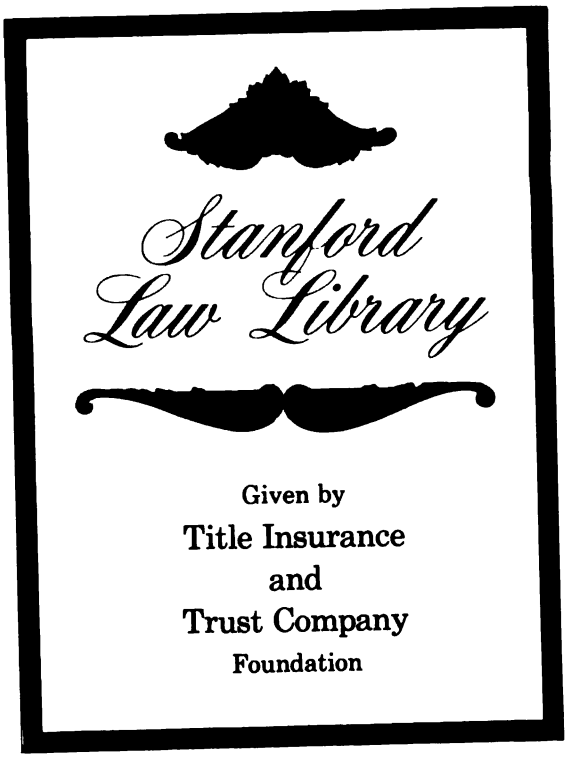

THE

Real Property Statutes

PASSED IN THE REIGNS OF

ING WILLIAM IV. AND QUEEN VICTORIA,

INCLUDING

ESCRIPTION—LIMITATION OF ACTIONS—ABOLITION OF FINES, ETC.—PAYMENT OF DEBTS—WILLS—JUDGMENTS—THE TRUSTEE ACTS—LEASES AND SALES OF SETTLED ESTATES—THE PROPERTY AND TRUSTEES AMENDMENT ACTS; AND TRUSTEES AND MORTGAGEES CLAUSES, ETC., ETC.,

WITH

COPIOUS NOTES OF DECIDED CASES

AND

FORMS OF DEEDS.

Seventh Edition,

WITH MANY ALTERATIONS AND ADDITIONS.

BY

LEONARD SHELFORD, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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TO

THE SEVENTH EDITION.

THE Author has incorporated in the present Edition the cases reported since the last Edition, which are applicable to the subjects contained in this Work. Such cases are numerous and important.

Several new Statutes and parts of Statutes, with new orders, and forms of affidavits adapted to such orders, are also inserted, with the view of rendering the Work complete, and more worthy of the extensive patronage which it has received.

3, BRICK COURT, TEMPLE,
18*th September*, 1863.

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ADDENDA.

Page 78, fourth line from the bottom.

When easement will not pass.

An easement, such as a right to use a pump, is a discontinuous easement, and requires definite words to create it, and differs from a continuous easement, such as a right to drains, which passes with the premises to which it appertains. Upon the severance of the ownership of two tenements, a discontinuous easement over one of such tenements will not pass and attach to the other tenement without words expressly creating an easement *de novo*, and therefore where a will contained a devise to C. P. of a house and garden as now in the occupation of T. A., and a devise to W. P. of an adjoining house and garden, it was held that no right to go to and from, and draw water from a pump in the garden of W. P., passed to C. P. or her assigns, although, at the date of the will, T. A. occupied the first-named house and was in the habit of using, but not as of right, the said pump. (*Polden* v. *Bastard*, 11 W. R. 778; 2 New Rep. 356. See *Pyer* v. *Carter*, 1 H. & N. 916, *post*, pp. 78, 79, 101.)

Page 234, at end of second paragraph.

What not an acknowledgment of right to redeem.

B., having been in possession of an estate as first mortgagee for upwards of twenty years, on being applied to for an account of the rents and profits on behalf of a person who had a subsequent charge upon the property, replied as follows:—"In answer to your letter I beg to say I deny the claim of your client. If he were entitled to the account, it would be of no use as the rents and profits of the estate have never been sufficient to pay the interest of the first charge." This letter was held not to be an acknowledgment of the plaintiff's right to redeem within 3 & 4 Will. 4, c. 27, s. 28. (*Thompson* v. *Bowyer*, 2 New Rep. 504; 11 W. R. 975; 9 Jur., N. S. 863.)

Page 502, at end of third paragraph.

Exoneration of real estate, stat. 17 & 18 Vict. c. 113.

By a will made in 1848, a testator, after directing payment of his debts, &c. out of his personal estate, bequeathed the residue to his daughter, who predeceased him without issue. The testator also devised his real estate to trustees upon certain trusts for the benefit of his daughter and her children with a gift over. The real estate was subject to a mortgage. In 1861 the testator made another testamentary disposition, but it made no reference to the former will, and only contained the bequest of a legacy. The devisee claimed to have his real estate exonerated from the mortgage

debt: it was held, that the will was made at the time of the statute 17 & 18 Vict. c. 113, and that the testamentary instrument, 1861, did not bring the will within the operation of the statute, and therefore the devisee was entitled to have the estate exonerated out of the personalty. Lord *Westbury*, C., observed, "A difficulty would undoubtedly have arisen if the parties were claiming not entirely under the will of 1848, but claiming the property in question under and by virtue of a will actually made in 1848, but re-published at a subsequent time, and the devises in which took effect *quoad* any particular estate by virtue only of that subsequent republication. There would have been a difficulty in applying to devisees claiming by virtue of a testamentary instrument made at one time and republished at another, and having an effect partly upon property existing before the date of the original making and partly upon property acquired in the interval between the original date and the date of the republication, because such persons could not be said in the language of the statute to be claiming under 'a will already made.' They would be claiming partly by virtue of a will that was already made and partly by virtue of the operation given to that instrument from the fact of its republication. But that is not the case here. The parties here claim under and by virtue of the will of 1848, and the will of 1848 does not cease to answer the description of 'a will already made,' because it may have been republished at a time subsequently to the 1st of January, 1855. I am, therefore, clearly of opinion, that within the spirit of the act and the intent of the act to prevent an unjust retroactivity of the statute, and within the words of the act, this will under which the present controversy arises was 'a will already made' within the meaning of those expressions at the time when this act received the royal assent." (*Rolfe* v. *Perry*, 9 Jur., N. S. 853.)

Thomas Ingle
14 March 1868

STATUTES

RELATING TO

REAL PROPERTY,

PASSED IN THE REIGNS OF

KING WILLIAM IV. AND QUEEN VICTORIA.

PRESCRIPTION.

2 & 3 WILLIAM IV. CAP. 71.

An Act for shortening the Time of Prescription in certain Cases (a). [1st August, 1832.]

I. *Time limited for establishing rights of common and other profit or benefit, except tithes and rent from land.*
II. *Limitation of time as to ways, easements and watercourses.*
III. *As to the use of light.*
IV. *How periods of limitation are to be computed.*
V. *Pleadings.*
VI. *Period less than that provided by statute not to be allowed.*
VII. *Saving in favour of persons under disabilities.*
VIII. *Time excluded in computation of period of forty years.*

I. TIME LIMITED FOR ESTABLISHING RIGHTS OF COMMON AND OTHER PROFIT OR BENEFIT, EXCEPT TITHES AND RENT FROM LAND.

2 & 3 *Will.* 4, *c.* 71, *s.* 1.

WHEREAS the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription (*b*), or grant, to any right of common (*c*) or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster

Claims to right of common and other profits à prendre, not to be defeated after thirty years' enjoyment by

2 & 3 *Will.* 4, c. 71, *s.* 1.

showing the commencement.

or of the Duchy of Cornwall (*d*), or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*e*).

After sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

This act extended to Ireland.

(*a*) By 21 & 22 Vict. c. 42, the provisions of the act 2 & 3 Will. 4, c. 71, shall, after the first day of January, 1859, extend and apply to Ireland.

(*b*) The reader is referred to a subsequent part of this work, as to the nature of prescription, the difference between it and custom, what things may or may not be claimed by prescription, and how a right depending upon it may be lost. (See *post.*)

(*c*) As to rights of common, see *post.*

(*d*) The provisions of this act are not affected by the Act for limiting Actions and Suits by the Duke of Cornwall, in relation to Real Property. (23 & 24 Vict. c. 53, s. 2.)

(*e*) The several decisions upon this statute, although relating to many different subjects, have for the most part a relation to each other; the more convenient course therefore will be to commence with the statute and the several decisions upon it, rather than to distribute them amongst the subjects which are hereafter considered separately.

Subjects included in first section.

The first section relates to such claims as may be lawfully made at common law, by custom, prescription, or grant, to any *right of common or other profit or benefit* to be taken or enjoyed from or upon any land. Tithes, rent and services are excepted from this act. The stat. 2 & 3 Will. 4, c. 100, provides the limitation of time with respect to claims of a *modus decimandi*, or exemption from, or discharge of tithes. (See Acts for the Commutation of Tithes and Supplement thereto, by Shelford, 3rd ed.) The stat. 3 & 4 Will. 4, c. 27, *post*, limits the time within which actions and suits must be brought respecting tithes not belonging to a spiritual or eleemosynary corporation sole. The limitation of time for the recovery of tithes is not affected by the Act for the Commutation of Tithes in England and Wales. (See 6 & 7 Will. 4, c. 71, s. 49.)

It must be borne in mind that the first section of this act includes different subjects from those in the second, which distinguishes between easements and common, or profit à *prendre*, and that a different limitation is established for the first and latter cases. (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Lawson* v. *Langley*, 4 Ad. & Ell. 890; *Jones* v. *Richard*, 5 Ad. & Ell. 413.) The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common; but the right to take "*something out of the soil*" is a profit à *prendre*, and not an easement. (*Manning* v. *Wasdale*, 5 Ad. & Ell. 764; 1 Nev. & P. 172; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554; 5 Nev. & M. 308; *Bailey* v. *Appleyard*, 3 Nev. & P. 257; 8 Ad. & Ell. 161.)

A right, claimed by the inhabitants of a township, to enter upon the land of a private person and take water from a well therein for domestic purposes, is an easement and not a profit à *prendre*, and may therefore properly be claimed by custom. (*Race* v. *Ward*, 4 Ell. & Bl. 702; 24 Law J., Q. B. 153; 1 Jur., N. S. 704.) The court held an alleged custom to be bad for

all the inhabitants occupying lands in a district to enter a close and take therefrom reasonable quantities of sand, which had drifted thereupon, for the purpose of manuring their lands. The reason was, that the drifted sand had become part of the soil, so that the claim was to take a profit *in alieno solo*. (*Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554, cited in *Race* v. *Ward*, 4 Ell. & Bl. 712.) It is an elementary rule of law that a profit *à prendre* in another's soil cannot be claimed by custom, for this among other reasons that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons like the inhabitants of a parish or other district who could not release the right. The claim of free miners to subvert the soil and carry away the substratum of stone without stint or limit of any kind cannot be supported either on the ground of custom, prescription or lost grant. A claim which is vicious and bad in itself cannot be substantiated by an user however long. (*Per Byles, J., Attorney-General* v. *Matthias*, 4 Kay & J. 591.)

2 & 3 *Will.* 4, *c.* 71, *s.* 1.

To a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the inhabitants of a parish to angle and catch fish in the *locus in quo* was held to be bad, as this was a profit *à prendre*, and might lead to the destruction of the subject matter to which the alleged custom applied. (*Bland* v. *Lipscombe*, 4 Ell. & Bl. 713, n. (*c*).)

Profit à prendre.

The liberty of fowling has been decided to be a profit *à prendre*. (*Davies'* case, 3 Mod. 246.) The liberty to hunt is one species of *aucupium*, and the taking of birds by hawks seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit; it is common of fishing. (*Anon.*, Hardr. 407.) The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—"of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish and fowl"—to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it should exercise the right, it has been considered that an interest, or *profit à prendre*, was intended to be granted. (*Per Parke*, B., *Wickham* v. *Hawker*, 7 Mees. & W. 78, 79.)

The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a licence of a profit *à prendre*. Substantially it may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a regrant of the right by the alienee of the fee simple to the alienor. (*Ewart* v. *Graham*, 7 H. L. 344, 345, *per* Lord *Campbell*.)

The 1st section requires in the case of a right of common or a profit *à prendre*, enjoyment "without interruption for the full period of thirty years;" the most undoubted exercise of enjoyment for twenty-nine years and three quarters will not be sufficient. (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 164. See *Flight* v. *Thomas*, 11 Ad. & Ell. 688, *post*.) This period of thirty years means next before the commencement of the action, when the right comes in question. (See *post*, s. 4, and note.) Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now the burden of establishing an immemorial right is withdrawn, and the proof is limited to thirty years. But the party prescribing must prove his right for that whole period, and no presumption will be drawn from evidence as to part of that period. (See 8 Ad. & Ell. 167.) The plaintiff prescribed under this statute, first for a right of pasture thirty years next before the commencement of the action; and, secondly, for a right of simply turning on cattle for twenty years. No evidence was given of acts of depasturing at a period commencing more than thirty years before the commencement of the suit; but that more than twenty-

Proof of enjoyment.

2 & 3 *Will.* 4, *c.* 71, *s.* 1.

eight years before the suit (in 1809) a rail was erected, so as to prevent the enjoyment of pasture, and that afterwards, the rail having been removed, the plaintiff depastured for twenty-eight years; it was held, that the defendant was not bound to prove that the rail was erected adversely to the plaintiff's right, but that the *onus* lay on the plaintiff to prove affirmatively his actual enjoyment of pasture for thirty years, and that no presumption could be admitted in his favour on proof of enjoyment for a less period. (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161, and note explanatory of case, ib. p. 1; 3 Nev. & Per. 257, note on case; 2 P. & Dav. 1; 2 Jurist, 872.) It was also held, that proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, the latter right being an easement only, a right of a quite different nature, and of which no evidence was given. (*Ib.*) *Littledale*, J., said it is clear that on the first issue no sufficient proof was given under this section. If the claim had been made by virtue of immemorial user, or of a non-existing grant, as was done before the statute, twenty-eight years' enjoyment would have been some evidence; but the late act, while it dispenses with the necessity of setting up such user or grant, and limits proof to a thirty years' enjoyment, requires that such enjoyment shall be proved to the full extent. Here the twenty years' enjoyment was proved in respect of a right, which by the statute requires thirty years to confirm it; that is, the right of pasture. The plaintiff, therefore, was not entitled to recover. (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 165, 166.)

How enjoyment may be proved.

Under sects. 1, 4 and 7 of this act, an enjoyment as of right for thirty years next before the commencement of an action, may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such period intervened), the estate over which the right has been exercised was in the hands of a tenant for life. The defendant pleaded, generally, that he had enjoyed as of right for thirty years *next before* the commencement of the action; the plaintiff replied that a life estate was outstanding for twenty-seven of the said thirty years; the defendant rejoined that such estate did not continue during any part of the said thirty years: and issue was thereupon joined. The defendant proved enjoyment during two periods, amounting together to thirty years; one period before and one after the life estate. It was held, that the defendant's issue was proved, and that as the plaintiff had replied and set up a tenancy for life he excluded the term of such tenancy, and drove the defendant to show thirty years' enjoyment, either wholly before the tenancy for life if it had still subsisted, or partly before and partly after, whereas in this case it had determined. Evidence that during the alleged enjoyment the estates over which, and in right of which, it has been exercised, were held by the same person, disproves enjoyment as of right: the fact, therefore, need not be specially pleaded, but may be proved under a mere traverse of the enjoyment. (*Clayton* v. *Corby*, 2 Q. B. 813.)

This section of the act does not prevent a claim to a right of common, &c. from being defeated after thirty years' enjoyment, by showing that such right was first enjoyed at a time when it could not have originated legally. A claim to a right of common over a Crown forest, in respect of a certain tenement being vested on thirty years' uninterrupted enjoyment under this section, may be defeated by showing that the tenement has been inclosed from the waste of a manor only forty years, and that the grant of any right over the forest was made absolutely void by a statute passed previously to the inclosure. It was questioned whether this act has any application to the case in which the establishment of a right by means of this statute would be a violation of the express terms of statutes prohibiting the granting of such a right. (*Mill* v. *New Forest* (*Commissioner*), 18 C. B. 60; 2 Jur., N. S. 520; 25 L. J., C. P. 212.)

The plaintiff claimed a right of common by prescription in respect of a *que* estate in land, and also by thirty and sixty years' enjoyment by the occupier of the land. The defendant offered evidence that a tenant then deceased, while tenant of the land for years, had declared that he had no

such right in respect of the land: it was held, that the declaration was not admissible, inasmuch as it was in derogation of the title of the reversioner. (*Papendick* v. *Bridgwater*, 5 El. & Bl. 166; 1 Jur., N. S. 657; 24 L. J., Q. B. 289.) Lord *Campbell*, C. J., observed, "it would be very mischievous if it were in the power of a tenant to destroy a profit *à prendre* belonging to the land which he occupies, or to impose a servitude upon it There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, profit *à prendre* by turbary or other common. It would come to this: that by the tenant's acknowledgment of a servitude, like that in *Scholes* v. *Chadwick*, 2 Moo. & R. 507, or for cutting turves or taking away sand, the tenant might create a servitude against the reversioner. That would be very inconvenient, and it is upon the view of the balance of general convenience that the English laws of evidence are founded. In *Daniel* v. *North*, 11 East, 372, it was decided that the acquiescence of the tenant cannot prejudice the landlord, and if so, I think, *à fortiori*, that his declaration cannot." (*Papendick* v. *Bridgwater*, 5 Ell. & Bl. 177; see *Scholes* v. *Chadwick*, 2 Moo. & R. 507; *Reg.* v. *Bliss*, 7 Ad. & E. 550.)

2 & 3 *Will.* 4, c. 71, *s.* 1.

The turning of cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, was held not to be an assertion of right so acquiesced in as to raise a presumption of title. Lord *Chelmsford*, L. C., observed, "the effect of acts of ownership must depend partly upon the nature of the property upon which they are exercised. If cattle be turned upon inclosed pasture ground, and be placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected from intrusion, and if it could it would not be worth the trouble of preventing it, there mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition." (*Att.-Gen.* v. *Chambers*, 4 De G. & J. 55; see pp. 65, 66. See *In re Hainault Forest Act*, 1858, 9 C. B., N. S. 648.

If the statute be relied on, it ought to be pleaded. (*Welcome* v. *Upton*, 6 Mees. & W. 401.) The first section of the statute enacts that no claim to right of common, which shall have been actually enjoyed by any person claiming right thereto, shall be defeated by showing only that it was first taken at some prior time. The 4th section enacts, that the thirty years shall be deemed and taken to be the period *next* before some suit or action wherein the claim shall be brought into question. The 5th section enacts, that in all pleadings in trespass, it shall be sufficient to allege that enjoyment of common as of right by the occupiers of the tenement in respect whereof the same is claimed for, and during such of the periods mentioned in the act as may be applicable to the cases, and without claiming in the name of the owner of the fee, as is now usually done. Taking these sections together, it has been decided that the period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question, and that an allegation of an enjoyment for thirty years next before the times when the trespasses to which the plea relates were committed is insufficient. (*Richards* v. *Fry*, 3 Nev. & P. 67; 7 Add. & Ell. 698; *Wright* v. *Williams*, 1 Mees. & W. 77.) Plea of enjoyment of a right of common for thirty years before the commencement of the suit was held sufficient, without saying thirty years *next* before. (*Jones* v. *Price*, 3 Bing. N. C. 52.) The proper mode of pleading a profit to be taken out of land is the enjoyment of the right for the periods mentioned in the first section. (*Welcome* v. *Upton*, 5 Mees. & W. 398; 7 Dowl. P. C. 475.)

To what period the statute refers.

2 & 3 *Will.* 4, *c.* 71, *s.* 2.

II. Ways, easements, and watercourses.

In claims of right of way or other easement the periods to be twenty years and forty years.

2. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way (*f*) or other easement, or to any watercourse (*g*), or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (*h*).

(*f*) As to the law of ways, see *post.*

(*g*) See note on watercourses, *post.*

What included in second section.

(*h*) This section relates to claims of rights of way, or other *easement*, or to any watercourse, or the use of any water to be enjoyed, or derived upon, over, or from any land or water. A claim, by the occupier of a coppermine, to sink pits in his own land for the water pumped out of his mine and for the precipitation of the copper contained in such water, and for that purpose to put iron into the said pits, and to cover the same with the said water, and afterwards to let it off, impregnated with metallic substances, into a watercourse flowing over the land of another, is a claim to a watercourse within this section. (*Wright* v. *Williams*, 1 Tyr. & G. 375; 1 Mees. & W. 77.)

An owner of a windmill cannot claim, either by prescription or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill. Such a claim is not within this section, which is confined to the rights of way or other easements, to be exercised upon or over the surface of the adjoining land.

This section includes only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right. (*Webb* v. *Bird*, 10 C. B., N. S. 283, *per Erle*, C. J.) *Erle*, C. J., said, "It appears to me, that this section was not intended to give a right, after twenty years, to every sort of enjoyment which may be classed under the general term easement, but that it was meant to apply only to the two descriptions of easement therein specified, viz., the right to a way or watercourse which may be enjoyed or derived upon, over, or from any land or water." He did not think the passage of air over the land of another was, or could, have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner, if the right were disputed. It is clear that such was the intention of the legislature, because the section provides that the claim shall not be defeated where there has been actual enjoyment for the period mentioned "without interruption." (*Webb* v. *Bird*, 10 C. B., N. S. 282) *Byles*, J., agreed

that the words "or other easement" in the second section mean any other easement *ejusdem generis* with a way,—something that is to be exercised upon or over the soil of the adjoining owner, more especially as it is clear, from the next section, that the easement of the access of light is excluded. (*Ib.* p. 286.) 2 & 3 *Will.* 4, *c.* 71, *s.* 2.

A company incorporated by act of parliament for making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under this section, a prescriptive right to take the water for any other purpose. An easement to take water to fill a canal ceases when the canal no longer exists. (*National Guaranteed Manure Company* v. *Donald*, 4 H. & N. 8; 28 Law J., Exch. 184. See *Rochdale Canal Company* v. *Radcliffe*, 18 Q. B. 287.)

The privilege of washing away sand, stone and rubble, dislodged in the necessary working of a tin mine, and of having the same sent down a natural stream through the plaintiff's land, may be the subject of a grant, and may be pleaded as a prescriptive right under this act to a declaration charging the defendants with throwing such stone, sand and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom. (*Carlyon* v. *Lovering*, 1 H. & N. 784; 26 Law J., Exch. 251.)

Easement is the general term for several species of liberties which one man may have in the soil of another without obtaining any interest in the land itself. (Cro. Car. 419.) Rights of accommodation in another's land, as distinguished from those which are directly profitable, are properly called *easements*. An easement (from the French word *aise*, i. e. *commoditas*) is defined to be a privilege that one neighbour hath by writing or prescription without profit, as a way, or a sink through his land, or such like. (Kitch. 103; Cow. Law Dict. Terms of the Law, tit. "Easement;" 5 B. & C. 229.) Definition of easements.

The *servient* tenement is that over which a right claimed by custom, prescription or grant is exercised, and the *dominant* tenement is that to which such right is attached. It is essential that the two tenements should belong to different owners; for upon both becoming absolutely vested in the same person the inferior right of easement is merged in the superior title of ownership. (*Holmes* v. *Goring*, 2 Bing. 83; 9 Moore, 166.) Where there is an unity of seisin of the land and of the way over the land in one person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way. (*James* v. *Plant*, 4 Ad. & Ell. 761.) Servient and dominant tenement.

"A servitude is a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor." (Code Civil, Art. 637.)

Easements are incorporeal rights (*Hewlins* v. *Shippam*, 5 B. & C. 221; 7 D. & R. 783) imposed upon corporeal property, and not upon the owner of it, so that on the change of the owner of the servient tenement the right to the easement is still retained by the owner of the dominant tenement.

Public rights of way, liability to repair highways, rights of way, watercourses, and rights of water and other *easements* are not to be deemed incumbrances within the meaning of the Act for the Transfer of Land (25 & 26 Vict. c. 53, s. 27); nor to be affected by a declaration of title. (25 & 26 Vict. c. 67, s. 29.)

There are an infinite number and variety of easements. The following may be enumerated:—Rights of way. Right to discharge a stream of water, either in its natural state, or changed in quantity or quality. (*Wright* v. *Williams*, 1 Mees. & W. 77.) Right to receive a flow of water. Right to discharge rain water by a spout or projecting eaves. Right to support from the neighbouring wall, or soil. Right to carry on an offensive trade. Right to hang clothes on lines passing over the neighbouring soil. (*Drewell* v. *Towler*, 3 B. & Ad. 735.) The right of landing nets on another man's ground. (*Gray* v. *Bond*, 2 Brod. & B. 667.) Right to make spoil banks upon the surface in working mines. (*Rogers* v. *Taylor*, 1 H. & N. 706.) The right to use a close for the purpose of mixing muck and preparing manure thereon for an adjoining farm. (*Pye* v. *Mumford*, 11 Q. B. 666.) Right to receive light and air by ancient windows. A right in the occupier Different kinds of easements.

2 & 3 *Will.* 4, c. 71, *s.* 2.

of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is a mere easement, and not a profit *à prendre* in the soil of another. Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken. (*Manning* v. *Wasdale*, 1 Nev. & Per. 172; 5 Ad. & Ell. 758. See *Fitch* v. *Rawling*, 2 H. Bl. 395.) The right to go on a neighbour's close and to draw water from a spring there; (*Race* v. *Ward*, 4 El. & Bl. 702;) or from a pump. (*Polden* v. *Bastard*, 11 W. R. 778.) A person may prescribe to an easement in the freehold of another as belonging to some ancient house, or to land, &c. And a way over the land of another, a gateway, watercourse, or washing-place in another's ground, may be claimed by prescription as easements; but a multitude of persons cannot prescribe, though for an easement they may plead custom. (Cro. Jac. 170; 3 Leon. 254; 3 Mod. 294.) In *Goodday* v. *Michell*, Cro. Eliz. 441, a way to a common fountain is mentioned as an easement claimable for parishioners by custom. The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the land through which it passes. (9 B. & C. 109; *Hollis* v. *Goldfinch*, 1 B. & C. 205.) The licence to make a vault in a parish church, and to have the sole and exclusive use of it, is an easement, which cannot be effectually granted without a deed or a faculty, although the incumbent of a living has no power to grant such a right even by deed, but only leave to bury in each particular instance. (*Bryan* v. *Whistler*, 8 B. & C. 288; 2 M. & Ryl. 318.) The right to sit in a pew in a church annexed to a house seems to be an easement. (5 B. & Ald. 361. See Best on Evidence, p. 479, 3rd ed.) A man cannot prescribe to have a necessary easement in the land of another person for himself and his servants to catch fish in his several fishery. (*Peers* v. *Lacy*, 4 Mod. 362.) Rent cannot issue out of a mere easement. (*Buzzard* v. *Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344.) But a payment in respect of an easement may be secured by a covenant or agreement.

The right of an owner of land to the support of the land is one of the ordinary rights of property, analogous to the right to a natural stream, incidental to all land, and not an easement or right acquired by grant or otherwise. (*Bonomi* v. *Backhouse*, Ell., Bl. & Ell. 642; *Backhouse* v. *Bonomi*, 9 H. L. C. 503.)

Nature of enjoyment.

The enjoyment of an easement as of right, for twenty years next before the commencement of the suit, within this statute, means a *continuous* enjoyment as of right for twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the period of enjoyment, although such unity of possession has its inception after the completion of the twenty or forty years. (*Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290.) Where a plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under this statute was defeated by an unity of possession from 1843 to 1853. (*Ibid.*) And such unity of possession need not be specially replied under the 5th section. (*Onley* v. *Gardiner*, 4 Mees. & W. 496. See *Monmouthshire Canal Company* v. *Harford*, 1 C., M. & R. 631; 5 Tyr. 85; *Richards* v. *Fry*, 3 Nev. & P. 367; 7 Ad. & Ell. 698.) To an action of trespass on land, the defendant pleaded, that for twenty, thirty, forty, and sixty years, he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. The replication denied the rights claimed. It appeared that within forty years B. had been lessee of the mill under one landlord, and of land under another: it was held, that this was such a unity of possession as prevented his having an easement on the land. (*Clay* v. *Thackrah* or *Thackeray*, 9 Car. & P. 47; 2 M. & Rob. 244.)

In replevin for taking the plaintiff's cattle, to an avowry damage feasant the plaintiff pleaded in bar under this statute an user for thirty years as of right, and also for sixty years as of right of common of pasture over the *locus in quo*. At the trial the fact of user by the plaintiff and by other occupiers of his farm was proved; but it appeared that S., from whom the

plaintiff and the defendant derived their title, was for more than sixty years before and until within thirty years seised in fee of the plaintiff's farm, and during the same period had an estate for life in the land over which the right of common was claimed, but never had actual possession of the dominant tenement, except by the tenant. More than thirty years before action, he joined with a remainder-man in making a conveyance of the servient tenement for making a tenant to the *præcipe* for the purpose of suffering a recovery, in order to raise money on mortgage; but no recovery was suffered, and S. continued possessed until twenty-eight years before the action, when the property was sold, and all community of title had ceased: it was held, that, although there was no unity of seisin to extinguish an easement or to prevent its existence, the facts precluded an enjoyment as of right within the meaning of this act. The title to the tenements was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years as of right, for S. being owner in fee of the farm, and also tenant for life and occupier of the common, the rights of the tenants over the common were derived from him, and as he could not have an enjoyment as of right against himself within the meaning of the statute, so neither could his tenants. (*Warburton* v. *Parke*, 2 H. & N. 64; 26 L. J., Exch. 298.) 2 & 3 *Will.* 4, *c.* 71, *s.* 2.

According to the true construction of the statute, in order to make an user "as of right," it must be exercised for the period prescribed as *of right against all persons*, so as to be evidence of a perfect right. But a party has no right of way "as of right" if the exercise for the first seven years was during a period when the owner could not stop him.

A plea under this act of an user of a way as of right for twenty years over a close is not supported by proof of an user of the way for part of the twenty years while a party was the landlord and owner as well of the messuage in respect of which the right was claimed as of the close over which it was exercised, and for the rest of the period when the defendant had acquired the freehold of the messuage.

In 1823, M. built two adjoining houses, behind each of which was a piece of ground appropriated as a yard, but no wall divided the yards. In 1832, M. permitted the defendant to occupy one of the houses without payment of rent, and he was accustomed to pass over the yard of the other house, which was let from time to time to different tenants, to a public highway. M. continued owner of both houses until his death in December, 1838. In August, 1839, the trustees under his will conveyed the last-mentioned house and the ground behind it to a person through whom the plaintiff derived his title. In September, 1839, the trustees conveyed the other house and ground to the defendant, who continued to occupy and use the way across the plaintiff's yard without interruption until 1853. It was held, that there was no user of the way "as of right" for twenty years within the meaning of this section. The exercise, in the first instance, was during a period when the owner could not stop him, and therefore he gained no right during that time. The time when he used the way not of right could not be added to the time when he used it as of right. (*Winship* v. *Hudspeth*, 10 Exch. 5; 21 Law J., Exch. 268.)

In questions under this section it is most important to show the nature of the user, and of the interruptions, as bearing on the question, whether the enjoyment was as of right. For though no interruption less than a year breaks the period when once the enjoyment as of right has begun, yet interruptions acquiesced in for less than a year may show that the enjoyment never was of right. (*Per Coleridge*, J., 17 Q. B. 275.)

In an action for disturbing a watercourse, which of right ought to flow into the plaintiff's close to irrigate it, a denial of the right was pleaded. On the trial it appeared that the watercourse was not ancient, but that the water had flowed in its present course for more than twenty years past the plaintiff's close. There was evidence, that during that period the plaintiff and those under whom he claimed had been constantly in the habit of drawing off the water to irrigate his close, and that the owners of the watercourse resisted it. On one occasion, where the plaintiff's servant drew off the water, he was summoned before a justice for so doing; the plaintiff's son,

2 & 3 *Will.* 4, c. 71, s. 2.

by his direction, attended and defended the servant, and paid a fine of one shilling. The conviction was under a local act, from which there was a power of appeal. The plaintiff did not appeal. The conviction was tendered in evidence and rejected. In summing up the judge explained that the enjoyment to defeat an adverse right must be for twenty years without interruption acquiesced in for a year. One of the jury asked what would be the effect in law of a state of perpetual warfare between the parties? Which question the judge did not answer. The jury found that "the watercourse had been enjoyed as of right for twenty years and without interruption for a year," and were directed to find for the plaintiff. It was held that interruption, though not acquiesced in for a year, might show that the enjoyment never was of right but contentious throughout, though if once the enjoyment as of right had begun no interruption for less than a year could defeat it, and consequently that the manner in which the question was left and the verdict found was not satisfactory, and a new trial was granted. (*Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267.) It was also held, that the acquiescence of the plaintiff in the conviction was evidence as an acknowledgment that he did not enjoy as of right, and although its weight might be great or small, it ought not to have been excluded. (*Ib.*)

User as of right.

The plaintiff and the defendant occupied contiguous portions of land. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land, and of damming up the brook when necessary, so as to force the water into an old artificial watercourse which ran across the defendant's land to the plaintiff's land. That was done for the purpose of supplying their cattle with water whenever they wanted it, except when the owners of the defendant's land used the water as they did at certain seasons of the year for irrigation. It was held, that upon this evidence the jury was warranted in inferring an user as of right by the occupiers of the plaintiff's land, of the easement on the defendant's land, and that for the interruption of such easement the plaintiff might maintain an action against the defendant. (*Beeston* v. *Weate*, 5 Ell. & Bl. 986.)

The plaintiff was possessed of a mill on the river Calder, and the defendant of a mill on the river Hebble, which flowed into the Calder at a point above the plaintiff's mill. The declaration complained that the defendant threw, placed and deposited into and upon the bed of the Hebble, and on the banks and side thereof at and near to the defendant's mill, large quantities of cinders and ashes, &c. which fell and were washed down and carried into the Hebble, and so were floated and passed with the water into the Calder and unto and into the plaintiff's mill-pond, and unto and into the plaintiff's part of the bed and channel of the Calder, filling them up and obstructing the working of his mill. The plea was as to the throwing, placing and depositing the cinders and ashes, that the defendant had been the occupier of the mill on the river Hebble for more than twenty years before the doing of the acts complained of, and that during all that time large quantities of cinders and ashes, &c. were necessarily produced at the mill, being the refuse of the ash-pit of the engine and the sweepings of the mill; and that, being such occupier, he enjoyed as of right and without interruption the privilege and easement of throwing, placing and depositing upon the bed and channel of the Hebble, and the banks and sides and near to his mill, all such quantities of cinders and ashes, &c. as were produced in the mill. The plea alleged that the cinders and ashes, &c. were produced in the defendant's mill, and justified the grievance in the lawful exercise of the privilege and easement. It was held, after verdict, that supposing the defendant to claim the banks and bed of the Hebble on and in which the cinders and ashes had been deposited as in his own occupation, or that the banks and bed were in the occupation of some third person against whom a valid right by way of easement had been gained, in either view the plea failed to show any right of easement as against the plaintiff. (*Murgatroyd* v. *Robinson*, 7 Ell. & Bl. 391; 3 Jur., N. S. 615; 26 Law J., Q. B. 233.) It was held also, that even if it were taken that an easement in the bed and banks of the Hebble had been alleged and proved, and as a

natural consequence that the deposit on the bed of the Calder was necessarily established, still as it was consistent with the plea that no perceptible deposit had been occasioned on the plaintiff's part of the bed of the Calder for twenty years, the plea was insufficient to show a claim to an easement of depositing cinders and ashes on the plaintiff's part of the bed of the Calder. (*Ib.*) But it was questioned whether, if such a claim had been alleged, it could be considered as a valid claim to an easement within the meaning of this section. (*Ib.*)

2 & 3 *Will.* 4, *c.* 71, *s.* 2.

It has been decided under the statute 2 & 3 Will. 4, c. 71, that an enjoyment of twenty years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. In an action on the case for obstructing a way claimed from a wharf, in a close called Cliff meadow, through Eacham meadow, over the *locus in quo*, called the Acre, where the obstruction took place, into a public highway, it appeared that Cliff and Eacham meadows were held under the Bishop of Worcester by a lease for three lives, granted in 1805. In 1809 Roberts purchased the leasehold interest from Davis, and began to make bricks in Cliff meadow, and carried them through Eacham meadow and the Acre into the highway. In 1811 Dalton, the then occupier of the Acre, and the assignee of a copyhold lease for four lives, under the bishop of the close called Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down, and he and the plaintiff, who claimed under him, continued to carry bricks over the Acre, without interruption, for more than twenty years, when the defendant, claiming as assignee of the bishop's lease, under Dalton, obstructed the way, and for that obstruction the action was brought. No proof was given on either side, that either of the original leases had been surrendered, and therefore the case was considered as if both had continued to the time of the obstruction. The jury found, first, that they would not presume any grant of right of way by the bishop; and secondly, that the plaintiff Roberts had actually enjoyed the way without interruption for more than twenty years, and the only question was, whether such an enjoyment gave to the plaintiff a right of way over the defendant's close, so as to enable him to maintain the action, which question depended upon the construction of the above act, particularly the second section. *Parke*, B., in giving the judgment of the court, after stating the second section of the act, said, "In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by section 5, (*post*, p. 21,) such a claim must be pleaded, and the like evidence would have been required before this statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed, 'as of right,' the 'easement,' but the soil itself. So it must have been enjoyed 'without interruption.' Again, such a claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a licence written or parol for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of twenty years having been uninterrupted, and not defeated on any ground above mentioned, would give a good title; but if the enjoyment take place with the acquiescence or laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the statute? Will it be good to give a right against the see, and against those claiming under it by a new lease, or

The case of *Bright* v. *Walker* on the construction of the above section.

2 & 3 *Will.* 4, c. 71, *s.* 2.

Bright v. *Walker.*

only as against the termor and his assigns during the continuance of the term? or will it be altogether invalid? In the first place, it is quite clear that no right is gained against the bishop. Whatever construction is put on the seventh section, (see *post*, p. 26,) it admits of no doubt under the eighth (see *post*, p. 28.) It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstance of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that possession of twenty years gives no title as against the bishop, and cannot affect the right of the see.

"The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendant claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but on the fullest consideration we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the see.

"Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. (See sect. 5 of the act, *post*, p. 21.) But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For in the first place, the statute is for the shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute nowhere contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons and invalid as to others.

"From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section. (See *post*, p. 26.) This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that, there must be that period of enjoyment *against* the owner of the fee.

"The conclusion, therefore, at which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as sect. 6 forbids a presumption in favour of a claim to be drawn from a less period than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking this possession into consideration, *with other circumstances*, as evidence of a grant which they may still find to have been made, if they are satisfied that it was made in point of fact." It was therefore decided that the plaintiff was

not entitled to recover, and a nonsuit was entered. (*Bright* v. *Walker*, 4 Tyrw. 508, 513; 1 Cr., Mees. & Rosc. 211, 223.) 2 & 3 *Will.* 4, *c.* 71, *s.* 2.

A lease was made in 1775, by A. to B., which comprised two closes, Blackacre and Whiteacre. A mill was subsequently built on Blackacre, which was supplied by a stream through Whiteacre; and S., a tenant of the mill under B., and subsequent tenants, enjoyed this right of water from 1818. In 1836, C., who was entitled to the reversion expectant on B.'s lease, appointed Whiteacre to K. for life from the expiration of that lease, retaining Blackacre. The lease of 1775 expired in April, 1840. K., in 1841, demised Whiteacre to the defendant; and, in 1843, C. demised Blackacre to the plaintiff, with the right to water sufficient for the mill as enjoyed by S. In an action for the diversion of the water, commenced in June, 1860, there was evidence of uninterrupted enjoyment from 1818 to 1860; it was held that, as during the lease of 1775 there was a unity of possession in B., the enjoyment by his tenant pending that lease was not an enjoyment "as of right" within the meaning of this act. (*Wilson* v. *Stanley*, 12 Ir. Com. Law Rep., N. S. 345.) It was held also, that the user for more than twenty years since April, 1840, conferred no title to the easement under this section, the reversion of the servient tenement during that period being vested in the tenant for life. (*Ib.*) *Pigott*, C. B., said, that according to the exposition of this statute in *Bright* v. *Walker*, two results follow from its enactments, first, a presumptive title founded on a presumed grant cannot now be established at all by proof of long uninterrupted possession; and secondly, the presumptive title which the statute has given the means of establishing can only be applied where the enjoyment has been such as to bind all estates, comprising the whole fee simple in the servient tenement. (*Ib.* p. 351.)

To support a plea framed on the 2nd section of this statute, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one. (*Lawson* v. *Langley*, 4 Ad. & Ell. 890.) Evidence of user.

A plea of forty or twenty years' user, under the 2nd and 4th sections of this statute, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it; and if the evidence go no further there is no case for the jury. In an action of trespass *quare clausum fregit* the defendant pleaded a right of way for twenty and forty years respectively, under the second section. Evidence was given of user, in support of these pleas, more than fifty years ago, but there was a failure to show that the user continued for the last four or five years before the commencement of the action. A verdict was found for the plaintiff: on motion for a new trial the rule was refused. (*Parker* v. *Mitchell*, 3 P. & Dav. 655; 11 Ad. & Ell. 788.) This was considered a correct decision. Pleas of twenty and forty years' user respectively under this act are not supported by proof of user for forty years and upwards before the commencement of the action to within fourteen months of it. Some act of user must be shown to have been exercised in the year in which the action was brought. (*Lowe* v. *Carpenter*, 6 Exch. 825.) And *Parke*, B., intimated that some act of user ought to be shown to have been exercised in the year in which the action was brought. (*Ib.* See *post*, s. 6, p. 26, n. (*n*).)

If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under this statute, for the agreement to suspend the enjoyment of the right does not extinguish it, nor is it inconsistent with the right. (*Payne* v. *Shedden*, 1 M. & Rob. 383.) To a plea of forty or twenty years' enjoyment of a way, a licence, if it cover the whole time, must be pleaded. (*Tickle* v. *Brown*, 4 Ad. & Ell. 369.) But a parol or other licence, given and acted on during the forty or twenty years, may be proved under a general

2 & 3 *Will.* 4, c. 71, *s.* 2.

traverse of the enjoyment as of right; and this, whether such licence be granted for a single time of using, or for a definite period. (*Ib.*) It seems, that where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such non-user was not a voluntary forbearance, give evidence that, two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it. (*Ib.*)

A right claimed under this act can only be co-extensive with the user; and an issue on a plea justifying under such a right is an issue, not upon the right, but the user, and differs therefore from an issue on a right claimed by prescription. (*Davies* v. *Williams*, 16 Q. B. 546.)

To an action for entering and passing over the plaintiff's close, the defendant pleaded a right of way from time immemorial, and an user for forty years and twenty years. An user, in fact, for more than forty years was proved. In 1839 all ways not set out in an award were extinguished by an act of parliament, and this way was not set out: it was held, that it could not be presumed from the user that the award was otherwise than properly made, and that less than twenty years having elapsed since the award, no right had been gained under this section. (*Holden* v. *Tilley*, 1 F. & F. 650.)

Replication to right of way, notwithstanding user as of right and without interruption.

To an action of trespass *quare clausum fregit*, the defendant pleaded a right of way across the *locus in quo* for the occupiers of B. field, on foot and with cattle and carriages, enjoyed as of right and without interruption for twenty years before the commencement of the suit under this statute. The replication traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of parliament (the Trent Navigation Act, 23 Geo. 3, c. 48), under which the Trent Navigation Company, before the commencement of the twenty years, made a haling-path for towing vessels along the river across the *locus in quo* into B. field; that after the commencement of the twenty years, under the powers of another act of parliament (The Dunham Bridge Act, 11 Geo. 4, c. 66), another haling-path was set out nearer to the river, but also across the *locus in quo* and into B. field, and that thereupon the navigation company abandoned the former haling-path, which thenceforth ceased to be used as such; that, before and at the commencement of the twenty years the occupiers of B. field used and enjoyed as of right and without interruption, by virtue and under the provisions of the first act of parliament, a way along the first-mentioned haling-path across the *locus in quo* on foot and with cattle, which right of way ceased and determined on the abandonment of that haling-path; but that, from that time until the commencement of suit, the occupiers of B. field, claiming right to the way as a continuation of the right before enjoyed by them under the act of parliament, continued to use the same way, which way, and the use and enjoyment thereof along the haling-path as aforesaid, is the same way and the same use and enjoyment thereof as in the plea mentioned, except as to the user with carriages. It was held, on demurrer, that the replication was good, that it disclosed facts showing that the defendant's user, although as of right and without interruption during the twenty years, within the meaning of the 2nd and 5th sections of this statute, was not such as would, previously thereto, have been sufficient to prove a claim by prescription or non-existing grant; and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea. (*Kinloch* v. *Neville*, 6 Mees. & W. 795.) *Alderson*, B., said, "If a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave given be from time to time within the twenty years. The 5th section creates the difficulty. The act, however, does not alter the nature of the right necessary to give a legal title. The party who avers the right must mean such as could be inferred to exist by custom, prescription or non existing grant; and the other party must show, in his answer, that there is no right of that nature. Here the replication states, that within twenty years before the commencement of the suit, the haling-path was shifted, and the previous one abandoned. If so, according to the act of parliament, the defendant's right to use it ceased,

So that the replication shows that the defendant could not have exercised the right either by custom, prescription or grant, and is therefore sufficient." Leave was given to amend, by pleading that the defendant had enjoyed the right for forty years. (*Kinloch* v. *Neville*, 6 Mees. & W. 806.) 2 & 3 *Will.* 4, *c.* 71, *s.* 2.

It seems that under the 2nd section of this act, prescription for a right, every year, and at all times of the year, to put and turn the party's cattle into and upon a certain close, is too vague, and may be demurred to. If there be no demurrer, and the issue on such plea be tried, the party prescribing and relying on the 2nd section must give proof applicable to some definite easement. And he will fail if the evidence entitle him not to an easement, but to a profit *à prendre*. (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161.)

III. Lights.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

3. When the access and use of light (*i*) to and for any dwelling-house, workshop or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing (*k*).

(*i*) See note on law of lights, *post*.

Period of enjoyment, twenty years without interruption.

It is to be observed that the actual enjoyment required by this section must be for twenty years, without interruption, but it is not necessary for the enjoyment, as in the case of profits *à prendre* under the first section, and of easements under the second section, that it should be had by *any person claiming right thereto*.

(*k*) To a declaration for obstructing ancient lights, the defendant pleaded the custom of London to build on ancient foundations to any height; that the defendant was possessed of an ancient messuage adjoining the plaintiffs' premises, and towards which the windows mentioned in the declaration looked, and that pursuant to the custom he built thereon, and thereby unavoidably a little obscured the plaintiffs' windows. To this plea the plaintiffs replied that the access of light and air to the windows in question had been enjoyed as of right and without interruption by the respective occupiers of the plaintiffs' messuage for and during the full period of twenty years before the said obstruction, and for and during the full period of twenty years next before the commencement of a suit (or action) wherein the plaintiffs' claim in this action and to the said access and use of light and air was and is brought in question. It was held, *Williams*, J., dissenting, that the twenty years' enjoyment of the access and use of light to a dwelling-house, &c., under the 3rd and 4th sections of this act, is taken to be the period next before some action or suit wherein the claim shall have been brought in question, and consequently that the replication was good. (*Cooper* v. *Hubbuck*, 12 C. B., N. S. 456; 9 Jur., N. S. 575.) The custom to rebuild to any height upon ancient foundations in the city of London is destroyed by this act. (*Ib.*)

According to this section, a claim to the use of light could not have been established unless it had been actually enjoyed for the full period of twenty years before the commencement of the action, but if there has been an enjoyment for nineteen years and a fraction, and then an interruption takes place, the right may be established at the end of the twentieth year, inasmuch as the interruption, under the 4th section, in order to defeat the twenty years' user, must have been acquiesced in or submitted to for a whole year. (*Flight* v. *Thomas*, 11 Ad. & Ell. 688; 3 P. & Dav. 442, affirmed by House of Lords, 1 West. 671; 5 Jur. 811; 8 Cl. & Fin. 231. See *post*, p. 20.) Lord *Campbell*, C. J., observed, "The decision in *Flight*

2 & 3 *Will.* 4, c. 71, s. 3.

v. *Thomas* may establish conclusively that, when an easement has once been enjoyed as of right, such enjoyment must be taken, for the purposes of the act, to continue though interrupted, unless the interruption be acquiesced in for a year. But I do not think that any member of this court is inclined to go beyond that decision." (17 Q. B. 272.)

The period of twenty years' enjoyment, which confers a right for the access of light under this section, is by the 4th section of this act the period of twenty years next before any suit or action wherein the claim to the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action. (*Cooper* v. *Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; 9 Jur., N. S. 575.)

This section of the act is retrospective, so that the right to the access of light and air may be acquired by virtue of an enjoyment prior to the passing of the act. (*Simper* v. *Foley*, 2 Johns. & H. 555.) An union of the ownership of the dominant and of the servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives. (*Ib.*) Where a right to an easement of this description is acquired against an owner of a leasehold interest in the servient tenement it is acquired also against the owner of the reversion. (*Ib.*)

This section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years *in the character of an easement*, distinct from the enjoyment of the land itself, and the statute places this species of negative easement on the same footing in this respect as those positive easements provided for by the other sections. (*Harbidge* v. *Warwick*, 3 Exch. 552.)

The plaintiff and the defendant occupied houses adjoining each other as tenants under leases, both of which were granted by the same lessor on the same day and both expiring at the same time. The defendant, by building on his own premises, obstructed a window in the house of the plaintiff. Though the latter had had uninterrupted enjoyment of light and air for more than twenty years, it was held that the circumstance of the two houses being held under the same landlord and for the same term did not prevent the one tenant from acquiring an indefeasible right to light as against the other. (*Frewen* v. *Phillips*, 11 C. B., N. S. 449; 7 Jur., N. S. 1246; 30 L. J., C. P. 356.) The judgment of the court in this case was founded upon *Truscott* v. *Merchant Taylors' Company* (11 Exch. 855), in which case *Coleridge*, J., said, p. 863: "In this case the Court of Exchequer gave judgment for the plaintiffs below, without argument, on the authority of *The Salters' Company* v. *Jay* (3 Q. B. 109). The only question is, whether that case was rightly decided. That depends on the construction of the 3rd section of the Prescription Act, which is addressed merely to the access of light. That section seems to me to simplify and almost new-found the mode of acquiring the right to the access of light. It founds it on actual enjoyment for the full period of twenty years without interruption, unless that enjoyment is shown to have been by consent or agreement expressly made by deed or writing, thus putting the right on a simple foundation and with the simplest exception." And *Cresswell*, J., said: "In the course of legislation then and since, parliament has been actuated by a desire to settle titles and rights. One object of the Prescription Act was to shorten the time by which persons who had the access and use of light could acquire an absolute right to it. The 3rd section does not say when the access and use of light shall have been enjoyed as of right, because every person has a right to so much light as can come in at his window. The Prescription Act brought this to a simple question; it says that after twenty years' enjoyment without interruption the right shall be deemed absolute and indefeasible." In *Salters' Company* v. *Jay* (3 Q. B. 109) and *Truscott* v. *Merchant Taylors' Company* (11 Exch. 855) it had been held, that an enjoyment of light for twenty years next before the suit confers an indefeasible right under this section, notwithstanding the local custom of London (confirmed by acts of parliament) that house walls might be raised to any height if upon the ancient foundations; but if an action for obstructing the light were delayed till after the obstruction had continued for a year, the claimant

could not rely upon this act, not having enjoyed the light for twenty years next before the suit. See sect. 4, and the custom would in that case prevail. 2 & 3 *Will.* 4, *c.* 71, *s.* 3.

Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within this section. (*Plasterers' Company* v. *Parish Clerks' Company* (in error), 6 Exch. 630; 15 Jur. 965; 20 L. J., Exch. Ch. 362.) The occupier of a house paid an annual sum, under a parol agreement, to the owner of the adjoining land for the liberty of keeping the windows open, which looked upon the land, and continued in such active enjoyment for twenty years. It was held, on error, in an action by the occupier against the owner of the adjoining premises for an obstruction to his lights, that the payment so made was no evidence of an interruption of the enjoyment within this section. (*Ib.*)

An actual enjoyment of light for twenty years, even under a permission verbally asked for the occupier of a house, and given by the person having a right to obstruct, is sufficient to confer a right under this section. (*London* (*Mayor*) *&c.* v. *Pewterers' Company*, 2 M. & Rob. 409.) Verbal licence.

By the custom of London, which is stated in the case of *Wynstanley* v. *Lee* (2 Swanst. 339, 340), an occupier of a house there had not an absolute property in the enjoyment of his share of light, whatever it might be, but the owner of the adjoining house or site of houses might build to any height, and to the obstruction of his light, unless he was precluded by some writing between them. And the custom was not repealed *merely by the length of time* during which one party enjoyed and the other acquiesced in such enjoyment. (2 Swanst. 341. See Privilegia Londoni, p. 101, cited Mood. & Malk. 351; and see Godb. 183; Yelv. 215; 1 Bulstr. 115; Com. R. 273; 1 Burr. 248; 3 Carr. & P. 317; *Shadwell* v. *Hutchinson*, 3 C. & P. 615; M. & M. 350; 2 B. & Ad. 97.) Custom of London.

This section extends to the custom of the city of London, authorizing one neighbour to obstruct the access of light to another's messuage, &c., by building on an ancient foundation; therefore in an action for building so as to darken windows which had been enjoyed without interruption for twenty years, the custom of London is no longer a defence. (*Salters' Co.* v. *Jay*, 3 Q. B. 109; 2 Gale & D. 414.) The last case is confirmed by *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855; 2 Jur., N. S. 356; 25 Law J., Exch. 173.)

IV. Periods how to be computed.

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made (*l*). Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

(*l*) This section is nothing but an exposition of the proof required to establish the right. (*Jones* v. *Price*, 3 Bing. N. C. 52.) In a plea under this statute it is sufficient to aver an user of the right for thirty, sixty, twenty or forty years, according to the nature of the case, next before the commencement of the suit, and it is not necessary to allege that it has existed for forty years before the act complained of in the declaration. (*Wright* v. *Williams*, 1 Tyr. & G. 375; 1 Mees. & W. 77; *Richards* v. *Fry*, 7 Ad. & Ell. 707.) Averment as to enjoyment before commencement of suit.

2 & 3 *Will.* 4, *c.* 71, *s.* 4.

Twenty years' enjoyment by the occupier, in order to give right under this statute, must be up to the time of the *commencement of the suit, not up to the time of the act complained of*; and, consequently, an enjoyment of twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit. This apparent absurdity, arising from a strict construction of the act, was fully considered and acted on in the two cases last cited. (*Per Parke*, B., *Ward* v. *Robins*, 15 Mees. & W. 242.) As it is impossible that the acts of user should continue to the very moment of action brought, or that they should be continued within a week or month of that time, *Parke*, B., thought that, according to the true construction of the statute, some act of that description must take place within each year. (*Lowe* v. *Carpenter*, 6 Exch. 832.)

Although, under this section, no interruption will prevent a right from being acquired by twenty years' user, unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of showing that the enjoyment never was as of right, and thereby of preventing a right being acquired under the first section of this act. (*Eaton* v. *Swansea Waterworks Co.*, 15 Jur. 675; 20 Law J., Q. B. 482; 17 Q. B. 267; *ante*, p. 10.)

How time is to be computed.

In an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land, the defendant pleaded an user for forty years *before the commencement of the suit*. It was objected that they should have averred the user for the allotted period to have taken place before the commission of the act complained of; and, in support of this objection, it was argued, that the court could only look upon the facts as they existed at the time the act complained of was committed; that it was absurd to say that the legality of an act must be ascertained, not by the state of things at the time the act was done, but by something that occurs afterwards. "If a literal construction," it was contended, "is to be put on the 4th section of the statute, an enjoyment of 500 years would give no indefeasible right, because the user is required to be during a period 'next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought in question.' The language of the 2nd section is clear of all doubt. It says expressly that the claim shall not be defeated, where the way or other matter has been actually enjoyed, by any person claiming right thereto, without interruption for the full period, &c. If the computation be of a period before the commencement of a suit, a party might establish his right, although during the last nine months of the forty years there had been an obstruction to which he submitted; for by the 4th section no interruption can be effectual against the user, unless acquiesced in for a year." Lord *Abinger*, C. B., in delivering the judgment of the court, said, "It is said for the plaintiff, that although the act in the 4th section expressly states, that the periods of twenty and forty years shall be deemed and taken to be next before the commencement of some suit, wherein the claim shall have been brought in question, yet that this enactment must be construed to mean that the period shall be those years next before the act complained of, on account of the absurdities and inconveniences to which a literal construction of this provision would give rise. One of these alleged absurdities and inconveniences was, that no good title could arise to any incorporeal hereditament mentioned in the statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added, that one action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before any action. Another was, that if the act be so construed, the plea justifying under such a right must be on the face of it absurd, as each of the pleas in question is suggested to be, for each justifies an act done at a particular time by the defendant, as being then lawful, and then done because the defendant actually enjoyed the right of doing the same thing for a period of time afterwards; so that it is said the character of the act, whether it be wrongful or rightful, cannot

be known at the time by the party doing it, but depends upon a subsequent event. We are of opinion, however, that it is impossible to construe the act of parliament as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription before the act passed were of the same nature, and the validity of rights gained by them depended much upon the mode of enjoyment, until that action was brought in which they came in question; and with respect to the form of the plea, which is at first sight somewhat incongruous, it is to be observed that there is something of the same kind of incongruity, though by no means to the same extent, in the usual mode of pleading a prescription, which states 'that some person seised in fee from time whereof the memory of man is not to the contrary, until and at the time when, &c., and from thence hitherto hath had and enjoyed, and hath been used and accustomed to have and enjoy, and still ought of right to have and enjoy,' a particular easement, and then justifies the act done by reason of that enjoyment, which enjoyment is both before and after the time of such act. It appears to us, that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance." The court held the pleas sufficient in point of law. (*Wright* v. *Williams*, 1 Mees. & W. 77, 98—100. See *King* v. *Inhabitants of Calow*, 3 Maule & S. 22.)

2 & 3 *Will.* 4, *c.* 71, *s.* 4.

In case the declaration stated that the plaintiff was lawfully possessed of a mill, and by reason thereof of right ought to have and enjoy the benefit of the water of a watercourse, which ran and flowed by means of a weir therein erected a little above the plaintiff's mill, being kept at a certain height, unto the said mill of the plaintiff, for supplying it with water for the working thereof; and complained that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been, &c. The defendant pleaded that, before and at times when, &c., he was the occupier of a certain close adjoining to the watercourse, and that he and all others the occupiers for the time being of the said close, for twenty years next before the commencement of the suit, enjoyed as of right and without interruption the right of, from time to time as occasion required, removing a part of the weir and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the said close; that at the times when, &c., irrigation was necessary for the close; wherefore the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent and for such a time as, and no more or longer than was necessary for diverting the water for the irrigation of the said close, *quæ sunt eadem*, &c. It was held, that this plea was good; that it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under this statute, was not complete until the commencement of the suit, and therefore was not inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of. (*Ward* v. *Robins*, 15 Mees. & W. 237.)

The interruption which defeats a prescriptive right under 2 & 3 Will. 4, c. 71, is an adverse obstruction, not a mere discontinuance of user by the claimant himself. (*Carr* v. *Foster*, 3 Q. B. 581. See sect. 6, *post*, p. 26, n. (*u*).)

Interruption means an obstruction by the owner of the *locus in quo*, but it is to amount to nothing unless acquiesced in for a year. (*Onley* v. *Gardiner*, 4 Mees. & W. 497.) A party filing a bill to establish a prescriptive right under this act must show that there was not an interruption for one year before the time of filing the bill. (*Ennor* v. *Barwell*, 2 Giff. 420, 421.)

Interruption, what.

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings

2 & 3 *Will.* 4, c. 71, *s.* 4.

were taken, it was held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy. (*Gale* v. *Abbott*, 8 Jur., N. S. 987; 10 W. R. 748.)

A claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement. The legislature evidently considered the passage of light—which bears a very close analogy to that of air—to stand upon a different footing from the other easements with which it had been dealing in the preceding section; and if it had intended to extend the right to the uninterrupted passage of wind and air, it would have done so in express terms. (*Webb* v. *Bird*, 10 C. B., N. S. 283. See *ante*, p. 6.)

Enjoyment for nineteen years and a fraction.

The right to an easement which has been enjoyed for nineteen years and a fraction, and is then interrupted by the owner of the soil, may still be acquired under this statute at the end of the twentieth year; for the interruption to defeat twenty years' user must have been acquiesced in or submitted to for a whole year. In an action for obstructing certain windows, in a house occupied by the plaintiff, it appeared that at the time when a wall which caused the obstruction was erected, the part of a window had existed and been enjoyed, and the use of the light and air through the same had been enjoyed for the space of nineteen years and 330 days only, the period of a year not having elapsed from the time of the erection of the wall until the commencement of the action in which the right had been brought into question. The plaintiff had notice of the erection and of the prevention of the light and air from entering thereby through the said part of the window, and at the time of the commencement of the action, the part of the window had been made, and had existed and been enjoyed, and the access and use of light and air through the part of the window had been enjoyed for the full space of twenty years, except as aforesaid, without any interruption except the interruption above mentioned, and not under any consent or agreement given by deed or writing; and at the time of the commencement of the action such interruption had not been acquiesced in for one year after the plaintiff had notice thereof. If the 3rd section had stood alone, the court held that the plaintiff below could not have established any claim to the use of the light in question, because it had not been actually enjoyed with the messuage for the full period of twenty years before the commencement of the action, but only for nineteen years and 330 days, when the enjoyment was interrupted by the erection of the wall. The 4th section, however, defines the meaning of the word *interruption*, and as upon the trial it was proved that the erection of the wall, which was the act complained of, had not been acquiesced in for one year after notice, inasmuch as the action was commenced within a few months after the erection of the wall, the court was of opinion that such erection of the wall and continuing it so erected, was not an interruption within the meaning of the 4th section of the act. (*Flight* v. *Thomas*, 11 Ad. & Ell. 688; 3 P. & Dav. 442, affirmed by the House of Lords, 5 Jurist, 811; 8 Cl. & Fin. 231. See 17 Q. B. 272; *ante*, p. 15, n. (*k*).)

Interruption by natural cause.

Where it appeared that at a period much earlier than twenty years before the commencement of the action, a stream of water had flowed through the plaintiff's lands; but that there had been some interruption about twenty-two years before the action, and it was not till within nineteen years that the stream had again flowed constantly in its former course, and it was objected that there was a want of sufficient evidence to support the plaintiff's claim, *Tindal*, C. J., said, it would be very dangerous to hold, that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment. (*Hall* v. *Swift*, 4 Bing. N. C. 381; 6 Scott, 167. See the remarks of *Patteson*, J., on that case, 3 Q. B. 585, 586; and *Carr* v. *Foster*, 3 Q. B. 381, *post*, p. 26, n. (*n*).)

Right not disproved by interruption.

To an action of trespass for taking the plaintiff's cattle in an open field, called P. and G. field, and impounding them, the defendant pleaded, 1st, that T. B. and his ancestors had been immemorially used and accustomed to have for themselves, and their heirs and assigns, the sole and several pasturage

2 & 3 *Will.* 4, *c.* 71, *s.* 4.

in 217 acres of P. & G. field in gross for all his and their cattle, from the 4th September to the 5th April; that T. B., in 1755, by indenture, granted the said pasturage to S. B., his heirs and assigns for ever; that J. B. (who claimed by descent from S. B.), in 1836, demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing on the said 217 acres. The second plea alleged a right of sole pasturage in gross for thirty years before the commencement of the suit (under the 1st section of this statute) in J. B. and his ancestors, and a demise from him to the defendant, concluding as in the first plea. The replication traversed the right of T. B., as alleged in the first plea, and the enjoyment of J. B. as of right, without interruption, for thirty years, as alleged in the second. It appeared in evidence, that within the last twenty years encroachments had been made by buildings and enclosures on the 217 acres, and that above thirty acres had been thus appropriated, but no encroachments had been made on the part of the 217 acres on which the alleged trespass was committed; it was held, that these interruptions being so recent did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea. (*Welcome* v. *Upton*, 6 Mees. & W. 536.)

V. Pleadings.

In actions on the case the claimant may allege his right generally as before this act.

5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation (*m*).

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

(*m*) The leading provision of this statute is in favour of enjoyment "as of right," that is, of such a nature that its origin could be reasonably referred to nothing but some right, though it were not capable of being exactly described. (*Per* Lord *Denman*, C. J., 4 Q. B. 355. See 1 Exch. R. 286.)

2 & 3 *Will.* 4, *c.* 71, *s.* 5.

Meaning of words "claiming right" and "as of right."

The words, "enjoyed by any person *claiming right*," applied to easements in the 2nd section, and "enjoyment thereof *as of right*," in the 5th section of this act, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly and notoriously, without particular leave at the time by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years. (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; 6 Nev. & M. 230. See *Bright* v. *Walker*, 1 Cr., M. & R. 219; *ante*, pp. 11, 12; *Arkwright* v. *Gell*, 5 Mees. & W. 333.)

The 5th section gives a new plea, by enacting, that in certain cases it shall be sufficient to allege the enjoyment "as of right." If the parties choose to avail themselves of that provision, they must follow the very words; and if they neglect to do so, the plea is bad, and the omission would be ground of demurrer. Since this statute, it is usual in pleading a right of way to plead first a prescriptive right, then a right of way existing for the last forty years, and then a right of way existing twenty years, and so of other rights under that statute. (*Per Alderson*, B., *Earl of Stamford* v. *Dunbar*, 13 Mees. & W. 827.)

A plea in trespass alleging that the defendant and all other prior occupiers of a certain tenement, for twenty years next before the commencement of the suit, have had, used and actually enjoyed without interruption, and of right ought to have had, used and actually enjoyed, &c. a way through the *locus in quo*, was held to be bad after verdict, as the actual enjoyment was not alleged to have been under the right claimed, and the enjoyment therefore was not shown to be "as of right," according to the 5th section. (*Holford* v. *Hankinson*, 1 Dav. & Mer. 473; 5 Q. B. 584.) The plea alleged a defective title, and came within the reason of the decision in *Jackson* v. *Pesked*, 1 Mau. & S. 234. The distinction between a defective statement and the statement of a defective title was exemplified in *Davis* v. *Black*, 1 Q. B. 900, and *Rutter* v. *Chapman*, 8 Mees. & W. 1.

Pleading enjoyment of an easement.

Where a defendant pleads an enjoyment of an easement for thirty years under this act, and the plaintiff relies on the existence of a life estate, or any of the other portions of time which by sect. 7 are to be excluded from the computation of the thirty years, not being inconsistent with the actual fact of enjoyment, he is bound under the 5th section of this statute to plead such life estate, &c. specially. (*Pye* v. *Mumford*, L. J. 1848, Q. B. 138; 12 Jur. 578; 5 Dowl. & L. 414.)

When licence must be replied specially.

It has been decided upon this section, that where a defendant justifies under an enjoyment of twenty or forty years, if the plaintiff relies upon a licence covering the whole of that period, he must reply such licence specially: but a licence granted and acted on during the period may be given in evidence under the general traverse of the enjoyment "during the period alleged, showing that there was not, at the time when the agreement was made, an enjoyment as of right;" and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; 6 Nev. & M. 230.)

Licence must be co-extensive with the right claimed.

To a declaration in trespass *qu. cl. fr.* the defendant pleaded, that he and the former occupiers of a house and land had for twenty years used and enjoyed as of right a certain way on foot and with horses, &c., from and out of a common highway, towards, into, through and over the plaintiff's close, to the defendant's house and lands and back, at all times of the year, at their free will and pleasure. The replication averred, that the defendant, &c. used and enjoyed the right of way mentioned in the plea, but they did so under the plaintiff's leave and licence. At the trial it appeared, that the defendant and the former occupiers of his house and land had an admitted right of way from thence over the *locus in quo* to the highway, and across the highway to a close called Reddings, and that for the last twenty years they had a licence from the plaintiff to use, whenever they pleased, a way from

the defendant's house and lands over the *locus in quo* to the highway and back, when they had not any intention of going to Reddings. It was held, that the replication was not supported by this evidence, and that the plaintiff was bound to show a licence co-extensive with the right claimed in the plea and admitted by the replication. (*Colchester* v. *Roberts*, 4 Mees. & W. 769.) 2 & 3 *Will.* 4, *c.* 71, *s.* 5.

The asking leave from time to time *within* the forty or twenty years breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and therefore the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. (*Monmouthshire Canal Co.* v. *Harford*, 1 Cr., M. & R. 614. See *Tickle* v. *Brown*, 4 Ad. & Ell. 383.) Lord *Denman*, C. J., said, that in looking at the report of the case of the *Monmouthshire Canal Co.* v. *Harford*, (1 Cr., M. & R. 614; 5 Tyr. 68; see *post*,) we find that the decision rests on this ground, viz. that the asking leave from time to time *within* the forty or twenty years breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and therefore the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow, that not only an asking leave, but an agreement *commencing within the period* may be given in evidence under the general traverse, notwithstanding the words of the 5th section; for the party cannot and does not rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. (*Tickle* v. *Brown*, 4 Ad. & Ell. 383, 334.) In *Beasly* v. *Clark* (3 Scott, 258; 2 Bing. N. C. 709), *Tindal*, C. J., said, "Under a replication denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section not being inconsistent with the simple fact of enjoyment, being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised as of right." In *Onley* v. *Gardiner*, (4 Mees. & W. 494,) it was decided, that unity of possession was "inconsistent with the simple fact of enjoyment as of right," and therefore need not be specially pleaded. The simple fact of enjoyment referred to in the 5th section is an enjoyment "as of right," and proof that there was an occasional unity of possession is as much in denial of that allegation, as the occasionally asking permission would be. The effect of asking leave.

In *Clayton* v. *Corby*, 2 Q. B. 813, it was held, that evidence of unity of possession was receivable under the traverse of a plea of enjoyment for sixty years, inasmuch as such proof went to show that the enjoyment was not as of right. (See *Pye* v. *Mumford*, 5 Dowl. & L. 414, *post*, p. 27.) What receivable in evidence.

In trespass *quare clausum fregit*, to a plea of enjoyment of a right of way over the plaintiff's close, by the occupiers of a close called W. for twenty years next before the commencement of the suit, under this statute, the plaintiff replied that, before the period of twenty years mentioned in the plea, one W. C. was seised in fee, as well of the close mentioned in the declaration as of the close called W., and continued so seised during part of the said period of twenty years, to wit, until, &c., when he died so seised, it was held bad on special demurrer; for that unity of *seisin* was not inconsistent with the right as alleged in the plea, and unity of *possession* (if that were meant by the replication) might have been given in evidence under a traverse of the right as alleged in the plea. (*England* v. *Wall*, 10 Mees. & W. 699.)

2 & 3 *Will.* 4, c. 71, *s.* 5.

In trespass, upon issue joined, whether the defendant had for thirty years enjoyed as of right a certain privilege, &c., upon the plaintiff's land, the plaintiff, in order to raise the presumption that the enjoyment was permissive, may give in evidence an old lease made to the defendant's predecessor, and expiring immediately before the commencement of the thirty years, whereby the lessee was entitled to the privilege, &c., during the term. It is not necessary in such a case for the plaintiff to reply the lease specially under this section. (*Clay* v. *Thackrah or Thackeray*, 2 M. & Rob. 244; 9 Carr. & P. 47; *ante*, p. 8.) In an action of trespass *quare clausum fregit*, it was also held, that this unity of possession need not be specially replied; and that, without a special replication under the 5th section, the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence. (*Ib.*) And it was held, that B.'s lease of the land having expired more than thirty years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right. (*Ib.*)

The plea under this act was of a right of way for the occupiers of a close for twenty years, for horses, carts, waggons, and carriages, at their free will and pleasure. The replication traversed such right. It was held that, under the issue, the plaintiff might show that the defendant had a right of way for horses, carts, waggons, and carriages, for certain purposes only, and not for all, and was not compelled to new assign; and might show that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which the right extended. (*Cowling* v. *Higginson*, 4 Mees. & W. 245.)

It is sufficient *primâ facie* proof of a prescription for a general easement as a right of way for all purposes to show the actual exercise of the right for more than twenty years for all the purposes to which the use or enjoyment of the premises at different times required its exercise, although for some of those purposes it appears that it was first used, in fact, within that period. (*Dare* v. *Heathcote*, 25 L. J., Exch. 245.) Hence, where a right of way was pleaded for cattle and carts, and it appeared that the right had been used for cattle for more than twenty years, and had for the first time been used for carts within that period on the first occasion which had arisen requiring its use in that manner; it was held that the evidence was enough to go to the jury, as raising a presumption that the right had existed to the general extent to which it was claimed, although it had not been exercised for a period so long as in itself to create a prescription. (*Ib.*)

The latter part of the 5th section, in express terms, applies only to rights which can be claimed *by the occupiers* of a tenement *in respect of it*, which, it has been contended, is confined to a claim appendant or appurtenant, and does not apply to a right in gross, as a right to take the whole pasturage *in gross*. (See 5 Mees. & W. 402; 6 Mees. & W. 540; 7 Mees. & W. 81.) It is questionable whether a right of common in gross be within this statute. *Parke*, B., said, "If the only question had been whether a right of common in gross be within the 5th section, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that the present case is within the equity of the statute." (*Welcome* v. *Upton*, 6 Mees. & W. 542. See *S. C.* 5 Mees. & W. 404.)

Whether common in gross within act.

With reference to the question whether this act applies to an easement in gross, *Willes*, J., said, "There is no doubt an easement in gross could not be claimed by an occupier under the prescription act, because under that act the claim is by custom, prescription or grant; and there is no doubt that a right could not be acquired under that act by twenty, thirty, or sixty years' enjoyment, according as it might be, whether an easement or a profit *à prendre*, except it was capable of being annexed to the land. But the question has arisen, whether it is not possible to plead a right in gross in the manner pointed out by the subsequent section, not a section giving the right, but a section giving the mode of pleading. It is perfectly clear to my mind, that it cannot be so pleaded without showing something more than that the person in possession is occupier; it must be

shown that he is heir or assignee of the person to whom the right in gross has been granted. The mere fact of his being in possession does not show that." (*Bailey* v. *Stephens*, 12 C. B., N. S. 113.) 2 & 3 *Will.* 4, c. 71, *s.* 5.

Proof of prescription.

In cases of prescription, the allegation must be proved as laid. Thus, in replevin, if the defendant avow taking the cattle as damage feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not be sufficient, for the issue is upon the whole. (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 313. See 2 H. Bl. 224.) But though a party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (Cro. Eliz. 722; 1 Taunt. 142; *West* v. *Andrews*, 1 B. & Cr. 77.) A party may prescribe for less than he proves, but that implies that the lesser right claimed is included in the greater. (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 167.) Where a plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all cattle that he kept, but that he had never kept any sheep; it was held to be evidence of a right for all commonable cattle, which ought to have been left to the consideration of the jury. It might have been otherwise if there had been evidence of the plaintiff having kept cattle which he did not turn on. A right of common was held to be well laid as "for sheep at all times of the year," though it was proved to be subject to folding the sheep at night in a certain farm, the expression being held to mean all usual times. (*Manifold* v. *Pennington*, 4 B. & Cr. 161; *Brook* v. *Willet*, 2 H. Bl. 224.) Where in debt, for not setting out tithe of hay, plaintiff averred that there was a certain annual custom as to setting out the tithe "within the parish, and the limits, bounds and tithable places thereof;" it was held, that such averment was proved, for that the custom prevailed in all parts of the parish where tithe of hay was set out, and that proof of a modus for hay in one township made no difference. (*Pigott* v. *Bayley*, 6 B. & Cr. 16.) Where a plaintiff claimed an easement of hanging linen across a yard for drying them, larger than that proved, the court refused to allow the plaintiff to amend on payment of costs, inasmuch as he was not thereby precluded from bringing another action, if he were interrupted in the enjoyment of the limited right. (*Drewell* v. *Towler*, 3 B. & Ad. 735.) The general rule of pleading in cases of tort is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is an exception, however, to this rule, which is, where the allegation contains matter of description. There, if the proof given be different from the statement, the variance is fatal. (*Ricketts* v. *Salway*, 2 B. & Ald. 363. See *Beadsworth* v. *Torkington*, 1 Q. B. 782; *Brunton* v. *Hall*, *Ib.* 792.) If the allegation of right be divisible, it seems that the plaintiff is entitled to a limited verdict for a divisible part of the right alleged, though he fails to prove the residue. (See *Giles* v. *Groves*, 12 Q. B. 721; 1 Chit. Pl. 400, 7th ed.; Bullen and Leake's Precedents of Pleadings, 249, 602, 2nd ed.)

VI. Less period not to be allowed.

Restricting the presumption to be allowed in support of claims herein provided for.

6. In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or

2 & 3 *Will.* 4, *c.* 71, *s.* 6.

number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim (*n*).

(*n*) This section forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute. (*Bright* v. *Walker*, 1 Cr., M. & Rosc. 222; *ante*, pp. 11, 12.)

The "interruption" which defeats a prescriptive right, under this statute, is an adverse obstruction, not a mere discontinuance of user by the claimant himself. In a case under the 1st section, if proof be given of a right of enjoyment at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased or was still substantially enjoyed. The inference to be drawn from the facts proved on this point is not a presumption within the 6th section. Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after: it was held, that a jury were justified in finding a continued enjoyment of the right during thirty years. (*Carr* v. *Foster*, 3 Q. B. 581; 2 Gale & D. 753. See *Hall* v. *Swift*, 4 Bing. N. C. 381.)

Parke, B., observed, "There is some difficulty in reconciling the two decisions of *Carr* v. *Foster*, and *Parker* v. *Mitchell*, *ante*, p. 13, although that may perhaps be effected by observing a distinction between enjoyment at the commencement and termination of the periods, and during the intermediate time. If, on the other hand, the two decisions are to be considered as irreconcilable, I think the more correct view is this, that no right can be obtained, unless an user be proved of the easement at least once a year during the prescribed period." (*Lowe* v. *Carpenter*, 6 Exch. 831.)

VII. Disabilities.

Proviso for persons under disabilities.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (*o*).

(*o*) It is the intention of the act, that an enjoyment of thirty years, or twenty years, shall be of no avail against an idiot or other person labouring under incapacity, but that one of sixty or forty years shall confer an absolute title, even against parties under disabilities. (See *Wright* v. *Williams*, 1 Tyr. & Gr. 392; 1 Mees. & W. 77.) This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim) is *tenant for life*. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoyment *against* an owner of the fee. (*Bright* v. *Walker*, 1 Cr., M. & R. 222; *ante*, pp. 11, 12.) By the 1st section, where the right, profit or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any

watercourse, or the use of any water, shall have been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

2 & 3 *Will.* 4, *c.* 71, *s.* 7.

Where to trespass *quare clausum fregit* the defendant pleaded thirty years' enjoyment of a right on the land in which, &c., under this statute, the plaintiff, if he relies on the fact, that during part of those thirty years the land had been held by a tenant for life, or any other matter of fact not inconsistent with the simple fact of enjoyment, should reply it specially, and not traverse the enjoyment as pleaded. (*Pye* v. *Mumford*, 5 Dowl. & L. 414; 17 Law J., Q. B. 138; 12 Jur. 578.)

In case for the diversion of water the plaintiff alleged in his declaration a reversionary interest in three closes of land, to wit, *three ponds* filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged. It appeared in evidence at the trial, that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that above thirty years ago he made a new pond in each of the three closes, and turned the water so as to supply them, and thenceforth disused the old pond, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate, under the 7th section, it was held, that he was entitled, under this declaration, to recover in respect of his right to the flow of water to the old pond. (*Hale* v. *Oldroyd*, 14 Mees. & W. 789.)

VIII. Time excluded from forty years.

What time to be excluded in computing the term of forty years appointed by this act.

8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (*n*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*o*).

Omission of easement in 8th section.

(*n*) The words of the 2nd section extend to all easements; but the word "easement" is omitted in the 8th section. There seems reason for thinking that the word *convenient* has crept into the 8th section instead of the word "easement," for, with that exception, the expressions in the two sections are the same. It does not appear why it should be supposed that the legislature would have neglected to protect the interests of reversioners in the case of other easements than ways and watercourses. (See *Wright* v. *Williams*, 1 Tyr. & G. 390; 1 Mees. & W. 77.)

(*o*) According to the 7th section a tenancy for life is included in the period of forty years; the 8th section only takes it out on condition that the

2 & 3 *Will.* 4, c. 71, s. 8.

reversioner shall bring his action within three years after its determination; a user of forty years confers a *primâ facie* title, which is good, unless the reversioner pursues his remedy within the three years. (*Wright* v. *Williams*, 1 Tyr. & G. 393; 1 Mees. & W. 77.) The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned. (*Onley* v. *Gardiner*, 4 Mees. & W. 500.)

Under the 7th and 8th sections of this act, the time during which the servient tenement has been under lease for a term exceeding three years, is to be excluded from the computation of forty years' enjoyment, but not from the computation of an enjoyment for twenty years. (*Palk* v. *Shinner*, 18 Q. B. 568.) The 8th section applies expressly to the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold, that it applies also to the computation of an enjoyment for twenty years. (*Per Erle*, J., *Ib.* 575.)

Replication of life estate.

Where a replication to a plea of enjoyment of an easement for forty years, under this act, sets up a life estate in order to bring the case within the 8th section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate. In an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land by turning water into a channel running through the plaintiff's lands, after such water had been used by the defendant on his own land, in precipitating minerals, and become so impregnated as to be extremely injurious to the plaintiff's estate; the defendant pleaded an user for forty years "before the commencement of the suit." The replication set forth, that Rice Thomas was seised in his demesne as of fee of the several closes over which the watercourse passed, and that by certain indentures of lease and release therein stated, his interest was conveyed to trustees for the uses therein mentioned, and one of which was to the use of Rice Thomas for life, with a power to Rice Thomas, whilst so seised of the freehold for his life, to grant leases upon certain conditions therein named, by indenture; that Rice Thomas, by virtue of this settlement, did become seised of the freehold for his life; and that whilst he was so seised, by virtue of the power therein contained, he did, by indenture duly made between himself of the one part, and Edward Hughes and Thomas Williams of the other part, enfeoff the said Hughes and Williams of the said closes for and during the term of the lives of William Lewis Hughes, now Lord Dinorben, Owen Williams and John Davies, and the longest liver of them; and the replication concluded by stating, that Lord Dinorben, one of the lives, was still in being. It was said by the court, "the enjoyment of the right during forty years alleged in the pleas, being admitted, the repli ations, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years *absolutely*, is, by the 8th section, excluded from the computation of the longer period of the forty years *conditionally* only; that is, provided the reversioner expectant on the determination of the term for life shall, within three years (that is, probably *before* the end of three years) after such determination, resist the right; and it does not appear that the plaintiff is entitled to the reversion *expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord Dinorben, the *cestui que vie*, is therefore not to be excluded, on these pleadings, from the period of forty years; and such period being complete, the defendant is entitled to an indefeasible right to the easement claimed. (*Wright* v. *Williams*, 1 Mees. & W. 100.)

Licence.

Upon an issue with regard to twenty years' enjoyment of a railroad without interruption, for the convenient use and occupation of their closes, the defendants insisting upon such a right are bound to show an uninterrupted enjoyment as of right during that period, and the plaintiff may prove under such issue applications by the defendants during the twenty years for leave to cross their railroad, and it is not necessary for them to

reply such licence specially under the 8th sect. Where the simple issue is, whether there has been a continued enjoyment of the way for twenty years, any evidence negativing the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken. (*Monmouthshire Canal Company* v. *Harford*, 1 Cr., M. & R. 615; *ante*, p. 23.) 2 & 3 *Will.* 4, c. 71, *s.* 8.

9. This act shall not extend to Scotland or Ireland (*p*). Not to extend to Scotland or Ireland.

(*p*) This act has been extended to Ireland by 21 & 22 Vict. c. 42, see *ante*, p. 2, n. (*a*).

10. This act shall commence and take effect on the first day of Michaelmas Term now next ensuing. Commencement of act.

Of Subjects included in the Prescription Act.

1. *Of the Nature of Prescription.*
2. *Of Rights of Common.*
3. *Of the Presumption of Grants of Easements.*
4. *Of Rights of Way.*
5. *Of Watercourses.*
6. *Of the Right to Pews.*
7. *Of the Right to Light and Air.*

1. OF THE NATURE OF PRESCRIPTION.

Every species of prescription by which property is acquired or lost is founded on this presumption, that he who has a quiet and uninterrupted possession of any thing for a certain number of years is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim was forborne. (1 Domat, 461.) The most ancient and distinguished writers on the common law of England have recognized the principle, that a right to any incorporeal hereditament may be acquired by length of time. This mode of acquisition they have denominated *prescription*, "*præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis.*" (Co. Litt. 113 b.) Every prescription supposes a *grant* once made, and afterwards lost, and therefore nothing can be claimed by prescription which in its nature could not have been granted. Provision was made against the insecurity to property for want of a reasonable term of limitation by the stat. 3 Edw. 1 (Westm. 1), c. 39, by protecting possession, when as old as Richard I., against certain legal proceedings. By analogy to that statute, the term of legal memory was fixed at the same period; but as no provision was made to shift the period, in consequence of the continual lapse of time, the reign of Richard I. was left as the point from which legal memory was dated. Hence, in order to constitute a prescription previously to 2 & 3 Will. 4, c. 71, the enjoyment must have existed *time out of mind*, or, in other words, must have commenced antecedent to the reign of Richard I. (Bract. L. 2, c. 22; 3 Lev. 160; 1 Bl. Comm. 76; 2 *Id.* 263.) The period called *legal memory*, in contradistinction to living memory, commenced in 1189. (Co. Litt. 114 b; 2 Inst. 238; 2 Ves. sen. 511.) But in order to make persons on the alert in guarding their rights, and to prevent disputes respecting rights which have been long and peaceably enjoyed, the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, Nature of prescription.

presumptive evidence that the right has existed time out of mind, and consequently (unless its origin could be proved) a sufficient foundation for establishing a prescriptive right. (10 East, 476; 2 Brod. & Bing. 403; Cowp. 215; 2 Wils. 23.) And accordingly a regular usage for twenty years, not explained nor contradicted, was that upon which many public and private rights were held, and, where there was nothing to contravene public policy, was sufficient to establish a custom. (*Rex* v. *Joliffe*, 2 B. & Cr. 54; 6 East, 214; 2 Wms. Saund. 175, a, d. See *The Free Fishers of Whitstable* v. *Gann*, 11 C. B., N. S. 412.) But since the stat. 2 & 3 Will. 4, c. 71, a title to subjects included in the first section of that act cannot be established by an enjoyment for a less period than thirty years, *ante*, p. 1. It is a general rule, that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing. (11 Mod. 160; Fitzgib. 243.) An usage for inhabitants to have common to their houses was held not to extend to a *new* house. (Owen, 4.) To every prescription there were two inseparable incidents—time and usage. (Co. Litt. 113.) Prescription, and time whereof no memory runneth to the contrary, were all one in law. (Litt. s. 170.) And this was understood not only of the memory of any one living, but also of proof by any record or writing, or otherwise, to the contrary, which was considered within memory. (Co. Litt. 115 a.) Thus a lease of ground for fifty-six years to be a passage negatived a prescription, and suffering it to be used for three or four years after the expiration of the lease was held not to amount to a gift to the public. (*Rex* v. *Hudson*, Str. 909.) A prescription ought to be certain; therefore a custom or prescription for copyholders to pay to the lord for a fine upon death *two years' rent or less* is bad. (Com. Dig. Prescription (E. 3).) But a custom to pay two years' improved value for a copyhold fine is good. And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor. (*Id.* (E. 4).) But it may be reasonable, although unusual or inconvenient, as for a way over a churchyard, or through a church. (2 Roll. Abr. 265, l. 40.)

Difference between custom and prescription.

A right by prescription to incorporeal hereditaments is founded on immemorial usage, as where a person shows no other title to what he claims than that he, and those under whom he claims, have immemorially used to enjoy it. Such a prescription differs from custom in this respect, that a custom is properly a local usage, not annexed to the person,—such as the custom that all the copyholders of a manor have common of pasture upon a particular waste; whereas prescription is always annexed to a particular person. (Co. Litt. 113 b; 4 Rep. 31 b.) This kind of prescription is of two sorts,—either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of a particular estate, and only exercisable by those who are seised of the estate. The first is termed a prescription in the person; the second is called a prescription in a *que estate*, which, in plain English, means a right or privilege claimed by prescription as annexed to and going along with particular lands. (Co. Litt. 13 b, 121 a; 3 Gwill. 1291.)

Prescribing in que estate.

Before the passing of the statute 2 & 3 Will. 4, c. 71, a prescription in a *que estate* must always have been laid in the person who was seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord. (6 Rep. 60 a; Fortesc. 340.) The uniform practice, in a plea justifying under a right of common, was to set out the title to the common specially, by showing a seisin in fee of the land to which the defendant claimed a right of common, either in himself or in some other person under whom he derived title, and then to prescribe in the *que estate* for the right of common, by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial. (*Grimstead* v. *Marlow*, 4 T. R. 718; 1 Wms. Saund.

346, n. (1).) And if the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad. (Cro. Car. 599; 4 Rep. 38.) As where a defendant justified under a right of common of pasture, showing a demise from a freeholder for life of the land in respect of which he claimed, and averred that he the defendant, and all those whose estate he then had, and his landlord, from time, &c., had common of pasture in respect of the demised premises, it was held upon demurrer to be a bad plea. (*Attorney-General* v. *Gauntlett*, 3 Y. & Jer. 93.) But by the fifth section of the act, (*ante*, p. 21,) in actions on the case, the claimant may allege his right generally; and in pleading to actions of trespass, where previously it would have been necessary to have alleged the right to have existed from time immemorial, it will be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed during the period provided by the act, and without claiming in the name of the owner of the fee.

Profit out of soil must be claimed by prescription.

A profit claimed out of another man's soil must be alleged by way of prescription, and not by way of custom, for a custom to take a profit *in alieno solo* is bad (*Blewitt* v. *Tregonning*, 3 Ad. & Ell. 575. See 9 C. B., N. S. 682), but an easement, as a right of way *in alieno solo*, may be claimed by custom. (*Grimstead* v. *Marlow*, 4 T. R. 717.) The same rights may be claimed either by custom or prescription. One is local, the other personal; and the difference lies in the mode of claim suited to the difference of the claimants. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there, or if he prescribes in the *que estate*, it must be under cover of the tenant in fee. The case of copyholders claiming common by custom is a strong instance. So occupiers of houses may set up a custom to cut turves. (*Bean* v. *Bloom*, 2 Bl. R. 928; *S. C.* 3 Wils. 456; *Sharp* v. *Lowther*, Cas. temp. Hardwicke, 293.) And although inhabitants cannot prescribe, they may allege a custom to have a right of common. (Vin. Abr. Custom, (B. 2); Owen, 71.) The inhabitants of a town cannot by that name and description prescribe for an easement *in alieno solo;* but where such a claim has been allowed, it will be found to have been invariably rested on the ground of custom, and not of prescription. (Co. Litt. 3 a; *Day* v. *Savadge*, Hob. 85, 5th edit.; *Gateward's case*, 6 Rep. 59 b, *S. C.* as *Smith* v. *Gateward*, Cro. Jac. 152; *Baker* v. *Brereman*, Cro. Car. 418; *Fitch* v. *Rawling*, 2 H. Bl. 393.) A custom for all the inhabitants of a vill to dance on a particular close at all times of the year, at their free will, for their recreation, has been held good, this being a mere easement. (*Abbot* v. *Weekly*, 1 Lev. 176, cited 4 Ell. & Bl. 713.) The reason why a profit *à prendre* cannot be supported by a custom in an indefinite number of people is, that the subject of the profit *à prendre* would in that case be liable to be entirely destroyed. (*Per* Lord *Campbell*, C. J., *Race* v. *Ward*, 4 Ell. & Bl. 705.)

There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. It does not follow that rights which can be sustained by grant can necessarily be sustained by prescription. The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. (*Dyce* v. *Hay*, 1 Macq. H. L. 305.)

In order to make out a prescriptive right, it must be claimed as annexed to land, or as having been created by a grant and enjoyed by a body corporate in continuance from time immemorial, or as a right handed down from ancestor to heir, without intermission, until the person who claims the present enjoyment. In an action of trespass for taking stones, sand, &c., from the sea shore, the defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of the highways of that township to take such stones, sand, &c., for the repair of the highways. On demurrer, the court held that such a custom was bad, being a profit *à prendre in alieno solo*, and that the overseers of the highways and the inhabitants of a township not being a corporation were not capable of taking by grant, and therefore

could not claim such right by prescription. (*Constable* v. *Nicholson*, 11 W. R. 698.)

A custom which had existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a *custom* for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84; and yet a *grant* of such an easement to fishermen within the district *eo nomine* might well be held to be void. (*Lockwood* v. *Wood*, 6 Q. B. 64, 65.)

What customs are valid.

It is an acknowledged principle that, to give validity to a custom,—which has been well described to be an usage,—which obtains the force of law, and is in truth the binding law, within a particular district or at a particular place, of the persons and things which it concerns (see *Davy's Reports*, 31, 32, (a)), it must be certain, or capable of being reduced to a certainty, reasonable in itself (see *Tyson* v. *Smith*, 9 Ad. & Ell. 406, 421), commencing from time immemorial, and continued without interruption, subject, however, to the qualifications introduced by the stat. 2 & 3 Will. 4, c. 71 (*ante*, pp. 1—27). It belongs to the judges of the land to determine whether a custom is reasonable or not. There are several cases in the books upon the question, what customs are reasonable and what are not. (See *Broadbent* v. *Wilks*, Willes, 363; *Wilkes* v. *Broadbent*, 1 Wils. 63.) A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for "*consuetudo ex certâ causâ rationabili usitata privat communem legem*" (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord. Year B. Trin. 2 H. 4, fol. 24, B. pl. 20.) So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4, (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will. (Litt. s. 212.) A custom is void which sets up a claim to lay coals to an indefinite extent and for an indefinite time on the lands of other copyholders, whereby their lands may be made practically useless, although they would still be liable to pay their rents, and to perform their stipulated services to the lord. (*Broadbent* v. *Wilks*, Willes, 360; 1 Wils. 63, recognized in H. L., 8 Jur., N. S. 626.) In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate. (*Tyson* v. *Smith*, 6 Ad. & Ell. 421; 1 P. & Dav. 307; 6 Ad. & Ell. 746; *post*.)

Customs derogatory from the general right of property must be construed strictly, and, above all things, they must be reasonable. (*Rogers* v. *Brenton*, 10 Q. B. 57.) The custom to erect booths in the highway during a fair has been held legal. Such custom was in substance for every victualler to enter upon any parts of a certain close within a borough (within which there was a fair immemorially held for three weeks), but leaving sufficient

part of such close open for use as a public highway, and for the more conveniently carrying on their trade during the fair, to erect booths, and keep goods there till the fair was ended, paying to the owner of the soil a reasonable compensation for the use thereof. (*Elwood* v. *Bullock*, 6 Q. B 383.) A custom is good for the freemen of a town to hold horse races, over certain land, every Ascension day. (*Mounsey* v. *Ismy*, 9 Jur. 306.) A custom would be bad which required a township, part of a parish, to pay a proportion of a church rate, without requiring the inhabitants of the township to be summoned to consider the rate. (*Reg.* v. *Dalby*, 3 Q. B. 602. See Broom's Maxims, pp. 824—829, 3rd ed.)

What may be claimed by prescription.

A prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like. (Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs, (B.); Com. Dig. Prescription, (C.); *Id.* Franchises, (A. 1).) A prescription to have a free warren in a manor and in the demesnes thereof is good. (*Rex* v. *Talbot*, Cro. Car. 311; Jones, 320. As to franchises, see Cruise's Dig. tit. XXVII.; 2 Bl. Comm. 37—40.) The general rule with regard to prescriptive claims is, that every such claim may be good if by possibility it might have had a legal commencement. (1 T. R. 667.) The right to hold a fair or market may be acquired by grant and by prescription. (2 Inst. 220.) And where the grantee of a market, under letters-patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged that such user operated as a bar to an action on the case for a disturbance of his market. (*Holcroft* v. *Heel*, 1 Bos. & P. 400; see 2 Wms. Saund. 174 n.; and *Campbell* v. *Wilson*, 3 East, 294.) The lord of an ancient market may by time have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise. (*Moseley* v. *Walker*, 7 B. & C. 40; *Mayor of Macclesfield* v. *Pedley*, 4 B. & Ad. 404.) So he may determine in what part of the township the market shall be held, and shift it from place to place, or confine the right of holding it to a particular place. (*Curwen* v. *Saikeld*, 3 East, 538; *De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456.)

Stallage.

Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. Therefore where a person used a market with a chair and a "ped," that is, a wooden or wicker basket, four feet long, two feet and a-half wide, and two feet high, with a lid which, being turned back and supported by pieces of wood *not fixed* in the soil, formed a table on which he exposed his provisions for sale, it was held that he was liable for stallage. (*Mayor of Yarmouth* v. *Groom*, 1 H. & Colt. 102.)

The word "toll" in a grant may include stallage. And if the crown grant to H. and his heirs that they may have and hold a market in the town of E., with all tolls and profits thence arising, but neither the crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant. A modern grant by H., a subject, holding under the crown as before mentioned, to which certain persons, styled inhabitants of E., are parties, granting that the said inhabitants of E., "their heirs and assigns for ever," shall enjoy the market as freely as H. held it of the crown, and containing a covenant by H. that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant. Such an exemption for the inhabitants of a town can be only by way of custom, not of grant or prescription. Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally, was questioned. (*Lockwood* v. *Wood*, 6 Q. B. 31; affirmed by Exch. Ch. *Ib.* 50.) The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops within the limits of the franchise on market days. (*Macclesfield (Mayor, &c.)* v. *Chapman*, 12 Mees. & W. 18; 13 Law J., N. S., Exch. 32.) Such a right can exist only by immemorial custom. (*Ib.*)

The stat. 10 & 11 Vict. c. 14, consolidates in one act the provisions

usually contained in acts for constructing and regulating markets and fairs.

Tolls.

Toll *traverse*, which is defined to be a sum demanded for passing over the private soil of another, (Com. Dig. tit. Toll, (A.),) or a duty which a man pays for passing over the soil of another in a way not a high street, (Vin. Abr. tit. Toll, (A.),) or for a passage over the private ferry, bridge, &c. of another, (1 Sid. 454,) may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription. (2 Wils. 296.) Until the act 2 & 3 Will. 4, c. 71, such toll could not have been claimed unless it had been taken time out of mind, (Fitzh. tit. Toll, pl. 3,) and reserved contemporaneously with the dedication of the way to the public. (*Pelham* v. *Pickersgill*, 1 T. R. 660.)

In order to support a prescription against public right, a consideration must be proved; as where *toll-thorough*, that is, a toll for passing over the public highway, is claimed. (*Mayor and Burgesses of Nottingham* v. *Lambert*, Willes, 111; *Brett* v. *Beales*, 10 B. & C. 508.) And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held that it was to be presumed that the right of passage had been granted to the public in consideration of the toll. (*Pelham* v. *Pickersgill*, 1 T. R. 660.) A right of distress is incident to every toll, (Bac. Abr. Distress, F. pl. 6,) but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, and no proof is given of anything like a contract by the party against whom the claim is made, and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way without showing any contract between the owner of the market and the occupier of the stall. (*Mayor, &c. of Newport* v. *Saunders*, 3 B. & Ad. 411.) The exemption from toll may also be claimed by prescription, or by the king's grant. (4 Inst. 252; 1 H. Bl. 206; 4 T. R. 130; 1 Bos. & Pul. 512; 7 Br. P. C. 126; *Mayor of Truro* v. *Reynolds*, 8 Bing. 275; *Lord Middleton* v. *Lambert*, 1 Ad. & Ell. 401; 3 Nev. & M. 841.) And the citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls. (F. N. B. 226, I.; 1 H. Bl. 206; Com. Dig. Toll, (G. 1).) Inhabitants of a place may prescribe to be quit of toll. (*Baker* v. *Brereman*, Cro. Car. 418, recognized, 6 Q. B. 63.)

Customs as to working mines.

To a declaration in case for digging mines near the foundation of the plaintiff's dwellinghouse, without leaving due support, so that the said foundations were injured, and the dwellinghouse cracked, sunk in, and was in danger of falling and being destroyed, the defendant pleaded that the dwellinghouse, from time whereof, &c., was part of the manor of N., and was situate in a township within the said manor; that the queen was seised in fee of the manor, and of the mines, collieries and seams of coal therein; and that she and all those whose estate she had, &c., and their tenants, and those to whom she or they have granted licence to mine, from time whereof, &c., have been used, &c., and of right ought, &c., to work the said mines, collieries, &c., under any messuages, dwellinghouses, buildings and lands, parcel of the manor and within the township, and, for the purpose of working the said mines, collieries, &c., to dig and make under ground all such mines, pits, &c., under the said messuages, dwellinghouses, buildings and lands, or any part thereof, as might from time to time be expedient and necessary for that purpose, and out of the said mines, &c., to get the coals, &c., and carry away and convert the same, doing no more than necessary for the purpose aforesaid, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation, when demanded, for the use of the surface, or any damage occasioned thereto in and about the working of the mines, collieries, &c., but without making compensation in respect of the surface on any other account, and without making compensation for any damage occasioned to any messuages, dwellinghouses or other buildings, within and part or parcel of the manor, by or for the purpose of working the said mines, collieries, &c. Justification, stating that the defendant, as lessee and grantee of the crown, committed

the alleged grievances, &c., in exercise of the above right, doing no more than was necessary for the purposes aforesaid. It was held, that the prescription was void, as being unreasonable; that a custom, similarly pleaded, was void on the same ground; that the right, if maintainable in itself, might have been pleaded in virtue either of prescription or of custom; and that it might have been claimed as well against copyholders as against tenants of customary freehold. (*Hilton* v. *Granville* (*Earl*), 5 Q. B. 701. See Cr. & Phill. C. C. 283; *Blackett* v. *Bradley*, 31 L. J., Q. B. 65.) "There can be no doubt but that, to some extent, the authority of *Hilton* v. *Lord Granville* has been shaken, inasmuch as a position assumed in the reasoning of the court, as one of the grounds of its decision, has since been distinctly overruled in *Rowbotham* v. *Wilson* (8 H. L. Cas. 348; 30 L. J., Q. B. 965), in which the question presented itself for adjudication; and it cannot be denied that the decision itself has not met with the universal approval of the profession, and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time it is equally clear, that though the reasoning of the court in *Hilton* v. *Lord Granville* has been impugned, the decision in that case has not been overruled; and the judgment having been a considered judgment, and standing unreversed, we do not feel ourselves as otherwise than bound by it. We must, therefore, but without expressing any opinion one way or the other as to the propriety of the decision in question, give judgment on the third plea for the plaintiff, leaving the defendants to take the case into error, if they shall be so advised." (*Per Cockburn*, C. J., in *Blackett* v. *Bradley*, 8 Jur., N. S., 588, 589.)

Right incident to grant of mines.

The rights of a grantee of minerals depend on the terms of the deed by which they are conveyed. Under a grant of minerals a power to get them is a necessary incident. (*Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; 30 L. J., Q. B. 965.) *Primâ facie* the owner of the surface of land is entitled to the surface itself and all below it *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him. The rights of the grantee of minerals must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie* it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. A similar presumption *primâ facie* arises, that the owner of the mines is not to injure the soil above by getting them, if it can be avoided. (*Rowbotham* v. *Wilson*, 8 H. L. Cas. 360, *per* Lord *Wensleydale*.)

A declaration stated that lands were in the occupation of a tenant of the plaintiff, the reversion belonging to him, and that the defendant wrongfully dug out of the lands large quantities of stone, sand and soil, and carried away the same, and made large holes, excavations and cuttings in and through parts of the lands, and erected mounds and banks of earth and rubbish in and upon other parts of the lands, so as thereby permanently to alter, damage, injure and spoil the surface of the lands. The defendant pleaded that R. was seised in fee of all the mines and quarries of stone under the earth or upon the earth within certain parts of a lordship, and that he and all those whose estate he had and has of and in the mines and quarries within the lordship, from time whereof the memory of man is not to the contrary, have been used and accustomed of right, as often as it might be necessary, for the purpose of effectually getting, winning or working the mines or quarries within the parts of the lordship, to enter into and upon any lands within the said parts, within or under which the mines or quarries were situate, such lands being, or having been, part of the waste of the lordship, and to dig, excavate and cut into and through the same lands unto the stone of the mines and quarries, and out of the holes and excavations so made to raise, dig and get the stones of the mines and quarries, and carry away the same, doing no more damage than necessary. The plea then stated that R. demised a quarry of stone, situate within and under the lands of the plaintiff, being parcel of the mines and quarries of stone within the lordship, to the defendant from year to year; and the plea justified the acts complained of in the exercise of the right.

There were two other pleas under the 2 & 3 Will. 4, c. 71, alleging an enjoyment of the right by the defendant as occupier of the quarry for forty and twenty years. On demurrer it was held, that the pleas were good, for the right was not unreasonable, and might have originated in grant. (*Roger* v. *Taylor*, 1 H. & N. 706; 26 L. J., Exch. 203.) The custom was upheld in this case on the ground that it was of the nature of an easement. (*Constable* v. *Nicholson*, 11 W. R. 699, *per Willes*, J.)

Custom of mining in Cornwall.

The declaration in case stated that the plaintiff was possessed of and entitled to a tenement, to wit, the right to dig and take to his own use tin and tin ore in certain land, and alleged a disturbance by the defendant. The plea denied the possession and title *in modo et formâ*. At the trial the plaintiff claimed under the following custom, which the jury found to exist in fact: any person may enter on the waste land of another in *Cornwall*, and mark out by four corner boundaries a certain area; a written description of the plot of land so marked with metes and bounds, and the name of the person for whose use the proceeding is taken is recorded in an immemorial local court, called the Stannary Court, and proclaimed at three successive courts held at stated intervals: if no objection is successfully made by any other person, the court awards a writ to the bailiff of the court to deliver possession of the said "bounds or tin work" to the bounder, who thereupon has the exclusive right to search for, dig and take for his own use all tin and tin ore within the described limits, paying to the landowner a certain customary proportion of the ore raised, under the name of toll tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain. It was held, that the custom to preserve the right by the mere ceremony of an annual renewal, without working, is unreasonable and bad in law, and that the plaintiff (who had ceased to work or pay toll for eighteen years) could not recover in the above action even as against a stranger, and that although the alleged custom involved a claim of profit *in alieno solo* it would have been a good one, if *bonâ fide* working had been found to be obligatory under it. (*Rogers* v. *Brenton*, 10 Q. B. 26.) It was observed by Lord *Denman*, C. J., in this case, "That it might be collected from the case, *Day* v. *Savadge*, Hob. 85, 86, that that which is matter of interest, as the taking a profit from the soil, must for its existence have some person in whom it is; and a flux body, which has no entirety or permanence, cannot take that interest, which by the supposition is immemorial and permanent, because, from its nature, it cannot prescribe for anything. Necessity, however, will control this: the case of common of pasture exemplifies both the rule and the exception; in itself it is an interest; it is the taking a profit from the soil; it is properly matter of prescription. If the copyholders of one manor will claim it in the wastes of another, they must, because they can, do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but, if they claim it in *his* wastes, they cannot prescribe in their own names and rights by reason of the want of permanence; nor can they in their lord's name, for he cannot claim common in his own land; they are, therefore, from necessity, allowed to claim it by custom. But what is the necessity? that growing out of the original compact, when they received permission to cultivate for their own benefit, and on condition of certain services, certain portion of their lord's land. That compact included the right of common on the lord's waste; and the law will not suffer that right to want a legal character, and so be without the means of its legal enforcement, though at the expense of strict legal reasoning. In the same way, the right now in question must have originated in each instance in a virtual contract: the owner has permitted the tinner to enter and work, when he did not work himself or devote his waste exclusively to other purposes by inclosure, on the condition that the tinner shall render to him a certain portion, fixed by custom, of the produce of the mine. Here, as in the instance of a common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it in justice, cannot prescribe for it from necessity; therefore, that the undoubted

Right founded on prescription.

right may not be defeated, they shall be allowed to claim it by custom." (*Rogers* v. *Brenton*, 10 Q. B. 60, 62.)

What cannot be claimed by prescription.

A title to lands and other corporeal substances, of which more certain evidence may be had, cannot be made by prescription, as that a man, and all those whose estate he has, have been seised time out of mind of particular lands. (Brooke, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch, 132; 2 Bl. Comm. 264.) The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land. (*Wilkinson* v. *Proud*, 11 Mees. & W. 33. See *Stoughton* v. *Lee*, 1 Taunt. 402.) What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by stat. 9 & 10 Vict. c. 62), felons' goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. (Co. Litt. 114; 2 Bl. Comm. 265.) A prescription for a right of common to all the subjects of the realm cannot be supported. (*Pell* v. *Towers*, Noy, 20; Br. Abr. Pres. pl. 71.) Every man of common right may fish in the sea, or with lawful nets in a navigable river (*Warren* v. *Matthews*, 6 Mod. 73; Salk. 357), and therefore a prescription for a right of fishing in the sea, as annexed to certain tenements, is bad (*Ward* v. *Cresswell*, Willes, 265), which is not merely the law of this country, but also of nations; (Grot. de Jure Belli et Pacis, b. 2, c. 3, s. 9; Bract. lib. 1, c. 12, s. 6;) but a subject may have a several fishery in an *arm* of the sea by prescription. (*Mayor of Oxford* v. *Richardson*, 4 T. R. 439.) And though *primâ facie* every subject has a right to take fish found upon the seashore between high and low watermark, such general right may be abridged by the existence of an exclusive right in some individual. (*Bagott* v. *Orr*, 2 Bos. & P. 472.)

A man cannot prescribe or allege a custom against a statute, because it is the highest matter of record in law, (3 T. R. 271; 11 East, 495,) unless the custom or prescription be saved or preserved by another act. (Co. Litt. 115.) And Lord *Coke* makes a difference between acts in the negative and in the affirmative; for a statute in the affirmative, without any negative, express or implied, does not take away the common law; and likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against a common law. (Hargrave's Co. Litt. 115 a, n. (15).) One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases. (*Aldred's case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription, (F. 4).) An ancient custom may be destroyed by the express provisions of a statute or by positive language inconsistent with the existence of the custom. (*Merchant Taylors' Company* v. *Truscott*, 11 Exch. 855; *Salters' Company* v. *Jay*, 3 Q. B. 109.)

How prescriptive rights may be lost.

By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the statute of limitations (32 Hen. 8, c. 2), it is enacted that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such seisin or possession had been within three-score years next before such prescription made. (2 Bl. Com. 263, 264.) And the remedy for such rights, so far as it depended upon real actions, was further abridged by the abolition of real actions after 31st December, 1834, by the statute 3 & 4 Will. 4, c. 27, s. 36 (see *post*). Where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged. (3 Bligh, 245.) But a title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of common, and the land charged therewith of an estate

equally high and perdurable in both. (Co. Litt. 114 b.) An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right. (*Canham* v. *Fisk*, 2 Cr. & Jerv. 126.) Thus if a person, having a right of common by prescription, takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right. (Co. Litt. 113 b.) A prescriptive right may be lost by the destruction of the subject-matter; (4 Rep. 88;) but not by an alteration of the quality of the thing to which a prescription is annexed. (Hob. 39; 4 Rep. 86 a, 87 a.) An ancient grant without date did not necessarily destroy a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. (*Addington* v. *Clode*, 2 Bl. Rep. 989.) A plea, that before and at, &c., the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, &c., of a certain open field, called, &c., was held to be disproved by showing a grant to the defendant's ancestor eighty-one years before for a valuable consideration; and such plea is not aided by the stat. 2 & 3 Will. 4, c. 71, s. 1, which, if relied on, ought to be pleaded. (*Welcome* v. *Upton*, 5 Mees. & W. 398. See *Reg.* v. *Westmark*, 2 M. & Rob. 305.) It seems that a release of a right of way, or of a right of common, will not be presumed by mere non user for a less period than twenty years, although it is otherwise as to lights. (*Moore* v. *Rawson*, 3 B. & Cr. 339. See *post*, and note on lights, *post*.) The right to hold courts for the determination of civil suits, granted by the king's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non user of fifty years. (*Rex* v. *The Steward, &c., of Havering*, 5 B & Ald. 691; *Rex* v. *The Mayor, &c., of Hastings*, *Id.* 692, n.)

Formerly a prescription could not run against the king, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi* (2 Inst. 273; 2 Roll. 264, l. 40; Com. Dig. Prescription, (F. 1); Broom's Maxims, pp. 62—65, 3rd ed.) Liberties and franchises were excepted in the statute 9 Geo. 3, c. 16, limiting the claims of the crown to sixty years (see *post*, note on the limitation of the rights of the crown). By 32 Geo. 3, c. 58, the crown is barred in informations for usurping corporate offices or franchises by the lapse of six years. (See Bac. Abr., 7th ed., Prerogative (E. 6), 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 23; *Reg.* v. *Harris*, 11 Ad. & Ell. 518.) It will be observed that by the stat. 2 & 3 Will. 4, c. 71, ss. 1, 2, (*ante*, pp. 1, 6,) the crown is placed upon the same footing with the subject as to the rights affected by that act.

The doctrine as to the grant of a franchise by the crown within time of memory being a determination of a prescriptive claim to the same franchise does not appear to be settled. Where a bishop, having free warren by prescription over the demesne and tenemental lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was held that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the court considered to be at least doubtful), it could not affect it over the other lands of the manor. (*Earl of Carnarvon* v. *Villebois*, 13 Mees. & W. 313.)

2. OF RIGHTS OF COMMON.

Several species of common.

Common is a right or privilege which one or more persons claim to take or use in some part or portion of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription

continues good, although there be no deed or instrument in writing that proves the original contract or agreement. (4 Rep. 37 a; 2 Inst. 65; Vent. 387; Bac. Abr. Common.) Common has been divided into five sorts, viz. 1st, *Common of pasture*, which is a right or liberty that one man or more have to feed or fodder their beasts or cattle in another man's land. 2ndly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house. (See Noy, 145; 7 East, 121; 3 Lev. 165.) 3rdly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (See Cro. Jac. 25, 256; 5 Rep. 25 a; 4 Rep. 87 a; Cro. Eliz. 820; Plowd. 381.) 4thly, *Common of piscary*, or a right and liberty of taking fish in another's pond, pool, or river. And, 5thly, a liberty, which in some manors the tenants have, of digging and taking sand, gravel, stone, &c. in the lord's soil. (Bac. Abr. Common, (A.).) All claims of this kind, in order to be valid, must be made with some limitation and restriction. (*Clayton* v. *Corby*, 5 Q. B. 419: see *post*, p. 46.)

Prescription for commonable rights.

A party may prescribe to take the sole and several herbage which may be granted; (Co. Litt. 122; *Hoskins* v. *Robins*, Pollexf. 13; *Potter* v. *North*, 1 Vent. 385; *Welcome* v. *Upton*, 6 Mees. & W. 543;) although it was formerly doubted. (*North* v. *Cox*, 1 Lev. 253.) Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the north of England, although some have thought the owners of them are tenants in common of the soil. (*Welcome* v. *Upton*, 6 Mees. & W. 541, 542; *Rex* v. *Whixley*, 1 T. R. 137.) The grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself. (Co. Litt. 4 b.) A cattle-gate is not a more extensive right than the above, and does not include the right to the soil. (*Rigg* v. *Earl Lonsdale*, 1 H. & N. 923, 936.) A person may prescribe to have the sole and several pasture, vesture, or herbage, for a *limited time in every year*, in exclusion of the owner of the soil. (Fitz. Prescription, 51; Co. Litt. 122 a; 2 Roll. Abr. 267 (L.) pl. 6; Winch's Rep. 5; Hutt. 45.) And a like prescription, in exclusion of the owner of the soil for the whole year, was held good, as it did not exclude the lord from his profits of mines, trees, and quarries. (*Hoskins* v. *Robins*, 2 Saund. 324; *S. C.*, 2 Lev. 2; Pollexf. 13; 1 Mod. 74.) So a tenant may prescribe to have all the thorns growing upon such a place in exclusion of the owner of the soil. (*Douglass* v. *Kendal*, Cro. Jac. 256.) But a man cannot prescribe to have *common eo nomine* for the *whole* year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing. (Co. Litt. 122 a; 1 Roll. Abr. 396 (A.), pl. 1, 2; 2 Roll. Abr. 267, pl. 3; 2 Lev. 268; 1 Ventr. 395.) However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year. (Yelv. 129; 1 Brownl. 187; Cro. Jac. 208, 257.) So it is said the lord may be restrained, together with the commoners, from using a common at all during a part of the year; (1 Roll. Abr. 405, 406); and that the commoners may prescribe to have common in exclusion of the lord for part of a year. (2 Roll. Abr. 267 (L.), pl. 1; 1 Wms. Saund. 353, n. (2).) So a man may prescribe to have a separate fishery, to the exclusion of the owner of the soil wholly from fishing; for he has still the profit of the soil and water. (Co. Litt. 122 a, and n.; Ventr. 391. See 2 Saund. 326.)

The claim in right of a freehold estate and the lands which formerly belonged to the manor farm, of a separate right of feeding and folding an unlimited number of sheep, is not a claim of a right of common, but of something in the nature of a separate right of feeding and folding, (Kielway, 198 a; *Puwsany and Leader's case*, 1 Leon. 11,) which may have arisen out of an exception made by the lord upon granting the lands, or it may have been created by an act of parliament. (*Ivatt* v. *Mann*, 3 Man. & G. 699.)

Common of pasture.

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant, or in gross. (Selw. N. P. Common, s. 2.)

Common appendant.

Common appendant is a right belonging to the owners or occupiers of arable

lands to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either horses and oxen to plough the land, and cows and sheep to manure it. (Co. Litt. 122 a.) This as matter of universal right was originally permitted not only for the encouragement of agriculture but for the necessity of the thing. For when lords of manors granted out parcels of land to tenants for services either done or to be done, these tenants could not plough or manure the land without beasts. These beasts could not be sustained without pasture, and pasture could not be had but in the lord's wastes and in the unincloased fallow grounds of themselves and the other tenants. The law therefore annexed this right of common as inseparably incident to the grant of the lands. (2 Bl. Com. 33; *Tyrringham's case*, 4 Rep. 36 a; 2 Inst. 85.)

There is no general common-law right of tenants of a manor to common appendant in the waste. *Parke*, B., said, although there are some books which state that common appendant is of common right, and that common appendant is the common law right of every free tenant in the lord's wastes, (see *Mellor* v. *Spateman*, 1 Wms. Saund. 346 d, 6th ed.; *Bennett* v. *Reeve*, Willes, 227; Com. Dig. Comm. B.,) it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right at common law, incident to the grant.

The right therefore is not a common right of all tenants, but belongs only to each grantee, before the stat. *Quia emptores*, of arable land by virtue of his individual grant and as incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits and depends on the will of the grantor. (*Lord Dunraven* v. *Llewellyn*, 15 Q. B. 810, 811.)

Common appendant may be claimed in pleading as appendant, without laying a prescription, although appendancy implies a prescription. (Harg. Co. Litt. 122 a, n. 2.) It can only be claimed in the lord's wastes, (2 Inst. 85; 1 Roll. 396; 4 Rep. 37,) for the claimant's own commonable cattle levant and couchant upon the land. (*Ib.*; Burr. 320.) Levancy and couchancy mean the possession of such land as will keep the cattle claimed to be commoned during the winter. (5 T. R. 46; Willes, R. 227; 8 T. R. 396. See *Willis* v. *Ward*, 2 Chit. 297.) A right of common for cattle "*levant and couchant*," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining. (*Whitelock* v. *Hutchinson*, 2 Mood. & Rob. 205.) In other words the right is governed by the number of cattle which the commoner has the means of housing and providing for in the winter. (*Dyce* v. *Hay*, 1 Macq. H. L. C. 313.) Case by commoner for disturbing his common by putting on cattle. Plea, a right of common appurtenant for cattle levant and couchant; that the cattle in the declaration mentioned were defendant's own commonable cattle levant and couchant, and that he put them on to use the common, which is the same, &c. Replication, that "all the said cattle in the said declaration mentioned" were not defendant's own commonable cattle levant and couchant, in manner, &c. Conclusion to the country. It was held, that the defendant maintained his issue by showing that, on the occasion of every alleged disturbance, some of the cattle put on were levant and couchant, and that on these pleadings plaintiff could not insist on a surcharge. The word "all" was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle; not that it was truly alleged of some, and falsely of others. (*Bowen* v. *Jenkin*, 6 Add. & Ell. 911.) This species of common must have existed from time immemorial; (1 Roll. Abr. 396;) and cannot be claimed by prescription, as appurtenant to a house without any curtilage or arable land; (1 Roll. Abr. 497; *Scholes* v. *Hargraves*, 5 T. R. 46;) but it might formerly be claimed as appendant to a cottage, because by 31 Eliz. c. 7, (repealed by 15 Geo. 3, c. 32,) it was requisite for a cottage to have four acres of land attached to it. (*Emerson* v. *Selby*, 1 Salk. 169; 2 Lord Raym. 1015.) Common appendant

can only be claimed for such cattle as are necessary for tillage, as horses and oxen to plough the land, and cows and sheep to manure it. (Co. Litt. 122 a.) Common appendant is so necessarily incident to the land, that it cannot be severed from it, and, therefore, however often the land may be divided, every parcel of it is entitled to common appendant. (Willes, 240.) A person cannot prescribe for a right of common as occupier of a messuage. (*English* v. *Burnell*, 2 Wils. 258.) A claim of a right of common without stint, as annexed to an ancient messuage without land, cannot as such exist by law. (*Benson* v. *Chester*, 8 T. R. 396.) The occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his right of common. (*Bean* v. *Bloom*, 2 Bl. R. 926; *S C.*, 3 Wils. 456.)

Common appurtenant.

Common appurtenant may be claimed as well by grant within time of memory as by prescription; and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, proof, that the lord's tenant of the land had for fifty years past enjoyed the right of common on the waste, is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture, as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture. (*Cowlam* v. *Slack*, 15 East, 108.) This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land. (4 Rep. 37 a.) And it may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399.) A person may claim common appurtenant for a certain number of cattle, in which case the cattle of a stranger may be put upon the common, as no injury can arise to the owner of the soil as the number is ascertained. (Bac. Abr. 96; *Richard* v. *Squibb*, 1 Ld. Raym. 726. See *Stevens* v. *Austin*, 2 Mod. 185; *Thornel* v. *Lassels*, Cro. Jac. 27.) The principle furnished by *Potter* v. *North* (1 Wms. Saund. 350; *Hoskins* v. *Robins*, 2 Wms. Saund. 324), as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved by the grant, and to see whether the act be in derogation of the latter. Thus, where tenant of B. prescribed to have for himself and his tenants, &c., occupiers of the farm of B., the sole and exclusive right of pasture and feeding of sheep and lambs on L. as to the said farm of B. belonging and appertaining: it was held, that this did not entitle him to take in the sheep and lambs of other persons to pasture in L., for that by the terms of the grant some interest in the pasture was reserved to the lord, and the above practice was prejudicial to such interest. (*Jones* v. *Richard*, 6 Ad. & Ell. 530. See 5 *Id.* 413.)

Apportionment of common.

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but it is otherwise as to common appurtenant and other kinds of common, as common of estovers or piscary. But both common appendant and common appurtenant will be apportioned on alienation of part of the land to which the common is appendant or appurtenant. (Co. Litt. 122 a, 164 a; *Tyrringham's case*, 4 Rep. 36; *Wild's case*, 8 Rep. 78; *O'Hare* v. *Fahy*, 10 Ir. C. L. R., N. S. 318.)

An owner demised to B. and others seventeen acres, a portion of forty-one acres, by the following description:—"All that part of the lands of Moyglass, containing seventeen acres, now in the possession of B. and partners, together with a right of commonage and turbary for the use of the farm," for a term of eighteen years, which was a shorter term than that for which the grantor was possessed: It was held, that the lessees of the seventeen acres acquired by the sub-lease, as against the head landlord, a pro-

portional share of the common appurtenant to the forty-one acres. (*O'Hara* v. *Fahy*, 10 Ir. C. L. R., N. S. 318.

The rent-charges under the acts for the commutation of tithes in England and Wales, in respect of the tithes of common appendant or appurtenant, are to be a charge on the allotments thereafter to be made in respect of the lands to which the right of common is attached. (2 & 3 Vict. c. 62, s. 14.)

Common because of vicinage.

Common because of vicinage or neighbourhood, is not strictly a right of common. It happens where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits. (*Musgrove* v. *Cave*, Willes, 322.) And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape, and stray thither of themselves, the law winks at the trespass. (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 33.) The position, that this species of common is not a right, but matter of excuse for a trespass, is sufficiently established. (*Wells* v. *Pearcy*, 1 Bing. N. C. 556; 1 Scott, 426; *Gullett* v. *Lopes*, 13 East, 348.) Although it may be claimed by prescription, it is rather matter of immemorial custom. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that it is necessary therefore for the pleadings to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years' user under the statute 2 & 3 Will. 4, c. 71. (*Prichard* v. *Powell*, 10 Q. B. 589.) Reputation may be given in evidence in support of the immemorial right of such common so pleaded. (*Ib.*) If to an action of trespass in the common called A., the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. (*Morewood* v. *Wood*, 14 East, 327.) The plaintiff being possessed of a house and land in E., had for sixty years exercised rights of common in W.; it appeared at the trial that this was done near the boundary of two commons of W. and E., which lay open and uninclosed, and adjacent to each other, and that the parties exercising the right did not at the time know the exact boundary; that the plaintiff had, on the previous inclosure of the common at E., obtained an allotment there in respect of his estate: it was held, that it was properly left to the jury to say whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W. (*Hetherington* v. *Vane*, 4 B. & Ald. 428.) Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. (*Heath* v. *Elliot*, 4 Bing. N. C. 388; 6 Scott, 172.)

Evidence.

To establish a right of common *pur cause de vicinage* an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed. (*Clarke* v. *Tinker*, 10 Q. B. 604.) It seems that a plea is bad, after verdict, which professes to show a common *pur cause de vicinage* by usage between the close of an individual and a waste or common. (*Ib.*)

Where the commons of two towns adjoin, and a right of common by reason of vicinage exists, and in one town there are fifty acres of common, and in the other town one hundred acres of common, the commoners in the first town cannot put more cattle upon the common of fifty acres than it will feed, without any respect to the common in the other town. (*Corbet's case*, 7 Rep. 5 a.)

The Court of Exchequer Chamber inclined to think that common *pur cause de vicinage* may exist between two neighbouring proprietors, though there be no right of common over the land on either side, from which the cattle escape. (*Jones* v. *Robin* (in error), 10 Q. B. 620.) It was held by the

same court (affirming the judgment of the Queen's Bench, 10 Q. B. 581), that a plea claiming common *pur cause de vicinage* in respect of a private estate, over which no other right of common is shown, and alleging such common to exist by custom, is bad, and that a plea of such common against the owner of the land into which the cattle escape, must be a plea of grant or prescription. It was held, therefore, that a claim of such common, merely alleging that the land of A. and the land of B. were, and from time whereof, &c. had been, contiguous to each other, and not separated by any fence, and that the sheep from time to time duly put on the land of A. to feed, from time immemorial, have gone, escaped, &c., and have been used and accustomed to go, &c., therefrom into the land of B., and to intermix there, and to feed with sheep from time to time feeding on B.'s land, and in like manner, &c., alleging, in similar form, that the sheep duly put on B.'s land have gone therefrom and been used, &c., upon the land of A., and to intermix, &c., is ill pleaded, the objection being taken to the replication on demurrer to the rejoinder. (*Ib.*)

Determination of right.

An end may be put to this species of common by inclosure. (*Tyrringham's case*, 4 Rep. 36 b, 38 b, 39 a; *Corbet's case*, 7 Rep. 5 a.) Where one of two adjoining commons, with common of vicinage, is inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway, which led over the one to the other; yet, as the separation was not complete, so as to prevent cattle straying from one to the other by means of the highway, the common by vicinage still continues. (*Gullett* v. *Lopes*, 13 East, 348.) In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there, by inclosing his own land. (2 Wils. 269.) By a local act, all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose and authorized to distrain the cattle of strangers trespassing. No fence having been made, it was held, that the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W. in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W. (*Wells* v. *Pearcy*, 1 Scott, 426; 1 Bing. N. R. 556.) It seems that the cattle would be liable to distress, or the owner to an action of trespass, notwithstanding the want or defect of fences, if the cattle were suffered to remain in the *locus in quo* after notice to the owner that they were trespassing there. (*Ib.*) It was questioned whether a notice in fact to the commissioners in W. (without inclosure), that all the rights of common in B. were extinguished, would put an end to the legal excuse of trespasses *pur cause de vicinage*. (*Ib.*) It was admitted, that when there is a common *pur cause de vicinage* between two wastes, and one of them is under a private act of parliament conveyed to allottees, for the purpose of being inclosed, and the commissioners under the act extinguish all rights of common on such one waste, these proceedings do not of themselves put an end to the common *pur cause de vicinage*. (*Clarke* v. *Tinker*, 10 Q. B. 604.)

Common in gross.

Common in gross is such a right of common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor. (Co. Litt. 122 a; 2 Bl. Comm. 34.) Common appurtenant for a certain number of cattle may be converted into common in gross. (Cro. Jac. 15; 5 Taunt. 244.) If A. and all those whose estate he has in the manor of D. have had from time immemorial a fold course, that is, common of pasture for any number of sheep not exceeding 300, in a certain field, as appurtenant to the manor, he may grant over to another this fold course, and so make it in gross; because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant on the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. (1 Roll. Abr. 402, pl. 3; *Day* v. *Spooner*, Cro. Car. 432; Sir W. Jones, 375; 3 Wms. Saund. 327, n.) A right of common

in gross *sans nombre*, in the latitude in which it it was formerly understood, cannot exist, (1 Saund. 346; 1 Ld. Raym. 407; Willes, 232; 8 T. R. 396,) and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put on a particular number of cattle. (*Bennett* v. *Reeve*, Willes, 232.) A right of common in gross does not confer a vote for the coroner of a county. (*Reg.* v. *Day*, 3 Ell. & Bl. 859.)

To an action for disturbance of a right of common by putting cows on the common field, the defendant pleaded that he was possessed of land, the occupiers whereof had for thirty years before action enjoyed common of pasture in the field for "one cow, and *three fourth parts of a right of common of pasture for another* cow," and that he was possessed of other land, the occupiers whereof had for thirty years enjoyed one fourth part of a right of common of pasture for one cow, and three fourth parts of the right of common of pasture for another cow in his own right, and in respect of one fourth part of the right of common of pasture for one cow, as the servant of A., put two cows, and no more, on the common. There was a discussion whether any such right could exist for a fractional part of a cow, which it was unnecessary to decide, although possibly such a right may exist by express grant. And if one person having a right of common to the extent of one part of the eatage of a cow could find another person in a similar situation, they might unite their interests, in order to exercise the right. The court held, that whether or not there could be a right to common of pasture for a fraction of one animal, the plea was bad, as the allegation "of a right to three fourths of a right of common of pasture" was unintelligible. (*Nicholls* v. *Chapman*, 5 H. & N. 643; 92 Law J., Exch. 461; 8 W. R. 664.)

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre*. (*Mellor* v. *Spateman*, 1 Saund. 343; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.) Where, before the passing of 5 & 6 Will. 4, c. 76, all freemen inhabiting within an ancient borough claimed right of common on certain lands, and that act (sect. 7) has extended the limits of the borough, the right of common can no longer be described in pleading to be a right "in all freemen inhabiting within the borough;" for that act only reserves the right to those who reside within the old limits, and does not make the newly-defined borough the same to all intents and purposes as the old one. (*Beadsworth* v. *Torkington*, 1 Q. B. 782.) See a plea of common by a burgess under a grant to a corporation, *Parry* v. *Thomas*, 5 Exch. 37. The new burgesses created under the stat. 5 & 6 Will. 4, c. 76, are not entitled to participate in the rights of common enjoyed by the old burgesses and freemen for their own benefit prior to the passing of that act. (*Hulls* v. *Estcourt*, 2 New Rep. 131.)

The stat. 2 & 3 Vict. c. 62, s. 13, provides the mode in which Lammas lands and a right of common in gross are to be charged with rent-charges, in lieu of tithes, under the acts for the commutation of tithes in England and Wales.

Presumption that waste land belongs to lord of manor.

Primâ facie the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste lands is rather evidence that it belongs to the lord than to any private individual. (*Doe* d. *Dunraven* v. *Williams*, 7 Carr. & P. 332.) A right to any part of the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like. (*Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554; *Barnes* v. *Mawson*, 1 Maule & S. 77; *Richards* v. *Peake*, 2 B. & C. 918.) The lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right. (*Folkard* v. *Hemmett*, 5 T. R. 417.) In like manner there may be a valid custom in a manor within the limits of an ancient forest belonging to the crown, for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court-roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights. (*Boulcott* v. *Winmill*,

2 Camp. 261; see *Northwich* v. *Stanway*, 3 Bos. & P. 346.) But without a custom for the purpose, the lord cannot make a new grant of copyhold. (*Rex* v. *Hornchurch*, 2 B. & Ald. 189; *Rex* v. *Wilby*, 2 Maule & S. 504.) But a custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law. (*Badger* v. *Ford*, 3 B. & Ald. 153.) But a custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the *onus* of proving that a sufficiency is left lies on the lord. (*Arlett* v. *Ellis*, 7 B. & C. 346. See *Rogers* v. *Wynne*, 7 D. & R. 521.)

Grant of common by lords of manors.

The stat. 4 & 5 Vict. c. 35, s. 91, enacts, "That where by the custom of any manor the lord of such manor is authorized, with the consent of the homage of such manor, to grant any common or waste lands of such manor to be holden of the lord by copy of court roll, nothing in that act contained shall operate to authorize or empower the lord to grant any such common or waste lands without the consent of the homage assembled at a customary court holden for such manor, nor shall any court holden for such manor be deemed or taken to be a good or sufficient customary court for such purpose, unless the same shall have been duly summoned and holden according to the custom of such manor in such cases used and accustomed before the passing of that act, and unless there shall be present at such court a sufficient number of persons holding lands of such manor by copy of court roll to constitute, according to such custom, a homage assembled at such court."

Presumption that encroachments by tenant belong to the landlord.

It is well settled, that encroachments made by a tenant are for the benefit of the landlord, unless it appears clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent. (*Doe* d. *Lewis* v. *Rees*, 6 Carr. & P. 610.) This doctrine originated in those cases where the landlord was lord of the manor, and the tenant encroached upon the waste. (*Per* Lord *Campbell*, C. J., 2 Ell. & Bl. 353.)

Where a tenant who holds under the lord of a manor encroaches upon the waste, he is presumed to have approved against the commoners for the benefit of the lord. In other cases, when the power to encroach is derived from the occupation of the premises held of a landlord, and the encroachment is occupied as if it was part of the holding, then at the end of the tenancy the presumption as between the landlord and tenant is, that it is part of the holding, and it belongs to the landlord. (*Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304. See p. 324.) Such presumption may be rebutted by the special circumstances of the case. (*Berney* v. *Bickmore*, 8 L. T., N. S. 353.)

A lessee for lives of a farm inclosed from an adjoining extra-parochial waste, over which there was a right of common in respect of his farm, some small pieces of land near but not actually contiguous to the farm. The lessor was not lord of the waste; it was held, that, in the absence of evidence showing a contrary intention, it was to be presumed that the lessee made the inclosures for the benefit of his lessor, to belong to him as part of the farm at the determination of the lease. It was also held, that such presumption was not rebutted by the fact that the lessee, during the lease, made a conveyance of these inclosures to his son in fee, which, however, was not delivered, nor followed by any possession. By writing indorsed on the lease, the lessee agreed that all inclosures made by him upon the said waste should be surrendered up to the lessor, his heirs, &c., at the end of the lease, and that the lessee should pay to the lessor, his heirs, &c., the sum of sixpence annually, as an acknowledgment for the same: it was held, that this was an admission on the part of the lessee that he had made the inclosures for the benefit of the lessor. (*Doe* d. *Lloyd* v. *Jones*, 15 Mees. & W. 380.)

A tenant encroached on waste land not belonging to his landlord, separated from his holding only by a road. He built on the encroachment, and continued to occupy it as a part of his holding and ancillary to the occupation thereof for more than twenty years. He then gave up the original holding to his landlord, but claimed to retain the encroachment as his own. In ejectment by the landlord, it was held, that an encroachment

made under such circumstances is as between landlord and tenant to be presumed to be part of the holding; that it rested on the defendant to show, by other facts, that the encroachment was not made as part of the holding, and that the mere intervention of the road did not rebut the *primâ facie* presumption. (*Andrews* v. *Hailes*, 2 Ell. & Bl. 349.) The presumption in favour of the landlord only prevails as against the tenant, and not as against the rights of a third party. (*Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373.)

It is laid down in all the cases, whether the inclosed land is part of the waste or belongs to the landlord or a third person, that the presumption is, that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord's title. *Parke*, B., observed, "I am disposed to discard the definition, that the encroachment is made 'for the benefit of the landlord,' and to adopt that of Lord *Campbell*, viz. that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land inclosed should be adjacent to the demised premises, the same rule prevails where the encroachment is at a distance. That is now law, and I must add, that even though at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding." (*Kingsmill* v. *Millard*, 11 Exch. 318, 319. See *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; 23 Law J., C. P. 57; 18 Jur. 468.)

Right to approve.

By the statute of Merton, 20 Hen. 3, c. 4, and by subsequent statutes, 29 Geo. 2, c. 36, and 31 Geo. 2, c. 41, the lord of a manor may inclose so much of the common as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled to rights of common. This inclosure, when justifiable, is called in law "*approving*," an ancient expression signifying the same as "*improving*." (2 Bl. Com. 34.)

A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not restrain the lord's right to approve. (2 T. R. 392, n.) The lord may dig clay pits on the common without leaving sufficient herbage, if it can be proved that such right has been immemorially exercised. (*Bateson* v. *Green*, 5 T. R. 411.) If this decision imports that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported on principle. (*Per* Lord *Denman*, C. J., 5 Q. B. 729, 730. See *Folkard* v. *Hemmett*, 5 T. R. 417.) A custom for the owners of a waste to set out to the owners of certain ancient messuages portions of the waste to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary and pasture, is good. (*Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; and see *Bateson* v. *Green*, 5 T. R. 411; *Place* v. *Jackson*, 4 D. & R. 318; 2 Atk. 189.)

In ejectment for a forfeiture by a lord of a manor against a copyholder of inheritance for digging and taking clay from the manor to be sold off the manor to any one, the defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without license from the lord, to break the surface and to dig clay without limit from and out of the copyhold tenements, for the purpose of making it into bricks to be sold off the manor. The custom was held to be good, as it might have resulted from an agreement between the lord and his tenants before the time of legal memory. Lord *Wensleydale* doubted whether this custom was good; for although the lord, being owner of the soil originally, could have given by express grant such a power, and even a much larger power to his tenants; yet, when there is no express grant but one which is sought to be im-

plied by usage, as a custom is, it is a condition required by law that the custom should not be unreasonable, otherwise the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by its exercise, rather than to a grant. (*Marquis of Salisbury* v. *Gladstone*, 9 H. L. C. 692. See pp. 701, 702, 704, 705.)

Where an inclosure act directed that the commissioners should set out and allot a certain portion of the common lands for the getting of stone, gravel and other materials, for the repairs of the highways and other roads to be set out under the act, and for the use of the inhabitants within the parish: it was held, that this did not authorize the inhabitants to take such materials for their private purposes, but only for the repairs of the roads. (*Rylatt* v. *Marfleet*, 14 Mees. & W. 233.)

A custom for all victuallers to erect booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly, every fortnight), and to place posts and tables there, a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, each paying therefor to the lord a compensation of 2*d.*, is good. (*Tyson* v. *Smith*, 1 P. & Dav. 307; 9 Ad. & Ell. 406.)

A person seised in fee of part of the waste, although he be not lord, may approve without the consent of the homage, provided he leaves a sufficiency of common for the tenants of the manor. (*Glover* v. *Lane*, 3 T. R. 445.) But there can be no approvement against the tenants of a manor who have a right to dig gravel on the wastes, and to take estovers (*Duberley* v. *Page*, 2 T. R. 391; see *Grant* v. *Gunner*, 1 Taunt. 435), although the lord may approve against common of pasture by the statute of Merton, 20 Hen. 3, c. 4, notwithstanding there may be other rights of common against which he cannot approve. (*Shakespear* v. *Poppin*, 6 T. R. 741.)

On the trial of an issue between the lord of a manor and a commoner as to the right of the lord to inclose a portion of the waste, leaving a sufficiency of common for those having a right of common, the waste there being part of a royal forest: it was held, that the right of the crown to turn deer on the waste did not form an element for the consideration of the jury on the question of sufficiency of common in a case where no deer had been turned on the waste for upwards of twenty years. (*Lake* v. *Plaxton*, 10 Exch. 196; 24 Law J., Exch. 52.)

An owner *par autre vie* of a common may prove under the stats. 20 Hen. 3, c. 4 and 13 Edw. 1, st. 1, c. 46. The owner of a common may erect thereon a house necessary for the habitation of beast-keepers, for the care of the cattle of himself and the other persons having rights of common there. So he may erect a house necessary for the habitation of a woodward to protect the woods and underwoods on the common. A plea justifying the erection of a house for such beast-keepers need not state the names of the other commoners, nor that they assented to the appointment of beast-keepers. To an action on the case for a continuing disturbance of common, the defendant pleaded an approvement of the *locus in quo*, "leaving sufficient common of pasture for the said plaintiff and all other persons entitled thereto, together with sufficient ingress and egress to and from the same, according to the form of the statute, &c.:" it was held, that the plea sufficiently showed that enough of common was left at the time of the approvement, and in the place where the plaintiff was entitled to enjoy it. (*Patrick* v. *Stubbs*, 9 Mees. & W. 830.)

The greater part of the commons in England have been inclosed under local acts of parliament.

General inclosure acts.

The 41 Geo. 3, c. 109, called the General Inclosure Act, consolidated certain provisions which had usually been inserted in acts of inclosure, and facilitated the mode of proving the several facts usually required on the passing of such acts. The 1 & 2 Geo. 4, c. 23, amended the law respecting the inclosure of open fields, common, and waste lands in England. The 3 & 4 Will. 4, c. 87, remedied defects in titles to real property allotted under inclosure acts, in consequence of the award not having been enrolled, or not having been enrolled within the time limited by the several inclosure acts, and authorized the appointment of new commissioners where the same

should have been omitted. Further facilities for the inclosure of open and common, arable, meadow and pasture lands and fields in England and Wales were given by stat. 6 & 7 Will. 4, c. 115. The stat. 8 & 9 Vict. c. 118, provides means for facilitating the inclosure and improvement of commons and lands held in common, the exchange of lands, and the division of intermixed lands. The same act provides remedies for defective or incomplete executions, and for the non-execution of the powers of general and local inclosure acts, and for the revival of such powers in certain cases. By the last act the superintendence of applications for the inclosure of lands, and the carrying the same into operation, is entrusted to the first commissioner of woods and forests, and two other commissioners, who are styled "The Inclosure Commissioners for England and Wales." Such commissioners, or any two of them, may sit as a board for carrying the act into execution. The appointments under the act were limited to five years next after the 8th of August, 1845, and thenceforth until the end of the then next session of parliament. By 25 & 26 Vict. c. 73, the inclosure commission is continued until 1867. The act 8 & 9 Vict. c. 118, is amended by 9 & 10 Vict. c. 70, and extended by 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 16 & 17 Vict. c. 124; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31, and 22 & 23 Vict. c. 43.

Calculation of interests.

An owner (not being the lord of a manor) of a piece of land, on which certain persons had rights of common, had also the right, as owner of the soil, of getting the brick earth under the surface without interfering with the rights of the commoners. Upon an application by certain of the commoners to the commissioners, under the 8 & 9 Vict. c. 118, for the inclosure of such piece of land, the interest of such owner in the land, in respect of such brick earth, is to be taken into account by the assistant commissioner, in calculating the several amounts of interests in the land proposed to be inclosed of the dissenting and assenting parties, under sect. 27, and the commissioners will be prohibited from proceeding in the proposed inclosure without his consent. (*Church* v. *Inclosure Commissioners for England and Wales*, 11 C. B., N. S. 664; 8 Jur., N. S. 893; 31 L. J., C. P. 201.)

Feigned issue. Prohibition.

Where, at the instigation of A., an inclosure was commenced by the commissioners appointed under the 8 & 9 Vict. c. 118, and the assistant commissioner, having heard the evidence of A. and others, decided that A. was lord of the manor of the lands to be inclosed, B. put in a claim as being lord of the manor over a part of the lands, and framed a feigned issue according to section 56; and afterwards A. moved for a prohibition to prevent the commissioners from proceeding in the inclosure, and also to set aside the issue: it was held, that the prohibition could not issue, and that the commissioners would not only be right in proceeding with the inclosure, but were bound to do so; and as to the feigned issue, that they would not set it aside, as the commissioner had not exceeded the powers given him by sect. 56, and as A. might have become a party to the issue if he had chosen to do so. (*Re Portsmouth* (*Lord*); *Partridge* v. *Inclosure Commissioners for England and Wales*, 9 W. R. 336.)

Setting out ways over allotments.

By a provisional order, land was directed to be allotted to the plaintiff in lieu of his right in the lands to be inclosed, but the order did not expressly exempt such allotment from having a private road made over it: it was held, that the commissioners had power to order the valuer to set out a private road over such land. (*Grubb* v. *Inclosure Commissioners for England and Wales*, 31 L. J., C. P. 221; Exch. Cham., 9 C. B., N. S. 612.)

Expenses of inclosure.

The trustees under a settlement had power to sell and exchange the estates, and were to apply the proceeds of a sale in discharging subsisting incumbrances or in the purchase of other land. In 1852, they sold part of the estates, and paid the proceeds to the tenant for life, who applied the money in payment of the expenses of inclosure. By 8 & 9 Vict. c. 118, the person in possession or receipt of the rents and profits (in this case the tenant for life and not the trustees) may charge the allotments with the expenses of inclosure to the extent of 5*l.* per acre by executing a mortgage; and, by 11 & 12 Vict. c. 99, s. 8, the sum so raised is to be paid to the commissioners. The tenant for life died without having executed such a mort-

gage. It was held, that the sums expended were nevertheless to the extent aforesaid a charge on the allotments, and were to be allowed as a proper application of the money produced by the sale. (*Vernon* v. *Lord Manvers*, 11 W. R. 133.)

Where, by an agreement between the lord of the manor and the copyholders, the waste lands are allotted and inclosed, the allotments taken by the copyholders are of freehold tenure. (*Paine* v. *Ryder*, 24 Beav. 151; *Doe* d. *Lowes* v. *Davidson*, 4 M. & Selw. 175.)

Under the act 8 & 9 Vict. c. 118, gavelkind lands in Kent may be exchanged for lands in Middlesex held in common soccage. (*Minet* v. *Leman*, 7 De G., M. & G. 340; 1 Jur., N. S. 692; 24 L. J., Ch. 545.)

Interest of commoner.

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common. (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; Sir *Simon de Harcourt's case.*) Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there. (12 H. 8, 2 a; *per Brooke*, J., 2 Leon. 202; Godb. 182, pl. 258; *Anon.* Bridg. 10; *Samborn* v. *Harilo*, 2 Bul. 116; *Carrill* v. *Pack*, 1 Sid. 251.) If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action on the case. (6 Term Rep. 483; *Sadgrove* v. *Kirby*, 1 Bos. & Pull. Rep. 13.) So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows, for it would be a meddling with the soil, and a judging for himself, but he must have recourse to his action against the lord. (*Cooper* v. *Marshall*, 1 Burr. 259; *S. C.*, 2 Wils. 51; 1 Roll. Abr. 405, pl. 3.) Much less can a commoner kill the rabbits to prevent their increase, to the prejudice of the common. (*Hodson* v. *Grissell*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; *S. C.*, cited 1 Lutw. 108; 2 Leon. 203; see 1 Wms. Saund. 353, n.)

Extinguishment of common.

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold. A right of common may be extinguished by a release of it to the owner of the soil; and if the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole. (*Rotherham* v. *Green*, Cro. Eliz. 593; 1 Show. 350.) Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But in order to extinguish a right of common by unity of possession, it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the tenements in respect of which the common is claimed, and in the premises over which the right was claimed. (*Rex* v. *Inhabitants of Hermitage*, Carth. 239; *Bradshaw* v. *Eyr*, Cro. Eliz. 570; 4 Rep. 38 a.) Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished. (1 Roll. Abr. 401.) Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, with the appurtenances, the common is extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common is gone. (*Marsham* v. *Hunter*, Cro. Jac. 253; Gilb. Ten. 224. See 4 & 5 Vict. c. 35, s. 81; 15 & 16 Vict. c. 51, s. 45; *post*, p. 50.)

Where, under an inclosure act, the waste lands of a manor were directed to be allotted in certain proportions, the freehold of such part of the lands as are not portioned out in the award remains in the lord of the manor. (*Packe* v. *Mee*, 9 W. R. 335.)

An issue was framed under the General Inclosure Act, 8 & 9 Vict. c. 118, s. 56, to try whether the defendant was entitled in respect to certain messuages, lands and tenements "to common of pasture or feeding or right of

pasturage" over the wastes in a manor of T. for sheep and all commonable cattle levant and couchant in respect of the said last-mentioned messuages, tenements and lands belonging or appertaining or as usually enjoyed therewith. It appeared at the trial that the owner of the messuages, &c., had been entitled to common in respect thereof, but that fifteen years before the framing of the issue he became owner of the manor and so of the soil of the waste; after this the pasturage was enjoyed as before. The messuages and manor both became vested in the defendant. The judge directed the jury that on this issue the defendant must fail, as he could not have common on his own soil; it was held to be a misdirection, inasmuch as the defendant had an interest, which, though not strictly a right of common, might be popularly so described in an issue framed under the statute. (*Lloyd* v. *Earl of Powis*, 4 Ell. & Bl. 485.)

By what words a right of common will pass.

By the conveyance of the lands to which either common appendant or appurtenant is annexed, the right of common will pass. (*Solme* v. *Bullock*, 3 Lev. 165; *Sacheverell* v. *Porter*, Cro. Car. 482; *Drury* v. *Kent*, Cro. Jac. 14.) Where common has been extinguished by union of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was attached, and the words "appertaining" and "belonging" only are used, the right will not pass, those words not being sufficient to revive the right, though those who have occupied the tenement since the extinguishment have always enjoyed the common. But if the words "or therewith used or enjoyed" are inserted, they would be sufficient to revive the right. (*Clements* v. *Lambert*, 1 Taunt. 205; *Morris* v. *Eggington*, 3 Taunt. 24; *Barlow* v. *Rhodes*, 1 Cr. & Mees. 448; *Wardle* v. *Brocklebank*, Ell. & Ell. 1058.) The effect of an enfranchisement of copyholds, being to extinguish all rights and privileges annexed to the copyholder's estate as such, if a copyholder has a right of common, and his copyhold is enfranchised, the common is gone, since the copyhold tenure has ceased: and the right of common will not pass by the word "appurtenances" in the deed of enfranchisement; (Moore, 667; Cro. Jac. 253; 2 Ld. Raym. 1225; Salk. 170, 364;) but must be made by express grant. (Moore, 667; Cro. Eliz. 570.) Where a copyhold tenement, to which a right of common was originally appendant, having vested in the lord by forfeiture, was granted by him as copyhold, with the appurtenances; it was held, that having always continued demisable while in the hands of the lord, it was a customary tenement, and as such was still entitled to a right of common. (*Badger* v. *Ford*, 3 B. & Ald. 153.) And a copyholder, who has common in a waste, *without* the manor of which his copyhold is parcel, has it as annexed to the land, and not to his customary estate, such common is not extinct by enfranchisement of the copyhold, though there be no words of regrant. And after enfranchisement, the feoffee must, previously to the stat. 2 & 3 Will. 4, c. 71, have prescribed in a *que estate* of his lord for himself and his customary tenants till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement. (*Barwick* v. *Matthews*, 5 Taunt. 365.) Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law. (*Styant* v. *Staker*, 2 Vern. 250; Comb. 127.)

Right reserved in enfranchisement.

In case of the enfranchisement of copyholds, under the statutes 4 & 5 Vict. c. 35, s. 81, and 15 & 16 Vict. c. 51, s. 45, it is provided that copyhold lands when enfranchised are to become freehold, subject to the payment of the consideration for the enfranchisement; but it is provided that nothing contained in those acts shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto, notwithstanding the same shall become freehold.

Common of turbary.

Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale. (*Valentine* v. *Penny*, Noy, 145. See *Hayward* v. *Cannington*, 1 Lev. 231; 1 Sid. 354.) A custom for all the customary tenants of a manor, having gardens, to dig turf on the waste, for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad in law, as being indefinite, uncertain, and destructive of the

common. (*Wilson* v. *Willes*, 7 East, 121, recognized in *Marquis of Salisbury* v. *Gladstone*, 8 Jur., N. S. 627, *ante*, p. 47. See *Peppin* v. *Shakespear*, 6 T. R. 748.) In trespass for breaking the plaintiff's close and digging and carrying away clay, the defendant justified as owner of a brick kiln, and pleaded that all occupiers thereof for thirty years had enjoyed, as of right, &c., a right to dig, take, and carry from the close so much clay as was at any time required by him and them for making bricks at the brick kiln, in every year and at all times of the year: it was held unreasonable and bad, as amounting to an indefinite claim to take all the clay out of the close in question. (*Clayton* v. *Corby*, 5 Q. B. 415; see 2 Q. B. 813.) Common of turbary, appurtenant to a house, will pass by a grant of such house with the appurtenances. (*Solme* v. *Bullock*, 3 Levinz, 165.)

In an action of trespass *quare clausum fregit*, the pleas justified under a right of common of turbary, claimed by prescription and by enjoyment for thirty and sixty years over G., whereof the *locus in quo* was part. The replication denied the right of common of turbary in the *locus in quo*. On the trial, it appeared that the defendant had enjoyed the right on every part of G. where any fuel had been found, that the *locus in quo* was part of G., but that it was on a rock on which no fuel ever had been, or in the ordinary course of nature could ever be found. A verdict having been given for plaintiff, it was held, that the inference drawn from the user was, that the right extended to all parts of G. fit for the production of fuel and not to such a spot as the *locus in quo*, and that the verdict for the plaintiff was right. (*Peardon* v. *Underhill*, 16 Q. B. 120.)

There is nothing in law to prevent a party dealing with his own land and demising it from annexing to the land or granting to the lessee a right to take turbary upon other lands of the landlord, to be consumed upon houses to be subsequently built upon the premises. (*Hill* v. *Barry*, Hay. & J. 688; *Duggan* v. *Carey*, 8 Ir. Com. L. R. 210.)

A., by an indenture in 1735, demised lands to B. and C., for a term of 889 years, and A. covenanted that B. and C., "their executors, administrators and assigns, and every of them, should and might from time to time, and at all times during the grant, cut and carry away from off the bog of Coolnemoney and Ballyna," (the absolute property of the lessor, and not included in the lease,) "turf sufficient to be expended on the premises." B. and C. covenanted to repair all houses and outhouses that were or thereafter might be built upon the premises. In 1735, B. and C. partitioned the lands, and in 1856 the commissioners of the Incumbered Estates Court granted B.'s moiety to the plaintiff, "with the appurtenances:"—It was held, that the right of turbary was apportionable, and that the plaintiff was entitled to a proportional share. (*Hargrove* v. *Congleton*, 12 Ir. C. L. Rep., N. S. 368.)

Common of estovers.

Common of estovers, or *estoviers*, that is, necessaries (from estover, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. The Saxon word bote is used by us as synonymous to the French estovers; and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; which latter is sometimes called fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote or hedge-bote, is wood for repairing hedges or fences, as pales, stiles, and gates, to secure inclosures. These botes or estovers must be reasonable ones: and such any tenant or lessee, except a strict tenant at will, may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. (Co. Litt. 41; 2 Bl. Com. 35.) The rule is founded on the obligation upon tenants of making necessary repairs. (*De Salis* v. *Crosan*, 1 Ball & B. 188.) Where no wood exists, and where part of the premises demised are bog, from which no other beneficial use can arise, a tenant is at the common law in Ireland entitled to use such bog for the purposes of fusl, as he would have been authorized to use wood, had there been any for a like purpose. (*Howley* v. *Jebb*, 8 Ir. C. L. R. 485.) Where tenants abuse their right of estovers, the Court of Chancery will

grant an injunction, as if they cut turf for sale. (*Lord Courtown* v. *Ward*, 1 Sch. & Lef. 8; see *Wilson* v. *Bragg*, 8 Bac. Abr. 428, Waste (O).)

Every tenant for life or years has a liberty of this kind of common right in the lands which he holds unless restrained, which is usual by particular covenants or exceptions. (2 Bl. Com. 282.) The right to estovers may also be appendant or appurtenant to a messuage or dwelling-house by prescription or grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers.

This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits *in alieno solo* is bad. (*Gateward's case*, 6 Rep. 59; *Bean* v. *Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead* v. *Marlowe*, 4 T. R. 717; *Selby* v. *Robinson*, 2 T. R. 758; *Hoskins* v. *Robins*, 1 Vent. 123—163; 2 Saund. 320.) A person having common of estovers in a certain wood of another, by view and delivery of the owner's bailiff, by taking estovers without such view and delivery is a trespasser, though he takes less than he was entitled to. (5 Rep. 25 a.) A person having common of estovers, either by grant or prescription annexed to his house, may alter the rooms or chambers, or build new chimneys, or add to the house without losing the right, but he cannot use any of the estovers in the parts newly added. (*Luttrell's case*, 4 Rep. 87 a.)

A person prescribed to have estovers for repairing houses, or for building new houses on the land. It was alleged that the custom was unreasonable to take estovers for the building of new houses, but the majority of the court held it to be a good prescription, for one might grant such estovers at that day; but one of the judges held the prescription to be bad, as it ought only to be for the repair of ancient houses. (*Arundel* v. *Steer*, Cro. Jac. 25.)

Common of estovers can only be claimed by prescription for an ancient house; (F. N. B. 180; 4 Co. 86;) but if it be pulled down and another rebuilt, either in the same or another place, the prescription will not be lost. (*Costard and Wingfield's case*, Godb. 97; *Cowper* v. *Andrews*, Hob. 39.) A person having common of estovers is not entitled to estovers out of timber which the owner of the soil has cut down in part of the wood, but he must take his estovers out of the residue. (Cro. Eliz. 820; Cro. Jac. 256.) A person having common of estovers appurtenant to a house cannot grant the estovers to another, reserving the house to himself, nor grant the house to another, reserving the estovers to himself; for in either of those cases, the estovers cannot be severed from the house, because they must be spent on the house. (Plowd. 381.)

The estovers taken must be reasonable, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore they must be expended; (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54;) and cannot be sold to be used elsewhere. (11 H. 6, 11 b.; *Earl of Pembroke's case*, Clayt. 47.)

A claim of a prescriptive right in the owners or occupiers of close A. to enter close B. (belonging to a third person), and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon "as to the close A. appertaining," is void, as being too large. (*Bailey* v. *Stephens*, 12 C. B., N. S. 91; 8 Jur., N. S. 1063; 31 L. J., C. P. 226.)

Remedy for disturbance of right of common.

The usual remedy adopted by commoners for an injury to the right of common is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or owner of the soil, (*Hassard* v. *Cantrell*, Lutw. 101,) or a stranger or a commoner. (1 Selw. N. P. 422, 10th edit.) In this action the plaintiff must prove an injury sustained; but the smallest injury is sufficient, as that of taking away the manure which was dropped on the common by the cattle. (*Pindar* v. *Wadsworth*, 2 East, 154. See cases cited in *Marzetti* v. *Williams*, 1 B. & Ad. 426; and *Blafield* v. *Payne*, 4 B. & Ad. 410.) In case for disturbance of a right of common, the declaration alleged that the mayor, aldermen and

burgesses of the town and borough of Stamford had the right in question for every resident freeman paying scot and lot; it appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford: it was held, that the declaration was not supported, as the right claimed was larger than that proved. (*Beadsworth* v. *Torkington*, 1 G. & D. 482; 1 Q. B. 782.) In an action on the case for disturbance of common, when the defendant justifies under a right of common for his cattle levant and couchant, the plaintiff must new assign, if he intends to prove a surcharge. (*Bowen* v. *Jenkins*, 2 Nev. & P. 84; 6 Ad. & Ell. 911.)

If one of the commoners surcharges the common, that is, puts more cattle into the common than he is entitled to do, the commoner who is injured may maintain an action on the case against the other for a surcharge, notwithstanding he has himself been guilty of a surcharge. (*Hobson* v. *Todd*, 4 T. R. 71.) In an action on the case for the surcharge of a common, the plaintiff may declare generally for the injury, without stating the defendant's right of common, and how he had exceeded that right. (*Atkinson* v. *Teesdale*, 2 W. Bl. 817; 3 Wils. 278. See *Cheesman* v. *Hardham*, 1 B. & Ald. 706.) In case for a surcharge of common, the plaintiff need not show that he was exercising his right of common at the time of the surcharge, but only that he could not enjoy his common so beneficially as he ought. (*Wells* v. *Watling*, 2 W. Bl. 1233.) As to the right of distress for a surcharge, see 1 Wms. Saund. 346, c. 346 d.

An action of trespass will lie by one tenant in common against another, and also against his licensee, for making holes in the common, and for digging and taking turves away, when those acts are not done in the exercise of a right of common. And the plea, that the close was not the plaintiff's close, does not put in issue the exclusive possession of the plaintiff. But the plaintiff will recover such damages only as are proportionate to his interest. (*Wilkinson* v. *Haygarth*, 11 Jur. 104; 16 L. J., Q. B. 103.)

An owner seised in fee of a close, upon which the burgesses of a borough had a right during a certain portion of the year to depasture their cattle, and having during that period exclusive possession of the close, may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes; but not against one who, during that period, merely rides over the close. (*Cox* v. *Glue*, 5 C. B. 533.)

Where a common had been inclosed for twenty years, the commoner's right of entry was gone, and he must have formerly resorted to his action of assize of common. (*Hawke* v. *Bacon*, 2 Taunt. 159; *Creach* v. *Wilmot*, *Id.* 160, n.) But writs of assize have been abolished by stat. 3 & 4 Will. 4, c. 27, s. 36, *post*.

Right of commoners to abate.

It is the policy of the law not to allow commoners to abate except in a few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages he has sustained. The cases where the law allows an abatement by a commoner, are where the acts of the lord are directly contrary to the nature of the common. For by the grant of it, the grantor gives everything which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a wall, gate, hedge, or fence around the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant. (2 Roll. Abr. 145, (W.) pl. 2; *Cooper* v. *Marshall*, 1 Burr. 259; *Sadgrove* v. *Kirby*, 6 Term Rep. 485.) The power of abatement in this case seems analogous to other cases where the acts done are inconsistent with the terms of the grant; and if the grantor of a way, &c., stops it up, the grantee may abate the erection. A commoner may pull down a house wrongfully erected upon the common, if necessary for the exercise of his right, unless persons are in it at the time. (*Perry* v. *Fitzhowe*, 15 Law J., N. S., Q. B. 239; 10 Jur. 799; 8 Q. B. 775.) In trespass for pulling down the dwelling-house of the plaintiff, in which he and his family were inhabitants and actually present at the time, a plea justifying, because it was wrongfully erected upon a place over which defendant had a right of common, is bad. (*Ib.*) So in trespass for expelling the plaintiff from his

dwelling-house, a plea justifying under the same right of common, and averring that, for the purpose of using it, the defendant prostrated the dwelling-house, "and in so doing necessarily and unavoidably expelled and put out the plaintiff," is bad, because the natural meaning of the words is, that the pulling down and expelling were contemporaneous. (*Ib.*)

Before the stat. 3 & 4 Will. 4, c. 27, the commoner was barred of his right of entry and ejectment, by having acquiesced in the inclosure of part of a common for more than twenty years, and his remedy was by writ of assize of common. The lord was not conclusively barred of his remedy to recover common lands which had been inclosed until the lapse of sixty years, within which time he might recover the lands by a real action. (*Edwards* v. *M'Leay*, Cooper, C. C. 318; *Hawke* v. *Bacon*, 2 Taunt. 155; *Crouch* v. *Wilmot*, *Id.* 159. See 2 Smith's L. C. 632, 5th ed.)

If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder; and the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner. (*Barking* v. *Read*, 19 Law J., Q. B. 291.) This is a very different case from *Perry* v. *Fitzhowe*; (8 Q. B. 757;) for the defendant alleged that the house was his own, and that the plaintiff was a mere intruder; and it cannot be that such a person can prevent the owner from doing what he pleases on his own land. In the latter case, the plaintiff had a right of possession, but in the former case he had none. (See *Harvey* v. *Bridges*, 1 Exch. 261.)

A declaration for breaking the plaintiff's house in which he was, and pulling it down is not answered by a plea as to the breaking and entering, that the defendant was entitled to common of pasture over the land on which the house had been wrongfully erected, and that he necessarily and unavoidably committed the trespasses complained of in removing the house. (*Jones* v. *Jones*, 8 Jur., N. S. 1132; 1 H. & Colt. 1.) In this case the court was of opinion that this case was not distinguishable from *Perry* v. *Fitzhowe*, but declined to express any opinion whether they would for the first time have concurred in the judgment in that case.

Where a house obstructs the exercise of a right of common, the commoner may after notice and request to the plaintiff to remove the house, pull it down, though the plaintiff is actually inhabiting and present in the house. (*Davies* v. *Williams*, 16 Q. B. 543.) The defendant in trespass pleaded, that for thirty years before suit he and all occupiers for the time being had enjoyed common of right and without interruption in, upon and throughout the close called P., and issue was joined on a traverse of this plea. The close P. was 3,000 acres in extent, and interruption by inclosure of ten acres had been acquiesced in for a year, and the trespass complained of was committed on these ten acres: it was held, that the defendant would have proved his plea by proof of user on the place only where the trespass was committed: the plaintiff was entitled to the verdict. (*Ib.*) A plea claiming an immemorial right of common in occupiers, for the time being, is bad after verdict. (*Ib.*) So where the commoner is deprived of part of his common, by the erection of a wall, gate or hedge upon the common itself, it seems he may abate the erection, for it deprives him of his common, and forms no part of the soil of the common, and by such abatement the commoner does not at all meddle with the soil. (*Mason* v. *Cæsar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38.) And yet, as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of being punished in an action of trespass, provided the lord has left a sufficiency of common. When a part and not the whole of a common had been inclosed, a commoner in asserting his right of common may throw down the whole of the hedge erected on the common, and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle. (*Arlett* v. *Ellis*, 7 B. & C. 346; 9 D. & R. 897; 9 B. & C. 671.) But where a hedge or erection is made upon other land, which is no part of the common, but surrounds the common, the commoner can only abate so much of the erection as to make a way for his cattle to go into the common. (15 Hen. 7, 10 b, pl. 18; 29 Edw. 3, 6; 2 Inst. 88;

Mason v. *Cæsar*, 2 Mod. 65. See 1 Wms. Saund. 353, a.) If the lord of a manor plant trees upon a common, a commoner has no right to cut them down; his remedy is only by an action. (6 T. R. 483.)

Common of fishery.

A *common of fishery* is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common; (Salk. 637;) and trespass will not lie for an injury to it. A person having a common fishery in another's land cannot cut the grass growing on the bank. (13 Hen. 8, p. 15, b.) Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which the fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape is debarred, except in times of extraordinary flood. (*Weld* v. *Hornby*, 7 East, 195. As to the right of fishery, see Selw. N. P. tit. Fishery.) It seems that the owner of a several fishery, in ordinary cases, and when the terms of the grant are unknown, may be presumed to be the owner of the soil. (*Duke of Somerset* v. *Fogwell*, 5 B. & C. 875.) Such an owner has the exclusive right of taking the fish within particular limits. (3 Salk. 360; 2 Salk. 637. See Co. Litt. 122 a, n. 7; *Rex* v *Ellis*, 1 Maule & S. 652.) The word "several," as applied to a right of fishing, has the same meaning as the word "separalis" had before the pleadings were in English. A declaration, reciting that the defendant had been summoned to answer plaintiff in an action of trespass, charged that the defendant, with force and arms, broke and entered a fishery, to wit, the sole and exclusive fishery of the plaintiff, in a certain part of a river then flowing and being over the soil of one F., and then fished for fish in the said fishery of the plaintiff, and the fish of the said fishery of the plaintiff there found and being in the said fishery chased and disturbed. The declaration concluded, and other wrongs to the plaintiff did, against the queen's peace and to the plaintiff's damage. It was held by the Court of Exchequer Chamber, reversing the judgment of the Queen's Bench, that the words "sole and exclusive fishery" were at any rate after verdict equivalent to "several fishery," that is, the right of fishing exclusive of all others in a particular place; that the statement that the soil was in F. did not vitiate the count or render it necessary to deduce a title from the owner of the fee. But the Exchequer Chamber agreed in opinion with the Queen's Bench, that an action of trespass will lie for fishing in a several fishery. (*Holford* v. *Bailey*, 13 Q. B. 426; 8 Q. B. 1000.)

Where a private river runs through a manor, the presumption of law is, that each owner of land within the manor, and on the bank of the river, has the right of fishing in front of his land; and, if the lord claims a several fishery, he must make out that claim by evidence. (*Lamb* v. *Newbiggin*, 1 Car. & K. 549.) From the words of a deed under which the lord claimed, it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor. It was held, that this presumption was rebutted by proof that, before the date of that deed, owners of land within the manor, and on the banks of the river, had the right of free fishery therein. (*Ib.*)

Evidence of rights.

Evidence of a continuous practice for upwards of sixty years wholly unresisted for a corporation to grant licences to fish in a navigable tidal river, and to appoint watchers in order to prevent unlicensed persons from fishing therein, is sufficient for a jury to infer the ownership of a free fishery in the corporation; and it is not a just conclusion, from the fact of their having recovered in a former trial, where a part only of the entire subject-matter of the free fishery was in issue, that at that time the corporation was not possessed of the whole, and that their claim to the remainder was therefore an usurpation. (*Mannall* v. *Fisher*, 5 C. B., N. S. 856; 5 Jur., N. S. 389. See *Little* v. *Wingfield*, 8 Ir. C. L. R. 279.) As to the presumption of the grant of a right of fishing from adverse user for sixty years, *Beaman* v. *Kinsella*, 8 Ir. C. L. R. 291. When the rights of lords of manors depend upon the ownership of the soil, see *Grand Union Canal Company* v. *Ashby*, 6 H. & N. 394; 30 L. J., Exch. 203; *Clarke* v. *Mercer*, 1 F. & F. 492.

Where there has been possession of a fishery for a considerable length of time, a person claiming a *sole* right to it may bring a bill to be quieted in the possession of it, though he has not established his right at law. (*Mayor of York* v. *Pilkington and others*, 1 Atk. 282.) And if the persons who dispute the right are numerous, so that it cannot be determined in one action at law, the party claiming an exclusive right may go to a court of equity first, which will direct an issue for *settling* the right, as in disputes between the lords of manors and their tenants, or the tenants of different manors. (*Lord Tenham* v. *Herbert*, 2 Atk. 483.) But if the question about a right of fishing arises between two lords of manors, neither of them can go into equity for relief until the right has been established at law. (*Lord Tenham* v. *Herbert*, 2 Atk. 483; *Whitchurch* v. *Hyde*, *Id.* 391; *Welby* v. *Duke of Rutland*, 6 Br. P. C. 575; see 1 Br. C. C. 40, 572.)

As to the law of common in general, see Bac. Abr. Common; Com. Dig. Common; Cruise's Dig. tit. XXIII.; Woolrych on Rights of Common, 2nd ed.

3. OF THE PRESUMPTION OF GRANT OF EASEMENTS.

Foundation of presumption, as to incorporeal rights.

For a long series of years prior to the passing of the act 2 & 3 Will. 4, c. 71, judges had been in the habit, for the furtherance of justice, and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the statute of limitations, 21 Jac. 1, c. 16. Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but, as said by a learned author, (2 Stark. on Ev. 669,) "a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation; and though in theory it was mere presumptive evidence, in practice and effect it was a bar." The act 2 & 3 Will. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury. (*Bright* v. *Walker*, 4 Tywr. 507; 1 Cr., Mees. & Rosc. 217. See *ante*, pp. 11, 12.)

The presumption of a legal title, by grant or otherwise, to incorporeal rights in the lands of others, founded on adverse possession and enjoyment of such rights for the space of twenty years, appears to have been adopted in analogy to the enactment of the statute of limitations, 21 Jac. 1, c. 16, which made an adverse enjoyment of twenty years a bar to an action of ejectment; (*Holcroft* v. *Heel*, 1 Bos. & Pull. 460; 2 Saund. 175, a;) for as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of land. (*Campbell* v. *Wilson*, 3 East, 294; *Read* v. *Brookman*, 8 T. R. 151.) This rule, according to Lord *Mansfield*, C. J., "is founded upon principles of sound policy and convenience;" (Cowp. 110;) and the grant is presumed, as the same learned judge declares, "for the purpose and from a principle of quieting a long possession." (*Ib.* 215.) The rule was resorted to, with the view of relieving the infirmity and necessity of mankind, who require, for the preservation of their property and rights, where there is no written document, the admission of some general principle to take the place of individual and specific belief, and the legal presumption supplied the place of such belief. (*Hillary* v. *Waller*, 12 Ves. 266.)

A presumption of a grant is raised upon the general principle, that what has been done should be presumed to be rightly done; *ex diuturnitate temporis omnia presumuntur solemniter esse acta.* (Co. Litt. 6 b.) In applying this principle to a right of way, if it be found that the act has been often repeated, (for the occasional use of a walk or a path across a man's field would hardly be such an use as would establish the right,) but if the act must necessarily have been often repeated with the knowledge of the persons acting upon an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is applied to presumption in the case of light or of flowing water. (3 B. & C. 621, 622.) If there has

been an uninterrupted possession of light, water, or any other easement for twenty years, it affords a ground for presuming a right by grant, covenant or otherwise, according to the nature of the easement, and if there is nothing to rebut the presumption, a jury may be directed to act upon it. (*Yard* v. *Ford*, 2 Wms. Saund. n. (2); *Cross* v. *Lewis*, 2 Barn. & Cress. 686; *S. C.* 4 Dowl. & Ryl. 234; *Livett* v. *Wilson*, 3 Bing. 115; and see the judgment of *Holroyd*, J., *Williams* v. *Moreland*, 2 Barn. & Cress. 914; *S. C.* 4 Dowl. & Ryl. 588, and the cases there cited.) But the rule was subject to this qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant any such right for a longer period than during the continuance of his particular estate; (2 Wms. Saund. 174, n. (2); *Daniel* v. *North*, 11 East, 372; *Barker* v. *Richardson*, 4 Barn. & Ald. 579; *Wood* v. *Veal*, 5 Barn. & Ald. 454; *S. C.* 1 Dowl. & Ryl. 20;) but if the easement existed previously to the commencement of the tenancy, the fact of the premises having since been for a long period in the possession of a tenant will not defeat the presumption of a grant. (*Cross* v. *Lewis*, B. & Cr. 686.)

How far prescription act has superseded common law.

There is nothing in the act 2 & 3 Will. 4, c. 71, to interfere with a claim of a right of way or other easement by express grant. (*Bright* v. *Walker*, 1 Cr., M. & R. 223; *ante*, pp. 11, 12; *Livett* v. *Wilson*, 3 Bing. 115; *Plant* v. *James*, 2 N. & M. 517; 4 Ad. & Ell. 749, 765; *Blewett* v. *Tregonning*, 3 Ad. & Ell. 554.) Although that statute has facilitated the proof of profits à *prendre* and easements, it does not appear to have superseded the common law, so that a party may elect to proceed either under the statute or according to the common law. In *Onley* v. *Gardiner*, 4 Mees. & W. 496, where the defendant failed in proving a sufficient title under the statute, in consequence of an unity of possession, the court after argument, in which it was held that such unity defeated the title under the statute, allowed the defendant to amend his plea, by pleading a right of way immemorially. (See *Richards* v. *Fry*, 3 Nev. & P. 72.) In *Welcome* v. *Upton*, 5 Mees. & W. 403, 404, *Parke*, B., said, the only question upon which there seems to be any doubt is this: whether, supposing a right of pasturage to be a profit to be taken out of the land, the defendant can plead in the old form claiming the right from time immemorial; because the 1st section of stat. 2 & 3 Will. 4, c. 71, prevents such right, when enjoyed for thirty years, from being defeated, by showing that it first existed prior to that time. I think, however, that under the 1st section the proper mode is to plead the enjoyment of the right for the periods therein mentioned. The 7th section of the stat. 2 & 3 Will. 4, c. 100, limiting the time as to exemption from tithes, empowers the parties relying on that statute to plead it, and when that is not done, the same construction will prevail as has been held with respect to the statute 2 & 3 Will. 4, c. 71, and consequently where a party pleads a modus existing from time immemorial, he may proceed just in the same way as he might have done before the former statute was passed, although his claim will be liable to be defeated by showing the payment of tithes in kind at any time within legal memory. (*Earl of Stamford* v. *Dunbar*, 13 Mees. & W. 822; *ante*, p. 22.)

Pleas of non-existing grant.

In order to obviate the difficulty of proving an immemorial usage, it formerly became a practice to plead a right of way by what was termed a *non-existing grant*; (*Blewett* v. *Tregonning*, 3 Ad. & Ell. 554;) that is, a *feigned* grant by deed (supposed to be lost) from a former freeholder of the land, in or upon which the easement was exercisable, to a former freeholder of the tenements in respect of which it was claimed, but it was necessary that the names of the parties to, and the date of, such supposed grant should be stated; (*Hendy* v. *Stephenson*, 10 East, 55;) but profert of the deed is excused if it be averred that the deed has been lost by time and accident. (*Read* v. *Brookman*, 3 T. R. 151.) It is necessary to support the plea, if denied, by proof that, at the anterior period stated, the parties described as the former freeholders (the pretended grantor and grantee) of the easement really were such freeholders concurrently of the respective properties. (*Blewett* v. *Tregonning*, 3 Ad. & Ell. 554.) The defendant pleaded a grant of right of way by deed, subsequently lost. The plaintiff in his replication traversed the grant. At the trial, there being conflicting testimony as to

the uninterrupted user of the way, the judge directed the jury, that if, upon this issue, they thought the defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; if they thought there had been no way granted by deed they would find for the plaintiff:—it was held that this direction was right. (*Livett* v. *Wilson*, 3 Bing. 115; 10 Moore, 439. See *Doe* d. *Fenwick* v. *Read*, 5 B. & Ald. 232.) If the plaintiff merely traverse a non-existing grant of a way, he cannot on the trial give evidence to show that the supposed grantor was not, as alleged in the plea, seised in fee, even for the purpose of rebutting the presumption of the grant. (*Cowlisham* v. *Chesly*n, 1 Cr. & Jerv. 48; Chitty, Pl. 597, 6th edit.) With reference to pleas of this kind, it was said by *Littledale*, J.,—"If the evidence establish an user as far back as memory goes, and there does not appear to have been any time at which it did not exist, that is proof of prescription; and, supposing the evidence sufficiently strong, a prescription is what the jury would find, and they have no right to find a grant, unless more be shown. Supposing the evidence in such a case to leave it doubtful whether the right existed sixty or seventy years ago, it may be protected under a plea of *non-existing* grant; but if the evidence of user goes far enough to prove a prescription, such evidence cannot be relied on to prove a grant." (*Blewett* v. *Tregonning*, 3 Ad. & Ell. 583, 584.)

Necessity of a deed to pass incorporeal rights and easements.

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest therein cannot be created or passed otherwise than by deed. (*Hewlins* v. *Shippam*, 5 B. & C. 221.) A term for years in an incorporeal hereditament, or in a thing lying in grant, cannot be created without deed. (14 Vin. Abr. tit. Grant (G a); 2 Roll. Abr. 63, tit. Grant (G); Co. Litt. 85, a; 5 B. & C. 882.) Although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quantity of interest granted, but on the nature of the subject matter; a right of common or a right of way can no more be granted for life or for years without a deed, than in fee simple. (*Per Alderson*, B., in *Wood* v. *Leadbitter*, 13 Mees. & W. 842, 843.) Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before *Magna Charta*, by the description of "*separalem piscariam*," it being an incorporeal hereditament, a term for years cannot be created in it without deed. (*Duke of Somerset* v. *Fogwell*, 5 B. & C. 875.) Where there was an agreement in writing, but not under seal, to let a messuage, together with the full and free and exclusive licence and leave to hunt, hawk, course, shoot, and sport over a manor, and the tenant entered and was possessed during the term, it was held, in an action of assumpsit on the agreement for the rent, on demurrer to a plea, that, not being by deed, the agreement was void, because an *incorporeal hereditament* was agreed to be let, and that the plaintiff was not entitled to recover in respect of the actual enjoyment of the premises let by the defendant, of which he had taken possession. (*Bird* v. *Higginson*, 2 Ad. & Ell. 696; 4 Nev. & M. 505; 1 Har. & Woll. 61; 6 Ad. & Ell. 824.) In the case of a written agreement not under seal, whereby the plaintiff agreed to let land to the defendant, with a right of sporting, the defendant to make satisfaction to the plaintiff's tenants for the damage done by game on their farms: although it was held that the right of sporting did not pass by the agreement, yet that the agreement to make compensation was valid and good ground for an action, the defendant having had the full benefit of such agreement. An agreement to execute a conveyance is valid as an agreement, though it does not operate to pass an estate; and its validity is not affected by the question whether the subject of the deed be corporeal or incorporeal. (*Thomas* v. *Fredericks*, 10 Q. B. 775.) A licence to a stranger to use a common, in effect amounting to a grant of the common of pasture, can only be by deed. (*Hoskins* v. *Robins*, 2 Wms. Saund. 328, and n. 12; Shep. Touch. 330.) Where the plaintiff in replevin answered an avowry for damage feasant by a plea of licence from the commoner, who had right of

common for twenty beasts, it was objected, that if the commoner could license, he could not do so without deed, and of that opinion was the whole court. (*Monk* v. *Butler*, Cro. Jac. 574.) A licence or liberty cannot be created and annexed to an estate of inheritance or freehold without deed. (Shep. Touch. 231.) Whatever may be the effect of a parol licence by the owner of land to fence off part of a common and to build a house thereon, as against such owner it is clear that a grant of a freehold interest running with the inheritance cannot be binding on a stranger to the grantor, unless the grant was by deed. (*Perry* v. *Fitzhowe*, 8 Q. B. 757. See *Ramsey* v. *Rawson*, 1 Vent. 18—25.) It seems questionable whether a custom to demise by parol a right of common can be supported at law. (*Lathbury* v. *Arnold*, 1 Bing. 219; 8 Moore, 72. See *Rex* v. *Lane*, 1 D. & R. 78; 5 B. & Ald. 488.)

Nature of a licence and its legal incidents.

In *Thomas* v. *Sorrell* (Vaugh. 351), *Vaughan*, J., says:—"A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it would have been unlawful. As a licence to hunt in a man's park, 'to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants." A mere licence is revocable, but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and on the other hand a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a valid grant, and it is therefore revocable. Thus a licence by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Chief Justice *Vaughan*, a licence not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land: and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a water-course, to flow on the land of the licensee, in such a case there is no valid grant of the water-course, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the licence would be irrevocable. (*Per Alderson*, B., *Wood* v. *Leadbitter*, 13 Mees. & W. 844, 845.)

Where it appeared by entries in the court roll of a manor that the lord had granted a licence to build a cottage on the waste, subject to the payment of an annual rent, and the licence had been executed, and the cottage inhabited, Lord *Ellenborough* said:—"A licence is not a grant, but may be recalled immediately, and so might this licence the day after it was granted." (*Rex* v. *Inhabitants of Horndon-on-the-Hill*, 4 Maule & S. 565. See *Rex* v. *Inhabitants of Geddington*, 2 B. & C. 129; *Rex* v. *Inhabitants of Hagworthingham*, 1 B. & C. 634; *Rex* v. *Warblington*, 1 T. R. 241; *Rex* v. *Inhabitants of Standon*, 2 Maule & S. 461.)

The locking a gate, through which parol leave has been given to pass, is of itself sufficient notice of revocation of the leave. (*Hyde* v. *Graham*, 8 Jur., N. S. 1229.)

The right to be buried in a particular vault was held to be an easement

capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity. (*Bryan* v. *Whistler*, 8 B. & C. 298; 2 M. & R. 318. See *Adams* v. *Andrews*, 15 Q. B. 284.)

An agreement to let a party have a trench for water, though given for a valuable consideration, if there be no conveyance, is a parol licence, revocable at the will of the grantor. (*Fentiman* v. *Smith*, 4 East, 107.) The right to a drain running through the adjoining land cannot be conferred by a parol licence, but such interest can only be created by deed. In an action on the case for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a licence granted to his landlords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard into another yard appurtenant to the premises in the plaintiff's occupation: it was held, that the interest as declared upon by the plaintiff being in its nature freehold, and the licence to support it being merely by parol and not by deed, the action was not maintainable. (*Hewlins* v. *Shippam*, 5 B. & C. 221; 7 D. & R. 783.) So where the plaintiff sued for an obstruction of a certain drain which had been originally constructed at the plaintiff's expense on the defendant's land by his consent verbally given,—after it had been enjoyed some time, the defendant obstructed the channel, so that the water was prevented running as before; and it was contended on the part of the plaintiff that the licence so given having been acted on, could not be revoked by the defendant; but the court held that the plaintiff was clearly not entitled to recover. With regard to the question of licence, the court said, "the case of *Hewlins* v. *Shippam* is decisive to show that an easement like the present cannot be conferred except by deed, nor has the plaintiff acquired any other title to the water." The mere entry into the close of another, and cutting a drain there, cannot confer a right. (*Cocker* v. *Cowper*, 1 Cr., M. & R. 418.)

It seems to require a deed to create the right to have light and air come unobstructed from the land of one owner of land to the newly-opened window of an adjoining owner of a house. (*Bridges* v. *Blanchard*, 1 Ad. & Ell. 536; 3 Nev. & M. 691; *Blanchard* v. *Bridges*, 4 Ad. & Ell. 195. See *post*, note on Lights.)

Where a personal licence of pleasure is granted, it extends only to the individual, and it cannot be exercised with or by servants, but if there is a *licence of profit* and not of pleasure it may. (*Duchess of Norfolk* v. *Wixman*, Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2, cited 7 Mees. & W. 77.) A parol licence from A. to B. to enjoy an easement over A.'s land, is countermandable at any time whilst it remains executory; and if A. conveys the land to another, the licence is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land. A mere parol licence to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. In order to make the grantee a wrong-doer in such a case he is not entitled to notice from the purchaser of the change of ownership in the soil, as that is a fact which he is obliged to know at his peril. (*Wallis* v. *Harrison*, 4 Mees. & W. 538. See *Coleman* v. *Foster*, 1 H. & N. 37.)

A canal company, in consideration of the lessee's expenditure on certain icehouses on the banks of the canal, granted a lease thereof, with licence to take ice from a part of the canal: it was held, that the licence was not exclusive, but that it was a grant of sufficient to enable the lessee to fill the icehouses; and that so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. (*Newby* v. *Harrison*, 1 John. & H. 393.)

There is a clear distinction between a licence to do something which in its own nature seems intended to be permanent and continuing, and by which expense is incurred, and a licence to do acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; in the latter case, if the licence is countermanded, the party is

but in the same situation as he was before it was granted; but in the former case the party to whom the licence was granted may sustain a heavy loss by its being countermanded, and the party granting the licence should expressly reserve the power of revoking the licence after it had been carried into effect. (*Liggins* v. *Inge*, 7 Bing. 694.) A plea of leave and licence to erect and maintain a wall upon a given spot is not supported by proof of a licence to erect only. (*Alexander* v. *Bonnin*, 6 Scott, 611; 4 Bing. N. C. 799; 1 Arn. 337.)

Notwithstanding these authorities, it has been contended, that a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing. (7 Taunt. 384.) In *Webb* v. *Paternoster*, Palm. 71, it is laid down, that the grant of a licence to stack hay upon land does not amount to a lease of the land. This case arose before the Statute of Frauds. In *Wood* v. *Lake*, Say. 8, a parol agreement was held valid, which was for liberty to stack coals on a part of a close for seven years, and that during this term the person to whom it was granted should have the sole use of that part of the close upon which he was to have the liberty of stacking coals. (See Sugd. V. & P. 96, 97, 11th ed.) In *Taylor* v. *Waters*, 7 Taunt. 384; 2 Marsh. 551, an action was brought against the door-keeper of the Opera House, for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him an entrance into that theatre for twenty-one years. It was objected that the right claimed was an interest in land, and being for more than three years could not pass without a writing signed by the party, or his agent authorized in writing. But it was held, that it was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges therein, and was not required to be in writing by the Statute of Frauds, though it extended beyond three years, and consequently might be granted without deed. In support of this opinion the cases of *Webb* v. *Paternoster*, *Winter* v. *Brockwell*, 8 East, 308, and *Wood* v. *Lake*, were relied on. The authority of the case of *Taylor* v. *Waters* has been denied.

A right to come and remain for a certain time on the land of another can be granted only by deed; and a parol licence to do so, though money be paid for it, is revocable at any time, and without paying back the money. To an action of trespass for assault and false imprisonment, the defendant pleaded that, at the time of the supposed trespass, the plaintiff was in a close of Lord E., and that the plaintiff, as the servant of Lord E., and by his command, *molliter manus imposuit* on the plaintiff to remove him from the said close, which was the trespass complained of. The plaintiff replied, that he was in the close by the leave and licence of Lord E.; which was traversed by the rejoinder. The evidence was, that Lord E. was steward of the Doncaster races; that tickets of admission to the grand stand were issued with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the inclosure round it during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of Lord E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea: it was held, that on this evidence the jury were properly directed to find the issue for the defendant. (*Wood* v. *Leadbitter*, 13 Mees. & W. 838.)

A licence for the free admission to a theatre is determined by an assignment of the subject-matter in respect of which the privilege is to be enjoyed. (*Coleman* v. *Foster*, 1 H. & N. 37.)

The plaintiff, a tenant of a house for a term of years, being possessed of certain fixtures, which were his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away by the plaintiff if the tenant should refuse them. The landlord wrote an answer declining to purchase, but adding, "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold until the entry of the new tenant, who came in under demise from the same

landlord, but who declined to take them. The plaintiff then (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures, but the tenant refused permission, and the plaintiff thereupon brought an action for the hindrance and trover against the tenant: it was held, that if the landlord's letter to the plaintiff amounted to a licence to take away the articles, yet, not being under seal, it was no valid grant of such privilege as against a new tenant in possession, and not party to the licence. (*Roffey* v. *Henderson*, 17 Q. B. 574; 21 Law J., Q. B. 49.)

In an action of trover for sand, tin ore and gravel, a party claiming ownership in a field granted to the plaintiff a parol licence to search therein for minerals. The plaintiff, acting under this licence, dug pits in the field, and threw up sand and gravel, mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel and ore, the party who gave the plaintiff the parol licence granted him a similar licence by deed: it was held, that the plaintiff was entitled to maintain an action for the gravel, sand and ore, as against the defendant, who was a wrong-doer. (*Northam* v. *Bowden*, 11 Exch. 70; 24 Law J., Exch. 237.)

A parol licence to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), cannot be recalled at pleasure, after it has been executed at the defendant's expense, at least not without tendering the expenses he had been put to; and therefore no action lies as for a private nuisance arising from the existence of such skylight. (*Winter* v. *Brockwell*, 8 East, 308.) *Bailey*, J., said, "The case of *Winter* v. *Brockwell*, 8 East, 309, is distinguishable from *Hewlins* v. *Shippam*, 5 B. & C. 221. All that the defendant there did he did *upon his own land:* he claimed no right or easement upon the land of the plaintiff. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was, that as the plaintiff had consented to the obstruction of such easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb* v. *Paternoster*, *Wood* v. *Lake*, and *Taylor* v. *Waters*, were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed." (5 B. & C. 233.) The court seems to have proceeded upon the same distinction in the following case—where the plaintiff's father gave the defendant leave, by parol, to lower the bank of a river and to erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted: it was held, that his son could not maintain an action against the defendants for continuing the weir, although his father, a few years after the licence was given, had required them to raise up the bank and pull down the weir. (*Liggins* v. *Inge*, 7 Bing. 682; 5 M. & P. 712. See *Mason* v. *Hill*, 5 B. & Ad. 15.) The court did not consider the object, and still less the effect, of the parol licence, to be the transferring from the plaintiff's father to the defendants *any right or interest* whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir, which he then consented should be erected by the defendants; that after he had once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it was too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition. (See also *Duke of Devonshire* v. *Eglin*, 14 Beav. 530; 20 Law J., Ch. 495.)

A parol licence to do an act on the lands of the licensor, as to raise a

weir to increase the supply of water, which but for the licence would be wrongful, and may be injurious to the licensor, is not revocable after the act has been done and expense has been incurred on the faith of the licence, at all events not without putting the licensee *in statu quo*. It seems to make no difference that the act is to be done partly on the lands of the licensor and partly on those of the licensee. (*Blood* v. *Keller*, 11 Ir. C. L. Rep. 124.)

What will operate as a licence.

A parol agreement which is void under the Statute of Frauds, 29 Car. 2, c. 3, s. 4, may operate as a licence so as to excuse what would otherwise be a trespass, as where the purchaser entered to take away a crop. (*Carrington* v. *Roots*, 2 Mees. & W. 257; *Crosby* v. *Wadsworth*, 6 East, 602.) Goods which were upon the plaintiff's land were sold to the defendant; by the conditions of sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods: it was held, that after the sale the plaintiff could not countermand the licence. And the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and licence and a peaceable entry to take, to which the plaintiff replied *de injuriâ*, it was held, that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter, and the defendant had broken down the gates and entered to take the goods. (*Wood* v. *Manley*, 11 Ad. & Ell. 34; 3 P. & D. 5.) *Alderson*, B., approved of this decision, and said it was a case not of a mere licence, but of a licence coupled with an interest. The hay, by the sale, became the property of the defendant, and the licence to remove it became, as in the case of the tree and the deer, put by C. J. *Vaughan*, irrevocable by the plaintiff. (Vaugh. 351, *ante*, p. 59.) This case was analogous to that of a man taking another's goods and putting them on his land, in which case the owner is justified in going on to the land and removing them. (*Wood* v. *Leadbitter*, 13 Mees. & W. 853, citing Vin. Abr. Trespass H. a. 2, pl. 12; *Patrick* v. *Colerich*, 3 Mees. & W. 483. See *Williams* v. *Morris*, 11 Law J., N. S. 126, Exch.)

It seems that the crown may, by parol, confer privileges over land so as to deprive itself of the power of treating the party exercising the privilege as a wrong-doer; the actual possession of crown lands, under a parol licence from the crown, entitles the party in possession to maintain trespass against a wrong-doer. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrong-doer, even where that possession may be wrongful as against a third person. (*Harper* v. *Charlesworth*, 4 B. & C. 590; 8 D. & R. 572.)

4. OF RIGHTS OF WAY.

Different kinds of ways.

There are four kinds of ways; (Co. Litt. 56 a;)—1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horse-way and foot-way—4, a drift-way. Although a carriage-way comprehends a horse-way and a foot-way, (*Davies* v. *Stephens*, 7 Carr. & P. 570,) yet it does not necessarily include a drift-way. (1 Taunt. 279.) It is said, however, that evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way. (*Ibid.*)

A way may be granted for agricultural purposes only (*Reynolds* v. *Edwardes*, Willes, 282), or for the carriage of coals only (*Iveson* v. *Moore*, 3 Ld. Raym. 291; 1 Salk. 15), or for the carriage of all other articles except coals. (*Marquis of Stafford* v. *Coyney*, 7 B. & C. 257; *Jackson* v. *Stacey*, Holt, N. P. C. 455.) A reservation in a lease of a right of way on foot, and for horses, oxen, cattle and sheep, does not give any right of way to lead manure. The term "leading" implies drawing in a carriage. A grant conferring a right "to lead manure" would be construed according to the usual mode of leading, that is, by drawing in a cart. In case for disturbance of a way, the plaintiffs claimed a right for themselves, &c., on foot to go,

return, &c., and also to lead and carry away manure, but proved only a grant of way on foot and for horses, oxen, cattle, and sheep. It was held a variance; for the term "lead," so used, implies drawing in a carriage. (*Brunton* v. *Hall*, 1 Q. B. 792; 1 Gale & D. 207.) The plaintiffs took issue upon a plea, traversing the whole right claimed in the declaration. The right actually interfered with was that of carrying away manure with a wheelbarrow. It was held, assuming this privilege to be covered by the grant, that the plaintiffs could not, by proving so much of the alleged right, entitle themselves to a verdict on the issue generally. (*Ib.* See 2 Q. B. 963.) Evidence of an user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but the extent of the right is a question for the jury, under all the circumstances. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, the jury may be warranted in finding a way for all. (*Cowling* v. *Higginson*, 4 Mees. & W. 245. See *Dare* v. *Heathcote*, 25 L. J., Exch. 245; 26 *Ib.* 164; *Hawkins* v. *Carbines*, 27 L. J., Exch. 44; *Ballard* v. *Dyson*, 1 Taunt. 279; *Jackson* v. *Stacey*, Holt, N. P. C. 455; *Allan* v. *Gomme*, 3 P. & Dav. 589, 590.) A finding by the jury of a right of way for carting timber will not support a plea of a right of way for all carts, carriages, horses, and on foot, or even amount to a proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively on the issue joined on the plea. (*Higham* v. *Rabbett*, 5 Bing., N. S. 622; 7 Scott, 827) There may be both an occupation way and a public highway over the same road, for it does not on becoming a highway cease to be an occupation way. (*Brownlow* v. *Tomlinson*, 1 Man. & Gr. 484.)

Highways. A right of way may be either public or private. Ways common to all the king's subjects are called highways. (1 Ventr. 189; 1 T. R. 570.) A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or to a house, or a village, or to the fields, it is a private way; whether it be a public or private way is a matter of fact, and depends much on common reputation. (1 Ventr. 189; Hawk. P. C. b. 1, c. 76, s. 1.) The public may have a right to a road as a common street, although there be no thoroughfare; (*Rugby Charity* v. *Merryweather*, 11 East, 575; *Bateman* v. *Bluck*, 18 Q. B. 870; *Campbell* v. *Lang*, 1 Macq. H. L. C. 451;) or to a road terminating in a common. (*Rex* v. *Inhabitants of Wandsworth*, 1 B. & Ald. 63.) So it may be a highway, although it is circuitous; (*Rex* v. *Lloyd*, 1 Camp. 261; 3 T. R. 265;) and although it is only occasionally used by the public, and does not terminate in any town, or in any other public road; (*Rex* v. *Inhabitants of Wandsworth*, 1 B. & Ald. 63;) and, on the contrary, it is not necessarily a public highway, although it does lead from one market town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions. (11 East, 376, n. (a).) On an issue, whether or not certain land in a district, repairing its own roads, was a common highway, it is admissible evidence of reputation (though slight), that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation. (*Barraclough* v. *Johnson*, 8 Ad. & Ell. 99; 3 Nev. & P. 233; see *Nicholls* v. *Parker*, 14 East, 331, n. to *Outram* v. *Moorewood*.)

It is a rule, that evidence of reputation must be confined to general matters, and not touch particular facts; the question in a cause being whether a particular road admitted to exist was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy: it was held, that such declaration was not evidence either as showing reputation, as a statement accompaning an act, or as the admission of an occupier against his own interest. (*The Queen* v. *Bliss*, 7 Ad. & Ell. 550. See *Papendick* v. *Bridgwater*, 5 Ell. & Bl. 166.)

Dedication of *ways* to the public. If a man opens his land, so that the public pass over it continually, the

public, after a user of a very few years, will acquire a right of way; and a party not meaning to dedicate a way, but only to give a licence, should do some act to show that a licence only is intended. The common course is to shut up the way one day in every year. (*The Trustees of British Museum* v. *Finnis*, 5 Car. & Payne, 460.) The presumption of a dedication may be rebutted by proof of a bar having been placed across the street soon after the houses forming the street were finished; though the bar was soon afterwards knocked down, and the way has been since used as a thoroughfare. (*Roberts* v. *Carr*, 1 Camp. N. P. C. 262, n.; and see *Lethbridge* v. *Winter*, *Id.* 263, n.) But a gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with the reservation of the right of keeping a gate across it to prevent cattle from straying. (*Davies* v. *Stephens*, 7 Carr. & P. 570; *Rex* v. *Bliss*, 2 Nev. & P. 464.)

A permissive user of a way is not inconsistent with a right to resume the way. In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event. Thus, where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him 5*s.* a year and find cinders to repair the way, and that the inhabitants of the hamlet should lead and lay down the cinders, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for five years: it was held, that the evidence showed no dedication, but a licence only, resumable on breach of the agreement. (*Barraclough* v. *Johnson*, 8 Ad. & El. 99; 3 Nev. & P. 233.) A dedication to the public may be presumed from a shorter time than is necessary to establish a right of possession to land; and it has been presumed from an user by the public during a period of eight years, and even six years. (*Rugby Charity* v. *Merryweather*, 11 East, 376.) So where a court on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed. (*Rex* v. *Lloyd*, 1 Camp. 268; 3 T. R. 265.) Where a canal company originally erected a bridge for the use of the tenants of particular lands, but for ten years the public had crossed it without interruption: it was held, that it was properly left to the jury to say, whether the company intended or not to dedicate it to the public, and the jury, having so found, the court, in the absence of any misdirection in law, refused to interfere with such finding. (*Surrey Canal Company* v. *Hall*, 1 Scott, N. S. 264; 1 Mann. & G. 382. See *Rex* v. *Wright*, 3 B. & Ad. 681.) An user by the public of an open strand or waste does not necessarily lead to the inference that the owner of the soil has abandoned his right to it, and given it to the public. Although the dedication of a way to the public may be *partial* or limited as to the sort of way (as to a horseway, &c.), yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor, for that would be the reservation of a right inconsistent with the dedication to the public. (*Fitzpatrick* v. *Robinson and others*, 1 Hudson & Brook, 585. See *Blundell* v. *Catterell*, 5 B. & Ald. 315; *Lade* v. *Shepherd*, 2 Str. 1004; *Barraclough* v. *Johnson*, 3 Nev. & P. 233.) Although there may be a dedication of a way to the public for a *limited purpose*, as for a footway, horseway or driftway, there cannot be a dedication to a *limited part* of the public, as to a parish; and such a partial dedication is simply void, and will not operate in law as a dedication to the whole public. In order to constitute a dedication of a way to the public by the owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence if interrupted by the owner. (*Poole* v. *Huskinson*, 11 Mees. & W. 827.) There can be no dedication to the public of land as a highway, with a reservation of a right of making cuts through the land when wanted for the purpose of drainage. (*Rex* v. *Leake*, 2 Nev. & M. 595; 5 B. & Ad. 469.) There can be no dedi-

cation of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity. (*Dawes* v. *Hawkins*, 8 C. B., N. S. 848; 7 Jur., N. S. 262.) A highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon. (*Morant* v. *Chamberlin*, 6 H. & N. 541; 30 L. J., Exch. 299.) It seems that the setting out a road under a local act, by commissioners, for the use of *particular* persons, which in fact has been used by the public for many years, is not sufficient evidence of a dedication, without evidence of acquiescence on the part of the parish. (*Rex* v. *St. Benedict*, 4 B. & Ald. 447. See *Campbell* v. *Wilson*, 3 East, 294; *Rex* v. *Miller*, 1 B. & Ad. 32; *Rex* v. *Edge Lane*, 6 Nev. & M. 81.)

When dedication may be presumed.

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed, whoever he may be; and it is not material to inquire who the precise owner was, or whether he intended to dedicate the road to the public. (*Reg.* v. *Tything of East Mark*, 12 Jur. 332; 17 Law J., Q. B. 177; 11 Q. B. 877.)

By an inclosure act, commissioners were authorized to set out public and private roads; and it was enacted, that after the commissioners had set out and allotted the parts of the commons and waste lands for the purposes aforesaid, they should allot and award to the lord of the manor, in respect of his right and interest in the soil in the commons and waste lands, such parts thereof as should to them seem meet, not exceeding one-twentieth part of the remaining parts of the commons or waste lands. On an indictment against a tithing of the parish for the non-repair of a road set out by the commissioners as a private road, it was held, that the jury were properly directed to presume, from fifty years' uninterrupted usage, an intention of the owner of the soil, whoever he might be, to dedicate it to the public. (*Ib.*) It was held, that the crown, if owner of the soil, might dedicate it to the public. (*Ib.*)

The principle is, that when there is satisfactory evidence of such an user of the road as to time, manner and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was from whom the dedication necessarily inferred from such an user first proceeded. On the trial of an indictment for obstructing a highway, it appeared that the alleged highway had been laid out as a projected street in 1827, and *de facto* used as a highway till 1836, when the defendants began to obstruct it, and soon after inclosed a portion of the road. The owners of the soil of the greater part of this road brought ejectment; the defendant entered into negotiation with them, and had agreed to open the road; but finally, in 1853, broke off the negotiations, assigning as their reasons that they had, since the negotiations commenced, acquired the fee of another part of the road. On that spot, of which the defendant thus claimed the fee, was the obstruction the subject of the indictment. Evidence was given that the spot on which the obstruction now was made had been part of an estate settled in strict settlement in 1823, on a tenant for life, with power to grant building leases, and for the trustees of the settlement to sell with the consent of the tenant for life. The first tenant in tail was still, at the time of the trial, an infant. The tenant for life being called as a witness, said, (*inter alia*,) that in 1828 the whole of this property had been sold by his trustees, and he had had nothing to do with it since. The judge left it to the jury to say whether they would infer a dedication in 1829, from whoever was the owner of the fee. A verdict was found for the crown. It was held a proper direction, for open user as of right by the public raises a presumptive inference of dedication requiring to be rebutted. And here the statement of the defendants, that they acquired the fee in 1853, coupled with the evidence of the tenant for life, that he had not had anything to do with it since 1828, was evidence that the fee was, in 1829, not subject to the settlement, so that there was nothing to rebut the *primâ facie* inference of dedication in 1829, arising from the public user of right in that year. (*Reg.* v. *Petrie*, 4 Ell. & Bl. 737.)

If a particular class of persons use a pathway and the owner does not interrupt the user for some private reason not communicated to the persons

using the path, a public right of way is gained by the user after the lapse of twenty years. (*Reg.* v. *Broke*, 1 F. & F. 514.)

A dedication to the public will not be presumed in the case of a wood with a path or track through it leading in different directions where people have wandered at pleasure and made tracks, and in dry weather have used such tracks, which were never repaired, and which in wet weather were hardly passable. (*Chapman* v. *Cripps*, 2 F. & F. 864; *Schwinge* v. *Dowell*, *Ib.* 845.)

Acts of tenants not binding.

A tenant for ninety-nine years cannot dedicate a way to the public, without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term. (But see *ante*, pp. 27, 28; 4 B. & Ad. 75; *Reg.* v. *Bliss*, 7 Ad. & Ell. 555; *Barraclough* v. *Johnson*, 7 Ad. & Ell. 104.) In *Wood* v. *Veal* (5 B. & Ald. 454), the public had used a way over the *locus in quo* as long as could be remembered; but the land had been under a lease for ninety-nine years during the whole time, and it was left as a question for the jury, whether there had been a dedication to the public before the term commenced, for if not, there could be no dedication except by the owner of the fee, and the lease explained the user as not being referable to a dedication by such owner. Yet there was strong evidence to show that the landlord could not have been ignorant of the user. (8 Ad. & Ell. 104. See *Rex* v. *Lloyd*, 1 Camp. 260; *Baxter* v. *Taylor*, 1 Nev. & M. 13.) But where a lease was granted of certain ground to be a passage for fifty-six years, evidence of the user of the road by the public three or four years after the expiration of the lease was held to be evidence of a gift to the public. (*Rex* v. *Hudson*, Str. 909.) Where a public footway over crown land was extinguished by an inclosure act, but used for twenty years afterwards by the public, it was held not to be a dedication to the public, as it did not appear to have been with the knowledge of the crown. (*Harper* v. *Charlesworth*, 4 B. & Cr. 574.) However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence. (*Rex* v. *Barr*, 4 Camp. N. P. C. 16; *Davies* v. *Stephens*, 7 Car. & P. 570. See *Deeble* v. *Lineham*, 12 Ir. C. L. Rep., N. S. 1.) And notice to the steward is notice to the landlord. (*Rex* v. *Barr*, *sup.*; *Doe* d. *Foley* v. *Wilson*, 11 East, 56.) It seems that there may be a partial dedication of a highway to the public: but where the owner of lands had, on the making a new road over his property, given his consent thereto on condition of its being used for coal carts, it was held, that if even by law there could not be a restriction to a public way, the grant amounted only to a licence, which was revocable, and that, after notice, a person using such way with coal carts would be a trespasser. (*Marquis of Stafford* v. *Coyney*, 7 B. & Cr. 257. See *Roberts* v. *Carr*, 1 Camp. 262; *Rex* v. *Inhabitants of Northamptonshire*, 2 Maule & S. 262.) Where there has been a public king's highway, no length of time during which it may not have been used will prevent the public from resuming the right, if they think proper. (*Rex* v. *Inhabitants of St. James's*, 2 Selw. N. P. 1352, 8th ed. See 2 B. & Ald. 662; *Rex* v. *Montague*, 4 B. & C. 598.) The public cannot release their right to a public highway by non-user. (*Dawes* v. *Hawkins*, 8 C. B., N. S. 848; 7 Jur., N. S. 262.) As to the law of Highways, see Shelford's Law of Highways, 3rd ed.

Ownership of soil in highways.

The freehold of the highway is in the owner of the freehold of the soil, although the public may pass and repass at their pleasure. (2 Inst. 705; *Sir John Lade* v. *Shepherd*, 2 Str. 1044.) The owner of the soil is entitled to all profits, trees and mines upon or under the highway. (1 Roll. Abr. 392; 1 Burr. 143.) In the 82nd section of the stat. 5 & 6 Will. 4, c. 50, there is a saving of mines to the owner of lands taken for widening narrow roads. The soil in turnpike roads does not vest in the trustees thereof, who have only the control of the highway, without a special clause for that purpose. (*Davison* v. *Gill*, 1 East, 69. See also *Rex* v. *Mersey Navigation*, 9 B. & C. 95; *Rex* v. *Thomas*, *Id.* 114.) The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his

cattle to depasture along the highway; (*Dovaston* v. *Payne*, 2 H. Bl. 527; *Stevens* v. *Whistler*, 11 East, 51;) or an action of ejectment for land over which there is a public right of way. (*Goodtitle* v. *Atker*, 1 Burr. 133; *Doe* v. *Wilkinson*, 3 B. & C. 413. And see *Scales* v. *Pickering*, 4 Bing. 448.) The presumption at law is, that waste land adjoining a road belongs to the owner of the soil of the adjoining inclosed land, and not to the lord of the manor; (*Steel* v. *Prickett*, 2 Stark. 463; *Scoones* v. *Morrell*, 1 Beav. 251;) whether such owner be a freeholder, copyholder or leaseholder. (*Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; 9 D. & R. 908.) The right to land adjoining either side of the road extends to the centre. (*Cooke* v. *Green*, 11 Price, 736.) The ground of this presumption is, that the road has been granted by the owners of the adjoining land, and that their ownership, therefore, extended to the middle of the road. Where the lord of a manor has conveyed land to A. and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the fact that the strip of land lies between a highway and land indisputably comprised in the conveyance to A. (*White* v. *Hill*, 6 Q. B. 787.)

The presumption of law, that slips of waste lands adjoining a highway belong to the owner of the adjoining inclosed land, may be rebutted by evidence tending to raise a contrary presumption. In an action by a rector, to recover a slip of land lying between the glebe and a highway, in order to rebut the presumption of ownership arising from contiguity, it was proved that the defendant and those under whom he claimed had occupied the spot in question for more than forty years, and during four or five successive incumbencies, without interruption, and that there were slips of land adjoining the piece in dispute, at either end, also lying between the glebe and the road, which were occupied adversely to the rector: it was held, that the whole case on both sides resting on presumption, it was properly left to the jury to say whether or not the evidence given on the defendant's part rebutted the presumption of law on which the plaintiff's case rested. (*Doe* d. *Harrison* v. *Hampson*, 4 Com. B. 267.)

The principle of the ownership of the soil being in the owner of the adjoining land is carried so far that a man may be a trespasser on land where the public have a right to pass and repass, where he is on the highway, not for that but for other and different purposes. Though the public have a right of passage over land which is a highway, they have no right to use it except as a highway. (See *Dovaston* v. *Payne*, 2 H. Bl. 527; *Reg.* v. *Pratt*, 24 L. J., M. C. 113.)

To constitute the offence of trespassing upon land in search or pursuit of game, within section 30 of 1 & 2 Will. 4, c. 32, there must be a personal entering or being on land, but such land may be a highway. The defendant whilst on a highway carrying a gun and accompanied by a dog, sent the dog into a cover on one side of the highway, after which a pheasant rose and flew across the highway, and the defendant then being on the highway fired at the pheasant. B. was the lord of the manor and owner of the land on each side of the highway; the land on one side was let to a yearly tenant, B. reserving the right of entry for the purpose of killing game: it was held, that the defendant was properly convicted, under section 30, of committing a trespass by being upon land in the possession and occupation of B., and there in search of game. (*Reg.* v. *Pratt*, 4 El. & Bl. 860; 1 Dear., C. C. R. 502; 1 Jur., N. S. 681; 24 L. J., M. C. 113.)

When soil in highway passes by conveyance.

The ordinary rule of law is, that in the case of the sale of land adjoining a highway the soil of the highway, *ad medium filum viæ*, passes by the conveyance, and the fact that the land is set forth by admeasurement and referred to in a plan, which *includes* no portion of the highway, does not prevent the operation of such rule. (*Berridge* v. *Ward*, 7 Jur., N. S. 876.)

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres within the fences that were therein conveyed, if the words "more or less" were added. (*Denby* v. *Simpson*, 7 Jur., N. S. 1058; 9 W. R. 743, Exch. Cham.; *Simpson* v. *Dendy*, 6 Jur., N. S. 1197, C. P.)

The general turnpike act, 3 Geo. 4, c. 126, does not alter the presumption of law that the soil is vested in the owner of the adjacent land to the centre of the highway, nor vest the soil of turnpike roads in the trustees thereof. If the lord of the manor and owner of close A., adjacent to one side of a highway, and also of close B., adjacent to the opposite side, convey both in one deed to one vendee, the soil of the road passes to the vendee, although the acreage of each of the closes comprised within their fences respectively be stated in the conveyances, unless there be sufficient in the deed to show, as by marks on the indorsed map or plan of the property, that the soil of the road was intended to remain in the vendor. (*Marquis of Salisbury* v. *Great Northern Railway Company*, 5 C. B., N. S. 174; 5 Jur., N. S. 70; 28 L. J., C. P. 40.)

The presumption that the soil of a road, *usque ad medium filum viæ*, belongs to the owners of the adjoining lands, applies equally to a private as to a public road. (*Holmes* v. *Bellingham*, 7 C. B., N. S. 329; 6 Jur., N. S. 534; 29 L. J., M. C. 132.)

The soil in roads set out under an inclosure act does not by presumption of law belong to the adjoining owners. (*Rex* v. *Edmonton*, 1 M. & Rob. 24; *Rex* v. *Wright*, 3 B. & Ad. 681.) Where the herbage of a road becomes vested by the general inclosure act, 41 Geo. 3, c. 109, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietor. (*Rex* v. *Hatfield*, 4 Ad. & Ell. 156.) The ownership of the soil in a road set out under an inclosure act was held to remain in the lord of the manor, for that portion of the soil only is taken from him for which he received compensation and which is allotted to others. (*Per Parke*, B., *Poole* v. *Huskisson*, 11 Mees. & W. 827. See *Reg.* v. *Tything, East Mark*, 12 Jur. 332; *ante*, p. 66.)

By an inclosure act waste lands of a manor were to be allotted in certain proportions. A part of the waste land was not portioned out in the award of the commissioners: it was held, that the freehold of such land remained in the lord of the manor, as there was nothing in the act to transfer such freehold. (*Packe* v. *Mee*, 9 W. R. 335; *Ewart* v. *Graham*, 5 Jur., N. S. 773.)

The presumptive right of the owner of the adjoining land may be repelled by evidence of acts of ownership by the lord of the manor. (*Anon.* Lofft, 358.) Though *primâ facie* the presumption is, that a strip of land lying between a highway and the adjoining close belongs to the owner of the close; as the presumption also is, that the highway itself, *ad medium filum viæ*, does, such presumption is confined to that extent, for if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. (*Grose* v. *West*, 3 Taunt. 39; *Headlam* v. *Hedley*, Holt, N. P. C. 463.) Upon a question whether a piece of waste land, between a highway and inclosures, belonged to the plaintiff, the owner of the adjoining inclosure, or to the lord of the manor, it was held that the lord might give evidence of grants by him of the waste between the road and the other inclosures of other persons at a distance from the spot claimed by the plaintiff, provided such evidence were confined to the road which passed by the spot claimed by the plaintiff. (*Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332; 5 Mann. & R. 173; 2 Bing. N. S. 102. See *Stanley* v. *White*, 14 East, 332.)

Balks.

In a case where it was contended that balks are by presumption of law the property of the owner of the adjoining soil, *Taunton*, J., said, "Is there such a presumption? the common instance of a presumption of that kind is in the case of roads. Balks are strips of land lying between lands which are private property; if the presumption be as stated, it is at any rate not so familiarly known." (*Bailiffs of Godmanchester* v. *Phillips*, 4 Ad. & Ell. 560.) An inclosure act directed that commissioners should award to a corporation, who were owners of the soil of certain commons, a twentieth part of the commons by way of compensation. The corporation, who were plaintiffs in an action of trespass *quare clausum fregit*, having given evidence of acts of ownership in the *locus in quo*, the defendant, to show that their right to

it had been compensated for by allotments made by the commissioners, gave evidence that these allotments amounted to a twentieth part of the commons. In contradiction to this evidence, the plaintiffs proved that a part of the land, which they alleged to be common, consisted of uncultivated strips of land between the cultivated parts of the common and the lands of private proprietors, called balks, and the plaintiffs gave some evidence of property in these balks. The judge having left the question of property in the *locus in quo* to the jury, who found for the plaintiffs, it was held that, it was not ground for a new trial; that, in presumption of law, the balks belonged to the owners of the adjacent land, unless the contrary were proved. (*Ib.*)

Ditches.

Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. (*Guy* v. *West*, Selw. N. P. 1218.) The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet or eight feet has anything to do with it. (*Per Lawrence, J., Vowles* v. *Miller*, 3 Taunt. 138. See the judgment of *Holroyd*, J., 7 B. & C. 307, 308.) If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of the land in which the tree was first sown or planted. (*Holder* v. *Coates*, M. & M. 112. See *Waterman* v. *Soper*, 1 Lord Raym. 737; *Masters* v. *Pollie*, 2 Roll. R. 141; Anon. 2 Roll. R. 255.)

How private ways may be claimed.

A private way is a right which one or more persons have of going over the land of another. This may be claimed either by grant, prescription, custom, by express reservation, as necessarily incident to a grant of land, or by virtue of an inclosure act. (Selw. N. P. 1241.) A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over which the way runs, belongs to the grantor of the way. (*Taylor* v. *Whitehead*, 2 Dougl. 475; *Bullard* v. *Harrison*, 4 Maule & S. 387; 1 Wms. Saund. 322 a, n. (3); *Duncombe's case*, Cro. Car. 366. See *Robertson* v. *Gauntlett*, 16 Mees. & W. 289.) But if a highway be impassable, the public are entitled to pass in another line. (*Ib.* See Shelford's Law of Highways, pp. 25, 73, 3rd ed.)

Grant of right of way.

A way may be claimed by grant, as where an owner of land grants to another person a way through or over a particular close; (Com. Dig. Chimin, D. 3;) so a covenant by an owner of land that another person shall have and use a way amounts to a grant. (*Holme* v. *Seller*, 3 Lev. 305.) And if a man seised of Whiteacre and Blackacre uses a way through the latter to the former, and afterwards grants Whiteacre, with all ways, &c., such right of way passes to the grantee. (*Staple* v. *Haydon*, 6 Mod. 3.) Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as abutting on an intended way, without specifying the breadth: it was held, the sublessee was entitled to a *convenient* way only. (*Harding* v. *Wilson*, 2 B. & Cr. 96.) Under a grant of a free and convenient horseway and footway, and for carts and carriages, &c., over to a certain piece of land, "to carry stone, timber, coal, or other things whatsoever," the grantee may lay a framed way along the land for carrying coals as being the most convenient, but the grantee will not be justified in making transverse roads across the land. (*Senhouse* v. *Christian*, 1 T. R. 560.) Where certain houses, with a piece of ground, part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof *used or enjoyed before*; and at the time of the grant of the lease the whole of the yard was in the occupation of one person, who had always used and enjoyed a right of

way to every part of that yard: it was held, that the lessee was entitled to such right of way to the part of the yard demised to him. (*Kooystra* v. *Lucas*, 5 B. & Ald. 830; 1 Dowl. & Ryl. 506.)

If a close is conveyed *with all ways thereto belonging and appertaining*, the easement will not pass, except in the case of a way of necessity, where such right of way would pass without any words of grant of ways. (*Grimes* v. *Peacock*, Bulst. 17.) But a way not strictly appurtenant will not pass by those words in a conveyance, unless the parties appear to have intended to use them in a sense larger than their ordinary legal sense. (*Barlow* v. *Rhodes*, 1 Cromp. & Mees. 439.) The words "belonging and appertaining" are synonymous. (*Ib.* 448.) Where an *underlease* described the ground demised and the ways granted by the words "always thereunto appertaining," a road over the soil of the original lessor was held not to pass by those words, although it might have done so by the words "heretofore used." (*Harding* v. *Wilson*, 2 B. & Cr. 96.) Where the plaintiff claimed a right of way over the defendant's soil, and it appeared that in the defendant's lease, granting him all ways, without exception or qualification, there was a covenant for contributing with other occupiers of the lessor's property to the keeping up paths, &c. used in *common* by them, and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply, it was held, that it might be inferred that the defendant took the soil demised to him, subject to the plaintiff's right of way. (*Oakley* v. *Adamson*, 8 Bing. 356; 1 Moore & Scott, 510.) In 1728, land was let on a building lease, which expired at Lady-day, 1824. In 1819, the plaintiff, by virtue of a demise from an under-lessee, which expired in 1820, was in possession of a house erected on a part of this land, and under that demise exercised, as all his predecessors had done for more than thirty years, a right of way over a passage on one side of his house as necessary for the use and enjoyment thereof, particularly for repairing the eastern side: the under lessee's interest expired in 1822; the defendant was in possession of the soil of the passage by virtue of an assignment, in 1791, of the lease of 1728. In 1819, the party possessed of the reversion expectant on the lease of 1728 demised to the plaintiff the house of which he was in possession as above for fifty-seven years and a half, to hold from Lady-day, 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822, the reversioner demised the soil of the passage to the defendant for sixty-one years, to hold from Lady-day, 1824: it was held, that under the demise of 1819, the plaintiff was entitled to a right of way over the defendant's passage. (*Hinchliffe* v. *Earl Kinnoul*, 5 Bing. N. C. 1; 6 Scott, 650.)

A private estate act, enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorized to be leased as and for a way, street, square, passage, or sewer, or other conveniences for the general improvement of the estate and the accommodation of tenants and occupiers: it was held, that exclusive private rights of way over land so appropriated for a way might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants and occupiers. (*White* v. *Leeson*, 5 H. & N. 53; 29 L. J. 105; 5 Jur., N. S. 1361.)

Evidence of right of way.

In an action for obstructing a way, granted by a lease from the defendant to the plaintiff, the judge will receive evidence of the state of the premises at the time of granting the lease, and will then put a construction on the lease as to the line along which the way is granted: but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant. (*Osborn* v. *Wise*, 7 Car. & P. 761.) Where a testator being seised in fee of two adjoining closes A. and B., over the former of which a way had immemorially been used to the latter, devised B. with the appurtenances: it was held, that the devisee could not, under the word "*appurtenances*," claim a right of way over A. to B., as no new right of way was thereby created, and the old one was extinguished by the unity of seisin in the devisor. (*Whalley*

v. *Thompson*, 1 Bos. & Pul. 371.) An existing way will pass by the word "appurtenances." (*Ib.* See *post*, p. 78.)

Unity of seisin.

Where there is an unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject-matter of the conveyance. (*James* v. *Plant*, 4 Ad. & El. 761.) Estates A. and B., formerly distinct, became vested in coparceners. Before that time a right of way had been enjoyed from A. over B., and after the unity of seisin the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, outhouses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining or therewith usually held, used, occupied or enjoyed; to have and hold the messuages, &c., called A. with the buildings, lands, &c., thereunto belonging, and their appurtenances, to the releasee, to the use of S. in fee; *habendum*, as the estate B., in similar terms; with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the *præcipe* in a recovery: it was held, that the deed sufficiently showed an intention that a right of way (which was admitted to have been used up to the time of the deed) from the high road over B. to A. and back, for the convenient use of A. by the occupiers of A., should pass to the uses limited as to A.; that by the word "appurtenances" in the *habendum* as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass; and that the releasee to uses, having no estate in A., interpreting that clause with reference to the other parts of the deed, the way in question did pass; and that the releasee to uses, having no estate in A., had not such seisin of the soil as would extinguish the right of way by unity of seisin. (*James* v. *Plant*, 4 Ad. & El. 749; 2 Nev. & M. 517.)

Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass. (*Grimes* v. *Peacock*, 1 Bulst. 17; *Saundeys* v. *Oliff*, Sir T. Moore, 467; *Whalley* v. *Thompson*, 1 Bos. & P. 371; *Clements* v. *Lambert*, 1 Taunt. 205; *Barlow* v. *Rhodes*, 1 Cromp. & Mees. 439; *ante*, p. 50. See *Worthington* v. *Gimson*, 6 Jur., N. S. 1053.)

If the grantor wish to revive or create such a right, he must do it by express words, or introduce the terms "therewith used and enjoyed:" in which case easements existing in point of fact, though not existing in point of law, would vest in the grantee. (*Per Parke*, J., 2 Nev. & Mann. 522.)

A question has often arisen, where unity of ownership in land and in a right of way over the land has taken place, as to what subsequent grant by the owner is sufficient to convey the continued enjoyment of the easement as well as the land itself. It seems from these decisions, that, inasmuch as the unity of ownership extinguishes the easement, the right of way cannot pass as simply appurtenant to the land to which it was formerly attached, though it continues to exist in point of user. But though it does not exist as a right, it will pass by a conveyance of the land if proper words be used to pass it, as if all ways "used and enjoyed" with the land are conveyed. (*Barlow* v. *Rhodes*, 1 Cr. & M. 439; *James* v. *Plant*, 4 Ad. & Ell. 749.) The same rule applies where a conveyance purports to be of all waters, watercourses, privileges, easements, advantages and appurtenances to the premises belonging, or in anywise appertaining to or with the same or any part thereof held, used, occupied or enjoyed, or deemed to be so. (*Wardle* v. *Brocklehurst*, Ell. & Ell. 1058.)

If a right of way is appurtenant to a piece of land which is demised, the

right of way passes also without any special mention of such right. (*Skull* v. *Glenister*, 7 L. T., N. S. 827.)

Extinguishment by unity of ownership.

A., being a termor of land, built two houses on it; the whole was then released to him in fee, with all ways, easements, advantages and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied or enjoyed. By his will he devised one house, and the appurtenances thereunto belonging, to B., and the other to C., in similar terms. During A.'s ownership of both, the entrance from the high road to the principal door of the house, afterwards devised to B., was by a set-out carriage drive or sweep, entering from a high road passing immediately in front of the house, afterwards devised to C., to B.'s door, and then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of entrance. B.'s house had a coach-house, opening only into the high road, and a back entrance into the same. After A.'s death, C. made a fence across so much of the carriage drive as passed immediately in front of his house and across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. brought trespass, claiming the way as appurtenant to his house and garden: it was held, first, that the way as used in A.'s time, during the unity of ownership in him, immediately in front of C.'s house, did not pass to B. with the house devised to him under the word "appurtenances" in A.'s will. (*Pheysey* v. *Vicary*, 16 M. & W. 484.) And it seems that it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient and reasonable mode of enjoying every part of B.'s premises could not be had. (*Ib.*)

In an action for trespass for breaking and entering a close called the Hencroft, the defendant pleaded that C., being owner in fee of the said close, granted to W. H., by indenture, a way over the said close for the occupiers of a certain dye-house, and that the defendant, being in the occupation of the dye-house, committed the said trespass. The plaintiff claimed oyer of the indenture, and set it out in his replication. By the indenture C. granted, bargained, &c., to W. H. all those newly-erected buildings standing and being partly on the said close called the Hencroft, and partly on B. C., together with all and singular outhouses, edifices, buildings, roads, ways, &c., and appurtenances, with the said premises usually held, occupied and enjoyed, the said C. reserving to himself exclusively the said Hencroft, with the rights, privileges and appurtenances within and to the same belonging: it was held, on special demurrer, that the plea was bad, in omitting to aver that the way had been usually held, occupied or enjoyed with the Hencroft. (*Tatton* v. *Hammersley*, 3 Exch. 279; 18 L. J., Exch. 162.) It was held also, that no right of way was granted by C. over the Hencroft. (*Ib.*)

Commissioners of partition may award a right of way over the lands of one party to the lands of another party interested in the partition. (*Lister* v. *Lister*, 3 Y. & Coll. 540.)

Presumption of grants of way.

A right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and neither a freehold nor a chattel interest in it can be created or passed otherwise than by deed. (5 B. & Cr. 229. See *ante*, p. 58.) Grants of rights of way are presumed from long enjoyment, where its commencement cannot be accounted for, unless a grant has been made. (5 B. & Ald. 237.) The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave or favour, or under a mistake, was held sufficient to leave to a jury to presume a grant, although the road in question had been extinguished about twenty-six years before, under the award of the commissioners of an inclosure act. (*Campbell* v. *Wilson*, 3 East, 294.) So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant from the defendant. (*Keymer* v. *Summers*, Bull. N. P. 74, cited 3 T. R. 157.) Where a defendant pleaded a grant of a right of way by deed subsequently lost, and

the plaintiff in his replication traversed the grant, and at the trial there was conflicting testimony as to the uninterrupted user of the way, a direction by the judge to the jury to find for the defendant, if they thought he had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, and to find for the plaintiff if they thought there had been no way granted by deed, was held to be right. (*Livett* v. *Wilson*, 3 Bing. 115.)

Though an uninterrupted possession for twenty years and upwards be a bar to an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude to the prejudice of his landlord. But presumptions are sometimes made against the owners of lands, during the possession and by the acquiescence of their tenants, in cases of rights of way and of common, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own. (*Daniel* v. *North*, 11 East, 372.) In every case where the party claiming relies on his want of possession, the question whether he knew or not of the enjoyment is to be determined by the circumstances of the case, and may very properly be left for the consideration of the jury. (*Dawson* v. *Duke of Norfolk*, 1 Price, 247; *Gray* v. *Bond*, 2 Brod. & Bing. 667.) The user of a way during the occupation of tenants does not bind the landlord, unless he was aware of it; but if the user has been for a great length of time, it may be presumed that he was aware of it. (*Davies* v. *Stephens*, 7 Carr. & P. 570.) The knowledge of the owner of the land and his acquiescence may be presumed from circumstances. Thus where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had, at various times, dressed and improved the landing-place, and both the fishery and the landing-place originally belonged to one person, but no evidence was offered to show that he or those who under him owned the shore at A. knew of the landing nets by the lessees of the fishery: it was held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of the shore at A. (*Gray* v. *Bond*, 2 Brod. & Bing. 667; 5 Moore, 527.)

Knowledge of owner of the fee.

There being two tenants of adjoining premises held under the same landlord, the tenant of one of the premises acquired a right of way to his vaults through the adjoining premises. The landlord sold both premises at one sale, with a condition that they were to be subject to and with the benefit, as the case might be, of all subsisting rights or easements of way or passage, so far as any lot might be affected thereby: it was held, that the vendor, being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other. (*Daniel* v. *Anderson*, 8 Jur., N. S. 328; 31 L. J., Chan. 610; 10 W. R. 366.)

Where premises are demised or conveyed "with a right of way thereto," it may be a question for the jury what is a reasonable use of such right. (*Hawkins* v. *Carbines*, 27 L. J., Exch. 44.)

Where a right of way was expressed to be "through the gateway of the plaintiff" (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload, and turn round and go out again, but through alterations of the premises, could not do so without slightly trenching upon the plaintiff's premises: it was held, that, in the reasonable use of the right of way, the defendant had a right to do this: and that what was a reasonable user was for the jury. (*Ib.*)

By prescription.

A private way may also be claimed by prescription; as that a man is seised in fee of a certain messuage, and that he, and all those whose estate he has in the same messuage, have from time immemorial had a way (describing it as the case may be) from —— to ——. A way being only an easement, and not an interest should not be laid as appendant or appurtenant. (Yelv. 159.) Where a particular tenant relies on a prescriptive right, he must, before the act 2 & 3 Will. 4, c. 71, s. 5, *ante*, pp. 21, 30, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee. (2 Salk. 562; Com. Dig. Chimin, (D. 2).) Unity

of possession of the land to which the way is claimed as appurtenant, with the land over which the way lies, extinguishes the way; for it is an answer to the prescription, and the way is against common right. (1 Roll. Abr. 935; 3 T. R. 157; 5 East, 295; *Whalley* v. *Thomson*, 1 Bos. & Pull. 371; *Buckby* v. *Coles*, 5 Taunt. 311.) But where in trespass *quare clausum fregit*, the defendant prescribed in a *que estate* for a right of way over the *locus in quo*, and it appeared that the defendant's land had, within fifty years, been part of a large common, and afterwards inclosed under the provisions of an act of parliament, and allotted to the defendant's ancestor, it was held, that notwithstanding this evidence the right claimed by the defendant's plea might in law exist: and the jury having found that in fact it did exist, the court refused to disturb the verdict. (*Codling* v. *Johnson*, 9 B. & Cr. 933.) If the lessor enjoy a prescriptive right of way, or any other easement, by virtue of the demised premises, such right will pass to the tenant for life or years. Before the act 2 & 3 Will. 4, c. 71, (see *ante*, s. 5, pp. 21, 30,) the only distinction between a tenant for years and a tenant for life was, that the former in pleading could not prescribe in his own right; but he must have asserted the right through his landlord, or the owner of the freehold. (*Cantrell* v. *Stephens*, Styl. 300; *Dawney* v. *Cashford*, Carth. 432.)

By custom.

A custom that every inhabitant of a certain village shall have a way over certain land, either to church or to market, is good; because it is only an easement, but not a profit. (6 Rep. 60 b.; Co. Litt. 110 b.; Cro. Eliz. 180. See 2 H. Bl. 393; *ante*, pp. 31, 32.)

By express reservation.

A right of way may be claimed by express reservation; as where A. grants lands to another, reserving to himself a way over such land. (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin, (D. 2); and see *Earl of Cardigan* v. *Armitage*, 2 Barn. & Cr. 197; 3 Dowl. & R. 414.) *Tindal*, C. J., in *Durham and Sunderland Railway Company* v. *Walker*, 2 Q. B. 967, observed, "a right of way cannot in strictness be made the subject either of exception or reservation. It is neither a parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same way as the right of sporting or fishing." (See *Doe* d. *Douglas* v. *Lock*, 2 Ad. & Ell. 705; *Wickham* v. *Hawker*, 7 Mees. & W. 63.) In order to establish an easement claimed by lessors, as in the nature of a grant from the lessee, it would in general be essential to show the execution of the lease by the lessees. (*Durham and Sunderland Railway Company* v. *Walker*, 2 Q. B. 967.)

Grants of rights of way in reference to mines.

The dean and chapter of Durham, being seised in fee of lands in that county, demised them, in 1832, to W., by indenture between them and him, containing this clause: "except and always reserved out of this present lease, indenture or grant, the woods, underwoods, and trees now growing or hereafter to grow upon the said demised premises, and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down, take and carry away the said wood and trees, and to dig, win, work, get and carry away the said mines, quarries, and seams of clay, with free ingress, egress and regress, wayleave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting waggonway or waggonways in and over the said premises or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties, always excepted and reserved to the said dean and chapter, their successors, grantees or assigns." Four different constructions of this clause were suggested: first, that the meaning was to reserve to the dean and chapter an unlimited power of granting wayleaves over all or any part of the lands demised, without any restriction whatever as to the uses to which the ways should be applied: secondly, if that were considered too wide a construction, then it was contended that the clause authorized the granting of wayleaves for the purpose of carrying

coals and minerals from whatever mines they might have been raised and gotten: thirdly, it was argued that at all events the dean and chapter had, under the reservation, the power of granting wayleaves for the transport of their own mines and minerals, whether raised from under the lands demised or from any other lands: and, fourthly, it was contended that the deed in fact gave no power to the dean and chapter, except that of making ways and granting wayleaves for the purpose of getting the coal and minerals excepted in the demise. The Court of Exchequer Chamber were all of opinion that the fourth, which is the most limited construction, is the correct one, and that the only right reserved to the dean and chapter is that of making and granting the right of making ways over the demised lands for the purpose of getting the excepted wood, mines and minerals. (*Durham and Sunderland Railway Company* v. *Walker*, 2 Q. B. 940.) In *Farrow* v. *Vansittart*, 1 Railw. Ca. 602, 614, the same construction was put upon a clause in one of the dean and chapter's leases, exactly similar to the one above stated.

An act of parliament for inclosing the moors and commons within the manor of Lancaster, in the county of Durham, contained a saving of all the seignoral rights of the Bishop of Durham, as lord of the manor, and also provided that the bishop and his successors, and their lessees and assigns, should at all times thereafter work and enjoy all mines and quarries lying under the said moors and commons, together *with all convenient and necessary ways and wayleaves over the same*, and full and free liberty of making and using any new roads or waggonways over the same, and for that purpose to remove obstructions, &c., and of winning and working the said mines and quarries belonging to the see and bishopric of Durham, wheresoever the same should be, and of leading and carrying away all the coals, minerals, &c., to be gotten thereout, or out of any other lands and grounds whatsoever, &c. It was held, that this clause entitled the bishop to carry over the lands inclosed under the act, not only coals and minerals got within or under those lands, but also those got out of any other mines belonging to the see of Durham; but not to carry coals, &c., got out of other mines worked by the bishop, but not belonging to the see. It was held, also, that an allegation, that a certain colliery was within and parcel of the manor, was not a sufficient allegation that it was a colliery belonging to the see. (*Midgley* v. *Richardson*, 14 Mees. & W. 595.)

By a deed dated in 1830, the grantor conveyed in fee farm land in the manor of A., in the county of Northumberland, "excepting and reserving out of the grant all mines of coals within the fields and territories of A. aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits; with a covenant by the grantees, that they, their heirs and assigns, "should give such accustomed recompence for digging and breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases." By another deed, of the same date, the same parties conveyed in fee farm, to other persons, land in the manor of H. (adjoining A.), with a like exception, reservation and covenant. It was questioned whether, under this reservation of a sufficient "wayleave," the coalowner had now a right to make a railway, for the purpose of carrying coals from the mines for shipment, with cuttings and embankments, and fenced in so as to exclude the owner of the soil. It was held, however, that the right was not confined to such ways as were in use at the time of the grant. It was held, also, that, under the reservation in the former deed, the coalowner could not carry over A. coals got in H., although part of the same mineral field. (*Dand* v. *Kingscote*, 6 Mees. & W. 174.)

When right of way did not pass.

It is not competent to a vendor to create rights unconnected with the use and enjoyment of land and to annex them to it, neither can the owner of land render it subject to a new species of burden so as to be binding in the hands of the assignee. A right of way cannot be so granted as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant. (*Ackroyd* v. *Smith*, 10 C. B. 164; 14 Jur. 1047; 19 Law J., C. P. 315.) In trespass *quare clausum fregit*, the

defendant justified under a supposed right of way conveyed to them by A.; the plea, after stating the conveyance to A. of a certain close and certain plots, pieces or parcels of land, &c., together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing for all purposes in, over, along and through a certain road," alleged an assignment by A. to the defendant of the said lands, tenements, hereditaments, premises and appurtenances "granted by the former deed," and then averred that the trespasses complained of were committed by the defendants, being owners of the said lands, &c., and in the possession and occupation thereof, in using the right of way for their own purposes; the plaintiffs, after setting out the deed upon oyer, demurred specially to the plea on the ground that the defendants claimed a more extensive right than that granted by the deed, and that if the right as claimed was granted by the deed it was not assignable. It was held, that the grant to A. was not restricted to the use of way for the purpose connected with the occupation of the land conveyed, but that the right in question was not one which inhered in the land, or which concerned the premises conveyed, or the mode of occupying and enjoying them, and therefore did not pass to the defendants by the assignment. (*Ib.*)

Right of way by necessity.

As a right of way may be created by an express grant, so it may also arise by an implied grant, where the circumstances are such that the law will imply such grant. This right of way has been commonly termed a way of *necessity*, but it is in fact only a right of way by implied grant; for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant by operation of law. (1 Wms. Saund. 323, n. See 4 Maule & S. 387.) A purchaser of part of the lands of another has a way of necessity over the vendor's other lands, if there be no convenient way adjoining; so if a man having four closes lying together sells three, and reserves the middle close, to which he has no way but through one of those sold, although he did not reserve any way, yet he shall have it as reserved to him by the law. (*Clark* v. *Cogge*, Cro. Jac. 170; *Jordan* v. *Attwood*, Owen, 121.) A way of necessity passes by grant or lease of the land, without being expressed; for the land cannot be used without a way. (*Beaudely* v. *Brook*, Cro. Jac. 189.) A conveyance of land by a trustee, to which there is no access but over the trustee's land, passes a right of way. (*Howton* v. *Frearson*, 8 T. R. 50.) So if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving a right of way, it will be reserved to him by operation of law. (*Ib.*) Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient. (*Cobb* v. *Selby*, 6 Esp. 103.) Unless a tithe owner has a right of way to carry tithe off titheable lands within the parish by grant of the owner of the fee, or by prescription, he has, *primâ facie*, only a right to use such road for that purpose as is used at the time by the occupier to carry off the other nine-tenths; and if he has any further right to use any other way from the particular close, because used by the occupier for other agricultural purposes, or for more convenient use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues, without being stopped up by the occupier. A farmer, acting *bonâ fide*, has a right to alter the line of road to his farm, in which case the parson must use the substituted road, unless he can show a right by grant or by prescription. (*James* v. *Dodds*, 2 C. & M. 266; 4 Tyrw. 101.)

Where a man leases lands, reserving the timber, he may enter to show it to a purchaser. (2 Rol. Abr. 74, 1, 41; 1 Rol. Abr. 109, 1, 5.) So if a man grants to another certain trees in his wood, the grantee may go with carts over the grantor's lands to carry away the trees. (*Liford's case*, 11 Rep. 52, a; Vin. Abr. Incident.) A man having a right to wreck thrown on another man's land, has necessarily a right of way over such land to take the wreck. (*Anon.*, 6 Mod. 149.) A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it. (*Bullard* v. *Harrison*, 4 Maule & S. 387. See 1 Wms. Saund. 323, n. 6.) A way of necessity exists after a

unity of possession, which would otherwise have extinguished the way, and after a subsequent severence. (*Buckby* v. *Coles*, 5 Taunt. 311.) A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as he would have done by using the old way, the latter will cease to exist. (*Holme* v. *Goring*, 2 Bing. 76; 9 Moore, 166; *Reynolds* v. *Edwards*, Willes, 282.)

In an action for a disturbance of a right of way, it appeared that in 1839 A., being the owner of five closes, two of which, called the Holme Closes, were separated by two of the others from the only available highway, sold the entire property in three lots. M. purchased the Holme Closes, and D. the remaining closes. Over the latter the tenants of A., from the year 1823, used a way for the occupation of the Holme Closes. The deeds of conveyance to the three purchasers were all executed on the same day, but it could not be ascertained in what order of priority they were executed. No special grant or reservation of any particular way was contained in any of them, but in the conveyance to M. there were the usual words, together with all ways, roads, &c., to the closes belonging or appertaining. For several years after the execution of the conveyances the plaintiff, who occupied the Holme Closes as tenant of M., had used the way in question, but in 1843 the defendant, who had purchased D.'s closes, disputed the plaintiff's right and obstructed the way. It was held, first, that assuming that the conveyance to M. was executed before that of D., the plaintiff was clearly entitled to the way, for where a person having a close surrounded by his land grant the close to another, the grantee has a way over the grantor's land as incident to the grant. (*Pinnington* v. *Galland*, 9 Exch. 1; 22 Law J., Exch. 349.) It was held, secondly, assuming that the conveyance to D. was executed before that of M., the plaintiff was, nevertheless, entitled to the way; for while the property in the Holme Closes remained in A. he had that way of necessity as being the most convenient mode of access to his premises, and it passed by his conveyance to M. under the words "all ways to the closes belonging or appertaining." (*Ib.* See *Pyer* v. *Carter*, 1 H. & N. 916.)

It seems that no right of way by necessity can exist where the title of the parties is by escheat, even assuming that escheat is equivalent to a grant; the only ground on which the lord of a manor can claim a way of necessity is, that he has no other way. (*Proctor* v. *Hodgson*, 10 Exch. 824.)

It is settled by modern authority that the ground on which the way of necessity is created is, that a convenient way is impliedly granted as a necessary incident. It is observed by *Parke*, B., in *Proctor* v. *Hodgson*, 10 Exch. 824, 828, that the extent of the authority of *Holmes* v. *Goring*, 2 Bing. 76, is, that though it is a grant, it may be construed to be a grant of such a right of way as from time to time may be necessary. He adds, "I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at the time that the court was wrong." In a recent case the court was not inclined to extend the authority of *Holmes* v. *Goring* so far as to hold that the person into whose possession the servient tenement comes may from time to time vary the direction of the way of necessity at his pleasure, so long as he substitutes a convenient way. The court held, that the way of necessity, once created, must remain the same way as long as it continues at all. (*Pearson* v. *Spencer*, 1 Best & S. 584.)

On a severance of two tenements, any right to use ways which, during the unity of possession, has been used and enjoyed in fact, does not pass to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create the right to use these ways *de novo*. In this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way; (*Worthington* v. *Gimson*, 29 L. J., Q. B. 116; 6 Jur., N. S. 1053; see *Polden* v. *Bastard*, 11 W. R. 778;) and *Pheysey* v. *Vicary*, 16 M. & W. 484, (*ante*, p. 73,) is an authority that the same rule in this respect applies to a will as a deed. (See *Whalley* v. *Thompson*, 1 Bos. & P. 371, *ante*, p. 71.) But when property devised or granted is land-locked, and there is no other way of

getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the lands of the testator or grantor, it is clear that a way of necessity is created *de novo*. (*Pearson* v. *Spencer*, 1 Best & S. 583, 584.)

Where the owner of two or more adjoining houses sells one of them, the purchaser of such house is, without any express reservation or grant, entitled to the benefit of all the drains from his house; and is, on the other hand, subject to all the drains necessary for the enjoyment of the adjoining house. Such necessity is to be considered with reference to the time of the conveyance, and without reference to whether any other outlet could be made for the drainage. (*Pyer* v. *Carter*, 1 H. & N. 916; 26 L. J., Exch. 258. See *Ewart* v. *Cochrane*, 4 Macq. H. L. C. 117.) An owner of two adjoining properties, consisting of a tan-yard and a house and garden, made a cesspool in a corner of the garden, and a drain to carry the water into it from the tan-yard, which gradually sloped down towards the garden. Afterwards he sold the two properties to different persons. The conveyances made no allusion to the existence of the drain and cesspool: it was held, that the easement passed by an implied grant with the tan-yard. (*Ib.*)

A. was owner of the E. estate, adjoining the sea-shore, and let N., part of the estate, to a tenant, with express liberty to take sea-weed from the shore to manure his lands. N. was a farm lying inland, no part of it being nearer than about two miles from the shore. N., while so occupied, was sold to F., and the lands were described in the conveyance as the same are presently possessed by the tenant. No express mention was made of any easement to take sea-weed, and there were only the general words, together with all the appurtenances. F. claimed an easement to go and collect the sea-weed adjoining A.'s estate to manure his lands: it was held, there being no express words of conveyance of such an easement, and the period of prescription not having elapsed, the easement did not pass under the words together with the appurtenances. (*Baird* v. *Fortune*, 7 Jur., N. S. 926; 10 W. R. 2; 5 L. T., N. S. 2, H. L.)

Where, at the time of the grant in respect of which the right of way is claimed, there was a way from the house into the garden, and that way continued to exist, another way of necessity, where the deed contains no reservation of a right of way, cannot be claimed on the ground of its being more convenient than the other way. An owner of land built a house on the front of it, with a cottage at the back, the access to the cottage being by a passage through the house. He conveyed the cottage to B. in fee, with the right of passage, and two years afterwards he conveyed the house, with a garden, to D. in fee. From the time the house was built, D. and the prior owners and occupiers of it used a part of the passage, which was included in the ground conveyed to B., for the purpose of passing between the house and the garden and offices, through a doorway opening from that part of the passage into the garden. There was, however, another mode of getting to the garden through a room in the house. Within twenty years of the building of the house, B. blocked up the doorway: it was held, that D. had not, as owner of the house, any right of way over the part of the passage either by grant or necessity. (*Dodd* v. *Burchall*, 8 Jur., N. S. 1180; 1 H. & Colt. 113; 31 L. J., Exch. 364.)

Where a plaintiff derived title to a *locus in quo* under a lease from the owners within the last twenty years (without any reservation of a right of way), and the defendant had within that time occupied part of the *locus* and taken adjoining premises by a subsequent lease from the original lessors: it was held, that he could not set up a right of way over the land by user or of necessity. (*Walter* v. *Williams*, 2 F. & F. 423.)

Repair of way.

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin (D. 6); Godb. 53; *Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 109; Vin. Abr., Incidents (A.)), and the grantor is not bound to repair (Com. Dig. Chimin (D. 6), unless by express stipulation or prescription. (1 Saund. 322, a, n.; *Rider* v. *Smith*, 3 T. R. 766.) The grantee of a private way is to make it. (*Osborn* v. *Wise*, 7 Car. & P. 764.) By common law he who has the use of a thing ought to repair it, unless the grantor has bound himself to do so. (*Taylor* v. *Whitehead*, 1 Doug. 720; *Pomfret* v. *Ricroft*, 1

Wms. Saund. 322, b.) Although at common law the grantee of a way ought to repair it, that is not a condition incident by law to the grant of a right of way; it is not even an obligation to which the grantee is subject; it is no more than this, that if he wants the way to be repaired he must repair it himself. (*Per Coleridge, J., Duncan* v. *Louch*, 6 Q. B. 909, 910.)

In an action on the case for obstructing a right of way between two specified termini over a close called the Terrace Walk, the way was claimed as appurtenant to a messuage, in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement proved was a right to pass forwards and backwards over every part of the close, and not merely between the termini specified in the declaration; and it was shown that the easement was enjoyed under a grant thereof to D., his heirs, tenants and assigns, and to certain other persons, he, they and every of them from time to time contributing and paying a rateable share and proportion towards repairing and amending the Terrace Walk: it was held no variance, the easement proved being only larger than the easement alleged, and not different in kind; and it was also held, that the obligation to repair was not in the nature of condition precedent, and need not be alleged in the declaration. (*Duncan* v. *Louch*, 6 Q. B. 904.)

A. granted to B., his heirs and assigns, occupiers of certain houses abutting upon a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage way, and gave him "all other liberties, powers and authorities incident or appurtenant, needful or necessary to the use, occupation or enjoyment of the said road, way or passage:" it was held, that under these words B. had a right to put down a flagstone in this piece of land in front of a door, opened by him out of his house into this piece of land. It was observed by *Chambre*, J., that the nature of the thing was material in considering the effect of the words. The way was granted for the occupation of a dwelling-house, and the grantee ought to have everything needful for the occupation of his dwelling-house; he ought therefore to have the opportunity of repairing the way in such a manner, that it should not be wet or dirty, when he or his family or his visitors enter. If any inconvenience had been occasioned to the grantor, it might make a difference; but that was not the case here, nor was it to be feared that any right could hereafter be set up in respect of the soil in consequence of this stone having been put down, for the precise extent of the road was pointed out. (*Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 109.)

Under the 9th section of the General Inclosure Act, 41 Geo. 3, c. 109, a road continued as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair. (*Rex* v. *Inhabitants of Hatfield*, 4 Ad. & Ell. 156.) Parishes are not liable to the repair of any road or occupation way made at the expense of an individual, or of any roads to be set out as a private drift-way or horse-way in any award of commissioners, unless they are made to the satisfaction of the surveyor of the highways and of two justices of the peace. (5 & 6 Will. 4, c. 50, s. 23.) This provision is not retrospective in respect of roads completely public by dedication at the time of the passing of the act (31st August, 1835); but applies to roads then made and in progress of dedication. (*Reg.* v. *Westmark*, 2 M. & Rob. 305.)

A road, the soil and freehold of which were in A., ran from a highway to a well. The land upon each side of the road belonged to B. B. built a wall along the high road across the mouth of the road to the well, leaving a stile for foot passengers, and levelled the fences on each side of the road. There was a dispute as to whether those acts of B. had been done twenty years before the action was brought. Upon the trial of an action of trespass brought by A. against B., the jury was unable to agree whether the acts of B. had been done within twenty years, but found that the public, down to the commencement of the action, had exercised a right of way to the well, since the erection of the stile on foot, and before with horses and carriages. The judge thereupon discharged them from a finding upon the time when

B.'s acts were done, and directed a verdict for the plaintiff: it was held (*Pigot*, C. B., dissenting), that this was a misdirection, and that if B.'s acts were done more than twenty years before the action was brought, A.'s title was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. (*Tottenham* v. *Byrne*, 12 Ir. Com. Law Rep., N. S. 376.)

How right of way extinguished.

Where a person having a right of way over the land of another purchases such land, the right of way is extinguished by the unity of seisin and possession. (*Heigate* v. *Williams*, Noy, R. 119.) There is, however, a distinction between a right of way which is of necessity and a right of way which is merely an easement, for in the latter case it is not extinguished by unity of possession. (*Sury* v. *Pigot*, 3 Bulstr. 340; Noy, R. 84.)

Presumption as to loss of right of way.

It does not appear to have been decided what is the precise period requisite to extinguish a right of way by mere non-user. Lord *Tenterden* said, "One of the general grounds of a presumption is, the existence of a state of things, which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter a release of it, is presumed." (*Doe* d. *Pentland* v. *Hilder*, 2 B. & Ald. 791.) *Littledale*, J., expressed a similar opinion. He said, according to the present rule of law, a man may acquire a right of way or a right of common (except indeed common appendant) upon the land of another by enjoyment; after twenty years' adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who had acquired the right by grant ceased for a long period of time to make use of the privilege granted to him, it may then be presumed that he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a lengh of time is necessary to found a presumption of a grant, there must be a *similar non-user to raise a presumption* of a release, and this reason may perhaps apply to a right of common or of way. (*Moore* v. *Rawson*, 3 B. & C. 339.) Although the grant of an occupation way cannot be presumed from a user of less than twenty years, yet it is not necessary, in order to destroy the right to such an easement, that a cesser of the use for twenty years should be proved. (*Reg.* v. *Chorley*, 12 Jur. 822, Q. B.; 12 Q. B. 515.) A cesser of the use for any period less than twenty years, accompanied by an act clearly indicative of an intention to abandon the right, is sufficient to destroy such an easement. (*Ib.*) If the owner of land has granted to an individual the easement of an occupation way over it, then the subsequent absolute dedication by him of a footway to the public, in the same place, cannot be presumed, without also presuming, or proving in fact, a release of the easement by the individual; for without the release the owner can only be supposed to have given what he himself had, a right of user not inconsistent with the easement. (*Ib.*) In order to prove a grant of an occupation way through a lane to the defendant's premises, he offered two deeds, which purported to be grants by the owners of the soil of an occupation way through the lane, to tenants of premises situated on the opposite side of the lane from the defendant's premises: it was held, that the deeds were wrongly admitted for that purpose. (*Ib.*)

It was laid down in another case, that where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in; an unsuccessful attempt on the part of the occupiers of the land, over which the way ran, from time to time, to interrupt such right, will not be sufficient to get rid of it. (*Harvie* v. *Rogers*, 3 Bligh, N. S. 444—447. See 12 Ves. 265; *Norbury* v. *Meade*, 3 Bligh, 211, 241.) It will be observed, that by the 4th section of the statute 2 & 3 Will. 4, c. 71, (*ante*, p. 17,) no act is to be deemed an interruption, unless the same shall have been acquiesced in for one year after the party

interrupted shall have notice thereof, and of the person making or authorizing the same to be made. A prescriptive right of way to a public towing-path on the banks of a navigable tide-river, is not destroyed by that part of the river adjoining the towing-path having been converted by statute into a floating harbour, although such towing-path was thereby subject to be used at all times of the tide; whereas before it was only used at those times when the tide was sufficiently high for the purposes of navigation; and such prescription is not destroyed by a clause in the statute whereby the undertakers of the work were authorized to make a towing-path over land, comprising the towing-path in question, on paying a compensation to the owner of the soil. (*Rex* v. *Tippett*, 3 B. & Ald. 193.)

The discontinuance for upwards of twenty years of the use of an immemorial right of way to a close, because the occupiers had a more convenient access to it over another close, is not evidence of an intention to abandon the right. (*Ward* v. *Ward*, 21 Law J., Exch. 334.) *Alderson*, B., observed in this case, "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something, which is adverse to the user." A parol agreement for the substitution of a new way for an old prescriptive way, and the consequent discontinuance to use the old highway, afford no evidence of the abandonment thereof. (*Lovell* v. *Smith*, 3 C. B., N. S. 120.) In this case the plaintiff, having a right of way by prescription more than thirty years previously, agreed with the owner and occupier of the servient tenement, that the use of a portion of that way should be discontinued, and a new one equally convenient substituted for it, *Willes*, J., said, "I do not think that this court means to lay down that there can be an abandonment of a prescriptive easement like this, without a deed or evidence from which the jury can presume a release of it." (*Ib.* pp. 126, 127.)

Loss of right of way by alteration of land over which it passed.

There does not appear to be any direct authority to show whether, if the use of a place, to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used. It has been held, that if a man has a right of way to a close called A., he cannot justify using the way to go to A. and from thence to another close of his own adjoining to A. (1 Roll. Abr. 391, pl. 3; *Howell* v. *King*, 1 Mod. 191; *Lawton* v. *Ward*, 1 Ld. Raym. 75; and 1 Lutw. 111.) It seems, however, that an alteration of the substance of the thing, in respect of which the right is claimed in such a manner as to occasion any injury or prejudice to the person who supplies the easement, will prevent the acquisition of any additional right of easement. (See *Luttrell's case*, 4 Rep. 86.) In trespass *quare clausum fregit* it appeared that B., being the owner of the *locus in quo*, and also of certain other land, with houses and a stable, loft and chaise-house, conveyed to A. a part of the premises, consisting of a house and land comprehending the *locus in quo*, reserving to himself, his heirs, &c., occupiers for the time being of a messuage, (not conveyed,) a right of way and passage over the *locus in quo* to a stable and loft over the same, and the space or opening under the loft and then used as a wood-house, and to the chaise-house standing on the side of the *locus in quo* (the stable, loft, wood-house and chaise-house not being conveyed), and also the use of the *locus in quo* in common with A., his heirs, &c., and their tenants for the time being, it being expressed to be the intent of the parties that the whole of the yard comprehending the *locus in quo* should be open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them; afterwards B. built a cottage on the site of the opening under the loft: it was held, 1. That the reservation of the use of the *locus in quo* did not authorize B. to use it for the purpose of passing to the cottage. 2. That the reservation of the right of way was not limited to a right of passage to the space so long as it was used as a wood-house; but gave a way generally to the space so described while it was open. 3. But that B. was not entitled to use that way for the purpose of passing to a newly-erected cottage on that space. (*Allan* v. *Gomme*, 11 Ad. & Ell. 759; 3 P. & Dav. 581.) *Denman*,

C. J., in giving judgment said, that the case depended upon the legal effect of the reservation. "Upon that we are of opinion that, under the terms of this deed, the defendant is not entitled to have the right of way claimed, but that he is to be confined to the use of a way to a place which should be in the same predicament as it was at the time of the making of the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words 'now used as a wood-house,' merely used for ascertaining the locality and identity of the place called a space or opening under the loft, and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground; but we think that he could only use it for purposes which were compatible with the ground being open, and that if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed. Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that B. had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture or in corn, and had subsequently filled the land with small cottages, or had built a factory or established gasworks, it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings. The supposed intention of the parties cannot indeed be considered; and it can only be determined by the instrument itself what their intention was." (*Allan* v. *Gomme*, 3 Per. & Dav. 591; 11 Ad. & Ell. 759; see *Osborn* v. *Wise*, 7 Carr. & P. 761.) *Parke*, B., observed, that in *Allan* v. *Gomme*, "a more strict rule was laid down than he should have been disposed to adopt, for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed. No doubt if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." (*Henning* v. *Burnet*, 8 Exch. 192.)

The plaintiff, being owner in fee of some land partly built upon, conveyed to the defendant a dwelling-house, with a coach-house and stable at the back thereof, and a field, together with all ways, waters, easements, &c., to the dwelling-house and field belonging or usually enjoyed therewith, with free liberty of ingress, egress and regress for the defendant with cattle and carriages over the carriage road and footpath leading to the said dwelling-houses, coach-houses and stables in the occupation of F. N. and the defendant. Previously to this conveyance a private road was used for carriages, cattle, &c., from the turnpike road to the defendant's coach-house and stable, and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach-house and stable, and built a wall across the private road near their former site (inclosing a portion of the road which had been conveyed to him in fee), and he also opened a gate at the further corner of his field into the private carriage road, which he used instead of the former gate, and drove cattle and carriages along the road into the field and back again. It was held, that the defendant was liable in trespass, inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith extended only to the user of the way as it existed at the time of the grant through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house and stable only. (*Henning* v. *Burnet*, 8 Exch. 187.)

Right of way when not lost by alteration.

A company and the defendant each purchased lands of W., which were separated by a road over which a right of way was reserved to each (the freehold remaining in W.) with a joint obligation to repair. In the conveyance to the company the land purchased by them was described as containing thirty-one acres or thereabouts, "which, with the abuttals and boundaries thereof, were more particularly described in the map or plan thereof affixed to and forming part of the conveyance, together with full and free liberty, licence and authority for the company, their successors and assigns and tenants, and all persons coming to or going from the same

lands and hereditaments, or any part thereof, to use and enjoy, with horses, carts and carriages, or on foot, jointly or in common with others the person or persons for the time being entitled to the like liberties, licences and authorities respectively, the roads or ways leading to and from the same lands and hereditaments as the same roads or ways are described in the said map or plan." At the time of conveyance the land so purchased by the company was separated from the road by a hedge, in which were two gates, one at the upper, the other at the lower end of the road. The company removed the hedge and built a wall with two gates thereon, both at the same distance from the spot where the old gates had stood. The defendant obstructed the access to these new gates by excavating the road to the depth of between four and five feet. It was held, that the defendant was liable to an action at the suit of the company, for that whether the company was justified in altering the position of the gates or not, the company was still entitled to the uninterrupted use of the way as granted to them. (*South Metropolitan Cemetery Company* v. *Eden*, 16 C. B. 42.) But it seems that the grant was a general grant of a right of way along the road and every part thereof, and was not limited to a way through the old gates. (*Ib.*)

The acquiring a right of way by the public does not destroy a previously-existing right of way over the same line; but the private way must be previously existing. A private right of way cannot be proved by evidence of a public right. A right of way had been granted in 1675; there was evidence that for ten years before the commencement of the action for obstructing the right of way, that part of the way had become public. It was held unnecessary to state in the declaration that such part had become public. (*Duncan* v. *Louch*, 6 Q. B. 904.)

Stopping ways under inclosure acts.

By the 10th section of the General Inclosure Act, 41 Geo. 3, c. 109, the commissioners are directed to set out private roads; and by the 11th section of that act it is declared that all roads, ways and paths, over, through and upon such lands and grounds, which shall not be set out, shall be extinguished. But where a private inclosure act does not vary the terms of the above act, if the commissioners in their award do not notice a road running over the inclosed lands, it is, by the operation of that act, extinguished, and the proprietor of the lands over which it runs may stop it up. Thus it was held, that a plaintiff, to whom an allotment was made by a commissioner under an inclosure act, of land over which the defendants had a private right of way before the passing of the act, but which was noticed or described amongst those set out by the commissioner, might justify the stopping up of such way, although the award contained no declaration that the road in question was stopped up. (*White* v. *Reeves*, 2 B. Moore, 23.) As to the construction of local inclosure acts giving powers to stop up roads, see *Logan* v. *Burton*, 5 B. & Cr. 513; *S. C.*, 3 Dowl. & Ryl. 299; *Harber* v. *Rand*, 9 Price, 58; *Rex* v. *Inhabitants of Hatfield*, 4 Ad. & Ell. 156. As to stopping up and turning highways under inclosure acts, see Shelford on the Law of Highways, pp. 212—219, 3rd ed. Where commissioners had no power under the particular or general inclosure act to stop up a way over old inclosures, but did not by their award set out any new way over the waste lands inclosed, it was held, that an old footway passing from a public highway over wastes to old inclosures, into another public highway, still existed as it formerly did over the waste lands, and over the old inclosures into the public highway. (*Thackrah* v. *Seymour*, 1 Cr. & Mees. 18.)

A private right of way over waste land, or a line between two points, is not necessarily a right over every part of the land, and the owner of the soil may inclose on each side of it, if the way can be substantially used as conveniently as before the inclosure. (*Hutton* v. *Hamboro*, 2 F. & F. 218.)

The 10th and 11th sections of the stat. 41 Geo. 3, c. 109, do not extinguish a right to take water from a well which the inhabitants of a parish had immemorially exercised before an inclosure act upon land formerly common which had been inclosed, although the ancient way to the well which existed before the inclosure had been extinguished under it. (*Race* v. *Ward*, 7 Ell. & Bl. 384.)

It is an elementary rule in pleading, that when a state of facts is relied

on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the *locus in quo* became a highway; and if the plaintiff's case is that a *locus in quo*, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. (*Williams* v. *Wilcox*, 8 Ad. & Ell. 331.) In all cases for disturbance of a way, the obstruction ought to be charged in the pleadings in the thing itself to which the party has a right, and if charged generally, the declaration would be bad. Much more then, when the mode of the obstruction is stated, and that not in the thing where the right is claimed. (*Tebbutt* v. *Selby*, 1 Nev. & P. 717; 6 Ad. & Ell. 786.) Where in an action for wrongfully stopping up a way the precise locality of the way is material to the defence, the defendant is bound to show it in his pleadings. (*Ellison* v. *Iles*, 3 Per. & D. 391; 11 Ad. & Ell. 665.) Where in an action of trespass for disturbing a right of way the plaintiff averred that the defendant used and enjoyed the right of way mentioned in the plea, but that he did so under the plaintiff's leave and licence, the plaintiff is bound to show a licence co-extensive with the right claimed in the plea, and admitted by the replication. (*Colchester* v. *Roberts*, 4 Mees. & W. 769.) By an inclosure act, it was enacted, that all ways over a certain field, called West Field, allotted to B., should be extinguished from the time of the making and completion of a new road, as therein directed, with a proviso that nothing in the act should extend, or be construed to extend, to deprive A., his heirs or assigns, or his or their agents, &c., of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of rebuilding, repairing, opening or shutting the sluices thereon, or to cleanse the same: it was held, that this reserved to A. his right of way unimpaired over West Field, for the purposes mentioned in the act. (*Adeane* v. *Mortlock*, 7 Scott, 189; 5 Bing. N. C. 236; 3 Jur. 105.)

An ancient public bridle way existed for the greater part undefined over common inclosed land, the remaining part being through old inclosures. By an award of inclosure commissioners, under a local act, the road was altered in some parts, and defined throughout within narrow limits, was set out as "one public and bridle road and private carriage road for the use" of certain private individuals named in the award, and to be kept in repair by them. No order of justices for stopping up or diverting the old road or certificate of the sufficiency of the new road had been obtained: it was held, that the award did not operate under the General Inclosure Act, 41 Geo. 3, c. 109, as a diversion or stopping up of the public bridle road and setting out of a new one, but that the public had the same right of passage as before, and therefore that the parish in which the road lay remained liable to do such repairs, as were requisite to maintain it a public bridle road. (*Reg.* v. *Cricklade*, 14 Q. B. 735; 19 Law J., M. C. 169, Q. B.; 14 Jur. 690. See *Gwyn* v. *Hardwicke*, 1 H. & N. 49; 25 L. J., M. C. 97.)

Action for disturbance of ways.

An action on the case lies for the disturbance of a right of way, created either by reservation, grant or prescription; (Com. Dig. Action on the Case for Disturbance, (A. 2); 1 Roll. Abr. 109;) and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use. (*Loughton* v. *Ward*, 1 Lutw. 111.) But such action will not lie for the disturbance of a highway, unless the plaintiff has sustained some special damage. (Co. Litt. 56 a; 5 Rep. 73 a; 2 Bing. 263, 266; *Rose* v. *Groves*, 5 Man. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 1002; *Blagrave* v. *Bristol Waterworks Company*, 1 H. & N. 369.)

The Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 53, takes away the common law right of action for an interference under the powers of a railway company with a private right of way, except when special damage has been sustained. (*Watkins* v. *Great Northern Railway Company*, 16 Q. B. 961; 20 Law J., Q. B. 391.)

In an action of trespass for breaking the plaintiff's close, which was set out by abuttals, and pulling down certain posts and bars then standing thereon, the defendants pleaded that there was a public footway over the said close, and that the defendants, because the posts and bars obstructed the footway, pulled them down. The replication traversed the public footway: it was held, that on these pleadings the defendants were entitled to a verdict on proving a right of footway over any part of the close, and were not bound to prove a right of way over the spot where the posts and bars stood. (*Webber* v. *Sparkes*, 10 Mees. & W. 485; 12 Law J. (N. S.) 41. See *Wood* v. *Wedgewood*, 1 C. B. 273.)

In an action of trespass for breaking and entering the plaintiff's close, called, &c., and cutting down and prostrating 100 yards of his rails there standing, the defendants pleaded a public right of way over the close, and that they were using the said way, and because the said rails were wrongfully erected upon, and standing in and obstructing the said way, they prostrated the same, &c., which are the same supposed trespasses, &c. The replication was, that the said rails were not standing in the said way, in manner, &c. Issue was taken thereon. The defendants had cut down some rails of the plaintiff standing on a public highway in the close described, and other rails belonging to him, which were in the same close and not on the highway. It was held, that the plaintiff could not recover; for, by taking issue on a plea which restricted the matter of dispute to the highway, he had excluded himself from proof as to rails in any other part of the close; and, to recover for these, he should have new assigned. (*Bracegirdle* v. *Peacock*, 8 Q. B. 174.)

A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was in the thoroughfare, suffered a loss of custom: it was held sufficient special damage to entitle him to his action on the case. (*Wilkes* v. *Hungerford Market Company*, 2 Scott, 446; 2 Bing. N. C. 281; 1 Hodges, 281.) In *Iveson* v. *Moore*, 1 Lord Raym. 186, it was held, that the preventing of colliers from coming to a colliery by obstructing a public highway, by which the benefit of the colliery was lost, was such a damage as would enable a man to maintain an action for the nuisance. (See *Rose* v. *Miles*, 4 Maule & S. 101; *Rose* v. *Groves*, 5 Mann. & G. 620, *post*.)

Liability of owner for negligence.

Where an owner of the soil permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to a person lawfully availing himself of such permission, though he would not be liable for an accident caused by the ordinary risks attaching to the nature of the place, or the business there carried on. (*Gallagher* v. *Humphrey*, 10 W. R. 664.)

An owner of land having a private road for the use of persons coming to his house, gave permission to a builder who was engaged in building on the land to place materials upon the road. The builder availed himself of such permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage: it was held that the builder was liable to an action. (*Corby* v. *Hill*, 4 C. B. (N. S.) 556; 4 Jur. (N. S.) 512; 27 Law J., C. P. 218; *Belch* v. *Smith*, 7 H. & N. 736.)

Action by reversionar.

A reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversioner; for, in order to entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. (*Baxter* v. *Taylor*, 4 B. & Ad. 72; *S. C.*, 1 Nev. & M. 11. See *Jackson* v. *Pesked*, 1 Maule & S. 234; *Alston* v. *Scales*, 2 Moore & Scott, 5.) A reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right. (*Hopwood* v. *Schofield*, 2 M. & Rob. 34. See *Young* v. *Spencer*, 10 B. & Cr. 145.) A declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut and fastened a certain gate, standing in and across the way, and wrongfully kept the same so locked, &c., and thereby

obstructed the way, and that by means of the premises the plaintiff was injured in his reversionary estate: it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, and it must be assumed after verdict that evidence to that effect had been given. (*Kidgill* v. *Moor*, 9 C. B. 364.) If a road, when made, was such as was authorized by a reservation in a lease, the intention to use it for a purpose not authorized is no ground for an action by the reversioner, though, if the intent were carried into effect, the tenant in possession may be entitled to bring an action of trespass. (*Durham and Sunderland Railway Company* v. *Walker*, 2 Q. B. 940.)

Forms of pleadings.

In the Schedule to the Common Law Procedure Act, 15 & 16 Vict. c. 76, the following forms of pleading are given: "That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof, for twenty years before this suit, enjoyed, as of right and without interruption, a way on foot and with cattle from a public highway over the said land to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of the said way." The form of replication to the above plea is, "That the occupiers of the said land did not for twenty years before this suit enjoy, as of right and without interruption, the alleged way."

Injunction.

Where the lessees of a colliery had agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, and the owner of the first colliery had granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees became possessed of the first colliery and the right of way, an injunction was granted to restrain him from removing the materials and destroying the way. (*Newmarch* v. *Brandling*, 3 Swanst. 99.)

It was stipulated by an agreement between the parties to a suit that the plaintiff, his heirs and assigns, should have full and free permission "to use at all times the roads and ways in and through the defendant's estate." There were two roads traversing the estate, at a further extremity of which, where his land terminated, certain existing obstructions were continued by the defendant, so that the plaintiff, whilst he had the use of the roads over the estate, could not pass beyond it. An injunction was granted to restrain the defendant from making and continuing the obstruction at the extremity of his land. (*Phillips* v. *Treeby*, 8 Jur., N. S. 999.)

A canal act empowered the proprietors of mines and their lessees to make railways or roads across the lands of other persons intervening between the mines and the canal to convey their minerals to the canal. In 1843, an agreement was entered into between the lessees of coal mines and the owners of intervening lands to make a tramroad across them subject to an annual rent of 5*l.* 5*s.* The lessees afterwards abandoned the tramroad, and, without any consent except that of the tenant, made a railroad across the lands in a different direction from the tramroad. They also erected an engine-house, for which they subsequently agreed with the mortgagee in possession to pay an additional rent of 1*l.* 15*s.* The defendant subsequently became owner of the lands, and gave notice to the lessees that he should require an annual payment of 35*l.*, and the lessees refusing to pay that sum he gave them notice to cease the use of the railway, and subsequently he took up the rails. Upon a bill filed by the lessees, it was held, that the defendant was bound by the agreement and the acts of his predecessors, that the abandonment of the tramroad for a railway had not affected the rights of the parties, that the defendant was not justified in taking up the rails, and that the plaintiffs were entitled to restore them, the defendant being answerable in damages for the loss sustained by the plaintiffs. (*Mold* v. *Wheatcroft*, 27 Beav. 510; 6 Jur., N. S. 2.)

Since the act 25 & 26 Vict. c. 42, the Court of Chancery refused an injunction in respect of a footway, and made a reference to chambers to ascertain the amount of damages. (*Wedmore* v. *Mayor, &c. of Bristol*, 7 L. T., N. S. 459.)

5. OF WATERCOURSES.

Nature of the right to water.

The right of conducting water through one estate for the use and convenience of an adjoining estate, is an incorporeal hereditament of the class of easements, or a predial service, which was known to the civilians under the name of service *aquæ ductus* (Domat's Civil Law, L. 1, T. 12), and is of use when Seius has a scarcity of water, and requires it for watering his cattle, or his lands, or for making his mill go, or for any other such advantage to his ground. (2 Frederican Code, 144.)

In *Acton* v. *Blundell*, 13 Mees. & W. 348, 349, the court considered the following to be a correct exposition of the law as laid down in *Mason* v. *Hill*, 5 B. & Ad. 1; 2 Nev. & M. 747; and substantially declared by Sir *John Leach*, V. C., in *Wright* v. *Howard*, 1 Sim. & S. 190. The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that neither can the proprietor above diminish the quantity or injure the quality of the water which would naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above. The principles upon which the right to the use of water depends, were thus expressed by Sir *J. Leach*, V. C., in a luminous judgment:—"*Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations. No proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant." (*Wright* v. *Howard*, 1 Sim. & Stu. 203; the foregoing remarks were adopted by Lord *Tenterden*, C. J., *Mason* v. *Hill*, 3 B. & Ad. 312, 313; and see 5 B. & Ad. 18; *Ennor* v. *Barwell*, 2 Giff. 426, 427.)

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of *Fleta* and of *Blackstone*), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler* v. *Wilkinson*, 4 Mason's American Rep. 401, in the courts of the United States, as "an incident to the land; and that whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law." (*Per Tindal*, C. J., in *Acton* v. *Blundell*, 13 Mees. & W. 349, 350.)

In *Prescott* v. *Phillips*, cited 6 East, 213; 5 B. & Ad. 23; 2 Nev. & Man. 747, it was ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could

give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above nineteen years, which was shown in that case, was not sufficient." (See *Cox* v. *Matthews*, 1 Ventr. 237, cited 5 B. & Ad. 25.) For the important alterations which have been made on this subject by stat 2 & 3 Will. 4, c. 71, ss. 2, 4, 5, 6, 8, see *ante*, pp. 6, 17, 21, 25, 27. It seems to be a correct proposition of law, that the possessor of land through which a natural stream runs has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below; that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant; and that whether the loss by diversion of the general benefit of such a stream be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting. (See *Wood* v. *Waud*, 13 Jur. 472, *post*.)

The converse proposition, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a good purpose has a good title to it against all the world, including the proprietor of the lands below, who has no right of action against him unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes, and in default of his having done so, may altogether deprive him of the benefit of the water, is said to have originated in a mistaken view of the principles laid down in *Bealey* v. *Shaw*, 6 East, 208; *Saunders* v. *Newman*, 1 B. & Ald. 258; *Williams* v. *Morland*, 2 B. & C. 913. In *Williams* v. *Morland*, (2 B. & C. 910,) *Bayley*, J., said, "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it: subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public." In *Liggins* v. *Inge*, (7 Bing. 692,) *Tindal*, C. J., said, "Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined, things the property of which belongs to no person, but the use to all. And, by the law of England, the person who first appropriates any part of this water flowing through his land to his own use, has the right to the use of so much as he then appropriates against any other." (See 2 Black. Comm. 14; *Bealey* v. *Shaw*, 6 East, 208.) Lord *Denman*, C. J., however, said, "that none of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water." (*Mason* v. *Hill*, 5 B. & Ad. 23.) His lordship, after citing from the Roman law, 2 Inst. tit. 1, s. 1; Dig. book 43, tit. 13, 13, s. 4, proceeded thus, "From these authorities, it seems that the Roman law considered running water, not as a *bonum vacans*, in which any one might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only. We think that no other interpretation ought to be put upon the passage in Blackstone (2 Bl. Com. 14), and that the *dicta* of the learned judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other way than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant, though he may be the proprietor of the

land above, has any right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein. (*Mason* v. *Hill*, 5 B. & Ad. 24.) See *Arkwright* v. *Gell* (5 Mees. & W. 220), where *Parke*, B., said, "The object of the judgment in *Mason* v. *Hill* was to set right the mistaken notion which had got abroad in consequence of certain *dicta* in *Williams* v. *Morland* (2 B. & C. 910), that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it."

The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has a right to the *usufruct* of the stream of water which flows through it.

This right to the benefit and advantages of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state, but it is only a right to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. (*Per Parke*, B., *Embrey* v. *Owen*, 6 Exch. 369.)

The position, that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer: and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. (*The Earl of Rutland* v. *Bowler*, Palmer, 290.) But it is a very different question whether he can take away from the owner of the land below one of its natural advantages which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to an useful purpose. If this be so a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away: and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another. (*Mason* v. *Hill*, 5 B. & Ad. 18.)

To constitute a watercourse in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by user. (*Briscoe* v. *Drought*, 11 Ir. Com. Law Rep., N. S. 250, Exch. Cham.)

For upwards of fifty years the rain fall and drainage of a main street of a town situate on the slope of a hill had, for the convenience of the inhabitants, run down through a kennel on each side of the street into a culvert which connected the kennels at the end of the street, and discharged its contents into an open lane through which they flowed into the plaintiff's drain, and were used by him for agricultural purposes, the surplus flowing off into the Shannon. There was no definite channel for the stream of water and sewerage to flow in through the lane, which was the passage to the fair green of the town, and was the property of the defendant; but the lane being lower on one side than the other, the stream flowed along the lower side, spreading more or less over the surface of the lane, and sometimes in floods covering the entire surface. The defendant having stopped the passage by which the stream at the end of the lane flowed into the plaintiff's drain, and diverted the water into a drain upon his own land: it was held,

that there was evidence of a watercourse, viz. water flowing between banks more or less defined. (*Ib.*) It was held, also, as long as the inhabitants of the town permitted the water and sewerage to continue so to flow, the plaintiff had as against the defendant required a right by presumption of grant to have it continue to flow into his drain, and that the defendant had as against the plaintiff acquired in like manner a correlative right to have the flow continue without such obstruction by the plaintiff as would flood or injure the defendant's lands. (*Ib.*) It seems that the inhabitants of the town had as against both the plaintiff and defendant, and all intervening proprietors, acquired an easement of having their drainage transmitted through the lane into the Shannon, but that neither the plaintiff nor the defendant, nor any other intermediate proprietor, could as against the inhabitants of the town insist on the continuance of the flow of water and sewerage, if the inhabitants or any of them chose to stop or divert its flow, or alter their system of drainage. (*Ib.*) When the question at the trial is whether there is a watercourse or not, the judge ought, before he leaves that question to the jury, to instruct them as to what constitutes a watercourse in law. (*Ib.*)

Ownership of soil of rivers.

Where a river is not navigable, the presumption is, that the soil is the property of the owners on each side to the middle of the river, and consequently they are entitled to a co-extensive right of fishing. And if a man is owner of the land on both sides, by common presumption he is owner of the whole river. (Hale, de Jure Maris, cap. 1; *Carter* v. *Murcot*, 4 Burr. 2162; Harg. L. Tracts, 5; *Rex* v. *Wharton*, 12 Mod. 510.) Where in trespass *quare clausum fregit* the plaintiff claimed the whole bed of the river flowing between his land and the defendant's, the defendant contending that each was entitled *ad medium filum aquæ*; it was held, that evidence of acts of ownership exercised by the plaintiff upon the banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm of C. adjoining the defendant's land, and also of repairs done by the plaintiff to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff. (*Jones* v. *Williams*, 2 Mees. & W. 326.)

A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. (*Lord* v. *Commissioners of Sydney City*, 12 Moo. P. C. C. 473.)

In the case of a navigable river, the presumption is, that the soil is vested in the crown, yet a subject may claim a prescriptive right to a several fishery in an arm of the sea even against the crown. (*Mayor, &c. of Oxford* v. *Richardson*, 4 T. R. 439. See *Rex* v. *Smith*, 2 Doug. 411.) But by grant or prescription a subject may have the interest in the water and soil of navigable rivers, as the City of London has been stated to have the soil and property of the Thames by grant (Dav. 56 b; Com. Dig. Navigation (B); but this has been questioned in some modern cases. (*Attorney-General* v. *Corporation of London*, 8 Beav. 270; 2 Mac. & G. 247; 2 Hall & T. 1; *Attorney-General* v. *Johnson*, 2 J. Wils. C. C. 87.)

With respect to rivers that are not navigable, the proprietors of the banks on each side have an interest in the fishery of common right. So that every inland river that is not navigable appertains to the owners of the soil. Where such rivers run between two manors, and are the boundaries between them, one moiety of the river and fishery belongs to one lord, the other to the other lord. (Davies, R. 155.) A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. If the weir when so first granted obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public and navigable river, the Severn, where the king's subjects had a right to navigate, and that the rest of the river was choked up, so that the defendants could not navigate without breaking down the weir. Replication, that the part where the weir stood

was distinct from the channel where the right of navigation existed, and was not a public navigable river. Rejoinder, that the part was a part of the Severn, and that the king's subjects had a right to navigate there when the rest was choked up; and that the rest was choked up. Surrejoinder, traversing the right. It was held, that in support of this traverse the plaintiff might show user to raise presumption of such a grant as above, and was not bound for the purpose of introducing such proof to set out his right more specifically on the record. Where the crown had no right to obstruct the whole passage of a navigable river it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. (*Williams* v. *Wilcox*, 8 Ad. & Ell. 314; 3 Nev. & P. 606.)

Where a grant of wreck was made by Hen. 2, and confirmed by Hen. 8, to the proprietor of land on the coast, who within forty years had constructed an embankment across a small bog to reclaim sea mud, and had since asserted an exclusive right to the soil, without opposition, it was held, that from such usage anterior usage might be presumed; and that the usage, coupled with the terms of the grant, served to elucidate it, and to establish the right so asserted. (*Chad* v. *Tilsed*, 2 Brod. & Bing. 403.) By an act of parliament, reciting that a certain tract of land daily overflowed by the sea, and to which the king in right of his crown claimed title might be rendered productive if embanked, and that his majesty had consented to such embankment, a part of the said land, called Lipson Bay, was granted to a company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore, and overgrown with brushwood and old trees. The company, in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides. It was held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown, and did not therefore pass to the embankment company by the act of parliament. (*Lowe* v. *Govett*, 3 B. & Ad. 863.) The use of the banks of the river for more than twenty years by fishermen, who have occasionally sloped and levelled them, is evidence of a grant by the owner of the soil, although both the fishery and landing-place once belonged to the same person, and there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used. (*Gray* v. *Bond*, 2 Brod. & Bing. 667.)

Acts of ownership exercised by the lord of a manor, upon the seashore adjoining, between high and low water mark—such as the exclusive taking of sand, stones and seaweed—may be called in aid to show that the shore is parcel of the manor, where an ancient grant under which the manor appears to have been held, and which professes to grant the manor with "wreck of the sea," "several fishery" and other rights of an extensive description, does not expressly purport to convey "*littus maris*." (*Calmady* v. *Rowe*, 6 C. B. 861.)

Navigable rivers.

Whether a river be navigable or not is a question of fact for the jury. (*Vooght* v. *Winch*, 2 B. & Ald. 662.) The flux or reflux of the tide is evidence of a navigable river. (*Miles* v. *Rose*, 5 Taunt. 705.) The channel of a public river is properly described as a common highway (Anon. 1 Campb. 517, n.), although the analogy between it and a highway on land is not complete in all particulars; and there is no one circumstance which more decisively affixes on a river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it. (*Mayor, &c. of Colchester* v. *Brooke*, 7 Q. B. 373.)

By 13 Geo. 2, c. 36, s. 2, a corporation was empowered to do all things necessary to make the Medway navigable, and the river so to be made navigable and all lands to be by them made use of for the benefit of the

navigation were thereby vested in the corporation, their successors, heirs and assigns for ever: it was held that the act conferred upon the corporation such an interest in all the water of the river for the purposes of the navigation as were interfered with by the abstraction of any part by the riparian proprietors, and that it was not necessary that there should be an actual damage to the navigation to entitle the corporation to sue for such abstraction. (*Medway Navigation Company* v. *Earl Romney*, 9 C. B., N. S. 575; 7 Jur., N. S. 846; 30 L. J., C. P. 263.

The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is therefore no excuse, if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding. If property (as oysters) be placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property, by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. And therefore, the fact that such property was a nuisance is no excuse for running upon it negligently. *Mayor, &c. of Colchester* v. *Brooke*, 7 Q. B. 339.

The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it. (*Case* v. *Midland Railway Company*, 27 Beav. 247; 5 Jur., N. S. 1017; 28 L. J., Chan. 727.

Experiments were directed to be made by a civil engineer in order to ascertain the effect of steam navigation on a canal. (*Ib.*)

A perpetual injunction was granted to restrain a canal company from preventing a railway company using steam on the canal, the railway company undertaking not to exceed a speed of three miles an hour. (*Ib.*)

A judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive. On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. (*Miles* v. *Rose*, 1 Marsh. 313; 5 Taunt. 705; 4 Maule & S. 101.) It was held in that case that the cutting of rushes in the creek by strangers, without interruption, was a strong circumstance to show that the river was public, and the fact that pleasure-boats were accustomed to sail up the creek was also relied on. But a right to a track path on each side of the river Tees (alternately) for towing without paying any acknowledgment, was found upon a trial at bar. (*Pierce* v. *Lord Falconberge*, 1 Burr. 292.) If an act of parliament for enclosing and allotting the commons and waste lands of a parish through which a navigable river flows empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. (*Simpson* v. *Scales*, 2 Bos. & P. 496.) A statute authorizing the making of a new course for a navigable river, and turning the whole part into a floating harbour, will not without words for the purpose put an end to a public towing-path upon that part; but such towing-path will be liable to be used as such for the purposes of the harbour, and it will make no difference though the river was a tide river, and not navigable at low water. (*Rex* v. *Tippett*, 1 Russ. on Crimes, 346, 3rd ed.)

Rights as to seashore.

The public at large have no common law right to bathe in the sea, and, as incident thereto, of crossing the shore on foot or with bathing machines for that purpose. (*Blundell* v. *Catterall*, 5 B. & Ad. 268.) So there is not at common law a general right in the public of entering the seashore for the purpose of taking seaweed. (*Howe* v. *Stowell*, 1 Alcock & Napier, 348.)

A grant by the crown to a subject of the soil of the seashore below low

water mark and of a toll for the anchorage of vessels there, may be presumed to have had a legal origin; and such a toll, if found to exist, may be enforced by distress. (*Whitstable Fishery* v. *Gann*, 11 C. B., N. S. 387; 31 L. J., C. P. 372.)

The seashore between high and low water mark may be parcel of the adjoining manor; (*Constable's case*, 5 Rep. 107; Hargrave's Law Tracts, 12;) and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence, to show that such seashore is parcel of the manor. Thus, evidence of modern acts of ownership was held to have been properly admitted as evidence, to show that grants by King John and King Edward I., of certain lands by the terms of Terra de Gower, "and Dominium de Terræ de Gower," included the sea coast down to low water mark. *Parke*, B., was of opinion, that all ancient documents, where a question arises as to what passed by a particular grant, can be explained by evidence of modern usage. (*Duke of Beaufort* v. *Mayor, &c. of Swansea*, 3 Exch. 413.)

Where a lord of a manor claimed title to the seashore between high and low water, and produced in evidence a deed or grant from the crown of a manor adjacent to the shore, and also proved acts of ownership over the foreshore in himself, and those under whom he claimed. The real question to be left to the jury is, whether the grant, coupled with the evidence of ownership, was sufficient to induce them to believe that the shore in question passed by the grant. (*Attorney-General* v. *Jones*, 6 L. T., N. S. 655, Exch.)

An information for the purpose of having the title of the crown to alluvium gained from the sea, declared and established, is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence showing a title in the crown to some lands in the possession of the defendant. (*Attorney-General* v. *Chambers*, and *Attorney-General* v. *Rees*, 4 De G. & J. 55. See *Godfrey* v. *Little*, 2 Russ. & M. 633.) But where the witness, in support of the information, deposed that the alluvium had been added to the main land, not gradually and imperceptibly, but rapidly; it was held, that a sufficient case had been made for directing issues. (*Ib.*)

It seems that the title to alluvium arising from artificial causes, does not differ as to the rights of landowners, from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore, and not from acts done with a view to the acquisition of the seashore. (*Ib.*) Where the acts of ownership relied on consisted merely of turning cattle upon a marsh which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle were allowed to stray without interruption, Lord *Chelmsford*, C., said, "The effect of acts of ownership must depend partly upon the acts themselves, and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it; there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition. (*Attorney-General* v. *Chambers*, 4 De G. & J. 55, see p. 65.)

In *Scratton* v. *Brown*, 4 B. & C. 485, where the advance of the sea had been gradual and imperceptible, and the high and low water mark had varied in the same degree, it was held, that the freehold of the grantee of the shores and sea grounds shifted as the sea receded or encroached. (See 2 Bl. Com. 262; *Rex* v. *Lord Yarborough*, 3 B. & C. 91; *The Hull and Selby Railway Company*, 5 M. & W. 327.)

The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded on statute or on usage. (*Ball* v. *Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra*.)

The privilege of a watercourse is not confined to private individuals; it

may be vested in a corporation, as where there was a grant to the corporation of Carlisle of water, for the purpose of turning the city mills. (8 East, 487.)

Ferry.

The inhabitants of a place may prescribe for such an easement, as where the inhabitants of a vill, or the parishioners of a parish, alleged a custom or usage of keeping an ancient ferry-boat. (3 Mod. 294. See *ante*, pp. 31, 32.) A right of ferry is a matter in which the public are interested, and of which therefore reputation is evidence, and so also is a verdict or judgment of a court of competent jurisdiction, touching the same right, although between other parties. (*Pim* v. *Currell*, 6 Mees. & W. 234.)

A ferry is the exclusive right to carry passengers across a river or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land, and is wholly unconnected with the ownership or occupation of land. (*Newton* v. *Cubitt*, 12 C. B., N. S. 32; 9 Jur., N. S. 544. See *Reg.* v. *Matthews*, 5 El. & Bl. 546; 1 Jur., N. S. 1204; 25 Law J., M. C. 7.)

In an action for an evasion of an ancient ferry, by carrying passengers across the river near thereto, the court refused to allow the defendant to add a plea, alleging a variety of circumstances to show that from the altered state of the neighbourhood, public convenience required that which the defendant had done, holding that the plea was clearly bad, and at the most amounting to not guilty. (*Newton* v. *Cubitt*, 5 C. B., N. S. 627; 5 Jur., N. S. 847; 28 Law J., C. P. 176.)

The right to water, how obtained.

It requires a deed to create a right and title to have a passage for water. (4 East, 107; 5 B. & Cr. 232; *ante*, p. 58.) Although the right to a flow of water formerly belonging to the owner of a mill can only pass by grant, as an incorporeal hereditament, yet after a parol licence to perform works upon a river had been executed, it is sufficient to relieve the party from restoring it to its former state, although the licence has been countermanded. Thus, where the plaintiff's father, by oral licence, had permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiff's mill: it was held, that the plaintiff could not maintain an action against the defendants for continuing the weir, as it was a licence to construct a work in its nature permanent and continuing, and attended with expense to the party using the licence, who might sustain a heavy loss by its being countermanded; and it was the fault of the party himself, if he meant to reserve the power of revoking such a licence after it was carried into effect, that he did not expressly reserve that right when he granted the licence, or limit it as to duration. (*Liggins* v. *Inge*, 7 Bing. 682.) The only ground on which such a parol licence can be held irrevocable is, that it has been acted on and expense incurred. (*Mason* v. *Hill*, 5 B. & Ad. 15; *ante*, pp. 60, 61.)

A company was established by stat. 34 Geo. 3, c. 78, for making and maintaining a certain navigable canal, and by a section, reciting that the erection of steam engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines *for the sole purpose of condensing the steam* used for working them, such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation. The company sued R. in case, for that he being possessed of land within twenty yards of the canal, and of a mill and steam engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing, whereby the company lost and was deprived of the water. The defendant pleaded that he was tenant of land, and was the occupier of a mill erected on the said land and abutting on the canal and of a steam engine in the mill, being the land, mill and engine mentioned in the declaration, and that the defendant and all occupiers of the said land, mill and engine, had for twenty years used as of right the easement of drawing from time to time from the canal such quantities of water as were necessary for other purposes than that of condensing, &c., to wit, for the purposes of supplying the boilers of heating the said mill, of cleansing the boilers and of supplying water to a cistern, to wit, *a cistern on the roof of a*

certain engine-house on the said land, and that the defendant in the exercising of his right drew the water for the purposes aforesaid. The replication traversed the enjoyment and right as alleged. Upon issue thereon it appeared that a mill of the defendant, called the Old Mill, with a steam engine, abutting on the canal, had existed more than twenty years, that within twenty years a new mill with another engine had been erected adjoining to and communicating with the Old Mill, water passing from one to another, and the machinery of the one being worked by power from the other, and that the water of the canal had been used in both mills (in the old during more than twenty years) for the purposes mentioned in the plea, except that of supplying a cistern on the roof of the engine house, there being no cistern in that place. The jury found that the buildings constituted one mill, and that the user proved had been as of right, and a verdict was taken for the company. On motion to enter a verdict for the defendant, it was held, that the justification in respect of a certain mill was supported by the proof of the defendant having occupied and used the water for the old mill during twenty years, and, that if the company meant to rely upon a more modern user in the new mill, they should have new assigned, and that the failure of proof as to the cistern did not entitle the company to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof. (*Rochdale Canal Company* v. *Radcliffe*, 18 Q. B. 287; 21 Law J., Q. B. 297.) The company moved for judgment *non obstante veredicto* on the same issue, and relied upon the act of parliament, and others establishing and regulating their canal, which gave the public a right for the purposes of the navigation to use the canal and the adjoining wharfs and ways, paying certain rates, empowered the company to raise money on the security of such rates, and obliged them to convey all their waste water into the Duke of Bridgewater's canal. It was held, that the company could not consistently with these enactments have granted the water for other purposes than that permitted by the stat. 34 Geo. 3, c. 78, s. 113, and that an actual grant, if proved for the purposes mentioned in the plea, would have been illegal, and no justification, and therefore that the grant for such purposes implied from twenty years' user was no legal defence to the action. (*Ib.*) *Erle*, J., observed, "This is a claim to impose the servitude upon the canal by virtue of twenty years' user. The party seeking to establish such a claim must show a grant by a person capable of making the grant relied upon; now the grant here is by persons having no distinct ownership of the water, but entitled only to the flow of it for the purposes of the navigation, and having no right to the surplus. If it had appeared by direct evidence that the company had made a grant to the purport now supposed, setting out their title, that grant would have appeared to be against the right of the public and void upon the face of it. The twenty years' user therefore could establish no right." (*Ib.* 315.)

By a navigation act the undertakers were authorized to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose, and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as the commissioners under that act should direct. By a subsequent clause any persons injured by the works were to receive compensation, to be assessed by the commissioners. The commissioners were named in the act, and power was given them to appoint successors from time to time. The navigation was made, and as part of it a dam across a river was enlarged. Subsequently all the commissioners died without having appointed successors. The company afterwards raised the dam to the injury of a mill-owner below. It was held, by *Wightman*, *Erle* and *Crompton*, Js., that the power to alter the dam still existed, even though the mill-owner should no longer have any means of obtaining compensation, as to which they gave no opinion. Lord *Campbell*, C. J., dissented, and held that the compensation clause having been incapable of execution by extinction of the commissioners, the powers which the act had conferred upon the company, to cause injury to other persons, could no longer be exercised. (*Kennet and Avon Navigation Company* v. *Witherington*, 18 Q. B. 581.)

How to be used. At common law, a proprietor of land adjoining a river has a right to raise

the banks, from time to time as occasion may require, upon his own land, so as to confine the flood-water within the banks, and to prevent it from overflowing his land, with this single restriction, that he does not thereby occasion any injury to the lands or property of other persons. Therefore, where the occupiers of lands adjoining a canal who erected artificial banks called fenders, to prevent the flood-water escaping upon their land, in consequence of which the canal banks were enlarged, and the navigation obstructed, were indicted and found guilty, the judgment was reversed, and a *venire de novo* awarded, because the jury had not found whether, before the making of the canal or embankment, the landowners had exercised the right of raising the banks from time to time as occasion required, so as to confine the water at all times within the ordinary channel, and prevent it in times of flood from overflowing the banks, nor whether the passage over the banks in times of flood was the usual and ordinary course. (*Rex* v. *Trafford*, 1 B. & Ad. 874; *S. C.*, in error, 8 Bing. 204; 1 M. & Scott, 401; 2 Cromp. & Jerv. 265; 2 Tyrw. 201.) There was an appeal in the last case to the House of Lords, 20th June, 1834, when the parties were advised to come to an arrangement, and the hearing was postponed *sine die*.

The proprietor of lands along which there is a flood stream cannot obstruct its old course by a new waterway, to the prejudice of the proprietor of lands on the opposite side. Thus, a proprietor of land on the bank of a river, who had commenced the building of a mound, which, if completed, would, in times of ordinary flood, have thrown the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by a perpetual interdict, in Scotland, from the further erection of any bulwark, or other work, which might have the effect of diverting the stream of the river, in time of flood, from its accustomed course, and throwing the same on the lands of the other proprietor; Lord Chancellor *Lyndhurst* observing, that it was clear, beyond the possibility of a doubt, that by the law of England such an operation could not be carried on. (*Menzies* v. *Breadalbane*, 3 Bligh, N. S. 414, 418.)

The declaration stated, in substance, that the defendant wrongfully placed timber in a certain navigable river, whereby the rightful access to the plaintiff's public-house was obstructed, and divers persons who would otherwise have come to the plaintiff's house, and taken refreshments there, were prevented from so doing: it was held, that the declaration stated no act on the defendant's part amounting to a public nuisance: but that if it had done so, the plaintiff might nevertheless maintain an action for the particular injury to himself, and that there was a sufficient allegation of special damage. (*Rose* v. *Groves*, 6 Scott, N. R. 645; 5 Man. & G. 613; 3 Dowl. N. S. 61; Law J. 1842, C. P. 251; 7 Jur. 951.)

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner, to use any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it. (*Brown* v. *Mallett*, 5 C. B. 599.) The owner is therefore not liable to an indictment, or to an action, at the suit of a party sustaining special damage in respect of such omission. (*Ib.* See *post*, p. 112.)

A count in case stating that the plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed, and of right entitled, to have the free use and navigation of the river, for the purpose of passing in boats and conveying goods to the messuage, and convenient access to the messuage from the river; but that the defendant fixed barges, planks, &c., in the part of the river near the messuage, and kept and continued the same, and thereby hindered the plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and the plaintiff was thereby put to expense in endeavouring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently showing a particular injury to the individual. (*Dobson* v. *Blackmore*, 9 Q. B. 991.) But if the jury negative actual damage, the plaintiff cannot have judgment. (*Ib.*) A count, stating the plaintiff to be a reversioner of premises occu-

pied by his tenants, and abutting on a public navigable river; and that the plaintiff, and all the liege, &c., were accustomed of right to have free navigation and passage on the river for boats, &c.; and the plaintiff was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to approach the same, and pass to the premises from the river, and unload the boats on the premises, without obstruction; but that the defendant fixed barges, planks, &c., in the part of the river near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises, from the river, and hindered the unloading of boats on the premises; and by means thereof the plaintiff was injured in his reversionary interest: was held to be bad in arrest of judgment, as not showing a damage to the reversionary interest. (*Dobson* v. *Blackmore*, 9 Q. B. 991.)

Right of taking water for irrigating lands.

Whether a riparian proprietor may use the water of a stream for the purpose of irrigation, if he again return it into the river with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. The right of taking of water for such a purpose is a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application. If the irrigation take place not continuously but only at intermittent periods, when the river is full, and no damage is done thereby to the working of a mill on the stream, and the diminution of water is not perceptible to the eye, it is such a reasonable use of the water as is not prohibited by law. (*Embrey* v. *Owen*, 6 Exch. 372.) To an action by the plaintiffs, the occupiers of a water grist mill, against the defendant, a riparian proprietor, for diverting the stream, the defendant pleaded, first, not guilty; fourthly, that at certain periods of the year, when the water was more than sufficient for the use of the mill, the defendant diverted small and reasonable quantities of the water for the purpose of irrigating certain closes belonging to her on the bank of the stream, which quantities of water, except that which was absorbed and used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but only intermittent; that the quantity of water absorbed and lost was small and "inappreciable," and that the diversion caused no damage to the plaintiff's mills,—Replication *de injuriâ* and issue thereon. At the trial it was proved, that the diversion was not continuous, and that it caused no diminution of the water cognizable by the senses. The judge in directing the jury left it to them, with respect to the issue on not guilty, to say whether there was any *sensible diminution* of the water by reason of the diversion, and, with respect to the other issue, he told them that he had a difficulty in affixing a legal meaning to the term "inappreciable," but suggested that it might mean a quantity so inconsiderable as to be *incapable of value or price*. It was held, that this was not, under all the circumstances, such an unreasonable use of the water as to be prohibited by law, and therefore that the issue on not guilty was rightly found for the defendant. It seems that the word "inappreciable" meant "incapable of being estimated or valued," and in that sense the fourth plea was not proved. Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, and the law will presume damage. (*Embrey* v. *Owen*, 6 Exch. 353.)

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. (*Sampson* v. *Hoddinott*, 1 C. B., N. S. 590; 3 Jur., N. S. 243; 26 L. J., C. P. 148.) By usage he may acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. (*Ib.*) The plaintiff had immemorially enjoyed the

benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; and although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that the plaintiff was enabled to irrigate his meadows effectually; but of late the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water, after it had passed the mill and before it reached the plaintiff's meadows; and although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully: it was held, that this detention of the water was an use of it, which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action. (*Ib.*) In such a case it is not necessary to show actual damage to the plaintiff's reversionary interest; it is enough to show an obstruction of his right; and such obstruction of his right being shown, the law will infer damage. (*Ib.*) The right of the riparian proprietor is limited to natural streams, and does not attach in the case of artificial cuts or drains. (*Ib.*)

By a deed between A., the owner of Greenacre, and B., the owner of Blackacre, it was agreed that A. should have, during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the water should be under the control and at the disposal of B. and his assigns, and should be allowed to flow in a free and uninterrupted course towards and into Blackacre, through a channel therein partially described, and that the owner of Greenacre should cleanse and repair the said channel, with liberty for B., his heirs, &c., to do so on his default. It was held, that this deed operated as a grant to B. of an easement of the watercourse therein described at all times except the first ten days of each month, and that he thereby acquired a right in respect of that channel, and that an alteration of this channel was an injury to his right, in respect of which B. might maintain an action, although no actual damage had occurred. (*Northam* v. *Hurley*, 1 Ell. & Bl. 665; 17 Jur. 672; 22 Law J., Q. B. 183.) It was held also, that a declaration describing the right as an easement to which the plaintiff was entitled by reason of his possession of Blackacre, without referring to the deed, was sufficient. (*Ib.*) The judgment in this case was founded on the effect of the deed which governed the rights of the parties, and, in so deciding, the court did not intend at all to limit the salutary principle laid down in *Embrey* v. *Owen*, (6 Exch. 353,) to the effect that the superior riparian proprietors may use the stream for all reasonable purposes while on their land, provided they send it on without material diminution or alteration to inferior proprietors. (*Ib.* 673.)

Evidence of right.

The long enjoyment of a watercourse is the best evidence of right, and raises a presumption of an agreement; and proof of a special licence, or that it was limited in point of time, must come from the party who opposes the right. (*Finch* v. *Resbridger*, 2 Vern. 390; Gilb. Eq. C. 3.) Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow of water in his own lands, without diminution or alteration; but an adverse right may exist, founded on the occupation of another; and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. Before the stat. 2 & 3 Will. 4, c. 71, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it, derived from grant or act of parliament. (*Bealey* v. *Shaw*, 6 East, 208; *Cox* v. *Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b. See *Dewhirst* v. *Wrigley*, 1 C. P. Coop. 329.)

The enjoyment of water drawn from a brook along an artificial channel, and acts done by the owner of the dominant tenement upon the servient tenement, which, without the existence of an easement, would be tortious

and actionable, may be evidence of a right in the owner of the dominant tenement to the use of the water. (*Beeston* v. *Weate*, 5 El. & Bl. 986; 2 Jur., N. S. 540; 25 L. J., Q. B. 115.) An artificial cut from a brook began at point A. in the close of the defendant to point C., and thence back into the brook. The defendant and the previous occupiers of his farm had been in the habit of turning the water of the brook down the artificial cut at A. for the purpose of irrigating the latter close. The plaintiff occupied a close called the Cow Pasture, near this latter close, and as far back as living memory went he and the previous occupiers of the Cow Pasture had habitually, when the cattle were depasturing there, gone upon the defendant's land and diverted the water from the brook by putting a dam at A., which caused it to flow down the artificial cut, and by putting another obstruction at C., turned it so as to flow into a watering place for cattle in the Cow Pasture. In an action by the plaintiff alleging a right to the use of part of the water of the brook flowing along the artificial cut: it was held, that there was evidence to support the right that the use of the water by the defendant on the servient tenement did not take away from the effect of the use of it by the plaintiff for the dominant tenement, and that the purpose of irrigation for which the cut was made was not a mere temporary purpose. (*Ib.*)

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoy, and still of right ought to have and enjoy, the water of a stream which had been used to flow alongside the lands and premises, is not supported by proof that the plaintiff was a lessee of mines under lands adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. (*Insole* v. *James*, 1 H. & N. 243.)

The owner of land through which a natural stream of water runs (which has been diminished in quantity by having been in part appropriated to the use of works above, for upwards of twenty years, without objection) may, after erecting a mill on his own land, maintain an action against the proprietor of these works for an injury to such mill by a further subsequent diversion of the water. (*Bealey* v. *Shaw*, 6 East, 208. See 5 B. & Ad. 19.)

Presumption of grant.

An ancient watercourse, which had supplied D.'s mill, had been in 1824, and thence until 1826, obstructed by a new road which was made across it, and the supply of water having been thus cut off, a new watercourse was constructed by D. to supply his mill through the lands of A. (through which the original watercourse had passed), and L., in 1853, obstructed the new watercourse. The lands of L. had been in the occupation of tenants from 1827 to 1853. The reversioner did not reside upon them, and the rents were received by a barrister living in Dublin, but who occasionally came to Cork (where the lands were situate) and lodged in the neighbourhood. An action having been brought by L. against D., for removing the obstruction to the watercourse, the latter claiming a title to the flow of the water, and the judge having left to the jury the presumption of a grant to D., and having also told them that they should be satisfied that such grant had been actually executed in fact: it was held, that there was sufficient evidence to leave to the jury a question of presumption of a grant to D. (*Deeble* v. *Linehan*, 12 Ir. Com. Law Rep., N. S. 1, Exch. Cham.) It was held, that there was no evidence or acquiescence on the part of the reversioner sufficient to authorize such question of presumption being left to the jury. (*Ib.*) It was held also, that the jury should not have been required to find that, as a matter of fact, a deed of grant had been actually executed. (*Ib.*)

Alteration in mode of enjoyment.

It is not necessary that the mode of enjoying a watercourse should always have been precisely the same; for where, in an action for a nuisance to a watercourse, the plaintiff declared on his possession, and stated the mill to be an ancient one, it was held to be no defence, that he had within twenty years somewhat altered the wheels. (*Saunders* v. *Newman*, 1 B. & Ald. 258.) In which case it was said by *Abbott*, J., "that the owner is not bound to use the water in the same precise manner, or to apply at the same mill; if he were, it would stop all improvement in machinery. If indeed the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the alteration is by no means injurious, the old

wheel drew more water than the new one." (*Ib.* See *Luttrell's case*, 4 Rep. 87 a.)

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill owner such a right to keep it shut up, that the owner of the land adjoining the ditch would not be justified in reopening the communication, although it might appear that the communication between the ditch and stream was ancient. (*Drewett* v. *Sheard*, 7 Car. & P. 465.) If the owner of a water mill worked by a ground-shot wheel at a low head of water alter the wheel to a breast-shot wheel, which requires a high head of water, and after that for twenty years and more discontinue the use of the breast-shot wheel, and resume the use of the ground-shot wheel, his discontinuance will cause the mill owner to lose his right to the high head of water. (*Ib.*) A right to a watercourse is not destroyed by the owners altering the course of the stream, and the owner may establish his claim, notwithstanding an interruption within twenty years of his action brought to enforce the right. Where the plaintiff had a right to water flowing from the defendant's land across a lane to his own land, and it appeared that "formerly the stream meandered a little down the lane before it flowed into the plaintiff's land, and that in the year 1835 the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises," and this, it was contended, negatived the right claimed in the declaration, *Tindal*, C. J., said, "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment; the making straight a crooked bank or footpath would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself." (*Hall* v. *Swift*, 6 Scott, 167; 4 Bing. N. R. 381. See *ante*, p. 20.) The right to the overflow of water into an old pond is not lost by discontinuing the use of such pond, and obtaining the same or a greater advantage from the use of three new ponds; a substitution of such a nature, and the exercise of the right in a different spot, not being an abandonment of the right. (*Hale* v. *Oldroyd*, 14 Mees. & W. 789. See *ante*, p. 27.)

It seems that nothing of necessity to a building, *e. g.* a gutter *in alieno solo*, to carry off water, &c., is extinguished by unity of ownership. (*Pheysey* v. *Vicary*, 16 Mees. & W. 484.) In *Shury* v. *Piggott* (3 Bulstr. 339; Poph. 166; W. Jones, 145), which was an action on the case for stopping a watercourse, the court held, that the right to the flow of water is not extinguished by unity of ownership, in which respect it is distinguished from a way. *Whitlock*, J., says, (3 Bulstr. 340,) "There is a difference between a way, a common and a watercourse. Bracton (lib. 4, fol. 221—2,) calls them *servitutes prædiales;* those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. A watercourse does not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally and cannot be averted." (See *Pyer* v. *Carter*, 1 H. & N. 916, *ante*, p. 79.)

Previously to the stat. 2 & 3 Will. 4, c. 71, (*ante*, p. 1—28,) the acquiescence of lessees would not bind the landlord, nor that of tenants the reversioner. Thus where A., who was tenant for life with a power of jointuring, which he afterwards executed, and in 1747 gave a licence to B. to erect a weir on a river in A.'s soil, for the purpose of watering B.'s meadow, then A. died and the jointress entered, and continued seised till 1799, when the tenant of A.'s farm diverted the water from the weir, upon which the tenant of B.'s farm brought an action on the case for diverting the water; the court were of opinion that the uninterrupted possession of the water for so many years, with the acquiescence of the particular tenants for life, would not affect the reversioner, although they refused to disturb a verdict which had passed for the plaintiff, inasmuch as it would not con-

clude the rights of the parties. (*Bradbury* v. *Grinsell*, 2 Wms. Saund. 175, n. (*d*).) Evidence of user for twenty years of a head stock to pen up a rivulet was held insufficient evidence for raising the presumption of a grant to warrant its continuance to the injury of church land; for if the preceding vicar had made such a grant, it would not have bound his successor. (*Wall* v. *Nixon*, 3 Smith's R. 316. See *Barker* v. *Richardson*, 11 East, 372. See *ante*, pp. 67, 74.) Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the queen's subjects; for no obstruction for twenty years will bar a public right. (*Vooght* v. *Winch*, 2 B. & Ald. 662; *Weld* v. *Hornby*, 7 East, 195.) A public right of navigation may be extinguished either by an act of parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud. And where a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel when the road was made cannot be proved, it is to be presumed that the right of navigation was legally extinguished. (*Rex* v. *Montague*, 4 B. & C. 598.) The law has made no provision for the clearing of such a highway in the case of the accumulation of silt or any other natural cause by which the channel becomes choked up; and in no such cases the river ceases to be navigable, at least until such causes are by some means counteracted. (*Per* Lord *Denman*, C. J., *Mayor of Colchester* v. *Brooke*, 7 Q. B. 374.) A corporation, being the conservators of a river and the owners of the soil between high and low water mark, cannot authorize their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation. (*Rex* v. *Lord Grosvenor and others*, 2 Stark. N. P. C. 511.)

If one has anciently pits which are supplied by a rivulet, he may cleanse them, but cannot change or enlarge them, (*Brown* v. *Best*, 1 Wils. 174,) nor change the channels from a river to the prejudice of another owner. (*Duncombe* v. *Randall*, Hetl. 32.)

Artificial watercourses.

In the absence of a special custom, artificial watercourses are not distinguished in law from natural ones; and a title may be gained by twenty years' user as well to the former as to the latter. Therefore, where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing: it was held, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it. It is questionable whether an universal practice in the neighbourhood to resume the use of such adit waters, for mining purposes, after so long an interval, might not have been set up in answer to the claim of easement, thereby raising the inference that the party claiming used the water, not of right, but only during the accidental disuse of the adit and with knowledge that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the waters. (*Magor* v. *Chadwick*, 11 Ad. & Ell. 571; 3 P. & Dav. 367. See *Arkwright* v. *Gell*, 3 Mees. & W. 232.) The court in refusing a new trial said that the proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to be quite indefensible. And the late case of *Arkwright* v. *Gell*, 5 Mees. & W. 203 (see *post*) leads to no such conclusion. (*Per* Lord *Denman*, *Magor* v. *Chadwick*, 11 Ad. & Ell. 586. See *Sutcliffe* v. *Booth*, 32 L. J., Q. B. 136.)

When no action lies for diverting artificial watercourse.

No action lies for an injury occasioned by the diversion of an artificial watercourse, where, from the nature of the case, it is obvious that the enjoyment of it depends upon temporary circumstances, and is not of a permanent character, and where the interruption is by a party who stands in the situation of the grantor. (*Wood* v. *Waud*, 13 Jur. 472; 18 Law J., Exch. 305; 3 Exch. 748.) Where, therefore, the owners of a colliery had suffered the water pumped out of their colliery to flow along an artificial channel; it was held, that in the absence of any grant or prescriptive title, no action lay by

the owner of land through which the water had been so accustomed to flow against an owner of land above, and through whose land the sough likewise passed, for diverting such water; for the owners of a colliery thus getting rid of a nuisance to their works, by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, but that each might take and use what passed through his land, and the proprietor of the land below had no right to any part of that water until it had reached his own land, nor had he any right to compel the owners above to permit the water to flow through their land for his benefit. (*Ib.* See *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058.)

Draining water for agricultural purposes.

The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular definite course, and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land. The land of the plaintiff and defendant was contiguous and on the outside of the defendant's land, and near to it was a wet springy spot, where at most seasons of the year some water rose to the surface and collected in sufficient quantity to flow down the slope of the land. In times of wet a great body of water flowed down, and after a long drought there was hardly any, and sometimes none. There was no regular formed ditch or channel for the water, the place where it flowed being constantly trodden in by cattle. The water which was not absorbed (and except in times of drought all of it was not absorbed) ran into an old watercourse of the plaintiff which led into a reservoir of the plaintiff; the water had so flowed for upwards of twenty years. The defendant, for the purpose of draining his land, and for supplying some part of his property with water, diverted this water from the plaintiff's reservoir. At another spot of the plaintiff's land, as long ago as any one could recollect, water had always risen to the surface. There had generally been a drinking place for cattle formed with stones, and the overflow of the water went down a ditch and thence into a watercourse to the plaintiff's reservoir: it was held, that the defendant was not liable to the plaintiff for having deprived him of the use of such waters, he having diverted them by draining his land for the purpose of getting rid of the water and of supplying another portion of his property with it. (*Rawstron* v. *Taylor*, 11 Exch. 369.)

Right applicable to water flowing in defined channel.

The right of a riparian owner to the lateral tributaries or feeders of the main stream applies to water flowing in a defined and natural channel or watercourse, and does not extend to water flowing over or soaking through land previous to its arrival at such watercourse. The water of a shallow basin or pond formed by landslips, when exceeding a certain depth, escaped over the surface of the land, and thence by natural force of gravity found its way by land drains or dykes to a brook. In like manner, the overflow of water from an ancient well, and a swamp adjoining, ran in wet seasons to the brook. The overflow from another well, used as a watering place for cattle, formed a stream, which after following the course of an artificial ditch along a hedge side, and in other parts flowing down a small channel formed by the water, and over swampy places where the cattle had trodden in the soil, ran over a field and thence along a natural valley, and along hedge-sides and ditches, and discharged itself into the brook: it was held, that a millowner, having a right to the use of the water of the brook, had no cause of action against the occupier or owner of the land for diverting either of these sources of supply before the waters had arrived at a definite natural watercourse. (*Broadbent* v. *Ramsbottom*, 25 Law J., Exch. 115.)

The right of a party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created. The flow of water from a drain, made for the purpose of agricultural improvements, does not give a right to the neighbour so as to preclude the proprietor from altering the level of his drain for the improvement of his land. (*Greatrex* v. *Hayward*, 8 Exch. 291; 22 L. J., Exch. 137.) A special verdict found that a pit in the plaintiff's close, adjoining a close of the defendant, in and since 1796, had been prin-

cipally supplied with water coming from the defendant's close, through an agricultural drain for the better cultivation of the land, and which water flowed thence into a ditch, and then into a pit; that the drain came from a hill side through the defendant's close, through a wet boggy soil, and not from any ascertained source, and that it aided in effecting a general surface drainage of the defendant's close; that the defendant, for the more effectual draining and cultivating his close, deepened the course of an old drain, and by making a communication between it and the drain which fed the plaintiff's pit. The immediate object was to get a better fall of water from the defendant's close, which previously had been so wet and boggy as to be comparatively unproductive. It was held that, under the above circumstances, no grant of the flow of water to the plaintiff was to be presumed, and that the plaintiff had no right of action against the defendant for the diversion of the water. (*Ib.*)

The stanners of Devonshire are not entitled, by custom, to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands. (*Bastard* v. *Smith*, 2 M. & Rob. 129.)

Water drained from mines.

A party receiving water drained from a mine has no right to compel the owners of the mine to continue such discharge. Before the year 1705, a company of adventurers had begun to construct a sough or level now called the Cromford Sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth in Derbyshire; being remunerated, by agreement with the proprietors of the mines, by a portion of the lead ore raised within the district benefited thereby (technically called the "Title of the Sough"). The water from this sough flowed into a brook called Bonsall Brook, and their united waters turned an ancient corn-mill. In 1738, they leased this easement of continuing and maintaining the sough to certain parties for 999 years. In 1771, A. obtained a lease for eighty-four years, from the owner of the land through which the sough was made, of the brook, of the stream of water issuing from the sough into it, and of the piece of land on which the corn-mill stood, with the right of erecting mills thereon; and accordingly, in 1772, erected extensive cotton-mills thereon, partly on the site of the ancient corn-mill, and they were worked by the same junction of the two streams. This lease contained a proviso, that if, during the term, the stream issuing from Cromford Sough should, by the bringing up of any other sough, or by unavoidable accident, be taken away or lessened, so that there should not come to the mills sufficient water for working them, and the lessor should not be able otherwise to supply it, it should be lawful for A. to take down the mills, and remove them to another piece of ground therein described, of which a lease should be granted for the rest of the term. In 1789, A. purchased from the lessor the absolute interest in the land leased, and in that through which so much of the sough was made as lay within the manor of Cromford. In the meantime, another company had, in 1771, commenced the construction of another sough on a lower level, called the Meer Brook Sough (commencing within the manor of Wirksworth), for the purpose of draining a larger portion of the mineral field, under a similar licence from the same mine-owners, who had before used the Cromford Sough. In 1836, Meer Brook Sough having been so far extended into Cromford as to drain Cromford Sough, the water supplying A.'s mills was thereby diverted: it was held, that, under the circumstances, A. had not acquired by user of the water issuing from Cromford Sough such a right to it as to entitle him to maintain an action against the proprietors of the Meer Brook Sough, this being an artificial watercourse made for a particular and temporary purpose, and its water having been originally taken by him with notice that it might be discontinued, and the circumstances not being such as to afford any presumption of a grant by the owners of the mines; and that he did not acquire such right by force of the stat. 2 & 3 Will. 4, c. 71, s. 2. (*Arkwright* v. *Gell*, 5 Mees. & W. 203.) The right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse, at common law, independently of the effect of user under the stat. 2 & 3 Will. 4, c. 71, was to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would be no presumption of the right to

the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the bed drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purposes. The court were of opinion, that the statute did not give A., and those who claimed under him, any such right. Lord *Abinger*, C. B., said, "the whole purview of the stat. 2 & 3 Will. 4, c. 71, shows, that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods, '*without interruption*,' and therefore necessarily imports such an user as could be *interrupted* by some one 'capable of resisting the claim,' and it also requires it to be of right. But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not 'of right,' they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it. We therefore think, that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and therefore our judgment must be for the defendant." (*Arkwright* v. *Gell*, 5 Mees. & W. 203. See observations on this case in *Magor* v. *Chadwick*, 11 Ad. & Ell. 571; *ante*, p. 102.)

The plaintiff and the defendant occupied adjoining collieries. A predecessor of the defendant, but with whom he had no privity, committed a trespass, and made holes, called "thyrlings" in a barrier (of coal belonging to the plaintiff), which separated the two collieries. The defendant, in working his mine, broke down a seam of coal of his own, and the consequence was, that the water flowed from his mine into the plaintiff's through the "thyrlings:"—it was held, that there was no duty on the defendant to prevent the water from flowing from his mine into the plaintiff's. (*Smith* v. *Kendrick*, 13 Jur. 362; 18 L. J., C. P. 172. See *Clegg* v. *Dearden*, 12 Jur. 848; 17 Law J., Q. B. 233.)

Water in subterraneous channels.

By the term watercourse is usually understood a stream of water flowing above ground; but questions of a similar nature occur respecting the right to water flowing in a subterraneous channel. It was held by Lord *Ellenborough*, C. J., that after twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground, and the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water to the spring is diminished. (*Balston* v. *Benstead*, 1 Camp. 463.) But in *Cooper* v. *Barber*, (3 Taunt. 99, cited by the court, 12 Mees. & W. 352,) where the defendant had for many years past penned back a stream for the purposes of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible and unknown by the plaintiff until the land was applied for building purposes, the court held that no right to cause such percolation was acquired by the user, and that the adjoining owner, on receiving injury from it upon erecting a house, might bring an action for it.

It was questioned in *Hammond* v. *Hall* (10 Sim. 551), whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished.

The owner of land, through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. *Tindal*, C. J., intimated no opinion whatever as to what might be the rule of law, if there had been an un-

interrupted user of the right for more than the last twenty years; but the court, confining themselves strictly to the facts stated in the bill of exceptions, thought the case was not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil or part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injurid*, which cannot become the ground of an action. (*Acton* v. *Blundell*, 12 Mees. & W. 353, 354.) In such a case as *Acton* v. *Blundell* the existence and state of the underground water is generally unknown before the well is made, and after it is made there is a difficulty in knowing certainly how much, if any indeed, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to that of his neighbour, who, in digging a mine or another well, may possibly be only taking back his own. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterraneous waters, especially when the result would be to prevent the full enjoyment of the rights of property in the neighbouring owner, and to prevent him from extracting metals or minerals from his own soil, or making some other beneficial use of it. If the course of a subterranean stream be well known, as is the case with many, which sink underground, pursue for a short space a subterraneous course and then emerge again, it never would be considered that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. (*Dickenson* v. *Grand Junction Canal Company*, 7 Exch. 300, 301.)

The last case has been questioned, and it has been laid down that the principles which regulate the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels. It is now settled by several authorities that no action will lie against a man who, by digging or cutting drains in his own land, thereby drains his neighbour's land also by intercepting the flow of the water percolating through the pores of the soil, and which but for such digging or draining would have reached his neighbour's land, or by causing the water already collected, in fact, on his neighbour's soil to percolate away from and out of it. (*New River Company* v. *Johnson*, 6 Jur., N. S. 374, Q. B.) In *Dickenson* v. *Grand Junction Canal Company*, 7 Exch. 282, the Court of Exchequer laid down that an action would lie against a landowner for digging a well, and so preventing subterraneous water from reaching a natural surface stream which it would otherwise have reached, and this whether the water was part of an underground watercourse, or would have reached the stream by percolation through the intervening strata; but this opinion has been overruled by the decision of the House of Lords in *Chasemore* v. *Richards*, 7 H. L. C. 349, affirming the judgment of the Court of Exchequer Chamber, 2 H. & N. 168. The facts of that case appear from the following opinion of the judges, which was acted on by the House of Lords. It appears by the facts that are found in this case, that the plaintiff is the occupier of an ancient mill on the river Wandle, and that for more than sixty years before the present action he and all the preceding occupiers of the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the river Wandle is, and always has been, supplied above the plaintiff's mill in part by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the river Wandle, part

Opinion of the judges in *Chasemore* v. *Richards*.

rising to the surface and part finding its way underground in courses which continually vary. The defendant represented the members of the Local Board of Health of Croydon, who, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes, sank a well in their own land in the town of Croydon, and about a quarter of a mile from the river Wandle, and pumped up large quantities of water from their well for the supply of the town of Croydon, and by means of the well and the pumping the Local Board of Health did divert, abstract and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river Wandle, and so to the plaintiff's mill; and the quantity so diverted, abstracted and intercepted, was sufficient to be of sensible value towards the working of the plaintiff's mill. The question was, whether the plaintiff could maintain an action against the defendant for this diversion, abstraction and interception of the underground water. The law respecting the right to water flowing in definite visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the case of *Embrey* v. *Owen*, 6 Exch. Rep. 353. But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all in the ordinary sense, but percolating or oozing through the soil, more or less according to the quantity of rain that may chance to fall. The inapplicability of the general law, respecting rights to water, to such a case has been recognized and observed upon by many judges whose opinions are of the greatest weight and authority. In the case of *Rawstron* v. *Taylor*, 11 Exch. Rep. 382, *Parke*, B., said, "This is the case of common surface water flowing in no definite channel, though contributing to the supply of the plaintiff's mill. The water having no definite course, and the supply not being constant, the plaintiff is not entitled to it. The right to have a stream running in its natural direction does not depend upon a supposed grant, but is *jure naturæ*." In the subsequent case of *Broadbent* v. *Ramsbotham*, 11 Exch. Rep. 602, 615, *Alderson*, B., observes, that "all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook, but this does not prevent the owner of the land on which it falls from dealing with it as he may please, and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel. There is here no watercourse at all." In the earlier case of *Acton* v. *Blundell*, 12 Mees. & Wels. 324, the Court of Exchequer was of opinion that the owner of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbour from so doing was *damnum absque injuriâ*, and gave no ground of action. There is no case or authority of which I am aware, that can be cited in support of the position contended for by the plaintiff, or in which the right to subterranean percolating water, adverse to that of the owner of the soil, came in question, except the nisi prius case of *Balston* v. *Bensted*, 1 Camp. 463, and *Dickenson* v. *The Grand Junction Canal Company*, 7 Exch. Rep. 282. In the first of these cases Lord *Ellenborough* is reported to have expressed an opinion that twenty years' enjoyment of the use of water in any manner afforded an exclusive presumption of right. This opinion amounted only to the dictum of an eminent judge, followed by no decision upon the point, for the case ended in the withdrawal of a juror, and is directly at variance with the judgment of the Court of Exchequer in the other case upon which the plaintiff relies, of *Dickenson* v. *The Grand Junction Canal Company*, in which the court declared, 7 Exch. Rep. 299, that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state unaltered by the acts of a neighbouring proprietor who cannot dig so as to deprive it of the support of his land. In the case of *Dickenson* v. *The Grand Junction Canal Company*, the very question now before your lordships' house arose, and that case is relied upon by the plaintiff as a decisive authority in his favour. The Court of Exchequer was of opinion that the company by digging a well and pumping out the

water, and so intercepting and diverting underground and percolating water which would otherwise have gone into a stream which flowed to the plaintiff's mill, and was applied to the working of it, had become liable to an action for the infringement of a right at common law. In the same judgment, however, the court refers, 7 Exch. Rep. 300, to the case of *Acton* v. *Blundell*, apparently with approbation, and observes that the existence and state of underground water is generally unknown before a well is made, and after it is made there is a difficulty in knowing certainly how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbour. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters. But the court, without at all adverting to this distinction which it had adopted, treated the case of underground percolating water as governed by the same rule as would obtain in the case of visible streams and watercourses above ground; and no remark or comment was made, or reason assigned by the court, for arriving at a conclusion which not only does not seem warranted by the premises previously adopted, but is in effect hardly consistent with them. The plaintiff in that case was held to have a cause of action independently of any infringement of a right at common law, by reason of the breach of an agreement between the parties and of an act of parliament; and a decision upon the right at common law seems not to have been necessary for determining the suit between the parties. These considerations greatly weaken the effect of the case of *Dickenson* v. *The Grand Junction Canal Company*, as an authority against the defendant upon the point now in question, but it is an authority in his favour to show that a right to water is not by a presumed grant from long acquiescence, but, if it exists at all, is *jure naturæ*, and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable to the case of waters percolating underground. In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickenson* v. *The Grand Junction Canal Company*, expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturæ*. If so, *à fortiori* the right, if it exists at all in the case of subterranean percolating water, is *jure naturæ*, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference.

The question then is, whether the plaintiff has such a right as he claims *jure naturæ* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff's mill? It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's

mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effect of all the wells as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any of them, and, if any, which? for it is clear that no action could be maintained against them jointly. (*Chasemore* v. *Richards*, 7 H. L. C. 349.)

A local act authorized a company to enter upon lands within a certain manor, and to dig and search for any spring of water, and to convey the water from such springs into the town of South Shields for the use of the inhabitants of the town and the shipping in the harbour. It provided that the company should not take the water from any spring, streams or ponds, so as to deprive the occupiers of lands of water for their own necessary uses and for the cattle depasturing therein. The company had the power to lay down pipes, &c., and the inhabitants, with the consent of the company, might obtain the water by pipes, &c., to communicate with the company's pipes, at certain charges according to the bore of the pipes. It was held, that the owners or occupiers of lands within the manor were not prevented by the act from sinking wells in such lands, though the effect might be to draw off the water from the company's springs. (*South Shields Waterworks Company* v. *Cookson*, 15 Law J., N. S., Exch. 315.) It was also held, that the defence that the defendant, within twenty years after the discovery of the spring by the plaintiff, sunk a well and used the water in a manner and for purposes not prohibited by the act, was admissible under not guilty and a plea denying the plaintiff's right. (*Ib.*)

Right to discharge water upon adjoining land.

Although every one in building is bound so to construct his house as not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw the rain water upon the neighbouring land, (11 Hen. 7, f. 257,) yet a right by user for twenty years and upwards for the owner to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land, has been recognized. (*Thomas* v. *Thomas*, 2 Cr. M. & R. 34. See *Wright* v. *Williams*, 1 Mees. & W. 77; *Lady Browne's case*, cited in *Slaney* v. *Pigott*, Palm. 446; Com. Dig. Action on Case for Nuisance, A.; *Baten's case*, 9 Rep. 50, n. (*b*); Vin. Abr. Nuisance, (G. 5).) The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain and discharge it upon such land in a body. (*Reynolds* v. *Clarke*, Ld. Raym. 1399.) If one has a right to enter into the yard of another, and he fixes a spout there to discharge water upon the plaintiff's land, trespass will not lie, but case. (*Reynolds* v. *Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212.)

Building a roof with eaves, which discharge rain-water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the reversion. (*Tucker* v. *Newman*, 11 Ad. & Ell. 40.) It was said by Lord *Abinger*, C. B., "that if water from the spout of the eaves of a row of houses has flowed into an adjoining yard, and been there used for twenty years by its occcupiers, that the owners of the houses had not contracted an obligation not to alter the construction so as to impair the flow of water." (*Arkwright* v. *Gell*, 5 Mees. & W. 283.)

The flow of water for twenty years from the eaves of a house will not give a right to the neighbour to insist that the houses shall not be pulled down or altered so as to diminish the quantity of water flowing from the roof. (*Wood* v. *Waud*, 3 Exch. 748; *Greatrex* v. *Hayward*, 8 Exch. 293, 294.)

A declaration in case stated that the defendant, being possessed of a messuage adjoining a garden of the plaintiff, erected a cornice upon his messuage, projecting over the garden, by means whereof rain-water flowed from the cornice into the garden and damaged the same, and the plaintiff had been incommoded in the possession and enjoyment of his garden. It was held, that the erection of the cornice was a nuisance, from which the law would infer injury to the plaintiff; and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the

period of the erection of the cornice and the commencement of the action. (*Fay* v. *Prentice*, 1 C. B. 828.) It was held, also, that the declaration was not to be construed as alleging a trespass. (*Ib.*)

Action for obstructing water-courses.

Where the owners of property have by long enjoyment acquired special rights to the use of water in its natural state, as it was accustomed to flow, by way of particular easement to their own properties, and not merely a use, which is common to all the queen's subjects, an action on the case may be maintained for a disturbance of the enjoyment; (4 East, 107;) but where the injury, if any, is to all the queen's subjects, the only remedy is by indictment. (*Rex* v. *Bristol Dock Company*, 12 East, 429.) An act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose the mere privilege of scouring and cleansing it, which is a mere easement. (*Rex* v. *The Mersey, &c. Navigation*, 9 B. & C. 114; *Rex* v. *Thomas*, *Ib.* 95.) The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an act of parliament allowing them the use of the land through which the river passes. (*Hollis* v. *Goldfinch*, 1 B. & C. 221.) It has been said, that the mere obstruction of the water, which has been accustomed to flow through the plaintiff's lands, does not *per se* afford any ground of action: some benefit must be shown to have arisen from the water going to his lands; or at least it is necessary to show that some deterioration was occasioned to the premises by the subtraction of the water. (*Williams* v. *Morland*, 2 B. & C. 915; *S. C.*, 4 Dowl. & Ryl. 583.) It is not clear that an occupier of land may not recover for the loss of the general benefit of water flowing through his land, without a special use or damage shown. (*Palmer* v. *Kebblethwaite*, 1 Show. 64; *S. C.*, Skinn. 65; *Glynne* v. *Nicholas*, 2 Show. 507; *S. C.*, Comb. 43; *Mason* v. *Hill*, 5 B. & Ad. 26, 27; *ante*, pp. 89, 90.)

Where one riparian proprietor had by means of a water-wheel raised and diverted from the premises of another proprietor, about one-fortieth part of the volume of a stream, it was held, that it was for the jury to consider whether he had thereby inflicted on the other any sensible or material injury. (*Lord Norbury* v. *Kitchin*, 3 F. & F. 292.)

The proprietor of lands contiguous to a stream may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course. Where A. erected a mill in 1823 on his own land, the former owner of which had for twenty years before 1818 appropriated the water of a stream running through it to the purposes of watering his cattle and irrigating his land. In 1818, B. had erected a mill near the same stream, and the owner and occupier of A.'s land then gave a parol licence to B. to make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where A.'s mill was afterwards erected. In 1818, B., without licence, conveyed part of the water which had before flowed into the stream from certain springs into a reservoir for the use of his mill. In 1828, A. appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829, A. demolished the dam erected by B., and gave him notice not to divert the water. B. then erected a new dam lower down the stream, and by means of it diverted from A.'s mills, at some times all the water before appropriated by A., at others a part of it, and the water, when returned into the stream, was in a heated state. It was held, on special verdict, 1st. That whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A. was entitled to the surplus water, for he was first occupant of that and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling such water. 2ndly. That A. was in like manner entitled to recover in respect of the water diverted by B. at his new dam, because the licence granted to B. by the former occupier was to

take the water at one particular point, and not at the place where this dam was made; and further, because if the licence had been general to take at any place, it would have been revocable, except as to such places where it had been acted on and expense incurred, and it was worked before the last dam was erected. 3rdly. That A. was entitled to recover for the water diverted from the springs and collected in a reservoir in 1818; for the possessor of land through which a natural stream flows has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment. (*Mason* v. *Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *S. C.*, 2 Nev. & Mann. 747.)

For upwards of twenty years water had flowed through an old drain on the defendant's land, and along an ancient watercourse, and thence along a close of the defendant, called G. B., and had thence contributed to supply the plaintiff's mills, after their erection in 1845. In that year the defendant by deed conveyed to the plaintiff the close G. B., "together with all ways, watercourses, liberties, privileges, rights, members and appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for the defendant to use for manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close G. B., returning the surplus, or so much as remained after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. B. The defendant erected a lock-up tank upon his land, and caused the water which arose on his land, near to the close G. B., and which had previously been accustomed to flow along the old drain and ancient watercourse into the close G. B., and he caused the water to be conveyed from the tank to a lower part of his land, to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close G. B.: it was held, that, by the deed, the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso, and that by locking it up he had diverted it, and was liable to an action for a breach of his covenant by reason of such diversion. (*Rawstron* v. *Taylor*, 11 Exch. 369.)

The water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source, and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose: it was held, that an action lay by the mill-owner against the person so abstracting the water. (*Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627; 26 L. J., Exch. 146.)

If water has been accustomed to flow along a channel from time immemorial, and it has been appropriated, the first owner of the adjoining lands on both sides of it who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. (*Frankum* v. *Earl of Falmouth*, 6 C. & P. 529; 2 Ad. & E. 452; 4 Nev. & M. 330.) If land, with a run of water upon it, be sold, the water passes with the land; and the vendee, having used the water, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it. (*Canham* v. *Fisk*, 2 Cr. & Jerv. 126; 2 Tyrw. 155.)

The owner of land, entitled by reason thereof to the advantage of water flowing through it in a natural watercourse, who has erected mills upon that land and on the banks of the watercourse, and has used such water for working such mills, has, by reason of the possession of such mills, a right to the enjoyment of the water of such watercourse for the purpose of working them, although they have been erected for a period less than twenty years from the time of action brought for an infringement of such right. (*Wood* v. *Waud*, 13 Jur. 472; 18 Law J., Exch. 305; 3 Exch. 748.) The water of such watercourse having been used by a mill-owner, whose mills were situated above the plaintiffs,' for manufacturing purposes, and returned again to the

stream, except about five per cent. of that used, which had been lost by evaporation: it was held, that this was a sufficient amount of injury to entitle the plaintiffs to a verdict upon the issue of not guilty. (*Ib.*) Where an action had been brought by a person, entitled as above mentioned, against the defendants for polluting the water, and the facts were that the defendants had polluted the water by pouring soap-suds, &c., but that such pollution had done no damage to the plaintiff, because the stream was already so polluted by similar acts of mill-owners above the defendants' mills, that the wrongful act of the defendants made no sort of practical difference: it was held, nevertheless, that upon the issue of not guilty, the plaintiff was entitled to have that issue found for him. (*Ib.*)

An action on the case will lie for the special damage occasioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland. (*Rose* v. *Miles*, 4 Mau. & S. 101.) If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession, each of them being entitled to recover his respective loss. (*Biddlesford* v. *Onslow*, 3 Lev. 209; *Queen's College* v. *Hallett*, 14 East, 489; 1 Wms. Saund. 322 b, notes; *Jesser* v. *Gifford*, 4 Burr. 2141; Com. Dig. Action on the case for Nuisance, (B). See *Brown* v. *Mallett*, 5 C. B. 599; *ante*, p. 97.)

In an action on the case for erecting a cesspool near a well, and thereby contaminating the water of the well, the plea of not guilty puts in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated. (*Norton* v. *Scholefield*, 9 Mees. & W. 665.)

If the owner of land, on which is a house, construct on other part of the land a sewer, and let the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed. (*Alston* v. *Grant*, 3 Ell. & Bl. 128.)

Action for fouling water.

A declaration alleged that the plaintiff was possessed of steam-engines and boilers, and used, had and enjoyed the benefit and advantage of the waters of a branch canal to supply the same, and which waters ought to have flowed and been without the fouling or pollution thereafter mentioned; yet the defendant wrongfully discharged into the water of the canal foul materials, and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded not guilty, and that the waters of the canal ought not to have flowed and been without the fouling mentioned. An arbitrator, to whom the cause was referred, found that the plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises, and with which water he fed the boilers of his engines. The defendant, without any right or permission from the company, fouled the water in the canal, whereby the water, as it came into the plaintiff's premises, was fouled, and by the use of it the plaintiff's boilers were injured. Judgment having been given for the plaintiff: it was held, in the Exchequer Chamber, by *Williams*, *Crowder* and *Willes*, Js., that the verdict upon the issue joined on the second plea ought to be found for the plaintiff; by *Wightman*, *Erle* and *Crompton*, Js., that the verdict on that issue ought to be found for the defendant. (*Laing* v. *Whaley*, 3 H. & N. 675; 4 Jur., N. S. 930; 27 L. J., Exch. 422.) It was held, also, by *Erle*, *Crowder*, *Crompton* and *Willes*, Js., that the declaration was good after verdict; by *Wightman* and *Williams*, Js., that the judgment ought to be arrested. (*Ib.* See *Whaley* v. *Laing*, 2 H. & N. 476; 26 L. J., Exch. 327.)

To an action for polluting a stream and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fellmonger, and returning it polluted to the stream so used, and also prescriptive rights for twenty and forty years. The plaintiff new assigned, that he sued not only for the grievances in the pleas admitted and attempted to be justified, but for that the defendant committed the grievances over and above what the defences jus-

tified. At the trial it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it, but that within the last twelve years the tannery business had been considerably enlarged and the business (and consequently the pollution of the stream) increased fourfold. Without leaving anything to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues, except the first and second: it was held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right to use the water for the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence, and that the new assignment was well pleaded. (*Moore* v. *Webb*, 1 C. B., N. S. 673.)

The defendants, calico printers, had for many years been in the habit of using the water of a brook for the purposes of their works. Arsenite of soda has latterly been used in large quantities in the process of dyeing calico, and arsenic from the defendants' works was traced in the mud of the reservoir of the Stockport Waterworks Company, which was eleven miles below the defendants' works, and also in the water supplied by them to the town. The company gave evidence that the defendants might have prevented the arsenic from escaping, if they had constructed a large settling reservoir below their works. The witnesses were cross-examined, to show that this would have been very expensive; but the defendants gave no evidence as to the mode in which they carried on their works. In answer to a question by the judge, the jury found that the defendants' trade was a lawful trade, carried on for purposes necessary or useful to the community, in a reasonable and proper manner, and in a reasonable and proper place: it was held, that there was no evidence that the defendants' trade was carried on in a reasonable and proper manner, and in a proper place. (*Stockport Waterworks Company* v. *Potter*, 7 H. & N. 160. See *Hole* v. *Barlow*, 4 C. B., N. S. 334.)

An act incorporated a company for the purpose of supplying a town with gas. By a subsequent act it was enacted, "that if the company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond or place of water within the limits of the act, any washing substance or thing which shall be produced by making or supplying gas, they shall forfeit 200*l*." In 1854, the company erected a gas-tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the company, and the tank was erected on solid sandstone, and with proper materials. The company knew that mines in the neighbourhood had been worked, but they did not know that mines had been under or near to any part of their land. In 1838 there were workings under half the company's land, and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes: it was held, that the company had suffered the washings to flow into the well, and consequently was liable to the penalty. (*Hipkins* v. *Birmingham and Staffordshire Gaslight Company*, 6 H. & N. 250; 7 Jur., N. S. 213; 30 L. J., Exch. 60; 5 H. & N. 74; 29 L. J., Exch. 169; 8 W. R. 182; affirmed, on appeal, 7 Jur., N. S. 343; 9 W. R. 168, Exch. Cham.)

A watercourse, though artificial, may have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream, and therefore an action will lie, by one riparian proprietor against another, for the pollution and diversion of a watercourse, although it is artificial, and was made by the hand of man. (*Sutcliffe* v. *Booth*, 32 L. J., Q. B. 136.)

By 23 & 24 Vict. c. 77, s. 8, any person doing any act whatsoever whereby any fountain or pump is wilfully or maliciously damaged, or the water of any well, fountain or pump is polluted or fouled, is liable, upon summary conviction before two justices, to forfeit 5*l*., and a further sum, not exceeding 20*s*., for every day during which such offence is continued after written authority from the local authority in relation thereto; but this provision does

not extend to any offence provided against by the 23rd section of the Nuisances Removal Act, 1855.

Actions by reversioner.

It is no defence to an action by a reversioner, for an injury to the reversion, in not repairing a gutter for the conveyance of water through the plaintiff's land to the defendant's mill, whereby the water oozed through the gutter, and carried away the soil of the close, that the defect in the gutter was occasioned by the plaintiff's tenant; for the owner of the reversion was suing for a permanent injury to his estate, and he could not be met with the answer that the injury arose out of the wrongful act of the defendant, for which the defendant might have maintained an action against him. (*Lord Egremont* v. *Pulman*, 1 Moo. & Malk. 403. See *post.*)

In case of an injury to the plaintiff's reversionary interest, by the defendant's obstruction of a watercourse on his land, and thereby sending water upon and under the house and land in the occupation of the plaintiff's tenant, the defendant pleaded, that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land; that, in consequence it fell into the watercourse, and caused the damage; and that within a reasonable time after the defendant had notice, he removed it: the plea was held to be bad, it not appearing by whom, or under what circumstances, the wall which fell into the watercourse was built, or that it was connected with any benefit to be derived from it to any persons claiming reversionary interests in the property. If the defendant was not liable, on general principles, to cleanse and open the watercourse, it was no defence for an antecedent injury, that he did so as soon as he had notice of such injury. (*Bell* v. *Twentyman*, 1 Gale & D. 223; 1 Q. B. 766.)

In an action on the case by a reversioner for widening, &c., a watercourse, the defendant pleaded a right to the watercourse for twenty years, and that he had, of right, as often as required, scoured and widened the watercourse. The plaintiff replied, traversing the right to the watercourse, as well as to scour and widen. It has held, on special demurrer, that the replication was not double. (*Peter* v. *Daniel*, 5 Dowl. & L. 501; 5 C. B. 568.)

Repair of drains.

The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such. (*Brent* v. *Haddon*, Cro. Jac. 555; *Cheetham* v. *Hampson*, 4 T. R. 319; *Boyle* v. *Tamlyn*, 6 B. & C. 329.) Therefore a declaration in case for omitting to cleanse and repair drains and sewers, whereby the plaintiff's adjacent premises suffered damage, is bad on general demurrer, if it charge the defendant as the "owner and proprietor" of such drains and sewers, unless it also allege some ground of liability. The words "owner and proprietor" do not necessarily import that the party is occupier, and were used in this declaration in contradistinction to occupier. (*Russell* v. *Shenton*, 3 Q. B. 449. See *Rex* v. *Kerrison*, 1 Mau. & S. 435; *Ballard* v. *Harrison*, 4 Mau. & S. 387; *Tenant* v. *Goldwin*, 1 Salk. 21, 360; 2 Salk. 770; *Payne* v. *Rogers*, 2 H. Bl. 349; *Rex* v. *Pedly*, 1 Ad. & E. 822.) If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but an action of covenant does not lie against the lessor for not repairing it. (*Pomfret* v. *Ricroft*, 1 Saund. 320. See *ante*, p. 79.)

By an award made by the commissioners under an inclosure act, certain drains were set out, and it was ordered that the owners or occupiers of the land over which such drains respectively passed should make and cleanse, and keep the same of sufficient width and depth to carry off the water intended to run down such drains: it was held, that the plaintiff was not thereby authorized to make a slough or underdrain on his land, so as to cause an increased quantity of water to pass into one of the awarded drains. (*Sharpe* v. *Hancock*, 8 Scott, N. R. 46.)

The owner of certain land at O. had used from time immemorial a certain ancient watercourse for the purpose of draining his lands, and for the improvement of the drainage, had altered a bridge some distance below them. The commissioners appointed by an inclosure and drainage act cut some new drains into the ancient watercourse, at a point below the plaintiff's land, but above the bridge; whereupon he filed a bill for an injunction, on the ground that the accession of water brought down by the new drains

would obstruct his flow of water. On the motion to dissolve an injunction obtained *ex parte*, an issue was directed, and an *interim* injunction granted. The verdict having been given in favour of the plaintiff, the defendant moved for a new trial, which was granted on the ground that events had happened since the trial of the issue which would enable the jury to give a verdict founded on experience. It was held, that the rule that an individual may so use his own property as not to injure his neighbour's, applies to persons acting under inclosure and other acts of parliament of a similar nature. (*Dawson* v. *Power*, 4 Railw. C. 81; 5 Hare, 415; 11 Jur. 766; 16 Law J., Ch. 274; affirmed by L. C., 30th July, 1847.)

A conveyance of land from the defendant to the plaintiff contained the following clause: "Save and except, and always reserved unto the plaintiff, his heirs and assigns, the power to enter upon the land, and to dig and make a covered sewer or watercourse through the land, in order to convey the waste water from the premises of the plaintiff into the river W., on making reasonable compensation to the defendant for any damage or injury which might be occasioned thereby, either to the surface of the ground or the buildings under which the same might be made." The plaintiff having constructed a covered drain or sewer in pursuance of the power, the defendant made an opening in it and drained his premises through it: it was held, that the reservation gave the plaintiff a right to the exclusive use of the sewer. (*Lee* v. *Stevenson*, 4 Jur., N. S. 950; 27 L. J., Q. B. 263.)

A right to take water from a well, by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land; therefore, where nominal damages had been recovered in an action for disturbing such a right, (on an issue traversing that the plaintiff was entitled to the use of the well in manner, &c.,) and the judge at Nisi Prius certified that the damages were under forty shillings, it was held that the plaintiff was entitled to his full costs, under stat. 43 Eliz. c. 6, s. 2. (*Tyler* v. *Bennett*, 4 Ad. & El. 377. See stat. 3 & 4 Vict. c. 24; *Shuttleworth* v. *Cocker*, 2 Scott, N. R. 47; *Thompson* v. *Gibson*, 5 Jur. 390.)

The following form is given in the schedule to the Common Law Procedure Act, 1852, "That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill."

The expenses of surveying and taking levels, in order to ascertain whether a weir had been improperly raised to the prejudice of the plaintiff's water mill, will not be allowed him on taxation. (*Ormerod* v. *Thompson*, 16 Mees. & W. 860.)

Commissioners of sewers.

The commissioners of sewers have not such a possession in their works as to enable them to maintain an action of trespass against wrong-doers; therefore when they brought an action of trespass against the commissioners of a harbour for pulling down a dam erected by the former across a navigable stream, and had obtained a verdict, the court above ordered a nonsuit to be entered. (*Duke of Newcastle* v. *Clark and others*, 8 Taunt. 602.) Commissioners of sewers may now acquire the legal interest and constructive possession of land and works under 3 & 4 Will. 4, c. 22, for amending the laws relating to sewers. See sections 24, 38, 47, 57. The stat. 3 & 4 Will. 4, c. 22, s. 47, enacts, that "the property of and in all lands, tenements, hereditaments, buildings, erections, works and other things, which shall have been, or shall hereafter be purchased, obtained, erected, constructed, or made by or by order of, or which shall be within or under the view, cognizance or management of any commissioners of sewers, with the several conveniences, &c., shall be, and the same are hereby vested in the commissioners of sewers." It was held, that this section had not the effect of vesting in the commissioners of sewers the property in all lands under their "view, cognizance or management." Lord *Abinger*, C. B., thought the object of the statute was to enable the commissioners for the time being to exercise a proprietary right over such lands as they might purchase under the act; and *Parke*, B., was of opinion that the effect of the act was, that lands purchased by one set of commissioners might be held also by sub-

sequent commissioners, under whose survey the lands might be, in the nature of a corporation. (*Stracey* v. *Nelson*, 12 Mees. & W. 535.) The laws relating to sewers are further amended by 12 & 13 Vict. c. 50.

Abatement of nuisance.

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it. (2 Smith's R. 9; Com. Dig. Pleader, 3 M. 41.) An individual cannot abate a nuisance if he be not otherwise injured by it than as one of the public. (*Colchester* (*Mayor, &c. of*) v. *Brooke*, 7 Q. B. 339.)

In an action for breaking the plaintiff's close, and destroying a hatch, the defendant pleaded that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing, he pulled it down: evidence may be given as to what a former tenant said as to asking permission to have the water, as this is an act done, and may be proof of an exercise of a right by one side, and of an acquiescence in it by the other. (*Wakeman* v. *West*, 8 Carr. & P. 105.)

Relief in equity as to watercourses.

On the filing of an information by the Attorney-General at the relation of an individual, and a bill by the relator, an injunction *ex parte* on affidavits was granted to restrain a purpresture in the river Thames; and it appearing that there had been no previous writ *ad quod dammum*, and that an indictment in the Court of King's Bench was depending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of the defendants, stating that the act complained of was beneficial to the navigation. And it was held to be immaterial to whom the soil belonged, it not being competent either to the crown or to a subject to use it for any purpose amounting to a nuisance. (*Attorney-General* v. *Johnson and others*, 2 Wils. C. C. 87; see *Kerrison* v. *Sparrow*, 19 Ves. 449; Coop. C. C. 305; *Crowder* v. *Tinkler*, 19 Ves. 617.) The rule with respect to interposing by injunction between public companies or trustees, in cases of apprehended mischief or nuisance, was thus laid down by Lord *Brougham*, C.: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action, and if need be, expedite the proceedings, the injunction in the mean time being continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question." (*Earl of Ripon* v. *Hobart*, 3 M. & Keen, 179.)

Persons obtaining from the legislature powers to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has pointed out; but (except in a proceeding at the instance of the Attorney-General) any one seeking the assistance of a court of equity to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter; therefore where a waterworks' act empowered a company to divert the water of a stream (without limit as to quantity), by means of an open channel filled with loose stones, and they were diverting it by means of a culvert: it was held, that another company, who were entitled to the water of a stream into which the diverted stream had flowed, were not entitled to an injunction to restrain a violation of the terms of the act as to the mode of diversion. (*Liverpool* (*Mayor, &c. of*) v. *The Chorley Waterworks Company*, 2 De G., Mac. & G. 852.)

An injunction was granted before answer to restrain the defendant from removing a bank, which formed the plaintiff's only protection from inundations of the sea, on account of the irreparable injury the plaintiff was likely to sustain: it was intimated by the court, however, that the injunction would not have been granted if the plaintiff had not previously established his right at law. (*Chalk* v. *Wyatt*, 3 Mer. 688.) An injunction was granted against the obstruction of the flow of water through a goit in the

defendant's land to the plaintiff's mill. (*Dewhurst* v. *Wrigley*, 1 C. P. Coop. 319.)

Where the court interposes by injunction to prevent a nuisance, provision was formerly required to be made for having the question between the parties tried at law. (*Dewhurst* v. *Wrigley*, 1 C. P. Coop. 319; *Motley* v. *Downham*, 3 My. & Cr. 1, 14; *Attorney-General* v. *Cleaver*, 18 Ves. 211, 218.) If a party having a right to the flow of water acquiesces for three, or even two years, in the erection of works injurious to his right, equity will not interfere in his behalf until he has established his right at law. (*Weller* v. *Smeaton*, 1 Br. C. C. 572; *S. C.*, 1 Cox, 102; *Birmingham Canal Company* v. *Lloyd*, 18 Ves. 515; Coop. C. C. 77, 193. See 25 & 26 Vict. c. 42, ss. 1, 2, *post*, p. 132, and *ante*, p. 87.) So parties by allowing works to be completed will be deprived of their remedy by injunction. (*Blakemore* v. *Glamorganshire Canal Navigation*, 1 Mylne & K. 154.)

The defendant consented to the plaintiff's making a watercourse through his land, upon being paid a proper and reasonable sum. The watercourse was made, but no grant was executed and no sum arranged. After nine years' user the defendant stopped it up, but he was restrained by decree from so doing, and a reference was made to the Master to settle a proper compensation. The agreement having been made with a number of subscribers: it was held, that the proper mode of suing was by some on behalf of all. (*Duke of Devonshire* v. *Eglin*, 14 Beav. 530; 20 L. J., Ch. 495.)

The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream while on his premises in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's land, was freed to the utmost possible extent from any noxious ingredient with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances the Lord Chancellor dissolved an injunction which had been granted by the Vice-Chancellor, restraining the defendant from diverting and using the water. (*Elmhirst* v. *Spencer*, 2 Mac. & G. 45.)

Where parties, in possession of an easement, filed a bill to restrain the owner of the land from proceeding with an action of trespass, alleging three grounds of defence to the action, two of which were legal, and one equitable, the Court of Chancery allowed the action to proceed to judgment, inasmuch as if the legal grounds of defence should be sustained, the interposition of that court would be unnecessary, and if they should not be sustained, and it should therefore become necessary to entertain the equitable question, that court would know what amount of damages a jury had assessed as a compensation for the easement, and be enabled to secure that amount until the hearing of the cause. (*Barnard* v. *Wallis*, 1 Cr. & Phil. 85.)

A bill in equity will lie for the establishment of the enjoyment of a watercourse, and for the performance of a covenant to cleanse it. (*Holmes* v. *Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; Gilb. Eq. C. 3; *New River Company* v. *Graves*, 2 Vern. 431.) And it was held, that a man who had been in possession of a watercourse sixty years might bring a bill against a mortgagee, who foreclosed the equity of redemption, to be quieted in the possession, although he had not established his right at law. (*Bush* v. *Western*, Prec. Ch. 530. See *Duke of Dorset* v. *Girdler*, *Ib.* 531.) The diversion of watercourses, or the pulling down their banks, and causing inundation, are nuisances against which a court of equity will protect parties by injunction, and in some cases without first bringing an action at law. (*Martin* v. *Stiles*, Mos. 144; see 1 Ves. sen. 476; 2 Atk. 302; 3 Atk. 726; 1 Vern. 120, 129.)

An injunction may be granted on the ground of danger to property. Where the defendant, having large pieces of water in his park, supplied by the stream flowing to the plaintiff's mill, had at one time stopped the water, and at another time let it out in such quantities as to endanger the mill: although the court will not restrain what has been enjoyed twenty years, yet it will interpose where a different mode of enjoyment, calculated to do

mischief, is used; and an injunction was granted for restraining the defendant from using dams, &c., so as to prevent the water flowing in such regular quantities as it had done on a particular day. (*Robinson* v. *Lord Byron*, 1 Br. C. C. 588; see *Anon.* 1 Ves. jun. 140; *Crowder* v. *Tinkler*, 19 Ves. 620.) If on a motion to dissolve the injunction there be a question as to the right to the flow of water, an issue will be directed to try it. (2 Cox, 4.) The effect of an order specifically to repair the banks of a canal and other works has been obtained by an order to restrain a party using and enjoying a canal from impeding the navigation, by continuing to keep the canal, banks, or works out of repair; by diverting the water, or preventing it, by the use of locks, from remaining in the canals, or by continuing the removal of a stopgate. (*Lane* v. *Newdigate*, 10 Ves. 192.) This case was said to go to the very uttermost verge of all the former cases. Lord *Brougham* agreed with Lord *Lyndhurst* in the opinion, that if the court had this jurisdiction, it would be better to exercise it directly and at once; and that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction. (*Blakemore* v. *The Glamorganshire Canal Navigation*, 1 M. & Keen, 183.) In this case the court, on an interlocutory application for an injunction, refused to grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined. The leading principle to guide the court in such an application, at least where no very special circumstances occur, being that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay further injury, to keep things as they are for the present. (*Ib.* 185.)

By mining operations the defendant had sunk not only the level of a stream supplying the plaintiff's mill, but also that of the adjoining land. The plaintiff filed a bill for an injunction, but it did not appear that there had been any diminution of the supply of water to the mill: it was held that the bill ought not to be dismissed; and on the defendant undertaking not to work the minerals so as to obstruct the water and the supply thereof along the watercourse, it was retained, with liberty to apply. The court, however, intimated that in default of the undertaking being given, an injunction would be granted. (*Elwell* v. *Crowther*, 31 Beav. 163.)

The conservators of river banks, who were empowered by act of parliament to apply the funds under their control (which were raised by a rate upon the proprietors of adjacent lands) in executing all works, &c., necessary for putting the banks into and maintaining the same in a permanent state of stability, were held to be authorized to apply a portion of the fund in watching, and, if necessary, opposing a bill in parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence. (*Bright* v. *North*, 2 Ph. C. C. 216; 16 Law J., Ch. 255.)

The court refused to decree a specific performance of an agreement to purchase the fee-simple of certain lands, and also the right to impound the water of a river, and to divert from it a stream of water, because the vendor, though seised in fee of the lands, had only a lease for ninety-nine years of the other subjects of the contract, and had not, as against some of the proprietors of the land on the banks of the river, a right to divert the water; and because the purchaser had entered into a contract for the purpose of erecting a manufactory to be wrought by the water, and twelve years had elapsed between the time of the agreement and the hearing of the cause. (*Wright* v. *Howard*, 1 Sim. & Stu. 190. See *Shackelton* v. *Sutcliffe*, 1 De G. & S. 609.)

The statute 10 & 11 Vict. c. 17, consolidates the provisions usually contained in acts authorizing the making of waterworks for supplying towns with water. This act places the taking of streams upon the same footing as the taking under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18; and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit, and giving a bond, in accordance with the provisions of the latter act. (*Ferrand* v. *Mayor, &c. of Bradford*, 21 Beav. 412; 2 Jur.,

N. S. 175. See *Purnell* v. *Wolverhampton New Waterworks Company*, 10 C. B. 576; *Hildreth* v. *Adamson*, 8 W. R. 470; *Busby* v. *Chesterfield Waterworks, &c. Company*, 1 El., Bl. & El. 176.)

6. OF THE RIGHT TO PEWS.

Right to pews founded on faculty or prescription.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the *parishioners*; and the disposing of the seats therein the right of the ordinary. (Hob. 69; Gibs. Cod. tit. 9, c. 4.)

According to the common law the rector, whether endowed or spiritual only, is entitled to the chief seat in the chancel unless some other person be in a condition to prescribe for it from time immemorial. The ecclesiastical court, in the exercise of its ordinary authority, would allot to him such sitting and protect him against the disturbance of such right. (*Spry* v. *Flood*, 2 Curt. 357.)

An exclusive title to *pews* and seats in the body of the church may be maintained in virtue of a *faculty*, or by *prescription*, which is founded on the presumption that a faculty had been heretofore granted. All other pews and seats in the body of the church are the property of the parish; and the churchwardens, as the officers of the ordinary, and subject to his control, have authority to place the parishioners therein. No precise rules are prescribed for the government of churchwardens in the use of this power, for its due exercise must depend on a sound judgment and discretion applied to the circumstances of the parish. (*Report of Eccl. Commrs., Feb.* 1832, p. 48.)

Disposal of pews.

By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use *in common* of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary. (12 Rep. 105; 3 Inst. 202; 3 Hagg. Eccl. Rep. 733.) By the general law, the use of all the pews belongs to the parishioners; they are to be seated therein, in the first instance, by the churchwardens; the power of the latter, however, is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority discreetly, for the proper accommodation of the parishioners *at large*. This is the law, not merely to be found in ecclesiastical authorities, but is the common law of the land, as laid down by the highest common law authorities. (*Blake* v. *Usborne*, 3 Hagg. Eccl. R. 733.) It will be sufficient to refer to Lord Coke. (12 Rep. 105; 3 Inst. 202.) The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated. (*Reynolds* v. *Monkton*, 2 M. & Rob. 384.) The parishioners cannot prescribe to dispose of pews in exclusion of the ordinary. (1 Salk. 167, pl. 7.) Neither the minister nor the vestry have any right whatever to interfere with the churchwardens in seating and arranging the parishioners, as often erroneously supposed; at the same time the advice of the minister, and even sometimes the opinion and wishes of the vestry, may be fitly invoked by the churchwardens, and to a certaint extent may be reasonably deferred to in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of all the inhabitants. The parishioners, indeed, have a claim to be seated according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of *all* parishioners to be seated, if sittings can be afforded them. Accordingly they are bound, in particular, not to accommodate the higher classes beyond their real wants, to the exclusion of their poorer neighbours, who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation, supposing the seats to be not all equally convenient. (2 Addams, R. 425, 426.)

The incumbent has no authority in the seating and arranging the parishioners beyond that of an individual member of the vestry, and which his

station and influence in the parish naturally give him. He may properly object to a plan which is generally inconvenient, which diminishes the accommodation in the church, which disfigures the building, which renders it dark and incommodious. In every case of this description, it is very proper he should make a representation to the ordinary; but as to the mere arrangement of seats, if the parishioners can settle that among themselves, and to their own satisfaction, and can agree about the expense, there seems but little necessity for the interference of the incumbent; the expense is that of the parishioners; the churchwardens are bound to repair with the consent of the vestry; it is not the vicar, but the vestry which appropriates the seats: the general superintendence and authority in allotting them rests with the ordinary. (1 Phill. R. 233.)

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris*; it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. A possessory right is not good against the churchwardens and the ordinary: they may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would give a person in possession, *cæteris paribus*, the preference over a mere stranger. (1 Phill. R. 324.) The churchwardens are not justified in dispossessing any one of a sitting which he has enjoyed for a time, without giving notice of their intention, and offering an opportunity for explanation. (*Horsfall* v. *Holland*, 6 Jur., N. S. 278.)

A possessory right is sufficient to maintain a suit against a mere disturber. (*Spry* v. *Flood*, 2 Curt. 356.) The fact of possession implies either the actual or virtual authority of those having power to place. The disturber may show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty. (1 Phill. R. 324.) Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession. (*Morgan* v. *Curtis*, 3 M. & R. 389.) On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives. (3 Hagg. Eccl. R. 733.) A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked. (2 Hagg. Eccl. R. 417.)

Prescriptive right to pews, on what founded.

A *prescriptive right* must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any acts have been done by the inhabitants of such messuage, they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right. The *onus* and *beneficium* are supposed to go together; mere occupancy does not prove the right. What might be the effect of very long occupancy, where no repairs have been necessary, does not appear to be decided. It is a common error to suppose that by mere occupancy pews become annexed to particular houses. In country parishes the same families occupy the same pews for a long time, but they still belong to the parish at large: if, however, it is shown that the inhabitants of a particular house *have repaired*, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew. Thus the uniform and exclusive possession of the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title. (1

Phill. R. 325-6.) To exclude the jurisdiction of the ordinary from the disposal of a pew, it is necessary, not merely that possession should be shown for many years, but that the pew should have been built and repaired time out of mind. (1 T. R. 428.) The strongest evidence of that kind is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the act 2 & 3 Will. 4, c. 71, was not required. (1 Hagg. Cons. R. 322.) Twenty years' adverse possession seems to bar the right to a pew. (1 Phill. R. 328.)

On application for a faculty to repair and repew a church, a parishioner appeared to the decree and prayed a faculty might not be granted without a proviso that a pew claimed to be held by him by prescription should not be removed or altered. The prescription was denied. It was held, that a *primâ facie* title by prescription was established, and that the faculty should be issued with the proviso. (*Knapp* v. *Parishioner of St. Mary, Willesden*, 2 Rob. Ecc. Rep. 358; 15 Jur. 473.) Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been made within the period of any one living. (*Ib.*)

Where the members of a corporation have as such occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund. (*Reg.* v. *Mayor, &c. of Warwick*, 10 Jur. 262; 15 Law J., Q. B. 306.)

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title, and therefore if they sue in the ecclesiastical court to be quieted in the possession of such seats, the court of K. B. will grant a prohibition, although it seems that such persons cannot establish such a claim even by prescription. (*Byerly* v. *Windus and others*, 5 B. & C. 1; *S. C.*, 7 Dowl. & Ryl. 564. See *Hallack* v. *University of Cambridge*, 1 Gale & D. 100; 1 Q. B. 593, as to prohibition against granting a faculty.) A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations. (2 Addams, R. 427.)

A pew annexed by prescription to a certain messuage cannot, as is often erroneously conceived, be severed from the occupancy of the house, but passes with the messuage, the tenant of which for the time being has *de jure* the prescriptive right to the pew, (1 Hagg. Cons. R. 319; 1 T. R. 430; 3 M. & R. 334; 2 Add. 428,) which cannot be sold nor let without a special act of parliament, (1 Hagg. Eccl. R. 319, 321,) or under the provisions of the Church Building Acts. (See 58 Geo. 3, c. 45, ss. 65, 66, 75—79; 59 Geo. 3, c. 134, ss. 26, 32; 8 & 9 Vict. c. 70, s. 11.) Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with, and thus annex it to his house, but it reverts to the disposal of the churchwardens. (1 Hagg. Eccl. R. 34.) A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew has for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation of seat against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. (*Blake* v. *Usborne*, 3 Hagg. Eccl. R. 726.) Customs pleaded, "that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad. (1 Hagg. Cons. R. 317.) Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been constantly reprehended by the ecclesiastical courts, and discouraged as often as set up. (1 Hagg. Cons. R. 317.) But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew. (2 Add. 428.)

It was held, that sect. 51 of the local statute 51 Geo. 3, c. 151, which enacts, that the said vestrymen (of St. Marylebone) shall set out and appropriate such a number of seats for the gratuitous accommodation of the poor of the said parish for the time being, and also of such other pews

or seats for the use of the parishioners of the said parish as the said vestrymen shall think necessary, proper and convenient, is imperative upon the vestrymen, and empowers them to set out and appropriate the pews (other than those of the poor) without restriction, and not subject to the superintendence of the ordinary. (*Spry* v. *Flood*, 2 Curt. 362.)

It was held, that by the 52nd sect. of 51 Geo. 3, c. 151, which enacts, that it shall be lawful for the vestrymen of St. Marylebone, if they shall think proper, to let the pews, &c., or any of them, except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as before mentioned, to such persons only who shall be inhabitant householders within the said parish, the vestrymen were empowered to let all the pews save those for the poor, and consequently to remove the rector from one of two pews of which he had been in possession from the time of his induction, and to let it to another inhabitant householder. (*Spry* v. *Flood*, 2 Curt. 364.)

Action for disturbance of pews.

Where a pew is claimed as annexed to a house by faculty or prescription, the courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action on the case. (*Mainwaring* v. *Giles*, 5 B. & Ald. 361.) Where the pew is in a chancel, the freehold of an individual, the right to it is triable at common law. (*May* v. *Gilbert*, 2 Bulstr. 151.) The ecclesiastical court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury. (*Report of Eccl. Commrs.*, p. 49.) If a man claiming title by prescription to an aisle, chancel, &c., as his freehold, or to a pew or seat in the body of the church, or in an aisle, &c., as appurtenant to a house in the parish, is disturbed therein by the parson, ordinary, or churchwardens, by a suit in the spiritual court, he may have a prohibition, if he suggest as grounds for it that he or those whose estate he hath, built, or time out of mind repaired, and therefore had the sole use of such aisle, or of such pew or seat; for the party has a right to a trial of the prescription in a temporal court. (See 1 Burn's Eccl. Law, 8th ed., 366, 367; *Witcher* v. *Cheslam*, 1 Wils. 17; *Corwen* v. *Pym*, 12 Rep. 105; *Jacob* v. *Dalton*, 2 Raym. 1755; *Boothby* v. *Bailey*, Hob. 69; *Francis* v. *Lee*, Cro. Jac. 366; *Day* v. *Beddingfield*, Noy's Rep. 104; *Buxton* or *Bunton* v. *Bateman*, 1 Sid. 89; *S. C.*, 1 Lev. 71; Sir T. Raym. 52; *Crook* v. *Sampson*, 2 Keb. 92; *Brabin* v. *Tradum*, Poph. 140; 2 Roll. Abr. 287, 288.)

The uninterrupted possession of a pew in a church for twenty years affords a presumptive evidence of a legal title by prescription, or by a faculty against a wrong-doer. (*Darwin* v. *Upton*, 2 Wms. Saund. 175 c.) But if the right was claimed as appurtenant to an ancient messuage the claim would, before the stat 2 & 3 Will. 4, c. 71, be rebutted by proof that the pew began to exist within time of legal memory. (*Griffith* v. *Matthews*, 5 T. R. 296.) In an action on the case for disturbing the plaintiff in the possession of a pew in a church, which the plaintiff and those under whom he claimed had been in the uninterrupted enjoyment of for thirty-six years, but which appeared in evidence to have been an open pew before that period; the judge recommended the jury to presume a title in the plaintiff after so long a possession as thirty-six years, and the Court of King's Bench afterwards, on a motion for a new trial, held the direction of the judge proper. (*Rogers* v. *Brookes*, 1 T. R. 431, n.) A pew in a parish church was claimed in respect of an ancient messuage; and it was proved, that, so far as living memory extended, the pew in question had been one of three pews adjoining each other, and under one and the same claim of right, viz., in respect of the said ancient messuage: it was held, that proof of repairs done to one of the pews, not that in question, was evidence as to all, and therefore as to that in question. (*Pepper* v. *Barnard*, 12 Law J., N. S., Q. B. 361; 7 Jur. 1128.) The pew must be laid in the declaration as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not a sufficient title to maintain an action on the case for disturbing the plaintiff in his enjoyment thereof, but he must prove a prescriptive right or faculty. (*Stocks* v. *Booth*, 1 T. R. 428.) So where a pew

in a chancel, claimed in right of a messuage, was shown to have been erected on the site of old open seats in 1773, and there was no evidence of any faculty or search for one at the proper places; it was held, that the judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, and left it to them to say whether, upon the evidence merely of long undisturbed possession, any faculty existed; and a new trial was refused. (*Morgan* v. *Curtis*, 3 M. & Ry. 389.)

The grant of part of the chancel of a church by a *lay impropriator* to A., his heirs and assigns, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews there erected. (*Clifford* v. *Wicks*, 1 B. & Ald. 498.)

But the churchwardens have not, as against the incumbent of a church or chapel, a joint possession of it, so as to disable him from maintaining trespass against them for acts of violence in pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate. (*Jones* v. *Ellis*, 2 Y. & J. 265.) The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews. (*Ib.*)

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house, by the inhabitants of it, who have repaired the seat time out of mind, and an action on the case for a disturbance lies at common law. (*Carleton* v. *Hutton*, Noy, 78; Gibs. 221.) And a pew in the body of the church may be prescribed for as appurtenant to a house out of the parish. (*Davis* v. *Witts*, Forr. R. 14; *Lousley* v. *Hayward and another*, 1 Younge & Jerv. 583.)

Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration and proved, as the building or repairing of the pew. (*Kenrick* v. *Taylor*, 1 Wils. 326; *Ashley* v. *Freckleton*, 3 Lev. 73; see *Fiske* v. *Rovitt*, Lofft, 423; Com. Dig. Action upon the Case for Disturbance, (A. 3); Gibs. 197, 198.)

The right to sit in a pew may be apportioned, and therefore where by a faculty, reciting that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house, a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house, which was afterwards divided into two: it was held, that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrong-doer. (*Harris* v. *Drewe*, 2 B. & Ad. 164.)

It seems that a bill in equity will not lie to be quieted in the possession of a pew, though there is a decree for it before the ordinary. (*Baker* v. *Child*, 2 Vern. 226.)

A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the defendants to execute work in the church which would be injurious to himself, and praying an injunction; the plaintiff did not allege that he was a parishioner and that he was in the habit of attending Divine Service in the parish church. It is questionable whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens. (*Woodman* v. *Robinson*, 2 Sim. N. S. 204.) See *Cardinall* v. *Molyneux*, 7 Jur., N. S. 854, as to proceedings against an incumbent who removed pews and substituted chairs in the church.

A man may prescribe that he is tenant of an ancient messuage, and ought to have a separate burial in a particular vault within the church. (Com. Dig. Cemetery, (B.).) It seems that the same rules are applicable to vaults as to pews. (*Bryan* v. *Whistler*, 8 B. & C. 293; *S. C.*, 2 M. & Ryl. 318; see *Francis* v. *Ley*, Cro. Jac. 366; Gibs. Cod. 542.) As to Rights of Burial, see Har. Index, tit. Ecclesiastical Law, XVII., Burial.

7. OF THE RIGHT TO LIGHT AND AIR.

Right to lights how acquired.

A right to the enjoyment of light and air may commence by mere occupancy. Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his land, buildings with as many windows as he pleases, without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy his light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant, for light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air. (*Per Littledale*, J., 3 B. & Cr. 340. See 2 B. & Cr. 691.)

Romilly, M. R., said, "The principle is this: if a person opens a window letting in light and air from the land of his neighbour, who allows it to be enjoyed for twenty years, that person acquires a right to that easement over his neighbour's land, just as he would in the case of a footpath or carriage way, or any other easement. In such cases the law presumes a grant and a right to that easement so acquired, but limited to the extent to which he has for twenty years enjoyed it. Thus, in the case of a footpath, the right is limited to a footpath, and cannot be extended to a carriage road; and in the case of a window, the light is confined substantially to that which has been enjoyed, and the window cannot afterwards be enlarged so as to acquire a more extended right." (*Cooper* v. *Hubbuck*, 30 Beav. 163.)

It was held by Lord *Ellenborough*, C. J., that a party who had granted a *parol* licence to erect a skylight could not, after expense had been incurred, recall the licence, and treat the party to whom it had been granted as a trespasser for doing such act. (*Winter* v. *Brockwell*, 1 East, 308; see *Wood* v. *Lake*, Say, R. 3, *ante*, pp. 61, 62.)

In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired, (a question of admitted nicety,) still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It is considered that convenience and justice both require this limitation; if it were once admitted that a new window, varying in size, elevation or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented, if it had come in question in the first instance. The case of *Chandler* v. *Thompson*, (3 Camp. 80,) is not at all inconsistent with this reasoning. (*Per Patteson*, J., *Blanchard* v. *Bridges*, 4 Ad. & Ell. 191, 192.) There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbour has incurred great

expense in building upon his own adjoining land, should be at liberty, by subsequent erections, to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection, and this with good reason, for it is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well-understood grant of it from the owner of that land, who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant on such terms as he may think proper to impose, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided by litigation. If a party, who has neglected to secure to himself the unobstructed enjoyment of light and air to a new window by previous express licence or covenant, relies for his title to them upon any thing short of an acquiescence of twenty years, the *onus* lies upon him of producing such evidence as leads clearly and conclusively to the inference of a licence or covenant. And if a deed be not necessary for that purpose, it is obviously advisable to have it. (*Blanchard* v. *Bridges*, 4 Ad. & El. 194, 195.) In an action for obstructing ancient lights, the facts stated in a special case were as follows:—The plaintiffs and defendants possessed premises opposite to each other, in the city of London. The plaintiffs' premises, in which the windows had been used for more than twenty years, having been burnt down, the plaintiffs rebuilt them, but in the newly-erected building the windows were placed in different situations, were of different sizes, and altogether occupied more space than those in the old building; some parts of the new windows were connected with some parts of the old ones, but a great portion of the old and new windows did not coincide. In the special case it was stated that "the defendants could not have obstructed the passage of light to such portions of the windows of the plaintiffs' new building as were new, without at the same time obstructing the passage of light to such portions of the plaintiffs' windows as were in the sites of the old windows to the extent stated in the declaration." It was held by the Exchequer Chamber, affirming the judgment of the court below, that as none of the new windows occupied the same position as any one of the ancient windows did, no right was acquired in respect of any of them against the plaintiffs. (*Hutchinson* v. *Copestake*, 9 C. B., N. S. 863; 31 L. J., C. P. 19; 8 C. B., N. S. 102.)

In *Hutchinson* v. *Copestake*, 9 C. B., N. S. 867, *Crompton*, J., said he wholly dissented from the doctrine supposed to have been laid down by the Master of the Rolls, in *Cooper* v. *Hubbuck*, 30 Beav. 160; 7 Jur., N. S. 457, that a party having several windows in a house could put out an intermediate new window between two old ones, where no apparent detriment to the owner of the servient tenement appeared to arise therefrom. *Crompton*, J., thinks that the right to restrict the owner of the adjoining land from building on his own land, gained by user or grant, must be confined to the subject-matter of such user or grant, and that the restriction on the owner of the servient tenement must be substantially the same, according to the rule as laid down in *Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; 5 N. & M. 567. He does not think that the owner of the old lights can say, "this new window I now put out will occasion you no harm, as you could not build so as to affect any of my new lights before, and this new one will not abridge your power of building." The new light is not one of the windows to which the original assent was given, and it may be that the owner of the servient tenement would not have chosen to acquiesce if the window had been in the situation of the new window. (*Hutchinson* v. *Copestake*, 9 C. B., N. S. 867, 868.)

Where an owner of the dominant tenement has exceeded the limits of the right which he has acquired to the access of light and air, by opening an additional window, leaving his ancient windows unaltered, he has not necessarily lost or suspended his admitted right; but the opening of the additional window justifies the owner of the servient tenement in obstructing the ancient windows, if the doing so is unavoidable in the exercise of his

right to obstruct the new window. (*Binckes* v. *Pash*, 11 C. B., N. S. 324; 8 Jur., N. S. 360; 31 Law J., C. P. 121; 10 W. R. 424.) This case was held to be distinguishable from *Renshaw* v. *Bean*, 18 Q. B. 121, *post*, p. 130, on the ground that in the latter case the windows, the right to which was held to be suspended, if not lost, had been so much altered that they could not properly be regarded as the same windows as those in respect of which the right had been gained, so that in truth the ancient windows, and the right claimed in respect of them, might well be regarded as having ceased to exist. (11 C. B., N. S. 336, 339, 340.)

A. being possessed of a house of three storeys, in Wood Street, Cheapside, with a window in each storey, lowered and enlarged the windows in the first and second floors, and added two new storeys to the building, with the windows therein. The altered windows on the first and second floors each occupied in part the space before occupied by the ancient windows, the window on the third floor remained as it had always been. B., in rebuilding his premises opposite, obstructed *the whole* of the windows of A.'s house, it being impossible (as found in a special case) to obstruct the new lights without at the same time obstructing the old ones. A. thereupon stopped up his new windows, and restored the old ones to their original state, and then required B. to remove the obstruction, which he refused to do: it was held by *Bramwell*, B., and *Blackburn*, J., that the original obstruction was not justifiable, controverting the principle laid down in *Renshaw* v. *Bean*, 18 Q. B. 121, and adopted in *Hutchinson* v. *Copestake*, 9 C. B., N. S. 803. It was held by *Wightman*, J., and *Crompton*, J., that the original obstruction was justifiable, but that the defendant was bound to remove it upon the abandonment by the plaintiff of the usurped lights. It was held by *Pollock*, C. B., and *Martin*, B., that the obstruction being lawful at the time of its erection, its continuance was not unlawful. The judgment of the court of Common Pleas, (11 C. B., N. S. 283,) was, therefore, affirmed. It is said that a writ of error is now pending in Parliament. (*Jones* v. *Tapling*, 12 C. B., N. S. 826—863.)

The enjoyment of lights for twenty years, without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them. (2 B. & C. 686; *Darwin* v. *Upton*, cited 3 T. R. 159; 2 Wms. Saund. 175.) Before the stat. 2 & 3 Will. 4, c. 71, s. 3, *ante*, p. 15, the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years, and a presumption against the owner of lands was not so easily inferred in the case of light as in cases of rights of way or common, where the tenant suffered an immediate injury. Thus it was held that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to such enjoyment, although he would have been bound by twenty years' acquiescence, after having known that the windows were opened. (*Daniel* v. *North*, 11 East, 370.) The tenant cannot merely by his own admission bind the landlord; (*Reg.* v. *Bliss*, 7 Ad. & Ell. 554;) nor can he do so by declarations. (*Papendick* v. *Bridgwater*, 5 Ell. & Bl. 166; see p. 177.) Since the act 2 & 3 Will. 4, c. 71, where the right to light is acquired against an owner of a leasehold interest, it is also acquired against the owner of the reversion. (*Simper* v. *Foley*, 2 Johns. & H. 555.) *Pollock*, C. B., said it may be, since the prescription act, that if a man opens a light towards his neighbour's land, the reversioner may have no means of preventing a right thereto being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent. (*Frewen* v. *Phillips*, 11 C. B., N. S. 455.) So where lights had been enjoyed for more than twenty years, contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the 55 Geo. 3, c. 147, it was held, that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. (*Barker* v. *Richardson*, 4 B. & Ald. 579.

See also *Cross* v. *Lewis*, 2 B. & Cr. 686.) It will be observed, that by the act 2 & 3 Will. 4, c. 71, s. 3, *ante*, p. 15, an absolute right to light may be acquired by an enjoyment without interruption for twenty years, as the eighth section of the act, providing for possession during particular estates, does not extend to lights. And since that statute a right to lights may be established upon an enjoyment for nineteen years and a fraction, provided the action be brought before the interruption has continued for the full period of a year. (*Flight* v. *Thomas*, 8 Per. & D. 442; 11 Ad. & Ell. 668; 5 Jurist, 811; 8 Cl. & Fin. 231; *ante*, p. 15.) Hence it follows, that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier at least during some part of the time. (*Harbidge* v. *Warwick*, 3 Exch. R. 557; *ante*, p. 16.)

As a man cannot derogate from his own grant, it is well established, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights. (*Palmer* v. *Fletcher*, 1 Lev. 122.)

In 1855, the owners in fee of a house and adjoining land granted to trustees a lease of the land for ninety-nine years, and they covenanted to build upon it according to a plan. In 1856, the owners conveyed the reversion in fee of the lands to the trustees; in 1857, the owners conveyed the house in fee to a person under whom the plaintiff obtained possession. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct the light and air which, for upwards of twenty years, had come to the windows of the plaintiff's house. If he had built according to the plan in the lease, the obstruction would not have been to the same extent. Until the lease was granted, there had never been any severance either in the title to, or possession or occupancy of, the land and house, and the same had been occupied and used together by the proprietors for upwards of fifty years: it was held, that the plaintiff could maintain no action against the defendant for building on the land so as to obstruct the light and air which formerly came to the windows of the plaintiff's house. (*White* v. *Bass*, 7 H. & N. 722; 8 Jur., N. S. 312; 31 Law J., Exch. 283. See *Tenant* v. *Goodwin*, 2 Ld. Raym. 1093; *Cox* v. *Matthews*, 1 Ventr. 237; *Rosewell* v. *Prior*, 6 Mod. 116; *Compton* v. *Richards*, 1 Price, 27; *Swansborough* v. *Coventry*, 9 Bing. 309; 2 M. & Scott, 262; *Canham* v. *Fisk*, 2 Cr. & Jerv. 128.) And upon the same principle, where several adjoining portions of land, on which the building of houses had been commenced, were sold, and by the conditions of sale were to be finished according to a particular plan within the space of two years: it was held, that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser, who has built his house according to the plan; (*Compton* v. *Richards*, 1 Price, 27;) for the lots were sold under an implied condition, that nothing should be done by which the windows for which spaces were then left might be obstructed. (*Ib.*) And where the plaintiff purchased a house A., and the defendant at the same time purchased the adjoining land, upon which an erection of one storey high had formerly stood, although in the conveyance to the plaintiff his house was described as bounded by building ground belonging to the defendant: it was held, that the defendant was not entitled to build a greater height than one storey, if by so doing he obstructed the plaintiff's lights. (*Swansborough* v. *Coventry*, 9 Bing. 305; *S. C.*, 2 M. & Scott, 362.) A., the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows. After that B. accepted a new lease of the house from A.: it was held, that B. could not alter his tenement, so as to obstruct the windows existing in C.'s house at the time of his lease from A.; though the windows were not twenty years old at the time of the alteration. (*Coutts* v. *Gorham*, 1 M. & M. 396.) So where the owner of a house divided it into two tenements, and demised one of them to the defendant: it was held he was liable to an action on the case for obstructing the windows in the house at the time of the demise,

although of recent construction, and there was no stipulation against the obstruction. (*Riviere* v. *Bower*, 1 Ry. & M. 24.)

Right to lights, how lost.

Completely shutting up windows with brick and mortar for above twenty years will destroy the privilege of light. (*Lawrence* v. *Obee*, 3 Camp. 514.) And the right to the use of light and air, which a party has appropriated to his own user, may be lost by mere non-user even for a less period than twenty years, unless an intention of resuming the right within a reasonable time be shown when it ceased to be used. Thus, where a person, entitled to ancient lights, pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such blank wall to remain about seventeen years, and the defendant erected a building against it, when the plaintiff opened a window in the same place where there had formerly been a window in the old wall: it was held, in an action for obstructing the light of the new window, that it must, at least, be shown that at the time of the erection of the blank wall, and the apparent abandonment of the former lights, it was not a perpetual, but a temporary abandonment of the enjoyment, with an intention to resume it within a reasonable time. (*Moore* v. *Rawson*, 3 B. & C. 336; 5 D. & R. 234.) And it was said by *Littledale*, J., that if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house, and consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to show that he did not mean to convert the land to a different purpose, then his right would not cease. (*Ib.* 341. See *ante*, p. 124.)

The plaintiff was owner of a house in which there were ancient windows. His predecessor blocked them up, and they continued blocked up for nearly twenty years. The defendant purchased the adjoining land, and proposed to build upon it. The plaintiff, by way of asserting the right to the light, re-opened his ancient windows. The defendant obstructed them. On the trial of an action for this obstruction, the judge directed the jury that, if the right to light had once been acquired, it continued unless lost: and he directed them, if they thought the right had once been acquired, to find for the plaintiff, unless they thought his predecessor had, in blocking up the windows, manifested an intention of permanently abandoning his right to the light, or unless they thought that the windows had been kept so closed as to lead the defendant to alter his position in the reasonable belief that the windows had been permanently abandoned. The plaintiff having had a verdict: it was held that the defendant had no ground to complain of this as a misdirection. (*Stokoe* v. *Singers*, 8 Ell. & Bl. 31; 3 Jur., N. S. 1256; 26 L. J., Q. B. 257.)

It was questioned whether the manifestation of an intention to abandon the windows communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon. (*Ib.*)

Action for obstructing lights.

When a party has acquired a right to the use of light, an action on the case lies for obstructing it. (9 Rep. 59 a; *Boury* v. *Pope*, 1 Leon. 168.) In order to sustain such an action, it is not necessary to show a total privation of light. If the plaintiff can prove that by reason of the obstruction he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient. (*Cotterell* v. *Griffiths*, 4 Esp. N. P. C. 69.) To sustain an action on the case for darkening the plaintiff's windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure the plaintiff's property in point of value or occupation. (*Pringle* v. *Wernham*, 7 Carr. & P. 377; *Wells* v. *Ody*, *Ib.* 410.)

Rights to air and light are bestowed by Providence for the common benefit of man, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes without in some

degree impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action, for they are necessary incidents to the common enjoyment by all. (*Per Parke*, B., *Easbrey* v. *Owen*, 6 Exch. 372, 373.)

If an ancient window be enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was anciently enjoyed, for the original aperture remained privileged as before the enlargement. (*Chandler* v. *Thompson*, 3 Campb. 80. See 4 Ad. & Ell. 192.) But a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether. (*Garrett* v. *Sharpe*, 3 Ad. & Ell. 325; 4 Nev. & M. 834.) And if a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, it is entitled in its new state only to the same degree of light which it possessed in its former state. (*Martin* v. *Goble*, 1 Campb. 322.) So where an old house is pulled down, and a new one built, the lights in the new house must be in the same place, of the same dimensions, and not more in number, than in the old house. (*Cherrington* v. *Abney*, 2 Vern. 646.) Where one party has the enjoyment of light, and alterations are made in the adjoining buildings, the diminution of light, as a ground of action against the party building, must be such as makes the premises to a sensible degree less fit for the purposes of business or occupation. (*Parker* v. *Smith*, 5 Car. & Payne, 438; *Back* v. *Stacey*, 2 C. & P. 465.) The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window. (*Chandler* v. *Thompson*, 3 Campb. 80; see 9 Rep. 58 b; *Cotterell* v. *Griffiths*, 4 Esp. N. P. C. 69.) The intrusion upon a neighbour's privacy even by opening a new window overlooking the adjoining property is not a ground for interference either at law or in equity. (*Turner* v. *Spooner*, 1 Drew. & Sm. 467.) So the building of a wall which merely intercepts the prospect of another, without obstructing his lights, is not actionable. (*Knowles* v. *Richardson*, 1 Mod. 55; 2 Keb. 611, 642; see 2 Ves. sen. 453.) It was held in a recent case, that the use of an open space of ground for a purpose requiring light and air, as a timber yard and saw pit, for twenty years, did not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air. (*Roberts* v. *Macord*, 1 M. & R. 230.)

Actions by reversioner.

A reversioner may maintain an action for obstructing lights, for if he were prevented from suing for such an injury during the continuance of the lease, he might have great difficulty in proving his right when he came into possession. (*Shadwell* v. *Hutchinson*, 1 Mood. & Malk. 350. See 3 Taunt. 139.) The ground upon which a reversioner is allowed to bring his action for obstructions apparently permanent to lights and other easements which belong to the premises is, that if acquiesced in, they would become evidence of a renunciation and abandonment. (*Bower* v. *Hill*, 1 Bing. N. C. 555. See 1 Wms. Saund. 346, b, n.; *Raine* v. *Alderson*, 6 Scott, 691; 4 Bing. N. C. 702. See *ante*, pp. 86, 113.) And in *Young* v. *Spencer*, Lord *Tenterden* said that it seemed to be clearly established, that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner, (10 B. & C. 145,) who may in all cases bring an action where a stranger does an act injurious to the inheritance, and rendering it of less value. (*Jesser* v. *Gifford*, 4 Burr. 2141.) And if the obstruction be continued, a new action may be maintained notwithstanding the former recovery. (2 B. & Ad. 97.)

A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights is sufficient if it show an obstruction which may operate injuriously to the reversion, either by its being of a permanent character or by its operating in denial of the right. (*Metropolitan Association, &c.* v. *Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 330.)

The owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights. (*Thomlinson* v. *Brown*, Say, R. 215.

See also 4 Burr. 2141; 3 Leon. 109.) Such an action may be brought not only against the party who first erected the nuisance, but also against his lessee or assignee for continuing it; (*Roswell* v. *Prior*, 12 Mod. 635; *S. C.*, 2 Salk. 460; 1 Ld. Raym. 713. See also Carth. 456; 1 Keb. 794;) but after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given, (12 Mod. 640; Carth. 455,) unless a continuance of the nuisance be laid in the declaration. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen who performed and the clerk who superintended the works, are liable to an action. (*Wilson* v. *Peto and Hunter*, 6 B. Moore, 47.)

Action where alterations were in excess of power.

The plaintiff, being reversioner of a lease which adjoined premises in the occupation of the defendant and had ancient windows, rebuilt the house, added an upper storey, opened windows in that storey, and enlarged the ancient windows, and otherwise altered their position, and such rebuilding and alterations being within twenty years of the commencement of the action. The defendant subsequently rebuilt his premises, and thereby darkened the windows in both the upper and the lower storeys of the plaintiff's house. It was held, in an action by the plaintiff, as reversioner for this obstruction, that the plaintiff having by these alterations exceeded the limits of his right, and it being through the nature of such alterations impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess, without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition. (*Renshaw* v. *Bean*, 18 Q. B. 121; 21 Law J., Q. B. 219.) It seems that such alterations did not destroy the right altogether. (*Ib.*) It was held, also, that a defence, founded upon the fact of such alterations by the plaintiff, and the impossibility of a partial obstruction, was properly raised under a traverse of the plaintiff's right to the windows. (*Ib.* See *Cooper* v. *Hubbuck*, 30 Beav. 163.) The observations of *Kindersley*, V. C., on this case in *Wilson* v. *Townend*, 6 Jur., N. S. 1109; 30 L. J., Ch. 25.

Action against railway company for obstructing lights.

By a railway act it was provided, that nothing in the act contained should authorize the company to take, injure or damage, for the purposes of the act, any house or building which was erected on or before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake, &c. A subsequent clause contained provisions for settling all differences which might arise between the company and the owners or occupiers of any lands which should be taken, used, damaged or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation, as well for damages already sustained as for future, temporary or perpetual, or any recurring damages: it was held, that the company were liable, in an action on the case, to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a railway station erected by the company under the act, and by the dust, &c., drifted from the station and embankment into the house, and that the plaintiff was not bound to come in under the compensation clause. (*Turner* v. *Sheffield and Rotherham Railway Company*, 10 Mees. & W. 425; 3 Railw. C. 222. See Shelford on Railways, p. 252, 3rd ed.)

Abatement of private nuisance.

As a general rule a person, who is injured by a private nuisance, may abate it (Jenk. Cent. 260, Cent. 6, Case 57; *Penruddock's case*, 5 Rep. 100 b), but no more of a house which is erected as a nuisance can be pulled down than is necessary to abate such nuisance. (*James* v. *Hayward*, 1 W. Jones, 221, 222.) If a person builds a house so near that of another that it stops his lights or shoots water upon his house, the person injured may enter upon the owner's soil and pull the house down, provided no person be therein. (*Rex* v. *Rosewell*, 2 Salk. 459. See *Perry* v. *Fitzhowe*, 8 Q. B. 757; *ante*, pp. 53, 54.)

To an action of trespass for entering a close of the plaintiff, and pulling down a stable, the defendant pleaded that he was possessed of a dwelling-

house adjoining the plaintiff's close, and was entitled to have the light and air enter through a certain ancient window therein; that the stable wrongfully and unlawfully obstructed the light and air and darkened the window, wherefore he entered the plaintiff's close and pulled down the stable to remove the obstruction. To this plea the plaintiff replied *de injuriâ*: it was held, on special demurrer, that the replication was good, and the plea consisted merely of excuse; that it neither claimed any interest in the plaintiff's land, nor set up such a right by virtue of an authority from the plaintiff within the true meaning of the rule which precludes the adoption of this general form of replication. (*Thompson* v. *Eastwood*, 8 Exch. 69.)

Injunction to prevent stopping lights.

The Court of Chancery will grant an injunction to restrain the owner of a house from making any erection or improvements, so as to darken or obstruct the ancient lights or windows of an adjoining house. (*Back* v. *Stacey*, 2 Russ. 121.) In a plain case of a nuisance for stopping up lights, an injunction may be granted upon affidavit, notice and certificate; but it was refused where the application proceeded merely on a particular right to a long enjoyment of a prospect. (*Attorney-General ex rel. Gray's Inn* v. *Doughty*, 2 Ves. sen. 453. See *Squire* v. *Campbell*, 1 M. & Cr 459.) The law does not protect the right to privacy as it does that to light and air. (*Jones* v. *Tapling*, 12 C. B., N. S. 838, 839, 842.) The right to lights, as a ground for an injunction to stop the erection of buildings, must be founded on prescription, or else on some agreement or a reasonable presumption of one. (*Morris* v. *Lessees of Lord Berkeley*, 2 Ves. sen. 452.) The right to an ancient light depends upon an implied contract, but there may be a right to a light depending upon an express contract, and therefore the defendants, who had become the reversioners of the premises, and were about to diminish their lessee's ancient light, were, upon the principle of ancient light and implied contract, and also express contract as existing between landlord and tenant, restrained by injunction from obscuring the ancient light. The lessee of a dwelling-house, in which he carried on business as a diamond merchant, was held to be entitled to an injunction restraining owners of premises adjacent (who afterwards purchased the reversion of the lessee's house) from constructing the party-wall which they were about to rebuild, so as to occasion such an obstruction of the lessee's ancient lights, however slight, as would injure him in his business. (*Hertz* v. *Union Bank of London*, 1 Jur., N. S. 127; 2 Giff. 686.) Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of adjoining land, his heirs, executors, administrators and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant by granting an injunction to restrain the erection of additional buildings, but will leave the parties to their remedy (if any) at law. (*The Duke of Bedford* v. *The Trustees of the British Museum*, 2 M. & Keen, 552.) The foundation of the jurisdiction to interfere by injunction in these cases is such material injury to the comfort of those who dwell in the neighbouring house, as to require the application of a power to prevent as well as to remedy an evil, for which damages more or less would be given at law, but the court will not interfere upon every degree of darkening ancient lights, nor in every case where an action may be maintained. (*Attorney-General* v. *Nichol*, 16 Ves. 338.) Courts of equity will restrain the erection of buildings which would cause irreparable injury, as loss of health, loss of trade or destruction of the means of existence, without waiting the slow process of establishing the legal right, when delay itself would be wrong; but the plaintiff is bound to show not only a legal right to the enjoyment of the ancient lights, but that if the building of the defendant is suffered to proceed, such an injury will ensue as warrants the court to interpose. (*Wynstanley* v. *Lee*, 2 Swanst. 335, 336.) But although it be perfectly clear that the plaintiff is entitled to succeed in an action of trespass, a court of equity will not interfere by

injunction where the nature or degree of injury is not such as to require that extraordinary relief. (*Attorney-General* v. *Fishmongers' Company*, 1 Dick. 104.)

The question in cases seeking to restrain a nuisance is, whether or not the act complained of will abridge and diminish seriously and materially the ordinary comfort of existence to the occupiers, whatever their rank or station, or whatever their state of health may be. (*Per K. Bruce*, V. C., *Walter* v. *Selfe*, 4 De G. & S. 315. See *Soltau* v. *De Held*, 2 Sim., N. S. 133, as to bell ringing.)

A plaintiff, who in an insignificant degree obscured the light and air to his own dwelling-house, was held to be not thereby disentitled to an injunction to restrain the defendant from erecting a building so as seriously to diminish the supply of light and air. (*Arcedeckne* v. *Kelk*, 2 Giff. 683.)

An upright screen of translucent fluted glass, having louvres of slanting openings in its framework, for the transmission of air, raised to a height of about thirty-five feet from the ground, and at a distance of about thirty feet from the windows of an adjoining house, is not such an obstruction of light and air as the court will interfere with by injunction. (*Radcliffe* v. *Portland* (*Duke of*), 8 Jur., N. S. 1007; 10 W. R. 687.)

An injunction against obstruction of ancient lights was granted on affidavit before appearance and without notice to the defendant, although the plaintiff had previously to the filing of the bill commenced an action at law. (*Attorney-General* v. *Nichol*, 3 Mer. 687.) But the injunction was afterwards dissolved, on the defendant's undertaking, if the verdict at law should be against him, to remove the injury. (*S. C.*, 16 Ves. 338.) But the court will not interpose on certificate of bill filed before answer, unless the injury is of a nature so pressing as not to admit of delay. (2 Swanst. 337. See *Chalk* v. *Wyatt*, 3 Mer. 688.) And such an injunction is sometimes granted until after a trial at law directed by the court. (*Attorney-General* v. *Bentham*, 1 Dick. 277; 1 Ves. sen. 543. See stat. 15 & 16 Vict. c. 86, ss. 61, 62.)

In all cases in which any relief or remedy, within the jurisdiction of the Court of Chancery or the Court of Chancery of the county palatine of Lancaster respectively, is or shall be sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same court. (25 & 26 Vict. c. 42, s. 1.) Where questions of fact may be more conveniently tried at assizes, issues may be directed. (*Ib.* s. 2.) The provisions of 21 & 22 Vict. c. 27, to apply to that act. (*Ib.* s. 3.)

An injunction was granted to prevent the stopping of ancient lights against a lessee of an ecclesiastical corporation, subject to the plaintiffs establishing their right to the easement in an action. Upon a motion to dissolve the injunction, Sir *L. Shadwell*, V. C., after referring to the case of *Attorney-General* v. *Nichol*, and remarking that the building would materially affect the comforts of the houses in which the windows were, said, "I have, therefore, a case before me, in which, according to my opinion, upon the simple question of nuisance, the building, if completed, would be a nuisance, and in which it is not by any means clear that the Dean and Chapter of Westminster would have a right to erect the building proposed, and in which it appears that Lady Montford may not have that right, even though the Dean and Chapter may have it; I think, therefore, the injunction should be continued, though the matter must be tried." (*Sutton* v. *Lord Montford*, 4 Sim. 559. See *ante*, pp. 115, 116.)

A tenant from year to year may file a bill for an injunction to protect the right to the access and use of light; but the injunction will be limited to the period of the continuance of his tenancy. (*Simper* v. *Foley*, 2 Johns. & H. 555.) Where A., being entitled to ancient lights overlooking B.'s property, alters and extends them, and afterwards B. builds up and obstructs the ancient lights, the court will, at the suit of A., grant an injunction against B., upon the term of A.'s consenting to restore the lights to their former position. (*Ib.*)

A bill by a yearly tenant to restrain the continuance of an obstruction to

his light and air, was supported, and a mandatory injunction granted, although after the bill was filed the landlord gave the tenant notice to quit, and his interest in the premises would expire in a few months. (*Jacomb* v. *Knight*, 9 Jur., N. S. 529.)

The court will restrain the interference with ancient lights, although the plaintiff is not the occupier of the house interfered with, and may have no intention of occupying it. (*Wilson* v. *Townend*, 6 Jur., N. S. 1109; 30 Law J., Chan. 25; 9 W. R. 30.) It was questioned whether the right of easement was lost where the ancient windows had been enlarged and altered. (*Ib.*) In *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 Law J., Chan. 123, it was held, that if ancient windows which look over the land or upon the premises of another are enlarged and are complained of, the court, upon their being restored to their original dimensions, will restrain the owner of the adjoining property from obscuring such restored windows.

Where a bill was filed to restrain the obstruction of ancient lights, the plaintiffs claimed five windows as ancient lights, and, on an issue directed, the plaintiffs failed to establish their claim to all the windows, it appearing that the new windows could not be obstructed without obstructing the old ones: it was held, that the plaintiffs, on their present bill, were not entitled to any relief; but on their offering to restore their windows to their former position an injunction was granted, but with costs against the plaintiffs, except as to the issue. (*Weatherley* v. *Ross*, 1 New R. 228.)

Where a landlord, who had granted a lease of premises, including ancient lights and appurtenances to A., in consideration of improvements which had been made by A., in the premises leased (which improvements included new lights) granted a lease of the adjoining premises to B., and B. was building so as to block up the lights of A.: it was held, that the landlord could not have blocked up such lights, and that his lessee B. could stand in no better position, and the court granted an injunction as against B. (*Davies* v. *Marshall*, 1 Drew. & Sm. 557.) If a person having ancient lights, which he is entitled to have protected, puts in new lights on the same side of the building, he has no right to any protection in respect of such new lights, even though in so doing he necessarily interferes with the ancient lights. (*Ib.*)

The principle as to ancient lights is, that the owner of the dominant tenement cannot substantially depart from the mode of user. He cannot change the position of his lights, nor increase the original aperture into which windows have been put; but if he has, in using his right, contracted to any given extent the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows of an improved structure, that let in more light and air. (*Turner* v. *Spooner*, 1 Drew. & Sm. 467; 7 Jur., N. S. 1068; 30 L. J., Chanc. 801; 9 W. R. 684.) B., possessed of ancient lights, substituted new window frames with single plate glass panes, opening internally, for the old ones, consisting of small panes with lead frames, opening only partially. In consequence of this alteration more light and air were let in, although the apertures were not increased. C., whose premises were adjoining, objected to this alteration, on the ground that it was a new easement, and interfered with the privacy of his premises. He proceeded to erect a frame work, glazed with opaque coloured glass, within a few inches of B.'s ancient lights, B. thereupon applied for an injunction:—it was held, that if a party possesses ancient lights, and without enlarging the apertures, can acquire an increased degree of light and air, he is entitled to such acquirement, without giving a right to the occupier of the servient tenement to say there is a new easement; but if he decreases the dimensions of the apertures, the occupier of the servient tenement has a right to object; and if, in asserting his right, he interferes with the passage of light and air, he is justified in doing so. (*Ib.*)

If an adjoining owner knowingly permits a messuage and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they have been completed, or assert a right to raise a party wall, and build upon his own property so high as to render the new buildings

less accessible to light and air, than they were at the completion of the work. (*Cotching* v. *Bassett*, 32 L. J., Ch. 286; 9 Jur., N. S. 590. See *Dann* v. *Spurrier*, 7 Ves. 231, 235.) The court in this case proceeded upon the doctrine that it will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive that he would not have done, but upon an expectation that the lessor would not throw an objection in the way of the enjoyment. It must however be proved, by strong evidence, that the party acted upon that sort of encouragement. (*Dann* v. *Spurrier*, 7 Ves. 235, 236.)

Operation of licence and acquiescence.

A plaintiff complained of an obstruction of the light and air to his ancient windows; of the raising and erecting of walls and buildings, whereby the smoke and vapour from the plaintiff's chimneys were prevented from being carried off; and that the defendant had deprived his house of the support which he was entitled to. He pleaded, by way of equitable defence, that the grievances were occasioned by the pulling down and rebuilding of the defendant's house; that the plaintiff had notice, and that the old building was pulled down, and the new one erected, and large sums of money were expended thereon by the defendant, with the knowledge, acquiescence, and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the so pulling down and rebuilding. The plaintiff replied, that the defendant acquiesced and consented upon the faith of false representations made to him by the defendant and her agents, that the grievances would not result from, or be produced by, the pulling down and rebuilding:—it was held, that the plea afforded a good defence on equitable grounds. (*Davies* v. *Marshall*, 10 C. B., N. S. 697; 31 L. J., C. P. 61.) It was held, also, that the replication was a good equitable answer to the plea. (*Ib.*)

Where injunctions refused.

Three weeks before the defendant began to erect certain buildings, afterwards complained of as obstructing the plaintiffs' light and air, the plaintiffs were informed by him that he intended to build, and that he had obtained plans from, and made a contract with a builder with that object. The plaintiffs did not ask to see the plans, nor inquire into the details, nor take proper care to discover where the proposed buildings were to be erected: it was held that the plaintiffs' negligence was sufficient to disentitle them to an injunction. It was also held, that although the plaintiffs might be entitled to damages, the Court of Chancery in such a case had no jurisdiction to award them, but would leave the plaintiffs to their remedy at law. (*Johnson* v. *Wyatt*, 11 W. R. 852.)

Although a tenant from year to year may, where sufficient damage has been sustained, be entitled to an injunction restraining an interference with his lights, the court will not disregard the fact of his tenancy being only one from year to year, in estimating the amount of damage which he may be suffering. (*Jacomb* v. *Knight*, 2 New Rep. 295; 11 W. R. 812.)

The plaintiff was in the enjoyment of ancient lights. There had been a building adjoining his, with a wall alleged to have been twelve feet high, and not interfering with his light. The defendant was about to pull down the ruins of this wall, and rebuild it thirty feet high, which he alleged was the original height. The plaintiff's evidence as to the original height was more precise than the defendant's. The defendant said he never intended to build beyond the original height. The plaintiff proved that he threatened to build much beyond twelve feet. An injunction had been obtained and the defendant never moved to dissolve it. At the hearing a decree for a perpetual injunction was granted without requiring the plaintiff to try his right at law. (*Potts* v. *Levy*, 2 Drew. 272.)

Cases as to nuisance.

The owner of a house has a right at common law to wholesome and untainted air, unless the business which creates a nuisance has been carried on for such a length of time as will raise a presumption of a grant from the neighbouring owners in favour of the party who causes the nuisance. (*Elliottson* v. *Feetham*, 2 Bing. N. C. 134; 2 Scott, 174.) Nothing less than an user of twenty years will afford such presumption. (*Bliss* v. *Hall*, 5 Scott, 500.)

Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement, as to amount *primâ facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. (*Bamford* v. *Turnley*, 31 L. J., Q. B. 286; 10 W. R. 803.) The fitness of the locality does not prevent the carrying on of an offensive though lawful trade from being an actionable nuisance; but whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie whatever the locality may be. (*Ib.*)

If a plaintiff applies for an injunction in respect of a violation of a common law right, and the existence of that right or the fact of its violation is denied, he must establish his right at law: but having done that he is, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation. For such a purpose the award of an arbitrator is equivalent to a verdict. (*Imperial Gaslight and Coke Company* v. *Broadbent*, 7 H. L. Cas. 600.)

Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage.

Though a party may be disentitled by acquiescence to an injunction to stop another's manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that the latter is entitled to an injunction to prevent the party who has acquiesced from recovering damages at law. Equity may leave both parties to their legal rights. (*Bankart* v. *Houghton*, 27 Beav. 425.)

An injunction to prevent, on the ground of acquiescence, a party injured by copper works, from enforcing a judgment recovered by him for damages at law was refused with costs. (*Ib.*)

Bill to restrain a nuisance.

A bill was filed by five several occupiers of houses in a town to restrain the erection of a steam engine, which would be a nuisance to each of them. It was held, that each occupier had a distinct right of suit, and that they could not sue as co-plaintiffs, for as each had a separate nuisance to complain of, that which was an answer to one might not be an answer to the other. (*Hudson* v. *Maddison*, 12 Sim. 416.)

In *Walter* v. *Selfe*, 4 De G. & S. 315, the defendant commenced burning bricks within a hundred yards of the plaintiff's house, and the court granted an injunction, it being proved that the brick burning materially interfered with the comfort of existence.

An injunction was granted to restrain brick burning, which interfered with the comfort and enjoyment of a mansion and with ornamental trees, which excluded the view of unsightly objects, and where such trees were in some cases destroyed, and in many instances injured by brick burning. (*Beardmore* v. *Tredwell*, 31 L. J., Chan. 892.) See *Bamford* v. *Turnley*, 31 L. J., Q. B. 286, which is the case of an action by the adjoining owner as to brick burning.

LIMITATION OF ACTIONS AND SUITS.

3 & 4 WILLIAM IV. CAP. 27.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]

I. *Interpretation clause, s.* 1.
II. *Period of limitation fixed, and when right first accrues, ss.* 2—15.
III. *Savings in case of disabilities, ss.* 16—19.
IV. *Concurrent rights, s.* 20.
V. *Operation of the statute in case of estates tail, ss.* 21—23.
VI. *Limitation of time as to suits in equity, ss.* 24—27.
VII. *Limitation of time between mortgagor and mortgagee, s.* 28.
VIII. *Limitation of time as to church property and advowsons, ss.* 29—33.
IX. *Abolition of real and mixed actions, &c., ss.* 36—39.
X. *Limitation of time for the recovery of money charged on land, legacies, arrears of dower, rent and interest, ss.* 40—42.
XI. *Limits of act, ss.* 43—44.
XII. *Of the limitation of actions on specialties,* 3 & 4 *Will.* 4, *c.* 42.
XIII. *Of the limitation of actions on simple contract,* 21 *Jac.* 1, *c.* 16; 9 *Geo.* 4, *c.* 14.

I. INTERPRETATION CLAUSE.

3 & 4 *Will.* 4, *c.* 27, *s.* 1.

Meaning of the words in the act.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,)

"Land."

the word "land" (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) (*c*), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest (*d*), and whether freehold or copyhold, or held according to any other tenure; and the word

"Rent."

"rent" shall extend to all heriots (*e*), and to all services and suits (*f*) for which a distress may be made, and to all annuities (*g*) and periodical sums of money charged upon or payable out of any land (*h*) (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom, the

Person through whom another claims.

person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*i*); and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual (*k*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

3 & 4 *Will.* 4, *c.* 27, *s.* 1.

"Person."

Number and gender.

(*a*) The object of all statutes of limitation is to prevent claims at great distances of time when evidences are lost, and in all well-regulated countries the question of possession is held to be an important point of policy. (*Trustees of Dundee Harbour* v. *Dougall*, 1 Macq. H. L. C. 321, *per* Lord *St. Leonards*.)

The several statutes of limitations being all *in pari materiâ* ought to receive an uniform construction notwithstanding a slight variation in phrase, the object and intention being the same. (*Murray* v. *East India Company*, 5 B. & Ald. 206, 215, *per Abbott*, C. J.) All these acts being, as they were emphatically termed by Lord *Kenyon*, statutes of repose, are to be liberally and beneficially expounded. (*Per Dallas*, C. J., in *Tolson* v. *Kaye*, 6 Moore, 558; 3 Bro. & B. 217.)

What subjects are and are not included in this act.

Turnpike tolls are not within this act, and consequently more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls notwithstanding the 42nd section of the act. A share of the tolls of a turnpike road not coming within the meaning of the word *land* as defined by the first section of this act. (*Mellish* v. *Brooks*, 3 Beav. 22; 4 Jur. 739.) But quarries and limestone land do come within that word. (3 Ir. Law Rep. 521.)

The limitation prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by this statute. (*Manning* v. *Phelps*, 10 Exch. 59; 24 Law J., Exch. 62.)

The word "rent" has an ambiguous meaning, being either the estate in the rent or the rent reserved under a lease. It has been confined to the former meaning alone, so that a mere non-receipt of rent under a lease for more than twenty years does not deprive the lessor of his right to rent under the lease. (*Grant* v. *Ellis*, 9 M. & W. 113.) The word "tithes," like rent, has an ambiguous meaning, signifying either the estate in the tithes or the chattel itself, the fruits of the estate. Tithes are included in the word "land," which in its proper sense applies only to cases in which there are two parties, each claiming an estate in the land adverse to each other. It has been held, that the statute does not prevent the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for twenty years, but that the operation of the statute is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. (*Dean and Chapter of Ely* v. *Cash*, 15 Mees. & W. 617. See 5 Beav. 574.) Lord *St. Leonards* said, *rent*, in the sense in which it is spoken of in the second section, means rent of inheritance, and it does not mean rent reserved by lease for example, or rent in the common and customary form of a render for property. (*Dean of Ely* v. *Bliss*, 2 De G., M. & G. 459. See p. 472.)

A lessee of premises for one hundred and twenty-five years from the 25th of March, 1782, by a lease dated the 21st of July, 1787, and which

3 & 4 *Will.* 4, c. 27, *s.* 1.

contained clauses of distress and re-entry, demised the same to a lessee for one hundred and twenty years from the 25th of March last past. Twenty-two years' arrears of rent accrued due to the representatives of the lessor in the last-mentioned lease: it was held, that although the original lessee had no reversion expectant on the determination of the lease of the 21st of July, 1787, yet that the rent reserved by the lease was a conventional equivalent for the right of occupation, and that therefore the right of the representatives of the original lessee to the rent during the residue of the term was not barred by this section. (*Re Turner*, 11 Ir. Ch. Rep., N. S. 304.)

Tithes, moduses or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of this act. The stat. 2 & 3 Will. 4, c. 100, limits the time for establishing all prescriptions of or for any *modus decimandi*, or of or to any exemption or discharge of tithes by composition real or otherwise. (See *Salkeld* v. *Johnston*, 1 Mac. & G. 242; 18 Law J., Ch. 493; 1 Hall & T. 329. See the cases on the construction of that act, Shelford on Tithes, pp. 391—398, 3rd ed., and supplement thereto, pp. 47—86.) The time for recovering lands belonging to such a corporation is prescribed by 3 & 4 Will. 4, c. 27, s. 29, *post*.

It was said by *Patteson*, J., that the language of the first section of this act cannot limit the sense of the term rent. An interpretation clause does not restrain the meaning. (7 Q. B. 979.) Where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is a "rent" for which a distress may be made, within the meaning of the Limitation Act, 3 & 4 Will. 4, c. 27, ss. 1, 8. (*Doe* d. *Edney* v. *Benham*, 7 Q. B. 976, 981.) So the service (under the like circumstances) of ringing the church bell at stated hours from Michaelmas to Christmas. (*Doe* d. *Edney* v. *Billett*, 7 Q. B. 976, 983.) It is laid down in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money;" and that for these things there may be a distress. So in Co. Litt. 96 a, it is said, "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number and sometime a lesser number there; and yet this uncertainty being referred to the manor, which is certain, the lord may distrain for this uncertainty." So in Litt. s. 137, it is laid down, that if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it. (*Doe* d. *Edney* v. *Benham*, 7 Q. B. 982.)

Where the overseer of a township claimed lands which they had allowed a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish, the enjoyment of this privilege by the parishioners, for upwards of twenty years, whilst the lands were occupied by persons paying no rent, does not defeat the title of such persons under this statute. *Parke*, B., expressed an opinion that whatever the origin of that duty or liability might have been, there was nothing in it which, in his opinion, conferred upon it the character of rent, or "profits of land" within the third section of the act. (*Doe* d. *Robinson* v. *Hinde*, 2 M. & Rob. 441.) This case was first tried before Lord *Denman*, C. J., who held that the keeping a grindstone was rent, but on discussion of the case afterwards in court, it was argued, that to meet the provision of the statute there should have been a service for which a distress might be made. (7 Q. B. 978.)

Considerable doubt had been expressed whether the stat. 3 & 4 Will. 4, c. 27, extends to any legacies which are not charged on land. The title of the act is "an act for the limitation of actions, &c., relating to *real property*;" all the sections preceding the 40th are conversant about some proceedings relating to land, as well as the subsequent sections, except the 42nd and the 43rd. (See *Paget* v. *Foley*, 2 Bing. N. C. 679; 3 Scott, 120; 1 Jebb & Symes, 343; and the notes on the 40th and 42nd sections.)

Charities.

Before the stat. 3 & 4 Will. 4, c. 27, time did not run against charities in a court of equity, neither were charities bound to the times expressed in the statutes of limitations, 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16. (Duke, 161; *Attorney-General* v. *Mayor of Coventry*, 3 Madd. 368; 2 Vern. 399; *Attorney-General* v. *Christ's Hospital*, 3 My. & K. 344; *Attorney-General* v. *Mayor*

of Bristol, 2 Jac. & W. 321; *Attorney-General* v. *Poulden*, 8 Sim. 472; *Attorney-General* v. *Smythies*, 2 My. & K. 749; *Christ's Hospital* v. *Grainger*, 1 Hall & T. 533; 1 Mac. & G. 460; Shelford on Charities, p. 563.) 3 & 4 Will. 4, c. 27, s. 1.

At law the old statute of limitations operated against all claimants although they held in trust for charities; but in the Court of Chancery, unless in the case of a purchaser for value, they had no operation. (43 Eliz. c. 4; Sugd. V. & P. 944, 945, 11th ed.) The stat. 3 & 4 Will. 4, c. 27, does not contain any saving in favour of charities.

By the 24th section no person can bring any suit in equity but within the time of legal limitation. Sir *E. Sugden*, L. C., said, it appeared to him, that unless the case of a charitable trust can be brought within the saving of the 25th section, which operates between trustee and *cestui que trust*, it would fall within the general prohibition of the 24th section; for charities were only saved in equity from the operation of the former statutes, as trusts, although highly favoured ones; and now all trusts are barred by section 24 unless saved by section 25, and the court is not at liberty to introduce an exception into the act, which the legislature, providing generally for all trusts, have not thought it proper to enact. (*Commissioners of Donations* v. *Wybrants*, 2 Jones & L. 182, see pp. 194—196; *Attorney-General* v. *Magdalen College, Oxford*, 18 Beav. 223, 238, *post*.) By the ancient rule of equity no one could acquire an estate with notice of a charitable use without being liable to it. The statute 3 & 4 Will. 4, c. 27, has not altered the rule in equity, which must still prevail where the charity is not bound by section 24, or is within the saving of section 25. (2 Jones & L. 198. See *Incorporated Society* v. *Richards*, 1 Dru. & War. 258; 1 Con. & L. 83.)

The stat. 9 Geo. 2, c. 36, not extending to Ireland, a testator by his will of the 4th of June, 1812, devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged. A schoolmaster was never appointed. In 1839 an information was filed to carry the said trust into execution. It was held that the Statute of Limitations could not run until a schoolmaster was appointed. It was questioned in this case whether trusts for charitable purposes are within the statute; but the court held, that this case did not involve the determination of any such question, for in point of fact no person could take this annuity until an appointment of a schoolmaster had been made, and time could not run under the statute against the demand of a non-existing person. The charge is of itself a trust, like the common and ordinary case of a charge of debts, which, in the view of the court, creates a trust for their payment: here there was no person entitled to receive this annuity, other poor children are now entitled to the benefit of this trust, and therefore this case does not fall within the statute. (*Attorney-General* v. *Persse*, 2 Dru. & War. 69.)

(*b*) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed. (Co. Litt. 6 a; 3 Rep. 2; Shep. Touch. 91.) *Hereditaments* are of two sorts, *corporeal*, consisting wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land. (Co. Litt. 4; 2 Bl. Com. 17.) An *incorporeal* hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. (*Ib.* 20.) Many of the latter are not within this act, but the periods of limitation for several incorporeal rights are prescribed by the stat. 2 & 3 Will. 4, c. 71 (*ante*, pp. 1—27). Hereditaments.

(*c*) *Ecclesiastical* corporations are those of which not only the members composing it are spiritual persons, but of which the object of the institution is also spiritual, such as bishops, some deans, and prebendaries, all archdeacons, parsons, and vicars, which are *sole* corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. (Co. Litt. 150 a; 1 Bl. Com. 471; 1 Kyd on Corporations, 22.) Different kinds of corporations.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them to such persons as he has directed. (1 Bl. Com. 471.) These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of

3 & 4 *Will.* 4, c. 27, *s.* 1.

persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal by which it acts, although it have not the *name* of a college. (*Per Holt*, Skinn. 484.) There are many hospitals not incorporated in which the succession is kept up by trustees. (10 Rep. 31, 35.) There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne, under the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy." (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20.) And such are many corporations of trustees or governors of free schools. (See 1 Kyd on Corporations, 25—27.) All these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, (1 Ld. Raym. 6,) and although they, in some things, partake of the nature, privileges and restrictions of ecclesiastical bodies. (1 Bl. Com. 471.) Each university of Oxford and Cambridge is a *lay* corporation and not eleemosynary, as particular colleges are, although some salaries are attached to some of their officers. (*Rex* v. *Vice-Chancellor of Cambridge*, 3 Burr. 1652. See Shelford on the Law of Mortmain and Charities, 8—34.)

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of a college, the master and brethren of an hospital, the dean and chapter of a cathedral church. (10 Rep. 29 b; 11 Rep. 69 b.)

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a corporation sole. (Co. Litt. 43.) So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar. (10 Rep. 29 b; Wood's Inst. 109; 1 Bl. Com. 470; 1 Kyd on Corporations, 20.) Corporations are as liable to the operation of prescription as private persons. (*Dundee Harbour Trustees* v. *Dougall*, 1 Macq. H. L. C. 317.)

Meaning of the term "freehold."

(*d*) The term *freehold*, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel. (Co. Litt. 43 b; 1 Burr. 108.) An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person." (Watk. on Conv. by Morley and Coote, 63; Prest. on Estates, 200—203. See observations on an Estate of Freehold, by Manning, 2 Jur. 459.) All interests in land for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or days, are deemed *chattel* interests, (1 Prest. on Estates, 203,) which may subsist in both corporeal and incorporeal hereditaments. (Noy's Maxims, by Bythewood, 142, 357; Bac. Abr. Executors, (H. 3).) Chattels real are such as concern the realty, as terms for years of land, the next presentation to a church, (Dyer, 135 a,) estates by statute-merchant, statute-staple, elegit, or the like. (Co. Litt. 118 b.) By the common law no estate of inheritance or freehold is comprehended under the word chattels. (*Ib.*) Where a testator devises lands to his executors for payment of his debts, or until his debts are paid, the executors only take an estate for so many years as are necessary to raise the sum required. (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509.) It is the same where an estate is devised till such time as a particular sum shall be raised out of the rents and

profits thereof. (*Corbet's case*, 4 Rep. 81 b; 1 P. Wms. 118; Co. Litt. 45 b; Com. Dig. Biens, (A. 1). See 7 Will. 4 & 1 Vict. c. 26, ss. 30, 31; Shelford on Wills, 262—283.)

3 & 4 Will. 4, c. 27, s. 1.

(*e*) Heriot is defined to be the best beast, or other thing, due to the lord on the death or alienation of his tenant. Heriots are usually divided into two sorts, heriot *service*, and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; (*Lanyon* v. *Carne*, 2 Saund. 166;) the latter arise upon no special reservation whatever, but depend merely upon immemorial usage and custom. (Co. Cop. s. 24.) Heriot *service* may be recovered either by seizure, (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192,) or by distress within the manor. (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11.) Any goods belonging to another, found upon the lands charged with heriot service, may be distrained. (Bro. Har. 6; Cro. Car. 260; *Austin* v. *Bennet*, 1 Salk. 356.) A heriot due by the *custom* of a manor may be payable on the death of every tenant of an estate of inheritance, or for life or years, (21 Hen. 7, 13 & 15; Keilw. 80; Bro. Har. 5,) or at will. (*Hix* v. *Gardiner*, 2 Bulstr. 196.) As the property of it vests immediately in the lord on the death or alienation of the tenant, the lord may seize the identical thing, though he cannot distrain any other chattel for it. (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker* v. *Gage*, 1 Show. 81.) If the lord of a manor is entitled to five beasts as heriots on the death of a tenant, and he selects seven, this selection will not vest in him the property in any five of them. And if the best beast may be claimed as a heriot, the property in any particular beast will not vest in the lord before selection of it. (*Abington* v. *Lipscomb*, 6 Jur. 257; 1 Q. B. 776. See stat. 4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94, providing for the commutation of manorial rights in respect of copyholds. See further as to heriots, Shelford on the Law of Copyholds and the supplement thereto, pp. 119—133; 2 Watk. on Cop. c. 6; 2 Saund. Rep. 168, n.; Cruise Dig. tit. X., c. 4, ss. 49—63; Com. Dig. Copyhold, (K 18), (K 27); Scriven on Cop. 370—391, 4th ed.; *Croome* v. *Guise*, 4 Bing. N. C. 148; 5 Scott, 453.) A heriot may be due by custom on the death of a tenant in respect of a tenement of free lands held in fee simple of a manor. (*Damarell* v. *Protheroe*, 10 Q. B. 20.)

Heriots.

The decision of the court, that the twenty years within which an action must be brought for the recovery of rent runs from the day on which the last payment of rent was made, will lead to some difficulty in the case of heriots and other similar rights which become due at uncertain intervals, and also in the possible though not very probable case of a rent reserved, payable every twenty years, or a longer interval. In reference to such cases, it was observed by *Parke*, B., "if the twenty years are to be calculated from the last payment, a party, it was argued, will lose his right without any default or laches whatever, when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years; and no doubt great difficulty may exist in dealing with such cases. But as to heriots, probably the answer to this objection may be, that in a case similar to that now before us, the word 'rent' would not include heriots; for though, by the interpretation clause, the word 'rent' is made to include heriots, yet that is only where the nature of the provision or the context does not exclude such a construction; and it may be that the injustice pointed out would afford grounds for holding, that in the clause now under consideration, the word 'rent' does not include heriots. A similar observation may be made upon the case of rents payable at greater intervals than twenty years, and this may be considered either as falling under the general enactment in the second section, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the statute at all, and is left in the same condition as if the act had not passed." (*Owen* v. *De Beauvoir*, 16 Mees. & W. 566. See *De Beauvoir* v. *Owen*, 19 Law J., Exch. 177.)

In trover for a heriot, it was proved by entries in the court rolls of a manor, that down to the year 1804 the land in respect of which the heriot

3 & 4 *Will.* 4, *c.* 27, *s.* 1.

was claimed was freehold land, held of the lord by heriot, quit rent, relief, &c. On the death of a tenant, in 1804, a heriot was seized. In 1824 the next tenant died, but there was no entry of any seizure of a heriot on that occasion, or of any reason for the omission. In 1826, the present lord came into possession; and, in 1847, upon the death of the next tenant, the heriot now claimed was seized. Since 1804 no quit rent or relief appeared to have been demanded or paid, nor any service of any kind rendered to the lord of the manor. It was held, that the lord's right of action was not barred by the second section of this act, and that there was no ground for presuming that the tenure of the lands had been changed or even that the heriot had been released by the lord. It seems that the right to the quit rent was barred by the statute. (*Earl of Chichester* v. *Hall*, 17 Law T. 121, Q. B.)

Different kinds of rents.

(*f*) A rent (*reditus*) is properly, a sum of money or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising. (2 Bl. Comm. 41; Gilb. on Rents, 9, &c.) There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck. (Litt. s. 213.) *Rent-service* is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feodal oath of fidelity. (Co. Litt. 142.) For if a tenant holds his land by fealty and ten shillings rent, or by the service of ploughing the lord's lands and five shillings rent, these pecuniary rents being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or in arrear, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. (Litt. s. 215.) *A rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it. (Co. Litt. 143.) Rent-*seck*, (*reditus siccus*,) or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress. (2 Bl. Comm. 42.) Either a rent-service disconnected from the reversion, (*Ards* v. *Watkin*, Cro. Eliz. 637, 651,) or a rent-charge may be divided by will or by deed, operating under the statute of uses, so as to make the tenant liable without attornment to several distresses by the devisees or *cestuis que use*. It seems that since the stat. 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind. (*Rivis* v. *Watson*, 5 Mees. & W. 255. See *Colborne* v. *Wright*, 2 Lev. 239.)

There are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and ancient copyholders of a manor, (2 Inst. 19,) which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents; (*reditus capitales*;) and both sorts are indifferently denominated *quit-rents*, (*quieti reditus*,) because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation. (Co. Litt. 143.) For a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual method, for life or years. (2 Bl. Com. 43.) An opinion is expressed by Mr. Hargrave, (Co. Litt. 143 b, n. 5,) that the true meaning of *fee-farm* is a perpetual farm or rent, the name being founded on the *perpetuity* of the rent or service, and not on the *quantum*; and that the term is not applicable to any rents except *rent-service*, where he differs from Mr. Douglas, who had thought that a fee-farm was not necessarily a rent-charge, but might also be a rent-seck. (*Bradbury* v. *Wright*, Dougl. 627, n. 1.) These are the general divisions of rent; but the difference between them (in respect of the remedy for recovering them) is now abolished.

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By stat. 4 Geo. 2, c. 28, s. 5, the same remedy was given by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize, and chief-rents, which had been duly answered or paid for the space of three years within the space of twenty years before the first day of that session of parliament, (January 21, 1731,) or should be thereafter created, as in case of rent reserved upon lease. (See Dougl. 627.) The three years mentioned in this statute need not be *continuous*, it is sufficient if, for the space of three *whole* years within twenty years before the passing of the act, the rent was paid, though those years may not be consecutive. (*Musgrave* v. *Emerson*, 10 Q. B. 326.) A tenant by elegit has a right to distrain without attornment. (*Lloyd* v. *Davies*, 2 Exch. R. 103.) An action of debt lies on an express covenant for the payment of a freehold rent charged on land conveyed in fee. (*Varley* v. *Leigh*, 2 Exch. R. 446.) *Rolfe*, B., guarded himself against expressing an opinion that debt will lie for rent in consequence of the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36. (*Ib.* p. 450.) It is clear, if a lessee for years assign his term, reserving a rent, with no clause of distress, not having any reversion, he cannot distrain for the rent either by the common law or by the statute, (—— v. *Cooper*, 2 Wils. 375; *Parmenter* v. *Webber*, 2 B. Moore, 656. See 4 Taunt. 720; 8 Taunt. 593,) although he may re-enter on the breach of a condition. (*Doe* v. *Bateman*, 2 B. & Ald. 168.) A. being seised in fee, leased premises to B. for sixty-one years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years: it was held, that A. had not parted with his reversion by the lease to C., so as to take away his right to distrain for rent due from B. under his lease. (*Smith* v. *Day*, 2 Mees. & W. 684.) A rent-charge granted for life by a tenant for years is good as a chattel interest, and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears. (*Saffery* v. *Elgood*, 1 Ad. & Ell. 191.) An agreement for a future lease, at a rent certain, is not a sufficient reservation of rent, and will not constitute a demise; and where a party is let into possession under such an agreement, the lessor cannot distrain, but must resort to his action of use and occupation. (*Hegan* v. *Johnson*, 2 Taunt. 148; *Dunk* v. *Hunter*, 5 B. & Ald. 322.)

Distress for rents.

Where a party, entitled to a term in land, let the land by parol to another, at a weekly rent, for the whole of such term, and it is the intention of the parties to create the relation of landlord and tenant, use and occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, and has quitted accordingly. Such a demise will not be deemed an assignment, against the intention of the parties, though nothing be left in the party demising. (*Pollock* v. *Stacey*, 9 Q. B. 1033.)

It was held, that the executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, could not distrain for arrears of rent accrued in the testator's lifetime; for the latter was not a tenant in fee-simple of a rent, within the meaning of the stat. 32 Hen. 8, c. 37, s. 1. (*Prescott* v. *Boucher*, 3 B. & Ad. 849. See the cases on this subject collected and reviewed in 1 Wms. on Executors, 602, &c.) But by stat. 3 & 4 Will. 4, c. 42, ss. 37, 38, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. (Sect. 37.) And such arrearages may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes made relating to distresses for rent are made applicable to the distresses so made as aforesaid. (Sect. 38.)

Right of executors to distrain.

Distress after end of term.

Before stat. 8 Ann. c. 14, s. 6, rent accruing before the expiration of a tenancy could not be distrained for after the tenancy expired, though the tenant continued in occupation. Therefore, where an avowry for rent

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arrear is framed at common law, it must be alleged and proved that the tenancy continued up to the time of the distress. (*Williams* v. *Stiven*, 9 Q. B. 14.)

Right to distrain for annuity given by will.

It has been decided, that a distress may be taken for arrears of a rent-charge created by *will*, although the testator does not in terms give a power to distrain, such power being a consequence drawn by law from the rent-charge. (*Rodham* v. *Berry*, K. B., April, 1826; Watk. Conv. by Cov. 243, n. (*a*).) Where there was a devise of lands to A. for life, remainder to B. in fee, charged with the payment of 20*l.* a year to C. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B.: it was held, that the annuity was a charge on the estate, and that C. might distrain for the arrears, although the will contained no power of distress. (*Buttery* v. *Robinson*, 3 Bing. 392; 11 Moore, 262.) A rent for equality of partition is not a rent-service, but a rent-charge of common right, and therefore may be distrained for. (Litt. s. 253.)

Rents not issuable out of incorporeal hereditaments.

Rent cannot issue out of an incorporeal hereditament, so as to warrant a distress, which can only be made in respect of a fixed ascertained rent reserved out of land. (2 Barn. & Ad. 339.) A rent could not formerly be reserved out of an advowson in gross, tithes, or any other *incorporeal* hereditament. (Co. Litt. 47 a, 142 a; Gilb. on Rents, 20, 22.) A rent cannot be reserved out of a rent; (2 Roll. Abr. 446; Keilw. 161;) nor out of a mere privilege or easement in land. (*Buzzard* v. *Capel*, 8 B. & Cr. 141.) Part of a rent may be granted, although it cannot be reserved out of an *old* rent. (2 Ves. sen. 178.) A rent may be reserved upon a grant of an estate in remainder or reversion, for the remedy by distress will arise when the lessee comes into possession (Co. Litt. 47 a) for all the arrears. (2 Roll. Abr. 446.) And by stat. 11 Geo. 2, c. 19, s. 8, a landlord may distrain any cattle feeding upon a common appurtenant to the land demised. By stat. 3 & 4 Will. 4, c. 42, s. 3, actions of debt for rent upon an indenture of demise must be commenced within ten years after the 10th of August, 1833, or within twenty years after the cause of action. (See *post.*)

A lease by a bishop of *tithes only*, rendering the ancient rent, was held void against the successor, because there was no remedy for the rent by distress or assize. (*Tanlintine* v. *Denton*, Cro. Jac. 111; *Dean and Chapter of Windsor* v. *Gover*, 2 Wms. Saund. 230.) But by stat. 5 Geo. 3, c. 17, all leases for one, two or three lives, or for any term not exceeding twenty-one years, of any tithes, tolls or other incorporeal hereditaments without any lands, by any bishop, college or hall, dean and chapter, precentor, prebendary, hospital or any other person who is enabled by statute to make such leases of any *corporeal* hereditaments, are as effectual against the lessors and their successors, as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. It is perfectly clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only. Therefore where, by an instrument not under seal, A. agreed to let to B. on lease the rectory of L., and the tithes arising from the lands in the parish of L., and also a messuage used as a homestead for collecting the tithes, at a yearly rent of 200*l.*, the rent being in arrear, A. distrained, and B. having brought trespass, it was held, that the distress was altogether unlawful, because the agreement, not being under seal, did not operate as a demise of tithes, and no distinct rent was reserved for the homestead. (*Gardiner* v. *Wilkinson*, 2 Barn. & Ad. 336.)

The king may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant. (Co. Litt. 47 a; 2 Inst. 132; 5 Rep. 4; Gilb. on Rents, 22.) And the grantee of fee-farm rents from the crown might exercise the same power. (1 P. Wms. 306.)

Old Limitation Act as to rents.

By stat. 32 Hen. 8, c. 2, s. 4, (10 Car. 1, sess. 2, c. 6, Irish,) no person should make any avowry or cognizance for any rent, suit or service, and allege any seisin of any rent, suit or service in the same avowry or cognizance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estates he shall pretend or claim to have above fifty years next before the making of the

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said avowry or cognizance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created by deed, the commencement whereof could be shown, (Co. Litt. 115 a; 8 Rep. 64,) or by act of parliament, (*Faulkner* v. *Bellingham*, Cro. Car. 80,) or by will, (*Collins* v. *Goodall*, 2 Vern. 235,) as to which there was no prescribed period of limitation, either at law or in equity. (*Cupit* v. *Jackson*, M'Clel. 495; 13 Price, 721. See *White* v. *James*, 4 Jur., N. S. 1214; and *Stackhouse* v. *Barnston*, 10 Ves. 467; *Foster's case*, 8 Rep. 128; *De Beauvoir* v. *Owen*, 19 Law J., Exch. 182.) So that arrears for any number of years might have been recovered unless there was evidence to raise a presumption of payment. (10 Ves. 467.) But mere length of time, short of fifty years, the period fixed by the stat. 32 Hen. 8, c. 2, and unaccompanied with other circumstances, was not of itself sufficient ground to presume a release or extinguishment of a quit rent. (*Eldridge* v. *Knott*, Cowp. 214, cited 10 Ves. 467, 468.)

Personal annuity.

(*g*) An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. (2 Bl. Comm. 40.) The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, and the latter on the real. (Co. Litt. 2 a; 114 b, 20 a.) An annuity given by a will, forming no charge upon land, but being personal only, is not within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42. (*Roch* v. *Callen*, 6 Hare, 531. See *Hunter* v. *Nockolds*, 19 Law J., Ch. 177; 18 Law J., Ch. 407; 1 Hall & T. 644; 1 Mac. & G. 640.) A terminable annuity for ten or twenty years is within the act. (*Uppington* v. *Tarrant*, 12 Ir. Ch. R., N. S. 269.)

(*h*) A gross sum of money charged upon lands, to be paid by yearly instalments, and secured by power of distress, is within this and the 42nd section. (*Ib.* 262.)

Escheat.

(*i*) An *escheat* was in its nature feodal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lords, called a seignory, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an escheat. (*Burgess* v. *Wheate*, 1 Eden, 191.)

Escheat is founded on the principle that the blood of the person last seised *in fee* is by some means utterly extinct and gone; and since none can inherit his estate, but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance must fail. (2 Inst. 64; Wright's Ten. 115.) Escheat may happen from default of heirs, as where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations on the part of those ancestors from whom the estate descended, or where until the stat. 3 & 4 Will. 4, c. 106, s. 9, (see *post*,) he died without any relations of the whole blood. An escheat may also arise from the corruption of the tenant's blood, consequent upon an attainder for treason or felony, by which he becomes incapable of inheriting, and, until recently, of transmitting anything by heirship. (See 3 & 4 Will. 4, c. 106, s. 10, and note, *post*. On the subject of escheat, see 2 Bl. Comm. 241—257; Cruise's Dig. tit. XXX.; Harg. Co. Litt. 18 b, n. (2); *Henchman* v. *Attorney-General*, 2 Sim. & Stu. 498.)

(*k*) The poor of a parish are a class of persons within the meaning of the word "persons" in this section, in a case where the rents of property are applicable for the benefit of such poor. (*St. Mary Magdalen College, Oxford* v. *Attorney-General*, 6 H. L. C. 189; 3 Jur., N. S. 675; 26 L. J., Ch. 620.) The Attorney-General, whether suing *ex officio*, or at the relation of others, is not a "person" having a right to bring an action or suit in equity to recover land, within the meaning of this act, he is only part of the machinery by which the rights of others are sought to be enforced. (*Ib.* See *Attorney-General* v. *Magdalen College, Oxford*, 18 Beav. 223; sect. 24, *post*.)

King when bound by acts of parliament.

The king having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used in an act of parlia-

3 & 4 Will. 4, c. 27, s. 1.

ment, whether affirmatively or negatively, (11 Rep. 68,) is not bound in his public capacity by the general words of an act of parliament, unless named; (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall* v. *Maule*, 4 Ad. & Ell. 284; *Rex* v. *Wright*, 1 Ad. & Ell. 434; *In re Cuckfield Burial Board*, 19 Beav. 153; 24 Law J., Ch. 585;) except where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, when the king is bound, though not particularly named. (Plowd. 136, 137; 11 Rep. 68 b; 5 Rep. 14; 7 Rep. 32. See Bac. Abr. Prerogative, (E).) But where a statute is general, and its effect would be to deprive the king of any prerogative, right, title or interest, he is not bound unless specially named, (11 Rep. 68,) and was held not to be within the Statute of Limitations, (Br. St. Lim. 67,) nor the statute of 13 Edward 1, st. 1, c. 5, which makes plenarty for six months a good plea in *quare impedit*. (11 Rep. 68; Plowd. 244.)

Limitation as to rights of the crown.

As the king is not particularly named in this act, it is conceived that he is not included in the words "body politic;" and that the period of limitation as to rights of the crown is not altered by it. The king comes expressly within the provisions of the prescription act, 2 & 3 Will. 4, c. 71, (see *ante*, pp. 1, 6,) and the stat. 2 & 3 Will. 4, c. 100, for shortening the time required in claims of modus or discharge from tithes.

By stat. 21 Jac. 1, c. 2, the king was disabled from claiming any manors, lands or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced. (See Co. Litt. 119 a, n. (1); 3 Inst. 188.) And by statute 9 Geo. 3, c. 16 (extended to Ireland by 48 Geo. 3, c. 47), it is provided, that the king shall not sue, &c., any persons, &c., for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record; and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. The statute does not extend to estates in reversion or remainder, or limited estates, and contains several provisoes and exceptions. Where it appeared in evidence that although the tithes in question had been constantly leased, but neither the crown or its lessees had received any tithes, or compensation in lieu of them, since 1715, it was held, that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil* from 1729 to the time of the institution of the suit, were sufficient proof that they had been "duly in charge," so as to protect the claim of the crown from the operation of the statute. But the court doubted whether the mere act of granting leases of the tithes, none having been received by the crown or its lessees since the year 1715, would have been sufficient to keep up the title of the crown, if the tithes had not been constantly kept in charge. (*Attorney-General* v. *Lord Eardley*, 8 Price, 73; *S. C.* Dan. 271; 3 E. & Y. 986. See 3 Inst. 189, as to the meaning of "being in charge.")

Further provisions as to Duke of Cornwall and rights of the crown.

The provisions of the 9 Geo. 3, c. 16, extend to actions and suits by the Duke of Cornwall in relation to real property, 23 & 24 Vict. c. 53, s. 1, but the latter act does not affect the provisions of 7 & 8 Vict. c. 105; nor 2 & 3 Will. 4, c. 71, *ante*, p. 1; and 2 & 3 Will. 4, c. 100. See 23 & 24 Vict. c. 53, s. 2. The stat. 9 Geo. 3, c. 16, is amended by 24 & 25 Vict. c. 62; and by the 1st section of the latter act, the crown shall not hereafter sue any persons for real property (other than liberties or franchises) which such persons or their ancestors have held or taken the profits by the space of sixty years before the commencement of suit, by reason only that the same real property, or the rents thereof, have been in charge to the crown, or stood *insuper* upon record within the said space of sixty years. The provisions of this act apply to actions by the Duke of Cornwall, and to the provisions of 7 & 8 Vict. c. 105, and 23 & 24 Vict. c. 53. See 24 & 25 Vict. c. 62, s. 2.

The crown shall not, for the purposes of the act 9 Geo. 3, c. 16, be deemed to have been answered the rents of real property which shall have

been held, or of which the rents shall have been taken by any person by the space of sixty years before the commencement of any action, as mentioned in that act, by reason only of the same real property having been parcel of any manor of which the rents shall have been answered to the crown, or some other person under whom the crown claims or shall thereafter claim as aforesaid, or of any manor which shall have been duly in charge to the crown or stood *insuper* of record. (24 & 25 Vict. c. 62, s. 3.) There is a reservation of the reversionary interests of the crown, and of the Duke of Cornwall in real property subject to leases, in which cases the right shall not be deemed to have first accrued until the determination of such leases. (24 & 25 Vict. c. 62, s. 4.)

3 & 4 *Will.* 4, *c.* 27, *s.* 1.

Where an entire manor or other district has been in charge to the crown within sixty years, acts done in different parts of it by different persons, such as the erection and occupation of lime-kilns for burning limestone found within the district, and of cottages for the purpose of such occupation and the sale of lime so produced, do not amount to such an adverse possession as to displace the title of the crown to the district, although they may have been continued for above sixty years. (*Doe* d. *Will.* 4 v. *Roberts*, 12 Mees. & W. 520.)

The statute 9 Geo. 3, c. 16, does not give a title, it only takes away the right of suit of the crown, or those claiming from the crown, against such as have held an adverse possession against it for sixty years. (11 East, 495.) Although it was held that possession of crown land, commencing at least fifty-five years ago, by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death nineteen years before the action, and afterwards continued for two years by his widow, when the defendant obtained possession, would have been sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown had been capable of making such a grant, in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it. (*Goodtitle* d. *Parker* v. *Baldwin*, 11 East, 488.) But the grant was not presumed in this case, because it would have been against the express provisions of an act of parliament. (*Ib.* 495.) By stat. 21 Jac. 1, c. 14, s. 1, it is enacted, "that wheresoever the king, his heirs or successors, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements or hereditaments, within the space of twenty years before any information or intrusion brought or to be brought to recover the same: that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the king." Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession *in fact* against the crown. Therefore, after such an adverse possession by a subject for twenty years, the crown could only recover land by information of intrusion; consequently ejectment would not lie at the suit of the grantee of the crown, notwithstanding the rights of the crown are not barred by the statute of limitations. (*Doe* d. *Watt* v. *Morris*, 2 Scott, 276; 2 Bing. N. R. 189.) Rules have been made for assimilating the mode of procedure to that in ejectment and trespass on the common law side of the Court of Exchequer as nearly as may be, consistently with the rights and prerogatives of the crown, and the provisions of the stat. 21 Jac. 1, c. 14, the mode of procedure to remove persons intruding upon the Queen's possession of lands, shall be distinct from that to recover profits or damages for intrusion. (See Rules on Revenue side of the Court of Exchequer, made in pursuance of 22 & 23 Vict. c. 21, 22nd June, 1860, Nos. 21—38.)

The title of the crown to lands, of which it has been out of possession for

3 & 4 *Will.* 4, c. 27, *s.* 1.

twenty years, may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the crown. (*Attorney-General* v. *Parsons*, 2 Mees. & W. 23.)

Although the statute of limitations does not bind the crown, yet where the claim of the crown is only a derivative right, it must stand in the same situation as its principal. Therefore, the statute of limitations may be pleaded to a *scire facias* issued by the crown against the drawer of a bill of exchange, which was barred in the hands of the crown debtor upon the ground that the crown is only entitled to its debtor's right, and cannot create or reserve a right, if none existed, or it has become barred; and that as the crown debtor could not have recovered if the statute had been pleaded, so neither could the crown, standing in the same situation as its debtor. (*Rex* v. *Morrall*, 6 Price, 24.) But where a right has vested in the crown before the statute has run against the former owner, the rights of the crown are not barred or affected by the statute of limitations, as the crown is not within its operation. (*Lambert* v. *Tayler*, 4 Barn. & Cress. 138. See *Tayler* v. *Attorney-General*, 10 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the crown. *In re Robson*, 2 Phill. C. C. 64; *In re Baron de Bode*, *Ib.* 85. See 23 & 24 Vict. c. 31, as to petitions of right and the orders thereon, 8 Jur., N. S., 283, Part II.)

An ancient extent of crown lands, found in the office of Land Revenue Records, and purporting to have been made by the steward of the crown lands, is evidence of the title of the crown to lands therein mentioned, and stated to have been purchased by the crown of a subject. Documents deposited in the office of her Majesty's land revenue records and inrolments, pursuant to the stat. 2 Will. 4, c. 1, may be proved by examined copies, in a suit brought to establish the title of the crown, or its lessee, to lands to which such documents relate, and that, although the original purport to be the rental of a former *grantee* of the crown. Expired leases by the crown of lands or mines, tendered in evidence as acts of ownership by the crown, are so proveable by examined copies, although the originals may not have been inrolled within six months after their execution, pursuant to the statute 10 Geo. 4, c. 50, s. 63. (*Doe* d. *Will.* 4 v. *Roberts*, 13 Mees. & W. 520.)

Presumption of grants from the crown.

But though the crown was not bound by the statute of limitations, yet a grant from it may be presumed from great length of possession, not because the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact for the purpose and from a principle of quieting the possession. (*Corporation of Hull* v. *Horner*, Cowp. 102, 215.) Thus grants from the crown of markets and the like, after an uninterrupted enjoyment of twenty years, (11 East, 419,) have been presumed. So an enfranchisement of a copyhold may, upon sufficient evidence, be presumed against the crown. (*Roe* d. *Johnson* v. *Ireland*, 11 East, 280.) So where the title of a family to an advowson was evidenced by deeds and conveyances for a period of nearly 140 years, and there had been three presentations by them and none by the crown, it was held, that a grant from the crown might be presumed. (*Gibson* v. *Clark*, 1 Jac. & Walk. 159. See 3 T. R. 158.)

King Charles 1, by letters patent, granted certain mills, &c., subject to a fee-farm rent, with a proviso, that if the mills should at any time thereafter be in decay, &c., his majesty and his successors should have a right of re-entry. Subsequently, under the provisions of 22 Car. 2, c. 6, the fee-farm rent was sold. It did not appear that the right of re-entry had ever been specially granted or released. It was held that, having regard to the sale of the fee-farm rent, no right of re-entry capable of being enforced remained in the crown; and that such right did not pass to the purchaser of the rent. (*Flower* v. *Hartopp*, 12 Law J., N. S., Ch. 507; 7 Jur. 613.) In a case where Charles 1 had granted the soil between high and low water marks along the coast of the county of Southampton, but no possession had been taken of the spot in question under the grant until 1784, the crown

3 & 4 *Will.* 4, c. 27, *s.* 1.

having remained in possession for upwards of 150 years after the grant, this was held to create a presumption against it, and the parties not having been in possession more than nineteen or twenty years, no title was gained by adverse possession against the crown. (*Parmeter and others* v. *Attorney-General*, 1 Dow. 316.)

Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held to be conclusive proof of ownership against purchasers from the crown, relying upon a parliamentary survey and the court rolls of a manor, to show that the right to the property had formerly been in the crown. (*Attorney-General* v. *Lord Hotham*, 1 Turn. & Russ. 210.) But although grants on record have been presumed, there seems to be no instance of the presumption of an inrolment of a deed which was made essential by statute. (*Doe* v. *Waterton*, 3 B. & Ald. 149, 151; *Wright* v. *Smythies*, 10 East, 409.) It might be otherwise if some foundation were laid for raising a presumption by showing that there was a chasm in the records corresponding with the date of the supposed conveyance. (*Allen* v. *Walker*, 1 Jac. & Walk. 619.) The registry of a deed of lands in a register county will not be presumed. (*Doe* d. *Beauland* v. *Hirst*, 11 Price, 475. See *Attorney-General* v. *Ewelme Hospital*, 17 Beav. 366.) An inrolment of a tithe award was presumed where the usage of paying tithe was shown. (*Macdougall* v. *Purrier*, 2 Dow & Cl. 135, cited 8 Q. B. 580.) An objection to a title that two fee-farm rents, created by letters patent by James I, were not shown to have been extinguished, was overruled, it being proved that no claim had been made by the crown of the rent from the year 1706, and no proof of any previous claim. (*Simpson* v. *Gutteridge*, 1 Madd. 609.) It seems that where port duties are claimed under a grant from the crown, which appears from the evidence to be inrolled, but which is not produced by the plaintiff, the jury ought not to be directed to presume such grant upon mere evidence of usage. (*Brune* v. *Thompson*, 4 Q. B. 543.) Upon the *dicta* of certain judges, that even an act of parliament might be presumed, if necessary, in support of an ancient usage, it was observed by Lord *Denman*, C. J., even such a strong presumption might not be unreasonable, where the usage has been such as nothing but an act of parliament could legalize, and has prevailed in those obscure ages, in which not only the records of parliament may have been negligently kept, but even the form of parliament itself is scarcely to be discerned. But no judge would venture to direct a jury that they could affirm the passing of an act of parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can be found on the parliament roll, in the journals of either house of parliament, in any records of the courts of law, in the numerous treatises of enlightened authors, devoting unwearied industry and the greatest accuracy on similar inquiries, or in the history of the country. (*Reg.* v. *Chapter of Exeter*, 12 Ad. & E. 532, 533.) By stat. 3 & 4 Will. 4, c. 99, ss. 12, 13, quit rents and other rents payable to the crown in respect of any honors, manors, lands, and hereditaments in England or Wales, are placed under the management of the Commissioners of Woods and Forests and Land Revenues, and the Lord High Treasurer, or the Commissioners of the Treasury, are empowered, by warrant under his or their hands, to remit, release or discharge all or any of the same rents, and the arrears thereof. (See 10 Geo. 4, c. 50; 2 Will. 4, c. 1.)

On the construction of the stat. 48 Geo. 3, c. 27, for confirming defective titles in Ireland, and limiting the right of the crown to sue, see *Tuthill* v. *Rogers*, 6 Ir. Eq. R. 429.

3 & 4 *Will.* 4, *c.* 27, *s.* 2.

II. Period of Limitation fixed, and when Right first accrues.

Twenty Years.

No land or rent to be recovered but within twenty years after the right of action accrued to the claimant, or some person whose estate he claims.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (*l*).

Cases on construction of second section of act.

(*l*) The effect of this section is to put an end to all questions and discussions whether the possession of the lands, &c., be adverse or not, and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section. (*Culley* v. *Doe* d. *Taylorson*, 3 P. & Dav. 548; 11 Ad. & Ell. 1008.) What is adverse possession has generally no operation except with regard to the 15th section. Sir *E. Sugden*, L. C., said, "Under the new act possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create an estate, although they enabled the party to hold against all the world. But the new statute in point of fact gives the estate, to recover which the remedy is barred, for it bars the remedy and binds the estate; and if the five years have elapsed under the 15th section—if the possession was what was called adverse, because possession would give a good title under the act, unless the party could bring his case within some of the exceptions in the subsequent section—the estate is transferred, and the remedy is barred." (*Incorporated Society* v. *Richards*, 1 Connor & L. 84, 85; 1 D. & War. 289.)

It is perfectly settled, that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give a title adversely; and although, perhaps, now, no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this act was passed. (*Dean of Ely* v. *Bliss*, 2 De G., M. & G. 476, 477. See *post*, p. 159.)

Lord *Denman*, C. J., said, "We are all clearly of opinion that the 2nd and 3rd sections of the stat. 3 & 4 Will. 4, c. 27, have done away with the doctrine of non-adverse possession; and except in cases falling within the 15th section of the act (see *post*), the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession." (*Nepean* v. *Doe* d. *Knight*, 2 Mees. & W. 911. See *Doe* d. *Higginbotham* v. *Barton*, 3 P. & Dav. 198; *Jack* v. *Walsh*, 4 Ir. L. R. 254.) In the former case the plaintiff claimed as grantee in reversion of a copyhold estate on the death of A., who went to America in the latter part of the year 1806, or early in 1807, and the last account that was heard of him was by a letter written by him from Charleston, which was received in May, 1807. The declaration in ejectment was served on the 18th January, 1839, and it was not shown that this was within twenty years after the death of A. The verdict which was found for the plaintiff was set aside. As to the presumption of the death of a party who has not been heard of for several years, see *post*, s. 16, note.

In 1788, estates were settled by marriage settlement to the use of the

wife for life, with remainder to her issue in tail, with remainder to the settlor (whose heiress at law she was) in fee. In 1818, by deeds to which the husband and wife and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G. the son for life, remainder to his issue in tail, remainder to J. F. his sister for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828: it was held, that, inasmuch as the estate of J. F. was carved out of the estate by R. G., she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds, as he would have had if he had continued alive, viz. twenty years from the year 1822, when his remainder came into possession. The effect of the deed of 1818, and of recovery was to bar all remainders over, and to create new estates out of his estate tail. (*Doe* d. *Curzon* v. *Edmonds*, 6 Mees. & W. 296.)

3 & 4 Will. 4, c. 27, s. 2.

By this act the right of entry is taken away, unless an entry be made within twenty years of the right first accruing where the party is not entitled to the benefit of the 15th section, which has now generally ceased to operate. (*Holmes* v. *Newlands*, 11 Ad. & Ell. 44; 3 P. & Dav. 128; *Newlands* v. *Holmes*, 8 Q. B. 679.)

A., being tenant for life of a copyhold estate, and B. his daughter tenant in tail in remainder, joined in a recovery in 1778, and A. surrendered to the use of himself for life, remainder to the right heirs *of the survivor*. A. and B. shortly afterwards surrendered to a *bonâ fide* purchaser in fee. B. having become the survivor died without having made any further surrender. On an ejectment by her heir-at-law within twenty years after her death, it was held, that the statute of limitations did not apply, inasmuch as B.'s life estate passed to the purchaser; B. therefore could not enter, and, as the contingent remainder could not pass by the surrender, (*Doe* v. *Tomkins*, 11 East, 185; *Doe* v. *Wilson*, 4 B. & Ald. 303,) the heir-at-law had no right of entry until B.'s death. (*Doe* d. *Baverstock* v. *Rolfe*, 3 Nev. & P. 648; 8 Ad. & Ell. 650.)

Where a lessor permits his lessee, during the continuance of the leases, to pay no rent for twenty years, the lessor is not therefore barred by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment, but the case comes within the latter branch of the third section. (*Doe* d. *Davey* v. *Oxenham*, 7 Mees. & W. 131. See *post*.)

Where a landlord had set apart a portion of his property, and built a schoolhouse upon it, and appointed a schoolmaster, who was paid an annual stipend by the landlord, and was also paid by subscription and by the scholars, and the schoolmaster was permitted to occupy these premises for the purpose of the school: it was held, that such occupation for upwards of twenty years did not give the schoolmaster an adverse right against the landlord; for his occupation was the occupation of the landlord, he being in the situation of a servant. (*Lessee of Moore* v. *Doherty*, 5 Ir. L. R. 449.)

The 2nd section of the act, taken in connection with the 12th, applies to coparceners, joint-tenants, and tenants in common, so as to make their possession separate from the time when the act came into operation. (*Culley* v. *Doe* d. *Taylerson*, 3 P. & Dav. 550; 11 Ad. & Ell. 1008; *Woodroffe* v. *Doe* d. *Daniell*, 15 Mees. & W. 769.)

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held, that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as heir, on her death in 1838. (*Doe* d. *Bennet* v. *Long*, 9 Carr. & P. 773.)

A plaintiff admitted to be in possession and seeking to displace the title under which the defendants claim, on the ground that it is barred by the 3 & 4 Will. 4, c. 27, s. 2, need not show what that title was and how it was barred; but a general allegation, so as to bring the case within that section, is sufficient. In trespass *quare clausum fregit*, the defendant pleaded

3 & 4 *Will.* 4, c. 27, *s.* 2.

specially, deducing title to the *locus in quo* under an inclosure act in J. S., and alleging that J. S. thereupon became and continued possessed thereof, until just before the time when, &c., and the defendant then justified the trespasses as the servant of J. S. and by his command. The plaintiff replied, that the defendant entered and committed the trespasses after the passing of the Limitation Act, 3 & 4 Will. 4, c. 27; that the entry was made to recover the close in which, &c.; and that the right to make such entry did not first accrue to J. S., or to the defendant, or any person through whom J. S. or the defendant claimed, within twenty years next before such entry. It was held good, on special demurrer, and that it was not necessary to set forth the particular mode in which the estate of J. S., or the party through whom he claimed, had determined. (*Jones* v. *Jones*, 16 M. & W. 699.)

An annuity under a will within the act.

Since this statute a distress or action for an annuity accruing by will must be resorted to within twenty years from the death of the testator. It appeared that John Salter, the father of the defendant of that name, by his will duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to John Salter, the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.*, by four quarterly payments, to commence on the first quarterly day of payment after his decease; with a power of distress, if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804, without having revoked or altered his will; and that, on the 17th March, 1835, the defendants distrained for 870*l.* for twenty nine years' arrears of the annuity, ending at Christmas, 1834. It appeared that the right to make a distress for the annuity first accrued to John Salter, the son, on the expiration of the twenty days next after the first quarterly payment subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appeared that there was no payment or receipt of the annuity by the defendant Salter before the distress was put in in March, 1835, for it was for the whole of the arrears since the testator's death. The second issue on the case arose upon a plea in bar, framed upon the second section of stat. 3 & 4 Will. 4, c. 27. The facts brought the case within the second section, unless the third section did in terms exclude from the operation of the second the claim of any person whose right to a rent is derived under a will, by reason of the words "other than a will" in the third section (*post*). The court, in the first instance, expressed an opinion that the case was excluded from the operation of the second section, by reason of its not being comprehended within the third, which third section was thought to contain an enumeration of the instances to which only the second section could be held to be applicable; and the court held that the annuitant was not barred by the lapse of twenty years, and the non-payment of the annuity. (*James* v. *Salter*, 2 Bing. N. C. 505.) Upon further consideration, the court changed their former opinion. *Tindal*, C. J., in giving judgment, said, "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but it is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to show that such must be the just construction of the act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances, except those enumerated in the third section. Again, if the words 'granted by any instrument other than by will,' were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at

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direct variance with other parts of the statute; for instance, in the third section immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, 'or other future estates or interests' is large enough to comprehend, and would comprehend, all executory devises; and again, section forty expressly provides for the case of any legacy. And indeed the words, 'by any instrument other than by will,' carry the matter no further than if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case, not being enumerated in the third section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz. the devise of an estate in possession in land, or of an estate in possession in a rent-charge first created by the will, would be altogether unprovided for by the statute. For the third class of instances, enumerated in section three, describes the grant to be 'by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent,' a description which can neither apply to the case of a devise of a particular estate in land, or of a newly-created rent; for the devisor, who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of the same estate or interest as that claimed by the devisee; still less can the devisor, who creates a new rent-charge by his will, be said to have been in the receipt of his rent. The case therefore under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff." (*James* v. *Salter*, 3 Bing. N. C. 544; see pp. 553—555; 4 Scott, 168; 5 Dowl. P. C. 496.)

3 & 4 *Will.* 4, *c.* 27, *s.* 2.

In *Paget* v. *Foley*, 2 Bing. N. R. 679; 3 Scott, 135; *Tindal*, C. J., said, "This statute was proposed to include other rents of the same nature as those to which the act, according to its title and preamble, was intended to apply, rather than to conventional rents reserved on a lease." It was not necessary, however, to decide the point in that case, for the reason which will hereafter appear. (See *post*.) The Real Property Commissioners seem also to have contemplated an assimilation of limitation for land and all rents, other than conventionary rents between landlord and tenant. (See 1 Real Prop. Rep. p. 50.)

The word "rent" in the second section of the act does not include rents reserved on leases for years, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like.

The word "rent" in the 2nd section is confined to cases where an estate in the rent is claimed.

In an action of replevin for taking the goods of the plaintiff in his dwelling-house at K., it appeared by the pleadings, that in the year 1764, D. B., being seised in fee of the land on which the house in question was afterwards built, demised the same on a building lease for a term of ninety-nine years at an annual rent of 25*l*., payable on the four usual days of payment, and it further appeared that on the 13th day of June, 1836, the reversion expectant on the determination of the term became, after various mesne assignments, vested in W. P. in fee. The defendant in replevin made cognizance as the bailiff of W. P., and justified the taking as a distress for the three years and three quarters of a year's rent due at Lady-day, 1840, being the rent accrued due subsequently to the time when W. P. had acquired the reversion. To this cognizance the plaintiff pleaded in bar, that for a period of more than twenty years before any of the rent in question had become due, the parties entitled to the reversion, and through whom the said W. P. claimed, had discontinued the receipt of the rent reserved by the original lease, and that during that period no rent had been paid or received. To this plea there was a demurrer, and the question for the

3 & 4 Will. 4, c. 27, s. 2.

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decision of the court was, whether the plea in bar did or did not disclose a good defence to the claim of rent on the part of W. P.

The question turned entirely on the construction of the stat. 3 & 4 Will. 4, c. 27, and mainly on the 2nd section and the first branch of the 3rd section. On the part of the plaintiff it is contended, that his case comes expressly within the provisions of the act. W. P., he says, derives title to the rent claimed through several persons named in the 3rd cognizance of the defendant, who were successively the owners in fee of the reversion expectant on the termination of the lease; and those persons being so entitled to the reversion discontinued the receipt of the rent for a period of more than twenty years next before the time when any of the rent distrained for became due, during which period no rent has been paid or received, and this the plaintiff contends is precisely within the letter and spirit of the statute. The defendant, on the other hand, contends that this is not a case within the statute at all. He contends that the word "rent" in the 2nd section of the statute, cannot be taken as having any reference to rents such as that now in question, namely, rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation, but must be confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like. We accede to this latter view of the case. In order to come to a just conclusion as to the meaning of the word "rent," as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word "recover," as used in the 2nd section. The enactment is, that no person shall make an entry or distress, or bring an action to "recover" any land or rent but within twenty years, &c. Now, so far as relates to land, the word "recover" in this passage clearly means the same thing as "obtain possession or seisin of." The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted. If such be the meaning of the word "recover," when used with reference to one of its objects, "land," it is very reasonable to suppose that the legislature intended it to have the same meaning in respect to the other object, "rent." It is true, indeed, that, with respect to an incorporeal hereditament, like rent, there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the terre-tenant as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still, before the passing of this act a party seised of rents, whether rents service, rents charge, or rents seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, *quod recuperit seisinam*, and in each case the party was entitled to a writ of *habere facias seisinam*, which, in case of a recovery of rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land in lieu of execution, (Vin. Abr. Assize, B. h. 12, Seisin, a 7,) and in case of a subsequent withholding of rent, the party aggrieved might have his writ of redisseisin with all its consequences, as in the case of a subsequent disseisin of lands or houses. (Reg. Br. 206.) Now we are of opinion that it is to this sort of recovery only that the 2nd section of the statute has reference; for such is clearly the meaning of the word "recover" when used with reference to land, and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course, that the word "rent" in the 2nd section must necessarily be confined to rent, which might in its nature have been the object of such a recovery, and this certainly does not include the rent reserved on common leases for years. According

to our view of this case, therefore, even if the 2nd section had stood alone, we should have been of opinion that the pleas in bar afforded no answer to the defendant's cognizance, and consequently that he was entitled to judgment in his favour. But we think it right to add that the correctness of the construction we put on the 2nd section appears to us to be strongly confirmed by the subsequent parts of the statute. In the 3rd and some other sections, the act proceeds to define the time, in most, though (as is noticed by Lord C. J. *Tindal* in the case of *James* v. *Salter*, 3 Bing. N. C. *553*, *ante*, p. 152) not in all possible cases, at which the right to make a distress for the purpose of recovering any rent shall be deemed to have first accrued to the party making the same. The first case put is that of a party who has himself, in respect of the estate or interest claimed, been in possession of the rent, and who afterwards has been dispossessed or has discontinued the receipt of the rent. The estate or interest claimed must, according to the context, mean the estate or interest claimed in the rent, and not in the lands out of which the rent issues. Now a person entitled to the rent reserved on a common lease for years has no estate in the rent at all. (See *Prescott* v. *Boucher*, 3 B. & Ad. 849, *ante*, p. 143.) He is entitled to the rent, when it from time to time becomes due, as being an incident to his reversion, and not because he has any estate in the rent itself. He is himself the freeholder of the land, and can therefore have no estate in rent issuing out of the land. The word "interest" indeed is of so large and comprehensive a nature as, perhaps, to embrace the right which the reversioner has in the rent as incident to his reversion; still that interest can in no fair sense be described as the interest claimed. What is claimed by a landlord distraining for rent on a common lease for years is the amount of the arrears, wholly irrespective of the extent of his estate or interest in the reversion, as an incident to which the right to those arrears has accrued. What he "recovers" by his distress is the amount due for arrears of rent, and will be the same whether he is tenant in fee simple, tenant for life, or tenant for years. The statute in this branch of section 3 clearly looks to the party recovering the same estate or interest of which he was previously possessed, and of which he had been dispossessed, and this is altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years. Indeed this very distinction appears to have been contemplated by the legislature in this act, for by the 42nd section a limit is imposed as to the number of years' arrears for which a party entitled to rent may distrain, and there the subject-matter to be recovered by the distress is described not as "rent," but as "arrears of rent."

3 & 4 *Will.* 4, *c.* 27, *s.* 2.

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It must further be observed in the present case that, at the end of the ninety-nine years, the reversioner will clearly be entitled to the possession of the land. For by one of the express provisions of section 3, the right to the reversion is to be deemed to have first accrued when the estate falls into possession, unless, which is not the case here, some third person shall in the mean time have got into wrongful receipt of the rents, this being in certain cases treated by the act as analogous to an actual disseisin. As therefore the rights of the reversioner, which are to be enforced when the particular estate is determined, are certainly preserved, it seems impossible to imagine that those rights which exist as incidents to the reversion during the subsistence of that particular estate could have been intended to be extinguished. The reason why, at the end of the ninety-nine years, the reversioner will be entitled to recover the land is, that during that term the party in possession has been holding under the lease in question, one of the terms of which is that he is to pay the rent reserved. The argument of the plaintiff goes to this, that though the tenant is most undoubtedly holding under the lease, yet that lease is to be treated as if all that concerns the reservation of rent were struck out, and all the other provisions remained. The landlord will be bound by his covenants for title (unless made conditional on payment of rent by the tenant), he will also be bound by his covenants, if such there are, to build or repair or furnish materials for building or repairing, and by all collateral engagements. The tenant, on the other hand, will be bound by his covenants as to cultivation, repairing, and the like, and this appears to us altogether inconsistent with the notion,

Right of reversioner at expiration of lease.

3 & 4 *Will.* 4, *c.* 27, *s.* 2.

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Reversioner's right how affected by non-payment of rent.

that the legislature meant to bar the reversioner of his right to recover the rent due.

A strong argument in favour of the construction which we have put on this act may be drawn from the 9th section. It was strongly argued on the part of the defendant that that section amounts to a virtual recognition by the legislature of the accuracy of the proposition for which he contends, namely, that where there is no receipt of rent by a party wrongfully claiming the reversion, there the right to the reversion and to the rent as incident to it, remains unaffected. We think there is great force in this argument, and its weight may be much increased by considering what, upon the plaintiff's construction of the statute, would be the position of the reversioner, if no rent should be paid for twenty years, and after that time a wrongful claim should be set up by some party not entitled. Mere non-payment of rent will certainly not bar the reversioner's right to recover the land at the end of the term. When therefore no rent has been paid for twenty years, the condition of the reversioner, according to the plaintiff's view of the law, is, that he has no possibility of obtaining payment of any further rent, but when the term is expired, he will be entitled to recover the land; suppose, then, that in this state of things a wrongful claimant should succeed in getting the tenant to pay rent to him, and that then, after twenty years, the term should expire, it is clear that by the express provision of the 9th section, the right of the reversioner to the land would be barred, so that by the act of a party wrongfully obtaining rent to which he was not entitled, and which act the reversioner had, according to the plaintiff's argument, no possible means of contesting, the reversioner is at the end of the term deprived of what but for such wrongful act he would have been clearly entitled to, namely, his right to the possession of the land. On the view which we take of the law, no such anomaly exists; for the reversioner, by distraining for or otherwise obtaining his rent, within twenty years after the first wrongful receipt of it by the adverse claimant, effectually prevents his being, by the wrongful act of another, deprived of the estate at the expiration of the term.

It is not unworthy of notice, that throughout the act the receipt of rent is constantly mentioned in a mode which appears as if studiously designed to mark that the rent contemplated is not the ordinary rent reserved on leases for years, not that which is usually spoken of as the rents and profits, but something distinct from both.

For instance, in the 2nd section, the language is, *when the person claiming such land or rent shall have been in possession or in receipt of the profits of such land, or in receipt of such rent:* and the same, or nearly the same, mode of expression is used throughout the act. This is certainly not the ordinary mode of speaking of a person in actual possession of land, or in receipt of the rents reserved on leases for years. We do not rely very much on this argument, but the circumstance is worth adverting to.

It was pressed on the part of the plaintiff, that whatever question might have been raised as to the meaning of the word "rent," deducing that meaning from the 2nd and subsequent sections of the statute, yet that it was not competent to the court to give to the word any but its most extended meaning, by reason of the express enactment in the 1st section, the interpretation clause. But we do not feel pressed by that argument, inasmuch as that clause expressly excludes from its operation all cases in which the context requires a less extended signification. On the whole, therefore, we are of opinion that the limitation by the 2nd section of the statute does not apply to the present case, and consequently that there must be judgment for the defendant. (*Grant* v. *Ellis*, 9 Mees. & W. 113; see pp. 120—128.)

An additional rent in the nature of a penal rent reserved by indenture of demise between landlord and tenant was held not to be within the second section of 3 & 4 Will. 4, c. 27. (*Daly* v. *Lord Bloomfield*, 5 Ir. L. R. 65. See *post*.)

The granting of a lease to a third person by the lessor of a tenant at will is a determination of the tenancy at will, but it does not give the lessor such a right of entry as is contemplated by this section when the lessor's title is

that of a reversioner expectant on a term of years. (*Hogan* v. *Hand*, 14 Moore P. C. C. 310.) 3 & 4 *Will.* 4, *c.* 27, *s.* 2.

It seems that the second section of 3 & 4 Will. 4, c. 27, does not apply to claims for tithe composition, as between the tithe claimant and the owner of the land, but only to *estates* in tithe; but even if such a case did come within the 2nd section, it was within the saving of the 15th, as the withholding of tithe by the occupier of the land was not an adverse possession at the time of the passing of the 3 & 4 Will. 4, c. 27. (*Lord Shannon* v. *Hodder*, 2 Brady, Adair & Moore, 223, n.)

The operation of the 2nd section in the case of tithes has been confined to cases where there are two parties, each claiming an adverse estate in tithes. Therefore, a person who has received no tithes for twenty years cannot recover the possession of them from another who has for twenty years received those tithes from the terre-tenant. (*Dean and Chapter of Ely* v. *Cash*, 15 Mees. & W. 617. *Dean of Ely* v. *Bliss*, 2 De G., M. & G. 459. See *ante*, p. 137.)

Limitation of real actions before the new statute.

By the common law there was no stated or fixed period within which it was necessary to commence actions, but afterwards certain remarkable events were from time to time selected for that purpose as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by stat. 32 Hen. 8, c. 2, which enacted, that no person should maintain any writ of right, or make any prescription, title or claim of, to or for any *manors*, *lands*, *tenements*, *rents*, *annuities*, *commons*, *pensions*, *portions*, *corodies* or *other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the said writ, or next before the said prescription, title or claim so made. Actions upon the *possession* of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the stat. 21 Jac. 1, c. 16, and the limitation of time for suing out such writ was fifty years. This writ was maintainable by one in remainder for an intrusion made after the determination of an estate *pur autre vie*; and a demandant who claimed under a devise might maintain the writ. (*Peircey*, dem., *Gardner*, ten., 3 Bing. N. C. 748.) Dignities were held not to be within the Statute of Limitations, and even an adverse possession and exercise of a dignity by persons not entitled to it, for a period of eighty-five years, was resolved by the House of Lords not to bar the real claimant. (In the barony of Willoughby of Paiham, Lords' Journ. vol. 31, p. 350; see 3 Cru. Dig. 202.) But offices with fees and profits are within them. (Lords' Journ. vol. 36, p. 295.) An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin but upon his grant. (Bro. St. Lim. 26; see *ante*, p. 145.) So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter, as they did not count upon a seisin of any ancestor or predecessor, but upon their own possession. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years. (Bro. St. Lim. 33; Bac. Abr. Limitation of Actions, (B).)

Non-claim on fines.

By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons having present rights of entry, and not being under any disabilities, if they did not claim within five years after the proclamations made; to all persons under disabilities if they did not claim within five years after their disabilities were removed: and to all persons not having present rights, if they did not claim within five years after their rights of entry accrued, unless under disabilities, and then within five years after the removal of their disabilities. By the abolition of fines, the practice of gaining a title by a fine and non-claim will be prevented in future. (See 3 & 4 Will. 4, c. 74, s. 2, *post*.) In order that a fine should operate as a bar by non-claim, it was necessary that the person who levied it should have had a freehold either by right or by wrong. If he turned out a lawful possessor of it, if he had

3 & 4 Will. 4, c. 27, s. 2.

committed a disseisin, he had what was called a wrongful freehold, and if the party entitled had not claimed within five years after the fine had been levied, that would be a bar to him. Or if a person had been in by right adversely to the rest of the world, and asserting the dominion to be his own, and levied a fine after the proclamations had been made and five years had expired, any demand or latent claim would be equally barred. (*Davies* v. *Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn* v. *Doe* d. *Cooper*, 5 B. & C. 701. See *Doe* d. *Burrell* v. *Perkins*, 3 Maule & S. 271; *Doe* d. *Parker* v. *Gregory*, 2 Ad. & Ell. 14.) If at the date of the fine the parties were all married women, the entry might be within five years after they became discovert, as regarded them, or within five years of their death, if they died under coverture, as regarded their heirs. (*Doe* d. *Blight* v. *Pett*, 11 Ad. & Ell. 853; 4 P. & Dav. 278.) A husband claiming in right of his wife, in order to avoid a fine must have entered within five years after his title accrued. (*Doe* d. *Wright* v. *Plumtre*, 3 B. & Ald. 474.)

The stat. 21 Jac. 1, c. 16, limited the period for all writs of formedon to twenty years, and enacted that no persons should at any time thereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same, and, in default thereof, such persons so not entering, and their heirs, should be disabled from such entry after to be made.

The provisions of the statutes 32 Hen. 8, c. 2, and the 21 Jac. 1, c. 16, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6, by making the limitation in a writ of right on the seisin of the party's ancestors sixty years, and in a possessory action upon possession of ancestors fifty years, and in an action upon the party's own seisin or possession twenty years, and in an avowry or cognizance for rent, suit or service, forty years. Actions of formedon and *scire facias* on fines and recoveries were limited to twenty years after the title or cause of action accrued, and an entry upon lands must be made within twenty years after the title accrued, with an exception in favour of persons being infants, *feme coverts*, *non compos mentis*, imprisoned, or beyond seas, who should sue within ten years after the removal of the disability.

Time of entry under stat. 21 Jac. 1, c. 16.

By the stat. 21 Jac. 1, c. 16, s. 1, (10 Car. 1, sess. 2, c. 6, ss. 12, 13, Ir.,) no entry could be made, and therefore no ejectment maintained, but within twenty years after the title of entry first accrued, with the exception of persons under disabilities. There were two periods from which the term of twenty years limited by that statute was to be computed, one with respect to the rights of persons entitled in possession, and the other with respect to the rights of persons entitled to future interests. Less difficulty arose with respect to the latter, because it can easily be proved when such rights would have come into possession by the determination of the preceding estates; but the former period was to be computed from the time when the *wrong-doer* acquired the possession of the freehold *adversely* to the title of the owner, whose estate thereby became a mere right; and in many cases it was very difficult to ascertain what would constitute such possession. It was formerly considered necessary that there should be an ouster of the seisin in one of five modes, called disseisin, abatement, intrusion, discontinuance, and deforcement. Disseisin is where the person in possession of the freehold is evicted. Abatement is where a wrong-doer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. Intrusion is where a wrong-doer enters on the vacant possession, after the death of the tenant for life, instead of the remainderman or reversioner. Discontinuance was where a tenant in tail in *possession* aliened by a tortious conveyance, as feoffment or fine, which did not bar the entail. Deforcement was considered to include the other four terms, and any holding over after the determination of an estate, or other wrongful withholding of the freehold from the right owner. (See 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173.)

Disseisin.

When a party enters by colour of a *void* grant, he is a *disseisor*. (*Buckler's case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 368; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316.) But where a grant is according to the rules of law, but requires to be perfected by a subsequent ceremony, as if a

feoffee enters before livery of seisin, he is not a disseisor. (2 Rep. 55.) Wherever there is a disseisin, the possession of the disseisor will be considered *adverse*, and the party must pursue his remedy within twenty years from the act constituting the disseisin. (Butl. Co. Litt. 330 b, n.) There may be an unlawful possession which does not amount to a disseisin. (*Doe* v. *Gregory*, 2 Ad. & Ell. 14; 4 Nev. & M. 308. See 2 Mees. & W. 904. As to disseisin, see *Taylor* v. *Horde*, 1 Burr. 108; *Doe* v. *Lynes*, 3 B. & C. 388; *Williams* d. *Hughes* v. *Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. on Abst. 284, *et seq.*) A feoffment made after 1st October, 1845, has not any *tortious* operation. (8 & 9 Vict. c. 106, s. 4.)

3 & 4 *Will.* 4, *c.* 27, *s.* 2.

Great practical difficulty had arisen under the former statutes in determining what is adverse possession, and when it shall be considered to have begun. This must generally be left as a question of fact for the jury; but there are some rules of law (*præsumptiones juris et de jure*) which absolutely prevented the possession from being considered adverse, and the expediency of which was very questionable, as they did not seem necessary for preserving rightful claims, and they greatly impaired the healing tendency of the statutes of limitations. (See 1 Real Prop. Rep. 47.) The above statute has for the most part put an end to questions of this kind, (see *ante*, s. 2, pp. 150, 151, n.,) but still there will be cases arising under the 9th section, which must be decided with reference to some of the old rules as to adverse possession.

Adverse possession.

Where one person held an estate on the joint account of himself and another, or by the permission of the real owner, and without claiming any inconsistent right, the possession is not adverse, and the original title is not affected. Thus, where one holds lands as lessee, his possession is in contemplation of law that of the lessor. (1 Wils. 176; 3 Wils. 521.) For length of possession during a particular estate, as under a lease for lives, as long as the lives are in being, gives no title; but if the tenant hold over for twenty years after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainderman or reversioner, because it was adverse to his title. (Cowp. 218.) Where the relation of landlord and tenant could be implied, the statute 21 Jac. 1, c. 16, did not run, (2 Bos. & Pull. 542,) or where the party in possession was tenant at sufferance. (2 Dowl. & Ryl. 38.) As to the effect of non-payment of rent since the stat. 3 & 4 Will. 4, c. 27, see *ante*, p. 156, *post*.

Three females, being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for partition by deed of the lands held in coparcenary, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery, within twenty years after her death, and before the stat. 3 & 4 Will. 4, c. 27, to recover her share, which had been held by the husband of one of the other coparceners, it was held, that the possession was under the agreement, and not adverse. It was also held, that nothing could be presumed, beyond what was contemplated by the agreement, which provided for a deed and not for a recovery. (*Doe* d. *Millett* v. *Millett*, Law J., 1848, Q. B. 202; 11 Q. B. 1036.)

Possession is either in fact or in contemplation of law, and in either case, while it remained in the owner, the stat. 21 Jac. 1, c. 16, did not run. Therefore, where a stranger entered and divided the profits of an estate for more than twenty years with the real owner, it was held, that he might, notwithstanding, maintain an ejectment, as where two men are in possession, the law will adjudge it to be in him who has the right. (*Reading* v. *Rawsterne*, 2 Ld. Raym. 829; 1 Salk. 423.)

Issues in tail had no distinct and successive rights under the stat. 21 Jac. 1, c. 16, any more than heirs of estates in fee simple, (4 Taunt. 830,) and therefore that statute began to run when the title descended to the first tenant in tail, unless he was under a disability, and each succeeding tenant in tail had no right to sue within twenty years after the death of his predecessor. (*Tolson* v. *Kaye*, 3 Brod. & Bing. 217. See 3 B. & Ad. 738.)

In formedon on the descender, pleas, that the title and cause of action did

3 & 4 *Will.* 4, c. 27, s. 2.

not first descend or fall by force of the gift within twenty years next before the suing out of the original writ, were held good, although some of such pleas did not state that the donee or any of the issues in tail had ever been out of possession. To a plea that the title did not first descend or fall by force of the gift within twenty years next before the suing out of the original writ, the demandant replied that the title first descended, and fell *to him the demandant*, within twenty years. This replication was held bad on general demurrer in the Common Pleas, and the Exchequer Chamber declined to reverse the judgment. (*Tolson* v. *Kaye, in error*, 6 Man. & G. 536. See *Doe* d. *Daniel* v. *Woodroffe*, 10 Mees. & W. 633; 16 *Ib.* 769.)

Where the possession of one party was consistent with that of the other, it was not considered adverse. Thus, where by a marriage settlement a copyhold estate was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife, the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement: it was held, that if he had no other title than the admission, a possession by him for twenty years would have barred the heir of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life in the nature of a tenant by the curtesy, and this without any admittance after the death of the wife, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband within twenty years after the husband's death, though more than twenty years after the death of the wife. (*Doe* d. *Milner* v. *Brightwen*, 10 East, 588.) So where A., being seised in fee of an undivided moiety of an estate, devised the same (by will made some years before her death) to her nephew and two nieces as tenants in common; one of the nieces died in the lifetime of A., leaving an infant daughter; A., by another will, which was never executed, intended to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece. After A.'s death, the nephew and surviving niece covenanted to carry the unexecuted will into execution, and to convey one-third of the moiety to a trustee upon trust to convey the same to the infant if she attained twenty-one, or to her issue if she died under twenty-one and left issue, or otherwise to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee for the use of the infant during her lifetime. An ejectment having been brought by the devisee of the nephew more than twenty years after his death, but within twenty years after the death of the infant: it was held, that there was no adverse possession until the death of the infant, and that the ejectment was well brought. (*Doe* d. *Colclough* v. *Hulse*, 3 B. & Cr. 757.) But where copyhold lands had been granted to A. for the lives of herself and B., and in reversion to C. for other lives, and A. died, having devised to B., who entered and kept possession for more than twenty years: it was held, that C. was barred by the statute after B.'s death from maintaining ejectment, as C.'s right of possession accrued on the death of A., when his interest terminated, inasmuch as there could be no general occupant of copyhold land. (*Doe* d. *Foster* v. *Scott*, 4 B. & Cr. 706; 7 Dowl. & Ry. 190.) Where a daughter entered into occupation of premises on the death of a mother, to whom they had belonged till then, and held them without interruption for twenty years, but the mother had left a son who was living during the whole time of the daughter's occupation: it was held (on ejectment brought before stat. 3 & 4 Will. 4, c. 27, came into operation) that it could not be presumed from this circumstance alone that the sister's occupation was virtually that of the brother's. (*Doe* d. *Draper* v. *Lawley*, 13 Q. B. 954.) A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constituted such an adverse possession as would, under the statute of 21 Jac. 1, c. 16, create a bar to an entry or to an action of ejectment, as where the husband of tenant for life held over twenty years after her decease. (*Doe* d. *Parker* v. *Gregory*, 4 Nev. & Mann. 308. See *Doe* d. *Allen* v. *Blakeway*, 5 Car. & P. 563.)

In order to prove possession, in an ejectment for mines, it is not sufficient to show that the lessor of the plaintiff was lord of the manor, an actual possession of them within twenty years must be proved. (*Rich* v. *Johnson*, Str. 1142.) A verdict for the plaintiff in trover for lead dug out of a mine will not prove possession of the mine, for trover may be brought on property without possession. (Bull. N. P. 102; Adams on Ejectment, 263, 4th ed.)

3 & 4 *Will.* 4, *c.* 27, *s.* 2.

The stat. 21 Jac. 1, c. 16, ran against the lord of a manor as well as against any other person. Hence, if a house, &c., be built upon the waste, the lord shall take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. If a cottage is built upon waste in defiance of a lord of a manor, and quiet possession has been had of it for twenty years, it is within the stat. 21 Jac. 1, c. 16; but if it were built at first by the lord's permission, or any acknowledgment have been since made, (though it were 100 years since,) that statute would not run against the lord. (Bull. N. P. 104, cited 3 B. & C. 414.) Payment of rent for a piece of waste land after an occupation of thirty years, without previously paying any rent, was held conclusive evidence that the former occupation by the party was a permissive occupation. (*Doe* d. *Jackson* v. *Wilkinson*, 3 B. & C. 413.) So where a cottage, standing in the corner of a meadow, (belonging to the lord of a manor,) but separated from the meadow and highway by a hedge, had been occupied for about twenty years without any payment of rent, and then upon possession being demanded by the lord was reluctantly given up, and was afterwards restored to the party, he being at the time told that if allowed to resume possession, it would only be *during pleasure*, and he kept possession fifteen years more, and never paid any rent: it was held, that the jury were warranted in presuming that the possession had commenced by the permission of the lord. (*Doe* d. *Thompson* v. *Clarke*, 8 B. & C. 717. See *Reg.* v. *Cuddington*, 2 New Sess. C. 10; Law J. 1845, M. C. 182.) A mere licensee is in this respect on the same footing as a tenant. (*Doe* v. *Baytup*, 3 Ad. & E. 188.) Where A., in 1800, without any leave, inclosed a small piece of waste land from a common, and held and cultivated it, and in 1826 built a hut upon it, wherein he lived for a year and a half, and in 1827 sold and conveyed it to a purchaser. In the years 1806, 1811 and 1817, the parish officers and freeholders, who perambulated the parish for the purpose of marking the boundaries and asserting their right of common, pulled up a portion of the fence to the land inclosed, and dug up part of the bank and rode through the inclosure. In 1820 or 1822, a like perambulation was made by the direction of the lord of the manor, when similar acts were done. No acknowledgment was paid to the lord for the land, nor other act done for asserting the right to the land. In a question as to the settlement of A., it was held, that he had been in adverse possession of the land for twenty years. (*Rex* v. *Inhabitants of Woburn*, 10 B. & C. 846.) An inclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time without objection, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. (*Doe* d. *Foley* v. *Wilson*, 11 East, 56.) If a licence be given by a commoner, by parol, to build a cottage on a common, he cannot maintain an action for the encroachment, although no sufficient common is left. (*Harvey* v. *Reynolds*, 12 Price, 724; 1 C. & P. 141.) To trespass on the case by a freeholder having right of common against a defendant for an encroachment, a plea of leave and licence was held to be supported by evidence that the plaintiff had permitted a former encroachment by the defendant, the plaintiff being then under age, and had since, when of full age, countenanced a further encroachment by expressing his assent, and requiring an increase of the rent or annual acknowledgment paid by the defendant. (*Ib.*) If a person, within twenty years, inclose a portion of the lord's waste by the licence of the lord, such person cannot be turned out of the possession of it by the lord, without some act being done, from which a legal revocation of the licence can be inferred. (*Doe* d. *Dunraven* v. *Williams*, 7 Car. & P. 332.) When premises have been inclosed from the waste with the know-

Encroachments from waste.

3 & 4 *Will.* 4, c. 27, s. 2.

ledge of the lord, the licence presumed from his acquiescence may be revoked by the lord's breaking down the fences before the commencement of the action. A cottage had been built on land inclosed from the waste, and there was evidence of its having been done with the knowledge of the lord. It was proved, that the lord of the manor and his servants, a few days only before the action was brought, had entered on the inclosure and broken down the hedges in several places: it was held, that the jury were warranted by such act in finding a revocation of the licence. Such revocation may be by act *in pais* or by parol; and no precise time is limited by law as necessary to intervene between it and the commencement of the action, which treats the party in possession as a trespasser. (*Doe* d. *Beck* v. *Heakin*, 6 Ad. & Ell. 495; 2 N. & P. 660.) A., forty-five years ago, inclosed a piece of ground from the waste, and built a cottage on it; he died twenty-nine years ago, and after that his widow and daughter lived on the premises till the death of the former, a month before the trial: it was held, in ejectment by A.'s eldest son, that his claim was barred unless the jury were satisfied that his mother held the premises by his permission and not adversely. (*Doe* d. *Pritchard* v. *Jauncey*, 8 Car. & P. 99.) If a person makes an encroachment from the waste and dies within twenty years, this encroachment (except as against the rightful owner) descends to his heir, and does not go to his executor. (*Ib.*)

Encroachment by tenant adjoining landlord's estate.

If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. (*Doe* d. *Lewis* v. *Rees*, 6 Car. & P. 610; *Doe* d. *Challoner* v. *Davies*, 1 Esp. 461; *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; *Doe* d. *Watt* v. *Morris*, 2 Bing. N. C. 189; 2 Scott, 276. See *ante*, pp. 45, 46.) That encroachments by the tenant on the waste do not belong to the landlord, see *Doe* d. *Colclough* v. *Mulliner*, 1 Esp. 460. *Primâ facie*, every inclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. If a lessee inclose land which is near the demised premises, as being part of the premises comprised in his lease, this is not an adverse possession against his landlord, and a twenty years' possession by him will not enable him to retain possession of the inclosed land against his landlord. (*Doe* d. *Dunraven* v. *Williams*, 7 Car. & P. 332; *Doe* d. *Harrison* v. *Murrell*, 8 Car. & P. 134. *Ante*, p. 44.)

Right conferred by twenty years' possession.

Possession for twenty years, though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, is a title as against strangers (*Doe* d. *Payne* v. *Webber*, 1 Ad. & Ell. 119; 3 Nev. & M. 746; *Doe* v. *Parke*, 4 Ad. & Ell. 816), and consequently confers on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries, notwithstanding it may be apparent to the court that the rightful title is in another. (See 3 Man. & R. 112, n.) A party who has a possession for twenty years has a good title against any one coming in after, unless the latter shows title. (*Doe* d. *Danson* v. *Parke*, 4 Ad. & Ell. 818; *per* Lord *Denman*. See *Doe* d. *Smith* v. *Webber*, 1 Ad. & Ell. 119.) Before the stat. 3 & 4 Will. 4, c. 27, if no other title appeared, a clear possession of twenty years was strong presumptive evidence of a fee. (*Doe* d. *Tarrwell* v. *Barnard*, Cowp. 595.) Possession of land for any term less than twenty years by a feoffee is not presumptive evidence of livery of seisin. (*Doe* d. *Wilkins* v. *Cleveland*, 9 B. & C. 864; 4 M. & R. 666; *Doe* d. *Lewis* v. *Davies*, 2 Mees. & W. 503.)

In ejectment the lessor of the plaintiff relied on her own possession for thirteen years, and her husband's before her for eighteen years, but in so doing showed that her husband died leaving children. The defendant, in whom the legal estate was before the twenty years, had turned the lessor of the plaintiff out of possession. It was held, first, that the possession of the lessor of the plaintiff, not being connected by right with that of her husband, sect. 34 of stat. 3 & 4 Will. 4, c. 27, did not give her the right of possession against the defendant. (*Doe* d. *Carter* v. *Barnard*, 13 Jur. 915; 18 Law J., Q. B. 306. See *Doe* d. *Humphrey* v. *Martin*, 1 Car. & M. 32; *Doe* d. *Hughes* v. *Dyball*, 3 Car. & P. 610.) Possession is *primâ facie* evidence of title, and,

no other interest appearing in proof, evidence of a seisin in fee. But in this case the lessor of the plaintiff not only proved her own possession, but that of her husband before her, for eighteen years, which was *primâ facie* evidence of his seisin in fee; and as he died in possession, and left children, it was *primâ facie* evidence of the title of the heir, against which the possession of the lessor of the plaintiff for thirteen years could not prevail; and therefore she had proved the title to be in another, of which the defendant was entitled to take advantage. 3 & 4 *Will.* 4, *c.* 27, *s.* 2.

An adverse possession of twenty years is not only a negative bar to the plaintiff's recovery in ejectment, but takes away his right of possession and gives a positive title to the opposite party; (Runn. Eject. 55, 2nd ed.;) therefore, where a plaintiff in ejectment proved twenty years' possession immediately preceding that for ten years by the defendant, it was held that the former was entitled to recover, as his earlier possession must prevail. (*Doe* d. *Harding* v. *Cooke*, 7 Bing. 346; 5 Moore & P. 181. See also *Stocker* v. *Berny*, 1 Ld. Raym. 741; 2 Salk. 421; 1 Burr. 119.) Where a party is let into possession of land with the consent of the owner, and does acts importing that he continued in possession only with the owner's permission, such acts will prevent the possession being adverse. (See Litt. s. 70.) On ejectment, G., under whom the defendant claimed, was let into possession twenty-two years before the action brought, by virtue of a contract with P. for the purchase of an allotment accruing to P. under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase-money for some years, but never completed the purchase: it was held, that even after the lapse of twenty-two years, his possession was not adverse to P.'s title, and that there was no ground to presume a conveyance. It was also held, that G., or any person claiming under him, was estopped from raising an objection to P.'s title, that the commissioners of inclosure had made no formal award. (*Doe* d. *Milburn* v. *Edgar*, 2 Bing. N. C. 498.) Where a widow continued to reside in a freehold house, of which she was seised, for more than twenty years after her husband's death, it was held that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. (*Doe* d. *Hickman* v. *Haslewood*, 1 Nev. & P. 352; 6 Ad. & El. 167.) As to parol declarations negativing a widow's title under a possession for twenty years, see *Doe* d. *Haman* v. *Pettet*, 5 B. & Ald. 223; *Doe* d. *Reffey* v. *Harbrow*, 1 Nev. & M. 422; 3 Ad. & Ell. 67, n. Statements made by a deceased person while in possession of property are in themselves original evidence, if they go to cut down his interest in it. A declaration by a possessor of land, that he held "for life-interest," does not necessarily admit that the right of possession would, immediately on his death, accrue to the reversioner, for one or more life interests might exist consistently with the words used. (*Doe* d. *Welsh* v. *Langfield*, 16 Mees. & W. 497.) A party having a legal estate cannot convey it away to another by equivocal acts which amount to an admission of title in another. But where the party's title rests merely on the Statute of Limitations, his acts may amount to an admission that he held as tenant to another. (*Doe* d. *Groves* v. *Groves*, 10 Q. B. 491.) The acts *in pais*, which bind parties by way of estoppel, are but few, and these acts are of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. (Co. Litt. 352 a.) Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. (*Lyon* v. *Reed*, 13 Mees. & W. 285, see p. 309. See *Nickells* v. *Atherstone*, 10 Q. B. 944.) Titles would be placed in uncertainty and peril by the extension of the doctrine in *Thomas* v. *Cooke*, 2 B. & Ald. 119. The doctrine of this and subsequent cases as to what constitutes a surrender by operation of law within the stat. 29 Car. 2, c. 3, s. 3, will be taken to be law until it shall be overruled by a court of error. (*Davison* v. *Gent*, 1 H. & N. 744; 3 Jur., N. S. 342; 26 L. J., Exch. 122.) The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, is no evidence of a possession not being adverse prior to 3

3 & 4 *Will.* 4, *c* 27, *s.* 2.

& 4 Will. 4, c. 27. E. being in occupation of land signed an instrument, whereby he recited that he was tenant of the land; that L. claimed the fee, and had entered in the name of taking possession: that E. did thereby attorn to L., and become tenant to him from the preceding Michaelmas for such part as was in his occupation, at the rent under which E. now occupied, and that he had that day paid L. a shilling in part of his rent: it was held, that this was an attornment, but not an agreement requiring a stamp, though no title was shown *aliunde* in L.; and that it was evidence of L.'s ownership at the time of the attornment, against future occupiers, though such occupiers did not claim through E. The land was copyhold. After the attornment L. was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with proper formalities in the copyhold court, within the twenty years following: it was held, that L. (before the stat. 3 & 4 Will. 4, c. 27) was absolutely barred from bringing ejectment at the end of the twenty years, though E. continued in occupation till within twenty years of the ejectment brought. The action was commenced before the 31st December, 1833; therefore the stat. 3 & 4 Will. 4, c. 27, did not apply, and it was unnecessary to consider the point that would have arisen under the 2nd, 8th and 15th sections. (*Doe* d. *Linsey* v. *Edwards*, 5 Ad. & El. 95.) The owner of a cottage divided into two parts, in 1808 put in two servants, H. and W. to occupy it, who occupied each part severally till his death in 1814, without paying rent. They continued to occupy undisturbed after his death till 1821, when H. died, having by his will devised his moiety to W. H. some time before his death took in L. to live with him as a servant, and after H.'s death L. continued in possession. It was held, on ejectment brought by W., that by proving L. to have come in under H. he had shown a *primâ facie* title. The stat. 3 & 4 Will. 4, c. 27, s. 2, was held inapplicable, because the defendants were mere strangers; and the question was, whether the plaintiff had made out any title at all, and the court thought that he had, by showing H. to have been in possession of the premises, and that L. came in under H. (*Doe* d. *Willis* v. *Birchmore*, 1 Perry & Dav. 448; 9 Ad. & Ell. 662.) A woman, living apart from her husband, obtained a demise of property for a term; the husband's representative brought ejectment against a party who claimed to have had adverse possession for more than twenty years, and who had obtained and held possession without knowing of the husband's existence: it was held, that it was no misdirection to direct the jury to find for the plaintiff, unless they thought that such possession was adverse to the wife; inasmuch as, if adverse to the wife, it was adverse to the husband, and not otherwise. (*Roe* d. *Wilkins* v. *Wilkins*, 4 Ad. & El. 86; 5 Nev. & M. 434.)

Right of claimant to take possession.

It should seem that every claimant who has such a right of possession as would entitle him to maintain ejectment, is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace. (*Taylor* v. *Cole*, 3 T. R. 292; *Taunton* v. *Costar*, 7 T. R. 431; *Rex* v. *Wilson*, 8 T. R. 357; *Rogers* v. *Pitcher*, 6 Taunt. 202; 1 Marshall, 541; *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574; Co. Litt. 245, b; 1 Mann. & Ry. 221, n. (*c*); 5 Nev. & M. 164; *Reg.* v. *Newlands*, 4 Jurist, 322; *Perry* v. *Fitzhowe*, 8 Q. B. 757.) After a tenancy has been determined by a notice to quit, the landlord cannot enter on the premises whilst the tenant still remains in possession, and after requesting him to depart and give up the possession, and on his refusing so to do, turn him out of possession by force, using as much force and no more than is necessary for that purpose. (*Newton* v. *Harland*, 1 Mann. & G. 644; see *Taylor* v. *Cole*, 3 T. R. 295; *Taunton* v. *Costar*, 7 T. R. 431; *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; 8 Scott, 156; *Butcher* v. *Butcher*, 7 B. & C. 402; 1 M. & Rob. 220; *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574.) A. let certain premises to B. by an agreement which contained the usual clause for payment of rent and for repairing the premises, and also a clause, that in case of non-payment of the rent or non-performance of the conditions, it should be lawful for A., without any demand, to enter upon and take possession of the premises, and expel B. therefrom without any legal process; and that in case of such entry, and of any action being brought for the same, the defendant might plead leave and licence of B. to A. for the entry or trespasses

complained of. In an action of trespass by B. against C. for breaking and entering, &c., and assaulting plaintiff, C. pleaded leave and licence. It appeared that rent being in arrear from B. to A., C., under a written order from A., had entered and forcibly expelled B. The foregoing agreement was given in evidence. It was held, that the plea was sustained by the evidence. It was held, also, that as the plaintiff had not new assigned any excess, the assault was merely an aggravation of the principal trespass, and was covered by the plea. (*Kavanagh* v. *Gudge*, 7 Mann. & G. 316.)

3 & 4 Will. 4, c. 27, s. 2.

When Right shall be deemed to have first accrued.

3. In the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land (*k*), or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*l*); and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) (*m*) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (*n*); and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest (*o*), and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (*p*); and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of con-

When the right shall be deemed to have first accrued;

in the case of an estate in possession;

on dispossession;

on abatement or death;

on alienation;

in case of future estates;

in case of forfeiture or breach of condition.

3 & 4 Will. 4, c. 27, s. 3.

dition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.

(*k*) By section 35, the receipt of the rent payable by any tenant from year to year, or other lessee, is, against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land for the purposes of this act.

(*l*) See *Grant* v. *Ellis*, *ante*, pp. 153—156.

The effect of non-payment of rent.

Where a party has been in receipt of rent and afterwards discontinues such receipt, the statute fixes the point from which the twenty years are to date at the day on which the last payment of rent was made, and the party claiming has not the option of calculating from the time when he discontinued the receipt of rents. In this case the defendant was entitled to an ancient quit rent, payable annually at Michaelmas out of certain land held of his manor. All the rent which accrued due to Michaelmas, 1824, was duly paid; the last payment having been made on the 15th January, 1825. No rent was paid after that date, and on the 15th May, 1845, the defendant distrained for six years' arrears of rent accrued due up to Michaelmas, 1844; and it was held, that at the time of the distress his title to this rent had been extinguished by lapse of time. (*Owen* v. *De Beauvoir*, 16 Mees. & W. 547, affirmed by Exch. Ch., 19 Law J., Exch. 177. See *post*, s. 34, n.) A person dispossessed of land is allowed twenty years from the time of his being dispossessed, and during all that period he may bring his ejectment. But a person disseised of rent has, according to the above case, only twenty years from the last payment; and so, if an annual rent has been paid on the day on which it became due, and afterwards unjustly withheld, the party aggrieved has only nineteen years, instead of twenty, during which he can bring his action or distrain; for during the first year of the twenty it is plain that he has no right of distress or action at all. (*Per Parke*, B., *S. C.*, 16 Mees. & W. 565.)

Where a lease renewable for ever had expired by the dropping of lives, so that in fact only a tenancy from year to year existed, but the owner in fee of the land, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed: it was held, that no one of them could subsequently set up in equity claims adverse to the real characters they bore under such lease and sub-lease. So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42nd sect. of 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years. It is not in the power of a tenant, by any act of his own, to alter the relation in which he stands to his landlord. (*Archbold* v. *Scully*, 9 H. L. C. 360.)

Where no actual possession.

This statute does not apply to cases of want of actual possession, but to those cases only where the owner has been out of it and another party has been in possession for the prescribed time, for there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. Therefore, where in 1725 the owner in fee of a close, with a stratum of coal and other minerals under it, conveyed the surface to A. (under whom the plaintiff claimed), excepting the minerals to himself, his heirs and assigns, and reserving liberty to enter and get them, and the right of entry had not been exercised for more than forty years by the owner, but no other person had worked or been in possession of the mines, such owner was not barred by this section. (*Smith* v. *Lloyd*, 9 Exch. 562; 23 L. J., Exch. 194.)

Where by an indenture, dated 19th October, 1738, certain lands were granted, excepting the mines, and with liberty for the grantor, his heirs and assigns, to enter for working them: it was held, that the grantor's right was not barred or extinguished by his omitting to work the mines for twenty years, the original possession, whatever that was, having remained unaltered, and no act having been done, or claims made, at variance or inconsistent with the right of the grantor and his heirs: the court construed the words

3 & 4 *Will.* 4, c. 27, *s.* 3.

"discontinuance of possession," in the statute, to mean an abandonment of possession by one person, followed by the actual possession of another person; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected. (*M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514.) The inference of abandonment of right from *non user* is not applicable to the case of mines. (*Seaman* v. *Vawdrey*, 16 Ves. 390.) A grant of mines will not be presumed against an express reservation of them, although the owner had allowed the person in possession of the surface to expend money in working them. (*Norway* v. *Rowe*, 19 Ves. 156; *Bowser* v. *Colby*, 1 Hare, 139.)

In 1725, the owner in fee of a close, with a stratum of coal and other minerals under it, conveyed the surface to A. (under whom the defendant claimed), reserving the minerals and a right of entry to B. (under whom the defendant claimed), and the right of entry had not been exercised for more than forty years, no other person having worked or having been in possession of the mines: it was held, that the title of the grantees of the mines was not barred by the 3 & 4 Will. 4, c. 27. *Parke*, B., observed, "We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under the 3 & 4 Will. 4, c. 27, ss. 2, 3, for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of *Blackburne*, C. J., in *M'Donnell* v. *M'Kinty*, *supra*, and the principle upon which it is founded." (*Smith* v. *Lloyd*, 9 Exch. 571, 572. See *Tottenham* v. *Byrne*, 12 Ir. C. L. R. (N. S.) 376, *ante*.)

Trespass for breaking and entering the plaintiff's closes and digging minerals therein. Pleas, first, not guilty; secondly, not possessed; and, thirdly, a plea justifying the trespasses by the defendant as assignee of a lease of the minerals for ninety-nine years, granted by the owner in 1821. Replication, that the right to make an entry did not first accrue to the defendant within twenty years next before the making of the said entry. It appeared in evidence that from 1816, B. was in possession of the close under a lease, in which there was no reservation of the mines. In 1821, the owner granted a separate lease of the minerals to B. and P. for ninety-nine years, under whom the defendant claimed. In 1847, the mines were first worked: it was held, that B. was in possession of the mines before 1821, by reason of his being in possession of the surface as lessee under a lease, without reservation of the mines; and that such possession enured for the benefit of himself and P. on the granting of the lease of 1821, so as to make himself and P. possessed of the mines from 1821 under that lease, and not to leave the effect of that lease to be the granting of a mere *interesse termini*. (*Keyse* v. *Powell*, 2 El. & Bl. 132; 17 Jur. 1052; 22 L. J., Q. B. 305.) It was held further, on the third issue, that, although the plea confessed the possession to be in the plaintiff at the time of the alleged trespass in 1847, yet that the defendant was not confined to rely upon the right of entry which accrued to him in 1821, but might rely on a supposed dispossession within twenty years before 1847, and his right of immediate re-entry thereupon. (*Ib.*)

(m) On the construction of these words "other than a will," see *James* v. *Salter*, 3 Bing. N. C. 544; 4 Scott, 168; *ante*, pp. 152, 153.

(n) It was doubted whether the 3rd section comprehended the case of a mortgagee, so as to render it necessary for him to bring his action of ejectment within twenty years from the day of default made in payment of the mortgage money. (*Doe* v. *Williams*, 5 Ad. & Ell. 291.) But it is now provided by stat. 7 Will. 4 & 1 Vict. c. 28, that a mortgagee of land, as defined by 3 & 4 Will. 4, c. 27, s. 1, (*ante*, p. 136,) may bring actions to recover land within twenty years after the last payment of any principal or interest. (See *Doe* d. *Roylance* v. *Lightfoot*, 8 Mees. & W. 553; section 28, *post*, and note.)

3 & 4 Will. 4, c. 27, s. 3.

(*o*) The words "or other future estate or interest" were said to be large enough to comprehend, and would comprehend, all executory devises. (*James* v. *Salter*, 3 Bing. N. C. 554, *ante*, p. 152. See *Doe* d. *Johnson* v. *Liversedge*, 11 Mees. & W. 517, *post*, sect. 20, n., as to what is a future estate within these words.)

Limitation between trustee and cestui que trust.

On the trial of an ejectment for certain undivided shares of a messuage and lands in Kent, before Lord *Denman*, C. J., at the Maidstone Spring Assizes, 1846, it appeared that, in 1766, the owner in fee of the premises had mortgaged them to one Hubbard for a term of 500 years. In the following year Hubbard became the absolute purchaser in fee; and the residue of the term was at the same time assigned to one Holyhead (since deceased), in trust for Hubbard, and to attend the inheritance. A limited administration of this term, as part of the goods of Holyhead, had been taken out by the lessor of the plaintiff in 1843; and he brought this ejectment on behalf of the infants, who claimed title, through Hubbard, to the beneficial interest in four-ninths, undivided shares, of the property, their title being denied by the defendants, who also claimed through Hubbard. Holyhead had never been in possession, nor had Hubbard before he became owner in fee. The defendants objected that the right of entry was barred by the 2nd section of this act. The verdict was for the plaintiff, with leave for the defendants to move to enter a nonsuit. The court decided that the lessor of the plaintiff was barred by the 2nd and 3rd sections of the act. *Patteson*, J., would not say that the words of the 3rd section, as to persons claiming on alienation, which have been referred to, are specially pointed to the case of trustee and cestui que trust; but they certainly seem to be very applicable. Now, if the termor could have brought ejectment twenty years before this action was brought, there is an end of the case; for this action was not brought within five years after the passing of stat. 3 & 4 Will. 4, c. 27, so as to be within the saving of the 15th section. The 3rd section seems clear; and there is nothing in any other part of the act to militate against our construction of it. (*Doe* d. *Jacobs* v. *Phillips*, 10 Q. B. 130.) The Court of Common Pleas did not consider the case last cited as binding on them, but expressed an opinion that the case of a *cestui que trust* holding possession of land under a trustee does not fall within this clause, which is meant to apply to cases where the person holding the land does not hold it under, or in privity with, the person in whom the right of entry is supposed to be. The *cestui que trust*, in such a case, holds possession under the trustee and under the protection of the instrument by which the estate is conveyed to the trustee. It cannot, therefore, be said that it is a case in which no person entitled under the instrument has been in possession, for the *cestui que trust* has been in possession under the instrument. (*Garrard*, dem., *Tuck*, ten., 8 C. B. 231; see p. 252.)

Effect of non-payment of rent.

(*p*) Where a landlord merely omits to compel his lessee, during the continuance of a lease, to pay rent for twenty years, and there has been no payment to any other person, the landlord is not therefore barred, but may recover in ejectment, at any time within twenty years after the determination of the lease, such a case being within the latter part of this section. In an action of ejectment, it appeared that R. B., being seised in fee of the premises in question, in the year 1795 demised them to T. D. and A. D. for ninety-nine years, if three persons named in the lease, or the survivors or survivor of them, should so long live, reserving an annual rent of 38*l*. In 1815, J. D. acquired the fee in the premises; and on his death they descended to his heir at law, G. D., who, in 1825, devised them to E. D., the lessor of the plaintiff in fee. In the year 1802, A. D., the surviving lessee under the lease of 1795, assigned the premises to the defendant, who paid the rent until 1815, when he entered into an agreement with J. D., that on his being allowed to make certain alterations in the premises, he should not call on the defendant for payment of any further rent during his life. The defendant accordingly occupied the premises without payment of any rent until the determination of the lease by the death of the last *cestui que vie* in 1837, when the action was thereupon commenced, the defendant having refused to give up the possession. It was contended for the defendant, that the right of the lessor of the plaintiff was barred by this statute, more than twenty years having elapsed since 1815, at which time the right

of action, by reason of the nonpayment of the rent, first accrued. The learned judge overruled the objection, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict, if the court should be of opinion that the statute was a bar. Upon this motion, *Parke*, B., said, "I think there is no ground whatever for granting a rule in this case. The point appears to me to be perfectly clear, and I cannot see how any doubt could have been entertained on the subject. The lessor of the plaintiff claims an estate in remainder, expectant on the determination of a lease granted for ninety-nine years, if three persons named in the lease should so long live. She has but the right of possession until the end of that period, or the expiration of the last of the three lives. The case therefore falls within the latter part of the 3rd section of the act. The 9th section throws light on this subject. Here there has been no adverse claim, and no payment of rent to any other person: it is the mere case of a landlord omitting to compel his tenant to pay the rent reserved by his lease. The right of the plaintiff manifestly accrued on the determination of the lease, and he is entitled to bring his action at any time within twenty years from that period." (*Doe* d. *Davy* v. *Oxenham*, 7 Mees. & W. 131, 133, 134; see *Grant* v. *Ellis*, *ante*, pp. 153—156.) The former case was followed where the lessor of the plaintiff in ejectment had purchased the reversion, subject to a lease for years, at a rent of 4*l.* and to an annuity of 4*l.*, and the tenant in possession under the lease had paid the sum of 4*l.* yearly for upwards of twenty years to the annuitant, until his death in 1830, and subsequently to his widow: it was held, that it was for the jury to consider in what character the tenant made such annual payment, and if, as agent for his landlord, the possession was not adverse, and the right of the person entitled to the reversion is not barred by this statute. (*Doe* d. *Newman* v. *Godsill*, 5 Jur. 170; 4 Q. B. 603, n.) It was held, that where a landlord, or those through whom he claims, have received no rent for upwards of twenty years under an *existing* lease, containing an express clause of re-entry for the nonpayment, he is barred by the 2nd section of 3 & 4 Will. 4, c. 27, from recovering either the land or the rent, the case falling expressly within that section, (*Doe* d. *Mannion* v. *Bingham*, 3 Ir. L. R. 456,) a right of entry having accrued more than twenty years before. The case of *Doe* d. *Davy* v. *Oxenham*, *suprà*, was cited, and the court was strongly pressed with the anomaly of the landlord being entitled to recover the possession at the end of the term, or within twenty years after, and yet be unable to avail himself of the condition of re-entry in the subsisting lease. The Court of Common Pleas, however, after considerable deliberation, while they recognized the propriety of the above decision of the English Exchequer, and admitted the existence of the anomaly, yet stated they felt bound by the language of the enactments, which they thought clear on the subject. (*Doe* d. *Mannion* v. *Bingham*, 3 Ir. L. R. 456. See *Owen* v. *De Beauvoir*, 16 Mees. & W. 560.)

3 & 4 *Will.* 4, *c.* 27, *s.* 3.

In *Crosbie* v. *Sugrue*, (9 Ir. L. R. 17,) it appeared that R. had demised land at a rent of 7*s.* 6*d.* per annum by a freehold lease, and that a life in the lease was then in esse. In 1815, R. died, having devised the estates to C. for life, remainder to his first and other sons in tail. C. died in 1818, and his son, who was then a minor, became entitled under the will. The last payment of rent was in 1818, and it was held that an action of ejectment for nonpayment of rent, brought in 1845, was not barred. It was the case of a freehold lease, and not void by reason of nonpayment of rent. Supposing that the rent had not been paid for twenty years, the lease did not become void but voidable at the election of the landlord. There was no evidence that he had taken any step to avoid the lease, which he had a right to do, and in the absence of all evidence upon the subject the landlord still retained his power of election; and in such a case of things it was impossible to say that the landlord was barred by the Statute of Limitations. (See *Arnsby* v. *Woodward*, 6 B. & C. 519.)

Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion. A bill of discovery in aid of an action of ejectment, filed in 1840, stated

3 & 4 *Will.* 4, c. 27, s. 3.

that in 1776, A. B., being seised in fee, granted leases of the property which expired in 1825, and that the plaintiff, as heir of A. B., was now entitled to the property, for the recovery of which he was about to bring an action of ejectment. The defendant pleaded the Statute of Limitations, (3 & 4 Will. 4, c. 27,) and averred that the plaintiff had not been in possession or received rents for more than twenty years before the bill was filed; that the defendant had entered into possession as purchaser in fee simple in 1819, and had ever since remained in peaceable possession as tenant in fee: it was held, that this plea could not in law be sustained, for there being no allegation that the rent had been paid to any one wrongfully claiming to be entitled in reversion immediately expectant on the determination of the lease, the plaintiff's right did not accrue until the expiration of the lease in 1825, or within twenty years from the filing of the bill. (*Chadwick* v. *Broadwood*, 3 Beavan, 308; *Archbold* v. *Scully*, 9 H. L. C. 360.)

When the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it, and therefore the statute will run from the time of such receipt, and not from the time of such sale. (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42. See *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514, *ante*, p. 167.)

Forfeiture.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened (*r*).

When right of entry to be exercised by remainderman.

(*r*) Though a remainderman expectant on an estate for life or years, to whom a right to enter, or bring an ejectment, is given by the forfeiture of the tenant for life or years, may take immediate advantage of a forfeiture, yet he is not bound to do so; therefore, if he pursues his remedy within his time after the remainder attached, it will be sufficient, nor can the Statute of Limitations be insisted on against him, for not coming within twenty years after his title first accrued by the forfeiture. (1 Ves. sen. 278. See *Doe* d. *Allen* v. *Blakeway*, 5 Carr. & P. 563.) So where a testator, having made a lease for years of an estate, with a clause of re-entry on nonpayment of rent, devised it, and after his death *his heir* received the rent during the lease, (being a period of more than twenty years,) without any steps having been taken by the *devisee* to recover the possession: it was held, that the devisee was not barred, for he could not have entered during the lease; and although a forfeiture had been committed, he was not obliged to take advantage of it. (*Doe* d. *Cooke* v. *Danvers*, 7 East, 299.) So also strangers to fines, having different and distinct rights by several titles accruing at different times, were allowed five years to avoid a fine after the accruing of each title; (Cruise, Dig. tit. XXXV. ss. 29, 34. See 1 Wms. Saund. 319, a. n.;) it was determined, that where a fine was levied by a tenant for *years*, advantage must be taken by the person who is reversioner at the time the fine was levied, and that he could not assign his right of entry, nor enter

himself after having parted with his reversion. (*Fenn* v. *Smart*, 12 East, 444.) *3 & 4 Will. 4, c. 27, s. 4.*

The lord of a manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years. (*Witton* v. *Peacock*, 3 M. & Keen, 325.) If a copyholder made a lease of his copyholds contrary to the custom of the manor, and the lord died before his entry or seizure for the forfeiture, the reversioner or remainderman could never take advantage of the forfeiture done or committed before their time; (*Lady Montagu's case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162;) unless the act of forfeiture destroys the estate. (3 Term Rep. 173.) As to the forfeiture of Copyholds, see Shelford on Copyholds, pp. 148—172; *Chamberlain* v *Drake*, 2 Sid. 8; and for waste, *Eastcourt* v. *Weeks*, 8alk. 186; Lutw. 799; *Bird* v. *Kirkby*, 1 Mod. 199; Carter, 237; Gilb. Ten. 249. But the lord may seize copyhold land *quousque* in virtue of a right which accrued to the preceding lord on default of the heirs coming in to be admitted, although he be devisee, and not the heir of the preceding lord; but, to entitle him to make such seizure, there must be three proclamations made at three consecutive courts. (*Doe* d. *Bover* v. *Trueman*, 1 B. & Ad. 736.) The admittance of a copyholder, after a forfeiture incurred by levying a fine, would be a waiver, and any act equally solemn will have the same effect. (3 Term Rep. 172.) M., after a devise of his property real and personal to P., purchased lands in fee, and procured an assignment of an outstanding term of years to P. as his trustee. On the death of M., without republishing his will, a moiety of the fee descended to P.'s wife as coparcener with others; but P., thinking himself entitled under the will, entered into and took the profits of the whole to his own use, and afterwards joined his wife in a feoffment and fine *sur cognizance de droit come ceo*, with proclamations: it was held, that the term was not merged by the seisin of P. in right of his wife; that the feoffment and fine were not void, but operated as a disseisin and forfeiture of the term, of which advantage might be taken by entry within five years either after forfeiture or after the expiration of the term; that in the meantime the term might be treated as still subsisting, for the purpose of entitling a plaintiff in ejectment to recover on a demise of P.'s personal representatives. (*Doe* d. *Blight* v. *Pett*, 11 Ad. & Ell. 842; 4 P. & Dav. 278.)

Entry for forfeiture of copyholds.

In cases of conditions of re-entry, there is a difference between leases for *lives* and leases for years, and, with respect to the latter, there is also a difference between them, which arises entirely from the manner in which the condition of re-entry is expressed in the lease. As to leases for lives, it is held that, if the tenant neglects or refuses to pay his rent after a regular demand, or is guilty of any other breach of the condition of re-entry, the lease is only *voidable*, and therefore not determined until the lessor re-enters, that is, brings an ejectment for the forfeiture; though the clause of the condition should be, that for the nonpayment of rent or the like, the lease *shall cease and be void*. For it is a rule, that where an estate commences *by livery* it cannot be determined *before entry*. (Plowd. 135, 136.) And in the case of a freehold lease, entry is requisite before bringing an ejectment for a forfeiture. (Co Litt. 218; 2 Rep. 53 a; 4 Tyrw. 625.)

Entry when necessary.

An actual entry is not necessary to avoid a mere licence to dig mines, but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the nonperformance of covenants, it seems to follow, that to put an end to such a licence, the grantor must give notice of his intention to do so after a breach of a condition, which notice would be equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed. (*Roberts* v. *Davey*, 4 B. & Ad. 664. See *Doe* v. *Wood*, 2 B. & Ald. 724.) If the lessor, after notice of the forfeiture, which is a material and issuable fact (3 Rep. 64 b, 2 T. R. 430, 431), accepts rent which accrued due after, or does any other act which amounts to a dispensation of the forfeiture, the lease, which was before voidable, is thereby affirmed. But the dispensation with a forfeiture for a breach of a condition does not take away the right of entry for a subsequent breach. (*Roe* v. *Harrison*, 2 T. R. 425; *Macher* v. *Foundling Hospital*, 1 Ves. & B. 191; *Doe* v. *Bliss*, 4 Taunt. 725.) With respect to leases for years, the necessity of an entry depends upon the wording of the con-

3 & 4 *Will.* 4, c. 27, *s.* 4.

dition. If the words be, that upon the doing of such an act the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act the estate shall thereupon immediately cease and determine, there no entry is necessary. (12 East, 448.) In the first case the lease is only *voidable*, and may be affirmed by the acceptance of rent, or other act, if the lessor had notice of the breach of the condition at the time. (Plowd. 133; Co. Litt. 215, a; 3 Rep. 64, a, 65; Cowp. 804.) A distress made by a landlord on the assignee of his lessee is a waiver of a forfeiture incurred by a prior breach of covenant; but if there be a continuing breach, the landlord is not precluded from taking advantage of it for a time subsequent to the distress. (*Doe* d. *Flower* v. *Peck*, 1 Barn. & Ad. 428.) But where a lease for years is made with a condition that for nonpayment of the rent, or the like, the lease shall be null and void, if the lessor makes a legal demand of the rent, and the lessee neglects or refuses to pay, or is guilty of any other breach of the condition of re-entry, the lease is absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition, or by any other act. (Cowp. 804. See 1 Wms. Saund. 287 c, n. 16.)

It was held, that a condition of re-entry on breach of covenants in a lease could only operate during the continuance of the lease; when that was determined the proviso was gone, and the reversioner, having never been in possession by right of re-entry for the condition broken, could not take advantage of it, and that the lessee, who had sown the land, was entitled to emblements. (*Johns* v. *Whitley*, 3 Wils. 127.)

A lessor has a right to make the estate of his lessee conditional, and the assignee of such an estate takes it subject to the condition, and liable to be divested by the breach of it. It is immaterial in a case in which the lessor, and not the assignee of the reversion, is the real plaintiff, whether the condition is for the performance of some covenant which runs with the land, or one which is wholly collateral; upon the breach of either species of covenant, the estate ceases when the lessor chooses to take advantages of his right of re-entry. (*Doe* d. *Flower* v. *Peck*, 1 Barn. & Ad. 436, 437.)

Notice of condition.

Where a party is really ignorant of the existence of an instrument in which the condition is contained, and where he would have a good title if there were no such instrument, a neglect of the terms of the condition will not subject him to a loss of the estate, and the party entitled to avail himself of the condition must take care to make it known to the person who was to comply with it. (*France's case*, 8 Rep. 89 b; Shep. T. 148; *Mallon* v. *Fitzgerald*, 3 Mod. 28; Skinn. 126; *Doe* d. *Kenrick* v. *Lord W. Beauclerk*, 11 East, 657.) An heir at law, to whom a devise is made upon condition, is not liable to lose his estate by a breach of the condition, unless he has notice of the devise which contains it; and the *onus* of proving that the notice has been given, lies upon the party entitled to the benefit of the breach of the condition. *Doe* d. *Taylor* v. *Crisp*, 1 P. & Dav. 37; 8 Ad. & Ell. 779; 2 Jur. 943.)

Reversioner.

Reversioner to have a new right.

5. Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the

creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent (*s*). 3 & 4 *Will.* 4, *c.* 27, *s.* 5.

(*s*) By this section the remainderman is not bound to enter for a forfeiture until his estate fall into possession, nor is the right affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined. But it will be seen by the 20th section (*post*), that several rights in the same person may, contrary to the rule which previously prevailed, be barred without any new allowance.

Administrator.

6. For the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration (*t*). An administrator to claim as if he obtained the estate without interval after death of deceased.

(*t*) In the case of intestacy, it had been decided that, as to all rights occurring after the death of the intestate, the statutes of limitation only began to run from the grant of administration. Hence a right to a chattel interest in lands might have been kept alive, notwithstanding adverse possession, to the expiration of the term, however long, and instances had occurred of serious practical inconvenience from that state of the law. The object of this clause of the act is to make the period of limitation with respect to chattel interests in land begin to run from the time when the right of entry arose and might have been acquired by taking out letters of administration. Old rule that statute of limitations ran from grant of administration.

The next of kin and creditors of the intestate will have no just cause of complaint, if for twenty years they neglect their rights, and great injustice might be done to the party in possession by allowing a stale demand to be brought forward after a longer lapse of time. (See 1st Real Prop. Rep. p. 48.) The above enactment will, it is apprehended, apply to an administrator suing for the subjects mentioned in the 40th, 41st, and 42nd sections of the act, see *post*. The utility of the alteration will be further apparent on reference to the previous state of the law.

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the ecclesiastical court, and has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. (*Woolley* v. *Clark*, 5 B. & Ald. 744.) The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so that he may recover against a wrong-doer who has seized or converted the goods of the intestate after his death in an action of trespass or trover. (*Tharpe* v. *Stallwood*, 5 M. & G. 760; *Foster* v. *Bates*, 12 Mees. & W. 233; *Welchman* v. *Sturgis*, 13 Q. B. 552.) But this doctrine of relation exists only in cases where the act done is for the benefit of the estate. (*Morgan* v. *Thomas*, 8 Exch. 302; 22 Law J., Exch. 152; 17 Jur. 283.) An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. (*Hickman* v. *Walker*, Willes, 27.) Thus where a term was granted in remainder expectant on another existing term, and before the expiration of the first term the grantee died; at the expiration of the first term the lessor entered and levied a fine before administration granted; and after the five years' non-claim on the fine had run, letters of administration were obtained of the effects of the person entitled to the reversionary term, and it was held that the administrator should have five years from that time, as there was no

3 & 4 *Will.* 4, c. 27, *s.* 6.

right of entry before. (*Stanford's case*, Cro. Jac. 61; cited in *Cary* v. *Stephenson*, 2 Salk. 421; *S. C.*, Carth. 335; Skinn. 555; 4 Mod. 376.) In another case where there was a gift of a term of years to A. for life, remainder to B. for life, remainder to C., who died in 1736; A. in 1757; B. in 1779. Administration of the effects of C. was first granted in 1816, *eighty years from his death*, and his administrator brought an ejectment; he was nonsuited at the trial, but the Court of Common Pleas granted a new trial. (*Fairclaim* v. *Little*, cited in 5 Barn. & Ald. 214.)

In an action by an administrator against the acceptor upon a bill of exchange, payable to the testator, *but accepted* after his death, it was held, that the Statute of Limitations began to run from the time of granting the letters of administration, and not from the time the bill became due, there being no cause of action until there was a party capable of suing. (*Murray* v. *The East India Company*, 5 Barn. & Ald. 204; and see *Pratt* v. *Swaine*, 8 Barn. & C. 285; *Perry* v. *Jenkins*, 1 M. & Cr. 118; *Hyde* v. *Price*, 1 C. P. Coop. 196; *Freake* v. *Cranfeldt*, 3 M. & Cr. 499; *Howlitt* v. *Lambert*, 1 Ir. Eq. R. 263; Wms. Law of Executors, 395, 399.) The Statute of Limitations is not a good plea where an executor has not taken out administration; because no laches can be imputed to a plaintiff for not suing whilst there was no executor against whom he could bring his action. (Coop. Eq. Pl. 233; 2 Vern. 694; 1 Eq. Cas. Abr. 305.) But where the defendant had possessed the personal estate and might have been sued as executor *de son tort*, his plea of the Statute of Limitations was allowed, although he had not taken out probate until some years after the testator's death. (*Webster* v. *Webster*, 10 Ves. 93.) It is no answer to a plea of the Statute of Limitations, that after the cause of action accrued, and after the statute had begun to run, the debtor within the six years died, and that (by reason of litigation as to the right of probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted. (*Rhodes* v. *Smethurst*, 4 Mees. & W. 42; 6 *Ib.* 351.)

A testator died in 1842, having appointed R. and others his executors. R., who owed the testator 300*l.* on a promissory note, did not prove the will until 1855: it was held, that he could then set up the Statute of Limitations in respect of the debt, that the act of proving had relation to the testator's death, and that he must be considered as having the 300*l.* in his hands as assets, and he was charged therewith, and with interest from 1855. (*Ingle* v. *Richards*, 28 Beav. 366.)

Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; although no right of action accrues to the administrator until he has obtained letters of administration. (*Pratt* v. *Swaine*, 8 Barn. & Cress. 287; 2 Man. & Ryl. 350.) An executor or administrator is not deemed to be in possession of things immovable, as leases for years or houses, before entry; (Went. Off. Ex. 228, 14th ed.;) although a reversion of a term, which the testator granted *for part* of the term, is in the executor immediately on the testator's death. (*Trattle* v. *King*, T. Jones, 170.) But the relation of the grant of administration to the death of the intestate did not, it seems, divest any right legally vested in another between the death of the intestate and the grant, so as to enable an administrator, who had obtained letters of administration after an execution issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to the stat. 8 Ann. c. 17. (*Waring* v. *Dewberry*, Gilb. Eq. Rep. 223, cited in 1 Str. 97; Fortesc. 360; *S. C.*, Vin. Abr. Executors (Q).) It seems that the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate, and to render him liable to an account for the rents and profits of it from the death of the intestate. (*Rex* v. *Inhabitants of Horsely*, 8 East, 410.) And in ejectment by an administrator, the demise might be laid on a day after the intestate's death, but before the administration granted. (Selw. N. P. 716, 10th ed.; *Lessee of Patten* v. *Patten*, Alcock & Napier, 493, Ir. See *Holland* v. *King*, 6 C. B. 727.)

Tenancy at Will.

3 & 4 Will. 4, c. 27, s. 7.

7. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee (*t*).

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

(*t*) Under the 2nd section (which limits the time for recovering lands by action to twenty years after the right accrues), s. 34 (which extinguishes the title at the determination of such period), and s. 7 (which enacts, that, in the case of a tenancy at will, the right of action shall be deemed to have accrued at the determination, or at the end of one year from the commencement of such tenancy), no title accrues to a party who was tenant at will, and held without interruption for twenty years after the expiration of the first year, but who had quitted possession before the act passed. It appeared that in 1807, W. T., being tenant in fee of the premises in question, put his eldest son, J. T., in possession of them, which possession J. T. kept till 1831, when he died. His widow, the defendant, had continued in the occupation ever since. W. T. died in September, 1833, having devised all his property to trustees. The lessor of the plaintiff was the eldest son of J. T., and claimed as his heir at law: no proof of title was given for the defendant. It did not appear that W. T., or the devisees, had made any entry before December 31, 1833. The jury found that J. T., the lessor of the plaintiff, was tenant at will to W. T. in 1807, and that no rent was paid to or profits received by W. T. for twenty years from that time. It was contended that the 7th section of 3 & 4 Will. 4, c. 27, operated retrospectively, and that from the end of the first year of J. T.'s tenancy the right of W. T. was as much barred as if there had been a possession adverse to him for twenty years. The court, however, held that no title accrued to the party who was tenant at will, but who had quitted possession before the act passed. The case would have been quite different if the tenant at will had continued in possession. (*Doe* d. *Thompson* v. *Thompson*, 6 Ad. & Ell. 721; 2 Nev. & P. 656.)

Construction of this section.

Where A., in 1817, let B. into possession of lands as tenant at will, and in 1827, A. entered upon the land without B.'s consent, and cut and carried away stone therefrom, it was held, that this entry amounted to a determination of the estate at will; and that B., who continued in possession as before, thenceforth became tenant at sufferance, until by agreement express or implied a new tenancy was created between the parties; and therefore, that, unless the fact of such tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action *first* accrued at the expiration of one year after the commencement of the original tenancy at will, that is, in the year 1818. But the court granted a new trial, in which the question for the jury would be, whether a new tenancy at will was created after the determination of the old one in 1827, as the effect of a determination of the tenancy at will was to make a tenancy by sufferance only, during which the landlord might have brought ejectment without any demand of possession or other act, and such tenancy at sufferance would continue until the parties created a new tenancy at will by fresh agreements between them express or implied. (*Doe* d. *Bennett* v. *Turner*, 7 Mees. & W. 226.) *Parke*, B., said, "If the tenancy throughout the whole period had been one continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will

3 & 4 Will. 4, c. 27, s. 7.

had been created, but the tenant had continued to occupy merely as tenant by sufferance, in either of these cases the right to bring an action, which, by the express provision of the 7th section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period would have been barred." (*Ib.* p. 224.)

On the new trial it appeared that the landlord entered upon the land without the tenant's consent, and cut and carried away stone; the Court of Exchequer Chamber held that such entry amounted to the determination of the estate at will. It also appeared that in the year 1829 the defendant, being one of the assessors for the land tax in the parish, signed an assessment, in which he was named as the occupier of the farm in question, and the landlord was named as the proprietor. This was held to be evidence whence the jury might infer that a new tenancy had been created between the parties. (*Turner* v. *Doe* d. *Bennett*, 9 Mees. & W. 643.)

At Whitsuntide, 1818, the overseers of the parish put the plaintiff into possession of a cottage as a parish pauper. He continued in uninterrupted possession, without paying any rent, till a day in the month of April, 1839. The overseers then took proceedings against him, with a view to get possession of the cottage, before he could set up a claim to it under the Statute of Limitations. They accordingly entered upon it, turned out him and his family, and removed nearly the whole of his furniture and goods. Shortly after, on the same day, he resumed the possession of the cottage. There was evidence that he agreed to pay a weekly acknowledgment, but the jury found that he neither then nor afterwards became a weekly tenant nor tenant at will to the overseers. He continued in possession till the 24th July, 1852, when the overseers entered, and he having refused to deliver up the cottage, they destroyed it. In trespass against the overseers, it was held, that there was an actual determination of the tenancy in April, 1839, and that when the plaintiff resumed possession, a new right of entry accrued to the parish officers under this statute, which they must be supposed to have exercised in July, 1852, and therefore the action could not be maintained. (*Randall* v. *Stevens*, 2 El. & Bl. 641; 18 Jur. 182; 23 L. J., Q. B. 68.)

In 1781, a lord of a manor, with the consent of the tenants of the manor, granted to certain persons a licence to inclose a piece of the waste land, and that they and their heirs should hold the same in trust for the purpose of building a workhouse, rendering to the lord of the manor the yearly rent of *5s.* for the same for ever. The churchwardens and overseers entered into possession, and built a workhouse, and used it as such until 1836. The yearly rent of *5s.* was paid from 1781 to 1791, and from 1825 to 1836. In 1835, the persons to whom the licence was granted in 1781 being dead, notice was given to the officers of the parish by the steward of the manor to nominate other persons for the purpose of admission to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a fine on their admission. In 1840, the parish officers, in conformity with a resolution of the inhabitants in vestry assembled, surrendered the premises into the hands of the lord of the manor, and the latter took possession and afterwards conveyed the premises to the defendants. In an action by the churchwardens and overseers to recover the premises, it was held, that the grant of the licence in 1781 did not manifest an intention to convey a freehold estate, and that the admission of fresh trustees in 1840, and the payment of the *5s.* (which the court inferred was paid during the interval between 1791 and 1825) were acknowledgments that the freehold was in the lord of the manor, and that the land was held by his permission, and therefore the possession was not adverse at the time of the passing of the act. (*Hodgson* v. *Hooper*, 6 Jur., N. S. 911; 29 L. J., Q. B. 222; 8 W. R. 637.) It was held, also, that the first tenancy being a tenancy at will, the admission in 1835 being inoperative to convey a copyhold estate, the possession under it amounted in point of law to no more than a tenancy at will, and therefore the right of entry of the lord would not be barred until twenty years after. (*Ib.*)

The granting of a lease to a third person by the lessor of a tenant at will

3 & 4 Will. 4, c. 27, s. 7.

is a determination of the tenancy at will, but it does not give the lessor such a right of entry as is contemplated by the 2nd section of this act, when the lessor's title is that of a reversioner expectant on a term of years. (*Hogan* v. *Hand*, 14 Moore, P. C. C. 310.)

A tenant at will in possession of a house and land was told by the landlord that he must give up possession. Upon his refusing to do so a writ of ejectment was served upon him, but he subsequently obtained verbal permission to retain the house and a portion of the land rent free for the life of himself and of his wife: it was held, that inasmuch as what had been done amounted to an actual entry, and as a new tenancy was created, the period of twenty-one years was to be reckoned from that time, and not from the original creation of the tenancy at will. (*Locke* v. *Matthews*, 32 L. J., C. P. 98.)

The court held, that this section only applies to cases of tenancies at will existing at the time it passed, or subsequently; and that it does not apply to cases where the tenancy at will had been determined before the passing of the act. The lessor of the plaintiff in an ejectment claimed as heir at law of his father, who died in November, 1816. From the time of the death of the father, the mother of the lessor of the plaintiff continued in possession of the premises in question, as tenant at will to the lessor of the plaintiff, until her death in July, 1832. Upon the death of the mother, the defendant, having no title himself, took possession of the premises, and remained in possession until the ejectment was brought, not as agent to the lessor of the plaintiff, but adversely to him, as found by the jury. The court said the 7th section of the act is in terms only applicable to the case of a future, or at most of an existing, tenancy at will, and not to the case of a tenancy at will which had been determined, and was not existing when the act passed. A different construction, even if the words permitted it, would cause the greatest hardship; for a person who, as the law stood before the passing of the act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would by the operation of the statute be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights. (*Doe* d. *Evans* v. *Page*, 5 Q. B. 767, see p. 772.)

A tenancy at will commencing in 1824 and determined in 1831 is no bar under the 2nd and 7th sections to an ejectment commenced in 1847. (*Doe* d. *Birmingham Canal Company* v. *Bold*, 11 Q. B. 127.)

In 1801, D., being seised of land in fee, permitted his daughter J. and her husband M. to occupy as tenants at will. D. died in 1837, after the passing (24th July, 1833) of this statute, but before the expiration of the five years allowed by sect. 15. He devised the land to J. for life, remainder to W. in fee. He also devised to J. an annuity charged on other land. J. and M. occupied from 1801 to J.'s death in 1843, no rent being paid. After J.'s death M. continued in the occupation. On ejectment brought in 1844 by W., the remainderman, against M., it was held, that W. was not entitled to insist that J. and M. had held under the devise to J., but that M., although he had received the annuity on behalf of his wife, might rest his defence upon the occupation under the tenancy at will; that sect. 15 was inapplicable, no step having been taken within the five years; and that the action was barred, under sects. 2 and 7, by the lapse of twenty years from the end of one year after the commencement of the tenancy at will. (*Doe* d. *Dayman* v. *Moore*, 9 Q. B. 555.)

R. C., the purchaser of land, was let into possession before the execution of a conveyance. He let in his son as tenant at will. The son occupied, and built a cottage on, the land. Afterwards, R. C. took a conveyance from the vendor, and some time after he mortgaged the land. The son continued to occupy the premises in all respects as at first till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry: it was held, that an action of ejectment afterwards brought against her was barred by the 2nd and 7th sections of this act, for that the tenancy at will was not determined by the father's taking a conveyance; and that if it had in

3 & 4 *Will.* 4, c. 27, s. 7.

point of law been so determined by that event or by the mortgage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will, and the tenancy altogether had continued more than twenty years from the end of the first year. (*Doe* d. *Goody* v. *Carter*, 9 Q. B. 863.)

The proviso as to *cestuis que trust* contained in this section applies only to cases of declared and express trusts, and not to the case of a person holding under an agreement to purchase.

In 1816, a landlord let a tenant into possession of lands under an agreement for purchase, which was never completed. The tenant continued in possession till his death in 1822, without having paid any rent. He devised all his real estate to his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not. In ejectment for the premises brought in 1842 by parties claiming under the landlord, it was left to the jury to say, whether a tenancy at will had been created between the original landlord and the devisee, for if not the action was barred by this section. Such direction was held to be proper. (*Doe* d. *Stanway* v. *Rock*, 4 Man. & G. 30; 1 Car. & M. 549.)

Trustee and *cestui que trust.*

The object of this statute was to settle the rights of persons adversely litigating with each other, not to deal with cases of trustee and *cestui que trust* where there is but one single interest, viz., that of the person beneficially entitled. A *cestui que trust* who enters into possession of land becomes at law tenant at will to the trustee. Where, therefore, the equitable owner of an estate, a term in which had been assigned to attend the inheritance, is in possession, the right of entry under the 2nd section of this act accrues only upon the determination of the tenancy at will resulting from such possession. The 3rd section of this act does not apply to the case of a *cestui que trust* holding possession of land under the trustee. (*Garrard*, dem., *Tuck*, ten., 8 C. B. 231.)

The provision, that no *cestui que trust* shall be deemed to be a tenant at will within this clause, is said by the Court of Common Pleas to be equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced, in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. (*Garrard*, dem., *Tuck*, ten., 8 C. B. 253.)

The doctrine, that a *cestui que trust*, who is in the possession of an estate by the consent or acquiescence of the trustee, must be regarded as tenant at will, only applies where the *cestui que trust* is the actual occupant. If he is only allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate, and the consequence appears inevitable, that if the actual occupier is under such circumstances permitted to occupy for more than the twenty years prescribed by this statute without paying rent, the result must be that the trustees lose their title, exactly as in the ordinary case of landlord and tenant. (*Melling* v. *Leak*, 16 C. B. 652; 1 Jur., N. S. 759; 24 Law J., C. P. 187.) The management of an estate was entrusted by the trustees in fee to the *cestui que trust*, who was tenant for life, as beneficial owner, and the latter, never having been in actual occupation, let C. into possession, who occupied during the life of the *cestui que trust* for more than twenty years without paying rent or acknowledging title: it was held, that a tenancy at will had not been created between the *cestui que trust* and the trustees, and that C. had therefore acquired a good title by adverse possession under this act. (*Ib.*) In this case a messuage was devised to two trustees, in trust for D. for life, and after his death on other trusts. The testator died in 1815. In 1818, the plaintiff, who had married a daughter of one E., who it was assumed had been let into possession of the messuage by D., the tenant for life, succeeded E. in the possession of the premises, and remained therein without payment of rent to or acknowledgment of title in any one until 1854, when

the heir at law of the surviving trustee (the tenant for life being dead) turned him out: it was held, that the plaintiff had by his adverse possession for more than twenty years acquired a title as well against the trustees as against the *cestui que trust*, for that although a *cestui que trust* who is in possession with the consent or acquiescence of the trustees may be regarded as their tenant at will, yet if he is only allowed to receive the rents or otherwise deal with the property in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate. (*Ib.*) *3 & 4 Will. 4, c. 27, s. 7.*

Creation of tenancy at will.

An estate at will, being the lowest estate which can arise by the agreement of the parties, is not bounded by definite limits with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties. (See Litt. ss. 68, 82.) As it depends upon the will of *both*, although it is expressed to be at the will of *one* only, (Co. Litt. 55 a,) the dissent of either may determine it. An estate at will may arise by implication, as well as by express words. The definition of an estate at will is, "where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession." (Litt. s. 68; 2 Bl. Com. 145.) Thus, where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will. (Litt. s. 70.) And a person who entered and enjoyed lands under a void lease, and paid rent, was held to be tenant at will. (*Denn* v. *Fearnside*, 1 Wils. 176.) A simple permission to occupy may create a tenancy at will unless an intention appears to create a yearly tenancy by an agreement to pay rent quarterly, or some other aliquot part of a year. Under an agreement to let premises so long as both parties like, and receiving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, a tenancy at will, strictly so called, is created. (*Richardson* v. *Langridge*, 4 Taunt. 128.) This case lays down the law correctly on this subject, viz. that a simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year, as, for instance, an agreement to pay rent by the quarter or some other aliquot part of a year. (*Per Parke*, B., *Doe* d. *Hull* v. *Wood*, 14 Mees. & W. 687.) Although the law is clearly settled that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held, that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson* v. *Langridge*, (4 Taunt. 128,) a party who had paid rent under an agreement of this description, but had not paid it with reference to a year or any aliquot part of a year, was held nevertheless to be a tenant at will only. (See *Braythwayte* v. *Hitchcock*, 10 Mees. & W. 497; *Cox* v. *Bent*, 5 Bing. 185; 2 M. & P. 281.) A tenancy from year to year will not be presumed against the clearly expressed intention of the parties. By a proviso in a deed A. agreed to become tenant to C. and D. of the premises, &c., at their will and pleasure, at and after the rate of 25*l.* 4*s.* per annum, payable quarterly. A. remained in possession under this agreement for two years, and paid a year's rent, after which the lessors distrained for four quarters' rents; it was held, that A. was tenant at will and not from year to year. (*Doe* d. *Bastow* v. *Cox*, 11 Q. B. 122.)

It may, under particular circumstances, be presumed that a party in possession as apparent owner was in reality only tenant at will. W. H., seised in fee of a house and land, died in 1798, leaving a widow, and his son J. H., a minor above fourteen years of age. The widow (with whom J. H. lived) continued to occupy the house and land. In 1798, J. H. being still a minor, the widow married the defendant, who continued thenceforward to occupy the house and land. In 1805, J. H. left the premises, but occasionally resided there afterwards for two or three weeks at a time, with the defendant and his wife. The wife died in 1841. In 1842, J. H. mortgaged the premises in fee to the lessor of the plaintiff for money which was paid to the defendant, the defendant himself being present at the execution of the deed and privy to its contents, and receiving the money from J. H. It was

3 & 4 *Will.* 4, c. 27, s. 7.

held, that, in ejectment by the mortgagee, the jury were warranted in presuming that the defendant occupied as tenant at will to J. H. (*Doe* d. *Groves* v. *Groves*, 10 Q. B. 486.)

An entry by a person under a contract for the purchase of an estate, or an agreement for a lease with the consent of the vendor, or of the person agreeing to grant the lease, will create a tenancy at will between the parties. (*Hegan* v. *Johnson*, 2 Taunt. 147; *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Doe* v. *Lawder*, 1 Stark. 308; *Right* v. *Beard*, 13 East, 210; *Doe* v. *Jackson*, 1 Barn. & C. 448; *Doe* v. *Sayer*, 3 Camp. 8.) If there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will. (*Right* d. *Lewis* v. *Beard*, 13 East, 210.) It is not, however, the *agreement*, but the letting into possession, that creates such tenancy; for the person suffered so to occupy cannot, on the one hand, be considered as a *trespasser* when he enters, and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. (1 Mees. & W. 700.) A party who has been let into the possession of land under a contract for sale which has not been completed, is a tenant at will to the vendor. (*Ball* v. *Cullimore*, 2 Cr. M. & R. 120; 1 Gale, 96.) Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of *5l.* per cent. per annum on the purchase-money until the completion of the purchase, which was to be in three months; and the purchase not being completed, he continued in possession on the same terms: it was held, that this was only a tenancy at will, which might be determined without notice to quit. (*Doe* d. *Tomes* v. *Chamberlaine*, 5 Mees. & W. 14. See *Saunders* v. *Musgrove*, 8 B. & C. 524; 9 D. & R. 529.) But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord:—"1831, Sept. 2; S. S. (the tenant) purchased an estate in the parish of C., bought of R. G. (the landlord), at the sum of 100*l.*; received on account, 10*s.* Mr. R. G. is willing to let the sum lie by, paying 4 per cent." It was held, that as there was an implied condition in the contract, that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation at law. It seems, however, that if the true construction of the agreement had been, that from a certain time the defendant was to be absolutely a debtor for the purchase-money, paying interest on it, and to cease to pay rent from year to year, a tenancy at will would have been created after that time; and the acceptance of such new demise at will would then have operated as a surrender of the interest from year to year by operation of law. (*Doe* d. *Gray* v. *Stanion*, 1 Mees. & W. 695. See *Souter* v. *Drake*, 5 B. & Ad. 992; 3 Nev. & M. 40, as to obligation to make a good title.)

Determination of tenancy at will.

The most obvious mode of determining an estate at will is an express declaration, that the lessee shall hold no longer, either made on the land, or by notice given to the lessee. (Co. Litt. 55 b.) Any act of ownership exercised by the landlord, which is inconsistent with the nature of the estate, will operate as a determination of it. (*Ib.*; Co. Litt. 245 b.) Thus, any conveyance by the lessor of the property, held at will, is evidence of dissent, and operates as a determination of the will. (*Dinsdale* v. *Iles*, 2 Lev. 88.) It may be determined by demand or by entry. (*Doe* d. *Tomes* v. *Chamberlaine*, 5 Mees. & W. 16.) It is clearly laid down, "that if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue." (Co. Litt. 55 b.) So a tenancy at will is determined by the landlord's entry on the land without the consent of the tenant, and cutting and carrying away stone therefrom. (*Doe* d. *Bennett* v. *Turner*, 7 Mees. & W. 226.) So in *Ball* v. *Cullimore*, (2 Cr. M. & R. 120,) it was held, that a feoffment by the lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the

livery is made, and have no notice of the determination of the will, the general rule of law being, that any act done upon the land by the lessor in assertion of his title to the possession determines the will. A tenancy at will is determined by an agreement to purchase. (*Daniels* v. *Davison*, 16 Ves. 252.) A letter from the owner to the tenant at will, stating that unless the latter paid what was due to the former, immediate measures would be taken to recover possession of the property, was held sufficient to determine the estate at will. (*Doe* v. *Price*, 9 Bing. 356; 2 M. & Scott, 464.) Neither party can determine an estate at will at a time which would be prejudicial to the other. (Co. Litt. 55 b, n. 16; *Leighton* v. *Theed*, 1 Ld. Raym. 707; *Peacock* v. *Peacock*, 16 Ves. 57.) A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord. (*Pinhorn* v. *Souster*, 8 Exch. 763; 22 Law J., Exch. 266; see *Melling* v. *Leak*, 16 C. B. 669.) When a party creates a tenancy at will, and afterwards becomes insolvent, the vesting order of the Insolvent Debtors Court, with knowledge thereof by the tenant, is a determination of the tenancy; and if the tenant, after such information, continues in possession, he may be treated as a trespasser. (*Doe* d. *Davies* v. *Thomas*, 6 Exch. 854.)

3 & 4 Will. 4, c. 27, s. 7.

Relation between mortgagor and mortgagee, &c.

The relation between mortgagor and mortgagee is perfectly anomalous and *sui generis*. (2 Jac. & Walk. 183.) The mortgagor is only like a tenant at will to the mortgagee, his *legal* interest being inferior to that of a strict tenant at will. (Doug. 22, 282, 283.) A mortgagor in possession may be described in pleading as the tenant of the mortgagee in an action by a third party. (*Partridge* v. *Bere*, 5 B. & Ald. 604; *S. C.*, 1 Dowl. & Ryl. 273.) The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such, or as a trespasser, at the election of a mortgagee, (*Doe* v. *Maisey*, 8 B. & Cr. 767. See *Wheeler* v. *Montefiore*, 1 Gale & D. 493,) and the mortgagor or his tenant coming in after the mortgage, may be ejected without any demand of possession having been made (*Ib.*) either by the original mortgagee or by his assignee; (*Thunder* v. *Belcher*, 3 East, 449;) whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will, (4 T. R. 680,) and the mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will. (1 T. R. 383. See Coote on Mortgages, 325—330; *Walmsley* v. *Milne*, 7 C. B., N. S. 133; 5 B. & Ald. 605, n.) "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will." (*Per Buller, J.*, in *Bird* v. *Wright*, 1 T. R. 378. See 4 Bligh, 97.) A mortgagee may consider the mortgagor, as against a stranger, as his tenant at will; but he is not bound to do so, and therefore it is that he may bring ejectment against him as a trespasser, without a previous demand of possession. (*Partridge* v. *Bere*, 5 B. & Ald. 604; *Hitchman* v. *Walton*, 4 Mees. & W. 415; *Doe* d. *Garrod* v. *Olley*, 12 Ad. & Ell. 481.) By the mortgage deed, the mortgagor attorned to the mortgagee as tenant at a quarterly rent, which was stated to be done for the purpose of securing the principal and interest, and in contemplation and part discharge thereof. A power of entry was also reserved to the mortgagee on default of payment: it was held, that he or his assignee might bring ejectment against the mortgagor without giving him notice to quit. (*Doe* d. *Snell* v. *Tom*, 4 Q. B. 615.) In *Doe* d. *Higginbotham* v. *Barton*, 11 Ad. & Ell. 314, *Denman*, C. J., said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge* v. *Bere*, 5 B. & Ald. 604, and *Hitchman* v. *Walton*, 4 Mees. & W. 409, that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner, so that as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right. (We purposely avoid the expression 'is not adverse, by reason of the statutes 3 & 4 Will. 4, c. 27, and 7 Will. 4 & 1 Vict. c. 28.')"

An express tenancy at will may exist notwithstanding the reservation of

3 & 4 *Will.* 4, c. 27, s. 7.

a yearly rent. An indenture of mortgage, after the usual power of sale by public auction or private contract, in the event of the nonpayment of the mortgage money, contained a proviso and covenant by the mortgagee that no sale, or public notice or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor. There was likewise a covenant by the mortgagee for quiet enjoyment by the mortgagor *as tenant at will* to the mortgagee on payment of a certain yearly rent by two equal half-yearly payments, but no livery of seisin was made to the mortgagor: it was held, that the mortgagor was tenant at will only to the mortgagee, and that those clauses in the deed did not create in him a tenancy from year to year. (*Doe* d. *Dixie* v. *Davies*, 7 Exch. 89; 16 Jur. 44; 21 Law J., Exch. 60; *Doe* d. *Basto* v. *Cox*, 11 Q. B. 122; 17 Law J., Q. B. 3; *Walker* v. *Giles*, 6 C. B. 662. See the *Metropolitan Counties Assurance Company* v. *Brown*, 4 H. & N. 428.) Where a mortgagee recognizes a tenant as being in lawful possession of the premises at a given time by the receipt of rent, it is not competent to him to say afterwards that at that time he was a trespasser. (*Doe* d. *Whitaker*, v. *Hales*, 7 Bing. 322.) But in ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. (*Doe* d. *Rogers* v. *Cadwallader*, 2 Barn. & Ad. 473.)

Relation between trustee and cestui que trust.

A *cestui que trust* is not to be deemed a tenant at will within this section to his trustee. The general rule is, that a *cestui que trust* being in possession of the estate, with the consent, or even the mere acquiescence, of the trustee, is considered as his tenant at will. (4 Bac. Abr. 198; *Smith* v. *Pierce*, 3 Mod. 195; *Focus* v. *Salisbury*, Hardr. 400; *Freeman* v. *Barnes*, 1 Ventr. 55, 80; 1 Lev. 270; *Pomfret* v. *Windsor*, 2 Ves. sen. 472, 481; 1 Ventr. 329; *Gree* v. *Rolle*, 1 Ld. Raym. 716.) The doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust* has been long repudiated. (*Doe* d. *Shewen* v. *Wroot*, 5 East, 138. See *Lessee of Massey* v. *Touchstone*, 1 Sch. & Lef. 67, n.) It is a rule, that however plain the trust may be, yet in a court of law the *legal interest* must prevail; (*Doe* d. *Da Costa* v. *Wharton*, 8 T. R. 2;) therefore trustees of a meeting-house or of lands, of which they are seised in trust for the support of the minister, may maintain an action of ejectment against him upon a simple demand of possession without any notice to quit. (*Doe* d. *Jones* v. *Jones*, 10 B. & C. 718; 5 M. & R. 616; *Doe* d. *Nicholl* v. *M'Keag*, 10 B. & C. 724; 5 M. & R. 620.) But the trustee and visitors of a free grammar school cannot recover the schoolhouse in ejectment without having previously determined his interest by summons. (*Doe* d. *Thanet* v. *Gartham*, 8 Moore, 368; 1 Bing. 357. See *Rex* v. *Gaskin*, 8 T. R. 209; *Reg.* v. *Governors of Darlington School*, 6 Q. B. 682.) The relation between trustee and *cestui que trust* is not analogous to that between mortgagor and mortgagee, as equity never takes away the possession of the *cestui que trust* by delivering it to the trustees, unless there be gross mismanagement, or some other reason for it. (9 Mod. by Leech, p. 227.)

Tenancy from Year to Year.

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such

years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen) (*u*). *3 & 4 Will. 4, c. 27, s. 8.*

(*u*) The 8th section applies to tenancies from year to year, created before and existing at the passing of the act, 24th July, 1833. By a settlement, made on the marriage of Gilbert Fownes and Ann his intended wife, in the year 1778, and a recovery duly suffered in pursuance thereof, the premises in question were limited and settled (after the marriage) to such uses as the said Ann should by deed appoint. The marriage took effect, and by a deed made on the 27th of March, 1790, Ann Fownes appointed the property to the use of John Finch and Joseph Jukes, and their heirs, upon trust, after her decease, to sell the same and apply the purchase-money in such manner and for such purposes as she should by her will direct and appoint; and in default of appointment, she directed that it should form part of the remainder of her personal estate. Ann Fownes survived her husband, and by her will, dated 6th of October, 1808, disposed of her real and personal estate generally, but made no appointment as to the property in question, or the purchase-money to arise from the sale of it; and she appointed Peter Kempson and two other persons her executors, and died in 1811. Kempson survived his co-executors, and in the year 1814 let the defendant's father into possession as tenant from year to year, without any lease or other writing of the premises in question, which (the deed of 1790 having been overlooked) were supposed to have passed under the general devise of real estate in the will. He continued in possession and paid rent to Kempson until the 25th of March, 1824, since which time no demand or payment of rent appeared to have been made, Kempson having died in the month of May in the same year. The defendant's father died a few years ago, leaving the defendant in possession of the premises. Rent was demanded of him by the parties beneficially interested under the deed of 1790, and payment being refused, this ejectment was brought in the name of the heir-at-law of Joseph Jukes, who was the survivor of the trustees named in the deed of 1790. It was objected for the defendant, that the right of action was barred by this section of the act: and the Lord Chief Baron, being of that opinion, nonsuited the plaintiff. Upon motion by the plaintiff to enter a verdict, *Parke*, B., thought no rule ought to be granted, the case being clearly within the words of the 8th section, which are not the same as those of the 7th section, upon which *Doe* v. *Page* (*ante*, p. 177) was decided. Here the defendant's father was in possession of the land as tenant from year to year after the passing of the act, therefore the period of limitation is twenty years from the last receipt of rent from him, in April, 1824; it expired, therefore, in April, 1844, and this ejectment was consequently brought too late. The effect of the act is to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed. (*Doe* d. *Jukes* v. *Sumner*, 14 Mees. & W. 39.)

Cases on the application of the 8th section.

The lessor of the plaintiff in ejectment proved a conveyance of the land to himself fifty years before the action was brought: he had not occupied; but a person who had occupied proved payment of rent by himself to the lessor of the plaintiff within thirty-three years of the action brought, at which time H. came into occupation. No lease to H. was shown. It was proved that, within twenty years before the action was brought, H., being in possession, declared that he was then paying rent to the lessor of the plaintiff; and that afterwards, and before action brought, the defendant had said that he was tenant to H. H. died before the trial. It was held, that the plaintiff was not barred by the second section of this act, payment of rent being duly proved by H.'s admission, so as to satisfy sect. 8, and the defendant being bound by the evidence which was good as against H.; and that sect. 14, which requires acknowledgments of title to be in writing, was inapplicable to this case. (*Doe* d. *Earl Spencer* v. *Beckett*, 4 Q. B. 601.)

This section requires an instrument in writing which may operate as a lease, and a party holding property for twenty years without such a lease or payment of any rent acquires a title. In 1824, B. was let into possession of a cottage under an agreement purporting to be a demise by the churchwardens and overseers of the poor of the parish of P., at the rent of 1*s.* 6*d.*

3 & 4 *Will.* 4, *c.* 27, *s.* 8.

per week; B. to quit on one month's notice being given, &c. This agreement was signed only by one of the overseers. The churchwardens did not sign, nor was there any evidence to show that they had assented to the agreement. B. never paid any rent or made any acknowledgment. B. afterwards sold the premises to the defendant: it was held, in an action of ejectment brought after twenty years by the churchwardens and overseers for the time being against the defendant, that, as the agreement did not pass an interest, it did not amount to a lease in writing, within the meaning of this section, and that consequently the claim of the lessor of the plaintiff was barred by twenty years' adverse possession. (*Doe* d. *Lansdell* v. *Gower*, 16 Jur. 100; 21 Law J., Q. B. 57; 17 Q. B. 589.)

Where the tenancy is disputed, the circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land of which he is tenant, that would not be a payment of rent within this section. (*Attorney-General* v. *Stephens*, 6 De G., M. & G. 146.)

Creation of tenancy from year to year.

An estate from year to year may be created either by the parol or written agreement of the parties. The qualities that distinguish it from proper terms of years, and from estates at will, are, that it is now raised by construction of law alone instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest, and that whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them. (*Birch* v. *Wright*, 1 T. R. 380.) Although *primâ facie* all leases for uncertain terms create a tenancy at will, the courts of law have for some time past inclined to construe such leases to constitute a tenancy from year to year, especially where an annual rent is reserved; (3 Burr. R. 1609; *Roe* v. *Lees*, 2 Bl. R. 1171; *Doe* v. *Weller*, 7 T. R. 478. See *Pope* v. *Garland*, 4 Y. & Coll. 399; *Doe* v. *Watts*, 7 T. R. 83; *Doe* v. *Morse*, 1 B. & Ad. 365;) which is certain, or which, from the terms of the agreement, is capable of being ascertained with certainty. (*Daniel* v. *Gracie*, 6 Q. B. 145.)

The defendant, being tenant from year to year at a given rent, the rent was raised, at the termination of one of the years, by consent of the landlord and tenant. It was held, that, if this created a new contract, it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred (in default of additional evidence), even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain. (*Doe* d. *Monck* v. *Geekie*, 5 Q. B. 841.) A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least. Therefore, where a tenant, at the expiration of a term of years, held over, and the landlord received rent from him, it was held, that the landlord might, by a half-year's notice, require him to quit at the end of the first year after the term of years had expired. (*Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957.)

Payment of rent is *primâ facie* evidence of a tenancy from year to year; (*Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & P. 838; 5 B. & Ad. 689;) if made with reference to a year or some aliquot part of a year. (*Braythwayte* v. *Hitchcock*, 10 Mees. & W. 497; *Doe* d. *Hull* v. *Wood*, 14 Mees. & W. 687.) Although a tenancy from year to year is ordinarily implied from the mere receipt of rent, (*Bishop* v. *Howard*, 2 B. & C. 100,) it is competent to either the payer or receiver to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the payment of rent unexplained. (*Doe* d. *Lord* v. *Crago*, 6 C. B. 90.) A demise "not for one year only but from year to year" operates as a demise for two years, and consequently the tenant cannot be ejected after a notice to quit at the expiration of the first year.

(*Dean* v. *Cartwright*, 4 East, 31.) A lease for one year and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. (*Doe* d. *Chadborn* v. *Green*, 1 Perry & Dav. 454; 9 Ad. & Ell. 658. See *Buckworth* v. *Simpson*, 1 Cr. M. & R. 834; 5 Tyr. 344.)

3 & 4 Will. 4, c. 27, s. 8.

A tenancy from year to year will not arise by implication where it will work a forfeiture. (*Penny* v. *Child*, 2 Maule & S. 255.)

A tenant who holds on after a term has elapsed goes on as tenant from year to year, because in the silence of the parties no other terms can be implied. (*Doe* d. *Rogers* v. *Pullen*, 2 Bing. N. C. 753.) A tenant for life under a settlement made a lease for lives not warranted by his leasing power, and after his death and that of the last *cestui que vie*, the remainderman continued to receive of the lessee rent of the same amount as that reserved by the lease, which was far below the real value of the lands. There was evidence from which it might be inferred that the lease in question had been since the death of the last *cestui que trust* treated by both parties under a mistake, as a renewal in pursuance of a supposed covenant for perpetual renewal in a former lease. It was held, in an ejectment on the title brought by the remainderman, that the lessee was a tenant from year to year since the death of the last *cestui que vie*, and was entitled to a notice to quit. (*Bell* v. *Nangle*, 2 Jebb & Symes, 259. See *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; *Howard* v. *Sherwood*, 1 Alcock & Nap. 217.) An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is a quasi tenant at sufferance, and the mere fact of occupation, coupled with payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term. (*Simpkin* v. *Ashurst*, 4 Tyrw. 781; *S. C.*, 1 Cr., Mees. & Rosc. 261.) So long as the occupation is merely continued with the bare acquiescence, or without the disagreement of the person entitled to the possession, a tenancy at sufferance exists. (*Sykes* d. *Murgatroyd* v. *Birkett*, cited 1 T. R. 161; Co. Litt. 270 b; Cro. Jac. 169.)

Where a party enters into possession of a farm, and pays rent under an agreement for a lease containing divers covenants applicable to a tenancy from year to year: it was held, that where the agreement stipulated for the lease to contain a condition of re-entry, if the tenant should grow two successive crops of white corn without fallowing, that he might be ejected without notice if he committed a breach of the covenant. (*Doe* d. *Thompson* v. *Amey*, 4 P. & Dav. 177. See *Lord Bolton* v. *Tomlin*, 1 Nev. & P. 247; 5 Ad. & Ell. 856.)

A tenancy from year to year was considered as recommencing every year in the case of *Tomkins* v. *Lawrence*, 8 Carr. & P. 729, but in *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682, *Parke*, B., said, "Though some doubts may once have existed as to whether, in the case of a tenancy from year to year, there was a fresh tenancy at the end of each year, it is now clear beyond all doubt that the same tenancy continues till the one or the other of the parties determines it at his pleasure." And the same principle must apply to any shorter tenancy, as from week to week. (*Per Crompton*, J., *Reg.* v. *Thornton* (*Township*), 6 Jur., N. S. 799; 29 L. J., M. C. 162, 164.) The nonpayment of rent for sixteen years, and no proof of any demand being made, is of itself sufficient evidence to presume the determination of a tenancy from year to year. (*Stagg* v. *Wyatt*, 2 Jur. 892.)

Though a *parol* agreement for a longer term than three years is void by the Statute of Frauds, 29 Car. 2, c. 3, s. 1, as to the duration of the term, yet it creates a tenancy from year to year, regulated in every other respect by the agreement. (*Doe* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3. See *Goodtitle* d. *Galloway* v. *Herbert*, 4 T. R. 680.)

By stat. 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing of any tenements or hereditaments "shall be void at law unless made by deed." An agreement to let for three years and a week is void as a lease by that section, but the tenant, notwithstanding, holds from year to year, subject to the terms of the agreement, and is bound to quit at the expiration

3 & 4 Will. 4, c. 27, s. 8.

of the three years, without a previous notice to quit. (*Tress* v. *Savage*, 4 Ell. & Bl. 36; 18 Jur. 680; 23 Law J., Q. B. 339. See 8 & 9 Vict. c. 106, s. 3, *post*.)

The interest of a tenant from year to year does not determine by his death, but devolves to his personal representatives. (*Doe* v. *Porter*, 3 T. R. 13; 15 Ves. 241.)

Notice to quit.

A tenancy from year to year may be determined by a notice to quit from either party, which, when there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six months') notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced. (*Right* v. *Darby*, 1 T. R. 159.) A notice to quit a house held by the plaintiff as tenant from year to year was given to him on the 17th June, 1840, which required him to quit the premises "on the 11th October now next ensuing, or such other day and time as his said tenancy might expire on." The tenancy had commenced on the 11th October in a former year. It was held, that this was not a good notice for the year ending on the 11th October, 1841. (*Mills* v. *Goff*, 14 Mees. & W. 72.)

Land was let for one year, and so on from year to year, until the tenancy should be determined as after mentioned, with a subsequent proviso that three months should be sufficient notice to be given from either party, and another subsequent proviso that it should be lawful for either party to determine the tenancy by giving three months' notice. It was held, that the tenancy was not determinable by three months' notice expiring before the end of the second year. (*Doe* d. *Chadborn* v. *Green*, 9 Ad. & Ell. 658; 1 P. & Dav. 454; see *Birch* v. *Wright*, 1 T. R. 378; *Denn* d. *Jenkin* v. *Cartwright*, 2 Campb. 572; *Thompson* v. *Maberley*, 4 East, 29.) On a demise for one year and six months certain from August 13th, at a rent payable on the usual quarter days, three calendar months' notice to be given on either side before determination of the said tenancy. The tenant continued to occupy beyond the year and six months. It was held, that a three months' notice to quit, expiring on 13th August, was proper; and not a notice expiring at the end of a year from the termination of the year and six months. (*Doe* d. *Robinson* v. *Dobell*, 1 Q. B. 806.) A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted; the tenant having afterwards discovered that his tenancy expired at Christmas gave his landlord another notice accordingly, and on possession being demanded at Midsummer refused to quit the premises. It was held, that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing, within the Statute of Frauds, being to take effect *in futuro*. (*Doe* d. *Murrell* v. *Milward*, 3 Mees. & W. 328; see *Johnstone* v. *Hudlestone*, 4 B. & C. 922; *Weddall* v. *Capes*, 1 Mees. & W. 50.) A tenant from year to year gave his landlord notice to quit, ending at a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice. The tenant quitted according to his notice, and the landlord entered, and did some repairs. It was held, that the tenancy was not determined. (*Bessell* v. *Landsberg*, 7 Q. B. 638.) A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it. Notice to quit at the end of the current year of tenancy, "on failure whereof I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, and does not give the tenant an option. (*Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143.) Land and buildings were held by a yearly tenant, the land from 2nd February to 2nd February, the buildings from 1st May to 1st May. The landlord, on the 22nd October, 1833, served him with a notice to quit the lands and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice." It was held,

3 & 4 *Will.* 4, c. 27, s. 8.

that as to the lands the notice was to be considered a notice to quit on 2nd February, 1835; and that the landlord might recover both land and buildings after that day in ejectment. (*Doe* d. *Williams* v. *Smith*, 5 Ad. & Ell. 350.) As to requisites of notice to quit, see 2 Selw. N. P. 701, 705, 10th ed. A notice to quit given by a person authorized by one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they shall all agree. (*Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135; *Doe* d. *Kindersley* v. *Hughes*, 7 Mees. & W. 139; see *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626.)

A notice to quit cannot be required by a person holding adversely, but only where there is a subsisting tenancy on both sides, nor is it necessary where the tenant does an act which amounts to a disavowal of the title of the landlord. (*Doe* d. *Calvert* v. *Frowd*, 1 Moore & P. 486.) A notice to quit is unnecessary, where on demand of possession the party refuses to give up possession, claiming the property as his own. (*Doe* d. *Lansdell* v. *Gower*, 17 Q. B. 589.) In *Doe* d. *Williams* v. *Pasquali*, Peake's N. P. C. 196, a refusal to pay rent to a devisee under a will, which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without a previous notice to quit. (See *post*, pp. 189, 190.)

Lease reserving Rent.

Where rent amounting to 20s. reserved by a lease in writing shall have been wrongfully received, no right to accrue on the determination of the lease.

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent (*charge*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*charge*), subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled (*x*).

(*x*) According to the judgment of Lord *Denman*, C. J., in *Doe* d. *Angell* v. *Angell*, 9 Q. B. 356, this section is to be read as if the word "charge" in italics had been interposed.

The right to recover land subject to a lease is to be considered as having accrued not from the time which any person dealing with the leases, or dealing with those entitled to the leases, gets possession, and claims to be entitled to the fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease; for then the adverse title of the person, who receives the rent under such circumstances, is first really brought into operation against the party who claims on the expiration of the lease. (*Per* Lord *Langdale*, *Chadwick* v. *Broadwood*, 3 Beav. 316.)

J., seised in fee, leased for sixty-one years, for a term expiring in 1837, within five years after the passing of stat. 3 & 4 Will. 4, c. 27 (24th July, 1833). From J.'s death, which happened more than twenty years before the passing of the act, B. received the rent reserved on the lease down to its

3 & 4 *Will.* 4, *c.* 27, *s.* 9.

expiration, and he then entered into possession; and afterwards W., within five years after the passing of the act, brought ejectment against B., claiming to be entitled, as J.'s devisee, immediately on J.'s death. It was held, that, under sect. 9, the action would have been barred by B.'s receipt of the rent; but that it was preserved by sect. 15 for five years after the passing of the act. (*Doe* d. *Angell* v. *Angell*, 9 Q. B. 328.) Lord *Denman*, C. J., in giving judgment, observed, that "considerable difficulty arises in the construction of this act of parliament, by reason of the word 'rent' being used in two different senses throughout, viz., in the sense of a rent charged upon land, and of a rent reserved under a lease. In the very first section of the act, the interpretation clause, it is used in both senses; for it is made to extend 'to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land.' In the 2nd section, it is used in the sense of rent-charge only, as was stated by *Tindal*, C. J., in the judgment in *Paget* v. *Foley*, 2 Bing. N. C. 679, 688; and as expressly held by the Court of Exchequer in the case of *Grant* v. *Ellis*, 9 Mees. & W. 113. The word is used in the same sense in the 3rd, 4th and 5th sections. In the 7th section it is used in the same sense; the words are 'when any person shall be in possession or in receipt of the profits of any land, or in *receipt* of any *rent*, as tenant at will.' Now a tenant at will of *land*, out of which a rent is *reserved*, cannot by any possible construction of language be said to be in the *receipt* of that rent which he *pays*; he cannot be tenant at will of the land and of the rent also. Indeed, no one can be said to be tenant of, or to have any estate in, the rent reserved by a lease, as was shown in the case of *Prescott* v. *Boucher*, 3 B. & Ad. 849–859; and was agreed to in the judgment in *Grant* v. *Ellis*, 9 Mees. & W. 124. The word 'rent,' therefore, in the 7th section must mean rent-charge; and there is no absolute absurdity in supposing that a person, seised in fee or for life of a rent-charge, might, for a gross sum of money, demise it for years or at will at a smaller rent. In the 8th section the same sense must, for the same reasons, be given to the word 'rent' in the earlier part of the section; but at the close of it the word is manifestly used in the other sense, viz., that of rent reserved, the words being 'or at the last time when any *rent* payable in respect of such tenancy shall have been received.'" We come now to the 9th section, on which the case of *Doe* d. *Angell* v. *Angell* turned, the word "rent" is there used seven times. The first time it means *rent-charge*; the second and third, rent reserved; the fourth, *rent-charge*; the fifth, rent reserved; the sixth, rent-charge; the seventh, rent reserved. If the word "rent-charge" be substituted for "rent," where the meaning is such, in this section, the section will run with the word *rent-charge* substituted as above for the word rent. (*Doe* d. *Angell* v. *Angell*, 9 Q. B. 355, 356.)

The rule of law before this statute was, that in case of a lease, adverse possession, so as to bar the reversioner, did not commence till the expiration of the term. Before the new act, length of possession during a particular estate, as a term of 1000 years, or under a lease for lives as long as the lives were in being, gave no title; but if tenant *pur auter vie* held over for twenty years after the death of *cestui que vie*, such holding over would in ejectment be a complete bar to the remainderman or reversioner, because the possession was adverse. (Cowp. 218.) The real property commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where *no rent* or only a *nominal rent* is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20*s.* a year may for this purpose be considered nominal." (1 Real Prop. Rep. 47.) Before this act it was decided that the holding over for twenty

years by a lessee for years determinable on lives at a *nominal* rent, who, at the commencement of such holding over, falsely asserted that one of the *cestuis que vies* was alive, but omitted to pay the reserved rent, was not an adverse possession barring the entry or ejectment of the reversioner. So although the reversioner had notice of the cesser of the term, and granted a fresh lease to another person, who neglected to enter for more than twenty years. (*Rex* v. *Inhabitants of Axbridge*, 4 Nev. & M. 477.)

3 & 4 Will. 4, c. 27, s. 9.

The mere receipt of rent by a stranger, without colour of title, was not evidence of adverse possession against one who had the legal title, for it was no disseisin, but at the option of the latter, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry. (Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith* v. *Parkhurst*, Andr. 324; *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68.) If there be a tenant at sufferance, and a stranger, not having any right to the land, make a lease to him by indenture, rendering rent, without putting the tenant by sufferance out of possession, and the tenant pay the rent to the stranger, that is not any disseisin to him who has the right. (1 Roll. Abr. 659, (C.) pl. 11.) So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election. (*Blunden* v. *Baugh*, Cro. Car. 302.) For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election. (See 2 Sch. & Lef. 622; 1 Taunt. 599.)

Before the stat. 3 & 4 Will. 4, c. 27, when there was a valid lease subsisting, the right of entry was preserved until the determination of the lease, although no rent had been received; (*Orrell* v. *Maddox*, Runn. Eject. App. No. 1;) and even the adverse receipt of rent for more than twenty years did not deprive the party of his right of entry on the determination of the lease, (*Doe* v. *Danvers*, 7 East, 299. See *Bushby* v. *Dixon*, 3 Barn. & C. 298, 304, 305,) although a void lease, or a term which had become attendant upon the inheritance for the benefit of the owner of it, did not prevent the running of the Statute of Limitations. (*Taylor* v. *Horde*, 1 Burr. 60.)

But where an estate had been in lease, and A. entered and received the rent during the continuance of the lease, and remained in possession more than twenty years from the time of his entry, and another person claiming the estate within twenty years after the expiration of the lease brought an ejectment and filed a bill for a discovery, it was held that the possession was adverse, as a bill might have been filed by the parties claiming during the whole time the leases were in existence, and a demurrer to the discovery was allowed, and assistance in equity refused. (*Cholmondeley* v. *Clinton*, Turn. & Russ. 107.)

Disclaimer of landlord's title.

A disclaimer imports a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself. (1 Mann. & G. 139.) And if a tenant disavowed his landlord's title by attorning to another, and the landlord was apprised of it and acquiesced, the possession of his tenant became adverse, and the Statute of Limitations would have run against the landlord. (*Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 624.) Lord *Redesdale* observed, "The attornment of a tenant will not affect the title of the lessor so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant *disavowing the tenure* by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that as to every other demand. But where there is no disavowal of the tenure, the mere nonpayment of rent by the tenant for a number of years will not bar the remedies of the landlord at the expiration of the term, as the possession of a tenant entering under a lease is lawful as against his lessor who was entitled to all his remedies for the rent." (2 Sch. & Lef. 625, 626.) The act of a tenant in setting up a title adverse to that of his landlord, in order to obtain the freehold, operates as a forfeiture of his term, and it is the same whether he does it himself, or assists another to do it. Whether he tries to get the freehold himself, or by collusion or connivance assists that result in favour of another, it operates equally as a forfeiture. Therefore where a termor, after

3 & 4 *Will.* 4, *c.* 27, *s.* 9.

deserting the demised premises, delivered up the possession of them with the lease, to a party who claimed by a title adverse to that of the landlord, with the intent to assist him in setting up that title, and not that he should hold *bonâ fide* under the lease, it was held that the term was forfeited by such act of betraying possession. (*Doe* d. *Ellerbrock* v. *Flynn*, 1 Cr. M. & R. 137; 4 Tyrw. 619.) But a tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. (*Doe* d. *Graves* v. *Wells*, 10 Ad. & Ell. 427.) In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such by requesting further information will not be enough, nor will a mere refusal to pay rent. (*Doe* d. *Williams* v. *Pasquali*, Peake, N. P. C. 196.) When a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, evidence of the disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy from its particular nature was limited. (10 Ad. & Ell. 435.) But though a lessee set up an adverse claim to the property in the premises he holds under the lease, yet that does not incapacitate him from maintaining possession under the lease, where the relation of landlord and tenant has not been actually abandoned. (*Rees* d. *Powell* v. *King*, Forrest, 19.) A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase-money, the agent of the lessor applied to him to give up possession, to which he answered that he had bought the property and would keep it, and had a friend who was ready to give him the money for it. This was held to be no disclaimer, because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. (*Doe* d. *Gray* v. *Stanion*, 1 Mees. & W. 695; 1 Tyr. & G. 1065. See *Doe* d. *Williams* v. *Cooper*, 1 Mann. & G. 135.) It was held, that payment of rent to another party without the consent or knowledge of the landlord, after an adverse possession of twenty-three years, did not amount to an attornment; and that the fraudulent act of a tenant in betraying the possession of his landlord by disclaiming tenure under him, and admitting a title in a third person, would not affect the landlord's title, so long as he had a right to consider the person as holding possession as tenant. (*Meredith* v. *Gilpin*, 6 Price, 146.) Payment of rent by a lessee to a lessor, after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired, and such knowledge is a fact to be decided by the jury. (*Fenner* v. *Duplock*, 2 Bing. 10; 9 Moore, 38.)

A tenant, though not permitted to deny the right of demising, may rely upon his landlord's title having expired. G. demised premises to D., who entered and paid him rent. During the term a third party, T., disputed G.'s title, and they agreed to be bound by the opinion of a barrister, who decided in T.'s favour. G. thereupon delivered up the title deeds, and permitted T.'s attorney to tell D., the tenant, that he must in future pay the rent to T. as his landlord. D. then paid rent accordingly, but G. afterwards distrained upon him for the same rent. On replevin, avowry, and plea in bar stating the above facts, it was held, that G.'s claim of title as landlord to D. had expired; that his conduct amounted to an admission of that fact; and that D. was not estopped from alleging it. And, per Lord *Denman*, C. J., that G. was estopped from setting up his relation of landlord against D., having himself induced D. to pay rent to another person. (*Downs* v. *Cooper*, 2 Q. B. 256.) On disclaimer, see Woodfall's L. & T., pp. 310—313, 8th ed.

Entry.

3 & 4 *Will.* 4, *c.* 27, *s.* 10.

A mere entry not to be deemed possession.

10. No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon (*y*).

(*y*) The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of the defendant, but in the presence of his family said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. It was held, that these acts were not sufficient to disturb the defendant's possession under this section. (*Doe* d. *Baker* v. *Combes*, 19 L. J., C. P. 306.)

By stat. 21 Jac. 1, c. 16, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. An entry to avoid a fine with proclamations, though not authorized by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it. (*Doe* d. *Blight* v. *Pett*, 11 Ad. & Ell. 842; 4 P. & Dav. 278.)

By the stat. 4 & 5 Ann. c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the Statute of Limitations (21 Jac. 1, c. 16), or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect. (See 1 Wms. Saund. 319, n. (1); 10 B. & C. 848.) This clause in the act will have the effect of shortening the period within which an ejectment can be brought; for, under the statute of Anne, a party might enter just before the expiration of the twenty years, and commence his action within one year afterwards.

Continual Claim.

No right to be preserved by continual claim.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action (*z*).

(*z*) Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably and repeated once in the space of every year and a day, (which was called *continual claim*,) was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations. (Litt. ss. 414, 415; Runn. Eject. 51, 52, 2nd ed.; Ad. Eject. 101, 3rd ed.; *Ford* v. *Grey*, 1 Salk. 285.) Actual entry was sufficient to keep alive the right of a person disseised, but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations. (*Hodle* v. *Healey*, 1 Ves. & B. 540.)

Coparceners, &c.

Possession of one coparcener, &c. not to be the possession of the others.

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land

3 & 4 *Will.* 4, c. 27, s. 12.

or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them (*a*).

Construction of this section.

(*a*) This section has relation back as far as relates to the period of the act, and makes the possession of one coparcener, joint-tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession. Therefore where one tenant in common has been out of possession for twenty years prior to the passing of the statute, he is barred by sections 2 and 12 from bringing his action, but might have maintained it under section 15 within five years of the passing of the act, if the other tenant in common had not been in possession adversely to him at the time of the passing of the act. In 1799, D., M. and A., being entitled to a remainder in fee, as tenants in common, of lands then held by a tenant for life, D. and the tenant for life conveyed the third, in which D. had the remainder, to C., who thereupon entered into possession of the whole. In 1800, the tenant for life died, A. having died before. The heir-at-law of A. filed a bill in Chancery in respect of the land against C. In 1835, while the proceedings were going on, the said heir-at-law died, having devised to J. all his lands, &c., whether in his own possession or that of others, as far as he lawfully could, specifying those which he was seeking to recover from C. In 1836, the devisor's heir-at-law brought ejectment against C. for A.'s third part: it was held, that under sections 2 and 12 of this statute the defendant's possession could not be held to have been ever that of the other tenants in common, for that sect. 12 made the possession of tenants in common separate from the commencement of the tenancy in common, and not merely from the time of the act passing. That therefore sect. 2 would have barred the lessor of the plaintiff, but that his right was saved by sect. 15, the ejectment having been brought within five years of the passing of the act, and the possession of C. not being adverse to the other tenants in common, within the meaning of that section. (*Culley* v. *Doe* d. *Taylerson*, 11 Ad. & Ell. 1008; 3 P. & Dav. 538.) This statute is, to a certain degree, retrospective, as to the possession of tenants in common; and though before the act the separate possession of one coparcener, joint-tenant, or tenant in common, of the entirety, or more than his individual share of such land, was not adverse as against the owners of the other shares, yet, by the operation of the act, the possession, which was not adverse prior to that act, became by that act adverse as against tenants in common, who were not in possession. (*O'Sullivan* v. *M'Swiney*, 1 Longfield & T. 118, 119; *Doe* d. *Holt* v. *Horrocks*, 1 Car. & K. 566.) Since the passing of the act 3 & 4 Will. 4, c. 27, the possession of land by one coparcener cannot be considered as the possession of his coparcener; nor, consequently, can the entry of one have the effect of vesting the possession in the other. (*Woodroffe* v. *Doe* d. *Daniell*, 15 Mees. & W. 792.) Where a tenant in common had been in the exclusive possession of the rents of S. for more than twenty years, and an ejectment had been brought by another co-tenant in common, to which A. had taken defence, and on which no further proceedings were had, taking such defence is not conclusive evidence of adverse possession against A.'s co-tenant in common. (*O'Sullivan* v. *M'Swiney*, 1 Longfield & T. 111.)

By this statute, actual possession by the enjoyment of the profits of lands, though not adverse in the old sense of the law, is, in itself, a bar and a transfer of the estate; and it is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. (*Burroughs* v. *M'Creight*, 1 Jones & L. 290.) Lands were conveyed to a trustee and his heirs, in trust for five persons, as tenants in common in fee. For more than twenty years prior to the filing of the bill, four of the tenants in common had been, by their agent, in the uninterrupted and exclusive receipt and enjoyment of the rents and profits of all the lands. The trustee never, in any manner, interfered in the trust. It was held, that the title of the fifth tenant in common was barred by this statute, which has altered the rule that the possession of one tenant in common is the possession of the other. The case was not within the saving of the 25th section, for the defend-

ants had not received the rents under, but in opposition to, the trustees. (*Ib.*) 3 & 4 *Will.* 4, *c.* 27, *s.* 12.

Mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants. (*M'Mahon* v. *Burchell*, 2 Phill. C. C. 127; 1 Coop. 457.) One tenant in common of real property cannot maintain an action for money had and received against his co-tenant, his remedy being an action of account under the stat. 4 Ann. c. 16, s. 27. (*Thomas* v. *Thomas*, 19 Law J., Exch. 175; 14 Jur. 180.) As the only remedy given by the stat. 4 Ann. c. 16, s. 27, is an action, there is no right to relief in equity, unless the case be one in which such action would lie. An executor who had been co-tenant in common with his testator of a farm which the latter had alone cultivated, claiming to be a creditor of the estate for a moiety of the profits, the court directed an action to be brought to try the right. (*Henderson* v. *Eason*, 2 Phill. C. C. 308; 15 Sim. 303. See *Murray* v. *Hall*, 7 C. B. 441.)

How tenants in common, &c. were affected by old statutes of limitation.

Coparceners, joint-tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other. (Co. Litt. 243 b, n. (1), 373 b; *Ford* v. *Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868.) The possession of one coparcener was that of the other, so as to create a seisin in the other, and carry her share by descent to her heirs, although the other had never actually entered; (*Doe* v. *Keen*, 7 T. R. 386;) and entry by one coparcener, when not *adverse* to her companions, enured to the benefit of all. (Co. Litt. 243 b; *Doe* v. *Pearson*, 6 East, 173; Smith, 295.) But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other. (*Davenport* v. *Tyrrel*, 1 Bl. R. 675.)

Possession of Younger Brother, &c.

Possession of a younger brother not to be the possession of the heir.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir (*b*).

(*b*) The effect of this section is illustrated in the judgment of the court in *Jones* v. *Jones*, 16 Mees. & W. 712, *ante*, p. 152.

Prior state of the law.

If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son, as the law intended that he entered claiming as heir to his father, being the same title as that by which the elder son claimed. (Litt. s. 396; *Sharington* v. *Strotton*, Plowd. 306.) On proof that the sister of the plaintiff occupied the estate for twenty years, and that the defendant entered as her heir, her possession would be construed to be by curtesy and licence, to preserve the possession of the brother, and therefore not within the intent of the stat. 21 Jac. 1, c. 16. The presumption ceased if it appeared that the brother had been in the actual possession, and that he had been ousted by the sister. (*Page* v. *Selby*, Bull. N. P. 102; 2 Stark. on Ev. 220, 2nd ed.; Co. Litt. 242; Plowd. 298, 306.) In a case, it appeared that on the 3rd of April, 1800, L. D. died seised in fee of lands, and immediately on his death his second son entered into possession of them, being the devisee of such lands named in the will of his father, which was only attested by two witnesses. On the 7th of December, 1805, the second son mortgaged those

3 & 4 *Will.* 4, *c.* 27, *s.* 13.

lands, and in the mortgage described himself as executor, heir at law, and devisee of his father. In 1823, the second son died, and on an ejectment by the heir of the eldest son of L. D., it was held that he was not barred by the Statute of Limitations, there being no ground to presume an actual ouster by the second son. For the motive of the younger brother in entering was not a matter of consideration, and the circumstance of there being a will not attested so as to pass real estate could not, as to that question, make any difference; for the entry was still nothing but an entry without title, such a will being in fact no will of land. If the mortgage had been by feoffment, it would have amounted to an ouster or disseisin; not being so, it could only be considered as affording some ground for the presumption of an ouster, a question which it was unnecessary to decide, inasmuch as twenty years had not elapsed since the execution of the mortgage. (*Lessee of Dowdall* v. *Bryne*, Batty's Ir. R. 373.)

Written Acknowledgment of Title.

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (*c*).

What is an acknowledgment.

(*c*) Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide. (*Doe* d. *Curzon* v. *Edmonds*, 6 Mees. & W. 295; *Morrell* v. *Frith*, 3 M. & W. 402.) Where letters were relied on as an acknowledgment of title, Sir *E. Sugden*, L. C., said it was a question of fact for a jury, whether the letters in question amounted to an acknowledgment of title within the statute. (*Incorporated Society* v. *Richards*, 1 Dru. & War. 290.) A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years:" the bargain subsequently went off, and no rent was paid or lease executed. It was held, that this letter was not an acknowledgment of title within this section, because there was no final bargain. *Doe* d. *Curzon* v. *Edmonds*, 6 Mees. & W. 295. See *Morrell* v. *Frith*, 3 Mees. & W. 402.)

By an indenture dated 27th October, 1827, between the defendant of the one part, and the plaintiff of the other part, after reciting that certain copyhold premises were surrendered to the plaintiff for securing the repayment of 300*l.* by him that day lent to the defendant, the plaintiff covenanted on repayment of that sum and interest on the 27th April, 1828, to surrender

the premises to the defendant, and the defendant covenanted to pay the 200*l.* and interest at the time appointed for payment. There was also a stipulation that in default of repayment, the plaintiff might take possession of the premises. The deed was in fact executed on the 23rd of August, 1834. No principal, interest or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment. It was held, that the deed was a sufficient acknowledgment of the plaintiff's title within this section, as the deed was to be read as speaking from the time of its execution, and consequently there was a sufficient acknowledgment to prevent the right of entry from being barred. (*Jayne* v. *Hughes*, 10 Exch. 430; 24 Law J., Exch. 113.) 3 & 4 *Will.* 4, *c.* 27, *s.* 14.

A correspondence by a party in possession of property with the solicitor of a society, by which he merely professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, and offered to refer to arbitration all questions touching such account, as the only matter in dispute, was held to amount to a written acknowledgment of the plaintiff's title, and save it from being barred. (*Incorporated Society* v. *Richards*, 1 Connor & Lawson, 86; 1 Dru. & War. 258.) Where two parties are dealing with each other, the one claiming a right to the property, and the other an incumbrance on it, the incumbrancer cannot be heard to say that an acknowledgment, contained in a correspondence between them, is not binding on him, because there might be an infirmity in the title acknowledged, in case some third party were to make a claim. (1 Connor & Lawson, 86.) The acknowledgment must be in writing, and it may be doubted whether parol evidence of the acknowledgment will be excluded. (*Haydon* v. *Williams*, 7 Bing. 168; 4 M. & P. 811.)

If a person through whom the defendant in an action of ejectment claims has, in an answer sworn by him to a bill filed by the plaintiff in reference to the same property, acknowledged the title of the plaintiff within twenty years of the time of the action being brought, such acknowledgment will be evidence against the defendant, and will operate as a bar to the Statute of Limitations under this section. (*Goode* v. *Job*, 28 L. J., Q. B. 1; Ell. & Ell. 6.)

It was held, that the unaccepted proposal for a lease made, by E. F., whose personal representative the defendant was, to the parties from whom the lessors of the plaintiff derived title, such proposal having been signed for a third party for and in the presence of E. F., who was unable from illness to write, was evidence of an acknowledgment of title within the 14th section. (*Corporation of Dublin* v. *Judge*, 11 Ir. L. R. 9. See Storey on Agency, 55, 56.) The moment after an acknowledgment of title, within the meaning of the 14th section, is made, the time begins to run against the person to whom it is made. (*Burroughs* v. *M'Creight*, 1 Jones & L. 290.)

Acknowledgments in writing.

The requiring an acknowledgment in writing to take a case out of the statute 3 & 4 Will. 4, c. 27, is adopted by analogy to the statute 9 Geo. 4, c. 14, in this section, and in the 28th, 40th, and 42nd sections of this act, and in the 5th section of the 3 & 4 Will. 4, c. 42. It may be proper to remark, that a difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party in possession, or *his agent*, signed by the person in possession. By the 28th section, twenty years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him.

By the 40th section, money charged upon land and legacies are to be deemed satisfied at the end of twenty years, unless some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42nd section, no arrears of rent or interest are to be recovered, but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by

3 & 4 *Will.* 4, c. 27, *s.* 14.

whom the same was payable, or his *agent*. In four cases above mentioned, therefore, the acknowledgment is binding if given *to* the party entitled, *or his agent;* but an acknowledgment of title under the 14th section, or of a right to redeem under the 28th section, cannot be given *by an agent*, whilst, in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual. The cases as to acknowledgments under the 40th and 42nd sections of this act, and under 9 Geo. 4, c. 14, are collected in the subsequent notes.

By the 5th section of 3 & 4 Will. 4, c. 42, (limiting the time within which actions on specialties are to be brought,) any acknowledgment either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or part satisfaction on account of any principal or interest due thereon, will take a case out of that act.

It will be seen that the acknowledgment required by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 1, is to be made or contained by or in some writing to be signed by the party chargeable thereby. Under that statute, a signature by the agent of the party to be charged is not sufficient to take a case out of the Statute of Limitations, 21 Jac. 1, c. 16. (*Hyde* v. *Johnson*, 3 Scott, 289; 2 Bing. N. C. 778.) This decision, it is conceived, will be applicable to an acknowledgment under the 14th section of 3 & 4 Will. 4, c. 27, which requires a signature by the person in possession, or in receipt of the profits of land, or of the rent, but not to the cases under the other sections, where a signature is required to be by the party *or his agent*. (*Lord St. John* v. *Boughton*, 9 Sim. 218. See *Forsyth* v. *Bristowe*, 8 Exch. 720, 721.)

Acknowledgment by agents.

In reference to the provisions of 9 Geo. 4, c. 14, ss. 1, 8, and the 16 & 17 Vict. c. 113, ss. 24, 27, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself. (19 & 20 Vict. c. 97, s. 13.) Sir *J. Romilly*, M. R., observed, that "since Lord Tenterden's Act the acknowledgment or promise to pay must be made to the creditor. There might have been some question whether an acknowledgment, if made to an agent of the creditor, is not made to him. The stat. 19 & 20 Vict. c. 97, s. 13, removes all difficulty as to promises *by* the agent of the debtor. However, in equity it would be considered, that if an application were made by the solicitor of the creditor, and the debtor wrote to say that he would pay the debt, it would be the same as if he had made the promise to the creditor himself." (*Fuller* v. *Redman*, (No. 2,) 26 Beav. 620.)

In an action for the use and occupation of premises alleged to have been held by the defendant as tenant to the plaintiff's testator, who died in 1837, the defendant pleaded the Statute of Limitations. A letter, dated August 30, 1837, after the testator's death, in answer to an application by the attorney for payment of the arrears of rent, was held a sufficient acknowledgment of the testator's title to take the case out of the statute. The property which the defendant had occupied for several years had for a long time been the subject of a chancery suit. The letter stated that the defendant was involved in law from 1805 to 1816 concerning the land, which had given him great trouble and expense, and that with respect to the expenses it was reasonable that the lords of the fee should make him some recompence accordingly; and after detailing certain particulars as to the several claims which had been made to the property, that the plaintiff's testator had been applied to to defend his title as to one fourth, but had objected so to do, and that "it appeared reasonable that the plaintiff should vindicate his right to the land," rather than that the expenses should fall upon the tenants; the letter concluded by stating that the writer "begged compassion, mercy and pity, and recompence in a satisfactory manner." (*Fursden* v. *Clegg*, 10 Mees. & W. 572.)

In 1818, the plaintiff and the defendant's grandfather became seised as tenants in common of a meadow. The meadow was then in the possession of the defendant's grandfather, who had previously held it under a lease. The plaintiff's father became possessed in 1826, and so continued till his death, in 1836. In 1837, a person, who was proved to be a land-agent, who received the defendant's rents and managed his property, wrote the follow-

3 & 4 *Will.* 4, *c.* 27, *s.* 14.

ing letter to the plaintiff's agent:—"Sir,—Mr. P. (the defendant) is now in possession of his two-thirds of the meadow, who will, no doubt, accept a lease (three lives) for Ley's (the plaintiff's) one-third at a fair rack rent. You must be aware Mr. P. is bound to pay rent for Ley's one-third during the time his father held the meadow, but no doubt he will do so in case you agree for a lease. (Signed) J. NEWTON. Will you favour me with the terms of a lease for the one-third of the meadow, that I may lay it before Mr. P." No answer was shown to have been given to this letter; but the defendant continued in possession of the land down to 1857, when an action of ejectment was commenced. It was not shown that either the defendant or his predecessors had paid any rent to the plaintiff since 1818. The land-agent was in court, but was not called as a witness for the defendant: it was held, that the letter was not a sufficient acknowledgment of the plaintiff's title within this section. (*Ley* v. *Peter*, 3 H. & N. 101; 27 L. J., Exch. 239.) It was held, also, by *Bramwell*, B., *Watson*, B., and *Channell*, B., *dissentiente Martin*, B., that the letter, coupled with the other facts, was not evidence from which the creation of a tenancy at will could be presumed. (*Ib.*) It was questioned whether the letter was admissible in evidence against the defendant. (*Ib.*)

TIME OF LIMITATION ENLARGED.

Possession not adverse at passing of Act.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or *interest* (*d*), at any time within five years next after the passing of this act (*e*).

(*d*) The word "interest," which is in the parliament roll, appears to be a mistake for "rent," *per* Lord *Denman*, C. J. (*Doe* d. *Angell* v. *Angell*, 9 Q. B. 360.)

Cases on construction of this section.

(*e*) The policy of this act was to make a possession of twenty years confirm a title, subject to certain exceptions. One of those exceptions is, where there has been an acknowledgment in writing according to the 14th section; the other, where the possession, at the time of the passing of the act, was not adverse: and, in such cases, it was accordingly considered, that the parties should have five years for the recovery of the land or interest claimed. (2 Brady, Adair & Moore, 95.) This section does not give five additional years to the party claiming, if the possession was *adverse* to his right at the time of the passing of the act (24th July, 1833). (*Holmes* v. *Newland*, 11 Ad. & Ell. 44; 3 P. & Dav. 128. See *Culley* v. *Doe* d. *Taylerson*, 3 P. & Dav. 551; 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Sweeny*, 2 Ir. L. R. 95, 96.) Adverse possession, within the meaning of this section, is not an adverse possession for twenty years: it was held, therefore, that a possession for twenty years, without payment of rent or an acknowledgment of title, was sufficient to bar an ejectment brought for the recovery of lands where the possession was adverse *at the time of the passing of the act*, although such possession had not been adverse for a period of twenty years. (*Lessee of O'Sullivan* v. *M'Sweeny*, 2 Ir. L. R. 89.)

3 & 4 Will. 4, c. 27, s. 15.

The question as to the fact of an adverse possession, such as would bring a party within this section, must be determined as it would have been if the act had never passed. (*Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 296.)

This section only applies where the possession was not adverse according to the former state of the law at the time of the passing of the act, that is, July 24, 1833. (*Nepean* v. *Doe* d. *Knight*, 2 Mees. & W. 911.) In an ejectment on the title by one coparcener against the other it was held, that if the possession of the defendant be adverse to the title of the lessor of the plaintiff at the time of the passing of this statute, though it has not been so for the period of twenty years before, the case is not within the 15th section of the act. Adverse possession, within the meaning of that section, is not adverse possession for the period of twenty years antecedent to the passing of the act. If the possession be adverse at the time of the passing of the act, and it appear that the defendant has not been in the sole and exclusive possession of the lands, without acknowledgment or account, for more than twenty years before the ejectment was brought, the title of the lessor of the plaintiff is barred. (*Lessee of O'Sullivan* v. *M'Sweeny*, 1 Jones & Carey, 295; 2 Ir. L. R. 89.)

D. mortgaged land in fee to I., subject to a proviso of cesser upon payment of the money secured upon a day more than twenty years before the passing of this statute. Within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. On ejectment brought by the heir of I. within five years after the passing of the statute, the jury found that the mortgage money was unpaid: it was held, that the ejectment was not barred by the second section, D.'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plaintiff had, by this section, five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest. (*Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 291.)

W. being owner in fee of certain lands, I. occupied them for twenty years, and until his own death, which was before W.'s death. After I.'s death, his widow, and afterwards the defendant, who was eldest son of I., held on till and after the death of W., and until ejectment was brought by W.'s devisee, within five years of the passing of this statute. The jury found that the possession was not adverse to W.: it was held, that the lessor of the plaintiff was not barred by sections 2 and 7, but had five years from the passing of the statute under section 15; and that the defendant could not resist the action on the ground that, having had no notice, he still continued tenant at will. (*Doe* d. *Burgess* v. *Thompson*, 5 Ad. & Ell. 532; 1 Nev. & P. 215.) By a marriage settlement, a husband was entitled to the moiety of an estate in fee, which moiety originally belonged to his wife: during the coverture, the other moiety descended to the wife, as heiress at law to her brother. The wife afterwards died, in the husband's lifetime, without issue, and the husband, from the time of her death, in April, 1815, till a sale of the estate in November, 1838, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person: it was held, that this was a case falling within the 15th section of this statute, and that notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse, the heir at law of the wife, not having made his claim within five years after the passing of the act, was barred by the statute. (*Ex parte Hassell, In re Manchester Gas Act*, 3 Jur. 1101; 3 Y. & Coll. 617.)

There is no saving of minority in the 15th section, and, therefore, the period of five years given by that section cannot be extended by reason of the minority of the claimant. (*Scott* v. *Nixon*, 3 Dru. & War. 388. See also on this section, *Incorporated Society* v. *Richards*, 1 Dru. & War. 289.)

III. Savings in Case of Disabilities.

3 & 4 Will. 4, c. 27, s. 16.

16. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid (*f*), such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy (*g*), coverture, idiotcy, lunacy (*h*), unsoundness of mind, or absence beyond seas (*i*), then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened) (*j*).

Persons under disability of infancy, lunacy, coverture or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

(*f*) See sections 2 and 14, *ante*, pp. 150, 194.

(*g*) An estate being settled on the wife for life, with remainder to her children, the husband entered on the wife's death in 1832, and remained in possession till his death, the eldest son attained his age in 1836, and in 1855 filed a bill against the devisee of his father: it was held, that the son was not barred by this section. It was contended, that the plaintiff's right was barred, as he had been of age more than *ten years*, his right having accrued on the death of his mother in 1832. It was held, the reasonable inference was that the father entered on behalf of his children as their guardian, which was totally different from the case of a mere stranger entering upon property under similar circumstances. *Wood*, V. C., observed, "Then it is said that though the entry might have been lawful in its inception, the retention of the property, after the children attained twenty-one, barred their right under the Statute of Limitations, but I think the better and sounder view here is, that if this gentleman entered as guardian, this court would never allow him to set up any other title to the estate. However, if it were set up, he would be in a different position as to the statute from a stranger who had so entered. Then, assuming that he ceased to continue in the position which up to that time he had held, as a father receiving the rents for his children, still the rights of the children would accrue for the first time when they respectively attained twenty-one, and each would have twenty years from such time to assert his rights, and therefore the statute had not barred such rights." (*Thomas* v. *Thomas*, 2 Kay & J. 79, 84, 85.)

Effect of father's entry on son's estate.

A testator who died in 1833 gave all his property to his two daughters, and appointed his brother and another executors of his will and trustees of his wife and children. The will having been attested by only two witnesses, the real estate descended upon his two daughters. In 1833, J., one of the trustees named in the will, entered into the receipt of the rents, and paid interest on a mortgage affecting the estate. Thirty years afterwards, on a question as to whether the claim of the infant's heir was barred as against the claim of J.'s heir, it was held, that, in the absence of express evidence to the contrary, J. must be presumed to have entered on behalf of the infants, and therefore time did not run against them. It was held, also, that the surviving daughter who succeeded to her sister's moiety, and had been under successive disabilities of infancy and marriage, was entitled to an account against J. as her bailiff from the death of her father. (*Pelley* v. *Bascombe*, 11 W. R. 766. See *Hicks* v. *Sallitt*, 23 L. J., Ch. 571; 3 De G., M. & G. 782.)

Entry by trustee.

(*h*) See *Fulton* v. *Creagh*, 3 J. & Lat. 329, *post*, p. 206; 3 Y. & Coll. 620.

(*i*) The words "absence beyond seas," were interpreted literally, and meant out of the realm. (*Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4.) See section 19, *post*, p. 207, as to what places are not to be deemed beyond

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seas. Absence beyond seas has ceased to be a disability under this statute by 19 & 20 Vict. c. 97, s. 10. (See *post.*)

Observations on this section.

(*j*) *Parke*, B., observed, "This clause, it will be observed, is made to operate only where the party intended to be protected is under disability at the time when the right to make the distress or bring the action *first* accrued; and if this be held to be the time when the last payment was made, the protection will, in many cases, be wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives; if he should, by reason of his lunacy, omit to enforce payment of his rent for twenty years, it would seem, on all principle, that he must have been intended to be protected; but, certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th section. Many other similar cases may be pointed out. This is, no doubt, a very serious defect, and would afford strong grounds for adopting any reasonable construction of the 3rd section, by which it might be remedied. But no construction would have that result; for, even if by a forced and difficult construction of the sixth branch of the section we were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell into arrear; yet the very same difficulty would exist in all the other cases pointed out by the statute, namely, the case of a person dying seised, and leaving an heir not under disabilities, but who should become disabled before any rent has accrued due, and the case of a person claiming under a settlement, who may be a *feme sole* when her title accrues, but may be under coverture before she has any title to distrain or sue for rent; and so as to the other cases provided for by the 3rd section. The same thing may be said of the 8th section. For these reasons, though we are fully sensible of the incongruities of the case, yet we feel bound to act on the plain and natural construction of the language of the 3rd section, and to hold that the right of the defendant in this case to distrain must be taken to have first accrued on the 15th day of January, 1825, when the last payment of rent was made, and so that the distress made in May, 1845, was unlawful, all right to the rent having been extinguished before that time." (*Owen* v. *De Beauvoir*, 16 Mees. & W. 567, 568; see observations of *Patteson*, J., in *De Beauvoir* v. *Owen*, 5 Exch. 166, Law J., 1850, Exch. Ch. 182.)

It will be observed that imprisonment is not a disability within this act. The disability of imprisonment was omitted in this section on the ground that imprisonment, whether under civil or criminal process, is of short and defined duration; and during its continuance the party has ample means of communication with friends and professional advisers. (1 Real Prop. Rep. 44.) Imprisonment is no longer a disability under stat. 21 Jac. 1, c. 16; 19 & 20 Vict. c. 17. s. 10.

The stat. 21 Jac. 1, c. 16, s. 2 (10 Car. 1, sess. 2, c. 6, s. 13, Ir.) contained a proviso, that "if any person having right of entry should be, at the time his right or title *first* descended, accrued, come or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond seas, then such person and his heir might, notwithstanding the said twenty years had expired, bring his action or make his entry, as he might have done before that act; so as such person or his heir shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same; and at no time after the said ten years." In the construction of that clause, it was held that it only extended to the persons on whom the right *first* descended, and that when the statute had once begun to run, no subsequent disability, either voluntary or involuntary, would prevent its operation. (*Doe* d. *Duroure* v. *Jones*, 4 T. R. 310; and see *Sturt* v. *Mellish*, 2 Atk. 610—614; Str. 556; 1 Wils. 134.) Thus, where a tenant in tail died, with issue in tail, a *feme covert*, who died under coverture, leaving issue two sons, both infants, the eldest attained twenty-one, and died without issue, leaving his brother under age, who did not prosecute his claim within ten years after he attained twenty-one, nor until more than twenty years had elapsed since the right first descended: he was held

Construction of saving clause in 21 Jac. 1, c. 16.

3 & 4 *Will.* 4, *c.* 27, *s.* 16.

to be barred by the statute, on the ground that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore, he and his heirs had only ten years from the time he attained twenty-one. (*Cotterell* v. *Dutton*, 4 Taunt. 826.) When the ancestor, to whom the right first accrued, died under a disability, which suspended the operation of the statute, it was held, that his heir must enter within ten years next after his ancestor's death, provided more than twenty years had elapsed from the time of the commencement of the ancestor's title to the expiration of the ten years. (*Doe* d. *George* v. *Jesson*, 6 East, 80.) Where an estate descended to parceners, one of whom was under a disability, which continued more than twenty years, and the other did not enter within that period, the disability of the one was held not to preserve the title of the other after the twenty years had elapsed. (*Doe* d. *Langdon* v. *Rowlston*, 2 Taunt. 441.)

Persons beyond seas.

It was said by Lord Chancellor *Hardwicke*, that if a man both of non-sane memory and out of the kingdom came into the kingdom and then went out again, his non-sane memory continuing, his privilege as to being out of the kingdom was gone, and his privilege as to non-sane memory would cease from the time he returned to his senses. (2 Atk. 610—614.) If a party at the time the cause of action accrues is abroad, the statute does not begin to run until he comes to England; and if he never comes, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. (*Strithorst* v. *Græme*, 3 Wils. 145.) In this case the plaintiff was a foreigner, and the court held that, being a foreigner, he had six years for bringing his action after his first coming to this country. (See *Lafond* v. *Ruddock*, 13 C. B. 818.) If a plaintiff be beyond seas at the time of the action accruing, he may sue under the stat. 21 Jac. 1, c. 16, s. 7, at any time before his return, as well as within the time limited after his return. (*Le Veux* v. *Berkeley*, 5 Q. B. 836; *Townsend* v. *Deacon*, 13 Jur. 366; 3 Exch. R. 706.) If a plaintiff be in England when the cause of action accrues, the time of limitation begins to run, and a subsequent departure from the kingdom, and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time. (*Smith* v. *Hill*, 1 Wils. 134. See Lord *Kenyon's* observations, 4 T. R. 311; *Denys* v. *Shuckburgh*, 4 Y. & Coll. 47.) So where there are several partners, some of whom are in England at the time the right of action accrues and others beyond the seas, the action must be brought within six years next after the cause of action accrued, notwithstanding the absence of some of the partners beyond the seas. (*Perry* v. *Jackson*, 4 T. R. 516. See *post*.)

Presumption of death.

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years, a period which has been fixed from analogy to the statute of bigamy, (1 Jac. 1, c. 11, s. 2,) and the statute concerning leases determinable on lives. (19 Car. 2, c. 6.) Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years. (*Hopewell* v. *De Pinna*, 2 Campb. 113.) Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death. (*Doe* v. *Deakin*, 4 B. & Ald. 433; see 2 *Id.* 386.) It was held, that where no account could be given of a person within the exception of the statute 21 Jac. 1, c. 16, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him. (*Doe* d. *George* v. *Jesson*, 6 East, 84.) Proof that a person sailed in a ship bound to the West Indies some years ago, which has not since been heard of, is evidence upon which a jury may presume that the individual is dead; but the time of the death, if it become material, must depend upon the particular circumstances of the case. (*Watson* v. *King*, 1 Stark. N. P. C. 121; *Paterson* v. *Black*, Park's Ins. 483; 1 Bl. R. 404.) The burthen of proof is on those asserting the death. (*Wilson* v. *Hodges*, 2 East, 312.)

Though where a party has not been heard of for seven years, after going abroad, he will, at the expiration of that time, be presumed to be dead, there is no presumption raised by law as to the *time* when the death

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Presumption of death.

actually took place; but this is a matter concerning which the jury must form their own opinion upon the particular facts of the case. And therefore an ejectment brought by a remainderman more than twenty but less than twenty-seven years since the tenant for life was last heard of, cannot be supported without other evidence, from which the jury may infer that the tenant for life was alive within twenty years. (*Doe* d. *Knight* v. *Nepean*, 2 Nev. & M. 219; 5 B. & Ad. 86.) In that case it was necessary to show that the ejectment was brought within twenty years of the death of a party, and for that purpose it was insisted, that although after a lapse of seven years after a party was last heard of the law presumes him to be dead, yet that the presumption is that he lives during the whole of that period; but the Court of Exchequer Chamber, on appeal from the Court of King's Bench, affirmed the doctrine there laid down, "that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or end of any particular period during those seven years; that if it be important to any person to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was heard of. The presumption of law relates only to the fact of death; the time of death, whenever it is material, must be a subject of distinct proof." (*Nepean* v. *Doe* d. *Knight*, 2 Mees. & W. 894. See *Doe* d. *Knight* v. *Nepean*, 5 B. & Ad. 86; 2 Nev. & M. 219; *Rex* v. *Inhabitants of Harbourne*, 2 Ad. & Ell. 540; 4 Nev. & M. 341; *Rex* v. *Twyning*, 2 B. & Ald. 386.) A person ought not to be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive. The old law relating to presumption of death is daily becoming more untenable, in consequence of the increased facility of travelling. (*Watson* v. *England*, 14 Sim. 28.)

A reference was made to the master, to inquire whether A. B. was living or dead. He reported certain facts and findings on stated evidence, showing that, after diligent inquiry, nothing had been heard of A. B. for more than seven years; and he found that he was not able to state to the court whether A. B. was living or dead. On a petition to confirm the report, the court read and considered the evidence, and came to a conclusion presuming the death. (*Grissall* v. *Stelfax*, 9 Jur. 890. See *Wilcox* v. *Purchase*, *Ib.*)

The presumption of death, after seven years' absence, does not arise where the probability of intelligence is rebutted by circumstances. (*Bowden* v. *Henderson*, 2 Sm. & Giff. 360.)

Where it is necessary to a plea of justification, under a lease from tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer. (*Dayrell* v. *Hoare*, 4 Per. & Dav. 114.) A declaration for rent by assignee of a reversion for the life of a third person against assignee of the term, omitted to aver that *cestui que vie* was living when the rent accrued: it was held, that the continuance of the life was not to be implied from the mere deduction of title, and an acknowledgment in the breach that "after the plaintiff became so seised the rent became due and still is in arrear to the plaintiff," and that the declaration was bad on general demurrer. (*Fryer* v. *Coombs*, 4 Per. & Dav. 120; 11 Ad. & Ell. 403.) In *Webster* v. *Birchmore*, (13 Ves. 362,) the presumption of death from length of time was held to have relation to the commencement of the period of uncertainty as to the existence of the party when he was proved to have been in a desperate state of health, and was to have returned to his relation in six months. In *Sillick* v. *Booth*, (1 Y. & Coll. N. C. 117,) a party was presumed to have died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of such hurricane months. Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815; both before and after the testator's death endeavours were made, by inquiries and advertisements, to ascertain whether such child

were living or dead, but without success: it was held, that he must be presumed to have died before the date of the will. (*Rust* v. *Baker*, 8 Sim. 443.) In establishing a title upon a pedigree, where it may be necessary to throw a branch of the family out of the case, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. What is done on such a trial is no injury to the man or his issue, if he should afterwards appear and claim the estate. (*Rowe* v. *Hasland*, 1 W. Bl. 404. See Fitz. N. B. 196, A. L.) Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *primâ facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment. (*Doe* d. *Banning* v. *Griffin*, 15 East, 293.) The death of a legatee has been presumed from twenty-five years' absence abroad without being heard of. (*Dixon* v. *Dixon*, 3 Br. C. C. 610.) On a reference to the master to inquire whether a legatee was living or dead, the certificate of the master, stating that the legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree. (*Lee* v. *Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315. See also 13 Ves. 362.)

3 & 4 Will. 4, c. 27, s. 16.

Presumption of death.

A. went abroad in September, 1830. His father died in September, 1833. About twenty months previous to that time A. was heard of for the last time. The court ordered the share of the father's residue bequeathed to A. to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it, in case A. should be living, or should have died after his father. (*Dowling* v. *Winfield*, 14 Sim. 277.)

A sum of money was set apart, in 1815, to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837, the master having certified, upon presumption that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842, the master having certified, upon presumption that she had died in 1822, and that no personal representative had been heard of, the court ordered immediate payment to the same party of the accumulation since that time. And, in 1847, it ordered payment of the rest of the fund to the same party, though resident abroad, upon his giving his personal security to refund, in case the annuitant, or her personal representative, should ever establish a claim. (*Cuthbert* v. *Purrier*, 2 Ph. C. C. 199.) Where the husband of a party had, seven years before her death, left this country for America, and had not been heard of since three days after his arrival there, although he had been advertised for in that country, the husband's death was presumed, and probate was granted of his wife's will as if she had died a widow. (*Re bonis How*, 1 Sw. & T. 53; 4 Jur., N. S. 366.) As to presuming the death of parties who embarked in vessels lost at sea or not afterwards heard of, see *In bonis Norris*, 1 Sw. & T. 6; 27 L. J., Prob. 4; *In bonis Main*, 1 Sw. & T. 11; 27 L. J., Prob. 5; *In bonis Smyth*, 28 L. J., Prob. 1.

Where husband and wife are drowned by the same accident, the presumption is that they died at the same time, and in order to entitle the next of kin of the husband to the wife's property, it must be shown that he survived his wife. (*Satterthwaite* v. *Powell*, 1 Curt. 705.)

Presumption of survivorship.

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again; a question was raised between the next of kin of the testator and a legatee under the will, which was dependent on the event of the testator's surviving his wife: it was held, first, that the onus of proof, that the husband was the survivor, was upon the legatee; secondly, that it was requisite to produce positive evidence in order to enable the court to pronounce in favour of the survivorship; and thirdly, that no such evidence having been produced, the next of kin was entitled. (*Underwood* v. *Wing*, 4 De G., M. & G. 631; 1 Jur., N. S. 169; 24 Law J., Ch. 293.)

By the law of England the question of survivorship, in cases of the above

3 & 4 *Will.* 4, c. 27, s. 16.

description, is matter of evidence, and not of positive regulation and enactment, varying according to the ages and sex of the persons dying in the same shipwreck, as it is in the French Code, and in the absence of evidence there is no conclusion of law on the subject. (*Ib.*)

Where a party who took under a will had not been heard of for seven years, the testator having died after three years had elapsed, and the advertisements which were issued on the death of the testator had failed to produce any information, it was decided that such legatee must be assumed to have survived the testator, and could not be presumed to have died at any particular period during the seven years. (*Dunn* v. *Snowdon*, 11 W. R. 160.)

A young sailor, who was last seen in the summer of 1840 going to Portsmouth to embark, was presumed to have survived his grandmother, who died in March, 1841. (*Re Tindall*, 30 Beav. 151.)

There is no presumption of law arising from age and sex as to survivorship among persons whose death is occasioned by one and the same cause. Nor is there any presumption of law that all died at the same time. The question is one of fact, depending wholly upon evidence; and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. (*Wing* v. *Angrave*, 8 H. L. C. 183.)

In *Sillick* v. *Booth*, (1 Y. & Coll. C. C. 117,) it was held that evidence of health, strength, age or other circumstances may be given in cases of the above nature tending to the judicial presumption that one of two brothers who perished by shipwreck survived the other. (See *Gen. Stanwix's case*, Fearne's Post. Works, 38; *Rex* v. *Dr. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright* v. *Netherwood*, 2 Salk. 593, n.; *Hitchcock* v. *Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw* v. *Toulmin*, 2 Dick. 633; *Mason* v. *Mason*, 1 Mer. 308; *Taylor* v. *Diplock*, 2 Phill. Ecc. C. 261; *In bonis Selwyn*, 3 Hagg. Ecc. R. 741; *Colvin* v. *The King's Proctor*, 1 Hagg. Ecc. 92.)

It will be observed, that this act provides that no action shall be brought but within forty years after the right first accrued, and that no further time, beyond the twenty or ten years, is allowed for a succession of disabilities.

Extreme Period of Limitation fixed.

Forty Years.

But no action, &c. shall be brought beyond forty years after the right of action accrued.

17. Provided nevertheless, and be it further enacted, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired (*i*).

A purchaser entitled to evidence of sixty years' title.

(*i*) The period for which a good title is required to be shown is still sixty years, notwithstanding the stat. 3 & 4 Will. 4, c. 27. Lord *Lyndhurst*, C., said, "It was supposed that, by the operation of that act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that con-

veyancers have entertained different opinions on the subject; but, after considering it, I am of opinion, that the statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was the duration of human life, and that is not affected by the statute. It was true that, in other respects, the security of a sixty years' title is better now than it was before; but I think that it is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years, instead of the sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration." (*Cooper* v. *Emery*, 1 Phill. C. C. 388.)

3 & 4 Will. 4, c. 27, s. 17.

Cases on construction of this section.

A *feme sole* seised in fee married, and she and her husband ceased to be in the possession or enjoyment of the land, and went to reside at a distance from it. They both died at times which were not shown to be within forty years from their ceasing to occupy. The wife's heir-at-law brought ejectment against the person in possession within twenty years of the husband's death, and within five years of the passing of this statute, but more than forty years after the husband and wife ceased to occupy: it was held, that the heir-at-law was barred by the 17th section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. *Denman*, C. J., said, "The fact being clear that within the terms of 3 & 4 Will. 4, c. 27, s. 3, the plaintiff's mother was dispossessed or discontinued the possession or receipt of the rents above forty years before the action brought, the action was clearly barred by the 17th section of the same statute. Some argument was raised on the question whether the possession was adverse or not, but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date. If the persons actually in possession could be shown to have held under him through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter, but in this case there was not a single fact from which such an inference could be drawn. On the contrary, the departure of the former possessors to a distance without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claim of ownership. And as the title of the plaintiff's ancestor rested on no documents, but was merely evidenced by possession at an early period, that ancestor's entire desertion of the premises for so long a time goes far to show a consciousness that the anterior occupation was without title. It is true that if Mrs. C. was the owner, her husband was tenant by the curtesy, and that their son's right of possession did not accrue till after his father's death; but this furnishes no answer to the positive enactment of limitation in the 17th clause." (*Doe* d. *Corbyn* v. *Bramston*, 3 Ad. & Ell. 63; *S. C. nom. Doe* d. *Corbyn* v. *Branson*, 4 Nev. & M. 664.) There is a material distinction between the case of a husband and wife making the possession derelict as was the case in *Doe* v. *Bramston*, and the case where the husband and wife are seised in fee in right of the wife, and the husband, by a conveyance which does not bind the wife, purports to convey the fee. Because the effect at law is, that such conveyance merely passes to the grantee of the husband that estate which he had and might have held during the continuance of the coverture. In such case the right of the wife comes within the fourth description of interest in the 3rd section of the statute 3 & 4 Will. 4, c. 27. If husband and wife, being seised in fee in right of the wife, convey to a purchaser by deed without fine, the wife, if she survives, and if not her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years. (*Jumpsen* v. *Pitchers*, 13 Sim. 327.) The purchaser held under the husband by means of the lawful estate which the husband could create, and the creation of which had the effect of making that which was the wife's present estate, a future estate, within the meaning of the fourth description in the 3rd section of the statute. (*Ante*, p. 165.)

In 1787, a lease was made by a lunatic to his brother for lives renewable for ever. The lessee, who was the last life in that lease, died in 1836. Various proceedings were had in the lunacy matter respecting the lease and

3 & 4 *Will.* 4, c. 27, s. 17.

the rent reserved thereby, the result of which was that; without recognizing the lease as a valid demise, the lessee was permitted to hold part of the lands demised, paying the entire reserved rent. From 1836 to 1842 the profits were received by the heir of the lessee. In 1842 the lessor died, and the fee descended upon the heir of the lessee, who was also heir of the lessor. It was held, on a bill filed by a judgment creditor of the lessee, that the latter had not acquired either the fee-simple, subject to a perpetual rent equal to the rent reserved, or a right to a renewal, by reason of the Statute of Limitations (3 & 4 Will. 4, c. 27), length of time, or the proceedings in the lunacy matter; and that the profits received by the heir of the lessee, from 1836 to 1842, were not assets of the lessee. For although the lessee had enjoyed the property demised for three lives, and no one attempted to impeach the lease, yet the court had no power to give validity to the covenant for renewal contained in it. The covenant was in itself simply void, and in itself created no obligation on the part of the lunatic, who was incapable of contracting, and the lapse of time did not enable the court to give validity to the covenant, which was void at law. (*Fulton* v. *Creagh*, 3 Jones & L. 329.)

Successive Disabilities.

No further time to be allowed for a succession of disabilities.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person (*k*).

(*k*) This section is so far retrospective as to extend to a case where the first person under disability died before the passing of the act. A claimant to land in the colony of New South Wales, whose ancestor died under disability in 1835, and who himself continued under disability till he brought an action of ejectment in 1856, was barred by a colonial ordinance of 1837, which applied the 3 & 4 Will. 4, c. 27 to the colony of New South Wales. (*Devine* v. *Holloway*, 9 W. R. 642; 14 Moore, P. C. C. 290.) It is easy to imagine infancy, coverture, lunacy and absence beyond the seas, so to follow one another with respect to a particular line of heirs, that by successive disabilities the period of limitation might be indefinitely protracted; the object of this section of the act is, where ten years or more have expired from the time when the right accrued to a party dying under disability, to allow his heir only ten years whether under disability or not. Successive disabilities in *the same person* had been held to prevent the operation of the Statute of Limitations, and to give to the heir ten years after the death of his ancestor to enforce his claim by ejectment. Therefore, when A., a minor, having herself been dispossessed of certain lands in 1787, married in 1794, and being a *feme covert*, attained her full age in 1796, and died in 1827, it was held that an ejectment was well brought by her heir. (*Lessee of Supple* v. *Raymond*, 1 Hayes, Ir. Rep. 6. See 2 Prest. Abstr. 340; Blansh. Lim. 21, 22.)

3 & 4 *Will.* 4, c. 27, s. 19.

Beyond the Seas.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act (*l*).

Scotland, Ireland, and the adjacent islands, not to be deemed beyond seas.

(*l*) See 19 & 20 Vict. c. 97, s. 12, *post*. It was held that Dublin, or any place in Ireland, was beyond the sea within the meaning of the statute 21 Jac. 1, c. 16, s. 7. (*Nightingale* v. *Adams*, Show. 91.) Of course, Scotland was not considered beyond sea. (*King* v. *Walker*, 1 Bl. Rep. 286.) The 19th section of the stat. 3 & 4 Will. 4, c. 27, which removes disabilities by reason of residence in Ireland, &c., is applicable to cases of residence in Ireland before the passing of the statute, if the controversy has not arisen till after the passing of it. (*Ex parte Hassell, In re Manchester Act*, 3 Jur. 1101; 3 Y. & Coll. 617. See *Battersby* v. *Kirk*, 2 Bing. N. C. 603; *Lane* v. *Bennett*, 1 Mees. & W. 70; Tyrw. & G. 441; *ante*, p. 199. *Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4.)

IV. Concurrent Rights.

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession (*m*).

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

(*m*) Copyhold land was surrendered, in 1798, to the husband and wife for their joint lives, with remainder to the heirs of the husband. In 1805, the husband absconded and went abroad, and was never afterwards heard of. In 1807, a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the copyhold estate until her death in 1841, whereupon the assignee was admitted: it was held, that an ejectment by the assignee brought after her death was in time, for that the husband's reversion in fee was a future estate within the meaning of the stat. 3 & 4 Will. 4, c. 27, s. 3. The court thought it clear that the husband, if he had not been bankrupt, would have been entitled to the possession during the joint lives of himself and wife, and that upon his death the wife was entitled to possession for her life, and the heirs of the husband on the expiration of their joint lives. There would, however, be only one interest, and the assignee being barred as to the estate in possession during the continuance of the husband's life, it was urged that he was barred altogether by the 20th section. The court thought, supposing the 20th section to apply, the proviso at the end of it applied also, because the wife had been in possession during the whole

Cases on the construction of this section.

3 & 4 Will. 4, c. 27, s. 20.

period of her life, until the time of her death; and though she had not recovered that possession by virtue of legal proceedings, it was a sufficient *recovery* for the purpose of that section, if she had been in the actual possession during the whole of her life. Until her death, there was no right in the assignee to take possession, and the action was brought in time. (*Doe* d. *Johnson* v. *Liversedge*, 11 Mees. & W. 517.)

In 1784, premises were leased to H. I. for three lives. H. I., by his will, devised all his estate and interest in the premises to his wife, A. I., her heirs and assigns. A. I., in 1793, conveyed the estate so devised to her to her son R. I., and the heirs of his body, with a proviso that if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A. I., her heirs and assigns. In 1811, R. I. purchased the reversion in fee in the premises, expectant on the lease for lives, which was duly conveyed to him, and at the same time an old satisfied term of 5000 years affecting the premises was assigned to a trustee for him, to attend the inheritance. R. I. died in 1812, without issue, leaving his nephew, L. I., his heir-at-law, and the heir-at-law of A. I. The lease for lives determined in 1835. For upwards of twenty years from the death of R. I. the premises were held adversely to L. I. It was held, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the lease for lives in 1835. It was held, also, that since the stat. 8 & 9 Vict. c. 112, the outstanding term would have been no defence to an ejectment by L. I., or any person claiming under him. That branch of the 3rd section of the Limitation Act, 3 & 4 Will. 4, c. 27, which relates to estates in reversion expectant on the determination of a particular estate, applies only to cases where another person than the reversioner is entitled to the particular estate. (*Doe* d. *Hall* v. *Moulsdale*, 16 Mees. & W. 689.)

This section of the act is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in unâ personâ equum est ac si essent in diversis.*" (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368.) Under the statute 21 Jac. 1, c. 16, s. 1, a party might have pursued his right of entry twenty years after it attached, although in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment. Thus when a tenant in tail of lands in ancient demesne demised them by fine in the court of ancient demesne for three lives, and afterwards levied a fine of the reversion in the same court to the use of himself and his heirs, it being agreed that the fines in that court did not bar the estate tail, it was held that the first fine created a discontinuance, and the second did not; and that although the issue in tail did not bring their formedon within twenty years after the death of their ancestor, they were not barred of their right of entry within twenty years from the determination of the lease for lives. (*Hunt* v. *Bourne*, 1 Salk. 339; 2 *Id.* 421; 4 Br. P. C. 66. See *ante*, *s. 5*, p. 172.)

V. Operation of the Statute in Cases of Estates Tail.

Where Time has run against Tenant in Tail.

Where tenant in tail is barred, remainderman whom he might have barred shall not recover.

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any

estate, interest or right, which such tenant in tail might lawfully have barred (*n*). 3 & 4 *Will.* 4, *c.* 27, *s.* 21.

(*n*) In ejectment the plaintiff proved that A. being seised in fee of the land in question devised it to the father of the plaintiff in tail general, and died in 1799. The plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person through whom the defendant claimed possession. It was held, that under this section, since the tenant in tail was barred, the issue in tail was also barred. (*Austin* v. *Llewellyn*, 9 Exch. 276; 23 Law J., Exch. 11.) An estate tail was limited to A., remainder in tail to B., remainder to C. A. dies, then B. dies within twenty years, and C. becomes entitled in possession, being at the time under disability. It was held, that the 21st and 22nd sections of this act commenced running against C. from the death of A., and that having commenced to run C. was not saved from its operation under 16th section by being under disability when her right accrued in possession. Vice-Chancellor *Kindersley* said, the intention and operation of the 21st and 22nd sections are to put remaindermen, whose estate might be barred by the tenant in tail, in the same position as if they claimed under tenants in tail; that is, the act of the tenant in tail, in allowing any portion of the twenty years to run without making an entry or bringing an action to the extent of the period allowed to elapse, binds the remainderman. (*Goodall* v. *Skerratt*, 3 Drew. 216; 1 Jur., N. S. 57; 24 Law J., Chan. 323.)

The 21st section applies to the case where the right of entry of tenant in tail is barred *by his neglect* to make such entry in proper time, not to the case where he has conveyed away his own right to another and put it out of his power to enter. In the latter case the right of entry is not barred by reason of the same not being made within the period limited, but by reason of his not being able to enter against his own conveyance.

An estate tail having been discontinued by a feoffment made by the tenant in tail more than twenty years before his death, it was held that the issue in tail might bring his writ of formedon at any time within twenty years next after such death, the period of limitation prescribed by this statute not running against him during the life of tenant in tail. (*Cannon*, dem., *Rimington*, ten., 12 C. B. 1, 18.)

Where Time has commenced running against Tenant in Tail.

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action (*o*). Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

(*o*) The twenty years for making an entry did not commence under the stat. 21 Jac. 1, c. 16, until the right accrued. An estate might have been enjoyed for centuries under an adverse possession against a tenant in tail, and afterwards have been recovered by a remainderman, as, for example, where an estate was limited to one in tail, with remainder to another in fee, and the *tenant in tail* and his issue were barred of their remedy by the Statute of Limitations; yet as the remainderman's right of *entry* did not accrue until the failure of the issue of the tenant in tail, which might not have happened for an immense number of years, the remainderman might, at any time within twenty years after the failure of the issue in tail, have entered and recovered the estate by ejectment. (*Taylor* v. *Horde*, 1 Burr. 60; *S. C.*, Cowp. 689; 1 Ken. 143; 5 Br. P. C. 247.)

3 & 4 *Will.* 4, c. 27, s. 23.

Possession under Defective Conveyance by Tenant in Tail.

Where there shall have been possession, under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

23. When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest or right to take effect after or in defeasance of such estate tail (*p*).

(*p*) The object of this section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances, which although they were effectual to bar the issue were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which show what the operation is as to the issue, and those clauses seem to be studiously worded so as to be confined only to the case of persons entitled after the expiration of the estate tail. (Per *Cranworth*, L. C., *Penny* v. *Allen*, 7 De G., M. & G. 426.)

The title of a plaintiff to real estate against which a recovery was set up as a bar accrued in 1837, the plaintiff having brought an ejectment and been forced to abandon it, filed a bill in equity in 1855: it was held, that his title to relief was not barred by lapse of time, and in particular that this section of the act did not apply. (*Penny* v. *Allen*, 7 De G., M. & G. 409; 3 Jur., N. S. 273. See Sugden's New Statutes relating to Property, 87, 89, 2nd ed.)

In *Doe* d. *Curzon* v. *Edmonds*, (6 Mees. & W. 295,) the court were of opinion, that where there was an estate for life, remainder in tail, and the tenants for life and in tail (after an adverse possession had commenced) suffered a recovery, and declared the use of it to A. for life, remainder to the original tenant for life, remainder to the late tenant in tail for life, remainder over to his issue, remainder to B. for life, and the late tenant in tail died without issue, B. had the same time to enter that the tenant in tail would have had, had there been no recovery. The proposition of the real property commissioners on the subject of this section was, "That on any alienation by tenant in tail, by any assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights and interests, limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights or interests." (1 Real Prop. Rep. 79, pl. 15, and see *Ib.* p. 46.) Before the passing of this act, when an heir in tail brought an ejectment against a defendant who had been in receipt of the rents of an estate thirty years during the life of the ancestor in tail, and seven years after his death, the ancestor having had seisin, it was held, that such possession of the defendant was no bar to the

action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by showing that the ancestor had not conveyed by fine and recovery. For though he might have conveyed by fine and recovery, and so have barred the lessor of the plaintiff, he might also have conveyed by lease and release, which would have made a good title against himself only, and would not have barred his son, the next tenant in tail. The court were of opinion that the long possession by the defendants might be referable to such a state of things, and if so, there would have been no adverse possession to the title of the issue in tail, and the son was not barred. (*Doe* d. *Smith* v. *Pike*, 3 B. & Ad. 742; 1 Nev. & Mann. 385.)

3 & 4 Will. 4, c. 27, s. 23.

An estate being limited by marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died leaving his widow and three children, viz., G., an only son, and L. and H. daughters, the widow in 1735, by deed-poll, in consideration of an annuity granted to her by her son G., and of natural affection, granted, surrendered and yielded up the estate to G. in fee; and he afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto to B., the eldest son of W., for life, with remainder to his second son. In 1790, B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814, he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other coparcener, H., at B.'s request, suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees. It was held, on error, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer):—1. That the deed poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail. 2. That this base fee did not, on the death of the widow, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; and that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued till his death, and therefore the period of twenty years, for the operation of the Statute of Limitations (21 Jac. 1, c. 16) against the issue in tail, was to be calculated from G.'s death in 1779, and not from the death of his mother in 1767; and that B.'s entry in 1790 was not barred by lapse of time. 3. That although B. entered under the will, and manifested an intention to take the estate under it, for his life only, that intention was immaterial, and he was remitted, *nolens volens* as to his moiety, to the original estate tail, which was barred by the recovery in 1814. It was held also (reversing the judgment of the Court of Exchequer), that the entry and remitter of B. did not operate to remit M., his coparcener, to the other moiety of the estate. (*Woodroffe* v. *Doe* d. *Daniell*, 15 Mees. & W. 769 (affirmed by House of Lords, 2 H. L. Cases, 811); *Doe* d. *Daniell* v. *Woodroffe*, 10 Mees. & W. 608.)

VI. Limitation of Time as to Suits in Equity.

Time of Limitation fixed with reference to the Legal Limitation.

24. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or dis-

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

3 & 4 *Will.* 4, c. 27, s. 24.

tress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity (*p*).

(*p*) By this section twenty years' possession is a bar to suits in respect of equitable rights, but in the case of disability ten years is allowed by the 16th section (*ante*, p. 199) next after the disability has ceased, but by the 17th section (*ante*, p. 204) no suit can be brought after the lapse of forty years from the accruer of the right, whatever disabilities may have existed.

Courts of equity have constantly guided themselves by this principle, that wherever the legislature has limited a period for proceedings at law, equity will, in analogous cases, consider the equitable rights as bound by the same limitation. (1 P. Wms. 742; 3 *Ib.* 143; Prec. Ch. 518.) Thus in the case of equitable titles to land, equity required relief to be sought within the same period in which an ejectment would lie at law; and in cases of personal claims it also requires relief to be sought within the period prescribed for personal suits at law of a like nature. If therefore the ordinary limitation of such suits at law be six years, courts of equity will follow the same period of limitation. (*Edsell* v. *Buchanan*, 1 Ves. sen. 83; Com. Dig. Chancery, 1; *Smith* v. *Clay*, 3 Br. C. C. 639, n.; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 156; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 629.) Lord *Redesdale* held that courts of equity acted not merely by *analogy*, but in *obedience* to the Statute of Limitations upon all legal titles and demands, and could not act contrary to their provisions, and that the Statute of Limitations virtually included courts of equity; for when the legislature limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated *that equity followed the law*, and therefore to have virtually enacted in the same cases a limitation in equity. (2 Sch. & Lef. 630, 631; 1 *Ib.* 428; *Foley* v. *Hill*, 1 Phill. C. C. 405.) This statute was intended to put an end altogether to the discretion of courts of equity in those cases where they had before acted by analogy to the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the court, but is incorporated in the statute. (*Berrington* v. *Evans*, 1 Y. & Coll. 439, 440.) Those courts also, by their own rules, independently of any statutes of limitation, give great effect to length of time, and refer frequently to those statutes for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand. (17 Ves. 97.) This section of the statute only bars equitable rights so far as they would have been barred if they had been legal rights. (*Archbold* v. *Scully*, 9 H. L. C. 360.) Time is a bar in equity to stale demands independent of this statute. A bill filed by tenant for life in remainder against the representatives of a prior tenant for life for an account of timber improperly cut, was dismissed with costs on account of the delay, the bill not having been filed until nearly twenty years after the death of the first tenant for life. (*Harcourt* v. *White*, 28 Beav. 303.)

The title of a plaintiff to real estate against which a recovery was set up as a bar accrued in 1837, the plaintiff having brought an ejectment, and been forced to abandon it, filed a bill in equity in 1855: it was held, that his title to relief was not barred by lapse of time, and in particular that this section of the act did not apply. (*Penny* v. *Allen*, 7 De G., M. & G. 409; 3 Jur., N. S. 273.)

A bill of foreclosure within this section.

A bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of equity, an actual estate. The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the 24th section of the 3 & 4 Will. 4, c. 27, and the 7 Will. 4 & 1 Vict. c. 28, (see *post*, sect. 28,) and the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been

a legal instead of an equitable one. (*Wrixon* v. *Vize*, 3 Dru. & War. 104. See *Dearman* v. *Wyche*, 9 Sim. 570; *Henry* v. *Smith*, 2 Dru. & War. 387.) 3 & 4 *Will.* 4, *c.* 27, *s.* 24.

The statutory rule, 3 & 4 Will. 4, c. 27, ss. 2, 3, 4, 5, which gives to a remainderman twenty years from the time when his title accrues in possession, for bringing an action or suit for the property, applies to a claim for compensation for equitable waste as well as to a claim to the land itself; and, therefore, an account of equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of the plaintiff as remainderman in tail having accrued within twenty years before the filing of the bill. Upon a claim to compensation for equitable waste the court does not consider whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs, for the tenant for life has no right to alter the nature of property belonging to another person. (*Duke of Leeds* v. *Earl of Amherst*, 2 Phill. C. C. 117; 14 Sim. 357. See *Morris* v. *Morris*, 4 Jur., N. S. 964, 966.)

In 1772, a husband and wife mortgaged their respective estates for securing a debt of the husband. The husband died in 1776, and in 1782 the produce of his estate was brought into court and accumulated. The wife died in 1805, and in 1832 the husband's mortgage-creditor, neglecting to prosecute his claim against the husband's assets, obtained payment out of the produce of the wife's estate. In 1840, the heir of the husband petitioned for payment out of court of the accumulated fund arising from the husband's estate, and a reference was made to ascertain the incumbrances thereon. An unpaid judgment creditor of the wife carried in a claim, which having been disallowed, as founded on a mere equity, he, in 1841, filed a bill against the heir of the husband and the representative of the wife, to establish his claim against the fund. It was held, first, that the husband's debt having been paid out of the wife's estates, her estate had a right to be recouped out of the estate of the husband; and, secondly, that the plaintiff's claim was not barred by the Statute of Limitations. (*Lancaster* v. *Evors*, 10 Beav. 154; 16 Law J., Chanc. 8.)

Where the lord of a manor granted a lease of the manor for three lives, which, with the court rolls, was deposited with the lessee; upon the expiration of the lease by the death of the surviving life, the lord requested the representatives of the lessee to deliver back the court rolls, of which no notice nor any proceeding was taken until twenty-two years after, when a bill was filed by the lord to recover the title deeds and court rolls. It was held, upon a plea of the statute, that the suit was brought too late, that which was tantamount to a conversion and adverse possession having taken place in 1822. The bill was retained for a year, to enable the plaintiffs to try an action at law. (*Dean and Chapter of Wells* v. *Doddington*, 2 Coll. C. C. 73.)

Effect of appointment of a receiver.

Although the appointment of a receiver by the Court of Chancery does not prevent the bar under the statute *against* a stranger, yet it will prevent time running in *favour* of a stranger to the suit. (*Wrixon* v. *Vize*, 3 Dru. & War. 104, see p. 123; *Parkinson* v. *Lucas*, 28 Beav. 627.) The possession of the receiver in a cause in which a trustee of the legal estate is made a party as such, may fairly be treated as the possession of the trustee. For many purposes the possession of the receiver is the possession of the party entitled to the lands, and time will not run against a person in possession. (*Gresley* v. *Adderley*, 1 Swans. 579; *Boehm* v. *Wood*, Turn. & R. 345; *Wrixon* v. *Vize*, 3 Dru. & War. 104. See *Groome* v. *Blake*, 8 Ir. C. L. R., N. S. 428.)

The appointment of receiver in the matter of an infant will not prevent the operation of the Statute of Limitations on a claim affecting the minor's estate, notwithstanding the fact, that the Master, in a report ascertaining the nature of the minor's property, has expressly found that the minor's estate was subject to that incumbrance. (*Harrison* v. *Duignan*, 2 Dru. & War. 295. See *Greenway* v. *Bromfield*, 9 Hare, 203. See pp. 225, 226.)

3 & 4 Will. 4, c. 27, s. 25.

Express Trust.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (*q*).

This section applies to express trusts only.

(*q*) This section is confined to express trusts; that is, trusts expressly declared by a deed or a will, or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument, and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in the enjoyment of the property, from setting up the statute; but if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the court, on the principles of equity, would hold him a trustee, then this section does not apply, and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who but for the loss of time would be the right owner. (*Per Kindersley*, V. C., *Petre* v. *Petre*, 1 Drew. 393.)

Cases in reference to this section.

A testator devised his real estate to trustees upon trust to pay certain annuities, which were to be increased in certain events, and a term of ninety-nine years was vested in other trustees for better securing the annuities, and, subject thereto, the estates were limited to the testator's sons for life, with divers remainders over. The first tenant for life entered into possession and soon afterwards the events happened by which the annuities were to be increased. The original annuities were regularly paid, but no payment was made in respect of the increased annuities. After the death of the tenant for life, and much more than six years after the period when such increased payments ought to have been made, a bill was filed by one of the annuitants to have the whole arrears raised out of the estate of the tenant for life, and by sale or mortgage of the term: it was held, that the term being a subsisting term on which the trustees might obtain possession, the case was within the saving of this section, and that the annuitant was not barred by the operation of the 42nd section of this act from recovering the entire arrears. (*Cox* v. *Dolman*, 2 De G., Mac. & G. 592; 17 Jur. 97; 22 Law J., Chanc. 427.) The abstract question determined in *Hunter* v. *Nockolds*, 1 Mac. & G. 640, is unaffected by this decision, though in that case as in this the annuity was collaterally secured by a term of years, a circumstance which was not adverted to either in the argument or the judgment. (*Ib.*)

The legal estate acquired by disseisin will not defeat the rights of the parties equitably entitled. If a party who by virtue of this statute claims to have obtained the fee has done so with notice that the party from whom the conveyance proceeded was a trustee, the former will take, subject to the trusts upon which it was held by the party making the conveyance. (*Scott* v. *Scott*, 4 H. L. C. 1065. See *Hicks* v. *Sallitt*, 3 De G., M. & G. 782; 23 Law J., Ch. 571; 18 Jur. 913; *Hicks* v. *Hastings*, 3 Kay & J. 701.)

A. being the owner in fee of estate K. and other estates in Ireland, subject to a mortgage in fee by a deed of February, 1807, which upon the face of it was for valuable consideration, purported to convey these estates to trustees

in fee upon trust for himself for life, remainder to his eldest son B. (then unmarried) for life, remainder to B.'s first and other sons in tail male, &c. In June, 1807, A. and B., by deed, which on the face of it did not appear to be for value, purported to convey estate K. to trustees in fee, upon trust for A. for life, remainder to W. a younger son of A. for life, remainder to W.'s first and other sons in tail male, thereby in effect treating the previous deed as cancelled. A. died in 1808, when W. entered into possession of estate K., and either he or the appellant J., his eldest son, had remained in possession ever since. In 1811, the mortgage was paid off by B., and the legal fee in estate K. was conveyed to him. In 1815, W. married, upon which occasion estate K. was made the subject of settlement. In 1837, B. died, leaving the respondent J. B., his eldest son, his heir at law, and in tail. In 1844, J. B. claimed estate K. under the deed of February, 1807, and brought his ejectment against J., but failed, the judge who tried the case being of opinion, and so directing the jury, that the plaintiff was barred by the Statute of Limitations and the twenty years' possession of the defendant. J. B. then brought his suit in equity to obtain possession of estate K., and that the reconveyance of the legal fee in 1811 might be declared to have been obtained by B. as a trustee for the parties claiming under the deed of February, 1807: it was held (agreeing with the court below, that the deed of February, 1807, should be treated as a deed for value, and that of June, 1811, as not for value), that the fee acquired under the Statute of Limitations did not create any bar in this case, for that the possession of W. and his son was to be treated exactly in the same way as if he had obtained the legal fee by conveyance, in which case the trusts of the deed of February, 1807, would have attached. (*Scott* v. *Scott*, 4 H. L. C. 1065; 18 Jur. 755.) Lord *St. Leonards* had no doubt that it was a point of law not to be disputed, that the legal estate became a trust, and consequently that, although at law, W. S. might, as against the children of B. S., set up his possession, it was in reality no adverse possession that the legal estate could never have been set up against those parties who had, after the conveyance of the equitable estate, entitled themselves to the legal estate. (*Scott* v. *Scott*, 4 H. L. C. 1085. See *Earl of Mansfield* v. *Ogle*, 24 Law J., Chanc. 700; 1 Jur., N. S. 414.)

3 & 4 Will. 4, c. 27, s. 25.

In 1824, A., and B. as his surety, covenanted to pay an annuity for ninety years, and A. granted lands to which he was entitled in remainder expectant upon the decease of the survivor of two tenants for life to a trustee for 500 years, upon trust, in case the annuity should be in arrear for a month, and either before or after the decease of the surviving tenant for life, to sell for the purpose of raising the arrears of the annuity and securing future payments. B. became a bankrupt in 1827, A. in 1829. The last payment in respect of the annuity was made in 1831. Upon a bill filed by the annuitant, in 1854, one of the life estates still subsisting: it was held, that the plaintiff was entitled to have the lands sold for the residue of the term according to the trusts, and to payment of all arrears. (*Snow* v. *Booth*, 2 Kay & J. 132; 2 Jur., N. S. 244.)

The 25th section, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust. (*Law* v. *Bagwell*, 4 Dru. & War. 398.) The Statute of Limitations was held not to apply where the right of the plaintiffs did not accrue until the year 1820, upon the death of their father, and they filed their bill in 1837, at the same time satisfactorily accounting for the intermediate delay. Sir *E. Sugden*, L. C., said, unless a man is a mere trustee upon express trusts time will run from the conveyance, but that a party entitled in remainder cannot be held bound by the 25th section of the statute, before the period when his right to the possession accrues. (*Thompson* v. *Simpson*, 1 Dru. & War. 459, see p. 489.)

A conveyance of real estate to trustees upon trust, in the first place, to secure payment of an annuity, is within this section. An owner of a rever-

3 & 4 *Will.* 4, c. 27, *s.* 25.

sionary interest in real estates, for the purpose of better securing an annuity, granted the estates to trustees upon trust, to permit him to hold and enjoy the same until default should be made in payment of the annuity; and in case of default, upon trust to sell the estates, and after payment of the costs attending the sale, to pay the arrears of the annuity, and invest the residue to meet the growing payments of the annuity, and subject thereto in trust for the grantor, his executors, administrators, and assigns absolutely: it was held, that an express trust was created for the benefit of the annuitant within this section, and that he was entitled to recover the whole of the arrears of the annuity as against the grantor and the subsequent incumbrancers, and was not limited to six years by the 42nd section of this act. (*Lewis* v. *Duncombe*, 7 Jur., N. S. 695; 30 L. J., Chan. 732, 867; 9 W. R. 446. See *Round* v. *Bell*, 30 Beav. 121.)

The relation of trustee and *cestui que trust* must be clearly constituted to bring a case within this section. (*Law* v. *Bagwell*, 4 Dru. & War. 398.) A testamentary guardian is a trustee, and therefore the statute is not applicable to accounts as between him and his ward. (*Matthews* v. *Brise*, 14 Beav. 341.) Under a marriage settlement a term of years was vested in trustees for raising 10,000*l.* for the younger children of the marriage, and subject thereto the estates were limited to the first and other sons in tail male. Much more than six years after the 10,000*l.* ought to have been raised and paid, the younger children filed a bill to have that sum raised. It was held, that the relation of trustee and *cestui que trust* existed between the parties, and that the plaintiff's claim was not barred by the 40th section of this act. (*Young* v. *Lord Waterpark*, 13 Sim. 204; affirmed by Lord *Lyndhurst*, C., 10 Jur. 1; 15 L. J., Ch. 63.)

On 25th June, 1814, Sir George Bowyer granted six annuities, payable out of his life interest in real estate. On the 28th June, 1814, he appointed receivers of the estate, and directed them to apply the rents in payment of such annuities, and of any other annuities he might thereafter grant. By deed of the same date he vested his life estate in a trustee upon trust, if default should be made in payment of any of the annuities, or of any other annuities to be granted by him, to sell the real estate, and to apply the proceeds in payment of such annuities. On the 30th August, 1814, he granted three other annuities charged on the same estate; and on the same day he executed a deed, directing the receivers and trustee to pay the nine annuities. Notice of the last-mentioned deed was served on the receivers and trustee immediately after its execution. The rents of the estate were received by one of the receivers, and applied in payment of the first six annuities, but they were insufficient to pay the three latter annuities, and for forty years no payment had been made in respect of these three annuities. On a bill filed in 1855, by persons interested in those three annuities, it was held, (per *Turner*, L. J., confirming the decision of *Romilly*, M. R., 23 Beav. 609; 3 Jur., N. S. 968, *sed dubitante Knight Bruce*, L. J.,) that the deed of direction made the receivers and the trustee express trustees for the three annuitants, subject to the rights of the six annuitants. (*Knight* v. *Bowyer*, 2 De G. & J. 421; 4 Jur., N. S. 569; 28 L. J., Chan. 521.) And that in cases of express trust, the Statute of Limitations is no bar to a demand of a *cestui que trust*, though the other *cestuis que trust* have for more than twenty years received from the trustee the whole of the rents to the exclusion of the claimant. (*Knight* v. *Bowyer*, 2 De G. & J. 421.)

A renewable leasehold for lives was vested in A. in trust for B. for life, with remainders in the events that happened to C. and his heirs. Afterwards, on the marriage of B., a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B. for life, remainder to the sons of that marriage in tail, under which D. would be entitled. The lease still being subsisting in A., B. took a renewal in his own name, without noticing the trusts, and after the death of B. D. entered and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under C. D., on his marriage, assigned the leasehold to

trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed on the construction of which the doubts arose took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds: it was held, firstly, that assuming the possession of D. and those claiming under him to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust those claiming under the settlement by D. could, as purchasers, set up the statute. (*Petre* v. *Petre*, 1 Drew. 371.) 3 & 4 *Will.* 4, *c.* 27, *s.* 25.

By settlement of 1786, lands were conveyed to trustees upon trust to raise 500*l.* for the issue of the marriage, and subject thereto for the husband and his heirs. In 1792, the husband and the trustees joined in demising the lands to B., in consideration of a sum of money paid to the husband, and a bond for 500*l.* given by B. to the trustees; and it was declared that B. should not be liable to be sued for the 560*l.* until the trust vested in the trustees relative to the 500*l.* should be executed or spent, pursuant to the settlement of 1786, without affecting or in any way charging or incumbering the lands in the hands of B., his heirs or assigns, or until the husband or his heirs should otherwise discharge and exonerate the lands from the said sum of 500*l.* There was issue of the marriage one child only, a daughter, who married J. S., and died; and J. S. became entitled to the 500*l.* The trustees entered judgment on the bond against B., and in 1812 assigned it to J. S. No part of the principal or interest of the 500*l.* had been paid, or acknowledgment given, since 1812: it was held, that the demand of J. S. to the 500*l.* was not barred by the Statute of Limitations. The assignment of the judgment in 1812 to J. S., being a transaction to which the trustee and himself alone were parties, merely substituted him in the place of the trustee, and did not discharge the estate from the original trust, or vary the rights of the parties to the 500*l.* The trust created by the settlement of 1786 for raising the 500*l.*, is an express trust, and within this section. (*Blair* v. *Nugent*, 3 Jones & L. 660, 661.)

Trustees had by mistake paid to one of the *cestuis que trust* a portion of the trust funds, to which he was not entitled. In a suit by another party interested against the *cestui que trust* to make him refund, it was held, that the Statute of Limitations was inapplicable: that he was bound to repay, though more than six years had elapsed, and that all his interest in the trust fund was liable to make good the amount. (*Harris* v. *Harris*, 29 Beav. 110.)

What are trusts within this section.

Where a testator in the introductory part of his will directed all his just debts to be paid, and then devised his lands, subject to the payment thereof, to trustees upon trust for other persons in succession, it was held that a trust was created for the payment of the testator's debts, and that the right of a judgment creditor was not affected by the 40th section of this statute, but it was taken out of it by the saving of this section. This case appears to have been decided expressly on the ground that the estate was vested in trustees, and that on the whole construction of the will the payment of the debts was part of the trusts to be performed. (*Hunt* v. *Bateman*, 10 Ir. Eq. R. 360. See *Dillon* v. *Cruise*, 3 Ir. Eq. R. 70.)

Brady, L. C., could not find any satisfactory authority for the position that a devise to a party intended to take beneficially, subject to the debts of the devisor, without more, constitutes that description of trust which would warrant him in holding that, as between the creditors and the devisee, the relation of *cestui que trust* and trustee is so established as to except the charge from the operation of the 40th section of the 3 & 4 Will. 4, c. 27. Therefore he held that a devise of lands to A. for life, subject to all the testator's just debts, &c., with a bequest of personalty, the better to enable the devisee to pay the testator's debts, &c., did not prevent a judgment debt of the testator from being barred by the 40th section, nor create a trust within the 25th section. (*Dundas* v. *Blake*, 11 Ir. Eq. R. 138.)

3 & 4 *Will.* 4, *c.* 27, *s.* 25.

Where an annuity is given by will, and the real estate of the testator is charged with the payment of it, and then the estate is simply devised charged with the payment of the annuity, *Wigram*, V. C., was of opinion, that it is not the case of an express trust within the 25th section of the statute, and that only six years' arrears of the annuity can be recovered. (*Francis* v. *Grosor*, 5 Hare, 39.)

It has been held in Ireland that the subjects of the 40th and 25th sections are quite different; that of the 40th being money, and that of the other land or rents, in which it is impossible, from the interpretation clause, to comprise a gross sum of money charged on the estate. Therefore where lands were devised charged with the payment of a legacy, the trust, although an *express one*, was held to be within the 40th section and not within this 25th section of the act. (*Knox* v. *Kelly*, 6 Ir. Eq. R. 279.) And a trust in a will for the payment of debts, although an express trust, does not fall within the 25th section. (*Young* v. *Wilton*, 10 Ir. Eq. R. 10.)

A testator, who died in 1795, devised his real estates to trustees to sell, and out of the interest of the proceeds, and out of the rents of the estates, until they should be sold, to pay certain annuities. No payment had been made in respect of any of the annuities for more than twenty years before the bill was filed in 1837 for executing the trusts of the will, and for raising the arrears of the annuities by sale of the testator's real estates. The trustees had entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about eleven years prior to the filing of the bill. The defendant relied on the 42nd and 40th sections of this act, and *Sheppard* v. *Duke*, 9 Sim. 567. But the court held, that the plaintiff's right to the annuities was not barred by this statute, for the trustees were trustees to pay the annuities, and their possession of the estates, out of which the annuities were directed to be paid, continued down to the year 1826; therefore it was plain that the objection to the bill founded on the Statute of Limitations could not be supported. (*Ward* v. *Arch*, 12 Sim. 472. See *Gough* v. *Bult*, 16 Sim. 323.)

The common lien of the vendor of an estate is not an express trust within this section, to which in the absence of special circumstances no length of time is a bar, the 40th section of that act having made twenty years a bar to every lien upon land. The right of the vendor to recover the purchase-money, as a lien or charge upon the land, is not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, for the administration of his estate; nor by suits by the residuary devisees and legatees of the purchaser for the administration of his estate. (*Toft* v. *Stephenson*, 7 Hare, 1; 1 De G., M. & G. 28.)

A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estate: it was held, that the legatee was not barred by the 42nd section of this statute, from claiming interest on the legacy from the end of the first year after the testator's death. (*Gough* v. *Bult*, 16 Sim. 323. See *Obee* v. *Bishop*, 1 De G., F. & J. 137.)

Where a trustee lends out trust money in breach of the trust, and the borrower with notice of the trust applies the money to his own use, he cannot be permitted to separate the loan from the trust, and insist that the loan being barred by the statute the trust is barred also. (*Ernest* v. *Croysdill*, 6 Jur., N. S. 740.) Even where the Statute of Limitations does not apply, the court will not entertain a suit by a *cestui que trust* instituted for the purpose of challenging the accounts settled by his trustees, when the accounts and matters had been investigated twenty years before, and he had every opportunity of going into them. Lapse of time alone will be sufficient bar to such a suit. (*Bright* v. *Legerton*, 6 Jur., N. S. 1179, affirmed on appeal, 8 W. R. 678.)

Trusts for charities.

Trusts in favour of charities are equally with other trusts within this section. The testator devised lands to trustees and their heirs upon trust, to grant and convey the same to the use of J. W. for life, subject nevertheless to and charged with four annuities, to commence upon the death of X.; three of which were to be paid to three different charitable institutions, (two of them being corporate bodies,) and the fourth to the poor of the

parish; and after the death of J. W., subject to the annuities, to the use of his first and other sons in tail; and he directed the said several annuities to be paid (not saying by whom) on the days therein mentioned; and expressly charged his estate with the same. X. died more than twenty years before the filing of the bill to establish the charitable devises, and no payment or other satisfaction was ever made on foot of the annuities. No conveyance had been executed by the trustees; but J. W. had, since the death of the testator, been in possession of the estates, and he and his eldest son suffered a recovery and resettled them: it was held, that the right to recover the annuities was not barred by this statute, the trust for the charities being an express one, within the meaning of the 25th section of this act. At the conclusion of his judgment Sir *E. Sugden*, L. C., said, it is not a case in which annuities were given to trustees for the charities; and the estate itself, subject to the annuities, was given to other persons beneficially. If the case should arise, it may be found more difficult to relieve the charities in this court, when time has operated against the trustees of the charities as a legal bar. (*The Commissioners of Donations* v. *Wybrants*, 2 Jones & L. 182. See *ante*, pp. 138, 139.) *3 & 4 Will. 4, c. 27, s. 25.*

If trustees in whom land is vested for charitable purposes convey the land to a purchaser for valuable consideration, as between themselves and their *cestui que trust* no time creates a bar. The trustees and their *cestuis que trust* are barred from instituting any proceedings in their own names to recover the land from a purchaser when twenty years have elapsed from the conveyance, subject to the exception contained in the clause which saves rights pending disabilities. (*Attorney-General* v. *Magdalen College, Oxford*, 18 Beav. 223; 18 Jur. 263; 23 Law J., Chan. 844.)

Charities are trusts, and are as such within the operation of this section. Where the attorney-general, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred. Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and churchwardens of the two parishes, who, with the consent of the vestries, might lease them for ever to a college subject to a fixed rent-charge. Above sixty years after this lease (the fairness of which at the time of its execution was not impeached) the attorney-general filed an information against the lessees, praying that it might be cancelled: it was held, that the real plaintiffs in the suit were the poor of the two parishes, that they were in the situation of a *cestui que trust*, that the suit by information of the attorney-general (who had no independent rights) was a suit by them, that they could not maintain such a suit unless against their trustees, except within twenty years; that it was not such a suit, but was a suit against purchasers for value, and therefore that it was barred. (*St. Mary Magdalen, Oxford* v. *Attorney-General*, 6 H. L. C. 189; 3 Jur., N. S. 675; 26 Law J., Chan. 620.)

The decision in this case was held to govern a case where charity land had not been aliened in fee, but had been held under a lease for 500 years at a rent which had been regularly paid. (*Attorney-General* v. *Davey*, 4 De G. & J. 136; 19 Beav. 521; *Attorney-General* v. *Payne*, 27 Beav. 168.)

An ejectment bill, filed in 1842, stated that the plaintiff's alleged right to the land accrued in 1812; that a bill had been filed in 1824 to recover the property; and that an ejectment had been brought in 1832, which was stayed until the plaintiff had paid the costs of a former ejectment; but it did not state the result of the suit or action: it was held, that it must be inferred that they had failed, and that they did not prevent the operation of the Statute of Limitations. (*Bampton* v. *Birchall*, 5 Beav. 67.)

Time no bar between trustee and cestui que trust.

In the case of a direct or express trust, as where an estate is conveyed to the use of A. and his heirs in trust for B. and his heirs, no time, as between the trustee and *cestui que trust*, can operate as a bar to the equitable right of the latter; (Barnard, C. R. 449; *Townshend* v. *Townshend*, 1 Br. C. C. 551. See Lewin on Trusts, pp. 560—566, 4th ed.;) for between him and his trustee there is no adverse possession. Where there is a trust created by the act of the parties, no time will be a bar, for the possession of the trustees

3 & 4 *Will.* 4, c. 27, *s.* 25.

is the possession of the *cestui que trust*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title; but where a person is in possession by virtue of a fraud, he is not a trustee in the ordinary sense of the word, and he does not become so until he is declared to be a trustee by a decree of a court of equity; in these cases, time begins to run at the period when the fraud is discovered. (*Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 633.) Until the fraud is discovered the time does not operate; but the fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured, as to make it his duty, if he intend to seek redress, to make inquiry, and to ascertain the circumstances of the case. (*Marquis Clanricarde* v. *Henning*, 30 Beav. 180.) Between *cestui que trust* and trustee no lapse of time will preclude the account from the commencement of the trust, in a case in which the relation of trustee and *cestui que trust* continues, the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to the *cestui que trust* that information to which he was entitled, and accounted with him in such manner as he ought. (*Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41; 3 Keen, 722.) But time may be a bar where there has been a direct and independent dealing between the trustees and the *cestui que trust* after the relation has terminated. (*Wedderburn* v. *Wedderburn*, 2 Keen, 749.) A suit to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the will, is not a suit to recover a legacy within the meaning of the 40th section of this act. The fund ceased to bear the character of a legacy as soon as it assumed the character of a trust fund. The suit, therefore, was considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust, and it is clear, therefore, that it is not within the terms of that section. (*Philippo* v. *Munnings*, 2 M. & Cr. 309.) Where there is no doubt as to the origin and existence of a trust in respect of property, of which, for a long series of years, the trustees have been in the beneficial enjoyment, lapse of time is no bar to the recovery of the property by the *cestui que trust*; but where any doubt exists, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust. (*Attorney-General* v. *Fishmongers' Company*, 5 Jurist, 693; 5 M. & Cr. 16.) But the rule that a trust is not barred by length of time applies only as between *cestui que trust* and trustee, and not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place. Therefore, where a *cestui que trust* and his trustee have been both out of possession for the time limited, the party in possession has a good bar against both. (*Per Lord Hardwicke* in *Llewellyn* v. *Mackworth*, Barnard, C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townshend* v. *Townshend*, 1 Br. C. C. 550; *Clay* v. *Clay*, 3 Br. C. C. 639, n.; Ambl. 645; *Hercy* v. *Ballard*, 4 Br. C. C. 469; *Harmood* v. *Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 629; Sugd. V. & P. 610—612, 11th ed.) Where the whole rents have been received by some tenants in common, not under the trustees, but in opposition to their claim, those who have received the whole rents in spite of the trustees will acquire a title against the claim of another tenant in common who had been out of such receipt. (*Burroughs* v. *M'Creight*, 1 Jones & L. 290. See *ante*, p. 192.) A conveyance of the legal estate by the trustee, or as Lord *Hardwicke* seems to have thought, (1 Ves. sen. 435, 536,) a disseisin or actual ouster of the trustee by the *cestui que trust*, may indeed be presumed from length of possession, or under particular circumstances; but time alone does not destroy the interest of the trustee. Where estates were devised to trustees upon trust to sell and to pay debts, and subject thereto for the testator's infant children, and the surviving

trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, the testator being insolvent: on a bill for an account and conveyance of the estate, by one of the children and the representatives of another child, forty-five years after the testator's death, stating that they had recently discovered the facts, special inquiries were directed to ascertain whether they had any notice of the circumstances, whether they had in any manner released, and whether the trustee had advanced money to the amount of the value of the estate. (*Chalmer* v. *Bradley*, 1 Jac. & Walk. 51, where numerous cases on this subject are cited.) In one case the purchase of trust property by trustees for their own benefit was set aside, after a considerable lapse of time and several assignments. (*Attorney-General* v. *Lord Dudley*, Coop. C. C. 146.) But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years. (*Gregory* v. *Gregory*, Coop. C. C. 201. See *Champion* v. *Rigby*, 1 Russ. & M. 539; Lewin on Trusts, p. 344, 4th ed.)

3 & 4 Will. 4, c. 27, s. 25.

Possession of cestui que trust not adverse to trustee.

In general the possession of the *cestui que trust* is not adverse against the trustee, unless the former has denied the title of the trustee. In the case of a strict trustee, it is his duty to take care of the interest of his *cestui que trust*, and he is not permitted to do anything adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them. (*Per* Lord *Eldon*, 2 Jac. & W. 190.) For where a person has conveyed a legal estate in land to a trustee for himself for any particular purpose, and continues to hold the possession, he becomes tenant at will to such trustee, and his possession not being adverse to the title of the trustee, the Statute of Limitations will not operate. Where an estate was conveyed by a tenant for life and remainderman to the use of trustees in trust to sell it, with the consent of the parties interested, and to invest the purchase-money in other lands to be settled to different uses, with a proviso that till such sale the rents should be received by such persons as would have been entitled thereto under a former settlement: it was held, that the possession and receipt of the rents by the tenant for life for above twenty years after the creation of the trust, consistent with the terms of the deed and the object of the trust, without any interference of the trustees, did not show his possession to be adverse to their title, so as to bar their ejectment against his grantees, such possession being consistent with and secured to him by the deed of trust. A presumption of a reconveyance from trustees is always made in favour of the possession of those who are rightfully entitled to it, and to invest that possession with a legal title; but such a presumption is not warranted where the possession of the party was all along consistent with the deed and the title of the trustees. (*Keene* v. *Deardon*, 8 East, 248. See *Smith* d. *Dennison* v. *King*, 16 East, 283.) A trustee, whose duty it was to sell certain estates, and pay off a mortgage and other incumbrances on them, and retain a debt due to himself, and until the sale to keep down the interest on the charges, and pay the surplus over, but who did not sell, but took a transfer of the mortgage, and remained in possession for twenty-two years, during the first ten of which the interest exceeded the rents, was decreed to reconvey the estates. (*Latter* v. *Dashwood*, 6 Sim. 462.) So where an estate was vested in trustees, and a married woman who was entitled to an equitable estate for life joined with her husband in conveying the estate to a purchaser by deed and fine for a valuable consideration: it was held, that the possession of the purchaser was not adverse against the trustee who had the legal estate, and that the statute did not begin to run until the determination of the life estate. (*Fausset* v. *Carpenter*, 5 Bligh, N. S. 75; *S. C.*, 2 Dow & Clark, 233. See *Carter* v. *Carter*, 4 Jur., N. S. 65; 27 L. J., Ch. 74, 80, 81.)

A fine levied by a trustee could not prejudice the equitable interest of his *cestui que trust*, unless it were levied to a purchaser without notice; (see Gilb. Ch. 62; *Bell* v. *Bell*, 1 Ll. & G. temp. Plunket, 59;) and as *cestui que trust*, entitled to the equitable inheritance, is considered at law merely as tenant at will to his trustee, a fine levied by him did not divest or prejudice the

3 & 4 *Will.* 4, c. 27, s. 25.

legal estate. (*Earl Pomfret* v. *Lord Windsor*, 2 Ves. sen. 472, 481; 1 Sand. on Uses, 291, 3rd ed.; 5 Cruise, Dig. 208—213.)

Where a trustee of a term for the payment of debts purchased the inheritance from the tenant for life, and had it conveyed to him by fine and feoffment, the circumstance of the purchaser being trustee was held not to entitle the remainderman to an account of rent, except from his entry to avoid the fine, nor if he neglected to claim for five years did it prevent his being barred. (*Reynolds* v. *Jones*, 2 Sim. & Stu. 206.)

Constructive trusts.

The following instances of constructive trusts may be mentioned. Where an estate is subject to a trust or equitable interest, and a person purchases it for a valuable consideration, with notice of the trust or equitable interest, the estate will be subject to it in the hands of the purchaser. (*Saunders* v. *Dehew*, 2 Vern. 271; *Langton* v. *Astrey*, 2 Ch. Rep. 30; *Daniells* v. *Davison*, 16 Ves. 249.) And though a purchaser had not notice before he paid his money, yet if he had notice before the execution of his conveyance, he will be bound. (*Wigg* v. *Wigg*, 1 Atk. 384; *Tourville* v. *Naish*, 3 P. Wms. 307.) So a person acquiring an estate as a mere voluntary grantee, (1 Rep. 121 b; *Pye* v. *George*, 2 Salk. 680,) or as a devisee, (*Marlow* v. *Smith*, 2 P. Wms. 200,) will take it subject to every beneficial or equitable lien.

It was settled about six years after the passing of the Statute of Frauds, (29 Car. 2, c. 3,) that where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him who paid the money; such a case forming an exception to the seventh section of that statute, which requires all declarations of trust to be in writing. (2 Ventr. 361; *Wray* v. *Steele*, 2 Ves. & Beames, 390.) Where there is a contract for the purchase of an estate, whether freehold or copyhold, and the purchaser has performed his part of the contract, the vendor, from the time he ought to have conveyed, becomes, by construction of a court of equity, a trustee for the purchaser, that court considering things contracted to be done for valuable consideration as performed. (*Hinton* v. *Hinton*, 2 Ves. sen. 634.)

The rule that trusts are not within the Statute of Limitations was held not to apply, where a claim was made after a great length of time against a trustee by *implication* of law arising upon a doubtful equity. (*Townshend* v. *Townshend*, 1 Cox, 28.) Though no time bars a direct trust as between *cestui que trust* and trustee, a court of equity will not allow a man to make out a case of constructive trust at any distance of time; for where the length of time would render it extremely difficult to ascertain the true state of the fact, or where the true state of the fact is easily ascertained, and where relief would originally have been given upon the ground of constructive trust, it is refused to a party, who after long acquiescence comes into a court of equity to seek that relief. (*Beckford* v. *Wade*, 17 Ves. 97; *Ex parte Hasell*, 3 Y. & Coll. 622; *Bell* v. *Bell*, 1 Lloyd & G. temp. Plunket, 65. See *Bonny* v. *Ridgard*, cited 4 Br. C. C. 138.)

In *Salter* v. *Cavanagh*, 1 Drury & Walsh, 668, it was held, that where a party had been expressly named in a will, his representatives were trustees within this section; and that though a constructive trust would be barred by that statute, and might have been barred previously to it by length of time, yet that that only applied to cases where the trust did not arise on the face of the instrument, but was to be made out by evidence. (See *Beckford* v. *Wade*, 17 Ves. 87; *Townshend* v. *Townshend*, 1 Br. C. C. 550; 1 Cox, 28. See Lewin on Trusts, pp. 139—149, 4th ed.)

Fraud.

In cases of fraud, no time shall run whilst the fraud remains concealed.

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have

first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed (*r*). *3 & 4 Will. 4, c. 27, s. 26.*

(*r*) This section does not mean the case of a party entering wrongfully into possession, but it applies to a case of designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving the right, and who by means of such concealment is enabled to enter and hold. (*Petre* v. *Petre*, 1 Drew. 397; *Dean* v. *Thwaite*, 21 Beav. 621; *Thurston* v. *Anstey*, 27 Beav. 335; Sugd. Stat. p. 98, 2nd ed.)

A *cestui que trust* of real estate under a will was discharged, in 1825, under the Insolvent Act, but omitted the estate from his schedule. In 1831, he became bankrupt, and his assignee in bankruptcy took a conveyance of the estate from the trustee, on trust for the creditors under the bankruptcy: it was held, that it thereby became vested in him upon an express trust, viz., that declared by the will, the benefit of which belonged to the creditors under the insolvency; and that, on a bill being filed by the assignee in insolvency in 1853, and that independently of the question of concealed fraud, the Statute of Limitations afforded no defence to the recovery of the estate or the mesne profits. (*Sturgis* v. *Morse*, 3 De G. & J. 1; 24 Beav. 541.) The assignee in bankruptcy had entered into the receipt of the rents with notice of the insolvency, and had acted in defiance of the title under it: it was held not a case for limiting the time within which the account was to be taken. (*Ib.*)

To prove that a fraud was concealed within the meaning of this section, it is not sufficient to show that the party was in such an imbecile or uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the court cannot possibly estimate for this purpose the chance which the state of mind and education of a man may afford of his making such discovery, and is therefore compelled to assume that every one, not actually a lunatic, is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary. Therefore a suit cannot be maintained in equity to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect, that, though cognizant of all the facts, it was necessarily a concealed fraud as to him. (*Manby* v. *Bewicke*, 3 Kay & J. 342.)

When time bars in cases of fraud.

Though courts of equity will interpose in order to prevent those mischiefs which would probably result from persons being allowed at any distance of time to disturb the possession of another, or to bring forward stale demands; yet as its interference proceeds upon principles of conscience, it will not encourage nor in any manner protect the abuse of confidence, and therefore no length of time will bar a fraud. (1 Fonbl. Eq. 331; *Cotterill* v. *Purchase*, Forrest, 61; *Alden* v. *Gregory*, 2 Eden, R. 230; *Whalley* v. *Whalley*, 1 Mer. 486; *S. C.*, 3 Bligh, 1. As to length of time being no bar in cases of fraud, see also *Deloraine* v. *Browne*, 3 Br. C. C. 633; *Smith* v. *Clay*, *Ib.* 639, n.; *Hercy* v. *Dinwoody*, 4 Br. C. C. 258; 2 Ves. jun. 87; *Yate* v. *Moseley*, 5 Ves. 480; *Moth* v. *Atwood*, 5 Ves. 845; *Purcell* v. *Macnamara*, 14 Ves. 91; *Beckford* v. *Wade*, 17 Ves. 87; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 630; *Moore* v. *Blake*, 1 Ball & B. 62; *Medlicott* v. *O'Donnell*, *Ib.* 156; *Gould*

3 & 4 *Will.* 4, c. 27, *s.* 26.

v. *Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse* v. *Royal*, 12 Ves. 355; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272; *Byrne* v. *Frere*, 2 Molloy, 176; *Hatch* v. *Hatch*, 9 Ves. 292.) An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time. (*Gordon* v. *Gordon*, 3 Swanst. 400.)

An estate was settled on husband and wife for life, with a limitation to their issue, and, in default, a power of appointment was given to the wife. There was one child only of the marriage, who died an infant. The wife survived her husband, and appointed the estate to G. D. F., who was the releasee to uses, and had possession of the settlement. G. D. F., shortly after the wife's death, made a feoffment, and levied a fine with proclamations. After the expiration of the five years, the heir of the child claimed the estate, insisting that, under the terms of the settlement, the child took the estate in fee, and that the power of appointment had never arisen. He filed a bill against G. D. F. to avoid the fine, alleging that it had been levied with full knowledge of the plaintiff's rights, and with a fraudulent view to bar them. It was held, that the act of G. D. F. did not constitute a fraud, that G. D. F. stood in no fiduciary relation towards the plaintiff, and the bill was dismissed with costs. (*Langley* v. *Fisher*, 9 Beav. 90; 15 Law J., Chanc. 73.)

If, in levying a fine, a direct fraud is practised, the Court of Chancery has undoubted jurisdiction to give relief; but the mere fact that a party levying a fine has good reason to believe, that, if he did not do so, an adverse claim might or would be established against him, has never been considered as sufficient evidence of a gross fraud to induce this court to grant relief. (*Ib.* See 2 Ph. C. C. 425.)

It is the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, time has no effect. (*Charter* v. *Trevelyan*, 4 Law J. (N. S.) Chanc. 209; see 11 Cl. & Fin. 740.) A. was the solicitor and land agent of B., who was desirous of selling an estate, and in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, and a land valuer (whose valuation was not shown to have been communicated by A. to B.) put upon the two portions separate values, which added together exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, and then purchased the other portion for a sum much less than that stated in the estimate, but which, added to C.'s purchase-money, just made up 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, and the conveyance from B. was executed to that relative; but immediately afterwards a conveyance was executed from the relative to A., and in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till thirty-seven years afterwards, and then B. filed his bill against the representatives of A. (who had died seventeen years before) to set aside the latter conveyance, and to have an account. It was held, that the circumstances of the transaction were of a fraudulent nature, and therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached. It was held, also, that the bill was sustainable, though disputes which had arisen between A. and B. as to their mutual accounts had been referred in A.'s lifetime to a barrister, who was empowered to inquire into all matters in difference between them; and who, after awarding the payment of a certain sum by A. to B., had directed the execution of mutual releases of all matters in difference, and such releases had been executed. (*Charter* v. *Trevelyan*, 11 Cl. & Fin. 714.)

Accounts were opened on the ground of fraud, notwithstanding the lapse of seventeen years. (*Allfrey* v. *Allfrey*, 1 Hall & T. 179; 1 Mac. & G. 87.)

A. and B., having for many years been partners in business as solicitors, dissolved their partnership in 1834, and the business continued to be carried on by A. alone until 1841, when he became bankrupt; and it was then dis-

covered that a sum of money which had been paid by a client into the joint account of the firm at their bankers in 1829, for the purpose of investment, and which A. had shortly afterwards represented to have been invested accordingly, and on which he had regularly paid interest on that footing, had, instead of being invested, been appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money, it was held, that in equity the effect of the misrepresentation, so far as regarded the Statute of Limitations, was the same as if it had been made on the day the fraud was discovered, notwithstanding the partnership had been dissolved more than six years before. (*Blair* v. *Bromley*, 2 Ph. C. C. 354; 11 Jur. 617; 16 Law J., Ch. 495.)

3 & 4 Will. 4, c. 27, s. 26.

A court of equity will not impeach a transaction on the ground of fraud, where the fact of the alleged fraud had been within the knowledge of the party many years: but held that every new right of action in equity which accrued to the party must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant. (2 Sch. & Lef. 637.) Where a party is to be constituted a trustee, by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time the circumstances of the fraud were discovered. (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank* v. *Smith*, 2 Y. & Coll. 58.) Thus where the facts constituting the fraud had been in the knowledge of the party, and he had laid by for twenty-five years, relief was refused. (*Blennerhasset* v. *Day*, 2 Ball & B. 118.) But a party who had received money under a misapprehension of his rights was held not bound by it, as in the case of a contract for a disputed title, or the compromise of a litigated right. (*Ib.* 128.) The filing a bill within twenty years, although there has been some delay in prosecuting it, prevents time from operating as a bar. (Cas. temp. Talbot, 63.)

The procuring instruments of conveyance and devise to be executed by a person of unsound mind is a fraud within this section of the act. (*Lewis* v. *Thomas*, 3 Hare, 26.)

When equity will prevent Statute of Limitations being used as bar.

Where, by the interposition of a court of equity to prevent an act rightfully or wrongfully intended, the defendant has lost a remedy at law, a court of equity will give him a remedy equivalent to that from which the interposition of such court has debarred him. Thus where the Statute of Limitations has run pending an injunction, the court will restrain a debtor from taking advantage of the statute. (*Anon.*, 2 Cas. Ch. 217; *Brown* v. *Newall*, 2 M. & Cr. 572.) And a court of equity will supply a defect in any title which has been prejudiced by an order of the court. If, for instance, an injunction has been continued so long as to deprive a party of his legal remedy, who has a clear right to recover at law, a court of equity would restrain the party who obtained the injunction from pleading the Statute of Limitations. (*Fyson* v. *Pole*, 3 Y. & Coll. 273.) So equity will give interest on the arrears of an annuity. (*Morgan* v. *Morgan*, 2 Dick. 643; see *Grant* v. *Grant*, 3 Sim. 340, see p. 364; 3 Russ. 598, and see p. 607,) where the annuitant, with a term of years and a power of entry and distress, had by means of the injunction been prevented from proceeding with an action of ejectment, which had been commenced for recovery of such arrears. So a party who has been restrained in equity from proceeding at law, while the debt was under the penalty of the bond, will be entitled to the principal and interest beyond the penalty. (*Duval* v. *Terry*, Show. P. C. 15, cited in *Grant* v. *Grant*, 3 Russ. 607; see *O'Donel* v. *Browne*, 1 Ball & B. 262.) Where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances, and for a length of time, which deprives his adversary of his legal rights, a court of equity will supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party so prosecuting an unfounded claim has deprived his adversary. (*Pultney* v. *Warren*, 6 Ves. 73; *The East India Company* v. *Campion*, 11 Bligh, 158, 186, 187; see *Furnival* v. *Boyle*, 4 Russ. 142; *Morgan* v. *Morgan*, 2 Dick. 643; *Grant* v. *Grant*, 3 Sim. 863; *Sirdefield* v. *Price*, 2 Y. & C. 73; *Brown* v. *Newall*, 2 M. & Cr. 572, 573.)

Effect of proceedings in pre-

In order to prevent the operation of the Statute of Limitations in a court

3 & 4 *Will.* 4, *c.* 27, *s.* 26.

venting operation of statute.

of equity in a matter of simple contract, it was sufficient if the bill was filed within six years after the accruer of the right to sue, although the subpœna was not sued out till after the expiration of that period. (*Coppin* v. *Gray*, 1 Y. & Coll. C. C. 205; *Purcell* v. *Blennerhassett*, 3 Jones & L. 24.) With reference to the Statute of Limitations, an amended bill will date from the day of the filing of the original bill, and not from the day of the amendment. (*Blair* v. *Ormond*, 1 De G. & S. 428; *Byron* v. *Cooper*, 11 Cl. & Fin. 556; *Plowden* v. *Thorpe*, 7 Cl. & Fin. 164; *Attorney-General* v. *Hall*, 11 Price, 760.) Although the mere filing of a bill will operate by itself to save the bar of the statute, yet the court will know how to deal with any improper delay, by not giving the benefit of the statute to the plaintiff, if there was anything in his conduct to disentitle him to its assistance. (*Forster* v. *Thompson*, 4 Dru. & War. 318; *Coppin* v. *Gray*, 1 Y. & Coll. C. C. 205; *Boyd* v. *Higginson*, Flan. & K. 603.) When a defendant is out of the jurisdiction, and the bill prays process against him when he shall come within it, the operation of the Statute of Limitations is suspended, though he has neither been served nor appeared in the suit. (*Hele* v. *Lord Bexley*, 20 Beav. 127.) A plaintiff was required to account for the delay of nineteen years in filing his bill, where the circumstances of the parties had changed by deaths; and the foundation of the suit being a legal demand, the court, after such delay, declined to act, unless the demand was established in an action. (*Blair* v. *Ormond*, 1 De G. & S. 428.)

A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trusts as to the personal estate. In 1847 a supplemental bill was filed raising questions on the will as to the real estate in which the heir who was then unknown was interested; and in 1849 another supplemental bill was filed to bring the heir who was then ascertained before the court: it was held, that the heir was barred by lapse of time from claiming the real estate adversely to the trustees, for the institution of a suit to carry the trusts of a will into execution could not preserve the rights of the heir who claimed adversely to such will, but that the heir at law was not barred from claiming part of the real estate as being in the events that had happened undisposed of and held by the trustees in trust for him. (*Simmons* v. *Rudall*, 1 Sim., N. S. 115; 15 Jur. 102.)

Where the maker of a note became lunatic, and the plaintiff did not take any active proceedings, it was held, that he was not entitled to be relieved from the effect of the statute. In 1825 the holder of a promissory note brought an action against the maker, who became lunatic; whereupon the lunatic and his committee filed a bill to restrain proceedings in the action, on the ground of alleged insufficiency of consideration for the note; and upon the motion for an injunction, an order was made by consent, staying proceedings in the action and the suit, with liberty for the holder of the note to go in and establish his claim in the lunacy. He accordingly took proceedings to support his claim before the master in lunacy, who, however, disallowed it, and in August, 1830, made his report, without including in it the name of the holder of the note as a creditor. The lunatic died in March, 1843; and in February, 1844, the holder of the note filed a creditors' bill against the representatives of the lunatic. It was held, that the plaintiff was not entitled to be relieved from the effect of the Statute of Limitations. (*Rock* v. *Cooke*, 1 De G. & S. 675; 12 Jur. 5; 17 Law J., Ch. 93.)

A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the master thereon, followed by a report finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, as against the heir at law of the lunatic, who was not a party to the application. (*Wilkinson* v. *Wilkinson*, 9 Hare, 204.)

An order in lunacy directing the taxation of the costs, charges and expenses incurred by the solicitors employed in prosecuting the commission in lunacy and subsequently as the solicitors of the committees, and directing an inquiry whether it would be fit and proper to raise these costs, &c. by sale or mortgage of the lunatic's real estate, did not constitute them a judgment debt, nor make them a charge in equity upon such real estate, but such costs, &c. were considered as a simple contract debt due by the

lunatic for necessaries. The lapse of six years during the lunatic's life will not bar a debt of this description, for the Court of Chancery will take judicial notice in a suit to obtain payment out of his assets after his death, that any action against the lunatic for the recovery of the claim would have been restrained by the lord chancellor on petition in lunacy. An action of debt for necessaries supplied will lie against a lunatic. (*Stedman* v. *Hart*, 1 Kay, 607.)

3 & 4 *Will.* 4, *c.* 27, *s.* 26.

Where a claim and an affidavit in support of it were carried into the master's office, under a winding-up order on behalf of a creditor whose debt was not barred at the time by the statute, and a year elapsed without the creditor making any further attempt to establish the debt before the master or to enforce payment of it, and in the meantime six years had elapsed from the time when the debt accrued due: it was held, that the claim ought not to have been disallowed by the master as being barred by the statute. (*Wryghte's case*, 5 De G. & S. 244; 16 Jur. 812. See *S. C.*, on appeal, 16 Jur. 715; 21 Law J., Chan. 807, L. J.)

A plaintiff brought an action of ejectment against a person in possession, and afterwards filed a bill of discovery in aid of the action, and to restrain the defendant from setting up outstanding terms. By the death of the defendant the suit abated, and the benefit of the action at law became lost. After twenty years' adverse possession, the plaintiff having filed a bill of revivor, a demurrer thereto was allowed, on the ground that no effectual proceeding could now be had at law, and that the discovery and relief sought would therefore be useless. (*Bampton* v. *Birchall*, 11 Beav. 38; 1 Phill. C. C. 568.)

Where, according to the terms of a deed of trust, no proceedings are to be taken by creditors for the recovery of the debt otherwise than out of appropriated property, the debtor or his representatives cannot, under such circumstances, afterwards set up such abstinence of suit in pursuance of the contract as a bar to the claim of the creditor. A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed, and the creditors, in consideration thereof, granted to the debtor licence to reside and attend to his affairs in any place he might think proper, without suit or molestation of his person or his goods, chattels and effects by any such creditors, and that in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such licence, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar: it was held, that this amounted only to a licence by a creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate, and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed,—nor an administration suit by the creditor against the estate of the debtor after his decease for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust deed or amounted to an acquittance of the debt: it was held, also, that the existence of the trust deed, and the covenant and licence therein contained, prevented the operation of the Statute of Limitations during the life of the debtor in respect of the debts for the payment of which the trust was created. (*O' Brien* v. *Osborne*, 10 Hare, 92; 16 Jur. 960.)

Acquiescence.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

27. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act (*s*).

(*s*) If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. (*Duke of Leeds* v. *Earl of*

3 & 4 *Will.* 4, *c.* 27, *s.* 27.

Amherst, 2 Phill. C. C. 123.) Parties cannot be said to acquiesce in the claims of others, unless they are fully cognizant of their right to dispute them. (*Marker* v. *Marker*, 9 Hare, 16.)

Acquiescence imports knowledge, for a man cannot be said to have acquiesced in what he did not know; and in cases involving a breach of trust, acquiescence imports full knowledge. It is a settled rule that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case. (*Per Turner*, L. J., *Life Assurance of Scotland* v. *Siddal*; *Cooper* v. *Greene*, 3 De G., F. & J. 74.)

When acquiescence bars relief in equity.

Acquiescence may have the same effect as an original agreement, and may bar the right of the party to relief in equity. But to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers. The doctrine of acquiescence does not apply where all the parties are under the influence of a common mistake. (2 Mer. 362.) In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew that his trustee had become the purchaser, for while the *cestui que trust* continues ignorant of that fact there can be no *laches* in not quarrelling with the sale upon that ground. (*Randall* v. *Errington*, 10 Ves. 427, 428; *Morse* v. *Royal*, 12 Ves. 335.) Lord Chancellor *Eldon* said, "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust, and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence; recollecting, in the conduct of that inquiry, how important it is on the one hand to secure the property of the *cestui que trust*, and on the other not to deter men from undertaking trusts." (3 Swanst. 64.) All *cestuis que trust*, who (being of age and under no incapacity) have had full information of the conduct of their trustees, which was liable to objection, and openly or tacitly acquiesced in it during a considerable time, are held to have authorized or adopted such conduct, and precluded themselves from all remedy in that respect. (*Brice* v. *Stokes*, 11 Ves. 319; *Walker* v. *Symonds*, 3 Swanst. 64; *Ryder* v. *Bickerton*, *Ib.* 83, n.; *Underwood* v. *Stevens*, 1 Mer. 712; *Trafford* v. *Boehm*, 3 Atk. 444.)

Length of time, when it does not operate as a statutory or positive bar, operates simply as evidence of acquiescence. A bar by length of time and by acquiescence are said not to be two distinct propositions. They constitute one proposition, and that proposition, when applied to a question of a breach of trust, is, that the *cestui que trust* assented to the breach of trust.

A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not bear upon the question of his assent to a breach of trust. He is not less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case. (*Per Turner*, L. J., *Life Association of Scotland* v. *Siddal*; *Cooper* v. *Greene*, 3 De G., F. & J. 72, 73.)

A trustee of real estate devised his real estate to T., subject to the payment of a legacy, but the trust estate did not pass. T. however acted as trustee. It was held, that she might be deemed a trustee upon an express trust, and that the Statute of Limitations was therefore no defence to a claim against her estate in respect of a breach of trust. (*Ib.*)

T. improperly allowed part of the trust fund to be received by B., the tenant for life. S., one of the reversioners, borrowed money from C., and mortgaged to him her share in the trust funds. B. at the same time gave C. a bond and a mortgage of other property for the same debt, B. being a surety for S. in this transaction. The debt having been paid out of B.'s estate: it was held, that T.'s representative could not claim to have this payment set off against the claim of S., in respect of the misapplied part of the trust fund. (*Ib.*)

In this case, *Turner*, L. J., said the respondents relied much upon *Brown*

v. *Cross*, 14 Beav. 105, seeming to import that if a *cestui que trust* knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be barred by acquiescence if he does not promptly do so; but this broad proposition was not necessary to the decision of that case, and *Turner*, L. J., was not prepared to assent to it. It is the duty of the trustee to observe the trust and to preserve the property for the benefit of those entitled in remainder; and his lordship was not prepared to hold that the trustee can be permitted to escape from the liability incident to that duty by simply informing the *cestui que trust* that he has committed or intends to commit a breach of it. (*Ib.* 75. See *March* v. *Russell*, 3 My. & Cr. 31.) 3 & 4 *Will.* 4, c. 27, s. 27.

Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it. (*Pickering* v. *Lord Stamford*, 2 Ves. jun. 583.)

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was held a bar to relief. (*Hicks* v. *Cooke*, 4 Dow. 17.) Long acquiescence by a party acquainted with the facts is a bar to equitable relief for setting aside a lease, upon the ground of fraud or mistake, although it might have been otherwise if the parties interested had questioned the lease recently after the transaction. (*Selsey* v. *Rhodes*, 2 Sim. & Stu. 41; 1 Bligh, N. S. 1.) An heir at law has also been held not entitled to an issue *devisavit vel non* after twenty years' acquiescence in his ancestor's will. (*Tucker* v. *Sanger*, M'Clel. 424; 13 Price, 119.) An acquiescence of twenty-three years, with a knowledge of the will, is a good bar to a claim by a residuary legatee against an executor for an account, on the ground of neglect or misfeasance, and that independently of the stat. 3 & 4 Will. 4, c. 27. (*Portlock* v. *Gardner*, 11 Law J. (N. S.) Ch. 313.) A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years, and after her death her executrix filed a bill for their recovery. No explanation was given of the circumstances, and no proof of any intermediate payment. The bill was dismissed on the ground of great laches. (*Pattison* v. *Hawkesworth*, 10 Beav. 375. See *Sibbering* v. *Earl of Balcarras*, 19 Law J., Ch. 252, where the court refused to entertain a suit for setting aside the sale of a reversionary interest after the lapse of several years.) A wife was held to be bound by the declaration of her husband alone of the uses of a fine levied of her lands after having acquiesced fifteen years from his death. (*Swanton* v. *Raven*, 3 Atk. 105.) Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by an act of parliament, it was held, that it was not competent for the shareholders to impeach such agreement in respect of the public interest. (*Gray* v. *Chaplin*, 2 Russ. 126.) Acquiescence will not be held to have taken place, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate. (*Purcell* v. *Macnamara*, 14 Ves. 106, 121, 122.) Where executors took upon themselves to distribute the personal property of a testator, in thirds, without consulting a legatee, and the shares were paid without her authority, upon her supposition that their construction of the will was right, it was held, that the legatee was not precluded from relief on the discovery of the mistake of the executors. (*Newton* v. *Ayscough*, 19 Ves. 539; *Brooksbank* v. *Smith*, 2 Y. & C. 59. See *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 122.)

VII. Limitation of Time between Mortgagor and Mortgagee.

Time of Limitation fixed—Twenty Years.

28. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, Mortgagor to be barred at the end of twenty

3 & 4 *Will.* 4, c. 27, s. 28.

years from the time when the mortgagee took possession, or from the last written acknowledgment.

comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent by, from or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged * money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (*t*).

* Lege mortgage.

(*t*) Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section, (*ante*, p. 194,) was not barred of his ejectment by the 2nd and 3rd sections, inasmuch as the mortgagee's right had accrued more than twenty years previously. (*Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 291.) These doubts have been removed by the following enactment.

3 & 4 Will. 4, c. 27.

By statute 7 Will. 4 & 1 Vict. c. 28, reciting that, "doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled 'An Act for the Limi-'tation of Actions and Suits relating to Real Property, and for

'simplifying the Remedies for trying the Rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed:" it is declared and enacted, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding."

3 & 4 Will. 4, c. 27, s. 28.

Mortgagees within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last payment of principal or interest.

Where the mortgage deed contains no provision that the mortgagor may enjoy the land in the interval between the execution of the deed and default in payment of the mortgage-money, the mortgagee has an immediate right of entry upon the execution of the deed, and an ejectment must be brought within twenty years afterwards if no interest has been paid. W. B., seised in fee of land, by indentures of lease and release, bearing date respectively the 2nd and 3rd days of September, 1819, and executed by himself only, conveyed the same to T. R. in fee, with the proviso, that on payment by him to T. R. of 200*l.*, with interest, on the 25th March, 1820, the mortgagee, his heirs and assigns, should reconvey the mortgaged premises to the mortgagor, his heirs and assigns. The deed then contained a covenant, that in the event of default being made in payment of the above sum or any part thereof, it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after such default, peaceably and quietly to enter into and enjoy the said premises, and also a covenant by the mortgagor for further assurance in case of such default. It was held, that the mortgagee had the right of possession under this deed from the time of its execution, and not merely from the 25th March, 1820, and therefore that an ejectment for the recovery of the premises brought by the heir at law of the mortgagee, within twenty years of the latter but not of the former date, (no interest having been paid on the mortgage, nor any other act recognizing the title of the mortgagee done for twenty years from that date,) was too late. (*Doe* d. *Roylance* v. *Lightfoot*, 8 Mees. & W. 553; 5 Jur. 966. See *Wilkinson* v. *Hall*, 4 Scott, 301; 3 Bing. N. C. 508; *Fisher* v. *Giles*, 5 Bing. 421; 2 M. & P. 741; Shep. Touch. 272 (8th edit.).)

Cases on construction of 28th section, &c.

The lessor of the plaintiff was the assignee of a mortgage made more than twenty years before ejectment was brought, but the mortgagor had, within twenty years, paid interest on the mortgage. The defendant had been let into possession more than a year before the mortgage by the mortgagor, and suffered by him as a favour to occupy the premises without payment of rent and without any written acknowledgment. The mortgagor's right of entry as against the defendant accrued under the 3 & 4 Will. 4, c. 27, less than twenty years before the mortgage, but more than twenty years before the ejectment brought: it was held, that the 7 Will. 4 & 1 Vict. c. 28, preserved to the lessor of the plaintiff, being a mortgagee, the same right of entry as if the 3 & 4 Will. 4, c. 27, had not passed, and that the defendant's possession never having been such as before the stat. 3 & 4 Will. 4, c. 27, would have been adverse to the lessor of the plaintiff, he was entitled to recover, though the mortgagor's right of entry, within the meaning of the 3 & 4 Will. 4, c. 27, had accrued before the mortgage, and was barred under that statute by lapse of time, before commencement of the ejectment. (*Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366; 20 Law J., Q. B. 431; 15 Jur. 1031.)

Where A. mortgaged land, of which B. was in possession, to C. for a thousand years, and B. continued in possession for upwards of twenty years from the mortgage without having paid rent to A. or to any one, but interest was paid under the mortgage within twenty years from the time of the ejectment being brought: it was held, that, under 7 Will. 4 & 1 Vict. c. 28, the

3 & 4 *Will.* 4, c. 27, s. 28.

title of those claiming under C. was not barred. (*Ford* v. *Ager*, 2 New Rep. 366; 8 L. T., N. S. 546.)

The landlord of A. and B., adjacent closes, mortgaged them, and afterwards demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it, saying he had granted rights over B. to the occupier of other adjoining lands. The tenant held both A. and B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B. It was held, that on this evidence, he might insist as against the landlord on a twenty years' occupation of B., within the 3 & 4 Will. 4, c. 27, ss. 2 and 3. (*Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373.) On a purchase of lands which were under mortgage, the purchaser paid the principal and interest due on the mortgage, and took a conveyance, in which the mortgagor and mortgagee joined, of the premises, and of the mortgagor's equity of redemption and all the residue of his interest: it was held, that the purchaser was a person "claiming under" a mortgage within the stat. 7 Will. 4 & 1 Vict. c. 28, and that the twenty years' limitation under 3 & 4 Will. 4, c. 27, s. 2, ran from the paying off of of the mortgage and interest. (*Ib.*) Lord *Campbell*, C. J., said, "the real question here is, whether the lessor of the plaintiff can be considered 'entitled to or claiming under' a mortgage. He is not a mortgagee nor the assignee of a subsisting mortgage; the mortgage which Wilson had created in 1822 was paid off in 1834, when the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claims. Although he is not *entitled to the mortgage*, we think that he *claims under the mortgage*. In no other way can the statute be made effectual for the protection of mortgagees. According to the construction we put upon it in *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366, the mortgagee might have maintained an ejectment after the expiration of the twenty years, or he might have transferred this right of action by assigning to another who paid him off. But suppose that the mortgage deed contains a power of sale, may the mortgagee not transfer the same right to a purchaser? Is the purchaser barred by the lapse of time, and may he recover back the purchase-money which went in satisfaction of the mortgage? If so, the mortgagee, who has regularly received payment of his interest, may entirely lose his principal from the mortgagor having omitted to receive rent or an acknowledgment from the tenant for twenty years. On payment of the mortgage-money the mortgage ceases to exist as a security for money, but the person to whom the mortgagee conveys his legal interest *claims under the mortgage*, although the equity of redemption should likewise be conveyed to him." (*Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 381, 382.)

In *Searle* v. *Colt*, 1 Y. & Coll., N. S. 36, a question was raised but not determined with reference to the right of the grantee of an annuity charged on land to take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor, punctual payment of the annuity, and no acknowledgment in writing of the grantee's title. It was contended that the grantee, never having been in possession or receipt of the profits of the land, and consequently never having been dispossessed, the time must be considered to have run against him from 1810 (when the annuity was granted) by virtue of the 3rd section. In support of this construction, *Dearman* v. *Wyche*, 9 Sim. 570, was cited, and it was said, that although the stat. 7 Will. 4 & 1 Vict. c. 28, withdrew mortgages from that construction, yet it applies to that species of incumbrance only. Where real estate is conveyed to trustees to secure the payment of an annuity, it is within the 25th section of this act. (*Lewis* v. *Duncombe*, 30 Law J., Chanc. 732.)

Where a man by his will creates particular estates and remainders and then mortgages his estate, of course he and his devisees have only in common the period of time to claim against the mortgagee in possession, and the will cannot give to the devisees successive rights. (*Browne* v. *Bishop of Cork*, 1 Dru. & Wal. 700; Sugd. Real Prop. Stat. p. 36. See *Raffety* v. *King*, 1 Keen. 601.)

Where a mortgagee, who had not been in receipt of the rents and profits of the mortgaged premises for upwards of twenty years, nor received an

3 & 4 Will. 4, c. 27, s. 28.

acknowledgment as required by the 3 & 4 Will. 4, c. 27, nor had even known of his rights until informed thereof by a puisne creditor, was brought before the court by that creditor by an amendment made in 1837 by a supplemental bill to a bill filed in 1833, for the purpose of completing the title to a purchaser, so as to have distributed among the creditors of the estate certain funds, which had been impounded to indemnify the purchaser against an outstanding and apparently unsatisfied charge, of which the said mortgage formed a moiety: it was held, that the mortgagee's claim was not barred by 3 & 4 Will. 4, c. 27, which was held to be inapplicable, as the mortgagee did not come in the character of plaintiff, but as defendant, in a suit instituted prior to the passing of the statute. (*Murphy* v. *Sterne*, 1 Drury & Walsh, 236.)

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the Statute of Limitations. (*Booth* v. *Purser*, 1 Ir. Eq. R. 33.)

Acknowledgments under this section.

More than twenty years after a mortgagee had entered into possession the mortgagor's solicitor wrote to the mortgagee, requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of meeting unless some one is ready with the money to pay me off:" it was held, that this letter was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations, although not written within twenty years after the mortgagee had entered into possession. (*Stansfield* v. *Hobson*, 3 De G. Mac. & G. 620; 22 Law J., Chan. 657.)

A mortgagee in possession of lands at Hendred, having received from the grandfather of the infant heir of the mortgagor a letter, the contents of which did not appear, wrote in answer as follows: "Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you; which I am very willing to settle if your granddaughter is of age, I never told you any otherwise; as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your granddaughter about the business." It was held, that the last-mentioned letter was an acknowledgment of the heir's right to redeem the mortgage, and that when she came of age she was entitled to consider her grandfather as having acted as her agent, and consequently that she was entitled to redeem the mortgage at any time within twenty years after the letter was written. It was objected, that as the letter was not written either to the granddaughter, or to any person to act as her agent, it was not such a written acknowledgment as the statute requires. The question, however, was, whether the party who wrote the letter did not treat the party to whom it was written as the agent of the child. She was at that time an infant; and the writer made the statements in his letter in answer to the grandfather's letter upon the infant's business; and when he said, "I am very willing to settle if your granddaughter is of age," can it be supposed that that was not meant to be a statement of which the granddaughter might avail herself when she came of age? It would be a forced construction to say that this was not an acknowledgment within the statute, or that it was not given to the agent of the person claiming the estate of the mortgagor. It is not necessary to make a person an agent, that he should have an actual authority to act; it is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf. The letter, too, treats the grandfather as agent; it assumes that he had full knowledge of all the circumstances relating to the property; and, in the Vice-Chancellor's opinion, the expressions in it did in effect admit the right in dispute. (*Trulock* v. *Robey*, 12 Sim. 406, 407.)

Where a plea of the Statute of Limitations was pleaded to a bill for redemption against a mortgagee in possession, and the bill stated that interest had been paid within twenty years, but contained no charge of documents, and the plaintiff had filed a replication:—it was held, that the plaintiff might nevertheless compel production of documents by the defendant for the purpose of obtaining evidence upon the issue tendered by the bill as to payment of interest within twenty years. (*Parkinson* v. *Chambers*, 1 Kay & J. 72. See 15 & 16 Vict. c. 86, s. 18.)

3 & 4 *Will.* 4, c. 27, *s.* 28.

Where a tenant for life of a mortgaged estate by deed admitted the payment of interest on the mortgage, this was not a sufficient acknowledgment of the debt, as against the remainderman, to prevent the Statute of Limitations from operation. (*Gregson* v. *Hindley*, 10 Jur. 383.)

A. mortgaged an estate to B. for 1000 years. B. died, having bequeathed the mortgage to his widow. She also died; and in 1822 her personal representative entered into and continued in possession of the estate until 1838, when they sold and assigned the mortgage to C., who entered and continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mortgage, and conveyed the term to C., subject expressly to the equity of redemption of A., or his legal representatives. It was held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable. (*Lucas* v. *Denison*, 13 Sim. 584.)

In 1816, the mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises, and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee, who then entered into possession. The mortgagor was not a party to either transfer, and had not from the time the original mortgagee entered into possession received any acknowledgment in writing of his equity of redemption. In 1833, the above stat. 3 & 4 Will. 4, c. 27, s. 28, was passed. In 1845, the representative of the mortgagor filed his bill for redemption against the representatives of the second transferee. It was held, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828, and that the suit (as to that estate) was therefore barred. (*Batchelor* v. *Middleton*, 6 Hare, 75.)

A mortgagee in fee, who had been in possession for more than twenty years, died in 1805, leaving a will, by which he devised the property to his eldest son in tail, with divers remainders over, and appointed him his executor and residuary legatee. In 1812, the person claiming under the will of the mortgagor filed a bill against the son to redeem, and the suit was compromised in 1814 on the terms of the son paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, and without having done any act to bar the entail created by his father's will. It was held, that his heir at law was entitled to the equitable fee, and that the remainderman under his father's will had no title in equity. It was considered that the same effect was to be given to the son's acknowledgment as if he had held only under the mortgage, and his father's will had not contained the limitations by which an estate tail was given to him, with remainders over. The consequence was that effect must be given to the conveyance of the equity of redemption to the son, under which the respondents claimed, and that no effect was to be given to the limitation in the testator's will, by which he professed to give a remainder in fee to his daughters after the successive estates tail limited to his son. (*Pendleton* v. *Rooth*, 1 De G., F. & J. 81; 1 Giff. 35; 5 Jur., N. S. 840; 6 Jur., N. S. 182; 29 Law J., Ch. 265.)

A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer. It was held, that such possession was not adverse during the existence of the life estate so purchased, and that the stat. 3 & 4 Will. 4, c. 27, s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner. Vice-Chancellor *Wigram*: "I cannot compel the purchaser to take a title depending on the operation of the Statute of Limitations under the circumstances of this case. The possession of the mortgagee appears to me, in point of fact, not to have been adverse. The 28th section supposes the existence of a person to whom the acknowledgment is to be made, as well as that of the party to make it; there must be not only a party to redeem, but one to be redeemed. The parties in this case were not, I think, in the situation which the statute contemplates as creating a bar. The mortgagee became in effect the tenant for life of the equity of redemption; the remainderman or reversioner may therefore pro-

perly look upon him as holding in that character. He would not necessarily refer his possession to any other title. It would be a surprise upon the parties interested in the property, after the expiration of the life interest, if they were told that the tenant for life had another and an adverse title, by means of which they are to be barred, and the tenant for life to acquire an absolute interest." (*Hyde* v. *Dallaway*, 2 Hare, 528.) 3 & 4 *Will.* 4, *c.* 27, *s.* 28.

The reason is not apparent why the mortgagee should not be allowed to make an admission (in writing signed by himself) of his mortgage title to a third person, of which the mortgagor may have the benefit; the statute however requires the admission should be made to the mortgagor himself or his agent, and by that the court is bound. (*Batchelor* v. *Middleton*, 6 Hare, 83, 84.) In *Forsyth* v. *Bristow*, 8 Exch. 716, it was questioned whether the acknowledgment to take the case out of the stat. 3 & 4 Will. 4, c. 42, s. 5, must be made to the creditor or his agent. (See *post.*)

It was questioned whether since the statute 3 & 4 Will. 4, c. 27, the bar created by twenty years' possession by a mortgagee is defeated by his having kept accounts of the rents received by him. (*Baker* v. *Whetton*, 14 Sim. 426.) But it is observed by Sir E. Sugden, Real Prop. Stat. p. 117, 2nd ed., that keeping accounts "could hardly be held to supply the want of an acknowledgment; for during the twenty years prudence would require that an account should be kept, and after that period, when the right to redeem is barred, no one has a right to inquire how the owner, though formerly a mortgagee, has kept his accounts. The statute intended to put an end to such inquiries."

Where an equity of redemption is put in settlement, though the tenant for life is the party bound to pay the interest upon the mortgage, yet the mere laches of the mortgagee to demand such interest from the tenant for life will not prejudice his claim against those in remainder. (*Wrixon* v. *Vize*, 2 Dru. & War. 192; *Loftus* v. *Swift*, 2 Sch. & L. 642.)

It should be observed that there are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by the 28th section. (Sugd. Real Prop. Stat., p. 118, pl. 45, 2nd ed.)

A mortgagee, who holds property in pledge, is responsible for it in its integrity. Therefore, where a mortgagee of lands allowed the owners of adjacent coal mines to enter and work a mine for the purpose of exploring, which they did, and sold the coals, an account was directed against them all for the benefit of the mortgagor upon a bill to redeem, and the Statute of Limitations was held not to apply to a case of this kind, as between mortgagor and mortgagee. (*Hood* v. *Easton*, 2 Giff. 692.)

Welsh mortgages.

A Welsh mortgage is a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits in the meantime shall be received by the mortgagee without account in satisfaction of interest. (See *Talbot* v. *Braddyl*, 1 Vern. 395; *Lawley* v. *Hooper*, 3 Atk. 280; *Yates* v. *Hambly*, 2 Atk. 237.) But it is probable that at the present day a court of equity will decree an account against the mortgagee of the rents and profits, whether the value was excessive or not beyond the interest, and notwithstanding the agreement that the profits shall be retained in lieu of interest. (*Fulthorpe* v. *Forster*, 1 Vern. 477; see Coote on Mortgages, 207, 212; 5 Jarm. Conveyancing, by Sweet, 96, 101.)

A Welsh mortgagee has no remedy to compel redemption or foreclosure, (*Longuet* v. *Scawen*, 1 Ves. sen. 406,) but if a man be permitted to hold over twenty years after the debt has been fully paid, it seems that the mortgagor would be barred. (*Fenwick* v. *Reed*, 1 Mer. 125; 5 B. & Ald. 232; and see 2 Spence on Eq. Jurisd. pp. 616—618.) Where A., being entitled in fee to a freehold estate in remainder expectant on the decease of B., demised his interest to C. for a term of 500 years, subject to a proviso for redemption on payment of the sum of 1,000*l.* and interest, without any time being fixed by the proviso for payment of the money; the deed contained a covenant by A. for payment of the money on demand, and also a covenant that it should be lawful for B. to enter into the property, and to hold and enjoy the same until the payment of the principal money and interest: it was held, that the mortgage was in the nature of a Welsh mortgage; and a bill of foreclosure filed by B. against a person to whom A. had conveyed his

3 & 4 *Will.* 4, c. 27, s. 28.

reversionary interest, was dismissed, but without costs. (*Teulon* v. *Curtis*, 1 Younge, 616. See *Hartpoole* v. *Walsh*, 5 Br. P. C. 267, Toml. ed.) The grant of annuities during the life of the grantees, in satisfaction of a debt to which the grantor was not to be personally liable, but reserved a power of purchasing the annuities, was held part of the personal estate of the grantee, similar to a Welsh mortgage. (1 Ves. sen. 402.)

VIII. Limitation of Time as to Church Property and Advowsons.

Time of Limitation fixed.

No lands or rents to be recovered by ecclesiastical or eleemosyna y corporation sole, but within two incumbencies and six years, or sixty years.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period (*u*).

(*u*) Where an ancient rent was payable out of lands A. and B., and the owner of the lands sold B. and charged others to indemnify the purchaser, and continued to pay the whole rent, no payment having been made to the purchaser of B. and the period prescribed by this section had elapsed, yet it was held that the purchaser's estate was still liable; for by the very terms of this section the period of limitation is to commence when the right to make an entry or distress or to bring an action or suit has first accrued, and to ascertain this terminus, recourse must be had to the third section, which defines it to be when the person in possession or receipt of the rent shall, while entitled thereto, have been dispossessed or have discontinued the possession or receipt of it. But here there was a continued receipt of the whole of the rent from the owner of A. and his ancestors, and as there was a common liability to its payment attaching on B., all the payments made by the owner of A. are sufficient to prevent the bar of the statute from operating in favour of the owner of B. The statute never began to run. (*Archbishop of Dublin* v. *Lord Trimleston*, 12 Ir. Eq. Rep. 251; Sugd. on Real Prop. Stat. 153, 2nd ed.)

How ecclesiastical persons are affected by

Before this act, ecclesiastical corporations, and generally all ecclesiastical persons seised in right of their churches, were not within any of the

Statutes of Limitation, and therefore could not bar their successors, by neglecting to bring actions for recovery of their possessions within the time prescribed for other persons, although an ecclesiastical person, who was guilty of such neglect, would himself have been barred. (Plowd. 358, 538; 11 Rep. 78 b; 7 Roll. R. 151; 2 Bos. & Pull. 546. See 3rd Real Prop. R. 58—62.)

3 & 4 *Will.* 4, *c.* 27, *s.* 29.

Statute of Limitations.

Although the Statute of Fines, 4 Hen. 7, c. 24, (*ante*, p. 157,) did not operate as a bar to the successors of bishops, rectors, or other ecclesiastical persons entitled to lands in respect of offices for life, yet each particular person was bound by a lapse of five years in his own time after the fine had been levied. (*Runcorn* v. *Doe* d. *Cooper*, 5 B. & C. 696; 8 D. & R. 450; *Croft* v. *Howel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College case*, 11 Rep. 67.) The act 2 & 3 Will. 4, c. 71, for shortening the time of prescription in certain cases, extends to any ecclesiastical person, but tithes are excepted from that act. (*Ante*, pp. 2, 6.) The statute 2 & 3 Will. 4, c. 100, has shortened the time required for the valid establishment of claims of a *modus decimandi* or exemption from or discharge of tithes by composition real or otherwise. In the construction of this statute there was great difference of opinion, but Lord *Cottenham*, C., has concurred with the opinion of the majority of the judges, who think, that under the act the proof of the enjoyment of the discharge claimed for the prescribed time is a sufficient answer to a demand for tithes. (*Salkeld* v. *Johnston*, 1 Mac. & G. 242; 1 Hall & T. 329; 2 Exch. 256; 2 C. B. 749.)

Advowsons.

Time of Limitation fixed.

No advowson to be recovered but within three incumbencies or sixty years.

30. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years (*x*).

(*x*) The provisions of this act, so far as relates to any right to present to or bestow any church, vicarage, or other ecclesiastical benefice, are extended to Ireland by 6 & 7 Vict. c. 54, and 7 & 8 Vict. c. 27. See 8 & 9 Vict. c. 51, as to costs of defending rights of patronage in Ireland.

By stat. 1 Mary, sess. 4, c. 5, (which was extended to Ireland by stat. 10 Car. 1, st. 2, c. 6,) it was enacted, that the stat. 32 Hen. 8, c. 2, should not extend to a writ of right of advowson, *quare impedit*, assize *of darrein presentment*, nor *jure patronatus*, but the time of seisin to be alleged in such cases should be as it was at the common law before the making of the said statute, which was from the time of the commencement of the reign of Rich. 1. Before the statute of Mary, if the incumbent of an advowson had lived sixty years and died, and a stranger had presented, the patron could not maintain *quare impedit* or *darrein presentment*. (See Plowd. 371 b; Co. Litt. 115 a.) By the stat. 7 Anne, c. 18, (which was held not to be retrospective, 5 Ves.

3 & 4 *Will.* 4, c. 27, *s.* 30.

828,) it was enacted, that no usurpation should displace the estate of the patron, and that he might present on the next avoidance as if there had not been any usurpation; which provision, in effect, took away all limitations of suits about the right of patronage. (See 3 Bl. Comm. 250.)

Lapse.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop (*y*).

Lapse.

(*y*) Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse*. (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12.) The six months commence from the time the patron has notice of the avoidance; (2 Burn, Eccl. Law, 327;) but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice. (*Ib.* 329.) If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron. (Com. Dig. Esglise, (H. 9).) But where the incumbent is himself patron, a sentence of deprivation is not necessary to render the first living void, the object of such a sentence being to give notice to the patron. (*Apperley* v. *Bishop of Hereford*, 3 Moore & Scott, 192; *S. C.*, 9 Bing. 681.) If the bishop should not present within six months after the lapse to him, then the right to present goes to the archbishop; (Com. Dig. Esglise, (H. 11);) and if neither the bishop nor archbishop present, then to the crown, which is not confined to any time. (Cro. Car. 335; Plowd. 498.) It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse. (3 Moore & Scott, 114.) So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted. (Hutt. 24; Hob. 152, 154; 2 Inst. 273.) So after a lapse to the king, if the patron's clerk be presented, instituted and inducted, and die incumbent, before the king has taken advantage of the lapse, his right is gone. (Owen, 2—5; Cro. Eliz. 44, 119; 7 Rep. 28.)

When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the king, and is called a *prerogative* presentation. This right of the crown was formerly doubted, (*Wentworth* v. *Wright*, Owen, 144,) but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the crown is lost. (2 Bl. Rep. 770; *Rex* v. *Bishop of London*, 1 Show. 464; *S. P.*, Show. P. C. 185; Com. Dig. Esglise, (H. 6); *Archbishop of Armagh* v. *Attorney-General*, 2 Br. P. C. 514.) If after a grant of the next presentation to a living the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of

the king's presentee. (*Calland* v. *Troward*, 2 H. Bl. 324; 8 Br. P. C. 71; 6 T. R. 439, 778.) 3 & 4 *Will.* 4, c. 27, s. 31.

The right of the crown to present to an English benefice, upon the appointment of the incumbent to a bishopric, is not barred by the crown having before such appointment granted the advowson to a subject. But no such right exists in the case of an appointment to the bishopric of Christ's Church, in New Zealand. (*Reg.* v. *Eton College*, 8 Ell. & Bl. 610.)

The right of presentation given to the universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Will. & M. c. 26, s. 2, and 12 Anne, st. 2, c. 14, s. 1, arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter. (*Edwards* v. *Bishop of Exeter*, 7 Scott, 652; 5 Bing. N. S. 652; 3 Jur. 725. See *Cottington* v. *Fletcher*, 2 Atk. 155.) By statute 12 Anne, st. 2, c. 14, the presentation to any benefice by any Roman Catholic is void. And by stat. 11 Geo. 2, c. 17, s. 5, every grant made of any advowson or right of presentation, collation, nomination or donation, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, is void, unless it be for valuable consideration to a Protestant purchaser. (See 9 & 10 Vict. c. 59.) Universities.

An advowson *donative* being in the patron's disposal by his own deed of donation, without presentation, institution or induction, (Co. Litt. 344 a,) is not subject to lapse, (*Ib.*; *Fairchild* v. *Gayre*, Cro. Jac. 63; *Britton* v. *Wade*, *Ib.* 515,) unless such be the terms of the foundation, or unless the donative be augmented by Queen Anne's bounty, in which case it is subject to lapse, by statute 1 Geo. 1, st. 2, c. 10, ss. 6, 14, in case there be no nomination within six months. (See *Mutter* v. *Chauvel*, 1 Mer. 475.) As to proof of augmentation, see 11 East, 478. The ordinary may, by ecclesiastical censures, compel the patron of a donative to fill the church. (3 Salk. 140; *Rex* v. *Bishop of Chester*, 1 T. R. 396.)

By stat. 21 Hen. 8, c. 13, if a person having a benefice with cure of souls, of the yearly value of 8*l.* or above, was instituted and inducted into any other benefice with cure of souls, the first benefice became void. (See, on the construction of this statute, *Boteler* v. *Allington*, 3 Atk. 453; *Botham* v. *Gregg*, 4 Moore & S. 230; *Halton* v. *Cove*, 1 B. & Ad. 530.) The stat. 1 & 2 Vict. c. 106, ss. 1—13, has repealed the stat. 21 Hen. 8, c. 13, and made new provisions as to pluralities, which provisions apply generally to all persons and benefices without distinction of value. By the 11th section of 1 & 2 Vict. c. 106, institution into a second benefice *ipso facto* avoids the first. (See *Storie* v. *Bishop of Winchester*, 9 C. B. 62; *Ex parte Bartlett*, 12 Q. B. 488, as to avoidance by non-residence under ss. 54, 58, of the same statute, when the clerk is in prison.)

Further provisions are made relating to the holding benefices in plurality by statute 13 & 14 Vict. c. 98.

Estates subsequent to Estates Tail.

32. In the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly. When person claiming an advowson in remainder, &c. after an estate tail shall be barred.

3 & 4 *Will.* 4, *c.* 27, *s.* 33.

Extreme Period of Limitation One Hundred Years.

No advowson to be recovered after 100 years.

33. Provided always, and be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title (*z*).

(*z*) It will be observed that there is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least. An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. Sir W. Blackstone observes, that instances are not wanting, wherein two successive incumbents have continued for upwards of 100 years; and states as an instance, that two successive incumbents of the rectory of Chelsfield-cum-Farnborough, in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751. (3 Chitt. Bl. Comm. 250; Co. Litt. 115 a.)

FINAL EXTINCTION OF RIGHT.

At the end of the period of limitation the right of the party out of possession to be extinguished.

34. At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished (*a*).

Effect of this section.

(*a*) This section of the act is new in principle, as the former statutes of limitation were held not to bar the *right* but merely the *remedy*; but this bars the right as well as the remedy. (See 1 Wms. Saund. 283 a, n.; 2 B. & Ad. 413; 1 B. & Ald. 93; 1 Ld. Raym. 422.) The old statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right, but, under the new act, when the remedy is barred, the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar. (*Incorporated Society* v. *Richards*, 1 Dru. & War. 289.) By the effect of the statute after the proper period of limitation has passed, the legal fee-simple is in the party who has been in possession during that period, and he is competent to convey to another. The old statute of limitations was held to operate as an extinguishment of the remedy of one, and not as giving the estate to the other, where one heir in gavelkind had disseised the other, and been in the

sole possession sixty-two years. (1 Bl. R. 678.) Under this and the 2nd and 3rd sections the right to rent is extinguished by the lapse of twenty years from the time of the last payment of such rent, although twenty years have not expired since the rent became due. (*Ante*, p. 166, n. (*l*).) 3 & 4 *Will.* 4, *c.* 27, *s.* 34.

Though by this section the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers for a period exceeding twenty years confers no right on any one of them who has not himself had twenty years' uninterrupted possession, except as furnishing a defence to a trespasser in possession against an action by the rightful owner. (*Dixon* v. *Gayfere*, 17 Beav. 421; 23 Law J., Chan. 60.)

After both the trustees and *cestui que trust* had been out of possession more than twenty years, an ejectment was brought by A. B., the heir of the trespasser, in the name of the trustee, and he obtained judgment. The trustee who, disclaiming all personal interest, then instituted a suit seeking to have the rights declared as between the rightful owner and the heir of the trespasser, and the court by its receiver took possession. A. B. afterwards instituted a suit against the trustee and the rightful owner to recover the property. It was held, that the court being in possession this statute had conferred no right and did not apply. (*Ib.*) A. wrongfully entered and died intestate, his widow entered. It was held, that the possession of the widow was not a continuance of that of her husband, it not being shown that she was entitled to dower, and such a right not entitling her to enter into the whole estate. (*Ib.*) A suit dismissed as against the principal defendant, and which though pending as against the others has yet been practically abandoned, does not prevent the operation of the statute. (*Ib.*)

The effect of this and the 2nd section as to land, is, that after twenty years' possession adverse to a title it is extinguished, so that it cannot be revived or re-vested by a re-entry after that period, upon the doctrine of remitter, because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry, and the express provision in the statute that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. (*Brassington* v. *Llewellyn*, 27 Law J., Exch. 297; 1 F. & F. 27.)

Without the aid of this statute twenty years' possession gave a *primâ facie* title against every one, and a complete title against a wrong-doer who could not show any right, even if such wrong-doer had been in possession many years, provided they were less than twenty. (*Doe* d. *Harding* v. *Cooke*, 7 Bing. 346; see *ante*, p. 163.) And the effect of this section would probably be to give the right to the possessor for twenty years even against the party in whom the legal estate formerly was, and, but for the act would still be, where he had not obtained the possession till after the twenty years, but then it is apprehended that such twenty years' possession must be either by the same person or by several persons claiming one from the other by descent, will or conveyance. (*Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945, 952.)

Where a Statute of Limitations extinguishes the right and does not merely bar the remedy, the defence under such statute need not be pleaded specially, and therefore in an action of replevin evidence of the lapse of twenty years since the last payment of rent may be given under a plea in bar of *non tenuit*. (*De Beauvoir* v. *Owen*, Law J. 1850, Exch. Ch. 177; 5 Exch. 166; *Owen* v. *De Beauvoir*, 16 Mees. & W. 547.)

The appointment of receivers in a suit in chancery, at the instance of judgment creditors of a former owner, is not such an interruption of possession as will prevent an indefeasible title being acquired by an adverse possession for twenty years under this section. (*Groome* v. *Blake*, 8 Ir. C. L. R. 428.)

The court will compel a purchaser to take a title depending upon parol evidence of adverse possession under this statute. A testator by his last will and testament, after appointing certain lands to his eldest son, George, gave all the residue of his real estate among his six younger sons, subject to the payment of his debts and some charges. Shortly afterwards, he obtained a conveyance of certain freehold property, which was the subject of the controversy in the present suit, and died without having altered in

3 & 4 *Will.* 4, *c.* 27, *s.* 34.

any respect or republished his will, leaving his eldest son of full age. Upon the death of the testator, in 1791, the six younger sons entered into the possession, *inter alia*, of the after-acquired property, and so continued until the present time: George, the eldest son, died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of George during his life or after his death by his heir at law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839, the premises were sold under a decree of the court, pronounced in a suit instituted by a judgment creditor of the testator, in which suit the infant heir was a party defendant. Subsequently to this sale the heir died, and the suit was not revived against the next heir. The abstract of title stated all the above matters, and was verified by two affidavits deposing as to the fact of the possession and receipt of rent by the younger sons: it was held, upon objections to the title on the part of the purchaser, that by the operation of this statute, such a title had been created as the purchaser was bound to take. (*Scott* v. *Nixon*, 3 Dru. & War. 388.) In the subsequent case of *Tuthill* v. *Rogers*, (6 Ir. Eq. R. 441; 1 Jones & L. 36,) *Sugden*, L. C., observed, that the above decision had been acquiesced in, and in conformity with it he should be compelled in principle to adopt the same construction against the rights of the crown, if the case came within the provisions of the act 48 Geo. 3, c. 47, by which the right of the crown is barred, and the estate actually transferred and vested in the person who has held adverse possession for sixty years.

Receipt of Rent.

Receipt of rent to be deemed receipt of profits.

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

IX. Abolition of Real and Mixed Actions, &c.

Real and mixed actions abolished after the 31st December, 1834;

36. No writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationalibus divisis, writ of right of ward, writ de consuetudinibus, et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonia, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize, of novel disseisin, nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or

nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet (*b*) or a quare impedit (*c*), or an ejectment (*d*)), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

3 & 4 *Will.* 4, *c.* 27, *s.* 36.

except for dower, quare impedit and ejectment.

(*b*) The right to bring real actions is preserved for a limited time by the 37th and 38th sections. (See *post*, p. 245.) A writ of right by journeys accounts, sued out after the time allowed by stat. 3 & 4 Will. 4, c. 27, s. 36, for suing out original writs of right, is a nullity, being a new writ and not a continuance of a former one. (*Davies* v. *Lowndes*, 2 Dowl. & L. 272; 6 Man. & G. 529; 8 Scott, N. R. 539. See 1 Phill. C. C. 328.)

It seems that an action of debt does not necessarily lie for rent in consequence of the abolition of real actions. (*Varley* v. *Leigh*, 2 Exch. R. 460.) If a tenant in a writ of right obtain judgment on demurrer to the count, the demandant not joining in the demurrer but making default, the judgment for the tenant ought not to be final, no issue being joined on the mise. A judgment under such circumstances, barring the demandant as to the present action, is, so far, good; but if it also adjudge that the tenant shall hold to him and his heirs quit of the demandant and his heirs for ever, that part is erroneous, and judgment ought so far to be reversed. So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench. (*Nesbit* v. *Rishton*, 11 Ad. & El. 244; 6 Ad. & El. 103; 9 Ad. & El. 426; 2 Per. & D. 706.)

Dower, writ of right of dower and quare impedit abolished as real actions, and to be commenced by writ of summons.

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 26, no writ of right of dower or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit* shall be brought after the commencement of this act, (10th October, 1860,) in any court whatsoever, but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower or for freebench, or in *quare impedit*, as the case may be.

Writ and all proceedings thereupon to be same as in ordinary actions.

The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment execution, and all other proceedings and costs upon such writ shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons, and the provisions of "The Common Law Procedure Act, 1852," and of "The Common Law Procedure Act, 1854," shall apply to the writ and pleadings and proceedings thereupon, 23 & 24 Vict. c. 126, s. 27.

Recovery of dower.

A writ of right of dower laid when a widow had dower of part of the lands in the same vill, for then she could not have dower *unde nihil habet* against the same tenant. (Com. Dig. Dower (G. 1). See Roscoe on Real Actions, 29.) Dower *unde nihil habet* was a writ of right in its nature, and lay in all cases where a woman had a right of dower, except where she had part from the same tenant in the same vill where she then demanded it. (Com. Dig. Dower (G. 2). See Roscoe on Real Actions, 39; 2 Wms. Saund. 43—45 d, notes; Roper on Husband and Wife, by Bright, pp. 391—431, where the mode of proceeding is fully explained.)

It has been held, that copyholders shall neither plead nor be impleaded for the tenements which they hold by copy by the king's writ, but shall have their plaints in the nature of the several actions at common law, unless the dispute arise between the lord and his tenant. (2 Watk. on Cop. 35.) And the plaint in the nature of a writ of *dower* lies in the manor court. (4 Rep. 30 b. See *Rex* v. *Coggan*, 6 East, 431, n.; *Scott* v. *Kettle-*

3 & 4 *Will.* 4, c. 27, s. 36.

well, 19 Ves. 335; *Widowson* v. *Earl of Harrington*, 1 Jac. & Walk. 532; 1 Scriven on Cop. 562, *et seq.*, 3rd edit.) Courts of equity show great indulgence to a dowress on account of the great difficulty of determining *à priori* whether she could recover at law, ignorant of all the circumstances, and the person against whom she seeks relief having in his possession all the information necessary to enable her to establish her rights. (6 Ves. 89.) Therefore a court of equity will assist a woman claiming dower, by putting out of her way a term which prevents her obtaining possession at law; but that is only as against an heir; (*Lord Dudley and Ward* v. *Lady Dudley*, Prec. Ch. 241;) or volunteer not a purchaser; (*Lady Radnor* v. *Rotherham*, Prec. Ch. 65; but see *Williams* v. *Lambe*, 3 Br. C. C. 264, and note by Eden;) the heir or volunteer being considered as claiming in no better right than she does. A person being seised of an estate of inheritance, subject to a term outstanding for a purpose still unsatisfied, married in 1796; in 1805 mortgaged the estate, and died in 1825: it was held, that the widow having a judgment in dower was relievable in equity against the outstanding term, and should have her dower subject to one-third of the charges affecting the term. Neither party in this case having got the legal estate under control, there was no pretence for saying that equity ought not to give the preference to the dowress, who was the first incumbrancer. (*Wilkins* v. *Lynch*, 1 Hayes' Ir. R. 98.) When any question of dower has arisen in courts of equity, and doubts have been entertained of the title to dower, the practice has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favour, by giving her a discovery of title deeds; by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. (*D'Arcey* v. *Blake*, 2 Sch. & Lef. 391.) If the right of dower is not controverted, the Court of Chancery has a concurrent jurisdiction, and writs of dower may be considered as having almost gone out of use. (*Mundy* v. *Mundy*, 2 Ves. jun. 122.) Upon the point whether a plea of a purchase for valuable consideration without notice be an answer to a bill by a dowress against a *bonâ fide* purchaser, Lord *Thurlow* held, that such a plea would bar an *equitable*, but not a *legal* title; (*Williams* v. *Lambe*, 3 Br. C. C. 264;) which was followed in *Collins* v. *Archer*, 1 Russ. & M. 292, where it was held, that such a plea would not be available against a *legal* title on a bill filed for on account of tithes. (See *Payne* v. *Compton*, 2 Y. & Coll. 457; *Bowen* v. *Evans*, 2 Jones & L. 263; Sugd. V. & P. 1071, 11th ed.; 1 Story's Eq. Jurisp. 510—512.) If the wife be divorced *à mensâ et thoro*, a court of equity will not assist her in recovering dower, but leave her to her remedy at law. (*Shute* v. *Shute*, Prec. Chan. 111; Shelford on Law of Marriage and Divorce, 420.)

Quare impedit.

(*c*) In a proceeding by *quare impedit* the plaintiff must prove that he, or those under whom he claims, have made a presentation to the living. This is the only legal evidence of the right. If it were otherwise, any person might set up a claim to present a clerk without a shadow of right, and contrary to reason and common sense. (*Cook* v. *Elphin*, 5 Bligh, N. S. 126.) In another case, where a party claimed to present in the fourth turn in right of one of four coparceners, it was held sufficient to allege in the declaration a presentation by the ancestor under whom all the coparceners claimed. (*Gully and others* v. *Bishop of Exeter*, 10 B. & Cr. 584; 5 Bing. 171; see 2 M. & P. 105; 4 Bing. 525.) An advowson descended to four coparceners, A., B., C. and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to present was disputed. F., however, presented, and on the next avoidance E. presented. It was held, that the presentation by E. and F. were to be counted, though they were usurpations on the rights of F. and D. respectively, and that on the seventh avoidance F. would be again entitled to present. (*Richards* v. *Earl of Macclesfield*, 7 Sim. 257. See *Pyke* v. *Bishop of Bath and Wells*, Bac. Abr. tit. Joint Tenants (H.), vol. iv. p. 482, 7th edit.) In *quare impedit* the ordinary

3 & 4 *Will.* 4, c. 27, s. 36.

could not counterplead the patron's title by setting up title in the Queen by lapse. (*Stone* v. *Bishop of Winchester*, 9 C. B. 62.)

It was not competent to the bishop to dispute the title of the patron, at least before collation, as two persons are never permitted to dispute concerning the title of a third in his absence. (*Apperley* v. *Bishop of Hereford*, 3 Moore & Scott, 102. See *Elvis* v. *Archbishop of York*, Hob. 316; and the 1st resolution in *Holland's case*, 4 Rep. 75 b.) As to a right of nomination by a majority, see *Earl Harrington* v. *Bishop of Lichfield*, 4 Bing. N. C. 77; 7 Scott, 371. If a deanery is in the presentation of the crown as patron, or if the crown has a right to nominate a person to the chapter, to be by them presented to the bishop for institution to the deanery, (a right of which many instances occur, and which is fully recognized in the books,) the proper remedy to admit the nominee of the crown is by *quare impedit*, and the Court of Queen's Bench never interferes by mandamus when that writ lies. (*Reg.* v. *Chapter of Exeter*, 12 Ad. & E. 512; see p. 534.)

By statute 4 & 5 Will. 4, c. 39, costs might be recovered in actions of *quare impedit*, and if plaintiff was nonsuited, &c., the defendant was, with the exception mentioned in the act, to have judgment. A bishop, who was a defendant in *quare impedit*, who failed upon demurrer, might be exempted from costs by the certificate of the court under that act. (*Edwards* v. *Bishop of Exeter*, 6 Bing. N. C. 146; 7 Scott, 652, 679; see 8 & 9 Vict. c. 51, for enabling archbishops and bishops in Ireland to charge their sees with the costs incurred by them in defending their rights of patronage in certain cases.)

(*d*) An *ejectment* is a possessory action, wherein the title to lands and tenements may be tried, and the possession recovered in all cases where the party claiming title has a *right of entry*, whether such title be to an estate in fee, fee tail, for life, or for years. (See 15 & 16 Vict. c. 76, ss. 168—221; 17 & 18 Vict. c. 125, s. 93; 2 Archbold's Pr., by Prentice, 1005—1066 (11th ed.).)

Saving Clauses.

Real actions may be brought until the 1st June, 1835.

37. Provided always, and be it further enacted, that when on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired (*e*).

(*e*) A writ of right was issued before the expiration of the time allowed by this section; after that time had expired the return day of the writ was altered, and the writ was resealed: it was held, that the writ must be considered as having been brought after the time limited by the act; and it was therefore superseded. (*Foot* v. *Collins*, 1 My. & Cr. 250.)

Saving the rights of persons entitled to real actions only at the commencement of the act, &c.

38. Provided also, and be it further enacted, that when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which, by virtue

3 & 4 *Will.* 4, *c.* 27, *s.* 38.

of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away (*f*).

Formedon still lies.

(*f*) The rights preserved by this saving were required to be enforced within the time allowed by the act, where a right of entry existed. By a will in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint; and in default of appointment, remainder to the heirs of his body, with remainder over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue: it was held in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remaindermen only capable of being enforced by real action. In such a case this section preserves the right of the remainderman to bring a formedon. (See *Doe* d. *Gilbert* v. *Ross*, 7 Mees. & W. 102; *Seymour's case*, 10 Rep. 96 a; *Doe* d. *Cooper* v. *Finch*, 4 B. & Ad. 283; 1 Nev. & M. 130, *Doe* d. *Jones* v. *Jones*, 1 B. & C. 238; 2 D. & R. 373; Sugd. V. & P. 613 (11th ed.); 1 Hayes, Conv. 237, (5th ed.).)

In formedon the tenant, having demanded a view after a general imparlance, the demandant issued a writ of *petit cape*, which was held to be irregular; (*Tolson* v. *Watson*, 3 Bing. N. C. 770;) because the latter writ can only be awarded where a default has been committed by the tenant, and in this case there had been no such default; instead of suing out that writ, the demandant ought to have counterpleaded or demurred. Demand of view in formedon may be withdrawn on payment of costs, when the delay in the application is sufficiently accounted for. (*Tolson* v. *Fisher*, 3 Bing. N. C. 783; 4 Scott, 569.) The tenant in a writ of formedon having demanded a view, for the avowed purpose of obtaining more time than he could obtain upon a judge's order for the time to plead, the demandant having counterpleaded that the tenant was in possession of the land demanded, and of none other in the parish, the court allowed the latter to withdraw the demand of view on payment of costs, notwithstanding the propriety of the step had been the subject of discussion in a preceding term. (*Tolson*, dem., *Watson*, ten., 5 Scott, 77.)

Descent cast, Discontinuance and Warranty.

No descent, warranty, &c. to bar a right of entry.

39. No descent cast, discontinuance, or warranty (*g*), which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

Descent.

(*g*) A mere entry is not possession. Continual or other claim will no longer preserve any right of entry, or distress or action. (*Ante*, sects. 10, 11, p. 191.) By the common law, descents of corporeal inheritances in fee simple took away the entry of the party who had right; (Litt. s. 385;) as if a disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim; (Litt. s. 414;) and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of

possession belonged to him, although the mere right was in the disseisee. (*Smyth* v. *Tyndall*, 2 Salk. 685.) The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry; (Litt. l. 3, c. 6;) nor did it affect copyhold or customary estates, where the freehold is in the lord; (*Doe* d. *Cook* v. *Danvers*, 7 East, 299;) nor cases where the party has not any remedy but by entry as a devisee. (Co. Litt. 240 b; 7 East, 321. On descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F)(G)(H); Com. Dig. Descent (D); Roscoe on Real Actions, 81—87; Adams on Ejectment.)

3 & 4 *Will.* 4, *c.* 27, *s.* 39.

A discontinuance of estates in lands and tenements is defined by Lord *Coke* to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter." (Co. Litt. 325 a.) At common law, an estate might be discontinued five ways: 1. By feoffment. 2. By fine. 3. By common recovery. 4. By confirmation: and 5. By release with warranty. A grant by deed or fine, of such things as lie not in livery, (Litt. s. 618; Co. Litt. 332 a,) does not work any discontinuance. A feoffment made after 1st Oct. 1845, has no tortious operation. (8 & 9 Vict. c. 106, s. 4.)

Discontinuance.

A discontinuance of an estate tail could only be made by a tenant in tail in possession; (*Doe* d. *Jones* v. *Jones*, 1 Barn. & Cress. 243;) and where tenant for life joined with a remainderman in tail in making a lease for lives, it was held not to create a discontinuance. (*Trevilian* v. *Lane*, Cro. Eliz. 56. See 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a.) But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance; thus, where lands were limited to A. for five hundred years, remainder to B. in tail, remainder to C. in tail, reversion to B. in fee; and B. levied a fine with proclamations to the use of himself in fee: it was held, that although the estate for years of A. continued, the estate of B. was discontinued, and the remainder in tail to C. divested. (*Doe* v. *Finch*, 1 Nev. & Mann. 130; and see the notes to that case, where much learning on the subject of discontinuance, &c. is collected; *S. C.*, 4 B. & Ad. 283. As to discontinuance, see Bac. Abr. and Com. Dig. Discontinuance; Co. Litt. 325 a, 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe* d. *Gilbert* v. *Ross*, 7 Mees. & W. 125.)

Warranty.

As to the law of warranty, see Com. Dig. *Guaranty;* Co. Litt. 365 a, 393 b, and notes by Butler; Bac. Abr. *Warranty;* Shepp. T. 181—203. In a case, where A., tenant for life, remainder to B. his wife for life, remainder to the heirs of the body of B. by A. to be begotten; and C. the issue of A. and B., in their lifetime levied a fine come ceo, &c., without proclamations, but containing a clause of warranty; and C. survived A. and B., and died leaving issue D.: it was held, that the right of entry of D. was taken away by the effect of the warranty. (*Doe* d. *Thomas* v. *Jones*, 1 Crompt. & Jerv. 528; *S. C.*, 1 Tyrw. 506.) By stat. 3 & 4 Will. 4, c. 74, s. 14, all warranties of lands which shall be made after the 31st December, 1833, by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. (See *post.*)

3 & 4 Will. 4, c. 27, s. 40.

X. Limitation of Time for the Recovery of Money charged on Land, Legacies, Arrears of Dower, Rent and Interest.

Charges and Legacies.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

40. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage (*h*), judgment (*i*), or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy (*k*), but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same (*l*), unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*m*), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, *or his agent*, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given (*n*).

It has been doubted whether the 40th section applies to principal and surety at all. (*Seager* v. *Aston*, 3 Jur., N. S. 484.)

This section extended to cases of claims to estates of intestates.

The act 23 & 24 Vict. c. 38, s. 13, enacts, "that after the thirty-first day of December, one thousand eight hundred and sixty, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given."

What cases come within this section.

(*h*) This section relates to actions brought to recover money, and these actions, in case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it. (*Doe* d. *Jones* v. *Williams*, 5 Ad. & Ell. 296.) This section is not to be construed as restricted to actions against real estate, but as affecting charges on real estate, whether sought to be enforced against either the real or personal representatives. (*O'Hara* v. *Creagh*, 1 Longfield & Towns. 65; *Sheppard* v. *Duke*, 9 Sim. 567.)

The statute cannot be applied to a case where there is no assignable

3 & 4 Will. 4, c. 27, s. 40.

person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by, and belongs to, the same person who is entitled to the interest. In 1773, a tenant for life paid off a charge of 25,000*l.* affecting the settled estates. He died in 1837, having in the meantime taken no steps for keeping the charge alive: it was held, that notwithstanding more than twenty years had elapsed, and that there had been no part payment or acknowledgment, the charge still existed in favour of his representatives, and had not been defeated by this section. (*Burrell* v. *Earl of Egremont*, 7 Beav. 206. See *Lord Kensington* v. *Bouverie*, 1 Jur., N. S. 577; *Baldwin* v. *Baldwin*, 4 Ir. Ch. R. 501; *Lord Carbery* v. *Preston*, 13 Ir. Eq. R. 455.)

And to bring a charge within the operation of this section, there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge. (*M'Carthy* v. *Daunt*, 11 Ir. Eq. R. 29.)

By a marriage settlement, dated in 1828, A. covenanted to transfer a sum of stock belonging to him to trustees upon trust to pay the dividends to himself for life, and then upon trusts for the benefit of the intended wife and the issue of the marriage. The stock was not transferred: it was held, that A. was not a trustee of it within the exception of the Statute of Limitations, but that it was a debt from him, and that notwithstanding his life interest time began to run against this debt from the execution of the settlement; for in this case the sum of stock which ought to have been brought into existence as a trust fund never had any existence, and it could not be assumed that a person had been paying himself the interest of a non-existing fund. (*Spickernell* v. *Hotham*, 1 Kay, 669.)

Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgage title until his death, and the same rule applies where the mortgagee is a tenant in common with others of the mortgaged estate. (*Wynne* v. *Styan*, 2 Phill. C. C. 303.)

F. was indebted to C. in 800*l.*, to secure which, in 1814, he granted to C. an annuity or rent of 100*l.*, to be issuing out of the lands of Dovegrove (held by F. under a lease from C.) *habendum* until thereby the 800*l.* and interest was paid: and F. covenanted to pay the annuity. In 1815, C. assigned the sum of 798*l.* (being the money then due on foot of the 800*l.*) and the annuity to H., and covenanted that the annuity should be regularly paid: and, being entitled to a sum of 2,000*l.* charged on lands of which he was himself tenant for life, he, as a further security, assigned 800*l.*, part of the 2,000*l.*, to a trustee, upon trust, in case the annuity should be unpaid for forty-one days, then, from time to time, to call in and receive such parts of the 2,000*l.* as should be sufficient to satisfy the arrears, and apply the same in payment thereof; and, after payment thereof, in trust for C. In 1816, the annuity was unpaid for more than forty-one days; but payments were made on the foot of it, up to October, 1821. In 1820, C. evicted the lands of Dovegrove, for non-payment of rent, and died in 1824. Under a decree to take an account of incumbrances affecting the lands charged with the 2,000*l.* made in a suit instituted in 1839, the master reported that the principal money which, in October, 1821, was due on foot of the 798*l.*, and to secure which the 800*l.* had been assigned, was still due; and that the residue of the 2,000*l.*, after payment of that sum, was due to the personal representative of C. Upon an exception taken by the personal representative of C., it was held, that the demand of H. was not barred by this section. The trust created by the deed of 1815 is a continuing trust, not to be executed once for all; and a present right to receive the 800*l.*, within the meaning of this section, did not accrue upon the non-payment of the annuity for forty-one days. A person entitled to a sum of money charged upon land assigned it to trustees, in trust to secure the payment of a debt, and after payment thereof in trust for himself. He cannot, as against his creditor, insist that the trust is barred by the Statute of Limitations. (*Heenan* v. *Berry*, 2 Jones & L. 303.)

In 1807, a devisee of one undivided third part of real estates which were subject to a term of 5000 years to raise money for payment of debts and

3 & 4 Will. 4, c. 27, s. 40.

legacies created by the will of a testator executed a mortgage in fee of such third part to bankers in trust to raise by sale or mortgage a debt due to them within three calendar months with interest, and also from time to time to raise any further advances which they might make. In 1809, a suit was instituted for administration of the estate of the testator. The mortgagees were not parties to that suit, they being in ignorance of their interest. Shortly afterwards both the mortgagor and the mortgagees became bankrupts. The assignees of the mortgagees were made parties to a supplemental suit in 1841. No steps had been taken by the bankrupts or their assignees to raise any money under the deed of 1807: it was held, that their claim was barred by the 2nd, 24th and 40th sections of this act, as no proceedings had been taken to substantiate the claim, and no part of principal or interest had been paid. The existence of the prior term did not affect the question, because the statute makes no distinction between a reversion and property in immediate possession. (*Humble* v. *Humble*, 24 Beav. 535; 3 Jur., N. S. 1289.)

In 1817, a tenant for life of freehold estates, subject to long outstanding terms, granted a personal annuity to the plaintiff, secured by warrant of attorney, on which judgment was forthwith entered up and docketed. Afterwards, in 1818 and 1819, he created other incumbrances, two of which were demises of the estate. The plaintiff did not sue out any elegit till 1822, when he did so. The inquisition being duly returned, he commenced an action of ejectment, which he discontinued in consequence of the outstanding terms. In a suit, to which the plaintiff was no party, the priorities of the other incumbrances were declared. The plaintiff, within twenty years from the last payment of the annuity, filed this bill against all the other parties, to have it declared that he was entitled to stand as first incumbrancer, and that the decree, &c., might be altered, or that the plaintiff might be at liberty to proceed at law, and the defendants might be restrained from setting up the terms. One of the defences was, that the plaintiff's annuity was usurious: the court held, that the plaintiff was not barred by the proceedings in the suit, and retained the bill for a year, giving the plaintiff leave to bring an action for the recovery of the freehold and restraining the defendants from setting up the terms, and also (though not specifically asked by the bill) from setting up the Statute of Limitations. The court also refused to interfere with the application of the rents in the meantime, or to grant inquiries as to the validity of the plaintiff's charge, holding, that *primâ facie* credit was to be given to the judgment; and that if the defendants had any equitable case to make against the judgment, they ought to adopt proceedings of their own, to establish that case. (*Smith* v. *Effingham*, 7 Beav. 357.)

Judgments.

(*i*) This section applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor. (*Watson* v. *Birch*, 15 Sim. 523; 11 Jur. 198; 16 Law J., Ch. 188.)

A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right. A judgment was obtained in 1813. It was revived by *scire facias* in 1828. A bill was filed in 1838, in the Court of Exchequer in Ireland, against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. On a plea of this statute, it was held, that the *scire facias* created new rights, and that the plea was no bar to the suit. (*Farrell* v. *Gleeson*, 11 Cl. & Fin. 702. See *Farran* v. *Beresford*, 10 Cl. & Fin. 319.) Revivor of a judgment on a *scire facias*, although there be no change of parties, gives a new present right to the conusee so as to prevent the operation of this section. (*Re Blake*, 2 Ir. Ch. R. 643.) A revivor by *scire facias* against the conusor of a judgment is sufficient to keep the judgment alive as against the terre-tenants of an estate of which the conusor was seised at the date of the rendition of the judgment, but which he had conveyed away before the issuing of the *scire facias*. (*Murray* v. *Clarke*, 4 Ir. Common Law R. 610.)

As to proceedings to revive a judgment, see 15 & 16 Vict. c. 76, ss. 128—134; Arch. Pr., Q. B., by Prentice, pp. 1112—1129 (11th ed.); and 19 & 20 Vict. c. 97, s. 10, by which a person entitled to revive a judgment, &c.,

is not entitled to any longer time for doing so by reason of his being beyond the seas, or imprisoned at the time his right accrued. (See *post.*) *3 & 4 Will. 4, c. 27, s. 40.*

In *Harty* v. *Davis*, 13 Ir. Law R. 23, it was decided that it is competent for the conusor of a judgment, by an acknowledgment given, no matter how long after the rendition of the judgment, provided it be within twenty years before the commencement of the action or suit, to keep the claim alive in favour of the person entitled to it; in fact, that this section operates only as a suspension of the remedy and not as an extinguishment of the right. (See *Waring* v. *Waring*, 5 Ir. Ch. R. 6.)

Before this statute a bill filed by one creditor on behalf of himself and the other creditors would prevent the Statute of Limitations from running against any of the creditors who came in under the decree. (*Sterndale* v. *Hankinson*, 1 Sim. 393. See *Watson* v. *Birch*, 15 Sim. 523.)

When a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for payment of the remainder: it was held, that he was barred by this section of the act from proving his debt before the master, and receiving payment rateably with the other creditors, the statute providing that such a claim should not be made after twenty years, unless in the meantime part of the money, either principal or interest thereon, should have been paid, or some acknowledgment should have been given in writing. Those being the only exceptions in the act, in which nothing was said of the case of a bill being filed by one creditor for the benefit of the rest, the court considered the case as a proceeding in equity to recover money upon a judgment upon which twenty years had run, and that it came within none of the exceptions of the statute. (*Berrington* v. *Evans*, 1 Y. & Coll. 484; see *Sterndale* v. *Hankinson*, 1 Sim. 393; *O'Kelly* v. *Bodkin*, 2 Ir. Eq. R. 369; *Peyton* v. *M'Dermott*, 1 Dru. & Walsh. 198.) Sir *E. Sugden*, L. C., thought that the case of *Berrington* v. *Evans* would not prevent a creditor from coming in under another creditor's bill, filed for the general benefit of creditors, where his demand would not have been barred had he himself filed the bill, and he comes in according to the decree and the course of the court. Courts of equity should be cautious not to render it necessary for every creditor to file a bill upon his debtor's death, in order to raise his demand where one suit is regularly instituted. (*Bermingham* v. *Burke*, 2 Jones & L. 714.) *Judgment barred by twenty years' delay.*

In 1806, bonds for payment of money were given by B., with warrants of attorney to confess judgment. The conditions were to pay the principal upon the death of B., with interest on the first bond from the day of its date, and on the latter from the day of the death of the obligor. The obligees were T., a son of the obligor, and C., in whom the bonds were vested as trustees of the marriage settlement of G. upon trusts for the benefit of the children of the marriage. In 1807, the real estates of B. were settled upon T., one of the obligees, subject to a term of 300 years, for raising 5,000*l.*, which was to be applied in satisfying a debt, and the remainder was to go towards payment of judgment and specialty debts then owing by B. The obligor died in 1816, leaving his son T. his executor, who survived his co-trustee C., and died in 1836. On the death of T., B. came into possession of the estates. On a bill filed by the children of G. against B. and his children, who were entitled to the estates subject to the term, and also against the owners of the term, praying for an account and payment of the amount due on the bonds, and that the same might be decreed to be well charged on the lands included in the term: it was held, that the bonds did not come within the description of judgment and specialty debts now due and owing, and therefore were not a charge upon the estate subject to the term, but that the children of G. were entitled to be paid out of the general assets of the obligor, of which the money to be raised by the term formed part. (*Burrowes* v. *Gore*, 6 H. L. Cas. 907; 4 Jur., N. S. 1245.) It was held, also, that the Statute of Limitations was inapplicable, because, although the money was secured by bonds, that was only an additional mode of securing the discharge of a trust which could not be discharged

3 & 4 *Will.* 4, *c.* 27, *s.* 40.

until the person who entered into the obligation, who was in the nature of a trustee, actually paid the money; and, further, because the person who was to pay the money to the trustees was liable beyond his legal obligation, which liability could only be got rid of by actual payment. (*Ib.*)

A mortgagee's suit for foreclosure and sale, instituted in 1811, during the lifetime of a debtor, is not such a suit as will prevent the Statute of Limitations running against a judgment creditor of that debtor, inasmuch as the judgment creditor could not have instituted such a suit. (*Bennett* v. *Barnard*, 12 Ir. Eq. R. 229.)

The Statute of Limitations does not begin to run against a judgment entered on a *post obit* bond, until the death occurs upon which the bond is payable. (*Barber* v. *Shore*, 1 Jebb & S. 610. See *Tuckey* v. *Hawkins*, 4 C. B. *655*, *post*.) A writ of *scire facias* will issue to revive a judgment given as a collateral security for the payment of an annuity, although more than twenty years have elapsed since it was signed, if payments of the annuity within that time have been made. (*Williams* v. *Welch*, 3 Dowl. & L. *565*.)

Legacies.

(*k*) Doubts were entertained whether this section extended to any legacies not charged on land; but it has been held to be also applicable to legacies payable out of personal estate only. (See *Paget* v. *Foley*, 2 Bing. N. C. 679; 3 Scott, 120; 1 Jebb & S. 343; *Sheppard* v. *Duke*, 9 Sim. 569; *Henry* v. *Smith*, 2 Dru. & War. 391.)

It was questioned in *Pawsey* v. *Barnes*, 20 Law J., Ch. 393; 15 Jur. 943, whether the share of the produce of real estate devised to trustees upon trust to sell was a sum charged on or payable out of land within this section.

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such, having been barred by lapse of time, it was held, that it could not be claimed under the charge of debts. V. C. *Shadwell* said, "taking it to be now admitted that the executor possessed assets of the testatrix sufficient to pay the legacy, the plaintiff must, in the first instance, show his right to sue for payment of it, as a legacy, out of the testatrix's personal estate. By the 40th section of 3 & 4 Will. 4, c. 27, the twenty years began to run from the time when the legatee attained twenty-one, which was in 1815, and if the right to sue for the legacy is barred by lapse of time, how can you revive that right in another form? By possessing assets of the testatrix, the executor became liable to pay the legacy, that is, he became in a certain sense a debtor to the legatee for the amount of it, but you cannot say that he or his estate continues liable, unless you show that the party claiming the legacy has come in time to demand it out of the assets possessed by him. You cannot, by treating him as a debtor, prolong the time for claiming the legacy; consequently the claim made by this bill cannot be sustained." (*Piggott* v. *Jefferson*, 12 Sim. 26.)

Money due on a bond by an ancestor is not a sum of money payable out of land, within this section. (*Roddam* v. *Morley*, 1 De G. & J. 1.)

Residuary property is within this section, where a present right to receive the residue had accrued thirty years ago, and it was not contended that any suit was necessary for ascertaining the amount of the residue. (*Prior* v. *Horneblow*, 2 Y. & Coll. 201.) With regard to the meaning of the word "legacy" in this section, *Shadwell*, V. C., was inclined to think that, where the act speaks of a legacy, it does in effect speak of a share of a residue; and it does not make any difference between a share of a residue and a legacy. But then that appeared to him to be a very important point, on which he was not bound to give an opinion then. (*Christian* v. *Devereux*, 12 Sim. 271.)

More than twenty years after the death of the testator, the representative of one of his executors and the residuary legatee under his will filed a bill against the representative of the co-executor to recover residuary assets of the testator alleged to have been possessed by the co-executor. It was held that the plaintiffs were barred by this section as to assets possessed by the executor more than twenty years before the filing of the bill, but they were

not barred as to assets possessed by him since that time. (*Adams* v. *Barry*, 2 Coll. C. C. 290.) 3 & 4 *Will.* 4, c. 27, s. 40.

The 25th section of this act qualifies the provisions of the 40th, where the suit is to compel a party to account for a breach of trust. (*Phillipo* v. *Munnings*, 2 My. & Cr. 309; see *ante*, p. 221.) A devise subject to legacies does not create a trust for payment, so as to take the case out of this section. (*Proud* v. *Proud*, 11 W. R. 101.) In *Dillon* v. *Cruise* (3 Ir. Eq. R. 70), it was decided, that where a trust is created for the payment of debts, the rights of a judgment creditor to the benefit of that trust is not affected by the 40th section of this act. Where a party receives money in the character of a trustee, the Statute of Limitations will not run in his favour. (*Ex parte Bolton*, 1 Deac. & C. 556; see *post*, as to presumption of payment of legacies.)

(*l*) It seems difficult to attach any definite meaning to the words "*present right*," &c. and to say whether those words mean such a right as the party could render effectual, or whether the disability to proceed effectually either at law or in equity prevents the right from being considered as having accrued within the meaning of this section. (See *Dillon* v. *Cruise*, 3 Ir. Eq. R. 82.) This section appears to be capable of two interpretations; the one construing the terms within twenty years next after a present right to receive the same to mean, within twenty years after the first present right to receive the same accrued to any person; the other construing them to mean within twenty years next after a present right, established or accrued under any of the securities mentioned in this clause. (2 Jebb & Symes, 109.) It will be observed that the word "*first*" does not precede the word "accrued" in the 40th section as it does in the 2nd section, and the omission of that word may in many cases make a material difference in the construction of this section. (*Ryan* v. *Cambie*, 2 Ir. Eq. R. 334.) *Tindal*, C.J., said, "by the words, 'present right to receive the same,' we understand an immediate right without waiting for the happening of any future event." (*Farran* v. *Beresford*, 10 Cl. & Fin. 334.) Meaning of words "present right to receive," &c.

Where a testator's estate is so heavily charged with mortgages that it is uncertain whether a legatee will ever be paid his legacy, it seems to be doubtful whether it can be said that he has a present right to receive it within this statute. (*Ravenscroft* v. *Frisby*, 1 Coll. C. C. 22.) Legatees whose legacies were charged on real estate, subject to prior charges, were not affected by lapse of time so long as any of the prior charges subsisted. (*Faulkner* v. *Daniel*, 3 Hare, 212.)

In 1816, A. mortgaged an estate to B., and covenanted to pay the mortgage-money; and, in July, 1817, A., and B. as his surety, conveyed the property to C., on trust, to sell and pay, first, a debt due from A. to C., which A. and B. also covenanted to pay; and, secondly, to pay B.'s debt. In August following, A. executed to B. an equitable charge on other property. In 1834, C. sold the estate, and applied the produce in part payment of his demand. In 1842, a bill was filed by B. against A. to realize the equitable charge: it was held, that, until the trust of the deed of July, 1817, was exhausted in 1834, the covenant in the deed of 1816 subsisted wholly unaffected by time; that the debt and the personal remedy to recover it subsisted at the time the bill was filed, and that the equitable charge was therefore then operative. (*Bennett* v. *Cooper*, 9 Beav. 252; 10 Jur. 507; 15 Law J., Ch. 315.) The existence of prior charges upon the property, upon which a legacy is charged, will not prevent "a present right to receive" within this section. (*Proud* v. *Proud*, 11 W. R. 101.)

(*m*) The entering into the receipt of rents and profits by a mere equitable mortgagee was held sufficient to keep the debt alive. (*Brocklehurst* v. *Jessop*, 7 Sim. 438.) Where a bond is entered into as a collateral security for money secured by mortgage, and the interest being in arrear, the mortgagee takes possession and remains in possession upwards of twenty years without taking interest otherwise than by the receipt of rents and profits, it seems questionable whether his remedy on the bond is not barred in equity as well as at law by the Statute of Limitations. (*White* v. *Hillacre*, 3 Y. & Coll. 597.) The person designated in this section as the person by whom money is payable must evidently mean, in the case of a claim by equitable Part payment.

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lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him in the only sense in which it is payable by any one. Unless he pay it he will lose his land, and it is obviously in that sense that the statute in such a case speaks of the money as payable. (*Toft* v. *Stephenson*, 1 De G., M. & G. 40.)

A payment of principal or interest of a sum of money charged on land by a person expressly or impliedly authorized to make it, will be equivalent to a payment by the party liable, so as to prevent the operation of the statute. But a payment by a mere stranger will not. (*Homan* v. *Andrews*, 1 Ir. Ch. Rep. 106. See *Linsall* v. *Bonson*, 2 Bing. N. C. 245.)

On the death of a mortgagor, in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of her daughters who were co-heirs, and she paid interest on the mortgage. In 1858, the mortgagee instituted a suit to realize his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval: it was held, that the daughters were bound by the payments, the widow being regarded as a stranger, or the agent of the infants, or the tenant of the mortgagee; the daughters were, therefore, either barred themselves or as against them; interest had been paid on the mortgage. (*Ames* v. *Mannering*, 26 Beav. 583.)

In 1824, a legatee, who was entitled to a legacy charged upon land devised to a tenant for life, mortgaged it to another; and at the same time the legatee and the tenant for life, as surety, gave a bond to the mortgagee as a collateral security for the amount. The legatee died in 1847, and the tenant for life in 1851. In the administration of the testator's estate, the mortgagee claimed to be paid the amount of legacy and interest due to him; and thereupon the widow and legal personal representative presented a petition, praying that the legacy might be ordered to be paid to her on the ground that the Statute of Limitations had barred the right of the mortgagee to recover the sum due on the mortgage. The widow alleged that no interest was paid by the legatee after 1828, but that the mortgagee had received, previous to and in 1846, interest in part from the tenant for life and surety: it was held upon both branches of the case, that the operation of the Statute of Limitations, and the acknowledgment by a co-obligor of a bond that the mortgagee was entitled to the legacy, and that the petition must be dismissed, but without costs. (*Seager* v. *Aston*, 3 Jur., N. S. 481; 26 Law J., Chan. 302.)

Acknowledgments in writing.

(*n*) Under the 40th section the acknowledgment of the right must be given in writing, signed by the person by whom the same shall be payable or his *agent*, to the person entitled or his *agent*. Under the 42nd section the acknowledgment must be given to the person entitled to the interest or *his agent*, signed by the person by whom the same was payable or *his agent*. The words of these two sections being nearly the same, it seems to be the more convenient course to arrange the decisions as to acknowledgments under both these sections in one note. As to acknowledgments under the 14th and 28th sections, see *ante*, pp. 194—196, 233—235.

Who is agent.

In reference to this and the other sections, where the acknowledgment to or by the party interested or *his agent* is made sufficient (see *ante*, p. 196), it will be necessary to consider who is in law the agent, and by what acts he is so constituted, where no direct proof of agency is produced. An agent need not be authorized in writing. (*Coles* v. *Trecothick*, 9 Ves. 250.) Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority. (*James* v. *Bright*, 5 Bing. 533; 2 M. & P. 120, per *Best*.) When one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command. (*Foster* v. *Bates*, 12 Mees. & W. 233; see *Trulock* v. *Robey*, 12 Sim. 407, *ante*, p. 233.) So a subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority. (*Maclean* v. *Dunn*, 1 M. & P. 761; 4 Bing. 722; see *Ex parte Skinner*, 1 Deac. & Ch. 403; *Ex parte Machul*, 1 Rose, 447; *Richardson* v. *Anderson*, 1 Camp. 43, n.; *Rucker* v. *Cammeyer*, 1 Esp. 105.) It has been held, that the several statutes of limitation, being *in pari materiâ*, ought to receive an uniform construction, notwithstanding any

3 & 4 Will. 4, c. 27, s. 40.

slight variations of phrase, their object and intention being the same. (5 B. & Ald. 215; see *Anon.* Lofft, 398; *Doe* d. *Tennyson* v. *Lord Yarborough*, 7 Moore, 258; 1 Bing. 24.) The principle of some of the cases, as *Whippy* v. *Hillary*, 3 B. & Ad. 399; 5 Carr. & P. 209, *post*, and *Routledge* v. *Ramsay*, 8 Ad. & Ell. 221; 3 Nev. & P. 319, *post*, decided upon the statute 9 Geo. 4, c. 14, although in language different from that of 3 & 4 Will. 4, c. 27, ss. 40, 42, may be applicable to some cases arising under the latter statute. (*Holland* v. *Clark*, 1 Y. & Coll. N. C. 169.) But other decisions under 9 Geo. 4, c. 14, s. 1, were not applicable to cases arising under the 40th and 42nd sections of this act, for the word "agent" is omitted in the first section of the former act. (See *Hyde* v. *Johnson*, 3 Scott, 389; 2 Bing. N. C. 778; *ante*, p. 196.) Therefore, an acknowledgment of a debt signed by an agent of the debtor did not, before the act 19 & 20 Vict. c. 97, s. 13, (see *post*,) take the debt out of the operation of that act. All that the act of 3 & 4 Will. 4, c. 27, ss. 40, 42, requires is, that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. Thus where an estate was devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A., an acknowledgment of a debt in writing, *signed by the trustee* or his agent, was held to be sufficient to preserve the creditor's right of suit for twenty years after the acknowledgment was given; but such an acknowledgment will not impose on the trustee any personal liability to pay the debt. (*Lord St. John* v. *Boughton*, 9 Sim. 219.)

Acknowledgments under 40th and 42nd sections.

On March 4, 1811, an agreement was entered into for the purchase of freehold land for 6,300*l.* to be paid on the 13th May, 1811, and the purchaser was immediately put into possession. In 1827, the purchaser before any conveyance was made to him and before he had paid any part of the purchase-money, died, having devised the land to trustees. The trustees disclaimed and others were appointed by the Court of Chancery. In 1834, the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt, stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien, to which this statute was set up as a defence by answer: it was held, that the trustees were persons by whom the purchase-money was payable within the meaning of this section; also that the acknowledgment of their attorney in 1834 was sufficient within the meaning of the exception in the act to withdraw the case from its operation, and for this purpose to bind the *cestuis que trustent*, although the trustees were appointed not by or under any power contained in the will, but by the Court of Chancery; also, that the answers claiming the benefit of the statute must be considered as alleging that no acknowledgment of the right to receive the money had been given or signed by the person by whom it was payable or his agent; and that therefore, although the bill did not allege any acknowledgment to have been made, the plaintiffs were entitled to put the acknowledgment in evidence on an appeal, although it was not read or proved at the original hearing. Also, that this only applied to the trustees who had admitted the agency of the attorney, but that, as against other defendants who had not made a similar admission, the assignees were entitled to an inquiry as to any acknowledgment having been given. (*Toft* v. *Stephenson*, 1 De G., Mac. & G. 28; 15 Jur. 1187; 21 Law J., Chanc. 129; 7 Hare, 1.)

In admitting acknowledgments, under the 40th section, to the person entitled or his agent, the court has not restricted itself within narrow limits. If it be made in a schedule, affidavit or answer, it is sufficient, although it may be said that in those cases it is made to the court and not to the party. *Sugden*, L. C., thought the decisions right, and that they proceeded upon a *liberal* but yet a fair and just construction of the statute. (3 Jones & L. 677.) In December, 1821, A. and B., creditors of D. deceased, jointly advanced a sum of money to save leaseholds of D. from eviction for nonpayment of rent; as between themselves the money was advanced in equal moieties: to a bill filed by B. against A., and the devisees in trust of D., to raise the sum so advanced, the trustees, in April, 1824, put in an answer admitting the payment of the salvage money. In a suit instituted in January, 1844,

3 & 4 *Will.* 4, c. 27, *s.* 40.

for a sale of D.'s estate, A. filed a charge on foot of his salvage claim: it was held, that the acknowledgment contained in the answer of April, 1824, was sufficient to take the claim out of the bar of this section. (*Blair* v. *Nugent*, 3 Jones & L. 673.)

On a bill filed in April, 1840, by a party as administrator of his wife, seeking the recovery of the principal and interest of a legacy of 150*l.* bequeathed to her by a testator who died in 1811. The legatee attained her majority when the legacy vested, and married before the year 1825. In December, 1825, the two executors of the testator gave the plaintiff a written acknowledgment, whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy and 50*l.* interest thereon. It was held to be clear that this document precluded the defendants from all benefit under this section. (*Holland* v. *Clarke*, 1 Y. & Coll. N. C. 151.)

In a case where it was contended that an acknowledgment by the debtor to a third person took a case out of this section, *Alderson*, B., said that will not do; there must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute. Lord Tenterden's Act, 9 Geo. 4, c. 14, explains that. (*Grenfell* v. *Girdlestone*, 2 Y. & Coll. 676.) In order that an acknowledgment may have the effect of taking a demand out of the operation of the 42nd section of this statute, the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand. (See *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 676.) Therefore, where a bill was brought against two executors for payment of a legacy bequeathed to the plaintiff's wife, and for arrears of interest accrued since her death; and the plaintiff, with a view of taking his demand for interest out of the operation of the 42nd section of the statute, relied on certain letters written by one of the executors to his the plaintiff's attorney: it was held, 1st. That the letters had not the effect ascribed to them by the plaintiff, because they had been written by the party not for the purpose of charging himself but of throwing the burden of payment on the co-executor; 2ndly. That even if they had been written for the purpose of charging himself, it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out letters of administration to his wife. (*Holland* v. *Clarke*, 1 Y. & Coll. N. S. 151.)

Where mortgagees of the works and tolls of a harbour company agreed in 1818 that the exchequer loan commissioners making an advance of money under the provisions of the acts of parliament regulating them, the tolls of the harbour should be applied, first, in paying interest on the commissioners' advances; secondly, in paying interest on prior mortgages; and, thirdly, in reduction of the principal until it was paid off. The tolls being insufficient to keep down the interest on the advances, they sold the subject of their security to a railway company, with notice of the agreement. In 1833, before the sale to the railway company, one of the mortgagees wrote to the treasurer of the harbour company complaining of nonpayment of interest. The treasurer replied that no interest had been paid since 1821, as the income of the harbour left but a small surplus, after payment of expenses; but that he was at all times willing to give information to the mortgagees, or to any other gentleman who had embarked property in the undertaking. It was held, that the agreement and the correspondence took the case out of the statute, both as to principal and interest. The letter was considered a sufficient acknowledgment within this section, and that from the time of the entry of the commissioners, which was within six years from the date of the letter, the statute could not operate, as the case came within the proviso of this section. (*Jortin* v. *South-Eastern Railway Company*, 6 De G., Mac. & G. 270; 1 Jur., N. S. 433; 24 Law J., Ch. 343.)

A judgment was obtained on a joint bond and warrant of attorney against A. and B. in 1815; B. had joined in these as a security for A. On the 20th March, 1820, A. wrote to V.'s agent, "You have inclosed 150*l.* to my credit on account of V.'s interest;" and by the account book kept by V.'s agent (since dead), appeared an entry by the agent of 17th March, 1820,

3 & 4 *Will.* 4, *c.* 27, *s.* 40.

charging himself with a bill for 30*l.* drawn by A., and 100*l.* cash from A. In 1822, V.'s attorney applied by letter to B. calling for the amount of payment of the above debt, and B. on that occasion wrote to V.'s attorney, acknowledging the receipt of his letter, "applying for payment of his, B.'s and A.'s joint bond." And soon after B.'s agent wrote a letter to V.'s attorney, enclosing a proposal of terms upon which matters should be arranged by A., and said, "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839, for an account of the sum due on the judgment: it was held, that it appeared that there was a payment on account of interest, and a sufficient acknowledgment to take the case out of the 40th section of this statute, and that the statute was retrospective. (*Vincent* v. *Willington*, 1 Longfield & T. 456.) It seems that an affidavit made in the suit may be a sufficient acknowledgment within the 42nd section of this act. (*Tristram* v. *Harte*, 1 Longfield & T. 186.)

An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of this section. (*Millington* v. *Thompson*, 3 Ir. Ch. R. 236.)

Master's report not an acknowledgment.

Where certain suits were pending, in which A. and B. were defendants, and a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and amongst others he reported B. a creditor by a judgment affecting them for a certain sum: it was held, that this was not such an acknowledgment in writing by the agent of A. and B., or his agent, as will take the case out of the Statute of Limitations, the Master's report not being an acknowledgment in writing within the meaning of the act, nor can the Master be deemed an agent. The act contemplates such writing as may be evidence of a right, and the agent such a one as is acting directly under authority. The Master's report is a public document, and not the property of either party; he acts judicially, and the report is his act, and not the act of the suitor; he is appointed by the Lord Chancellor's authority, and his acts are binding, whether he is recognized as the agent or not. (*Hill* v. *Stawell*, 2 Brady, Adair & Moore, 392; 2 Jebb & S. 389.) In this case the creditor who was held to be barred was not a party to the suit. (See *Wrixon* v. *Vize*, 3 Dru. & War. 123; *ante*, p. 254.)

Plea under this section.

The 40th section of this statute may be pleaded to a bill of foreclosure; a foreclosure suit being, in fact, a suit for the recovery of the money secured by the mortgage, although, according to what appears upon the face of the bill, there is nothing to prevent the plaintiffs from bringing an ejectment. (*Dearman* v. *Wyche*, 9 Sim. 570. See observations of *Sugden*, L. C., on this case in *Wrixon* v. *Vize*, 3 Dru. & War. 120, 121; *ante*, p. 235.) A plea of this statute ought not to deny by answer statements in the bill, which are in direct contradiction to the averments necessary to support the plea; but an answer in support of the plea ought to be confined to those statements in the bill, which allege facts ancillary to or as affording evidence of statements which are directly negatived by the requisite averments in the plea. (*Dearman* v. *Wyche*, 9 Sim. 570.) A plea relying upon the 40th section of this act should both state the commencement of the period of limitation and negative the cases of exception in that section. A plea was held defective which did not expressly aver that the action was not brought within twenty years next after a present right to receive the sum secured by the judgment had accrued. And it did not in terms aver that a present right to receive the sum secured by the judgment had accrued to the conusee, or to any other person, twenty years before the action brought, or at any specific time. (*Fortescue* v. *M'Kone*, 1 Jebb & S. 341.) Where a creditor's suit was commenced before the passing of this statute, it was held, that the claim of a judgment creditor, who subsequently came in and proved his debt in due course under the decree, was unaffected by the operation of that statute. Had it been necessary to make a special application to the court for liberty to prove the debt, grounded upon a denial of the creditor's knowledge of the existence of the suit, it would have been otherwise. (*O'Kelly* v. *Bodkin*, 2 Ir. Eq. R. 361.) A party insisting upon the Statute of Limitations, as a bar to a demand against him, must set up that defence upon the first opportunity; otherwise a party is contesting a question of right, when

3 & 4 *Will.* 4, c. 27, s. 40.

in fact there was no legal question to be decided; for if the statute be a bar, the cause ought to stop when the defence is set up. (*Costello* v. *Burke*, 2 Jones & L. 669.)

A defendant not being required by the bill to do so did not file any answer. The cause came on upon a motion for a decree, when the defendant at the bar pleaded the Statute of Limitations, the court, holding that a defendant who intends to set up such a defence ought to do so by answer, disallowed the objection thus taken. (*Holding* v. *Barton*, 1 Sm. & G., App. 25.)

Upon a motion for a decree, a defendant may have the benefit of the Statute of Limitations, though it is only set up by his affidavit. (*Green* v. *Sneed*, 30 Beav. 231; 31 L. J., Chanc. 320.)

A defendant who has answered cannot have the benefit of the Statute of Limitations at the hearing, unless he has insisted on it by demurrer, plea or answer. (*Harrison* v. *Borwell*, 10 Sim. 382.)

In the joint answer of a husband and wife to a creditors' bill for payment out of an estate of which the wife was administratrix, the wife alone set up the Statute of Limitations as a defence to the suit: it was held, that the interest of the wife was not so merged in the coverture that the court would disregard her separate defence, and that the statute was for the protection of the estate sufficiently pleaded by the wife alone. (*Beeching* v. *Morphew*, 8 Hare, 129.)

When it appears on the face of the bill that the cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the Statute of Limitations, but may demur. (*Hoare* v. *Peck*, 6 Sim. 51; *Tyson* v. *Pole*, 3 Y. & Coll. 275. See *Foster* v. *Hodgson*, 19 Ves. 180; *Earl Deloraine* v. *Browne*, 3 Br. C. C. 633; and authorities cited by Belt; *Plunket* v. *Earl of Burlington*, 3 Y. & Coll. 266; *Ferguson* v. *Livingston*, 9 Ir. Eq. R. 203; *Bampton* v. *Birchall*, 5 Beav. 67; 1 Dan. Ch. Pr. 515, 516 (2nd ed.).) Where the cause of action had not arisen within six years before the commencement of the suit, a demurrer to a bill of discovery was allowed. (*Smith* v. *Fox*, 6 Hare, 386.) Notwithstanding the principal question in the suit be the right of the plaintiffs to two annuities, one of which only has been paid, the defendant, on a decree being made for the arrears of the unpaid annuity, cannot set up the Statute of Limitations as limiting the period of the account, if the benefit of the statute be not claimed upon the pleadings. (*Rock* v. *Callen*, 6 Hare, 531; 12 Jur. 112; 17 L. J., Chanc. 144.) Averments in a plea of the Statute of Limitations, negativing facts that would defeat the plea, but which are not stated in the bill, are surplusage, but do not vitiate the plea. A plea of the Statute of Limitations need not negative the usual *general* allegation that the defendant has in his custody documents relating to the matters contained in the bill. (*Forbes* v. *Shelton*, 8 Sim. 335.) It is not competent for a defendant failing in the defence made by his answer to set up another defence dependent upon matters of fact not put in issue by his answer, and which the plaintiff has no opportunity of disproving or explaining. (*Persse* v. *Persse*, 1 West, P. C. 110.)

When a defendant seeks to have the advantage of the 42nd section of this statute he must in general rely upon it in his pleading. But where a third party (the mortgagee of the person who created the charge, to raise which the bill was filed) omitted to rely upon the statute expressly, but denied the existence of the debt in his answer, in such terms as was considered to amount substantially to a reliance upon the statute, the court would not deprive him of the benefit of the statute; but holding that the question upon the bar of the statute was for the court, and not for the officer, the plaintiff, under the circumstances, was allowed to make out any case he was able before the officer, to bring his claim within either of the exceptions to the act, and the officer was directed to report specially thereon. (*Cummins* v. *Adams*, 2 Ir. Eq. R. 393.)

In the case of *Welsh* v. *Welsh*, 1 Jones & Carey, 232, it was decided by the Court of Exchequer in Ireland, that a defendant, who does not rely on the Statute of Limitations in his answer, cannot resort to it in his discharge. Lord Chancellor *Plunkett* said, as to that decision in the Exchequer, which

has been cited to show that the defence of the Statute of Limitations could not be set up in the office where it had not been relied on in the answer, "I would require to have that proposition fully considered before I adopted it in its full extent. The consequences to creditors in the administration of assets in the office would be quite alarming. It may be quite right to apply it in a case between plaintiff and defendant; but it seems to me to be impossible to apply it in a case like the present." (*Drought* v. *Jones*, 2 Ir. Eq. R. 306.) 3 & 4 *Will.* 4, c. 27, s. 40.

The Statute of Limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. If the action was commenced before the bill was filed, the plea must aver that the cause of action did not accrue within six years before the action was brought. (*Macgregor* v. *East India Company*, 2 Sim. 452.) A plea of the Statute of Limitations to a bill of discovery in aid of an ejectment was allowed. (*Scott* v. *Broadwood*, 2 Coll. C. C. 447.) Where no relief can be had at law, on account of lapse of time, a suit for discovery and relief in an action at law cannot be sustained. (*Fisher* v. *Price*, 11 Beav. 199.)

A plea, pleading first the statute 21 Jac. 1, c. 16, and afterwards the stat. 9 Geo. 4, c. 14, is not double; for those acts, although passed at different times, are to be considered as making jointly one law. (*Forbes* v. *Shelton*, 8 Sim. 335.) Leave was given to file a double plea to an ejectment bill, namely, not heir, and secondly, the Statute of Limitations. (*Bampton* v. *Birchall*, 4 Beav. 558.)

To a bill filed for an account of coal against the representatives of the lessees of a mine, the defendants pleaded the Statute of Limitations in respect of the account, and averred that they had not taken upon themselves the performance of the covenants in the lease. It was held, that this being a plea of the statute, and a plea of liability never incurred, the two things were inconsistent. The defendants also pleaded the statute as to further accounts of coal obtained from land not comprised in the original lease; and the defendants then averred that they had practised no fraud or concealment in obtaining such coal. It was held, that this raised an issue not contained in the bill, and not supporting the plea, and was inconsistent with the plea. Separate pleas may be put in to separate parts of a bill. (*Emmott* v. *Mitchell*, Law J. 1845, Ch. p. 179.)

Before this statute it seems that if the mortgagor continued in possession, and there had been neither payment nor demand of any principal or interest for twenty years, that it was sufficient to raise the presumption of payment; (1 Ch. R. 59, 105; *Trash* v. *White*, 3 Br. C. C. 289; *Christopher* v. *Sparke*, 2 Jac. & Walk. 228; *Cooke* v. *Soltau*, 2 Sim. & Stu. 154; *contrà Joplis* v. *Baker*, 2 Cox, 118; *Leman* v. *Newnham*, 1 Ves. sen. 51;) but such presumption was liable to be rebutted by circumstances, and payment of interest on part of the debt was sufficient to keep the whole alive. (*Leftus* v. *Smith*, 2 Sch. & Lef. 642.) Presumption of payment.

If a judgment creditor has lain by for twenty years without any effort to enforce his judgment, and it has not been acknowledged by the debtor within that time, it will be presumed to be satisfied. (Peake's Ev. 25, n.; Coote on Mortgages, p. 76. See 4 Ann. c. 16, s. 12; *Kemys* v. *Ruscomb*, 2 Atk. 45.) Of Judgments.

It was held, that the presumption arising from lapse of time of a judgment having been satisfied, was not rebutted by evidence of the debtor having been in extremely embarrassed circumstances, and, in the opinion of those who knew him, incapable of paying the debt secured by the judgment. (*Williams* v. *Gorges*, 1 Campb. 217.) Upon a bill filed by a creditor to enforce a judgment of twenty-eight years' standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during a great part of that period: it was held, that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that, to obtain relief in equity, he was bound under the circumstances to show to demonstration that the judgment had been satisfied. (*Grenfell* v. *Girdlestone*, 2 You. & Coll. 662. See *White* v. *Parnther*, 1 Knapp, 228, 229.) Presumption of satisfaction.

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Lien for purchase-money unpaid.

Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be (*Chapman* v. *Tanner*, 1 Vern. 267; *Pollexfen* v. *Moore*, 3 Atk. 272; and see 1 Br. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth* v. *Symmons*, 15 Ves. 329) or be not (*Smith* v. *Hibbard*, 2 Dick. 730; *Charles* v. *Andrews*, 9 Mod. 152) conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold, (*Winter* v. *Lord Anson*, 3 Russ. 488,) gives the vendor a lien on the land for the money. So, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced. (*Lacon* v. *Mertins*, 3 Atk. 1; see Sugd. V. & P. 857 (11th ed.).) But it seems that there will be no lien for money paid where the contract is illegal by statute. (*Ewing* v. *Osbaldiston*, 2 M. & Cr. 88.) And in those cases in which the lien would subsist as between vendor and vendee, the vendor shall have the lien against a third person, who had notice that the money was not paid. (*Mackreth* v. *Symmons*, 15 Ves. 349; 3 Atk. 373, *contrà*.)

But this implied contract may be rebutted by clear and irresistible evidence, showing the intention of the parties that the estate shall not be a security for the money. (*Mackreth* v. *Symmons*, 15 Ves. 329; see 16 Ves. 278.) The lien may subsist notwithstanding a personal security is given for the money, whether by bond, bill of exchange (*Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Grant* v. *Mills*, 2 Ves. & B. 309; *Ex parte Peake*, 1 Madd. 346) or promissory note. (*Gibbons* v. *Baddall*, 2 Eq. Cas. Abr. 682, n. b.)

The taking drafts which are dishonoured will not *per se* deprive the vendor of his right of lien. (*Hughes* v. *Kearney*, 1 Sch. & Lef. 136; see *Grant* v. *Mills*, 2 Ves. & B. 306.) The right of lien applies also where the vendee becomes a bankrupt against his assignees. (*Ex parte Peake*, 1 Madd. 346.)

By an agreement for the sale of an estate, the purchase-money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase-money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal, with interest, within twelve months after the death of the vendor, and of interest in the meantime. The vendor was held to have a lien on the estate for the amount of the bond. (*Winter* v. *Lord Anson*, 1 Sim. & Stu. 488; 3 Russ. 488.) A vendor was held not to have waived his lien on the estate sold, by taking the promissory note of the vendee, and receiving its amount by discount. (*Ex parte Loaring*, 2 Rose, 79.)

Where there is no special agreement extinguishing the lien, the question is, what was the intention of the parties. Lord *Eldon* observes (*Mackreth* v. *Symmons*, 15 Ves. 350), "the modern authorities upon this subject have brought it to this inconvenient state: that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken."

A mortgage of other lands for the whole or part of the purchase-money, (*Nairn* v. *Prowse*, 6 Ves. 752,) or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security, (*Bond* v. *Kent*, 2 Vern. 281; 1 Sch. & Lef. 135,) has also been thought sufficient for the purpose of discharging the equitable lien on the purchased estate in the first instance, or wholly, and in the second instance to the amount of the money remaining on the personal security, although Lord *Eldon* seems to have held the former not conclusive. (15 Ves. 341.)

A covenant between the vendor and purchaser, that the purchase-money should be repaid within two years after resale, discharges the vendor's lien. (*Ex parte Parkes*, 1 Glyn & J. 228.) So where the consideration for the conveyance is expressed to be the covenant for the payment of an annuity and a sum in gross. (*Clarke* v. *Royle*, 3 Sim. 499; see *Stuart* v. *Ferguson*,

1 Hayes, 452.) A vendor who has taken, as a security for part of the purchase-money, the bond of the vendees, and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendees, establish a lien on the entire estate. (*Capper* v. *Spottiswoode*, 1 Taml. 21; and see *Blackburn* v. *Gregson*, 1 Cox, 90.) The mere security for the payment of the price stated in a conveyance will not discharge the vendor's lien. The security is considered as simply for payment of the price, and if the price be not paid the lien subsists. The proper way of deciding questions of this kind is to look at the instruments executed by the parties, and to declare upon such instruments what the intention of the parties was. (*Winter* v. *Lord Anson*, 3 Russ. 488.) Thus, where a vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchasers should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events but not in all events, pay a further sum of 3,000*l.*; this is not a security, but a substitution for the price, and the lien of the vendor is discharged. (*Parrott* v. *Sweetland*, 3 Myl. & Keen, 655.)

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The lien of a vendor upon the land and upon the title-deeds, until the purchase-money be paid him, does not apply to a conveyance to the purchaser executed by some but not all the parties, where the contract has gone off by the vendor's default; and if there be any lien on such conveyance, it is vested in the purchaser as a security for his deposit. (*Oxenham* v. *Esdaile*, 3 Y. & J. 262; 2 Y. & J. 493.)

A party who executes a deed is estopped in a court of law from saying that the facts stated in that deed are not truly stated. Therefore, where the whole purchase-money of the premises was acknowledged to have been well and truly paid, the party is precluded from saying, in an action at law, that any part of that money remains due; and parol evidence that it was never paid, being inconsistent with the deed, is not admissible. (*Baker* v. *Dewey*, 1 B. & C. 704; see *Lampon* v. *Corke*, 5 B. & Ald. 606.)

The lien subsists, notwithstanding the consideration is expressed in the deed to be paid, and a receipt is indorsed upon it, (15 Ves. 337; *Coppin* v. *Coppin*, 2 P. Wms. 295,) and in such a case a court of equity will grant relief as well as discovery. (*Ryle* v. *Haggie*, 1 Jac. & Walk. 234.)

A vendor conveyed without receiving his purchase-money; the receipt of it was indorsed on the deed, and the title-deeds delivered to the purchaser. The purchaser then made a mortgage by deposit and absconded: it was held, that as between the vendor's lien for his unpaid purchase-money and the right of the mortgagee, that the possession of the title deeds, and the fact of the indorsement of the receipt on the deed, gave the mortgagee the better equity. (*Rice* v. *Rice*, 2 Drew. 73.)

An unpaid vendor is entitled to proceed as a mortgagee, and to have the estate resold, and the produce applied, first, to pay the expenses of resale, and, secondly, the purchase-money. (*Hope* v. *Booth*, 1 B. & Ad. 498.)

Presumption of payment of legacies.

In an early case it was decided that the Statute of Limitations could not be pleaded in bar to a suit for a legacy, although it had been due twenty years. (*Anon.* Freem. C. C. 22; see also 1 Vern. 256.) But though the statute could not be pleaded, yet in many cases it was adopted where there was no fraud, and the parties had permitted the assets to be distributed without claiming the legacy for thirty-five or forty years, and was a good defence by way of answer upon the ground of raising a presumption of payment. (*Higgins* v. *Crawford*, 2 Ves. jun. 572; *Pickering* v. *Stamford*, *Ib.* 582; *S. C.*, 4 Br. C. C. 214; *Jones* v. *Turberville*, *Id.* 115; *S. C.*, 2 Ves. jun. 11.) And it seems that the lapse of twenty years after the testator's death without any demand of the legacy would have been sufficient to afford a presumption of payment. (*Montressor* v. *Williams*, 1 Rop. on Leg. 792 (2nd ed.).) In the case of *Campbell* v. *Graham* (1 Russ. & Mylne, 453), in which this doctrine was much considered, a party bought a legacy, which was assigned to him twenty-seven years after the testator's death, and four years more elapsed before the filing of the bill: and it was held, that he was barred by length of time, and on an appeal to the House of

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Lords such decision was affirmed. (2 Cl. & Finn. 429.) Under particular circumstances, thirty-nine years was held not sufficient to raise the presumption of the payment of legacies. (*Shields* v. *Rice*, 3 Jur. 970.) But it has been held, that a legatee might recover a legacy, though ten years had elapsed without any demand. (*Lee* v. *Brown*, 4 Ves. 362.) From mere lapse of time the only presumption that can be drawn is this, that which ought to have been done at the commencement of the period has been done at the end. Presumption of payment of a legacy from mere length of time cannot be inferred where such payment is out of the ordinary course of transactions. A payment *in presenti* of a sum due *in futuro* cannot be presumed without evidence of it. (*Price* v. *Hornblow*, 2 Y. & Coll. 206.)

Legacies charged on real estate were held, under the circumstances of the case, to be payable, notwithstanding the lapse of more than forty years from the testator's death to the filing of the bill; the statute 3 & 4 Will. 4, c. 27, not being applicable. (*Ravenscroft* v. *Frisby*, 1 Coll. 16; 13 Law J. (N. S.) Ch. 153.)

Arrears of Dower.

Time of Limitation fixed Six Years.

No arrears of dower to be recovered for more than six years.

41. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit (*o*).

(*o*) In equity, as at law, there was before this act no limitation to a claim of the *arrears* of dower. (*Oliver* v. *Richardson*, 9 Ves. 222.) And though at *law*, by the death of the heir, the widow lost all arrears incurred in his lifetime, (*Mordaunt* v. *Thorold*, 3 Lev. 375,) yet in equity, if she had filed her bill before the death of the heir, she was entitled to the mesne profits (*Curtis* v. *Curtis*, 2 Br. C. C. 620) from the time her title accrued, (*Dormer* v. *Fortescue*, 3 Atk. 130,) provided that she had made an entry; (*Tilley* v. *Bridger*, 2 Vern. 519; Prec. in Ch. 252;) and so in case of her death were her representatives. (*Wakefield* v. *Child*, 1 Fonbl. Eq. 159, n.; see 3 & 4 Will. 4, c. 105, for amending the law of dower, *post*; *Bamford* v. *Bamford*, 5 Hare, 203.)

Arrears of Rent or Interest.

Time of Limitation fixed Six Years.

No arrears of rent or interest to be recovered for more than six years.

42. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent (*q*): provided

nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (*r*). *3 & 4 Will. 4, c. 27, s. 42.*

(*q*) A "charge," properly so called, and a "mortgage" are not synonymous; but although the word charge does not include mortgage, yet as the 40th section of this act expressly mentions mortgages, they must be included in this section of the act, from the necessity of construing those two clauses by reference to each other. (*Bolding* v. *Lane*, 8 Jur., N. S. 407; 10 W. R. 548.)

The words in this section "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears might be enforced. (*Bolding* v. *Lane*, 9 Jur., N. S. 506; 8 Jur., N. S. 407. See cases on acknowledgments, *ante*, pp. 254—257.)

(*r*) This section is prospective in its operation, and not retrospective, and therefore does not affect parties to any suits which were commenced before its provisions took effect. (*Paddon* v. *Bartlett*, 3 Ad. & Ell. 884; 5 Nev. & M. 383; *Peyton* v. *M'Dermot*, 1 Dru. & Walsh, 198. In *Vincent* v. *Willington*, 1 Longfield & T., the statute was held to be retrospective.) This section not retrospective.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by nonpayment, except that under this act the amount to be recovered is limited to six years. (*Archbold* v. *Scully*, 9 H. L. C. 360. See *ante*, p. 166.)

A life annuity was directed by will to be paid by trustees out of the interest of trust funds, and, subject thereto, the income was given to a person for life, and the corpus to other persons. The income of the fund having been insufficient to pay the annuity: it was held, that the arrears were a charge upon the corpus, and that the tenant for life was only bound to keep down the interest of the arrears, and that the claim for arrears beyond six years was not barred by the statute, as there was a trust for the payment. (*Playfair* v. *Cooper*, 17 Beav. 187.)

A party granted an annuity for ninety-nine years determinable on the dropping of certain lives, and demised a real estate to which he was entitled in remainder to a trustee for a term of years, upon trust to raise the arrears of the annuity by sale either before or after the determination of the particular estate. Upon a bill filed by the annuitant to enforce his security before the term came into possession: it was held, (affirming the decision of *Wood*, V. C., 2 Kay & J. 132; 2 Jur., N. S. 37,) that he was entitled to have the term sold, and all arrears paid, and that this did not restrict his right to arrears accrued within the last six years. (*Snow* v. *Booth*, 2 Jur., N. S. 244; 25 L. J., Chanc. 417—L. J.) Arrears of an annuity are recoverable for more than six years if there is a term to secure it. (*Ib.* See *ante*, p. 215.)

In some of the cases which have arisen under 3 & 4 Will. 4, c. 27, and 3 & 4 Will. 4, c. 42, the courts have treated the provision of the second act as an exception out of the enactments of the former. (See *Paget* v. *Foley*, 2 Bing. N. C. 690; *Strachan* v. *Thomas*, 12 Ad. & E. 558.) The effect of the conjoint enactment is, that no more than six years' arrears of rent or interest, in respect of any sum charged on or payable out of any land or rent, shall be recovered by way of distress, action or suit, other than and

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except an action on covenant or debt on specialty, in which case the limitation is twenty years. An annuity and certain extra premiums for life insurance were charged upon lands of the grantor, and secured by his covenant to pay, by a demise, with power of sale of the lands charged, and by a judgment entered up and duly registered. It was held by Lord *Cottenham*, C., reversing the order of the court below, that the representatives of the annuitant were only entitled to recover against the land the arrears of the annuity and the premiums which had respectively become due to and been paid by them or the grantee, within six years from the time of instituting proceedings to recover the same. (*Hunter* v. *Nockolds*, 19 Law J., Chanc. 177; 18 Law J., Chanc. 407; 1 Hall & T. 644; 1 Mac. & G. 640, overruling *Du Vigier* v. *Lee*, 2 Hare, 326; see *Harrison* v. *Duignan*, 2 Dru. & War. 298; *Hughes* v. *Kelly*, 3 Dru. & War. 482.) All that Lord *Cottenham* decided in *Hunter* v. *Nockolds* was, that a claim to arrears of an annuity cannot be established *as a personal debt* against the grantor beyond six years. The petitioners went in to prove their claim as a personal debt against the estate of the party who granted the annuity; and having chosen to take that form of proceeding, they were allowed to prove the debt for six years and no more. (*Snow* v. *Booth*, 2 Kay & J. 135; 2 Jur., N. S. 244, *ante*, pp. 215, 263. See *Cox* v. *Dolman*, 2 De G., M. & G. 592, *ante*, p. 214.)

A. was from the 2nd July, 1805, till the 10th July, 1841, (when he was found a lunatic,) and B., his committee, had ever since been, seised as of fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* *per annum*, payable on 29th September and 25th March, created by letters-patent, 29 Hen. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto. It was held, that the case was governed by this section, and consequently that neither the lunatic nor his committee was entitled to recover, in the year 1847 or the year 1844, any part of the arrears of the two-third parts of the fee-farm rent which accrued due from 29th September, 1831, to the 29th September, 1837, inclusive. (*Humfrey* v. *Gery*, 7 C. B. 567.)

On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor a receiver was appointed, and at the hearing a reference as to incumbrances on the estate was directed. A state of facts and claim carried in before the master under such inquiry by an incumbrancer not a party to the suit was held to take the charge as to the interest out of this section, and the incumbrancer was held to be entitled to the arrears of interest for six years antecedent to the claim carried in before the master. (*Greenway* v. *Broomfield*, *Handley* v. *Wood*, 9 Hare, 201.)

Where there is a mortgage of land and a covenant by the mortgagor for himself and his heirs to pay the mortgage money and interest, if there has been no payment for a long period, the land is only charged with six years' arrears of interest under 3 & 4 Will. 4, c. 27, s. 42; but twenty years' arrears may be recovered by an action on the covenant under 3 & 4 Will. 4, c. 42, s. 3. In such a case in a suit by the heir of the mortgagor to redeem, the mortgagee may tack the personal liability on the covenant as against the heir. It seems that it would be otherwise if the suit were by the mortgagor himself. (*Elvy* v. *Norwood*, 5 De G. & S. 240; 16 Jur. 493, Ch.)

A mortgagee, notwithstanding the interest mortgaged is reversionary, can only recover six years' arrears of interest as against the land mortgaged, although he may recover twenty years' arrears on the covenant to pay. (*Sinclair* v. *Jackson*, 17 Beav. 405.) Arrears of an annuity charged on a reversionary interest in land are recoverable more than six years after the same became payable, this section having no application so long as the interest is reversionary. (*Wheeler* v. *Howell*, 3 Kay & J. 198.) The interest on money secured by mortgage of land and by covenant being sixteen years in arrear, the mortgagee filed his bill of foreclosure against the heir of the mortgagor, raising no question of liability on the covenant or of any right of tacking. A decree was made to take an account of what was due on the mortgage. Under the Statute of Limitations twenty years' arrears could be recovered on the covenant, but six only against the land. The master refused to allow the plaintiff to tack his two claims. It was held, on

exceptions, that he was right. (*Sinclair* v. *Jackson*, 17 Beav. 405.) It was questioned, whether the right to tack in such a case would be different in a suit for foreclosure from what it is in a suit for redemption. (*Ib.*) It was said by Sir *J. Romilly*, M. R., there is this difference between a suit for foreclosure and one for redemption: in the former, the mortgagee seeks to recover what is charged upon the land, or to foreclose the mortgagor; but that is a very different thing from the mortgagor seeking to redeem and to restrain the mortgagee from enforcing his legal rights, when the court may impose upon him this condition, and decline to interfere in his favour except upon payment of everything which is due to the mortgagee. (*Ib.*, see pp. 412, 413.)

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When money is secured by an ordinary mortgage for a term of years, with a covenant by the mortgagor in the usual form to pay interest, and with a bond as a further security, the mortgagor in a suit to foreclose can only recover six years' arrears of interest. The case was governed by this principle, that where there is a simple mortgage with a bond and covenant only, six years' arrears of interest can be recovered against the estate; but where there is a trust to secure the mortgage and interest, or where the estate is vested in a trustee to raise a sum of money and interest, this statute does not apply, and interest can be recovered to the extent allowed by the stat. 3 & 4 Will. 4, c. 42. (*Round* v. *Bell*, 30 Beav. 121. See *Lewis* v. *Duncombe*, 29 Beav. 175, *ante*, p. 216.)

An annuity charged on land by will comes within the meaning of the word rent in the 42nd section, as explained by the interpretation clause of this act, *ante*, p. 136, and therefore no more than six years' arrears are recoverable. (*Ferguson* v. *Livingston*, 9 Ir. Eq. R. 202.)

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of this section of the act, and only six years' arrears of interest can be recovered for such debts. In relation to the statutes of limitations the rights of judgment creditors for arrears of interest, as against the real and personal estates of their debtor, are equal and co-extensive. As far as the bar of the statute operates for the protection of the real estate, to the same extent the personal estate is protected; the statute 3 & 4 Vict. c. 105, s. 26, enacts, that every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest shall carry interest, &c. The interest thus given is subject to the limitations of the statute 3 & 4 Will. 4, c. 27, s. 42. (*Henry* v. *Smith*, 2 Dru. & War. 381; 1 Con. & L. 506.)

In a petition matter, a conditional order for the appointment of a receiver to pay the sum of 1,506*l.*, "stated to be due to the petitioner," on the judgment, was made absolute, with liberty to the master, at the instance of the respondent, to ascertain the sum due. The respondent is not precluded from relying on this section of the act in the office, as a bar to more than six years' arrears of interest, though he did not rely on it in showing cause against the conditional order, and the sum stated in the order was much more than the principal money and six years' interest thereon. The court having, at the instance of the respondent, restrained the petitioner from proceeding on the order for the receiver, the respondent undertaking to pay him a certain annual sum, the petitioner is not entitled to appropriate the moneys paid him, pursuant to that order, to the discharge of interest which had accrued due more than six years before the making of the conditional order. (*Costello* v. *Burke*, 2 Jones & L. 665.)

Cases not within the 42nd section.

The 2nd section of the act provides for the case where the right or title to an annuity is disputed. (See *ante*, p. 152.) The 42nd section provides for the case where the title to the annuity is *not* disputed, but the distress is made for the arrears due. (*James* v. *Salter*, 3 Bing. N. C. 552.) Arrears of rent, or of an annuity secured by deed, may be recovered for twenty years under the statute 3 & 4 Will. 4, c. 42, s. 3, notwithstanding the 42nd section of 3 & 4 Will. 4, c. 27. (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Strachan* v. *Thomas*, 4 P. & Dav. 229; 12 Ad. & Ell. 536; see *post.*)

Three annuities charged upon an estate were granted, in 1814, in respect whereof no payment had been made since March, 1815. In January, 1855, a bill was filed for an account of the rents and profits of the estate, and

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payment of the arrears of the annuities: it was held, that this section did not operate as a bar. (*Knight* v. *Bowyer*, 3 Jur., N. S. 968; 26 Law J., Chan. 796, *ante*, p. 216.)

Arrears of an annuity charged on a reversionary interest in land are recoverable more than six years after the same became payable, this section having no application so long as the interest is reversionary. (*Wheeler* v. *Howell*, 3 Kay & J. 198.)

Under this section a mortgagee, irrespective of a covenant to pay, or a term to secure the payment, is entitled to six years' arrears of interest. (*Shaw* v. *Johnson*, 1 Drew. & Sm. 412; 7 Jur., N. S. 1005; 9 W. R. 629.) So far as a covenant to pay affects the land, it is limited to six years.

Where a term is created on an express trust to secure principal and interest, this section does not operate as a bar, and a mortgagee's right is not confined to six years. (*Ib.*)

Where there is an agreement to assign a term on an express trust to secure principal and interest which can be enforced in equity, although the deed is not executed, the court will consider such assignment as if it had been executed, and make a decree for a general account not limited to the six years. (*Ib.*)

A testator, by his will, bequeathed all his property to H. upon the trusts thereinafter mentioned. He then bequeathed his leaseholds to H. for life, with remainder as to part of them to B. for life, with remainder to G. absolutely; and he gave the residue of his property to G. absolutely, and appointed H. his executrix. G. survived the testator, and died intestate in March, 1838. H. took out administration to his estate in May, 1838, and died in 1841; appointed B. her executrix, who thus became the representative of the testator as well as of H. B. afterwards took out administration to G., one of whose next of kin, in 1858, filed a bill against B. for the administration of G.'s estate: it was held, that B. could not avail herself of any defence founded on the statutes of limitations, but that an account of the rents of the leaseholds received, which was not limited to six years before the filing of the bill, and an account of the personal estate of G. received by H. and B. respectively, had been rightly directed against her. (*Obee* v. *Bishop*, 1 De G., F. & J. 137.) A demand against the assets of a deceased trustee or personal representative, for a breach of trust or misappropriation committed by him, is not barred by the lapse of six years after his death. (*Ib.*) *Turner*, L. J., said, with respect to the general personal estate, that he was of opinion, it would be most dangerous to hold that a demand against the assets of a deceased trustee or personal representative, in respect of a breach of trust or misappropriation committed by him, is barred at the expiration of six years from his death. Courts of Equity, in dealing with equitable debts, are not bound by 21 Jac. 1, c. 16; and, although they have in many instances adopted a rule grounded on an analogy of that statute, they do not extend that analogy to demands arising out of a breach of trust. (*Ib.*)

No more than six years' arrears of tithe rent-charge can be recovered by the owner thereof from the owner of the lands in Ireland. (*Ecclesiastical Commissioners* v. *Marquis of Sligo*, 5 Ir. Ch. R. 46.)

A terminable annuity, as an annuity for ten or twenty years, is within this section.

Periodical payment.

A testator bequeathed 250*l.* to B., to be chargeable on lands, and to be paid by yearly payments and instalments of 20*l.* per annum from the day of her marriage, with consent, but not until then; and, in case B. should intermarry without such consent, then she should be entitled to 1*s.*; such portion of 250*l.* to be paid and payable by yearly instalments of 20*l.* per annum from the day of her marriage, but not until then, with power to B. or her lawful husband to distrain in case of nonpayment of the 20*l.* And the testator desired that his two sons (to whom he devised the lands) should contribute jointly and severally to support and clothe B. in a reasonable manner; and that, upon doing so, no interest should arise upon the 250*l.*; but if they neglected such support and clothing, he desired that the 250*l.* should be liable to interest at 6*l.* per cent. until B.'s marriage, but by no

3 & 4 *Will.* 4, *c.* 27, *s.* 42.

means after: it was held, that the instalments were periodical payments of a sum of money charged upon lands, and as such within this section. (*Uppington* v. *Tarrant*, 12 Ir. Ch. R., N. S. 268, 269. See *ante*, p. 136.)

By statute 21 Jac. 1, c. 16, s. 3, actions of debt for arrearages of rent must have been commenced and sued within six years after the cause of such actions had accrued. This statute was confined to actions for arrears of rent upon a demise without deed, and did not extend to cases of rent reserved by specialty. (*Freeman* v. *Stacey*, Hutton, 109.) The statute 21 Jac. 1, c. 16, s. 3, could not be pleaded in an action of debt under the 2 & 3 Edw. 6, c. 13, for not setting out tithes. (*Talory* v. *Jackson*, Cro. Car. 513; see 1 Mod. 246.) But by statute 53 Geo. 3, c. 127, s. 5, "No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due." In bills for an account of tithes, courts of law and equity have a concurrent jurisdiction; and inasmuch as in a court of law arrears of tithes can be recovered only for six years before the commencement of the action, so in a court of equity the account will be carried back only six years previous to the filing of the bill. (*Collins* v. *Archer*, 1 Russ. & Myl. 284; see *Chichester* v. *Sheldon*, Turn. & Russ. 253; *S. C.*, 3 E. & Y. 1102; *Garrard* v. *Scholfar*, 3 Gwill. 1045; 2 E. & Y. 282; *Goode* v. *Waters*, 20 Law J., Ch. 72.)

Tithes.

Since 5 & 6 Will. 4, c. 74, if any tithe, oblation or composition not excepted in 7 & 8 Will. 3, c. 6, or exceeding 10*l.* yearly value, due from any one person, is in arrear, it must be proceeded for before two justices; and if the title of the claimant, or liability of the party sought to be charged, is undisputed, two years' arrears may be there recovered; whereas if such title or liability is denied *vivâ voce* before the justices, or at any time in writing, the claimant may proceed by suit in equity, and recover six years' arrears. (*Robinson* v. *Purday*, 16 Mees. & W. 11.) Not more than two years' arrears of any tithe commutation rent-charge is recoverable by distress or entry under statute 6 & 7 Will. 4, c. 71, ss. 81, 82. If the half-yearly payments of a rent-charge under that act be in arrear, and no sufficient distress found, the owner of the rent-charge may recover such arrear for a period not exceeding two years, by assessment and writ of *habere possessionem*, under the 82nd section, although no attempt to distrain has been made at the end of each or any but the last of the half years, and although at the end of one or more of such previous half years there may have been a sufficient distress for the amount then due. (*In re Camberwell Rent-charge*, 4 Q. B. 151; 3 Gale & D. 365.)

Tolls.

The trustees of a turnpike road, pursuant to a power given to them by act of parliament, mortgaged to J. M. such share and proportion of all the tolls as the money advanced by him should bear to the whole principal amount advanced on the tolls. The security was continued by various acts of parliament, but no interest was paid in respect of such mortgage for thirty years and upwards. It was held, in a suit instituted by the representative of J. M. against one of the trustees of the road, seeking payment of all the arrears of interest due to him out of all the tolls, that he was not barred by the Statute of Limitations from recovering the whole of such arrears (tolls not being within the meaning of the act), but that the other mortgagees on the tolls were necessary parties to a suit for that purpose. (*Mellish* v. *Brooks*, 3 Beav. 22; 4 Jur. 739; *ante*, p. 137.)

When arrears of interest are limited to six years.

A canal company conveyed, under their common seal, the canal works and rates to a mortgagee, to hold until the sum borrowed, with interest, should be repaid. There was no covenant to repay. It was held, that under this section, although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. There being no covenant or engagement to pay, but simply a conveyance of the canal, there was not the species of action of covenant, or of debt upon bond or other specialty, referred to in the statute 3 & 4 Will. 4, c. 42, s. 3, *post*. (*Hodges* v. *Croydon Canal Company*, 3 Beav. 86.)

3 & 4 *Will.* 4, *c.* 27, *s.* 42.

No more than six years' arrears of interest of money charged on lands can be recovered, though the deed creating the charge vested the lands in trustees to secure it, and though the defendant held possession with knowledge of the trust. (*Byrne* v. *Robinson*, 1 Ir. Eq. R. 333.) By a marriage settlement of the year 1798, certain lands were limited to trustees to the use of A., the husband, and B., the intended wife, and the survivor of them, for their respective lives, with remainder to the issue of the marriage, and also to C. (a daughter of B. by a former marriage), in such shares as the survivor of them, the said A. and B., should appoint. In 1819, A. being the survivor, in pursuance of the power, appointed a certain sum to C., and limited a portion of the said lands to trustees, to receive and levy by sale or mortgage the sum so appointed, and directed that the same should bear interest, and be payable on the marriage of C., with a proviso that if the marriage of C. should take place in the lifetime of A., the said principal sum should not be raised until twelve months after the decease of A. On a bill filed by C. and her husband after the death of A. against a son of A. and B., who had got into, and continued in the possession of the lands since the year 1820, and disputed the validity of the original settlement of 1798: it was held, that the plaintiffs were within this section, and therefore only entitled to six years' arrears of interest on their charge. (*Burne* v. *Robinson*, 1 Dru. & Walsh, 688.) In this case the Lord Chancellor only intended to decide that the case was not within the 25th section. (*Dillon* v. *Cruise*, 3 Ir. Eq. R. 82.)

To an action of covenant upon an indenture of demise for rent, the defendant pleaded the 3 & 4 Will. 4, c. 27, s. 42, and it was held by the Court of Exchequer in Ireland (contrary to the case of *Paget* v. *Foley*, 2 Bing. N. C. 679), that the statute did apply to such a case. (*Bruen* v. *Nolan*, 1 Jebb & Symes, 346, n.; see *Armstrong* v. *Lloyd*, 2 Brady, A. & M. 70.) In replevin the plaintiff declared for a taking on the 9th August, 1838, and the defendant avowed for five years of arrears of rent next before and ending on the 25th March, 1836, due to the defendant by virtue of a demise theretofore made; to this avowry the plaintiff pleaded, amongst other pleas, a plea of the stat. 3 & 4 Will. 4, c. 27, s. 42, to the whole amount of the arrears. The defendant demurred, principally on the ground that the plea of the statute should have been confined to the period of the five years, which were outside six years, but the court overruled the demurrer. (*Wilson* v. *Jackson*, 2 Ir. Law R. 1.) A party on whose estate the plaintiff had a charge for principal and interest, being desirous of paying it, instead of having it raised out of the estate, was ordered to pay it into court by a given day. He made default, and applied for an extension of the time, which was granted. It was held, that the plaintiff was not entitled to subsequent interest on the aggregate of principal and interest due, but on the principal only. (*Wilkinson* v. *Charlesworth*, 2 Beav. 470.)

Part payment.

In a foreclosure suit, the defendants, some of whom were minors, by their answer relied on the Statute of Limitations as disentitling the plaintiff to more than six years' interest. In the progress of the cause, an order was made upon consent, in pursuance of which a payment was made to the plaintiff on account of his demand. It was held, that, although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between *adults*, yet as the interests of *minors* were concerned, the payment ought to be considered as made without prejudice to the rights, and subject to the equities of the parties in the cause, and ought not, therefore, to be permitted to defeat the defence relied upon by the answer. It is questionable how far the officer is authorized to decide between *the parties* in a cause upon a pleading by way of discharge, filed in the office, relying on the Statute of Limitations. *Thwaites* v. *M'Donough*, 2 Ir. Eq. R. 97.)

Possession in prior incumbrance.

The exception in this clause of the act is, where a man has an estate and there are several incumbrances on it, and one of the incumbrancers enters into possession, there another creditor shall not be prejudiced by that possession, if he come for relief within a year after the prior creditor has been removed from the possession.

If a prior mortgagee or other incumbrancer is in possession, the right of

3 & 4 *Will.* 4, c. 27, *s.* 42.

the subsequent creditor to recover interest during the full period of such possession, although that period may exceed six years, is saved, provided he is so vigilant as to come within one year after the determination of that possession. A judgment creditor who has the first security upon the estate, and gets into possession, is a prior incumbrancer in possession within this proviso. (*Henry* v. *Smith*, 2 Dru. & War. 390.) A judgment creditor of a tenant in fee, in remainder after an estate for life, is not entitled to recover out of the lands arrears of interest which accrued due during the existence of the tenancy for life, and more than six years before the commencement of the suit. The prior incumbrance referred to in the exception in the 42nd section is one which affects the estate or interest upon which the subsequent incumbrance is also a charge. (*Vincent* v. *Going*, 1 Jones & L. 697.)

Case within exception in 42nd section.

A. being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estate did not join in the demise. A. remains in possession until the death of the grantor of the annuity. It was held, that the annuitant was not debarred from recovering more than six years' arrears, as the annuitant fell strictly within the literal terms of the exception in this section. (*Drough* v. *Jones*, 2 Ir. Eq. R. 303.) It will be observed, that the 42nd section contains no exception in favour of persons under disabilities; and if the act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest. It has been observed by a learned writer, "that even as to legacies charged upon real estates, there is no saving as to arrears of interest for infancy, or the like. In the case of younger children's portions, although by way of legacy, the interest is often allowed to remain in arrear for several years, for the accommodation of the head of the family; and the statute will, unless it be modified, often bar a just claim unnecessarily, and ultimately injure the person whom it was intended to benefit; and whether a legacy be payable out of real or personal estate, of course interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee." (Sugd. V. & P. 638 (11th ed.).)

No saving in favour of persons under disabilities.

Jury may allow interest on debts.

By statute 3 & 4 Will. 4, c. 42, s. 28, (3 & 4 Vict. c. 105, s. 53, Ireland,) it is enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demandant shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that the interest shall be payable in all cases in which it is now payable by law. (See *Higgins* v. *Sargent*, 2 B. & C. 348; Ram on Assets, 560—576.) This act contains a further proviso, that such interest so to be allowed by such jury shall not be so allowed for any period exceeding six years. The jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest (*in Ireland* for any period not exceeding six years) over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions of policies of assurance made after the passing of this act (14th August, 1833, England; 10th August, 1840, Ireland.) (3 & 4 Will. 4, c. 42, s. 29; 3 & 4 Vict. c. 105, s. 54, Ireland.)

Where jury may give damages as interest.

Interest to be allowed on writs of error for delay in execution.

If any person shall sue out any writ of error upon any judgment whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof. (3 & 4 Will. 4, c. 42, s. 30; 3 & 4 Vict. c. 105, s. 55, Ireland.)

Cases on construction of act 3 & 4 Will. 4, c. 42, ss. 28—30.

On a judgment affirmed on a writ of error, the House of Lords gives interest from the day of its affirmance, pursuant to the provisions of the statute 3 & 4 Will. 4, c. 42, s. 30. (*Garland* v. *Carlisle*, 5 Clark & Fin.

3 & 4 Will. 4, c. 27, s. 42.

354.) Where judgment is given in a court of error for the defendant, the court is bound, under 3 & 4 Will. 4, c. 42, s. 30, to allow interest, which, it seems, will be 4*l.* per cent. for the time that execution has been delayed by the court of error. (*Levy* v. *Langridge*, 4 Mees. & W. 337. See *Burn* v. *Carvalho*, 4 Nev. & M. 893; 1 Add. & Ell. 895, where no interest was allowed, because the writ of error was tested before the statute received the Royal Assent.) By a contract of sale, the purchaser was to pay a certain sum by six instalments, and also 5*l.* per cent. half-yearly from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums, by way of per-centage, to be secured by the bond of the purchaser. In the contracts, and also in the declaration thereon, this additional per-centage was called interest upon the instalments; neither the instalments nor the additional per-centage were paid as they became due, nor was any bond given: it was held, that the purchaser was chargeable with interest upon the last four instalments, until actual payment of those instalments; but that the jury were not bound either at common law or under 3 & 4 Will. 4, c. 42, s. 28, to give interest upon the additional per-centage treated by parties as interest. (*Atwood* v. *Taylor*, 1 Man. & Gr. 279; 1 Scott, N. R. 611.) In an action on an attorney's bill, the plaintiffs gave notice, pursuant to 3 & 4 Will. 4, c. 42, s. 28, that they should claim interest from the date of the notice. After the writ was issued, the bill was referred for taxation at the instance of the defendant, no terms being made as to allowance of interest: it was held, that the plaintiffs could not afterwards have an assessment of damages for the purpose of recovering the interest. (*Berrington* v. *Phillips*, 1 Mees. & W. 48.)

Before the passing of the act 3 & 4 Will. 4, c. 42, at law a judgment did carry interest, but interest might be recovered at law, in the shape of damages, by an action on the judgment. (*Gaunt* v. *Taylor*, 3 M. & Keen, 302. As to the practice of courts of equity in giving interest on judgments, see 1 C. P. Cooper's R. 230—250, n. As to payment of interest generally, see Harr. Index, tit. Interest; 2 Stark. on Ev. 575—579, 3rd ed.) The stat. 3 & 4 Will. 4, c. 42, being a remedial act, a court of equity will adopt many of its provisions, changing its formal language, and adapting it to the practice of the court. If after the passing of that act an action could have been brought on a judgment, the jury will be directed by the judge to exercise their discretion upon the point of interest; so it will be allowed in equity, if a step is taken equivalent to an action. (*Hyde* v. *Price*, 8 Sim. 578.) It has since been held, that the act 3 & 4 Will. 4, c. 42, s. 28, giving power to juries to allow interest if they think fit, has not altered the rules by which the discretion of the Court of Chancery is guided. (*Re Powell's trust*, 10 Hare, 134. See *Booth* v. *Leicester*, 3 My. & Cr. 459; 1 Keen, 247, 579; *Martin* v. *Blake*, 3 Dr. & War. 125.)

Interest out of surplus on debts not carrying the interest.

A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers under a decree or order of the court, or of the judge in chambers, shall be entitled to interest upon his debt at the rate of 4*l.* per cent. from the date of the decree or order, out of any assets which may remain after satisfying the costs of the suit, the debts established and the interest of such debts as by law carry interest. (46th Order, 26th Aug. 1841; Cons. Ord. XLII., rule 10. See Morgan's Ch. Acts and Orders, p. 591, 3rd ed.)

Judgment debts to carry interest.

Every judgment debt shall carry interest at the rate of 4*l. per centum per annum* from the time of entering up the judgment or from the 1st October, 1838, in cases of judgments then entered up, and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. Decrees and orders of courts of equity, and in bankruptcy and lunacy, and rules of the superior courts of common law, ordering the payment of money, &c., to any person, are to have the same effect as judgments in the courts of common law. (1 & 2 Vict. c. 110, s. 18; 3 & 4 Vict. c. 105, s. 27, Ireland.) Every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest, shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment, or from the 1st November, 1840, in cases of judgments then entered up, and not carrying interest until the

sume shall be satisfied, and such interest may be levied under a writ of execution on such judgment. 1 & 2 Vict. c. 110, s. 17 (3 & 4 Vict. c. 105, s. 26, Ireland.) 3 & 4 Will. 4, c. 27, s. 42.

Interest not allowed beyond penalty of bond.

It is the general rule both at law, (*Brangwin* v. *Parrot*, 2 W. Bl. 1190; *White* v. *Sealey*, 1 Dougl. 49,) and in equity, (*Bromley* v. *Goodere*, 1 Atk. 75,) to consider the penalty of the bond as the limit of the debt or damages which can be recovered. But there are exceptions to this rule. (See the cases collected in 1 C. P. Cooper's R. 209—230.) A person conveyed estates to trustees upon trust to sell and apply the produce of sale in discharging all his bond debts, together with the interest then due and to grow due for the same to the day of payment. A bond creditor, claiming under this deed, is not entitled to principal and interest beyond the amount of the penalty of the bond. (See *Clarke* v. *Lord Abingdon*, 17 Ves. 106; *Hughes* v. *Wynne*, 1 Mylne & Keen, 20.)

Where in a creditors' suit bond creditors had been allowed by the master their principal and interest, to the extent of the penalties of the bonds, and had received an apportionment upon the sums so amounting to the penalties; upon further funds becoming available for the creditors: it was held, that the bond creditors were entitled to subsequent interest on the sums remaining due on the conditions of the bonds, provided that such interest, together with the sums remaining due, did not exceed the penalties in the bonds. (*Walter* v. *Meredith*, 3 You. & Coll. 264.)

Account of rents in equity.

In cases where a party has slept on his rights, and no compromise or discussion of his claims has taken place, and where the defendant is ignorant thereof, and there is no disability on the one side nor fraud on the other, interest on a portion, or an account of rents, will not be carried farther back than the filing of the bill. (1 Ball & B. 180.) Lord *Hardwicke*, in *Dormer* v. *Fortescue*, (3 Atk. 130,) mentioned several cases in which the Court of Chancery directs an account of rents and profits from the time the title accrued, as where there is a trust, and a mere equitable title, or upon a bill brought by an infant, as every person who enters upon the estate of an infant enters as guardian or bailiff to him. (*Newburgh* v. *Bickerstaffe*, 1 Vern. 295; *Hatton* v. *Simpson*, 2 Vern. 724; *Titley* v. *Bridges*, Prec. Chan. 252; *Duke of Bolton* v. *Deane*, *Ib.* 516; *Bennett* v. *Whitehead*, 2 P. Wms. 644; *Bloomfield* v. *Eyre*, 8 Beav. 250; *Bodeley* v. *Lefevre*, 1 Hare, 602, n.; *Hicks* v. *Sallitt*, 3 De G., M. & G. 801.) So upon a legal title, where the plaintiff has been kept out by the fraud, misrepresentation, or concealment of his title by the defendant. (*Bennett* v. *Whitehead*, *supra*; *Duke of Bolton* v. *Deane*, *supra*; *Townsend* v. *Ash*, 3 Atk. 340.) In an adverse suit, in the nature of an ejectment suit, the account is directed only from the filing of the bill. In a suit against a person affected with a fiduciary character, the account is taken either from the original period when the title accrued, or if the court thinks fit, on account of laches, for six years only previous to the filing of the bill. (*Thomas* v. *Thomas*, 2 Kay & J. 85.) In *Monypenny* v. *Bristow*, (2 Russ. & M. 117,) the account was taken from the time the plaintiff's title accrued, because the defence of the Statute of Limitations was not raised by the pleadings. So in *Pultney* v. *Warren*, (6 Ves. 73,) Lord *Eldon* decreed an account of mesne profits from the time of the title accruing, against executors, upon the special ground that the plaintiff was prevented from recovering in ejectment by the rule of a court of law, and by an injunction at the instance of the occupier who ultimately failed both at law and in equity. But in these cases the account cannot go beyond six years by analogy to the action for mesne profits. (*Reade* v. *Reade*, 5 Ves. 744; *Harmood* v. *Oglander*, 6 Ves. 215.) So where an estate was held under trustees, and the tenants insisted on the Statute of Limitations, the account of rent was only ordered for six years before the filing of the bill. (*Hercy* v. *Ballard*, 4 Br. C. C. 468.) But where there has been a mere adverse possession without fraud, concealment, or an adverse possession of some instrument, without which the plaintiff cannot proceed, or where there has been any considerable degree of laches on the part of the plaintiff, the account shall only be taken from the filing of the bill. (*Ib.*; *Dormer* v. *Fortescue*, *supra*; *Forder* v. *Wade*, 4 Br. C. C. 520; *Drummond* v. *Duke of St. Albans*, 5 Ves. 433; *Pettiward* v. *Prescot*, 7 Ves. 541;

3 & 4 *Will.* 4, c. 27, *s.* 42.

Pickett v. *Loggan*, 16 Ves. 215; *Schroder* v. *Schroder*, 1 Kay, 591.) The rule is, that in the absence of special circumstances, a party found to be wrongfully in the possession of property, is to account for the rents and profits during the whole period of time that his wrongful possession has continued. (*Hicks* v. *Sallitt*, 3 De G., M. & G. 782.) The right to an account, even in the case of mines, may be lost by laches. (*Parrott* v. *Palmer*, 3 Myl. & K. 632.) A party's right to an account may also be restricted in consequence of laches in not finding out a mistake earlier by the means which were in his power. (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42.)

In case of charities.

There is no fixed limit of time in directing an account against the trustee of a charity. But where there has been a long period, during which a party has, under an innocent mistake, misapplied a fund, from the laches and neglect of others in not setting him right, and when the accounts have in consequence become entangled, the court, under its general discretion, considering the enormous expense of the inquiries, the great hardships of calling upon representatives to refund what families have spent, acting on the notion of its being their property, in giving relief has fixed a period to the account. The accident of when the information was filed, or the demand was made, can only be material as putting the parties on their guard, and therefore leaving them without excuse for any errors they may commit. The result of the authorities is, that in each case the court is bound by the particular circumstances. (*Attorney-General* v. *The Mayor of Exeter*, Jac. 448.) An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the information, nor to six years before that time. (*Attorney-General* v. *Brewers' Company*, 1 Mer. 495; *Attorney-General* v. *Corporation of Stafford*, 1 Russ. 547.) And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount. (*Attorney-General* v. *Mayor of Exeter*, Jac. Rep. 443; *S. C.*, 2 Russ. 362; *Attorney-General* v. *Caius College*, 2 Keen, 110; *Attorney-General* v. *Pretyman*, 4 Beav. 462.) When the Court of Chancery limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the Statute of Limitations. The court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it. (*Attorney-General* v. *Mayor of Exeter*, 2 Russ. 367.) If there be a fair and honest intention on the part of those who have the management of a charity, it is not the practice of the court, though that rule should be founded in mistake, to hold trustees responsible for acts so done, or to call back money which they have so paid. (*Attorney-General* v. *The Dean and Canons of Christchurch*, 2 Russ. 324.) The principles upon which the court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *Attorney-General* v. *Mayor, &c. of Newbury*, 3 Myl. & Keen. 647. (See Shelford on Mortmain and Charities, pp. 455—467.) Length of time would not protect a purchaser with notice of charitable trusts. (*Attorney-General* v. *Christ's Hospital*, 3 Myl. & Keen, 344; see *Attorney-General* v. *Mayor of Bristol*, 2 Jac. & W. 321; *Attorney-General* v. *Poulden*, 8 Sim. 472; *ante*, pp. 138, 139, 218, 219.)

Error to be brought within six years.

No judgment in any cause shall be reversed or avoided for any error or defect therein unless error be commenced or brought and prosecuted with effect within six years after such judgment signed or entered of record. (15 & 16 Vict. c. 76, s. 146; 16 & 17 Vict. c. 113, s. 166, Ireland.)

Proviso for disabilities.

If any person entitled to bring error as aforesaid shall be at the time of such title accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person shall be at liberty to bring error as aforesaid, so as such person commences or brings and prosecutes the same with effect within six years after coming to or being of full age, discovert, of sound memory or return from beyond the seas, and if the opposite party shall at the time of the judgment signed or entered of record be beyond the seas, then error may be brought, provided the proceedings be

commenced and prosecuted with effect within six years after the return of such party from beyond seas. 15 & 16 Vict. c. 76, s. 147 (16 & 17 Vict. c. 113, s. 168, Ireland.) — 3 & 4 *Will.* 4, *c.* 27, *s.* 42.

No judgment in any cause on the revenue side of the Exchequer shall be reversed or avoided for any error or defect therein, unless error be commenced and prosecuted with effect within six years after such judgment signed or entered of record: provided, that if the party entitled to bring error be at the time of such title accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, the court or judge may allow error to be brought at any other time. (22 & 23 Vict. c. 21, s. 18.) — Error in revenue cases.

Bills of review have been generally disallowed after twenty years have elapsed from the time of pronouncing a decree which has been signed and inrolled, by analogy to the statute 10 & 11 Will. 3, c. 14. (4 Burr. 1963; 1 Br. P. C. 95; 5 Br. P. C. 460; 6 Br. P. C. 395.) But persons under any of the disabilites specified in that statute are allowed the further period of five years after their removal. (*Lytton* v. *Lytton*, 4 Br. C. C. 458.) To sustain a bill of review there must be error apparent upon the face of the decree. (*Green* v. *Jenkins*, 6 Jur. 515.) — Bills of review.

No petition of appeal from any decree or sentence of any court of equity in England or Ireland will be received by the House of Lords, after two years from the signing or inrolling, or extracting of such decree or sentence, and the end of fourteen days from the first day of the meeting of parliament next ensuing such two years, unless the person entitled to such appeal be within the age of twenty-one years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland; in which case such person may bring his appeal within two years next after his full age, discoverture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and fourteen days from the first day of the meeting of parliament next ensuing such two years. In no case shall any person be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree or interlocutor appealed against. (Standing Order, H. L., No. 118; Lords' Journ., 24th May, 1725; 22nd June, 1829; 6 Cl. & Fin. 976.) The decisions in *De Burgh* v. *Clark*, 4 Cl. & Fin. 562, and in *Attwood* v. *Small*, 6 *Ib.* 232, 309, apply only against a final decree, which appeal will bring up the previous interlocutory orders. (*Beavan* v. *Countess of Mornington*, 8 H. L. C. 525.) — Appeal to House of Lords.

The General Orders of the Court of Chancery, 7th August, 1852, limiting the time for inrolment of a decree (except by leave of the court) to five years, are valid. Where a decree in one suit has been acquiesced in for more than five years, and the time for inrolling it has been allowed to pass, so that it cannot be inrolled except by the leave of the court, the fact that a decree of an opposite kind has been pronounced in another suit, arising out of the same circumstances, (but pending between different parties,) does not afford a ground for enlarging the time for inrolling the decree in the first suit, so as to enable the party against whom it was pronounced to appeal to the House of Lords. An appeal against an order, on further directions, will not have the effect of bringing up the decree on which it is founded. (*Beavan* v. *Countess of Mornington*, 8 H. L. C. 525.)

A decree establishing a charge was carried into execution, though not proceeded on for forty years, where there was an acknowledgment within twenty years of the subsistence of the charge. (*Barrington* v. *O'Brien*, 1 Ball & B. 173; 2 *Ib.* 144; see 19 Ves. 587.) A decree to carry into execution an erroneous decree being reversed, the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree, as between the plaintiff creditor and the debtor there is no presumption from lapse of time, in such a case and upon such a state of the pleadings, that the debt has been paid; but other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. (*Hamilton* v. *Houghton*, 2 Bligh, 169.)

3 & 4 *Will.* 4, c. 27, *s.* 43.

XI. Limits of the Act.

Spiritual Courts.

Act to extend to the spiritual courts.

43. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity (*q*).

Recovery of legacies.

(*q*) The mode of recovering personal legacies in the ecclesiastical courts is stated in 3 Hagg. Eccl. R. 161, 162. A legatee cannot maintain a suit in the ecclesiastical court to recover his legacy when there are only equitable and not legal assets. (*Barker* v. *May*, 9 B. & C. 489; 4 M. & R. 386.) No action at law lies against an executor for a pecuniary legacy; (*Deeks* v. *Strutt*, 5 T. R. 690; see *Mayor of Southampton* v. *Graves*, 8 T. R. 593; *Atkins* v. *Hill*, Cowp. 284; *Hawkes* v. *Saunders*, Cowp. 289, *contrà*;) nor against an administrator to recover a distributive share; nor against his executor, although he has promised to pay. (*Jones* v. *Tanner*, 7 B. & C. 542; 1 M. & R. 420. See *Johnson* v. *Johnson*, 3 Bos. & P. 169.) But an action at law lies against an executor to recover a specific chattel bequeathed after his assent to the bequest. (*Doe* v. *Guy*, 3 East, 120; 4 Esp. 154; *Paramour* v. *Yardley*, Plowd. 539; *Westwick* v. *Wyer*, 4 Rep. 28 b.) And under peculiar circumstances, an action of assumpsit for money had and received, and on an account stated, was held to be maintainable by a residuary legatee against an executor for the plaintiff's share of the residue, "on the ground of a certain sum being received and retained to the plaintiff's use;" the defendant had ceased to hold the money in his character of executor. (*Hart* v. *Minors*, 2 Cr. & M. 700.) The plaintiff and three others being residuary legatees, the defendants, as the executors named in the will, accounted with them; and having paid to the latter the respective sums due to them thereon, took from them and from the plaintiff a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands: it was held, that the money, not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law. (*Gregory* v. *Harman*, 1 M. & P. 209; 3 C. & P. 205; *The Corporation of Clergymen's Sons* v. *Swainson*, 1 Ves. sen. 75; *Reech* v. *Kennegal*, *Ib.* 123; *Rogers* v. *Soutten*, 2 Keen, 598; *Bothe* v. *Crampton*, Cro. Jac. 612; *Davis* v. *Reyner*, 2 Lev. 3; *Goring* v. *Goring*, Yelv. 10; *Rann* v. *Hughes*, 7 T. R. 350, n.; *Childs* v. *Monins*, 2 Brod. & Bing. 460; 5 B. Moore, 282; *Bradley* v. *Heath*, 3 Sim. 543; *Holland* v. *Clark*, 1 Y. & Coll. N. C. 151. See Wms. on Executors, 1513—1518, 3rd ed.) In an action against executors upon an account stated for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. (*Rose* v. *Savory*, 2 Scott, 199; 1 Hodges, 269; *Gorten* v. *Dyson*, 1 Brod. & B. 219; *Moert* v. *Moessard*, 1 M. & P. 8; *Wasney* v. *Earnshaw*, 4 Tyrw. 806; *Roper* v. *Holland*, 3 Ad. & Ell. 99; 4 Nev. & M. 868.) A testator devised lands in fee, after the determination of certain life estates, to A., B. and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to and to be equally divided among the children of his niece. A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mortgagees for 500 years: it was held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed. (*Braithwaite* v. *Skinner*, 5 Mees. & W. 313; 3 Jur. 1054.)

3 & 4 *Will.* 4, *c.* 27, *s.* 44.

Scotland and Ireland.

44. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit[a] to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland (*r*).

Act not to extend to Scotland, nor to advowsons in Ireland.

[a] *Lege* present.

(*r*) The stat. 6 & 7 Vict. c. 54, which was passed on the 10th August, 1843, recites the 30th, 31st, 32nd and 34th sections of 3 & 4 Will. 4, c. 27:—

Sect. 1. "And whereas the hereinbefore in part recited act, save in so far as it relates to any such right as last aforesaid, is already in force in Ireland, and it is expedient to extend to Ireland the whole of the provisions of that act; be it therefore enacted, that after the 1st day of January, 1844, the several clauses and enactments in the said act passed in the session of parliament held in the 3rd and 4th years of the reign of his late majesty King William the Fourth contained, and hereinbefore recited, relating to any right to present to or bestow any church, vicarage or other ecclesiastical benefice (the clause thereof providing that the said act so far as it relates to any such right shall not extend to Ireland, always excepted), shall extend and apply to Ireland, and that as fully and effectually as if the same clauses and enactments were here repeated, substituting for the said date of the 31st day of December, 1833, the said date of the 1st day of January, 1844."

Provisions of 3 & 4 Will. 4, c. 27, relating to advowsons, &c. extended to Ireland.

The 2nd section, after reciting part of the 1st section of 3 & 4 Will. 4, c. 27, as to the meaning of "person through whom another claims," "person," "number," "gender," enacted, "that the same words and expressions shall in this act be similarly interpreted, extended and applied." (See *ante*, p. 136.)

Certain words in those provisions to be similarly interpreted.

Sect. 3. "And whereas doubts have been entertained whether the several periods by the said act limited for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, apply to the case of a bishop claiming to have right to collate to or bestow any ecclesiastical benefice in his diocese, and it is expedient that all such doubts should be removed; be it therefore enacted, that the several periods limited by the said act or by this act for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron to present to or bestow any ecclesiastical benefice: provided always, that nothing herein contained shall be deemed to affect the right of any bishop to collate to any ecclesiastical benefice by reason of lapse."

Removing doubts as to the periods limited for bringing any *quare impedit* or other action.

Sect. 4. "And whereas by an act passed in the Irish parliament in the session held in the 17th and 18th years of the reign of King Charles the Second, intituled 'An Act for the explaining of some Doubts arising upon an Act, intituled "An Act for the better Execution of his Majesty's gracious Declaration for the Settlement of his Kingdom of Ireland, and Satisfaction of the several Interests of Adventurers, Soldiers and other his Subjects there;" and for making some Alterations of and Additions unto the said Act for the more speedy and effectual Settlement of the said Kingdom,' it was enacted, that certain advowsons and rights of patronage, and the rights of nomination, presentation or collation to or donation of certain ecclesiastical benefices or promotions, which had been forfeited by certain Irish Papists or Popish recusants, should vest, remain and continue in his majesty, his heirs and successors, until such Irish Papist or Popish recusant, or the right heir of such Papist or recusant, should come to church and receive the sacrament according to the rites of the church of England, and from and after such conformity should be again revested in the person so conforming and his heirs: and whereas by an act passed in the 2nd year of the reign of her majesty Queen Anne, intituled 'An Act to prevent the further Growth of Popery,' it was enacted, that where any Papists, or per-

Provisions for the cases of Roman Catholic patrons who shall hereafter conform. 18 Car. 2 (1).

2 Anne, c. 6.

6 & 7 Vict. c. 54, s. 4.

sons professing the Popish religion, did or should claim, enjoy or possess any advowson or advowsons of churches, right of patronage or presentation to any ecclesiastical benefice, or where any Protestant or Protestants did or should hold, claim, enjoy or possess any advowson or advowsons of churches, or right of patronage or presentation to any ecclesiastical benefice or benefices, in trust or for the use and benefit of any Papist or Papists whatsoever, that every such advowson and right of patronage or presentation should be thereby *ipso facto* vested in her majesty, her heirs and successors, according to such estates as such Papist had in the same, until such time as such Papist, or the heir or heirs of such Papist, should take a certain oath and subscribe a certain declaration and abjuration prescribed by and set forth in the said act, and should conform to the church of Ireland as by law established; be it enacted, that no possession under any presentation by the crown, or collation by the ordinary, which may have taken place by reason of the said act of the 18th year of the reign of his majesty King Charles the second, or of the said act of the 2nd year of the reign of her majesty Queen Anne, during the nonconformity of any such patron professing the Roman Catholic religion, shall be deemed an adverse possession within the meaning of this act against the right of any such patron or his heirs, or any person claiming by, through or under him or them; provided, that in all cases in which any patron shall have conformed to the said united church within sixty years before the passing of this act, or shall hereafter conform thereto, such patron, or any person claiming by, through or under him, shall not be barred from bringing any such *quare impedit* or other action or suit, for the purpose in the said first herein recited act mentioned, before the expiration of sixty years, to commence and be computed from the day on which such patron shall have so conformed as aforesaid."

Act not to apply to suits commenced before 1st January, 1845.

Sect. 5. "Provided always, and be it enacted, that this act shall not be prejudicial or available to or for any plaintiff or defendant in any action or suit already commenced, or on or before the said first day of January, 1845, to be commenced, relating to any right to present to or bestow any church, vicarage or other ecclesiastical benefice in Ireland."

The stat. 7 & 8 Vict. c. 27, recites the 6 & 7 Vict. c. 54, s. 5:—"And whereas doubts have arisen as to whether under the said hereinbefore recited provision the time therein adverted to for limiting any action or suit relating to any right to present to or bestow any church, vicarage or other ecclesiastical benefice in Ireland was to expire on the 1st day of January, 1844, or on the 1st day of January, 1845: and whereas it is necessary to remove such doubts, and to explain and amend the said hereinbefore recited provisions of the said recited act, and to further amend the said recited act:" it is declared and enacted, "that the said recited act shall not be prejudicial to or available for any plaintiff or defendant in any action or suit already commenced, or on or before the said 1st day of January, 1845, to be commenced, relating to any right to present to or bestow any church, vicarage or other ecclesiastical benefice in Ireland."

Recited act not to affect any action, &c. commenced before 1st January, 1845, relating to any right to presentation.

When actions within prescribed limits are abated by deaths of parties, new actions may be commenced.

Sect. 2. "And be it enacted by the authority aforesaid, that if and when any action or suit relating to any right to present to or bestow any church, vicarage or other ecclesiastical benefice in Ireland already commenced, or which shall hereafter be commenced within the limitations prescribed by the said recited act or this act, shall become abated by the death or marriage of any party thereto, it shall and may be lawful to and for the plaintiff or plaintiffs therein, or the heir at law or the personal representative of the plaintiff or plaintiffs therein, according to the alleged estate or title of such plaintiff or plaintiffs in respect of the subject matter of such actions or suits, or for the person or persons claiming to be entitled in remainder or reversion expectant upon the estate of such plaintiff or plaintiffs to the right to present to or bestow the church, vicarage, or other ecclesiastical benefice in Ireland for which such action or suit shall have been so commenced, to bring a new action to enforce his, her or their right to present to or bestow such church, vicarage or other ecclesiastical benefice in Ireland, provided such new actions shall be commenced within twelve calendar months from the abatement of such preceding action or suit, anything in the said recited acts or either of them or in this act contained notwithstanding." (See 8 & 9 Vict. c. 51.)

3 & 4 *Will.* 4, *c.* 42, *s.* 3.

XII. Of the Limitation of Actions on Specialties.

Limitation of action of debt on specialties, &c.

The third section of the 3 & 4 Will. 4, c. 42, enacts, "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited." As to Ireland see 16 & 17 Vict. c. 113, s. 20.

To an action of debt on a bond, dated more than twenty years before the commencement of the action, the defendant pleaded that the debt and cause of action in the declaration mentioned did not accrue at any time within twenty years next before the commencement of the suit; the plaintiff replied that the debt and cause of action did so accrue. At the trial the bond was produced, and appeared to be a *post obit* bond, and it was proved that the party upon whose death the sum secured was made payable died within twenty years: it was held, that the plaintiff was entitled to the verdict. (*Tuckey* v. *Hawkins*, 4 C. B. 655. See *Barber* v. *Shore*, 1 Jebb & S. 610, *ante*, p. 252.)

Twenty years' arrears of rent and annuity secured by deed may be recovered.

An action of covenant for rent in arrear may be brought within the time limited by 3 & 4 Will. 4, c. 42, s. 3, and is not limited to six years by the 42nd section of 3 & 4 Will. 4, c. 27. *Tindal*, C. J., after observing that the stat. 3 & 4 Will. 4, c. 27, was not proposed to include rents reserved on leases, (see *ante*, pp. 154, 155,) proceeded, "however, it is not necessary to give an opinion on the point; for, on comparing the 42nd section of 3 & 4 Will. 4, c. 27, with the 3rd section of 3 & 4 Will. 4, c. 42, if it was intended in the former to exclude rent on an indenture of lease, the latter statute has now excluded that species of rent from the operation of the former. The first act received the royal assent on the 24th July, 1833, and was to come in force on the 1st January, 1834; the second received the royal assent on the 14th August, 1833, and was to come in force on the 1st June, 1833. The legislature, therefore, by the second statute, made a new and distinct enactment to come into operation before the other. If there be anything in the second irreconcilable with the first, it would be a strange proceeding that the legislature should designedly pass one law to be in force for some time in one year, and a different law on the same subject matter to come in force the next. But it seems to me that there is nothing conflicting in the two. The words of the 3rd section of 3 & 4 Will. 4, c. 42, are not merely negative words but import an affirmative also, not merely that a plaintiff may not sue for rent accruing more than ten years before, but that he may sue for all that time to come for rent in arrear at the time the act passed. Therefore here is in August, 1833, a legislative declaration that actions may be brought for rent in all that period; compare that with section 42, in 3 & 4 Will. 4, c. 27, if that section is to be taken as comprehending similar causes of action. If the 42nd section of 3 & 4 Will. 4, c. 27, is a general enactment, the subsequent declaration that an action of covenant may be commenced during a longer period is virtually an exception out of

3 & 4 *Will.* 4, *c.* 42, *s.* 3.

the former: we are to reconcile the two enactments if it be possible, but if it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception; therefore, without affecting the clause in the first statute further than is necessary to give effect to the second, we decide that the plea of six years' limitation of the cause of action is bad." (*Paget* v. *Foley*, 2 Bing. N. C. 679; 3 Scott, 135. See *Paddon* v. *Bartlett*, 3 Ad. & Ell. 895; 5 Nev. & M. 383; *Wilson* v. *Jackson*, 2 Ir. Law R. 1; *ante*, p. 158.) In an action of debt on a bond, the defendant, after craving oyer of the bond and condition, which was for payment of money pursuant to the covenant in an indenture of even date with the bond, and for performance of the covenants, &c., contained therein on the part of the obligors, pleaded that no cause of action in respect of the said writing obligatory, by reason of any breach of the said condition, or of the covenants, &c., in the said indenture contained, had accrued at any time within twenty years next before the commencement of the suit. It was held, that the plea was bad; first, for not setting out the indenture, as it might contain impossible covenants, in which case the bond would be single, and the plea to the breaches only would be bad; secondly, in not properly confessing a breach of the condition. It seems that the more proper form of plea would have been to set out the indenture, to aver performance of all that was performed within twenty years, to admit the breaches beyond twenty years, and to those breaches to plead the Statute of Limitations. (*Sanders* v. *Coward*, 15 Mees. & W. 48.) *Parke*, B., in giving judgment, observed, "In construing the 3rd section of the 3 & 4 Will. 4, c. 42, it seems to us that the limitation in an action on bond, of 'twenty years from the cause of action or suit,' is not to be confined to twenty years from the first breach of a condition to do various things, any more than it would be confined to that period from the first breach of a covenant to do various things, in an action of covenant. Although, on the first breach of the condition of a bond, the obligee may sue the obligor, and have judgment under the statute of 8 & 9 Will. 3, c. 11, as a security of a higher nature for future breaches, he is not bound to pursue that course. He may waive the right of action on the bond in respect of the first breach, or any number of breaches, and be contented with the specialty security only for future breaches, and sue afterwards on a subsequent forfeiture, and assign that for a breach. If it were not so the inconvenience would be considerable, and the value of a security by bond diminished; and it is to be observed, that the limitation in the statute is not from the cause of action first accrued on the bond, but generally from the cause of action; and this construction leaves the obligee much in the same situation as before the act, except that the statute gives to the lapse of time the effect of an absolute bar to the remedy, instead of its being used as evidence of payment or performance of the condition, as it would have been before. If before the statute there had been a bond for the payment of twenty annual instalments, the lapse of twenty years from the time fixed for the payment of each instalment would have been good evidence to raise a presumption of the due payment of each instalment, but the right to recover the instalments due within twenty years would be unaffected." (*Sanders* v. *Coward*, 15 Mees. & W. 56, 57. See *Higgs* v. *Mortimer*, 1 Exch. R. 711; *post*.) It is admitted that, since *Sanders* v. *Coward*, 15 Mees. & W. 48, and *Blair* v. *Ormond*, 17 Q. B. 423, where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture, by reason of the non-performance of the first act in that series, yet if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that. The obligee, therefore, is not prevented by the statute from suing in respect of breaches committed more than twenty years after the first breach, if he has chosen to waive the previous breaches." (*Per* Lord *Campbell*, C. J., *Amott* v. *Holden*, 18 Q. B. 603, 604.)

An action of debt upon a covenant in an indenture granting an annuity or rent-charge to issue out of land, may be brought within the period of twenty years limited by 3 & 4 Will. 4, c. 42, s. 3, and is not barred by 3 & 4 Will. 4, c. 27, s. 42, which limits the recovery of arrears of rent within six years. (*Strachan* v. *Thomas*, 4 P. & Dav. 229; 12 Ad. & Ell. 558.)

3 & 4 Will. 4, c. 42, s. 3.

An action by a railway company against one of its members for calls under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, and its special act, is an action founded upon a statutory liability, and therefore a plea, that the action is founded upon contracts without specialty, and that the alleged causes of action did not nor did any or either of them accrue within six years before the suit, is a bad plea, the proper limitation to such an action being twenty years by the 3 & 4 Will. 4, c. 42, s. 3. (*Cork and Bandon Railway Company* v. *Goode*, 13 C. B. 827; *Sheppard* v. *Hills*, 11 Exch. 55.) The limitation prescribed by 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by that statute. (*Manning* v. *Phelps*, 10 Exch. 59.)

It has been already stated that a court of equity will adopt many of the provisions of the stat. 3 & 4 Will. 4, c. 42. (*Hyde* v. *Price*, 3 Sim. 578. See *ante*, p. 174.)

Remedy for infants, femes covert, &c.

The 4th section of 3 & 4 Will. 4, c. 42, enacts, "that if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, (*ante*, p. 277,) is or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is or are or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas."

Absence of defendants beyond seas provided for.

Proviso in case of acknowledgment in writing, or by part payment.

The 5th section of 3 & 4 Will. 4, c. 42, provides, "that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action or* any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute." (See 16 & 17 Vict. c. 113, s. 23, as to Ireland.)

* *Lege* on

The 5th section does not specify by whom the part payment is to be made; but Lord *Cranworth*, C., expressed an opinion that there can be no doubt but it must be made by a party interested, for the legislature could not mean to give any right against the debtors by the mere act of a stranger. (*Roddam* v. *Morley*, 1 De G. & J. 18.)

The absence beyond seas of plaintiffs is no longer an impediment, nor is the absence of one or more joint debtors an impediment as against the others. (19 & 20 Vict. c. 97, ss. 10, 11. See *post*.)

A bond conditioned for the replacing a precise amount of stock on a fixed day, not for the payment of any given sum of money on that day, nor even for the payment of such a sum of money as would purchase the given amount of stock, but for replacing the stock itself, is not such an instrument as comes within the 5th section of 3 & 4 Will. 4, c. 42. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee is not payment of interest, neither

3 & 4 Will. 4, c. 42, s. 5.

is any sum of money thereby acknowledged to be due. Lord *Campbell*, C. J., said, "the argument that as the bond in question is plainly within the 3rd section, it must necessarily be within the 5th, is quite untenable, for it is obvious that a bond conditioned to perform the covenants of a lease in respect of repairs or any other matter sounding purely in damages, would be within the 3rd section, and yet it would be impossible by any ingenuity of construction to bring it within the 5th." (*Blair* v. *Ormond*, 17 Q. B. 436, 437.)

In the year 1833, the plaintiffs, who were trustees of a marriage settlement, lent to the husband at interest some of the money settled to the separate use of the wife, on the security of the joint bond of the husband and the defendant. No interest was paid; but on the 31st October, 1847, it was arranged between the plaintiffs and the husband and wife that she should give to the plaintiffs her receipt for the interest up to that date, which she did accordingly. She afterwards gave from time to time receipts for each half-year's interest up to November, 1860. No money ever passed: it was held, that the transaction amounted to a payment or satisfaction of the interest, so as to take the case out of the statute 3 & 4 Will. 4, c. 42, s. 5. (*Amos* v. *Smith*, 1 H. & Colt. 238; 31 L. J., Exch. 423. See *Bodger* v. *Arch*, 10 Exch. 333, as to payment by settlement of accounts.)

A deed, by which the mortgagee conveyed the equity of redemption, after reciting the mortgage deed, contained a recital that the principal sum still remained due, *all the interest thereof having been paid up to the date thereof*. The deed also contained a covenant by the assignee of the equity of redemption to pay the principal sum and interest thereon. It was held, in an action by the mortgagee against the mortgagor upon the mortgage deed, that the recital in the conveyance, which was made within twenty years of the action brought, was evidence of the payment of interest on the mortgage debt, so as to take the case out of the stat. 3 & 4 Will. 4, c. 42, s. 5, and 7 Will. 4 & 1 Vict. c. 28. It was also held, that the subsequent payment of interest by the assignee of the equity of redemption was payment by the "agent" of the mortgagor within the meaning of the statute. It was questioned whether the acknowledgment required to take the case out of the 3 & 4 Will. 4, c. 42, s. 5, must be an acknowledgment made to the creditor or his agent. (*Forsyth* v. *Bristowe*, 8 Exch. 716.)

The acknowledgment under this section need not be made by the person chargeable to the person entitled, or amount to a promise to pay. Therefore the admission of a bond debt, contained in an answer of the executors of the obligor in a suit to which the obligee was not a party, is sufficient to take the bond debt out of the operation of this statute. (*Moodie* v. *Bannister*, 4 Drew. 433; 5 Jur., N. S. 402; 28 L. J., Chanc. 881.)

In an action of covenant on an indenture of mortgage of certain houses, executed in 1824 by the defendant in favour of the plaintiff's testator, to secure payment of 400*l.* and interest, the plaintiff, in order to take the case out of the stat. 3 & 4 Will. 4, c. 42, gave in evidence a deed executed by the defendant within twenty years before action brought, but to which deed the plaintiff's testator was no party. The deed, after reciting that the defendant had executed a mortgage of the house in question to the plaintiff's testator for securing to him a sum of 320*l.* and interest, stated that he conveyed that and other properties to trustees on trust to sell, and out of the proceeds of the sale to pay off all the mortgages and other incumbrances affecting the property, and then to pay the creditors, with an ultimate trust as to the surplus. It was held, that this was not an acknowledgment of the debt within the 5th section of the statute, so as to take the case out of the operation of the 3rd section. It was not necessary for the court to decide the point which was raised in this case as to how far the principle of the cases which have decided that an acknowledgment to third persons is not sufficient, in actions on simple contracts, to take a debt out of the 21 Jac. 1, c. 16, is applicable to the 3 & 4 Will. 4, c. 42, as to debts by specialty. (*Howcutt* v. *Bonner*, 3 Exch. R. 491.) The case of *Mountstephen* v. *Brooke*, (3 B. & Ald. 141,) was cited for showing that an acknowledgment to a stranger of a debt in a deed, to which the creditor was not a party, was sufficient to take the case out of the Statute of Limitations. (See *Lord St.*

3 & 4 *Will.* 4, *c.* 42, *s.* 5.

John v. *Boughton*, 9 Sim. 225; *ante*, pp. 196, 255; *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 662; *Hyde* v. *Johnson*, 2 Bing. N. C. 778, *post*, pp. 292, 293.)

To a declaration in covenant for nonpayment of money, the defendant pleaded that the cause of action did not accrue within twenty years. Replication, that it did accrue within, &c. It was held, under stat. 3 & 4 Will. 4, c. 42, ss. 3, 5, that the plaintiff could not, in support of this issue, give evidence of an acknowledgment by letter within the twenty years. (*Kempe* v. *Gibbon*, 9 Q. B. 609.)

Payment by a devisee on a specialty of his testator's, in which the heirs were bound, is an acknowledgment within the 5th section, and sufficient to preserve the right of action, not only against the party making the payment, but also against all other parties liable on the specialty. (*Roddam* v. *Morley*, 1 De G. & J. 1; 3 Jur., N. S. 449; 26 Law J., Ch. 438; 2 Kay & J. 336; 2 Jur., N. S. 805; 25 Law J., Ch. 329.) M. died indebted on a bond in which the heirs were bound, and having devised his real estates in strict settlement. The devisee for life entered into possession, and, after keeping down the interest on the bond for above twenty years, died, and thereupon the tenant in tail in remainder came into possession: it was held (reversing the decision of Wood, V. C.), that the payment of interest by the tenant for life prevented the action from being against those in remainder. (*Roddam* v. *Morley*, 26 Law J., Ch. 438.) "If the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest as devisee, who is affected by the payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other persons liable on the specialty." (*Per* Lord *Cranworth*, L. C., *Ib.*)

Where a debt secured by an assignment by way of mortgage of an interest in a legacy, expectant upon the death of a tenant for life, became barred before the death of such tenant for life, it was held, that the assignment still continued to be a valid security. (*Seager* v. *Aston*, 26 Law J., Ch. 809; 4 Jur., N. S. 484.)

The limitation after judgment of outlawry reversed.

The 6th section of 3 & 4 Will. 4, c. 42, (see 16 & 17 Vict. c. 113, s. 21, as to Ireland,) enacts, "if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, then in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after." Judgment of outlawry, for not appearing to answer an indictment for high treason, was reversed after the lapse of 116 years, on writ of error, sued out by a co-heir of the outlaw, because it did not appear by the record that proclamations had been made, or a writ of proclamation issued. Judgment was given that the outlawry be reversed, and the co-heir, the plaintiff in error, be restored to all things which he hath lost, &c. (*Tyntè* v. *The Queen*, 7 Q. B. 216.)

No part of the United Kingdom, &c. to be deemed beyond the seas within the meaning of this act.

The 7th section of 3 & 4 Will. 4, c. 42, enacts, "that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the 21st year of the reign of King James the First, intituled 'An Act for Limitation of Actions, and for avoiding of Suits in Law.'" (See 3 & 4 Will. 4, c. 27, s. 19; *ante*, p. 207. See 19 & 20 Vict. c. 97, s. 12, *post*.)

Notwithstanding the Act of Union, and the 3 & 4 Will. 4, c. 42, s. 7, Ireland is still a place beyond the seas within the stat. 4 Ann. c. 16, s. 19,

3 & 4 *Will.* 4, c. 42, s. 7.

which provides, that if a defendant in certain actions, at the time the cause of action accrued, shall be beyond the seas, the person entitled to such action shall be at liberty to bring his action against such person after his return from beyond the seas, within the time specified in that act and in the stat. 21 Jac. 1, c. 16. (*Lane* v. *Bennett*, 1 Mees. & W. 70.) See *Battersby* v. *Kirk*, 2 Bing. N. C. 603.)

Beyond seas.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her majesty, to be deemed to be beyond the seas within the meaning of the act 3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, s. 2, c. 6. (3 & 4 Vict. c. 105, s. 36, which is repealed by 16 & 17 Vict. c. 113, s. 3.)

Presumption of payment of bonds.

Satisfaction of money secured on bonds has been long presumed after twenty years. (3 P. Wms. 396; 2 Atk. 144.) In *Morley* v. *Morley*, (5 De G., M. & G. 610,) bonds more than twenty years old were presumed to be satisfied. But such presumption of payment might, like every other mere presumption, have been encountered by evidence to repel it, as if the interest were proved to have been paid within the time conceived to furnish the presumption; (8 Mod. 278; 2 Ld. Raym. 1370; 3 Br. P. C. 535; 2 Str. 827; 2 Cox, 118;) or if the obligor had had no opportunity nor means of paying; (*Fladong* v. *Winter*, 19 Ves. 196;) or had been abroad ever since he acknowledged by letter the debt to be due. (*Newman* v. *Newman*, 1 Stark. N. P. C. 101.) The simple payment of interest which has accrued within twenty years, is a clear acknowledgment that the bond was unsatisfied. Payment within twenty years of interest, which has accrued beyond the twenty years, is only proof that such a bond once existed. But a receipt indorsed on the bond signed by the obligee, but prepared by a *third* party, who paid such interest, was held an admission that the debt was subsisting within twenty years. (*Sanders* v. *Meredith*, 3 Mann. & Ryl. 116.) And even the production of a receipt for interest within twenty years, indorsed on a bond by the obligee, though the time when such receipt was written and signed did not appear otherwise than by the indorsement itself, has been held to rebut the presumption of payment. (*Barrington* v. *Searle*, 3 Br. P. C. 535; *Glyn* v. *Bank of England*, 2 Ves. sen. 43.) Where, in debt on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payment of *interest* by the obligor to A. B. equal in amount to the interest that would have become due on the bond: it was held, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for A. B., was admissible in evidence after the death of the obligee to connect the payments of interest with the bond. *Gleadow* v. *Atkin*, 1 Cr. & Mees. 410; 3 Tyrw. 289. See *Middleton* v. *Melton*, 10 B. & Cr. 317; 1 Phil. on Ev. 255, 7th ed.) By stat. 9 Geo. 4, c. 14, s. 3, it was enacted, that no indorsement or memorandum of any payment written or made after the 1st January, 1829, upon any promissory note, bill of exchange, or *other writing*, by or on the behalf of the party to whom such payment should be made, should be deemed sufficient proof, so as to take the case out of the operation of either of the statutes, 21 Jac. c. 16, or the Irish act, 10 Car. 1, sess. 2, c. 6. Generally speaking, no time short of twenty years could of itself raise a presumption that a bond had been paid; and even where no demand had been made during that time, that was only a circumstance for the jury to found a presumption upon, and was in itself no legal bar. (*Oswald* v. *Legh*, 1 Term R. 271.) In cases where satisfaction of a bond has been presumed within a less period than twenty years, some other evidence has been given in favour of such a presumption; such as having settled an account in the intermediate time, without any notice having been taken of such a demand. (*Ib.*) But where there is no evidence that the parties have settled any accounts, payment will not be presumed unless twenty years have elapsed since the bond was forfeited. (*Colsell and others* v. *Budd and others*, 1 Campb. 27. See *ante*, pp. 259, 261.)

21 *Jac.* 1, *c.* 16, *s.* 3.

XIII. Of the Limitation of Actions on Simple Contract Debts, 21 Jac. 1, c. 16; 9 Geo. 4, c. 14.

Limitation of actions on simple contract debts.

By stat. 21 Jac. 1, c. 16, s. 3, all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded on any lending or contract, without specialty, and all actions of debt for arrearages of rent, shall be commenced within six years after the cause of action.

An action of debt for a penalty incurred under a bye-law, made by virtue of a royal charter under the great seal, is not an action of debt grounded upon a contract without specialty within this section, and therefore a plea of the Statute of Limitations under this statute is a good plea, and bars the recovery of the penalty, unless the action be not commenced within six years after it is incurred. (*Tobacco-pipe Makers* v. *Loder*, 16 Q. B. 765; 20 Law J., Q. B. 414; 15 Jur. 1194.)

An action for calls by a company under the Companies Clauses Consolidation Act, 1845, is an action on a specialty, and is therefore not barred by this act, although not brought within six years. (*Cork and Bandon Railway Company* v. *Goode*, 13 C. B. 827; 17 Jur. 555; 22 Law J., C. P. 198. See *post*, p. 288.

By the same section, actions of trespass, detinue and replevin must be commenced within six years; actions of assault, battery, wounding and imprisonment within four years; and actions of slander within two years. By section 4, if judgment is given for the plaintiff, and afterwards reversed by a writ of error, or arrested, or if the defendant is outlawed, and the outlawry reversed, a new action may, from time to time, be commenced within a year afterwards. And, by section 7, if any person entitled to any such cause of trespass, detinue, action for trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, at the time of the cause of action accruing, shall be under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, such persons shall be at liberty to bring the actions within the time before limited, after being of full age, discovert, of sane memory, at large, and returned from beyond seas, as other persons not having the same impediments should have done. This provision as to disabilities is altered by 19 & 20 Vict. c. 97, s. 10, which declares absence beyond seas or imprisonment no disability. (See *post*.) By 4 & 5 Ann. c. 16, s. 19, where any persons, against whom there is cause of action, shall be beyond sea at the time of such cause of action accruing, the persons who shall have such cause of action shall have liberty to bring an action within such times as are limited by the statute 21 Jac. 1, c. 16, after their return. (See 3 & 4 Will. 4, c. 42, s. 7; *ante*, p. 281. As to Ireland, see 16 & 17 Vict. c. 113, s. 20. See 19 & 20 Vict. c. 97, s. 12, for the definition of "beyond seas," within 4 & 5 Ann. c. 16, *post*.)

The 21 Jac. 1, c. 16, extends to India and applies to Hindoos and Mahometans as well as Europeans in civil actions in the Supreme Court. (*Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4.)

General limitation of actions under local and personal acts.

The stat. 5 & 6 Vict. c. 97, after reciting that divers acts, commonly called public, local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for any thing done in pursuance of the said acts respectively, and that the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only, enacts, "That from and after the 10th August, 1842, the period within which any action may be brought for any thing done under the authority or in pursuance of any such act or acts shall be two years; or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision or enactment by which any other time or period of limitation is appointed or enacted, shall be, and the same is hereby repealed." But this act does not extend to actions brought before the passing of it. (See *Moore* v. *Shepherd*, 10 Exch. 424, as to the Ramsgate Harbour Act.)

21 *Jac.* 1, *c.* 16, *s.* 3.

On the 8th May, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, and the "public, local and personal" in each session should be classed in separate volumes. (*Richards* v. *Easto*, 15 Mees. & W. 251.) The Metropolitan Police Acts, 10 Geo. 4, c. 44, & 2 Vict. c. 47, and 3 & 4 Vict. c. 84, are not local and personal within the meaning of the stat. 5 & 6 Vict. c. 97, and therefore the times limited by the former statutes respectively for the bringing of actions against justices of a metropolitan district are not altered by the last act. (*Barnett* v. *Cox*, 9 Q. B. 617.)

When the statute begins to run.

In general the day on which the cause of action accrued is to be included. (Hob. 109; 4 Moore, 465.) It may be laid down as a general rule, that the time limited by the statute does not begin to run until there be a full and complete cause of action. On a sale of goods on credit the statute begins to run from the time when credit has expired. (*Helps* v. *Winterbottam*, 2 B. & Ad. 431.) In assumpsit the statute begins to run from the breach of the promise; therefore in an action against an attorney, in which it was stated as a breach, that the defendant neglected to make a search at the Bank of England, to ascertain whether certain stock was standing in the names of certain persons: it was held, that the omission to search having taken place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years. (*Short* v. *M'Carthy*, 3 B. & Ald. 626; *Brown* v. *Howard*, 2 Brod. & B. 73; *Battley* v. *Faulkner*, 3 B. & Ald. 288; *Howell* v. *Young*, 5 B. & C. 259.) In an action on the case for negligence, where the declaration alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage, and the statute runs from the time when the breach of duty is committed, and not from the time when the consequential damage accrued. (*Howell* v. *Young*, 8 D. & R. 14; 5 B. & C. 259; 2 Car. & P. 238; *Smith* v. *Fox*, 6 Hare, 386. See *post*, p. 286.)

As a general rule, an attorney or solicitor retained to conduct a suit is under the obligation to carry it on to its termination, and he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds, and in case of refusal he may sue him for his costs. The retainer is also determined by the death of the client. A solicitor was retained in a chancery suit in which his client was a defendant, and an order was made by the court, that a supplemental bill should be filed to make certain persons next of kin parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made the solicitor's client died: it was held, in an action by the solicitor against the representative of the client for his bill of costs up to the time when the order was made, that the debt was not barred by the Statute of Limitations. (*Whitehead* v. *Lord*, 7 Exch. 691; 21 Law J., Exch. 239; see *Stokes* v. *Trumper*, 2 Kay & J. 232.)

From the time when an attorney might decline proceeding further with his client's business until his bill is paid, the Statute of Limitations will begin to run. (*Rothery* v. *Munnings*, 1 B. & Ad. 15; *Harris* v. *Osbourn*, 2 Cr. & Mees. 629; 4 Tyrw. 445; *Nicholls* v. *Wilson*, 11 Mees. & W. 106.) The defendant employed the plaintiff, an attorney, in several transactions, and, among others, in procuring him money to pay off a mortgage. In an action against the defendant on the plaintiff's bill of costs, it appeared by items in the bill, that he had made applications in several quarters for this purpose, but without success, after which he wrote to the plaintiff, informing him what had been done, and requesting to know his wishes. This item bore date more than six years before action brought. The next, dated within six years, was, "Paid the postage of your answer." By subsequent items, it appeared that further endeavours were made by the plaintiff to raise the money. Ultimately it was obtained: it was held, that the transaction was not one in which the attorney's employment was continuous, and that the latter items did not draw after them the previous ones, so as to take them out of the Statute of Limitations. (*Phillips* v. *Broadley*, 9 Q. B. 744.)

In 1832, A. employed B. and C., then in partnership as attornies, to lay

out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D. subsequently sold the property subject to the mortgage, and the purchaser shortly afterwards paid 500*l.* to C., who, however, did not inform either D. his partner or A. of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838, but both before and after the dissolution and after the death of A., which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A. and his representatives up to 1848 by C. In 1846, the 300*l.* was paid to C., and the mortgage deed was given up by C., but no reconveyance was ever executed. Neither A. nor his representatives had any knowledge of these facts till 1848. Entries had been made by C. in the partnership books of the receipts and payments, but B. had no knowledge of the transaction subsequent to the original advance of 500*l.*: it was held, in an action by the executors of A. against B. and C., that the Statute of Limitations was a bar to the action. For there was no promise in writing or part payment of principal or interest, and to take a case out of the statute there must be a payment *quâ* interest, or a part payment of principal, thereby acknowledging more to be due. In this case, although interest had been paid, it was not paid as interest on money due from the defendants to the plaintiff's testator, but as interest represented to have been received by them from the principal debtor. (*Sims* v. *Brutton*, 5 Exch. 802; 20 L. J., Exch. 41.) 21 *Jac.* 1, *c.* 16, *s.* 3.

Where the cause of action does not arise until after request made, the statute will only run from the time of such request. (*Gould* v. *Johnson*, 2 Salk. 422; 2 Saund. 63 b, n.) If goods be consigned to a factor for sale, an action does not lie against him for not accounting for them, until after a demand made of an account; and the statute therefore, in such case, runs only from the time of such demand. (*Topham* v. *Braddick*, 1 Taunt. 572.) If the contract be to pay money at a future period, or upon the happening of a certain event, as "when J. S. is married," the statute does not begin to run until that specified period has arrived or the event has occurred. (*Fenton* v. *Imbers*, 1 W. Bl. 354; 3 Burr. 1278. Where a bill of exchange is drawn, payable at a future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the money was to be repaid, namely, when the bill became due, and not from the time of the loan. (*Wintersheim* v. *Countess of Carlisle*, 1 H. Bl. 631.)

The defendant, being drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise that, in consideration of the plaintiff having agreed not to proceed against him, the defendant thereby debarred himself of all future plea of the Statute of Limitations in case of his being sued, and thereby promised to pay the bills, "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." In an action of special assumpsit on this agreement, it was held, that under stat. 21 Jac. 1, c. 16, s. 3, the limitation of action ran from the time of the defendant becoming able to pay, though the plaintiff had made no demand, and had not been informed by the defendant, or otherwise had knowledge of such ability. (*Waters* v. *The Earl of Thanet*, 2 Q. B. 757.)

K. being indebted to the plaintiff and to the defendant, and also to a banking company, it was agreed between all the parties that to secure K.'s debt to the company the defendant should draw upon K. three bills of exchange, payable to the plaintiffs, and that the plaintiffs should indorse them to the company. The bills became due in 1843, and were dishonoured. In 1847 the company sued the plaintiffs on the bills, and the plaintiffs, in 1851, paid the amount: it was held, that the plaintiffs were barred by the statute from suing the defendant as drawer of the bills. (*Webster* v. *Kirk*, 17 Q. B. 944; 21 L. J., Q. B. 159.)

The statute runs from the time the plaintiff might have brought his action, unless he be subject to any of the disabilities specified in the statute, *ante*, p. 283. The defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of any default,

21 *Jac.* 1, *c.* 16, *s.* 3.

to have judgment and execution for the whole, as if all the periods for payment had expired. It was held, that in an action of assumpsit on the implied promise to pay according to the terms of the defeasance the defendant might show, under a plea of the Statute of Limitations, that the first default was made more than six years before action; and that this was a complete defence, not only as to instalments due more than six years ago, but also as to those due within that period. (*Hemp* v. *Garland*, 4 Q. B. 519.)

If any one of the securities for an annuity are set aside, the grantee may recover back the purchase-money in an action for money had and received for failure of consideration. In such a case the Statute of Limitations runs from the time when the security is set aside, it not appearing that the consideration has failed before that time; and the statute does not attach if the security was set aside within six years, though six years have elapsed since the annuity was last paid. (*Huggins* v. *Coutes*, 5 Q. B. 432; *Cowper* v. *Godmond*, 9 Bing. 748.)

Injury to real property.

In an action by an owner of the reversion of a messuage, entitled to the support of the underground mines and earth of the contiguous ground, it appeared that the defendant negligently, and without leaving proper support, worked the mines under the contiguous land, and kept and continued the messuage, and caused it to remain without proper support, whereby it became injured. The defendant pleaded that the cause of action did not accrue within six years. The messuage was an ancient house, and the defendant, more than six years before the action, worked the mines at 280 yards distance from the house, in such a manner that the earth intervening between the place of working and the foundation of the house gradually gave way, and finally, within six years of the action, the effect reached the foundation of the house, which was thereby injured. Till within the six years no actual damage to the house occurred, nor was the act of the defendant known to the plaintiff: it was held by the Exchequer Chamber (reversing the judgment of the Queen's Bench), that the defendant's plea could not be sustained. The court being of opinion that the plaintiff's cause of action arose when his property was injured, and as no actual damage occurred more than six years before the action was brought, that the Statute of Limitations did not apply, and that the plaintiff was entitled to judgment upon the plea. (*Bonomi* v. *Backhouse*, Ell., Bl. & Ell. 622; 5 Jur., N. S 1345; 28 L. J., Q. B. 378. It was decided by the House of Lords that a right of action accrued to the plaintiff when the injury actually occurred, and that it was not barred by this statute.

The right of a person to the support of the land immediately around his house is not in the nature of an easement, but it is the ordinary right of enjoyment of property; and until there is an interference with it he has no legal ground of complaint, although in fact something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property. (*Backhouse* v. *Bonomi*, 9 H. L. C. 503.)

Where B. and C. were permitted by a mortgagee not in possession of the mortgaged property, consisting of coal mines, to enter upon the working of the mines, to sell the property, and to receive the value; in taking an account of the quantity and value of the coal wrought by B. and C., more than six years before the bill was filed, by permission of the mortgagee, but who were strangers to the mortgagor: it was held, that the Statute of Limitations did not apply. (*Hood* v. *Easton*, 2 Jur., N. S. 729; 2 Giff. 692; *ante*, p. 235.) This decision was afterwards questioned on appeal, but no judgment was given. (See *S. C.*, 2 Jur., N. S. 917, L. J.)

In an action for maliciously opposing the plaintiff's discharge under the Insolvent Debtors' Act, it appeared that the opposition and order for the detention of the plaintiff were before the commencement of the six years, but the imprisonment under the order continued within six years: it was held, that the action was barred by this statute, the imprisonment having commenced by the order of the commissioner. (*Violett* v. *Simpson*, 8 El. & Bl. 344; 3 Jur., N. S. 1217; 27 L. J., Q. B. 138.)

Conversion.

A.'s furniture was seized under an execution by the sheriff, who assigned it to the judgment creditor. A.'s friends afterwards purchased it from the

judgment creditor, and the sheriff's officers then returned and left the goods in A.'s possession, who remained in undisturbed enjoyment for more than six years. After his death the furniture was claimed by his friends who had purchased it, and adversely by his administratrix: it was held, that the rights of the former were not barred by the Statute of Limitations, which could only apply from six years from a conversion. (*Edwards* v. *Clay*, 28 Beav. 145.) 21 *Jac.* 1, c. 16, *s.* 3.

Money deposited with a banker by his customer in the ordinary way, is *money lent* to the banker with a superadded obligation that it is to be paid when called for by cheque; and consequently, if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the Statute of Limitations is a bar to its recovery—*dubitante Pollock*, C. B. (*Pott* v. *Clegg*, 16 Mees. & W. 324.) A banking firm, who, on opening an account with a customer, had agreed to allow him interest at three per cent. on the balances which should from time to time be standing to his credit, set up the Statute of Limitations as a defence to a bill filed against them by the customer for an account. The account, as it stood in the bankers' book, showed a considerable balance due to the plaintiff, but there being no item in it, or evidence of any transaction connected with it, of a date within six years prior to the filing of the bill, nor any suggestion in the bill, that the bankers were bound, by the agreement or otherwise, to have actually entered the interest as it became due to the credit of the customer in the account, or that they had omitted so to do with a fraudulent intent, the defence was allowed to prevail. An account between a banker and his customer, consisting of three items only and interest, was held not to be a proper subject for a bill in equity. (*Foley* v. *Hill*, 1 Phil. C. C. 399. See *Brown* v. *Gordon*, 22 Law J., Ch. 65; *Bridgman* v. *Gill*, 24 Beav. 302.) Transactions with bankers.

In an action by a customer against a banking firm to recover the balance of his account, the plaintiff was nonsuited, on the ground that two of the defendants were not members of the firm at the time when the cause of action accrued. As the statute would have been a bar to a fresh action, the court, upon affidavits which showed that the defendants had never, during some negotiations which extended over several years respecting the subject-matter of the action, raised any question as to their being the proper parties to be sued, and had averred in a bill against the plaintiff, after pleading and before trial, that the liabilities of the preceding firm had been transferred to the defendants, set aside the nonsuit, and gave the plaintiff leave to amend the declaration, by striking out the two defendants who had been erroneously sued, although it appeared upon the bill who the members were when the cause of action accrued. (*Crawford* v. *Cocks*, 2 Prac. Rep. 192; 6 Exch. 287; 20 L. J., Exch. 169.)

A firm carried on business as A., B. and C. At the time of an alleged debt being contracted, B. and C. were surviving, and an action was subsequently commenced in their names. For more than three years after issue joined, negotiations were pending for a reference, which ultimately went off, and notice of trial was then given. It was then discovered that at the time of the debt being contracted eight other persons were beneficially interested in the firm. The court allowed the writ and other proceedings to be amended, by adding the names of these persons, in order to avoid the effect of the statute. (*Corne* v. *Malins*, 2 Prac. Rep. 498; 20 L. J., Exch. 434.)

Where money was advanced to a firm to be repaid on demand, with compound interest: it was held, that the Statute of Limitations ran from the date of the advance. (*Jackson* v. *Ogg*, 1 Johns. 397; 5 Jur., N. S. 976.) Entries made in the books of the firm, crediting the person who advanced the money with interest from time to time, on the footing of periodical rests, do not bar the statute. (*Ib.*) In 1845, A. lent money to B., a trader, upon an agreement that interest was to be allowed at 10*l.* per cent., such interest to be left to accumulate by way of compound interest at that rate. B. carried the money to the account of A. in his books, and interest was from time to time duly credited in such account, at the rate and in the manner specified. No communication whatever took place on the subject of the debt until 1857, and no payment of interest or principal was made: it was held,

21 *Jac.* 1, *c.* 16, *s.* 3.

that the Statute of Limitations commenced running immediately on the advance being made, that the entry of interest did not take the case out of the statute, and that the debt was consequently barred. (*Ib.*)

Order to wind up company.

An order to wind up a company does not prevent the statute from running against a creditor whose right of action had accrued previously to the winding-up order. (*Re Royal Bank of Australia*, 29 L. J., Chanc. 295; 8 W. R. 269.) In May, 1849, an order was made to wind up a company, and in the ensuing October, the solicitors who had acted for the company carried in a claim against them for costs. In November, 1850, the solicitors, on the application of the official manager, delivered to him the company's books and papers, on which they had a lien for their costs, upon the official manager at the same time undertaking in writing to pay them the amount of their bill out of the first funds which might come into his hands. That undertaking received the sanction of the Master. In 1859, the official manager recovered a sum of money, and the solicitors subsequently thereto sent in to him a larger bill of costs against the company: it was held, that, having regard to the undertaking of the official manager of November, 1850, the solicitors' claim was not barred by the Statute of Limitations, and an order was made to tax their bill of costs, without prejudice to the question whether they were entitled to have a call made to pay the same when taxed. *Re Gloucester, &c. Railway Company*, 29 L. J., Chanc. 383; 2 Giff. 47.) It has been decided that a solicitor could not require a call to be made for payment of his bill. (*Ex parte A' Beckett*, 2 Jur., N. S. 684.) By 25 & 26 Vict. c. 89, s. 75, the liability to contribute under a winding-up order creates a specialty debt. (See 20 & 21 Vict. c. 14, s. 13; Shelford's Law of Joint Stock Companies, pp. 83, 84.)

Concealment of right.

It is no answer to a plea of the Statute of Limitations that the plaintiff was prevented by the defendant's fraud from knowing of the cause of action until after the time of limitation had expired. (*Imperial Gaslight and Coke Company* v. *London Gaslight Company*, 10 Exch. 39; 18 Jur. 497; 23 L. J., Exch. 303.)

In an action for the value of coal wrongfully taken out of the plaintiff's mine, a replication to a plea of the Statute of Limitations, that the wrongful taking was fraudulently concealed from the plaintiff until within six years before action, was disallowed to be pleaded, on the ground that a court of equity would not restrain the defendant from setting up the defence; and that if there was any right to equitable relief it could only be by a bill for an account in equity, in which the amount allowed would be different from the amount recoverable at law. (*Hunter* v. *Gibbons*, 2 Jur., N. S. 1249; 26 L. J., Exch. 1.)

Action upon devastavit.

The remedy for a claim founded upon a devastavit is barred by the lapse of six years. A. executed a money bond, binding himself and his heirs, and died in 1794, leaving B. his heir and executor, to whom real and personal assets devolved sufficient to satisfy the bond. B. paid interest on the bond during his life. He died in 1813, leaving his widow C. his executrix and general legatee and devisee. C. paid interest on the bond down to February, 1817. In May following she married D., who paid the interest and part of the principal due on the bond during the coverture, which was determined in June, 1834, by the death of C., and he afterwards paid the interest down to his own death. C. by will, under a power of appointment, gave to D. a life interest in her real estate, and she took out administration to her with her will annexed. D. died in May, 1852, leaving E. his executor. Subsequently the bond creditor look out administration *de bonis non* to A., B. and C., and filed a bill against E. and the devisees of C., seeking to obtain payment out of the real and personal estate of C.: it was held, that the claim of the creditor against C. personally was a claim on simple contract only as for a devastavit, and was therefore barred by lapse of time. (*Thorne* v. *Kerr*, 2 Kay & J. 54; 2 Jur., N. S. 322; 25 L. J., Chanc. 57.)

A note payable on demand is payable immediately, and the statute begins to operate from the date; (*Christie* v. *Fonsick*, 1 Selw. N. P. 131;) but where it is payable twenty-four months after demand, the cause of action does not accrue, and the statute does not begin to run until after twenty-four months after demand made. (*Thorpe* v. *Boothe*, 1 Ry. & Moo. 388.) Payment of

interest upon a promissory note payable on demand is sufficient to take the case out of the Statute of Limitations, although there be no independent evidence that any demand of payment of the note has been made. (*Bamfield* v. *Tupper*, 7 Exch. 27; 21 Law J., Exch. 6.) And so where a note is payable after sight, the statute runs only from the time of presentment. (*Holmes* v. *Kerrison*, 2 Taunt. 323. And see *Savage* v. *Aldred*, 2 Stark. 232.) The holder of a bill of exchange on *nonacceptance*, and protest and notice thereon, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the *nonpayment of the* bill when due. The Statute of Limitations, therefore, runs against him from the former, and not the latter period. (*Whitehead* v. *Walker*, 9 Mees. & W. 506.)

21 *Jac.* 1, *c.* 16, *s.* 3.

Under 21 Jac. 1, c. 16, s. 3, the Statute of Limitations is not a bar to a set-off unless the six years have expired before the action is brought. Therefore, where to a plea of set-off the plaintiff replied that the cause of set-off did not accrue within six years of the commencement of the suit or the pleading of the plea, the replication was held bad on special demurrer. (*Walker* v. *Clement*, 15 Q. B. 1046. See 9 Geo. 4, c. 14, s. 4, *post*.)

Set-off.

The statute 21 Jac. 1, c. 16, s. 3, extends to defences of set-off, &c., as well as actions; therefore a debt barred by the statute cannot be set off, and if such debt be pleaded in bar to the action the plaintiff may reply the above statute. (*Remington* v. *Stevens*, 2 Str. 1271; Bull. N. P. 180.)

Where to a plea of set-off, alleging that the amount due from the plaintiff equalled the plaintiff's claim, the plaintiff replied as to a part of the set-off the Statute of Limitations, and as to the remainder the general issue: it was held that this was bad, and that the proper replication would have been that part of the set-off was barred by the statute, and that the plaintiff was not indebted to the defendant in any sum which with the part so barred was equal to the amount of his demand. (*Mead* v. *Bashford*, 5 Exch. 336.)

The particulars of set-off showed seven different bills for work and stores for seven different ships of the plaintiff. In order to take the set-off out of the statute, the defendant proved that, in an interview between him and the plaintiff, the plaintiff brought forward the bills and made the balance due to the defendant about 90*l*., and gave his acceptance for 60*l*., which the defendant acknowledged thus, "received acceptance on account." It was held, that the set-off consisted of one subject-matter of demand, and therefore the payment took it out of the statute. (*Walker* v. *Butler*, 6 El. & Bl. 506; 2 Jur., N. S. 687.) See *Williams* v. *Griffith*, 3 Exch. 335, where letters were not sufficient to take the plaintiff's claim, nor an account and affidavit sufficient to take the defendant's set-off, out of the Statute of Limitations.

The liability of an equitable assignee of leaseholds is that of simple contract, and the Statute of Limitations limits its liability to six years after the cause of suit. (*Saunders* v. *Benson*, 4 Beav. 351. See *Moore* v. *Greg*, 2 Phill. C. C. 717.)

The Statute of Limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. (*Macgregor* v. *East India Company*, 2 Sim. 452.)

Exception of merchants' accounts.

The exception in the stat. 21 Jac. 1, c. 16, s. 3, as to actions on merchants' accounts, is repealed, and such actions must now be brought within six years after the cause of action has arisen. (19 & 20 Vict. c. 97, s. 9. See *post*.)

As to persons resident abroad.

If a plaintiff was beyond seas at the time of the action accruing, he might sue under stat. 21 Jac. 1, c. 16, s. 7, at any time before his return, as well as within the limited time after his return. (*Le Veux* v. *Berkeley*, 5 Q. B. 836.)

Under the stat. 4 Ann. c. 16, s. 19, if a right of action accrued against several persons, one of whom was beyond seas, the Statute of Limitations did not run till his return, though the others had never been absent from the kingdom. (*Fannin* v. *Anderson*, 7 Q. B. 811.) If one of several intended co-plaintiffs was within seas, the statute did run, because one plaintiff could act for the others and use their names in an action. (*Perry* v. *Jackson*, 4 T. R. 516. See 19 & 20 Vict. c. 97, ss. 10, 11, *post*.)

21 *Jac.* 1, *c.* 16, *s.* 3.

Where a person dies abroad, to whom a right of action has accrued during his residence there, and he never returned to this country, his executors may sue for it, although more than six years have elapsed since it accrued. It was unnecessary to consider the question whether the executor could maintain the action after the expiration of six years; *Parke*, B., inclining to the opinion that the executor was under no restraint; but *Rolfe*, B., thinking it would be more reasonable to consider the right of action as accruing to the executor at the death of the testator, and to limit the right of action to six years. (*Townsend* v. *Deacon*, 3 Exch. R. 706.)

The proviso in favour of persons under disabilities, in the 21 Jac. 1, c. 16, s. 7, applies as well to foreigners who have never been in the country as to parties residing abroad at the time of the accruing of the cause of action and returning afterwards to England. (*Lafond* v. *Ruddock*, 13 C. B. 813. See *ante*, p. 201.)

A person, in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, and, before the bill arrived at maturity, went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved by his executors in England, and within six years after his death a creditor's bill was filed against the executors: it was held, that the plaintiff was not barred by the Statute of Limitations. (*Story* v. *Fry*, 1 Y. & Coll. C. C. 603; see *Williams* v. *Jones*, 13 East, 439.) The Statute of Limitations did not apply to a defendant who was abroad when the cause of action accrued, and who had not since returned to this country, for by the 4 Ann. c. 16, s. 19, the plaintiff was not barred of his action unless the defendant had returned and six years had elapsed since his return. (*Forbes* v. *Smith*, 11 Exch. 161; 1 Jur., N. S. 503; 24 Law J., Exch. 299.) It was therefore a good replication to a plea of the Statute of Limitations that at the time when the causes of action accrued the defendant was in parts beyond the seas, and that he did not at any time between the time when the causes of action accrued and six years before commencement of the action ever come or return into the United Kingdom, and that he continued in such parts beyond the seas until within six years before the commencement of the action. (*Ib.*)

The 19th section of the 4 & 5 Ann. c. 16, is not an enabling but an exceptive provision to the 21 Jac. 1, c. 16. (*Towns* v. *Mead*, 16 C. B. 123; 1 Jur., N. S. 355; 24 L. J., C. P. 89.) Therefore, where one or two joint contractors is abroad at the time of the contracting of the debt and remains so abroad up to the time of his death, the 21 Jac. 1, c. 16, does not begin to run until after such death, and the plaintiff is not barred within six years of such death (although after six years since the debt was contracted) from suing the other joint contractor. (*Ib.*) Under the 4 Ann. c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the Statute of Limitations does not run until his return or death, though the others have never been absent from the Kingdom. (*Ib.*) It was questioned if the statute ever begins to run at all where such contractor so dies abroad without having ever returned to this country. (*Ib.* See 19 & 20 Vict. c. 97, ss. 12, 14, *post.*)

Debts not revived by trust for payment.

A devise of real estates in trust for payment of the testator's debts will not revive a debt barred by the statute at the time of the testator's death. (*Burke* v. *Jones*, 2 Ves. & B. 275.) A direction for the payment of debts in a will of personal estate will not stop the running of the Statute of Limitations. (*Freake* v. *Cranefeldt*, 3 My. & Cr. 499; see *Jones* v. *Scott*, 1 Russ. & M. 255, reversed by House of Lords, 4 Cl. & Fin. 382.) But a testator may, by express directions in his will, revive debts which have been barred. (*Williamson* v. *Nayler*, 3 Y. & Coll. Exch. 208; *Philips* v. *Philips*, 3 Hare, 281.) If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted. (*Freake* v. *Cranefeldt*, 3 My. & Cr. 409; see *Rhodes* v. *Smethurst*, 4 Mees. & W. 42, affirmed in error, 6 Mees. & W. 351; *ante*, p. 174.)

When a man makes a provision for his debts, he makes a provision for those debts which are not barred by the Statute of Limitations, that is to

say, for those which can be deemed, and in law are deemed, debts, because he has the benefit which the legislature has given to him as a protection against stale demands. They are not debts which are recoverable, therefore they are not debts. The law has barred them. But if a man chooses voluntarily to make a provision for his father's debts to which he was not liable, this statute has no operation with respect to such debts. (*O'Connor* v. *Haslam*, 5 H. L. C. 170; see p. 181.) 21 *Jac.* 1, c. 16, s. 3.

An executor's advertisement to creditors to send in an account of their claims for examination does not amount to a promise sufficient to revive a debt already barred by the Statute of Limitations. (*Scott* v. *Jones*, 4 Cl. & Fin. 382.)

The courts have held, under the 4th sect. of 21 Jac. 1, c. 16, where proper process has been issued by the testator, and the time to which the statute points has expired before judgment, the equity of the statute will apply, so as to enable the executor to take up the action. (Bull. N. P. 150; *Karver* v. *James*, Willes, 255; see *Townsend* v. *Deacon*, 3 Exch. R. 710.)

From an early period, although the time limited by the stat. 21 Jac. 1, c. 16, had elapsed, the plaintiff was permitted to prove an acknowledgment of, or promise to pay, the debt within six years, which was sufficient to entitle him to recover. (3 Y. & Jerv. 522.)

Many of the clauses in the stat. 9 Geo. 4, c. 14 (usually called Lord Tenterden's Act), being analogous in principle to several of the provisions in the 3 & 4 Will. 4, c. 27, and some of the decisions upon the former act being applicable to cases under the latter, appear to be fit subjects for consideration in this work.

The stat. 9 Geo. 4, c. 14, was made with a view to provide a remedy against the vague and loose verbal promises which had been allowed to take cases out of the Statute of Limitations. (6 Bing. 264.) That act, after reciting the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, enacts, "That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever (see 16 & 17 Vict. c. 113, s. 24, as to Ireland): provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff." (9 Geo. 4, c. 14, s. 1.) 9 Geo. 4, c. 14. In actions of debt or upon the case, no acknowledgment shall be deemed sufficient, unless it be in writing, or by part payment. Proviso for case of joint contractors.

The 2nd section makes provision as to pleas in abatement.

The 3rd section enacts, "that no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed suffi- Indorsements of payments.

9 *Geo.* 4, c. 14.

cient proof of such payment, so as to take the case out of the operation of either of the said statutes." (16 & 17 Vict. c. 113, s. 25, Ir. See *Bradley* v. *James*, 18 Q. B. 822, *post*.)

Simple contract debts alleged by way of set-off.

The 4th section enacts, "that the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise." (See 16 & 17 Vict. c. 113. s. 26, Ir.)

Construction of Lord Tenterden's Act.

The intention of the statute 9 Geo. 4, c. 14, was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but merely to require a different mode of proof, substituting the certain evidence of writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. The inquiry, therefore, in a given case, whether the written document amounts to an acknowledgment or a promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar effect. (*Haydon* v. *Williams*, 7 Bing. 163; 4 M. & P. 811.)

Part payment.

Since Lord *Tenterden's* Act, after the six years have elapsed, nothing will revive the debt, except an acknowledgment in writing, from which a promise to pay can be inferred, or a part payment of principal or interest. Now there have been several cases in which it has been considered after much discussion, and adopted by all the courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in part payment of the debt in question; if it stands ambiguous whether it be part payment of an existing debt or payment generally, without the admission of any greater debt as due to the party; if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the Statute of Limitations. (*Per* Lord *Abinger*, C. B., *Waugh* v. *Cope*, 6 Mees. & W. 829.) Part payment to come within the statute must be a payment accompanied by an acknowledgment from which a promise may be inferred to pay the remainder. (*Foster* v. *Dawber*, 6 Exch. 839. See *Sims* v. *Brutton*, 5 Exch. 802.)

Acknowledgment must be signed by party.

Under the 9 Geo. 4, c. 14, s. 1, and previously to the 19 & 20 Vict. c. 97, s. 13 (see *post*), an acknowledgment signed by the agent of the debtor would not revive a debt barred by the Statute of Limitations, 21 Jac. 1, c. 16; but it must be signed by the debtor himself. *Tindal*, C. J., said, "The legislature has in many statutes given equal efficacy to written instruments when signed by the parties and when signed by their agents; but in all those cases express words have been employed for that purpose. The Statute of Frauds, in its 3rd section, requires for the purposes of that section a note in writing to be signed by the party, 'or their agents thereunto lawfully authorized *by writing*;' in the 4th section a memorandum or note in writing is required, 'signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;' in the 5th section a devise of lands is required to be made in writing, to be 'signed by the party so devising, or by some other person in his presence, and by his express directions;' in the 7th section a declaration of trusts of any lands shall be in writing, 'signed by the party;' and lastly, the 17th section requires upon the sale of goods, that there shall be some note or memorandum in writing of the bargain, 'signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.' It appears, therefore, that the legislature well knew how to express the distinction, not only between a signature by the party, and a signature by his agent, but also to describe the different mode by which agents for different purposes are to be appointed. The same observation arises upon referring to the more recent statutes, 3 & 4 Will. 4, c. 27, s. 42, and c. 42, s. 5. When, therefore, we find in the statute now under consideration, that it expressly mentions the signature by the party only, we think it a safer construction to adhere to the precise words of the statute, and that we should be legislating, not interpreting, if we extended its operations to writings signed, not by the party chargeable thereby, but by his agent. And we feel ourselves the more

compelled to adopt this construction, as we find the 7th section of the same statute recites the 17th section of the Statute of Frauds, so that the legislature must have had in their view at the very time of passing this statute, and therefore must have intended, the distinction between writings signed by a party or signed by his agent." (*Hyde* v. *Johnson*, 2 Bing. N. C. 778—780; 3 Scott, 389; *Clark* v. *Alexander*, 8 Scott, N. R. 165.) *9 Geo. 4, c. 14.*

What acknowledgments sufficient.

If, since the stat. 9 Geo. 4, c. 14, a defendant, by a letter, admits a *balance to be due*, without stating the amount, this will take the case out of the Statute of Limitations, so as to entitle the plaintiff to nominal damages. (*Dickenson* v. *Hatfield*, 5 Car. & Payne, 46; 2 M. & M. 141.) An acknowledgment of a debt without mentioning the amount will not entitle the plaintiff to recover nominal damages on a count upon an account stated. (*Lane* v. *Hill*, 16 Jur. 496.) A general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations. These words in a letter were held a sufficient acknowledgment to revive a debt barred by the Statute of Limitations:—"I wish I could comply with your request, for I am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it; my hope is, that out of the present harvest you will be paid." (*Bird* v. *Gammon*, 3 Bing. N. C. 883; 5 Scott, 213.) In another case the defendant had a claim against his attorney the plaintiff, the amount of which was not ascertained; at the foot of his bill, the plaintiff acknowledged the debt thus:—"By Mr. Lacy's bill," leaving a blank for the sum: it was held, that this was a sufficient acknowledgment to take the defendant's claim out of the Statute of Limitations. (*Waller* v. *Lacy*, 1 Scott, N. R. 186; 8 Dowl. 563; 1 Mann. & G. 54.) Where a deed executed by A. and B. recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck; and that A. was willing to pay B. the amount which might appear to be due to B. in respect of such sums, such amount to be ascertained and paid as thereinafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed: it was held that, notwithstanding the clause as to arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained; and that, when coupled with extrinsic parol evidence as to the amount, they were sufficient, consistently with stat. 9 Geo. 4, c. 14, to take the debt out of the Statute of Limitations. (*Cheslyn* v. *Dalby*, 4 You. & C. 238.) In assumpsit on a bill of exchange, a letter was produced to take the case out of the Statute of Limitations, from the defendant to the plaintiff, stating that the plaintiff should be informed, immediately it was settled, how the defendant's affairs should be arranged; adding, "Your account is quite correct, and, oh! that I were now going to inclose the amount." No amount of debt was stated, and no proof was given, from the letter or otherwise, to what account the letter referred, nor whether the letter applied to the bill. It being left to the jury to say whether this was an unconditional acknowledgment of the debt, and they having found that it was, it was held that there was no ground for a nonsuit; for that the acknowledgment was unconditional; and that the jury, if it was a question for them, had decided it rightly. (*Dodson* v. *Mackey*, 8 Ad. & El. 225, n.) But it seems that when a written acknowledgment does not state the amount due, there can only be nominal damages; (*Id.*; see *Lechmere* v. *Fletcher*, 1 Cr. & M. 623; 3 Tyr. 450; *Dabbs* v. *Humphries*, 10 Bing. 446; 4 M. & Scott, 285;) unless there be proof *aliunde* of the amount due. (*Dickenson* v. *Hatfield*, 5 Carr. & P. 46.) A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt of more than six years' standing, was held sufficient, within the stat. 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations, though no amount was stated, and to entitle the plaintiff to recover the whole of such proportion proved by extrinsic evidence. (*Lechmere* v. *Fletcher*, 1 Cr. & Mees. 623; *Waller* v. *Lacy*, 1 Scott, N. R. 186; 8 Dowl. P. C. 563; 1 Mann. & G. 54.) An answer and inventory in the Ecclesiastical Court, made on the citation of the next of

9 *Geo.* 4, *c.* 14.

kin, stating the debts due from the estate of the deceased, and signed by the administrator, is sufficient to take such debts out of the Statute of Limitations, 21 Jac. 1, c. 16; 9 Geo. 4, c. 14. (*Smith* v. *Poole*, 10 Law J. (N. S.), Chanc. 192; *Spollan* v. *Magan*, 1 Ir. Com. L. R. 691.)

In 1845, J. lent the plaintiff 200*l.* on the security of the joint and several promissory note of himself and two sureties. Between November, 1845, and February, 1847, J. bought of the plaintiff goods to the amount of 17*l.* In July, 1847, the plaintiff remitted to J. 10*l.* for interest due on the note, and at the same time sent his bill for the goods. J. wrote in answer:—"I beg to acknowledge the receipt of 10*l.* cash, and the bill amounting to 17*l.*, both of which sums I have placed to your credit. I have enclosed your bill, receipt it, and return it to me by post." It did not appear whether the plaintiff had sent back the bill receipted. In February, 1853, and after the death of J., the promissory note was paid by one of the sureties without taking credit for the 17*l.* In May, 1853, the plaintiff sued the administratrix of J. for the 17*l.*, when she pleaded the Statute of Limitations. It was held, that the above letter was a sufficient promise to take the case out of that statute, for it imported not a conditional promise but an absolute promise, coupled with a suggestion as to the mode of payment. (*Evans* v. *Simon*, 9 Exch. 282; 23 Law J., Exch. 16.)

Upon an application for payment of 450*l.* due upon two bills of exchange, dated 25th of March, 1836, upon which interest had been paid up to the 25th of March, 1841, a letter was written by the debtor on the 13th of January, 1846, stating:—"I hope to be in H. very soon, when I trust every thing will be arranged with Mrs. W. agreeable to her wishes." It was held a promise to pay, which would take the debt out of the statute, and exceptions to the master's report, allowing the debt, were overruled. (*Edmonds* v. *Goater*, 21 Law J., Chanc. 290. See *Fuller* v. *Redman*, 26 Beav. 620, *ante*, p. 196.)

The following letter is an acknowledgment from which a promise to pay might be implied so as to rebut the statute:—"In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat. Yours, J. J." (*Cornforth* v. *Smithard*, 5 H. & N. 13; 29 Law J., Exch. 228; 8 W. R. 8.)

The plaintiff having applied to the defendant for payment of a debt, the defendant wrote in answer:—"I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour, this term will decide the matter." This was held a sufficient acknowledgment. (*Collis* v. *Stack*, 1 H. & N. 605; 26 Law J., Exch. 138.) The question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made. (*Ib.*)

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had also a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows:—"September 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st of November, and when the policy is paid on the 29th October, I hope that you will have the whole of your account ready for me as I hope to be with you on that day." "October 25. Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.*, of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B., of course you are aware that you have paid 25*l.* to my credit, that Mr. Y. paid over when he could not complete the purchase of the property in the High-street." This was held a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations. (*Godwin* v. *Culley*, 4 H. & N. 373.)

S. borrowed of J. 200*l.* upon promissory notes, and a year afterwards remitted to J. 10*l.* on account of the interest due, and sent him a bill of 17*l.* for goods. J., by note, acknowledged the 10*l.* and the bill, and stated that

he placed both sums to the credit of S., and requested S. to receipt the bill and return. In an action for the 17*l.*, it was held, that the above letter took the case out of the statute. (*Evans* v. *Simon*, 9 Exch. 282.) So where the plaintiff having repaired some cottages for the defendant sent him his bill, and in answer, the defendant wrote thus:—"I have received your bill, it does not, I think, specify sufficiently to which cottages the work is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. H. (the defendant's agent). It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return them by first post, with instructions to pay, if correct." It was held that the letter was a sufficient acknowledgment of a debt to take the case out of the statute. (*Sidwell* v. *Mason*, 26 Law J., Exch. 407.)

A. gave B. a promissory note, dated October, 1834, for 837*l.* 1*s.* 6*d.*, payable on demand. In December, 1834, demand was made, and A. then promised to pay interest and signed an unstamped memorandum, dated the 2nd of December, 1834, as follows:—"I promise to pay to B. 837*l.*, with 4*l.* per cent. interest thereon, A." Neither principal nor interest was paid, but in January, 1848, A. wrote to B. a letter referring to a promissory note for a debt which he acknowledged and promised thereby to pay. It was held, that the memorandum of December, 1834, and a letter accompanying it, showed that interest was running, and that though in form a promissory note and unstamped it could be looked at to see to what debt this interest was to be referred; and that as no other debt was proved to exist, the 837*l.* there mentioned was to be assumed to be part of the 837*l.* 1*s.* 6*d.* secured by the former promissory note. It was held, also, that in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note of October, 1834, and thus to take it out of the Statute of Limitations. (*Spickernell* v. *Hotham*, 1 Kay, 699.)

To prevent the right to have an account from being barred by the Statute of Limitations, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party. (*Prance* v. *Sympson*, 1 Kay, 678; 18 Jur. 929.) A. having a claim for an account against B. and C. in respect of a former partnership between them, wrote to B.:—"C., before he goes, ought to settle the Bridgewater and Minehead account, because if he is under any idea that there is a balance due to him he is grossly mistaken, as such balance is due to yours ever, A." B. answered, "My dear A.—Bridgewater and Minehead—I have had a long talk with my partner about this matter; he says and insists that there is a large balance coming to him, but I have put the matter right with him and you, and I must go into it and settle the account. It is necessary that we should sit down to this matter and put it on the square." It was held, that this was a sufficient acknowledgment of the right to an account, and promise to pay anything that might be due, to save the right to sue for an account in equity from being barred by the statute. (*Ib.*)

Memorandum exempted from stamp duty.

No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. 9 Geo. 4, c. 14, s. 8; (16 & 17 Vict. c. 113, s. 27, Ir.) Under this section the following memorandum:—"I acknowledge to owe to M. 36*l.*, which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the Statute of Limitations, the debt itself being proved by other evidence. (*Morris* v. *Dixon*, 4 Ad. & Ell. 845.) When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the Statute of Limitations under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments

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which might be stamped with an agreement stamp. (*Jones* v. *Ryder*, 4 Mees. & W. 32.)

What acknowledgments are not sufficient.

The acknowledgment in writing to take a case out of the Statute of Limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. (*Buckett* v. *Church*, 9 Car. & P. 209.) An acknowledgment, without anything more, may raise an implied promise since the stat. 9 Geo. 4, c. 14. as it did before; but where something else is added, that must be taken into consideration. A debtor having sums due to him, handed the accounts to his creditor, and wrote, "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear," and added his signature. It was held, that this acknowledgment did not imply a promise to pay, and was no answer under the statute, 9 Geo. 4, c. 14, to a plea of the Statute of Limitations. (*Routledge* v. *Ramsey*, 8 Ad. & Ell. 221; 3 Nev. & P. 319.) An acknowledgment, accompanied with what is a contradiction of any promise to pay, is not sufficient. (*Linsell* v. *Bonsor*, 2 Bing. N. C. 241; 2 Scott, 399.) Whether such a written acknowledgment be conditional or unconditional is a question for the court, not the jury (*Ib.*), except where the document is connected with other evidence affecting the construction. (*Morrell* v. *Frith*, 3 Mees. & W. 402; *Bird* v. *Gammon*, 3 Bing N. C. 883; *Power* v. *Barham*, 4 Ad. & Ell. 473; 1 M. & R. 507.) The later cases have decided that the effect of a document set up as an acknowledgment is entirely a question for the court, unless extrinsic evidence is necessary to qualify or explain it. (*Per Parke*, B., *Smith* v. *Thorne*, 18 Q. B. 140.) A party being written to by the plaintiff's attorney for payment of an alleged debt due for more than six years, wrote an answer, in which he stated that he was "in almost daily expectation of being enabled to give a satisfactory reply" to the application, and that he would call on the plaintiff's attorney "on the matter:" it was held, that this was not sufficient to take the case out of the Statute of Limitations. (*Morrell* v. *Frith*, 8 Carr. & P. 246.) Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the Statute of Limitations under 9 Geo. 4, c. 14, unless it be so entered in writing; the only act capable of taking a case out of the statute being the payment of principal or interest. (*Emery* v. *Day*, 1 C., M. & R. 245; 4 Tyr. 695.) If a payment may have been made by a party paying to the credit of an account due to himself, or with the intention of satisfying the whole of the demand against him, it is not sufficient to bar the Statute of Limitations; there must be a distinct admission of an existing debt, of which the payment was payment in part. The plaintiff and attorney had done professional business of various kinds for the defendant in 1827, and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2*l.* 2*s.* and 10*s.* 6*d.*, inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2*l.* 2*s.* and 10*s.* 6*d.* were paid to the plaintiff on the production of those receipts. In 1831, the plaintiff delivered to the defendant a bill of costs, amounting to 289*l.*, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for 3*l.* and 5*l.* cash lent, the rest of the bill was for professional business. In an action on this bill commenced in June, 1839, it was held, that the letters given in evidence did not sufficiently show that the 2*l.* 2*s.* and 10*s.* 6*d.* were paid in discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations as to any part of the demand. (*Waugh* v. *Cope*, 6 Mees. & W. 824.) A deed of composition, by which, after reciting that the defendant was indebted to the plaintiff and others, the former assigned his property to the plaintiff, in trust to sell and to pay all such creditors as should sign the schedule of debts

annexed, but which was neither signed by the plaintiff nor specified the amount of his debt, and had become void under a proviso, was held not to be evidence of a promise, nor an acknowledgment in writing within the stat. 9 Geo. 4, c. 14, for the acknowledgment was only of some debt, but what remained to be made out by parol evidence. (*Kennett* v. *Milbank*, 8 Bing. 38; 1 M. & Sc. 102.) The Statute of Limitations is not barred by a letter in which the defendant states "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; and that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information;" for by the stat. 9 Geo. 4, c. 14, s. 1, the acknowledgment in writing, to bar the statute, must be signed by the party chargeable thereby, and such letter does not charge the defendant. (*Whippy* v. *Hillary*, 3 B. & Ad. 399; 5 C. & P. 209.) An admission by a bankrupt in his balance sheet will not take a debt out of the Statute of Limitations as against his assignees. An admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, will not take a debt of the bankrupt out of the Statute of Limitations. (*Pott* v. *Clegg*, 16 Mees. & W. 321.) In order to take a case out of the Statute of Limitations, a letter from the defendant to the plaintiff was put in, containing the following words:—"I shall be most happy to pay you both interest and principal *as soon* as convenient;" and in a subsequent part, "I shall pay no more interest till we have a fair settling." Other letters of the defendant acknowledged a debt, but spoke of a settling between him and the plaintiff. It was held that, in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay; and, as it seems, that the settlement alluded to had taken place between the parties. (*Edmunds* v. *Downes*, 4 Tyrw. 173; 2 C. & M. 459.) 9 *Geo.* 4, *c.* 14.

A mere acknowledgment is not sufficient to take a case out of the Statute of Limitations, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, an implication will not arise. (*Tanner* v. *Smart*, 6 B. & C. 602; *S. C.*, 9 Dowl. & Ryl. 549.) The principle of law applicable to these cases since the last case is, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay coupled with a condition, he must show performance of the condition. The following letter written by the defendant to the plaintiff's clerk, in answer to an application for a debt contracted above six years before the action brought, was held not sufficient to defeat a plea of the Statute of Limitations:—"I will not fail to meet the plaintiff on fair terms, and have now a hope before perhaps a week from this date I shall have it in my power to pay him at all events a portion of the debts, when we shall settle about the liquidation of the balance." (*Hart* v. *Prendergast*, 14 Mees. & W. 745. See *Gardner* v. *M'Mahon*, 3 Q. B. 561; 2 Gale & D. 593; *Fuller* v. *Redman*, 26 Beav. 620.) Letters not containing any absolute acknowledgment of a debt or unqualified promise to pay, but only expressing a hope that on the transfer of a mortgage the debtor might be able to clear off the whole that might be standing against him, will not take a case out of the statute. (*Smith* v. *Thorne*, 18 Q. B. 134.)

There must either be an unconditional acknowledgment from which a promise can be inferred or a promise. But if the promise be conditional and the condition be unperformed, that is not an absolute promise until the condition be performed. In *Smith* v. *Thorne*, (18 Q. B. 134, 139,) *Parke*, B., said, "the acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled." (Cited by *Hill*, J., *Everett* v. *Robertson*, 1 Ell. & Ell. 20.)

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In answer to a plea of the Statute of Limitations in an action for a debt, the creditor proved that within six years of action brought the debtor had presented a petition for arrangement with his creditors under 7 & 8 Vict. c. 70, and had inserted the debt upon which the action was brought in the account of his debts, and his proposal was, that "for the future, payment or compromise of such debts and engagements," he proposed to assign all his estate and effects to trustees: it was held, not to be sufficient to take the case out of the statute, as not showing that from which the court could infer an unconditional promise, or a promise upon a condition fulfilled. (*Everett* v. *Robertson*, 1 Ell. & Ell. 16.)

A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute. An acknowledgment to take a case out of the statute must be made to the creditor; and it seems that one to his agent is sufficient. (*Fuller* v. *Redman*. 26 Beav. 614, *ante*, p. 196.)

A mere acknowledgment of a debt, accompanied with a proposal to pay part, which has not been acceded to, is not sufficient to take the case out of this statute. (*Francis* v. *Hawkesley*, 1 Ell. & Ell. 1052; 5 Jur., N. S. 1391; 28 Law J., Q. B. 370; 7 W. R. 599.)

An admission of a debt made to a person, who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of the Statute of Limitations, though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe. (*Goate* v. *Goate*, 1 H. & N. 29.)

The acknowledgment must be before the action is brought. (*Bateman* v. *Pindar*, 3 Q. B. 574.) A mere acknowledgment, though it may, under circumstances, amount to a new promise, yet if it does not, it is not a sufficient answer to the Statute of Limitations. (*Fearn* v. *Lewis*, 4 Moore & P. 1; *S. C.*, 6 Bing. 349; *Scales* v. *Jacob*, 11 B. Moore, 553; *S. C.*, 8 Bing. 628; *Ayton* v. *Bolt*, 12 B. Moore, 305; *S. C.*, 4 Bing. 105.) And therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability on the defendant's part to make the payment, was held not to raise an implication of a promise to pay. (*Brigstock* v. *Smith*, 1 Cr. & Mees. 483.)

In *Philips* v. *Philips*, (3 Hare, 281, 299,) *Wigram*, V. C., laid down the following principle, which was recently quoted by *Williams*, J., as the true one (10 C. B., N. S. 749, 750):—"The legal effect of an acknowledgment of a debt, barred by the Statute of Limitations, is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

A letter in these terms was held not to contain an acknowledgment from which a promise to pay could be inferred:—"I have received a letter from Messrs. P. and L., solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10*l.* per annum, until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly." (*Buckmaster* v. *Russell*, 10 C. B., N. S. 745; 8 Jur., N. S. 155, Exch. Cham.)

Where a written promise to pay a debt barred by the Statute of Limitations has been lost, parol evidence of the contents of the writing is admissible. (*Haydon* v. *Williams*, 7 Bing. 163; 4 M. & P. 811.) But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence. (*Edmunds* v. *Downes*, 4 Tyrw. 173; 2 Cr. & M. 459.)

The promise given in evidence, under the general replication to the

Statute of Limitations, must be consistent with the promises laid in the declaration, and consequently evidence of a *conditional* promise will not support an *absolute* promise in the declaration. (*Tanner* v. *Smart*, 6 B. & C. 603; 5 D. & R. 549.) For where an action is brought after the six years, and the subsequent acknowledgment of the defendant is the very ground of action, the plaintiff must take it altogether as he finds it, and cannot use the acknowledgment without annexing the qualification also. (*Haydon* v. *Williams*, 7 Bing. 168; 4 M. & P. 811.) 9 *Geo.* 4, *c.* 14.

It was ruled by Lord *Tenterden*, C. J., that one executor cannot be bound by the express promise of another executor, even if he binds himself in his character of executor; (*Tullock* v. *Dunn*, 1 Ry. & M. 416; *Scholey* v. *Walton*, 12 Mees. & W. 510;) although in other cases an opinion was expressed by the court, that an express promise made by one executor in his representative character will bind the remaining executors in their representative character. (*Atkins* v. *Tredgold*, 2 B. & C. 23; 3 D. & R. 200; *M'Culloch* v. *Dawes*, 9 D. & R. 40.) Executors who pay a debt, against which the Statute of Limitations may be pleaded as a legal bar, do not render themselves liable over to the persons who are interested in the testator's property. (*Hill* v. *Walker*, 4 Kay & J. 166, 169.)

Part payment of principal or interest.

In order to take a case out of the Statute of Limitations by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and, thirdly, that the payment was made of part of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at time of the payment. (*Tippets* v. *Heane*, 1 C. M. & R. 252. See *Wainman* v. *Kynman*, 1 Exch. R. 118.) One of three joint makers of a promissory note became insolvent and inserted the note and the holder's name in his schedule, and a dividend was afterwards paid to the holder by order of the Insolvent Court: it was held in an action upon the note, that such was not sufficient to take the case out of the Statute of Limitations, either as against the other makers of the note or as against the insolvent himself. (*Davies* v. *Edwards*, 7 Exch. 22; 21 Law J., Exch. 4.) The meaning of *part payment* of the principal is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum* due from the person making the payment to him to whom it is made, which part payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact. (*Waters* v. *Tompkins*, 2 Cr. M. & R. 726.) In an action upon a promissory note, to which the Statute of Limitations was pleaded, the plaintiff gave evidence that the defendant had paid *5s.* on account of the note. He then offered to prove that the defendant, on a subsequent occasion, admitted orally that he had made such payment on the above account. It was held, that the latter evidence was not excluded by stat. 9 Geo. 4, c. 14, s. 1. (*Beavan* v. *Gething*, 3 Q. B. 740.) Since the statute 9 Geo. 4, c. 14, the payment within six years of interest which had become due upon a note, beyond that period, has been held sufficient to take the case out of the Statute of Limitations, where the note remained in the hands of the payee. (*Bealy* v. *Greenslade*, 2 Tyrw. 121; 2 C. & J. 61; 1 Price, P. C. 144.) So also was payment of interest within six years, by one of the several makers of a joint and several promissory note. (*Wyatt* v. *Hodson*, 1 M. & Scott, 442; 8 Bing. 309.) Payment of interest upon a promissory note payable on demand will take a case out of the statute, although there be no independent evidence of any demand of payment of the note having been made. (*Bamfield* v. *Tupper*, 7 Exch. 27.) Payment of interest, within six years of action brought, on a promissory note given to a woman before marriage to her husband in her lifetime, was held an answer to the plea of the Statute of Limitations in an action by her administrator, such payment being considered as made to the husband in the character of agent to his wife, and not to have reduced the *chose in action* into possession. (*Hart* v. *Stephens*, 6 Q. B. 937.)

9 Geo. 4, c. 14.

A. gave B, then being a feme sole, a promissory note; B. died, having married C., who thereupon arranged with A. that the interest on the note should go towards the maintenance of B.'s child then under the care of A. In 1839, A. and C. settled their accounts; and A. indorsed a memorandum on the note, that all the interest up to that date was paid, but no money passed. In 1848, the child died, no payments on either side having been made in the meantime. In 1853, C. took out letters of administration to B., and brought an action against A. to recover the amount of the note, alleging a promise to himself as administrator after the death of B. It was held (dubitante *Parke*, B.) that the agreement between the plaintiff and the defendant, and the continued acting thereon up to the time of the child's death, constituted a payment of interest within this section. (*Bodger* v. *Arch*, 10 Exch. 333; 24 L. J., Exch. 19.)

The words of the act, that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," can never mean a payment made by a stranger, and without authority, but payment made by the principal debtor or any one acting by his authority. (*Linsell* v. *Bonsor*, 2 Bing. N. C. 245; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106.)

In an action against a husband and his wife upon a joint and several promissory note made by the wife before coverture, and one J. A., a promise was alleged to have been made by the wife *dum sola*. The defendant pleaded the Statute of Limitations. The declaration was amended after issue by inserting an allegation of a subsequent promise by the husband. The plaintiffs proved a payment of interest within six years made by the wife after marriage with money sent by J. A., but without the privity or subsequent ratification of the husband: it was held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the Statute of Limitations, inasmuch as the wife being incapable of making any promise in law, express or implied payment by her, or the other joint maker of the note, could create no promise on her part, and as such payment was not made by the husband, or for any consideration affecting him or with his sanction, it raised no implied promise on his part. (*Neve* v. *Hollands*, 18 Q. B. 262.) If the payment had been made by the husband, or with his sanction, the declaration, as amended, would have been bad in arrest of judgment, as the wife would then have been improperly joined in the action. (*Ib.*, per Lord *Campbell*, C. J.)

It was decided that a verbal acknowledgment of the payment of part of a debt within six years was not sufficient within the stat. 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations; as the previous enactment must be engrafted upon the proviso as to part payment, and the whole must be taken together and the payment proved, not by a verbal acknowledgment, but by evidence of the actual payment, or by writing such as the act requires; and being so proved it will have the same effect as it had before the passing of the act. (*Willis* v. *Newnham*, 3 Y. & J. 518.) But that decision is now overruled, and part payment of principal or payment of interest on account of a debt is not affected by the 9 Geo. 4, c. 14, and therefore a *parol acknowledgment* of payment within six years before the action brought will take the case out of the statute. (*Cleave* v. *Jones* (*in error*), 6 Exch. 573, Exch. Cham.; 15 Jur. 515; 20 L. J., Exch. 238.)

Evidence of verbal admissions in 1850 by A., since deceased, that he owed a debt of 2,330*l.* to B.'s estate, the interest of which he had arranged to discharge and was discharging by paying two annuities bequeathed by B.'s will, together with a statement in an affidavit made by B.'s executor in 1850, which was inserted in the draft affidavit from the dictation of A. to the effect that B.'s executor had received in August, 1850, from A. a half-year's interest on 2,300*l.*, and had paid the same annuities the same half-year, was held sufficient to take the debt of 2,300*l.* out of the statute. (*Edwards* v. *Jones*, 1 Kay & J. 534.)

In an action by an executor of the payee of a promissory note against the maker upon a promissory note more than six years overdue, the plaintiff, in order to take the case out of the Statute of Limitations, produced a book in

which he had in 1844 and 1847 respectively, at the request of the testatrix, entered two payments as for interest due upon the note, which she told him she had received from the defendant: the evidence was held to be excluded by the third section, (*ante*, p. 291,) which applies, where there is nothing but an indorsement. (*Bradley* v. *James*, 13 Q. B. 822.) An indorsement made, before the passing of this act, on a promissory note by a person in the habit of transacting business for both maker and payee, of interest having been paid up to a certain day, was held to take the note out of the operation of the statute; and where, on the death of the maker, an arrangement was come to between the trustee of his will which charged his land with his debts, and the payee, that interest should not be payable until after the death of the latter: it was held, that the remedy was not barred. (*Briggs* v. *Wilson*, 17 Beav. 330.) In assumpsit on a promissory note bearing interest, proof that the defendant being sent to by the plaintiff for money, paid 1*l.*, and said, "this puts us straight for the last year's interest, all but 18*s.*: some day next week I will bring that up," is sufficient answer to a plea of the Statute of Limitations, no evidence being given of any other debt due from the defendant to the plaintiff. (*Evans* v. *Davies*, 4 Ad. & Ell. 840; 3 Dowl. P. C. 786; 1 Gale, 150.) 9 *Geo.* 4, *c.* 14.

A. owed B. three sums on three promissory notes, dated respectively in 1839, 1840, 1841. In 1846, B. applied for interest, and A. paid 5*l.* on account of interest generally, and a few days afterwards B., without the knowledge or concurrence of A., made a memorandum on the note 1841, that the payment had been made on account of interest thereon. At the time of this payment, two of the notes were barred by the statute: it was held, upon appeal reversing the order of the court below, that the payment of the interest generally could not be referred exclusively to the two notes which were barred, but must be referred either to the three notes or to the one not barred, and in either view the effect of the payment was to take the note of 1841 out of the statute. It seems that the appropriation by the creditor, without the knowledge or consent of the debtor, will not *per se* furnish sufficient ground for raising against the debtor a new promise to pay. Where a payment is made by a debtor on account generally, the court will not refer it to a debt barred by the statute if it can be attributed to any debt not so barred. (*Nash* v. *Hodgson*, 25 Law J., Chanc. 186; 1 Kay, 650; 23 Law J., Chanc. 780; 1 Jur., N. S. 946; see *Mills* v. *Fowkes*, 5 Bing. N. S. 455.)

A creditor who had more than six years before the action supplied ship's stores on seven separate occasions to the debtor amounting in the aggregate to more than 300*l.* within six years, asked his debtor for money. The debtor answered, that he had not looked into his accounts but supposed the balance to be between 90*l.* and 100*l.*, but he had not cash. Being pressed he accepted a draft at four months for 60*l.*, which he did taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ship's stores was 95*l.*, but the different accounts were never balanced or ascertained between the creditor and debtor: it was held, that the evidence of the giving of the acceptance under these circumstances was evidence to go to the jury of a payment on account of all the debts so as to be evidence of a fresh promise to pay what was due sufficient to take the whole out of the statute. (*Walker* v. *Butler*, 6 El. & Bl. 506; 2 Jur., N. S. 687; 25 L. J., Q. B. 377.)

This case was distinguished from *Burn* v. *Boulton* (2 C. B. 476) and *Nash* v. *Hodgson* (*supra*), in each of which cases there were two separate debts, and no evidence was given which properly applied the payment to one more than to the other, therefore there was no such unequivocal acknowledgment of the debt which was barred as to take it out of the operation of the statute. But in this case there was only one debt for the same sort of work, whatever was done or said was with reference to one subject matter of demand. (*Walker* v. *Butler*, *supra*.)

A parish vestry having agreed to borrow money for building almshouses,

9 *Geo.* 4, *c.* 14. the defendants being two of the parish officers in 1830, gave to the testator who advanced the money a promissory note signed thus:—

Joseph Hughes G. R. John Evans W. G.	Churchwardens Overseers	Or others for the time being.

Interest on this note had been regularly paid by the overseers for the time being up to 1847, and had been by them debited to the parish. An action was brought upon the note, and the Statute of Limitations was pleaded. The jury were directed to find a verdict for the defendants on the Statute of Limitations if they thought that the payment of interest was not made with their knowledge or authority. On a rule for a new trial on the ground of a misdirection: it was held, that the form of the note made the existing parish officers the agents of the defendants for the payment of the interest on the note, and therefore that the judge was wrong in withdrawing the form of the note from the consideration of the jury, and stating that the question was whether the interest had been paid with the authority or knowledge of the defendants. (*Jones* v. *Evans*, 19 L. J., Exch. 200.)

Between Midsummer, 1845, and Lady-day, 1854, the guardians of the Wycombe Union made payments by way of relief to non-settled paupers of the Eton Union. The only authority for these payments were letters written in 1847, 1849 and 1850, in which the guardians of the Eton Union requested the guardians of the Wycombe Union to make weekly payments to certain paupers. One of these letters stated that the money would be repaid quarterly, and another stated that if they would furnish an account at the end of each quarter they would be repaid. In July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account in which they claimed a balance (after giving credit for a payment made in November, 1849) for relief on non-settled paupers of the Eton Union from Lady-day, 1845, to Lady-day, 1847, and from Lady-day, 1849, to Lady-day, 1850. No previous account had been sent in or claim made in respect thereof: it was held, that the payment not being generally on account did not take the case out of the Statute of Limitations. *Pollock*, C. B., said:—"The Statute of Limitations applied to a large part of the demand, and the payment which had been made did not take the case out of the Statute of Limitations, for it was made in respect of particular and specific transactions, and was not like the case of a merchant's or tradesman's accounts, where the payment is made in respect of the entire demand. Then as to the items within six years, all the documents are coupled with a very reasonable condition which had not been complied with." (*Wycombe Union* (*Guardians*) v. *Eton Union* (*Guardians*), 1 H. & N. 687; 26 L. J., M. C. 97.

One of three joint makers of a promissory note became insolvent, and inserted the note and the holder's name in his schedule, and a dividend was afterwards paid to the holder by order of the Insolvent Debtors' Court in respect of the note: it was held, in an action upon the note, that such payment was not sufficient to take the case out of the Statute of Limitations either as against the other makers of the note or as against the insolvent himself. The payment was not an admission that the debt was due, but it was merely a payment made by a permission granted to the assignee, and confirmed by the court to distribute the insolvent's assets among his creditors. (*Davies* v. *Edwards*, 7 Exch. 22; 21 L. J., Exch. 4; 15 Jur. 1014.)

If an equitable mortgagee enters into the receipt of the rents of the mortgaged estate, such receipt is *primâ facie* a payment within the meaning of the proviso in the stat. 9 Geo. 4, c. 14, s. 1. (*Brocklehurst* v. *Jessop*, 7 Sim. 438.) Anything received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the Statute of Limitations. (*Hooper* v. *Stephens*, 4 Ad. & Ell. 71; 7 C. & P. 260; *Hart* v. *Nash*, 2 Cr. M. & R. 337.) If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment so as to prevent the

operation of the Statute of Limitations. (*Hart* v. *Nash*, 2 Cr. M. & R. 337.) 9 *Geo.* 4, *c.* 14.
In order to make a delivery of goods within six years operative in taking a case out of the statute, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment. (*Cottam* v. *Partridge*, 4 Scott, N. R. 819.)

A letter, the fair effect of which is that the writer is not certain whether the debt is owing, and will have the matter examined into, is not a sufficient acknowledgment in writing to take the case out of the statute, notwithstanding that it contains expressions of regret that the debt should have been so long unpaid. (*Collinson* v. *Margesson*, 27 L. J., Exch. 305.) But a letter, not in itself sufficient to bar the statute, may be left, with other evidence, to the jury upon the question whether there have been payments or deliveries of goods in part satisfaction of the debt within the six years. It will be a question for the jury whether the payments or deliveries of goods were made and received on account of the particular debt sued for. (*Ib.*)

The following letter, addressed by the defendant to the plaintiff within six years, respecting a debt otherwise barred by the Statute of Limitations, was held (on appeal) not a sufficient acknowledgment to take the case out of the statute:—"I am surprised at receiving a letter from H. (the plaintiff's attorney) this morning for the recovery of your debt. I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. (one of the plaintiffs) was in town." (*Cawley* v. *Furnell*, 12 C. B. 291; 15 Jur. 908; 20 Law J., C. P. 197.)

The following letter, written by the debtor in answer to an application for payment of a debt, was held to be insufficient:—"I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary, that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance." (*Rackham* v. *Marriott*, 2 H. & N. 196; 3 Jur., N. S. 495; 26 L. J., Exch. 315; 1 H. & N. 234; 2 Jur., N. S. 619; 25 L. J., Exch. 324.)

P., being indebted to the executors of C. in 1,100*l.*, to which A. was beneficially entitled, sent a letter to A., as follows:—"I have sent you a note for the money due to you, which your mother left for you." Inclosed in this letter was a promissory note on a receipt stamp for 1,100*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent the debt was barred by the statute: it was held, that there was not sufficient acknowledgment by P. without referring to the note to see what was the promise made, and that this could not be done for want of a proper stamp. (*Parmiter* v. *Parmiter*, 30 L. J., Chanc. 508.)

Since 9 Geo. 4, c. 14, there must be part payment in cash, or what is equivalent to it, to take a case out of the Statute of Limitations. A. occupied a house and land under B. at the rent of 16*l.* a-year, and A., at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person, who had been employed by B. and had paid 12*s.* a-week. A. continued in B.'s service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A. to recover wages for twelve years, deducting the rent: it was held, that this was not such an open account as would take the case out of the Statute of Limitations since the 9 Geo. 4, c. 14, but that there must be a part payment in cash, or what is equivalent to it, to have that effect. (*Williams* v. *Griffiths*, 2 Cr., M. & R. 45.)

Where a bill of exchange has been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill, the promise implied from such delivery not being within the meaning of stat. 9 Geo. 4, c. 14, s. 1, "an acknowledgment or promise by words *only*," and the word "payment" in the proviso in that

9 *Geo.* 4, *c.* 14.

section being used in the popular sense, so as to include a giving and taking of a negotiable instrument on account of a debt as well as a giving and taking of it in satisfaction of the debt. (*Turney* v. *Dodwell*, 3 Ell. & Bl. 136; 18 Jur. 187; 23 L. J., Q. B. 137.)

The defendant, in 1840, gave S. for value his acceptance in blank on a 5*s.* stamp. S., in 1852, and as the jury found not within a reasonable time, filled in his own name as drawer for 200*l.* at five months. The defendant being sued on the bill by an innocent indorsee for value, pleaded the Statute of Limitations: it was held, that the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank, and that the plaintiff was entitled to recover. (*Montague* v. *Perkins*, 17 Jur. 557; 22 L. J., C. P. 187.)

Where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid when due, by the drawee to the creditor, it operates as a part payment to defeat the Statute of Limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. (*Irving* v. *Veitch*, 3 Mees. & W. 90.)

A promissory note being given by A. and a surety to a banker, and a contemporaneous memorandum of an agreement showing the note to be given as a security for the banking account to be kept by A. with the bank: it was held, that the Statute of Limitations did not run from the time when A. became indebted to the bank, but from the time when the balance was struck. (*Hartland* v. *Jukes*, 9 Jur., N. S. 180; 32 Law J., Exch. 162.) If a bond with a penalty were given to secure a duty which is to be performed during a period of twelve years, the bond would be forfeited by a delinquency in the first year, but the obligee might elect not to act on it until the delinquency in the twelfth year. (*Per Bramwell*, B., 7 L. T., N. S. 792.)

A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant was in his own handwriting, but said he could not recollect the fact of payment: it was held, nevertheless, that there was sufficient evidence to go to the jury, as to the fact of payment to take the case out of the Statute of Limitations. (*Trentham* v. *Deverill*, 3 Bing. N. C. 397; 4 Scott, 128.) The defendant was indebted to the plaintiffs in a balance of 2,245*l.*, for which they held his overdue promissory note. In 1827, the plaintiffs and the defendant agreed that the defendant should pay the balance as follows: 245*l.* in cash, and the remainder by annual payments of 300*l.* a-year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiffs should hold his promissory note as a security for the payment of the amount. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September, 1830: it was held, that the plaintiffs were entitled, at any time within six years from September, 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. (*Irving* v. *Veitch*, 3 Mees. & W. 90.)

In an action for money lent the defendant pleaded the Statute of Limitations, and at the trial the plaintiff proved the transmission of the money to the defendant, and the payment by him of a half-yearly sum for interest up to a certain time, and produced an answer to a bill in chancery, in which the defendant admitted having paid the same half-yearly sum within six years, but asserted that it was paid by way of annuity and not of interest. Assuming that an acknowledgment of a payment must be in writing, and signed, under the 9 Geo. 4, c. 14. s. 1, in order to bar the operation of the Statute of Limitations: it was held, that the evidence for the plaintiff was sufficient to go to the jury; that the construction of the admission in the answer was for the court; and that the whole of it should have been left to the jury, but that they might believe the fact of the payments having been made half-yearly, but reject the residue, and infer from the other evidence that the payments were really made in respect of interest. (*Baildon* v. *Walton*, 1 Exch. R. 617; 17 L. J., Exch. Cham. 357.) Words used at the time of making a payment qualify it, but it is for the jury to judge of the truth of

a statement accompanying the admission of a previous payment. (*Ib.* See *Trentham* v. *Deverill*, 3 Bing. N. C. 397.) 9 *Geo.* 4, *c.* 14.

A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by the plaintiff upon the security of a promissory note payable to him or bearer on demand with interest, and signed by the defendant thus: "I. H., churchwarden, J. E., overseer, or *others for the time being*." The interest had been regularly paid by the overseer for the time being up to 1847, but the defendants had never paid the interest, or in express terms authorized the parish officers to pay it for them. The defendants having pleaded the Statute of Limitations to an action on the note: it was held, that it was a question for the jury, whether by the form of the note the defendants had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the statute. (*Jones* v. *Hughes*, 5 Exch. 104. See *Rew* v. *Pettet*, 1 Ad. & E. 196.)

Payment by settlement of accounts.

The stat. 9 Geo. 4, c. 14, does not apply to the fact of an account stated, where there are items on both sides; but the going through an account with items on both sides and striking a balance converts the *set-off* into *payments*. (*Ashby* v. *James*, 11 Mees. & W. 342, recognized in *Worthington* v. *Grimsditch*, 7 Q. B. 484; *Clark* v. *Alexander*, 8 Scott, N. R. 165; *Bodger* v. *Arch*, 10 Exch. 333; *Amos* v. *Smith*, 1 H. & Colt. 238.) The going through an account where there are items on one side only does not alter the situation of the parties at all or constitute a new consideration. (*Ib. Smith* v. *Forty*, 4 Car. & P. 126; *Jones* v. *Rider*, 4 Mees. & W. 32; *Mills* v. *Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444.) To an action by the payee of a promissory note for 300*l.* against the defendants, as surviving executors of William P., the maker, the plaintiff, to take the case out of the Statute of Limitations, proved that he had been supplied by Joseph P., the deceased executor, with malt and other articles, and he put in evidence an account between them, signed as follows: "Settled, Joseph P.;" on one side of which the plaintiff was charged with various quantities of malt, and on the other side had credit for payments, there being, amongst others, the following item: "To one year's interest, 15*l.*:" it was held, that the settlement of the account was evidence of payment of the 15*l.* by Joseph P., but not in his representative character. (*Scholey* v. *Walton*, 12 Mees. & W. 510.)

Where two parties meet and state an account, and in order to render it binding, each admits that the other has a set-off against him, the courts consider the parties to be upon the same footing as if the debt due from each were paid to the other, when instead of going through that process, they set off the one against the other.

The renewal of former promissory notes by a debtor cannot be considered as a promise rendering a party liable to pay original debts, where all that can be inferred from giving fresh notes is that the party intended to give a fresh security limited to the liability on the new notes, without any intention on his part to renew his liability on the original demand. (*Foster* v. *Dawber*, 6 Exch. 839; 20 L. J., Exch. 385.

A testator died in 1829, part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute: it was held, that the second note must be treated as a new security given for payment of the old debt, and the executor was charged with the 100*l.* (*Sparkes* v. *Restall*, 22 Beav. 587. Where there was an open account between R. and H., which extended from 1834 to within a short time of H.'s death in 1847, and in 1845, H. signed a memorandum as follows: "It is agreed that Mr. H. in his general account shall give credit to Dr. H. for 174*l.*, being for bricks delivered to the trustees of Y. P. chapel in 1834:" it was held, reversing the decision of Sir *J. Stuart*, V. C., that this was not such an acknowledgment as to take the general account out of the Statute of Limitations, and that the delivery of the bricks could not be treated as a part payment, so as to have that effect. (*Hughes* v. *Paramore*, 1 Jur., N. S. 1101; 24 Law J., Chanc. 681—L. J. See *ante*, pp. 302, 303.)

9 *Geo.* 4, *c.* 14.

An account stated between the defendant, a part owner and ship's husband, and his co-owners, in which the items of the plaintiff's account for work done and money advanced are included is not such an acknowledgment as will take the case out of the operation of the Statute of Limitations. The circumstance of there being no ascertained or adjusted debt till within six years will not delay the operation of the statute. (*Nash* v. *Hill*, 1 F. & F. 198.)

Case of joint contractors.

It has been decided, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representatives of the other to take the debt out of the statute as against the survivor; as where, after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the Statute of Limitations as against the survivor. (*Slater* v. *Lawson*, 1 B. & Ad. 396; 2 B. & C. 25; 8 B. & C. 36.) The principle of this decision is, that one party cannot be bound by the admissions of another, except in cases of continuing joint contract. Payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the Statute of Limitations as against the other maker, although such payment was made after the statute had run. (*Channell* v. *Ditchburn*, 5 M. & Wels. 494; *Goddard* v. *Ingram*, 3 Q. B. 839. See *Atkins* v. *Tredgold*, 2 B. & C. 23; 3 Dowl. & R. 200; *Slater* v. *Lawson*, 1 B. & Ad. 396; *Burleigh* v. *Stott*, 8 B. & C. 36; 2 M. & Ry. 93; *Whitcomb* v. *Whiting*, Dougl. 652; *Munderston* v. *Robertson*, 4 Man. & R. 140. See cases cited 5 M. & W. 498, n.) The correctness of the above decision in *Channell* v. *Ditchburn* is questioned in Story on Partnership, 324, n. If a debtor, A., give as security a note of himself and another, B., a payment on behalf of B., after the statute has begun to run, revives the debt as against A. (*Ex parte Woodman*, 3 Mont. & A. 609. See *Ib.* 613.) After the death of one of two partners, the survivor cannot set up the Statute of Limitations as a bar to a demand against the assets of the deceased. It seems questionable whether the deceased's representatives can set up the statute so long as the survivor continues liable to the payment of the debt, and the deceased's estate is consequently liable to be called upon by the survivor for contribution. (*Winter* v. *Innes*, 4 M. & Cr. 101, 111. See *Braithwaite* v. *Britain*, 1 Keen, 206, 221.)

Where the party making the payment holds two perfectly different characters, (as if he is debtor in his individual character, and debtor also as executor,) the courts will look to the character in which he made the payment; but in these cases, although the person is the same, the characters which he fills, and the rights and liabilities incident to those characters, are in law wholly different.

A. deposited moneys with B., C. and D., who were bankers in partnership, and received from them notes, in which they promised to pay him the amount three months after sight with interest. B. died in March, 1837, having appointed C. and another his executors. C. and D. continued the banking business in the same name until 1842, and interest was regularly paid on the notes by the firm until that time, the payment being indorsed upon the notes and signed by one of the partners or their clerk. In December, 1843, the executors of A. filed their bill against the executors of B. and the devisees under his will, for the payment of the amount of the notes out of the personal or real estate of B. It was held, that the act of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the Statute of Limitations as against the real or personal estate of the deceased partner. (*Way* v. *Bassett*, 5 Hare, 55; 15 Law J., N. S. 1; *Fordham* v. *Wallis*, 10 Hare, 225; *Scholey* v. *Walton*, 12 Mees. & W. 512.) Whether a written acknowledgment made and signed by one of several partners stands upon a different footing from a written acknowledgment by one of several joint contractors, was adverted to, but not decided, in *Clerk* v. *Alexander*, 8 Scott, N. R. 163.

The testator devised certain estates to trustees for the payment of his debts, and appointed the same trustees his executors, and devised other estates in various portions, some of the same to trustees for the separate use

of married women for life, with remainders over, others to devisees in fee, and others to devisees for life, with remainders over in tail, and of some of which estates the testator created terms for raising specific sums of money, and others he charged with legacies and annuities. The testator died in January, 1843. On a bill filed in August, 1849, by a payee of a promissory note made by the testator (on which it was proved that interest had been paid by the executor up to 1847), for payment of the note out of the real as well as personal estate against the executors and trustees, some of whom were insolvent, against the residuary legatees who had received payment on account of their residuary shares, and against the parties beneficially interested in the real estate, of whom some set up the Statute of Limitations in bar of the demand, some omitted to do so, and others were out of the jurisdiction: it was held, that payment of interest is an acknowledgment of a debt, and upon a general acknowledgment of a debt, where nothing is said to prevent it, a general promise to pay is to be implied, and such an acknowledgment made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, or is answerable also in the character of executor or trustee of another, for he then represents two persons, and the question in such a case is by whom the promise is made and not what is its extent or effect; (see *Tanner* v. *Smart*, 6 B. & C. 603, 609; *Atkins* v. *Tredgold*, 2 B. & C. 23; *Way* v. *Bassett*, 5 Hare, 55;) that the payment of interest of a debt of the testator by his executor, they being also trustees of his real estate, not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate, for although the executors and trustees were the same persons, they filled different characters, and where the payments were made by them in the character of executors only, the real estate was not affected by it. (*Fordham* v. *Wallis*, 10 Hare, 217; 17 Jur. 228; 22 Law J., Ch. 548.)

9 *Geo.* 4, *c.* 14.

It was also held, that the creditor was entitled to a decree as against the parties beneficially interested in the real estate, who had omitted to claim the benefit of the Statute of Limitations. That the heir or devisees of the real estate of a testator might themselves take proceedings for securing the due application of the personal estate in the payment of debts and in exoneration of the real estate, and that they cannot, therefore, after a lapse of time successfully resist the claim of a creditor as against the real estate on the ground of his laches in not suing earlier for the recovery of the debt. That the demand of a simple contract creditor as against the real estate of the testator, which would otherwise be barred by the Statute of Limitations, was not kept alive so as to preclude the operation of the statute by the effect of any right which might exist or might have existed among the parties to have the assets of the testator marshalled. That payment by executors to residuary legatees whilst the debts of the testator remained unpaid was a breach of trust, and that the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor as against the residuary legatees to the extent of their interest in the residue, and they must therefore refund the monies they had received on account of the estate. (*Ib.*)

It seems that parties who being joint and several debtors had availed themselves of the statute, and have been held liable to debts which the statute would have barred, cannot insist upon contribution from other joint and several debtors who have protected themselves by setting up the statute from their liability in respect of the same debts. But whatever the right to such contribution may be, it does not entitle the creditor to insist upon its application as against the debtors who have so protected themselves. (*Ib.*)

Fraudulent payment by one of several partners.

Indebitatus assumpsit against J. and W.; plea, the Statute of Limitations; replication, that the debt accrued within six years. The debt was originally contracted with J., W. and S.; and S., more than six years afterwards, and within six years of the action being brought, made a payment in re-

9 *Geo.* 4, *c.* 14.

spect of it to the plaintiff. S. became bankrupt shortly after; and the jury found that he made the payment in fraud of J. and W., and in expectation of immediate bankruptcy. It was held, that, nevertheless, the payment barred the operation of the statute. (*Goddard* v. *Ingram*, 3 Q. B. 839.)

Confirmation of promises made by infants.

No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. (9 Geo. 4, c. 14, s. 5.) A written acknowledgment of a debt is an answer to a plea of the Statute of Limitations, though made by an infant, if the debt was for necessaries supplied to him. (*Willins or Williams* v. *Smith*, 4 Ell. & Bl. 180; 1 Jur., N. S. 163; 24 Law J., Q. B. 62.) In an action of debt for goods sold and delivered; plea, infancy; replication, that the defendant ratified the contract in writing, signed by him after coming of age. Issue thereon. The plaintiff produced the following paper, signed by the defendant: "I am sorry to give you so much trouble in calling: but I am not prepared for you, but will, without neglect, remit you in a short time." The paper had no address or date, and specified no sum; but it was proved orally that the defendant delivered it to the plaintiff's agent on being pressed for the debt, the amount of which was also proved by oral evidence. This was held sufficient to satisfy the statute 9 Geo. 4, c. 14, s. 5. No evidence was given to show whether the defendant was of age or not when he delivered the paper: it was held, that the plaintiff must recover; the defendant, if he relied on his infancy at the time, being bound to prove it. (*Hartley* v. *Wharton*, 11 Ad. & Ell. 934; 3 P. & Dav. 529. As to the second point, see *Borthwick* v. *Carruthers*, 1 T. R. 648; *Bates* v. *Wells*, 1 Stark. Ev. 463, 2nd ed.) Any written instrument signed by the party, which, in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification of a promise or simple contract debt. (*Harris* v. *Wall*, 1 Exch. R. 122; Law J. 1847, Exch. 270. See *ante*, p. 254.)

Repeal of certain provisions of 2 & 3 Will. 4, c. 39.

By the Common Law Procedure Act, 1852, so much of the act 2 & 3 Will. 4, c. 39, s. 10, as relates to the duration of writs and to alias and pluries writs, and to the proceedings necessary for making the first writ in any action available to prevent the operation of any statute, whereby the time for the commencement of any action may be limited, is repealed. (15 & 16 Vict. c. 76, s. 10.)

Renewal of writ of summons to save the Statute of Limitations, and for other purposes.

No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date, but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal bearing the date of the day, month and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said superior court, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a præcipe, in such form as has heretofore been required to be delivered upon the obtaining of an alias writ; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons. (15 & 16 Vict. c. 76, s. 11; 16 & 17 Vict. c. 113, s. 28, as to Ireland.)

Within six months of issuing a writ of summons the plaintiff's attorney paid the proper fees at the office for its renewal under sect. 11 of the 15 & 16 Vict. c. 76, but he inadvertently neglected to get the seal of the court impressed upon it; after the lapse of six months the omission was discovered. There having been no default in their officer, the court refused to order the seal to be impressed *nunc pro tunc*, in order to prevent the running of the statute. (*Nazer* v. *Wade*, 31 Law J., Q. B. 5.)

Under that act a concurrent writ of summons can only be issued within six

months from the time of issuing the original writ. (*Cole* v. *Sherard*, 11 Exch. 482.) Where a writ of summons has been issued before that act came into operation, and has been duly continued up to that time, the first renewal under that act is *quasi* the original writ. (*Ib.*) 9 *Geo.* 4, *c.* 14.

It is questionable whether the six months for which the renewed writ of summons under the 11th section of the 15 & 16 Vict. c. 76, is to be available, are to be reckoned inclusively or exclusively of the date of the renewal. The officer, assuming the former to be the proper construction, having declined to seal a writ which upon that assumption was tendered a day too late, the court, without expressing any opinion as to whether or not he had rightly construed the act, directed him to seal it *nunc pro tunc*. (*Black* v. *Green*, 15 C. B. 262; *Anon.*, 18 Jur. 1017; 24 Law J., C. P. 1; *S. P.*, *Anon.*, 18 Jur. 1104; 24 Law J., Q. B. 23.)

The court will not allow a writ of summons, resealed too late to take a case out of the provisions of the Statute of Limitations by mistake of the attorney, to be resealed *nunc pro tunc* for this purpose. (*Bailey* v. *Owen*, 9 W. R. 128.)

As to process to save the Statute of Limitations, see 2 Arch. Pr., Q. B., by Prentice, 12th ed., pp. 1245, 1246, and *Black* v. *Green*, 15 C. B. 262.

Notices to be given to the clerk of County Court of special defences, who shall communicate the same to the plaintiff.

No defendant in any court holden under the act 9 & 10 Vict. c. 95, shall be allowed to set off any debt or demand claimed, or recoverable by him from the plaintiff, or to set up by way of defence, and to claim and have the benefit of, infancy, coverture, or any Statute of Limitations, or of his discharge under any statute relating to bankrupts, or any act for relief of insolvent debtors, without the consent of the plaintiff, unless such notice thereof as shall be directed by the rules made for regulating the practice of the court shall have been given to the clerk of the court; and in every case in which the practice of the court shall require such notice to be given, the clerk of the court shall, as soon as conveniently may be after receiving such notice, communicate the same to the plaintiff by the post, or by causing the same to be delivered at his usual place of abode or business, but it shall not be necessary for the defendant to prove on the trial that such notice was communicated by the plaintiff to the clerk. (9 & 10 Vict. c. 95, s. 76.)

Rules of the county court as to the Statute of Limitations.

66. Where the defendant intends to rely on (*inter alia*) the Statute of Limitations, his notice shall contain the particulars hereinafter mentioned, with reference to such grounds of defence; provided that in case of non-compliance with those rules which apply to such six grounds of defence, and of the plaintiffs not consenting at the hearing to permit the defendant to avail himself of such defence, the judge may, on such terms as he shall think fit, adjourn the hearing of the cause, to enable the defendant to give such notice.

70. Where the defendant intends to rely on the defence of any Statute of Limitations he shall give notice thereof in writing to the registrar of the court, at least five clear days before the return day of the summons.

72. In all cases mentioned in the last six rules, the party thereby required to give the notice shall, unless otherwise expressly ordered, at least five clear days before the day of hearing, deliver to the registrar of the court as many copies thereof as there are opposite parties, and an additional copy to be filed; and the registrar shall, within twenty-four hours from the time of receiving the same, transmit by post one copy of such notice to each of the opposite parties.

Summonses in county court to save Statute of Limitations.

173. Successive summonses may be issued without leave of the court for the purpose of preventing the operation of any statute whereby the time for the commencement of any action is or may be limited, and the first and each subsequent summons shall be in force for twelve calendar months from the time of issuing the same, including the day of such issuing; and such subsequent summons shall be issued before the expiration of the previous summons, and entered in the plaint book of the court: provided that on entering the plaint in the first instance, the usual fee shall be paid, but for such subsequent summonses no further fee shall be paid, nor shall it be necessary that any attempt be made to serve the first summons or any successive summonses, unless the plaintiff require the same, and such successive

9 *Geo.* 4, *c.* 14.

summonses shall be a continuance of the action on and from the day on which the first summons was issued.

174. Where a summons has been served in due time to prevent the operation of any Statute of Limitations, and either party dies after such service, and after the lapse of the period within which it is provided that an action may be brought, proceedings may be taken by or against the surviving party, or by or against the personal representative of the deceased party, within one year from the day of holding the court at which the summons required the defendant to appear. (Broom's County Courts, Appendix, pp. 100, 115, 2nd ed.)

MERCANTILE LAW AMENDMENT ACT.

19 & 20 Victoria, c. 97.

An Act to amend the Laws of England and Ireland affecting Commerce. [29th July, 1856.]

Limitation of Actions and Suits.

19 & 20 *Vict.* c. 97, *s.* 9.

Limitation of actions for "merchants' accounts."

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant (*a*), their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

(*a*) See *ante*, pp. 283, 289.

Absence beyond seas or imprisonment of a creditor not to be a disability.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of twenty-first year of the reign of King James the First, chapter sixteen, section three (*b*), or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen (*c*), or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five (*d*), or by the acts of third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two (*e*), and chapter forty-two, section three (*f*), or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*g*), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

(*b*) *Ante*, p. 283.
(*c*) *Ante*, p. 283.
(*d*) *Ante*, p. 267.
(*e*) *Ante*, pp. 248, 262.
(*f*) *Ante*, p. 277.
(*g*) *Ante*, p. 277.

19 & 20 *Vict.* c. 97, *s.* 10.

This section applies to all actions barred by the 21 Jac. 1, c. 16, s. 3, and not commenced till after the former act came into operation. (*Cornill* v. *Hudson*, 3 Jur., N. S. 1257; 27 Law J., Q. B. 8.) Therefore, where an action brought to recover damages from the keeper of the Queen's Prison for not allowing to the plaintiff the allowances provided for by the 53 Geo. 3, c. 113, was barred by the 21 Jac. 1, c. 16, s. 3, and was not commenced till after the 19 & 20 Vict. c. 97, came into operation: it was held, that this section operated as a bar, although the plaintiff had continued to be imprisoned from the time when the cause of action accrued till within six years of the commencement of such action. (*Ib.*)

This section, as to the imprisonment of the creditor, applies to cases where the cause of action accrued before that act came into operation, and no action is commenced till after that time. (*Cornill* v. *Hudson*, 8 El. & Bl. 429; 3 Jur., N. S. 1257; 27 Law J., Q. B. 8.)

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen (*h*), or of this act.

(*h*) See 3 & 4 Will. 4, c. 27, s. 19, *ante*, p. 207.

This section of the act is not retrospective.

A testator resided in Jersey, and died, having appointed his widow, who also lived there, the executrix of his will. She proved his will in Jersey, but not in England, and did not act as executrix in England: it was held, that she was not a person whom a creditor of the testator could sue in this country, and that the Statute of Limitations did not therefore run in favour of her testator's estate. (*Flood* v. *Patterson*, 9 W. R. 294.)

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

13. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight (*i*), and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven (*k*), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the

same effect as if such writing had been signed by such party himself. 19 & 20 *Vict.* c. 97, *s.* 13.

(*i*) *Ante*, pp. 291, 295.
(*k*) *Ante*, pp. 291, 295.

Part payment by one contractor, &c. not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

14. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*l*), and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three (*m*), and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*n*), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

(*l*) *Ante*, p. 283.
(*m*) *Ante*, p. 277.
(*n*) *Ante*, p. 277.

This section is not retrospective, and therefore a payment by one co-debtor made before this act takes the case out of the Statute of Limitations as against the other. In an action brought after the passing of the act in order to bar the operation of the Statute of Limitations, (21 Jac. 1, c. 16, s. 3,) the plaintiff proved payments of principal and interest within six years before the action, and before the passing of the act, by a co-contractor with the debtor, and such payments were made with his knowledge and consent: it was held by the Queen's Bench, that, by virtue of this section, assuming it to be applicable to a transaction before the act, such proof did not bar the operation of the 21 Jac. 1, c. 16, s. 3, for although to the knowledge and consent of the debtor that did not show that he was charged otherwise than by reason only of payment of any principal or interest by any co-contractor or co-debtor, and that this section is so applicable. This judgment was afterwards reversed by the Exchequer Chamber on the ground that this section does not apply to a payment made before the act. (*Jackson* v. *Woolley*, 8 El. & Bl. 778; 4 Jur., N. S. 656; 27 L. J., Q. B. 448.)

This section does not apply to notes made before the act, even though the payment or acknowledgment has been made after the act.

In 1853, H. as principal, and the defendant as surety, gave a joint and several promissory note to the plaintiff, payable on demand. In 1861, H. made an assignment for the benefit of his creditors, and the defendant signed and gave the following letter to the plaintiff:—"I consent to your receiving the dividend under H.'s assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received a dividend on the note, and afterwards brought an action on it against the defendant for the balance, to which the defendant pleaded the Statute of Limitations. It was held, that the letter was not such an acknowledgment as barred that statute, as a promise to pay the debt could not be implied from the letter; and, secondly, that the payment of the dividend, coupled with the letter, did not amount to more than "a payment only" by one co-debtor, under this section; and that, therefore, the defendant, the other co-debtor, was entitled to the benefit of the statute. (*Cockrill* v. *Sparke*, 32 L. J., Exch. 118; 9 Jur., N. S. 307; 3 F. & F. 150.)

Two partners made a joint promissory note. After the death of one partner, the surviving partner, who was his executor, continued for more than

19 & 20 *Vict.* c. 97, *s.* 14.

six years to pay interest on the note. The holder of the note then claimed against the estate of the deceased partner: it was held, that the payments must be taken as made by the surviving partner in his capacity of partner, and though this section relating to co-contractors was passed after the cause of action accrued, it barred the claim. (*Thompson* v. *Waithman*, 2 Jur., N. S. 1080; 3 Drew. 628; 26 L. J., Ch. 1080.) This case must be considered as overruled by the two last preceding cases.

Short title.

16. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."

Extent of act.

17. Nothing in this act shall extend to Scotland.

ABOLITION OF FINES AND RECOVERIES.

3 & 4 WILLIAM IV. c. 74.

*An Act for the Abolition of Fines and Recoveries (a), and for the Substitution of more simple Modes of Assurance.** [28th August, 2833.]

I. *Interpretation clause, s.* 1.
II. *Fines and recoveries abolished, ss.* 2, 3.
III. *The tenure of ancient demesne, ss.* 4—6.
IV. *The amendment of fines and recoveries, and the rendering them valid in certain cases, ss.* 7—12.
V. *The custody of the records of fines and recoveries, s.* 13.
VI. *Estates tail not barrable by warranty, s.* 14.
VII. *Alienation of estates tail, ss.* 15—21.
VIII. *Definition of the protector, ss.* 22—33.
IX. *Powers of the protector, ss.* 34—37.
X. *Confirmation of voidable estates created by tenant in tail, s.* 38.
XI. *Enlargement of base fees, s.* 39.
XII. *Modes by which estates tail and estates expectant thereon are to be barred, ss.* 40—49.
XIII. *Estates tail in copyholds, ss.* 50—54.
XIV. *Bankrupts' estates tail, ss.* 55—69.
XV. *Money to be laid out in lands to be entailed, ss.* 70—72.
XVI. *The inrolment of deeds, &c., ss.* 73—76.
XVII. *Alienation by married women, ss.* 77—91.
XVIII. *Ireland, s.* 92.
XIX. *Orders of the Court of Common Pleas made in pursuance of the above Act.*
XX. *Alienation of the reversionary interests of married women in personal estate,* 20 & 21 *Vict. c.* 57.

INTERPRETATION CLAUSE.

Meaning of certain words and expressions. "Lands."

1. Be it enacted, that in the construction of this act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accom-

* This act does not extend to Ireland, but on the 15th August, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, entitled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance in Ireland." This act corresponds in most particulars with the English statute. The general period fixed for the Irish act to come into operation was the 31st October, 1834, instead of 31st December, 1833.

3 & 4 *Will.* 4, c. 74, s. 1.

panied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting lands, either at law or in equity,* and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting money subject to be invested in the purchase of lands; and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred (*b*); and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (*c*); and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the

"Estate."

"Base fee."

"Estate tail."

"Actual tenant in tail."

"Tenant in tail."

"Tenant in tail entitled to a base fee."

"Money."

"Person."

Number and gender.

* The definition of the word "estate," taken in connection with the 77th section, *post*, enables a married woman by deed acknowledged to dispose of any interest in land either at law or in equity, or any charge, lien or incumbrance in or upon or affecting land either at law or in equity. (*Briggs* v. *Chamberlain*, 11 Hare, 74.)

In the glossary clause of the Irish act, the word "estate" is made to extend to "any interest, charge, *right, title*, lien or incumbrance in, upon or affecting lands, either at law or in equity, *whether present or vested, or future or contingent.*" The additional words, *right and title*, were probably introduced in consequence of some doubts which some, as it is conceived, erroneously entertained whether the word estate would comprehend the right or title of dower of a married woman. (See note to section 78, *post.*)

plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement (*d*); and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is any thing in the subject or context repugnant to such construction.

3 & 4 Will. 4, c. 74, s. 1.

Settlement.

(*a*) The principal objects of this statute are,—

The principal objects of this act.

1st. To abolish fines and recoveries, and to make warranties by a tenant in tail no longer effectual for barring entails.

2nd. To enable a tenant in tail to make an effectual alienation by any deed to be inrolled, by which a tenant in fee can convey.

3rd. To make the beneficial owner of an estate for years determinable on life, or of any greater estate prior to an estate tail under a settlement, the protector of the settlement for the purpose of consenting to a disposition by a tenant in tail in remainder.

4th. To repeal the statute 11 Hen. 7, c. 20, restraining the alienation by married women tenants in tail of lands of the gift of their husbands, except as to settlements made before the passing of this act.

5th. To provide new methods by which estates tail and interests expectant thereon may be barred, as well as to freeholds as copyholds.

6th. To repeal the Bankrupt Act, 6 Geo. 4, c. 16, s. 65, as far as relates to estates tail, and to give to the commissioners of bankrupt other powers of disposing of the estates tail of bankrupts.

7th. To repeal the statutes 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45; and to extend the substitute for fines and recoveries to the case where money is directed to be laid out in the purchase of lands to be settled, so that any person, if the land were purchased, would have an estate tail therein.

8th. To enable married women, with the concurrence of their husbands, to dispose of lands and money subject to be invested in lands, and to release or extinguish any interest or powers as if sole by deeds to be acknowledged by them before Judges or Commissioners.

The origin of estates tail.

By the common law, before the stat. Westm. 2, commonly called the statute *de donis*, (13 Edw. 1, c. 1,) there were two kinds of estates of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple *conditional*, where lands were given to a man and to the heirs of his body. (See *Willion* v. *Berkeley*, Plowd. 222—252; 2 Prest. on Est. 323—354.)

The estate of a tenant in tail grew out of the ancient conveyances to a man, and to the heirs of his body. Under such a conveyance, it was held at common law, that, until issue born, the grantee had not the absolute property in the estate, it being limited by the grant, not to his general heir, but to the heirs of his body; but that the moment issue was born, the con-

3 & 4 Will. 4, c. 74, s. 1.

dition being performed, the estate became absolutely his property for some purposes, (2 Bl. Comm. 111,) and he could dispose of it in the same manner as if he had held it in fee simple. The legislature, however, thought fit to interfere; and by the statute *de donis* it was declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate. (3 Madd. 531, 532.)

What may be entailed.

Two things are essential to an entail within the statute *de donis*. One requisite is, that the subject be land or some other thing of a *real* nature. The other requisite is, that the estate in it be an *inheritance*. Therefore neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are entailable any more than personal chattels; because as the latter, not being either interests in things *real* or of *inheritance*, want *both* requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled as to answer the purposes of an entailed estate, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. (Harg. Co. Litt. 20, a, n. (*5*). See Fearne, 495—501, 7th ed.) Lands in ancient demesne were held according to the custom, which was that each tenant should hold to him and the heirs of his body with reversion to the lord, but that every tenant might by deed alien to any person to hold to him and the heirs of his body with remainder to the lord, on first obtaining the lord's licence, which by custom was also always granted on payment of a year's rent. It was held that such lands were not within the operation of the statute *de donis*. (*Cresswell* v. *Hawkins*, 3 Jur., N. S. 407.) Copyholds cannot be entailed, except by custom. (3 Rep. 8; 2 Bl. Comm. 113.) As to evidence of such a custom, see *Goold* v. *White*, 1 Kay, 683. (See *post*, note to section 50.) And if an annuity be granted out of personal estate to a man and the *heirs of his body*, it is a fee conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the failure of the issue of the grantee. (2 Ves. sen. 170; 1 Br. C. C. 325.) A *quasi* estate tail in lands held *pur autre vie* may be barred by deed, surrender or even by articles (*Guy* v. *Mannock*, 2 Eden, 339; see 16 Ves. 313; Coop. C. C. 178; 1 Mer. 665); but not by *will*. (*Hopkins* v. *Ramadge*, Batty, 365; 1 Sch. & Lef. 281; 1 Ball & B. 77; but see 6 T. R. 292, *contrà*.) So by the surrender and renewal of a lease for lives by the first *quasi* tenant in tail of it, even without the concurrence of the trustees, he may acquire the absolute ownership of the lease. (*Blake* v. *Blake*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox. See Coop. C. C. 184, 185.) But a *quasi* tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person with remainder over, could not by his own act, by fine or otherwise, in the lifetime of the tenant for life, and without his concurrence, bar the remainders over. (*Slade* v. *Pattison*, 5 Law J. (N. S.) Chan. 51, affirmed on appeal to the Lords Commissioners, July, 1835. See *Wastneys* v. *Chappell*, 3 Br. P. C. 50.) So where an estate *pur autre vie* is limited to one for life with remainder over, there the first taker cannot bar the remainder, unless the remainderman in tail joins. (*Low* v. *Barron*, 3 P. Wms. 262; *Osbrey* v. *Bury*, 1 Ball & B. 53.)

S. and J. being joint tenants of copyhold lands for life in remainder expectant upon the determination of a previous life estate in M., with several inheritances in tail, with cross-remainders in tail, S. and her husband, without the concurrence of M., surrendered their estate and interest to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint. S. died in the lifetime of her husband and of J.; the husband afterwards died having by his will appointed the surrendered share to his executors: it was held, that the *quasi* estate tail of S. was not barred, and that whether the life estate of M. was under the same instrument as that under which S. and J. derived their title, or whether M.'s tenancy was under her paramount title of freebench, still her concurrence was necessary in order effectually to bar the estate tail in re-

mainder; it was held, also, that there was under the circumstances no severance of the joint tenancy. (*Edwards* v. *Champion*, 3 De G., M. & G. 202.)

3 & 4 Will. 4, c. 74, s. 1.

Quasi entails of estates *pur autre vie*, and in chattels.

The statute 3 & 4 Will. 4, c. 74, has not altered the law with respect to *quasi* entails in estates *pur autre vie*, or in mere chattels. (See Shelford on Wills, pp. 89, 90.) A person cannot by *will* bar a *quasi* entail and the remainders over. (*Campbell* v. *Sandys*, 1 Sch. & L. 281; *Cresswell* v. *Hawkins*, 3 Jur., N. S. 408. See *Doe* d. *Lake* v. *Luxton*, 6 T. R. 292.) A *quasi* tenant in tail in possession of such an estate has full power over, and may, by any act *inter vivos*, deal with the estate precisely as if there never had been any settlement; but a *quasi* tenant in tail in remainder cannot, without the concurrence of the tenant for life, defeat the subsequent remainders. But if he alien with the consent of the tenant for life, or obtain a renewal with his concurrence, or if the tenant for life procures a renewal, and then conveys to the *quasi* tenant in tail, this will be sufficient to bar the *quasi* entail. If a tenant *quasi* in tail in remainder executes a conveyance for valuable consideration, but without the concurrence of the tenant for life, and, surviving the tenant for life, lives until a period at which he was clearly capable of barring the entail, it was questioned whether such alienation shall operate to bar the remainders over. (*Allen* v. *Allen*, 2 Dru. & War. 307; 1 Con. & L. 427; 1 Cl. & Fin. 427.) A father, tenant for life of an estate *pur autre vie*, and his son, tenant *quasi* in tail in remainder, under a marriage settlement of the year 1767, join in executing a deed of the year 1792 (the son being at the period of the execution of such deed under age), whereby the lands were conveyed to a trustee upon trust for the father for life, remainder to the son, if he survived his father, absolutely; but if he died in the lifetime of his father, without issue, then to the father, absolutely. In this deed there was contained a power enabling the father and son to revoke the uses and declare new ones. The father, in three years after, executes a deed by which he purported to convey all his interest to the son, but still remained in possession, and subsequently obtained a renewal to himself from the head landlord. The father and son subsequently join in selling part of the lands comprised in the original settlement creating the *quasi* entail; and on that occasion exercised the power of revocation which was contained in the deed of 1792. The son, in 1815, executes a settlement upon the occasion of his marriage (his father being then alive, but not a party to the deed), by which deed he conveys the lands to trustees upon certain trusts for himself for life, for his intended wife, and the issue of the marriage, and in default of issue, for himself absolutely. The son survived the father, and died in 1832, leaving issue one daughter only. The next tenant *quasi* in tail under the original settlement of 1767, filed his bill, claiming under the entail as still subsisting. It was held, that by the operation of the deed of 1792, which was voidable only and not void, and which had been afterwards confirmed by the son by the effect of his subsequent dealings with the property, the *quasi* entail had been effectually barred. (*Allen* v. *Allen*, 2 Dru. & War. 307; 1 Con. & L. 427; 1 Cl. & Fin. 427. See *Pickersgill* v. *Grey*, 31 L. J., Ch. 394.)

Origin of common recoveries.

Entailed estates were made by the statute *de donis* unalienable, and neither the issue nor the remaindermen could be barred; that consequence was soon found by experience productive of great inconveniences, by preventing forfeitures of estates, and taking away the power of raising money upon them for the purposes of trade and commerce, or as a provision for the younger children of families. And soon after the passing of that statute, which it was found impracticable to repeal, means were devised for breaking through it, by common recoveries, which were first established by a judicial determination in *Taltaram's case*. (2 Edw. 4, 14 & 19; Hardr. 209; Willes, Rep. 452.) Common recoveries were considered only as common assurances, and not at all as real transactions, being conveyances on record borrowed from the ecclesiastics (who invented them to evade the statutes of mortmain) in order to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple. (Willes, Rep. 448, 551; 5 J. B. Moore, 607; 5 T. R. 109, n. See Shelford on Mortmain and Charities, pp. 12, 13.) As a common recovery pursued the forms of a real

3 & 4 *Will.* 4, *c.* 74, *s.* 1.

action, it was absolutely necessary that the vouchee against whom the judgment was obtained should have been living on the day when such judgment was given by the court, for otherwise the judgment was erroneous. (*Broome* v. *Swan*, 3 Burr. 1595; *S. C.*, 1 Bl. Rep. 496, 526; 6 Br. P. C. 333; 2 Saund. 42.) The necessary information on this subject will be found in Cruise's Dig. vol. 5; 1 Preston's Convey.; Coventry's Treatise on Common Recoveries; Sheppard's Touchst., by Preston; *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 1.)

The law respecting fines and recoveries is every day becoming of less practical application; but some knowledge upon that subject is still required in the investigation of titles, and will lead to the better understanding of this statute. The general objects of fines and recoveries being clearly explained in the first report of the commissioners of real property, some extracts, with some variations and references, are added in the following note:—

Definition of a fine and its origin.

"A fine in its origin was an amicable composition, by leave of the king or his justices, of any actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at common law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real suit above alluded to. This is the origin of fines, which, before this statute, subject to certain modifications made from time to time by statutes, had been in use for centuries. The bar by non-claim after a year and a day on fines at common law was taken away by the statute 34 Edw. 3, c. 16. The statutes 1 Rich. 3, c. 7, and 4 Hen. 7, c. 24, have declared, that a fine proclaimed in four successive terms, the first proclamation being made in the term in which the fine is engrossed, shall operate as a bar by non-claim at the end of five years after the last proclamation, but with a certain limited extension of time in the cases of infancy, coverture, lunacy, and absence beyond seas; and by the latter statute, and the statute 32 Hen. 8, c. 36, the further effect of barring estates tail was given to fines levied with proclamations. The two last statutes gave rise to a distinction between the fines levied with proclamations and fines levied without proclamations, the latter being fines at common law, and having those effects only which fines had immediately after the passing of the statute 34 Edw. 3, c. 16.

Different sorts of fines.

"There were four sorts of fines, viz., 1st, a fine '*Sur conuzance de droit come ceo, &c.;*' 2ndly, a fine '*Sur conuzance de droit tuntum;*' 3rdly, a fine '*Sur concessit;*' and 4thly, a fine '*Sur done grant et render.*' The first and third were those in general use; the second was sometimes used, but the same purposes could not be attained either by the first or third. The fourth had become obsolete. The first was always levied with proclamations, and so it seems was the fourth fine. But the second and third were usually levied without proclamations.

Operation of fines.

"The three principal uses to which fines were applied were, to bar estates tail, and enable a tenant in tail to acquire or pass a base fee determinable on the failure of the issue in tail (see stat. 32 Hen. 8, c. 36), to gain a title by non-claim (see *ante*, pp. 157, 158; *Davies*, dem., *Lowndes*, ten., 7 Scott, N. R. 141), and to pass the estates and bar the rights of married women. The interest of a married woman in copyhold estates would not pass by a fine. (*Life Association of Scotland* v. *Siddall*, 7 Jur., N. S. 785. See note to section 91, *post.*) For the first two objects the first fine was usually resorted to. The last object was often accomplished by the first fine, sometimes by the second, but more frequently by the third, which was usually resorted to for conveying the life estates and interests of married women, and for creating terms of years to bind, by way of estoppel, their contingent or executory or other estates and interests." (See Co. Litt. 121 a, n.)

By marriage settlement, dated in 1815, renewable leaseholds for years were conveyed to trustees upon trust to renew, &c., and then in trust for J. B., the husband, for life; remainder to raise certain sums in certain events, which happened; remainder to the intended wife for life; remainder, in the events which happened, to the wife absolutely. By another indenture of re-settlement, dated in 1823, reciting the settlement and that the leaseholds had

been renewed, and were then held for twenty-one years from 1821, and that there was no issue nor probability of issue, the husband and wife covenanted to levy a fine *sur concesserunt* of the leasehold hereditaments, which was to enure to vest them in a new trustee, to extinguish a trust in the original marriage settlement for raising a sum of money, but subject to all the other trusts in the marriage settlement anterior to the trust for the wife; and subject, as aforesaid, to enure to the new trustee "during all the rest, residue and remainder of the said term of twenty-one years from 1821, so lately granted;" nevertheless upon trust for the husband absolutely. The husband died in 1831, the leasehold hereditaments having been again renewed in the interim. The wife survived the year 1842, and died in 1853: it was held, that the leaseholds and all renewals of the said lease were bound and conveyed as against the wife surviving, by the indenture of 1823, and the fine levied in pursuance thereof. (*Dickens* v. *Unthank*, 1 Jur., N. S. 916; 24 L. J., Chanc. 501.)

3 & 4 *Will.* 4, *c.* 74, *s.* 1.

"A fine, according to the sort used, would also produce the following effects: it would operate by estoppel in other cases beside the one above noticed (see note to section 20, *post*); it would operate as a confirmation of all prior defeasible estates or charges made by the party levying it; it would release or extinguish rights, interests and powers (see note to section 34, *post*); it would destroy or extinguish contingent remainders and executory interests; it would create a discontinuance when levied by a tenant in tail in possession (see *ante*, p. 247); it would revoke devises (*Doe* d. *Dilnot* v. *Dilnot*, 2 Bos. & P., N. R. 401), and when levied by a tenant for life or in tail after possibility of issue extinct, or by a tenant for years, or by a copyholder, it would produce a forfeiture; and when levied by a tenant in tail, with the immediate remainder or reversion in fee to himself, the base fee acquired by the fine would merge in the remainder or reversion, which would immediately become an estate in possession, and all the estates and charges made on the remainder or reversion, not only by the tenant in tail himself, but also by those who were previously entitled to the remainder or reversion, would, in consequence of the merger, be let into possession, and become immediately available." (See note, section 39, *post*. As to discontinuance, see *ante*, p. 247.)

Discontinuance by tenant in tail.

In order that a fine levied by a tenant in tail might operate as a discontinuance to the reversioner, the tenant in tail must be rightfully in possession by force of his estate tail at the time when the fine was levied. (*Anderson* v. *Anderson*, 7 Jur., N. S. 1067; 9 W. R. 492.) Therefore a fine levied by a tenant in tail in remainder, expectant upon the determination of an estate by the curtesy during the existence of the previous estate, and in favour of the tenant by the curtesy, was held not to work a discontinuance. (*Ib.*)

In ejectment a fine is no evidence of ownership in the conusor; and without proof that he was in possession when it was levied, it is no evidence at all. A mortgage is evidence of title in the mortgagor, and if it is proved to have been paid it will be presumed that there has been a re-assignment. (*Brassington* v. *Llewellyn*, 1 F. & F. 27.

Definition of a common recovery and its origin.

"A common recovery was a judgment in a fictitious suit, in the nature of a real action, brought by the demandant against the tenant of the freehold, who vouched some person to warrant the lands, and judgment was given for the demandant to recover them against the tenant, in consequence of the person vouched, or the person last vouched, if there should be more than one vouchee, making default in defending the title to the lands, which title he was supposed to have warranted. In a recovery, the regular process of a real action was pursued throughout, and no compromise took place as in a fine. Common recoveries were invented by ecclesiastics in order to elude the statutes of mortmain, and were in constant use for that purpose until checked by the statute Westminster 2, 13 Edw. 1, c. 32. In consequence of the principles laid down in the 12 Edw. 4, in *Taltarum's case*, a common recovery was afterwards applied to the purpose of evading the statute of Westminster 2, 13 Edw. 1, c. 1, commonly called the Statute *De Donis Conditionalibus*, by virtue of which the old common law estate of fee simple conditional was abolished, and the modern estate tail was introduced, with such restrictions that the tenant in tail could not alienate the lands entailed,

3 & 4 *Will.* 4, c. 74, s. 1.

nor make them subject to his debts in the hands of his successors, nor were they liable to forfeiture for felony or treason, the last of which incidents was, in those disturbed times, considered by the crown as a serious evil. In the long interval of nearly two hundred years between the passing of the Statute *De Donis* and the application of recoveries to the evading of that statute, there was no contrivance, except that of warranty in a few cases, by which lands entailed could be unfettered. During that interval many attempts were made in parliament to procure the repeal of that statute, but without success, on account of the uniform opposition of the great landed proprietors. Awkward as was the contrivance of a recovery for unfettering lands entailed, yet it was considered a great boon to the public, because it removed the mischiefs which arose from the tendency of the Statute *De Donis* to establish perpetuities.

Operation of a recovery.

"The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations and charges, not prior to the estate tail, and to acquire or pass a fee simple or an estate commensurate with the estate of the settlor; but a reversion vested in the crown could not, as it is generally understood, be barred by a recovery. (See section 18, *post*, and note.)

"A recovery would produce other effects, viz., it would operate by estoppel, when suffered without a proper tenant to the *præcipe*, or by persons having contingent, or expectant or other rights or interests, or by expectant heirs, and in some other cases so as to conclude the parties suffering it and all persons claiming under them, except issue in tail; it would operate as a confirmation of all prior estates or charges made by the tenant in tail who suffered it. (See note to section 38, *post*.) It would release or extinguish rights, interests and powers; it would destroy or extinguish contingent remainders and executory interests; it would work a discontinuance to the issue in tail, if not duly suffered by tenant in tail; it would revoke devises. (*Doe* d. *Lushington* v. *Bishop of Llandaff*, 2 Bos. & P., N. R. 491.) It would create a forfeiture in many cases, when suffered by a tenant for life, or by persons not having the freehold.

"Although it was not usual to suffer a recovery, except when it was necessary to bar entails and remainders over, yet when resorted to for those purposes, it was not unfrequently made use of at the same time to convey, release, bar or extinguish the estates, rights, powers and interests of married women and others.

Necessary parties to a recovery for barring estates tail and remainders.

"In order to operate as a bar to an estate tail, and the remainders and reversion, it was necessary that a proper writ should be brought, and that there should be a demandant, tenant and vouchee. The writ must have been brought by the demandant, against the person who had the immediate freehold, who was technically called the tenant to the *præcipe*; for all actions to recover the seisin of lands, to be effectual, must be brought against the actual tenant of the freehold. Hence a tenant in tail, who had not himself the immediate freehold, must, in order to bar by a recovery the entail and the remainders and reversion, have procured the concurrence of the person who had the immediate estate of freehold. In consequence of the difficulties which frequently occurred in procuring a conveyance from lessees for lives to make a tenant to the *præcipe*, their concurrence was dispensed with by the stat. 14 Geo. 2, c. 20 (21 Geo. 2, c. 11, Ireland); and by the same statute the person entitled to the first estate for life, or other greater estate in reversion expectant on the leases, was made competent to make the tenant to the *præcipe*, and was for that purpose considered as having the immediate estate of freehold. The common law required that a tenant to the *præcipe* in a recovery should have the freehold before and at the time of judgment given. But the above-mentioned stat. 14 Geo. 2, c. 20, has made a recovery valid, if the freehold is vested in the tenant to the *præcipe* before the end of the term, great session, session or assizes in which it was suffered, notwithstanding the fine or deed for making the tenant to the *præcipe* should be levied or executed after the judgment had been given in such recovery, and the writ of seisin had been awarded. Thus it appears that the legislature had relieved common recoveries from one of the requisites in real adverse suits, and in doing so had incumbered them with a legal fiction. In a recovery by a tenant in tail, it was neces-

sary that he should vouch some person to warranty. If the writ was brought by the demandant against the tenant in tail, and he vouched over another person, the recovery only barred the estate tail, of which the tenant in tail was then seised, and the remainders and reversion. This recovery was called a recovery with single voucher. If the writ was brought by the demandant against another person who had the immediate estate of freehold, and that person vouched the tenant in tail, and he vouched over another person, the recovery barred all estates tail of or to which the tenant in tail was or ever had been seised or entitled, and the remainders and reversion. This recovery was called a recovery with double voucher. If there were two estates tail existing at one time in distinct persons, the one being derived out of the other, a recovery with treble voucher was sometimes suffered, although the necessity of such a recovery was considered doubtful. In this case the writ was brought by the demandant against some person who had the immediate estate of freehold, not being either of the tenants in tail, and that person vouched the tenant of the derivative estate tail, who vouched over the tenant of the original estate tail, and he vouched over another person. The person solely vouched or last vouched, was always some officer of the court where the recovery was suffered, and he was called the common vouchee. It was not usual to suffer a recovery with single voucher. In the case of a recovery with double or treble voucher, the person having the first estate of freehold conveyed it to a stranger to make him tenant to the *præcipe*; the tenant must have appeared in court, either personally or by attorney, and therefore some person in the habit of attending the court where the recovery was suffered was usually made the tenant, in order to save the expense and delay of a commission of *dedimus potestatem*, which must have been incurred if the tenant appeared by attorney. It was not necessary that the demandant should appear in court; but every vouchee must have appeared in court, either in person or by attorney. The demandant had judgment to recover the land against the tenant, and the tenant had judgment to recover of his vouchee land of equal value, in recompense for the land lost by his default; and if there were several successive vouchees, each person vouching had judgment to recover of his vouchee in like manner. The supposed recompense in value to the tenant and vouchee, or each successive vouchee except the last, was usually assigned as the reason why the issue in tail and the remainders and reversion were barred by a recovery.

3 & 4 *Will.* 4, *c.* 74, *s.* 1.

Mischiefs arising from the necessity of the freehold being in the tenant to the præcipe.

"In consequence of its being required that the tenant to the *præcipe* should have the freehold, great difficulties were frequently thrown in the way of barring entails, and occasionally serious mischiefs arose. So long as the freehold remained in the tenant for life, or, if there should be no tenant for life, in the tenant in tail, who was to suffer the recovery, there was no difficulty. But it often happened that the freehold was in a trustee, or had been alienated by the tenant for life or tenant in tail, and the person in whom it was vested could not be traced, or would refuse to concur in making the tenant; sometimes it was a question of construction whether the freehold was vested in trustees. If, under the impression that they had not the freehold, they were not made to join in the conveyance to the tenant, the recovery may be void. Not unfrequently, from omitting to investigate the title when a recovery was to be suffered, or from some other cause, it was not known that the freehold was in a trustee, or that it had been aliened, and from ignorance of this circumstance the recovery was void. These mischiefs could only be remedied by obtaining the concurrence of the person in whom the freehold was vested, and suffering a new recovery. If a recovery should be void for want of a proper tenant to the *præcipe*, and the defect should not be discovered in the lifetime of the tenant in tail who suffered it, the evil was incurable, and the estate might be lost by the persons claiming under the recovery. (See 1 Prest. on Conv. p. 28.)

"When a tenant in tail in remainder was desirous of suffering a recovery, he was at the mercy of the person having the freehold, who had it in his power to withhold his assent. There were instances of this power being abused, and of the person having the freehold extorting from the remainder-

3 & 4 *Will.* 4, c. 74, *s.* 1.

man a consideration for his concurrence. This sometimes occurred when the freehold continued in the first tenant for life, who might or might not be connected with the remainderman; but it more frequently occurred when the freehold was vested in an alienee, who was generally a stranger. There were cases in which great skill and caution must have been used in making the tenant to the *præcipe*, in order to preserve powers, rights and interests, which might otherwise be prejudiced or extinguished, as the following examples will show. If a tenant for life conveyed to a tenant to the *præcipe* to enable a remainderman in tail to suffer a recovery, he would, without caution, have extinguished the powers annexed to his estate for life, and let in upon his own estate the incumbrances of the remainderman. The expedients adopted to prevent this mischief are extremely subtle and artificial. (See note to section 34, *post.*) By similar expedients, a tenant for life with a contingent remainder in tail, either to himself or his children, might assist a remote remainderman in tail in suffering a recovery without destroying the contingent remainder. If a person having either an estate tail or an estate for life, with a contingent remainder to his children (but, as not unfrequently happened, it is doubtful which), was desirous of barring his supposed estate tail by a recovery, but at the same time wishes to prevent the forfeiture of his supposed life estate and the destruction of the contingent remainder, a different contrivance, no less artificial, was resorted to. In recoveries of copyholds, most of these precautions were unnecessary. After the demandant had obtained judgment in a recovery, a writ of seisin was sued out, to be executed by the sheriff of the court where the lands lie, and he returned that he had executed the writ, and delivered seisin of the lands to the demandant. But this was a false return, for the writ was never executed, and seisin was never in fact delivered. So that while the law required that the demandant should recover against the actual tenant of the freehold, when he had recovered the lands, it failed in the final object of the action, namely, that of giving him possession. Thus the suit was to commence with all the formalities of a real action, but to end with dispensing with the only object of those formalities, namely, to give to the demandant the lands sued for." (*First Report of Commissioners of Real Property, ordered by the House of Commons to be printed, 20th May*, 1829, pp. 20—25.)

Base fee.

(*b*) The species of base fee here defined is thus described by Lord *Coke*:—Where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple as long as the tenant in tail has heirs of his body, derived out of the estate tail; this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it. (*Seymour's case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 432.) Thus, suppose A., being tenant in tail general, levied a fine with proclamations, the estate tail was converted into a base or determinable fee, which would subsist as long as there was any issue inheritable under the entail, and on the failure of such issue, the person next in remainder after the estate tail was entitled to enter. It was clearly settled that a release or bargain and sale by a tenant in tail gave a *base fee*, voidable by the issue in tail. (*Machel* v. *Clark*, 2 Ld. Raym. 779; *S. C.*, Salk. 619; Com. 120; 7 Mod. 18; 11 Mod. 19; *Goodright* d. *Tyrrell* v. *Mead*, 3 Burr. 1703; *Seymour's case*, 10 Rep. 95; *Doe* d. *Neville* v. *Rivers*, 7 Term Rep. 276.) A conveyance by a tenant in tail without a disentailing assurance will in general pass a fee determinable by the entry of the issue in tail. (*Sturgis* v. *Morse*, 2 De G., F. & J. 231, 232.)

Divest.

(*c*) The word *divest* signifies nothing more than a mere deprivation of the possession. (Cow. Dict.) But the words *put to a right* have a more extensive signification, as they mean a deprivation not only of the possession, but also of the right of possession; for when an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property, which could not be regained by a possessory, but only by a real action. (See 1 Burr. 107; 1 Taunt. 578, 588; 1 T. R. 738; Butl. Co. Litt. 239 a, n. (1).)

Relation of ap-

(*d*) It has been established ever since the time of Lord *Coke*, (*Sir Edward*

Clere's case, 6 Rep. 18,) that where a power of appointment over real estate is executed, that the appointee takes under him who created the power, and not under him who executes it. The estates limited in default of and until the execution of the power are defeated by an appointment, for the execution of a power is the limitation of a use under and by the effect of the instrument by which the power was reserved. Thus in the ordinary case of a marriage settlement, with a power to the tenants for life of leasing for twenty-one years, when the tenant for life executes the power, the effect is not technically making a lease; but such lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life estate and the subsequent limitations. (*Maundrell* v. *Maundrell*, 10 Ves. 255, 256; see Co. Litt. 216 a, 241 a, notes by Butl.) It has been held, that a right of dower, which had attached before the execution of a power, was defeated by an appointment. (*Ray* v. *Pung*, 5 B. & Ald. 561; 5 Madd. 310.) So where an estate was limited to such uses as a purchaser should appoint, and subject thereto, to the usual uses to bar dower, an appointment made under the power would, in equity as well as at law, overreach any judgments, which might in the meantime have been entered up against the purchaser, and the circumstance that the appointee took with notice of the judgments would make no difference in this respect. (*Skeeles* v. *Shearly*, 3 My. & Cr. 112; 8 Sim. 153; *Eaton* v. *Sanxter*, 6 Sim. 517; *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459; *Tunstall* v. *Trappe*, 3 Sim. 300.) An important alteration has been effected by the statute 1 & 2 Vict. c. 110, s. 11 (3 & 4 Vict. c. 105, s. 19, Ireland), with respect to defeating judgments by the execution of a power, for that statute authorizes execution against the real estates of the owner, over which, at the time of entering up judgment, or at any time afterwards, he had any disposing power which he might, *without the assent* of any other person, exercise for his own benefit. But in such a case, if the appointee is a purchaser or mortgagee, *without notice* of the judgment, then it may be defeated by an appointment, in consequence of the 5th section of the stat. 2 & 3 Vict. c. 11. An exception to the above rule, that the appointee takes under the deed creating the power, is, where the person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act. (*Snape* v. *Turton*, Sir W. Jones, 392; *Yelland* v. *Ficlis*, Moore, 788; *Goodright* v. *Cator*, Dougl. 477.) Thus where an estate was limited by a marriage settlement to trustees to the use of the settlor *for life*, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate *for his own life* in the settled estate, a revocation subsequent thereto *of all the uses* by him, with the consent of the trustees, will not affect the estate granted for his life for a valuable consideration. (*Goodright* v. *Cator and others*, Dougl. 477; see Gilb. on Uses, 142; *Edwards* v. *Slater*, Hardr. 415; *Reg.* v. *Ellis*, 4 Exch. 652.) An appointment has not relation in point of time so as to make the appointee take from the time of the creation of the power; thus, in the case of *The Duke of Marlborough* v. *Godolphin*, 2 Ves. sen. 61, Lord Sunderland left the interest of 30,000*l.* to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2,000*l.* to Mr. Spencer, and 1,500*l.* to Lady Morpeth, who both died in her lifetime. It was contended that the appointment related back to the time of Lord Sunderland's will, which relation would overreach the death of the two parties, who were alive at the time of the death of the testator, Lord Sunderland; and then it would be considered as vesting in them in their lives. But Lord *Hardwicke* said, that nothing vested in them during their lives, and consequently that nothing was transmissible to their representatives; because every person claiming under the execution of a power must claim not only according to the execution of the power, but according to the nature of the instrument by which that power is executed; and therefore a will in execution of such a power, being always revocable, it is not complete till the death of the testatrix, although an appointment by deed, even with a power of revocation, would

3 & 4 Will. 4, c. 74, s. 1.

pointment to deed creating a power.

3 & 4 *Will.* 4, c. 74, s. 1.

have vested the sums from the time of its execution. (See 1 Ves. sen. 139; 2 Ves. sen. 612; *Lisle* v. *Lisle*, 1 Br. C. C. 533.) A deed of appointment of lands in a register county was postponed to a mortgage made after it, which was registered both before the deed creating the power and the appointment. (*Scrafton* v. *Quincey*, 2 Ves. sen. 413.) It is in general clear where a party, having both an authority and an interest, does an act, purporting an intention to pass the interest, he shall be held to intend that, and not to exercise his authority. (10 Ves. 258; see Sugd. on Powers, c. 5, s. 6.)

II. Fines and Recoveries abolished.

Abolition Clause.

No fine or recovery to be levied or suffered after the 31st of December, 1833.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery (*e*); and any fine or common recovery, which shall be levied or suffered contrary to this provision, shall be absolutely void.

(*e*) It will be observed that no time is prescribed for completing the fine or recovery.

Provision as to Covenants to levy Fines, &c.

Persons liable after 31st December, 1833, to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but in any case where the purpose of a fine or recovery cannot be so effected, the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same operation as the fine or recovery.

3. In case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable, under such covenant or agreement, to make, or to procure to be made, such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to

be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect, as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

3 & 4 Will. 4, c. 74, s. 3.

III. The Tenure of Ancient Demesne.

Reversal of Fines, &c.

4. No fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against, and as binding upon, the conusors thereof, and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be

Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

3 & 4 *Will.* 4, c. 74, s. 4.

suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor, upon such writ of deceit as aforesaid, shall still remain as good and valid against, and as binding upon, the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid (*f*).

Tenure by ancient demesne.

(*f*) All those estates which are called in Doomsday Book *terræ regis* were manors belonging to the crown, being part of its ancient demesne; a great portion of the lands comprised within those manors was in the hands of tenants who held the same of the crown by a peculiar species of socage tenure which has long been known by the appellation of *ancient demesne* (4 Inst. 269, 270), which can only subsist in manors of that sort. Whether ancient demesne or not can only be determined by a reference to Doomsday Book. (Dyer, 250; 2 Burr. 1046. See 2 Scriven on Cop. 579—599, 4th ed.; Com. Dig. Ancient Demesne; and Third Real Property Report, 12, 13.) The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the lord's court. Hence the title to lands of that tenure are frequently involved in considerable difficulties, in consequence of fines or recoveries having by mistake been levied or suffered in the Court of Common Pleas. "A fine or recovery of lands of this tenure ought to be levied or suffered in the court of the manor of which the lands are held. As, however, the lands are within the jurisdiction of the courts at Westminster, a fine or recovery in the Court of Common Pleas is not void, but only voidable. The consequence of this is, that the lands become frank fee till the lord, by means of a writ of deceit, reverses the fine or recovery: after the reversal the lands are restored to the ancient tenure, and the fine or recovery is rendered void, not only as to the lord, but also as to the parties, and all the persons claiming under them. Till the reversal, the parties are absolutely bound by the fine or recovery, and there is no method by which the lord can be compelled to bring his writ of deceit, and, according to the prevailing opinion, there is no limit to his right to bring it; and the parties themselves, however so disposed, cannot rectify the error. Although a release from the parties would be effectual to extinguish their rights, yet, according to the better opinion, no subsequent fine or recovery can be levied or suffered in the lord's court, nor can the tenant claim any protection from the lord, or any right depending on the tenure, till the reversal of the fine or recovery in the Court of Common Pleas, nor can the tenant have any effectual dealing with the lands as frank fee, till the lord has released his seignory. Therefore, till the reversal of the fine or recovery, or the release of the seignory, the title is unmarketable. The principles of justice require that a fine or recovery in the Court of Common Pleas of lands in ancient demesne should, when reversed by the lord, still remain good against all persons except him. Another mischief arising from the conversion into frank fee of lands of the tenure of ancient demesne, by levying a fine or suffering a recovery in the superior court, is, that the owner, not being aware of the effect produced by such fine or recovery, afterwards, and before the same is reversed, levies a fine or suffers a recovery in the lord's court, which, according to the better opinion, is void, on the ground of its having been *coram non judice*. Fines and recoveries are not unfrequently levied and suffered in the superior court, not

Effects of fines and recoveries in the C. P. of lands in ancient demesne.

from any wish to defraud the lord of his tenure, but from the circumstance of the legal advisers of the parties not knowing that the lands are of the tenure of ancient demesne: for it often happens that, previously to a fine or recovery, the title to the land is not investigated; or there may be nothing appearing on the abstract to show that the lands were of that tenure. The law in this case is, therefore, harsh and inconvenient. A fine or recovery levied or suffered in the Court of Common Pleas of lands in Wales (before the stat. 1 Will. 4, c. 70), or in a county palatine, is absolutely void, and therefore works no mischief. This principle may be a good one as to lands in those jurisdictions, because the boundaries are well known and defined. But, for the reason above given, it could not be made to apply to lands held in ancient demesne." (*First Real Property Report*, pp. 28, 29.)

3 & 4 Will. 4, c. 74, s. 4.

Defect of Jurisdiction.

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court shall be as valid as if the tenure had not been changed.

5. If at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid and binding as the same would have been if the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

3 & 4 Will. 4, c. 74, s. 6.

Tenure of Ancient Demesne restored.

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognised within twenty years.

6. In every case in which at any time, either before or after the passing of this act, the tenure or* ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

IV. The Amendment of Fines and Recoveries, and the rendering them Valid in certain Cases.

Errors in Fines.

Fines made valid without amendment.

7. If it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission (*g*).

Fine and recovery.

(*g*) An estate stood limited, subject to a life estate, to five persons, as tenants in common in tail, with cross remainders between them in tail. One of these persons, a married woman, concurred with her husband in a deed mortgaging her fifth share, and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue; and the deed contained a covenant to levy a fine of the property

* *Lege* of.

expressed to be conveyed by the deed. A fine was levied purporting to extend only to the fifth share. Afterwards one of the other tenants in tail died without issue and without having barred his estate tail: it was held, that there was an error in the fine which was cured by this section, and that the fine was effectual as to one-fourth and not as to one-fifth only. (*Life Association of Scotland* v. *Siddal*; *Cooper* v. *Green*, 3 De G., F. & J. 58.) *3 & 4 Will. 4, c. 74, s. 7.*

Cases of amendment of fines.

The court refused to amend a fine by substituting for the name of one parish mentioned by mistake in the fine the name of another parish in which, according to the deed to lead the uses, the premises were situated; the court observing, that if the application were acceded to, it would be in the same situation as before the act, and be called on to amend upon every conveyancer's doubt, and all the expense would be incurred which the act was passed to prevent. (*Lockington*, dem., *Shipley and wife*, conusors, 1 Bing. N. C. 355.) Fines of conusor's lands in G. and any other adjoining parish, were amended by inserting the parish of R., an adjoining parish, in which the conusor had land, which had gone according to the deed to lead the uses. (*Totton*, dem., *Vincent*, defor., 5 Bing. N. C. 626.) The court amended a fine levied at the Carmarthen great sessions, 1830, by indorsing the first and third proclamations, of which there was no entry, it appearing that such proclamations had been made, but the entry of them omitted by the clerk of the court. (*Lloyd*, dem., *Nicholas*, defor., 4 Bing. N. C. 633; 6 Scott, 355.) In another case a similar amendment was made of a fine levied in 1771, at the great sessions for the county of Cardigan, upon the affidavit of the clerk to the deputy-prothonotary of that court, to the effect that the proclamations were always duly made according to the practice of the court, but very often not registered, and on the affidavit of the surviving deforciant that the fine was intended between the parties, she (the survivor) now wishing to transmit a good title to a purchaser, and although no affidavit was produced of the fact of the proclamations in this particular case. (*Price* v. *Watkins*, 6 Jur. 170.) A fine was levied at the autumn great sessions held for the county of Cardigan in 1830; the roll of fines levied at those sessions was then proclaimed, and also at the autumn assizes for that county in 1831; and it appeared that the fine was then upon the proper roll. There was no evidence as to any proclamation having been made at the spring assizes, 1831; and there was no indorsement of any of the proclamations, the officer whose duty it was to indorse them on the roll having omitted to do so. The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Cardigan, by the 11 Geo. 4 & 1 Will. 4, c. 70, came on the death of the late deputy-prothonotary, and this after an ejectment brought to recover the premises comprised in the fine. (*Evans*, dem., *Davis*, defor., 3 Jur. 223; 5 Bing. N. C. 229; 7 Dowl. P. C. 259; 6 Scott, 372.)

Fines levied in the Court of Common Pleas to be deemed fines with proclamations.

The stat. 11 & 12 Vict. c. 70, recites that notwithstanding all fines levied in the Court of Common Pleas at Westminster previously to the abolition of fines were levied with proclamations, yet unnecessary trouble and expense are occasionally incurred by parties being required to procure evidence of such proclamations having been in fact made, and enacts that all fines heretofore levied in the said Court of Common Pleas shall be conclusively deemed to have been levied with proclamations, and shall have the force and effect of fines and proclamations. Sect. 2. Provided always, and be it enacted, that nothing herein contained shall extend to or affect any proceedings at law or in equity pending at the time of the passing of this act, 31st Aug. 1848. 3. Provided also, and be it enacted, that this act shall not extend to any fine heretofore levied of or concerning any lands, tenements, or hereditaments which at the time of the passing of this act, 31st Aug. 1848, shall be actually possessed or enjoyed by any person or persons under a title adverse to or inconsistent with the operation of such fine if levied with proclamations, but in all such cases it shall be necessary for all parties alleging that such fine was levied with proclamations to prove such allegation in the same manner as if this act had not been made.

Pending proceedings not to be affected.

Not to extend to fines concerning lands, &c. possessed under adverse titles, &c.

3 & 4 Will. 4, c. 74, s. 8.

Errors in Recoveries.

Recoveries made valid without amendment.

8. If it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission (*h*).

(*h*) A recovery was amended under this section by inserting the words "*right of free warren*," the right having always gone with the property in question, and the deed to lead the uses conveying all hereditaments. (*In re Twisden's Recovery*, 4 Bing. N. C. 253; 5 Scott, 638.)

In the exemplification of a recovery, the name of the tenant was inserted in the place of that of the demandant and *vice versâ*: it was held, as it was apparent upon the deed how it was intended that the parties should be described, the defect was remedied by this section, and that no amendment was necessary. (*Wickens*, dem., *Windus*, ten., 9 C. B. 711.)

Cases where the court refused to amend recoveries.

In a recovery the court of C. P. will not allow the christian names of the vouchee (erroneously transposed in the warrant of attorney) to be made right, amendments never being allowed in that instrument. (*Lamont*, vouchee, 3 Scott, 666; 2 Bing. N. C. 297.) Where the deed to lead the uses of a recovery is sufficient to cover all the lands intended to be passed, an application to amend the recovery by inserting the name of the parish is unnecessary. (*Re Watkins*, 9 Dowl. P. C. 58.) The court refused to permit an old recovery to be amended by the insertion of a parish, the words of the deed being large enough to embrace it, and the omission being consequently cured by this section. (*Evans*, vouchee, 2 Scott's N. R. 83.)

See further, as to the amendment of fines and recoveries, Cruise, Dig. tit. XXXV. c. 5, XXXVI. c. 6; 2 Wms. Saund. 94.

Jurisdiction to Amend saved.

Saving jurisdiction in cases not provided for.

9. Provided always, and be it further enacted, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Defect of Tenant to the Præcipe, Non-inrolment of Bargain and Sale.

Recoveries made valid in certain cases where bargain and sale is not duly enrolled.

10. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled.

Defect of Legal Tenant to Præcipe.

3 & 4 Will. 4, c. 74, s. 11.

11. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ (*i*); and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved (*k*).

Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

(*i*) Fines and recoveries were levied or suffered of equitable estates, and had, with a few exceptions, the same operation as they would have had if the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular estate, or destroyed contingent interests, except in the instance of a recovery suffered by an equitable tenant in tail, which would bar the entail, and all interests to take effect on the determination or in derogation thereof. Fines and recoveries of equitable estates must have been levied and suffered in the same courts, and with the same formalities, as those of legal estates; but there was some difference between legal and equitable recoveries, so far as regarded the tenant to the *præcipe*. (See *First Real Property Report*, p. 29.)

Equitable fines and recoveries.

It had been established that an equitable estate for life and a legal remainder in tail would not unite, so as to make a good recovery; and that in order to make a good tenant to the *præcipe* there should have been a legal estate for life, with a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail. (*Shapland* v. *Smith*, 1 Br. C. C. 75; *Salvin* v. *Thornton*, *Id.* 73, n.; *S. C.* Ambl. 545. See *Iveson* v. *Pearman*, 3 B. & C. 811; 4 B. & Ad. 55; 1 Collect. Jurid. 214; *Doe* d. *Cadogan* v. *Ewart*, 7 Ad. & Ell. 670.) A recovery suffered by an equitable tenant for life with a legal remainder in tail was void. Thus, where an estate was conveyed to a purchaser and his trustee and their heirs, to the use of the purchaser and trustee and the heirs and assigns of the purchaser for ever, it was held, that a recovery suffered by a devisee in tail under the will of the purchaser after his death, but in the lifetime and without the concurrence of the trustee, in whom the legal estate of freehold for life was vested, was bad, as the tenant in tail had no legal estate in her, except a remainder in tail expectant on the determination of the trustee's life estate and an equitable estate during his life. (3 B. & Cr. 799.) But an equitable remainder in tail might have been barred although the person making the tenant to the *præcipe* had the legal estate. (3 Ves. 125.) Where a legal tenant in tail conveyed his estate to a trustee or mortgagee, and was afterwards desirous of suffering a recovery, the concurrence of his alienee in making a tenant to the *præcipe* was necessary, and the recovery without it would not have been effectual. But this rule was held not applicable by analogy to trust estates, and therefore if equitable tenant in tail with equitable remainder over conveyed his interest to another person and his heirs by way of mortgage, or upon such trusts as left the ultimate beneficial ownership in himself, a recovery suffered of the secondary equitable estate was valid without the concurrence of the mortgagee or trustee in the convey-

3 & 4 *Will.* 4, c. 74, s. 11.

ance making the tenant to the *præcipe*. (*Nouaille* v. *Greenwood*, Turn. & Russ. 26. See *Casborne* v. *Scarfe*, 1 Atk. 603.)

A testator, who was entitled to the equity of redemption in freehold premises, subject to a mortgage in fee, devised the premises to J. P. and another as trustees, on trust, in the first place, out of the rents to pay off the mortgage; and he then gave 10*l.* a year out of the rents in the events which happened to E. P., and the remainder of the rents to J. P. and S. M. P. equally; and, after the death of E. P., he devised certain parts of the premises to J. P. and the heirs of his body. S. M. P. died in the lifetime of E. P.; J. P. then joined in suffering a recovery for the purpose of barring the estate tail; but neither E. P. nor the next of kin of S. M. P. joined in making the tenant the *præcipe*: it was held that the concurrence of E. P. was not necessary, but that the concurrence of the next of kin of S. M. P. was necessary, and that the recovery was, for want of such concurrence, invalid as to one moiety of the premises. (*Penny* v. *Allen*, 7 De G., M. & G. 409; 3 Jur., N. S. 273.) The eldest son and heir of S. M. P. was in possession of the rents of all the devised premises, and joined in respect of certain parts of them of which he was himself tenant in tail in making the tenant to the *præcipe*. The court refused, in the absence of any other circumstances tending to prove it, to presume a surrender to him of S. M. P.'s estate *pour autre vie*, or to regard him as having a title to it by general occupancy. (*Ib.*) It was held, that there could be no general occupancy, whether the estate *pour autre vie* was regarded as legal or equitable, and that the person beneficially entitled, and not the executor or administrator of S. M. P., was the proper person to concur in making the tenant to the *præcipe*. (*Ib.*) The title of the plaintiff against which the recovery was set up accrued in 1837; the plaintiff brought an ejectment in 1852, but was forced to abandon it, and to proceed in equity: he filed his bill in 1855. It was held that he was not barred of his title to relief by lapse of time, and in particular that the 3 & 4 Will. 4, c. 27, s. 23, did not apply. (*Ib.*) The account of rents and profits of those portions of the property to which the plaintiff was declared entitled was directed from 1852, the time when the plaintiff first made an adverse claim by commencing the ejectment. (*Ib.*)

Lands were devised (before stat. 7 Will. 4 & 1 Vict. c. 26) to L. and his heirs, in trust to permit and suffer A. to take the rents and profits during A.'s life, "with this proviso, to pay" W. out of the same, an annuity for her life, and if A. died before W., to permit W. to enjoy the lands for her life; and, after the deaths of A. and W. the devisor gave and devised the lands to the heirs male of A., remainder over. A. and W. both survived the devisor. A. survived W., and after W.'s death suffered a common recovery. It was contended that A. took an equitable estate only for his life under the will, with a legal estate tail in remainder under the same instrument, and therefore that the recovery was inoperative to bar the estate tail or remainder over. It was held, that assuming L. to have had a legal estate during W.'s life, A. was legal tenant in tail male after W.'s death, and that the recovery barred the estate tail and remainders. (*Adams* v. *Adams*, 6 Q. B. 860.)

What requisite in making legal tenant to the præcipe.

To make a legal tenant to the *præcipe* it was absolutely necessary that there should be possession by seisin in fact or in law; but the equitable owner never had the legal seisin, often not the actual possession, and very frequently not even the right to call for either. In the one case, if it were shown that the possession was not in the party, and consequently would not pass from him, the purpose of the conveyance was frustrated, no legal freehold being acquired; but in the other case it was not the object, nor could ever be the effect of the conveyance, to transfer the possession, but only to pass the equitable interest; and therefore an equitable recovery was held to be valid though the tenant in tail was not at the time in the actual receipt of the rents, which a trustee had paid over to others under a decree which was afterwards reversed. (*Lord Grenville* v. *Blyth*, 16 Ves. 224.) The possession and the right to it are presumed to go together till the contrary is shown, and the rightful owner will not be held out of possession unless it be shown that some other person has adversely obtained possession at the time of executing the deed making the tenant to the *præcipe*. (*Pigott* v. *Waller*, 7 Ves. 122.) Nothing short of a disseisin or intrusion can prevent

3 & 4 *Will.* 4, c. 74, *s.* 11.

the freehold in law from remaining in the party entitled to it, and a person not having an estate of freehold cannot suffer a recovery, though in possession. Where a tenant in tail in remainder expectant on an estate for life had obtained possession of the settled estate under a judgment in an action of ejectment, and during the life of the tenant for life made a feoffment with livery of seisin to a third party to make him tenant to the *præcipe* for suffering a common recovery, in which the tenant in tail was vouched, it was held that the taking possession under the judgment in ejectment did not amount to a disseisin of the freehold, as there was no *tortious ouster* (see Litt. s. 279; Co. Litt. 153); and that the feoffment, without the concurrence of the jointress, did not make a good tenant to the *præcipe*, and that the recovery was void, because there was no disseisin of the jointress, nor *ouster* of her freehold; that the feoffment was made really under an idea of having a right to suffer a recovery, and not with an intention to constitute a disseisin, and that if it were done with that intention, it amounted to a feoffment in *form* only, and was not such a feoffment as was in use of old; no transmutation of the possession passed by it, but its object being secret and collusive, it ought not to work a constructive disseisin. (*Taylor*, dem., *Atkyns* v. *Horde*, 1 Burr. 60; Cowp. 689; 6 Br. P. C. 633, Toml. ed.; see Butl. Co. Litt. 330, b, n.) It is a general rule that unless the persons entitled to the actual possession of the land concur in a feoffment, it will not defeat their interest. (*Doe* d. *Maddock* v. *Lynes*, 3 B. & C. 388.)

If a tenant in tail, after having assigned dower, suffered a recovery without the concurrence of the widow, it was void as to the part assigned, for want of a good tenant to the *præcipe*. (*Row* v. *Power*, 2 Bos. & Pul. 1.) But a dowress who had not entered was not a necessary party to a recovery. (4 Br. C. C. 525. See Gilb. Ten. 26; 5 Cru. Dig. p. 246, pl. 18.) So where tenant in tail conveyed his estate to the use of himself and his *intended* wife for their lives, with remainder to the heirs of their bodies, and after marriage the husband alone suffered a recovery, it was held to bar but a moiety, and to be a severance of the joint estate. (*Moody* v. *Moody*, Ambl. 649. See Co. Litt. 187; 2 Br. C. C. 180.) So where there were two joint tenants of a manor, and a writ of entry of the whole manor was brought against one of them, on which a common recovery was suffered, it would only be good for the moiety of the person against whom the writ was brought, but as to the other moiety, it would be void for want of a tenant to the *præcipe*. (*Winchester's case*, 3 Rep. 1; *Collyer* v. *Mason*, 2 Brod. & Bing. 685.) The above clause in the act will not, it is conceived, be applicable to cases similar to the three last cited.

(*k*) Allusion has been already made to the stat. 14 Geo. 2, c. 20, which dispensed with the concurrence of persons holding freehold leases in making tenants to the *præcipe*. (See *ante*, p. 322.)

Remedial Clauses qualified.

Certain cases in which fines and recoveries shall not be made valid by this act.

12. Provided always, and be it further enacted, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery, on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act;

3 & 4 Will. 4, c. 74, s. 12.

and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery, and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party (*l*).

(*l*) A decision in the Exchequer Chamber in Ireland, reversing the decision of the Queen's Bench, is stated to have put a construction upon the 9th section of the Irish act (which is the same as the 12th section of the English act, and which excepts, out of the previous sections, cases where any person at the passing of the act was in possession in respect of any estate which the recovery, if valid, would have barred), which does not seem to be warranted by the words and intention of the legislature. (Sugd. Statutes, p. 187, 2nd ed.; *Davies* v. *D'Arcy*, 3 Ir. C. L. Rep., N. S. 617; 4 Ir. Ch. Rep., N. S. 87.)

V. Custody of the Records of Fines and Recoveries.

As to the records of fines and recoveries in the Courts of Common Pleas at Westminster and Lancaster, and the Court of Pleas at Durham, after the 31st of December, 1833.

13. After the thirty-first day of December, one thousand eight hundred and thirty-three, the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and while the

3 & 4 *Will.* 4, *c.* 74, *s.* 13.

said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the accustomed fees; and when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made, and extracts or copies obtained, at such times and on paying such fees as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed (*l*).

(*l*) By 5 & 6 Will. 4, c. 82, the offices in the Court of Common Pleas connected with fines and recoveries are abolished. The records and documents concerning the duties of such offices are to be transferred to the officer of the Court of Common Pleas appointed under 3 & 4 Will. 4, c. 74, for registering the certificates of acknowledgment of married women subject to the order of that court (s. 2). The business of the abolished offices is transferred to the same officer (s. 3). Searches may be made and copies taken of the records and documents, which copies and extracts, signed by the same officer, shall be as available in evidence and as effectual as the same would have been if signed by the officers of such abolished offices.

The 5 Vict. sess. 2, c. 32, passed on 18th June, 1842:—"Whereas the records of fines levied and recoveries suffered in the lately abolished courts of great sessions in the principality of Wales, and the lately abolished court of session in the county palatine of Chester, were in many cases so irregularly and carelessly engrossed and kept, that divers purchasers, and others whose titles were intended to be secured by and under the said fines and recoveries, are in danger to have the same impeached, notwithstanding that the said fines and recoveries had duly passed all the offices, and that the lands intended to be thereby assured are sufficiently described in the proceedings upon such fines and recoveries: be it enacted, that all fines levied in the lately abolished courts of great sessions in the principality of Wales, or in the lately abolished court of session of the county palatine of Chester, of which the writ of covenant was duly returned and compounded, and of which the acknowledgment was before the judge or by commissioners duly taken and allowed, and of which the said writs and concords, with other proceedings, were lodged in the office of the prothonotary of the county in which the lands named in such writs are situated, shall be holden good and firm in law, notwithstanding the misprision or neglect of any prothonotary, deputy prothonotary, secondary, or other officer of any of the said courts, or their clerks, or any other public officer whatsoever, to file the same, or to engross the chirograph or foot of such fine, to endorse or record the proclamations thereof, or to enrol or docket the said fine, or do any other thing which by his office he ought to have done after the acknowledgment of the said fine."

All fines levied in the late courts of great sessions in Wales and the court of session in Cheshire shall be held to be good in law, notwithstanding any neglect in keeping the record.

Sect. 2. "That where it shall be needful to prove that any fine which appears to have been duly acknowledged was levied wtth proclamations in any of the said courts, it shall be taken to have been so levied, and shall have all the force of a fine levied with proclamations, although no chirograph or foot of such fine be found endorsed with proclamations, nor any entry of them or any of them appear on record, if such fine were duly enrolled or entered on the plea roll of the session in which it was levied, or docketed in the docket roll or docket book of such session, so as to set forth the names of the parties, and the places in which the lands are situated of which such fine was levied; or if within three years from the passing of this act, or such further time as the Court of Common Pleas shall in any case

Certain fines taken to be levied with proclamations.

3 & 4 *Will.* 4, c. 74, s. 13.

allow, such fine shall have been docketed, in such form as aforesaid, in docket rolls or docket books of parchment or vellum, by the several late prothonotaries of the said abolished courts, or in case of the death or inability of any such prothonotary, by some person or persons appointed for that purpose by the Master of the Rolls; or if within the said period of three years, or such further time as the Court of Common Pleas shall in any case allow, the writ of covenant, and the concord and all other proceedings of such fine, shall have been enrolled, with the allowance of the said court, in a book or books, roll or rolls of parchment or vellum, as hereinafter provided: provided always, that any such fine may be reversed by writ of error issued within twenty years from the levying thereof." To prove the levying of a fine with proclamations in a court of great session in Wales, the chirograph was produced, having one proclamation indorsed, and the plea roll of the same session, at which the chirograph stated the fine to have been levied, containing the entry of a *licentia concordandi* between the same parties, and respecting the same premises, as those mentioned in the chirograph. It was held sufficient, by virtue of the stat. 5 Vict. c. 32, s. 2. (*Doe* d. *Cadwalader* v. *Price*, 16 Mees. & W. 603.)

Certain recoveries declared good in law.

Sect. 3. "That all recoveries suffered in any of the said abolished courts whereof the writ of entry was duly returned, and the appearance of the tenant and vouchee or vouchees duly recorded by the court, or the warrant or warrants of attorney duly executed and allowed, and of which the said writ and other proceedings (if any) was or were lodged in the office of the prothonotary of the county in which the lands named in the said writ are situated, shall be holden good and firm in law, notwithstanding the non-enrolment or non-exemplification of such recovery, or any other misprision or neglect of any prothonotary or other officer as aforesaid to do any thing which by his office he ought to have done, after the recording of the appearance of the tenant and vouchee or vouchees, or the execution and allowance of the warrant or warrants of attorney: provided, nevertheless, that where no enrolment on the plea roll of the session in which such recovery was suffered, or any exemplification of a pretended enrolment thereof, sealed with the judicial seal of the court, or any entry on the remembrance roll sufficient to prove the arraignment of the writ of entry, can be found or produced, no such recovery shall be holden good by virtue of this act, unless within three years after the passing of this act, or such further time as the Court of Common Pleas shall in any case allow, the writ of entry or other proceedings extant of record touching the said recovery shall be enrolled as hereinafter provided, or such recovery shall have been docketed in full and ample manner as aforesaid: provided also, that any such recovery may be reversed by writ of error issued within twenty years from the suffering thereof."

Fines and recoveries may be enrolled in the office of registrar of Court of Common Pleas.

Sect. 4. "That, subject to such orders as the Court of Common Pleas from time to time shall make, any person may at any time henceforward cause the writ, concord, chirograph, proclamation, appearance, warrant of attorney, and all or any other proceedings in any fine or recovery levied or suffered in any of the said abolished courts, and now extant among the public records thereof, to be enrolled in the office of the registrar of certificates and affidavits of acknowledgments of deeds by married women in the Court of Common Pleas, which office, for the purposes of an act passed in the twenty-seventh year of Queen Elizabeth, intituled 'An Act for Reformation of Errors in Fines and Recoveries in the Twelve Shires of Wales and Counties Palatine, and for Exemplification of Fines and Recoveries generally,' and under such of the provisions of the said act as are now capable of taking effect, shall be deemed to be the enrolment office therein named: provided always, that no such enrolment of any writ of covenant or writ of entry shall be made as aforesaid where such writ shall not have been duly filed upon the proper file of the session in which the same was returnable, unless the compounding of such writ shall be proved to the satisfaction of the said registrar by an entry thereof duly made in the book of the compounder of king's silver for the county in which the lands named in such writ are situated; and in every such case such entry or certificate of composition made shall be enrolled together with such writ."

27 Eliz. c. 9.

Sect. 5. "And be it declared and enacted, that the Court of Common Pleas shall have the same power of amending any fine or recovery, and the record or enrolment thereof, whether as now extant, or as such fine or recovery, or any proceedings thereof, shall hereafter be enrolled, in manner aforesaid, as if the same had been originally levied, suffered or had in the Court of Common Pleas."

3 & 4 Will. 4, c. 74, s. 13.

Saving the amending power of Court of Common Pleas.

VI. Estates Tail not Barrable by Warranty.

14. All warranties of lands which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail (*m*).

Estates tail, and estates expectant thereon, no longer barrable by warranty.

(*m*) See 3 & 4 Will. 4, c. 27, s. 39, *ante*, p. 246.

VII. Alienation of Estates Tail.

General enabling Clause.

15. After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail (*n*), whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,* including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made (*o*).

Power after the 31st of December, 1833, to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

* The remainder of the corresponding clause in the Irish act, 4 & 5 Will. 4, c. 92, s. 12, runs thus: "whose estates are to take effect after the determination or in defeazance of any such estate tail, including the King's most excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made."

3 & 4 Will. 4, c. 74, s. 15.

(*n*) A disentailing deed, executed by a tenant for life, has not the same effect as a fine or recovery formerly had in divesting subsequent contingent estates, and so creating a tortious fee. Such a deed would have had no such operation at common law, and its effect under the statute depends entirely upon its having been executed by a tenant in tail. (*Slater* v. *Dangerfield*, 15 Mees. & W. 263.)

By a disentailing deed under this act, after reciting that A. was tenant for life, with remainder to B. in tail of the two estates therein comprised, and that A. being called upon to pay a debt of 1,200*l.* had applied to C., who had agreed to advance that sum in consideration of B. joining in the deed, which he had also agreed to do in order to defeat all estates tail of B., and to convey the inheritance in fee therein, A. and B. jointly conveyed the two estates and all the interest of A. and B. therein to C., for 500 years, to secure the repayment of 1,200*l.* and interest, with remainder to A. for life, remainder to B. in fee; in fact, A. was tenant in tail, not tenant for life of one of the two estates: it was held, that the conveyance being for valuable consideration as to both, B. and C., the tenant in tail under A.'s entail, could not be heard to say, that such entail was not barred by the deed, the intention to convey the whole fee simple in the property so entailed being sufficiently expressed, and the operative words of the disentailing deed being large enough to bar such entail. (*Evans* v. *Jones*, 1 Kay, 29.)

An alien might suffer a common recovery, (4 Leon. 404, Shep. Touch. 404,) and may execute a disentailing deed. (1 Jarm. on Wills, 34.)

Actual tenant in tail means exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right. (*Ante*, s. 1, p. 316.) By letters patent, King Charles the Second, in the 25th year of his reign, in consideration of natural love and affection, granted an estate tail in certain lands to his illegitimate son, H. F., afterwards created Duke of Grafton. It was held, that such estate and all other estates tail and remainders, and reversions thereupon expectant or depending, were effectually barred and extinguished by indentures of bargain and sale under 3 & 4 Will. 4, c. 74, s. 15, notwithstanding the stat. 34 & 35 Hen. 8, c. 20. (*Duke of Grafton* v. *London and Birmingham Railway Company*, 6 Scott, 719. See Com. Dig. Estates, B. 31; Bac. Abr. Fines and Recoveries, 2nd division, C.)

Reversion in crown barred by conveyance under this act.

(*o*) A tenant for life in possession with a remote remainder in tail could by a recovery with double voucher bar such entail, but without prejudice to the intermediate interests between his estate for life and remainder in tail. (*Smith* v. *Clifford*, 1 Term Rep. 738; *Meredith* v. *Leslie*, 6 Br. P. C. 388; see *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 43.)

A rent being an incorporeal hereditament, and susceptible of the same limitations as other hereditaments, may be granted or devised for life or in tail with remainders or limitations over. But there is a difference between an entail of lands and an entail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, might, by a common recovery, bar the entail and reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquired by a common recovery only a base fee, determinable upon his decease and failure of the issue in tail: but if there was a limitation of it in fee after the limitation in tail, the recovery of the tenant in tail gave him the fee simple. (*Smyth* v. *Farnaby*, Carter. 52; Sid. 285; 2 Keb. 29, 55, 84; *Weeks* v. *Peach*, Lutw. 1218, 1224; *S. C.*, Salk. 577; *Chaplin* v. *Chaplin*, 3 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Prest. on Conv. 3.)

It will deserve consideration, whether a tenant in tail by an assurance under this act of a rent *de novo*, without any limitation in fee on its original creation, will acquire more than a base fee, as he would have done by a recovery; the act makes no distinction between a tenant in tail of land and of rents. (See *ante*, p. 316.)

3 & 4 *Will.* 4, c. 74, s. 16.

Ex provisione Viri, &c. Restraining Clause.

Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 Hen. 7, c. 20, except with assent.

16. Provided always, and be it further enacted, that where under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands (*p*).

The stat. 11 Hen. 7, c. 20, and construction of it.

(*p*) By stat. 11 Hen. 7, c. 20, (confirmed by stat. 32 Hen. 8, c. 36, s. 2,) "if any woman who has any estate in *dower* or for *life*, or *in tail jointly* with her husband, or *only to herself*, or to *her use*, in any lands or hereditaments of the *inheritance or purchase of her husband*, (Co. Litt. 326, b,) or given to the husband and wife in tail or for life, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband, or of his ancestors, shall hereafter, being *sole*, or with any *after-taken husband*, discontinue, alien, release or confirm with warranty, or by covin suffer any recovery of the same against them, or any of them, or any other seised to their or either of their use; all such recoveries, discontinuances, alienations, releases, confirmations and warranties shall be utterly void and of none effect." And a right of entry is given to the persons entitled to the estate, and if such alienation were made by such wife and her second husband, such entry may be made during his life, but after his decease such women may re-enter and enjoy according to their *first* estate; but women if sole at the time of such alienation are barred, and an immediate right of entry is given to the persons entitled. The statute excepts discontinuances and recoveries made with the consent of the persons next entitled to the inheritance, and preserves the widow's right to *alien* for the term of her *life only*. The last-mentioned statute extends not only to cases in which the gift is confined to the issue of the husband, (*Foster* v. *Pitfal*, Cro. Eliz. 2, 524,) but to a limitation to the heirs of the body of the wife in tail general, with a remainder or reversion in favour of the *husband* or his ancestors. (*Symson* v. *Turner*, 1 Eq. Cas. Abr. 220; see *Gretton* v. *Haward*, 6 Taunt. 94; *S. C.*, 2 Marsh. 9.) Where an estate is settled partly in consideration of the marriage, and partly in consideration of the money paid, the consideration of marriage will prevail and bring the case within the statute. (*Villars* v. *Beaumont*, Dyer, 145 a; *Watkins* v. *Lewis*, 1 Russ. & M. 390.)

Some cases, though within the words of the statute, have been construed not to be within its meaning, as where an estate was devised by the husband to his wife in tail, with remainder over to a *stranger* in fee. (Cro. Eliz. 2; 1 Leon. 261.) So also, where the husband purchased an estate, but the whole consideration was paid by the wife's sister upon condition that such estate should be settled to the use of the husband and wife in tail: it was held, that the alienation of the wife after the death of the husband was valid, and not within the act. (*Watkins* v. *Lewis*, 1 Russ. & M. 378.) The statute 11 Hen. 7, c. 20, being made for the protection of the interests of the issue, did not apply when the heir in tail himself joined with his mother either in a fine, or in the conveyance declaring the uses it was intended to effectuate. (*Curtis* v. *Price*, 12 Ves. 97. See the cases on the last-mentioned statute collected in 1 Roper on Husband and Wife, by Bright, pp. 497, 515; Cruise's Dig. tit. XXXVI. c. 10; Prest. Conv. 19—21, 146—149.)

3 & 4 *Will.* 4, *c.* 74, *s.* 17.

Repeal of 11 *Hen.* 7, *c.* 20.

Except as to lands in settlements before this act, the act 11 Hen. 7, c. 20, repealed.

17. Provided always, and be it further enacted, that, except as to lands comprised in any settlement made before the passing of this act, the said act of the eleventh year of the reign of his Majesty King Henry the Seventh shall be and the same is hereby repealed.

Reversion in Crown, &c., not to be barred.

The power of disposition not to extend to certain tenants in tail.

18. Provided always, and be it further enacted, that the power of disposition hereinbefore contained shall not extend to tenant of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled, "An Act to embar feigned Recovery of Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct (*q*).

(*q*) Whenever there is any reason to suspect that an estate has belonged to the crown, it is necessary to require the production of the original grant from the crown, or to search for it.

Tenants in tail of the gift of the crown.

By statute 34 & 35 Hen. 8, c. 20, no feigned recovery by assent of parties against any tenant in tail of any lands *given by the crown*, whereof the reversion or remainder, at the time of such recovery had, shall be in the king, shall bind the heirs in tail, whether any voucher be had in such recovery or not; but after the death of such tenant in tail, the heirs in tail may enter and enjoy the lands according to the form of the gift; the recovery or any other thing done or suffered by or against such tenant in tail notwithstanding. In order to bring an estate tail with a reversion in fee to the crown within the protection of the act, it must be clearly a gift or provision of the king; for where a grant made by the crown, reserving the reversion on failure of the issue of the grantee, was made neither as a *gift* nor as a *reward* for services, but as an act of justice in execution of some secret trust or obligation binding the crown, it was held not to be within that act, and that a recovery barred the reversion. (*Perkins* d. *Voule* v. *Sewell*, 4 Burr. 2223; *S. C.*, 1 Bl. Rep. 654; see Co. Litt. 372 b, 373 a; Cruise's Dig. tit. XXXVI. c. 10, s. 42—51; 1 Prest. Conv. 18, 19, 144—146, 221.) If the king, having made a gift in tail, reserving the reversion to himself, afterwards gave leave to the tenant in tail to suffer a common recovery, for the purpose of passing the reversion out of himself in order to be reconveyed to him, which was done accordingly, the tenant in tail or his issue might afterwards bar such reversion by a common recovery, notwithstanding the statute, because the reversion having been once severed from the crown the privity of estate was gone, and the statute was intended only to restrain where the reversion continued in the crown without any alteration. (*Earl of Chesterfield's case*, Hardr. 409.) That mode of barring the crown was prevented by statute 1 Ann. sess. 1, c. 7, which restrains the alienation of lands belonging to the crown, except for a term not exceeding thirty-one years or three lives, or for a term determinable upon one, two or three lives; but see statute 34 Geo. 3, c. 75; 39 & 40 Geo. 3, cc. 86, 88; 47 Geo. 3, c. 24.

Where tenant in tail of the gift of the crown was disseised, and the disseisee levied a fine with proclamations, and five years elapsed: it was held, that the issue in tail was barred, although the fine of the tenant in tail himself would have been within the 34 & 35 Hen. 8, c. 20. (*Stratfield* v. *Dover*, Cro. Eliz. 595; but see 1 Sid. 166; 1 Roll. R. 171.)

A common recovery previously to the statute of Hen. 8, did not bar the reversion or remainder in the crown, because it was not like common persons bound by the fictitious recompense on which the effect of a recovery was founded. (2 Roll. Abr. 293, 294; Hob. R. 339.) It was decided that,

where tenant in tail male with the reversion in the crown, before the statute 34 & 35 Hen. 8, c. 20, suffered a common recovery with single voucher, the recoveror gained a *base fee* determinable on failure of issue male of the donee; that such base fee was descendible and alienable; that the issue in tail were barred, and the ancient reversion remained in the crown, which might come into possession and take effect whenever there should be a failure of such issue. (Bro. tail, 41; Cro. Car. 430; Plowd. 555; Dyer, 32 a; *Neal* d. *Duke of Athol* v. *Wilding*, 1 Wils. 275.) It was a question in a recent case, whether a reversion in an estate in Ireland (to which the statute 34 & 35 Hen. 8 does not extend, Co. Litt. 372 b, n. 3), after an estate tail, which had vested in the crown in consequence of the attainder of the reversioner, could be barred by a common recovery suffered by the issue in tail when in possession. The point was considered so doubtful by the House of Lords, that a purchaser, who objected to the title on that ground, was held not bound to accept it. (*Blosse* v. *Clanmorris*, 3 Bligh, 62. See 19 & 20 Vict. c. 120, s. 42, *post*.)

3 & 4 Will. 4, c. 74, s. 18.

In several acts of parliament conferring estates on eminent individuals as a reward for public services, tenants in tail are restrained from aliening such estates, except for their own lives, as in the case of the Duke of Marlborough, by 5 Anne, cc. 3, 4, (see *Davis* v. *Duke of Marlborough*, 1 Swanst. 74,) and the Duke of Wellington. (See statutes 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28.)

Tenants in tail after possibility of issue extinct.

By statute 14 Eliz. c. 8, it is provided that recoveries against tenant by the curtesy, tenant in tail after possibility of issue extinct, or otherwise, for term of life, or estate determinable upon life, or with voucher over against any such particular tenant, shall be void against him in reversion or remainder. But this act shall not be prejudicial to any person who shall by *good title* recover lands by reason of a former right; and recoveries of lands by assent of him in reversion or remainder (so as such assent appear of record) shall be of like force against such person so assenting as before this act. A common recovery with double voucher, suffered by a bare tenant for life as vouchee, without feoffment or fine, was held to destroy contingent remainder immediately expectant on the life estate, notwithstanding the statute 14 Eliz. c. 8. (*Doe* d. *Davis* v. *Gatacre*, 5 Bing. N. C. 609.) A tenant in tail after possibility of issue extinct has no power of barring the estate tail or the remainders expectant thereon, but for all purposes of alienation is considered merely as tenant for life (Co. Litt. 28 a; 11 Rep. 80); although not impeachable for waste.

Thus where by a settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, without impeachment of waste, remainder to trustees to preserve contingent remainders; remainder to the use of the wife for life for her *jointure* and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; *remainder to the heirs of the body of the husband and wife*; remainder to the right heirs of the husband: the wife survived the husband, and had no issue: and it was held, that she was tenant in tail after possibility of issue extinct, and that she was unimpeachable of waste, and entitled to the property of the timber when cut by her. (*Williams* v. *Williams*, 15 Ves. 419; *S. C.*, 12 East, 209; 3 Madd. 519.) Where a testator, being seised in fee of the reversion of an estate, devised it to his wife during her natural life, and after her decease to the heirs of her body by the testator lawfully begotten or to be begotten, and for want of such issue with remainder over, the wife was held to be a tenant in tail after possibility, after the period from her husband's death when she might have had issue by him, though there never was any issue of the marriage. (*Platt* v. *Powles*, 2 Maule & S. 65.)

Power to enlarge Base Fees.

Power after the 31st of December, 1833, to enlarge

19. After the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an

3 & 4 Will. 4, c. 74, s. 19.

estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the king's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute (*r*); saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

base fees; saving rights of certain persons.

(*r*) The remainder of the corresponding section of the Irish statute 4 & 5 Will. 4, c. 92, s. 16, runs thus:—"including the king's most excellent majesty, his heirs and successors, as regards the title to* his majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made: provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this act have been granted to any person or persons by his majesty, or any of his predecessors, in any reversion or remainder which may have come to the crown by attainder or otherwise."

* *Sic.*

Disposition by Heirs Expectant restrained.

Issue inheritable not to bar expectancies.

20. Provided always, and be it further enacted, that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest (*s*) which he may have as issue inheritable to any estate tail therein (*t*).

Alienation of expectancies.

(*s*) The words in the corresponding section of the Irish stat. 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or *possibility*."

(*t*) See 8 & 9 Vict. c. 106, s. 6, *post*. This clause of the act and the abolition of fines will have the effect of putting an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple has during the life of his father. It may be useful to advert to the power of alienation possessed by persons having expectant or contingent interests, although all of them do not come within the operation of this act. A fine levied by a person who afterwards became heir was an estoppel. (1 Roll. Abr. 482 (S.) pl. 2; *Helps* v. *Hereford*, 2 B. & Ald. 242; W. Jones, 456; *Doe* v. *Martyn*, 2 Mann. & R. 485; 8 B. & C. 497; *Christmas* v. *Oliver*, 10 B. & C. 181.) But where a tenant in tail of an advowson and his son and heir joined in a grant of the next avoidance, and the tenant in tail died, it was adjudged that the grant was utterly void against the son and heir who joined in the grant, because he had nothing in the advowson neither in possession or right, nor in actual possibility at the time of the grant. (*Sir M. Wivel's case*, Hob. 45; Perk. s. 65; 1 Anstr. 11; 3 Term Rep. 365.) A fine would in some cases have barred the collateral heirs of the cognisor, though he was never seised of the entail, provided the right to

such entail had descended upon him. For in a formedon in the descender the demandant had to mention every one to whom any right to the entail descended, by which means he became privy to all such persons. (8 Rep. 88 b.) Thus if a father, tenant in tail, had three sons, and the eldest levied a fine in his father's lifetime, if he or any of his issue, inheritable to the entail, survived the father, the younger sons and their issue would have been barred by the fine, because by the death of the father a right to the entail descended to the elder brother and his issue, and so the younger brothers became privies to him. But where neither the cognisor nor any of his issue ever acquired a right to the entail, such fine would not have barred any of his collateral heirs, because in making out their title and pedigree to the person last seised of the entail, they need not have mentioned the person who levied the fine or any of his descendants, and consequently were not privies to them. So where an eldest son levied a fine of an estate tail, which was then vested in his mother, and then died in her lifetime, so that the estate tail never descended on him, it was held that such fine did not bar the second brother, because the estate tail never having descended to the elder brother, the younger was not privy to him. (*Bradstock* v. *Scovel*, Cro. Car. 434.)

3 & 4 *Will.* 4, *c.* 74, *s.* 20.

By stat. 4 & 5 Will. 4, c. 92, s. 22, for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland, it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: provided nevertheless that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition."

Persons empowered to dispose of lands in Ireland, not having a vested estate.

A mere possibility could be only bound or extinguished at law by estoppel, by a fine, or a recovery (*Weale* v. *Lower*, Pollex. 54), or in equity by contract. (*Beckley* v. *Newland*, 2 P. Wms. 182; *Hobson* v. *Trevor*, *Id.* 191; see *Lyde* v. *Mynn*, 1 M. & Keen, 693; 1 Madd. Ch. 437; 3 Mer. 671.) But when a possibility is coupled with an interest, as where the person is fixed and ascertained, it may not only be bound by estoppel or contract, but may be released (*Jewson* v. *Moulson*, 2 Atk. 417), or be devised, though it cannot be granted or transferred by the ordinary rules of the common law. (*Lampet's case*, 10 Rep. 46.) A contingent remainderman conveyed his interest to secure a debt. The remainder was afterwards destroyed by the tenant of the prior estate. The interest which the remainderman afterwards acquired under the will of such tenant was held to be available by the creditor. (*Noel* v. *Bewley*, 3 Sim. 103. See *Smith* v. *Baker*, 1 Yo. & Coll. C. C. 223.) A testator bequeathed a sum of money to trustees in trust for his daughter for life, and in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next of kin, by a voluntary deed, assigned her expectant interest in reversion to the husband. It was held, on the death of the daughter, without leaving issue, that the assignment operated only as an agreement to assign; and consequently, that being voluntary, a court of equity would not enforce it. (*Meek* v. *Kettlewell*, 1 Phill. C. C. 342; 1 Hare, 464.) An agreement, of which the subject is in expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. (*Lyde* v. *Mynn*, 1 My. & Keen, 683. See *Pope* v. *Whitcombe*, 3 Russ. 124.) A specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease. (*Wethered* v. *Wethered*, 2 Sim. 183; see *Harwood* v. *Tooke*, 2 Sim. 192;

Possibilities.

3 & 4 *Will.* 4, c. 74, *s.* 20.

Alexander v. *Duke of Wellington*, 2 Russ. & M. 55; *Carleton* v. *Leighton*, 3 Mer. 667.) If an heir apparent levied a fine of lands, and survived his ancestor, he was bound by estoppel after the descent to him. (*Edwards* v. *Rogers*, Sir W. Jones, 756; *Wright* v. *Wright*, 1 Ves. sen. 412.) But where, in pursuance of an agreement made before marriage, certain estates belonging to the wife, and other lands belonging to her father, in which she had no interest, were conveyed by lease and release according to the articles, and then a fine was levied by the husband and wife to the uses of the settlement, as well of the lands to which she was then *entitled*, as of other lands belonging to her father, one moiety of such lands having descended to her on his death as one of his co-heiresses: it was held that such moiety became subject to and bound by the uses of the settlement, the fine having operated as an estoppel. (*Helps* v. *Hereford*, 2 Barn. & Ald. 242.) A fine by a contingent remainderman did not operate by estoppel only, but it had an ulterior operation when the contingency happened; that the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied. (*Rawlin's case*, 4 Rep. 52; *Weale* v. *Lower*, Pollex. 54; *Trevivian* v. *Lawrence*, 6 Mod. 258; Ld. Raym. 1051; *Vick* v. *Edwards*, 3 P. Wms. 372; *Doe* d. *Christmas* v. *Oliver*, 10 Barn. & Cress. 181; *Doe* d. *Howell*, *Id.* 191; *Doe* v. *Martyn*, 8 B. & C. 527; *Davies* v. *Bush*, 1 M'Clel. & Y. 58; see Fearne, 365.)

A fine by a contingent remainderman passed nothing, but left the right as it found it, and therefore was no bar when the contingency happened in the mouth of a stranger to the fine against a claim in the name of such remainderman; as the fine operated by estoppel only, which was available only by parties and privies. (*Doe* d. *Brune* v. *Martyn*, 8 B. & C. 527.)

A contingent interest in terms of years may be assigned in equity for valuable consideration, or for love and affection between parent and child. (1 Ves. sen. 411; *Wind* v. *Jekyl*, 1 P. Wms. 572.)

The doctrine of estoppel is a curious and important head of the law, and well deserving attention. It would exceed the limits of these annotations to discuss it at large, but it may be useful to state some of its principles. An estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth. (Terms of the Law, 157; Litt. s. 667; Co. Litt. 352 a.) There are three kinds of estoppels, by matter of record, by deed, whether an indenture or a deed poll (*Bonner* v. *Wilkinson*, 5 B. & Ald. 682; 1 D. & R. 328), with this difference, that in the case of a deed poll only the party making the deed is estopped, while by a deed indented both parties are concluded (Co. Litt. 47 b; *Lewis* v. *Willis*, 1 Wils. 314; Litt. s. 693); and by matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, &c. (Co. Litt. 352.)

Estoppel by deed.

It was held by *Leach*, Master of the Rolls, that where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped in respect of the solemnity of the instrument from saying, as against the other party to the indenture, contrary to his own averment in it, that he had not such interest at the time of its execution. A conveyance by lease and release will operate as an estoppel; and where the releasee can have the benefit of the conveyance at law, a court of equity will not interfere in his behalf. (*Bensley* v. *Burdon*, 2 Sim. & Stu. 519, afterwards affirmed by the Lord Chancellor; see 2 B. & Ad. 282.) But where A., having an equitable fee in certain lands, mortgaged the same to B., by lease and release, and the latter recited that A. was *legally or equitably* entitled to the premises conveyed; and the releasee covenanted that he was lawfully and equitably seised in his demesne of and in and otherwise well entitled to the same, and the legal estate was subsequently conveyed to A., and he afterwards, for a valuable consideration, conveyed the same to C.: upon an ejectment brought by B. against C., it was held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was

3 & 4 *Will.* 4, c. 74, s. 20.

not thereby estopped from setting up the legal estate acquired by him after the execution of the release, and that the release did not operate as an estoppel by virtue of the words granted, bargained, sold, aliened, remised, released, &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal estate in the premises. (*Right* d. *Jefferys* v. *Bucknell*, 2 B. & Ad. 278.) In this case there was a want of that certainty which is requisite to create an estoppel, the recital being in the alternative, "that the mortgagor was lawfully *or* equitably entitled," and the covenant for title was to the same effect. Sir *E. Sugden*, L. C., observed, "an innocent conveyance by lease and release could not operate by estoppel. It is true that Sir *J. Leach*, in *Bensley* v. *Burdon*, did hold the contrary, and decided that an estoppel could be worked by lease and release. The point was subsequently ruled the other way in *Right* v. *Bucknell*, and it is now clearly settled, that a conveyance of this nature has no effect upon the legal estate which the party subsequently acquires." (*Lloyd* v. *Lloyd*, 4 Dru. & War. 369; *Stackpoole* v. *Stackpoole*, 4 Dru. & War. 347.)

A devise of real estate was to A. for life, remainder to the children of A. in fee, with a provision for survivorship and accruer in case of the death of any or either of such children under the age of twenty-one years and without issue, and if there should not be any child of A. or if any or all such children should die under twenty-one and without issue, a devise to the heirs and assigns of A. although A. had no child at the date of the will or at the death of the testator: it was held, that the gift to the heir of A. was a contingent remainder. A. was a married woman and during her coverture she and her husband settled her interest under the above will by a deed dated in 1840, and which was acknowledged pursuant to this act upon herself for life, remainder to her children, and if none then to her husband in fee. This deed recited the will accurately. A. died never having had children. It was held, that her heir claiming by descent was not estopped by this deed. (*Crofts* v. *Middleton*, 2 Kay & Johnson, 194.) V. C. *Wood* said, "in this case the instrument showed upon the face of it that the party had not anything to release except this contingent interest, and therefore the deed could have no legal effect. The Statute of Fines and Recoveries does not give to this deed the effect of a fine, but only the operation which it would have if executed by a man or *feme sole*, and therefore, as any person so circumstanced would not be estopped, there can be estoppel in this case." (*Ib.* p. 205.) It was also held, that this act has not removed the inability of a married woman to contract concerning her real estate, and that the above-mentioned settlement, although for valuable consideration, was not a contract which could be enforced against the heir of the married woman. (*Ib.*)

The court held, upon appeal against this decision, that, assuming that between the passing of this act and the 7 & 8 Vict. c. 76, (see 8 & 9 Vict. c. 106, s. 6, *post*,) a man or a feme sole could not by any means effectually dispose at law of a contingent remainder in fee by act *inter vivos*, except by estoppel by means of a false recital, still, upon the true construction of this act, a married woman could convey such an estate by deed acknowledged. And, supposing such a deed could not operate so as to pass the legal estate, still, if made for a valuable consideration, it would be good to confer an equitable title by way of contract, for this act gives a married woman power, with the concurrence of her husband (see s. 77, *post*), to contract by an acknowledged deed, so as to bind her real estate, though not herself personally. (*Crofts* v. *Middleton*, 2 Jur., N. S. 528; 25 L. J., Ch. 513; 8 De G., M. & G. 192.)

Contingent interests in any tenements or hereditaments are now made alienable by deed. (See *post*, 8 & 9 Vict. c. 106, s. 6.)

The party is not estopped by a deed upon the face of which the truth appears; for if the deed alleges the truth, it is obvious that the truth cannot be alleged against the deed, and the case of an estoppel cannot arise. While A. was in possession, B. and his eldest son, by deed truly reciting the facts, released their interest to trustees; it was admitted, that this being a release of a possibility to a party not privy in estate, and the whole truth appearing by the deed, no legal interest passed either by way of conveyance of interest,

3 & 4 *Will.* 4, c. 74, *s.* 20.

or by way of estoppel. (*Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 2; 4 Nev. & M. 730; see *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23.) The recital of a particular fact in a deed will estop the party making the statement. (1 Show. 57; *Shelley* v. *Wright*, Willes, 9; *Lainson* v. *Tremere*, 1 Ad. & Ell. 792; 3 Nev. & M. 603; *Bowman* v. *Taylor*, 2 Ad. & Ell. 278; 4 Nev. & M. 264; *Hill* v. *Manchester and Salford Waterworks Company*, 2 B. & Ad. 544; *Pargeter* v. *Harris*, 7 Q. B. 708.) The execution by the lessee of the counterpart of a lease granted in exercise of a power given by a will recited in the lease, was held an admission of the execution of such will. (*Bringloe* v. *Goodson*, 5 Bing. N. C. 738; 8 Scott, 71.) A party taking under a conveyance is not estopped by recitals in a previous deed, on which the title conveyed is founded, when the suit relates to other lands than those comprised in such conveyance. (*Doe* d. *Shelton* v. *Shelton*, 4 Nev. & M. 857; 3 Ad. & Ell. 265.)

An estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action or proceeding there can be no estoppel. (*Carter* v. *Carter*, 3 Kay & J. 618.)

Effect of an estoppel.

The effect of an estoppel is to prevent the party who has executed it from impugning the general effect of the deed, or any particular statement or clause it contains. (Cowp. 600; Co. Litt. 47 b; *Doe* v. *Ford*, 3 Ad. & Ell. 649.) The receipt for the consideration money in the body of the deed is binding upon the parties at law (*Rountree* v. *Jacob*, 2 Taunt. 141); and cannot be contradicted by parol evidence (*Baker* v. *Dewey*, 1 B. & C. 704); but equity, on proof that the money was not paid, will grant relief. (*Ryle* v. *Haggie*, 1 Jac. & W. 234.) But the operation of the words of the release and receipt may be restrained by the recitals in a deed, showing that the money has not been paid. (*Lampon* v. *Corke*, 5 B. & Ald. 606; 1 D. & R. 211; see *Alner* v. *George*, 1 Camp. 392; *Legh* v. *Legh*, 1 Bos. & P. 447; *Hickey* v. *Burt*, 7 Taunt. 42; *Jones* v. *Herbert*, 7 Taunt. 421; *Payne* v. *Rogers*, Dougl. 407.) But the receipt for the consideration money indorsed on a deed being no part of it, is not an estoppel, but only evidence open to contradiction. (*Lampon* v. *Corke*, 5 B. & Ald. 606; *Graves* v. *Key*, 3 B. & Ad. 313.)

Exceptions to the rule.

The rule which requires a man to be bound by his own deliberate representations of matters of fact, may be overbalanced by weightier considerations. Thus if a trustee, deriving his authority from a public act of parliament, grants by a deed unauthorized by the act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power. (*Fairtitle* d. *Mytton* v. *Gilbert*, 2 T. R. 169; see *Doe* d. *Baggely* v. *Hares*, 4 B. & Ad. 435.) So a party to the deed is not estopped from pleading its illegality (*Collins* v. *Blantern*, 2 Wils. 347; *Paxton* v. *Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an act of parliament or public policy. (*Prole* v. *Wiggins*, 3 Bing. N. C. 230; 3 Scott, 601.) So a party is not estopped from showing that a deed is void under the Mortmain Act, 9 Geo. 2, c. 36. (*Doe* d. *Preece* v. *Howells*, 2 Ad. & Ell. 744.) But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game. (*Doe* v. *Roberts*, 2 B. & Ald. 367; see further on this subject, Com. Dig. Estoppel; 1 Wms. Saund. 325, n. (4); 2 Smith's Leading Cases, 444; see also the cases, *Doe* d. *Leming* v. *Skirrow*, 7 Ad. & Ell. 157; 2 Nev. & P. 123; *Gaunt* v. *Wainman*, 3 Scott, 413; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; 3 M. & Keen, 792; *Bringloe* v. *Goodson*, 4 Bing. N. C. 726; 6 Scott, 502. See an article on Estoppel by Deed, 5 Jur. 858, 1170.)

Copyholds not bound by estoppel.

In order to pass a copyhold estate by surrender, the estate must pass into the hands of the lord, through which it must be taken. A fine differed from the case of a surrender inasmuch as it was good against the heir by estoppel, although it passed no estate; but if a surrender be not valid, there will be no estoppel, and no estate can pass into the hands of the lord. (*Taylor* v. *Phillips*, 1 Ves. sen. 230.) It was held that a surrender of a copyhold estate made by the heir apparent in the lifetime of the ancestor, whom he survived, did not operate by estoppel so as to prevent the heir at law of the surrenderor from recovering the possession. (*Goodtitle* v. *Morse*, 3 Term R. 365.) And a court of equity afterwards refused to compel the

heir at law to surrender to the purchaser, on the ground that the original contract to convey made by one not then entitled was a personal equity attaching on the conscience of the party, and not descending with the land. (*Morse* v. *Faulkner*, 1 Anstr. 11; 3 Swanst. 429.) On the same principle devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; and such a surrender will not operate by estoppel against the parties or their heirs. (*Doe* d. *Blacksell* v. *Tomkins*, 11 East, 185.) And where a copyhold was surrendered to the use of the husband and wife for their natural lives and the life of the longer liver of them, and after the death of the survivor of them to the right heirs of the survivor for ever: it was held that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor, which neither passed nor was bound by their joint surrender to a purchaser for a valuable consideration. (*Doe* v. *Wilson*, 4 Barn. & Ald. 303.) In the case last cited, Lord *Tenterden*, C. J., observed, that the surrender to the purchaser for a valuable consideration must receive the utmost effect of which it was legally capable, and be construed to pass all that the surrenderors could lawfully convey. Now the *quantum* of estate which they might lawfully convey must be commensurate with the *quantum* of estate that was actually vested in them at the time of the surrender, which was an estate held in entirety for their joint lives and the life of the survivor, and that a surrender of a copyhold could not operate by estoppel. (*Id.* 312, 313; see *Doe* d. *Baverstock* v. *Rolfe*, 3 Nev. & P. 648.)

3 & 4 *Will.* 4, *c.* 74, *s.* 20.

It has been seen that by the 15th section of this act, (*ante*, p. 339,) every actual tenant in tail, whether in possession, remainder, *contingency*, or otherwise, has power to alien; and as this clause is applied to copyholds by the 50th section of this act (see *post*), it should seem that a *contingent tenant in tail* of copyholds may now dispose of such interest by the modes prescribed by this act. (See 8 & 9 Vict. c. 106, s. 6, *post*.)

Contingent interests devisable.

Before the amendment of the laws of wills, contingent and executory estates and possibilities accompanied with an interest were devisable. (*Selwin* v. *Selwin*, Burr. 1131; *Moore* v. *Hawkins*, 2 Eden's C. C. 342; *Roe* v. *Griffiths*, 1 Bl. Rep. 605; *Roe* v. *Jones*, 1 Hen. Bl. 30; *Jones* v. *Roe*, 3 East, 88; 17 Ves. 182; *Scawen* v. *Blunt*, 7 Ves. 300.) But such an interest was not devisable where the person who is to take is not in any degree ascertainable before the contingency happens; as where there was "a devise to two equally, or to the survivor of them, and to be disposed of by her, the survivor, as she might by will devise;" the will of one of such devisees made during their joint lives, although she survived, was held inoperative. (*Doe* d. *Calkin* v. *Tomkinson*, 2 Maule & Sel. 164.) By stat. 7 Will. 4 & 1 Vict. c. 26, s. 3, contingent interests are devisable whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested. (See *Ingilby* v. *Amcotts*, 2 Jur. (N. S.) 556.)

Possibilities in personal estate may be disposed of by will as well as assigned in equity. (Fearne, 439; Pollexf. 44; 2 Freem. 250; 9 Mod. 101; 2 P. Wms. 608; 1 P. Wms. 572; 3 P. Wms. 132. See Shelford on Wills, pp. 153—155.)

Dispositions for limited Purposes.

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

21. Provided always, and be it further enacted, that if a tenant in tail of lands shall make a disposition of the same under this act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any

3 & 4 *Will.* 4, c. 74, s. 21.

intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected (*u*).

(*u*) By this section of the act, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be entitled to the equity of redemption discharged from the entail; but if he creates an estate *pour autre vie*, or for years only, or an "*interest, charge* or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge created, although there be an express declaration of intention that the deed shall operate as a complete bar of the entail. Assuming, what is not clear, that a conveyance by a tenant in tail to a trustee to the use of a mortgagee for a term of years, with remainder to such uses as the tenant in tail should appoint, or to the use of himself in fee, would not extinguish the entail altogether, it will be necessary, where the object is to make a mortgage for years, or to create a charge, and to bar the entail in the equity of redemption, to attain the latter object by a distinct deed, either before or after the creation of the mortgage or charge. Assuming also, what is not clear, that where a mortgage in fee is made with a proviso that on payment of the money the estate shall be reconveyed to the former uses, either by reference or by express limitation to the same uses, that the entail would not be revived, it will be necessary to have a distinct deed for preserving the entail, as to the equity of redemption; it may however be contended that the object of this section is not to apply to express limitations, but merely to prevent a simple declaration that the entail shall or shall not be barred from having any operation; (see 9 Jarm. Conv. 404, 405;) and therefore that, by one deed either of the last-mentioned objects may be accomplished. In mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged from the entail without any further assurance, it will be proper to frame the proviso of redemption not so as to make the estate of the mortgagee *void* on payment of the money, but to direct that he shall reconvey it (which is the usual form) to the uses intended; for if the condition in the former case should be performed, it might be contended that the tenant in tail became seised of his former estate tail.

Equitable mortgages.

The words "interest, charge, lien or incumbrance," unless controlled by the 40th section of the act, (see *post*,) would seem to include an equitable mortgage. The deposit of title deeds is evidence of an agreement to execute a mortgage, and an equitable title to a mortgage is, in the Court of Chancery, as good as a legal title in a court of law. (*Ex parte Wright*, 19 Ves. 258.) It has long been settled law, that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, if no other purpose be shown; (*Ex parte Kensington*, 2 Ves. & B. 83; *Ex parte Langston*, 17 Ves. 230;) a rule which has often been reprobated, and, as it seems, is not to be extended. (*Ex parte Wetherell*, 11 Ves. 398; *Ex parte Haigh*, 11 Ves. 403; *Norris* v. *Wilkinson*, 12 Ves. 192.) So the deposit of the copy of court roll, by which a copyhold estate is held, gives a *lien* thereon in the nature of a mortgage. (*Ex parte Warner*, 19 Ves. 202.) A written agreement accompanying the deposit must *primâ facie* determine the purpose for which it was made; (*Ex parte Coombe*, 17 Ves. 371; *Ex parte Mountfort*, 14 Ves. 607;) though a deposit originally for a particular purpose may be enlarged

by a subsequent parol agreement. (*Ex parte Kensington*, 2 Ves. & B. 84.) Where the object of the deposit is not evidenced by writing, the court must decide upon parol evidence with what intent the deposit was made, although in truth it is in the very teeth of the Statute of Frauds, 29 Car. 2, c. 3. (*Ex parte Whitbread*, 19 Ves. 211; *Ex parte Haigh*, 17 Ves. 402; *Norris* v. *Wilkinson*, 12 Ves. 197; see 2 Hov. Suppl. to Ves. jun. 148. On equitable mortgages, see 5 Jarm. Conv. by Sweet, 109 *et seq.*; Coote on Mortgages, ch. viii.; Shelford on the Law of Bankruptcy, pp. 407—410, 3rd ed.)

3 & 4 *Will.* 4, *c.* 74, *s.* 21.

VIII. Definition of the Protector.

22. If at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause (*x*).

The owner of the first existing estate under a settlement, prior to the estate tail under the same settlement, to be the protector of the settlement.

(*x*) In cases of lunacy the Lord Chancellor is protector. (See *post*, ss. 33, 48.) Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder under this statute, and where the tenant in tail in possession is a lunatic, the Lord Chancellor will, as such protector, consent to a disentailing deed by the tenant in tail in remainder, where it is for the benefit of the near relatives of the lunatic. (*In re Blewitt*, 2 Jur., N. S. 217, overruling *In re Blewitt*, 3 M. & Keen, 250; *In re Wood*, 3 M. & Cr. 266. See note to section 48, *post*. When there will be a resulting trust, see *Hill* v. *Bishop of London*, 1 Atk. 618; *King* v. *Denison*, 1 Ves. & B. 260; *Cook* v. *Hutchinson*, 1 Keen, 42.)

3 & 4 *Will.* 4, c. 74, *s.* 23.

Protector as to undivided Shares.

Each of two or more owners of a prior estate to be the sole protector as to his share.

23. Provided always, and be it further enacted, that where two or more persons shall be owners, under a settlement, within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share (*y*).

(*y*) See *Church* v. *Edwards*, 2 Br. C. C. 180; *Oakley* v. *Smith*, Amb. 90; 1 Eden, 261; 3 Prest. Conv. 90 *et seq.*

Protector in case of Married Women.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

24. Provided always, and be it further enacted, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement (*z*).

(*z*) Where, by a settlement executed prior to the passing of this act, real estate was settled to the separate use of a married woman for her life, with remainder in tail, she alone is, by virtue of this section, the protector of the settlement; and her husband's consent is not requisite, under the 34th section, to enable the tenant in tail to make an absolute disposition of the property. (*Keer* v. *Brown*, 5 Jur., N. S. 457; 1 Johns. 138; 28 Law J., Chanc. 477.)

Protector as to Estates restored or confirmed.

As to estates confirmed or restored by settlement.

25. Provided always, and be it further enacted, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

Lessees not to be Protector.

As to leases at rent created by settlement.

26. Provided always, and be it further enacted, that where a lease at a rent shall be created or confirmed by a settlement,

the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement. *3 & 4 Will. 4, c. 74, s. 26.*

Dowresses, &c., not to be Protector.

27. Provided always, and be it further enacted, that no woman in respect of her dower (*z*), and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three), no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

No tenant in dower, heir, executor, &c. to be protector, except in the case of a bare trustee.

(*z*) It was not thought advisable to require the concurrence of the tenant in dower, for it seldom, if ever, happens that dower is set out by metes and bounds; and if such an estate does occur, her concurrence would have only a partial operation, as the estate is confined to a part of the lands entailed. (1 Real Prop. Rep. pp. 32, 33.)

Who to be Protector where excluded by the two last Clauses.

28. Provided always, and be it further enacted, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

Tenant to the Præcipe to be Protector, when.

29. Provided always, and be it further enacted, that where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement (*a*).

Where, in the disposition of an estate before the 31st December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

(*a*) This and the following section of the act will render it necessary, where it is intended to bar an entail created on or before the 31st December, 1833, to ascertain in whom the *immediate freehold* of the lands is vested, in the same way as was required for determining who was the proper person for making a tenant to the *præcipe* in a recovery. (See *ante*, pp. 323, 333, 334.) This section must be attentively considered in connection with the 27th,

3 & 4 *Will.* 4, *c.* 74, *s.* 29.

Question as to protectorship.

30th and 31st sections. In *Corrall* v. *Cattell*, 4 Mees. & W. 734, (and see *Cattell* v. *Corrall*, 3 Y. & Coll. 413,) a testator by his will, dated the 24th April, 1817, devised estates to his wife for life, (subject to the annuity of 2*l.* to his daughter,) with remainder to his second son in tail, with remainder to the testator's right heirs. The testator died in 1817, leaving his wife surviving him, and she died in 1832. By a deed dated the 19th August, 1817, and made between the tenant in tail of the one part, and two trustees of the other part, in consideration of 10*s.* and other good considerations, the tenant in tail granted, released and confirmed to the said trustees, their heirs and assigns, the remainder or reversion of the grantor in the premises expectant on the decease of his mother, to hold unto the said trustees during the life of the grantor, in trust for their own proper authority, and without the further concurrence of the grantor, to let and demise the premises and to receive the rents and profits, and thereout in the first place to discharge the annuity of 2*l.* given by the will, and to pay the expenses of all repairs, and to reimburse themselves all costs, and lastly to pay the surplus to the grantor, his executors, administrators and assigns. And the deed contained a proviso that nothing therein contained should operate beyond the plaintiff's life interest in the property. The tenant in tail having sold the estate, a question was raised whether he could make a good title to the premises, without the sanction and concurrence of the surviving trustee under the above deed. It was argued that the tenant in tail having parted with his life estate altogether, or at least parted with the legal interest, was not in a condition to have suffered a recovery to bar the reversion upon his estate tail to his elder brother, who was alive, and that the stat. 3 & 4 Will. 4, c. 74, would not help him out of the difficulty, either because the surviving trustee was a protector of the settlement within the meaning of that act, who would not join, or because there was no protector of the settlement, and therefore the act did not apply. It was unnecessary however to decide these important questions. (See s. 22, *ante*, p. 351.)

Where in the case of the disposition of a reversion on or before the 31st of December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

30. Provided always, and be it further enacted, that where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Bare Trustee to the Protector, when.

Where a bare trustee under a settlement made

31. Provided always, and be it further enacted, that where, under any settlement of lands made before the passing of this

act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement (*b*).

3 & 4 *Will.* 4, *c.* 74, *s.* 31.

before the passing of this act shall be the protector.

(*b*) The husband of a married woman taking an estate for her separate use under a settlement is not a bare trustee under the settlement within this section. (*Kerr* v. *Brown*, 1 Johns. 138; 5 Jur., N. S. 457; 28 L. J., Chanc. 477. See *ante*, s. 24, p. 352, n.)

Under this section a trustee, having the first *immediate* estate of *freehold*, will be protector of a settlement made *before the passing of this act* (28 Aug. 1833). Thus under a settlement containing a limitation to A. for ninety-nine years, if he should so long live, with remainder to trustees during the life of A. upon trust by the usual means to preserve contingent remainders, with remainder to the first and other sons of A. in tail; the trustees would be protector of the settlement during the life of A., and their concurrence would be necessary for enabling the first tenant in tail to make an effectual disposition. (See *Smith* d. *Dormer* v. *Packhurst*, 3 Atk. 135; 2 Str. 1105; Andr. 315.)

A bare trustee, who under this section is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist; that is, so long as, according to the rules of the Court of Equity, he is required to be a trustee. This section is intended to meet the case where there are contingent remainders, which the trustees were intended to protect, but not a case where there are no contingent remainders. Therefore where there was a devise of lands to trustees upon trust for the testator's daughter during her life, for her separate use without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over: it was held, that the testator's daughter, having become discoverte and being *sui juris*, could compel a conveyance by the trustees of the legal estate. (*Buttanshaw* v. *Martin*, 1 Johns. 89; 5 Jur., N. S. 647.)

Power to appoint Protector.

Power to any settlor to appoint the protector.

32. Provided always, and be it further enacted, that it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the pro-

3 & 4 *Will.* 4, c. 74, s. 32.

tector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place (*c*).

(*c*) The trustee of an executory settlement is a settlor within this section of the act, and as such is entitled to appoint a protector at his discretion. *Shadwell*, V.-C., said, "The act of parliament furnishes reasons why a protector should not be appointed by the court, unless upon a special case. By the 36th section the protector is made irresponsible, and is at liberty to act from mere caprice, ill-will or any bad motive. By the 37th section a protector is enabled to take a bribe for giving consent; and if two or three persons are made protector, and any one of them incurs a disability under the 33rd section, then it is questionable, at least, whether the Court of Chancery could act, in lieu of such person, with the other or others who are not disabled; and if it could not, there would be no protector capable of acting." (*Bankes* v. *Le Despencer*, 11 Sim. 508. See pp. 527, 528; 7 Jur. 210; Law J., 1843, Ch. 293.)

Lord Le Despencer conveyed certain real estates to trustees in trust to settle the said estates, after the death of himself and of his eldest son, to the use of such persons, for such estates and in such manner, that the same should, so far as the law would permit, be strictly settled, so as to go along with the dignity of Le Despencer (a barony of which Lord Le Despencer was seised in fee), so long as the person possessed of the same dignity should be a lineal descendant of the settlor, and be held and enjoyed by the person for the time being possessed of the same dignity, and being such lineal descendant, as aforesaid; and that, during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlement, the rents of the estates might be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death without issue male such suspension or abeyance should be, for the time being, occasioned. The court declared, that the above trust ought to be carried into effect, and it was referred to the Master to approve of a proper settlement. The Master approved of a settlement, making all the persons in esse in the line of succession tenants for life, and all those who came into esse afterwards tenants in tail. Daughters were made tenants in common, with cross remainders between them. A shifting clause was also inserted, that, if the estates should be divided between tenants in common, at a time when the barony of Le Despencer should not be in abeyance, then, for the purpose of effecting the intention of the settlor, the entirety of the estate should go with the dignity. A proviso followed, that the court should have power to vary the settlement at any future time. Upon exceptions to the Master's report it was held, that it was not expedient to add to this settlement a clause for the appointment of a protector under this statute; but that the trustee, upon trust to settle, was a settlor within the meaning of the

act, and ought to be allowed a discretion, unless good reason appeared to the contrary. (*Bankes* v. *Le Despencer*, 7 Jur. 210; 11 Sim. 508; Law J., 1843, Ch. 293.) Also, that it was not desirable to limit a term of years, determinable with the life estate and twenty-one years afterwards, to effect the intention respecting the rents during abeyance, but that the shifting clause already inserted would be effectual; the settlement ought, therefore, to remain as the Master had settled it, with the exception, that no clause should be inserted giving the court power to vary the trusts at a future period. (*Ib.*)

3 & 4 *Will.* 4, *c.* 74, *s.* 32.

Protector of Lunatics, &c.

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c., the Court of Chancery to be the protector.

33. Provided always, and be it further enacted, that if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind (*d*), shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid (*e*); or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid (*f*); or if any settlor entailing the lands shall, in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

(*d*) All the jurisdiction and all the powers and authorities of a judicial nature, given by "The Trustee Act, 1850," and by any other act of parliament then in force, to the Lord Chancellor, entrusted, by virtue of the Queen's sign manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic or of unsound mind, shall belong to and may be exercised by all or any of the persons or person for the time

3 & 4 *Will.* 4, c. 74, *s.* 33.

being entrusted as aforesaid. (15 & 16 Vict. c. 87, s. 15; see 14 & 15 Vict. c. 83, s. 13.)

Where the party has not been found a lunatic, &c. it will probably be referred to a Master in Lunacy to ascertain that fact, and whether the party, if of sound mind, would be protector of the settlement. (See *post*, note to section 48.)

(*e*) The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, is the protector of a settlement in the place of a lunatic of estates situate in Wales, although the party is resident in Ireland, and has been found lunatic by inquisition issued by the Lord Chancellor of Ireland. (*In re Graydon*, 14 Jur. 157; 1 Mac. & G. 655; 2 Hall & T. 182.)

(*f*) On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement. (*In re Wainwright*, 1 Phill. C. C. 258.) There is, however, an omission in this section of *the case of a person convicted of treason or felony.* But Lord *Cottenham*, C., thought that the omission must be supplied by implication, otherwise no effect can be given to the previous words, "if any person, protector of a settlement, shall be convicted of treason or felony." Now these words cannot be struck out of the act, and it is much more natural to supply the words "in lieu of the person who shall be convicted," than to adopt a construction which would deprive the preceding words of all meaning. (*Ib.* pp. 261, 262.) As to the form of petition, evidence and order on an application to the court to consent as protector of a settlement to the barring of an entail, see *In re Gravenor*, 1 De G. & S. 700.

Powers of the Protector.

His Consent required.

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

34. Provided always, and be it further enacted, that if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same (*g*); but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same shall claim the lands entailed.

(*g*) In a case where there was an adult tenant for life, and an infant tenant in tail, a vesting order under the Trustee Act, 1850, will, if the protector consents to it, bar all estates in remainder, and not pass a base fee only under this act. (*Powell* v. *Matthews*, 1 Jur., N. S. 973.)

Power of sale not barred by protector's consent.

A settlement, by which real estates were limited to the use of A. for life, with remainder to her son in tail, contained a power of sale and exchange to be exercised during the life of the tenant for life with her consent signified by writing under her hand and seal. By a disentailing deed, to which the tenant for life was a party, the tenant in tail, with the consent of his mother, the tenant for life, testified by her executing that deed, conveyed the settled

estates subject to her life estate therein, and also other hereditaments of which he was tenant in tail in possession, to uses to bar dower in his own favour. This deed contained no recital of any contract, but in the operative part its object was stated to be in order to defeat the estate or estates tail of the tenant in tail in the hereditaments therein comprised, and all other estates, powers, rights and interests limited to take effect after the determination or in defeasance of such estate or estates tail, and to limit the fee simple in such hereditaments as to such parts thereof as were vested in the tenant for life, subject to her life estate therein to the uses thereinafter expressed: it was held, that the concurrence of the tenant for life in the disentailing deed did not bar her power of assenting to a subsequent exercise of the power of sale and exchange, because this was a power to raise a use paramount to the estate tail, and there was nothing in the frame of the deed from which a contract could be implied that the tenant for life would not consent afterwards to the exercise of the power of sale and exchange. (*Hill* v. *Pritchard*, 1 Kay, 394.)

3 & 4 Will. 4, c. 74, s. 34.

Advantage of *consent* to a conveyance.

The advantage attending the new mode, of making the first beneficial owner merely a *consenting* and not a *conveying* party, will be, that he will be able to give his concurrence to the alienation by the remainderman in tail without affecting the powers or contingent rights or interests of the tenant for life, anterior to the estate tail to be barred, and without letting in the incumbrances of the remainderman, which without due caution were the consequences of the old rule. (See 1 Real Prop. Rep. 33.) Several ingenious contrivances had been adopted by conveyancers for avoiding those inconveniences, respecting which further information will be found in Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4th ed.; *Pelham's case*, 1 Rep. 14 b; *Smith* d. *Richards* v. *Clifford*, 1 T. R. 738; *Doe* v. *Lord Mulgrave*, 5 T. R. 320; *Earl Jersey* v. *Deane*, 5 B. & Ald. 575; *Roper* v. *Halifax*, 8 Taunt. 845; *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 43.

According to the strict rules of the common law, the over-reaching power of a fine "*Sur conuzance de droit come ceo*, &c." in divesting estates, and in extinguishing rights, powers, &c. was so inflexible, that its operation could not be controlled even by the declared intention of the parties. It had, however, been recently decided that a fine might be prevented from operating beyond the particular purposes intended, provided such intention of the parties clearly appeared. (*Earl Jersey* v. *Deane*, 5 B. & Ald. 569; *Tyrrell* v. *Marsh*, 3 Bing. 31; *S. C.*, 10 B. Moore, 305. See Sugd. on Powers, 71—78, 8th ed.)

Protector must consent to Enlargement of Base Fee.

Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

35. Provided always, and be it further enacted, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands in respect of which there shall be such protector, the power of disposition hereinbefore contained.

Protector not to be controlled.

The protector to be subject to no control in the exercise of his power of consenting.

36. Any device, shift or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settlement

3 & 4 Will. 4, c. 74, s. 36.

shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

Exclusion of Equity as to Protector.

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

37. Provided always, and be it further enacted, that the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act (*h*).

The rule in equity referred to by last section.

(*h*) Where a party has a power of appointing an estate, whether real or personal, amongst several objects, and exercises such power upon condition that the party in whose favour the appointment is made shall confer on the appointor, or a stranger, some benefit at the expense of the objects of the power, such execution is fraudulent, and will be set aside in equity. (See *Pawlet* v. *Pawlet*, 1 Wils. 224; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. 71; *Lane* v. *Page*, Ambl. 233; *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299; *Tucker* v. *Sanger*, M'Clel. 430.) Thus, where a person having a power of jointuring, executed it in favour of his wife, but it was agreed between the parties that the wife should receive only part of the jointure for her own benefit, and that the residue should be applied for the use of the husband, the execution of the power was set aside so far as it was in favour of the husband himself, on the ground of its being a fraud on the power and those creating it. (*Lane* v. *Page*, Ambl. 233; *Aleyn* v. *Belchier*, 1 Eden, 132.) So, if a parent under a power of appointing the estate unto any of his children, exclusively of the others, appoint to one, upon a previous bargain with such child that he should pay a consideration for it, equity will set aside the appointment altogether. (*M'Queen* v. *Farquhar*, 11 Ves. 467; *Palmer* v. *Wheeler*, 2 Ball & Beatty, 18; *Rhodes* v. *Cook*, 2 Sim. & Stu. 488; *Farmer* v. *Martin*, 2 Sim. 502; *Green* v. *Pulsford*, 2 Beav. 70.) The fraud consists not in the selection of one child in preference to another, but in the arrangement, which makes the appointment, though in form to the child, in effect an appointment to the father himself. To make such an appointment fraudulent, it is not necessary that it should be wholly for the benefit of the father; it is enough that it is partially so. (*Jackson* v. *Jackson*, 1 Dru. 113; 7 Cl. & Fin. 977; West, 575; Sugd. on Prop. 515—517.) So if the donee of the power appoints the fund to one of the objects of the power, upon an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad. (*Arnold* v. *Hardwick*, 7 Sim. 343. See Sugd. on Powers, 606—616, 8th ed.; 2 Chance on Pow. 441—446.) Strong suspicion that an appointment made by a father to his son was for the benefit of the father, is not sufficient to avoid the transaction. (*Hamilton* v. *Kirwan*, 2 Jones & L. 393.) But the principle of those cases has not been extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an *immediate benefit* has been conferred on the son as a consideration for his barring the entail. (*Tweddell* v. *Tweddell*, Turn. & Russ. 1; *Davis* v. *Uphill*, 1 Swanst. 129.)

3 & 4 *Will.* 4, *c.* 74, *s.* 38.

X. Confirmation of voidable Estates created by Tenant in Tail.

38. Provided always, and be it further enacted, that when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent (*f*): provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him (*g*).

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

(*f*) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

(*g*) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue, for whatever act bound the tenant in tail himself, was binding on the recoverers, or the persons to whose use the recovery was suffered, who were estopped from alleging that the person against whom they had recovered had but an estate tail. (*Capel's case*, 1 Rep. 60; *S. C.*, Poph. 5, 6; *Beck* d. *Hawkins* v. *Welsh*, 1 Wils. 277; *Tourle* v. *Rand*, 2 Br. C. C. 652; *Goodright* d. *Tyrell* v. *Mead*, 3 Burr. 1703; *Cheney* v. *Hall*, 2 Eden, 357; 3 Atk. 9.) A common recovery was a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple. (Willes' Rep. 451.) What passed by the recovery did not come out of the remainder or reversion, but in continuance of the estate tail, which was expanded into a fee simple, and persons coming in under the recovery were liable to all the charges created by the tenant in tail.

Prior acts of tenant in tail, how confirmed.

A mortgagee claiming under a recovery suffered expressly to his use was postponed to a settlement by lease and release made previous to marriage

3 & 4 Will. 4, c. 74, s. 38.

by a tenant in tail. (*Capel's case*, 1 Rep. 60; *Cheney* v. *Hall*, Ambl. 526; and see also *Goodright* d. *Tyrell* v. *Mead*, 3 Burr. 1703; *Tourle* v. *Rand*, 2 Br. C. C. 652; *Stapleton* v. *Stapleton*, 1 Atk. 2.) But a recovery suffered by a tenant in tail, who had previously made a *voluntary* settlement, had not the effect of confirming it as against a mortgagee claiming under an instrument made subsequent to the recovery. (*Cormick* v. *Trapaud*, 6 Dow, 60.)

But as the fine levied by a tenant in tail operated as an extinguishment of the estate tail and passed a base or qualified fee, it only gave validity to the prior charges on the estate as against himself and the persons claiming under the entail, but not as against those claiming in reversion or remainder. The operation of a fine levied by a tenant in tail, who had the immediate reversion in fee in himself, was to merge the estate tail, and bring the reversion in fee into immediate possession, by which means it became liable to the incumbrances of all those who had been seised of it. Therefore, where A. settled his estate on himself for life, remainder to B. his eldest son in tail male; remainder to C. his youngest son, in like manner, remainder to his own right heirs; B., being in possession, granted leases, with covenants for a perpetual renewal, and afterwards died without issue; C. the remainderman entered and levied a fine, the uses of which were declared to himself in fee: it was held, that C. was bound to a performance of B.'s covenants in the leases. (*Shelburn* v. *Biddulph*, 6 Br. P. C. 356, Toml. ed.; *Symons* v. *Cudmore*, Show. 370; *S. C.*, 4 Mod. 1; 1 Salk. 338; Skinn. 284, 317, 328; 3 Salk. 335; Carth. 257; 12 Mod. 32; Holt, 666; 1 Freem. 503; 2 Atk. 204; see 7 Ves. 497; 2 Atk. 204.)

If a man, who was tenant in tail, created an incumbrance or conveyed his estate by a voidable conveyance, and afterwards levied a fine, though for a different purpose, the first operation of the fine would be to give effect to the antecedent act, even against his own subsequent declaration; if it was a legal conveyance the fine operated as a confirmation of it, and the same rule was extended to the case of an *equitable charge*. (*Lloyd* v. *Lloyd*, 4 Dru. & War. 374.)

A base fee created by the lease and release of a tenant in tail might be confirmed by a subsequent fine levied, even after the death of the original releasee, in pursuance of a prior covenant. (*Doe* v. *Michelo*, 8 T. R. 211, 214.) But where the fee of an estate descended on a party who was equitable tenant in tail, under articles made on his father's marriage, and such son on his own marriage agreed to make a settlement of the estate upon himself and the issue of the marriage in the usual course of family settlement, and afterwards levied a fine: it was held, that although the fine, without more, would have brought the reversion in fee into possession, yet, being coupled with a declaration of uses, the uses of the second settlement were substituted for those of the first, and that the reversion in fee did not come into possession so as to be liable to the father's judgment debts. (*Browne* v. *Blake*, 1 Molloy, 368.)

XI. Enlargement of Base Fees.

Base fee, when united with the immediate reversion, enlarged, instead of being merged.

39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by

any disposition under this act if such remainder or reversion had been vested in any other person (*h*). *3 & 4 Will. 4, c. 74, s. 39.*

(*h*) If a tenant in tail, with a reversion in fee to himself, levied a fine, the effect of that on the estate tail was to create a base fee, which became merged in the other fee, and let in all the incumbrances of the ancestor, which had frequently happened, in practice, from such a person being ill-advised to levy a fine instead of suffering a recovery; generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together; in such a case, by the operation of the statute *de donis*, the estate tail is kept alive, not merged in the reversion in fee. (5 Term Rep. 109, 110; 2 Rep. 61; *Kynaston* v. *Clarke*, 2 Atk. 204; *Shelburn* v. *Biddulph*, 4 Br. P. C. 594.) A base fee will merge by union with the absolute fee; the possibility of reverter on a conditional fee at common law will merge in the fee simple absolute; (*Simpson* v. *Simpson*, 4 Bing. N. C. 333; see 2 Ves. sen. 35; Hob. 323; *Symonds* v. *Cudmore*, 1 Salk. 338; Carth. 258; *Crow* v. *Baldmers*, 5 T. R. 109;) an estate tail after possibility of issue extinct, (Co. Litt. 27 b,) an estate of mere freehold, legal or conventional, (Co. Litt. 338 b,) a term of years, (*Salmon* v. *Swann*, Cro. Jac. 619; *Hughes* v. *Robotham*, Cro. Eliz. 302,) or estate at will, (Vin. Abr. tit. Est. at Will,) will be extinguished by the acquisition of the fee. On the subject of merger of base fees, the Real Property Commissioners made the following remarks: "If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense." (1 Real Property Report, p. 28; but see *Sperling* v. *Trevor*, 7 Ves. 497.) It will be observed that this difficulty is removed by this section of the act, by preserving base fees from merger, and enlarging them, when united with the immediate reversion, into as large an estate as the tenant in tail, if in possession, could have created.

The effect of a fine in merging a base fee in the reversion.

The rule, that where there is in the same person a legal and equitable interest the former absorbs the latter, (*Wade* v. *Paget*, 1 Br. C. C. 367,) must be always understood with some qualification, as it holds only where the legal and equitable estates are co-extensive and commensurate, but is not admitted where a party has the whole legal estate and a *partial* equitable estate, as the latter will continue to subsist for the benefit of the person seised of the whole legal estate. (*Champernoon* v. *Williams*, 2 Ch. C. 63—78; 1 Vern. 13; *Robinson* v. *Cummings*, Forr. 164; 1 Atk. 473; *Brydges* v. *Brydges*, 3 Ves. 126; see *Capel* v. *Girdler*, 9 Ves. 509; *Selby* v. *Alston*, 3 Ves. 339; *Alston* v. *Wells*, Dougl. 771, 2nd ed.) In order to effect a merger by the union of legal and equitable interests in the same party they must be of the same quality, and an estate tail and fee simple not being of the same quality, an equitable estate tail in a copyhold does not merge by the accession of the legal fee. (*Merest* v. *James*, 6 Madd. 118; *Brown* v. *Blake*, 1 Molloy, 382.)

XII. Modes by which Estates Tail and Estates Expectant thereon are to be barred.

40. Every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple abso-

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and

3 & 4 Will. 4, c. 74, s. 40.

lute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed (*i*); and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed (*k*).

If a married woman, with her husband's concurrence.

Old rule as to effect of contract by tenant in tail.

(*i*) This section of the act adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete any contract or agreement made by his ancestor, respecting the estate tail, because the issue claims, by a paramount title *per formam doni*, from the person by whom the estate tail was originally granted, and not from his ancestors. (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *Attorney-General* v. *Day*, 1 Ves. sen. 218.) And such rule applied, although the ancestor had covenanted to levy a fine or suffer a recovery, and had received part, or even the whole of the purchase-money, and a decree had been made against him to levy a fine or suffer a recovery; and he died in contempt and in prison for not obeying such decree. (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104; 1 Ves. sen. 224.) And even where tenant in tail, in pursuance of a covenant to settle a jointure, had acknowledged a fine, but died before it was perfected, the Court of Chancery refused to supply the defect against the issue. (2 Vern. 3.) And the rule was, it seems, applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold. (See Sugd. V. & P. 227, 11th ed.; 1 Prest. Conv. 153.) A decree directing the owner of a legal estate to do such acts as are requisite to bar the estate tail, but which are incomplete at his death, is not binding on the succeeding issue in tail. (*Frank* v. *Mainwaring*, 2 Beav. 115; see 1 Ch. Cas. 171.) In considering the effect of this clause, the 22nd and 23rd sections of the act for the limitation of actions must be borne in mind. (See *ante*, pp. 209, 210.

It is observed that there is nothing in this section to affect contracts as such, and therefore, although they will not operate to bar or bind the entail under the act, nor can equity give to them that operation, yet they may still be recovered upon at law, or be made the foundation of a specific performance against the tenant in tail.

A specific performance of a covenant for further assurance in a deed of mortgage, by a tenant in tail in remainder not inrolled, was refused by *Stuart*, V. C., in *Davis* v. *Tollemache*, 2 Jur., N. S. 1181; but this probably depended upon the frame of the deed, and other circumstances, and cannot be considered as an authority against the general power of the court to specifically enforce contracts for sale or mortgage, and covenants for further assurance against a tenant in tail either in possession or in remainder. (Sugd. on the Statutes, p. 197, 2nd ed.)

A. and B. (brothers) were tenants in common in tail of copyhold property, with cross remainders between them. B. obtained a loan for A. from C., for which A. gave his promissory note, and deposited the title deeds with C. as a collateral security, and gave a written memorandum by which he engaged "to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required;" and B. wrote at the foot "I join in the deposit." A. died unmarried and without having surrendered to C. or barred the remainders. Upon a bill by C. against B. seeking to foreclose the entirety, it was held, affirming the decision of the court below, first, that this was a good equitable charge, not

merely upon A.'s "interest" in his moiety, but also upon B.'s estate in remainder, and that B. must bear the expense of surrendering that moiety; secondly, that the charge extended only to the moiety of the estate which originally belonged to A. (*Pryce* v. *Bury*, 18 Jur. 967; 23 Law J., Chan. 676; 2 Drew. 11.)

3 & 4 Will. 4, c. 74, s. 40.

(*k*) A married woman, tenant in tail, executed, with the concurrence of her husband, a disentailing deed, which was inrolled under this act within six months, but was not acknowledged by her till long afterward: it was held, that as it was not necessary that the acknowledgment should precede the inrolment, that the deed was effectual. (*Ex parte Taverner*, 1 Jur., N. S. 1194; 7 De G., M. & G. 627.)

Inrolment of Assurance.

41. Provided always, and be it further enacted, that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five-sixth parts of a rack rent,) shall have any operation under this act unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth (*l*).

Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack rent, or not less than five-sixths of a rack-rent, to be inoperative unless inrolled in Chancery within six months.

(*l*) Where deeds are to be executed by parties abroad, there may in some cases be a difficulty, if not an impossibility, of having them returned within the six months. It would have been proper to have extended the period for inrolment in such cases. The inrolment of the deed of disposition under this statute may be made immediately upon the execution of the deed, and may be effected either by the vendor or the purchaser; and as the inrolment relates to the execution of the deed, it follows that a tenant in tail, who has not barred the entail under the statute, can nevertheless make a good title in fee simple. (*Cattell* v. *Corrall*, 4 Y. & Coll. 228.) If the disentailing deed requires inrolment or registration by any other statute, the requisitions of such statute must be observed; if lands lie within a registry district, the deed must be registered. But the inrolment of a bargain and sale, or of a conveyance to charitable uses, according to this act, will satisfy the requisition of the statutes 27 Hen. 8, c. 13; 9 Geo. 2, c. 36.

Inrolment is not necessary in the case of copyholds, except on the court rolls, which must be done within six calendar months after the execution of the deed. (*Honeywood* v. *Foster*, 30 Beav. 1. See s. 54, *post*.)

3 & 4 *Will.* 4, c. 74, *s.* 42.

Consent of Protector how to be given.

Consent of the protector to be given by the same assurance or by a distinct deed.

42. The consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

Consent by distinct Deed.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

43. If the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

Consent irrevocable.

Protector not to revoke his consent.

44. It shall not be lawful for the protector of a settlement, who under this act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Consent of Married Women.

A married woman protector to consent as a feme sole.

45. Any married woman, being either alone or jointly with her husband protector of a settlement may, under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

Inrolment of distinct Deed.

Consent of a protector by distinct deed void, unless inrolled with or before the assurance.

46. Provided always, and be it further enacted, that the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery either at or before the time when the assurance shall be inrolled.

Exclusion of Jurisdiction of Equity.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

47. In cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of

disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law (*k*).

3 & 4 Will. 4, c. 74, s. 47.

(*k*) See *Petre* v. *Duncombe*, 7 Hare, 24.

Consent of Lunatic, &c., how to be given.

48. Provided always, and be it further enacted, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons entrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid (*l*), or the said Court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary (*m*); and if such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

Lord Chancellor, &c. to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

(*l*) See *ante*, p. 357, n. (*d*).

(*m*) An order has been made by the Lord Chancellor, as protector, for

3 & 4 *Will.* 4, c. 74, *s.* 48.

enabling a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund.

Cases as to the exercise of the power of consenting given to the Lord Chancellor.

In *Grant* v. *Yea*, 3 M. & Keen, 245, the lunatic was tenant for life, and his eldest son *quasi* tenant in tail in remainder, of a sum in the three per cent. consols, being the produce of lands which had been sold under an order of the court, and declared to be subject to the same uses as the lands had been subject to. The son petitioned that the Lord Chancellor, as protector under the above act, would concur with the petitioner in barring the estate tail and ulterior limitations to which the stock was subject, for the purpose of enabling the petitioner to convert the stock into money, to be applied in the purchase of a commission in the army. It was stated in an affidavit made in support of the petition by the lunatic's brother-in-law, who was committee of the estate, that the lunatic was in a state of hopeless lunacy; that he was possessed of landed estates of the value of 2,500*l.* a year, and of property in the funds yielding an annual income of 400*l.*; that a yearly allowance of 1,300*l.* was made to his wife for the maintenance of the lunatic; and that the petitioner, who was a lieutenant in the army, had an allowance of 400*l.* a year out of the estate; and the purpose to which the principal part of the money in question was to be applied was the purchase of a captain's commission for the petitioner, who had entered the army with the full approbation of his father, and who, it was represented, had now a favourable opportunity of purchasing a step. The 15th, 22nd, 33rd, 48th, 49th and 71st sections of the act were referred to. The committee of the estate and next of kin, and the lunatic's younger brother, who had a charge upon the fund, consented to the application. Lord Chancellor *Brougham* expressed his opinion that this was a case which fell within the provisions of the 33rd and 48th sections of the act referred to, and that the circumstances were such as to justify him in exercising his discretion. The master to whom a reference was made having found the facts stated in the petition, an order was made directing the stock to be sold, and the produce to be paid to the committee, to be applied for the advancement of the petitioner in the army, and that the petitioner's allowance out of his father's estate should be reduced to the extent of the dividends of the stock sold.

The cases deciding (*In re Blewitt*, 3 M. & R. 259; *In re Wood*, 3 My. & Cr. 266), that the Lord Chancellor has no jurisdiction where the tenant in tail in possession is a lunatic, have been overruled. (*In re Blewitt*, 2 Jur., N. S. 217, see *ante*, p. 351, n. (*x*).)

The principles by which the Lord Chancellor, when protector of the settlement in the place of a lunatic, will be guided in giving or withholding his consent, are more fully laid down in a case which came before Lord *Cottenham*. *In re Newman* (2 Myl. & Cr. 112), the lunatic was tenant for life, with remainder to his children as tenants in common in tail, with remainder over to the brother and sisters of the lunatic as tenants in common in tail, with an ultimate remainder to the right heirs of the testator. The lunatic was forty-three years old, had no child, and was unmarried. The eldest son of the testator, and eldest brother of the lunatic, was the testator's heir-at-law; and he had a remainder in tail in one-sixth, with the ultimate remainder in fee in the entirety. Application was made to the court by the husband of one of the daughters of the testator, who was entitled, in default of issue of the lunatic, to an estate tail in one-sixth, praying that the Lord Chancellor would consent on behalf of the lunatic tenant for life to a deed, the object of which was to bar the issue of that daughter, and of course to destroy the remainder to the heirs of the settlor, in order to give this share of the property to the husband and wife to dispose of as they pleased, for it was proposed to be settled to such uses as they should appoint. Lord *Cottenham*, C., in delivering judgment, said, "This petition came before me as protector of the settlement under the Fines and Recoveries Act, to induce me to consent to a deed of disposition on the part of the lunatic, who is tenant for life, to act, in fact, for the tenant for life, in order to give effect to a recovery (*thereby meaning a deed of disposition under this act*). As protector of the settlement, the only duty of the court is, to see what, in reference to the interests of the family, it would be proper for the tenant

for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others. Now, if nothing is done, one-sixth will go to this daughter and her children if she has any, and if not to the eldest son of the testator as his right heir; and I am asked to consent to that which will take it away from the eldest son, and take it away from the family, by giving it to the husband of the daughter. That would be anything but protecting the settlement; it would be destroying the settlement; giving the estate to a person not a member of the family, namely, the husband of the daughter. I should not consider that it would be a proper act for the tenant for life to concur in a deed of disposition to that effect." *3 & 4 Will. 4, c. 74, s. 48.*

The Lord Chancellor, in acting as protector of a settlement in the place of a lunatic, considers the moral as well as the legal result of his consent to bar remainders. And where the only child of the lunatic who, upon her marriage, had converted her estate tail into a base fee, reserving a power of appointment, required his consent to bar the remainders over, the Lord Chancellor refused his consent, the remainder over being to the brother of the lunatic. (*In re Graydon*, 14 Jur. 211; 1 Mac. & G. 655; 2 Hall & T. 182.)

Real estates were devised to trustees, upon trust, to raise by sale or mortgage thereof sufficient to pay the debts and legacies of the testatrix, and subject thereto, to the use of A. for life, with remainder to his first and other sons in tail male, with remainders over. In a suit, instituted in the Court of Exchequer, for the payment of the debts and legacies of the testatrix, a decree for a sale was pronounced, under which accordingly a sale was had; but pending the proceedings in the suit, A., the tenant for life, died, leaving him surviving three sons, of whom S., the eldest, and first tenant in tail under the will of the testatrix, was a lunatic, and so found by inquisition. Upon an application in the matter of the lunacy, on the part of the plaintiffs in the Exchequer suit, that the committee should be directed to execute the necessary deed, to bar the estate tail of the lunatic, the court refused to make the order. It seems that if the legal fee was in the trustees, the concurrence of the committee of the lunatic was not necessary. (*In re Skerrett*, 2 Dru. & War. 585.)

The court had no jurisdiction under stat. 1 Will. 4, c. 65, and 3 & 4 Will. 4, c. 74, to authorize the committee of the estate of a lunatic tenant in tail in possession to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remainderman. (*In re Starkie*, 3 M. & Keen, 247; see *Cullum* v. *Upton*, 19 Law J., Chan. 276.) By stat. 18 & 19 Vict. c. 13, the Lord Chancellor, in matters of lunacy, is enabled to empower committees of the estates of lunatics to grant leases binding on the issue or remaindermen.

Evidence of Consent for a Lunatic, &c.

Order of the Lord Chancellor, &c. to be evidence of consent.

49. Provided always, and be it further enacted, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind (*n*), or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document, or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

(*n*) See *ante*, p. 357, n. (*d*).

3 & 4 *Will.* 4, *c.* 74, *s.* 50.

XIII. Estates Tail in Copyholds.

Qualified Application of previous Clauses to.

The previous clauses to apply to copyholds, with certain variations.

50. All the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estates shall be merely an estate in equity, may be made either by surrender, or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained (*o*).

(*o*) Copyholds are not within the stat. *De donis* (13 Edw. 1, c. 1; Cro. Car. 44, 45,) and therefore not entailable, except by special custom; (*Doe* v. *Truby*, 2 W. Bl. 946; 3 Dougl. 303;) and where no such custom exists in the manor, the party, who would otherwise be tenant in tail, will take a fee simple conditional at common law. (*Doe* d. *Spencer* v. *Clark*, 5 B. & Ald. 458; *Simpson* v. *Simpson*, 4 Bing. N. C. 333; *Moore* v. *Moore*, 2 Ves. sen. 596; *Doe* d. *Blesard* v. *Simpson*, 3 Scott, N. R. 774; *Hardcastle* v. *Dennison*, 10 C. B., N. S. 606. See *ante*, p. 318.)

The testator having surrendered copyholds to the use of his will, devised them to trustees for sixty years, on certain trusts, subject to which he devised to H. for life, remainder to his first son in tail, with remainders over, with a proviso for cesser of the term. On the death of the testator, in 1813, the trustees were admitted and a fine was paid: the trusts of the term were satisfied. By a private act, the 7 & 8 Vict. c. xxiv, new trustees therein named were empowered to sell the copyholds, freed and discharged from the limitations of the will, and by any surrender by them made, according to the custom of the manor, and in the same manner as if they were the copyhold tenants of the same, to surrender them to the use of the purchaser, his heirs and assigns. No estate was given to the new trustees by the act: it contained a clause saving the rights of all persons except those interested under the will. The new trustees sold the copyholds, and tendered a surrender to the steward, which was refused, on the grounds that they must be admitted tenants of the manor before they could surrender, and that the estate tail could only be barred by surrender for that purpose, on which by the custom of the manor a fine would be due to the lord. The court thought the custom of the manor by no means showed the necessity of two surrenders, and in reference to sections 15, 22, 40, 42, 50 and 52 of 3 & 4 Will. 4, c. 74, it seemed clear that the tenant for life and remainderman in tail might (independent of the private act) by one surrender have barred the entail and conveyed to the purchaser, and that only one fine would in such case have been payable, it being always recollected that the tenant for life and remainderman had already been admitted by the operation of the admittance of the original trustees. (*Reg.* v. *Lords of the Manor of Weedon-Beck*, 18 Law J., Q. B. 289; 13 Q. B. 808.)

Old mode of barring entails in copyholds.

Before the passing of this act there were several modes of barring entails in copyholds besides that by recovery:—By forfeiture and re-grant, a custom said to be peculiar to the manor of Wakefield; (*Pilkington* v. *Stanhop*, 1 Sid. 314; 2 Keb. 127;) although it seems that it would have been effectual if established in any other manor. (*Pilkington* v. *Bagshaw*, Sty. 450; *Carr* v. *Singer*, 2 Ves. sen. 606.) Concurrent customs in a manor court to bar entails in copyholds, by recovery and by surrender, were good; (*Doe* d. *Wallhead* v. *Ossingbrooke*, 2 Bing. 70; *Everall* v. *Smalley*, 2 Str. 1197; 1 Wils. 26; *Doe* v. *Truby*, 2 W. Bl. R. 944;) and slight evidence was held sufficient to prove the latter, because it was adverse to the interest of those who made the evidence. (*Doe* d. *Dauncey* v. *Dauncey*, 7 Taunt. 674. See *Roe* d. *Bennett* v. *Jeffrey*, 2 Maule & Selw. 92; *Doe* v.

Mason, 3 Wils. 63.) And as a custom of entailing copyhold estates would create a perpetuity, unless there were some means devised to bar them, it has been adjudged, that where there was no custom to bar the entail by recovery, it might be barred by common surrender. or even by a surrender to the use of a will. (*Carr* v. *Singer*, 2 Ves. sen. 606,) by three judges, against the opinion of *Willes*, C. J., who thought a recovery was the proper method of barring the entail. The presumption is, that a surrender will bar an estate tail in copyholds until a contrary custom is shown. (*Goold* v. *White*, 1 Kay. 683. See 1 Watk. on Cop. 178; 1 Scriv. on Cop. pp. 54—71, 4th ed.) Before this act the same mode of barring an equitable entail in copyholds must have been pursued, as was required by the special custom of the manor for barring an entail in the legal estate. (3 Ves. 127; 3 Atk. 815; 1 Watk. on Cop. 180, 181.) It will be seen that, by this act, an equitable entail in copyholds may be barred either by surrender or by deed. (See *post*, s. 53, p. 373.)

3 & 4 *Will.* 4, *c.* 74, *s.* 50.

Consent of Protector by Deed.

As to the deed of consent and the entry of it on the court-rolls where the protector of a settlement of copyholds consents by deed to the disposition of a tenant in tail.

51. Provided always, and be it further enacted, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward, or deputy steward, shall, by writing under his hand, to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be *primâ facie* evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

Consent of Protector not by Deed.

As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

52. Provided always, and be it further enacted, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his

3 & 4 *Will.* 4, *c.* 74, *s.* 52.

steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls (*o*); and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof (*p*).

Entry on court rolls to be within six months.

(*o*) A disentailing assurance, in order to operate upon copyhold lands under this act, must be entered on the court rolls within six calendar months after the date of its execution, by analogy to the time within which an assurance affecting freehold lands is required to be enrolled in the Court of Chancery. (*Honeywood* v. *Foster*, 30 Beav. 1; 7 Jur., N. S. 1264; 30 Law J., Chan. 930; 9 W. R. 855. See s. 41, *ante*, p. 365.)

Evidence of entry in court rolls.

(*p*) A copy of a court roll under the steward's hand is good evidence to prove the copyholder's estate, so an examined copy of the court roll is good evidence, if sworn to be a true one. (1 Keb. 567, 720; Comb. 138, 337; 12 Mod. 24; Bull. N. P. 247 a, 7th edit.) A surrender and admittance may be proved by the original entries made by the steward, without producing a copy stamped, as required by stat. 48 Geo. 3, c. 149. (*Doe* d. *Bennington* v. *Hall*, 16 East, 208.)

Where a surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls, it was held that such surrender and presentment might be proved by a draft of an entry produced from muniments of the manor, and the parol testimony of the foreman of the homage who made such presentment. (*Doe* d. *Priestley* v. *Calloway*, 6 Barn. & Cres. 484.)

The provisions in statute 48 Geo. 3, c. 149, ss. 32, 33, requiring every surrender of copyhold and admittance, &c., *made out of court*, or a memorandum thereof, to be stamped; and in case of a surrender, &c., *in court*, the steward to make and deliver to the tenant a stamped copy of the court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and, therefore, a surrender and admittance out of court (presented and inrolled afterwards) may be proved by an examined copy of the court roll, without producing the original surrender, &c., or memorandum thereof. (*Doe* d. *Cawthorn* v. *Mee*, 4 B. & Ad. 617.) An examined copy of court rolls is admissible in evidence to prove a surrender of copyhold lands, without being stamped; the provision in 55 Geo. 3, c. 184, as to copies of court rolls, applying only to such copies as are given out and signed by the steward. (*Doe* d. *Burrows* v. *Freeman*, 12 Mees. & W. 844.) In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his admittance, are evidence of his title against the alleged surrenderor. (*Doe* d. *Garrod* v. *Olley*, 4 P. & Dav. 275; 12 Ad. & Ell. 481.)

Disposition of equitable Estates Tail in Copyholds.

Power to equitable tenants in

53. Provided always, and be it further enacted, that a tenant

in tail of lands held by copy of court roll, whose estate (*q*) shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor * of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered (*q*).

3 & 4 *Will.* 4, *c.* 74, *s.* 53.

Tail of copyholds to dispose of their lands by deed.

* *Lege* manor.

(*q*) It seems that the expression ought to have been "whose estate *tail* shall be merely an estate in equity." See the 50th section, *ante*, p. 370, which probably supplies the omission. (Sugd. Statutes, p. 224, pl. 6, 2nd ed.)

(*r*) This section only applies to equitable estates of tenants in tail of lands held by copy of court roll; the court, therefore, refused a mandamus to the lord of a manor, commanding him to enter on the court rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not inrol the deed by which they were granted. (*Reg.* v. *Ingleton* (*Lord of Manor*), 8 Dowl. P. C. 693.) This was a rule calling on the lord and steward of the manor of Ingleton, in the West Riding of Yorkshire, to show cause why a mandamus should not issue, directing them to enter on the rolls an indenture concerning certain customary freehold lands within the manor. It appeared that a testator devised the customary freeholds to trustees upon trust for W. O. for life, and then to his first and other sons in tail in strict settlement. W. O. and his eldest son, being desirous to bar the equitable entail in these customary lands, did, on the 29th July, 1839, execute an indenture of bargain and sale, by which the lands were conveyed to W. W., upon trust for W. O., his heirs and assigns for ever. The lands in question were parcel of the manor of Ingleton, and there were payable in respect of them to the lords of the manor certain fixed rents, suits and services. The lands were not held by copy of court roll, nor did they pass by surrender and admittance, but were conveyed by deed in the nature of a grant, whose

This act does not extend to customary freeholds.

3 & 4 Will. 4, c. 74, s. 53.

operative words were—"grant, bargain, sell, alien, surrender and convey." The habendum ran thus: "to hold to the *said* (purchaser), his heirs and assigns for ever, according to the custom of the said manor, and under the rents, dues, suits and services usual and accustomed." Such deeds are not inrolled on the court rolls, but remain with the purchaser; and on their production at a subsequent court, it is customary for such purchaser to receive an admittance engrossed on plain parchment signed by the steward, and this constitutes him legal tenant. By the custom of the manor persons claiming to be equitably interested are not recognized; but it is otherwise as regards the last legal tenant, the claims of whose heir, devisee or grantee, are acknowledged. It is also the custom of the manor that entails affecting the customary lands may be barred by surrender to a trustee, on which surrender certain fines are payable to the lord. It further appeared that there were no court rolls—nothing but the verdicts of the juries in loose sheets, and signed by the juries successively; nor has the steward the power to make any entry on their papers, unless at the holding of a court. On the 1st December, 1824, the trustees, under the testator's will, had been admitted tenants, and their admittance stated the nature of the estate which they held. One of the trustees having since died, the surviving trustee, in whom the legal estate was, had given a notice to the steward not to admit any other person as tenant. In pursuance of the act 3 & 4 Will. 4, c. 74, an application was made to enter the indenture of the 29th July, 1839, on the court rolls. That application having been refused, a rule was obtained for a mandamus, which was discharged on the ground that the 53rd section of the act was inapplicable, and no other provision was made by the statute for estates of this tenure. (*Reg.* v. *The Lord and Steward of the Manor of Ingleton*, 4 Jurist, 700. See *Carlisle* v. *Towns*, 2 B. & Ad. 585.)

Mandamus.

In applying for a mandamus to the steward of a manor to inrol a deed of disposition pursuant to stat. 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit. (*Crosby* v. *Fortescue*, 5 Dowl. P. C. 275.)

Dispensation with Inrolment.

Inrolment not necessary as to copyholds.

54. Provided always, and be it further enacted, that in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls.

XIV. Bankrupt's Estate Tail.

Partial Repeal, 6 Geo. 4, c. 16.

Repeal of the Bankrupt Act, 6 Geo. 4, c. 16, s. 65, so far as relates to estates tail, but not to extend to lands of a bankrupt under a commission or fiat issued on or before the 31st

55. After the thirty-first day of December, one thousand eight hundred and thirty-three, so much of an act (6 Geo. 4, c. 16), as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion, or remainder, and whereof

no reversion or remainder is in the crown, the gift or provision of the crown shall be and the same is hereby repealed: provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat which, in pursuance of the said act (6 Geo. 4, c. 16), or of any former act concerning bankrupts, or of an act (1 & 2 Will. 4, c. 56), hath been or shall be issued on or before the thirty-first day of December, one thousand eight hundred and thirty-three: provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them (*p*).

3 & 4 Will. 4, c. 74, s. 55.

December, 1833, nor to revive former acts.

(*p*) By 12 & 13 Vict. c. 106, s. 208, such of the clauses of the act 3 & 4 Will. 4, c. 74, as are numbered respectively in the copies of that act printed by her Majesty's printers, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, shall extend and apply to proceedings in bankruptcy under a petition for adjudication of bankruptcy as fully and effectually as if those clauses were re-enacted in this act and expressly extended to such proceedings.

Clauses in 3 & 4 Will. 4, c. 74, with respect to the disposition of estates tail under bankruptcies, extended to proceedings under petition for adjudication.

By stat. 6 Geo. 4, c. 16, s. 65, (re-enacting the 21 Jac. 1, c. 19, s. 12,) it was enacted, that the commissioners should, by deed indented and inrolled, make sale, for the benefit of the creditors, of any lands, tenements and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estate in tail in possession, reversion or remainder, and whereof no reversion or remainder was in the crown, the gift or provision of the crown; and every such deed should be good against the bankrupt, and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements and hereditaments.

Power of commissioners under former bankrupt acts.

Where a remainderman in tail became a bankrupt, the commissioners could only convey a base fee, and even where a joint commission issued against the tenant for life and the tenant in tail in remainder, it was held that the execution of the power by the commissioners operated separately on each estate, and that when executed it could not do more than convey an estate for life and a base fee. (*Jervis* v. *Tayleur*, 3 B. & Ald. 557.) Where there is no custom of entailing lands in a manor under a limitation to a man and the heirs of his body, he takes a fee simple conditional, which might have been conveyed during the life of the bankrupt by the commissioners under the provisions of the 13 Eliz. c. 7, s. 11; and notwithstanding his death before any such conveyance, the commissioners might execute a valid conveyance of such estate after his death, pursuant to stat. 1 Jac. 1, c. 15, s. 17. (*Doe* d. *Spencer* v. *Clark*, 5 B. & Ald. 458.) In that case it was observed by *Holroyd*, J., that it was unnecessary to determine what would be the effect of a bargain and sale executed by the commissioners after the death of the bankrupt, in a case where, during his life, he had been seised of an estate tail. But it seems, by a recent case, (*Ex parte Somerville, In re Loscombe*, 1 Mont. & Ayr. 408,) that an estate tail passed by the common bargain and sale, which used to be made to the assignees; and that under the 65th section of 6 Geo. 4, c. 16, the commissioners could convey an estate tail, of which the bankrupt was seised, after his death, or if not, that the commissioners would be justified in executing such a conveyance, in order to have the question settled. Where a trader sold an estate, and conveyed it as tenant in fee simple, with the usual covenant for further assurance, and became bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the commissioner should be at liberty to execute a deed of confirmation to the purchaser. (*Ex parte Fripp*, 1 De Gex, 293.)

3 & 4 Will. 4, c. 74, s. 55.

Where a tenant in tail, having mortgaged his estate, afterwards became bankrupt, it was held that his assignees under the commission took the estate discharged of the mortgage. (*Beck* v. *Welsh*, 1 Wils. 276. See *Sturgis* v. *Morse*, 6 Jur., N. S. 766; 28 Beav. 398; 2 De G., F. & J. 223, see p. 232. See *ante*, p. 223.) But if the bankrupt had covenanted with the mortgagee for further assurance, a court of equity would compel the assignees either to redeem or to be foreclosed, and execute proper conveyances to the mortgagee. (*Pye* v. *Daubus*, 3 Br. C. C. 595; *Edwards* v. *Appleby*, 2 Br. C. C. 652, n.; see Coote on Mortgages, 214—222.) Under the 6 Geo. 4, c. 16, s. 65, the equitable mortgagee of a bankrupt tenant in tail was entitled to have his lien made good as against the fee simple of the premises of which the bankrupt was seised in tail. (*Ex parte Wise*, 1 Mont. & M. 65.)

The stat. 6 Geo. 4, c. 16, s. 70, did not enable the assignees of a bankrupt mortgagor to revest the legal estate in themselves by tender or payment to the mortgagee after the day on which, by the deed, the mortgage becomes absolute in default of payment; though a tender or payment before the day will, under that section, vest the legal estate in them. (*Dunn* v. *Massey*, 6 Ad. & El. 479; 1 Nev. & P. 578.) Where a legal mortgage was executed by the bankrupt in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, and was consequently an unavailable security: it was held, that it did not operate as a merger of the equitable mortgage, and that the party was entitled to the usual order as equitable mortgagee. (*Ex parte Harvey, re Emery*, 3 Dea. 547; 4 Dea. 52; see *Ex parte Haines, Re Barnett*, 4 Dea. 20.) Although an equitable mortgagee gives notice to the tenant to pay him the rent, he does not thereby entitle himself to the rent accruing before the order for sale. (*Ex parte Scott, Re Pearson; Ex parte Burrell, Re Norman*, 3 Dea. 76; *Ex parte Somerville*, 3 Dea. & Ch. 668; 1 Mont. & A. 408.) Where the deposit was of deeds conveying an equity of redemption of premises in fee, of which the party subsequently paid off the mortgage, it was held that the creditor was entitled to the full benefit of the security so exonerated; so also of shares in estates at the time of the deposit undivided, but for the equality of partition of which the bankrupt had subsequently paid a consideration, and acquired the entirety of a portion. (*Ex parte Bisdee*, 1 Mont., D. & D. 333.)

Where the mortgage deed contained a covenant not to call in the mortgage money for five years, if the interest was paid regularly, it was held that, on the bankruptcy of the mortgagor, the mortgagee claiming to prove was entitled to the usual order of sale. (*Ex parte Bignold*, 3 Dea. 151; 3 Mont. & A. 447; see *Ex parte Jones*, 4 Dea. 750.)

Actual Tenant in Tail.

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

56. Any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act (1 & 2 Will. 4, c. 56), under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: provided always, that

if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

3 & 4 Will. 4, c. 74, s. 56.

Life Estate in Remainder of Non-Trader.

Life estate in remainder, &c.

By the Bankruptcy Act, 1861, where, under any settlement or will, a bankrupt non-trader shall be entitled to a life estate in remainder, expectant upon the death or deaths of any previous tenant or tenants for life, with any remainder over to the bankrupt's issue, or the heirs of his body, or any of them, as purchasers, the life estate of such bankrupt non-trader shall not be sold before it falls into possession, without an express direction of the court. (24 & 25 Vict. c. 134, s. 115.)

Base Fee.

Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

57. Any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

Consent of Protector.

As to the consent of the protector in case of bankruptcy.

58. The commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining the certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall

3 & 4 *Will.* 4, c. 74, s. 58.

be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

Inrolment, &c. of Deeds of Disposition and Consent.

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

59. Every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed

so entered a memorandum, signed by him, testifying the entry of the same on the court rolls. *3 & 4 Will. 4, c. 74, s. 59.*

Enlargement of Base Fees.

Subsequent enlargement of base fees created by the disposition of the commissioner.

60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Enlargement of Base Fees subsequent to Conveyance.

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

Confirmation of voidable Estates.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to

62. Provided always, and be it further enacted, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no pro-

3 & 4 Will. 4, c. 74, s. 62.

be a protector; but not against a purchaser without notice.

tector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

Avoidance of Acts of Bankrupt.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

3 & 4 *Will.* 4, c. 74, s. 64.

Powers of Bankrupts reserved, where.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

64. Provided always, and be it further enacted, that, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

A., in November, 1841, mortgaged estates of which he was tenant in tail in remainder, and the indenture, which was not enrolled, contained the usual covenant for further assurance. In September, 1842, A. was adjudicated a bankrupt, and subsequently received his certificate. In July, 1855, an order was made which declared that A. was entitled to two parts of the estates in S., and that they were comprised in the mortgage deed. A disentailing assurance was in February, 1856, tendered by the mortgagee to A. for execution, but he refused to execute it; and thereupon a bill was filed against A. and his assignees in bankruptcy, praying that it might be decreed pursuant to his covenant for further assurance, to execute and deliver to the plaintiff a proper disentailing assurance of all the hereditaments in S., to which he was entitled for an estate in tail male. A demurrer to the bill by A. was allowed, and the bill was subsequently dismissed. (*Davis* v. *Tollemache*, 2 Jur., N. S. 1181.) It seems that, unless there be words in a conveyance to show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the court will not resort to its extraordinary jurisdiction for specific performance to compel the grantor to execute an assurance of a kind that was not contemplated when the grant was made. (*Ib.*) *Stuart*, V. C., said, "what the intention of the legislature was in passing this particular clause I cannot exactly define, but it is perfectly plain that it reserved to the bankrupt, from the operation of the bankrupt laws, an extraordinary power which, but for this clause, he could not have had. In case the deed had contained a specific covenant for barring the entail, he was by no means prepared to say that upon the construction of this section it is not possible that at law the bankrupt might have been liable for damages for non-execution of that covenant. But his impression was that the right to recover upon a covenant expressly to execute a disentailing deed, and a right to recover damages for the non-execution of a disentailing deed, such non-execution being averred as a breach of the covenant for further assurance, are entirely different things." (*Davis* v. *Tollemache*, *Ib.* 1185.)

Disposition where Bankrupt is dead.

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the

65. Any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands,

3 & 4 *Will.* 4, *c.* 74, *s.* 65.

bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition.

Disposition of Copyholds.

Every disposition by the commissioner of copyhold lands where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

66. Every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

As to copyholds and customary lands of bankrupt.

By 24 & 25 Vict. c. 134, s. 114, the Court of Bankruptcy shall have power to dispose for the benefit of the creditors of any estate or interest, at law or in equity, which at adjudication or afterwards before order of discharge a bankrupt has in any copyhold or customary land, and to make an order

vesting the land or such estate or interest as the bankrupt has therein, in such person and in such manner as the court shall direct. (See 12 & 13 Vict. c. 106, s. 210.)

3 & 4 *Will.* 4, *c.* 74, *s.* 66.

Rents, Covenants, and Conditions.

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to make disposition, and to enforce covenants as if entitled to the reversion. This clause to apply to all copyhold lands, but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

67. The rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute 11 Geo. 2, c. 19, or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition, and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions, and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt: provided always, that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

Previous Clauses as to Bankrupts to apply to Ireland.

All the provisions of the act in regard to bank-

68. All the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall

3 & 4 Will. 4, c. 74, s. 68.

rupts shall apply to their lands in Ireland.

be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland (*q*).

Provisions of the Irish act as to bankrupts apply to their lands in England.

(*q*) Sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the 4 & 5 Will. 4, c. 92, as to bankrupts' lands in Ireland, with the omission of copyholds, agree in substance and effect with sects. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 67 of the 3 & 4 Will. 4, c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (i. *e. issued under Irish stat.* 11 & 12 *Geo.* 3, *c.* 8,) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons, as fully and effectually as if the act had throughout extended to land of any tenure in England.

Inrolment of Deeds in Ireland.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

69. Provided always, and be it further enacted, that in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England (*r*).

Deeds relating to bankrupts' lands in England to be inrolled in Court of Chancery there.

(*r*) The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides, that in all cases of bankruptcy every deed of disposition under that act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

XV. Money to be laid out in Lands to be Entailed.

Repeal of Stat. 7 *Geo.* 4, *c.* 45.

Repeal of the statute 7 Geo. 4, c. 45, except as to proceedings commenced before 1st January, 1834.

70. After the thirty-first day of December, one thousand eight hundred and thirty-three, an act (7 Geo. 4, c. 45), shall be and the same is hereby repealed, except as to such proceedings under the act hereby repealed as shall have been commenced before the first day of January, one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the act hereby repealed:

provided always, that the act (39 & 40 Geo. 3, c. 56) repealed by the said act of the seventh year of the reign of his late Majesty King George the Fourth shall not be revived (*s*).

3 & 4 Will. 4, c. 74, s. 70.

39 & 40 Geo. 3, c. 56, not to be revived.

(*s*) Money directed to be laid out in the purchase of land is considered by a court of equity as converted into real estate. Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery. This inconvenience was removed by the two acts mentioned in this section, which provided that in all cases where money under the control of any court of equity, or of which trustees were possessed, should be subject to be invested in the purchase of freehold or copyhold lands, to be settled in such manner that it would be competent for the persons who would be the tenants in tail of any estate therein, either alone or with the owners of any particular preceding estates therein, to bar such estates tail and remainders, it should not be necessary to have such money actually invested in lands, but a court of equity, on the petition of the person who would be tenant of such estates tail and the party having any antecedent estates (being adults, or *femes covert* separately examined), might order such money to be paid to them, or applied as they should appoint. The order under the act, if made in vacation, was to take effect only in case the party should be living on the second day of the ensuing term. (5 Ves. 12; 6 Ves. 116.) The order would not have been made in term unless there were time to suffer a recovery, (8 Ves. 609,) nor in any case, without a reference to the master to inquire whether the parties had incumbered their interests in the money. (6 Ves. 576.) But where the fund was subject to charges, the court would order it to be transferred to the tenant in tail, after providing for such charges. (*In re Lord Somerville*, 2 Sim. & Stu. 470. See other cases which arose under the 7 Geo. 4, c. 45, in 3 Russ. 369, 416; 5 Russ. 5.) The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stat. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45, after the 31st October, 1834, except as to proceedings commenced before 1st November, 1834.

Old mode of barring estates tail in entailed money.

Mode of Disposition of entailed Money.

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

71. Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to

3 & 4 Will. 4, c. 74, s. 71.

be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of land to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll (*t*).

Object of last section.

(*t*) The object of this section is to make the substitute for fines and recoveries applicable to money to be laid out in land to be entailed, and to allow it to be unfettered by the same process as the land itself would be if purchased. When by means of the substitute the money is discharged from the entail and remainder, or, as may sometimes happen, from an entail only, the trustees will, if the money should be discharged from all interests and charges subsequent to the entail, and there should be none such subsisting, either upon the interest in tail, or prior thereto, pay it over immediately to the person barring the entail, and will, if there should be any interests and charges still subsisting, hold it in trust for the person barring the entail, and the persons entitled to such interests and charges. If the money should be in court, it may be paid upon application to the court, on producing evidence that the person barring the entail is entitled to receive it. (See 1 Real Property Rep. 36.) An order was made for payment out of court of a sum of stock, of which the petitioner was *quasi* tenant in tail in possession under a settlement, on his producing the deed inrolled, or an affidavit of the inrolment of the deed, whereby, in pursuance of the provision of this section, he had barred the estate tail and remainder over in the stock in question. (*In re Smythe*, 3 M. & Keen, 249.)

A. being entitled as *quasi* tenant in tail to a sum of stock, executed a disentailing deed, which was duly inrolled in Chancery, and presented a petition for the transfer of the stock. This deed was produced at the hearing of the petition, with the certificate of the clerk of inrolments indorsed, but no evidence was given of the execution of the deed. It was held, that the petitioner's title was not made out by the production of the deed, and that evidence of his execution of the deed ought to be given. (*Bishop* v. *De Burgh*, Law J. 1846. Ch. 35.)

Where a tenant in tail becomes entitled to a fund in court exceeding in amount 200*l.*, an order for payment out will not be made unless a disentailing deed has been executed. (*Re Tylden's Trust*, 8 Law T., N. S. 631.)

On payment out of court of railway purchase money for land belonging to a tenant in tail, a disentailing deed having been executed, although such deed applies to all the estates, of which a very small portion has been taken by the company, the deed must be made an exhibit, and an affidavit attesting the execution is not sufficient. (*Re Field's Estate*, 11 W. R. 927.)

Entailed Money—Ireland.

3 & 4 Will. 4, c. 74, s. 72.

72. So far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold, as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland: (*u*) saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

Lands of any tenure in Ireland, to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

(*u*) This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

XVI. The Inrolment of Deeds, &c.

73. Any rule or practice requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's High Court of Chancery in England or Ireland (*x*).

As to deeds being acknowledged before inrolment.

(*x*) The stat. 12 & 13 Vict. c. 109, ss. 17, 18, directs a seal to be provided for the inrolment office, and certificates of inrolment to be written upon every deed to be inrolled, which certificates, when sealed, are to be admitted as evidence.

By the Irish act, 4 & 5 Will. 4, c. 92, s. 73, it is provided, that any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by that act required to be inrolled in the Court of Chancery in Ireland.

3 & 4 Will. 4, c. 74, s. 74.

Relation back of inrolled Deeds.

Every deed to be inrolled by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

74. Every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled (*y*).

(*y*) This clause of the act will render it necessary for purchasers and mortgagees to have the deed under which they take inrolled without any delay, and it will be proper for them to ascertain, by search at the inrolment office, that no conveyance prior to that under which they claim, made by the tenant in tail, has been inrolled. A bargain and sale, when acknowledged and inrolled, has relation to the time of execution, and if the grantee dies within six months, and afterwards it is acknowledged and inrolled, it is good, because it is a collateral act required by act of parliament, and not arising from the nature of the instrument itself. (2 Ves. sen. 79. See Com. Dig. Bargain and Sale (B. 9).)

Fees on Inrolment of Deeds.

The Court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c.

75. It shall be lawful for his Majesty's High Court of Chancery in England, as to deeds to be inrolled in England under this act, and for his Majesty's High Court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the inrolment of such deeds (*z*), and to be paid for searches for such deeds in the office of inrolments, and to be paid for copies of the inrolment of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

(*z*) It is understood that no order has been made as to the fees; the charge now made for inrolling deeds in Chancery is about 1*s.* per folio.

The Court of Common Pleas to regulate the fees for entries on court rolls and indorsements on deeds, and for taking consents, &c.

76. It shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants

in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls. *3 & 4 Will. 4, c. 74, s. 76.*

XVII. Of Alienation by Married Women.

General enabling Clause.

77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act (*z*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release (*a*), surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole (*b*), save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her (*c*) as hereinafter directed (*d*): provided always, that this act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers as a feme sole.

Not to extend to copyholds in certain cases.

(*z*) See section 40, *ante*, p. 350.

(*a*) The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the word "disclaim."

Sir *J. Romilly*, M. R., was of opinion that on principle and preponderance of authority it is established that before this statute a fine was necessary to pass the interest of a married woman in that part of her fee simple estate which did not belong to her husband, and that since that statute an acknowledgment under this section is necessary for that purpose, notwithstanding that the estate of the wife is given to her separate use. A married woman may dispose of her life interest in real estate given to her for her separate use, and which she is not restrained from anticipating, and also of her absolute interest in personalty, whether in possession or reversion, without a deed acknowledged. (*Lechmere* v. *Brotheridge*, 11 W. R. 814, see pp. 817, 818.) In *Adams* v. *Gamble*, 12 Ir. Ch. R., N. S. 102, it was held that a married woman could dispose of freeholds settled to her separate use as if she were a feme sole without an acknowledgment under the statute. The Lord Chancellor of Ireland dissented from that decision. (See *Re Trevylyan*, 31 Law J., Ch. 560; *Re Hayes*, 9 W. R. 769, *post*, p. 396.)

Acknowledged deed when necessary.

(*b*) Where a married woman was entitled to a fund to be raised out of real estate on the death of a tenant for life, it was held that a deed executed during the lifetime of the tenant for life by her and her husband, and the parties entitled to the estate, and acknowledged by her under this act, would not bar her right. (*Hobby* v. *Allen*, 15 Jur. 835; 20 Law J., Chanc. 199.)

Reversionary interest in proceeds of real estate.

3 & 4 Will. 4, c. 74, s. 77.

But it has since been decided that a married woman may convey a reversionary interest in a sum of money the produce of real estate directed to be sold by trustees after the death of the tenant for life. (*Tuer* v. *Turner*, 20 Beav. 560; 24 Law J., Chan. 663.) The interest of a married woman in the proceeds of real estate devised by the will under which she took such interest, upon trust for sale, was held to pass by her deed executed and acknowledged according to the provisions of this statute, whether such interest be in possession or reversion, and whether the sale of the real estate be or be not made. (*Briggs* v. *Chamberlain*, 11 Hare, 69.) In this case, *Wood*, V. C., observed, "In the case before me there is a devise to trustees to sell the real estate, and out of the proceeds this lady and the other children of the testator's nephew are to be paid their respective shares. There is therefore a legal and an equitable interest created, and that equitable interest in the estate is not in the trustees, but in the several persons for whose benefit the sale is to be made, and the case appears to me to fall as distinctly as it can do within the words of the statute." (*Ib.* 77. See interpretation of word "estate," *ante*, s. 1, p. 316. See *May* v. *Roper*, 4 Sim. 360; *Forbes* v. *Adams*, 9 Sim. 462; Sugden's Real Prop. Statutes, pp. 232, 233, 2nd ed. Section 79, *post*.)

In *Crofts* v. *Middleton*, 8 De G., M. & G. 212, *Knight Bruce* said, in reference to this section there does not occur the least reason to believe that those who framed or those who passed the act denied or meant to restrain either the voluntary or any other alienation of any property or interest which immediately before the passing of the act was either voluntarily or for value alienable. (See *ante*, p. 347.)

(*c*) By 8 & 9 Vict. c. 106, contingent and other like interests, and also rights of entry, may be disposed of by deed; but every such disposition by a married woman must be conformable to the provisions of this act. (See *post*.)

Right of dower included in this section.

Soon after the passing of this act doubts were raised whether under this clause a married woman could extinguish her right of dower. The question could apply only to women who were married before the 1st January, 1834, and whose rights of dower are saved by stat. 3 & 4 Will. 4, c. 105, s. 14. (See the word "estate" in the interpretation clause, *ante*, p. 316; Co. Litt. 345 b.)

Sir *E. Sugden* observes (Sugd. on Stat. 234, 2nd ed.), the Dower Act (3 & 4 Will. 4, c. 105) does not prevent a married woman, with the concurrence of her husband, from barring her dower; but the statute 3 & 4 Will. 4, c. 74, has abolished the only modes by which that could have been accomplished. In framing the present section, the right of dower is not scientifically provided for, but the intention is obvious, and the married woman is empowered to extinguish any estate which she has in the lands; and the word "estate" is, by the first section, extended to any interest in lands, and a power, therefore, does appear to be given to married women and their husbands to bar dower.

Election.

A married woman can elect so as to affect her interest in real property, without deed acknowledged under this act, and where she has so elected, the court can order a conveyance accordingly, the ground of such order being, that no married woman shall avail herself of fraud. (*Barrow* v. *Barrow*, 4 Kay & J. 409; 4 Jur., N. S. 1049; 27 L. J., Ch. 678.)

Disclaimer.

Doubts were entertained whether a married woman, by a deed acknowledged according to this act, can *disclaim*; an opinion in the affirmative has been expressed by the editor of the last edition of Cruise's Digest (7 vol. p. 13, 4 vol. p. 19, n.) on the ground that although there might not be words in the clause which technically and strictly apply to the interest of the *feme covert* trustee, which until the trust is accepted is a potential rather than an actual "estate;" yet that it would be in entire accordance with the spirit and intent of the act, to construe a disclaimer within the operation of the clause, as the act is intended to substitute assurances for fines and recoveries; and before the act a *feme covert* trustee might have disclaimed by fine. And by the first section of the act it is declared, that the word *estate* shall extend to "*any interest in, upon, or affecting lands*, either at law or in equity." The Irish statute 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *dis-*

claim, after the words "dispose of." By 8 & 9 Vict. c. 106, s. 7, a married woman may disclaim by deed made conformable to this act. 3 & 4 *Will.* 4, *c.* 74, *s.* 77.

The old doctrine was, that an estate of freehold could be disclaimed only by matter of record. (*Butler and Baker's case*, 3 Rep. 26) But it is established by modern authorities that a deed is sufficient for that purpose. Although a devise, being *primâ facie* for the devisee's benefit, is supposed to be accepted by him until he does some act to show his dissent, yet he may by deed under his hand and seal, without matter of record, renounce the estate, and make it as to him null and void. (*Townson* v. *Tickell*, 3 B. & Ald. 31.) This case has been followed in a case where a deed of disclaimer by a devisee in trust of freehold and copyhold property was held to vest the entire legal estate in his co-trustees. (*Begbie* v. *Crook*, 2 Bing. N. C. 70; 2 Scott, 128; and see observations on *Townson* v. *Tickell*, in 4 M. & R. 189, and in 2 Scott, 130.)

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, because such deed is clear evidence of the disclaimer, and admits of no ambiguity; but there may be conduct which amounts to a clear disclaimer. As where a person named as executor and trustee under a will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended, upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: it was held, that he was not under the circumstances chargeable as executor or trustee. (*Stacey* v. *Elph*, 1 Mylne & Keen, 195.) A disclaimer by one of the three executors of a will, who were directed to sell copyholds by a deed executed some time after the sale, reciting that he had from the testator's decease declined to act, and had never acted in the executorship or trusts of the will, was held to be a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction. (*Peppercorn* v. *Wayman*, 5 De G. & S. 230; 21 Law J., Chan. 827. See *Harris* v. *Watkins*, 2 Kay & J. 473, as to presuming a disclaimer by a devisee.)

An interest devised vests in the devisee by presumption of law before entry. (Co. Litt. 111, a.) Where the devisee of an estate refused to take it saying she was entitled, as heir at law, and would not accept any benefit by the will of the devisor: it was held, that this was not such a disclaimer as prevented her from afterwards bringing an ejectment on her title as devisee. (*Doe* d. *Smyth* v. *Smyth*, 6 B. & C. 112; 9 D. & R. 136.) In the last case it was said by the court not to be necessary to decide whether the renunciation and disclaimer may be by parol; because in whatever form they are made, a disclaimer of an estate in land must be clear and unequivocal. (*Ib.* 117.) It seems that a devise of copyholds may be disclaimed by word of mouth only before the devisee has been admitted. (*Rex* v. *Wilson*, 10 B. & C. 5; 5 M. & R. 140; see Shepp. Touchs. 462.) A gift of personal chattels, as well as a lease for a term of years, may be waived and avoided by parol. (1 Ventr. 128.) On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainderman. (*Ib.* 116.) And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other. (*Smith* v. *Wheeler*, 1 Vent. 128; 2 Keb. 772.) The disclaimer of one of several trustees has the effect of vesting the estate in the other trustees exclusively. (*Small* v. *Marwood*, 9 B. & C. 300; *Browell* v. *Reed*, 1 Hare, 435.) At the reading of a testator's will after his death, which devised lands upon certain trusts, the devisee in trust said, "I ought to have had 5*l.* for being trust." The trustee, by deed executed sixteen years after the testator's death, had disclaimed all the property devised by the will, with all the trusts thereof. It was left to the jury to decide whether the trustee had assented to the devise; but the court held, that the above expression was so ambiguous, that it ought not to have been left to the jury as evidence importing the trustee's assent to the devise. Unless there was unequivocal evidence of assent, the subsequent disagreement by deed of disclaimer would avoid the estate *ab initio*, and vest the

3 & 4 *Will.* 4, c. 74, s. 77.

legal estate in the other trustee; so that, as his heirs had disclaimed, it would revert to the heir at law of the testator. (*Doe* d. *Chidgey* v. *Harris*, 16 Mees. & W. 517.)

In *Crewe* v. *Dickin*, 4 Ves. 97, one of two trustees released and conveyed to his co-trustee, and he having sold, the trustee who had released refused to join in the receipt for the purchase-money: and it was held, that the trustee must be considered as having accepted the trust, he having conveyed and released to his co-trustee, and that the purchaser was not bound to accept the title. With reference to the last case Lord *Eldon* said, (2 Swanst. 370,) "If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity." And his lordship expressed an opinion, that if a person who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad to act upon. (*Nicholson* v. *Wordsworth*, 2 Swanst. 371.) But a trustee of real estate, who disclaimed all estate, powers, &c. in the estate devised, was held not to be a necessary party in a conveyance to a purchaser, nor in a receipt for the purchase-money. (*Adams* v. *Taunton*, 5 Madd. 433. See, in addition to the cases cited, Litt. ss. 684, 685; stat. 21 Hen. 8, c. 4; Co. Litt. 113, a; *Bonifant* v. *Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.* 4 Leon. 207; *Hawkins* v. *Kemp*, 3 East, 410; *Thomson* v. *Leach*, 2 Vent. 198; Carth. 211, 230; 2 Salk. 616; Show. P. C. 151; 3 Lev. 284; 1 Show. 296; Rep. temp. Holt, 665.) It was held, that a discretionary power given to two trustees to sell copyholds, one of whom disclaimed, might be exercised by the other trustee. (*Affleck* v. *James*, 13 Jur. 739.) Trustees who declined to act have been directed to convey by the Court of Chancery. (*Attorney-General* v. *Doyley*, 2 Eq. Cas. Abr. 194; *Hussey* v. *Markham*, Rep. temp. Finch, 258.) In these cases the trustees were discharged from the trusts by force of the decree, and therefore an acceptance could not be inferred from the form of the instrument. In *Sharp* v. *Sharp*, 2 B. & Ald. 405, it was held that trustees had not acted, though they had conveyed the estate instead of disclaiming.

A testator gave a legacy of 1,100*l.* to two persons, upon certain trusts for the benefit of his daughter and her children; he then, after making some other devises and bequests, proceeded to give a messuage to the same persons, upon trust for his widow for her life, and after her decease, to apply the rents for his grandson H. during his minority, and to convey the messuage to H. at twenty-one; and he appointed his widow sole executrix. At the time of the widow's death, H. had attained twenty-one; and afterwards, by a deed which recited the devise of the messuage upon the trusts of the will therein stated, the death of the widow, and that, in her lifetime, H. attained twenty-one, "whereby it became unnecessary for them to act in the trust declared by the will, and in fact they never intermeddled therein; but inasmuch as the legal estate in the said messuage was still outstanding in them by virtue of the recited will, they had consented, at the request of H., to convey such estate to him," the two persons named in the deed conveyed the devised messuage to H.: it was held, that the execution of this deed was of itself sufficient evidence that the persons who executed it had accepted and acted in the trusts of the will. (*Urch* v. *Walker*, 3 My. & C. 702.)

A *feme covert* made a disposition of property, as to which it was doubtful whether it was settled to her separate use. The husband disclaimed: it was held, that, whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife. (*Rycroft* v. *Christy*, 3 Beav. 238.)

Different kinds of powers.

Powers are either appendant or in gross, or altogether collateral; appendant, when the exercise of them is in the first instance to interfere with, and to a certain extent, to supersede, the estate of the donee of such power;

in gross, when they do not commence until the determination of the estate of the donee; and collateral, when the donee has no estate at all in the property which is the subject of the power. A power reserved to a tenant for life to make leases in possession is appendant; for, by the exercise of it, the term created by it necessarily precedes the estate of the tenant for life, to whom it is reserved. A power to a tenant for life to jointure is a power in gross; for the jointure created by it must necessarily take effect after the death of the particular tenant. Where an estate is limited to the use of A. for life, with remainders over to other persons, and with a power of revocation and new appointment reserved to A., this power is both appendant and collateral. It is appendant as to the estate for life of A., and collateral as to the estates in remainder. A power wholly collateral is reserved to a stranger, having no legal estate in the property settled. As where an estate is limited in strict settlement, and a power is reserved to a stranger to revoke the existing uses, and limit new ones. (1 Sand. on Uses, 169, 170, 4th ed.)

3 & 4 *Will.* 4, *c.* 74, *s.* 77.

In *Albany's case* (1 Rep. 111), it was held, that the reserved power of the grantor, who took an estate for life under the settlement, might be extinguished by his release. In *Digge's case* (1 Rep. 173), it was held, that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and inrolled, was extinguished by his fine, levied after a revocation, but before inrolment. In *Leigh* v. *Winter*, (Sir W. Jones, 411,) it was held, that the grantor who took by the settlement an estate for life could release his reserved power of revocation. In *Bird* v. *Christopher* (Styles, 389), it was held, that if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished. In *King* v. *Melling* (1 Ventr. 225), it was held, that a power in the devisee for life to jointure his wife was extinguished by a recovery. In *Tomlinson* v. *Dighton* (1 P. Wms. 149), it seems to be admitted, that where there is a devisee for life, with power to appoint to her children, the power would be extinguished by fine. In *Saville* v. *Blacket* (1 P. Wms. 777), it was held, that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with a sum of money, by joining in a recovery and re-settlement of the estate, because he would otherwise defeat his own grant. Destruction of powers.

Where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levied a fine, the power was held to be extinguished. Thus where by a marriage settlement lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of 400 years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son, and one or more younger child or children, who should live to attain his, her or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l.* in the whole, as the husband and wife should, by any deed or writing, or his or her last will and testament, appoint; and in default of such appointment, or subject thereto, after the monies so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned to attend the inheritance. There were younger children of the marriage, who attained twenty-one. The wife died, without having joined in any appointment, and afterwards the husband levied a fine of the premises: and it was held, that the power was extinguished. (*Bickley* v. *Guest*, 1 Russ. & Mylne, 440.)

So where an estate was devised to A. for life, remainder to such of his children surviving him as he should by deed or will appoint, with remainder to the use of the first son of A. in tail, with remainders over, and the son joined with his father in suffering a recovery, it was held, that the power was destroyed, (*Smith* v. *Death*, 5 Madd. 371; and see *Jesson* v. *Wright*, 2 Bligh, 15,) where Lord *Redesdale* said, "How can a man, having a power for the benefit of his children, destroy it?" Lord *Hale*, in *Edwards* v. *Slater* (Hardres, 410), seemed to be of opinion, that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appendant to his estate, as a leasing power, or unconnected

3 & 4 *Will.* 4, c. 74, s. 77.

with his particular estate, and therefore in gross, might be destroyed by release, fine or feoffment. In *West* v. *Berney* (1 Russ. & Mylne, 435), Sir *J. Leach*, M. R., expressed an opinion, "that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, may be extinguished. In respect of his freehold interest, he can act upon the estate; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross, in tenant for life, would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because his conveyance of the life estate is not inconsistent with the exercise of his power." It was determined by Lord *Mansfield* (*Ren* d. *Hall* v. *Bulkeley*, 1 Dougl. 292), that if a tenant for life, with power to grant leases when in possession for twenty-one years, to take effect in possession and not in reversion, reserving the best rent, &c., convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished; but he may still grant leases, agreeably to the terms of the power. So where there was a power in a strict settlement, enabling three successive tenants for life, "respectively when and as they shall respectively be in the *actual possession* of the said lands," &c., by virtue of the limitations of the settlement, and not before, to make leases, &c. for lives or years. The second tenant for life conveyed his life estate to three persons, in trust to secure to them an annuity during his life, and subject thereto to pay the surplus rents to him,—the conveyance containing a covenant on the part of the grantees, that in case the then lease should expire during the life of the grantor, it should be lawful for him to let the premises as *he should think proper*, with their consent, provided a rent not less than the existing rent should be reserved. The old lease having expired, the second tenant for life, with the consent of the grantees, made a new lease. Under these circumstances it was held, that the power was not inseparably annexed to the estate for life; and though it might not be competent for the tenant for life to derogate from his own act, still he had here expresly reserved an authority to let; and that the new lease, being conformable both to the power and the covenant, was good. *Abbott*, C. J., said, "We ought not to hold that such a power is extinguished by a transfer of the estate, unless we see clearly in the language of the deed, whereby the power is created, that the donor of the power intended inseparably to annex it to the life estate given, and to a continuance of that estate in the identical person to whom it is given." The words "and not before" were much relied on to show that the clause pointed out only the order in which the successive tenants for life were to execute. (*Long* v. *Rankin*, App. Sugd. on Powers, 676, 4th ed.; 2 Chance on Powers, 569, 600.)

A power *simply collateral*, that is, a power to a stranger who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, it cannot be released, where it is to be exercised for the benefit of another, as in the case of a power to executors to sell lands. (Co. Litt. 265 b; 11 Rep. 111 a.) But where the power is for the benefit of the party, as a power to charge a sum of money for himself, it may be released; and in such a case his joining in a conveyance of the land, clear of the charge, would be a release. (*West* v. *Berney*, 1 Russ. & Mylne, 434, 435.)

An authority to *consent* to the exercise of a power of sale appears to be subject to the same rules, with reference to extinguishment and suspension, as an authority to execute a power. (*Earl and Countess of Jersey* v. *Deane*, 5 B. & Ald. 569; 10 Moore, 311; *Roper* v. *Halifax*, 8 Taunt. 845.) The trustees of a marriage settlement were empowered to invest the trust funds in land, and afterwards to resell the lands, with the consent of the husband and wife. After the trustees had invested part of the funds in land, the husband, who was tenant for life, conveyed his interest under the settlement to a purchaser by the description of all his life, and other estate and interest in all the monies, stocks, fund and securities, and messuages, lands, &c., into which the monies, &c. were, or at any time hereafter might be, con-

verted and changed. It was held, that the husband's power to consent to a resale of the lands was not destroyed by his alienation of his interest under the settlement. (*Warburton* v. *Farn*, 16 Sim. 625; 18 Law J., Chanc. 312. See *Hill* v. *Pritchard*, 1 Kay, 394, *ante*, p. 359.) A general power of appointment given to husband and wife, during their joint lives, was held not to be destroyed by a conveyance by the husband under the Insolvent Act to the provisional assignee. (*Jones* v. *Winwood*, 3 Mees. & W. 653; 10 Sim. 150; *Morgan* v. *Rutson*, 16 Sim. 234; *Badham* v. *Mee*, 7 Bing. 695; 1 M. & Scott, 14; 1 M. & Keen, 32.)

3 & 4 Will. 4, c. 74, s. 77.

By a marriage settlement of the husband's lands, after a life estate limited to the husband, &c., a joint power was reserved to the husband and to his wife to appoint the estate in favour of children, with a contingent limitation to the children (which in the events which happened could not take effect) and the reversion in fee to the husband. It was held, that the bankruptcy of the husband prevented a subsequent exercise of the joint power *to the prejudice of the assignees.* (*Hole* v. *Escott*, 2 Keen, 444; 4 My. & Cr. 187; see *Thorpe* v. *Goodall*, 17 Ves. 388; 1 Rose, 40, 270.) By 6 Geo. 4, c. 16, s. 77, and 12 & 13 Vict. c. 106, s. 147, the assignees of a bankrupt are enabled to exercise for the benefit of the creditors all powers vested in a bankrupt, which he might execute for his own benefit (except the right of nomination to a vacant ecclesiastical benefice).

A husband and wife cannot, either jointly or severally, appoint an attorney to alienate the wife's lands. (*Graham* v. *Jackson*, 6 Q. B. 811; Law J. 1845, Q. B. 129.)

(*d*) See s. 79, *post.*

Saving of other Powers.

78. Provided always, and be it further enacted, that the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition (*e*).

The powers of disposition given to a married woman by this act not to interfere with any other powers.

(*e*) In the corresponding clause in the Irish statute, 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." Lord *Lyndhurst*, C., took this clause in the subsequent act to be an expression by the legislature of what was meant by the English act. (*Baggett* v. *Meux*, 1 Phill. C. C. 628.)

No clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any powers given by the Settled Estates Act. (19 & 20 Vict. c. 120, s. 37.)

The act which authorizes a judicial separation between husband and wife makes her, after such separation, in effect, a *feme sole*, but provides that the act shall not prevent her from joining at any time during the separation in the exercise of any joint power given to herself and her husband. (20 & 21 Vict. c. 85, s. 26.)

Where an act of parliament authorizes the purchase of lands in which a *feme covert* is interested, and gives the Court of Exchequer authority to distribute the purchase-money amongst the parties beneficially entitled thereto, the exercise of that authority by the court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a *feme covert*, or on payment of her money out of court. (*Ex parte Ellison, Re Trinity House Corporation Act*, 2 Y. & Coll. 528.)

Solemnities dispensed with by act of parliament.

Purchase-money belonging to a married woman, which has been paid into court by a railway company, may be paid out to her upon her examina-

3 & 4 Will. 4, c. 74, s. 78.

Powers of alienation by married women.

tion without a deed acknowledged. (*Re Hayes*, 9 W. R. 769. See *Re Trevylyan*, 31 Law J., Ch. 560.)

The disabilities of married women at common law, independent of particular customs, to alien their property, whether real or personal, either by deeds or wills, are well known. (See Harg. Co. Litt. 111 b, n. (4).) The wife of a man who has abjured the realm, or been transported, may act as if her husband were dead. (Co. Litt. 132; 2 Vern. 104; 3 P. Wms. 37.) Through the medium of powers and trusts, however, a married woman has long been allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife may, without her husband, execute a naked authority, as to sell lands whether given before or after coverture, and though no special words are used to dispense with the disability of coverture. (Co. Litt. 112 a, and n. (6).) The rule is the same where both an *interest* and an authority pass to the wife, if the authority is collateral to and does not flow from the interest, because then the two are unconnected, as if they were vested in different persons. (Rep. temp. Finch, 346.) As, too, a *feme covert* may without her husband convey lands in execution of a mere power or authority, so she may with equal effect in performance of a *condition*, where land is vested in her on condition to convey to others. (W. Jones, 137, 138.) The reason why in these instances the wife may convey without her husband seems to be, that he can receive no prejudice from her acts, but a great one might arise to others if his concurrence should be essential. (Harg. Co. Litt. 112 a, n. (6).) The same reasoning has been urged in favour of the power of a married woman to convey an estate of freehold vested in her as a trustee; but as the law takes no notice of trusts, the better opinion, sanctioned by uniform practice, is, that as to estates of freehold which a married woman has as trustee, no effectual conveyance could formerly be made by her without fine or recovery, nor now without a deed duly acknowledged. (See 1 Prest. on Abs. 337.)

By the custom of London, confirmed by statute 34 & 35 Hen. 8, c. 22, and of several other cities and boroughs, as Norwich, &c., &c., a married woman, on being privately examined before the mayor, may bind herself by a deed acknowledged and inrolled, (Hob. 225; Com. Dig. London, (N. 3),) according to the custom of the city or borough. (2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. xxxii, ch. 2, pl. 33.) By statute 32 Hen. 8, c. 28, the husband and wife may together, under certain restrictions, make leases of the wife's lands for three lives or twenty-one years. If the requisites of the statute be not complied with, the lease is only voidable, not actually void; and by her receipt of rent after her husband's death the lease will be confirmed. (*Doe* v. *Weller*, 7 T. R. 478.) By statute 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, (repealing 29 Geo. 2, c. 31,) a married woman entitled to any lease or leases for life or lives, or for any term of years, either absolute or determinable upon the death of one or more person or persons, may apply to a court of equity by petition or motion, and by the order of such court may by deed only surrender such lease or leases, and accept and take for her own benefit a new lease or leases, during such number of lives, determinable upon lives, or for such number of years as were mentioned in the lease or leases surrendered at the making thereof respectively, or otherwise, as those courts should direct. This act was extended to Ireland by 5 & 6 Will. 4, c. 17. Before 29 Geo. 2, c. 31, married women could not surrender leases without a fine. (*Price* v. *Butts*, 2 Roll. 168.) A deed acknowledged under this act, being less expensive than an application to a court of equity, will probably be now adopted.

It has long been firmly settled, that a married woman may execute a power whether appendant, in gross or simply collateral. (*Harris* v. *Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons* v. *Moulton*, Finch, 346; *Daniel* v. *Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Travel* v. *Travel*, 3 Atk. 711, cited 2 Ves. sen. 191,) as well over a copyhold as a freehold estate. (*Driver* v. *Thompson*, 4 Taunt. 294.) Thus, if a married woman is tenant for life, with a power of leasing in possession, she could not heretofore create a mortgage term without a fine or recovery, nor now without a deed acknowledged according to this statute, but by the mere execution of her power she may make a lease, which will

at least in part, and may perhaps wholly, take effect out of her interest. So if she has a general power of appointment, with remainder, in default of appointment, to herself in fee, she could not by the old law affect the remainder vested in her, except by a fine or recovery, nor under this act without a deed acknowledged; but she may defeat the remainder, and convey away the estate by the execution of her power. *3 & 4 Will. 4, c. 74, s. 78.*

A power of disposing of real estate may be given to a married woman, either by way of trust or of power over an use. In the first instance, suppose a woman having a real estate before marriage, and either before or after marriage by a proper conveyance conveys such estate to trustees in trust for herself during her coverture for her separate use; and afterwards that it shall be in trust for such person as she shall by any writing under her hand and seal or by will appoint, and in default of appointment to her heirs, and after marriage she makes an appointment in pursuance of the power, it will be a good declaration of trust, and would defeat the right of her heir at law. (2 Ves. sen. 191.) A power is a mode which the owner of an estate reserves to himself or gives to another, through the medium of the Statute of Uses, of raising and passing an estate. (10 Ves. 266.) The right of disposing of an estate may be reserved to a married woman by way of power over an use, as where an estate is conveyed to the use of herself for life, remainder to the use of such persons as she shall appoint, and, in default of appointment, to her own right heirs, by the execution of such power, she alone can dispose of the remainder in exclusion of her heirs. (2 Ves. sen. 191.) In what way powers may be reserved to married women.

A power coupled with an interest given to a single woman to be executed by her, *being sole*, cannot be exercised during marriage. (*Marquis of Antrim* v. *Duke of Buckingham*, 1 Ch. Cas. 17; 1 Eq. Abr. 343, pl. 4.) And where there is an express dispensation with coverture, powers coupled with an interest may be exercised notwithstanding coverture; an opinion had prevailed that where there is no dispensation with coverture that such powers could be executed. (Sugd. on Powers, 150; Harg. Co. Litt. 112 a, n. (b); 1 Prest. on Abs. 338; Watk. Conv. by Cov. 390, n. (a).) It has been decided that an appointment made by a married woman during coverture is valid, notwithstanding the surrender by which the power was created did not contain any express dispensation with the disability arising from coverture, the court being of opinion that there was an implied dispensation with coverture, and that the meaning of the settlement was, that the power should be executed by the married woman, whether she were covert or sole. (*Doe* d. *Blomfield* v. *Eyre*, 3 C. B. 557; see p. 578, affirmed in error, 5 C. B. 713; see pp. 741, 745.)

A power resting on articles only made before marriage will enable the wife to dispose of property. By articles before marriage, the intended husband covenanted that he would execute all such acts and conveyances as should be necessary for vesting any estate which might descend to his wife, in such persons as she should name, in trust for her sole and separate use, and to be subject to such disposition as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife having become entitled to a trust estate in some lands devised them by her will. And it was decreed that the power was well created and executed. (*Wright* v. *Cadogan*, 1 Br. P. C. 486; Ambl. 468; 2 Eden, 239; see *Doe* v. *Staple*, 2 T. R. 684.) But a mere contract by the wife to convey, entered into after marriage, whether for her own benefit or that of others, would be void. (*Dillon* v. *Grace*, 2 Sch. & Lef. 462; *Worrall* v. *Jacob*, 3 Mer. 256.)

A condition in a feoffment or grant not to alien to any person is void. (6 Rep. 41 b.) A grantee may be restrained from aliening for a particular time or to a particular person. (*Large's case*, 2 Leon. 82; 3 Leon. 182; *Muschamp's case*, Bridgm. 134.) So a devise in fee on condition that the devisees should not alien, except to their sisters or their children, is good. (*Doe* v. *Pearson*, 6 East, 172; *Cuthbert* v. *Purrier*, Jac. 417; *Ross* v. *Ross*, 1 Jac. & W. 158.) Condition restraining alienation.

The old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands and upon her receipt only; and Clauses against anticipation.

3 & 4 Will. 4, c. 74, s. 78.

under such a trust she could dispose of her interest. When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole*, as to possess all the incidents of property, and that she might therefore dispose of it as if *sole*, it was necessary, in order to protect her against the husband's rights, to qualify the gift by prohibiting anticipation. (*Pybus* v. *Smith*, 1 Ves. jun. 189; 3 Br. C. C. 340.)

The words "not to be paid by *anticipation*" seem to have been first introduced by Lord *Thurlow*, who, it is said, did not attempt to take away any power the law gave her as incident to property, which being a creature of equity, she could not have at law; but as under the words of the settlement it would have been her's absolutely, so that she could alien, Lord *Thurlow* endeavoured to prevent that, by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation, reasoning thus—that equity making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it; but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different. (See *Brandon* v. *Robinson*, 18 Ves. 434, 435.) Thus, under a trust to pay the dividends of a fund from time to time into the proper hands of a man, or on his proper order or receipt subscribed with his own hand, to the intent that the same should not be grantable, transferable or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or any part thereof, and on his decease the principal to be paid to such persons as in a course of administration would become entitled to his personal estate: it was held, that it was a life interest, liable to be assigned under a commission of bankruptcy; for, generally speaking, where property is given to a man for life, the donor cannot take away the incidents to a life estate, one of which is a power of disposition. (*Brandon* v. *Robinson*, 18 Ves. 429; 1 Rose, 197; see *Graves* v. *Dolphin*, 1 Sim. 66; 19 Ves. 88; and the cases cited 1 Swanst. 481, n.) So where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of such *cestui que trust* during his life, his interest passed to his assignees under the Insolvent Act, notwithstanding a proviso in the will that he should not have power to sell, mortgage or anticipate the income of the fund. (*Green* v. *Spicer*, 1 Russ. & M. 395; see *Lear* v. *Leggett*, *Ib.* 690; 2 Sim. 479; *Pym* v. *Lockyar*, 12 Sim. 394.) But where by the expressions used in a will it can be collected to have been the intention of the testator that the estate shall cease on bankruptcy, it will do so. As where there was no gift, but a direction that the payment should be made into the donee's proper hands, *but not to his assigns*, and for his own use and benefit, and there was a proviso that if the party should by any ways or means whatever sell, dispose of or incumber the right he had for life, then his interest to cease, and the trustees to apply it for the benefit of his children: it was held, that on the bankruptcy of the tenant for life his interest ceased, and that his children became entitled. (*Cooper* v. *Wyatt*, 5 Madd. 482; *Page* v. *Way*, 3 Beav. 20.) In *Shee* v. *Hale*, (13 Ves. 404,) a gift for life, with comprehensive words restraining the disposition of it, and giving it over in that event, was held to cease by the party's taking advantage of the Insolvent Act. (See *Wilkinson* v. *Wilkinson*, Coop. C. C. 295; 2 Wils. C. C. 47; *Snowdon* v. *Dales*, 7 Sim. 524; *Godden* v. *Crowhurst*, 10 Sim. 642; *Avison* v. *Holmes*, 1 Johns. & H. 530.)

It is now settled, that if property be given or settled to the separate use of a woman *unmarried* when the settlement or gift takes effect, and she be prohibited against anticipating it, it will, if not alienated by her when *discovert*, be enjoyed by her as her separate estate during any coverture or covertures to which she may afterwards be subject; and she will, during the existence of such coverture or covertures, be unable to anticipate it. (*Tullett* v. *Armstrong*, 1 Beav. 1; affirmed, on appeal, by Lord *Cottenham*, 4 My. & Cr. 377.) In *Barton* v. *Briscoe*, (Jac. 603,) it was held, that the restraint on anticipation continued in force only during the coverture, and therefore where, by a settlement made after marriage, the dividends of certain sums of stock were to be paid by trustees to the separate use of a married woman, but not so as to deprive herself of the benefit thereof by sale,

mortgage, charge, or otherwise in the way of anticipation, with remainder as she should appoint by will, and in default of appointment to A., the court after the death of the husband ordered the fund to be transferred upon the consent of the widow and her daughter, the latter being entitled in default of appointment. So a clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy. (*Brown* v. *Pocock*, 2 Russ. & Mylne, 210; 2 Mylne & Keen, 189. See *Massey* v. *Parker*, *Id.* 174.)

3 & 4 Will. 4, c. 74, s. 78.

The clause against anticipation may be confined to a particular coverture. (*Knight* v. *Knight*, 6 Sim. 121; *Bradley* v. *Hughes*, 8 Sim. 149.)

Real estate was devised to A., the wife of B., her heirs and assigns for ever, for her use and benefit, with power to appoint, and in default, remainder over. Personal estate was given to A. for her sole and separate use, independent of her husband B., and her receipts alone to be sufficient discharges: it was held, that the limitations to the separate use of A. did not extend beyond the husband specifically named. (*Moore* v. *Morris*, 4 Drew. 33; 3 Jur., N. S. 552.)

It is now settled that a gift to the separate use without power of anticipation will operate upon all the covertures of a woman, unless the provisions are destroyed while she is discovert; whether or not the provisions for separate use and against anticipation are applicable to the whole of the life estate given, or only to a particular coverture, must depend upon the construction of the words of the gift. By a post-nuptial settlement a sum of money, the property of the wife, was vested in trustees upon trusts which were construed to operate as a direction to pay the dividends to the wife for life, or to her appointees, without anticipation: it was held, that the restraint against anticipation operated during the whole life of the wife, and was not restricted to an existing coverture by the introduction of additional words, which obviously applied only to such existing coverture. If the restriction forms part of the only sentence which gives any estate, and is in words made part of the gift, then the estate and the restriction must be commensurate. (*In re Gaffee*, 1 Mac. & G. 541; 1 Hall & T. 635; 7 Hare, 101.)

A court of equity will give effect during coverture to a clause in restraint of alienation annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or only for life. Lord *Lyndhurst*, C., said, "After the case of *Tullett* v. *Armstrong*, (4 My. & Cr. 377,) there can be no doubt about the doctrine of this court respecting the property given to the separate use of a married woman; and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal; but a court of equity having created in both a new species of estate may in both cases modify the incidents of that estate." (*Baggett* v. *Meux*, 1 Phill. C. C. 627.)

Lands were devised to trustees "for the use and benefit of T., the rents and profits of which estate she should receive from the tenants herself while she lives, whether married or single." In a later part of the will, which did not contain anything authorizing a sale or mortgage, the testatrix directed that no sale or mortgage of the estate or its rents should take place during the life of T., who was unmarried when the will was made, but who had married after the death of the testatrix: it was held, that she took an estate for life for her separate use, without power of anticipation, and that a mortgage made by her and her husband was therefore invalid. (*Goulder* v. *Camm*, 1 De G., F. & G. 146.)

A testator bequeathed personal estate in trust for the use of a *feme covert*, and without power of anticipation. The legatee was, at the date of the will, domiciled abroad, and had continued so ever since. By the law of her

3 & 4 Will. 4, c. 74, s. 78.

domicile the restraint against anticipation was disregarded, but the court, nevertheless, refused to give effect to a beneficial arrangement made by her anticipating her income. (*Peillon* v. *Brooking*, 25 Beav. 218.)

By lease and release, by way of marriage settlement, lands, the inheritance of the wife, were conveyed by her to trustees and their heirs, to the use of the wife and her assigns, until the marriage; and from the solemnization of the marriage in trust for the wife and her assigns during her life, for her own sole and separate use, independent of the debts, control, or engagements of the husband; and from her decease to the use of the husband, his heirs and assigns: it was held, that the trustees did not take the legal estate during the life of the wife, but that the use was executed in her, notwithstanding the words "to her own sole and separate use," &c. *Parke*, B., observed, "Although no doubt it is highly probable that these parties intended to give the trustees the legal estate during the life of the wife, they have not used apt words for that purpose. We cannot collect clearly from the words of the deed, that they intended to give the trustees an active trust, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife. The limitation to her sole and separate use is therefore void at law, and the use is executed in the wife, although the husband is a trustee for her in equity." (*Williams* v. *Waters*, 14 Mees. & W. 166; see p. 173.)

Power of disposition over separate estate.

Although the law acknowledges no separate estate in the wife, it is otherwise in a court of equity, where the wife in the absence of any clause against anticipation is permitted to deal with such property as if she were a *feme sole*, not only as to strangers, but as to her husband. Therefore, where in a deed executed, upon a separation between husband and wife, by them and by the trustees of their marriage settlement, the wife charged her separate property comprised in the settlement with the payment of an annuity to the husband, and the husband released his marital rights in respect of all future property acquired by the wife: it was held, that the release by the husband was a good consideration for the grant of the annuity by the wife, and that the payment of it would be enforced by the court. (*Logan* v. *Birkett*, 1 Mylne & Keen, 220.)

Where a testator devised a freehold estate to trustees, in trust to pay the rents as the same should become due and payable into the hands of his wife, and not otherwise, for her life for her separate use, and directed that the receipts of his wife alone for what was actually paid into her own proper hands should be good discharges to his trustees, it was held that the wife had power to alienate her life estate; Sir *J. Leach*, V. C., observing, that it was too late to contend that a lady is restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands, and upon her receipt alone. The contrary having been settled by repeated authorities, the construction given to the expressions in question was, that they were intended only to exclude the marital claims of any present or after-taken husband, and not to control that right of disposition which is incident to property. (*Acton* v. *White*, 1 Sim. & Stu. 429; see Sugd. Pow. 118, 119, 5th ed.; *Barrymore* v. *Ellis*, 8 Sim. 1. See *Cox* v. *Chamberlain*, 4 Ves. 631; *Roach* v. *Wadham*, 6 East, 289; *Wilde* v. *Fort*, 4 Taunt. 334.) A mere direction to pay income to the wife's separate use from time to time will not restrain her from alienation. (*Parkes* v. *White*, 11 Ves. 222.)

In *Alexander* v. *Young*, (6 Hare, 393,) stock was bequeathed to the separate use of a married woman for life, and after her decease to her appointee by deed or will; with a direction that any appointment by deed should not come into operation until after her death. *Wigram*, V. C., held, an irrevocable appointment by deed might be made, and that the clause could not be read as amounting to a restraint against anticipation.

The intention to restrain anticipation must be clearly expressed, but it is not necessary in all cases that negative words should be introduced in the receipt clause to complete the restraint on alienation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. (*Harrop* v. *Howard*, 3 Hare, 624; *Moore* v. *Moore*, 1 Coll. 54; *Medley* v. *Horton*, 8 Jur. 853.)

3 & 4 *Will.* 4, c. 74, s. 78.

No particular form of words is necessary to impose a restraint on anticipation in a limitation to the separate use of a married woman, the question being one of intention. (*Baker* v. *Bradley*, 2 Jur., N. S. 98; 25 Law J., Chanc. 7.) By an instrument giving property in trust for a married woman and her assigns for her life for her separate use, it was declared that the receipts of the married woman alone, or of some person or persons authorized by her to receive any payment of the rents and income after such payment should have become due, should alone be good discharges: it was held, that she was restrained from anticipation. (*Ib.*) The case of *Field* v. *Evans*, 15 Sim. 375, was approved of. (*Ib.*)

A testator bequeathed leasehold and other personal estates to trustees in trust to pay the rents, &c., to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, and in default of such appointment, or so far as the same should not extend, into her proper hands for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges, and after her death in trust for her children. It was held, upon the particular terms of the gift, that the restraint on anticipation applied to an assignment, by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts alone should be good discharges. (*Brown* v. *Bamford*, 1 Phill. C. C. 620; 11 Sim. 127. See *Moore* v. *Moore*, 1 Coll. C. C. 54; *Field* v. *Evans*, 15 Sim. 375; *Harnett* v. *Macdougall*, 8 Beav. 187.) A gift of property to the separate use of a woman, "but not to be sold or mortgaged," was held to restrain anticipation. (*Steedman* v. *Poole*, 6 Hare, 193.)

It seems well established, that a settlement, gift, or limitation of personal property to the separate use of a woman, or in similar words, without any restraint on her alienation, enables her not only to receive and apply to her separate use the income, but to dispose of the capital or corpus, either by an act *inter vivos*, or by will. (*Rich* v. *Cockell*, 9 Ves. 369; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock* v. *Monk*, 2 Ves. sen. 191; *Hearle* v. *Greenbank*, 3 Atk. 696; 1 Ves. sen. 298.) Where an estate in *fee simple* is conveyed for the separate use of a married woman, without an express power of appointment reserved to her, she cannot during her coverture dispose of the fee simple, without the concurrence of her husband in such assurance as is required for passing her interest in lands. (See 1 Sand. Uses, 345, 4th ed.; Chance on Powers, pl. 545; *Goodill* v. *Brigham*, 1 Bos. & P. 192.) Thus where lands were devised to a trustee and his heirs, *in trust* for the *separate use* of a married woman, and to convey the same to her, her heirs and assigns, free from the control of her present or any future husband, and to permit her to take the rents and profits: it was held, that she had no power of devising the premises, for the legal estate was vested in the trustee for securing her against her husband's rights, with the beneficial interest in fee in her, without the incidental power of devising, and upon her death the trustee became seised for the heir at law, notwithstanding she had executed a will in favour of another person. (*Doe* d. *Stevens* v. *Scott*, 1 Moore & P. 317; 4 Bing. 505.) A married woman having real property settled to her separate use, with a testamentary power over it, may dispose of leaseholds and other chattels purchased with the produce of it, but not of real estate so purchased. (*Churchill* v. *Dublin*, 9 Sim. 447.)

A husband and wife cannot effectually dispose of the life interest of the wife in a fund not settled to her separate use, beyond the duration of the coverture. (*Stiffe* v. *Everitt*, 1 M. & Craig, 37.) The Court of Chancery will not supply the want of an acknowledgment of a deed by a married woman, to do so would deprive married women of that protection which the law has thrown round them. (*Lassence* v. *Tierney*, 14 Jur. 182, 186; 1 Mac. & G. 551; see p. 572.) A feme covert, to whose sole and separate use a reversionary interest in personal property was given, may assign that interest as if she was a *feme sole*; and her assignment will bind her right in case she survive her husband. (*Keene* v. *Johnstone*, 1 Jones & Carey, Ir. R. 255.) A married woman, to whom a rent-charge for life in reversion was

3 & 4 Will. 4, c. 74, s. 78.

devised to her separate use without the intervention of trustees, joined with her husband in assigning it for valuable consideration; such assignment was held to bind her after her husband's decease, although no fine had been levied. (*Major* v. *Lansley*, 2 Russ. & M. 355.)

A fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for the payment of the fund to the son was refused, on the ground that the Court of Chancery will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. (*Whittle* v. *Henning*, 2 Phill. C. C. 731; 11 Beav. 222; 12 Jur. 1079; *Story* v. *Tonge*, 7 Beav. 91.) *Shadwell*, V. C., had, in several cases under similar circumstances, ordered the transfer of trust funds. (14 Sim. 592—599; see *Bishop* v. *Colebrooke*, 16 Sim. 39.)

Although the power to impose a restraint against anticipation in the case of a married woman is a creature of equity, still the imposition of the restraint is the act of the settlor, and the court will not assist in removing the restraint, although it would be for the benefit of the married woman. Therefore a legacy to a married woman, upon condition that she and her husband absolutely convey, or cause to be conveyed, their interests in an estate vested in trustees, upon trust for herself for life, without power of anticipation, with remainder to her children, cannot be paid to her, as she is unable to comply with the condition. (*Robinson* v. *Wheelwright*, 2 Jur., N. S. 554; 25 Law J., Chan. 385; 21 Beav. 214; 2 Jur., N. S. 32.)

Where purchase money paid into court by a railway company belongs to a married woman, the court will pay it out to her without deed acknowledged, but simply upon her examination. (*Re Hayes*, 9 W. R. 769.) The court will not order payment to a married woman on her separate receipt without examination. (*Gibbons* v. *Kibbey*, 7 Jur., N. S. 1298; 10 W. R. 55.)

Acknowledgment of Deeds.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

79. Every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery (*c*), or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided (*d*).

(*c*) The office of Master in Chancery is now abolished. (15 & 16 Vict. c. 80, s. 1.)

Acknowledgments by married women may be received by judge of county court.

Any acknowledgment to be made by any married woman under 3 & 4 Will. 4, c. 74, may be received by a judge of a county court, in the same manner as such acknowledgment may be received by a judge of a superior court. (19 & 20 Vict. c. 108, s. 73.)

By schedule C. to the latter act, the fee for taking the acknowledgment of a married woman is 1*l.*

(*d*) Where any married woman shall be seised or possessed of or entitled to any estate or interest, manorial or otherwise, in land proposed to be conveyed for the purposes of the act affording facilities for the conveyance and endowment of sites for schools, she and her husband may convey the same for such purposes by deed, without any acknowledgment thereof. (4 & 5 Vict. c. 38, s. 5.)

An acknowledgment by a married woman before two commissioners, one of whom was interested, was held to be void. (*Banks* v. *Ollerton*, 10 Exch. 168; 23 Law J., Exch. 285; *Re Ollerton*, 15 C. B. 796.)

3 & 4 *Will.* 4, *c.* 74, *s.* 79.

The statute 17 & 18 Vict. c. 75, intituled "An Act to remove Doubts concerning the due Acknowledgment of Deeds by Married Women in certain Cases," was passed on the 7th August, 1854. This act recites the above section.

And whereas it is apprehended that deeds executed by married women under the provisions of the said act may be liable to be invalidated by the circumstance that the judge, or master in chancery, or one or both of the commissioners, taking the acknowledgment, may be or may have been interested or concerned, either as a party or otherwise, in the transaction giving occasion for such acknowledgment, and it is not expedient that deeds executed in good faith under such circumstances should be invalidated: it is therefore enacted as follows:—

Acknowledgment of deed not impeachable by reason only of party before whom same was taken being interested.

1. No deed which has been acknowledged or which shall hereafter be acknowledged by a married woman before a judge of one of the superior courts of Westminster, or a master in chancery, or before two of the perpetual commissioners or two special commissioners appointed as by the said act is required, shall be impeached or impeachable at any time after the certificate of such acknowledgment has been filed of record in the Court of Common Pleas at Westminster, by reason only that such judge or master in chancery, or such commissioners, or either of them, was or were interested or concerned, either as a party or parties, or as attorney or solicitor or clerk to the attorney or solicitor of one of the parties, or otherwise, in the transaction giving occasion for such acknowledgment.

Staying proceedings for quashing certificate of acknowledgment.

2. Provided, that if any proceeding instituted before the thirteenth day of July, one thousand eight hundred and fifty-four, in the said Court of Common Pleas, for the purpose of quashing or taking off the file of records of the said court any certificate of an acknowledgment of a deed by a married woman, on the ground that such judge or master in chancery, or either of such commissioners, was interested or concerned as aforesaid, shall be pending at the passing of this act, it shall be lawful for the said court to proceed with and dispose of the same as if this act had not passed, except that if the said court shall be satisfied that any person or persons acting *bonâ fide* has or have been induced by the terms of the orders made by the said court in Hilary Term, one thousand eight hundred and thirty-four, to acknowledge, or to accept a title depending on the acknowledgment of, any deed or deeds before commissioners, one of whom may have been interested or concerned as aforesaid, the said court may refuse to permit the certificate to be quashed or taken off the file on such terms as to the payment of costs and expenses as the said court shall think fit to make.

Court of Common Pleas may make rule for preventing commission-

3. The Court of Common Pleas may from time to time make any rules which to them may seem fit for preventing

3 & 4 *Will.* 4, *c.* 74, *s.* 79.

any commissioners interested or concerned as aforesaid from taking any acknowledgment under the said recited act, anything herein contained to the contrary notwithstanding, so nevertheless that no such rule shall make invalid any acknowledgment after the certificate shall have been filed of record as aforesaid.

ers who are interested from taking acknowledgments.

Examination.

The judge, &c. before receiving such acknowledgment, to examine her apart from her husband.

80. Such judge, master in chancery, or commissioners aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void (*e*).

(*e*) No person connected with the husband ought to be present when a married woman's examination as to her consent is taken. (*Re Bendyshe*, 3 Jur., N. S. 727; 26 Law J., Chan. 814.) The court directed the officers to file an acknowledgment of a married woman who was deaf and dumb. The nature of the transaction having been duly explained to her by signs, and she in like manner signifying her assent, and these facts appearing upon affidavit and also upon the certificate. (*Re Harper*, 7 Scott, N. R. 431; 6 Man. & G. 732.) The form of the certificate of acknowledgment by a deaf and dumb woman, and the affidavit to verify the same, are in Macqueen on Husband and Wife, App. pp. 31—34.

The Court of Chancery has no jurisdiction to compel a conveyance by a married woman pursuant to its decree. In *Jordan* v. *Jones*, 2 Phill. C. C. 170, the plaintiff was equitable mortgagee of an estate by virtue of a deposit of title deeds made by Mrs. Jones when sole, she being at the time mortgagee in fee of the estates. The suit was for a foreclosure of the mortgage or a sale. By the decree it was ordered that the estate should be sold, and that all proper parties should join in the conveyance as the master should direct. The estate was accordingly sold, and the purchaser having paid his money into court was let into possession; but Mrs. Jones and her husband refused to execute the deed of conveyance; whereupon an order was made by *Wigram*, V. C., that Mrs. Jones should execute a conveyance pursuant to the decree, and acknowledge it before a master or commissioner, as required by this act. But, upon appeal, Lord *Cottenham*, C., reversed his Honor's order, being, after some hesitation, of opinion, "that the court had no authority to make such an order against a married woman."

Where a ward of court married without consent, and after she attained her majority executed, by the direction of the Court of Chancery, a settlement of real estate to which she was equitably entitled, and did not acknowledge the deed under this act: it was held, that the heir was not bound, as the court could not have compelled the wife to acknowledge the deed. (*Field* v. *Moore*, *Field* v. *Brown*, 7 De G., M. & G. 691.)

A married woman, a party to a creditor's suit for the administration of the estate of a person of whom she was heir at law, was, by the decree in the cause, ordered to convey. She accordingly executed the deed, but refused to acknowledge it under this statute. The purchaser, by his petition, prayed a reference to the master under the stat. 1 Will. 4, c. 60, to inquire whether she was a trustee, and the court referred it to the master to inquire whether the conveyance executed by her was a proper one to be executed

and acknowledged by her under the decree, and if not, to approve of a proper conveyance. (*Billing* v. *Webb*, 12 Jur. 247; 1 De G. & S. 716.) 3 & 4 *Will.* 4, *c.* 74, *s.* 80.

Appointment of perpetual Commissioners.

81. For the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke or place, for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their place of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same (*e*).

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

(*e*) By 23 & 24 Vict. c. 127, s. 30, every appointment made after 28th August, 1860, of any attorney or solicitor, under this section, to be a perpetual commissioner for taking acknowledgments of married women under this act shall, before any such authority or appointment is acted upon, be brought to the registrar by the person to whom the same is granted, or some person on his behalf, and the registrar shall, in books to be kept for that purpose, enter the particulars of every such authority or appointment on payment of one shilling, and the registrar shall mark such authority or appointment as having been entered, and with the date of the entry; and such books shall at all times be open to public inspection during office hours without fee or reward.

Appointment to be registered.

Power of perpetual Commissioners.

82. Provided always, and be it further enacted, that any person appointed commissioner for any particular county, riding, division, soke or place, shall be competent to take the acknowledgment of any married woman wheresoever she may

Power of perpetual commissioners not confined to any particular place.

3 & 4 *Will.* 4, *c.* 74, *s.* 82.

reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be (*f*).

(*f*) The two commissioners who take the acknowledgment in England must both be appointed for the county in which the acknowledgment is taken. (*Webster* to *Carline*, 4 Man. & G. 27; 1 Dowl. P. C., N. S. 678.)

The commissioners for taking the acknowledgments of married women have a lien for their fees on the instruments in their joint possession, and if a deed were in the possession of one only, he might, if authorized by the other, detain the deed for that other's lien. (*Ex parte Grove*, 3 Bing. N. C. 864.)

Special Commissioners.

If, from being beyond seas, &c. a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

88. In those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any person therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid (*g*): provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

(*g*) The following is the form of a special commission issued under this section:—

"I [*name of judge*], one of the justices of her Majesty's Court of Common Pleas at Westminster, do, by virtue of the statute in that case made and provided, appoint A. B. and C. D. special commissioners, to take the acknowledgment of Ann ——, the wife of E. F., now residing at ——, in ——, of any deed by which it is intended to pass the estate of her the said Ann [*or* to bar the dower of her the said Ann] as a married woman, pursuant to the statute 3 & 4 Will. 4, c. 74. And I do order and direct that this commission shall be executed and returned to the proper officer of the court on or before the —— day of ——, 186—.

"Dated this —— day of ——, 186—."

"Entered."

The court will not enlarge the time for returning a special commission for taking an acknowledgment of a married woman abroad, where it has been executed after the return day named therein. (*Re Carter*, 9 C. B., N. S. 791.)

The court will enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad where it has been duly executed, but its return has been unavoidably delayed until after the return day therein named.

The court allowed a commission with the certificate of acknowledgment and affidavit to be received and filed, notwithstanding the omission of the month in the jurat of the affidavit. (*Re Van Ufford*, 9 C. B., N. S. 789.)

The court will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad under this act, where, by reason of the remoteness of the residences of the parties, the time has proved to be too short. (*Re Booth*, 5 C. B., N. S. 540.)

The acknowledgment of a married woman taken abroad under this act must be taken by the persons mentioned in the commission; and therefore, where there were variances between the names of the persons designated in

3 & 4 *Will.* 4, c. 74, *s.* 83.

the commission as commissioners and the names in the signatures attached, the court required that there should be an identification by affidavits of persons on the spot bearing positive testimony to the fact.

A commission was directed to William Bates, lawyer, John Howey, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Debuque, in the state Iowa, in the United States of America. The certificate of acknowledgment was signed by Andrew Cummins and John Hoey. The affidavit of verification was made by Hoey, who described himself as one of the commissioners, and stated the certificate was signed by Andrew Cummins, "the other commissioner." An affidavit was produced made by the solicitor who prepared and sent out the commission, who stated that "he verily believed that Andrew Cummins and John Hoey, who signed the certificate of acknowledgment, and John Hoey, who made the affidavit of the due taking thereof, were the persons to whom the commission was intended to be directed. The court refused to allow the documents to be received and filed without an affidavit by some person acquainted with the place, who could more clearly identify the parties for those intended. (*Re Booth*, 5 C. B., N. S. 541; 4 Jur., N. S. 1301; 28 L. J., C. P. 138.)

A commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners, one of whom was described as "Edward C. Jones," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other commissioners, but Jones signed the certificate and affidavit of verification, "Edmund C. Jones." The court allowed the document to be received and filed upon the production of affidavits showing that Edmund C. Jones was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "Edward C. Jones," and that there was no other collector of that name in the Company's service. (*Re Price*, 17 C. B. 708.)

An affidavit, verifying the certificate of acknowledgment of a deed by a married woman before special commissioners, ought to show clearly that the persons, who purported to have taken the acknowledgment, were the commissioners named in the commission. The court allowed a defect in that respect to be supplied by affidavit. (*Re Vaughan*, 1 C. B, N. S. 314.)

A commission for taking the acknowledgment of a married woman abroad, under this act, was addressed to "Robert Roger Strong, registrar of the Supreme Court of Wellington, New Zealand;" and on its return the acknowledgment was found to have been taken by "Robert Rodger Strang, registrar of the Supreme Court of Wellington:" it was held, that the objection might be got over by a slight explanation on affidavit showing the identity of the party: it was held also, that an objection that the affidavit was sworn before "I. K., a solicitor of the Supreme Court of Wellington, and a commissioner for taking affidavits there," was insurmountable. (*Re Smith*, 10 C. B., N. S. 344; 9 W. R. 556.)

The court allowed a commission for taking the acknowledgment of a deed by a married woman at Sydney, in New South Wales, to go out with a blank for her christian name, which was unknown, (*In re Appleton*, 1 C. B. 477,) but when the commission is returned, the court will require strict proof of her identity. (*In re Atherton*, 3 Dowl. & L. 26.) The court allowed a commission for taking the acknowledgment of a married woman in Australia, under this section, to go out with a blank for a christian name of the husband, which (the marriage having taken place there) was unknown here. (*In re Legge*, 15 C. B. 364.) Where the acknowledgment of a married woman had been taken in a remote part of India, under peculiar circumstances, in the absence of all the commissioners, before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein. (*Re Stubbs*, 4 Man. & G. 609.) It is not necessary to state in a certificate under this section the specific place at which the acknowledgment of a married woman has been taken; it is enough if the deed appear to have been executed within the terms of the commission. (*Ex parte Hutchinson*, 17 L. J., C. P. 111; 5 C. B. 499; 5 Dowl. & L. 523.)

Where an affidavit verifying the certificate of acknowledgment by a mar-

3 & 4 *Will.* 4, c. 74, s. 83.

ried woman, taken abroad by commissioners under a general commission pursuant to this act, varied from the form given by Reg. Gen., H. T. 1834, in not stating where the acknowledgment was taken, but contained sufficient to satisfy the court that the commission had been *bonâ fide* acted on beyond the seas, the court allowed the certificate to be filed, as the rule of court is not a statutable rule. (*Re Partridge*, 17 C. B. 18; 1 Jur., N. S. 1140.)

The affidavit verifying the certificate of the acknowledgment of a married woman, taken by commission under this section of the act, may be filed subsequently to the filing of the certificate. (*Anon.*, 5 M. & Scott, 52.)

Memorandum of Acknowledgment.

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned:

84. When a married woman shall acknowledge any such deed as aforesaid, the judge, master in chancery or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,

'THIS deed, marked [*here add some letter or other mark for the purpose of identification*], was this day produced 'before me [*or* us] and acknowledged by therein 'named to be her act and deed; previous to which acknowledg- 'ment the said was examined by me [*or* us] separately 'and apart from her husband, touching her knowledge of the 'contents of the said deed and her consent thereto, and declared 'the same to be freely and voluntarily executed by her' (*g*).

(*g*) A certificate of acknowledgment of a deed by a married woman was allowed to be filed where, in lieu of the form given in this section, the commissioners merely certified that the lady was, as they believed, of full age. (*Ex parte Wallis*, 7 C. B., N. S. 303; 6 Jur., N. S. 201.)

Certificate of Acknowledgment.

and also sign a certificate of the taking of such acknowledgment to the effect here mentioned.

And the same judge, master in chancery or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment, which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,

'THESE are to certify that on the day of , 'in the year one thousand eight hundered and , before 'me the undersigned Sir *Nicholas Conyngham Tindal*, Lord 'Chief Justice of the Court of Common Pleas at *Westminster*, '[*or* before me Sir *James Parke*, knight, one of the justices of 'the Court of King's Bench at *Westminster; or* before me the 'undersigned *James William Farrer*, one of the masters in 'ordinary of the Court of Chancery; *or* before us *A. B.* 'and *C. D.* two of the perpetual com- 'missioners appointed for the for taking the acknow- 'ledgments of deeds by married women pursuant to an act 'passed in the year of the reign of his Majesty King

'*William* the Fourth, intituled *An Act* [*insert the title of this* '*Act*]; *or* before us the undersigned *A. B.* and *C. D.* '[two of the commissioners specially appointed pursuant '[to an act passed in the year of the reign of his Ma-'[jesty King *William* the Fourth, intituled *An Act* [*insert the* '*title of this Act*], for taking the acknowledgment of any deed '[by the wife of] appeared personally '[the wife of and produced a certain indenture, marked '[*here add the mark*], bearing date the day of '[and made between [*insert the names of the parties*], and '[acknowledged the same to be her act and deed (*g*): And I '[*or* we] do hereby certify that the said was, at the '[time of her acknowledging the said deed, of full age and '[competent understanding, and that she was examined by me '[*or* us] apart from her husband, touching her knowledge of '[the contents of the said deed, and that she freely and volun-'[tarily consented to the same.' 3 & 4 *Will.* 4, *c.* 74, *s.* 84.

(*g*) When the above form of certificate to be made by commissioners for taking the acknowledgments of married women will not suit the particular circumstances of the case, the Court of Common Pleas will make a special order for the alteration in that case. Thus where lands were vested in two infant females, one of whom was married, and a conveyance had been ordered to be made in pursuance of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, ss. 6, 7, the commissioners for taking the acknowledgment having refused to take the acknowledgment, the court directed them to take it, and to omit the words "of full age" in the certificate. (*Re Luke*, 1 Scott, 80; *S. C.*, 1 Bing. N. R. 265.) In general the certificate will not be filed unless the affidavit state positively that the woman is of full age. A statement of belief is not sufficient. (*Re Coverley*, 8 Scott, 147.) The certificate of the acknowledgments of two married women, taken under this act, stated them to have acknowledged the execution of indentures of lease and release; they were parties only to the indenture of release. The court, upon motion, refused to order the amendment of the certificate. (*Ex parte Witty and Salt*, 9 Dowl. P. C. 838; 3 Man. & G. 201; *Re White*, 3 Scott, N. R. 591.)

Provision for wife.

Where property is sold under the compulsory provisions of an act of parliament, that part of the rule of Hilary Term, 4 Will. 4, which directs inquiry to be made of a married woman at the time of acknowledging a deed to convey her interest under this statute, whether any provision is made for her in consideration of her so giving up her interest, is inapplicable. (*Re Foster*, 7 C. B. 120.)

Where the amount of the consideration which forms the inducement for a married woman to give up her interest in an estate was too small (40*l.*) to form the subject of a settlement, and the arrangement was that the amount should be paid to the wife, the court allowed the acknowledgment to be registered. (*Ex parte Webber*, 5 C. B. 179.)

The court refused to allow a certificate of acknowledgment by a *feme covert* to be filed, where it appeared from her answers to the inquiry of the commissioner as to whether she intended to give up her interest in the estate without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will, although it was shown by another affidavit that she perfectly understood that to be no provision, inasmuch as the will was revocable. (*Re Dixon*, 4 C. B. 631.)

The officer appointed under this section is justified in declining to receive and file an acknowledgment of a deed by a married woman, conveying her interest in property, where a provision is made for her in lieu of such her interest, and the commissioner merely certifies that the deed

3 & 4 *Will.* 4, c. 74, s. 84.

declaring the trusts of that provision "has been already engrossed, and was produced before him;" and the court will not make any order on the subject until they are satisfied that the deed has been duly executed. (*Re Dallas*, 10 C. B., N. S. 346; 30 L. J., C. P. 282.)

Filing of Certificate with Affidavit.

Certificate, with affidavit verifying the same, to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the court.

85. Every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars, as to the consent of the married woman, as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas (*h*).

(*h*) See the General Order as to affidavits, Nov. 24, 1862 (13 C. B., N. S. 2, *post*, p. 424); and as to affidavits of acknowledgments in any colony, &c., Gen. Order, Jan. 13, 1863 (13 C. B., N. S. 405, *post*, p. 424.)

In Scotland and Ireland the affidavit must be sworn before a commissioner for taking affidavits in the Court of Common Pleas at Westminster, appointed pursuant to the statute 3 & 4 Will. 4, c. 42, s. 42.

In France the affidavit may be sworn before the consul, vice-consul, or any attorney or attornies of either of the superior courts at Westminster.

The certificate of acknowledgment of a deed by a married woman described her as Mary, the reputed wife of A. B., otherwise Mary S., spinster; she was similarly described in the affidavit of verification and in the deed itself. The court directed their officer to receive and file the certificate and affidavit. (*Ex parte Francis*, 5 C. B. 498; 17 L. J., C. P. 110.) The acknowledgment of a deed by a married woman, where the affidavit, verifying such acknowledgment, varied in its title and commencement from the form prescribed by the rule of H. T., 4 Will. 4, was allowed to pass; the affidavit being one upon which perjury could be assigned. (*Re Shaw*, 3 Man. & G. 236.) The certificate of acknowledgment of a married woman to bar her dower, taken under a special commission, was verified by an affidavit written on paper, contrary to the usual practice of the court, by which such documents are required to be on parchment. It was held, that the affidavit and other documents might be received and filed. (*Ex parte Carr*, 17 L. J., C. P. 107; 5 C. B. 496; 5 Dowl. & L. 488.) An acknowledgment of a deed by a married woman under this act was taken in 1842, and the certificate and memorandum thereof duly signed by the commissioners, but by some inadvertence on the part of the solicitor employed in the transaction there was no affidavit of verification and the documents were not filed. After the lapse of thirteen years the court allowed the certificate to be received and filed upon an affidavit by the surviving commissioner, stating that it had always been his practice, and as he believed that of his co-commissioner, to make all inquiries of the married woman before taking her acknowledgment, and that from the circumstance of his having signed

3 & 4 *Will.* 4, *c.* 74, *s.* 85.

the certificate and memorandum, he verily believed that all proper inquiries had been made on this occasion, though, from the lapse of time, he was unable positively to state what the answers were. (*Re Warne*, 15 C. B. 767.)

The affidavit verifying the certificate of a married woman's acknowledgment of a deed may be made by one of the commissioners who took the acknowledgment, if he be a practising attorney, and the other commissioner has no interest in the matter. (*Re Schofield*, 3 Bing. N. C. 293; 3 Scott, 657.)

The court directed an acknowledgment by a married woman to be filed, although it was doubtful whether there was not *an erasure* in the jurat of the affidavit of acknowledgment, it being certain that there was a *rasure* in it. (*Re Millard*, 6 Dowl. & L. 86, C. P.)

The court refused to direct the officer to receive a certificate and affidavit of an acknowledgment, the affidavit having an interlineation in an important part, without anything to denote that the interlineation had been made before the affidavit was sworn. (*Re Worthington*, 5 C. B. 511; *Re Page*, 5 Dowl. & L. 475.) The court allowed a certificate of an acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit, there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. (*Re Bingle*, 15 C. B. 449.) It is no objection to the filing of a certificate of acknowledgment under this act, that the date of the certificate is written on an erasure. (*Anon.* 16 C. B. 574.)

The court permitted the affidavit verifying the notarial certificate of an acknowledgment under this act to be received, notwithstanding an erasure in the jurat, the court being satisfied that there had been a substantial compliance with the statute, and the erasure having arisen from circumstances over which the parties had no control. (*Re Denton*, 6 C. B., N. S. 287.) The jurat of an affidavit of the due taking of an acknowledgment at Sydney had an interlineation in the body of it, and an erasure in the jurat. The court refused to allow it to be filed. (*Re Tierney*, 15 C. B. 761.) In the jurat of an affidavit of the due taking of an acknowledgment at Calcutta, the name of one of the deponents was interlined: it was held, that the affidavit could not be received. (*Re Fagan*, 5 C. B. 436.) The court refused to allow the amendment of the certificate of the acknowledgment by a married woman of a deed conveying an interest in land where the commission issued in January, 1848, and the certificate erroneously stated the acknowledgment of the deed to have been taken in February, 1847. (*Re Millard*, 5 C. B. 753.)

In the case of an acknowledgment taken abroad, the court will not dispense with an affidavit of verification, sworn and authenticated according to the local law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule. (*Re Crawford*, 4 C. B. 626.) The court refused to direct the proper officer under 3 & 4 Will. 4, c. 74, to receive and file an acknowledgment, where the affidavit of verification was sworn before the British minister at Florence, it not appearing that there was any difficulty in getting it sworn before some properly-constituted authority at that place. (*Re Baroness Dunsany*, 7 C. B. 119.)

Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken. In this country it is necessary that it should appear that the acknowledgment was taken before commissioners duly authorized to act in the place where it is taken. But the same reasons do not apply in the case of an acknowledgment taken abroad. (*Re Shufflebottom*, 6 Scott, 898; *Re Partridge*, 17 C. B. 18.)

The court allowed a certificate of an acknowledgment taken at Adelaide under this act to be filed, notwithstanding the affidavit of verification omitted to mention the place where the acknowledgment was taken, it appearing by affidavit that the acknowledgment was taken at that place. (*Re Saunderson*, 8 C. B., N. S. 93; 6 Jur., N. S. 1373; 29 Law J., C. P. 264; 8 W. R. 417.) A statement in the affidavit of verification of an acknowledgment under this statute, that it was taken "at Madeira," is sufficiently precise. (*Ex parte Hutchinson*, 5 C. B. 499; 5 Dowl. & L. 523.)

3 & 4 Will. 4, c. 74, s. 85.

The court permitted a certificate of acknowledgment under this act to be filed, although the affidavit to excuse the want of a notarial certificate (which was sworn by one of the commissioners taking the acknowledgment, and was in other respects sufficient,) erroneously stated that the affidavit verifying the certificate was sworn by the *other* commissioner, when in fact it was sworn by the deponent himself. (*Re Taylor*, 4 Scott, N. R. 328; *Re Warburton*, 3 Man. & G. 633.)

Commissioners to take affidavits in Scotland and Ireland.

By stat. 3 & 4 Will. 4, c. 42, s. 42, the superior courts of common law and equity at Westminster have the same powers of granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they then had in the counties in England and Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes then in force, (see 29 Car. 2, c. 5; 6 Geo. 3, c. 50, s. 2; 5 Geo. 4, c. 106, ss. 9, 10; 11 Geo. 4 & 1 Will. 4, c. 76, s. 18,) and persons falsely swearing before persons so authorized are liable to the penalties of perjury. In Scotland and Ireland it should therefore seem that the affidavit must be sworn as required by the Rule Hilary Term, 4 Will. 4, or before a person authorized, under the stat. 3 & 4 Will. 4, c. 42, s. 42, to take affidavits in those countries. The stat. 55 Geo. 3, c. 157, empowers the courts of law and equity in Ireland to grant commissions for taking affidavits in all parts of Great Britain. An affidavit verifying the certificate of acknowledgment, taken in pursuance of the 79th section of this act, was sworn in Ireland, not before a commissioner appointed for taking affidavits in the Court of Common Pleas, there having been no such commissioner appointed for Ireland under the 3 & 4 Will. 4, c. 42, s. 42, but before a commissioner for taking affidavits in the Court of Common Pleas in Ireland. The officer appointed by the commissioner to file the certificates and affidavits under the 89th section of this act having declined to receive the certificate and affidavit, on the ground that the latter was not sworn before a person properly qualified, on a motion to have them filed, *Tindal*, C. J., said the statute, and the rules of court made in pursuance thereof, require the affidavit of the taking of the acknowledgment to be sworn before a judge of this court, or a commissioner appointed for taking affidavits in this court. The affidavit in this case is a mere nullity; perjury could not be assigned upon it. (*Re Anderson*, 2 Scott, 626; 2 Bing. N. C. 435.)

Ireland.

British consul.

It was decided that a British consul at a foreign port has authority under the statute 6 Geo. 4, c. 87, s. 20, (which authorizes the consul-general or consul to administer an oath whenever the same should be required, and to do all such notarial acts as a notary public may do,) to certify as to the handwriting and authority of the party before whom is sworn the affidavit verifying the certificate of taking an acknowledgment of a married woman (abroad), under this act. (*Re Barber*, 2 Scott, 436; 2 Bing. N. C. 268; 4 Dowl. P. C. 640.) Although a British consul in a foreign country has not power, *per se*, to administer oaths of verification of the proceedings before a commission under the 28th section of this act, yet if a notary public in the foreign country certify that by the laws of that country the British consul has power to administer an oath, an affidavit of verification made before the consul will be received. (*Ex parte Hutchinson*, 5 Dowl. & L. 523; 5 C. B. 499.) The court allowed an acknowledgment to be received and filed under this act, where the affidavit verifying the same was sworn before "the provisional British consul for the Society Islands," it appearing that there was no notary or any other official person before whom it could be sworn within many hundred miles. (*Re Darling*, 2 C. B. 347.) The court dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu under this act, it being sworn that there was no English notary resident in the island. (*Re Hurst*, 15 C. B. 410.)

The court refused to allow a certificate of acknowledgment taken in Ontario under this act to be filed, when the affidavit of verification purported to be sworn before J. S., an attorney of the supreme court. The affidavit must be sworn before a magistrate, and his authority to administer oaths certified by a notary public. (*Re Woodman*, 11 C. B., N. S. 630)

There being sufficient upon the documents reasonably to satisfy the court that the commission has been *bonâ fide* executed, the court permitted

them to be received, though the notarial certificate did not in terms verify the signature of the justices of the peace before whom the affidavit of verification purported to be sworn. (*Re Foster*, 5 C. B., N. S. 544; 28 Law J., C. P. 138.) 3 & 4 *Will.* 4, *c.* 74, *s.* 85.

It is no objection that the notarial certificate is on paper instead of parchment. (*Re Cock*, 5 C. B., N. S. 543; 28 Law J., C. P. 138; *Ex parte Carr*, *ante*, p. 410.)

By stat. 18 & 19 Vict. c. 42, ss. 1, 2, 3, oaths may be administered by ambassadors and other officers exercising their functions in any foreign country, and by consuls exercising their functions in any foreign place. Affidavits taken before such ambassadors, &c., may be used in the courts in the United Kingdom. Documents are to be evidence without proof of seal or signature of ambassador or other official person.

A notarial certificate is not required when the affidavit is sworn before any British diplomatic minister or consular agent authorized by the last act.

Prior to the passing of the last act, an affidavit sworn before the British consul at Paris, to obtain an order to dispense with the concurrence of the husband of a married woman under the 91st section of this act, was not admissible. (*Re Cooper*, 16 C. B. 225.)

The court directed the officer to receive an affidavit verifying the certificate of an acknowledgment by a married woman, under this act, made by a notary public at Carlsruhe in Germany, the commissioner himself declining to make the affidavit. (*Re Pearsall*, 2 Scott, N. R. 188; 1 Man. & G. 973; 9 Dowl. P. C. 46.) An affidavit of a married woman's acknowledgment of a deed in foreign parts was admitted, on showing that affidavits are not usually signed at Hamburg. (*Ex parte Birch*, 4 Bing. N. C. 894.) *In re Eady*, (6 Dowl. 615,) it was held, that an affidavit made in Germany, verifying the certificate of acknowledgment of a married woman resident in that country, should be made, not before the British consul, but before a native court. It was also held to be no objection to the affidavit that it was originally in the German language, if it were translated, and the translation verified by a notary. The oath, too, might likewise be administered in German, if it were interpreted to the deponent. Germany.

Where an acknowledgment of a married woman was taken at Milan, the court allowed a certified copy of an act of the Imperial Royal Civil Tribunal of that city to be received and filed in lieu of the affidavit verifying the certificate of the commissioners upon the production of an affidavit from a competent party, showing that by the law of that country depositions on oath are always deposited amongst the records of the court, and that office or certified copies only are delivered out to the parties. (*Re Clericetti*, 15 C. B. 762.) Milan.

An affidavit verifying the due taking, in Russia, of the acknowledgement of a deed by a married woman, made before the British consul, was held sufficient; it having been stated in the notarial certificate, made in a former case, that the laws of Russia do not grant authority to any magistrate to administer oaths to any person whatever. (*Davy* v. *Maltwood*, 2 Man. & G. 424; *Ex parte Bayley* or *Daly*, 2 Scott, N. R. 823; 9 Dowl. P. C. 380; *Re Barber*, 4 *Ib.* 640; *Re Eady*, 6 *Ib.* 615.) The court directed an acknowledgment under 3 & 4 Will. 4, c. 74, s. 79, to be received and filed under sect. 85, where the affidavit verifying the certificate of the commissioners was sworn before A. B., "minister of the British chapel at Moscow," it being deposed to in an affidavit by the secretary of the Russia company in London, that A. B. was in the habit of administering oaths to British subjects there, and certified by two merchants at Moscow that there was no English notary public or British consul or vice-consul within 400 miles of that city. (*Re Pickersgill*, 6 Man. & G. 250; 6 Scott, N. R. 831.) An acknowledgment by a married woman was taken before commissioners in India, pursuant to the provisions of this act, and an affidavit to that effect was sworn before a magistrate having competent authority. A person, describing himself as major-general, certified that the affidavit had been so sworn, and that the authority was competent, and stated that there was no notary at the place. On affidavits of the general's handwriting and rank, the court held the certificate sufficient. (*Re Daly*, 17 L. J., C. P. 1; 5 C. B. Russia. India.

3 & 4 *Will.* 4, *c.* 74, *s.* 85.

128; 5 Dowl. & L. 333.) The court, under *very* peculiar circumstances, allowed a commission for taking the acknowledgment of a married woman in India to be amended by inserting therein the names of two gentlemen before whom the acknowledgment had been taken, and who were not originally named therein as commissioners, and also dispensed with a notarial certificate, and received an affidavit sworn before a "political agent;" the place at which the acknowledgment was taken being a very remote part of India, and it appearing, though not by affidavit, that there was no notary public, nor any magistrate before whom an oath could be taken within several hundred miles. (*Re Stubbs*, 5 Scott, N. R. 327.)

America.

The affidavit verifying the acknowledgment of a married woman, taken in Philadelphia, commenced as follows:—"Be it remembered, that on the 10th December, 1840, came before me J. B., Esq., alderman of Philadelphia, &c., J. S., &c., and in due course of law deposed and swore, &c." It then proceeded in the form of an affidavit, was subscribed by the deponent, and was accompanied by the usual notarial certificate. The court directed the affidavit to be received, although it was not in exact compliance with the rule of H. T., 4 Will. 4. (*Ex parte Shaw*, 9 Dowl. P. C. 839.) The court refused to file the certificate of an acknowledgment by a married woman, resident in America, verified by an affidavit made before a notary public, without an affidavit that notaries public are the proper officers for taking affidavits in America; and also as to the identity of the commissioners. (*Anon.*, 3 Jur. 125; *S. C.*, nom. *Ex parte Mann*, 7 Scott, 142; 5 Bing. N. C. 226; *Re Price*, 17 C. B. 708.) Upon an acknowledgment of a conveyance by a married woman taken in a township of Pennsylvania, the court, in lieu of notarial certificate, received a certificate of an officer describing himself as "the prothonotary and clerk of the Court of Common Pleas in and for Centre County, Pennsylvania," it being sworn that there was no notary public within eighty miles of the place. (*Re Way*, 6 Man. & G. 1046; 7 Scott, N. R. 999.) The court refused to allow an affidavit and notarial certificate of an acknowledgment to be filed under this section, the affidavit purporting to be sworn before one G., a commissioner for taking affidavits in the Court of Queen's Bench, Canada West, and the notary certifying him to be a commissioner of that court, and as such qualified to administer oath. (*Re Street*, 2 C. B. 364.)

The court allowed a special commission for taking the acknowledgment in America, the certificate of the taking thereof and the affidavit of verification to be filed pursuant to this section, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not show where the affidavit was sworn. (*Re Chandler*, 1 C. B., N. S. 323.)

Effect of filing Certificate, relation back.

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

86. When the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment (*g*).

(*g*) A deed executed by a married woman to pass real estate, and indorsed with a memorandum of acknowledgment before a judge, under the 84th section of this act, is not effectual unless a certificate of that acknowledgment be filed of record in the Court of Common Pleas as required by this section. (*Jolly* v. *Handcock*, 7 Exch. 820; 22 Law J., Exch. 38.)

The obvious meaning of this section is this: the certificate, when filed, is to have relation back to the date of the acknowledgment, when it shall itself take effect; but if the certificate be not filed, that then the acknowledgment shall not have any effect whatever. It is clear, that the legislature passed this statute for the purpose of enabling married women to perform certain acts which are to be considered as valid only when done in a certain prescribed manner; and further, that the fact of those acts having been done in the manner required is also to be recorded. (*Jolly* v. *Handcock*, 7 Exch. 824.)

3 & 4 *Will.* 4, *c.* 74, *s.* 86.

Index of Certificates.

87. The officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

The officer with whom the certificates are lodged to make an index of the same.

Copies of Certificate—Evidence.

88. After the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

Officer to deliver a copy of certificate filed, which shall be evidence.

Power of Court of Common Pleas defined.

89. The Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit, touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination, memorandums, certificates, affidavits, &c.

3 & 4 Will. 4, c. 74, s. 89.

Officer to hold office during good behaviour;

and subject to any regulations which may be hereafter made by Parliament.

The 25 & 26 Vict. c. 96, enacts, that the officer appointed under the last section and his successors, shall respectively from and after the 7th of August, 1862, hold such office and appointment during good behaviour.

2. Provided always, that the said officer and his successors shall hold the said office subject to any regulations which may be hereafter made by parliament concerning the same or the duties thereof; and in the event of such office being abolished, or of the duties thereof being transferred or altered by any act to be hereafter passed, or of any alteration being made by competent authority in the fees, emoluments, or remuneration to be allowed to such officer, the said officer and his successors shall not be entitled to make any claim to compensation which he or they would not have been entitled to make if this act had not passed.

Disposition of Equitable Interests.

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

90. In every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of the manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid (*i*).

(*i*) A *feme covert* who surrenders copyhold lands ought previously to be examined separately from her husband by the steward of the manor, although by special custom such examination may be made before two customary tenants. (*Driver* d. *Berry* v. *Thompson*, 4 Taunt. 298. See 1 Watk. on Cop. by Cov. 89.) A custom in a manor required that the consent of the husband to the surrender by his wife should be expressed in the surrender and admission. A surrender was made by the wife at a general court, and the husband was present at that court, but in the surrender his consent was not expressed: it was held, that the surrender was inoperative, and that the court could not infer from circumstances that the husband's consent had been given. It seems that such a surrender would not be good even if the husband were divested of all property at the time. (*Doe* d. *Shelton* v. *Shelton*, 4 Nev. & M. 857; 3 Ad. & Ell. 265; 1 Harr. & Wol. 287.)

It seems that a special custom may authorize a surrender by the wife alone, with the assent of the husband. (*Taylor* v. *Phillips*, 1 Ves. sen. 229; 1 Watk. on Cop. 64). But a custom for the wife to dispose of her copyhold estate by surrender without the husband's assent is bad. (*Stevens* v. *Tyrrell*, 2 Wils. 1. See *White* v. *Driver*, 4 Taunt. 294; *Doe* d. *Nethercote* v. *Bartle*, 5 B. & Ald. 492.)

It was held, that a surrender of a copyhold estate, to which a *feme covert* was entitled, after secret examination by the steward, to the use of her husband, in his presence and with his consent, testified by his immediate admittance, was valid. (*Scamon* v. *Maw*, 3 Bing. 378; *S. C.*, 11 Moore, 243.)

A surrender by the wife of a copyholder with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, was held effectual to bar her right of freebench, if any such existed by special custom, although at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises. (*Wood v. Lambirth*, 1 Phill. C. C. 8.)

3 & 4 *Will.* 4, *c.* 74, *s.* 90.

Dispensation with Husband's Concurrence.

Court of Common Pleas, in the case of a husband being lunatic, &c. may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

91. Provided always, and be it further enacted, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred (*k*): provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband.

Husband of unsound mind.

(*k*) Upon a motion on the part of a married woman to convey her interest in property without the concurrence of her husband, on the ground that he is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is a lunatic *at the time of the application*. (*Re Turner*, 3 C. B. 166.) The court refused to dispense with the concurrence of the husband of a married woman in the conveyance of her interest in property, upon an affidavit merely stating that the husband and wife were living apart, and that the former was in a very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed or other legal instrument, but required an affidavit showing an effectual application to him for the purpose. (*Re Murphy*, 5 Scott, N. R. 166; 4 Man. & G. 635.)

3 & 4 Will. 4, c. 74, s. 91.

A husband being a minor the court granted a rule under this section to enable the wife to execute a conveyance of her separate property without his concurrence. (*Re Haigh*, 2 C. B., N. S. 198; 3 Jur., N. S. 371; 26 Law J., C. P. 209.)

The court granted an order to dispense with the concurrence of the husband in a conveyance by the wife of her separate property under this section, upon an affidavit showing that he had absconded and had not been heard of since the year 1837, although it also appeared that she had in the meantime married again. (*Ex parte Yarnall*, 17 C. B. 189.)

The court dispensed with the concurrence of the husband (who was living separate from his wife) in the conveyance of property in which the wife had a separate interest under the will of her deceased father, where the husband had refused to execute the deed. (*Re Perrin*, 14 C. B. 420.)

Husband abroad.

Upon the affidavit of a married woman that her husband had absconded in 1831, after committing an act of bankruptcy, had never been heard of since, but was believed to be in America, leave was granted for her to pass her life interest in certain freehold property, pursuant to the 77th and 91st sections of this act. (*Ex parte Mary Gill*, 1 Bing. New Rep. 168. See Cruise's Dig. vol. vii. p. 1, 4th ed.) The Court of Common Pleas authorized a *feme covert* to convey her copyhold property, her husband having resided abroad for more than twenty years with another woman. (*Ex parte Shirley*, 5 Bing. N. S. 226; 7 Dowl. P. C. 258.) In support of an application for an order to dispense with the concurrence of the husband of a married woman to the deeds of conveyance of certain property, under this section, it was sworn that the husband had absconded from home, and had since sailed for Port Phillip; that since the departure of the ship, his wife had heard nothing of him, and that she believed him to be on his said voyage; that her husband had been made a bankrupt, and that her interest in the property in question passed to his assignees; and also, that, her husband having sold the property, she was desirous of completing the conveyance; held sufficient. (*Ex parte Stone*, 9 Dowl. P. C. 843.) The court granted leave to take the acknowledgment of a married woman without the concurrence of her husband, under sections 75 and 91 of this act, where it appeared that the parties lived together only seventeen weeks after marriage, in 1829, when the husband went away, and the wife after many inquiries was not able to find him. (*Anon.* 2 Jurist, 945, C. P.) The court refused, in 1847, to dispense with the concurrence of a husband, upon an affidavit merely stating that he entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand; and that she believed it was his intention never to return. (*Ex parte Gilmore*, 3 Com. B. 967.) The court will not grant a rule to enable a married woman to execute a conveyance without her husband's concurrence, upon the mere statement that the husband, a seaman, has gone abroad, and has not been heard of for some years, and that the wife has been informed that he is dead. The affidavit must show some reasonable ground for presuming the statement to be true. (*Ex parte Taylor*, 7 C. B. 1.)

To warrant the court to make an order, under this section, to dispense with the concurrence of the husband in the conveyance of the wife's property, on the ground of his being beyond the seas, it must be shown that he has absented himself under such circumstances as to induce the court to infer that he has no intention to return to this country. (*Re Squires*, 17 C. B. 176.) An order will not be granted when it appears that the husband is in correspondence with the wife, and remitting sums of money for her support, however small. (*Ib.*)

By a marriage settlement made in 1844, the freehold property of the intended wife was conveyed to trustees upon trust to permit the husband to receive the rents during coverture, or until the wife should by writing under her hand otherwise direct or appoint, and after such direction or appointment, upon trust for the separate use of the wife, and after her death for her appointee. The deed also contained a power of sale to be exercised by the trustees "at the request and by the direction of the husband and wife during their joint lives, such request and direction to be testified by some writing

under the hands and seals of the husband and wife." The husband received the rents and profits down to 1851, when the wife exercised her power of appointment by the trustees to receive the rents and profits, and to apply them to her separate use. In 1852, the husband went to Australia and had not been heard of since December, 1857, when he was at Geelong; and the wife deposed to her belief that he would never return to this country. The court refused to dispense with the concurrence of the husband in the conveyance of the property under this section, it also appearing that no application had been made to him to concur. (*Re Eden*, 5 C. B., N. S. 232; 28 Law J., C. P. 4.) The court made an order, under this section, to dispense with the concurrence of the husband in a conveyance of the wife's property, upon an affidavit stating, that, having fallen into distressed circumstances, the husband, *about two months before*, left England for Australia, with the intention of never returning, and that he had ever since been living separate and apart from his said wife. (*Re Kelsey*, 16 C. B. 197.)

3 & 4 *Will.* 4, *c.* 74, *s.* 91.

Husband and wife separated.

An order that a married woman might be at liberty to make, without the concurrence of her husband, a disposition of lands to which she was entitled as tenant in tail in possession, and tenant in fee simple, was made on affidavit that the wife was entitled to the property, that she and her husband lived separate from each other, and that he had been found a lunatic by inquisition in 1833. (*Ex parte Thomas*, 4 Moore & Scott, 331.) The concurrence of the husband, in the conveyance by his wife of her separate property, will be dispensed with, where the parties are living apart by mutual consent, and the husband refuses to join in the execution unless part of the purchase-money is paid to him. (*Re Woodcock*, 1 Man. & G., N. S. 437.)

So an order for dispensing with the husband's concurrence was made on affidavit, stating the marriage in 1816; that, in 1820, the husband left his wife, and that she had never heard of or received any information respecting him since, and that his present residence was altogether unknown to her; that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage; and that, if the application were not granted, she would be liable to incur a forfeiture. (*Ex parte Shuttleworth*, 4 Moore & Scott, 332, n. (b).)

Affidavits.

In support of an application for a married woman to be permitted to convey her interest in an estate, without the concurrence of her husband, an affidavit was produced, sworn by the sister of the married woman, who stated that the person on whose behalf the application was made was speechless, the court refused to grant the application without an affidavit that the married woman herself had been examined. (*Re Williams*, 2 Scott, N. R. 120; 1 Man. & G. 881; 9 Dowl. P. C. 72.) The court will not dispense with the affidavit of a married woman herself, upon an application under this section, for an order for the conveyance of the property of the wife without the concurrence of her husband. (*Ex parte Bruce*, 9 Dowl. P. C. 840.)

The court refused to grant a rule to enable a married woman to execute a conveyance without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent, but required an affidavit showing that an application had been made to the husband to execute the deed, and that he had refused to do so. (*Ex parte Trenery*, 1 C. B., N. S. 187.)

The court will not permit a married woman to execute a conveyance under this section without the concurrence of her husband, where he had refused to concur upon an affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him. (*Re Price*, 13 C. B., N. S. 286.)

Upon a motion under this section to dispense with the concurrence of the husband in a conveyance of the wife's separate interest in certain property, in addition to an affidavit that the parties were living apart by mutual consent, and that the husband had been applied to but had refused to execute the conveyance, the court required an affidavit negativing the

3 & 4 *Will.* 4, *c.* 74, *s.* 91.

wife's receipt of any allowance from her husband. (*Ex parte Fish*, 9 C. B., N. S. 715.)

An order to enable a married woman to make a conveyance of her property without her husband's concurrence, cannot be made without an affidavit from her negativing any communication from him. But where a delay until the following term would have caused great inconvenience to the parties, the court gave directions for the order to be drawn up in vacation, on the production of an affidavit. (*Re Horsfall*, 3 Man. & G. 132.) An affidavit of a married woman to obtain an order of the court, empowering her to make a conveyance of her property without her husband's concurrence, is sufficient if sworn (where the party is residing abroad) before an officer, whom the certificate of a notary public certifies to be a person empowered by law to take affidavits. (*Re Schiff*, 1 Dowl. & L. 911.)

Where an application is made to the court to dispense with the concurrence of the husband in a conveyance of the wife's property, an affidavit describing her as "widow" is informal. (*In re Noy*, 7 Scott, N. R. 434.) The court declined to receive an affidavit in which she was described as "wife or widow." (*Re Anderson*, 2 C. B., N. S. 811.)

Upon a motion to dispense with a husband's concurrence in a deed for the conveyance by the wife of her separate property, the affidavit must contain the addition or description of the husband. (*Re Gardner*, 1 C. B., N. S. 215.)

The affidavit, upon which a motion is founded under this statute, must describe the deponent "as the wife of, &c.," even though circumstances are disclosed, showing a well-grounded belief that the husband is dead. (*Ex parte Sparrow*, 12 C. B. 334.)

The following form of rule to dispense with the husband's concurrence in the conveyance of property, to which the wife alone was entitled, was made in *Ex parte Duffill*, 5 Man. & G. 378; 6 Scott, N. R. 30):—"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to dispose of, release, surrender or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce." (*Ib.*)

XVIII. Ireland.

Ireland.

92. This act shall not extend to Ireland, except where the same is expressly mentioned (*l*).

(*l*) By 4 & 5 Will. 4, c. 92, the provisions of this act have been extended to Ireland, with the omission of sections 4, 5 and 6 (*ante*, pp. 327—330), relating to lands held by ancient demesne, and sections 50, 51, 52, 53, 54 (*ante*, pp. 370—374), 66, 76, 90, relating to copyholds (see *ante*, pp. 382, 388, 416.) The other variations between the two statutes have been already noticed. (See *ante*, pp. 315, 339, 344, 345, 361, 384, 387, 389.)

The clauses in 4 & 5 Will. 4, c. 92, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under the Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict. c. 60, s. 340.

This act applies to lands locally situate in the town of Berwick-upon Tweed. (6 & 7 Will. 4, c. 103, s. 6.)

XIX. Orders of the Court of Common Pleas, made in pursuance of the above Act, in Hilary Term, 1834.

3 & 4 *Will.* 4, *c.* 74.

"Whereas it has been found expedient to make alterations in the General Rules made in Michaelmas term last by this Court, for the purpose of carrying into effect the statute passed in the 3rd and 4th years of the reign of his present Majesty, cap. 74, intituled 'An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance;"

"And whereas it is necessary to make Orders touching the amount of the reasonable Fees and Charges to be taken by the several persons appointed to carry the powers of the said act into execution; and it will be convenient that all the Orders and Regulations made by the Court under the said act should be contained in the same rule:

"Now it is hereby ordered, that the said General Rules be and the same are hereby revoked; provided that this present Rule shall not be construed in any respect to invalidate any proceedings which, before the 1st day of March next ensuing, shall have been taken, pursuant to the direction of the said Rules of Michaelmas term last:

"And it is hereby further ordered, that, where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.

"And it is further ordered, that before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear to them or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot or at the back thereof. (See *ante*, pp. 408, 409.)

"And it is hereby further ordered, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed) be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the counties palatine of Lancaster or Durham, and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent (or, if more than one person join in the affidavit, that one or more of the deponents) knew the person or persons making such acknowledgment; and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his (deponent's) knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor,

3 & 4 *Will.* 4, c. 74.

or agent, so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit: And that previously to such acknowledgment being taken, the deponent had inquired of such married woman (or if more than one, of each of such married women) whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same had been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (judge, master, or) commissioners.

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested shall by deed be described to be situate.

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary, or such affidavit may be made where it is found convenient by one of the said commissioners, with such variations in the form thereof as shall be necessary in that behalf.

"AND IT IS HEREBY FURTHER ORDERED, that the certificates and affidavits verifying the same, shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or a judge.

"AND IT IS HEREBY FURTHER ORDERED, that the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—(*n*)

	£	*s.*	*d.*
To a judge or master (*o*), for taking the acknowledgment of every married woman (*p*), of which 7*s.* 6*d.* will be paid, in the case of a judge, to his clerk, and the residue thereof will be paid over to the treasury; and in the case of a master, the whole will be paid over to the treasury, or the Fee Fund Account of the Court of Chancery	1	6	8
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13*s.* 4*d.* for each commissioner	1	6	8
To each commissioner when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses	1	1	0
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses	2	2	0
To the clerk of the peace, or his deputy, for every search	0	1	0

(*n*) See *ante*, p. 415, s. 89.

(*o*) The office of Master in Chancery is now abolished. (15 & 16 Vict. c. 80, s. 1.) The fee of taking an acknowledgment by judge of a county court is one pound.

(*p*) By an order made in Michaelmas term, 1852:—In pursuance of the Common Law Procedure Act, 1852, among the fees to be taken at the judges' chambers in the superior courts of common law is the following (all other fees being thereby abolished):—Every acknowledgment by married women, 10*s.* (1 Ell. & Bl. 261, 265, 267.)

	£	s.	d.	3 & 4 *Will.* 4, c. 74.
To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0	
To the same for every further complete number of 50 names, an additional	0	2	6	
To the officer for every search.....	0	1	0	
To the same, for every official copy of the certificate	0	2	6	
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0	
To the same, for every further complete number of 50 names additional	0	2	6	
To the same, for preparing every special commission, including a fee of 5*s.* to the clerk of the Chief Justice or other judge for the fiat	0	15	0	
To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3rd and 4th Will. 4, c. 74	0	5	0	

"AND IT IS HEREBY FURTHER ORDERED, that the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls, shall be as follows:—

	£	s.	d.
For the indorsements on the deed of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord, steward or deputy steward, each indorsement of memorandum 5*s.* together	0	10	0
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of 72 words.....	0	0	6
For taking the consent of each protector of settlement of lands..	0	13	4
For taking the surrender by each tenant in tail of lands.....	0	13	4
For entries of such surrenders, or the memorandums thereof, in the court rolls, at per folio of 72 words.....	0	0	6

N. C. TINDAL.
J. A. PARK.
J. B. BOSANQUET.
E. H. ALDERSON."

The following additional Rules were made in Trinity Term, 1834:—

"IT IS ORDERED, that from and after the last day of this term, where such parts of the affidavit, verifying the certificate of acknowledgment taken in pursuance of the late act of parliament, respecting fines and recoveries, as state 'the deponent's knowledge of the party making the acknowledgment, and her being of full age,' cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

"AND IT IS FURTHER ORDERED, that where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken shall be taken for the first acknowledgment only.

"And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

3 & 4 *Will.* 4, c. 74.

"And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

"In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL.
J. A. PARK.
S. GASELLE.
J. B. BOSANQUET."

GENERAL ORDER.

AFFIDAVITS of Verification of Certificates of Acknowledgments under 3 & 4 Will. 4, c. 74.

Affidavits under 3 & 4 Will. 4, c. 74.

1. From and after the first day of Easter Term next inclusive, every affidavit of the verification of certificates of acknowledgments of deeds of married women, except as herein after provided, shall be drawn up in the first person and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject; provided that this rule shall not be applicable to any such affidavits where the acknowledgments have been taken out of England and Wales under special commissions issued prior to the said first day of Easter Term next.

2. The officer with whom all such certificates are filed is empowered in the interval between the date of this rule and the said first day of Easter Term next to receive and file any affidavits of verification, whether drawn up in the first or third person.

By the Court.*

* November 24th, 1862, 13 C. B., N. S. 2. See forms of affidavits, *post*.

GENERAL ORDER.

AFFIDAVITS on Acknowledgments.

1863. Affidavits on acknowledgments.

With respect to acknowledgments of deeds by married women taken in any colony or foreign possession being part of the dominions of her Majesty, —It is ordered, that affidavits verifying the same made before any court or judge, magistrate, commissioner, notary public or other person authorized to administer an oath, and containing in the jurat a statement by such court or judge, magistrate, commissioner, notary public or other person of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of the 3 & 4 Will. 4, c. 74, s. 85, relating to affidavits of verification.

By the Court.*

* January 13th, 1863, 13 C. B., N. S. 405.

XX. Alienation of the Estates of Married Women in Personal Estate.

20 & 21 Victoria, c. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [25th August, 1857.]

Be it enacted as follows:

20 & 21 *Vict.* c. 57, *s.* 1.

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same.

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of interests in or powers over land in England or Wales;

In Ireland, as by 4 & 5 Will. 4, c. 92.

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this act shall be acknowledged by her, and be otherwise perfected, in the manner by the act 3 & 4 Will. 4, c. 74, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of the act shall be acknowledged by her and be otherwise perfected in the manner by the act 4 & 5 Will. 4, c. 92, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said acts mentioned, shall extend and be applicable to such interests in personal estate, and to such powers as may be disposed of, released, or extinguished by virtue of this act, as fully and effectually as if such interests or powers were interests in or powers over land.

20 & 21 *Vict.* c. 57, s. 3.

The powers of disposition given by this act not to interfere with any other powers.

3. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which independently of this act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

Act not to extend to settlements of married women upon marriage.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

Not to extend to Scotland.

5. This act shall not extend to Scotland.

MARRIAGE SETTLEMENTS BY INFANTS.

18 & 19 Victoriæ, c. 43.

An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage (*a*).

[2nd July, 1855.]

18 & 19 *Vict.* c. 43, *s.* 1.

Whereas great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: for remedy whereof it is enacted, as follows:

Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.

1. From and after the passing of this act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

The words "Court of Chancery," in the above act, to include Court of Chancery in Ireland.

(*a*) By 23 & 24 Vict. c. 83, in the interpretation of the act 18 & 19 Vict. c. 43, and for all the objects and purposes thereof, the words "the Court of Chancery" shall include and be taken to include the Court of Chancery in Ireland, and all orders made and approbations already given by the Court of Chancery in Ireland in cases provided for and contemplated by the said act shall be as valid and binding in law as if the words "the Court of Chancery in Ireland" had been expressly contained in the said act in all the places where the words "the Court of Chancery" are mentioned therein.

In case infant die under age, appointment, &c. to be void.

2. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

18 & 19 *Vict.* c. 43, s. 3.

The sanction of the Court of Chancery to be given upon petition.

3. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian, in a summary way, without the institution of a suit; and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit; and the court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition (*b*).

(*b*) On a petition by a female infant under this act, praying a reference to approve of a proper settlement, and stating that the intended marriage had the sanction and approbation of the infant's father, the Lord Chancellor made the order without directing any inquiry as to the propriety of the marriage. (*Re Dalton*, 6 De G., Mac. & G. 201; 2 Jur., N. S. 1077; 25 Law J., Chan. 75.) He considered that the provisions of the act do not impose on the court any other duty than that of looking to the propriety of the settlement, though what in each particular case might be a proper settlement must sometimes lead to an inquiry as to all the circumstances connected with the marriage. (*Ib.*)

It is still undecided, notwithstanding the above case, whether on the petition of an infant under this act, praying a reference to approve of a proper settlement of the infant's property, this statute has relieved the court from inquiring into the propriety of the proposed marriage. But the court will make the reference where there is proper evidence of the propriety of the proposed marriage. (*Re Strong*, 2 Jur., N. S. 1241; 26 Law J., Ch. 64.)

Draft, how settled.

The draft of the settlement, when not drawn by one of the conveyancing counsel, will be directed to be taken into chambers to be perused by the chief clerk and approved by the judge. (*Re Williams*, 8 W. R. 678; 6 Jur., N. S. 1064.) The court refused to sanction the insertion of a clause in a settlement to be made by a female infant on her marriage, providing that no person professing the Roman Catholic religion should take any interest under the settlement. The court, however, sanctioned the insertion of a clause making it compulsory on the successive owners, or their husbands, to assume the name and arms of the ancestor from whom the settlor derived the estates. (*Ib.*)

In a settlement under this act there ought not to be any limitation to collaterals, or any benefit conferred upon the guardian of the minor whose property is put in settlement. (*Re M'Clintock*, 10 Ir. Ch. R., N. S. 469.)

The court has no jurisdiction under this act to approve a settlement of an infant's property originally made without its concurrence. (*Per Stuart*, V. C., *Re Fuller's Settlement*, Feb. 10, 1860; Morgan's Chancery Acts, 249, 3rd ed.)

Mode of proceeding.

The ordinary course upon a petition is for the court, after hearing counsel, to adjourn the petition into chambers. This proceeding does not make the infant a ward of court, and the court is not therefore called upon to sanction the marriage but only the settlement. (Judge's Regul. by Bloxam, p. 43.) No order is drawn up, but a note signed by the registrar is left at chambers with the petition, and a summons to proceed on the petition is usually issued. Upon the return of this summons, or at an adjourned meeting, evidence is produced in conformity with the general order. (1 Smith's Ch. Pr. 1149, 7th ed.)

The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, are submitted to the judge (8th Aug. 1857; 20 Judge's Regul.) and considered. The draft of such settlement is settled at chambers and then engrossed, and an affidavit verifying such engrossment is made and filed, and an office copy produced at chambers. The chief clerk thereupon signs the usual memorandum in the margin of the engrossment, and indorses on the original petition a minute of the order made, and from such minute a formal order is drawn up

by the registrar, which is passed and entered in the usual way. The settlement is then executed by the necessary parties, and the marriage takes place. (1 Smith's Ch. Pr. 1149, 1150, 7th ed.)

18 & 19 *Vict.* c. 43, *s.* 3.

Upon applications to obtain the sanction of the court to infants making settlements on marriage under the act of 18 & 19 Vict. c. 43, evidence is to be produced to show—

Evidence on applications under the act.

1. The age of the infant.
2. Whether the infant has any parents or guardians.
3. With whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has.
4. The rank and position in life of the infant and parents.
5. What the infant's property and fortune consist of.
6. The age, rank and position in life of the person to whom the infant is about to be married.
7. What property, fortune and income such person has.
8. The fitness of the proposed trustees and their consent to act.

The proposals for the settlement of the property of the infant and of the person to whom such infant is proposed to be married are to be submitted to the judge. (Gen. Order in Chancery, August 8, 1857.)

4. Provided always, that nothing in this act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

Not to apply to males under twenty or females under seventeen years of age.

LAW OF DOWER.

3 & 4 WILL. IV. c. 105.

An Act for the Amendment of the Law relating to Dower (a).
[29th August, 1833.]

INTERPRETATION CLAUSE.

3 & 4 *Will.* 4, *c.* 105, *s.* 1.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons and things as well as one person or thing.

Meaning of the words in the act.

"Land."

Number.

The objects of this act.

(*a*) The principal objects of this statute are,

1st. To make *equitable* estates in possession liable to dower, and to dispense with the necessity of the actual seisin of the husband.

2nd. To take away the right of dower out of lands disposed of by the husband in his lifetime or by his will, and to give partial charges created by the husband priority over the right of dower.

3rd. To enable the husband to bar the right of dower by a declaration in a deed or in a will. The act does not extend to widows married on or before the 1st of January, 1834.

The reasons upon which the alterations in the law of dower are founded, will appear by the following extract from the First Report of the Commissioners of Real Property; references to some of the decisions upon the subject will be found in the notes by the Editor.

Law of dower.

"The present law of dower gives to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments, with a few exceptions, such as common *sans nombre* and personal annuities, (see Co. Litt. 32 a; *Lyster* v. *Mahoney*, 1 Dru. & War. 236,) of which her husband was seised in law, (that is, had the legal property by descent, there being at the same time no possession,) or, in fact, for an estate of inheritance in possession at any time during the marriage, notwithstanding any alienation or disposition which the husband may have made of the estates, or any part of them."

[Dower is due of mines wrought during coverture, whether by the husband or by lessees for years, whether paying pecuniary rents or rents in kind, and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the lands of others. Such a grant is a grant of a real hereditament in fee simple. But dower is not due of mines or strata unopened, whether under the husband's soil or under the soil of others. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit. (*Stoughton* v. *Lee*, 1 Taunt. 401.)—ED.]

A. died intestate, seised of real estates, under which were seams of coal, but no mines had been opened at the time of his death. Upon a bill being filed by his infant daughter and heiress at law by her next friend for the administration of his estate, it was by the order of the court declared that the intestate's widow was entitled to dower out of his freehold estates, and it was referred to the master to inquire what was due to the widow for dower from the death of the intestate, and the widow was appointed receiver of the rents and profits of the estate, and was directed to pay the interest of a sum to be raised by mortgage, to retain a sum for the maintenance of the infant, and to pay the residue of the rents and profits into court to the account of the infant, and the master was ordered to prosecute an inquiry directed by a decree on the hearing, respecting the leasing the estates for coal mines. Under an order of the court, the widow, as receiver, felled poles and small timber on the real estate, and accounted for the proceeds of the sale in passing her accounts. Afterwards, the widow again married. The master found it would be fit that the whole estate should be let for coal mines. An order was made approving of a provisional agreement entered into for a lease, and directed that the agreement should be carried out by a lease to be settled in chambers. A lease was afterwards settled in which the infant granted and demised, and the widow as guardian, with the consent of her second husband, granted, demised, leased and confirmed all the mines under the estate, except within a certain area round a house, the rents and royalties (and a rent or sum of *4l. 4s.* for every acre of the surface used for raising coal) being reserved to the infant. All the covenants were entered into, by or with the infant: it was held, first, that the proceedings which had taken place did not amount to an assignment of dower. (*Dicken* v. *Hamer*, 1 Drew. & Sm. 284; 29 Law J., Ch. 778.) Secondly, that the widow was entitled in respect of her dower to one-third of the yearly income which had arisen or might arise from the amount of the purchase-money of poles and small timber cut and sold under the direction of the court. (*Ib.*) Thirdly, that as the lease was intended to be made for the benefit of the infant alone, the widow was not entitled in respect of dower to any benefit from the rents and profits of the mines and minerals opened and raised since the decease of her husband. (*Ib.*) It was also held, that until an assignment the widow was entitled to one-third of the rents of the real estate of the land, exclusive of the rents and profits of the mines, but inclusive of the rents paid by the lessees for any portion of the surface of the land used for the purpose of the mines. (*Ib.*) It seems that a widow dowable of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but that she is not entitled to one-third as corpus. (*Ib.*)—[Ed.]

3 & 4 Will. 4, c. 105, s. 1.

[The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower. (*Moody* v. *King*, 10 Moore, 223; *S. C.*, 2 Bing. 447.)—Ed.]

"It does not give dower out of lands to which the husband had a right, but of which he had not seisin in law or in fact.

"The widow is not entitled to take possession of any land for her dower, the assignment is to be made by the heir; and if he neglect it, or do it unfairly, she can compel a just assignment by legal process, and generally recover compensation for the detention."

[To entitle a woman to damages in dower, it must be alleged and proved that the husband died seised of an estate of inheritance. (*Jones* v. *Jones*, 2 C. & J. 601; *S. C.*, 2 Tyrw. 531.)—Ed.]

"The heir has no right to denude the estate of timber as against the dowress; therefore where a testator died seised of certain estates, out of which his widow was entitled to dower, the heir of the testator entered into possession of the estates and cut down timber, the produce of which timber was paid into court: it was held that the widow was entitled to a third of the produce for life. (*Bishop* v. *Bishop*, 5 Jur. 931.)

"This law appears well adapted to the state of freehold property which existed at the time when it was established, and during a long period after-

Old law of dower adapted to former state of things.

3 & 4 *Will.* 4, *c.* 105, *s.* 1.

wards; alienation was at first prohibited, and it long remained rare; a disposition by will, except as to estates in a few districts devisable by custom, was not allowed, so that the estate of the husband descending of course to his heir, there was not likely to be any difficulty in finding the lands a share of which was to be assigned, nor any interference with the property of third persons in making the assignment; besides all which there was no fund for maintaining the widow but the real estate.

Become inconvenient.

"This state of things has for a long period been so much changed, as to make the original law of dower highly inconvenient. Estates are now frequently conveyed away and charged by the husband, and it is desirable that there should be a power of so doing free from the burden of dower. The great increase, too, of personal property affords other means of providing for widows.

Bar of dower by jointures.

"The legislature long since, by the statute of 27 Hen. 8, c. 10, provided a method of diminishing the evil to some extent, by making a jointure of a certain description given before marriage a bar of the right of dower, though such jointure may be of inadequate value, and made to the wife before she has arrived at the age at which she is enabled to assent to such provision. (See *post*, p. 434.) Courts of equity have enlarged the remedy by making some provisions not strictly within the terms of the statute bars of dower. Courts of equity have also obviated the inconveniences arising from dower, and also very materially restricted and impaired the right to dower, by holding that equitable estates, a modification of the ownership of real property, which has been introduced since the law of dower was established, and now exists to a very great extent, are not subject to dower; and further, by holding that a purchaser may protect himself against the dower of the vendor's wife in legal estates, by procuring the assignment to a trustee for himself of an outstanding legal term (in reality a mere fictitious estate), decisions scarcely reconcilable with the principles of justice (as they make the rights of parties liable to be affected by technical rules and fictions), and contrary to a general principle laid down with respect to equitable estates, that equity should follow the law, and at variance with the principle of decisions in the analogous case of the husband's tenancy by the curtesy, which is held to attach to equitable estates. (See *post*, pp. 437, 438.)

Equitable estates not subject to dower.

Protection by terms of years.

Statutable bar inconvenient.

"It may be observed here, that the statutable bar by jointure depends at law, and in case of the marriage of a female under twenty-one years in equity also, on the validity of the title of the jointure; it is therefore troublesome in questions with purchasers. (See *Simpson* v. *Gutteridge*, 1 Madd. R. 609; *Corbet* v. *Corbet*, 1 Sim. & Stu. 612; *S. C.*, 5 Russ. 254; Sugd. V. & P. 542, 11th ed.)

Conveyance to uses to bar dower.

"In order to defeat the right of dower in cases not within the statute, and to which the above decisions would not apply, purchasers have long had recourse to the contrivance of taking conveyances of estates in a very artifical form, called a conveyance to uses to bar dower, which, while it confers the whole beneficial ownership, and an absolute dominion over the legal estate, prevents the legal estate from so vesting in the purchaser as to make the property subject to his wife's dower. This ingenious form of conveyance, which was long in being perfected, and is now nearly universal, is found in practice to be attended with some inconveniences, and owing to the mistakes of unskilful practitioners, it occasionally leads to serious mischiefs."

[The form of limitation to uses to bar dower, which has been almost universally adopted, was in effect to such uses as the purchaser, by deed or writing executed in the presence of two witnesses, should appoint: In default of and until appointment to the purchaser for life, remainder to a trustee and his heirs during the life of and in trust for the purchaser, remainder to the purchaser, his heirs and assigns. (See Gilb. on Uses, by Sugd. 321—325, n.; Fearne, 347, n. by Butl. 7th ed.)—Ed.]

A vendor being entitled under a limitation to uses to bar dower without a power of appointment, the purchaser insisted on the concurrence of the dower trustee. The trustee being abroad, the vendor filed a bill to enforce specific performance without his being a party to the conveyance. The Vice-Chancellor held, that the objection was well founded, and made a

decree for specific performance, with an order vesting the estate of the dower trustee in the purchaser, upon the execution of the conveyance by the vendor; but considering the objection, though tenable, to be frivolous and vexatious, he gave no costs to either party: it was held, on appeal by the purchaser, that the objection was frivolous and vexatious, and ought not to have been insisted on, and that costs ought not to be given to the purchaser. (*Collard v. Roe*, 4 De G. & J. 525.)

3 & 4 Will. 4, c. 105, s. 1.

"By all these means the law of dower is in most instances evaded; where husbands find their estates subject to dower, they very frequently make provision for their widows on the condition of their relinquishing their dower; and sometimes without knowing that the right to dower exists, or without expressly noticing it, they make provisions for their widows, and at the same time make dispositions of their fee simple estates inconsistent with the enjoyment of dower by the widow, or which, by clear implication, indicate that dower is not meant to be enjoyed by the widow.

Provisions by will in lieu of dower.

"These last modes of defeating dower are found to be from various causes very uncertain, and often open to questions, and they are not unfrequent sources of litigation, in which the widow finds herself involved, or is tempted by the uncertainty of the law to engage.

"The general result is, that the right to dower exists beneficially in so few instances, that it is of little value considered as a provision for widows, and we believe it may be confidently asserted, that it is never calculated on as a provision by females who contract marriage or their friends; yet there is so much of uncertainty in the modes by which dower is prevented, that the actual or possible existence of the right is a very frequent and serious impediment to the transfer of property, and the ascertaining in each case that it does not exist in the widows of any of the persons through whom the property has passed, or procuring the necessary acts to be done for preventing or barring it where it does or may exist, or securing the future production of the evidence of its non-existence, are the causes of frequent and great delay and expense attending such transfers. Thus where there is no person who can derive any benefit from the law of dower, that law exists often as a clog to the transfer of property, sometimes as a legal pretext for delaying the performance of a contract, and sometimes as the inevitable cause of, or a mischievous temptation to, litigation. Generally we conceive, that the right to dower may be said to exist to a greater extent to the injury of proprietors and purchasers, and to a comparatively small extent for the benefit of widows, and to some extent also to their injury, in leading them into or involving them in litigation.

General result that dower is of little value as a provision for widows.

"The true principle (as we think) on which the law of dower was originally established, and on which it has a claim on grounds of justice and policy (without sacrificing the general convenience) to be supported is, that it should be considered as that interest in an estate of inheritance which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims in natural justice and policy appear to stand at least at an equal footing with the claims of the heir; it is so far analogous to the provision which a law, established in more modern times, has made for the widow out of the husband's personal estate undisposed of by his will. By combining this principle with another of high and perhaps paramount importance, a principle which the law has carefully established almost to its fullest extent, viz. that a right of alienation should be inseparably incident to property of every description, we think that the law of dower may be put on a footing more beneficial on the whole to widows, and free from all the present inconveniences and mischiefs.

Principle on which the right to dower may be sustained.

"The distinction as to dower between the husband's seisin and his mere right, we think, in the present state of things, irrational. (See *post*, p. 439.)

"We propose that dower should attach upon all estates of inheritance in possession, excepting the species of property to which dower is not incident; and on property considered in equity as real estate of or to which any husband dies seised or entitled in fact or in law, whether legally and beneficially, or beneficially only, which, if belonging to the wife, would be subject to the husband's curtesy, but subject, like the interest of other

Proposed alterations of the law of dower.

3 & 4 *Will.* 4, c. 105, s. 1.

persons having partial interests in the inheritance, to any estates, charges, or incumbrances which the husband may have lawfully created, or bound himself to create, and to his debts, so far as they attach on his freehold estates, and as to estates which he can affect by his will, to any disposition, direction, or declaration made by his will, executed so as to affect freehold estate, and that dower should not attach on any other estate.

"By this enactment the artificial distinction between legal and equitable estates will be taken away; on the other hand, the subtle contrivances to which we have referred will become unnecessary.

Provisions in case of wills,

"We propose that a provision made by will for a widow out of personal estate shall not deprive her of dower, unless the will, expressly or by clear implication, shall so direct, but that any devise of freehold estate shall be held to be free from dower, unless the contrary be declared.

"And that as to estates which the husband might by his will dispose of against his wife's right to dower, he may by his will duly executed declare that such right should be discharged without making any further disposition. And we propose that the enactments shall not interfere with the rule of courts of equity, giving widows a preference over other legatees for

and of deeds.

legacies given to them in satisfaction of dower. And we propose that a declaration in any deed or instrument giving or devising estates of inheritance, may make the estate of the donee or devisee not subject to his wife's dower; but these enactments not to prevent courts from enforcing, on equitable principles, covenants or agreements of husbands not to bar the right to dower, nor to prevent the barring of dower by agreement or settlement, or its forfeiture by adultery.

New rules not to extend to copyholds, &c.

"We do not propose at present to extend the alterations of the law of dower to gavelkind lands or borough-English lands, or to copyhold or customary lands, as to all which the right to dower or freebench is regulated by a variety of peculiar customs. We deem it expedient to postpone the recommendation of any further alteration of the laws relating to those several tenures, until the whole subject shall come under our view." (1 Real Prop. Rep. 16—19. As to tenures, see 3 Real Prop. Rep. 3—22.)

This act extends to lands of gavelkind tenure. (*Farley* v. *Bonham*, 2 Johns. & H. 177; 7 Jur., N. S. 232.)

It is to be observed that copyholds are not within this statute. (*Powell* v. *Jones*, 2 Sm. & G. 407.)

Jointures.

In consequence of two maxims of the common law—first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage. (*Vernon's case*, 4 Rep. 1; Co. Litt. 36 b.)

Before the passing of the Statute of Uses (27 Hen. 8, c. 10) the greater part of the lands in England having been conveyed to uses which were not liable to dower, (Dyer, 266, pl. 7; 4 Rep. 1 b,) it was usual to make a provision for the wife before marriage out of the husband's lands. (3 Rep. 58 b; 4 Rep. 1 b; Wilmot's Notes, 184, 185.) The Statute of Uses having transferred the legal estate to the *cestüi que use*, all women then married would have become dowable of lands held to the use of their husbands, and retained their title to lands settled on them in jointure. To prevent that injustice, it is by the 6th section of the Statute of Uses declared, that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower; and the 9th section reserves to the wife a right to refuse a jointure or to claim her dower. (See Wilmot's Notes, 184, &c.) It was decided that the species of estates enumerated are proposed only as examples, and the courts have in construction extended the operation of the statute to other instances within its principle, though not within its words. (4 Rep. 2 a.) By the effect of that statute, therefore, no widow can claim both jointure and dower. Jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce. (1 Swanst. 429, n.) A jointure within that statute is defined to be a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband,

for the life of the wife at least, if she herself be not the cause of its determination or forfeiture. (Co. Litt. 36 b, 37.) 3 & 4 *Will.* 4, *c.* 105, *s.* 1.

According to Lord Coke, (Co. Litt. 36 b,) there are six requisites to a strict legal jointure, viz. 1st. The provision for the wife must by original limitation take effect in possession or profit immediately after the husband's death. (*Wood* v. *Shirly*, Cro. Jac. 488.) 2nd. It must be for the term of her own life, or greater estate. (Dyer, 97 b.) 3rd. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the *whole*, and not of part of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower. (See 9 Mod. 152: 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391.) And, 6th. It may be made either before or after marriage. (4 Rep. 3.)

In equity, a trust estate, an agreement to settle lands as a jointure, or a covenant from the husband that his heirs, executors, or administrators would pay an annuity to his wife for her life, in case she survived him, in full for her jointure and in bar of dower, without expressing that it should be charged on lands, or in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage accepts in lieu of dower, is a good jointure. (*Earl Buckingham* v. *Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; Wilmot's Notes, 177; *Charles* v. *Andrews*, 9 Mod. 152; *Williams* v. *Chitty*, 3 Ves. jun. 545; *Tinney* v. *Tinney*, 3 Atk. 8; *Carruthers* v. *Carruthers*, 4 Br. C. C. 500; *Estcourt* v. *Estcourt*, 1 Cox, 20; *Simpson* v. *Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a, n. by Thomas; Harg. Co. Litt. 36 b, n. (5); Sugd. V. & P. 543, 544, 11th ed.; *Dyke* v. *Rendall*, 2 De G., M. & G. 209.) A future contingent provision accepted by an adult female upon her marriage in lieu of dower, is in equity a valid bar to dower. (*In re Herons*, 1 Flan. & K. 330. See *Power* v. *Sheil*, 1 Moll. 312; *Williams* v. *Chitty*, 3 Ves. 545; *Corbet* v. *Corbet*, 1 Sim. & S. 612; 5 Russ. 254.)

A wife had a jointure secured on her husband's estate X. In 1844 the husband contracted to purchase an estate Y., and to enable him to sell the estate X., the wife, in 1845, released her jointure, and he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y. had been conveyed, the husband contracted to sell it: it was held, that in equity the estate Y. was charged with the jointure. (*Warde* v. *Warde*, 16 Beav. 103; *Wellesley* v. *Wellesley*, 4 My. & Cr. 554.)

By a settlement made on the marriage of an adult female, it was declared that in consideration of the intended marriage, and "for providing a competent jointure and provision of maintenance" for the wife and issue of the marriage, the father of the husband had paid him 3,000*l.*, and that the husband had given a bond for the payment of 2,000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife and the issue of the marriage. During the coverture the husband bought certain lands which he subsequently sold to a purchaser from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill by the wife for dower out of the lands so sold: it was held, that her right was barred by the settlement, and that she had no lien on or right to resort to the lands to the satisfaction of the amount due on the bond. (*Dyke* v. *Rendall*, 2 De G., M. & G. 209; 16 Jur. 939; 21 Law J., Chanc. 905.)

The word "thirds" is not confined to real estate, but is a general expression which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband. (*Thompson* v. *Watts*, 2 Johns. & H. 291; 8 Jur., N. S. 760; 31 Law J., Ch. 445; 10 W. R. 485.) In construing a stipulation in a marriage settlement, that the provision thereby made for the intended wife is "in lieu of dower or thirds," the court considers the fund out of which the provision was made. (*Ib.*) Where, therefore, by an ante-nuptial settlement the provision thereby made for the intended wife was partly charged on personalty of the intended husband, who had children by a former marriage: it was held, on his dying intestate, that the claim of his widow to a distributive share in his personal estate, was barred by a stipulation in the above words. (*Ib.*)

3 & 4 *Will.* 4, c. 105, *s.* 1.

A marriage settlement contained a clause that the provision thereby made, and intended for a wife in the event of her viduity, should be accepted, deemed and taken in full lieu of dower or thirds, to which she might be entitled at common law or otherwise howsoever: it was held, that she was barred of her share of her husband's personal estate, under the Statute of Distributions. (*Re Burgess*, 11 Ir. Chanc. Rep., N. S. 164.)

A *feme covert* is not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law. The consent of a married woman to release her jointure, and accept an allowance during the life of her husband, who was a lunatic, without prejudice to her right to dower, was held not to be binding upon her after his decease. (*Frank* v. *Frank*, 3 My. & Cr. 171.)

A jointure settled on a wife by articles, to which she was not a party, will not deprive her of dower; (*Earl Buckingham* v. *Drury*, 3 Br. P. C. 497; *S. P.*, *Daly* v. *Lynch*, *Ib.* 48;) but an infant having before her marriage a jointure made to her in bar of dower, is thereby bound and barred by the stat. 27 Hen. 8, c. 10. (*Ib.*)

The wife's claim on the personal estate of her intestate husband was held to be barred by a settlement on her marriage of a certain sum that was in trust for her for life "as and for her jointure, in full lieu, bar and satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal or freehold" of her intended husband. (*Gurly* v. *Gurly*, 8 Cl. & Finn. 743.) By marriage articles the intended husband covenanted that, in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of; and that in preference to any creditor of his, or to any deed or will which he might make or execute in his lifetime, contrary to the true intent and meaning of the articles. There was no issue of the marriage; and the husband died, leaving his wife surviving: she is not entitled, in addition to the moiety of her husband's real and personal estate given to her by the articles, to dower out of the other moiety of his real estates of inheritance. (*Hamilton* v. *Jackson*, 2 Jones & Lat. 295.)

Forfeiture by adultery.

The wife of an owner of lands in fee, out of which she is dowable by 13 Edw. 1, c. 34, forfeits her right to dower by adultery, elopement, and remaining in a state of adultery until reconciliation with her husband, the gist of the offence being the adultery. (*Woodward* v. *Dowse*, 8 Jur., N. S. 413. See *Hetherington* v. *Graham*, 6 Bing. 135.)

As to the law of jointures, see 1 Rop. on Husband and Wife, by Bright, c. 10; Cruise's Dig. tit. VII.; Bac. Abr. Dower and Jointure (G.); Gilb. on Uses, by Sugd. p. 321, &c.

Terms of years attending the inheritance.

The result of the cases as to the doctrine of attendant terms before the stat. 8 & 9 Vict. c. 112, was, when there was an old term that was satisfied, the inheritance being the estate, the interest in the term attended upon it. If there were a first, second and third mortgagee, they were, according to their respective gradations, entitled to the benefit of the term. It was possible that some or all of them might not know of its existence; and according to the practice of conveyancers, sanctioned by and perhaps growing out of the doctrines of courts of equity, if a subsequent incumbrancer, without notice, got in the term, he gained a priority: if, at the time of advancing his money, he had notice of the previous incumbrances, he did not gain priority. (Per Lord *Eldon* in *Mole* v. *Smith*, Jac. R. 496. See *Radnor* v. *Vandebendy*, Show. P. C. 69; Pr. Ch. 65; *Swannock* v. *Lifford*, 2 Atk. 208; Ambl. 6; Co. Litt. 208 a, n.; *Willoughby* v. *Willoughby*, 1 T. R. 763.)

An heir, though he could avail himself at law of a term attendant upon the inheritance, was not allowed in a court of equity to defeat the widow's claim of dower; for, having a certain quantity of interest, equity considered her as having a corresponding interest in the term. When the husband conveyed to a purchaser, without the concurrence of the wife, nothing but the husband's estate passed subject to dower, which remained as it was. *Maundrell* v. *Maundrell*, 7 Ves. 578; *S. C.*, 10 Ves. 246.) But a purchaser for valuable consideration, or a mortgagee, (*Wynn* v. *Williams*, 5 Ves. 130,)

might protect himself from dower by taking an actual assignment of a term created before the right of dower attached, to a trustee for himself, or a declaration of trust from the trustee, or by obtaining possession of the deed creating the term, (7 Ves. 567; 10 Ves. 246,) notwithstanding he had notice of the right of dower. (10 Ves. 271; see Butl. Co. Litt. 290 b, n. 1, s. 13. See *In re Sleeman*, 4 Ir. Ch. R. 563; 8 & 9 Vict. c. 112, *post.*)

3 & 4 *Will.* 4, *c.* 105, *s.* 1.

Purchase for value without notice is not a defence to a suit instituted to enforce a mere legal right, such as dower. (*Corry* v. *Cremorne*, 12 Ir. Chanc. Rep., N. S. 136.) A purchaser, in 1840, obtained possession of a deed creating an attendant term, but did not procure an assignment of the term: it was held, that he could not rely on this term as a bar to a claim for dower. (*Ib.*)

In *Mole* v. *Smith*, (Jac. R. 490; *S. C.*, 1 Jac. & W. 665,) an attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee of the term, and her husband having become a bankrupt, his assignees agreed to sell the estate, and filed a bill for a specific performance of the agreement, pending which suit the husband died: it was held, that the widow was not entitled to dower, that she must assign the term for the benefit of the purchaser, and that he was bound to accept the title.

Where a dower suit was not occasioned by any difficulty as to the assignment or mode of payment of the dower, but solely by the defendant not having admitted the title till he put in his answer to her bill, she was allowed her costs up to the hearing. (*Harris* v. *Harris*, 11 W. R. 62.)

Suits for.

A demandant in dower is not entitled, under 17 & 18 Vict. c. 125, s. 50, to inspection of the deed under which the property, out of which she claims to be endowed, was conveyed away by her husband as against a *bonâ fide* purchaser for value, without notice of the marriage, the balance of authorities being assumed to be in favour of the position, that a bill for discovery could not be sustained in such a case. (*Gomm*, dem., *Parrott*, ten., 3 C. B., N. S. 47; 3 Jur., N. S. 1150; 26 Law J., C. P. 279.)

A widow filed a bill for dower against alienees of her husband. In order to make out her title to dower, she was obliged to give in evidence a deed, by which the estate had been conveyed to the person from whom her husband claimed. This deed contained a recital that the legal estate was outstanding in trustees. She also gave in evidence certain orders of the Court of Chancery, to show that such recital was mistaken: it was held, that she was entitled to a reference to ascertain the lands of which she was dowable. (*Kernaghan* v. *M'Nally*, 11 Ir. Ch. Rep., N. S. 52.

Dower of Equitable Estates.

Widows to be entitled to dower out of equitable estates.

2. When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal or partly equitable (*d*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) (*e*) then his widow shall be entitled in equity to dower out of the same land.

(*d*) A husband was seised in fee, subject to a trust term to secure life annuities, and to pay him half the surplus rents: it was held, that his widow was entitled to have her dower set out at once. (*Sheaf* v. *Cave*, 24 Beav. 259.) The legal estate in certain freeholds was vested in K. as mortgagee in fee, subject to the equity of redemption of F.; K. also claimed to be entitled to an undivided moiety in these freeholds, which claim was disputed by F., but was established by a decree at the Rolls: after K.'s death it was held, that the legal and equitable interest had not been so united in K. as to entitle

3 & 4 *Will.* 4, *c.* 105, *s.* 2.

his widow to dower out of his undivided moiety. (*Knight* v. *Frampton*, 10 Law J., N. S., Chanc. 247; 4 Beav. 10.)

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower; the other moiety was conveyed to the trustees of her husband's will: it was held, that she was entitled to dower out of the entirety of the latter moiety. (*Reynard* v. *Spence*, 4 Beav. 103.)

Origin of rule not allowing dower out of equitable estates.

The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right, where it does not subsist at law.

Nothing can be more striking than the inconsistency of the doctrine which subjected trust estates to the right by curtesy, while it exempted them from the claim of dower. Courts of equity had assumed as a principle, in acting upon trusts, to follow the law; and, according to that principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, that principle, if pursued to the utmost, would have affected the titles to a large proportion of the estates in the country, as parties had been acting on the footing of dower upon a contrary principle, and had supposed that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to a tenancy by the curtesy, for no person would purchase an estate subject to such right, without the concurrence of the person in whom it was vested. (*D'Arcy* v. *Blake*, 2 Sch. & Lef. 388.) A widow is not entitled to freebench of a *trust* estate in copyholds. (*Forder* v. *Wade*, 4 Br. C. C. 520.)

Where an estate was subject to a mortgage *in fee* at the time of the marriage, and continued so during the coverture, the widow was not entitled to dower, as at law the whole legal inheritance was vested in the mortgagee; and the right of redemption was merely an *equitable* title, insufficient to create a claim of dower. (*Dixon* v. *Saville*, 1 Br. C. C. 326.) A party died in 1830, having vested in him a mortgage in fee, and the lapse of time and circumstances were such as to render it very improbable that any party could now establish any right to the equity of redemption: it was held, nevertheless, that the widow was not entitled to dower. Though the husband might have considered the property as his own at his death, and though the court might not then consider it subject to any redemption, yet the quality of the estate in the consideration of the court was not such as to give a right of dower. (*Flack* v. *Longmate*, 8 Beav. 420.) Where the husband was seised merely as a mortgagee or trustee, the wife was entitled to dower at law, but subject in equity to the same right of redemption or trust as her husband was liable to; but a court of equity would interfere to prevent a widow from taking advantage of her legal right. (*Hinton* v. *Hinton*, 2 Ves. sen. 634; see 2 Freem. 43, 71; 1 Burr. 117; Butl. Co. Litt. 205 a, n. (1), 11th ed.; *Lyster* v. *Mahony*, 1 Dru. & War. 242.)

So a woman is not entitled to dower of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture. (*D'Arcy* v. *Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a; Co. Litt. 203 a, Harg. note; Perk. 338, 348; *Forder* v. *Wade*, 4 Br. C. C. 520.) If a man before marriage entered into a contract for the sale of his fee simple estate, his subsequent marriage would not under the old law create any right of dower; the husband being a trustee for the purchaser, the court would not allow the wife to assert her right of dower. It was the same in the case of a contract made after marriage, but before the legal estate was vested in the husband. So if the husband conveyed a legal estate in remainder, not subject to dower at the time of the conveyance, dower would not afterwards attach on that estate in favour of the wife, merely because, if he had not conveyed the estate, it would have fallen into possession, and become liable to dower. (*Lloyd* v. *Lloyd*, 4 Dru. & War. 370.) On the surrender in

deed or in law of the life estate to the husband the right of dower will attach. (1 Roll. Abr. 676, pl. 40.) But if a rent be reserved on a lease for years, made before marriage, the wife will be entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cesset executio* during the term. (Prec. Ch. 250.) And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, is dowable after payment of them. (Co. Litt. 41 a; 8 Rep. 96 a; 2 Vern. 404.) 3 & 4 *Will.* 4, *c.* 105, *s.* 2.

(*e*) See *Fry* v. *Noble*, 24 Law. J., Ch. 591. The widow of a joint tenant in fee or in tail is not entitled to dower, because, upon the death of one of the joint tenants, the estate goes to the survivor, who is then in from the first grantor, and may plead the deed creating the estate as originally made to him, without naming his companion. (Litt. s. 45; Co. Litt. 37 b, 30 a, 183 a.) And if a joint tenant aliens his share, his wife shall not be endowed. (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615.)

Seisin of Husband.

3. When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (*f*). Seisin shall not be necessary to give title to dower.

(*f*) A right of entry is where a man, who has the possession of lands, is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover the possession. (See Rosc. on Real Actions, 79, &c.; 1 Real Prop. Rep. 493.) We have already seen (*ante*, p. 246) that no descent cast or discontinuance made after the 31st December, 1833, is to bar a right of entry, and that continual claim will not preserve it. (*Ante*, p. 191.) The time within which a right of entry must be prosecuted is now prescribed by statute 3 & 4 Will. 4, c. 27. (See *ante*, pp. 150—190.) Right of entry.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. (1 Burr. 107.) One of the circumstances required to give a title of dower before this act was, that the husband should be seised during the coverture of the estate whereof the wife is to be endowed. A seisin in law was sufficient, without a seisin in deed. Seisin.

A seisin in law, in its usual acceptation, is where the inheritance in lands and hereditaments, of which a man died seised or possessed, descends upon his heir, who dies before entry or possession. (Litt. s. 448.) In such a case, if the heir leave a widow, she will be entitled to dower. (Litt. s. 681.)

On conveyances under the Statute of Uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, and therefore his wife was dowable, although no entry had been made by him, or other act done to acquire an actual seisin. As if lands were bargained and sold, and a stranger entered, and then the deed was inrolled and the bargainee died, his wife would be endowed; (2 And. 161; Gilb. Uses, by Sugd. 213; see Cro. Jac. 604;) but if the husband had died before inrolment, she would not have been endowed. (Gilb. Uses, 213.)

But wherever an actual entry was necessary to give effect to a conveyance, as in the case of an exchange at common law, the wife was not entitled to dower, unless the husband had entered. (Perk. s. 368; Park on Dower, 34.)

3 & 4 Will. 4, c. 105, s. 4.

ALIENATION, &c. BY HUSBAND.

No dower out of estate disposed of.

4. No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

Priority to partial estates, charges and specialty debts.

5. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower (*e*).

(*e*) A widow has no right against the heir at law of her deceased husband to be indemnified in respect of a mortgage created by the husband. Therefore where, in a case of that description, the mortgaged property had been sold by order of the court in a suit for administration of an intestate's estate: it was held, as between his widow and his heir, that the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale, after deducting what was due upon the mortgage. (*Jones* v. *Jones*, 4 Kay & J. 361.)

Notwithstanding the statute 3 & 4 Will. 4, c. 104, (see *post*,) and this section of this act, the widow's right to dower or freebench has still priority over mere creditors of a deceased husband. (*Spyer* v. *Hyatt*, 20 Beav. 621.)

By old law, husband alone could not defeat dower.

Before this act, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge. (3 Lev. 386; Co. Litt. 32.) It was a right attaching by implication of law, which, although it might never take effect (as if the wife died in the husband's lifetime), yet from the moment that the facts of *marriage* and *seisin* had concurred, was so fixed as to become a title paramount to that of any person claiming under the husband by subsequent act. (Co. Litt. 32 a; F. N. B. 147 (E).) The alienation of the husband, therefore, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c., would not defeat the wife's right of dower against the husband's alienee, against whom dower might be recovered in the same way as against the heir of the husband dying seised. The consequence of the above rule was, that all charges or derivative interests created by the husband after the title of dower had attached were voidable as to that part of the land which was recovered in dower. (Shep. T. 275; *Stoughton* v. *Leigh*, 1 Taunt. 410; Co. Litt. 46 a; 7 Rep. 8, 72; Jenk. Cent. p. 36; see Park on Dower, 237, 238.)

Freebench.

Freebench, in the absence of any custom to the contrary, does not attach even in right until the husband's death; (Carth. 275; 12 Mod. 49; 3 Lev. 385; 2 Ves. sen. 633; 2 Atk. 526; 2 T. R. 580; 3 Ves. jun. 256;) and therefore any alienation by him *alone*, even by contract, (2 Ves. sen. 621,) to take effect in his lifetime, will defeat the widow's claim. (*Benson* v. *Scott*, 3 Lev. 385; *Goodwin* v. *Windmore*, 2 Atk. 526; *Farley's case*, Cro. Jac. 36; Moor, 758; *Dagworth* v. *Radford*, Sir W. Jones, 462; 1 Freem. 516; Gilb. Ten. 321; see 2 Watk. on Cop. 73—79. See Shelford on Copyholds, pp. 68—72.)

Where copyholds were surrendered to a purchaser to uses similar to the common uses to bar dower, on which surrender the purchaser was admitted to hold as tenant in fee simple, and continued to hold on that admittance till his death, his devisee is bound by the terms of the admittance and is not entitled to claim as appointee under the surrender so as to defeat the widow's right to freebench. (*Powdrell* v. *Jones*, 2 Sm. & G. 407; 18 Jur. 1111; 24 Law J., Chan. 123.)

It was questioned whether since the stat. 55 Geo. 3, c. 192, the devisee of copyhold estates surrendered to the uses of the will can claim as appointee under the surrender. (*Ib.*)

Copyhold land purchased by the husband was surrendered to the use of him and his assigns for life, and after his decease to the use of such person, for such estate and upon such trust as he by any surrender or by will should surrender or devise, and in default of such surrender or devise and so far as

the same if incomplete, shall not extend to the use of the husband, his heirs and assigns for ever, at the will of the lord, &c. The husband was admitted in fee, and by will devised the land to a trustee on trust for sale. By the custom of the manor the title of the wife could only be destroyed by her voluntary surrender: it was held, that she was entitled to her freebench. (*Ib.*) 3 & 4 *Will.* 4, *c.* 105, *s.* 5.

The admittance to copyholds has reference back to the surrender, so that where copyholds are surrendered to A., who dies before admittance, the admittance of heirs has reference back to the date of the surrender, and supplies in A. such a seisin as to entitle his widow to freebench (*Smith* v. *Adams*, 18 Beav. 499; see 18 Jur. 968; 24 Law J., Chan. 258; 5 De G., M. & G. 712): it was held by the Master of the Rolls, that a customary heir who enjoys as heir copyholds, surrendered to his ancestor, but who died before admittance, cannot, by neglecting or declining to procure admittance, defeat the right of the ancestor's widow to freebench, and such heir was declared a trustee in respect of such freebench; the Lords Justices on appeal were however of a different opinion. (*Ib.*) A widow was held not entitled to freebench out of a moiety of copyholds to which her husband was seised in remainder, subject to an existing life estate. (*Ib.*)

By the custom of the manor of Cheltenham, as settled by statute 1 Car. 1, the widow of a copyholder is entitled to dower out of customary lands of which her husband was tenant during the coverture, although such lands had been aliened during the coverture by the husband alone, without the wife having been examined in court or joined in the surrender. (*Riddell* v. *Jenner*, 10 Bing. 29; 3 M. & Scott, 673.) Where lands held of that manor, between the time of alienation by the husband and of his death, have been improved in value by buildings, the widow is entitled to dower, according to the value at the time of his death, although one-third remain not built upon. And if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each such possessor. (*Doe* d. *Riddell* v. *Gwinnell*, 1 Gale & D. 180; 1 Q. B. 682.)

The widow of a tenant in tail of copyhold is entitled to freebench, though there is no custom as to the freebench of widows of tenants in tail, but only as to the freebench of widows of tenants in fee. (*Doe* d. *Duke of Norfolk* v. *Sanders*, 3 Dougl. 303; see 1 Scriv. on Cop. 72—79, 4th ed.)

By the custom of gavelkind, the wife, after the death of her husband, shall have for her dower a moiety of all lands of her husband so long as she continued chaste. (Rob. on Gav. by Wilson, pp. 205—236.)

6. A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land (*f*). Dower may be barred by a declaration in a deed;

(*f*) In order to prevent a widow from having dower out of lands purchased by her husband, a declaration contained in the deed of conveyance that she shall not be dowable is sufficient under this section, although the deed was not executed by the husband. (*Fairley* v. *Tuck*, 3 Jur., N. S. 1089; 27 Law J., Chan. 28.)

A conveyance of real estate, prior to this act, made to a married man to the usual uses to bar dower, with a declaration that it was to the intent "that the present or any future wife should not be entitled to dower," will not, as against the heir at law, deprive a second wife, married after the passing of this act, of her dower. (*Fry* v. *Noble*, 24 Law J., Chan. 591; 7 De G., M. & G. 687; 2 Jur., N. S. 128; *Clarke* v. *Franklin*, 4 Kay & J. 266.)

7. A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when or by a declaration in the husband's will.

3 & 4 Will. 4, c. 105, s. 7.

by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

8. A right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

9. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will (*g*).

(*g*) In *Marston* v. *Roe*, (2 Nev. & P. 504; 8 Ad. & Ell. 14,) a question was raised, but not decided, whether a will made by a testator in contemplation of marriage, in which he devised certain real estates to his future wife for life, would operate to bar her right of dower under this act.

When widow was put to election.

A devise by a husband for the benefit of his wife, who was entitled to dower, did not operate as a satisfaction of such right, unless an intention was expressed, or could be inferred, that the gift by the husband was in lieu of dower, in which case the wife could not claim both, but was put to her election. Several cases occurred upon this subject, which are collected in Rop. on Husband and Wife, by Bright, c. 11, s. 3; and see 1 Jarman on Wills, pp. 396—410. The right to dower being in itself a clear legal right, an intent to exclude that right by voluntary gift must, before this act, have been demonstrated by express words, or by clear and manifest implication. In order to exclude such right, the instrument itself must have contained some provision inconsistent with the assertion of such legal right. (2 Sch. & Lef. 452, 453.) It was decided by the House of Lords, that a devise to the widow of a part of the land, out of which she was dowable, did not exclude her from her right of dower; the sole possession of a part of the lands, out of which the dower is to issue, not being deemed inconsistent with the assertion of a legal right to the third of the whole estate. (*Lawrence* v. *Lawrence*, 2 Vern. 365; Freem. 244; 3 Br. P. C. 484; 1 Swanst. 398, n.; 1 Br. C. C. 292, n. by Belt.: see *Roadley* v. *Dixon*, 3 Russ. 192; *Miall* v. *Brain*, 4 Madd. 126; *Butcher* v. *Kemp*, 5 Madd. 61; *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dru. & War. 102, where Sir *E. Sugden* said that it was impossible to reconcile all the cases on this subject.

A testator bequeathed to his wife an annuity, payable out of part of his real estate, and he devised other real estate to trustees upon trust, on the youngest of his nephews and nieces coming of age, to sell and to divide the proceeds among them; the testator gave to the trustees an express power to lease, and also the general power to manage and to cut timber for the purpose of repairs at their discretion: it was held, that the widow was bound to elect between the annuity and her dower, and that in order to raise a case of election against the widow, it must be shown from the will that the husband intended to dispose of the property subject to dower in a manner inconsistent with the right to dower, and that the power to lease, given to the trustees, was a sufficient evidence of such intention; further, that the powers to manage and to cut timber were inconsistent with the right to dower. (*Parker* v. *Sowerby*, 4 De G., M. & G. 321; 18 Jur. 523; 23 Law J., Ch. 623; *Warbutton* v. *Warbutton*, 2 Sm. & G. 163, *contrà*.)

Powers of or trusts for sale created by will over real estate are not (as leasing powers have been held) inconsistent with a widow's right to dower. (*Bending* v. *Bending*, 3 Kay & J. 57; 3 Jur., N. S. 535; 26 Law J., Chan. 469.) Nor is her claim affected by any direction as to the distribution of the proceeds. (*Ib.*) There is no such rule as that where a testator's widow is entitled under his will to what would exceed her dower; she is thereby put to her election. (*Ib.*) Where a testator, by his will, directed his trustees to sell all his freehold and copyhold estates wheresoever situate, and gave his widow half of the proceeds, and also half of all his personal

property (except articles specifically bequeathed to her): it was held, that she was not bound to elect between her dower and the benefits given her by the will. (*Ib.*) A testator devised all and singular the rents, issues and profits of his copyhold lands, to be applied to the maintenance of his children, until the youngest should have attained twenty-one, subject in the meantime and charged with an annuity to his wife, so long as she should continue his widow, and upon his youngest child attaining twenty-one, he devised all and singular his said copyhold lands among all his children equally; and he devised all and singular his freehold tithes and land upon the same trusts as he had declared respecting his copyhold estates, subject to the annuity to his wife; and he bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow: it was held, that the widow was entitled both to the benefits given by the will and to her dower. (*Dowson* v. *Bell*, 1 Keen, 761; see *Harrison* v. *Harrison*, 1 Keen, 765.)

3 & 4 Will. 4, c. 105, s. 9.

A. bequeathed to his widow an annuity for life; and if she made and persisted in any claim upon the residue of his property after his decease he bequeathed to her no part of his property, and the annuity should not be paid: it was held, that she was not by the direction precluded from claiming her dower, nor was she put to her election. (*Wetherell* v. *Wetherell*, 7 Law T., N. S. 89.)

A widow is not bound by receiving an annuity given in lieu of dower, until she has an opportunity of knowing that the assets are sufficient for payment of the annuity. (*Eland* v. *Eland*, 2 Jur. 852.) The widow's acquiescence in payments made to her for several years of one-third of the dividends arising from the proceeds of the sale of an estate subject to her dower, may amount to an election to take her dower in preference to the devised estate. (*Parker* v. *Downing*, 2 Jur. 28.)

A testator made a provision for his widow expressly in lieu and satisfaction of any estate or interest to which she might be entitled as his widow out of his real and personal estate. The widow enjoyed this provision, but in ignorance of her right to dower: it was held, sixteen years after the testator's death, that she was entitled to elect. (*Sopwith* v. *Maughan*, 30 Beav. 235.) In an action for the recovery of dower, a plea by the tenant in May, 1833, that the demandant had elected to receive an annuity in satisfaction of dower, was not supported by showing the demandant's receipt of dividends of the stock for securing the annuity in September, 1833; for the latest time in respect of which evidence of satisfaction would have been admissible was at the time of plea pleaded. It seems that a court of law cannot properly take cognizance of an election of a widow to take something in lieu of dower, such a question being for a court of equity. (*Slatter* v. *Slatter*, 1 Bing. N. C. 259; 5 Moore & Scott, 82.)

Where the terms of the devise expressly or clearly imply that it was the testator's intention that the devise of part of the lands, though *only for the life* of the widow, should be in satisfaction of dower out of the remainder, she will be put to her election. (*Chalmers* v. *Stovil*, 2 Ves. & B. 224; *Dickson* v. *Robinson*, Jac. R. 503.) A testator charged his estates with payment of his debts and of an annuity to his wife, in lieu of dower. The real estates having been sold to pay the debts, and the income of the remaining proceeds being insufficient to pay the annuity: it was held that the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund; and it was also held (the annuity being wholly in arrear), that the arrears were to be computed from the testator's death. (*Stamper* v. *Pickering*, 9 Sim. 176.) A widow, in a case in which she was bound to elect between her dower and an annuity given by her husband's will, received the annuity for five years: it was held, under the circumstances, that she had not elected. (*Reynard* v. *Spence*, 4 Beav. 103.)

It will be observed that this act has given the husband complete power to defeat the right of dower, either by deed or will; and where any interest in the land liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared, although no gift to the wife out of personal estate is to defeat the right of dower, unless an intention to do so be declared by the will.

3 & 4 *Will.* 4, c. 105, *s.* 10.

Bequest of personal estate to the widow shall not bar her dower.

10. No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will (*h*).

(*h*) A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared. (*Ayres* v. *Willis*, 1 Ves. sen. 230.)

Agreement not to bar Dower.

Agreement not to bar dower may be enforced.

11. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them (*i*).

(*i*) In purchasing an estate free from dower by force of this act, it should be ascertained that the vendor has not bound himself by agreement not to bar his wife's dower. (Sugd. V. & P. 548, pl. 24, 11th ed.)

Priority of Legacies in Lieu of Dower.

Legacies in bar of dower still entitled to preference.

12. Nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies (*k*).

Preference of legacies in lieu of dower.

(*k*) When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, since the bequest is not made as a bounty, like other general bequests, but as purchase-money for the collateral right or interest, it will be entitled to a preference of payment to the other general legacies, which are merely voluntary. (See 1 Rop. on Leg. 372, 2nd ed.; Wms. on Executors, 839; 1 Fonbl. on Eq. 372.) Upon this principle, when a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion to the other legatees. (*Burridge* v. *Bradyl*, 1 P. Wms. 127; *Blower* v. *Morrett*, 2 Ves. sen. 420; *Davenhill* v. *Fletcher*, Ambl. 244.) Therefore where a testator, who had by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific legacies and a sum of money, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full: it was held that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legatees. (*Heath* v. *Dendy*, 1 Russ. 545.) It seems that the principle of these cases applies only where at the death of the testator the widow is entitled to dower. (*Id.* 545.)

A widow, dowable out of her husband's lands, having elected to take an annuity given by his will in lieu of dower, was held to be entitled to priority over the other legacies, the testator's estate being insufficient to pay the legacies in full. (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.)

3 & 4 *Will.* 4, *c.* 105, *s.* 13.

Dower ad Ostium, &c. abolished.

Certain dowers abolished.

13. No widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris (*l*).

(*l*) An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34 a; 2 Bl. Comm. 132, 133.

Saving and Restraining Clause.

Act not to take effect before the 1st January, 1834.

14. This act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower (*m*).

(*m*) See *Fry* v. *Noble*, 24 Law J., Ch. 591. The remedies for the recovery of dower have already been adverted to. (See *ante*, pp. 243, 244.) And as to what arrears of dowers may be recovered, see *ante*, p. 262.)

It may become a question whether or not widows who were married on or before the 1st January, 1834, will be entitled to dower out of *equitable* estates under the second section of this act. (*Ante*, p. 437.)

Tenant by the Curtesy.

Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case the husband shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. (Litt. ss. 35, 52; 2 Bl. Comm. 126.)

Requisites of a tenancy by the curtesy.

Four circumstances are requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage be *voidable* only, the husband will be tenant by the curtesy, unless the marriage be actually avoided during the lives of *both* parties. (*Hicks* v. *Harris*, Carth. 271; 2 Salk. 548; 4 Mod. 182. See 2 Ves. sen. 245; 7 Rep. 43 b.) 2nd. The wife must have a seisin in deed of *corporeal* hereditaments (Co. Litt. 29 a), either before or after issue born. (*Id.* 30 a.) The receipt of rent reserved on a lease for years, amounts to an actual seisin; (*De Grey* v. *Richardson*, 3 Atk. 469;) but the husband cannot acquire such a seisin of an estate let on a lease for life before marriage as will entitle him to be tenant by the curtesy, unless the lease determine during the coverture. (Co. Litt. 29 a, 32 a.)

A husband will not be tenant by the curtesy of an estate tail of which the wife was not seised during the coverture. (Co. Litt. 29 a.) Therefore, where tenant in tail by lease and release conveyed to trustees to the use of herself till marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, and the wife died first: it was held, that the husband was not entitled to a life estate under the settlement, nor as tenant by the curtesy, a base fee only having passed by the settlement, voidable by the entry of the issue in tail. (*Doe* d. *Neville* v. *Rivers*, 7 T. R. 276.)

As to *incorporeal* hereditaments, a seisin in law is sufficient. Thus, if a man seised of an advowson or rent in fee has issue a daughter, who is married, and dies leaving issue before the advowson was void or the rent

3 & 4 *Will.* 4, *c.* 105, *s.* 14.

became due, the husband will be tenant by the curtesy, although his wife had only a seisin in law. (Co. Litt. 29 a, and notes by Harg.)

Where there is a devise in fee simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. As where there was a devise to trustees in fee, in trust for A. until she attained twenty-one or married, and then to the use of her and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. A. married, had a child which died, and then the mother died under twenty-one; and as the wife, during her life, continued seised of a fee simple to which her issue might by possibility inherit: it was held, that her husband was entitled to be tenant by the curtesy. (*Buckworth* v. *Thirkel*, 10 Moore, 235, n.; 2 Bing. 447; 3 Bos. & P. 652, n.; 4 Dougl. 323. See 2 Sim. 251; 2 Rop. on Husband and Wife, Jac. ed. addenda, No. 2; Butl. Co. Litt. 241 a, n. (4); *Boothby* v. *Vernon*, 9 Mod. 147.)

But where an estate was devised to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs, and A. died, leaving issue: it was held, that her husband was not entitled to be tenant by the curtesy, because the estate, which the wife had, determined on her death, leaving issue, by which the children took as purchasers by force of the gift, and not by descent from her. (*Barker* v. *Barker*, 2 Sim. 249.)

An estate by the curtesy must arise out of an inheritance, and no such estate can issue out of an estate *pur autre vie*. (*Stead* v. *Platt*, 18 Beav. 54.)

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger. (*Jones* v. *Davies*, 7 H. & N. 507; 8 Jur., N. S. 592; 31 Law J., Exch. 116; 10 W. R. 464.)

3rd. The wife must have issue born alive in her lifetime, and capable of inheriting the estate. (Co. Litt. 29 b; 8 Rep. 34 b; Dyer, 25 b.) The evidence of a father claiming an estate for life as tenant by the curtesy will be considered sufficient proof that his child was born alive, when it was acquiesced in and acted upon by the father of the wife who was residing in the house. (*Jones* v. *Ricketts*, 31 Law J., Chan. 753; 10 W. R. 576.)

4th. The last circumstance required to consummate the right of the husband is the death of the wife. (Co. Litt. 20 a.)

Copyholds.

Copyholds are not subject to curtesy, except by custom, (4 Rep. 22 a, 30 b; *Paulter* v. *Cornhill*, Cro. Eliz. 361,) to which resort must be had for determining what portion of the lands of a feme copyholder a husband will take. It is generally an estate for the life of the husband, if there be issue, as at common law; but in gavelkind lands, a moiety only, so long as he continues unmarried, whether there be issue or not. (Co. Litt. 30 a, 111 a; 2 Sid. 153; Rob. on Gav. by Wilson, pp. 177—204; 1 Scriven on Cop. pp. 46, 79—80, 4th ed.; Shelford on Copyholds, pp. 72—74.)

Equitable estates.

Equity follows the law in the quality of estates, and therefore a husband will become tenant by the curtesy wherever the wife, during the coverture, is in possession of an equitable estate of inheritance, and has issue by such husband capable of inheriting such estate. The wife may have an equitable inheritance, notwithstanding a direction to pay the rents to her separate use; and if the wife be in receipt of the rents during the coverture, and there be issue capable of inheriting, the husband will be entitled to be tenant by the curtesy. (*Morgan* v. *Morgan*, 5 Madd. 408; *Herle* v. *Greenbank*, 3 Atk. 715; *Pitt* v. *Jackson*, 2 Br. C. C. 51.) By a marriage settlement the wife's freehold estates were vested in a trustee, in trust for her separate use during her life, remainder for such persons as she should appoint by deed or will, and in default of appointment, in trust for her right heirs. The wife died without having made any appointment, leaving her husband and a son surviving. After her death trustees sold the estate under a power in the settlement, which directed the proceeds to be invested in the purchase of other lands, or on mortgage, or in the funds, and the securities to be held on the trusts aforesaid. It was held that, on the wife's death, the husband became

equitable tenant by the curtesy of the estates, and, therefore, was entitled to the interest of the purchase-money during his life. (*Follett* v. *Tyrer*, 14 Sim. 125.) 3 & 4 *Will.* 4, c. 105, s. 14.

Where an equitable estate in fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate, by the curtesy of her husband, could not be interfered with. (*Smith* v. *Matthews*, 3 De G., F. & J. 139.)

Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may, perhaps, be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under the settlement during the whole period of coverture, yet the possession of the estate, in conformity with the equitable interests of the *cestuis que trust*, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. (*Parker* v. *Carter*, 4 Hare, 400.) If the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession, or if both the trustee and *cestui que trust* are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy. (*Parker* v. *Carter*, 4 Hare, 416.)

The husband may be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be tenant by the curtesy (*Bennett* v. *Davis*, 2 P. Wms. 316); although a *partial* exclusion from the enjoyment of the property will not have that effect. (5 Madd. 412.)

The Real Property Commissioners suggested some alterations in the law of Curtesy, and a bill for carrying them into effect was brought into parliament, but did not pass. (See 1 Real Prop. Rep., pp. 19, 20, 70, 71.)

By stat. 3 & 4 Will. 4, c. 74, s. 22 (*ante*, p. 351), an estate by the curtesy qualifies a person to be protector of a settlement.

In dealing with property which has descended from a married woman, it is necessary to inquire whether she has left a husband who is entitled to be tenant by the curtesy.

LAW OF INHERITANCE.

3 & 4 William IV. c. 106.

An Act for the Amendment of the Law of Inheritance (a).
[29th August, 1833.]

Interpretation Clause.

3 & 4 Will. 4, c. 106, s. 1.

Meaning of words in the act.

"Land."

"The purchaser."

"Descent."

"Descendants."

"Persons last entitled."

"Assurance."

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows, (that is to say,) the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be con-

e Page 448.

ents,

OF JANUARY, 1834.

LL. IV. c. 106.

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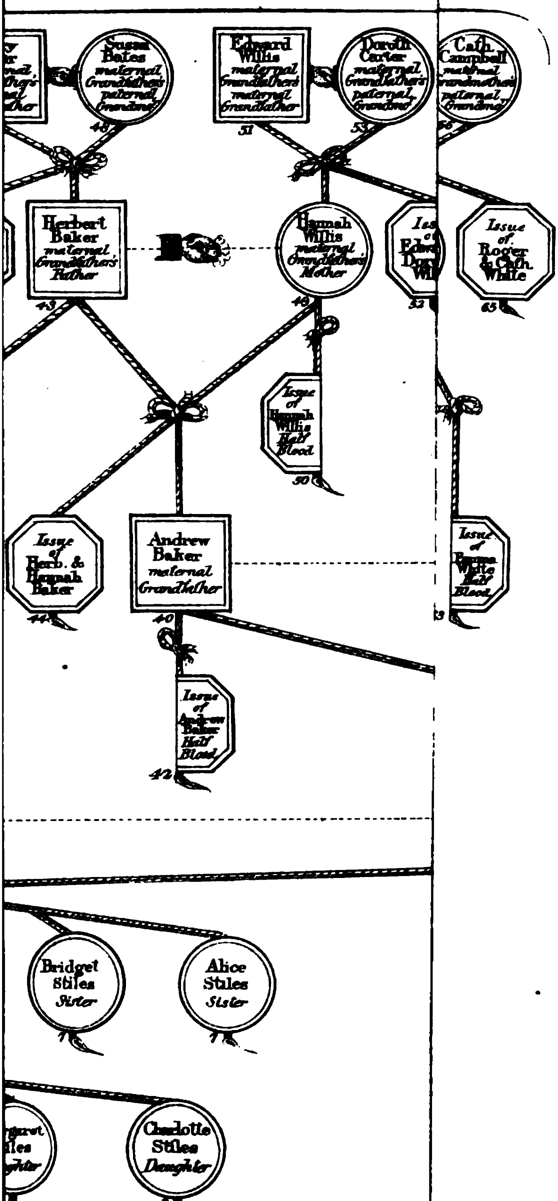

Lith. 17 Mill Street W.

veyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. 3 & 4 *Will.* 4, *c.* 106, *s.* 1. Number and gender.

(*a*) The leading objects of this act are: The objects of the act.

1st. To alter the root of descent by tracing the descent from the person last entitled, unless it be proved that he took by descent, thus superseding the rule that the descent should be traced from the person who last died actually seised.

2nd. To declare that the heir of a testator taking under his will shall be considered as taking as *devisee*, and that under a limitation to a grantor or his heirs, such person shall be considered as a *purchaser*.

3rd. To declare that brothers and sisters shall not inherit immediately from each other, but that every descent from them shall be traced through the parent.

4th. To enable the lineal ancestor to inherit from his issue in preference to collateral relations. Thus, on failure of lineal descendants of the last owner, inquiry is to be made for the father, and not for the brother or sister, nephew or niece; for the grandfather, and not for the uncle, aunt, or cousin, ascending in the first instance to the immediate parent, and then again descending to his issue, as in a course of transmission from him; and so, as to every more remote lineal ancestor and his issue, in each degree. But preference is given to the male ancestral line throughout.

5th. To make the half-blood capable of inheriting next after any relation in the same degree of the whole blood and his issue.

6th. To allow descents to be traced through persons who have been attainted.

The report of the Commissioners of Real Property will explain the general object of the alterations made by this act, and for further information on the important subject of the law of descents, the reader is referred to 2 Bl. Comm. 200, 240; Bl. on the Law of Descents; Watkins and H. Chitty on Descents; Bac. Abr. and Com. Dig. Descents; Hale's Hist. C. L. 206—248.

"The rules which govern the transmission of freehold estates of inheritance at common law, on the decease of an absolute proprietor, in the absence of express disposition by him, are (for the most part) well understood, and appear to be well suited to the habits and feelings of the people. State of the law of descents before the new act.

"By these rules an estate descends to the eldest or only son, or his descendants, if he should be dead, leaving issue, and next to the second and other sons, according to priority of birth, and their descendants; in default of sons and their descendants, it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living.

"When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead, leaving issue, and to the other brothers in succession and their descendants. If there be no brother or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before.

"In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, was a purchaser.

"In the former case the heir is to be sought in the family from which the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened; in the latter case the law gives the preference to the relations on the paternal side, but if there

3 & 4 *Will.* 4, c. 106, s. 1.

be none such, then it directs the inheritance to go to the relations on the maternal side.

Exclusion of the ascending line.

"Here occurs a rule, drawn from feudal principles, which is at variance with ordinary feelings and notions, and has been long considered unjust; every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden, that is, in most cases, to the crown. [By the 6th section of the act 3 & 4 Will. 4, c. 106, *post*, p. 463, the lineal ancestors are admitted.]

"In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother, and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants: and if none such, to sisters of the whole blood and their descendants in equal shares as before. In failure of this line, the next more remote ancestor on the same side is made the stock in the same manner,

Preference of the paternal line.

and then the next more remote, and so on; the rule being still observed, that the paternal line has the preference in ascending from the first purchaser, and that up to the first purchaser the inheritance must be traced back through the line of ancestors by which it descended.

"If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

"Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years.

Question with respect to female stocks on the paternal side.

"According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collateral relations of the paternal great grandmother. According to other authorities (and this is the doctrine maintained by Mr. Justice *Blackstone* in his Commentaries), the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

Heirs must be of the blood of the first purchaser.

"On failure of relations on the paternal side of the first purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, first on the paternal and then on the maternal side, as before. It is to be observed, that on failure of heirs of the last proprietor on the side of the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother can never pass to his collateral relations on the father's side.

Exclusion of the half-blood.

"It has been laid down, in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim.

"Thus a brother of the deceased proprietor by the same father, but a different mother, cannot inherit to the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat, and the same is the case with an uncle, half-brother of the father, and so on. This rule, like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation.

"We think that both these rules may be taken away, without introducing any uncertainty into the law of inheritance, or materially impairing its symmetry."

3 & 4 *Will.* 4, *c.* 106, *s.* 1.

And, 1st, *As to the Ascending Line.*

Ancestor to come in when his issue would have inheritited by the old law.

"It appears desirable, that the lineal ancestor should be let into the succession in such order as to infringe as little as possible on the present rules, and to found the new rule upon some principle already established, making it agreeable, so far as may be, to the feelings of the people, and to the general policy of the law of inheritance. This we think may be best done by introducing the ancestor wherever the descendants of such ancestor would be entitled according to the present rules; the ascending line would thus come in immediately after the descending. If the purchaser of an estate died without issue, and intestate, leaving a father, that father would take before the brothers or sisters or their descendants; and if there were neither father nor brothers or sisters, or their descendants, a surviving grandfather would take before uncles or aunts. Conformity in the laws regulating different species of property is desirable, with a view to the better general understanding of the law. Accordingly one recommendation of this rule is, that it would make the transmission of real property, in one case, conformable to the law now long established for the transmission of personal property, which, in case of the intestacy of a person dying unmarried and without issue, goes exclusively to the father as next of kin—a law which it is believed has not been found inconvenient, nor considered unfair or objectionable. The father, too, as the general dispenser of the family property, seems the fittest person to have the control over whatever is to devolve by law upon some part of his family.

Descent between brothers and sisters not to be immediate.

"By a technical rule of pleading, the descent from one brother or sister to another has been hitherto considered immediate, and in the opinion of some persons it would be better to consider that as a substantial rule, and to prefer brothers and sisters to the fathers: this, however, would be introducing an anomaly, especially if the principle were not followed up by postponing generally the ancestor to his descendants, the grandfather, for instance, to the uncle. [Sect. *5* of act 3 & 4 Will. 4, c. 106, *post*, p. 463.]

"It may be argued in support of such proposal, that the ancestor, who is likely to be advanced in life, may be expected to be less capable of making a discreet disposition of his property, that he may be tempted unfairly to divert it to his issue by a different marriage, or even to make some disposition altogether capricious and unreasonable; but the dependence of children on their parents is acknowledged to be salutary, and when it is considered that the proposed change of the law will only come into operation in the absence of express disposition, and therefore it may be presumed, for the most part, where no strong reason was felt by the deceased proprietor for making a disposition, the general good of the family seems likely to be best consulted by vesting the property in its head, rather than in any of the younger members, and, as already observed, less violence will thus be done to the general system of the law of inheritance.

Ancestor not to be restricted to a life estate.

"The same reason we consider should prevail against a plan which has been proposed, of giving to the ancestor an interest during his life only."

2nd. *As to the Half-Blood.*

Whole blood of first purchaser to be preferred only between kindred in equal degree.

"We think it advisable that no distinction should exist between the whole and the half-blood, except that preference should be given to the whole blood of the first purchaser, as between his kindred in equal degree or their descendants, with the exception of a single case afterwards mentioned.

"The following reasons seem to us sufficient for putting the whole blood and the half-blood on an equal footing, with the above exception.

Reasons for restricting the preference of whole blood.

"1st. One ancestor only of any couple of ancestors being the person from or through whom the inheritance descends, it seems needless to have any regard to the other ancestor. Thus if land descend from the father to the eldest son, there seems no reason why it should not pass from him to the second son, whether born of the same or another mother.

"2nd. The rule is recommended by the principle of conformity already suggested, as in the transmission of personal estate, the whole blood and

3 & 4 *Will.* 4, *c.* 106, *s.* 1.

half-blood standing on an equal footing, and so in case of descent of a title of nobility, or of an estate tail.

"3rd. The difference between the whole and the half-blood, however well understood by lawyers, is, it is believed, not familiar to the public: lands are therefore liable to be left to descend contrary to the intention of the owner, and they are liable to be claimed and to be possessed contrary to the law without an evil intention; and further, in deducing the title on sales of estates, the circumstance of the half-blood, being not of very frequent occurrence, is liable to be overlooked by those who prepare the abstract of title, and by those who know nothing of the pedigree but what is laid before them, and thus a bad title may be approved of by the advisers of a purchaser for valuable consideration and accepted by him; whatever leads to insecurity of titles is of course, independently of other considerations, greatly objectionable.

"Some of the above reasons apply with equal force to the case in which a person who died seised was himself the purchaser.

Reason for giving the restricted preference.

"The reason which has inclined us to give a limited preference to the whole blood in this case is, that when one parent has issue by another marriage, the connection between the members of the two families is felt to be much less than between the members of each family. If a brother leave a whole brother or sister, or the issue of either of these, and also an elder brother by a different marriage, it would be repugnant to common feelings and notions, to direct his estate to descend to the half brother, although if he left a brother or sister of the half-blood, or the issue of such, and only a more remote relation of the whole blood, the proximity of kindred would seem to give a reasonable preference to the former. It would be desirable if, with reference to the half-blood, a distinction could be drawn between the case of a purchaser by his own act, according to the familiar use of the word purchaser, and that of a purchaser in the mere technical sense of the word, that is, a person who may have succeeded perhaps to the family estate, but is considered as a purchaser, because it comes to him through some deed or will, and not by inheritance, and in the latter case to put the whole and the half-blood on an equal footing; it is considered, however, impracticable to frame a law founded on this distinction, which should be clear and simple, except, indeed, that a power may be given to the person from whom the property comes, of directing that it shall be taken as if it descended from a particular line of ancestors, as hereafter explained, in which case we think the distinction of the whole and half-blood may also be taken away.

"It is proposed, therefore, that the whole blood of the first purchaser, who took without reference to any ancestor, shall be preferred, as between persons claiming through the same ancestor of the first purchaser to the half-blood, and that, subject to this preference, the distinction between the whole and the half-blood shall be abolished."

[The half-blood are now capable of inheriting under the 9th section of 3 & 4 Will. 4, c. 106, *post*, p. 465.]

3rd. *As to the Female Ancestor.*

Blackstone's rule as to female ancestor to be adopted.

"With respect to the question as to the preference of the nearer or more remote female ancestor on the paternal side, the case having, it is understood, occurred more than once since the Commentaries were published, it seems expedient to settle it, and the symmetry of the rules of inheritance appears most consulted by adopting the rule laid down by Mr. Justice *Blackstone*. It is proposed to declare this to be the law, and to extend it of course to the case of direct ascent, so that the mother of the paternal grandfather would be preferred to the mother of the father." [Four tables are subjoined to the First Real Property Report, one showing the order of inheritance as laid down by Mr. Justice *Blackstone*, the others showing the order of inheritance according to the proposed alterations.]

4th. *Limitation to Special Heirs.*

Inconvenience of the law regarding

"The rule above mentioned, which directs that where the inheritance passes to collateral relations of the last proprietor, those only are admitted

to take who are of the blood of the first purchaser, occasioning an estate to pass sometimes in a different channel where the deceased owner had inherited the estate, and where he had acquired it by what the law denominates purchase, although the distinction is often, as has already been observed, only technical, introduces complexity, and sometimes causes anomalous diversities in the transmission of estates. 3 & 4 *Will.* 4, *c.* 106, *s.* 1.

the blood of the first purchaser.

"Thus, if a person acquired an estate immediately under a will or settlement made by his maternal ancestor, that estate would descend to his relations on the father's side, and would not return to the family from which it came, until the father's line were exhausted. On the other hand, if is came from a maternal ancestor by descent, strictly so called, all the relations on the paternal side would be excluded; and rather than pass to them, the estate would escheat. In consequence again of a principle of courts of equity, that a man cannot be a trustee for himself, and that where a beneficial estate is in the same party with the legal estate, it is absorbed by the latter, cases have occurred where the course of descent of an inherited estate, the title to which was equitable, has been changed by the accident of the mere legal estate (that is, what may be called the *fictitious* estate of the trustee) descending from the other line of ancestors, and absorbing the equitable estate. An additional inconvenience arises from the occasional nicety of the distinction between strict descent and purchase, according to the technical sense of the latter word—a circumstance which sometimes makes the channel of descent a matter of question.

Reason against abrogating the law.

"It has been proposed to remedy these inconveniences by considering every person who dies owner of an estate of fee-simple as the stock from whom alone the inheritance is to be traced as if he had been first purchaser.

Estates may be limited to descend to heirs on the part of a specified ancestor.

"It is apprehended, however, that such a rule would occasionally produce very objectionable consequences. Thus, if an heiress died under age, leaving a child who should also die under age and without issue, the estate would necessarily be carried from her family to the family of her husband.

"This proposal, therefore, is not recommended as a general rule.

"It has, however, occurred to us, that a person devising or settling an estate in fee-simple might be allowed to direct that the donee or devisee should take the estate as if it had come to him from a particular ancestor; that an estate, for instance, might be given to a man and his heirs on the part of his mother. The attempt to create limitations of this nature has been frequently made; the law now forbids such limitations in grants of estates in fee-simple, although it allows them on the creation of estates tail. We incline to the opinion that allowing them in the former case would be a reasonable enlargement of the power of absolute proprietors, and would diminish the inconveniences produced by the technical distinction between inheritance and purchase. This is the case in which we think the distinction between the whole blood and the half-blood of the purchaser may be abolished.

Heir of first purchaser let in in a certain case.

"We think that especial regard should be paid to the blood of the first purchaser, in a case which will be liable to occur in consequence of the admission of the half-blood to inherit. If an estate should descend from a purchaser to his half brother, it might happen that the heirs of the second brother would be strangers in blood to the first, and the heirs of the first brother (at the death of the second) strangers in blood to the second; this would be the case if the common parent were illegitimate, and the second brother should die without issue, and there were no other brother or sister, or the issue of such; and it might be the case under other circumstances. We propose to provide for the case by directing the inheritance to pass to the heir of the first purchaser, when the heir of the last proprietor shall not be also heir of the first purchaser.

Last proprietor considered as first purchaser on failure of blood of first purchaser.

"We further think that the last proprietor may be treated as if he had been first purchaser, in the rare case in which the line from which the estate descended to the last proprietor has failed, for the purpose of admitting to the inheritance his other relations, rather than let it escheat.

"It may seem superfluous to legislate for cases like these, which may appear very unlikely to occur in practice; they are found, however, to

3 & 4 *Will.* 4, *c.* 106, *s.* 1.

occur in consequence of the acquisition of estates by persons of illegitimate birth, who have in law no relations but their own descendants, or by the descendants of such, and in consequence of the loss of evidence of pedigree in families of mean condition or origin."

5th. Seisin of Ancestor.

"A rule of law, founded on feudal principles, and expressed in the legal maxim, *seisina facit stipitem*, directs, that inheritance is to be traced from the person who last died actually seised; that is, who was in possession by himself, or a tenant for years, or had received some rent (in the case of a freehold lease), or had exercised some act of ownership; thus, if the right to an estate descended to a person who himself died without having taken possession, or having had it by construction of law, the inheritance is to be traced not from such person, but from the person who died possessed. This law produces many anomalous consequences: it makes it sometimes a matter of chance whether a whole sister or a half brother of the person who last died entitled, or whether a father, or an uncle, or more remote relation of the person who last actually enjoyed the property, shall inherit; and it may happen that one part of the family estate, having been in the occupation of a tenant, shall go one way, another part, as to which the possession may have remained vacant during the time of the person last entitled, shall go another way.

Inconvenience of old law.

"Owing to the circumstances that some species of property, as reversions and advowsons, do not admit of taking actual possession, though an act of ownership has the effect of taking possession, and that on the other hand, in most cases which admit of possession, and as to equitable estates, the law creates constructive possession, these anomalies are sometimes inevitable; moreover, occasionally nice and doubtful questions arise as to the fact of actual or constructive possession.

Doubtful questions as to fact of seisin.

"The rule itself appears not to be grounded on any solid principle, and though the inconveniences arising from it will be lessened by admitting the half-blood and the lineal ancestor to inherit, it is proposed to abolish it, *and to enact that estates shall pass to the heirs of the person who last died entitled, although he may not have had seisin.*

[It will be observed that this proposal has not been adopted, and that the descent is to be traced from the purchaser. See sect. 2 of act, and note.]

New laws of inheritance to be applied to copyhold lands, &c.

"It appears expedient to extend all the above proposed rules to the inheritance of lands held by tenures or customs, different from the general tenure of free and common socage, as copyhold lands and customary freeholds, and lands held in ancient demesne, and borough-English and gavelkind lands, and also to descendible freeholds." (1 Real Property Rep. 10—16.)

Equitable estates are subject to the same rules of descent as *legal*. (2 P. Wms. 668; 1 Rep. 121 b; 4 Rep. 22; 2 Eden, 258; 1 Sand. Uses, 217, 3rd ed.; *Trash* v. *Wood*, 4 My. & Cr. 324.)

Root of Descent.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

2. In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof (*c*), unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved

to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

3 & 4 Will. 4, c. 106, s. 2.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof. (22 & 23 Vict. c. 35, s. 19.)

Descent, how to be traced.

The last preceding section shall be read as part of the 3 & 4 Will. 4, c. 106. (*Ib.* s. 20.)

Preceding section incorporated with 3 & 4 Will. 4, c. 106.

(*c*) Where an illegitimate child became the purchaser of lands which descended to his son, who died without issue and intestate, it was held, that the heirs of the party last seised were not entitled; but that, notwithstanding the 3 & 4 Will. 4, c. 106, s. 2, the lands escheated to the crown. Thus, in 1808, G. N., a foundling, purchased the property in dispute, having previously married M. J., a widow, whose maiden name had been B., and by whom he had one son, G. N. the younger; he died in 1815 intestate, leaving his wife and his son G. N. the younger his survivors. His widow died shortly afterwards, and his son entered into the possession of the property as his father's heir at law. The son never married, and died seised in March, 1834, intestate. Upon his death the defendant took possession of the property, and continued in possession up to the trial. The lessor of the plaintiff claimed as heir at law of the younger N., viz. as grandson of one J. B., who was the eldest brother of M., the wife of the foundling and mother of the younger N. It was held, that the property escheated, the 2nd section having provided that in future descents shall be traced from the purchaser, and not from the person last seised. (*Doe* d. *Blackburn* v. *Blackburn*, 1 Mood. & Rob. 547, *Parke*, B.) The Real Property Commissioners intended to provide for this very case, in order to prevent an escheat, by making the last proprietor (the son in this case) the purchaser, in order to let in his other relations; (1 Real Prop. Rep. 15;) and they introduced a clause in the bill for that purpose, which was struck out. (See Sugd. Vend. & Purch. 551, 11th ed.) This has now been supplied by the 22 & 23 Vict. c. 35, ss. 19, 20, above stated.

As to rule tracing descents from the purchaser.

The explanations in the first section have rendered actual seisin unnecessary in the purchaser or the person to be deemed such; but every estate, right and interest, whether in possession, reversion, remainder or contingency (*ante*, p. 448), and whether the last person who had a right to the land did or did not obtain the possession or receipt of the rents and profits thereof, are now the foundation of a right in the first purchaser, from whom the descent is accordingly to be traced. The second section renders it necessary to prove a descent at every step, in order to exclude the last possessor's title as a purchaser; but it does not exclude such proof, and therefore when it can be obtained the descent will be traced as it has actually taken place, subject to the provisions of the act. (See Sugd. V. & P. 550, 11th ed.)

A. being seised in fee of copyhold property, devised the same to B. for life, remainder to her issue as tenants in common; and if but one child, then to such one, his or her heirs, &c. absolutely; and in default of such issue to his own right heirs. On the death of A., B. was admitted, and afterwards married the defendant. B. subsequently died, leaving, by the defendant, one child, C., an infant, who afterwards died, aged eight months. Immediately on the death of B., the defendant entered into the receipt of the rents and profits, and so continued from that time till the time of the action. The defendant's sisters were C.'s heirs at law and by custom. In ejectment by the heir at law of A., it was held, that as C. took by purchase, actual seisin by her was not necessary in order to transmit the estate to her right heir, and that the lessor of the plaintiff was entitled to recover. *Tindal*, C. J., said, "the devisee in fee has, without an actual entry, such a seisin of the premises devised as will enable his heir to take from him by descent,

3 & 4 Will. 4, c. 106, s. 2.

and consequently to bar the heir at law of the devisor. It is the clear result of all the authorities, that wherever a party has succeeded to an estate by descent, he must obtain an actual seisin or possession, as contradistinguished from a seisin in law, in order to make himself the root or stock from which the future inheritance by right of blood must be derived; that is, in other words, in order to make the estate transmissible to heirs. It will be quite sufficient to refer to the maxim in Fleta, *seisina facit stipitem*, (2 Bl. Comm. 209; Co. Litt. 15 a,) and to the well-known doctrine of *possessio fratris*, without citing any express authorities on this point. But the case now under consideration does not arise upon the right of the heir claiming from an ancestor who himself took by descent, and died before actual seisin, but upon the right of one who claims *as heir at law of a devisee*, that is, of a purchaser, who dies before the actual seisin; and the question is, whether such heir can maintain his possession against the heir of the testator. We think the right to the inheritance is in the defendant, and that he can retain the possession." (*Doe* d. *Parker* v. *Thomas*, 4 Scott, N. R. 449; 3 Man. & G. 815; see *Doe* d. *Winder* v. *Lawes*, 7 Ad. & Ell. 213.)

The descent of an estate in remainder or reversion, or by executory devise, will be analogous to the descent of an estate taken by descent from a purchasing ancestor. It will therefore descend to the heirs of the original remainderman or reversioner, in a course of devolution corresponding to that in which the latter descends to the heirs of the purchasing ancestor, and with a corresponding difference from the manner and principles of a descent of such an estate at common law; that is to say, it is the fact of purchase that constitutes the person the stock of descent under the new law, and not the fact of seisin, or what may be equivalent to seisin as under the old law. Any partial disposition, therefore, of the remainder or reversion, or other act of ownership exercised by the mesne owner, which under the old law would, in such a case, be considered as equivalent to seisin, and sufficient to turn the descent, will not of itself have that effect under the new law. But if the conveyance by which the disposition is made should contain an express limitation of the fee to the mesne owner himself or his heirs, he would then, under the 3rd section of the act, acquire, by means of the conveyance, a new estate by purchase in the remainder or reversion, which would thenceforth be descendible to his own heirs, and not to the heir of the original remainderman or reversioner, or of the last purchaser of the remainder or reversion.

Where a coparcener dies intestate leaving a son, the whole of her share descends on her son. T., tenant in fee of certain hereditaments, died in 1826 intestate, leaving two daughters E. and S. his co-heiresses at law. E. continued seised of her moiety till 1st of June, 1835, when she died intestate, leaving G. her eldest son and heir at law. S. continued seised of her moiety till 16th January, 1839, when she died intestate, leaving B. her eldest son and heir at law. The devisees of G., in a suit for a partition against B., claimed five-eighths of the hereditaments, contending that under this section, on the death of E. her moiety descended in moieties on S. and G. as co-heirs of T., who was assumed to be the purchaser, therefore S. obtained three-fourths or six-eighths, and G. one-fourth or two-eighths, and that on the death of S. her six-eighths descended in moieties on B. and G., therefore B. took three-eighths and G. five-eighths. *Shadwell*, V. C., "I cannot bring myself to entertain the least doubt that E.'s four-eighths descended on her son G. I do not see how any one acquainted with the principles of law can doubt. Can you suppose that an act of parliament, by any portion of it, meant to introduce doubt into a case that was so plain before the act passed? Was it not the meaning of the act to leave the law of inheritance, in such parts as were plain, absolutely as it was found, and only to alter it where it was doubtful? Just observe what is the purview, 'to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require;' that is the general object stated in distinct words, 'the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same.' There the act is speaking of what ought to be the rule in cases where the thing is

doubtful, but where the thing is so plain that nobody could doubt you must make it consistent, and if you see an act was passed to make the thing clear, do not say that the act was to make it doubtful. On looking through the act that portion of the second section appears to me so plain that I shall not send the case to law." It was declared, that on the death of E. her moiety descended upon G., and that on the death of S. her moiety descended upon B. (*Cooper* v. *France*, 14 Jur. 215; 19 Law J., Ch. 315.) 3 & 4 *Will.* 4, *c.* 106, *s.* 2.

In ejectment for copyhold premises, the plaintiff claimed as customary heir in borough-English of M., who purchased the premises in 1772. Upon the death of M., in 1812, the premises descended to his two infant granddaughters as coparceners. One of them died unmarried, and was succeeded in her moiety by her sister, who, in 1836, married the defendant. She died in 1838, leaving one son, to whom the premises descended, and who died in 1854 without issue, and was the person last seised. It was proved that lands in the manor descended lineally to the youngest son of the person last seised *ad infinitum*, and if no son, to the daughters as coparceners: if no lineal heirs, to the youngest brother of the person last seised, and to the youngest of such youngest brother; and if the youngest brother died without issue, to the next youngest brother; and if no brother, then among the sisters as parceners. There was also an entry of descent and admission of the youngest son of an uncle, and of the youngest sons respectively of two sisters, heirs of the person last seised. The plaintiff was the youngest son of the youngest brother of M., the purchaser: it was held, in the Exchequer Chamber (affirming the judgment of Exchequer), that the custom did not extend to so remote a collateral relation as the plaintiff. (*Per Coleridge, Wightman, Cresswell* and *Crompton*, Js. (*Cockburn*, C. J., *Erle* and *Williams*, Js., *dissentientibus*), *Muggleton* v. *Barnett*, 2 H. & N. 653; 4 Jur., N. S. 139; 27 L. J., Exch. 125, Exch. Cham.) It was held, also, that this act did not affect the custom of descent in the manor. (*Ib.* See 4 Jur., N. S., Part II. pp. 56, 74, 85, 120.)

Devise of freehold and leasehold lands in Kent, in strict settlement, with an ultimate limitation to the testator's own right heirs; the will also containing a similar disposition of other leaseholds in Kent, not the subject of the suit: it was held, that the common law heir was entitled. (*Sladen* v. *Sladen*, 2 Johns. & H. 369; 31 L. J., Ch. 775; 10 W. R. 579.) The custom of gavelkind being, that the lands of an intestate dying without issue are partible amongst his brothers equally, the court will apply all the incidents of descent to that custom, and the descendants of a deceased brother will stand in the same position *jure representationis* as their respective parents would have occupied; nor does the right of representation stop at the children of a brother by analogy to the Statute of Distributions. Therefore, where a man died intestate and without issue, seised of gavelkind lands, leaving a nephew and two sons of a deceased nephew: it was held, that the latter were entitled *jure representationis* to the share which their father, if living, would have taken. (*Hook* v. *Hook*, 32 L. J., Ch. 14; 11 W. R. 105.) *Wood*, V. C., said, "the canon of descent applicable to the point is laid down in *Clements* v. *Scudamore*, 1 P. Wms. 63, where Chief Justice *Holt* said, 'the custom alters the descent by the common law to the eldest son, and carries it to the youngest son generally, and must have all the consequences of a descent.' Accordingly, the right of representation was admitted as a general incident of descent to operate upon the customary rule of preferring the younger son, exactly as it operated in the common law rule, preferring the eldest. The same principle must be applied whether the custom be that of gavelkind or borough-English. You must ascertain what the custom is, and then apply all the rules of descent to the custom so ascertained." (*Hook* v. *Hook*, 1 Hem. & M. 43; 32 L. J., Ch. 15, 16.)

Tracing descent.

Real estate stood limited to A. B. for life, with remainder to C. D. in fee simple. C. D. died, living A. B., leaving two aunts, a cousin, the son and heir of another aunt, and two cousins, the daughters and co-heiresses of another aunt, her co-heirs at law. The property became thus divisible into eighths, two to one aunt, two to another, two to the son of another, and one eighth to each daughter of the other aunt. One of the daughters, E. F., died in 1824, living A. B. the tenant for life, leaving I. K. her son and heir

3 & 4 *Will.* 4, *c.* 106, *s.* 2.

at law. The other, G. H., died in 1832, living A. B., the tenant for life, leaving I. K. her nephew and heir. None of these persons had in any way dealt with the property. In 1839, A. B., the tenant for life, died: it was held, that as to the one-eighth which had belonged to his mother, it was not necessary to trace the descent afresh from C. D., to whom the remainder in fee was limited, but that he ought to be considered as standing in his mother's place in respect of that share. (*Paterson* v. *Mills*, 15 Jur. 1; 19 Law J., Ch. 310.)

By the second section the descent is to be traced from the purchaser whether that purchaser is the person upon whose death the descent takes place, or an ancestor of that person. In every case, therefore, of the death of a person entitled to an estate by descent, the heir of such person is passed over, and the heir of the original purchaser must be sought for. To illustrate the effect of this rule in the case of a descent in coparcenary,—a case of constant occurrence where the custom of gavelkind prevails, and not unfrequent in descents of land held by the ordinary tenure,—suppose A. to have purchased an estate, and to have died intestate, leaving three daughters, B., C., D., who each take a third by descent; B. then dies, leaving two daughters; under the old law, if B. or either of her two sisters had acquired seisin, her two daughters would have taken her third between them; and if neither B. nor her sister had acquired seisin, the descent of the entire estate would, it seems, have been looked upon as remaining open (though this point is by no means clear), and B.'s two daughters would have been entitled to a third as before. But under the present law it has been contended B.'s share alone is the subject of descent, and it descends to the heir of the purchaser, A.; that is, it descends to B.'s daughters, as her representatives *in coparcenary with* C. *and* D.; so that B.'s daughters, instead of taking each a sixth, take each an *eighteenth* only. If one of B.'s daughters were then to die, without doing any act to turn the descent, (and until her majority she could do no such act,) her share would be again subdivided, and her own issue would only be entitled to a *one hundred and eighth share* of the original estate, if, under these circumstances, the adult daughters of the original purchaser had settled or sold their shares, the representatives of B. would have lost all chance of receiving any equivalent by descent from them. (See 5 Jur. 641, 763; 23 Law Mag. 279; 1 Hayes's Convey. 314, 5th ed.; 1 Jarm. & Byth. Convey. by Sweet, 139, 140.) The subject of descent amongst coparceners is much discussed in 10 Jur. 71—75, 112, 132, 160, 173.

Right of posthumous heir.

Although lands have actually descended in the first instance to the person who was heir of the party last seised at the time of his decease, yet, if a nearer heir is afterwards born, property will shift to the nearest heir who subsequently comes into being. (See *Rider* v. *Wood*, 1 Kay & J. 644; Cru. Dig. Descent, Ch. III. s. 14.) A. being seised of real estate died, leaving his sisters his presumptive co-heirs, his wife being *enceinte* of a son, who was born subsequently. The rents from the ancestor's death having remained unreceived by the co-heirs: it was held, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir. (*Goodale* v. *Gawthorne*, 2 Sm. & G. 375; 18 Jur. 927; 23 Law J., Ch. 878.) But if during the period of the qualified heirship and seisin in the sisters they had entered and received the rents, as they might have done, they would have been entitled to retain such rents. (*Ib.*; *Doe* v. *Clarke*, 2 H. Bl. 399.)

It has been decided by *Wood*, V. C., that a posthumous heir is entitled to the rents of a descended estate only from the date of his birth, whether the prior rents have been actually received or not, the principle being that the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not. (*Richards* v. *Richards*, 1 Johns. 754; 6 Jur., N. S. 1145.)

3 & 4 *Will.* 4, *c.* 106, *s.* 3.

Devise to Heir—Limitation to Grantor.

3. That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*d*); and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof (*e*).

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

(*d*) Under this section an heir to whom lands are devised by the ancestor takes them as devisee to all purposes; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him. (*Strickland* v. *Strickland*, 10 Sim. 374.)

This section of the act is in direct contravention of two old-established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring property. A title by *descent* is vested in a man by the single operation of law, and by *purchase* by his own act or agreement. (Co. Litt. 18 b; 2 Bl. Comm. 200, 201.) The latter is thus defined by Littleton, s. 12: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or cousins, but by his own deed."

Descent and purchase.

Lord *Coke* states that a purchaser is a law term, and imports any estate which is *not* cast upon a man by act of law, (as descent or escheat,) but which he takes or accepts by conveyance for money or other consideration, *vel aliâ, quâvis fortunâ*, or freely by gift. (Co. Litt. 18 a.)

It was a positive rule of law, that a man could not make his right heirs take by purchase, neither by conveyance at common law, nor by a limitation to uses, nor by devise. (*Counden and Clerk's case*, Hob. 30; *Pybus* v. *Mitford*, 1 Ventr. 372; Co. Litt. 22 b.) The same rule applies to equitable as legal estates (Watk. Desc. 169), and to copyholds as to freeholds. (*Roe* d. *Noden* v. *Griffith*, 4 Burr. 1952; *Thrustout* d. *Gower* v. *Cunningham*, 2 Bl. R. 1048; Fearne, 68.) The difference between the acquisition of an estate by descent and by purchase consists principally in two points: 1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2nd. An estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent. (Cruise's Dig. tit. XXX., s. 4.)

Where under a devise the whole fee is not exhausted, the reversion results to the testator as part of his old estate, and the heir takes it by descent and not by purchase. Therefore, under the law of inheritance, as it existed prior to this statute, if the heir had died intestate, without being seised of such resulting interest, the descent must have been traced from the ancestor. (*Buchanan* v. *Harrison*, 8 Jur., N. S. 965; 31 Law J., Chan. 74.)

Heir taking by descent or by purchase.

The court will not allow any legal interest existing in the heir to prevent the devolution of the equitable interest in the course in which it would pass if the legal interest were separate. Therefore, where the heir was seised of the legal estate as trustee under his ancestor's will, and the ultimate trust in the fee failed for remoteness: it was held, that his legal estate did not so unite with his beneficial interest as to constitute a seisin of the latter. (*Ib.*)

3 & 4 Will. 4, c. 106, s. 3.

There may, however, be a *possessio fratris* of an equitable as well as of a legal estate, and any dealing by the heir with his beneficial interest in the reversion will be sufficient to constitute a seisin; so that on his death intestate a sister of the whole blood will be entitled to the exclusion of a brother of the half-blood. (*Ib.*)

Devise to heir void.

Before the passing of this act it was a rule of law, that where a testator made the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary was void. (See 4 Real Prop. Rep. 74, 75.) Therefore, if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent, as his better title; so where a man, seised of land in fee on the part of his mother, devised it to the heir on the part of his mother in fee, the heir was in by descent. (*Reading* v. *Royston*, 1 Salk. 242; *S. C.*, Prec. Ch. 222; 2 Ld. Raym. 829; Com. R. 123; *S. P.*, 2 Leon. 11; Dyer, 124 a; Plowd. 545; 2 Ves. & B. 190.) Where a devise of lands to the heir at law made no alteration in the nature or limitation of the estate, the heir took not by purchase under the will, but by his preferable title by descent, notwithstanding the will imposed some pecuniary charges on the estate. (*Clarke* v. *Smith*, Com. 72; *Allen* v. *Heber*, 1 Bl. R. 22; *Emerson* v. *Inchbird*, 1 Ld. Raym. 728; *Plunket* v. *Penson*, 2 Atk. 292.) Where a man, seised in fee on the part of his mother, devised to his executors for sixteen years for payment of his debts, remainder to his heir on the part of his mother, it was held that the heir took by descent. (*Hedger* v. *Rowe*, 3 Lev. 127; see Wms. Saund. 8 d.) And an heir at law was held to take by descent under a devise to him after the death of his mother, charged with the payment of sums of money. (*Chaplin* v. *Leroux*, 5 Maule & S. 14.) So under a devise to one for life or in tail, with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent, and not under the will. (Hob. 30; 10 Rep. 41; Ventr. 372.) So a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, was held not to alter the quality of the estate, which he would otherwise have taken as heir; and that he therefore took by descent, and not by purchase. (*Doe* d. *Pratt* v. *Timins*, 1 B. & Ald. 530; see 1 Jarman on Wills, 67, 68; *Langley* v. *Sneyd*, 7 Moore, 165; *S. C.*, 3 B. & B. 243; *Manbridge* v. *Plummer*, 2 M. & Keen, 93.) A testator, by his will dated in 1809, devised his real estates to trustees, in trust to pay an annuity, and out of the residue of the rents to maintain S. M. (who was his heir) until he attained twenty-one; and on his attaining twenty-one, to convey the estates to him in fee; but if he died under twenty-one, then to J. S. in fee. S. M. having attained twenty-one, it was held that he took the estate by descent. (*Wood* v. *Skelton*, 6 Sim. 176.) So a devise after limitations in strict settlement, in default of such issue then to the devisor's *next* heir at law, was held a limitation of the reversion, and not a contingent remainder to the heir as a purchaser at the time of the failure of such issue. (*O'Keefe* v. *Jones*, 13 Ves. 413.)

But where a different estate was devised than would have descended to the heir, the disposition by will prevailed, as where the estate was devised to the heir in tail. (Plowd. 545.) So where a man having issue two daughters, who were his heirs, devised to them and their heirs, they took under the will, for by law they would have taken as coparceners, but by the will the estate was given to them as joint tenants. (Cro. Eliz. 431; Com. R. 123; 2 Ld. Raym. 829; *Scott* v. *Scott*, 1 Eden, 461, 462, n.; *S. C.*, Ambl. 388; see 6 Sim. 185; *Swaine* v. *Burton*, 15 Ves. 371.)

(*e*) By a well-known rule, called the rule in Shelley's case (1 Rep. 93; see *Parker* v. *Clarke*, 3 Sm. & G. 161, 165), it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold,

not to be executed until after the determination of the preceding mesne estate. (1 Barn. & C. 243.) There is a long series of decisions on this rule. (See Fearne, Cont. Rem., 10th ed., pp. 28—201.) In order to understand this section of the act, it is necessary to observe, that when a person has an interest in lands and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of these lands will, on the determination of the granted interest or estate, return or revert to the grantor. (Com. Dig. Estate, (B. 10, 11, 12, 31); 2 Bl. Com. 175; Co. Litt. 22 b; Plowd. 151; Watk. on Conv. 120.) An estate in *reversion* is therefore the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted by him (Co. Litt. 22), or the returning of the land to the grantor or his heirs after the grant is over. (*Ib.* 142.) A reversion is never created by deed or writing, but arises from construction of law, whereas a remainder can only be limited by deed or some other assurance. It is a rule that a grantor cannot enable his heir general to take a remainder as purchaser, under a limitation to his *heirs*, but where the limitation is to the right heirs of the grantor, the use so limited is construed to be the old use, and will be executed in him as the *reversion in fee*, and not as a remainder. (1 Rep. 129 b, 130; *Godolphin* v. *Abingdon*, 2 Atk. 57.) As where a man granted to A. B. with remainder to his own heirs male, such heirs took by descent. (*Wills* v. *Palmer*, Bl. R. 687; 5 Burr. 2615.) Before the above act it was a general rule, that where a party seised in fee conveyed lands to the use of himself for life, with remainder to others for particular estates for life or in tail, with an ultimate limitation to the *right heirs* of the *grantor*, such limitation was inoperative, as he continued seised of the reversion as part of his former estate, which was consequently descendible in the same line as it would have been if no such conveyance had been made. (*Read* v. *Morpeth*, Cro. Eliz. 321; Moore, 284; 2 Rep. 91 b.) So where a man seised in fee levied a fine to the use of himself and his wife for life, remainder to the use of the right heirs of the settlor, the ultimate limitation did not create a remainder, but the interest undisposed of remained in the grantor as part of the reversion, as if that limitation had been omitted. *Bingham's case*, 2 Rep. 91.) This doctrine is exemplified by the case of *The Marquis of Cholmondeley* v. *Clinton* (2 Mer. 173; *S. C.*, 2 B. & Ald. 625; 2 Jac. & Walk. 1; 1 Dow, N. S. 299; 4 Bligh, N. S. 1), where the Earl of Orford, in a conveyance to uses, reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of Samuel Rolle, his maternal grandfather, in consideration of natural love and affection to his relations, the heirs of S. Rolle, and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settled them to the use of himself for life, remainder to the heirs of his body, for default of such issue as he should appoint, and for default of appointment to the use of the *right heirs* of S. Rolle; and at the time of the settlement, the Earl of Orford was himself the right heir of S. Rolle: it was held, that this ultimate limitation did not give an estate by purchase to the heir of S. Rolle, but that the estate, on the death of the settlor without issue, descended on his heirs general. (See *Locke* v. *Southwood*, 1 My. & Cr. 411.)

3 & 4 Will. 4, c. 106, s. 3.

Reversion.

If a man, seised as heir on his mother's side, made a feoffment in fee to the use of himself and his heirs, the use, being a thing in confidence, would have followed the nature of the lands, and would have descended to the heir on the part of the mother. (Co. Litt. 13 a; *Godbold* v. *Freestone*, 3 Lev. 406.) And it was the same if the limitation had been by fine and recovery; it was still the ancient use; and there was no difference whether upon the conveyance of an estate any part of the use resulted by implication of law, or whether it was reserved by express declaration to the party from whom the estate moved. (*Abbot* v. *Burton*, Salk. 590. See *Stringer* v. *New*, 9 Mod. 363.) But that rule held only where lands came by *descent*, and not where a person took by *purchase*. But as by a common recovery suffered of an estate tail, the recoveror acquired an absolute estate in fee simple, derived out of the estate tail; if a tenant in tail *by purchase* under a marriage settlement, made by his ancestor *ex parte maternâ*, with the reversion in fee by descent *ex parte maternâ*, suffered a common recovery to

Alteration of line of descent.

3 & 4 *Will.* 4, c. 106, s. 3.

the use of himself in fee, such estate would have descended to his heirs general *ex parte paternâ*; for the recovery did not let in the reversion in fee, but a new estate was thereby acquired by *purchase*, totally different from the old estate. (*Martin* v. *Strachan*, Str. 1179, Nolan's ed.; *S. C.*, Willes, Rep. 444; 1 Wils. 66; 6 Br. P. C. 319; 5 Term Rep. 104.) The last rule was held to be applicable to copyholds. (*Roe* d. *Crow* v. *Baldwin*, 5 Term Rep. 104.) But if a tenant in tail by purchase, with the reversion in fee *ex parte maternâ*, levied a fine, the land descended to his maternal heirs; (*Simmonds* v. *Cudmore*, Salk. 338; 1 Show. 370;) for the tenant in tail, by levying a fine, acquired a base fee, which merged in the reversion, of which the tenant was seised *ex parte maternâ*, and descended in the same line. One of two parceners aliened his moiety in fee, whereby the alienee and the remaining parcener became tenants in common; afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question was, whether by that deed the parcener took anything as purchaser, so as to break the descent *ex parte maternâ* and to let in the heir *ex parte paternâ*, on the death of the parcener. It was admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken. (Com. Dig. Parcener, C. 15.) It was held, that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs *ex parte maternâ*. (*Doe* d. *Crosthwaite* v. *Dixon*, 5 Ad. & Ell. 834; 1 Nev. & P. 255.)

A devise of all the testator's residuary real estate to trustees in fee upon trust to pay the rents to A. for life, and after his death upon trust to convey the same residuary real estate to such person as should answer the description of the testator's heir at law, breaks the descent of the real estate which had descended to the testator *ex parte maternâ*, and vests it in his heir at law according to the common law as equitable devisee.

Wood, V. C., said, "the whole estate is devised away from the heir at law, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of the testator's heir at law. The expression 'heir at law' is somewhat strong, but independently of that, the fact of the testator having divested the inheritable quality of the estate by breaking the descent entirely and giving the estate to the trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir at law of the testator. I think that there is not any authority precisely in point, but the principle must be, that when once the descent is broken by a devise of the whole fee simple to trustees upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir of the testator according to the common law." (*Davis* v. *Kirk*, 2 Kay & J. 391, see pp. 393, 394.)

Where a man has an *equitable* estate *ex parte paternâ* or *ex parte maternâ*, and afterwards, by descent or otherwise, acquires the *legal* estate, the equitable estate will merge in the legal, and the descent will be according to the legal title. (*Goodright* v. *Wells*, Dougl. 771, 2nd ed.; *Wade* v. *Paget*, 1 Br. C. C. 363; *Selby* v. *Alston*, 3 Ves. 339; *Lyster* v. *Mahony*, 1 Drury & Warren, 243; and see *Goodright* v. *Searle*, 2 Wils. 29; *Goodtitle* v. *White*, 1 New Rep. 383; 15 East, 174; 3 Prest. Conv. 325, 340.)

But where an infant died seised of an equitable estate which had descended *ex parte maternâ*, his incapacity to call for a conveyance of the legal estate, (by which the course of the descent might have been broken,) was held not a sufficient reason to induce the court to consider the case as if such a conveyance had actually been made; it not being, according to the terms of the trust, any part of the express duty of the trustees to execute such a conveyance. (*Langley* v. *Sneyd*, 1 Sim. & Stu. 45.)

3 & 4 *Will.* 4, *c.* 106, *s.* 4.

Limitation to Heirs as Purchasers.

4. When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land (*f*).

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

(*f*) When the words "heirs male of the body," &c., operate as words of purchase, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixed effect. For though they give the estates to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance through the same persons, as if it had attached in and descended from the ancestor. (Fearne, Cont. Rem. 80.) Thus, under a limitation to the heirs male of the body of B. (where no estate is in or given to B. himself), though it originally attaches in his heir male under that special description, and so far operates as words of purchase, yet it not only gives such heir an estate in tail male, without any express words of limitation to the heirs male of his own body, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B. in the same course as if the estate tail had descended from B. himself. (*Mandeville's case*, Co. Litt. 26. See *Vernon* v. *Wright*, 4 Jur., N. S. 1113; 2 Drew. 439; *Southcot* v. *Stowell*, 1 Mod. 226, 237; 2 Mod. 207, 211; *Wills* v. *Palmer*, 5 Burr. 2615; *S. C.*, 2 Bl. R. 687; *Wrightson* v. *Macauley*, 14 Mees. & W. 214; *Winter* v. *Perrott*, 9 Cl. & Fin. 606.)

Brothers and Sisters.

5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent (*g*).

Brothers, &c. shall trace descent through their parent.

(*g*) Before this act the descent between brothers and sisters was considered as *immediate;* and in making out their title *to each other*, the common father need not have been named, although living, but the descent between them was exactly the same as if he had been dead. (Watk. Desc. 111, n.; H. Chitty on Desc. 64, 354; *Collingwood* v. *Pace*, 1 Ventr. 413; Bridg. by Bann. 410.)

Lineal Ancestors admitted.

6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his

Lineal ancestor may be heir in preference to collateral persons claiming through him.

3 & 4 *Will.* 4, c. 106, s. 6.

heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue (*h*).

(*h*) A son legitimate in Scotland by the subsequent marriage of his parents, both natives of and domiciled and married in Scotland, died intestate as to lands in England of which he was seised in fee and without issue: it was held that the father did not inherit under this section. (*Re Don's Estate*, 4 Drew. 194.)

Under this section, if a son purchase an estate and die *without issue*, leaving a father, brothers and sisters, the brothers and sisters will now be postponed to the father. (First Real Prop. Rep. 12. See Sugd. V. & P. 11th ed.)

Old rule excluding the ascending line.

It was an old maxim of law, that an inheritance might lineally descend but not ascend. (3 Rep. 40 a.) The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated. (*Cowper* v. *Cowper*, 2 P. Wms. 666.) Though a father or mother could not inherit as such from their child who died without issue, or brother or sister, yet a father or mother before this act might have inherited as *cousin* to their child; as where a son died seised in fee of land without issue, brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother, it was held, that she might take as heir to her son in the capacity of his cousin. (*Eastwood* v. *Vincke*, 2 P. Wms. 613.) So if a son purchased lands and died without issue, his uncle would have had the land as heir, and not the father, though the father was nearer of blood; (Litt. s. 3;) but if in that case the uncle acquired actual seisin and died without issue, while the father was alive, the latter might then by that circuity have had the land as heir to the uncle, though not as heir to the son, because he came to the land by collateral descent, and not by lineal ascent. (Craig. de Jur. Feud. 234; Wright's Ten. 182, n. (z).) So the father might have taken by *purchase* as the nearest of blood to his son, as if a lease were made to the son for life with remainder to his next of blood in fee, the father was capable of taking such remainder by *purchase*, though he could not have taken it by descent from his son. (Co. Litt. 10 b; 3 Rep. 40 a.)

Male Line.

The male line to be preferred.

7. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

3 & 4 *Will.* 4, *c.* 106, *s.* 8.

Mother of Male Paternal Ancestor.

8. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male paternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants (*i*).

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

(*i*) This statute has declared the law to be in accordance with the position laid down by Mr. J. Blackstone, 2 Comm. 238. We hold the law to have established that where the consanguinity has to be made out on the paternal side of the ancestors of the party, the more remote branch must be exhausted before recourse is had to the less remote. The point, though formerly much doubted, has been considered settled ever since the time of Sir W. Blackstone. (Per *Tindal*, C. J., in *Davies*, dem., *Lowndes*, ten., 7 Scott, 56; 5 Bing. N. C. 169.) It was decided, that where a person seised of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ*. (*Hawkins* v. *Shewen*, 1 Sim. & Stu. 257. See Hale's Hist. C. L. by Runn. 2nd vol. 120.)

Where the title which was made out was one said to be derived from the heir *ex parte maternâ* to the mother of the person last seised, it appeared that certain issues had been tried in which the jury had found that the heir had no heirs *ex parte paternâ*, and that the person under whom the defendant claimed was his heir at law *ex parte maternâ*, and it further appeared that statutory declarations had been made to the effect that the party last seised had been heard to say that he never had any heirs on his father's side. The majority of the court was of opinion that the title by heirship was the weakest possible title of that description, that as the issues so found by the jury were tried between two heirs *ex parte maternâ*, both of them had an interest in keeping out of the view of the jury any heir *ex parte paternâ* who might exist, and that the statement of the person last seised that he had no heirs on his father's side was entitled to very little weight, as the expression is ambiguous, for it may mean either that he had no heirs of the same name on his father's side, or it may mean and indeed could not well seem to mean more than that there were no heirs on his father's side with whom he was acquainted, or that he was not aware that any such heir existed. It certainly could not mean that he had no heirs at all on his own, his grandmother's, or his great grandmother's side. (*Jeakes* v. *White*, 6 Exch. 880.)

Admission of Half Blood.

9. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

3 & 4 *Will.* 4, *c.* 106, *s.* 9.

the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother (*k*).

Exceptions to the rule excluding the half blood.

(*k*) The old rule of law, which excluded the half blood from taking by descent, was subject to some exceptions and qualifications, to which it will be proper to advert. As the descent from the parent to daughters was *immediate*, daughters by different venters might have inherited together as one heir to their common parent, although they could not inherit to each other. (Harg. Co. Litt. 14 a, n. (*5*).) Thus, Lord *Hale* says, all the daughters, whether by the same or divers venters, do inherit together to the father. (Hale's C. L. c. 11.) Therefore, if A. marries B., who dies leaving issue a daughter, and A. afterwards has issue one or more daughters by C. his second wife, and dies; all these daughters shall take his estate in equal shares as coparceners. So all the daughters by different wives succeed to the inheritance of which their father was either seised in his own right, or to which their father would have been heir had he survived the person last seised. And the daughters by several husbands succeed in the same manner to the inheritance of their mother. (See Watk. on Desc. 159, n. (b); H. Chitty on Desc. 78, 79.) So, also, in the case of *estates tail*, the half blood coming within the description of the entail might inherit as effectually as the whole blood, for they do not claim as heirs of the person last seised, but of the original donee. (Plowd. 57; 3 Rep. 42; *Goodtitle* v. *Newman*, 3 Wils. 526.) In *titles of honour*, also, half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled, or the person who is made the stock of descent. (Co. Litt. 15 b; 3 Rep. 42 a; Cruise's Dig. tit. XXVI. c. 3, ss. 8—11.)

A brother or sister of the half blood is entitled to share personal estate equally with one of the whole blood, inasmuch as they are both equally near of kin to the intestate. (Wms. Executors, 916, 929.)

By stat. 1 Jac. 2, c. 17, s. 7, it is provided, "that if after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." Under that act, the brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother, after the death of the intestate father, in the personal property of the intestate dying without wife or children. (*Jessopp* v. *Watson*, 1 Mylne & Keen, 665.) So a *posthumous* brother of the half blood will take, under the Statute of Distribution, a share of the intestate brother's personal estate. (*Burnet* v. *Mann*, 1 Ves. sen. 156.)

According to the custom of descent in the manor of Taunton Deane, a surviving sister is not entitled to inherit in preference to a son of a deceased brother's son. (*Locke* v. *Colman*, 2 My. & Cr. 635.

If a man takes through his father by devise, which is now made to invest him with the character of purchaser (sect. 3), the estate on his death, intestate and without issue, will go to his sisters of the whole blood, in exclusion of the brothers of the half blood, and so in the ascending scale to his aunt of the whole blood, in preference to his uncle of the half blood; whereas, if the estate had descended to him from his father, who was the purchaser (which, but for this statute, it would have done, although devised to him), the brother of the half blood would, under the act, have been preferred to the sisters of the whole blood, whilst the father's sisters of the whole blood would have taken before his brother of the half blood. (Sugd. V. & P. 555, 556, 11th edit.)

Seisin of ancestor.

Before the above act, a man, in order to qualify himself to take by descent, must have shown that he was heir of the person last seised of the

actual freehold and inheritance. (Co. Litt. 11 b, 15 d; 3 Bos. & P. 648; *Jenkins* v. *Pritchard*, 2 Wils. 45.) Thus, if A. dies, leaving a son and daughter by one venter, and a son by another, and the son by the first venter becomes actually seised and dies, his sister shall be heir to him; but if he had died without having acquired the seisin, the son by the second venter would have taken as immediate heir of his father, to the exclusion of the sister. (Co. Litt. 15; Sir W. Jones, 561.) The entry of the heir upon any part of the estate will give him actual seisin of all the lands in the same county. But where the lands lie in different counties, there must be an entry in each. The entry of the heir, in order to acquire seisin, is only necessary where the lands are in the actual occupation of the ancestor at the time of his death. For if the lands are held under a lease for *years*, and the lessee has entered under the lease, the heir will be considered as having actual seisin, before entry or receipt of rent, because the possession of the lessee is his possession. (Co. Litt. 15 a; 3 Wils. 521; 7 T. R. 398, 399; *Id.* 213. See *Bushby* v. *Dixon*, 3 B. & C. 304.) But where *freehold* leases are outstanding, the elder brother must obtain possession by the receipt of rent or other acknowledgment in order to acquire seisin, for otherwise the descent would have been to the younger brother of the half blood, in preference to the sister of the whole blood. (8 T. R. 211; 7 T. R. 386; Co. Litt. 15 a; Jenk. 242.) Where A. died, leaving two infant daughters by different venters: it was held, that an entry by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter to carry the descent of her moiety on her death to her heirs, the possession of one parcener being the possession of the other, so as to create a seisin in the other, and carry her share and descent to her heirs. (*Doe* v. *Keen*, 7 T. R. 386.)

3 & 4 *Will.* 4, c. 106, *s.* 9.

We have already seen, that by stat. 3 & 4 Will. 4, c. 27, s. 12 (*ante*, p. 191), the possession of one coparcener is not to be that of the other, which it is presumed will be applicable to cases of descent.

In *Cunningham* v. *Moody*, 1 Ves. sen. 174, where the limitation was to husband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of such issue to the right heir of the husband in fee; the husband had one daughter of the marriage mentioned in the settlement, and another daughter of a second marriage; and upon the death of the first daughter without issue, the question was, whether her sister of the half blood was entitled to the reversion in fee. Lord *Hardwicke* held, that as the reversion which descended upon the eldest sister was never clothed with possession, it was governed by the rule *possessio fratris de feodo simplici facit sororem esse hæredem*, and would descend to the sister of the half blood. Where a testator devised all his lands to S. A. (his son by his first wife) when he should come to the age of twenty-one years, but if he should die before twenty-one years, and D. A. (the testator's daughter by his second wife) should be then living, he gave the same to her when she should attain twenty-one years. The testator died, and then S. A. died under age and without issue. It was held, that on the death of S. A. the inheritance vested in D. A., his sister of the half blood, in preference to his uncle of the whole blood, because S. A. did not die seised of such an estate in fee as would descend upon his heir of the whole blood, but only of an estate expectant upon the life estate of his sister. (*Doe* d. *Andrew* v. *Hutton*, 3 Bos. & P. 643.) See *Goodtitle* d. *Vincent* v. *White*, 15 East, 174; *Goodtitle* d. *Castle* v. *White*, 2 Bos. & P. N. R. 388.) And where a posthumous son was born, and his mother was in possession of the lands whereof his father died seised, she became his guardian in socage; and the infant son having died very young, was considered to be actually seised of the inheritance, so as to exclude his sisters of the half blood. *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 516.) But if a man purchased a reversion expectant upon a freehold, it will descend to his heir, though it has never come into possession. (Harg. Co. Litt. 14 a, n. 6; 3 Bos. & P. 648, 650.)

We have already seen (*ante*, p. 448), that this act applies to descendible freeholds, the descent of which to heirs was before governed by the same rules as prevailed in cases of estates of inheritance. (*Gravenor* v. *Brooks*, Poph. 32.) The rule of *possessio fratris* applied to estates *pur autre vie*, the

3 & 4 *Will.* 4, c. 106, *s.* 9.

receipt of the rent of lands held for lives by the step-mother of an infant is a sufficient seisin to entitle his sisters of the whole blood in exclusion of a brother of the half blood. (*Long* d. *Macartney* v. *Myles*, Fox & Smith, Ir. Rep. 1.) And the rule was applicable to copyholds. (4 Rep. 21.) Where the guardian of an infant entitled to a descendible freehold for lives *ex parte maternâ* renewed the lease on the death of a life: it was held, that the new lease, being considered as a new acquisition, would descend to the heirs *ex parte paternâ*. (*Pierson* v. *Shore*, 1 Atk. 480.)

The above instances will show the necessity, in cases not within the new rules of descent, of inquiring on the investigation of titles, where any children of the half blood have been passed over in a pedigree in favour of the collateral relations of children of the whole blood, whether the latter were *actually seised*, and of requiring evidence of such actual seisin. So, on the other hand, where children of the half blood have been admitted, some evidence should appear to show the failure of the issue of the whole blood without having acquired any seisin.

Attainted Blood.

After the death of a person attainted, his descendants may inherit.

10. That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four (*l*).

The effect of attainder.

(*l*) Persons attainted of high treason or felony were incapable of inheriting lands or of transmitting them by descent to their posterity. (Co. Litt. 8 a, 391 b; Cro. Car. 566.) Another consequence of such an attainder was the corruption and extinction of all hereditary blood in the person attainted, by which he was rendered not only incapable of himself inheriting or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor; and therefore a general heir could not derive a title through an attainted person where there was corruption of blood. (11 Rep. 1 b; Co. Litt. 391 b; see Yorke's Law of Forfeiture, 72, 4th ed.; 2 Blac. Com. 251; 4 *Ib.* 388; Bl. Considerations on the Law of Forfeiture for High Treason; Bac. Abr. Forfeiture; Burn's J. Forfeiture.) But where the party attainted need not be mentioned in the pedigree, as between two sons of an attainted father, there was nothing to hinder one brother from inheriting to the other, since the descent was immediate, as he could make himself heir to the person last seised, without mentioning the father. (1 Ventr. 413; Yorke's Law of Forfeiture, 83, 4th ed.)

According to the undoubted law of this country, freeholds of inheritance, which at the time of the death of a *felo de se* belonged to him, do not escheat to the crown, but pass to his heir at law. (*Norris* v. *Chambers*, 29 Beav. 258; 3 Co. Inst. 55; 2 Bl. Com. 386; 2 Bac. Abr. tit. Felo de se; 4 Vin. Abr. 268, tit. Blood corrupted, A., pl. 2; *Haley* v. *Petit*, Plowd. 253, 261; 7 Jur., N. S. 689.)

There was a material difference between the case of a fee tail and a fee simple, which was, that notwithstanding the forfeiture of lands entailed by an attainder, yet the blood of the attainted person was not corrupted so as by any consequential disability to affect the issue in tail. Therefore, if the son of the donee in tail was attainted of treason during the life of the father,

and died, leaving issue, and then the father died, the estate would descend to the grandchild notwithstanding the attainder, for he claimed *per formam doni*. (*Dowtie's case*, 3 Rep. 9 b; Yorke's Law of Forfeiture, 81, 82; Br. Descent, pl. 1; Bro. Forfeiture, pl. 37; *Mantell* v. *Mantell*, Cro. Eliz. 28; *Sheffield* v. *Ratcliffe*, Godb. 305; Hob. 347.)

3 & 4 *Will.* 4, c. 106, *s.* 10.

If a copyholder be attainted of treason or felony, his copyhold is immediately forfeited to the lord. (Hawk. P. C. b. 2, c. 49, s. 7.) But by the custom of some manors, the son may inherit from his father, notwithstanding the attainder of the latter. (1 Watk. on Cop. 326.)

By the statute 54 Geo. 3, c. 145, it is enacted, that no attainder for felony after the 27th July, 1814, except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his, her or their natural lives only, and that it shall be lawful for every person or persons to whom the right or interest of any lands, tenements or hereditaments after the death of any such offender or offenders should or might have appertained, if no such attainder had been, to enter into the same. (See Hans. Parl. Debates, 27th vol. 527—538.)

Commencement of Act.

Act not to extend to any descent before January, 1834.

11. This act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

Limitations made before the 1st January, 1834, to the heirs of a person then living, shall take effect as if this act had not been made.

12. Where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four (*m*).

(*m*) Dates must be attended to; for an heir to take by descent from a person who died before the 1st January, 1834, and an heir to take by *purchase* under a deed executed before the 1st January, 1834, or the will of a testator who died before that day (whether, as to the heir taking by purchase, the ancestor was living on or after the same day or not), must be traced according to the old law. (1 Hayes' Conv. 320, 5th ed.)

LEGITIMACY DECLARATION.

21 & 22 Vict. c. 93.

An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the right to be deemed Natural-born Subjects. [2nd August, 1858.]

21 & 22 *Vict. c. 93, s. 1.*

WHEREAS it is expedient to enable persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and also to enable persons to establish their right to be deemed natural-born subjects: Be it therefore enacted as follows:

Application to Court for Divorce and Matrimonial Causes for declaration of legitimacy or validity or invalidity of marriage.

1. Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes (*a*), praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such court for a decree declaring that his marriage was or is a valid marriage, and such court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on her Majesty, and on all persons whomsoever.

(*a*) The Divorce Acts are 20 & 21 Vict. c. 85, 21 & 22 Vict. c. 108, 22 & 23 Vict. c. 61, 23 & 24 Vict. c. 144. By the 7th section of the act 22 & 23 Vict. c. 61, the right of appeal to the House of Lords, given by the 56th sect. of 20 & 21 Vict. c. 85, is extended to all sentences and final judgments on petitions under the act 21 & 22 Vict. c. 93.

A petition under this act, presented on behalf of an infant to establish his legitimacy, can only be so by a guardian assigned to him by the court. (*Re Upton*, 6 Jur., N. S. 404.)

When a party applying to the Court of Divorce to declare the validity of a marriage, under the act 21 & 22 Vict. c. 93, has filed a petition, he should ask permission to cite individuals to see proceedings, and show sufficient reason why they should be selected. (*Re Shedden*, 5 Jur., N. S. 151.)

21 & 22 *Vict.* c. 93, s. 2.

Application to court for declaration of right to be deemed a natural-born subject.

2. Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said court for a decree declaratory of his right to be deemed a natural-born subject of her Majesty, and the said court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon her Majesty and all persons whomsoever.

Petition to be accompanied by affidavit.

3. Every petition under this act shall be accompanied by such affidavit verifying the same, and of the absence of collusion, as the court may by any general rule direct.

20 & 21 Vict. c. 85, to apply to proceedings under this act.

4. All the provisions of the act of the last session, chapter eighty-five, so far as the same may be applicable, and the powers and provisions therein contained in relation to the making and laying before parliament of rules and regulations concerning the practice and procedure under that act, and fixing the fees payable upon proceedings before the court, shall extend to applications and proceedings in the said court under this act, as if the same had been authorized by the said act of the last session.

Power to award and enforce payment of costs.

5. In all proceedings under this act the court shall have full power to award and enforce payment of costs to any persons cited, whether such persons shall or shall not oppose the declaration applied for, in case the said court shall deem it reasonable that such costs shall be paid.

Attorney-General to have a copy of petition one month before it is filed, and to be respondent.

6. A copy of every petition under this act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of such petition, be delivered to her Majesty's attorney-general, who shall be a respondent upon the hearing of such petition and upon every subsequent proceedings relating thereto.

Court may require persons to be cited.

7. Where any application is made under this act to the said court, such person or persons (if any) besides the said attorney-general as the court shall think fit, shall, subject to the rules made under this act, be cited to see proceedings or otherwise summoned in such manner as the court shall direct, and may be permitted to become parties to the proceedings, and oppose the application (*b*).

(*b*) The court will generally, at the request of either party to a petition under this act, direct issues raised to be tried by a jury, as where it is as imple question of fact; e. g., legitimate or not, access by the husband or not. (*Re Bouverie*, 2 Sw. & Tr. 548; 31 L. J., Mat. Cas. 79; 10 W. R. 811.)

To a petition under this act the attorney-general is the necessary respondent, the petitioners have a right to have their case heard as between themselves and him, and the parties cited *pro interesse suo* cannot sustain a plea of *res judicata* as between themselves and the petitioners in bar of the whole proceedings. (*Shedden* v. *Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. Cas. 217; 9 W. R. 285.)

It seems by the 10th section the legislature intended to guard against the danger of disturbing former judgments not to hinder a petition under the act from being heard. (*Ib.*)

21 & 22 *Vict.* c. 93, s. 8.

Saving for rights of persons not cited.

8. The decree of the said court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the court prejudice any person if subsequently proved to have been obtained by fraud or collusion.

Persons domiciled in Scotland may insist, on an action of declarator, that he is a natural-born subject.

9. Any person domiciled in Scotland, or claiming any heritable or moveable property situate in Scotland, may raise and insist, in an action of declarator before the Court of Session, for the purpose of having it found and declared that he is entitled to be deemed a natural-born subject of her Majesty; and the said court shall have jurisdiction to hear and determine such action of declarator, in the same manner and to the same effect, and with the same power to award expenses, as they have in declarators of legitimacy and declarators of bastardy.

No proceedings to affect final judgments, &c. already pronounced.

10. No proceeding to be had under this act shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction (*c*).

(*c*) This section does not prevent the court from inquiring in any case into the merits of the petition, but only that its decree shall have any effect upon the final judgment already pronounced of another competent court. (*Shedden* v. *Attorney-General and Patrick*, 6 Jur., N. S. 1163.)

Acts to be read together.

Short title.

11. The said act of the last session and this act shall be construed together as one act; and this act may be cited for all purposes as "The Legitimacy Declaration Act, 1858" (*d*).

(*d*) It is said that the great and serious defect of this act is its want of a clause authorizing a declaration of bastardy. (Macqueen on the Law of Marriage, &c., p. 356, 2nd ed.)

PAYMENT OF DEBTS OUT OF REAL ESTATES.

11 Geo. IV. & 1 Will. IV. c. 47.

An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estates.

[16th July, 1830.]

Repeal of former Acts.

Whereas an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the Relief of Creditors against fraudulent Devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several Laws therein mentioned:" and whereas an act was passed by the parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for Relief of Creditors against fraudulent Devises:" and whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the Payment of Debts of Traders:" and whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted, that the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments or other real estate of any person or persons who died before the passing of this act (*a*).

3 & 4 Will. & M. c. 14.

6 & 7 Will. 3, c. 14.

4 Anne, c. 5 (I.)

47 Geo. 3, c. 74.

Recited acts repealed.

(*a*) By the common law, freehold lands of inheritance which descended to the heir were assets for the payment of the ancestor's debts by specialty, as by bond or covenant in which the heirs were named. (1 Str. 665; 4 East, 492.) But the ancestor, by disposing of the land by will, could deprive his creditors of that means of payment as the devisee was neither at law, (4 East, 491; 7 East, 135; 2 Atk. 292, 432; 2 Anstr. 515,) nor in equity, (2 Atk. 432,) liable to the payment of the testator's debts in respect of the land devised. The heir at law also to whom the land descended might have defeated the creditor of his ancestor by aliening the land before suit by the creditors, (1 P. Wms. 777,) although in equity he appears to have been responsible for the value of the land sold. (*Id.* 777, 431; see 1 Fonbl. Eq. 283.) To obviate those mischiefs the statute 3 & 4 Will. & Mary. c. 14, (made perpetual by 6 & 7 Will. 3, c. 14, and extended to Ireland by 4 Anne, c. 5,) was passed, which was repealed and re-enacted by the above act with additional provisions to supply some omissions in the former statute. It must, however, be remembered, that the statutes of 3 &

Old rule as to liability of lands to debts.

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 1.

4 Will. & Mary, c. 14, and 47 Geo. 3, c. 74, are still in force as to persons who died before the 16th July, 1830. The statute of 3 & 4 Will. & Mary, c. 14, was confined to fraudulent devises, and therefore fraudulent conveyances, whether voluntary or not, were not within it. It was decided that if a man made a conveyance of lands in his lifetime, in order to defraud his creditors, and died, his bond creditors had no right to set aside the conveyance; for the statute (it is said) was only designed to secure such creditors against any imposition which might be supposed in a man's last sickness. But if he gave away his estate in his lifetime, this prevented the descent of so much to the heir, and consequently took away their remedy against the heir, who was liable only in respect of the land descended. And as a bond is no lien whatever on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger. (*Parslow* v. *Weedon*, 1 Eq. Abr. 149, pl. 7; 1 Fonbl. Eq. 286.) This doctrine was much questioned and when it was first promulgated gave much dissatisfaction. (*Jones* v. *Marsh*, Forr. 64.) Hence the reason is apparent why voluntary conveyances of lands cannot be set aside, except by creditors who have reduced their debts to judgment before the death of the party, for until that time they constitute no lien on the land. (1 Fonbl. Eq. ch. 4, s. 12; Gilb. Lex Prætoria, 293, 294; *Colman* v. *Croker*, 1 Ves. jun. 160.) Debts by specialty in which the heirs are bound constitute no lien or charge upon the land, either in the hands of the debtor or of his heir. A., who was a trader, at his death, indebted by specialty and simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife and children, and afterwards died: it was held, that the 3 & 4 Will. & Mary, c. 14, and 47 Geo. 3, c. 74, s. 2, did not charge the real assets, descended or devised, with the ancestor's debts, but made the heir or devisee personally liable to the value of the assets, and, therefore, that the son's widow and children were entitled to hold the estates discharged from the debts of the father. (*Spackman* v. *Timbrell*, 8 Sim. 253.) By taking proper proceedings the specialty creditors may obtain payment out of the descended or devised estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. (*Richardson* v. *Horton*, 7 Beav. 112. See *Pimm* v. *Insall*, 1 Mac. & G. 449; 7 Hare, 193; *Morley* v. *Morley*, 5 De G., M. & G. 610.)

Devises to be void against Specialty Creditors.

For remedying frauds committed on creditors by wills.

2. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any

rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her or their decease, shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of (*b*) the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant or other specialty, binding his, her or their heirs) to be fraudulent, and clearly, absolutely and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. 11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 2.

(*b*) The words "power to dispose of" were held to include leasehold estates *pur autre vie*, and therefore, that a devise of them was void against creditors. (*Westfaling* v. *Westfaling*, 3 Atk. 460, 465.)

Devisees to be liable to Specialty Debts.

8. And, for the means that such creditors may be enabled to recover upon such bonds, covenants and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her and their action and actions of debt or covenant (*c*) upon the said bonds, covenants and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, *or the devisee or devisees of such first-mentioned devisee or devisees jointly* (*d*) by virtue of this act (*e*); and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended (*f*). Enabling creditors to recover upon bonds, &c.

(*c*) By stat. 3 & 4 Will. & Mary, c. 14, s. 3, the remedy was confined to actions of *debt*, and it was decided that an action of *covenant* would not lie against the devisee of land to recover damages for a breach of covenant entered into by the devisor. (*Wilson* v. *Knubley*, 7 East, 128.) B., as surety for J., became party to an indenture, whereby A. leased land to J., at a rent payable by J. for a term determinable on A.'s death; and B. and J. covenanted jointly and severally for themselves and their heirs that B. and J., or one of them or their heirs, executors, &c., should pay the rent reserved, and also a further rent as liquidated damages, if the land were farmed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due: it was held, that B.'s devisees were not liable, under the stat. 3 & 4 Will. & Mary, c. 14, to an action of debt for any of the sum due. (*Farley* v. *Bryant*, 3 Ad. & Ell. 839; 5 Nev. & M. 42. See *Jenkins* v. *Eriant*, 6 Sim. 603; *Morse* v. *Tucker*, 5 Hare, 79.)

(*d*) The remedy is here extended to the devisees of devisees. (*Westfaling* v. *Westfaling*, 3 Atk. 460.) Equity followed the rule of law; and therefore, in a bill by a specialty creditor against a devisee under the 3 & 4 Will. & Mary, c. 14, it was decided, that the heir at law (if any) of the tes-

11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47, *s.* 3.

tator was a necessary party. (*Gawler* v. *Wade*, 1 P. Wms. 99; *Warren* v. *Stawell*, 2 Atk. 125.)

(*e*) In arranging the funds in equity between the heir and devisee, it is settled that assets descended to the heir must be applied to pay debts before lands can be charged which are specifically devised. (*Chaplin* v. *Chaplin*, 3 P. Wms. 367; *Powis* v. *Corbet*, 3 Atk. 556.)

In the ordinary administration of assets, the first fund applicable to the payment of debts is the personal estate, not specifically bequeathed; then land devised or ordered to be sold for payment of debts, not merely charged; then descended estates; then lands charged with debts. (*Harwood* v. *Oglander*, 8 Ves. 124; *Milnes* v. *Slater*, *Ib.*, 295.)

(*f*) If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the Court of Chancery will, after a decree obtained in a suit by another creditor for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. (*Price* v. *Evans and wife*, 4 Sim. 514.) In an action of debt against a devisee on a bond of his testator, in which the question is, whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, was not a competent witness for the defendant. (*Bloor* v. *Davis*, 7 Mees. & W. 235.)

Action against Devisee only.

If there is no heir at law actions may be maintained against the devisee.

4. If in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid (*g*).

(*g*) Where the obligor of a bond, having devised his land, died before the passing of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, it was held, that the specialty creditor could not maintain an action against the devisee alone, there being no heir, under 3 & 4 Will. & Mary, c. 14, s. 3. (*Hunting* v. *Sheldrake*, 9 Mees. & W. 256. See *Gawler* v. *Wade*, 1 P. Wms. 100.)

Act not to extend to Provisions for Payment of Debts.

Not to affect limitations for just debts, or portions for children.

5. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made,

and by his, her and their trustee or trustees, his, her and their heirs, executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied, anything in this act contained to the contrary notwithstanding (*h*).

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 5.

(*h*) The uniform rule is, that an effectual provision by will for payment of creditors is not fraudulent within the statute, and it makes no difference whether the land be devised to trustees to sell, or descend to the heir charged with debts. (*Matthews* v. *Jones*, 2 Anstr. 515; *Bailey* v. *Ekins*, 7 Ves. 323; *Earl of Bath* v. *Earl of Bradford*, 2 Ves. sen. 590; *Plunket* v. *Penson*, 2 Atk. 292; *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Kidney* v. *Coussmaker*, 12 Ves. 154.) But if the devise for payment of debts does not provide for it in a practicable manner, the case will not be taken out of the statute. (*Hughes* v. *Doulben*, 2 Cox, 170; 2 Br. C. C. 614.) A devisee of all the devisor's lands in trust to sell and pay all the testator's debts could not be sued under the stat. 3 & 4 Will. & Mary, c. 14. (*Gott* v. *Atkinson*, Willes, 521; *S. C.*, Barnes, 164.)

Devises not within the act.

Where a testator devised his real estate to trustees and their heirs, upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same and all his effects whatsoever to the same trustees, their executors and administrators, upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies, and dispose of the residue: it was held, that the devise was substantially a devise of the real estate for the payment of all debts, and by the 4th section of the stat. 3 & 4 Will. & Mary, c. 14, good against the specialty creditors, and converted the produce into equitable assets. (*Soames* v. *Robinson*, 1 Mylne & Keen, 500; see *Barker* v. *May*, 9 B. & C. 489.) A question frequently arises as to what amounts to a charge of debts. In *Graves* v. *Graves*, 8 Sim. 43, a testator directed all his debts, legacies and funeral expenses to be paid as soon as conveniently might be after his decease. Afterwards he devoted a particular estate to the payment of his debts, legacies and funeral expenses, in aid of his personal estate, and devised the rest of his estates to his children in strict settlement: it was nevertheless held, that all his real estates were charged with his debts. (See *Godolphin* v. *Penneck*, 2 Ves. sen. 270; *Palmer* v. *Graves*, 1 Keen, 545; *Douce* v. *Lady Torrington*, 2 My. & Keen, 600; *Braithwaite* v. *Britain*, 1 Keen, 206; *Thomas* v. *Britnell*, 2 Ves. sen. 313; *Shaw* v. *Berrer*, 1 Keen, 559.)

Although a devise for payment of debts by rents and profits is out of the statute, the court would not be willing to adopt the limited construction of confining it to annual rents and profits; but would, upon a devise of a gross sum out of rents and profits for that purpose, hold that the testator intended the debts to be paid with all practicable speed. (*Bootle* v. *Blundell*, 19 Ves. 528.) And a direction in a will to pay simple contract before specialty creditors was held not to be void, as it was within the exception in the Statute of Fraudulent Devises (*Millar* v. *Horton*, Coop. C. C. 45); but a devise not for the payment of debts generally would not be within the exception. (3 Barnard. 304.) Though the Statute of Fraudulent Devises will prevent a devise for payment of legacies from disappointing creditors by specialty, it would not prevent a devise for payment of debts generally from letting in creditors by simple contract to the prejudice of creditors by specialty. (*Kidney* v. *Coussmaker*, 12 Ves. 154; 2 Atk. 104.)

Heir to be answerable for Value of Lands aliened.

6. In all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard to

Heir at law to be answerable for debts, although

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 6.

he may sell estate before action brought.

any lands, tenements or hereditaments descended to him, and shall sell, alien or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution (*i*).

Extent of liability of heir to debts.

(*i*) The common law and the statutes 3 & 4 Will. & Mary, c. 14, and 47 Geo. 3, sess. 2, c. 74, s. 2, do not charge the real assets descended or devised with the debts of the ancestor, but make the heir or devisee liable personally to answer for the value of the assets. (*Spackman* v. *Timbrell*, 8 Sim. 259.) An heir taking lands by descent is liable for his ancestor's debts no further than the value of the land descended; therefore if the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor; and if the heir pleads, in an action of debt by a specialty creditor of his ancestor, that he has paid specialty debts to the value of the assets descended, the plea is good on demurrer. (*Buckley* v. *Nightingale*, 1 Str. 665; *Horn* v. *Horn*, 2 Sim. & S. 448; see 8 Sim. 259.) But a plea by an heir to an action on his ancestor's bond, that he claims to retain a certain sum for money laid out in *repairing* the premises descended, cannot be supported (*Shetelworth* v. *Neville*, 1 T. R. 454), although it may be otherwise if the repairs were *necessary*. (*Ib.*) The case of an heir at law is not like that of a trustee for the payment of debts; the latter cannot apply the rents and profits to his own use, which must go in diminution of the just debts; but an heir at law is entitled to the rents until judgment is given against him. (1 T. R. 457.) A specialty creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt, and may therefore follow the real assets or their specific produce in the hands of the assignees. (*Ex parte Morton*, 5 Ves. 449.)

Plea by Heir.

Where an action of debt is brought against the heir, he may plead riens per descent.

7. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of the original writ brought or the bill filed against him, any thing herein contained to contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or nihil dicit, it shall be for the debt and damage, without any writ to inquire of the lands, tenements or hereditaments so descended (*k*).

(*k*) In an action against an heir or devisee (see Com. Dig. Pleader (2 E)), the defendant may not only plead any matter which might have been pleaded by the ancestor or devisor, but may also deny the character in which he is sued; or admitting it, may plead that he has *nothing by descent* or by *devise*, either generally (*Ib.*) or specially; viz. that he has nothing but a reversion after an estate for life or years (Com. Dig. Pleader (2 E 3)), or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to third person. (*Ib.*; 1 Chitty on Pleading, 4th ed. 431, 432; 2 *Ib.* 468—470; 3 *Ib.* 973, 974; Selw. N. P. Debt, s. 6; 2 Saund. R. 7, n. 4.) To debt against heirs on the bond of their ancestors, the defendants pleaded *non est factum, per fraudem* and *riens per descent*; and the plaintiff replied, that after the death, &c., and before the commencement of the suit, the defendants had lands, &c. by descent, &c.: it was held, that this was a replication under the statute 3 & 4 Will. & Mary, c. 14, s. 6, and that the jury, having found that lands descended, ought to have assessed the value of those lands. (*Brown* v. *Straker*, 1 Cr. & Jer. 583.)

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 7.

By the Rules of Pleading, made in pursuance of the Common Law Procedure Act, 1852, it is (amongst other things) provided, that in actions on specialties and covenants the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. The plea of *nil debet* shall not be allowed in any action. (1 Ell. & Bl. App. XXX.)

Devisees to be liable like Heirs.

8. Provided always, and be it further enacted, that all and every the devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements or hereditaments to him or them devised shall be aliened before the action brought.

Devisees to be liable the same as heirs at law.

Traders' Estates liable to Simple Contract Debts.

9. From and after the passing of this act, where any person being, at the time of his death, a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by

Traders' estates shall be assets to be administered in courts of equity.

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 9.

Creditors by specialty to be paid first.

specialty, in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands (*k*).

(*k*) This section of the act corresponds *verbatim* with the statute 47 Geo. 3, sess. 2, c. 74. In the construction of that act it was held, that a party to come within it must have been a trader at his death. (*Keene* v. *Riley*, 3 Mer. 436; *Hitchon* v. *Bennett*, 4 Mad. 180.) It was decided that where a person who was a trader at his death devised his real estates, subject to the payment of legacies, the purchaser of the estate from the devisee was bound to see to the application of his purchase-money in satisfaction of the legacies charged on the land, notwithstanding their liability under 47 Geo. 3, sess. 2, c. 74, to the payment of the simple contract debts. (*Horn* v. *Horn*, 2 Sim. & Stu. 448.) It is a general rule, that where debts are charged generally, the purchaser or mortgagee is not bound to see to the application of the money. And where real estate is devised subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate will be liable to the charge, if the circumstances of the transaction afford intrinsic evidence of a breach of trust, and that the mortgage or purchase-money was not to be applied for payment of the debts and legacies. (*Watkins* v. *Cheek*, 2 Sim. & Stu. 199.)

Freehold and leasehold estate was devised to A., subject to the payment of debts and annuities. A. sold the real estate. The purchaser, insisting that the annuitants ought to concur, filed a bill against the vendor for a specific performance. The vendor's answer admitted the sufficiency of the personal estate to pay the debts; that they had all been paid since the contract, and that the sale had not been made for the specific purpose of satisfying the debts. It was held, that these circumstances did not vary the rule as to the liability of the purchaser to see to the application of the purchase-money, and that he was bound to complete. (*Page* v. *Adam*, 4 Beav. 269. See *Jones* v. *Price*, 11 Sim. 557; Sugd. V. & P. 840, 841, 11th ed.)

The rule which relieves a purchaser from seeing to the application of the purchase-money, when the estate is subject to a primary general charge of debts, has reference to the time of the testator's death, and does not cease to be applicable, though the debts be subsequently paid; and, therefore, where an estate so charged was sold by the trustee, it was held that the *cestuis que trust* were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser, whether all the debts were not paid, had refused to answer the question. (*Forbes* v. *Peacock*, 1 Phill. C. C. 717; *Sabin* v. *Heape*, 27 Beav. 560; *Eland* v. *Eland*, 4 My. & Cr. 420; *Johnson* v. *Kennett*, 3 My. & K. 624; 6 Sim. 384.)

The bankrupt being entitled to one-third part of freehold property in his own right, and to another third as heir at law to his brother, deposited the title-deeds of the property with his bankers, to secure advances. The personal property of the brother, who was a trader subject to the bankrupt law, was insufficient to discharge his debts, and therefore his third of this property was, under this section, assets for payments of his debts: it was held, nevertheless, that the lien of the bank extended to the two-thirds of the estate, in preference to any claims of the brother's creditors. (*Ex parte Baine*, 1 Mont. D. & G. 492.)

It was held, that persons having prior incumbrances on freehold and copyhold estates, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estates. (*Parker* v. *Fuller*, 1 Russ. & Mylne, 656.)

An admission of the debt by the personal representative of a deceased trader was held not to bind a devisee of his real estate, who had made no such admission, as against him it was necessary to prove the original exist-

ence of the debt, or an acknowledgment of it by him. (*Putnam* v. *Bates*, 3 Russ. 188. See *Tullock* v. *Dunn*, 1 Ryan & Moody, 416; *Tredgold* v. *Atkins*, 2 Barn. & Cress. 23.) A devisee is not bound by the amount of a claim substantiated against the executors in an action at law to which he was not a party. (*Wilson* v. *Leonard*, 3 Beav. 373.) 11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 9.

It is in the discretion of the executor or administrator, under ordinary circumstances, to plead the Statute of Limitations to a debt due by his testator or intestate or not, and if he acts *bonâ fide* in not pleading it, and pays the debt, the payment will be good. (*Norton* v. *Frecker*, 1 Atk. 526; *Castleton* v. *Fanshaw*, Prec. Ch. 100; *Shewen* v. *Vanderhorst*, 1 Russ. & M. 349; 2 Russ. & M. 75; 2 Wms. Executors, 1282, 1283.) But although the executor is not bound to plead the Statute of Limitations, yet, after a decree in a creditor's suit, the objection may be taken against any other creditors coming in before the master, whose claims are barred by the statute. (*Ex parte Dewdney*, 15 Ves. 498.) Such objection may be taken by the residuary legatee, or any other party interested in the fund, before the master, notwithstanding the refusal of the executors. (*Shewen* v. *Vanderhorst*, 1 Russ. & M. 347. See *Beeching* v. *Morphew*, 8 Hare, 129; *ante*, p. 258.)

Where a judgment has been recovered against executors for a debt due from their testator, which they paid, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up against the creditor who recovered the judgment. (*Hunter* v. *Baxter*, *Re Freer's Estate*, 3 Giff. 214; 31 L. J., Ch. 432.)

In taking the accounts in an administration suit, any creditor may object that another creditor's debt is barred by the Statute of Limitations, but it seems that such objection cannot be taken to the debt, which is the foundation of the suit. (*Fuller* v. *Redman*, 26 Beav. 614.)

An executor may pay a debt proved to be justly due by the testator, although barred by the Statute of Limitations, and on the same principle may have a right to retain his own just debts, although barred by the statute. (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 415.)

Where the Statute of Limitations had run against a debt due from a testator before his death, and the executor wrote thus to the creditor: "The legatees object to my paying the claim, though I think it just, and not only do not dispute the claim, but admit it thinking it just, but I am compelled to refuse payment without an order of the court:" it was held, that the debt was not revived, and that the real estate could not be subjected to it by any act of the devisees in trust, though they were all executors. (*Briggs* v. *Wilson*, 5 De G., M. & G. 12.) Where an executor does not set up the Statute of Limitations on a creditor's administration summons, the residuary legatee cannot set it up against the plaintiff. It is otherwise as to *cestuis que trust* of devised estates, who but for the Chancery Amendment Act would have been necessary defendants. (*Ib.*)

In a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration, it was held, that the executors might retain so much of a legacy as was sufficient to satisfy a debt due from the legatee to the testator at the time of his death, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations. (21 Jac. 1, c. 16, s. 3.) It was questioned whether the executor would have had the same right of retainer, if the suit had been for payment by himself personally, and not out of assets of the testator. (*Courtney* v. *Williams*, 3 Hare, 539.)

Parol not to demur.

10. From and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or toge- In actions by or against infants, the parol shall not demur.

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 10.

ther with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur (*l*).

(*l*) When in an action or suit the plaintiff or defendant is an infant, in many cases either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age, or (in the legal phrase) that the infant may have his age, and that the *parol may demur;* that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. (3 Bl. Comm. 300; 2 Inst. 257, 291.) But this privilege was always confined to an infant *heir*, to whom lands had come by descent from the specialty debtor, and did not extend to an infant devisee who was sued for a specialty debt under 3 & 4 Will. & Mary, c. 14. (*Plasket* v. *Beeby*, 4 East, 485.) The parol demurred in equity in those cases only in which it would have demurred at law. (*Price* v. *Carver*, 3 My. & Cr. 162.) Where the heir was an infant a doubt was expressed whether a decree for sale, under the 47 Geo. 3, sess. 2, c. 74, could be made during his infancy, as the parol might demur. (*Lechmere* v. *Brasier*, 2 Jac. & Walk. 187. See *Scarth* v. *Cotton*, Jac. R. 635, n.) All cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the parol would demur at law, are cases in which a day is given to show cause against the decree. The above statute affords no remedy in such cases, except that by the 11th section it enables the court to take from the infant the legal estate of property decreed to be sold for the payment of debts, but for that purpose only. In other cases in which a conveyance is required from an infant, the law remains as it was before. Therefore a decree of foreclosure against an infant must give the infant a day to show cause against the decree after he attains twenty-one, notwithstanding the 10th and 11th sections of this statute. (*Price* v. *Carver*, 3 Mylne & Cr. 157; *Scholefield* v. *Heafield*, 7 Sim. 669. See *Powys* v. *Mansfield*, 6 Sim. 637; *Clinton* v. *Bernard*, 1 Dru. 287.)

Where a decree has been made against an infant defendant who put in the common answer by his guardian, the general rule is, that such defendant on coming of age has the privilege of putting in a new answer, stating a different case, and of going into evidence in support of that case. This privilege does not extend to foreclosure suits. (*Kelsall* v. *Kelsall*, 2 M. & Keen, 409.) In a foreclosure suit, a day having been given by the decree to the infant defendant, the heir of the mortgagor, to show cause against it, the court made an order under stat. 11 Geo. 4 & 1 Will. 4, c. 47, s. 11, directing an immediate conveyance to the purchaser by the infant. (*Flood* v. *Sutton*, 1 Flan. & Kelly, 179.)

After a decree and order on further directions in a suit by creditors, the plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the court, the accounts were directed to be taken over again as against the infant, with liberty to the master to adopt any of the accounts before taken, if he should find it beneficial to the infant so to do. (*Baillie* v. *Jackson*, 10 Sim. 167.) In a suit for administering the property of a person deceased, if an infant defendant is interested in the real estates, the court will not direct those estates to be sold, until the accounts of the personal estate have been taken, and the cause heard for further directions. (*Ib.*)

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 11.

Conveyances by Infants.

Infants to make conveyances under order of the court.

11. Where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years (*m*).

(*m*) An application under this section for an infant heir or devisee to convey must be made by petition, and not by motion. (*Anon.*, 1 Y. & Coll. 75.) An infant devisee in tail may be ordered to convey under this section (*Penny* v. *Pretor*, 9 Sim. 135); and the conveyance must be made by the proper assurance which by law is now required for a tenant in tail. (*Radcliffe* v. *Eccles*, 1 Keen, 130.) This section of the act extends to a case where the decree for sale of the estate was made prior to the act. (*Chapman* v. *Tennant*, 2 Russ. & Mylne, 74.) Where a testator devised his estate to two persons as tenants in common in fee, and one of them died after the testator, leaving an infant heir; in a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser under this section of the act. (*Brook* v. *Smith*, 2 Russ. & Mylne, 73.) A conveyance by an infant under this section passes only such interest as the infant, if of full age, might pass. (*Heming* v. *Archer*, 8 Beav. 294. See 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87, *post*, pp. 485, 486.)

Conveyances by Persons having Limited Interests.

Persons having a life interest may convey the fee, if the estate is ordered to be sold.

12. Where any lands, tenements, or hereditaments, hath been or shall be devised in settlement by any person or persons whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or

11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 12.

otherwise assure the fee simple, or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold (*n*).

(*n*) Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator, and an order was made in the cause and pursuant to this statute that the guardian of the infant should surrender them to the purchaser: it was held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant under the 29th section of the Trustee Act, 1850. An order under the Trustee Act, 1850, may be made in the cause without petition. (*Wood* v. *Beetlestone*, 1 Kay & J. 212.)

It had been decided that where it is necessary to resort to the real assets of a deceased debtor for payment of his debts, the court might direct the money to be raised by mortgage instead of sale, and might also direct the infant heir or devisee of the debtor to convey the estate to the mortgagee. (*Holme* v. *Williams*, 8 Sim. 557.) In *Smethurst* v. *Longworth*, (7 Law J., N. S., Chanc. 18,) it was held, that the court was not authorized to direct a mortgage of an infant's estate for payment of the ancestor's debts. (See 2 & 3 Vict. c. 60, *post*, p. 485.)

This section does not apply to a case where an estate is devised to a trustee during the life of the *cestui que trust*, with remainder over, and by the disclaimer of the trustee the legal estate descended on the heir. (*Heming* v. *Archer*, 7 Beav. 515; 8 Beav. 294.) An estate was sold to a party to a suit for payment of the testator's debts, and which by the disclaimer of a trustee was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. The purchase-money was in court. It was held, that no effective conveyance could be made under the act until the class of children had been determined, by the death of A. (*Heming* v. *Archer*, 9 Beav. 366.)

A testator devised real estates to trustees to pay debts, and to convey the real estate, subject to such debts, to his son upon marriage in strict settlement. The trustees accordingly conveyed the estate to the testator's son for life, with remainder in strict settlement: it was held, that the son could convey the legal estate under this section. Where the estate of infants is concerned, there will be a direction to settle the conveyances absolutely, and not in case the parties differ. (*Cheese* v. *Cheese*, Law J. 1846, Chan. 28.)

A decree having been made in a creditor's suit for sale of part of the real estate, and a sale having taken place of freeholds and copyholds, on a petition under the statute that the tenant for life might convey and surrender to the purchaser, the same was ordered, notwithstanding that the stat. 3 & 4 Will. 4, c. 104, making copyhold estate assets for the payments of simple contract and specialty debts, was passed subsequently, the words of the former act having a prospective operation. (*Branch* v. *Browne*, 12 Jur. 768; 17 Law J., Chanc. 435.)

The tenant for life of estates, decreed in a creditor's suit to be sold for payment of debts, was a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18. (*Re Milfield*, 2 Phill. C. C. 254.)

Ireland.

Not to repeal act 33 Geo. 1 (I.) relating to debts due to bankers.

13. Nothing in this act shall extend or be deemed or construed to extend to repeal or alter an act made by the parliament of Ireland, in the thirty-third year of the reign of King

George (*p*) the First, intituled "An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers" (*q*). 11 *Geo.* 4 & 1 *Will.* 4, *c.* 47, *s.* 13.

(*p*) The following words are here omitted by mistake: "the Second, intituled 'An Act for repealing an Act passed in this Kingdom in the eighth Year of the Reign of King George.'"

(*q*) By the third section of the Irish statute 33 Geo. 2, c. 14, all dispositions after 10th May, 1760, by bankers of real or leasehold estates, or any interest therein, to or for any children or grandchildren of any banker, are void against creditors, though for valuable consideration, and though not creditors at the time.

The stat. 2 & 3 Vict. c. 60, after reciting the 11th and 12th sections of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, (*ante*, pp. 483, 484,) and that doubts were entertained whether the above sections authorized courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, or of lands, tenements, or hereditaments so devised in settlement as aforesaid, and also to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant, enacts, "that the said hereinbefore recited provisions of the said act shall extend and the same are hereby extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements, or hereditaments so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant. Recited provisions of 11 Geo. 4 & 1 Will. 4, c. 47, extended to authorize mortgages as well as sales of estates.

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements, or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and be subject and applicable to in case no such sale or mortgage had been made" (*o*). Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

(*o*) In a creditor's suit the court has no jurisdiction, under these statutes, 11 Geo. 4 & 1 Will. 4, c. 47, and 2 & 3 Vict. c. 60, to extend the sum to be raised by way of mortgage by an infant for payment of the debts of his ancestor or devisor, so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be. (*Hill* v. *Maurice*, 1 De G. & S. 214. See *Garmstone* v. *Gaunt*, 1 Coll. C. C. 577.)

11 & 12 *Vict.* c. 87.

The stat. 11 & 12 Vict. c. 87, after reciting the 12th section of the 11 Geo. 4 & 1 Will. 4, c. 47, (*ante*, p. 483,) "And that such provision did not extend to the case of lands, tenements, or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" it is enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements, or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

Recited provision to extend to lands, &c. of a deceased debtor, in certain cases.

PAYMENT OF DEBTS OUT OF REAL ESTATES.

3 & 4 WILLIAM IV. c. 104.

An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and Contract Debts.* * Sic.

[29th August, 1833.]

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands (*a*).

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

(*a*) This statute makes freehold estates subject to simple contract debts, which were before subject to specialty debts; but it applies only to estates which the testator has *not charged* or *devised subject to the payment of his debts*. All estates subject to the payment of debts will not be liable to be sold without the intervention of a court of equity; and the rule that a charge of debts is equivalent to a trust to sell for the payment of debts, leaves the distinction between estates subjected to the payment of debts by the will of the debtor, and estates subject to debts by the operation of the law, precisely as it was before this act. (*Ball* v. *Harris*, 4 My. & Cr. 264.)

Decisions on this statute.

3 & 4 *Will.* 4, *c.* 104.

This act charges the real estates of any person dying seised of such estates not only with the debts of every description actually due at his death, but also with all liabilities which may result out of obligations entered into during his life. (*Hamer's Devisees' case*, 2 De G., M. & G. 366; 16 Jur. 555; 21 Law J., Chan. 832.)

A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies: it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate, which passed under the residuary devise to N., first, that there was no equity in favour of pecuniary legatees to have the assets marshalled, so as to throw the debts on the real estate devised to N.; but secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. In this case it was contended, that as the will was executed subsequently to the passing of this act, and as every testator must be presumed to be cognizant of the law, the testator knew that his debts were chargeable by statute on his real as well as on his personal estate, and of course, therefore, when he made his will, meant that, in the event of the personalty proving insufficient to answer both his debts and legacies, the former should be thrown upon the real estate. It was said, however, by Lord *Cottenham*, C., that he could not feel justified in departing from the rules established in the cases which preceded this statute, on account of the very beneficial provisions of that act. To do so would create great confusion, and much uncertainty and litigation; and the provisions of that act could have no bearing upon the construction of a charge of legacies; and indeed, as to debts, a charge by the will was not inoperative in consequence of that act. (*Mirehouse* v. *Scaife*, 2 My. & Cr. 695, 698, 708.)

It has been already stated, that under the stat. 3 & 4 Will. 4, c. 106, s. 3, (*ante*, p. 459,) an heir to whom lands are devised by his ancestor takes them as devisee to all purposes. Where real estates are devised to the heir, although for certain purposes he takes by descent, yet, as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter, though the creditors of a testator have a right to resort to the estate devised to the heir in priority to the other devised estates, yet the heir is entitled to contribution from the other devisees to the extent to which his estate may be exhausted by debts. (*Biederman* v. *Seymour*, 3 Beav. 368.)

Debts by specialty, in which the heirs are not bound, are not, in the administration of assets, entitled by virtue of this act to any priority over simple contract debts. (*Cummins* v. *Cummins*, 3 Jones & L. 64.)

Where a party dies without heirs, and his land escheats to the lord, it is applicable to payment of debts under this statute, but whether it is so applicable in priority to estates specifically devised seems to be questionable. (*Evans* v. *Brown*, 6 Jur. 380; 5 Beav. 114.)

To a suit for administering the real assets of a testator, under this statute, the heir at law is not a necessary party, as well as the devisee. (*Bridges* v. *Hinxman*, 16 Sim. 71, overruling *Brown* v. *Weatherby*, 10 Sim. 125. See *Weeks* v. *Evans*, 7 Sim. 546.) And it is not necessary to establish the will against the testator's heir. (*Goodchild* v. *Terrett*, 5 Beav. 398.)

In a creditors' suit, seeking the application of real estate in payment of debts, both the heir at law and devisees of the debtors being parties, and the will not being admitted by the heir, the court would neither dismiss the bill against the heir, nor direct an issue *devisavit vel non* at his request, as the creditors had a title paramount to that of the heir or devisees, and the question of the validity of the will as between them could not affect the rights of the creditors. (*Spickernell* v. *Hotham*, 9 Hare, 73.)

In the case of a general devise and bequest of the testator's real and personal estate to A. for life, and after the decease of A., a devise of certain

copyholds to B., and a direction that, on the decease of B., the copyholds should be sold, with a gift of the monies arising by such sale amongst persons of certain classes who should be living at the death of B., share and share alike: it seems that the executors would not be necessary parties, on the mere ground that the copyhold estate is by statute made assets to be administered in equity for the payment of debts. (*Curtis* v. *Fulbrook*, 8 Hare, 346.) 3 & 4 *Will.* 4, *c.* 104.

In order to obtain a decree for the sale of a testator's real estate, for payment of his debts under this statute, it is not necessary that the bill should be filed by a creditor. (*Dinning* v. *Henderson*, 2 Coll. C. C. 330.) The court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts in a suit for the administration of his estates, though it be instituted not by a creditor, but by the heir and the next of kin of the deceased. (*Price* v. *Price*, 15 Sim. 484; *Rodney* v. *Rodney*, 16 Sim. 307.)

The rights of simple contract creditors of an ancestor, as against the descended estates, are not defeated by judgments entered up against the heir for his personal debts before suit. (*Kinderley* v. *Jervis*, 22 Beav. 1; 2 Jur., N. S. 602; 25 L. J., Chanc. 538.) The 3 & 4 Will. 4, c. 104, makes real estate assets, to be administered in courts of equity for payment of simple contract debts of the deceased; and the 1 & 2 Vict. c. 110, s. 13, makes a judgment a charge on any lands of which the judgment debtor is seised, or over which he shall have any disposing power for his own benefit; and it makes such judgment an equitable mortgage thereon: it was held, that judgments entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, have no priority over the simple contract creditors of the intestate in respect of the descended estate. (*Ib.*) It was not the object, nor is it the operation, of the 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate; but, as the statute makes the land assets for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bonâ fide* purchaser of the lands from the heir or devisee is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves. (*Ib.*) The real estate of a deceased person constitutes assets to be administered in a Court of Equity according to the priorities specified by the statute, and all the incidents of assets attach to it, and consequently such assets are liable, in the first place, to pay the debts of the deceased debtor, and subject thereto they belong to his devisee or heir at law; but the devisee or heir at law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor. (*Ib.*)

The proviso in this act makes an equity of redemption in a mortgage in fee legal assets, and consequently the creditors by specialty, in which the heirs of the deceased are bound, will be entitled to be paid the full amount of their debts, out of the money received for the sale of the equity of redemption, before any part of it will be applied in payment of the debts of the creditors by simple contract. (*Foster* v. *Handley*, 1 Sim. N. S. 200.) A creditor by bond, in which the heirs are named, takes priority over a specialty creditor, in which the heirs are not expressly named. (*Richardson* v. *Jenkins*, 1 Drew. 477.)

Simple contract debts, what.

Before this act, lands were not liable to the payment of simple contract debts, except those of traders by stat. 47 Geo. 3, sess. 2, c. 74, and 11 Geo. 4 & 1 Will. 4, c. 47. (*Ante*, pp. 479, 480.) Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. It is easy to see in what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. (2 Bl. Comm. 465.) A foreign judgment constitutes but a simple contract debt. (*Wilson* v. *Lady Dunsany*, 18 Beav. 293.)

3 & 4 *Will.* 4, *c.* 104.

Payments on behalf of lunatics.

A person who was a lunatic, but had not been found to be so by inquisition, died seised of a small freehold estate, but not possessed of any personal property. His step-father had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses: it was held, that he was not entitled, under this act, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate. (*Carter* v. *Beard*, 10 Sim. 7.) See *Rogers* v. *Price*, 3 Y. & Jerv. 28, where it was held that an executor, who has assets sufficient for the purpose, is liable, upon an implied promise, to pay for a funeral suitable to the degree of his testator, furnished by the directions of a third person. In *Wentworth* v. *Tubb*, 1 Y. & Coll. N. C. 171, it was decided that, in the case of necessaries supplied to a lunatic, the law raises a contract by implication on the part of the lunatic, under which the amount of such necessaries may become payable as a debt out of his real or personal assets, on a bill filed for the administration of those assets. (See *Manby* v. *Scott*, 1 Sid. 112; *Baxter* v. *Earl Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; *Brown* v. *Joddrell*, 3 Carr. & P. 30; Mood. & M. 105; *Dane* v. *Lady Kirkwall*, 8 Carr. & P. 679. See Shelford on Lunatics, 462—465, 2nd ed.)

The law will raise an implied contract or debt against the lunatic or his estate, for the monies expended for the necessary protection of his person and estate. (*Williams* v. *Wentworth*, 5 Beav. 325.)

If a trustee be sued in chancery for an account, and it appears that he has properly expended sums of money for the protection and safety, or for the maintenance and support, of his *cestui que trust*, at a time when he, though adult, was incapable of taking care of himself, the court will allow him credit in account for such sums of money. (*Nelson* v. *Duncombe*, 9 Beav. 211.)

Breach of trust.

A trustee, who has committed a breach of trust by misapplying the trust fund, is considered only as a simple contract debtor to his *cestui que trust*. (*Vernon* v. *Vawdry*, 2 Atk. 119; *Cox* v. *Bateman*, 2 Ves. sen. 19; see *Perry* v. *Phelips*, 4 Ves. 116.) But an acknowledgment by a trustee under his hand and seal, that he alone had received the whole trust money for the purposes of the trust, (*Gifford* v. *Manley*, Cas. temp. Talbot, 109,) or any general words amounting to a covenant on his part, will make him a debtor by specialty; and in equity, undertaking to perform the trusts is equivalent to executing the deed. (*Lord Montford* v. *Lord Cadogan*, 19 Ves. 638.) The money due in respect of a breach of trust, where the trust is created by an instrument under seal, is a specialty debt. (*Wood* v. *Hardisty*, 2 Coll. C. C. 542.)

A breach of trust will constitute merely a simple contract debt, unless there is something in the creation of the trust to raise a liability on covenant against the trustee. (*Adey* v. *Arnold*, 2 De G., M. & G. 432; 16 Jur. 1123; *Wynch* v. *Grant*, 2 Drew. 312.) A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. (*Richardson* v. *Jenkins*, 1 Drew. 477; 17 Jur. 446; 22 Law J., Chan. 874.) The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract; a delaration by the trustee, that he will stand possessed on certain trusts, &c., is sufficient. (*Ib.*)

A covenant by a father in his son's marriage settlement, by will or otherwise, in his lifetime, to settle 3,000*l.*, to be charged upon all real and personal property of which he should, at or immediately before his death, be seised or possessed, so as immediately after the decease of the survivor of himself and wife to become well and effectually vested in the trustees of the settlement, upon trust for the son's widow and the issue of the marriage: was held to create a specialty debt, to be proved accordingly in the administration of his father's estate. (*Eyre* v. *Monro*, 3 Kay & J. 305; 3 Jur., N. S. 584; 26 L. J., Chanc. 757.)

Marshalling assets.

Before this act, freehold estates were not assets for the payment of simple contract creditors, (8 Ves. 384,) although in some cases they acquired a right against the real estate by marshalling. (12 Ves. 154.) The principle of marshalling was, that a person who had two funds to which he might resort

for the payment of a debt, should not by his choice disappoint another who had only one, but the latter should stand in the place of the former. (*Trimmer* v. *Bayne*, 9 Ves. 209.) This rule was applied where a person had a double fund to resort to, and another person had a demand upon one fund only, in which case the court turned the person having the double fund upon that which was not liable to the other person's demand, in order to leave that fund open to the latter. (*Attorney-General* v. *Tyndall*, Ambl. 615.) And therefore, if a mortgagee exhausted the whole personal estate in payment of his debt, the simple contract creditors of the mortgagor were entitled to stand in the place of the mortgagee against the freehold estate, for the proportion of the mortgage which had been paid out of the personal estate. (*Aldrich* v. *Cooper*, 8 Ves. 391.) And where it is necessary for the payment of creditors, that the mortgagee of freeholds and copyholds should be compelled to take his satisfaction out of the latter, and he takes it out of the former, those creditors who are thereby disappointed may stand in his place as to the copyhold estate, (*Aldrich* v. *Cooper*, 8 Ves. 382,) although the mortgage of the copyhold was distinct from, and subsequent to, the mortgage of the freeholds. (*Gwynne* v. *Edwards*, 2 Russ. 289.) So also legatees were entitled to stand in the place of specialty creditors, who were paid out of the personal estate, against estates descended, but not against specific devisees, unless the estates were devised subject to debts or a mortgage. (8 Ves. 396, 397.) The court will not marshal assets for the payment of a simple contract debt out of real estate, where the bill has not been filed on behalf of all the creditors of the deceased: and liberty to amend the bill at the hearing was refused, under the circumstances. (*Connolly* v. *M'Dermot*, 3 Jones & L. 260.)

3 & 4 Will. 4, c. 104.

There does not appear to be any authority for holding that the right to marshal assets will be exercised in favour of a simple contract creditor, whose immediate right against the real estate is barred by the Statute of Limitations. *Turner*, V. C., observed, "Simple contract creditors have now a direct right against the real estate, in case of a deficiency of the personal. They do not require the aid of this court to marshal the assets, in order to give them a remedy against the estate; and for whatever purpose the doctrine of marshalling may be necessary to be kept on foot, I do not think that it ought to be kept alive for the purpose of giving indirectly a right which could not be asserted directly. The consequence would be, that in all cases where there are any specialty debts, the simple contract creditors would be entitled to sue the real estate at any time within which the specialty creditor could have sued: in effect, to create in equity the same limitation as to simple contract debts as the statute has prescribed as to specialties." (*Fordham* v. *Wallis*, 10 Hare, 230. See *Busby* v. *Seymour*, 1 Jones & L. 527.)

This statute has not affected the law as to the marshalling of assets in favour of pecuniary legatees against devisees of real estate charged with or devised subject to the testator's debts. (*Rickard* v. *Barrett*, 3 Kay & J. 289.) The question now as before the act is one simply of intention on the whole of the will, and a mere charge of debts upon the real estate or a mere devise of the real estate subject to the testator's debts without any trust is sufficient, in the event of the personal estate proving inadequate to pay both debts and legacies, to entitle the legatees to come upon the real estate so far as the personalty has been applied in payment of debts. (*Ib.* See *Foster* v. *Cook*, 3 Br. C. C. 347.)

A testator devised one estate to the plaintiff, charged with the payment of debts, and another estate, not so charged, to the defendant. The debts exhausted the proceeds of the sale of the estate devised to the plaintiff; and he was proceeding under this statute to sell the estate devised to the defendant, and pay a debt due to himself, part of which was barred by the Statute of Limitations: but the court held that this statute did not give an executor power to pay, out of the assets obtained by virtue of this statute, a debt due to himself, or a stranger, which was so barred. (*Dring* v. *Greetham*, 1 Eq. R. 442; 23 Law J., Ch. 156.)

Formerly copyholds were not liable to an extent; (Park. R. 195; *Drury* v. Copyholds here-

3 & 4 *Will.* 4, c. 104.

tofore not liable to debts.

Man, 1 Atk. 96;) and neither the crown nor the subject was allowed to take copyhold tenements held in fee or for lives in execution, (8 Ves. 394,) yet it was said that leases for years of copyhold tenements, granted by virtue of a licence from the lord, may be taken in execution, that being a common law interest. (3 Prest. Abstr. 351.) Before the stat. 1 & 2 Vict. c. 110, copyhold lands could not be taken in execution upon a judgment (*Cannon* v. *Pack*, Vin. Abr. Copyhold, (O. e.) pl. 6; 2 Eq. Cas. Abr. 226, pl. 6); nor be seized upon an outlawry, because it would have been prejudicial to the lord of the manor. (*Rex* v. *Budd*, Park. R. 190.) But it seems that they may be sequestered (*Dunkley* v. *Scribnor*, 2 Madd. 443; *Marquis of Carmarthen* v. *Hawson*, 3 Swanst. 294); although the sequestration will not be revived against the heir of the party who was sequestered (*Whitehead* v. *Harrison*, 1 Barn. K. B. 431); and they are within the rules as to marshalling assets. (*Aldrich* v. *Cooper*, 8 Ves. 388; 2 Pow. on Mort. 263, n.) But a trust of copyholds, which descended according to the rules of the common law, was assets in the hands of the heir of the *cestui que trust*, as the customary descent is in that case broken. (*Kelly* v. *Kelly*, 2 Eq. Cas. Abr. 509, pl. 4.)

Copyholds liable to be taken in execution.

By stat. 1 & 2 Vict. c. 110, s. 11, all real estates, including lands and hereditaments of copyhold or customary tenure, of which the person against whom execution is sued, was seised at the time of entering up such judgment, or at any time afterwards, or over which he had alone a power, may be taken in execution; but the person taking such lands in execution, is liable to the performance of the services due to the lord of the manor.

Before this act, copyhold estates were not liable, either at law or in equity, to the debts of a testator any further than he charged them. (*Aldrich* v. *Cooper*, 8 Ves. 393.) But where a testator having both freehold and copyhold estates, charged all *his real estates* with the payment of his debts, if he had surrendered the copyhold to the use of his will, the freehold and copyhold would have been applied rateably; but if he had not surrendered the copyhold, it would not have been applied until the freehold was exhausted. (*Growcock* v. *Smith*, 2 Cox, 397; *Coombes* v. *Gibson*, 1 Br. C. C. 273; *Kentish* v. *Kentish*, 2 Br. C. C. 257.) But equity would, before the statute 55 Geo. 3, c. 192, supply a surrender to the use of a will where a manifest intent to charge copyholds with debts appeared in the will. (*Drake* v. *Robinson*, 1 P. Wms. 443; *Bateman* v. *Bateman*, 1 Atk. 421.) As to copyholds being charged by a will, see *Noel* v. *Weston*, 2 Ves. & Bea. 269; *Godolphin* v. *Penneck*, 2 Ves. sen. 271; *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 275; *Ronalds* v. *Feltham*, Turn. & Russ. 418.) Where one party, having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was held, that the latter was entitled to require that the former should be satisfied out of the copyhold estate so far as it would extend. (*Tidd* v. *Lister*, 10 Hare, 157.)

Copyholds were not within the statute 3 & 4 Will. & Mary, c. 14, nor the 47 Geo. 3, sess 2, c. 74, nor the 11 Geo. 4 & 1 Will. 4, c. 47, and consequently before this act were not liable to specialty debts, or debts of traders.

Purchaser not liable to debts.

Although an heir-at-law is bound by specialty debts in respect of freehold lands descended, yet a purchaser of such lands, without notice of any debts, was never held to be subject to them. The Statute of Fraudulent Devises was always considered as placing a devisee on exactly the same footing as an heir-at-law, although the contrary had been ineffectually attempted to be established. (*Matthews* v. *Jones*, 2 Anstr. 506.) Equity will however, on behalf of creditors, grant an injunction against a purchaser to restrain payment of the purchase-money to the heir. (*Green* v. *Lowes*, 3 Br. C. C. 217.) And as simple contract creditors under the 47 Geo. 3, sess. 2, c. 74, were held to stand in this respect in the same situation as specialty creditors under the Statute of Fraudulent Devises (*Woodgate* v. *Woodgate*, Sugd. V. & P. 834, 835, 11th ed.), so, it is conceived, they will under this act, and that a purchaser of lands from an heir or devisee will not be liable to the payment of the simple contract debts of the intestate or testator.

Where real estate under this statute is assets for the payment of a simple contract debt, a purchaser of the estate with notice of such debt is not bound to see his purchase-money applied in discharge thereof. (*Jones* v. *Noyes*, 4 Jur., N. S. 1033.) 3 & 4 *Will.* 4, *c.* 104.

A creditor cannot have a decree for the administration of real estate unless he sues on behalf of all creditors. (*Pontford* v. *Hartley*, 2 Johns. & H. 736.)

DEVISE OF REAL ESTATES CHARGED WITH DEBTS.

22 & 23 Vict. c. 35.

An Act to further amend the Law of Property and to relieve Trustees. [13th August, 1859 (*a*).]

22 & 23 *Vict.* c. 35, s. 14.

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

14. Where by any will which shall come into operation after the passing of this act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper (*b*).

(*a*) The other sections of this act will be found under different heads in this work. (See *ante*, p. 455, and *post*.)

Cases as to implied powers of sale.

(*b*) Before this statute the law was in an unsettled state in regard to the right person to sell under a will where the estate was vested in trustees, charged with debts or legacies, upon trusts declared by the testator, but without any provision for the raising of the debts or legacies, or where there was such a charge, but the testator's whole interest was not devised to trustees. (See Sugd. on Powers, 120—122, 8th ed.; Sudg. V. & P. 662, 14th ed.; 2 Davidson's Conv. 254, 834—836; 2 Jur., N. S. 68.)

A testator devised lands for life with contingent remainders over, and then devised other lands to another tenant for life with contingent remainders over, and charged the latter lands with the payment of a mortgage on the former lands, and also with his debts generally, but he gave no express power of sale: it was held, that the executor took a power of sale by implication, and that after a sale of the latter lands by the executor the devisees of the former had no equity against the purchaser in respect of the charge of the mortgage debt. (*Robinson* v. *Lowater*, 5 De G., M. & G. 272; 18 Jur. 363; 23 Law J., Ch. 641; 17 Beav. 592.) The judgment of *Turner*, L. J., in this case proceeded upon the ground that it must have been in the contemplation of the testator that the debts should be raised immediately, but no power being given to the devisees to raise it, and the will containing a devise of a life estate with contingent remainders over, it was impossible during the subsistence of those contingent remainders the devisees could themselves raise it. On the face of the will therefore it was not the intention

22 & 23 *Vict.* c. 35, s. 14.

of the testator that the money should be raised by the devisees. It seemed, therefore, without reference to the cases decided upon the subject, that in this case at least it was the intention of the testator that the money should be raised by the executor, and that the executor must be considered as invested with all necessary powers for that purpose. (*S. C.*, 5 De G., M. & G. 277.)

The last case was followed in *Eidsforth* v. *Armstead* (2 Kay & J. 333), where, after a charge of debts, &c., on his real and personal estates, the testator devised the estates to trustees, their heirs and assigns, upon trust for his wife for life, and then for his daughter for her separate use for life, and after her death to the use of such persons as she should appoint by will, and in default of appointment, to the use of her right heirs; and the testator charged his estate with 700*l.* to be paid to his granddaughter when she attained twenty-one. *Wood*, V. C., said, the testator having charged his real estate with a sum of money must be taken to have given an implied power of sale to some person to raise the sum required. The donee of the power must be ascertained in each case from the whole will. In this case it appears to me that the persons who were intended to sell were the trustees. It was decided that a general charge of debts on the real estate gave to the executors an implied power of sale. (*Wrigley* v. *Sykes*, 20 Beav. 337; 2 Jur., N. S. 78; 25 Law J., Chan. 458.) A testator directed his debts to be paid out of his real and personal estates; he then devised his freehold lands to trustees for five hundred years, and subject to that he gave all his real and personal estate to his five sons, their heirs, executors, administrators and assigns, upon condition that they should proportionately contribute to the payment of his debts, legacies, &c., on failure of which the trustees of the term were to raise out of the rents, or by mortgage or sale of the shares of the defaulting son, as much money as the son ought to have paid. The testator appointed his five sons executors, and two of them, after the death of their three brothers, sold a portion of the estates: it was held, that the executors had an implied power of sale under the direction to pay debts, and that a contract entered into by them after the death of their three brothers and thirty-one years after the decease of the testator was valid, and a decree was made for specific performance. (*Ib.*) The court added, that it certainly should secure to the purchaser, as far as it was competent for the court to do so, a good legal estate when the conveyance was made. (See observations on this case, Sugd. on Powers, 121, 8th ed.)

Under a direction to pay debts the executors of the original executor sold the testator's real estate twenty-seven years after his death, and nine years after the death of the executor: it was held, that a good title could be made under the implied power of sale, and that the vendors were not bound to state whether there existed any debts which made a sale necessary. (*Sabin* v. *Heape*, 27 Beav. 553.) *Romilly*, M. R., observed, "In all probability there must be some limit in these cases and some period at which the court will say, that the debts must have been paid, and when it would be very difficult to make a good title upon a sale made to satisfy a charge on real estate contained in a will." (*Ib.* 560.)

The decisions on this subject in equity were opposed to a case at law which decided that a mere charge of debts, funeral and testamentary expenses on estates, whether devised to others or allowed to descend, will not give to the executors an implied power of selling or mortgaging, to pay the debts or the funeral or testamentary expenses. (*Doe* d. *Jones* v. *Hughes*, 6 Exch. 223.)

Lord *Cranworth* observed, "Where there is a general charge of debts and no legal estate given, it may be, that, as against the heir at law, the executors may sometimes, perhaps always, possess impliedly a power to convey the legal estate in order to raise the money to satisfy the charge, but that doctrine certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies, there that money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title." (*Colyer* v. *Finch*, 5 H. L. C. 922.)

Where A. devised his realty, after his debts, funeral and testamentary

22 & 23 *Vict.* c. 35, s. 14.

expenses should be paid thereout, to trustees, for certain persons, and after the death of the survivor of those persons, upon trust to sell, with power to give receipts: it was held, that the trustees, notwithstanding the preceding implied power in the executors, could make a good title without the executor's concurrence. (*Hodkinson* v. *Quin*, 1 Johns. & H. 303; 7 Jur., N. S. 65; 30 Law J., Chan. 118; 9 W. R. 197.) In this case *Wood*, V. C., said, "It was decided that where there is a charge of debts and no distinct provision as to the person by whom a sale is to be made, then the executors take an implied power to sell for the payment of debts, though the persons beneficially interested are capable of concurring, and that where an attempt is made to resist the sale, the executors are entitled to a conveyance of the legal estate. (*Ib.*, 1 Johns. & H. 309.)

A testator directed his debts to be paid by his executrix, and he devised his real estate to her for life, *with power to mortgage* it as far as should be needful for her maintenance and comfort: it was held, that the executrix had no power of sale for payment of the debts. (*Cook* v. *Dawson*, 29 Beav. 123; 7 Jur., N. S. 130; 30 Law J., Ch. 311; 9 W. R. 305, affirmed on appeal, 30 Law J., Ch. 359.) *Romilly*, M. R., said, "It is clearly established, that where there is a general charge of debts on the real estate, an executor has power to sell it for that purpose, and that the purchaser is not bound to see to the application of the purchase-money. (*S. C.*, 29 Beav. 126.) Where a testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally upon the real estate, at least in all cases where the real estate is afterwards disposed of by the will. But an exception obtains, where the direction that the debts shall be paid is coupled with a direction that they must be paid by the executor. In that case, it is assumed, that the testator meant that the debts should be paid only out of the property which by law passes to the executor. (*Ib.* See the observations of the M. R. on *Graves* v. *Graves*, 8 Sim. 43.)

It seems that, in the absence of any special direction, a mere power to mortgage does not authorize a mortgage with power of sale. (*Clarke* v. *Royal Panopticon*, 4 Drew. 26; see *Russell* v. *Plaice*, 18 Beav. 21.) But a power to raise money by sale or mortgage has been held to authorize a mortgage with a power of sale; (*Bridges* v. *Longman*, 24 Beav. 27;) but a mere power to mortgage does not confer an additional power to sell. (*Cook* v. *Dawson*, 29 Beav. 128.)

By 23 & 24 Vict. c. 145, ss. 11—16, 34, where mortgages are created by deed since 28th August, 1860, and there is no provision to the contrary, any mortgagee, although the deed contains no power of sale, may, when the principal sum has been in arrear for twelve months, or the interest for six months, or there has been any default by the mortgagor in insuring, proceed to a sale after six months' notice, and sign a valid receipt for the purchase-money.

Powers given by last section extended to survivors, devisees, &c.

15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

Executors to have power of raising money, &c. where there is no sufficient devise.

16. If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any), shall have the same or the like

power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate. 22 & 23 *Vict.* c. 35, s. 16

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen and sixteen of this act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof. Purchasers, &c. not bound to inquire as to powers.

18. The provisions contained in sections fourteen, fifteen and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do. Sections 14, 15 and 16 not to affect certain sales, &c. nor to extend to devises in fee or in tail.

23. The bonâ fide payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. Not to be bound to see to the application of purchase-money.

See 23 & 24 Vict. c. 145, s. 20.

PAYMENT OF MORTGAGE DEBTS.

17 & 18 Victoria, c. 113.

An Act to amend the Law relating to the Administration of the Estates of deceased Persons.

[11th August, 1854.]

17 & 18 *Vict.* *c.* 113, *s.* 1.

Whereas it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: be it enacted, as follows:

Heir or devisee of real estate not to claim payment of mortgage out of personal assets.

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five (*a*).

Not to affect rights claimed under any will, &c. before 1st January, 1855.

Extent of act.

2. This act shall not extend to Scotland.

(*a*) Before this statute it followed from the known rules, both of law and equity, that as between the real and personal representatives of the *debtor*, the personal estate was primarily liable to the payment of the mortgage debt, and must indemnify the real estate against it. All instances to the contrary were mere exceptions to that general rule, and whether the lands in mortgage devolved on the heir at law as *hæres natus*, or on a general

17 & 18 *Vict.* c. 113, s. 2.

devisee as *hæres factus*, or on a particular devisee, in either case the personal estate was liable, in the absence of evidence of intention to the contrary, as the primary fund, to exonerate the real estate descended or devised from the debt. (See Coote on Mortgages, p. 452, 3rd ed.; Jarman on Wills, 3rd ed.)

The rule previous to this statute was, that the personal estate of the deceased debtor was the primary fund to pay off a mortgage, unless an intention was shown to throw the debt on the mortgaged estate. The object of the statute was, to make the mortgaged estate the primary fund, unless an intention can be shown to throw the debt on the personalty. (*Goodwin* v. *Lee*, 1 Kay & J. 378; *Swainson* v. *Swainson*, 6 De G., M. & G. 652.)

A direction in a will that all the testator's just debts, funeral and testamentary charges and expenses, should be paid and discharged *by his executors*, as soon as convenient after his decease, out of his estate, followed by a gift of all the testator's real and leasehold estates (which were subject to a mortgage) to trustees, who, with his wife, were named also executors of his will: was held, not to be such an expression of a contrary intention, as to bring the case within the saving of this act; and consequently, that the *cestui que trust*, under the will of the real estate and leaseholds, took them subject to the mortgages charged thereon. (*Woolstencroft* v. *Woolstencroft*, 2 De G., F. & J. 347; 30 Law J., Ch. 22, overruling the decision of *Stuart*, V. C., 2 Giff. 192.) Lord *Campbell*, C., expressed an opinion that the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed with respect to exempting the personal estate, the mortgaged land being now primarily liable, as the personal estate had been previously. Expressed intention was formerly allowed to prevail over the usual rule of law, but the intention to transfer the liability from the personal estate to the heir or devisee of the mortgaged land was required to be clear and unequivocal. (2 De G., F. & J. 350, 351.)

Turner, L. J., said, "with reference to the above *dictum* of Lord *Campbell*, that the rule which had been before observed with respect to exempting personal estate, should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, probably meant no more than that the intention must be clearly proved. If Lord *Campbell* intended to say, that, as before the act it had been necessary to show an intention, not only to charge the mortgaged estate, but also to discharge the personalty, so now it was necessary to show an intention, not only that another fund should be charged, but also that the mortgaged estate should be discharged," *Turner*, L. J., was not prepared to follow him. In order to take a case out of the act, it was sufficient to show a contrary or other intention: this destroyed the analogy between the two cases. In the one case the intention to be proved was contrary to the established law; in the other, it was only contrary to a statutory rule expressly made dependent upon intention. (*Eno* v. *Tatham*, 11 W. R. 476.) In *Mellish* v. *Vallins*, (2 Johns. & H. 199,) *Wood*, V. C., said, "that he had not been able to satisfy himself, that in cases under the act the rule suggested by Lord *Campbell* is applicable." (See the observations of *Stuart*, V. C., *Smith* v. *Smith*, 3 Giff. 263.)

A gift of all the testator's personal estate, "subject to the payment of his debts, funeral and testamentary expenses," was held sufficient to charge the personalty with the payment of mortgage debts. The real estate was devised in a mode not pointing in any way to the mortgage debt being paid out of the property, the trustees were to let the property, to apply the rents for maintenance, and in a certain event to sell and hold the proceeds upon certain trusts. (*Eno* v. *Tatham*, 11 W. R. 475.)

In *Smith* v. *Smith*, 3 Giff. 263, a testator devised a house to his daughter in fee, and bequeathed all his personal estate to trustees, and he declared that they should thereout pay his debts, and "subject thereto" divide the residue amongst his children. V. C. *Stuart* was of opinion, that the circumstance that the devise of the mortgaged estate was to one of the executors, who had been plainly directed by the testator to pay all the debts out of

17 & 18 *Vict.* c. 113, *s.* 2.

the personal estate, made such a distinction between that case and *Woolstencroft* v. *Woolstencroft* (*ante*, p. 499), that he could not consider the language of this testator's will and the construction put upon it as bound by that decision. His Honor thought there was a contrary and other intention expressed, and that it was sufficient evidence of a contrary intention that the testator had directed the devisee of the estate and two other persons to pay the debt out of his personal estate. (*Smith* v. *Smith*, 3 Giff. 275.)

A bequest of personalty, "subject to the payment thereout of all the testator's just debts," is a sufficient indication of intention, within the words of this act, to make the personal estate the primary fund for the payment of mortgage debts. (*Mellish* v. *Vallins*, 2 Johns. & H. 194; 8 Jur., N. S. 864; 10 W. R. 421.)

An equitable mortgage by deposit and memorandum is within this act. (*Pembroke* v. *Friend*, 1 Johns. & H. 132.) A direction in a will that "all just debts be paid as soon as may be," followed by a devise in fee of a freehold house (which was subject to an equitable mortgage), was held not to be such an expression of a contrary intention as to bring the case within the saving of this act, and consequently that the devisee took *cum onere*. *Wood*, V. C., said, "The testator does not say that the debts are to be paid out of his personal estate or by his executors. Had he used the words 'by my executors,' there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply. There would have been more room for the argument if the property had been devised in strict settlement; but the gift to the widow being in fee, there was nothing to prevent a sale for payment of the mortgage debt immediately after the testator's death." (*Ib.* 134.)

A direction by a testator that all his just debts and funeral and testamentary expenses should be paid and discharged out of his personal estate, is not a sufficient expression "of a contrary or other intention," so as to prevent a devisee of a mortgaged estate taking it, subject to the payment of the charges thereon. (*Rowson* v. *Harrison*, 31 Beav. 207.)

A testator, by will dated in November, 1860, after devising a portion of his real estates, and specifically bequeathing his household furniture and effects to his wife, and devising his other real estates to his wife for life, and after her death to other persons in succession, gave all his ready money, securities for money, and other his personal estate, to trustees upon trust to sell, and thereout in the first place to pay all his just debts, funeral and testamentary expenses, and after payment thereof to hold the residue upon the trusts therein mentioned. At the testator's death the title-deeds of part of his real estate were deposited with certain bankers by way of mortgage to secure their banking account: it was held, that the trust declared of the residuary personal estate was not a sufficient indication of a "contrary or other intention," within the meaning of this act, to relieve the real estate comprised in the deposited deeds, and that the charge must be paid out of the mortgaged estate. (*Moore* v. *Moore*, 10 W. R. 877.)

A testator gave one-third of the rents of his real estate to his widow for life, and he devised an estate at B., in thirtieth parts, to his children as tenants in common. The residue of his real and personal estate, "after paying his *mortgage* and other debts," he left to be divided into thirtieth parts, and to be taken by the same and in the same proportions as the estate at B.: it was held, that the widow took no interest in the personalty, and that the mortgages were payable primarily out of the residue and not out of the mortgaged estate under this act, for there was a distinct direction that the debts should be paid out of the residue. (*Greated* v. *Greated*, 26 Beav. 621.) *Romilly*, M. R., said, there was a misapprehension as to his decision in the last case, and that he did not mean to decide that the personal estate was exonerated, but that there was another fund expressly provided for the payment of the mortgage debts, viz., the residue of the real estate, and that, therefore, this act did not apply, not because the testator had exonerated the real estate from the burthen imposed by the act, but in consequence of an expression of his intention that the mortgage should be paid from another fund than the property on which it was charged. (*Allen* v. *Allen*, 30 Beav. 401.)

17 & 18 *Vict.* c. 113, s. 2.

A distinction has been made in the construction of this act between directing the payment of a mortgage on a devised estate from a particular source, and from signifying an intention that it should be paid out of the personal estate. A testatrix had an estate (A.), which she had mortgaged, and an estate (B.), which had been mortgaged by a former owner. She devised A. for sale and payment of some legacies, and she devised the residue of her real and personal estate, including B., unto her two sons in fee. The testatrix directed any mortgages, debts or incumbrances, specifically affecting any parts of her residuary real or personal estate before disposed of, to be exclusively borne by and paid out of the premises specifically charged therewith. And subject thereto the testatrix directed all her debts, &c., to be paid out of her said residuary real and personal estate. It was held, that the mortgage on A. was primarily payable out of the residuary real and personal estate. (*Allen* v. *Allen*, 30 Beav. 395.)

A testator, having mortgaged his real estate for 6,000*l.*, by his will devised it to his wife for life, and afterwards to four of his children and their issue. The residue of his real and personal estate was given to trustees upon trust for sale, and the monies arising therefrom were to be held upon trust in the first place to pay his funeral and testamentary expenses, and debts, and to invest the residue for the benefit of his six children. It was decided, that the personal estate, and the proceeds of the sale of the testator's real estate, were primarily liable to discharge the mortgage debt of 6,000*l.* (*Newman* v. *Wilson*, 31 Beav. 33.)

In *Stone* v. *Parker*, 1 Drew. & Sm. 212, the testator declared that his trustees should stand possessed of his residuary real and personal estate, and the proceeds thereof, subject in the first place to the payment of his just debts, &c., and, in a subsequent passage, empowered the acting trustees and executors for the time being of his will to pay and satisfy any debts owing or claimed to be owing by or from him, and any liabilities to which he or his estate might be subject. *Kindersley*, V. C., was of opinion that the testator had signified an intention to exonerate a real estate specifically devised from a mortgage charged upon it.

A general charge upon the real estate in aid of the personal estate is not a charge within the definition of the word "mortgage" in this act, the object and intention of the act was not in such a case to alter the administration of assets, or to make the real estate primarily liable to the exoneration of the personal estate, but the statute only produces that effect where there is a defined and specified charge on a specific estate and to the extent of that charge. A general charge is not within the act unless and until the amount of it has, in the administration of the estate, been accurately defined, and the devisee has expressly taken the estate subject to such ascertained charge. Then if for his convenience this amount has not been raised by sale or mortgage, but has been allowed to remain on the estate, it would constitute a mortgage within the statute. The statute only applies when the devisee does some act to make the debt his own, so that at his death, independently of the statute, his personal estate would have been primarily liable to pay the charge; the act then interposes, and the land so charged becomes the primary fund for the payment of the charge upon it. (*Per Romilly*, M. R., *Hepworth* v. *Hill*, 30 Beav. 483.)

A testator bequeathed a legacy of 4,000*l.* to trustees, for the benefit of certain persons in succession, and directed that in case his personal estate should be insufficient the amount should be raised out of his real estate. B. was residuary devisee and legatee. The trusts having been duly administered, with the exception of raising the 4,000*l.*, B. was let into possession of the real and personal estate. The interest on the legacy was regularly paid. B. subsequently executed a deed, to which the surviving trustee of the testator was a party, whereby it was agreed that certain of the estates should be discharged from the liability to pay the legacy, and that the remaining estates should alone be charged with such payment. B. died, having devised some of the real estates. Upon a bill to obtain payment of the 4,000*l.*, and interest: it was held, that the dealings with the property had not affected the charge created by the testator, and that both the real and personal estate remained liable for the payment of the legacy; that if

17 & 18 *Vict.* c. 113, *s.* 2.

the personal estate was originally sufficient to pay the legacy, then the residuary legatee had made his own assets liable; that if insufficient, then the real and personal estate which was handed over to the residuary legatee was liable, the personal estate remaining in specie being the fund primarily liable. (*Hepworth* v. *Hill*, 30 Beav. 476; 8 Jur., N. S. 960; 31 Law J., Chan. 669; 10 W. R. 477.)

Where the personalty goes to the crown for want of next of kin, it has been held, notwithstanding the words of the act, "as between the different persons claiming through or under the deceased person," that the statute applies and the crown takes exonerated from mortgage debts. (*Dacre* v. *Patrickson*, 1 Drew. & Sm. 186.)

The last proviso, that nothing in the 17 & 18 Vict. c. 113, contained, shall affect the rights of any person claiming under or by virtue of any will, deed or document already made or to be made before the 1st of January, 1855, was held not to apply to the case of the heir of an intestate, where the intestate, before the 1st of January, 1855, had executed a mortgage, reserving the equity of redemption to himself and his heirs. (*Piper* v. *Piper*, 1 Johns & H. 91; 6 Jur., N. S. 1026; 29 Law J., Ch. 719; 8 W. R. 543.) The proviso at the end of this act does not save a right to the heir to be exonerated from a mortgage debt out of the personal estate bequeathed to a legatee by a will made before that date. (*Power* v. *Power*, 8 Ir. Ch. Rep., N. S. 340.) In 1834, A. made his will, by which he devised to B. all his right, title and interest to real estate, and he also devised and bequeathed to B. all his personal property, together with all other real, freehold and chattel property of every nature and kind whatsoever of which he might be seised or possessed at the time of his death, and he appointed C. his executor. After his will A. granted mortgages, for the purpose of securing which he executed a disentailing deed, which was held to be a revocation of the will as to the real estate. A. died in 1856: it was held, that this act applied, and that the heir was not entitled as against the legatee of the personal estate to be exonerated from the mortgage. (*Ib.*)

The statute extends only to "any estate or interest in land or other hereditaments," which includes copyholds; (*Piper* v. *Piper*, 1 Johns. & H. 91;) and while seeking to remove a supposed objectionable principle of law has rendered the law itself more complex by introducing a new rule as to one species of property, and leaving the old rule still applicable to the other species, for it is evident that the legatee of a chattel or fund (not being an interest in land) which the testator has pledged or mortgaged, will still be entitled to have it exonerated at the expense of the general personal estate; and the use of the terms "heir or devisee to whom such lands or hereditaments shall descend or be devised" seems to leave a specific legatee of mortgaged leaseholds in a similar position. The enactment should have extended to make all real and personal property the primary security for any charge affecting it; the law would then at least have been consistent. (2 Jarman on Wills, 612, 613, 3rd ed.)

AMENDMENT OF THE LAWS RESPECTING WILLS.

1 Victoria, c. 26.

An Act for the Amendment of the Laws with respect to Wills.
[3rd July, 1837.]

1 *Vict.* c. 26, s. 1.

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power (*a*), and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other Testamentary Disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Meaning of certain words in this act;

"Will;"

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.)

"Real estate:"

"Personal estate:"

Number:

Gender.

1 *Vict. c.* 26, *s.* 2.

(*a*) Lord Justice *Turner* observed that, according to this interpretation, a power of appointment by will extends to and includes a power of appointment by testament, or codicil, or writing in the nature of a will; but the act goes no further, everything beyond that is left to judicial determination. (*Collard* v. *Sampson*, 4 De G., M. & G. 227. See *post*, s. 10, n.)

Repeal of the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

2. An act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins, whereby a Man may devise Two Parts of his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland in

10 Car. 1, sess. 2, c. 2, (I.)

the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the parliament of Ireland in the seventh year of the reign of

Sects. 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 Will. 3, c. 12, (I.)

King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also so much of an act passed in the

Sect. 14 of 4 & 5 Anne, c. 16.

fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen

6 Anne, c. 10, (I.)

Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in

Sect. 9 of 14 Geo. 2, c. 20.

the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth Year of the Reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an act passed in the

25 Geo. 2, c. 6, (except as to colonies.)

twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the par-

25 Geo. 2, c. 11, (I.)

liament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of

King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates pur autre vie to which this act does not extend. 1 *Vict. c.* 26, *s.* 2. 55 Geo. 3, c. 192.

3. It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate (*b*) which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*c*); and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the peesons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

rights of entry; and property acquired after execution of the will.

(*b*) This act does not enable a testator to bequeath a *chose in action* so as to pass the right of suing to the legatee. (*Bishop* v. *Curtis*, 21 Law J., Q. B. 391; 17 Jur. 28.)

(*c*) An executory interest, which descended, in 1840, upon the testator as heir at law, was held to pass under a devise, made in 1851, of his residuary real estate, and did not go to the persons who were his heirs at law at the time when the executory devise took effect. (*Ingilby* v. *Amcotts*, 2 Jur., N. S. 556.)

1 *Vict. c.* 26, *s.* 4.

As to the fees and fines payable by devisees of customary and copyhold estates (*d*).

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

(*d*) See 4 & 5 Vict. c. 35, ss. 88, 89, 90.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

5. When any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate,

and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

have the same remedy for recovering and enforcing such fine, heriot, duties and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent. 1 *Vict. c.* 26, *s.* 5.

Estates pur autre vie.

6. If no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*d*).

(*d*) There may be a special occupant of an equitable estate *pur autre vie.* (*Reynolds* v. *Wright*, 2 De G., F. & J. 590; 27 L. J., Chanc. 392; 4 Jur. N. S., 198.) Leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, executors, administrators and assigns. A. survived the devisor, and, being illegitimate, died without heirs and intestate, living the *cestui que vie:* it was held, that the devised estates passed under this act to A.'s administrator, the nominee of the crown. (*Ib.*)

No will of a person under age valid;

7. No will made by any person under the age of twenty-one years shall be valid.

nor of a feme covert, except such as might now be made.

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act (*e*).

(*e*) By the law, as it stood at the time when this act was passed, an infant might make a valid will of personal estate, but married women had no testamentary capacity, except by virtue of a delegated authority. By means of a power or under a trust, as in case of separate estate, a married woman might, by a writing in the nature of a will, dispose of real or personal estate; and, with the licence and consent of her husband, she might make a will, properly so called, of personal property. It was the intention of the legislature, by this statute, to render infants absolutely incapable of making a will; but it has preserved the testamentary status of married women equally as it stood under the existing law. Therefore a married woman's devise of real estate must still be made by means of a trust or power created for the purpose, and her capacity to bequeath personal estate must still be derived from the licence or authority of her husband. (*Per* Lord *Westbury*, C., *Thomas* v. *Jones*, 32 L. J., Ch. 131; see p. 141.) The construction put upon the 8th section by *Wood*, V. C., is, that it disables a married woman from doing anything which, before the passing of the act, she could not have done by reason of her coverture; it preserves the incapacity of coverture as it stood before the act; but, as regards any incapacity arising from matters independent of coverture, applicable to men and women alike, the statute was not intended to draw a distinction between married women and other persons. The statute makes a will operate as if executed immediately before the death, and the effect of this is, in the case of a married woman, that she must be regarded as a married woman executing the instrument immediately

1 *Vict. c.* 26, *s.* 9.

before her death, and passing thereby everything of which, at the time of her death, she had acquired a power of disposing. (*Thomas* v. *Jones*, 2 Johns. & H. 483, 484; affirmed by L. C., 32 L. J., Ch. 139; 9 Jur., N. S. 161. See *Bernard* v. *Minshull*, Johns. 276.)

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

9. No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction (*e*); and such signature shall be made (*f*) or acknowledged (*g*) by the testator in the presence of two or more witnesses present at the same time (*h*), and such witnesses shall attest and shall subscribe the will in the presence of the testator (*i*), but no form of attestation shall be necessary (*k*).

(*e*) See 15 & 16 Vict. c. 24, s. 1, *post*.

Testator's signature.

(*f*) A signature by the testator of his name after the attestation by the witnesses, although in their presence, is not a compliance with the statute. (*In bonis Olding*, 2 Curt. 865; *In bonis Byrd*, 3 Curt. 117.) A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised a doubt upon the point. (*Cooper* v. *Bockett*, 3 Curt. 648; *Brenchley* v. *Still*, 2 Rob. Eccl. R. 162; *Thompson* v. *Hall*, 16 Jur. 1144.)

The subscribing witnesses to a will differed in the account which they gave of the execution, one not recollecting whether the deceased signed or not, the other deposing that she did not see the deceased sign. They agreed that the signature was not acknowledged in their presence. A witness present at the time deposed, that the deceased signed her name in the presence of the subscribing witnesses. It was held on this evidence that the will was duly executed, the court being satisfied that the signature of the testatrix was subscribed to the will at the time when the witnesses subscribed their names. (*Bennett* v. *Sharp*, 1 Jur., N. S. 456.)

An attesting witness may sign the will for the testator by his direction, for there is nothing in the act which prevents the person signing for the testator being one of the witnesses to attest and subscribe the will. (*In bonis Bailey*, 1 Curt. 914.) The witness, in fact, attests the *direction* of the testator, and that direction amounts to an acknowledgment. (*Smith* v. *Roberts*, 1 Rob. Eccl. R. 262.) A party signing a will for a testator, who was too ill to sign, by his direction signed it in his own name, but expressed it to be on behalf of the testator. This was deemed sufficient. (*Clark's case*, 2 Curt. 329.) A mark by the testator for a signature was held sufficient, although the name did not appear. (*In bonis Bryce*, 2 Curt. 325.)

Acknowledgment of signature.

(*g*) The testator's signature must be made or acknowledged in the presence of the witnesses. It is not necessary that the party should say in express terms to the witnesses, "that is my signature;" it is sufficient if it clearly appears that the signature was existent in the will when it was produced to the witnesses, and was seen by them when they did, at the testator's request, subscribe the will. (*Keigwin* v. *Keigwin*, 3 Curt. 607; *In bonis Ashmore*, 3 Curt. 756; *Hudson* v. *Parker*, 1 Rob. Eccl. R. 25.) A testatrix having pointed to her will which she had previously signed, and expressed her satisfaction at its contents, and by gestures intimated that she had signed the same, and that she wished two persons present together to attest the will: she was held to have duly acknowledged her signature. (*In bonis Davies*, 2 Rob. Eccl. R. 337.)

A testator produced a will entirely in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them *to put their names underneath his:* it was held a sufficient acknowledgment of the signature, the court being satisfied (although there was no express evidence of the fact) that the signature was in the testator's handwriting. (*Gaze* v. *Gaze*, 3 Curt. 451.)

Where a will is signed by the testator before the witnesses are called in,

the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument which they are signing, does not amount to an acknowledgment of the signature by the testator. (*Ilott* v. *Genge*, 4 Moore, P. C. 265; 3 Curt. 160.) And even where the testator, in the joint presence of the witnesses, *acknowledged the paper to be his will*, but they did not see him sign the paper, nor did they at the time of subscribing see his signature, the writing being purposely concealed from them: this was held to be a void will. (*Hudson* v. *Parker*, 1 Rob. Eccl. R. 14.)

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The court rejected probate of a will entirely in the testator's handwriting, with perfect testimonium and attestation clauses, where the witnesses deposed to the effect that the deceased asked them to sign a paper which was folded down so that they saw no writing whatever upon it, and that the deceased did not write his name or acknowledge any signature in their presence. (*Shaw* v. *Nevill*, 2 Adm. & Eccl. R. 203; 1 Jur., N. S. 408.)

The name of the deceased having been signed to his will, at his request, by the drawer thereof, who on a subsequent day asked, at the request of the deceased, two persons called in by the deceased himself to attest his will, all being present together at the same, to sign their names as witnesses, which they did, and the deceased then placed his seal on the paper and said: "I deliver this as my act and deed." It was held not to have been acknowledged by the deceased in the presence of the witnesses. (*In bonis Summers*, 2 Rob. Eccl. R. 295; 14 Jur. 791.)

(*h*) A will may be attested by the witnesses making marks (*In bonis Amiss*, 2 Rob. Eccl. R. 116); and the testator may write the names of the witnesses opposite their respective marks. (*In bonis Ashmore*, 3 Curt. 756.) But an attesting witness, able to write, cannot subscribe for another witness who is unable to write. (1 Notes of Cases, 456.)

A. made his mark at the end of a testamentary paper, which, however, purported to be the will of B. It was so described at the beginning, and in the testimonium and attestation clauses, and the mark was stated to be the mark of B. The execution of the paper by A. was fully proved, and that the state of his family at the time was such as was set forth in the will: it was held, that as A. executed the paper by making his mark, with the intention that it should operate as his will, it was, notwithstanding the misnomer, admitted to probate as the will of A. (*In bonis Douce* or *Douse*, 8 Jur., N. S. 723; 31 Law J., Prob. 172.)

A will, purporting to be that of "S. Clarke," and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark, against which appeared the name "S. Barrell." The former was her maiden name, and the latter the name of the husband she had married: it was held, that there being no doubt as to the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it. (*In bonis Clarke*, 1 Sw. & Tr. 22; 4 Jur., N. S. 24; 27 Law J., Prob. 18.)

A., in the presence of a testator and by his direction, impressed the testator's usual signature at the foot of a codicil, by means of a stamp upon which such signature had been engraved: it was held, that the will was duly signed. (*Jenkyns* v. *Gaisford*, 32 Law J., Prob. 122.)

A husband who is witness to a will cannot also subscribe for his wife. (*In bonis White*, 2 Notes of Cases, 461.) To pass over a signature previously made with a dry pen amounts to no more than an acknowledgment of a signature; and if an attesting witness, on the re-execution of a will, merely traces his previous signature with a dry pen, it is insufficient. (*Playne* v. *Scriven*, 1 Rob. Eccl. R. 772.) An attesting witness to a will, duly executed, attested and subscribed a second execution of the will, by adding the word "Bristol" (the name of the city) at the end of her name and street in which she dwelt written on the former execution, but did not otherwise subscribe on the second execution. The court held, that there was no proof of an attestation to the signature of the testatrix, and that the addition made could not be held to be an attestation by a witness. (*In bonis Trevanion*, 2 Rob. Eccl. R. 315; 14 Jur. 919.)

Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and

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attested, and that, subsequently, the attesting witness's name had been erased by the testator, and had at his request been re-written by the attesting witness, the court granted probate to the widow, on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children. (*In bonis Coleman*, 2 Sw. & Tr. 314.)

A will was held to be duly executed where the signatures of the testator and the attesting witnesses were written on a separate piece of paper, which had been previously wafered to the foot of the will. (*Cook* v. *Lambert*, 32 Law J., Prob. 93.)

It has long been settled, that after a will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. (*White* v. *British Museum*, 6 Bing. 310.) To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. An acknowledgment by a witness of his signature by putting a dry pen over it is not sufficient. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. The signature or acknowledgment of the testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed or so acknowledged his signature, subscribe the will in his presence. (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160.)

A will was attested by one witness in his own handwriting. He also held and guided the hand of a second witness, who could neither read nor write. This having taken place in the presence of the testator, was held to be a sufficient attestation. (*Harrison* v. *Elvin*, 3 Q. B. 117; *In bonis Frith*, 4 Jur., N. S. 288; 27 Law J., Prob. 6.)

The names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen: it was held, that the will was duly attested. (*In bonis Lewis*, 31 Law J., Prob. 153.)

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under this act, which does not require them to sign their names. (*In bonis Christian*, 2 Rob. Eccl. R. 110; *In bonis Martin*, 6 Notes of Cases, 694.) A testatrix having signed her will desired M. C. and E. T. to attest; but as E. T., one of them, could not write, the testatrix desired J. J. C., who was also present, to write the name of E. T., which J. J. C. did, but did not sign his own name. It was held, that the paper was not entitled to probate, as E. T. might have made his mark, and that a desire that another should sign for a witness could not be construed to be a subscription by that witness. (*In bonis Cope*, 2 Rob. Eccl. R. 335.)

In the case of *Casement* v. *Fulton*, (5 Moo. P. C. C. 14,) before the Judicial Committee of the Privy Council, it was laid down that the witnesses to a will must subscribe their names in the presence of each other; but, according to subsequent decisions, it is not necessary that the witnesses should subscribe in the presence of each other. (*Faulds* v. *Jackson*, 6 Notes of Cases, Suppl. 1; *In bonis Webb*, 1 Jur., N. S. 1096; 2 Jur., N. S. 309.) This is considered to be a settled point. (Sugd. on Stat., p. 342, 2nd ed.) If both the witnesses are dead, it will not be presumed that they did not both sign at the same time, from the difference in the colour of the ink. (*Trott* v. *Trott*, 29 Law J., Prob. 156.)

Testator's presence.

(*i*) The execution must be attested by the witnesses in the actual or constructive presence of the testator. A testator, intending to execute a codicil, signed the same lying in bed, there being present in the room two witnesses who attested the codicil. The curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe the codicil as attesting it. It was held, that the testator and the witness signed their names in the presence of each other, as required by this section of the act. (*Newton* v. *Clarke*, 2 Curt. 320.) In this case the court was of opinion, where a paper is executed by the deceased in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the pre-

sence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign. Even in the case of a blind person it must appear that the will was so attested that the testator, if he had had his eyesight, could have seen the witnesses subscribe. (*In bonis Piercy*, 1 Rob. Ecc. R. 278.) 1 *Vict. c.* 26, *s.* 9.

A will signed by the attesting witnesses in the same room where the testatrix lay in bed with the curtains closed and her back to the attesting witnesses, who deposed to her utter inability to have turned herself so as to have drawn aside the curtains, was held not to have been signed by the witnesses in the presence of the testatrix. (*Tribe* v. *Tribe*, 1 Rob. Eccl. R. 275; *Longford* v. *Eyre*, 1 P. Wms. 740; *Casson* v. *Dade*, 1 Br. C. C. 99.)

Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names. A testator wrote his will, and signed it in the presence of two persons summoned by him for the purpose; they took the will into an adjoining room to sign their names; the rooms communicated by a door, which was left open. There was no proof that the testator did actually see the witnesses sign their names: it was held, that the signature of the witnesses was not made in the presence of the testator, as required by this section. (*Norton* v. *Bazett*, 2 Jur., N. S. 766; 3 Jur., N. S. 1084.)

A will was contained in five sheets of paper, and at the bottom of each of the first four sheets, the signatures of the testator and of the attesting witnesses were in the margin, and at the end of the will there was a regular attestation, but unsigned, although the testator signed his name at the end of the will. The witnesses were both dead, and no other person was present at the execution of the will, and the will was rejected as there was nothing to show that the signatures in the margin were intended to attest the signature of the testator at the end of the will, which alone gave validity to the will. (*Ewen* v. *Franklin*, Deane's Eccl. R. 7; 1 Jur., N. S. 1220. See Sugd. on Stat., p. 344, 2nd ed.) But where the attesting witnesses, instead of signing their names near to that of the testator on the first side of a sheet of paper where the will ended, and where there was ample space for their signatures, signed under an endorsement on the fourth page, such attestation was held to be good, for the statute does not point out the place where the witnesses are to sign. (*In bonis Chamney*, 1 Rob. Eccl. R. 757.)

If upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses; in the absence or death of the witnesses, the *primâ facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will the presumption is the same. (*Burgoyne* v. *Showler*, 1 Rob. Eccl. R. 5.) Where, however, the witnesses negative compliance with the requisites of the act, the will cannot be supported unless their evidence be rebutted by proof of circumstances, showing that the witnesses cannot be credited, or that from the facts and circumstances which they state their recollection fails them. (*S. C.; In bonis Ayling*, 1 Curt. 913; *Gove* v. *Gawen*, 3 Curt. 151; *Pennant* v. *Kingscote*, *Id.* 642.)

A will appeared to have been signed by two attesting witnesses, neither had any recollection of the circumstance; they both, however, when shown the signatures, acknowledged them to be theirs: it was held, that the will must be presumed to have been duly executed. (*Foot* v. *Stanton*, 1 Deane, Eccl. R. 19; 2 Jur., N. S. 380.)

A testamentary paper, in the handwriting of a party, concluded as follows:—"In witness of this I have set my hand this 14th day of January, 1854; signed by the testatrix, A., her last will, in our presence." There was no other signature of the deceased at the end of the writing. The surviving attesting witness could give no distinct account of the state of the paper at the time of or the circumstances attending the execution, and there was no direct evidence on the former point. It was admitted to probate. (*In bonis Torre*, 8 Jur., N. S. 494—Prob.) Where witnesses have deposed,

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the one positively that the will was not executed in the testator's presence, and the other as positively declared that it was, the court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause. (*Brenchley* v. *Still*, 2 Rob. Eccl. R. 176, 177; *Farmar* v. *Brock*, 1 Deane, Eccl. R. 187; 2 Jur. 670.)

Positive affirmative evidence by the subscribing witnesses of the facts of a testator acknowledging his signature in their joint presence, and of their subscribing in conformity with the requisites of the law, is not absolutely essential to the validity of testamentary papers. When the inaccuracy and imperfect recollection of witnesses are established, the court may upon the circumstances of the case presume due execution. (*Leech* v. *Bates*, 1 Rob. Eccl. R. 714.) Positive evidence of one of the subscribing witnesses, negativing the fact of signing or acknowledgment of the signature by the deceased in his presence, in the absence of circumstances raising any presumption of his being mistaken, will compel the court to pronounce against the due execution of a testamentary paper. (*Noding* v. *Alliston*, 14 Jur. 904.)

Although a will may be valid without any attestation clause, (*Bryan* v. *White*, 2 Robert. 315,) yet one should be added; otherwise, in order to obtain probate, it is necessary to have an affidavit of one of the subscribing witnesses to prove that the provisions of the act, in reference to the execution of the will, have in fact been complied with. (*Belbin* v. *Skeats*, 1 Sw. & Tr. 148.)

Although a testamentary instrument is not properly executed or attested, yet, if it is clearly referred to by one of later date properly executed and attested, it will be operative, and no particular form of expression is necessary; therefore, where there was a will duly executed, then a codicil attested by one witness only, and, lastly, a codicil duly executed, which was described as "another codicil to my will," the second codicil was held to give operation to the first codicil. (*Ingoldby* v. *Ingoldby*, 4 No. Cas. 439; *Re Hilhouse*, 1 Eccl. & Adm. Rep. 111.) And it of course would be the same if the will were informally executed, but a codicil duly executed were to be described as a codicil to his last will, (*Hill's Case*, 4 No. Cas. 404; *Hally's Case*, 5 No. Cas. 510,) it is not properly a question of incorporation, (see *Id.* 512,) but any other papers may be incorporated by reference in a testamentary instrument duly executed, the paper to be incorporated need not be void or valid *per se*, and whether of itself void or valid is equally entitled to probate. (*Sheldon* v. *Sheldon*, 1 Robert. 81; and see *Dickens' Case*, 3 Curt. 60; *Willesford's Case*, *Ib.* 77; *Bacon's Case*, 3 No. Cas. 644; *Smartt's Case*, 4 No. Case, 38; *Darby's Case*, 4 No. Cas. 427.) But the paper intended to be incorporated must be in existence; it must be already written. (*Countess Ferraris* v. *Lord Hertford*, 3 Curt. 468.) As to lists of articles referred to, see *In re Ash*; *In re Countess Dowager of Pembroke*, 2 Jur., N. S. 526. (Sugd. on Stat., pp. 345, 346.)

An unattested paper, which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of this section. (*Allen* v. *Maddock*, 11 Moore, P. C. C. 427.) Where there is a reference in a duly executed testamentary instrument to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by this statute. (*Ib.*)

If the parol evidence satisfactorily prove that in the existing circumstances there is no doubt as to the instrument referred to, it is no answer that by possibility circumstances might have existed in which the instrument could not have been identified. (*Ib.* See Wigram on Evid., prop. 5.)

A married woman, having power under a settlement to make a will, in 1851 made a testamentary instrument in her own handwriting, which she intended to operate as a will, but which was not attested according to the requirements of this section. In 1856, she duly executed a codicil, which was headed, "This is a codicil to my last will and testament." This codicil contained no reference to the testamentary paper of 1851, which was not

produced at the time the codicil was executed, but was found at her death in a trunk in a room in her residence, enclosed in a sealed envelope, on which was indorsed "Mrs. Anne Foote's Will." The codicil was found in a drawer in her bed-room. No other will or testamentary paper was found. It was held, first, that, as there was a distinct reference in the codicil to a "last will and testament," and as no other will had been found, the testamentary paper of 1851 was by parol evidence sufficiently identified as the last will referred to by the codicil of 1856. (*Allen* v. *Maddock*, 11 Moore, P. C. C. 427.) It was held, secondly, that, though informally executed, the testamentary paper of 1851 was incorporated with and made valid by the duly-executed codicil of 1856, and probate was granted of both papers as together containing the last will and codicil of the testatrix. (*Ib.*) 1 *Vict. c.* 26, *s.* 9.

The Court of Probate will not extend the principle of incorporation of law as laid down in *Allen* v. *Maddock*, *supra*. (*In bonis Greves*, 1 Sw. & Tr. 250; 7 W. R. 86.)

In order that a testamentary paper duly executed may incorporate another, it must refer to it as a written document then existing in such terms that it may be ascertained. (*Smart* v. *Prujean*, 6 Ves. 565.) The identity may be ascertained by the aid of the surrounding facts. A. duly executed the following document:—"It is my wish for my dear husband to administer the monies. The smaller bequests L. will be so kind as to attend to." She then, in the presence of the attesting witnesses, inclosed in it two papers with writing thereon, folded it up and sealed it. After her death the envelope was found to contain two sheets of paper containing bequests of money; and other bequests in the handwriting of the deceased, but unexecuted, were found. It appeared that the envelope had been opened and resealed, and there was no evidence that the papers found in it were those originally inclosed, or that they were in existence when the envelope was executed. No other testamentary papers were found. It was held, that the duly-executed paper did not refer to any written document as then existing; and, assuming that it did so, that the document was not pointed out in such a manner as to enable the court to ascertain its identity; and, therefore, that the three papers were not together entitled to probate, and that, as the duly-executed paper taken by itself had no testamentary character, it was not entitled to probate. (*Van Straubenzee* v. *Monck*, 32 Law J., Prob. 21.)

A will contained the following clause:—"I request my trinkets shall be divided as I shall direct in a small memorandum." After the death of the deceased an unexecuted memorandum in her handwriting, disposing of certain trinkets, was found; and it appeared that this was in existence before the execution of a codicil, but it was referred to by it. It was held, that the memorandum was not entitled to probate. (*In bonis Mathias*, 32 Law J., Prob. 115, overruling *In bonis Hunt*, 2 Robert. 622; *In bonis Stewart*, 32 Law J., Prob. 94.)

A. executed his will in February, and a codicil on the same paper in December below the signature to the will; and before the commencement of the codicil appeared a memorandum, which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will: it was held, that the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly-executed codicil of a subsequent date, such codicil referring merely to the will. (*In bonis Willmott*, 1 Sw. & Tr. 36.)

Where a testatrix purported by a codicil to revive a will not only revoked but destroyed, the court refused to grant probate of the draft, which was an unexecuted paper, and not specifically adverted to or recognized by the codicil. The court gave no opinion as to what would be the case if the will had been accidentally lost or destroyed without *animus revocandi*. (*Hale* v. *Tokelove*, 2 Robert. 318.)

A testator made a will in 1858, and another in 1859, and then the will of 1858 was actually destroyed, the will of 1859 having previously revoked it. A codicil was afterwards made in terms purporting to be a codicil to the will of 1858. It was decided that it could not again become a will, as the instrument had been destroyed, and it no longer existed either in law or

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fact. It did not exist as a will from the time when the second will was executed, and it no longer existed as a written instrument, as a paper writing, from the time it was burnt. (*Rogers* v. *Andrews*, 2 Sw. & Tr. 342.)

A. wrote out a draft will, which on his death was found completed, with the names of two attesting witnesses. On inquiry no such persons could be traced, and the writing of the names was sworn to be that of A. himself. The court granted administration of the goods of A., as having died intestate, without the parties interested under the draft will having been first cited to propound it. (*In bonis Lee*, 4 Jur., N. S. 790—Prob.)

A will was written on one side of a half-sheet of paper, and concluded with the words, "In witness whereto I have hereunto set my hand and seal this 9th day of July, in the year as above written." A small space at the bottom of the page was left blank, and then followed a separate piece of paper attached by wafers to the half-sheet on which the will was written. The testator's signature, the attestation clause, and the signatures of the attesting witnesses were alone written on this separate paper. It was held, that the court could not grant probate of such a document. (*In bonis Lambert*, 8 Jur., N. S. 158; 31 Law J., Prob. 118.)

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

10. No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity (*k*).

(*k*) It is now decided, after some conflicting opinions, that this section does not apply to a case where the power authorizes an appointment only by deed or writing and does not in terms authorize an appointment by will or a testamentary writing. The question arose thus:—The settlor reserved a power of appointing, "during the term of his natural life, by any *deed or deeds, writing or writings*, under his hand *and seal*, to be attested by two or more credible witnesses," and then he made an appointment by will, *not under seal*, but executed and attested as required by this statute. V. C. *Wigram*, in *Buckell* v. *Blenkhorn*, (5 Hare, 131,) which was followed in *Man* v. *Ricketts*, (7 Beav. 95,) held, that inasmuch as the previous decisions had established that where there was a power worded like this of appointing "by writing," coupled with certain solemnities, a testamentary writing executed with those solemnities would be a good execution of the power, the donor being indifferent, so long as the conditions were complied with, whether the instrument were a writing or a will; therefore the case would fall within this section of the statute. It was also held by the Master of the Rolls, on the authority of that case, that a will not sealed, but executed according to the formalities of this act, was a due execution of a power required to be executed by writing under hand and seal. But the Lords Justices held that the title was too doubtful to force upon a purchaser, and that it could not be assumed that a power to appoint by "any writing" is identical with a power to appoint by will. (*Collard* v. *Sampson*, 16 Beav. 543; 22 Law J., Ch. 729; 17 Jur. 641; 4 De G., M. & G. 224. See *Orange* v. *Pickford*, 4 Jur., N. S. 649, 650; 4 Drew. 363.) And it has since been decided by V. C. *Wood*, that where a power of appointment is to be exercised by a writing under the hand and seal of the donee, it cannot be exercised by a will executed with only the formalities required by this act, because the essential requisition of the power is that it should be exercised under hand and seal, and the statute applies to a power of which the essential requisition is that it should be exercised by will. (*West* v. *Ray*, 1 Kay, 385. See Sugd. Pow. 217—221, 8th ed.)

Soldiers and mariners' wills excepted.

11. Provided always, and be it further enacted, that any soldier being in actual military service (*l*), or any mariner or sea-

man being at sea (*m*), may dispose of his personal estate as he might have done before the making of this act. 1 *Vict. c.* 26, *s.* 11.

(*l*) This privilege, as it respects soldiers, has been held to be confined, by the insertion of the words, "actual military service," to those who are *on an expedition*; and, consequently, it has been decided that the will of a soldier made while he was quartered in barracks, either at home (*Drummond* v. *Parish*, 3 Curt. 522), or in the colonies (*White* v. *Repton*, 3 Curt. 818; *In bonis Phipps*, 2 Curt. 368; *In bonis Johnson*, 2 Curt. 341), is not privileged. The same was held as to the will of a soldier made at Bangalore, in the East Indies, whilst in command of the army there stationed, and who died whilst on a tour of inspection of the troops under his command. (*In bonis Hill*, 1 Rob. Eccl. R. 276. See 1 Wms. Exors. 96, 4th ed.) Soldiers.

The term "soldier," in this section, extends to persons in the military service of the East India Company. (*In bonis Donaldson*, 2 Curt. 386.) An unattested will, made by an officer on service at Berbice, was allowed to pass as that of a soldier in actual military service at the prayer of the party whose interest was prejudiced by such will. (*In bonis Phipps*, 2 Curt. 368.)

(*m*) The term "mariner or seaman" does not exclude any person in her Majesty's navy, though superior of the ship, being "at sea," from the exception contained in this act. (*In bonis Hayes*, 2 Curt. 338.) A codicil signed but not attested on board a Queen's ship in a river by the commander-in-chief actually engaged in a naval operation was held to be within this section, and to incorporate a prior codicil signed by him but not attested whilst living on shore. Though the admiral was not actually at sea when he wrote the codicil, he was in a river on a *naval expedition*. (*In bonis Austen*, 2 Rob. Eccl. R. 611; 17 Jur. 284.) A will made under this section remains operative unless expressly revoked, although the maker of such will lives in England several years after the date of such will. (*In bonis Leese*, 17 Jur. 216.) But in a case in which the testator was commander-in-chief of the naval force at Jamaica, but lived on shore at the official residence, his family and establishment being also on shore: it was held, that the testator did not come within the exception as to mariners at sea. (*Seymour's Case*, cited 3 Curt. 530; 2 Curt. 339.) Seamen.

This section applies to seamen, whether in the Queen's or merchants' service. (*In bonis Milligan*, 2 Rob. Eccl. R. 108; *Morrell* v. *Morrell*, 1 Hagg. 51.) Probate was allowed of an unattested codicil made at sea by the purser of a man-of-war, as that of a seaman. (*In bonis Hayes*, 2 Curt. 338.) The will of a seaman, who went on shore and there died by an accident, was allowed probate as that of a seaman at sea. (*In bonis Lay*, 2 Curt. 375.) Henry Corby died at sea on the 24th June, 1853. He left England in October, 1850, for New Zealand, whence he afterwards, in May, 1852, went to Australia; he there resided till the 15th March, 1853, on which day he shipped as an able seaman on board the "James Alexander," which was then lying at Melbourne on a voyage to England, and he remained on board that vessel until his death. Three letters, all in the handwriting of the deceased, of a testamentary character; one dated on the 6th, and the others on the 15th March, but the first not signed, were received by members of his family in England, and, on intelligence of his death being received, search was made among his boxes and effects for some more formal testamentary instrument, but without success. It was held, that the papers were not entitled to probate as a mariner's will within the meaning of this section. (*In bonis Corby*, 18 Jur. 634.)

12. This act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the pay of the Royal Navy," respecting the wills of petty Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

1 *Vict. c.* 26, *s.* 12.

officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

Publication not to be requisite.

13. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

14. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

15. If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will (*x*).

(*x*) Where the execution of a will was attested by two marksmen and signed also by two other persons as witnesses, the court held that the signature of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen, and that the legacy to the wife of one of them failed under this section. (*Wigan* v. *Rowland*, 11 Hare, 157.)

A legacy was given by will, and a codicil confirming the will was attested by the legatee; the gift was held to be good. A person entitled to a share of a residue given by will, attested a codicil which indirectly increased the residue: such attestation was held not to invalidate the witness's claim to a share of the residue. (*Gurney* v. *Gurney*, 3 Eq. R. 569; 3 Drew. 208; *Tempest* v. *Tempest*, 2 Kay & J. 635.)

Where there was a bequest to several as joint tenants, one of whom was an attesting witness to the will, it was decided, that as the gift to the witness was simply void, the other joint tenants took the whole, there being no lapse. (*Young* v. *Davies*, 32 L. J., Ch. 372.)

Creditor attesting to be admitted a witness.

16. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

17. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby ap-

pointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions). 1 *Vict. c.* 26, *s.* 18.

No will to be revoked by presumption.

19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*n*).

(*n*) A testatrix by her will devised real estates, and by a subsequent deed attested by two witnesses she conveyed them on other trusts. It was held that the deed, assuming it to be void as a *turpis contractus*, was not a "writing declaring an intention to revoke" within this section, and therefore that the will operated on such estate and interest as the testatrix possessed in the property at her death. One great object of this act was to put an end to all those questions which previously arose where a devise was destroyed by the alteration of the estate of the testator. (*Ford* v. *De Pontes*, 30 Beav. 572; 4 Jur., N. S. 323.)

A testator having made a will executed under seal, and published and attested as a sealed instrument, afterwards for the purpose of revoking it tore off the seal and with it part of a word: it was held that the tearing off the seal was sufficient within this section to revoke the will. The tearing having destroyed the will in its entirety as and for which it had been published. (*Price* v. *Powell*, 3 H. & N. 341. See *Doe* d. *Rees* v. *Harris*, 6 Ad. & E. 209.)

By the usual statement in the witnessing clause at the end of a will that the testator has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will, and if having so recited he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation of the whole will under this section. (*Williams* v. *Tyley*, 1 Johns. 530.)

A testator cut out of his will the names of the attesting witnesses, giving as his reason that he had some idea of altering it and having a new will made, and afterwards on the same day replaced the piece so cut out, saying that the will would do for the present. The court upon motion, with the consent of the persons interested in case of intestacy, granted probate. (*In bonis Eeles*, 32 L. J., Prob. 4. See *In bonis De Bode*, 5 Notes of Cases, 189.)

Where a will in the custody of a testator is found after his death mutilated, the presumption in the absence of evidence is that it was mutilated by him after its execution, and if there be a codicil after the execution of the codicil. From the manner in which part of a will has been cut off, and from other circumstances showing an intention not to revoke the whole will but only such part as was cut off, the remainder of a will with a codicil may be entitled to probate. (*Christmas* v. *Whinyates*, 32 L. J., Prob. 73.)

A will is not destroyed within this section by being struck through with a pen, the name of the testator being crossed out and the names of the attesting witnesses being struck through. It was said by Sir *H. Jenner*, that when the legislature, after mentioning "burning" a will, and "tearing" a will, speaks of "otherwise destroying" a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the same metaphorically, as being a destruction of the contents of the will, it never could have been their intention that the cancelling of a will should

1 *Vict. c.* 26, *s.* 20.

be a mode of destroying it. (*Stephens* v. *Taprell*, 2 Curt. 458, see p. 465; *Re Brewster*, 6 Jur., N. S. 56.)

The testator's name is essential to the existence of a will, and if he cross out his signature it is a revocation within this section. (*Hobbs* v. *Knight*, 1 Curt. 768.)

A testatrix obliterated, with the intention of revoking, several passages of her will, so that none of the parts obliterated could be distinguished upon the face of the will: it was held that this was a complete revocation within this section. (*Townley* v. *Watson*, 3 Curt. 761.) Upon this section it is obvious that a *part only* of a will may be revoked in the manner described; in other words, that the whole will is not *necessarily* revoked by the destruction of a part, although a destruction of a part may, under certain circumstances, operate as a revocation of the entire will. The burning, tearing or destroying the instrument must be done *with the intention to* revoke it. If done without such intention it is ineffectual. (*Clarkson* v. *Clarkson*, 2 Sw. & Tr. 497.) It is not the manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means which will satisfy the requisites of the law; the act must be accompanied with the *intention* of revoking; there must be the *animus* as well as the act, both must concur in order to constitute a legal revocation. It is the *animus*, also, which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what portion thereof. (*Per* Sir *J. Dodson*, *Clarke* v. *Scripps*, 2 Rob. Eccl. R. 567. See *Doe* v. *Harris*, 6 Ad. & Ell. 209.)

No alteration in a will shall have any effect unless executed as a will.

21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will (*o*).

(*o*) Although this section does not, like the preceding one, contain the words, "with the intention of revoking the same," it has been held, intention must accompany the acts mentioned in this section in the same way as intention must accompany the acts mentioned in the 20th section. Under the Statute of Frauds (*Bibb* d. *Mole* v. *Thomas*, 2 W. Bl. 1044) and this act, intention is indispensable; under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done without an intention to revoke, and only for the purpose of making immediately some new disposition or alteration; and if, from want of compliance with the statutory regulations, such new disposition or alteration could not take effect, then the burning, tearing or obliteration, in no degree revoked the will, but it remained in full force as if nothing had been done to it. Similar principles must be applied in cases arising under the present statute; there is nothing in the statute which tends to a contrary conclusion. (*Per* Dr. *Lushington*, *Brooke* v. *Kent*, 3 Moo. P. C. C. 349, 350.) It was decided by the Privy Council, where a testator intended to revoke a legacy by substituting a different sum to that originally given, and such substituted sum was not effectually given for want of compliance with the statute, the original legacy is not revoked, and that evidence is admissible to show what was the original legacy. (*Brooke* v. *Kent*, 3 Moo. P. C. C. 334.)

The word "apparent" here used does not mean capable of being made apparent by extrinsic evidence, but applies to what is apparent on the face

of the instrument itself. A testator obliterated *animo revocandi* several passages of her will, so that none of the parts could be distinguished upon the face of the will: it was held, that this was a complete revocation within this section. The court being of opinion that it was the intention of the legislature, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in this act. (*Townley* v. *Watson*, 3 Curt. 761.) Where the alteration is not attested in the manner required by this section probate will be granted of the will as it originally stood, if that is apparent; (*In bonis Beavan*, 2 Curt. 369; *In bonis Martin*, 1 Rob. Eccl. R. 712;) but if not, probate will be granted in blank as to such parts of the will as cannot be read. (*In bonis Ibbetson*, 2 Curt. 337.) 1 *Vict.* c. 26, s. 21.

In order to discover the words as they originally stood, the court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses, or by evidence of that nature. (*Ib.*)

Where a will contains alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which at the time of the execution the attesting witnesses cannot depose to, in the absence of all direct evidence as to the alterations and erasures, the presumption of law is that such alterations and erasures were made after the execution of the will, and probate of the will was granted in its original form. (*Cooper* v. *Bockett*, 4 Moo. P. C. C. 439; *Simmons* v. *Rudall*, 1 Sim. N. S. 137; *Gann* v. *Gregory*, 3 De G., M. & G. 777.) The mere circumstance of the amount or the name of the legatee being inserted in different ink and in a different handwriting, does not alone constitute an obliteration, interlineation or other alteration within the meaning of this section, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. (*Greville* v. *Tylee*, 7 Moo. P. C. C. 320.) In the absence of proof that certain words in a will, written with a different pen and in different ink and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such will consisting of the inserted words which constituted *a reversionary* disposition were pronounced against. (*Ib.*)

Interlineations were made in a will by the testator after its execution. He sent for the witnesses, pointed out the alterations, declared he republished his will, and then acknowledged his original signature, but did not re-sign. The witnesses placed their initials opposite to the alterations and also signed a memorandum at the foot of the will. The court granted probate of the will with the alterations, but intimated that the proper course, perhaps, would have been for the testator to have re-signed his name as the witnesses did. (*In bonis Dewell*, 1 Adm. & Eccl. R. 103; 17 Jur. 1130.)

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

22. No will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (*p*).

(*p*) One entire part of a will, in duplicate, in the possession of the testator, being undestroyed, but the other part, in the possession of his solicitor,

1 *Vict. c.* 26, *s.* 22.

having been destroyed by the testator on the execution of a subsequent will made in 1838 in terms revoking the prior will, was held to be revived by a codicil made subsequently to the second will, though referring to the first will *merely by date*, and that such reference sufficiently shows the intention to revive as required by this section, and that parol evidence is not admissible to establish a mistake in the date. (*Payne* v. *Trappes*, 1 Rob. Eccl. R. 583.)

A testatrix duly executed a will, and, subsequently thereto, two other wills, both of which contained a clause revoking all former wills. She afterwards destroyed the two latter wills. It was held, that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive. The court said the only mode in which the will could be revived is that pointed out by this section. There must be a *re-execution*, there are no other means of showing an intention to revive. (*Major* v. *Williams*, 3 Curt. 432.)

The testator left two substantive wills, by the latter of which he disposed of the whole of his property, but without expressly revoking the former will, nor appointing executors by the latter will. The court held the latter paper to have been executed as a will, and not as a codicil, and to have revoked the prior will. (*Henfrey* v. *Henfrey*, 2 Curt. 468.)

A testator executed a will in 1825, which was found uncancelled at his death, which happened in 1853. In 1852, he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words "This is the last will and testament." This latter instrument was not forthcoming at the testator's death, but there was no evidence of its destruction. The Prerogative Court held, that the instrument executed in 1852 was not to be considered as a codicil, but a substantive will, which operated as a revocation of the prior will of 1825, and that, under this section, the deceased must be considered to have died intestate, as the former will was not revived by the destruction of the latter. The Judicial Committee, upon appeal, reversed the sentence of the court below, and decreed probate of the will of 1825 upon the following grounds:—1st. That the *onus probandi* lies upon the party setting up the subsequent instrument as a revocation of the former will. 2nd. That, to establish the revocation of a former will relating to personalty by a subsequent testamentary paper not forthcoming, by parol evidence of execution only, in the absence of any draft or instructions, such evidence must be strong and conclusive as to its contents. 3rd. That the mere fact of such an instrument commencing with the words "This is my last will and testament," does not make it operate as a revocation, as those words do not necessarily imply that such instrument contained a different disposition of the property; and that, to make it operate as a revocation of a former will, it must be proved that the contents of the latter instrument differed from the former. 4th. That a subsequent will (the contents of which were unknown) having remained in the custody of the deceased, and not forthcoming, the presumption of law was, that it was destroyed by him *animo revocandi*, and did not revoke a prior will uncancelled. (*Cutto* v. *Gilbert*, 9 Moo. P. C. C. 131. See *Plenty* v. *West*, 1 Rob. Eccl. R. 264.)

A testator left four testamentary instruments, duly executed. After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate, the Court of Chancery, on the certificate of the Common Pleas, decided that, as to the real estate, the last instrument alone constituted the last will. (*Plenty* v. *West*, 16 Beav. 173; 17 Jur. 9; 22 Law J., Chan. 185.) A testamentary paper relating to real estate alone, commencing "This is the last will and testament of me relating to my real estate whatsoever," was held totally to revoke a prior will. (*Ib.*)

A devise not to be rendered inoperative by any subsequent conveyance or act.

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal

estate as the testator shall have power to dispose of by will at the time of his death (*q*). 1 *Vict. c.* 26, *s.* 23.

(*q*) This clause of the act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estate in fee and afterwards take a re-conveyance of them to themselves and a trustee to bar dower; but it does not apply to cases where the thing meant to be given is gone. A testatrix having devised a real estate, afterwards sold it. The purchase was not completed until after her death. It was held, that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase-money, and notwithstanding this section of the act. (*Farrar* v. *Earl of Winterton*, 5 Beav. 1.)

A testatrix devised all her freehold messuages, &c., to trustees, in trust to sell, and to stand possessed of the proceeds in trust for A., and gave the residue of her personal estate to the trustees in trust for B. After the date of her will she sold the houses and conveyed them to a purchaser, who deposited the conveyance and title deeds with her to secure part of the purchase-money: it was held, that the security and money did not pass, under this section of the act, to the trustees in trust for A., but to the trustees in trust for B. (*Moor* v. *Raisbeck*, 12 Sim. 123.)

A testator devised an estate N. by his will, the limitations of which he varied by a codicil, both dated prior to this act, and afterwards he entered into a contract by which he agreed to give, after his death, to A. alone the option of purchasing the estate N., and also another estate, W., upon the purchase of which the contract for an option was entered into. By a second codicil, made after this act, reciting the purchase of the estate W., he devised that estate. A. enforced a sale to him by suit against the devisees of the testator: it was held, that the purchase-monies of estates N. and W. devolved according to the limitations of the will which would have been applicable to these estates in case there had been no sale. (*Emuss* v. *Smith*, 2 De G. & S. 722.)

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*r*). A will shall be construed to speak from the death of the testator.

(*r*) The qualification in this section, to the general operation of the act, "unless a contrary intention shall appear by the will," does not render it necessary to find a contrary intention expressed in so many words, it is sufficient, if on a fair construction of the will, adhering to those rules which are usually adopted in construing wills, that the contrary intention does appear. A testator devised the house "wherein I *now* reside," and "all the remainder of my real estates whereof I am *now* seised," and afterwards devised "all such trust estates as are *now* vested in me, or as to the leasehold premises as shall be vested in me at the time of my death:" it was held, that freehold estates, purchased by him between the date of his will and his death, did not pass under the devise, the court being satisfied that the testator, in using the word "now," meant the day on which he made his will. (*Cole* v. *Scott*, 1 Hall & T. 477; 1 Mac. & G. 518.) The word "now" received the same construction in *Hutchinson* v. *Barrow*, 6 H. & N. 533.

A testator devised all his freehold estate at B., which he purchased of C., by a will dated before, and republished by a codicil dated after this act, but a small piece of land, purchased with the estate by the testator of C., and always held and mixed with it, was leasehold. After making the codicil, the testator purchased the fee of that small piece of land, and the leasehold interest was merged: it was held, notwithstanding this section of the act, that the codicil did not pass the after-acquired fee, the gift being one expressly of a freehold estate, not comprising the little leasehold bought with

1 *Vict. c.* 26, *s.* 24.

it, though mixed with the freehold estate. (*Emuss* v. *Smith*, 2 De G. & S. 722.)

Where a testator describes property "of which I am seised," that is nothing more than the expression "all my estates," and unless there is something definite, as in *Cole* v. *Scott*, *supra*, to show that the testator intended to refer to property in his possession at the date of the will, such a gift will pass everything which answers the general description at the death of the testator. A testator by his will, dated in February, 1837, devised "all and every my messuages, lands and hereditaments, which I am seised of or entitled to, in possession, reversion, remainder or expectancy, situate in B., in the county of L.," to two trustees, to the use of Y. for life, with remainders over; he also bequeathed to the same trustees and Y. certain sums of money on certain trusts therein mentioned, and appointed them executors, and he gave to the same persons three legacies of 100*l.* each for their trouble in the execution of his will. By a codicil, dated in February, 1838 (after this statute came into operation), after reciting the devises and bequests contained in his will, and that he had since determined to appoint C. an additional trustee for the purposes in his will mentioned, he gave and devised all his messuages, lands, &c., described in and devised by his will, and also several sums of money therein mentioned, to C., his heirs, executors, &c., upon the trusts in the will mentioned, and nominated him one of the executors of his will, and directed and declared that it should be read and construed in the same manner and have the same operation and effect as if C. had been named a trustee and executor with the other trustees, and bequeathed to him the like legacy of 100*l.*; and in all other respects the testator ratified and confirmed his said will: it was held, that the will was republished by the codicil, and passed real estates purchased by the testator after the date of the will and of the codicil. The court being of opinion that the testator was to be considered as having made a new will, of the date of the codicil, exactly the same as the old will, with the alterations contained in the codicil. Such a will would contain a devise of all the lands of which he was seised or possessed in B. to the three trustees, instead of the two, and then this will, being construed as speaking with respect to the lands in B., as if it were executed immediately before the testator's death, would pass the property purchased after the codicil. (*Doe* d. *York* v. *Walker*, 12 Mee. & W. 591; 13 Law J., N. S., Exch. 153.)

A testator by his will, dated in 1835, devised all freehold lands and hereditaments whatsoever or wheresoever, in these words—"of or to which I, or any person or persons in trust for me, am, is or are seised or entitled in possession, reversion or remainder, or which, by virtue of any special power, I am enabled to appoint or dispose of by this my will." By a codicil, dated in 1845, the testator gave and devised all his lands comprised in and devised by his said will to the uses mentioned in the codicil, and he thereby ratified and confirmed his said will, except so far as it was altered or revoked by his codicil. After the date of the codicil, and before his death in 1848, the testator acquired other freehold lands: it was held, that the lands so acquired passed by the will and codicil. (*Lady Langdale* v. *Briggs*, 25 Law J., Chan. 100.)

The testatrix, at the date of her will, and at her death, had a mansion called Quendon Hall, and land around it, and also other detached farms in Essex. There was no parish of Quendon Hall, nor was the term "Quendon Hall Estates" a recognized appellation of any particular property: it was held, that extrinsic evidence was admissible to show what estates the testatrix understood to be comprised in that description. For this purpose, old account books, in the handwriting of the testatrix,—one containing an account of timber cut down on the Quendon Estate, and a paper headed "1844, Quendon Hall Farms," written by the testatrix at about the date of her will,—were received in evidence. Evidence was also admitted to prove that much of the property had been derived by the executrix under the will of a relative, who had appended to her gift a direction that her devisee should assume the name and arms of Cranmer, particularly as the testatrix in this clause had annexed a like condition to the above-mentioned devise. Estates acquired by the testatrix after the date of her will, although she had

contracted to purchase some of them before that time, and although they were chiefly small additions to what were clearly comprised in the devise, were held not to pass thereby. (*Webb* v. *Byng*, 1 Kay & J. 580.) On the question as to whether the after-acquired property was included in the devise, Vice-Chancellor *Wood* said, "I cannot think that the testatrix intended to include that. A general description of 'all my estates' in such a county would, of course, according to the recent Wills Act and late decisions, pass after-acquired property in that county; but where the whole question in the cause is what is meant by a particular term, and one can only arrive at it by finding that this term is an arbitrary designation, which has acquired a certain meaning in the mind of the testatrix, and I find this property, which is here enumerated, to have been called by her by this arbitrary designation, I cannot possibly extend that to other property to which she has not ascribed the arbitrary designation; although, if I were allowed to consider what she might have done, if she had been informed of what she ought to do for that purpose, I should think it probable that she would have added these small properties which she afterwards acquired, so as to allow them to pass in the same manner as the rest: but I cannot find anything which will pass them by force of the new Wills Act." (*Webb* v. *Byng*, 1 Kay & J. 594.)

1 *Vict. c.* 26, *s.* 24.

Vice-Chancellor *Wood* said, "When I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention,' to which the act in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" A testatrix, in 1850, bequeathed thus, "I give *my* New Three-and-a-quarter per Cent. Annuities." The testatrix, at the date of her will, was possessed of 3,010*l.* £3 : 5*s.* per Cent. Annuities; and, at the time of her death, she was possessed of 17,010*l.* like annuities: it was held, that the bequest comprised all the New 3¼ per Cent. Annuities which she had at her death. (*Goodlad* v. *Burnett*, 1 Kay & J. 341.)

Vice-Chancellor *Wood* observed, in another case, "A gift of 'all my stock' would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of 'all my stock which I have purchased,' that would make a considerable difference, and would, I think, be enough on the face of the will to show that the testator was defining the particular portion of property which he intended to give as being property then in his possession." A will, made since the statute, contained the words "I hereby exonerate my sister from all claims in respect of money laid out by me in improvements of the estates in Scotland, and which money has, according to the laws of Scotland, been charged thereon:" it was held, that this exoneration only applied to money so charged at the date of the will, and not to money afterwards laid out and charged, nor even to money then laid out but afterwards charged. (*Douglas* v. *Douglas*, 1 Kay, 400.)

Under this section the court will consider what would be the proper construction of the will, assuming it to have been executed immediately before the testator's death, and whether, regard being had to the time when it was executed, any thing appears in the will showing that, by this construction, the intention of the testator will be contravened. C., being then possessed of personalty only, by will, executed in 1849, after a bequest of money and chattels, added, "all the rest, residue and remainder of my goods, chattels, stock-in-trade, estate and effects of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto B. and T., executors of the will," to hold to them the said B. and T., their executors, administrators and assigns, upon trust "to sell and dispose thereof," and call in and receive all debts, "and place the monies arising by such sale or disposal" upon government or other security, receive the interest and dividends, and

1 *Vict. c.* 26, *s.* 24.

pay the same to the testator's wife for life during her widowhood, and, if she died or married again, to apply the same or a sufficient part thereof, to the maintenance of his children till they should come of age, and when the youngest should come of age, to divide the said residue and the interest equally among the children. After the execution of the will, O. purchased land: it was held, that, under the 24th section of this statute, such land passed by the residuary clause. (*O'Toole* v. *Browne*, 3 Ell. & Bl. 572.)

This section of the act does not apply to the objects of the testator's bounty who are to take the real and personal estate given by the will, but only to the real and personal estate comprised in the will. A testator bequeathed the income arising from certain funds to A., a widow, for life or until her marriage, and after her death or marriage, which should first happen, he gave the principal amongst her children by two former husbands. A. married again between the date of the will and the death of the testator, and he was aware of her marriage: it was held, overruling the decision of Vice-Chancellor *Wood*, that A. was not entitled to the income of the funds, but that the gift, upon her decease or marriage, came at once into operation. (*Bullock* v. *Bennett*, 24 Law J., Chan. 512, 397; 7 De G., M. & G. 283.) Lord Justice *Turner* expressed his opinion that this section of the act is, with reference to the real and personal estate comprised in it, that the will is to speak as if executed immediately before the death of the testator, and he understands this to mean, that it is to speak as if executed immediately before the testator's death, not with reference to the objects of his bounty, who are to take the real and personal estate, but with reference to the real and personal estate to be taken by those objects. Had it been intended to reach the objects, the words, "with reference to the real and personal estate," would hardly have been required to be inserted. (*Ib.*)

A question has been raised but not decided, whether this section would apply to a case where there was a residuary bequest (except such real and personal estate as might remain subject to the trusts of a marriage settlement, by reason of no specific disposition thereof having been made by the testatrix under the power therein contained). (*Hughes* v. *Jones*, 32 Law J., Ch. 487.)

A residuary devise shall include estates comprised in lapsed and void devises.

25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (*s*).

(*s*) A testator by his will in 1847 devised specific real estate to his daughter M., and after making several specific bequests devised and bequeathed "*all other real and personal estate of which he might die possessed*" to M. and others of his children. M. died in his lifetime: it was held, that the devise expressed by the words "all other, &c." was a residuary devise within this section, and, no contrary intention appearing by the will, included the real estate devised to M. (*Cogswell* v. *Armstrong*, 2 Kay & J. 227.)

It was decided that this statute has not altered or affected the rule that a testator's real estate specifically devised, his real estate devised by way of residue, and his personal estate specifically bequeathed, are to contribute in rateable proportions to make up the deficiency of his residuary personal estate for payment of debts. (*Eddels* v. *Johnson*, 1 Giff. 22; 27 Law J., Ch. 302; 4 Jur., N. S. 255.) This act has not altered the rule of law that every devise of real estate, though in terms residuary, is in fact specific. (*Pearmain* v. *Twiss*, 2 Giff. 130.)

Vice-Chancellor *Kindersley* has since decided that a residuary devise of

real estate is not specific. Therefore, where the personal estate proved deficient for payment of debts, the real estates devised by way of residue were chargeable with the payment of the debts in priority to the real estates specifically devised. (*Dady* v. *Hartridge*, 1 Drew. & S. 236; *Barnwell* v. *Ironmonger*, *Ib.* 242; *Rotheram* v. *Rotheram*, 26 Beav. 465.)

1 *Vict. c.* 26, *s.* 25.

This section is to be construed upon the principle of assimilating a residuary devise of real estate, with a similar bequest of personalty, and therefore a devise which was by construction residuary was held to pass lands in a devise void as being contrary to law. (*Carter* v. *Haswell*, 3 Jur., N. S. 788; 26 Law J., Ch. 576.)

A married woman, having the power of appointment under her marriage settlement over estates A. and B., appointed, by will in September, 1838, estate A. to her husband in fee, and "all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another person. By codicils to her will she revoked the appointment of estate A. to her husband, and gave him the same estate for life, with remainder to trustees to sell and pay certain legacies, and pay the residue to charities: it was held, that the devise of "all other the hereditaments," &c. by the will, was not residuary, but specific, and that the void gifts to the charities did not pass by it, but lapsed as unappointed, and that this section of the act had no reference to this case, and did not come within the rule which was intended to be altered by this section. V. C. *Wood* observed, that rule was that, by the reasoning applied before the new Wills Act, all gifts of real estates were specific, because it was considered that no one could devise an estate which he had not got at the date of the will. Therefore, when a testator gave estate A. to one person, and all the rest of his real estate to another, that devise, though in terms residuary under the old law, as plainly described a specific estate as if it had set it out by metes and bounds. Then the legislature provided that a devise of real estate in general terms should no longer be specific, but should include all estates that the testator might afterwards acquire, and therefore it was reasonable that lapsed and void devises should fall into the residue and pass under such a general gift. But the testatrix in this case had not made such a gift. She has recited that she had a power under a particular deed, which she was desirous of exercising. She expressed no intention of disposing of all the real estate that she might afterwards acquire, but having a power over a particular estate she gave part of it to one person and all the rest to another. (*In re Brown*, 1 Kay & J. 527.)

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*t*).

(*t*) Testator by his will made in 1815, but confirmed by the codicil in 1841, after directing payment of his debts and funeral and testamentary expenses and giving certain annuities, with which he charged his real estate, and certain legacies, bequeathed all the rest, residue and remainder of his personal estate, goods and chattels whatsoever and wheresoever to his brother M. absolutely to and for his own use and benefit. He then devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments, situate, lying, arising or being at or near certain places in the counties of Durham and York, and a parcel of land purchased by me of M. L. at &c. in the county of York, and all other my real estates in the said counties of Durham

1 *Vict. c.* 26, *s.* 26.

and York, and elsewhere in Great Britain, and all my estate and interest therein," to trustees to hold the same (subject to the said annuities) to the use of his said brother M. for life, remainder to the issue of the said M. in tail male, in default of such issue to W. E. and his heirs. At the time of making his will and at his decease the testator was possessed of freehold estates in both the said counties and of lands held under certain church leases in one of them, which had been according to the usual practice of the lessors renewed every seven years. These leaseholds were distinct from, but near, and in some places contiguous, to the freehold; some of them were let and occupied with the freehold at undivided yearly rents. Cottages ornamental and otherwise were built upon part, and on part were buildings occupied by labourers employed upon the freehold estate: it was held, that under this section the leasehold estates in question passed under the general devise of the realty, there being no contrary intention apparent on the will. (*Wilson* v. *Eden*, 18 Q. B. 474.) The same case had been previously sent for the opinion of the Court of Exchequer. (See *Wilson* v. *Eden*, 11 Beav. 237, 253; *S. C.*, 5 Exch. 752.)

A will made after this act, whereby the testator gave, devised and bequeathed all his estate and effects whatsoever and wheresoever, and of what nature or kind soever to A., to be paid, assigned or transferred to him on his attaining twenty-one: it was held, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will that in the meantime the executor should apply the interest, dividends and proceeds of such estate and effects, or so much thereof or so much of the principal thereof as they should think necessary in the maintenance, education and putting forth of A. in the world, and should invest the said estate and effects on real or personal security at their discretion. The directions applicable only to personal estate may in such a case be construed as referring not to the whole subject matter of the gift, but to such portions of the estate as may consist of personalty to which such directions may be fitly applied: it was held, that the testator must be presumed to have had knowledge of this act and that if he used general words of disposition applicable to real estate, and competent to pass such estate, those words would operate upon all the real estate of which he might die seised, although he had not a single acre of land belonging to him at the time of making his will. (*Stokes* v. *Salomons*, 9 Hare, 75.)

A general gift shall include] estates over which the testator has a general power of appointment.

27. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*u*).

(*u*) This section of the statute is confined to general powers, and does not extend to a special or limited power.

A power to appoint by will amongst children in such manner as the appointor shall think proper, is not within this section of the act. (*Clowes* v. *Awdry*, 12 Beav. 604; *Russell* v. *Russell*, 12 Ir. Ch. R., N. S. 377.)

It has been suggested, that the only safe rule for discriminating between

mere conjecture and the contrary intent required by the statute, is to inquire whether there is anything in the will inconsistent with the notion that the residuary bequest is meant to operate as an execution of the power. A testator was under a covenant to pay 2,000*l.* to the trustees of his settlement, upon trust for his wife for her life, with remainder to his *general* appointees, by deed or will. By the will he directed his executors to pay the 2,000*l.* to the trustees, in order that they might invest it, and pay the income to the wife for life; and he then bequeathed his residuary estate, subject to certain legacies, to the wife absolutely: it was held, that the residuary bequest was a good execution of the power. (*Scriven* v. *Sandom*, 2 Johns. & H. 743. See *Hutchins* v. *Osborn*, 4 Kay & J. 252.) 1 *Vict. c.* 26, *s.* 27.

This section of the act, as to personal estate, does not require a general bequest of the personal estate, but, on the contrary, it requires a simple bequest of the personal estate described in a general way, and that language seems to apply to a simple pecuniary legacy given in such a general way as to be paid out of the personal estate generally, and not out of any personal property described in a specific way or otherwise than in a general way. According to this construction, the personal property, applicable to pay general legacies, must include all the personal estate which a testator has power to appoint in any manner which he may think proper, and the bequest operates under the statute as an execution of a general power where no contrary intention appears by the will. It seems that general pecuniary legacies, with no particular fund indicated for the payment, are bequests of personal property described in a general manner, and therefore, where the proper assets of the testator are inadequate, without resort to the property over which the testator has a general power of appointment, general pecuniary legacies are within the operation of this section, and the will must be held to include and extend to the personal estate subject to the power of appointment, so far as is necessary to satisfy general pecuniary legacies described in a general manner. (*Hawthorn* v. *Shedden*, 2 Jur., N. S. 749; 3 Sm. & Giff. 293.)

Under this section a general residuary bequest will operate as an appointment of the personal estate, which the testator has power to appoint in any manner he may think proper. (*Spooner's Trust*, 2 Sim., N. S. 129.)

This section of the act applies to married women having testamentary powers of appointment, exercisable during coverture, equally with persons *sui juris*. *Wood*, V. C., apprehended that this act means simply this, the capacity of a married woman to execute a testamentary instrument shall be regulated by those rules which existed before the passing of the act. Before the passing of the act she was competent to dispose of property over which she had a power of appointment, exercisable during coverture. Her capacity in that respect shall remain unaltered, but the provisions of the act as to the mode in which a power shall be exercised by will, and all the other provisions of the act, will apply to any testamentary instrument which a married woman would have been competent to execute previous to the passing of the act, just as it would apply to any testamentary instrument executed by any person *sui juris*. (*Bernard* v. *Minshull*, Johns. 276, see p. 297; *Thomas* v. *Jones*, 2 Johns. & H. 482. See *ante*, p. 507, n. (*e*).)

A general power given to the survivor of two persons may under this act be exercised by a general devise in a will executed by the ultimate survivor during the joint lives. (*Thomas* v. *Jones*, 2 Johns. & H. 475; 8 Jur., N. S. 1124; 31 Law J., Chanc. 732; 10 W. R. 853; affirmed by L. C., 32 Law J., Chanc. 139; 9 Jur., N. S. 161.) The 7th and 8th sections of this act preserve the previously-existing incapacities arising from infancy and coverture, but section 8 does not preserve in the case of married women any incapacities not specially dependant on coverture, which are removed generally by other sections of the act, as, for example, those relating to after-acquired property or power. (*Ib.*) Therefore, where a general power was vested in the survivor of A., B. and C. (a married woman with testamentary capacity), and C. ultimately became the survivor: it was held, that the power was well exercised by a residuary devise in the will of C., made while under coverture, and during the life of B. (*Ib.*) The circumstance that the devise contained a limitation for the life of B., was held,

1 *Vict. c.* 26, *s.* 27.

not to be a conclusive indication of an intention not to exercise a power, which would only come into existence in the event of B. predeceasing the testatrix. (*Ib.*)

A married woman, in 1846, duly made a will in execution of a general power of appointment, disposing of certain stock, and appointing executors thereof. In 1855, she made another will without the consent of her husband, disposing of certain other property under her marriage settlement, and of other articles; it did not refer to the general power under which the will of 1846 was made, nor to the stock thereby appointed, but it contained a general clause of revocation, and named a different executor. It was held, that this section was intended to enlarge the dispositive powers of testators, and has no bearing on questions of revocation. That the clause of revocation in the will of 1855 being in general terms, and containing no reference to the general power in the execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will. (*In bonis Merritt*, 1 Sw. & Tr. 112.)

By a voluntary settlement in 1848 a settlor transferred a debt to a trustee in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death to distribute the amount amongst specified persons. He afterwards executed an appointment, by deed, of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave all his personal estate not otherwise effectually disposed of to trustees: it was held, first, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848; and secondly, that even if no such intention appeared this act applies only to cases where the testator has power to appoint in any manner he may think proper, and where the power of appointment was equivalent to absolute property. (*Moss* v. *Hasler*, 2 Sm. & G. 458; 18 Jur. 973.)

Estates A. and B. were so settled that the testator had no power to deal with A. but had a power of appointment over B. By his will, made after this act, he referred to the settlement and confirmed it, and then reciting that he had considerable freehold estates and might become possessed of more, he devised all his real estates of which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement. He had not at the date of his will or at his death any other estates besides A. and B.: it was held, that the testator must be taken to have known that he had a power of appointment over estate B., that the confirmation of the settlement operated only upon the estate A., and that the devise was a good execution of the power. (*Lake* v. *Currie*, 2 De G., Mac. & G. 536; 16 Jur. 1027; 15 Beav. 472.)

A., being entitled to a share of a testator's residuary estate, bequeathed all the effects due to him from the estate to his nine children. The estate was then unadministered, but it was afterwards administered, and certain debts due to it were allotted to A. as his share of the residue. After which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters, or any of them or any of their children, as he, from time to time by deed or writing to be by him duly executed and attested or by his will, should appoint: it was held, that under the combined operation of the 24th and 27th sections of this act, the will, though made before the power was created, was a good execution of it. (*Stillman* v. *Weedon*, 16 Sim. 26; 12 Jur. 992; 18 Law J., Ch. 46. See *Thomas* v. *Jones*, 2 Johns. & H. 481.)

A devise without any words of limitation shall be construed to pass the fee.

28. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will (*x*).

(*x*) It has been held that this section of the act can be applicable only to

1 *Vict. c.* 26, *s.* 28.

the case of a devise of real estate which exists and is vested in the testator at the time of his death, of which he has then a disposing power, and that it does not apply to the case of a particular estate, which the testator is about to create for the first time by his will. A testator devised his real estate to a devisee in fee charged with certain annuities or annual rent-charges to two annuitants: it was held, on a special case, that the annuitants took the annuities for life; that this section of the act only applies to estates vested in or in the power of the testator, and not to estates or interests created *de novo* by his will, and that a purchaser could not maintain an objection to the vendor's title or refuse to execute the contract for purchase upon the ground that the annuities were given in fee and not for lives. (*Nicholls* v. *Hawkes*, 22 Law J., Chanc. 255; 10 Hare, 342.)

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

29. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*y*).

(*y*) It is said that the object of this section is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words having acquired a legal meaning different from the popular meaning. (*Greenway* v. *Greenway*, 1 Giff. 138.)

This section of the act has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one;" which additional words, upon the authority of decided cases, modify their meaning. (*Morris* v. *Morris*, 17 Beav. 198; 17 Jur. 966.) A testator devised an estate in fee to his son, but if he should die under twenty-one, over; by a codicil he limited the estate over in the event of the son dying without issue "or" under twenty-one: it was held that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and consequently that A., on attaining twenty-one, had an absolute estate in fee-simple. (*Ib.*)

A testator, by his will executed in 1838, gave the residue of his real and personal estate to trustees upon trust to pay an annuity to his wife, and to invest the sum of 1,000*l.* and pay the interest to his son for life, and after his decease to any widow of his son, and after her decease upon trust as to the principal for his children, and subject to the annuity and to the above and another legacy upon trust expressed thus:—"In trust for all my children, in equal shares, and the heirs of their bodies, (except as to my son J. F. G. and his children and their issue, whose share, in consequence of the 1,000*l.* set apart for him and them as aforesaid, shall be rated at 1,000*l.* less than the share of any other of my children,) and in case there shall be a failure of issue of any of such children, then as to the share or shares of him, her or them whose issue shall so fail, to the use of the others or other of them and the several heirs of their respective bodies." The testator was possessed of freehold and leasehold property, and left J. F. G. and one other

1 *Vict. c.* 26, *s.* 29.

child: it was held, that J. F. G. was entitled in fee to half of the testator's freeholds and absolutely to his leaseholds; that the parenthetical expression was merely explanatory, and that this section of the act did not affect the devise and gift. (*Green* v. *Green*, 3 De G. & S. 480; 14 Jur. 74; 18 Law J., Chanc. 465.)

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

30. Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estates tail shall not lapse.

32. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*z*).

(*z*) It has been held that the words "shall die" mean after the act came into operation. A testator by a will, made before this act came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of his estate. The son died after this act came into operation leaving issue, and after his death made a codicil to his will, altering a bequest to another child, but in other respects confirming his will: it was held, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir at law of the son; and so far as it was personal, to his executrix under a will made before this act came into operation. (*Winter* v. *Winter*, 5 Hare, 306.) So where a testator by a will made subsequent to this act gave to his son a residuary share of his estate, and the son died after the act came into operation and before the date of the will, leaving children: it was held, that the gift took effect, although, according to the law prior to this statute, there

1 *Vict. c.* 26, *s.* 33.

would have been no effectual devise or bequest. (*Mower* v. *Orr*, 7 Hare, 473.)

A testator devised houses to his eldest son Joseph, who had died previously to the date of the will, leaving a son his heir: it was held, on the construction of this section, that the heir of the devisee was entitled. (*Wisden* v. *Wisden*, 2 Sm. & G. 396; 18 Jur. 1090.) V. C. *Stuart* expressed his opinion "that the words of the 33rd section point at no particular period of death within the testator's lifetime. The words 'shall die' speak from the death of the testator, and I can see no words to refer the futurity of the word 'shall' to the date of the will. I consider the words of the clause as meaning that any gift to any child, though not living at the testator's death, is within its operation, and therefore I must construe the will as if the deceased child was alive when the will was written, and I shall hold that the son of Joseph takes the devised estate by descent from his father the devisee under the will." (*Wisden* v. *Wisden*, 2 Sm. & G. 405.)

This section does not prevent the lapse of property appointed by will under a power to appoint in favour of particular objects, where, by the instrument creating the power, the property is disposed of in default of any appointment being made. (*Griffiths* v. *Gale*, 12 Sim. 327, 354.)

A devise and bequest was made to all the testator's children (without naming them). A subsequent codicil confirmed the gift, as mentioned in the will, "to his surviving children," naming all of them. One died in the testator's lifetime, leaving children who survived the testator: it was held, that the survivorship had relation to the testator's death and not to the date of the will, and that the representatives of the deceased child took nothing under this section. (*Fullford* v. *Fullford*, 16 Beav. 563.)

The provisions in this act against the lapse of legacies given to children render it necessary for a testator intending that a legacy given to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. (*Re More's Trust*, 10 Hare, 178.)

Upon the construction of this section taken alone, a legatee within it will take the same provision under his father's will, and with the same powers and incidents of property, as if he had actually survived the testator, and the issue of such legatee will not take the bequest independently of the legatee. This clause does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, notwithstanding his death in the lifetime of the testator. (*Johnson* v. *Johnson*, 3 Hare, 157.)

The intention of the legislature was to provide against lapse merely, and not to alter the construction to be put on any will. On arriving at the conclusion that there would have been a lapse, then the statute applies, not otherwise. This section does not apply to the case of a gift to a class. According to the rule before the act, under a gift to children as a class, the share to which a surviving child would have been entitled did not lapse in consequence of his death in the testator's lifetime. (*Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, 1 Johns. 210.)

This section applies to a testamentary appointment made in exercise of a general power. A testatrix, by her will in 1840, in exercise of a general power, appointed the proceeds of real estate to her daughter, who died in her lifetime, leaving issue living at the death of the testatrix: it was held, that the personal representative of the daughter was entitled. (*Eccles* v. *Cheyne*, 2 Kay & J. 676.)

This section was held to extend to a case where the issue of the legatee, who was alive at the date of the will, was not the same issue as was in existence when the legatee died. (*In bonis Parker*, 1 Sw. & Tr. 523.)

A testator gave a legacy to his daughter, a married woman, who predeceased him, leaving issue, and also her husband her surviving. The settlement made on her marriage contained a covenant that all property coming to her, or to her husband in her right, during the coverture, should be settled: it was held, that, notwithstanding the fictitious survivorship created by this section for the purpose of preventing a lapse, the legacy was not acquired during the coverture within the meaning of the covenant, and

1 *Vict. c.* 26, *s.* 33.

was therefore not bound by the settlement. (*Pearce* v. *Graham*, 32 Law J., Chan. 359.)

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

34. This act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished or revived; and this act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight (*a*).

(*a*) Under this section of the act the effect of the republication of the will by the codicil is the same as if the testator had at the date of the codicil made a will in the words of the will so republished. (*Winter* v. *Winter*, 5 Hare, 306; 11 Jur. 10; 16 Law J., Chan. 111.) A codicil, executed in 1839, to a will of 1818, was held to be a republication of that will, and to have the effect of bringing a bequest in the will to a deceased daughter under the operation of the 33rd section of this act, as no intention to the contrary appeared on the face of either instrument. (*Skinner* v. *Ogle*, 1 Rob. Eccl. Rep. 363.)

Act not to extend to Scotland.

35. This act shall not extend to Scotland.

THE WILLS ACT AMENDMENT ACT, 1852.

15 & 16 VICTORIA, c. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills." [17th June, 1852.]

15 & 16 *Vict.* c. 24, *s.* 1.

WHEREAS the laws with respect to the execution of wills require further amendment: be it therefore enacted as follows:

1 Vict. c. 26.

1. Where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction (*a*): every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is

When signature to a will shall be deemed valid.

15 & 16 *Vict.* c. 24, *s.* 1.

underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

(*a*) 1 Vict. c. 26, s. 9, *ante*, p. 508.

Signature of testator.

A. wrote out his own will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation, and requested that they would sign their names, which they did. His name was not written at the foot or end otherwise than in the attestation clause: it was held, that, under this act, the execution was valid. (*In bonis Walker*, 2 Sw. & Tr. 354; 8 Jur., N. S. 314; 31 Law J., Prob. 62.)

A will of an English lady, drawn up by a notary in France, was signed by her, not at the end of the will itself, but at the end of a notarial minute, which immediately followed the will, detailing the circumstances and facts under which the will was made: it was held, that such a signature was a compliance with this statute. (*Page* v. *Donavan*, 3 Jur., N. S. 220.—Prec. C.)

The words "John Greata, executor," were written before a will was signed, but not above the signature: it was held, that since this act they did not form part of the will. (*In bonis Greata*, 2 Jur., N. S. 1172.—Prec. C.)

Act to extend to certain wills already made.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

Interpretation of "will."

3. The word "will" shall in the construction of this act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her Majesty Queen Victoria (*b*).

(*b*) 1 Vict. c. 26, s. 1, *ante*, p. 503.

Short title of act.

4. This act may be cited as "The Wills Act Amendment Act, 1852."

WILLS OF PERSONALTY BY BRITISH SUBJECTS.

24 & 25 Victoria, c. 114.

An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.

[6th August, 1861.]

Be it enacted by, &c., as follows:

24 & 25 Vict. c. 114, s. 1.

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Nothing in this act to invalidate wills otherwise made.

4. Nothing in this act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act.

Extent of act.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act.

WILLS AND DOMICILE OF BRITISH SUBJECTS ABROAD, &c.

24 & 25 Victoria, c. 121.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within Her Majesty's Dominions. [6th August, 1861.]

24 & 25 *Vict.* c. 121, *s.* 1.

Whereas by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by, &c., as follows:

No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile unless resi-

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that no subject of any such

24 & 25 *Vict.* c. 121, s. 2.

foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

dent therein for one year immediately preceding his or her death, &c.

3. This act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

Who this act shall not apply to.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul or consular agent, shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

APPORTIONMENT OF RENTS AND PERIODICAL PAYMENTS.

4 & 5 WILL. IV. c. 22.

An Act to amend an Act of the Eleventh Year of King George the Second, respecting the Apportionment of Rents, Annuities and other Periodical Payments.

THE STATUTE 11 GEO. 2, c. 19, s. 15, RECITED AND EXTENDED.

4 & 5 Will. 4, c. 22, s. 1.

Recital of statute 11 Geo. 2, c. 19, s. 15, by which rents were recoverable from undertenants, where tenants for life died before the rent was payable.

WHEREAS by an act passed in the eleventh year of the reign of his Majesty King George the Second, intituled "An Act for the more effectual securing the Payment of Rents, and preventing Frauds by Tenants," it was enacted, that where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life should and might, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day then a proportion of such rent according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively: and whereas doubts have been entertained whether the provisions of the said act apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said act; and it is therefore desirable that such doubts should be removed by a declaratory law; and whereas by law, rents, annuities and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose) (*a*), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands; and other evils arise from such

rents, annuities and other payments not being apportionable, which evils require remedy; be it therefore enacted and declared, that rents reserved and made payable on any demise or lease of lands, tenements or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act (*b*).

4 & 5 Will. 4, c. 22, s. 1.

Rents reserved on leases determining on the death of the person making them (though not strictly tenant for life), or on the death of tenant pur autre vie, to be considered as within the provisions of recited act.

(*a*) Lord *Campbell*, C. J., said this recital is strong evidence of what the law is, and the burden of proving that the legislature has fallen into a mistake is cast upon those who say so; but the rule thus laid down, instead of being liable to the imputation of error, is fortified by a long series of decisions. (*Reg.* v. *Lords of the Treasury*, 16 Q. B. 362.)

(*b*) This section does not appear to provide for the case of a lease made by a tenant in fee to a tenant for life reserving rent; and therefore, where such a lease, having been granted before the passing of the act, determines by the death of the lessee for life between two rent days, the rent is lost and cannot be apportioned. The act in this section appears to contemplate two cases only; viz. the case of a lease determining on the death of the lessor, and the case of a lease determining on the death of the life for which the lessor was entitled. And even if the lease were granted after the passing of the act, it may be doubted whether such a case falls within the 2nd section. (1 Wms. Executors, 661, n., 3rd ed.)

Prior state of law.

Before the statute 11 Geo. 2, c. 19, if the lessor tenant for life died within the half year, at the end of which rent was due, the rent reserved upon a lease not made in execution of a power was lost, because the representatives could not recover a part. The principle was, that a contract cannot be apportioned, and that under a lease, with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire. (1 Swanst. 338, n.) In some cases the law qualified this principle; but in no case with respect to time (Co. Litt. 292 b; 10 Rep. 128); and courts of equity did not admit an apportionment of rent in respect of time. (*Jenner* v. *Morgan*, 1 P. Wms. 392; *Hay* v. *Palmer*, 2 P. Wms. 502; *Bentham* v. *Alston*, 2 Vern. 204.) In covenant, as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory, as any other personal contract is, the rent is not apportionable; but it is in an action of covenant by the lessor against the assignee of the lessee, for the condition of such assignee is in point of law different from that of a lessee chargeable on the privity of contract. (*Stevenson* v. *Lambird*, 2 East, 575.) The statute 11 Geo. 2, c. 19, s. 15, provided, that where a lessor tenant for life should die before the rent day, his executors might recover from the tenant a proportionate part of rent so growing due, making all just allowances. The Irish statute 23 & 24 Geo. 3, c. 46, provides for a similar apportionment where the *cestui que vie* of an estate *pur autre vie* dies before the rent day, a case not provided for by the last quoted English statute, although it was admitted to be a case within its mischief. (3 Taunt. 331; see Wms. Executors, 542, 660, 3rd ed.) The statute 11 Geo. 2, c. 19, was held to apply where leases had been made by a tenant in tail, which determined on his death, because not conformable to the statute 32 Hen. 8, c. 28, or on account of there being no issue inheritable under the entail; (*Whitfield* v. *Pindar*, cited 2 Br. C. C. 662; 8 Ves. 311; *Paget* v. *Gee*, Ambl. 198; 1 Swanst. 356;) and rent was apportioned between the representative of a tenant in tail, who died without issue, and the remainderman in tail. (*Vernon* v. *Vernon*, 2 Br. C. C. 659.) The same statute applied to those cases only where the lease was not binding on the remainderman or rever-

4 & 5 Will. 4, *c.* 22, *s.* 1.

sioner, and the rent would consequently have been lost both to him and the executor at common law. Therefore, before this act, if a tenant in fee made a lease, or tenant for life with a leasing power made a lease in conformity to it, and the lessor died in the interval between two periods of the rent being due, *i. e.* at any time before midnight of the rent day, the whole rent went to the heir or remainderman, and there could be no apportionment in favour of the executor. (Wms. Law of Executors, 540; *Norris* v. *Harrison*, 2 Madd. 268; 10 Rep. 127 b; *Duppa* v. *Mayo*, 1 Saund. 287; 1 P. Wms. 177; 2 Bl. R. 1075; 4 T. R. 173.)

When there was an apportionment and when not.

Rent was apportioned where a man seised of two acres, one in fee and another in tail, made a lease for life or years, and died, and the issue in tail avoided the lease. (Co. Litt. 148 b.) So where a lease of lands of which the lessor was seised in fee, and of other lands of which he was tenant for life, with a power of leasing, was granted at a certain rent, but the lease was not well executed according to the power: it was held, that the lease as to the lands held in fee was good, because the rent might be apportioned. (*Doe* v. *Meyler*, 2 Maule & S. 275.) Where a tenant for life with a leasing power granted leases from year to year, some by parol, some in writing, but not conformable to the power, on his death before the expiration of the lease, the rents were apportioned. (*Clarkson* v. *Scarborough*, 1 Swanst. 354; *Symons* v. *Symons*, 6 Madd. 207; *Ex parte Smyth*, 1 Swanst. 337.) It has not been expressly settled whether any apportionment will take place in the case of a prior-existing tenancy from year to year, which the tenant for life claiming under the original lessor permitted to continue until the death of the former. (4 Byth. & Jarm. Prec. 357; Woodfall's L. & T. by Harrison, 305, 5th ed.) A tenant in fee demised lands from year to year. He died, having devised the lands for life. The devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy. It was held, that the administrator of the tenant for life was not entitled to an apportionment of the rent under the stat. 11 Geo. 2, c. 19, s. 15. (*Betheroyd* v. *Woolley*, 5 Tyrw. 522; 1 Gale, 66.) Where a lessee under a lease which determined at the death of the lessor, but was not within the stat. 11 Geo. 2, c. 19, paid over the whole rent for the current quarter, or other integral period, to the person entitled in remainder, such person would have been compelled to account for a proportion of it to the lessor's representatives, though the latter had no remedy against the tenant for its recovery, on the principle that where a man pays money from equity and conscience, though not bound at law, such money shall be divided according to equity. (*Paget* v. *Gee*, Ambl. 198; *Hawkins* v. *Kelly*, 8 Ves. 308.)

Composition for tithes.

And on the same principle, a composition for tithes, received after the death of the incumbent by his successor, was apportioned with reference to the respective periods of enjoyment. (*Aynsley* v. *Wordsworth*, 2 Ves. & B. 331.) Although it had been held that if the successor continued to receive the next payment after the death of his predecessor, the former would only be accountable to the executors of the latter for such a portion as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death would have amounted to. (*Williams* v. *Powell*, 10 East, 269.) Where a rector agreed with an occupier of land for a certain sum of money in lieu of tithes, payable yearly at Michaelmas, and the rector died about a month before Michaelmas, it was decreed, that the agreement having been determined by the death of the rector, the successor should be entitled to tithes in kind from such death, and the executor of the last incumbent to a proportion, according to the agreement, until the death of the testator. (Bunb. 294.) A rector, who took a composition for his tithes every Michaelmas, died in January, 1841. The new rector was collated in the following April, and, before harvest time, he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers, as a composition in lieu of tithes. In August, the new rector required the respective occupiers to pay him, as a compensation for their tithes, the amount mentioned by the surveyor. The occupiers accordingly, in November, 1841, made their payments according to the surveyor's report, for the whole year, from Michaelmas, 1840, to Michaelmas, 1841.

It was held, that the representative of the late rector was entitled to be paid by the new rector a proportion, according to the time which elapsed from Michaelmas, 1840, to the late rector's death, of the composition which existed in the late rector's lifetime. It seems that a composition for tithes is within the statutes 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22. (*Oldham* v. *Hubbard*, 2 Y. & Coll. N. C. 209.) *4 & 5 Will. 4, c. 22, s. 1.*

Though rents and common annuities were not apportionable, yet in equity the maintenance of infants was always apportioned up to the day of their deaths, because it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of the quarter. (*Hay* v. *Palmer*, 2 P. Wms. 501; *Reynish* v. *Martin*, 3 Atk. 330.) An annuity was given for maintenance, and charged upon land for a certain time, which ceased before the time of the year at which the annuity was payable: the annuitant was held entitled to an apportioned part of such annuity for the time between the last payment and the cessation of the charge. (*Sheppard* v. *Wilson*, 4 Hare, 395. See *Longmore* v. *Elcum*, 2 Y. & Coll. C. C. 363.) And upon the same principle, an annuity secured by bond for the separate maintenance of a feme covert, where the quarterly payments were not made in advance by way of maintenance for the ensuing quarter, but payable at the end of each quarter, was apportioned at the death of the wife. (*Howell* v. *Hanforth*, Bl. R. 1016. See 16 Q. B. 362, 363.) Annuities.

An annuity given by will to a married lady, living with and maintained by her husband, for her separate use, payable half-yearly, was not apportioned. (*Anderson* v. *Dwyer*, 1 Sch. & Lef. 301.) The interest of money secured on mortgage, although reserved half-yearly, is considered as accruing from day to day, and not in the nature of rent; and on the death of a person entitled to the interest for life, what is due from the last day of payment will be apportioned between his executors and the remainderman. (*Edwards* v. *Countess of Warwick*, 2 P. Wms. 151.) But interest given by a will, in the nature of an annuity, was not apportioned in favour of the executor of the tenant for life. (*Franks* v. *Noble*, 12 Ves. 484.) Before the passing of this act, if a testator was entitled to the dividends of stock in the public funds for his life, and he died between the two days when they were due, his executors could not claim any apportionment, but the whole half-year's dividend went to the remainderman. (*Rashleigh* v. *Master*, 3 Br. C. C. 99; *Pearly* v. *Smith*, 3 Atk. 260; *Sherrard* v. *Sherrard*, 3 Atk. 502; *Wilson* v. *Harman*, 2 Ves. 672; Amb. 279.) In the case of money directed to be laid out in the purchase of land to be settled on a person for life, with remainder over, and in the meantime to be invested in government securities, the personal representatives of the tenant for life, who died before the half-yearly day on which the dividends became due, were not entitled to any apportionment, but the whole went to the person in remainder. (*Sherrard* v. *Sherrard*, 3 Atk. 502; *Pearly* v. *Smith*, *Id.* 280; *S. C.*, Ambl. 279.) Thus, where by articles money was to be laid out in the purchase of lands, and in the meantime to be invested in South Sea Annuities, and the profits to go in the same way as the rent of the land would, and the person who would have been tenant for life of the land died in the middle of the quarter: it was held, that the dividends on those annuities being made payable by act of parliament on certain days, like rent, were not to be apportioned, being distinguishable from the case of money secured by mortgage, which may be called in at any time. (*Wilson* v. *Harman*, 2 Ves. sen. 672; Amb. 279. See *Warden* v. *Ashburner*, 12 Jur. 784; 17 Law J., Ch. 440.) Where an annuity secured upon bond payable quarterly, and by will charged on real estate in aid of the personal estate, had been ordered to be paid out of a fund in court half-yearly, at Midsummer and Christmas; the annuitant having died between Lady-day and Midsummer, her representative obtained an order for payment of the quarter to Lady-day. (*Webb* v. *Shaftesbury*, 11 Ves. 361.) Upon the accounts of the receiver a point was made, whether a tenant for life, having died in the middle of the year, the land tax, quit-rents, and other charges, should be borne entirely by the estate of the son, the infant remainderman in tail, having actually become due after the death of the tenant for life, or whether there should be an apportionment: it was held,

4 & 5 Will. 4, c. 22, s. 1.

that however reasonable it might be to make a statute as to the apportionment of taxes between the tenant for life and the remainderman, the stat. 11 Geo. 2, c. 19, s. 15, had no reference to the case giving the tenant for life the benefit only as against the tenant, the under lessee. (*Sutton* v. *Chaplin*, 10 Ves. 66.)

Apportionment of rent, &c., amongst owners of the reversion.

There are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent issues; the other by granting part of the rent to one person and part to another. (*Bliss* v. *Collins*, 1 D. & R. 291; 5 B. & Ald. 882.) If the lessor dispose of part of the lands in reversion, either by will or deed, and the lessee attorn to such grantee, the rent is apportionable, but the lessee's concurrence to the apportionment is necessary. (*West* v. *Lascelles*, Cro. Eliz. 851; 13 Rep. 57 a.) A rent-charge may be divided by will, or by deed operating under the statute of uses, so as to render the tenant liable without an attornment to several distresses by the devisees or *cestuis que use*. And it seems that since the statute 4 Ann. c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind. (*Rivis* v. *Watson*, 5 Mees. & W. 225. See *Colborne* v. *Wright*, 2 Lev. 289.) Rent-service may be devised by will, and divided from the reversion so as to enable a devisee of part of the rent to maintain an action of debt. (*Ards* v. *Watkin*, Cro. Eliz. 637, 651.) As to the apportionment of conditions of entry in certain cases, see 22 & 23 Vict. c. 35, s. 3, *post*.

In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 Geo. 2, c. 19, s. 22, as upon a holding at a certain rent; and if he avow under the statute for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at Nisi Prius may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute by describing the rent in conformity with the proportionate value of the respective particles or parts into which the reversion has been divided. It seems that the judge or the court, substituted by consent of parties for the judge at Nisi Prius, may make such amendment, although first prayed for after the verdict is delivered, and before it is recorded; (*Roberts* v. *Snell*, 1 Mann. & G. 577;) that assignee of part of the reversion may distrain as well as an assignee of the reversion in part of the premises. (*Neale* v. *Mackenzie*, 1 M. & W. 747, 757; *Stevenson* v. *Lambord*, 2 East, 575; 2 Inst. 503; *Jacob* v. *Kirk*, 2 M. & Rob. 221.)

If part of the land out of which the rent-charge issues is evicted by a title paramount, the rent will be apportioned; and if a rent-service is chargeable on land which descends to parceners, and they make partition, and one is distrained for the whole, she may compel the others to contribution. The same doctrine will apply to co-feoffees of the land, or of different parts of the land. (Co. Litt. 146, 148, 149; Com. Dig. Suspension, E. G.; 2 Inst. 119; Bac. Abr. Rent, M. 1, 2; *Averall* v. *Wade*, Lloyd & G. temp. Sugd. 252.)

If the lessee be evicted from part of the land by title paramount to the landlord, the rent may be apportionably diminished according to the proportion of the land evicted. But if the lease be bad as to part of the land by the *act of the lessor*, he will not be entitled to an apportioned rent in respect of so much of the land as is well demised.

A lessee of one hundred acres of land accepted the lease and entered upon the land: upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease. It was held, on error (reversing the judgment of the Court of Exchequer), that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable; and that the lessor was not entitled to distrain for the whole rent or any part of it. (*Neale* v.

Mackenzie, 1 Mees. & W. 747; 2 Cr. M. & R. 84. See *Tomlinson* v. *Day*, 5 Moore, 558; 2 Brod. & B. 681.)

4 & 5 *Will.* 4, *c.* 22, *s.* 1.

PERIODICAL PAYMENTS WHICH ARE TO BE APPORTIONED, AND THE RECOVERY OF APPORTIONED PARTS.

All rents, annuities and other payments coming due at fixed periods to be apportioned;

2. From and after the passing of this act, all rents service reserved on any lease by a tenant in fee or for any life* interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act (*c*) (or being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made; and that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before (*d*), as he, she or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties

subject to all just deductions.

Remedies for obtaining the apportioned parts.

* Sic, sed quære *less*.

4 & 5 Will. 4, c. 22, s. 2.

entitled to the same under this act in any action or suit at law or in equity.

Act does not apply to rents not reserved by writing.

(*c*) A lunatic's estates, of which he was seised in fee, were let by parol agreement from year to year, the rents payable half-yearly at Lady-day and Michaelmas. The lunatic died in June: it was held, that the proportion of the half-year's rents from the last Lady-day before the lunatic's death up to the day of his death, was not apportionable under this statute. Lord *Cottenham*, C., was of opinion that the statute does not apply to this case. First, it enumerates the most worthy subject, namely, rents service, that is, rents reserved under leases; then it proceeds to give an enumeration of various other subjects, concluding with a general clause, large enough to embrace every kind of payment coming due at fixed periods; and it requires that they should be under an instrument executed after the passing of the act. But there was no intention on the part of the legislature to make any distinction between the several matters which are the subject of the enactment, as to whether the payments should or should not be under an instrument in writing. Even in the case of the least worthy of the subject-matters which the section enumerates, it was intended that the instrument creating or evidencing the payment should be in writing; and *à fortiori*, that was so as to the most worthy, the only question being as to the time at which the instrument was to be executed. (*Re Markby*, 4 M. & Cr. 484; 3 Jur. 767.)

The estate of a devisee for life is not entitled as against him in remainder to an apportionment of rents upon parol leases from year to year created by his testator, and not since determined by himself by any act *inter vivos*. (*Cattley* v. *Arnold* and *Banks* v. *Arnold*, 1 Johns. & H. 651; 5 Jur., N. S. 361.) A tenant from year to year has a lease for a year certain, with a growing interest, during every year thereafter, springing out of the original contract and parcel of it, and therefore where such a tenancy has been created by an owner in fee of lands who devises them to one for life with remainders over, the interest of the tenant from year to year, unless terminated by the devisee for life by some act *inter vivos*, does not determine upon the decease of the tenant for life; and consequently the rent then accruing due is *not* apportionable under sect. 15 of the 11 Geo. 2, c. 19. Nor unless reserved by an instrument in writing is such rent apportionable under this act. (*Ib.*)

Devise in trust for one for life, remainder for his first and other sons in tail, remainder for testator's own right heirs. The devisee for life proved to be heir at law of the testator, and died intestate and without leaving issue: it was held, that notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a determination of his interest within the meaning of this act, and therefore the rents were not apportionable between his heir and his personal representative. (*Re Clulow*, 3 Kay & J. 689; 26 Law J., Chan. 513.) Where it can be predicated that the interest mentioned in the 2nd section has been determined, the rents and other payments there mentioned shall be apportioned; but where this cannot be predicated, the contest being between the heir and the executor, the heir shall take the whole and there shall be no apportionment. (*Ib.*)

A. by will directed that, for twenty-one years next after his death, his trustees should receive and accumulate the rents and profits of his real estate, and apply them towards payment of his debts and legacies, and, subject to that term he gave the beneficial interest in the income of his estate to B. for life: it was held, under this act, that the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested in the accumulations and the tenant for life, who was entitled on the expiration of the term. (*St. Aubyn* v. *St. Aubyn*, 30 Law J., Chan. 917; 9 W. R. 922.) A portion of the income was derived from royalties, payable under mining sets or leases, when the ore should be obtained: it was held, that the rent not becoming due at fixed periods, it did not come within this act. (*Ib.*)

(*d*) This statute only applies where the rent still remains, but is to be apportioned between two parties; for it says, that the person who has the portion of the rent is to recover the same "when the entire portion, of which such apportioned parts shall form part, shall become due, and not before;" and from whom is he to recover it? from the person who has received the entire rents, so that "the person liable to pay the rents shall be resorted to for such apportioned parts." The act cannot apply to a person who has chosen to come in and determine his right to receive rents. (*Oldershaw* v. *Holt*, 4 P. & Dav. 313, *per Coleridge*, 12 Ad. & Ell, 590. See *post*, p. 547.)

4 & 5 Will. 4, c. 22, s. 2.

To what cases the act applies.

A., on his father's death, became tenant in tail in possession of estates, with remainder to his younger brother in tail. After the father's death a suit was instituted on behalf of A. and his younger brother (both of whom were infants), and a receiver of the rents of the estates was appointed. The younger brother was made a party to that suit, as being entitled to a portion out of the estates. A. died under twenty-one, and without issue. At his death the estates were held, as they had been ever since his father's death, by yearly tenants under parol demises. It was held, that A.'s administratrix was entitled to a proportionate part of the rents which were accruing due at his death. (*Kevill* v. *Davies*, 15 Sim. 466.)

A testator, by will made in 1836, gave freehold, copyhold and leasehold estates to a trustee upon trust to maintain his mansion-house, and pay various expenses, and for that purpose to expend annually not exceeding 600*l.*, and permit his wife to reside therein, &c.; and after some other deductions to pay five-eighth parts of the net rents of his estates unto his wife *for her own use during her life*, and the other three-eighths to his daughters. The wife received her portion of the net rents up to Lady-day, 1847, and died on 24th July, 1847. The personal representatives under her will, by a petition in the cause, claimed a proportionate part of the rents from the last payment up to and including the day of her decease. It was held, that the tenant for life was not affected by the payments of the rents, as they were payable to a trustee; that a right of the trustee to pay arose with his receipt; that the right of the wife to receive accrued under the will; that there was nothing to prevent the payments being made at fixed periods, and that the personal representatives were entitled to a proportionate part of the rents up to and including the day of the wife's death. (*Knight* v. *Boughton*, 19 Law J., Ch. 66; 12 Beav. 312. See observations on this case in *Swan* v. *Bookey*, 4 Ir. Law R., N. S. 582.)

Certain real estates were settled by deeds, dated in 1828, upon A. B. for life, with remainder over, and a power of leasing for twenty-one years was given to the tenant for life. After the passing of this act A. B. exercised as to some of the estates his power of leasing, and died in 1849, between two quarterly days of payment of rent: it was held, that the case was within the act, and that his personal representative was entitled to a portion of the rent which accrued between the last day of payment and his death. (*Lock* v. *De Burgh*, 15 Jur. 961; 20 Law J., Ch. 2, 384; 4 De G. & Sm. 470.) See *Fletcher* v. *Moore*, 3 Jur., N. S. 458, where *Kindersley*, V. C., came to a decision opposed to that case.

Tenant in fee, having demised by parol to tenants from year to year, devised the estate to one for life, with remainders over, and died. The devisee for life did not determine the tenancies from year to year, and died: it was held, that there was no apportionment of the rents between the devisee for life and the first remainderman. A tenancy from year to year, created by a tenant in fee, is not determined by the death of a tenant for life claiming under a tenant in fee the original lessor. (*Cattley* v. *Arnold*, 5 Jur., N. S. 361.)

This act applies to all cases where either the lease reserving the rent, or the instrument creating the life interest in it, has been executed since the passing of the statute. Rent reserved by a lease granted after the act, under a power in a settlement executed before the act, was held to be apportionable between the executors of the tenant for life under the settlement and the remainderman. (*Plummer* v. *Whiteley*, 1 Johns. 585; 5 Jur., N. S. 1416; 29 Law J., Chan. 247.) *Wood*, V. C., said he considered that the first branch of the commencement of the 2nd section of this act refers to two

4 & 5 Will. 4, c. 22, s. 2.

classes of subjects, to each of which the enacting words are applicable; that in fact the section must be read thus: in the first place, that after the passing of the act all rents reserved by tenants in fee or for life, or by donees of powers of leasing, such leases being granted after the passing of the act, shall be apportioned; and in the next place, that all other rent-charges and other rents, &c., made payable or coming due at fixed periods under an instrument executed after the passing of the act, shall also be apportioned. According to this construction, the former portion of the section provides for interests existing at the passing of the act, whilst the latter looks to and provides for the future. *Wood*, V. C., thought that this is a rational interpretation of the statute, and although open to the objection that to a certain extent it renders the statute *ex post facto* legislation, he thought it must have been the ground upon which *Lock* v. *De Burgh* (*ante*, p. 545) was decided; he therefore followed that decision in deciding the present case, and declared, that the rents in question ought to be apportioned. (*Plummer* v. *Whiteley*, 1 Johns. 585; 5 Jur., N. S. 1416.)

This statute requires, in order to exclude apportionment, either an express direction that there shall be none, or language so express in the terms of the gift that apportionment is clearly impossible consistently with it. Inference from the whole tenor and context of the will is not sufficient to exclude the operation of the statute. (*Tyrrell* v. *Clark*, 2 Drew. 86. See sect. 3, *post*, p. 548.)

A testator gave an annuity to A. B. for life, no period of payment being mentioned. Under the decree of the Court of Chancery the first payment was directed to be made at the expiration of one year after the testator's death. The annuitant died eight days before the end of the year. It was held, that the annuity must be apportioned, although it was not continued to any other person after the death of the annuitant. (*Trimmer* v. *Danby*, 23 Law J., Ch. 979.)

This statute applies to cases in which the interest of the person interested in such rents and payments is terminated by his death, or by the death of another person; but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representative of such person, whose interest is not terminated at his death. (*Browne* v. *Amyott*, 3 Hare, 173; 13 Law J. (N. S.) Ch. 232.) It was urged against this construction of the act, that one consequence would be, that where tenant in fee simple devised to one as tenant for life, the devisee for life would take the entire periodical rent due at the first day of payment after the commencement of his estate, and his proportionable share up to the day of the determination of his life interest. The law would operate in his favour both at the beginning and the end of his life estate. *Wigram*, V. C., however, thought it was not an argument of any great force, upon the construction of the act, which did not affect to control the power of the tenant in fee to dispose of his estate, as between his devisees or real and personal representatives, as he may think proper. (*Browne* v. *Amyott*, 3 Hare, 173, see p. 183. See *Beer* v. *Beer*, 21 Law J., C. P. 124; 16 Jur. 223.)

A life estate in realty was created by a deed in 1787. The estate was sold and invested in 1821 in consols. The tenant for life died on the 9th December, 1841. It was held, that her executors were *not* entitled to an apportionment of the dividends under this statute, the settlement having been made before this act. (*Michell* v. *Michell*, 4 Beav. 549.) By a will dated in 1795, an estate was devised to A. for life, with remainder to B. The estate was purchased by a railway company, and the purchase-money was paid into court and invested. Upon the death of A. it was held, that his representatives were not entitled to have an apportionment of the dividends becoming payable after his decease. (*Re Longworth's estate*, 23 Law J., Ch. 104.)

The salary of an auditor and superintending manager of an estate, holding office during the joint lives of the employer and himself, is not apportionable under this section. (*Lowndes* v. *Earl of Stamford and Warrington*, 18 Q. B. 425.)

A testator, who died in May, 1835, directed his executors to apply a competent part of the interest of a fund towards the maintenance and edu-

cation of the testator's son during his minority, and to accumulate the rest; and, after attaining twenty-one, to apply a moiety of the dividends for his support till he attained twenty-five, and to transfer the fund at twenty-five, with a gift over if he died between twenty-one and twenty-five. The son attained twenty-one between the periods of payment of the half-yearly dividends. It was held, that there should be no apportionment, and that he was entitled to the whole half-yearly dividends received after he came of age. (*Campbell* v. *Campbell*, 7 Beav. 482.)

4 & 5 Will. 4, c. 22, s. 2.

A., in 1836, let certain land to B. under a building agreement; the rent was to commence at Christmas, 1838, and A. was to have a right of re-entry in case of non-performance on the part of B. A. availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st January, 1839. In September, 1838, he had re-let the land to C. at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement. In an action by A. for breaking the first agreement, it was held, first, that the demise in the ejectment was to be taken as the date of the re-entry by A., and that he was not entitled to that portion of the rent between the previous Christmas and that day, under the provisions of this statute. Second, that it was properly left to the jury, as a mere money calculation, to say whether A. had sustained more than nominal damages by the breaking the agreement. (*Oldershaw* v. *Holt*, 4 Per. & D. 307; 12 Ad. & Ell. 590; see *Packer* v. *Gibbins*, 1 Q. B. 421.)

It has been doubted whether an annuity payable on certain days, as half-yearly or quarterly, determinable on the death of the grantor, would come within this act, which enables the annuitant to recover the apportioned parts, "*when the entire portions of which such apportioned parts form part shall become due and payable*," because if the annuity ceased by the death of the grantor on any other day than that appointed for payment, the *entire* portion would never become payable. It has, therefore, very properly been recommended that the usual apportionment clause in the grant of such an annuity should be retained. (9 Jarman's Prec. 578, n.) Lord *Campbell*, C. J., observed, the words in italics contemplate "a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion of which this forms a part never does become due or payable." (*Lowndes* v. *Earl of Stamford and Warrington*, 18 Q. B. 439.)

Rent-charges and annuities.

King William the Fourth, by indenture, in pursuance of the stat. 1 & 2 Will. 4, c. 11, granted to trustees, for his consort, Queen Adelaide, an annuity of 100,000*l.*, to commence on the decease of his Majesty, and "continue," "during the natural life of her Majesty," payable out of the consolidated fund, "at the four most usual days of payment in the year (that is to say), the 31st March, 30th June, 30th September and 31st of December, by even and equal portions, the first payment thereof to be made at such of the said days as shall first and next happen after the decease of his Majesty in case her Majesty should survive him." His Majesty died on the 20th June, 1837. On the 30th of June, the trustees received a full quarter's payment of 25,000*l.* This payment was made after consulting the law officers of the crown, who advised that the entire sum was due, and her Majesty was informed of their advice. The quarterly payments were made up to and on 30th September, 1849. Her Majesty died on 2nd December, 1849. Her trustees applied for a proportionate part of the quarterly payment, which would have become due on the 31st December, 1849, if she had so long lived. It was held, that the annuity was not apportionable, and Lord *Campbell*, C. J., observed, "Were it an annuity granted in similar terms between subject and subject, we conceive there can be no doubt upon the subject, and there certainly would have been no apportionment either in the first quarter or the last." (*Reg.* v. *Lords of the Treasury*, 16 Q. B. 357, see pp. 362, 363.)

Where an annuity was granted to A., during the joint lives of B. and C., charged upon the lands of Blackacre, and payable by two equal portions, on the 1st of May and 1st of November in each year, upon trust to pay the same to B. during the joint lives of B. and C., and then to C. if she sur-

4 & 5 Will. 4, c. 22, s. 2.

vived: it was held, that C. having survived B. and died on the morning of the 1st May, was entitled to the entire sum due upon that day. (*Robinson* v. *Robinson*, 2 Ir. Law R., N. S. 370.)

Rent-charges and annuities.

A tenant for life granted a rent-charge, chargeable on lands, for the life of the grantor, provided the grantee should so long live, with a power of distress and a covenant for further assurance, to a relative as a suitable provision for her, with an apportionment clause in the event of the death of the grantee between two days of payment. The grantor died between the days of payment, leaving the grantee surviving: it was held, first, that, independently of this act, there could be no apportionment. (*Leathley* v. *French*, 8 Ir. Chanc. Rep. 401.) Secondly, that the court could not imply an intention that there should be an apportionment on the death of the grantor, having regard to the express apportionment clause on the death of the grantee in the lifetime of the grantor. (*Ib.*) Annuities, independently of this act, are not apportionable, unless granted for the maintenance of infants or married women living separate from their husbands. (*Ib.*)

A. covenanted, on his marriage, to pay an annuity to his wife during her life. By his will he confirmed the annuity, and devised his residuary real and personal estate to his wife for life, with remainders over: it was held, that the payments of the annuity were apportionable between the value of the life estate and the value of the reversion. (*Yates* v. *Yates*, 6 Jur., N. S. 1023.)

A testator, who died in August, 1834, after directing a fund to be formed, by investing the rents of his estates in the purchase of bank annuities, charged it with the payment of 150*l.* a-year to his wife during her life: it was held, that, though the 150*l.* was not a continuing payment, the executors of the wife, who outlived the testator between seven and eight years, were entitled to a proportinate part of the 150*l.* a-year for the interval between the death of the wife and the last preceding yearly day of payment. The act creates an apportionment; but the time for making it does not arrive until another dividend becomes due. (*Carter* v. *Taggart*, 16 Sim. 447.)

Dividends of companies.

If a company is so constituted that its dividends are to be declared, and therefore become due at fixed periods, such dividends are within this act. It is otherwise as to dividends of companies, as, for instance, railway companies, governed by the Companies Clauses Act, 1845, which have no fixed period for declaring a dividend, and are under no obligation to declare a dividend at all. When a dividend is apportionable, it is with reference to the last payment, not to the period during which the profits were earned, that the proportions are to be calculated. (*Re Maxwell's Trusts*, 9 Jur., N. S. 350.)

Dividends out of profits, from time to time declared by a commercial company, are apportionable under this act. (*Hartley* v. *Allen*, 4 Jur., N. S. 500; 27 L. J., Chanc. 621.) But a single sum of money, to be divided among the shareholders, is not so apportionable. (*Ib.*) For the purpose of apportionment, a dividend is to be taken as payable on the day on which it was actually payable, and not on the last day of the period during which it was earned. (*Ib.*)

Of interest on railway debentures.

A testator bequeathed railway debentures to trustees to pay the interest to his children for life, and afterwards the capital to go to his grandchildren. He died in February, and the next half-year's payment of dividend upon the debentures was received in July: it was held, that the debentures being in the nature of mortgages, upon which the interest accrued *de die in diem*, the portion of the half-year's dividend due up to the testator's death was to be considered as capital, and not income, as between the tenants for life and remainderman. (*Re Rogers*, 1 Drew. & Sm. 338; 6 Jur., N. S. 1363; 30 L. J., Chanc. 153.)

Exception.

Act not to apply to certain cases.

3. Provided always, and be it enacted, that the provisions herein contained shall not apply to any case in which it shall

be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description (*d*).

4 & 5 *Will.* 4, *c.* 22, *s.* 3.

(*d*) The provisions of this act are extended to all rent-charges payable under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 86.

This act extends to Scotland. (*Fordyce* v. *Brydges*, 1 H. L. Ca. 1; 11 Jur. 157.) A Scotch tenant in tail, though in legal contemplation an owner or fiar, is nevertheless within this act. Lord *Cranworth*, C., had no doubt that the statute applies to a tenant in tail. The evil prior to this statute was, that if the tenant in tail died indebted and the rents were nearly accruing due, all those accruing rents would go to the successor. To remedy that evil the statute was passed. (*Baillie* v. *Lockhart*, 2 Macq. H. L. 258.)

On determination of leases or tenancies under tenant for life, &c., instead of emblements, tenant to hold until expiration of current year, &c.

That where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any laudlord entitled for his life or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting; and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid, at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid. (14 & 15 Vict. c. 25, s. 1.)

LOANS ON REAL SECURITIES IN IRELAND.

4 & 5 WILLIAM IV. c. 29.

An Act for facilitating the Loan of Money upon Landed Securities in Ireland (*a*). [25th July, 1834.]

MONEY DIRECTED TO BE LENT ON ENGLISH SECURITIES MAY BE ADVANCED ON REAL SECURITIES IN IRELAND.

4 & 5 Will. 4, c. 29, s. 1.

WHEREAS in last wills and other testamentary dispositions, and in marriage and other settlements of real and personal property, and in other deeds, agreements or writings, a direction, trust or power is often given, created or reserved to lay out or invest money at interest on real securities in England, Wales or Great Britain, or to sell and convert into money real or leasehold estates, or government or parliamentary securities, or securities of foreign states or other property, and to lay out or invest the money arising from such sale and conversion on real securities: and whereas from the abundance of capital in Great Britain the interest of money is very much reduced, and the interest to be procured on money in Ireland is much higher than the interest to be procured on money in Great Britain: and whereas manifest improvement has taken place in the condition and security of landed property in Ireland, which it is desirable to encourage and advance: and whereas it would be highly beneficial to both Great Britain and Ireland if the loan of money on landed securities in Ireland was facilitated: be it therefore enacted, that from and after the passing of this act it shall be lawful for any person or persons who, under or by virtue of any direction, trust or power already given, created or reserved, or hereafter to be given, created or reserved as aforesaid, is or are or shall be authorized or directed to lend money at interest on real securities (*b*) in England, Wales or Great Britain, to lend the same or any part thereof at interest on real securities in Ireland, in the same manner in all respects as if such investment had been expressly authorized in or by such direction, trust or power as aforesaid; and such person or persons shall not, on account of his or their so lending money on real securities in Ireland, be considered in a court of equity guilty of any breach of trust, or held accountable further or otherwise than if the money had been laid out by him or them on real securities in England, Wales or Great Britain.

Power to lend money on real securities in Ireland the same as in England, &c.

(*a*) This act enables trustees and others to lend money on real securities in Ireland without committing a breach of trust, although the trust or power authorizing the investment only directs the money to be laid out on real securities in England, Wales or Great Britain. *4 & 5 Will. 4, c. 29, s. 1.*

It is perhaps hardly necessary to observe, that securities on lands in Ireland must be registered as required by the statutes for the registration of deeds in Ireland. Object of this act. Registration.

(*b*) Real securities mean landed securities, that is, mortgages or other incumbrances affecting land. (*Attorney-General* v. *Bowles*, 3 Atk. 808; see 2 Ves. sen. 44; Ambl. 635.)

Direction of Court of Equity required in case of Minors, &c.

2. Provided always, and be it further enacted, that all loans of money on real securities in Ireland under this act, in which any minor or unborn child or person of unsound mind is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or authority being obtained in any cause upon petition in a summary way. Proviso for loans where minors, &c., are interested.

Payment of Money lent by Trustees or Public Bodies on Securities in Ireland may be decreed in English Courts of Equity.

3. In all cases of trustees or public bodies lending money on real securities in Ireland under the authority of this act, it shall be lawful for any court of equity in England to make all such orders and decrees for enforcing payment of the principal and interest thereby secured, or any part thereof, as if the said lands and hereditaments were situate in England or Wales; and it shall be lawful for the party or parties obtaining such orders or decrees to cause a copy of such orders or decrees, under the seal of the court by which the same shall have been made, to be exemplified, and certified to the lord chancellor, lord keeper or lords commissioners of the great seal of Ireland for the time being, or to the barons of his Majesty's Court of Exchequer in Ireland, whereon the said lord chancellor, lord keeper or lords commissioners for the custody of the said great seal of Ireland, or the said barons of the said Court of Exchequer in Ireland, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively so exemplified, to be enrolled, either in the rolls of the Court of Chancery or in the said Court of Exchequer, as the case may be, and shall cause all such process to issue against the said lands and hereditaments comprised in the said securities, and the party or parties against whom such decrees or orders shall be obtained, and his, her or their real and personal estate, goods, chattels and effects, in Ireland, in order to enforce obedience to and performance of the same, in such manner and form, and with such force and effect, as if the cause wherein such order or decree shall have Loans by trustees or public bodies.

4 & 5 Will. 4, c. 29, s. 3.

been made had been originally cognizable by and instituted in the said Courts of Chancery or Exchequer in Ireland; and it shall be lawful for the said lord chancellor, lord keeper or lords commissioners of the great seal in Ireland, or the said barons of the said Court of Exchequer in Ireland, to make such order or orders in respect of or consequent upon such process against the party or parties, or in respect of the said lands, or the real and personal estate, goods, chattels or effects of the said party or parties, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the Bank of Ireland, with the privity of the accountant-general of the said Courts of Chancery and Exchequer in Ireland respectively, to the credit or for the benefit of the party or parties who shall have obtained such order or decree, or to the credit of the cause in which such order or decree shall have been made; and the governor and company of the Bank of Ireland are hereby authorized and required to receive and hold all such monies subject to the orders of the said Court of Chancery in Ireland: provided always, that no such monies shall be charged with or subject to poundage for the usher of the said Court of Chancery in Ireland, or otherwise, where the same shall be paid out by order of the said last-mentioned court: and provided always, that no security for costs shall be required to be given in Ireland by any party or parties enforcing in manner aforesaid the execution of such orders or decrees of any court of equity in England as hereinbefore mentioned (*c*).

(*c*) It was decided that the concluding part of the 3rd section must be read thus: "in any cause, or upon petition in a summary way," and that the proposed securities must be approved of by the master. (*Ex parte French*, 7 Sim. 510.)

Under this statute a trust to invest money in real securities in England or Wales, or Great Britain, will authorize an investment on real securities in Ireland also; and though the money be already invested in Great Britain, the court will, on the application of the tenant for life of the fund, direct a reference to the master to inquire whether it will be for the benefit of all parties interested, that that investment should be changed for one at a higher rate of interest in Ireland. (*Ex parte Lord W. Pawlett*, 1 Phill. C. C. 570.) An order of reference, under this act, as to whether it would be for the benefit of the parties beneficially interested in a settled fund, to lend it on the security of freehold estates in Ireland, might be made *ex parte*, but the court would not confirm the master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, had either been served with the petition or appeared before the master. (*In re Kirkpatrick's Trust*, 15 Jur. 941.)

When a person residing out of the jurisdiction of the Court of Chancery in Ireland files a bill there, and the defendant appears, but does not make any application to the court for time to answer, it is an order of course to direct the plaintiff to give security for costs, but the application for time is a waiver of the right to require security. (*Stackpole* v. *O'Callaghan*, 1 Ball & B. 566, and note. See Dan. Ch. Pr. p. 29, 2nd ed.)

4 & 5 Will. 4, c. 29, s. 4.

Consent to be obtained.

4. Provided always, and be it enacted, that every such loan shall be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales, or Great Britain, testified in the manner required by such direction, trust or power (*d*).

Consent of persons interested to be had.

(*d*) The nature of the consent will depend upon the terms of the trust or power, which must be strictly pursued. Where power was given to trustees with the consent of A. under her hand, attested by two witnesses, to advance 1,500*l.* to her husband, which they lent without the consent of A., who, by a subsequent instrument under her hand, attested by two witnesses, testified that the money was advanced with her consent: it was held, on a bill filed by A., that the trustees must refund the 1,500*l.* with costs, for the actual advance of the money to the husband created a pressure upon the judgment of A., which gave to her subsequent approbation a different character from the free consent required by the settlement. (*Bateman* v. *Davis*, 3 Madd. 98.)

Where by a marriage settlement the interest of a trust fund was limited to a wife for life to her separate use, with power to the trustees upon her consent in writing to advance the trust fund to her husband, upon the security of his bond; if the trustees, with the consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. (*Cocker* v. *Quayle*, 1 Russ. & M. 585. See *Cholmeley* v. *Paxton*, 5 Bing. 48.)

Exception.

5. Provided also, and be it enacted, that the provisions of this act shall not apply to any case in which such direction, trust or power as aforesaid doth or shall or may contain any express restriction against the investment of such money as aforesaid on securities in Ireland (*e*).

To what cases act not to extend.

(*e*) As the investment of money in settlement on securities in Ireland may put parties to much trouble and inconvenience, in the absence of a contrary intention, it will be proper in the usual trust or power directing money to be invested "in the parliamentary stocks or public funds of Great Britain, or upon Government or real securities in England or Wales," to add, "*but not on real or other securities in Ireland*," or words to that effect.

A. B. being entitled under the will of her husband to the interest of a sum of money during her widowhood, with remainder to other parties, which sum the trustees named in the will were to be at liberty to invest in real securities in England and Wales, presented her petition under this statute, to have the money invested in real securities in Ireland: it was held, that although an investment in Ireland might be for the advantage of the petitioner, on account of getting more interest for it, yet that, unless it appeared that it would be for the benefit of those in remainder, the court would not make an order sanctioning such an investment. (*Stuart* v. *Stuart*, 5 Jur. 3; 3 Beav. 430.)

When court refused to make order.

4 & 5 Will. 4, c. 29, s. 6.

TRUSTEES TO BE RESPONSIBLE FOR TITLE.

Act not to relieve persons intrusted with trust or power from responsibility as to title, &c.

6. Provided always, and be it further enacted, that nothing contained in this act shall relieve or be construed to relieve any person or persons intrusted or clothed with such direction, trust or power as aforesaid from any responsibility as to title, security or otherwise, either at law or in equity, save that having lent and advanced such money as aforesaid on real securities in Ireland instead of having invested such money on real securities in England, Wales or Great Britain (*f*).

(*f*) It is the duty of a trustee, who executes a power, to show that he has complied with the exigencies required by it. So where he varies the investment of the trust fund the burden of proof lies on him to show that it is a fit and proper investment. (*Norris* v. *Wright*, 14 Beav. 291.) This act only relieves a trustee from any liability in respect of an investment in Ireland instead of England, and therefore, where, upon petition under this act, the court sanctioned an investment which was made without proper evidence of value and without the consent of the necessary parties, and there was a loss, the trustees were held liable for a breach of trust. (*Ib.*) Pending a suit to make trustees liable for the improper investment of trust monies on an Irish estate, the property was put up for sale under the Encumbered Estates Act, and an order was made giving the trustees liberty to buy, which they did: it was held, that the order did not relieve the trustees from any liability in the cause, although it was not expressed to be made "without prejudice." (*Ib.*)

ENACTMENTS RELATIVE TO JUDGMENTS AFFECTING REAL AND PERSONAL PROPERTY,

CONTAINED IN THE 1 & 2 VICT. C. 110; 2 & 3 VICT. C. 11; 3 & 4 VICT. C. 82; 18 & 19 VICT. C. 15, AND 23 & 24 VICT. C. 38, SS. 1—5.

1 & 2 VICT. C. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England (*a*). [16th August, 1838.]

OF THE EXECUTION OF WARRANTS OF ATTORNEY.

1 & 2 *Vict.* c. 110, *s.* 9.

Warrants of attorney and cognovit actionem to be executed in the presence of an attorney on behalf of the party.

9. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a cognovit actionem due information of the nature and effect thereof; be it enacted, that from and after the time appointed for the commencement of this act [1 October, 1838], no warrant of attorney to confess judgment in any personal action, or cognovit actionem given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney (*b*).

(*a*) It is to be observed, that the Bankruptcy Act, 1861, s. 230, Schedule (G), has repealed the whole of the stat. 1 & 2 Vict. c. 110, except sects. 1 to 22, both inclusive.

By whom warrant of attorney to be attested.

(*b*) In order to make a cognovit valid, its execution must be attested by an attorney attending on behalf of the defendant, *other than* the attorney acting for the plaintiff. (*Mason* v. *Kiddle*, 5 Mees. & W. 513; 4 Jur. 89; *Rising* v. *Dolphin*, 4 Jur. 193; 8 Dowl. P. C. 309.) The country agent of an attorney is not a competent witness to the execution of a *cognovit*, though expressly named by the defendant. (*Mason* v. *Riddle*, 8 Dowl. P. C. 207.) A warrant of attorney is not vitiated by the fact that the name of the attorney who attests on behalf of the defendant was first suggested by the plain-

1 & 2 *Vict.* c. 110, *s.* 9.

tiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose. (*Taylor* v. *Nicholls*, 6 Mees. & W. 91; 8 Dowl. P. C. 242; 4 Jur. 271. See *Kemp* v. *Matthew*, 8 Scott, 399; *Hale* v. *Dale*, 8 Dowl. P. C. 599; 4 Jur. 988; *Pease* v. *Wells*, 8 Dowl. P. C. 626; 4 Jur. 679.) But where the attorney acting for the defendant is named by the plaintiff, the defendant must have a full opportunity of exercising his discretion as to the adoption, otherwise the cognovit will be bad. (*Barnes* v. *Pendrey*, 8 Dowl. P. C. 747.) It is not necessary that the party executing a *cognovit* should first name the attorney to attest the execution thereof, nor is it necessary that such attorney should be the regular attorney of the party giving the *cognovit*; it is sufficient if he be merely employed for the occasion, provided the person giving the *cognovit* shall ultimately exercise a free discretion in the adoption of him. (*Pease* v. *Wells*, 8 Dowl. P. C. 626; 4 Jur. 679.)

A warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on one former occasion acted professionally for the plaintiff, and who afterwards acted as the plaintiff's attorney in entering up judgment and issuing execution upon the warrant of attorney. The court set it aside. (*Cooper* v. *Grant*, 12 C. B. 154.) In such a case the court will not impose on the defendant the terms of bringing no action. (*Ib.*)

Attorney cannot act for both parties.

An attorney in those cases cannot act for both parties; (*Morley* v. *Davis*, 5 Jur, 246;) as where the attorney being in the first instance the attorney of the defendant generally, and being so particularly in respect of a warrant of attorney which he subscribes for him, and also superadds, in reference to this instrument, the character of attorney for the plaintiff, such attestation is invalid. (*Rising* v. *Dolphin*, 8 Dowl. P. C. 309; 4 Jur. 193.) But one attorney may act for each of three defendants, who freely recognize the attorney as acting for each of them respectively. (*Haigh* v. *Frost*, 7 Dowl. P. C. 743.) When on the execution of a warrant of attorney there was but one attorney present, who had previously acted for the plaintiff, and who on that occasion made out his bill to the plaintiff, but delivered it to the defendant, and was paid by him: it was held, that he was not such an attorney acting on behalf of the defendant as required by this statute. (*Sanderson* v. *Westley*, 8 Dowl. P. C. 412; 6 Mees. & W. 98; 4 Jur. 942.) An attestation of a warrant of attorney on behalf of the defendant, by an attorney, who, besides practising on his own account, was acting at the time as clerk to another attorney, and the latter was acting as attorney both for the plaintiff and defendant in the transaction, was held insufficient within this act. (*Durrant* v. *Blurton*, 9 Dowl. P. C. 1015; 5 Jur. 825.) The attorney who subscribed the execution of a warrant of attorney for the defendants was the attorney of the plaintiffs: it was held, that though the defendants were fully aware of the nature of the instrument, yet, as the attorney was not wholly uninterested, this was not a sufficient attestation within this section. (*Deverell* v. *Thring*, 3 Jur. 1193.)

A warrant of attorney to confess judgment, as a security for advances, was attested in due form by an attorney acting for the defendant, and as his attorney and at his request, but who also acted in the transaction for the plaintiff. The defendant was informed that the attorney had been consulted by the plaintiff. The warrant was executed on 6th March, 1847, judgment was signed on 19th July, 1847, and a *fi. fa.* shortly after issued but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On 28th June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on 29th July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings was obtained in Trinity Term, 1851. It was held, that by this section the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection being made must prevail; it was also held, that the circumstances above stated did not preclude the assignees of the bankrupt defendant from raising the objection. It seems questionable, whether lapse of time after execution levied, and other circumstances showing that the plaintiff was knowingly allowed to alter his position on the faith of the judgment thus obtained, may preclude the defendant or his representatives from raising the objection. (*Hirst* v. *Hannah*, 17 Q. B. 383.)

1 & 2 *Vict.* *c.* 110, *s.* 9.

Where the attorney, who attested the execution of a warrant of attorney, was London agent to the plaintiff's attorney (who mentioned the name and address in town), and acted as such in filing the instrument, and made charges against the country attorney, with which he was debited: it was held, that the attorney so attesting was in substance the plaintiff's attorney, and that he could not, therefore, stand in that independent situation which this statute requires. (*Pryor* v. *Swaine*, 2 Dowl. & L. 37; 13 Law J., N. S., Q. B. 214; 8 Jur. 423. See *Mason* v. *Riddle*, 5 Mees. & W. 513; *Pease* v. *Wells*, 8 Dowl. P. C. 626; *Walton* v. *Chandler*, 1 C. B. 306.) If a warrant of attorney executed abroad be intended to be enforced in this country it must be attested by an attorney in the form required by this section. (*Davis* v. *Trevanion*, 2 Dowl. & L. 743; Law J. 1845, Q. B. 138; 9 Jur. 492.)

The act applies to a *cognovit actionem* in an action of ejectment. (*Doe* d. *Rees* v. *Howell*, 4 Jur. 1035; *Doe* d. *Kingston* v. *Kingston*, 6 Jur. 105; 1 Dowl. P. C., N. S. 263.) The act does not apply to a defendant who is himself an attorney. (*Chipp* v. *Harris*, 5 Mees. & W. 430.)

Form of attestation.

An attestation in this form, "Witness G. E. defendant's attorney, named by him, and attending at his request," is not sufficient without the attorney's proceeding to declare that he subscribed as such attorney. (*Poole* v. *Hobbs*, 8 Dowl. P. C. 113; *Potter* v. *Nicholson*, 8 Mees. & W. 294; 9 Dowl. P. C. 808; 5 Jur. 511.) A warrant of attorney to confess judgment was attested by an attorney as follows: "Signed by the above-named G. C. P., in the presence of us, of whom the said J. H. S. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained, to the said G. C. P., before the execution thereof by him." "Signed, J. H. S., attorney, Leeds, J. R." It was held, an insufficient attestation under this section, for want of a statement that J. H. S. subscribed as attorney for G. C. P. (*Everard* v. *Poppleton*, 5 Q. B. 181.) If an attesting witness to a cognovit, described himself as an "attorney expresly named for the defendant, and that he declares and subscribes himself as such," this is a sufficient attestation under this section; and it is not necessary to state in the attestation that he has been appointed such attorney by the defendant. (*Oliver* v. *Woodroffe*, 3 Jur. 12.) It is not requisite under this section, that the attorney to the defendant, in the attestation of a cognovit, should state himself to be an attorney named by the defendant; it is sufficient if he declares himself to be an attorney for the defendant; nor need the attorney be originally named by the defendant; it is sufficient if the latter adopts the attorney named by the plaintiff. (*Oliver* v. *Woodroffe*, 7 Dowl. P. C. 166; 4 Mees. & W. 650; 3 Jur. 59.) And if the nature and effect of the instrument be explained to the defendant, it is immaterial that it has not been read over to him. (*Ib.*) An infant cannot bind himself by a cognovit. (*Ib.*) It has been held in recent cases, that the attestation need not follow the precise words of the statute, if the requisites of it are expressed plainly. (*Pope* v. *Kershaw*, 2 C. B. 198; *Lewis* v. *Lord Kensington*, 2 C. B. 463; 3 Dowl. & L. 637; Law J. 1846, C. P. 100; *Lindley* v. *Girdler*, 1 Dowl. & L. 699; Law J. 1844, Q. B. 53; 8 Jur. 61; *Lewis* v. *Tankerville*, 2 C. B. 463; *Gay* v. *Hall*, 5 Dowl. & L. 522; 18 Law J., Q. B. 12; *Phillips* v. *Gibbs*, 16 Mees. & W. 209; 4 Dowl. & L. 275; Law J. 1847, Exch. 48.) The attestation to a warrant of attorney, under this section, was in the following form:—"Signed, sealed and delivered by the said H. H. (the defendant), in my presence; and I declare myself to be attorney for the said H. H., and that I subscribe my name as such attorney. (Signed) G. O., solicitor." It was held, that this was a sufficient compliance with the terms of the statute. It was held, also, that it need not appear on the face of the attestation, in express words, that the attorney attesting the defendant's signature attended at the defendant's request, and that he was named by him. (*Gay* v. *Hall*, 5 Dowl. & L. 422; 2 C. B. 322; 13 Law J. 124; 18 Law J., Q. B. 12.)

The attestation to a warrant of attorney must contain words which show with certainty that the subscribing attorney is the attorney of the person executing it, and that he attests or subscribes the execution thereof as the attorney of such person. The following attestation was held to be insuffi-

1 & 2 *Vict.* *c.* 110, *s.* 9.

cient:—"Witnessed by me as the attorney of the said W. B., attending at the execution hereof at his request and expressly named by him." (*Hibbert* v. *Burton*, 10 Mees. & W. 678; 2 Dowl. N. S. 434.) The last case has been recently cited as establishing the rule, that if this section of the act is not exactly followed, the words used must by necessary implication show that all the three requisites of the declaration required by the statute have been complied with. A warrant of attorney was attested as follows:—"Signed, sealed and delivered in the presence of me, H. C., who, at the request and in the presence of the parties executing the warrant of attorney, have set and subscribed my name as the attorney on their behalf, attesting the execution hereof, having first read over and explained to them, and each of them, the nature and contents thereof." It was held (with the dissent of *Erle*, J.), that the attestation was invalid, on the ground that the witness did not by necessary implication declare himself the attorney for the persons executing the warrant of attorney as required. (*Pocock* v. *Pickering*, 21 Law J., Q. B. 365; 18 Q. B. 789.)

It is not necessary that the defendant should actually nominate the attorney attesting a warrant of attorney on his behalf; it is sufficient if, of his own free will, he adopts an attorney suggested by the plaintiff. Nor is it necessary that the attorney should be cognizant of the facts under which the warrant of attorney is given, or that he should consult with the defendant in private previous to signing; it is enough if the attorney be there, willing to give the defendant the advice if he asks it; and he cannot complain afterwards that his interests were not protected, if he withhold from the attorney the necessary information. (*Joel* v. *Dicker*, 5 Dowl. & L. 1; Law J. 1847, Q. B. 359; 11 Jur. 589.)

Application to set aside the warrant.

An application to set aside a warrant of attorney, on the ground of its not having been duly attested in compliance with the statute, can only be made by the party himself, or by an attorney employed and authorized by him for that purpose. (*Lewis* v. *Lord Tankerville*, 11 Mees. & W. 109.) A judgment was entered up on a warrant of attorney, executed by principal and sureties. One surety being arrested, paid the debt, and recovered a proportional part from his co-surety, who afterwards discovered that the warrant had been attested by a person not qualified to act as an attorney, contrary to this section. It was held, that the co-surety not being the party who had paid the debt, could not move the court that the warrant should be set aside for the defective attestation, and the amount of his contribution repaid him by the plaintiff; and a rule nisi, obtained by the co-surety for this purpose, was discharged without costs. *Patteson*, J., expressed an opinion, that, under this section, a party who has introduced an unqualified person as qualified, to attest the execution of a warrant of attorney, cannot afterwards move to set it aside, because attested by such person. (*Price* v. *Carter*, 7 Q. B. 838.)

A defendant may apply to set aside a warrant of attorney and judgment thereon, on the ground of a non-compliance with the statute, although he has become a bankrupt since the execution of the warrant. (*Taylor* v. *Nicholls*, 6 Mees. & W. 91; 4 Jur. 271.) Where a cognovit had been attested on behalf of the defendant by an attorney who accompanied the plaintiff's son to the defendant's residence, and who subsequently carried the instrument to the Queen's Bench office to be filed, and there subscribed his name upon the back of it, as the plaintiff's attorney's agent, the court set aside the instrument under the 9th and 10th sections. (*Rice* v. *Linstead*, 7 Dowl. P. C. 153; 6 Scott, 895.)

Cases not within the act.

A consent to a judge's order for judgment and execution is not within this section, and therefore the order is valid, though neither the defendant nor his attorney attended before the judge. (*Bray* v. *Manson*, 8 Mees. & W. 668; 9 Dowl. P. C. 748.)

A writ of summons having been issued, but not served on the defendant, he signed a document entitled in the cause, and prepared by the plaintiff's attorney, whereby the defendant consented to a judge's order for the payment of the debt and costs, with liberty for the plaintiff's attorney to enter an appearance for him, and sign judgment and issue execution *instanter*. No attorney attended on behalf of the defendant when this consent was given.

A judge's order was afterwards obtained on this consent, final judgment signed, and execution issued. It was held, on motion to set aside the judge's order and subsequent proceedings, that this consent did not, under this section, require the presence of an attorney for the defendant at its execution, and that unless fraud were shown, the court would not interfere. (*Thorne* v. *Neal*, 2 Q. B. 726; 2 Gale & D. 48. See *Baker* v. *Flower*, 8 Mees. & W. 670.) A judge's order for staying proceedings upon payment of debt and costs on a given day, otherwise judgment, is not within the act. (*Brookes* v. *Hodgson*, 8 Scott, N. R. 223. See 2 Archb. Q. B. Pr. 890—894, 9th ed.)

1 & 2 *Vict.* c. 110, *s.* 9.

10. A warrant of attorney to confess judgment or cognovit actionem, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (*b*).

Warrant, &c., not formally executed invalid.

(*b*) By 3 Geo. 4, c. 39, ss. 1, 5, warrants of attorney in personal actions are to be filed within twenty-one days. The officer of the court is to keep a book containing particulars of each warrant of attorney and cognovit. In addition to the book directed to be kept by 3 Geo. 4, c. 39, another book or index shall be kept of names, &c., of persons to whom warrants of attorney are given, which shall be open to inspection. (6 & 7 Vict. c. 66.) A judge's order obtained by consent given by any trader defendant is to be void, unless the same, or a copy thereof, be filed within twenty-one days, in like manner as warrants of attorney and *cognovit actionem*. (12 & 13 Vict. c. 106, s. 137.) The twenty-one days for filing a warrant of attorney under 3 Geo. 4, c. 39, s. 1, are to be reckoned exclusively of the day of execution; so that a warrant executed on 9th December, and filed on 30th December, is in time. (*Williams* v. *Burgess*, 12 Ad. & Ell. 635.) The 3 Geo. 4, c. 39, s. 1, is extended to every bill of sale of personal chattels made after 10th July, 1854. (17 & 18 Vict. c. 36, s. 1.)

Rules of court.

"No judgment shall be signed upon any cognovit or any warrant of attorney, without such cognovit or warrant being delivered to and filed by the master, who is hereby ordered to file the same in the order in which it is received.

"Leave to enter up judgment on a warrant of attorney above one and under ten years old is to be obtained by order of a judge, made *ex parte*, and if ten years old or more upon a summons to show cause.

"Every attorney or other person who shall prepare any warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made on such warrant containing the substance and effect of such defeasance." (Reg. Gen. Hil. T. 1853, 25—27; 1 Ell. & Bl. App. vi.)

Regulations as to judges' orders for signing judgment.

"All written consents upon which orders for signing judgments are obtained shall be preserved in the chambers of the respective courts. In actions where the defendant has appeared by attorney no such order shall be made, unless the consent of the defendant be given by his attorney or agent. Where the defendant has not appeared, or has appeared in person, no such order shall be made, unless the defendant attends the judge, and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf; except in a case where the defendant is a barrister, conveyancer, special pleader, or attorney." (Reg. Gen. Hil. T. 1853, 155—157; 1 Ell. & Bl. App. xxvi.)

Writ of Elegit.

Sheriff empowered to deliver execution of lands to

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to ob-

1 & 2 *Vict.* *c.* 110, *s.* 11.

Judgment creditor.

tain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to take and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power (*c*), which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: provided also, that as against purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed (*d*).

Proviso as to copyhold lands.

Proviso as to purchasers, mortgagees and creditors.

(*c*) See *Beavan* v. *Lord Oxford*, 25 Law J., Ch. 299, *post*.

(*d*) In an inquisition on an *elegit* taken since this act, it is not necessary to set out the land by metes and bounds; it is sufficient to describe it in such a manner as would be sufficient to identify it in a conveyance. (*Doe* d. *Roberts* v. *Parry*, 13 Mees. & W. 356; 8 Jur. 963.)

Where a party dies after verdict, and before judgment, his lands are bound in the hands of his heir by a judgment entered up within two terms after

verdict under the stat. 17 Car. 2, c. 8, s. 1, made perpetual by 1 Jac. 2, c. 17, s. 4. (*Saunders* v. *M'Gowran*, 12 Mees. & W. 221.)

1 & 2 *Vict.* c. 110, *s.* 11.

Where the lease is taken in execution by the sheriff the term remains in the original lessee until an actual assignment by the sheriff to the purchaser. (*Playfair* v. *Musgrove*, 14 Mees. & W. 239; *Giles* v. *Grover*, 9 Bing. 128; 2 M. & Scott, 197.) Where a sheriff sells a term taken in execution under a *fi. fa.* to the execution creditor, but executes no assignment in writing of the term, the estate remains in the debtor, and the execution creditor has no defence to an ejectment at his suit. (*Doe* d. *Hughes* v. *Jones*, 9 Mees. & W. 372.) A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. (*Stratford* v. *Twynam*, Jacob, 418.)

A sale of property for good consideration is not, either at common law or under stat. 13 Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor. (*Wood* v. *Dixie*, 7 Q. B. 892.)

What may be taken in execution.

This act has extended the remedy of the judgment creditor against the *whole*, instead of one *moiety* of the debtors' lands, including copyholds, which were not subject to execution under the old law. (See *ante*, pp. 491, 492.) By the old law leasehold estates were not bound by a docketed judgment till delivery of a writ of execution to the sheriff, and by this statute leaseholds would have been bound in the same manner as freeholds. By the 2 & 3 Vict. c. 11, s. 5 (see *post*), a registered judgment shall not bind or affect any lands, "or any interest therein, further or otherwise, or more extensively in any respect" than a former docketed judgment would have done. Leaseholds are not, therefore, now affected by a *registered* judgment any further than they were formerly affected by a *docketed* judgment. (See *Westbrook* v. *Blythe*, 3 Ell. & Bl. 737; *post*, pp. 567, 568.)

By the old law, if an estate tail were extended, the issue might avoid it after the death of the tenant in tail. (*Ashburnham* v. *Lord St. John*, Cro. Jac. 85; Gilb. on Executions, 106.) As tenants in tail, where there is no protector, have a disposing power, without the assent of any other person, it is conceived that in such a case the issue will be bound by judgments entered up against the tenant in tail. The 13th section expressly declares, that a judgment shall be binding as against the issue of the body and other persons whom, without the assent of any other person, the debtor might have barred. Trust estates are liable to execution under the 11th section of the act, which extends to lands and hereditaments, of which the debtor, or any person in trust for him, shall have been seised at the time when the execution issued. After verdict and before judgment had been entered up, the defendant sold his leasehold by auction: it was held, that under this statute the plaintiff could not levy execution on the purchase-money. (*Brown* v. *Parrott*, 4 Beav. 585.) In *Causton* v. *Machlew* (2 Sim. 242), a person who was possessed of a term for years in a house, had allowed judgments to be entered up against him. The term having been sold, the purchaser objected to the title, on the ground that continuances might have been entered, and there might by possibility be writs in the hands of the sheriff, but the objection was overruled. (See *Williams* v. *Cradock*, 4 Sim. 313.)

Where a trustee conveyed land before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands could not be taken in execution. (*Hunt* v. *Coles*, 1 Com. 226; see *Steele* v. *Phillips*, Beatty, 193; *Hickson* v. *Aylward*, 3 Molloy, 25.) It was decided, that a trust created by a defendant in favour of himself and another person is not a trust within the 29 Car. 2, c. 3, s. 10, that clause being confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person, the trust within that statute being one of a clear and simple nature for the benefit of the debtor. (*Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684.) Soon after the passing of this statute, a doubt was raised whether, under the 14th section, stock could be charged in which the debtor had only a partial interest; and whether the construction of its terms must not be governed by that put on similar ex-

1 & 2 *Vict.* c. 110, *s.* 11.

pressions in the Statute of Frauds (see *Doe* d. *Hull* v. *Greenhill*, 4 B. & Ald. 684), so as to be held to apply only to simple trusts for the debtor alone, and not to trusts where the stock is standing in the name of a trustee for several persons having partial interests. But this doubt is removed by stat. 3 & 4 Vict. c. 82, which extends the provisions of the 14th section of this act, "to the *interest* of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any stocks, funds or shares, as also in the dividends, interest or annual produce of such stocks," &c. The stat. 3 & 4 Vict. c. 82, has also removed another doubt, whether the power of a judge to make a charging order applied to the case of stock standing in the name of the accountant-general of the Court of Chancery, by declaring that it shall be lawful for a judge of any of the superior courts of law to make such order as to stock, &c. standing in the name of the accountant-general of the Court of Chancery, or the interest or dividends thereof, in the same way as if the same were standing in the name of a trustee for the judgment debtor. But the order in such a case shall not operate to prevent a transfer or payment of the dividends by the direction of the Court of Chancery.

When the goods of a defendant, who alleges that he holds them solely as trustee, are taken in execution, the defendant, in his character of trustee, may in general dispute the seizure; and the sheriff in such case is entitled to the benefit of an interpleader rule under sect. 6 of stat. 1 & 2 Will. 4, c. 58. But it was questioned whether this would be so if the defendant had possessed the goods for a long time under circumstances inconsistent with the trust. (*Fenwick* v. *Laycock*, 2 Q. B. 108.)

Lands, of which a man is seised in right of his wife, are liable to execution. (Dalt. Sher. 136; Coote on Mortgages, 67.) Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after-taken husband. (*Newlands* v. *Paynter*, 4 My. & Cr. 408.) Where rent became due after the delivery of a writ of *elegit* to the sheriff, but before the inquisition was taken thereon, it was held, that the execution creditor was not entitled to the rent. (*Sharp* v. *Key*, 8 Mees. & W. 379; 9 Dowl. P. C. 770.)

Further provision in favour of purchasers, without notice, &c.

It is to be observed that by the 5th section of 2 & 3 Vict. c. 11, as against purchasers and mortgagees, *without notice* of any judgment, &c., none of such judgments, &c. shall bind or affect any lands, &c., or any interest therein, further or otherwise, or more extensively, although duly registered, than a judgment of one of such superior courts would have bound such purchaser or mortgagee before this statute. But nothing in either of the same acts shall affect any judgment as between the parties thereto, or their representatives, or those claiming as volunteers under them.

Sheriff's poundage.

The stat. 3 Geo. 1, c. 15, s. 16, which, for ascertaining the fees for executing of writs of *elegit*, so far as they affect real estate, enacts, that the poundage to be taken by sheriffs "by reason or colour of their office," or "by reason or colour of their executing of any writ or writs of *habere facias possessionem aut seisinam*," shall not exceed a certain proportion of the yearly value of any lands "whereof possession or seisin shall be by them or any of them given," applies to the execution of writs of *elegit*, though not expressly named in the enacting part; and the sheriff taking more than the limited poundage for such execution is liable to the penalties imposed by stats. 8 Geo. 1, c. 25, s. 5, and 29 Eliz. c. 4, s. 1. (*Nash* v. *Allen*, 4 Q. B. 784.) The stat. 29 Eliz. c. 4, against extortion by sheriffs, is not repealed by 1 Vict. c. 55, but the only effect of the latter statute is to exempt from the penalties of the former statute the cases in which the sheriff shall take no larger fees than shall be allowed by the order of the judges. (*Pilkington* v. *Cooke*, 16 Mees. & W. 615.) In an action of debt by a sheriff against an execution creditor for poundage, the defendant claimed to set off the expenses, which he had paid, of a bill of sale and appraisement, preparatory to an assignment in trust for the creditors of the party whose goods were seized: it was held, that, without further evidence on the defendant's part, the payment in respect of such a sale could not be considered as made for the sheriff, and could not be set off. (*Marshall* v. *Hicks*, 10 Q. B. 15. See Watson's Sheriff, 305—316, 2nd ed., as to writ of *elegit*.)

1 & 2 *Vict.* c. 110, s. 12.

WRIT OF FIERI FACIAS.

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditors, and to sue for amount secured by bills of exchange and other securities.

12. By virtue of any writ of fieri facias to be sued out of any superior or inferior court, after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer, having the execution thereof, may and shall seize and take any money or bank notes (whether of the governor and company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived, and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued (*d*); provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

Proviso as to indemnity of sheriff.

(*d*) Where the sheriff has seized goods under a *fi. fa.* and holds a balance of money, the proceeds of the sale, such money is not liable to seizure under a *fi. fa.* against the execution creditor, under this section, as money belonging to such creditor, unless the sheriff has appropriated and set apart specific money for the balance to be paid under the first *fi. fa.* (*Wood* v. *Wood*, 4 Q. B. 397.) The statute applies only to the case of money set apart and earmarked, and the property specifically of the party against whose effects the *fi. fa.* issues, and which the sheriff may seize as he would any

What cannot be taken under the statute.

1 & 2 *Vict.* c. 110, *s.* 12.

other goods belonging to the defendant; and was intended to remedy the defect which formerly existed in the execution of a *fi. fa.*, it being considered that nothing could be seized that could not be sold, and that money was not the subject of a sale. (*Ib.* 401.)

The sheriff is not bound to levy under a *fi. fa.* whatever the value of the goods may be, unless the execution creditor (having notice) first satisfies the landlord's rent. (*Cocker* v. *Musgrove*, 15 Law J., N. S., Q. B. 465; 10 Jur. 922; 9 Q. B. 223; *Risely* v. *Ryle*, 11 Mees. & W. 16.)

This section gives no power to seize money in execution while in the hands of a third person, as trustee for the defendant; and therefore money deposited in court in one action, pursuant to 43 Geo. 3, c. 46, s. 2, and the 7 & 8 Geo. 4, c. 71, s. 2, cannot be paid out to an execution creditor in a second action, in satisfaction of his claim. (*Frances* v. *Campbell*, 6 Jur. 105.) If a sheriff under a *fieri facias* levies on and removes goods which are not the property of the judgment debtor, and has notice of rent due before the removal, he is liable to the landlord under stat. 8 Anne, c. 14, s. 1, although he has paid over the whole proceeds of the levy to the owner of the goods. (*Forster* v. *Cookson*, 1 Gale & D. 58; 5 Jur. 1083; 1 Q. B. 419.)

The effect of this section is, to place bank notes and money seized under a *fi. fa.* upon the same footing as goods, and, therefore, bank notes so seized are not to be treated as the property of the execution creditor, so as to be available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person. *Maule*, J., observed, "The intention of the statute was to subject money, &c. to seizure, in the same way as any other chattels were before, except that where money is seized it is not necessary that the form of a sale should be gone through. But, although the sheriff may, and ought, if the execution creditor desires it, to hand over the money to him, it does not follow that it becomes by *the seizure* the property of the execution creditor. It is not convenient or necessary that the things for the first time made seizable by this act should be placed in a different position from goods which were seizable before." (*Collingridge* v. *Paxton*, 11 C. B. 683.)

Effect of judgment as to funds in chancery.

A judgment creditor, on ascertaining that a sum of money was about to be paid in a cause to his debtor, applied by petition to the Court of Chancery, that the sheriff might be at liberty to seize in the accountant-general's office a cheque, by means of which the sum of money was to be paid out to the debtor: it was held, that under this section the cheque was liable to seizure, and that, inasmuch as the cheque was in the hands of the accountant-general, the application to the court was proper. (*Watts* v. *Jefferyes*, 3 Mac. & G. 422; 15 Jur. 435.) It was observed by the Lord Chancellor, that this section does not in terms comprise the particular case of money standing in the name of the accountant-general, but the 3 & 4 Vict. c. 82, was passed with the view of rendering all the property of a debtor, which was so situated as not to be reached under this act, available for the purpose of satisfying the debts of the judgment creditor. (*Ib.*) A cheque of the accountant-general in favour of A. B., but not delivered out, is not A. B.'s property, so as to be liable to be seized by the sheriff under this section. Leave to seize such a cheque was refused, but a stop order was granted. (*Courtoy* v. *Vincent*, 15 Beav. 486. See *Warburton* v. *Hill*, 1 Kay, 470, *post*, p. 575.)

The plaintiff having issued a *fi. fa.*, the sheriff seized goods, the proceeds of which were exhausted by payment of a year's rent to the landlord under stat. 8 Anne, c. 14, s. 1, the expenses, and the sum due upon another writ of *fi. fa.* previously delivered to the sheriff. It was held, that a return of *nulla bona* to the plaintiff's writ was proper, and that the sheriff, in an action against him for falsely making such return, might show the above facts, under a plea that the original defendant had no goods whereof the sheriff could levy the damages in the declaration mentioned. (*Kintle* v. *Freeman*, 11 Ad. & Ell. 539.)

What cannot be taken in execution.

Property held by way of lien cannot be taken in execution under a *fi. fa.* either at common law or since this section. (*Legg* v. *Evans*, 6 Mees. & W. 36; 8 Dowl. P. C. 177; 4 Jur. 197.) Where a defendant died between eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was sued out

against his goods between two and three in the afternoon of the same day, the court set aside the execution as irregular. (*Chick* v. *Smith*, 8 Dowl. P. C. 337; 4 Jur. 86.) A party privileged from arrest having been taken on a *ca. sa.* by the sheriff of G., paid the money to the sheriff and obtained a judge's order to have it refunded. When the town agent was about to do so, the money was claimed by the sheriff of M. under a *fi. fa.* directed to him: it was held, that the money could not be taken under the *fi. fa.* (*Masters* v. *Stanly*, 8 Dowl. P. C. 169; 4 Jur. 28, Exch.) The surplus of the proceeds of property sold under a *fi. fa.* remaining in the hands of the sheriff after satisfying the execution creditors, is a debt due from the sheriff to the debtor, and cannot be taken in execution under a *fi fa.* at the suit of a third party, against the defendant in the former suits. (*Harrison* v. *Paynter*, 6 Mees. & W. 387; 8 Dowl. P. C. 349; 4 Jur. 488.) Where a sheriff, who had seized and sold certain goods under a writ of *fieri facias*, kept the money in his hands in consequence of a suit in equity between the parties respecting the amount due to the plaintiff: it was held, that the writ must be considered as wholly executed, and ought not, on the sheriff's going out of office, to be transferred to his successor under 3 & 4 Will. 4, c. 99, s. 7. (*Ib.*; see *Woodland* v. *Fuller*, 11 Ad. & Ell. 859.)

1 & 2 *Vict.* c. 110, *s.* 12.

Fixtures.

There is no doubt that by a conveyance, whether to a purchaser or to a mortgagee, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them; *Colegrave* v. *Dios Santos* (2 B. & Cr. 76; 3 D. & R. 255) is an authority to that effect in the case of a purchaser, and *Longstaffe* v. *Meagoe* (2 Ad. & Ell. 167) in the case of a mortgagee. (See *Steward* v. *Lombe*, 1 Brod. & B. 506; *Boydell* v. *M'Michael*, 1 Cr. M. & R. 177.) The deed may be so qualified as not to pass fixtures. (*Hare* v. *Horton*, 5 B. & Ad. 715.) Fixtures cannot generally be treated as goods and chattels until detached from the freehold. (*Nutt* v. *Butler*, 5 Esp. 176; *Lee* v. *Risdon*, 2 Marsh, 495; *Niblett* v. *Smith*, 4 T. R. 504.) In a *fi. fa.* against a lessee, who may himself remove them, they *may* be taken. (*Place* v. *Fagg*, 4 Man. & R. 277, *per Bayley*, J.; *Winn* v. *Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247; *Pitt* v. *Shew*, 4 B. & Ald. 206; *Evans* v. *Roberts*, 5 B. & C. 841; 8 D. & R. 611; Shelford's Law of Bankruptcy, pp. 260—266, 407, 3rd ed.) Fixtures annexed to the freehold cannot be taken under a *fi. fa.* (Watson's Sheriff, 252, 2nd ed.)

Persons acquiring title to goods before they have been seized or attached under a writ against the seller protected.

No writ of *fieri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ or any other writ, by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff or coroner. (19 & 20 Vict. c. 97, s. 1.)

The Effect of a Judgment.

Judgment to operate as a charge on real estate.

13. A judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's superior courts at Westminster (*e*), shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes (*f*), rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time after-

1 & 2 *Vict.* c. 110, *s.* 13.

wards, have any disposing power (*g*), which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing, under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon (*h*): provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment (*i*); or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice.

Charge not to be enforced until after expiration of a year.

Proviso as to purchasers.

Order of Court of Probate.

(*e*) The 25th sect. of 20 & 21 Vict. c. 77, enacts, that the Court of Probate shall have the like powers, jurisdiction and authority for enforcing orders, decrees and judgments, made or given by the court under that act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the court under that act, as are by law vested in the High Court of Chancery, for such purposes in relation to any suit or matter depending in such court. The charge and right of suit in equity given by that statute to the persons who obtain decrees of the High Court of Chancery, cannot in any sense be treated as part of the powers, jurisdiction and authority for enforcing its decrees; and the words of the 25th section of the Court of Probate Act denote only the ordinary powers of enforcing decrees by writs of execution and process in contempt. (*Per* Lord *Westbury*, C., *Pratt* v. *Bull*, 32 L. J., Ch. 144.)

It was decided, that an order of the Court of Probate, directing the payment of a sum of money, does not, by being registered with the senior master of the Court of Common Pleas at Westminster, constitute a valid charge on land. (*Pratt* v. *Bull*, 32 L. J., Ch. 21, 144; 11 W. R. 82; 4 Giff. 117.)

1 & 2 *Vict.* c. 110, *s.* 13.

Order of Divorce Court.

The 52nd sect. of the 20 & 21 Vict. c. 85, enacts, that all decrees and orders, to be made by the Divorce Court in any proceeding or petition to be instituted under the authority of that act, shall be enforced and put in execution in the same or the like manner as the judgments, orders and decrees of the High Court of Chancery may now be enforced and put in execution. It was questioned whether that provision authorizes the registration, under this act, of a decree for permanent alimony. The decree having been entered on the register, the Court of Common Pleas declined on motion to order it to be expunged, leaving it to the Court of Chancery to decide whether the remedy was available or not. (*Ex parte Holden*, 13 C. B., N. S. 641.)

Benefices not charged by this section.

(*f*) A judgment entered up, in 1845, against a beneficed clergyman for a debt was duly registered: it was at first held, that, under this section, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed, (*Hawkins* v. *Gathercole*, 1 Sim. N. S. 63,) but it was decided on appeal that such judgment did not create a charge upon the benefice. (*S. C.*, 24 Law J., Ch. 332.)

A judgment creditor of a beneficed clergyman is prevented, by the stat. 13 Eliz. c. 20, which renders void charges on benefices, with cure, from suing in equity to have his judgment made a charge under this statute. (*Bates* v. *Brothers*, 2 Sm. & Giff. 509.)

A rector, who was also the patron of a living, gave warrants of attorney to various creditors who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest whenever execution should be issued: it was held, that the agreement pointed so particularly to making the judgments charges on the living, that the court could not give effect to it by granting an injunction and a receiver. (*Long* v. *Storie*, 3 De G. & S. 308. See *Metcalf* v. *Archbishop of York*, 1 My. & Cr. 547.)

(*g*) The power of defeating a voluntary settlement by a subsequent sale for valuable consideration is not a "disposing power" upon which a judgment entered up against the settlor will operate under this section, for a voluntary settlor cannot, for his own benefit and without the assent of any other person, defeat his own settlement. (*Beavan* v. *Lord Oxford*, 25 Law J., Ch. 299; 1 Jur., N. S. 1121; 6 De G., M. & G. 581. See *Shaw* v. *Neale*, 6 H. L. Cas. 581; 4 Jur., N. S. 695; 27 Law J., Ch. 444.)

(*h*) That which formerly, by force of the Statute of Westminster, 13 Edw. 1, st. 1, c. 18, was a general charge upon lands, now by force of the express directions of this section becomes a specific charge; words cannot be more express. If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge. When the act of parliament says, that every judgment creditor shall have the same remedies in a court of equity as he would be entitled to in case the person, against whom the judgment has been entered, had agreed to charge the lands with the amount of that judgment debt, whether that charge be legal or equitable, the judgment becomes, in the view of a court of equity, an equitable estate. We are no longer dealing with a general lien, but with a specific incumbrance. (*Rolleston* v. *Morton*, 1 Drury & War. 171, 195; 1 Con. & L. 252; Sugd. V. & P. 663, 11th ed.)

Effect of non-registration in Middlesex.

In an ejectment for land in Middlesex on a case stated, it appeared that A., being possessed for a term of ninety-nine years in the lands, conveyed them by way of mortgage to the plaintiff on the 19th June, 1852. The mortgage was registered in Middlesex on the 28th June. The defendant, on the 5th June, 1852, obtained a judgment in the Queen's Bench against A. On the same day the judgment was registered in the Common Pleas; it was never registered in Middlesex. On the 8th September, 1852, an elegit issued and the lands were delivered to the defendant: it was held, that the judgment was a charge on lands in general under this section, from the time it was registered in the Common Pleas, but that by stat. 2 & 3 Vict. c. 11, s. 5, (see *post*,) it had no further effect against a *bonâ fide* purchaser for value and without notice than a docketed judgment before this statute. That a docketed judgment would not before this act have bound a term for years

1 & 2 *Vict.* *c.* 110, *s.* 13.

until execution, and consequently that the plaintiff, being a *bonâ fide* purchaser of this term of years before the execution, was entitled to the lands as against the defendant the judgment creditor. It was also held, that these lands being in Middlesex, the judgment, though registered in the Common Pleas, did not bind the lands till the memorial was registered in Middlesex, under stat. 7 Anne, c. 20, s. 18, which enacts, that no judgment shall affect or bind any lands in Middlesex, but only from the time that a memorial of such judgment shall be entered at the registry office. Here the judgment was not entered at the registry office for Middlesex. The leaseholds in this case were comprised within that act, as the only leaseholds excepted by the 17th section are leases at rack rent and leases not exceeding twenty-one years, whereas the lease in this was not at rack rent and exceeded twenty-one years. It was contended, that the section requiring registration of a judgment in Middlesex was in effect repealed by this section, enacting that a judgment shall charge the land from the time of registration in the Common Pleas, as if a charge had been executed by the tenant. But the Court of Queen's Bench thought the two statutes could be read together, and carried into effect by holding that a judgment registered in the Common Pleas will have the effect of a charge upon land in Middlesex, only from the time that the judgment has been also registered in the registry for Middlesex. (*Westbrook* v. *Blythe*, 3 Ell. & Bl. 737. See *Hughes* v. *Lumley*, 4 Ell. & Bl. 274; *post*, p. 584.)

A judgment creditor, whose judgment was registered pursuant both to the Registry Act, 5 & 6 Anne, c. 18, (West Riding, Yorkshire,) and this statute, filed a bill to redeem a prior mortgage of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments and the conusees had registered them pursuant to this act, *but not under the West Riding* Act. It was held, that those conusees were not necessary parties to the suit. (*Johnson* v. *Holdsworth*, 1 Sim. N. S. 106. See 16 Ves. 419.)

This section, giving to a judgment creditor the same remedies in equity as if the debtor had power to charge the hereditaments, and had, by writing, agreed to charge the same with the judgment debt and interest, does not make the judgment creditor a purchaser; and a subsequent judgment creditor will not be affected by notice, unless it is duly registered. (*Benham* v. *Keane*, 31 L. J., Chanc. 129; 8 Jur., N. S. 604—L. J.) The 1 & 2 Vict. c. 110, does not repeal the 7 Ann. c. 20, but the two are to be read together; and a judgment registered in the Common Pleas is no charge against land in Middlesex until entered on the Middlesex register under the latter act. (*Ib.*) Therefore where a judgment creditor, having notice of a prior judgment registered in the Common Pleas, but not in Middlesex, registered his judgment in Middlesex before the earlier judgment was so registered, he was held entitled to priority. (*Ib.*) It is otherwise as to a mortgagee having such notice. (*Ib.*) When a creditor has once registered his judgment in the Common Pleas, his rights, as against a prior judgment creditor, are not affected by his neglect to re-register; and this circumstance will not prevent his claiming priority over the earlier judgment by reason of his being first on the Middlesex register. (*Ib.*)

A. was entitled to an annuity which was secured by a covenant and by an assignment of leaseholds to her in trust to sell: it was held, that her interest under the deed might be made available under this section, for payment of a judgment debt due from her. (*Harris* v. *Davison*, 15 Sim. 128.)

Where, under a power to invest on real or government securities, a trust fund is invested on mortgages, a judgment creditor of one of the *cestuis que trust* is entitled to a charge on his interest to the extent of all monies which may be payable to him out of the rents and profits of the mortgaged property, or otherwise by virtue of such mortgage. But the share of the judgment debtor in the interest paid to the trustees by the mortgagor, and not taken out of the rents and profits, is not subject to a charge under this section, the covenant to pay being a security which falls under the 12th section. (*Avison* v. *Holmes*, 1 Johns. & H. 530; 7 Jur., N. S. 722; 30 L. J., Chanc. 564; 9 W. R. 550.)

A. had a bond executed to him in 1828 by a corporation for the due payment of interest on certain sums advanced by him, and for which he also

held other securities. In 1835, the Municipal Corporation Act passed, which abolished the right of corporations to mortgage or to alien for more than thirty-one years at a rack rent, except with the consent of three Lords of the Treasury. Two subsequent amendment acts were passed to save the rights of previous creditors. In 1852, the bond was put in force, and judgment entered up thereon: it was held, that A. was entitled to the benefit of this section, giving him the same rights as if the debtors had agreed in writing to charge their lands, and a receiver was accordingly appointed over all their real property, including some which was acquired in 1851. (*Arnold* v. *Gravesend* (*Mayor, &c.*), 2 Jur., N. S. 703; 25 L. J., Chanc. 530.)

1 & 2 *Vict.* c. 110, *s.* 13.

Priority of equitable mortgagee over judgment.

Notwithstanding this statute, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land, under an *elegit*, without notice of the mortgage. (*Whitworth* v. *Gaugain*, 1 Phill. C. C. 728; 1 Cr. & Ph. 325; *Langton* v. *Horton*, 1 Hare, 561. See *Kinderley* v. *Jervis*, 22 Beav. 27.)

In a suit by a judgment creditor against his debtor, to give effect to a charge under this statute, on the interest of the debtor in an estate of which he was mortgagee, which was vested in trustees for sale to satisfy incumbrances, and pay the surplus to the mortgagor, a sale of the estate was directed; and, the purchase-money proving insufficient to satisfy the charges thereon, the plaintiff was held entitled to be paid his debt and costs in priority to the costs of the mortgagor or mortgagee of the estate, or any other of the defendants, except the trustees for sale. (*Clare* v. *Wood*, 4 Hare, 81.)

In a suit by a judgment creditor, who had been in possession under an *elegit*, to have the real estates of the debtor sold under this act, the plaintiff must account in the same manner as a mortgagee in possession. (*Bull* v. *Faulkner*, 1 De G. & S. 685; 12 Jur. 33.)

Proceedings in equity.

Before this statute a judgment creditor, who desired to enforce his security against his debtor's equitable interest in a freehold estate by a bill in equity, must previously have sued out an *elegit*; and if his bill did not allege that he had done so, it was demurrable. (*Neate* v. *Duke of Marlborough*, 3 Mylne & Cr. 407.)

The court only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title, and therefore, where the plaintiff had obtained judgment, but had not sued out the *elegit*, it was held, that he was not entitled to the aid of the court as against the freehold estate of the debtor; that he did not, under this section of the statute, become entitled to such aid until the expiration of one year from the time of entering up his judgment, and that this being an objection that the plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the court to relieve against fraud in respect to the freehold estate. The court will interpose to remove legal impediments out of the way of judgment creditors, or for the preservation of the property pending disputes at law as to the rights of judgment creditors, but the court does not supply or extend legal rights. (*Smith* v. *Hurst*, 10 Hare, 30.)

A judgment creditor, having registered his judgment under this act, is not entitled to a decree for foreclosure, but only to an order for sale. (*Footner* v. *Sturgis*, 5 De G. & S. 736. See *Ford* v. *Wastell*, 6 Hare, 229; 2 Phill. C. C. 591.) But in *Jones* v. *Bailey*, (17 Beav. 582,) where the plaintiff had obtained a charge on the defendant's real estates by virtue of a judgment, in 1852, under this statute: it was held, that the plaintiff had that which is equivalent to an agreement to execute a legal mortgage, and that if that were done the plaintiff would only be entitled to a foreclosure.

A creditor, having sued out execution on a judgment at law, and finding the interest of his debtor in a term of years to be an equitable interest, has a lien upon it in equity without the aid of this statute; and where, after such execution, the leasehold estate of the debtor had been sold: it was held, that the execution creditor had a lien on the proceeds of the sale. (*Gore* v. *Bowser*, 3 Sm. & G. 1; 1 Jur., N. S. 392; 24 L. J., Chanc. 316; affirmed on appeal, 24 L. J., Chanc. 440—L. J.)

Judgment creditors will not be allowed successive periods of three months

1 & 2 *Vict.* c. 110, s. 13.

each to redeem, but one period of three months will be given to them or any of them. (*Radcliff* v. *Salmon*, 4 De G. & S. 526; *Stead* v. *Banks*, 5 De G. & S. 560; *Bates* v. *Hillcoat*, 16 Beav. 139.)

An agreement that a certain judgment debt and interest thereon should be paid to the plaintiff out of any monies which might be recovered by the defendant in respect of certain claims which he had against a third person, was held to create a valid equitable charge upon these monies when recovered. The defendant having recovered the monies so due to him in an action, and the same having been paid into the Court of Common Pleas, the Court of Chancery, in a suit by the judgment creditor to establish his equitable charge on the fund, granted an injunction to restrain the defendant from receiving it until he should have paid the judgment debt and interest, and the costs of the suit. (*Riccard* v. *Prichard*, 1 Kay & J. 277.)

The principle to be deduced from several authorities is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money, or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debt or funds to which the order refers. (*Per* Lord *Truro*, *Rodick* v. *Gandell*, 1 De G., M. & G. 763.

A., by articles of agreement, covenanted to pay B. 5,000*l.*, and it was thereby agreed and declared that the 5,000*l.*, and interest, should be and was thereby charged on land: it was held, that by virtue of this section a judgment creditor had a charge upon such land, and was a proper party to a suit for foreclosure. (*Russell* v. *M'Culloch*, 1 Kay & J. 313; 1 Jur., N. S. 157. (See *Younghusband* v. *Gisborne*, 1 De G. & S. 209.)

In a mortgage suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to the plaintiff's charge under this section. (*Lewis* v. *Duncombe*, 20 Beav. 398.)

The plaintiff was mortgagee of premises, the equity of redemption in which belonged to G., against whom, in May, 1857, an adjudication in bankruptcy was made, and assignees of the estate and effects were duly appointed. B., in December, 1856, and L., in February, 1857, entered up judgments duly recovered against the bankrupt. On a bill filed by the plaintiff for foreclosure, B., by answer, disclaimed all right and interest in the mortgaged premises. L., by answer, after stating that his judgment remained unsatisfied, stated that he did not claim to be entitled to any charge on the mortgaged premises, being advised that under this statute such judgment was unavailable, by reason of the bankruptcy of G., and that he was an unnecessary party to the suit. He did not, however, disclaim all right and interest in the premises: it was held, that, though by this statute a judgment creditor is not entitled to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the time of entering up his judgment, yet it seems that there is nothing to prevent him from taking proceedings to make his charge available at the end of one year. (*Harrison* v. *Pennell*, 4 Jur., N. S. 682.) Where a judgment is not entered up one year before the bankruptcy of the person against whom judgment is entered up, it will not operate to give the judgment creditor any preference; and therefore, although L. was deprived of his right to a preference, he was not deprived of his right to a charge of which he would at the end of one year be entitled to claim the benefit, and consequently he was properly made a party to the suit; but that, as he had not sufficiently disclaimed by his answer, he was not entitled to his costs. (*Ib.*)

Judgment creditors are not purchasers within the statute 27 Eliz. c. 4. A purchaser, in the sense in which the word is used in that statute, is a person who gives money, or other valuable consideration, in order to have the land. In 1836, before the passing of this act, T. had recovered a judgment against Lord O., which was duly docketed. After that judgment was so docketed and before the passing of this act, Lord O. executed a voluntary settlement in favour of his wife, under which she was tenant for life. After the passing of this act other creditors recovered judgments against Lord O.,

which were duly registered in pursuance of the statute 2 & 3 Vict. c. 11, and the question was whether they, in respect of these judgments, had a claim on Lady O.'s interest under the voluntary settlement. T. omitted to register his judgment till 1849, and thereby lost his priority as against the subsequent judgment creditors; it was held, that this did not entitle the latter to stand in his place as against the voluntary settlement. (*Beavan* v. *Lord Oxford*, 25 L. J., Ch. 299; 6 De G., M. & G. 492; 1 Jur., N. S. 1121. See *Shaw* v. *Neale*, 6 H. L. Cas. 581; 4 Jur., N. S. 695; 27 L. J., Ch. 444.

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By this section the legislature meant that a judgment was to operate on all lands and interest in lands over which the debtor might have a disposing power for his own benefit without committing a breach of duty, that is, over which he had a right at law or in equity to consider himself the beneficial owner. The introduction of such words as "honestly" or "without committing a breach of duty" appears to be superfluous, for they are necessarily to be understood as forming a part of the clause. (*Kinderley* v. *Jervis*, 22 Beav. 1; 2 Jur., N. S. 602; 25 L. J., Chanc. 538; 2 Jur., N. S. 603.)

Sir *E. Sugden* observes, "These provisions (1 & 2 Vict. c. 110, s. 13) render it now immaterial whether the seller has an equitable or a legal estate, for they are placed on the same footing; and the period of inquiry as to an equitable ownership is no longer the time of execution sued, but of the entering up of the judgment or any time afterwards; and therefore the transfer of the legal estate after the judgment, and before execution sued, is no longer material; nor is it important whether the seller has an estate with or without a general power, for in either case the judgment is equally binding, or whether the seller has *only* a general power, for that is for this purpose treated as an estate, and the judgment creditor has no longer a general lien, but an actual charge on the estate, to which a court of equity is bound to give effect. (Sugd. V. & P. 663, 11th ed.)

The judgment creditors of an insolvent plaintiff, whose estates were sold by the order of the court, were held to be necessary parties to the conveyance to the purchaser. (*Hotham* v. *Somerville*, 9 Jur. 702; 9 Beav. 63.)

A. devised his estate at H. to his second son, who survived him, and afterwards died intestate: whereupon the estate descended to N., his elder brother. Pending a suit instituted by A.'s creditors judgments were entered up against N., which remained unsatisfied when the estate at H., together with the testator's other estates, was sold under the decree in the suit for payment of his debts. It was held, that N.'s judgment creditors were necessary parties to the conveyance of the estate at H., as they could issue execution against his estate, and as they could not be compelled to join in the conveyance, because they were not parties to the suit, that a good title could not be made to the estate. (*Cradock* v. *Piper*, 14 Sim. 310.)

Vendors contracted to sell land, and the purchasers paid part of the purchase-money, and were let into possession, but were unable from insolvency to complete the contract. The vendors filed a bill for specific performance, and in default for a re-sale. There were at that time registered judgments against the purchasers, but they were not made parties to the suit. The vendors obtained a decree for sale, and the land was sold by auction. A. bought one lot and required that the judgment creditors should release their interest as they were not parties to the suit: it was held, reversing the decision of *Stuart*, V. C., that the original purchasers by entering into possession had accepted the title and had become owners in equity of the property, and that the judgment debts of their creditors attached under this section. (*Grey Coat Hospital* (*Governors*) v. *Westminster Improvememt Commissioners*, 26 L. J., Chanc. 843; 3 Jur., N. S. 188; 1 De G. & J. 531.)

(*i*) After twelve months a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since its registration. (*Derbyshire, &c. Railway Company* v. *Bainbrigge*, 15 Beav. 146.)

Under this section the court, upon a bill filed by a creditor to enforce his judgment under the statute, declined to appoint a receiver of the real estate

1 & 2 *Vict.* c. 110, s. 13.

of the debtor, within the year limited by the statute. (*Smith* v. *Hurst*, 1 Coll. C. C. 705.)

A judgment creditor, though unable to proceed in equity to obtain the benefit of his charge before the expiration of a year under this section, is nevertheless entitled to have the life interest of his debtor in lands at once impounded for his protection. (*Yescombe* v. *Landor*, 28 Beav. 80; 5 Jur., N. S. 780; 28 L. J., Ch. 876.)

A judgment creditor of a tenant for life of real estate sued out an *elegit*, but was unable to obtain payment of his demand as the estates were vested in trustees. Upon a bill by the judgment creditor asking for the aid of the court to obtain satisfaction of his demand: it was held, that he was entitled to an injunction to restrain the trustees from paying the rents and profits of the estates to the tenant for life until the creditor was in a position to obtain the benefit of the judgment. (*Ib.*)

Contribution.

If part of an estate subject to a judgment is sold, leaving the remainder in the hands of the conusor, and execution is taken out against the original debtor or his heir, he will not be entitled to contribution against the purchaser; but if the execution had been against the purchaser only, he will be entitled to contribution against the owner of the residue of the estate. (3 Rep. 11 b; *Hartly* v. *O'Flaharty*, Beatty, 61; and see 16 & 17 Car. 2, c. 5.) A party seised of several real estates, and indebted by judgment, settles one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledges other judgments: it was held, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute. (*Averall* v. *Wade*, Lloyd & G. temp. Sugd. 252.)

Charge upon Stock, &c.

Stock and shares in public funds and public companies belonging to the debtor and standing in his own name to be charged by order of a judge.

14. If any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) (*k*) standing in his name in his own right (*l*), or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts (*m*), on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor (*n*); provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*o*).

(*k*) A banking copartnership, which made returns to the Stamp Office, pursuant to 7 Geo. 4, c. 46, was held to be a public company not incorporated within the meaning of this section. (*Macintyre* v. *Connell*, 1 Sim. N. S. 225; 20 Law J., Ch. 284; 15 Jur. 529.)

The defendant held shares in the Union Bank of London, and judgment having been obtained in an action against him, a judge at chambers made an order under this section, charging such shares with the judgment debt.

1 & 2 *Vict.* c. 110, *s.* 14.

On application to set aside such order, it appeared that the bank consisted of a great number of shareholders, and was carried on pursuant to the terms of a deed of settlement, by which it was provided, that the shares should not be transferred except by the consent of the directors, and also that if any order or decree was made against any proprietor, by which his shares became charged, they were to be forfeited to the company. The company was not registered under 7 & 8 Vict. c. 110, but was entitled to sue and be sued by a public officer under 7 & 8 Vict. c. 113, s. 47, and 7 Geo. 4, c. 46. It was held by *Parke*, B., and *Alderson*, B., that it being doubtful whether the company was a public company or not, the order ought not to be set aside. (*Graham* v. *Connell*, 1 Pr. Rep. 38; 19 Law J., Exch. 361.)

(*l*) The defendant, a registered owner of shares in a joint stock company, deposited the certificate with E. as a security for money advanced. The defendant afterwards borrowed a further sum from an insurance office, and executed to C., one of his sureties on that occasion, with the consent of E., who was the other surety, a transfer of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. The money not having been paid to the insurance office, they claimed it from E. and C., when C. requested the insurance office to transfer the shares into his name, which they refused to do on the ground that they had been previously served with a judge's order nisi to charge the shares: it was held, that the shares were properly charged as shares standing in the defendant's name in his own right, within the meaning of this section. (*Fuller* v. *Earle*, 7 Exch. 796; 21 Law J., Exch. 314.)

Orders of judge.

(*m*) The provisions of this section are defined and extended by statute 3 & 4 Vict. c. 82, s. 1. (See *post*.) A judge of the Court of Chancery is not a judge of one of the superior courts at Westminster, within the meaning of this section, and has no jurisdiction under this section to order monies invested in the name of the accountant-general to stand charged with a judgment debt recovered at law against the party entitled to such funds; but the application should be made to one of the common law judges of the superior courts at Westminster. (*Miles* v. *Presland*, 4 My. & Cr. 431; 2 Beav. 300.) In *Robinson* v. *Pearce* (7 Dowl. 93; 2 Jur. 896), it was held, that money deposited by the vendee of land in the hands of a third party, for the use of the defendant, could not be attached under this section, and that the 12th section only applied to money in the hands of the debtor, and not in the possession of a third party as trustee for him. A judge at chambers only, and not the court, has authority under this section, to make an order to charge a fund with the payment of money recovered by a judgment; if he makes an absolute order, the court has jurisdiction to set it aside if wrongly made; but if he only makes an order *nisi*, the court has no authority to entertain the question, although the judge expresses his desire to refer it to the court. (*Brown* v. *Bamford*, 9 Mees. & W. 42.) An application to enter on the judgment roll orders charging stock in execution under this section, for the purpose of having them reviewed by a court of error, was refused. (*Newton* v. *Boodle*, 6 C. B. 532; 18 Law J., C. P. 73.)

Under this act and 3 & 4 Vict. c. 82, the jurisdiction to make a charging order is not confined to the particular judge in whose branch of the court the fund sought to be charged may be standing, but it belongs to every judge of the Court of Chancery. (*Marquis Hastings* v. *Beavan*, 10 W. R. 206.)

Such order needs not be entitled in the particular matter to the credit of which the fund is standing, the order being valid if entitled in any of the acts which confer the jurisdiction. (*Ib.*)

Such an order properly entitled will not be rendered void by being also entitled in a matter in which it was not necessary to entitle it at all. (*Ib.*)

Certain stock, the subject-matter of a deed of settlement executed under the sanction of the Court of Chancery, having been charged by the order of a judge, under the 14th and 15th sections of this statute, the trustees moved to discharge the order, on the ground that the judgment debtor had forfeited all interest under the settlement, by taking the benefit of the provisions relating to insolvent debtors. The motion was opposed, upon a suggestion that the settlement was fraudulent and void as against creditors, and that a suit was pending in the Court of Chancery to avoid it. The court declined

1 & 2 *Vict.* *c.* 110, *s.* 14.

to interfere, even if they had jurisdiction, *Tindal*, C. J., observing, "If we were to entertain this motion, we should in effect be entering into a complicated chancery suit. Assuming therefore that we have jurisdiction, this is not a case in which it can be exercised." (*Rogers* v. *Holloway*, 6 Scott, N. R. 274; 5 Man. & G. 292.)

A judge at chambers having made an order under this section, and 3 & 4 Vict. c. 82, s. 1, charging an annuity "payable out of the suitors' fund" by order of the Lord Chancellor, in pursuance of the provisions of the 46 Geo. 3, c. 128, the Court of Exchequer, considering it doubtful whether or no the judge's order was valid, refused to set it aside, as by so doing they would deprive the party of the right of appeal. It seems doubtful whether the Court of Exchequer has jurisdiction over an order of that description. (*Witham* v. *Lynch*, 1 Exch. R. 391.)

The court has no jurisdiction to rescind the order of a judge at chambers charging stock or shares under this section. (*Graham* v. *Connell*, 1 Prac. Rep. 38; 19 Law J., Exch. 361.) It is no objection to an order *nisi* to charge stock pursuant to the 14th and 15th sections of this act, that it calls upon a judgment creditor to show cause on a day certain. (*Robinson* v. *Burbidge*, 9 C. B. 289.)

(s) Where a judgment creditor has got a charging order at law upon the interest of the judgment debtor in a fund in the Court of Chancery, a stop order applied for in the usual way is the proper course, and an order *nisi*, made in that court upon a petition for a stop order, not received two clear days before the application, was discharged with costs. (*Re Nowell*, 11 W. R. 896.) Where a testator by his will directed that certain stock should stand in the names of his executors, and the dividends should be paid to G. C. during his life, and on his death to E. C., his widow, "she to lay it out for the good of his children:" and that when the youngest child should come of age, the fund should be sold out and divided amongst the children. It was held, in an action in which E. C. (after the death of G. C.) was a defendant, that an order might be made, under the 14th and 15th sections of this act, for charging "so much of the dividends as were payable to E. C. for her own use and benefit." (*Fowler* v. *Churchill*, 11 Mees. & W. 57.)

After the order obtained by a judgment creditor, for charging the interest of his debtor in government stock standing in the name of trustees, has been made absolute under the 15th section of this statute, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them; and the trustees are to apply the dividends according to the equitable interests of the parties. (*Bristed* v. *Wilkins*, 3 Hare, 235.)

The East India Company granted to the defendant a pension in consideration of his distressed state and the services of his father. It was held, that this could not be charged with a judgment debt by a judge's order under the 14th and 15th sections of this statute. The judge's order directed that the pension should stand charged, unless cause were shown at chambers in six calendar months. The court rescinded the order, on motion by the East India Company and by an assignee of the pension, within the six months. (*Morris* v. *Manesty*, 7 Q. B. 674.)

Effect of charging order.

It was decided by Lord *Campbell*, C. J., *Wightman*, J., and *Crompton*, J., that the order of a judge, charging stock, standing in the name of a trustee in trust for the judgment debtor, with a judgment debt, gave priority to the judgment creditor over a prior mortgagee of such stock; the mortgagee not having given notice to the trustee of his mortgage, and the judgment creditor not having notice of the mortgage, and the stock still remaining in the name of the trustee. But *Erle*, J., was of opinion that a judgment creditor, with a charging order on stock, does not become entitled to it against a prior mortgagee, although he has given no notice of his mortgage to the trustee of the stock. (*Watts* v. *Porter*, 3 Ell. & Bl. 743.) The latter view of the subject has been considered correct by the Court of Chancery. (*Beavan* v. *Lord Oxford*, 25 Law J., Ch. 299; 2 Jur., N. S. 121. See *Whitworth* v. *Gaugain*, 1 Phill. C. C. 728; *ante*, p. 569.)

A testator left real and personal property to trustees to be sold and divided among children. One of the children, by assignment, for valuable

1 & 2 *Vict.* c. 110, *s.* 14.

consideration, created charges on his portion, and notice of each of these assignments was, immediately after its execution, given to the trustees of the will. A judgment was recovered against the assignor; a sale was ordered of the real estates, and the proceeds were vested in the Three per Cents. The judgment creditor obtained a charging order under this section upon the share of the assignor. The question then arose which should be preferred, the assignees or the judgment creditor: Vice-Chancellor *Knight Bruce* decided in favour of the assignees. They had perfected their equitable security long before the charging order, and a new charge then created by the debtor could not have affected their securities. If the parties had equal equities, priority of date was to determine the preference between them. (*Brearcliff* v. *Dorrington*, 4 De G. & S. 122, cited by Lord *Campbell*, 3 Ell. & Bl. 754. See *Kinderley* v. *Jervis*, 22 Beav. 28.)

In *Dunster* v. *Lord Glengall*, (3 Ir. Ch. R. 47,) the Master of the Rolls in Ireland decided that an equitable mortgagee, by deposit of railway shares, is entitled to priority over a prior judgment creditor, who, subsequently to the mortgage, has obtained an order charging the shares.

This section gives to a charging order absolute upon stock held in trust for the judgment creditor the same effect as a charge under his hand, and the object of the 15th section is only to prevent any new charge being effected after the charging order *nisi* has been obtained and before it is made absolute. When the charging order is made absolute, the 15th section has performed its functions; but if the judgment debtor had assigned the stock before the date of the order *nisi*, the assign might obtain a stop order before the order *nisi* was absolute, notwithstanding the 15th section, for the real charge under a charging order is only acquired when it is made absolute. If a person, having notice of a previous assignment of a trust fund, take an assignment to himself of the same fund, he cannot obtain priority over the previous assign whether the trustee had notice or not, and therefore if a judgment creditor, at the time of making his charging order absolute, have similar notice, he is likewise unable to obtain priority. Where the fund is standing in the name of the accountant-general, the practice of the office is to enter a memorandum of every charging order left at the office, but such notice is not treated as any restraint nor as equivalent to a stop order. No entry is made of notice of any other assignment. The accountant-general is not a trustee of the funds committed to him, but merely the agent of the court. The trustees who have paid the funds into court are the trustees of it until the court has in some way dealt with it, and then the court becomes the trustee. Therefore, notice to the accountant-general of an assignment of funds in his hands is of no avail against a stop order afterwards obtained by a subsequent purchaser without notice. (*Warburton* v. *Hill*, 1 Kay, 470.)

A charging order under this section will be made absolute, notwithstanding proceedings against the trustees of the fund by creditors, and there is no other fund for payment of costs. (*Smith* v. *Youde*, 2 F. & F. 376—Willes.)

(*o*) The proviso contained in this section does not prevent the creditor from obtaining the stop order to restrain the debtor from receiving dividends of stock accruing within the six months. (*Watts* v. *Jefferyes*, 3 Mac. & G. 372; 15 Jur. 783; 20 Law J., Chan. 659.) The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realizing the security, yet that the judgment creditor may in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished *pro tanto*, by stopping payment to the debtor of part of his security. (*Ib.* See *Bristed* v. *Wilkins*, 3 Hare, 235.) The proviso does not extend to a bill by a tenant by elegit to redeem a mortgage. (*Barnes* v. *Thrupp*, 3 Jur., N. S. 1242.)

1 & 2 *Vict.* c. 110, *s.* 15.

Operation of Judge's Orders.

Order of judge to be made in the first instance ex parte, and on notice to the bank or company to operate as a distringas.

15. And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit (*h*).

Charging.

(*h*) It is not a good suggestion to an order for discharging stock under this section, that it requires cause to be shown on a day specified, although the statute directs that it shall require cause to be shown "within a time to be mentioned in such order." (*Robinson* v. *Burridge*, 1 Prac. Rep. 94; 19 Law J., C. P. 242.) Nor that such order purports to be made in pursuance of the 1 & 2 Vict. c. 110 alone, and not also of the 3 & 4 Vict. c. 82. (*Ib.*) A judgment was entered in the master's book, as in a cause of A. *v.* B., the plaintiff obtained an order to charge stock of the defendant standing in the name of the accountant-general, which order was entitled A. *v.* C. sued as B. A rule to rescind it having been obtained, on the ground that it did not follow the judgment in its title, the plaintiff produced the judgment

paper, which was intituled in the same way as the order. It was held, that the order was properly intituled. (*Ib.*) It seems that such an order is in the nature of a writ of execution, and ought to follow the judgment in its title. (*Ib.*) The words "C. sued as" appear to have been interlined: it was held by *Wilde*, C. J., that such interlineation must be presumed to have been made before the judgment paper was sealed by the court. (*Ib.*)

1 & 2 *Vict.* c. 110, *s.* 15.

Writ of distringas to be issued from Court of Chancery according to form in first schedule to act 5 Vict. c. 5.

The 5 Vict. c. 5, s. 5, enacts, that, in the place and stead of the writ of *distringas*, as the same has been heretofore issued from the Court of Exchequer, a writ of *distringas*, in the form set out in the first schedule to that act, shall, on and after the 15th day of October, 1841, be issuable from the Court of Chancery, and shall be sealed at the subpœna office, and that the force and effect of such writ, and the practice under or relating to the same, shall be such as was then in force in the said Court of Exchequer: provided, nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of that act, or of any other act then in force, or under the general authority of the Court of Chancery, be made with reference to the proceedings and practice of the said Court of Chancery. (See Order of Court, 17th November, 1841, as to *distringas*.) The statute 5 Vict. c. 5, s. 4, has conferred on the court no new summary jurisdiction with respect to granting injunctions; but the remedy provided thereby was intended only for limited and interim purposes, viz., to protect stock until the party having a claim to it can have time to assert that claim by bill. H. obtained a restraining order under the above statute on the 30th of May, but he neglected to file a bill. Upon motion made the 30th June to discharge the order, it was held, first, that the order could not stand without a bill filed; and secondly, that although the court had power to continue the order until a bill should be filed, yet that this was not, by reason of H.'s delay in filing a bill, the proper case for the exercise of such power. (*In re Suisse*, 6 Jur. 597.) It seems that the remedies given by the 4th and 5th sections of the act 5 Vict. c. 5, are cumulative, and consequently that a party who has sued a *distringas*, under the 5th section, is not thereby precluded from afterwards applying for an injunction under the 4th section. (*Ex parte Marquis of Hertford*, 1 Phill. C. C. 129; 1 Hare, 584. See Lewin on Trusts, pp. 651—656, 4th ed.)

Form of writ.

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriffs of London, greeting:—We command you that you omit not by reason of any liberty, but that you enter the same and distrain the governor and company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermmeddle therewith until we otherwise command you; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the —— day of ——, to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery by ——, complainant; and further to do and receive what our said court shall then and there order in the premises, and that you then leave there this writ. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign. DEVON."

The following is the form of the affidavit which has been substituted by the judges of the Court of Chancery by an Order dated 10th December, 1841, for the form set out at the foot of the Orders of the 17th November, 1841:

A. B. [*the name of the party or parties in whose behalf the writ is sued out*] *v.* The Governor and Company of the Bank of England.

I, —— of ——, do solemnly swear, that, according to the best of my knowledge, information and belief, I am [*or if the affidavit is made by the solicitor*, "A. B., of ——, is"] beneficially interested in the stock hereinafter particularly described, that is to say [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing*].

1 & 2 *Vict.* c. 110, *s.* 16.

Effect of taking the Body.

Securities not realised to be relinquished if the person be taken in execution.

16. If any judgment creditor, who under the powers of this act shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly (*i*).

(*i*) In *Wells* v. *Gibbs* (3 Beav. 399), a question was raised whether an order to pay money into court to the credit of a cause is an order within the meaning of the 18th section of this act; and if so, whether a taking under an attachment for contempt would, under this section, invalidate a charge obtained under the 13th section. The court said, it certainly is not the same thing as a taking under a *ca. sa.* at law; nor is this court bound by the decisions of courts of law, which in some cases prohibit a party proceeding against the property and person at the same time. (See *Hide* v. *Pettitt*, 1 Ch. Ca. 91.) The two concurrent processes have at all times existed in this court, and still exist, so that if a defendant should remain in prison, and neglect to pay money according to the order of the court, a sequestration would go against his estate.

A creditor recovered a judgment in this country, and obtained a charge on his debtor's lands, &c., under the 15th section of this act. He afterwards arrested the debtor in Jersey upon mesne process for the same debt. It was held, that the charge on the lands here was not thereby forfeited under this section. (*Houlditch* v. *Collins*, 5 Beav. 497.)

Interest on Judgments.

Judgment debts to carry interest.

17. Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*k*).

(*k*) Interest runs on a judgment debt, under this section, from the time of the entry of the *incipitur*, and not merely from the final completion of the judgment after the taxation of costs. (*Newton* v. *Grand Junction Railway Company*, 16 Mees. & W. 139.) Under this section a plaintiff is entitled to interest upon a judgment from the day on which it is signed, the words "entered up" in that clause having reference to the entry of the *incipitur* in the master's book; and this right is not varied by an abbreviation mark in the amount at a subsequent period, upon a review of the taxation. (*Fisher* v. *Dudding*, 3 Scott, N. R. 516; 9 Dowl. P. C. 979. See *ante*, pp. 269, 270.)

Under the 17th and 18th sections of this statute, interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate. (*Attorney-General* v. *Nethercote*, 10 Sim. 529.)

1 & 2 *Vict.* c. 110, *s.* 17.

This section, allowing interest on judgments, applies as well to judgments for costs as for the subject-matter of the action. Therefore, where it was sought to set aside a writ of *ca. sa.*, upon the ground that it commanded the sheriff to levy the amount of the defendant's costs upon a nonsuit with interest: it was held, that the motion could not be sustained. (*Pitcher* v. *Roberts*, 2 Dowl. N. S. 394; 12 Law J., N. S. 178; 7 Jur. 466.)

Rules as to recovery of interest.

Under the Common Law Procedure Act, 1852, the following rules have been made as to the recovery of interest on writs of execution:—76. Every writ of execution shall be endorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered, under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of four pounds per centum per annum from the time when the judgment was entered up, or if it was entered up before the 1st of October, 1838, then from that day; provided that, in cases where there is an agreement between the parties that more than four per cent. interest shall be secured by the judgment, then the endorsement may be accordingly to levy the amount of interest so agreed. 77. In cases of an assessment of further damages, pursuant to the statute of 8 & 9 Will. 3, it shall be stated in the body of the writ of execution that the sheriff, or other officer or person to whom the writ is directed, is to levy interest on the damages assessed and costs taxed in that behalf, at the rate of four pounds per centum per anuum from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day. (Reg. Gen. Hil. T. 1853; 1 Ell. & Bl. App. xv.)

Decrees and Orders in Equity.

Decrees and orders of courts of equity, &c. to have effect of judgments (*l*).

18. All decrees or orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses are by such orders or rules respectively directed to be paid.

(*l*) This section is extended to the Common Palatinate Courts and to the Equity Court of Durham. (18 & 19 Vict. c. 15, s. 2.)

Provisions of 1 & 2 Vict. c. 110 to be applicable to orders of the

The provisions of the act 1 & 2 Vict. c. 110, so far as the same relate to orders of the Lord Chancellor, or of the Court of Review therein referred to in matters of bankruptcy, and the powers given by the same act to the

1 & 2 *Vict.* c. 110, *s.* 18.

Lord Chancellor and the said Court of Review in matters of bankruptcy, shall extend to and be applicable to orders of the Lord Chancellor and of the Court of Appeal in Chancery, sitting in bankruptcy, under the Bankruptcy Act, 1861. (24 & 25 Vict. c. 134, s. 214.)

Lord Chancellor and Court of Appeal.

A provision to the same effect was contained in 12 & 13 Vict. c. 106, s. 248; and see 14 & 15 Vict. c. 83, s. 7.

Writs of execution upon decrees and orders of courts of equity, under this section, must issue out of the court in which such decrees and orders are made, and cannot be awarded by a court of common law. (*Stanford* v. *Robinson*, 3 Mann. & G. 407. *Re Stanford*, 4 Scott, N. R. 23.) A party entitled to costs under an interpleader order is not bound to take out execution under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 7, but may make the order a rule of court, and take out execution under this section. (*Cetti* v. *Bartlett*, 9 Mees. & W. 840.) Where an order of court was made for payment of costs of a motion to set aside an award, and a *ca. sa.* was sued out more than a year and a day after the allocatur, the arrest was held to be regular under this section, without *scire facias* or motion in court. (*In re Spooner and Payne*, 11 Q. B. 136.)

The seizure of the person of the debtor for contempt of court is not, under this section, the release of the debts against the debtor's property. (*Roberts* v. *Ball*, 3 Sm. & G. 168.)

After verdict in ejectment, the successful party may sue out execution on the consent rule for the amount of his taxed costs, under this section, without any previous rule, calling upon the opposite party to pay such amount. (*Doe* d. *Pennington* v. *Barrell*, 10 Q. B. 531.) It seems, that where a rule has the force of a judgment, under this section, it is not necessary that a rule should be served calling on the party in default to show cause why he should not pay the amount mentioned in the rule. (*Doe* d. *Harrison* v. *Hampson*, 5 Dowl. & L. 484; 4 C. B. 745.) A rule calling on a party to pay money pursuant to an award, with a view to execution under this statute, is a rule nisi only; and the court refused to make such rule absolute without personal service, where it appeared that such service might be effected. (*Winwood* v. *Holt or Hoult*, 3 Dowl. & L. 85; 14 Mees. & W. 197; 15 Law J., Exch. 10.)

A judge at the assizes made an order to postpone a cause to the next assizes, the defendant forthwith to pay to the plaintiff the costs of the day, to be taxed. This order was afterwards made a rule of court, before which, however, the suit having abated by the defendant's death, the court refused to order the costs to be taxed, with a view to the plaintiff's issuing execution under this section. (*Hill* v. *Brown*, 11 Jur. 290; 16 Mees. & W. 796.)

A judge's order under the 6 & 7 Vict. c. 73, s. 43, ordering judgment to be entered up for the amount found by the master's allocatur to be due on an attorney's bill of costs, has the same force as a rule of court for the payment of money under this section. No action, therefore, need be brought on such order, and if brought, the costs of the writ, declaration and appearance will not be allowed. (*Griffiths* v. *Hughes*, 11 Jur. 313; 16 Law J., Exch. 176; 16 Mees. & W. 809; 4 Dowl. & L. 719.)

Orders charging stock.

Stock standing in the accountant-general's name to the separate account of a party against whom a judgment debt has been recovered, may be charged, under this statute, with the debt; but the charging order must be made, not by a judge in equity, but by a judge at common law; and although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and therefore does not interfere with the rights of prior incumbrancers. A court of equity will make a stop order as auxiliary to the charging order. A party intending to apply for a stop order must give notice of his application to all other persons having like orders on the funds. (*Hulkes* v. *Day*, 10 Sim. 41; 4 Jur. 1125. See *ante*, p. 564.) A judgment having been obtained against a party, to whom a sum standing to the credit of the cause had been ordered to be paid, the court, on the application of the judgment creditor, stayed the delivery to the debtor of the accountant-general's cheques. (*Robinson* v. *Wood*, 5 Beav. 388.) Courts of equity will carry into execution their orders for decrees and costs, by charging the government

1 & 2 *Vict.* c. 110, *s.* 18.

stock of the debtor under the provisions of this statute; and for that purpose it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute. (*Blake* v. *White*, 3 Y. & Coll. 434; 3 Jurist, 749.)

The court will not set aside a judge's order charging stock unless it is clear that such order ought not to have been made. (*Nicholls* v. *Rosewarne*, 28 L. J., C. P. 273.)

A decree for specific performance with a reference to the master to compute interest and tax costs, and ordering the defendant to pay the purchase-money, and interest and costs when ascertained, was held to constitute a judgment debt. (*Duke of Beaufort* v. *Phillips*, 1 De Gex & S. 321.)

A bill in equity to charge lands under the 13th and this section, with sums payable by virtue of a rule of court of common law, was held to be demurrable on the ground that the party filing the bill was not the person to whom the money was payable under the rule, but only the person for whose benefit such money was payable. (*Crowther* v. *Crowther*, 2 Jur., N. S. 274; 25 L. J., Ch. 511.)

A party, who has obtained a decree for an account of what is due to him, and payment of what shall be found due, cannot, pending the account, obtain a charging order, under this section, on the property of the defendant, such a decree not being a decree for the payment of money within the meaning of this section. (*Chadwick* v. *Holt*, 2 Jur., N. S. 918; 26 Law J., Ch. 76.)

The chief clerk's certificate, finding money to be due to a party, though adopted by the judge, is not an order for payment of money within this section, so as to make the sum found due carry interest. (*Earl Mansfield* v. *Ogle*, 4 De G. & J. 38.)

A decree directing payment to the credit of a cause does not constitute a plaintiff a judgment creditor of the defendant under this act. (*Ward* v. *Shakeshaft*, 8 W. R. 335.)

A judgment at law being given to be dealt with by a court of equity, it was held, that a charging order ought not to be obtained on such judgment without the leave of the Court of Equity. (*Spence* v. *Briscoe*, 26 Beav. 509.)

A. B. had obtained an order in the Exchequer for payment of costs, against a party to a suit in Chancery, who was tenant for life of certain property over which a receiver had been appointed, with directions to pay her the rents. Such an order having the effect of a judgment under this section, Lord *Langdale*, M. R., gave leave to A. B., notwithstanding the appointment of a receiver, to sue out and execute such writs as he might be advised. (*Grooch* v. *Hayworth*, 3 Beav. 428.) Under an agreement of reference a sum was awarded to be paid by the plaintiff to the defendant; and afterwards the agreement was made a rule of court. It was held, that the plaintiff could not, by virtue of the rule of court, issue execution for the sum under this section, that clause being applicable, for such purpose, only where the money payable by the rule is expressed in the rule itself. (*Jones* v. *Williams*, 11 Ad. & Ell. 175; 4 P. & Dav. 217.) Where there is a doubt as to the validity of an award, the court will not grant a rule under this section, calling upon the party to pay the sum awarded. (*Dickenson* v. *Allsop*, 13 Mees. & W. 722. See *Fawcett* v. *Eastern Counties Railway Company*, 6 Dowl. & L. 54.) A judge's order for payment of money obtained *ex parte* cannot be made the foundation of an execution under this section. (*Rickards* v. *Patterson*, 1 Dowl. P. C., N. S. 52; 8 Mees. & W. 313; 5 Jur. 894. See *Neale* v. *Postlethwaite*, 8 Dowl. P. C. 100.) A party to whom a sum of money has been made payable by a rule of court is entitled under this section to sue out execution for the amount without any leave obtained from the court for that purpose. (*Wallis* v. *Sheffield*, 3 Jur. 1002.)

The court will not make an order for payment of money directed by an award to be paid so as to enable the party entitled to receive it to avail himself of this section, except where the case is clear and free from doubt. (*Mackenzie* v. *Sligo and Shannon Railway Company*, 9 C. B. 250.) An attachment does not lie against a corporation, *e. g.* an incorporated railway company, for nonperformance of an award. (*Ib.* See 23 & 24 Vict. c. 126, s. 33.) The Court of Common Pleas refused a rule for payment of money

1 & 2 *Vict.* c. 110, *s.* 18.

under an award where it appeared that the unascertained costs of certain proceedings in Chancery were payable to the other party under the award. (*Lambe* v. *Jones*, 9 C. B., N. S. 478.)

A rule of court for the payment of money upon a condition *only* cannot be the foundation of a proceeding under this section. In an action by the plaintiffs as churchwardens to recover possession of a book belonging to the parish, a verdict was taken for the plaintiffs, subject to a special case. Upon the argument of the case the court directed a nonsuit. The case was afterwards turned into a special verdict, and upon argument it was agreed, "that the judgment of the court below should stand and the select vestry be at an end, the costs of both sides to be paid out of the parish funds." This agreement was embodied in an order of *Erle*, J., which was afterwards made a rule of court. Difficulties arising in carrying out this order, the court of error awarded a *venire de novo*, and upon the cause again coming on for trial an order of *nisi prius* was drawn up by consent, referring it to *Williams*, J., to determine the cause and all matters relating to it, with power to direct in what manner the order (and rule thereon) of *Erle*, J., was to be carried into effect. In August, 1852, *Williams*, J., made an order directing the defendants to pay the plaintiffs on the 1st March, 1853, 1,735*l.* 5*s.* 6*d.* (the amount at which the plaintiff's costs had been taxed) "unless in the meantime the sum be paid to the plaintiffs out of the funds of the parish." This last-mentioned order having been made a rule of court, and the money not having been paid, the plaintiffs issued an execution thereon under this section. It was held, that the order of *Williams*, J., was not an award, but a judge's order, and made with competent authority, but that being conditional it was not one upon which an execution could at once issue in pursuance of this statute. (*Gibbs* v. *Flight*, 13 C. B. 803.)

The form (No. 10) of the writ of execution, where a matter of account is referred to and decided on by an arbitrator, officer of the court or county court judge, as settled by the judges by the rule of Michaelmas Term, 1854, does not dispense with the signing of judgment or obtaining a rule or order under this section. (*Kendel* v. *Merrett*, 18 C. B. 173. See 17 & 18 Vict. c. 125, s. 3.)

To constitute a proper service of an award, a copy must be delivered to the party, and the original must, at the same time, be shown to him. Where the copy was personally delivered to the party on the 21st of October, and a demand of performance made on the 23rd, the original being then for the first time shown: it was held, that this was not such a service as to form the foundation either of an attachment or of a rule under this section. (*Lloyd* v. *Harris*, 8 C. B. 63.)

Where all matters in difference in a cause are referred by a judge's order, the court will enforce the payment of the sum awarded by a rule of court under this act, although the time for moving to set aside the award has not expired. An award ordering the defendant to pay the sum awarded to the plaintiff or his attorney S. is good without any power of attorney to S. to demand the money. (*Hare* v. *Fleay*, 20 Law J., C. P. 249; 15 Jur. 1038.)

A direction in an award, that one party shall pay money to a stranger, is good, if it does not appear impossible that such payment can be made for the benefit of a party to the award. (*Adcock* v. *Wood*, 20 Law J., Exch. 435.)

It is competent to a bankrupt, if he will, to become a party to a reference concerning a matter which has passed to his assignees, and if he is ordered by the arbitrator to pay costs the court will enforce the payment by a rule under this section. (*Re Milnes*, 15 C. B. 451; 18 Jur. 1108; 24 Law J., C. P. 29.)

The words of this section, "monies or costs, charges or expenses," mean money decreed or ordered to be paid, together with the costs, &c., to be ascertained on taxation by the officer of the court, and no order to pay costs is requisite. (*Jones* v. *Williams*, 8 Mees. & W. 349; 9 Dowl. P. C. 702; 5 Jur. 895.) Costs having been taxed upon a rule of court, the court refused to make an order upon the party to pay the ascertained amount, to found an execution under this section. (*Hodgson* v. *Patterson*, 5 Scott, N. R. 76; see

Rickards v. *Patterson*, 8 Mees. & W. 313; *Jones* v. *Williams*, 8 Mees. & W. 349; 9 Dowl. 702; *Neale* v. *Postlethwaite*, 1 Ad. & E., N. S. 243; *Doe* v. *Amey*, 8 Mees. & W. 365.) An order of the Court of Chancery requiring the defendants in a suit to pay a certain sum into the Bank, with the privity of the accountant-general, to the credit of the cause, is not an order which has the effect of a judgment within the provisions of this statute. (*Gibbs* v. *Pike*, 8 Mees. & W. 223; 9 Dowl. P. C. 131. See *post*, p. 585.) 1 & 2 *Vict.* c. 110, *s.* 18.

A solicitor has no lien upon real estate recovered by him for his costs and expenses in so doing. The taxing master's certificate when registered is not an order for the payment of money within this section. (*Shaw* v. *Neale*, 20 Beav. 157; 1 Jur., N. S. 666; 24 Law J., Ch. 563.)

An order for payment of costs operates only as against purchasers, mortgagees and creditors from the registration of the certificate of taxation. (*Hargrave* v. *Hargrave*, 23 Beav. 484.)

New Register.

19. No judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and title of the cause or matter in which such judgment, decree, order or rule, shall have been obtained or made, and the date of such judgment, decree, order or rule, and the account of the debt, damages, costs or monies thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order or rule; and such officer shall be entitled for any such entry to the sum of 5*s.*; and all persons shall be at liberty to search the same book on payment of the sum of 1*s.* (*n*). No judgment, decree, &c. to affect real estate otherwise than as before the act, until registered (*m*).

(*m*) This section is extended to the Common Law and Palatinate Courts, and to the Equity Court of Durham. (18 & 19 Vict. c. 15, *s.* 2, *post*, p. 604.)

(*n*) See 2 & 3 Vict. c. 11, ss. 2—4, *post*, pp. 589, 590.

By a decree, A. was ordered to pay the defendant's costs of a suit. After the decree, but before a registry, A. sold his real estate, which was the whole of his property, to C., who had notice of the suit. The purchase-money was received by B., who was A.'s solicitor, and who retained a considerable part of it to pay his costs in the suit. On a bill by the defendant in the former suit against A., B. and C., to set aside the sale and to charge the costs on the estate: it was held, that the sale was not fraudulent within the 13 Eliz. c. 5, and that the decree not having been entered pursuant to the provisions of this section till after the sale, the court had no jurisdiction to make the costs of the former suit a lien on the estate. (*Nortcliffe* v. *Warburton*, 8 Jur., N. S. 854; 31 L. J., Chan. 777; 10 W. R. 635. See 18 & 19 Vict. c. 15, *s.* 4, *post*, p. 605.)

S. had recovered a judgment against L., which he had registered in the Common Pleas under this section. Afterwards H. registered his judgment in the Common Pleas, and the land being in Middlesex he registered it also Priority obtained by registration.

1 & 2 *Vict.* *c.* 110, *s.* 19.

in Middlesex under stat. 7 Ann. c. 20, s. 18. Afterwards S. registered his judgment in Middlesex. It was held, that H.'s judgment had priority before S.'s judgment. The only objection made to the title of H. was, that S.'s elegit ought to have priority, because his judgment was registered first in the Court of Common Pleas, although H.'s judgment was registered first in the register for the county of Middlesex. But Lord *Campbell*, C. J., said, according to our decision in *Westbrook* v. *Blythe* (3 E. & B. 737; *ante*, pp. 567, 568), which we see no reason to question, a judgment registered in the Common Pleas will have the effect of a charge upon a term in lands in the county of Middlesex only from the time when judgment has also been registered in the registry for Middlesex, and before S.'s judgment was registered in the registry for Middlesex, H.'s judgment had been registered both in the registry of the Common Pleas and in the registry for Middlesex, so that his charge was complete and ought to have priority. (*Hughes* v. *Lumley*, 4 Ell. & Bl. 274.)

A judgment registered in Middlesex under the 7 Ann. c. 20, takes priority over an earlier unregistered judgment, notwithstanding notice. (*Benham* v. *Keane*, 1 Johns. & H. 685; 7 Jur., N. S. 1096; 9 W. R. 765. Affirmed on appeal, 10 W. R. 67.) A mortgage registered under the 7 Ann. c. 20, with notice of an existing unregistered judgment is postponed in equity to such judgment. (*Ib.*)

A decree in equity for the payment by the defendant to the plaintiff of a sum of money on or before a certain day was held, in reference to the provisions of this act, not to confer any priority as against a deed executed by the defendant conveying his freehold estate in a register county to trustees for the benefit of his creditors, or as against a vesting order made on the defendant's insolvency, the deed having been executed and the vesting order having been made previously to the registration of the decree. (*Lee* v. *Green*, 6 De G., Mac. & G. 155; 2 Jur., N. S. 170; 25 L. J., Chan. 269.) It was held, also, that the non-registration of the deed and of the vesting order until after the registration of the decree was immaterial, it being proved that the plaintiff had notice of the deed and of the vesting order when he registered the decree. (*Ib.*)

Judgment at law was obtained in an action in which the defendant was sued in a wrong christian name, but the judgment was registered against the debtor in his true christian name, adding the title of the cause with the wrong christian name: it was held, that this registration complied with this act, and that the judgment was good against the debtor and valid against his other creditors. (*Beavan* v. *Oxford* (*Earl*), 3 Sm. & G. 11; 1 Jur., N. S. 154; 24 L. J., Ch. 311.)

The plaintiff, after making an entry of a judgment obtained against the defendant in the book of the senior master of the Common Pleas, pursuant to this section, with a view of charging the defendant's real estate, took him in execution under the same judgment. The defendant became insolvent, and his assignee contracted to sell his real estate. The purchaser refused to complete the purchase in consequence of the entry of the judgment which charged the property. The plaintiff having refused to consent to an entry of satisfaction being made in the book, the court, on the application of the assignee, granted a rule, ordering the plaintiff's attorney to attend before the senior master of the Common Pleas, and consent to an entry being made that the plaintiff had taken the defendant in execution under the judgment, after having made the entry. (*Lewis* v. *Dyson*, 1 B. C. C. 33; 16 Jur. 222; 21 Law J., Q. B. 194.)

The court has no jurisdiction over the senior master, as to the entry of particulars of a judgment for the purpose of charging lands under this section. The master must act upon his own discretion. (*Ex parte Ness*, 5 C. B. 155.) An order was made in a suit in equity that one G. should pay in, to the name of the accountant-general (in trust in the cause), a certain sum of money admitted by his answer to be the amount of a sale of a trust fund, and the solicitor for the defendant registered it under this section, and G. was in consequence prevented from disposing of his lands: it was held, that the registering of the order was not *per se* a wrongful act, and that no action was maintainable without proof of malice. It seems that the order was

within the equity of 1 & 2 Vict. c. 110, s. 18. (*Gibbs* v. *Pike*, 9 Mees. & W. 351; 12 Law J., Exch. 257. See *ante*, p. 583.)

1 & 2 *Vict.* c. 110, *s.* 19.

The Court of Chancery has no jurisdiction to order the master of the Common Pleas to vacate a memorandum entered under this act, of an order of the former court. (*Wells* v. *Gibbs*, 3 Beav. 399.)

New Writs.

20. Such new or altered writs shall be sued out of the courts of law, equity and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act (*n*).

New writs to be framed (*m*).

(*m*) This section is extended to the Common Law and Palatinate Courts, and to the Equity Court of Durham. (18 & 19 Vict. c. 15, s. 2, *post*, p. 604.)

(*n*) Forms of writs of execution are contained in the schedule to the Reg. Gen. Hil. T. 1853, made in pursuance of the Common Law Procedure Act, 1852, which forms may be used in cases to which they are applicable, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their validity or regularity. (1 Ell. & Bl. App. pp. xxix, xxxiv—lv. See orders for the regulation of the practice and proceedings of the Court of Chancery, with the forms of writs of *fieri facias*, *elegit* and *venditioni exponas*, 9 May, 1839; 4 My. & Cr. Appendix; 3 Jur. 410. See Morgan's Ch. Acts, pp. 604—622, 3rd ed.) The forms of writs in bankruptcy under this act are prescribed by the Rules in Bankruptcy. (See Shelford's Law of Bankruptcy, App. pp. xxxii, xxxvii, 3rd ed.)

Courts of Lancaster and Durham.

21. All the remedies, authorities and provisions of this act applicable to her Majesty's superior courts of common law at Westminster, and the judgments and proceedings therein, shall extend to and be applicable to the Court of Common Pleas of the county palatine of Lancaster and the Court of Pleas of the county palatine of Durham, within the limits of the jurisdiction of the same courts respectively; and the judgments of each of the said last-mentioned courts shall, within the limits of the jurisdiction of the same courts respectively, have the same effect in all respects as the judgments of any of her Majesty's said superior courts at Westminster, under and by virtue of this act; and all powers and authorities hereby given

Powers, &c. of this act applicable to the courts and judges at Westminster, to be applicable to courts of Lancaster and Durham.

1 & 2 *Vict.* c. 110, *s.* 21.

to the judges or any judge of her Majesty's superior courts at Westminster, with respect to matters depending in the same courts, shall and may be exercised by the judges or any judge of the said Court of Common Pleas at Lancaster or the justices or any justice of the said Court of Pleas at Durham, with respect to matters therein depending, and within the jurisdiction of the same courts respectively: provided always, that no judgment of either of the same last-mentioned courts shall by virtue of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and title, trade or profession of the plaintiff and defendant, the date when such judgment was signed, and the amount of the debt, damages and costs thereby recovered, shall be left with the prothonotary or deputy prothonotary, or some other officer to be appointed for that purpose by the said courts respectively, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is to be affected thereby; and such officer shall be entitled for every such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book on payment of the sum of one shilling: and provided also, that no order or other proceeding under this act, made by any justice or justices of the said Court of Common Pleas of the county palatine of Lancaster or the Court of Pleas in the county palatine of Durham, shall be valid or effectual except made in open court on one of the court or return days of the same court, except such justice or justices shall be also a judge or judges of one of the said courts at Westminster: provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice or justices of the Court of Pleas in the county palatine of Durham, who shall not be a judge or judges of one of the said courts of common law at Westminster.

Judgments of Inferior Courts.

For removal of judgment of inferior courts.

22. In all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing this act a barrister of not less than seven years' standing shall act as judge, assessor or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid whereby any sum of money or any costs, charges or expenses shall be payable to any person, it shall be lawful for the judges of any of her Majesty's superior courts of record at Westminster, or if such inferior court be within the county palatine of Lancaster, for the judges of the Court of Common Pleas at

Lancaster, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses, shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record or rule or order, as the case may be, being respectively under the seal of the inferior court, and the signature of the proper officer thereof, to order and direct the judgment, or as the case may be, the rule or order of such inferior court, to be removed into the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be, and immediately thereupon such judgment, rule or order shall be of the same force, charge and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof, as if such judgment so recovered or rule or order so made had been originally recovered in or made by the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order: provided always, that no such judgment or rule or order, when so removed as aforesaid, shall affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, any further than the same would have done if the same had remained a judgment, rule or order of such inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same (*p*).

1 & 2 *Vict.* c. 110, *s.* 22.

(*p*) The proviso at the end of this section is repealed by 18 & 19 Vict. c. 15, s. 7, *post*, p. 606. Where a judgment is removed from an inferior court for execution under this act, the court will only enforce the judgment, and will not inquire into the regularity of previous proceedings below. (*Simons* v. *Count de Wintz*, 8 Dowl. P. C. 646.) A final order or decree of the vice-warden of the Stannary Courts, on the equity side, may be removed into the Court of Queen's Bench, the defendant having gone out of the jurisdiction, in order to issue execution pursuant to this section. (*Harvey* v. *Gilbard*, 7 Dowl. P. C. 616; 3 Jur. 316.) Under this statute such an order or decree may be made a rule of the Court of Queen's Bench by a rule absolute in the first instance. (*Ib.*, see 7 Dowl. P. C. 525.)

The judgment of a county court constituted under the 9 & 10 Vict. c. 95, is not removable into a superior court for the purpose of execution, either under the 19 Geo. 3, c. 70, s. 4, or this section. (*Moreton* v. *Holt*, 10 Exch. 707; 1 Jur., N. S. 215; 24 Law J., Exch. 169.)

The Court of Chancery will aid a judgment of a county court, which cannot be enforced at law against the equitable chattel estate of the defendant. (*Bennett* v. *Powell*, 3 Drew. 326.)

Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are sup-

1 & 2 *Vict.* c. 110, *s.* 22.

ported and enforced; and the same rule applies to inferior courts in this country, and applies equally whether they be courts of record or not. (*Parke*, B., *Williams* v. *Jones*, 14 Mees. & W. 633.)

Entry of satisfaction on roll.

In order to acknowledge satisfaction of a judgment, it shall be required only to produce a satisfaction piece in form as hereinafter mentioned, and such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives, and such signature or signatures shall be witnessed by a practising attorney of one of the courts at Westminster, expressly named by him or them and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece, before the same is signed, and which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, and state he is witness as such attorney [provided that a judge at chambers may make an order dispensing with such signature under special circumstances, if he thinks fit], and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the master may direct.

FORM OF SATISFACTION PIECE.

"In the ——.

"Monday the —— day of ——, A.D. 186—.

"—— to wit. Satisfaction is acknowledged between —— plaintiff, and —— defendant in an action —— for —— and ——. And —— do hereby expressly nominate and appoint ——, attorney-at-law, to witness and attest —— execution of this acknowledgment of satisfaction.

"Judgment entered on the —— day of ——, in the year of our Lord 186—. Roll No. —.

"Signed by the said ——, in the presence of me, ——, of ——, one of the attorneys of the Court of ——, at Westminster: and I hereby declare myself to be attorney for and on behalf of the said ——, expressly named by h—, and attending at h— request, to inform h— of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h—); and I also declare that I subscribe my name hereto as such attorney."

—— ——, The above-named plaintiff. (Date.)

(1 Ell. & Bl. App. p. xvi, Rule 80.)

Entry of satisfaction on judgments.

Upon a satisfaction piece, duly signed and attested in accordance with R. 80 of Reg. Gen. H. T. 1853, being presented to the clerk of the judgments of the masters in the court in which the judgment has been signed, he shall file the same, and enter satisfaction in the judgment book against the entry of the said judgment, and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment. (Reg. Gen. E. T. 23rd April, 1857; 3 Jur., N. S., Part II., p. 176; 2 C. B., N. S. 92.)

The court or a judge will compel a plaintiff, who has received satisfaction of his judgment, to execute the proper satisfaction, in order to have the entries on the registers duly vacated. (*Fish* v. *Tindal*, 10 W. R. 801, Exch.)

ACT FOR FURTHER PROTECTION OF PURCHASERS AGAINST JUDGMENTS, &c.

2 & 3 Victoria, c. 11.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens and Fiats in Bankruptcy (p). [4th June, 1839.]

Dockets to be closed.

2 & 3 *Vict.* c. 11, *s.* 1.

No judgment to be hereafter docketed under the provisions of 4 & 5 Will. & M. c. 20.

Whereas it is desirable that further protection should be afforded to purchasers against judgments, crown debts and lis pendens; be it therefore enacted, that no judgment shall hereafter be docketed under the provisions of an act passed in the fourth and fifth years of the reign of their late Majesties King William and Queen Mary, intituled "An Act for the better discovery of Judgments in the Courts of King's Bench, Common Pleas and Exchequer, at Westminster," but that all such dockets shall be finally closed immediately after the passing of this act, without prejudice to the operation of any judgment already docketed and entered under the said recited act, except so far as any such judgment may be affected by the provisions hereinafter contained (*q*).

(*p*) This act is repealed so far as relates to the protection of purchasers against secret acts of bankruptcy and fiats in bankruptcy. (12 & 13 Vict. c. 106, s. 1.)

(*q*) By stat. 4 & 5 Will. & Mary, c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3, judgments were directed to be docketed in alphabetical order; and it was declared that no judgments should affect lands or tenement as to *bonâ fide* purchasers, unless docketed and entered according to the act. Docketing the issue is not a sufficient docketing of a judgment within the provisions of the above act. (*Braithwaite* v. *Watts*, 2 Cr. & J. 318; 2 Tyr. 293. See *Brandling* v. *Plummer*, 3 Jur., N. S. 401; 26 L. J., Ch. 326.)

All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day, but it shall be competent for the court or a judge to order judgment to be entered *nunc pro tunc*. (Reg. Gen. H. T. 1853; 1 Ell. & Bl., App. xii., Rule 56.)

Docketed Judgments to be entered pursuant to Stat. 1 & 2 Vict. c. 110.

As to judgments already docketed.

2. No judgment already docketed and entered under the said recited act of their late Majesties King William and Queen Mary shall, after the first day of August, one thousand eight

2 & 3 *Vict.* c. 11, *s.* 2.

hundred and forty-one, affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until such memorandum or minute thereof as is prescribed in an act passed in the first and second years of her present Majesty Queen Victoria, intituled "An Act for abolishing Arrest on Mesne Process and Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England," shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings (*r*).

1 & 2 Vict. c. 110.

(*r*) See *ante*, s. 19, p. 583.

Date of Minute.

The date when the memorandum of judgment is left to be entered in a book.

3. In addition to the entry by the said last-mentioned act or by this act required to be made in a book by the senior master of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him (*s*).

(*s*) An outstanding docketed judgment not registered pursuant to 1 & 2 Vict. c. 110, s. 19, and this act, is not a valid objection to the title of the vendor on the sale of realty. (*Bedford* v. *Forbes*, 1 Carr. & K. 33.)

The 3rd, 4th, 5th and 7th sections of this act are extended to the courts of counties palatine. (18 & 19 Vict. c. 15, s. 3.)

Judgments to be registered periodically.

Judgments, after five years from entry to be void, unless a fresh memorandum is left.

4. All judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which since the passing of the said recited act of the first and second years of the reign of her present Majesty have been registered under the provisions therein contained, or which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements and other hereditaments, as to purchasers, mortgagees or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years

before the right of such creditors accrued, and so, toties quoties, at the expiration of every succeeding five years (*r*); and the senior master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shilling (*s*). *2 & 3 Vict. c. 11, s. 4.*

(*r*) A., B. and C. were judgment creditors of D.; A. and B. having priority to C. A. and B. subsequently omitted to register their judgments within five years from their previous registration; C. duly registered within the five years: it was held, that A. and B. did not thereby lose their priority to C. (*Beavan* v. *Earl of Oxford*, 6 De G., M. & G. 492; 2 Jur., N. S. 121; 25 L. J., Ch. 299.) The effect of the provisions of this section is to deprive the judgment creditor who omits to register within five years of protection against subsequent purchasers, mortgagees and creditors; but not to alter his position as to previous purchasers, mortgagees and creditors. (*Ib.*) The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mortgagees and creditors. (*Ib.*) The decision in *Shaw* v. *Neale*, (20 Beav. 157; 1 Jur., N. S. 666; 24 L. J., Ch. 563,) as to the effect of omitting to register within five years, was observed upon and in substance overruled. (*Ib.*) **Registration.**

Under this act, if A. has a judgment registered under the 1 & 2 Vict. c. 110, s. 18, (*ante*, p. 579,) such registration will protect him against all who become mortagees or purchasers during the currency of the five years, and such protection will continue as to them under a re-registration, even though he should have omitted to re-register within five years; but as to persons becoming mortgagees or purchasers between the period when his first registration ceased and when his re-registration began, he will not be protected, but they will have priority over him. (*Shaw* v. *Neale*, 6 H. L. Cas. 581; 4 Jur., N. S. 695; 27 L. J., Ch. 444.) Lord *Cranworth*, C., said, he had no doubt whatever that what the legislature intended was this, to give to a registered incumbrancer the benefit of that registration during the five years in which it endured, and to render it a protection to him against any purchasers, mortgagees or creditors, who might become so during the currency of the period of registration. And so with respect to re-registration, and *toties quoties* at the end of every five years when registration is required, so that, according to his Lordship's view of the construction of this provision, if, after the expiration of the five years, the incumbrancer omitted to re-register, and in the intervening period before his re-registration a person became a mortgagee or purchaser of the estate, that subsequent re-registration would not prevail against such mortgage or purchase, but that mortgage or purchase would have priority over the incumbrance which the party had failed to re-register within the term, and so advantage would be given to other parties to intervene, and to obtain the benefit as of a prior security. (*Ib.* 605.) This act applies to all purchasers, mortgagees and creditors deriving title through the debtor, whether directly from him or not. (*Ib.*) Therefore where a purchaser, with notice of a judgment debt then being on the register, afterwards mortgaged the estate, and at the date of the mortgage five years had elapsed without re-registration of the judgment: it was held, that the mortgagee was not affected thereby. (*Benham* v. *Keane*, 1 Johns. & H. 685; 31 L. J., Ch. 129; 8 Jur., N. S. 604.) *Wood*, V. C., said, the intention of the act was to make a five years' search sufficient, and to remedy the inconvenience of those laborious searches which were formerly thought necessary, though in one sense a person might consider himself safer in not looking at the register at all. Looking, however, to the risk arising from the doctrine of constructive notice, it was generally thought prudent to search the register, and the object of this act is to limit the necessity for a search to a period of five years. (*Ib.*; 31 L. J., Ch. 135, 136; 1 Johns. & H. 708.)

This provision refers only to creditors who have some right or interest in such lands, tenements or hereditaments, as, for example, by virtue of a creditor's decree directing a sale of such property. Creditors of a deceased debtor have not on his death a right against his leasehold property in the

2 & 3 *Vict.* c. 11, *s.* 4.

hands of his executor or administrator within the meaning of this act. It was questioned if they have even after a creditor's decree any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors. (*Simpson* v. *Morley*, 2 Kay & J. 71.)

In 1846, the plaintiff, a mortgagee with power of sale under a deed of mortgage dated in January, 1844, contracted to sell the mortgaged premises to the defendant. At the date of the contract the premises in question were subject to two judgments registered against the mortgagor in 1843, but it appeared that on taking his mortgage the plaintiff also took an assignment to a trustee for himself of the residue of a term of 1,000 years in the premises created in 1818, and it was denied by the plaintiff that at the date of the mortgage he had notice of the judgment. The defendant, who had been let into possession, having refused to complete the contract by payment of the purchase-money, the suit was instituted for a specific performance of the contract. Shortly afterwards, the five years from the date of the registration of the judgments terminated without a re-registration of such judgments having been made pursuant to this section, and afterwards, pending the suit, one only of such judgments was re-registered: it was held, upon appeal from the decree of Sir *J. Stuart*, V. C., for specific performance, that the purchaser could not be forced to take a conveyance of the premises in question, except upon the terms either of the concurrence therein of the judgment creditor who had re-registered, and of the other in case he should re-register, or of a release or exoneration of the premises from the judgments. (*Freer* v. *Hesse*, 17 Jur. 703; 22 Law J., Ch. 597.)

Search for judgments.

(*s*) The search for judgments on a purchase or mortgage was rarely carried back beyond twenty years, because the lapse of that period raised, as has been already stated, the presumption of satisfaction (*ante*, p. 259); and now, by stat. 3 & 4 Will. 4, c. 27, s. 40, no action or suit or other proceeding shall be brought to recover any sum of money secured by any judgment but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless the charge be kept alive by part payment, or by some written acknowledgment. (See *ante*, pp. 248, 250—252.) The search for judgments need not be extended beyond five years, because the second section of this act (*ante*, p. 589) has provided that no judgment already docketed under 4 & 5 Will. & Mary, c. 20, shall, after the 1st August, 1841, affect any lands as to purchasers, mortgagees or creditors, unless and until the minute thereof prescribed by the 1 & 2 Vict. c. 110, s. 19 (*ante*, p. 583), shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments. The 4th section of this act has further provided that all judgments, decrees or orders, rules and orders, which had been registered under the 1 & 2 Vict. c. 110, or which thereafter should be so registered, are, in order to bind purchasers, mortgagees or creditors, to be again registered every *five years*. With respect to the question, in what cases search should be made for judgments, it is said the answer is, that in *no case* should a purchaser now dispense with such a search. The register of judgments should be searched, although the estate lie in a registered county. (Sugd. V. & P. 546, 14th ed.) In purchasing from a tenant in tail or remainderman it will be necessary to search for judgments against the preceding tenants in tail. (See *ante*, pp. 560, 566.) A purchaser should also search the Court of Chancery for statute deeds substituted for fines and recoveries, as well as the index in the Common Pleas for the certificates of acknowledgments of deeds by married women; in which index the names of married women and their husbands are alphabetically arranged. (See 3 & 4 Will. 4, c. 74, s. 87, *ante*, p. 415; Sugd. V. & P. 546, 14th ed.) There should be a search for grant of annuities. (18 & 19 Vict. c. 15, s. 12, *post*, p. 608; Sugd. V. & P. 547, 14th ed.)

When a judgment has been registered and a search has been made for such judgment, the person searching must be considered to have notice of the judgment. (*Procter* v. *Cooper*, 18 Jur. 444.) A., on the occasion of advancing his client's money to B., had a search made for judgments by his clerks; it did not appear whether, in the result of their search, the clerks

found any judgment against B., or whether they communicated anything to A. But in fact the search was made, and in fact there was a prior judgment entered up against B. A. afterwards took a mortgage of B.'s property, and then sold to C.: it was held, that the facts were sufficient evidence of notice of the judgment to A., so as to affect C. the purchaser, and let in the judgment. (*Procter* v. *Cooper*, 2 Drew. 1.) 2 & 3 *Vict.* c. 11, *s.* 4.

An estate was mortgaged to A., and afterwards to the defendant. The plaintiff subsequently obtained a registered judgment against the mortgagor. The defendant then purchased the equity of redemption without searching for judgments. On a bill to charge the equity of redemption with the judgment, the court held, that the defence of "purchase for valuable consideration without notice" was available in this case, and that it was not incumbent on a purchaser to search for judgments. (*Lane* v. *Jackson*, 20 Beav. 535. See Sugd. V. & P. 761, 14th ed.)

Facility is given for searches for crown debts, or a *quietus* in respect of them, by the 8th and 9th sections of this act; but the existence of crown debts incurred before the 4th June, 1839, must be ascertained by the old mode. (See *post*, p. 598.)

Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose, and interest on his deposit money. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and for the same reason, the comparison of deeds with the abstract should be early. (*Hodges* v. *Earl of Lichfield*, 1 Bing. N. C. 492, 499. See *Lodge* v. *Lysely*, 4 Sim. 75; *Foster* v. *Blackstone*, 1 Myl. & K. 259; *Forth* v. *Duke of Norfolk*, 4 Madd. 504; and Sugd. V. & P. 538, 547, 14th ed.)

After December 31st, 1859, provision as to registry contained in 2 & 3 Vict. c. 11, and 18 & 19 Vict. c. 15, to apply to crown debts.

From and after the thirty-first day of December, one thousand eight hundred and fifty-nine, the provision for re-registry of judgments, decrees or orders, rules or orders, contained in the act 2 & 3 Vict. c. 11, as explained and amended by the act of the 18 & 19 Vict. c. 15, shall extend and apply to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as is by section eight (*t*) of the first-mentioned act required to be registered, so that it shall be obligatory on the crown, in order to bind the lands, tenements or hereditaments of its debtors or accountants, as against purchasers, mortgagees or creditors, becoming such after the thirty-first day of December, one thousand eight hundred and fifty-nine, to re-register in like manner, as it is obligatory on a private person, and so that notice of any such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office not duly re-registered, shall not avail against purchasers, mortgagees or creditors, becoming such after the thirty-first day of December, one thousand eight hundred and fifty-nine, as to lands, tenements or hereditaments; and this provision shall apply to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as since the passing of the first-mentioned act has been registered under the provisions therein contained, or as shall hereafter be so registered. This section shall not extend to Ireland. (22 & 23 Vict. c. 35, s. 22.)

(*t*) *Post*, p. 595.

2 & 3 *Vict.* c. 11, *s.* 5.

PURCHASERS WITHOUT NOTICE.

Judgments duly registered not to affect purchasers or mortgagees more extensively than judgments of superior courts would hitherto have done.

5. As against purchasers and mortgagees without notice of any such judgments, decrees or orders, rules or orders, as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid, would have bound such purchaser or mortgagee before the said act of the first and second years of the reign of her present Majesty, where it had been duly docketed according to the law then in force (*t*).

(*t*) A judgment *registered* under the stat. 1 & 2 Vict. c. 110, does not bind leasehold lands against a purchaser for value without notice until an elegit is awarded, for before that act a *docketed* judgment did not bind such lands before an elegit was awarded. (*Westbrook* v. *Blythe*, 3 Ell. & Bl. 737, *ante*, p. 568.) A judgment is not such a charge upon land as will, by means of registration (apart from the stat. 1 & 2 Vict. c. 110), take precedence of a mortgage, though unregistered. (*Cathrow* v. *Ede*, 1 Sm. & Giff. 423.)

A decree for payment of money gives no right as against the land before registration. (*Lee* v. *Green*, 25 Law J., Chan. 269.)

A creditor by judgment registered pursuant to 1 & 2 Vict. c. 110, but not registered in the Middlesex registry, by suit sought priority over a mortgagee of a subsequent date, but whose security was properly registered in the Middlesex registry, and to foreclose him. The court, having regard to this section, in order to determine the priority directed an issue, whether the mortgagee had, at the date of his mortgage, actual notice of the judgment. (*Robinson* v. *Woodward*, 4 De G. & S. 562. See *Hughes* v. *Lumley*, 4 Ell. & Bl. 274; *ante*, p. 584.)

EXTINCT JUDGMENTS.

Not to revive judgments already extinguished or barred.

6. Nothing in the said recited act of her present Majesty nor in this act contained shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgments as between the parties thereto, or their representatives, or those deriving as volunteers under them.

REGISTRY OF LIS PENDENS.

Purchasers not to be affected by any lis pendens, unless such suit is duly registered as directed by this act.

7. No lis pendens shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical

order, by the name of the person whose estate is intended to be affected by such lis pendens; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of lis pendens which shall be registered under the provisions of this act (*u*). 2 & 3 *Vict.* c. 11, *s.* 7.

(*u*) By stat. 13 & 14 Vict. c. 35, s. 17, the filing of a special case under that act (which commenced on 1st of Nov. 1850), and the entering of appearances thereto by the persons named as defendants therein, shall be taken to be a *lis pendens*, and may be registered under the provisions of this act in like manner as any other *lis pendens* in a court of equity may now be so registered, and unless and until so registered, shall not bind a purchaser or mortgagee without express notice thereof. Special case to be a lis pendens, and may be re-registered.

It seems that, upon filing a bill in equity, there is a *lis pendens* before service of the bill; and that a general administration suit is a *lis pendens quoad* lands afterwards sold under the decree in it. (*Drew* v. *Earl of Norbury*, 3 Jones & L. 267.)

As to *lis pendens*, see *Kinsman* v. *Kinsman*, 1 Russ. & My. 617; Powell on Mortgages, by Coventry, Vol. 1, 541—547; Sugd. V. & P. 1044—1048.

Registry of Crown Debts.

8. No judgment, statute or recognizance which shall hereafter be obtained or entered into in the name or upon the proper account of her Majesty, her heirs or successors, or inquisition by which any debt shall be found due to her Majesty, her heirs or successors, or obligation or specialty which shall hereafter be made to her Majesty, her heirs or successors, in the manner directed by an act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, intituled "The Erection of the Court of Surveyors of the King's Lands, and the Names of the Officers there, and their Authority," or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, intituled "An Act to make the Lands, Tenements, Goods and Chattels of Tellers, Receivers, et cætera, liable to the Payment of their Debts," shall affect any lands, tenements or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and also in the case of any judgment the court and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages and costs thereby recovered, and also in the case of a statute or recognizance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also

Recognizances entered into not to affect purchasers, unless duly registered as directed by this act.

33 Hen. 8, c. 39.

13 Eliz. c. 4.

2 & 3 *Vict.* c. 11, s. 8.

in the case of an inquisition the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty the sum in which the obligee* shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office, and the time of the officer accepting the same, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled "The Index to Debtors and Accountants to the Crown," in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute or recognizance, inquisition, obligation or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee (*x*).

* Sic, query obligor.

Registry to be open to inspection.

Who are and are not accountants to the crown.

(*x*) The statute 13 Eliz. c. 4, enumerates a great many officers of the crown, and renders their lands liable to crown debts. That statute is repealed as to *receivers of customs*, by the 6 Geo. 4, c. 105, s. 13. (See 6 Geo. 4, c. 106, s. 7.) In *Wilde* v. *Fort*, 4 Taunt. 334, a commissioner of Dutch property who was directed by statute to pay the surplus of certain sales into the Bank of England, subject to the orders of the king in council, was considered to come within the words "receiver of any sums of money, imprest or otherwise, for the use of the crown." Money impressed by the crown is money advanced for the purpose of being employed by the party for the use of the crown. (6 Price, 424.) But in *Casberd* v. *Ward and the Attorney-General* (6 Price, 411), it was held, that a collector of assessed taxes is not a collector or receiver of money *to the use* of the king's majesty, within the purview of the statute. (See 16 Vin. Abr. 527—529. See 43 Geo. 3, c. 99, and 3 Geo. 4, c. 88, as to the bond by a tax collector and his surety, and the sale of lands and goods under it. (*Gwynne* v. *Burnell*, 2 Bing. N. C. 7; 9 Bing. 544.) A recognizance by a guardian in the matter of a minor is not a debt due to the crown upon which an extent can issue, as the debt not being of a public nature, is not altered by the form of the security. (*Ex parte Usher*, 1 Rose, 366.) It was formerly questioned whether a bond to the crown, entered into by the committee of a lunatic, in consequence of a grant of the lunatic's estate having been made to him in the usual form, under the great seal, be an obligation of the same force and effect as a statute staple within the 33 Hen. 8, c. 39, s. 50, so that an extent may be issued on it. (*Rex* v. *Lamb*, M'Clel. 402; 13 Price, 649. See form of bond in Shelford on Lunatics, 849, 850, 2nd ed.) It has been decided that such bond is within that statute, and that the crown is entitled to treat it as matter of record, and to have a *scire facias* thereon. (*Reg.* v. *Chambers*, 11 Mees. & W. 776.) A bond to the crown under 33 Hen. 8, c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond. The giving such a bond is the voluntary act upon the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the crown. Such bond is within the 33 Hen. 8, c. 39, though made payable to "the king, his heirs and successors," and, being a record, can be looked at by the court, although it be not set out in the pleadings. (*Reg.* v. *Ellis*, 4 Exch. 652.) A deputy assistant commissary-general was held to be a public accountant within the meaning of the statutes, subjecting the property of certain accountants with the crown to seizure and sale for satisfaction of the balance against them. (*Rex* v. *Fernandes*, 12

2 & 3 *Vict.* c. 11, *s.* 8.

Price, 862.) An agent of a fire insurance company, who has received premiums and duties for the company to whom he has given security, is liable to a writ of immediate extent for the duties, although the company be also liable to the crown. (*Rex* v. *Wrangham*, 1 C. & J. 408; 1 Tyr. 383.) A person employed in the service of the crown as deputy commissary-general to the forces abroad, and assistant commissary in the islands of Guernsey and Alderney, and employed in the negotiation of Bank of England notes received from the paymaster-general of the forces, and of bills of exchange received from the treasury on account of the public service, having also received specie on the same account, is accountable to the crown, and is, as such accountant, within the stat. 13 Eliz. c. 4, s. 1, and his lands, of which he was seised at any time during the period of his accountability, are bound by his engagement with the public, and subjected to prerogative process for security and payment of the balance ultimately declared against him. (*Rex* v. *Rawlings*, 12 Price, 834.)

When lien of crown attaches.

In cases coming within the stat. 13 Eliz. c. 4, the lien of the crown attaches from the time at which the owner of the land becomes a receiver and accountant; so that a sale made after the acceptance of the office, and before any debt is contracted, may, to the extent of the interest of the crown, be defeated by the existence of a subsequent debt to the crown. (*Nicholls* v. *How*, 2 Vern. 389; *King* v. *Bishop of Sarum*, Moore, 126; 25 Geo. 3, c. 35.) All freehold lands are liable to the execution of the crown, and *trust estates* (*Earl of Devonshire's case*, 11 Rep. 92; 13 Eliz. c. 4, s. 5) as well as legal estates, are bound by this lien. Consequently the plea of being a purchaser for valuable consideration, without notice, will not avail against the crown; and a purchaser, though thus favourably circumstanced, cannot use an attendant term as a protection against the crown. (*Rex* v. *Smith*, Sugd. V. & P. 673, 778, 1098, 11th ed.; *How* v. *Nichol*, Pr. Ch. 125. See *Rex* v. *St. John*, 2 Price, 317; *Rex* v. *Hollier*, 2 Price, 394.) Where the term never was held in trust for the crown debtor, it may be used as a defence against the crown debt. (*Rex* v. *Lamb*, 13 Price, 649; M'Clel. 402.) Entailed lands are chargeable under 33 Hen. 8, c. 39, s. 76, when the lien attached on the *heir in tail*, as such, under the statute, a *bonâ fide* alienation by the heir in tail before the *teste* of the writ of extent would bind the crown. (*Anderson's case*, 7 Rep. 21.) An agreement on borrowing (by recital in a bond) money, on the part of the borrower, that certain real property, freehold and leasehold, should stand pledged for repayment of it, and a delivery of the title deeds, amounting in equity to a mortgage or right to a mortgage, creates a lien binding as against the prerogative lien of the crown, in respect of a debt accruing due to the king subsequently; and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the crown debtor, seized under an extent in chief. (*Fector* v. *Philpot*, 12 Price, 197.) Where part of the property so equitably pledged was leasehold, renewable by the lessee, and the equitable mortgagee had procured a renewal of the lease in the name of the lessee (the crown debtor), by surrendering the original lease, and taking a new one of the same premises after the crown debt had accrued, such new lease, and the premises leased thereby, were held to be subject to the equitable lien on the old lease, and the lien to be preferable to the demand on the part of the crown against the crown debtor, in respect of priority of satisfaction out of the proceeds of the sale. (*Ib.*) When the mortgagor had become bankrupt, an equitable mortgagee was not allowed the costs of successfully defending an extent in aid. (*Ex parte Stevens*, 2 Mont. & Ay. 31; see 12 & 13 Vict. c. 106, s. 127.)

The crown is not entitled to recover against its debtors under an extent property which had been fairly and *bonâ fide* assigned to other creditors prior to the time when the debt to the crown was incurred. A. and B. carried on business in partnership; they were also members of a firm, which traded as C. & Co.: A. and B., for the purposes of paying off certain of their debts, assigned in trust to the other members of the firm of C. & Co. portions of their shares in that firm. The assignment, which was *bonâ fide*, was regularly intimated, and it was duly entered in the books of the firm. An extent at the suit of the crown afterwards issued against A. and

2 & 3 *Vict.* c. 11, *s.* 8.

B.: it was held, that the portions of the shares thus assigned could not be seised under the extent. (*Spears* v. *The Lord Advocate*, 6 Cl. & Fin. 180, 189. See *Scott* v. *Scholey*, 8 East, 467; *Rex* v. *Sanderson*, 1 Wight. 51; *Rex* v. *Lee*, 6 Price, 369.)

It was held no objection to the title to an estate, that an extent had issued from the crown against the owner, which remained in the hands of the sheriff unexecuted, it appearing that the Lords of the Treasury had in fact compromised the debt, though a writ of *amoveas manus* had not actually issued. (*Poole* v. *Shergold*, 1 Cox, 160.) But it was held a sufficient objection to a title, that a person under whom the vendors claimed held during his seisin of the estate an office under the crown, and that his accounts with the crown had not been liquidated. (*Wilde* v. *Fort*, 4 Taunt. 334; *ante*, p. 596.)

The stat. 6 & 7 Will. 4, c. 28, (amended by 2 Vict. c. 61,) enables persons to deposit stock or Exchequer bills in lieu of giving security by bond to the postmaster-general, and to the commissioners of land revenue, customs, excise, stamps and taxes.

On the subject of crown debts, see West on the Law and Practice of Extents in Chief and in Aid, 8vo. 1817; Manning's Practice of the Court of Exchequer, 8vo. 1827; 5 Jarm. Convey. by Sweet, pp. 64 f, 79; Butl. Co. Litt. 209 a, 18th ed.; Har. Index, tit. Extent.

Searches for crown debts.

Before the above act there was no easy and certain mode of guarding against the risk of crown debts, on account of there being no index to debtors and accountants to the crown. The usual searches for crown liabilities were made at the Exchequer Office, and amongst the receivers-generals' bonds at the Tax Office. (2 Real Prop. Rep. 12.)

As the estates of persons who are indebted to the crown remain liable during the existence of any part of the debt, it is necessary in all cases of sale or mortgage to ascertain whether the present or former owners have become accountants to the crown either on their own account or as sureties for others. Independently of the register to be established under this act, the fact could never be ascertained with certainty, because there was no place in which the existence or the amount of debts due to the crown can be discovered; but it was proper to inquire of the vendor's solicitor and the connections of the parties as to the existence of any such debts, and to make inquiries at any of the public offices with which the owner probably had any dealings. (As to searches for judgments, see *ante*, pp. 592, 593.)

Registry of a Quietus.

Quietus to debtors or accountants to the crown to be registered.

9. Whenever a quietus shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior master of the said Court of Common Pleas, together with a certificate, signed by the accountant-general, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence (*x*).

(*x*) Formerly where a vendor was a debtor or accountant to the crown, the title was not good until a *quietus* was entered up on record. (See *Wilde* v. *Fort*, 4 Taunt. 334.) And a purchaser could not be compelled to take the title, although the crown consented to the payment of the purchase-money into the Exchequer on account of the debt. (*Brakespear* v. *Innes*, Sugd. V. & P. 1009, 11th ed.) Where it appeared that certain bonds, given to the crown to secure an advance of Exchequer bills, which had been duly

indorsed, had been paid off, but no *quietus* had been obtained, by reason of the abolition of the pipe-office, the court, upon the production of a warrant by the attorney-general on behalf of the crown, ordered the master to make a minute in the index of the crown debtors that the bonds had been satisfied; *valeat quantum*. (*Ex parte Fleetwood*, 4 Man. & G. 640; 5 Scott, N. R. 184.) A *quietus* obtained by a party who is an accountant to the crown is pleadable to all prior debts, although he continue to be an accountant, and become indebted afterwards to the crown. (*Ex parte Fleetwood*, 4 Man. & G. 644.)

2 & 3 *Vict.* c. 11, s. 9.

Discharge of Crown Debtor's Estate.

10. And whereas it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the crown from the claim of the crown in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged; be it therefore enacted, that it shall be lawful for the commissioners of her Majesty's treasury of the United Kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators and assigns, wholly exonerated and discharged from all further claims of her Majesty, her heirs or successors, for or in respect of any debt, claim or liability, present or future, of the debtor or accountant to whom such lands, tenements or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid.

For discharge of the estates of debtors or accountants to the crown in certain cases.

Part Discharge.

11. Any such certificate, or the discharge of any such lands, tenements or other hereditaments by virtue of this act, shall in nowise impeach, lessen or affect the right or power of her Majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor

Discharge of part of the estate of a debtor or creditor to the crown not to affect claim of the crown on other lands liable.

2 & 3 *Vict.* c. 11, *s.* 11.

or accountant to the crown out of or from any other lands, tenements or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained (*y*).

(*y*) By 1 & 2 Geo. 4, c. 121, s. 10, where an estate is sold under a writ of extent, or by the Court of Chancery or Exchequer, and the purchase-money is paid into the receipt of the king's exchequer, that will absolve the purchaser.

IRELAND.

Act not to extend to Ireland.

14. This act shall not extend to Ireland.

The provisions of the above act, with some alterations, were extended to Ireland by 7 & 8 Vict. c. 90. The law concerning judgments in Ireland is further amended by stat. 12 & 13 Vict. c. 95, and 13 & 14 Vict. c. 29.

3 & 4 Victoria, c. 82.

An Act for further amending the Act for abolishing Arrest on Mesne Process in Civil Actions.

[7th August, 1840.]

Definition and Extension of Property liable to Judgments.

3 & 4 *Vict.* c. 82.

1 & 2 Vict. c. 110.

Provisions of recited act as to property of judgment debtors defined and extended.

Recites the act 1 & 2 Vict. c. 110, s. 14 (*ante*, p. 572), and that doubts had been entertained whether the said provisions extend to the cases hereinafter mentioned: and declares and enacts, that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares as aforesaid as also in the dividends, interest or annual produce of any such stocks, funds, annuities or shares: and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to, or out of any such stocks, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities or shares or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

3 & 4 Vict. c. 82, s. 2.

REAL ESTATE NOT TO BE AFFECTED BY JUDGMENT UNTIL MEMORANDUM LEFT.

No judgment, decree, &c. to affect real estate, until memorandum left with the senior master of the Common Pleas, notwithstanding notice of such decree, &c. to purchaser, &c.

2. And whereas it was by the said act further enacted, that no judgments of any of the superior courts of common law at Westminster, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, should by virtue of the said act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as therein mentioned should be left with the senior master of the Court of Common Pleas at Westminster (*z*): and whereas doubts have been entertained whether a purchaser, mortgagee or creditor, having notice of any such judgment, decree, order or rule as aforesaid, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same as in the said act is mentioned may not have been left with the senior master of the said Court of Common Pleas; be it therefore further declared and enacted, that no such judgment, decree, order or rule as aforesaid, shall by virtue of the said act affect any lands, tenements or hereditaments at law or in equity as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the senior master of the said Court of Common Pleas at Westminster: any notice of such judgment, decree, order or rule to any such purchaser, mortgagee or creditor in anywise notwithstanding (*a*).

(*z*) See *ante*, s. 19, p. 583.

(*a*) See 18 & 19 Vict. c. 15, s. 5, *post*, p. 605.

FURTHER PROTECTION OF PURCHASERS AGAINST JUDGMENTS.

18 & 19 Victoria, c. 15.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Cases of Lis pendens, and Life Annuities or Rent-charges. [26th April, 1855.]

Whereas an act of parliament was passed in the session of the first and second years of her Majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England;" and another act in the session of the second and third years of her Majesty, intituled "An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy;" and another act in the session of the third and fourth years of her Majesty, intituled "An Act for further amending the Act for abolishing Arrest on Mesne Process in Civil Actions:" and whereas the provisions of the said acts respecting judgments, decrees, orders and rules, and lis pendens, ought to include and be applicable to the counties palatine of Lancaster and Durham, and the common law and equity courts thereof respectively: and whereas an act was passed in the session of the thirteenth and fourteenth years of her Majesty, intituled "An Act to amend the Practice and Proceedings of the Court of Chancery of the County Palatine of Lancaster," by force whereof the said provisions do to some extent include and are applicable to the county palatine of Lancaster, as far as regards the Court of Chancery thereof: be it therefore enacted as follows:

18 & 19 *Vict. c. 15, s. 1.*

1 & 2 Vict. c. 110.

2 & 3 Vict. c. 11.

3 & 4 Vict. c. 82.

13 & 14 Vict. c. 43, s. 24.

1. Any judgment of the Court of Common Pleas of the county palatine of Lancaster, or of the Court of Pleas of the county palatine of Durham, obtained before the coming into operation of the said act of the session of the first and second years of her Majesty, and not already registered in the said Courts respectively under the provisions of the same act, and which shall not be registered in the said Courts respectively under the same provisions as amended by this act, on or before the first day of November, one thousand eight hundred and fifty-five, shall not after that day affect any lands, tenements or hereditaments in

Judgments of common law palatinate courts obtained before coming into operation of 1 & 2 Vict. c. 110, and not registered under the same, not to affect lands, &c. unless registered within limited time.

18 & 19 *Vict.* c. 15, *s.* 1.

the said counties palatine respectively as to purchasers, mortgagees or creditors, unless and until such memorandum or minute of such judgment as in the said act prescribed shall be left with the prothonotary of the court in which the judgment has been obtained, who shall forthwith enter the same in manner by the same act as amended by this act directed in regard to judgments thereby authorized to be registered, and shall be entitled for every such entry to the sum of two shillings and sixpence; and the provision for re-registration, toties quoties, hereinafter mentioned, as explained by this act, is hereby extended and applied, mutatis mutandis, to judgments registered under this present provision.

Fee for entry of judgments.

Certain provisions of 1 & 2 Vict. c. 110, extended to common law palatinate courts, and to equity court of Durham.

2. And be it declared and enacted as follows: the provisions contained in the sections of the said act of the first and second years of her Majesty, numbered respectively 18, 19, and 20 (*a*), giving to certain rules of courts of common law, and decrees and orders of courts of equity, the effect of judgments in the superior courts of common law, and constituting the persons therein mentioned judgment creditors, and giving to courts of equity the powers by the same act given to the judges of the said superior courts, and giving to the persons so constituted judgment creditors as aforesaid such remedies as are therein mentioned, and authorizing the registration of such decrees, orders and rules as aforesaid, and providing for the writs to be sued out of courts of equity, shall extend and are applicable, mutatis mutandis, to the said counties palatine and the courts of common law thereof respectively, and to the Court of Chancery of the county palatine of Durham, within the limits of their respective jurisdictions, to the end that the same law in the respects aforesaid may apply to the courts of the said counties palatine, and the decrees, orders, judgments and rules thereof, so far as relates to lands, tenements and hereditaments within the jurisdiction of such courts respectively, as under the previous statutes amended by this act, will regulate the operation of judgments in the superior courts of common law: but no judgment, decree, order or rule of any court shall bind lands, tenements and hereditaments in the said counties palatine respectively, as against purchasers, mortgagees or creditors, unless and until such memorandum or minute thereof as hereinbefore is mentioned shall be left with the prothonotary of the palatine court in which are situated the lands, tenements and hereditaments intended to be charged thereby.

(*a*) See *ante*, pp. 579, 583, 585.

Certain provisions of 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82, extended to common law and equity courts of counties palatine.

3. The provisions contained in the sections of the said act of the second and third of her Majesty numbered respectively 3, 4, 5 (*a*) and 7 (*b*), and in the section of the said act of the third and fourth of her Majesty numbered 2 (*c*), respecting the particulars to be inserted in the register by the master, and respecting the re-registration of judgments, decrees or orders, and rules, and respecting the registration and re-registration of lis pendens, and respecting the protection of purchasers, mort-

gagees and creditors, as explained or amended by this act, shall extend and are applicable, mutatis mutandis, to the counties palatine and the courts of common law and Courts of Chancery thereof respectively, within the limits of their respective jurisdictions (*d*). 18 & 19 *Vict.* *c.* 15, *s.* 3.

(*a*) *Ante*, pp. 590, 594.
(*b*) *Ante*, p. 594.
(*c*) See *ante*, p. 602.
(*d*) See 22 & 23 Vict. c. 35, s. 22, *ante*, p. 593.

No judgment, &c. registered under 3 & 4 Vict. c. 82, to affect lands, &c. as to purchasers, &c. until registered.

4. And whereas the protection afforded to purchasers, mortgagees and creditors, by the said act of the third and fourth of her Majesty, against judgments, decrees, orders or rules not duly registered, any notice thereof notwithstanding, is confined to judgments, decrees, orders or rules binding by virtue of the said act of the first and second years of her Majesty: and whereas the docket or register previously in use has been closed, and the said provision ought not to be so restricted: be it therefore enacted, that no judgment, decree, order or rule which might be registered under the said act of the first and second years of her Majesty shall affect any lands, tenements or hereditaments, at law or in equity, as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order or rule to any such purchaser, mortgagee or creditor in anywise notwithstanding (*d*).

(*d*) See *ante*, p. 602.

Purchasers protected against judgments not registered.

5. And whereas it is expedient that certain doubts which have arisen upon some of the provisions for the protection to purchasers against judgments in the said acts contained should be removed; be it therefore declared and enacted as follows: the provisions contained in the section numbered 2 (*e*) of the said act of the third and fourth years of her Majesty extends and shall be deemed to extend as well to the act therein referred to as to the section numbered 4 (*f*) of the said act of the second and third of her Majesty, as explained by this act, so that notice of any judgment, decree, order or rule, not duly registered, shall not avail against purchasers, mortgagees or creditors as to lands, tenements or hereditaments.

(*e*) *Ante*, p. 602.
(*f*) *Ante*, p. 590.

Provision for re-registration explained.

6. Where by the said act of the second and third years of her Majesty re-registry of judgments, decrees, orders or rules is required within such period of five years as is therein mentioned, in order to bind purchasers, mortgagees and creditors, it shall be deemed sufficient to bind such purchasers, mortgagees and creditors if such a memorandum or minute as was required in the first instance is again left with the senior master of the Common Pleas within five years before the execution of

18 & 19 *Vict.* c. 15, s. 6.

the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest, in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditors accrued, as directed by the said last-mentioned act, although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or minute was left, and so toties quoties upon every re-registry.

Judgments of inferior courts, when removed, shall be registered.

7. Where by the section numbered 22 (*g*) of the said act of the first and second years of her Majesty power is given to remove judgments, rules or orders obtained in or made by certain inferior courts into the said superior courts, or into the Court of Common Pleas of Lancaster, as the case may be, no such judgment, rule or order which has already been or hereafter shall be so removed shall bind any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until after such removal it shall be registered, and, if necessary, re-registered, in like manner as in order to bind such purchasers, mortgagees or creditors, it must have been if originally entered up in one of the said superior courts, or in the said Court of Common Pleas of Lancaster, as the case may be; but from and after the passing of this act every such judgment, rule or order so registered, and where necessary re-registered, shall be binding in like manner, but not further or otherwise, as other judgments, rules or orders of the said superior courts or of the said Court of Common Pleas of Lancaster respectively, and the proviso at the end of the said section 22, restricting the operation of the same is hereby repealed.

(*g*) *Ante*, p. 586.

Extinguished judgments not revived.

8. Nothing herein contained shall extend to revive or restore any judgment which shall be extinguished or barred, or to affect or prejudice any such judgment, or any decree, order or rule, as between the parties thereto, or their representatives, or those deriving as volunteers under them.

Duties of prothonotary.

9. For the purposes of any registration or re-registration to be made in pursuance of this act in either of the said counties palatine, all such acts and things as under the provisions of the said several acts of the reign of her Majesty, ought to be done by or left with the senior master of the Court of Common Pleas at Westminster, shall be done by or left with the prothonotary or deputy prothonotary of the Court of Common Pleas of the county palatine of Lancaster, or of the Court of Pleas of the county palatine of Durham, as the case may require, or such other officer (if any) of the same courts respectively as may for the time being have been appointed by the same courts respectively for the purpose of entering the judgments thereof respectively, under the provisions of the said act of the first and second years of her Majesty; and the said prothonotary, deputy prothonotary, or other officer as aforesaid, shall be entitled to the sum of two shillings and sixpence, and no more, for the duties

Fees for registration and searches.

to be performed on every registration, and the sum of one shilling only for re-registration; and all persons shall be at liberty to search all or any of the books kept in pursuance of any of the foregoing provisions of this act in each court, for the sum of one shilling.

18 & 19 *Vict.* c. 15, s. 9.

10. And whereas by the section numbered 123, of the Bankrupt Law Consolidation Act, 1849, when any person admits (in manner therein mentioned) that he is indebted to a bankrupt, it is enacted, that every order of the Court of Bankruptcy for the payment by such person of the amount so admitted, and costs (if any), shall have the effect of a judgment in the said superior courts, and may be enforced accordingly, and by the section numbered 249 (*a*) of the same act: be it therefore enacted as follows: no such order of the Court of Bankruptcy for payment of money or of costs as aforesaid shall affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until it shall be registered, and if necessary re-registered, in like manner as in order to bind such purchasers, mortgagees or creditors, it must have been if it had originally been a judgment or rule obtained or entered up in one of the said superior courts or in the said palatine courts respectively, any notice of any such order to any such purchaser, mortgagee or creditor, in anywise notwithstanding.

No order of Court of Bankruptcy to affect lands, &c. until registered.

(*a*) This section is repealed by the Bankruptcy Act, 1861, s. 230, Schedule (G.).

Any court acting under the Bankruptcy Act, 1861, may in all matters before it award such costs as shall seem fit and just, and all costs so awarded shall be recoverable in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered, and the like remedies may be had upon an order of such court for costs, as upon a rule of any of the said superior courts for costs; but no such order shall affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until it shall be registered, and, if necessary, re-registered pursuant to the provisions of the act of the 23 & 24 Vict. c. 38, (see *post*,) any notice of any such order to any such purchaser, mortgagee or creditor, in anywise notwithstanding. (24 & 25 Vict. c. 134, s. 213.)

Power to award costs.

Remedies for recovering costs.

Order for costs must be registered under 23 & 24 Vict. c. 38.

11. And whereas great delay and expense are occasioned upon purchases and mortgages of lands in consequence of judgments against mortgagees and crown debts and liabilities to the crown of mortgagees continuing to bind lands, although the mortgagees have been *bonâ fide* paid off, and the lands have been actually conveyed to purchasers, or to other mortgagees: for remedy whereof be it enacted as follows: where any legal or equitable estate or interest or any disposing power in or over any lands, tenements or hereditaments, shall, under any conveyance or other instrument executed after the passing of this act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments, shall not be taken in execution under any writ of elegit, or other writ of execution, to be sued upon any judgment, or any decree, order or rule, against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment,

Legal estate vested in purchaser or mortgagee not to be taken in execution.

18 & 19 *Vict.* c. 15, s. 11.

decree, order or rule, or the money thereby secured, be a charge upon such lands, tenements or hereditaments, so vested in purchasers or mortgagees, nor shall such lands, tenements or hereditaments, so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable under any writ of extent, or writ of execution or other process issued by or on behalf of her Majesty, her heirs or successors, in respect of any judgment, statute or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they hath or have become or shall become a debtor or accountant, or debtors or accountants to the crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid (*b*).

(*b*) If a mortgagor sells the mortgaged estate, and pays off the mortgage, after the passing of this act, the estate in the hands of the purchaser ceases to be affected, by a judgment which had been registered against the mortgagee. (*Greaves* v. *Wilson*, 25 Beav. 434; 28 Law J., Ch. 103; 4 Jur., N. S. 802.)

It had been decided that a judgment creditor acquired a charge, under the 1 & 2 Vict. c. 110, against the mortgage property of the debtor, whether the interest was legal or equitable, and the object of this section is to make the charge cease when the mortgage is paid off. (*Per Wood*, V. C., *Avison* v. *Holmes*, 1 Johns. & H. 543, 544.)

Life annuities and rent-charges not to affect lands as to purchasers, &c. until memorandum left with senior master.

12. And whereas by reason of the repeal in the last session of parliament of the act of the fifty-third year of King George the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rent-charges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: be it therefore enacted by the authority aforesaid as follows: any annuity or rent-charge granted after the passing of this act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument or assurance, whereby the annuity or rent-charge is granted, and the annual sum or sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book in alphabetical order by the name of the person whose estate is intended to be affected by the annuity or rent-charge, together with the year and the day of the month when every such memorandum or minute is so left with him, and he shall be entitled for every such entry to the sum of two shillings and sixpence, and all persons shall be at liberty to search the same

book, together with the other books or registers in the office, on payment of the sum of one shilling. 18 & 19 *Vict.* c. 15, *s.* 12.

13. The searches of the several registers, by the said recited acts or by this act authorized to be made for the sum of one shilling, may be made by the parties themselves, under proper regulations in the office, and the sum of one shilling only shall be payable on one search, although more names than one shall be searched for where such names relate to the same purchase, mortgage or other transaction. Searches may be made by parties themselves.

14. The provisions of this act shall not extend to require the registry of annuities or rent-charges given by will. Annuities, &c. given by will excepted from act.

EXECUTION AND JUDGMENTS.

23 & 24 Victoria, c. 38.

An Act to further amend the Law of Property.
[23rd July, 1860.]

23 & 24 *Vict.* c. 38, s. 1.

Be it enacted as follows:

Judgments.

Writs of execution of judgments to be registered (a).

1. Whereas it is desirable to place freehold, copyhold and customary estates on the same footing with leasehold estates, in respect of judgments, statutes and recognizances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold or customary or leasehold, to ascertain when execution has issued on any judgment, statute or recognizance, and to protect them against delay in the execution of the writ: be it therefore enacted, that no judgment, statute or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, (whether such purchaser or mortgagee have notice or not of any such judgment, statute or recognizance,) unless a writ or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: provided always, that no judgment, statute or recognizance to be entered up after the passing of this act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

(a) See *Appleton* v. *Sturgis*, 10 W. R. 312.
The first five clauses of this act do not extend to Ireland. (Sect. 15.)

Persons acquiring title to goods before they have been seized or attached under a writ against the seller protected.

No writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ: provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff or coroner. (19 & 20 Vict. c. 97, s. 1.)

23 & 24 *Vict.* c. 38, s. 2.

Mode of registering.

2. The registry hereinbefore required of any writ of execution, or other due process on any judgment, statute or recognizance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute or recognizance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books in the same office, on payment of the sum of one shilling only: and all the provisions in this act in regard to writs of execution or other process and the registry thereof, or otherwise relating thereto, shall extend, mutatis mutandis, to writs of execution or other due process issuing on judgments of the several Courts of Common Pleas of the county palatine of Lancaster, and of pleas of the county palatine of Durham; but none of these provisions are to extend to Ireland.

Double search necessary.

As the writ of execution is to be registered in the name of the judgment *creditor*, two searches will be necessary; first, in the register of judgments in the name of the debtor; and, secondly, in the register of executions in the name of the creditor.

Provision for protection of heirs and executors against unregistered judgments.

3. And whereas by an act passed in the fourth and fifth years of their late majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas and Exchequer in Westminster," it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates: And whereas by several later acts judgments are required to be registered with more particulars than were required by the said recited act; and it is thereby enacted, that judgments not so registered shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same acts contained the dockets existing under the said first-recited act have been finally closed: And whereas the said several later acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates, in consequence whereof such heirs, executors or administrators have been held

23 & 24 *Vict.* c. 38, s. 3.

to have lost the protection which they enjoyed under the said first-recited act, and it is expedient that the same should be restored; be it therefore declared and enacted, that no judgment which has not already been or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of the fourth and fifth years of King William and Queen Mary, so as to bind lands, tenements or hereditaments as against purchasers, mortgagees or creditors, shall have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates.

By 4 & 5 Will. & M. c. 20, judgments not docketed were not to have any preference against heirs, executors or administrators in the administration of estates, and the 2 & 3 Vict. c. 11, closed the docket: it was held, that the old law was thereby revived, and that the administrator had committed a devastavit by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter. (*Fuller* v. *Redman*, 26 Beav. 600; 29 Law J., Chan. 324.)

Judgments as against heirs and executors to be re-registered.

4. No judgments which since the passing of an act 1 & 2 Vict. c. 110 (*b*), (being one of the acts hereinbefore referred to,) have been registered under the provisions therein contained, or contained in the later act of the second and third years of Queen Victoria, chapter eleven (*c*), as explained and amended by the act of the session of the eighteenth and nineteenth years of Queen Victoria, chapter fifteen (*d*) (being two other of the acts hereinbefore referred to), or which shall hereafter be so registered, shall have any preference against heirs, executors or administrators in their administration of their executors', testators' or intestates' estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorized to be made in manner directed by the said act of the second and third of Queen Victoria, as explained and amended by the act of the eighteenth and nineteenth of Queen Victoria; but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the senior master of the Common Pleas within five years before the death of the testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left; and so toties quoties upon every re-registry.

(*b*) See *ante*, p. 583.
(*c*) *Ante*, p. 589.
(*d*) *Ante*, p. 603.

Extent of the word "judgment."

5. In the construction of the previous provisions the term judgment shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment (*e*).

(*e*) The other sections of this act are inserted in other parts of this work. (See *ante*, p. 248, and *post*.)

CROWN DEBTS AND JUDGMENTS.

23 & 24 Victoria, c. 115.

An Act to simplify and amend the Practice as to the Entry of Satisfaction on Crown Debts and on Judgments.

[28th August, 1860.]

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23 & 24 *Vict.* c. 115, *s.* 1.

Whereas by several acts of parliament debts and obligations to the crown, judgments pending suits, and annuities are severally required to be registered in the office of the senior master of the Court of Common Pleas at Westminster, in order to affect any lands, tenements and hereditaments sought to be charged therewith, and it is expedient to simplify and amend the practice with respect to the entry of satisfaction or discharge on the registry thereof respectively: be it therefore enacted, as follows:

Provisions of Sects. 195, 196 and 197 of 16 & 17 Vict. c. 107, extended to all bonds to the crown.

1. All the powers, provisions and regulations, concerning bonds and other securities relating to the customs contained in sections one hundred and ninety-five, one hundred and ninety-six, and one hundred and ninety-seven, of the act passed in the session of parliament holden in the sixteenth and seventeenth years of her Majesty's reign, chapter one hundred and seven (*a*), shall, mutatis mutandis, be deemed to extend and shall be applied to all bonds and other securities entered into or given to her Majesty, her heirs or successors: provided always, that in every case in which under the provisions of the said sections any certificate is required to be signed or any other matter authorized to be done by the commissioners of customs, or any number of them, any such certificate or matter in relation to any bond or other security concerning or incident to any public department shall respectively be signed and done by the respective commissioners or other principal officers of such department, or any two of them respectively, or if there shall be only one such commissioner or principal officer then by him, as the case may be, or if there shall be no such commissioner or other principal officer then by the commissioners of her Majesty's treasury or any two of them (*b*).

All bonds, &c. valid.

(*a*) Sect. 195. All bonds and other securities entered into by any person or persons for the performance of any condition, order or matter relative to the customs or incident thereto, shall be valid in law, and upon breach of any of the conditions thereof may be sued and proceeded upon in the same manner as any bond expressly directed, or given by or under the provisions of any act relating to the customs, and all bonds relating to the customs or for the

23 & 24 *Vict.* *c.* 115, *s.* 1.

performance of any condition or matter incident thereto shall be taken to or for the use of her Majesty, and all such bonds, except such as are given for securing the due exportation of or payment of duty upon warehoused goods, may, after the expiration of three years from the date thereof or from the time, if any, limited therein for the performance of the condition thereof, be cancelled by or by the order of the commissioners of customs, and all bonds given under the provisions of this or any act relating to the customs by persons under twenty-one years of age shall be valid.

Bonds to be taken to the use of her Majesty.

Bonds of minors valid.

How bonds may be discharged.

Sect. 196. If any bond given under the provisions of this or any act relating to the customs, or in respect of any matter under the control or management of the commissioners of customs shall have been registered in the Court of Common Pleas in England, or in the office of the registrar of judgments in Ireland, and the condition of such bond shall have been satisfied, the commissioners of customs, by certificate under the hands of any two or more of them, may authorize the proper officer of the said court or office of registrar of judgments as the case may be, to enter up satisfaction on the record of such bond or obligation, and such certificate may be in the form or to the effect following:—

This is to certify that the following bond has been satisfied and cancelled.

Name or names of the obligor or obligors.	Date of bond.	Penalty.	Condition.	Where registered.

Given under our hands this —— day of ——, 186—.

} Commissioners of Customs.

To the Senior Master or other proper officer of the Court of Common Pleas [*if in England*], or to the Registrar of Judgments [*if in Ireland, as the case may be*].

And upon the receipt of such certificate such officer is required to enter up satisfaction accordingly, whereupon the bond or obligation shall be discharged, and the land thereby affected shall be released and exonerated from all claims in respect thereof.

Exoneration of estates of obligors.

Sect. 197. When any bond entered into under the provisions of this or any act relating to the customs, or for the performance of any condition, order or matter incident or relative to the customs, shall have been registered in the Court of Common Pleas in England, under the act of the second year of the reign of her present Majesty, chapter eleven, or in the office of the registrar of judgments in Ireland, under the act of the seventh and eighth years of the reign of her said Majesty, chapter ninety, and it shall be deemed necessary in the discretion of the commissioners of customs, to exonerate the whole or any part of the lands of any obligor of such bond from liability in respect thereof, the commissioners of customs, by certificate or certificates under the hands of any two or more of them, may, first requiring the consent of any co-obligor if they shall deem it necessary, exonerate and discharge such lands or any part thereof, as the case may require, and such certificate may be in the form or to the effect following:—

Form of certificate of exoneration.

By a bond or obligation bearing date the —— day of ——, 186—, [*name of obligor seeking exoneration,*] of [*residence and description of obligor*], became bound to her Majesty, her heirs and successors, in the sum of ——, conditioned as therein mentioned, and the said bond was on the —— day of ——, 186—, duly recorded in the Court of Common Pleas, [*if in England,*] or filed in the office of the registrar of judgments, [*if in Ireland,*] in pursuance of the act [*state the act under which the bond was registered*]. This is to certify that all the estates, lands, tenements and hereditaments [*if the whole are to be discharged*] or [*here set out the particular lands, tenements and hereditaments exonerated, if part only are to be discharged, adding the following words,*] being part of the estate, lands, tenements and hereditaments of the said [*name of obligor seeking exoneration,*] are wholly exonerated and discharged from all claims of her Majesty, her heirs or successors, or of the

commissioners of customs on her or their behalf in respect of such bond or obligation. Given under our hands this —— day of ——, 186—. 23 & 24 *Vict.* c. 115, *s.* 1.

(Signed) } Commissioners of her Majesty's Customs.

And the lands mentioned in such certificate or certificates shall thereupon be held wholly exonerated and discharged from all liability in respect of such bond or obligation, and every such certificate shall be accepted by all persons and in all courts as sufficient evidence of the exoneration of the lands therein described. Certificates to be sufficient evidence of exoneration.

2. The senior master of the Court of Common Pleas at Westminster may, upon the filing with him of an acknowledgment in the form or to the effect following, be at liberty to enter a satisfaction or discharge as to any registered judgment, pending suit, lis pendens, decree, order, rule, annuity or rent-charge, or writ of execution, and such officer shall be entitled for any such registry of satisfaction or discharge to the sum of two shillings and sixpence, and no more; and such senior master may issue certificates of the entry of any satisfaction or discharge, and may charge the sum of one shilling for every such certificate. As to entry of satisfaction on judgments.

Form of Acknowledgment of Satisfaction.

Satisfaction is acknowledged between *A. B.* and *C. D.* as to a —— dated the —— day of ——, 186—, for the sum of £——, a memorandum of which said —— was left with the senior master of the Court of Common Pleas at Westminster, on the —— day of ——, 186—, to affect the estate of ——, and [if so] on the writ of execution thereon, dated the —— day of ——, 186—, a memorandum of which was left with the said master on the —— day of ——, 186—.

And —— [*or* the executor or administrator of] do hereby expressly nominate and appoint ——, of ——, attorney-at-law, to witness and attest the execution of this acknowledgment of satisfaction.

Signed by the said ——, in the presence of me, the undersigned ——, one of the attorneys of her Majesty's Court of ——, at Westminster, and I hereby declare myself to be the attorney for and on behalf of the said ——, expressly named by ——, and attending at ——, request to inform him of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by ——), and I also declare that I subscribe my name as witness hereto as such attorney. } *A. B.*, the above-named ——, [*or F. G.*, executor or administrator of] the —— day of ——, 186—.

LEASE AND RELEASE.

4 & 5 VICTORIA, c. 21.

An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties. [18th May, 1841.]

4 & 5 *Vict.* c. 21, *s.* 1.

A release to be effectual although no lease for a year shall be executed.

WHEREAS it is expedient to lessen the expense of conveying freehold estates: be it enacted, that every deed or instrument of release of a freehold estate, or deed or instrument purporting or intended to be a deed or instrument of release of a freehold estate, which shall be executed on or after the fifteenth day of May, one thousand eight hundred and forty-one, and shall be expressed to be made in pursuance of this act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and sale or lease for a year for giving effect to such release, although no such deed or instrument of bargain and sale or lease for a year shall be executed (*a*); provided that every such deed or instrument so taking effect under this act shall be chargeable with the same amount of stamp duty as any bargain and sale or lease for a year would have been chargeable with (except progressive duty) if executed to give effect to such deed or instrument, in addition to the stamp duties which such deed or instrument shall be chargeable with as a release or otherwise under any act or acts relating to stamp duties (*b*).

Release chargeable with the stamp duty to which the lease for a year would have been liable.

(*a*) See 8 & 9 Vict. c. 106, s. 2, *post*, p. 619. The principles upon which the conveyance by lease and release is founded will be found in 2 Sanders on Uses, Chap. Lease and Release; 2 Preston's Conv. 207—489; Shep. Touch. 320; Sugd. Intr. to Gilbert on Uses; Butl. Co. Litt. 271, b. n. Div. iii. 3; Watk. on Conv. by Coventry and Preston; 3 Jarm. Conv. tit. Bargain and Sale.

(*b*) This provision as to stamp duties, so far as the same relates to any deed or instrument bearing date after the 10th day of October, 1850, is repealed by 13 & 14 Vict. c. 97, s. 6.

The recital or mention of a lease for a year in a release executed before the passing of this act, to be

2. And whereas many deeds or instruments of bargain and sale or leases for a year, to give effect to deeds or instruments of release of freehold estates heretofore executed, have been lost or mislaid; be it enacted, that where, in or by any deed or instrument of release of freehold estates executed before the fifteenth day of

May, one thousand eight hundred and forty-one, any deed or instrument of bargain and sale or lease for a year for giving effect to such deed or instrument of release shall be recited, or by any mention thereof in such deed or instrument of release appear to have been made or executed, such recital or mention thereof shall be deemed and taken to be conclusive evidence of the deed or instrument of bargain and sale or lease for a year so recited or mentioned having been made and executed; and such deed or instrument of release shall also have the like effect as if the same had been executed after the fifteenth day of May, one thousand eight hundred and forty-one, whether such deed or instrument of bargain and sale or lease for a year shall or shall not have been lost or mislaid, or may or may not be produced: provided always, that this act shall not prejudice or affect any proceedings at law or in equity pending at the time of the passing of this act, in which the validity of any bargain and sale or lease for a year shall be in question between the party claiming under such bargain and sale or lease for a year and the party claiming adversely thereto; and such bargain and sale or lease for a year, if the result of such proceedings shall invalidate the same, shall not be rendered valid by this act (*c*).

4 & 5 Vict. c. 21, s. 2.

evidence of the execution of such lease for a year.

(*c*) In Ireland the actual existence of a lease for a year is not required, it is sufficient if the release contains the usual reference to it. By the Irish stat. 9 Geo. 2, c. 5, s. 6, made perpetual by 1 Geo. 3, c. 3, after reciting that it has frequently happened that purchasers for valuable considerations under deeds of lease and release have been prevented from recovering their rights for want of being able to produce the lease for a year, which is often lost or mislaid, it is enacted, "that in all cases the recital of a lease for a year in the deed of release shall be deemed and be taken to be full and sufficient evidence of such lease." This statute makes no alteration in the law, and only facilitates the proof of the lease for a year, by making the recital of it equal to the production, but it must be recited to be such as it ought to be if produced. The words "in his (the releasee's) actual possession now being, by virtue of a lease made pursuant to the statute," were held an insufficient recital of the lease within this statute. The lands however being in lease, the release was held to operate as a grant of the reversion, from the words "demise, set, and to farm let," notwithstanding there was a covenant in the instrument to make a future grant. (*Doe* d. *Burne* v. *Saunders*, 1 Fox & Smith, 18. See 1 T. R. 735; 12 East, 186; 15 East, 244; 5 T. R. 163.) By the Irish stat. 1 Geo. 3, c. 3, it is declared, that in all cases of pleading deeds of lease and release, wherein it may be necessary to allege the bringing such deeds into court, it shall be sufficient to allege the bringing into court the deed of release, in which the recital of such lease shall to all purposes whatsoever be as effectual as producing the same. (See *Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 262; *Jenkins* v. *Peace*, 4 Jur. 850.)

Recital of lease for year sufficient as to lands in Ireland.

3. In the construction of this act the word "freehold" shall have not only its usual signification, but shall extend to all lands and hereditaments for the conveyance of which, if this act had not been passed, a bargain and sale or lease for a year, as well as a release, would have been used.

Construction of the word "freehold."

AMENDMENT OF THE LAW OF REAL PROPERTY.

8 & 9 Victoria, c. 106.

An Act to amend the Law of Real Property (*a*).
[4th August, 1845.]

Repeal of Statute 7 & 8 Vict. c. 76.

8 & 9 *Vict.* c. 106, *s.* 1.

Be it enacted, as follows, (that is to say);

Repeal of so much of 7 & 8 Vict. c. 76, as abolishes contingent remainders as from the commencement (*b*),

1. That so much of an act passed in the last session of parliament, intituled "An Act to simplify the Transfer of Property," as enacted that, after the time at which that act should come into operation, no estate in land should be created by way of contingent remainder; but that every estate which, before that time, would have taken effect as a contingent remainder should take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties, as an executory devise; and that contingent remainders existing under deeds, wills or instruments executed or made before the time when that act should come into operation, should not fail, or be destroyed or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine, shall be and is hereby repealed, as from the time of the commencement and taking effect thereof; and that the residue of the said act shall be and is hereby repealed, as from the first day of October, one thousand eight hundred and forty-five.

and the residue as from 1st October, 1845.

(*a*) A letter from Mr. H. B. Ker, dated April, 1845, to the Lord Chancellor, contains an explanation of the reasons upon which this act is founded, and is printed in Davidson's Concise Precedents in Conveyancing, 10—49, 2nd ed.

(*b*) See the eighth section of this act as to contingent remainders.

Grant.

The immediate freehold of corporeal tenements to lie in grant

2. After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate free-

hold thereof, be deemed to lie in grant as well as in livery (*c*); and that every deed which, by force only of this enactment, shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release, founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable (*d*).

8 & 9 *Vict.* c. 106, *s.* 2.

as well as in livery.

Stamp duty on grants thereof.

(*c*) The general object of this section is to give to all freehold lands in possession the capacity of being transferred without any of those forms or solemnities which occasion expense and trouble, but have no essential connexion with the act of transfer. "A large class of freehold hereditaments was by the previous law, and had, from the remotest antiquity, been invested with this capacity, to the extent of being transferable by the observance only of those forms or solemnities which are included in the execution of an ordinary deed. The hereditaments so circumstanced are technically said to lie in grant, while the hereditaments to which the law has hitherto denied the capacity of being transferred by deed are technically said to lie in livery. It has never been proposed that the class of property with which this section deals should be made transferable by any mode less formal than a deed. We have therefore considered that the most direct and the most simple means of obtaining the object proposed is, to impart to *corporeal* hereditaments, that is, to hereditaments which lie in livery only, the capacity of being transferred by deed, by providing that, 'as regards the conveyance of the immediate freehold thereof,' they 'shall be deemed to lie in grant as well as in livery.' The effect of the clause will be to render a reference to the Lease and Release Act of the 4 & 5 Vict. c. 21, unnecessary in the case of corporeal hereditaments in England, and to dispense with a reference to a recital of a lease for a year in the case of corporeal hereditaments in Ireland." (See Mr. Ker's Letter to the Lord Chancellor.) A remainder, reversion and incorporeal hereditaments are not the subjects of a feoffment, for a feoffment operates on the possession which the owners of such estates had not to convey; hence remainders, reversions and incorporeal hereditaments were said to lie in *grant*, which was the mode of conveyance at the common law of those estates which did not lie in livery or of which livery could not be given.

By the term *immediate freehold* is meant the first of all the estates of freehold; for example, when A. is tenant for life, remainder to B. for life, in tail or in fee, B. has an *estate of freehold*, but A. has the *immediate freehold*. (1 Preston's Convey. 48.)

Although livery of seisin is rendered unnecessary by this section, the colour given by a plea claiming title to a dwelling-house, in which, &c., under colour of a certain charter of demise pretended to have been made thereof, was held not to show a title in the plaintiff. (*Wright* v. *Burroughes*, 3 C. B. 685; 4 Dowl. & L. 438.)

(*d*) This provision as to stamp duties, so far as the same relates to any deed or instrument bearing date after the 10th day of October, 1850, is repealed by 13 & 14 Vict. c. 97, s. 6.

Certain Acts to be void unless by Deed.

3. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed (*e*), and that a partition and an exchange (*f*) of any tenements or hereditaments not being copyhold, and a

Feoffments, partitions, exchanges, leases, assignments and surrenders required (subject to certain excep-

8 & 9 *Vict.* c. 106, *s.* 3.

lease, required by law to be in writing (*g*), of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing (*h*) of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: provided always, that the said enactments so far as the same relates to a release (*i*) or a surrender shall not extend to Ireland.

tions) to be by deed.

(*e*) By the custom of gavelkind an infant on attaining the age of fifteen years may alien lands by feoffment, livery of seisin being made in person and not by attorney. (Robinson on Gavelkind, 248—250, 3rd ed.)

(*f*) At common law coparceners might have made partition of things lying in livery or grant by parol without deed, and tenants in common might have made partition of things lying in livery by *parol* without deed, if they afterwards perfected the partition by livery of seisin. (Litt. s. 250; Co. Litt. 169 a.) So, too, joint tenants for years might have made partition by parol without deed. (Co. Litt. 187 a.) But joint tenants of freeholds, whether corporeal or incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed. (Co. Litt. 169 a.) Since the Statute of Frauds, 29 Car. 2, c. 3, a writing was in all cases necessary, but a deed was required only in cases in which it was necessary before that statute. (1 Martin's Conv. by Davidson, 417, 418; 1 Byth. Conv. by Jarman, 193.)

An exchange since the Statute of Frauds, 29 Car. 2, c. 3, must, if it relate to land for a larger interest than a term of three years, be in writing, and if the things whereof the exchange is made lie in grant, *i. e.* if they consist of reversions, rents or other incorporeal hereditaments, or if they lie in several counties, it must be by deed. (Co. Litt. 51 b.)

(*g*) This section does not apply to agreements for the lease of tolls under the General Turnpike Act, 3 Geo. 4, c. 126, s. 57. (*Shepherd* v. *Hodsman*, 18 Q. B. 316; 21 Law J., Q. B. 263.)

As a lease for years of corporeal hereditaments might be created by a writing not under seal, questions frequently arose whether an instrument relating to the creation of such on interest was an actual demise or an agreement for a future demise. (See 4 Martin's Conv. by Davidson, 4—10.) The distinctions upon this subject had become very refined. (Woodfall's Landl. and Tenant, 118—130, 5th ed.; 1 Platt on Leases, 579—611.)

An instrument not under seal of incorporeal hereditaments could not operate as a lease. (*Gardiner* v. *Wilkinson*, 2 B. & Ad. 336; *ante*, p. 144.)

By agreement in writing not under seal the plaintiff let to the defendant, at a yearly rent, the right of fishing in a certain river with rod and line only. The defendant having used the fishery, it was held, that the plaintiff might recover the rent under an indebitatus count for the use and occupation of the fishery, although it was objected on the authority of *Bird* v. *Higginson* (5 Ad. & E. 83, *ante*, p. 58), that no interest passed by the agreement. (*Holford* v. *Pritchard*, 3 Exch. 793.)

Cases of agreement to let under repealed statute.

By 7 & 8 Vict. c. 76, s. 4, (in force from and after the 31st of December, 1844, and repealed by 8 & 9 Vict. c. 106, from the 1st of October, 1845,) it was enacted, that no lease in writing of any freehold, copyhold or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease. By a document, dated the 3rd of July, 1845, and purporting to be a memorandum of agreement (made while that section was in force), M. agreed to let and B. to take certain rooms in a house from the 7th day of that month, for the monthly rent of 36*s.*, to be paid every four weeks: it was held, that it was only an agreement to execute a lease, and was well admitted in evidence as such agreement without

8 & 9 *Vict.* c. 106, *s.* 3.

a stamp, being of no certain value above 1*l.* 16*s.* It was questioned whether, since the repeal of 7 & 8 Vict. c. 76, s. 4, by 8 & 9 Vict. c. 106, such a memorandum would require a stamp of 1*l.* 15*s.* as a lease under 55 Geo. 3, c. 184, Sched. Part 1, tit. Lease. (*Burton* v. *Revell*, 16 Mees. & W. 307.)

An agreement in writing not under seal, under which the defendant had entered into possession, was made in March, 1845, and was prevented from operating as a lease by 7 & 8 Vict. c. 76, s. 4, which came into operation in December, 1844; the court thought that the stat. 8 & 9 Vict. c. 106, repealing so much of the former statute as related to agreements from October, 1845, did not apply to the agreement in question, both because it was made at a time in respect of which the former statute remained unrepealed, and also because the nature of the contract was fixed by the intention of the parties at the time it was made. (*Arden* v. *Sullivan*, 19 Law J., Q. B. 268.)

Operation of this act on demises not by deed exceeding three years.

A. and B., after this act came into operation, executed a written instrument not under seal, by which A. agreed to let and B. to hire land for a term exceeding three years, at a rent payable monthly. B. entered, and it was afterwards orally agreed that the rent should be paid quarterly: it was held, that this section, though rendering the lease void as not being by deed, still made it void only as a lease, and did not prevent it from indicating the terms on which B. held as tenant from year to year, and that consequently B.'s tenancy might be determined during the term by a half-year's notice, but at the end of the term expired without notice. (*Tress* v. *Savage*, 4 Ell. & Bl. 36; 18 Jur. 680; 23 L. J., Q. B. 339.) The court was of opinion that the party entering into possession under such an instrument is in the same position as that in which he would have been in before the acts 7 & 8 Vict. c. 76 and 8 & 9 Vict. c. 106. He has not a lease nor a tenancy for the three years and a week, but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties, he goes out without notice. (*Ib.* 43.)

By agreement not under seal, the plaintiff agreed to let and the defendant to hire certain premises for seven years; and it was further agreed that a good and sufficient lease, embodying the terms of the agreement, should be prepared at the joint expense of the parties. In an action for not accepting a lease, the court decided, that the instrument was void as a lease under this section, but that it operated as an agreement with mutual promises by the lessor to grant and by the lessee to accept a formal lease on a future day. (*Bond* v. *Rosling*, 1 Best & Sm. 371.)

By writing not under seal, signed by the plaintiff and the defendant, the plaintiff agreed to take of the defendant a farm at a yearly rental, "the tenancy to commence from the 29th day of September next," for a term of eight years, subject to a lease, to be drawn up by the defendant. It was held, that there was no contract by the defendant to give the plaintiff possession of the farm on the day named, for that possession was to be given only on the commencement of a tenancy under a lease for eight years, and this agreement was void as a lease under this section, and that an action could not be maintained upon it against the defendant for not delivering possession to the plaintiff. (*Drury* v. *Macnamara*, 5 Ell. & Bl. 612; 1 Jur., N. S. 1163.)

In 1851, A. became tenant to the defendant of premises under terms of a written agreement (not under seal) for a term of three years, the rent payable quarterly in advance. A. occupied the premises for some time and paid several quarters' rent, and the receipts given to him by the defendant's agent stated that such payments were in advance, although in fact A. never paid the rent in advance: it was held, that although the agreement was void under this section as not being under seal, still that the receipt taken was ample evidence of the tenancy being upon the terms of the rent being payable quarterly in advance. (*Lee* v. *Smith*, 9 Exch. 662; 23 Law J., Exch. 198.) It seems that the agreement itself might also have been referred to for the purpose. (*Ib.*)

This section, requiring a lease to be made by deed, has made no difference in the interpretation of written instruments. (*Stratton* v. *Pettit*, 16 C. B.

8 & 9 Vict. c. 106, s. 3.

420; 1 Jur., N. S. 662; 24 Law J., C. P. 182.) The intention of the parties, as declared by the words of the instrument, must govern the construction, and where there is an instrument by which it appears that one party is to give possession of premises and the other to take it, that is a lease unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made. (*Ib.*) Articles of agreement were signed by the plaintiff and the defendant, by which it was witnessed that the plaintiff agrees to let and the defendant to take premises now in his possession to hold unto the defendant for the term of five years, and the plaintiff also agrees to sell and the defendant to purchase the fee simple of the same at the end of five years, yielding and rendering by the defendant to the plaintiff as well for the rent for five years as for the purchase, 70*l.*, by seventy shares of one pound each in an assurance company, the receipt and delivery of which shares to the plaintiff for the rent and purchase he hereby admits. If the defendant be legally ejected from the premises during the term, there shall be refunded by the plaintiff to the defendant, either in cash or in the said shares after the rate of 7*l.* 10*s.* per annum for the portion of the time unexpired at the time of such eviction. That no abstract or investigation of title shall be required beyond evidence of seisin and possession as owner by the plaintiff and his ancestors for twenty-one years last passed, and that the defendant shall immediately do all acts necessary to transfer and vest the shares in the plaintiff: it was held, first, that the intention of the parties to be collected from this instrument was that it should operate as a lease, and that therefore not being by deed it was void. (*Ib.*) It was held, secondly, that the agreement by the defendant to transfer the shares was independent of the implied agreement by the plaintiff to produce evidence of seisin and possession for the twenty-one years, and that the production of such evidence was therefore not a condition precedent to the plaintiff's right to have a transfer of the shares. (*Ib.*)

In *Rollason* v. *Leon* (7 H. & N. 77), *Bramwell*, B., said "With unfeigned respect for the learned Judges of the Court of Common Pleas, I have always thought and still think that the case of *Stratton* v. *Pettit* (16 C. B. 420) was not rightly decided. We are not, however, called upon to overrule it, because the present case is distinguishable. It seems to me that in *Stratton* v. *Pettit* the court made this mistake, whereas before the 8 & 9 Vict. c. 106 passed, it involved no inconvenience that certain words should be interpreted as an actual demise: yet when that statute passed and made the same reasoning inapplicable, and rendered it impossible that parties using words of agreement should have intended to create a lease, the court held that the same reasoning applied and that words of mere agreement were words of lease."

An action was brought on the following agreement made in 1861:—"L. agrees to let, and R. agrees to take the wood-mill with the house and land adjoining for the period of three years from Lady-day then next at the rent of 120*l.* per annum. A lease for the same to be executed and signed as soon as possible, subject to the permission of the landlord of the mill. L. also agrees to let and R. agrees to take the mill, house, land, &c., from this date up to Lady-day then next on the same terms and at the same rate of rent; R. to have the sole use of the mill, house and land, and all machinery and utensils therein contained. It was held, that the agreement operated as an actual demise from its date up to Lady-day, and as an agreement for a lease from that time for a term of three years, and consequently was not void under this section for not being under seal. (*Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Exch. 96.)

What a lease, and not an assignment.

In an action for the use and occupation of a part of a house from June to October, it was proved that the plaintiffs, being lessees from May till the 13th December, let by parol the premises to the defendant till the latter day, reserving a weekly rent; that the parties intended to create the relation of landlord and tenant, and to pass the interest by lease; that the defendant occupied and paid rent till June, and then gave a week's notice to quit, and at the expiration thereof returned the key, against the will of the plaintiffs, and left the premises vacant, and refused to pay any subsequent rent. Upon these facts the defendant objected, that, as the plaintiffs intended to part

with all their interest in the premises, they must be taken to have intended an assignment, and that the transaction could not take effect as an assignment, as there was no writing nor deed, as required by stat. 29 Car. 2, c. 3, s. 3, and stat. 8 & 9 Vict. c. 106, s. 3; and that therefore the defendant was not liable beyond the time of his actual occupation. It was held, that the intention of the parties at the time of the contract could be effected by holding that the interest passed by way of lease. Lord *Denman*, C. J., observed: "The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by a parol lease. This they were at liberty to do by law, and we therefore carry their lawful intention into effect. If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only; and we should construe that which was expressed and intended to be a lease to be an assignment merely, *ut res pereat*, which is against a known salutary maxim. As important rights and duties arise often from assignment of terms, the law has properly provided that the relation of assignor and assignee shall not be contracted, unless the intention is proved by deed. But in protecting against imperfect evidence of assignment, there was no need to alter the law of leasing; and it appears to us to remain unchanged, and we see no inconvenience in supporting as a lease that which was intended to be so, although it may pass all the lessor's interest." (*Pollock* v. *Stacy*, 9 Q. B. 1035.)

8 & 9 *Vict.* c. 106, s. 3.

(*h*) This section refers to a surrender *in writing*, and does not include a surrender by operation of law.

A surrender by deed is unnecessary where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him, and such acceptance operates as a surrender in law; but it is not enough that the lessee agrees to an act done by the reversioner; and it seems that a demise of premises by the reversioner to a stranger, with the consent of the lessee in possession, will not amount to a surrender by operation of law. (*Lyon* v. *Read*, 13 Mees. & W. 285.) In this case *Parke*, B., observed the term surrender by operation of law is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. (*Ib.* 305, 306.)

Surrender by operation of law.

(*i*) The word "release" appears to be inserted by mistake instead of "lease."

Operation of certain Instruments Limited.

4. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation (*k*); and that an exchange or a partition of any tenements or hereditaments, made by deed, executed after

Feoffments not to operate by wrong, nor exchanges or partitions to imply any condi-

8 & 9 *Vict.* c. 106, *s.* 4.

tion, or give and grant any covenant.

the said first day of October, one thousand eight hundred and forty-five, shall not imply any condition in law; and that the word "give" or the word "grant," in a deed executed after the same day, shall not imply any covenant in law, in respect of any tenements or hereditaments (*l*), except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant (*m*).

(*k*) A feoffment had the effect of barring or destroying contingent remainders depending upon particular estates. (*Archer's case*, 1 Rep. 66 b.) A feoffment also destroyed powers appendant and powers in gross, but not powers collateral. A feoffment was the only conveyance by which a tenant for years, by elegit, statute merchant or staple or a copyholder, could create an estate of freehold by disseisin. (Co. Litt. 49; 2 Sand. on Uses, 14, 15.) In consequence of the new enactment, a feoffment in fee simple, made by a tenant for life, will merely convey his life interest, and will not be a cause of forfeiture; and a feoffment by a lunatic or idiot will be void and not merely voidable, as formerly. (See Shelford on Law of Lunatics, 335, 336, 2nd edit.)

(*l*) The operation of the words "grant" and "give" in creating an implied warranty of title in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years, is fully discussed by Mr. Butler in his note to Co. Litt. 384 a. (See 4 Cruise's Dig. tit. XXXII. c. 24.)

An action of covenant will lie by the lessee against the lessor upon the word "demise" in a lease, that word importing a covenant in law on the part of the lessor that he has a good title, and that the lessee shall quietly enjoy during the term. (*Burnett* v. *Lynch*, 5 B. & C. 609.) This case was qualified by *Humble* v. *Langston*, 7 M. & W. 517, but upheld by the Court of Exchequer Chamber. (*Walker* v. *Bartlett*, 18 C. B. 845; *Mathew* v. *Blackmore*, 1 H. & N. 766.) In a contract for the demise of land, a promise of quiet enjoyment during the term is implied by law. (*Hall* v. *City of London Brewery Company* (*Limited*), 2 Best & S. 737.) Although the word "demise" in a lease implies a covenant for title and a covenant for quiet enjoyment, both branches of such implied covenant are restrained by an express covenant for quiet enjoyment. (*Line* v. *Stephenson*, 5 Bing. N. C. 183; 4 Bing. N. C. 678; 7 Scott, 69; 6 Scott, 447; *Merrill* v. *Frame*, 4 Taunt. 329; *Hinde* v. *Gray*, 1 Man. & Gr. 195; *Granger* v. *Collins*, 6 Mees. & W. 458; *Lessenbury* v. *Evans*, 3 Man. & G. 210.) Where land is demised by *parol* without any actual covenant, the law implies a covenant for quiet enjoyment during the term, but not a covenant for good title. (*Bandy* v. *Cartwright*, 8 Exch. 913.)

Covenant to stand seised.

The plaintiff in ejectment on a demise of the 12th of October, 1850, claimed under the following deed:—"In consideration of the love and affection which I have towards my son W. S. (the lessor of the plaintiff), I have given and granted, and by these presents do give and grant, to the said W. S. all that," &c., "and that the said W. S. is to take possession of the same at Michaelmas-day next (1850). I have delivered him, the said W. S., all the premises absolutely at Michaelmas-day next, without further condition." It was held, that supposing such deed to be void as a grant of the freehold in future, still, the day named having passed, the plaintiff was entitled to recover, the deed amounting to a covenant to stand seised to the use of W. S. (*Doe* d. *Starling* v. *Prince*, 15 Jur. 632; 20 Law J., C. P. 223.) The provision in this section, that "The word 'give' or the word 'grant,' in a deed, shall not imply a covenant in law," was held inapplicable to the case. (*Ib.*)

(*m*) In the conveyance of lands to be made by the promoters of the undertaking under the Lands Clauses Consolidation Act, or the special act, the word "grant" implies certain covenants by them for title, except so far as the same shall be limited by express words contained in any such conveyance. (8 & 9 Vict. c. 18, s. 132.)

The words "grant, bargain and sell" operate as covenants for title in deeds of bargain and sale of lands lying in the East and North Ridings of Yorkshire by stat. 6 Ann. c. 35, s. 30; 8 Geo. 2, c. 6, s. 35.

8 & 9 *Vict.* c. 106, s. 5.

Strangers to Deeds.

Strangers may take immediately under an indenture, and a deed purporting to be an indenture shall take effect as such.

5. Under an indenture, executed after the first day of October, one thousand eight hundred and forty-five, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also, that a deed, executed after the said first day of October, one thousand eight hundred and forty-five, purporting to be an indenture, shall have the effect of an indenture, although not actually indented (*l*).

(*l*) It was necessary to name as parties to an indenture all persons who are intended to take an immediate estate or benefit by it. (Co. Litt. 231 a.) This rule did not extend to remainders, (Co. Litt. 231 a, 259 b,) nor, it was said, to uses or the benefit of a trust. (2 Prest. Conv. 394.) A practical distinction between an indenture and a deed poll is, that no person can take an immediate estate or benefit under an indenture, unless he be named as a party to it; but any person can take an immediate estate or benefit under a deed poll, inasmuch as it is addressed to all the world. (Co. Litt. 26 a, 231; Burton's Real Prop. 442, n.; 2 Prest. Conv. 394 *et seq.*; 1 Martin's Conv. 324.) Another practical distinction between a deed poll and an indenture is, that a covenant entered into by a deed poll with any covenantee named in the deed is valid; but a covenant in an indenture entered into with a person not a party cannot be sued on by that person. (*Greene* v. *Hoare*, Salk. 197; *Berkley* v. *Hardy*, 5 B. & C. 353; *Lord Southampton* v. *Browne*, 6 B. & C. 718.) But a person not a party to a deed may covenant with one who is, and will be bound by executing the deed. (*Salter* v. *Kidgly*, Carth. 76; 2 Prest. Conv. 415.)

Alienation of Contingent Interests.

Contingent and other like interests, also rights of entry, made alienable by deed, saving estates in tail; and as regards married women enjoining conformity to 3 & 4 Will. 4, c. 74.

6. After the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry (*m*), whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this act, defeat or enlarge an estate tail (*n*); and that every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an act passed in the third and fourth years of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance" (*o*), or, in Ireland, of an act passed in the fourth and fifth years of the reign of his said late majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland."

4 & 5 Will. 4, c. 92.

(*m*) It was said by *Maule*, J., "that this does not mean a right of entry

8 & 9 *Vict.* c. 106, s. 6.

for a forfeiture, but the right of entry in the nature of an estate or interest, that is, where a person by lapse of time has lost everything except his right of entry." (*Hunt* v. *Remnant*, 9 Exch. 640.) *Pollock*, C. B., said, "This section does not relate to a right to repossess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry, and nothing but that, remains." (*Hunt* v. *Bishop*, 8 Exch. 680.)

(*n*) The alienation of interests of this description under the law, as it existed previously to the abolition of fines and recoveries, has been already considered. (See *ante*, pp. 344—346.) As to alienation of supposed rights, see 32 Hen. 8. c. 9; *Doe* d. *Williams* v. *Evans*, 1 C. B. 717, and the cases there cited.

(*o*) See *ante*, pp. 389—420.

Disclaimer by Married Women.

Capacity of married women to disclaim estates or interests by deed extended to England.

7. After the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and that every such disclaimer shall be made conformably to the said provisions of the said Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance (*p*).

(*p*) See *ante*, pp. 390, 391.

Contingent Remainders.

Contingent remainders protected as from 31st December, 1844, against the premature failure of a preceding estate.

8. A contingent remainder, existing at any time after the thirty-first day of December, one thousand eight hundred and forty-four, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened (*q*).

(*q*) This section of the act does not alter the rules of law as to the creation of contingent remainders. (See 2 Bl. Comm. 164, 170; Watk. on Conv. tit. Remainder.) In consequence of the rule that a remainder must vest in the grantee during the existence of the particular estate, or the very instant it determines, contingent remainders might be defeated, by destroying or determining the particular estate on which they depend, before the contingency happens whereby they become vested. (1 Real Prop. Rep. 66, 135.) Therefore, when there was tenant for life, with divers remainders in contingency, he might not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest; the consequence of which was, that he utterly defeated them all. As, if there were tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son was born, surrendered his life estate, he by that means defeated the remainder in tail to his son: for his son not being *in esse* when the particular estate determined, the remainder could not then vest; and, as it could not vest then by the rules of law, it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by

his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. (2 Black. Com. 171.) The above clause will supersede the necessity of a limitation of estates to trustees during the life of the tenant for life, to support the contingent remainders expectant upon the determination of the life estate by forfeiture, surrender or merger. 8 & 9 *Vict.* *c.* 106, *s.* 8.

Quasi contingent remainders in copyholds were protected from destruction by the estate of the lord of the manor. (*Pickersgill* v. *Grey*, 30 Beav. 352.)

See *Egerton* v. *Massey*, 3 C. B., N. S. 338; 3 Jur., N. S. 1325; 27 L. J., C. P. 10, as to the destruction of a contingent remainder by merger.

Reversion expectant on Lease.

When the reversion on a lease is gone the next estate to be deemed the reversion.

9. When the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease (*r*).

(*r*) This section of the act is retrospective in its operation. (*Upton* v. *Townend*, 17 C. B. 542.)

It sometimes happened, where the immediate reversion on a lease is a term, or other particular estate, that it becomes merged in some other estate in the same land; and, where that is the case, not only the benefit of the covenants, but the rent and all remedies for it, are lost. (3 Real Prop. R. 49.) The object of this section is to prevent such consequence, and to preserve covenants of, and remedies against a lessee, and the obligations on the lessor which are incident to the immediate reversion. (*Webb* v. *Russell*, 3 T. R. 678; *Wootley* v. *Gregory*, 2 Yo. & J. 536; *Burton* v. *Barclay*, 7 Bing. 745; *Thorn* v. *Woolcombe*, 3 B. & Ad. 586; 2 Platt on Leases, 393—399.)

Act not to extend to Scotland.

10. This act shall not extend to Scotland.

SATISFIED TERMS.

8 & 9 Victoria, c. 112.

An Act to render the Assignment of Satisfied Terms unnecessary. [8th August, 1845.]

Terms attendant on 31st December, 1845.

8 & 9 *Vict.* c. 112, *s.* 1.

Whereas the assignment of satisfied terms has been found to be attended with great difficulty, delay and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate: be it therefore enacted, that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, one thousand eight hundred and forty-five, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, one thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term (*a*).

On 31st December, 1845, satisfied terms of years attendant on inheritance, &c. of land, to cease, except, &c.

(*a*) Allusion has already been made to the doctrine of attendant terms of years assigned to attend the inheritance. (*Ante*, p. 436.) The subject is fully explained in the Second Report of the Real Prop. Comm. pp. 7—14. As to terms attendant by implication or construction of law, see Sugd. V. & P. 786—789, 11th ed.

Cases in reference to this section.

In *Doe* d. *Hall* v. *Moulsdale* (16 Mees. & W. 689, *ante*, p. 208), it was contended that an outstanding term, although for some purposes destroyed by the above statute, was still to remain as a protection against actions and claims at law. The defendant was the party in possession, and required the protection of the term. The court, however, had no doubt that the term was to be deemed to have absolutely ceased and determined under the act on the 31st December, 1845, and consequently afforded no defence to the action of ejectment.

In 1829, A. died seised in fee of lands, of which his eldest son B. was his tenant. On his death B., supposing him to have died intestate, entered on the lands, claiming them as heir at law, and in 1830 mortgaged them in fee, and levied a fine to confirm the mortgage; and at the same time an outstanding term of 500 years was by his direction assigned to a trustee for the mortgagee. In 1835, B. sold the estate to the defendant, who paid off

8 & 9 *Vict.* c. 112, *s.* 1.

the mortgage; the legal estate in fee and the equity of redemption were conveyed to the defendant, and the term was assigned to a trustee for him to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee, to whom the term was assigned in 1835: it was held, first, that B. had a sufficient estate to make him a good conusor of the fine; secondly, that by the operation of this statute the term had absolutely determined, and that the plaintiff could not recover upon the demise laid in the name of the trustee. (*Doe* d. *Cadwalader* v. *Price*, 16 Mees. & W. 603.) On the question as to what had become of the satisfied term under the 1st section of the statute 8 & 9 Vict. c. 112, *Parke*, B., observed, "As the plaintiff has in his declaration a demise by a trustee of the term, added to that of the real claimant of the property, we must decide whether that satisfied term did or did not continue after the 31st December, 1845; and in order to do this, we must also determine whether the party claiming the protection of the term was really entitled to that protection against an incumbrance; and as that is a question of equity, we have thrown on us the duty of a court of equity without adequate machinery. Such, however, is the operation of the act, and we must therefore decide whether the defendant, who was in possession, wanted the protection of this term. Now as we have already held that he did not, seeing that he had the legal estate wholly independent of the term, his case does not fall within the latter part of the 1st section of the statute; but it falls within the former part of it, the effect of which is, that the term actually ceased and determined by the operation of the act on the 31st of December, 1845, and consequently the plaintiff cannot recover on the demise of the trustee of the term. If it had turned out that the defendant wanted the protection of the term, on the ground that he was a purchaser for valuable consideration, it would be necessary for us to determine what course he ought to take; probably it would be necessary for him to apply to a court of equity, or to apply to this court to strike out of the declaration the demise in the name of the trustee; but as he does not want the protection of the term, it has absolutely ceased and determined on the 31st December, 1845. The defendant is therefore entitled to a verdict on all the demises." (*Ib.* 613, 614.)

Surrender of term not presumed.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to. (*Garrard* v. *Tuck*, 13 Jur. 871; 18 Law J., C. P. 338; 8 C. B. 231.) Therefore where the owner of the estate, which is subject to such attendant term, devised it without referring to the term, and the devisee mortgaged it with notice of the term, but without the mortgagee taking any assignment of the term, and the devisee afterwards conveyed the estate to trustees for sale, it was held, that there had not been such a dealing with the estate as to induce the court to presume a surrender of the term. (*Ib.*) The relation of the owner of the estate, who is in possession of the land, to the trustee of a term assigned to attend the inheritance, is that of a tenant at will; and it is only on the determination of such tenancy that there is a vested right of entry in the trustee within the 2nd section of the Statute of Limitations, 3 & 4 Will. 4, c. 27. (*Ib.*; see *ante*, p. 150.) The court expressed an opinion that the case of a *cestui que trust* holding possession of lands under a trustee does not fall within the 3 & 4 Will. 4, c. 27, s. 3, which is meant to apply to cases where the person holding the land does not hold it under or in privity with the person in whom the right of entry is supposed to be. A *cestui que trust* in such cases holds possession under the trustee, and under the protection of an instrument by which the estate is conveyed to the trustee. It cannot therefore be said it is a case in which no person entitled under an instrument has been in possession, for the *cestui que trust* has virtually been in possession under an instrument. (*Ib.*; see *Doe* d. *Jacobs* v. *Phillips*, 8 Q. B. 158; *ante*, p. 168.)

C. being, under a deed of settlement of 1813, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no

8 & 9 *Vict.* c. 112, s. 1.

notice of the settlement, and the residue of two terms, each of 1,000 years, was assigned by the personal representatives of H. to a trustee for the defendant to attend the inheritance. These terms had originally been created for mortgage purposes, and in 1773, the mortgage debt having been satisfied, were assigned to H. in trust to attend the inheritance for the benefit of the then owner in fee. The estate had been settled in 1778, and had also been mortgaged in 1836 and the three following years, but in none of the deeds, nor in the settlement of 1813, was any notice taken of the outstanding terms. In 1844, C. duly exercised his power of appointment, limiting the estate after his death (which took place in 1853) to the plaintiff his eldest son in fee. In an action of ejectment, a verdict having been taken for the plaintiff, subject to a case disclosing these facts: it was held, first, that the court could not presume a surrender of the terms, which was not stated as a fact, for that, even assuming the decision in *Doe* d. *Putland* v. *Hilder* (2 B. & Ald. 782) to be right, (which the court greatly doubted,) the presumption, if to be made at all, must be made by the jury and not by the court. (*Cottrell* v. *Hughes*, 15 C. B. 532; 1 Jur., N. S. 448; 24 Law J., C. P. 107.) It was held, secondly, that, as the terms were, on the 31st December, 1845, attendant on the inheritance by express declaration, and would, if subsisting, have afforded to the defendant such protection against the settlement of 1813 as a court of equity would not have restrained him from setting up in a court of law, they were within the exception of this section, and must be considered as subsisting terms. (*Ib.*)

The intention of this act was that all mere dry satisfied terms made attendant on the inheritance should merge, but not terms assigned or agreed to be assigned as a protection to a mortgagee or purchaser. A term outstanding in a trustee for a mortgagor and to attend is not so merged by this act as to prevent the mortgagor from assigning it to a trustee as a security for the mortgage debt. (*Shaw* v. *Johnson*, 1 Drew. & S. 412; 7 Jur., N. S. 1005.) With respect to this case Lord *St. Leonards* observes, that "there is no date in the report in Drewry & Smale, but in the Jurist it appears that the mortgage was long before the period fixed for merger of satisfied terms. The attendant term therefore was not a satisfied term within the act, as it was by mortgage agreed to be a security for the mortgagee. (Sugd. on the Stat. 282, 2nd ed.)

A term of 500 years having been created in 1738 as a security for portions for younger children, and to attend the inheritance, was afterwards assigned by the tenant for life, under a settlement made in 1784, to a trustee as a security for 100*l.* advanced by W., and to attend the inheritance. W. and the tenant for life afterwards conveyed the term to M., in trust for S., with a declaration of trust for certain parties: it was held, that such parties, having had notice that the object of the term was satisfied, could not set up against the parties claiming under the settlement of 1784, the term which had been assigned to W. by a person who had no right to deal with it except to the extent of his own interest. (*Plant* v. *Taylor*, 7 H. & N. 211; 8 Jur., N. S. 140; 31 Law J., Exch. 289.)

A., who had married in 1832, purchased an estate in 1837, subject to a satisfied term, of which he procured an assignment to a trustee for himself. He afterwards executed three mortgages, in each of which he covenanted that the lands were free from dower; and on the occasion of the first mortgage the deed of assignment of the term was delivered to the solicitor for the mortgagee, but it did not clearly appear that he retained the exclusive possession of it. It was held that, notwithstanding the saving in this statute, the term had ceased by the operation of this act, and that the mortgagees were not entitled to its protection against A.'s wife's right of dower. (*In re Sleeman*, 4 Ir. Ch. R. 563.)

8 & 9 *Vict.* c. 112, *s.* 2.

Terms satisfied after 31st December, 1845.

Satisfied terms now subsisting, &c. to cease on becoming attendant upon inheritance, &c. of lands.

2. Every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, one thousand eight hundred and forty-five, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (*b*).

Case of a term not determined under this section.

(*b*) In 1838, Mary Humphreys mortgaged premises for 1,000 years to Davies to secure 60*l.* and interest. In June, 1842, Mary and John Humphreys mortgaged the premises in question, subject to the term of 1,000 years, to Minshall in fee; and in October, 1844, in consideration of 18*l.* conveyed the equity of redemption to Clay, the lessor of the plaintiff. By articles of agreement of the same date, Clay agreed to convey to Meredith Humphreys the moiety of such premises on a certain event. By deed 21st December, 1844, the residue of the term was assigned to John Thompson, his executors, administrators and assigns, with a proviso for redemption on payment by Clay or Meredith Humphreys of 160*l.* with interest. By the same deed Minshall released the same premises to R. Thompson in fee, upon trust to reconvey to or to the use of J. Clay and M. Humphreys, on payment by them or either of them of 160*l.* on 21st June then next. On the 20th September, 1847, a portion of the mortgaged premises being required by a railway company, in consideration of 220*l.* (160*l.* of which was paid to Thompson in discharge of principal and interest due to him), and the residue, 60*l.*, paid to J. Clay, M. Humphreys and R. Thompson, by the direction as well of J. Thompson as of J. Clay and M. Humphreys, released and assigned to the company in fee the portion of the premises required by them. The defendants in an action of ejectment put in an indenture dated 26th October, 1839, and made between M. Humphreys of the one part, and C. Humphreys, her daughter (who afterwards married the defendant Jones), of the other part, whereby M. Humphreys, in consideration of 19*l.* expressed to be paid to her, but which was not in fact paid, by C. Humphreys, conveyed the premises in question amongst others to C. Humphreys in fee. This deed was unknown to the parties to the subsequent deeds. The case of the plaintiff rested on the demise of J. Thompson, the assignee of the term of 1,000 years. For the defendants it was contended that the term had determined, but the court held that the term had not become attendant upon the inheritance by construction of law, so as to be determined by the second section of this statute; and therefore Clay was entitled to recover upon the demise of J. Thompson. *Patteson*, J., observed, "It is not necessary to decide whether the defendants claiming to have the fee can maintain that this is a satisfied term, the satisfaction of the mortgages having been made not by him, but by Clay, under a mistaken belief that the equity of redemption in fee had been conveyed to himself, because we are of opinion that this term is not within either of the alternatives in the statute for determining terms. It is not attendant on the inheritance by express declaration, there being no such declaration, neither is it by construction of law; for the trust is expressly declared to be for Clay and Humphreys, who have not the inheritance; and although they were supposed to be entitled thereto when the deed was executed, that supposition is now proved to have been founded on a mistake. That mistaken supposition has no effect upon the express words of the instrument." (*Doe* d. *Clay* v. *Jones*, 18 Law J., Q. B. 260; see Sudg. V. & P. 777, 11th ed.; and observations on this case, 13 Jur. part 2, pp. 382—384.)

In *Bass* v. *Wellsted*, 12 Jur. 347, a question was raised, but not decided, as to the protection against dower by a term since the above act.

8 & 9 *Vict.* c. 112, s. 3.

Construction of act.

3. In the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Not to extend to Scotland.

4. This act shall not extend to Scotland.

THE TRUSTEE ACT, 1850.

13 & 14 Victoria, c. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees. [5th August, 1850.]

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13 & 14 *Vict.* c. 60, *s.* 1.

Whereas an act was passed in the first year of the reign of his late majesty King William the Fourth, intituled "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give Effect to their Decrees and Orders in certain Cases:" and whereas an act was passed in the fifth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in Trust:" and whereas an act was passed in the second year of the reign of her present Majesty, intituled "An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees:" and whereas it is expedient that the provisions of the said acts should be consolidated and enlarged: be it therefore enacted, that all proceedings under the said acts or any of them commenced before the passing of this act may be proceeded with under the said recited acts, or according to the provisions of this act, as shall be thought expedient, and, subject as aforesaid, that the said recited acts shall be and the same are hereby repealed: provided always, that the several acts repealed by the said recited acts shall not be revived, and that such repeal shall only be on and after this act coming into operation.

11 Geo. 4 & 1 Will. 4, c. 60.

4 & 5 Will. 4, c. 23.

1 & 2 Vict. c. 69.

Interpretation of terms.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used; it is declared, that the several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,)

The word "lands" shall extend to and include manors, messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

The word "stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein (*a*):

13 & 14 *Vict.* c. 60, s. 2.

The word "seised" (*b*) shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity (*c*), in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent (*d*):

The words "convey" and "conveyance" applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple Modes of Assurance" (*e*), and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands (*f*):

3 & 4 Will. 4, c. 74.

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another:

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any lord keeper or lords commissioners of the great seal for the time being:

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any keeper or lords commissioners of the great seal of Ireland for the time being:

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall

13 & 14 *Vict.* c. 60, s. 2.

extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person:

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo*:

The expression "person of unsound mind" shall mean any person not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs:

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a court of equity be deemed merely a security for money:

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate:

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

(*a*) Shares in a joint-stock banking company come within this definition of stock. (*In re Angelo*, 5 De G. & S. 278.) Shares in ships registered under the "Merchant Shipping Act, 1854," are also included. (18 & 19 Vict. c. 91, s. 10.)

(*b*) This word does not apply to leaseholds. (*Re Harvey*, Seton on Decrees, p. 418.)

(*c*) In suits where all parties beneficially interested are before the court, it is sufficient for the purchaser to take a conveyance of the legal estate, as the equities of the parties are bound by the order of sale. (*Re Williams' Estate*, 5 De G. & Sm. 515; Lewin on Trusts, p. 671, 4th ed., n. (*b*).)

(*d*) This definition of "contingent right" is taken from the 8 & 9 Vict. c. 106, s. 6, (*ante*, p. 625,) with the view of including in this act all the estates and interests which may be disposed of under the former act.

(*e*) A vesting order under this act will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under 3 & 4 Will. 4, c. 74, s. 34. (*Powell* v. *Matthews*, 1 Jur., N. S. 973. *Ante*, p. 358, n.)

(*f*) See *Rowley* v. *Adams*, 14 Beav. 130.

Lord Chancellor may convey estates of lunatic trustees and mortgagees.

3. When any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics (*g*), to make an order that such lands

13 & 14 *Vict.* c. 60, *s.* 3.

be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Certain statutory jurisdiction given to Lord Chancellor, intrusted with care of lunatics, to be exercised by the persons for the time being so intrusted.

(*g*) All the jurisdiction and all the powers and authorities of a judicial nature, given by the act 11 Geo. 4 & 1 Will. 4, c. 65, by "The Trustee Act, 1850," and by any other acts or act of parliament then (1st July, 1852) in force, to the Lord Chancellor, intrusted by virtue of the Queen's sign manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic or of unsound mind, shall belong to and may be exercised by all or any of the persons or person for the time being intrusted as aforesaid. (15 & 16 Vict. c. 87, s. 15. See 15 & 16 Vict. c. 55, s. 11, *post*.)

Before the above act it was considered that the lords justices acting in lunacy under the royal sign manual had jurisdiction to make a vesting order. (*In re Waugh's Trust*, 2 De G., M. & G. 279.)

A petition for an order, vesting in new trustees property of which a trustee has become lunatic, ought to be served on his committee. (*Re Saumarez*, 8 De G., Mac. & G. 390.)

The appointment under this act of a new trustee, in the place of one of unsound mind, not so found by inquisition, belongs to the jurisdiction in lunacy, and not to the Court of Chancery. It cannot therefore be exercised by the Court of Chancery of Lancaster. (*Re Ormerod*, 3 De G. & J. 249.)

The wife of a lunatic was sole surviving trustee of stock. An order was made, appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustee the right to transfer the stock. (*Re Wood*, 3 De G., F. & J. 125.)

Where a widow, a sole surviving trustee of a will, married, and her husband was afterwards duly found lunatic, such husband was held a trustee within this act; and the costs of his committee who appeared were allowed out of the corpus of the trust fund. (*Re Wood*, 7 Jur., N. S. 323; 30 L. J., Ch. 453.)

If the lunatic be a *trustee*, the trust estate or the *cestui que trust* must bear the costs of the proceedings under the act; and if he be a *mortgagee*, and it appear upon the face of the mortgage deed that the lunatic mortgagee is a trustee for a third party, the costs will fall on the mortgagor. (*Re Lewes*, 1 Mac. & G. 23.) But if the mortgagor have no notice of the fact that the lunatic is a trustee, the costs will follow the general rule. (*Re Townsend*, 1 Mac. & G. 686.) What is the general rule has been much disputed. The latest phase of the law is, that, where the estate of the mortgagee is beneficially interested by reason of the mortgage money remaining unpaid, there the costs are, by force of authority and contrary to principle, to be borne by the lunatic's estate. (*Re Wheeler*, 1 De G., M. & G. 436; *Re Stuart*, 4 De G. & J. 317; and cases cited (*Ib*). See Lewin on Trusts, 673, n. (*b*), 4th ed.)

Where the heir at law of a mortgagee is a lunatic, the costs of obtaining an order vesting the legal estate in the mortgagor must be borne by him. (*Re Jones*, 7 Jur., N. S. 115.)

See Shelford on Lunatics, pp. 505—510, 2nd ed., for cases prior to this act.

Contingent rights may be conveyed.

4. When any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mort-

gagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Lord Chancellor may transfer stock of lunatic trustees and mortgagees.

5. When any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any other person or persons the said Lord Chancellor may appoint (*e*).

(*e*) A new trustee was appointed under a power in a settlement in the place of a trustee who was a lunatic. An order was made under this act for vesting the estate in the new trustee, but the committee of the lunatic's estate had not been served. The registrar declined to draw up the order without service, which the court directed to be made. (*Re Saumarez*, 25 L. J., Ch. 575.)

Power to transfer stock of deceased person.

6. When any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint.

Court of Chancery may convey estates of infant trustees and mortgagees.

7. Where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*f*).

(*f*) It was at first doubted whether under this section real estate could be ordered to go to uses to bar dower in favour of the *cestui que trust* (*In re Howard's Estate*, 21 Law J., Ch. 437; 5 De G. & S. 435); but in a subsequent case an order was made under this act that the legal estate outstanding in a trustee should vest to uses to bar dower in favour of a purchaser. (*Davey* v. *Miller*, 17 Jur. 908; 22 Law J., Ch. 1054.) And it is said that the same practice might be adopted under other sections, enabling the court to make vesting orders. (*Ex parte Grieve*, 5 De G. & S. 436, where the form of the order is stated.)

13 & 14 *Vict.* c. 60, s. 7.

A petition was presented under this act for an order to vest the legal estate, which was outstanding, in the infant heir of an intestate mortgagee. The owner of the equity of redemption had devised it to his three daughters, charged with a legacy of 200*l.* The three daughters applied that the estate might be vested in them subject to the legacy, and the court made the order. (*In re Ellerthorpe*, 18 Jur. 669.) A mortgage in fee was made of real estate. The mortgagor died, having devised the estate to an infant. A claim of foreclosure was filed by the mortgagee against the infant, and an order for sale was made therein. A vesting order as to the equity of redemption in the infant, against whom the decree for sale had been made, was refused on the ground that the mortgagee had the legal estate, and that all equitable estates were bound by the order for sale. (*In re Williams' Estate*, 5 De G. & S. 515; 21 Law J., Ch. 437.)

A petition under this act for the appointment of a person to convey in the place of an infant heir of a deceased mortgagee need not be served upon the infant. (*Re Willan*, 9 W. R. 689.)

Where the executor and executrix (a married woman) of a mortgagee applied for a vesting order, the court instead of vesting the property in the executor and executrix, who was a feme covert, and who, in order to part with it, would have to acknowledge the deed, vested it in such person or persons as the executor and executrix should appoint, and, in default thereof, in the executor and executrix. (*Re Powell*, 4 Kay & J. 338; Lewin on Trusts, 674, 4th ed.)

Contingent rights of infant trustees and mortgagees.

8. Where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such land from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey the estate of a trustee out of the jurisdiction of the court.

9. When any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*g*).

(*g*) A testator devised real estates to trustees, upon trust to sell and pay debts and apply the surplus as therein mentioned. The trustees disclaimed the trusts by deed: the heir at law of the testator could not be found. It was held, in a suit for the sale of the estates and administration, that the case fell within the meaning of the 9th section of this act, and that an order appointing a party to convey to a purchaser was correct. (*Wilks* v. *Groom*, 6 De G., M. & G. 205; 2 Jur., N. S. 1077.)

Leases were granted to A. B. for certain terms of years. He subdemised to C. D. for terms less ten days. C. D. mortgaged to E. F. & Co. for securing money, and subdemised for the last-mentioned terms less one day, with a power of sale, and covenanted to assign the last day of each term to a purchaser. The mortgagees (E. F. & Co.) sold to G. H., and assigned the mortgage terms. G. H. then bought of A. B. the improved ground rents, and took an assignment of the leases granted to him. C. D., the mortgagor, being abroad, G. H. petitioned under this act, that the court would declare the last day of each of the terms created by the underlease to him vested in the petitioner, but the court, concurring in the opinion of one of the Vice-Chancellors, dismissed the petition. (*In re Probert's Purchase*, 22 Law J., Ch. 948.)

13 & 14 *Vict.* c. 60, *s.* 10.

Court may make order in cases where persons are seised of lands jointly with parties out of jurisdiction of court, &c.

10. When any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*h*).

(*h*) The two cases, *Re Plyer's Trust* (9 Hare, 220; 15 Jur. 766,) and *In re Watts' Settlement* (9 Hare, 106), decided upon this and the 34th section, are overruled. (See *Smith* v. *Smith*, 3 Drew. 72; see section 34, n, *post*.

Under this section the court will make an order vesting lands in a new trustee jointly with continuing trustees, notwithstanding the doubts suggested in the above cases. (*Re Bute* (*Marquis*), 1 Johns. 15; 5 Jur., N. S. 487.)

Contingent rights of trustees.

11. When any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the court to a contingent right in lands.

12. When any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery or cannot be found, it shall be lawful for the said court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

When it is uncertain which of several trustees was the survivor.

13. Where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is uncertain whether the last trustee be living or dead.

14. Where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful

13 & 14 *Vict.* c. 60, s. 14.

for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When trustee dies without an heir.

15. When any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate (*i*).

(*i*) Where a mortgagee with power of sale and a trust to pay the residue to the mortgagor took possession and so remained until his death, giving his estate generally to trustees but left no heir at law, the court would not make a vesting order under the 9th or 19th sections of this act, but under this section. (*Re Keeler*, 11 W. R. 62.)

This section does not apply to leaseholds. (*Re Mundel's Trust*, 8 W. R. 683.) In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust in case the principal money and interest should be repaid by a given day for the borrower, his heirs or assigns; but in case default should be made, then upon trusts for sale; and the trusts of the purchase-money were declared to be for payment of the principal money, interest and costs, and subject thereto for the borrower, "his executors, administrators or assigns." Default having been made: it was held, that the trust of the surplus being for the borrower, "his executors, administrators or assigns," and not for him, "his heirs or assigns;" the deed operated to convert the property as between his real and personal representatives. It was, therefore, more than merely a security for money, more, that is, than a "mortgage," as defined by the 2nd section of this act, it was a deed of "trust" within the meaning of this section; and the lender having died intestate, and it being impossible to find his heir, the court had power to make a vesting order under that section. (*Re Underwood*, 3 Kay & J. 745.)

Contingent right of unborn trustee.

16. When any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

Power to convey in place of a refusing trustee. (*Repealed.*)

17. Where any person jointly or solely seised or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned persons, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for convey-

ing or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*e*). 13 & 14 *Vict.* c. 60, s. 17.

(*e*) This section is repealed and another provision substituted for this and the following section, by 15 & 16 Vict. c. 55, s. 2, *post*. See *Rowley* v. *Adams*, 14 Beav. 130, in which difficulties arose in the application of this section to copyholds.

Power to convey in place of person entitled to contingent right. (*Repealed.*)

18. Where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by a person entitled to require the same, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or release such contingent right, or shall neglect or refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right (*f*).

(*f*) This section is repealed by the 2nd section of 15 & 16 Vict. c. 55. See *post*.

Power to convey in place of mortgagee.

19. When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found:

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for

13 & 14 *Vict.* *c.* 60, *s.* 19.

conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person:

When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee:

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*g*).

(*g*) This clause is not confined in its operation to a case of simple reconveyance in the literal sense of the word. Where a mortgagee in fee (who has never been in possession or in receipt of the rents and profits) has died intestate as to the mortgaged hereditaments, and his heir cannot be found, the court may, under this act, make an order vesting the legal estate in his executors. (*Boden's Trust*, 1 De G., M. & G. 57; 16 Jur. 279; 21 Law J., Ch. 316; 9 Hare, 820.)

When the personal representative of a mortgagee assigns the mortgage, the heir of the mortgagee being out of the jurisdiction, the assignee may, under this section, obtain an order vesting the legal estate. The relief given by this section is not confined to the case of a reconveyance to the mortgagor. (*Re Quinlan*, 9 Ir. Chanc. Rep., N. S. 306.)

Power to appoint a person to convey in certain cases.

20. In every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the

Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto.

13 & 14 *Vict.* c. 60, *s.* 20.

As to lands in Lancaster and Durham.

21. As to any lands situated within the duchy of Lancashire or the counties palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has, under the provisions hereinbefore contained, been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagee within the meaning of this act.

When trustees of stock out of the jurisdiction.

22. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery (*g*), or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said court may appoint (*h*).

(*g*) See *Re Ormerod*, 3 De G. & J. 249; *ante*, p. 636.

(*h*) On a petition under the 22nd and 23rd sections of this act for the appointment of a new trustee in the place of a trustee, who was stated to be residing in Jamaica out of the jurisdiction of the Court of Chancery, V. C. *Kindersley* was of opinion, "that he was not authorized under this act to remove a trustee merely because he is out of the jurisdiction; it might be that he was absent only for a limited time. The words of the act are certainly very general; but it never could have been the intention of the legislature

13 & 14 *Vict.* c. 60, s. 22.

that a trustee should be removed without some further reason than his being out of the jurisdiction, there being no evidence to show that he does not intend to return to this country." (*In re Mais*, 21 Law J., Ch. 875; 16 Jur. 608.)

The husband of an executrix out of the jurisdiction was held to be a trustee within this section. (*Ex parte Bradshaw*, 2 De G., M. & G. 900; Law J., Chanc. 180.)

This section authorizes an order vesting a right to receive future as well as past dividends. (*Re Peyton*, 25 Beav. 317; 2 De G. & J. 290.) Bank stock was standing in the names of four trustees, one of whom was abroad and inaccessible. There being some inconvenience in removing him, the court, under this section, vested the right to receive the past and future dividends in the three other trustees during their joint lives. (*Ib.*) Where new trustees of stock, forming part of a larger integral sum, had been appointed under this statute, in the room of a person of unsound mind, though not so found by inquisition, in whose name the stock had stood, and a portion only of the stock belonged to the trust, and there was an arrear of dividends, an order was made enabling the new trustees to receive the dividends on the whole, and to retain such part as was due in respect of the trust fund. (*Re Stewart*, 8 W. R. 425.)

The wife of a lunatic was the sole surviving trustee of a sum of stock. An order was made appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock. (*Re Wood*, 3 De G., F. & J. 125.)

It is said that the term "sole trustee" has a clear and definite meaning, and that it means a person originally a sole trustee or one who has become sole trustee by surviving. A. and B. being trustees, the Master found that it was uncertain whether A. was living or dead, but B. was living; afterwards B. died. It was held, that A. was sole trustee within the act, and the 22nd section of the act did not apply. (*Re Randall's Will*, 1 Drew. 401.)

A debtor resident in India pledged shares held by him in a joint-stock banking company in England with a creditor in England, with an authority by letter to sell, which was communicated to and recognized by the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser, it was held, that the shares were "stock," and that the debtor in India, being a constructive trustee, was a trustee for the purchaser within this act, and the court made an order directing a specified person to transfer the shares to the petitioner. (*Re Angelo*, 5 De G. & S. 278; 16 Jur. 831.) Under the 1 Will. 4, c. 60, the court was prohibited from making any order upon such a petition until the rights of the petitioner had been ascertained by suit, but this act contains no such prohibition. (*Ib.*)

When trustee of stock refuses to transfer.

23. Where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*i*).

(*i*) The person entitled for life to the dividends of stock held in trust requested in writing two executors of a sole deceased trustee, in whose name the trust stock was standing in the bank books, to receive the dividends, and they made default for twenty-eight day in doing so. Upon the petition of the person entitled for life to the dividends, the court declared, that the

right to receive the dividends which accrued due prior to such request was vested in the petitioner, but it was held, that the court had no authority to make any order as to any dividends accrued or to accrue subsequent to the date of the request. (*In re Hartnall*, 5 De G. & S. 111; 16 Jur. 33; 21 Law J., Chanc. 384.)

The surviving trustee of a sum of stock neglected for twenty-eight days after a request in writing had been made to him by persons who had been duly appointed new trustees to transfer the stock to them. The court held, that they were persons absolutely entitled to the stock within the meaning of this act, and ordered the stock to be transferred to them. (*Ex parte Russell*, 1 Sim. N. S. 404.)

One of several trustees of stock is not a person absolutely entitled within the meaning of the 23rd and 24th sections of this act, nor is a *cestui que trust* who has only a life interest in the dividends, at least where the application is to transfer the stock. (*Mackenzie* v. *Mackenzie*, 16 Jur. 723.) In consequence of the difficulties which arose under this section, further provision is made by the 15 & 16 Vict. c. 55, ss. 4, 5. See *post*.

When one of several trustees of stock refuses to transfer or receive and pay over dividends.

24. Where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees (*k*).

(*k*) A trustee having refused to transfer certain shares to new trustees duly appointed, a notice was served upon him under this section, and on a petition being afterwards presented, which was not served on the recusant trustee, the court made a vesting order. (*Re Baxter's Will*, 2 Sm. & G. App. v.)

When stock is standing in the name of a deceased person.

25. When any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint.

Effect of an order vesting the legal right to transfer stock.

26. Where any order shall have been made under any of the provisions of this act vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed

13 & 14 *Vict.* c. 60, s. 26.

are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof (*l*).

(*l*) See sect. 35, *post*, *Re Smyth's Settlement*, 4 De G. & S. 499; 15 & 16 Vict. c. 55, s. 6.

Effect of an order vesting legal right in a chose in action.

27. Where any order shall have been made under the provisions of this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

28. Whensoever, under any of the provisions of this act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all

acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of the manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts, for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments (*m*).

13 & 14 *Vict.* c. 60, s. 28.

(*m*) It is not necessary for the lord of a manor to appear in court to consent to a vesting order under this act, a verified certificate of his consent being sufficient. (*Ayles* v. *Cox*, 17 Beav. 584. See *Re Flitcroft*, 1 Jur., N. S. 418.)

Where copyholds of inheritance had been sold by order of the court in a suit by an equitable mortgagee against the infant customary heir who had not been admitted and the personal representative of the deceased mortgagor, the consent of the lord of the manor evidenced either by his appearing and consenting or by a verified certificate of his consent is a necessary preliminary to the drawing up of a vesting order under this act made upon the petition of the purchaser, the infant heir and the personal representative of the mortgagor. (*Cooper* v. *Jones*, 2 Jur., N. S. 59; 25 L. J., Ch. 240.)

When a decree is made for sale of real estate for payment of debts.

29. When a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

30. Where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition (*n*) or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare, that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the said Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as

13 & 14 *Vict.* c. 60, s. 30.

the said court or the said Lord Chancellor might under the provisions of this act make concerning the estates, rights and interests of trustees born or unborn (*o*).

(*n*) In a partition suit, instead of giving an infant entitled to a share a day to show cause, the court may declare him to be a trustee of such parts of the property as are allotted to other parties. (*Bowra* v. *Wright*, 4 De G. & Sm. 265.)

Where in a suit for partition of lands, to which a lunatic was entitled to an undivided share, a partition had been made and the lunatic had been declared a trustee within this act: it was held, on a petition by the owner of the other undivided moiety, that the court had jurisdiction to carry out the petition by a vesting order under this act, notwithstanding the doubt (*Re Bloomar*, 2 De G. & J. 88) attributed to the court. (*Re Molyneux*, 10 W. R. 512.)

Where the shares of the parties to a partition suit were very minute and complicated, the court declared each of the parties trustees as to the shares allotted to the other of them and vested the whole in a single trustee with directions to convey to each of the parties their allotted shares. (*Shepherd* v. *Churchill*, 25 Beav. 21. See form of order, *Ib.*, p. 23; and *Orger* v. *Sparke*, 9 W. R. 180.)

(*o*) The infant heir of a person who has died intestate leaving real estate, which he had in his lifetime contracted to sell, is not a constructive trustee for the purchaser within this act, unless he has been declared to be so by a decree of the court. *Wood*, V. C., referred to this section, and to the first section of the amending act (15 & 16 Vict. c. 55), as showing that in cases of real estate the constructive trust must first have been declared by a decree of the court, and said that the reason of that was, that there might always be a question whether the contract could be enforced by a suit for specific performance, and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided. His Honor referred to a case of *Re Probert* (22 Law J., Ch. 948), in which, after he had declined to make an order, the Lords Justices also held, that a lessee who had mortgaged by way of underlease and covenanted to stand possessed of the reversion of his lease in trust for the mortgagee and his assigns, was not such a trustee for an assign of the mortgagee to whom he had sold the underlease by virtue of a power of sale in the mortgage deed. (*Re Carpenter*, 1 Kay, 420.)

Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator, and an order was made in the cause, pursuant to the 1 Will. 4, c. 47, that the guardian of the infant should surrender them to the purchaser: it was held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant under this section. (*Wood* v. *Beetlestone*, 1 Kay & J. 213.)

A testator devised his freehold estates to his granddaughter for life, with remainder to all her children as tenants in common in fee, on their attaining twenty-one. In a suit for the administration of the testator's real and personal estates certain parts of the real estate had been contracted to be sold by order of the court, to provide a fund for payment of costs. The only two infant children of the granddaughter were parties to the suit. On their petition in the cause and under the Trustee Act, 1850, praying a declaration that the petitioners and the unborn children of the granddaughter would on attaining twenty-one be trustees of the estates devised to the children of the granddaughter for the purpose of the decree, and that their respective rights might be vested in the respective purchasers, or that some person might be ordered to convey for them: it was held, that the 29th and 30th sections of this act did not apply, and that the infants were not constructive trustees; and the court refused to make any order. (*Weston* v. *Fyler*, 5 De G. & S. 608; 16 Jur. 1010.) This case was decided before the 15 & 16 Vict. c. 55, the first section of which appears to have removed the difficulty. (*Wake* v. *Wake*, 17 Jur. 545.)

On making an order of foreclosure absolute, the court refused to add a declaration under this act, that the mortgagor being out of the jurisdiction is a trustee, in order to found upon it a subsequent application for a vesting order. Such a declaration can be obtained only on a separate application. (*Smith* v. *Bouchier*, 1 Sm. & G. 72; 16 Jur. 1154.)

13 & 14 *Vict.* c. 60, *s.* 30.

Power to make directions how the right to transfer stock to be exercised.

31. It shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this act are enforced.

Power to court to make order appointing new trustees (*o*).

32. Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (*p*).

(*o*) See 24 & 25 Vict. c. 145, s. 27, *post*, for further provisions as to the appointment of new trustees.

(*p*) The court has not jurisdiction under this act to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising and willing to exercise the power, although such donee may have disclosed an intention or desire to exercise his power corruptly. Sir *G. J. Turner*, after referring to the 32nd, 17th and 24th sections of this act, observed: "It is clear from the introduction of these provisions, that it was not the intention of the legislature to take estates out of trustees without the observance of every necessary and proper precaution; and I think it is a reasonable inference that it was not intended to take away a legal power vested in a party without a similar degree of precaution being observed. I am of opinion that it is not competent to the court under the provisions of this statute to take away the legal power vested in Hodson, however corruptly he may have intended to exercise it. That in effect disposes of the case, for if I have not power to appoint a trustee in the place of Lee, I clearly cannot have power to appoint one in the place of Lister if I remove him. Independently, however, of the power which remains in Hodson, I think that this statute was not intended to give the court jurisdiction to remove a trustee, where he states that he is desirous of continuing in the trust. The act empowers the court whenever it is expedient to appoint new trustees, but that provision is, I think, confined to the appointment and does not extend to the discharge of a trustee who is willing to remain." (*Re Hodson's Settlement*, 9 Hare, 118, 121.)

The Trustee Act does not give the court jurisdiction to displace a trustee who is desirous of continuing in the trust. The trustee cannot, under the summary jurisdiction of the court over solicitors, be removed from the trust for acts done by him not in the character of solicitor, or in any relation immediately arising out of that character, but in the character of trustee. (*Re Blanchard*, 3 De G., F. & J. 131.)

The mere fact of there being a dissension between one of several *cestuis que trust* and the trustee is not a sufficient ground for removing the trustee from the trust. (*Forster* v. *Davies*, 8 Jur., N. S. 65; 31 L. J., Ch. 276; 10 W. R. 180.)

Two trustees of real estate named in a will disclaimed. On a petition by a person entitled to a pecuniary legacy charged on the estates to appoint two persons named in the petition as trustees in their place, it was suggested that this section of the act authorized the court to appoint trustees in sub-

13 & 14 *Vict.* c. 60, *s.* 32.

stitution for or in addition to *existing* trustees only, and that the heir of the testator had become the existing trustee: it was held, that the distinction was too narrow, and the court, upon affidavits of the fitness of the proposed trustees, appointed them in substitution for the trustees who had disclaimed. (*Re Tyler's Trust*, 5 De G. & S. 56; 5 Jur. 1120; 21 L. J., Ch. 16.)

Two trustees of real estate were appointed by the court in the place of one on a petition under this act, and the property being small, without a reference, on an affidavit of the fitness of the two persons proposed as trustees; (*Ex parte Tunstall*, 4 De G. & S. 421;) Vice-Chancellor *Kindersley* observing, "That trust property ought, if possible, to be prevented from coming into the hands of a sole trustee." (See *Re Welch*, 3 My. & Cr. 292; *Birch* v. *Cropper*, 2 De G. & S. 255; *Plenty* v. *West*, 16 Beav. 356; *Ellison's Trust*, 2 Jur., N. S. 62; *Porter's Trust*, *Ib.* 349.)

On petition for the appointment of new trustees under this act, it was asked that the parties named in the petition might be appointed trustees without a reference to the master. Upon an affidavit of their fitness, the order was made, but the court required the written consent of the parties proposed to be appointed trustees. (*Re Battersby's Trust*, 16 Jur. 900.)

A petition by a tenant for life for a vesting order to vest property in a new trustee, appointed in the place of a trustee out of the jurisdiction, must be served on the remainderman. It must be proved by affidavit (*inter alia*), that the event has occurred in which the power could be exercised, and that the proposed trustee is a fit and proper person. (*In re Maynard's Settlement*, 16 Jur. 1084.)

On a petition to appoint new trustees in the place of two who were advanced in age and desirous of retiring, both the old trustees and all the *cestuis que trust* were required to appear. (*Re Sloper*, 18 Beav. 596.)

In a case where the surviving trustee of a term of years was dead intestate, and no administration had been taken out to his estate, the court declined to appoint a new trustee, stating that this section only enables the court to appoint a new trustee or trustees "in substitution for or in addition to any existing trustee or trustees," and that the words "if any" in the 34th section did not enlarge this section. (*Re Hazeldine*, 16 Jur. 853.)

A testator, in 1860, after specifically devising certain lands, &c., not including in such devise any lands or hereditaments vested in him as mortgagee or trustee, gave all the residue of his real and personal estate unto all his nephews and nieces as tenants in common. It was held, on petition by the executors, that the trust and mortgage estates did not pass to the unascertained class, but to the heir at law as trustee; and the court directed the same to be vested in the executors upon the trusts of the will. (*Re Finney's Estate*, 8 Jur., N. S. 965.)

A settlement contained a power to appoint a new trustee in case any trustee should become incapable of acting. A trustee became of unsound mind. Upon petition under this act, the court made an order for appointing a new trustee and empowering the continuing trustee to transfer the trust fund. (*Re Cooper*, 25 L. J., Ch. 685.)

New trustees had been appointed under a power of trust property, comprising freehold, copyhold and leasehold estates, but the property remained vested in the representatives of a former trustee who had died abroad. A petition was presented for a vesting order under sect. 15 of this act, but the court made an order, under sect. 32, re-appointing the trustees who had been already appointed under the power, and ordered that the trust estates should vest in such trustees under sect. 34. (*Re Mundel*, 6 Jur., N. S. 880; 8 W. R. 683.)

Where the trustees of a will are dead, and there is a question as to the party in whom the legal estate is vested, the court will appoint new trustees, notwithstanding that a receiver has been appointed in the suit, and continue the receiver. (*Reeves* v. *Neville*, 10 W. R. 335.)

New trustees of a charity were to be appointed in lieu of those who should depart the United Kingdom from whatever cause or motive, or under whatsoever circumstances; and every such trustee so departing the United

13 & 14 *Vict.* c. 60, s. 32.

Kingdom was immediately, upon his departure, to be and be considered to be discharged from the trust of the charity. A temporary departure from the United Kingdom was held insufficient to vacate the office of trustee. (*Re Moravian Society*, 4 Jur., N. S. 708; 26 Beav. 101. See *Re Watts' Settlement*, 9 Hare, 106.)

Where one of two proposed new trustees of a will was an unmarried lady of independent property, and not exercising any calling, the court, upon a petition for the appointment of new trustees under this act, sanctioned her appointment. (*Re Campbell's Trusts*, 10 W. R. 640; 31 Beav. 176; 31 L. J., Ch. 821; 8 Jur., N. S. 1199.)

Where, on a petition for the appointment of new trustees, a vesting order as to leasehold property was sought, and it appeared that the last surviving trustee had never acted, and there was no legal personal representative of such trustee, the court made an order vesting the leaseholds in the new trustees at the parties' own risk, at the same time expressing an opinion that the order was not justified by the terms of the Trustee Acts. (*Re Robinson's Will*, 11 W. R. 1035.)

Where estates were given to trustees upon trust (after a trust for one for life, with remainder for his children) to convey to a person in the event of the death of the tenant for life without issue, the court, under this section, appointed trustees in the place of original trustees who refused to act. In this case the legal estate was vested in the equitable tenant for life, which was thought objectionable, and therefore a clear case for the appointment of new trustees. (*Re Sheppard*, 32 L. J., Ch. 23; 11 W. R. 60.)

An order was made under the Trustee Act, 1850, vesting lands in a trustee who was afterwards found to be an alien. Upon petition of rehearing before office found, the original order was discharged, and a new order was made vesting the lands in a proper person. (*Re Giraud*, 9 Jur., N. S. 862.)

The new trustees to have the powers of trustees appointed by decree in suit.

33. The person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

Power to court to vest lands in new trustees.

34. It shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate (*p*).

(*p*) On a suit to appoint new trustees, it appeared that of the two of the remaining trustees of a marriage settlement one had gone out of the jurisdiction and the other was willing to act. It was held, that an order would be made for vesting the estate in the new trustees, to be appointed for such estate as was vested in the continuing and absent trustees. Vice-Chancellor *Kindersley* said, "The question was whether the Trustee Act, or that part of it which authorized the court to make a vesting order, was applicable to the case of two or more trustees, one of whom was out of the jurisdiction. In *Watts' Settlement* (9 Hare, 106), and *Re Plyer* (9 Hare, 220), Sir *G. J. Turner*, L. J., then Vice-Chancellor, declined to make such an order. His Honor had taken pains to ascertain what was the practice, and he found that orders of this kind were now made by the court, the Lords Justices themselves concurring in that view, and making such orders. It must therefore be understood that there was no longer any doubt upon the construction of the act in this respect, and the court would, without any hesitation, make

13 & 14 *Vict.* c. 60, *s.* 34.

vesting orders under circumstances such as in the present case. The order therefore would be to vest in the new trustees such estate as was vested in the continuing and absent trustees." (*Smith* v. *Smith*, 3 Drew. 72. See *Re Marquis of Bute's Will*, 1 Johns. 15; 5 Jur., N. S. 487.)

The court has authority to make a vesting order under this act, though there may exist a person capable of executing a conveyance of the trust property to the persons appointed trustees by the court. Vesting orders have only been refused where the facts of the particular case rendered it improper to make such an order. (*Re Manning's Trusts*, 1 Kay, App. xxviii.)

By this section the appointment of new trustees must necessarily precede the vesting order: where the object of appointing a new trustee was to get the estate out of a lunatic trustee, the court thought that the lunacy of the trustee afforded such a case of difficulty as to warrant the court in appointing a new trustee. (*Re Davies*, 3 Mac. & G. 278.)

Power to court to vest right to sue at law in new trustees.

35. It shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (*q*).

(*q*) See *Re Smyth's Settlement*, 4 De G. & S. 499; 15 & 16 Vict. c. *55*, *s.* 6, *post*.

Old trustees not to be discharged from liability.

36. Any such appointment by the court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

37. An order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock or chose in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage (*r*).

(*r*) Persons entitled to six seventh parts of a trust fund applied to have a new trustee of the fund appointed: it was held, that *primâ facie* all the persons beneficially interested must be before the court, and that the circumstances might render such an application impossible, yet no such impossibility being suggested in this case, the court declined to make the order asked without service on the person entitled to the remaining one seventh part. (*Re Richard's Trust*, 5 De G. & S. 636.)

Where an objection was made to a petition presented by legatees, who were interested in the purchase-money of an estate, which had been paid,

13 & 14 *Vict.* c. 60, *s.* 37.

the objection was obviated by amending the petition and making the purchasers co-petitioners, and three purchasers were allowed to join in one petition. (*Rowley* v. *Adams*, 14 Beav. 130.)

After a decree for the sale of an intestate's copyhold estate in lots, but before the sale, the infant heir of the intestate was admitted: it was held, that a petition for a vesting order was properly presented by the purchaser whose money was in court, and that the costs of the order were to be borne by the vendors and to be paid out of the purchase-money of the particular lot, and not out of the fund in court generally. (*Ayles* v. *Cox*, 17 Beav. 584.)

Copyhold premises were surrendered in 1829 by a debtor to the use of his creditor, his heirs and assigns, upon trust, that he, his heirs, executors, administrators or assigns, should sell the same, and out of the proceeds should pay to himself, his executors or administrators, 200*l.* then due and interest. The creditor died in 1831. In 1851 his personal representative contracted to sell the copyhold premises for 100*l.* The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, that there was no personal representative, and that proof of the title of the customary heir would be very expensive. The court made an order vesting the legal estate of the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the mortgagor. (*Re Wise*, 5 De G. & S. 415.)

Power to go before the master in the first instance.

38. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the Lord Chancellor, intrusted as aforesaid, or from the Court of Chancery, it shall be lawful for him to exhibit before any one of the masters of the High Court of Chancery (*s*) a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate (*t*).

(*s*) The office of Master in Chancery is abolished by 15 & 16 Vict. c. 80, s. 1.

(*t*) Lands bought by a father in the name of his son were held, under the circumstances of the case, not to amount to an advancement, but the Lord Chancellor declined to make an order to that effect on the petition of the father, though the petition was founded on the certificate of the master under this section. (*Collinson* v. *Collinson*, 3 De G., M. & G. 409.)

Power to apply to the court or the Lord Chancellor.

39. Any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as such person may deem himself entitled to upon the facts found by the master.

Power to present petition in the first instance.

40. Any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give

13 & 14 *Vict.* c. 60, s. 40.

evidence by affidavit or otherwise in support of such petition before the said court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

What may be done upon petition.

41. Upon the hearing of any such motion or petition it shall be lawful for the said court, or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said court or for the said Lord Chancellor to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court, or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss petition with or without costs.

42. Upon the hearing of any such motion or petition, whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act.

Power to make an order in a cause.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause, or of any petition or motion in the said cause or matter, to make such order under this act (*u*).

(*u*) An order under this act may be made in a cause without a petition. (*Wood* v. *Beetlestone*, 1 Kay & J. 213.)

An order was made under this and the 34th section, for vesting the mortgaged premises in the plaintiff on nonpayment of the principal, interest and costs. (*Lechmere* v. *Clamp*, 30 L. J., Ch. 651; 9 W. R. 860.)

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

44. Whenever any order shall be made under this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so

alleged in any court of law or equity upon any question as to the legal validity of the order: provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this act, when the same shall appear to have been improperly obtained. 13 & 14 *Vict.* c. 60, s. 44.

45. It shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock or chose in action, in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said court under any statute authorizing the said court to make an order to that effect in a summary way upon petition (*x*). Trustees of charities.

(*x*) The 28th section of the Charitable Trusts Act (16 & 17 Vict. c. 137), confers on the Master of the Rolls and the Vice-Chancellors at chambers the same jurisdiction as they would have exercised before the passing of that act in a suit regularly instituted or upon petition. New trustees having been appointed under that act by the Vice-Chancellor, and the surviving trustee being a lunatic, it is competent for the Vice-Chancellor in chambers to make the vesting order under the Trustee Acts, 1850 and 1852. (*Re Davenport's Charity*, 4 De G., M. & G. 839.)

46. No lands, stock or chose in action, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attanider or conviction had taken place (*y*). No escheat of property held upon trust or mortgage.

(*y*) This section is the same as the third section, 4 & 5 Will. 4, c. 23.

On a petition under that act, praying that the court would appoint a person to transfer certain funds standing in the name of Mr. Fauntleroy as trustee, and which had been forfeited to the crown by his attainder, and also to authorize the Bank to make the transfer accordingly; it was decided that the proper reference would be to inquire and state whether he was a trustee within the meaning of the 4 & 5 Will. 4, c. 23, and also within the meaning of 11 Geo. 4 & 1 Will. 4, c. 60. (*Anon.*, Law J. vol. 13, p. 73.) An order was made under 4 & 5 Will. 4, c. 23, s. 3, for a reference to inquire whether a person convicted of felony in the year 1822 was a trustee of stock standing in his name for the petitioner, and whether any grant thereof had been made by the crown: it was held not necessary to serve the attorney-general on behalf of the crown with notice of the application to the court. (*Re Tyson*, 1 Jur. 281.) In the case of a mere naked trustee, having the legal estate vested in him, the lands do not escheat, but the Court of Chancery, under References under this section.

13 & 14 *Vict.* c. 60, s. 46.

the provisions of stat. 4 & 5 Will. 4, c. 23, had power to appoint a new trustee in the place of a felon, and all the interests of such felon will become vested in the new trustees. (*Ex parte Tyson*, 1 Jur. 472, cited 3 Y. & Coll. 344.) The affidavit of one of the clerks of the treasury, that he had searched the registry of grants in the office of the Secretary of State, and had found no grant by the crown of the estate of a trustee who had been convicted of forgery, was held sufficient evidence of the non-existence of that grant. (*Ex parte Tyson*, 1 Jur. 472.)

Evidence of no grant from crown.

It had been considered that when land or personal property was vested in several trustees, one of whom was attainted, the whole, at least as to chattels, became forfeited to the crown, inasmuch as the crown could not be a joint tenant with any other person. (Co. Litt. 190 a; *Hales* v. *Petit*, Plowd. 257; 9 Rep. 129 b; 2 Bl. Com. 409; Cro. Eliz. 263; Finch's Law, 178; 10 Mod. 245.)

Power is now given to the court to appoint new trustees in lieu of any joint or sole trustee who has been or shall be convicted of felony. (15 & 16 Vict. c. 55, s. 8; *post*.

Act not to prevent escheat or forfeiture of beneficial interest.

47. Nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

Money of infants and persons of unsound mind to be paid into court.

48. Where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock or chose in action, conveyed, assigned, or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the accountant-general, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said court; and it shall be lawful for the said court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a decree in the absence of a trustee.

49. Where, in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the court, and that he cannot be found, it shall be lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and soli-

citor at the hearing of such cause: provided always, that no such decree shall bind, affect or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors or administrators, for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use and benefit, or otherwise than as a trustee as aforesaid. 13 & 14 *Vict.* c. 60, *s.* 49.

Powers of the master.

50. When any person shall, under the provisions of this act, apply to one of the masters of the Court of Chancery in the first instance, and adduce evidence for the purpose of obtaining the certificate of such master as a foundation for an order of the said Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, it shall be lawful for the said master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the master under this act shall be enforced by the same process as orders of the court made in any suit against a party thereto.

Costs may be paid out of the estate.

51. The Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or court shall think proper (*z*).

(*z*) Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee deceased. The heir of the deceased trustee could not be found, and on petition an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs with interest at 4*l.* per cent. might form a charge on the inheritance. (*Ex parte Davies*, 16 Jur. 882.)

On the appointment of new trustees of two trust funds, the costs will be paid out of each fund in proportion to the value of the funds. (*Re Grant's Trusts*, 2 Johns. & H. 754.)

Upon a petition under this act for the appointment of a new trustee, the court has no jurisdiction to award costs adversely against third parties cited to appear as respondents to the petition. (*Re Primrose*, 3 Jur., N. S. 899; 23 Beav. 590.) But see *Re Woodburn* (1 De G. & J. 333; 3 Jur., N. S. 799; 26 L. J., Ch. 522), where it was decided that the court has jurisdiction, under 10 & 11 Vict. c. 96, to award costs against a trustee who had availed himself of the provisions of that act by paying the trust fund into court, and thus submitted himself to the jurisdiction of the court.

Commission concerning person of unsound mind.

52. Upon any petition being presented under this act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Suit may be directed.

53. Upon any petition under this act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of

13 & 14 *Vict.* c. 60, *s.* 53.

Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose (*a*).

(*a*) Two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner in the property of the partnership at a valuation, and the survivor accordingly exercised such option, and paid to the executors of the deceased partner the amount at which his share was valued. The share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir, but the court refused upon petition or motion under this act, without suit, to declare the infant heir a trustee for the surviving partner. (*Re Burt*, 9 Hare, 289.)

Powers of Court of Chancery to extend to property in the colonies.

54. The powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations and colonies belonging to her Majesty (except Scotland).

Powers given to Court of Chancery may be exercised by that court in Ireland.

55. The powers and authorities given by this act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland (*b*).

(*b*) This section, taken in connection with the 57th, does not give to the Lord Chancellor of Great Britain sitting in lunacy a concurrent jurisdiction over lands in Ireland. (*Re Davies*, 3 Mac. & G. 278.)

Powers of Lord Chancellor in lunacy to extend to property in the colonies.

56. The powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations and colonies belonging to her Majesty (except Scotland and Ireland).

Powers of Lord Chancellor in lunacy may be exercised by Lord Chancellor of Ireland.

57. The powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

Short title.

58. In citing this act in other acts of parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

Commencement of act.

59. This act shall come into operation on the first day of November, one thousand eight hundred and fifty.

Act may be amended, &c.

60. This act may be amended or repealed by any act to be passed in this session of parliament.

THE TRUSTEE ACT EXTENSION.

15 & 16 Victoria, c. 55.

An Act to extend the Provisions of "The Trustee Act, 1850."
[30th June, 1852.]

15 & 16 *Vict. c. 55, s. 1.*

Whereas it is expedient to extend the provisions of the Trustee Act, 1850: be it therefore enacted,

Court of Chancery may make an order for vesting the estate, in lieu of conveyance by a party to the suit after a decree or order for sale.

1. When any decree or order shall have been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or, being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser or in such other person as the court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate (*a*).

(*a*) Where a sale has been ordered by decree of property, in which infant and possible unborn children are interested, though such decree was made before the passing of this act, and though the purpose of the sale is not confined to the payment of debts, the court has authority under the Trustee Act, 1850 and this act taken together to make a vesting order. (*Wake* v. *Wake*, 17 Jur. 545.)

A donee of a power of jointuring under a settlement was ordered, in a suit for specific performance instituted by his wife, to execute the power by a deed to be approved by the master, whereby 1,000*l.* per annum was to be appointed as the plaintiff's jointure. On his refusal to obey the decree, it was held, that under the Trustee Acts, 1850, 1852, he might be declared a trustee of all the rights, interests, estates and property acquired by him under the settlement, and the court appointed a person to execute the requisite deeds in his place under this act. (*Wellesley* v. *Wellesley*, 4 De G. M. & G. 537; 21 Law J., Ch. 966.)

Power to make an order for vesting the

2. Sections numbered seventeen and eighteen in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in

15 & 16 *Vict.* c. 55, s. 2.

estate, on refusal or neglect of a trustee to convey or release.

every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly-authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (*b*).

(*b*) On the neglect of old trustees to transfer stock to new trustees appointed by the court, the court will upon motion vest the right to transfer stock in the new trustees, and that whether the order upon the old trustees was made in a cause or upon petition. (*Re Holbrook*, 29 L. J., Ch. 200; 8 W. R. 3.)

This act was held to apply to a case in which the executor of a surviving trustee had not proved the will, and had neglected to transfer stock on the requisitions of new trustees appointed out of court. The court directed an order vesting the right to transfer stock to be amended by stating that the executor had neglected to transfer for twenty-eight days. (*Re Ellis*, 24 Beav. 426.)

Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee.

3. When any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them, together with any other person or persons the said court may appoint (*c*).

(*c*) This section of the act is supposed to have been introduced in consequence of the decision, that the court had no jurisdiction to make a vesting order with regard to stock held by an infant sole trustee, who was out of the jurisdiction of the court. (*Cramer* v. *Cramer*, 5 De G. & S. 312.)

The sole trustee of money for A. and B. invested it in stock in the joint names of himself and B. (an infant) after the death of the trustee and A. The infant was held to be a trustee within the 13 & 14 Vict. c. 60 and this section, and a vesting order was made. (*Sanders* v. *Homer*, 25 Beav. 467.)

On neglect to transfer stock for twenty-eight days, order may be made vesting right to transfer

4. Where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order

of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*d*). *15 & 16 Vict. c. 55, s. 4.* In such person as the court shall appoint.

(*d*) See sect. 23 of Trustee Act, 1850, *ante*, p. 644. The case of a trustee refusing to obey the order of the court, was not provided for by the Trustee Act, 1850, but came within 1 Will. 4, c. 15, s. 36, sub-division 15. (*Mackenzie* v. *Mackenzie*, 5 De G. & S. 338.)

5. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint (*e*). On like neglect by executor, similar order may be made.

(*e*) See sect. 23 of the Trustee Act, 1850, *ante*, p. 644, n.

6. When any order, being or purporting to be under this act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made (*f*). Bank of England and companies to comply with such orders.

(*f*) This provision appears to have been introduced in consequence of the case *Re Smyth's Settlement*, 4 De G. & S. 499.

7. Every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and Indemnity to bank and companies so obeying.

15 & 16 Vict. c. 55, s. 7.

it shall not be necessary for the Bank of England, or such company or association, or person, to inquire concerning the propriety of such order, or whether the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, had jurisdiction to make the same.

Power to appoint new trustees in lieu of persons convicted of felony.

8. When any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same (*g*).

(*g*) See 13 & 14 Vict. c. 60, ss. 46, 47; *ante*, pp. 655, 656.

Power to the court to appoint new trustees where there is no existing trustee.

9. In all cases where it shall be expedient to appont a new trustee, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said court to make an order appointing a new trustee or new trustees whether there be any existing trustee or not at the time of making such order (*h*).

(*h*) Where a power of sale was given by will to two trustees, one of whom was an infant, the court, under the 32nd sect. of the Trustee Act, 1850, appointed a new trustee in the place of the infant. (*Re Porter's Trusts*, 25 Law J., Ch. 482; 2 Jur., N. S. 349. See *Re Robinson's Will*, 11 W. R. 1035, *ante*, p. 651.)

Where a trustee of a term died many years ago, and there are difficulties in procuring a personal representative of the trustee, the court has power to appoint a new trustee under this section. (*Davis* v. *Chanter*, 4 Jur., N. S. 272; 27 L. J., Ch. 577.)

Chancellor may make orders for appointment of trustees, without it being necessary that it should be made in Chancery, &c.

10. In every case in which the Lord Chancellor, intrusted as aforesaid, has jurisdiction under this act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in chancery as well as in lunacy, or be passed and entered by the registrar of the Court of Chancery.

As to powers of persons intrusted with the care of lunatics.

11. All the jurisdiction conferred by this act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised and performed by the person or persons for the time being intrusted as aforesaid (*i*).

(*i*) See 15 & 16 Vict. c. 87, s. 15; *ante*, p. 636.

Act to be construed as part of

12. This act shall be read and construed according to the

definition and interpretations contained in the second section of the Trustee Act, 1850 (*k*), and the provisions of the said last-mentioned act (except so far as the same are altered by or inconsistent with this act) shall extend and apply to the cases provided for by this act, in the same way as if this act had been incorporated with and had formed part of the said Trustee Act, 1850.

15 & 16 *Vict.* *c.* 55, *s.* 12.

Trustee Act, 1850.

(*k*) See *ante*, pp. 633—635.

13. Every order to be made under the Trustee Act, 1850, or this act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

All orders made under Trustee Act, 1850, or this act to be chargeable with the same stamp duty as deeds of conveyance.

LEASES AND SALES OF SETTLED ESTATES.

19 & 20 Victoria, c. 120.

An Act to facilitate Leases and Sales of Settled Estates (a).
[29th July, 1856.]

19 & 20 *Vict.* c. 120, *s.* 1.

Whereas it is expedient that the Court of Chancery should have power in certain cases to authorize leases and sales of settled estates where it shall deem that such leases or sales would be proper and consistent with a due regard for the interests of all parties entitled under the settlement; and it is also expedient that persons in possession of land for certain limited interests should have power to grant agricultural or occupation leases thereof, at rack rent, for a reasonable period: 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 the present parliament assembled, and by the authority of the same, as follows:

(*a*) See Smith's Ch. Pr., pp. 1128—1139, 7th ed.

Interpretation of certain terms.

1. The word "settlement," as used in this act, shall signify any act of parliament, deed, agreement, copy of court roll, will or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons, by way of succession (*b*), including any such instruments affecting the estates of any one or more of such persons exclusively; and the term "settled estates," as used in this act, shall signify all hereditaments of any tenure and all estates or interests in any such hereditaments which are the subject of a settlement; and for the purposes of this act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life (*c*).

(*b*) A testator devised real estate to trustees upon trust to pay an annuity to his daughter, and, after her death, upon trust for all her children who should attain twenty-one equally. The daughter died leaving children, some of whom were infants. The trustees having entered into a contract for the sale of a portion of the real estate, a petition was presented on behalf of the infant children for an order authorizing such sale under this act, but the court refused to make the order asked for. (*Re Burdin*, 5 Jur., N. S. 1378.)

The time for ascertaining whether hereditaments stand limited by way of succession, so as to bring them within the operation of this act, is when the

application is made to the court; and the act does not apply where the particular limitations were spent, and the property had become vested in fee simple. (*Re Birtle's Estates*, 32 L. J., Ch. 439.)

In determining whether the estate is "settled," reference must be had to the state of things at the date of the instrument, and not to the state of circumstances when it comes into operation. (*Re Goodwin's Settled Estates, Ex parte Butler*, 8 Jur., N. S. 1170; 3 Giff. 620; 10 W. R. 612.)

G., in 1831, devised her estates on trust for her daughter for life, with remainder for all the daughter's children equally, as tenants in common, the shares of the children to be vested at twenty-one or marriage. The will contained clauses of survivorship and accruer, but no powers of sale or demise. The daughter died in 1856 leaving nine children; G. died in 1858; and the shares of two children were resettled by the parties entitled. Four other children had attained twenty-one, and their shares were vested absolutely in them. The other three children were infants. Under the provisions of the 19 & 20 Vict. c. 120 and 21 & 22 Vict. c. 77, on a petition presented for the purpose by the parties entitled to all the shares, (including the trustees and *cestuis que trust* of the two shares resettled, certain mortgagees and the guardians of the three infants,) the court made an order for a sale of the whole of the property. (*Ib.*)

The interest which may arise by way of accruer is a limitation, by "way of succession," within the meaning of the acts. (*Ib.*)

The shares of children who have attained twenty-one may be included in an order for sale of the whole estate upon such children becoming co-petitioners. (*Ib.*)

(*c*) See 21 & 22 Vict. c. 77, s. 1, *post*.

Power to Court of Chancery to authorize leases of settled estates, subject to certain conditions. (*d*)

2. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease twenty-one years, for a mining lease, or a lease of water, water mills, wayleaves, waterleaves, or other rights or easements, forty years, and for a building lease (*e*) ninety-nine years, or where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant building leases for longer terms, then for such term as the court shall direct:

Secondly, on every such lease shall be reserved the best rent, or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine:

Thirdly, where the lease is of any earth, coal, stone or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as here-

19 & 20 *Vict.* c. 120, s. 2.

inafter mentioned; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone or mineral for his own benefit, one-fourth part of such rent, and otherwise, three-fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent, by the appointment of trustees or otherwise, as the court shall deem expedient:

Fourthly, no such lease shall authorize the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations or other works authorized by the lease:

Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof; and every such lease shall contain a condition for re-entry on nonpayment of the rent for a period not less than twenty-eight days after it becomes due (*f*).

(*d*) The powers of leasing conferred by this section can only be exercised in cases where the contracts for granting the leases are strictly within the terms of this act. In such cases the Trustee Acts apply only after a decree in a suit to which the intended lessees would be necessary parties.

A testator in his lifetime entered into contracts for leases of parts of his estate for building purposes. The contracts provided for granting separate leases of the houses when built, apportioning the whole ground rent among some of them, and leaving the rest to be demised at a peppercorn rent. He devised the estate in strict settlement, without any power under which the leases could be granted: it was held, that this act could not safely be resorted to for granting these leases. The court granted leave to the petitioners to apply to parliament for a private act. (*Cust* v. *Middleton*, 3 De G., F. & J. 33; 7 Jur., N. S. 151; 30 L. J., Ch. 260; 9 W. R. 242.)

(*e*) The term "building lease" includes a repairing lease for a term not exceeding sixty years. (21 & 22 Vict. c. 77, s. 2, *post*.)

(*f*) The trustees of a dissenting chapel at St. Helen's, in the county of Lancaster, presented a petition, praying that power to grant building leases of property in that place, for any term not exceeding 600 years, might be vested in them. Sir J. *Romilly*, M. R., on proof that it was customary to grant building leases for 999 years of land in that neighbourhood, authorized the endorsement of a power to grant such a lease for 600 years on a deed declaring the trusts of a dissenting chapel. (*Re Cross's Charity*, 27 Beav. 592.)

The court authorized the granting of building leases of settled estates for 999 years or at fee farm, upon evidence that, according to the custom of the country, that was the mode of disposing of property for building purposes, and that it could not be beneficially disposed of for such purposes on any other terms. (*Re Carr*, 7 Jur., N. S. 1267; 6 W. R. 776.)

Leases may contain special covenants.

3. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the court shall deem expedient with reference to the special circumstances of the demise.

19 & 20 *Vict.* c. 120, *s.* 4.

4. The power to authorize leases conferred by this act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Parts of settled estates may be leased.

5. Any leases granted under this act may be surrendered, either for the purpose of obtaining a renewal of the same or not; and the power to authorize leases conferred by this act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease (*g*).

Leases may be surrendered and renewed.

(*g*) This section is extended to all leases, whether granted in pursuance of this act or otherwise. (21 & 22 Vict. c. 77, s. 5, *post.*)

Power to authorize leases to extend to preliminary contracts.

6. The power to authorize leases conferred by this act shall extend to authorize preliminary contracts to grant any such leases; and any of the terms of such contracts may be varied in the leases.

Mode in which leases may be authorized.

7. The power to authorize leases conferred by this act may be exercised by the court, either by approving of particular leases, or by ordering that powers of leasing, in conformity with the provisions of this act, shall be vested in trustees in manner hereinafter mentioned.

What evidence to be produced on an application to authorize leases.

8. When application is made to the court, either to approve of a particular lease, or to vest any powers of leasing in trustees, the court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized.

After approval of a lease, court to direct who shall be the lessor.

9. When a particular lease or contract for a lease has been approved by the court, the court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct.

Powers of leasing may be vested in trustees.

10. Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to this act should be vested in trustees, it may by order vest any such power accordingly, either in the existing trustees of the settlement or in any other persons; and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct; and in every such case the court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid (*h*).

19 & 20 *Virt.* c. 120, *s.* 10.

(*h*) Leases to be granted by trustees under this act must be settled in the judge's chambers. (*Re Procter*, 3 Jur., N. S. 534; 26 L. J., Ch. 464.)

An order was made under this act to empower trustees to grant agricultural, mining and building leases, and the words "and such leases to be settled by the judge" were inserted in the order. The building leases related to small takes, and had theretofore been granted in a printed form at a trifling cost, but if every lease was to be settled by the judge the expense would be more than doubled. Under these circumstances, it was held, that the words "and such leases to be settled by the judge" must be expunged. (*Re Earl Jersey*, 9 W. R. 609.)

On petition, the court made an order vesting in trustees of a settlement certain powers to grant leases, and to do other things, without in the first instance directing a reference to the conveyancing counsel, or ordering an inquiry as to the propriety of the powers. (*Re Jones*, 5 Jur., N. S. 138, 564.)

Model leases.

A model lease will, in cases where expense may thus be saved, be directed to be settled and adopted for each lease, without the necessity of applying to chambers in every case. (*Re Hemingway*, 7 W. R. 279; 33 Law T. 103, where the following order was made:—"It is ordered that general powers of leasing the estates in the petition mentioned, subject to the provisions and restrictions in the act contained, be vested in and in the petition mentioned, such powers to be exercised with the consent in writing of ; and such leases to be in such terms and conditions, and to contain such covenants, conditions and stipulations, as shall be approved of by the judge to whose court this cause is attached.") It has been suggested, that, under this order, the proceeding would be as follows: the parties would, by an affidavit of the surveyors employed, state the terms and conditions upon which it was proposed to grant the leases; and the intended covenants, conditions and stipulations would also be stated, and a certificate approving of these particulars would answer every purpose: thus, the minimum rent per foot, the class of houses, the period to be allowed for building, the nature of the covenants for repairing, insuring, &c., would all be settled, This being done with care would render any further application unnecessary, unless a very different class of lease was required. (See *Chambers' Settled Estates*, 8 W. R. 646; 6 Jur., N. S. 1005; Morgan's Chancery Acts, p. 255, n., 3rd ed.)

Where land is sold, pursuant to an order of the court under this act, the conveyance must be settled by the judge, whether the parties differ or not. (*Re Eyre*, 4 Kay & J. 268; 4 Jur., N. S. 830.)

But where land is to be sold in lots, and one conveyance has been settled by the conveyancing counsel of the court, it may be adopted by the chief clerk for all the rest in which no special circumstances exist to render such a course improper. (*Ib.*)

Court may authorize sales of settled estates and of timber.

11. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court (*i*).

(*i*) This act empowers the court to authorize the sale and conveyance of minerals situate under a settled estate apart from the surface thereof. (*Re Law*, 7 Jur., N. S. 511.) The contract for sale was ordered to be carried into effect by a grant, with a provision limiting the time within which the

coal was to be worked out. (*Re Mallin*, 9 W. R. 588; 3 Giff. 126; 30 L. J., Ch. 929.)

19 & 20 *Vict.* c. 120, *s.* 11.

Consideration for land sold for building may be a fee-farm rent.

12. When any land is sold for building purposes it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve.

Minerals, &c. may be excepted from sales.

13. On any sale of land any earth, coal, stone or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants, or submit to any restrictions, which the court may deem advisable.

Court may authorize dedication of parts of settled estates for roads, &c.

14. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to and vested in any other trustees, upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees, when required, as by the court shall be deemed advisable (*k*).

(*k*) Under this act the court will not authorize the sale of a portion of the estate for raising money to make the necessary roads on building; but it will authorize leases on the terms of the lessee's making such roads. (*Re Chambers*, 28 Beav. 653; 29 L. J., Ch. 924; 6 Jur., N. S. 1005; 8 W. R. 646.)

How sales and dedications are to be effected under the direction of the court.

15. On every sale or dedication to be effected as hereinbefore mentioned the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct (*l*).

(*l*) Real estate, the equity of redemption in which was devised in strict settlement, was ordered to be sold, and an order was made appointing A. and B. to convey under this act. A subsequent order declared that the order should bind the mortgagees. After this the mortgagees conveyed the legal estate in the real estate to the trustees of the will: it was held, that, notwithstanding such conveyance by the mortgagees, A. and B. had power to convey, and that the concurrence of the trustees of the will was unnecessary. (*Eyre* v. *Saunders, Ex parte Yeo*, 5 Jur., N. S. 703; 28 L. J., Ch. 439.)

Application by petition to exercise powers con-

16. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years

19 & 20 *Vict.* c. 120, s. 16.

determinable on his death, or for an estate for life or any greater estate, may apply to the court, by petition in a summary way, to exercise the powers conferred by this act (*m*).

ferred by this act.

(*m*) Where a testator leaves property to his widow for life or during widowhood, and she and the parties entitled in remainder join in a petition under this act, that is a sufficient compliance with the terms of this section. (*Williams* v. *Williams*, 9 W. R. 888.)

With whose consent such application to be made.

17. Subject to the exception contained in the next section, every application to the court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant in tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf any unborn child (*n*).

(*n*) Where a great number of legatees had charges upon the estates sought to be leased, an order was made under this section without service on the legatees; but *Kindersley*, V. C., directed the words "subject to and so as not to affect the rights, estates and interest of any person whose consent and concurrence could not be obtained" to be inserted therein. (*Re Legge's Settled Estates*, 6 W. R. 20.) And services of notice on a person of weak mind, not found a lunatic by inquisition, who had a remote contingent interest in the property, were dispensed with where there were others in the same interest who had concurred. (*Re Franklin's Settled Estates*, 7 W. R. 45.) It was held, by *Wood*, V. C., in *Eyre* v. *Saunders* (4 Jur., N. S. 830,) that where the *cestuis que trust* "beneficially interested" (being persons having portions secured on the lands to be sold) were numerous, and the trustees had power to give receipts for the monies payable (see now 22 & 23 Vict. c. 35, s. 23, *post*), the consent of the latter to the sale was sufficient.

The expression "persons entitled," in this act, means persons beneficially entitled; and all persons entitled must concur. Trustees can only consent for unborn children; but trustees, with a power of sale, may join in a sale which will bind all persons claiming under their trust. (*Grey* v. *Jenkins*, 26 Beav. 351.)

Petition may be granted without consent, saving rights of non-consenting parties.

18. Provided nevertheless, that, unless there shall be a person entitled to an estate of inheritance whose consent or concurrence shall have been refused or cannot be obtained, it shall be lawful for the court, if it shall think fit, to give effect to any petition, subject to and so as not to affect the rights, estate or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate or interest ought in the opinion of the court to be excepted.

Notice of application to be served on all trustees, &c.

19. Notice of any application to the court under this act shall be served on all trustees who are seised or possessed of any

estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the court ought to be so served, unless the court shall think fit to dispense with such notice. 19 & 20 *Vict.* c. 120, s. 19.

20. Notice of any application to the court under this act shall be inserted in such newspapers as the court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the Court of Chancery by motion for leave to be heard in opposition to or in support of any application which may be made to the court under this act; and the court is hereby authorized to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think fit (*o*). Notice of application to be given in newspapers.

(*o*) As to the time for motions under this section and the order thereon, see order, pl. 17, *post*.

21. The court shall not be at liberty to grant any application under this act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred (*p*). No application under this act to be granted where a similar application has been rejected by parliament.

(*p*) Where, therefore, a petitioner had several times applied to parliament for similar powers of leasing settled property as were asked for by the petition, and such applications were rejected: it was held, that the court had no power to grant such an application. (*Re Wilson*, 1 L. T., N. S. 25.)

22. The court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient, for preventing fraud or mistake. Notice of the exercise of powers to be given by the court.

23. All money to be received on any sale effected under the authority of this act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same shall be paid into the Bank of England or Ireland, as the case may be, to the account of the Accountant-General of the Court of Chancery, ex parte the applicant in the matter of this act, and in either case such money shall be applied as the court shall from time to time direct to some one or more of the following purposes; (namely,) Court may appoint trustees to receive and apply monies arising from sales.

The purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the

19 & 20 *Vict.* c. 120, *s.* 23.

same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (*q*).

(*q*) Estates having been sold under this act, and the proceeds paid into court, a petition was presented for re-investment in other lands: it was held, that it was unnecessary again to serve those parties whose concurrence had previously been obtained at the time of the sale. (*Re Duke of Cleveland's Harte Estates*, 1 Drew. & Sm. 481; 7 Jur., N. S. 769; 30 L. J., Ch. 862; 9 W. R. 883.)

An estate was sold by the direction of the court under this act, and the proceeds paid into court. On the petition of the tenant for life, with the consent of the tenant in tail, the court made an order for liberty to invest the purchase-money on mortgage. (*Wall* v. *Hall*, 8 L. T., N. S. 44.)

Petitions having been presented under this act, and under a private act, respecting money in court to which an infant remainderman was entitled, the court directed that a guardian *ad litem* should be appointed to represent the infant remainderman, and also that the trustees of the will, under which the property was settled, should have their costs of appearing upon the petition. (*Re Hart Estates Act*, 29 L. J., Ch. 530; 8 W. R. 336.)

Where an estate has been sold under this act, it is not necessary to publish in the newspapers any notice of an application for the re-investment of the purchase-money in other land. (*Re Sexton Barns*, 10 W. R. 416.)

Where there was no trustee of the settled estate which had been sold in existence, the court required new trustees to be appointed, and the conveyance of the lands purchased to be made to such new trustees. (*Ib.*)

Trustees may apply monies, in certain cases, without application to court.

24. The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land (*r*).

(*r*) This section refers only to applications under the act for the sale of estates, and not to petitions dealing with purchase-money. (*Re Duke of Cleveland's Harte Estates*, 1 Drew. & Sm. 481; 7 Jur., N. S. 769; 30 L. J., Ch. 862; 9 W. R. 883.)

Until money can be applied, to be invested, and dividends to be paid to parties entitled.

25. Until the money can be applied as aforesaid, the same shall be from time to time invested in Exchequer Bills, or in Three per Centum Consolidated Bank Annuities, as the court shall think fit; and the interest and dividends of such exchequer bills or bank annuities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Court may exercise powers repeatedly; but may not exercise them if expressly negatived.

26. The court shall be at liberty to exercise any of the powers conferred on it by this act, whether the court shall have already exercised any of the powers conferred by this act in respect of the same property, or not; but no such powers shall be exercised if an express declaration or manifest intention that they shall not be exercised is contained in the settlement, or may reasonably be inferred therefrom, or from extrinsic circumstances or evidence: provided always, that the circumstance of the set-

tlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this act, if it shall think that the powers contained in the settlement ought to be extended. 19 & 29 *Vict.* c. 120, *s.* 26.

27. Nothing in this act shall be construed to empower the court to authorize any lease, sale or other act beyond the extent to which in the opinion of the court the same might have been authorized in and by the settlement by the settlor or settlors. Court not to authorize any act which could not have been authorized by the settlor.

28. After the completion of any lease or sale, or other act, under the authority of the court, and purporting to be in pursuance of this act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorize the same; except that no such lease, sale or other act shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained (*s*). Acts of the court in professed pursuance of this act, not to be invalidated.

(*s*) Where realty, which was comprised in a settlement, had been in part subjected to sub-settlements, operating through powers of appointment in the original deed, and in part emancipated from all settlement by becoming vested in persons as tenants in fee, and in other persons as mortgagees: it was held, that an order obtained in the matter of this act, and in the matter of the estates comprised in the original settlement for the sale of all the lands comprised therein, was erroneous. (*Re Thompson, Green* v. *Thompson*, 1 Johns. 418; 5 Jur., N. S. 1343.)

It is competent to a purchaser under this act to object, at any time before completion, that the order for sale was in excess of the jurisdiction of the court. (*Ib.*)

It seems, nevertheless, that the conveyance when completed will give an indefeasible title by virtue of this section, notwithstanding any excess of jurisdiction; and that it is not necessary that the proceedings under the act should specify the particular settlement to which the property is at the time subject, provided the property is sufficiently identified, and is actually under settlement; and that the court has jurisdiction to order a sale under the act, notwithstanding the existence of powers under which the proposed sale may be effectual. (*Ib.*)

29. It shall be lawful for the court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement, and subject to the same limitations; and the court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the court shall direct. Costs.

30. The Lord Chancellor of Great Britain, with the advice and assistance of the English Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or of any three of them, so far as relates to proceedings in England, and the Lord Chancellor of Ireland, with the advice and assistance of the Irish Master of the Rolls and of the Lord Justice of the Court of Appeal in Chancery in Ireland, or of any two of them, so far as relates to proceedings in Ireland, may, if he shall think fit, from time to time make Power to Lord Chancellor, &c., to make rules and orders.

19 & 20 *Vict.* c. 120, *s.* 30.

general rules and orders for carrying the purposes of this act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the court in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers and solicitors of the court in respect to such matters; and such rules and orders may from time to time be rescinded or altered by the like authorities respectively; and all such rules and orders shall take effect as general orders of the court (*t*).

(*t*) See 21 & 22 Vict. c. 77, s. 7, and the orders made in pursuance of this act, *post*, pp. 679—682.

Rules and orders to be laid before parliament.

31. All general rules and orders made as aforesaid shall, immediately after the making and issuing thereof, be laid before both Houses of Parliament, if parliament be then sitting, or if parliament be not then sitting, within twenty-one days after the next meeting thereof; and it shall be lawful for either of the Houses of Parliament, by any resolution passed within thirty-six days after such rules or orders have been laid before it, to resolve that the same or any part thereof ought not to continue in force, and thereupon the same shall cease to be binding.

Tenants for life, &c., may grant leases for twenty-one years.

32. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life, or for a term of years determinable with his life, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years to take effect in possession: provided, that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less than twenty-eight days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained; and provided a counterpart of every deed of lease be executed by the lessee.

Against whom such leases shall be valid.

33. Every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates

be settled, and in the case of unsettled estates against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same (*u*). 19 & 20 *Vict.* c. 120, *s.* 33.

(*u*) See 21 & 22 Vict. c. 77, s. 8, *post*, p. 679.

Evidence of execution of lease by lessee.

34. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this act.

Repeal of 32 Hen. 8, c. 28, and 10 Car. 1, sess. 3, c. 6 (Ireland), except as to ecclesiastical leases.

35. The act of the thirty-second year of King Henry the Eighth, chapter twenty-eight, intituled "Lessees to enjoy the Farm against the Tenants in Tail," and the act of the parliament of Ireland of the tenth year of King Charles the First, session three, chapter six, intituled "An Act that Lessees shall enjoy their Farms against Tenants in Tail or in Right of their Wives, &c.," are hereby repealed, except so far as relates to leases made by persons having an estate in the right of their churches.

Provision as to infants, lunatics, &c.

36. All powers given by this act, and all applications to the court under this act, and consents to such applications, may be exercised, made or given by guardians on behalf of infants, and by committees on behalf of lunatics, and by assignees of bankrupts or insolvents: provided nevertheless, that in the cases of infant or lunatic tenants in tail no application to the court or consent to any application may be made or given by any guardian or committee without the special direction of the court (*x*).

(*x*) See Order 23, *post*, p. 681.

Under this section a guardian to an infant may, after a petition has been presented by the infant, be appointed. Whilst they point out the most convenient course of proceeding under the act, the regulations of the 8th August, 1857, are not absolutely obligatory in every case. (*Re Hargreaves*, 5 Jur., N. S. 60; 28 L. J., Ch. 197. See *post*, pp. 681, 682.)

A married woman applying to the court to be examined apart from her husband.

37. Where a married woman shall apply to the court, or consent to an application to the court, under this act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband, or not; and no clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by this act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding (*y*).

No clause, &c. in settlement restraining anticipation to prevent court from exercising powers of this act.

(*y*) The examination of a married woman, under this section, ought not to take place until the petition has been presented and answered, and carried into the chambers of the judge by whom it is to be heard, but ought to take place before any judicial step has been taken by him upon it. (*Re Foster*, 1 De G. & J. 386; 24 Beav. 220.)

The issuing of advertisements under the 20th section, before the exami-

19 & 20 *Vict.* c. 120, *s.* 37.

nation, will not invalidate the proceedings; but as a general rule it is desirable that the examination should take place immediately after the petition has been carried into chambers. (*Ib.*)

A married woman, entitled to a jointure charged on settled estates, must be examined under this section. Upon an application under the act, the examination was allowed to be taken after the order was made on the petition, but before it was drawn up, the petition being ordered to be mentioned again after the examination. (*Re Turbut's Estate*, 2 New Rep. 487.)

Where all parties interested in an application under the third section, including the trustees of the settlement of a married lady, consented to the application, the court dispensed with her separate examination under this section. (*Re Lord De Tabley's Settled Estates*, 8 Law T., N. S. 719.)

Such examination to be either by the court or by a solicitor.

38. The examination of such married woman shall be made either by the court or by some solicitor duly appointed by the court for that purpose, who shall certify, under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same (*a*).

(*a*) This section, in requiring the appointment of a solicitor to examine a married woman abroad, meant a solicitor of the Court of Chancery in England, and therefore the court refused to direct a commission to a barrister and solicitor of a court in Canada for that purpose; but this is not necessary since the 21 & 22 Vict. c. 77, s. 6, *post*, p. 679. (*Turner* v. *Turner*, 2 De G. & J. 534.)

As to consent of married women under age.

39. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

No equity to compel any one to apply to the court.

40. Nothing in this act shall be construed to create any obligation at law or in equity on any person to make or consent to any application to the court, or to exercise any power.

Tenants for life, &c. may exercise powers notwithstanding incumbrances.

41. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein.

Exception as to entails created by acts of parliament.

42. Provided always, that nothing in this act shall authorize any sale or lease beyond the term of twenty-one years of any settled estates in which, under the act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "To embar feigned Recovery of Lands wherein the King is in Reversion," or under any other act of parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the crown (*b*).

(*b*) See *ante*, p. 342, n.

19 & 20 *Vict.* c. 120, s. 43.

Saving rights of lords of manors.

43. Nothing in this act shall authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

To what settlements this act to extend.

44. The provisions of this act shall extend to all settlements, whether made before or after it shall come in force, except those as to demises to be made without application to the court, which shall extend only to settlements made after this act shall come in force.

Extent of act.

45. This act shall not extend to Scotland.

Commencement of act.

46. This act shall come in force on the first day of November, one thousand eight hundred and fifty-six.

LEASES AND SALES OF SETTLED ESTATES AMENDMENT ACT.

21 & 22 Victoria, c. 77.

An Act to amend and extend the Settled Estates Act of 1856.

[2nd August, 1858.]

21 & 22 *Vict.* *c.* 77, *s.* 1.

WHEREAS it is expedient to amend and extend the *Settled* Estates Act of 1856 (nineteenth and twentieth Victoria, chapter one hundred and twenty), in certain particulars: be it enacted, as follows:—

Definitions of "settlement" and "settled estates" (*a*).

1. For the purposes of the definitions of "settlement" and "settled estates" contained in the first section of the said act, all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor, or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement (*a*).

(*a*) See *ante*, p. 664.

"Building lease" to include repairing lease.

2. The term "building lease" in the said act shall be deemed to include a repairing lease, so that no repairing lease shall be made for a term exceeding sixty years (*b*).

(*b*) See *ante*, p. 665.

Powers of leasing to extend to copyhold and customary tenants of manors.

3. All the powers to authorize and to grant leases contained in the said act and this act shall be deemed to include powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under the said act and this act.

Extension of power under section 2 of recited act as to term for building leases (*c*).

4. The power given to the court by the second section of the said act to extend the term thereby prescribed for building leases, where it shall be satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant building leases for longer terms, shall be extended and may be exercised with respect to all the other leases in the same section mentioned, except agricultural leases, provided the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such leases for longer terms.

(*c*) See *ante*, p. 665.

5. The power conferred by the fifth section of the said act to surrender leases granted under the provisions of the said act shall be deemed to extend to all leases, whether granted in pursuance of the said act or otherwise. 21 & 22 *Vict. c. 77, s. 5.* As to surrender of leases (*d*).

(*d*) See *ante*, p. 667.

6. Whenever a married woman is resident out of the jurisdiction of the Court of Chancery of England or the Court of Chancery of Ireland respectively, as the case may be, her examination, under the thirty-eighth section of the act, may be made by any person appointed for that purpose by the court, whether he is or is not a solicitor of the court; and the appointment of any such person, not being a solicitor, shall afford conclusive evidence that the married woman was as the time of such examination resident out of the jurisdiction of the court (*f*). As to taking examinations of married women (*e*).

(*e*) See *ante*, s. 38, p. 676.

(*f*) The decision in *Turner* v. *Turner* (2 De G. & J. 534), led to the introduction of this section.

7. The power contained in the said act to make and rescind general rules and orders shall extend to the matters to which this act relates; and such rules and orders may, so far as may be found expedient, alter the procedure prescribed by the said act and this act (*g*). Extension of power to rescind general rules and orders.

(*g*) See *ante*, s. 30, p. 673.

8. In addition to the persons expressly enumerated in the thirty-third section of the said act against whom demises authorized by the thirty-second section are to be valid, such demises, in the case of unsettled estates, shall be valid against the wife of any husband making such demise of estates to which he is entitled in right of such wife. As to validity of demises under section 33 of recited act (*h*).

(*h*) See *ante*, p. 674.

Orders made under Stat. 19 & 20 Vict. c. 120.

Proceedings under the statute 19 & 20 Vict. c. 120, relating to leases and sales of settled estates:—

(14.) Every petition under the act and every public and private notice required by the act shall set forth the name, address and description of the petitioner, and also a place in London, Westminster, or the borough of Southwark, or within two miles from the record and writ clerks' office, where he may be served with any order of the court or of the judge in chambers, or notice relating to the subject of the petition. (15 Nov. 1856, Ord. 1.) Name, &c. of and place for service on petitioner.

(15.) All petitions and notices, and also all affidavits and other proceedings under the act shall be entitled in the matter of the act and in the matter of the property in question, mentioning the county and parish or place in which it is situate, and describing it by general terms, and every such petition shall be marked with the words Title of petitions, &c. under the act.

19 & 20 *Vict. c.* 120.

"Master of the Rolls," or with the title of the Vice-Chancellor before whom it is intended to be heard. (Nov. 1856, Ord. 2.) (*a*)

(*a*) The particular settlement need not be specified provided the property be sufficiently identified and shown to be under settlement. (See *Re Thompson's Settled Estates, Green* v. *Thompson*, 1 Johns. 418; 5 Jur., N. S. 1343.)

Advertisements.

(16.) After any such petition has been presented application may be made *ex parte* and in chambers to the judge before whom it is intended to be heard, for directions in what newspapers the notices required by the act are to be inserted. (15 Nov. 1856, Ord. 3.) (*b*)

(*b*) Where a leasing power had been granted to a tenant who died, and a petition was presented by the succeeding tenant for life and her husband, praying that the power might vest in one of the trustees of the will under which she claimed: it was held, under the circumstances, that the advertisements need not be repeated. (*Re Kentish Town Estate, Weeding* v. *Weeding*, 1 Johns. & Hem. 230.)

Time for motions under section 20, service of order thereon.

(17.) Motions under the 20th section of the act may be made *ex parte* within seven clear days after the publication of the advertisement which may be last inserted in the newspaper, but not later, except by special leave of the court; and every order made on any such motion must be served on the petitioner within four days after the making thereof. (15 Nov. 1856, Ord. 4.) (*c*)

(*c*) In bespeaking the order the newspapers containing the advertisements, and any interlocutory orders which may have been made relating thereto, must be left with the registrar. (33rd Regulation of March 15, 1860.)

Application for copy of petition, how made.

(18.) If the person obtaining such order shall require a copy of the petition such person shall at the time of serving such order make a written application to the petitioner for such copy, with an undertaking to pay all proper charges for the same. (15 Nov. 1856, Ord. 5.)

Delivery and payment of copy.

(19.) Within two clear days after such application a copy of the petition shall be ready to be delivered, and shall be delivered on demand, and on payment for the same after the rate of fourpence per folio. (15 Nov. 1856, Ord. 6.)

Petition, when heard.

(20.) No petition under the act shall be set down for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements. (15 Nov. 1856, Ord. 7.) (*d*)

(*d*) Where a petition is presented under the act 19 & 20 Vict. c. 120, before it can come on to be heard, the secretary of the Lord Chancellor must certify that the advertisements ordered have been inserted, and that the twenty-one days since the last advertisement required by the General Order XLI., r. 20, have expired. (*Re Blake*, 6 Jur., N. S. 724; 8 W. R. 539; *Re Mallin's Settled Estate*, 3 Giff. 126; 6 Jur., N. S. 809.)

Where the publication of the last of the advertisements required by the act would not expire in time to allow the twenty-one days necessary to elapse before setting down the petition for a hearing, so that the petitioner would be thrown over the long vacation, the court allowed the petition to be set down on the last day of petitions before the vacation. (*Re Adam*, 6 Law T., N. S. 604.)

Court must be satisfied that no previous application to Parliament has been made.

(21.) Upon every application under the act the court must be satisfied by sufficient evidence that no such previous application to parliament, as is mentioned in the 21st section of the act, has been made and rejected, or reported against. (15 Nov. 1856, Ord. 8.) (*e*)

(*e*) *Ante*, p. 671.

19 & 20 *Vict.* c. 120.

(22.) On every application under the act for authority to sell, the court must be satisfied by sufficient evidence who are the parties interested in the estate, whose consent is required by the act, and what are the circumstances which render the proposed sale proper and expedient. (15 Nov. 1856, Ord. 9.) (*f*)

Evidence of parties interested, and propriety of sale.

(*f*) See 19 & 20 Vict. s. 16, *ante*, p. 669.

(23.) Where under the provisions of the 36th section (*ante*, p. 675) of the act it shall be necessary to obtain the special directions of the court for any application to the court, or any consent to such application, such special directions may be obtained *ex parte* by summons, at the chambers of the judge to whose court the application may be intended to be made, or may have been made. (15 Nov. 1856, Ord. 10.) (*g*)

Special directions under sect. 36 obtained by summons ex parte.

(*g*) See the 21st and 22nd Regulations of Aug. 3, 1857, below, as to the mode in which the application is made.

(24.) Every order of the court made in pursuance of the powers conferred on it by the act shall specify on what document or documents (if any) the notice referred to by the 22nd section (*ante*, p. 671) of the act shall be placed or indorsed; and the judge may, if he thinks fit, require that such document or documents so indorsed shall be produced in court for his inspection, and in case of any such order relating to lands in a register county or district, the court may order a duplicate or a memorial of the same to be registered. (15 Nov. 1856, Ord. 11.)

Documents on which notice under sect. 22 is indorsed to be specified in order.

(25.) The fees and allowances to all officers and solicitors of the court, in respect of the matters under the act, shall be such fees and allowances as by the practice of the court and Orders 38 and 39, they are entitled to take and charge for business of a similar nature. (15 Nov. 1856, Ord. 12.)

Fees and allowances to officers and solicitors.

(21.) For the purpose of procuring the appointment of a guardian to infants under the act of parliament of 19 & 20 Vict. c. 120, and the Consolidated General Order 41, r. 23 (*supra*) (*h*), a summons should be taken out in the names of the infants by a next friend in the form used for originating proceedings in chambers, intituled in the same manner as the petition or intended petition, that ——, or some other proper person or persons may be appointed guardian or guardians of the said infants, for the purpose of making an application on behalf of the said infants, or consenting on behalf of the said infants to an application to the court under the provisions of the above act. In case the application to the court is to be made on behalf of the infants, the guardian must be appointed before the petition is presented. If the guardian is to consent to an application, the guardian may be appointed either before or after the petition is presented. Upon the application to appoint such guardian the following evidence is to be adduced:—

Appointment of guardians under 19 & 20 Vict. c. 120, and Ord. 41, r. 23.

Evidence.

1. The age of the infant.
2. Whether he has any parent, testamentary guardian or guardian appointed by the Court of Chancery.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed.
5. That the proposed guardian has no interest in the intended application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant.
6. The consent of the guardian to act.
7. The nature of the intended application to the court.

19 & 20 *Vict. c.* 120.

(*h*) The regulations of the 8th of August, 1857, are not absolutely binding as orders. Therefore, though those regulations direct that a guardian to an infant petitioner must be appointed before the petition is presented, the court authorized such an appointment on an application after the petition had been presented and answered. (*Re Longstaffe*, 1 Drew. & Sm. 142; 8 W. R. 491. See *ante*, p. 675.)

Leave to make or consent to application on behalf of infants, &c. under 19 & 20 Vict. c. 120, and Ord. 41, r. 23.

(22.) For the purpose of procuring the direction of the judge for leave to make or consent to an application on behalf of infants or lunatics under the said act of 19 & 20 Vict. c. 120, and the Consolidated General Order 41, r. 23, a summons is to be taken out after the petition is presented in the ordinary form, intituled in the same manner as the petition, by the guardian of the infant or committee of the lunatic, that he may be at liberty on behalf of the infant or lunatic to make the application [*or* consent to the application] to the court proposed to be made by the petition presented to the Lord Chancellor [*or* Master of the Rolls] on the —— day of ——. Upon this application the guardian or committee should make an affidavit that he believes it to be proper and for the benefit of the infant or lunatic that the application proposed to be made should be made [*or* consented to] on behalf of the said infant or lunatic, and such other evidence, if any, should be adduced as the circumstances of the case may require, to show the propriety of the application so far as the infant or lunatic is concerned, and the petition should be produced.

Procuring directions of judge under Ord. 41, r. 16.

(23.) For the purpose of procuring the directions of the judge pursuant to the General Order 41, r. 16, (*ante*, p. 680,) a summons is to be taken out after the petition has been answered, intituled in the same manner as the petition, that directions may be given in what newspapers the notices required by the act are to be inserted. The petition is to be produced on the return of the summons, and the judge's direction will be written on the petition, and signed by his chief clerk (*i*).

(*i*) *Regulations, August* 8, 1857, *not having the force of general orders.* See Morgan's Chancery Acts, pp. 578—581 and 700—702, 3rd ed.

LAW OF PROPERTY AND TRUSTEES RELIEF AMENDMENT.

22 & 23 Victoria, c. 35.

An Act to further amend the Law of Property and to relieve Trustees. [13th August, 1859.]

Be it enacted as follows:

Leases.

22 & 23 *Vict.* c. 35, s. 1.

Restriction on effect of licence to alien.

1. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done (*a*).

(*a*) See 23 & 24 Vict. c. 38, s. 6, *post*.

As to crown lands, see 8 & 9 Vict. c. 99, s. 5.

Leases often contain a covenant on the part of the lessee that he will not assign, or that he will not underlet the premises without the consent of the lessor. This, like all other covenants, is usually accompanied by a condition for re-entry on the breach of it. The jealousy which always prevailed in our law against allowing restraints on alienation led to the discouragement of this kind of restriction, and it was accordingly decided, that when, under a condition restraining assignment without licence, a licence had been once given, the condition was determined; and the law was the same with respect to a covenant to the like effect, although there seems to be no reason why such a covenant or condition should not be held to run with the land, and be binding from time to time on such persons as might become assigns with the consent of the landlord. (See *Weatherall* v.

22 & 23 *Vict.* c. 35, s. 1.

Geering, 12 Ves. 511; 3 Real Prop. Rep. 49.) In *Dumpor's case* (4 Co. 119 b) it was decided that a condition in a lease that the lessee or his assigns shall not alien without the special licence of the lessor, is determined by an alienation by licence, and no subsequent alienation is a breach of the condition, nor does it give a right of entry to the lessor. (See 4 Taunt. 735.) So in the case of a lease to several lessees, upon condition that they or any of them should not assign without the lessor's licence, an alienation with licence by one of the lessees determined the condition as to all. So a condition not to alien the land or any part thereof without licence was determined as to the whole by the lessor's licence to alien part only, for the condition could not be apportioned or divided by the parties. The doctrine of *Dumpor's case* was disapproved by distinguished judges, but never overruled. In *Brummell* v. *Macpherson* (14 Ves. 175), Lord *Eldon* said, "Though *Dumpor's case* always struck me as extraordinary, it is the law of the land at this day;" and accordingly in that case his lordship decided that a proviso in a lease for re-entry, upon assignment by the lessee, his executors, administrators or assigns, without licence, ceased by assignment with licence, though to a particular individual. (See Dyer, 152, pl. 7.)

It does not appear to have been expressly decided that this doctrine applies to any other covenant or condition than that against alienation, but it would seem to be equally applicable on principle to covenants and conditions, restrictive of carrying on particular trades, or converting lands from pasture to arable, and to all covenants and conditions by which the licence or consent of the lessor is made requisite for doing any particular act. (See 3 Real Prop. Rep. 50. See Lord *Eldon's* remarks in *Macher* v. *The Foundling Hospital*, 1 Ves. & B. 191.)

Restricted operation of partial licences.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence (*b*).

(*b*) See 23 & 24 Vict. c. 38, s. 6, *post*.

Apportionment of conditions of re-entry in certain cases.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for nonpayment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the

apportioned rent or other reservation allotted or belonging to him (*c*). 22 & 23 *Vict. c.* 35, *s.* 3.

(*c*) See 23 & 24 Vict. c. 38, s. 6, *post.*

The rule of law, that conditions are entire and cannot be apportioned by the act of the parties, (Co. Litt. 215 a; *Dumpor's case*, 4 Rep. 119 b; see *Weatherall* v. *Geering*, 12 Ves. 511,) had been found very inconvenient in practice, where the object of the parties has been to grant a partial dispensation with a condition, or to give the benefit of it to several grantees of the reversion; (*Knight's case*, 5 Rep. 55 b; see *Brummell* v. *Macpherson*, 14 Ves. 173; 4 Taunt. 736; 1 V. & B. 191; 3 Real Prop. Rep. 49;) for the severance of any part of the reversion destroyed the whole condition, giving one entire right of entry into the premises on nonpayment of rent or the like; (*Knight's case*, 5 Rep. 55 b; *Dumpor's case*, 4 Rep. 120 b; Co. Litt. 215 a;) and if a lessor assigned the reversion of part of the premises to one, his right of entry would be gone, (*Twynam* v. *Pickard*, 2 B. & Ald. 112,) although it had been decided that an action of covenant will lie by the assignee of the reversion of *part* of the demised premises against the lessee for not repairing. (*S. C.*, *Ib.* 105; see Shepp. T. 176.)

Policies of Insurance.

4. A court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or in mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure, upon such terms as to the court may seem fit (*d*). Relief against forfeiture for breach of covenant to insure in certain cases.

(*d*) The court has jurisdiction to relieve against a breach of covenant to insure committed after the passing of this act arising on a lease dated before the passing of the act. (*Page* v. *Bennett*, 2 Giff. 117; 6 Jur., N. S. 419; 29 L. J., Ch. 398; 8 W. R. 339.)

By 23 & 24 Vict. c. 126, s. 2, in the case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the court or a judge shall have power upon rule or summons to give relief in a summary manner, but subject to appeal as mentioned in sects. 4 to 11, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of the 23 & 24 Vict. c. 35, and upon such terms as would be imposed in such court. Relief against forfeiture for non-insuring.

By sect. 3, where such relief shall be granted, the court or a judge shall direct a minute thereof to be made by indorsement on the lease or otherwise.

5. The court, where relief shall be granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise. When relief granted the same to be recorded.

6. The court shall not have power under this act to relieve the same person more than once in respect of the same covenant or condition; nor shall it have power to grant any relief under this act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of court in favour of the person seeking the relief. Court not to relieve any person more than once in respect of the same covenant, &c.

7. The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the Lessor to have benefit of an informal insurance.

22 & 23 *Vict.* c. 35, s. 7.

same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases.

8. Where, on the bonâ fide purchase after the passing of this act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

Preceding provisions to apply to leases for a term of years absolute, &c.

9. The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.

Rent-charges.

Release of part of land charged not to be an extinguishment.

10. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditament released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release (*e*).

Release of rent-charges.

(*e*) A person having a rent-charge, by releasing all his right in part of the land charged extinguishes the whole rent, because it issues out of every part, and cannot be apportioned. (18 Vin. Abr. 504.) But a person having a rent-charge may release part of it to the tenant of the land, and reserve part, for the grantee deals only with that which is his own, namely, the rent, and not with the land. (Co. Litt. 148 a; 3 Vin. Abr. 10, 11.) So if the lessee surrender part of the land to the lessor, the rent services will be apportioned. (Co. Litt. 148.)

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole (Litt. s. 222), because the rent is entire and against common right, and issuing out of every part of the land (Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152), although it is otherwise where part of the lands out of which the rent issues descends on the grantee. (1 Roll. Abr. 236, pl. 5.) If the grantee of a rent-charge purchases part of the land, and the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, this amounts to a new grant. (Co. Litt. 147 b.) A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and

above the rent-charge. (*Dennet* v. *Pass*, 1 Bing. N. C. 388; 5 Moor. & S. 218.) 22 & 23 *Vict.* c. 35, *s.* 10.

Judgments.

11. The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release. Release of part of land charged not to affect judgment.

Powers.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity (*f*): provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend (*g*). Mode of execution of powers.

(*f*) By 1 Vict. c. 26, s. 10, *ante*, p. 514, an appointment by will is to be executed like other wills and to be valid, although other required solemnities are not observed.

(*g*) See Sugd. on Powers, pp. 137, 247, 8th ed.

13. Where under a power of sale a bonâ fide sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the said principal monies and interest, under the direction of the court, upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the court may declare that the said sale is valid, and thereupon the Sale under power not to be avoided by reason of mistaken payment to tenant for life.

22 & 23 *Vict.* c. 35, s. 20.

legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him (*h*).

(*h*) Before this act, trustees having a power of sale only could not sell the estate separate from the timber standing upon it, though the tenant for life was without impeachment of waste, and might have cut the timber previously to the sale. (*Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C. nom. Cockerell* v. *Cholmley*, 10 B. & C. 564; 3 Russ. 565; 1 Russ. & M. 418; 1 Cl. & Fin. 60. See 25 & 26 Vict. c. 108.)

[The 14th, 15th, 16th, 17th and 18th sections of this act are inserted *ante*, pp. 494—497.]

[The 19th and 20th sections of this act, as to inheritance, are inserted *ante*, p. 455.]

Assignment of Personalty.

Assignment to self and others.

21. Any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

[The 22nd section of this act is inserted *ante*, p. 593.]

Application of Purchase Money.

Not to be bound to see to the application of purchase money.

23. The bonâ fide payment to and the receipt of any person to whom purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security (*i*).

(*i*) It seems the better opinion that this clause applies only to trusts created since 28th August, 1859. (Lewin on Trusts, p. 224, 4th ed. See 23 & 24 Vict. c. 145, ss. 29, 34, *post*.)

Punishment of vendor, &c. for fraudulent concealment of deeds, &c. or falsifying pedigree.

24. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser [*or* mortgagee] (*k*), or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this act conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser [*or* mortgagee], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made

by any person under such pedigree, but whose right was concealed by the falsification of such pedigree, and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of her Majesty's attorney-general, or in case that office be vacant of her Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct. 22 & 23 *Vict.* c. 35, s. 24.

(*k*) This section of the act shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in this section. 23 & 24 Vict. c. 38, s. 8, *post*, p. 695.

Interpretation of terms.

25. In the construction of the previous provisions in this act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed, re-assigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred:

The term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments (*l*).

(*l*) See 1 & 2 Vict. c. 110, s. 18, *ante*, pp. 579, 580.

Trustees and Executors.

Trustee, &c. making payment under power of attorney not to be liable by reason of death of party giving such power.

26. No trustee, executor or administrator making any payment or doing any act bonâ fide under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act bonâ fide done as aforesaid by such trustee, executor or administrator, was not known to him:

22 & 23 Vict. c. 35, s. 26.

provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor or administrator, if the money had not been paid away under such power of attorney.

As to liability of executor or administrator in respect of rents, covenants or agreements.

27. Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be,) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed (*l*).

(*l*) A fund which had been set apart out of the residue to indemnify executors in respect of leaseholds of a testator was ordered to be paid out to a residuary legatee, such indemnity since this section being no longer necessary. (*Dodson* v. *Sammell*, 1 Drew. & Sm. 575; 8 Jur., N. S. 584.) This section of the act is retrospective in its operation. (*Ib.*)

Where an indemnity fund is set apart by the court in respect of leasehold property belonging to a testator, it is done for the security of the ground landlord and not for the protection of the executors, and the parties beneficially interested are not entitled to have it paid out under this section without the consent of the ground landlord. (*Bunting* v. *Marriott*, 7 Jur., N. S. 565.)

As to liability of executor, &c. in respect of rents, &c. in conveyances on rents-charge.

28. In like manner, where any executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation,) or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the

22 & 23 *Vict.* c. 35, s. 28.

said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

Trustee, executor, &c. may apply by petition to judge of Chancery for opinion, advice, &c. in management, &c. of trust property.

30. Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons inte-

22 & 23 Vict. c. 35, s. 30.

rested in such application, or such of them as the said judge shall think expedient; and the trustee, executor or administrator, acting upon the opinion, advice or direction given by the said judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application: provided nevertheless, that this act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator, shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice and direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made (*m*).

(*m*) In applications under this section the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court where he deems it necessary to have the assistance of counsel. (23 & 24 Vict. c. 38, s. 9, *post*, p. 695.)

General order.

All petitions, summonses, statements, affidavits and other written proceedings under this section shall be intituled, "In the matter of the said act, and in the matter of the particular trust, will or administration," and every such petition and statement shall be marked in manner directed by the 6th of the Consolidated General Orders, rule 6; and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs numbered consecutively, and every such summons shall, except as to its title, be in the form of the general summons in schedule (K.), No. 1, subjoined to the Consolidated General Orders. (Con. Ord. 1, March 20, 1860; 6 Jur., N. S. 121, part 2.)

At the time when any such summons is sealed, the statement upon which the same is grounded shall be left at the chambers of the judge, and shall on the conclusion of the proceeding be transmitted to the registrar by the chief clerk with the minutes of the opinion, advice or direction given by the judge, and the registrar shall cause such statement to be transmitted to the Report Office to be there filed. (Ord. 2, *Ib.*)

Every such petition or summons shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time. (Ord. 3, *Ib.*)

The opinion, advice or direction of the judge shall be passed and entered and remain as of record in the same manner as any order made by the court or judge, and the same shall be termed "a judicial opinion" or "judicial advice" or "judicial direction" as the case may be. (Ord. 4, *Ib.*)

The fees of court and the fees and allowances to solicitors on proceedings under this section shall be the same as are now payable under the Consolidated General Orders 38 and 39, and by the practice of the court for business of a similar nature. (Ord. 5, *Ib.* See Morgan's Chancery Acts, pp. 682, 683, 3rd ed.)

This act is retrospective in its operation. (*Re Simpson*, 1 Johns. & H. 89; 8 W. R. 388.)

A petition ought not in the first instance to be served upon any one, but an application should be made in chambers as to the persons upon whom the petition should be served. No affidavits can be read on such petition. (*Re Muggeridge*, Johns. 625; 6 Jur., N. S. 192; 29 L. J., Ch. 288; 8 W. R. 235.)

But *Kindersley*, V. C., decided that, when a petition is presented under this section, the petitioners must serve such persons as they think proper, and must not bring on the petition merely in order to ascertain who ought to be served. (*Re Green*, 6 Jur., N. S. 530; 29 L. J., Ch. 716.)

On such a petition the court will not direct an inquiry at chambers. (*Re*

Mockett, Johns. 628; 29 L. J., Ch. 294.) Where an important and difficult question is involved the proper course is to file a bill instead of presenting a petition under the act. (*Ib.*) 22 & 23 *Vict.* c. 35, s. 30.

The court will not give an opinion under this section upon matters of detail which cannot be properly dealt with without the superintendence of the court and the assistance of affidavits. (*Re Barrington*, 1 Johns. & H. 142; 6 Jur., N. S. 1073; 29 L. J., Ch. 807; 8 W. R. 577.)

Therefore, where trustees of a settlement having a power of purchasing lands on the request of tenants for life desired the opinion of the court as to the propriety of applying 1,200*l.* on such request in repairs and permanent improvement, no answer was given on the petition, but it was intimated that on a bill filed there would be no objection on principle to the course proposed to be taken, and subsequently the order was made in a suit instituted for the purpose. (*Ib.*)

Sir *J. Romilly*, M. R., said, the object of this section is to enable trustees and executors to obtain upon petition the advice and opinion of the court upon matters of discretion vested in them, but it was not intended thereby to enable them in this summary way to determine questions of construction. (*Re Hooper's Will*, 30 L. J., Ch. 795; 9 W. R. 729; 7 Jur., N. S. 595; 29 Beav. 656.)

The court will not upon a petition presented by a trustee or an executor under this section for the opinion, advice or direction of the court, construe an instrument or make any order affecting the rights of parties to property. Such petitions should relate only to the management and investment of trust property. (*Re Lorenz*, 1 Drew. & Sm. 401; 7 Jur., N. S. 402; 9 W. R. 567.)

The court declined upon a petition for its opinion under this section to decide whether an intestate's estate was liable upon a covenant to be implied in his marriage settlement. (*Re Evans*, 30 Beav. 232.)

Where the opinion of the court is sought by petition under this act by executors of a will upon which questions of difficulty arise and the assets are not distinctly ascertained, the court will not give its opinion unless at the wish and with the consent of all parties interested. (*Re Mockett*, 6 Jur., N. S. 142; 8 W. R. 235.)

The opinion of the court upon a petition under the act gives an indemnity to the trustees only upon the facts stated in the petition, is subject to no appeal, and will not preclude the filing a bill, which would seem the better course under the circumstances above stated. (*Ib.*)

The court will not under this section give its opinion for the guidance of trustees on the effect of a limitation contained in an instrument. (*Re Hooper*, 29 Beav. 656.)

The court will not give an opinion on an hypothesis, therefore, where a petition was presented under this section to obtain the advice of the court as to the mode in which calls not yet made on account of certain shares specifically bequeathed by the testator were to be met, the court ordered the petition to stand over till the call had been actually made. (*Re Box*, 11 W. R. 945.)

31. Every deed, will or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say, "That the trustees or trustee for the time being of the said deed, will or other instrument, shall be respectively chargeable only for such monies, stocks, funds and securities, as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker or other person, with whom any trust

Every trust instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

22 & 23 *Vict.* c. 35, s. 31.

monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument" (*n*).

(*n*) See *Wilkins* v. *Hogg*, 3 Giff. 116; 9 W. R. 688; 10 W. R. 47.

As to investments by trustees.

32. When a trustee, executor or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor or administrator, to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper (*o*).

(*o*) See 23 & 24 Vict. c. 38, ss. 10, 11, *post*, pp. 696, 697. This section of the act shall operate retrospectively. 23 & 24 Vict. c. 38, s. 12, *post*, p. 697.

Extent of Act.

Act not to extend to Scotland.

33. This act shall not extend to Scotland.

FURTHER AMENDMENT OF LAW OF PROPERTY.

23 & 24 Victoria, c. 38.

An Act to further amend the Law of Property.
[23rd July, 1860.]

Be it enacted as follows:

23 & 24 *Vict.* c. 38, *s.* 1.

[The 1st, 2nd, 3rd, 4th and 5th sections of this act, as to the registration of judgments, are inserted *ante*, pp. 610—612.]

Restriction of effect of waiver.

6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

Provision for cases of future and contingent uses.

7. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere.

Sect. 24 of 22 & 23 Vict. c. 35, extended to mortgagees.

8. The section twenty-four (*a*) in the act of the session of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.

(*a*) *Ante*, p. 688.

Form of applying for advice of judge, &c. under sect. 30 of 22 & 23 Vict. c. 35.

9. Where any trustee, executor or administrator shall apply for the opinion, advice or direction of a judge of the court of Chancery under the thirtieth section of the act of the twenty-second and twenty-third of her present Majesty, chapter thirty-

23 & 24 *Vict.* c. 38, *s.* 9.

five (*b*), the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court where he deems it necessary to have the assistance of counsel.

(*b*) *Ante*, p. 691.

Power to Lord Chancellors, &c. of England and Ireland to make general orders as to investment of cash under the control of the court.

10. It shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in Ireland, to make such general orders from time to time as to the investment of cash under the control of the court, either in the three per cent. consolidated or reduced or new bank annuities, or in such other stocks, funds or securities as he or they shall, with such advice or assistance, see fit; and it shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion of any three per cent. bank annuities now standing or which may hereafter stand in the name of the accountant-general of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds or securities upon which, by any such general order as aforesaid, cash under the control of the court may be invested; all orders for such conversion of bank annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the court shall direct (*c*).

General order.

(*c*) The following General Order was issued under this section on February 1st, 1861:—

1. "Cash under the control of the court may be invested in Bank Stock, East India Stock, Exchequer Bills and £2 : 10*s.* per cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales as well as in Consolidated £3 per cent. Annuities, Reduced £3 per cent. Annuities and New £3 per cent. Annuities."

2. "Every petition for the purpose of the conversion of any £3 per cent. Bank Annuities into any other of the stocks, funds or securities hereinbefore mentioned shall be served upon the trustees, if any, of such Bank £3 per cent. Annuities, and upon such other persons, if any, as the court shall think fit."

(II.) Upon applications under this order, the court at first sanctioned investments in East India Stock, which it seems meant only the old East India Stock (*Equitable Reversionary Interest Society* v. *Fuller*, 1 Johns. & H. 382; *Colne Valley and Halstead Railway Company*, 1 De G., F. & J. 53), upon the petition of the tenant for life, even though the market price of investment exceeded, as it commonly does, the fixed rate at which the stock will be redeemable in 1874, viz. 200*l.* per cent. (*Equitable Reversionary Interest Society* v. *Fuller*, 1 Johns. & H. 379; *Bishop* v. *Bishop*, 9 W. R. 549.) But subsequently the Lord Chancellor and Lords Justices upon appeal concurred in refusing the application on the ground that it would work an injury to the remainderman. Lord *Campbell*, C., observed, that no

23 & 24 *Vict.* c. 38, s. 10.

more precise rule could safely be laid down than "that in the absence of any special circumstances which might make the desired transfer asked by the tenant for life beneficial to those in remainder irrespective of pecuniary calculations, the transfer ought not to be permitted, if on pecuniary calculations it might be injurious to those in remainder." And *Turner*, L. J., appears to have assented to this view, giving as an instance in which the court might properly make such investment, where "from the exigency of a family it would be desirable for the children that the income of the parents should be increased." But he added that the decision was "not intended to embarrass trustees where the fund was not in court, and that they would in making such an investment be entitled to the protection of the court, if they acted *bonâ fide* to the best of their discretion." (*Cockburn* v. *Peel*, 5 W. R. 725; 3 De G., F. & J. 170.)

In a recent case the tenants for life of a residue applied for the sale of Bank Annuities and the investment of the proceeds upon Bank Stock, and the court after taking time to consider declined to make any order, on the ground that the exercise of the power by the court was discretionary, and that there were no special circumstances to call for such a change of investment. (*Maclaren* v. *Stainton*, M. R., July 4th, 1861.)

But where a tenant for life had a wife and five children, and his income exclusive of the dividends on the fund in court (£6,357 : 15*s.* 2*d.* Consols,) was only 70*l.* per annum, the court thought these circumstances sufficient to justify an investment in Bank of England Stock, and made the order accordingly. (*Peillau* v. *Brooking*, 4 L. T., N. S. 731; Lewin on Trusts, pp. 699, 700, 4th ed.)

Under special circumstances the court upon the petition of a tenant for life will sanction a change of investment from New £3 per Cents. to Bank Stock, but refused an investment in East India Stock, as it would involve a loss of capital, if that stock should be redeemed at a reduction from the present market value. (*Re Langford's Trusts*, 31 L. J., Ch. 334.)

Trustees, &c. to invest trust funds in the stocks, &c. in which cash under the control of the court may be invested.

11. When any such general order as aforesaid shall have been made it shall be lawful for trustees, executors or administrators having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds or securities in or upon which by such general order cash under the control of the court may from time to time be invested.

Clause 32 of 22 & 23 Vict. c. 35, to act retrospectively.

12. Clause thirty-two of the said act of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall operate retrospectively (*d*).

(*d*) *Ante*, p. 694.

[The 13th section of this act is inserted *ante*, p. 248.]

Order to take account of debts, &c. of deceased person under sect. 19 of 13 & 14 Vict. c. 35, may be made immediately after probate granted.

14. The order to take an account of the debts and liabilities affecting the personal estate of a deceased person, pursuant to the nineteenth section of the act of the thirteenth and fourteenth years of Victoria, chapter thirty-five, may be made immediately, or at any time after probate or letters of administration shall have been granted (*e*); and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said court, sitting at chambers, upon a summons in the form used for originating proceedings at chambers; and after any such order shall have been made, the said court or judge may, on the application of the executors or

23 & 24 Vict. c. 38, s. 14.

administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having, or claiming to have, any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order shall be certified by his chief clerk, without any adjudication thereon; and any notices for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the twenty-ninth section of the act of the twenty-second and twenty-third years of Victoria, chapter thirty-five (*f*).

Court on application of executors or administrators may by order of course direct it to be referred to a master to take an account of debts and liabilities.

(*e*) This act enacted, that it shall be lawful for the said court upon the application of the executors or administrators of any deceased person by order to be made upon motion or petition of course, and to be in the form or to the effect set forth in the schedule thereto, with such variations as circumstances may require, to refer it to one of the masters of the said court to take an account of the debts and liabilities affecting the personal estate of such deceased person and to report thereon: provided always, that no such order shall be made until the expiration of one year next after the death of such deceased person or pending any proceedings to administer the estate of such person, and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person shall be made, it shall be lawful for the said court by such decree or order to stay or suspend the proceedings under such order of course on such terms and conditions, if any, as to the said court shall seem just. 13 & 14 Vict. c. 35, s. 19.

(*f*) *Ante*, p. 691.

Act not to extend to Scotland, &c.

15. This act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

TRUSTEES AND MORTGAGEES ACT.

23 & 24 Victoria, c. 145.

An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted in Settlements, Mortgages and Wills. [28th August, 1860.]

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23 & 24 *Vict.* c. 145, *s.* 1.

Whereas it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: be it enacted as follows:

Part I.

Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.

Trustees empowered to sell may sell in lots, and either by auction or private contract.

1. In all cases where by any will, deed or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

Sale may be made under special conditions, and trustees may buy in, &c.

2. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned

23 & 24 *Vict.* c. 145, *s.* 2.

thereby, and no purchaser under any such sale shall be bound to inquire whether the person making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

Trustees exercising power of sale, &c. empowered to convey.

3. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.

Moneys arising from sales, &c. to be laid out in other lands;

4. The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents and purposes, powers, provisoes and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

or in payment of incumbrances.

5. Provided nevertheless, that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or dis-

charging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject. 23 & 24 *Vict.* c. 145, *s.* 5.

6. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland. Money arising from sales, &c. not to be laid out, nor lands exchanged, elsewhere than in the country in which lands sold or exchanged is situated.

7. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made (*a*). Until purchase of lands, &c., money to be invested at interest.

(*a*) See *Re Duke of Cleveland*, 1 Drew. & Sm. 481; 7 Jur., N. S. 769.

8. It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same. Trustees of renewable leaseholds may renew. Restriction.

9. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they Money for equality of exchange and for renewal of leases may be raised by mortgage, &c.

23 & 24 Vict. c. 145, s. 9.

shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

No sale, &c. to be made without consent of tenant for life, &c.

10. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed or other instrument, to have been intended that such sale, exchange or purchase, should be made by the person or persons making the same without the consent of any other person.

Part II.

Powers of Mortgagees (b).

Powers incident to mortgages.

11. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely,

To sell.

1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner:

To insure.

2nd. A power to insure and keep insured from loss or damage

by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest: 23 & 24 *Vict.* c. 145, s. 11.

3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned. To appoint receiver.

(*b*) Where it is intended that the mortgagee should not have all or any of the powers conferred by the act, it may be prevented by express declaration. (Sect. 32, *post*.)

12. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money. Receipts for purchase-money sufficient discharges.

13. No such sale as aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling. Notice to be given before sale; but purchaser relieved from inquiry as to circumstances of sale.

14. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows; first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal monies then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators or assigns, as the case may be. Application of purchase-money.

15. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed. Conveyance to the purchaser.

16. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered or assigned to and were then Owner of charge may call for title deeds and conveyance of legal estate.

23 & 24 *Vict.* c. 145, s. 16.

vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Appointment of receiver.

17. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.

Receiver deemed to be the agent of the mortgagor.

18. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Powers of receiver.

19. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property, of which he is appointed receiver by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Receiver may be removed.

20. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver to receive a commission not exceeding five per cent.

21. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

Receiver to insure, if required.

22. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.

Application of moneys received by him.

23. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates and assessments whatsoever, and in

payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns. 23 & 24 *Vict.* *c.* 145, *s.* 23.

24. The powers and provisions contained in this part of this act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt. This part to relate to charges by way of mortgage only.

Part III.

Provisions as to Investment of Trust Funds, appointment and powers of Trustees and Executors, &c. (c).

25. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: provided always, that no such original investment as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person. On what securities trust funds may be invested.

(*c*) Further provisions as to investments are contained in 22 & 23 Vict. c. 35, s. 32, *ante*, p. 694; 23 & 24 Vict. c. 38, ss. 10, 11, *ante*, pp. 696, 697. Lord *St. Leonards'* observes, it is not likely that the provisions of the 25th section will be acted upon after the powers which have been conferred on trustees by the statutes referred to. (Sugd. on Statutes, p. 308, 2nd ed.)

26. In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income by way of com- Trustees may apply income of property of infants, &c. for their maintenance.

23 & 24 *Vict.* *c.* 145, *s.* 26.

pound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Provisions for appointment of new trustees on death, &c. (*d*).

27. Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall with all convenient speed be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery either before or after the passing of this act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will or other instrument creating the trust.

(*d*) The usual indemnity clauses are supplied by 22 & 23 Vict. c. 35, s. 31, *ante*, p. 693.

Appointment of new trustees in cases herein named.

28. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

Trustees' receipts to be discharges (*e*).

29. The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.

(*e*) See further clause, 22 & 23 Vict. c. 35, s. 23, *ante*, p. 688.

30. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

23 & 24 *Vict.* c. 145, *s.* 30.

Executors may compound, &c.

Part IV.

General Provisions.

31. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

Tenants for life, &c. may execute powers, notwithstanding incumbrances.

32. None of the powers or incidents hereby conferred or annexed to particular offices, estates or circumstances shall take effect or be exerciseable if it is declared in the deed, will or other instrument creating such offices, estates or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will or other instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations (*f*).

Powers, &c. hereby given may be negatived by express declaration.

(*f*) This is an option which will probably be frequently acted upon, more particularly owing to the latter portion of the section, to which Lord *St. Leonards* always entertained and expressed a strong objection; for nothing can be more difficult, not to say dangerous, than to attempt to amalgamate the powers in a settlement and the powers in the act, or to engraft the latter in the former. Where the settlement is purposely silent as to the powers conferred by the act, and the settlor approves of and chooses to rely upon them, the only inconvenience will be that the settlement itself will not inform the persons claiming under it of the powers vested in them, but it will be necessary to refer to the act for that purpose. (Sugden on Powers, 877, 878, 8th ed.; Sugden on Statutes, 301, 2nd ed.)

33. Nothing in this act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will or other instrument under which such trustees or other persons are empowered to act had con-

No persons other than those entitled under the settlement, &c. to be affected.

23 & 24 *Vict.* c. 145, s. 33.

tained express powers for such trustees or other persons so to deal with or affect such estates or rights.

Commencement of act.

34. The provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after the passing of this act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Extent of act.

35. This act shall not extend to Scotland.

APPENDIX.

No. 1.

RELEASE AND CONVEYANCE *of the Freehold Part, and Covenant to surrender the Copyhold part, of an Estate, by a Tenant in Tail in Possession, to a Purchaser with Limitations, or a Declaration to bar Dower; the Vendor's Wife joining to extinguish her Right of Dower.* (*See* 3 & 4 *Will.* 4, *c.* 47, *ss.* 15, 40, 53; *ante, pp.* 339, 363, 372; *and* 3 & 4 *Will.* 4, *c.* 105, *ss.* 6, 14; *ante, pp.* 441, 445.)

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, between B. Adams, of, &c., Esq., (eldest son and heir of the body of A. Adams, late of, &c., Esq., deceased, by Anne, his late wife, before A. Bell, spinster, also deceased), and Mary, his wife, of the first part; [*the purchaser*] of the second part, and J. K., of, &c., gent., a trustee nominated by and on behalf of the said [*purchaser*] of the third part. [*If the purchaser should not have been married until after the* 1*st of January*, 1834, *and the declaration should be adopted* (*see post*), *there will be no necessity for a trustee.*] (*a*) WHEREAS by indentures of lease and release, bearing date respectively the eighth and ninth days of March, 1800, the release being made, or expressed to be made between the said A. Adams, of the first part; the said Anne Adams, then A. Bell, spinster, of the second part; A. B. and C. D., of the third part; and E. F. and G. H., of the fourth part (being the settlement made previously to and in consideration of the marriage then intended to be, and shortly afterwards duly solemnized between the said A. Adams and A. Bell), the freehold parts of the capital messuage or tenement, farm, lands and hereditaments hereinafter described and intended to be hereby granted and released, were (amongst other hereditaments) duly conveyed and assured from and after the solemnization of the said intended marriage, to the use of the said A. Adams and his assigns, for and during the term of his natural life, and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the said A. B. and C. D. and their heirs, during the natural life of the said A. Adams, upon trust to support the contingent uses and estates hereinafter limited, and from and after the decease of the said A. Adams, To the use, intent and purpose, that the said A. Bell, in case she survived

Parties.

Recital of settlement creating the entail.

(*a*) A husband married on or before the 1st of January, 1834, will not be able to defeat his wife's right of dower, by the new methods, prescribed by the act for amending the law of dower. It will therefore be advisable for a purchaser who married before that time to have the estate conveyed to such uses as will enable him to defeat his wife's dower, without her future concurrence. Both Sir *Edward Sugden* (V. & P. 545, 11th ed.) and Mr. *Hayes* (1 Conv. 304, 5th ed.) agree in the propriety of adopting the old form of uses to prevent dower in the case of a husband married on or before the 1st of January, 1834.

the said A. Adams, should receive and take the annual sum or yearly rent-charge of 300*l.* for her jointure and in bar of her dower, with the usual powers and remedies by distress and entry for recovering and enforcing the payment thereof, and subject thereto to the use of the said E. F. and G. H., their executors, administrators and assigns, for the term of 200 years, upon certain trusts for further securing the payment of the said annual sum or yearly rent-charge, and from and after the expiration or other sooner determination of the said term of 200 years, and in the meantime subject thereto, to the use of the first and every other son of the said A. Adams, on the body of the said A. Bell lawfully to be begotten, severally and successively, according to their respective seniorities, and the heirs of the body and respective bodies of all and every such sons and son issuing, with divers remainders over: AND WHEREAS at a court held in and for the manor of Dale, in the said county of ——, on the —— day of ——, the said A. Adams, in pursuance of a covenant for that purpose contained in the said recited indenture of settlement, did surrender all and every the messuages, lands, tenements and hereditaments of him the said A. Adams, holden of the said manor by copy of court roll, with their appurtenances, to the use of the said A. B. and C. D., their heirs and assigns, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as (regard being had to the nature of the said estates, and the tenure by which the same were holden) would nearest or best correspond with the uses, estates, trusts, powers, provisoes, agreements and declarations expressed and contained in the said hereinbefore-recited indenture of the 9th of March, 1800, of and concerning the freehold hereditaments thereby released, or expressed and intended so to be, or such and so many of the same uses, estates, trusts, powers, provisoes and declarations as were then subsisting undetermined and capable of taking effect: And at the same court the said A. B. and C. D. were duly admitted tenants to the said copyhold hereditaments so surrendered to their use as aforesaid, TO HOLD to the said A. B. and C. D. and their heirs, according to the form and effect of the surrender so made to their use as aforesaid, at the will of the lord of the said manor of Dale, by copy of court roll, by the rents and services therefore due and of right accustomed to be paid and performed: AND WHEREAS the said A. Adams departed this life on or about the 1st day of May, 1830, leaving the said B. Adams, his eldest son and heir-at-law, who thereupon became entitled to the hereditaments comprised in the said-recited indentures for an estate of inheritance in tail general, subject to the said annuity or yearly rent-charge of 300*l.*, and the powers, remedies and term for securing the payment of the same: AND WHEREAS the said Anne Adams departed this life on or about the 1st day of October now last past, and all arrears of the said annuity or yearly rent-charge of 300*l.* having been paid up to the time of her decease, the term of 200 years created by the said-recited indenture of settlement has, by force of a proviso therein contained, absolutely ceased and determined: AND WHEREAS the said B. Adams has contracted and agreed with the said [*purchaser*] for the absolute sale to him of the fee simple and inheritance of and in the freehold parts of the messuage or tenement, farm, lands, and hereditaments hereinafter described, and of the customary estate of inheritance of and in the copyhold parts of the same hereditaments, free from all incumbrances, at or for the price or sum of 5,000*l.*: AND UPON the treaty for the said purchase it was agreed that the sum of 4,100*l.* (part of the said sum of 5,000*l.*) should be the apportioned value of the said freehold hereditaments, and that the sum of 900*l.* (residue of the said sum of 5,000*l.*) should be the apportioned value of the said copyhold hereditaments: AND WHEREAS the said A. B. departed this life

Surrender of copyholds to trustees upon the trusts of the settlement.

Death of tenant for life.

Death of jointress.

Contract for purchase.

Apportionment of consideration.

Death of one of the trustees.

on or about the 5th day of May, 1832, leaving the said C. D., his co-trustee, him surviving, and in whom the legal estate in the said copyhold hereditaments is now vested: NOW THIS INDENTURE WITNESSETH, that in pursuance and part performance of the said-recited agreement, and for defeating all estates tail of the said B. Adams of and in the messuage, farm, lands and hereditaments expressed to be hereby granted and released, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estates tail (*b*), and for extinguishing the dower, right and title of dower, and every other estate and interest of the said Mary Adams of and in the same hereditaments, and for limiting and assuring the same hereditaments and the inheritance thereof in fee simple to the uses hereinafter expressed, and for and in consideration of the sum of 4,100*l.* of lawful money of Great Britain (part of the said sum of 5,000*l.*, the aforesaid purchase-money) to the said B. Adams in hand paid by the said [*purchaser*] at or immediately before the sealing and delivery of these presents, the receipt of which said sum of 4,100*l.* in full for the absolute purchase of the freehold parts of the hereditaments hereinafter described, and expressed to be hereby granted and released, and the fee simple and inheritance thereof, free from all incumbrances, the said B. Adams doth hereby admit and acknowledge, and from the same and every part thereof doth acquit, release and discharge the said [*purchaser*], his heirs, executors, administrators and assigns, and every of them for ever by these presents: He, the said B. Adams, under and by virtue and in pursuance of the powers and provisions given by and contained in the act of parliament in that case made and provided, doth, by these presents, grant, dispose of, alien, release and confirm, and the said Mary Adams, with the concurrence of the said B. Adams, and for the purpose of releasing and extinguishing her right and title of dower in or out of the said messuages, lands, and hereditaments hereinafter described, doth by these presents intended to be forthwith duly acknowledged by the said M. Adams, and perfected in other respects with the solemnities prescribed by law for rendering deeds of married women effectual to extinguish their interests in land, doth remise, release and quit claim unto the said [*purchaser*] and his heirs, [all such part or parts, and so much as is or are freehold, and not copyhold, of and in] (*c*): All [*parcels*], together with all and singular houses, outhouses, edifices, buildings, barns, stables, coach-houses, cottages, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the said messuages, farm, lands, hereditaments and premises hereinbefore expressed to be hereby granted and released, belonging or in anywise appertaining, or with the same or any of them respectively

FIRST TESTATUM.

Conveyance of freeholds.

General words.

(*b*) The intention to bar entails was formerly thus expressed in recovery deeds, and in deeds of covenant to levy fines:—"For docking, barring and extinguishing all estates tail, and reversions and remainders thereupon expectant or depending of and in the messuages," &c. The language in the precedent is more conformable to that of the general enabling clause in the 3 & 4 Will. 4, c. 74, s. 15 (*ante*, p. 339), although it is conceived that the old mode of expressing the intention would be equally effectual.

(*c*) Where the freeholds can be clearly identified, the words within brackets should be omitted.

now or at any time heretofore demised, leased, held, used, occupied or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them, or any part of them, or appertaining thereunto, with their and every of their appurtenances. AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the same messuage, farm, lands and other hereditaments: AND all the estate, right, title, interest, inheritance, use, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of them the said B. Adams and Mary his wife, and each of them, of, in, to, from and out of the same premises, and every part and parcel thereof: [AND all deeds, evidences in writings relating to or concerning the said messuage, farm, lands, hereditaments and premises, or any of them, solely or together with other hereditaments of less value, now in the custody or power of the said B. Adams, or which he can obtain or procure without suit at law or in equity, together with true and attested copies of all deeds, evidences and writings relating to or concerning the same hereditaments and premises, or any of them, jointly with other hereditaments of equal or greater value; the first set of such copies to be made and delivered at the costs and charges of the said B. Adams, but all future copies to be made, written and taken at the request, costs and charges of the said [*purchaser*] (*e*)]. TO HAVE AND TO HOLD the said messuage or tenement, farm and lands, and all and singular other the hereditaments and premises hereinbefore expressed to be hereby granted and released, with their appurtenances, unto the said [*purchaser*] and his heirs. [*If the purchaser should have been married on or before the 1st January*, 1834, *or if the time of his marriage is a matter of doubt, it will be advisable to adopt the old limitations*

Reversion, &c.

All deeds.

HABENDUM.

(*e*) This clause as to title deeds is not now usually inserted, and of course it should be omitted where the title deeds are not intended to be delivered to the purchaser. It is an established principle that whoever is entitled to the land has also a right to the title-deeds. (*Harrington* v. *Price*, 3 B. & Ad. 170; *Hooper* v. *Ramsbottom*, 6 Taunt. 12; *Ogle* v. *Story*, 4 B. & Ad. 735; *May* v. *Harvey*, 13 East, 197; *Parry* v. *France*, 2 Bos. & P. 461; *Lord* v. *Wardle*, 3 Bing. N. C. 680.) Where a vendor sells only a part of the estate, and retains the remainder, to which the deeds relate, the purchaser is not entitled to them without an express grant (*Yea* v. *Field*, 2 T. R. 708; 2 Prest. Conv. 466); and where lands held under one title are sold to two or more persons in separate parcels, the deeds are usually granted to the purchaser of the largest lot; but in cases where a purchaser cannot obtain the original deeds, he is entitled in the absence of a stipulation to the contrary (*Boughton* v. *Jewell*, 17 Ves. 176) to attested copies of all such of them as are not of record. (*Campbell* v. *Campbell*, cited Sugd. V. & P. 475, 11th ed.) A purchaser is not entitled as a matter of course to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him, but only of those which are necessary to make out a good sixty years' title. (*Cooper* v. *Emery*, 1 Phil. C. C. 388.) The right of a purchaser to a covenant for the production of documents constituting part of his title, does not extend to copies of court rolls or indentures of bargain and sale inrolled, unless they are in the possession or power of the vendor. (*Ib.*) Although, as observed by Lord *Eldon* in *Dare* v. *Tucker*, 6 Ves. 460, purchasers have set a value upon attested copies which does not belong to them, they are waste paper upon an ejectment, except between the parties themselves. Therefore a purchaser should obtain a covenant from the vendor or the person having the larger portion of the estate to produce the deeds themselves, in order that the purchaser may be enabled to defend his title and possession. (Sugd. V. & P. 477, 11th ed.) But where a purchaser of a small part of an estate took a covenant for the production of the deeds of which he afterwards obtained

to prevent dower; if after that time, the declaration subsequently inserted will be sufficient.] TO THE USE of such person or persons, for such estate or estates, interest or interests, and to and for such uses, intents and purposes, and under and subject to such powers, provisoes, declarations, and agreements, and in such manner and form as he the said [*purchaser*] by any deed or deeds, intrument or instruments in writing to be duly executed by him, shall from time to time or at any time or times direct, limit or appoint, and in default of and until such direction, limitation or appointment, and as to such part or parts of the premises of which no complete direction, limitation or appointment shall be made, or to which any such direction, limitation or appointment shall not extend, to the use of the said [*purchaser*] and his assigns, during his natural life, without impeachment of waste, and from and after the determination of that estate by any means in his lifetime, to the use of the said [*trustee*] and his heirs, during the life of the said [*purchaser*]; In trust, nevertheless, for the said [*purchaser*] and his assigns, to the intent that no wife of the said [*purchaser*] who shall happen to survive him shall become entitled to dower out of or in the said premises or any part thereof, and from and after the determination of the estate so limited in use to the said [*trustee*] and his heirs, during the life of the said [*purchaser*], To the only use and behoof of the said [*purchaser*], his heirs and assigns for ever, and to, for, and upon no other use, trust, intent or purpose whatsoever. [*Or where the declaration is adopted,* "TO THE USE and behoof of the said [*purchaser*], his heirs and assigns for ever: And it is hereby declared by the said [*purchaser*] that any wife of the said [*purchaser*], who shall happen to survive him, shall not be entitled to any dower out of or in the messuage, farm, lands and hereditaments hereby granted and released, or expressed and intended so to be, or any part thereof:"] AND the said B. Adams doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said [*purchaser*], his heirs and assigns (*f*), that the said Mary Adams (she hereby consenting) shall and will forthwith, or as soon as conveniently may be after the execution of these presents, at the costs and charges of the said B. Adams, his heirs, executors or administrators, duly appear before two of the perpetual commissioners appointed for the county of ——, for taking the acknowledgments of deeds by married women, pursuant to the act of parliament in that case made and provided (*g*); and that the said Mary Adams shall and will

Old form of limitation to bar dower.

Declaration to bar dower.

Covenant by vendor that his wife shall acknowledge the deed before commissioners.

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possession as mortgagee, it was held that the assignee of the mortgage could not recover them where the assignment of the mortgage contained no grant of the deeds. (*Yea* v. *Field*, 2 T. R. 708. See *Davies* v. *Vernon*, 6 Q. B. 443; *Owen* v. *Knight*, 4 Bing. N. C. 54.) In *Barclay* v. *Raine*, 1 Sim. & Stu. 449, it was decided that where the vendor had not the custody of the original deeds, but had a covenant for the production of them, that the title was not marketable, because the covenant did not run at law with the land. (See 2 Real Prop. Rep. 15—17, and 3 Real Prop. Rep. 56—58, 72, pl. 11.)

(*f*) It is not the practice to insert this covenant; but when it is probable that the separate examination of and acknowledgment by a married woman will not be taken at the time of the execution of the deed by her, it seems advisable to insert a covenant of this kind in the deed, which she is required to acknowledge.

(*g*) *Covenant where two Married Women are to acknowledge the Deed.*

And each of them the said [*husbands*], so far as concerns the acts, deeds, and defaults of his own wife respectively, but not further or otherwise, doth hereby for himself, his heirs, executors and administrators, covenant and

produce these presents, and acknowledge the same to be her act and deed before the said commissioners and be examined by them apart from the said B. Adams her husband, touching her knowledge of the contents of these presents, and freely and voluntarily consent thereto, and do all such other acts and things as are required by the said act of parliament in that case made and provided, and the orders of the Court of Common Pleas made in pursuance thereof, for completing and giving effect to such separate examination of and acknowledgment by the said Mary Adams as aforesaid, and for causing the certificate of such acknowledgment, with an affidavit of the signature thereof by the said commissioners, to be duly filed of record in her majesty's Court of Common Pleas at Westminster: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said recited agreement, and for and in consideration of the sum of 900*l.* of lawful money of Great Britain (residue of the said sum of 5,000*l.* the purchase-money aforesaid,) to the said B. Adams well and truly paid by the said [*purchaser*] immediately before the execution of these presents, in full for the absolute purchase of the copyhold hereditaments hereinafter mentioned, and covenanted to be surrendered, and the customary inheritance thereof in possession, the receipt of which said sum of 900*l.* he the said B. Adams doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release and discharge the said [*purchaser*], his heirs, executors, administrators and assigns, and every of them for ever: He the said B. Adams doth hereby for himself, his heirs, executors and administrators, and the said C. D., at the request of the said B. Adams, and so far as relates to the acts and deeds of himself, the said C. D. and his heirs doth hereby for himself, his heirs, executors and administrators, covenant with the said [*purchaser*], his heirs and assigns, that he the said B. Adams and C. D. and all other persons rightfully claiming under or in trust for him the said B. Adams, or his heirs or issue, shall and will, on the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, at or before the next court baron or customary court to be holden in and for the said manor of Dale, or out of court, according to the custom of the said manor, well and effectually surrender or cause to be surrendered into the hands of the lord or lady of the said manor, according to the custom thereof, to

SECOND TESTATUM.

Covenant to surrender copyholds.

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agree with the said [*purchaser*], his heirs and assigns, that each of them the said [*married women*] they hereby respectively consenting, shall and will forthwith, or as soon as conveniently may be after the execution of these presents, at the joint costs and charges of the said [*husbands*], their respective heirs, executors or administrators, duly appear before two of the perpetual commissioners appointed for the city of —— for taking the acknowledgments of deeds by married women, pursuant to the act of parliament in that case made and provided, and that each of them the said [*married women*] shall and will produce these presents, and acknowledge the same respectively to be her act and deed before the said commissioners, and be respectively examined by them apart from her respective husband, touching her knowledge of the contents of these presents, and freely and voluntarily consent thereto, and that each of them the said [*married women*] shall and will do all and such other acts and things as are required by the same act of parliament and the orders of the Court of Common Pleas made in pursuance thereof, for completing and giving effect to such separate examinations and acknowledgments by the said [*married women*] respectively as aforesaid, and for causing the certificate or certificates of such acknowledgments respectively, with the necessary affidavit or affidavits of the signature or signatures thereof respectively by the said commissioners, to be duly filed of record in her majesty's Court of Common Pleas at Westminster.

the use of the said [*purchaser*], his heirs and assigns for ever (*h*): All such and so many and such part or parts as is or are copyhold and holden of the said manor by copy of court roll, of and in the messuage or tenement, farm, lands and hereditaments hereinbefore described, with their and every of their rights, members and appurtenances, and all the estate, right, title, interest, trust, property, possession, claim and demand whatsoever of them the said B. Adams and C. D., and each of them, of, in, and to the same and every part thereof, to the intent that the said [*purchaser*] or his heirs may be admitted tenant or tenants of the said copyhold hereditaments: To hold the same to him the said [*purchaser*], his heirs and assigns for ever, at the will of the lord or lady of the said manor, by copy of court roll, according to the custom of the said manor, by and under the rents, suits and services therefore due and of right accustomed to be paid and performed. And that in the mean time and until such surrender shall be made, and the said [*purchaser*] or his heirs shall be admitted tenant or tenants under and by virtue of the same surrender, he the said C. D. and his heirs and all other persons shall stand and be seised or possessed of the same copyhold lands and hereditaments, and every part of the same, with the appurtenances, upon trust, and for the sole benefit of the said [*purchaser*], his heirs and assigns (*i*). AND the said C. D. doth hereby for himself, his heirs, executors and administrators, covenant with the said [*purchaser*], his heirs and assigns, that he the said C. D. hath not at any time heretofore made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter or thing whatsoever, whereby, or by reason or means whereof, the said copyhold hereditaments hereinbefore covenanted to be surrendered, or any part thereof, are, is, can, shall or may be impeached, charged, surrendered or incumbered in title, estate or otherwise howsoever. AND the said B. Adams, for himself, his heirs, executors and administrators, doth further covenant, promise and agree to and with the said [*purchaser*], his [appointees] (*k*), heirs and assigns, by these presents, in manner following (that is to say), that notwithstanding any act, deed, matter or thing, by him the said B. Adams, or the said A. Adams, or either of them, made, done, committed or executed, or knowingly or willingly suffered to the contrary, he the said B. Adams, at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said messuage and other hereditaments hereinbefore expressed to be hereby granted and released, and every part thereof with their appurtenances, for a good, sure, sole, perfect and absolute estate of inheritance in fee tail general in possession, and of the said customary or copyhold lands, hereditaments and premises, hereinbefore covenanted to be surrendered, for an equitable estate of inheritance in tail general, according to the custom of the manor of Dale aforesaid, without any manner of condition, use, trust, property, power of revocation, equity of redemption, remainder or limitation of any use or uses or other restraint, cause, matter or thing whatsoever, to alter, change, defeat, incumber, revoke or make void the same, and that notwithstanding any such act, deed, matter or thing, as aforesaid,

Covenant by trustee that he has not incumbered.

Covenants for title by vendor.

(*h*) Where the copyhold part of the estate is not included in the previous description of the parcels, the copyholds intended to be surrendered should be here described.

(*i*) See form of surrender, *post*, pp. 727, 728.

(*k*) The word "appointees" should be omitted when no power of appointment is given to the purchaser.

they the said B. Adams, and C. D., or one of them, now have or hath in themselves or himself good right, full power, and lawful and absolute authority to grant, release, dispose of, surrender, and confirm the said freehold and copyhold messuage, farm, lands, and other hereditaments, hereinbefore expressed to be hereby granted and released, and hereinbefore covenanted to be surrendered, with the appurtenances thereunto belonging, unto the said [*purchaser*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND that it shall and may be lawful to and for the said [*purchaser*], his [appointees], heirs and assigns, from time to time and at all times hereafter peaceably and quietly to enter into and upon, and to have, hold, occupy, possess and enjoy the said freehold and copyhold messuage, farm, lands and other hereditaments, hereinbefore expressed to be hereby granted and released, and hereinbefore covenanted to be surrendered, with their appurtenances, and to have, receive and take the rents, issues and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by them the said B. Adams, and Mary his wife, and C. D., or any or either of them, their or any or either of their heirs or issue, or of or by any other person or persons lawfully or equitably claiming or to claim, by, from, or under or in trust for them, or any or either of them, or by, from, or under the said A. Adams: AND that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released and for ever discharged or otherwise by the said B. Adams, his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from, and against all and all manner of former and other gifts, grants, estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned or suffered, by the said B. Adams, his heirs or issue, or by any person or persons lawfully or equitably claiming or to claim, by, from or under, or in trust for him or them, or any of them, or by the said A. Adams, or any person claiming under him: AND FURTHER, that the said B. Adams and Mary his wife, and his heirs and issue, and the said C. D. and his heirs, and all and every other persons and person having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, to, in or out of the said messuage, farm, lands, and other hereditaments, hereinbefore expressed to be hereby granted and released, and hereinbefore covenanted to be surrendered, or any of them, or any part thereof respectively, by, from, or under or in trust for the said B. Adams and his heirs or issue, or any of them, or by, from, or under the said A. Adams, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said [*purchaser*], his [appointees], heirs or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, surrenders, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, releasing, conveying, surrendering, assuring and confirming the said freehold and copyhold messuage, farm, lands and other hereditaments hereinbefore expressed to be hereby granted and released, and hereinbefore covenanted to be surrendered, and every part thereof, with their appurtenances, unto the said [*purchaser*], his [appointees], heirs and assigns, or otherwise as

For quiet enjoyment.

Free from incumbrances.

For further assurance.

he or they shall direct or appoint, and as by the said [*purchaser*], his [appointees], heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. IN WITNESS, &c. (*l*)

Memorandum to be indorsed on, or written at the Foot, or in the Margin of the last Deed.

This deed, marked B. [*or some other letter or mark*], was this day produced before us, and acknowledged by Mary Adams, therein named, to be her act and deed; previous to which acknowledgment the said Mary Adams was examined by us, separately and apart from B. Adams, her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her. Witness our hands, this —— day of January, 18—.

[*Signatures of two Commissioners.*]

Where Acknowledgment relates to two or more Married Women.

This deed, marked A. [*or some other letter or mark*], was this day produced before us, and acknowledged by [*christian and surnames of married women*] therein named, to be their several acts and deeds; previous to which acknowledgments the said [*names as above*] were examined by us separately and apart from their respective husbands touching their knowledge of the contents of the said deed, and their consent thereto, and each of them declared the same to be freely and voluntarily executed by her. Dated the —— day of —— one thousand eight hundred and ——.

[*Signatures of two Commissioners.*]

Certificate of two of the perpetual Commissioners, of having taken the Acknowledgment of Mary Adams, to be written or engrossed on a separate piece of Parchment.

These are to certify that on the —— day of January, 18—, before us, A. B. and C. D., two of the perpetual commissioners appointed for the county of —— for taking the acknowledgments of deeds by married women, pursuant to an act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," appeared personally, Mary, the wife of B. Adams, and produced a certain indenture marked B., bearing date the —— day of —— 18—, and made between [*insert names of parties*] and acknowledged the same to be her act and deed; and we do hereby certify that the said Mary Adams was, at the time of her acknowledging the said deed, of full age and competent under-

(*l*) This deed, in order to be effectual, must be inrolled in Chancery within six calendar months after its execution. (See *ante*, p. 365.) It has been submitted that a vendor ought to procure the conveyance to be inrolled at his own expense, for the same reason that he was required to bear the expense of a fine or common recovery. (9 Jarm. Prec. 412, n.)

standing, and that she was examined by us, apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.

[*Signatures of the two Commissioners.*]

Certificate relating to three Married Women.

These are to certify that on the —— day of ——, in the year one thousand eight hundred ——, before us [*names of two commissioners*], two of the perpetual commissioners appointed for the county of —— for taking the acknowledgments of deeds by married women, pursuant to an act passed in the fourth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," appeared personally Mary, the wife of John Jones, Ellen, the wife of Edward Ellis, and Anne, the wife of Arthur Arms, and produced a certain indenture of release, marked A, bearing date the —— day of ——, one thousand eight hundred and ——, and made between the said John Jones and Mary his wife, Edward Ellis and Ellen his wife, and Arthur Arms and Anne his wife of the first part, the said John Jones of the second part, and Luke Lee, of the third part, and each of them acknowledged the same to be her act and deed. And we do hereby certify that each of them the said Mary Jones, Ellen Ellis, and Anne Arms, was at the time of her acknowledging the said deed of full age and competent understanding, and that each of them was examined by us apart from her husband, touching her knowledge of the contents of the said deed, and that each of them freely and voluntarily consented to the same.

[*Signed by the two Commissioners.*]

FORMS OF AFFIDAVITS. (*m*)

No. 1.

Affidavit verifying the Certificate of Acknowledgment, to be made by an Attorney, when the Acknowledgment is taken before a Judge.

IN THE COMMON PLEAS.

I —— of —— in the —— of ——, gentleman, one of the attornies of the court of ——, at Westminster, make oath and say—

1. That I know ——, the wife of ——, in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned

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(*m*) In filling up the certificate of acknowledgment, the names *only* of the parties to the deed should be set out.

All alterations, interlineations or erasures, in the certificate must have the initials of the clerk to the Judge before whom the acknowledgment is taken set opposite thereto, and all alterations in the affidavit must have the initials of the commissioner or of the clerk to the Judge before whom the affidavit is sworn set opposite thereto.

This affidavit must be sworn before a commissioner of the Court of Common Pleas, or a Judge, on parchment.

was made by the said ——, and the certificate signed by the judge in the said certificate mentioned, on the day and year therein mentioned, at ——, in the —— of ——, in my presence.

2. That at the time of making such acknowledgment the said —— was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

3. That previous to the said —— making the said acknowledgment, I inquired of her the said ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such inquiry the said —— declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—. Where a provision is to be made.

4. That before the said acknowledgment was so taken, I was satisfied and do now verily believe that such provision has been made by——, and that such —— has been produced to the said judge.

[3. That previous to the said —— making the said acknowledgment, I inquired of her the said ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such inquiry the said —— declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said —— I have no reason to doubt the truth, and I verily believe the same to be true.] Where no provision is to be made.

5. That it appears by the deed acknowledged by the said ——, that the premises wherein she is stated to be interested are described to be in the —— of ——, in the —— of ——.

Sworn, &c.

No. 2.

Joint Affidavit verifying the Certificate of Acknowledgment to be made by a Third Party (either an Attorney or not) and by an Attorney, when the Acknowledgment is taken before a Judge.

In the Common Pleas.

We ——, of ——, in the —— of ——, and —— of —— in the —— of——, gentleman, one of the attornies of the court of —— at Westminster, severally make oath and say—

1. And first I —— for myself say:—That I know ——, the wife of ——, in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment in the said certificate mentioned the said —— was of full age.

2. And I ——, for myself say:—That the acknowledgment in the said certificate mentioned was made by the said ——, and the certificate signed by the judge in the said certificate mentioned, on the day and year therein mentioned, at ——, in the —— of ——, in my presence.

3. That at the time of making such acknowledgment the said —— was of competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

Where a provision is to be made.

4. That previous to the said —— making the said acknowledgment, I inquired of her the said ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said —— declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the said acknowledgment was so taken, I was satisfied and do now verily believe that such provision has been made by ——, and that such —— has been produced to the said judge.

Where no provision is to be made.

[4. That previous to the said —— making the said acknowledgment, I inquired of her the said ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said —— declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for or in consequence of her so giving up such her interest; of which declaration of the said —— I have no reason to doubt the truth, and I verily believe the same to be true.]

6. That it appears by the deed acknowledged by the said ——, that the premises wherein she is stated to be interested, are described to be in the —— of ——, in the —— of ——.

Sworn, &c.

NOTE.—The affidavit of identity of the married woman and of her being of full age are the only facts that can be sworn to by a person who is not an attorney. (See *ante*, p. 718, n. (m).)

No. 3.

Affidavit verifying the Certificate of Acknowledgment to be made by Special Commissioner.

IN THE COMMON PLEAS.

I ——, of ——, in the —— of ——, one of the commissioners mentioned in the certificate hereunto annexed, make oath and say—

1. That I know ——, the wife of ——, in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said ——, and the certificate signed by me, and ——, of ——, in the —— of ——, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at ——, in the —— of ——, in my presence.

2. That at the time of making such acknowledgment the said —— was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

* Insert one of these alternatives —"I am," *or* "to the best of my knowledge and belief, the said —, the other commissioner, is."

3. That* ——, not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

Where a provision is to be made.

4. That previous to the said —— making the said acknowledgment, I inquired of her, the said ——, whether she intended to give up her

interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such enquiry the said ——, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the said acknowledgment was so taken I was satisfied and do now verily believe that such provision has been made by ——, and that such —— has been produced to me and the said ——, the other commissioner.

[4. That previous to the said —— making the said acknowledgment, I enquired of her, the said ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such enquiry the said —— declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said ——, I have no reason to doubt the truth, and I verily believe the same to be true.]

Where no provision is to be made.

6. That it appears by the deed acknowledged by the said ——, that the premises wherein she is stated to be interested are described to be in the —— of ——, in the —— of ——.

Sworn, &c. (*n*)

(*n*) The affidavit of identity of the married woman and of her being of full age are the only facts that can be sworn to by a person who is not a commissioner.

In filling up the certificate of acknowledgment, the names *only* of the parties to the deeds, without their additions, are to be set out.

All alterations, interlineations, or erasures in the certificate must have the initials of the commissioners before whom the acknowledgment is taken set opposite thereto, and all alterations in the affidavit must have the initials of the magistrate or person before whom the affidavit is sworn set opposite thereto.

N.B.—This affidavit should be sworn in the presence of a notary public before some magistrate duly authorized to swear affidavits at the place where the acknowledgment may be taken, and a notarial certificate must accompany the affidavit to be filed. See the form, *post*, p. 726.

Or it may be sworn before any British diplomatic minister or consular agent authorized by the statute 18 & 19 Vict. c. 42, to take affidavits, and when so sworn the notarial certificate will not be required.

In Scotland and Ireland the affidavit must be sworn before a commissioner for taking affidavits in the Court of Common Pleas at Westminster, appointed pursuant to the statute 3 & 4 Will. 4, c. 42, s. 42. In France the affidavit may be sworn before the consul, vice-consul, or any attorney or attornies of either of the superior courts at Westminster.

By rule of court of Hilary Term, 1863, it is ordered, that affidavits verifying certificates of acknowledgments taken in any colony or foreign possession, being part of the dominions of her Majesty, made before any court, judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such court, &c., of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of the statute 3 & 4 Will. 4, c. 74, s. 85, relating to such affidavits.

No. 4.

Affidavit verifying the Certificate of Acknowledgment, to be made by a Special Commissioner when more than one Married Woman makes Acknowledgment.

IN THE COMMON PLEAS.

I ——, of ———, in the ——— of ———, one of the commissioners mentioned in the certificate hereunto annexed, make oath and say—

1. That I know ——, the wife of ——, and ——, the wife of ——, respectively in the said certificate mentioned, and that the acknowledgment therein mentioned was made by each of them the said ——, and ——, and the certificate signed by me, and ——, of ———, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at ———, in the ——— of ———, in my presence.

2. That at the time of making such acknowledgment each of them, the said ——, and ——, was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

* Insert one of these alternatives —"I am," or "to the best of my knowledge and belief, the said —, the other commissioner is."

3. That *——, not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

Where a provision is to be made for each.

4. That previous to the said ——, and ——, severally making the said acknowledgment, I enquired of each of them, the said ——, and —— whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry each of them, the said ——, and ——, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the acknowledgment of either of them was so taken I was satisfied, and do now verily believe, that such provision has been made by ——, and that such —— has been produced to me, and the said ——, the other commissioner.

Where no provision is to be made for either.

[4. That previous to the said ——, and ——, severally making the said acknowledgment, I inquired of each of them, the said ——, and ——, whether she intended to give up her interest in the estate—, in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry each of them, the said ——, and ——, declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of each of them, the said ——, and ——, I have no reason to doubt the truth, and I verily believe the same to be true.]

6. That it appears by the deed acknowledged by the said ——, and ——, that the premises wherein each of them is stated to be interested, are described to be in the —— of ———, in the ——— of ———.

Sworn, &c. (*o*)

(*o*) See *ante*, p. 721, note.

No. 5.

Affidavit verifying the Certificate of Acknowledgment, to be made by an Attorney (not being a Commissioner, taking the Acknowledgment).

IN THE COMMON PLEAS.

I ——, of ——, in the county of ——, gentleman, one of the attorneys of the Court of ———, make oath and say—

1. That I know ——, the wife of ——, in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said ——, and the certificate signed by ——, of ———, gentleman, and ——, of ———, gentleman, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at ——, in my presence.

2. That at the time of making such acknowledgment, the said —— was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

3. That to the best of my knowledge and belief, the said ——, one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

Where no provision is to be made.

4. That previous to the said —— making the said acknowledgment, I inquired of the said —— whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry the said —— declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest; of which declaration of the said —— I have no reason to doubt the truth, and I verily believe the same to be true.

Where a provision is to be made.

[4. That previous to the said —— making the said acknowledgment, I enquired of her, the said ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry, the said —— declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the said acknowledgment was so taken, I was satisfied, and do now verily believe, that such provision has been made by ——, and that such —— has been produced to the said commissioners.]

5. That it appears by the deed acknowledged by the said ——, that the premises wherein she is stated to be interested, are described to be in ——, in the county of ——.

Sworn, &c. (*p*)

(*p*) The affidavit of identity of the married woman and of her being of full age are the only facts that can be sworn to by a person who is not an attorney.

The commissioners cannot take acknowledgments out of the county, city, town or division for which they are appointed; and notwithstanding their

being appointed for more than one county, &c., they should be described in the certificate as appointed only for the particular county, city, town or division in which the acknowledgment is taken.

In filling up the certificate of acknowledgment, the names *only* of the parties to the deeds should be set out.

All alterations, interlineations or erasures in the certificate must have the initials of the commissioner or of the clerk to the Judge before whom the acknowledgment is taken set opposite thereto, and all alterations in the affidavit must have the initials of the commissioner or of the clerk to the Judge before whom the affidavit is sworn set opposite thereto.

This affidavit must be sworn before a commissioner of the Court of Common Pleas, or a Judge of either of the courts, on parchment.

No. 6.

Affidavit verifying the Certificate of Acknowledgment, to be made by one of the Commissioners when more than one Married Woman makes Acknowledgment.

IN THE COMMON PLEAS.

I ——, of ——, in the —— of ——, gentleman, one of the —— of the Court of ——, and one of the commissioners mentioned in the certificate hereunto annexed, make oath and say —

1. That I know ——, the wife of ——, and ——, the wife of ——, respectively in the said certificate mentioned, and that the acknowledgment therein mentioned was made by each of them, the said ——, and ——, and the certificate signed by me and ——, of ——, in the —— of ——, gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at ——, in the —— of ——, in my presence.

2. That at the time of making such acknowledgment each of them the said ——, and ——, was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

3. That* —— not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

* Insert one of these alternatives —"I am," *or* "to the best of my knowledge and belief, the said —, the other commissioner, is."

[4. That previous to the said ——, and ——, severally making the said acknowledgment, I enquired of each of them the said ——, and ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry each of them, the said ——, and —— declared that a provision was to be made for her in consequence of her so giving up such her interest in the said estate—.

Where a provision is to be made for each.

5. That before the said acknowledgment was so taken, I was satisfied, and do now verily believe, that such provision has been made by ——, and that such —— has been produced to me and the said ——, the other commissioner.]

6. That it appears by the deed acknowledged by the said ——, and ——, that the premises wherein each of them is stated to be interested, are described to be in the —— of ——, in the —— of ——.

Sworn, &c. (*q*)

(*q*) See *ante*, p. 723, note.

No. 7.

Joint Affidavit verifying the Certificate of Acknowledgment, to be made by a Third Party (either an Attorney or not), and by a Commissioner, when more than one Married Woman makes Acknowledgment.

IN THE COMMON PLEAS.

We ——, of ——, in the —— of ——, and ——, of ——, in the —— of ——, gentleman, one of the attorneys of the Court of ——, and one of the commissioners mentioned in the certificate hereunto annexed, severally make oath and say—

1. And first I, ——, for myself say:—That I know ——, the wife of ——, and ——, the wife of ——, respectively in the said certificate mentioned, and that at the time of making the acknowledgment in the said certificate mentioned, each of them the said ——, and —— was of full age.

2. And I, ——, for myself say:—That the acknowledgment in the said certificate mentioned was made by each of them the said ——, and ——, and the certificate signed by me and ——, of ——, in the —— of ——, gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at ——, in the —— of ——, in my presence.

3. That at the time of making such acknowledgment, each of them the said ——, and ——, was of competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

4. That* ——, not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

5. That previous to the said —— and ——, making the said acknowledgment, I enquired of each of them the said —— and ——, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry each of them the said —— and ——, declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said —— and —— respectively, I have no reason to doubt the truth, and I verily believe the same to be true.

6. That it appears by the deed acknowledged by the said —— and ——, that the premises wherein each of them is stated to be interested are described to be in the —— of——, in the —— of ——.

Sworn, &c. (*r*)

* Insert one of these alternatives —"I am," *or* "to the best of my knowledge and belief, the said ——, the other commissioner is." Where no provision is made for either.

(*r*) See *ante*, p. 723, note.

No. 8.

Joint Affidavit verifying the Certificate of Acknowledgment, to be made by a Third Party (either an Attorney or not), and by an Attorney (not being a Commissioner taking the Acknowledgment).

IN THE COMMON PLEAS.

We ——, of ——, and ——, of ——, one of the attorneys of the Court of ——, severally make oath and say—

1. And first I, ——, for myself say: — That I know ——, the wife of ——, in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment therein mentioned, the said —— was of full age.

2. And I, ——, for myself say:—That the acknowledgment in the said certificate mentioned was made by the said ——, and the certificate signed by ——, of ——, and ——, of ——, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at ——, in my presence.

3. That at the time of making such acknowledgment the said —— was of competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

4. That to the best of my knowledge and belief the said ——, one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

Where no provision is made.

5. That previous to the said —— making the said acknowledgment, I inquired of the said —— whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—, and that in answer to such enquiry the said —— declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest; of which declaration of the said —— I have no reason to doubt the truth, and I verily believe the same to be true.

6. That it appears by the deed acknowledged by the said ——, that the premises wherein she is stated to be interested are described to be in ——, in the county of ——.

Sworn, &c. (*s*)

(*s*) See note to No. 5, *ante*, p. 723.

No. 9.

Form of Notarial Certificate. (*t*)

I ——, notary public, of lawful authority admitted and sworn, dwelling at ——, HEREBY CERTIFY that ——, of ——, on the —— day of ——, one thousand eight hundred and ——, was sworn in my presence at ——, to the truth of the affidavit hereunto annexed, by and before ——: AND I DO HEREBY CERTIFY that the said —— is

——, and is duly qualified to administer oaths at —— aforesaid, and that the name "——," subscribed to the said affidavit, and also the name "——," subscribed to the jurat thereof, are of the respective proper handswriting of the said —— and ——, and were respectively signed by them in my presence.

IN TESTIMONY WHEREOF I have hereunto set my hand and notarial seal.

Dated the —— day of ——, one thousand eight hundred and ——.

Affidavits should be engrossed on parchment, and sworn before a judge of the Court of Common Pleas or a commissioner of that court. No stamp is now required on these affidavits. (4 & 5 Vict. c. 84.)

(*t*) For verification of affidavits sworn in Scotland, Ireland or France, or before any British diplomatic or consular agent authorized by the statute 18 & 19 Vict. c. 42, to take affidavits, this certificate is not required. See *ante*, p. 413.

SURRENDER *out of Court by an equitable Tenant in Tail and his Trustee of the Copyhold Parts of the Estate, in pursuance of the Covenant contained in last Deed, ante*, pp. 714, 715.

MANOR OF DALE, IN THE COUNTY OF ——. } WHEREAS [*recite the settlement creating the entail, the admission of the trustees, the death of the tenant for life, and of one of the trustees, ante*, pp. 709, 710]: NOW THEREFORE BE IT REMEMBERED, that on the —— day of ——, in the year of our Lord 18—, C. D. of &c. and B. Adams, of &c. esq., copyhold tenants, or one of them, a copyhold tenant of the said manor, came before me, John Giles, steward of the said manor and courts thereof, and for defeating all estates tail of the said B. Adams of and in the lands and hereditaments intended to be hereby surrendered, and all remainders, reversions, estates, interests and powers to take effect after the determination or in defeasance of such estates tail (and in consideration of the sum of 900*l.* of lawful money of Great Britain to the said B. Adams well and truly paid by [*name and description of the purchaser*] at or immediately before the passing of this surrender, in full for the absolute purchase of the lands and hereditaments intended to be hereby surrendered, and the inheritance thereof in possession, according to the custom of the said manor) he the said C. D. (at the request and by the direction of the said B. Adams, testified by his signing this surrender) and also the said B. Adams, under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," did, and each of them did, out of court, according to the custom of the said manor, surrender out of their and each of their hands into the hands of the lords of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of ——, a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatso-

ever of them the said C. D. and B. Adams, and each of them, holden of the said manor by copy of court roll, with their and every of their rights, members, privileges, easements and appurtenances (*u*), And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; and all the estate, right, title, interest, use, trust, inheritance, property, claim and demand whatsoever, legal and equitable, of them the said C. D. and B. Adams, and each of them, of, in, to or out of the same premises and every part thereof, with the appurtenances, TO THE ONLY USE AND BEHOOF of the said [*purchaser*], his heirs and assigns for ever, absolutely and without any manner of condition whatsoever.

[*Signatures of C. D. and B. Adams.*]

Taken and accepted the —— day of ——, 18—, by me, [*Signature of Steward.*]
Steward of the said Manor.

In the presence of [*Signature of Witness.*]

No. II.

GRANT *by a Tenant in Tail in Remainder with the Consent of the Protector of the Settlement, for the purpose of barring the Estate Tail and all Remainders expectant thereon.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, between William Evans, of &c. esq. of the first part; Edward Evans, of &c. esq. (the eldest son and heir of the body of the said William Evans), of the second part; and A. B. of &c. of the third part:

Recital of will creating the entail.

WHEREAS Hugh Evans, late of &c. esq. being, at the date and execution of his will hereinafter recited, and thenceforth to the time of his decease, seised of an estate of inheritance in fee simple in possession of and in the messuages, lands, tenements and hereditaments hereinafter described, and intended to be hereby granted, duly made, signed and published his last will and testament in writing, bearing date the 10th day of May, 1806, executed and attested in such manner as by law was then required for rendering valid the devise of freehold estates, and thereby gave and devised all and every the messuages, lands, tenements and other hereditaments, situate, lying, and being in the several parishes of A., B. and C., or elsewhere, in the county of Essex, of or to which the said Hugh Evans, or any person or persons in trust for him, was or were seised or entitled for an estate of freehold and inheritance in fee simple, in possession, remainder, reversion, or expectancy, with their and every of their appurtenances, to the uses, upon the trusts, and for the ends, intents and purposes, and with, under, and subject to the powers, provisoes, and declarations thereinafter declared and in part hereinafter mentioned; that is to say, to the use of his (the said testator's) son, the said William Evans, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and, after the determination of that estate by any means in his lifetime, to the use of C. D., of &c. esq., and E. F., of &c. gentlemen, and their heirs, during the life of the said William

(*u*) Where the surrenderors hold other copyholds of the manor, besides those intended to be surrendered, there must be a description of the parcels sold, or an exception of such parts as are intended to be retained.

Evans, upon trust, by the usual ways and means, to preserve the contingent remainders thereinafter limited from being defeated or destroyed; and from and after the decease of the said William Evans, to the use of the first and other sons of the said William Evans successively in tail, so that the elder of such sons, and the heirs of his body issuing, might be preferred to and take before the younger of such sons and the heirs of their respective bodies issuing, with divers remainders over: AND WHEREAS the said Hugh Evans departed this life on or about the 6th day of April, 1808, without having altered or revoked his said will: AND WHEREAS the said Edward Evans, as the eldest son and heir of the body of the said William Evans, is entitled to an estate tail in remainder immediately expectant upon the decease of the said William Evans in the messuages, lands and hereditaments hereby granted, or expressed and intended so to be: AND WHEREAS the said W. Evans, as the protector of the settlement made by the said recited will, and in order to enable the said E. Evans to make such disposition and conveyance as are hereinafter contained effectual against all persons claiming after the determination or in defeasance of the estate tail of the said E. Evans, has agreed, at the request of the said E. Evans, to consent to the same in manner hereinafter expressed: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in order to defeat and destroy all estates tail of the said E. Evans in the messuages, lands and hereditaments expressed to be hereby granted, and all estates, rights, interests and powers, to take effect after the determination or in defeasance of such estates tail, and in order to convey and assure the inheritance in fee simple in remainder expectant upon the decease of the said W. Evans in the same hereditaments, unto and to the use of the said E. Evans, his heirs and assigns: He the said Edward Evans, with the consent and approbation of the said William Evans, as such protector as aforesaid, testified by his being a party to and sealing and delivering these presents, doth by these presents grant, dispose of, and confirm unto the said A. B. and his heirs, All that the remainder of him the said Edward Evans, expectant and to take effect upon the decease of the said William Evans, of and in all, &c. [*parcels and general words*], and the reversion, &c. and all the estate, &c. (see *ante*, pp. 711, 712): TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises expressed to be hereby granted, (subject and without prejudice to the estate for life of the said William Evans, and all powers, exemptions and privileges (except the power of consenting as protector), annexed to such estate, unto the said A. B. and his heirs, To the only use and behoof of the said Edward Evans, his heirs and assigns, for ever, freed and absolutely discharged of and from the estate tail of the said Edward Evans, and all remainders, reversions, estates, rights, interests and powers to take effect after the determination or in defeasance of such estate tail. [*When it is intended to bar dower, the declaration may be here inserted.* See *ante*, p. 713.] IN WITNESS, &c. (*v*).

Death of testator.

Agreement of protector to consent.

TESTATUM.

Grant by tenant in tail.

HABENDUM.

(*v*) This deed must be inrolled in Chancery within six calendar months after its execution. (See *ante*, p. 365.)

It may be prudent to omit the words "bargain and sell" in an assurance intended not to operate as a bargain and sale. An instrument containing the words "*grant, bargain and sell*," intended by the parties to take effect as a bargain and sale, and *duly inrolled as such*, was held to operate as a grant, because the evident design of the parties in making the assurance

would have been defeated if it had been construed as a bargain and sale. (*Haggerston* v. *Hanbury*, 5 B. & C. 101; 7 D. & Ry. 723. See *Miller* v. *Green*, 1 Cr. & J. 142; 8 Bing. 192; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; *Pentland* v. *Healey*, 1 Alc. & Nap. 65; *Avery* v. *Cheslyn*, 5 Nev. & M. 372; 3 Ad. & Ell. 75; *Nash* v. *Ash*, 1 H. & Colt. 160.)

No. II.

CONVEYANCE *by the Owner of a Base Fee for the purpose of enlarging it into a Fee Simple absolute. See* 3 & 4 *Will.* 4, *c.* 74, *s.* 19, *ante*, *p.* 343 (*x*).

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, between Edward Evans, of &c. esq. the [*owner of the base fee,*] (the eldest son and heir of the body of William Evans, of &c. esq. deceased), of the one part, and A. B., [*the releasee,*] of the other part: WHEREAS [*recital of will creating the entail and death of testator, ante*, pp. 728, 729]: AND WHEREAS, under and by virtue of an indenture bearing date on or about the 1st day of May, 1832, and made, or expressed to be made, between the said Edward Evans of the one part, and C. D. of the other part, and by a fine *sur conuzance de droit come ceo*, &c. acknowledged and levied by the said Edward Evans before his majesty's justices of the Court of Common Pleas at Westminster, in or as of Trinity Term, 1832, in pursuance of a covenant or agreement contained in the same indenture, and a declaration of uses of the same fine therein contained, the messuages, lands and hereditaments expressed to be hereby granted and released were duly limited and assured (subject and without prejudice to the estate for life of the said William Evans in the same hereditaments), unto and to the use of the said Edward Evans, his heirs and assigns for ever. AND WHEREAS the said William Evans departed this life on or about the 1st day of June, 1834, whereupon the said E. Evans became entitled to a base fee in possession in the said hereditaments; and the said E. Evans is desirous of enlarging such base fee into a fee simple absolute: NOW THIS INDENTURE WITNESSETH, that in order to enlarge the base fee of the said E. Evans in the messuages, lands and hereditaments expressed to be hereby granted and released, into a fee simple absolute, and to defeat and destroy all estates tail, remainders, reversions, rights, titles, interests and powers, to take effect after the determination or in defeasance of the base fee into which the estate tail of the said E. Evans has been converted as aforesaid; and in order to limit and assure the inheritance in fee simple in possession in the same hereditaments to the use of the said E. Evans, his heirs and assigns for ever, he the said E. Evans doth by these presents grant, alien, dispose of, release and confirm unto the said A. B., All that, &c. [*parcels, general words, and the reversion of all the estate, &c. ante*, pp. 711, 712]: TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereby granted and released, or expressed and intended so to be, with

Fine levied by tenant in tail in remainder.

Death of tenant for life.

TESTATUM.

Owner of base fee conveys for the purpose of enlarging it into a fee simple absolute.

(*x*) Where there is a protector of the settlement creating the entail which has been converted into a base fee, the owner of it cannot acquire the fee simple absolute without the consent of such protector. (See 3 & 4 Will. 4, c. 74, s. 35, *ante*, p. 359.)

their and every of their rights and appurtenances, unto the said A. B. and his heirs, To THE ONLY USE AND BEHOOF of the said E. Evans, his heirs and assigns for ever, and to and for no other use, intent or purpose whatsoever. [*If the party was not married on or before 1st January*, 1834, *and it is intended to bar dower, the declaration, ante*, p. 713, *should be added.*] IN WITNESS, &c. (*y*).

(*y*) This deed must be inrolled within six calendar months after its execution in Chancery. (*Ante*, p. 365, s. 41.)

No. IV.

CONVEYANCE *by Bargain and Sale (to be inrolled in Chancery by a Tenant in Tail in Remainder, without the Consent of the Protector of the Settlement, with a Covenant to complete the Title at a future Period.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, between Edward Evans, of &c. esq. (the eldest son and heir of the body of William Evans, of &c. esq.) of the one part, and [*the purchaser*] of the other part. WHEREAS [*recital of will creating the entail and death of the testator, ante*, pp. 728, 729]: AND WHEREAS the said E. Evans, as the eldest son and heir of the body of the said W. Evans, is seised or entitled to an estate tail in the messuage, lands and hereditaments hereby bargained and sold, or expressed and intended so to be, in remainder expectant upon the decease of the said W. Evans, and the said E. Evans has issue six children now living, namely, [*names of children*] (*z*): AND WHEREAS the remainder in fee simple expectant upon the decease of the said W. Evans, in the messuage, lands and hereditaments expressed to be hereby bargained and sold, was, on the —— day of March now last past, put up to sale by public auction at the Crown Inn, situate at ——, in the county of ——, in one lot, and at such sale the said [*purchaser*] was the highest bidder for and declared to be the purchaser of the same hereditaments at or for the price or sum of 1,000*l.* (*a*): AND WHEREAS the said

Recitals of vendor's title.

Of sale by auction.

Refusal of protector to consent.

(*z*) A tenant in tail in remainder, without the consent of the protector of the settlement, can only convey a base fee, which will endure so long as such tenant in tail has issue of his body, on the failure of which, unless the base fee be subsequently enlarged, the remainders over will take effect. It would not therefore be prudent for a purchaser to take a conveyance from a tenant in tail in remainder, without the protector's consent, unless there is issue, which will probably live until the title can be perfected, and reliance can be placed on the covenant of the vendor for securing to the purchaser the damage he will sustain by the non-performance of the covenant to complete the title. Hence, in cases of this kind, it will often be necessary to invest the purchase-money in the names of trustees until the title shall be completed.

(*a*) It must be remembered, that expectant heirs and the owners of reversionary interests are entitled for mere inadequacy of consideration to have the contract rescinded upon terms of redemption. (See 2 Swanst. 139, n. (*a*), and the numerous cases there cited.) But the rule does not extend

W. Evans, as the protector of the settlement made by the said recited will, has refused to consent to the disposition of the said hereditaments by the said E. Evans, but the said [*purchaser*] has consented to accept in the first instance a conveyance from him without such consent, on his entering into such covenant for completing the title of the said [*purchaser*] to the fee simple absolute in the same hereditaments as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that for carrying the aforesaid sale and agreement into effect, and in consideration of the sum of 1,000*l.* of lawful money of Great Britain to the said E. Evans in hand paid by the said [*purchaser*] at or before the sealing and delivery of these presents, in full for the absolute purchase of the fee simple and inheritance of the hereditaments expressed to be hereby bargained and sold, subject only to the estate for life of the said W. Evans therein, but free from all other incumbrances, the receipt of which said sum of 1,000*l.* the said E. Evans doth hereby admit and acknowledge, and from the same and every part thereof doth acquit, release, and for ever discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and every of them, by these presents, and in order to defeat the estate tail of the said E. Evans under the said recited will in the same hereditaments, and to convey a base fee therein in remainder immediately expectant upon the decease of the said W. Evans unto the said [*purchaser*], his heirs and assigns, He, the said E. Evans, doth by these presents grant, bargain, sell, dispose of, and confirm unto the said [*purchaser*] and his heirs, All [*parcels, general words, remainder, &c. all the estate, &c. ante*, pp. 711, 712]: TO HAVE AND TO HOLD the said messuage, lands, hereditaments, and all and singular other the premises expressed to be hereby bargained and sold, with their and every of their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, subject to the estate for life of the said W. Evans, and the remainders, estates, rights, interests and powers to take effect after the determination, or in defeasance of the base fee into which the estate tail of the said E. Evans is converted by these presents, [*if the vendor has the ultimate remainder or reversion, add these words*, "except the ultimate remainder or reversion so limited to or vested in the said [*vendor*], his heirs and assigns, as aforesaid."] AND the said E. Evans for himself, his heirs, executors and administrators, doth hereby covenant with the said [*purchaser*], his heirs and assigns, in following manner; (that is to say,) that notwithstanding any act or deed by him the said E. Evans or the said [*the testator*] committed or executed to the contrary, he the said E. Evans, at the time of the execution of these presents, is lawfully and absolutely seised of and in, or well and sufficiently entitled to the said messuage, lands, and other hereditaments hereinbefore expressed to be hereby bargained and sold, and every part thereof, with their appurtenances, for a good and sole estate of inheritance in tail general in remainder immediately

TESTATUM.

Tenant in tail in remainder conveys to purchaser in fee.

Covenants for title.

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to sales *by auction*, (*Shelley* v. *Nash*, 3 Madd. 232,) nor to the sale by a father, tenant for life, and his son, tenant in tail in remainder, who form a vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate. (*Wood* v. *Abrey*, 3 Madd. 417; see *Fox* v. *Wright*, 6 Madd. 111; *Marsack* v. *Reeves*, 6 Madd. 109; *Wethered* v. *Wethered*, 2 Sim. 183; *Harwood* v. *Tooke*, *Id.* 192; *Earl Portmore* v. *Taylor*, 4 Sim. 182; *King* v. *Hamlet*, *Id.* 223; 2 My. & K. 456; *Wardle* v. *Carter*, 7 Sim. 490; Sugd. V. & P. 314—324, 11th ed.; *Earl of Aldborough* v. *Trye*, 1 West, 221; 7 Cl. & Fin. 436.)

expectant upon the decease of the said W. Evans, with such remainders over as aforesaid. AND that notwithstanding any such act or deed as aforesaid, he the said E. Evans now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, dispose of, and confirm the messuage, lands and other hereditaments hereinbefore expressed to be hereby bargained and sold, with the appurtenances thereunto belonging, unto the said [*purchaser*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: and that it shall be lawful for the said [*purchaser*], his heirs and assigns, immediately from and after the determination of the estate for life of the said W. Evans, and from time to time and at all times thereafter, peaceably and quietly to enter into and upon, and to hold, occupy, possess, and enjoy the said messuage, lands and other hereditaments hereinbefore expressed to be hereby bargained and sold, with their appurtenances, and to have, receive and take the rents, issues and profits thereof, and of every part thereof, for his and their own use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever of or by him the said E. Evans, his heirs or issue in tail, or of or by any other person or persons lawfully or equitably claiming or to claim, by, from or under or in trust for him, them or any of them, or by, from or under the said [*the testator*]. AND that freely, clearly, and absolutely acquitted, released, and for ever discharged or otherwise by the said E. Evans, his heirs, executors or administrators, well and sufficiently kept harmless and indemnified from and against all former and other gifts, grants, bargains, sales, estates, troubles, charges and incumbrances whatsoever, either already or hereafter to be made, executed, occasioned or suffered by the said E. Evans, or his heirs or issue in tail, or by any person or persons lawfully or equitably claiming or to claim by, from or under or in trust for him, them or any of them, or by the said [*the testator*] or any person claiming under him, except in respect of the estate for life of the said W. Evans. AND FURTHER, that the said E. Evans, his heirs and issue in tail, and all and every other person and persons having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust or property, either at law or in equity, of, in, to or out of the said messuage, lands and other hereditaments hereinbefore expressed to be hereby bargained and sold, or any of them, or any part thereof, by, from, or under or in trust for the said E. Evans, his heirs, or issue in tail, or any of them, or by, from, or under the said [*the testator*], (except the said W. Evans or his assigns, in respect only of his estate for life, and as protector of the settlement made by the said recited will,) shall and will, from time to time and at all times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said [*purchaser*], his heirs or assigns, make, do, acknowledge and execute, or cause and procure to be made, done, acknowledged and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, conveying, confirming or otherwise assuring the said messuage, lands and other hereditaments hereinbefore expressed to be hereby bargained and sold, and every part thereof, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, or otherwise, as he or they shall direct or appoint, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required, and as shall be tendered to be done and executed. AND MOREOVER, that the said E. Evans, and every other person lawfully claiming by, from, or under him, shall and will, imme-

Free from incumbrances.

For further assurance.

Covenant to perfect the title.

diately after the decease of the said W. Evans, or as soon as circumstances will permit, and the said E. Evans shall be able and competent so to do, at the costs and charges of the said E. Evans, his executors or administrators, make, do and execute all such acts, deeds, conveyances and assurances as shall be necessary, and as the said [*purchaser*], his heirs and assigns, or his or their counsel in the law, shall reasonably advise or require, for effectually barring, discharging and defeating all remainders, reversions, estates, rights, interests and powers, to take effect under and by virtue of the said recited will after the determination or in defeasance of the base fee of the said [*purchaser*], his heirs and assigns, or the estate tail of the said E. Evans in the said messuage, lands and hereditaments hereinbefore expressed to be hereby bargained and sold, and for enlarging the base fee of the said [*purchaser*], his heirs or assigns, in the same hereditaments, into a fee simple absolute, and for perfecting his or their title to the same: AND that in case the said E. Evans shall happen to depart this life before such acts, deeds, conveyances and assurances as last aforesaid shall be made and perfected, then and in such case the executors or administrators of the said E. Evans shall and will, at their own costs and charges, cause or procure the issue (*b*) in tail of the said E. Evans, or other the person or persons who shall be entitled in remainder or reversion immediately expectant upon the determination of the base fee hereby created or intended so to be, when and so soon as circumstances will permit, in like manner to make, do and execute all such acts, deeds, conveyances and assurances as shall be necessary, and as the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall reasonably advise or require, for effectually barring, discharging and defeating all remainders, reversions, estates, rights, interests and powers, to take effect under and by virtue of the said recited will, after the determination or in defeasance of the base fee of the said [*purchaser*], his heirs and assigns in the said hereditaments, and for enlarging such base fee of the said [*purchaser*], his heirs and assigns into a fee simple absolute, and for perfecting his or their title to the same, or for conveying and assuring the remainder or reversion in the said hereditaments expectant upon the base fee, into which the estate tail of the said E. Evans is intended to be converted by these presents, unto and to the use of the said [*purchaser*], his heirs and assigns; but it is hereby agreed and declared, that no further or other consideration shall be payable by the said [*purchaser*], his heirs or assigns, in respect of any estate or interest to be conveyed and assured in pursuance of the covenant lastly hereinbefore contained: IN WITNESS, &c.

(*b*) It is to be observed, that a covenant of this kind will not bind the issue in tail, (see *ante*, s. 40, p. 363, n. (*i*),) nor those in remainder; and in case of their refusal to perform it, the only remedy of the purchaser will be an action on the covenant against the representatives of the vendor. It is advisable, when practicable, to obtain a demise from the vendor of another estate to a trustee upon trust to raise the purchase-money for the benefit of the purchaser, in the event of his title not being perfected within a limited time.

No. V.

CONVEYANCE *by Bargain and Sale (to be inrolled in Chancery) by Indorsement on last Deed, for completing the Title of a Purchaser entitled to a Base Fee under the Assurance of a Tenant in Tail in Remainder.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, between the within-named E. Evans, of the one part, and the within-named [*purchaser*], of the other part: WHEREAS (*c*) the within-named W. Evans, the protector of the settlement made by the will recited in the within-written indenture, departed this life on or about the —— day of —— now last past: AND WHEREAS the said E. Evans has agreed specifically to perform the covenant contained in the within-written indenture for completing the title of the said [*purchaser*] to the messuages, lands and hereditaments, by the same indenture expressed to be bargained and sold: NOW THEREFORE THIS INDENTURE WITNESSETH, that in pursuance and performance of the said covenant, and in consideration of the sum of 10*s.* of lawful money of Great Britain to the said E. Evans paid by the said [*purchaser*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, and in order to defeat all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of the base fee, into which the estate tail of the said E. Evans was converted by the operation of the within-written indenture, and in order to enlarge the base fee of the said [*purchaser*] in the hereditaments by the within-written indenture expressed to be bargained and sold, into a fee simple absolute, and to perfect the title of the said [*purchaser*] to the same, he the said E. Evans doth by these presents grant, bargain, sell and confirm unto the said [*purchaser*], his heirs and assigns, the messuage, lands, hereditaments, and all and singular other the premises by the within-written indenture expressed to be bargained and sold, with their and every of their rights, members and appurtenances, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same hereditaments and premises, and every part thereof, and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever of the said E. Evans in, to, or out of the same hereditaments and premises, and every part thereof: TO HAVE AND TO HOLD the said messuage, lands, hereditaments, and all and singular other the premises hereinbefore expressed to be hereby bargained and sold, with their and every of their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns for ever: And the said E. Evans doth hereby for himself, his heirs, executors and administrators, covenant and declare with and to the said [*purchaser*], his heirs and assigns, that he the said E. Evans hath not at any time heretofore made, done, committed or executed, or been party or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said messuage, lands, hereditaments and premises hereinbefore expressed to be hereby bargained and sold, or any of them, or any part thereof, are, is, can, shall or may be conveyed, assured, impeached, charged or incumbered in title, estate, or otherwise howsoever (save and except by the within-written indenture and these presents). IN WITNESS, &c.

RECITALS.

Death of protector.

Agreement to perform covenant.

TESTATUM.

Tenant in tail bargains and sells to purchaser.

Covenant against incumbrances.

(*c*) Where this conveyance is not made by indorsement, the last deed should be recited as well as the instrument creating the entail to be barred.

No. VI.

CONSENT *of the Protector of a Settlement to an absolute Disposition by a Tenant in Tail in Remainder.* (*See ante*, ss. 42, 43, p. 366.)

Creation of entail.

TO ALL TO WHOM THESE PRESENTS SHALL COME, D. Dunn, of——, esq. [*the protector*], sends greeting: WHEREAS by indentures of lease and release, bearing date respectively on or about the 9th and 10th days of March, 18—, the release being made or expressed to be made between [*names of parties*], divers messuages, farms, lands and hereditaments in the several parishes of A., B. and C., in the county of York, in the said indentures particularly mentioned and described, with their appurtenances, were duly conveyed and assured, [*to the use of D. Dunn for life, with remainder to his first and other sons in tail with divers remainders over*]: AND WHEREAS Edward Dunn, of &c. esq. is the eldest son and heir of the body of the said D. Dunn, and under and by virtue of the limitations contained in the said recited indenture of release is entitled to an estate tail in remainder immediately expectant on the decease of the said D. Dunn of and in the messuages, farms, lands and hereditaments comprised in the said recited indentures: AND WHEREAS, in order to enable the said E. Dunn to defeat all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of the estate tail of the said E. Dunn, of and in the messuages, farms, lands and hereditaments comprised in the said recited indentures, the said D. Dunn, as the protector of the settlement made by the same indentures, has consented and agreed (at the request of the said E. Dunn) to give his unqualified consent and approbation, according to the directions for that purpose contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," to any disposition, conveyance, or assurance hereafter to be made and executed by the said E. Dunn, of and concerning the said messuages, farms, lands and hereditaments in manner hereinafter expressed: NOW THESE PRESENTS WITNESS, that in pursuance and performance of said recited agreement, he the said D. Dunn doth by these presents give and grant his absolute and unqualified consent and approbation to any conveyance, assurance and disposition, which shall be made and executed by the said E. Dunn, either on the day of the date and execution of these presents, or at any time thereafter, of and concerning all or any part or parts of the messuages, farms, lands, tenements, and hereditaments comprised in and conveyed and assured by the hereinbefore-recited indentures of lease and release, with their and every of their appurtenances (*d*); subject nevertheless and without prejudice to the estate for life of the said D. Dunn, of and in the same hereditaments, and all powers, privileges and exemptions (except the power of consenting as protector), annexed or incident to such estate. IN WITNESS, &c. (*e*).

Agreement of protector to consent to disposition by tenant in tail.

TESTATUM.

Protector consents to absolute disposition by tenant in tail.

(*d*) Where the consent is intended to be confined to part of the property comprised in the settlement, there must necessarily be a description of the parcels, to the disposition whereof the consent is to apply.

(*e*) This deed must be inrolled in Chancery at or before the time of the inrolment of the deed of disposition by the tenant in tail. (*Ante*, s. 46, p. 366.)

No. VII.

CONSENT *of the Protector of a Settlement to a particular Disposition by a Tenant in Tail in Remainder.* (*See ante*, p. 366, s. 43.)

TO ALL TO WHOM THESE PRESENTS SHALL COME, John Jones, of &c. [*the protector*], sends greeting: WHEREAS [*recital of deed or will creating the entail under which J. Jones is tenant for life, with remainder to D. Jones in tail with divers remainders over*]: AND WHEREAS a marriage has been agreed upon and is intended to be shortly had and solemnized between the said D. Jones and Lucy Gay, of &c. spinster, and upon the treaty for such marriage it was agreed that the said D. Jones should settle and assure the messuages, lands and hereditaments mentioned and comprised in, and intended to be conveyed and assured by, the indenture of grant and release hereinafter mentioned [*or* recited], to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations in the same indenture expressed, declared, and contained of and concerning the same hereditaments: AND WHEREAS, in order to enable the said D. Jones to make such disposition, settlement and assurance as are contained in the indenture of grant and release hereinafter mentioned [*or* recited], the said J. Jones, as the protector of the settlement made by the said [*deed or will creating the entail*], has consented and agreed (at the request of the said D. Jones) to give his consent and approbation, according to the directions for that purpose contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," to the conveyance, disposition, and assurance intended to be made by the indenture of grant and release hereinafter mentioned [*or* recited]. [*It being obvious that the deed of consent and the assurance to which it refers should be connected with certainty, it will be advisable in some cases to recite in the former so much of the latter as will show the parcels intended to be included, and the proposed limitations, as follows*]: And whereas by an indenture of grant and release already prepared and ingrossed, but intended to be executed after the execution of these presents, and bearing date the day next after the day of the date of these presents, and made or expressed to be made between [*names and description of parties*]; All those [*description of parcels*] are intended to be conveyed and assured by the said D. Jones, unto the said [*the trustees of the intended settlement*] and their heirs; To hold the same unto the said [*trustees*] and their heirs, (subject to the estate for life of the said J. Jones,) to the use, &c. [*set forth the uses*]: NOW THESE PRESENTS WITNESS, that in pursuance and performance of the said recited agreement on the part of the said J. Jones, he the said J. Jones, as such protector as aforesaid, doth, by these presents, give and grant his consent to such conveyance, assurance, and disposition, as are intended to be made and contained [*where the intended settlement is not recited*] in a certain indenture of grant and release already prepared and ingrossed, and bearing date the day next after the day of the date of these presents, and made, or expressed to be made, between [*names and description of parties*], [*or where the intended settlement is recited*, in and by the said recited indenture of grant and release,] of and concerning the messuages, lands and hereditaments in the same indenture particularly mentioned and described, and intended to be thereby granted and released: Pro-

Recital of intended marriage of tenant in tail.

Protector's agreement to consent.

Recital of intended settlement.

TESTATUM.

Protector consents to a particular disposition.

Consent confined

to particular disposition.

vided always, and it is hereby declared, that the consent hereby or intended to be hereby given is confined to the conveyance, assurance and disposition lastly hereinbefore referred to, and shall not extend, nor be deemed or construed to extend, to any other conveyance, assurance or disposition made or executed, or to be made or executed, by the said D. Jones, of and concerning the said hereditaments, or any part thereof, nor prejudice or affect the estate for life of the said J. Jones, or any power, privilege or exemption (except the power of consenting as protector) annexed or incident to such estate. In WITNESS, &c. (*f*).

(*f*) This deed must be inrolled in Chancery at or before the time of the inrolment of the deed of disposition by the tenant in tail. (See *ante*, p. 366, s. 46.)

No. VIII.

CONSENT *of the Protector of a Settlement of Copyholds to an absolute Disposition by a Tenant in Tail in Remainder.* (*See ante*, s. 51, p. 371.)

Creation of entail.

TO ALL TO WHOM THESE PRESENTS SHALL COME, A. B. of &c. esq. [*the protector*], sends greeting: WHEREAS under and by virtue of the last will and testament of [*testator*] bearing date the —— day of ——, 18—, the said A. B. is tenant for life of the copyhold messuages, lands and hereditaments hereinafter mentioned, with remainder to C. D. and the heirs of his body, with divers remainders over; AND WHEREAS, at a court held in and for the manor of Dale in the county of ——, on the —— day of ——, the said A. B. was admitted tenant under and by virtue of the will of the said [*testator*] to divers messuages, lands, tenements and hereditaments holden of the said manor by copy of court roll, To hold the same to the said A. B. and his assigns during the term of his natural life, according to the form and effect of the will of the said [*testator*]; AND WHEREAS the said [*tenant in tail in remainder*] is desirous of acquiring an absolute estate of inheritance in fee simple in remainder, according to the custom of the manor of Dale aforesaid, expectant and to take effect in possession on the decease of the said A. B. of and in the said copyhold hereditaments and premises, and hath applied to and requested the said A. B., as the protector of the settlement made by the said recited will, to consent to an absolute disposition of such remainder by the said [*tenant in tail in remainder*] in compliance with the directions for that purpose given by an act of parliament passed in the session of parliament held in the third and fourth years of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance;" and the said A. B. has agreed to give such consent in manner hereinafter expressed: Now THESE PRESENTS WITNESS, that the said A. B. as such protector as aforesaid, and in compliance with the directions for that purpose contained in the said act of parliament, doth by these presents give and grant his absolute and unqualified consent and approbation to any disposition or surrender, dispositions or surrenders, which shall be made and passed by the said [*tenant in tail in remainder*] either on the day of the date and execution of these presents, or at any time thereafter, according to the custom of the said manor, of and concerning all or

Admission of tenant for life.

Protector's agreement to consent.

TESTATUM.

Protector consents to disposition by remainderman.

any part or parts of the messuages, lands, tenements and hereditaments, to which the said A. B. was admitted tenant as aforesaid (subject and without prejudice to the estate for life of the said A. B. therein) to and for such uses, trusts, intents and purposes, as in and by any such disposition or surrender, or dispositions or surrenders, shall be expressed, declared and contained of and concerning the same. IN WITNESS, &c.

MEMORANDUM *to be indorsed on last Deed.*

I, E. F., steward of the within-mentioned manor of Dale, do hereby acknowledge that the within-written deed poll, under the hand and seal of the within-named A. B. was produced to me on the —— day of —— before any surrender in pursuance thereof was made by the within-named [*tenant in tail*]. Witness my hand this —— day of ——, 18—. [*Signature of E. F.*]

FURTHER MEMORANDUM *to be indorsed on last Deed.*

I, the above-named E. F., do hereby testify that the within-written deed poll, and the above memorandum indorsed thereon, have been duly entered on the court rolls of the within-mentioned manor. Witness my hand this —— day of ——, 18—.

[*Signature of E. F.*] (*g*).

(*g*) See *ante*, p. 371, s. 51, requiring the above memorandums to be indorsed on the deed of consent.

No. IX.

SURRENDER *out of Court by a Tenant in Tail in Remainder, in order to acquire a Base Fee.*

MANOR OF DALE, IN THE COUNTY OF ——. } BE IT REMEMBERED, that on the —— day of ——, in the year of our Lord 18—, A. B. of &c. came before me, ——, deputy steward of the said manor and courts thereof, and in order as well to defeat the estate tail of the said A. B. in the messuages, lands and hereditaments hereinafter mentioned, as to acquire a base fee therein in remainder, immediately expectant upon the decease of [*the tenant for life*] he the said A. B., under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," did out of court, according to the custom of the said manor, surrender out of his hands into the hands of the lord of the said manor, by the hands of me the said deputy steward, by the rod, in the presence and testimony of —— a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of him the said A. B. holden of the said manor by copy of court roll, with their and every of their rights, members, privileges and appur-

tenances, And the reversion and reversions, remainder and remainders thereof; And also all the estate, right, title, interest, use, trust, inheritance, property, claim and demand whatsoever, legal and equitable, of him the said A. B. of, in, to or out of the same premises, every or any part thereof, with the appurtenances, To the use of the said A. B. his heirs and assigns for ever, in remainder immediately expectant upon the decease of the said [*tenant for life*] and according to the custom of the said manor. [*Signature of A. B.*]

Taken and accepted the —— day of ——
18—, by me, [*Signature of Deputy Steward,*]
Deputy Steward of the said Manor.

In the presence of [*Signature of Witness.*]

No. X.

SURRENDER *out of Court by a Tenant in Tail in Remainder with the Consent of the Protector of the Settlement, for the Purpose of acquiring an Estate in Fee in Remainder.*

MANOR OF DALE, IN THE COUNTY OF ——. } WHEREAS [*recitals of deed or will under which A. B. is tenant for life, with remainder to* C. D. *in tail with divers remainders over—of admission of* A. B. *and of protector's agreement to consent, ante, p.* 738.] NOW THEREFORE BE IT REMEMBERED, that on the —— day of ——, in the year of our Lord 18—, the said C. D. came before me ——, steward of the said manor and courts thereof, and in order as well to defeat the estate tail of the said C. D. in the messuages, lands and hereditaments hereinafter mentioned, and all remainders, reversions, estates, rights, interests and powers to take effect after the determination or in defeasance of such estate tail, as to acquire an estate of inheritance therein immediately expectant upon the decease of the said A. B., he the said C. D., under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in the said act of parliament, did out of court, according to the custom of the said manor, and with the consent of the said A. B. previously given to me, as appears by the memorandum hereunder written, in compliance with the direction for that purpose contained in the said act of Parliament, surrender out of the hands of the said C. D. into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of ——, a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of him the said C. D. holden of the said manor by copy of court roll, with their and every of their rights, members, privileges and appurtenances, And the reversion and reversions, remainder and remainders thereof, And also all the estate, right, title, interest, use, trust, inheritance, property, claim and demand whatsoever, legal and equitable, of him the said C. D., of, in, to or out of the same premises, every or any part thereof, with the appurtenances, To the use of the said C. D. his heirs and assigns for ever, in remainder immediately expectant, and to take effect in possession on the decease of the said A. B. according to the custom of the said manor.

C. D. [*Signature of Tenant in Tail.*]

Taken and accepted the —— day of ——,
18—, by me [*Signature of Steward,*]
Steward of the said Manor.

In the presence of [*Signature of Witness.*]

MEMORANDUM *of Protector's Consent.*

Memorandum, that previously to the making and passing of the above-written surrender by the above-named [*tenant in tail*], the above-named A. B., as the protector of the settlement made by the above-recited will of the said ——, had given his consent to the above-named [*person taking the surrender*] to the disposition intended to be effected by the said [*tenant in tail*] by the above-written surrender.

A. B. [*Protector's signature.*]

[*Steward's signature.*]

No. XI.

SURRENDER *out of Court by a Married Women, Tenant in Tail, and her Husband, to the Use of a Purchaser.*

MANOR OF DALE, IN THE COUNTY OF ——. WHEREAS [*the testator*] being at the time of the execution of his will hereinafter recited, and also at his decease, seised of an estate of inheritance, according to the custom of the said manor, of and in the copyhold hereditaments hereinafter mentioned, duly made, signed and published his last will and testament in writing, bearing date the —— day of —— 18—, and thereby gave and devised all and every the messuages, lands, tenements and hereditaments of him the said [*testator*] situate, lying and being in the parish of —— in the county of ——, and in any town, parish or place thereto next or near adjoining, unto Mary Jones, spinster, and the heirs of her body lawfully issuing, and in default of such issue the said [*testator*] gave and devised the same hereditaments as therein mentioned; AND WHEREAS the said [*testator*] departed this life on or about the —— day of —— 18—, without having altered or revoked his said will; AND WHEREAS at a court held in and for the said manor on the —— day of —— 18—, the said Mary Jones was admitted tenant under and by virtue of the will of the said [*testator*] to the copyhold hereditaments and premises so devised to her as aforesaid; To hold to her the said Mary Jones and the heirs of her body, according to the form and effect of the said recited will, at the will of the lord and according to the custom of the said manor; AND WHEREAS the said Mary Jones, on the —— day of —— 18—, intermarried with and is now the wife of A. B. of &c. esq., [*recite contract of sale*]; NOW THEREFORE BE IT REMEMBERED, that on the —— day of —— in the year of our Lord 18—, the said A. B. and Mary his wife, copyhold tenants, or one of them, a copyhold tenant of the said manor, came before me —— steward of the said manor and the courts thereof, and in order to defeat the estate tail of the said [*married woman*] in the said hereditaments, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estate tail, (and in consideration of the sum of £—— of lawful money of Great Britain to the said A. B. and Mary his wife in hand well and truly paid by [*name and description of purchaser*] in full for the absolute purchase of the said hereditaments and of the inheritance of the same in possession, according to the custom of the said manor,) they the said A. B. and Mary his wife, under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his late majesty king William the Fourth, intituled "An Act for the Abolition

Recital of will creating entail.

Admission of devisee.

of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto,) did out of court, according to the custom of the said manor, surrender out of their and each of their hands into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of ——, a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of them the said A. B. and Mary his wife, and each of them, holden of the said manor by copy of court roll, with their and every of their rights, members, privileges and appurtenances; And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; And also all the estate, right, title, interest, use, trust, property, claim and demand whatever, legal and equitable, of them the said A. B. and Mary his wife, and each of them, of, in, to or out of the same premises, every or any part thereof, with the appurtenances; To the only use and behoof of the said [*purchaser*], his heirs and assigns for ever, absolutely, and without any manner of condition whatsoever. [*Signatures of Husband and Wife.*]

Taken and accepted the —— day of ——, 18— (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto) by me,

[*Signature of Steward*],
Steward of the said manor.

In the presence of [*Signature of Witness.*]

No. XII.

RELEASE *by two Equitable Tenants in Common in Tail of Copyholds, which had been previously surrendered by an Heir at Law to a Purchaser, and Covenants for Title* (*h*).

Parties.

THIS INDENTURE, made the —— day of ——, A.D. 18—, between John Fox, of &c., eldest son and heir at law of W. Fox, late of &c., gent., deceased, by Mary his late wife, before Mary May, spinster, also deceased, of the first part; Edward Fox, of &c., the only other child of the said W. Fox, by the said Mary his wife, of the second part, and [*purchaser*] of the third part: WHEREAS [*recital of settlement, whereby freehold estates were limited to W. Fox for life, with remainder to his children by Mary his wife, as tenants in common in tail.*]

Recital of covenant to surrender copyholds to uses of a settlement.

AND the said [*settlor*] did, by the said indenture now in recital, covenant to surrender all and singular the copyhold messuages, lands, tenements and hereditaments of him the said [*settlor*], holden of the manor of Dale, in the county of ——; To the uses thereinbefore declared concerning the freehold hereditaments thereby granted and released, or as near thereto as the tenure of the same copyhold hereditaments would permit:

That no surrender was made in pursuance of the covenant.

AND WHEREAS no surrender of the said copyhold hereditaments has ever been made in pursuance of the said recited covenant, although the same hereditaments thereby became subject in equity to

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(*h*) This precedent is framed with reference to the statutes 3 & 4 Will. 4, c. 74, s. 53, *ante*, p. 372, and 4 & 5 Vict. c. 21, s. 3, *ante*, p. 616. See 9 Jarm. Conv. 490, note.

the uses declared by the said recited indenture of settlement: AND WHEREAS the said [*settlor*] departed this life on the 6th day of May, 1850, leaving the said J. Fox and E. Fox the only children of the marriage between the said W. Fox and Mary his wife, and thereupon the said J. Fox and E. Fox became entitled under and by virtue of the limitations contained in the said recited indenture of release to all the freehold and copyhold hereditaments thereby granted and released, and covenanted to be surrendered as aforesaid, as tenants in common in tail: AND WHEREAS at a court held in and for the said manor of Dale, on the 1st day of November, 1852, the said J. Fox was admitted tenant, as the eldest son and heir, according to the custom of the said manor of the said [*settlor*], to all and singular the copyhold hereditaments hereinafter described, To hold the same to him the said J. Fox, his heirs and assigns for ever, at the will of the lord of the said manor, according to the custom of the said manor, by and under the rents, suits and services therefore due and of right accustomed to be paid and performed: AND WHEREAS the said [*purchaser*] has contracted and agreed with the said J. Fox and E. Fox for the absolute purchase of the messuage or tenement and inclosures of land hereinafter described, and the inheritance thereof in possession, according to the custom of the manor of Dale aforesaid, free from all incumbrances, at or for the price or sum of 600*l.*: AND WHEREAS, in pursuance of the said recited contract, at a court held in and for the manor of Dale aforesaid, on the day of the date, but before the sealing and delivery of these presents, the said J. Fox did surrender into the hands of the lord of the said manor, according to the custom thereof, ALL THAT, &c. [*parcels*], To the use of the said [*purchaser*], his heirs and assigns for ever, according to the custom of the said manor; and the said [*purchaser*] was thereupon admitted tenant to the said messuage or tenement and inclosures of land hereinbefore described, and so surrendered to his use as aforesaid, To hold the same unto the said [*purchaser*], his heirs and assigns for ever, according to the custom of the said manor, by the rents and services therefore due and of right accustomed to be paid and performed: AND WHEREAS it hath been agreed that the said J. Fox and E. Fox should execute such release and conveyance as are hereinafter contained, for the purpose of barring all equitable estates or interests in tail, and all remainders and reversions thereupon expectant or depending, now subsisting or capable of taking effect in the said copyhold hereditaments so surrendered to the use of the said [*purchaser*] as aforesaid, under or by virtue of the covenant contained in the said recited indenture of settlement, and that the said J. Fox and E. Fox should enter into such covenants as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in further pursuance and performance of the said recited contract, and in consideration of the sum of 300*l.* (part of the said purchase-money of 600*l.*) of lawful money of Great Britain, to the said J. Fox paid by the said [*purchaser*] at or before the sealing and delivery of these presents, and also in consideration of the sum of 300*l.* of like lawful money (residue of the said purchase-money of 600*l.*) to the said E. Fox paid by the said [*purchaser*] at the same time, the several receipts of which said sums of 300*l.* and 300*l.* (making together the said sum of 600*l.*) in full, for the absolute purchase of the said messuage or tenement, and inclosures of land hereinbefore described, and the inheritance thereof, according to the custom of the said manor, the said J. Fox and E. Fox, do hereby respectively acknowledge, and of and from the same sums of 300*l.* and 300*l.*, and every part thereof respectively, do and each of them doth hereby acquit, release and discharge the said [*purchaser*], his heirs, executors, administrators and assigns for ever; and for the

Death of settlor.

Admission of heir to copyholds.

Contract for purchase.

Surrender by heir to purchaser.

Agreement to bar entail and to enter into covenants.

TESTATUM.

Release by two tenants in common.

of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto,) did out of court, according to the custom of the said manor, surrender out of their and each of their hands into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of ——, a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of them the said A. B. and Mary his wife, and each of them, holden of the said manor by copy of court roll, with their and every of their rights, members, privileges and appurtenances; And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; And also all the estate, right, title, interest, use, trust, property, claim and demand whatever, legal and equitable, of them the said A. B. and Mary his wife, and each of them, of, in, to or out of the same premises, every or any part thereof, with the appurtenances; To the only use and behoof of the said [*purchaser*], his heirs and assigns for ever, absolutely, and without any manner of condition whatsoever. [*Signatures of Husband and Wife.*]

Taken and accepted the —— day of ——, 18— (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto) by me,

[*Signature of Steward*],
Steward of the said manor.

In the presence of [*Signature of Witness.*]

No. XII.

Release *by two Equitable Tenants in Common in Tail of Copyholds, which had been previously surrendered by an Heir at Law to a Purchaser, and Covenants for Title* (*h*).

Parties.

This Indenture, made the —— day of ——, A.D. 18—, between John Fox, of &c., eldest son and heir at law of W. Fox, late of &c., gent., deceased, by Mary his late wife, before Mary May, spinster, also deceased, of the first part; Edward Fox, of &c., the only other child of the said W. Fox, by the said Mary his wife, of the second part, and [*purchaser*] of the third part: Whereas [*recital of settlement, whereby freehold estates were limited to W. Fox for life, with remainder to his children by Mary his wife, as tenants in common in tail.*]

Recital of covenant to surrender copyholds to uses of a settlement.

And the said [*settlor*] did, by the said indenture now in recital, covenant to surrender all and singular the copyhold messuages, lands, tenements and hereditaments of him the said [*settlor*], holden of the manor of Dale, in the county of ——; To the uses thereinbefore declared concerning the freehold hereditaments thereby granted and released, or as near thereto as the tenure of the same copyhold hereditaments would permit: And whereas no surrender of the said copyhold hereditaments has ever been made in pursuance of the said recited covenant, although the same hereditaments thereby became subject in equity to

That no surrender was made in pursuance of the covenant.

(*h*) This precedent is framed with reference to the statutes 3 & 4 Will. 4, c. 74, s. 53, *ante*, p. 372, and 4 & 5 Vict. c. 21, s. 3, *ante*, p. 616. See 9 Jarm. Conv. 490, note.

the uses declared by the said recited indenture of settlement: AND WHEREAS the said [*settlor*] departed this life on the 6th day of May, 1850, leaving the said J. Fox and E. Fox the only children of the marriage between the said W. Fox and Mary his wife, and thereupon the said J. Fox and E. Fox became entitled under and by virtue of the limitations contained in the said recited indenture of release to all the freehold and copyhold hereditaments thereby granted and released, and covenanted to be surrendered as aforesaid, as tenants in common in tail: AND WHEREAS at a court held in and for the said manor of Dale, on the 1st day of November, 1852, the said J. Fox was admitted tenant, as the eldest son and heir, according to the custom of the said manor of the said [*settlor*], to all and singular the copyhold hereditaments hereinafter described, To hold the same to him the said J. Fox, his heirs and assigns for ever, at the will of the lord of the said manor, according to the custom of the said manor, by and under the rents, suits and services therefore due and of right accustomed to be paid and performed: AND WHEREAS the said [*purchaser*] has contracted and agreed with the said J. Fox and E. Fox for the absolute purchase of the messuage or tenement and inclosures of land hereinafter described, and the inheritance thereof in possession, according to the custom of the manor of Dale aforesaid, free from all incumbrances, at or for the price or sum of 600*l.*: AND WHEREAS, in pursuance of the said recited contract, at a court held in and for the manor of Dale aforesaid, on the day of the date, but before the sealing and delivery of these presents, the said J. Fox did surrender into the hands of the lord of the said manor, according to the custom thereof, ALL THAT, &c. [*parcels*], To the use of the said [*purchaser*], his heirs and assigns for ever, according to the custom of the said manor; and the said [*purchaser*] was thereupon admitted tenant to the said messuage or tenement and inclosures of land hereinbefore described, and so surrendered to his use as aforesaid, To hold the same unto the said [*purchaser*], his heirs and assigns for ever, according to the custom of the said manor, by the rents and services therefore due and of right accustomed to be paid and performed: AND WHEREAS it hath been agreed that the said J. Fox and E. Fox should execute such release and conveyance as are hereinafter contained, for the purpose of barring all equitable estates or interests in tail, and all remainders and reversions thereupon expectant or depending, now subsisting or capable of taking effect in the said copyhold hereditaments so surrendered to the use of the said [*purchaser*] as aforesaid, under or by virtue of the covenant contained in the said recited indenture of settlement, and that the said J. Fox and E. Fox should enter into such covenants as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in further pursuance and performance of the said recited contract, and in consideration of the sum of 300*l.* (part of the said purchase-money of 600*l.*) of lawful money of Great Britain, to the said J. Fox paid by the said [*purchaser*] at or before the sealing and delivery of these presents, and also in consideration of the sum of 300*l.* of like lawful money (residue of the said purchase-money of 600*l.*) to the said E. Fox paid by the said [*purchaser*] at the same time, the several receipts of which said sums of 300*l.* and 300*l.* (making together the said sum of 600*l.*) in full, for the absolute purchase of the said messuage or tenement, and inclosures of land hereinbefore described, and the inheritance thereof, according to the custom of the said manor, the said J. Fox and E. Fox, do hereby respectively acknowledge, and of and from the same sums of 300*l.* and 300*l.*, and every part thereof respectively, do and each of them doth hereby acquit, release and discharge the said [*purchaser*], his heirs, executors, administrators and assigns for ever; and for the

Death of settlor.

Admission of heir to copyholds.

Contract for purchase.

Surrender by heir to purchaser.

Agreement to bar entail and to enter into covenants.

TESTATUM.

Release by two tenants in common.

of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto,) did out of court, according to the custom of the said manor, surrender out of their and each of their hands into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of ——, a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of them the said A. B. and Mary his wife, and each of them, holden of the said manor by copy of court roll, with their and every of their rights, members, privileges and appurtenances; And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; And also all the estate, right, title, interest, use, trust, property, claim and demand whatever, legal and equitable, of them the said A. B. and Mary his wife, and each of them, of, in, to or out of the same premises, every or any part thereof, with the appurtenances; To the only use and behoof of the said [*purchaser*], his heirs and assigns for ever, absolutely, and without any manner of condition whatsoever. [*Signatures of Husband and Wife.*]

Taken and accepted the —— day of ——, 18— (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto) by me,

[*Signature of Steward*],
Steward of the said manor.

In the presence of [*Signature of Witness.*]

No. XII.

Release *by two Equitable Tenants in Common in Tail of Copyholds, which had been previously surrendered by an Heir at Law to a Purchaser, and Covenants for Title* (*h*).

Parties.

This Indenture, made the —— day of ——, A.D. 18—, between John Fox, of &c., eldest son and heir at law of W. Fox, late of &c., gent., deceased, by Mary his late wife, before Mary May, spinster, also deceased, of the first part; Edward Fox, of &c., the only other child of the said W. Fox, by the said Mary his wife, of the second part, and [*purchaser*] of the third part: Whereas [*recital of settlement, whereby freehold estates were limited to W. Fox for life, with remainder to his children by Mary his wife, as tenants in common in tail.*]

Recital of covenant to surrender copyholds to uses of a settlement.

And the said [*settlor*] did, by the said indenture now in recital, covenant to surrender all and singular the copyhold messuages, lands, tenements and hereditaments of him the said [*settlor*], holden of the manor of Dale, in the county of ——; To the uses thereinbefore declared concerning the freehold hereditaments thereby granted and released, or as near thereto as the tenure of the same copyhold hereditaments would permit:

That no surrender was made in pursuance of the covenant.

And whereas no surrender of the said copyhold hereditaments has ever been made in pursuance of the said recited covenant, although the same hereditaments thereby became subject in equity to

(*h*) This precedent is framed with reference to the statutes 3 & 4 Will. 4, c. 74, s. 53, *ante*, p. 372, and 4 & 5 Vict. c. 21, s. 3, *ante*, p. 616. See 9 Jarm. Conv. 490, note.

the uses declared by the said recited indenture of settlement: AND WHEREAS the said [*settlor*] departed this life on the 6th day of May, 1850, leaving the said J. Fox and E. Fox the only children of the marriage between the said W. Fox and Mary his wife, and thereupon the said J. Fox and E. Fox became entitled under and by virtue of the limitations contained in the said recited indenture of release to all the freehold and copyhold hereditaments thereby granted and released, and covenanted to be surrendered as aforesaid, as tenants in common in tail: AND WHEREAS at a court held in and for the said manor of Dale, on the 1st day of November, 1852, the said J. Fox was admitted tenant, as the eldest son and heir, according to the custom of the said manor of the said [*settlor*], to all and singular the copyhold hereditaments hereinafter described, To hold the same to him the said J. Fox, his heirs and assigns for ever, at the will of the lord of the said manor, according to the custom of the said manor, by and under the rents, suits and services therefore due and of right accustomed to be paid and performed: AND WHEREAS the said [*purchaser*] has contracted and agreed with the said J. Fox and E. Fox for the absolute purchase of the messuage or tenement and inclosures of land hereinafter described, and the inheritance thereof in possession, according to the custom of the manor of Dale aforesaid, free from all incumbrances, at or for the price or sum of 600*l.*: AND WHEREAS, in pursuance of the said recited contract, at a court held in and for the manor of Dale aforesaid, on the day of the date, but before the sealing and delivery of these presents, the said J. Fox did surrender into the hands of the lord of the said manor, according to the custom thereof, ALL THAT, &c. [*parcels*], To the use of the said [*purchaser*], his heirs and assigns for ever, according to the custom of the said manor; and the said [*purchaser*] was thereupon admitted tenant to the said messuage or tenement and inclosures of land hereinbefore described, and so surrendered to his use as aforesaid, To hold the same unto the said [*purchaser*], his heirs and assigns for ever, according to the custom of the said manor, by the rents and services therefore due and of right accustomed to be paid and performed: AND WHEREAS it hath been agreed that the said J. Fox and E. Fox should execute such release and conveyance as are hereinafter contained, for the purpose of barring all equitable estates or interests in tail, and all remainders and reversions thereupon expectant or depending, now subsisting or capable of taking effect in the said copyhold hereditaments so surrendered to the use of the said [*purchaser*] as aforesaid, under or by virtue of the covenant contained in the said recited indenture of settlement, and that the said J. Fox and E. Fox should enter into such covenants as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in further pursuance and performance of the said recited contract, and in consideration of the sum of 300*l.* (part of the said purchase-money of 600*l.*) of lawful money of Great Britain, to the said J. Fox paid by the said [*purchaser*] at or before the sealing and delivery of these presents, and also in consideration of the sum of 300*l.* of like lawful money (residue of the said purchase-money of 600*l.*) to the said E. Fox paid by the said [*purchaser*] at the same time, the several receipts of which said sums of 300*l.* and 300*l.* (making together the said sum of 600*l.*) in full, for the absolute purchase of the said messuage or tenement, and inclosures of land hereinbefore described, and the inheritance thereof, according to the custom of the said manor, the said J. Fox and E. Fox, do hereby respectively acknowledge, and of and from the same sums of 300*l.* and 300*l.*, and every part thereof respectively, do and each of them doth hereby acquit, release and discharge the said [*purchaser*], his heirs, executors, administrators and assigns for ever; and for the

Death of settlor.

Admission of heir to copyholds.

Contract for purchase.

Surrender by heir to purchaser.

Agreement to bar entail and to enter into covenants.

TESTATUM.

Release by two tenants in common.

purpose of defeating and destroying the equitable or other estates tail of the said J. Fox and E. Fox, of and in the messuage or tenement and inclosures of land hereinbefore described, and intended to be hereby granted and released, and all remainders, reversions, estates, rights, interests and powers to take effect after the determination or in defeasance of such estates tail; and in order to limit and assure the inheritance in the same hereditaments, according to the custom of the said manor, unto and to the use of the said [*purchaser*], his heirs and assigns, they the said J. Fox and E. Fox do and each of them doth by these presents, made in pursuance of an act passed in the session of parliament held in the fourth and fifth years of the reign of her majesty Queen Victoria, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," grant, dispose of, release and confirm unto the said [*purchaser*], his heirs and assigns, the messuage or tenement and inclosures of land hereinbefore described, and to which the said [*purchaser*] hath been so admitted tenant as aforesaid, together with all and every the rights, members and appurtenances thereto belonging or appertaining, or therewith used and enjoyed; AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; AND all the estate, right, title, interest, property, claim and demand whatsoever at law or in equity of them the said J. Fox and E. Fox, and of each of them, in, to and out of the same

HABENDUM. hereditaments and premises, and every part thereof, TO HAVE AND TO HOLD the said messuage or tenement, inclosures of land, and all and singular other the hereditaments and premises hereby granted and released, or expressed and intended so to be, and every part thereof, with the appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, subject nevertheless to the rents, suits and services therefore due and of right accustomed to be paid, rendered

Covenants for title. and performed; AND each of them the said J. FOX and E. FOX, so far as relates to his undivided moiety, or equal half part or share of and in the messuage or tenement and inclosures of land hereby granted and released, or expressed and intended so to be, and the right to assure, quiet enjoyment, freedom from incumbrances, and further assurance thereof respectively, doth hereby for himself respectively, his respective heirs, executors and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following (that is to say), that notwithstanding any act, matter or thing whatsoever, at any time heretofore made, done, committed or knowingly suffered to the contrary, by them the said J. Fox and E. Fox, or either of them, or by the said [*settlor*], they the said J. Fox and E. Fox, or one of them, at the time of passing the said recited surrender to the use of the said [*purchaser*], his heirs and assigns as aforesaid, and of the execution of these presents, have or hath or had good right, full power, and lawful and absolute authority to surrender or otherwise assure the said messuage or tenement, inclosures of land and hereditaments hereinbefore described, with their appurtenances, to the use of the said [*purchaser*], his heirs and assigns for ever, in manner aforesaid, and according to the true intent and meaning of the same

Quiet enjoyment. surrender, and of these presents: AND ALSO, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess and enjoy the said messuage or tenement, inclosures of land, and hereditaments hereinbefore described and expressed to be hereby granted and released, and every part thereof, with the appurtenances, and to receive and take the rents and profits thereof, to and for his and their own use and benefit abso-

lutely, and without any let, suit, trouble, denial, eviction, claim or demand whatsoever of the said J. Fox and E. Fox, or either of them, their or either of their heirs or issue, or any other person or persons whomsoever lawfully or equitably claiming or to claim any estate, right, title or interest, by, from, through, under or in trust for them or any of them, or the said [*settlor*] deceased: AND THAT free and clear, and freely, clearly and absolutely acquitted, released and for ever discharged, or otherwise by the said J. Fox and E. Fox, or one of them, their or one of their heirs, executors and administrators, well and effectually saved, defended, kept harmless and indemnified from and against all former and other gifts, grants, bargains, sales, mortgages, freebench and right and title of freebench, wills, debts, legacies, forfeitures, estates, titles, charges and incumbrances whatsoever, either already or hereafter to be made, done, committed, executed or knowingly suffered by the said J. Fox and E. Fox, or either of them, their or either of their heirs or issue, or any person or persons claiming or to claim under them or any of them, or the said [*settlor*] deceased, (the rents and services due and of right accustomed to be paid and performed in respect of the said premises always excepted:) AND MOREOVER, that they the said J. Fox and E. Fox respectively, and their respective heirs and issue, and every person having or claiming, or who shall or may at any time or times hereafter have or claim, any estate, right, title or interest at law or in equity, in, to or out of the said messuage or tenement, inclosures of land and hereditaments hereinbefore described and expressed to be hereby granted and released, or any part thereof, by, from, through or under them or any of them, or the said [*settlor*] deceased, shall and will from time to time, and at all times hereafter, at the request, costs and charges of the said [*purchaser*], his heir or assigns, make, do and execute, or cause to be made, done and executed, all such further and other lawful and reasonable acts, deeds, surrenders and assurances whatsoever, for the better and more effectually or satisfactorily granting, releasing, surrendering and assuring the same hereditaments and premises, and every part thereof, with the appurtenances, To the use of the said [*purchaser*], his heirs and assigns for ever, according to the custom of the manor of Dale aforesaid, subject to the rents and services therefore due and of right accustomed to be paid and performed, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. IN WITNESS, &c. (*i*)

Free from incumbrances.

For further assurance.

MEMORANDUM *to be indorsed on last Deed.*

I A. B. of &c., gentleman, steward of the within-mentioned manor of Dale, do hereby testify that the within-written indenture has been duly entered on the court rolls of the said manor. Witness my hand this —— day of ——, 18—.

[*The signature of A. B.*]

(*i*) This deed must be entered on the court rolls of the manor, which should be done without delay. See end of s. 53, *ante*, p. 373.

No. XIII.

APPOINTMENT *of Protector under the Stat.* 3 & 4 *Will.* 4, *c.* 74, *and Power to supply Vacancies in the Office.* (*In this case the settlement was to two tenants for life in succession, with remainders in strict settlement.*)

AND WHEREAS under the provisions of an act of parliament passed in the session held in the third and fourth years of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," the said W. Evans and E. Evans would, in default of any appointment to the contrary, be respectively the protectors of the settlement intended to be hereby made: AND WHEREAS the said W. Evans and E. Evans have agreed to appoint the said A., B. and C. to be protectors of the settlement intended to be hereby made in the place and stead of the said W. Evans and E. Evans respectively, in manner hereinafter mentioned: NOW THIS INDENTURE LASTLY WITNESSETH, that in pursuance and under and by virtue of the power for that purpose contained in the act of parliament lastly hereinbefore referred to (*j*), they the said W. Evans and E. Evans do and each of them doth by these presents nominate and appoint the said A., B. and C. to be protectors of the settlement intended to be hereby made in lieu and in the place of the said W. Evans and E. Evans, and the survivor of them, for and during the natural lives of the said W. Evans and E. Evans, and the natural life of the survivor of them, with all such powers, authorities and discretion, as in and by the said act of parliament are given to or vested in the protector of any settlement: PROVIDED ALWAYS, and it is hereby agreed and declared, and the said W. Evans and E. Evans do hereby respectively direct and declare, that in case during the lives of the said W. Evans and E. Evans, or the life of the survivor of them, the said A., B. and C., or any or either of them, or any protector to be appointed as hereinafter is mentioned, shall die, or shall by deed relinquish his or their office of protector of the settlement intended to be hereby made, then and in such case, and as often as the same shall so happen, it shall be lawful for the surviving or other protector or protectors for the time being, or if there shall be no such protector, then for the protector who shall so relinquish his office; and if there shall be no such protector, then for the executors or administrators of the last deceased protector, by any deed or deeds duly executed and to be inrolled pursuant to the direction for that purpose contained in the said last-mentioned act of parliament, to appoint any one person or number of persons in esse, and not being an alien or aliens, to be a protector or protectors of the settlement intended to be hereby made during the lives of the said W. Evans and E. Evans, and the life of the survivor of them, in the place or stead of any one person or number of persons who shall die or relinquish his or their office of protector as aforesaid; and that when and so often as any person or persons shall be appointed protector or protectors as aforesaid, such person or persons shall be the protector of the settlement intended to be hereby made, in case there

Appointment of protector by settlors.

Power to appoint new protector in case of death or relinquishment of the other protector.

(*j*) See *ante*, s. 32, p. 355. The effect of appointing any person to be protector in the place of the tenants for life, and perpetuating the protectorship, will be, that a tenant in tail under the settlement will not be able, during the existence of the prior estates, to bar the remainders over without the consent of such protector.

shall be no other protector hereby appointed or to be appointed in pursuance of this power; but if any other person or persons hereby appointed, or to be appointed as aforesaid, shall continue protector, then joint protector with such other person or persons: PROVIDED NEVERTHELESS, that by virtue or means of any appointment to be made under the power lastly hereinbefore contained, the number of persons composing the protector of the settlement intended to be hereby made shall not at any one time exceed three. IN WITNESS, &c. (*k*)

(*k*) This deed must be inrolled in Chancery within six calendar months after its execution. (See *ante*, s. 32, p. 355.)

No. XIV.

RELINQUISHMENT *of the Office of Protector and Appointment of another in his Place, under the Power contained in the last Form.*

THIS INDENTURE, made the 6th day of June, A.D. 18—, between A., of &c. [*the protector resigning*], of the first part; B., of &c., and C., of &c. [*the continuing protectors*], of the second part; and D., of &c. [*the new protector*], of the third part: WHEREAS by indentures of lease and release, bearing date respectively the 1st and 2nd days of January, 18— (duly inrolled in her Majesty's High Court of Chancery on the 3rd day of the same month), the release being made or expressed to be made between [*parties*], being the settlement made previously to and in consideration of the marriage then intended to be and since duly solemnized between the said E. Evans and J. Grace, divers manors, messuages, lands and other hereditaments in the same indenture particularly mentioned and described, were duly conveyed and assured [*recite the limitations shortly as far as the estate for life of* E. Evans], with divers remainders over: And by the indenture now in recital the said W. Evans and E. Evans did nominate and appoint the said A., B. and C. to be protectors of the settlement intended to be thereby made, in lieu and in the place of the said W. Evans and E. Evans [see *ante*, p. 746]: And by the indenture now in recital it was agreed and declared [*here recite the power, see ante*, p. 746]: AND WHEREAS the said A. is desirous of relinquishing his office of protector of the said recited indenture of settlement, and the said B. and C., by virtue of the power in the same indenture contained (*l*), have agreed to appoint the said D. to be protector, in the place of the said A., of the said recited settlement jointly with the said B. and C., and the said D. has consented and agreed to accept the said office, as he doth hereby testify and acknowledge. NOW THIS INDENTURE WITNESSETH, that he, the said A., hath relinquished, given up and resigned, and by these presents doth relinquish, give up and resign his office of protector of the said recited indenture of settlement, and all powers, authorities and discretion incident to the office of such protector as aforesaid: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and further performance of the said recited agreement, and by force and virtue and in exercise and execution of the power or authority so given and reserved to the said B. and C. by the said in part recited indenture of settlement, and of every or any other power or authority in anywise enabling them in

Recital of settlement appointing protector.

Desire of protector to resign.

FIRST TESTATUM.

Relinquishment by one protector.

SECOND TESTATUM.

Appointment of new protector.

this behalf, they, the said B. and C., do and each of them doth by this present deed or writing under their respective hands and seals nominate and appoint the said D. to be protector of the said recited indenture of settlement in the place of the said A. jointly with the said B. and C., and the survivor of them, during the lives of the said W. Evans and E. Evans, and the life of the survivor of them, with all such powers, authorities and discretion as are incident to the office of such protector as aforesaid, and to the intent that the said B., C. and D. shall and may, as protectors of the said recited settlement, have and exercise the same powers, authorities and discretion, to all intents and purposes whatsoever, as if the said D. had been originally in and by the said recited indenture of settlement appointed protector as aforesaid jointly with the said B. and C. IN WITNESS, &c. (*m*).

(*l*) *Or*, AND WHEREAS the said A. departed this life on the —— day of —— now last past, and the said B. and C., by virtue of the power contained in the said recited indenture of settlement, have agreed, &c.

(*m*) A deed of this kind must be inrolled in Chancery within six calendar months after its execution. (See *ante*, s. 32, p. 355.)

No. XV.

CONVEYANCE *by two Tenants in Common in Tail, and by another Tenant in Common in Tail, and her Husband, for the purpose of barring all Estates Tail, and effecting a Partition of the Estate* (*n*).

Parties.

THIS INDENTURE, made the —— day of ——, A.D. 18—, between John Gay, of &c., esq., the only son of James Gay, late of &c., esq., deceased, by Mary his late wife, before Mary Jones, spinster, of the first part; Lucy Gay, of &c., spinster, one of the daughters of the said James Gay and Mary his wife, of the second part; James Still, of &c., Esq., and Mary his wife, late Mary Gay, spinster, the only other daughter of the said James Gay and Mary his wife, of the third part; and [*trustee*] of the fourth part: WHEREAS by indentures of lease and release, bearing date respectively on or about the 1st and 2nd days of May, 1838, the release being made, or expressed to be made, between the said James Gay, of the first part; the said Mary Gay, the late wife of the said James Gay, by her then name and description of Mary Jones, spinster, of the second part; A. and B. of the third part; and C. and D. of the fourth part; (being the settlement made previously to and in consideration of the marriage then intended to be and shortly afterwards duly had and solemnized between the said James Gay and Mary Jones), the messuages, farms, lands and hereditaments hereinafter described, and intended to be hereby granted and released, were duly conveyed and assured, from and after the solemnization of the said then intended marriage, to the use of the said James Gay and his assigns for his natural life, with remainder to the use of the said A. and B. and their heirs during the life of the said James Gay, upon trust to preserve the contingent remainders thereinafter limited, with remainder to the use and intent that the said Mary Jones and her assigns, in case she should survive the said James Gay, might, immediately after his decease, receive for her life, as a jointure

Recital of lease and release creating the entail.

(*n*) On the law of partition, see 6 Jarm. Conv. by Sweet, 586—612.

and in bar of dower, the yearly rent-charge of 500*l.*, payable as therein mentioned, with the usual powers of distress and entry in case of non-payment of the same, and subject thereto to the use of the said C. and D. for the term of 100 years, to commence from the day next before the day of the decease of the said James Gay, upon certain trusts therein declared, for better securing the due and punctual payment of the said rent-charge, with remainder to the use of the child, if only one, and if more than one, all the children of the said intended marriage of the said James Gay and Mary Jones, to be equally divided between them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and the heirs of the body or several and respective bodies of the same child or children respectively lawfully issuing, with cross-remainders between them in tail, with divers remainders over: AND WHEREAS the said Mary Gay, the wife of the said James Gay, died in his lifetime, and the said James Gay departed this life on or about the 4th day of March, 1860, leaving the said John Gay, Lucy Gay and Mary Still the only children of the marriage of the said James Gay and Mary his wife: AND WHEREAS the said John Gay, Lucy Gay and J. Still and Mary his wife are desirous of and have agreed to join in barring all estates tail and remainders and reversions thereupon expectant or depending of and in the messuages, farms, lands and hereditaments mentioned and comprised in the said hereinbefore in part recited indentures of lease and release, and thereby granted and released, or expressed and intended so to be, and have also agreed to make a partition and division of the same hereditaments, to which they the said John Gay, Lucy Gay and J. Still and Mary his wife, in right of the said Mary, under and by virtue of the limitations contained in the same indenture of release, have become entitled as tenants in common in tail; and in order to effect such purposes and agreements, they have agreed to convey and assure the same hereditaments and premises unto the said [*trustee*] and his heirs, To the uses, upon the trusts, and for the ends, intents and purposes hereinafter expressed and declared of and concerning the same: AND WHEREAS the messuage and several hereditaments and premises comprised in the first schedule hereunder written, being part of the hereditaments so agreed to be divided, have been allotted and appropriated unto the said John Gay, as the part, share and proportion to be taken by him in severalty of the said hereditaments so agreed to be parted and divided as aforesaid: AND the several hereditaments mentioned and comprised in the second schedule hereunder written, other part of the hereditaments so agreed to be divided as aforesaid, have been allotted and appropriated unto the said Lucy Gay, as the part, share and proportion to be taken by her in severalty of the said hereditaments so agreed to be parted and divided as aforesaid: AND the several hereditaments mentioned and comprised in the third schedule hereunder written, residue of the hereditaments so agreed to be divided, have been allotted and appropriated unto the said John Still and Mary his wife, in right of the said Mary, as the part, share and proportion to be taken by the said J. Still and Mary his wife, in right of the said Mary, in severalty, of the said hereditaments so agreed to be parted and divided as aforesaid: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for carrying the same into effect, and to the intent and purpose to defeat and extinguish the estates tail of the said John Gay, Lucy Gay and Mary Still, of and in the messuages, farms, lands and other hereditaments hereinafter mentioned, and intended to be hereby granted and released, and all remainders, reversions, estates, rights, powers and interests to take effect after the determination, or in defeasance of such estates tail, or any of them, and for conveying and

Death of jointress and tenant for life.

Agreement to bar entail and make partition.

Agreement as to division of the estates.

FIRST TESTATUM.

Conveyance by the tenants in common to a trustee.

assuring the same premises to the uses, upon and for the trusts, intents and purposes hereinafter respectively limited, expressed and declared of and concerning the same, they, the said John Gay, Lucy Gay and James Still and Mary his wife, do and every of them doth by these presents intended to be acknowledged by the said Mary Still and perfected in other respects as required by law for passing her interests as a married woman in lands, grant, alien, release, dispose of and confirm

Parcels. unto the said [*trustee*] and his heirs, THE messuages, farms, lands and hereditaments mentioned and described in the first, second and third schedules hereunder written, and each and every of them: And also all and singular other the messuages, farms, lands, tenements and hereditaments whatsoever of them the said John Gay, Lucy Gay and J. Still and Mary his wife in right of the said Mary, and each and every of them, mentioned and comprised in and conveyed and assured by the said hereinbefore in part recited indentures of lease and release, or wherein or whereto they or any of them, or any person or persons in trust for them or any of them, hath or have any manner of estate, right, title or interest in possession, reversion, remainder or expectancy:

All houses, &c. TOGETHER with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, commons, common of pasture and other commonable rights, mines, minerals, quarries, furzes, trees, woods, underwoods and the ground and soil thereof, mounds, fences, hedges, ditches, ways, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the said messuages, farms, lands, hereditaments and premises belonging, or in anywise appertaining, or with the same or any of them respectively now or at any time heretofore demised, leased, held, used, occupied or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them, or any part of them, or appertaining thereunto, with their and every of their appurtenances:

Reversion, &c. AND the reversion and reversions, remainder and remainders, yearly

All the estate, &c. and other rents, issues and profits thereof: AND all the estate, right, title, interest, use, trust, inheritance, term and terms for years and for life and lives, property, possession, benefit and equity of redemption, claim and demand whatsoever, of them, the said John Gay, Lucy Gay and J. Still and Mary his wife, respectively, of, in, to or out of the said hereditaments, and every part and parcel of the same, with their

HABENDUM. and every of their rights, members and appurtenances: TO HAVE AND TO HOLD the said messuages, farms, lands, hereditaments, and all and singular other the premises hereinbefore expressed to be hereby granted and released, with their and every of their rights and appurtenances, unto the said [*trustee*] and his heirs for ever, freed and absolutely discharged from all estates tail and remainders or reversions thereupon expectant or depending: TO THE USES, upon and for the trusts, intents and purposes hereinafter limited, expressed and

Declaration of the uses of each share in severalty by reference to the schedules. declared of and concerning the same (that is to say), AS TO, FOR AND CONCERNING such part and parts of the hereditaments and premises hereinbefore expressed to be hereby granted and released, as are mentioned and comprised in the said first schedule hereunder written, with their appurtenances, TO THE ONLY USE and behoof of the said John Gay, his heirs and assigns for ever, to be by him and them held in severalty, in lieu of the undivided part or share of the said John Gay of and in the entirety of the said messuages, farms, lands and other hereditaments hereinbefore expressed to be hereby granted and released, [*see declaration to prevent dower, ante*, p. 713]: AND AS TO, FOR AND CONCERNING such part and parts of the hereditaments and premises hereinbefore expressed to be hereby granted and released,

as are mentioned and comprised in the said second schedule hereunder written, with their appurtenances, To THE ONLY USE and behoof of the said Lucy Gay, her heirs and assigns for ever, to be by her and them held in severalty, in lieu of the undivided part or share of the said Lucy Gay of and in the entirety of the messuages, farms, lands and other hereditaments hereinbefore expressed to be hereby granted and released, AND AS TO, FOR AND CONCERNING such part and parts of the hereditaments and premises hereinbefore expressed to be hereby granted and released, as are mentioned and comprised in the said third schedule hereunder written with their appurtenances, To THE USE of such person and persons, for such estate or estates, interest or interests, and subject to such powers, provisoes, conditions, restrictions and limitations, and with such remainder over, and charged and chargeable with such sums of money, either annual or in gross, as they, the said J. Still and Mary his wife, by any deed or deeds, instrument or instruments in writing, to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses, shall from time to time direct, limit or appoint, and in default of and until such direction, limitation or appointment, and so far as any such direction, limitation or appointment, if incomplete, shall not extend, To THE USE of the said [*trustee*] and his heirs, during the joint natural lives of the said J. Still and Mary his wife, UPON TRUST that the said [*trustee*], his heirs and assigns, do and shall, during the joint natural lives of the said J. Still and Mary his wife, collect, get in and receive the yearly rents, issues and profits of the hereditaments and premises hereinbefore limited to the use of the said [*trustee*] and his heirs as last aforesaid, as and when the same shall become payable, and pay the same rents to such person or persons, and for such intents and purposes, as the said Mary Still, notwithstanding her coverture, by any writing or writings under her hand shall from time to time, but so as not to deprive herself by sale, mortgage or otherwise by anticipation, direct or appoint, and for want of such direction or appointment into her own hands for her own sole, separate and peculiar use and benefit, and without being in anywise subject or liable to the debts, control, interference or engagements of the said J. Still her husband; and it is hereby declared that the receipt or receipts of the said Mary Still, and such person or persons as she shall from time to time direct to receive such rents, issues and profits, after the same shall have become due, shall be a good and effectual release and discharge, or good and sufficient releases or discharges for so much money as in such receipt or receipts shall be expressed or acknowledged to be received. And if the said Mary Still shall survive the said J. Still, then immediately after the decease of the said J. Still, To THE USE of the said Mary Still, her heirs and assigns for ever; but if the said Mary Still shall die in the lifetime of the said J. Still, then immediately after the decease of the said Mary Still, To THE USE of the said J. Still and his assigns during the term of his natural life; and from and immediately after his decease, THEN, to the use of such person or persons, for such estate or estates, interest or interests, and with, under and subject to such powers, provisoes, conditions and limitations, and with such remainders over, and charged and chargeable with such sums of money either annual or in gross, as she the said Mary Still, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils thereto in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be respectively by her signed in the presence of and attested by two or more credible witnesses, direct, limit or appoint; and in default of such direction, limitation or appointment, and

Share of married woman limited to uses in her favour.

so far as any such direction, limitation or appointment, if incomplete, shall not extend, To THE USE of the said Mary Still, her heirs and assigns for ever: AND it is hereby declared that the hereditaments and premises comprised in the said third schedule are limited to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed and declared concerning the same, in lieu of the undivided part or share of the said J. Still and Mary his wife, in right of the said Mary, of and in the entirety of the said messuages, farms, lands and other hereditaments hereinbefore expressed to be hereby granted and released, AND the said J. Still doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said [*trustee*] and his heirs (*o*), That the said Mary Still (she hereby consenting) shall and will forthwith, or as soon as conveniently may be after the execution of these presents, at the costs and charges of the said J. Still, his heirs, executors or administrators, duly acknowledge these presents, and perfect the same in other respects, with the solemnities prescribed by law for rendering the deeds of married women effectual for passing their interest in land. PROVIDED ALWAYS and it is hereby declared, that if the said [*trustee*] or any trustee to be appointed as hereinafter is mentioned shall die, or decline or become incapable to act in the trust aforesaid before the same shall be executed or become incapable of taking effect, then and so often as the same shall happen it shall be lawful for the said Mary Still, notwithstanding her coverture, by any deed duly executed by her, to appoint any other person to be a trustee in the place of the trustee so dying, declining or becoming incapable to act, and that upon every such appointment the hereditaments and premises comprised in the said third schedule hereunder written, or such of them as shall not have been previously disposed of under the joint power of appointment hereinbefore limited to the said J. Still and Mary his wife, shall be conveyed in such manner that the same may be effectually vested in the new trustee and his heirs during the joint lives of the said J. Still and Mary his wife, upon the trusts hereinbefore declared concerning the same premises. And it is hereby declared that the receipts in writing of the trustee for the time being of these presents shall be effectual discharges for any sum or sums of money payable to him in and about the execution of the trusts aforesaid, and that the trustee for the time being under these presents shall not be answerable for any involuntary losses which may happen in the execution of the trusts aforesaid, and that it shall be lawful for such trustee for the time being to reimburse himself out of the monies to be received by him under the trusts hereby declared all such costs and expenses as he shall incur or be put unto in the execution of the aforesaid trusts, or in relation thereto: AND each of them the said John Gay and Lucy Gay, so far as relates to his and her undivided third part or share of and in the messuages, farms, lands, hereditaments and premises hereinbefore expressed to be hereby granted and released, and the quiet enjoyment, freedom from incumbrances, and further assurance thereof, doth for himself and herself respectively, and his and her respective heirs, executors and administrators, and the said J. Still, so far as relates to the undivided third part or share of the said J. Still and Mary his wife, in right of the said Mary, of and in the said messuages, farms, lands, hereditaments and premises hereinbefore expressed to be hereby granted and released, and the quiet enjoyment, freedom from incumbrances, and further assurance thereof, doth for himself and his heirs, executors and administrators, covenant, promise and agree with and to

Covenant by J. Still that his wife shall acknowledge the deed before commissioners.

Power for Mary Still to appoint a new trustee, and for his indemnity.

Covenants for quiet enjoyment.

(*o*) See other form of covenants of this kind, *ante*, pp. 713, 714.

the said [*trustee*] and his heirs, and *cestuis que use*, and separately with every such *cestuis que use*, in manner following (that is to say), THAT the messuages, farms, lands and other hereditaments hereinbefore expressed to be hereby granted and released, with their appurtenances, shall and may from time to time, and all times hereafter, go and remain to the several uses hereinbefore respectively limited, expressed and declared of and concerning the same, and be peaceably and quietly entered into and upon, and be held, occupied, possessed and enjoyed, and the rents, issues and profits thereof, and of every part thereof, had, received and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever of or by them the said John Gay, Lucy Gay, and J. Still and Mary his wife, or any or either of them, or any other person or persons claiming or to claim by, from, through, under or in trust for them or any or either of them, And that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released and for ever discharged or otherwise, by the said John Gay, Lucy Gay, and J. Still and Mary his wife, or some or one of them, their or some or one of their heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, entails, wills, statutes merchants or of the staple, recognizances, judgments, executions, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the queen's Majesty, and of, from and against all other estates, titles, troubles, charges, debts and incumbrances whatsoever, either already had, made, executed, occasioned or suffered, or hereafter to be had, made, executed, occasioned or suffered by the said John Gay, Lucy Gay, and J. Still and Mary his wife, or any or either of them: AND FURTHER, that they the said John Gay, Lucy Gay, and J. Still and Mary his wife respectively, and their issue respectively, and all and every other persons and person having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, in, to or out of the said messuages, farms, lands, and other hereditaments hereinbefore expressed to be hereby granted and released, or any of them, or any part thereof, by, from, under or in trust for them the said John Gay, Lucy Gay, and J. Still and Mary his wife respectively, or any of them, their or any of their heirs or issue respectively, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the person or persons beneficially entitled to the same premises by virtue of the uses and limitations hereinbefore expressed and declared, or any of them, make, do, acknowledge and execute, or cause and procure to be made, done, acknowledged and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring of the said messuages, farms, lands and other hereditaments hereinbefore expressed to be hereby granted and released, and every part thereof, with their appurtenances, to the uses hereinbefore limited and declared of and concerning the same, as by the said person or persons making such request and so entitled as aforesaid, his, her or their heirs, appointees or assigns, or his, her or their counsel in the law, shall be reasonably devised or advised and required; so that the person or persons who shall be re-

Free from incumbrances.

For further assurance.

quired to make and execute such further assurance or assurances be not compelled nor compellable, for the making or doing thereof, to go or travel from his, her or their dwelling, or respective dwellings, or place or respective places of residence or abode: AND WHEREAS, upon the treaty for the aforesaid partition, it was agreed that the several title deeds, evidences and writings relating to the said messuages, farms, lands and other hereditaments hereinbefore expressed to be hereby granted and released, or expressed and intended so to be, should be deposited with the said John Gay, upon his entering into a covenant to produce the same, and permit copies to be made thereof, when thereunto required, in manner hereinafter mentioned, and in pursuance of such agreement the title deeds, evidences and writings mentioned in the fourth schedule hereunder written have been delivered to the said John Gay, which he doth hereby acknowledge (*p*): NOW THIS INDENTURE LASTLY WITNESSETH, that in pursuance and performance of the said last recited agreement, and in consideration of the premises, the said John Gay, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree, to and with the said [*trustee*], his heirs and *cestuis que use*, and as a separate covenant to and with each of them, the said Lucy Gay, her heirs and assigns, and the said J. Still and Mary his wife, their and her appointees, heirs and assigns, that he the said John Gay, his heirs, executors, administrators or assigns, shall and will from time to time, and at all times hereafter (unless prevented by fire or other accident happening without his or their default), upon every reasonable request, and at the proper costs and charges of the person or persons for the time being beneficially entitled to the premises comprised in the said second and third schedules, by virtue of the uses and limitations hereinbefore contained, or any of them, produce and show forth, or cause to be produced and shown forth, to him, her or them, or any of them, or to such person or persons as he, she or they, or any of them, shall by writing direct, desire or require, or at any trial, hearing or examination, in any court of law or equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, the several deeds, evidences and writings mentioned in the fourth schedule hereunder written or hereunto annexed, and every or any of them, for the manifestation, defence and support of the estate, right, title, interest, property or possession of the person or persons for the time being beneficially entitled as last aforesaid, or any of them, of, in and to all or any part of the said messuages, farms, lands and other hereditaments, with their appurtenances, comprised in the said second and third schedules hereunder written: AND ALSO, that the said John Gay, his heirs, executors, administrators or assigns, shall and will, at the request, costs and charges of the person or persons for the time being beneficially entitled as last aforesaid, give and deliver to him, her or them, one or more fair, true and attested or other copy and extract, or copies and extracts, of and from the same deeds, evidences and writings, or any of them, and shall and will permit and suffer such copies and extracts respectively to be examined and compared with the originals thereof, either by such person or persons as last aforesaid, or by any person or persons whom he, she or they shall appoint in writing under his, her or their hand or hands for that purpose. IN WITNESS, &c. (*q*).

Recital of agreement as to title deeds.

SECOND TESTATUM.

Covenant for production of title deeds.

(*p*) See *ante*, p. 712, note.

(*q*) This deed must be inrolled in Chancery. See forms of acknowledgment, certificate and affidavits, *ante*, pp. 717, 718.

THE FIRST SCHEDULE to which the above-written indenture refers.

ALL THAT, &c. [*Description of the portion of the estate allotted to John Gay.*]

THE SECOND SCHEDULE to which the above-written indenture refers.

ALL THAT, &c. [*Description of the portion of the estate allotted to Lucy Gay.*]

THE THIRD SCHEDULE to which the above-written indenture refers.

ALL THAT, &c. [*Description of the portion of the estate allotted to J. Still and Mary his wife.*]

THE FOURTH SCHEDULE to which the above-written indenture refers.

[*A list of the deeds covenanted to be produced, setting out the dates, and the names and descriptions of the parties.*]

No. XVI.

MORTGAGE *in Fee, by a Tenant in Tail in Remainder, after an absolute Consent had been given by the Protector of a prior Settlement, with Variations where the Protector joins for the Purpose of consenting to the Mortgage and Power of Sale.* (See 3 & 4 Will. 4, c. 74, s. 21, *ante*, p. 350, n. (*u*).) (*r*).

THIS INDENTURE, made the —— day of ——, A.D. 18—, between Edward Dunn, of &c. esq. eldest son and heir of the body of D. Dunn, of &c. esq. of the one [*or* first] part; [*where protector consents by the same deed, he should be a party*], of the second part; and [*mortgagee*], of the other [*or* third] part: WHEREAS by indentures of lease and release, bearing date respectively on or about the 9th and 10th days of March, 1832, the release being made, or expressed to be made, between [*parties*], the messuages, lands and hereditaments, hereinafter described and intended to be hereby bargained and sold, were (amongst other hereditaments) duly conveyed and assured, [*to the use of D. Dunn for life, with remainder to his first and other sons in tail*]: AND WHEREAS by a deed poll under the hand and seal of the said [*D. Dunn*], bearing date the 1st day of February, 1863, and duly inrolled in his Majesty's High Court of Chancery on the 12th day of the same month, after reciting the hereinbefore in part recited indentures of lease and release, and reciting that (see *ante*, p. 736); it was by the indenture now in recital witnessed, that the said D. Dunn did give and grant his absolute and unqualified consent and approbation to any conveyance, assurance and disposition, which should be made and executed by the said E. Dunn, either on the day of the date of the said deed poll, or at any time thereafter, of all or any part or parts of the manors, messuages, farms, lands, hereditaments and premises, comprised in and conveyed and assured by the said therein and herein-

Parties.

Recital of creation of entail.

Deed of consent of protector.

(*r*) It will be frequently advisable for the tenant in tail to execute the necessary assurance for barring the entail, by a deed to be executed and inrolled before the mortgage, which will supersede the necessity of inrolling the mortgage deed. This form can easily be adapted to the case of a mortgage by a tenant in tail in *possession*.

before in part recited indentures of lease and release, subject nevertheless and without prejudice to the estate for life of the said D. Dunn, of and in the same hereditaments, and all powers, privileges and exemptions, (except the power of consenting as protector,) annexed to such estate (*s*): AND WHEREAS the said E. Dunn has applied to and requested the said [*mortgagee*] to advance and lend him the sum of 1,500*l.*, which the said [*mortgagee*] has consented and agreed to do upon having the same sum, with interest for the same, secured in manner hereinafter expressed. [*Where the protector consents by the same deed, instead of the recital of the deed poll, the following recital and operative part should precede the conveyance by the mortgagor.*]

Application for loan.

Recital of agreement of protector to consent to mortgage.

AND WHEREAS the said [*protector*], in order to enable the said [*mortgagor*] to make an effectual security for the said sum of 1,500*l.* and interest, as against all persons whose estates are to take effect after the determination or in defeasance of the estate tail of the said [*mortgagor*], of and in the messuages, lands and hereditaments hereinafter described, and intended to be hereby granted and released, has agreed, as the protector of the said recited settlement, to consent to the conveyance, assurance, and disposition intended to be made by these presents, in manner hereinafter expressed: NOW THIS INDENTURE WITNESSETH, that in pursuance and performance of the said recited agreement on the part of the said [*protector*], He the said [*protector*] doth by these presents give and grant his absolute and unqualified consent to the conveyance, assurance and disposition intended to be made by the said [*mortgagor*] in and by these presents, subject, nevertheless, and without prejudice to the estate for life of the said [*protector*], or any power, privilege or exemption, annexed to such estate.

Protector consents to mortgage made by this deed.

Conveyance by tenant in tail.

NOW [*or* And] THIS INDENTURE [*or* further] WITNESSETH, that in pursuance and performance of the said recited agreement, [*or* on the part of the said mortgagor], and for and in consideration of the sum of 1,500*l.* of lawful money of Great Britain to the said E. Dunn in hand paid by the said [*mortgagee*] at or immediately before the sealing and delivery of these presents, the receipt of which said sum of 1,500*l.* the said E. Dunn doth hereby admit and acknowledge, and of and from the same, and every part thereof, doth acquit, release and discharge the said [*mortgagee*], his heirs, executors, administrators and assigns, and every of them, for ever, by these presents, and in order to defeat the estate tail of the said E. Dunn of and in the messuages, lands and hereditaments hereinafter described and intended to be hereby granted, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estate tail, he the said E. Dunn, with the consent of the said D. Dunn, testified [by the said recited deed-poll,] [*or*, as aforesaid], doth by these presents grant, alien, dispose of and confirm unto the said [*mortgagee*] and his heirs ALL THAT the remainder of him the said E. Dunn expectant and to take effect on the decease of the said D. Dunn, of and in ALL THAT, &c. [*parcels, general words, reversions, &c. and all the estate, &c. ante*, p. 711.] TO HAVE AND TO HOLD the said messuages, lands, and all and singular other the hereditaments hereinbefore expressed to be hereby granted, subject and without prejudice to the estate for life therein of the said [*protector*], and all powers, privileges, and exemptions thereto annexed, (except the

HABENDUM.

To use of mortgagee in fee.

(*s*) In cases where it appears that a tenant for life has powers, it must be ascertained that they are not of such a kind as will enable him to defeat the mortgage: it is assumed in this case, that the tenant for life had only the usual power of leasing at rack-rent for the term of twenty-one years.

power of consenting as protector), unto the said [*mortgagee*] and his heirs, To the only use and behoof of the said [*mortgagee*], his heirs and assigns for ever, freed and absolutely discharged from the estate tail of the said E. Dunn, and all other estates tail, remainders, reversions, limitations and conditions thereupon expectant or depending, but subject nevertheless to the proviso or agreement for redemption of the said hereditaments and premises hereinafter contained (that is to say), PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said E. Dunn and the said [*mortgagee*], and the true intent and meaning of them and of these presents, nevertheless, are, that if the said E. Dunn, his heirs, executors, administrators or assigns, shall and do well and truly pay, or cause to be paid, to the said [*mortgagee*], his executors, administrators or assigns, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, the sum of 1,500*l.* of lawful money of Great Britain, with interest for the same after the rate of 5*l.* for every 100*l.* for a year, on the —— day of ——, which will be in the year 18—, without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments or impositions whatsoever (except for or on account of the present or any future tax upon property or income), then and in such case he the said [*mortgagee*], his heirs and assigns, shall and will at any time after such payment shall be so made as aforesaid, upon the request and at the proper costs and charges of the said E. Dunn, his heirs or assigns, re-convey the said messuages, lands, hereditaments and premises hereinbefore expressed to be hereby granted, with their appurtenances, (subject to the estate for life of the said D. Dunn, if then subsisting,) unto the said E. Dunn, his heirs and assigns, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done or committed by the said [*mortgagee*], his heirs, executors, administrators or assigns, or any of them, so as for doing thereof the said [*mortgagee*], his heirs, executors, administrators or assigns, or any of them, be not compelled or obliged to go or travel from the place or places of his, their or any of their usual abode or dwelling: AND the said E. Dunn doth hereby for himself, his heirs, executors and administrators, covenant with the said [*mortgagee*], his executors, administrators and assigns, that the said E. Dunn, his heirs, executors or administrators, shall and will pay or cause to be paid to the said [*mortgagee*], his executors, administrators or assigns, at or in the common dining hall aforesaid, the said sum of 1,500*l.* of lawful money aforesaid, on the —— day of ——, in the year ——, and shall and will henceforth, so long as the said sum of 1,500*l.* or any part thereof shall remain due and owing on the security of these presents, pay or cause to be paid to the said [*mortgagee*], his executors, administrators or assigns, interest for the said sum of 1,500*l.*, or for so much thereof as for the time being shall remain unpaid, after the rate of ——*l.* for every 100*l.* for a year, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year, and shall and will make all and every the said payments and payment without any deduction or abatement whatsoever out of the same in respect of any present or future taxes, charges, assessments or impositions, or any other matter, cause or thing whatsoever (except the income or property tax): AND it is hereby agreed and declared (*t*), that if default

Proviso for redemption.

Covenant for payment of mortgage money.

Power for mortgagee to sell estate.

(*t*) Where a security is made by way of mortgage with a power of sale, the donee of the power is a trustee within the rule which prohibits the purchase of trust property by the trustee. (*Downes* v. *Grazebrook*, 3 Mer. 200.)

shall be made in payment of the said principal sum of ——*l.*, or the interest thereon, or any part thereof respectively on the said —— day of ——, it shall be lawful for the said [*mortgagee*], his executors, administrators or assigns, at any time or times after such default without any further consent on the part of the said E. Dunn, his heirs, issue or assigns, to make sale of the said hereditaments and premises hereinbefore expressed to be hereby granted, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, with full power upon any such sale to make any stipulations as to title, or evidence, or commencement of title or otherwise, which the said [*mortgagee*], his executors, administrators or assigns, shall deem proper, and also with full power to buy in, or rescind, or vary any contract for sale of the said premises, or any part thereof, and to resell the hereditaments which shall be so brought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and for the purposes aforesaid, or any of them, to make and execute all such agreements and assurances as he or they shall think fit: AND it is hereby agreed and declared, that upon any sale under the power of sale hereinbefore contained by the executors, administrators or assigns of the said [*mortgagee*], or by any other person or persons who may not be seised of the legal estate in the premises sold, the heirs of the said [*mortgagee*], or any other person or persons in whom the legal estate of the same premises shall be vested, shall make such assurances of the same for the purpose of carrying the sale thereof into effect as the person or persons by whom the sale shall be made shall direct: PROVIDED ALSO, and it is hereby agreed and declared, that the said [*mortgagee*], his executors, administrators or assigns, shall not execute the power of sale hereinbefore contained, unless and until he or they shall have given a notice in writing to the said E. Dunn, his heirs, executors, administrators or assigns, to pay off the monies for the time being owing on the security of these presents, or left a notice in writing to that effect at or upon some part of the said hereditaments and premises hereinbefore expressed to be hereby granted, and default shall have been made in payment of such monies, or some part thereof, for six calendar months from the time of giving or leaving such notice, or unless and until some half-yearly payment of interest which shall become due on the security of these presents, or a part of some such half-yearly payment, shall have become in arrear for the space of three calendar months after the day on which the same shall become due: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see or inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any default has been

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Where a mortgagor remains in possession and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on nonpayment, may eject the mortgagor without notice to quit or demand of possession. (*Doe* d. *Fisher* v. *Giles*, 5 Bing. 421.)

Where a mortgagee of a bankrupt's estate, with a power of sale, put up the premises for sale, and then applied for leave to bid, it was held that he could not be permitted to do so, unless he waived the power, and the property were sold under the order of the Commissioners. (*Ex parte Davis*, 1 Mont. & Ayr. 89.)

In cases like the present it will often be advisable to convey the estate to a trustee upon the usual trusts for sale, in case the mortgage-money be not paid.

made in payment of any principal money or interest intended to be hereby secured at the time hereinbefore appointed for payment thereof, or whether any money remains on the security of these presents, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed and taken to be within the aforesaid power in that behalf, and to be valid and effectual accordingly, and the remedy of the said E. Dunn, his heirs, issue or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any such sale, shall be in damages only: AND it is hereby further agreed and declared, that the said [*mortgagee*], his executors, administrators and assigns, shall hold the monies which shall arise from any sale made in pursuance of the aforesaid power in that behalf upon trust in the first place, by, with or out of the same monies to reimburse himself or themselves, or pay and discharge all the costs and expenses incurred in or about such sale, or otherwise in respect of the premises; and in the next place to apply such monies in or towards satisfaction of all and singular the monies for the time being due or owing on the security of these presents, and then to pay the surplus (if any) of the said monies which shall arise from such sale unto the said E. Dunn, his heirs or assigns: AND it is hereby also agreed and declared that the aforesaid power of sale may be exercised by any person or persons who for the time being shall be entitled to receive and give a discharge for the monies for the time being due or owing on the security of these presents: PROVIDED ALSO, and it is hereby agreed and declared, that the aforesaid power of sale, or anything herein contained, shall not in anywise prejudice or affect the right of foreclosure: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said [*mortgagee*], his executors, administrators or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power and trusts, or any of them: AND the said E. Dunn doth for himself, his heirs, executors and administrators, covenant, promise, grant and agree with and to the said [*mortgagee*], his heirs and assigns, by these presents, in manner following, (that is to say,) that he the said E. Dunn is, at the time of the sealing and delivery of these presents, lawfully and rightfully seised of or entitled to an estate of inheritance in fee tail in remainder expectant on the decease of the said D. Dunn of and in the said messuages, lands, hereditaments and premises hereinbefore expressed to be hereby granted with their appurtenances, without any condition, trust, power of revocation or limitation of any use or uses, or other restraint, cause, matter or thing whatsoever, to alter, change, charge, incumber, lessen, determine, defeat or make void the same estate; and that he the said E. Dunn now hath in himself, with the consent of the said D. Dunn, so given as aforesaid, good right, full power, and lawful and absolute authority to grant, dispose of, and convey all the said messuages, lands, hereditaments and premises hereinbefore expressed to be hereby granted, with their appurtenances, unto and to the use of the said [*mortgagee*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO, that if default shall be made in the payment of the said sum of 1,500*l.* and interest or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall and may be lawful to and for the said [*mort-*

Covenants for title by mortgagor.

For quiet enjoyment after default.

gagee], his heirs or assigns, at any time or times thereafter and after the decease of the said D. Dunn, into and upon all and every the said messuages, lands, hereditaments and premises hereinbefore expressed to be hereby granted, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy and enjoy, and receive and take the rents, issues and profits thereof, to and for his and their own use, without any let, trouble, interruption or disturbance whatsoever, of, from or by the said E. Dunn, his heirs, issue or assigns, or any other person or persons whomsoever, any estate, right, title or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim in or to the said messuages, hereditaments and premises, or any of them, or any part or parts thereof (save and except the estate for life of the said D. Dunn, and such leases as shall have been granted by him in pursuance of the power for that purpose given to him by the said recited indenture of release): AND that the free and clear, and freely and clearly and absolutely acquitted, exonerated and discharged or otherwise by the said E. Dunn, his heirs, executors or administrators, saved, protected, kept harmless and indemnified of, from and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, right and title of dower, mortgages, uses, wills, entails, annuities, rent-charges, rent seck and arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges and incumbrances whatsoever (except the estate for life of the said D. Dunn and such leases as aforesaid). AND MOREOVER, that if default shall be made of or in payment of the aforesaid sum of 1,500*l.* and interest or any part thereof, contrary to the aforesaid proviso and covenant for the payment of the same, and the true intent and meaning of these presents, then and in such case he the said E. Dunn and his heirs and issue, and all and every other persons and person whomsoever having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title or interest, of, in or to the said messuages, lands, hereditaments and premises hereinbefore expressed to be hereby granted, or any of them, or any part or parts thereof (save and except the said D. Dunn in respect of his life estate, and the persons entitled for the time being to such leases as are hereinbefore excepted in respect thereof) shall and will from time to time and at all times thereafter, upon the request of the said [*mortgagee,*] his heirs, executors, administrators or assigns, as to such parts of the same hereditaments and premises as for the time being shall not under the power of sale herein contained have been absolutely sold and conveyed or the equity of redemption wherein shall not have been absolutely foreclosed at the costs and charges of the said E. Dunn, his heirs, executors or administrators, and as to such parts thereof as for the time being shall have been so sold or the equity of redemption wherein shall have been absolutely foreclosed at the costs and charges of the person or persons requiring the same, make, do and execute, or cause and procure to be made, done and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring all the said messuages, lands, hereditaments and premises hereinbefore expressed to be hereby granted with their appurtenances, unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, free from all incumbrances except as before excepted, as by the said [*mortgagee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required: PRO-

Free from incumbrances.

For further assurance.

Proviso for mort-

VIDED ALSO, and it is hereby agreed and declared between and by the said [*mortgagee*] and the said E. Dunn, that after the decease of the said D. Dunn it shall and may be lawful to and for the said E. Dunn, his heirs and assigns, peaceably and quietly to have, hold, occupy, possess and enjoy all the said messuages, lands, hereditaments and premises hereby granted, or expressed and intended so to be, with their appurtenances, and to receive and take the rents, issues and profits thereof to his and their own use, until default shall be made in payment of the said sum of 1,500*l.* and interest, or some part thereof respectively, contrary to the aforesaid proviso or covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption or disturbance whatsoever, of, from or by the said [*mortgagee*], his heirs or assigns, or by any other person or persons whomsoever lawfully claiming or to claim by, from or under him, them or any of them (*u*). PROVIDED ALWAYS, and it is hereby agreed and declared, that none of the powers and incidents conferred or annexed to the estates or charges of mortgagees by an act passed in the session held in the 23rd & 24th years of the reign of Queen Victoria, intituled, "An Act to give to Trustees, Mortgagees and Others, certain Powers now commonly inserted in Settlements, Mortgages and Wills" (*x*) shall take effect or be exerciseable so far as the same act confers a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the hereditaments hereinbefore expressed to be hereby granted. IN WITNESS, &c.

gagor's enjoyment until default.

Proviso to negative appointment of receiver.

(*u*) This deed must be inrolled in Chancery within six calendar months after its execution; see *ante*, p. 365, s. 41. The last proviso is now usually omitted.

(*x*) See this act, *ante*, ss. 17—23, 32, pp. 704, 707.

No. XVII.

CONVEYANCE *for Barring an Equitable Entail affecting an Estate which had been directed to be sold, and the Produce invested in the Purchase of other Lands to be entailed, by the Party who would have been Tenant in Tail of the Lands to be purchased, and by the Heir at Law of the surviving Trustee for Sale.* (See 3 & 4 Will. 4, c. 74, s. 71, *ante*, p. 385.)

THIS INDENTURE, made the —— day of ——, A.D. 18—, between C. Crow, of &c. esq., the eldest son of J. Crow, late of &c., esq., deceased, of the first part; J. Daw, of &c., the eldest son and heir at law of M. Daw, late of &c., the surviving trustee named in the indentures of lease and release hereinafter recited, of the second part; and [*releasee*] of the third part: WHEREAS by indentures of lease and release, bearing date respectively on or about the 6th and 7th days of June, 1831, the release being made or expressed to be made between [*parties*], the messuages, lands and hereditaments hereinafter described and intended to be hereby granted and released were duly conveyed and assured unto and to the use of the said M. Daw and A. B., their heirs and assigns for ever, in trust to sell and dispose of the same hereditaments in manner therein mentioned: AND by the said indenture of release it was declared and agreed that the said [*trustees*], their heirs, executors, administrators and assigns, should stand and be possessed of, and interested in, the sum or sums of money to arise or be

Parties.

Recital of conveyance of estates to trustees upon trust to sell.

produced by the sale or sales which should be made in pursuance of the trusts of the same indenture, and also of and in the rents, issues and profits of the said messuages, lands and hereditaments, in the meantime and until the same should be sold, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as were or should be expressed, declared, and declared of and concerning the same, in and by an indenture therein mentioned to be then already prepared and ingrossed, and to bear or intended to bear even date with the indenture now in recital, and to be made or intended to be made between the persons therein named, being the same persons who are parties to the indenture of release next hereinafter recited: AND WHEREAS by indentures of lease and release bearing date respectively on or about the 6th and 7th days of June, 1831, the release being made or expressed to be made between [*parties*], divers manors, messuages, lands and other hereditaments in the county of ——, therein particularly mentioned and described, were duly conveyed and assured, to the use of the said J. Crow and his assigns, during the term of his natural life, with remainder to the said [*trustees*] and their heirs during the life of the said J. Crow, upon trust, by the usual means to preserve the contingent remainders thereinafter limited, with remainder to the use of the first and other sons of the said J. Crow successively in tail, with divers remainders over: AND by the indenture of release now in recital (being the indenture referred to by the hereinbefore recited indenture of release) it was declared that the said [*trustees*], their heirs, executors, administrators and assigns respectively should stand and be possessed of, and interested in, all and every the sums and sum of money to arise or be produced by the sale or sales which might be made of the messuages, lands, hereditaments and premises comprised in the said therein and hereinbefore in part recited indenture, or any part thereof, in pursuance of the trusts of the same indenture in that behalf declared, upon trust that they the said [*trustees*], or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, should lay out and invest the same in the purchase of messuages, lands or hereditaments, in fee simple in possession in England or Wales, of a clear and indefeasible estate of inheritance, and settle and assure, or cause to be settled and assured, the lands and hereditaments so to be purchased, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under and subject to such and the same powers, provisoes, conditions and agreements as were in and by the indenture now in recital limited, expressed, declared and contained of and concerning the manors, hereditaments and premises thereby released or intended so to be, or as near thereto as the deaths of parties and other intervening accidents would then admit: AND it was by the indenture now in recital declared, that the rents, issues and profits of the hereditaments comprised in the said first hereinbefore recited indenture of release, or of such part or parts thereof as should for the time being remain unsold, should in the meantime and until the same should be sold, in pursuance of the trusts aforesaid, belong and be paid to such and the same person or persons as would for the time being, under the trusts thereinbefore declared, have been entitled to receive the rents, issues and profits of the hereditaments directed to be purchased with such monies, in case such purchase or purchases and settlement as aforesaid had then been actually made: AND WHEREAS the said J. Crow departed this life on or about the —— day of ——, leaving the said C. Crow his eldest son and heir in tail: AND WHEREAS the said C. Crow, who, as the eldest son of the said J. Crow, would, under and by virtue of the said secondly hereinbefore recited indenture

Recital of settlement of other real estates.

Declaration of trusts of money to arise from sale of estates directed to be sold.

Death of tenant for life.

That party entitled to lands to be purchased

of release, be entitled to the lands and hereditaments by the same indenture directed to be purchased with the money to arise from the sale of the said messuages, lands and hereditaments by the said first hereinbefore-recited indenture of release directed to be sold, for an estate tail in possession, in case the same hereditaments were sold, and such purchase and settlement were made and executed, as by the said secondly hereinbefore recited indenture of release is directed, hath elected to take the hereditaments so directed to be sold, in lieu of the lands and hereditaments by the same indenture directed to be purchased with the money to arise from such sales as aforesaid; and the said C. Crow being by virtue of the trusts contained in the same indenture, and the election he hath so made as aforesaid, entitled to the same hereditaments for an equitable estate tail in possession, is desirous of barring and extinguishing all equitable estates tail and remainders and reversions thereupon expectant and depending of and in the same hereditaments, and for that purpose has determined to make and execute such conveyance and assurance as is hereinafter contained: AND WHEREAS the said M. Daw survived the said A. B. his co-trustee, and the said M. Daw departed this life on or about the —— day of —— now last past, having made and published his last will and testament in writing, but such will does not contain any particular or general devise of the hereditaments comprised in the first hereinbefore recited indenture of release, and so vested in him as surviving trustee as aforesaid, and therefore, upon his decease, the legal estate in the same hereditaments descended to and became vested in the said J. Daw as the eldest son and heir at law of the said M. Daw: AND WHEREAS the said J. Daw, on the request of the said C. Crow, has agreed to join in the conveyance hereinafter contained, for the purpose of passing the legal estate in the hereditaments hereinafter described, now vested in him as the heir at law of the said M. Daw, the surviving trustee as aforesaid: NOW THIS INDENTURE WITNESSETH, that in order to defeat all estates tail of the said C. Crow of and in the messuages, lands and hereditaments hereinafter described, and intended to be hereby granted and released, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estates tail, and for limiting and assuring the same premises unto and to the use of the said C. Crow, his heirs and assigns for ever, and in consideration of the sum of 5*s.* of lawful money of Great Britain to each of them the said C. Crow and J. Daw in hand paid by the said [*releasee*] at or before the sealing and delivery of these presents, the several receipts whereof are hereby acknowledged, he the said C. Crow doth by these presents grant, alien, dispose of, release and confirm, and the said J. Daw (*u*) (at the request and by the direction of the said C. Crow, testified by his being a party to and sealing and delivering these presents,) DOTH by these presents grant, release and confirm unto the said [*releasee*]: ALL THAT, &c. [*Description of estate, general words, reversion, &c. and all the estate, &c. ante*, pp. 711, 712.] TO HAVE AND TO HOLD the said messuages and lands, and all and singular other the hereditaments and premises hereinbefore expressed to be hereby granted and released, with their and every of

had elected to take lands directed to be sold.

Death of trustees.

Agreement of heir of trustee to convey.

TESTATUM.

Conveyance by tenant in tail and trustee.

HABENDUM.

(*u*) It seems that until the entail is barred, the trustee would not be justified in conveying the legal fee to the tenant in tail, but only an estate commensurate with the interest of the latter. (See *Short* v. *Wood*, 1 P. Wms. 470, and the cases cited in 1 Atk. 12, 3rd edit.)

their appurtenances, unto the said [*releasee*] and his heirs: To the only use and behoof of the said C. Crow, his heirs and assigns for ever, freed and absolutely discharged of and from all estates tail, and all remainders and reversions expectant or depending thereupon, and all collateral limitations thereunto annexed, and all the trusts, estates, and interests created, limited or declared, or directed to be created, limited or declared, in and by the said hereinbefore recited indentures of release, or either of them: AND the said J. Daw doth hereby for himself, his heirs, executors and administrators, covenant and declare with and to the said [*releasee*], his heirs and assigns, that he the said J. Daw hath not at any time heretofore made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said messuages, lands and other hereditaments hereinbefore expressed to be hereby granted and released, or any of them, or any part thereof, are, is, can, shall or may be conveyed, charged, affected or incumbered in title, estate or otherwise howsoever. IN WITNESS, &c. (*x*).

Covenant against incumbrances.

(*x*) This deed must be inrolled in Chancery within six calendar months after its execution. (See *ante*, s. 71, p. 386.)

No. XVIII.

ASSIGNMENT *of Stock, subject to be invested in the Purchase of Lands to be entailed, by the Persons who would have been Tenant for Life in Possession and Tenant in Tail in Remainder of such Lands, if purchased, for the purpose of discharging the Stock from the Trusts to which it was subject.* (See *ante*, p. 385.)

Parties.

THIS INDENTURE, made the —— day of ——, A.D. 18—, between William Evans, of &c., of the first part; Edward Evans, of &c., the eldest son and heir of the body of the said W. Evans, of the second part; and A. B., of &c., of the third part; WHEREAS [*recital of will devising estates to W. Evans for life, with remainder to his first and other sons successively in tail.* (See *ante*, p. 728.)] And the said testator gave and bequeathed all his goods, chattels, ready money, securities for money and other personal estates and effects whatsoever unto the said [*trustees*], their executors, administrators and assigns, upon trust, that they the said [*trustees*], or the survivor of them, or the executors, administrators or assigns of such survivor, should sell and dispose of, and convert into money, all such part of his (the said testator's) personal estate as should not consist of money or government securities or mortgages upon real estates, and should stand and be possessed of and interested in the money into which the same shall be so converted, and of and in such part of the same as should consist of money, government securities, or mortgages, upon trust that they the said [*trustees*], or the survivor of them, or the executors, administrators and assigns of such survivor, should by and with the same pay his (the said testator's) debts, legacies, funeral and testamentary expenses: And the said testator directed that the said [*trustees*] or the survivor of them, or the executors, administrators or assigns of such survivor,

Recital of will giving the residue of personal estates to trustees to be invested in purchase of lands, to be limited in strict settlement.

should lay out and invest all the ultimate residue and surplus of his (the said testator's) personal estate, which should remain after payment of his debts, legacies, funeral and testamentary expenses, in the purchase of freehold manors, messuages, lands or hereditaments, to be situate in the said county of Essex, with such copyhold messuages, lands, tenements or hereditaments, as might be contiguous thereto, or be convenient to be held therewith; And the said testator directed that the said [*trustees*], or the survivor of them, or the executors, administrators or assigns of such survivor, should convey, settle and assure, or cause to be conveyed, settled and assured, the real estate which should be so purchased, to such and the same uses, upon and for such and the same trusts, intents and purposes, and with, under and subject to such and the same powers, provisoes, limitations and declarations, as in and by his said will were declared or expressed of and concerning the hereditaments thereby devised as aforesaid, and which should be then subsisting undetermined or capable of taking effect, or as near thereto as the deaths of parties and other contingencies would then admit; And the said testator further declared his will to be, that until the money directed to be invested in the purchase of real estate as aforesaid should be invested in a purchase or purchases as thereinbefore directed, it should be lawful for the said [*trustees*], and the survivor of them, and the executors, administrators and assigns of such survivor, to place out and invest such money at interest in the public funds, or in or upon government or real securities, in their or his names or name, and to alter and transpose such securities or funds as often as to them or him should seem meet, and that the dividends, interest and annual proceeds of such stocks, funds or securities should go and be payable and applicable to and for such uses, intents and purposes, as the rents and profits of the estates to be purchased therewith respectively would go and be payable and applicable, in case such purchase or purchases and settlement as aforesaid were then actually made: AND WHEREAS the said [*testator*] departed this life on or about the —— day of ——, without having altered or revoked his said will, which was duly proved by the said [*trustees*], the executors therein named, on the —— day of ——, in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS after payment and satisfaction of all the debts, legacies, funeral and testamentary expenses of the said [*testator*], the sum of £—— remained in the hands of the said [*trustees*], subject to be invested in the purchase of real estates, pursuant to the directions for that purpose contained in the said recited will: AND WHEREAS the said [*trustees*] did not lay out and invest the said sum of £——, or any part thereof, in the purchase of lands, pursuant to the directions contained in the said recited will, but the same sum was, on or about the —— day of ——, invested by the said [*trustees*], in their names, in the purchase of the sum of 10,000*l.* three per cent. consolidated bank annuities, which is now standing in their names in the books of the governor and company of the Bank of England, subject to the trusts of the said recited will: AND WHEREAS the said W. Evans would be tenant for life of the lands and hereditaments, by the said will directed to be purchased and settled as aforesaid, if such purchase and settlement were made, and in such case the said E. Evans would be tenant in tail in remainder expectant on the decease of the said W. Evans, of and in the same lands and hereditaments: AND WHEREAS the said W. Evans and E. Evans have agreed to concur in these presents for the purpose of discharging the said sum of 10,000*l.* three per cent. consolidated bank annuities, from the trusts of the said recited will, in manner hereinafter men-

Testator's death, and probate of his will.

That surplus of testator's estate remained after payment of debts, &c.

Surplus of testator's personalty invested in funds.

Interests of parties.

Agreement to discharge stock from trusts.

Agreement of tenant for life to accept sum in satisfaction of his interests.

tioned: AND WHEREAS the life estate or interest of the said W. Evans, of and in the dividends of the said sum of 10,000*l.* three per cent. consolidated bank annuities, has been valued at the sum of 2,000*l.* like annuities, which the said W. Evans has agreed to accept in full satisfaction of all his interest or estate in the said first-mentioned sum, or any other stocks, funds or securities, in or upon which the same may be invested, or in any lands or hereditaments directed to be purchased therewith respectively: NOW THIS INDENTURE WITNESSETH (*y*), that in order to discharge the said sum of 10,000*l.* three per cent. consolidated bank annuities, or any stocks, funds or securities, in or upon which the same may be invested, from the trusts declared by the said recited will, and for defeating all estates tail directed to be limited or created in the lands thereby directed to be purchased as aforesaid, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estates tail, and to the intent that the said W. Evans and E. Evans may acquire the absolute interest in and power of disposition over the same sum, and also in consideration of the sum of 5*s.* of lawful money of Great Britain to each of them the said W. Evans and E. Evans paid by the said A. B. at or before the sealing and delivery of these presents, the several receipts whereof are hereby acknowledged, the said W. Evans, according to his interest in the premises hereinafter assigned, and the said E. Evans, under and by virtue and in pursuance of the power or provision for that purpose given by or contained in an act of parliament passed in the session of parliament held in the third and fourth years of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance;" and with the consent and approbation of the said W. Evans, testified by his being a party to and sealing and delivering these presents, do, and each of them doth by these presents, bargain, sell, assign, transfer and set over, unto the said A. B., his executors, administrators and assigns, ALL THAT the said sum of 10,000*l.* three per cent. consolidated bank annuities, now standing in the names of the said [*trustees*] in the books of the Governor and Company of the Bank of England as aforesaid, and the stocks, funds and securities in or upon which the same shall be laid out or invested, and the interest, dividends and annual proceeds now due or hereafter to become due in respect of the same; and also all other the stocks, funds, trust monies and securities now vested in or standing in the names of the said [*trustees*], the produce of which, under the trusts of the said recited will of the said [*testator*], is subject, or, in case these presents had not been executed, would have been subject to be laid out and invested in the purchase of lands to be settled as aforesaid; And all the right, title, interest, property, claim and demand whatsoever of them the said W. Evans and E. Evans, and each of them, of, in, to, from or out of the stocks, funds, securities and premises hereby assigned, or

TESTATUM. Tenant for life and remainderman assign the stock to a trustee.

(*y*) It will be observed, that the act of parliament requires a disposition of this kind to be effected by an assignment, otherwise it might probably have been considered sufficient for the tenant for life and remainderman to have declared by deed to be inrolled, that the stock should be discharged from the trusts of the will, and that the trustees should transfer, or stand possessed of the stock, to such persons, or upon such trusts, as the interested parties directed, without the formality of an assignment to a third party.

expressed and intended so to be, and every part thereof, TO HAVE, HOLD, RECEIVE, TAKE AND ENJOY the stocks, funds and securities, and all and singular other the premises hereby assigned, or expressed and intended so to be, unto and by the said A. B., his executors, administrators and assigns, to the intent and purpose that the same may be freed and absolutely discharged of and from all the trusts, directions, powers and authorities in and by the said recited will of the said [*testator*] expressed, declared, and contained of and concerning the clear residuary personal estate of the said [*testator*], and also of and from all estates tail and other interests whatsoever to which the lands directed to be purchased and settled as aforesaid would have been subject, in case such purchase and settlement as aforesaid had been actually made and executed (*z*): AND it is hereby declared and agreed by and between the parties to these presents, that the said A. B., his executors, administrators and assigns, and also the said [*trustees*], and their respective executors, administrators and assigns, shall henceforth stand and be possessed of and interested in all and singular the stocks, funds, securities and other premises hereby assigned, or expressed and intended so to be, and every part thereof, UPON TRUST for such person or persons, and for such intents and purposes as the said W. Evans and E. Evans shall by any writing or writings under their hands jointly direct or appoint; and in default of such direction or appointment, THEN AS TO AND CONCERNING 2,000*l.* three per cent. consolidated bank annuities, part of the said sum of 10,000*l.* like annuities, and the interest, dividends and annual proceeds henceforth to become due in respect of the said sum of 2,000*l.* like annuities, IN TRUST for the absolute use and benefit of the said W. Evans, his executors, administrators and assigns, and to be transferred as he or they shall direct, in full satisfaction for the estate or interest of the said W. Evans of and in the said trust monies, stocks, funds and securities, or in the lands and hereditaments by the said recited will directed to be purchased therewith as aforesaid: AND AS TO AND CONCERNING the sum of 8,000*l.* three per cent. consolidated bank annuities (residue of the said sum of 10,000*l.* like annuities), and all dividends henceforth to become due in respect thereof, and all other the premises hereby assigned, or expressed and intended so to be (subject to the said sum of 2,000*l.* like annuities, and the dividends thereof, so to be held in trust for or to be transferred to the said W. Evans as aforesaid), IN TRUST for the said E. Evans, his executors, administrators and assigns, and to be paid or transferred to him or them, or as he or they shall direct. Provided always, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said W. Evans, his executors, administrators and assigns, for the said sum of 2,000*l.* three per cent. consolidated bank annuities, and the dividends thereof, or the produce thereof respectively, and the receipt or receipts in writing of the said E. Evans, his executors, administrators and assigns, for the said sum of 8,000*l.* like annuities, and the dividends thereof, or the produce thereof respectively, shall be respectively good and effectual releases and discharges to the said [*trustees*], and their respective executors, administrators and assigns, without any further or other direction or authority from the said A. B., his executors, administrators or assigns, and that he and they respectively shall not be answerable or

HABENDUM.

Declaration of trust of the stock.

Receipts of parties entitled to be sufficient discharges.

(*z*) Where the parties assigning are not to receive the money or stock, the usual power of attorney and of giving discharges should be inserted.

accountable for any misapplication or nonapplication of the said trust monies, stocks and funds, or the dividends thereof, or any part thereof respectively. IN WITNESS, &c. (*a*).

(*a*) It is apprehended, that after the due execution and inrolment of this deed in Chancery, that the trustees, in whose names the stock is standing, will be justified in transferring it according to the trusts of this deed. If W. Evans or E. Evans have created any incumbrances affecting the fund, of which the trustees have notice, the fund cannot be safely transferred without the consent of the incumbrancers, or providing for their charges. The trustees, on transferring the stock, will be entitled to require the usual release and indemnity from the parties beneficially interested.

No. XIX.

ASSIGNMENT *by Tenant in Tail in Remainder, with the Consent of the Protector of the Settlement, of Funds subject to be laid out in Lands to be entailed, in order that the same may be immediately re-assigned to the Assignor. Declaration that Fund shall be considered as Personal Estate.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, between W. Evans, of &c. esq. [*the tenant in tail in remainder*] of the first part; E. Evans, of &c. [*the protector*] of the second part; and [*trustee*] of the third part: WHEREAS [*the same recitals as in* No. XVIII. *as far as the agreement to discharge stock from trusts*]: AND WHEREAS the said W. Evans is desirous of acquiring the absolute beneficial interest in the said sum of 10,000*l.* 3*l.* per cent. consolidated bank annuities, subject to the estate for life of the said E. Evans therein, who, as the protector of the settlement created by the said recited will, has agreed to consent to the assignment intended to be hereby made in manner hereinafter mentioned:

TESTATUM. Tenant in tail assigns stock, &c. with consent of protector.

NOW THIS INDENTURE WITNESSETH, that in order to defeat the estate tail of the said W. Evans, created or directed to be created in the said stocks, funds and securities hereby assigned, or expressed and intended so to be, and all estates, rights, interests and powers to take effect after the determination or in defeazance of such estate tail, and to vest the absolute beneficial interest in the same stocks, funds and securities in the said W. Evans, subject to the life interest of the said E. Evans therein, and in consideration of the sum of 10*s.* of lawful money of Great Britain, paid by the said [*trustee*] to the said W. Evans, at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, he the said W. Evans, under and by virtue and in pursuance of the powers and provisions for that purpose given by or contained in an act of parliament made and passed in the fourth year of the reign of his late majesty King William the Fourth, intituled, "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," with the consent and approbation of the said E. Evans, testified by his being a party to and sealing and delivering these presents, doth by these presents assign, transfer and set over unto the said [*trustee*], his executors, administrators and assigns, All that the said sum of 10,000*l.* 3*l.* per cent. consolidated bank annuities, now standing in the names of the said [*trustees*] in the books of the Governor and Company of the Bank of England as aforesaid, and the stocks, funds and securities in or upon which the same shall be

laid out and invested, and the dividends and interest thereof to become due after the decease of the said E. Evans, and also all other the stocks, funds, trust monies and securities now vested in and standing in the names of the said [*trustees*], the produce of which, under the trusts of the said recited will of the said [*testator*], is subject, or in case these presents had not been made and executed, would have been subject to be laid out and invested in the purchase of lands to be settled as aforesaid; And all the right, title, interest, property, claim and demand whatsoever of the said W. Evans of, in, to, from or out of the said stocks, funds and securities hereby assigned, or expressed and intended so to be: To HAVE, HOLD, RECEIVE, TAKE AND ENJOY the stocks, funds, and all and singular other the premises hereby assigned, or expressed and intended so to be, (subject to the estate or interest therein for life of the said E. Evans, but freed and absolutely discharged from the estate tail of the said W. Evans, and all estates, rights, interests and powers to take effect after the determination or in defeazance of such estate tail,) unto the said [*trustee*], his executors, administrators and assigns, in trust for the said W. Evans, his executors or administrators, and to the intent that he the said [*trustee*], his executors or administrators, do and shall forthwith, in and by an indenture already prepared and ingrossed, and intended to be indorsed on these presents, and to be made between the said [*trustee*] of the one part, and the said W. Evans of the other part, assign the said stocks, funds, securities and premises hereby assigned, or expressed and intended so to be, subject as aforesaid, unto the said W. Evans, his executors, administrators and assigns, for his and their own use and benefit, and upon and for no other trusts, intent or purpose whatsoever: AND the said W. Evans and E. Evans, according to their respective interests in the premises, do hereby declare and direct, that the stocks, funds, securities and trust monies hereby assigned, or expressed and intended so to be, shall from henceforth be and be deemed to be of the nature and quality of personal estate to and for all intents and purposes whatsoever, any rule of equity to the contrary notwithstanding, and that the same, or any part thereof, shall not be laid out by the said [*trustees*] in the purchase of lands and hereditaments, pursuant to the directions for that purpose contained in the said recited will of the said [*testator*]. IN WITNESS, &c. (*b*)

HABENDUM.

To trustee in trust to re-assign.

Declaration that funds shall be considered as personal estate.

(*b*) This deed must be inrolled in Chancery within six calendar months after its execution. (See *ante*, p. 386.) Money directed to be laid out in the purchase of lands is, for all the purposes for which it is so directed to be invested, impressed in equity with the qualities of *real estate*; it will descend to the heir, it will be real assets for payment of debts, and will pass by a devise of lands and hereditaments. It is, however, competent to the parties having absolute interests in such money, by a declaration of their intention, to take from the fund such qualities of real estate, and to make it transmissible as personalty. (*Van* v. *Barnett*, 19 Ves. 109.)

No. XX.

RE-ASSIGNMENT (*to be indorsed on last Deed*) *for the Purpose of vesting the absolute Reversionary Interest in the Funds in the Tenant in Tail in Remainder.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, between the within-named [*trustee*] of the one part, and the within-named W. Evans of the other part: WITNESSETH, that

in pursuance of the trusts reposed in the said [*trustee*] by the within-written indenture, and in consideration of the sum of 10*s.* of lawful money of Great Britain to the said [*trustee*] paid by the said W. Evans, at or immediately before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [*trustee*] doth by these presents assign, transfer and set over, unto the said W. Evans, his executors, administrators and assigns, All that the within-mentioned sum of 10,000*l.* 3*l.* per cent. consolidated bank annuities, and all other the stocks, funds, securities, dividends, interest and premises, in and by the within-written indenture assigned, or expressed and intended so to be: AND all the right, title, interest, property, possibility, claim and demand whatsoever, both at law and in equity, of him the said [*trustee*] of, in, to, or out of the same premises, and every part thereof, Together with all powers, remedies and means whatsoever, requisite or necessary for suing for, recovering, and giving effectual releases and discharges for the same stocks, funds, securities and premises, and every or any part thereof: TO HAVE AND TO HOLD, RECEIVE, TAKE AND ENJOY all and singular the premises hereby assigned, or expressed and intended so to be, unto and by the said W. Evans, his executors, administrators and assigns, for his and their own use and benefit, as part of his and their personal estate and effects, subject nevertheless to the life interest of the within-named E. Evans in the same stocks, funds, securities and premises: AND the said [*trustee*] doth hereby for himself, his heirs, executors and administrators, covenant and declare with and to the said W. Evans, his executors, administrators and assigns, that he the said [*trustee*] hath not made, done, executed or permitted any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said stocks, funds, securities and premises hereby assigned, or expressed and intended so to be, or any part thereof, are, is, can, shall or may be charged, incumbered or in any manner prejudicially affected in title, interest or otherwise howsoever. IN WITNESS, &c. (*c*)

Covenant by trustee that he had not incumbered.

(*c*) This deed will require a 35*s.* stamp, but not inrolment.

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