A PRACTICAL TREATISE ON THE LAW OF COVENANTS.

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——— sudet multùm, frustráque laboret — Hor.

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TO

THE RIGHT HONORABLE

CHARLES, LORD TENTERDEN,

BARON TENTERDEN,

OF HENDON, IN THE COUNTY OF MIDDLESEX,

LORD CHIEF JUSTICE OF ENGLAND,

&c. &c. &c.

THIS WORK,

IS, WITH PERMISSION,

MOST RESPECTFULLY INSCRIBED,

BY HIS LORDSHIP'S

MUCH OBLIGED

AND MOST OBEDIENT SERVANT,

THE AUTHOR.

PREFACE.

The utility of works expressly devoted to the investigation of particular branches of jurisprudence, has been universally acknowledged; and it is a matter of surprise, that, among the numerous valuable text books already published, the Law of Covenants has not been made the subject of a distinct treatise. With the view of supplying the defect, the Author undertook the heavy responsibility of composing this volume. To collect, analyze, and reduce into order, the mass of confused, and frequently contradictory cases on the subject; to expound their general principles; and to exhibit, in a connected and comprehensive form, the actual state of the Law of Covenants at the present day, was the serious duty he imposed upon himself. With what degree of success his endeavours may have been attended, he is afraid to contemplate. Had he been aware of the difficulties incident to the progress of his labours, he might, perhaps, have abandoned his intention, and have left the task to others more competent to carry it into execution.

Most of the positions advanced as law in these pages, will, it is apprehended, be found to be fully warranted by the authorities cited in confirmation of them. But in some instances, depending rather on a train of reasoning for the conclusion arrived at, than admitting a justification by any precise case in point, the Author has, with much diffidence, submitted his own opinion. As his remarks are easily distinguishable from the propositions sanctioned by judicial determination, and will be estimated in proportion only to their intrinsic worth, no danger can accrue to the student from their perusal. He may adopt or repudiate them as his better judgment may suggest.

The selection of the Particular express Covenants treated of in Part the Third, was necessarily a matter of discretion. Those only have been introduced which the Author considered most serviceable for practice. The several particular covenants usually inserted in Apprenticeship deeds, Charter-parties, Partnership deeds, Marriage Settlements, &c., except so far as they tended to illustrate the general doctrines of the law of covenants, have not been noticed. Each of those subjects would, if fully discussed, be sufficient of itself to fill a volume. Covenants to stand seised, being but a mode of as-

surance, and now almost obsolete, are also omitted.

Bare abstract propositions, even if not likely to mislead, do not appear to afford the best means of imparting instruction. Unaccompanied and unsupported by the circumstances from which they are deduced, they leave upon the mind but a feeble impression of their effect, and are apt to occasion obscure and confused ideas: the student is left to the resources of his own imagination, or to the tedious process of examining a lengthy case, (supposing he has the report at hand,) to ascertain the reasons of the judgment of the court. In order to obviate these inconveniences, and to furnish a more ready solution of doubts, the Author has, in many instances, framed such a condensed narration of principal facts as he thought most likely to promote the object he had in view, namely, simplification and practical utility. On the other hand, to avoid prolixity, he has taken great pains to divest the statements of all unnecessary detail.

Every one must have experienced the trouble of tracing the same case through the several contemporary books of reports, especially those of the early writers: its identity being often difficult to be dis-

covered, sometimes from orthographical inaccuracies, at others, from the total alteration of names. These variations in name, and the different publications in which the same case is to be found, are particularized in the notes.

The result of his exertions the Author now offers to the profession, with an assurance that no diligence has been spared to render the work as useful as possible. He has only to add, that if the information and advantage to be derived from the perusal of it be in proportion to the time, labour, and anxiety bestowed on its production, his most sanguine expectations will be realized, and his highest ambition attained.

1, *New Square, Lincoln's Inn,*
24th August, 1829.

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A

PRACTICAL TREATISE

ON

THE LAW OF COVENANTS.

INTRODUCTORY REMARKS.

The frequent insertion of covenants in modern deeds, their variety and capability of modification, afford the most satisfactory evidence of their use and efficacy. From the earliest periods they have been resorted to as a means of securing the due and punctual performance of contracts, and the facility with which they were rendered available in courts of justice, recommended them to general adoption. The multiplicity of decisions on the subject in past times also well attests its importance, and how largely it has engaged the deliberations of our judicial tribunals. For a long series of later years, the Law of Covenants has been of increasing interest, and the source of most anxious legal investigation. The principles have, consequently, become more uniform and settled than formerly, and the whole law assumes a more scientific and systematic character. Covenants, as Lord Eldon has observed (*a*),

(*a*) 15 Ves. 264.

may be for almost any thing; and the most casual observer cannot have failed to perceive how very considerable a feature they constitute in almost every modern conveyance. In fact, no part of the instrument requires more scrupulous nicety of attention. To all professional gentlemen a knowledge of the Law of Covenants cannot prove otherwise than of the utmost utility; but to the real property lawyer in particular, an intimate acquaintance with their nature, construction, and operation, is absolutely indispensable. His avocations necessarily bring his mind hourly in contact with that branch of the law; and unless he make himself perfectly familiar with its details, it is impossible for him to perform his required duties with honor to himself, or advantage to those who seek the benefit of his information and assistance.

In the following sheets will be considered—*First*, The nature and kinds of covenants, and of the parties thereto; *Secondly*, The general rules of construction; *Thirdly*, The construction of, and other matters connected with, covenants of most ordinary occurrence in practice; *Fourthly*, The liabilities and rights arising from covenants; *Fifthly*, The remedies and relief incident thereto; and *Lastly*, will be noticed those covenants which are *ab initio* void; and the means by which others, valid in their creation, may be discharged or suspended.

PART THE FIRST.

OF THE NATURE AND KINDS OF COVENANTS, AND OF THE PARTIES THERETO.

CHAPTER THE FIRST.

OF THE NATURE OF COVENANTS.

A COVENANT may be defined to be an agreement between two or more persons, by an instrument in writing, sealed and delivered; whereby some of the parties engage, or one of them engages, with the other or others of them, that some act hath or hath not already been done; or for the performance or non-performance of some specified duty. It has been said, that in general covenant will not lie on a contract *in præsenti*, as on a covenant to stand seised (*b*); or that a certain horse is yours (*c*); or shall henceforth be the property of another (*d*); yet, without doubt, in some cases, on a covenant *in præsenti*, as that the covenantor *is* absolutely seised of an estate of inheritance, and *hath* good right to Definition.

(*b*) Pybus v. Mitford, 1 Mod. 121. 159; S. C. 2 Lev. 75; Freem. 351; T. Raym. 228; 1 Vent. 372; 3 Keb. 129. 239. 316. 338. Plowd. 308. Finch's Law, 49, [b].

(*c*) Shep. Touch. 162.

(*d*) Plowd. 308; Finch's Law, 49, [b].

convey, an action may be maintained (*e*). So a covenant that terminates in itself is not properly a covenant, but a defeasance (*f*); as a covenant by a lessee that the demise shall be void, which will have the effect of determining the lease, and will in consequence disable him from suing on the lessor's covenants.

The lien.

That part of a covenant which precedes and introduces the subject matter of the agreement itself, and binds or obliges the covenantor to the observance of his contract, is denominated the *lien*. By its aid is limited the extent to which the covenantor is willing to render himself liable. He may covenant for himself alone, or for himself and the acts of his wife; singly or severally as to some; jointly with reference to others; as far as regards his own estate or interest, or the estate or interest of another. In short these liens may be modelled and adapted to any situation, object, or combination of circumstances, however complicated (*g*).

Covenantor.

The party entering into the covenant is called the *covenantor*, and he with whom it is made, the

Covenantee.

covenantee.

The rule that a covenant cannot be created but

(*e*) Kingdon v. Nottle, 4 Mau. & Selw. 53.

(*f*) Plowd. 138. 308, a.

(*g*) The insertion in the Appendix of the *liens* chiefly used in modern practice will, it is hoped, prove a valuable addition to this work.

by deed (*h*) is, with two or three exceptions hereafter noticed (*i*), universally true; and it is equally true, that on any writing in the nature of an agreement under hand and seal, covenant will lie (*k*). Thus on a bond it is supportable, for it proves an agreement (*l*); and whether the deed be an indenture or deed-poll is immaterial (*m*). Where the latter instrument is used, it need not of course be executed by the covenantee, although he must be named therein (*n*); his acceptance being such an assent to the contract as will render it binding (*o*); and the party must have the deed to show (*p*). Therefore, where in covenant the plaintiff declared that J. S. being arrested at his suit, and in the custody of the bailiff, he the defendant, in consideration that the plaintiff would order the release of J. S., promised and engaged to bring in the body of J. S. into the custody of the bailiff on such a day, on demurrer it was held that the action would not lie, the plaintiff not being named in the agreement (*q*).

(*h*) Fitzh. N. B. 145. A. G. Shep. Touch. 160. Metcalfe v. Rycroft, 6 Mau. & Selw. 75. Burnett v. Lynch, 5 Barn. & Cres. 602; S. C. 8 Dow. & Ry. 368.

(*i*) Post, p. 9.

(*k*) Holles v. Carr, 3 Swanst. 647, 8; S. C. Rep. temp. Finch, 261; 2 Mod. 86; 2 Freem. 3.

(*l*) Hill v. Carr, 1 Ch. Ca. 294. Holles v. Carr, 3 Swanst. 648.

(*m*) Rol. Ab. 517. Bac. Ab. 529. Covenant, (A). Fitz. N. B. 145. K.

(*n*) Green v. Horne, 1 Salk. 197; S. C. Comb. 219, semb. cont. Nurse v. Frampton, 1 Lord Raym. 28; S. C. 1 Salk. 214. See Ex parte Richardson, 14 Ves. 187. Collins v. Plumb, 16 Ves. 454.

(*o*) 4 Cru. Dig. 393. 3d Ed.

(*p*) Shep. Touch. 162.

(*q*) Green v. Horne, sup.

So much does the word *covenant* imply a deed, that there is no occasion to allege in a declaration, that the deed containing the covenant was under the defendant's seal; the circumstance of sealing must be inferred (*r*); and even if it be stated that the defendant covenanted, and the instrument declared on be not sufficiently shown to be a deed, the defect is cured by pleading over (*s*). But where the plaintiff declared, that the defendant, by a certain writing made at Westminster, under his own proper hand, granted the plaintiff an annuity, and covenanted for payment, the court were against the plaintiff on the face of his own declaration; because an action of covenant could not be supported upon this writing, unless it were a deed, and it did not appear to be a deed upon the face of the declaration, not being laid to be sealed with his seal. They also said, that its being laid with a *profert hic in curiâ* could not help it, though it should be found on production to be a deed; but they allowed, that if the plaintiff had declared that the defendant had granted this annuity *per factum suum*, it would have been good (*t*).

It is proper to mention, that a deed-poll containing a covenant to insure against fire may refer to conditions in a printed paper without stamp, seal, or

(*r*) Atkinson v. Coatsworth, 1 Stra. 512; S. C. 8 Mod. 33. Aldworth v. Hutchinson, Lutw. 98. Nels. fol. ed.

(*s*) Dodd v. Atkinson, Ca. temp. Hardw. 342.

(*t*) Moore v. Jones, 2 Stra. 814; S. C. 2 Ld. Raym. 1536; 1 Barnard. K. B. 62. 85.

signature, and the paper shall be considered as part of the deed itself (*u*).

An indenture not *inter partes* will have the operation of a deed poll, on which debt, and covenant also, may be maintained by a party not executing. A deed was drawn in the following terms: "This indenture charter-party witnesseth that Benly, master and part owner of a ship, with the consent of Cooker (the plaintiff), the other part owner, lets the ship to the defendant for a voyage;" the defendant covenanted to pay Benly such a sum as master; and covenanted with the said Benly, and likewise with Cooker, to pay Cooker 300*l.*; and for non-payment, Cooker brought this action of debt on the charter-party. The court were of opinion, that as this was not an indenture between parties, but only a deed poll, the party might covenant with a stranger, and also with other persons, to do several other acts, for which every one severally might bring his action (*v*). Had the deed been *inter partes*, he who was a party to the deed could not covenant with another who was no party; but where one, a mere stranger, and not named a party, (the instrument being *inter partes*,) covenanted with another who was named, and sealed the deed, he was held to be bound by his sealing. This distinction has been often taken (*w*).

(*u*) Routledge v. Burrell, 1 H. Blac. 254.

(*v*) Cooker v. Child, 2 Lev. 74; S. C. 3 Keb. 94. 115. Lowther v. Kelly, 8 Mod. 115. Lucke v. Lucke, Lutw. 93. Nels. fol. ed. Clement v. Henley, 2 Rol. Ab. 22. Faits, (F) 2.

(*w*) Salter v. Kidgly, Carth. 76; S. C. Holt, 210; 1 Show.

Where one agreed to let a house to another at a certain rent, and a stranger covenanted on behalf of the lessee, that he (the lessee) should pay the rent, the court decided that on this deed, the defendant, although not a party, was clearly liable to an action of covenant, in consequence of his having sealed.

And very recently a similar judgment was pronounced. The declaration stated that by indenture between J. Drummond and C. Drummond, in his lifetime, (whom plaintiffs survived,) of the first part, the dowager baroness Southampton, then guardian of Charles Lord Southampton, (plaintiff,) of the second part, and the defendant, and one G. R. of the third part, J. D. and C. D., since deceased, with the assent of Lady Southampton, did demise to defendant and G. R. certain premises therein mentioned; habendum for twenty-one years; reddendum unto the said Charles Lord Southampton and the heirs male of his body, and for default of such issue, unto such other person or persons as for the time being should be entitled to the remainder or reversion of the same premises, expectant on the determination of the said demise, during the residue of the said term, a certain yearly rent; and defendant and G. R. severally covenanted and agreed with

58. East Skidmore v. Vaudstevan, Cro. Eliz. 56; S. C. nom. Scudamore v. Vaudenstene, 2 Inst. 673; 2 Rol. Ab. 22. Faits, (F) 1. Storer v. Gordon, 3 Mau. & Selw. 322. Metcalfe v. Eycroft, 6 Mau. & Selw. 75. Berkeley v. Hardy, 5 Barn. & Cres. 355; S. C. 8 Dow. & Ry. 102. Barford v. Stuckey, 5 J. B. Mo. 22; S. C. 2 Brod. & Bing. 333; 1 Bing. 225.

Charles Lord Southampton, and with J. D. and C. D., and the survivor, and the heirs of the survivor, that they would pay the said yearly rent unto the said C. Lord Southampton, &c. (according to the reddendum): the court held, that upon the face of this lease, they were not at liberty to presume that any interest passed except from J. and C. Drummond. Lord Southampton was a stranger to the indenture, and could not join in any action for non-performance of the covenant contained in it (*x*).

Some instances, (being the exceptions before alluded to,) are to be found of covenants created without deed. By the custom of London an action of covenant may be maintained without a specialty (*y*). In the city of Bristol there is also a custom, that *conventio ore tenus facta* shall bind the covenantor as strongly as if it were made in writing; but the custom will not warrant an action against an executor; for the covenant binds the covenantor only by custom, and shall be taken strictly (*z*).

Another instance of a covenant arising against the party without his deed is to be found in the case of the king's lessee by patent, who, although there is no sealing by such lessee, is liable upon his covenant in the patent (*a*). For when he takes by patent he

(*x*) Lord Southampton v. Brown, 6 Barn. & Cres. 718.

(*y*) 22 Ed. 4. 2, a. Priv. Lond. 149. Fitz. N. B. 146, A. Com. Dig. London, (N. 1.).

(*z*) Wade v. Bemboe, 1 Leon. 2.

(*a*) Ewre v. Strickland, Cro. Jac. 240; S. C. nom. Evers v. Strickland, 1 Bulstr. 21. but this point not noticed. Brett v. Cum-

consents to all things therein, and the words in that clause or sentence are as spoken by him (*b*). Another reason given is, because the lessee takes by matter of record, and although in show they are the words of the lessor only, yet the lessee accepting and enjoying the premises demised, it is as well his covenant in fact, and shall bind him as strongly, as if it had been a covenant by indenture (*c*). This, it will be noticed, is on a transaction between the king and a subject (*d*): whether the principle can be extended to cases between subject and subject is now to be discussed.

A proposition has been advanced, and received without scruple by the profession, that a person may, by certain acts of his own, such as his acceptance of an interest conveyed by a deed which he never executed, bind himself to perform all the covenants and conditions therein contained, as effectually as if he had in a formal manner sealed and delivered the instrument. This, it is to be observed, is totally independent of any custom or usage or matter of record. As the position has been transcribed from book to book, and has at different times been adopted

berland, Cro. Jac. 399. 521; S. C. 3 Bulstr. 163; 1 Rol. 359; 2 Ib. 63; Poph. 136; Godb. 276. Wooton v. Hele, 1 Mod. 291, 2.

(*b*) Ewre v. Strickland, sup.

(*c*) Brett v. Cumberland, sup.

(*d*) In like manner, certain words will constitute a condition when inserted in grants from the crown, which will not have the same operation in deeds between subjects; as, *ad faciendum; faciendo; eâ intentione; ad effectum; ad propositum; ad solvendum;* Co. Lit. 204, a. 10 Co. 42, a.

in the works of gentlemen highly distinguished for their legal attainments (*e*), the author feels considerable diffidence in venturing to deviate from the beaten track, and to submit his own views in opposition to the opinions entertained by more experienced members of the profession; but the ground on which their opinion is founded seems too much at variance with the broad, settled distinction between instruments under seal and those not under seal, and to clash too materially with the technical nature of an action of covenant, to be dismissed without some investigation of, and observations on the authorities cited in support of the position.

The case referred to in almost all the books in favor of the doctrine is to be found in Co. Lit. 231, a. and is as follows: — "An indenture of lease was engrossed between A. of the one part, and D. and R. of the other part, which purported to be a demise from A. to D. and R. A. sealed and delivered the indenture, and D. sealed the counterpart to A.; but R. did not seal and deliver it. And by the same indenture it is mentioned, that D. and R. did grant to be bound to the plaintiff in 20*l.*, in case certain conditions comprised in the indenture were not performed. And for this 20*l.* A. brought an action

(*e*) 4 Cru. Dig. 393. 3d. Ed. s. 4. where the word *by* two persons is inserted instead of *to*. Com. Dig. Covenant, (A. 1.) Vin. Abr. Condition, (I. a. 2.) Dy. 13, b. pl. 66. 2 Rol. Rep. 63. recognised by Lord Coke, 3 Bulstr. 164. 1 Rol. Rep. 359. 2 Ibid. 63. Co. Lit. 230, b. note (1) by Butler. Co. Lit. by Thomas, vol. ii. p. 229. n. (F). Burnett v. Lynch, 5 Barn. & Cres. 596; S.C. 8 Dow. & Ry. 368.

against D. only, and showed forth the indenture. The defendant pleaded, that it was proved by the indenture that the demise was made to D. and R., which R. was in full life, and not named in the writ. The plaintiff replied, that R. never sealed and delivered the indenture, and so his writ was good against D. sole. And there the counsel of the plaintiff took a diversity between a rent reserved, which was parcel of the lease, and the land charged therewith, and a sum in gross, as here the 20*l.* were; for as to the rent, they admitted, that by the agreement of R. to the lease he was bound to pay it; but for the 20*l.*, that was a sum in gross and collateral to the lease, and not annexed to the land, and grew due only by the deed; and therefore R., said he, was not chargeable therewith, for that he had not sealed and delivered the deed. But, inasmuch as he had agreed to the lease, which was made by indenture, he was chargeable by the indenture for the same sum in gross; and, for that R. was not named in the writ, it was adjudged that the writ did abate." And for this the cases in the note (*f*) are cited by Coke.

That the case is good law there is no reason to doubt, but the misapprehension and misrepresentation of the kind of action have been the occasion of the seeming error into which the followers of Lord Coke have fallen. It will be observed, that in the passage just quoted the words are; "And for this 20*l.* A. brought an action against D. only," using the word *action* generally, without confining it

(*f*) 38 Ed. 3. 8, a. 3 H. 6. 26, b. 45 Ed. 3. 11, 12.

to any particular class. On reference, however, to the year book, 38 Ed. 3. 8, a., from which the case is extracted, the form of the action proves to be *debt* and not *covenant*. It is not necessary here to enter into an inquiry whether *debt* could be maintained under the circumstances (*g*); it is sufficient to shew that the case referred to does not warrant the position that covenant can be supported against a party, who, without executing the deed, has availed himself of a benefit under it.

The case in the year book, 3 H. 6. c. 26. (*h*), to which reference is made in Co. Lit. was also an action of *debt* and related to the defeasance of an obligation. The object of the suit was to recover from one T. B. twenty marks on his bond. The defendant pleaded a deed executed by the obligee, subsequently to the date of the bond, to one J. H., which recited the bond, and then *granted* that if the said J. H. should perform certain conditions, then the bond should be void. It was averred that J. H. had performed the conditions, and the question before the court was, whether the defendant, being a stranger to the deed of defeasance, could by his plea take advantage of it. The case was twice argued, but ultimately judgment was given against the defendant by three judges against the opinions of two dissentient, the Chief Baron being in favor of the plaintiff.

(*g*) Lock v. Wright, 1 Stra. 570; S. C. 8 Mod. 40.

(*h*) The former part of the case will be found, ibid. p. 18.

How little this case bears upon the point is evident; but if it possesses any influence at all, it must be admitted, that the decision, denying the defendant, on the score of his being a stranger, the privilege of pleading the defeasance, militates against rather than supports the proposition advanced.

Next in order in Co. Lit. is 45 Ed. 3. 11, 12.; but this case has less relation to the question than the preceding. The plaintiff had leased a manor to a man and wife for the term of their lives, rendering twenty marks a year rent, and they *obliged* themselves that the plaintiff should have such surety for payment of the money as his counsel should devise. On their refusal, a writ of *covenant* was brought against them both, and on an objection that the wife should not have been joined in the action, the writ was quashed.

The principal difficulty to be surmounted is the sanction which the proposition appears to have received from a most profound lawyer and able judge in a very recent case (*i*); but when all the circumstances attending that recognition are considered, it is submitted that the observation of Lord *Tenterden*, then Lord Chief Justice *Abbott*, is not conclusive on the point. The case was—the executors of a lessee for years assigned by a *deed-poll* the demised premises to one Lynch (the defendant) for the residue of the term, under and subject to the payment of the

(*i*) Burnett v. Lynch, 5 Barn. & Cres. 602. See likewise Staines v. Morris, 1 Ves. & B. 14.

rent reserved by the original indenture, and the performance of the covenants therein contained, &c. Lynch took possession and occupied the premises under this assignment, and before the expiration of the term assigned over. The lessor sued the executors of the lessee for breaches of covenant committed during the time that Lynch continued assignee of the premises, and recovered damages against them. The question then before the court, as far as our subject is concerned, was, whether an action on the case founded on the tort could be maintained against Lynch, for having neglected to perform the covenants during the time that he continued assignee, whereby the executors sustained damage; and it was determined that it could. In delivering his opinion, the Lord Chief Justice said (*k*), "It has been contended, that if any action will lie, it must be an action of covenant. I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or who *(under some very peculiar circumstances, such as those mentioned in Co. Lit.* 231 *a.)* has agreed by deed to do a certain thing." Now it is clear that this observation is far from being a judicial determination of the point; and this is more apparent from the circumstance, that neither of the other Judges (Bayley, J. Holroyd, J. and Littledale, J.) in any way even alluded to the case in Co. Lit. The Lord Chief Justice, relying on counsel for the accuracy

(*k*) 5 Barn. & Cres. 602.

of their citations, was evidently misled by its being quoted as an action of covenant (*l*); and that, not from the fountain head, the year book, but from another quotation of the case, as founded on a writ of covenant, in an argument in 2 Rol. Rep. 63.; and finding it impossible to reconcile the incongruity with the general principles and technical nature of an action of covenant, and believing that the case referred to was in covenant, and not in debt, treated it as an exception from the general rule.

The general adoption of this error, if error it be, has manifestly been occasioned by the constant reference to the case as cited in Rol. Rep., instead of at once seeking the decision in the year book. Had the latter course been pursued, it is probable that the case would not have been quoted in Burnett v. Lynch, in support of the position there contended for; nor have derived additional weight as an authority, that a person shall be liable in covenant, although he never executed the deed, in consequence of the notice taken of it by the Lord Chief Justice.

The situation of a party taking an interest by means of such an instrument closely resembles that of a person to whom a conveyance has been made by deed-poll; and the author does not hesitate to assert, that no instance can be found of an action of covenant having been entertained by the courts against one claiming under a deed-poll. He has used every diligence in consulting the books, and has made frequent inquiries of his professional

(*l*) 5 Barn. & Cres. 596.

friends, but has not been able to discover any case in which a lessor has come before the court in an action of covenant against his lessee on a lease by deed-poll, and has had a decision in his favor (*m*). On the contrary, it has been adjudged, that on a deed-poll mutual covenants cannot arise, as it is the deed of one party only (*n*). Indeed in Burnet v. Lynch, the court expressly denied the liability of the assignee, on the ground of his not having executed the deed. And moreover, on a plea of *non est factum* in such a case, where the bare question is deed or no deed, it would seem impossible to establish an indenture against the defendant who never sealed, so as to render him liable in covenant.

The above, then, are the cases on which this strange doctrine rests; two of them being actions of debt (*o*); the third totally unconnected with the subject (*p*); and the last, it is humbly submitted, a mere *obiter dictum* (*q*); and the foregoing are the

(*m*) The generality of the position in the text may not at first sight appear to be consistent with the subjoined cases, but on a strict examination of these authorities the above proposition, it is submitted, will be found to be warranted to its fullest extent. Chancellor v. Poole, 2 Dougl. 764. Staines v. Morris, 1 Ves. & B. 14. Wilkins v. Fry, 1 Meriv. 266. From the imperfect report of Norris v. Elsworth, Freem. 463. it cannot be collected whether the lease was by deed-poll or indenture.

(*n*) Lock v. Wright, 1 Stra. 571; S. C. 8 Mod. 40. And see Bidwell v. Lethbridge, 1 Barnard. 235. Sutherland v. Lishnan, 3 Esp. 42. Kimpton v. Eve, 2 Ves. & B. 353. Co. Lit. 363, b.

(*o*) 38 Ed. 3. 8, a. 3 H. 8. 26. 18, b.

(*p*) 45 Ed. 3. 11, 12.

(*q*) Burnett v. Lynch, 5 Barn. & Cres. 602.

reasons which induce the author to maintain that an action of covenant can only be supported, (with the exceptions above noticed, the one founded on custom, the other on a contract between the king and the subject, and a matter of record,) against a person, who by himself or some other person acting on his behalf has executed a deed under seal.

Perhaps, however, the doctrine has been too long sanctioned to be now reversed. At all events, it is an introduction of an equitable principle into a court of law; the acceptance of a deed being considered equivalent to an actual execution by the lessee. But as the point may admit of some reasonable doubt, it would be extremely unsafe in practice to dispense with the execution of an indenture by the lessee, on the assumption that his entry and enjoyment under the lease would, of themselves, be sufficient to expose him to an action of covenant on breach of any of the covenants to be performed by him.

It is scarcely necessary to mention, that a covenantee without executing the deed may bring an action of covenant against the covenantor (*r*), whether the instrument be a deed poll or an indenture; for the right of suit is constituted by the covenantor's execution of the deed (*s*).

(*r*) Clement v. Henley, 2 Rol. Ab. 22. Faits, (F.) pl. 2. Petrie v. Bury, 3 Barn. & Cres. 353; S. C. 5 Dow. & Ry. 152.

(*s*) Vernon v. Jefferys, 2 Stra. 1146; S. C. 7 Mod. 358.

CHAPTER THE SECOND.

OF THE SEVERAL KINDS OF COVENANTS.

SECT. I.

OF AFFIRMATIVE—NEGATIVE—EXECUTED—EXECUTORY—OBLIGATORY—DECLARATORY—AND DISJUNCTIVE OR ALTERNATIVE COVENANTS.

With regard to their several kinds, covenants admit of a variety of divisions. They are either in the *affirmative*, that something is already performed or shall be performed hereafter; or in the *negative*, that the party hath not performed or will not perform a certain act; as that he hath not done, nor will do any act to incumber. A covenant of the first kind will not deprive a man of a right lawfully enjoyed by him independently of the covenant; as if the lessor agree with the lessee that he shall have thorns for hedges growing upon the land, by assignment of the lessor's bailiff. Here no restraint is imposed upon the exercise of that liberty which the law allows to the lessee, and therefore he may take hedgebote without assignment; but had the words been in the negative, that he should not take thorns without assignment, or that he should take by as-

Affirmative.

Negative.

signment and not otherwise, the case would be materially altered (*t*).

A negative covenant cannot be said to be performed until it becomes impossible to break it. On this ground the courts are unwilling to construe a covenant of this kind to be a condition precedent. Therefore, where a tailor assigned his trade to the defendant, and covenanted thenceforth to desist from carrying on the same business with any of the customers, and the defendant, in consideration of the performance thereof, covenanted to pay him a life annuity of 100*l.*, it was held, that if the words *in consideration of the performance thereof* should be deemed to amount to a condition precedent, the plaintiff would never obtain his annuity; because, as at any time during his life he might exercise his former trade, until his death it could never be ascertained whether he had performed the covenant or not (*u*). The defendant, however, on a breach by the plaintiff, might have his remedy by a cross action of covenant (*v*).

There is a difference also between a negative covenant which is only in affirmance of an affirmative covenant precedent, and a negative covenant which is additional to the affirmative covenant. A covenant by a person to sail from the river Thames to a certain place in Spain, the words of the cove-

(*t*) Anon. Dy. 19, b. pl. (115). Shelley, J. *dissent.* 1 Leon. 251.

(*u*) Hunlocke, or Humlock, v. Blacklowe, 2 Saund. 156; S. C. 1 Sid. 464; 1 Mod. 64; 2 Keb. 674.

(*v*) Ibid.

nant being, *quòd decederet, procederet, et non deviaret,* is of the latter description; for unless restrained by the negative covenant, *quòd non deviaret,* which is additional, he might have departed and proceeded, and have gone to Africa or the West Indies (*w*). To a covenant of the former class a plea of performance generally is good; but not to the latter; the defendant in that case must plead specially (*x*).

Executed. Executory.

Where the covenant relates to an act already done it is usually termed a covenant *executed;* and, *executory,* where the performance is future (*y*).

Obligatory. Declaratory.

Between covenants *obligatory,* and covenants *declaratory,* there is this difference. The latter serve to limit and direct uses; but the former, as that the party shall enjoy free from incumbrances, shall never be construed to raise an use, because they have another effect (*z*).

Disjunctive or Alternative.

Some covenants are framed in the *disjunctive* or *alternative,* giving the covenantor the choice of doing, or the covenantee the choice of having performed, one of two or more things at election; as a covenant to make a lease to J. S., or to pay him 100*l.* at Michaelmas, as the covenantor, or, as the case may be, the covenantee shall prefer. The rule in these cases seems to be, that the party for whose benefit

(*w*) Laughwell v. Palmer, 1 Sid. 87; S. C. nom. Lathwell v. Fisher, or Palmer, 1 Keb. 334. 372.

(*x*) Ibid.

(*y*) Shep. Touch. 161.

(*z*) Hore v. Dix, 1 Sid. 27.

the alternative arises must do the first act, by determining his election. Therefore, where one Kerne covenanted to pay to Morris, his executors, &c. at the choice and election of Morris, within a month after the death of Lady Kerne, thirty pounds or twenty kine, it was decided, that the defendant might plead in bar the plaintiff's neglect to make his election within the month, as the covenantor was not obliged to tender both money and kine (*a*). But where the covenant was to deliver to the plaintiff at such a day and place twenty pounds or ten kine at the then choice of the covenantee, the court were clearly of opinion, that the defendant in pleading performance ought to show a tender to the plaintiff as well of the twenty pounds as the ten kine, and for default thereof judgment was given against the defendant (*b*).

So where one engaged to make such further assurance within such a time, by fine or feoffment, as the covenantee should choose, it was held to be incumbent on him to elect which of the assurances he would have (*c*).

The defendant in another case agreed to come over to England, in order to dance ballets at the Italian Opera in the Haymarket, or at such other place as the plaintiff should appoint. The defendant never came. No license had been obtained from the Lord Chamberlain for the Opera House,

(*a*) Basset v. Kerne, 1 Leon. 69; S. C. Mo. 241.

(*b*) Fordley's case, 1 Leon. 68.

(*c*) Basset v. Kerne, 1 Leon. 70.

nor had any other place been appointed by the plaintiff; the court therefore decided, that the defendant could not perform at the Opera for want of the license, and that he was not liable to an action for not going elsewhere, in consequence of the plaintiff's neglect to furnish him with notice to dance at any other place (*d*).

In like manner, on a covenant to do a specific act, or an act to be appointed by a third party, if the latter be chosen, the duty of procuring the appointment falls on the covenantor. Accordingly where the defendant, the lessee of a mill, covenanted to leave the mill-stones in as good condition as he found them, or to pay to the plaintiff so much as they should be damnified, the damage to be estimated by A. and B. who viewed them when the defendant entered upon the premises, and the plaintiff assigned for a breach that the defendant had left the mill-stones damnified, and had not made satisfaction to the plaintiff, and the defendant pleaded that A. and B. had not estimated the damage, the court were of opinion, that since the latter part of this disjunctive covenant was for the safety of the defendant, it belonged to him to procure this estimation, or otherwise he should be liable. If the estimation had been to be made by such persons as the covenantee should appoint, and he had refused to appoint, that would have excused the defendant, because the performance of the cove-

(*d*) Gallini v. Laborie, 5 Term Rep. 242.

nant was rendered impossible by the act of the covenantee (*e*).

So where one covenanted to deliver to the plaintiff all the tackle of a ship mentioned in an inventory, or in default thereof to pay him before a day named so much as the tackle should be valued at by four men, and the defendant pleaded that before the day the men had not made their valuation, the court held, that as the option was for the advantage of the defendant, it was his duty to have procured the valuation, and gave judgment against him (*f*).

It may be mentioned, that if a party covenants with another to pay him a sum of money on one of two events which should first happen, the plaintiff, by deferring his suit until the happening of the later event, is not debarred of his right of action; and though entitled to his action on the first contingency, yet if he tarry till the second it is but his own delay, of which the defendant shall not take advantage (*g*). The plaintiff therefore need not aver that the first of the events had not happened (*h*).

And where there was a covenant to pay the plaintiff annually two hens, or in lieu thereof one shilling, and the breach assigned was that he did

(*e*) Studholme v. Mandell, 1 Ld. Raym. 279; S. C. Lutw. 213. Nels. fol. ed. Lamb's case, 5 Co. 23, b.; S. C. Cro. Eliz. 716.

(*f*) Moore v. Morecombe, Mo. 645.

(*g*) Loggin v. Orrery, 1 Lord Raym. 133.

(*h*) Ibid.

not pay either, it was deemed unnecessary for the plaintiff to allege that he had made his election; but if the breach assigned had been that he did not pay one of the two things, the plaintiff must have alleged that he had made his choice to have that thing paid (*i*).

When any of the covenants are in the disjunctive, and in the election of the covenantor to do one of two things, performance ought to be specially pleaded; for otherwise the court cannot know what part hath been performed (*k*).

SECT. II.

OF EXPRESS COVENANTS.

COVENANTS, again, are either *express* or *implied;* or, as they are sometimes termed, *covenants in deed,* or, *covenants in law.*

Express covenants are such as are created by the express words of the parties in a deed, declaratory of their intention. As the good of society requires that contracts entered into with the solemnity incident to deeds or covenants should be inviolably ob- Express.

(*i*) Ashworth v. Lord, Say. 232.

(*k*) Oglethorpe v. Hide, 1 Leon. 311.

served and strictly executed, the law has decreed, that where a man expressly covenants to do an act which he would not otherwise be bound by law to perform, he has, by his own deliberate act, imposed on himself a responsibility, from which in general he cannot be relieved, and is compellable, if he neglect such duty, to make compensation in damages to the party injured (*l*). And where a man submits or covenants to be examined as to matters which will be penal on him, equity even will not interpose in his favor (*m*). On the same ground it has been determined, that a tenant for life without impeachment of waste is liable on his express covenant to repair, notwithstanding it was urged that such a covenant was inconsistent with his estate (*n*). And although a covenant be entered into under a mistaken impression, yet it shall be equally binding on the covenantor (*o*). A person may, on this principle, also, be responsible on his express covenant for the performance of some duty by another (*p*); as the observance of an award by such third person (*q*); or for the payment by a stranger of a certain sum of money on the conveyance

(*l*) Barker v. Thorold, 1 Saund. 47; S. C. 2 Keb. 145.

(*m*) East India Company v. Atkins, 1 Stra. 168; S. C. Com. 347. South Sea Company v. Bumstead, Mos. 74. 77.

(*n*) Chesterfield v. Bolton, 2 Com. 626.

(*o*) Scounden v. Hawley, Holt, 174; S. C. Comb. 172. Anon. 12 Mod. 399.

(*p*) Hughes v. Humphreys, 6 Barn. & Cres. 680, 6. Branch v. Ewington, 2 Dougl. 518. Cuming v. Hill, 3 Barn. & Ald. 59.

(*q*) Lupart v. Welson, 11 Mod. 170.

of an estate to him (*r*); or for the conveyance of an estate by him (*s*). Nor is it any plea to an action at law for breach of the agreement to say, that the third person had nothing to do with it, or no estate in it; for the defendant having undertaken to procure the conveyance, must do so at his peril (*t*).

Where, however, the party engages in a contract, in the performance of a public duty, on behalf of the public, such person shall not be personally responsible in an action on that contract; for it would be extremely dangerous and detrimental to the King's service to hold that individuals should make themselves personally liable on contracts which they enter into on the part of government; since no private person would accept of any command on such terms (*u*). Whether the contract be by parol or by deed makes no difference as to the construction to be put upon it (*v*).

By what words created.

In order to constitute an express covenant the

(*r*) Appleton v. Binks, 5 East, 148; S. C. 1 Smith, 361.

(*s*) Anon. 2 Ch. Ca. 53. Scounden v. Hawley, Holt, 174; S. C. Comb. 172.

(*t*) Staughton v. Hawley, M. 1 W. & M. Rot. 662. B. R. judgment in H. after. Sugd. V. & P. 183. n. 6th ed.

(*u*) Macbeath v. Haldimand, 1 Term Rep. 172. Unwin v. Wolseley, Ibid. 674. Allen v. Waldegrave, 2 J. B. Mo. 621; S.C. 8 Taunt. 566. See also Hancock v. Hodgson, 4 Bing. 269.

(*v*) Unwin v. Wolseley, 1 Term Rep. 678. Girdley v. Lord Palmerston, 7 J. B. Mo. 91; S. C. 3 Brod. & Bing. 275. See also Miller v. Seare, 2 W. Black. 1141. and 2 J. B. Mo. 704.

law does not require any precise or technical language (*w*). The formal word "covenant" is not indispensably necessary (*x*); for wherever the intent of the parties can be collected out of a deed for the not doing or doing a thing, that is sufficient to make an action of covenant maintainable (*y*). This rule is very simple and comprehensive, as will be seen from the following examples.

By words of obligation.

Thus covenant will lie on the words of a bond, for they prove an agreement (*z*); or on the words "I oblige," "agree" (*a*); or, "I bind myself to pay so much at such a day, and so much at another day" (*b*); or, "I am content to give to A. 10*l*. at Michaelmas and 10*l*. at Lady-day" (*c*). So, where a party acknowledged himself to be accountable for all such moneys as should be charged by him on A., to be paid to B., covenant, it was held, could be brought, as it might on any words in a deed purporting to be an agreement for payment of money (*d*). An action will also lie on words of agreement, although the parties may disclaim an intention to co-

(*w*) Andrews v. Ellison, 6 J. B. Moore, 199. Lant v. Norris, 1 Burr. 290.

(*x*) Harwood v. Hilliard, 2 Mod. 268; S. C. 3 Keb. 848. Stevinson's case, 1 Leon. 324. Saltoun v. Houstoun, 1 Bing. 433; S. C. 8 J. B. Mo. 546.

(*y*) Hill v. Carr, 1 Ch. Ca. 294. Duke of St. Albans v. Ellis, 16 East, 352. 12 East, 182. n.

(*z*) Hill v. Carr, 1 Ch. Ca. 294.

(*a*) Williamson v. Codrington, 1 Ves. 516. Otway v. Holdips, 2 Mod. 266.

(*b*) Norrice's case, Hardr. 178.

(*c*) 3 Leon. 119. pl. 199.

(*d*) Brice v. Carre, 1 Lev. 47; S. C. 1 Keb. 155.

venant; as where they "resolved and agreed, and did by way of declaration and not of covenant spontaneously and fully agree." Lord Eldon called this clause nonsensical (*e*).

But words merely importing an order or direction that other persons should pay a sum of money cannot be the foundation of an action of covenant. In the case of a policy of insurance which declared, "Now we the trustees and directors of the said society whose names are hereunto subscribed, do order, direct, and appoint the directors for the time being of the said society to raise and pay, by and out of the moneys, securities, and effects of the said contributionship," &c. a sum of money in case of loss by fire, the court conceived that nothing was to be found in the instrument which constituted a covenant, the deed being upon the face of it only an order for the payment of money (*f*).

Where, however, a person was admitted a member of a fire association, upon the terms and conditions prescribed by their deed of settlement, and paid one year's insurance; and by a policy under seal, three of the directors declared that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sums set against each article respectively; and it was further stipulated, that neither of the directors who signed the policy,

(*e*) Ellison v. Bignold, 2 Jac. & Walk. 510.

(*f*) Alchorne v. Saville, 6 J. B. Moore, 202. note (*a*).

nor the plaintiff, nor the holder of it, should as members of the society be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same: In reasonable construction, said the court, this instrument may be considered as a covenant to entitle the insurer, in case of loss by fire, to receive a remuneration out of the funds of the society; particularly as the policy was signed by the defendants, who agreed or covenanted to be themselves personally liable, as far as the funds of the society would extend (*g*): and this case was expressly distinguished from Alchorne v. Saville, which, they said, was merely an order on the directors for the time being to pay, and they did not sign the policy.

So, if it be agreed between two persons that one shall pay the other a sum of money for his lands on a particular day; these words will amount to a covenant on the part of the latter to convey the lands (*h*).

And words used in the future tense, unconnected with preceding words of agreement, will of themselves be sufficient to constitute an express covenant; and it makes no difference whether the first or third person be used: for example, a lease was made to W. C. wherein were these words: "And the said William, his executors, &c. shall sufficiently repair

(*g*) Andrews v. Ellison, 6 J. B. Moore, 199. 319; S.C. 1 Sid. 423; T. Raym. 183; 1 Lev. 274; 2 Keb. 533.

(*h*) Pordage v. Cole, 1 Saund. 542.

the said mill and premises, and leave them sufficiently repaired:" On these words it was determined covenant could be maintained (*i*). And the like was resolved on the words in the first person, "I have in my custody a writing obligatory, &c. and I will be ready at all times when I shall be required to re-deliver the same writing obligatory to the said B." (*k*).

By words of exception or restriction.

Words in the form of an exception may also amount to a covenant. A lessee agreed that he would from time to time and at all times during the term, plough, sow, manure, and cultivate the premises demised, (except the rabbit-warren and sheep-walk,) in a regular and due course of husbandry, according to the custom of the country; and it was determined, that the exception was as much a covenant or agreement as the rest of the stipulation in which it was placed; and that the words, "except the rabbit-warren and sheep-walk," in this place, were tantamount to the words, "but not the rabbit-warren and sheep-walk," which would have imported more directly perhaps a negative of ploughing the rabbit-warren and sheep-walk (*l*). So where the words were used restrictively, as that the lessee should have wood, *non succidendo arbores,* these were held to be a covenant by the lessee that he would not cut down the trees (*m*). So were the words that A.

(*i*) Brett v. Cumberland, Cro. Jac. 399. 521; S.C. 3 Bulstr. 163; 1 Rol. Rep. 359; 2 Ibid. 63; Poph. 136; Godb. 276.

(*k*) Rol. Ab. 519. pl. 5. Bac. Ab. Covenant, (A) p. 528. cited 2 Mod. 89. as Walker v. Walker.

(*l*) Duke of St. Albans v. Ellis, 16 East, 352.

(*m*) Mar. 9. pl. 22. Anon. Dy. 19, b. pl. (115).

should take fire-bote without cutting more than was necessary (*n*).

Where the demise is of land, except a close, covenant will not lie for the disturbance of that close (*o*); but where the exception is of a thing *dehors* to the lessor, as a way, common, estovers, or other profit *apprendre*, that is equivalent to an engagement by the lessee for the lessor's enjoyment: the exception amounts to a reservation of newly created way, &c. and therefore covenant lies (*p*). But if a party reserves a liberty to take certain property upon the premises assigned, this differs from a covenant. Thus in an action on an agreement between the plaintiff and defendant that the former should convey all her interest in a certain lease to the latter, except that the assignor should have every year 200 furze or wood faggots, the defendant had judgment, because the deed did not amount to a covenant that he should deliver so many faggots; but it was a reserved liberty for her to take them on the land (*q*). So on a covenant by a lessee to repair the demised premises, principal timber only excepted, the lessor was not obliged to deliver the timber; for the exception amounted to no more than

(*n*) Stevinson's case, 1 Leon. 324.

(*o*) Lady Russel v. Gulwell, Cro. Eliz. 657; S. C. Mo. 553; cited 1 Rol. 102; Hob. 276; 11 Co. 50, b.

(*p*) Bush v. Cole, 1 Salk. 196. S. C. 12 Mod. 24; Carth. 232; 1 Show. 388, nom. Bush v. Calis. Co. Lit. 47, a.

(*q*) Tuckerman v. Tuckerman, Lutw. 101. Nels. fol. ed. Stevens v. Carrington, 1 Dougl. 27.

that he was to provide it ready for the defendant to carry (*r*).

If an office be granted *absque impetitione, denegatione, restrictione, &c.* covenant will lie on the words against the grantor (*s*).

By words of recital.

Words of recital also may, when joined and considered with the rest of the instrument, be the foundation of an action of covenant. The case was: A. B. by deed-poll, reciting that he was possessed of certain lands for years by good and lawful conveyance, assigned the same to J. S., with divers covenants, articles, and agreements in the said deed contained, which were or ought to be performed on his (A. B.'s) part, and a bond was given by A. B. for performance of the covenants. The court held that the recital was an agreement within the meaning of the condition of the bond; for, said *Gawdy*, J. "every thing contained in the deed is an agreement, and not only that which I am bound to perform: As if I recite by my deed that I am possessed of such an interest in certain land, and assign it over by the same deed, and thereby covenant to perform all agreements in the deed, if I be not possessed of such interest, the covenant is broken:" And it was clearly resolved, that if A. B. had not the interest by a good and lawful conveyance the obligation was

(*r*) Brailsford v. Parsons, Lutw. 95. Nels. fol. ed. See 277. Stone v. Gilliam, 1 Show. 149.

(*s*) Bishop v. Redman, 1 Leon. 277.

forfeited (*t*). So where a termor for ninety-nine years, if three persons named should so long live, recited his interest, and that one life was in being, and assigned his term; it was adjudged that this recital amounted to a covenant that the life continued (*u*). So on the demise of a coal mine, reciting that before the sealing of the indenture it was agreed on consideration that the plaintiff should have the third part of the coals dug up; it was objected that this was no covenant to pay the third part, but a recital of an agreement to have it; yet *Hale*, C. J. held, that were it but a recital that before the indenture the parties had agreed, it would amount to a covenant; for the indenture itself confirmed the agreement and intent precedent (*v*).

If a particular recital is contained in a deed, and referred to as the occasion of a covenant, the covenant if inconsistent therewith will not be binding; as if J. S. by agreement, reciting that R. M. deceased, the late father of Joseph M., Samuel M., Thomas M., Nathaniel M., and John M., had bequeathed to each of them the said Joseph, &c. (naming all but Nathaniel,) 50*l.*, covenants to pay the aforesaid Joseph, &c. (including Nathaniel,) the

(*t*) Severn v. Clerke, 1 Leon. 122. Holles v. Carr, 3 Swanst. 638. 643; S. C. 2 Mod. 86; Rep. temp. Finch, 261; 2 Freem. 3. Johnson v. Procter, Yelv. 175; S. C. Cro. Jac. 233; 1 Bulstr. 2; 2 Brownl. 212. cited by Lord Eldon, 2 Bos. & Pul. 25.

(*u*) Best v. Brett, 1 Rol. Ab. 518, 9. cited in Holles v. Carr, 3 Swanst. 649. See also Barton v. Fitzgerald, 15 East, 530.

(*v*) Barfoot v. Freswell, 3 Keb. 465.

aforesaid several legacies, &c. nothing being mentioned in the recital to have been bequeathed to Nathaniel, the defendant's covenant, although with Nathaniel as well as the rest, shall not oblige him to pay Nathaniel any thing; for the covenant was to pay the legacies or sums *aforesaid* (*w*).

The word *whereas*, when it renders the deed senseless or repugnant, may be struck out as impertinent, and shall not vitiate a deed in other respects sensible. An agreement ran thus: "Memorandum, on the 14th day of February, 1687. Imprimis, 'Tis covenanted by T.H. and John Smith: Whereas T.H. hath covenanted by virtue of these presents, concluded and articled all his lands to J. S. and his heirs. Item, for the sum of 315*l.*, the one half to be paid the 2nd of February, &c. Item, the said J. S. then to enter; the other half to be paid the 2nd of February following." An objection was raised that the word *whereas* in the beginning of the articles made the whole to be no more than a recital. But it was answered that it was an impertinent word, and would not make the whole a recital; because the very next words were, T. H. by virtue of these presents hath covenanted, &c. It was also decided, that the preter tense should be taken for the present, *ut res magis valeat*; and that upon the whole frame of the sentence, it was plain the parties intended that the defendant should have the lands,

(*w*) George v. Butcher, 2 Vent. 140. See also Ramsden v. Hylton, 2 Ves. 310. Cole v. Gibson, 1 Ves. 507.

because he was to pay the value and enter upon an appointed day (*x*).

An express covenant may also be created by words which, at the first view, might appear to operate rather as conditions, qualifications, or defeasances of covenants.

By words of proviso.

With regard to words of proviso. An office had been conveyed by the plaintiff to the defendant, provided that out of the first profits he should pay the plaintiff 500*l.*; it was held, that as this proviso was in the nature of a covenant, and not by way of condition or defeasance, covenant would lie (*y*).

So where a lease was made to B. for life, with a proviso that if the lessee should die within the term of forty years, the executors of the lessee should have it for so many of the years as should amount to the number of forty, to be computed from the date of the lease, this proviso was held only to amount to a covenant (*z*).

If a lessee for years covenants to repair, provided always and it is agreed that the lessor shall find great timber, &c.; this creates a covenant on the part of the lessor to find great timber, by the word *agreed;* and it will not be a qualification of the

(*x*) Hilton v. Smith, Lutw. 150. Nels. fol. ed.

(*y*) Clapham v. Moyle, 3 Salk. 108; S. C. 1 Lev. 155; 1 Keb. 842. 860. 897.

(*z*) Parker v. Gravenor, 2 Dy. 150, a; S. C. And. 19. pl. 38; Benl. 72. pl. 115; 1 Co. 155, a.

lessee's covenant (*a*). An action, however, will not lie where there is a proviso only, and no express covenant; as if A., in consideration of 400*l.* lent him by B., grants land to B. for 99 years, if G. should so long live, provided if A. should pay 60*l.* per annum quarterly during G.'s life, or should within two years after his death pay B. the 400*l.*, then the indenture should be void; this was deemed to be a mere proviso (*b*). And so in the former case (*c*), had the word *agreed* been omitted, the proviso would not have operated as a covenant on the lessor's part, but only as a qualification of the covenant of the lessee.

By words of condition.

Where A. leased to B. for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them; the lessee was liable to an action for omitting to leave the houses in good plight (*d*); for here an agreement was implied. But wherever the words do not amount to an agreement, or are merely conditional to defeat the estate; as if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, covenant is not maintainable (*e*).

(*a*) Holder v. Taylor, Brownl. 23; S. C. Hob. 12. but a different point. Pordage v. Cole, T. Raym. 183; S. C. 1 Lev. 274. Samways v. Eldsly, 2 Mod. 77.

(*b*) Suffeild v. Barkervil, 2 Mod. 36. Briscoe v. King, Cro. Jac. 281; S. C. Yelv. 206; 1 Bulst. 156; 1 Brownl. 113. Tomles or Toomes v. Chandler, 2 Lev. 116; S. C. 3 Keb. 454. 460.

(*c*) Holder v. Taylor, ubi sup.

(*d*) 40 Ed. 3. 5, b. Bac. Ab. Covenant, (A). Rol. Ab. 518.

(*e*) Geery v. Reason, Cro. Car. 128. See Simpson v. Titterell, Cro. El[14] 242. 2 Co. 71, b.

Under Registry Acts.

East Riding of Yorkshire.

By an act passed in the 6th year of queen Anne's reign, c. 35., entituled, "An Act for the public registering of all deeds, conveyances, wills, and other incumbrances, that shall be made of, or that may affect any honors, manors, &c. within the East riding of the county of York, or the town and county of the town of Kingston upon Hull," &c. it is enacted (*f*), "that in all deeds of bargain and sale hereafter inrolled in pursuance of this act, whereby any estate of inheritance in fee simple is limited to the bargainee and his heirs, the words *grant, bargain, and sell,* shall amount to, and be construed and adjudged in all courts of judicature to be, express covenants to the bargainee, his heirs and assigns, from the bargainor for himself, his heirs, executors, and administrators, that the bargainor notwithstanding any act done by him, was at the time of the execution of such deed seised of the hereditaments and premises thereby granted, bargained, and sold, of an indefeasible estate in fee-simple, free from all incumbrances (rents and services due to the lord of the fee only excepted); and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him; and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him; unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators, and assigns respectively, shall and may in any action to be brought, assign a breach

(*f*) 6 Anne, c. 35. s. 30.

or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale."

North Riding.

An exactly similar clause is contained in the statute, 8 Geo. 2. c. 6. (*g*), relating to lands in the North Riding of the same county.

West Riding.

By sec. 34 of the statute of Anne, the provision is extended to lands lying within the West Riding of the county of York, (the mortgage or purchase whereof shall exceed the sum of 50*l.*,) as effectually as if the same had been inserted and contained in the registry acts (*h*) of that division.

Words of indemnity in marriage settlements.

It may here be noticed, that the common clause of indemnity in marriage settlements, "that the trustees and their heirs shall not be chargeable with or accountable for any money arising in the execution of the said trusts in the said indenture, but what the person or persons so to be accountable shall actually receive," is not a clause of charge, but rather of discharge and indemnity: it is to take away that responsibility which each would be under for the acts of the other, were it not for this clause. The sense of it is, that the trustees and their heirs shall not be accountable for more than they receive; they are accountable for what they actually receive, but not as under a covenant (*i*).

(*g*) 8 Geo. 2. c. 6. s. 35.

(*h*) 2 & 3 Anne, c. 4. 5 Anne, c. 18.

(*i*) Bartlett v. Hodgson, 1 Term Rep. 42.

SECT. III.

OF IMPLIED COVENANTS.

Implied. IMPLIED covenants depend for their existence on the intendment and construction of law. There are some words which of themselves do not import an express covenant, yet being made use of in certain contracts have a similar operation, and are called covenants in law; and are as effectually binding on the parties, as if expressed in the most unequivocal terms (*k*). If land be granted for a term of years by the word *demise* or *grant*, without any express covenant for quiet enjoyment, here the lessee, or his assignee, if ousted by rightful title, may sustain an action on the implied covenant that the lessor warranted he had a good title at the time of executing the deed (*l*).

The distinction between express and implied covenants is not merely technical, but in many instances its consequences are of considerable moment. In construction, express covenants are regarded with greater strictness than those which are implied; and without any consideration a man may enter into an express covenant (*n*).

From an early case (*o*) it appears, that a grantee

(*k*) Bac. Ab. Covenant, (B).

(*l*) Deering v. Farrington, Freem. 367; S. C. 1 Mod. 113; 3 Keb. 304. Hacket v. Glover, 10 Mod. 142. 5 Co. 17. Carth. 98.

(*n*) Shubrick v. Salmond, 3 Burr. 1639. May v. Trye, Freem. 447; S. C. 3 Keb. 764. 780.

(*o*) Harper v. Bird, or Burgh, T. Jo. 102; S. C. 2 Lev. 206.

of a reversion could at common law, independently of the statute 32 Hen. 8. c. 34., maintain an action of covenant against a lessee for rent in arrear on the *reddendum*, which was construed to be an implied covenant (*p*), although the grantor of the reversion after his assignment over, had released all covenants to the lessee. This release, if executed before any breach, or before suit commenced, would clearly have operated as a bar to an action on an express covenant (*q*); but the court held that they would intend the action to be grounded on the *reddendum*, which the lessor could not release after his assignment.

The heir, as he cannot be named, cannot be bound by a covenant in law; but it is otherwise with an executor, who, although not named, is liable on the words *yielding and paying* (*r*). No liability, however, will attach upon an executor after the determination of the estate in respect of which the covenant arose: for example; Tenant for life, with remainder over in fee, granted and demised for fifteen years absolutely, and died before the expiration of the term, the remainder-man entered on the lessee, and the court held, that the lessee could not sue the executor of the tenant for life upon the covenant in law, which, being annexed to the estate, determined by

S. P. Vyvyan v. Arthur, 1 Barn. & Cres. 410; S. C. 2 Dow. & Ry. 670.

(*p*) See post, p. 50. as to the *reddendum*, or the words *yielding and paying*, being an implied or an express covenant.

(*q*) Middlemore v. Goodale, Cro. Car. 503; S. C. W. Jo. 406.

(*r*) Newton v. Osborn, Sty. 387.

his death; though it was agreed that it would have been otherwise on an express covenant for quiet enjoyment (*s*).

Repeated attempts have been made in argument (*t*), with reference to the liability of assignees, to draw a distinction between express and implied covenants, and to shew that an action on the latter must be confined to the actual parties to the deed; and cases have been cited in support of this opinion. The position, however, is scarcely tenable; both principle and the weight of authority seem decidedly opposed to it.

On principle it appears but reasonable that an assignee should be charged as well on an implied as on an express covenant. Let us take the case of a covenant for payment of rent arising out of the words *yielding and paying*, on a demise by indenture, executed by both parties, in which is contained no express covenant to that effect. Here the lessee is chargeable with the payment of rent, in respect of his enjoyment of the property, or in privity of estate only (*u*). The covenant is implied by law for the lessor's benefit, and for the purpose of affording him a remedy, on non-payment of rent, by a form of

(*s*) Swan v. Scarles & Stranson, Mo. 74; S. C. And. 12. Anon. Dy. 257, a. Benl. 150. Bragg v. Wiseman, 1 Brownl. & Gold. 22. Netherton v. Jessop, Holt, 412.

(*t*) Bush v. Calis, or Coles, 1 Show. 388; S. C. Carth. 232; 1 Salk. 196; 12 Mod. 24. but this point is not noticed. Porter v. Swetnam, Sty. 406.

(*u*) Bacheloure v. Gage, W. Jo. 223. Anon. 1 Sid. 447. Auriol v. Mills, 4 Term Rep. 98.

action, to which, in the absence of an express covenant, he would not otherwise be entitled. This benefit, it must be supposed, was intended by law to be commensurate with the interest derived under the lease; but it could not be commensurate, if the act of the party, such as an assignment, could defeat the implied covenant. We therefore find that the lessee was liable on such a covenant, at the suit of the assignee of the reversion, even without the aid of the 32 H. 8. c. 34. (*v*). Now if the benefit ran with the land in the hands of reversioners, on the same principle, the charge must run with the land in the hands of assignees; or in other words, the rights and liabilities must be reciprocal. It must be remembered, too, that a covenant to pay rent runs with the land at common law, and binds an assignee, though not named (*w*). The object of the law in raising an implied covenant was to supply the omission of an express one; but this could only be accomplished by imparting to the former the principal qualities of the latter, and in consequence of charging the assignee with the payment of rent. Being responsible in respect of privity of estate only, the lessee's assignment of his interest deprives the lessor of his action of covenant against such lessee (*x*); because all privity of estate then ceases, as between them;

(*v*) Harper v. Burgh, or Bird, 2 Lev. 206; S. C. T. Jo. 102. Vyvyan v. Arthur, 1 Barn. & Cres. 410; S. C. 2 Dow. & Ry. 670.

(*w*) Stevenson v. Lambard, 2 East, 575.

(*x*) Anon. 1 Sid. 447. Bacheloure v. Gage, W. Jo. 223. where it is said, after assignment and *acceptance* no action lies on the implied covenant. See Staines v. Morris, 1 Ves. & B. 11.

but this privity must exist somewhere; the relative situations of landlord and tenant must still be preserved: the assignee, therefore, taking the same interest, under the same grant, stands in all respects, (except as to collateral covenants,) in the place of the lessee; and by his enjoyment under the assignment is liable to all the legal consequences flowing out of the original grant, (one of which legal consequences undoubtedly is the payment of rent on the covenant implied by law,) in the same manner as the lessee would have been had no assignment been executed. Thus much for the principle on which the question is founded.

The balance of authority, also, seems to preponderate in favor of the assignee's liability. The cases stated to be adverse to it do not warrant that conclusion, and are in general merely speculative cases proposed by the advocates engaged in argument; while those in its support make a near approach to positive decisions on the subject. Thus, in Brett v. Cumberland (*y*), it was held, that "of a covenant in land which is only created by the law, or of a rent which is created by reason of the contract, none is longer chargeable with them, than the privity of the estate continue with them." And of this opinion was *Rolle* C. J., in a case (*z*) of covenant against the executrix of an assignee of a lessee for years for non-payment of rent, on the words *yielding and paying*. He considered that these words, being the agreement of

(*y*) Brett v. Cumberland, Cro. Jac. 523.

(*z*) Porter v. Sweetnam, Sty. 406. 431.

both parties to the indenture, constituted an express covenant; but held, that there was no difference in this instance between a covenant in law and an express covenant, because it was touching a thing which arose from the land, and so the assignee was bound by it.

No case is to be found in which the precise point has received a judicial determination; but the above afford reasonable grounds for concluding that an assignee is liable on implied covenants.

Implied covenants do not extend to a thing not *in esse* at the time of the demise. Therefore if A., in consideration that B. will build a mill upon the land, and a watercourse through the land, demises the land to B. by the words *dedi et concessi*, and afterwards stops the watercourse, B. for the above reason cannot maintain covenant against A. (*a*).

It must not be forgotten, that where a general implied covenant, arising for instance on the words "demise and lease," and an express limited covenant, as "that the lessee shall quietly enjoy against the acts of the lessor, or any claiming or to claim by, from, or under him," are comprised in the same instrument, the former will be qualified and restrained by the latter, the rule of law being, *expressum facit tacitum cessare* (*b*). But where one makes a lease for

(*a*) Huddy v. Fisher, 1 Leon. 278. pl. 377.

(*b*) Merrill v. Frame, 4 Taunt. 329. Nokes's case, 4 Co. 80, b; S.C. Cro. Eliz. 674. Gainsford v. Griffith, 1 Saund. 58; S. C. 1

life by the words *dedi et concessi;* or makes a lease for life by other words, reserving rent; (in which case the law creates a warranty against all men during the life of the lessor); in these cases an express warranty in the deed shall not take away nor qualify the implied warranty; but the lessee may make use of which of them he will, if he be ousted or evicted by one who hath an elder title (*c*).

It was settled so long ago as the time of Siderfin, that where a bond is given generally for the performance of covenants in a lease, it is extended to protect breaches in implied as well as express covenants; and if rent be not paid, or there be an eviction, the bond is forfeited for breach of the two implied covenants (*d*).

By what words raised.

Next as to the words by which implied covenants may be raised.

As to the word *demise.*

If a lease for years be made by any of the following words, *grant* (*e*), *demise* (*f*), *dimisi* (*g*), or *dimise-*

Sid. 328; 2 Keb. 76. 201. 213. Deering v. Farrington, 1 Mod. 113; S. C. Freem. 367; 3 Keb. 304. Hayes v. Bickerstaffe, Vaugh. 118; S. C. 1 Freem. 194. but not the same point.

(*c*) Shep. Touch. 165.

(*d*) Iggulden v. May, 9 Ves. 330. Nokes's case, 4 Co. 80, b; S. C. Cro. Eliz. 674.

(*e*) Spencer's case, 5 Co. 17, a. 18, a. Clarke v. Samson, 1 Ves. 100. Iggulden v. May, 9 Ves. 330. Style v. Hearing, Cro. Jac. 73.

(*f*) Deering v. Farrington, 1 Mod. 113; S. C. Freem. 367; 3 Keb. 304. Andrew's case, Cro. Eliz. 214. Burnett v. Lynch, 5 Barn. & Cres. 609. Iggulden v. May, ubi sup. Merrill v. Frame, 4 Taunt. 609.

(*g*) Hachet v. Glover, 10 Mod. 142. Nokes's case, 4 Co. 80, b. Holder v. Taylor, Hob. 12.

runt (*h*), the law implies a covenant on the part of the lessor, that the lessee shall hold and enjoy the term against all lawful incumbrances; and if the lessee, or his assignee, be lawfully evicted by one having title paramount to the lease, covenant may be brought against the lessor. So if at the time of the demise a stranger be seised of the land, the lessor is guilty of a breach of covenant, in taking upon himself to demise that in which he had no interest; for the word *dimisi* imports a power of letting, as *dedi* does of giving: nor will the want of an entry by the lessee, or an ejectment of the stranger, deprive the lessee of his remedy; for it would be unreasonable to compel him to enter on the land, and so commit a trespass (*i*).

As to the word *grant*.

An impression has generally prevailed, that the word *grant* in any conveyance will create a warranty; and the objections entertained by trustees to execute deeds containing that word are well known: and hence the introduction in assignments by trustees, of the words, "by way of assignment or other assurance only, and not of covenant or warranty." The opinion, however, is founded in error, and originates in a disregard of the distinction between conveyances of estates of freehold and grants of chattel interests. Where estates of the former description are the subject of conveyance, no doubt whatever exists

(*h*) Coleman v. Sherwin, 1 Show. 79; S. C. 1 Salk. 137.

(*i*) Holder v. Taylor, Hob. 12. Cloake v. Hooper, Freem. 121; S. C. 3 Keb. 162. 202. Stile v. Herring, 1 Rol. Ab. 520. Bedford v. Hall, Ow. 104, 5. Ludwell v. Newman, 6 Term Rep. 458.

that the word *grant* will not constitute a warranty (*k*); though it is otherwise with the word *dedi* (*l*). Trustees, therefore, on conveyances of freeholds, may safely dispense with their precautions, and rest assured that they impose upon themselves no risk or responsibility by the adoption of this word *grant*, to which they would not be equally liable even were it excluded from the conveyance (*m*).

It is also observable, that this word, as a word of conveyance, whether the subject be an original grant, or an assignment, of a chattel interest (*n*), will produce the same effect of raising a covenant by construction of law.

If goods, however, be demised by indenture for years, and the lessee be evicted within the term, covenant will not lie on the word *dimisi;* for the law does not create any covenant on such a personal thing (*o*); and therefore in the case of a lease of a house, together with the goods, it is usual to make a schedule thereof, and affix it to the lease, and to

(*k*) Spencer's case, 5 Co. 18, a. Browne, or Browning, v. Honywood, Freem. 339. 414; S. C. 3 Keb. 188. 549. 617. Pincombe v. Rudge, Hob. 3; S. C. Yelv. 139; 1 Rol. 25; Noy, 131. nom. Pinckard v. Ridge. Hayes v. Bickerstaffe, Vaugh. 126. But see Browning v. Wright, 2 Bos. and Pul. 21, where Lord Eldon said, the words *grant, bargain, sell, enfeoff, and confirm*, certainly import a covenant in law. And ibid. 26, where Buller, J. said, the words *grant and enfeoff* amount to a general warranty in law, and have the same force and effect.

(*l*) Spencer's case, 5 Co. 17, a. Nokes's case, 4 Co. 80, b. 81, a.

(*m*) Butl. n. (1). Co. Lit. 384, a.

(*n*) Person v. Jones, 2 Rol. 399; S. C. Palm. 388.

(*o*) Bac. Ab. Cov. (B).

have a covenant from the lessee to re-deliver them at the end of the term; for without such covenant the lessor can have no remedy but trover or detinue for them after the lease ended (*p*).

As to the words *bargain and sell.*

Unaccompanied by the term *grant*, the words *bargain and sell*, it is submitted, do not import an implied covenant. It is generally believed, and acted upon in practice, that these words in conveyances are totally innocent. They are the usual language by which trustees and others, who desire to divest themselves of any responsibility in respect of covenants, usually assign their interests. It is true that Lord Ellenborough, in one case (*q*), asked, "Do not the words *bargain and sell* as much imply that the party has the thing which he professes to bargain and sell, as the word *grant?*"; but this proves no more than that his Lordship conceived a doubt on the subject; and it clearly shews that the learned judge was unacquainted with any positive decision respecting it; for had such case occurred to his mind, it is highly improbable that it would not have been cited by him. Nor is any judgment, perhaps, to be discovered determining Lord Ellenborough's question in the affirmative.

As to the words *assign and transfer.*

It would seem that on words of *assignment*, the law will, in some particular cases, imply a covenant. It was so resolved, where a man *assignavit et transfer.*

(*p*) Bac. Ab. Cov. (B).

(*q*) Barton v. Fitzgerald, 15 East, 528.

posuit all the money that should be allowed by an order of a foreign state to come to him, in lieu of his share of a ship; though Twisden, J. seemed to doubt (*r*). When all the circumstances of this case are considered, it cannot fairly be inferred, that under all circumstances, or even generally, where the word *assign* is used, a covenant will exist by intendment of law. The subject of the assurance, it must be kept in mind, was a chose in action; and the object of the decision evidently was, to give to the deed the operation of a covenant to do a future act, rather than to admit of its being annulled, on the ground that the contract matter of it was not the subject of a legal assignment. On the contrary, no case has decided that the words *assign and transfer* shall have any such legal import. The word *assign* certainly does not imply any covenant or contract on the part of the assignee, but is a mere description of the interest conveyed (*s*).

As to the words *yielding and paying*.

Some difference of opinion has been entertained, whether the words *yielding and paying* in a demise, constitute an express or an implied covenant. There are cases on each side. From some of them it is difficult to collect to which class a covenant on these words was intended to belong. Thus in Hollis v. Carre (*t*), decided in 1676, Finch, C. said, "There

(*r*) Deering v. Farrington, 1 Mod. 113; S. C. Freem. 367; 3 Keb. 304.

(*s*) Burnett v. Lynch, 5 Barn. & Cres. 609.

(*t*) Hollis v. Carre, 2 Mod. 91; S. C. 3 Swanst. 647, 8; and Finch's Ch. Ca. 261, but the point is not noticed in the last book.

are many cases where words will make a covenant because of the agreement, when the general words of covenant are wanting, such as *yielding and paying*." It appears from the whole of the case, that the Chancellor thought that the covenant was express. In Barker and Keete, (1678), it is merely said, that *yielding and paying* makes a covenant (*u*); and Norris v. Elsworth, (1678), is equally uncertain (*w*). So all to be found on this subject in Giles v. Hooper, (1690), where there was a lease for years, rendering 80*l.* per annum rent, is, that *render* makes a covenant, but whether express or implied does not appear (*x*).

We now come to the cases in which it has been determined, that by these words an express covenant is created.

Rolle, C. J. was of opinion, in Newton v. Osborn, (1653), that the words *yielding and paying* constituted an express covenant; for it was the agreement of both parties, viz. of the lessor and lessee (*y*). And he continued of this opinion in Porter v. Swetnam, (1654), and used nearly the same language as before (*z*). So in Hellier v. Casbard, (1665), which was an action of debt on a lease, it was agreed that

(*u*) Barker v. Keete, 1 Freem. 250; S. C. 2 Mod. 249, but the point not noticed.

(*w*) Norris v. Elsworth, Freem. 463.

(*x*) Giles v. Hooper, Carth. 135.

(*y*) Newton v. Osborn, Sty. 387.

(*z*) Porter v. Swetnam, Sty. 406. 431.

these words made an express covenant, and not a covenant in law only(*a*).

On the other hand, the cases following maintain that an implied covenant arises from the words in question.

Besides the determination to this effect in the anonymous case in Siderfin (*b*), it was clearly held in Harper v. Burgh (*c*), where the attention of the court was called to the very point, that the *reddendum* was a covenant in law only. Lord Kenyon, too, who delivered the judgment of the court in Webb v. Russell (*d*), said, "In point of law I cannot conceive how this covenant made with Stokes can be said to run with the land; for Stokes is stated in the declaration to have no interest whatever in the land; and yet both the implied covenant arising from the *yielding and paying*, and also the express covenant, are entered into with Stokes." And that these words constitute a covenant in law only, is further proved by what fell from Mr. Justice Holroyd in a late case (*e*). "The covenant (said he) to be implied from the *reddendum* is in the nature of a covenant to render a rent, and consequently it is a covenant that runs with the land."

(*a*) Hellier v. Casbard, 1 Sid. 240. 266; S. C. 1 Lev. 127, nom. Helier v. Casebert. See Rol. Ab. Covenant, 519. pl. 10.

(*b*) Anon. 1 Sid. 447. pl. 9. *anno* 1670.

(*c*) Harper v. Burgh, or Bird, 2 Lev. 206; S. C. T. Jon. 102.

(*d*) Webb v. Russell, 3 Term Rep. 402.

(*e*) Vyvyan v. Arthur, 1 Barn. & Cres. 416; S. C. 2 Dow. & Ry. 670.

On this side, also, is the important additional authority of Lord Eldon, who, in Iggulden v. May (*f*), stated, that there was a covenant for quiet enjoyment under the words *granted and demised;* a covenant for payment of rent under the words *yielding and paying;*" and at the conclusion of the sentence his Lordship expressly designated them as two implied covenants. And in a later case (*g*), in giving his opinion, the same learned Judge observed, " The effect of the lease in the warranties and obligations, as arising out of the words of the lessor and lessee, *yielding and paying*, and under the execution of their agreement by the court, is perfectly different; the latter including the covenant for quiet enjoyment; and in many other respects the mutual obligations of both with reference to each other, being by the express covenants very materially varied."

Thus there are only two or three cases which give to the words *yielding and paying* the operation of an express covenant; while, on the other hand, the more numerous as well as the more recent decisions are opposed to that construction. We may now therefore conclude, that an express covenant is not created by these words; but that the covenant which exists by virtue of them is derived solely from intendment and implication of law.

This being settled, the subject must not be quitted without one precautionary observation. The expres-

(*f*) Iggulden v. May, 9 Ves. 330.

(*g*) Church v. Brown, 15 Ves. 264.

sion that covenant arises from the words *yielding and paying* is too general, and admits of an important qualification, a neglect of which may be the cause of much confusion and mistake. In practice, leases are sometimes prepared by *deeds-poll*, the rent being reserved by the above words. Now if the position contended for in a former page (*h*) be correct, viz. that covenant cannot be maintained against any one, (with the exceptions there noticed,) unless he himself, or some other person acting on his behalf, has executed a deed under seal; it necessarily follows, that this form of action cannot be supported against a lessee by deed-poll; and for this obvious reason, because there cannot be an execution of the instrument by him; nor, as it is contended, will his acceptance of the deed and an interest under it, expose him to the liability. The author has taken great pains in endeavouring to find a positive decision contravening this opinion, but without success. All the cases recently cited on this question, except Hellier v. Casbard, Giles v. Hooper, Harper v. Burgh, and Norris v. Elsworth, are expressly mentioned to have arisen on covenants contained in indentures, which it is fair to presume were executed by both parties. Although in Newton v. Osborn it is not stated whether the deed was indented or poll, yet, as Rolle, C.J. said it was the agreement of both parties, it may be inferred that the instrument was of the former description. It is true, that in the cases just excepted no notice is taken of the sort of deed; but not one mentions the case as having arisen on a deed-poll.

(*h*) Ante, p. 10, et seq.

It has however been expressly determined (*i*), that mutual covenants cannot arise on a deed-poll, it being the deed of one party only.

If, therefore, this course of reasoning be admitted to be right, the consequence must be, that on an implied covenant, arising from the words *yielding and paying*, an action of covenant will not lie against a lessee, his executors, administrators, or assigns, where the instrument by which the term is granted is a deed-poll, or an indenture unexecuted by or on behalf of the lessee.

Whether the word *reddendum* will support an action of covenant on a lease for life is an unsettled point (*k*).

Implied from the terms or object of the contract.

These covenants are sometimes raised by implication of law from the words of the parties actually used in an express covenant, when, without such legal intendment, the express covenant would be cramped in its operation, or the advantage or security meant to be enjoyed under it, in a measure defeated. Thus where the defendant being the proprietor of a certain medicine, assigned the same, and all his right, title, and interest therein, and all profits that should arise therefrom, to the plaintiff; to hold the same to him in like manner as the defendant might have done, if the assignment had not been made; and covenanted that he had good right to sell; that it

(*i*) Lock v. Wright, 1 Stra. 571; S. C. 8 Mod. 40. See also Pordage v. Cole, 1 Saund. 319.

(*k*) Harper v. Bird, T. Jo. 102.

should be lawful for the plaintiff from time to time and at all times thereafter, to prepare, compound, or make the said medicine, and to sell the same in the name of the defendant, and to receive the profits arising from the sale thereof for his (the plaintiff's) sole use and benefit; and covenanted also for further assurance: the whole court were of opinion, that as the defendant had sold and assigned the medicine by words competent to convey the whole property in it, and had covenanted that the plaintiff might at all times thereafter prepare and sell the medicine and receive the profits thereof, the law would imply a covenant that he should not himself vend that for his own profit which he had agreed to sell and had sold to another; and that as he was afterwards concerned with others in making and vending it on his own account, he was manifestly guilty of a breach of covenant; for if he retained the making and vending, and the profits arising from the sale of any part of it, he could not be said to have conveyed all his right, title, and interest in the subject matter (*l*). Lord Ellenborough afterwards observed (*m*), that no argument could be drawn from the opinion delivered by the court to authorize the extension of the doctrine to the wrongful act of a stranger; but they considered the breach committed by the defendant as the retention and exercise of a right by him, the original proprietor, over the medicine which he had conveyed to the plaintiff.

(*l*) Seddon v. Senate, 13 East, 63.

(*m*) Ibid. p. 79.

And where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a settled price, for the improvement of their lands and repair of their houses, it was held that this covenant also implied that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (*n*).

So where the lessee covenanted that he would at all times during the term fold his flock which he should keep upon the demised premises, upon such parts thereof where the same had been usually folded, under a penalty of three pounds a time for every time the same should be folded off from the demised premises, or on any other part thereof than where the same had been usually folded; the court considered that by this covenant the tenant was absolutely bound to keep as well as fold a flock (*o*).

Again, where two persons covenanted together that it should be lawful for one to hold the other's property for a certain time, it was determined, that it was emphatically an agreement that he should not detain it for a longer time, but should then give it up to the owner. The possession of a ship by the freighter beyond forty days, the time stipulated for loading and

(*n*) Earl of Shrewsbury v. Gould, 2 Barn. & Ald. 487.

(*o*) Webb v. Plummer, 2 Barn. & Ald. 746.

unloading, was therefore decreed to be unlawful, and in contravention of his implied covenant that he would not detain it longer than that time (*p*).

Here may be noticed the difference between a misfeasance, by which a man defeats or prejudices the effect of his own grant; and a nonfeasance, which is merely passive negligence or omission: although the former entitles the party injured to an action, yet on the latter covenant is not maintainable. If one by deed grants a watercourse, and then stops it, the grantee may have an action of covenant against him. So if a lease is made of a house and estovers, and the lessor destroys all the wood out of which the estovers are to be taken, the lessee may bring an action of covenant against the lessor; for these are wilful acts of the grantor or lessor; and it is a misfeasance in him to annul or avoid his own grant, and equivalent to an eviction in other cases of a demise. But where there is no misfeasance, but only a nonfeasance, an action does not lie; as if I grant a way over my land, I shall not be bound to repair it; but if I voluntarily stop it, or lock the gates (*q*), I may be sued for the misfeasance; yet for the bare nonfeasance in not repairing the way when out of repair no action at all lies. And where one granted and demised to the plaintiff a messuage and piece of land, (except a small piece of land, on which a pump was standing,) together with the use of the pump, it

(*p*) Randall v. Lynch, 12 East, 179.

(*q*) Climson v. Pool, Latch, 47.

was decided(*r*), that no action lay against the lessor for not repairing the pump when in decay and ruinous; and that when the use of a thing was granted, every thing was granted by which the grantee might have and enjoy such use; and therefore the lessee himself might have repaired the pump.

Where, however, the defendant had demised to the plaintiff a messuage, and covenanted that during the term he would permit him to have free ingress, egress, and regress through the gate at the bottom of the yard belonging to the said messuage, and the use of the pump in the said yard jointly with the defendant, whilst the same should remain there, paying half the expenses of keeping it in repair; the removal of the pump, although without reasonable cause, and in order to injure the lessee, was not such a misfeasance on the lessor's part as to expose him to an action by the lessee; for the introduction of the words *whilst the same should remain there*, qualified the general covenant, and reserved to the lessor a power of removing the pump, whatever might be his motive for doing so(*s*).

(*r*) Pomfret v. Ricroft, 1 Saund. 321; S. C. 1 Vent. 26. 44; 1 Sid. 429; 2 Keb. 505. 543. 569. See Butterfield v. Marshall, Lutw. 192. Nels. fol. ed.

(*s*) Rhodes v. Bullard, 7 East, 116.

SECT. III.

OF COVENANTS REAL—INHERENT—PERSONAL—AND COLLATERAL OR IN GROSS.

COVENANTS, with reference to the nature of the estate on which, and the parties on whom they are binding, may be divided into *real* and *personal*.

Real. Different definitions have been given of covenants real. It is, of course, a necessary ingredient in the constitution of a covenant real, that it relate to the realty; and it is immaterial whether the interest or quantity of estate to which the covenant refers be a real estate (properly so called), or a chattel interest in realty.

Fitzherbert says (*t*), writs of covenant are of divers natures; for some are merely personal, and some covenants are real, to have a real thing, as lands and tenements; as a covenant to levy a fine of land is a real covenant. But a writ of covenant which is more personal is, where a man by deed doth covenant to build him a house, &c., or to serve him, or to enfeoff him, &c., and he doth not the same according to the covenant, &c. It is difficult, however, to conceive on what ground the distinction above drawn, between a covenant to levy a fine and a covenant to enfeoff, can be supported. They relate alike to the realty. It seems to be a distinction

(*t*) Fitz. Nat. Brev. 145. A.; p. 323, 6th Ed.

without a difference, and such a one as at this day would not be admitted.

Covenants real, observes Mr. Cruise (*u*), are those which have for their object something annexed to, or inherent in, or connected with land, or other real property. Thus where three coparceners purchased land in fee, and covenanted that the survivors should convey to the heirs of such as should die first; this was resolved to be a covenant real (*v*).

This definition is more comprehensive, and clearly embraces in its terms a covenant to enfeoff; which is as much connected with land as a covenant to levy a fine, or other covenant, can well be. We have then this definition opposed, at least in its example, to that in F. N. B.

It is laid down by Mr. Justice Blackstone (*w*), that if the covenantor covenants for himself *and his heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant.

The difference which exists in the above explanations of a covenant real, has seemingly arisen from the circumstance, that Fitzherbert and Mr. Cruise kept in view only the subject matter of the covenant,

(*u*) 4 Cru. Dig. 397.3d Ed.
(*v*) Jenk. 241, case, 24.
(*w*) 2 Bla. Com. 304.

and the interest which the covenantee or his heirs might derive under it; while Mr. Justice Blackstone referred simply to the liability of the covenantor, and to the descriptions of property which would be charged on his death to make compensation in case of a breach. The learned judge did not suppose that land or other real property must necessarily be the subject to constitute a real covenant; he only looked to the covenant with reference to the estates and persons on which it might, in case of breach, attach in the quality of a lien or charge. According to his definition, even the most personal or collateral covenant, such as to pay a sum of money in gross (*x*), or to build a house on another man's land (*y*), would, if the heirs were named, rank as a covenant real. It appears, although such is not the general acceptation of the term *covenant real* among conveyancers, that the definition given by the author of the Commentaries is by far the most extensive, and is also most reasonable and accurate.

But admitting that all these definitions are correct, and taking them as distinct classes of covenants real, the best definition will be found in Sheppard's Touchstone (*z*). He says—a covenant is also either real, i. e. that whereby a man doth bind himself to pass a thing real, as lands or tenements; as a covenant to levy a fine of land, in which case the land itself is to be recovered; or when it doth run in the realty so with the land, that he that hath the one hath or

(*x*) Spencer's case, 5 Co. 16, b.
(*y*) Ibid.
(*z*) Shep. Touch. 161.

is subject to the other, and so a warranty is called a real covenant.

Hence a covenant may be real, having for its object something annexed to, or inherent in, or connected with land or other real property; although it may be purely personal to the covenantor, and his personal representatives, because he has omitted to name his heirs. And secondly, a covenant, though clearly personal, or relating to personalty, as to pay a gross sum of money, may be a covenant real, because the heir, being named, will be liable in respect of assets by descent from his ancestor, the covenantor.

When, on a sale, the entire estate in the property is disposed of, whether a fee simple be conveyed, or a term for years assigned, and the vendor covenants for title in the usual manner (*a*); these are real covenants, and bind the covenantor during his life, and after his death, his heir will be liable in respect of his having been expressly named, and deriving assets by descent. And as these covenants are annexed to, and run with the land for the benefit of purchasers at common law, it seems, that not only the vendee, but also his assignee, will be entitled in case of eviction to maintain an action, although a stranger to the covenant. Thus two parceners made partition of land, and the one covenanted with the other to acquit her and her heirs of a suit that

(*a*) Comments on the usual covenants for title will be found post, Part the Third.

issued out of the land; the covenantee aliened; and it was resolved, that the assignee, although a stranger, should have an action of covenant, because the acquittal ran with the land (*b*).

Now if this position be once admitted as to an assignee; *à fortiori* the heir of the covenantee may also take advantage of the covenant without being named; for a person can have assigns only of two sorts, either an assign in fact of the party, or an assign by appointment or designation of law (*c*); and clearly an heir is an assign of the latter description. Moreover it is said (*d*), that the heir is comprehended within the word *assigns* with respect to the performance of covenants and conditions; and a declaration on a covenant running with the land, alleging that the estate came to the defendant by assignment thereof, is supportable by evidence that he was heir (*e*). No ground, therefore, appears to exist for excluding him from the benefit of covenants, and placing him in a worse situation than an assignee in fact.

So where instead of the whole estate being parted with, a partial interest, such as a term for years, is carved out of it, leaving a reversion in the vendor, his covenants for title with the lessee, without naming assigns, are real and run with the land, and

(*b*) 5 Co. 18, a. cited in Spencer's case, and authorities there; Co. Lit. 384, b.; Sugd. V. & P. 542. 6th ed.

(*c*) Weatherall v. Geering, 12 Ves. 513.

(*d*) Chapman v. Dalton, Plowd. 288. Goodall's case, 5 Co. 96. 1 Saund. 111. n. (c.)

(*e*) Derisley v. Custance, 4 Term Rep. 75. See also Kingdon v. Nottle, 4 Mau. & Selw. 53.

therefore the executors or administrators of the lessee, by right of representation, and even his assignee, merely by virtue of holding the estate in or to which the covenants are inherent or attached, may recover damages for a breach.

On purchases in fee, covenants are seldom entered into by the vendee. Sometimes, indeed, it occurs, that on a conveyance by a man of his whole estate to another, the purchaser covenants to pay a rent charge thereout to the vendor and his heirs; but in this case the covenant, it appears, will not run with the land in the hands of an assignee: the heir will be bound in respect of assets descended, but not otherwise (*f*). It is said, however, that the party may have remedy in equity against the assignee (*g*).

When subordinate interests, such as leases for years are granted, covenants are invariably inserted in skilfully drawn instruments, not only on the vendor's or grantor's part for title, but also on the vendee's or grantee's, for the performance of certain specified duties, such as to pay rent and to repair. These also are real covenants running with the land (*h*); and as on the one hand, assignees are

(*f*) Brewster v. Kidgill, 1 Salk. 198; S. C. 2 Ibid. 615; 3 Ibid. 340; 5 Mod. 369; 12 Mod. 160. 171; Holt, 175. 669; Carth. 438; Comb. 424. Cook v. Earl of Arundel, Hardr. 87. See, however, Roach v. Wadham, 6 East, 289; S. C. 2 Smith, 376. Milnes v. Branch, 5 Mau. & Selw. 411.

(*g*) Brewster v. Kidgill, ubi sup.

(*h*) Stevenson v. Lambard, 2 East, 575. Holford v. Hatch, Dougl. 183. arg. Lougher v. Williams, 2 Lev. 92.

capable, in respect of possession, of availing themselves of all advantages derivable from such real covenants entered into with the original lessee; so on the other, they shall be made to sustain, although not named, all such burthens and liabilities as are annexed to, or inherent in the land, and chargeable on them in consequence of the relation of landlord and tenant, and the covenants comprised in the lease. Nor is this liability confined to the duration of the lessor's life, but extends and survives, according to his interest, to his heirs or executors, although not named, even at common law; and by statute (*i*), to the assignees of such reversioner, who in their turn cannot divest themselves of the relative responsibilities.

Inherent.

Whenever covenants are conversant about the land, as, that the thing demised shall be quietly enjoyed, or shall be kept in reparations, or that the party shall pay rent, shall not cut down timber trees, or do waste, shall fence the coppices when they are new cut, or make further assurance, or the like, they are said to be *inherent* (*k*), and necessarily run with the land. But this subject will be resumed when we come to treat of the liabilities and rights arising from covenants.

Personal.

A covenant *personal* relates only to matters personal as distinguished from real, and is binding on the covenantor during his life, and on his personal

(*i*) 32 H. 8. c. 34. (*k*) Shep. Touch. 161.

representatives after his decease in respect of assets. According to Sir W. Blackstone, a personal may be transformed into a real covenant by the mere circumstance of the heir's being named therein, and having assets by descent from the covenantor. This has been noticed in a prior page (*l*) to which the reader's attention is referred. A covenant may also be personal in a sense, where it is to be performed personally by the covenantor only (*m*).

A few examples will be useful in illustrating this part of our subject. A covenant to pay a sum of money in gross (*n*), to build a house on the land of a third person (*o*), are mere personal covenants. So where a man leased sheep, or other stock of cattle, or any other personal goods, for a time, and the lessee covenanted for himself and his assigns at the end of the time to deliver the like cattle or goods, as good as the things letten were, or such price for them, and the lessee assigned the sheep over; this covenant was held not to bind the assignee, being a mere personal contract, and wanting such privity as was between lessor and lessee and his assigns of the land in respect of the reversion (*p*). Thus also, where J. B. being seised in fee, conveyed certain premises to the defendant and J. R., their heirs and assigns, to the use that J. B., his heirs and assigns, might receive a certain yearly rent to be

(*l*) Ante, p. 61.

(*m*) Cooke v. Calcraft, 2 W. Blac. 856. Cro. Eliz. 553.

(*n*) Spencer's case, 5 Co. 16, b. 2d resol.

(*o*) Ibid.

(*p*) Ibid. 3d resol. 5 Barn. & Ald. 7.

issuing out of the land conveyed, with powers of distress and entry; and subject thereto to the use of the defendant in fee, which rent the defendant covenanted with J. B. his heirs and assigns to pay; and J. B. afterwards granted the rent to the plaintiffs, their executors, administrators, and assigns, for 1000 years, it was determined that the covenant was personal to J. B., and that an action of covenant would not lie for the plaintiffs for the non-payment of the rent (*q*). Likewise, where a person conveyed part of certain lands, which were subject to a fee-farm rent, and covenanted that the part sold should be discharged of the rent, the court decided, that this was no more than an ordinary and a personal covenant, which could only charge the heir in respect of assets descended (*r*). So a covenant by the freighter of a vessel to pay freight to the owner is also merely personal, and cannot be transferred to an assignee of the ship by an assignment of the property in the ship, in the same manner as certain covenants are said to run with the land (*s*). And although a warranty annexed to the land of

(*q*) Milnes v. Branch, 5 Mau. & Selw. 411. Another reason might perhaps have been given for refusing to entertain this action. The rent was not assigned, but a subordinate partial interest only was created out of the whole rent; so no privity whatever existed between the plaintiff and defendant, if we may argue from the analogy the case bears to the relative situations of original lessor and underlessee. See Holford v. Hatch, Dougl. 183.

(*r*) Cook v. Earl of Arundel, Hardr. 87.

(*s*) Splidt v. Bowles, 10 East, 279. Chinnery v. Blackburn, 1 H. Black. 117, n.

an estate of inheritance is a covenant real; yet when annexed to a chattel, it is a personal covenant whereon damages are recoverable (*t*).

One of the principal differences between a real and a personal covenant therefore is, that the former may run with the land, and charge an unnamed assignee; but the latter never can, nor can an assignee, even where expressly named, be bound by (*u*), nor avail himself of any benefit under such covenant.

Some covenants also are said to be *collateral*, i. e. such as concern some collateral thing, that doth not at all, or not so immediately, relate to the thing granted, as, to pay a sum of money in gross, to build a house on another man's ground, to make a feoffment or lease of other land, or that the lessor shall distrain for the rent in some other land than that which is demised, or the like (*w*); or a covenant by an assignee of a term with his assignor to pay the rent reserved, and perform the covenants contained in the original lease, and indemnify the assignor therefrom (*x*). And of this description is a covenant by the lessee of a mortgagor and mortgagee with the mortgagor to pay the rent, &c. (*y*); by a mortgagor with the mortgagee to pay the mortgage Collateral.

(*t*) Bouls v. Horton, Freem. 57. Browning v. Honywood, Ibid. 547. Hob. 4. Co. Lit. 101, b.

(*u*) Spencer's case, 6 Co. 16, b. 2d resol.

(*w*) Shep. Touch. 161. 5 Barn. & Ald. 7.

(*x*) Mayor v. Steward, 4 Burr. 2439.

(*y*) Webb v. Russell, 3 Term Rep. 393.

money (*z*); by the lessee of a public house to account and pay such a sum for every tun of wine sold in the house (*a*). And where a rent charge was granted to A. and his heirs, to the use of B., the court held that a covenant for payment was collateral, and could not be transferred with the rent, by virtue of the statute of uses, 27 Hen. 8. c. 10., so as to enable B. to maintain an action upon it (*b*). These covenants are also termed covenants in gross. They are not binding on assignees, although executors and administrators in their representative capacity are chargeable in respect of a breach. But the covenant cannot be called collateral where it relates to the thing demised, although the lease be of sheep or other personal goods; yet the assignee is not bound even in this latter case (*c*).

SECT. IV.

OF COVENANTS DEPENDENT—CONCURRENT—AND MUTUAL OR INDEPENDENT; AND HEREIN OF THE DISTINCTION BETWEEN COVENANTS AND CONDITIONS.

COVENANTS, as they are affected by each other in the same deed, may be divided into three classes.

Dependent. First, there are covenants which are conditions,

(*z*) Canham v. Rust, 8 Taunt. 227; S. C. 2 J. B. Mo. 164.
(*a*) Anon. Godb. 120. pl. 140.
(*b*) Bascawin v. Cook, 1 Mod. 223; S. C. 2 Mod. 138.
(*c*) 5 Barn. & Ald. 7. 8.

and *dependent*, in which the performance of one depends on the prior performance of another; and, therefore, till the prior condition be performed, the other party is not liable to an action on his covenant (*d*).

Concurrent.

Secondly, there are others which are mutual conditions to be performed at the same time; they are also termed *concurrent covenants;* and in these, if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act (*e*).

Mutual or Independent.

The third sort are called *mutual or independent*; where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff (*f*).

It will be found difficult to furnish any one clear and precise rule, by which the distinction between covenants and conditions can be accurately ascertained. The earlier cases, offering no defined principle of construction, serve only as so many unconnected examples of the actually existing difference between the two. So refined and subtle are the dis-

(*d*) Kingston v. Preston, 2 Dougl. 689; semb. S. C. Anon. Lofft, 194, but badly reported.

(*e*) Ibid.

(*f*) Ibid.

tinctions on which they have proceeded, that it is almost impossible to draw from them any reasons, as a guide to discover with certainty whether covenants are dependent or not. Some of the determinations have incurred the censure of outraging common sense (*g*); others of deciding contrary to the real meaning of the parties, and the true justice of the case (*h*).

That no particular words are required to create either a covenant or condition is perfectly clear; and it is also immaterial, in point of construction, whether the clause be placed in the instrument prior or posterior to others. There are, indeed, some words on which conditions precedent usually arise, such as, *for* (*i*), *ita quòd* (*k*), *sub conditione* (*l*), *quòd si contingat* (*m*), &c. And in some instances the words shall be construed to be both a covenant and a condition; as if one leases for years by indenture, provided always, and it is covenanted and agreed, that the lessee shall not alien; this is a condition by force of the proviso, and a covenant by force of the other words (*n*). But the courts at the present day, disregarding these quaint technicalities, will notice

(*g*) Per Lord Kenyon, in Goodisson v. Nunn, 4 Term Rep. 764, and see ibid, per Grose, J., 765.

(*h*) Per Grose, J., in Glazebrook v. Woodrow, 8 Term Rep. 371.

(*i*) Lock v. Wright, 1 Stra. 569; S. C. 8 Mod. 40. Peeters v. Opie, 2 Saund. 350; S. C. 1 Vent. 177. 214. Co. Lit. 204, a.

(*k*) 2 Ld. Raym. 766. Co. Lit. 203, a. Feltham v. Cudworth, 7 Mod. 11.

(*l*) Co. Lit. 202, b.

(*m*) Ibid. 203, b. See also Com. Dig. Condition, (A. 2).

(*n*) Co. Lit. 203, b. Samways v. Eldsly, 2 Mod. 74. Cromwell's case, 2 Co. 72, a. Simpson v. Titterell, Cro. Eliz. 242.

such words, so far only as they disclose, and are evidence of, the intention of the contracting parties.

To collect many of the cases which have thus received the disapprobation of later judges would prove a task equally laborious and unprofitable, and tend to confuse, without benefiting the reader. It is therefore proposed to submit a few specimens of the discrepances which prevailed in the early adjudications, in justification merely of the foregoing observations.

Thus it is laid down, that where there is an agreement that one shall deliver a cow to the other, and that the other shall give him so much money, the action lies for either side, without performance of his promise (*o*); but if by the agreement A. is to deliver B. a cow, and for it B. is to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring his action (*p*).

So it is said (*q*), that if I covenant with J. S. to give him 10*l.* to serve me for a year; in his action for his money he must count for his service done, and aver that he hath served me out the year. In another (*r*) we find the law to be, that if one cove-

(*o*) Nichols v. Raynbred, Hob. 88. In *assumpsit*.

(*p*) Ibid. cited in Thorpe v. Thorpe, 12 Mod. 460. Dy. 76, a. pl. 30.

(*q*) Cowper v. Andrews, Hob. 41. 42. Lampleigh v. Brathwait, Hob. 106.

(*r*) Guy v. Nichols, Comb. 265. See also Winstone v. Linn, 1 Barn. & Cres. 460; S. C. 2 Dow. & Ry. 465.

nants to serve A., and A. covenants to pay him so much for service, these are mutual covenants; and that if he serves one month, and then runs away, the first month's wages become due. And in the case in Hobart will be found many distinctions respecting the word *pro,* showing in what cases it will operate as a condition precedent, and where it will not.

So where A. covenants with B. to marry his daughter, and B. covenants to convey an estate to A. and the daughter in special tail, it is said that though A. marry another woman, or the daughter another man, still A. may have an action against B. on the covenant; but if B. had covenanted to convey the estate *for the cause aforesaid,* the marriage would constitute a condition precedent, and no action would lie till it should be solemnized (*s*).

We find again (*t*), that if a man by indenture leases for years, and therein the lessee covenants and grants with the lessor, that neither he nor his assigns will grant, assign, or sell the land to any but to his wife during her life, &c. upon pain of forfeiture of his lease, this is a condition. Yet in another case (*u*), where a lessee for years of a manor covenanted that neither he nor his assigns would molest, vex, or turn

(*s*) 15 H. 7. 10. pl. 17. Bro. Covenant, 22. cited, 12 Mod. 460.

(*t*) Whitchcot v. Fox, Cro. Jac. 398; S. C. nom. Hitchcock v. Fox, 1 Rol. 68. 389; 2 Bulstr. 290.

(*u*) Pen v. Glover, Mo. 412; S. C. Cro. Eliz. 421. See Thomas v. Ward, Cro. Eliz. 202; S. C. 1 Leon. 245. Anon. Dal. 8. pl. 7. Archdeacon v. Jennor, Cro. Eliz. 604.

out any tenant from his tenancy, upon pain of forfeiture of his lease, it appeared to the court that this was not a condition.

Further, if a lessee for years covenants to repair, provided always, and it is agreed that the lessor shall find great timber, &c.; this makes a covenant on the part of the lessor to find great timber, by the word *agreed;* and it will not be a qualification of the covenant of the lessee (*v*). But if the lessee covenants to repair, provided always that the lessor shall find great timber, without the word *agreed,* this proviso shall not make any covenant on the part of the lessor, but it shall be only a qualification of the covenant of the lessee.

In 1 Rol. Ab. (*w*) it appears that there were articles of agreement made by A. on behalf of B. of the one part, and C. of the other part, where it was covenanted by A. that B., for the consideration thereafter expressed, should convey certain lands to C., who on his part, for the consideration aforesaid, covenanted to pay B. one hundred and sixty-six pounds; and it was adjudged, that the assuring the land was not a condition precedent.

(*v*) Danv. Ab. Covenant, (C), pl. 2. 3. Vin. Ab. Covenant, (C), pl. 2. 3. Holder v. Taylor, Brownl. 23; S. C. Hob. 12. pl. 24, cited by both, and 1 Sid. 423, quoted in support of this position; but it is remarkable that not one of the books referred to decides any thing of the kind. See Browne v. Walker, Lutw. 119. Nels. fol. ed. Bragg v. Nightingall, Sty. 140. Slater v. Stone, Cro. Jac. 645.

(*w*) 1 Rol. Ab. 415. pl. 8; S. C. cited 12 Mod. 463.

In Elwick v. Cudworth (*x*), the plaintiff, in consideration of 1100*l.* to be paid to him by the defendant, covenanted to assign to him ten shares in the corporation of linen manufacture on a certain day; and the defendant covenanted that he would then accept those shares, and at the same time pay the money; and by the same deed they bound themselves to each other in the penalty of 2200*l.* for the performance of the said covenants. It was held that the assignment of the shares ought to precede the payment of the money, because the covenant to pay it was in the nature of a condition to prevent the penalty of 2200*l.* which the defendant was to forfeit if he did not pay 1100*l.* on the day, which payment had no manner of reference to the day on which the assignment ought to be made, but it wholly related to the acceptance of the assignment; so that their meaning must have been, that the plaintiff should assign the shares, and the defendant should accept thereof, and that upon such acceptance he was to pay the money.

In Blackwell v. Nash (*y*), the plaintiff covenanted to transfer to the defendant, on or before the 21st of September, so much stock, and the defendant, in consideration of the premises, covenanted to

(*x*) Elwick v. Cudworth, Lutw. 149. Nels. fol. ed.

(*y*) Blackwell v. Nash, 1 Stra. 534; S. C. 8 Mod. 105. Gibbons v. Prewd, Hardr. 102. Beany v. Turner, 1 Lev. 293. Hunlocke, or Humlock, v. Blacklow, 2 Saund. 155; S. C. 1 Mod. 64; 1 Sid. 464; 2 Keb. 674. Wilkinson v. Meyer, 8 Mod. 173. Dawson v. Myer, 2 Stra. 712.

accept and pay for it; he then averred that he was ready and offered to transfer to the defendant, who refused to accept or pay, &c.; on demurrer it was objected, that *for it* made a condition precedent, and that the plaintiff should have shown an actual transfer of the stock; to which it was answered, that they were mutual covenants, and that the plaintiff need not show a performance on his part; and it was held, that *in consideration of the premises* was in consideration of the covenant to transfer, and not of an actual tranferring, for which the defendant had his remedy. And the judgment was afterwards affirmed in the Exchequer Chamber on a writ of error. But in commenting on this case, Lord Kenyon remarked (*z*), that it seemed from the case in Strange, that the judges were surprised at the old decisions, and in order to get rid of the difficulty, they said that a tender and a refusal would amount to a performance: that it was true they went further, and said that *in consideration of the premises* meant only in consideration of the covenant to transfer, and not in consideration of the actual transferring of the stock; but to the latter part of that judgment he could not accede.

It may here be observed, that where there is a negative covenant on one side, in consideration of which there is an affirmative covenant on the other, the non-performance of the negative covenant is no answer to

(*z*) 4 Term Rep. 764.

an action for the non-performance of the affirmative covenant. As if A. covenants not to do a certain thing, and B., *in consideration of the performance thereof*, covenants to give him 100*l.*; this covenant of A., though it be expressed to be the consideration of B.'s covenant, is not a condition precedent, because a negative covenant cannot be said to be performed, until it becomes impossible to break it (*a*).

These examples shall suffice. Any one disposed to a further investigation of the subject may advantageously consult the authorities quoted below (*b*).

The inclination of the courts in the old cases was clearly to construe covenants of this sort to be independent, sometimes perhaps contrary to the meaning of the parties. But the liberality of construction adopted in more recent times has, in a great measure, removed the difficulties occasioned by the nice and obscure distinctions taken in the above cases. The later authorities convey more just sentiments, and Kingston v. Preston (*c*), although not the first case where those sentiments began to be enter-

(*a*) Humlock v. Blacklow, 1 Mod. 64; S. C. 2 Saund. 155; 1 Sid. 464; 2 Keb. 674.

(*b*) Bettisworth v. Campion, Yelv. 133. Brocas's case, 3 Leon. 219. Everard v. Hopkins, 1 Rol. 155, per Lord Coke. Spanish Ambassador v. Gifford, 1 Rol. 366. 371. Ware v. Chappell, Sty. 186. Sheer v. Shalecroft, 12 Mod. 400; S. C. Holt, 177. Browne v. Walker, Lutw. 119. Nels. fol. ed. Bragg v. Nightingall, Sty. 140. Slater v. Stone, Cro. Jac. 645.

(*c*) Kingston v. Preston, cited in Jones v. Barkley, 2 Dougl. 689; Anon. Lofft, 194. but badly reported, semb. S. C.

tained (*d*), was the first strong authority in which they prevailed in opposition to the former (*e*); the principle laid down by Lord Mansfield, and now fully established, being, that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and that, however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.

Nothing can exhibit the doctrine which ought to prevail in these instances in a stronger point of view than the circumstances of that case; for there, if the plaintiff had prevailed, the most flagrant injustice would have been committed. The facts were: the defendant, being possessed of a very large stock in trade, covenanted with the plaintiff to assign the same to him and another person at the end of a twelvemonth, at a fair valuation, when deeds of partnership were to be executed between the two last persons; and the plaintiff covenanted that he would, *at and before* the sealing and delivery of the deeds, procure good and sufficient security to be given to the defendant, and to be approved of by him, for the payment of a certain stipulated sum by monthly instalments; and the attempt was by the plaintiff to get possession of the whole stock in trade of the defendant, to a great amount, without giving him any security at all, to his inevitable ruin. But the

(*d*) Thomas v. Cadwallader, Willes, 496.

(*e*) Per Grose, J. in Glazebrook v. Woodrow, 8 Term Rep. 371.

absurdity and injustice of the thing struck the court so forcibly, that they said it could never have been the intention of the parties, that the defendant should surrender his whole fortune into the plaintiff's hands, without the previous security which he had insisted upon, and that he should solely rely upon his remedy by action for the breach of the plaintiff's covenant: they accordingly gave judgment for the defendant.

To discover the intention of the parties concerned is therefore the chief object; and to that end a consideration of the following rules, extracted from the leading cases on the subject, will be of material service. They are four in number, and as here arranged, the two first will be found to relate to dependent, and the third and fourth to independent covenants.

1. Where the mutual covenants go to the whole of the consideration on both sides.

1st. Where the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other (*f*).

This rule was also propounded by Lord Mansfield, and formed the ground on which the case of the Duke of St. Albans v. Shore (*g*) was decided. An action of debt was brought for a penalty on certain articles of agreement, dated 30th March 1787, whereby the defendant was to purchase of the plaintiff a certain farm at the price of 2594*l*., which was

(*f*) Boone v. Eyre, 1 H. Blac. 273. note; 2 W. Blac. 1312; another action between the same parties.

(*g*) Duke of St. Albans v. Shore, 1 Hen. Blac. 270.

to be paid at Lady-day then next, in the following manner: the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the defendant, at the price of 1820*l.*, (to be deducted from the before-mentioned sum of 2594*l.*,) the defendant to convey those premises at the expense of the plaintiff, and the plaintiff to make a good title to the defendant at his (the defendant's) expense; and the plaintiff, on executing the conveyances, was to receive the rest of the purchase-money. *All timber trees, elms, and willow trees, which then were upon any of the above estates, to be fairly valued by two appraisers, and the prices or value thereof to be paid by the respective purchasers of the estates at the time before mentioned;* the rents of the respective estates to be received by the owners till the 24th of March then next. It was also provided, that in case the plaintiff should not be enabled to make a good title to the said estate before the said 24th of March, the agreement should be void. After the contract the duke cut down part of the trees. And it was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that condition could not be pleaded in bar to the action. It was however determined, that the covenant of the plaintiff went to the whole of the consideration of that which was to be done by the defendant; for the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by the separate valuation of it. It was expressly agreed, that all trees which then were

upon any of the estates should be valued; and it was not to be permitted to any party contracting to convey land, which included the timber, by his own act to change the nature of it, between the time of entering into the contract and that of performing it. There might be cases where the timber growing on an estate would be the chief inducement to a purchase of that estate. But it was not considered necessary to inquire whether it were the chief inducement to a purchase or not; for if it might be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it.

So where the defendant covenanted to pay the plaintiff such a sum, the plaintiff making to him a sufficient estate in such lands before the feast of St. Thomas next ensuing the date of the deed, it was held that the words *he making a sufficient estate* were a condition precedent to the payment of the money (*h*).

In like manner, where a covenant was entered into by a tenant, at all times during the term to repair the premises, and, at the end or sooner determination of the term, to yield them up in good and tenantable repair, he the said (landlord) finding and allowing timber sufficient for such reparations during the term, to be cut and carried by the said (lessee); no doubt whatever was entertained by the court that this was a condition precedent; for the finding of the timber

(*h*) Large v. Cheshire, 1 Vent. 147; S. C. 2 Keb. 801. Morris v. Knight, Sugd. V. & P. 219, n. 6th edit.

was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant (*i*).

2ndly. Where a day certain is appointed for payment of the money; if the said day is to incur after the time in which the consideration ought to be performed, for which the money is made payable; the performance of the consideration is a condition precedent to the payment of the money, and ought to be averred in an action brought for the money (*k*).

2. Where the act, in consideration of which the money is to be paid, precedes the day of payment.

Therefore where a vessel was let to freight, and the defendant covenanted to pay the plaintiff 670*l.* sterling per month, for every calendar month the ship should be employed by him, the freighter; and by the terms of the charter-party the freight, pilotage, and port-charges, were all of them expressly covenanted to be paid by the defendant on the arrival and discharge of the ship at her destined port in Great Britain; and the vessel was wrongfully seized, and brought back to, and detained in London, so that she did not complete the stipulated voyage; the plaintiff was not allowed to recover freight for the time she had been actually engaged in the defendant's service; for these payments were made to depend on the event of the ship's arrival and discharge at her destined port in Great Britain, as a condition precedent to the plaintiff's right to demand the

(*i*) Thomas v. Cadwallader, Willes, 496.

(*k*) Thorpe v. Thorpe, 1 Lord Raym. 665; S. C. Ibid. 235; Holt, 28. 96; 12 Mod. 445; 1 Salk. 171; 1 Mod. Ent. 111. Lutw. 75. Nels. fol. ed.

same (*l*). And it was not enough to show that the owner did all in his power towards earning the freight, &c., by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage, and earn the freight, &c.; but such completion was still liable to be defeated by the act of God, as the accidents of the voyage; and the performance of the condition which was to entitle the owner to freight, &c., would still have been contingent, although such his offers had been accepted by the freighter. Therefore this is not like the case, where a party, tendering to do that which he has undertaken, and which he has the immediate power of doing at the time, in order to entitle himself to a correspondent duty from another, is, by a refusal of the other to accept such tender, absolved from the necessity of averring performance of it in an action for a breach in not performing the subsequent or concurrent duty.

So where freight was covenanted to be paid within ten days next after the arrival of the ship at her first destined port abroad, and the vessel was lost on her

(*l*) Smith v. Wilson, 8 East, 437; S.C. 6 Mau. & Selw. 78, in another stage. Cook v. Jennings, 7 Term Rep. 381. Thompson v. Brown, 7 Taunt. 656; S. C. 1 J. B. Mo. 358, overruling Hotham v. East India Company, 1 Dougl. 272. See also Heard v. Wadham, 1 East, 619. Storer v. Gordon, 3 Mau. & Sel. 308. Fothergill v. Walton, 8 Taunt. 576; S. C. J. B. Mo. 630.

outward voyage, the owner was not entitled to recover, as such arrival created a condition precedent to the owner's right to payment of any freight (*m*).

And within the same rule falls the earlier case of Lock v. Wright (*n*); where the plaintiff declared, that the defendant, by his writing indented (*o*), agreed with the plaintiff, that he, the defendant, would accept of the plaintiff 500*l*., fourth subscription, as soon as the receipts should be delivered out by the company, and would pay for the same 950*l*. on the 5th of November next after the date of the writing; and then averred that the defendant did not pay the money at the day. From the first part of the resolution of the court, it would appear that this case would find a more appropriate place among the class of covenants requiring concurrent performance; for in pronouncing judgment, Pratt, C. J. said, That the intent of the parties appeared to be, that one should have the money and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent. But the circumstance of the transaction being by deed-poll seemed to have influenced the decision in this respect; for, continued the Chief Justice, this is not a covenant entered into by both parties, upon which each will have his mutual re-

(*m*) Gibbon v. Mendez, 2 Barn. & Ald. 17. Byrne v. Pattinson, Abbott on Shipping, 335. 5th ed. See Dy. 76, a. pl. 29. 30.

(*n*) Lock v. Wright, 1 Stra. 569; S. C. 8 Mod. 40.

(*o*) In 8 Mod. the case is stated to have arisen on a deed-poll, and the reasoning of the court, even in *Strange*, will lead to the same conclusion.

medy; but it is the deed-poll of the defendant only; and, therefore, though upon the delivery or tender of the stock the plaintiff will have his remedy for the money, yet the defendant, on the other side, upon payment of the money, will have no remedy to compel the delivery of the stock; and having no such remedy, he shall not be obliged to pay the money till the consideration for which it is payable is performed. It was therefore held to be a condition precedent, because otherwise the intention of the defendant to have the stock for his money could never take effect; and the declaration was in consequence deemed bad, for want of an averment of a delivery or tender of the stock.

The analogous cases cited beneath, to which it is unnecessary to advert more particularly, will also afford the reader further information on this subject (*p*).

As a species of dependent covenants, that class of cases in which the acts stipulated for require a contemporaneous performance, or as it has been called, a performance *uno flatu* (*q*), may be attended to in this division. It has been remarked, that in these, if one party is ready, and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement,

(*p*) Porter v. Shephard, 6 Term Rep. 665. Worsley v. Wood, Ibid. 710. Routledge v. Burrell, 1 H. Blac. 254. Oldman v. Bewicke, 2 H. Blac. 577. n. (a). cited 6 Term Rep. 714. Anvert v. Ennover, 2 Barnard. 308.

(*q*) Walker v. Harris, Anstr. 245.

and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act.

This rule, according to the opinion of Mr. Justice Le Blanc (*r*), applies to every case of a sale of property, where one engages to convey on a certain day, and the other to pay at the same time; and this, whether the one be stated in terms to be in consideration of the other or not. In neither case will the court compel one party to perform his part, until the other has done or has offered to do his own. Thus where (*s*) the plaintiff agreed, that he would, on or before the 2nd of September then next, well and sufficiently grant, surrender, or otherwise convey to the defendant all that copyhold tenement, &c.: in consideration whereof the defendant covenanted to pay to the plaintiff the sum of 210*l.* on or before the 2nd of September next ensuing; and on failure of complying with the before-mentioned agreement the defendant was to pay to the plaintiff the sum of 21*l.*; and if the plaintiff did not deliver the estate according to the before-mentioned agreement, then he was to pay the defendant the sum of 21*l.* These, it was held, were reciprocal acts to be performed by the parties at the same time, the one dependent on the other; when the one party conveyed his estate he was to receive the purchase-money; and when the other parted with his money he was to have the estate: for supposing the purchase-money of an

(*r*) In Glazebrook v. Woodrow, 8 Term Rep. 374.

(*s*) Goodisson v. Nunn, 4 Term Rep. 761.

estate were 40,000*l.*, it would be absurd to say that a purchaser might enfore a conveyance without payment, and compel the seller to have recourse to him, who might perhaps be an insolvent person.

Thus, also, where the defendant, in consideration of 252*l.* paid to him, agreed to transfer 6000*l.* South-Sea stock to the plaintiff, any time before the 9th of January 1720, within three days after the same should be demanded by note in writing delivered to the defendant or left for him at his house in Angel Court, upon payment of the further sum of 9000*l.* The payment of the money was held not to be a condition precedent, but a concurrent act; and if the defendant had been there, the plaintiff must have laid down his money, though not so as to part with it till transfer (*t*). So where the agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock; and the plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying &c. Hôlt, C. J. said, If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must

(*t*) Merrit v. Rane, 1 Stra. 458. Turner v. Goodwin, Fort. 145; S. C. Gilb. K. B. 40; 10 Mod. 153. 189. 122; 2 Vin. Ab. 183. pl. 9. The reports in Fortescue, Gilbert, and 10 Modern, agree in making the words of the covenant to be, *he assigning over to him*, &c.: in Viner, they are, *upon his assigning*. Wyvill v. Stapleton, or Shelburne v. Stapleton, 1 Stra. 615; S. C. 8 Mod. 68. 292. 314. 381. fol. ed.; 3 Bro. P.C. 89; S.C. vol. i. p. 215, Toml. ed. Elwick v. Cudworth, Lutw. 149. Nels. fol. ed.

aver and prove a transfer or a tender, and the other a payment or a tender (*u*).

The same doctrine prevailed (*v*) where the plaintiff, being in possession of a school, covenanted with the defendant to convey to him the good will of it, and the building itself, on or before the 1st of August 1797, and in the mean time he consented to put him in possession of the premises on some prior day; and in consideration thereof the defendant covenanted to pay him a stipulated price, on or before the same 1st of August, with interest from the 1st of January next preceding the said 1st of August. The plaintiff, without having executed the conveyance, or made a tender of it, commenced this action to recover the consideration-money. And it was holden, that the very statement of such a claim was sufficient to refute it: that if these were not dependent covenants, it was difficult to conceive what covenants were so; the true justice of the case and the evident meaning of the parties being, that the execution of the conveyance and the payment of the money should be concurrent acts; and even the payment of the interest was to be deferred till the 1st of August, though it was to run from the January preceding: that the very substance of the consideration to entitle the plaintiff to receive the money was the making of the conveyance required; and as it was admitted that he had not done it, there was an end

(*u*) Callonel v. Briggs, 1 Salk. 112; S. C. Holt, 663; Collins v. Gibbs, 2 Burr. 899.

(*v*) Glazebrook v. Woodrow, 8 Term Rep. 366. Heard v. Wadham, 1 East, 619. See also Morton v. Lamb, 7 Term Rep. 125.

of the question. The case of Campbell v. Jones (*w*), it will be seen, was very different from the present; for there the instruction to be given was not to be, and could not in the nature of the thing be performed at the same time with the payment of the money by the defendant, for which a certain time was limited; whereas no time was limited for giving the instruction. But here the parties stipulated for the conveyance and the payment of the money at the same time.

3. Where the mutual covenants go to a part only of the consideration on both sides.

3rdly. Where mutual covenants go to a part only of the consideration on both sides, and where a breach may be paid for in damages, the defendant has a remedy on his covenant, and shall not plead it as a condition precedent (*x*).

Therefore in a case of covenant on a deed (*y*), whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.*, and an annuity of 160*l.* for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy; and the defendant covenanted, that, the plaintiff well and truly performing all and every thing therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned

(*w*) Campbell v. Jones, 6 Term Rep. 570, noticed more at length in the next and following pages.

(*x*) Boone v. Eyre, 1 Hen. Blac. 273, note; 2 W. Blac. 1312, another action between the same parties. Fothergill v. Walton, 8 Taunt. 576; S. C. 2 J. B. Mo. 630.

(*y*) Boone v. Eyre, supra.

was the nonpayment of the annuity. Plea, That the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not good title to convey; to which there was a general demurrer. And Lord Mansfield, after advancing the above general principle, said, If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action. And Mr. Justice Ashhurst added (*z*), There is a difference between executed and executory covenants; here the covenants are executed in part, and the defendant ought not to keep the estate because the plaintiff has not a title to a few negroes. In this case it will be observed, that the substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity to say that the plaintiff had not a good title to some of the negroes which were upon the plantations, because all the material part of the covenant had been performed, and the defendant had a remedy upon the covenant for any special damage occasioned by the non-performance of the rest.

The same general rule was recognised and adopted in another case (*a*), where it had been agreed between the plaintiff and defendant, that, in consideration of the sum of 500*l.* to be paid to the plaintiff by the defendant in manner thereinafter mentioned, he, the plaintiff, would teach and instruct

(*z*) See 6 Term Rep. 573.

(*a*) Campbell v. Jones, 6 Term Rep. 570.

the defendant in the bleaching and preparing of all materials, according to the specification of a patent obtained by the plaintiff, and would also permit and suffer the defendant, during the continuance of the patent, to bleach, &c. the materials for making paper according to the specification, &c. In pursuance of the agreement, and in consideration of 250*l.* to the plaintiff paid by the defendant, and of the further sum of 250*l.* covenanted to be paid to the plaintiff by the defendant in manner thereinafter mentioned, and in consideration of the covenants and agreements of the defendant thereinafter contained, the plaintiff covenanted, to the best of his skill, and with all possible expedition, to teach and instruct the defendant in the manner and method of bleaching linen and other materials used in making paper, according to the specification of a patent obtained by the plaintiff, and according to the method which he then used, or any improved method which he should or might thereafter use in bleaching, &c. And the defendant, in consideration of the plaintiff's covenants, covenanted that he would, on or before the 25th of February 1794, or sooner in case the plaintiff should before that time have sufficiently taught and instructed him in bleaching and preparing the materials for making paper, &c., pay the plaintiff the further sum of 250*l.* The nonpayment of this further sum was the breach assigned. To this there was a special demurrer, and in support thereof it was said, that the plaintiff's teaching the defendant his method of bleaching the materials used in making paper was a condition precedent to the plaintiff's right to

demand payment of the last sum of 250*l*. On the other hand it was insisted, that they were mutual and independent covenants. In this latter opinion the court concurred; and one of the grounds on which the plaintiff was deemed entitled to judgment was, that the teaching of the defendant was not the whole of the consideration of the covenant to pay. The agreement of the parties was, that in consideration of one entire sum of 500*l*. the plaintiff should teach and instruct the defendant in the art of bleaching materials for making paper, *and* permit him during the period of his patent to bleach such materials according to his specification; and though this sum was divided into two sums of 250*l*. each, and was to be paid at different times, no part was denominated to be the consideration for using the patent, nor any part as the consideration for teaching, but one integral sum was adapted to the whole. And as the plaintiff's agreement had been executed in part, by transferring to the defendant a right to exercise his patent, it was held, that he ought not to keep that right without paying the remainder of the consideration, because he might have sustained some damage by the plaintiff's not having instructed him.

The authority of these cases, and the soundness of the principle on which they were determined, have been again acknowledged, and acted upon a short time since (*b*). T. C., in consideration of the covenants in the deed contained, assigned to H. R. C. all that branch or portion of the trade of him T. C. carried on

(*b*) Carpenter v. Cresswell, 4 Bing. 409; S. C. 1 Mo. & P. 66.

at Billingsgate, consisting of purchases and assignments from Scotland, and also his interest in certain salmon fisheries there, and covenanted not to interfere or act in the branch of the business so assigned. H. R. C., in consideration of the assignment and covenants entered into by T. C., covenanted on his part to pay T. C. an annuity of 250*l.* by quarterly payments, and to abstain from interfering in the branch of trade still carried on by T. C. Here the court were unanimous that the engagement by T. C. not to interfere in the Scotch fish business formed only a part of the consideration for the defendant's covenant; another, and most material part being the assignment of the Scotch fishery; and this distinguished the present case from the Duke of St. Alban's v. Shore, because there the vendor of the estate, having cut down the timber after he had agreed to sell it with the timber standing, had so changed the state of the premises, that the vendee could never have that which he had contracted to buy.

The grounds on which the courts hold covenants, where they go to a part of the consideration only, to be independent, and not pleadable as conditions precedent, are twofold. First, Because the defendant for a breach on the plaintiff's part, may resort to his action, and recover proportionate remuneration in damages; and for the plain reason, that the damages sustained by the breach of one such covenant may not be at all adequate to the damage sustained by the breach of the other, the performance of the agreement on the defendant's part is not dispensed with

on account of his not having received the whole consideration (*c*). And secondly, Since the plaintiff's agreement is executed in part, the defendant ought not to keep the right without paying the remainder of the consideration, although he may have sustained some damage (*d*).

And on this subject, C. J. Dallas has observed (*e*), that the doctrine in Boone v. Eyre, as to the covenant going to the whole or a part of the consideration on both sides, has all the weight which some of the greatest names in Westminster Hall can give it. It was laid down by Lord Mansfield; it was next recognized by Lord Loughborough, and formed the ground of the determination of the court of C. P. in the case of the Duke of St. Alban's v. Shore; it was then sanctioned by Lord Kenyon and the rest of the court of K. B. in the case of Campbell v. Jones, and was afterwards eulogized by Lord Ellenborough in delivering the judgment of the court in Havelock v. Geddes. The doctrine, indeed, has never been alluded to but in terms of the highest commendation.

The fourth rule is, if a day be appointed for payment of money, and the day comes before the thing for which the money is to be paid can be done; 4. Where the day for payment of the money arrives before the act for which the money is to be paid can be performed.

(*c*) Campbell v. Jones, 6 Term Rep. 573. Duke of St. Albans v. Shore, 1 H. Blac. 279. Boone v. Eyre, Ibid. 273. n. Thomas v. Cadwallader, Willes, 499.

(*d*) Ibid.

(*e*) 8 Taunt. 583; 2 J. B. Mo. 639.

there, though the agreement be to pay the money for the doing of the thing, yet an action may be brought for the money before the thing done; because the agreement is positive that the money shall be paid at the appointed day (*f*); and it is presumed that the party intended to rely on his remedy, and not to make the performance a condition precedent. The same rule had before been propounded by Chief Justice Hale (*g*): 'Tis true, said he, if there be a time limited for payment, which time may fall out before the work or thing be done, there the doing it is not a precedent condition.

In laying down the rules in Thorpe v. Thorpe, Lord Holt cites the year book 48 Ed. 3. 2, 3. and Ughtred's case, 7 Co. 10. But the case in the year book is inaccurately stated by Lord Coke in Ughtred's case to be, "that Sir Ralph Tolcelser covenanted with Sir Richard Pool to serve him with three esquires of arms in the war with France, and Sir Richard covenanted *therefore to pay* him forty-two marks; and that each party had equal remedy, one for the service, and the other for the money." But it appears in the year book that the covenant was, that half the money was to be paid in England before they went to France: the principle therefore of that case agrees with the doctrine of Holt in Thorpe v. Thorpe, as is observed by him in 12 Mod. 461.

(*f*) Thorpe v. Thorpe, sup. p. 83.

(*g*) Peters v. Opie, 1 Vent. 177. Keb. 811. 837; 2 Lev. 23; 3 Keb. 45. Cowper v. Andrews, 214; S. C. 2 Saund. 350; 2 Hob. 41. 42.

One of the grounds on which the case of Campbell v. Jones was adjudged has already been mentioned (*h*); the other was the rule now under consideration. The plaintiff, it will be recollected, covenanted, with all possible expedition, not by any fixed time, to instruct the defendant in bleaching linen, &c.; and in consideration of the plaintiff's covenants, the defendant covenanted that he would on or before the 25th of February, or sooner in case the plaintiff should before that time have instructed him, pay him the further sum of 250*l*. And on the authority of Thorpe v. Thorpe the court gave judgment in favor of the plaintiff, saying, that had it been the intention of the parties that the defendant should covenant to pay the money as soon as the plaintiff should have instructed him, the natural and obvious way of expressing such intent would have been for the defendant to covenant to pay *as soon as he should be taught;* but if the design of the parties were that the plaintiff should at all events be paid on the 25th of February, and sooner in case the defendant should be sooner instructed, the expression used was a natural expression, and the words *in case the said plaintiff should before that time have instructed the said defendant*, would be confined to the word *sooner;* and therefore, that the intent of the parties appeared to be, that the payment might be accelerated, but should not in any event be delayed.

To the same effect is a case, in which the plaintiff agreed to take the defendant into partnership, and

(*h*) Ante, p. 93.

also to assign over to him a moiety of the interest in the house, to commence *from and after* a day named, on the terms and conditions that the defendant should pay to the plaintiff, *on or before* the day specified, the sum of 300*l.*, as a premium or fee to be admitted into the said partnership. It was contended, that the lease and copartnership being to run immediately from and after the day on which the payment was to be made, the conveyance must be on or before that time; but the court were of a contrary opinion, and conceived that the words *from and after* excluded that day; and if so, the covenant of the defendant was precedent to the other, and was broken before the other was to be executed (*i*).

The principle also of the case of Pordage v. Cole (*k*) agrees with the doctrine of Lord Holt in Thorpe v. Thorpe. There was an agreement by the defendant to give a certain sum to the plaintiff for all his lands and house, &c., to be paid at a fixed period, and only 5*s.* of the purchase-money were advanced at the time of making the agreement; an action on the agreement was holden to lie for the residue, without showing that he had either made or tendered a conveyance of the lands; for part of the money was actually paid at the time of the contract, and the residue was made payable on an appointed day, which might happen before the lands were or could be conveyed.

(*i*) Walker v. Harris, 1 Anstr. 319; S. C. 1 Sid. 423; 1 Lev. 245. 274; T. Ray. 183; 2 Keb. 533.

(*k*) Pordage v. Cole, 1 Saund. 542.

So likewise, where (*l*) the plaintiffs covenanted that they would build a house for the defendant, and that it should be finished by a certain day; in consideration whereof the defendant covenanted to pay 3800*l.* in the following manner; that is to say, the sum of 1266*l.* 13*s.* 4*d.* as soon as the second floor should be laid; the further sum of 1266*l.* 13*s.* 4*d.* as soon as the fourth floor should be laid; and the remaining 1266*l.* 13*s.* 4*d.* as soon as the whole building should be covered in, &c.: and Mr. Justice Buller, in delivering his opinion, said, that the only question in this case was, whether the covenants were dependent, and whether the completing the building was a condition precedent. That it was a rule long established in the construction of covenants, that if any money was to be paid before the thing was done, the covenants were mutual and independent; and that, as by the terms of this contract two several sums were to be paid before the thing to be done was done, the plaintiffs were clearly entitled to their action for the money without averring performance, and the defendant to his remedy on the covenants, if the buildings were not completed at the appointed time.

It will not be out of order in this place to allude to those cases in which the participle active has given rise to discussion. With few exceptions they have

(*l*) Terry v. Duntze, 2 H. Blac. 389. cited in Heard v. Wadham, 1 East, 629, 630. Cock v. Curtoys, K. B. M. 2 Geo. 4. Bach v. Owen, 5 Term Rep. 409. Russen v. Coleby, 7 Mod. 236; S. C. Ridg. 154.

been resolved to belong to the class of mutual and independent covenants.

A lessor, in one case, covenanted with his lessee, that he paying the rent and performing the covenants on his part to be performed, should quietly enjoy; and the breach assigned was a disturbance by the lessor, who pleaded, that till such time the plaintiff did quietly enjoy the thing demised without disturbance, but then he cut down wood, which was contrary to his covenant, and then, and not before, he, the lessor, entered. The arguments for the plaintiff were, that this covenant was not conditional, for the words *paying and performing* signified no more than that he should enjoy, &c. under the rents and covenants, and it was a clause usually inserted in the covenant for quiet enjoyment: that the word *paying* might in some cases amount to a condition, but that was where without such construction the party could have no remedy; but that here were express covenants in the lease, and a direct reservation of the rent, to which the party concerned might have recourse when he had occasion; and judgment was given that the covenant was not conditional (*m*); though Atkins, J., doubted.

So where a lessee covenanted to repair the demised premises, 5000 slates being found and allowed

(*m*) Hays v. Bickerstaffe, 2 Mod. 34; S. C. 1 Freem. 194; Vaugh. 118. Warren v. Asters, *alias* Arthur, T. Jo. 205; S. C. Anon. 2 Mod. 317. Allen v. Babbington, 1 Sid. 280; S. C. 2 Keb. 9. 23. Anon. 2 Show. 202. Walker v. Wakeman, 1 Vent. 294; S. C. Freem. 414; 2 Lev. 150; 3 Keb. 544. 547. 586. 595. 619.

and delivered on the said premises by the lessor, his heirs and assigns, for and towards the repairing thereof; it was said for the plaintiff, that the word *being* implied that the plaintiff had provided at the time of the indenture 5000 slates, otherwise the expression would have been *being to be found;* and that if the words would not admit of this construction, yet that finding the slates could not be considered as a condition precedent, but as a mutual covenant. But the court were all of opinion that the word *being* did not necessarily imply that the plaintiff had provided the slates; if he had, the words *having been* would have been more proper; but that *being* was a middle word, which might admit of both significations. And they held that it ought rather to be considered as a covenant than a condition precedent (*n*).

To the same effect is Dodd v. Innis (*o*) in Lofft, but like most of the cases contained in that volume, wretchedly reported, and rendered more obscure by the inaccuracies of the press. The case appears to have arisen on a covenant by a lessee with his lessor to leave sufficient compost on the soil of the landlord, at the end or sooner determination of the term; the lessee having the yard, barn, and room to lodge in and dress diet. The defendant pleaded that he did not covenant, but that there was a condition, if the lessor gave room for corn, then the lessee (*p*) should have compost. Lord Mansfield, however, observed,

(*n*) Mucklestone v. Thomas, Willes, 146. 153

(*o*) Dodd v. Innis, Lofft, 56.

(*p*) This clearly should be *lessor*.

that the parties had no difficulty; they were plain sensible men, and accordingly they put the issue on the fact. "You did not give me room to bestow my straw," &c. said the tenant. "I did," says the lessor. Can there be any thing clearer, continued his lordship, than that the covenant could not be to reside in the breast of the landlord to make election during any part of the term? Had it been so, the tenant bestows his corn and straw, houses his cattle, &c. and then comes to (*q*) the landlord and says, "I don't want you to furnish compost, and that being the condition on which you were to lodge your corn, and have the other benefits expressed, take your corn, cattle, and straw, and carry them where you think good." Where the tenant covenants to repair, if the lessor finds sufficient timber, the proviso restrains the covenant (*r*): but in this case there is not the least foundation for such construction.

This was followed by Boone v. Eyre (*s*), so frequently referred to, in which the plaintiff declared on a deed of sale made to the defendant of a plantation with the negroes, &c. thereto belonging, in consideration of 500*l.* and an annuity, and the defendant covenanted with the plaintiff that, he the said John Boone, well, truly, and faithfully doing, fulfilling, and performing all and singular the covenants, clauses, recitals, and agreements in the said indenture contained, he, the defendant, would pay the annuity. The

(*q*) The sense requires the omission of this word *to*.

(*r*) See Willes, 496. and ante, p. 82, 3.

(*s*) Boone v. Eyre, 2 W. Blac. 1312; S. C. 1 H. Black. 273. n. but not the same point.

defendant's counsel urged that this was not a case of mutual covenants, but the performance of the plaintiff's covenants was made a condition precedent to the performance of those by the defendant. But De Grey, C. J. said, Where the particle *doing*, *performing*, &c. is prefixed to a covenant by another person, it is clearly a mutual covenant and not a condition precedent.

It appears, however, that instances may be found somewhat at variance with the preceding proposition; for in one case (*t*), where A. covenanted to pay B. so much money, B. making him a good estate in such lands, it was held, that the making the estate was a condition precedent, and therefore to be averred. The same construction was given to a case in which a tenant covenanted to repair, he the said landlord, his heirs and assigns, finding, allowing, and assigning timber sufficient for such reparations during the said term, to be cut and carried by the said tenant, his executors, administrators, and assigns. The opinion of the court was, that the finding of the timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant; for a man could not repair until the timber was assigned to him for such repairs (*u*): and they said that the word *provided*, which in two cases (*v*) was holden to make a condi-

(*t*) Large v. Cheshire, 1 Vent. 147; S. C. 2 Keb. 801. cited by Holt, C. J. in Thorpe v. Thorpe, 12 Mod. 461.

(*u*) Thomas v. Cadwalladar, Willes, 496.

(*v*) 1 Rol. Ab. 518. 2 Danv. 229. See ante, p. 75. note (*r*).

tion, was not so strong an expression as the words *finding and allowing* in the present.

By reference to the authorities cited in this chapter, the reader will perceive that the author has not confined himself to cases decided solely on actions of covenant; but other forms of action, such as assumpsit, case, and debt, have lent their aid in illustrating the rules there laid down. The extension of the same general principles to the latter as well as the former, and the consequent analogy between the cases, will sufficiently warrant their introduction. The further examples of cases relating to independent covenants and mutual promises mentioned in the note (*w*) the student will do well to consult.

To gentlemen engaged in preparing the pleadings in actions, the distinctions between covenants dependent and independent is of considerable moment; as upon their construction will rest the necessity of averring performance in the declaration. All the cases are uniform in deciding,

First, That where the plaintiff's covenant constitutes a condition precedent, to enable him to maintain an action against the defendant for the nonperformance of his part of the agreement, the condition on the part of the plaintiff must be previously complied with, however difficult or improbable the thing

(*w*) Davidson v. Gwynne, 12 East, 381. Martindale v. Fisher, 1 Wils. 88. Hall v. Cazenove, 4 East, 477; S. C. 1 Smith, 272. Ferry v. Williams, 1 J. B. Mo. 498; S. C. 8 Taunt. 62. Havelock v. Geddes, 10 East, 555. Ritchie v. Atkinson, 10 East, 295.

may be, or he cannot lay claim to the right which was to attach on its being executed (*x*). And the fulfilment of such condition precedent must be averred, whether the duty be to be executed by the plaintiff or defendant, or by any other person; or some excuse for the non-performance must be shown; for where all proper steps are taken by a party to observe the condition, and the neglect or default of the other party renders the performance impossible, or where he dispenses with such performance, (performance being in the power of the party offering,) the tender is tantamont to a performance, and the plaintiff acquires the right as completely as if the previous deed had actually been done (*y*). But if performance, or that which is equivalent to performance, be not alleged and proved, the defendant may plead nonperformance of the condition precedent in bar to the plaintiff's action: or if the averment of performance be entirely omitted, or imperfectly made, the defendant may take advantage of it on demurrer (*z*).

(*x*) Worsley v. Wood, 6 Term Rep. 719, reversing the judgment of C. P. 2 H. Blac. 574.

(*y*) Hotham v. East India Company, 1 Term Rep. 638. White v. Middleton,—Davis v. Mure,—and Pole v. Harrobin, cited therein. Jones v. Barkley, 2 Dougl. 684. Ughtred's case, 7 Co. 10, a. Co. Lit. 206, b. Goodisson v. Nunn, 4 Term Rep. 764. Smith v. Wilson, 8 East, 443. See also Heard v. Wadham, 1 East, 619. Thompson v. Brown, 7 Taunt. 656; S. C. 1 J. B. Mo. 358, overruling Hotham v. East India Company, 1 Dougl. 272. Cordwent v. Hunt, 8 Taunt. 596; S.C. 2 J. B. Mo. 660. Cook v. Jennings, 7 Term Rep. 381. Campbell v. French, in error, 6 Term Rep. 200, reversing the judgment of C. P. 2 H. Blac. 163. Scott v. Mayn, Cro. Eliz. 450. 479; S. C. Mo. 452; Poph. 109; 2 And. 18; 5 Co. 20, b.

(*z*) Selw. N. P. 515. 6th ed. As to what will be a sufficient

Secondly, That if the acts contracted for be to be performed at the same time, neither can maintain an action without shewing a performance of, or an offer to perform, or at least a readiness to perform, his part, though it be not certain which of the parties is obliged to do the first act (*a*).

And, Thirdly, That if the covenants be mutual and independent, as it is no excuse for the defendant to allege a breach of the contract on the part of the plaintiff, so without performance on the plaintiff's part, he is capable of supporting an action, and of course no averment of performance is necessary to be inserted in the declaration (*b*).

averment in this respect, see Jones v. Barkley, sup. Martin v. Smith, 6 East, 555. Phillips v. Fielding, 1 H. Blac. 123.

(*a*) Ante, note (*y*). Glazebrook v. Woodrow, 8 Term Rep. 366. Morton v. Lamb, 7 Term Rep. 125. Rawson v. Johnson, 1 East, 203. Lancashire v. Killingworth, 1 Ld. Raym. 686; S. C. 2 Salk. 623; Com. 116. Bordenave v. Gregory, 5 East, 107; S. C. 1 Smith, 306. Lea v. Exelby, Cro. Eliz. 888. Lord Aldborough v. Lord Newhaven, cited 4 Term Rep. 763, 5.

(*b*) Ante, note (*y*). Trench v. Trewin, 1 Ld. Raym. 124. Thomas v. Cadwallader, Willes, 499.

CHAPTER THE THIRD.

OF THE PERSONS BY AND WITH WHOM COVENANTS MAY BE MADE.

THE subject of this chapter may be considered, first, with reference to the capacity of the parties; and, secondly, with reference to their number and connexion.

SECT. I.

WITH REFERENCE TO CAPACITY.

In general.

All persons of sufficient legal capacity may bind themselves by covenant.

In particular cases.

Every contract must have for its basis the capability of the parties to enter into an agreement. An incapacity to contract may therefore arise from various causes.

1. Idiots and lunatics.

Idiots and lunatics, being creatures void of understanding, and unable, from imbecility of intellect, to give the solemn and deliberate assent (*a*) necessary to the validity of a contract, are on principles both

(*a*) Every true consent supposes, 1st, a physical power; 2dly, a moral power of consenting; 3dly, a serious and free use of them; Puffendorf's Law of Nature and Nations, Barbeyrac's note 1. b. iii. c. 6. s. 3. 1 Fonbl. Tr. Eq. 45. 4th ed.

of humanity and justice, restrained from all manner of engagements. And although such persons could not formerly have availed themselves of their own mental infirmity, the maxim being, that a man should not be allowed to *blemish* himself by pleading his own insanity (*b*); yet a more lenient and reasonable rule has latterly obtained, and it appears that idiotcy or lunacy would at the present day be a good defence to an action (*c*). Of course, previous or subsequent lunacy will not vitiate a covenant entered into during an interval of sanity; although in a doubtful case a suspicion may arise, that the party was not in a sound state of mind at the time of executing the agreement (*d*).

2. Persons of weak mind.

Weakness of mind is not of itself a sufficient ground for avoiding a covenant, unless some stratagem or fraud be also had recourse to by the person in whose favor it is made. According to Sir Joseph Jekyll, "Where a weak man gives a bond, if there be no fraud or breach of trust in the obtaining it, equity will not set it aside for the weakness of the obligor, if he be *compos mentis;* for the court will not measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity" (*e*). And of this opinion was Lord Hardwicke, who held, that

(*b*) 2 Bla. Com. 291, 2.

(*c*) Ibid. Yates v. Boen, 2 Stra. 1104. Faulder v. Silk, 3 Campb. 126.

(*d*) 1 Dow, 177.

(*e*) Osmond v. Fitzroy, 3 P. Wms. 129; S. C. 2 Eq. Ca. Ab. 186. pl. 8. Griffin v. Deveuille, Cox's note, 3 P. Wms. 130. 3 Woodd. Vin. Lect. Appendix, p. xvi.

it was not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who had engaged in it; for supposing the bargain to be in fact very hard and unconscionable, if a person would enter into it with his eyes open, equity would not relieve him upon this footing only, unless he could show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement (*f*).

3. Aged persons.

Nor will the court annul an improvident agreement merely on account of the old age of the covenantor. In such case it is necessary that some substantial ground for supposing fraud be stated and proved; the circumstance of the party being old, seventy-five years of age for instance, does not alone constitute a ground for presuming fraud or imposition (*g*).

4. Drunkards.

Where a person is in that state of extreme intoxication as to be deprived of reason, it appears, that, even at law, a deed obtained from him, or her, while in that condition, would be invalid (*h*).

No assistance can be derived from a court of equity by a person who has obtained an agreement or deed

(*f*) Willis v. Jernegan, 2 Atk. 251. See also White v. Small, 2 Ch. Ca. 283. Bridgeman v. Green, Wilmot, 58.

(*g*) Lewis v. Pead, 1 Ves. jun. 19.

(*h*) Pitt v. Smith, 3 Campb. 33. Fenton v. Holloway, 1 Stark. 126. Cole v. Robins, Bul. N. P. 172. Cooke v. Clayworth, 18 Ves. 16.

from another in a state of intoxication (*i*); nor, on the other hand, will aid be given to a person to get rid of any agreement or deed, merely upon the ground of his having been inebriated at the time; the court considering, that to interpose on either side, in the common case of intoxication (*k*), would be to encourage drunkenness; but where any unfair advantage has been made of the situation of the drunken party, or any contrivance or management resorted to, for the purpose of drawing him in to drink, he may then become a proper object for equitable relief (*l*). And should a contrariety of evidence exist as to the fact of intoxication, equity would hesitate to determine a fact so controverted without the intervention of a jury. In Cooke v. Clayworth, the plaintiff prayed that the agreement in writing executed by him might be declared fraudulent and void as against him, and might be delivered up to be cancelled, and for an injunction; but the court, for the reasons above stated, dismissed the bill without costs, and dissolved the injunction.

According to the writers on the law of Scotland, a similar doctrine prevails in that country (*m*).

(*i*) Rich v. Sydenham, 1 Ch. Ca. 202.

(*k*) Cragg v. Holme, cited 18 Ves. 14.

(*l*) Cory v. Cory, 1 Ves. 19. Johnson v. Medlicott, 3 P. Wms. 131. n. (A). Cooke v. Clayworth, 18 Ves. 16. See also Dunnage v. White, 1 Swanst. 137.

(*m*) "Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract." Stair, July 29th, 1672. Lord Hatton. Ersk. Inst. 447. s. 16.

"An obligation granted by a

5. Infants.

Infants, being supposed to be destitute of judgment and discretion, have always been regarded by law with a favorable eye. With a view to their advantage, and to prevent imposition upon them by others of more mature experience, it is wisely provided, that their covenants shall be mere nullities (*n*). And in this respect specialty engagements by covenant by an infant are distinguishable from his simple contracts (*o*); for the former, although entered into for necessaries supplied, cannot support an action. However much for his benefit the covenant may be, the infant is not bound. On an apprenticeship deed, for example, he cannot be sued; for notwithstanding he may voluntarily bind himself an apprentice, and if he continue apprentice he may have the benefit of his trade, yet neither at the common law, nor by any words of the statute of 5th Eliz., will a covenant or obligation of an infant for his apprenticeship bind him (*p*); except by the custom of London, in which an action of covenant will lie against him, as if he were a man of full age (*q*).

Under these circumstances it is customary for the

person while he is in a state of absolute and total drunkenness is ineffectual, because the granter is incapable of consent, for the law has thought it equitable to protect those who have not the use of their reason, (even though they should have lost it by their own folly,) from the fraud or circumvention of others." 3 Campb. 34. n. (*a*).

(*n*) Farneham v. Atkins, 1 Sid. 446.

(*o*) Co. Lit. 172, a. 3 Mau. & Selw. 482.

(*p*) Gylbert v. Fletcher, Cro. Car. 179. Whitley v. Loftus, 8 Mod. 190.

(*q*) Horn v. Chandler, 1 Mod. 271. Lilly's case, 7 Mod. 15. Walker v. Nicholson, Cro. Eliz. 652.

father, or some friend, to covenant with the master for the faithful service and good conduct of the apprentice (*r*). And indentures of apprenticeship have existed, and have been in universal use in this form, for more than a century (*s*).

But it is to be observed, that if an infant and one of full age jointly and severally covenant for the payment of an annuity to a third person, a plea that his co-covenantor was an infant is not admissible to protect the party of full age from the consequences of his contract (*t*). So, notwithstanding an action will not lie against an infant apprentice, yet it may be maintained against the master or mistress on the covenant entered into with the infant apprentice to find meat and drink, &c. (*u*).

6. Feme coverte.

By marriage a woman becomes so identified with her husband, as together to constitute in law but one person; her legal existence is for most purposes suspended during coverture (*v*). From this union proceeds her incompetency to bind herself or husband by covenant (*w*); unless, it would seem (*x*), she was authorized by him to enter into such contract. Thus, where a married woman, without any authority from

(*r*) Whitley v. Loftus, 8 Mod. 190, 1. Branch v. Ewington, 2 Dougl. 518.

(*s*) Cuming v. Hill, 3 Barn. & Ald. 59.

(*t*) Haw v. Ogle, 4 Taunt. 10.

(*u*) Farneham v. Atkins, 1 Sid. 446.

(*v*) Lit. s. 168. 291. 1 Bla. Com. 442.

(*w*) 11 Ves. 531. White v. Cuyler, 1 Esp. N. P. C. 200; S. C. 6 Term Rep. 176. 45 Ed. 3. 11, 12.

(*x*) Ibid.

her husband, engaged a servant in the capacity of a waiting woman, and agreed by deed to pay her so much a year, it was decided that the covenant of the wife was void on account of the coverture; but, as the servant had performed the stipulated services, the court determined that the husband was liable in *assumpsit*, and the deed was admitted as evidence of the contract (*y*). This incapacity, however, is confined to the duration of the coverture; nor will marriage defeat a covenant previously entered into by the woman with a third person; it was therefore held, that on a covenant by a woman *dum sola* to plant the premises demised to her with so many oaks annually during the term, her after-taken husband was liable; and even an assignment by her *dum sola* was not in this case considered sufficient to discharge him from an action for a breach (*z*). An action will also in some cases survive against the wife after her husband's decease; as if a husband and wife levy a fine *sur concesserunt* for years, with a general warranty; no doubt is entertained that covenant would lie against the wife upon the fine (*a*).

7. Attainted or outlawed persons.

A person attainted of certain crimes (*b*), or an outlaw in a civil suit (*c*), or criminal prosecution (*d*), is deprived of the protection of the law. He is deemed *civiliter mortuus*, and his goods and chattels

(*y*) Ante, n.(*w*).

(*z*) Anon. 6 Mod. 239.

(*a*) Wotton v. Hele, 2 Saund. 177; S. C. 1 Mod. 66. 290; 1 Sid. 466; 1 Lev. 301; 2 Keb. 684. 703. 709. 723.

(*b*) 1 Chit. Crim. Law, 730.

(*c*) Tidd, 124. 8th edit. Com. Dig. Utlagary, (D. 2.).

(*d*) Com. Dig. Utlagary, (B).

and choses in action become forfeited to the crown (*e*). Being unable to prefer his suit in courts of justice, he is, in effect, incapable of contracting for his own benefit (*f*); but this incompetency does not extend to defeat another of his claim, or right of action against the outlaw, or attainted person; for the latter, notwithstanding his own inability to sue, may be sued on a contract made by him during the continuance of the outlawry or attainder (*g*).

By a reversal of the outlawry or attainder, or by a pardon, the disability may be removed; and as a consequence, the competency to contract, and capacity to bring an action will be re-established (*h*).

8. Husband with Wife.

In other cases persons labour under incapacity *sub modo* only, and are disqualified from covenanting with some particular party: for instance, on account of the consolidation of the legal existence of husband and wife, his covenant with her is completely ineffectual (*i*); otherwise her separate existence must be supposed; and to covenant with her would be only to engage with himself (*k*). It would be, as the Scotch call it, an *unilateral* covenant (*l*).

We must, however, be careful not to confound a co-

(*e*) Chit. jun. Prerog. 223. Bac. Ab. Outlawry, (D). 2. 1 Salk. 395. Bullock v. Dodds, 2 Barn. & Ald. 258.

(*f*) 2 Barn. & Ald. 275.

(*g*) Macdonald v. Ramsay, Fost. Cr. L. 61. cited 15 East, 465.

(*h*) 1 Chit. Crim. L. 731. Bac. Ab. Outlawry, (D). Com. Dig. Utlagary, (C. 5.).

(*i*) Co. Lit. 112.

(*k*) 1 Bla. Com. 442.

(*l*) 11 Ves. 531.

venant between a husband and wife, with a covenant between him and a third person for her benefit. Although such a contract is, as we have seen, in the former case, absolutely void; yet in the latter it may well be supported. A covenant by J. B. with a stranger to stand seised to the use of his (J. B.'s) wife (*m*), will raise an use in favor of the wife, which will be executed by the statute of uses (*n*), and thus vest the estate in her.

SECT. II.

WITH REFERENCE TO THE NUMBER AND CONNEXION OF THE PARTIES.

OF COVENANTS SEVERAL—JOINT—AND JOINT AND SEVERAL.

I. With reference to the liabilities of covenantors.

It may be proper to premise, that at present covenants are considered only as they relate to the liabilities of covenantors: As they concern the rights of covenantees will be touched upon shortly.

1. Several.

First, Where more persons than one are covenantors, and each undertakes only to the extent of his own acts and defaults, without entailing on himself the necessity of making reparation in case of a breach by the other or others, this is termed a several covenant. It is in all respects the same as if each of the covenantors had executed a separate

(*m*) Co. Lit. 112, a. (*n*) 27 H. 8. c. 10.

deed on the same parchment (*o*). The consequence is that the covenantee, where the covenant is broken, must resort to the culpable party for satisfaction in damages, without involving the other covenantors in litigation. By thus covenanting a man incurs no risk beyond that of his own default; while in the cases of joint, and joint and several covenants, as we shall hereafter see, he subjects himself to claims occasioned by the delinquencies of his companions, over whose actions he can exercise no controul. The peculiar safety of this class of covenant is therefore obvious. It is seldom that trustees enter into any other, and then only as the result of express stipulation.

2. Joint.

Secondly, It may easily be conceived, that in the multiplicity of affairs between man and man, several persons may be jointly engaged in the same transaction; that some may be less scrupulous in performing their agreement than others; and consequently, that the security of one may be more valuable and available than the security of another. A person, therefore, with whom a covenant is to be entered into, may be dissatisfied with the separate responsibility of the parties, and may require that each covenantor shall not only be liable for his own, but also for the acts and defaults of his co-covenantor. Hence have arisen covenants joint; by which, each party becomes answerable for himself, and is in effect a

(*o*) Mathewson's case, 5 Co. 23, a.; S.C. nom. Matthewson v. Lydiate, Cro. Eliz. 408. 546.

surety also for the due performance of the covenant by the other (*p*).

Thirdly, Joint and several covenants are, as the term denotes, a combination of the two former. The difference is, that they afford the covenantee the election of suing on either. In some respects they are considerably more beneficial to the covenantee than the others: without prejudicing the several, they ensure the joint liability; and although the advantage of the joint security may be defeated by the insolvency of the survivor, the assets of the deceased covenantor may be charged in the hands of his representatives on the separate covenant (*q*). 3. Joint and several.

Very few questions have been agitated whether covenants on the part of the covenantors have been joint, several, or joint and several; the language of the lien has generally been sufficient to indicate the intention of the parties, and the nature of the covenant in this respect; but little therefore remains to be adduced on this part of the subject.

With respect to the form, no particular words are necessary to constitute a covenant of either kind. If two covenant generally *for themselves* (*r*), without any words of severance, or that they *or* one of them shall do such a thing, a joint charge is created (*s*); which shows the necessity of adding words of

(*p*) Lilly v. Hodges, or Hedges, 8 Mod. 166; S. C. 1 Stra. 553.

(*q*) Enys v. Donnithorne, 2 Burr. 1196.

(*r*) May v. Woodward, Freem. 248.

(*s*) Robinson v. Walker, 7 Mod. 154; S. C. 1 Salk. 393.

severalty where the covenantor's liability is to be confined to his own acts.

The words *for themselves and every of them* amount to a covenant joint and several; *for every of them* being tantamount to *for each of them* (*t*). So do the words *obligamus nos et utrumque nostrum* (*u*); or, *conveniunt pro se et pro quolibet eorum* (*v*); though Holt, C. J. declared that he thought there might be a diversity between *A. et B. conveniunt et quilibet eorum convenit*, and *A. et B. conveniunt pro se et quolibet eorum;* for in the first, *quilibet eorum convenit* expressly severed the lien, but *pro quolibet eorum* seemed to go to the thing to be done; that is, that they both or either of them would do it: and so one might covenant that he or A. would do such a thing (*w*); and he said that the word *conveniunt*, and not *pro quolibet eorum*, made the lien.

Covenants implied by construction of law, as on the word *dimiserunt*, will be co-extensive with the interest granted, joint if a joint estate, if a several interest, several (*x*). And an action alleging as a breach that at the time of the demise a stranger was seised in fee, so that the lessors had not, nor ought to have demised the premises, must be against

(*t*) May v. Woodward, Freem. 248.

(*u*) Robinson v. Walker, 7 Mod. 153; S. C. 1 Salk. 393.

(*v*) Ibid. Bolton v. Lee, 2 Lev. 56; S. C. 3 Keb. 39. 50.

(*w*) See also Neele v. Reeve, 2 Sid. 107.

(*x*) Coleman v. Sherwin, 1 Show. 79; S. C. Carth. 97; 1 Salk. 137; Comb. 163. The same as to an express covenant, Meriton's case, Noy, 86.

both the lessors. But a breach by the tortious entry of one of the lessors, will support an action against him alone; for where one of the lessors has actually done wrong by his entry on the lessee, without the assent of the others, the covenant in law is not to be taken to be joint, so as to charge the other lessors with this personal wrong of their companion; for it would be unreasonable that the innocent should be punished with the guilty; and therefore, as to the breach by the entry of one lessee, the action may well be brought against him alone (*y*).

Where the covenants are joint and several by two lessees of a joint interest, it does not follow, because the interest must in its nature survive, that the covenants must be construed to run with the land: on the contrary, each is also liable on the separate covenant, which in case of his death will devolve and be binding upon his executor. In this case it would have been a particular hardship on the lessor to have had these covenants construed differently, the surviving lessee being insolvent; so that the lessor, had he been precluded from resorting to the executor of the deceased covenantor, who died in affluent circumstances, would have been entirely deprived of his rent (*z*).

It will not be amiss in this place to notice how far a joint and several lien will affect various covenants in the same deed; and it may be laid down as

(*y*) Ante, n. (*x*).

(*z*) Enys v. Donnithorne, 2 Burr. 1190.

a rule, that the first covenant in a lease, whereby the lessees covenant jointly and severally *in manner following, that is to say*, &c., must according to the general principles of construction, extend to all the subsequent covenants on the part of the lessees throughout the deed, unless there be something in the nature of the subject to restrain them to the former part of the lease. It is not necessary to repeat in every covenant that *each* of the lessees covenants for himself and his representatives; the general words introductory to the covenants are sufficient to extend to all the subsequent covenants on their part. The case (*a*) from which this rule is deduced was attended with circumstances of a peculiar and special nature. A lease had been granted by the Duke of Northumberland of a colliery to two lessees, who covenanted jointly and severally with the lessor *in manner following, that is to say;* then followed a string of covenants on the part of the lessees, that they would work the collieries in a proper manner, that they would once in every fortnight deliver an account in writing of the quantities of coals worked, &c. &c. After these followed a covenant on the Duke's part to make certain allowances for every ton of coals worked. And after a proviso respecting the sale of small or inferior coals, came the clause on which this action was brought, viz. And it was thereby further agreed that an account should be stated and settled once in every six months, and that the moneys appearing to be due should be accounted for and paid *by the said lessees, their executors, &c.*, (without saying *and each*

(*a*) Duke of Northumberland v. Errington, 5 Term Rep. 522.

of them). And it was thereon contended, that the latter covenants relative to the payments were entered into in respect of the interest which the lessees were to derive under the lease; and as that was joint, it was intended by the parties that when the interest ceased, the responsibility founded on that interest should cease also. But on the above principle, and on the rule of construction that it is immaterial in what part of a deed any particular covenant is inserted, the Court gave judgment for the plaintiff.

As to the construction of joint covenants in equity: It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived; but where an obligation exists independently of any instrument by which the duty may have been secured, as in the case of partnership debts, bonds, &c., the principle is different; and in such case a joint bond (and the principle extends to covenants) has in equity been considered as several, there having been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. The case was(*b*): One of several partners died, and the partnership, as far as his interest was concerned, was determined. The surviving partners jointly entered into a covenant, on certain consi-

(*b*) Sumner v. Powell, 2 Meriv. 30. Thomas v. Frazer, 3 Ves. 399.

derations, to indemnify his executor from all claims in respect of the partnership. Some of the other partners having died, and the executor having been obliged to pay a large sum of money in respect of the late partnership, filed his bill claiming to be entitled to be repaid such sum out of the estates of some of the deceased partners, and contended, that the obligation, which though only joint at law, would be held in equity to be several as well as joint; and therefore binding on the estate of the deceased covenantor. But Sir William Grant, the Master of the Rolls, held, that in this case the covenant was purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they had thereby undertaken; and that there was no equity that entitled the executor to demand from the other partners an engagement to that effect. They were contented, he said, to give him a covenant of indemnity, and as it was only a joint covenant that was given, he could not say that it was any thing more than a joint covenant that was meant to be given. It was not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There was nothing but the covenant itself by which its intended extent could be ascertained. His Honor, therefore, refused to give the covenant any other than its legal operation and effect, and the bill was dismissed with costs.

II. With reference to the rights of covenantees.

It now becomes necessary to notice covenants, several, joint, and joint and several, as they relate to covenantees.

In considering this subject it is most important to keep in view the difference between the rights and interests acquired by covenantees, and the responsibilities imposed on covenantors, by virtue of their agreement. This distinction will be discovered to pervade, and regulate the decisions of all the cases; in the majority of which the doubt has been, how far covenantees, when there were more than one, were capable of suing separately or jointly. Some general propositions, now to be submitted, are deducible from the authorities. That the following observations are not in any way to be connected with the liabilities of covenantors, and suits instituted against them jointly or severally, but are confined to the rights and interests of covenantees and actions by them, must, it is repeated, be preserved in remembrance.

1. Several.

First, then, it is a well settled principle, that covenants shall not be construed to be joint or several from the particular language in which they may be conceived, but shall be measured and moulded according to the interests of the covenantees; and although in terms the covenant may import to be joint, yet where the interest is several, so shall the covenant be construed (*c*). This rule was established at a very early period, and has been fully recognised and sanctioned by all the succeeding cases to the present day.

(*c*) James v. Emery, 8 Taunt. 245; S. C. 2 J. B. Mo. 195; 5 Price, 529. Withers v. Birchan, 3 Barnew. & Cres. 254; S.C. 5 Dow. & Ry. 106. Owston v. Ogle, 13 East, 538. Anon. Jenk. 262, case 63.

The leading case on this subject will be found in Lord Coke's reports (*d*), in which a vendor covenanted with four persons, *and to and with each and every of them*, that he was lawfully seised, &c.; and it was resolved, that all the covenantees must join in the action, notwithstanding the above words in italics; for as to these words this difference was agreed: When it appears by the declaration that every of the covenantees hath or is to have a several interest or estate, there, when the covenant is made with the covenantees, *et cum quolibet eorum*, these words make the covenant several in respect of their several interests. As if a man by indenture demises to A. Black-acre, to B. White-acre, and to C. Green-acre, and covenants with them that he is lawful owner of all the said acres; in that case, in respect of the said several interests by the said words *et cum quolibet eorum* the covenant is made several; but if he demises to them the acres jointly, then these words *cum quolibet eorum* are void; for a man by his covenant (unless in respect of several interests) cannot make it first joint and then several by the same or the like words, *cum quolibet eorum:* for although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee; yet a man cannot bind himself to three, and to each of them, to make it joint or several at the election of several persons for one and the same cause. It was also held, where one covenanted that he would not agree

(*d*) Slingsby's case, 5 Co. 18, b; S. C. nom. Beckwith's case, 3 Leon. 160. 2 Leon. 47. Windham's case, 5 Co. 8, a. Cook v. Wotton, Dy. 337.

for taking the farm of the excise of beer without the consent of the plaintiff and another, that this constituted a several cause of action, which enabled either of the covenantees to sue for his particular damages; for otherwise one covenantee might be bribed to withhold his consent, and so defeat the other of his remedy (*e*).

The same rule prevailed where two persons, for certain considerations, covenanted with Rowley, Emery, and Cludde, and each of them, their and each of their executors, administrators, and assigns, to pay them, in certain proportions, the sum of 14000*l.* by instalments. Emery and Cludde, without joining Rowley, who was then alive, brought an action, to which *actio non* was pleaded; and, on the ground that the interests of the covenantees were evidently several, the plaintiffs recovered (*f*).

A similar judgment, and for the same reasons, was pronounced in a still later case (*g*). Two distinct annuities had been granted by two separate indentures to Storton and Barker. By a subsequent indenture, reciting the annuity deeds, one Moore covenanted with Barker and Storton, their executors, &c., that in case the grantors, or either of them, should make default in payment of the said annuities, or either of them, he (Moore) his heirs, &c.

(*e*) Wilkinson v. Lloyd, 2 Mod. 82.

(*f*) James v. Emery, in error, 2 J. B. Mo. 195; S. C. 8 Taunt. 245; 5 Price, 529.

(*g*) Withers v. Bircham, 3 Barn. & Cres. 254; S. C. 5 Dow. & Ry. 106.

would pay the same. After Moore's death Barker's annuity became in arrear, upon which this action was brought against Moore's executors. They pleaded that the joint covenantee was still living, and contended, on the authority of Rolls v. Yate (*h*), and Anderson v. Martindale (*i*), that this covenant was joint; but the court were of a contrary opinion, and held that the interests were clearly several, as each of the annuitants had a distinct interest in the annuity payable to him; and as the interest was several the covenant must also be several, and, consequently, the action was properly brought by the executor of that covenantee whose annuity was in arrear. And the cases cited were distinguished from the principal case, because in each of those cases one of the covenantees had no interest whatever; and the covenant was not only joint in its language, but was for one entire thing; but here the covenant was for payment of a distinct annuity to each of the covenantees. In James v. Emery the same distinction was taken by the court between that case and Southcote v. Hoare (*k*), which was there cited for the defendant.

The reason for these decisions is, that if a man could bind himself to three, and to each of them, to make it joint or several at the election of several persons for one and the same cause, the court would be in doubt for which of them to give judgment.

(*h*) Rolls v. Yate, Yelv. 177; S. C. 2 Brownl. 207; 2 Bulst. 25.

(*i*) Anderson v. Martindale, 1 East, 497, noticed post.

(*k*) Southcote v. Hoare, 3 Taunt. 87, noticed post.

and the covenantor might be doubly charged for the same breach (*l*).

2. Joint.

The general rule is applicable as well to joint as to several covenants: if a covenant be joint and several, or several only in the terms of it, yet if the interest and cause of action be joint, the covenant shall be construed so as to accord with the interest (*m*). And it would seem that the rule is too inflexible to admit of any alteration by language, however strong or emphatic (*n*). Thus if each of several parties covenants with the other and others of them *respectively*, and his and their *respective* executors, &c. to do a certain act which constitutes a joint interest and cause of action in the covenantees, they are all bound to join in the action (*o*).

Again, where a lessee under a power covenanted with J. C. (a receiver appointed by the Court of Chancery), and other the receiver or receivers for the time being, and to and with such other person or persons as for the time being should or might be entitled to the freehold or inheritance, or to the rents and profits, of the said premises, and

(*l*) Slingsby's case, 5 Co. 19. 3 H. 6. 44, b., confirmed by Anderson v. Martindale, 1 East, 501.

(*m*) Eccleston v. Clipsham, 1 Saund. 153; S. C. 2 Keb. 338. 339. 347. 385. Spencer v. Durant, Comb. 115; S. C. 1 Show. 8. Johnson v. Wilson, Willes, 248; S. C. 7 Mod. 345. Saunders v. Johnson, Skin. 401.

(*n*) Kingdom v. Jones, T. Jo. 150; S. C. reported in Raym. 459; Skin. 6. 26, but this point not adverted to.

(*o*) Eccleston v. Clipsham, ubi supra.

to and with every of them, to repair, &c.; it was determined, that the action could not be brought by the executor of the party entitled to the freehold, as the interest was joint, and survived to the receiver; and that the words *to and with every of them* meant nothing more than that the party covenanted with every of the receivers and with the person entitled jointly. The court also remarked, that there was a great deal of difference between covenants, where the parties covenant jointly and separately, and where they covenant *with* them and every of them (*p*).

The covenant in this case, it will be seen, was entered into with two persons for one and the same thing, and both had a legal interest in the performance of it; and as the benefit was only to one, it was impossible that the interests could be several.

It had been before determined (*q*), that a covenant with J. A., and also with E. W., to pay J. A. an annuity during the life of E. W., created a joint interest, the defendant being bound to pay the annuity only once. And on this ground judgment was given against the executor of J. A. deceased, the court asking, if both parties were allowed to bring separate actions for the same interest where only one duty was to be performed, which of them ought to recover for the nonperformance of the covenant.

(*p*) Southcote v. Hoare, 3 East, 497. See Rolls v. Yate, Taunt. 87. Yelv. 177.

(*q*) Anderson v. Martindale, 1

3. Joint and several.

After what has been advanced, it is perhaps scarcely necessary to add, that the same words may for some purposes constitute a joint, and for others a several covenant, and have a changeable operation so as to correspond with the different interests of the covenantees under the various agreements in the same deed (*r*). An interest joint at first, may also by subsequent dealings become several; as if two out of three receive their shares; this is a severance, and will enable the third party to maintain an action singly for his proportion (*s*).

The first duty therefore is to ascertain with certainty the quality of the covenantees' interest, from which will ensue the necessity of their joining or severing in action. It is not denied that difficulties may sometimes occur in distinguishing a joint from a separate interest; and no regular criterion can exist by which this difference can be clearly and broadly defined; but it is presumed that a careful examination of the object of the deed itself, an attention to the general rules for construction of covenants (*t*), and a perusal of the examples just submitted, will in a great measure surmount any obstacle, and enable the inquirer to arrive at a right conclusion.

A brief recapitulation and summary in this place of the principal points of the cases previously cited,

(*r*) Saunders v. Johnson, Skin. 401. Kingdom v. Jones, T. Jo. 150. Lilly v. Hodges, or Hedges, 8 Mod. 166; S.C. 1 Stra. 553.

(*s*) 1 Chit. Plead. 6. 7. 3d ed. cites Garret v. Taylor, 1 Esp. N.P. 117. Watson's Law of Partn. 420. 2d ed. 7 Term Rep. 279.

(*t*) Post, Part the Second, p. 136, et seq.

as they relate to the parties joining or severing in action may perhaps be useful: the subject shall accordingly be divided into two branches; the first, to show what persons must be joined as *plaintiffs;* the second, what persons must be joined as *defendants.*

I. Persons to be joined as plaintiffs.

First, From the observations before made it has been collected, that the nature of the interest derived by the covenantees will generally direct the necessity of their suing severally or in conjunction; but it may be too much to assert that the words of the covenant shall have no influence; a distinction having been taken between those cases in which the covenantees *must,* and those in which they *may* join in an action.

1. Where the interest is several.

Where there is no express contract with all, and their legal interest is several, the covenantees *must* sue separately (*u*): yet where the contract is entered into with the covenantees jointly, and the estate taken by them is several, they *may* at their option sue jointly or severally; jointly in respect of the joint contract; severally in respect of the interest (*v*). And if there are three covenantees taking distinct interests, two of them may support an action without joining the third, though living. This was in effect decided by a recent case (*w*). Two of three covenantees were plaintiffs; the defendant pleaded *actio*

(*u*) 1 Chit. Pl. 8. 4th ed. Tippet v. Hawkey, 3 Mod. 263.

(*v*) 1 Saund. 154. n.

(*w*) James v. Emery, in error, 2 J. B. Mo. 195; S. C. 8 Taunt. 245; 5 Price, 529.

non; for that Rowley, the other covenantee, was still living; and the judges held that as the interests were several, Rowley was not a necessary party; but no objection was taken either by the court or counsel to the action being commenced by the two conjointly. It therefore appears that although they *may* sever, they are not under any obligation to do so.

And it may be observed that the executor or administrator of each several covenantee stands in his testator's or intestate's situation (*x*).

2. Where the interest is joint.

On the other hand, where a joint interest is created, the covenantees cannot sever in action (*y*); nor can any words of severalty relieve them from the necessity of suing together; even although the covenant be with *each of them*, or with them *jointly and severally* (*z*). The reason assigned is, that if several were to be permitted to bring distinct actions for one and the same cause, where the interest is joint, the court would be in doubt for which of them to give judgment (*a*).

Should one only commence an action, and omit to aver in his declaration that the others are dead (*b*),

(*x*) Withers v. Bircham, 3 Barn. & Cres. 254; S. C. 5 Dow. & Ry. 106.

(*y*) Eccleston v. Clipsham, 1 Saund. 153; S. C. 2 Keb. 338. 339. 347. 385. Spencer v. Durant, Comb. 115; S. C. 1 Show. 8. Johnson v. Wilson, Willes, 248; S. C. 7 Mod. 345. Saunders v. Johnson, Skin. 401. Wilkins v. Fry, 1 Meriv. 262.

(*z*) Ibid.

(*a*) Slingsby's case, 5 Co. 19, a. cited 1 East, 500.

(*b*) Osborne v. Crosberne, 1 Sid. 238. Scott v. Godwin, 1 Bos. & Pul. 67.

or that they dissented from the deed, the defendant may avail himself of it on demurrer, or he may bring error, or move in arrest of judgment (*c*); for a very recent decision (*d*) has established that all joint covenantees who may sue must be parties to an action, as their assent is to be presumed; and it is not enough to aver that the other covenantees did not seal; they might sue notwithstanding; and unless the declaration shows that they have no right to be considered as covenantees, it is insufficient. Unlike, too, the several covenant, the executor derives no interest from a deceased joint covenantee, the surviving party being the only person entitled to institute legal proceedings (*e*).

II. Persons to be joined as defendants.

Secondly, What persons must be joined as defendants.

1. Where the covenant is several.

Where the covenant is entered into by two or more severally only, it is clear that an action joining them as defendants cannot be maintained; for at law, as well as in equity, the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situations (*f*).

2. Where the covenant is joint.

In actions against joint covenantors they must all be made defendants, and an omission to join them in

(*c*) 1 Chit. Pl. 7. 4th ed.

(*d*) Petrie v. Bury, 3 Barn. & Cres. 353; S. C. 5 Dow. & Ry. 152. Scott v. Godwin, 1 Bos. & Pul. 67.

(*e*) Anderson v. Martindale, 1 East, 497. Southcote v. Hoare, 3 Taunt. 87.

(*f*) Birkley v. Presgrave, 1 East, 226, 7.

suit can be taken advantage of by a plea in abatement only, verified by affidavit (*g*). And on the death of one, the joint covenantor incurs all the legal liability by survivorship, and exonerates the executor of his deceased companion (*h*). The covenantee, it is observable, may recover in execution against one the whole sum covenanted to be paid, and has nothing to do with the contribution between the covenantors (*i*).

But if a covenant be joint in its terms, and the deed be executed by one of the covenantors only, an action may be maintained against that one; for, although the words import a joint covenant, yet the deed is in fact the single instrument of the party executing it (*k*).

3. Where the covenant is joint and several.

Covenants joint and several confer on the covenantee the right of commencing proceedings at his election against both or either of the covenantors (*l*). And although one of three joint and several covenantors for the payment of an annuity may by his bankruptcy and certificate be rendered irresponsible, yet the covenantee may proceed against the other two (*m*). And on a joint and several covenant, the

(*g*) Eccleston v. Clipsham, 1 Saund. 154. n. 1. Cabell v. Vaughan, Ibid. 291. n. 4.

(*h*) 2 Vern. 99. Bac. Ab. Obligation, (D) 4.

(*i*) Clough v. Clough, 5 Ves. 717. Rowlandson, ex parte, 3 P. Wms. 405. And see Brett v. Cumberland, Cro. Jac. 523.

(*k*) Bidwell v. Lethbridge, 1 Barnard. 235. 2 Rol. 22.

(*l*) Lilly v. Hodges, or Hedges, 8 Mod. 166; S. C. 1 Stra. 553. Enys v. Donnithorne, 2 Burr. 1196.

(*m*) Baxter v. Nichols, 4 Taunt. 90.

covenantee has the option of suing either the executor of a deceased covenantor, or the survivor (*n*).

Bacon in his Abridgment (*o*) suggests a doubt, whether, on a joint and several covenant by three, an action can be supported against two, without joining the third then living. And whether if the plaintiff choose to sue two and not all three, he should not bring a separate action against each of the two. It may not be easy to find a case of *covenant* involving the very point; but if the analogy between bonds and covenants be admitted, and no good reason appears for rejecting it, there is a case (*p*) negativing the right to such an action. In Rolle's Abridgment it is laid down, "If three are bound jointly and severally, the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally." It was said also by Buller, J. in Stratfield v. Halliday (*q*), that if three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must sue them all, or each of them separately; and (the learned judge added) though that doctrine has been several times questioned, yet it has been held good law from the time of Lord Coke. And the same was adjudged at a much earlier period (*r*): there was a joint and several bond by three, and an action of debt was commenced against two; the court decided that the writ was not well brought: and Fitzherbert, J. directed the counsel for the de-

(*n*) May v. Woodward, Freem. 248.

(*o*) Bac. Ab. Cov. (D).

(*p*) Rol. Ab. 148.

(*q*) Stratfield v. Halliday, 3 Term Rep. 782.

(*r*) 27 H. 8. 6. pl. 29.

fendant to make thereof a plea, so that the other party might have his answer. And the defendant pleaded in abatement that there was another joint obligor who sealed the bond and was still alive (*s*). Certain it is, if A. and B. are bound jointly and severally to J. S., although he may elect to sue them jointly or severally, yet, if he sues them jointly he cannot sue them severally; nor, on the other hand, if he sues them severally, can he sue them jointly; for the precedency of one suit may be pleaded in abatement of the other; because if the obligee sues the obligors jointly and recovers judgment, he is at liberty to take as well the joint as the separate effects of each of the obligors in execution; and as in such case he can have no more than all the effects of each, it would be fruitless, and indeed vexatious, during such joint suit, to bring a separate action against each of the obligors (*t*).

The covenant, as we have seen, will not in all cases follow the devolution of the interest taken under a lease; for if two joint lessees covenant jointly and severally for payment of rent, although the interest must survive on the death of one, the executor of the deceased lessee may be sued alone in respect of the several covenant (*u*).

(*s*) Cabell v. Vaughan, 1 Saund. 291.

(*t*) Rowlandson, ex parte, 3 P. Wms. 405. And see Brett v. Cumberland, Cro. Jac. 523. See also Carne v. Legh, 6 Barn. & Cres. 124; S. C. 9 Dow. & Ry. 126.

(*u*) Enys v. Donnithorne, 2 Burr. 1190. Ante, p. 119.

PART THE SECOND.

OF THE GENERAL RULES FOR CONSTRUCTION OF COVENANTS.

EVERY covenant must receive the same construction from every court: whatever is its true meaning must be its meaning every where (*a*). And since, in construing covenants, the fulfilment of the evident intent and meaning of the parties is the design of courts of law and equity, they do not confine themselves within the narrow limits of a literal interpretation, but taking a more liberal and extended view, contemplate at once the whole scope and object of the deed. Their various decisions have consequently led to the establishment of some general rules for construction. These rules are few, simple, and easily comprehended; but the only difficulty consists in making the most just application of them (*b*). They shall be submitted in order, and a few cases appended to each of them by way of example and illustration. The construction of particular express covenants is reserved for future examination (*c*).

1. As to the intention.

The first general principle is, that covenants shall be so expounded as to carry into effect the intention of the parties. This intention is not to be collected

(*a*) 9 Ves. 333. 393. 1 Dougl. 277. 1 Eden, 376.

(*b*) 2 Bos. & Pul. 24, 5.

(*c*) Post, Part the Third.

from the language of a single clause in the deed, but from the entire context; and it is immaterial in what part of a deed any particular covenant may be inserted (*d*), for exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words (*e*); as is said by Plowden (*f*), "The scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself, and the intent thereof, also accomplished." So observes Lord Hobart (*g*), "The law, being to judge of an act, deed, or bargain, consisting of divers parts, containing the will and intent of the parties, all tending to one end, doth judge of the whole, and gives every part his office to make up that intent, and doth not break the words in pieces." This principle of construction is also agreeable to a rule in the civil law, viz., if the words of a covenant appear to be contrary to the intention of the covenantors which is otherwise evi-

(*d*) Duke of Northumberland v. Errington, 5 Term Rep. 526.

(*e*) Per Lord Ellenborough in Iggulden v. May, 7 East, 241; S. C. 3 Smith, 269; 2 New Rep. 449. Duke of Northumberland v. Errington, supra. Trenchard v. Hoskins, Winch, 93; S. C. Lit. 62. 65. 203. cited 11 East, 643. Doe dem. Spencer v. Godwin, 4 Mau. & Selw. 265. Barton v. Fitzgerald, 15 East, 541. Doe dem. Bish v. Keeling, 1 Mau. & Selw. 95. Sicklemore v. Thistleton, 6 Mau. & Selw. 12. Earl of Clanrickard's case, Hob. 275. 277. Nokes's case, 4 Co. 81, a. Kingston v. Preston, 2 Dougl. 689. Pigot v. Bridge, 1 Vent. 292. Ferrers v. Newton, 1 Sid. 312. Foord v. Wilson, 5 Taunt. 547; S. C. 2 J. B. Mo. 592. Glazebrook v. Woodrow, 8 Term Rep. 370.

(*f*) Plowd. 18. cited by Lord Ellenborough, 8 East, 89.

(*g*) Hob. 275.

dent, such intention must be followed rather than the words (*h*).

Accordingly, in many cases, the most general words in a deed have been holden to be narrowed and restrained by the apparent object and intent of the parties, as collected from other parts of the same deed. Thus in Broughton v. Conway (*i*), in debt on obligation, with this condition, (after reciting that the defendant had sold to the plaintiff a lease for years of the manor of S.,) that he would not do, nor had done, any act to disturb the plaintiff's possession of it, but that the plaintiff should hold and enjoy this peaceably without the disturbance of the defendant or any other person; it was holden by all the justices that the defendant was not bound to warrant peaceable possession to the vendee, but only against acts done, or to be done, by himself; and that all the sequel of the condition which came after the word *but* should be referred to the antecedent part of the condition, and expounded and extended in like manner; that is to say, that he should enjoy it without disturbance of any person or persons, by any act *by him* done, or to be done. To the same effect is the case cited in Shep. Touch. (*k*), as determined by Bridgeman, Justice: If one make a lease for years of a manor, and covenant that the lessee shall make estates for life or years, and that they shall be good; in this case it seems that the covenant shall not be taken to enable

(*h*) Domat, vol. i. 22. XI.

(*i*) Broughton v. Conway, Mo. 58.

(*k*) Shep. Touch. 169. cited by Lord Ellenborough, 8 East, 89.

the lessee to make estates for a longer time than his estate will bear.

Though the covenantor performs the letter of his covenant, yet if he does any act to defeat its intent or use, he is guilty of a breach (*l*). Therefore, where a person covenanted, that if H. R. paid him a sum of money on such a day, then he would deliver up the recognizance on which the sum was secured to be cancelled and vacated, it was clearly holden, that although it might be delivered up at the stipulated time, yet the defendant had broken his covenant by first prosecuting an extent upon the recognizance (*m*). So where one covenanted that another should have all the grains made in the covenantor's brewhouse for seven years, the intent of the parties being that the covenantee should have the grains for the use of his cattle, it was resolved, that by mixing hops with the grains, by which they were spoiled and rendered unprofitable to the plaintiff, the covenantor was guilty of a breach of covenant (*n*). So if I covenant that I will leave all the timber which is growing on the land I hire, upon the land at the end of the term, and then cut it down, though I leave it on the land ; or if I covenant to deliver so many yards of cloth, and I cut it in pieces, and then deliver it (*o*) ; or to deliver a horse, and poison him before delivery (*p*) ; my covenant is

(*l*) Anon. Skin. 39. 40. 2 Vent. 278.

(*m*) Robinson v. Amps, T. Raym. 25 ; S. C. 1 Sid. 48, nom. Robinson v. Aunts, and 1 Keb. 103. 118.

(*n*) Griffith v. Goodhand, T. Raym. 464 ; S. C. Skin. 39 ; T. Jo. 191.

(*o*) Ibid.

(*p*) Skin. 40.

broken; for the law regards the real and faithful performance of contracts, and discountenances all such acts as are *in fraudem legis*.

Twisden, J. in Hookes v. Swaine (*q*), said, he remembered a case in which one Sir W. Fish was bound in an obligation to pay on such a day in Gray's Inn Hall fifty pounds, without saying of money; and it was held that a tender of fifty pounds weight of stone did not satisfy the bond.

If a covenant be once properly performed, the covenantor shall be absolved from all liability, although the performance may by matter subsequent be defeated or rendered unavailing. As if I covenant that an infant shall levy a fine, which is levied accordingly, but afterwards reversed for error, this is a sufficient performance. Or if I covenant that A. B. shall marry C. D., both being infants, and the marriage is solemnized, I shall not be responsible for the future disagreement of A. B. when he shall attain his majority; for my covenant extended only to the marriage, not to the continuance of it; that ought to be left to the law (*r*). So if two covenant jointly to erect a house in a workmanlike manner, and the jury find that the house was built by one, without saying both, this is a perfect performance, because the thing required to be done was done (*s*). But there is a difference between this case

(*q*) Hookes v. Swaine, 1 Sid. 151; S. C. 1 Lev. 102; 1 Keb. 511. 517. 555, but the point not noticed.

(*r*) Leigh v. Hanmer, 1 Leon. 52.

(*s*) Boulter v. Ford, 1 Sid. 76; S. C. 1 Keb. 284; and S. C. nom. Porter v. Harris, 1 Lev. 63.

and the case where two covenant to go to York; there the one cannot plead that he went, but must plead that they both went; for there is a personal act to be done, and the one cannot go to York by deputy, as he may erect a house (*t*).

2. Equivocal words to be construed most strongly against the covenantor.

Secondly, The end of a good construction is to supply the defects of expression (*u*), and to prevent the evasion of the covenant by the covenantor, in consequence of the obscure or equivocal wording of the deed; the courts have therefore uniformly adopted a second general rule of construction, viz. that ambiguous words, or words *in equilibrio*, are to be taken most strongly against the covenantor (*v*); the maxim being, *verba chartarum fortiùs accipiuntur contra proferentem* (*w*).

One case will suffice to exemplify this rule; it would be useless to furnish more, as each of the cases, having arisen from a singular combination of circumstances, and a vague and scarcely intelligible mode of expression, can never be serviceable as precedents, except in instances where there is a similarity of facts and language. Thus J. S. covenanted to pay to his son-in-law and daughter twenty pounds per annum, without mentioning for how many years; the defendant contended, that, as no particular period was limited, he

(*t*) Ante, n. (*s*).

(*u*) Show. P. C. 143.

(*v*) Plowd. 287. Rubery v. Jervoise, 1 Term Rep. 234. Fowle v. Welsh, 1 Barn. & Cres. 35; S. C. 2 Dow. & Ry. 133. Love v. Pares, 13 East, 85. Earl of Shrewsbury v. Gould, 2 Barn. & Ald. 494.

(*w*) Love v. Pares, 13 East, 86.

was not under any obligation to pay for more than a year. The books (*x*) containing the case, differ indeed in their reports of it; but they all agree that it was adjudged after several arguments, that the payment was to continue beyond the first year. Siderfin says, the court held that it should be for the lives of the son-in-law and daughter, that the maintenance might be as lasting as the marriage; and the principle on which the decision was founded, is stated by Levinz to have been, that the covenant should be construed most strongly against the covenantor.

Sometimes, indeed, the court, from the incorrect or inartificial manner in which a deed is prepared, are unable to ascertain with sufficient certainty what is the intention of the parties. In such cases, rather than proceed on an intention not expressed, and to be formed only on conjecture, they deem it the safer rule to adhere to the language used, and construe the instrument according to the letter. A late case (*y*) called for a determination to this effect. A lessee for years covenanted to pay the reserved rent, and not to assign without the lessor's leave, provided that if the said rent should be in arrear for twenty days, &c., or if all or any of the covenants or agreements *thereinafter* contained on the part of the lessee to be performed should be broken, then it should be lawful for the lessor to re-enter. No covenants were contained in the deed on the lessee's part after the proviso, but only a covenant on the part of the lessor, that the

(*x*) Hookes v. Swaine, 1 Sid. 151; S. C. 1 Lev. 102; 1 Keb. 511. 517. 555.

(*y*) Doe dem. Spencer v. Godwin, 4 Mau. & Selw. 265.

lessee, paying the rent and performing the covenants *thereinbefore* contained on his part to be performed, &c., should quietly enjoy, &c. The defendant assigned without leave; and it was objected that this did not create a forfeiture of the lease within the proviso, by reason that the covenant not to assign preceded the proviso, and the proviso only related to covenants *thereinafter*, i. e. that followed and not preceded it. And of this opinion were the judges, who refused to construe *thereinafter* as *thereinbefore*, or to reject the word entirely; and Mr. Justice Le Blanc said, If indeed the intention of the parties were perfectly clear, we should be bound, though in case of forfeiture, to give to the instrument a sense conformable to such intention; yet it would be difficult to reject clear and positive words; but in this case I am not so fully satisfied of the parties' intention, as to find it necessary to reject any thing.

In another case (*z*), by an indenture dated in 1811, a wharf and other premises were demised to the plaintiff, to hold from the 29th of September, 1806, for 21 years; and the lessors covenanted, that the plaintiff should and might from time to time during that term, have the free use and benefit of the *new-intended road*, whenever the same should be made, at, or adjoining, or near to the said premises, and a right of way, and egress, and regress, from and to the road, into and upon the premises, without any interruption of the lessors, or any claiming under them. It appeared that no new road had been made since

(*z*) Crisp v. Price, 5 Taunt. 548.

the execution of the lease, but there was a road in existence adjoining the premises made a short time before the lease; and the fact was, but it could not be given in evidence, that the lease was granted in pursuance of an agreement for a lease in 1806, which stipulated, "that the premises should have the free use of the newly-intended road, whenever the same might be wanted, with a right of back-way out"; and the draft of the lease originally prepared had the same phrase, and was then consonant to the truth of the facts, and to the intention of the parties; but in the four years which had elapsed before the execution of the lease, the road intended had been made; and the defendant had excluded the plaintiff's premises from the road to which they adjoined by building a high fence between them. The court said they could not intend from the view of the lease that an intention existed before 1806 to make this road, and that it was executed before the date of the execution of the lease; for the indenture described it as a road newly intended in 1811. They, however, thought that relief might be obtained in equity.

It is worthy of remark, that in the construction of a covenant, no attention is paid to the acts of the parties, or the interpretation they may put upon it. A contrary rule is to be found in one instance (*a*); but this case has met with universal disapprobation, and a different doctrine is now fully established (*b*).

(*a*) Cooke v. Booth, Cowp. 819.

(*b*) Baynham v. Guy's Hospital, 3 Ves. 298. Eaton v. Lyon, 3 Ves. 694. Moore v. Foley, 6 Ves. 237. Iggulden v. May, 9 Ves. 333; S. C. 7 East, 244.

Thirdly, Exposition shall be made of the deed, so as to support, rather than annul the transaction; *ut res magis valeat quàm pereat* (*c*). 3. In support of the covenant.

Fourthly, When no time is limited for the doing of the thing, it shall be done in a reasonable time. Therefore if a man covenants to make further assurance at all time and times, at the charges of the covenantee, and counsel advises a fine, he is not bound to do it presently, but shall have a reasonable time (*d*). And if W., in consideration that T. will marry a certain woman before a time named, covenants to pay him ten pounds, and to find security for the payment of forty pounds more on his (W.'s) death, a convenient time shall be allowed to W. for finding the security (*e*). 4. Reasonable time allowed for performance.

(*c*) Shep. Touch. 166. 3 Atk. 136.

(*d*) Pexpoint v. Thymbelbye, 1 Rol. Ab. 441. 1 Ld. Raym. 402.

(*e*) Peeter v. Carter, Rol. Ab. 438.

PART THE THIRD.

OF PARTICULAR EXPRESS COVENANTS.

CHAPTER THE FIRST.

OF COVENANTS FOR REFERENCE TO ARBITRATION.

CONSIDERABLE jealousy is manifested by the courts of law and equity in preserving their privileges inviolate, and repressing attempts at encroachment on the exclusiveness of their jurisdiction. This jealousy is particularly evinced by their decisions respecting covenants for reference to arbitration. The constant introduction of these covenants in partnership and other deeds, might lead to a conclusion that they were available; but it deserves, from its importance, to be more generally known than it appears to be, that they are utterly nugatory and futile, though not absolutely illegal. There is no instance of an action on such a covenant having ever been entertained. It is unserviceable to both plaintiff and defendant. Should an action be commenced, assigning as a breach the defendant's refusal to name an arbitrator, the invalidity of the covenant may be urged to defeat the plaintiff of a judgment in his favor (*a*). On the other hand,

(*a*) Tattersall v. Groote, 2 Bos. & Pul. 131.

should the defendant endeavour to secure to himself the benefit of the covenant by way of defence, and plead, that though he had been ready and willing, and offered to refer the matters in controversy to three persons, &c., yet the plaintiff refused, the plea will not be allowed (*b*): indeed, it has been decided again and again, that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction. The court, however, observed that it was unnecessary to say how the point ought to be determined if it were *res integra*.

A jury, it must be admitted, would experience some difficulty in assessing damages, for *non constat* that the plaintiff would succeed in the arbitration; and this was thrown out by the court in the case first cited, as another ground of objection to the plaintiff's demand (*c*).

But although the mere agreement of the parties is not binding, yet it seems that a reference made, pending, or determined, might operate as a bar (*d*).

With very few exceptions, and those arising out of circumstances extremely peculiar, the rules and practice of equity coincide with the resolutions of

(*b*) Thompson v. Charnock, 8 Term Rep. 139.

(*c*) See also Mitchell v. Harris, 2 Ves. jun. 134. Street v. Rigby, 6 Ves. 817, 18, 19.

(*d*) Kill v. Hollister, 1 Wils. 129. Mitchell v. Harris, 2 Ves. jun. 137.

courts of law on this subject. It is fully settled that a specific performance of a covenant of this description will not be decreed (*e*); nor has there ever been an idea of a bill to enjoin a party from prosecuting his action at law, under a notion of giving specific effect to such a covenant, where proceedings have been commenced (*f*); nor will the court substitute the master for the arbitrators, for that would be to bind the parties contrary to their own agreement (*g*). And as a specific execution will be refused, so again, a party coming in as defendant cannot plead the agreement as a bar to the plaintiff's right to equitable relief (*h*). Opposed to this latter position is to be found a case (*i*), where Lord Kenyon, then Master of the Rolls, to a bill for an account of a partnership, allowed a plea of an agreement that all matters in difference were to be determined by arbitrators; but until that decision no such decree was ever heard of (*k*): by later determinations it has been repeatedly overruled; and the former doctrine has received the unqualified approbation of Lord Rosslyn (*l*), Lord Thurlow (*m*), and Lord El-

(*e*) Street v. Rigby, 16 Ves. 813. Price v. Williams, cited ibid. 818. Gourlay v. the Duke of Somerset, 19 Ves. 431. Agar v. Macklew, 2 Sim. & Stu. 418.

(*f*) Mitchell v. Harris, 2 Ves. jun. 137.

(*g*) Agar v. Macklew, 2 Sim. & Stu. 423.

(*h*) Wellington v. Mackintosh, 2 Atk. 569. See Lord Redesdale's Tr. Plead. 241.; and Beames's Elem. Pl. 231.

(*i*) Halfhide v. Fenning, 2 Bro. C. C. 336; S. C. nom. Halfhed v. Jenning, 2 Dick. 702.

(*k*) Per Lord Eldon, 6 Ves. 821.

(*l*) Mitchell v. Harris, 2 Ves. jun. 129; S. C. 4 Bro. C. C. 311.

(*m*) Price v. Williams, cited 6 Ves. 818.

don (*n*), and we may say, at a subsequent period, even of Lord Kenyon himself (*o*).

As a general proposition, therefore, it is true, that a covenant to refer disputes to arbitration will not bind the parties even to submit to arbitration before they come into equity. In some cases, however, where there has been a special anxious provision for arbitration, applying to every case in which a difference could arise, and stipulating expressly, not only that the arbitrators should determine upon evidence, but that they should be at liberty to use all such other ways and means to enable them to decide as they should think fit, the court has declined to interfere before the parties have tried the jurisdiction provided by the articles; and in a case relating to the Opera House, and the case of a brewery, where there were many partners, all interposition was refused by the court, and the parties were left to the remedy they had chalked out for themselves (*p*).

With a view to render the covenant efficient, the prudential course is to insert an agreement for liquidated damages (*q*); for where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it (*r*).

(*n*) Nichols v. Chalie, 14 Ves. 270. Street v. Rigby, 6 Ves. 815. Waters v. Taylor, 15 Ves. 10. 18.

(*o*) Thompson v. Charnock, 8 Term Rep. 139. 15 Ves. 18.

(*p*) Waters v. Taylor, 15 Ves. 10. Carlen v. Drury, 1 Ves. & B. 154. Gourlay v. The Duke of Somerset, 19 Ves. 431.

(*q*) Street v. Rigby, 6 Ves. 818.

(*r*) Lowe v. Peers, 4 Burr. 2229.

It is right to mention, that it is not a necessary consequence of a covenant to refer to arbitration, that the party thereby agrees to forbear to sue (*s*). Parties may so agree, and it is every day's practice, that if they do, they cannot proceed contrary to the agreement, and the covenant may be pleaded in bar to an action (*t*). It is also observable, that in this respect Halfhide v. Fenning differs from the other cases, the former containing negative words, that no suit either at law or in equity should be commenced until an award should have been made (*u*).

Fletcher v. Dyche, 2 Term Rep. 37. Shackle v. Baker, 14 Ves. 469.

(*s*) Street v. Rigby, 6 Ves. 817. 821.

(*t*) Mitchell v. Harris, 2 Ves. jun. 132. See also 6 Ves. 817. 821. Upon such a covenant, said Lord Eldon, there would be considerable difficulty; 6 Ves. 821. and see James v. David, 5 Term Rep. 141.

(*u*) See the case, and note (1) by Mr. Belt.

CHAPTER THE SECOND.

OF COVENANTS TO SURRENDER COPYHOLDS.

By a covenant to surrender copyholds a purchaser obtains a right in equity merely, without an equitable estate. By a surrender he obtains an equitable estate; and by admission he is invested with the legal seisin.

The principal use of a deed of covenant to surrender is to obtain also covenants for the title; but these covenants may be contained in a separate deed. The best plan, in order to preserve them from loss or accident, is to procure their insertion in the surrender; but this privilege the steward is not always disposed to allow.

A covenant to surrender will not amount to a surrender (*a*), any more than a covenant to grant a lease not warranted by the custom will operate as an immediate lease, so as to create a forfeiture (*b*). And although presented by the homage, the mere covenant

(*a*) Zinzon v. Talmash, 2 Show. 130; S. C. nom. Zinzan v. Talmage, T. Raym. 402; T. Jo. 142; Pollexf. 561.

(*b*) Fenny dem. Eastham v. Child, 2 Mau. & Selw. 255. Hamlen v. Hamlen, 1 Bulstr. 189. Lenthall v. Thomas, 2 Keb. 267. Richards v. Sely, or Ceely, 2 Mod. 79; S. C. 3 Keb. 638.

does not give the lord any right to a fine. As if a copyholder covenants to assign and surrender to A., which covenant is presented by the homage, but before any surrender A. assigns his interest to B., to whom the copyholder surrenders; one fine only will be due on B.'s admission, as A. never was tenant to the lord (*c*). But the covenantee having such an interest as is capable of being made the subject of assignment, the assignee may compel the lord to admit him (*d*).

Where one covenants to surrender on reasonable request, the custom enabling the party to surrender as well by letter of attorney as in court, a refusal to execute a letter of attorney authorising a surrender is not a breach of the covenant; for the copyholder has the option of making the surrender either way (*e*); it was moreover held, that a tender of the letter of attorney did not constitute such a request as to charge the covenantor with damages for not surrendering at the next court according to the requisition of the power of attorney, an express and not an implied request being necessary (*f*). Nor is a covenant to surrender to a purchaser, and to make and do all necessary acts, deeds, &c. for the further assuring the premises, at the costs and charges of the vendor, broken by non-payment of the fine due to the lord on admission of the purchaser; as the title

(*c*) Rex v. The Lord of the Manor of Hendon, 2 Term Rep. 484.

(*d*) Ibid.

(*e*) Symms v Smith, Cro. Car. 299; S. C. W. Jo. 314; Godb. 445.

(*f*) Ibid.

is perfected by the admittance of the tenant, and the fine is not due till after admittance (*g*). Still, with a view to perform his agreement, the covenantor must not only make the surrender, but get it presented also, the surrender being otherwise incomplete (*h*). Therefore the plaintiff, in an action of covenant for not surrendering copyholds according to agreement, need not show that a court was holden at which such surrender could be made, as it was incumbent on the covenantor to procure the holding of a court (*i*). And a general covenant by a copyholder to surrender is well performed by surrendering to two tenants out of court according to the custom (*k*).

A specific performance of this covenant, contained in a marriage settlement, will be decreed against the covenantor's heir at law in favor of persons claiming within the consideration of the instrument (*l*); but it seems to be otherwise where the party seeking a specific execution is merely a volunteer (*m*). So where one covenanted in his settlement that he would, within one month after marriage, surrender a copyhold to the use of his wife for life, remainder to the issue, remainder to the heirs of the wife, and if

(*g*) Graham v. Sime, 1 East, 632. Rex v. The Lord of the Manor of Hendon, 2 Term Rep. 484.

(*h*) Shann v. Shann, Sty. 256; S. C. nom. Shann v. Bilby, Ibid. 280.

(*i*) Fletcher v. Pynfett, Cro. Jac. 102.

(*k*) Turner v. Benny, or Benson, 1 Mod. 61; S. C. 2 Keb. 666; S. C. nom. Beany v. Turner, 1 Lev. 293. Page v. Smith, 3 Salk. 100.

(*l*) Neeve v. Keck, 8 Mod. 106.

(*m*) Bellingham v. Lowther, 1 Ch. Ca. 243.

he should neglect or refuse to make such surrender, then he would leave his wife 500*l.* at his death, and he died after the month without assets, and without having made the surrender; the covenant was declared to be a charge in equity; and the heir at law was decreed to surrender to the plaintiff and her heirs, and till surrender to be deemed a trustee for her (*n*).

Wherever an actual surrender would amount at law to a revocation of a will, there a covenant to surrender copyholds previously devised will operate as a revocation of the will in equity (*o*).

(*n*) Wood v. Pesey, 5 Vin. Ab. 547. pl. 36.

(*o*) Vawser v. Jeffry, 16 Ves. 519; S. C. 3 Barn. & Ald. 462; 2 Swanst. 268. See also Brydges v. Duchess of Chandos, 2 Ves. jun. 436.

CHAPTER THE THIRD.

OF COVENANTS TO LEVY FINES.

THE particular circumstances requiring attention in preparing a covenant to levy a fine must depend on the kind of fine intended to be acknowledged. The following observations on a covenant to levy a fine *sur conuzance de droit come ceo, &c.* may be applied *mutatis mutandis* to fines of other descriptions.

I. Of its different parts.

Care should be taken that the covenant accurately specify; 1st, By whom the fine is to be levied. 2dly, At whose costs. 3dly, In or as of what term. 4thly, In what court. 5thly, To whom it is to be levied. 6thly, The kind of fine. 7thly, Whether with proclamations or not. 8thly, Of what parcels. 9thly, By what descriptions. And 10thly, The clause declaratory that it shall enure to the intended uses. The form given in the Appendix may serve as a general precedent, its several provisions being varied, and rendered conformable to the peculiar state of the title, and the object the parties have in view.

1. By whom the fine is to be levied.

First, The parties by whom the fine is to be levied should be expressly noticed. An omission in this

respect will be fatal. If it be intended that the fine should be levied by two or more, and the covenant comprises the name of one as a covenantor for his own acts only, a refusal by the other or others to concur will not constitute a breach of the covenant. But it is not requisite that all the parties to the fine should be covenantors: one person, as has before been observed (*a*), may covenant as well for the acts of others as for his own: he may therefore covenant that he and A. B. and C. D. will levy a fine; but in such case no prejudice can arise to A. B. or C. D. should they withhold their consent; the only person liable to make reparation in damages for the breach is the party named in the lien of the covenant.

Where a fine is to be levied by a married woman, the husband always takes upon himself the obligation of procuring his wife's concurrence. Sometimes the husband is made in the lien to covenant for himself, his heirs, executors, and administrators, *and also for his said wife,* that he and she will levy a fine; but this is an inaccurate form. The lien should in all cases be kept distinct from the body of the covenant, and it would be difficult to frame an action consistently with the form and language of a covenant by a man for himself and his wife. The covenant should be by the husband for himself, his heirs, executors, and administrators, that he and his wife, (she hereby consenting), will levy the fine. Whether her consent be noticed or not is unimportant;

(*a*) Ante, p. 26.

for the mention of her approbation cannot affect her, nor does it appear from any case that an equity is raised against her by such consent. A warranty in a fine, however, by a baron and feme, annexed to an estate for years, will bind the feme, though under coverture at the time, and an action of covenant will lie against the feme thereon after the death of the baron (*b*).

In an action on a covenant that a feme coverte should, when requested, join in levying a fine, and executing any deed which might be required of her by the plaintiff, in order to bar her right of dower, it has been recently held, that the plaintiff's declaration, which averred merely an application to and refusal by her to join in a fine and to execute the deed, was insufficient, in not averring an application to the covenantor, in order that he might exercise what influence he possessed to induce her to consent, and not to subject him to an action by reason of her refusal (*c*).

If one covenants that J. S. shall levy a fine, the insanity of J. S. will not amount to an excuse for non-performance; but if one covenants that J. S. shall do all such reasonable acts for further assurance as the covenantee shall devise, and a fine is required, the refusal of the justices, by reason of J. S. being *non compos mentis*, to take his conuzance of the fine,

(*b*) Wotton v. Hele, 2 Saund. 177; S. C. 1 Mod. 66. 290; 1 Sid. 466; 1 Lev. 301; 2 Keb. 684. 703. 709. 723.

(*c*) Tooley v. Nicholls, M. T. 1828. MS.

will not be a breach of the covenant, a fine under the circumstances not being a reasonable act (*d*).

One who covenants generally to levy a fine is not bound to go before commissioners, authorised by dedimus to take the fine, to acknowledge his consent (*e*). It may be done either in court or by commission (*f*).

2. At whose costs.

Secondly, As the expenses of a fine are considerable, the covenant should name the party by whom they are to be defrayed. If a fine be necessary to effect a valid conveyance, the conuzor must undertake the charge, unless he be exempted by express stipulation. Where it is to be levied merely for the satisfaction of the purchaser, the expense falls on him. And it may be mentioned here, that a fine required under a covenant for further assurance, where there is no provision respecting the expenses, must be levied at the costs of him who is to have the benefit of it (*g*).

3. Of what term.

Thirdly, The term or time within which the fine is to be levied is also to be stated. It is necessary to caution the reader against the adoption of a form which has inadvertently crept into practice, allowing so much latitude as not to be capable of being the foundation of an action, at least during the

(*d*) Pet v. Cally, 1 Leon. 304.

(*e*) Sty. Prac. Reg. 172.

(*f*) Turner v. Benny, 1 Mod. 63, latter end of case; S. C. 2 Keb. 666.

(*g*) Goldney v. Curtise, 1 Bulstr. 90. But see Preston v. Dawson, 1 Brownl. & Gold. 70.

covenantor's life. The form alluded to provides, that the covenantor, his heirs, &c. shall in or as of — term now last past, *or in or as of some subsequent term,* acknowledge and levy, &c. It would be impossible to assign a breach of a covenant framed in these words. The generality of the provision should therefore be qualified by some restrictive words, confining the duty of levying the fine within a definite limit of time. This may be accomplished by adding words of notice or request, thus; that the covenantor, his heirs, &c. shall in or as of — term now last past, or in or as of some subsequent term, when thereunto requested by the covenantee, his heirs or assigns, acknowledge, &c., or, on receiving from the covenantee, his heirs or assigns, so many weeks' or months' notice in writing for that purpose. Even if it be intended that the fine should not be levied immediately, or if the provision be made merely with a view to satisfy the scruples of a cautious purchaser, and to secure his right to a fine, should the same at any future period be deemed advisable, it is proper to take care that the intended conuzee may have the power of fixing at his discretion the time for having the covenant performed.

4. In what court.

Fourthly, With reference to the court in which the fine is covenanted to be levied, it is merely necessary to mention that it must be one of competent jurisdiction. What courts are invested with adequate authority cannot be made a subject of inquiry in these pages; information on that question may be obtained from the perusal of works expressly treating of the law of fines.

5. To whom the fine is to be levied.
6. The kind of fine.

Fifthly, The party to whom the fine is to be levied, and Sixthly, The kind of fine, must necessarily be regulated by the circumstances of each particular case, and the form varied accordingly; but it may be noticed, that the covenantee, being the party who is to take advantage of the fine, should do the first act necessary to its completion; namely, sue out the writ of covenant (*h*); and before an action will lie for refusal, the covenantee must bring his writ of covenant, and præcipe, and concord, and tender it to the covenantor (*i*), unless the performance of the covenant be rendered impossible by the covenantor's own act (*k*).

7. Of the proclamations.

Seventhly, Fines are very seldom levied without proclamations. Although they may not be essential to effectuate the object in view, the covenant almost invariably stipulates that proclamations shall be thereupon had and made. Unless it be so levied, the fine cannot operate as a bar to the issue of a tenant in tail, nor serve, by reason of non-claim, to protect a defective title from latent claims. The saving of expense, by acknowledging a common law fine, is of inconsiderable moment, compared with the advantages to be attained by the addition of proclamations.

8. Of the parcels.

Eighthly, Of the parcels. More acres of land are usually inserted in a fine than are intended to pass,

(*h*) Palmer's case, 5 Co. 127, a. Hill v. Waldron, Winch, 29; S. C. Hutt. 48. Goldney v. Curtise, 1 Bulstr. 90. But see 1 Mod. 62.

(*i*) Sty. Pract. Reg. 172.

(*k*) Hill v. Waldron, supra. Main's case, 5 Co. 20, b.

that the fine may be sure to comprehend enough. The addition of a few acres does not, of itself, furnish an excuse for refusing to levy a fine pursuant to a covenant; but a covenant to levy a fine of certain lands in the township of A. in the parish of B. will not oblige the covenantor to levy a fine tendered to him, comprising other lands of which he was seised in B. besides those contained in the covenant (*l*).

9. The mode of describing the parcels.

Ninthly, The mode of describing the parcels now claims our attention. If the covenant to levy the fine be a substantive, independent deed, it is customary to describe the parcels as fully as possible by particular description, or by such general and comprehensive terms as will include all the parcels meant to be subject to the operation of the fine, care being taken at the same time to exclude, by way of exception, such as are not intended to be passed; and it may be mentioned, that no deviation should be made from the old mode of description, unless very peculiar circumstances require the alteration. The general words "All houses, outhouses," &c. are also usually inserted.

Where the covenant constitutes but a part of the assurance; for instance, where it is comprised in a release, on a conveyance by lease and release and fine, the parcels are generally described in the body

(*l*) Danby v. Gregg, Willes, 150; S. C. nom. Grigg's case, 7 Mod. 293. Boulney, or Boldney, v. Curteys, Cro. Jac. 251; Mo. 810; S. C. nom. Goldney v. Curtise, 1 Bulstr. 90. Wilson v. Welsh, 2 Bulstr. 317; S. C. 1 Rol. 103. 117.

of the release, or by some prior recital. It is then sufficient that the covenant notice the parcels by reference in these or the like terms, "the said messuages or tenements, &c. hereby released or otherwise assured or intended so to be, with the appurtenances." Sometimes the particulars by which the parcels are to be described in the fine are specified, as, "the said messuages, &c. hereby released, &c. with the appurtenances, by the names and descriptions of five messuages, &c. or by such other apt and convenient names," &c. But this reference to the particular description in the fine may be omitted, and the form run thus: — "the said messuages, &c. hereby released, &c. with the appurtenances, by such apt and convenient names," &c.: the latter is the more approved form.

10. The declaratory clause.

Tenthly, The declaratory clause, to prevent a resulting use, should carefully specify the parties by whom, and the parties in whose favor, the uses are to be declared, and the extent of their respective ownerships. Thus tenant for life, in tail, and in fee, may join in a fine and declare the uses according to their several estates. Tenants in common, also, coparceners, and joint tenants, should declare the uses as to their individual shares.

The form of the declaration, it will be observed, is not restrained to the particular fine intended to be levied, but comprehends within its operation "all and every other fine and fines, &c. and other assurances," the uses whereof the parties have power to direct.

Sometimes (observes Mr. Preston), all the parcels comprised are to be included in the fine; at other times part only of these parcels are to be the subject of the declaration. Of course, when part only of the parcels are to be comprised, restrictive words must be used, that the declaration may not extend to more parcels than those intended to pass. Also, as often as the general form extends to all fines levied of those lands of which the fine is intended to be levied, and also to fines which may comprise those and other lands, it is highly expedient that the restrictive clause should be added. That clause is introduced by the words, "as to, for, and concerning," &c.; and there are few instances in which this clause can be safely dispensed with. Besides this restrictive clause, other clauses of distribution of the parcels may be requisite. This is particularly the case when different uses are to be declared of different undivided shares; or different uses are to be declared of distinct parcels. These and the like circumstances render the repetition of the restrictive clause, "as to, for, and concerning," &c. extremely convenient: and to make the clause run easy, it assumes the following form: — "Shall be and enure, &c. as to, for, and concerning the messuages, lands, &c. hereby released, &c. to the uses, upon the trusts, &c. hereinafter limited, expressed, and declared, of and concerning the same, that is to say, as to, for, and concerning All that close, &c. called ———," or "as to, for, and concerning one undivided third part or share," &c. to the use, &c.(*m*).

(*m*) 2 Prest. Conv. 118.

II. Who may take advantage of.

A covenant to levy a fine is a covenant real, and runs with the land for the benefit of an heir of the covenantee (*n*), or an assignee, or devisee of the estate to which it relates (*o*).

III. Who bound by.

It was formerly held (*p*), that where there was a covenant to levy a fine for a valuable consideration, and a decree in pursuance thereof, the decree would bind the issue, notwithstanding the death of the covenantor before the fine levied; as the father had by such fine the power of barring the issue. But this doctrine was soon reversed, and it is incontrovertibly established, that if tenant in tail sells at a full value, and receives the consideration money, and covenants to levy a fine, and is even decreed to do so; yet on his death, although in prison in contempt for not performing the decree, the issue in tail cannot be bound by such agreement (*q*), unless he do some act amounting to a confirmation (*r*); for the heir claims the estate *per formam doni* from the creator of the estate tail, and therefore, on the refusal or neglect of the tenant in tail to exercise the power he possessed of barring it by a particular conveyance, the court will not deprive the issue of that right which

(*n*) Winter v. D'Evreux, 3 P. Wms. 189. n. [B].

(*o*) F. N. B. 146, F. Danby v. Gregg, Willes, 150; S. C. nom. Grigg's case, 7 Mod. 293. King v. Jones, 5 Taunt. 418; S. C. 1 Marsh. 107; 4 Mau. & Selw. 188, in error.

(*p*) Hill v. Carr, 1 Ch. Ca. 294.

(*q*) Wharton v. Wharton, 2 Vern. 3. Weale v. Lower, cited 2 Vern. 306; S. C. 1 Eq. Ca. Ab. 266. (B). pl. 4; S. C. semb. cited in Powell v. Powell, Prec. Ch. 278; 1 P. Wms. 720. Jenkins v. Keymes, 1 Lev. 237. Ross v. Ross, 1 Ch. Ca. 171.

(*r*) Ross v. Ross, ubi supra.

he enjoys, not from the ancestor who contracted, but from the author of the entail (*s*).

IV. Of specific performance.

The right to a specific performance of a covenant by a man that he and his wife will levy a fine, has been the subject of much controversy and difference of opinion. Many decisions are to be found in favor of that right. In some of the earlier cases (*t*), indeed, the court went to a very great length; in one (*u*) decreeing that the defendant should compel his wife and another man's wife, being the other defendant, to levy a fine and join in the assurance; in another (*v*) the decree was made against the wife personally. And instances have been known of a husband being committed to the Fleet till the wife should do the act stipulated for; and it seems there was one instance where the husband staid a great while in prison, but was ultimately discharged, upon showing his utter inability to prevail upon his wife (*w*).

In Barrington v. Horn (*x*) a decree was made that the defendant should procure his wife to join with him in a fine to the plaintiff, according to his covenant; and the reason assigned was, that he had taken

(*s*) Ibid. Cotter v. Layer, 2 P. Wms. 626. Holt v. Holt, Ibid. 652. Hinton v. Hinton, 2 Ves. 634.

(*t*) Voux v. Gleas, Toth. 92. Barty v. Herenden, Ibid. 93. Griffin v. Tailor, Ibid. 106. See also Anon. 2 Ch. Ca. 53. Baker v. Child, 2 Vern. 61; S. C. 1 Eq. Ca. Ab. 25. pl. 16; 62. pl. 2.

(*u*) Rust v. Whittle, Toth. 94.

(*v*) Sands v. Tomlinson, Toth. 93. Westdeane v. Frizell, Ib. 93.

(*w*) 5 Ves. 848.

(*x*) Barrington v. Horn (in 1715), 5 Vin. Ab. 547. pl. 35; S. C. 2 Eq. Ca. Ab. 17. pl. 7.

upon himself to do so, and the plaintiff had paid the full value of the estate.

In Hall v. Hardy (*y*) the parties agreed to abide by an award. The arbitrators made an award that the plaintiff should pay 10*l.* to the defendant at such a day, and 30*l.* at another day, and that thereupon the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and her heirs. The plaintiff paid the defendant the 10*l.* on the day on which it was awarded to be paid, and afterwards tendered the remaining 30*l.*, which the defendant was willing to take, but would not execute the fine and deed of uses; wherefore the plaintiff brought a bill to compel him to a specific performance of the award. The Master of the Rolls declared that there had been a hundred precedents, where, if the husband for a valuable consideration covenanted that his wife should join him in a fine, the court had decreed him to do it; for that he had undertaken it, and must lie by it if he did not perform it. And the reason given by the Master of the Rolls in Winter v. D'Evreux (*z*) was, because in all these cases it was to be presumed that the husband, where he covenanted that his wife should levy a fine, had first gained her consent for that purpose.

Again, in Withers v. Pinchard (*a*), the estate (one

(*y*) Hall v. Hardy (in 1733), 3 P. Wms. 187; S. C. 2 Eq. Ca. Ab. 28. pl. 35.

(*z*) Winter v. D'Evreux, 3 P. Wms. 189. n. [B]. But see Lord Eldon's remarks on this reasoning, 8 Ves. 514, 15. post, p. 171.

(*a*) Withers v. Pinchard (in 1795), cited 7 Ves. 475.

moiety of which was the wife's) was settled to certain uses, with a power of revocation in the husband and wife with the consent of trustees, and the husband agreed to sell; although the wife by her answer, as well as the husband, swore that she never gave her consent to the sale, and they stated that they believed the trustees would not consent to the revocation of the uses, the Lord Chancellor decreed a specific performance, and that the husband should convey, and procure all proper parties to convey, as the Master should direct, if the parties should differ concerning the conveyance.

The same doctrine still prevailed in a case of much later date (*b*). The husband, for himself and his wife, (she thereby consenting,) had covenanted that he and his wife would, within one month, surrender the copyhold estates of which they were seised in her right, to the use of the plaintiff and others, upon trust to sell and pay the debt of 3299*l.* 15*s.* due to them. By their answer the defendants attempted to set up as a defence that the deed was obtained by fraud. The husband was at last decreed specifically to perform the covenant, and to procure his wife to join in the surrender; but the Master of the Rolls (Sir William Grant) in his judgment seemed to lay great stress on the circumstance of the husband not alleging his inability to obtain his wife's concurrence; of his not offering to pay the debt; and of the impossibility for him to

(*b*) Stephenson v. Morris, Morris v. Stephenson (in 1802), 7 Ves. 474. See also 16 Ves. 367.

put the plaintiff in the same situation as if the deed had never been executed; for the plaintiff might have had an execution against him, if he had not redeemed himself by giving this security; and he said that it was unnecessary to discuss Lord Cowper's reasoning in Ortread, or Outram, v. Round (*c*), the principal case being so dissimilar to that, and differing from it in all its circumstances. Hence we may infer that Sir William Grant would have pronounced a different decree, had the defendant stated his absolute inability to perform his agreement, and offered to put the other party in the same situation as if the agreement had never taken place. And with respect to the argument, that the court would not enforce the husband to use his controul over his wife, and compel her to part with her property, *per fas aut nefas* to obtain that which the law would not permit her to accede to without a private examination, His Honor said (*d*), "There are many ways in which a wife would be under compulsion; and yet it would be quite impossible to abstain from enforcing the demand against the husband. The effect would have been just the same if she had originally refused. The creditor would have thrown her husband into a prison, and there would have been the same necessity upon her."

We now come to consider the cases contravening the doctrine supposed to be established by the preceding authorities.

(*c*) Noticed next page. (*d*) 7 Ves. 480.

In Preston v. Wasey (*e*) the court refused to decree a specific performance of articles by a husband and his wife for conveying her inheritance, and the decree was affirmed; but the Lord Keeper on the appeal went upon the fraud, and did not seem to take notice of its being the inheritance of a feme coverte.

The case of Ortread, or Outram, v. Round (*f*) is more strongly opposed to the former decisions. The husband for a valuable consideration conveyed his wife's estate to a purchaser by lease and release, and covenanted that the wife should levy a fine; but could not afterwards obtain her consent. The defendant by his answer admitted the covenant, and stated his readiness to levy a fine himself, but said his wife refused to join with him, and he could not persuade her to do it. Lord Chancellor Cowper, by whom Barrington v. Horn had been adjudged, declared it to be a tender point to compel the husband by a decree to procure his wife to levy a fine, though there had been some precedents for it; and he said it was a great breach upon the wisdom of the law, which secured the wife's lands from being aliened by the husband without her free and voluntary consent, to lay a necessity upon the wife to part with her lands, or otherwise to be the cause of her husband's lying in prison all his days. He did not, however, think it proper *in this case* to decree a specific

(*e*) Preston v. Wasey, Prec. Ch. 76; S.C. 2 Eq. Ca. Ab. 55. pl. 1. (in 1697).

(*f*) Ortread, or Outram, v. Round (in 1718), 4 Vin. Ab. 203. pl. 4. See Sedgwick v. Hargrave, 2 Ves. 57.

performance of the covenant, but the defendant was ordered to refund the purchase money paid to him with costs. And the judgment seems to have been approved of by Sir W. Grant in Stephenson v. Morris (*g*).

So Lord Harcourt in his MS. Tables states the result of the case Bryan v. Woolley, which was carried up to the House of Lords, to be, that no agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution (*h*). And in Daniel v. Adams (*i*), where the baron and feme having a joint power to sell the estate of the wife, gave authority to an agent to sell by auction, and he sold by private contract, the court would not decree the husband to compel his wife to join; and this case was distinguished from Barrington v. Horn, and Hall v. Hardy, on the ground that in those cases the husband had received the whole or part of the consideration money.

The decisions in favor of specific performance were reviewed in the more recent case of Emery v. Wase (*k*), and their authority considerably weakened; but it is to be regretted that the precise point did not receive an actual judicial determination; the case having turned principally on a question of fair valua-

(*g*) Ante, p. 167.

(*h*) Bryan v. Woolley (in 1721), 2 Eq. Ca. Ab. 132. pl. 3; S. C. 4 Vin. Ab. 57. pl. 19; 1 Bro. P. C. 184. Toml. Ed. See 1 Madd. n. (*g*), where this case is referred to as Brick v. Whelley.

(*i*) Daniel v. Adams (in 1764), Ambl. 495.

(*k*) Emery v. Wase, (1801, 3), 5 Ves. 846; S. C. 8 Ves. 505.

tion by a surveyor. Lord Eldon, however, forcibly intimated his opinion to be in opposition to the right of specific performance on such a contract. His Lordship's argument is too valuable to be omitted (*l*). "Certainly (said he) the general point is of great importance, whether the contract of the husband, which however this was not intended to be, but that of the daughters, is to be executed against the husband by a court of equity, in effect compelling the husband to compel his wife to levy a fine, which is a voluntary act. This is brought forward in the report as the principal ground of the decree. The argument shews that point is not quite so well settled as it has been understood to be. The policy of the law is, that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long before I should say, the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that may be afterwards practised to procure it. I should have hesitated long in following up that presumption, rather than the principle of the policy of the law; for if a man chooses to contract for the estate of a married woman, or an estate subject to dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law, and what right has he to complain, if she, who according to law cannot part with her property, but by her own free will, expressed at the time of that act of record, takes advantage of the *locus pœni-*

(*l*) 8 Ves. 514.

tentiæ; and why is he not to take his chance of damages against the husband? If the cases have determined this question so, that no consideration of the absurdity that must arise, and the almost ridiculous state in which this court must in many instances be placed, can prevail against their authority, it must be so. For the sake of illustration, suppose 10,000*l.* 3 per cents carried to the account of a married woman, and the husband contracts to transfer, (taking it that the court had jurisdiction to decree performance of such a contract). At the hearing what is to be done for the wife? In the two last cases (*m*), the wife appears to have been left a party to the suit without affecting her under the decree. If the court cannot by the decree order any act to be done by her, the bill ought to be dismissed against her, unless some future act by her, to be ordered upon further directions, is looked to. But the principle of the decree shews that cannot be the purpose. It does not rest there. Suppose the husband procures her consent, even by the mildest means, persuades and influences her by the difficulties he has got into; or entering into an improvident contract; and she is examined here by the judge who has made the decree upon the husband, and if upon the submission of all the considerations which ought to be submitted to her in this court and the court of Common Pleas, she says she thinks it in her situation not fit for her to part with the property, the court must send the husband to gaol, telling her she never ought to relieve him from that state; and all this for the benefit of a person who cannot have

(*m*) Withers v. Pinchard, and Stephenson v. Morris, ubi supra.

a specific performance certainly, but who may have damages, and who sets up his title to a specific performance in opposition to the policy of the law. Upon the first ground, therefore, there is difficulty enough to make me pause before I should follow the two last authorities; and I am not sure whether it is not proper to have the judgment of the House of Lords to determine which of these decisions ought to bind us. As to the expression used by Lord Cowper, that this jurisdiction is to be very sparingly exercised, certainly it is very dissatisfactory to be informed that it is and it is not to be done." Lord Chief Justice Mansfield, too, who was very conversant with the doctrines of a court of equity, expressed the same sentiments. He said (*n*) that the covenant upon which the action then before the court was brought, (being a covenant to levy a fine,) was such as the Court of Chancery would not now enforce. And indeed, continued the learned judge, nothing can be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into gaol, when the principle of the law is that a married woman shall not be compelled to levy a fine. And the opinion entertained by Lord Eldon and Lord Mansfield, of the impropriety of compelling a husband to procure his wife's consent to a fine, has subsequently derived additional weight from the concurrence of Sir Thomas Plumer, M.R. (*o*).

It is, moreover, laid down by Gilbert (*p*), that if

(*n*) Davis v. Jones, in 1805, 1 New Rep. 269.

(*o*) Howell v. George, 1815, 1 Madd. 1. 6. Martin v. Mitchell, 2 Jac. & Walk. 426.

(*p*) Gilb. Lex Prætor 245.

a purchaser files a bill against the husband and wife for a specific execution of the agreement, and the wife upon private examination consents, the court will decree it. He adds, " But quære whether the court will decree it if the bill be preferred against the husband only; because if the court should compel the husband, the husband would compel the wife who is under his power, and the wife ought not by law to convey by means of any compulsion from her husband."

The inclination, therefore, of the Court of Chancery to discountenance the doctrine which formerly prevailed on this subject is very evident. And we may perhaps conclude, that at the present day a decree for the specific performance of such an agreement would not be pronounced; particularly should the husband declare the impossibility of procuring the consent of his wife, and express his willingness, by refunding the consideration money and costs, to put the covenantor in the same situation as he would have been in if the contract had never been entered into. And this mode of dealing with these agreements seems most consistent with the principle on which the law has so cautiously screened married women, with respect to their estates, from the undue influence or coercion of their husbands; and most in accordance with the doctrine laid down by Lord Redesdale (*q*), that " when a person undertakes to do a thing which he can himself do, or has the means of making others do, the court compels him to do it, or

(*q*) 2 Scho. & Lef. 166.

procure it to be done, unless the circumstances of the case make it highly unreasonable to do so." It is to be remembered, that notwithstanding the refusal of a Court of Equity to decree a performance *in specie*, the covenantee is not precluded from applying to a Court of Law for damages for a breach of the agreement.

It appears that a covenant by a husband, that he and his wife will levy a fine, will not be binding upon her in case of his death. Thus where one seised in tail, for valuable consideration, bargained and sold to another in fee, and covenanted that he and his wife would levy a fine for better assurance; and it was agreed that 30*l*., part of the consideration money, should be paid to the baron upon the conuzance of the fine by the baron and feme; and after the baron and feme acknowledged a fine before a judge in the circuit in the vacation; and the sum of 30*l*. was paid to the feme, the baron being sick, and the baron died before the term, and thereupon the feme stopped the passing of the fine, and after brought a writ of dower; the bargainee was held not to have any remedy in equity against the dower, because it was against a maxim in law that a feme coverte should be bound without a fine (*r*).

Opposed to this is the case of Baker v. Child (*s*), called by Sir Thomas Sewell, M. R. a loose note (*t*),

(*r*) Hody v. Lun, 1 Eq. Ca. Ab. 61. (E). pl. 1; 1 Rol. Ab. 375.

(*s*) Baker v. Child, 2 Vern. 61; S. C. 1 Eq. Ca. Ab. 25. pl. 6; 62. pl. 2.

(*t*) Ambl. 498.

in which it was said to be determined, that where a feme coverte by agreement made with her husband was to surrender or levy a fine, the court would compel her by decree to perform the agreement, although her husband should die before its completion. But Mr. Murray observed, in the case of Thayer v. Gould (*u*), before the Lord Chancellor, Michaelmas, 13 G. 2., that, upon looking into the register's minutes, it appeared the court made no decree in Baker v. Child, but that it was by consent referred to Mr. Serjt. Rawlinson for his arbitration. From this reference, however, we may fairly conclude, that there were circumstances in this case which rendered the decision of it doubtful at least; as, had it been clear that the court would have released the wife from the agreement, she certainly never would have submitted to an arbitration.

(*u*) 1 Atk. 617; Pow. Mortg. 740.

CHAPTER THE FOURTH.

OF COVENANTS FOR INDEMNITY AGAINST PAYMENT OF RENT AND PERFORMANCE OF COVENANTS.

Besides the ordinary covenants for title in assignments of leaseholds, a covenant by the assignee to indemnify the assignor against future payments of the rent and performance of the covenants contained in the original lease is sometimes required.

The equity is clear, that he who takes an assignment of a term from the lessee, shall take it, giving a covenant of indemnity to the assignor against the payment of the rent and the performance of the covenants. The reason is, that the lessee, under his covenant for payment of rent and performance of other acts, will remain liable during the whole term, notwithstanding he may part with the possession, and although many subsequent assignments may have taken place; and there is no instance of an assignment drawn with proper caution, which is not made expressly subject to payment of the rent, and performance of the covenants to be observed on the part of the lessee, his executors, administrators, and assigns; for though, if the assignee should part with the possession, the lessor might not be able to recover at law against that assignee, yet, if the original assignor enters into a covenant for the title, and the

assignee takes the premises, in the question as between the assignor and assignee, the former has a right to say to the latter, "You stand as between us in the situation in which I originally stood to the lessor; and if he under the express covenant resorts to me, you taking the premises from me, it is fit that the rent, if paid by me, should be reimbursed to me by you." This produces these covenants of indemnity (*a*). And there is no distinction between the cases of assignment by the original lessee, and by an assignee of that original lessee; the propriety of enforcing the covenant being as manifest in the case of the assignee, that he may be indemnified in respect of his parting with the possession, out of which the duty to pay the rent accrues, independently of actual covenant, as in the case of assignment by the original lessee. The purchaser knows that the title may or may not be disturbed; and if there is no covenant for indemnity against the rent, the consequence is, that the lessor, having the original lessee liable to pay the rent for premises, deteriorated perhaps by fire, and the landlord not bound to rebuild, may, though he has the power, decline to evict for non-payment of rent, as the original lessee, though not the assignee, may be able to pay; and if there is a mesne assignee, and the original lessee, on making over his title has got an indemnity, why should not the mesne assignee recover from the assignee, who has the possession, in respect of which such a covenant is entered into? (*b*).

(*a*) Staines v. Morris, 1 Ves. & B. 8. 11. Pember v. Mathers, 1 Bro. C. C. 52. See also Roach v. Wadham, 6 East, 306.

(*b*) Staines v. Morris, sup.

An executor, for the same reason, may assert his right to this covenant for indemnity. To the extent of his assets he is liable to be sued upon his testator's covenants, without regard to his having, or not having the possession of the lease. Even if the testator had before his death assigned the lease, the executor would not be the less liable to be sued upon the covenants. He cannot, by assigning it away himself, get rid of his liability to be sued. There is, therefore, a reason why he should require a covenant of indemnity, just as much as there was, why the testator himself should have required such a covenant; because as the testator was bound by the personal covenant, the executor is bound to the extent of assets by the same covenant (*c*).

As the right, therefore, to be thus indemnified rests on the principle, that the party selling, and his executors, will, in respect of his covenant, remain liable during the continuance of the term to his immediate vendor for a breach of covenant committed by any subsequent assignee, it follows that no such claim can be enforced, where the seller is not exposed to the liability of indemnifying his predecessor. Instances of this kind are of daily occurrence in treaties for the purchase of leaseholds from the assignees of a bankrupt. They do not obtain the bankrupt's property by any contract between them and the bankrupt; they take it by operation of law, and enter into no covenants to indemnify the bankrupt against the covenants in his leases. They may

(*c*) Wilkins v. Fry, 1 Meriv. 265.

waive his leases, and so not become liable to the landlord at all; they may take to them, subject only to such liability as attaches upon all assigns, that is, a liability to be sued on such covenants as bind assigns during the time they retain that character; but when they cease to retain it, their liability ceases, the privity of estate, which alone makes them liable to be sued, being determined. The assignees, therefore, of a bankrupt, after they have parted with the possession of their lease, are not liable to be sued at all; they stand in no need of an indemnity; and there is no principle on which they can require it from the vendee of their estate (*d*). Nor can the bankrupt demand such a covenant for his own protection. He has no right to prescribe any terms upon which he will part with his property, it being wrested from him for the benefit of his creditors, and applicable to the best advantage, for the purpose of paying their debts. Indeed, the Master of the Rolls (Sir William Grant) expressed a strong doubt, whether assignees, who were mere trustees for creditors, would be justified in annexing any such stipulation to the sale of a lease, as it would reduce the value of the lease (*e*).

A person contracting for the sale of a mere equity of redemption, which he himself had purchased from the mortgagor, necessarily stands in the same situation (*f*). He never was at any moment liable to be

(*d*) Wilkins v. Fry, 1 Meriv. 265.

(*e*) Ibid. 267.

(*f*) Ibid. 266. See also Lucas v. Comerford, 1 Ves. jun. 235; S. C. 3 Bro. C. C. 166.

sued upon the covenants in the lease; because it never could be alleged as against him, that all the estate, right, and interest of the vendor in the premises came to and was vested in him, which it is necessary to declare, in order to maintain an action against an assign upon a covenant (*g*). He takes nothing from the mortgagor but a naked equity of redemption; indemnity to him, therefore, would be without a meaning; for no question can ever arise whether he had or had not ceased to be liable, inasmuch as his liability never had any existence. And the same rule prevails against the right of a trustee for sale to be indemnified. He has no claim to be protected against a liability which ceases with his alienation over.

The inability alone of the purchaser to insist on the insertion of covenants for title in his assignment will not relieve him from the necessity of entering into the usual covenant for indemnity. If, for example, the property be submitted for sale by executors, who, as executors, never enter into covenants for title, the vendee will be decreed to covenant to indemnify them (*h*).

A covenant of this kind is collateral, and cannot run with the land (*i*).

The assignee of a lease executed a bond to indem-

(*g*) Ibid. Mayor of Carlisle v. Blamire, 8 East, 487.

(*h*) Staines v. Morris, 1 Ves. & B. 8. 13. 2439.

(*i*) Mayor v. Steward, 4 Burr.

nify the original lessees, against the covenants contained in the original lease; he afterwards quitted the country, the house was left untenanted, and the original lessees were obliged to pay the rent reserved: the assignee, having subsequently returned to England, made a compromise with them for the sum then due, in respect of his non-performance of the covenants, and shortly afterwards went abroad: they demised the house to a person who continued in possession till the end of the term. The Lord Chancellor held, that this mode of dealing with the premises did not give the assignee any title in equity to relief against the legal effect of his bond (*k*).

(*k*) Anderson v. Bailey, 1 Russ. 313.

CHAPTER THE FIFTH.

OF COVENANTS TO INSURE.

A COVENANT to insure, with a stipulation that in case of damage by fire the money to be recovered from the insurance office shall be laid out in rebuilding or repairing the premises, clearly falls within the rule laid down in Spencer's case (*a*), concerning covenants running with the land. The effect of such an insurance is not merely to put in the pocket of the person insuring, in the event of loss, the amount of the money secured, but to entitle the owner of the estate to have that money expended on the land; and if such be the operation of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild in case of damage by fire. It is therefore a covenant which will be binding on the assignee of the lessee, and which the assignee of the lessor may enforce (*b*). 1. Nature of.

The result will be the same, whether the money is to be applied in reinstating the property by virtue of the express contract of the parties, or the provisions of a statutory enactment. It has consequently been decided, that a covenant to insure premises situate

(*a*) Spencer's case, 5 Co. 17.

(*b*) Vernon v. Smith, 5 Barn. & Ald. 1.

within the weekly bills of mortality, mentioned in the act 14 Geo. 3. c. 78. (*c*), will run with the land, and

(*c*) The words of the 83d section of the act are, "And in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted by the authority aforesaid, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses or other buildings are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

It had been argued in the above case, from the preamble to the 83d section, that this provision of the statute only applied to cases where fraud was suspected. But it will be seen, that the enacting part of the clause goes beyond the mischief mentioned in the preamble; for under the first branch of it, where the owner of the building requests the insurance company so to apply the money, no suspicion of fraud is necessary to make such request compulsory on the directors.

enable the assignee of the reversion to maintain an action for the breach; since, by connecting the covenant with the act of parliament, which enables the landlord by application to the governors or directors of the insurance office to have the sum insured laid out in rebuilding the premises, the landlord has a right to say, that the money when recovered shall be so laid out. It is, therefore, as compulsory on the tenant to have the money disbursed in rebuilding, and as beneficial for the landlord, as if the tenant had expressly covenanted that he would expend the money he received in respect of the policy upon the premises (*d*).

No case has decided that a mere covenant to insure, unattended by a clause for reinstating the premises with the insurance money, will run with the land. Mr. Justice Best, indeed, in the last case, declared his opinion to be, that if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee: but whether the learned Judge intended to confine his observation to cases in which the property destroyed or injured was to be reinstated with the insurance money, or to extend it to a general covenant to insure, is not quite apparent. In the course of the argument (*e*) particular notice was taken of the omission of a clause, that the sum when recovered should be laid out upon the land; and the words of the learned Judge were, "But I think, also, that if the premises were in any other part of the kingdom, *this* would be

(*d*) Vernon v. Smith, 5 Barn. & Ald. 1.

(*e*) Ibid. p. 3.

a covenant that would pass to an assignee." Looking, therefore, at the entire case, the reasons advanced, and the language used by Justice Best in support of his opinion, it would seem that he considered that such a general covenant must in all cases run with the land.

Good grounds may, perhaps, exist for a different doctrine. It may be well in this place to refer to the rules or principles on which covenants are made to run with the land. It is clear law (*f*), that covenants in leases, extending to a thing in *esse*, parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, &c. And if they relate to a thing not in *esse*, but the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants. In order then to bring a covenant within the first of these rules, it is obvious that the insurance money must be rendered available to rebuild or repair the premises injured by fire. But, in the absence of a compulsory provision so to appropriate the money, how is this to be accomplished? If the lessee obtains payment from the insurance office, the landlord has, at law, no means of enforcing the tenant to devote the funds to repairs; nor has any

(*f*) Spencer's case, 5 Co. 16. Mayor of Congleton v. Pattison, Bally v. Wells, Wilmot, 344. 10 East, 130.

case decided that a court of equity will take steps to secure the application of the money for the benefit of the estate; and even if equity would interpose, it may be doubted whether a court of law could take notice of the power of that court, with a view to impart to a covenant a quality different from that which it would possess if equity should decline to interfere. If the covenant can run with the land at all, it must possess that property *at law*, independently of any assistance which equity may be disposed to render a landlord. The interest derivable under the policy would, in this view of the case, constitute a fund for the mere personal advantage of the insured (*g*). Now if the insurance money be a personal compensation, and if there be not any means to secure the application of that money for the benefit of the estate, it is difficult to conceive on what grounds a general covenant to insure can be deemed to be comprehended within the above rules relating to covenants running with the land.

Where a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire; on their being burned down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter, the covenant to insure being introduced for the security of the landlord, leaving the tenant still absolutely responsible on the covenant to repair (*h*).

(*g*) See The Sadlers' Company v. Badcock, 2 Atk. 554.

(*h*) Digby v. Atkinson, 4 Camp. 275.

The 14 Geo. 3. c. 78 (*i*), which enacts, that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, or any recompense be made by such person for any damage suffered thereby, also provides, that no contract or agreement made between landlord and tenant shall be thereby defeated or made void (*k*).

Although the subject will be more fully treated of hereafter (*l*), it may be mentioned here, that under a covenant to repair the lessee will be compelled to rebuild premises destroyed by fire (*m*).

II. Of the form of the covenant.

In framing a covenant to insure, the precaution of inserting a provision that the money recoverable from the insurance office shall be applied in repairing or rebuilding the premises injured or destroyed by fire, should never be neglected.

(*i*) 14 Geo. 3. c. 78. s. 101.

(*k*) Some confusion exists in the various acts of parliament relative to this provision. Clauses similar to the above were comprised in the 6th of Anne, c. 31. ss. 6. 7. The sixth section of that act being temporary, and having expired, was revived and made perpetual by the 10th of Anne, c. 14. s. 1. By 12 Geo. 3. c. 73. s. 46. the 6th of Anne was repealed; and by 14 G. 3. c. 78. s. 101. (which annulled 12 Geo. 3. c. 73.) the 6th Anne is also directed to be and continue repealed: but the clauses which were originally in the 6th of Anne are re-enacted by sect. 76. of 14 Geo. 3. c. 78., and in almost the same words. None of the above statutes, however, in any way allude to the 10th of Anne.

(*l*) Post, Chap. X.

(*m*) Bullock v. Dommitt, 6 Term Rep. 650. Chesterfield v. Bolton, 2 Com. 627.

A covenant in a lease to insure and keep insured the sum of 800*l.* at the least, in some sufficient insurance office within the cities of London and Westminster, upon the demised premises, was on a trial in ejectment objected to as void for uncertainty, because it did not specify what the nature of the insurance was to be, nor show in what sort of office it was to be effected: the court however held, that by a reasonable intendment the insurance was to be against fire, and that the lessee was to insure and to keep insured the sum of 800*l.* upon the premises, in an office where policies against fire were usually effected (*n*).

III. What a breach.

An action of ejectment was brought on a forfeiture for breach of covenant in a lease, wherein the lessee covenanted to insure in the joint names of himself and the lessor, and to the amount of two thirds of the value of the premises demised. The lessee had insured in his own name only, and, as contended, to a less amount than two thirds of the value of the premises. Both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be to the amount of two thirds of the value of the premises. The lessor had previously insured the premises at the same sum as the defendant. And the court determined, that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude he was doing all that was necessary or

(*n*) Doe dem. Pitt v. Shewin, 3 Campb. 134.

required of him, by insuring in his own name and to the amount before insured, he could not recover for a forfeiture, though there were no dispensation, or release from the covenant (*o*).

A lessee under a covenant to insure, made an insurance on the premises for 1200*l.*, from the 29th of September 1813, to the 29th of September 1814. The policy, after reciting the contract and payment of the premium and duty for the first year declared; "That from the date thereof, and so long as the said assured should pay or cause to be paid the said sum at the time therein mentioned, and the said company should accept the same, the capital stock, funds, and effects of the said company should stand charged and liable to pay to the said assured, his heirs, executors, and administrators, the amount of any loss or damage by fire to the property therein above mentioned, not exceeding the sum of 1200*l.*" On the back of the policy there was a printed memorandum, stating, that in case of the death of the assured, the policy might be continued to his legal representative, provided an indorsement was made on the policy to that effect within three months after his death. The lessee died in the end of the year 1813, leaving the defendant his executrix, and an indorsement was made on the policy continuing it for her benefit, before the ejectment was served, but more than three months after the death of the testator. In this case the court held that there was no

(*o*) Doe dem. Knight v. Rowe, 1 Ry. & Moo. 343; S. C. Car. & P. 246.

breach of covenant to keep the premises insured, for the policy did not become void for want of the indorsement within three months, but at most was voidable by the company. If the assured died within the time it enured to the benefit of his personal representative; and in case of death there might often be confusion in the affairs of the assured to prevent any application to indorse the policy within three months. They, indeed, entertained some doubts of the legality of such a proviso, where the policy (as in this instance) was declared to be for a definite period; and held, that under the circumstances of the case, to deprive the family of the benefit of the policy would be monstrous injustice (*p*).

But where a covenant was entered into by a tenant to insure, and he effected an annual policy on the premises with an insurance company in the usual printed form, by which it was declared, that the policy should be for such longer period as the tenant should regularly pay, and the company receive the premium; and a space of fifteen days beyond the quarter days was given for payment of the premium, during which time the company was to be liable: the year expired on the 25th of March 1811, but the tenant did not pay the premium for a renewal till the 25th of April following; and the company then gave a receipt for the premium, stating the insurance to be from Lady-day 1811 to Lady-day 1812; and no accident had happened by fire to the premises in the meantime; Lord Ellenborough

(*p*) Doe dem. Pitt v. Laming, 4 Campb. 73; S. C. 1 Ry. & M. 36.

decided, that the existence of the policy became suspended from the 9th, (when the fifteen days expired,) to the 25th of April; and that the landlord was therefore deprived of all protection after the latter day, since a fire might have happened in the meantime; and that there could be no pretence for saying that under those circumstances the office would have been liable; that the covenant to insure was therefore broken, and the landlord entitled to recover at law, whatever relief there might be for a tenant in equity (*q*).

IV. Of equitable relief.

The concluding sentence of the last decision leads us to observe, that in cases of forfeiture occasioned by a breach of covenant to insure, a court of equity will not afford the lessee any relief; the principle being, that where such relief is granted, the omission and consequent forfeiture must be the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation; but where the transgression is wilful, or the compensation impracticable, the court will refuse to interfere. As it is impossible to estimate in damages the quantum of the risk run by non-insurance, the effect of giving relief would be, that any tenant might break this special covenant with impunity; and every landlord must then be content to take his tenant for his insurer, for want of power to enforce his covenant. Whatever, therefore, may be

(*q*) Doe dem. Pitt v. Shewin, 3 Campb. 134. See also Tarleton v. Staniforth, 5 Term Rep. 695, affirmed in Exch. Chamb. 1 Bos. & Pul. 471; S. C. 3 Anstr. 707. Salvin v. James, 6 East, 571.

done in other cases, the court will not relieve a tenant from a forfeiture occasioned by his neglect to insure (*r*). In one instance, although the particular circumstances of the case were relied on as forming a special ground for such interference, the plaintiff having laid out 3000*l.* in repairs on the premises, the Lord Chancellor refused an injunction to restrain the defendant from suing at law upon the breach; for the omission to insure was stronger against the tenant than the omission to repair, because in the latter case the landlord might by exercising due vigilance see to the observance of the covenant; but in the former, where the lessee had undertaken to keep insured, the landlord must rely on him for the fulfilment of his engagement (*s*).

(*r*) Rolfe v. Harris, 2 Price, 206, n. Reynolds v. Pitt, Ibid. 212, n.; S. C. 19 Ves. 134.

(*s*) White v. Warner, 2 Meriv. 459.

CHAPTER THE SIXTH.

OF COVENANTS FOR PAYMENT OF RENT.

I. Of the object, &c. of the covenant.

THE punctual payment of rent is one of the first considerations with a landlord on granting a lease. The lessee during his own occupation, or his assignee, while his enjoyment lasts, may, by other forms of action, be compelled to make these payments; yet, in the absence of this covenant, by assigning over, they may discharge themselves of all future responsibility (*a*), and as the premises may be transferred into the hands of a beggar (*b*), an insolvent (*c*), or a person leaving the kingdom, provided the assignment be executed before his departure (*d*), the lessor would to a certain extent, lose his security for rent. A covenant to pay rent is, therefore, invariably contained in every *indenture* of lease. The liability of the lessee on the covenant will not be destroyed or diminished by his act of assigning

(*a*) Pitcher v. Tovey, 1 Salk. 81; S. C. 4 Mod. 71; 1 Show. 340; 2 Vent. 234; Holt, 73; 3 Lev. 295; Carth. 177; 1 Freem. 326; 12 Mod. 23. Staines v. Morris, 1 Ves. & B. 11. See also Treacle v. Coke, 1 Vern. 165; S. C. 1 Eq. Ca. Ab. 47. pl. 3.

(*b*) Le Keux v. Nash, 2 Stra. 1221. Taylor v. Shum, 1 Bos. & Pul. 21. And see Philpot v. Hoare, Ambl. 480.

(*c*) Onslow v. Corrie, 2 Madd. 330.

(*d*) Taylor v. Shum, supra.

over, but will endure against him (*e*), and his executors, having assets (*f*), until the determination of the demise. The advantage, therefore, of the covenant is, that, in case of his tenant's alienation, it affords the landlord a double claim for the payment of his rent, the assignee being chargeable in respect of privity of estate, and the original lessee still continuing amenable in respect of privity of contract. In the case of an *indenture* executed by the lessee, a covenant of this description will arise on the words *yielding and paying* (*g*). It is a covenant running with the land, and binding on an assignee without his being specially named (*h*).

Where covenant was brought for rent reserved payable at the two most usual feasts of the year, St. John the Baptist and Christmas, or within fourteen days after, the first payment to be made at Christmas next after the date, and a breach was assigned in non-payment of the rent at Christmas, without taking notice of the fourteen days after; it was argued on demurrer, that the fourteen days after should not refer to the first payment at Christmas, but that it was to be absolutely on Christmas day; the court, however, did not assent to this, but decided that the defendant had fourteen days after

(*e*) Edwards v. Morgan, 3 Lev. 233. Staines v. Morris, ubi sup. Buckland v. Hall, 8 Ves. 95.

(*f*) Pitcher v. Tovey, sup.

(*g*) See as to this ante, p. 54.

(*h*) Porter v. Swetnam, Sty. 406. Isteed v. Stoneley, 1 And. 82. Parker v. Webb, 3 Salk. 5. Holford v. Hatch, 1 Dougl. 183. Stevenson v. Lambard, 2 East, 575. Vyvyan v. Arthur, 1 Barn. & Cres. 416.

the first Christmas, as well as any other to pay his rent in, and therefore he had judgment (*i*).

Where a lease was made to hold from Michaelmas 1661 to Michaelmas 1668, paying so much rent half-yearly; the lessee demurred to an action for half a year's rent ending at Michaelmas 1668, supposing, as the words were *to Michaelmas* 1668, that there was not an entire half year, the day being to be excluded; it was admitted that in pleading *usque tale festum* would exclude that day; but it was held that in the case of a reservation, the construction was to be governed by the intent, which clearly was that the last day should be included (*k*).

One covenants for payment to his lessor of an additional rent of 10*l*., in case a certain piece of land (respecting which some disputes had existed) should be adjudged to belong to the lessor, or in case the lessee should by any ways or means come to the possession thereof, so that he might enjoy the same as part of the rope-walk demised, the burthen of this payment, it was held, must be borne by the lessee, whether he enjoyed the land by means of his landlord, or by agreement with a third person, and although he paid such third person a yearly rent for the occupation (*l*).

(*i*) Anon. 2 Show. 77.

(*k*) Pigot v. Bridge, 1 Vent. 292. Umble v. Fisher, Cro. Eliz. 702. Salter v. Kidley, 1 Show. 59. Walker v. Harris, 1 Anstr. 245. Pugh v. Duke of Leeds, Cowp. 714.

(*l*) Heath v. Baker, Ca. temp. Hardw. 319.

It may be mentioned, that an eviction by title, or a wrongful eviction of the tenant by the lord himself, will operate as a suspension of rent, and is a good plea in bar to an action of covenant for nonpayment (*m*). But where to an action of covenant for nonpayment of rent, on a lease of the parsonage of Dale, the defendant pleaded, that before any one day of payment of the same the ordinary sequestered the said parsonage for nonpayment of the first fruits, the plea was held to be bad, for the defendant did not show that any act was done by the plaintiff himself in his default (*n*).

II. In case of fire.

Whatever unfortunate accidents may befall the demised property during the term, or however unfavourably circumstanced the lessee may be for performing his engagements, he cannot rid himself, as long as the relation of landlord and tenant continues, of this express covenant. If the premises be rendered uninhabitable by fire, or totally burned down (*o*), or

(*m*) Dalston v. Reeve, 1 Lord Raym. 77. Jordan v. Twells, Ca. temp. Hardw. 171. Cooper v. Young, Fortes. 360. Co. Lit. 148, b. Walker's case, 3 Co. 22. Hodgkins v. Robson and Thornborow, 1 Vent. 276; S. C. Pollexf. 141; 3 Keb. 500. 505. 518. 541. 547; and 2 Lev. 143, nom. Hodgson v. Thornborough. And see Bushell v. Lechmore, 1 Lord Raym. 369. Roper v. Lloyd, T. Jo. 148. Hunt v. Cope, Cowp. 242. Lloyd v. Tomkies, 1 Term Rep. 671. Seddon v. Senate, 13 East, 79. Reynolds v. Buckle, Hob. 326. and Jones v. Bodinner, Comb. 380, denying Hob. 326.

(*n*) Jeakill v. Linne, Hetl. 54.

(*o*) Richards Le Taverner's case, Dy. 56, a. pl. 15. Monk v. Cooper, 2 Stra. 763; S. C. 2 Lord Raym. 1477. Belfour v. Weston, 1 Term Rep. 310. Pindar v. Ainsley, cited ibid. 312. Doe dem. Ellis v. Sandham, 1 Term Rep. 710; S. C. 3 Swanst. 685.

surrounded by water (*p*), or destroyed by flood (*q*), the rent will remain payable; nor can the landlord be forced to repair the damage, although a notice be given and request made to that effect by the tenant (*r*); and even if the landlord be bound to rebuild, and neglect to do so, no advantage can be taken by the tenant of this liability by way of plea; because the damages recoverable must be assessed by a jury, and being uncertain, cannot be set off against the demand for rent (*s*). Whether it is a good defence to an action on an agreement to take, assigning a breach in the not taking the house pursuant to the agreement, and the occupying the house and not paying rent for half a year, that the house was destroyed by fire before the day on which it was arranged that the defendant should enter and enjoy, does not appear to be settled (*t*).

III. Of Equitable relief from payment in case of fire.

The legal right of a landlord to receive his rent, notwithstanding the destruction of the demised property by fire or tempest, being indisputable, it was at one time supposed that the tenant might obtain relief in equity against these claims, on the ground that he could not have the enjoyment of that which was an

(*p*) Paradine v. Jane, Sty. 47; S. C. Al. 26.

(*q*) Carter v. Cummins, cited 1 Ch. Ca. 84.

(*r*) Belfour v. Weston, sup. Monk v. Cooper, 2 Stra. 763. Steele v. Wright, cited 1 Term Rep. 708. Brown v. Quilter, Ambl. 621; S. C. 2 Eden, 219; Cited in Cutter v. Powell, 6 Term Rep. 323.

(*s*) Monk v. Cooper, supra. Weigall v. Waters, 6 Term Rep. 488; S. C. 2 Anstr. 575.

(*t*) Phillipson v. Leigh, 1 Esp. N. P. C. 398. Holtzapffel v. Baker, 18 Ves. 117.

equivalent for the rent demanded. And in a case (*u*) where a bill was filed by a lessee to restrain his landlord (who had insured and had received the insurance money) from suing at law for rent after the premises had been consumed, and to compel him either to rebuild, or to pay the insurance money to the tenant towards satisfaction of his loss, Lord Northington expressed his surprise that it was thought so clear a thing, that there was no defence to such an action at law; and was so well convinced of the injustice of a man paying for a thing which he could not enjoy, and that occasioned by an accident which he did not undertake to stand to, that he was going to give directions for the cancellation of the lease, (an equity which the lessor by his answer had offered,) but the plaintiff being present in court, and choosing to continue tenant without having the house rebuilt, rather than give up the lease, his Lordship dismissed the bill with costs.

Lord Apsley (*v*) was also of opinion that though the landlord was not bound to rebuild, yet the tenant was neither obliged to rebuild, nor to pay rent till the premises were rebuilt. And in Campden v. Moreton (*w*), where the tenant, being sued for rent at law, filed his bill for an injunction, or that he might have the money paid by the insurance office towards re-

(*u*) Brown v. Quilter, Ambl. 619. Cited 1 Term Rep. 708. Serjeant Hill's MSS. in Lincoln's Inn Library, vol. x. p. 405.

(*v*) Steele v. Wright, coram Lord Apsley, 1773, Cited 1 Term Rep. 708.

(*w*) Campden v. Moreton, Serjt. Hill's MSS. in Lincoln's Inn Library, vol. x. p. 403; S. C. 2 Eden, 219.

building the premises, L. C. Northington continued the injunction till the hearing, and said that it was a most unreasonable and unconscientious thing that the lessors should be paid for houses which were the only or the principal thing demised in this lease, when the lessee could not have the enjoyment of them by an accident, the risk of which the lessor had by the lease taken upon himself(*x*), or from which he had at least discharged the lessee; and he seemed to think that the tenant might plead the matter in such manner as for a court of law to consider the accident as an eviction, and to give the tenant relief at law. And in a much earlier case (*y*) L. C. Clarendon inclined to interpose in favor of a lessee, to prevent his being liable to payment of rent, where the premises had been taken from him by the king's enemies, but it does not appear that he in fact interposed in consequence of this opinion.

But whatever success may formerly have attended these applications to Chancery, at the present day a very different opinion is entertained. No reliance is now placed on the above cases, subsequent decisions having, if not completely overruled, at least materially weakened their authority. The bill in one case (*z*) prayed for an injunction to restrain proceedings at law, and that the landlord might be compelled to repair, or accept a surrender of the lease; but on the principle that the rule of law must prevail where the

(*x*) The lessee's covenant to repair contained an exception in case of fire.

(*y*) Harrison v. Lord North, 1 Ch. Ca. 83.

(*z*) Hare v. Groves, 3 Anstr. 687.

equities are equal, and that the landlord's right to recover at law was fully established, the bill was dismissed.

Lord Eldon, in a case (*a*) before him very similar in its circumstances, considered himself bound by this solemn determination. His Lordship's reasoning on the subject is equally concise and pointed. Suppose, said he, a demise for seven years at a rent of 100*l.* per annum, the tenant to repair in all cases except fire, not to be liable in that case, and the landlord stipulating, that in case of fire he will be content, at the end of seven years, to take the land without the house; if they choose to make that agreement why should they not? These parties have made that agreement. If it can be maintained that the meaning of the contract is, that if a fire should happen, the rent shall not be paid, there is no occasion to come into equity; but, if that is not the effect of the contract at law, I cannot see any equity: the injunction was dissolved.

The notion (*b*) that an offer or refusal on the tenant's part to give up his lease will weigh with the

(*a*) Holtzapffel v. Baker, 18 Ves. 115; S. C. 4 Taunt. 45.

(*b*) Cutter v. Powell, 6 Term Rep. 323, where in answer to an assertion by counsel, that a tenant who had covenanted to pay rent was bound to continue paying the rent though the house was burned down, Lord Kenyon, C. J. observed, "But that must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction, Lord C. Northington said, that if the tenant would give up his lease, he should not be bound to pay the rent: and his Lordship referred to Brown v. Quilter, ubi sup. p. 199.

court seems to be abandoned. Lord Northington, indeed, laid some stress on that circumstance in his decision in Brown v. Quilter, where the lessee rejected an offer to have the tenancy determined. But in the two last cases, where a surrender of the leases was prayed, no notice was taken of it, nor was the judgment in either case at all influenced by the distinction; it may now, therefore, be considered clear, that a tenant will not in any degree benefit himself by proposing a cancellation of the lease and restitution of the premises.

IV. Where the landlord has received money on his insurance.

The receipt of insurance money by the landlord, where he has taken the precaution of insuring, has also been submitted as a ground for equitable relief; but this claim will be shown to rest on no very solid foundation. In this respect the cases of Brown v. Quilter, Steele v. Wright, and Campden v. Moreton, are distinguishable from Hare v. Groves. The lessors, in the three former instances, without any understanding or agreement with their lessees on the subject, had insured for their own benefit, and had received the amount on their policies after the burning of the premises. To the extent, therefore, of this insurance they were indemnified. In the last case the landlord had not protected himself by similar means. This was adverted to by Chief Baron Macdonald (*b*), and he considered that there might be some equity to say, that the lessor should not keep the house or its value, and receive the rent also, but should either put it down again for the use of the lessee, or remit the rent.

(*b*) 3 Anstr. 694.

The latest case (*c*), however, on the point, before the Vice-Chancellor (Sir John Leach), has superseded the distinction; and he declared that, with regard to the equity which the plaintiff alleged to arise from the defendant's receipt of the insurance money, there was no satisfactory principle to support it; for he asked, on what principle it could be that the plaintiff's situation was to be changed by that precaution on the part of the defendant with which the plaintiff had nothing whatever to do.

To sum up the whole, therefore, it is evident, First, That as the lessee has covenanted to pay his rent during the continuance of the term, so long will he be held liable *at law* on his express agreement, however ruinous may be the condition of the premises. Secondly, That as he might have provided in the lease for a suspension of rent in the case of accident by fire, and has neglected to do so, a court of *equity* cannot supply that provision which he has omitted to make for himself; for it must be intended that the purpose of the parties was according to the legal effect of the contract. Thirdly, That payment by an insurance office on the landlord's policy cannot alter the case; and, Finally, That the tenant has no equity to compel his lessor to expend money received from an insurance office in rebuilding the demised premises burned down, nor to restrain the landlord from suing for the rent until the premises be rebuilt.

(*c*) Leeds v. Cheetham, 1 Sim. 146. The circumstances of this case and of some of the cases previously cited will be found more in detail in the Chapter on "Covenants to repair," post. See Holtzapffel v. Baker, 18 Ves. 118. argo.

The form of a covenant for payment of rent should, therefore, contain an exception in favor of the tenant, during such time as the premises demised should remain uninhabitable by reason of accidental fire.

V. Of relief at law from forfeiture on breach.

From a very early period courts of law have exercised a discretionary power, in cases of nonpayment of rent at the specified day, of staying proceedings on payment of rent actually due, and all costs, at any time before execution executed (*d*); but it was a maxim, that persons seeking equity must do equity; and if by the equity of the court the plaintiff lost the benefit of the forfeiture of his lease the law gave him, it was but reasonable he should have security for his rent. Where, therefore, the defendant was a soldier, and, consequently, a privileged person, he was ordered to give security for the future payment of rent (*e*). The limit within which this practice of staying proceedings was allowed to obtain, was curtailed by act of parliament. By 4 Geo. 2. c. 28. (*f*) it is enacted, "That if the tenant or tenants, his, her, or their assignee or assignees, do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discon-

(*d*) Phillips v. Doelittle, 8 Mod. 345. Goodtitle v. Holdfast, 2 Stra. 900. Goodright dem. Stevenson v. Noright, 2 Wm. Blac. 746.

(*e*) Smith v. Parks, 10 Mod. 383.

(*f*) 4 Geo. 2. c. 28. s. 4.

tinued." It appears, then, by the words of the act, that the legislature only meant to legalize that practice to a certain extent, namely, the application of the tenant *before trial;* and the court has refused to extend the same after trial, lest they should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn (*g*). A mortgagee of a lease has the same title to relief against an ejectment for nonpayment of rent, and upon the same terms, as the lessee against whom the recovery is had (*h*).

VI. Of relief in equity from forfeiture on breach.

The principle on which equity (*i*) at first granted relief to the tenant, rested on an assumption that the landlord was compensated by receiving at a later period the stipulated sum, together with all interest and costs. But the uncertainty and injustice of a rule like this are too obvious to need comment. A neglect of punctuality in pecuniary matters, especially in a commercial country like our own, may be the cause of involving the creditor in embarrassments, and, perhaps, bankruptcy and ruin. Every man's observation will furnish him with numerous instances in which the addition of interest and costs would be but a wretched recompense for the consequences of being disappointed of payment on the specified day. A rule more fraught with mischievous results could hardly be devised. It has scarcely ever been called into operation without being exposed to censure, and

(*g*) Roe dem. West v. Davis, 7 East, 363.

(*h*) Doe dem. Whitfield v. Roe, 3 Taunt. 402.

(*i*) Wadman v. Calcraft, 10 Ves. 68, 9. Lovat v. Lord Ranelagh, 3 Ves. & B. 30.

Lord Eldon has repeatedly (*k*) expressed his marked and decided disapprobation of the doctrine.

Now, at common law, prior to the statute, we have seen, that the courts allowed a discontinuance of proceedings at any time *before execution executed;* but no precise period was fixed within which a tenant was obliged to prosecute his claim in equity. It was competent to him, even after execution executed, by tendering the landlord his arrears of rent and costs, to apply to Chancery for relief from the forfeiture, and to be reinstated in the demised lands (*l*). The disadvantageous situation in which a landlord was placed by this latitude of litigation also attracted the attention of the legislature; and by the same statute (*m*), after reciting, " that great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for nonpayment of rent, by reason of the many niceties that attend the re-entries at common law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay, of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that after such a re-entry made the lessee or his assignee, upon one or more bills filed in a court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without

(*k*) Reynolds v. Pitt, 19 Ves. 140. Hill v. Barclay, 16 Ves. 405; 18 Ves. 58. 60, 1. See also Sparks v. Liverpool Waterworks Company, 13 Ves. 434.

(*l*) Doe d. Hitchins v. Lewis, 1 Burr. 619.

(*m*) 4 Geo. 2. c. 28.

giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur;" it is (among other clauses) enacted (*n*), "that in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall permit and suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity within six calendar months after such execution executed; then and in such case, the said lessee or lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease."

The statute supposed the previous right of Chancery to act in cases of this description, but gave no relief *in specie* (*o*). The true end and professed intention of this act was, to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, from its remaining in the power of the tenant to offer him a compensation at *any* time in order to found an application for relief

(*n*) Part of sec. 2.

(*o*) Wadman v. Calcraft, 10 Ves. 70.

in equity, and to limit and confine the tenant to six calendar months after execution executed for his doing this; or else that the landlord should thenceforth hold the demised premises discharged from the lease (*p*). This relief will not be withheld from the tenant, although he may have committed breaches of other covenants contained in the lease (*q*).

It was formerly necessary, where a tenant was relieved in equity against an actual ejectment, for him to have a new lease granted for the residue of the term (*r*); the statute (*s*), however, dispenses with the formality of a fresh demise, by enacting, "that if such lessee or lessees, his, her or their executors, administrators or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them."

Where the plaintiff was lessee of a colliery, at a rate of so much per wey, and the colliery became not worth working, upon his offering to pay for all the coal that could be got, the court relieved him against the future rent, and the covenant in the lease to work the colliery, upon the equitable terms, of paying for all the coals remaining, and making a full satisfaction for the covenants, in case the landlord would accept the surrender of the lease (*t*).

(*p*) Doe d. Hitchins v. Lewis, 1 Burr. 619.

(*q*) Swanton v. Biggs, 1 Beat. 170.

(*r*) Hack v. Leonard, 9 Mod. 90.

(*s*) 4 Geo. 2. c. 28. s. 4.

(*t*) Smith v. Morris, 2 Bro. C. C. 311; S. C. 2 Dick. 697.

VII. In case of bankruptcy.

Bankrupts are now much more favoured with regard to payment of rent than they used to be. Previously to the statute, commonly called Sir Samuel Romilly's act (*u*), the liability of the bankrupt upon his covenants continued, notwithstanding his certificate, and the acceptance of his lease by the assignees (*v*). By that act (*w*), the bankrupt was discharged from his responsibility in respect of rent and covenants, where the assignees accepted the lease; and a short remedy by petition was given to compel the assignees to accept or decline the lease. But where they declined, the bankrupt remained answerable. An alteration of the law, and greatly to the advantage of bankrupts, has been effected by the late act (*x*). By sect. 75, it is enacted, "That any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent nonobservance, or nonperformance of the conditions, covenants or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid, and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person en-

(*u*) 49 Geo. 3. c. 121.

(*v*) Hammond v. Toulmin, 7 Term Rep. 616.

(*w*) Sec. 19.

(*x*) 6 Geo. 4. c. 16.

titled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and to deliver up such lease or agreement in case they should decline the same, and the possession of the premises, or may make such other order therein as he shall think fit."

VIII. In case of insolvency.

But it is not competent to a lessee discharged under the insolvent act (*y*) to determine his liability on the covenants, by delivering up his lease. He is only released from the covenants, on condition that the lease be taken by his assignees as part of his estate and effects. And the assignee is entitled to a reasonable time to decide whether he will accept the lease or not, and during that time he may take such steps as he may think necessary for the purpose of trying to render the property productive (*z*).

(*y*) 7 Geo. 4. c. 57. s. 23. See Aylet v. James, cited 1 H. Blac. 441. Cotterell v. Hooke, 1 Dougl. 97. Marks v. Upton, 7 Term Rep. 305. Mence v. Graves, 4 Taunt. 854.

(*z*) Lindsay v. Limbert, 2 Carr. & P. 526.

CHAPTER THE SEVENTH.

OF COVENANTS FOR PAYMENT OF TAXES, RATES, &c.

I. Land-tax.

It is the ordinary usage for the tenant to covenant to pay all taxes, rates, and assessments, except land-tax. Without this exception the other terms would include the land-tax; for when taxes are generally mentioned, they must be understood to signify parliamentary taxes, if the subject matter will suffer it (*a*); and the lessee would consequently be charged with the payment of all land-taxes, even those imposed by act of parliament long after the commencement of the lease (*b*), notwithstanding the word *parliament* were not expressed in the covenant (*c*).

By the general land-tax act (*d*), the tenants of all houses, lands, tenements, and hereditaments, which shall be rated by virtue thereof, are required and

(*a*) Brewster v. Kitchin, 1 Ld. Raym. 317; S. C. nom. Brewster v. Kitchell, Kidgell, or Kidgil, 1 Salk. 198; 2 Salk. 615; 3 Salk. 340; Holt, 175. 669; Comb. 424. 466; Carth. 438; 5 Mod. 368; 12 Mod. 166. Amfield v. White, 1 Ry. & M. 246.

(*b*) Giles v. Hooper, Carth. 135. Anon. Comb. 211.

(*c*) Count of Arran v. Crisp, 12 Mod. 54; S. C. Salk. 221; Holt, 549.

(*d*) 38 Geo. 3. c. 5. s. 17; an annual act. Made perpetual by 38 Geo. 3. c. 60. s. 1.

authorised to pay such sum or sums of money as shall be rated upon such houses, &c., and to deduct out of the rent so much of the said rate, as in respect of the said rents of any such houses, &c., the landlord should or ought to pay and bear. And the landlords both mediate and immediate, according to their respective interests, are required to allow such deductions and payments upon the receipt of the residue of the rents. The land-tax acts also provide, that nothing therein contained shall be construed to alter, change, determine, or make void any contracts, covenants, or agreements whatsoever, between landlord and tenant, or any other persons, touching the payment of taxes and assessments (*e*). Holt, C. J. was of opinion (*f*), that this last provision (inserted also in the earlier acts) was not absolutely necessary, for which he assigned the following reasons :—" First, Because these taxes lately assessed are subject-matter for the covenant; and, therefore, though the act allows the tenant to make a deduction, that could never be a repeal of the covenant, because it is the thing upon which the covenant is grounded, and against which it provides. Secondly, This provision for the tenant to deduct is for his advantage, which he might well waive by covenant, since he might well foresee it by the usage of the times; and a man may as well waive the benefit of a future law, as of a law already made. Thirdly, The tenant might well pay his rent without deduction, and not violate the law; for the difference where an act of parlia-

(*e*) Woodf. Land. & Ten. 250. (*f*) Brewster v. Kitchin, sup. 251. 6th edit.

ment will amount to a repeal of a covenant, and where not, is this; where a man covenants not to do a thing which it was lawful for him to do, and an act of parliament comes after and compels him to do it, there the act repeals the covenant, and *vice versâ;* Dyer, 27. pl. 178. 186, 7, 8. But where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant; Dyer, 48. pl. 5. So here, since the act does not compel the tenant to deduct, the act leaves the covenant in full force. Fourthly, This clause was only inserted to expedite the payment to the crown; and where an act of parliament is made for a particular purpose, it will not extend to collateral qualities; 8 Co. 138, Barrington's case. 19 Hen. 6. 62., a strong case, where a grant to be free from a future tax was allowed by all the judges."

The agreement to prevent the tenant from deducting from his rent the money paid by him for land-tax must be clear and explicit. The tenant is not bound to bear the charge where he covenants to pay the rent "without any deduction or abatement whatsoever"(*g*). But on the grant of a fee-farm rent "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee was deemed entitled to receive the full rent without deducting the land-tax; and Lord Mansfield thought it would not have been clearer, if the words had been

(*g*) Cranston v. Clarke, Say. 78.

" without any deduction, defalcation, or abatement for taxes" (*h*).

Where a building lease was granted for sixty-one years, in which there was a covenant that the lessee should pay all sum and sums of money that then was or were or should be assessed or taxed, for and in respect of the premises, for chimney-money, church, and poor, or visited houses, or otherwise, above and besides the rent reserved thereupon, the court held that the lessee must pay the land-tax, some meaning being necessarily attached to the words *or otherwise:* but Powell, J. thought, that although the land-tax was here included, yet the covenant would not extend to all taxes *in futuro;* for as in leases, taxes were distinguished into ordinary, which related to poor, church, &c., and extraordinary, to those imposed by parliament; so the words *or otherwise* would not extend to taxes of another nature imposed by parliament: And, said he, if a tax be given by parliament, which was never known or *in esse* before, these words in the covenant would not extend to such taxes; but if it had been worded thus:—" All taxes that should be hereafter imposed by parliament," all taxes whatsoever would be included. And Holt, C. J. said, where one made a lease, and covenanted to discharge the lessee of all burthens and charges, there being no tax at that time, but afterwards a fifteenth was granted by parliament, and the tenant was distrained for it, that this had been resolved to be within the

(*h*) Bradbury v. Wright, 2 Champernon, cited ibid. 625. Dougl. 624. Champernon v. Brewster v. Kitchin, sup.

covenant; because taxes were always a charge *in viris*, or, *in usu;* and he observed, that the case cited was stronger than the principal case, taxes being named in the latter, though not in the former (*i*).

A covenant by a bishop for himself and his successors, to discharge all public taxes assessed upon the land, will not bind his successor to pay a land-tax imposed subsequently to the demise, as a covenant incident to a lease which the bishop was empowered to make by the 32 Hen. 8.; for a covenant or warranty would not have bound the successor at common law without the consent of the Dean and Chapter; and if it should be taken that every covenant should bind the successor, then the statute of 1 Eliz. would be of no effect; but if it were an ancient covenant to discharge all ordinary payments, as pensions, or tenths granted by the clergy, the successor would be liable (*k*).

If the lessee covenants to pay "from time to time and at all times during the term the land-tax, and all other rates, taxes, assessments, and impositions whatsoever, already laid, assessed, or imposed upon the said premises, or any part thereof, or upon the said (landlord), his heirs and assigns in respect thereof, by authority of parliament, or otherwise howsoever," he is not obliged by this covenant to

(*i*) Hopwood v. Barefoot, 11 Mod. 237. Anon. Comb. 211. The Marchioness of Blandford v. The Dowager Duchess of Marlborough, 2 Atk. 542, 3. Anon. Comb. 211.

(*k*) Davenant v. The Bishop of Salisbury, 1 Vent. 223; S. C. 2 Lev. 68; 3 Keb. 69. Bishop of Oxford v. Wise, Cited 2 Atk. 544.

bear the expense of erecting a party-wall; since the words *taxes, assessments, impositions,* &c. extend to the land-tax, and all other taxes *ejusdem generis,* but not to the erection of a party-wall, which is not a tax (*l*).

II. Where the premises have been improved in value.

When the demised premises, in consequence of being improved after the lease, become of greater annual value, and an additional land-tax is imposed, the landlord is obliged to pay land-tax in proportion to the rent received by him, and the tenant is liable to defray the remainder, although his covenant with the lessor to pay all and all manner of rates, &c. contain an exception of land-tax; for the land-tax act directs the tenant to pay the land-tax in the first instance, and to deduct out of the rent so much of the rate as, in respect of the said rent, the landlord shall and ought to pay and bear; and the landlords, both mediate and intermediate, according to their respective interests, are required to allow such deductions. The legislature, therefore, did not mean that the whole of the land-tax in respect of all the rent should be borne by the original landlord, but each was to make that allowance in proportion to the rent which came to him (*m*).

And the same rule of law was adhered to in the

(*l*) Southall v. Leadbetter, 3 Term Rep. 458. S. P. affirmed in Barrett v. Duke of Bedford, 8 Term Rep. 605.

(*m*) Yeo v. Leman, 2 Stra. 1191; S. C. 1 Wils. 21, nom. Yaw v. Leman. Hyde v. Hill, 3 Term Rep. 377. Barnfather v. Lee, Ibid. 379. Whitfield v. Brandwood, 2 Stark. 440.

latest case on the subject (*n*). The landlord expressly covenanted "to bear, pay, and discharge, as well the land-tax as all other taxes, charges, rates, assessments, and impositions, parliamentary, parochial, or otherwise, already charged, or to be charged, upon or in respect of the said demised piece or parcel of ground, or any part thereof, during the continuance of the term hereby granted, or any renewed term or terms to be granted, or upon the said (lessee), his executors, administrators, or assigns, in respect thereof." The value of the property was considerably enhanced by the tenant's erecting fourteen houses thereon. It was held, that when the improvements were made, and the premises assessed in respect of their improved value, the tenant was entitled to deduct from the rent, not the whole taxes charged, but that proportion of the taxes which would have been payable in respect of the original value of the premises; for if the covenant were literally construed, so as to make the landlord liable for all taxes charged in respect of the improved value, it might possibly happen, in consequence of the improved value of the premises, and the increased rate of taxation, that the landlord would have nothing to receive for the use of his land, which must have been contrary to the intention of the lessor.

Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed, and also that he would pay all further or additional rates on the premises, or on any additional

(*n*) Watson v. Home, 7 Barn. & Cres. 285; S. C. 1 Man. & Ry. 191.

buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises, or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as might be assessed on the demised premises; the tenant was bound to defray all increase of the old, as well as any new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent (*o*). And where a party took seven sixteenths of certain premises, the whole of which were then rated at the annual rate of 35*l.*, and the lessor covenanted to pay all taxes then chargeable on the premises, or any part thereof, or on the yearly rent thereby reserved; and the lessee covenanted to pay all *fresh* taxes which should thereafter be charged upon the premises or any part thereof; it was held by Bayley and Holroyd, Justices, *dissentiente* Abbott, C. J., that the true construction of these covenants was, that the lessor should pay such taxes as were chargeable on the premises at the time of making the lease, considering them as of the annual value of seven sixteenths of 35*l.*, and that the lessee should pay all fresh taxes, and all such additions to the taxes formerly chargeable, as were occasioned by the improved value of the premises (*p*).

An action of assumpsit was brought on an agreement to purchase the lease of a public house, which in the agreement was described as holden by the

(*o*) Graham v. Wade, 16 East, 29.

(*p*) Watson v. Atkins, 3 Barn. & Ald. 647.

plaintiff at a certain net annual rent, under common and usual covenants. It appeared that the lease contained a covenant by the tenant to pay the land-tax, sewers-rate, and all taxes, besides the rent specified. To this an objection was taken by the defendant, and he contended, that the covenant to pay the land-tax and sewers-rate was not a common covenant, for that the former was always considered a landlord's tax, and under the statute of sewers the rate was sometimes imposed on the landlord, sometimes on the tenant, and sometimes on both; but the court considered these objections of no weight; as the stipulation to receive a net rent meant a rent clear of all deductions to which it would otherwise be liable; and they determined that the covenant to pay land-tax and sewers-rate must therefore be an usual covenant in a lease reserving a certain net rent (*q*).

III. Consequences of omission to deduct.

Should the tenant omit to deduct out of the rent of the current year payments made in respect of the land-tax and paving-rates, he is not entitled to deduct the amount of them out of the rent of any subsequent year (*r*); nor will a bill lie in equity to recover back the tax which ought to have been before allowed; as the tenant might if he pleased have waived the deduction of the tax (*s*). This was so held by Lord

(*q*) Bennett v. Womack, 7 Barn. & Cres. 627.

(*r*) Andrew v. Hancock, 1 Brod. & Bing. 37; S. C. 3 J. B. Mo. 278. Spragg v. Hammond, 2 Brod. & Bing. 59; S. C. 4 J. B. Mo. 431. See Brisbane v. Dacres, 5 Taunt. 143. Stubbs v. Parsons, 3 Barn. & Ald. 516.

(*s*) East v. Thornbury, 3 P. Wms. 127.

Harcourt (*t*), where the bill was brought by a tenant to be relieved out of the arrears of rent for the taxes he had actually paid, on account of rent reserved to a charity that appeared to be exempted from taxes; and the bill was dismissed with costs. But more particularly in another case (*u*), heard at the Rolls before Sir Joseph Jekyll, where the case was: One in 1683, in satisfaction of a widow's dower, mortgaged land on condition to pay her 20*l.* per annum; whereupon the court held, that this being an annual payment secured by land, should answer taxes in proportion as the land paid; but refused to make the annuitant refund in respect of the payments she had received tax-free, and for which the party paying had omitted to deduct.

IV. Property tax.

It was enacted by the property tax act (*v*), now expired, that if any person should refuse to allow any deduction authorized to be made by the act out of any rent or other annual payment mentioned in the ninth and tenth rules of No. 4, schedule (A), or out of any annuity or annual payment mentioned in schedule (C) or (E), or in the next preceding clause, save such annual interest as therein aforesaid mentioned, every such person should forfeit the sum of 50*l.*, and all contracts, covenants, and agreements, made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual

(*t*) Wildey v. The Coopers' Company, Mich. 1713, cited ibid. note [B].

(*u*) Atwood v. Lamprey, Mich. 1719. Ibid. note [B]. Currie v. Goold, 2 Madd. 163.

(*v*) 46 Geo. 3. c. 65. s. 115. Continued, 55 Geo. 3. c. 53. Expired, 5 April 1816.

payment aforesaid, in full, without allowing such deduction as aforesaid, should be utterly void. And it was provided (*w*), that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, should be deemed or construed to extend to the duties charged thereon as aforesaid, nor to be binding contrary to the intent and meaning of that act; but that all such duties should be charged upon, and paid by the respective occupiers, subject to such deductions and repayments as were by that act authorized and allowed; and that all such deductions and repayments should be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements.

In passing this statute, it was not intended by the legislature to avoid the deed itself, but only the contract for the payment without allowing the deduction for the property tax. A deed, therefore, granting an annuity within the time included by retrospection in the act, reciting the agreement for the purchase, at a certain price, of a certain annuity, free from the property or income tax, and covenanting for the payment of it without any deduction in respect of the property or income tax, or other parliamentary taxes, &c. was held not to be void *in toto*, but only to the extent of such disallowance (*x*). So a distinct

(*w*) 46 Geo. 3. c. 65. s. 195.

(*x*) Howe v. Synge, 15 East, 440. Readshaw v. Balders, 4 Taunt. 57. Fuller v. Abbott, 4 Taunt. 105. Tinckler v. Prentice, 4 Taunt. 549. Morgan v. Edwards, 6 Taunt. 394; S. C. 2 Marsh. 96. Buxton v. Monkhouse, Coop. 41. Wigg v. Shuttleworth, 13 East, 87.

covenant in a lease, whereby the tenant bound himself to pay property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by this statute, was adjudged not to avoid a separate covenant in the lease for payment of rent, clear of all parliamentary taxes, &c. generally, for such general words were understood of such taxes as the tenant might lawfully engage to defray (*y*).

An occupier of lands, having during a course of twelve years paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid, it was holden, that as these were voluntary payments on the occupier's part, he could not recover from his landlord any part of the property tax so paid (*z*); and it appears that the party would also be precluded from relief in equity (*a*).

V. Church and poors' rates.

Church and poors' rates, being charges on the person and not on the land, are not comprised within a covenant by a lessor to pay all the taxes on the land demised (*b*); nor within a covenant by him to

(*y*) Gaskell v. King, 11 East, 165.

(*z*) Denby v. Moore, 1 Barn. & Ald. 123. Andrew v. Hancock, 1 Brod. & B. 45.

(*a*) East v. Thornbury, 3 P. Wms. 127. n. [B]. and cases cited there, and ante, p. 219. 220.

(*b*) Theed v. Starkey, 8 Mod. 314. Jeffrey's case, 5 Co. 66, b. Anon. 4 Mod. 148. Rex v. St. Luke's Hospital, 2 Burr. 1064. Rex v. St. Bartholomew, 4 Burr. 2439. Harrison v. Bulcock, 1 Hen. Blac. 68. Milward v. Caffin, 2 W. Blac. 1330. Lord Bute v. Grindall, 1 Term Rep. 338.

indemnify the lessee against all duties, charges, and taxes whatsoever, to be imposed upon the lands, except tithes (*c*). This exception of tithes was not allowed to influence the construction of the covenant; for the tithes being a duty payable out of the land, the exception was necessary in opposition to the word *duties*.

(*c*) Case v. Stephens, Fitzgib. 297.

CHAPTER THE EIGHTH.

OF COVENANTS FOR PRODUCTION OF DEEDS, &c.

Where a vendor disposes of part only of his estate, he usually retains the title deeds in his own possession, and covenants with the vendee for their production. And where the lands are sold in lots to different purchasers, it is customary to stipulate that the buyer of the largest lot shall be entitled to the custody of the deeds, on entering into covenants with the purchasers of the smaller portions to produce those deeds, when required, to substantiate their title. In the absence of positive agreement to this effect, no one purchaser can assert his right to possess these documents in exclusion of the others; nor does it appear from any case, that the Court of Chancery will interpose to deprive one purchaser of the custody of the deeds, however small his share of the property may be, for the purpose of depositing them in the hands of another purchaser, although his part of the lands may greatly exceed in magnitude that of the actual holder of the instruments.

Mr. Fearne was of opinion, that the principle which required a vendor, who retained the title deeds in his own hands, to enter into covenants for title extending to the acts of his grantors, was applicable

to the covenant for the production of title deeds. He says(*a*), "Where a vendor retains to himself the title deeds, or the means of resorting to and obtaining their production, it seems but reasonable that he should covenant for their production to his vendee; for though the deed itself containing the covenant for production of them from the grantors of the vendor, if it extends to his assigns, as usual, would, when obtained by the vendee, I think, entitle him to the benefit of such covenant, as well as of the other covenants extending to assigns, so far as respects the parts purchased by him; yet to avoid all question on this point, and leave the risk attending the loss of the means of enforcing such covenants on the person retaining the custody of those means, I think the purchaser may reasonably require a covenant from the vendor for the production of those title deeds, to such an extent as the covenant in the vendor's purchase deeds entitled him to the production thereof; unless he can procure a new covenant for that purpose from his grantors to the new purchaser. If it is right that a vendor retaining the title deeds himself should covenant for their production, can it be otherwise that a vendor retaining in his own custody the means of obtaining their production, or a compensation in default thereof, should covenant to produce them to his vendee, in the manner and on the terms upon which he is so entitled to their production? Where is the difference between the vendor's retaining the possession of the title deeds himself, and his retaining the right and means of obtaining that pos-

(*a*) Fearne's Posth. 113.

session on any requisite occasion, in respect to his obligation to produce them on any such occasion to his vendee? Or why should he refuse to covenant to produce them in one case more than in the other, unless he distrusts the means he has retained for obtaining the production of them himself? If he does so, that becomes an additional reason for still further caution in, and security to, his vendee. It therefore seems to me, that the vendor in this case retaining his own purchase deed, which entitles him to the production of the scheduled title deeds, may reasonably be required to enter into a similar covenant for producing the same deeds to his vendee." At the same time, Mr. Fearne thought, that this covenant should be subject to a qualification, exonerating the vendor from responsibility in case he should produce his own purchase deed from his grantors, in order to enable the vendee to avail himself of the covenants therein contained, which of course would include the grantors' covenant to produce, and should also concur in any act for obtaining their production.

A later celebrated writer(*b*), however, observes, that where a person having a covenant for the production of the title deeds to his estate, sells only part of the estate and retains his purchase deed, and the covenant to produce the deeds; in such cases he should conceive the practice to be, for the vendor to enter into the usual covenant for production of the title deeds in his possession, which of course would in-

(*b*) Sugd. Vend. and Purch. 450. 6th edit.

clude the original covenant to produce the deeds. And this is the course usually pursued.

Covenants for production are real covenants and run with the land for the benefit of purchasers, but not for the benefit of vendors (*c*); in other words, purchasers from the covenantee may take advantage of them against the covenantors themselves, but the liability will not extend to the covenantors' assignees. The consequence is that a sale by the covenantor would materially tend to the prejudice of the covenantee and his assigns, by defeating them of their power of obtaining a specific performance of the covenant. It is true that the remedy of an action at law for a breach of covenant would remain, but damages would amount to a poor substitute for the advantages derivable from the production of the documents themselves.

By some gentlemen, indeed, a distinction is taken, as to the equitable liability of the vendor's assignee to the covenant for production, on the ground of notice. The better opinion seems to be, that the assignee with notice of the covenant would in equity be bound to a specific performance of it. And this doctrine would appear to derive some trifling degree of support from an observation which fell from Sir John Leach in a recent judgment (*d*). "Thring's covenant to produce (said his Honor) does not run with the land; nor is it pretended that Slade (the purchaser of Thring's share) had notice of that cove-

(*c*) Barclay v. Raine, 1 Sim. & Stu. 449. (*d*) Ibid. 455.

nant." This would appear to imply a notion in the mind of the Vice-Chancellor, that the circumstance of notice would effect a difference. Much uncertainty, however, prevails on the subject. Should notice be of any service, it seems advisable, in order to prevent an assign of the covenantor from taking without notice, that a memorandum of such deed of covenant for production be endorsed on the deed of conveyance to the covenantor.

These inconveniences have occasioned a practice, equally beneficial to both covenantor and covenantee, by means of which the chain of covenants for production continues unbroken, the covenantee is still enabled to enforce a specific execution, and at the same time the covenantor, when he no longer retains the power of executing his covenant, is absolved from the charge of observing its performance. The practice is for the covenantor, on a sale of the estate in respect of which he possesses the deeds, to procure the purchaser to enter into original covenants for production with the owners of the other parts of the property, similar to that which they hold from the vendor. And with this view it is customary to superadd to the common covenant for production a provision for determining the liability of the covenantor in case he should, on a sale and delivery of the deeds to a purchaser, procure such purchaser to enter into a like covenant for production.

It frequently happens that the owner of an estate, having a covenant for production of the title deeds, disposes of the land in parcels to distinct purchasers;

but objections have been urged to the competency of the vendees of these portions to prosecute separate actions against the covenantor; as he might without his consent be exposed to a multiplicity of suits, in proportion to the number of parts into which the covenantee might choose to subdivide the estate. A decision in the King's Bench appears to have set the question at rest; the divisibility of a covenant having been there so far admitted, as to enable the assignee of the reversion of part of the demised premises to recover in an action of covenant against the lessee for a breach in not repairing (*e*). And a corresponding action is maintainable by the assignee of part of the premises from the lessee against the lessor or his assignee (*f*). The only means of obviating any difficulty, if doubt should still exist, is to procure the covenantor to enter into a new covenant with each of the vendees of the subdivided parcels for production in the usual way.

Assignees of bankrupts, like other vendors, where the title deeds are not to be delivered to a purchaser, are bound to covenant to produce them; but their covenant should be confined to the time of their continuance as assignees (*g*). If, however, the covenant is so confined, the purchaser should have some security that the person who shall ultimately become entitled to the custody of the deeds will covenant for

(*e*) Twynam v. Pickard, 2 Barn. & Ald. 105. Congham v. King, Cro. Car. 221; S. C. nom. Conan v. Kemise, W. Jo. 245. Stevenson v. Lambard, 2 East, 575. Co. Lit. 385, a.

(*f*) Palmer v. Edwards, 1 Dougl. 187, n.

(*g*) Ex parte Stuart, 2 Rose, 215

their production. The proper course seems to be for the assignees' covenant to be made determinable in case they shall procure the person to whom they shall deliver the deeds to enter into a similar covenant with the purchaser (*h*).

Without a covenant for the production of the deeds, where they are retained by another, a purchaser is not compellable to complete his purchase. A very late case brought this question before the court. A large portion of certain hereditaments was sold to J. Thring; and about the same time, or soon after, other part was sold to G. Barclay, the father of the plaintiffs, under whom they claimed. J. Thring, to whom the title deeds were delivered, covenanted with his vendors to produce the deeds at their request, for such purposes as should be required by them, their heirs, executors, administrators and assigns. No deed of covenant was given to G. Barclay for production; but he was furnished with an attested copy of the above deed of covenant. Thring sold to Slade, and part of the purchase money remaining on mortgage, the title deeds were lodged with, and were still in Thring's hands. The original deed of covenant was lost, and Slade refused to execute another. Thring, however, executed a deed, acknowledging his execution of the original deed, and that the deeds were in his possession, and also covenanted for their production whilst he should continue mortgagee. The defendant when he agreed to purchase from the plaintiffs, had no notice that they could not deliver the

(*h*) Sugd. Vend. and Purch. 449. 6th edit.

original title deeds to him, or that he was to have a deed of covenant for the production of them, or that they related to other estates. The question for the opinion of the court was, whether, without such a deed of covenant from Slade, the defendant ought to be called upon to complete his purchase. The Vice-Chancellor said, "A Court of Equity never compels a purchaser to take without the title deeds, unless he has a covenant to produce them; and a right in equity to compel the production of the deeds, even if it existed, would be no answer. But the equity of the purchaser in the present case would be highly questionable. Thring's covenant to produce does not run with the land; nor is it pretended that Slade had notice of that covenant; and Slade, like every other proprietor, has a material interest against the exposure of his title deeds"(*i*).

It is very questionable whether a purchaser, under his vendor's covenant for further assurance, can compel him to enter into a covenant for the production of the title deeds retained in his custody (*k*).

As these covenants are constructive notice of encumbrances, and after a long interval lead to an inquiry for deeds, &c. which have been converted into dust or ashes, the safe practice is, and it is the general practice in modern times, to take the covenant in a separate instrument; and cases exist in

(*i*) Barclay v. Raine, 1 Sim. & Stu. 449. Shore v. Collett, Coop. 234. Berry v. Young, 2 Esp. N. P. C. 640, n.

(*k*) Fain v. Ayers, 2 Sim. & Stu. 533; 1 Russ. 259, n. Hallett v. Middleton, 1 Russ. 243. See post, Ch. XI. sect. v.

which it is prudent to take several deeds of covenant for the production of the evidence of title; each deed containing a different series, so that one of the covenants may be given over to a future purchaser, without any notice of deeds, which had better, even for the sake of such purchaser, be kept out of view (*l*).

The expense of a covenant for production, where effected by a distinct instrument, must be defrayed, it appears, by the purchaser (*m*); but the vendor must bear the charge, when the covenant is comprised in the deed of conveyance to the vendee (*n*).

It may be mentioned, that where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary; and the deeds afterwards come into the vendee's possession, on his taking a mortgage of the other part of the estate; on an assignment by him of the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for them: to entitle the plaintiff to recover, he should have a better right to the deeds than the defendant (*o*).

(*l*) 1 Prest. Abst. 28.

(*m*) 1 Bart. Prec. 88. Introd. 3d ed.

(*n*) Berry v. Young, 2 Esp. N. P. C. 640, n.

(*o*) Yea v. Field, 2 Term Rep. 708.

CHAPTER THE NINTH.

OF COVENANTS FOR RENEWAL.

I. Of their construction.

THE principal question arising on covenants of this kind has been, how far the instrument evidenced the intention of the parties to contract for a limited or a perpetual renewal. Although some of the cases hereafter cited were decided in courts of equity, yet, it is to be recollected, the judges presiding there were bound to put the same construction upon the instruments under consideration as they would receive at law. From all of these cases we may collect, that the courts, in *England* (*a*) at least, lean against con-

(*a*) It is well known, that in *Ireland* they are so fixed in the habit of leases perpetually renewable, as to have caused a kind of local prejudice in favor of presuming an intention of perpetual renewal, where the words of a covenant to renew give any opening for such a construction. See Mr. Hargrave's preparatory argument in Iggulden v. May, 3 Har. Juris. Exerc. 240; S. C. 9 Ves. 329, argo. Cooke v. Booth, Cowp. 823. Also The Earl of Inchiquin v. Burnell, 3 Ridg. P. C. 376, and the argument of Mr. Hargrave for the Earl on his appeal to the Irish House of Lords in that case; 1 Hargr. Jur. Arg. 415, 6; and 3 Hargr. Jurisc. Exerc. 182, 3. in which the following Irish cases connected with this subject are noticed; Sweet v. Anderson, 2 Bro. P. C. 430; S. C. Toml. Ed. vol. ii. p. 256. Earl of Ross v. Worsop, 4 Bro. P. C. 411; S. C. Toml. Ed. vol. i. p. 281. Magenis v. Magenis.—Pendred v. Griffith, 4 Bro. P. C. 512; S. C. Toml.

struing a covenant to be for a perpetual renewal, unless it is perfectly clear that such was the meaning of the covenant (*b*). Where that intention is apparent the courts feel themselves under the necessity of carrying it into execution.

Thus, where a lease was made for twenty-one years of a corn-mill, to be repaired by the tenant, and there was no covenant on the part of the lessee to pay a fine, but a covenant was contained therein on the part of the lessor, that he would, at any time before the last six

Ed. vol. i. p. 314. Charles v. Rowley, 2 Bro. P. C. Toml. Ed. 485. Kane v. Hamilton, 1 Ridg. P. C. 180. Bateman v. Murray, 1 Ridg. P. C. 187. Duchess of Chandos v. Brownlow, 2 Ridg. P. C. 345. The case of Bateman v. Murray occasioned the passing of the Irish Tenantry Act, 19 & 20 Geo. 3. c. 30., by which it is provided, that in all cases of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant, by neglecting or refusing to renew after the landlord has demanded the fine, courts of equity shall relieve, upon an adequate compensation being made. See likewise Davis v. Oliver, 1 Ridg. P. C. 1. Jackson v. Saunders, 1 Scho. & Lef. 443; S. C. 2 Dow, 437. Lennon v. Napper, 2 Scho. & Lef. 682. As these and other cases decided in Ireland proceeded on what Lord Lifford called *a local equity*, or as it has been sometimes termed, *the old equity of the kingdom*, to notice them more particularly in this work has been considered unnecessary. For an account of the history of renewable leases, and the principles on which renewals have been decreed in Ireland, the reader may refer to Boyle v. Lysaght, 1 Ridg. P. C. 384. 401, 2. Magrath v. Muskerry, 1 Ridg. P. C. 469. Calvert v. Gason, 2 Scho. & Lef. 561. Keating v. Sparrow, 1 Ball & B. 367. O'Neil v. Jones, 1 Ridg. P. C. 170.

(*b*) Taylor v. Stibbert, 2 Ves. jun. 443. Baynham v. Guy's Hospital, 3 Ves. 298. Moore v. Foley, 6 Ves. 237. Iggulden v. May, 9 Ves. 334. Maxwell v. Ward, 11 Price, 13; S. C. 13 Price, 674.

months, grant such further lease as should by the lessee, his executors, &c. be desired, without any fine, and under the same rents and covenants only as in the said lease then granted; the Court of Exchequer were of opinion, that under the words *the same rents and covenants* the covenant for renewal ought to be inserted in a renewed lease, and on appeal to the House of Lords the decree was affirmed (*c*). The ground on which this case was decided appears to have been, that the covenant being to grant such further lease as the lessee should desire, it was left to the lessee himself to say what interest he would require to be granted to him, without any restriction or limitation, except that no covenant should be introduced not contained in the original lease. Nor was it unfair to infer, that he who might have asked a lease for any number of years, did not exceed what was intended by requiring one with a covenant to renew (*d*).

So when in a lease for three lives, at the yearly rent of 43*s.* 8*d.*, the tenant covenanted, at the death of any of the lives which should first happen, to pay to the lessor, his heirs or assigns, within twelve months next ensuing such death, the sum of 68*l.* in the name of a fine, for every life added or renewed, from time to time; and the lessor covenanted that he would, for the consideration of the said sum of 68*l.*, to be paid to him, his heirs, &c., in the name of a fine, for adding one life to the remain-

(*c*) Bridges v. Hitchcock, 1 Bro. P. C. 522; S. C. Toml. edit. vol. v. p. 6. Cited in Furnival v. Crew, 3 Atk. 88, 9.

(*d*) See 7 East, 245, per Lord Ellenborough.

ing lives afore-mentioned, execute one or more lease or leases under the same rent and covenants as were expressed in the said indenture, and so continue the renewing of such lease or leases to the lessee or his assigns, paying as aforesaid to the said lessor, his heirs or assigns, the sum of 68*l.* for every life so added or renewed as aforesaid, from time to time, according to the true intent and meaning of the said indenture; Lord Hardwicke was of opinion, that the plaintiff was entitled to have the like covenants inserted upon every renewal, as well upon the death of the new lives, as upon the death of the old; the words *and so to continue renewing such lease or leases, &c.*, not meaning barely continuing a new life, but continuing and filling up the estate from time to time; and that the words *for every life so added as aforesaid*, meant any of the lives in the future leases; for the words were general that he would grant it for such life as aforesaid, which would comprehend the whole within this form of expression (*e*).

A covenant for perpetual renewal, however, can only be introduced on the ground that a clear intention for such perpetual renewal can be discovered. And although the parties might possibly have intended a perpetual renewal, yet if it is not so expressed, nor are there any general words, such as *from time to time*, from which such an intention can be collected, a perpetual renewal will not be decreed.

(*e*) Furnival v. Crew, 3 Atk. 83.

Formerly an opinion prevailed, that a covenant for renewal, *under the same rent, covenants, and conditions*, involved a liability to renew perpetually; but it is now decidedly ascertained, that those words will not, in the absence of more positive stipulation, have that operation; but will be construed to amount to a contract, not for a perpetuity of leases, but for a single lease only(*f*). It was so determined, in a case before L. C. Thurlow, where the covenant was, that the lessor would, at the end or determination of the term of twenty-one years, execute a new lease of the premises for the further term of seven years, to commence from the end of the said twenty-one years, subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements, *in all respects*, as were in and by the indenture of lease mentioned and expressed, in case the plaintiff should desire the same, and give twelve months' notice; but his Lordship decreed, that the lease should not contain a covenant for future renewal; as he had not an idea that the intention of the lessor was to renew the covenant for renewal, or that it could be so construed in a court of equity (*g*).

Sir William Grant likewise pronounced a similar decree (*h*). A lease for lives had been executed by

(*f*) Richardson v. Sydenham, 2 Vern. 447; S. C. 1 Eq. Ca. Ab. 47. Moore v. Foley, 6 Ves. 237.

(*g*) Tritton v. Foote, 2 Bro. C. C. 636; S. C. 2 Cox, 174, which contains a more ample report of the judgment. Russell v. Darwin, cor. Lord Camden, C., 2 Bro. C. C. 639, note.

(*h*) Moore v. Foley, 6 Ves. 232.

Lord Foley, which contained a covenant on his part, that when any one of the lives should happen to die, he would, on receipt of 42*l.* 6*s.*, and the surrender of the former lease, grant unto the survivors and such other person as they should nominate, the premises; to hold unto the survivor and such other person for their natural and respective lives, successively and not jointly, at, for, and under, the like rent, covenants, and conditions, as were therein reserved and contained. And moreover it was mutually granted and agreed, that in such grant to be made, it should be covenanted and agreed, that when and as often as any one of the said three persons for whose lives the said grant should be made, should happen to die, then the survivors of them should, within one year after the death of such one person, pay to Lord Foley, his heirs, or assigns, the sum of 42*l.* 6*s.*, and surrender the grant then in being; and Lord Foley, his heirs and assigns, should, upon the payment of the said money, and surrendering up of such grant, at the request and charges of the said survivors, execute another grant unto the said survivors, for and during the lives of such two of the said persons as should be then living, and for the life of such other person as the said survivors should nominate, under the like rent, covenants, provisoes, and conditions as were therein contained. The lease then made provision for the event of two of the lives falling within the year, and contained an agreement on the part of Lord Foley to grant a new lease for the life of the survivor and two such other persons as the survivor might nominate, at, for, and under, the like rents, covenants, and conditions, as were therein mentioned and contained

An exception taken by the defendant to the master's report approving a lease containing a covenant for perpetual renewal, was allowed by the Master of the Rolls, he being clearly of opinion that this could not be construed a covenant for perpetual renewal; for said he, "The first agreement is, that this stipulation shall be inserted in *such grant*, that is, the grant that was to be made upon the dropping of the first life; and consequently the introduction of this stipulation into that would have the effect of entitling the lessee to a renewal upon the death of every one of the three persons comprised in the second grant. I lay out of consideration the first lease. The second will become in the nature of an original lease; when there is a grant for three lives with this stipulation to be introduced into it; that when any one of the three dies, a new lease shall be granted for the lives of the survivors and a new life. Does that carry it further than the lives of the three persons whose names shall be contained in that second grant? I am of opinion it does not. There is no stipulation for any ulterior event, and there are no general words. The words are not *from time to time* as in Furnival v. Crew, upon which words Lord Hardwicke laid great stress, as amounting to an obligation to fill up lives upon the dropping at any time (*i*); but this covenant extends no further than to introduce this very stipulation into this one new grant; and as to the lives only to be contained in that grant.—The covenant

(*i*) It would, however, appear that Lord Hardwicke thought, in this case, that the words "under the same rents and covenants" would include the covenant for renewal. 3 Atk. 86. See also the opinion of Mr. Justice Buller in Cooke v. Booth, 2 Cowp. 823.

is specific to introduce it into such grant only. It is identified and ascertained by what is stipulated immediately before, that it is the grant upon the dropping of the first life; and further, that it extends to the three lives to be filled up, and no others. There is not a word expressing that it was the intention of the parties that it should be renewable for ever. I am perfectly at a loss to discover a ground for that intention, as they have expressed it.—There being no clear words in this case, nor any words relative to perpetual renewal; but the parties themselves having limited it, the question is, whether the proviso that the renewal shall be *under the same rents, covenants, and conditions as the first lease,* shall in the absence of more positive stipulation amount to a perpetual renewal. Upon Tritton v. Foote, and Russell v. Darwin, I am bound to hold that a covenant for renewal *under the same covenants* does not include the covenant to renew, but that it means only a second lease, not a perpetuity of leases." (*k*).

By the intention, therefore, and not by the acts of the parties, must the construction of these covenants

(*k*) See the same point in Hyde v. Skinner, 2 P. Wms. 196. Another report of this case is to be found in 1 Hargr. Jur. Arg. 425, and 3 Hargr. Jurisc. Exerc. 193, cited from Mr. Melmoth's MS. reports. Baynham v. Guy's Hospital, 3 Ves. 295. Iggulden v. May, 9 Ves. 330; S. C. 7 East, 237; S. C. in error in the Exch. Chamb. 2 New Rep. 449, where the judgment of the K. B. was affirmed. Harnett v. Yeilding, 2 Scho. & Lef. 555. Dowling v. Mill, 1 Mad. 541. Davis v. Taylors' Company, 1 Hargr. Jur. Arg. 427; 3 Hargr. Jurisc. Exerc. 195. Betesworth v. Dean and Chapter of St. Paul's &c., Ibid.

be governed: the fact of repeated renewals having been made cannot now be admitted to guide the decision as to a perpetual renewal on the one side or the other. An adjudication, indeed, of an opposite complexion was made in the Court of King's Bench during the time of Lord Mansfield (*l*). A case was sent from Chancery for the opinion of the K. B., and stated, that Robert Booth by indenture demised certain premises to one Otho Cooke, for the lives of the said Otho Cooke, Elizabeth Cooke, and Robert Cooke; and the said Robert Booth thereby covenanted as follows: "that if the said Otho Cooke, his heirs and assigns, shall be minded, at the decease of the said O. C., E. C., and R. C., or any of them, to surrender this present indenture, and take a new lease of the said premises, and thereby add one new life to the then two in being, in lieu of the life so dying, then the said R. B., his heirs, &c. upon request, on such surrender of the lease then in being, and upon payment of one broad piece of gold of twenty-two shillings value, or twenty-two shillings in silver to the said R. B., his heirs, &c. for every life so to be added in lieu of the life of every of them so dying, and at the proper costs of the said Otho, without demanding any further fine for the same, shall and will grant and execute unto the said Otho Cooke, his heirs, &c. a new lease for the lives of the two persons named in the former lease who shall be then living, and of such other person as the said Otho Cooke, his heirs or assigns, shall nominate and appoint, in lieu of

(*l*) Cooke v. Booth, Cowp. 819.

the person named in the preceding lease, as the same shall respectively happen to die, under the beforementioned annual rent, and the same covenants therein contained." The case also stated, that there had been successive renewals containing the same clause of renewal, from the time of a former lease granted by the ancestor of R. Booth down to the date of the lease in question. The court were of opinion that R. Booth and his ancestors had put their own construction on the covenant by the frequent renewals, in all of which the covenant for renewal had been uniformly repeated, and that the parties, by their own acts, had construed this to be a covenant for perpetual renewal.

A doctrine so utterly subversive of the fundamental principles of evidence was not likely to pass uncanvassed; and we consequently find that the authority of this case, so far as it relates to the admissibility of the acts of the parties to influence the construction of the covenant, has been repeatedly impugned. The opinion of the Master of the Rolls (Sir R. P. Arden) in Baynham v. Guy's Hospital (*m*), and Eaton v. Lyon (*n*), was vehemently opposed to it. "I strongly protest (said his Honor, in the former case,) against the argument used by the learned Judges in Cooke v. Booth, as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it; which I will never allow to affect my mind. That case was sent to law by Lord Bathurst. The learned Judges thought fit

(*m*) 3 Ves. 298. (*n*) 3 Ves. 694.

to return an answer to the Chancellor, that the legal effect was a perpetual renewal, upon the ground that, by voluntary acts, which the parties might or might not have done, the parties themselves had put a construction upon it. Mr. Justice Willes stated that as his only ground. Lord Mansfield made it his chief ground; but that ground was disapproved by Lord Thurlow, and is, I think, totally unfounded. I never will construe a covenant so. I never was more amazed; and Mr. Justice Wilson, who argued it with me, was much astonished at it. When it came back, Lord Bathurst not having retained the Great Seal long enough for it to come again before him, it came before Lord Thurlow, who said, that, sitting as Chancellor, when he asked the opinion of a court of law, whatever his own opinion might be, he was bound by that of the court of law (*o*); therefore he decreed a renewal, but said, he should be very glad if Mr. Booth would carry it to a superior tribunal. We had a consultation, and I wrote to Mr. Booth upon it; but he being only tenant for life refused to appeal."

(*o*) L. C. B. Richards, in the late case of Maxwell v. Ward, 11 Price, 18; S. C. also 13 Price, 674. alluding to this observation of Lord Thurlow, said, "Certainly that is not in the present day considered to be the effect of the opinion of courts of law on cases sent for their judgment. Lord Chancellor Eldon certainly did not consider himself bound by the certificate of the judges of a court of law. In a very recent case, in which Lord Eldon called in Mr. Justice Abbott and myself, we reviewed the opinion of the Court of Common Pleas, and the result was that we over-ruled it." The case here alluded to by his Lordship is that of Prebble and others v. Boghurst and others, reported in 7 Taunt. 538; and 1 Swanst. 309. 580.

Sir William Grant (*p*), Lord Eldon (*q*), and Lord Ellenborough (*r*), have also avowed their disapprobation of the doctrine; and when Iggulden v. May came before the Exchequer Chamber, in error (*s*), Sir James Mansfield, C. J., in giving the judgment of the court, expressed their opinion in the following terms: "It is true that similar renewals were allowed to operate in Cooke v. Booth; but we think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of a deed. Suppose the original lessor to have declared in the presence of fifty witnesses, that he intended to bind himself by the lease to a perpetual renewal; his declaration could not have been allowed to alter the construction of the lease itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction? That case has been impeached on all occasions, and in which the Court of King's Bench were misled by the renewals stated in the case sent from the Court of Chancery." The case of Cooke v. Booth, then, on the point in question, stands clearly overruled (*t*).

It may be remarked, that a covenant for renewal in a lease is not inconsistent with a covenant to let and manage to the best advantage, with reference to

(*p*) In Moore v. Foley, 6 Ves. 237.

(*q*) In Iggulden v. May, 9 Ves. 333.

(*r*) In S. C. 7 East, 244, 5.

(*s*) 2 New Rep. 449.

(*t*) See also Balfour v. Welland, 16 Ves. 156.

the subject, a trust for creditors; for trusts of this kind are generally short. Creditors hardly ever expect that such a trust as this should endure for more than twenty-one years. It is their interest to get the highest rent for twenty-one years; and at the granting of the lease they look to the circumstance of present advantage, and are not to be supposed to look to a subsequent period; they would reject a proposal to let the estate at a lower rent without a covenant for renewal; and it cannot be considered a prejudicial covenant in consequence of the present increased value of the premises (*u*).

II. Of breach and performance.

Any act of a party by which he absolutely incapacitates himself to perform his covenant is equivalent to an actual breach. Where, then, a lessor covenanted, that if the lessee for twenty-one years would surrender his lease at any time during the term, he would grant him a new lease, and the lessor afterwards levied a fine, and granted a lease of the same premises to the conuzee for eighty years, this was held to be a breach; and, in an action of debt on a bond for the performance of the covenant, the lessee was released from the necessity of showing that he offered to surrender, the maxim being, *Lex neminem cogit ad vana seu inutilia peragenda* (*v*).

Where a term of ninety-nine years, determinable on the deaths of three persons, was assigned to trus-

(*u*) Kirkham v. Chadwick, 13 Ves. 547.

(*v*) Main's case, 5 Co. 20, b.; S. C. Cro. Eliz. 450, 479; Mo. 452; 2 And. 18; Poph. 109; Jenk. Cent. 256. Ford v. Tiley, 6 Barn. & Cres. 325.

tees upon trust for J. S. for life; and J. S. covenanted, as often as any of the persons on whose lives the premises were or should be held should die, to use his utmost endeavours to renew the same, by purchasing of the lords of the fee new lives or a new life therein, in the room of such lives or life as should die as aforesaid, &c.; a renewal for his own life was resolved to be a good performance of the covenant; there being fair ground for him to insert his own life, that he might avoid the burthen of again renewing, on the death of the person he should put in; especially as the parties had neglected to prevent his so doing by any restrictive provision (*w*). But where the covenant was, that the party would use his endeavours to procure new leases to be granted by the lords of the fee to A. and B., the procuring them to be granted to himself, and offering an assignment to A. and B., did not amount to a performance (*x*).

III. Of covenants for renewal by charitable foundations, &c.

Hospitals and other charitable bodies, restrained by their constitution from granting leases for a longer period than twenty-one years, can no more, by the circuitous mode of covenanting for renewal, invest a lessee with an interest exceeding the prescribed limits, than originally grant a lease for the excessive term (*y*). Where, therefore, the founder of a hospital directed that no leases should be made for any longer term than twenty-one years, and the hospital made

(*w*) Scudamore v. Stratton, 1 Bos. & Pul. 455.

(*x*) Ibid. See Clarke v. Peppin, 2 Vent. 99.

(*y*) Watson v. Master, &c. of Hemsworth Hospital, 14 Ves. 324. See likewise Watson v. Hinsworth Hospital, 2 Vern. 596; S. C. 1 Eq. Ca. Ab. 100. pl. 8.

a lease for twenty-one years, with a covenant by renewal to make it up sixty years, the covenant, being deemed equally prejudicial to the hospital as a lease for sixty years, was decreed not to be binding in equity (*z*). A specific execution of such covenants cannot, in consequence, be enforced.

Next, as to leases with covenants for renewal by ecclesiastical and collegiate persons.

The restraining statute (*a*) is altered, so far as concerns leases made by spiritual, ecclesiastical, and collegiate persons of houses in cities,&c., by an act of the 14th of Elizabeth, c. 11. (*b*), which authorizes the making of leases, not exceeding the term of forty years, under certain restrictions, of any houses or grounds appertaining thereto, situate in any city, borough, town corporate, or market-town, or the suburbs thereof; so that such house be not the capital or dwelling-house used for the habitation of such persons, nor have ground to the same belonging above the quantity of ten acres.

By the 18th of Eliz. c. 11. (*c*), after reciting that sithence the making of the 13th of Eliz. c. 10., divers of the said ecclesiastical and spiritual persons, and others having spiritual or ecclesiastical livings, had from time to time made leases for twenty-one years or three lives, long before the expiration of the former

(*z*) Lydiatt v. Foach, 2 Vern. 410. Taylor v. Dulwich Hospital, 1 P. Wms. 655; S. C. 2 Eq. Ca. Ab. 198. pl. 2. Somerville v. Chapman, 1 Bro. C. C. 61.

(*a*) 13 Eliz. c. 10.

(*b*) 14 Eliz. c. 11. ss. 17. 19.

(*c*) 18 Eliz. c. 11. s. 2.

years, contrary to the true meaning and intent of the said statute, it was enacted, that all leases thereafter to be made by any of the said spiritual, ecclesiastical, or collegiate persons, or others, of any their said ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years should be in being, not to be expired, surrendered, or ended, within three years next after the making of any such new lease, should be void. And it was also enacted (*d*), that all and every bond and covenant whatsoever thereafter to be made for renewing or making of any lease or leases, contrary to the true intent of the act, or of the 13 Eliz. c. 10. should be utterly void. This act refers to the 13th of Eliz. c. 10. exclusively; and defeats such covenants for renewing leases only as are contrary to its own, and the provisions of that statute. The 14th of Eliz. remains undisturbed by its enactments. It has therefore been decided, that covenants by spiritual persons for renewing leases of houses, &c. in cities or towns, &c., are not prohibited by the 18th of Eliz. c. 11. (*e*).

IV. Of specific performance.

No doubt is at the present day entertained, that, on sufficient evidence of intention, a specific performance of a covenant for perpetual renewal will be decreed. It is a covenant to make an estate in land, and binds the lands in a court of equity, and a suit in that court is most advantageous, because there the thing itself can be obtained, which is a more adequate remedy than mere damages, which alone a court of law can give (*f*).

(*d*) Sect. 3.

(*e*) Crane v. Taylor, Hob. 269.

(*f*) Furnival v. Crew, 3 Atk. 87. Iggulden v. May, 9 Ves.

Lord Thurlow (*g*) almost brought himself to a notion, that any man who entered into such a covenant, must be taken so little to understand the nature of a bargain, and of property, that the court ought not to execute it by a specific performance; yet he never got so far in judgment (*h*). But from this position Lord Eldon has expressed his dissent; and it has now been so long held that such a covenant ought to be carried into execution, that, whether the judgment was originally right or wrong, it is so covered and sanctioned by decision, that it would be infinitely too dangerous to interpose a new rule in such cases (*i*).

The defendant holding under a corporation, of which he was a member, and in the habit of obtaining renewals on favourable terms, demised to the plaintiff at a certain rent, with a covenant to renew at the same rent as often as the corporation should renew to him. The corporation raised the rent payable by the defendant, who refused to renew to the plaintiff at the old rent; and on his refusing to advance his rent, the defendant brought an ejectment: to restrain proceedings the plaintiff filed this bill for

334. Harnett v. Yeilding, 2 Scho. & Lef. 553, 5. Betesworth v. Dean & Chapter of St. Paul's, 2 Eq. Ca. Ab. 26; pl. 30; S. C. 3 Bro. P. C. 389; S. C. Toml. ed. vol. i. p. 240.

(*g*) Tritton v. Foote, 2 Bro. C. C. 636; S. C. 2 Cox, 174. Rees v. Lord Dacre, cited 9 Ves. 332, but more fully set out in 3 Hargr. Jurisc. Exerc. 206, 7. 237; and 1 Hargr. Jur. Arg. 438, under the name of Reece v. Lord Dacre.

(*h*) Per Lord Eldon, 9 Ves. 330.

(*i*) Willan v. Willan, 16 Ves. 84.

an injunction. The Lord Chancellor granted the injunction, considering the defendant bound to renew to the plaintiff on the old terms, unless he chose to abandon the property, and allow the plaintiff to stand in his place for the renewal from the corporation; but otherwise he was bound specifically to execute his covenant for renewal on the terms on which he had covenanted to renew (*k*).

And in this place may be noticed, that where the covenant is to renew in general terms, without specifying the particular period for which the renewal is to be made (*l*); or, to grant such further lease as the lessee, his executors, &c. shall desire (*m*); a demand of a new lease for an excessive term, fifty years for instance, will not be complied with; but the covenant will receive a reasonable construction, and, the usual term of leasing being twenty-one years, equity will decree a lease of that duration, or for such shorter term as the lessee shall elect.

With respect to the persons who may insist on this right of renewal, it is to be observed, that if a covenant be to renew a lease on the request of the lessee (without mentioning his executors, &c.) within the term, and the lessee die, and his executors within

(*k*) Evans v. Walshe, 2 Scho. & Lef. 419.

(*l*) Hyde v. Skinner, 2 P. Wms. 196. According to Mr. Melmoth's report of this case, set forth in 1 Hargr. Jur. Arg. 426; and 3 Hargr. Jurisc. Exerc. 193, it appears that the covenant was to renew "for such further term as the lessee should then desire."

(*m*) Bridges v. Hitchcock, 1 Bro. P. C. 522; S. C. Toml. ed. vol. v. p. 6.

the prescribed period request the renewal, and the lessor refuse; as the executors of every person are implied in himself and bound without being named, they are entitled to the renewal, it being immaterial whether the demand be made by the testator or the executors (*n*). And as it is a covenant running with the land, the assignee of the term may avail himself of all benefit derivable under the contract (*o*), against the assignee of the reversion by virtue of the statute of 32 Hen 8. c. 34. (*p*). A breach can also be assigned at law against the executor or heir of the lessor (*q*).

Assignees under a commission of bankruptcy are not entitled to a specific performance of a covenant for renewal (*r*), unless, it seems, they should choose to take the house and be tenants, and to enter into covenants (*s*); but if the assignees assign over, as the covenant runs with the land, there is no just ground

(*n*) Hyde v. Skinner, 2 P. Wms. 196. Chapman v. Dalton, 1 Plowd. 286.

(*o*) Isteed v. Stonely, 1 And. 82. Anon. semb. Spencer's case, Mo. 159. pl. 300. Skerne's case, Mo. 27. Furnival v. Crew, 3 Atk. 88. Roe dem. Bamford v. Hayley, 12 East, 469. Vernon v. Smith, 5 Barn. & Ald. 11.

(*p*) Ibid. Tanner v. Florence, 1 Ch. Ca. 260. but qu. the correctness of this case as to the liability of the assignee of the reversion at common law.

(*q*) Furnival v. Crew, 3 Atk. 87.

(*r*) Drake v. Mayor of Exeter, 1 Ch. Ca. 71; S. C. 1 Eq. Ca. Ab. 53. pl. 1. 2 Freem. 183. Cited in Vandenanker v. Desbrough, 2 Vern. 97. See also Moyses v. Little, 2 Vern. 194; S. C. Eq. Ca. Ab. 53. pl. 4. Willingham v. Joyce, 3 Ves. 168. Brooke v. Hewitt, 3 Ves. 255. Weatherall v. Geering, 12 Ves. 504.

(*s*) Willingham v. Joyce, 3 Ves. 169.

for supposing that equity would refuse to assist such second assignee.

The insolvency of the tenant also seems to be a sufficient cause for rejecting his claim to renewal. The precise question has never been determined; but reasonable analogy would fairly support the position. Lord Eldon has declared that insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an agreement for a lease; the party seeking in equity an execution beyond the law. I shall therefore only say, (continued his lordship,) that at the hearing in general cases it would have considerable weight with me; in some cases more than in others. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly. If beyond that he undertakes for considerable expenditure upon the premises, before he is to be placed in the relation of a lessee, that is directly connected as a most important circumstance with the fact of solvency or insolvency. Therefore, where very considerable repairs are to be done by the lessee, his solvency is to be looked to to that extent.—And in the case before him, where between the treaty for renewal and the completion of the contract the lessee became insolvent, and paid a composition of seven shillings in the pound to his creditors, and among them to the landlord for a debt due for goods sold, the Lord Chancellor dissolved an injunction to restrain the landlord from proceeding in an action of ejectment (*t*).

(*t*) Buckland v. Hall, 8 Ves. 92. See also Willingham v. Joyce,

A distinction, with regard to insolvency, exists between a purchase and a lease. In the former instance, the bill for specific performance tenders payment of the purchase money, the latter is very much otherwise; and the court does not forget the habit of dealing among mankind with regard to the relation of landlord and tenant. The question, however, as to the effect of insolvency on the specific performance of the contract, was considered of too much consequence to be decided on motion (*u*).

In one case where a clause of re-entry was contained in the lease, and the value of the premises had been doubled by the improvements of the original lease, Lord Macclesfield was of opinion, that such clause of re-entry was a sufficient answer to an objection, that the executors of the covenantee for renewal might be insolvent tenants, and such as the covenantors would not care to trust (*v*).

A man who has committed felony (*w*), or a tenant who has committed waste, treated the land in an unhusbandlike manner, and been guilty of various breaches of covenant, for which the lessor has a right of re-entry, cannot, it seems, obtain a decree for the specific performance of a covenant for renewal (*x*).

sup. Boardman v. Mostyn, 6 Ves. 467. Featherstonhaugh v. Fenwick, 17 Ves. 313. De Minckwitz v. Udney, 16 Ves. 466.

(*u*) Buckland v. Hall, sup. O'Herlihy v. Hedges, 1 Scho. & Lef. 123.

(*v*) Hyde v. Skinner, 2 P. Wms. 196.

(*w*) Willingham v. Joyce, 3 Ves. 169.

(*x*) Hill v. Barclay, 18 Ves. 63. Gourlay v. The Duke of Somerset, 1 Ves. & B. 68.

But where there was an agreement for a lease, provided the intended lessee, his executors, administrators or assigns, should request the same for the special purpose only of carrying on his or their trade, or for the special purpose of residence of the lessee, his executors, administrators or assigns; a mere conditional agreement by the intended lessee to grant, if he could, an underlease to a third party, was not deemed such a forfeiture as to take away his right to a specific performance (*y*).

In order to enforce a specific performance, it is essential that some consideration should spring from the lessee; if the agreement for perpetual renewal be improvident, absurd, and unequal, or if inserted by mistake, equity will reject an application to carry it into specific execution. A bill was brought for this purpose, on a covenant for the renewal of a leasehold estate of the yearly value of 130*l.*, at a fine of 3*l.*, by an addition of ten years; but as there was no adequacy of price for this renewable perpetuity; no onerous services on the part of the lessee; no money advanced; no improvement, either stipulated or actually made, the bargain was considered so hard and injurious, that the bill was dismissed; but without costs. But as no proof existed of the covenant having been improperly obtained, a cross bill to have it declared void was dismissed with costs (*z*).

(*y*) Williams v. Cheney, 3 Ves. 59.

(*z*) Redshaw v. Bedford Level, 1 Eden, 346.

So a voluntary agreement endorsed on a lease by one not a party to it, but only a remainder-man, will not bind him to a performance of a covenant for renewal contained in such lease (*a*). And equally void is a promise by letter to renew a lease in consequence of money already expended on the premises; it is *nudum pactum*, which equity will not perform in specie. Nor will the circumstance of laying out money afterwards, as it is voluntary, vary the nature of the case; but if the promise be founded on an expressed intention of doing so, a specific performance will be decreed (*b*).

A purchaser with notice is bound in all respects as the vendor; therefore, where tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale; though the power was exceeded, yet a life having dropped in the lifetime of the lessor, the purchaser, having notice, was held to a specific performance, by granting a new lease with the same provision (*c*). Thus also, a purchaser from a tenant in tail, with notice of a covenant by him to renew a lease, which the father, tenant for life, had covenanted to renew, is bound to perform such cove-

(*a*) Dowling v. Mill, 1 Madd. 541.

(*b*) Robertson v. St. John, 2 Bro. C. C. 140. Richardson v. Sydenham, 2 Vern. 447; S. C. 1 Eq. Ca. Ab. 47. See Ford v. Compton, 2 Bro. C. C. 32. Pilling v. Armitage, 12 Ves. 78.

(*c*) Taylor v. Stibbert, 2 Ves. jun. 437. Tanner, *alias* Davis, v. Florence, 1 Ch. Ca. 259.

nant (*d*). So where a lessee of a college made an underlease, and covenanted with his lessee that he would renew his lease, and add to it a further term of three years; and he renewed the lease, but instead of adding the three years, he assigned it to J. S.; the assignee, having notice of the covenant, was obliged to add the three years (*e*). So where A. made a lease for three years, and, in consideration of the lessee's laying out 100*l.* in improvements, covenanted to grant a new lease at the end of the term; and the defendant purchased the estate and refused to renew; on application to Chancery the plaintiff had a decree in his favor (*f*).

A lease, however, not warranted by a power, having been granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting the rent reserved upon the lease, for many years after he came into possession, was not considered to have so far confirmed it, as to make the covenant for renewal binding on him (*g*).

V. Of relief in equity for covenantee.

A literal performance of these covenants is expected, where it can be accomplished. Accordingly, where a lease for sixty-one years had been granted, containing a covenant "that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would

(*d*) Brook v. Bulkeley, 2 Ves. 498.

(*e*) Finch v. Earl of Salisbury, Finch, 212.

(*f*) Richardson v. Sydenham, 2 Vern. 447; S. C. 1 Eq. Ca. Ab. 47.

(*g*) Higgins v. Rosse, 3 Bli. 112.

execute another lease of the said premises unto the lessee for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years thereby granted, at and under the said yearly rent, and the usual and general covenants; and so in like manner, at the end and expiration of every twenty years, during the said term of sixty-one years thereby granted, for the like consideration, and upon the like request, should and would grant and execute another lease of the premises to the lessee, his executors, &c., for the further term of twenty years, to commence at and from the expiration of the term then last before granted, at and under the like rent and covenants, &c.: under this covenant the lessee was not allowed to claim a further term of twenty years, at the expiration of the last twenty years in the lease, he having omitted to claim a further term at the end of the first and second twenty years (*h*).

In another case, the defendant had covenanted to renew the plaintiff's lease, at the request of the plaintiff, within three months before the expiration of the then granted lease. The lease being within a month of expiring, and the plaintiff not having requested a renewal, the defendant agreed to lease the premises to other persons. The plaintiff, then being in possession, applied for a new lease, which the defendant refusing, he filed his bill. The Lord Chancellor was clearly of opinion, that the plaintiff, having omitted to apply at the time agreed on, was not en-

(*h*) Rubery v. Jervoise, 1 Term Rep. 229.

titled to relief; observing, that if a lessee were relievable in such a case, he knew not where the court would stop; it would be saying, the lessee shall be loose, and the lessor bound. It may be observed, that the case referred to was a lease of a colliery, which from the nature of the property might have influenced the judgment of the court; and the Chancellor certainly does appear to have adverted to such circumstance; but his lordship seems to have rested his decision upon general principles, and not upon the particular circumstances of the case (*i*).

If the tenant has been guilty of gross laches in demanding a renewal, or tendering a lease for the lessor's execution, equity will not aid such lessee (*k*). That court will interpose and go beyond the stipulations of the covenant at law, only where a literal performance has been prevented by unavoidable accident, fraud, surprise, or ignorance not wilful, and upon compensation being made, and no injury done to the lessor (*l*). Relief was therefore refused, where the plaintiffs, being lessees for three lives under a corporation, who had covenanted to renew on certain terms when one life should drop, suffered two lives to expire, and brought the bill for renewal upon the original terms. The demand was resisted by the corporation; as the lease provided for renewal only

(*i*) Allen v. Hilton, 1 Fonbl. Tr. Eq. 432, note. Cited in City of London v. Mitford, 14 Ves. 58.

(*k*) Eaton v. Lyon, 3 Ves. 690. City of London v. Mitford, 14 Ves. 41. See also Vipon v. Rowley, 1 Ridg. P. C. 194. M'Alpine v. Swift, 1 Ball & B. 285.

(*l*) Eaton v. Lyon, 3 Ves. 690. 695. But see Maxwell v. Ward, 11 Price, 16. 17; the opinion of Lord C. B. Richards.

when one life should drop and two remain, but not in the case of two gone and one remaining. The bill was dismissed with costs, although a compensation was offered (*m*).

This disposition of the courts to force men to be diligent in the just pursuit of their rights, was further exemplified in a very recent case (*n*). A demise had been made to E. M. Brown for the term of 99 years, if he and two others named in the lease should so long live, with an agreement, "that if E. M. B. his executors, administrators, or assigns, should at any time thereafter, upon the death of any or either of the life or lives by which the said demised premises were then held, be desirous to renew his estate and interest, by adding a new life or lives in the room of the person or persons so dying, and should give notice in writing to or for the defendant, his heirs and assigns, within one year next after the death of any or either of the said person or persons for whose life or lives the said premises were then held, then and in such case, the defendant, his heirs and assigns, should and would, at the costs and charges of the said E. M. Brown, his executors, administrators, or assigns, at any time within the space of one year next after the death of any such life or lives, execute to the said E. M. Brown, his executors, &c. a good, and sufficient, and effectual lease of the pre-

(*m*) Bayly v. The Corporation of Leominster, 1 Ves. Jun. 476; S. C. 3 Bro. C. C. 529. Baynham v. Guy's Hospital, 3 Ves. 295. Bateman v. Murray, 5 Bro. P. C. 20. Toml. Edit.

(*n*) Maxwell v. Ward, 11 Price, 3; S. C. 13 Price, 674; S. C. M'Clel. 458.

mises for a new term of 99 years, to be determinable on the death or deaths of such of the said life or lives thereinbefore mentioned as should be then living, and the life or lives of any other person or persons as the said E. M. Brown, his executors, &c. should nominate in the room of the life or lives so dying, under the like yearly rents, covenants, provisoes, and agreements; and so *toties quoties* any life or lives should drop, and E. M. B., his executors, &c. should be desirous to renew his or their interest therein, upon payment of a certain fine. One of the cestuisque vie died in 1803, but no application for renewal was made till 1808. In August 1817, another of the two surviving lives determined; and in February 1818, before any renewed lease was granted, the last surviving life expired. In April 1818, a proposal was made by the representatives of the lessee for renewal for three new lives; but rejected, on the ground that on the death of the last life the lease was at an end. Alexander C. B. was of opinion, that the application made on the dropping of the second life did not entitle the party to a renewal, by inserting a life for that which dropped first. His Lordship then, without considering whether they were entitled to a renewal on the termination of the third life, for the purpose of simplifying the matter, confined himself to the question, whether the parties claiming had a right to have a life substituted for the second life, on the dropping of which they applied within the time and terms of the covenant, and under the circumstances which had taken place; and he held, that the true construction of the covenant was, that notice should have been given on the

dropping of the first life; and he said he could not decide otherwise without contradicting what Lord Alvanley said and did in the case of Eaton v. Lyon (*o*), by which he considered the decision in the principal case must be governed. The result was, that the bill was retained for twelve months in order to enable the plaintiffs to take the opinion of a court of law; and if no action should be brought within that period, the bill was to stand dismissed.

But a fair ground for relief is shown, if the lessee has lost his right by the fraud of the lessor, by which he was debarred the exercise of his right, or some accident or misfortune on his own part, which he could not prevent, by means whereof he was disabled from applying for a renewal at the stated times, according to the terms of his indenture. In this case a lease had been granted for twenty-one years at 1*l.* rent, with a covenant to renew from twenty-one years, to twenty-one years (to make up ninety-nine years). At the expiration of the first term, there being an arrear of rent due, and no application for renewal, the lessor brought an ejectment and obtained judgment and possession; but the lessee, accounting for the delay, and paying the arrear and interest, was decreed to be entitled to a renewal (*p*).

Equity will also relieve against an objection taken, that notice of an intention to renew was not given

(*o*) 3 Ves. 690.

(*p*) Rawstorne v. Bentley, 4 Bro. C. C. 415.

according to the letter of the condition of the covenant, *in writing* (*q*).

Ignorance, however, of a man's own rights, conferred by an instrument actually in his possession or power, where the other party is consequently innocent of concealment, or of any conduct contributing to keep him ignorant of any of its contents, amounts to such wilful ignorance as cannot excuse the non-performance of any conditions imposed on the persons claiming under the instrument, as necessary to raise to him the right which he himself must create. Where therefore an original lessee, with a covenant for renewal, died, and the instrument came into the possession of the executor of the lessee, the executor being ignorant of the covenants of the lease, and of his testator being one of the lives named therein, till apprized of it by his solicitor; L. C. B. Alexander entertained a clear opinion, that such ignorance of the contents of the lease did not entitle the plaintiff to seek relief in a court of Equity, from the effect of omitting to apply for renewal in time (*r*).

To the same effect is a very recent decision at the Rolls, where it appears that the assignee of the lease did not know of the death of the cestui que vie, and accounted for his ignorance on the ground that the description in the lease of the residence and trade of the person did not correspond with his actual resi-

(*q*) Maxwell v. Ward, 11 Price, 16.

(*r*) Maxwell v. Ward, 13 Price, 676; S. C. M'Clel. 458. 464.

dence and trade at the time of his decease, and therefore though he, the owner of the lease, knew of the death of this person, he was mistaken as to his identity, and immediately upon his receiving information upon the subject applied for a renewal; Sir J. Leach, M. R. thought that these circumstances did not entitle the plaintiff to relief in equity: and upon the general principle, that a lessee was bound to inform himself who the lives were, and apply within the prescribed period, his Honor dismissed the bill; observing, in allusion to Lord Alvanley's dictum in Eaton v. Lyon, which had been much pressed upon him in favour of the lessee, that this was a case of wilful ignorance (*s*).

VI. Of the necessity of surrendering existing interests.

The law formerly required the concurrence of all the under-lessees to a surrender of the existing interests, in order to obtain a renewal of the principal lease. The consequence was, that such renewal might be prevented or delayed by the refusal of any one under-tenant to surrender his lease: and it had been held, that if a lessee of a church lease made an under-lease, and filed his bill to compel the under-lessee to surrender, in order to enable him to renew with the church; although he offered when the lease was renewed, to grant a new lease to the defendant for the term then to come, and under the same rent, &c.; yet, if there was no covenant, in the under-lease to that effect, the court possessed no power to compel the under-tenant to surrender (*t*). "For preventing

(*s*) Harris v. Bryant, Rolls, 10 December, 1827.

(*t*) Colchester v. Arnott, 2 Vern. 383; S. C. Prec. Ch. 124.

such inconveniencies, and for making the renewal of leases more easy for the future," it was enacted (*u*), "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid, to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease."

VII. Of the expenses of renewal.

The plaintiff being possessed of certain premises held under an archbishop by lease, renewable from time to time on payment of certain fines and fees, demised the same for a term to the defendant, who covenanted "that he would from time to time, and at every time, during the said term of eighteen years, pay unto the plaintiff, or the said archbishop, such part of the fine and fees which, upon every renewal by the plaintiff of the lease by which he held the premises thereby demised (among others), should be payable or paid by the plaintiff, in respect of the premises thereby demised to the defendant. The plaintiff afterwards renewed his lease under the archbishop, for a period exceeding by five years the term demised to the defendant. It was held, that the defendant was not liable on this covenant to pay the whole of the fine and fees incurred by the plaintiff upon the renewal of his lease to the extent above mentioned; but only a part of such fine and fees,

(*u*) 4 Geo. 2. c. 28. s. 6.

commensurate with the interest which the defendant had acquired in the premises (*v*).

(*v*) Charlton v. Driver, 2 Brod. & Bing. 345; S. C. 5 J. B. Mo. 238.

59. See also Colegrave v. Manby, 6 Madd. 72; S. C. 2 Russ.

CHAPTER THE TENTH.

OF COVENANTS TO REPAIR.

I. In general. To what extent the mere relation of landlord and tenant, without any contract or stipulation between them, charges the latter with the duty of repairing the demised property, is not clearly ascertained. It seems, that he must keep the premises in what is called tenantable repair, and surrender them at the end of the term in as good condition as the ordinary and natural decay of the premises will admit; but until the meaning and extent of the term *tenantable repairs* shall be more accurately defined, the advance made in arriving at a correct knowledge of the actual obligations of the tenant will be trifling. The cases impart but little information on the subject.

With respect to a tenant from year to year, Lord Kenyon has laid down a rule, that he is bound to commit no waste, and to make fair and tenantable repairs; such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of premises; but not to make substantial and lasting repairs, such as to put on new roofing (*a*). Clearly, he is not liable for general repairs (*b*); nor is a tenant at will compellable to restore premises if

(*a*) Ferguson v. ——, 2 Esp. N. P. C. 590.

(*b*) Horsefall v. Mather, Holt's N. P. C. 7.

burnt down, or become ruinous by any other accident (*c*); but an implied assumpsit to use the premises in a husbandlike manner arises out of the relation of landlord and tenant (*d*).

The tenant's responsibility is now usually limited by an express covenant to repair. And this covenant extending to the thing *in esse*, parcel of the demise, and being *quodammodo* annexed and appurtenant to the property demised, will run with the land, and bind an assignee, although he be not named (*e*); even if he be assignee of part of the premises only (*f*).

The landlord sometimes, though seldom, enters into this covenant; but without a positive agreement he cannot be compelled to repair. Hence, if a lease be made of a house and a piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump; but no action of covenant lies against the lessor for not repairing it (*g*). So, if a house demised be burnt down, the

(*c*) Ibid.

(*d*) Powley v. Walker, 5 Term Rep. 373. Cheetham v. Hampson, 4 Term Rep. 318. See also Godfrey v. Watson, 3 Atk. 518. Parteriche v. Powlet, 2 Atk. 383.

(*e*) Spencer's case, 5 Co. 16, a.; S. C. 2 Bulstr. 281. Dean and Chapter of Windsor's case, 5 Co. 24, a. Buckley v. Pirk, 1 Salk. 317. Lougher v. Williams, 2 Lev. 92. Keeling v. Morrice, 12 Mod. 371. Smith v. Arnold, 3 Salk. 4; which case, as to the liability of the assignee on the covenant to build, seems to be bad law, being directly at variance with Spencer's case.

(*f*) Congham v. King, Cro. Car. 221; S. C. W. Jones, 245, nom. Conan v. Kemise.

(*g*) Pomfret v. Ricroft, 1 Saund. 321; S. C. 1 Vent. 26. 44; 1 Sid. 429; 2 Keb. 505. 543. 569. Rhodes v. Bullard, 7 East, 116.

landlord is not bound to rebuild, although the tenant is obliged to pay the rent during the term; and this, notwithstanding the lessor may have insured the premises, and received the money on his policy (*h*).

II. What premises fall within a covenant to repair.

A general covenant to repair has been construed to comprehend as well buildings erected by the tenant, as the buildings originally demised. A lessee covenanted to pull down the three houses leased to him, and to build three others in the same place; and also during the term well and sufficiently to repair all the houses so agreed to be built, and also all sewers, &c. made or to be made, and the said demised premises, and houses, and buildings, to be erected and built, and every of them, well and sufficiently repaired, to deliver up at the end or other sooner determination of the term: he built four instead of three houses; and the court were of opinion, that the covenant extended to the other house, as well as to the three which were agreed to be built (*i*). So, where there was a covenant in a lease to repair *prædimissa*, from the time of the lease to the determination thereof, and so well kept in repair to give up at the end of the term, not saying "from time to time;" and afterwards the lessee built a malt-house; the court held, that the covenant should extend to the malt-house, for it was a continuing covenant, and though the house had no actual, yet it had a potential being at the time of the lease (*j*).

(*h*) See ante, p. 198. 202.

(*i*) Dowse v. Cale, 2 Vent. 126; S. C. nom. Douse v. Earl, 3 Lev. 264. — Administratrix of Penry v. Brown, 2 Stark. 403.

(*j*) Brown v. Blunden, Skin. 121.

But where(*k*), in consideration of 200*l.* to be laid out in, upon, or about, rebuilding upon the ground and premises thereby demised, and other covenants, one Thomas Lant demised to Wilson (who assigned to the defendant) all that piece of ground, and all the messuages, tenements, houses, &c. thereon standing, in Suffolk Place, &c. for forty-three years; and the lessee covenanted to lay out the said sum of 200*l.* within fifteen years in *erecting and rebuilding* of messuages or tenements or some other buildings upon the ground and premises; and from time to time and at all times, all and singular the said messuages and tenements so to be erected, with all such other houses, edifices, &c. as should at any time or times *thereafter be erected*, &c. to repair, &c.; and the *said demised premises*, with all such *other* houses, &c. so well repaired, &c. at the end or other sooner determination of the said term to deliver up, &c.; the question was, to what buildings the covenant extended. Lord Mansfield said, we are extremely clear, that not only the words of the covenant, but also the intent of the parties, manifestly show, that it was not meant that any of the money should be laid out on the old buildings, but that they were to be pulled down, and that whatever the lessee should erect, with the 200*l.* or otherwise, for his own convenience, should be kept in repair. The words *demised premises* are put in opposition (*l*) to the buildings that were *to be erected* thereupon with the 200*l.* And the covenant to deliver up is agreeable to this construction; that covenant being to leave the de-

(*k*) Lant v. Norris, 1 Burr. 287.

(*l*) *Lege* "reference" instead of "opposition." And see 3 Lev. 265. Skin. 121, Editor's note.

mised premises, together with all such other houses, &c. as should be afterwards erected, &c. so well repaired.

And a covenant to repair a house, outhouses, and stables, will oblige the party to repair the racks in the stable; nor need the plaintiff set forth that they were fixed in the stable, and part of the freehold; for it would be very remote to give it any other construction than that they were fixed for use in the stable. Pollexfen C. J., however, entertained a contrary opinion (*l*).

So, if a lessee who has erected fixtures for the purposes of trade upon the demised premises, afterwards takes a new lease, to commence at the expiration of his former one, which new lease contains a covenant to repair, he will be bound to repair those fixtures, unless strong circumstances exist to shew that they were not intended to pass under the general words of the second demise; but it is doubtful whether any circumstances *dehors* the deed can be alleged to shew that they were not intended to pass (*m*).

Although no decision has reached the precise point, yet the cases lead to the opinion (*n*), that a general covenant "to make all needful and necessary repa-

(*l*) Anon. 2 Vent. 214.

(*m*) Thresher v. Company of Proprietors of East London Water-works, 2 Barn. and Cres. 608; S.C. 4 Dow. and Ry. 62.

(*n*) Moore v. Clark, 5 Taunt. 90. And see Robinson v. Lewis, 10 East, 227. 233.

rations and amendments whatsoever," will not bind a tenant to contribute to the expense of erecting a party-wall, under the act, 14 Geo. 3. c. 78. (*o*); unless he be also owner of the improved rent (*p*), that is, the man who on all the subsisting leases has the best rent (*q*); which improved rent is not construed to signify the improved value, nor can the owner thereof be charged (*r*); the object of the legislature in enacting that statute (*s*) being, to throw the burthen of paying the expense of party-walls on persons to whom long leases had been granted with a view to an improvement of the estate, and who afterwards underlet at a considerable increase of rent. A lessee, therefore, at a peppercorn rent for the first half year, and a rack rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax, and all other taxes, rates, and impositions, having assigned for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of the act, or the covenant; the charge being in such case to be borne by the original landlord. But it seems from an observation which fell from Lord Kenyon, that if a large sum in gross were received by the lessee from his assignee, as a consideration for

(*o*) Sangster v. Birkhead, 1 Bos. and Pul. 303. Barret v. The Duke of Bedford, 8 Term Rep. 602.

(*p*) Peck v. Wood, 5 Term Rep. 130. Taylor v. Reed, 6 Taunt. 249.

(*q*) Sangster v. Birkhead, 1 Bos. & Pul. 305.

(*r*) Beardmore v. Fox, 8 Term Rep. 214. Lambe v. Hemans, 2 Barn. & Ald. 467.

(*s*) See sec. 41.

the purchase, which would be equivalent to an improved rent, though no improved rent were reserved to the original lessee, he (the original lessee) would be liable to pay this expense within the act of parliament (*t*).

Should a tenant, under a covenant to repair, pull down a party-wall (being in a ruinous condition), and rebuild it at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority, he cannot maintain an action against his landlord for a moiety of the expense of rebuilding such party-wall (*u*).

Where, however, the tenant of a house covenanted to pay all rates, &c., "it being the true intent and meaning of the parties, that the said (lessor), his heirs and assigns, should have and receive the yearly rent or sum of 60*l.* hereby reserved, in net money, without any deduction, defalcation, or allowance out of the same, on any account whatever;" and the tenant also covenanted generally to repair; and also during the term, as often as need should require, to bear, pay, and allow, a reasonable share and proportion of, or for, or towards, supporting, repairing, amending, and cleaning, all *party-walls*, party-gutters, common sewers, public sewers, and drains, belonging, or which at any time during the said term should

(*t*) Southall v. Leadbetter, 3 Term Rep. 458. Stone v. Greenwell, Cited ibid. 461.

(*u*) Pizey v. Rogers, 1 Ry. & Moo. 357.

belong to the premises, or any part thereof; the court were clearly of opinion, on two grounds, that the tenant must bear the burthen of erecting the party-wall; First, on account of the agreement that the landlord should receive the yearly sum of 60*l.* in net money, without any deduction or allowance out of the same; and Secondly, on account of the covenant respecting the repairing of all party-walls, &c., which they considered sufficient evidence of intention that the expense should fall on the tenant (*x*).

Here may be mentioned, that by the statute 14 Geo. 3. c. 78. (*y*), it is enacted, "that no action, suit, or process whatever, shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom to the contrary notwithstanding.—Provided, that no contract or agreement made between landlord and tenant shall be hereby defeated or made void." So that a tenant is not under any necessity to reinstate

(*x*) Barrett v. The Duke of Bedford, 8 Term Rep. 602. But see Sangster v. Birkhead, 1 Bos. & Pul. 304; where the court said, they could not meddle with the question, whether a tenant was exempted from his covenant to repair by the provisions of the act; as the legislature never meant to incumber itself with the covenant which parties might make with each other; & see Robinson v. Lewis, 10 East, 233, 4. Stuart v. Smith, 2 Marsh. 435; S. C. 7 Taunt. 158.

(*y*) 14 Geo. 3. c. 78. s. 86. See ante, p. 188. note (*k*).

premises destroyed by fire, unless the terms of his lease impose this obligation upon him.

III. Of the liability, at law, to repair, where the premises are destroyed by fire, &c.

Under a general covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and even if the premises be entirely consumed, the covenantor is under an obligation to rebuild them (*z*). This liability of the tenant is founded on the old law: it it is so laid down in Brooke's Abridgment (*a*), referring to 40 Edw. 3. 5. So, in Walton v. Waterhouse (*b*), it was taken to be law by Hale, C. J., and the whole court; and though Saunders, who drew the plea, and argued the case on behalf of the defendant, was dissatisfied with the judgment; it was not because the court held that under such a covenant the lessee was bound to rebuild, but merely because he thought they had not considered whether the plea were good, or not, in form, the defendant having pleaded that the house was rebuilt, without saying by whom, and the plaintiff himself having in fact rebuilt it.

In like manner, if a party covenants to build a bridge in a workmanlike manner across a river, and

(*z*) Compton v. Allen, Sty. 162. Anon. Dy. 324, a. pl. 34. Poole v. Archer, 2 Show. 401; S. C. Skin. 210. Chesterfield v. Bolton, Com. 627. Bullock v. Dommitt, 6 Term Rep. 650; S. C. 2 Chit. 608. Pym v. Blackburn, 3 Ves. 38. Rook v. Worth, 1 Ves. 462.

(*a*) Bro. Ab. Covenant, pl. 4.

(*b*) Walton v. Waterhouse, 2 Saund. 420; S. C. 2 Keb. 535; 3 Keb. 40. Anon. 1 Vent. 38.

to uphold and keep it in complete repair for seven years, he will be held to the observance of his contract, although the bridge be, by the act of God, by a great, unusual, and extraordinary flood of water, washed and broken down (*c*). And the distinction taken in the books is this: when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And therefore, if a lessee covenants to repair a house, though it be destroyed by lightning, or thrown down by enemies, yet he ought to repair it (*d*).

In consequence of this obligation, and in order to afford some protection to the tenant, it is customary to introduce into the covenant to repair, an exception against accident by fire, and sometimes, by lightning and tempest. But it does not appear that this exception will, at law, bind the landlord to repair damages occasioned by fire or storms (*e*). An action was brought for half a year's rent (*f*): the defendant pleaded that he covenanted to repair, casu-

(*c*) Brecknock Canal Company v. Pritchard, 6 Term Rep. 750.

(*d*) Ibid. Anon. Dy. 33, a. pl. 10. Paradine v. Jane, Al. 26; S. C. Sty. 47. Chesterfield v. Bolton, Com. 627. Bullock v. Dommitt, 6 Term Rep. 650; S. C. 2 Chit. 608.

(*e*) Weigall v. Waters, 6 Term Rep. 488. Monk v. Cooper, 2 Stra. 763; S. C. 2 Ld. Raym. 1477. Steele v. Wright, Cited 1 Term Rep. 708.

(*f*) Ibid. and see S.C. 2 Anstr. 575.

alties by fire and tempest excepted; that a violent tempest arose, and threw down a stack of chimneys belonging to the house, and damaged the house so much, that it would have become uninhabitable, if he had not repaired it; that he had laid out 30*l.*, which he was ready to set off against the rent claimed. The court, after objecting to the plea, because it did not set off any certain debt, but uncertain damages, said, that they did not see by what covenant the landlord was bound to repair damages occasioned by fire or tempest; the exception having been introduced in the lessee's covenant for his benefit, and to exempt him from particular repairs; but if the plaintiff has fairly laid out money on repairing what he was not bound to repair, perhaps a Court of Equity would give him relief.

IV. Of the liability, in equity, to repair, where the premises are destroyed by fire, &c.

It will be seen, that the last dictum merely amounted to this, that if there were any remedy at all, it must be in equity: it negatived the remedy sought at law, but did not affirm the existence of an equitable claim. Whether a tenant has any equity to compel his landlord to put the premises in their former condition, or to restrain him from suing for rent until such rebuilding, has been the subject of some diversity of opinion.

In the case of Brown v. Quilter(*g*), the plaintiff had taken a house and wharf belonging to the defendant, and covenanted to repair, &c., accidents by

(*g*) Brown v. Quilter, Ambl. 619; S. C. 2 Eden, 219; and cited in Doe dem. Ellis v. Sandham, 1 Term Rep. 708; and in Cutter v. Powell, 6 Term Rep. 323.

fire excepted; and the defendant covenanted in the usual manner for quiet enjoyment. The house was afterwards burnt down. The defendant, having insured it at 500*l.*, and having received the insurance money, neglected to rebuild, and the plaintiff refused to pay the rent which became due after the house was burnt. As soon as the defendant brought an action for the rent, the plaintiff filed a bill for an injunction, and to compel the defendant either to rebuild the house, or to pay the insurance money to the plaintiff, towards satisfaction of his loss. The defendant in his answer insisted upon his right to the insurance money, and to be paid the rent without rebuilding the house, but offered to discharge the plaintiff from the lease. Lord Northington thought, that such a case as this should be considered as much an eviction, as if it had been an eviction of title; for the destruction of the house was the destruction of the thing; and though the covenant for quiet enjoyment would not extend to oblige the lessor to rebuild; yet, when an action was brought for rent after the house was burnt down, there was a good ground of equity for an injunction, till the house was rebuilt. The defendant, he said, by his answer had offered an equity, which was, to take back the lease, and consent to its being cancelled. And his Lordship was going to give directions for that purpose, but the plaintiff, being present in court, and choosing to continue tenant without having the house rebuilt, rather than give up the lease, his Lordship dismissed the bill, with costs. The learned judge remained of the same opinion in

the subsequent case of Campden v. Moreton (*h*): and Lord Northington's doctrine was corroborated by Lord Bathurst in Steele v. Wright (*i*).

In the case of Brown v. Quilter, Lord Northington proceeded upon an opinion, that, even at law, the right of the landlord to recover rent in a case where the property was destroyed by fire would be doubtful, and he considered it similar to an eviction; but, as observed by Macdonald, C. B. (*k*), it may well be questioned whether there is any real resemblance between the cases. The tenant can only be evicted where the title of the landlord was originally bad; where he never had in truth any thing to demise, and the pretending to do so was a fraud upon the lessee. In the principal case, there was a full capacity to demise the thing leased, on any terms which the parties might agree upon.

The authority, however, of these cases has been considerably shaken, if not entirely overruled, by subsequent decisions. The first case to the contrary (*l*) was a solemn determination upon a hearing. A covenant was comprised in the lease, on the part of the tenant (the plaintiff), for the due payment of the rent, and for keeping and leaving the premises in repair, damage by fire only excepted. The house was consumed by fire: the stables and outbuildings were not damaged. The plaintiff soon afterwards applied to the defendant to rebuild the premises,

(*h*) Campden v. Moreton, sup. p. 199.

(*i*) Steele v. Wright, Ibid.

(*k*) 3 Anstr. 693.

(*l*) Hare v. Groves, 3 Anstr. 687.

or to accept a surrender of the lease. The defendant refused to do so; and commenced an action at law on the covenant, for non-payment of rent accruing subsequently to the fire. A bill was filed for an injunction, and to compel the defendant either to accept a surrender of the lease, or to rebuild the premises. The court considered, that, at law, the landlord's right to recover his rent, notwithstanding the destruction of the property by fire, was fully established. And the bill was dismissed, not upon any evidence of the particular circumstances of the case, or of the dangerous use to which the house had been applied; but upon the general ground that the equity of the parties was equal, and that the rule of law must prevail.

Holtzapffel v. Baker (*m*) was the next case. The plaintiff was under an agreement to take a lease of the premises in question at a certain rent; he also agreed to pay the rent thereby reserved on the days and times therein mentioned; and to repair, damage by fire excepted. During his occupation the house was burnt down; and an action being brought for rent in arrear since the fire, the plaintiff filed his bill, praying that the defendant might rebuild the premises, and for an injunction against the proceedings at law in the meantime; or that the defendant might accept a surrender of the premises. Lord Eldon said, that if the parties agreed, the tenant to repair in all cases except fire, and the landlord, that in case of fire he would be content, at the end of the

(*m*) Holtzapffel v. Baker, 18 Ves. 115; S. C. 4 Taunt. 45.

term, to take the land without the house, he saw no reason why they should not; for if the meaning of the contract was, that, if a fire should happen, the rent should not be paid, there was no occasion to come into equity; but if that was not the effect of the contract at law, he could not see any equity: the injunction was therefore dissolved.

The main point of distinction between the cases first cited, viz. Brown v. Quilter, Campden v. Moreton, and Steele v. Wright, and the two last, Hare v. Groves, and Holtzapffel v. Baker, consists in the circumstance, that in the three former the landlord had insured the house, and on its being consumed had become entitled to the insurance, and, therefore, had in his pocket the value of the thing which was the subject of his contract with the lessee. As to him, therefore, no loss had happened. And Macdonald, C. B. thought, in the case of Hare v. Groves, that there might be some equity to say, that he should not keep the house or its value, and receive the rent also; but should either put it down again for the use of the lessee, or remit the rent.

But it has very recently been held, that there is no satisfactory principle to support that kind of equity which is alleged to arise from the defendant's receipt of the insurance money. The facts of the case (*n*) were these: The defendant demised to the plaintiff a cotton factory, together with the steam-boiler, steam engine, steam pipes, and gearing, there-

(*n*) Leeds v. Cheetham, 1 Sim. 146.

unto belonging for twenty-one years, at the yearly rent of 103*l.* 3*s.* 6*d.* The plaintiff covenanted to pay the rent during the term, and to repair and keep repaired the inside of the cotton factory, and the outbuildings and offices thereto belonging, together with all fixtures, buildings, &c.: and the defendant covenanted to maintain the outside brickwork, plastering, slating, tiling, and all other outer parts of the premises in good repair, &c. There was no exception in respect of accidents by fire, either in the covenant for payment of the rent, or in the covenant to repair. On the 22nd of June 1825, the factory, buildings, and premises, were destroyed by fire. After the lease was granted, the defendant insured the factory and buildings for 500*l.*; the steam engine for 100*l.*; the engine house for 60*l.*; and the gearing for 40*l.*; so that the total amount of the sums insured was 700*l.*; and shortly after the fire he received that sum from the insurance office. The bill prayed, that it might be declared, that the defendant was bound to lay out and apply the 700*l.*, or a competent part thereof, together with the old materials, in and towards the rebuilding and reinstating of the factory, buildings, and premises, &c.; and that it might also be declared, that the plaintiff was not bound to pay the rent during such term as the factory and premises, &c. should continue unbuilt and unrestored; and that he might be discharged therefrom accordingly; and that, in the meantime, the defendant might be restrained from further proceeding in the action. The Vice-Chancellor in delivering his judgment said:—Clearly, at law, the plaintiff, having covenanted to pay his rent during the whole

continuance of the lease, is not entitled to any suspension of the rent during the time that will be occupied in the rebuilding and restoration of the premises. It appears to me that, in this respect, equity must follow the law. The plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but, not having done so, a court of equity cannot supply that provision which he has omitted to make for himself; and it must be intended, that the purpose of the parties was according to the legal effect of the contract. With respect to the equity which the plaintiff alleges to arise from the defendant's receipt of the insurance money, there is no satisfactory principle to support it. The defendant, having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory, in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be, that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenants which he has required from the defendant; and to those covenants must he alone resort.

It is now, therefore, settled, that a tenant has no equity to compel his landlord to expend money received from an insurance office, in rebuilding the demised premises, on their being burnt down; or to restrain the landlord from suing for the rent until

after the premises shall have been rebuilt (*o*). In the last case, it is true, there was no exception against accidents by fire; but it appears that little importance is attached to these words; the exception being introduced merely for the benefit of the lessee, and to exonerate him from the necessity of repairing in certain events. It saves him from one of the duties to which he would otherwise be liable in case of fire, under the general covenant to repair (*p*).

It is to be observed, that a tenant holding over after the expiration of the term, impliedly holds subject to all the covenants in the lease which are applicable to his new situation; and, therefore, if after the expiration of a written lease, containing a covenant by the lessee to keep the premises in repair, he verbally agrees to continue tenant, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, and the premises afterwards become ruinous by accidental fire, he is bound to rebuild them; and the mere advance in the amount of rent to be paid makes no difference; for the advanced rent incorporates the old terms with the new contract, the parties still being supposed, in other respects, to have had reference to the old lease. The usage in such cases is, to declare in assumpsit on the implied promise raised

(*o*) This subject, with respect to the tenant's liability to pay rent after the destruction of the property by fire, has been already discussed; Ante, Chap. VI.

(*p*) Hare v. Groves, 3 Anstr. 696.

by the continued holding (*q*). An action on the case would also lie, declaring specially on the implied agreement, with an averment that the plaintiff was always ready to perform his part; but an action of covenant could not be supported (*r*).

V. What a breach.

Where the covenant is to repair, and *keep in repair*, if the premises be at any time out of repair, the party will be guilty of a breach of covenant (*s*). But where the party covenants to repair, and leave the houses and buildings in as good a plight as he found them, he will be answerable for all damage, even if committed by the king's enemies, or occasioned by storms, flood, fire, or lightning (*t*). But where he covenants to *leave* trees, wood, and other natural productions, in the same plight as he found them, a distinction will be taken between the act of the party, and the act of God, by which he may be incapacitated to perform his agreement. Thus, where one covenants to leave a wood in the same plight as he found it; by the act of cutting down trees himself, the covenant is immediately broken; for his own act has rendered the performance impossible; but it is otherwise, if some of the trees be blown down by

(*q*) Digby v. Atkinson, 4 Camp. 275. Bromefield v. Williamson, Sty. 407, in debt on bond for performance of covenants. Kimpton v. Eve, 2 Ves. & B. 353. See also Brudnell v. Roberts, 2 Wils. 143.

(*r*) Kimpton v. Eve, sup.

(*s*) Luxmore v. Robson, 1 Barn. & Ald. 584.

(*t*) Paradine v. Jane, Al. 26; S. C. Sty. 47. Anon. Dy. 33, a. pl. 10. Company of Proprietors of the Brecknock and Abergavenny Canal Navigation v. Pritchard, 6 Term. Rep. 750.

the wind, or the like: as the damage in that case arises by the act of God, the covenantor is not bound to supply it (*u*); the maxims of law being, *Lex non cogit ad impossibilia,* and, *Impotentia excusat legem* (*v*). So, where one covenants to repair a house before such a day, and it happens that the plague is in the house before and until the day; the omission to repair is not a breach of the covenant, for the existence of the plague is a good excuse; but, unless done in convenient time afterwards, the covenant will be broken (*w*).

In a case in Dyer (*x*), the court took a distinction between a covenant to repair under a penalty, and a covenant for non-performance: their opinion was, that if the house be burnt by lightning, or overturned by the wind, the lessee should be excused from the penalty; because it was the act of God, which could not be resisted; but they held, that he was bound to make and repair the thing in convenient time, because of his own covenant.

The breaking up of a pavement; carrying away the locks and keys of a cupboard; breaking the glass in the windows; and carrying away a shelf; amount to a breach of a covenant to repair (*y*). So does the breaking a door-way through the wall of the

(*u*) Shep. Touch. 73. Plowd. 29. 40 Ed. 3. 5, b. Main's Case, 5 Co. 21, a. Willams v. Hide, Palm. 549.

(*v*) Ingolsby v. Wivell, Hardr. 387. Shelley's Case, 1 Co. 98, a.

(*w*) Shep. Touch. 174.

(*x*) Anon. Dy. 33, a. pl. 10.

(*y*) Pyot v. Lady St. John, Cro. Jac. 329; S. C. 2 Bulstr. 102.

messuage demised, into the adjoining house, and keeping it open for a long space of time (*z*).

If a person, on a building lease, covenants to rebuild several houses, the rebuilding some, and repairing others, at a considerable expense, by pulling down the fore and back fronts, and rebuilding them, is not a performance of the covenant (*a*). But where a lessee covenanted to repair the four messuages demised, and, within the first fifty years of the term, to take down the said demised messuages *as occasion should require*, and in the place thereof to erect, in a workmanlike manner, upon the premises, four other good and substantial brick messuages; the Court of Common Pleas were of opinion, that, if within the fifty years the houses should be so repaired, as to make them completely and substantially as good as new houses, the lessor would have all he was entitled to; that the covenant would be satisfied without taking down the old houses; and that the words *as occasion should require* would raise a question of fact for a jury whether such occasion did arise (*b*).

A lessee gave a bond, with a condition that he would at all times during the term repair the two messuages leased; and, to an action, pleaded, that he had performed the conditions in all repects, except as to one

(*z*) Doe d. Vickery v. Jackson, 2 Stark. 293.

(*a*) City of London v. Nash, 1 Ves. 12; S. C. more fully reported, 3 Atk. 512.

(*b*) Evelyn v. Raddish, 7 Taunt. 411; S.C. Holt's N. P. C. 543.

kitchen, which was so ruinous at the time of the demise, that he could not maintain or repair it, and therefore he took it down, and rebuilt it in as short a time as he possibly could, in the same place, as large, and as sufficient in length, breadth, and height, as the other kitchen was; and that the said kitchen, at all times after the re-edifying it, he had sustained, and maintained, and well repaired: on demurrer, the court held, that the plea would have been available in an action of waste; but here, where he had by his own act tied himself to an inconvenience, he was bound at his peril to provide for it (*b*). It is difficult to reconcile the decisions in this and the preceding case; and it may be at least questionable, whether at the present day the condition would not meet with a different construction.

It may be mentioned, that where a tenant under a lease containing a covenant to repair, underlets the premises to one who enters into a similar covenant with him, and the original lessor brings an action on the covenant and recovers against the first lessee; the damages and costs recovered in that action, and also the costs of defending it, may be recovered as special damages in an action against the under-tenant for the breach of his covenant to repair (*c*).

An argument was advanced in a case (*d*), already quoted, (in which a tenant had covenanted to

(*b*) Wood v. Avery, 2 Leon. 189; S.C. Sav. 96.

(*c*) Neale v. Wyllie, 3 Barn. & Cres. 533; S.C. 5 Dow. & Ry. 442.

(*d*) Luxmore v. Robson, 1 Barn. & Ald. 584.

repair, and *keep* in proper repair, the buildings demised to him during the term,) that no right of action vested in the lessor or his assignees before the expiration of the term; and that the covenant to keep in repair, would be satisfied by the lessee's putting the premises into repair at any time during the continuance of the term; but it was resolved, that, as by the terms of the covenant the lessee was bound to *keep* the premises in repair, to keep them in repair, he must have them in repair at all times during the term; and that, if they were at any time out of repair, he would be guilty of a breach of covenant, which would be the proper subject of an action. There is, indeed, a position to be found of a contrary tendency in an early case (*e*). It is there laid down, that if a man leases a manor for years, and the lessee covenants to keep the houses of the manor, and as much as was in the manor, in as good plight as he found them, and during the term the lessee commits waste in the houses, and in cutting of oaks; an action will lie for the lessor, before the end of the term, for the oaks; because for them it is impossible that the covenant could be performed; although it is otherwise with respect to the houses. But this doctrine has been frequently questioned. The reporter of the case of Luxmore v. Robson remarks, that the counsel who was to have argued in support of the declaration stated, that, on referring to the case in F. N. B. (*f*), cited as an authority for the position laid down in Main's case, it appeared that no judgment whatever had been pronounced; and, therefore, what was

(*e*) Main's Case, 5 Co. 21, a.

(*f*) F. N. B. 145, K. In some editions, 145, I.

said by the court could be considered as no more than an *obiter dictum;* and that in 2 Rol. Rep. 347, Dodridge, J. denied the case to be law. Moreover, in Luxmore v. Robson, the proposition was repudiated by the court as unsound; Lord Ellenborough, C. J. observing, that common sense, the practice, and the general convenience of mankind, required that a construction different from that in the case cited (Main's case) should be adopted; to which Mr. Justice Bayley added, that neither common sense, nor any principle of law, would lead to the conclusion which the passage cited from 5 Rep. would seem to warrant.

Although the lessee is liable to an action before the expiration of his term, on a covenant to keep the premises in good repair; on a covenant to *leave* them in as good a state as he found them, no action will lie till the end of the term: if, therefore, the tenant pull them down, he will not be guilty of a breach of covenant, for he may rebuild them before the determination of his lease(*g*). And, consequently, it is usual in actions of covenant brought within the term for not repairing, to give only nominal damages, for the lessee may afterwards repair during the term; but that is only a rule of discretion; there may be circumstances where the whole value of the repairs shall be given for not repairing (*h*).

(*g*) Shep. Touch. 173.

(*h*) Moore v. Clark, 5 Taunt. 96. See further Vivian v. Champion, 1 Salk. 141; S. C. 2 Ld. Raym. 1225; Anon. 11 Mod. 45; & Holt, 178. Shortridge v. Lamplugh, 2 Lord Raym. 798; S. C. Holt, 621; 2 Salk. 678; 7 Mod. 71.

In most leases a clause is to be found, empowering the lessor to enter into the property demised at specified times, to view the condition thereof, and to leave notice of the defects or want of reparation; and the lessee, on his part, covenants to make the necessary repairs. On this clause cases have arisen, with regard to the time at which the landlord is enabled to sue; and the questions are, 1st, Whether, under these stipulations, an action can be supported without giving any notice at all; and 2dly, Where a notice has been served, whether an action can be maintained within the period prescribed by the notice for repairing.

First, Where a lessee covenants to repair, and to yield up the premises so repaired at the end of the term; and in the indenture is comprised another covenant, that it shall be lawful for the lessor, twice or oftener in every year, to enter and view the condition of the premises, and of all defects found to leave notice in writing to the lessee, to repair within six months; and the lessee covenants to repair within six months accordingly: it is not requisite to give six months' notice, prior to the commencement of an action for a breach in not repairing, as these are distinct and separate covenants, the one not qualified by the other (*i*). So, where the lessee of a house covenanted that he would, from time to time during the term, after three months' notice, sufficiently repair, and at the end of the term leave it sufficiently repaired; it was holden, that the latter was a distinct clause; and that,

(*i*) Wood v. Day, 1 J. B. Mo. 389; S.C. 7 Taunt. 646.

by leaving the premises in a dilapidated state, the tenant had committed a breach of his covenant, although he had received no notice three months before (*k*).

But where the covenant is clearly qualified, as if it be, that the tenant shall repair the messuages and premises demised, from time to time, and at all times, when, where, and as often as, need or occasion shall be during the term, and at furthest within three months after notice of any decay or want of reparation shall, by the lessor or his assigns, be given to, or left at, the demised premises, for the lessee or his assigns; to entitle the lessor to an action, he must comply with the provision respecting the notice; for the terms of stipulation must be joined to the former part of the sentence to render it complete (*l*). So, a covenant by a tenant, that, from and after the reparation of the demised messuage by the landlord, he (the tenant) will sufficiently repair and maintain it, is conditional; and although it be in a good state at the time of the lease, if it afterwards happen to decay, the landlord, until the first repairs be made by him, cannot charge the defendant on his covenant (*m*).

Secondly, Where notice has been given. If the lease contains a general covenant to keep the pre-

(*k*) Harflet v. Butcher, Cro. Jac. 644.

(*l*) Horsfall v. Testar, 1 J. B. Mo. 89; S. C. 7 Taunt. 385. See Schomberg v. Nash, Say. 113.

(*m*) Slater v. Stone, Cro. Jac. 645. Bragg v. Nightingall, Sty. 140.

mises in repair; and also a clause, that the lessor may enter to view the defects, &c.; and that the lessee shall, within three months after notice, repair all defects of which such notice shall be given; with the usual proviso for re-entry; a notice by the landlord, requiring the tenant *forthwith* to put the premises in repair according to his covenant, is no waiver of the right of re-entry occasioned by a breach of the general covenant to repair; nor will it preclude the landlord from bringing an action of ejectment prior to the expiration of the three months (*n*).

The distinction between this case and one of later occurrence in the Court of King's Bench (*o*), consists in the different language used in the notices. In the former, the tenant was required to put the premises in repair *forthwith;* which, it was held, did not prevent the landlord from bringing his ejectment at any time; but in the latter, the notice was to repair and amend *within the space of three calendar months* from the delivery thereof; which notice, the court thought, amounted to a declaration, that the landlord would be satisfied if the premises were repaired within three months; and was equivalent to an admission that the tenancy would continue up to the expiration of the three months, and, therefore, defeated him of his right to commence an action of

(*n*) Roe d. Goatly v. Paine, 4 Campb. 520.

(*o*) Doe dem. Morecraft v. Meux, 4 Barn. & Cres. 606; S. C. 7 Dow. & Ry. 98. 1 Carr. & P. 346. See also Hill v. Barclay, 16 Ves. 402; 18 Ibid. 56. 64.

ejectment before the determination of that period: but they clearly held, that, after giving the notice to repair within three months, the lessor might have an action against the defendant upon the former covenant, for not keeping the premises in repair; that remedy being very different from insisting on the forfeiture. There is another circumstance distinguishing this case from Roe v. Paine, which, of itself, and independently of the notice, operated as a waiver of the right of re-entry. The notice was dated the 6th day of August 1823. On the 24th of October 1823, the lessor of the plaintiff received of the defendant half a year's rent to the 29th of September 1823; and the declaration in ejectment was served on the 28th of October 1823, being prior to the effluxion of the said three months. As the landlord, therefore, by receiving the rent which became due on the 29th of September, had affirmed the subsistence of the lease up to that period, it was plain, that he did not mean to insist upon an immediate forfeiture at the time when the notice was given.

VII. Of specific performance.

The rule may now be taken to be established, that equity will not decree a specific performance of a covenant to repair; but will leave the party to recover damages in an action at law. This was the opinion of Lord Apsley (*p*), Lord Hardwicke (*q*), of Lord

(*p*) Whistler v. Mainwaring, 3 Woodd. Vin. Lect. 464. n.

(*q*) City of London v. Nash, 1 Bro. C. C. 12; S. C. 3 Atk. 512, reported more fully. Dean and Chapter of Ely v. Stewart, 2 Atk. 44; S. C. 3 Barnard. 170, more fully stated. See Parteriche v. Powlet, 2 Atk. 386.

Thurlow (*r*), Lord Loughborough (*s*), of Baron Richards (*t*), and of Lord Eldon (*u*). Lord Northington, too, on a demurrer to a bill, which sought, among other things, to compel the defendant to repair and amend the hedges and fences belonging to the premises demised, or to put the mansion-house and other buildings in repair, ridiculed the idea of such repairs being the subject of equitable jurisdiction, as he had no officer to see to the performance. How, he asked, can a master judge of repairs in husbandry? and added, that the nature of the thing showed the absurdity of drawing these questions from their proper trial and jurisdiction (*v*). So, where it was declared in a lease, that it should be lawful for the lessee to break up or dig for gravel, any part of the land; and he covenanted to pay the sum of 20*l.* for every acre he should so break up or dig, and to make good the same at or before the expiration of the lease; the Master of the Rolls (Sir William Grant) dismissed a bill for a specific performance of this covenant; the matter in controversy being nothing more, than what sum it would cost to put the ground in the condition in which by the covenant it ought to be (*w*). But in a late instance, although an order specifically to repair the banks of a canal, and stop-gates, and other works,

(*r*) Lucas v. Comerford, 1 Ves. Jun. 235; S. C. 3 Bro. C. C. 166. See Mosely v. Virgin, 3 Ves. 185. Hill v. Barclay, 16 Ves. 405, 6.

(*s*) Mosely v. Virgin, 3 Ves. 185.

(*t*) Bracebridge v. Buckley, 2 Price, 217. 223.

(*u*) Hill v. Barclay, 16 Ves. 405.

(*v*) Rayner v. Stone, 2 Eden, 128.

(*w*) Flint v. Brandon, 8 Ves. 159.

was refused, the effect was obtained, by an order, to restrain impeding the plaintiff from navigating, using, and enjoying, by continuing to keep the canals, 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 stop-gate (*x*).

Where the property in question was greatly out of repair, and the plaintiff's bill was to compel the defendant to discover whether the lease was not assigned to him, and to compel him to perform the covenants on the lessee's part; inasmuch as the defendant was only a mortgagee, who never was in possession, the court refused to assist the plaintiff to charge him, or decree him to perform the covenants in the lease; but the plaintiff was left to recover at law (*y*).

Nor is an under-lessee, receiving the profits of an estate, liable at law, nor bound in equity, on a covenant to repair, unless the first lessee do not leave assets; then, indeed, there might be some reason in equity to charge the defendant with the covenant; but where the proper remedy, an action against the executors of the first lessee, does not fail, the plaintiff will not be suffered to resort to this extraordinary method (*z*).

(*x*) Lane v. Newdigate, 10 Ves. 192.

(*y*) Sparkes v. Smith, 2 Vern. 275; S. C. 1 Eq. Ca. Ab. 47. pl. 6.

(*z*) Goddard v. Keate, 1 Vern. 87; S. C. 1 Eq. Ca. Ab. 47. pl. 7. Webber v. Smith, 2 Vern. 103; S. C. 1 Eq. Ca. Ab. 115. pl. 14.

A covenant in a lease to repair, and, at the end of the term, to surrender buildings in good condition, will not preclude the lessors from an injunction to restrain their lessees or under-tenants from pulling them down, and carrying away the materials, just before the end of the term (*a*).

A bill was filed for a specific performance of articles for a lease of lands, with usual covenants, in the county of Norfolk, where by custom the landlords usually covenant to repair. The defendant pretended, that the rent reserved on the lease was under the value, it being intended, that the tenant should repair. But no such agreement or mutual intention was proved. It was held, that the words *usual covenants* should be construed usual all over England; and that the lessee being plaintiff, to have a lease, should be obliged to repair, notwithstanding the contrary usage in Norfolk; but that the case might have had a different construction if the defendant had been plaintiff, to enforce the taking of a lease (*b*). Certain it is, that a covenant by a landlord to rebuild in case the premises should be blown down or burnt, otherwise the rent should cease, is not an usual covenant (*c*).

While this subject is under observation, it will not be irrelevant to notice the cases respecting the spe-

(*a*) Mayor of London v. Hedger, 18 Ves. 355.

(*b*) Burrel v. Harrison, 2 Vern. 231; S. C. Prec. Ch. 25, nom. Burwell v. Harrison, and better reported.

(*c*) Doe dem. Ellis v. Sandham, 1 Term Rep. 705; S. C. 3 Swanst. 685; Cited 1 Swanst. 353. n.

cific performance of covenants to build. On this question, the practice of the court has at different periods undergone some variation. Lord Hardwicke's opinion was, that upon a covenant of this description a landlord might come into equity for a specific performance, as the not building took away his security (*d*). And a prior case is to be met with, in which such a decree had been pronounced (*e*). Sir Lloyd Kenyon, M. R., however, thought otherwise; and said (what was not exactly consistent with fact, as has been shown by the case of Allen v. Harding,) that there was no case of a specific performance decreed of a covenant to build a house; giving as his reason: that if A. will not do it B. may (*f*). Lord Thurlow, likewise, thought that there could not be a decree to rebuild, as he could no more undertake the conduct of a rebuilding than of a repair (*g*).

The proposition that a decree for specific performance cannot be made upon a covenant to build, according to Lord Loughborough's opinion, admits this qualification: when the transaction and agreement are in their nature defined, perhaps there would not be much difficulty in decreeing a specific performance;

(*d*) City of London v. Nash, 1 Ves. 12; S. C. 3 Atk. 512. Pembroke v. Thorpe, 3 Swanst. 437. 443, in note.

(*e*) Allen v. Harding, 2 Eq. Ca. Ab. 17. pl. 6. See Lord Loughborough's comments on this case in Mosely v. Virgin, 3 Ves. 185, 6. Holt v. Holt, 2 Vern. 322; S. C. 1 Ch. Ca. 190; 1 Eq. Ca. Ab. 85. pl. 5; Ibid. 274. pl. 11. Rook v. Worth, 1 Ves. 461.

(*f*) Errington v. Aynesly, 2 Bro. C. C. 341; S. C. 2 Dick. 692.

(*g*) Lucas v. Comerford, 3 Bro. C. C. 166; S. C. 1 Ves. jun. 235; Cited 1 Meriv. 264.

but where it is loose and undefined, and it is not expressed distinctly what the building is, so that the court could describe it as a subject for the report of the Master, the jurisdiction could not apply. A bill, therefore, for a decree for specific performance of a covenant "to lay out 1000*l.* in building" was dismissed by him, as being too uncertain; for the kind of building did not appear. I suppose (said the Lord Chancellor) a house was meant. It is not said whether a manufactory would have answered or not. I cannot tell (*h*).

Thus, equity will execute a covenant, that a house to be built by a lessee shall correspond with the adjoining houses already built in its elevation (*i*). But where a landlord has dispensed with a covenant, in favor of one tenant, entered into for the benefit of all; such as, to build in uniformity, or, not to erect any building exceeding a certain height; although the party may have a good case for damages at law; he cannot have equitable relief by injunction to restrain others, to whom he has not given such license, from infringing the covenant; for if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants; because they are deprived of the right which he had given them to have the general plan enforced for the benefit of all; and every relaxation which the plaintiff

(*h*) Mosely v. Virgin, 3 Ves. 184. And see Gough v. Worcester and Birmingham Canal Company, 6 Ves. 353. Flint v. Brandon, 8 Ves. 164.

(*i*) Franklyn v. Tuton, 5 Madd. 469.

permits, in allowing houses to be built in violation of a covenant to build in uniformity, amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. These circumstances, together with the neglect of the plaintiff for four or five months to file his bill, prevented the court from interfering by injunction (*k*).

An agreement was entered into by one to build a house, according to a plan furnished by the surveyor of the other party, the latter undertaking, on its completion, to accept a lease of the premises; and the surveyor, after the commencement of the building, got possession of the plan by stratagem, and refused to redeliver it: on an application to enforce the party to take the lease, it was held, that small deviations from the plan agreed on would not be material; but that it would be otherwise if the deviation were obstinate or corrupt (*l*).

VIII. Of equitable relief from forfeiture on account of breach.

Whether a tenant, the defendant in an action of ejectment, under the clause conferring a right of entry on his landlord for breach of covenants, has any claim to be relieved by a court of equity against the consequences of his neglect to repair, remains to be discussed. Respecting the jurisdiction of the court on this subject, which has been denominated a dangerous jurisdiction, very little information is to be collected from ancient cases, and scarcely any in

(*k*) Roper v. Williams, Turn. 18.

(*l*) Craven v. Tickell, 1 Ves. Jun. 60.

modern times (*m*). The relief has in some instances been administered to the tenant; but at the present day, except under very particular circumstances, such as those noticed hereafter, the court will not extend the relief sought for to the instance of forfeiture for not repairing.

In one of the earliest cases (*n*), the plaintiff in ejectment had proved a breach of covenant, in not keeping a barn well thatched, had a verdict, and the tenant was turned out of possession; upon which he applied to a court of equity for relief; and a reference was directed to the Master, to see what damage was done (if any) by non-performance of the covenants, and at what time; the Lord Chancellor observing, that he could not apprehend what damage could be sustained, if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term. The ground of this decree has been the subject of Lord Eldon's repeated animadversion. If that is to be the principle, it might as well be said, that from the beginning to the end of the term there must be no (*o*) relief in equity, however wilful or obstinate the non-performance may be. How does the court know that the lessee will repair at the end of the term; or whether he or his assets will be then forthcoming, if the landlord cannot act

(*m*) Hill v. Barclay, 16 Ves. 406.

(*n*) Hack v. Leonard, 9 Mod. 90. And see Webber v. Smith, 2 Vern. 103; S. C. 1 Eq. Ca. Ab. 115. pl. 14.

(*o*) In both editions of Vesey the word *no* is omitted, but the sense of the context seems to demand its insertion.

upon it during the term? (*p*). If this doctrine can be maintained in general cases, what is to be said of the case where, the court administering this species of equity, the tenant has become bankrupt before the end of the term, the assignees refuse to take to the lease, and the premises are thrown back to the lessor in a state of utter non-repair? (*q*).

Lord Erskine also granted this relief (*r*). The case was somewhat peculiar in its circumstances, which may perhaps be considered as warranting the judgment. The relief sought did not arise out of the forfeiture by breach of a general covenant to repair; but on a covenant to lay out within a given time a specified sum, in substantially repairing and improving the premises. It did not appear that there had been any dealing by request and refusal between the lessor and lessee, in the period during which, by the express covenant, the money ought to have been applied; but the tenant, not having expended the sum of 200*l.* within the time prescribed by the covenant, after the commencement of the action of ejectment, offered to lay out that sum, or otherwise make compensation for the breach. Lord Erskine's opinion, therefore, was, that, as the covenant specified a liquidated sum to be laid out in a given time, and as the landlord could not be injured by the expenditure

(*p*) Reynolds v. Pitt, 19 Ves. 141, per Lord Eldon. Hill v. Barclay, 18 Ves. 61.

(*q*) Hill v. Barclay, 18 Ves. 62, per Lord Eldon.

(*r*) Sanders v. Pope, 12 Ves. 282. Referred to in Radcliffe v. Warrington, 12 Ves. 334. See also M'Alpine v. Swift, 1 Ball & B. 285. Davis v. West, 12 Ves. 475.

of that sum, and such ulterior sum as should, from the advance of price in materials and labour, be sufficient to put the premises in the state of repair in which they should have been placed at the appointed time, the lessee had a right to the indulgence of the court.

It was evidently the opinion of Lord Alvanley, that, in relieving against the strict performance of covenants, a court of equity ought not to interfere, unless the party, by unavoidable accident, fraud, surprise, or ignorance not wilful, had been prevented from executing his covenant literally (*s*). A similar opinion was entertained by Sir Joseph Jekyll in a previous case (*t*). This doctrine was not acceded to by Lord Erskine, who, in Sanders v. Pope, held, that the relief need not be confined within the limits marked out by Lord Alvanley, but might be given, at the discretion of the court, even against a wilful breach, where full compensation could be made.

It is necessary, however, to state, that the validity of Lord Erskine's judgment has been much questioned, and the case may be looked upon as overruled (*u*). In a subsequent case, closely resembling Sanders v. Pope in its circumstances, in which an express decision on the point was called for, Lord Eldon refused the claim of the tenant to equitable relief, and dissolved an injunction to restrain the

(*s*) Eaton v. Lyon, 3 Ves. 693.

(*t*) Descarlett v. Dennett, 9 Mod. 22. And see Reynolds v. Pitt, 19 Ves. 143.

(*u*) Bracebridge v. Buckley, 2 Pr. 200; Baron Wood, dissent. Rolfe v. Harris, 2 Pr. 210, n.

landlord from proceeding in an action of ejectment (*w*). But this decree, said his Lordship, is not intended to apply to cases of accident and surprise; the effect of the weather, for instance; or permissive want of repair, the landlord standing by and looking on (*x*).

The result of the determinations on the point appears to be, that although, in general, the court will not relieve against a breach of covenant to repair; yet, in cases of accident and surprise, &c., and under certain other peculiar circumstances, the relief may be administered. And this assistance was granted by Lord Eldon, where the defendants had insisted that their tenant should repair some premises which had been consumed by fire, pending a treaty with a third party, in the result of which, if completed, those premises would immediately afterwards be pulled down (*y*). At all events, there is no ground for relieving a tenant whose conduct with reference to his covenant has been gross or ruinous, that the landlord may be placed in the same situation, by afterwards putting the premises in sufficient repair. So, if the premises having been suffered to fall much out of repair, and the landlord making the requisition to repair, the tenant refuses to comply, there is not any pretence for applying to a court of equity (*z*).

(*w*) Hill v. Barclay, 16 Ves. 408; 18 Ves. 56. Wadman v. Calcraft, 10 Ves. 69. 70. Lovat v. Lord Ranelagh, 3 Ves. & B. 24.

(*x*) Hill v. Barclay, 18 Ves. 62.

(*y*) Hannam v. South London Waterworks Company, 2 Meriv. 61. 66.

(*z*) Hill v. Barclay, 16 Ves. 404. 406. Cox v. Higford, 1 Eq. Ca. Ab. 121; S. C. 2 Vern. 664, but confusedly reported.

CHAPTER THE ELEVENTH.

OF COVENANTS FOR TITLE.

Anciently, on the conveyance of lands in fee, or grant of hereditaments incorporeal (*a*), it was customary to annex a warranty; whereby the grantor did, for himself and his heirs, warrant and secure to the grantee the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense (*b*). In later times, however, a different system has obtained, by the introduction of, what are denominated, covenants for title; the invention of which is ascribed to Sir Orlando Bridgman (*c*). The simple means they presented of carrying into effect the various intentions of parties, and the facility with which they were accommodated to the circumstances connected with titles, soon occasioned their general use in practice. The consequence is, the old clause of warranty has totally disappeared. These covenants afford also a more

(*a*) Co. Lit. 365, a; 366, a.
(*b*) 2 Bla. Com. 300.
(*c*) 3 Pow. Conv. 205.

expeditious remedy in case of a defective title, than could be obtained in the case of a warranty. Under the latter, the warrantor was obliged to yield other lands in recompense for those from which the warrantee was evicted (*d*); but by the former, the covenantee is invested with a right of action to recover pecuniary compensation in damages in case of a non-performance.

Covenants for title are real covenants, and run with the land at common law; and the assignee, although not named, may take advantage of them (*e*); and may sue the executors of the covenantor for a breach (*f*); or the heir at law, where he is named and has assets by descent; but otherwise the heir is not liable for a non-performance of his ancestor's agreement (*g*). And the circumstance of the estate to which the covenant relates being an estate in fee, or for a term of years, can make no difference (*h*).

The covenants for title usually entered into, on a conveyance in fee simple, are five in number. First, That the vendor is seised in fee; Secondly, That he has good right to convey; Thirdly, That the purchaser and his heirs and assigns shall quietly enjoy; Fourthly, For indemnity against incumbrances; and Fifthly, For further assurance. We will take each of

(*d*) Co. Lit. 365, a.

(*e*) Middlemore v. Goodale, Cro. Car. 503; S. C. W. Jo. 406. 1 Rol. Ab. 521, (K.) pl. 6.

(*f*) Cro. Eliz. 553.

(*g*) Dyke v. Sweeting, Willes, 585. 2 Bla. Com. 243.

(*h*) Campbell v. Lewis, in error, 3 Barn. & Ald. 392; S. C. in C. P. 8 Taunt. 715; 3 J. B. Mo. 35.

these covenants separately, noticing the various cases which have from time to time been decided on their general merits and construction, or on the particular language in which they were couched; and adding, by way of explanation, such comments as the occasion may suggest.

It is scarcely necessary to repeat (*i*), that under the acts (*k*) relating to the registration of deeds, &c. in the East and North Ridings of the county of York, the words *grant, bargain, and sell,* will amount to express covenants for title, unless the same shall be restrained by express particular words. And the provision (*l*) is extended to deeds, &c. relating to lands within the West Riding, the mortgage or purchase money whereof shall exceed the sum of 50*l.*

SECT. I.

OF THE COVENANT FOR SEISIN.

I. For Seisin. FIRST, The covenant for seisin is an assurance to the purchaser, that the grantor has the very estate, both in quantity and quality, which he purports to convey (*m*); and usually runs in these words: "That he the said (vendor) is now seised to him and his

(*i*) The clauses will be found ante, p. 38, 9.

(*k*) 6 Anne, c. 35. s. 30. 8 Geo. 2. c. 6. s. 35.

(*l*) 6 Anne, c. 35. s. 34.

(*m*) Howell v. Richards, 11 East, 642.

heirs, of a good, sure, sole, lawful, absolute, and indefeasible estate of inheritance, in fee simple, of and in the said messuages, &c. hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, without any condition, trust, power of revocation, or of limitation to use or uses, or any other power, restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, revoke, make void, abridge, lessen, incumber, or determine the same estate, or any part or parcel thereof." The form here given is without any words of qualification attached to it. The same plan will be pursued with regard to the forms of the other covenants for title noticed in this chapter.

If one, under an impression that he is seised of land in fee, or possessed of a term of years, aliens, and covenants that he is lawfully seised, or possessed, or that he hath a good estate, or that he is able to make such an alienation, &c., when in truth the estate is in some other at the time, the covenant is broken as soon as it is made (*n*). So, if one bargains and sells land by deed indented to B., and before the deed is enrolled grants the same land to C., and covenants that he is seised of a good estate in fee; the subsequent enrolment of the deed will work a breach of the covenant (*o*). So, where one covenanted that he was seised of Blackacre in fee simple, when in fact it was copyhold land in fee, according

(*n*) Northcote v. Ward, Dy. 303, a. Salman v. Bradshaw, Cro. Jac. 304; S. C. 9 Co. 60, b.

(*o*) Shep. Touch. 170.

to the custom; the court held that the covenant was (*p*) broken: and the jury were directed to give damages in their consciences, according to the rate at which the county valued fee simple more than copyhold land (*q*).

Debt was brought on a bond for performance of covenants, in a conveyance of a house, &c., where there was a covenant, that the vendee should have liberty to draw water at a well adjoining the house, and another, that the vendor was seised in fee of the messuage, &c.; and a breach was assigned, that the defendant was not seised in fee of the well, &c. Upon demurrer, it was held, that the covenant for seisin did not extend to the well, it being only, that the plaintiff should have liberty to draw water there (*r*).

In assigning a breach of this covenant, the plaintiff need not show of what estate the covenantor was seised, but it will be sufficient to allege in the direct negative, that the party was not seised in fee (*s*).

This covenant, and the one next noticed, viz. that

(*p*) In both editions of Noy's Reports the word *not* is inserted in this place, apparently by mistake.

(*q*) Gray v. Briscoe, Noy, 142.

(*r*) Butterfield v. Marshall, Lutw. 192. Nels. fol. ed. And see Pomfret v. Ricroft, 1 Saund. 321; S. C. 1 Vent. 26. 44; 1 Sid. 429; and 2 Keb. 505. 543. 569. Rhodes v. Bullard, 7 East, 116; S. C. 3 Smith, 173.

(*s*) Glinister v. Audley, T. Ray. 14; S. C. nom. Glimston v. Audly, 1 Keb. 58. Muscot v. Ballet, Cro. Jac. 369.

the party has good right to convey, although they are connected, generally of the same import and effect, and directed to one and the same object, are somewhat improperly called synonymous covenants (*t*). They constitute two separate and independent covenants; for although if the vendor be seised in fee, he has power to convey; yet the converse of this proposition does not hold; for a person may have power to convey, though not seised in fee (*u*). Where brevity or economy is an object, the covenant for seisin may be omitted. Indeed that covenant seems useless where the party covenants that he has good right to convey in fee. Where the sale is under a power, the covenant for seisin is invariably rejected, and in its place is substituted a covenant, that the power is subsisting, and not exercised or revoked, &c. The like omission is made, where a tenant in tail conveys to a person to make him tenant to the præcipe, for suffering a common recovery, to the use of a purchaser in fee.

In this place it is fitting to notice, that, where a conveyance is made to A., to uses, the vendor's covenants for title should be entered into with A.; for as soon as the various uses come *in esse*, they are served out of his seisin, in favor of the cestuisque use; who, by virtue of the statute of uses, 27 Hen. 8. c. 10., which annexes or transfers the seisin or estate

(*t*) Nervin v. Munns, 3 Lev. 46. Howell v. Richards, 11 East, 642.

(*u*) 4 Cru. Dig. 404. s. 46. Trenchard v. Hoskins, Lit. Rep. 63. 65. 205.

to the use, become assignees to all intents, as if the conveyance had been originally made to them. And as they are then owners of the land, they may of course take advantage of all covenants running with the land.

SECT. II.

OF THE COVENANT THAT THE VENDOR HAS GOOD RIGHT TO CONVEY.

II. For good right to convey.

NEXT comes the covenant that the party has good right to convey, in this form: "And also that the said (vendor) now hath in himself good right, or full power, and lawful and absolute authority, by these presents to grant, release, or confirm the said messuage, &c. hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, unto and to the use of the said (purchaser), his heirs, appointees, and assigns, for ever, and according to the true intent and meaning of these presents."

A covenant that a vendor has good right to convey, is not confined to his title to the lands, but relates as well to his capacity to grant. Where, therefore, a husband and wife, seised in right of the wife, conveyed to a purchaser, with a covenant by the husband that they had good right to assure the lands; the incapability of the wife to convey, in conse-

quence of her infancy, was holden to be a manifest breach (*v*).

Immediately on the execution of the deed, if the covenantor has not good right to convey, his covenant is broken (*w*); and so long as the obstruction in the way of his right to grant remains, there is a continuance of the breach. An action may instantly be commenced by the covenantee, without waiting for a disturbance; since an eviction does not constitute the breach, but is the consequential damage arising therefrom (*x*). It is not like a covenant to repair, for a breach of which, damages may be recovered now, and again hereafter, and so *toties quoties;* but after one breach has been assigned, and a recovery had thereon, the party cannot again recover (*y*).

The breach may be assigned in terms as general as the covenant, as, that the party had not full power and lawful authority to convey; and the declaration need not show what person had right or estate in the premises, by which it may appear to the court that the covenantor had not such authority to convey; but it is incumbent on the defendant to show what estate he had in the land at the time of the conveyance, by which it may appear to the court that he had such full power (*z*).

(*v*) Nash v. Aston, Skin. 42; S. C. T. Jo. 195. Chamberlain v. Ewer, 2 Bulstr. 12. Goodman v. Knight, 1 Rol. 84; S. C. Cro. Jac. 358.

(*w*) Raynolls v. Woolmer, Freem. 41.

(*x*) King v. Jones, 5 Taunt. 426.

(*y*) Kingdon v. Nottle, 1 Mau. & Selw. 365; S. C. 4 Ibid. 53.

(*z*) Bradshaw's case, 9 Co. 60, b.; S. C. nom. Salman v. Bradshaw, Cro. Jac. 304; Jenk. Cent. 305, case 79.

SECT. III.

OF THE COVENANT FOR QUIET ENJOYMENT.

1. Where the covenant is unqualified.

THE covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. It is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant and the indemnity it affords, it is immaterial, where framed in general terms, in what respects, and by what means, or by whose acts, the eviction of the grantee takes place, so that he be lawfully evicted: the grantor, by such his covenant, stipulates to indemnify him at all events (*a*). It runs thus: "And also that it shall and may be lawful to and for the said (purchaser), his heirs and assigns, immediately upon and after the execution of these presents, and from time to time and at all times for ever hereafter, to enter into and upon, have, hold, use, occupy, possess, and enjoy the said messuages, &c. hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part and parcel of the same, without any let, suit, trouble, eviction, ejection, expulsion, interruption, hindrance, or denial whatsoever, of, from, or by, him the said (vendor), or his heirs, or any other person or persons whomsoever." An implied

(*a*) Howell v. Richards, 11 East, 642. Norman v. Foster, 1 Mod. 101.

covenant for quiet enjoyment of leaseholds arises on the words *grant, demise,* &c. The law relating to this subject will be found in a prior page (*b*).

A general covenant for quiet enjoyment was in earlier times holden to extend to tortious evictions or interruptions (*c*); but this doctrine was never freely acquiesced in; and a different rule is now established; so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood, of all men claiming by title; for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence, if one who has no right ousts or disseises a purchaser, he shall not have an action of covenant against the vendor; the reason being, that the law has already furnished the means of redress, by giving the injured party an action of trespass against the wrong doer (*d*). As far back as the time of Hen. VI. we find a case involving this very point. It was said (*e*), that if a lease be made for a term of years by deed, so that the lessor is chargeable by writ of covenant, if a stranger who has no

(*b*) Ante, p. 46, et seq.

(*c*) Mountford v. Catesby, 3 Dy. 328, a. pl. 8; S. C. 3 Leon. 43. Anon. Sty. 67. Anon. Lofft, 460. Anon. 1 Freem. 450. pl. 612. Shep. Touch. 166. 170. and the case cited in the margin of Dy. 328, a. 4 Jac.

(*d*) Hayes v. Bickerstaffe, Vaugh. 118. Lucy v. Leviston, Freem. 103; S. C. 3 Keb. 163. Tisdale v. Essex, Hob. 34; S. C. 1 Brownl. & Gold. 23; S. C. Mo. 861; 3 Bulstr. 204; 1 Rol. 397. Crosse v. Young, 2 Show. 425. Hamond v. Dod, Cro. Car. 5. Nokes's case, 4 Co. 80, b. Baylie v. Hughes, W. Jo. 242. Cowper v. Pollard, W. Jo. 197. Nicholas v. Pullin, 1 Lev. 83; S. C. 1 Keb. 379. 380. 413. Holms v. Seller, 3 Lev. 305.

(*e*) 22 H. 6. 52. [B]. pl. 26.

right ousts the termor, yet he shall not have a writ of covenant against his lessor. But if he to whom the right belongs ousts the termor, then he shall have covenant against his lessor. And this was followed by another decision, to the same end, in the reign of Hen. VIII.; where it was contended, that a writ of covenant would not lie against a lessor on an eviction of the lessee by tort; because no mischief arose to the lessee therefrom, inasmuch as trespass lay against the evictor; but when the ouster was by one having title paramount, against whom the lessee had no remedy, then covenant could be supported against the lessor; *quod fuit concessum per plusieurs* (*f*). Nor will a collateral warranty entered into by a third person charge him to a greater extent (*g*). And even if a party actually recovers without title, through the negligence of the covenantee, he cannot sue the covenantor for this disturbance. This happened in a case, where dower was recovered, after bar by fine and nonclaim, without any exception to it which might have been taken by the covenantee; as the eviction was clearly unlawful, the covenantor was not charged with a breach. It is apprehended, that the decision would have been the same, although the covenant had not been confined to *lawful* evictions (*h*).

Lord Chief Justice Vaughan (*i*), adverting to the

(*f*) 26 H. 8. 3. [B]. 11. Fitz. N. B. 145. K.

(*g*) Rashleigh v. Williams, 2 Vent. 46. 61. Buckley v. Williams, 3 Lev. 325, semb. S. C.

(*h*) Allen v. Thorn, Cited 1 Keb. 379. 1 Vent. 176.

(*i*) Hayes v. Bickerstaffe, Vaugh. 122.

inconveniences which would ensue from the admission of a contrary rule, gives the following reasons why lawful molestations alone should be included. 1st, Because it would be unreasonable that a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing. 2ndly, The covenantor, although innocent, might be charged, when the lessee hath his natural remedy against the wrong-doer: and the covenantor made to defend a man from that from which the law defends every man, that is, from wrong. 3dly, A man would have double remedy for the same injury, against the covenantor, and also against the wrong-doer. 4thly, A way would be opened to damage a third person, (that is, the covenantor,) by undiscoverable practice between the lessee and a stranger; for there would be no difficulty for the lessee secretly to procure a stranger to make a tortious entry, that he might therefore charge the covenantor with an action.

The point has been confirmed by a more modern case. A conveyance had been made of lands in America, during the time of the rebellion in that country, and the deed comprised a covenant, that the grantor had a legal title, and another, that the grantee might peaceably enjoy, &c. without the let, interruption, &c. of the grantor, his heirs, &c., and of and from all and every other person and persons whomsoever. The lands were seized by the States of America, as forfeited for an act done previously to the conveyance; notwithstanding the subsequent acknowledgment of their independence by this country. The

court thought it clear, that this act was not within the covenant; for they said, that even a general warranty, conceived in terms more general than the present covenant, had been restrained to lawful interruptions (*k*). The case of Mountford v. Catesby was cited for the plaintiff, but not noticed by the judges.

Lord Ellenborough's opinion also coincided with these determinations. The rule (said he) has, I think, been correctly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore, the law has properly restrained it within its reasonable import, that is, to rightful title.—Although the covenantor, after the wrongful act committed, admits the wrong done, and the covenantee's right to compensation, and *promises* to make satisfaction in damages, if the wrong-doer will not; this subsequent promise will not make that a breach of covenant, which was no breach before, and consequently is not sufficient to found an action of covenant (*m*).

(*k*) Dudley v. Folliott, 3 Term Rep. 584. And see Howell v. Richards, 11 East, 642. Noble v. King, 1 H. Blac. 34.

(*l*) Nash v. Palmer, 5 Maule & Selw. 379. See likewise Campbell v. Lewis, 3 Barn. & Ald. 396.

(*m*) Griffiths v. Brome, 6 Term Rep. 66.

But a covenant against the acts of a particular person by name will not be restrained to disturbances by title; for the covenantor is presumed to know the individual against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance by him, whether by lawful title or otherwise (*n*). An exception, however, in a demise of a small parcel of land in the possession of a particular individual, as tenant thereof, does not operate as an express covenant against such person; as he was mentioned, not with reference to his acts, but only as regarded his occupancy of a part of the premises (*o*).

The above rule prevails also, where a plain design is evinced to protect the purchaser against claims by *tort* as well as by *droit;* as if the covenant be, that the party shall enjoy against all claiming or *pretending to claim* any right, &c.: these words will extend to all interruptions legal or illegal. In this case there was a pretence of right of common set up to two closes comprehended in the lease; it was, therefore, considered to be the plain intent of the parties, that all disturbances should be guarded

(*n*) Foster v. Mapes, Cro. Eliz. 212; S. C. 1 Leon. 324; Ow. 100; cited Hob. 35; 2 Brownl. & Gold. 163. Lucy v. Leviston, Freem. 103. Perry v. Edwards, 1 Stra. 400. Nash v. Palmer, 5 Mau. & Selw. 374. Fowle v. Welsh, 1 Barn. & Cres. 29; S.C. 1 Dow. & Ry. 133. 1 Rol. Ab. 430. pl. 12. Shep. Touch. 166. 170. Rashleigh v. Williams, 2 Vent. 61, 2. Hill v. Browne, Freem. 142, Vaughan, C. J. *dissent.* Bloxam v. Walker, or Warner, Freem. 123. 130. Lewings v. March, Winch, 4. Penning v. Plat, Cro. Jac. 383.

(*o*) Rashleigh v. Williams, 2 Vent. 62.

against; for if legal claims only were included, the tenant would be put under the hardship of trying the right for the landlord, which was the very thing the tenant plainly desired to prevent by this covenant (*p*).

An exception, in a covenant for quiet enjoyment, of the acts of certain specified persons, is equivalent to a direction that the purchaser is to be indemnified against the claims of all others to whom the exception does not apply. Accordingly, where a tenant in tail, with reversion to the queen in fee, made a lease for twenty years, and covenanted that the lessee should enjoy against all persons, without the interruption of any besides the queen, her heirs or successors; *existentibus regibus vel reginis Angliæ;* and the queen granted her reversion to one W., who, on the death of the tenant in tail without issue, ousted the lessee; judgment was given for the lessee; as W. was the patentee of the queen, and none were excepted but the queen and her successors (*q*).

On a covenant to save harmless against all lawful and unlawful titles, in assigning the breach, it must appear that he who entered did not claim under the lessee himself (*r*).

In a case in Rolle's Abridgment (*s*), it is laid down,

(*p*) Southgate v. Chaplin, in C. P., Com. 230; S. C. Chaplain v. Southgate, in K. B., 10 Mod. 383. Lucy v. Levington, 1 Vent. 175; S. C. 2 Lev. 26; 2 Keb. 831. Hunt v. Allen, Winch, 25.

(*q*) Woodroff v. Greenwood, Cro. Eliz. 517.

(*r*) Norman v. Foster, 1 Mod. 101.

(*s*) Davie v. Sacheverell, 1 Rol. Ab. 429. pl. 7.

that a covenant by J. S. that his lessee shall enjoy the lands peaceably and quietly, without any *lawful* let, disturbance, ejectment, or molestation of the said J. S., is not broken by his entry on the lessee as a mere trespasser, and without any lawful title. Subsequent decisions, however, have taken a distinction between a tortious entry by a stranger, and by the covenantor himself; and it is now admitted law, that although the covenant only stipulates for quiet enjoyment, without the lawful interruption of the covenantor, his heirs or assigns, yet he cannot avail himself of the subterfuge that his entry was unlawful, and he, therefore, a trespasser, to avoid the consequences of his own wrong; for, as against the party himself, the court will not consider the word *lawful*, nor drive the covenantee to an action of trespass, when, by the generally implied covenant in law, the vendor had engaged not to annul his own deed, either by a rightful or an illegal entry (*t*). So, likewise, where the covenant is for quiet enjoyment, without any lawful interruption of the lessor or his executors, in an action on account of an entry by the executors, the plaintiff need not shew that the entry was by title, it being all one whether the covenantor or his executors be sued (*u*).

But in order to support an action on the cove-

(*t*) Cave v. Brookesby, W. Jo. 360. Tisdale v. Essex, Hob. 35. S. C. Mo. 861; 3 Bulstr. 204. Penning v. Plat, Cro. Jac. 383. Corus v. ——, Cro. Eliz. 544. Andrew's case of Graye's Inn, Cro. Eliz. 214. Crosse v. Young, recognized as law, 1 Term Rep. 671. Seddon v. Senate, 13 East, 63. 79.

(*u*) Ratcliff v. ——, 1 Brownl. & Gold. 80. Forte v. Vine, 2 Rol. 21.

nant, the entry must in all cases be made under an assumption of title. And in this instance, the defendant, having covenanted for quiet enjoyment, without the *lawful* let, suit, &c. of himself and those claiming under him, was holden to have committed a breach, by using and locking up a pew appertaining to the house sold, which the judges deemed as strong an assertion of right as could well be imagined (*v*). The court, it was said, would not be inclined to admit that an accidental trespass in hunting would work a breach (*w*). To the like effect is another case more recently determined (*x*). A general covenant was contained in a conveyance in fee, that the vendors were lawfully and rightfully seised of an estate of inheritance, in fee-simple, without any manner of condition, trust, limitation, use or uses, estate or estates tail, contingent remainder or remainders, or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber, or determine the same: And also, that they had good right to convey, &c. The lady of the manor, after the conveyance to these vendors, and before their conveyance over, apparently by mistake, granted a lease of part of the premises for ninety-nine years, if three persons named should so long live, to a stranger, who entered and kept possession for a long period: After a laboured argument, the

(*v*) Lloyd v. Tomkies, 1 Term Rep. 671.

(*w*) Ibid. Seddon v. Senate, 13 East, 72. And see Anon. Sty. 67. argo.

(*x*) Jerritt v. Weare, 3 Price, 575

court held, that this lease and the entry of the lessee did not create a disseisin in fact, to constitute which a manifest intention to oust, as well as an actual ouster, must exist; and Baron Graham, at the conclusion of his judgment, said: — In another point of view, if this were a disseisin, as has been contended, I am of opinion, that the defendants would still be entitled to their verdict, for there has not been any breach of this covenant; for there is no defect, in point of fact, in the general title. What can a man be supposed to covenant against beyond the validity of title? and most assuredly not against these surreptitious pocket leases. It is enough that a man covenants fairly against defects in his title; but he is not to be bound by such ridiculous rigour as these plaintiffs would hold him to. — Baron Wood concurred, and added: — The action of covenant only extended to the consequence of legal acts; and the reason is to be found in the case of Hayes v. Bickerstaffe; that the law shall never judge that a man covenants against the wrongful acts of strangers.

On this case an eminent writer (*y*) makes the following remarks: "It will be observed, that the leases were accompanied with actual possession by the lessees, who had expended money on the property; they were therefore within the covenant; and unless the covenants were held to extend to them, general covenants for title would be waste paper. They are always intended to guard against a title adverse to the covenantor's, although it may not be

(*y*) Sugd. Vend. and Purch. 548. 6th ed.

a lawful title. Clearly, the leases were a charge on the property at the time of the conveyance; and an ejectment, at all events, was necessary to dispossess the lessees. They, therefore, were an incumbrance within the covenant. It is not like the case of interruptions by persons not claiming lawfully subsequently to the conveyance."

Mere personal wrongs will not occasion a breach: the molestation must be such as concerns the estate: if, then, one enters, and beats and assaults the lessee, the lessor cannot be charged on his covenant for this disturbance (*z*).

Formerly, it was supposed, that a court of common law could not recognise proceedings in equity; and on this ground it was resolved, that a suit in Chancery was not a breach of a general covenant for quiet enjoyment (*a*). But this decision has been denied, and the contrary is settled (*b*). All question on the

(*z*) Penn v. Glover, Cro. Eliz. 421; S. C. Mo. 402.

(*a*) Selby v. Chute, Mo. 859; S. C. 1 Brownl. & Goldesb. 23; 1 Rol. Ab. 430. pl. 15. Winch, Entr. 116. Anon. 3 Leon. 71.

(*b*) Ashton v. Martyn, 2 Keb. 288. Hunt v. Danvers, T. Ray. 370; in which the plaintiff's counsel said: "True it is, that Selby v. Chute's case is, that a suit in Chancery is no disturbance, as it is reported by Moore, 859; 1 Rol. Ab. 430; and 1 Brownl. 23; but by the record itself, Winch Intr. 116. it appears that judgment was given for the plaintiff, and Winch was one of the judges who gave the judgment; for the case was decided 11 Jac., and he was made judge 9 Jac.; and so he should know better than any of those who reported the case, none of whom then attended the Court of C. B. but Brownlow, and this judgment was not entered in his office." T. Ray. 371. And see Calthorp v. Heyton, 2 Mod. 54. Lanning v. Lovering, Cro. Eliz. 916.

point is now avoided, by introducing into the covenant for quiet enjoyment, a few words extending to suits in equity; thus: — that the purchaser shall enjoy, without any let, *suit*, &c. by the vendor, or his heirs, &c. But the institution of a suit by a landlord against a tenant for a collateral purpose, unconnected with the lessee's estate or title; for example, to restrain him from ploughing up meadows, and committing waste; is not such an interruption or disturbance as will amount to a breach of the landlord's covenant for quiet enjoyment; even though the suit prove groundless, and be ultimately dismissed with costs (*c*). In the case of a demise for years, with a covenant to save the tenant harmless from all eviction during the term, it was held, that, as these words were to be construed during the term in computation of time, and not only from the time of the delivery of the deed, when it commenced in interest, an eviction, even before such delivery, entitled the lessee to an action (*d*).

2. Where the covenant is qualified.

The cases already noticed were decided on covenants for quiet enjoyment of a general and unqualified nature, comprehending the legal acts of all mankind. But in the majority of purchase deeds, the vendor's engagement to indemnify is restricted to much narrower limits; usually extending to the acts only of himself, and his heirs, and all others claim-

(*c*) Morgan v. Hunt, 2 Vent. 213.

(*d*) Lewis v. Hillard, 1 Sid. 374; S. C. 2 Keb. 291. 377. Lewyn v. Forth, 1 Vent. 185; S. C. 2 Keb. 848. 879. 3 Salk. 108. pl. 6. But see Offley v. Hickes, Cro. Jac. 263.

ing under or in trust for him. Now, with regard to the persons who are construed to come within the operation of the term *all persons claiming under him*, &c: It has been decided, that a person taking under an execution of a power of appointment, is within a covenant for quiet enjoyment, without any let, suit, &c. of the appointor, his heirs or assigns, or any person or persons claiming, or to claim, by, from, or under him; although the estate proceeded from the wife of the appointor, and he and she joined in exercising the power. This will be better understood by stating the facts of the case. Lady Astley being seised in fee, intermarried with Sir John Astley. In 1716, after the marriage, by indentures, between Sir John and Lady Astley of the one part, and trustees therein named of the other part, Sir John and Lady Astley covenanted to levy a fine, the uses of which they thereby declared to Sir John for life, remainder to trustees to secure 500*l.* a year to Lady Astley for life, remainder over; with a power to Sir John to make leases under the usual restrictions; and with a joint power of revocation to Sir John and Lady Astley during their joint lives. A fine was accordingly levied. Afterwards, by a joint deed, executed in 1753, they revoked all those uses declared by the indentures of 1716, which followed the estate for life, and power of leasing given to Sir John, and declared new uses to Lady Astley for life, with intermediate remainders, remainder to Lord Tankerville in tail. In 1771, Sir John Astley made the lease to the plaintiff containing the covenant on which the action was brought, and which lease was

not agreeable to the leasing power reserved by the settlement. The plaintiff entered; Sir John Astley died soon after; and all the prior estates being determined, Lord Tankerville's estate vested in possession; and he took advantage of the defect in the lease, and evicted the plaintiff. Lord Mansfield said, that as Sir John Astley was a necessary party to the second declaration of uses, by which the estate was limited to Lord Tankerville, his Lordship certainly claimed under him within the meaning of this covenant; and that, undoubtedly, Sir John had covenanted against his own acts, and the new limitations were created by one of his acts (*f*).

This decision has been corroborated by a judgment delivered a short time since in the Court of King's Bench. A. being seised in fee of an estate, by lease and release executed on his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question, for the lives of three persons therein named, and the life of the survivor; with a covenant that the lessee should quietly hold and enjoy the premises for and during the said term, without interruption of the lessor, his heirs, or assigns, or any other person or persons claiming, or to claim, any estate, right, or interest, in the same premises, or any part thereof, *by, from, or under him*, or any of his ancestors. The lease, being for three

(*f*) Hurd v. Fletcher, 1 Dougl. 43.

lives absolutely, was not conformable to the power, and became void on the death of A. His eldest son brought an ejectment and evicted the lessee, two of the cestuis que vie being then living. On the authority of Hurd v. Fletcher, the court were of of opinion, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment. Indeed, the point was so clear, that the defendant's counsel did not offer arguments to disprove it (*g*).

The Register to the Archdeacon of Suffolk granted the office of his scribe to the plaintiff, and covenanted that he should enjoy it as long as he or any other person had or did claim the place of register under him; and that he would not revoke, annul, or evacuate the said grant: he afterwards surrendered his place to the archdeacon: and the court held, that although the plaintiff was disturbed, he could not maintain covenant; for that the register having surrendered his place, the archdeacon did not claim under him, but his estate was absolutely drowned; and the covenant was but for as long as he or any body claiming under him had the office of register (*h*).

3. What a breach.

To qualify a party to support an action on this covenant, some positive act of molestation, or some deed amounting to a prohibition of enjoyment, must be proved: it is from the *commission* of an absolute

(*g*) Evans v. Vaughan, 4 Barn. & Cres. 261; S. C. 6 Dow. & Ry. 349.

(*h*) Steping v. Gladding, or Gladen, Freem. 18. 20.

disturbance, or from a prevention of enjoyment, not from an *omission* to perform something, which, if executed, might add to the security of possession, that a breach arises: mere passive neutrality is insufficient to give the covenantee a right of action; but from active measures, or hindrance of enjoyment only, can this right arise. One who had covenanted for quiet enjoyment, and for further assurance, was requested to direct trustees to raise a certain sum of money under the trusts of the deed, when no clause in the instrument rendered this direction necessary: a refusal to comply with the request was holden not to amount to a breach, as the act was irrelevant to the covenant on which the declaration was framed, and would have been nugatory if performed (*i*). It is not to be understood that an ouster or expulsion must take place in order to found a suit: it is enough that the quiet enjoyment of the covenantee be invaded or prevented. In the case of landlord and tenant, the covenant means a legal entry and enjoyment, without the permission of any other person: it follows, therefore, that a lease previously granted, and subsisting at the time of the second demise, as it will defeat the second lessee of his right of entry and occupation, must work a breach of the lessor's covenant for quiet enjoyment (*k*). To enforce the lessee, under the circumstances, to enter upon the land, and so commit a trespass, would be

(*i*) Warn v. Bickford, 9 Price, 43. See Killigrew v. Sawyer, Carth. 196; S. C. 2 Vent. 79; S. C. in Error, 4 Mod. 39.

(*k*) Ludwell v. Newman, 6 T. Rep. 458. Levett v. Withrington, Lutw. 97. fol. ed. by Nelson. Hacket v. Glover, 10 Mod. 142; on a sale of goods. Coleman v. Painter, Al. 19.

most unreasonable (*l*). So, where one assigned his term for years, and covenanted that the original lease was good, and not made void or incumbered, &c.; a previous lease granted by the assignor was held to amount to a breach; although the plaintiff before the assignment had notice of the lease, and had been attorned to by the under-tenant (*m*).

Where an ejection has actually taken place, in assigning a breach it is sufficient to allege, that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such lawful right and title, entered and evicted him; without showing that he evicted the plaintiff by legal process, or what title A. B. had; the allegation, that the party having lawful right and title entered, being tantamount to saying, that he entered by lawful right and title (*n*).

The erection of a gate across a lane, through which the plaintiff had a way to his close, was holden to be a breach of a covenant by the defendant for quiet enjoyment, and that he would not do any thing to molest, hinder, or prevent the plaintiff in the quiet possession or enjoyment of the lands: and it was said to be immaterial, as to the defendant, whether

(*l*) Holder v. Taylor, Hob. 12; in which a distinction between implied and express covenants for quiet enjoyment is hinted at. But see Cloake v. Hooper, Freem. 122; S. C. 3 Keb. 162. 202. and Lamme v. Tresham, 1 Rol. Ab. 430. pl. 10.

(*m*) Levett v. Withrington, Lutw. 97. Nels. fol. ed. Ludwell v. Newman, 6 Term Rep. 458.

(*n*) Foster v. Pierson, 4 Term Rep. 617. Hodgson v. The East India Company, 8 Term Rep. 278.

the gate was erected by right or by wrong; for in either case, being an obstruction, it should not have been erected there (*o*). So, on a lease of a messuage with a garden, and a house of office at the further end thereof, a covenant for quiet enjoyment of the demised premises, was broken by the building of a mansion-house on part of the garden (*p*). But the mere act of forbidding a tenant to pay rent to the plaintiff, unaccompanied by any other disturbance, will not amount to a breach (*q*). The act of molestation, whether committed by the covenantor himself, or by his servant at his command, will alike occasion a breach of the covenant (*r*).

A covenant for quiet enjoyment does not extend to oblige a lessor to rebuild in case of accident by fire (*s*).

Where the trustees of a charity granted an improper lease of the charity lands, and covenanted with the lessee for the actual enjoyment of the demised premises during the term; the Court of Chancery, in setting aside the lease, ordered the indenture of demise to be cancelled *in toto*, and refused to leave the personal covenants of the trustees in force for the benefit of the lessee (*t*).

(*o*) Andrews v. Paradise, 8 Mod. 318. Morris v. Edgington, 3 Taunt. 24.

(*p*) Kidder v. West, 3 Lev. 167.

(*q*) Witchcot v. Nine, 1 Brownl. & Gold. 81.

(*r*) Seaman v. Browning, 1 Leon. 157.

(*s*) Brown v. Quilter, Ambl. 621; S. C. 2 Eden, 219.

(*t*) Attorney General v. Morgan, 2 Russ. 306.

SECT. IV.

OF THE COVENANT FOR INDEMNITY AGAINST INCUMBRANCES.

IV. For indemnity against incumbrances.

THE covenant which follows that for quiet enjoyment, relates to the exemption of the land from incumbrances, and runs in these terms: "And *that* (*u*) free and clear, and freely, clearly, and absolutely, acquitted, exonerated, released, and discharged, or otherwise by him the said (vendor), his heirs, executors, or administrators, at his and their own costs and charges, in all things, well and sufficiently protected, defended, saved harmless, and kept indemnified, of, from, and against, all and all manner of former and other gifts, grants, feoffments, leases, mortgages, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, entails, annuities, legacies, rents, arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the king's majesty, or any of his predeces-

(*u*) This pronoun is used emphatically. You shall enjoy the estate, and *that* free from incumbrances. Dr. Johnson has extracted a passage from the Duty of Man, in which the word is used in the same sense: "We must direct our prayers to right ends; and *that* either in respect of the prayer itself, or the things we pray for." It has, however, been thought, that the word has crept into the common form of covenants through inadvertence. Sugd. Vend. and Purch. 554. 6th ed. note. The word *that* is translated into Latin, *hoc*. Anon. Dy. 255, a. pl. 4.

sors, sequestrations, estates, titles, troubles, liens, charges, and incumbrances whatsoever."

It is obvious, that a sentence commencing with the words, *And that free, &c.*, cannot of itself be perfect; but must depend both for import and construction on some antecedent passage, to which reference must be made, in order to ascertain the object and effect of the entire provision. Unconnected with some other clause, it will be both ungrammatical and senseless. The introductory words plainly prove, that it must be construed in connexion with that paragraph by which it is immediately preceded; that clause being the covenant for quiet enjoyment. These two covenants in conjunction then, signify, that it shall be lawful for the purchaser, not only to enjoy the estate without any let, suit, trouble, &c. by the vendor, but also to enjoy it free and clear, and freely and clearly acquitted, &c. of all incumbrances, at any time before, or to be at any time after, made by the vendor or his heirs, &c. It is not a covenant that the estate is free, and shall remain free from incumbrances; but that the purchaser shall enjoy it free from such incumbrances. It was the opinion of Lord Chancellor Cowper (*v*), that there was a difference between a covenant that the estate was free from incumbrances; and a covenant that the party should enjoy free from incumbrances; as, in the latter case, the covenant was not broken, notwithstanding the existence of incum-

(*v*) Vane v. Lord Barnard, 927. Shep. Touch. 170. But see Gilb. 7. King v. Standish, 1 Keb. Andrews v. Tanner, 1 Keb. 937.

brances, so long as undisturbed possession was enjoyed. The consequence is, that in order to justify legal proceedings on this covenant against incumbrances, it is requisite that an actual interruption, claim, or demand, be made on the purchaser; some hindrance or prevention of enjoyment proved; for the chance alone of his being disturbed, and his liability to satisfy claimants, or in other words, the mere existence of outstanding incumbrances, unless they prevent entry and enjoyment, as in the case of a prior unexpired lease, will not constitute an immediate breach.

A. covenanted, on the sale of a manor, that it should be acquitted or otherwise saved harmless from all *former* bargains, sales, titles, charges, and incumbrances, permitted or occasioned by any person, except the interest and estate of one M. L., and the estates which she at any time thereafter should grant, determinable at her death. M. L. afterwards granted certain lands, parcel of the manor, by copy of court roll for three lives: the continuance of which grant after M. L.'s death was the breach assigned. But it appeared to the court, that this grant of M. L. could not be called a *former* incumbrance, as it was made after the covenant; and although it was not determined by her death, according to the exception, yet the exception, which was but a qualification of the covenant, could not impart to it a more extensive signification than the words themselves expressed (*w*). But where one

(*w*) Lovell v. Lutterell, Sav. 74.

made a lease of lands for years, and the lessee bequeathed it to his wife *durante viduitate*, and after to his son; and he in reversion sold the fee to the woman during the widowhood, and covenanted that the land was discharged of all former sales, rights, titles, and charges; the covenant was held to be broken at the first, by reason of the possibility of the son (*x*).

A covenant for quiet enjoyment, without any impediment from the defendant, his heirs or assigns, or any other person, and that clearly acquitted and exonerated of and from all former and other grants, &c. rents, rents-charge, arrears of rent, statutes, &c., charges, and incumbrances whatsoever, was in this case said to be broken by the premises being chargeable with an annual quit-rent, payable to the lord of that manor, and incident to the tenure of those lands; although the plaintiff experienced no molestation for any *arrears* of that rent payable before the making the conveyance to him; for the vendor having undertaken that the purchaser should have the land discharged of all rents, the quit-rent, being a rent, was clearly within the terms of the covenant (*y*). The circumstance of the premises being simply chargeable with a quit-rent, would not, according to Lord Cowper's opinion, entitle the purchaser to an action. The above case at first seems repugnant to that proposition; but as it appears that the defendant re-

(*x*) Hamington v. Rydear, 1 Leon. 92. S. C. Mo. 249. pl. 393; 1 And. 162. pl. 208; 10 Co. 52, a.; Ow. 6, nom. Haverington's case.

(*y*) Hammond v. Hill, Com. 180. See Mountford v. Catesby, 3 Leon. 44, argo. Millway v. Medman, 2 Sid. 166.

joined that there was no molestation for any *arrears* of the rent due prior to the conveyance, we may perhaps infer, that there *was a molestation* for an arrear accruing in the vendee's own time; and by this construction reconcile the judgments.

To an action on a covenant (in an assignment of a lease) for quiet enjoyment, free and clear of and from all arrears of rent, assigning as a breach that the rent was in arrear and unpaid, it is sufficient for the defendant to plead, that he left so much money in the hands of the plaintiff, *eâ intentione quòd solveret* to the lessor in discharge of what rent was then in arrear (*z*).

A qualified covenant of this description usually provides against all incumbrances whatsoever, "at any time or times heretofore, and to be at any time, and from time to time, hereafter, had, made, done, committed, occasioned, permitted, or suffered by the said (vendor), or his heirs, or any person or persons rightfully claiming or to claim by, from, through, under, or in trust for him, them, or any or either of them, or by his or their, or any or either of their acts, means, consent, default, privity, or procurement."

The word *acts* signifies something done by the person against whose acts the covenant is made; and the word *means* has a similar import; something pro-

(*z*) Griffith v. Harrison, 4 Mod. 249.; S. C. 1 Salk. 196; Skin. 397, nom. Griffin v. Harrison.

ceeding from the person covenanting. Accordingly, where there was a covenant by a lessor, that the lessee should hold the premises without any lawful let, suit, interruption, &c. by the lessor, his executors, &c., or by or through his or their acts, *means*, right, &c.; and the under-lessee, in ignorance of a clause prohibiting the exercise of a business on the premises, (a right of re-entry on such event being reserved to the landlord,) underlet to a tenant who commenced the business of an auctioneer, thereby incurring a forfeiture, of which the original lessor took advantage; as the eviction was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises, it was not shown that a breach of the covenant contained in the lease had been committed, and judgment was given for the defendant (*a*).

And as to the word *default:* Where a seller covenanted for quiet enjoyment, without any action, &c., or interruption, by the seller or those claiming from him, or by, through, or with, his or their acts, means, default, privity, consent, or procurement; an arrear of quit-rent, which the purchaser was obliged to discharge, although not accruing while the vendor was owner of the premises, was held to amount to a breach of the covenant; for if it happened to be in arrear in his lifetime, it was a consequence of law, that it was by his *default*, in respect of the party with whom he covenanted to leave the estate unincumbered. It

(*a*) Spencer v. Marriott, 1 Barn. & Cres. 457; S. C. 2 Dow. & Ry. 665.

was his default that it was left unpaid (*b*). A distinguished writer (*c*), before quoted, remarks, that the reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions. It was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was, that the vendor should covenant against his own acts only; and yet it should seem that the argument of the court would apply as well to a mortgage, or any other incumbrance, created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default. We should be careful (continues he) to distinguish the foregoing case from that (*d*), where the lessor, reciting that he was seised of an estate of freehold and inheritance in the estate, covenanted for quiet enjoyment against himself, his heirs, &c., or any other person or persons lawfully claiming by, from, or under him, &c., or by or through his, their, or any of their acts, means, *default*, or procurement. The lessees were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord Rosslyn considered it to be clear, that

(*b*) Howes v. Brushfield, 3 East, 491.

(*c*) Sugd. Vend. and Purch. 552. 6th ed.

(*d*) Lady Cavan v. Pulteney, 2 Ves. jun. 544; 3 Ves. 384. Sugd. Vend. and Purch. 552, 3. 6th ed.

on eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. The ground of this opinion must have been, that the eviction was owing to the *default* of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence was to the lessees immaterial.

And with regard to the words *means, title, or procurement:* Where a husband purchased lands to him and his wife and the heirs of the husband, and afterwards made a lease, and covenanted for quiet enjoyment, without any impediment, expulsion, or interruption, by himself, his heirs, executors, or administrators, or by or through any other, by his *means, title, or procurement*; the entry of the widow after his death was deemed to be within the covenant; because, although in point of estate the widow was in by the vendor; yet it was by means of the purchase and the procurement of the husband; for if the husband had not procured the purchase, she would not have had any estate (*e*). So, a recovery in dower by the widow of a tenant in fee, who had made such a lease, would be a breach of the covenant; because she would claim by his means, i. e. the marriage. Yet the recovery in dower by the mother of the tenant in fee would not support an action; as she would not claim by his means, but by act of law, and his

(*e*) Butler v. Swinerton, Palm. 333. See Twiford v. Warcup, 339; S. C. Cro. Jac. 657; Godb. Cited in Musgrave v. Dashwood,

father. So, if one by whom an estate tail is purchased, leases, and covenants as above, the covenant will be broken by an ouster of the lessee by the issue in tail; because, the estate tail being originally created by the ancestor, the descent to his issue is by his means. But should the issue make such lease, and covenant, and the issue of the issue enter, no breach will thereby be occasioned; the issue not being in by his means, but by descent, which is an act of law, and *per formam doni* (*g*).

If a lessee subject to a condition for re-entry on nonpayment of rent underlets, and covenants for quiet enjoyment, without the impeachment of him or of any other occasioned by his impediment, interruption, means, procurement, or consent; his default in paying this rent, by means whereof the underlessee is evicted, is clearly a breach (*h*).

The words *permitting and suffering* do not bear the same meaning as, *knowing of and being privy to:* the meaning of the former is, that the party shall not concur in any act over which he has a control. This we find in a case reported a short time since (*i*). A trustee to prevent dower, on a grant of a term of 500 years by the owner, joined in the instrument, and covenanted that he had not at any time or times

2 Vern. 45. 63; S. C. 1 Eq. Ca. Ab. 25. pl. 5; 120. pl. 11; noticed by Lord Hardwicke, 2 Ves. 634. 638.

(*g*) Butler v. Swinerton, ubi supra.

(*h*) Stevenson v. Powell, 1 Bulstr. 182.

(*i*) Hobson v. Middleton, 6 Barn. & Cres. 295. See also Anon. 3. Dy. 255, a. pl. 4.

theretofore made, done, or committed, or executed, or knowingly or willingly permitted or suffered any act, &c. whereby the premises were, could, should, or might be, impeached, charged, incumbered, or affected in title, charge, estate, or otherwise howsoever. It appeared that the premises had been previously conveyed to one Scholes, and that the defendant was a party to the deed. Two breaches were assigned: First, that the defendant had committed an act by this conveyance, whereby the premises were impeachable, &c.: the second was, that he had made, done, &c. and knowingly and willingly permitted and suffered to be done, certain other acts whereby, &c., that is to say, that he did execute a certain deed, &c., and did *suffer and permit* W. T. H. (his cestui que trust and owner) to execute the said indenture, whereby the premises were impeachable, &c. The defendant, as to so much of the second breach as related to permitting and suffering W. T. H. to execute, protesting that he did not permit him, for plea said, that he *could not prevent* his executing it. As far as the execution of the deed by himself was concerned, he admitted the breach; and the court determined, that the plaintiff was entitled to recover on that breach; and were of opinion, that if *permitting and suffering*, according to the above meaning given to those words, applied only to that which the defendant could prevent, it was clear, that his consent in this case was not a breach of the covenant. It had been suggested, that, perhaps, the purchaser might have refused the conveyance, unless it were made with the consent of the defendant; but the court declined to raise that point; inasmuch as the

replication did not allege, that the consent of the defendant was an ingredient in the transaction necessary to the acceptance of the conveyance; and Mr. Justice Holroyd observed, that if the deed conveying to Scholes would operate as effectually, if executed by W. T. H. without the defendant's permission, as with it; then the permission really had nothing to do with the deed. The covenant extended to such permissive acts only as had, through the permission, an operative effect in charging the estate.

From a case in Douglas (*k*), where an administrator assigned, in a bonâ fide manner to the plaintiff, a supposed mortgage for 1200*l.*, which was found among the intestate's papers, and covenanted that neither the said intestate nor the administrator had done any act to incumber the mortgaged estate, it would appear, that the fact of the mortgage being forged, of which circumstance the administrator was ignorant, would not be a breach of his covenant.

SECT. V.

OF THE COVENANT FOR FURTHER ASSURANCE.

1. Object, &c. of the covenant.

THE fifth covenant, for further assurance, is one of considerable value to the purchaser. It relates both to the title of the vendor, and to the instrument of conveyance to the vendee; and operates as well to

(*k*) Bree v. Holbech, 2 Dougl. 654, a.

secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter. The following form may be safely adopted in practice: "And moreover, that he the said (vendor), and his heirs, and all persons whosoever lawfully or equitably and rightfully claiming, or to claim, any estate, right, title, trust, charge, or interest, at law or in equity, of, in, to, out of, or upon, the said messuages, &c. hereby released, or otherwise assured, or intended so to be, or any of them, or any part thereof, by, from, under, or in trust for, him or them, [exceptions, if any, to be here introduced,] shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges in all things of the said (purchaser), his heirs, appointees, or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, either by fine or fines, with or without proclamations, common recovery or recoveries, deed or deeds, enrolled or not enrolled, release, confirmation, or other assurance whatsoever, for further, better, more perfectly, lawfully, and absolutely, or satisfactorily, granting, releasing, confirming, or otherwise assuring, the said messuages, &c. hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, unto and to the use of the said (purchaser), his heirs, appointees, and assigns for ever, according to the true intent and meaning of

these presents, as by the said (purchaser), his heirs, appointees, or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required, and be tendered to be made, done, and executed."

2. What a breach.

The term *reasonable act*, means such an act as the law requires; and if it be unnecessary, it is not a reasonable act, or one which would be required by law. A refusal, therefore, to do something, which, if executed, would be totally useless and nugatory, will not charge the covenantor with a breach of his covenant to do all lawful and reasonable acts, &c. for further assurance. For example: Certain lands had been demised to trustees, upon trust to raise 1100*l.* by sale of the same premises, to be paid to the intestate of the plaintiffs; with a covenant for further assurance, as above. The breach assigned was, the defendant's refusal *to direct* the trustees to raise that sum, and pay the same to the plaintiffs; but the court were strongly against the plaintiffs, holding, that such direction was quite unnecessary on the defendant's part to authorize the trustees to raise the money, his direction for that purpose being irrelevant to the covenant on which the declaration was framed, and that even had the request been made, it would not have been obligatory (*l*).

Where husband and wife conveyed, and covenanted to make further assurance within seven years, and the wife died within the seven years, and her right

(*l*) Warn v. Bickford, 9 Price, 43. See Pudsey v. Newsam, Yelv. 44.

right descended to an infant of such tender age as to render the performance of the covenant impossible; the court were clearly of opinion, that the death of the wife in the infancy of her son, was the act of God; and that it was the plaintiff's fault that he did not demand the assurance in the lifetime of the wife (*m*).

In assigning a breach much particularity is requisite. Where the defendant covenanted, upon request of the testator, his heirs or assigns, to make further assurance to the testator, his heirs and assigns; and the breach assigned was, that the plaintiff, as executrix, requested the defendant to execute a release between the defendant, the plaintiff, and S. A., for further assuring the premises, to the uses mentioned in the deed, which the defendant refused; without showing that the plaintiff claimed an interest, or to whose use the release was to enure, or why S. A. was a party to it: on special demurrer, the breach was considered badly assigned (*n*).

3. What acts may be required.

This may lead us to consider, what acts may be required under this covenant. The rule in equity is, that if a bad title be sold with a covenant for further assurance, the vendor will be decreed to convey to the purchaser such title as he (the vendor) shall afterwards obtain, even although he acquire it by purchase for a valuable consideration. Thus, where a purchaser of crown lands at the time of the then late wars, having sold part to the plaintiff, and cove-

(*m*) Nash v. Aston, T. Jo. 195; S. C. Skin. 42.

(*n*) Kingdon v. Nottle, 1 M. & Selw. 355.

nanted to make further assurance, on the king's restoration, for 300*l.*, had a lease for years made to him under the king's title; he was decreed to assign his term in the part he sold (*o*).

The levying a fine is included under a covenant to do all lawful and reasonable acts for further assurance (*p*). The removal of a judgment or other incumbrance may likewise be called for (*q*). It would seem also, that the purchaser may obtain a recovery from the vendor; the right, however, not extending to bind his issue in tail or remainder-men; nor to enforce the vendor to procure a recovery by a tenant in tail from whom the title was derived (*r*).

A mortgagor under his covenant for further assurance is not compellable to release his equity of redemption; nor the mortgagee entitled to a warranty in such further assurance (*s*).

If a purchaser, with a covenant for further assurance, on a sale by him of the greater part of the

(*o*) Taylor v. Debar, (27 & 28 Car. 2.) 1 Ch. Ca. 274; S. C. 2 Ch. Ca. 212; 1 Eq. Ca. Ab. 26, (F.) pl. 2. See Seabourne v. Powel, 2 Vern. 11. Langford v. Pitt, 2 P. Wms. 630.

(*p*) King v. Jones, 5 Taunt. 427; S. C. 1 Marsh. 107; 4 Maule & Selw. 188. Goldney v. Curtise, 1 Bulstr. 90; S. C. Cro. Jac. 251, nom. Boulney v. Curteys; S. C. Mo. 810, nom. Boldney v. Curteis. Pudsey v. Newsam, Yelv. 44; S. C. 1 Brownl. & Gold. 84; Mo. 682. Middlemore v. Goodale, Cro. Car. 503. 505; S. C. Sir W. Jo. 406. 16 Ves. 366, 7.

(*q*) King v. Jones, ubi sup.

(*r*) 1 Prest. Abst. 257.

(*s*) Atkins v. Uton, 1 Ld. Raym. 36; S. C. nom. Atkin v. Urton, Comb. 318.

estate, is constrained to give up the title deeds, without retaining any to make out his title to the part unsold; it seems, he may require from the parties to the original sale, a duplicate of the conveyance to be kept by him, with an indorsement that it is only a duplicate. An application of this kind was granted, where an estate was sold by decree of the Court of Chancery, for payment of the testator's debts and legacies; but the matter being moved again by the other side, the order was discharged, on the ground that the decree being once executed, the court had no more to do in it (*t*).

As the estate is bound by a specific covenant for further assurance, a purchaser from a vendor, before his (the vendor's) bankruptcy, becomes entitled to that interest, which, by the bankruptcy and operation of law, vests in the assignees. Accordingly, where a tenant in tail makes a mortgage in fee, with covenant for further assurance, and becomes bankrupt, the assignees under his commission having, by virtue of the statute 21 Jac. 1. c. 19. s. 12., the fee-simple absolutely vested in them by the bargain and sale, are bound by this covenant, and will be decreed to redeem the mortgage, or stand foreclosed, and execute proper conveyances of the mortgaged premises to the plaintiff and his heirs (*u*). And, on the same principle, the heir of a mortgagor will be decreed

(*t*) Napper v. Lord Allington, 1 Eq. Ca. Ab. 166. pl. 4.

(*u*) Edwards v. Applebee, 2 Bro. C. C. 652, n. Pye v. Daubuz, 3 Bro. C. C. 595; S. C. 2 Dick. 759. Ex parte Wills, 2 Cox, 233; S. C. 1 Ves. jun. 162. See Beck dem. Hawkins v. Welsh, 1 Wils. 276.

to perform his ancestor's covenant. The premises in question, which were in fact copyhold estate, had been mortgaged to the plaintiff's testator as freeholds; and the indenture contained covenants by the mortgagor, that he was seised in fee, had good right to convey, and for further assurance. The bill was filed against the customary heir of the mortgagor, an infant, praying, that he might be decreed to surrender the estate to the use of the plaintiff, and for an account, and for foreclosure in default of payment. The Master of the Rolls was clearly of opinion, that the covenant was a contract for a valuable consideration affecting the land, and would affect the heir; but he would not direct the infant heir to surrender while an infant (*v*).

It was formerly holden, that, under an agreement to assure land by such reasonable assurance as by the plaintiff should be advised and required, the party was not bound to make the assurance with covenants, although they were ordinary and reasonable; for the agreement was to make reasonable assurance, and the covenants amounted to a collateral security only, without constituting part of the assurance (*w*). Since these decisions, the law has experienced a change; and it now appears, that if a man engages to make any such reasonable assurance as counsel shall advise, usual covenants

(*v*) Spencer v. Boyes, 4 Ves. 370.

(*w*) Stanyroyde v. Locock, Cro. Jac. 115. Pudsey v. Newsam, Yelv. 44; S. C. 1 Brownl. & Gold. 84; Mo. 682. Coles v. Kinder, Cro. Jac. 571. Wye v. Throgmorton, 2 Leon. 130.

may be inserted; for the covenant, it is said, shall be so understood; yet there must not be a warranty in it. Some, indeed, have held that there may be a warranty against the covenantor himself; but it is questionable whether that proposition will hold (*x*). In qualified covenants for title, a provision is usually introduced, by which many of the difficulties formerly existing on this subject are removed. The clause alluded to runs thus: "So as such further assurances, or any of them, shall not contain or imply any other or more general covenants or warranty, on the part of the person or persons who shall be requested to make or execute the same, than for the acts, deeds, and defaults, of himself, herself, and themselves, respectively, and his, her, and their heirs, executors, and administrators; and so as the person or persons who shall be requested to do such acts, or make such further assurances, shall not be compelled or compellable, for the purpose of making or doing the same, to go or travel from his, her, or their then dwelling or place of abode, or respective dwellings or places of abode." Still it seems, that if one is bound to make a feoffment or any other specified assurance, a naked deed of feoffment, &c., without warranty or covenants, must be tendered; otherwise the covenant will not be broken by the party's refusal or neglect to execute it (*y*).

Considerable doubt exists as to the right of a pur-

(*x*) Lassells v. Catterton, or Chatterton, 1 Mod. 67; S. C. T. Raym. 190; 1 Sid. 467; 2 Keb. 685.

(*y*) Shep. Touch. 168.

chaser to a covenant for the production of title-deeds, under the vendor's covenant for further assurance. Two cases very recently came before the Court of Chancery, in which the point was canvassed, but left undecided, in consequence of the judgment applying itself to the particular facts of each case, without regard to the general question. In one of these suits (*z*), before Lord Gifford at the Rolls, the documents, with respect to which the interference of the court was prayed, viz. certain books of account, were held not to be connected with the title of the lands, but wanted merely to establish a collateral fact; and inasmuch as they did not constitute part of the vendee's title; and as the vendor could only produce them by calling on others, subsequently interested, to produce them; the covenant created no obligation, in respect of which the documents should either be delivered to the purchaser, or deposited in a place of security: It was, therefore, quite wild to say, that, the purchaser had a right, under the covenant for further assurance, to a covenant for the production of the books and accounts.

The other case (*a*) appeared about the same time, before the Vice-Chancellor, Sir John Leach. The defendant had sold to the plaintiff a piece of land, and covenanted in the usual way for further assurance; the land having formed part of a larger estate belonging to the defendant. No title-deeds relating to it were ever delivered to the plaintiff, nor was

(*z*) Hallett v. Middleton, 1 Russ. 243.

(*a*) Fain v. Ayers, 2 Sim. & Stu. 533. A note of this case will also be found in 1 Russ. 259.

there any express covenant entered into for the production of them. The plaintiff sold his piece of land; and the bill prayed, that the defendant might be compelled to produce, or execute a covenant to produce, the title-deeds in question, to enable the plaintiff to make a good title. On this form of the prayer judgment seems to have been given. The Vice-Chancellor said, that whatever doubt there might be, whether, under a covenant for further assurance, a new covenant for production might be required; yet the bill stating the resale of the property, and praying, in the alternative, either a new deed of covenant to produce, or the actual production of the deeds; and the deeds being the root of the plaintiff's title, and in that sense a sort of common property (*b*); he was strongly inclined to think that the plaintiff had an equity to that extent. His Honor, however, still retained his doubt whether the covenant to produce could be required.

On a covenant with J. S. to make such assurance as his counsel shall advise, it is required, that the counsel shall give his advice to J. S., and that J. S. shall give notice of the assurance; for otherwise the covenantor cannot know the counsel or his advice (*c*). So, on a covenant to seal such a release as A. B.'s counsel shall advise, A. B. must procure his counsel to draw the release, and then tender it to the cove-

(*b*) See Barclay v. Raine, 1 Sim. & Stu. 449.

(*c*) Bennet's case, Cro. Eliz. 9. Higginbottom's case, 5 Co. 19, b. Stafford v. Bottorne, Cro. Eliz. 298; S. C. nom. Stafford's case, Mo. 595, in which a difference is taken between the words *advise* and *devise*. Blicke v. Dymoke, 9 J. B. Mo. 215.

nantor for execution (*d*): and the counsel is the only person who can devise the assurance: the covenantee himself, although learned in the law, cannot; for if he might, then it would be no plea to say, *consilium non dedit advisamentum* (*e*).

On the other hand, if one binds himself to make to another, such sufficient release and discharge as by J. S. shall be thought meet; inasmuch as J. S. is a stranger to the condition, and the condition is for the benefit of the obligor, and the performance thereof a saving of his bond, he takes upon himself to perform it at his peril; and, therefore, he ought to procure J. S. to devise and direct the assurance (*f*). In like manner, if one covenants to execute such a deed as shall satisfy A. B.'s counsel, the duty of tendering the deed to the counsel of A. B. is imposed on the covenantor (*g*). And where the party is bound to make a sure, sufficient, and lawful estate in certain lands, by the advice of J. D.; if he make an estate according to the advice of J. D., be it sufficient or not, lawful or not lawful, it will amount to a good performance of the condition of his bond (*h*).

On a covenant by A. with B. to make further

(*d*) Baker v. Bulstrode, 2 Lev. 95; S. C. 1 Vent. 255; 1 Mod. 104; 3 Keb. 273. T. Ray. 232.

(*e*) Bennet's case, ubi sup. More v. Roswell, Cro. Eliz. 297; S. C. Rosewell's case, 5 Co. 19, b.

(*f*) Lamb's case, 5 Co. 23, b.; S. C. nom. Lamb v. Brownwent, Cro. Eliz. 716. Atkinson v. Rolfe, 1 Leon. 105.

(*g*) Baker v. Bulstrode, 2 Lev. 95; S. C. 1 Vent. 255; 1 Mod. 104; T. Ray. 232; 3 Keb. 273. Cole's case, Cro. Eliz. 97.

(*h*) Lamb's case, sup.

assurance at the costs of the latter, A. ought to give him notice what sort of assurance he will make; and then B. ought to tender the costs; and then A. ought to make the assurance. But on a covenant that A. shall make a new demise to B., at the costs of B., or any particular assurance specified in the covenant, B. ought first to tender the costs, and then A. ought to make the assurance; for in the former case, B. cannot know what costs will be sufficient to tender, before he knows what sort of assurance A. will make; but in the latter case, by the inspection of the covenant itself, he will know what sort of assurance will be made (*i*). In this respect, the report of Coke differs from the rest: It is there said, that it is all one, when the covenant is general, and when it is particular, as, to make a feoffment: the covenantor ought to do the first act, viz., shew what manner of feoffment he will make, either by deed-poll or by indenture, &c. A fine required under a covenant for further assurance, where there is no provision respecting the expenses, must be levied at the costs of him who is to have the benefit of it (*k*).

A variation in words, but not in substance, between the indenture presented for execution, and the covenant for assurance, (as if the party had covenanted to assure all his lands in D., and the deed

(*i*) Heron v. Treyne, 2 Lord Raym. 750. Sleer v. Shalecroft, Holt, 177; S. C. nom. Steer v. Shalecroft, 12 Mod. 400. Hallings v. Connard, Cro. Eliz. 517; S. C. Mo. 457; Ibid. 454, nom. Hollins v. Connard; S. C. nom. Halling's case, 5 Co. 22, b.; S. C. nom. Halling v. Comand Ow. 157. Anon. Mo. 22. pl. 76.

(*k*) Goldney v. Curtise, 1 Bulstr. 90.

tendered particularly specify by name all the lands in D.,) will not justify a refusal by the covenantor to execute such an instrument(*l*).

An unlettered man, under a covenant to make a deed, is not obliged to seal and deliver any writing tendered to him, unless somebody be present, who can read the deed to him, should he require it; and if the deed be in Latin, French, or other language, which he cannot understand, and he demand that some one should read and interpret the writing to him, and no one happen to be present that can read and expound the tenor of the same in an intelligible language, he may refuse to deliver the instrument. So it is, although the man can read; yet if the deed be endited in Latin, French, or other such language as he cannot comprehend; and if he demand that it be read or expounded to him in such language as he may understand; and no one happen to be there to do it; he may withhold his delivery of it. And it is to be observed, that ignorance in reading, or ignorance of the language, *quæ sunt ignorantia facti*, may excuse; but *ignorantia juris non excusat*. If, therefore, the party can read, and understand the language also in which the writing is made, he will not be allowed time to obtain the opinion of his counsel learned in the law, although he may not be acquainted with the legal sense and operation of the words, and whether they agree with his covenant or not; but at his peril he must deliver the deed immediately on the covenantee's tendering it for execution (*m*).

(*l*) Keble v. Brown, Cro. Eliz. 660.

(*m*) Manser's case, 2 Co. 3, a.; S. C. 4 Leon. 62, overruling Ben-

Resort is more frequently made to equity for a specific performance of this covenant, than to a court of law to recover damages for a breach. A contract, however, which carries an equity to have it decreed *in specie*, ought to be free from all objection: the court will, therefore, refuse a specific performance of a covenant for further assurance in favor of a purchaser, where the estate, being a reversion, was bought of an expectant heir, in the lifetime of his father, and at an undervalue: the plaintiff in such case will be left to bring his action of covenant at law (*n*). A specific performance of a covenant for further assurance will also be refused, where the original conveyance itself is void; as if a man covenants to stand seised to the use of a mere stranger, and to make further assurance: Here, the conveyance being nugatory, and the covenant for further assurance only auxiliary, and going along with the estate, it follows, that if no estate passes, the nullity of the original conveyance will defeat the dependent covenant (*o*).

net's case, Cro. Eliz. 9. Wotton v. Cooke, 3 Dy. 337, b.; S. C. Bendl. 228; 1 And. 53; Jenk. Cent. 6. Case, 24. 1 Rol. Ab. 424. pl. 11. Symmes v. Smith, W. Jo. 314; S. C. 1 Rol. Ab. 441, 2; Cro. Car. 299. Andrews v. Eddon, 1 And. 122.

(*n*) Johnson v. Nott, 1 Vern. 271; S. C. Nott v. Hill, 1 Vern. 167. Zouch v. Swaine, 1 Vern. 320.

(*o*) Fursaker v. Robinson, Prec. Ch. 475; S. C. nom. Tursaker v. Robinson, Gilb. Eq. Rep. 139.

SECT. VI.

OF EQUITABLE RELIEF.

VI. Of equitable relief.

WHERE any fraud or concealment is practised by the vendor, by which the party is evicted, though by a person not claiming under the vendor, or any of those against whose acts the covenants for the title extend, the purchaser may bring an action on the case, in the nature of an action of deceit against him; but a bill in Chancery will, in most cases, be found a more effectual remedy; as it will lead to a better discovery of the concealment, and all the circumstances attending it; and may, in some cases, enable the court to create a trust in favor of the injured purchaser. And where the court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance at the time of the sale (*p*). So, on the other hand, where the bargain has been fraudulent and unrighteous on the part of the purchaser, equity will relieve the covenantor against an action brought on the covenants for title. In the case in question, the defendant had drawn in the plaintiff, a young man, and purchased an estate of him at a great undervalue; and it happened that the title was defective, and the defendant was evicted; and there being covenants for quiet enjoyment, and other securities entered into by the plaintiff, he now came to be relieved against an action

(*p*) Harding v. Nelthorpe, Nels. 118. 4 Cru. Dig. 421. 3d ed.

brought on these covenants: For the defendant Swaine it was insisted that he ought to have the value of the estate lost: But the vendor was relieved upon repayment only of the purchase money and interest, and not left liable at law to answer the value of the land upon the covenant; the purchaser discounting mesne profits (*q*).

Further, it is to be observed, that if a purchaser be evicted in consequence of a clear defect of title, the eviction not falling within the operation of the covenants for title in his purchase deed, the Court of Chancery, although it may acknowledge the hardship of the party's situation, cannot raise an equity in his favor, in order to decree a restitution of his purchase money (*r*). But in case the land be recovered by title paramount, not falling within the covenants, before payment of the money, the vendee will be relieved in equity from payment (*s*).

SECT. VII.

OF COVENANTS FOR TITLE WITH REFERENCE TO THEIR ABSOLUTE OR QUALIFIED CHARACTER.

VII. Absolute or qualified.

COVENANTS are either general, or, as they are sometimes termed, absolute, that is, unrestrained and

(*q*) Zouch v. Swaine, 1 Vern. 320. Johnson v. Nott, 1 Vern. 271.

(*r*) Urmston v. Pate, 4 Cru. Dig. 420. 3d edit. 3 Ves. 235.

(*s*) Anon. 2 Ch. Ca. 19. See also Cass v. Rudele, 2 Vern. 280; S. C. 1 Eq. Ca. Ab. 25. pl. 8.

unconfined to the acts of any particular persons, but a warranty against the disturbances of all people claiming by title; or, limited and qualified, that is, providing only against the acts of particular persons specified in the deed. This will be better illustrated by example. The ordinary covenants for title, on a conveyance in fee, we may recollect, are, First, That the vendor is seised in fee; Secondly, That he has good right to convey to the purchaser; Thirdly, That the purchaser, his heirs and assigns, shall quietly enjoy the premises, without any hindrance whatsoever; Fourthly, For indemnity against incumbrances; and Fifthly, For further assurance. Covenants in this general or absolute shape, extend to protect the purchaser against the lawful (*t*) interruptions of all the world, by whatever means their title may be derived. Instead, therefore, of exposing himself to a risk so extensive, the covenantor usually (*u*) restricts his liability by limiting or qualifying the generality of the covenants, by such words as the following: That "notwithstanding any act, &c. done or permitted by him," he is seised, &c. And that "notwithstanding any such act, &c." he has good right to convey. And also that it shall be lawful for the purchaser, his heirs, and assigns, quietly to enjoy the premises, without any let, suit, &c. from or by him, or any other person or persons whomsoever, "lawfully or equitably and rightfully claiming any estate, &c. in the premises, by, from, through, under, or in trust for, him or his heirs."

(*t*) See ante, p. 312.

(*u*) As to the persons against whose acts the vendor is bound to covenant; see next Sect.

[In this place also are enumerated the names of all persons, against whose acts the covenant is intended to guard.] And that (*v*) free from all incumbrances whatoever, "at any time or times heretofore, and to be at any time, and from time to time hereafter, made, done, &c. by the said (vendor), or any person or persons rightfully claiming or to claim by, from, through, under, or in trust for him, &c." Then follows the covenant for further assurance, by the vendor and his heirs, and all persons claiming or to claim any estate, &c. in the premises, "by, from, under, or in trust for, him or them, &c." Had this mode of annexing words of qualification to all the covenants which the vendor meant should be confined to the acts of himself and of those claiming under him been adhered to, much litigation would have been avoided. An inattention, however, to this cautious method of preparing deeds, has led to several decisions, to which it is now our duty to advert. The main difficulty, in consequence, has consisted in ascertaining, to what extent words of qualification contained in one clause of an instrument, should be construed to apply to, and narrow or limit, preceding or subsequent covenants in general terms, in the same deed.

Cases of this description afford an ample illustration of the general rule for the construction of covenants, before laid down (*w*); viz. That they shall be so expounded as to carry into effect the intention of the parties; which intention is not to be collected from the language of a single clause, but from the

(*v*) See ante, p. 330. n. (*v*). (*w*) Ante, p. 136.

entire context of a deed; and that it is immaterial in what part of a deed any particular covenant may be inserted; for that exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words. However general the words of a covenant may be, if standing alone; yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred, that the party could not have intended to use the words in the general sense which they import, the courts will limit the operation of the general words (*x*).

Our inquiry shall be directed to ascertain, First, In what cases words of qualification in the first part of a deed, will apply to, and limit covenants, in general terms, in a subsequent part of the deed. And Secondly, In what cases a qualification in the latter part of the instrument, will narrow a preceding covenant in general language.

1. In what cases a preceding qualified covenant will limit a subsequent general covenant.

First then, In what cases words of qualification in the first part, will apply to, and limit covenants, in general terms, in a latter part of the deed. The case of Browning v. Wright (*y*), decided in 1779, has universally been esteemed a principal and leading authority on this subject; and it is remarkable for the luminous judgment of Lord Eldon, then Chief Justice of the Court of Common Pleas. An estate in fee simple had been conveyed by the defendant's

(*x*) 3 Bos. & Pul. 574, 5.

(*y*) Browning v. Wright, 2 Bos. & Pul. 13. And see Proctor v. Johnson, Cro. Eliz. 809; S. C. Yelv. 175; Cro. Jac. 233; 1 Bulstr. 2; 2 Brownl. 212.

testator to the plaintiff. After the habendum, the deed ran thus: "And the said J. Wright and his heirs, the aforesaid piece or parcel of arable land hereby granted, or mentioned or intended to be hereby granted, unto the said plaintiff or his heirs, against him the said J. Wright and his heirs, shall and will warrant and for ever defend by these presents. And the said J. Wright, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said T. Browning, his heirs and assigns, in manner and form following, that is to say, that he the said J. Wright, for and notwithstanding any thing by him done to the contrary, is lawfully and absolutely seised of the said piece or parcel of arable land hereby granted, of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee simple, without any manner of condition, limitation, use, or trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat, or determine the same. *And that* he hath good right, full power, and lawful and absolute authority, to convey and assure the same to the said T. Browning, his heirs and assigns, *in manner aforesaid*. And the said J. Wright, for himself, his heirs, executors, or administrators, doth further covenant and agree to and with the said T. Browning, his heirs and assigns, that he the said J. Wright shall and will, as soon as as convenient, set out, at the expense of the said T. Browning, a cart-way to the said piece or parcel of arable land, through another field in the possession of W. Triggs; which cart-way, when set out, the said J. Wright and his tenants are to have a free passage to and from the farm belonging to the said J. Wright,

now in the occupation of the said William Triggs, without allowing any thing for the same; And that he the said T. Browning, his heirs and assigns, shall and lawfully may, at all times hereafter, peaceably and quietly hold and enjoy the said piece or parcel of arable land hereby granted, and receive the rents and profits thereof to his and their own use and uses, without any manner of let or interruption of the said J. Wright, or any other person or persons claiming under him. Then followed a qualified covenant for further assurance. And the question raised was, Whether the covenant for good right to convey ought or ought not to be confined to the acts of the vendor and his heirs.

The court clearly concurred in opinion, that it was not a covenant against all the world, but that it was either part of the first covenant, which was special; or, if a substantive covenant, that it must, by reference to the whole context of the deed, be considered a special covenant. Lord Eldon, in his judgment, relied on the circumstance of the transaction being the purchase of an inheritance in fee; in the conveyance of which, *primâ facie*, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. His Lordship drew a distinction between conveyances in fee, and assignments of leaseholds, and proceeded thus: "It sometimes happens, that parties require covenants in assignments of this kind of property, which are not required in conveyances of freehold; such as, an absolute covenant that the vendor holds a valid and indefeasible lease. But even where covenants of this

kind are introduced, if the words of the deed be, that he covenants *in manner and form aforesaid*, the court will look to the former part of the instrument, in order to ascertain the sense in which the covenant is to be taken. It is quite clear, with respect to the warranty, that it was not the intention of the grantor to warrant the title against any persons but himself and his heirs. It is equally clear, that it was not his intention to covenant for quiet enjoyment against the acts of any but himself and his heirs; nor was it his intention to make the covenant for further assurance extend to any other persons. We find all these limited covenants in an instrument of purchase in which we should not expect obligations of greater extent. What would be the use of any of the other covenants if this were general? It would be of little service to the grantor to insist that the warranty, and the covenants for quiet enjoyment and further assurance, were specially confined to himself and his heirs, if the grantee were at liberty to say, I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supersedes them all. It appears to me from the words and context of the deed, that, in such case, we should be driven to say, that the grantor intended at the same time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words *in manner aforesaid*, namely, for and notwithstanding any thing by him done to the contrary." Mr. Justice Buller observed, that he was inclined to think, that the per-

son who drew the deed intended that the two clauses should form but one covenant; but that not having strength of mind sufficient to carry him through one continued sentence of so great a length, he stopped, and introduced the words *and that*, which had created all the difficulty: That if these words were struck out, the case would be as clear as the sun; and the covenant would then stand thus: The grantor covenants that, notwithstanding any act done by him, he is seised of the estate, and hath good title to convey, the two clauses being synonymous (*z*).

On the same principle, a similar judgment was afterwards pronounced in a case (*a*), where the subject was an assignment of certain premises for the residue of a term of twenty-one years. The assignor covenanted, "that he had not at any time theretofore made, done, committed, or suffered, any act, deed, matter, or thing whatsoever, whereby or by reason whereof the said messuage and premises, or any part thereof, were, could, should, or might be, impeached, charged, incumbered, or affected, in title, estate, or otherwise howsoever; and that for and notwithstanding any such act, deed, matter, or thing, the lease was a good and subsisting lease, valid in the law, and not forfeited, surrendered, or become void or voidable; *and that* he the defendant, at the time of the sealing and delivering the indenture, had

(*z*) See Lord Alvanley's observations on this case, 3 Bos. & Pul. 574.

(*a*) Foord v. Wilson, 8 Taunt. 543; S. C. 2 J. B. Mo. 592. See also Nervin v. Munns, 3 Lev. 46.

in himself good right, full power, and lawful and absolute authority, to grant, bargain, sell, assign, transfer, and deliver, the same messuage and premises unto the plaintiff, his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of the same indenture." These covenants were succeeded by another for further assurance by the defendant, his executors, administrators, and all persons claiming under him or them. The counsel for the defendant was stopped by the court, who, in delivering their opinion, asked if it could be urged with the most remote hope of success, that this latter covenant (for good right to assign) was independent of those which preceded it; or, in other words, if it could be said, that the words *and that* were not copulative there. But they said that the case did not even stop there; for the covenant concluded, as if to prevent the possibility of misconstruction, with the words *in manner aforesaid*,—words which clearly pointed out, that the former part of the instrument was to be looked to, in order to ascertain the sense in which the covenant was to be taken: and they declared themselves incapable of distinguishing this case, in principle, from Browning v. Wright; the only shade of difference between the cases being, that the one was an assignment of a lease, the other a conveyance in fee. It was therefore decided, that the covenant, that the assignor had good right to assign, was qualified and restrained to his own acts only.

As connected with this subject, and governed by the same principle, the case of The Duke of Nor-

thumberland v. Errington (*b*) demands repetition here. In an indenture of lease of a colliery, the two lessees covenanted jointly and severally with the lessor *in manner following, that is to say, &c.* : — then followed a string of covenants respecting the working of the colliery, wherein the lessees covenanted jointly and severally; and then came a covenant, that the moneys appearing to be due should be accounted for and paid by the lessees, their executors, &c. (not saying *and each of them*); and it was holden, that this, like the former covenants, was several as well as joint, by reason of the introductory words. The case has been more fully noticed in a a former page (*c*), to which the reader is referred.

But, in order to admit of the qualifying language of the one covenant being considered as virtually transferred to and included in the other, it appears, that they should be connected covenants, of the same import and effect, and directed to one and the same object. Thus, in the cases just cited, the questions were, Whether words of qualification annexed to a covenant that the party was lawfully seised or possessed, should extend to the following covenant, in general terms, that he had good right to convey; and the decision in both cases was in the affirmative. Now, it will be perceived, that the covenant for title and the covenant for right to convey are (what is somewhat improperly called) synonymous covenants (*d*); but the covenant for quiet en-

(*b*) Duke of Northumberland v. Errington, 5 Term Rep. 522.

(*c*) Ante, p. 120.

(*d*) Nervin v. Munns, 3 Lev. 46. Browning v. Wright, 2 Bos. & Pul. 27.

joyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate, in quantity and quality, which he purports to convey. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon (*e*): One covenant goes to the title, the other to the possession (*f*). "Indeed," said Lord Ellenborough (*g*), "in looking at the case of Browning v. Wright (*h*), in which almost all the cases on the subject are collected and considered, I do not find any case in which it is held, that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed is to be construed according to the intention of the parties." On the contrary, in an early case (*i*), where one covenanted that he had a lawful right to grant, and that the grantee should enjoy, notwithstanding any claiming under the covenantor, it was said, that these were two several covenants. So, where a man covenanted that he was seised of certain lands of a lawful estate in fee, notwithstanding any act done by him, &c.; and that the said lands were of the annual value of 200*l.*; the court resolved, that these words,

(*e*) Per Lord Ellenborough, 11 East, 642.

(*f*) Norman v. Foster, 1 Mod. 101; S. C. 3 Keb. 246.

(*g*) 11 East, 643.

(*h*) 2 Bos. & Pul. 19.

(*i*) Norman v. Foster, sup.

for any act, &c., did not refer to the second covenant, but only to the first part; and that the second part was absolute, that the lands should be of such a value per annum (*k*).

Partly on the circumstance of the exception of a chief rent to the lord of the fee, but principally for the above reasons, was Howell v. Richards (*l*) determined. The case arose on a conveyance in fee, containing the following covenants on the part of the releasors: That they, for and notwithstanding any act, matter, or thing, by them, or any or either of them, done to the contrary, are, or some or one of them is or are, seised, &c. of an absolute and indefeasible estate of inheritance in fee simple, &c., without any manner of condition, trust, &c., or any other matter, restraint, cause, or thing whatsoever, to defeat, &c.; or incumber the same estate. And also that they, some or one of them, for and notwithstanding any such matter or thing as aforesaid, now have, or some of them hath, at the time of the sealing, &c., in himself, herself, or themselves, good right, full power, and lawful and absolute right and authority, to grant, &c. the said premises unto and to the use of the said Richard Howell, his heirs, &c., in manner aforesaid, and according to the true intent and meaning of these presents; *And likewise* that he the said Richard Howell, his heirs, &c., shall and may, from time to time and at all

(*k*) Hughes v. Bennet, Cro. Car. 495; S. C. Sir W. Jo. 403. Crayford v. Crayford, Cro. Car. 106; cites 27 H. 8. 29; S. C. Lit. 80. See also Belcher v. Sikes, 8 Barn. & Cres. 185.

(*l*) Howell v. Richards, 11 East, 633.

times for ever hereafter, peaceably and quietly enter into, hold, occupy, possess, and enjoy, the premises hereby granted, &c., without the lawful let, suit, &c., or disturbance whatsoever, of, or by the said (releasors), or any or either of them, their, any or either of their heirs or assigns, or for or by any other person or persons whatsoever; And that freely, and clearly, and absolutely, acquitted, exonerated, released, and discharged, or otherwise by the said (releasors), and each of them, their and each of their heirs, &c., well and sufficiently saved, defended, and kept harmless and indemnified, of, from, and against, all former and other gifts, grants, &c., estates, titles, troubles, charges, and incumbrances whatsoever, *save and except the chief rent* issuing out of or payable for the said premises to the lord of the fee of the same, if any should be due. And it was contended, that the general language of the covenant for quiet enjoyment, was in fair construction to be qualified and restrained by reference to the antecedent covenants for title, and for the right to convey, which were special and limited. But Lord Ellenborough, C. J., who delivered the opinion of the court, said, that the covenant to indemnify and save harmless, which followed the covenant for quiet enjoyment, was in the most comprehensive terms, and concluded thus: "Of, from, and against, all other estates, titles, troubles, charges, and incumbrances whatsoever," with this single saving, viz. "save and except the chief rent issuing out of, or payable for, the said premises, to the lord or lords of the fee of the same, if any such should be due:" That the covenant for quiet enjoyment

was special and particular in its terms, as well as general: it was against the disturbance of the defendant and others, the releasors by name, their heirs, &c.; and also against the disturbance of any other person whatsoever: That it was perfectly consistent with reason and good sense that a cautious purchaser should stipulate in a more restrained and limited manner for the particular description of title which he purported to convey, than for quiet enjoyment: He might have a moral certainty that any existing imperfections of title would be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death or the like; but these imperfections, though cured, so as to obviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title: That the person using the general words could not forget that he had immediately before used special words of a narrower extent. It appeared, therefore, that the covenant for quiet enjoyment was not in point of necessary construction to be restrained in the manner contended for on the part of the defendant: and consistently with the case of Browning v. Wright, and every other case that they were aware of, the court were warranted in giving effect to the general words of the covenant for quiet enjoyment; and which, his lordship said, were entitled to more weight in this case, inasmuch as they immediately followed and enlarged the special words of covenant against disturbance by the grantors themselves.

2. In what cases a subsequent limited covenant will qualify a preceding general covenant.

Secondly: In some instances, words of qualification used only in the latter part of the instrument will pervade and restrain an antecedent unlimited covenant.

To satisfy the apparent intention, the court will consider the two members as constituting but one covenant; or, where they are several and distinct in terms, deem them otherwise in point of obligation (*m*). Therefore, where the assignor of a term "covenanted and granted, that he had not made any former grant, or any thing, whereby the grant or assignment might be in any manner impaired, hindered, or frustrated, *but that* the said assignee and his executors, by virtue of that grant and assignment, might quietly have, hold, and enjoy, all and singular the premises, with their appurtenances, during the term to come, without any impediment or disturbance by him, or by any other person, &c.;" it was settled (*n*), by three judges against Browne, *è contrà* strongly, that the sequel of the sentence, viz. *but that*, was dilatory, and depended upon the precedent matter, and no new matter or sentence. So, where tenant pour autre vie leased for twenty-one years, and covenanted that he had not done any act *but* the lessees should or might enjoy it during the years, and afterwards, within the twenty-one years, the cestui que vie died; it was adjudged that the action of covenant did

(*m*) Trenchard v. Hoskins, Winch, 93; S. C. Lit. 62. 65. 203.

(*n*) Broughton v. Conway, Dy. 240, a.; S. C. Dal. 58; and Mo. 58.

not lie, for *but* referred the words subsequent to the words preceding (*o*).

In another case, the defendant covenanted, that certain lands conveyed to the plaintiff for her jointure were of the value of one thousand pounds per annum, and so should continue, notwithstanding any act done or to be done by him; and it was adjudged, that the words *notwithstanding any act*, extended as well to the time of the covenant made, as to the time future; and though they were not then of that value, the covenant was not broken except some act done by him were the cause of it (*p*).

Thus also, where a lessee covenanted to pay the reserved rent on the days and in manner in the lease mentioned; and the defendant covenanted, that the lessee should, at all times during the term, pay the rent on the respective days mentioned in the indenture, and that in case the lessee should neglect to pay the rent for forty days, the defendant would pay on demand; no doubt existed in the mind of the court, that the latter clause, as it regarded the surety, was a qualification of the former; the meaning of the covenants being, that the defendant did not become chargeable *eo instanti* the rent became due, but only after forty days' non-payment, and after demand made. If this were not so, the conse-

(*o*) Peles v. Jervies, Dy. 240. in the margin. The cases inserted in the margin of Dyer are of great authority, being collected by Lord Chief Justice Treby. 1 Wms. Saund. 59, n. (1). See also Babington v. Sheldon, Dy. 207, a. pl. 13. and Anon. Dy. 255, a. pl. 4.

(*p*) Rich v. Rich, Cro. Eliz. 43.

quence would be, that he would be subject to two actions, one on the day after the rent became due, and another after forty days, and demand made (*q*).

The like was resolved in Nind v. Marshall (*r*). There the defendant had assigned a messuage and premises to the plaintiff for the residue of a term of years, and covenanted as follows: "That for and notwithstanding any act, deed, matter, or thing whatsoever, by him the defendant, at any time theretofore made, done, committed, permitted, or suffered, the said thereinbefore in part recited indenture of lease was a good and subsisting lease, valid in the law, whereby to hold the said premises for all the residue of the term thereby granted, and not forfeited, surrendered, or otherwise determined, or become void, or voidable; *And further, that* it should and might be lawful to and for the plaintiff, his executors, administrators, and assigns, peaceably to enter into and enjoy the said messuage, &c., for and during all the rest, residue, and remainder of the said term of fourteen years, without any the lawful let, suit, &c. of the defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever having or lawfully claiming, or who should or might, at any time or times thereafter during the said term, have or lawfully claim any estate, right, title, trust, or interest, either at law or in equity, of, in, to, or out of the said premises, or any part or

(*q*) Sicklemore v. Thistleton, 6 Mau. & Selw. 9.

(*r*) Nind v. Marshall, 1 Brod. & Bing. 319; S. C. 3 J. B. Mo. 703. And see Noble v. King, 1 H. Blac. 34.

parcel thereof, *and that* free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the defendant, 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, charges, and incumbrances whatsoever, made, done, or committed, or wittingly or willingly permitted or suffered by the defendant, or by, through, or with, his, their, or either of their acts, means, default, procurement, consent, or privity, (subject only to the rents, covenants and agreements by the said indenture of lease reserved and contained): Next came a covenant for further assurance in qualified terms: And it was holden, Park, J. *dissentiente,* that the covenant for quiet enjoyment extended only against the acts of the covenantor, and those claiming under him, and not against the acts of all the world; for the court said, the words *and that,* following the covenant for quiet enjoyment, over-rode the whole of the preceding part, so that the covenant stood in effect thus: that there should be a quiet enjoyment during the residue of the term, free from, or indemnified against all interruption, not only on the part of the covenantor himself, his executors, administrators, or assigns, but on the part of all other persons lawfully deriving any title or interest from the acts or defaults of the covenantor, his executors, adminstrators, or assigns; and that it would be inconsistent with the first covenant to construe this to be a covenant warranting the quiet enjoyment of the lease against all the world; and it would be consistent with it to hold it a qualified covenant; and that

if the second covenant had the effect contended for by the plaintiff, the first covenant would be useless; and that it was consistent with the third covenant (a qualified covenant for further assurance), to hold the second to be qualified and restricted; because *all persons whatsoever* must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them; that they were in the nature of sweeping and comprehensive words, introduced to give the largest effect to the special words, reference being had to their special nature, and, as such, ranging under known rules of construction, and to be explained and applied as already stated: Judgment was given for the defendant accordingly.

It will be remarked, that this case is distinguishable from Howell v. Richards (*s*), which was much relied on by the plaintiff, because the clause respecting incumbrances, which forms the strength of the argument in favor of the defendant here, there formed the strength of the argument against him; that clause contained words as general as the words which preceded, with one single exception, viz. the chief rent, which was not an act or default of the party, or of any claiming under him; this therefore confirmed the generality of all the other words. And it is distinguishable from Gainsford v. Griffith, on the ground that the covenant for the validity of the lease, on which alone the court proceeded, holding it to be an independent cove-

(*s*) Sup. p. 366.

nant, and such as could not be connected in grammar or construction with the following covenant, was, by itself, clearly absolute, containing no words whatever of qualification; whereas here, the words of qualification, as Mr. Justice Richardson remarked, might and ought to be considered as part of the covenant for quiet enjoyment. The case of Barton v. Fitzgerald is also to the same effect as Gainsford v. Griffith.

If an express special agreement be inserted in a deed, that former covenants shall be confined to the acts of particular persons, these covenants will receive a limited construction. Thus, the grantor, on the conveyance of a fee-farm rent, covenanted generally that he was seised in fee, and had good right to sell, but the indenture contained a subsequent covenant between the parties, that none of the covenants in the deed should extend beyond the acts of the vendor and his heirs; and, notwithstanding an objection that it was a remote agreement at the end of the deed, and far distant from the other covenants, it was adjudged, that it qualified the first covenant, and restrained it to the acts of the covenantor and his heirs (*t*).

Acting on the same principle, equity has, by granting a perpetual injunction, relieved a party from legal proceedings grounded on the general words of a covenant, which was contrary to the intention of the parties, and it so appeared in the conveyance, where

(*t*) Brown v. Brown, 1 Lev. 57; S. C. 1 Keb. 234, 239.

the rest of the covenants were restrained to acts done by the plaintiff and all claiming under him (*u*).

It is otherwise, however, where the import and object of the covenants are different; in which cases, the courts will not impose any restraint on anterior covenants couched in absolute language; but will allow them the free and unshackled interpretation required by their unqualified and unlimited terms. Therefore, where the grantor covenanted that he had lawful right to grant, and that the grantee should enjoy notwithstanding any claiming under him (the grantor); as these were two several covenants, the one going to the title, and the other to the possession, the first was considered general and not affected by the second (*v*). So, where one assigned his term, and covenanted that the indenture of lease was a good, sure, perfect, and indefeasible lease in law of the said messuage, and so should remain to the plaintiff during the residue of the term; and that the plaintiff, his executors, &c., should quietly and peaceably enjoy the said messuage, during the residue of the term, without any disturbance of the defendant, or his executors, or assigns, and acquitted, or otherwise saved harmless from all incumbrances had, made, done, committed, suffered, or done by the defendant, the rent and covenants upon the original lease only excepted; the judges agreed, that this was an express general covenant in fact, which was

(*u*) Feilder v. Studley, Finch, 90. Cited by Lord Eldon, 2 Bos. & Pul. 26; and by Lord Alvanley, 3 Bos. & Pul. 575.

(*v*) Norman v. Foster, 1 Mod. 101; S. C. 3 Keb. 246.

not, nor could be restrained by any other subsequent covenant, if it could not be construed as part of the first general covenant; and that the words in the last covenant, *without interruption*, could not be applied in sense to the covenant that the lease was indefeasible; for then the sentence would be insensible, namely, that the lease was indefeasible without the interruption of the defendant, &c.; and besides, if it were sensible, yet the words *without interruption* did not take away the force and signification of the word *indefeasible*, but it remained an absolute general covenant as before (*w*). And in commenting on this case, in Browning v. Wright (*x*), Lord Eldon has observed, that the assignor seemed to have said, I not only covenant for the goodness of my title, but that you shall enjoy under that title, without any interruption from me. The nature of the assurance showed it to have been the intent of the parties, that the words in the last covenant should not attach upon the first.

A like judgment was delivered in the case of Trenchard v. Hoskins (*y*). The facts were: One

(*w*) Gainsford v. Griffith, 1 Saund. 58; S. C. 2 Keb. 76. 201. 213; and 1 Sid. 328. nom. Gamsford v. Griffith.

(*x*) 2 Bos. & Pul. 25.

(*y*) Trenchard v. Hoskins, Lit. 62. 65. 203; S. C. Winch, 91. As this case is reported by Winch, it appears that Hobart, C. J. and Jones, J. held the covenant to be qualified: and Hutton, J. and Winch, J., on the contrary, considered it a separate and general covenant. The report concludes by stating, "that it was said by the court, that the case was not of weight to be brought into the Exchequer Chamber, and therefore the court, advised that the parties would agree; quære, for the residue in the Exchequer Chamber concerning that." And Serjeant Williams, in a note to Gainsford v. Griffith, 1 Saund. 60.

Henry Hoskins, to whom the land in question had been bargained and sold by one Fitzwilliams, died seised, and the land descended to John Hoskins, and he and Peter Hoskins by indenture enfeoffed the plaintiff. And John and Peter Hoskins covenanted in manner and form following: that John Hoskins is seised of a good, perfect, and indefeasible estate in fee simple; and that he or Peter Hoskins has good and lawful authority to sell the same, and that there is not any reversion or remainder in the crown for any act done by John Hoskins, or Peter Hoskins, or William Proud, or any of them. The plaintiff assigned as a breach, that John Hoskins was not seised of a good estate in fee simple (*z*). The case was argued at great length, in Mich. 3 Car.; and the opinions of Richardson and Crooke at first seemed to be in favor of the defendant, and that all the covenants were restrained by the latter words; Hutton and Yelverton, *è contra*. But afterwards, Mich. 4 Car., the judges expressed themselves *seriatim*, and concurred in thinking, that the words *notwithstanding any act, &c.* did not control the generality of the antecedent co-

says, "That a writ of error was afterwards brought in the King's Bench, where it was adjudged, that the last clause, *notwithstanding any act done*, &c. did not restrain the first clause of the covenant, namely, that he had a good and indefeasible estate in fee; but that such clause was absolute and general, because the general usage of conveyances is to make one covenant independent of the other, and the judgment of the C. B. was reversed;" and he cites 2 Rol. Ab. 250. pl. 4. and 1 Sid. 328. But it is said in Sid. "that no reversal was entered; *ideo quære*" See Napper's case, Winch, 74. 87. 93.

(*z*) At this part of the report in Lit. there is an evident omission of the commencement of the defendant's plea in bar.

venant for seisin, on the following grounds: First, that the covenants differed in matter, person, and nature; for the first extended to John alone, in regard to the estate; the second, as to the power to sell, to John and Peter; and the third was, that no remainder existed in the crown, notwithstanding any act done by John, Peter, or William. Secondly, that the covenants differed in number; the first being in the singular, the second in the plural. Thirdly, that the second covenant was in the affirmative, the third in the negative; and that the words of qualification were annexed to the negative covenant only; so that it was all one as if the deed had said, that neither John, nor Peter, nor William, had done any act by which any reversion should be in the crown.

So also, where the assignor of certain shares of letters patent for making paper covenanted in these words: "That I the said J. S. have good right, and full power, and lawful and absolute authority, to assign and convey the said ten thousandth parts or shares of and in the said letters patent, and concern for making paper, &c.; and that I have not by any means, directly or indirectly, forfeited any right or authority I ever had, or might have had, over the same ten thousandth parts or shares;" the court held, that as the warranty in question, instead of being framed in the usual and almost daily words, where parties intended to be bound by their own acts only, (viz. *for and notwithstanding any act by him done to the contrary,*) omitted them altogether, the omission of these words was of itself decisive; and that, as the attention of the purchaser was not called by any words to the

intent of the vendor to confine his covenant to his own acts, the covenant for absolute right to convey was not restrained by the other parts of the deed (*a*).

In Barton v. Fitzgerald (*b*), the defendant by indenture, after reciting an original lease for the term of ten years, and that by divers mesne assignments the premises became vested in him for the residue of the said term of ten years, assigned the same to the plaintiff for the residue of the *said term of ten years*, and covenanted thus: "That he (the defendant) hath not at any time heretofore made, done, or committed, or willingly permitted or suffered to be done, any act, deed, matter, or thing whatsoever, whereby the said premises are, can, shall, or may be, charged, assigned, impeached, incumbered, or affected in title, estate, or otherwise howsoever, *save and except* an agreement with one W. Anderson for the occupation of part of the said premises for the term of three years from the 10th of October instant. And also that the said in part recited indenture of lease is a good and subsisting lease, valid in the law, of and for the said premises hereby assigned, and not forfeited, surrendered, or otherwise determined, or become void, or voidable. And further that it shall be lawful for the plaintiff, from time to time, and at all times hereafter during the said term hereby granted, peaceably and quietly to enter into, have, hold, occupy, and enjoy the said premises assigned, &c., and take the rents, &c. for

(*a*) Hesse v. Stevenson, 3 Bos. & Pul. 565.

(*b*) Barton v. Fitzgerald, 15 East, 530.

his own use and benefit, for and during all the rest, residue, and remainder, now to come and unexpired of the said term of ten years, in and by the said in part recited indenture of lease granted, without any the lawful let, suit, hindrance, interruption, or denial of the defendant, his executors, &c., or any other person or persons lawfully claiming or to claim the same premises, by, from, under, or in trust for, him, them, or any of them. And lastly, That the defendant shall from time to time, and at all times hereafter, during the residue of the said term granted by the said in part recited indenture of lease, at the request and costs of the plaintiff, make, do, and execute, or cause and procure to be made, done, and executed, all and every, or any further act, deed, matter, or thing whatsoever, for the further, better, more perfect, and absolute, assigning and assuring the said indenture of lease, and the said messuage and premises thereby demised, and now assigned to the plaintiff for all the remainder of the said term of ten years which should be therein now to come and unexpired, according to the true intent and meaning of these presents, as by the plaintiff, &c. should be reasonably advised or required." The lease was in fact determinable by the death of one H. de la Touche, but no mention whatever was made of that circumstance in the lease ; but the term was treated throughout the deed as absolute, without any qualification ; and during the term cestui que vie died : Lord Ellenborough, C. J., concluded his opinion by saying : " When I find a recital in the beginning of the subject matter of the contract, being for the residue of a term of ten years, without any contin-

gency annexed, and afterwards find an absolute covenant in its terms for the validity of such a lease, together with other covenants against his own acts and those claiming from him; I cannot say that we are not to give effect to the general words of the covenant; and we cannot do otherwise, without rejecting the word *and* (in the passage *and not forfeited or voidable*), and reading instead of it, *that is to say:* but looking at the whole deed, there is nothing whence we can collect such a meaning as would warrant so narrowed a construction."

Much to the same effect is a case (*c*), where the defendant sold the plaintiff certain lands, which he had purchased of one Woolaston, and covenanted that he was seised of a good estate in fee according to the indenture made to him by Woolaston. Judgment was given for the plaintiff, on the ground that the covenant that he was seised of a good estate in fee was absolute, and the reference to the conveyance by Woolaston, served only to denote the limitation and quantity of estate, and not the defeasibleness or indefeasibleness of the title.

Although the subject has been noticed before (*d*), this section cannot be closed without repeating, that an express particular covenant will qualify the generality of a covenant in law; the rule of law being, *expressum facit tacitum cessare*. As if one leases a house by the words *demise, grant, &c.*, and the lessor

(*c*) Cooke v. Founds, 1 Lev. 40; S. C. 1 Keb. 95. nom. Cookes v. Fowns.

(*d*) Ante, p. 45.

covenants that the lessee shall enjoy the house during the term without eviction by the lessor, or any claiming under him. Here the implied covenant, arising from the words *demise and grant*, is restrained by the mutual consent of both parties, expressed in the covenant for quiet enjoyment, and confined to evictions by the lessor, and those claiming under him (*e*). But where one joint tenant, reciting a lease of a mill, made to him and his companion jointly, and that his companion was dead, so that all belonged to him as survivor (as he intended), granted all the mill to Johnson, and all his estate, right, and interest in the same, and covenanted that the grantee there should continue discharged and acquitted of all charges and incumbrances, or other act or acts done by him, and gave a bond for the performance of *all grants*, covenants and agreements; and it appeared that the companion had, previously to his death, assigned his interest in severalty to a stranger, who afterwards ousted Johnson of that moiety; the court would not permit the surviving grantor to contend, that the covenant for quiet enjoyment, notwithstanding any act done by him, was satisfied by a compliance with the mere words of that covenant, in a case where the grantee had suffered eviction, not in consequence of any act done by the grantor,

(*e*) Nokes's case, 4 Co. 80; S. C. Cro. Eliz. 674; but the judgment as there reported was on a different point. Gainsford v. Griffith, 1 Saund. 60; S. C. 1 Sid. 328; 2 Keb. 76. 201. 213. Deering v. Farrington, Freem. 367; S. C. 1 Mod. 113; and 3 Keb. 304. Hayes v. Bickerstaffe, Vaugh. 118; S. C. but not the same point, 1 Freem. 194; 2 Mod. 34. Merrill v. Frame, 4 Taunt. 329.

but in consequence of the badness of his title (*f*). And this differs from Nokes's case, for there the grant was good for the whole, but became bad by subsequent eviction; and, therefore, the ensuing covenant qualified the general covenant; but in the present case, the grant was never good, as the grantor had no power to dispose of one moiety.

SECT. VIII.

AGAINST WHOSE ACTS THE VENDOR IS BOUND TO COVENANT.

VIII. Against whose acts vendor bound to covenant.

UNDER a general agreement to sell a fee-simple estate, free from all incumbrances, no more being said, the agreement carries *in gremio*, and in the bosom of it, the right to proper covenants; because that sort of engagement has at all times been carried into execution in a form and mode which alter most materially, substantially, and importantly, the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants. The words operating as warranties, are obligations, which it is not understood between the parties contracting, that the one is to undertake, and the other to have the benefit of; and though the agreement, if literally executed, would carry all the extensive obligations, to which the legal warran-

(*f*) Proctor v. Johnson, Cro. Eliz. 809; S. C. in error, 2 Brownl. 212; Yelv. 175; Cro. Jac. 233; 1 Bulstr. 2; Cited Lit. 206; 2 Bos. & Pul. 25; and 13 East, 71.

ties, flowing from the words, would bind the vendor and his heirs; yet it cannot be carried into execution without express covenants substituted for, and limiting the implied covenants (*g*).

The object of covenants for title being to constitute a regular chain of indemnity from purchaser to purchaser, to the end that the acts of each owner may be provided against; it is evident, that the extent to which a party may be required to covenant, must depend on the means by which he acquired the property. He may have derived his estate by purchase for a valuable consideration; or his interest may have been the subject of a voluntary conveyance to him; he may have taken by devise, which is equivalent to a voluntary conveyance; or by descent, immediately, or through a line of ancestors. A different form of security will, therefore, be necessary to suit the occasion, and to guard against the chance of eviction. In some instances, the covenants are general, indemnifying the purchaser against the lawful claims of any person or persons whomsoever; while in others, the particular persons to whose acts the covenant is intended to apply, are specifically named.

We will here inquire, Against whose acts the vendor is bound to covenant; First, where he was himself a purchaser for valuable consideration, and received with his conveyance the ordinary covenants for title; and Secondly, where the vendor was not himself a purchaser for a valuable consideration.

(*g*) Church v. Brown, 15 Ves. 263.

1. Where vendor was himself a purchaser for a valuable consideration, and obtained covenants for title.

First: The principle on which the usual qualification of covenants for title depends, is thus explained by Mr. Fearne (*h*): Regularly, (observes he,) a vendor who purchases lands himself, with proper covenants from those who convey to him, cannot reasonably be required to covenant further than against himself, and those claiming under him. This is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself, the peril or risk of such breach, and the duty of enforcing its remedy or compensation.

Mr. Fearne, however, was of opinion (*i*), that this principle would not apply to those cases, where the vendor did not depart with, or the vendee acquire, the deeds containing the covenants for the title

(*h*) Fearne's Posth. 110. See also two opinions in 3 Pow. Conv. 206. 209. Browning v. Wright, 2 Bos. & Pul. 22.

(*i*) Fearne's Posth. 111. See Lord Buckhurst v. Fenner, 1 Co. 1; S. C. Mo. 448; 2 And. 118.

against the acts of such grantors; for whilst the vendor retained in his own hands the immediate means of indemnity, which he thought proper to require of his grantor, it seemed but reasonable that he should engage for the like indemnity to his own vendee, and rely upon the indemnity he had retained for his own counter-security. Therefore, Mr. Fearne thought, that a vendor retaining in his own custody the only means of indemnity against the acts of his grantors, should engage to indemnify his vendee to the like extent; and that the vendor could not fairly object to his vendee's requiring an indemnity against the acts of the same persons, and to the same extent as he himself required; nor whilst he retained the means of enforcing such indemnity, deny his reliance upon, or refuse to subject himself to, a resort to those means. But he also conceived(*k*), that the covenants should be qualified by a proviso or agreement, including a covenant on the part of the vendee, at the end of the vendor's covenants, that in case of any claim or demand made by the vendee, his heirs, or assigns, upon the vendor, his heirs, executors, administrators, or assigns, by virtue of his covenant for quiet enjoyment against the former owner; and the vendor, his heirs, &c., should produce and deliver to the vendee, his heirs, &c. the purchase deeds from his grantors, in order to enable the vendee, his heirs, &c. to avail himself of the covenants therein contained, on the part of the former owner; and should concur in any act for enforcing the performance of such covenants; and for in-

(*k*) Fearne's Posth. p. 115.

demnifying the vendee, his heirs, and assigns, in respect of any such breach of those covenants so entered into by the former owner: then no advantage should be taken of the vendor's covenant with the vendee for quiet enjoyment, as against the acts of the former owner.

This, observes Mr. Sugden (*l*), is a distinction never attended to in practice: if a vendor is entitled to retain the deeds, he enters into the usual covenant for the production of them; but never enters into more extensive covenants for the title on account of the retention of the deeds.

Where the title is known to be defective, the party will sometimes complete his purchase, relying on the vendor's covenants for indemnity. It must of course, under these circumstances, be matter of express agreement, whether the vendee will take the conveyance containing covenants, with the usual qualification, or whether the covenants shall be made to extend generally to the acts of all the world (*m*). Should the seller agree to covenant against this defect specially and particularly, prudence suggests, with a view to keep the fact of unsoundness of title from the face of the purchase deed, that the indemnity should be contained in a separate instrument. Even in cases where there

(*l*) Sugd. Vend. & Purch. 453. 6th edit.

(*m*) See Savage v. Whitbread, 3 Ch. Rep. 14. Browning v. Wright, 2 Bos. & Pul. 27.

has been a covenant against incumbrances, it has been sometimes doubted, whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice (*n*).

2. Where the vendor was not himself a purchaser for a valuable consideration.

Secondly: Where the vendor himself was not a purchaser for a valuable consideration, but took the estate by devise, or descent, whether mediate or immediate, his covenants must be carried up to provide against the acts of the last purchaser who took a conveyance with the usual covenants for title. The same rule is attended to, where the vendor claims under a voluntary conveyance (*o*).

It may be right here to mention, that covenants, although required in a conveyance from a vendor to a vendee, are very improper in a grant by way of gift or bounty. And in a case, where a voluntary conveyance had been executed to an agent, by one who had lately come of age, of a reversion of no great value, and containing covenants, as in the case of a purchase; the transaction was decreed to be modified, by the agent's releasing the covenants at his own expense (*p*).

In sales under the crown no covenants for title whatever are entered into (*q*).

From a case which came before Lord Hard-

(*n*) Ogilvie v. Foljambe, 3 Meriv. 65.

(*o*) Pickett v. Loggon, 14 Ves. 239. 3 Pow. Conv. 208.

(*p*) Cray v. Mansfield, 1 Ves. 379.

(*q*) Wakeman v. The Duchess of Rutland, 3 Ves. 234, argo.

wicke (*r*), it appears, that persons claiming as cestuis que trust of the proceeds of sale, under a devise to trustees upon trust to sell, and to pay over the proceeds, after the discharge of debts, cannot be required to enter into covenants for title, further than against their own acts, and the acts of the individual immediately preceding them, and to the extent of the interest derivable by them under the will. The facts of the case were these: Mr. Loyd who died in 1738, had conveyed his estate in Shropshire to Mr. Hill, for securing twenty-three thousand pounds: the same year he charged his estate in Shropshire, and his estate in Anglesea, with two thousand pounds more; and the estates to stand as a security for twenty-five thousand pounds. By two several settlements, in consideration of fourteen thousand pounds, long before his death, he conveyed his Shropshire estate to Mrs. Webb in fee: and afterwards released her from payment of the fourteen thousand pounds. He then devised to two trustees and their heirs, all his manors, lands, &c. in the isle of Anglesea, and county of Carnarvon, to the intent that they, or the survivor, &c., out of the rents of his said estate, or by mortgaging or selling the same, should raise such sum as should be sufficient to discharge the mortgage of the lands then settled on Mrs. Webb, as well as his other just debts; and after the same should be so paid, he gave the same manors to his natural son in fee. One of the trustees died; the other renounced; and administration, with the will annexed, was granted to Frances Newton. The estate was sold, and the conveyance, settled by the

(*r*) Loyd v. Griffith, 3 Atk. 264.

purchaser's counsel, contained covenants against their own acts respectively, from Mr. Hill, the mortgagee; Sir E. L., surviving trustee in the will; the two trustees appointed by decree in the room of Sir E. L.; from Mr. Loyd, the natural son, and plaintiff; and from Frances Newton: and also the following covenants from Mrs. Webb: "That Mr. Hill, and the several persons abovementioned, have, or some of them have, at the sealing and delivery of these presents, full power and authority to grant to the purchaser and his heirs, the estates in Anglesea and Carnarvon; and that the said Sir Edward Leighton, &c. have a right to sell the same to the purchaser and his heirs." She is made to covenant, likewise, for quiet enjoyment, without any interruption by Hill, &c., and by herself, or by any of them, or by any other person or persons lawfully claiming or to claim, by, from, or under them, or any of them, or by, from, or under the said Thomas Loyd deceased, Pierce Loyd, father of the said Thomas Loyd deceased, Pierce Loyd, grandfather of the said Thomas Loyd, Pierce Loyd, great grandfather, Pierce Loyd, great great grandfather, or any of them; and that freely and clearly exonerated, &c., or by the said Hester Webb, her heirs, &c., and from time to time to be well and sufficiently saved harmless from all manner of former and other gifts, &c., and from all other estates, title, incumbrances, &c., made, &c. by Mr. Samuel Hill, &c., parties hereto, or by the said Thomas Loyd, Pierce Loyd his father, &c., or any of them, or by any other person or persons lawfully claiming any estate, right, &c., into or out of the premises, by, from, or under, or in trust for them,

or any of them; and likewise covenants that the parties thereto, viz. Hill, &c., and all persons claiming from them any estate in the premises, or from Thomas Loyd, and so on, to his great great grandfather, shall do any further act for assuring, &c. The Master conceived, that the covenants from Mrs. Webb were unreasonable, and ought to be struck out, and therein inserted a covenant against her own acts only. An exception was taken to the draft thus settled; "For that the covenants contained in the said draft of the conveyance, mentioned in the report, from Mrs. Hester Webb, for the title, for quiet enjoyment, and for further assurance on her part, are struck out of the draft of the said conveyance; whereas the purchaser insists, that the Master ought to have let the said covenants from Mrs. Webb have stood in the draft, or, at least, the purchaser ought to have had such covenants inserted therein, as would have indemnified him against any latent incumbrances made by Thomas Loyd, or his ancestors, to the amount of so much money as the said Hester Webb should receive a beneficial interest from, in the estate in question." Lord Hardwicke was of opinion, that the requisition of a covenant against the acts of all the ancestors of the devisor, would be carrying it too far; for it would be unreasonable to extend it to the first purchaser, where a family had been for several generations in possession of the estate; for they might have had the benefit of the statute of limitations and other bars in their favor. But his lordship thought, that it would be sufficient to carry the covenant no further back than the person under whom Mrs. Webb claimed.

Unless this restriction of the covenant can be accounted for by the circumstance, that the purchaser's counsel were willing to accept the conveyance with covenants extending only to Mrs. Webb's devisor, it is not easy to imagine on what principle this doctrine can be maintained. No reason whatever was assigned by Lord Hardwicke for thus confining the covenant to the acts of the person from whom the cestui que trust derived her interest. If an actual bar, by the statutes of limitations or otherwise, to any claimants anterior to a certain date, could be proved, it would not be unreasonable to limit the covenant to the acts of persons who might claim an interest within that period; but why it should guard against the acts of the devisor, and not against the acts of his predecessor, such devisor not being a purchaser, is not very apparent. At all events, the practice of conveyancers is completely at variance with the decision. It is their usage to make the vendor's covenant go as far back as, and include the acts of, the last purchaser of the estate, which enlists, at least, the sanction of reason in its favor. By this precaution, every link in the chain of covenants is preserved unbroken, and the purchaser indemnified against the acts of all persons intermediate between the present and the last vendor.

Another singular ground on which the judgment seems to have turned was, that the interest of the cestui que trust would make a difference in the mode of covenanting. "A good deal (said Lord Hardwicke) depends on the *quantum;* for if the purchase money arising from the sale of the Anglesea and Carnarvon

estates is twenty-seven thousand pounds, and Mrs. Webb draws out twenty-five thousand pounds for the exoneration of the mortgage upon the estate settled upon her, she may be said to be a devisee of that estate. But if there are other debts besides the mortgage to be paid, that are a charge upon that estate, then she cannot properly be said to be the devisee of the whole of that estate, but of so much as is left after the debts are paid." This rule of making the *principle* on which a cestui que trust is bound to enter into covenants for title subservient to the amount receivable under the will, has not met with universal approbation, as will be shown by a case which shall be cited presently. The exception, however, was ultimately allowed; and the Master was required to insert in the draft proper covenants from Mrs. Webb against her own acts, and the acts of Mr. Loyd, her devisor, as to so much as she was benefited by the estate.

Looking at the case altogether, it appears to have been decided rather with reference to particular circumstances, than founded on any general principles. Lord Chancellor Loughborough has treated it as having ended in a compromise (*s*), and has observed, that as Mrs. Webb made no objection to join in the covenant, the dispute was what the extent of it should be; and that Lord Hardwicke split the difference between them, and added to it, that the devisor had done no acts, considering her as entitled to the greater part of the money.

(*s*) Wakeman v. The Duchess of Rutland, 3 Ves. 233. 504.

Its authority is questionable on another ground; for in the case just cited it was decreed, that the cestuis que trust of the proceeds of sale, where the trust was for A., B., and C., and for legacies, and simple contract debts, could not be required to concur even as parties to the deed.

This case of Wakeman v. The Duchess of Rutland demands our particular attention, as it explains very fully and satisfactorily the grounds of the determination, that persons interested in the money to arise from the sale of lands devised for that purpose, where debts and legacies are also to be paid out of the fund, need not be parties to the contract, and, therefore, cannot be compelled to covenant for title. The decision is the more valuable, on account of the various stages of argument the case underwent, and the mature deliberation with which the judgment was pronounced, and was ultimately affirmed by the House of Lords. In an abridged shape the case stood thus: Thomas Eyre devised certain estates to two trustees, upon trust to sell, and to apply the produce of sale towards payment of his debts, &c., and to pay the remainder of the interest to his wife for life, and after her decease to divide the interest into five shares, and pay the same to his cousins, James Eyre, Charles Eyre, and Mary Eyre, who afterwards intermarried with Arthur Onslow; viz. two-fifths to James, two-fifths to Charles, and one-fifth to Mary, for their respective lives, with remainders to their issue respectively, and survivorship for want of issue, as therein directed; with the usual clause that the trustees' receipts should be good dis-

charges; and that the purchasers should not be answerable for the application of the purchase money. The bill was filed by the trustees for a specific performance of an agreement for sale. The following covenant in the draft of the conveyance was objected to, on the part of those to whom the surplus of the produce of the sale was given by the will: "And the said Lady Mary Eyre, James Eyre, Charles Eyre, and Mary Eyre, severally and respectively for themselves, and their several and respective heirs, executors, and administrators, do hereby, as far as they are respectively benefited under the said will, covenant and agree, that notwithstanding any matter or thing whatsoever by the said Thomas Eyre, the testator, or any of his ancestors, or any person lawfully claiming from, by, under, or in trust for him, them, or any of them committed, the said trustees are lawfully seised of an absolute and indefeasible estate of inheritance." The Chancellor's consideration was called to an exception to the Master's report in favor of the title, that the devisees of the money to arise from the sale were not parties to the suit; though it was alleged, that they had such an interest in the devised estates, that a good title could not be made without them, and without their joining in the conveyance and entering into the usual covenants for the title, and the safety and indemnity of the purchaser. The exception was overruled upon the form, as the point would come properly before the court upon objections to the conveyance; but the Lord Chancellor most unequivocally expressed an opinion adverse to the claims of the plaintiffs; observing, that he could not allow this exception,

without laying down as a general proposition, that all persons interested in the money to arise from the sale ought to be parties to the contract. The case came on again upon the following exceptions to the draft of the conveyance approved by the Master (*t*).

First exception, That in the draft of the conveyance the following persons were not named as parties thereto, viz. Lady Mary Eyre, widow of the testator; James Eyre, Charles Eyre, and Arthur Onslow, and Mary his wife, late Mary Eyre. Fifth exception, That the Master had not in the same draft inserted the usual covenants for the title from Lady Mary Eyre, James Eyre, Charles Eyre, and Arthur Onslow, and Mary his wife; so far as they are respectively benefited under the will of the testator. Sixth exception, That the Master had not certified, that he had allowed the draft of the conveyance left with him, upon the part of the defendants, approved by Mr. M'Namara, Mr. Shadwell, and Mr. Cruise. In delivering his judgment, Lord Loughborough said: "I do not blame the parties for repeating the objection, by making it an objection to the conveyance, for it more formally marks the opinion I entertain. The ground upon which I decided it, and which I have not heard, even in conversation, any thing tending in the least to remove, is, that if this objection is well founded, there never could have been, nor ever can be, any sale of an estate in the Court of Chancery, which is disposed of to trustees upon particular trusts for A. B. and C. and for legacies and for simple contract debts;

(*t*) Ibid. 3 Ves. 504.

for if it is true, that all claiming beneficially ought *pro ratâ* to enter into a covenant for the title, it is of absolute necessity, that there is no possibility of distinguishing the case of a simple contract creditor for 20*l.* and a cestui que trust for 20,000*l.* The former is as much under an obligation *pro ratâ*, with regard to his interest, to be a party to the conveyance, as the latter. The consequence would be, that the estate never could be sold by decree, till the account was taken of all the debts; because before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled; but it is the constant practice, and there are 500 such decrees, to sell the estate in the first instance: of course, the title can be made only by the trustees for the sale, without calling in all those parties who are beneficially interested; and I should feel the great inconvenience, with respect to what has been the course in times past, and in future. It will be easy to get a better authority than mine upon it; but at present I retain that opinion, which I gave more at length and with more full discussion of the case than I do now."

The plaintiff still dissatisfied, appealed to the House of Lords; when the decree was affirmed, with 200*l.* costs, without hearing the counsel for the respondents (*u*). The cause coming on for further directions, a specific performance was decreed with costs.

(*u*) The Duchess of Rutland v. Wakeman, 8 Bro. P. C. 145. Toml. ed.

The consequence is, that the conveying parties are *not compellable* to covenant further than that they have done no act to incumber.

It is however observable, that, notwithstanding these decisions, a different practice is universally sanctioned by conveyancers. The settled rule with them is, that all cestuis que trust who are entitled to any considerable interest in the purchase money, shall be made parties to the conveyance, and enter into covenants for title, in proportion to their several shares, and extending to the acts of the last purchaser.

The parties may, indeed, by making a special contract, entitle themselves to covenants of greater extent than those allowed by the Court of Chancery (*v*). And therefore, in all agreements for purchases of estates from devisees, &c. in trust to sell, the purchaser should stipulate, that such of the persons entitled to the purchase money as he may require, shall join in the usual covenants for the title. Where, however, the trust is to pay debts or trifling legacies, which will exhaust the whole of the purchase money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted (*w*).

It might, perhaps, be doubted whether equity would, in a case of this nature, enforce a specific perform-

(*v*) 3 Ves. 236.
(*w*) Sugd. Vend. & Purch. 455. 6th ed.

ance against a purchaser, who was ignorant, at the time he entered into the contract, of there not being any person to covenant for the title. To prevent any difficulty on this ground, it seems advisable to state in the particulars of sale or agreement, that the vendors are devisees in trust to sell, and that the money is to be applied in payment of debts and legacies; which would be notice that the purchaser could not require covenants for the title (*x*). It is clear, that if assignees of a bankrupt advertise to sell a freehold estate, they undertake, whether they say so or not, to make a title. There is no doubt that purchasers upon such sales will not bid so readily, and will be very cautious and wary; but the necessity of requiring them to advertise what they mean to sell, arises from this, that it is quite impossible for a court of equity specifically to perform the contract of a vendor, admitting that he did not choose to describe the subject as it was, lest an honest disclosure of its actual state should put it into the hands of the vendee at a lower price (*y*).

SECT. IX.

WHAT PERSONS ARE BOUND TO ENTER INTO COVENANTS FOR TITLE.

IX. What persons bound to enter into.

THE notice taken of the case of Wakeman v. The Duchess of Rutland, has in a measure anticipated

(*x*) Sugd. Vend. & Purch. 455. 6th ed.

(*y*) Deverell v. Lord Bolton, 18 Ves. 505. 512.

this division of our inquiry. It may safely be laid down as a general position, that wherever lands are conveyed by persons in their own right, and for a valuable consideration, they are obliged to enter into the ordinary covenants for title. And for this purpose, where a person has conveyed his estate to trustees upon trust to sell, the parties entitled to the proceeds of sale are, in equity, considered as the real owners, and are consequently required by conveyancers to enter into the usual covenants for title (*z*). The trustee also covenants that he has done no act to incumber.

The owner is liable to the same extent, where his estate is sold under an order of a court of equity (*a*). In Loyd v. Griffith, and Wakeman v. The Duchess of Rutland, the cestuis que trust, it is to be recollected, were to take the surplus only of the money arising from sale, after payment of debts, &c.; and consequently it was decreed by the latter case, that they ought not to be joined as parties to the conveyance: these cases do not, therefore, justify the conclusion, that covenants for title cannot, under any circumstances, be called for from cestuis que trust of the purchase money. If all the debts are discharged before the sale, the trust being in favor of an individual, after payment of debts; or if the purchase money is directed to be paid to one person, or divided between two or more, absolutely, without reference to debts, it is apprehended, that the cestuis que trust, being beneficially the owners of the

(*z*) 4 Cru. Dig. 417.

(*a*) Sugd. Vend. & Purch. 454. 6th ed.

estate in equity, would be decreed to enter into covenants for title (*b*).

Even under circumstances similar to those in the cases of Loyd v. Griffith, and Wakeman v. The Duchess of Rutland, we have seen (*c*), that conveyancers always require covenants for title from those cestuis que trust who take any considerable share of the purchase money.

A bankrupt cannot be compelled to join in the conveyance by his assignees (*d*); but his concurrence is rarely dispensed with, and he is usually made to covenant for title; this of course is matter of favour, and not of right.

His assignees, when they make a title, only covenant that they have done no act to incumber (*e*), unless they advertise to sell absolutely, in which case, it appears (*f*), they must covenant like other vendors. Executors and devisees in trust to sell covenant only that they have done no act to incumber (*g*).

A passage contained in the opinion first expressed by the Chancellor in Wakeman v. The Duchess of Rutland (*h*), requires a word of comment. It will be recollected, that in the will the common clause for

(*b*) Sugd. Vend. & Purch. 456. 6th ed.

(*c*) Ante, p. 398.

(*d*) Waugh v. Land, Coop. 134.

(*e*) White v. Foljambe, 11 Ves. 345.

(*f*) Deverell v. Lord Bolton, 18 Ves. 505. 512.

(*g*) Staines v. Morris, 1 Ves. & B. 12.

(*h*) 3 Ves. 235.

indemnity to purchasers was inserted. With reference to this, Lord Loughborough remarked, that by merely adding the cestuis que trust as parties, the prudence of this clause would be defeated, and the purchaser would take upon himself the knowledge of all the trusts of the will. But why the circumstance of the cestuis que trust joining in the conveyance, should have the effect of rendering the purchaser liable to see to the application of his purchase money, is not explained; nor why in the one case, and not in the other, he should be affected with knowledge of the trusts of the will. The very act of purchasing from devisees in trust to sell, imports notice of the existence of a will, and consequently of all its provisions; it is therefore questionable, whether, in derogation of the testator's express exoneration of the purchaser, he will, by a simple act of precaution, be burthened with the execution of the trusts of the will. Indeed, the contrary has been holden (*i*). One possessed of a term for years bequeathed it to A., and died indebted, having made B. his executor. The executor sold the term, upon which the legatee brought a bill against the purchaser insisting that the executor was but a trustee for the plaintiff, and that the purchaser must have had notice of this trust, the term having been bought

(*i*) Ewer v. Corbet, 2 P. Wms. 148; S. C. 2 Eq. Ca. Ab. 449. pl. 2. Nugent v. Giffard, 1 Atk. 463. Elliot v. Merriman, 2 Atk. 41; S. C. 3 Barnard. 78. Mead v. Lord Orrery, 3 Atk. 235. Ithell v. Beane, 1 Ves. 215; S. C. 1 Dick. 132, nom. Ithel v. Bean. Unless the purchaser appear to collude with the executor, as in Crane v. Drake, 2 Vern. 616; S. C. 1 Eq. Ca. Ab. 240. pl. 29.

of the executor, and consequently must be taken subject to the trust: But the Master of the Rolls said, that as for the notice of the will, and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must of necessity have notice; so that if notice were to be a hindrance, then, of consequence, no executor might sell. This appears to put an end to all doubt on the point.

It is apprehended, observes Mr. Preston, that an objection against a title could not be sustained merely on the absence of the usual and regular covenants for title in former conveyances (*k*).

(*k*) 3 Prest. Abst. 58.

CHAPTER THE TWELFTH.

OF COVENANTS IN RESTRAINT OF ASSIGNING OR UNDERLETTING WITHOUT LICENSE.

I. Object, &c. of the covenant.

GENERALLY speaking, the grant of an estate carries with it all legal incidents; and, therefore, the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant; for *modus et conventio vincunt legem*. That maxim, indeed, is to be taken with some qualification; as a grantor, when he conveys an estate in fee, cannot annex a condition to his grant absolutely restraining alienation; nor, when he conveys an estate tail, a condition not to bar the entail; such restrictions being imposed on him to prevent perpetuities; but short of that restriction, both parties may model it in what manner they please (*a*). A covenant of this kind, if inserted in very long leases, would tie up property for a considerable length of time, and, consequently, might be open to the objection of creating a perpetuity (*b*).

Every man taking a tenant looks to the probability of his rent being paid, his premises being kept in repair, or his land cultivated in a due

(*a*) Doe dem. Mitchinson v. Carter, 8 Term Rep. 60. Wilkinson v. Wilkinson, 3 Swanst. 523.

(*b*) Roe dem. Hunter v. Galliers, 2 Term Rep. 140.

and proper course of husbandry. An attention to these circumstances frequently leads to the introduction of a provision in the lease, restraining alienation or underletting without the express knowledge and sanction of the landlord. In some cases, the restriction extends to the whole duration of the term; in others, to a limited time only; such as, the last year, or the last two or three years; so that, at all events, the lessor may find, on the determination of the demise, a responsible tenant in possession of the property (*c*). The covenant in question is very old in the practice of the law, being recognised as well known in Lord Coke's time; and it is now so generally adopted, that a lease made without such covenants would be considered as improvidently drawn (*d*).

The situation in which a lessee prohibited from assigning without leave is placed, is, that he can have assigns only of two sorts, either an assign approved by the landlord, or an assign by appointment and designation of law (*e*). With relation, therefore, to the means by which a breach of a covenant of this kind may be committed, a distinction has been taken, and adopted in many cases, between those acts which are done *voluntarily* by the covenantor, and those that pass *in invitum*. Where a breach is occasioned by the act of the party himself, he, of course, renders himself liable to the penalties of his

(*c*) Buckland v. Hall, 8 Ves. 94. Church v. Brown, 15 Ves. 269.

(*d*) Folkingham v. Croft, 3 Anstr. 701.

(*e*) Weatherall v. Geering, 12 Ves. 513.

wilful default; but it is otherwise where the assignment is by the act and operation of law.

II. What amounts to a breach.

Covenants of this description have always been construed by courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation (*f*). It is, therefore, clearly settled (*g*), that a covenant in restraint of assignment

1. Under-lease.

does not extend to an under-lease; that being merely the creation of a partial subordinate interest, and not a transfer of the whole estate. In one case, the words of the lease were: "that the lessee, his executors or administrators, shall not nor will, at any time or times during this demise, assign, transfer, or set over, or otherwise do or put away this present indenture of demise, or the premises hereby demised, or any part thereof, to any person or persons whomsoever, without the license and consent of the lessor." The plaintiff in an ejectment was nonsuited; for the words *assign, transfer, and set over*, were deemed to be mere words of assignment; and, *otherwise do or put away*, signified any other mode of getting rid of the premises entirely, and could not be confined to the making of an under-lease; particularly as the lessor, if he pleased, might have provided against the change of occupancy as well as against an assignment; but he had not done so by any words

(*f*) Church v. Brown, 15 Ves. 265. Doe dem. Mitchinson v. Carter, 8 Term Rep. 61.

(*g*) Crusoe dem. Blencowe v. Bugby, 2 W. Blac. 766; S. C. 3 Wils. 234. Church v. Brown, 15 Ves. 265. Jalabert v. Duke of Chandos, 1 Eden, 372. Kinnersley v. Orpe, 1 Dougl. 57. Holford v. Hatch, Ibid. 183. Brewer v. Hill, 2 Anstr. 413.

which would admit of no other meaning. But where the proviso was, that the lessee should not set, let, or assign over, &c.; a demise for a term, which fell a day short of the original lease, was held to be within the meaning of the clause (*h*). So, an underlease was holden to be comprised within a proviso for re-entry, if the lessee, his executors or administrators, should assign or otherwise part with the indenture of lease, and the premises, for the whole or any part of the term (*i*).

It is incumbent on the party who would take advantage of a breach of a covenant prohibiting assignment, to show, that an actual assignment has been effected; and it is not sufficient to prove that a third person is in possession of the premises, carrying on his business there, having placed his name over the door; for, upon such evidence, *non constat* that the stranger was not a tortious intruder, and the original lessee willing to be turned out of possession. This evidence would not be sufficient, even though the lessee had covenanted not to part with the possession (*k*). It is, likewise, insufficient to assign as a breach, that the lessee made assignment contrary to the form and effect of the covenant: the declaration should expressly allege, that the assignment was made *without license* (*l*).

Since, therefore, a covenant restraining assign-

(*h*) Roe dem. Gregson v. Harrison, 2 Term Rep. 425.

(*i*) Doe dem. Holland v. Worsley, 1 Campb. 20.

(*k*) Doe v. Payne, 1 Stark. 86.

(*l*) Copping v. Slaymaker, or Steymaker, 2 Show. 248; S. C. Skin. 120; T. Jo. 229.

ment may be easily evaded by the grant of an underlease; clauses of this kind are seldom penned without adding also a negative on the right to underlet, except with the lessor's consent. And although an underlease is no breach of a covenant not to assign (*m*), yet the converse of the proposition cannot be maintained; for, on a covenant not to let, set, or demise, for all or any part of the term, a breach was holden to be wrought by an assignment; because it would be very strange, if the landlord meant to restrain underletting, that he should not mean to forbid the tenant to part with the whole interest (*n*). And this corresponds with the old law on the subject (*o*).

2. Letting lodgings.

Covenants denying the privilege of underletting, can only extend to such underletting as a license might be expected to be applied for. The exclusive enjoyment, therefore, of a room in the premises by a lodger, will not occasion a breach of a covenant "not to grant any underlease or leases, for any term or terms whatsoever, or let, set, assign, transfer, set over, or otherwise part with, the said messuage or tenement and premises, or his or their term or interest by the said indenture granted, or intended so to be, or any part thereof;" for whoever, said Lord Ellenborough, heard of a license from a landlord to take in lodgers? (*p*).

(*m*) Crusoe dem. Blencowe v. Bugby, 3 Wils. 234; S. C. 2 W. Blac. 766.

(*n*) Greenaway v. Adams, 12 Ves. 395. 400.

(*o*) Berry v. Taunton, Cro. Eliz. 331.

(*p*) Doe dem. Pitt v. Laming, 4 Campb. 73.

3. Disposing of part of the premises.

But where a lease contained a proviso for re-entry, "in case the tenant, his executors or administrators, should demise, lease, grant, or let, the said demised premises, or any part or parcel thereof, or convey, alien, assign, or set over, the indenture, or his or their interest therein, or any part thereof, to any person or persons whomsoever, for all or any part of the said term, without the special license and consent of the lessor, his heirs or assigns, in writing;" and the defendant, without such license, let a person of the name of Pincheon into the occupation of part of the premises exclusively, and of other parts jointly with the defendant, which premises Pincheon was to deliver up on being required so to do, on having three months' notice from the defendant; and it was agreed, that the parties should enter into partnership, and should equally divide the profits of the goods sold therein, as well as the produce of the garden; It was held, that it was a parting with the exclusive possession of some part of the demised premises; and conferred on the lessor the right of re-entry; and that the circumstance of Pincheon's occupation being gratuitous was immaterial to the landlord, who meant to guard against having any other than the person in whom he confided as tenant, let into possession without his consent (*q*).

4. Parting with possession under an agreement.

Assuming, what appears by the report to be the fact, that Pincheon was let into possession under an agreement only, and not a formal lease, it would be difficult to reconcile this case with what had previ-

(*q*) Roe dem. Dingley v. Sales, 1 Mau. & Selw. 297. See also Marsh v. Curteis, Mo. 425; S.C. 2 And. 42. 90. Doe dem. Holland v. Worsley, 1 Campb. 20.

ously fallen from Lord Eldon on the same point. In the course of his judgment in Church v. Brown (*r*), his Lordship said: "Further, if the landlord has a covenant against both assigning and underletting, the tenant may by agreement, neither assigning nor underletting, put another person in possession of the premises, and parting with the possession in that manner would not be a breach of those covenants." To avoid all doubt and chance of litigation, where the landlord is desirous that the possession as well as property should be confined to his tenant, express words prohibiting the privilege of taking in lodgers, or parting with the possession of the premises, must be contained in the deed. And as a covenant not to part with the possession of the premises will not restrain the tenant from parting with a part of the premises (*s*), the lease must be worded accordingly.

5. Deposit of deeds.

Nor will a covenant not to grant any underlease or leases, or let, set, assign, transfer, set over, or otherwise part with the premises demised, or the indenture of lease of a coffee-house, be broken by depositing the lease with the brewers of the lessee, as a security for beer supplied to the house (*t*).

6. Advertisement for sale.

It has also been settled, that an advertisement for

(*r*) Church v. Brown, 15 Ves. 265. See likewise Williams v. Cheney, 3 Ves. 61.

(*s*) Church v. Brown, 15 Ves. 265. Collins v. Sillye, Sty. 265.

(*t*) Doe dem. Pitt v. Laming, 1 Ry. & M. 36. Doe dem. Pitt v. Hogg, 4 Dow. & Ry. 226; S. C. 1 Carr. & P. 160. And see Doe dem. Goodbehere v. Bevan, 3 Mau. & Selw. 353.

the sale of a lease, will not create a breach of a condition or covenant prohibiting an underlease (*u*).

Where the restrictive covenant is limited to a particular person, this must be understood of an immediate assignment to that person; for if the lessee aliens his term to J. S., who afterwards assigns the same to the individual intended to be excluded, no breach is occasioned by such alienation (*v*); unless such alienation be made to J. S., to the intent and purpose that he shall assign over; for, *quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum* (*w*). Nor will an agreement of this sort be binding on the covenantor, except in respect of his original estate; for if the term become vested in him in a new capacity, he will be discharged from the obligation: As if, on the bankruptcy of a lessee, who had entered into a covenant not to assign or underlet, the assignees under the commission assign the same over to J. S., who then assigns to the bankrupt, the original lessee, and he afterwards makes an underlease of the premises; no forfeiture can accrue from this act; because, on the acceptance of the term by the assignees, the lessee becomes absolved by the operation of the bankrupt laws from all the covenants contained in the lease; and his title is then derived, not from the original lessor, but from J. S., and he takes the estate in a different capacity, viz. as assignee by purchase (*x*).

(*u*) Gourlay v. The Duke of Somerset, 1 Ves. & B. 68. See also Turner v. Richardson, 7 East, 335; S. C. 3 Smith, 330.

(*v*) Anon. Dy. 45, a.

(*w*) Co. Lit. 223, b.

(*x*) Doe dem. Cheere v. Smith, 1 Marsh. 359; S. C. 5 Taunt. 795

7. Bequest. Whether a bequest, or, as the books denominate it, the devise of a term, without the landlord's assent, is a breach of a covenant not to assign without license, is now to be considered. The law on this point appears to have undergone a total alteration; most of the early cases unequivocally deciding, that such a bequest did occasion a breach; and one case, in the time of James the First, and two recent judicial *dicta*, as explicitly advancing a contrary doctrine. Nearly all the cases have arisen on conditions, but this circumstance, it is apprehended, may be regarded as unimportant.

One of the first cases on the subject is to be found in Dyer (*y*). There a lease was made for a term of years, upon condition that the lessee should not assign his term without the assent of his lessor. The lessee devised his term to his son and wife, and made them his executors; and it was said, that if they had not been executors, the condition would have been broken. This was followed by Knight v. Mory (*z*), in which it was also held, that a general devise was a breach of the condition. In another case (*a*), where there was a lease for years, on condition that the lessee should not devise (*b*) the land, or assign over his term; and by will he bequeathed it; Gawdy, Fenner, and Clench, held, clearly, that the condition was broken, for by this bequest the

(*y*) Lord Windsor v. Burry, Dy. 45, b. in marg.

(*z*) Knight v. Mory, Cro. Eliz. 60.

(*a*) Barry v. Stanton, Cro. Eliz. 330.

(*b*) This word, it seems, is a typographical mistake for *demise*.

term was disposed of by his gift, which was an alienation, and was as strong as any other alienation: but Popham delivered no opinion. The point soon again came before the court; and all the Justices held, that a devise was a breach of a condition not to demise the premises (*c*). Anterior to that period, in the reign of Henry the Eighth, the court, indeed, had proceeded a step further. A lease for years was made, upon condition, that if the lessee *during his life* should assign the term without consent, the lessor might re-enter; and even here, although the restraint on alienation was expressly confined to the lessee's life, R. Brook, and Hales, the Master of the Rolls, thought that this was a forfeiture; for the devisee, when he was in, should be said to be in by the assignment which the lessee (*d*) made during his life (*e*). And a diversity was said to exist between an assignment, which the law made, and an assignment made by the lessee himself; for had the legatee been also executor, the covenant or condition would not have been broken (*f*). That the law on the subject continued uniform to the time of James the First, is apparent from the judgment in Horton v. Horton (*g*); viz. that a devise was a breach of the condition; for the lessee thereby made an alienation.

The books are silent on this point, as far as the

(*c*) Berry v. Taunton, Cro. Eliz. 331; semb. S. C. Ow. 14, nom. Taunton's case.

(*d*) *Lessor* in the report.

(*e*) Parry v. Harbert, Dy. 45, b.

(*f*) Ibid. Lord Windsor v. Burry, Dy. 45, b. in marg. Dumper v. Syms, Cro. Eliz. 817.

(*g*) Horton v. Horton, Cro. Jac. 74.

author has been able to learn, until the eighth of Charles the Second, when first a contrary doctrine was broached. A case then occurred, in which it was said, that if a lessee for years do covenant with the lessor not to assign over his term without the lessor's consent in writing, and do afterwards without such consent devise the term to J. S., this is not a breach of the covenant, for a devise is not a lease (*h*). This case, it is remarkable, makes no allusion to the antecedent decisions; yet its authority has been recognised and confirmed by judges of more recent times. It was quoted by counsel in Crusoe v. Bugby (*i*); and the court, in delivering their judgment, said, that the devising a term was a doing or putting it away, but that it did not amount to an assignment, or to a breach of the covenant or condition. Of this opinion also was Bayley, J. (*k*), who admitted, that a devise of a term by the lessee was not a breach of the covenant not to assign; and he observed, that such had been the general impression in the minds of the profession for a long series of years.

Under these circumstances, where no difficulty exists in obtaining the lessor's assent to a bequest, prudence would suggest the expediency of procuring his concurrence, in preference to the risk of an action, or a forfeiture of the estate, for assigning without license.

(*h*) Fox v. Swann, Sty. 482, 3.

(*i*) Crusoe dem. Blencowe v. Bugby, 3 Wils. 237; S. C. 2 W. Blac. 766; in which report the point is not judicially noticed.

(*k*) Doe dem. Goodbehere v. Bevan, 3 Mau. & Selw. 361.

8. Execution on a warrant of attorney.

At various times, the question has been agitated, Whether a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, created a forfeiture, when a proviso was contained in the lease determining it on assigning over. The early cases on the subject are contradictory; and until lately the precise point was not settled. There is this note in the margin of Dyer's Reports (*l*): "A man leased for years, upon condition that the lessee should not assign it over: the lessee acknowledged a statute: the term is extended; Walters cited this; Resolved to be a breach of the condition, although they come in in the *post*, and by act of law." In the case in Anderson (*m*), there was a difference of opinion among the judges; it was said by one of them, that if land be leased on condition not to assign, and the lease be taken in execution by reason of a judgment or recognizance, it is not a forfeiture; but this was denied by another of the judges, who said, that the execution was itself a forfeiture, to which the reporter adds, "which is hard, as it seems." The case is also reported by Leonard (*n*), according to which book, Periam, J. and Meade, J. held, that it was not an alienation against the condition. In another case in Leonard (*o*), where a man devised lands to his wife, until his son William should attain the age of twenty-two years, and then the remainder of part of the lands to his two sons, A. and John; the remainder of other part of his lands to two others of his said sons, upon condition, that if any of his

(*l*) Dy. 6, a.
(*m*) 1 And. 124.
(*n*) 1 Leon. 3.
(*o*) Large's case, 2 Leon. 83.

said sons should, before William should come to the age of twenty-two, go about to make sale of any part, &c., he should lose the lands, and the same should remain over; it was said, that if the devisee had entered into a statute to the value of the land leased, by the intent of the will, the same had been a sale; and such was the opinion of the whole court. These are the earliest cases on this subject.

At length came a case (*p*), by which the point was set at rest. The lease on which the action arose contained a covenant, that the lessee, his executors, administrators, or assigns, should not let, set, assign, transfer, make over, barter, exchange, or otherwise part with, the indenture, or the said messuage, lands, &c. thereby demised, or any part thereof, to any person or persons whomsoever, for all or any part of the said term, without the special license of the lessor, his heirs or assigns, in writing: with a proviso for re-entry on non-performance of the covenants. A creditor of the lessee, for a just debt, took from him a warrant of attorney to confess judgment, upon which, judgment was accordingly entered up, and execution issued; and under this execution the lease was sold by the sheriff to the defendant. At the time of his purchase the defendant knew that the lease contained the said covenant and proviso. The distinction between voluntary acts on

(*p*) Doe dem. Mitchinson v. Carter, 8 Term Rep. 57. And see Elliot v. Edwards, 3 Bos. & Pul. 181. Crusoe dem. Blencowe v. Bugby, 3 Wils. 237. Doe dem. Duke of Norfolk v. Hawke, 2 East, 481. Goring v. Warner, 2 Eq. Ca. Ab. 100; S. C. 7 Vin. Ab. 85. pl. 9.

the part of the lessee, and those that passed *in invitum*, was adopted by the court, and formed the ground of their decision: they determined, that judgments in contemplation of law always passed *in invitum;* and that there was no difference between a judgment obtained in consequence of an action resisted, and a judgment that was signed under a warrant of attorney; since the latter was merely to shorten the process, and to lessen the expense of the proceedings; that if the warrant of attorney had been a specific lien on the estate, that, perhaps, would have come within the words of this covenant; but it only gave the creditor power to enter up judgment against the tenant; and it did not follow, that the term must necessarily be taken in execution under that judgment; it might, they said, as well be argued, that the giving a bond, which might lead to a judgment and execution, on which the term might be taken, was a forfeiture. If, however, the warrant of attorney be given for the express purpose of having the lease taken in execution, and the tenant consent to it, the court will not be deceived by such a flimsy pretext; the maxim being, that that which cannot be done *per directum* shall not be accomplished *per obliquum*: and, as the tenant could not by any assignment, under-lease, or mortgage, convey his interest to a creditor, he should not be able to convey it by any attempt of this kind; for that would be an allowance to the party to avail himself of his own fraud to avoid the ordinances of the law (*q*).

(*q*) Ibid.

9. Extent.

A very recent case (*r*) connected with this subject must not be omitted. A clause was inserted in a lease, providing for the re-entry of the lessor, in case the term of years thereby granted should be extended or taken in execution. Before the end of the term the sheriff entered on the premises under a writ of extent against the lessees, at the suit of the crown, held an inquisition, and seised the lessees' interest into the King's hands; and the Judges held, that this proceeding was a taking in execution within the latter clause of the conditions, and that the term was determined, and forfeited to the lessor (*r*).

10. Bankruptcy.

On the distinction which governed the judgment in Doe v. Carter, it has been holden, that the bankruptcy of the lessee, and consequent vesting of his term in the assignees under the commission, are not a breach of a covenant restraining assignment; the word *assigns* being construed by the court to mean, voluntary assigns. The decisions have even gone further than that; and it is now settled, that the immediate vendee from the assignee is not within the proviso; the reason of which is, that the assignee in law cannot be incumbered with the engagement belonging to the property which he takes; such as, in this case, the carrying on the bankrupt's trade in a public house (*s*). And no difference exists be-

(*r*) Rex v. Topping, 1 M'Clel. & Y. 544.

(*s*) Doe dem. Goodbehere v. Bevan, 3 Man. & Selw. 353. Doe dem. Cheere v. Smith, 5 Taunt. 795; S. C. 1 Marsh. 359. Onslow v. Corrie, 2 Madd. 341. Goring v. Warner, 2 Eq. Ca. Ab. 100. pl. 3; S. C. 7 Vin. Ab. 85. pl. 9. But see Sir William More's case, Cro. Eliz. 26; where the administrator was bound, because, it was said, he was an assignee in law.

tween the compulsory course under which the sale is made, whether it be in the case of an execution on a warrant of attorney, or in the case of a bankruptcy; for the commission of bankruptcy is a statutable execution.

It has also lately been decided, where a tenant held some leasehold property, subject to a proviso for re-entry on aliening without license, that an assignment by him of all his property for the benefit of his creditors, which was void in law, and was afterwards avoided in fact, as an act of bankruptcy, by the issuing of a commission against the lessee, prior to any act or proceeding done or instituted by or on the part of the lessor, either by re-entry or otherwise, did not operate as a breach of the condition in the lease (*t*).

11. Taking benefit of Insolvent Act.

And on the above distinction between voluntary and involuntary acts, it appears, that an assignment by an insolvent debtor, who is not in a situation to be compelled to part with his property, would be comprehended within the meaning of a covenant or condition "not to contract or agree to sell, or otherwise part with the premises, or any part thereof, or in any way charge the same, or any part thereof, as a security for any sum or sums of money" (*u*).

Sir William Grant, M. R., considered, that bankruptcy superseded an agreement not to assign without

(*t*) Doe dem. Lloyd v. Powell, 5 Barn. & Cres. 308; S. C. 8 Dow. & Ry. 35.

(*u*) Shee v. Hale, 13 Ves. 404. See also Wilkinson v. Wilkinson, 3 Swanst. 515.

license, only in favor of general creditors (*v*). This, however, appears to have been in effect overruled; for, in a later case, in which a petition had been presented for the sale of some leasehold property, the lease of which had been deposited with the petitioner for securing a debt; as the lease contained no clause making an act of bankruptcy a determination of the lease, an order was made, that the premises should be sold under the lessee's commission (*w*).

Where assignments are made by the assignees of a bankrupt, they must be fair and *bonâ fide;* or equity will interpose and annul the transaction. A lessee for eleven years, at 140*l.* rent, who had covenanted for himself, his executors, and administrators, that he would not, without the lessor's consent, assign over the lease, became bankrupt; the defendant Hoare, the assignee under the commission, entered on the farm, sold off the crop and stock, paid the Michaelmas rent, 1739, and on the day before the next rent-day, assigned over to one Robinson, of whose insolvency there was strong proof: The bill was brought to oblige Hoare to keep the lease during the term. It appearing in evidence, that Robinson never ploughed or sowed the land, nor resided on the farm, but occupied it rather as an agent, Lord Hardwicke held it to be a fraudulent transaction between Hoare and Robinson, and decreed Hoare to

(*v*) Weatherall v. Geering, 12 Ves. 504.

(*w*) Ex parte Sherman, 1 Buck, 462. Ex parte Baglehole, 1 Rose, 432. Doe dem. Goodbehere v. Bevan, 3 Man. & Selw. 354.

answer the rent to the time, and the assignment to be set aside (*x*).

In consequence of these resolutions, it is now the frequent practice of conveyancers to stipulate, in the lease, for its determination, in case the lessee should become bankrupt. Some doubts were formerly entertained, whether provisions of this kind were contrary to law; but their legality has been fully established; and it has been adjudged, that they are neither in opposition to any express law, nor unlawful as against reason or public policy (*y*). But covenants of this kind do not fall within the range of what are termed *usual covenants* (*z*).

12. Assignments by executors, &c.

Executors and administrators stand, in this respect, in a situation different from that of assignees of a bankrupt. Although it is true, that executors or administrators are not comprehended within the clause restraining assignment, so as to occasion a breach by the term vesting in them (*a*); yet, where they are named in the covenant, they are bound thereby, and can only convey the estate in the same manner as their testator or intestate could have conveyed it (*b*).

(*x*) Philpot v. Hoare, 2 Atk. 219; S. C. Ambl. 480.

(*y*) Roe dem. Hunter v. Galliers, 2 Term Rep. 133. Doe dem. Lockwood v. Clarke, 8 East, 185. Church v. Brown, 15 Ves. 268. Dommett v. Bedford, 3 Ves. 148; S. C. 6 Term Rep. 684. Cooper v. Wyatt, 5 Madd. 482. Doe dem. Mitchinson v. Carter, 8 Term Rep. 61.

(*z*) Ibid.

(*a*) Parry v. Harbert, Dy. 45, b. Ld. Windsor v. Barry, Ibid. marg.

(*b*) Roe dem. Gregson v. Harrison, 2 Term Rep. 425. Stanhope v. Skeggs, Cited 2 Term Rep. 138.

If the covenant or proviso does not contain the word *executors*, but is confined to an assignment by the lessee himself, it may be doubted whether the restriction would extend to prevent a conveyance by the executor (*c*). But, it is observable, that a covenant by a lessee for himself and his assigns will bind his administrator (*d*). If the covenant not to assign contains an exception in favor of an assignment by will, it appears, that executors, claiming under the will, are not within the exception, so as to be at liberty to sell for payment of the testator's debts without leave of the lessor (*e*). Where, however, a forfeiture had been incurred by the executor selling the lease for payment of debts, and the assignee was turned out of possession; the Court of Chancery, on the ground that the lease was sold for payment of debts, to which it was liable, decreed the plaintiff to be relieved against the forfeiture (*f*).

The case of Seers v. Hind (*g*), in which one of the questions was, whether executors were warranted in disposing of a lease, as assets of the testator, where there was a proviso against alienation by the lessee, apparently takes a different view of the law. It was there said by Lord Chancellor Thurlow: "If A. lets

(*c*) 2 Term Rep. 429. Anon. Dy. 65, 6. pl. 8. Seers v. Hind, 1 Ves. Jun. 295. Lord Stanhope v. Skeggs, Cited 2 Term Rep. 138.

(*d*) Mo. 44. pl. 136. Sir W. More's case, Cro. Eliz. 26; S. C. And. 123. Thornhil v. King, Cro. Eliz. 757.

(*e*) Lloyd v. Crispe, 5 Taunt. 249.

(*f*) Cox v. Brown, 1 Rep. in Ch. 170.

(*g*) Seers v. Hind, 1 Ves. Jun. 295.

a farm to B., with covenant not to alien, and B. dies, may not his executors dispose of it? I think it has always been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God. I remember, Lord Camden entered into the question much in the same way; he took it to be clear law, that an alienation by death could not be a forfeiture. In case of a lease for years to A., it goes to his executor, not by way of limitation, as in the case of a remainder over, &c.; but as coming in the place of a lessee. I understood it to be well settled as I have stated." One way, perhaps, of reconciling this note (for it can scarcely be called a report) with the preceding cases, is, by taking for granted, that the restriction was confined to the lessee himself; and this supposition is warranted by the report, which makes no mention of executors (*h*).

The result of the authorities seems to be, that under such circumstances a forfeiture would be created at law, relievable however in equity; though, generally speaking, that court will not afford any relief against a forfeiture occasioned by assigning without license (*i*).

The case of a party taking an estate as executor, is like that of an heir taking a freehold; and he ought to have notice of the condition, in order to affect his

(*h*) See Anon. Dy. 66, a. pl. 8.

(*i*) Wafer v. Mocato, 9 Mod. 112; S. C. 2 Eq. Ca. Ab. 58. Reynolds v. Pitt, 19 Ves. 142. Hill v. Barclay, 18 Ves. 63. Lovat v. Lord Ranelagh, 3 Ves. & B. 31. Rolfe v. Harris, 2 Price, 211, note. Wadman v. Calcraft, 10 Ves. 67. Sanders v. Pope, 12 Ves. 292.

interest, by way of forfeiture for breach of the condition. Thus, where there was a proviso in a lease for three lives, that if the lessee, his executors or assigns, should lease the premises for more than seven years, (except it should be by his or their last will, and for the use of any wife or child,) without the license of the landlord in writing, it should be lawful for the landlord to re-enter; and the lessee's executor leased for fourteen years, without license, and without knowing the particular circumstances relative to the lease; Lord Chancellor Northington's opinion was, that as the executor was a stranger to the condition, the lease itself, at the time, being in the hands of another person; and as the underlease could not be for fourteen years absolutely, but must determine on the death of the executor (the last surviving life), the demise by him was not a breach of the condition (*k*).

III. Consequences of license once granted.

By way of preliminary remark, it may be stated, that, in addition to the covenant denying the privilege of alienation without the lessor's leave, it is the almost invariable practice to reserve to the landlord a power of re-entry, in case the tenant should not observe the covenants contained in the lease. This provision will enable the landlord to re-enter, or bring an ejectment, and by these means defeat the lessee's estate, and determine the tenancy, leaving both parties in the same situation as if the lease had never been granted. But the lessor, in the absence of a proviso for re-entry, would possess no such power, the mere covenant not to assign enabling him

(*k*) Northcote v. Duke, Ambl. 511; S. C. 2 Eden, 319.

to sue for damages only (*l*). The mere covenant, therefore, would afford a very indifferent security to the lessor, from the difficulty of ascertaining the actual extent of damage done by assignment, and the proportionate pecuniary recompense to be recovered.

It has long been clearly settled as law, that a *proviso* or *condition* for re-entry on assigning without license, was dispensed with by a license once granted, even in favour of a particular person; so that no subsequent alienation could break the proviso, or give cause of re-entry to the lessor; for the lessor could not admit an alienation at one time, and yet continue the estate subject to the proviso after; and inasmuch as, by force of the lessor's license, and of the lessee's assignment, the estate and interest of the assignee were absolute, it was not possible that his assignee, who had his estate and interest, should be subject to the first condition. Dumpor's case (*m*) has been universally referred to as justifying this position: and Lord Eldon, notwithstanding his remark, that the case always struck him as being extraordinary (*n*), and that he should not have thought it a very good decision originally (*o*), has admitted that it is now the law of the land.

(*l*) See Doe dem. Willson v. Phillips, 2 Bing. 13; S. C. 9 J. B. Mo. 46.

(*m*) Dumpor's case, 4 Co. 119, b. Whitehcot v. Fox, Cro. Jac. 398; S. C. 1 Rol. 68. 389; 2 Bulstr. 290. Cont. Anon. Dy. 152, a. pl. 7. Thornhil v. King, Cro. Eliz. 757.

(*n*) Brummell v. Macpherson, 14 Ves. 175.

(*o*) Macher v. The Foundling Hospital, 1 Ves. & B. 191. See also Doe dem. Boscawen v. Bliss, 4 Taunt. 735.

The ground of the resolution in Dumpor's case, and of those determinations which have succeeded and confirmed that decision, was, that the proviso or condition could not be divided or apportioned by the act of the parties. The same principle has also been extended to a *mere covenant*, whether properly or not is questionable, as covenants, unlike conditions, do not possess in their nature the property of indivisibility (*p*). In some of the cases (*q*), it is laid down, that such a covenant is at an end by a license once granted. Dumpor's case is, indeed, the authority cited in support of the statement; but the above distinction between covenants alone, and covenants coupled with provisoes or conditions for re-entry, is not adverted to.

IV. Whether it runs with the land.

Now, if it be law, that the grant of a license will operate as a discharge of the covenant, which is very doubtful; it follows, that the covenant, if once destroyed by dispensation, cannot possibly run with the land (*r*); since it cannot be revived to be rendered binding on an assignee. Nor, then, would the express mention of the assignee, as if the covenant were entered into by the lessee for himself, his executors, administrators, and *assigns*, make a difference in this respect (*s*). Some of the cases, how-

(*p*) Congham v. King, Cro. Car. 221; S. C. Sir W. Jo. 245, nom. Conan v. Kemise. Stevenson v. Lambard, 2 East, 575. Twynam v. Pickard, 2 Barn. & Ald. 105.

(*q*) Jones v. Jones, 12 Ves. 191. Macher v. The Foundling Hospital, 1 Ves. & B. 191. Lloyd v. Crispe, 5 Taunt. 257.

(*r*) Collins v. Sillye, Sty. 265. See also Lucas v. How, T. Raym. 250. Pennant's case, 3 Co. 64, a. Anon. Dy. 152, a. pl. 7.

(*s*) Dumpor's case, 4 Co. 119, b.; S. C. Cro. Eliz. 815, nom. Dumper v. Syms.

ever, lead to a different conclusion (*t*). To obviate the difficulty, a new covenant by the assignee with the lessor not to assign without license should be inserted in the assignment; with a fresh proviso for the landlord's re-entry on non-performance of any of the covenants contained therein. A license once given is not defeated by a subsequent grant of the lessor's reversion: the assignment by the lessee will be supported against the new reversioner (*u*).

V. Of the kind of license required.

Under a proviso in a lease not to assign or demise the premises without the consent of the lessor in writing, a parol license to underlet is not sufficient in equity, any more than at law; unless such parol license be used as a snare, and under circumstances which amount to a fraud; in which case equity will give relief (*v*).

VI. Waiver of forfeiture.

Where a forfeiture of the lease has been incurred by the lessee's non-observance of a proviso restraining alienation, the landlord may, at his election, avail himself of it to determine his tenant's interest. Many acts, however, may be committed on the lessor's part, which the courts will construe to be a

(*t*) Anon. Dy. 152, a. Thornhil v. King, Cro. Eliz. 757. Lloyd v. Crispe, 5 Taunt. 249. Doe dem. Cheere v. Smith, 5 Taunt. 795; S. C. 1 Marsh. 359. Bally v. Wells, 3 Wils. 33. Philpot v. Hoare, 2 Atk. 219; S. C. Ambl. 480. Paul v. Nurse, 8 Barn. & Cres. 486.

(*u*) Walker v. Ballamie, Cro. Jac. 102.

(*v*) Richardson v. Evans, 3 Madd. 218. See Roe dem. Gregson v. Harrison, 2 Term Rep. 425. Littler v. Holland, 3 Term Rep. 590.

waiver of such forfeiture; and as cases of forfeiture are not favoured in law (*w*), where once waived, the court will not render any assistance. Thus, if the lessor has full notice of the breach of the condition which gave him a right to re-enter, and does not take advantage of it, but accepts rent subsequently accrued; this will amount to a waiver; for these acts evidence his intention that the lease shall continue (*x*); even though the rent be paid by the assignee (*y*). But an acceptance of the rent after the day appointed, does not dispense with a forfeiture occasioned by the non-payment of that same rent at the stipulated time; to operate as a waiver, the rent received must grow due after the lessor's right of entry (*z*). It is also necessary that the party, at the time of taking such rent, be acquainted with the fact of forfeiture; a receipt given by a landlord for rent, subsequent to the time of forfeiture, shall be deemed to be an acknowledgment of the tenancy, in those cases only in which he is aware of the act of forfeiture, at the time (*a*).

A lessor who has a right of re-entry reserved on a

(*w*) Moody v. Garnon, Mo. 848. Sanders v. Pope, 12 Ves. 290.

(*x*) Goodright dem. Walter v. Davids, Cowp. 803. Arnsby v. Woodward, 6 Barn. & Cres. 519.

(*y*) Whitchcot v. Fox, Cro. Jac. 398; S. C. 1 Rol. 68. 389; 2 Bulstr. 290.

(*z*) Greene's case, 1 Leon. 262. Anon. 3 Salk. 3. Co. Lit. 211, b.

(*a*) Roe dem. Gregson v. Harrison, 2 Term Rep. 425. Whitchcot v. Fox, Cro. Jac. 398; S. C. 1 Rol. 68. 389; 2 Bulstr. 290. Pennant's case, 3 Co. 64, a. Marsh v. Curteis, Mo. 425; S. C. 2 And. 42. 90.

breach of covenant in restraint of assignment or underletting, is not, by waiving his re-entry on one under-letting, precluded from re-entering on the grant of a future under-lease (*b*).

Before a court of equity will enforce a discovery whether the lessee has assigned his term without license, the lessor must expressly waive any forfeiture occasioned by such assignment; and although the bill admits the defendant to be assignee and tenant; yet there is a difference between an implied affirming him to be tenant, and an express waiver of the forfeiture; for if the defendant, in the former case, should make the discovery, the plaintiff might immediately bring an action thereon; nor could the defendant come into equity for an injunction, which would be otherwise on the express waiver (*c*).

VII. Of equitable relief against forfeiture for breach.

Equity will not relieve against a breach of a covenant not to assign without license; for the lessee cannot show, that by the assignment the lessor sustains no damage; that, on the contrary, he, the lessee, is a beggar, who could not pay the rent, and that the assignee is a solvent tenant; that the lessor is, therefore, in a better condition, having two persons answerable to him instead of one. The answer is, that the court cannot estimate the damage: the fact, as it is alleged, may be true; but the con-

(*b*) Roe dem. Boscawen v. Bliss, 4 Taunt. 735.

(*c*) Fane v. Atlee, 1 Eq. Ca. Ab. 77. pl. 15. Lord Uxbridge v. Staveland, 1 Ves. 56.

sideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the whole continuance of the lease: it is sufficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation. In these cases, the law having ascertained the contract, and the rights of the contracting parties, a court of equity ought not to interfere (*d*).

VIII. Whether it is an usual covenant.

On grants of leases much discussion has arisen, as to the insertion, as a matter of right, of a covenant prohibiting the lessee from disposing of the lease without his landlord's license. Agreements for leases seldom contain in detail all the clauses which are to be introduced into the lease itself; but commonly refer to them in general terms, as matters to be settled by the ordinary course and acknowledged practice of common law. Where the agreement is totally silent as to the covenants to be contained in the lease, and expresses only that it is to contain the *usual* covenants, a fair question arises, What those usual covenants are. For a considerable period the point remained unsettled, the cases, by contrary decisions, warranting an opinion on either side: but whatever doubts may have formerly existed on the subject, they are now put an end to by a recent adjudication.

Usual covenants have been defined to be, such as may be exacted independently of positive stipulation; such as are incident to the nature of the contract,

(*d*) Hill v. Barclay, 18 Ves. 63.

and presumably, therefore, in the contemplation of both the parties to that contract (*e*); and such as are calculated to secure the full effect of the agreement (*f*). It remains, therefore, to ascertain, whether a covenant restraining alienation without leave, falls within the range of this definition.

The first express declaration in judgment upon the very point, occurred in the case of Henderson v. Hay (*g*); where the agreement was for a lease of a public-house, upon "common and usual covenants," and the bill was filed for a specific performance. Lord Thurlow said, that common and usual covenants must mean covenants incidental to the lease; that though the covenant not to assign without license might be a very usual one, as he believed it was, where a brewer or vintner let a public-house, that would not make it a common covenant. And a reference was directed to the Master generally to settle a proper lease, without any direction to omit the clause; but with a declaration, that the defendant had no right to have a clause inserted restraining alienation without license.

About a twelvemonth after, a case came before

(*e*) Wilkins v. Fry, 1 Meriv. 263, 4. per Sir William Grant. And see Bozon v. Farlow, 1 Meriv. 473. Harnett v. Yeilding, 2 Scho. & Lef. 556. Garrard v. Grinling, 2 Swanst. 249.

(*f*) Jones v. Jones, 12 Ves. 189. See Bennett v. Womack, 7 Barn. & Cres. 627.

(*g*) Henderson v. Hay, 3 Bro. C. C. 632. See Lord Eldon's observations on this case, 15 Ves. 271.

the court, at *Nisi Prius* (*h*), in which an opposite judgment was pronounced. The agreement declared, that the lease should contain "none but fair and usual covenants;" and with the knowledge of the decision in Henderson v. Hay, which was cited to the court, Lord Kenyon held, that a covenant not to assign or underlet without the lessor's leave, was a fair covenant, as it provided properly for the interest of the party demising, and it sufficiently appeared to have been a usual one, so long since as Dumpor's case (*i*); and he said he had never seen a lease properly drawn without it.

The same point came before the Court of Exchequer three years afterwards (*k*), on a bill for a specific performance of an agreement for the lease of a public-house at Leeds, "with all usual and reasonable covenants commonly inserted in leases of the same nature." By the evidence it appeared, that there was no regular local practice upon the subject, it being equally common in such leases to insert or omit the covenant in dispute. The court took time to consider; and in the next term, Macdonald, C. B., after noticing the above contradictory cases, stated the opinion of the court to be, that the covenant, being so established in common practice, might fairly be considered as a common and usual covenant to be inserted in leases. The bill was dismissed; but as the opposite decisions raised a case of fair doubt for

(*h*) Morgan v. Slaughter, 1 Esp. N. P. C. 8.

(*i*) 9 Co. 119, b.

(*k*) Folkingham v. Croft, 3 Austr. 700.

the plaintiff to bring into court, he was not to pay costs.

Notwithstanding the last case was adjudged after mature deliberation, it appears that the decision was far from being satisfactory to the minds of the profession; and the existence of four cases in controversy, three at the Rolls, and one before the Lord Chancellor, is decisive evidence that the point was not set at rest by the case in the Court of Exchequer.

In two of the cases alluded to (*l*), the question came before the court, but did not form the ground of the determination in either. In Jones v. Jones, the bill prayed for a specific performance of an agreement to grant a lease "containing all proper covenants." With respect to the term *proper covenants*, Sir William Grant, M. R. observed: "The word *proper* admits different senses. There is no covenant almost, which a landlord can propose, that, generally speaking, could be called an improper covenant; for he has a right to let his land upon any terms he may think fit to propose, and there are many covenants, not usual or common, that could not be objected to. But there are many covenants, though proper, that do not naturally flow out of the contract. The contract, *locatio et conductio*, does not naturally lead to many covenants that have now found their way into most leases, and cannot be said to be improper in many of them. But that cannot be the sense, with

(*l*) Jones v. Jones, 12 Ves. 186. Vere v. Loveden, 12 Ves. 179.

reference to the insertion of this covenant upon the expression in this agreement. It cannot mean those covenants which would not be unreasonable. It must mean such as are calculated to secure the full effect of the contract."

The circumstances of this case did not require an express judgment on the very point by the Master of the Rolls, but he most clearly declared his opinion to be, that if the question had arisen before any decision had been made subsequent to that of Henderson v. Hay, he should have been much inclined to think with Lord Thurlow, that the meaning was, *incidental covenants*, not collateral covenants, which it might be very wise to impose, and to which many tenants would not object, but which ought to be the subject of treaty and separate agreement, not necessarily flowing from the agreement to let and to take.

The other case, before Sir William Grant (*m*), was not a mere agreement for a lease with proper and usual covenants; but it was an agreement which contained in great detail the terms which the lease was to contain, and it seemed to be drawn with much method and apparent skill (*n*). It was stipulated, that covenants should be contained, by and on the part of the tenant, his heirs, executors, administrators, and assigns, for payment of the rents, taxes, &c., for keeping the premises, and all the walls, gates, &c. in good repair, during the lease, and so leaving them

(*m*) Vere v. Loveden, 12 Ves. 179.

(*n*) Per M. R. Ibid. 183.

at the determination thereof; also, in the usual manner, for the landlord to enter and see the state of the premises as to repairs. The agreement then concluded thus: "And lastly, it is agreed, that the lease shall take effect in possession from making thereof, and determinable on the lives aforesaid; and therein shall be contained a clause of re-entry by the landlord for non-payment of the rents, duties, and services, to be therein reserved, or for breach of any of the covenants on the tenant's part therein to be contained, and such other clauses as are usual in such cases. The defendant insisting that the lease to be granted should contain a covenant by the tenant against assigning and underletting without license, and refusing to grant a lease without that covenant, the bill was filed praying a specific performance.

Here too, the case was determined on its own merits, without any reference to the general question which was the subject of the conflicting authorities before cited; for it was holden, that the connexion of the last words in the agreement was with the clause of re-entry, mentioned immediately before; and therefore, that the construction ought unquestionably to be, clauses of the same kind as that with which those words were connected. But on the question of the clause against assignment being usual, the Master of the Rolls declared himself to continue of the opinion he expressed in Jones v. Jones.

The last case before Sir Wm. Grant on this subject,

was Browne v. Raban (*o*), in which the plaintiff had agreed to execute a counterpart of a lease "with usual covenants." If this question, said the learned judge, were to be decided for the first time, I should be disposed to agree with the opinion of Lord Thurlow in the case of Henderson v. Hay, that the construction ought to be, such covenants as are incidental to the lease; but Lord Kenyon having expressed his dissent from that opinion, and the Court of Exchequer having upon full consideration overruled it, I rather think the understanding of the profession now is, that this is a usual covenant, and is to be inserted, where there is an agreement for common and usual covenants.

Subsequently to the delivery of this opinion, the case of Church v. Brown (*p*), then depending before the Lord Chancellor, was decided, after a communication between his Lordship and the Master of the Rolls; upon which it was agreed, that the plaintiff in Browne v. Raban, should take a lease without the covenant.

This case of Church v. Brown, contains a review of all the preceding decisions, and is the leading authority on the subject. It was an agreement in general terms to grant a lease, without any stipulation respecting usual or common covenants. Lord Eldon, by whom the case was decided, considered, that independently of authorities, the meaning of the

(*o*) Browne v. Raban, 15 Ves. 528.

(*p*) Church v. Brown, 15 Ves. 258.

parties to a contract for a lease was, that there should be proper covenants; and that the law implied what they were, as connected with the title and character of the lessor: covenants in this sense incidental, as regulating the obligations expressed and implied; not in contradiction to the quantity of interest, which the demise itself without special words was by the agreement to give to the lessee. And he deemed the right to assign, unless restrained, incident to the estate. And that the safest rule of property was, that a person should be taken to grant the interest in an estate which he proposed to convey, or the lease he proposed to make; and that nothing which flowed out of that interest, as an incident, was to be done away by loose expressions, to be construed by facts more loose; that it was upon the party, who had forborne to insert a covenant for his own benefit, to show his title to it; and that it was safer to require the lessor to protect himself by express stipulation, than for courts of equity to hold, that contracting parties should insert, not restraints expressed by the contract, or implied by law, but such, more or less in number, as individual conveyancers should from day to day prescribe as proper to be imposed upon the lessee; and that all those restraints so imposed from time to time, should be introduced as the aggregate of the agreement. He thought that Lord Thurlow's authority, in 1791, was not treated with all the respect that was due to it in the subsequent period; and acting upon his own clear opinion of what the law was, he decreed that the lessor was not entitled to such a covenant.

The cases of Morgan v. Slaughter, and Folkingham v. Croft, are therefore overruled; and Henderson v. Hay re-established; and the opinion of the Master of the Rolls in Jones v. Jones, and Vere v. Loveden, fully confirmed by this decree. We may here also remark, that prior to the case of Henderson v. Hay, there is no one instance that such a covenant as this was conceived to fall within the description of usual covenants. Dumpor's case (*q*) proves no more than the fact, that there was in that instance such a proviso; not that it is a usual covenant, and on that account to be inserted in all leases.

Whether the words *with usual covenants*, or other words of that kind, be introduced into the contract or not is evidently quite immaterial; for in every agreement relating either to freehold or leasehold estates, it is implied that there shall be usual and proper covenants. Before the case of Henderson v. Hay, an agreement for a lease would have been executed precisely in the same mode, as to covenants to be inserted, whether that clause had been contained in it or not: so would an agreement for the conveyance of a real estate. And with great anxiety to be right upon this point, Lord Eldon said, he never would consent that his opinion should be supposed to stand upon such a distinction (*r*).

Still less can any stress be laid on the insertion or omission of the words *assigns* in the agreement.

(*q*) Dumpor's case, 4 Co. 119, b.
(*r*) 15 Ves. 272, 3.

If the agreement be to grant a lease to a man, his executors, administrators, *and assigns*, with a proviso that the intended lessee, his executors, or administrators, shall not assign without license, there is no more repugnancy in this proviso, than in an estate to a man and his heirs, with a subsequent restriction to heirs of a particular description. The assigns must be understood to be such as upon the whole, taken together, the lessee may lawfully have: viz. assigns with license; and upon reference to books of conveyancing, that will appear to be the form in which these leases are made, viz. to assigns, with a proviso that neither the lessee, nor his assigns, shall assign without license (*s*). And the same opinion was entertained by Lord Eldon, in Church v. Brown (*t*); he said, his judgment was formed upon grounds that made him lay out of consideration the small reasoning, as he termed it, upon the word *assigns;* since if the lease were to be made to the lessee, his executors, or administrators, his assigns would be included in himself.

In the course of argument by counsel, attempts have been made to draw a distinction between the different kinds of property which were the subject of demise; and to extend to some the protection of this particular clause, and at the same time to deny it to others. A public-house has been endeavoured to be placed on this favourable footing, on the supposition

(*s*) Weatherall v. Geering, 12 Ves. 511.

(*t*) 15 Ves. 268. Ibid. 264. Browne v. Raban, Ibid. 530. And see Vere v. Loveden, 12 Ves. 183.

that an assignee without the landlord's consent might, by negligent or improper conduct, occasion a forfeiture of the publican's license; and it has been urged, that, with reference to this peculiar species of property, the decisions in Morgan v. Slaughter and Folkingham v. Croft were made (*u*). The distinction, however, is untenable: it has been designated as a most dangerous proceeding (*v*). And it appears, that an agreement for the lease of a public-house, where nothing more is expressed, cannot be carried into execution in a different manner from an agreement as to property of another species, with regard to which, though there may not be the same reason, the landlord may have reasons operating upon him just as powerfully for requiring the restraint (*w*). This doctrine is, moreover, uniform with the determination in Henderson v. Hay, where Lord Thurlow rejected a covenant of this sort, notwithstanding the subject of agreement was a public-house.

It must be observed, that if the agreement be, in general terms, to make a lease "with usual covenants," without allusion to special local custom, these covenants shall be intended usual all over England, and not those usually entered into in that particular county in which the lands may lie. Thus, on an agreement for lands in Norfolk and the Isle of Ely, where the landlord usually covenanted to repair, the plaintiff, seeking a lease, was decreed liable to the re-

(*u*) See 12 Ves. 180. 181. And 267. 15 Ves. 261.

(*v*) Per Lord Eldon, 15 Ves.

(*w*) Ibid. 269.

pairs, notwithstanding the contrary usage of Norfolk; but the court held, that the case might have had a different construction, if the defendant had been plaintiff, to enforce the other party to take a lease (*x*). Should, however, the agreement refer to any particular local usage, as was the case in Boardman v. Mostyn (*y*), where the words were, "with the usual and customary covenants of the neighbourhood;" or to usage with respect to the peculiar subject of the demise, as in Folkingham v. Croft (*z*), the words being, "with all usual and reasonable covenants commonly inserted in leases of the same nature;" the court would institute an inquiry whether a covenant in prohibition of assignment were a customary covenant of the neighbourhood or not; and if it had the means of discovering such regular local practice, it would impose a check on the power of alienation without license accordingly.

Where premises, taken under a demise, containing a proviso, that the lessees should not assign without the license of the landlord in writing, were sold under a decree to a purchaser, who paid his purchase money into court, and was let into possession; to a bill filed against the landlord, who refused to concur in the assignment, praying that he might, under the circumstances, be decreed to give his license in writing, the purchasers were holden to be necessary parties; as they might, at a future period, file another

(*x*) Burwell, or Burrel, v. Harrison, Prec. Ch. 25; S. C. 2 Vern. 231.

(*y*) Boardman v. Mostyn, 6 Ves. 467. Church v. Brown, 15 Ves. 267.

(*z*) 3 Anstr. 700.

bill, insisting on the same equity; so that the defendant might be harassed with two suits relating to the very same matter, and praying the very same relief (*a*).

In conclusion; the vendor of a lease containing such a covenant, and not the vendee, is bound to obtain the lessor's license (*b*).

(*a*) Maule v. The Duke of Beaufort, 1 Russ. 349.

(*b*) Lloyd v. Crispe, 5 Taunt. 249. Mason v. Corder, 7 Taunt. 9; S. C. 2 Marsh. 33.

CHAPTER THE THIRTEENTH.

OF COVENANTS RESTRAINING THE EXERCISE OF PARTICULAR TRADES.

Leases very generally contain a covenant restraining the exercise of certain specified trades on the premises; and sometimes they go further, and totally prohibit the carrying on of all trades and businesses whatever. Covenants of this kind, as they affect the mode of occupation or enjoyment (*a*), will run with the land; and consequently, an assignee will be liable to an action for damages, or to forfeiture on the condition for re-entry, if he use the property demised in contravention of such an agreement. Accordingly, where a lessee of a house and garden for a term of years covenanted with the lessor, that he would not use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, without the license of the lessor; and afterwards, without his license, he assigned the lease to a schoolmaster, who carried on his business in the house and premises; the court entertained no doubt that this was a business within the meaning of the covenant, and one which was likely to create as much annoyance as could be predicated of almost any business; and

(*a*) Mayor of Congleton v. Pattison, 10 East, 136.

particularly as the exhibition of the boys might be said somewhat to resemble a shew of business within the terms of the covenant (*b*).

So, if one covenants that he will not let the shop, yard, or other thing belonging to the house, to any one who shall sell coals, and will not himself sell coals there, and then he lets the whole house to one who sells coals, this is a breach of the covenant (*c*).

In another case (*d*), the lease contained a covenant that the lessee, his executors, &c., would not permit or suffer any person or persons to inhabit or dwell in, use, or occupy, the said demised premises, or any part thereof, who should use or exercise therein or thereupon the trades or businesses of a brewer, baker, butcher, poulterer, fishmonger, fruiterer, &c., without the consent in writing of the said lessor, his executors, administrators, or assigns. The defendant took the house, and fitted it up as a chandler's shop, in which various articles of provisions, &c. were sold: he was also in the habit of selling meat in a raw state to all his customers. There was no exposure of it at the shop window, but it was in the interior shop, visible, however, to those who passed by the house, if they chose to look in; but he did not kill any animals there. The court said, that the real object in all these cases was, to prevent the

(*b*) Doe dem. Bish v. Keeling, 1 Mau. & Selw. 95.

(*c*) Chinsley v. Langley, 1 Rol. Ab. 427. pl. 7.

(*d*) Doe dem. Gaskell v. Spry, 1 Barn. & Ald. 617. See also Doe dem. Davis v. Elsam, 1 Mood. & Malk. 189.

lowering of the tenement in the scale of houses, by the exercise, whether wholly or partially, of those trades, which, in the judgment of the lessor, were likely to prevent tenants from afterwards taking the premises, and which, by so doing, might depreciate their value at a future period; that it was not necessary for a man to carry on every branch of a trade, in order to come within the proviso of the lease; but it would be quite sufficient if he partially carried it on there: and they held, that he did in this case exercise a material part of it, for he exposed the meat for sale, which had, either by him or his assistants, been slaughtered elsewhere.

But where a lessee covenanted that he would not do, or suffer to be done, any act, matter, or thing, upon the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighbourhood; and the lease contained a proviso for re-entry, in case the lessee should permit any person to inhabit the premises, who should carry on certain specified trades or businesses, (that of a licensed victualler not being one of those enumerated,) or any other business that might be, or grow, or lead to be offensive, or any annoyance, or disturbance to any of the lessor's tenants; it was determined, that the opening of a public house upon the premises was not a breach of the covenant or proviso (*e*).

(*e*) Jones v. Thorne, 1 Barn. & Cres. 715; S. C. 3 Dow. & Ry. 152. See Gorton v. Smart, 1 Sim. & Stu. 68.

If the covenant be, not to carry on certain trades without the lessor's previous consent in writing, his mere silent acquiescence in the exercise of one of the forbidden trades, does not raise an inference in the lessee's favor, that, commencing with that trade, he may afterwards carry on any other without the requisite license (*f*).

(*f*) Macher v. The Foundling Hospital, 1 Ves. & B. 188.

PART THE FOURTH.

OF THE LIABILITIES AND RIGHTS ARISING FROM COVENANTS, AT COMMON LAW, AND BY VIRTUE OF THE STATUTE 32 HEN. VIII. c. 34.

We now proceed to consider the consequences of the contract, with reference to the several liabilities and rights thereby created. They shall be noticed in the following order :—

Chapter the First. Of the liabilities at Common Law of,

I. The Covenantor.
II. The Heir.
III. The Devisee.
IV. The Executor or Administrator.
V. The Assignee.

Chapter the Second. Of the rights at Common Law of,

I. The Covenantee.
II. The Heir.
III. The Devisee.
IV. The Executor or Administrator.
V. The Assignee.

Chapter the Third. Of these liabilities and rights, as they are imposed by, or acquired under, the statute 32 Hen. 8. c. 34, relating to grantees of reversions, &c.

CHAPTER THE FIRST.

OF THE LIABILITIES AT COMMON LAW.

SECT. I.

OF THE LIABILITY OF THE COVENANTOR.

I. Of the liability of the covenantor.

IMMEDIATELY on the execution of the deed, the covenantor is charged with the performance of a certain specified duty; the covenantee, at the same time, deriving a title to the observance and benefit of the contract. A neglect of performance or breach of the agreement invests the latter with a right of action for redress at law; and subjects the former to the liability of rendering pecuniary compensation in damages, as the price of his default, in proportion to the injury sustained by the covenantee. It will not be necessary to dwell on the liability of the covenantor further than to remark, that the duty of performance accrues instantly on the creation of the covenant.

SECT. II.

OF THE LIABILITY OF THE HEIR.

II. Of the liability of the heir.

THE cases in which an heir is chargeable on his ancestor's covenant may be stated in a few words. Two circumstances must concur to create his lia-

bility: First, it is requisite, that the terms of the covenant specially provide for its performance by the heir: And, Secondly, that the heir have assets by descent from the covenantor to answer the claim (*a*); for though the covenant descends to the heir, whether he inherits any estate or no; it lies dormant, and is not compulsory, until he has assets by descent (*b*).

Where the covenant arises by implication of law, the heir, as, of course, he cannot be named therein, will not in general be bound. Therefore, where a lease is granted to his ancestor, with a reservation of rent on the words *yielding and paying*, which, we have seen (*c*), create an implied covenant, an action for non-payment will not lie against the heir (*d*). But where a man seised in fee simple makes a lease by the words, *demise, grant, and to farm let*, without any warranty in the deed, or any express covenant that the lessee shall enjoy the term, and dies, and his heir in by descent ousts the termor, he shall, it seems,

(*a*) 2 Bla. Com. 243. 304. Anon. Dy. 14, a. pl. 69. 1 Dy. 23, a. (142). 3 Dy. 257, b. cites 4 E. 3. 57. pl. 71. 7 E. 3. 65. pl. 67. Br. Ab. Garranties, pl. 89. Vin. Ab. Covenant, (D.) pl. 2. Shep. Touch. 178. 363. Co. Lit. 374, b. Cook v. The Earl of Arundel, Hardr. 87. Dyke v. Sweeting, Willes, 585. See also Barber v. Fox, 2 Saund. 136; S. C. 1 Vent. 159; 2 Keb. 811. 836. Woodward v. The Earl of Lincoln, Finch, 86. Derisley v. Custance, 4 Term Rep. 75. Pool v. Pool, 1 Ch. Rep. 18; S. C. Toth. 170.

(*b*) 2 Bla. Com. 243.

(*c*) Ante, p. 50.

(*d*) Newton v. Osborn, Sty. 387.

have an action of covenant against the heir for the privity, &c. (*e*).

Secondly, with regard to the assets: It is to be understood, that in order to constitute funds for satisfying the covenant, they must have descended from the covenantor: lands taken by descent *aliunde*, are not available to the covenantee. If, therefore, a father covenants for himself and his heirs to pay rent, or a gross sum of money, or to repair, or perform any other duty, and dies, having neglected to observe his agreement; an estate derived by his heir, by collateral inheritance from a brother, or other relation, not being an estate inherited from the father, will no more be subject to the demands of the covenantee, than lands originally purchased by the heir at law.

But should assets by descent vest in the heir, it appears, that the charge will continue to run against his heir taking the same assets. A man seised in fee hath issue two sons, and binds himself and his heirs in a bond, and dies seised of assets; and the eldest son enters, and dies without issue; the youngest son enters; he shall be charged by these assets as son and heir to his father, although there was an intermediate descent to the eldest; by the opinion of Wray, Chief Justice, Manwood, Chief Baron, Dyer, Chief Justice of the Bench, and Meade. And the same is the law of grandfather, father, and son. So, also, is the law of a grandfather and two daughters, who have two sons, the grandfather is bound for

(*e*) Swan v. Stransham, Dy. 257, b. Andrew's case, 2 Leon. 104.

himself and his heirs, and dies seised of assets; the daughters enter, and die without partition made; the sons enter: they shall be charged (*f*).

Without entering more largely into the inquiry of what shall be considered assets (*g*), we may notice, that before the statute of frauds (*h*), descended trust estates were not assets in the hands of the heir; but by that statute it is enacted (*i*), that "if any cestui que trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, there and in every such case, such trust shall be deemed and taken, and is hereby declared to be, assets by descent, and the heir shall be liable to, and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended." And by this act estates pur autre vie are subject to the same demands; the 12th section providing, that any estate pur autre vie shall be deviseable in manner thereby directed; "and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in cases of lands in fee simple."

(*f*) Anon. Dy. 368, a. pl. 46. Jenks v. ——, Cro. Car. 151. Holley v. Weeden, 2 Ch. Ca. 175. Davy v. Pepys, Plowd. 441.

(*g*) For this learning the student may refer to a most elaborate and learned note by Serjeant Williams on the case of Jeffreson v. Morton, 2 Saund. 8, d. 5th edit.

(*h*) 29 Car. II. c. 3.

(*i*) Sec. 10. King v. Ballett, 2 Vern. 248; S. C. 1 Eq. Ca. Ab. 211. pl. 4.

A right of action against the heir, in respect of such assets by descent, cannot, it is apprehended, be defeated by his alienation of the estates prior to the commencement of, or pending, legal proceedings: the charge once attaching will, it is supposed, continue in operation against him and his personal representatives, for the benefit of the covenantee, or his representatives, until compensation be made for any breach of the covenant committed during the lifetime, or even after the decease of the ancestor (*k*).

In an action against the heir, the plaintiff need not allege in the declaration, that the heir had lands by descent; for, as the want of such assets forms a good ground of defence, it is left to the defendant to plead that he had none (*l*).

SECT. III.

OF THE LIABILITY OF THE DEVISEE.

III. Of the liability of the devisee.

A DEVISEE is not liable, in respect of the lands devised, to an action of covenant for a breach of the testator's agreements. At common law, neither debt nor covenant lay against the devisee; but the legislature have given a remedy against him by the statute, entitled, "An act for the relief of creditors

(*k*) See 3 W. & M. c. 14. s. 5.

(*l*) Dyke v. Sweeting, Willes, 585. Coleman v. Winch, 1 P. Wms. 777; S. C. Prec. Ch. 511; 2 Eq. Ca. Ab. 498. pl. 19.

against fraudulent devises" (*m*): that remedy, however, is express, and is confined to the action of debt. And though the word *specialties* is used as well as *bonds*, yet, construing the whole together, it must be confined to those specialties on which the action of debt lies: And whoever looks at the statute attentively will see that such must have been the intention of the legislature, for it speaks all through of debts; but a mere breach of covenant cannot be considered as a debt (*n*). Hence, the advantage of taking a bond for performance of covenants. A sum of money, however, secured by covenant, will constitute a debt (*o*); and the testator's lands in the hands of a devisee will, consequently, be liable, in an action of *debt*, to the liquidation of the claim (*p*).

SECT. IV.

OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR.

IV. Of the liability of the executor or administrator.

THE executors or administrators of every person are implied in himself, and liable, in respect of assets, for covenants broken in the testator's lifetime (*q*), and for the performance, after his death, of such cove-

(*m*) 3 W. & M. c. 14.

(*n*) Wilson v. Knubley, 7 East, 128; S. C. 3 Smith, 123.

(*o*) Plumer v. Marchant, 3 Burr. 1380. Earl of Bath v. Earl of Bradford, 2 Ves. 587, 9.

(*p*) March v. Freeman, 3 Lev. 383.

(*q*) Hyde v. Skinner, 2 P. Wms. 197. Anon. Dy. pl. 69. Hyde v. The Dean, &c. of Windsor, Cro. Eliz. 553. F. N. B. 145. H.

nants as relate to the personalty, as to pay a sum of money, &c. (*r*); and this, notwithstanding the party covenants for himself and his assigns, without naming executors; for an executor or administrator is an assignee in law (*s*). It is said, if one covenants that his executors shall pay ten pounds to B., an action cannot be supported against the executors; and the reason given is, because it cannot be a debt in the executor where it was no debt in the testator (*t*); but the law of this case is rather doubtful; as the testator was himself bound, the lien, it is apprehended, would fall on his executors, although he himself never became liable to be sued (*u*).

If lessee for years covenants for himself, that he will within the first three years build a new house, and dies after the expiration of the term, without performing his covenant, his executors will be chargeable (*v*). Or if he covenants to repair the demised premises within six years, and dies within the six years, the executors are bound to make the reparation; for it may be made by them within the six years as well as by the testator (*w*). And so long as

(*r*) Shep. Touch. 78. 482. Dy. 23, a. Rushden's case, Dy. 4, b. Brice v. Carre, 1 Lev. 47; S. C. 1 Keb. 155. Fountain v. Gnales, Comb. 59; S. C. nom. Fountain v. Guavers, 2 Show. 333; Skin. 146.

(*s*) Anon. Mo. 44. pl. 136. 1 Bulstr. 23.

(*t*) Perrot v. Austin, Cro. Eliz. 232. Co. Lit. 386, a. 1 Bulstr. 23.

(*u*) Plumer v. Marchant, 3 Burr. 1383.

(*v*) Anon. Dy. 14, a. pl. 69. Latch, 261.

(*w*) 6 Vin. Ab. 383, 4. 10 H. 7. 18. pl. 4. Bro. Ab. Covenant, pl. 50. 4 Leon. 171.

the executor has assets, he must perform the covenants contained in a lease granted to his testator; nor will an assignment (*x*), even with an acceptance of the rent by the lessor of the assignee, relieve the executor from the charge (*y*).

In one case, an assignee of a lease, being evicted, received from the assignor 40*l.* in satisfaction for his being ejected, and afterwards brought covenant against the lessor's executor on the covenant for quiet enjoyment: he pleaded the acceptance of the 40*l.* in satisfaction of the wrong done, in bar of the action: and the court held, that the plaintiff might have two actions, and therefore was not barred of the action against the executor, by the payment of the 40*l.*; but it would have been otherwise, if he had pleaded that the sum was given in satisfaction of both the covenants (*z*).

A sale was to be made of a parcel of land, and it was agreed, between the plaintiffs and the defendant's testator, that if it should not produce a certain sum, then they should repay each other proportionably to the abatement; and the defendant's testator covenanted for himself and his executors, to pay his proportion to the plaintiffs, so that the plaintiffs should give him notice in writing of the said sale, by the space

(*x*) Pitcher v. Tovey, 1 Salk. 81; S. C. 1 Show. 340; 4 Mod. 71; 2 Vent. 234; Carth. 177; 3 Lev. 295; Holt, 73; 12 Mod. 23; 1 Freem. 326. Wilkins v. Fry, 1 Meriv. 265.

(*y*) Brett v. Cumberland, Cro. Jac. 522; S. C. 1 Rol. 359. Bachelour v. Gage, Cro. Car. 188; S. C. Sir W. Jo. 223.

(*z*) Whitway v. Pinsent, Sty. 300.

of ten days; but it was not said, that such notice was to be given to his executors or administrators. The whole court agreed, that, as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor and not to the testator (*a*).

Some covenants there are which require personal performance by the covenantor, and do not extend to his executors or administrators, except in the case of a breach committed by the testator during his life (*b*). Thus, one William Cooke, the plaintiff's intestate, being a newsman, and entitled to receive every morning thirty copies of the Daily Advertiser, assigned his right to the same, and all other his business of a newsman to the defendant, and covenanted, "that he the said William Cooke should not thereafter exercise the business of a newsman, but should use his utmost endeavours to procure for the said defendant, his customers in the said business." And in consideration of the premises, the defendant covenanted to pay eight shillings a week to the said William Cooke, his executors, administrators, and assigns, during the lives of the said William Cooke and Ann his wife, and the survivor of them. Cooke died, and his wife took out administration, and commenced the business of a newspaper vender on her own account. The court held, that the administratrix was not bound by the covenant, and grounded their judgment on the difference of

(*a*) Harwood v. Hilliard, 2 Mod. 268. See also Thurseden v. Warthen's executors, 2 Bulstr. 158.

(*b*) Hyde v. The Dean of Windsor, Cro. Eliz. 553. Hyde v. Skinner, 2 P. Wms. 196.

expression in the two clauses, viz. that Cooke himself, without naming his executors, &c., should abstain from the business of a newsman, but that the payment was to be made to him, his executors, &c.; that this was now payable to the plaintiff, not as wife, but as administratrix of William Cooke, and was assets for the payment of his debts; besides, it would be very hard, they said, to bar her from exercising a lawful occupation for her own livelihood, in consequence of this personal covenant of her husband (*c*). So, if a lessee for years covenants for himself to repair the houses demised, omitting other words, it seems, he is bound to repair only during his life, and the executors or administrators are not bound (*d*). And if a lessor covenants for himself only to discharge the lessee of all quit-rents out of the land, it seems, this covenant is only personal, and will bind the covenantor only during his life (*e*). But if in these cases the words *during the term* be added in the covenant, as on a covenant by a lessee for himself to repair the houses during the term, or on a covenant by a lessor for himself to discharge the lessee of all quit-rents during the term: in these cases, it appears, the executors and administrators also will be charged (*f*).

For breaches of covenant by the testator himself, the executor is chargeable *de bonis testatoris* only (*g*). And unless he enter on the property demised, he is

(*c*) Cooke v. Colcraft, 2 Wm. Blac. 856; S. C. 3 Wils. 380.

(*d*) Shep. Touch. 178.

(*e*) Ibid. Ingery v. Hyde's executors, Dy. 114, a.

(*f*) Shep. Touch. 178. 482.

(*g*) Jevens v. Harridge, 1 Saund. 1. note.

not chargeable upon the covenant of his testator *de bonis propriis*, although it be broken in the time of the executor; for it is the testator's covenant which binds the executor in his representative capacity; and by that name, and in that capacity, must he be sued. If, therefore, the executor before entry omits to repair the demised premises (*h*); or assigns over the lease without giving notice thereof agreed to be given to the lessor (*i*); he is only liable *de bonis testatoris*. But after an entry by the executor on the premises, the lessor has the option of suing him for breaches in his own time, either as executor, or as assignee (*k*); and if he be sued in the latter character, stating generally in the declaration, that the estate of the lessee in the premises lawfully came to the defendant, without naming him executor, the judgment will be *de bonis propriis* (*l*). After his assignment over, he is not liable *de bonis propriis* (*m*).

On an implied covenant, an action may, it seems,

(*h*) Anon. Dy. 324, b. pl. 34. Collins v. Thoroughgood, Hob. 188. Bull v. Wheeler, Cro. Jac. 647; S. C. nom. Bull v. Winter, Palm. 314. Dean and Chapter of Bristol v. Guyse, 1 Saund. 111. Castilion v. Smith's executors, Hob. 283.

(*i*) Bridgman v. Lightfoot, Cro. Jac. 671.

(*k*) Buckley v. Pirk, 1 Salk. 317; S. C. 10 Mod. 12. Lyddall v. Dunlapp, 1 Wils. 4.

(*l*) Tilney v. Norris, Carth. 519; S. C. 1 Salk. 309; 1 Lord Raym. 553. Keeling v. Morrice, 12 Mod. 371. Wilson v. Wigg, 10 East, 313. See likewise Lord Rich v. Frank, 1 Bulstr. 22; S. C. Cro. Jac. 238. Bailiffs, &c. of Ipswich v. Martin, Cro. Jac. 411; S. C. 1 Rol. 404. Sackvill v. Evans, Freem. 171.

(*m*) Boulton v. Canon, Freem. 336. 393. Jenkins v. Hermitage, Freem. 377; S. C. 3 Keb. 367.

be maintained against the executor or administrator of a lessor, if the lessee be lawfully evicted during the lifetime of the lessor (*n*); but unless the covenant be broken before the testator's death, the executor is not responsible (*o*); for on this kind of covenant, the liability of the executor ceases with the determination of the estate in respect of which the law created the covenant. Hence, where tenant for life, with remainder over in fee, demised to another for fifteen years, and died before the expiration of the term, upon which an entry was made by the remainder-man on the lessee; it was held by the court, that an action could not be supported by the lessee against the executor of the tenant for life upon the covenant in law, because by his death the estate and covenant determined; though it was agreed, that it would have been otherwise on an express covenant for quiet enjoyment (*p*). So if tenant in tail makes a lease for years and dies without issue, the covenant terminates with the estate (*q*).

A debt, we may mention, arising by a covenant, is a demand by specialty, and is of an equal nature

(*n*) Swan v. Stransham, Dy. 257, a.; S. C. nom. Swann v. Scarles and Stranson, Mo. 74; S. C. And. 12; Benl. 150.

(*o*) Procter v. Johnson, 2 Brownl. 214. Newton v. Osborn, Sty. 387. Porter v. Swetnam, Sty. 407.

(*p*) Swan v. Stransham, supra. Netherton v. Jessop, Holt, 412. Bragg v. Wiseman, 1 Brownl. & Gold. 22. Brudnell v. Roberts, 2 Wils. 143. Andrew v. Pearce, 1 New Rep. 158. Gervis v. Peade, Cro. Eliz. 615.

(*q*) Landydale v. Cheney, Cro. Eliz. 157; S. C. 1 Leon. 179.

with other specialty debts (*r*). Therefore, a covenant by a settlor in a marriage settlement, that the premises are free from incumbrances, will rank equally with debts on bond (*s*). And where one before marriage covenanted with two trustees, that he would by will, or that his executors or administrators should within six months after his death, pay out of his personal estate the sum of 700*l.* unto the said trustees or the survivor, &c.; the interest to be paid to his wife for life, and after her decease, the principal to be divided among his children, and in default of issue, as he should by will appoint; and he bound himself in the penalty of 1400*l.*; and after his death, in his wife's lifetime, one of the trustees took out administration; the court held, that the administrator might retain assets to the amount of 700*l.* against a bond creditor, who had commenced an action before the expiration of the six months (*t*).

SECT. V.

OF THE LIABILITY OF THE ASSIGNEE; WITH PRELIMINARY REMARKS ON COVENANTS RUNNING WITH THE LAND.

Preliminary remarks.

PERHAPS no branch of the law of covenants is less understood than that which forms the subject of the

(*r*) Plumer v. Marchant, 3 Burr. 1380. Earl of Bath v. Earl of Bradford, 2 Ves. 587, 9.

(*s*) Parker v. Harvey, 11 Vin. Ab. 292. pl. 39; 3 Bac. Ab. 81.

(*t*) Plumer v. Marchant, sup. See Simmons v. Bolland, 3 Meriv. 547.

present division. The expression of "covenants running with the land," is, indeed, familiar to all persons engaged in professional pursuits; but much useful information concerning them, yet remains to be imparted. An attempt will be made in this place to examine the nature of these covenants, and to elucidate the principles on which they are made to run with the land.

In order to make a covenant run with the land, whether the estate be granted for an estate of inheritance, or for a term of years, the performance or non-performance of it must affect the nature, quality, or value of the property conveyed, independently of collateral circumstances, or must affect the mode of enjoying it (*u*). It is not sufficient that a covenant is concerning the land; but to make it run with the land, there must be a privity of estate between the contracting parties. Therefore, where a mortgagor and mortgagee made a lease for years, and the lessee covenanted with the mortgagor and his assigns, to pay the rent and keep the demised premises in repair; the court held, that, as the mortgagor had no interest in the land of which a court of law could take notice, an equity of redemption being an interest recognized in equity only, the covenants were merely collateral, and could not run with the land, so as to enable the assignee of the mortgagee to take advantage of them (*w*). And though a party may covenant with a stranger to pay a certain rent,

(*u*) Mayor of Congleton v. Pattison, 10 East, 130.

(*w*) Webb v. Russell, 3 Term Rep. 393.

in consideration of a benefit to be derived under a third person; yet such a covenant cannot run with the land (*x*). And in the case above put, notwithstanding the mortgagor himself, being the covenantee, or his executors or administrators, could maintain an action on the covenant (*y*), yet no such right could be transmitted to an assignee on a purchase of the equity of redemption, the covenant being merely personal and collateral to any estate in the mortgagor (*z*).

Upon the same principle, if a lease be made by a trustee and his cestui que trust, and the covenants be entered into with the cestui que trust, an action cannot be maintained on these covenants by a purchaser of the reversion, in consequence of their being collateral to the reversion. So it seems, on a conveyance in fee to a trustee, if the covenants for title be entered into with the cestui que trust, these covenants cannot run with the land. It is essential, therefore, that they be made with the person having the legal estate.

The learned author of the Treatise on Vendors and Purchasers observes (*a*): "The proposition before stated, that it is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties, seems to apply as

(*x*) Ibid. 402.

(*y*) Stokes v. Russell, 3 Term Rep. 678; S.C. Russell v. Stokes, affirmed in error, 1 Hen. Blac. 562.

(*z*) Ibid. 1 H. Blac. 566.

(*a*) Sugd. Vend. & Purch. 544. 6th edit.

well to covenants entered into by a vendor, as to covenants entered into by a purchaser. But the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere cestui que trust; and if his covenants were to be deemed covenants in gross, the assignees of the land could only compel performance of the covenants by the circuitous mode of using the name of the first purchaser or his representatives, whom at the distance of some years it might be very difficult to trace. It seems impossible to get over the objection, by the form of the covenant; for although the vendor covenant with the purchaser, his heirs and *assigns*, yet the assignee of the lands will not be entitled to the benefit of the covenant, unless it run with the land under the general rule of law. The only mode by which the difficulty can be avoided is, to require the vendor to take a conveyance to himself in fee, or to the usual uses to bar dower, previously to executing a conveyance to the purchaser; and this I believe, has been sometimes done since it was first suggested in this work. If, indeed, the objection should be thought to exist, it might also be thought, that where the vendor conveys the estate to the purchaser under the usual power of appointment, the covenants will not run with the land, but this, it is conceived, would be carrying the rule much too far; and there seems to be some ground to contend, that even in Roach v. Wadham, as the power was coupled with an interest, the second purchaser might have been held to have come in under, and to stand in the place of the first purchaser, so as to satisfy the rule of law, although

he did not actually, as it was determined, take the estate of the first purchaser. The point, however, was considered as clear, and was not discussed either at the bar or upon the bench."

And if a privity of estate exists at the time of the making the covenant, yet if a subsequent purchaser does not take the estate of his immediate vendor, he will not be liable to the performance of a covenant entered into by such vendor with the preceding vendor. To render this proposition more intelligible, the case from which it is deduced must be set forth. An estate was conveyed to a trustee, *habendum* to him and his heirs, to the use of such person, and for such estate, as one W. should by deed, &c. appoint; and for want of such limitation, to the use of W. and his heirs; and the same conveyance reserved a certain fee-farm rent to the chief lord; and contained a covenant by W. his heirs and assigns for the payment of it: Afterwards, by indentures of lease and release, to which W. and his trustee were parties, after reciting the former conveyance, the trustee, by direction of W., did grant, bargain, sell, and release, and W. did grant, bargain, sell, alien, release, ratify, and confirm, and also direct, limit, and appoint, to the purchaser and his heirs, all their estate, title, interest, use, trust, &c., in law and equity, subject to the reserved rent, and to the performance of covenants on the part of W. to be performed; and the purchaser also covenanted with W. to pay the said rent, and to indemnify and save him harmless. The court held, that the purchaser took the estate by the appointment of, and not by conveyance from W.; and in

consequence, that the defendant (the heir, devisee, and executor of the purchaser,) was not liable in covenant for rent in arrear, either as executor, or assignee of the land, which was not bound in the hands of W.'s appointee by W.'s covenant (*b*). Mr. Sugden observes (*c*), that this decision leads to the observation, that wherever a purchaser is to enter into a covenant, which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance in fee, and should not permit the estate to be limited to the usual uses to bar dower.

By far the greatest number of cases, regarding the liabilities of assignees, has arisen on demises of leaseholds: the following observations will, therefore, be particularly applicable to assignees of interests of that description. In some instances we find, that the assignee is bound even where assigns are not mentioned. In others, his liability accrues solely in consequence of assigns being included in the covenant. And in the third class, the covenants are held not to extend to assigns, although particularly named.

1. Where the assignee is bound without being named.

First: Where a covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed, and appurtenant to the thing demised, and will go with the land,

(*b*) Roach v. Wadham, 6 East, 631. 289; S. C. 2 Smith, 376. See also Cox v. Chamberlain, 4 Ves. 6th edit.

(*c*) Sugd. Vend. & Purch. 543.

and will bind the assignee, although he be not bound by express words (*d*). As if the lessee covenants to repair the houses demised to him during the term; that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed and appurtenant to houses, and will bind the assignee, although he be not bound expressly by the covenant (*e*): it runs with the land, because it affects the estate of the term, and the reversion in the hands of any person that has it: if the covenant to repair be on the part of the lessor, the rent is the greater; if the lessee be to repair, he pays the less rent; and as an assignee has the benefit, it is but reasonable that an assignee should be subject to the charge (*f*), according to the maxim, *qui sentit commodum sentire debet et onus* (*g*). So, a covenant to lay out a given sum of money in rebuilding or repairing the premises in case of damage by fire, is clearly a covenant running with the land, and is such a covenant as will be binding on the assignee of the lessee (*h*). So is a covenant to insure premises situate within the weekly bills of mortality, mentioned in the 14 Geo. III. c. 78; the 83rd section of that statute entitling the owner of the premises to have the

(*d*) Spencer's case, 5 Co. 16, a.

(*e*) Spencer's case, sup. The Dean and Chapter of Windsor's case, 5 Co. 24, a.; S. C. nom. Hyde v. The Dean, &c. of Windsor, Cro. Eliz. 552; Mo. 399. Conan v. Kemise, W. Jo. 245; S. C. nom. Congham v. King, Cro. Car. 221. Tilney v. Norris, 1 Lord Raym. 553; S.C. 1 Salk. 309; Carth. 519.

(*f*) Buckley v. Pirk, 1 Salk. 317.

(*g*) 5 Co. 24, b.

(*h*) Vernon v. Smith, 5 Barn. & Ald. 1.

money insured expended, in case of damage by fire, in re-instating the property; and therefore, it affects the thing demised, as much as a covenant to repair or rebuild in case of fire (*i*).

Covenants also relating to the cultivation of the premises demised, will be sufficient to charge the assignee unnamed; as, to lime and dung the land during the term (*j*); or to spend all the muck thereon (*k*); or to leave fifteen acres every year for pasture *absque culturâ*, being for the benefit of the estate, according to nature of the soil, &c. (*l*).

And on the authority of the first and sixth resolutions in Spencer's case, it is determined, that a covenant by a lessee constantly during the lease, with his and their family, to inhabit and dwell in and upon the demised farm and lands, is of the same character, and will bind an assignee, although the executors and administrators of the lessee were only named (*m*). And if a man grants to a lessee for years, that he shall have so many estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come (*n*).

(*i*) Ibid. And see "Covenant to insure," ante, p. 183. et seq.

(*j*) Sail v. Kitchingham, 10 Mod. 158.

(*k*) Bally v. Wells, 3 Wils. 32; S. C. Wilmot, 341.

(*l*) Cockson v. Cock, Cro. Jac. 125.

(*m*) Tatem v. Chaplin, 2 Hen. Blac. 133.

(*n*) Spencer's case, 5 Co. 17, a. b. 5th res. The Dean and Chapter of Windsor's case, 5 Co. 24, b. F. N. B. 181. N.

Within this class also are comprised covenants for payment of rent (*o*), and to discharge the lessor of all charges ordinary and extraordinary (*p*). So, a covenant to do suit at the lessor's mill, by grinding all such corn there as should grow upon the demised premises during the term; or to carry coals to the lessor's mansion, and perform other similar services; will, so long as the ownership of the mill, or the mansion, and the reversion of the demised premises, continue in the same person, run with the land against the lessee or his assigns, and for the benefit of the reversioner or his grantee (*q*).

Where a restraint is imposed on the exercise of particular trades by covenant, the land itself is affected during the term with regard to the mode of occupation; the assignee unnamed will therefore be bound (*r*).

So, where A. leased a house, excepting two rooms, and free passage to them, and the lessee assigned, and the assignee disturbed the lessor in the passage thereto, the court decided, that an action of covenant lay against the assignee; and this diversity was taken: if the disturbance had been in the chamber, no action would have lain, because it was excepted, and so not demised; but it was otherwise where the

(*o*) Stevenson v. Lambard, 2 East, 575. Porter v. Swetnam, Sty. 406. Parker v. Webb, 3 Salk. 5.

(*p*) Dean and Chapter of Windsor's case, 5 Co. 24, b.

(*q*) Vyvyan v. Arthur, 1 Barn. & Cres. 410. 414; S.C. 2 Dow. & Ry. 670.

(*r*) Mayor of Congleton v. Pattison, 10 East, 130. 136.

lessee agreed to let the lessor have a thing out of the demised premises, as a way, common, or other profit *apprendre*, for there the covenant went with the tenement and bound the assignee (*s*).

Incorporeal hereditaments may likewise be the subject of covenants possessing this quality. Hence, where a lessee of the great and small tithes, covenanted for himself, his executors, administrators, and assigns, with his lessor, the rector of the parish of M., not to let any of the farmers occupying several of the estates at M. have any part of the tithes aforesaid, without the consent in writing of the lessor; the court were clearly of opinion, that an action of covenant might well be supported against the assignee of the lessee, the intention of the parties obviously being, to keep the tithes continually in pernancy; for the covenant was in effect, that the lessee and his assigns should take them in kind, that they might continue in the same state as when the lease thereof was made; and that by temporary compositions and unity of possession of the land and tithe thereof, moduses might not be let in, nor the manner of tithing be thereby obliterated; but that the existence of taking tithes might be preserved; and the court assimilated the case to a covenant to spend all the muck upon the land, and said, that it fell exactly within the rules laid down by Lord Coke, in Spencer's case, as to land: it concerned the thing demised, and tended to preserve and support the

(*s*) Cole's case, 1 Salk. 196; S. C. nom. Bush v. Coles, 12 Mod. 24; Carth. 232; S. C. nom. Bush v. Calis, 1 Show. 388.

estate of tithes in kind: and there was a reversion in the lessor, and a privity between him and the lessee (*t*). Whether the judges considered it as a covenant which would bind the assignee without being named, is not perfectly apparent; for, towards the conclusion of their judgment, they said: "In Purfrey's case (*u*), there is something looks against us; the opinion there is, that the covenant would not run along with the land; but it must be observed, that it did not concern the thing demised, nor is the word *assigns* there; so it does not apply to, nor clash with the case at bar." But where a lessee of tithes covenanted with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition, not exceeding 3*s*. 6*d*. per acre, it was held, that this was a covenant clearly collateral to the interest of the lessee of the lands, and could not be taken advantage of by him on a suit being instituted for the payment of tithes in kind (*v*).

Covenants for title (*w*); for quiet enjoyment (*x*); for further assurance (*y*); for renewal (*z*); to supply

(*t*) Bally v. Wells, 3 Wils. 25; S. C. Wilmot, 341. 10 East, 136.

(*u*) Purfrey's case, Mo. 243.

(*v*) Brewer v. Hill, 2 Anstr. 413.

(*w*) Middlemore v. Goodale, Cro. Car. 503; S. C. W. Jo. 406. 1 Rol. Ab. 521, (K.) pl. 6. Kingdon v. Nottle, 1 Maule & Selw. 355; 4 Ibid. 53.

(*x*) Noke v. Awder, Cro. Eliz. 373. 436; S. C. Mo. 419. Campbell v. Lewis, 3 Barn. & Ald. 392.

(*y*) Middlemore v. Goodale, sup. King v. Jones, 5 Taunt. 418; S. C. 1 Marsh. 107; S. C. in error, 4 Mau. & Selw. 188.

(*z*) Isteed v. Stoneley, 1 And. 82. Anon. semb. Spencer's case, Mo. 159. pl. 300. Skerne's case,

the demised premises with water (*a*); are also covenants running with the land, and will be binding on the assignee of the lessor, and are such as the assignee of the lessee may enforce. And it is observable, that an assignee of a personal contract for the liberty of bringing water to the city of London, is chargeable in equity with the covenants in the original lease or contract, as an equitable assignee upon an equitable privity of estate, like the assignee of a bond (*b*).

2. Where the assignee is bound by being named.

The second resolution in Spencer's case (*c*) takes a distinction, the good sense of which is not very easily discoverable. It was resolved, that if the covenant concerned a thing which was not in *esse* at the time of the demise made, but to be done on the land afterwards, (for instance, to build a new wall on some part of the premises demised,) the covenantor, his executors and administrators, would be bound, but not the assignee, if he were not named; for the law would not annex a covenant to a thing which had no being; but if the lessee had covenanted for himself and his assigns, then, forasmuch as it was to be done upon the land demised, it should bind the assignee; and the reason given is, that although the covenant did extend to a thing to be newly made,

Mo. 27. Tanner v. Florence, 1 Ch. Ca. 260. Furnival v. Crew, 3 Atk. 88. Roe dem. Bamford v. Hayley, 12 East, 469. Vernon v. Smith, 5 Barn. & Ald. 11.

(*a*) Jourdain v. Wilson, 4 Barn. & Ald. 266.

(*b*) City of London v. Richmond, Prec. Ch. 156; S. C. 2 Vern. 421.

(*c*) Spencer's case, 2d resolution. But see Anon. Mo. 159. pl. 300. Smith v. Arnold, 3 Salk. 4. cont.

yet it was to be made upon the thing demised, and the assignee was to take the benefit of it, and therefore he should be bound by express words.

This distinction, however, has been adhered to; and in a case where the lessee covenanted that, at the expiration of his term, a fair valuation should be made of all the fruit trees which should be then standing on the demised premises, and that the same should be delivered up to the lessor, his executors, administrators, or assigns, at the value to be fixed by such appraisement; and the lessor covenanted for himself, his executors and administrators, to pay to the lessee, his executors, &c., such sum of money as the trees should be valued at; it was held, that the lessee's right of action for a breach of this covenant could not be extended to an assignee of the lessor, without his being named in the covenant, as the subject matter of it did not relate to a thing in *esse* at the time of the demise (*d*).

It seems doubtful whether a covenant by a lessee of a public-house, that he and his assigns will buy all their beer of the plaintiffs, the lessors, can bind an assignee even when named (*e*).

(*d*) Grey v. Cuthbertson, 2 Chit. 482; S. C. 1 Selw. N. P. 498. See likewise The Mayor, &c. of Congleton v. Pattison, 10 East, 130, post, 477, 8. Anon. 12 Mod. 384.

(*e*) Hartley v. Peehall, Peake N. P. C. 131. Cited 4 Taunt. 342. See Holcombe v. Hewson, 2 Campb. 391. Jones v. Edney, 3 Campb. 285. Cooper v. Twibill, Ibid. note.

3. Where the assignee is not bound although named.

Thirdly: Although the covenant be for the lessee and his assigns, yet if the thing to be done be merely collateral to the land, and do not touch or concern the thing demised in any sort, there the assignee will not be charged (*f*). As if the lessee covenants for himself and his assigns, to build a house upon the land of the lessor, which is no parcel of the demise; or to pay any collateral sum to the lessor, or to a stranger: it will not bind the assignee; because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case, the assignee of the thing demised can no more be charged with it than any other stranger (*g*). Or if a man leases sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over; this covenant will not bind the assignee; for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land, in respect of the reversion. But in the case of a lease of personal goods, there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, and his executors or administrators, who represent him.

L. C. J. Wilmot, in commenting on these positions, has further explained the grounds of the as-

(*f*) Spencer's case, 5 Co. 16, b. 3d res.

(*g*) Ibid. Mayo v. Buckhurst, Cro. Jac. 438.

signee's exemption from liability (*h*). "The reasons (said he) why the assignees, though named, are not bound in the two last cases, are not the same. In the first case, [*i. e.* of a covenant to build a house on other land, or to pay a collateral sum to the lessor,] it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not *quodam modo*, but *nullo modo*, annexed or appurtenant to the thing leased. In the case of the mere personalty, [*i. e.* if the lease be of sheep or other personal goods,] the covenant doth concern and touch the thing demised; for it is to restore it, or the value, at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion: it is merely collateral in one case; in the other it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together, and to constitute that privity which must subsist between debtor and creditor to support an action."

The same law, if a man demises a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term: here, the assignee will not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of

(*h*) Wilmot, 344, 5. 5 Barn. & Ald. 7, 8.

the stock or sum, but out of the land only, and therefore, as to the stock or sum, the covenant is personal, and will bind the covenantor, his executors and administrators, and not his assignee: and it is not certain that the stock or sum will come to the assignee's hands; for it may be wasted or otherwise consumed or destroyed by the lessee; and therefore the law cannot determine, at the time of the lease made, that such covenant shall bind the assignee (*i*).

A covenant for payment of a rent-charge in fee, being a personal covenant, and collateral to the land of the grantor, will not affect an assignee or lessee of the land, at law (*k*), though, it is said, the grantee of the rent-charge has a remedy in equity (*l*). And where the owner of lands, subject to the payment of a fee-farm rent, sold part of the lands to one, under whom the plaintiff claimed, and covenanted that such part should be discharged from the rent; it was held, that this was clearly no more than an ordinary and personal covenant, which would not run with the land, but would charge the heir only in respect of assets (*m*). So, where J. B., being seised in fee, conveyed to the defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain,

(*i*) Spencer's case, 5 Co. 16, b. 17, a. 3d resol. James v. Blunck, Hardr. 88.

(*k*) Brewster v. Kitchin, Kitchel, or Kidgell, 1 Lord Raym. 317. 322; S. C. Comb. 424; Holt, 175. 669; 5 Mod. 368; Carth. 438; 1 Salk. 198; 2 Ibid. 615; 3 Ibid. 340; 12 Mod. 160. 171. But see ante, p. 65.

(*l*) Ibid. 5 Mod. 374.

(*m*) Cook v. The Earl of Arundel, Hardr. 87.

to be issuing out of the premises, and, subject to the said rent, to the use of the defendant, his heirs and assigns; and the defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent; and J. B. demised the rent to the plaintiffs for 1000 years: the court said, that it was incorrect to state this as a rent-charge granted by the owner of the fee, it being a conveyance in fee by J. B. to certain uses, one of which was, that he should receive the rent; so that the rent arose out of the estate of the feoffors. It was, therefore, not a grant by the owner of the fee; and the covenant was a covenant in gross (*n*). It is also to be observed, that this was not an assignment of the rent, but a derivative interest therein newly created (*o*). So, on the grant of a rent-charge to A., to the use of B., with a covenant by the grantor with A. for payment; although the rent-charge is executed in B. by the statute of uses (*p*), which transfers also all rights and remedies incident thereunto, together with the possession, so that the cestui que use may distrain; yet, as the covenant is merely collateral, and cannot be transferred, B. cannot bring an action for non-payment; but the grantees to uses may; for, as to them, that remedy is not destroyed (*q*).

A covenant to grind all the corn, grain, or malt, the lessees shall have occasion to use or spend, at

(*n*) Milnes v. Branch, 5 Mau. & Selw. 411. See ante, 68. n. (*q*).

(*o*) See Holford v. Hatch, 1 Dougl. 183.

(*p*) 27 Hen. VIII. c. 10.

(*q*) Bascawin v. Cook, 1 Mod. 223; S. C. 2 Mod. 138.

the plaintiff's mill, is likewise merely a collateral covenant, and unconnected with any thing relative to the premises leased; and cannot, in consequence, be binding on the assignee; for within such a covenant, corn for the horses, &c. of the defendants must be ground; and to whatever distance the defendants might remove to live, they must bring it to the plaintiff's mill. Had the covenant been, to grind all the corn they should spend ground, it might relate to the premises, and, running with the land, bind the assignees (*r*).

It may be mentioned, that if a lease be made by a bishop, containing a covenant not usually inserted in such leases, his successor, notwithstanding his being specially named, will not be bound to observe it (*s*).

In a more recent case, the nature of these covenants was fully elucidated by the court. The plaintiffs had demised to one J. C. a piece of ground in Congleton, called the Byflatt, for 300 years, and a certain slip of land, through which a watercourse was intended to be made, with liberty for making and repairing the same, and with liberty for J. C., his executors, administrators, or assigns, to erect in the Byflatt a silk mill, &c. And J. C. covenanted, for himself, his executors, administrators, and as-

(*r*) Lord Uxbridge v. Staveland, 1 Ves. 56. See also Vyvyan v. Arthur, 1 Barn. & Cres. 410; S. C. 2 Dow. & Ry. 670. Hamley v. Hendon, 12 Mod. 327.

(*s*) Davenant v. The Bishop of Salisbury, 1 Vent. 223; S. C. 2 Lev. 68; 3 Keb. 69.

signs, with the plaintiffs, that he, his executors, &c. would, at all times during the term, before any persons should be received as servants, workmen, or apprentices, in such silk mill, give notice of their names to the town clerk of the borough for the time being, and if he should immediately give satisfactory information to J. C., his executors, &c., or to the then owner or occupier of the silk mill, that any of the persons in such notice were legally settled in any other parish or township, and not in Congleton, then they should not be received to work in such silk mill, before a certificate of the settlement of such person, under the stat. 8 & 9 Wm. 3. c. 30, should be given to Congleton. On an action brought against the assignee of the term, the court were unanimously of opinion, that, as the covenant did not affect the nature, quality, or value of the thing demised, independently of collateral circumstances, or the mode of enjoying it, the assignee, though named, was not bound. They said, it might, indeed, collaterally affect the lessors as to other lands they might have in possession in the same parish, by increasing the poors' rates upon them; but it could not affect them even collaterally in respect of the demised premises during the term (*t*). The law would be the same, it appears, if the covenant had been, only to employ freemen of the corporation in the mill (*u*). So, if a lessee should covenant to make a communication by water from the demised premises through other persons' lands to another place, to facilitate the

(*t*) Mayor of Congleton v. Pattison, 10 East, 130. See likewise Collins v. Plumb, 16 Ves. 454.

(*u*) Ibid. 134.

access to a market; although the value of the reversion would be materially affected by the performance or non-performance of such a covenant; yet it could not bind the assignee, because all the cases show, that the assignee is not bound unless the thing to be done is upon the land demised (*v*). And on the same authority, it seems to have been admitted, that a covenant by a lessor to give his lessee, his executors, administrators, and assigns, a right of pre-emption of an adjoining piece of ground, would not run with the land, in the hands of the assignee of the lessee, being to do a thing collateral to the demised premises (*w*).

Several owners and occupiers of land in a parish, covenanted to concur in defending any suits that might be commenced against any of them, by the then present or any future rector, for the tithes of articles covered by certain specified moduses, or any other moduses; and bound themselves not to compromise or settle such suits, &c. And, among other things, it was agreed, that the several parties who were owners and occupiers, would severally bear, satisfy, defray, and discharge, all and every the costs, charges, and expenses, of the proceedings mentioned above, rateably according to the annual value of their respective lands within the parish, as they were rated to the poors' rate, and that the parties who were occupiers only, as lessees or tenants, should bear, contribute, and pay, to their respective lessors or landlords, executing the indenture, a fair

(*v*) Ibid. 138, 9.

(*w*) Collison v. Lettsom, 6 Taunt. 224; S. C. 2 Marsh. 1.

and equitable proportion of such costs, charges, and expenses, according to their respective interests in the lands by them respectively occupied, such proportion to be settled by three persons therein mentioned. The Master of the Rolls, in one part of his judgment, remarked, that this was not a covenant that would run with the land; a purchaser, therefore, on a sale of these estates would not be obliged to fulfil it (*x*).

As the above distinctions, especially the distinction between the first and second class just noticed, offer no very satisfactory criterion of the requisites to make a covenant run with the land; the safest way in practice, in all cases where the covenant is intended to run with the land, is, to include the assignee of the covenantor in the covenant: his being named, can never be prejudicial to the covenantee's interest; but may, in some instances of doubt respecting the class to which the particular covenant belongs, prove essentially serviceable to him; by conferring on him a right of action against such assignee, to which he would not be entitled on the omission to provide for the acts of assignees.

4. What persons are comprised within the term "assignee."

While we are on the subject of the liability of assignees, it may be proper to notice the extensive signification of that term, and to point out what persons may be construed to be invested with that character. By the seventh resolution in Spencer's case (*y*) it was agreed, that the assignee of the as-

(*x*) Stone v. Yea, Jacob, 426, 434.

(*y*) Spencer's case, 7th resolution.

signee should have an action of covenant (*z*). So, of the executors or administrators of the assignee of the assignee (*a*). So, of the assignees of the executors or administrators of every assignee (*b*); for all are comprised within the word *assignees;* for the same right which was in the testator or intestate shall go to his executors or administrators. And if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch; and so shall the heirs of the assignee. The same law of the assignee of the heirs of the feoffee, and of every assignee. So, every one of them shall have a writ of *warrantia chartæ;* for the same right which was in the ancestor, shall descend to the heir in such case, without express words of the heirs of the assignees. Parties coming in by act of law, as, tenant by statute-merchant, or statute-staple, or elegit of a term, and he to whom a lease is sold by force of an execution, are likewise within the meaning of the word *assignees* (*c*). But to charge an assignee, he must be possessed under the original demise. It is not sufficient, therefore, to allege that the tenements came to the defendant by assignment; but it must be shown that he was assignee of the term; for otherwise, he might claim under an assignment of another estate than the term of the lessee (*d*). And

(*z*) See also Congham v. King, Cro. Car. 221; S. C. nom. Conan v. Kemise, W. Jo. 245.

(*a*) See too Keeling v. Morrice, 12 Mod. 371. Hyde v. The Dean and Canons of Windsor, Cro. Eliz. 553.

(*b*) See also Whitfield v. How, 2 Show. 57.

(*c*) Spencer's case, 5 Co. 17, a. 5th res.

(*d*) Huckle v. Wye, Carth. 255, 6. 1 Brod. & B. 250.

where an estate was conveyed to A. and his heirs, to the use of such persons as B. should appoint, and in default of appointment, to B. in fee ; and, by the same conveyance, a certain fee farm rent was reserved to the chief lord, which rent B. covenanted for himself, his heirs and assigns, to pay ; and B. appointed to C. : It was held, that as C. came in under B.'s appointment, and not under his seisin, he was in paramount B., and not an assignee of B., so as to be liable on the covenant (*e*).

In order, however, to prove that the defendant is clothed with such a character as will render him liable on the covenant, it is sufficient to show that the estate is vested in him ; and, although in the case of a fee, the party be in possession as heir at law, he is liable on the covenant, on the general allegation of his being assignee (*f*). Hence, the usual form is : that all the said estate, right, title, and interest, of the said A. B. (the lessee), of, in, and to the said demised premises, with the appurtenances, afterwards, to wit, on, &c., at, &c., aforesaid, by assignment thereof then and there duly made, came to and vested in the said defendant (*g*). In a suit in equity also against the assignee of a lease, for a breach of covenant, the defendant should be shown, as in a declaration at law, to be an assign (*h*). But the expres-

(*e*) Roach v. Wadham, 6 East, 289 ; S. C. 2 Smith, 376.

(*f*) Derisley v. Custance, 4 Term Rep. 75. Whitfield v. How, 2 Show. 59.

(*g*) 1 Chit. Plead. 355. 3d ed. 1 Saund. 112, a. note (1).

(*h*) Lord Uxbridge v. Staveland, 1 Ves. 56.

sion, that the property vested in the defendant as assignee of "all the estate, right, title, and interest" of the covenantor, must be understood to respect that particular description and quality of estate, termed legal estate, by virtue whereof parties are at all liable, at law, to actions of covenant, as assignees. The devisees of an equity of redemption, therefore, the legal fee being in a mortgagee, cannot be charged, as such assignees, with a breach of covenant entered into by the devisor with a lessee or grantee (*i*). Nor is the mere depositary of a lease, delivered as a security for the repayment of money lent, such an assignee as may be sued for non-performance of covenants (*k*): his interest is simply equitable: but on this interest equity will act, and will decree the depositary to take an assignment of the lease, and execute a counterpart of the assignment, so as to put the lessor in a situation to recover damages at law against him for a breach of covenants (*l*). Nor is an assignee chargeable with covenant, where the lessors or grantors had not the legal or equitable estate in the real hereditament which they professed to grant. Hence, where two persons, being only part owners of the profits of a navigation, granted a right of cutting channels through the banks of the navigation, &c. for certain purposes, as if they had the sole ownership of the navigation; it was decided, that an

(*i*) The Mayor, &c. of Carlisle v. Blamire, 8 East, 487. Taylor v. Shum, 1 Bos. & Pul. 23. Goddard v. Keate, 1 Vern. 87; S. C. 1 Eq. Ca. Ab. 47. pl. 7. Wilkins v. Fry, 1 Meriv. 266.

(*k*) Doe dem. Maslin v. Roe, 5 Esp. 105.

(*l*) Lucas v. Comerford, 3 Bro. C.C. 166; S. C. 1 Ves. jun. 235; Cited 1 Meriv. 264.

action was not maintainable against the assignee for rent in respect of the grant, because no interest originally passed to the grantee (*m*).

In like manner, the operation of the word *assigns* can only be extended to such persons as assume that character after the covenant made. And where a lessor covenanted, for himself, his executors, administrators, and assigns, with his lessee, to permit him to make a drain to convey the waste water from the houses demised to the main shore, and the covenantor had previously assigned the lands intervening between the demised premises and the main shore to a stranger, who refused his permission for that purpose; the court held, that an action could not be supported against the lessor, the disturbance being alleged to be by an assignee who came in before the demise (*n*). On the other hand, if a tenant or his assignee continue in possession after the expiration of his lease, and pay rent, he will be presumed to hold over subject to all the covenants in the lease applicable to his new situation (*o*); the payment of rent being evidence of holding, not only on the same terms, but, further, subject to the same covenants and agreements (*p*). And though an action of covenant could not be maintained, an action of assumpsit, or on the case, would lie, declaring specially on the implied agreement (*q*).

(*m*) The Earl of Portmore v. Bunn, 1 Barn. & Cres. 694; S. C. 3 Dow. & Ry. 145.

(*n*) Target v. Lloyd, 2 Vent. 277.

(*o*) Digby v. Atkinson, 4 Camp. 275. Bromefield v. Williamson, Sty. 407.

(*p*) Kimpton v. Eve, 2 Ves. & B. 353.

(*q*) Ibid.

For some time, the courts entertained great doubts whether an action of covenant could be maintained by a lessor against an under-lessee, as being substantially an assignee; but after much consideration of the subject, and a full investigation of the authorities, it is clearly settled, that the action cannot be supported, unless against an assignee of the whole term (*r*). On this principle, where there was a grant by lessees for lives of all their estate, right, title, interest, &c. in the premises, to one and his executors, habendum to him and his executors for ninety-nine years, if the lives should so long live, in as large, ample, and beneficial a way, as the grantors, their heirs, &c. could have enjoyed the same; Lord Kenyon held, that as the term of ninety-nine years was not co-extensive with an estate of freehold, and there were no words by which the freehold of which the original lessees were seised, was conveyed to the defendant's testator, it could not be said that the whole interest in the lease passed to him: the reversioners, in consequence, (the lives being expired within the term,) could not maintain covenant against the under-lessee for not delivering up the premises in good repair (*s*). Yet it would appear, that equity would compel an under-lessee to repair, if the first

(*r*) Holford v. Hatch, 1 Dougl. 183. Kinnersley v. Orpe, 1 Dougl. 56. Crusoe dem. Blencowe v. Bugby, W. Blac. 766; S. C. 3 Wils. 234. Milnes v. Branch, 5 Maule & Selw. 411. Goddard v. Keate, 1 Vern. 87; S. C. 1 Eq. Ca. Ab. 47. pl. 7. Church v. Brown, 15 Ves. 265. Jalabert v. Duke of Chandos, 1 Eden, 372. Brewer v. Hill, 2 Anstr. 413. Anon. Mo. 93. pl. 230.

(*s*) The Earl of Derby v. Taylor, 1 East, 502.

lessee died insolvent (*t*). It may also be observed, that where one covenants for himself and his under-tenants, whether the under-tenant claim immediately under the covenantor, or mediately through several transfers of the under-lease, he still comes within the scope of the covenant (*u*).

5. Whether entry is necessary to constitute a party an assignee.

An actual entry upon the demised premises by an assignee is not requisite, in order to charge him with the performance of covenants running with the land: by accepting an interest under the conveyance, he incurs all the responsibility connected with the estate, as extensively as if he had taken possession in fact (*v*). A contrary decision (*w*) is to be met with in the reports; but whatever opinions may formerly have been supported, the law is definitively settled as above. Thus, where the assignees of a bankrupt lessee put up the premises for sale by auction, and a person became the purchaser, and paid his deposit, and gave orders for the assignment to be prepared by the solicitor of the assignees, and the assignment was accordingly prepared, and executed by the assignees and the bankrupt, but, instead of being delivered to the purchaser, remained in the solicitor's hands, who claimed a lien upon it for the expense

(*t*) Goddard v. Keate, sup.

(*u*) Burman v. Aston, 1 Lev. 144; S. C. nom. Boarman, or Bourman, v. Arton, or Acton, 1 Keb. 775. 806.

(*v*) Williams v. Bosanquet, 1 Brod. & B. 238; S. C. 3 J. B. Mo. 500. See Cook v. Harris, 1 Lord Raym. 367. Bellasis v. Burbrick, 1 Salk. 209; S. C. 1 Ld. Raym. 170.

(*w*) Eaton v. Jaques, 2 Dougl. 455. See also Jackson v. Vernon, 1 Hen. Blac. 114. Chinnery v. Blackburne, Ibid. 117. n. (a). Anon. 2 Freem. 253.

of preparing it; Lord Ellenborough held, that the assignment was complete before the rent became due, although it had not been delivered to, or accepted by the purchaser; and that the assignees of the bankrupt were not liable (*x*). So, where certain leasehold premises were assigned to the defendant, as trustee for one Fidell, to whom an annuity had been granted by the lessee, with the usual powers of distress and entry, in trust to permit the grantor to take the rents until default in payment, and thereafter to raise and pay the annuity to Fidell, and as to the surplus rents, in trust for the grantor; and a tenant who occupied one of the houses, having applied to the defendant to inquire to whom the rent should be paid, the defendant answered, "You must pay the rent to me; I am become landlord for my client, who has the annuity, and you must pay the ground rents to (*y*) me": It was held, that this amounted to a sufficient assumption of right, and approached as nearly to an entry on the land assigned as was possible under the circumstances, and therefore, the trustee was liable (*z*). And the same rule applies to an assignee of an assignee; and whether the second assignee enter on the premises or not is unimportant; by the assignment the title and possessory right pass, and the assignee becomes sufficiently possessed to discharge the prior assignee from the covenants in the lease (*a*).

(*x*) Odell v. Wake, 3 Campb. 394.

(*y*) In the report the word *for* is inserted, it seems, by mistake, instead of *to*.

(*z*) Gretton v. Diggles, 4 Taunt. 766.

(*a*) Walker v. Reeves, 2 Dougl. 461. n. (1.)

An endeavour to distinguish cases of an absolute assignment from a conditional or qualified assignment by way of mortgage, has given rise to some argument; and in Eaton v. Jaques, this distinction was sanctioned by the court, and formed the basis of Lord Mansfield's judgment. "To do justice between men, (said his Lordship,) it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say it was an absolute conveyance? It was a mere security, and it was not, nor ever is meant, that possession should be taken until default in payment, and the money has been demanded." Mr. Justice Buller, indeed, went a step further, and denied the liability of the assignee, without possession, even in the case of an absolute assignment, and said, that the distinction between a naked right and the beneficial enjoyment was founded in reason (*b*). This doctrine has, however, been subsequently impeached, and Eaton v. Jaques formally reversed; and it is now fully established, that so long as the assignee has the legal estate, so long he continues liable to perform the covenants in the lease, and it is perfectly immaterial whether the assignment be unconditional, or by way of mortgage (*c*).

(*b*) Eaton v. Jaques, 2 Dougl. 455.

(*c*) Sparkes v. Smith, 2 Vern. 275; S. C. 1 Eq. Ca. Ab. 47. pl. 6. Pilkington v. Shaller, 2 Vern. 374. Walker v. Reeves, 2

These cases, therefore, point out the propriety, where a term of years is the security for the re-payment of money advanced on mortgage, of taking, instead of an assignment, an underlease merely; the reservation of a day being sufficient to preserve a reversion in the lessee, and to prevent any privity of estate or of contract between the lessor and sub-lessee. At one time a practice existed of assigning the lease with a reservation of rent, or a right of entry, to the assignor, but these contrivances are now unserviceable and exploded; since it has been adjudged, that notwithstanding such reservation, if the whole term passes, the instrument will operate as an assignment, and not as an underlease, and will, on that account, bind the mortgagee to a performance of the covenants (*d*).

6. Duration of the assignee's liability; and herein of the duration of the liability of the lessee.

A lessee, or his executors and administrators, and an assignee, with respect to the continuance and duration of their liability to the covenants in a lease, stand in different situations. To explain the principles from which this difference originates, it will be needful to shew the distinction between the several kinds of privities.

First, There is a privity of estate; and Secondly, a privity of contract. These privities are frequently in distinct persons, and frequently unite in the same

Dougl. 461. n. [1]. Westerdell v. Dale, 7 Term Rep. 312. Stone v. Evans, Woodfall's Landl. and Ten. 84. 6th edit. Williams v. Bosanquet, supra.

(*d*) Palmer v. Edwards, 1 Dougl. 187. n. Chancellor v. Poole, 2 Dougl. 764.

individual (*e*). We will take the case of a lease: In respect of the lands demised, between the lessor and the lessee, the one being lord and reversioner, the other the subordinate tenant, there exists the relation of privity of estate. This privity, depending entirely on the estate, will have a duration co-extensive with the continuance of the term. By an assignment, the lessee may divest himself of the privity of estate, and transfer it to his assignee; and it will remain annexed to the estate in whose possession soever the lands may happen to fall; and notwithstanding the frequency with which the property may change owners, the assignee will still hold in privity of estate of the original landlord. In the event of an assignment to an insolvent person, it is clear, that the landlord's security for future payments of rent would be extremely precarious. It has, therefore, been usual at all times to insert special covenants on the lessee's part, for payment of rent, for repairing the demised premises, &c. These covenants create the second kind of privity, namely, of contract. So that a lessee, during his occupation, holds both by privity of estate and privity of contract. This latter privity is not absolutely transmitted to a purchaser, on an assignment by the lessee, as it will, until the determination of the term, oblige such lessee, and his personal representatives, and his heirs, where named and having assets by descent (*f*), to an observance of

(*e*) Walker's case, 3 Co. 23, a.; S. C. Mo. 351. Overton v. Sydal, Cro. Eliz. 555. Thursby v. Plant, 1 Saund. 237; S. C. 1 Sid. 401; 1 Lev. 259; 2 Keb. 439. 448. 468. 492; S. C. nom. Nurstie v. Hall, 1 Vent. 10.

(*f*) Ante, p. 448, 9.

the covenants (*g*); except in the case of covenants in law, upon which, after an assignment of the term, and acceptance of the rent from the assignee, covenant does not lie against the assignor (*h*).

Then, before we enter on the subject of the duration of the lessor's claim upon the assignee, a few words may be offered respecting the situation of the lessee.

With the liability arising from the privity of contract, the lessee is so permanently fixed during the term, that no act of his own (*i*) can absolve him from the lessor's demands in respect of it. An assignment, and tender of rent by the assignee (*k*), or even an assignment with the lessor's concurrence, and his subsequent receipt of rent from the assignee, will be ineffectual for this purpose (*l*). So, of course, when

(*g*) Buckland v. Hall, 8 Ves. 95. Staines v. Morris, 1 Ves. & B. 11. Norton v. Acklane, Cro. Car. 580. Matures v. Westwood, Cro. Eliz. 599. 617.

(*h*) Anon. 1 Sid. 447. Bacheloure v. Gage, W. Jo. 223; S. C. Cro. Car. 188. And see ante, p. 42.

(*i*) The bankruptcy of the lessee can scarcely be called his own act alone. See post, p. 493, as to the lessee's liability after bankruptcy.

(*k*) Orgill v. Kemshead, 4 Taunt. 642.

(*l*) Fisher v. Ameers, 1 Brownl. & Gold. 20. Brett v. Cumberland, Cro. Jac. 399. 521; S. C. 1 Rol. 359; Lane, 78; 3 Bulstr. 163. Ventrice v. Goodcheape, 1 Rol. Ab. 522. N. pl. 1. Devon v. Collyer, Ibid. Whitway v. Pinsent, Sty. 300. Edwards v. Morgan, 3 Lev. 233. Parker v. Webb, Holt, 75; S. C. 3 Salk. 5. Latch, 260. Arthur v. Vanderplank, 7 Mod. 198; S. C. Ridg. 40; 2 Barnard. 372; W. Kel. 167. Jenkins v. Hermitage, Freem. 377; S. C. 3 Keb. 367. Hornby v. Houlditch, Andr. 40; Cited 1 Term Rep. 93. Wilson v. Wigg, 10 East, 313. Jodde-

the lessee sells part only, he is liable in covenant for the whole (*m*). Nor can an assignment by act of law operate more favourably for him; for after a disposition of a lease by virtue of a *fieri facias*, or an *elegit*, the lessee continues liable on his covenant, notwithstanding the estate be taken from him against his consent (*n*). A felon, also, after attainder and forfeiture of his lands, remains bound by his express covenant (*o*). And unless a specific clause provide for the lessee's release, he will not be exonerated from the covenants, although he be divested of his estate by the operation of an act of parliament. An action was brought against the executrix of a lessee for years, for non-payment of rent, and the defendant pleaded the statute of 7 Geo. 1. c. 28., entitled "An act for raising money upon the estates of the late sub-governor, deputy-governor, directors, &c. of the South Sea Company," &c.; and that her said testator was one of the directors, and therein named, and was thereby acquitted and discharged of and from the payment of all rent due on the said lease; to which the plaintiff demurred: the court were unanimously of opinion, that this act could not be considered as a discharge or acquittal of the original lessee, and gave judgment for the plaintiff (*p*).

rell v. Cowell, Ca. temp. Hardw. 343. Staines v. Morris, 1 Ves. & B. 11. Marrow v. Turpin, Cro. Eliz. 715, overruled.

(*m*) Ards v. Watkin, Cro. Eliz. 637. Stevenson v. Lambard, 3 East, 575. 579.

(*n*) Auriol v. Mills, 4 Term Rep. 99.

(*o*) Trussel's case, Cro. Eliz. 213; S. C. Ow. 69; S. C. nom. Banyster v. Trussel, Ibid. 516; 2 And. 38. 45; Cited 1 H. Blac. 440. Hastings v. Blake, Noy, 1.

(*p*) Hornby v. Houlditch, Andr. 40; S. C. cited 1 Term Rep. 92,3; where the judgment is fully set out.

A bankrupt lessee is differently circumstanced. In case of an absolute rejection of his leaseholds by the assignees, the property still resides in the bankrupt; but he has the option of delivering up the lease, and of relieving himself from future rent and performance of covenants, or, by remaining tenant, to continue to bear the charges to which he was liable before his bankruptcy. But lessees discharged under the insolvent act (*q*), are subject to the same burthens as bankrupts were exposed to in the interval between Sir Samuel Romilly's act and the last bankrupt act. The statute relating to insolvents deprives the lessor of his remedy against them only on condition that the assignees take the prisoner's lease as part of his estate and effects; but the insolvent himself is not empowered to deliver up his lease, and so determine his liability on the covenants entered into by him with his landlord.

Thus much for the extent of the lessee's liability. The assignee's obligation to perform the covenants running with the land now claims our attention. This duty arises and endures solely on the score of privity of estate (*r*); and hence, as the tenant continues chargeable on his contract, the lessor may sue the assignee who has the estate, and the lessee who made the covenant, or his executors, at one and the

(*q*) 7 Geo. IV. c. 57. s. 23. See ante, p. 209, 210.

(*r*) Le Keux v. Nash, 2 Stra. 1221. Stevenson v. Lambard, 2 East, 575. Wilkins v. Fry, 1 Meriv. 265. Onslow v. Corrie, 2 Madd. 340. City of London v. Richmond, 2 Vern. 421; S. C. Prec. Ch. 156. Copeland v. Stephens, 1 Barn. & Ald. 607. Paul v. Nurse, 8 Barn. & Cres. 486.

same time; but execution shall issue only against one of them: for if he bring an action against the one, and after against the other, and shall take several executions, he who is last taken in execution may have an *auditâ querelâ* (*s*). Consequently, the lessor may sue at his election either the lessee or his executors, or the assignee (*t*).

Since an assignee bears the charges during his enjoyment of the benefit under the lease, and no longer, it follows, that by an assignment over he may free himself from all future burthens connected with the estate, without even the necessity of furnishing the lessor with notice of his intention to dispose of the property (*u*). Therefore, after a transfer by him, he cannot be subject to an action for a breach of a covenant to repair (*v*); nor for rent accruing due after that time (*w*); although his assignee may never have entered or taken possession (*x*). And an as-

(*s*) Brett v. Cumberland, Cro. Jac. 523. See Whitway v. Pinsent, Sty. 300.

(*t*) Boulton v. Canon, Freem. 336. Barnard v. Godscall, Cro. Jac. 309. Bacheloure v. Gage, W. Jo. 223; S. C. Cro. Car. 188. Burnett v. Lynch, 5 Barn. & Cres. 608; S. C. 8 Dow. & Ry. 368.

(*u*) Tongue v. Pitcher, 3 Lev. 295; S. C. nom. Tovey v. Pitcher, 2 Vent. 234; Carth. 177; S. C. Pitcher v. Tovey, in K. B. in error, reversing the judgment of C. P., Holt, 73; 1 Salk. 81; 4 Mod. 71; 12 Mod. 23; 1 Show. 340. And the court denied the authority of Kighly v. Bulkly, 1 Sid. 338; S. C. 2 Keb. 260; S. C. nom. Knight v. Buckley, T. Raym. 162; S. C. nom. Keightley v. Buckly, 1 Lev. 215. See also March v. Brace, 2 Bulstr. 151.

(*v*) Keeling v. Morrice, 12 Mod. 371.

(*w*) Pitcher v. Tovey, sup.

(*x*) Odell v. Wake, 3 Campb. 394. Taylor v. Shum, 1 Bos. & Pul. 21.

signee of a term declared against *as such*, is not liable for rent accruing after he has assigned over, although it be stated, that the lessor was a party executing the assignment to the first assignee, and thereby agreed, that the term, which before was determinable at the option of either party, should be absolute (*y*). Nor will an action lie on the covenants in the lease, against an assignee at the suit of an assignor, for the latter has no residuary interest (*z*).

But the subdivision of an estate will not exempt the assignee of a portion from the burthen of the covenants running with the land: If he be assignee of part only, he is liable to an action of covenant for not repairing that part (*a*). So, if an assignee of the whole land be evicted of a moiety by title paramount, he is chargeable with payment of an apportioned rent for the enjoyment of the other moiety, in an action of covenant, as he would be in debt, or upon an avowry in replevin; the covenant being a real contract in respect of the land, and dividable, and following the land (*b*).

7. Whether assignee liable after assignment for breaches before assignment.

Whether he is liable after assignment for breaches before assignment, is a question admitting of some controversy. In a case in Salkeld's Reports (*c*), it is

(*y*) Chancellor v. Poole, 2 Dougl. 764.

(*z*) Hicks v. Downing, *alias* Smith v. Baker, 1 Ld. Raym. 99. Wheeler v. Baker, 3 Salk. 10.

(*a*) Congham v. King, Cro. Car. 221; S. C. nom. Conan v. Kemise, W. Jo. 245. Ards v. Watkin, Cro. Eliz. 637. 651. Merceron v. Dowson, 5 Barn. & Cres. 479.

(*b*) Stevenson v. Lambard, 2 East, 575. See also Twynam v. Pickard, 2 Barn. & Ald. 105.

(*c*) Pitcher v. Tovey, 1 Salk. 81.

laid down, that covenant will lie against an assignee, for the rent due in his time, before assignment, but not after. This sentence is certainly rather equivocal; for the words *but not after* may refer either to rent becoming due after assignment, or to the assignee's liability after assignment. Bacon also states in his Abridgment (*d*), that an assignee who assigns over is liable, and shall pay the rent which incurred due before, and during his enjoyment; but the means by which this liability is to be enforced are not mentioned. The position seems to require investigation. The remedy by covenant, open to the lessor against the assignee, we have observed, is derived from the privity of estate which subsists between them during the occupancy of the latter; and it has also been seen, that, by getting rid of the estate, the assignee determines the privity as far as regards himself, and transfers it to the new assignee. If, therefore, that on which alone the liability is founded, namely, the privity, be destroyed, how can its dependent liability survive in charge against the assignee? The defeasance of the principal must surely operate as the defeasance of the accessary. Not only to the principle on which the action of covenant against the assignee is founded, does the proposition seem to be opposed, but it will be endeavoured to be shown, that the authorities will admit of a different doctrine.

A court of equity, it will be allowed, seldom in-

(*d*) Bac. Ab. Covenant, (E). 4. And Woodfall in his "Landlord and Tenant," p. 278. 6 Ed. refers to Bacon's Abr., and two cases unconnected with the point. See also 1 Eq. Ca. Ab. 47. pl. 3. in marg.

terferes, or renders its assistance in cases of this kind, while means of redress are available at law. If this be admitted, and if it can be proved that success has frequently attended suits in equity, to compel an assignee after his assignment to pay rent incurred during his possession, the inference will be, that the Court of Chancery assisted, because the party had no remedy at law. The earliest case the author has discovered, in which the point came before the court, and was determined on its own merits, occurred in the year 1683 (*d*). The assignee of a lease, rendering rent, having enjoyed the land six years, assigned over; and the bill was to call him to an account for the rent for such time as he enjoyed the land: the defendant pleaded a judgment upon a demurrer at law, but the plea was overruled; for though in strictness of law there was no privity of contract (*e*) to charge the assignee; yet in equity he was most certainly chargeable for such time as he received the profits. The counsel alleged that there were twenty precedents in the case; and the Lord Keeper (Sir Francis North, afterwards the Earl of Guildford,) said, that if there had not been one, he should not have doubted to make a precedent in this case. So that the bill was not only entertained, but it was also disclosed, that the plaintiff's claim against the assignee had been rejected in an action at law.

Next came the case of Philpot v. Hoare (*f*), de-

(*d*) Treackle v. Coke, 1 Vern. 165; S. C. 1 Eq. Ca. Ab. 47. pl. 3. See also City of London v. Richmond, 2 Vern. 421; S. C. Prec. Ch. 156.

(*e*) Query, *estate?*

(*f*) Philpot v. Hoare, Ambl. 480; in which report there is some

cided in 1741, in which, the assignee's discharge at law, and his liability in equity, were broadly stated in argument as indisputable points, and passed uncontradicted by counsel or the court. The facts may be briefly detailed. Ward, a lessee, became bankrupt, and Mrs. Hoare, one of the defendants, was chosen assignee; she entered on the farm, sold off the crop and stock, paid the Michaelmas rent, 1739, and, on the day before the next half-yearly rent-day, assigned to Robinson, the other defendant. There was proof, it is true, that the court considered Robinson in the light of an agent for Mrs. Hoare, rather than a bonâ fide assignee, and deemed the assignment fraudulent; but the argument is worth noticing (*g*): "It is not to be disputed in a court of equity, (said the counsel,) that such an assignee, notwithstanding such her assignment over, is at least liable to answer for the rent during her own occupation; though she is discharged at law." And Lord Hardwicke, after stating the case, said: "The defendant Hoare would have it supposed, that Robinson was to take the lease charged with the arrears of rent; and insists that she is chargeable only during the privity of her estate. As to arrears of rent for the half year due, 1740, I am clear of opinion, that the plaintiff (the lessor) has a remedy for them in this court;" which observation clearly distinguished between courts of law and equity, and implied that, in the former, the plaintiff was not enabled to recover. And as to the breach of a covenant for

confusion with regard to dates. 2 P.

The case is also reported 2 Atk. (*g*) Ambl. 482.

removing stover off the farm, his Lordship expressly said (*h*), that an action of covenant would not lie, as there was no privity between the defendant and the lessor. He also observed, that the case of Treackle v. Coke was a proper authority.

Shortly afterwards, in 1742, Lord Hardwicke again, not only relieved the lessor in equity, but plainly denied his power to recover at law (*i*). His Lordship's words were: "As to the arrears of rent incurred before the fire, (the fire happening previously to the assignment,) it is extremely plain, that Dodemede (the assignee) is liable to make satisfaction to the plaintiff; because during that time he was in possession of the rents and profits of the estates; however, as he has made an assignment to Lascelles, Valliant (the reversioner) has no remedy for these arrears at law, and is under a necessity of coming into this court for its assistance."

The justice of these decisions has been recognised in a case which lately received much attention in the Vice Chancellor's Court (*k*). Although the bill was filed to enforce the assignees of a bankrupt, who had assigned over to an insolvent, to pay a twelve-month's rent, accruing after such assignment; yet a great part of the judgment of the court applied to the case of an arrear of rent due by an assignee

(*h*) 2 Atk. 220.

(*i*) Valliant v. Dodemede, 2 Atk. 546, 8.

(*k*) Onslow v. Corrie, 2 Mad. 330.

before assignment. "Equity, said Sir Thomas Plumer (*l*), gives relief to a landlord for his rent in cases of assignment; first, where the assignment is merely colourable and fictitious, the possession remaining with the assignor; or, secondly, where, though there be a real assignment, yet it has been made for the purpose of depriving the landlord of his legal remedies for rent due, or for breaches of covenant incurred previous to the assignment." His Honor then stated the case of Treackle v. Coke, and continued: "In Gilbert's *Lex Prætoria* (*m*), it is said, 'Where a lessee covenanted for payment of rent and repairs, and for building on the premises, and the term was afterwards extended and sold for debt, and such assignees finding the term not worth their having, offered to resign to the lessor, and he refusing, they assigned to a beggar, the question was, whether this was a fraud that a court of equity would relieve against; and the court took this distinction; that if the assignees had continued long in possession, and the premises had been worse and become ruinous under their hands, or by their means, then the assignment would be considered to be a fraud to get rid of the damage that they ought to answer; but if

(*l*) P. 341.

(*m*) P. 362. Per V. C. "In the printed edition of the *Lex Prætoria*, no cases are cited in support of the passage quoted; but in a MS. copy of that work in the possession of Mr. Maddock which I have seen, two MS. cases are cited apparently from Gilbert's note-book, Sainbury v. Lampree, and Grameer v. Loveday; but I have not been able to find these cases anywhere in print. The passage quoted from the *Lex Prætoria* is embodied in the Practice of Equity, vol. i. p. 361, 2; and some able and useful notes are made upon it by Mr. Fonblanque."

they assigned immediately after their coming into possession, there was no reason to relieve, because the assignee was not chargeable at law, and the lessor had his original security against the lessee, and his executors, as he had before, unimpeached; and the assignee being under no obligation to hold it, there was no fraud in making such assignment.'—In a M.S. note of a case in Michaelmas Term, 12th George II., furnished me by Mr. Maddock, Mr. Fazakerly cited a case which was before Lord Chancellor Cowper, in which it was agreed, that when a lease is assigned to one, and he assigns to a third person, though the lessor hath strictly no remedy against the first assignee, the privity of estate being determined; yet, that if it appears, as it did in that case, that the second assignment was made in order to exonerate and discharge the assignor of *rent due* to the lessor, this court will look upon it as a fraud, and oblige such assignor to pay the rent *incurred in his time*, notwithstanding the privity of estate being determined, and there being no covenant from such second assignor:" and Valliant v. Dodemede was then noticed with approbation.

If this claim could have been supported, a case of very recent adjudication gave the lessor an opportunity of making it on an assignee, who had assigned over, for a breach of covenant to repair during his occupation; but he preferred an action against the lessee, and recovered (*n*).

(*n*) Burnett v. Lynch, 5 Barn. & Cres. 589; S. C. 8 Dow. & Ry. 368.

From these authorities, therefore, it is evident, that the opinions of some of our greatest judges, for a period approaching to a century and a half, have been directly hostile to the position contained in Bacon's Abridgment, and in Salkeld's book (assuming, that in the latter work, the term *but not after* has relation to the assignee's liability after assignment). The lessor's incapability of recovering at law, has been taken for granted in all the cases; and in Treackle v. Coke in particular, we find, that a judgment at law had been actually pronounced in favor of the defendant. As occasions for suing assignees similarly situated must frequently have occurred, the mere fact of the non-existence of any case involving the point, and corroborating the doctrine, affords a strong presumption, that the courts of law were fully conscious of their want of power to take cognizance of such an action. The reasons above advanced, then, it is submitted, may fairly be urged in justification of a refusal to rely too implicitly on the proposition advanced by Bacon and Salkeld; a proposition repugnant to principle, and destitute of any similar determination in its support. It is, moreover, a circumstance highly worthy of remark, that although Pitcher v. Tovey is reported by several other reporters contemporary with Salkeld (*o*); yet in no one of their works is the sentence in question to be found. We may therefore perhaps assume, without any great violation of probability, that it did not constitute part of the judgment of the court, but was an inference or deduction expressive only of the opinion of Mr. Salkeld himself.

(*o*) Holt, 73; 4 Mod. 71; 12 Mod. 23; 1 Show. 340.

If rent in arrear before assignment cannot be recovered at law, by an action of covenant, after the assignee has parted with the estate; on the same principle, an action of covenant cannot be maintained by a lessor against an assignee, after the expiration of the term by effluxion of time, for an arrear of rent accrued during the continuance of the lease. But it must be mentioned, that this opinion is opposed by a case in Ventris (*p*); where an assignee was declared to be liable to an action of covenant after the lease had expired, for a breach in not repairing the premises demised.

As, on the one hand, an assignee is not chargeable for breaches of covenant committed after an assignment by him; so, on the other, whether named or not, he will not be liable to an action for a breach committed before the assignment to him: If then a lessee covenants to rebuild and finish a house on the demised premises before a limited time, and afterwards assigns, having neglected to rebuild within the prescribed period, the assignee will not be bound, as the covenant was not broken by him (*q*).

8. What a valid or fraudulent assignment.

With respect to what shall be deemed a valid assignment, we may mention, that there is no fraud in assigning to a feme coverte; and unless the husband refuse his assent, such assignment will exoner-

(*p*) Morley v. Polhill, 2 Vent. 56.

(*q*) Grescot v. Green, Holt, 177; S. C. 1 Salk. 199. Anon. 12 Mod. 384. Churchwardens of St. Saviour's Southwark v. Smith, 3 Burr. 1271; S. C. 1 W. Blac. 351. Brittin v. Vaugh, Lutw. 109. Nels. fol. ed.

ate the assignor (*r*); nor is it fraudulent to dispose of the estate to a beggar; or to a person leaving the kingdom, provided the assignment be executed before his departure (*s*); or to a person actually a prisoner in the Fleet, although the consideration money be lent by the assignor to the assignee, to be repaid by him (*t*); or even although the assignee receive from the assignor a premium as an inducement to accept the transfer (*u*); but an execution to a non-entity, or a person not in existence, will be unavailable (*v*).

And as equity follows the law, assignments of this kind will not, in general, be disannulled in equity (*w*); though that court has, in some instances, interposed, and set aside the transaction, where it appeared to be a collusive agreement between the parties, rather than an actual assignment. In one case, a lessee for eleven years at 140*l.* rent, becoming a bankrupt, the defendant, the assignee under the commission, entered on the farm, sold off the crop and stock, and paid the Michaelmas rent, 1739, and the day before the next rent day, viz. on the 24th of March, 1740, assigned over the lease to one Robinson. The bill

(*r*) Barnfather v. Jordan, 2 Dougl. 452. Co. Lit. 3, a.; 356, b.

(*s*) Pitcher v. Tovey, 1 Salk. 81, &c. supra. Taylor v. Shum, 1 Bos. & Pul. 23. Onslow v. Corrie, 2 Madd. 345.

(*t*) Le Keux v. Nash, 2 Stra. 1221.

(*u*) Valliant v. Dodemede, 2 Atk. 546.

(*v*) Taylor v. Shum, 1 Bos. & Pul. 22.

(*w*) Valliant v. Dodemede, 2 Atk. 546, 8. Huddle v. Hawksby, Cited 2 Stra. 1221, and note. City of London v. Richmond, 2 Vern. 421.

was brought to compel the assignee of the bankrupt to pay the arrears and growing payments, and to make satisfaction for breach of covenants. It appeared in proof, that the defendant, Mrs. Hoare, knew Robinson to be insolvent; he never ploughed or sowed the land, never resided on the farm, but occupied it rather as an agent, and was to be indemnified by her. Lord Hardwicke held, that the defendant Robinson's not producing the assignment was evidence of fraud, and made it very suspicious that there was no assignment; nor did he believe Robinson ever had the assignment in his hands; and taking these circumstances together it looked like a collusive agreement. The defendant, Mrs. Hoare, was therefore decreed to answer the rent to Lady day 1740. An action in a *quantum damnificatus*, as to the breaches of covenant, was first ordered; but with a view to prevent any further litigation, his Lordship proposed, that in consideration of paying the plaintiff all the rent that was due, the lease for the residue of the term should be void, and the plaintiff should take the farm into his own hands, which the parties agreed to accordingly (*x*).

It may be observed, that if the dealing between the assignee and his assignee be colourable and fictitious only, it is a ground of objection at law, and the lessor may, by replying fraud to the plea of assignment, overturn the transaction in that court as well as he may in equity (*y*). But evidence of fraud

(*x*) Philpot v. Hoare, 2 Atk. 219; S. C. Ambl. 480.

(*y*) Knight v. Peachy, 1 Vent. 329. 331; S. C. T. Raym. 303;

cannot be received on a general replication of *non assignavit;* the fraud must be specially pleaded (*z*). Lord Chief Justice Eyre, indeed, doubted whether there could ever be such a thing as a fraudulent assignment, and whether an issue on such a point could ever be well taken. And both his Lordship and Mr. Justice Buller agreed, that the only case in which the replication *per fraudem* could be good, was, where the assignor kept possession of the premises, of which he made a profit, and made the assignment to prevent responsibility (*a*).

9. Liability of assignees of bankrupt.

A few words may be added, regarding the liability of the assignees of bankrupts. The general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term, and their adoption of the estate ; for they are not bound to accept a term of years that belonged to the bankrupt, subject to the rent and covenants. The object of the statute and the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose; the acceptance of a term, which, instead of furnishing the means of such payment, would diminish the fund arising from other sources, cannot be within the scope of their trust or duty. And in this respect, such a term differs from

Anon. T. Jo. 109, semb. S. C. Le Keux v. Nash, 2 Stra. 1221. Walker v. Reeves, 2 Dougl. 461. n. [I]. Onslow v. Corrie, 2 Madd. 339.

(*z*) Le Keux v. Nash, ante. Humberton v. Howgil, Hob. 72 ; Cited ibid. 166.

(*a*) Taylor v. Shum, 1 Bos. & Pul. 21.

the debts of a bankrupt and his unincumbered effects and chattels (*b*). But although the assignees may in the first instance repudiate the lease; yet they cannot, after their election to take, reject the term, when they find the bargain prove disadvantageous. Accordingly, where the lessor made application to the assignees, to know if they meant to take the bankrupt's interest in the house, and received for answer, that if they did not let it by Lady-day, they would give it up, and at Lady-day they paid the rent, and offered the agent the key; Lord Kenyon held, that the assignees were liable, and should not be allowed to renounce the lease when they discovered its want of value, and their inability to procure a tenant (*c*).

Something, then, beyond the bare execution of a deed by the commissioners, being required to vest the estate in the assignees; it becomes necessary to ascertain, what acts on the part of the assignees will amount to such an entry upon, or acceptance, or possession of the property, as will make them liable to the covenants in the lease. To enter upon that inquiry in this place will, it is hoped, be deemed a venial digression.

On this subject we find, that the mere act of the assignees' advertising the lease of the bankrupt's premises for sale by auction, without stating themselves to be the owners, or possessed thereof, and never

(*b*) Bourdillon v. Dalton, 1 Esp. N. P. C. 234; S. C. Peake's N. P. C. 312. Copeland v. Stephens, 1 Barn. & Ald. 593.

(*c*) Broome v. Robinson, Cited 7 East, 339; S. C. 3 Smith, 333.

having taken possession in fact of the premises, and no bidder offering, will not constitute an acceptance by them of the property; it amounts to no more than an experiment to ascertain the value, and whether the lease may be beneficial or not to the creditors. It might as well be said to be a taking to the interest of the bankrupt in the premises if they had sent a surveyor to ascertain what the value of the property was (*d*). Nor will a release by them of an under-lessee of the bankrupt, from all obligations to pay rent, &c. contained in such under-lease, amount to an acceptance of the premises by the assignees; for the discharge of the under-tenant does not interfere with the original letting between the lessor and the bankrupt; by the release, they merely alter the bankrupt's interest as respects the sub-lessee; but, as relates to the assignees, the bankrupt's situation remains precisely the same as if he had never under-let the premises (*e*). And where the assignees of a bankrupt, having allowed his effects to remain upon the premises occupied by him, nearly a twelvemonth after the bankruptcy, for the purpose of preventing a distress, paid the arrears of rent due, at the same time intimating to the landlord, that they did not mean to take the lease, unless it could be advantage-ously disposed of; and the effects were soon after sold, and removed from the premises, and the lease was at the same time put up to sale by order of the assignees, but there were no bidders for it; and they omitted to return the key to the landlord for near

(*d*) Turner v. Richardson, 7 East, 335; S. C. 3 Smith, 330.

(*e*) Hill v. Dobie, 8 Taunt. 325; S. C. 2 J. B. Mo. 342.

four months afterwards; Lord Ellenborough was of opinion, that the defendants had done nothing to render themselves liable as assignees of the lease granted by the plaintiff to the bankrupt; that the rent was paid by them, not as tenants, but for the express purpose of preventing a distress, with a protestation at the same moment, that they did not mean to adopt the term, unless, upon a trial being made, it should be found to be valuable; and that the mere omission to send the key was not tantamount to entering and taking possession of the premises; though, had they refused to deliver up the key, the case would have been different (*f*).

On the other hand, where the assignees do any act which denotes an intention to adopt the premises; as if they allow the cows of the bankrupt to remain for two days on some land demised to him, and order them to be twice milked there (*g*); or exercise any other direct act of ownership over the property; as, by giving orders respecting the management of the bankrupt's farm: in either of these cases, their conduct will amount to an election to take the property, and they will be deemed tenants, and liable to the covenants accordingly (*h*). So, if the bankrupt be possessed of a lease, and also of a reversionary interest, a sale by his assignees of the reversionary interest, will be such an assent on their parts to accept the estate, as may be taken advantage of by the

(*f*) Wheeler v. Bramah, 3 Campb. 340.

(*g*) Welch v. Myers, 4 Campb. 368.

(*h*) Thomas v. Pemberton, 7 Taunt. 206.

bankrupt, in a plea to an action by the lessor for breach of covenants contained in the lease (*i*).

In another case, the bankrupt's leasehold premises were put up for sale, and disposed of for 400*l*., and a deposit was paid; but in consequence of some omission on the part of the assignees, the purchaser refused to complete his purchase. The premises were on a subsequent day again put up for sale, but not sold. Gibbs, C. J. said, there was certainly no evidence why the contract was not completed; they put the premises up for sale and received a deposit; and from that he must conclude that the contract of sale was in force, and that fixed the assignees with the possession (*k*).

No instance is to be found, in which a deliberate act of taking possession has been curtailed of its full legal effect. If the assignees wish to curtail it, they should enter upon the premises with a protest that their entry was not for the purpose of possessing themselves of the premises as assignees; by neglecting this precaution they will subject themselves to the covenants: and where the assignees do enter and take possession, they will be chargeable, although the bankrupt's effects be upon the premises, and the assignees deliver up the keys immediately after a sale of the effects (*l*).

(*i*) Page v. Godden, 2 Stark. 309.
(*k*) Hastings v. Wilson, Holt's N. P. C. 290.
(*l*) Hanson v. Stevenson, 1 Barn. & Ald. 303. See also Naish v. Tatlock, 2 H. Blac. 319. Gibson v. Courthope, 1 Dow. & Ry. 205.

In concluding this subject, we may mention, that as to the legal effect of an assignment under a commission, with reference to a term of years, before the assignees' refusal or acceptance, there appear to be three modes in which it may be considered. First, does it pass the estate immediately to the assignees, defeasible upon their actual refusal to accept a (*m*) renunciation of it? Or, secondly, does it pass the estate immediately to the assignees, defeasible upon their neglect or forbearance to do some act manifesting their acceptance of it? Or, thirdly, is its effect suspended until acceptance? The first of these three modes is liable to this peculiar objection, viz. that it does not appear, by any reasoning or authority, how or to whom such actual renunciation is to be made; whether to the commissioners; to the lessor, whose residence may be at a distance or unknown; or to the bankrupts: and both the first and second are liable to objection, from the inconvenience and confusion which must ensue for some period following the execution of the assignment; and neither of them appears to be warranted by any principle or analogy of law: whereas, the suspension of the effect of the deed, until acceptance of the term by the assignees, will be analogous to the case of a lease for years, made by the owner of land at the common law. The execution of such a lease furnishes an inception of title in the intended lessee, which he may or may not adopt and perfect at his election; for no person can be compelled to take an estate against his will. If he does elect to adopt and perfect the deed, then

(*m*) Thus in the report; query, *or?*

upon such election it becomes available from the time of execution. Then, if the operation of the deed of assignment be suspended, the estate must necessarily remain in the bankrupt during the period of suspension; for it cannot be in abeyance, and must exist in some person: and the respective situations of the bankrupt and his assignees, will be similar to those of a lessor and his lessee for years before entry; but the estate in the bankrupt remains subject to the right of the assignees to have the land by their acceptance of the assignment, and thereby to give effect to the deed, and vest the estate in themselves (*n*).

Assignees of a bankrupt are no more disqualified from making an assignment to a beggar, &c. (*o*), to rid themselves of responsibility, than other individuals. If they derive no benefit from the lease; if they find it an onerous lease, *damnosa hæreditas;* they have a right, and it is a duty they owe to the bankrupt's creditors, to assign; nor will equity interfere to prevent or disturb such assignment, unless there be evidence of collusion (*p*).

(*n*) Copeland v. Stephens, 1 Barn. & Ald. 605, 6.

(*o*) See ante, p. 503, 4.

(*p*) Onslow v. Corrie, 2 Madd. 330.

CHAPTER THE SECOND.

OF THE RIGHTS AT COMMON LAW.

SECT. I.

OF THE RIGHTS OF THE COVENANTEE.

I. Of the rights of the covenantee.

As soon as the deed containing the covenant is executed, the covenantee, as we have seen, acquires a right to the observance of the agreement, and, in case of a breach, may sue for compensation in damages. His rights are so simple, that little is to be advanced respecting them; but this opportunity may be taken of mentioning, that the old cases (*a*), in which it has been held, that an action of covenant may be brought by him in whose favor the covenant is made, as well as by him in whose name it is made, are not now considered as law (*b*).

SECT. II.

OF THE RIGHTS OF THE HEIR.

II. Of the rights of the heir.

THE heir represents his ancestor as to any contracts relating to the freehold and inheritance, as the exe-

(*a*) See Deering v. Farrington, 3 Keb. 304. Lowther v. Kelly, 8 Mod. 115. Ex parte Richardson, 14 Ves. 187. And see Collins v. Plumb, 16 Ves. 454. Palm. 558.

(*b*) Ex parte Peele, 6 Ves. 604.

cutor represents the testator in respect of the personalty: and the distinction which attends real and personal covenants, with regard to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by such heir or assignee alone; but personal covenants must be sued for by the executor (*c*). Wherever the covenant relates to the land, and is for the advantage of the reversion, it is a real covenant, attendant upon, or annexed to the reversion, and by consequence, where his ancestor is seised in fee, a covenant to which the heir at law is entitled, on his ancestor's intestacy, as he is to the reversion (*d*). Accordingly, if one covenants with another and his heirs, to enfeoff him and his heirs of the manor of D.; if he will not do it, and he to whom the covenant is made dies, his heir shall have an action of covenant upon the deed (*e*); for the intent of the covenant was, to have the inheritance conveyed to the heir; and as the heir, on performance of the covenant, would have had the advantage of whatever, by the performance of the covenant, would have accrued; so he shall have damages, which accrue by the non-performance thereof (*f*).

Even in cases in which a breach has been com-

(*c*) Kingdon v. Nottle, 1 Mau. & Selw. 365. 4 Ibid. 53.

(*d*) Sail v. Kitchingham, 10 Mod. 158.

(*e*) F. N. B. 145. C. Wotton v. Cooke, Dy. 337, b.; S. C. Benl. 228; 1 And. 53; Jenk. Cent. 6. Case, 24.

(*f*) Wotton v. Cook, 1 And. 55.

mitted during the life of the testator, the heir's title to bring an action is preferred to that of the executor, provided no actual damage has been sustained by the testator. Thus, where one conveyed to another in fee, with the common covenants for title, and it afterwards appeared, that the vendor was not seised in fee; notwithstanding which, the vendee had enjoyed undisturbed possession during his life; the heir was considered to be the only person capable of taking advantage of the covenant; as the breach was not shown to have been a damage to the testator, nor was it alleged that the estate was prejudiced during his life; any damage, therefore, which accrued subsequently to his death, was matter which concerned the heir (*g*), or the devisee, in case of a devise; for so long as the defendant had not a good title, there was a continuing breach; and it was not like a covenant to do an act of solitary performance, which not being done, the covenant was broken once for all, but was in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case might require (*h*).

To the same effect is another case, decided a short time afterwards in the Court of Common Pleas (*i*). The action was brought by the plaintiff, as heir to his father, against the defendant, an executor, upon his testator's covenant in a conveyance to the plaintiff's father, that he, the vendor, and his wife, would do all acts for further assurance; a fine was required,

(*g*) Kingdon v. Nottle, 1 Mau. & Selw. 355.

(*h*) Ibid. 4 Mau. & Selw. 57.

(*i*) King v. Jones, 5 Taunt. 418; S. C. 1 Marsh. 107.

but not levied; the vendee died, and, after the descent of the premises, the plaintiff was evicted; and the court held, both on principle, and on the authority of Kingdon v. Nottle, that, as the ultimate damage was not sustained in the time of the ancestor, the action remained to the heir in preference to the executor: and the decision was subsequently affirmed, in error, in the King's Bench (*k*). But had an actual eviction of the ancestor been occasioned by the breach of the covenant, depriving the testator of the rents and profits during his life, to that extent the personal estate would have been damnified, to which personalty the heir, as heir, could make no claim, and would, consequently, have been precluded from taking any steps in that capacity for its recovery (*l*). Moreover, in the instance last put, the heir could have made no title to the land, as the eviction, assuming it to have been lawful, would have withdrawn all estate from the ancestor, and, of course, prevented its descent to the heir (*m*). So, on a covenant to repair, and leave in repair, if the premises are out of repair in the time of the ancestor, and continue so in the time of the heir, it is a damage to the heir, who is entitled to sue; and the damages are given to put the premises in repair, and not in respect of the length of time they continued in decay (*n*).

(*k*) Jones v. King, 4 Mau. & Selw. 188.

(*l*) Lucy v. Levington, 2 Lev. 26; S. C. 1 Vent. 175; 2 Keb. 831.

(*m*) Lucy v. Levington, sup.

(*n*) Vivian v. Campion, Holt, 178; S. C. 1 Salk. 141; 2 Lord Raym. 1125; 11 Mod. 45. pl. 10. See Mascal's case, 1 Leon. 62; S. C. Mo. 242. Lougher v. Williams, 2 Lev. 92.

Generally speaking, the heir should be included by name in the covenant, to qualify him to support an action; but the circumstance of his being named is not, in all cases, an indispensable requisite to his competency to sue. To carry into effect the intention of the persons contracting, is the end to which the endeavours of the courts are directed; and acting on this principle, the judges have decided, that where an intention is sufficiently apparent, that a covenant, in its nature running with the land, should continue in operation for a longer period than the life of the covenantee, advantage may be taken of it by the heir, although in terms not expressly named; as if the covenant be entered into with the lessor, (being owner of the fee,) his executors and administrators only: In this case an action can be supported by the heir; the mention of the executors affording satisfactory proof that the covenant was not meant to determine with the death of the testator (*o*). So, when a lessee covenants to pay rent to the lessor, (owner of the fee,) his executors, administrators, and assigns, during the term, the law will not suffer any construction to take away the energy of the words *during the term;* and though the covenant do not specify the heir, as it ought, yet, the rent being expressly made payable during the term, the heir, in right of the reversion, is capable of maintaining an action (*p*). It is necessary for a party entitling himself to an action as heir to his father, to show that

(*o*) Lougher v. Williams, 2 Lev. 92.

(*p*) Sacheverell v. Froggatt, 2 Saund. 367 a.; S. C. 1 Vent. 148. 161; 2 Lev. 13; T. Raym. 213; 2 Keb. 798. 819. 833. 839; Freem. 16, nom. Sacheverell v. Walker. Anon. Dy. 45, a. b.

his father had some estate ; but it is otherwise where he declares on his own demise (*q*).

Some, indeed, maintain that the heir, though not named, can in all cases, even in the absence of this strong indication of intention, take advantage of all covenants which are said to run with the land, being an estate of inheritance (*r*) : and, perhaps, the best way of putting it is, that the covenant will in all these cases run with the land, in favour of the heir, unless an evident intention be manifested to confine it to the covenantee (*s*). In the case of a warranty, however, a different law prevails (*t*).

The same right belongs to the heir when he takes from his ancestor, tenant pur autre vie, living the cestui que vie, and such heir alone can avail himself of the covenants running with the land. But where a party is tenant for his own life only, no right of action can devolve on his heir ; as the dropping of the life on which the estate is held, necessarily effects a determination of the lease (*u*).

(*q*) Willett v. ——, Holt, 568.

(*r*) See the argument of Mr. Gifford, afterwards Lord Gifford, in Kingdon v. Nottle, 1 Mau. & Selw. 357 ; 4 Ibid. 53 ; in which case, the devisee was allowed to recover, though heirs and assigns were not named. And 2 Saund. 371, per Hale, C. J.

(*s*) See Roe dem. Bamford v. Hayley, 12 East, 464.

(*t*) Co. Lit. 384, b.

(*u*) Brudnell v. Roberts, 2 Wils. 143.

SECT. III.

OF THE RIGHTS OF THE DEVISEE.

III. Of the rights of the devisee.

WHERE, instead of permitting the lands to descend, the proprietor has disposed of them by will, the devisee is invested with the same rights as would otherwise have devolved on the testator's heir at law (*v*). For illustration: A lease contained a proviso, that if either of the said parties should be desirous of determining the lease, at the end of the first seven or fourteen years of the said term of twenty-one years, it should be lawful for either of them, his *executors or administrators*, so to do, upon giving unto the other of them, his *heirs, executors, or administrators*, or leaving the same at his or their place of abode, twelve months' notice in writing of such his or their intention: the lessor died, having devised the premises to his youngest son, who, as devisee, gave the required notice to determine the tenancy at the expiration of the seven years: the court held, that the object of the proviso manifestly was, that the inheritance should not be bound, on the one hand, against the will of the persons to whom the inheritance should belong; and that, on the other hand, the lessee, and those claiming under him, should not be bound against their will; but that in all cases, the parties interested, whosoever they might be, should have power to give the necessary notice for that pur-

(*v*) Kingdon v. Nottle, 4 Man. & Selw. 53. 1 Barn. & Cres. 410; S. C. 2 Dow. & Ry. 670.

pose; that the right respected the interest demised, and, according to the rules which ascertained whether a covenant was to be deemed to run with the land or not, would be considered as annexed to the reversion on the one hand, and to the term on the other; that the proviso extended in reasonable construction to *all* representatives; and that a notice by the devisee as *hæres factus* was sufficient to determine the lease (*w*).

SECT. IV.

OF THE RIGHTS OF THE EXECUTOR OR ADMINISTRATOR.

IV. Of the rights of the executor or administrator.

EXECUTORS and administrators represent their testator or intestate in respect of his contracts personal, and in respect of contracts relating to the realty, where a damage has been sustained in the life-time of such testator or intestate (*x*); and an administrator *de bonis non* stands in the same position (*y*). It is also to be observed, that the executor of an administrator, who in that capacity had granted a lease, has a right of action for non-payment of rent in preference to an administrator *de bonis non* of the intestate; the latter administrator being in paramount the lease of the former administrator (*z*).

(*w*) Roe dem. Bamford v. Hayley, 12 East, 464.

(*x*) F. N. B. 145. D. 146. D.

(*y*) Smith v. Simonds, Comb. 64. S. C. 3 Keb. 298. 427. 463. 495. 549; S. C. 1 Vent. 275, nom. Norton v. Harvey; Ibid. 259; S. C. nom. Drue v. Baylye, Freem. 392. 402.

(*z*) Drew v. Bayly, 2 Lev. 100;

Where a person having a term for years only, grants an underlease; in respect of the covenants therein, on his decease possessed of the reversion, he is represented by his executors, and whether the breaches are incurred during the lessor's life, or since his death, they are the only persons who can recover damages from the covenantor for non-performance (*a*). But where the testator is the purchaser of an estate in fee simple, with the usual covenants for title, a mere breach of the covenant for seisin will not, of itself, support an action by his executor: the breach must be assigned specially with a view to compensation for damage sustained in the lifetime of the testator; or the executor must shew, that he claims some interest in the premises, as assignee or otherwise. Therefore, in the absence of any damage to the testator, which, if recovered, would properly form a part of his personal assets, or in the absence of such interest, the executor does not stand in a situation to take advantage of the breach (*b*). This appears to have been the ground on which an early case (*c*), before noticed, was decided. An action was brought by an executor against a vendor, on a covenant by him with the testator, his heirs and assigns, for quiet enjoyment; the testator had been evicted in his lifetime; and it was determined, that the breach and damage had so clearly accrued during the vendee's life, that the executor was the proper person to sue,

(*a*) See Mackay v. Mackreth, 2 Chit. 461.

(*b*) Kingdon v. Nottle, 1 Mau. & Selw. 355; 4 Ibid. 53. Chamberlain v. Williamson, 2 Mau. & Selw. 408. Co. Lit. 162, a.

(*c*) Lucy v. Levington, 2 Lev. 26; S. C. 1 Vent. 175; 2 Keb. 831.

although the covenant was made with the purchaser, his heirs and assigns only; for nothing descended to the heir. And this case has been frequently cited of late years with approbation (*d*). So, if in consequence of a breach of a covenant for seisin, the testator were prevented from selling, this would seem sufficient to vest the right of action in the executor (*e*). The like, if the demised premises were out of repair during the life of the testator, the lessor (*f*).

One inconvenience would certainly result from allowing the executor to represent the testator in contracts relating to the freehold, where no damage has been sustained in the testator's lifetime. The executor, who could recover only nominal damages, would thereby preclude the heir, who is the party actually damnified, from recovering at all; for it is apprehended, that another action could not be maintained by the heir, on the same breach, after a former recovery by the executor (*g*).

SECT. V.

OF THE RIGHTS OF THE ASSIGNEE.

V. Of the rights of the assignee.

As, on the one hand, an assignee will be bound by covenants real annexed to an estate, and which run

(*d*) In Kingdon v. Nottle, ubi sup. and King v. Jones, sup.

(*e*) Kingdon v. Nottle, 1 Mau. & Selw. 362.

(*f*) Morley v. Polhill, 2 Vent. 56; S. C. 3 Salk. 109. pl. 10.

(*g*) Kingdon v. Nottle, supra. See also Beely v. Parry, 3 Lev. 154. Brett v. Cumberland, Cro. Jac. 523.

along with it; so, on the other, he may take advantage of such covenants; and, therefore, if the lessor covenants to repair, or if he grants to the lessee so many estovers as will repair, or, as he shall burn within his house during the term; these, as things appurtenant, will go with the land, into whose hand soever it may come (*h*). So, if a man leases to another by indenture, the covenant in law created by the word *demise*, will go to the assignee of the term (*i*).

Where the covenant is inherent in the land, in order to confer a right of action on the assignee, it does not appear to be essential that he should be expressly named in the covenant. Thus, where two coparceners made partition of land, and the one covenanted with the other to acquit her of suit which was due; and the coparcener, to whom the covenant was made, aliened, and the suit was in arrear; and the assignee brought a writ of covenant against the coparcener to acquit her of suit; it was adjudged, that the writ was maintainable, notwithstanding the assignee was a stranger to the covenant; and the reason given was, because the acquittal fell upon the land (*k*). It was also agreed, that if a covenant were

(*h*) Bac. Ab. Covenant, (E) div. 5. Rol. Ab. 521. 5 Co. 17, b. F. N. B. 181. N.

(*i*) Spencer's case, 4th resol. 5 Co. 17, a. Nokes's case, 4 Co. 80, b.; S. C. Mo. 419; Cro. Eliz. 674.

(*k*) Spencer's case, 5 Co. 17, b. 18, a. Co. Lit. 384, b. Hyde v. The Dean, &c. of Windsor, Cro. Eliz. 552, 3; S. C. Ibid. 457; Mo. 399; 5 Co. 24, a. nom. The Dean and Chapter of Windsor's case. The reader will observe, that p. 457 in the folio edition of Cro. Eliz. is twice numbered by

made to say divine service in the chapel of another, there the assignee should not have an action of covenant; for the covenant could not in such case be annexed to the chapel, because the chapel did not belong to the covenantee. But if the covenant had been with the lord of the manor of D., and his heirs, lords of the manor of D., and inhabitants therein; the covenant would be annexed to the manor, and there the assignee would have the action of covenant without privity of blood; because the remedy by covenant would run with the land to give damages to the party grieved. So, a right of action devolves on the assignee, in case of a breach of covenant to renew (*l*); for quiet enjoyment, whether the interest assigned be an estate of inheritance or a chattel interest only, and whether any estate remain in the covenantor or not (*m*); or for further assurance (*n*). So, where husband and wife granted a watercourse through the wife's lands, with covenants for themselves, their heirs and assigns, to cleanse, and keep it in repair; and a recovery was suffered for strengthening and confirming the grant; and a bill was filed by the assignee of the grantee against the assignee of the lands, for a performance of the covenant; the court held, that this was not a personal contract only, but one that ran with the land; and though made by a feme covert, was established by the re-

mistake: the page 457 above referred to ought to be 473, as it follows p. 472.

(*l*) Skerne's case, Mo. 27. Isteed v. Stoneley, And. 82. pl. 148.

(*m*) Lewis v. Campbell, 7 Taunt. 715; S. C. 3 J. B. Mo. 35; 3 Barn. & Ald. 392, in error.

(*n*) Middlemore v. Goodale, Cro. Car. 503; S. C. W. Jo. 406.

covery, and would bind the assignee of the land, at the suit of the assignee of the grantee (*o*).

Persons coming in by act of law, as, tenant by statute-merchant, or statute-staple, or elegit of a term, and he to whom a lease for years is sold by force of any execution, are also entitled to have an action on a covenant annexed to the land, in the same manner as one claiming by act of the party (*p*). And before the statute of frauds (*q*), requiring conveyances to be in writing, an assignee by parol could support an action (*r*). An assignee of a lease by estoppel cannot: therefore, if one having no estate in the premises grants a lease to A., who assigns to B., with a covenant for quiet enjoyment, and B. assigns over to C., no action lies for C. against A.; because nothing passed but by estoppel; and as lessee by estoppel cannot assign any thing over, C. cannot be an assignee to support an action of covenant (*s*).

And as a right of action on a covenant cannot be assigned at law (*t*), it follows, that a covenant broken in the time of a lessor, cannot be the foundation of an action by his assignee (*u*); unless the breach con-

(*o*) Holmes v. Buckley, Prec. Ch. 39; S. C. 1 Eq. Ca. Ab. 27. pl. 4. Earl of Portmore v. Bunn, 1 Barn. & Cres. 694; S. C. 3 Dow. & Ry. 145.

(*p*) 5 Co. 17, a. And see ante, p. 480, et seq.

(*q*) 29 Car. II. c. 3. s. 3.

(*r*) Noke v. Awder, Cro. Eliz. 373. 436; S. C. Mo. 419.

(*s*) Ibid. 3 Co. 63, a.

(*t*) Lewes v. Ridge, Cro. Eliz. 863. 1 New Rep. 163.

(*u*) Anon. 3 Leon. 51. pl. 72. Canham v. Rust, 8 Taunt. 227; S. C. 2 J. B. Mo. 164.

tinue after the assignment to him; in which case he is competent to maintain an action (*v*). As if a lessee covenants to repair within such a time after notice, and omits to repair upon notice by the assignee of the reversion, covenant lies, though the premises were out of repair before the assignment (*w*).

(*v*) Mascal's case, Mo. 242; Nottle, ubi sup. S. C. 1 Leon. 62. Kingdon v.

(*w*) Mascal's case, sup.

CHAPTER THE THIRD.

OF THE LIABILITIES AND RIGHTS UNDER THE STATUTE 32 HEN. VIII. CH. 34. RELATING TO GRANTEES OF REVERSIONS.

By the rules of the common law, none but parties or privies to express covenants were bound by, or could take advantage of them. Grantees of reversions were regarded in the light of strangers, and were necessarily exempt from the liabilities created by the lessor's covenants, and at the same time deprived of all the immediate benefits which the original grantors themselves enjoyed, except the action of debt, or distress. These inconveniences had long been perceived: but when, under the arbitrary reign of Henry the Eighth, the religious houses were stripped of their accumulated landed possessions, and a large mass of property became, by the dissolution of the monasteries, vested in the crown, and, through the king's bounty, in the hands of his most favoured subjects, the disadvantages accruing from the strictness of the common law were greatly aggravated (*a*). The king, indeed, was speedily relieved from these disabilities, by an act of parliament (*b*), which invested him and his successors

(*a*) Isherwood v. Oldknow, 3 Mau. & Selw. 394. Vernon v. Smith, 5 Barn. & Ald. 10. 4 Reeve's Hist. C. L. 234.

(*b*) 31 Hen. VIII. c. 13; entitled "An Act for dissolution of Monasteries and Abbeys."

with all such rights, interests, entries, &c., as the late abbots, priors, &c., had in the rights of their said monasteries, &c. This statute formed the prelude to another, whereby the same powers were extended to the grantees of the sovereign, and their several assignees; and, on the other hand, tenants, and their assigns, were enabled to enforce the covenants stipulated for by their landlords. The words of the latter act (*c*) are: —

"Where before this time divers, as well temporal "as ecclesiastical and religious persons, have made "sundry leases, demises, and grants to divers other "persons, of sundry manors, lordships, ferms, meases, "lands, tenements, meadows, pastures, or other here-"ditaments, for term of life or lives, or for term of "years, by writing under their seal or seals, containing "certain conditions, covenants, and agreements, to be "performed, as well on the part and behalf of the "said lessees and grantees, their executors and as-"signs, as on the behalf of the said lessors and "grantors, their heirs and successors; and forasmuch "as by the common law of this realm, no stranger to "any covenant, action, or condition, shall take any "advantage or benefit of the same, by any means or "ways in the law, but only such as be parties or pri-"vies thereunto, by the reason whereof, as well all "grantees of reversions, as also all grantees and pa-"tentees of the king our sovereign lord, of sundry "manors, lordships, granges, ferms, meases, lands, "tenements, meadows, pastures, or other heredita-

(*c*) 32 Hen. VIII. c. 34.

" ments, late belonging to monasteries, and other re-
" ligious and ecclesiastical houses dissolved, sup-
" pressed, renounced, relinquished, forfeited, given
" up, or by other means come to the hands and pos-
" session of the king's majesty since the fourth day of
" February, the seven and twentieth year of his most
" noble reign, be excluded to have any entry or action
" against the said lessees and grantees, their ex-
" ecutors or assigns, which the lessors before that
" time might by the law have had against the same
" lessees for the breach of any condition, covenant,
" or agreement, comprised in the indentures of their
" said leases, demises, and grants. Be it therefore
" enacted by the king our sovereign lord, the lords
" spiritual and temporal, and the commons, in the pre-
" sent parliament assembled, and by authority of the
" same, that as well all and every person and persons,
" and bodies politic, their heirs, successors, and as-
" signs, which have or shall have any gift or grant of
" our said sovereign lord, by his letters patent, of any
" lordships, manors, lands, tenements, rents, parson-
" ages, tithes, portions, or any other hereditaments,
" or of any reversion or reversions of the same, which
" did belong or appertain to any of the said monas-
" teries, and other religious and ecclesiastical houses,
" dissolved, suppressed, relinquished, forfeited, or by
" any other means come to the king's hands since
" the said fourth day of February, the seven and
" twentieth year of his most noble reign, or which at
" any time heretofore did belong or appertain to any
" other person or persons, and after came to the
" hands of our said sovereign lord, as also all other
" persons being grantees or assignees to or by our said

" sovereign lord the king, or to or by any other person " or persons than the king's highness, and the heirs, " executors, successors, and assigns of every of them, " shall and may have and enjoy like advantages " against the lessees, their executors, administrators, " and assigns, by entry for non-payment of the rent, " or for doing of waste, or other forfeiture; and also " shall and may have and enjoy all and every such " like and the same advantage, benefit, and remedies " by action only, for not performing of other con- " ditions, covenants, or agreements, contained and " expressed in the indentures of their said leases, de- " mises, or grants, against all and every the said les- " sees, and farmers, and grantees, their executors, " administrators, and assigns, as the said lessors or " grantors themselves, or their heirs or successors, " ought, should, or might have had and enjoyed at any " time or times, in like manner and form, as if the re- " version of such lands, tenements, or hereditaments " had not come to the hands of our said sovereign lord, " or as our sovereign lord, his heirs and successors, " should or might have had and enjoyed in certain " cases, by virtue of the act made at the first session " of this present parliament, if no such grant by let- " ters patents had been made by his highness."

" II. Moreover, be it enacted by the authority " aforesaid, that all farmers, lessees, and grantees of " lordships, manors, lands, tenements, rents, parson- " ages, tithes, portions, or any other hereditaments, " for term of years, life or lives, their executors, ad- " ministrators, and assigns, shall and may have like " action, advantage, and remedy against all and every " person and persons, and bodies politic, their heirs,

" successors, and assigns, which have or shall have " any gift or grant of the king our sovereign lord, or of " any other person or persons, of the reversion of the " same manors, lands, tenements, and other heredita- " ments so letten, or any parcel thereof, for any condi- " tion, covenant, or agreement, contained or expressed " in the indenture of their lease and leases, as the " same lessees, or any of them, might and should have " had against the said lessors and grantors, their heirs " and successors; all benefits and advantages of re- " coveries in value, by reason of any warranty in deed " or in law by voucher or otherwise, only excepted."

" III. Provided always, that this act nor any " thing or things therein contained, shall extend to " hinder or charge any person or persons for the " breach of any covenant or condition comprised in " any such writing as is aforesaid, but for such cove- " nants and conditions as shall be broken or not per- " formed, after the first day of September next com- " ing, and not before; any thing before in this act " contained to the contrary thereof notwithstanding."

There are some dicta to the contrary (*d*), but the better opinion now is, that at common law, a grantee of a reversion could not maintain an action of covenant against the lessee, upon his *express* covenant (*e*);

(*d*) Athowe v. Heming, 1 Rol. 80; S. C. nom. Attoe v. Hemmings, 2 Bulstr. 281; S. C. nom. Alfo v. Henning, Ow. 151. 1 Rol. Ab. 521. pl. 6. Thursby v. Plant, 1 Saund. 239, argo.

(*e*) Barker v. Damer, 3 Mod. 336; S. C. Carth. 182; 1 Salk. 80; S. C. nom. Barker v. Dormer, 1 Show. 191. Thrale v. Cornwall, 1 Wils. 165. Webb v. Russell, 3 Term Rep. 401.

because, if he could, the provision of the statute 32 Hen. VIII. would have been in a great degree unnecessary. The statute recites, that no stranger to any covenant should take advantage of the same, and then it recognises, as a consequence, the situation of all grantees of reversions. The object of the statute, therefore, was the benefit of that class of persons recited in it(*f*).

Upon an *implied* covenant, however, an action at the suit of the assignee of the reversion was undoubtedly maintainable prior to the passing of that act. In proof of this, two or three cases are to be met with. In one, a lessee for forty years demised to the defendant for twenty years, rendering an annual rent of 16*l.*, which the defendant covenanted to pay; the plaintiff, to whom the lessor afterwards assigned his reversion, commenced his action for rent in arrear; and the court, in pronouncing judgment in his favour, declared, that they would intend that the action was brought on the *Reddendum*, which was a covenant in law, and ran with the reversion at common law, before the statute of Hen. 8., and passed by the grant of the reversion (*g*). And the point has been further established by a much later determination. A. being seised in fee of a mill, and of certain lands, granted a lease of the latter for years; the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing cer-

(*f*) Isherwood v. Oldknow, 3 Man. & Selw. 394.

(*g*) Harper v. Burgh, 2 Lev. 206; S. C. nom. Harper v. Bird, T. Jo. 102.

tain suits and services, and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill, and the reversion of the demised premises, to the same person; and it was held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it, resulting from the reddendum, was a covenant that ran with the land, as long as the ownership of the mill and the demised premises belonged to the same person, and consequently that the assignee of the lessor might take advantage of it (*h*).

The effect of the statute was to transfer the privity of contract from reversioner to reversioner, and to enable persons not strictly privies thereto, to bring actions upon the covenant, which at common law they were not entitled to maintain (*i*); thus providing a mutuality of remedy for and against the grantees of reversions, and for and against lessees, or their assignees; and placing the grantees or assignees in the same situation, and giving them the same remedy against the lessees, as the heirs at law of individuals, or the successors, in the case of corporations, had before the statute (*k*). Wherever, therefore, the sta-

(*h*) Vyvyan v. Arthur, 1 Barn. & Cres. 410; S. C. 2 Dow. & Ry. 670. See likewise Hamley v. Hendon, 12 Mod. 327. Lord Uxbridge v. Staveland, 1 Ves. 56.

(*i*) Thursby v. Plant, 1 Saund. 237; S. C. 1 Sid. 401; 1 Lev. 259; 2 Keb. 439. 448. 468. 492; S. C. nom. Nurstie v. Hall, 1 Vent. 10. Barker v. Damer, ante. Bord v. Cudmore, Cro. Car. 183; in debt. Isherwood v. Oldknow, 3 Man. & Selw. 395. Wey v. Yally, 6 Mod. 194.

(*k*) Webb v. Russell, 3 Term Rep. 402.

tute gave a grantee of a reversion the advantage of recovering on a covenant entered into by a tenant, there also the tenant, or his assignee, enjoyed a corresponding remedy against such reversioner, on a covenant made by his grantor. On covenants merely collateral, however, the statute has no operation: those only which concern the land demised, as, to repair the houses, mend the fences, scour the ditches, preserve the woods, and such like, come within the scope of its provisions (*l*). And thus, in respect of covenants which would run with the land, and bind an assignee of the lease, in respect of his having the possession, an assignee of the reversion, though assignees are not named in the covenant, can have his action in respect of that reversion, where there has been a breach of the duty undertaken to be observed by the tenant (*m*). And the true test in these cases is, if the performance of the covenant be beneficial to the reversioner, in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue (*n*).

The construction of the statute has occasioned some further decisions. It has been adjudged, That

(*l*) Co. Lit. 215, b. 5 Co. 18, a. Chaworth v. Phillips, Mo. 876.

(*m*) Kitchin v. Buckly, T. Raym. 80; S. C. 1 Lev. 109; 1 Keb. 565. 572; S. C. nom. Kitchin v. Compton, 1 Sid. 157. Anon. Mo. 159. Sacheverell v. Froggatt, 2 Saund. 371. Mascal's case, Mo. 242; S. C. 1 Leon. 62.

(*n*) Vyvyan v. Arthur, 1 Barn. & Cres. 417; S. C. 2 Dow. & Ry. 670.

the act extends to the grantee of the reversion of the subject, as well as of the king (*o*). And to grants made by the successors of the king, albeit the king be only named in the act (*p*).

It extends likewise to covenants entered into by or with lessees for years, or for life; but not to covenants entered into on a conveyance in fee, or gift in tail (*q*).

A grantee of the reversion of part of the lands is also within the act, and no disability to sue arises from his taking that partial interest only. In Pyot v. Lady St. John (*r*), a person seised in fee of one messuage, and possessed of a term of years in other premises, demised both for ten years to Lady St. John, by one lease; and then, by separate deeds, conveyed the reversion in fee, and the reversion for years, to Pyot. On an action of covenant being brought, it was objected, that Pyot ought to have brought several actions, but no objection was taken, that he was possessed, by each separate deed, only of the reversion of part of the premises. The court held, that though he might have brought several actions, still the bringing only one action was well enough. But if an objection, that he was assignee

(*o*) Hill v. Grange, 2 Dy. 130, b.; S. C. Plowd. 167. Co. Lit. 215, a.

(*p*) Co. Lit. 215, a.

(*q*) Ibid. Lewes v. Ridge, Cro. Eliz. 863. Matures v. Westwood, Cro. Eliz. 599. 617; S. C. nom. Mathuris v. Westroray, Mo. 527. See Davy v. Matthew, Cro. Eliz. 649.

(*r*) Pyot v. Lady St. John, Cro. Jac. 329; S. C. 2 Bulstr. 102, in error, judgment of C. P. affirmed.

of only part of the premises, had been valid, that decision could not have taken place; because it would have been an obvious answer to say, that several actions would not lie, inasmuch as in each it must have appeared that Pyot was only assignee of the reversion in part. So in another case (*s*), where two owners of a reversion, conveyed to them by separate deeds, joined in an action of covenant against the lessee for omitting to repair, and obtained judgment, the same objection, if valid, would have succeeded; and it can hardly be supposed, that if it had been considered valid, it would have been overlooked.

Of late years the point has been expressly decided, and no doubt whatever exists, that covenant will lie both by and against the assignee of the reversion of part of the premises (*t*); and therefore, the lessor may, as to the part retained by him, still maintain covenant at common law, against the lessee or his assignee; and the grantee of the reversion of the other part, is entitled, by force of the statute, to an action in respect of that portion (*u*).

The statute likewise extends to the grantee of part of the estate of the reversion. Thus, one made a lease for years, and devised the reversion to his wife for life, who granted it to the plaintiff for forty years, if she should so long live; and it was held, that an

(*s*) Kitchin and Knight v. Buckly, T. Raym. 80; S. C. 1 Lev. 109; 1 Keb. 565. 572; S. C. nom. Kitchin v. Compton, 1 Sid. 157.

(*t*) Twynam v. Pickard, 2 Barn. & Ald. 105. Shep. Touch. 176, cites Pime's case, Mich. 8 Jac.

(*u*) Ibid. 112.

action lay notwithstanding the plaintiff was assignee of only part of the reversion (*v*). So, where one being possessed of a reversion in a term for years, gave the same by his will to A. for life, and after his decease to B. and the heirs of his body; A. was considered to be a sufficient assignee to bring covenant; for the devise or bequest to him passed the whole estate, and the remainder to B. was but a possibility, and an executory devise (*w*). And we may here observe, that the damages given in cases similar to those last mentioned, will be commensurate with the estate of the plaintiff in the premises (*x*). And where there is a reversion for years, or for life, with a more remote reversion in fee; in respect of the injury done to the inheritance by diminishing its value, the remote reversioner is also competent to recover damages for a breach (*y*).

However uncertain the point may heretofore have been (*z*), it is now settled, that the grantee or surrenderee of the reversion of copyhold lands is within the intention and equity of the statute, so as to support covenant against the lessee, or his assigns; for

(*v*) Attoe v. Hemmings, sup. p. 531. Co. Lit. 215, a. Anon. Mo. 93. pl. 230. Mascal's case, Mo. 242; S. C. 1 Leon. 621. Bristow v. Bristowe, Godb. 161, 162. See Sherewood v. Nonnes, 1 Leon. 250. Anon. 3 Leon. 1.

(*w*) Dowse v. Cale, 2 Ventr. 126; S. C. nom. Douse v. Earle, 3 Lev. 264.

(*x*) Holt's N. P. C. 543. 545, n.

(*y*) Ibid. Jefferson v. Jefferson, 3 Lev. 130. Biddlesford v. Onslow, 3 Lev. 209. Jesser v. Gifford, 4 Burr. 2141. Tomlinson v. Brown, Cited ibid. See Attersoll v. Stevens, 1 Taunt. 183.

(*z*) Beal v. Brasier, Cro. Jac. 305; S. C. nom. Brasier v. Beale, Yelv. 222; Brownl. & Gold. 149. Swinnerton v. Miller, Hob. 177. Platt v. Plommer, Cro. Car. 24.

it is a remedial law, of great and universal use, and absolutely as necessary for copyholders as others; and by this construction of the statute, no prejudice can arise to the lords of copyhold manors; and the only reason why copyhold lands have been adjudged not to be within the meaning of other statutes is, the chance of damage resulting to the lord's interest from their being so included (*a*).

As a chose in action is not transferable at law (*b*), the grantee of a reversion cannot support an action for a covenant broken before the assignment to him (*c*); unless the breach be committed before the assignment, and continue so afterwards; as if buildings out of repair be allowed after the transfer of the reversion to remain in a dilapidated condition (*d*). But a right of action once vested and attached in the grantor for a breach in his own time, will not be defeated by his assignment over (*e*); although he may after such breach accept the rent from the tenant's assignee (*f*); for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone (*g*).

(*a*) Glover v. Cope, 4 Mod. 80; S. C. Carth. 205; 3 Lev. 326; Holt, 159; Skin. 296. 305; 1 Show. 284; Comb. 185; 1 Salk. 185. Webb v. Russell, 3 Term Rep. 398. Isherwood v. Oldknow, 3 Mau. & Selw. 386.

(*b*) See ante, p. 525.

(*c*) Lewes v. Ridge, Cro. Eliz. 863; Cited 4 Mau. & Selw. 56.

(*d*) Mascal's case, Mo. 242.

(*e*) Anon. Skin. 367. Midgley v. Lovelace, semb. S. C. Carth. 289; S. C. 12 Mod. 45; Holt, 74.

(*f*) Ashurst v. Mingay, 2 Show. 133; S. C. Sir T. Jo. 144; Lil. Ent. 135. Thursby v. Plant, 1 Sid. 402.

(*g*) Midgley v. Lovelace, sup.

Nor is the tenant liable at the suit of both the grantor and grantee for the same default: were it otherwise, he might be twice charged: a recovery by the one will, therefore, be a bar to the other (*h*). Indeed, as the statute transfers the privity of contract, together with the estate in the land, to the assignee of the reversion, it should seem, that the grantor cannot, after he has parted with his reversion, support an action for a breach committed subsequently to his grant; and that the grantee is the only person capable of suing (*i*). But it appears, that the grantee of the reversion may maintain an action of covenant for a breach against the first lessee, notwithstanding such lessee's assignment over (*k*).

A case adjudged a few years ago, in which the operation of this statute became incidentally the subject of observation, requires in this place a word of remark (*l*). The declaration stated, that the Earl of Portmore, and one Bennett Langton, (since deceased,) granted a license to A. Raby, to continue one channel, opening, way, or passage, through the west bank or side of the river Wey, near Coxe's Lock, upon condition that Raby would repair to the satisfaction of the said Earl and B. Langton, their heirs or assigns, in and upon the said channel, the tumbling-bay there, in order that the part of the waste or surplus water of the said river Wey, which would

(*h*) Beely v. Purry, 3 Lev. 154. Edwards v. Morgan, 3 Lev. 233.

(*i*) Ibid. See 3 Term Rep. 394. arg.

(*k*) Anon. Godb. 270. pl. 378. Thursby v. Plant, 1 Sid. 402.

(*l*) The Earl of Portmore v. Bunn, 1 Barn. & Cres. 694; S.C. 3 Dow. & Ry. 145.

otherwise run through the sluices or water-gates of Coxe's lock, should pass over the tumbling-bay, through the channel-head or weir belonging to the mills of A. Raby, lying near to Coxe's lock, to be possessed for the term of twenty-one years, for the express purpose of working the mills of Raby; and he covenanted for himself, his executors, administrators, and assigns, for payment of a rent. In the deed itself, the Earl and Langton were described as the persons having the greatest proportion or share of the profits of the river Wey. By an act of parliament, 22 & 23 Car. II., the river Wey was made a navigable river for ever, and the soil of the river and its banks was vested in certain persons, naming them, their heirs and assigns, upon the trusts therein mentioned, with power to elect new trustees; and it was enacted, that it should be lawful for any two persons, having the greatest proportion or shares in the profits of the river, to nominate and appoint one or more receiver or receivers of the profits of the river or navigation. The case was decided upon a different point; but all the judges declared themselves to be of opinion, that if the grantors had such a legal interest as they professed to have by the declaration, and had made such a grant as was set out in the declaration, it would have operated as the grant of an interest in a real hereditament, and that the assignee of the grantee would be liable for a breach of covenant contained in such grant, within the statute 32 Hen. 8. c. 34. Now, it is with much deference submitted, that the propriety of the application of the statute to the circumstances of this case seems very questionable. The statute is solely "concern-

ing grantees of reversions to take advantage of the conditions to be performed by the lessees," but does not by its influence enable grantors of interests to resort to the assignees of their grantees for breaches of covenant. The covenant, where it ran with the land, so as to charge the grantee's or lessee's assign, possessed that property under the rules of the common law, long before the enactment of the statute of Hen. 8. In the case just quoted, it will be seen, that there was no assignment of the reversion, so as to call for the introduction of this statute. One of the grantors, the Earl of Portmore himself, was the plaintiff, nor can it be made to appear from any part of the case, that there had been a grant or assignment of the reversion. The only assignment was by the grantee of the privilege; but a transfer of the reversion, even had it existed, would not mend the apparent error; for the observations of the court were expressly confined to the assignee of the grantee. It is then, humbly suggested, that, as the statute relates to grantees of reversions only, and as, in the case before us, no grant of the reversion had been made, it follows, that a reference to the act of 32 Hen. 8. was uncalled for and inapplicable.

Before closing this subject we may notice, that in order to make a person an assignee, he ought to come in of the same estate in respect of which the covenant was made; for should he come in by title paramount, he will not be invested with that character; as if lessee for twenty years leases for ten, and afterwards surrenders to him in reversion; the reversioner, being in by elder title, cannot have the

benefit of a condition or covenant entered into by the under-lessee (*m*). The like of a lord entering for an escheat or forfeiture (*n*). But a covenant entered into by a lessee with a tenant for life, the donee of a power to lease, his heirs and assigns, may be taken advantage of by a remainder-man, as an assignee, within the statute 32 Hen. 8. c. 34.; because the lease must be considered as emanating from the person who created the power, and as deriving its force and authority from him; and thus, the donor of the power being in the eye of the law the lessor, the remainder-man, coming in under him, stands in the relation of assignee to such donor (*o*). Indeed, every one who comes in by the act and limitation of the party, though in the *post*, is a sufficient grantee within the statute 32 Hen. 8. (*p*). And it seems to have been the better opinion (*q*), that the bargainee of a reversion by bargain and sale, indented and inrolled, was an assignee within this statute, though he had but an use by the act of the party, and the possession by the statute 27 Hen. 8. c. 10.

(*m*) Chaworth v. Phillips, Mo. 876. Thre'r v. Barton, Mo. 94. Webb v. Russell, 3 Term Rep. 393. See also Tayleur v. Dickenson, 1 Russ. 521.

(*n*) Co. Lit. 215, b.

(*o*) Isherwood v. Oldknow, 3 Mau. & Selw. 382. Anon v. Davis, Woodf. Landl. and Ten. 448. 6th ed. Goodtitle v. Funucan, 2 Dougl. 572. Machel v. Dunton, 2 Leon. 33. Whitlock's case, 8 Co. 69, b.

(*p*) Co. Lit. 215, b. Mo. 98.

(*q*) Lee v. Arnold, 4 Leon. 29.

PART THE FIFTH.

OF THE REMEDIES AND RELIEF INCIDENT TO COVENANTS.

CHAPTER THE FIRST.

OF THE REMEDY AT LAW; AND HEREIN OF BONDS FOR PERFORMANCE OF COVENANTS.

For a breach of covenant the law has provided the remedy of an action of covenant, in which damages are sought and recovered in proportion to the injury sustained by the covenantee. Debt, as we shall see, is, in some particular cases, also maintainable on a covenant. The method of suing out a writ of covenant has fallen into disuse, and no distinction now exists in the mode of commencing proceedings, whether the form of action be covenant, account, debt, annuity, or detinue. In all these cases the original writ is called a *præcipe*, by which the defendant has an option given him, either to do what is required, or to show cause to the contrary (*a*). At common law process of outlawry did not lie in actions of covenant, but this was altered by an early statute (*b*), which, after reciting that there was great delay in actions of annuity and actions of covenant, because there lay no process of outlawry in such

(*a*) 1 Tidd's Pract. 104. 9th edit.

(*b*) 23 Hen. VIII. c. 14.

nature of actions, ordained and enacted, that like process be had in every writ of annuity and covenant thereafter to be sued, as was in an action of debt.

An action of covenant can be had recourse to in those cases only in which there is a contract under hand and seal; and in this circumstance it is particularly distinguishable from assumpsit; for assumpsit, although for the recovery of damages, cannot in general be supported where the contract was originally under seal, or where a deed has been taken in satisfaction (*c*). So, if a covenant has been varied by a subsequent parol agreement, and another contract substituted in lieu of the former, such parol agreement can neither be the foundation of an action of covenant (*d*), nor pleaded in bar to an action brought on the original contract (*e*); but it may be the subject of an independent action of assumpsit (*f*).

Where a deed contains a contract, express or implied, for the payment of a sum certain, debt and covenant are in general concurrent remedies; but if the damages are unliquidated, or incapable of being reduced by averment to a certainty (*g*), debt is not maintainable; it lies only for the recovery of money *in numero;* and though the distinction between the terms, money *in numero*, and damages, may at first

(*c*) Bac. Ab. Debt, G. See Acton v. Symon, Cro. Car. 414. Bulstrode v. Gilburn, 2 Stra. 1027.

(*d*) Littler v. Holland, 3 Term Rep. 590. Heard v. Wadham, 1 East, 619.

(*e*) Littler v. Holland, 3 Term Rep. 590, 2.

(*f*) Heard v. Wadham, 1 East, 619. 630.

(*g*) Sanders v. Marke, 3 Lev. 429. Anon. Sty. 31. 1 Dougl. 6.

sight appear to be somewhat technical; yet, on further examination, the difference will be found to consist in something more than form; for instance, to an action of debt for rent, *rien in arrere* is a good plea (*h*), but not to covenant, as in the latter case the defendant would then confess the covenant broken, and the plea would tend but in mitigation of damages (*i*). Where money is stipulated to be paid by instalments, until the whole debt is due, unless it be secured by a penalty, debt cannot be supported (*k*); covenant in such cases is the proper remedy; and each successive default in payment at the appointed time, will give the covenantee a fresh right of action for that particular instalment (*l*).

This form of action is particularly resorted to on breaches of covenants contained in leases for years, and is, in many other instances, a preferable remedy to an action of debt. Thus, where the grantor of an annuity has become bankrupt or insolvent, it is advisable to proceed in covenant for arrears due after the bankruptcy or insolvency; an action of debt on the annuity deed, or on the bond, might be met by a plea of bankruptcy and certificate, or a plea of discharge under the insolvent act; which would generally operate as a bar (*m*). So, where rent is in arrear

(*h*) Warner v. Theobald, 2 Cowp. 588.

(*i*) Hare v. Savill, 1 Brownl. 19. Tyndal v. Hutchinson, 3 Lev. 170, on a plea of *nil debet*.

(*k*) Rudder v. Price, 1 Hen. Blac. 547. Coates v. Hewit, 1 Wils. 80. Hallet v. Hodges, Ibid.

(*l*) Co. Lit. 292, b.

(*m*) Cotterel v. Hooke, 1 Dougl. 97

under a lease, and the premises are out of repair, in which case unliquidated damages are claimed, the plaintiff should sue in covenant, because damages for the whole demand are recoverable.

The declaration in this action must show that the contract was under seal, and should usually make a profert thereof, or offer some excuse for the omission. It is not necessary to state the consideration of the defendant's covenant, unless the performance of it constituted a condition precedent, when such performance must be averred: and only so much of the deed and covenant should be set forth as is essential to the cause of action, and each may be stated according to the legal effect; though it is more usual to declare in the words of the deed: and the breach also may be in the negative of the covenant generally, or according to the legal effect, and sometimes in the alternative: and several breaches may be assigned at common law: and damages being the object of the suit, should be laid sufficient to cover the real amount.

The judgment in this action is, that the plaintiff recover a named sum for his damages which he hath sustained by reason of the breach or breaches of covenant, together with full costs of suit, to which the plaintiff is entitled, though the damages recovered be under 40*s.*, unless the judge certify under the statute 43 Eliz. c. 6. When the defendant suffers judgment by default, he is not bound in this action to put in bail in error, which circumstance renders the action

of debt for rent, or money due on a contract for a sum certain, preferable to covenant (*n*).

The statutes of limitations are confined to the particular actions enumerated therein, and do not extend to actions of covenant (*o*).

Of bonds for performance of covenants.

A practice obtained very generally at an early period of executing bonds as additional securities for the performance of covenants; and between covenants in general, and covenants secured by a penalty or forfeiture, there is this difference:—In the latter case the obligee has his election; he may either bring an action of debt for the penalty, and recover the penalty; (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction of the whole (*p*);) or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty *toties quoties* (*q*). Indeed, the obligee has been allowed to recover on the bond, and on the covenant also. The defendant by his bond, which recited that the plaintiff had agreed to sell him so many stacks of wood, and that the defendant covenanted to pay the plaintiff 35*l.* for every hundred of the said stacks, bound himself in a penalty of 100*l.* for performance; the plaintiff showed that there were so many stacks, &c., and brought his action for 310*l.*, &c.; as the total for all the said stacks.

(*n*) 1 Chit. Plead. 119. 3d ed. 387.

(*o*) 1 Tidd Pr. 15. 7th ed.

(*p*) Bird v. Randall, 3 Burr. 1345; S. C. 1 W. Blac. 373.

(*q*) Lowe v. Peers, 4 Burr. 2228; S. C. Wilm. 364.

An objection was taken, that the plaintiff could not have an action for more than the penalty; but Holt, C. J. said, that the plaintiff had his election to sue for the penalty, or for the rate agreed, although it were more than the penalty. And he might sue for the 310*l.* for the wood, and for the 100*l.* penalty also; for the penalty was only inserted to enforce the payment for the wood; and it could not be intended, that if the plaintiff sold wood to the value of 1000*l.*, he should be content with the penalty only (*r*).

By taking a bond for performance of covenants, the obligee acquires in one respect a considerable additional benefit. We have seen (*s*), that at common law a devisee was not liable to an action of debt or covenant, in respect of the lands devised, for a breach of the testator's covenant; and we have also seen, how easily a covenantee might even unintentionally be defeated of his right of resorting to the real property, by the covenantor's disposing of his estate by will to a stranger; and we have likewise noticed, that this defect in the law was remedied, as to actions of *debt*, by the statute of fraudulent devises (*t*): the advantage, therefore, of taking a bond for performance of covenants is obvious: on a breach of covenant the bond becomes absolute, and the penalty becomes an immediate *debt*, and consequently confers on the obligee, through the medium of the sta-

(*r*) Ingledew v. Cripps, 2 Ld. Raym. 814; S. C. nom. Incledon v. Crips, 2 Salk. 658; S. C. nom. Grips v. Ingledew, Holt, 200; 7 Mod. 87. See also Chilliner v. Chilliner, 2 Ves. 528. Howard v. Hopkyns, 2 Atk. 371.

(*s*) Ante, p. 452.

(*t*) 3 Wm. & M. c. 14.

tute, the power of attaching the lands in the hands of a devisee, for satisfaction in damages for the covenant broken.

Where a lessor takes a bond of this description, he will generally find it more advantageous to sue on the covenants contained in the lease for general damages, than to proceed on the bond for the penalty; because by adopting the latter course he is, as before observed (*u*), precluded from afterwards suing on his covenant: and as he can never recover on the bond an amount exceeding the penalty, he may be ultimately left, on future breaches, without the means of redress; whereas he may proceed on his covenant for breaches *toties quoties;* and may recover damages far exceeding the amount of the penalty (*v*).

The inconveniences attending bonds of this nature, and the hardships entailed upon the obligors, when legal proceedings were instituted for recovering the penalty, were soon felt, and occasioned loud complaint. The strict rules of the common law enabled a plaintiff, on proof of a breach of one covenant, to enforce the payment of the whole amount secured by the bond, however disproportioned it might be to the actual damage sustained by the obligee: the obligor, indeed, under such oppressive circumstances, might resort for relief to a court of equity, which

(*u*) Ante, p. 547.

(*v*) Johnson v. Bland, 2 Burr. 1087. Astley v. Weldon, 2 Bos. & Pul. 346. Harrison v. Wright, 13 East, 343, 8.

would direct an issue of *quantum damnificatus* (*w*), and prevent execution being enforced for more than sufficient to make full compensation; but this circuitous course of procedure was not always compatible with his means or inclination. A remedy was in consequence provided by the legislature; and by the statute 8 and 9 Wm. 3. it was enacted (*x*), "That in all actions upon any bond or bonds, or on "any penal sum, for non-performance of any covenants "or agreements in any indenture, deed, or writing "contained, the plaintiff or plaintiffs may assign as "many breaches as he or they shall think fit, and the "jury, upon trial of such action or actions, shall and "may assess, not only such damages and costs of suit "as have heretofore been usually done in such cases, "but also damages for such of the said breaches so to "be assigned, as the plaintiff upon the trial of the "issues shall prove to have been broken, and that the "like judgment shall be entered on such verdict as "heretofore hath been usually done in such like actions; "and if judgment shall be given for the plaintiff on a "demurrer, or by confession, or *nihil dicit*, the plain-"tiff upon the roll may suggest as many breaches of "the covenants and agreements as he shall think fit, "upon which shall issue a writ to the sheriff of that "county where the action shall be brought, to sum-"mon a jury to appear before the justices or justice

(*w*) White v. Sealy, 1 Dougl. 50. And see a valuable note "on the law respecting the relief given against a penalty, both in the construction of the stat. 8 & 9 W. III. c. 11., and in the practice of courts of equity," 3 Ev. Stat. 324. 2d edit.

(*x*) 8 & 9 Wm. III. c. 11. s. 8.

" of assize, or nisi prius, of that county, to inquire of " the truth of every one of those breaches, and to assess " the damages that the plaintiff should have sustained " thereby; in which writ it shall be commanded to " the said justices or justice of assize, or nisi prius, " that he or they shall make return thereof to the " court from whence the same shall issue, at the time " in such writ mentioned; and in case the defendant " or defendants, after such judgment entered, and " before any execution executed, shall pay unto the " court where the action shall be brought, to the use " of the plaintiff or plaintiffs, or his or their executors " or administrators, such damages so to be assessed " by reason of all or any of the breaches of such cove- " nants, together with the costs of suit, a stay of exe- " cution of the said judgment shall be entered upon " record; or if by reason of any execution executed, " the plaintiff or plaintiffs, or his or their executors or " administrators, shall be fully paid or satisfied all " such damages so to be assessed, together with his " or their costs of suit, and all reasonable charges and " expenses for executing the said execution, the body, " lands, or goods of the defendant, shall be thereupon " forthwith discharged from the said execution, which " shall likewise be entered upon record; but notwith- " standing in each case such judgment shall remain, " continue, and be, as a further security to answer to " the plaintiff or plaintiffs, and his or their executors " or administrators, such damages as shall or may be " sustained for further breach of any covenant or co- " venants in the same indenture, deed, or writing con- " tained, upon which the plaintiff or plaintiffs may " have a *scire facias* upon the said judgment against

" the defendant, or against his heir, terre-tenants, or " his executors or administrators, suggesting other " breaches of the said covenants or agreements, and " to summon him or them respectively to show cause " why execution shall not be had or awarded upon " the said judgment, upon which there shall be the " like proceeding as was in the action of debt upon " the said bond or obligation, for assessing of damages " upon trial of issues joined upon such breaches, or " inquiry thereof upon a writ to be awarded in man- " ner as aforesaid; and that upon payment or satis- " faction in manner as aforesaid, of such future da- " mages, costs, and charges as aforesaid, all further " proceedings on the said judgment are again to be " stayed, and so *toties quoties*, and the defendant, his " body, lands, or goods, shall be discharged out of " execution, as aforesaid" (*y*).

This law was made in favor of defendants, and is highly remedial, calculated to give plaintiffs relief to the extent of the damage sustained, and to protect defendants against the payment of further sums than what are in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only have accrued (*z*). And it is now settled (*a*), not-

(*y*) As to the mode of proceeding under this statute, see a learned note by the late Serjeant Williams, 1 Saund. 58.

(*z*) Hardy v. Bern, 5 Term Rep. 637. Mackworth v. Thomas, 5 Ves. 331.

(*a*) Drage v. Brand, 2 Wils. 377. Goodwin v. Crowle, 1 Wils. 357. Hardy v. Bern, Cited 5 Term Rep. 540; Ibid. 637; 13 East, 3, n. Roles v. Rose-

withstanding the existence of an apparent determination to the contrary (*b*), that the statute is compulsory on the plaintiff, and therefore he cannot refuse to proceed according to its provisions. He must assign the breach of those covenants for which he proceeds to recover the satisfaction; and if the defendant pleads to issue, and the cause goes to a jury for trial, the jury, upon trial of such cause, must assess damages for such of the breaches assigned as the plaintiff upon the trial of the issues shall prove to have been broken. Nor is it necessary that the covenants or agreements should be in an instrument distinct from the bond; they are within the statute if comprised in the condition of the bond itself (*c*).

Until the statute, the plaintiff could assign only one breach on the bond (*d*); for by assigning several breaches the declaration was objectionable on the ground of duplicity; because the bond was forfeited by the breach of one covenant as well as of several (*e*).

It was settled so long ago as the time of Siderfin, that where a bond is given generally for performance of covenants in a lease, it is extended to protect breaches in implied as well as express cove-

well, 5 Term Rep. 538. Walcot v. Goulding, 8 Term Rep. 126.

(*b*) Walker v. Priestly, Com. 376.

(*c*) Collins v. Collins, 2 Burr. 820, 6.

(*d*) King v. Gogle, Freem. 156.

(*e*) Symms v. Smith, Cro. Car. 176. Barnard v. Michel, 1 Vent. 114. 126; S.C. 2 Keb. 754. 766; 3 Salk. 108. pl. 7.

nants; and if rent be not paid, or an eviction take place, the bond becomes forfeited for breach of the implied covenants, arising in the one case on the words *yielding and paying*, and in the other, on the words *grant and demise* (*f*).

It may also be mentioned, that a bond, and the covenants to which it relates, constitute but one assurance; and the one being made void, the other fails of effect. A release of covenants, therefore, will operate as a discharge of an obligation given for securing the performance of such covenants (*g*).

(*f*) Iggulden v. May, 9 Ves. 330. Nokes's case, 4 Co. 80, b. But see 2 Brownl. & Gold. 214.

(*g*) Jevons v. Harridge, 1 Sid. 308; 2 Keb. 116. Capenhurst v. Capenhurst, T. Raym. 27; S. C. 1 Lev. 45; 1 Keb. 130. 164. 183.

CHAPTER THE SECOND.

OF RELIEF IN EQUITY.

Before the reader commences the perusal of this chapter, he should be apprized of the object with which it is here inserted. It is not intended to enter into that wide field of learning, the doctrines of the Court of Chancery in cases of covenant in general: the subject would be inexhaustible. As that Court, in carrying an agreement into execution, makes no distinction whether it be under seal or not, it is evident, that to discuss the principles and practice of the court, with reference to covenants in general, would lead to an investigation of the most extensive and most complicated branch of equitable jurisprudence, and would introduce much matter foreign to the subject of this volume. It is therefore proposed, that this part of the work should constitute a summary of the principles of equity connected with the law of covenants, as it has been treated of in the preceding pages; and should briefly recapitulate, by way of illustration, some of the chief points of such express covenants as have already been particularly noticed. These inquiries may be distributed under the following heads: First, Relief for the covenantee; 1. By way of specific performance; and 2. By way of injunction to restrain breaches of covenants: and, Secondly, Relief for the covenantor, against forfeiture occasioned by his breach of covenant.

SECT. I.

OF RELIEF IN EQUITY FOR THE COVENANTEE.

1. By way of specific performance.

THE imperfect compensation afforded by damages recoverable at law for a breach of covenant, occasions a frequent application to equity to enforce a performance of the agreement *in specie*. The court assumed that jurisdiction upon the simple principle, that the party had a moral right to the observance of the contract, to which right the courts of law, whose jurisdiction did not extend beyond damages, had not the means of giving effect; and even that was considered by the courts of law to be a great usurpation (*a*). It is on this ground that equity, in matters of real property, or property which partakes of the realty, exercises its authority to put a purchaser in the actual possession of the subject of his purchase (*b*). But the court does not decree specific execution according to the strict letter of the covenant; a conscientious modification of it, as circumstances may require, is uniformly made (*c*).

There are few cases in which a court of equity will decree a performance of a covenant or agreement upon which there cannot be an action at law,

(*a*) Alley v. Deschamps, 13 Ves. 227, 8. Halsey v. Grant, Ibid. 76.

(*b*) Newdigate v. Helps, 6 Madd. 133.

(*c*) Davis v. Hone, 2 Scho. & Lef. 341. 348.

according to the words of the articles and the events that have happened. The court, indeed, will carry several agreements into execution, upon which an action at law cannot be maintained, by reason of the form of the instrument; but rarely, where the covenant was not performed by reason of the events, such as a contingency not happening (*d*). But under some circumstances, where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, equity will carry it into execution, as, in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance, and to sustain an action at law performance must be averred according to the very terms of the contract (*e*).

We have seen, that equity will decree a specific performance of a covenant (in a marriage settlement) to surrender copyholds, in favor of the persons claiming within the consideration of the instrument; but not for the benefit of a mere volunteer (*f*); and where there is evidence of intention, a party may have a specific performance of a covenant for perpetual renewal (*g*); an execution *in specie* of a covenant for further assurance will also be decreed (*h*).

(*d*) Whitmel v. Farrel, 1 Ves. 256.

(*e*) Davis v. Hone, 2 Scho. & Lef. 341. 347.

(*f*) Ante, p. 153.

(*g*) Ante, p. 248.

(*h*) Ante, p. 353.

The court, however, will not entertain a bill for a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective, that equity interferes. In Errington v. Aynesly (*i*), Lord Kenyon said: "a specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way." But although courts of equity have not in every instance confined themselves within this line, yet, this being the principle, they will not deviate from it, further than they are bound from deference to precedents and authority. Thus, a memorandum was indorsed on a lease granted to one Clutton, that it should be lawful for him to break up or dig for gravel any part of the land; and he covenanted to pay 20*l.* for every acre he should so break up or dig, and to make good the same at or before the expiration of the term. A lease was then granted to the plaintiff, to commence at the expiration of Clutton's in 1799, which contained a covenant, that the premises should be in the same state and condition as Clutton had covenanted to leave and yield up the same. A bill was filed praying that the defendants might be decreed specifically to perform and carry into execution the grant, covenants, and agreements, made with the plaintiff by the said indenture; and that they might be ordered to put the plaintiff in possession of the piece of ground so demised to him, in such state and condition as Clutton, his executors, &c., ought to have made good the same. But the court dismissed the

(*i*) 2 Bro. C. C. 341.

bill, considering that complete justice could be done at law; the matter in controversy being nothing more, than the sum it would cost to put the ground in the condition in which by the covenant it ought to be (*k*). Nor will the court decree a specific execution in every case where it will not set aside the contract; nor, on the other hand, will it set aside every contract that it will not specifically perform (*l*); but will leave the party to make what he can of it at law: and there is another class of cases, in which the court refusing to carry the agreement into execution, would not stand neuter, but would order it to be delivered up (*m*).

Already have we noticed, in a more detailed manner, that a specific execution will not be ordered of a covenant for reference to arbitration (*n*); nor, it seems, of a covenant by a husband that his wife shall levy a fine (*o*); nor of a covenant to repair (*p*); to build (*q*); or to lay out a certain sum in building (*r*); unless the transaction and agreement be in their nature defined (*s*); as, to build a house so as to correspond in its elevation with the adjoining houses already built (*t*); nor will the court, in general, entertain a bill for a specific performance of contracts for chattels, or which relate to merchandize; but

(*k*) Flint v. Brandon, 8 Ves. 159.

(*l*) Mortlock v. Buller, 10 Ves. 292.

(*m*) Willan v. Willan, 16 Ves. 83.

(*n*) Ante, p. 148.

(*o*) Ante, p. 165, et seq.

(*p*) Ante, p. 293.

(*q*) Ante, p. 297.

(*r*) Ibid.

(*s*) Ibid.

(*t*) Ante, p. 298.

will leave the parties to law, where the remedy is much more expeditious (*u*), as in the case of a covenant to transfer stock (*v*); although, indeed, there is a solitary instance of such a covenant having been enforced (*w*). Nor will the court compel a rector to resign his living in favor of a plaintiff, in pursuance of a covenant to that effect, which the rector entered into upon being presented; for although the right of presentation is mere matter of property, the actual possession is not; but depends on the discretion of the ordinary; and the court not being able to exercise any jurisdiction over the ordinary, or enter into those considerations which may induce him to refuse the surrender of the defendant, or the presentation of the plaintiff; and having no means of determining the plaintiff's fitness for the living, or of securing his possession of it; the parties must be left to seek redress in a court of law (*x*). Nor will it enforce specific performance of an agreement to take a lease of a house, being one of six originally demised at a ground rent of 10*l*., with a proviso for re-entry on non-performance of any of the covenants contained in the original lease, notwithstanding an offer by the plaintiff to indemnify the defendant in case of eviction; for if the covenants in the first lease, though well observed with respect to this particular house, were to be broken as to any other of the five houses,

(*u*) Buxton v. Lister, 3 Atk. 383.

(*v*) Cud v. Rutter, 1 P. Wms. 570; S. C. 2 Eq. Ca. Ab. 18. pl. 8; S. C. nom. Scould v. Butter, Cited Prec. Ch. 534. Nutbrown v. Thornton, 10 Ves. 161.

(*w*) 10 Ves. 161. And see Dolaret v. Rothschild, 1 Sim. & Stu. 590.

(*x*) Newdigate v. Helps, 6 Madd. 133.

the original lessors would be entitled to re-enter on the whole property (*y*). Whether it will compel the performance of a contract for the purchase of a subject matter, of which the good-will of a public-house, unconnected with any fixed interest in the premises, forms the principal part, is not settled (*z*). And when from the circumstances it is doubtful whether the party meant to contract to the extent to which he is sought to be charged, equity will refuse to enforce a specific performance. Therefore, where Y., tenant for life, with power to lease for twenty one years at the best improved rent, made a lease to H., and thereby covenanted, "for the term of his life to renew the said lease to H., his executors, administrators, and assigns, by giving them a lease for twenty one years when applied to;" and H. surrendered the lease, under a clause empowering him to do so; and afterwards, upon a new agreement, Y. indorsed on the old lease, "I promise and agree to perfect a fresh lease to H. at any time he shall demand the same, at 5*l.* a year less than the within-mentioned rent; specific performance was refused, it being uncertain whether the contract extended to a future lease; and the contract being by a person having a limited interest, with a leasing power, to act in fraud of that power (*a*).

Though a party has only an equitable title to an estate, the court will decree against him a specific performance of covenants equally as if he had the

(*y*) Fildes v. Hooker, 3 Madd. 193.

(*z*) Coslake v. Till, 1 Russ. 376.

(*a*) Harnett v. Yeildng, 2 Scho. & Lef. 549, 554.

legal title, by directing him to procure the trustees to join in the conveyance (*b*). And on a bill for a specific performance of a covenant with A. for the benefit of B., A. must be a party to the suit (*c*).

2. By way of injunction to restrain breach.

The power of a court of equity extends not only to enforce an actual execution of a covenant in favor of the covenantee, but also to obviate a threatened wrong, or to prohibit a party from continuing the commission of an injury. We may conceive numberless cases of covenants broken, in which the recovery of damages at law, however large in amount, would never be a compensation to the party aggrieved. Hence has arisen the system of preventive justice, so advantageously administered by equity, by means of injunctions to restrain breaches of covenant. Applications for injunctions of this kind are of common occurrence, particularly on grants of farming leases. In one case, a lease contained covenants not to convert any meadow-land, and all the other usual covenants in a lease of a farm, showing clearly the nature of the lease for the purpose of tillage as a farm ; and Lord Eldon granted an injunction till appearance and further order, to restrain the defendant, a tenant to the plaintiff, from breaking up meadow for the purpose of building, contrary to the covenants of his lease ; observing, that he did so upon the ground of the covenant not to convert any meadow ; otherwise he should doubt, whether it

(*b*) Crop v. Norton, Barnard. Chan. 179; S.C. 2 Atk. 74; 9 Mod. 233. And see Cornbury v. Middleton, 1 Ch. Ca. 211.

(*c*) Cooke v. Cooke, 2 Vern. 36; S.C. 1 Eq. Ca. Ab. 73. pl. 8.

would do upon the ground of waste, without any affidavit that it was ancient meadow (*d*). At a later period, however, he granted an injunction to restrain a tenant from committing waste by ploughing up pasture land, although there was no express covenant not to convert pasture into arable; thinking that a covenant, contained in the lease, to manage pasture in a husbandlike manner, was equivalent to it (*e*). An injunction will also be awarded to restrain a lessee from pulling down, damaging, or destroying, contrary to his covenant, any of the buildings; and from cutting down, injuring, or destroying any of the trees, bark, wood, underwood, hedges, or fences; and from sowing any part of the farm with mustard seed, or any other pernicious crop; and from removing from off the farm any of the hay or straw, dung or manure produced or made thereon (*f*). And if a tenant, defending an ejectment brought by his landlord, makes default at the trial, and makes use of the interval to do all the mischief he can, by breaches of covenant, and wilful waste, an injunction will be granted on motion, or in the vacation on petition: it is otherwise if an ejectment has not been brought (*g*). But if a tenant covenants not to plough pasture; and if he should, to pay at the rate of 20*s*. an acre per annum, the court will refuse an injunction, as the damage has been settled between the parties themselves, and a price set for ploughing; nor, on the other hand, will the court

(*d*) Lord Grey de Wilton v. Saxon, 6 Ves. 106.

(*e*) Drury v. Molins, 6 Ves. 328.

(*f*) Pratt v. Brett, 2 Madd. 62. Kimpton v. Eve, 2 Ves. & B. 349.

(*g*) Lathropp v. Marsh, 5 Ves. 259.

assist the defendant coming for relief against such payment (*h*). The court will grant an injunction to restrain a breach of covenant not to carry on certain trades, secured by a forfeiture of the lease and penalty (*i*). And in Ward v. Duke of Buckingham, in the House of Lords, upon a lease of alum works, with a covenant by the lessee to leave stock of a certain amount upon the premises, there was a fair ground of suspicion that he did not mean to perform his covenant in that respect; and the court said, though there might be compensation in damages, it had (*k*) relation to that sort of enjoyment, for which the landlord had stipulated after the expiration of the term; and a sort of decree *quia timet* was made, and affirmed in the House of Lords (*l*).

But where a person, being lessee of certain water-works, and also owner in fee of a messuage and well adjoining, sold the messuage and well, and received from the vendee a covenant that he would not sell or dispose of water from the well, to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns; an injunction to restrain a breach of the covenant was refused, as the court, under such an agreement, would have to try, in each instance, whether the act of selling the specified quantity of water was a prejudice to the proprietors of the water-works (*m*). In like manner,

(*h*) Woodward v. Gyles, 2 Vern. 119.

(*i*) Barret v. Blagrave, 5 Ves. 555.

(*k*) The word *not* appears to be wanting; query?

(*l*) Nutbrown v. Thornton, 10 Ves. 161.

(*m*) Collins v. Plumb, 16 Ves. 454.

where there was a lease from the dean and chapter of Winchester, with a covenant not to make sale of, or take any timber trees growing or to grow on a certain part of the premises, save for the necessary building or repairing of their cathedral church, or of the church buildings thereto belonging, and a bill was filed by the lessee to restrain the dean and chapter from selling or cutting, except for the purposes aforesaid; an injunction, obtained on filing the bill, was dissolved on the coming in of the answer, stating that the whole of the timber was wanted for the purpose of repairs; the covenant not extending to deprive them of the right which they might have exercised independently of it (*n*).

SECT. II.

OF RELIEF IN EQUITY FOR THE COVENANTOR.

By way of relief against forfeiture.

THE origin of the doctrine of relief against forfeiture by breach of covenants in a lease, is to be attributed to those cases, in which relief was given with reference to non-payment of money at the specified time; the court holding, that by the payment of interest the party was put in just the same state as if the principal had been paid at the time stipulated (*o*). This relief was so freely administered in favour of persons who had forfeited their

(*n*) Wither v. Dean and Chapter of Winchester, 3 Meriv. 421.

(*o*) Reynolds v. Pitt, 19 Ves. 140.

leases by non-payment of rent at the appointed period, and at times so remote from the lessor's recovery in ejectment, that it became necessary to have the interference of the legislature, to confine within reasonable limits a rule which operated so materially to the prejudice of landlords. It was therefore enacted (*p*), that in case the lessees should suffer judgment to be had in ejectment, and execution executed thereon, without paying their rent and arrears and full costs, and without filing any bill for relief in equity within six calendar months after such execution executed, then the lessees should be barred from relief in law or equity, other than by writ of error for reversal of such judgment, if erroneous, and that the lessor should thenceforth hold the premises discharged from such lease. But the relief granted in this case will not preclude the landlord from prosecuting an ejectment for breaches of other covenants contained in the lease, against which relief cannot be had. And the Lord Chancellor recently (*q*) refused an injunction against a verdict in ejectment, upon a breach of covenant by lessee for years as to the mode of cultivation, (admitting that relief might be had after breach of such a covenant,) the defendant having been prevented from proving other breaches (*r*), against which no relief could be had. It appears, also, that the court will relieve, under some special circumstances, where

(*p*) 4 Geo. II. c. 28. s. 2. And see ante, p. 205.

(*q*) Lovat v. Lord Ranelagh, 3 Ves. & B. 24. And see Davis v. West, 12 Ves. 475.

(*r*) The judge having decided, that as one breach was proved, it was unnecessary to go into others.

the party has broken a covenant to repair (*s*). But on a breach of a covenant to insure (*t*), or not to assign without license (*u*), the court has universally refused to interpose for the benefit of the covenantor.

(*s*) Ante, p. 299.
(*t*) Ante, p. 192.
(*u*) Ante, p. 429.

PART THE SIXTH.

OF COVENANTS VOID IN THEIR CREATION; AND OF THE MEANS BY WHICH COVENANTS ORIGINALLY VALID MAY BE DISCHARGED OR SUSPENDED.

CHAPTER THE FIRST.

OF COVENANTS VOID IN THEIR CREATION.

SECT. I.

OF COVENANTS VOID AT COMMON LAW.

1. Of covenants void at common law.
1. With reference to the incapacity of the contracting parties.

THE invalidity of a covenant may arise from many causes. In the first place, where the parties have no legal capacity to contract, their covenant is void *ab initio;* nor can any subsequent act of confirmation impart effect to that which never had a legal existence (*a*). Idiots, infants, lunatics, and other persons labouring under various disabilities before noticed (*b*), are totally disqualified from binding themselves by covenant.

2. With reference to the object of, or consideration for, the covenant.

At common law, every covenant is invalid which has for its object the performance of an act *malum in se*. If one covenants to kill or rob a man, or commit a breach of the peace, or the like, such a

(*a*) Ludford v. Barber, 1 Term Rep. 86.

(*b*) Ante, p. 107, et seq.

covenant is absolutely illegal (*c*). So, covenants founded in fraud (*d*), or in violation of the precepts of religion, or morality, or the laws of public decency, are void in their creation. Accordingly, a mutual covenant between a man and woman for future cohabitation, or the continuance of an illicit intercourse, is perfectly futile both at law and in equity (*e*); and generally speaking, where the matter being in a condition would invalidate the condition as against law, there being in a covenant, it will in like manner render the covenant nugatory.

And if the thing engaged to be done, is in the nature of it impossible; as if a man undertakes to go to Rome in three hours, a covenant for its performance is also void (*f*). And so, on the same ground, is a covenant by a man to make a feoffment to his wife (*g*). But to make the covenant nugatory, the impossibility must exist at the time of its creation; for if the execution of the duty stipulated for be possible at the time, but afterwards in consequence of adventitious circumstances become impossible, the covenantor will still be liable on his express covenant (*h*); unless perhaps the performance of the covenant be rendered impossible by the act of

(*c*) Shep. Touch. 163. Co. Lit. 206, b. Atkinson v. Ritchie, 10 East, 534, 5.

(*d*) Waldo v. Martin, 4 Barn. & Cres. 319; S. C. 6 Dow. & Ry. 364; 2 Carr. & P. 1.

(*e*) Franco v. Bolton, 3 Ves. 371. Gray v. Mathias, 5 Ves. 286. Knye v. Moore, 1 Sim. & Stu. 61; S. C. 2 Ibid. 260. Priest v. Parrot, 2 Ves. 160.

(*f*) Co. Lit. 206, b. Shep. Touch. 164.

(*g*) Shep. Touch. 164.

(*h*) Shubrick v. Salmond, 3 Burr. 1637. Atkinson v. Ritchie, 10 East, 530.

God, as in one or two instances noticed hereafter; or be rendered impossible by the covenantee himself; as in a case where a man covenanted with B. that C. should marry Jane on a certain day, and before that day B. married her himself; here the covenant was held to be discharged, because by the covenantee's means it could not be performed (*i*). But a covenant, if within the range of possibility, will be upheld, however absurd or improbable the event may be; as where one covenants that it shall rain to-morrow, or that the Pope shall be at Westminster on such a day (*k*). And if a covenant be in part against the common law, and in part good, it will be upheld as to that part which is good (*l*).

Such covenants also as are opposed to public policy cannot be supported. Covenants in restraint of marriage are of this description: but there is a great deal of difference between promising to marry a particular person, and promising not to marry any one else. One contract of this nature under hand and seal ran thus: "I do hereby promise Mrs. Catharine Lowe, that I will not marry any person besides herself; If I do, I agree to pay to the said Catharine Lowe 1000*l.* within three months next after I shall marry any body else." In this case there was not the least ground to say that the man had engaged to marry the woman; much less did any thing appear of her engaging to marry him; therefore it was only a restraint upon his marriage with any other than the plaintiff; not a reciprocal engage-

(*i*) Co. Lit. 206, b. 2 Mod. 28.

(*k*) Rol. Ab. Condition, (D).

(*l*) Pigot's case, 11 Co. 27, b. Ley, 79. 8 East, 236. 1 Vent. 237.

ment to marry each other, or any thing like it; and the covenant was declared to be illegal and void (*m*).

So all contracts are void which have for their object a general restraint of trade, whether they be by bond, covenant, or promise, and whether the agreement be made with or without consideration, and whether it be of the party's own trade or not (*n*). Hence, a covenant not to trade in any part of England, though with consideration, is void; because it can never be useful to any man to restrain another from trading thus, unless the party intends to secure to himself a monopoly, which the law will not allow (*o*). But although general restraints of trade are prohibited, effect will be given to covenants restraining trade within particular limits; the

(*m*) Lowe v. Peers, 4 Burr. 2225; S. C. Wilmot, 364. Cock v. Richards, 10 Ves. 429. Baker v. White, 2 Vern. 215; S. C. 1 Eq. Ca. Ab. 89. pl. 7.

(*n*) Prugnell v. Gosse, Al. 67. Mitchel v. Reynolds, 1 P. Wms. 181. 186; S. C. 10 Mod. 27. 85. 130; Fortesc. 296. Chesman v. Nainby, 2 Stra. 739; S. C. 2 Ld. Raym. 1456; Fort. 297; 3 Bro. P. C. 349; 1 Bro. P. C. 234, Toml. ed. Gale v. Reed, 8 East, 80.

(*o*) 1 P. Wms. 193. Homer v. Ashford, 3 Bing. 322; S. C. 11 J. B. Mo. 91. No judge carried his abhorrence of these restraints so far as is reported of Hull, J. in the year-book, 2 Hen. V. fol. 5. pl. 26. There a dyer was bound that he should not use his craft for two years, and Hull held that the bond was against the common law, "and by G—d, (said he) if the plaintiff were here, he should go to prison till he had paid a fine to the King." In Mitchel v. Reynolds, 1 P. Wms. 181, Parker, C. J., in his admirable exposition of the laws on this subject, excuses the transport of Mr. Justice Hull's indignation, on the ground that it was excited by a case of most gross fraud and villany. 1 Sim. & Stu. 77. n.

bills of mortality for instance (*p*). And in partnership engagements, a covenant that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged, is not only permitted, but is the constant course (*q*). So, a covenant with the proprietors of a theatre not to write dramatic pieces for other theatres was held legal (*r*). And a covenant by a dyer, on a sale of the good-will of his business, and of a secret in dying, restraining himself generally from using that secret, has been upheld (*s*). Thus also, a contract entered into by a practising attorney to relinquish his business, and to recommend his clients to two other attorneys, and to refrain from practising in such business within 150 miles of London, was sanctioned by the Court of King's Bench (*t*). But where certain articles, under which A. had served his clerkship to an attorney, contained a proviso that A. should not practise within a certain district; and also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty to ensure his fulfilment of the proviso; and A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, and, with a knowledge of the purport of the articles,

(*p*) Clerk v. Crow, 2 Barnard. 463.

(*q*) Morris v. Coleman, 18 Ves. 437.

(*r*) Ibid.

(*s*) Bryson v. Whitehead, 1 Sim. & Stu. 74. See also Green v. Folgham, Ibid. 398, as to the sale of a secret of trade.

(*t*) Bunn v. Guy, 4 East, 190; S. C. 1 Smith, 1. Davis v. Mason, 5 Term Rep. 118.

completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him; a motion for an injunction to restrain him from practising within that district was refused with costs (*u*).

In like manner, covenants having for their object the encouragement of litigation, or the prevention of justice, are not lawful; although persons having a common interest may agree to unite in a defence; but then the agreement must not go beyond the common object. An agreement, therefore, by several owners and occupiers of land in a parish, to concur in defending any suits that should be commenced against any of them by the present or any future rector for the tithes of articles covered by certain specified moduses, or any other moduses; and binding themselves not to compromise or settle, and not limited to their continuance in the parish, or to any particular time, is illegal; as it might operate materially to impede the course of justice, if persons uniting in this manner against an individual, could carry it beyond the immediate purpose in which they are jointly interested (*v*).

3. With reference to the deed or estate on which they depend.

Covenants may also be void when considered with reference to the instrument in which they are contained, or the estate on which they depend. Whenever a deed is void, all the covenants dependent on the interest professed to be conveyed by that deed are also void (*y*); for if no estate passes by the

(*u*) Capes v. Hutton, 2 Russ. 357.

(*x*) Stone v. Yea, Jac. 426.

(*y*) Soprani v. Skurro, Yelv. 18.

deed, the covenant relating to, and dependent on the estate purported to be passed, must necessarily fail of effect. Hence, an assignee of a lease cannot take advantage of a covenant for quiet enjoyment contained in the original demise, where the estate was determined by the lessor, being tenant in tail, dying without issue, before the assignment: the assignment could have no operation, as the person who made it had no interest in the premises (*z*). And for the same reason, a lessee professing to assign over a term which in fact had no existence, is not liable at the suit of a subsequent assignee on a covenant for quiet enjoyment (*a*). The rule prevails also where a lease is void for uncertainty; therefore, where one possessed of a term for years granted so much of the term as should be unexpired at the time of his death, and the grantee assigned, and covenanted with the assignee for quiet enjoyment; it was held, that the want of certainty annulled the original lease, that the covenant could not subsist without an estate, and as no estate passed, the assignee could not maintain an action (*b*). And here may be noticed, that a lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is not void for uncertainty: as a lease for seven years, it undoubtedly is good, whatever may be the validity of it

(*z*) Andrew v. Pearce, 1 New Rep. 158.

(*a*) Noke v. Awder, Cro. Eliz. 373. 436; S. C. Mo. 419.

(*b*) Capenhurst v. Capenhurst, Raym. 27; S. C. 1 Lev. 45; 1 Keb. 130. 164. 183. Waller v. The Dean and Chapter of Norwich, Ow. 136; S. C. nom. Walter v. The Dean and Chapter of Norwich, Mo. 875; S. C. nom. Waters v. The Dean and Chapter of Norwich, 2 Brownl. & Gold. 158.

as to the two other eventual terms ; and if the breach be assigned for non-payment of rent incurred within the first seven years, the plaintiff is entitled to recover (*c*).

So, on the other hand, a covenant for payment of rent, the rent being an equivalent returned for the interest enjoyed, cannot be enforced, where no estate passes under the lease ; as if an attorney grants a lease for another in his own, instead of the name of his principal (*d*); or if the committee of a lunatic, having no legal authority for that purpose, makes leases in his own name (*e*) ; or if the lessor (supposing him competent to demise) has no interest in the premises (*f*); and the same result ensues, whether the lease is void at common law or annulled by statute (*g*). The exemption of a covenantor from the performance of his covenant connected with the estate was further admitted in a very late case. A license was granted for a term of years to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of the grantee, on his paying a certain annual sum ; and he covenanted to make such payments ; but inasmuch as it appeared at the trial that the grantors had not any legal or equitable

(*c*) Ferguson v. Cornish, 2 Burr. 1032. Goodright dem. Hall v. Richardson, 3 Term Rep. 462.

(*d*) Frontin v. Small, 2 Lord Raym. 1418 ; S. C. 2 Stra. 705. May v. Trye, Freem. 447 ; S. C. nom. Mayhur v. Try, 3 Keb. 764. 780.

(*e*) Knipe v. Palmer, 2 Wils. 130.

(*f*) Aylet v. Williams, 3 Lev. 193.

(*g*) Jevons v. Harridge, 1 Sid. 308, 9 ; S. C. 1 Saund. 6 ; 2 Keb. 102. 116. 118.

estate in the premises professed to be granted, the court held, that the assignee of the grantee was not bound by the covenant (*h*). So, where an apprenticeship deed was void, being for five years only, in violation of the statute 5 Eliz. c. 4., the court held, that the father's covenant to find his child in clothes, &c. during the apprenticeship, was completely dependent on the principal agreement, and fell to the ground when that was avoided (*i*). So, where several persons covenanted to abide by, and perform an award to be made by A. B., relative to the partition of certain lands; the award being deemed imperfect, because it had not directed by what instruments the partition should be completed, the covenants were held to be void too, and the covenantors discharged therefrom accordingly (*k*).

But if an estate, good in its creation, be defeated by a condition subsequent, a dependent covenant will still continue in operation to answer breaches committed prior to the determination of the estate: therefore, where one sold lands to the plaintiff, and covenanted that he had good right to sell, and there was a proviso in the deed, that if 100*l.* should not be paid on a certain day, the grant and bargain and sale and all should be void, and the money was not paid at the day; the court inclined to think that covenant would lie, as there was a right of action attached in

(*h*) Earl of Portmore v. Bunn, 1 Barn. & Cres. 694; S. C. 3 Dow. & Ry. 145. The particulars of this case are more fully set out ante, p. 539.

(*i*) Guppy v. Jennings, 1 Anstr. 256.

(*k*) Johnston v. Wilson, 7 Mod. 345; S. C. Willes, 248.

the bargainee immediately on the sealing of the deed, which could not be devested by the non-payment of the money, for he might have brought his action as soon as the deed was sealed (*l*).

In a late case in equity, where an improper lease had been granted by the trustees of certain charity lands, in which they covenanted for the lessee's actual enjoyment of the premises during the term, the court in setting aside the lease, ordered the indenture of demise to be cancelled *in toto*, and refused to leave the personal covenants of the trustees in force for the benefit of the lessee (*m*).

Where, however, the covenant is separate and distinct, and independent of any interest contained in the deed, the covenantor cannot discharge himself by showing that the estate intended to be granted did not pass (*n*). The defendant in this instance had bargained and sold certain lands to the plaintiff and his heirs, with a proviso for re-entry on payment of a certain sum on a day specified, and then covenanted for payment of the money: the deed was not duly enrolled, and it was contended, that as nothing passed by the deed, the covenant was void; but the court decided, that the covenant did not depend on the estate, and though nothing passed, the defendant was answerable; and they distinguished this case from Capenhurst v. Capenhurst; there,

(*l*) Raynolls v. Woolmer, Freem. 41. Hill v. Pilkinton, Cro. Eliz. 244.

(*m*) Attorney General v. Morgan, 2 Russ. 306.

(*n*) Northcott v. Underhill, 1 Ld. Raym. 388; S. C. Holt, 176; 1 Salk. 199.

they said, the covenant was that the covenantee should enjoy the term, which was impossible, where no term passed by the deed; whereas the covenant here was a separate and independent covenant, and it was not necessary to show in the action that any estate passed. Thus also, where an annuity or yearly rent-charge was granted by a rector or vicar out of his benefice, and the deed contained a covenant for payment, the covenant was allowed to operate as a personal security against the grantor, notwithstanding the invalidity of the grant under the statute 13 Elizabeth, c. 20. (*o*). In another case (*p*), the deed recited that the plaintiff had assigned over a patent to the defendant for registering the licenses of such as went beyond sea, (which patent in law appeared to be void,) and the defendant covenanted to pay 470*l.* per annum for seven years: it was argued, that as it appeared that the patent was void, the covenants must be void too; but the court denied it: they admitted that in the case of a covenant to pay rent, if the lease were void, the covenant would be void too; but they said, that in this case the recital of the patent was only the consideration, and although there were no consideration, the covenant would be good (*p*). So, where several tenants in common, wishing to make partition of their land, covenanted by deed to pay their respective shares of the survey and allotments, and to abide by the award of certain arbitrators as to the allotment; and

(*o*) Mouys v. Leake, 8 Term Rep. 411. Lord Ellenborough has said that this case was founded on admirable good sense and sound law; 8 East, 234.

(*p*) May v. Trye, Freem. 447; S. C. 3 Keb. 764. 780.

the arbitrators allotted the whole in severalty, but did not direct any deeds of conveyance to be executed, to vest the allotments in the respective owners; although it was decided, as we have seen (*q*), that for this defect the award was bad, and that no action could be maintained on the covenant for not performing the award; yet the covenantors were respectively held to be liable on the distinct and collateral covenant for payment of the expense of the survey (*r*).

On the same principle, a distinct covenant in a lease by a tenant to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the statute 46 Geo. 3. c. 65. s. 115., was held not to avoid a separate covenant in the lease for payment of rent, clear of all parliamentary taxes, &c. generally, for such general words were understood to mean such taxes as the tenant might lawfully engage to defray (*s*). And on the authority of this last case it was determined, that a covenant by the assignee of a lease and policy of insurance, to pay the assignor 300*l.* on a day named, and 5*l.* per cent. interest in the mean time, was not defeated by another covenant, contained in the same deed, that he would also pay and discharge the property tax which should become due and payable for and in respect of the said 300*l.*; the latter covenant, it was admitted, was

(*q*) Ante, p. 576.

(*r*) Johnston v. Wilson, 7 Mod. 345; S. C. Willes, 248.

(*s*) Gaskell v. King, 11 East, 165.

clearly void by the statute 46 Geo. 3. c. 65. s. 115., but the court did not think it so interwoven with the covenant for the payment of the principal or interest as necessarily to form part of the same covenant (*t*).

And in the same manner, though the bill of sale for transferring the property in a ship by way of mortgage be void, as such, for default of reciting the certificate of registry therein, as required by the statute 26 Geo. 3. c. 60. s. 17., still the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent (*u*). And again, where there was a demise of lands in the Bedford Level, Mr. Justice Bayley felt disposed to hold the lessee liable on his covenant to repair, as an independent covenant, although the lease had not been registered pursuant to the statute 15 Car. 2. c. 17. s. 8.; the learned judge, however, did not think it necessary to decide the point (*w*).

(*t*) Wigg v. Shuttleworth, 13 East, 87. Howe v. Synge, 15 East, 440. Readshaw v. Balders, 4 Taunt. 57. Fuller v. Abbott, Ibid. 105. Buxton v. Monkhouse, Coop. 41.

(*u*) Kerrison v. Cole, 8 East, 231. Biddell v. Leeder, 1 Barn. & Cres. 327; S. C. 2 Dow. & Ry. 499.

(*w*) Hodson v. Sharpe, 10 East, 350, 4.

SECT. II.

OF COVENANTS VOID BY STATUTE.

II. Of covenants void by statute.

All covenants entered into for the purpose of evading or contravening the provisions of legislative enactments are likewise void. To enter into a detailed statement of the several acts of parliament by which certain covenants are vacated, would be an almost endless labour; it would, in fact, amount to an enumeration of the majority of the prohibitory acts contained in our statute books, and this without conferring a corresponding benefit on the reader. By way of example, the note (*x*) below comprises some general titles showing a few occasions on which the legislature has interposed its authority, to defeat such injurious contracts as did not come within the reach and jurisdiction of the courts of common law.

(*x*) Acts of parliament have at different times been passed to annul covenants relating (among other things) to

Bribery
Gaming
Illegal Insurances
Lotteries
Sales of Offices
Simony
Smuggling
Stockjobbing
Usury
Wagers
&c. &c. &c.

CHAPTER THE SECOND.

OF THE MEANS BY WHICH COVENANTS ORIGINALLY VALID MAY BE DISCHARGED OR SUSPENDED.

SECT. I.

BY THE ACT OF GOD.

I. By the act of God.

THE rule laid down in the case of Paradine v. Jane (*a*), has often been recognised in courts of law as a sound one; *i. e.* when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract (*b*): therefore, if a lessee covenants to repair, the circumstance of the premises being consumed by lightning, or thrown down by an extraordinary flood of water, or overturned by an irresistible wind, will not effect his discharge (*c*). But where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him, as in the case of waste, where the house is destroyed by a tempest. In some cases where the act of God renders performance absolutely impossible, the covenantor shall be discharged; *quia impotentia excusat legem;* as if a

(*a*) Al. 27.
(*b*) 10 East, 533, 4.
(*c*) Ante, p. 274, 5.

lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest (*d*): or if one covenants to serve another for seven years, and he dies before the expiration of the seven years, the covenant is discharged, because the act of God defeats the possibility of performance (*e*). And so, it seems, if a man covenants to deliver a horse to another on request, the death of the horse, being the act of God, will relieve the man from the penalties of non-performance (*f*).

It is laid down in Rolle's Abridgment (*g*), that if a man covenants to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof before the day; for the law will not compel him to venture his life for it; but he may do it after. And Sheppard (*h*) says, that it must be done in convenient time afterwards, for otherwise the covenant will be broken. But it may be doubted whether this position is law at the present day; indeed, the principle of it has been much shaken by a late case (*i*), where the charterer of a ship, who covenanted to send a cargo alongside at a foreign port,

(*d*) 40 Edw. III. 6. Perk. pl. 738.

(*e*) Shep. Touch. 180. And see Nash v. Aston, Skin. 42; S. C. Sir T. Jo. 195.

(*f*) Williams v. Lloyd, W. Jo. 179; S. C. nom. Willams v. Hide, Palm. 548.

(*g*) Lawrence v. Twentiman, 1 Rol. Ab. Condition, (G). pl. 10.

(*h*) Shep. Touch. 174.

(*i*) Barker v. Hodgson, 3 Mau. & Selw. 267.

was not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the law at the port; and though he could not have communication without danger of contracting and imparting the disease; and Lord Ellenborough observed, "Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, was he not answerable for it upon his covenant? The question is, on which side the burthen is to fall?" So that this subsequent determination appears to impeach most materially the doctrine advanced in Rolle's Abridgment. And this decision is in accordance with one of rather earlier date. The master of a ship covenanted that he would, directly as wind and weather would permit, after the discharge of his outward bound cargo at Madeira, sail and proceed to Winyaw in South Carolina, or as near thereto as he could get, and stay there forty running days, and load his ship with such rice, &c. as the plaintiff's agents should tender to be laden; but by reason of contrary winds and bad weather the defendant was prevented from proceeding to Winyaw; yet the whole court held, that this circumstance did not excuse the performance of his express covenant, and gave judgment for the plaintiff(*k*). So, likewise, if a man covenants to deliver goods at London, the overturning of the boat by tempest will not excuse him(*l*).

(*k*) Shubrick v. Salmond, 3 Burr. 1637.

(*l*) 7 Term Rep. 384. Tompson v. Miles, Rol. Ab. Condition, (G). pl. 9. Danv. Ab. Condition, (G). pl. 9.

SECT. II.

BY THE ACT OF LAW.

1. By common law.

We have seen (*m*) that whenever a deed is void, all the covenants dependent on the interest professed to be conveyed by that deed are also void. And generally where the covenant is dependent on the interest enjoyed, a future destruction of that interest will have the effect of defeating the covenant: for instance, if lessee for years covenants to repair, and yield up at the end of the term, an eviction by elder title absolves him from the agreement; for the land being gone the covenant is annulled (*n*). So, if the interest determines by the death of the grantor, being tenant for life (*o*). The like, if he covenants to pay rent, and the lease is extended for the king's debt (*p*). In like manner, if tenant for term of years leases for a less term, and assign his reversion, and the assignee takes a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished (*q*). A covenant may likewise become extinguished by the death of the covenantor leaving the covenantee his heir (*r*). But where the covenant

(*m*) Ante, p. 573.

(*n*) Andrews v. Needham, Noy, 75; S. C. Cro. Eliz. 656.

(*o*) Brudnell v. Roberts, 2 Wils. 143. Ludford v. Barber, 1 Term Rep. 86.

(*p*) Peckam's case, Sav. 132.

(*q*) Webb v. Russell, 3 Term Rep. 393. Thre'r v. Barton, Mo. 94. Chaworth v. Phillips, Mo. 876. Soprani v. Skurro, Yelv. 19.

(*r*) Mudge v. Mudge, Com. 333.

is totally collateral to the reversioner's interest, a surrender will not discharge the obligation. This difference is easily explained. A. leased to M. for ten years, and M. covenanted to leave four acres of the land fallowed and ploughed at the end of the term; with a proviso enabling the lessee, if he should dislike his bargain, to surrender his estate, upon giving a year's warning. M. afterwards surrendered accordingly, but did not leave any part of the land fallowed; and it was adjudged by the court, that the acceptance of the surrender had not dispensed with the covenant; but it had been otherwise, if the lessee had engaged to leave the four acres ploughed at the end of the ten years; for then the acceptance of the surrender by the lessor before the expiration of the ten years would have made it impossible for the lessee to perform the covenant (*s*).

If two persons, one being an infant, covenant jointly and severally with a third, the incompetency of the minor cannot be taken advantage of by his co-covenantor to discharge himself of his own liability (*t*). So, if an infant and a person capable of covenanting enter into a mutual contract, the covenant of the latter is not avoided by the invalidity of the infant's (*u*).

And if two covenant for the execution of any duty, to build a house for example, and one suffers judgment by default, or confesses judgment, and the other proves performance, and has a verdict in his

(*s*) Austin v. Moyle, Noy, 118.
(*t*) Haw v. Ogle, 4 Taunt. 10.
(*u*) Farneham v. Atkins, 1 Sid. 446.

favor, no judgment or writ of inquiry of damages can be had against him against whom judgment went by default; because, although in trespass one may be guilty and the other not, yet in a joint contract the one cannot be convicted without the other (*v*).

By once recovering damages for a breach, where the covenant is to do an act of solitary performance, as to repair a house by such a time, the covenant is extinct, and the covenantor relieved from further responsibility on account thereof (*w*).

And we may remark, that the outlawry of the plaintiff is a good plea in bar to an action of covenant by him for a sum certain, or for rent, on account of the previous forfeiture of such sum or rent to the crown; but not to an action in which uncertain damages only are to be recovered, as in the case of a breach of covenant to repair; because the damages in such case are no more forfeitable than damages for a battery or a trespass before they are recovered. Before imparlance, however, the outlawry may be pleaded in abatement of the writ, even where uncertain damages are sought (*x*).

2. By statute.

This difference is established with regard to the question whether a covenant is repealed by act of parliament: if a man covenants not to do a thing which it was lawful for him to do, and an act of parliament

(*v*) Porter v. Harris, 1 Lev. 63; S. C. nom. Boulter v. Ford and Harris, 1 Sid. 76; 1 Keb. 284. Morgan v. Edwards, 6 Taunt. 398; S. C. 2 Marsh. 201.

(*w*) Anon. 3 Leon. 51. pl. 72.

(*x*) Clarke v. Scroggs, Lutw. 486. Nels. fol. ed.

after compels him to do it, the statute repeals the covenant: so it is, where he covenants to do a thing which is lawful, and a subsequent act hinders him from doing it: but if one covenants not to do a thing, which was then unlawful, and an act comes and makes it lawful, such act of parliament does not repeal the covenant (*y*). But if he covenants to do a thing which was then unlawful, and a subsequent statute legalizes the act, such statute does not repeal the covenant (*z*). In one case (*a*), an opinion was entertained by all the court, that if the thing to be done was lawful at the time when the party entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant was binding. The report of the same case by Skinner (*b*) merely says, that the court seemed strongly for the plaintiff, but concludes with a *sed quære*. As a general rule, therefore, it may be laid down, that if the performance of a covenant be rendered unlawful by the government of this country, the contract will be dissolved on both sides, and the defendant, inasmuch as he has been thus compelled to abandon his contract, will be excused from the payment of damages for the non-performance of it (*c*); but it is otherwise if the performance be prevented by the prohibition of a foreign country (*d*). And

(*y*) Brewster v. Kitchel, Holt, 175; S. C. 1 Lord Raym. 321; 1 Salk. 198; 2 Salk. 615; 3 Salk. 340; 12 Mod. 166.

(*z*) 12 Mod. 169.

(*a*) Brason v. Dean, 3 Mod. 39.

(*b*) By the name of Dean v. Tracy, Skin. 161.

(*c*) Barker v. Hodgson, 3 Man. & Selw. 270.

(*d*) Ibid. Atkinson v. Ritchie, 10 East, 534, 5.

where one having good title to lands by virtue of a fine, sold the same, and covenanted with the vendee for quiet enjoyment against himself and one P. V., and all claiming under them; and afterwards an act of parliament, reciting that B. had settled this estate upon C., and that certain persons had unduly procured the said fine from her, avoided the fine, and a claimant under C. entered; it was decided, that the vendor's covenant was not annulled by the statute; and reason given was, that the prospect of the fine being defeated, was in all probability the very occasion of the covenant (*e*).

Although a rent-charge is executed by the statute of uses (*f*), which transfers all rights and remedies incident thereunto, together with the possession, to the cestui que use; yet a covenant for payment made with the grantees to uses is neither transferred nor discharged by the operation of that act (*g*).

We have already (*h*) seen the effect of the bankrupt and insolvent acts of parliament on the covenants of lessees; and here may be added, that the statute 7 Geo. 1. c. 28., which vested all the estates of the governors and directors of the South Sea Company in certain trustees for raising money thereon, was not considered by the court as a discharge or acquittal of such governors or directors from the covenants comprised in their leases (*i*).

(*e*) Lucy v. Levington, 1 Vent. 175; S. C. 2 Lev. 26; 2 Keb. 831.

(*f*) 27 Hen. VIII. c. 10.

(*g*) Bascawin v. Cooke, 1 Mod. 223; S. C. 2 Mod. 138.

(*h*) Ante. p. 493.

(*i*) Hornby v. Houlditch, Andr.

If an agreement cannot by reason of any subsequent act of parliament, or the like, be performed in the whole, it may be executed in such part, and to such extent, as the law will allow (*k*).

An action of covenant is not affected by the statutes of limitations (*l*).

SECT. III.

BY THE ACTS OF THE PARTIES.

1. By the act of the covenantor.

It is not in the power of the covenantor by any act of his own, without the concurrence of the covenantee, or the intervention of legislative aid, (as in cases of bankruptcy or insolvency,) to defeat or even qualify his express covenant. If he be a lessee, we have seen (*m*) that an assignment of the estate will not relieve him; and that no exemption ensues even from an outlawry or attainder (*n*). An assignee of a lease is responsible on a distinct ground; he is not the original covenantor; he takes the estate charged with the covenant only, and, therefore, by parting with the former, he exonerates himself from all liability in respect of the latter (*o*).

40; S. C. cited 1 Term Rep. 92; with the judgment at length in the note, p. 93.

(*k*) Gr. and Rud. of Law and Eq. 76. pl. 6.

(*l*) Ante, p. 547.

(*m*) Ante, p. 491.

(*n*) Ante, p. 113, 14.

(*o*) Ante, p. 493, 4.

2. By the act of the covenantee.

The covenantee, however, by various acts, may relieve the covenantor from the duty of observing his engagement. The most simple is an actual release; and as it is a rule of law that matters contracted for by deed can only be dissolved by deed, it follows, that the performance of a covenant cannot be dispensed with by a subsequent parol agreement (*p*). Therefore, where one covenanted to pay a sum of money, and to an action for non-payment he pleaded a discharge in the nature of a release, without deed, in satisfaction of all demands, the plea was held bad, for the covenant being by deed could not be discharged but by an instrument of as high a nature (*q*). So, where A. covenanted to convey certain lands to B., and in consideration thereof B. covenanted, upon the execution of the conveyance, to pay 1000*l.*, and B. afterwards accepted a rent-charge in lieu of parts of the lands; it was held, that as the conveyance was a condition precedent, and had not been executed, A. could not recover the money. The parol agreement so substituted, it was said, might be sufficient whereon to found an action of assumpsit, but it could not be the foundation of an action upon a covenant under seal, whereby the parties bound themselves to perform a different con-

(*p*) Fortescue v. Brograve, Sty. 8. Blake's case, 6 Co. 43, b.; S. C. nom. Alden v. Blague, Cro. Jac. 99; S. C. nom. Eden v. Blake, Noy, 110. 2 Rol. 188. Cook v. Jennings, 7 Term Rep. 381. Smith v. Wilson, 8 East, 437; S. C. 6 Man. & Selw. 78. White v. Parkin, 12 East, 578. Thomson v. Brown, 1 J. B. Mo. 358; S. C. 7 Taunt. 656, overruling Hotham v. East India Company, 1 Dougl. 272. Sellers v. Bickford, 1 J. B. Mo. 460.

(*q*) Rogers v. Payne, 2 Wils. 376.

tract (*r*). So, where a builder covenanted to erect two houses by a certain time, in consideration of which the defendant was to pay him 500*l.*, and the time was afterwards enlarged by parol, and within the latter period the houses were finished; the court would not allow the plaintiff's claim for compensation, in an action of covenant, as the original contract had not been fulfilled, nor sufficiently dispensed with (*s*).

It is also to be noticed, that a covenant not broken is releaseable only by special name. A release of all "demands," although a word of extensive import, is no release of a covenant before it is broken (*t*); nor is an unbroken covenant discharged by a release of all "debts, dues, actions, causes of action, bills, obligations, and writings obligatory, &c.;" and although a covenant be a writing obligatory, yet that term hath a particular signification, for when we declare *per script. obligatorium*, it means no more than a bond (*u*); and it is moreover clear, that the words "actions and causes of action" will not reach it, because no cause of action arises until the covenant is broken (*v*).

(*r*) Heard v. Wadham, 1 East, 619.

(*s*) Littler v. Holland, 3 Term Rep. 590. Cordwent v. Hunt, 2 J. B. Mo. 660; S. C. 8 Taunt. 596.

(*t*) Hancock v. Field, Cro. Jac. 170. Henn v. Hanson, 1 Lev. 99; S. C. 1 Sid. 141. Trevil v. Ingram, 2 Mod. 281; S. C. nom. Tothil v. Ingram, 1 Vent. 314. 1 Ld. Raym. 518. 522.

(*u*) Carthage v. Manby, 2 Show. 90.

(*v*) Hall v. Kirby, 2 Dy. 217, b.; S. C. Mo. 34; 1 And. 8. pl. 16. Albany's case, 1 Co. 112, b. Hoe v. Marshall, Cro. Eliz. 579. 580; S. C. 5 Co. 71, a.; Mo. 469; Gouldsb. 166.

But by a release of "covenants" the covenant is undoubtedly discharged (*w*).

And with a view to prevent a multiplicity of actions, the courts have frequently construed express words of covenant to be words of release. Thus, supposing a covenantee, or the obligee of a bond, to covenant never to sue on the covenant or bond, or to agree to save the covenantor or obligor harmless; such a covenant would be looked upon in the light of a release; for if it operated only as a covenant it would produce two actions (*x*). It may, therefore, be pleaded in bar to an action against the original obligor or covenantor (*y*); although the last covenant be in a deed subsequently executed (*z*). But this rule applies only to cases where the covenantor and covenantee stand alone (*a*); for a covenant not to sue one of two joint and several obligors will operate simply as a covenant, and not as a release, and cannot be pleaded in bar; because it is not a release in its nature, but merely by construction to avoid circuity of action (*b*); and as a covenant defeated as to one is defeated as

(*w*) Reade v. Bullocke, Dy. 56, b. Hancock v. Field, sup. Praund. v. Turner, Fitzgib. 105. Lupart v. Hoblin, 2 Sid. 59.

(*x*) Lacy v. Kinaston, 1 Lord Raym. 688; S. C. Holt, 178. 218; 2 Salk. 575; 3 Salk. 298; 12 Mod. 415. 548. Smith v. Maplebeck, 1 Term Rep. 446.

(*y*) Ibid. Holt, 178. 218.

(*z*) Hodges v. Smith, Cro. Eliz. 623. Trevett v. Aggas, or Angus, Willes, 107; S. C. 2 Com. 568. But see Gawden v. Draper, 2 Vent. 217. Johnson v. Carre, 1 Lev. 152.

(*a*) Lacy v. Kinaston, supra. Hutton v. Eyre, 6 Taunt. 289; S. C. 1 Marsh. 603.

(*b*) Ibid. Fitzgerald v. Trant, or Cragg, 11 Mod. 254; S. C. 1 Com. 139. Baber v. Palmer, 12 Mod. 539. Dean v. New hall, 8 Term Rep. 168.

to all, (every defeasance, when the terms upon which it is made are performed, operating as a release,) to impart to the covenant a different effect would be to completely nullify the original engagement (*c*). A distinction, however, has been taken between a covenant perpetual not to sue, which amounts to a release, and a covenant not to sue within a particular time, such as seven years. In the latter case the covenant is not pleadable in bar; but the defendant must resort for redress to his counter-action (*d*). Whether a covenant not to sue one of several co-obligors is in equity a release of the rest is undetermined (*e*).

By a voluntary destruction of one of the seals of a deed, where the covenants therein are joint, both the covenantors are discharged from the covenants; but where they are several, the breaking of one of the seals will invalidate the instrument so far only as concerns him whose seal is torn away (*f*).

As a covenantor, by rendering the performance of his own covenant impossible, commits an immediate breach (*g*); so, on the other hand, he will be dis-

(*c*) Lacy v. Kinaston, supra. Clayton v. Kinaston, 1 Ld. Raym. 419; S. C. 2 Salk. 573; 12 Mod. 221.

(*d*) Deux v. Jefferies, Cro. Eliz. 352. Ayliff v. Scrimshire, Holt, 619; S. C. 1 Show. 46; Carth. 63; 2 Salk. 573; Anon. Comb. 123. See too Carvell, or Carivil, v. Edwards, Holt, 546; S. C. Carth. 210; 1 Show. 330. Ambl. 250.

(*e*) Hawkshaw v. Parkins, 2 Swanst. 550. But see Lord Kenyon's remark in Dean v. Newhall, 8 Term Rep. 171.

(*f*) Mathewson v. Lydiate, Cro. Eliz. 408. 470. 546; S. C. 5 Co. 22, b.; 2 Rol. 30.

(*g*) Main's case, 5 Co. 20, b.;

charged from the obligation, if the party for whose benefit it was made performs any act by which the covenantor is incapacitated to observe his contract. As if A. undertakes that J. S. shall marry a certain woman before such a day, and before that day the covenantee marries her himself (*h*); or covenants to do such an act as the covenantee shall appoint, and the latter refuses to make the appointment (*i*); or if he covenants to find eight men to grind every day at a corn-mill, and the covenantee converts the mill into a horse-mill: these acts will be sufficient to exonerate the covenantor (*k*).

Any positive act of forcible prevention by the covenantee will also release the covenantor; as if a man covenants with B. to collect his rents in such a town, and B. interrupts him (*l*); or if a lessee for years covenants to drain the water out of the land; or to build a house before such a day; and the lessor enters before the day and holds the lessee out (*m*). But the covenants would not be dispensed with by the covenantee's merely forbidding the covenantor to proceed with the drainage or building (*n*).

The omission of the covenantee to do some act necessary on his part to the execution of the cove-

S. C. Cro. Eliz. 450. 479. Ford v. Tiley, 6 Barn. & Cres. 325.

(*h*) Co. Lit. 206. 2 Mod. 28.

(*i*) Studholme v. Mandell, 1 Lord Raym. 279; S. C. Lutw. 213. Nels. fol. ed.

(*k*) City of London v. Greyme, Cro. Jac. 182.

(*l*) Anon. Keilw. 34, b.

(*m*) Carrel v. Read, Cro. Eliz. 374; S. C. Ow. 65; S. C. nom. Carith v. Read, Mo. 402.

(*n*) Barker v. Fletwel, Godb. 69.

nant may also be a ground for excusing the covenantor: for instance, if the presence of the covenantee is essential to the execution of a covenant, as if it be to enfeoff him, his absence is a sufficient excuse for the non-performance of it by the covenantor (*o*). So, if the covenantee neglects to take measures for legalising the performance of the act intended to be performed, where that duty devolves on him, an action cannot be supported against the covenantor for non-performance. Accordingly, where Laborie covenanted with Gallini to come over to England to dance ballets at the King's Theatre, but never came; the omission on the part of Gallini to procure the Lord Chamberlain's license for the entertainment, under the statute 10 Geo. 2. c. 28., was held a fatal objection to his recovering in an action; as the plaintiff could not call upon the defendant for a breach of the agreement, which, without such license, it was unlawful for him to execute (*p*). And in the case of a covenant in the alternative to dance at the King's Theatre, or at such other places as the plaintiff should appoint, a notice to dance elsewhere is necessary to enable the plaintiff to support an action (*q*). In like manner, if A. covenants to convey an estate to B. for his life and the lives of two such other persons as B. should nominate, and to deliver quiet possession before the Christmas following; the neglect of B. to name the lives is a sufficient excuse for the non-performance of the covenant by A. (*r*). So,

(*o*) Rol. Ab. Condition, (U). pl. 2.

(*p*) Gallini v. Laborie, 5 Term Rep. 242.

(*q*) Ibid.

(*r*) Twyford v. Buntley, Freem.

where the defendants covenanted that a ship freighted by them should go and return home within twelve months, the perils of the sea excepted, and the plaintiff's testator (the master) warranted that the ship at her departure should be sufficiently strong, well, and sufficiently furnished with a boat and necessaries, and manned by himself, and eight men and a boy, who, or as many as should be necessary, should at all times convenient be ready to serve with the boat during the voyage, and six of the seamen left the service of the ship; it was determined, that as the neglect of the master to provide other seamen to supply their places disabled the defendants from performing their contract, the same was a good plea in bar to an action by the master's executor (*s*).

A covenantor, however, may be discharged from performing a part of his covenant without affecting his liability as to the rest: accordingly, if the owner of a ship covenants with A. that he will receive such loading as he shall appoint at W. by such a day, and then go with the first fair wind to X., and there unload and take in other wares; and A. afterwards discharges him of the taking in of the goods at W., but not of the receiving his loading at X; this discharge of the parcel of the covenant is not any discharge of the residue, for they are several and distinct (*t*).

121; S. C. nom. Twiford v. Buckly, Carter, 205; 3 Keb. 183. 203.

(*s*) Wynne v. Fellowes, Holt, 466; S. C. 1 Show. 334.

(*t*) Smith v. Barnes, Rol. Ab. Condition, (G). pl. 8.

3. By their mutual act: Intermarriage.

With regard to the effect of an intermarriage between the covenantor and covenantee, the following distinctions are to be attended to. If the covenant be made for the payment of a sum of money due, or performance of any other act to be done, *in præsenti*, or which may become payable, or necessary to be performed, at some period during the coverture, such covenant is extinguished or avoided by the intermarriage; but where the covenant cannot from its nature confer a right of action while the coverture lasts, it is not extinguished or avoided; but during the marriage it is suspended only. The leading case on this subject is Cage v. Acton (*u*). An action was brought against the defendant, as administratrix of her deceased husband, for an arrear of rent due in the testator's lifetime. The defendant pleaded, that the intestate in his life, in consideration of an intended marriage between them, gave her a bond for 2000*l.*, conditioned for the payment of 1000*l.* within a certain time after his death; she then averred that the marriage took effect, the death of the intestate, and that he had not left her 1000*l.*, nor had his heirs paid it to her, that she took out administration, that assets to the value of 250*l.* came to her hands, which she retained in part satisfaction of the money due on the bond. Turton and Gould, Justices, were of opinion, that the debt was not extinguished by the intermarriage; Mr. Justice Gould taking the above distinctions; and ultimately judgment was given for

(*u*) Cage v. Acton, 1 Lord Raym. 515; S. C. Holt, 309; 12 Mod. 288; 1 Salk. 325; Lil. Ent. 213; S. C. nom. Gage v. Acton, Carth. 511; Com. 67.

the defendant against the opinion of L. C. J. Holt. A writ of error was afterwards brought (*v*), but it appears, either that the judgment was affirmed, or that the plaintiff in error deserted his writ of error. It is true, that in Vernon there is a dictum by one of the counsel that the bond was released in law by the marriage; but from what passed in the court, the judgment must have been affirmed, for the Lord Keeper decreed that the bond was a charge on the husband's real estate (*w*).

The authority of the above decision has been since fully established by the case of Milbourn v. Ewart (*x*). The obligee here assumed the character of plaintiff, and brought an action against the heir at law of her late husband, on a bond for 6,000*l.* given to her in contemplation of a marriage between her and the obligor, and conditioned for the payment of 3,000*l.* at the expiration of twelve months after his decease, in case she should be the survivor. The whole court spoke in high terms of commendation of the judgment in Cage v. Acton, and held, that the bond being given for the purpose of making a provision for the wife in the event of her surviving the obligor, it would be iniquitous to set it aside on account of the marriage, since it was for the event of the mar-

(*v*) Nom. Acton v. Peirce, 2 Vern. 480; S. C. Prec. Ch. 237; 1 Eq. Ca. Ab. 63. pl. 5; 316. pl. 9.

(*w*) Per Grose, J. 5 Term Rep. 387.

(*x*) Milbourn v. Ewart, 5 Term Rep. 381. Hayes dem. Foord v. Foord, Ibid. 386. Heeding v. Davis, Skin. 409; S. C. nom. Gibbons v. Davies, Comb. 242. Lupart v. Hoblin, 2 Sid. 58; Cited 1 Ld. Raym. 518. Anon. 1 Vent. 344.

riage that the bond was meant to provide. And Lord Kenyon observed, in allusion to Lord Holt's arguments in Cage v. Acton, that he could not but lament that he (Lord Holt) had recourse to such flimsy and technical reasonings to enforce a case so directly against law and conscience. These cases, it will no doubt be remarked, originated on bonds instead of covenants; but it is apprehended, that the above rules and distinctions are equally applicable to the latter species of security and action. Indeed, although the revival of the bond after the marriage was denied by Lord Holt, yet he expressly admitted (*y*), that there was no difference between the case of a promise and a covenant, and the whole court agreed, that the intermarriage operated as a suspension only, and not as an extinguishment of a promise (*z*).

But even in some cases in which the covenant is void at law from the right of action accruing during the coverture, relief may be obtained in equity; for example, if a feme sole gives a bond, or covenant to her intended husband, that, in case of their marriage, she will convey her lands to him in fee, and after their marriage the wife dies without issue, and then the husband dies; the bond or covenant, though extinguished at law, is good evidence of the agreement in equity, and the heir of the husband may compel a specific performance against the heir of the wife (*a*).

(*y*) 1 Ld. Raym. 522.

(*z*) See hereon Belcher v. Hudson, Cro. Jac. 222; S. C. Yelv. 156. Clark v. Thomson, Cro. Jac. 571. Smith v. Stafford, Hob. 216; S. C. Hutt. 17; Noy, 26. Anon. Lit. 32; Hetl. 12.

(*a*) Cannel v. Buckle, 2 P.

SECT. IV.

BY THE ACTS OF STRANGERS.

IV. By the acts of strangers.

THE law wisely determines that a covenantee's right to the performance of the covenant shall not be defeated or prejudiced by the acts of a third party. The admission of a different rule would indeed be to furnish the means of fraud and collusion to an alarming extent. Notwithstanding the difficulties which may attend the execution of a covenant on account of the acts of a total stranger, the covenantor cannot claim any exemption; and if the performance be rendered impossible, he must answer for the breach in damages. On this ground, if a man covenants that his son shall marry the covenantee's daughter, a refusal by her will not discharge the covenantor from making pecuniary satisfaction (*b*). Or if A. covenants to enfeoff B., a third party, A. is not released from his covenant, though B. will not accept livery of seisin (*c*). So, an act of piracy, unless specially provided against, is no excuse for the non-performance of a covenant by the master of a vessel to bring home a freight to such a port (*d*). And finally, if, in consequence of events which happen at a foreign

Wms. 243; S. C. 2 Eq. Ca. Ab. 23. pl. 24; 136. (H). pl. 1. Milbourn v. Ewart, 5 Term Rep. 384; which seem to overrule Darcy v. Chute, 1 Ch. Ca. 21; S. C. 2 Ch. Rep. 245; 3 Ch. Rep. 4; 1 Eq. Ca. Ab. 63. pl. 1. Fursor v. Penton, 1 Vern. 408.

(*b*) Perk. sec. 756.

(*c*) 7 Term Rep. 384.

(*d*) Bright v. Cowper, 1 Brownl. & Gold. 21; recognised in 8 East, 445; and 7 Term Rep. 385. Grigg v. Stoker, Forrest, 4.

port, a freighter is prevented from furnishing a loading there which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must make compensation in damages (*e*).

(*e*) Barker v. Hodgson, 3 Maule & Selw. 271. Atkinson v. Ritchie, 10 East, 530.

APPENDIX OF FORMS.

FORMS OF LIENS REFERRED TO IN THE NOTE, ANTE, PAGE 4.

1. *By one person.*—And the said (*covenantor*) doth by these presents for himself, his heirs, executors, and administrators, covenant, promise, and agree (*a*), to and with the said (*covenantee*), his heirs and assigns (*b*), in manner following, that is to say, &c.

2. *Several by two.*—And each of them the said (*covenantors*), severally, separately, and apart from the other of them, doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only, his own acts, deeds, and defaults, covenant, promise, and agree, to and with, &c.

3. *Several by three or more.*—And each and every of them the said (*covenantors*), severally, separately, and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to, for, and concerning only, his and her own acts, deeds, and defaults, covenant, promise, and agree, to and with, &c.

4. *Several covenant in a release by three vendors, joint-tenants.*—And each of them the said (*vendors*), severally, separately, and apart from the others of them, doth hereby for himself respectively,

(*a*) In a covenant that the party has done no act to incumber, the words "covenant and declare to and with, &c." should be used.

(*b*) Or "executors, administrators, and assigns," according to the nature of the estate or interest.

and his respective heirs, executors, and administrators, and as to, for, and concerning only, that third part of and in the said manors, &c. over which he hath the power or right of alienation, and the acts, deeds, and defaults of himself and his heirs, and all persons claiming or to claim by, from, under, or in trust for him or them, as far as relates to the same one-third part, covenant, promise, and agree, to and with, &c.

5. *Joint and several.*—And the said (*covenantors*) do hereby jointly for themselves, their heirs, executors, and administrators, and each of them severally, separately, and apart from the other of them, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with, &c.

6. *By each of four with the remaining three*—And each of them the said (*covenantors*), severally, separately, and apart from the others of them, doth hereby for himself, his heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with each of the others of them, and with his executors and administrators, That, &c.

7. *By husbands for themselves and wives.* And each and every of them the said (*husbands*), severally, separately, and apart from the others of them, doth hereby for himself respectively, and his respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself and of his said wife, and of his and her heirs, covenant, &c.

8. *Another form.*—And each and every of them the said (*covenantors*), severally, separately, and apart from the others of them, doth hereby for himself respectively, and his respective heirs, executors, and administrators, and so only as to be answerable to the extent of the part, share, or proportion of himself, or of his said wife, of and in the said messuages, lands, and hereditaments, hereby released, &c., or the money arising from the sale thereof, and so that neither of them, the said (*covenantors*), or his heirs, executors, or administrators, may be answerable or accountable for the acts, deeds, and defaults of any other or others of them, his or their heirs, exe-

cutors, or administrators, or of the wife of any other of them, or of her heirs, executors, or administrators, covenant, &c.

9. *On a sale by tenant for life and remainder-man in fee.*—And the said (*tenant for life*) doth hereby for himself, his heirs, executors, and administrators, and so only that he and they may be answerable for and to the extent in value of his estate for life in the said messuage, &c. hereby released, &c., and the acts, deeds, and defaults relating thereto; and the said (*remainder-man*) doth hereby for himself, his heirs, executors, and administrators, and so only that he and they may be answerable for the fee-simple and inheritance of the title to the same messuage, &c., subject to the life estate of the said (*tenant for life*), and the acts, deeds, and defaults relating to the fee-simple and inheritance of the same messuage, &c., covenant, &c.

In this case the covenants for title should run thus:—That notwithstanding, &c., the tenant for life and remainder-man are seised of a good, &c. estate of freehold, to the tenant for life for his life, with remainder to the remainder-man for an immediate estate of inheritance in fee-simple, of and in, &c. That they now have in themselves respectively good right to convey. For quiet enjoyment, without any let, &c. from or by the tenant for life, or the remainder-man, or his heirs. And freely acquitted, &c. by tenant for life, as to his life estate, and by the remainder-man, his heirs, executors, or administrators, as to the inheritance in fee-simple, subject to the same life estate. And moreover, that the tenant for life, and remainder-man, and his heirs, and all persons, &c., will do all acts for further assurance.

10. *By tenant for life and remainder-men in fee: each as to the acts, and for the estates and interests of himself, his wife, and trustees.*—And the said (*tenant for life*) doth hereby for himself, his heirs, executors, and administrators, and as to and concerning only his life estate in the premises, and the acts and deeds which relate to or concern the same life estate, or the value thereof; and each of them, the said A.B. and C.D., (*remainder-men,*) severally, separately, and apart from the other of them, doth hereby for himself respectively, and his respective heirs, executors, and administrators, and as

to and concerning only the acts, deeds, and defaults of himself and of his said wife respectively, and of his and her heirs, executors, and administrators, and the person or persons rightfully claiming or to claim, by, from, under, or in trust for him, her, or them respectively, as far as the same acts, deeds, and defaults, relate to or concern the moieties or parts and shares of said *(remainder-men)* respectively, or their respective trustees, of and in the said messuages, &c., hereby, &c.; and so that the said A. B., his heirs, executors, or administrators, may be answerable only for or to the value of the moiety, half part, or share of them the said A. B., his wife, and their trustees; and so that the said C. D. may be answerable only for or to the value of the moiety, half part, or share of them the said C. D., his wife, and their trustees, covenant, &c.

11. *To be answerable only to a certain extent.*—And the said *(covenantor)*, nevertheless so only as to the value of the beneficial interest of the said————, his wife, in the residue of the personal estate of the said————, doth, &c. covenant, &c.

12. *To the extent of share of purchase money.*—And each of them the said *(covenantors)*, severally, separately, and apart from the others of them, doth hereby for himself, and herself respectively, and his and her respective heirs, executors, and administrators, and so only as to be answerable for and to the extent of the value of the share or interest of himself and herself, and of his said wife respectively, of and in the said messuage, &c., hereby, &c., and the title to the same, &c., rateably and in proportion to such share and interest, covenant, &c.

13. *To the extent of one-sixth of damages recoverable under covenants.*—And the said (*covenantor*) doth hereby for himself, &c., so as to be answerable and accountable only to the extent of one-sixth part of the damages, which are to be recovered under or by virtue of the covenant hereinafter contained, being in proportion to the share and part of himself and his said wife in the purchase money arising from the sales to be made under the trusts reposed in the said————, as aforesaid, covenant, &c.

14. *By several persons entitled to lands in unequal shares.*—And the said A. B. doth hereby for himself, his heirs, executors, and

administrators, as far as relates to or concerns the three undivided fourth parts of the said A. B. and————, his wife, of and in the said messuage, &c., hereby released, &c., and the title to the same three undivided fourth parts, and the acts, deeds, and defaults relating thereto, and so only as to be answerable for and to the value of the same three-fourth parts; and the said C. D. doth hereby for herself, her heirs, executors, and administrators, as far as relates to or concerns her undivided fourth part of and in the said messuages, &c., and her title to the same undivided fourth part, and the acts, deeds, and defaults relating thereto, and so only as to be answerable for and to the value of the same fourth part, covenant, &c.

15. *By persons entitled in shares, extending to acts of testators.*—And each and every of them the said (*covenantors*), severally, separately, and apart from the others of them, doth by these presents for himself and herself respectively, and his and her respective heirs, executors, and administrators, and testators, and of all persons claiming or to claim by, from, under, or in trust for him or them respectively, and so that each and every of them the said (*covenantors*) respectively, and his and her respective heirs, executors, and administrators, may be answerable only for his or her respective share, right, and interest, of and in three undivided fourth parts of and in the messuages, &c. hereby, &c., and the value of the same three fourth parts, covenant, &c.

16. *By a person entitled to a third part.*—And the said (*covenantor*) doth hereby for himself, his heirs, executors, and administrators, and as to and concerning only the third part or share and title of him the said (*covenantor*), and the acts, deeds, and defaults of himself, his heirs, executors, and administrators, and all persons claiming, or to claim, by, from, under, or in trust for him or them, as far as concerns the same share and title, covenant, &c.

17. *By two severally as to distinct fifth shares.*—And each of them the said (*covenantors*), severally, separately, and apart from the other of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only his and her own fifth part or share of and in the messuage, &c. hereby released, &c., and the acts, deeds, title,

and default of himself and herself respectively, and of his and her respective heirs, executors, administrators, and assigns, and of the said (*testator*), and his heirs, so far as relates to or concerns the same fifth part, covenant, &c.

18. *By persons entitled in shares: several by three: joint and several by three others: and several by another.*—And each of them the said A., B., and C., severally, separately, and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her heirs, executors, and administrators, and so far only as concerns his, her, or their proportionate part or share of and in the said messuages, &c.: And the said D., E., and F., do by these presents jointly for themselves, their heirs, executors, and administrators, and each of them, severally, separately, and apart from the other of them, doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning, and only as to, for, and concerning the acts, deeds, and defaults of them the said D., E., and F., and their respective heirs, executors, and administrators, and their proportions, parts, or shares of the said messuages, &c.: And the said G. doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning the acts, deeds, and defaults of himself, and the said ——, his wife, his and her heirs, executors, and administrators, and as far only as concerns his or their said proportion, part, or share of the said messuages, covenant, &c.

19. *By persons entitled to moieties in their own right.*—And each of them the said (*covenantors*), severally, separately, and apart from the other of them, doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only his own moiety or half part of the said messuage, &c. hereby released, &c., and the acts, deeds, and defaults of himself, his heirs, executors, and administrators, and all persons claiming or to claim by, from, under, or in trust for them, in relation thereto, covenant, &c.

20. *By two persons entitled in equal moieties, one in his own right and the other in right of his wife.*—And the said A. B. doth

hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only the moiety or half part of his said wife, of the said messuages, &c., hereby released, &c., and the acts, deeds, and defaults relating thereto. And the said C. D. doth hereby for herself, her heirs, executors, and administrators, and as to, for, and concerning only the other undivided moiety or half part of the said messuages, &c., hereby released, &c., and the acts, deeds, and defaults relating thereto, covenant, &c.

21. *By husbands as to shares in their own rights, and in right of their wives.*—And each and every of them the said (*covenantors*), severally, separately, and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself and herself respectively, and of his said wife, and all persons rightfully claiming, or to claim, by, from, under, or in trust for him, her, or them respectively, or the said testator, but so only as to be answerable for the respective share, right, and interest of himself and herself respectively, and of his said wife, of and in the messuages hereby, &c., and of and in the money arising from the sale of the same hereditaments, covenant, &c.

22. *By vendors entitled in different shares, one being entitled jure uxoris.*—And each and every of them the said (*covenantors*), severally, separately, and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and so only as to be answerable for the part or proportion of himself or herself, and as to the said (*husband*), so far only as to be answerable for the part or proportion of himself and his said wife, in her right, of and in the said hereby assigned or otherwise assured moiety of and in the said messuages or dwelling-houses, and the money arising from the sale thereof, and so that neither of them the said (*covenantors*), or his or her heirs, executors, or administrators, may be answerable or accountable for the acts, deeds, and defaults of any other or others of them, his, her, or their heirs, executors, or administrators. And so that the said (*husband*) only may be answerable for the acts, deeds, and defaults of the said ——— the wife of the said (*husband*), or of her executors or administrators, covenant, promise, and agree, &c.

23. *By intended husband and wife in a settlement of wife's property.*—And each of them the said A. B. (*intended husband*), and C. D. (*intended wife*), severally, separately, and apart from the other of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and so that the said C. D. may be answerable only for the acts and defaults of herself and of her executors and administrators; and so that the said A. B. may be answerable only for the acts and defaults of himself, his executors, and administrators, and the acts and defaults of the said C. D. during her coverture by him, covenant and declare with, &c.

24. *By persons in their own right, and others in right of testator.*—And each and every of them the said (*owners in their own right*), severally, separately, and apart from the others of them, doth hereby for himself, and his respective heirs, executors, and administrators, and as to, for, and concerning only that part or share in which he is beneficially interested in his own right, of and in the said messuage, &c., and the acts, deeds, and defaults of himself, his heirs, executors, and administrators, and all persons claiming, or to claim, by, from, under, or in trust for him. And the said (*other covenantors*), severally, &c., and for his, &c., and so far only as he or she is beneficially interested in the share late of the said (*testator*), and the acts, deeds, and defaults relating to the share of the said (*testator*), covenant, &c.

25. *By a person entitled to an estate for life and reversion in fee.*—And the said (*covenantor*) doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only, and as far as relates to the title under his estate for life, and remainder or reversion in fee, and the acts, deeds, and defaults relating thereto, covenant, &c.

26. *By two persons severally in an assignment of lands demised to them by two distinct leases; each as to the premises comprised in his lease.*—And the said A. B. doth hereby for himself, his heirs, executors, and administrators, and so far only as relates to or concerns the messuage, &c., comprised in and demised by the said indenture of lease, bearing date on or about the 8th day of January,

1802. And the said C. D. doth hereby for himself, his heirs, executors, and administrators, and so far only as relates to or concerns the messuage or tenement and premises comprised in and demised by the said indenture, bearing date on or about the 7th day of October, 1812, covenant, &c.

27. *By each of two persons as to the deeds in his possession.*— And the said A. B. doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only the deeds, papers, and writings, mentioned in the first schedule to these presents, and the acts, deeds, and defaults relating thereto. And the said C. D. doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only the deeds, papers, and writings, mentioned in the second schedule to these presents, and the acts, deeds, and defaults relating thereto, covenant, &c.

FORM OF A COVENANT TO LEVY A FINE, REFERRED TO, ANTE, PAGE 155.

And the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said E. F., his heirs and assigns, that they the said A. B., and C. his wife, she hereby consenting thereto, testified by her execution of these presents, shall and will, at the costs and charges of the said A. B., as of ——— term last, or before the end of ——— term now next ensuing, acknowledge and levy, before his Majesty's Justices of the Court of Common Pleas at Westminster, unto the said E. F. and his heirs, one or more fine or fines, sur conuzance de droit come ceo, &c ; whereupon proclamations shall be had and made according to the statute in that case made and provided, and the usual course, order, and manner of fines for assurance of lands in like cases used and accustomed, of all the said lands and hereditaments hereby released, or expressed and intended so to be, with

their appurtenances, by such apt and convenient names, quantities, qualities, and descriptions, as shall be sufficient to ascertain and comprise the same: And it is hereby declared and agreed by and between the parties hereto, that the said fine so as aforesaid, or in any other manner, or at any other time, to be acknowledged and levied, and all and every other fine and fines, common recovery and recoveries, conveyances and assurances in the law whatsoever, already acknowledged and levied, and hereafter to be acknowledged and levied, of the said lands and hereditaments, or any part thereof, by or between the said parties to these presents, either alone or jointly with any other person or persons, or to which they or either of them are or shall or may be parties or privies, or party or privy, shall operate and enure, and be adjudged, construed, deemed, and taken to operate and enure, To the use, &c.

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