Pitt-Lewis' Winding-up Practice.—A Manual of the Practice as to Winding-up in the High Court and in the County Court; being the Companies (Winding-up) Act, 1890, and the Winding-up of Companies and Associations (Part IV. of the Companies Act, 1862), as now amended, with Notes, and the Companies Winding-up Rules, 1890. Forming a Supplement to "A Complete Practice of the County Courts." By G. PITT-LEWIS, Q.C., M.P., Recorder of Poole. *Demy* 8*vo.* 1891. *Price* 7*s.* 6*d. cloth.*

Pitt-Lewis' Complete Practice of the County Courts, including that in Admiralty and Bankruptcy, embodying the County Courts Act, 1888, and other existing Acts, Rules, Forms, and Costs, with Full Alphabetical Index to Official Forms, Additional Forms, and General Index. *Fourth Edition*, with Supplementary Volume containing New Winding-up Practice. By G. PITT-LEWIS, Esq., Q.C., M.P., Recorder of Poole. 3 *Vols. Demy* 8*vo.* 1890-91. *Price* 2*l.* 10*s. cloth.*

"**The Standard County Court Practice.**"—*Solicitors' Journal.*

Roscoe's Criminal Law.—A Digest of the Law of Evidence in Criminal Cases. *Eleventh Edit.* By HORACE SMITH and GILBERT GEORGE KENNEDY, Esqrs., Metropolitan Police Magistrates. *Demy* 8*vo.* 1890. *Price* 1*l.* 11*s.* 6*d. cloth.*

"What Roscoe says, most judges will accept without question."—*Law Times.*

Roscoe's Nisi Prius.—A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius.—*Fifteenth Edition.* By MAURICE POWELL, Esq., Barrister-at-Law. 2 vols. *Demy* 8*vo.* 1891. (*Nearly ready.*)

Edmunds on Patents.—The Law and Practice of Letters Patent for Inventions, with the Patent Acts and Rules annotated, and the International Convention; a full Collection of Statutes, Forms and Precedents, and an Outline of Foreign and Colonial Patent Laws, &c. By LEWIS EDMUNDS, assisted by A. WOOD RENTON, Esqrs., Barristers-at-Law. *Royal* 8*vo.* (992 *pp.*) 1890. *Price* 1*l.* 12*s. cloth.*

Sebastian's Law of Trade Marks and their Registration, and matters connected therewith, including a Chapter on Goodwill. Together with the Patents, Designs, and Trade Marks Acts, 1883-8, and the Trade Marks Rules and Instructions thereunder, Forms and Precedents; the Merchandise Marks Act, 1887, and other Statutory enactments; and the United States Statutes, 1870 to 1881, and the Rules and Forms thereunder, and the Treaty with the United States, 1877. *Third Edition.* By LEWIS BOYD SEBASTIAN, B.C.L., M.A., of Lincoln's Inn, Esq., Barrister-at-Law. *Demy* 8*vo.* 1890. *Price* 1*l.* 5*s. cloth.*

"The work stands alone as an authority upon the law of trade marks."—*Law Journal.*

Chitty's Index to all the Reported Cases decided in the several Courts of Equity in England, the Privy Council, and the House of Lords, with a Selection of Irish Cases on or relating to the Principles, Pleading and Practice of Equity and Bankruptcy from the Earliest Period. *Fourth Edition.* Wholly Revised, Re-classified, and brought down to the end of 1883. By HENRY EDWARD HIRST, Esq., Barrister-at-Law. *Complete in* 9 *Vols. Royal* 8*vo.* 1883-89. *Price* 12*l.* 12*s. cloth.* *** *The Volumes may be had separately to complete Sets.*

"**The work is thoroughly well done.**"—*Law Quarterly Review.*

Fisher's Digest of the Reported Decisions of the Courts of Common Law, Bankruptcy, Probate, Admiralty, and Divorce, together with a selection from those of the Court of Chancery and Irish Courts. From 1756 to 1883 inclusive. Founded on Fisher's Digest. By JOHN MEWS, Assisted by C. M. CHAPMAN, HARRY H. W. SPARHAM, and A. H. TODD, Barristers-at-Law. *In* 7 *Vols. Royal* 8*vo.* 1884. *Price* 12*l.* 12*s. cloth.*

Mews' Consolidated Digest of all the Reports in all the Courts for the Years 1884-88 inclusive. By JOHN MEWS, Barrister-at-Law. *Royal* 8*vo.* 1889. *Price* 1*l.* 11*s.* 6*d. cloth.*

The Annual Digest for 1889 and 1890. By JOHN MEWS, Barrister-at-Law. *Royal* 8*vo. Price each* 15*s. cloth.* *** *The above works bring Fisher's Common Law and Chitty's Equity Digests down to the end of* 1890.

Talbot and Fort's Index of Cases Judicially noticed (1865—1890); being a List of all Cases cited in Judgments reported in the "Law Reports," "Law Journal," "Law Times," and "Weekly Reporter," from Michaelmas Term, 1865, to the end of 1890, with the places where they are so cited. By GEORGE JOHN TALBOT and HUGH FORT, of the Inner Temple, Esqrs., Barristers-at-Law. *Royal* 8*vo.* 1891. *Price* 25*s. cloth.*

A TREATISE

ON THE

Law and Practice

RELATING TO

VENDORS AND PURCHASERS

OF

REAL ESTATE

BY THE LATE

J. HENRY DART.

THE SIXTH EDITION

BY

WILLIAM BARBER,
OF LINCOLN'S INN, ESQ., ONE OF HER MAJESTY'S COUNSEL,

R. B. HALDANE,
OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW,

AND

W. R. SHELDON,
OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. II.

LONDON:
STEVENS AND SONS, 119, CHANCERY LANE,
Law Publishers and Booksellers.
1888

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

VENDORS AND PURCHASERS OF REAL ESTATE.

CHAPTER XIII.

AS TO MATTERS RELATING TO THE COMPLETION OF THE PURCHASE.

1. *The execution of the conveyance:—by married women, &c. —conveyance of trust estates under the Trustee Act*, 1850.
2. *As to the discharge of incumbrances.*
3. *As to purchaser's liability to see to application of purchase-money.*
4. *As to the amount payable in respect of purchase-money—how increased or diminished.*
5. *As to execution by the parties.*
6. *To whom and how the purchase money should be paid—and as to its reinvestment on sales to railway companies.*
7. *As to purchaser's right to deeds, attested copies, &c.*
8. *As to matters necessary to insure the full effect of executed conveyance;—registration, inrolment, &c.*
9. *As to stamps.*
10. *As to costs.*

Section 1.

The execution of the conveyance, &c.

Vendor must convey in person.

(1.) The vendor must, if practicable, in person convey (*a*), or, as respects copyholds, surrender (*b*) the property: the purchaser need not unnecessarily rely upon a power of attorney, which may have determined by the death of the

(*a*) 2 V. sen. 681.

(*b*) *Mitchel* v. *Neale*, 2 V. sen. 679; *Noel* v. *Weston*, 6 Mad. 50; see *Anon.*, cited 1 Esp. 116; *Richards* v. *Barton*, *ibid.* 269.

Chap. XIII. Sect. 1.

principal (*c*) (unless expressed to be irrevocable in cases falling within sect. 8 of the Conveyancing Act, 1882), or have been suspended by his mental incapacity (*d*). Any assurance of a married woman's interest in real estate, executed under a power of attorney, was formerly inoperative (*e*). But she can now, whether an infant or not, by deed appoint an attorney, on her behalf, for the purpose of executing any deed, or doing any other act which she might herself execute or do (*f*). And a woman, married since the 31st of December, 1882, or married before that date, as to property acquired by her subsequently to it, can, by virtue of her position under the Married Women's Property Act, appoint an attorney to deal with her property as fully as she can herself deal with it. Where a deed is executed by attorney, the attorney formerly executed in the name of his principal: the fact being noticed in the attestation; but he may now execute any instrument under the power in and with his own name and signature (*g*). The execution of a deed by the committee of a lunatic, on his behalf, must be made in the name of the lunatic (*h*).

Sales by married women under the old and the new law.

The subject of sales by married women has been to a large extent affected by the Married Women's Property Act, 1882; and in dealing with it, it is necessary to distinguish between the position of women married before the Act as to property acquired before the Act came into operation, and that of women married before the Act as to property acquired since the Act came into operation, and also that of women married since the Act as to all their property.

1. Under the old law.

And *first*, with regard to women married before the 1st January, 1883, in respect of their property acquired before that date.

(*c*) *Wallace* v. *Cook*, 5 Esp. 117; see *Bailey* v. *Collet*, 18 B. 179; and *Webb* v. *Kirby*, 7 D. M. & G. 376.

(*d*) *Duke of Beaufort* v. *Glynn*, 25 L. T. O. S. 171.

(*e*) *Graham* v. *Jackson*, 6 Q. B. 811.

(*f*) 44 & 45 V. c. 41, s. 40. The section of course does not enable a married woman, by appointing an attorney, to dispense with an acknowledgment where one is otherwise necessary to the execution of the deed.

(*g*) 44 & 45 V. c. 41, s. 46.

(*h*) See 96 of the Lunacy Orders, 1883, and 16 & 17 V. c. 70, s. 134

Conveyance of freeholds must be acknowledged under 3 & 4 W. IV. c. 74.

Where, on the sale of freeholds, a married woman joins in respect of her estate or interest not settled to her separate appointment or use, her acknowledgment of the deed under the 3 & 4 Will. IV. c. 74, is an essential part of the conveyance (*i*): so, where, being entitled to the proceeds of real estate devised in trust for sale, she joins in conveying this estate to the trustee (*j*), such concurrence being for the purpose of obviating some possible objection to the validity of the sale itself, and not merely of supplying the want of a power in the trustee to give a sufficient discharge for the purchase-money, the purchase-money should not be paid until such acknowledgment be perfected. So, a lease by husband and wife, seised in fee in right of the wife, should be acknowledged by her; but slight circumstances may constitute an adoption of it by the wife if she survive her husband (*k*).

Except where the estate is settled to her separate use.

We have already seen that a married woman, who is not restrained from anticipation, has, in Equity, in respect of her separate estate, the same power of disposition as if she were a *feme sole* (*l*). But it was only after some conflict of opinion that the limits of the doctrine of the wife's separate estate, as regards her power of dealing with it during coverture, were precisely defined. In the case of *Taylor* v. *Meads* (*m*), in which the prior conflicting authorities (*n*) were fully considered, Lord Westbury held that a married woman, not restrained from anticipation, has, as incident to her separate estate, and without any express power, an absolute right of

(*i*) *Billing* v. *Webb*, 1 D. G. & S. 716; *Lassence* v. *Tierney*, 1 M. & G. 572.

(*j*) *Franks* v. *Bollans*, 3 Ch. 717. The Act, however, only applies to married women who are beneficially entitled; and therefore where married women convey as trustees under an order of the Court in an administration action, they need not acknowledge the deed, even although they are beneficially entitled to the proceeds; *Re Docwra*, 29 Ch. D. 693.

(*k*) *Toler* v. *Slater*, L. R. 2 Q. B. 42.

(*l*) *Ante*, p. 11.

(*m*) 4 D. J. & S. 597; and see *Pride* v. *Bubb*, 7 Ch. 64.

(*n*) *Lechmere* v. *Brotheridge*, 32 B. 353; *Buckell* v. *Blenkhorn*, 5 Ha. 131, 134; *Atchison* v. *Le Mann*, 23 L. T. O. S. 302; *Adams* v. *Gamble*, 12 Ir. Ch. Rep. 102.

Chap. XIII. Sect. 1.

disposition over her equitable fee by deed, not acknowledged under the Act, or by will; and it would seem that the interposition of trustees is not necessary to give her this right (*o*). There must, however, be clear proof of an intention to annex the separate use to the whole fee, and not merely to the life estate (*p*).

Remarks on *Taylor* v. *Meads*.

In a later case (*q*), V.-C. Kindersley appears to have considered the decision in *Taylor* v. *Meads* as the only binding authority for the proposition, that the *corpus* of real estate can be settled to the separate use of a married woman (*r*). There is certainly much to be said in favour of the view taken by Lord Romilly in *Lechmere* v. *Brotheridge* (*s*). If the original purpose of the doctrine is alone to be regarded, its operation may reasonably be restricted to the period of coverture; especially as a wider power of alienation, exerciseable by the married woman while under her husband's influence, may, in many cases, destroy the protection which it was the primary object of the equitable doctrine to afford. But the sounder view unquestionably is that the capacity to hold as separate estate carries with it, as an essential incident of property, a right of absolute alienation. Upon principle, this right ought to be as complete where the separate use is annexed to the fee, as where it is annexed only to the life estate: and its exercise would practically be denied to the married woman, if she could only dispose of her equitable fee settled to her separate use, with the concurrence of her husband and with the formalities prescribed by the Statute.

Separate estate under 33 & 34 V. c. 93.

By the 33 & 34 Vict. c. 93, s. 8, it was provided that where any freehold, copyhold, or customaryhold property

(*o*) *Hall* v. *Waterhouse*, 5 Giff. 64, a case of devise by the *feme covert*; but it is conceived she could formerly only pass the *legal* fee, vested in her for her separate use, by a statutory deed.

(*p*) *Troutbeck* v. *Boughey*, 2 Eq. 537; Lewin on Trusts, 780.

(*q*) *Troutbeck* v. *Boughey*, *suprà*; but see *Pride* v. *Bubb*, 7 Ch. 64, where Lord Hatherley, C., approves the doctrine laid down in *Taylor* v. *Meads*.

(*r*) But see *Baggett* v. *Meux*, 1 Ph. 627.

(*s*) 32 B. 353; see judgment.

should *descend* upon any woman married after the passing of the Act as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone were to be good discharges for the same (*t*). Under this section, a woman married after the passing of the Act had, unless controlled by settlement, the same proprietary rights over her equitable life interest in the descended real estate as if she were a *feme sole;* and, apparently, the application of the section was not confined to lands which descended upon her after marriage: but the Act left her still unable, as before, to dispose of the fee during coverture by will, or except by an acknowledged deed (*tt*); and her husband's title by curtesy was not excluded. This enactment still applies to the case of women married between the 9th of August, 1870, and the 1st of January, 1883. The Vendor and Purchaser Act, 1874, enacted that when any freehold or copyhold hereditament was vested in a married woman as a bare trustee, she might convey or surrender the same as if she were a *feme sole* (*u*).

Acknowledgment, by whom to be taken.

The acknowledgment, when necessary, is to be made before one of the Judges of the High Court of Justice, or before a County Court Judge (*x*), or before one (*y*) of the perpetual Commissioners appointed under the Act (*z*), or—where by reason of residence beyond seas, or ill-health, or any other sufficient cause, the married woman shall be prevented from so acknowledging the deed—before special Commissioners to be appointed by the Court of Common Pleas (*a*), now the Queen's Bench Division (*b*). Where a commission had issued to persons supposed to be near a particular locality up the country in India, and, in consequence of their removal, the

Special commissioners appointed *nunc pro tunc*.

(*t*) The Act came into operation on the 9th Aug. 1870.

(*tt*) See *Johnson* v. *Johnson*, 35 Ch. D. 345.

(*u*) 37 & 38 V. c. 78, s. 6.

(*x*) 19 & 20 V. c. 108, s. 23.

(*y*) Conveyancing Act, 1882, s. 7.

(*z*) 3 & 4 W. IV. c. 74, s. 79; as to Commissioners for separate counties, see *Blackmur* v. *Blackmur*, 3 Ch. D. 633.

(*a*) S. 83.

(*b*) Jud. Act. 1873, s. 32; and Order in Council, 16 Dec. 1880.

Chap. XIII. Sect. 1.

acknowledgment was taken before strangers, the Court, under the special circumstances, allowed the commission to be amended by inserting their names (*c*). When the Christian name of either the woman or the man is unknown, a commission may issue with the name in blank; but more than ordinary care must then be taken to verify the party by affidavit (*d*).

The formalities to be observed in taking acknowledgments have been much simplified by the provisions of the 7th section of the Conveyancing Act, 1882, and are now mainly as follows:—

Method of taking acknowledgment.

The person or persons taking the acknowledgment must sign a memorandum in the form prescribed by the Rules of the Supreme Court under the 7th section. Where the memorandum purports to be signed by a person authorized to take the acknowledgment, the deed, as respects the execution by the married woman, takes effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged (*e*). No certificate or affidavit of acknowledgment is necessary as to deeds executed after the 31st of December, 1882. The acknowledgment may apparently be taken at any time after execution, and in the case of a disentailing deed need not precede enrolment (*f*). The third sub-section provides that an acknowledgment, whether taken before or after the commencement of the Act, shall not be impeachable by reason only that the person taking the acknowledgment was interested or concerned, either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise in the transaction giving occasion for the acknowledgment. A rule has been made with reference to this sub-section which provides that, when any other person than a judge takes an acknowledgment, he shall add to the memorandum of acknowledgment a declara-

(1) Of deeds executed since 1882.

(*c*) *Re Stubbs*, 5 Sc. N. R. 327.

(*d*) *Re Apperton* or *Atherton*, 1 C. B. 447; 3 D. & L. 26; *Re Legge*, 15 C. B. 364.

(*e*) Sub-s. 2.

(*f*) *Ex p. Taverner*, 7 D. M. & G. 627.

tion to the effect that he is not interested or concerned in the transaction (*g*). The object, however, of the rule is merely to prevent any interested person from taking the acknowledgment, and not to render invalid any acknowledgment which may have been taken in despite of it (*h*).

(2) Of deeds prior to 1883.

Deeds, executed prior to 1883, require the same formalities as to acknowledgment as were required before the passing of the Conveyancing Act, 1882. A certificate, with an affidavit verifying the same, must be filed in the proper office of the Supreme Court of Judicature (*i*). An index is still kept of acknowledgments taken prior to, but not lodged till after, the commencement of the Act (*k*); and an office copy of any such certificate, whether filed before or after the commencement of the Act, is to be received as evidence of the acknowledgment of the deed to which the certificate refers (*l*). It is not quite clear whether the intention of this last sub-section is that the office copy is to be conclusive evidence of the proper acknowledgment of the deed, and so to get rid of the long line of old decisions on the strict formalities required with reference to the certificate and the verifying affidavit. But whether the intention is that it shall be conclusive, or merely *primâ facie*, evidence, these decisions can only have a bearing on old titles; and it therefore seems unnecessary in this edition to refer to them.

Gradual extinction of acknowledgments.

The formalities to be observed with reference to the acknowledgments of deeds executed subsequently to the 31st of December, 1882, are regulated by the Conveyancing Act, 1882, as already described. But as by virtue of the Married Women's Property Act, 1882, a woman married after the 31st of December, 1882, holds all property, and a woman married prior to that date holds property, her title to which has accrued since that date, in every respect as a *feme sole*,

(*g*) Rule 4.
(*h*) Sub-s. 3.
(*i*) Sub-s. 6.
(*k*) Sub-s. 7.
(*l*) Sub-s. 8.

Chap. XIII. Sect. 1.

the necessity for acknowledgments must before long cease entirely.

Mode of assuring married woman's interest in copyholds.

Upon a sale of copyholds, a surrender to the use of the purchaser, by the copyholder's wife, with his consent, after she has been privately examined, will bar her right to freebench, if any exist by special custom; although, at the date of the surrender, the purchaser has no legal estate in the premises (*m*). Upon the sale of her copyhold property, if she have the legal estate, the conveyance must be by surrender: if her estate be merely equitable, a surrender by her and her husband, after she has been privately examined, is binding as if her estate were legal (*n*); or her equitable estate will pass by a mere deed acknowledged under the Act (*o*): so also as regards her equitable estate in customary freeholds (*p*).

As to her acknowledged deed passing her reversionary interest in proceeds of sale, &c.

So, notwithstanding a doubt which has been entertained (*q*), it is clearly settled that an acknowledged deed will pass a married woman's reversionary interest in the proceeds of sale of real estate subject to a trust for sale, but remaining unsold (*r*); or in money subject to an absolute trust for investment in land (*s*); but not in money to be laid out in land *or otherwise* (*t*). So, her fine, or now her acknowledged deed, will bind her future interest and right of renewal in renewable leaseholds (*u*); and her contingent remainders (*x*). But acknowledgment is essential in order to bind her equitable interest not settled to her separate use: *e.g.*, a married woman *cestui que trust*, concurring in,

(*m*) See *Wood* v. *Lambirth*, 1 Ph. 8.

(*n*) 3 & 4 W. IV. c. 74, s. 90; her surrender may be taken by an *infant* deputy steward, *Eddlestone* v. *Collins*, 3 D. M. & G. 1.

(*o*) S. 77.

(*p*) *Torbuck* v. *Hewitson*, 19 L. T. O. S. 342.

(*q*) *Hobby* v. *Collins*, 4 De G. & S. 289.

(*r*) See *May* v. *Roper*, 4 Si. 360; 1 Jarm. 603, n.; *Forbes* v. *Adams*, 9 Si. 460.

(*s*) 3 & 4 W. IV. c. 74, s. 77.

(*t*) *Smithwick* v. *Smithwick*, 5 L. T. 23.

(*u*) *Dickens* v. *Unthank*, 1 Jur. N. S. 916.

(*x*) *Crofts* v. *Middleton*, 8 D. M. & G. 192.

but not acknowledging, the conveyance, upon a purchase, by her own trustee for sale, is not bound (*y*).

As to her terms for years.

We have seen that an assignment, merely by the husband, of his wife's legal terms for years, is sufficient; but that, as respects her equitable chattels real,—including even the equity of redemption, in a legal term mortgaged by her husband in her right,—it is prudent to require that she shall join in and acknowledge the assignment (*z*): and when the husband purports to convey, for the continuance of the coverture, his wife's freeholds, a like precaution seems to be requisite if the legal estate be outstanding, or in reversion expectant on a term of years created for a limited purpose (*a*).

In *Wortham* v. *Pemberton* (*b*), it was held that the estate of a *feme covert*, tenant in tail in possession, subject to a jointure term, was equitable during the joint lives of herself and her husband, or during the continuance of the term, so as to entitle her to a settlement: the ground of this decision being, that the jointure term interposed such a legal estate as enabled the Court to deal with the property while it remained subject to the term; but it may be doubted whether this decision can be supported.

Concurrence of husband when dispensed with.

By the 91st section of the Act, it is provided, that if a husband shall, in consequence of his being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed or making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent (*c*) or by sentence of

(*y*) *Franks* v. *Bollans*, 3 Ch. 717.

(*z*) *Ante*, p. 9.

(*a*) *Hanson* v. *Keating*, 4 Ha. 1; *Wortham* v. *Pemberton*, 1 De G. & S. 644; *Wilkinson* v. *Charlesworth*, 10 B. 324.

(*b*) 1 De G. & S. 644; and see Sug. 560.

(*c*) As to what constitutes living apart by mutual consent, see *Re Alice Rogers*, L. R. 1 C. P. 47.

Chap. XIII. Sect. 1.

divorce, or in consequence of being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court, by an order to be made in a summary way, upon the application of the wife, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by the Act or otherwise: and all deeds, &c., by the wife, pursuant to such order, are to be executed, &c., by her, as if a *feme sole;* and when executed, &c., shall, but without prejudice to the husband's rights as then existing independently of the Act, be as good and valid as they would have been if he had concurred: but the provision is not to extend to cases in which the Lord Chancellor, or other the persons intrusted with the Great Seal, or the Court of Chancery, shall be protector of a settlement in lieu of the husband. This clause has been held to extend to copyholds, over-riding the 77th section (*d*). It has been held that where an order has been obtained, dispensing with her husband's concurrence, an acknowledgment by the married woman is also unnecessary (*e*). The order has been made in cases where the husband, having committed an act of bankruptcy, has absconded and gone abroad, and has not since been heard of (*f*); even although the wife has married again (*g*); or where he is under transportation for felony (*h*); or is in prison abroad (*i*); or has left for Australia, in distress, and with no intention of returning (*k*): so, where, although not a lunatic (*l*), he was in a state of complete imbecility (*m*): so, where he was living apart from his wife, and refused to concur in conveying

(*d*) *Ex p. Shirley*, 5 Bing. N. C. 226.

(*e*) *Goodchild* v. *Dougal*, 3 Ch. D. 650.

(*f*) *Ex p. Gill*, 1 Bing. N. C. 168; *Ex p. Stone*, 9 Dowl. 843; *Ex p. Denny*, 2 C. L. R. 1755; *Ex p. Hulme* and *Ex p. Cobham*, 3 C. L. R. 149, note (*e*); *Ex p. Lord*, *ibid.* 37; the affidavit must be made by the wife herself; *In re Bruce*, 3 Sc. N. R. 592; *Ex p. Williams*, 2 Sc. N. R. 120.

(*g*) *Ex p. Yarnall*, 17 C. B. 189.

(*h*) *Ex p. Wimbush*, 3 C. L. R. 340.

(*i*) *Re Alberici*, 4 W. R. 208.

(*k*) *Re Kelsey*, 16 C. B. 197.

(*l*) As to what evidence of existing lunacy is sufficient, see *Re Turner*, 3 C. B. 166; and see *Re Murphy*, 5 Sc. N. R. 166.

(*m*) *Re Woodall*, 3 C. B. 639.

property vested in her as a trustee (*n*); or in conveying her own property, either at all (*o*), or unless part of the purchase-money were paid to him (*p*): but the Court has refused an order in cases of, what appeared to be, his mere temporary absence from the country; as where the wife's affidavit stated that he had gone to New Zealand, and, when last heard of, was employed in a Government vessel, and that she believed that he never intended to return (*q*): so, when it stated that the husband, a seaman, had gone abroad, and that she had not heard of him for many years, and believed him dead, no sufficient grounds for such belief being stated (*r*): so, where he was stated to be living separate from his wife, in London, with another woman (*s*). The order does not deprive the husband of the common law rights which he has acquired in the property by reason of the coverture (*t*).

Married woman may by acknowledged deed convey contingent interests and disclaim.

And the disposing power of a married woman under the above Act, was, by the 8 & 9 Vict. c. 106, extended to contingent and other similar interests, and to rights of entry; and she was also thereby enabled to disclaim, by an acknowledged deed under the 3 & 4 Will. IV. c. 74, any estate or interest in tenements or hereditaments in England, of any tenure (*u*).

Malins' Act.

And by the 20 & 21 Vict. c. 57, her power of disposition by an acknowledged deed was extended to her reversionary

(*n*) *Re Mirfin*, 4 Man. & G. 635; *Re Caine*, 10 Q. B. D. 284.

(*o*) *Ex p. Snelling*, 3 C. L. R. 149, note (*e*); *Re Perrin*, 14 C. B. 420.

(*p*) *Re Woodcock*, 1 C. B. 437; *Re Trendry*, 5 W. R. 322. For form of order enabling wife to convey her own estate, see *Ex p. Duffill*, 6 Sc. N. R. 30; but the Court will not sanction any particular form of conveyance, but will only give a general authority to convey; *Re Woodall*, 3 C. B. 639.

(*q*) *Ex p. Gilmore*, 3 C. B. 967; *Re Smith*, 16 L. J. C. P. 168; but see *Re Kelsey*, 16 C. B. 197; *Re Squires*, 17 C. B. 176; *Re Martin*, 4 Jur. 559.

(*r*) *Ex p. Taylor*, 7 C. B. 1. Of course the order was applied for as a means of avoiding the necessity of proving the death as a matter of title, and it was eventually made, on further evidence: but the affidavit must describe her as his "wife" and not his "widow;" *Ex p. Sparrow*, 12 C. B. 334.

(*s*) *Ex p. Parker*, 3 C. L. R. 148; *Re Squires*, 25 L. J. C. P. 55.

(*t*) S. 91; and see *Fowke* v. *Draycott*, 29 Ch. D. 996.

(*u*) See 8 & 9 V. c. 106, ss. 6, 7.

Chap. XIII. Sect. 1.

interests in personalty under any instrument executed after the 31st December, 1857, and not being a settlement or agreement for a settlement made on her marriage. As we have already seen (*x*), a married woman who is judicially separated from her husband, has the same power of disposition over her after-acquired property as if she were a *feme sole*.

Married woman judicially separated.

2. Under the Married Women's Property Act, 1882.

Secondly: as to the new law, it is sufficient to state that since the 31st of December, 1882, the Married Women's Property Act, 1882, has enabled every woman married since that date, and, as to property the title to which has accrued to her subsequently to that date, every woman married before that date, to convey every estate, whether real or personal, legal or equitable, in possession or reversion, as fully, and in the same manner, as if she were a *feme sole*. After considerable conflict of judicial opinion on the point, it has been finally decided that the words in the 5th section of the Act, entitling a woman married before its commencement "to have and to hold, and to dispose of, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Act," do not operate retrospectively, so as to change the nature of a married woman's title which has partially accrued before such commencement—*e. g.*, a remainder, which after such commencement becomes an estate in possession,—but that the title to the entire interest, whatever that may be, must accrue after the 31st of December, 1882 (*y*).

As to assignment of terms for years by executors or administrators.

An assignment of leaseholds, or any other chattel interest in real estate, by one of several executors or administrators, is valid (*z*); so, also, is an assignment by an executor who dies before probate; but the will must eventually be proved; as the probate copy is the only evidence of the appointment

(*x*) *Ante*, p. 12.

(*y*) *Reid* v. *Reid*, 31 Ch. D. 402.

(*z*) *Simpson* v. *Gutteridge*, 1 Mad. 609; *Sneesby* v. *Thorne*, 1 Jur. N. S. 1058.

of the executor (*a*): but an assignment by a person assuming to act as administrator, and who subsequently obtains letters of administration, is void (*b*).

Power for promoters of public undertakings to convey to themselves upon refusal or default of owners.

By the Lands Clauses Consolidation Act, if, upon the deposit in the Bank of the purchase-money or compensation agreed or awarded to be paid in respect of lands purchased or taken by the promoters of the undertaking, the owners or statutory owners fail to convey the land upon request, the promoters are authorized to execute a deed-poll, which will have all the effect of a conveyance by the owners or statutory owners (*c*): similar powers are also conferred upon the promoters of the undertaking, in the several events of the owners refusing to convey, or failing to make a title, or not being discoverable (*d*).

Trustee bound to convey at request of *cestui que trust*.

Where a trustee of an outstanding legal estate refuses in a plain case to convey at the request of a party entitled to a conveyance, he will, if a bill be filed against him, be fixed with costs (*e*): so, where a trustee for sale, with the consent of his *cestui que trust*, refused without sufficient reason to concur in a sale which they had agreed upon, he was ordered to pay the costs of a suit for his removal from the trusteeship (*f*): and where a party has accepted a trust, he cannot, it is conceived, justify his refusal to convey on the ground that no estate is in fact vested in him. A trustee, however, when required to convey the estate on the ground of the trusts having terminated, is entitled to clear and satisfactory evidence of such being the fact (*g*). And he cannot be

(*a*) *Brazier* v. *Hudson*, 8 Si. 67.

(*b*) Wms. Exors. 411; *Morgan* v. *Thomas*, 8 Ex. 302. The case of an administrator *cum testamento annexo*, apparently stands on the same footing; *Boxall* v. *Boxall*, 27 Ch. D. 220.

(*c*) See s. 75.

(*d*) See sects. 76, 77. See, on the construction of a clause in a private Act, similar to the 76th section, *Doe* v. *Manchester and Bury R. Co.*, 14 M. & W. 687; and see *ante*, p. 58, n. (*a*); and p. 92. As to a petition for payment out where there are adverse claims to the ownership, see *Re Manor of Lowestoft*, 24 Ch. D. 253.

(*e*) *Willis* v. *Hiscox*, 4 M. & C. 197; *Hampshire* v. *Bradley*, 2 Coll. 34.

(*f*) *Palairet* v. *Carew*, 32 B. 564.

(*g*) *Holford* v. *Phipps*, 3 B. 434 See as to a protector, *Buttanshaw* v. *Martin*, John. 8.

Chap. XIII. Sect. 1.

But only by description under which he himself took estate.

required from time to time to divest himself of different parcels of the trust estate, or to convey by other words and descriptions than those by which the conveyance was made to himself (*h*); and the rule is the same in the case of a mortgage (*h*).

Concurrence of mortgagee should be obtained in conveyance of equity of redemption.

The concurrence of the mortgagee in the conveyance should, where possible, be obtained, even where the mortgage is intended to be kept on foot; for as a mortgagee with several securities on two different estates is entitled, in cases not coming within section 17 of the Conveyancing Act, 1881, to hold both until full payment of all that is due to him, the purchaser of the equity of redemption of one estate may have to redeem the mortgage subsisting on the other (*i*).

Mortgagee, when bound to convey.

And a mortgagee cannot be compelled to re-convey before the time fixed for redemption, although he be tendered his principal with interest up to that time (*k*): nor, if the day fixed for redemption be allowed to elapse, can he subsequently be compelled to convey without either six months' notice or six months' interest paid in advance (*l*); but he can now be compelled to transfer instead of reconveying (*m*). An incumbrancer, although not a party to the contract, may so act as to bind himself to concur in a sale of part only of the property (*n*). Whether a stipulation purporting to postpone the mortgagor's right to redeem for a period of twenty years will have that effect seems to have been considered doubtful (*o*). And where a mortgagee has accepted a tender

(*h*) *Goodson* v. *Ellison*, 3 Russ. 594.

(*i*) See *Jennings* v. *Jordan*, 6 Ap. Ca. 698; *Harter* v. *Colman*, 19 Ch. D. 630; *Bird* v. *Wenn*, 33 Ch. D. 215.

(*k*) *Brown* v. *Cole*, 14 Si. 427; and cf. *Harding* v. *Pingey*, 10 Jur. N. S. 872, case of trust for securing the mortgage debt.

(*l*) As to the necessity of such a notice depending on custom rather than law, see *Browne* v. *Lockhart*, 10 Si. 420, 424; and see *Letts* v. *Hutchins*, 13 Eq. 176; *Re Moss*, 31 Ch. D. 90, where the six months' interest was disallowed.

(*m*) Conv. Act, 1881, s. 15; Conv. Act, 1882, s. 12; and see *Teevan* v. *Smith*, 20 Ch. D. 724; *Alderson* v. *Elgey*, 26 Ch. D. 567.

(*n*) See *Crosse* v. *Revy. Society*, 3 D. M. & G. 712; *Rowe* v. *May*, 18 B. 613.

(*o*) *Cowdry* v. *Day*, 1 Gif. 316.

of his principal, interest, and costs from a person having a partial interest and entitled to redeem, he is bound to convey to him the legal estate and to deliver up the title deeds, although there may be other claimants of the equity of redemption (*p*); but the conveyance should in such a case reserve the equities of the other persons interested (*p*).

Conveyance of legal estates from trustees, &c., formerly procurable under 1 W. IV. c. 60; repealed by "The Trustee Act, 1850."

In many cases a conveyance of the legal estate, which could not otherwise have been procured without suit, might, prior to the 1st November, 1850, have been obtained under the provisions of the 1 Will. IV. c. 60, the 4 & 5 Will. IV. c. 23, and the 1 & 2 Vict. c. 69. These Acts have been repealed, and their principal provisions have been re-enacted, along with considerable additions, by the 13 & 14 Vict. c. 60 (cited as "The Trustee Act, 1850"). By this Act (*q*), as amended by the 15 & 16 Vict. c. 55, the Lord Chancellor sitting in lunacy (as respects matters within that jurisdiction (*r*)), the Chancery Division of the High Court, and the local Courts of Lancaster and Durham (as respects lands within the palatinate jurisdiction (*s*)), are respectively enabled

Under which the Court may, in the several cases of—

(*p*) *Pearce* v. *Morris*, 5 Ch. 227.

(*q*) See sect. 1 for the extended meaning given throughout the Act to the expressions "lands," "seised," "possessed," "contingent right," "convey," "conveyance," "trust," "trustee," "lunatic," "person of unsound mind," "devisee," and "mortgagee." The word "land" has been held to include rent-charges, but the order was directed to be amended by adding the word "hereditaments" (Seton, 516; *Re Harrison*). An assignee of a bankrupt (*Re Joyce*, 2 Eq. 576), the executrix of a surviving trustee (*Re Ellis*, 24 B. 426), the heir of a deceased mortgagee (*Re Underwood*, 3 K. & J. 745), and the husband of a *feme covert* trustee (*Re Wood*, 3 D. F. & J. 125), have been held to be "trustees." See Seton, 516 *et seq.*, and Lewin, 1011 *et seq.*, for cases under this Act; and see the Extension Act, 1852.

(*r*) Which does not extend to lands in Ireland (*Re Davies*, 3 M. & G. 278); but as the judges of the Court of Appeal, who have jurisdiction in lunacy, are also judges additional of the Chancery Division for the purposes of lunacy matters, they can under their dual jurisdiction appoint new trustees and make a vesting order as to lands or personal estate in Ireland; *Re Lamotte*, 4 Ch. D. 325; *Re Hodgson*, 11 Ch. D. 888; *Re Smyth*, 34 W. R. 493; *Re Platt*, W. N. (1887), 140. The petition in such a case should be entitled both in lunacy and in the Chancery Division. The Lords Justices sitting in lunacy can make the order; *Re Waugh*, 2 D. M. & G. 279; and see 15 & 16 V. c. 87, s. 15, and c. 55, s. 11; and so may any other of the judges of the High Court or the Court of Appeal, who are entrusted by the Queen's sign manual with the care of lunatics; 38 & 39 V. c. 77, s. 7.

(*s*) S. 21.

Chap. XIII. Sect. 1.

to make an order vesting such lands as are hereafter mentioned in such person or persons, in such manner and for such estate, or releasing the lands subject to such contingent right as is hereafter referred to therefrom, or disposing of the same, as the Court shall direct; and the order is in itself to operate as an assurance, in the several cases of—

a lunatic or infant, being a trustee or mortgagee;

A lunatic or person of unsound mind, or infant, being seised or possessed of any land upon any trust or by way of mortgage (*t*), or entitled to any contingent right in any lands upon any trust, or by way of mortgage (*u*);

or of a trustee, being out of jurisdiction or not to be found;

Or of any person, solely or jointly with any other person or persons, seised or possessed of any lands upon any trust, or entitled to a contingent right in any lands upon any trust, being out of the jurisdiction, or not to be found (*x*);

(*t*) Sects. 3 and 7; see as to lunatic vendors, 16 & 17 V. c. 70, s. 122. Sect. 3 is not confined to the case where a lunatic is sole trustee or mortgagee, but applies to the case where he is one of several; *Zincrafts' Will Trusts*, 33 Ch. D. 414. On the petition of a person absolutely entitled to property, the trustee of which is a lunatic, the Court will not vest the property immediately in him, but will first appoint a new trustee in whom to vest it; *Re Holland*, 16 Ch. D. 672. The Court can appoint a person to transfer a mortgage vested in a person of unsound mind; *Re Nicholson*, 34 Ch. D. 663. The committee of a lunatic mortgagee cannot convey the legal estate under s. 136 of the Lunacy Reg. Act, 1853, but must sell first under that section, and then apply for a vesting order under s. 3 of the Trustee Act; *Re Harwood*, 35 Ch. D. 470. Where an infant trustee is a lunatic, the case comes within the ordinary jurisdiction of the Chancery Division; *Re Arrowsmith*, 6 W. R. 642. Service of the petition on the infant is not necessary; *Re Tweedy*, 9 W. R. 398; *Re Willan, ibid.* 689; but see *Re Adams' Trusts*, 35 W. R. 770. And on the section generally, see *Re Saumarez*, 4 W. R. 658; *Re Ormerod*, 3 D. & J. 249, and cases there cited; *Re Porter's Trusts*, 2 Jur. N. S. 349.

(*u*) Sects. 4 and 8. See cases cited in last note. The costs of proceedings under this Act, rendered necessary by the mortgagee becoming of unsound mind, must be borne by the mortgagee where he is beneficially interested in the mortgage money; *Re Wheeler*, 1 D. M. & G. 436; *Re Stuart*, 4 D. & J. 317; *Hawkins* v. *Perry*, 25 L. J. Ch. 656: but the mortgagor is not entitled to his costs of appearance out of the lunatic's estate; *Re Phillips*, 4 Ch. 629. As to costs where the lunatic mortgagee is trustee for another, see *Re Lewis*, 1 M. & G. 23; *Re Jones*, 2 Ch. D. 70. In all other cases the costs must be paid by the mortgagor; *Re Stuart*, *supra*; *Re Jones*, 2 D. F. & J. 554; *Re Rowley*, 1 N. R. 251.

(*x*) Sects. 9 to 12. See *Lechmere* v. *Clamp*, 31 B. 578; *Re Marquis of Bute's Will*, John. 15. The words "seised jointly" do not apply only to a joint tenancy at law, but are used in their widest sense to include co-parceners; *Re Greenwood's Trusts*, 27 Ch. D. 359.

Or of its being uncertain which of several persons jointly seised or possessed of any lands upon any trust was the survivor (*y*);

or of its being uncertain which of several trustees was the survivor;

Or (where one or more person or persons shall have been seised or possessed of any lands upon any trust) of its not being known whether the trustee last known to have been seised or possessed be living or dead (*z*);

or of its being uncertain whether last trustee be living or dead;

Or of any person seised of any lands upon any trust having died intestate as to such lands without an heir, or having died and its not being known who is his heir or devisee (*a*);

or of trustee dying without an heir;

Or of lands being subject to a contingent right in any unborn person or class of persons, who, upon coming into existence, would, in respect thereof, become seised or possessed of such lands upon any trust (*b*);

or of contingent right being claimable by unborn trustee;

Or of a person jointly or solely seised or possessed of any lands, or entitled to a contingent right therein, upon any trust, being demanded by a person entitled to require a conveyance, assignment, or release of the same respectively, or his agent, to convey, release, or assign the same, but wilfully refusing or neglecting to convey or assign the said lands (*c*) for the space of twenty-eight days next after such demand (*d*).

or of trustee refusing to convey, &c.

(*y*) Sect. 13, "Land," in this and the two following sections does not include "leaseholds;" see *Re Harvey*, Seton, 520; and *Re Mundel*, 8 W. R. 683. But a vesting order as to leaseholds on the appointment of new trustees may be made under the 34th sect., see *Re Driver's Settlement*, 19 Eq. 352; *Re Rathbone*, 2 Ch. D. 483; *Re Dalgleish's Settlement*, 4 Ch. D. 143.

(*z*) S. 14.

(*a*) S. 15. See *Wilks* v. *Groom*, 2 Jur. N. S. 1077. Under this section an order can be made vesting the property in a person absolutely entitled; *Re Godfrey's Trusts*, 23 Ch. D. 205. But the section will probably be now seldom employed, since in cases of a trustee dying after Dec. 31st, 1881, his trust estates devolves on his legal personal representatives; 44 & 45 V. c. 41, s. 30.

(*b*) S. 16.

(*c*) "Or to release such contingent right," seems omitted.

(*d*) 15 & 16 V. c. 55, s. 2, repealing sects. 17 & 18 of former Act; on which see *Rowley* v. *Adams*, 14 B. 130; *Re Crowe's Mortgage*, 13 Eq. 26.

Chap. XIII. Sect. 1.

And may, under certain circumstances, make a vesting order in respect of mortgaged lands in cases of

And where any mortgagee shall have died without having entered into the possession, or into the receipt of the rents and profits (*e*) of the mortgaged lands, and the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, the Court may make an order vesting such lands in such person or persons, in such manner, and for such estate as the Court shall direct, in case—

heir of devisee being out of jurisdiction or not to be found;

An heir or devisee of such mortgagee shall be out of the jurisdiction, or cannot be found (*f*);

or refusing to convey;

Or an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or his agent, have stated in writing that he will not convey the same; or shall not convey the same, for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or his agent;

or of survivor of several devisees being unknown;

Or it shall be uncertain which of several devisees of such mortgagee was the survivor;

or of its being uncertain whether heir or surviving devisee be alive;

Or it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead;

or of no heir or devisee existing or being known.

Or such mortgagee shall have died intestate as to such lands, and without an heir; or shall have died, and it shall not be known who is his heir or devisee (*g*);

And the order is itself to have the effect of an assurance (*h*).

(*e*) S. 19. And see *Re Boden's Trust*, 1 D. M. & G. 57; *Re Hewitt*, 27 L. J. Ch. 302.

(*f*) See *Re Skitter's Mortgage*, 4 W. R. 791; *Re Lea's Trusts*, 6 W. R. 482; *Re Hewitt*, *suprà*.

(*g*) *Re Minchin's Estate*, 2 W. R. 179.

(*h*) It was held that the Court cannot under these provisions vest

Court may appoint a person to convey, &c., instead of making vesting order.

And the Court may, in every case, instead of making a vesting or releasing order, appoint a person to make a conveyance, assignment, release, or disposition of the lands or contingent interest; which, when duly made, is to have the effect of a vesting or releasing order (*i*).

Devolution of mortgaged estates under Conv. Act.

The above-mentioned provisions of the 19th section are now of little practical importance, since the estates, vested by way of mortgage in any person solely, in case of his death subsequently to the 31st of December, 1881, devolve to, and become vested in, his personal representatives, notwithstanding any testamentary disposition made by him (*k*).

As to copyholds.

As respects copyhold or customary lands, a vesting order, if made with the consent of the lord or lady of the manor, is sufficient to pass the lands without surrender or admittance; and it appears that in practice such consent is always required by the Court (*l*); and where it appoints a person to convey such lands, such person may do all acts and execute all instruments for the purpose of completing the assurance (*m*), and which are to be effectual accordingly.

Court may declare what parties are trustees of lands comprised in any suit for specific performance, &c.

And where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, such Court may declare

the legal estate, subject to redemption, in the administrator of an intestate mortgagee in fee, whose heir is unknown, the debt remaining unpaid: *Re Meyrick*, 9 Ha. 116; but this has been overruled: *Re Boden*, 1 D. M. & G. 57; *King's Mortgage*, 5 De G. & S. 644; *Re Led's Trust*, 6 W. R. 482.

(*i*) S. 20. For form of conveyance, see *Ex p. Foley*, 8 Si. 395; and as to the form of order, see Seton, 507.

(*k*) 44 & 45 V. c. 41, s. 30.

(*l*) *Cooper* v. *Jones*, 2 Jur. N. S. 59; he must either appear and consent, or give a certificate of consent; which must be verified by affidavit, *S. C.*; *Ayles* v. *Cox*, 17 B. 581; *Cooper* v. *Jones*, *suprà*; *Bristow* v. *Booth*, L. R. 5 C. P. 80, where the customary heir was out of the jurisdiction.

(*m*) S. 28.

Chap. XIII. Sect. 1.

that any of the parties to the suit are trustees of such lands, or any part thereof, within the meaning of the Act: or may declare concerning the interests of unborn persons who might claim under any party to such suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of the Act: and thereupon the estates, rights, and interests of such persons, born or unborn, may be dealt with by order under the Act (*n*); and by the Partition Act, 1868 (*o*), the Court may make a similar declaration, where in suits for partition it directs a sale, instead of a division of the property.

Execution of instruments by order of the Court.

And now by sect. 14 of the Judicature Act, 1884, where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, the Court may, on such terms and conditions as may be just, order that such a conveyance, contract, or other document shall be executed by such person as the Court may nominate for that purpose; and the conveyance or other document so executed is to operate, and be for all purposes available, as if it had been executed by the person originally directed to execute it (*p*).

Under the Bankruptcy Act, 1883.

Under the Bankruptcy Act of 1883, the operation of the 32nd section of the Trustee Act, 1850, is extended so as to authorize the Court of Chancery to appoint a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) in cases where it appears expedient to do so (*q*).

(*n*) S. 30.

(*o*) 31 & 32 V. c. 40, s. 7.

(*p*) 47 & 48 V. c. 61. See *Re Edwards*, 33 W. R. 578; *Howarth* v. *Howarth*, 11 P. D. 95.

(*q*) 46 & 47 V. c. 52, s. 147; see *Coombes* v. *Brookes*, 12 Eq. 61; *Re Barker's Trusts*, 1 Ch. D. 43; *Re Adam's Trust*, 12 Ch. D. 634. If the bankrupt is willing to resign, and a new appointment can be made under the Conv. Act, 1881, s. 31, a petition should not be presented under the Trustee Act; *Re Gibbons' Trusts*, W. N. 1882, p. 12.

Certain allegations made evidence of facts alleged, if order made thereon.

And under the Trustee Act (*r*), whenever an order shall be made for the purpose of conveying or assigning any lands, or of releasing or disposing of any contingent right, and shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee, or the heir or devisee of a mortgagee, is out of the jurisdiction, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee or the heir or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died, and it is not known who is his heir or devisee, then in any of such cases the fact of an order being made upon such an allegation shall be conclusive evidence of the matter so alleged, in any Court of Law or Equity, upon any question as to the legal validity of the order; but this is not to prevent the Court from directing a reconveyance, &c., if the order is shown to have been improperly obtained.

Escheat of trust and mortgage estates.

And a subsequent section (*s*) re-enacts the 3rd and 5th sections of 4 & 5 Will. IV. c. 23, preventing the escheat, or forfeiture for felony, of property held upon trust or mortgage. The escheat is now extended to the equitable interest (*t*).

Stamp duty on vesting orders.

By section 13 of 15 & 16 Vict. c. 55, vesting and releasing orders, operating as conveyances, are subjected to stamp duty as such.

Interests of vendor, how far capable of being dealt with under Act.

It was observed, in the first two editions of this work, that the words "trust" and "trustee," as defined in the interpretation clause of the Act, would include the case of a vendor who had entered into a valid and subsisting contract for sale, or his representatives; but that the 30th section (*u*) seemed to

(*r*) S. 44: these provisions as to evidence do not seem to apply to orders by the Palatinate Courts.

(*s*) S. 46; and see 15 & 16 V. c. 55, s. 8.

(*t*) 47 & 48 V. c. 71, s. 4.

(*u*) See *ante*, p. 660.

Chap. XIII. Sect. 1.

show that it is not intended that a vendor's interests shall be dealt with under the Act, unless there has been a decree for specific performance, or an express declaration of trust (*x*): and this is now well settled (*y*): nor does the Act enable the Court to vest in a purchaser of leaseholds from a mortgagee with a power of sale, a nominal reversion left in the mortgagor, when the mortgage contains a mere covenant that upon a sale being made the mortgagor will assign the reversion as the purchaser may require (*z*): but it is conceived that it is otherwise, where there is the usual express declaration of trust of the nominal reversion (*a*). In one case where the mortgagor failed to appear, the foreclosure decree was extended to the reversionary term; but the vesting order was postponed until after the decree had been made absolute (*b*).

Cases where without suit the vendor or his heir has been held a trustee for the purchaser.

Where, however, on a sale of copyholds, the vendor had received the purchase-money and covenanted with the purchaser for the surrender of the property, but died before any surrender was made, the Court held on petition that the customary heir, who was under disability, was a trustee for the purchaser, on the ground that the contract had been executed, and appointed a person to convey on his behalf (*c*); and in one case, where a vendor to a railway company of land within their compulsory powers died before the title was accepted, his infant devisee was held to be a trustee under the

(*x*) See *Re Dickinson*, 17 L. T. O. S. 231; and under the 1 W. IV. c. 60, *Ex p. Williams*, 11 Si. 54; *Re Weeding*, 4 Jur. N. S. 707; *Cust* v. *Middleton*, 9 W. R. 242.

(*y*) *Re Carpenter*, Kay, 418; *Re Colling*, 32 Ch. D. 333; and see *Re Burt*, 9 Ha. 289. As to lunatics, see 16 & 17 V. c. 70, s. 122; and see *Re Weeding* and *Cust* v. *Middleton*, *supra*, and cases cited, Seton, 517.

(*z*) *Re Propert*, 22 L. J. Ch. 948. It is singular that V.-C. Wood refers to this case (see Kay, 420), as if there had been an express declaration of trust, instead of a mere agreement to assign.

(*a*) See 2 Dav. pt. 2, 119; *Re Collingwood*, 6 W. R. 536; but see remarks of V.-C. Wood, Kay, 420.

(*b*) *British Empire, &c., Co.* v. *Sugden*, 47 L. J. Ch. 691.

(*c*) *Re Cuming*, 5 Ch. 72; *Re Crowe's Mortgage*, 13 Eq. 26, where a similar order was made against a mortgagor who refused to surrender; *Re Bradley's S. E.*, 34 W. R. 148, where a wife died without having surrendered copyholds which she had by her marriage settlement covenanted to surrender to the trustees.

Act, and at the request of the infant's counsel, a conveyance was ordered to be executed on petition, without any bill having been filed (*d*).

Conveyance of lands contracted to be sold by a deceased person.

But now by virtue of the 4th section of the Conveyancing Act, 1881, where at the death of any person subsequently to the 31st of December, 1881, there is subsisting a contract enforceable against his heir or devisee for the sale of the freehold interest in any land, his personal representatives have power to give effect to the contract by executing a conveyance. But the conveyance will not affect the rights of parties claiming under the deceased (*e*).

In one case, where a vendor, after tender of a conveyance settled by the judge, refused either to convey or to receive the purchase-money, he was declared a trustee within the meaning of the Trustee Acts: and, on the purchaser paying his purchase-money into Court, his solicitor was ordered to execute the conveyance for the vendor (*f*).

Where, on a sale of copyholds, the vendor covenanted to stand seised thereof in trust for the purchaser, until the surrender should be made, he was held to be a constructive trustee within the Acts, without bill filed (*g*): so, also, the heir of a vendor who died before completion of a compulsory sale to a railway company (*h*): so, where an equitable reversionary interest in real estate had been sold and assigned to the purchaser, the legal interest, which had been improperly conveyed to the vendor, was, without suit, vested in the

(*d*) *Re Lowry's Will*, 15 Eq. 78; *sed quære* whether the order would have been made in default of consent by the infant's counsel, see *Re Carpenter*, Kay, 418; and it would seem that the decision cannot otherwise be supported, *Re Colling*, 32 Ch. D. 333.

(*e*) Sub-s. 2.

(*f*) *Warrender* v. *Foster*, cited Seton, 538; and see *Ex p. Mornington*, 4 D. M. & G. 537; and see now the power of the Court to order someone to execute an instrument under 47 & 48 V. c. 61, s. 14; *Re Edwards*, 33 W. R. 578; *Howarth* v. *Howarth*, 11 P. D. 95; *ante*, p. 660.

(*g*) *Re Collingwood*, 6 W. R. 536; *Re Cuming*, 5 Ch. 72, where there does not appear to have been such a covenant.

(*h*) *Re Russell's Est.*, 12 Jur. N. S. 224; cf. *Re Lowry's Will*, 15 Eq. 78.

Chap. XIII. Sect. 1.

purchaser (*i*): so, where a testator directed his executors to sell and apply the proceeds, and afterwards himself contracted to sell, his heir was declared a trustee of the outstanding legal estate (*k*).

Heir of mortgagee held trustee for the legal personal representatives.

Before the recent Conveyancing Act the power of sale in a well-drawn mortgage, usually provided that, if exercised by any person not seised of the legal estate, the person in whom the legal estate should be vested should convey as the person exercising the power should direct. The effect of such a provision was to make the person seised of the legal estate a trustee for the parties entitled to the mortgage money: but, even without it, the executors of a mortgagee might obtain a vesting order as to the legal estate which had descended to his heir; and this, whether the mortgagee had or had not entered into possession (*l*). The necessity for such a clause is now obviated in cases where a mortgage has been executed since the 31st of December, 1881, in reliance on the statutory powers conferred by the Conveyancing Act. In every such mortgage is implied a power of sale (*m*), which is exercisable by any person for the time being entitled to receive and give a discharge for the mortgage money (*n*).

Power of legal personal representatives to convey under V. & P. Act, 1874.

The power of conveying the legal estate, which is given by the 37 & 38 Vict. c. 78 (*o*), to the legal personal representatives of a mortgagee in cases falling within the statute, rendered it unnecessary in those cases to apply for a vesting order under the Trustee Act. The section was, however, held not to enable the personal representative of a mortgagee to convey the mortgaged property to a transferee (*p*), or to a

(*i*) *Re Wilkinson*, 12 W. R. 522.

(*k*) *Re Badcock*, 2 W. R. 386.

(*l*) See *Re Skitter's Trust*, 4 W. R. 791, under the 9th section; *Re Keeler*, 11 W. R. 62, under the 15th section; *Re Boden's Trust*, 1 D. M. & G. 57; *Re Lea's Trust*, 6 W. R. 482, under the 19th section. See also and distinguish *Re Osborn's Trusts*, 12 Eq. 392; *Re Walker's Mortgage*, 3 Ch. D. 209.

(*m*) S. 19.

(*n*) S. 21, sub-s. 4.

(*o*) See sect. 4; and *vide ante*, p. 16.

(*p*) *Re Brooks' Mortgage*, 46 L. J. Ch. 865; *Re Spradbery's Mortgage*, 14 Ch. D. 514.

purchaser under the power of sale (*q*); and it has now been repealed by the Conveyancing Act, 1881, which provides for the devolution, notwithstanding any testamentary disposition, to the personal representatives of any mortgagee, dying subsequently to the 31st of December, 1881, of any estates vested in him solely by way of mortgage (*r*). The case of property vested in a bare trustee was also dealt with by the Vendor and Purchaser Act (*s*), which provided that upon the death of a bare trustee of any corporeal or incorporeal hereditament of which he was seised in fee simple, such hereditament should vest like a chattel real in his legal personal representative. This section was repealed by the Land Transfer Act, 1875 (*t*), as from the 31st of December, 1875, and its operation thenceforth confined to the case of a bare trustee dying intestate. This enactment was in turn repealed by the 30th section of the Conveyancing Act, which applies to all trust estates, whether expressly devised or not.

On foreclosure by equitable mortgagee.

We may also remark that in a foreclosure suit by an equitable mortgagee, the Court, in making the decree absolute, may add a declaration that the mortgagor is a trustee for the mortgagee, and make a vesting order (*u*); so, in a partition suit, an infant may be declared a trustee within the Acts of any estate and interest vested in him, of such portions as are allotted in severalty to the other parceners (*x*).

Section 2.

(2.) *As to the discharge of incumbrances.*

As to the discharge of incumbrances.

Vendor liable for incumbrances

Until the conveyance is executed by all necessary parties, the vendor remains liable in respect to all defects in title. He must, for instance, refund the purchase-money, if the purchaser having paid it, even although having taken

(*q*) *Re White's Mortgage*, 51 L. J. Ch. 856.

(*r*) S. 30.

(*s*) S. 5.

(*t*) S. 48.

(*u*) *Leehmere* v. *Clamp* (No. 2), 30 B. 218; *S. C.* (No. 3), 31 B. 578; but see *Smith* v. *Boucher*, 1 S. & G. 72.

(*x*) *Bowra* v. *Wright*, 4 De G. & S. 265; and see 31 & 32 V. c. 40, s. 6, as to sales under the Partition Act, 1868; Seton, 531; *post*, p. 1302.

Chap. XIII. Sect. 2.

and defects of title until conveyance executed;

possession, be evicted by an adverse claimant (*y*). So, if incumbrances be discovered, he must discharge them, or the purchaser himself may pay them off out of the unpaid purchase-money (if any) (*z*): and a person to whom the vendor has, for valuable consideration and without notice of any particular incumbrance, assigned the unpaid purchase-money, takes subject to the purchaser's right so to apply the same (*a*): but the purchaser, of course, cannot retain any part of it as an indemnity against a contingent charge, against which he has agreed to accept the vendor's covenant (*b*).

Retention of incumbrances out of unpaid purchase-money after conveyance executed.

And in some cases a purchaser may, even after the conveyance is executed, retain out of unpaid purchase-money the amount of incumbrances which then come to his knowledge (*c*). And a purchaser, with notice of an incumbrance which he intends to be discharged, should take care that this is done, or that satisfactory security for its being done is given to him, before he pays his money. Where, on a sale by the Court, a purchaser, with knowledge of an incumbrance, and without waiting to have his requisitions in respect of it answered, accepted the title and took his conveyance, it was held that he was not entitled to look to the purchase-money, which he had paid into Court, as available for the discharge of the incumbrance (*d*).

Discharge of incumbrances under Conveyancing Act, 1881.

The Conveyancing Act, 1881, has provided a mode of making a title where incumbrancers are unable or unwilling to concur. By sect. 5 where land subject to any incumbrance, whether immediately payable or not, is sold, the Court has a discretion, on the application of any party to the sale, to direct or allow payment into Court of such an amount

(*y*) *Cripps* v. *Reade*, 6 T. R. 606; *Johnson* v. *Johnson*, 3 B. & P. 162; *Jones* v. *Ryde*, 5 Taunt. 488, 494; *Aubry* v. *Keen*, 1 Vern. 472; Sug. 549; *secus* where the eviction is after conveyance, see *Thomas* v. *Powell*, 2 Cox, 394.

(*z*) Sug. 552.

(*a*) *Lacy* v. *Ingle*, 2 Ph. 413.

(*b*) *Vane* v. *Lord Barnard* (case of a marriage settlement), Gilb. R. 6.

(*c*) *Vide post*, Ch. XIV. s. 7.

(*d*) *Miller* v. *Pridden*, 3 Jur. N. S. 78.

as when invested in government securities will be sufficient to provide for the incumbrance, with an additional amount not exceeding ten per cent., except in special cases, to meet contingencies. And the Court may thereupon declare the land to be free from the incumbrance, and make any necessary order for conveyance or vesting (*e*).

As to succession duty.

The Succession Duty Act (*f*) has given rise to several questions in connection with the present subject. The first and most important one is, whether, where land is in settlement, *e. g.*, limited to A. for life, with remainder to B. in fee, and A. and B. unite in selling the fee simple, the land will, in the hands of the purchaser, be subject to succession duty at the time at which B.'s estate in remainder would have become an estate in possession, had no sale been effected. This seems clearly the case, if the sale is effected by means of the concurrence of the remainderman, as above supposed; but not where the sale is made in exercise of a power overriding the limitations (*g*). Then comes the question, how, in the case above supposed, the duty must be borne as between the vendors and the purchaser. If the purchaser, when he entered into the contract, had no notice of the state of the title, it seems reasonably clear that he can insist on the duty being borne by the vendors; and even if he bought with notice of the property being in settlement, it seems to be doubtful whether if, as is usually the case, the contract were one entire contract for the purchase of the fee simple in possession—as distinguished from separate contracts for the purchase of the separate interests which in the aggregate make up the fee simple—the vendors might not still be required to discharge the duty. But if a purchaser contract for a reversionary interest, as such, he must be presumed to do so with a knowledge that he is buying a property which

(*e*) Sect. 5. For the circumstances under which this discretion will and will not be exercised, see *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788; *Re Lake and Taylor's Mortgage*, 28 Ch. D. 402; and on sales under the Court, *post*, p. 1316.

(*f*) 16 & 17 V. c. 51.

(*g*) See s. 42.

Chap. XIII. Sect. 2.

is *primâ facie* subject to the duty; and in such a case he cannot (*h*), in the absence of an express stipulation to the contrary in the contract, require the vendor to discharge it (*i*): and it is conceived that he may be called upon to covenant to pay it when due, and to indemnify the vendor against it. It has been held that no duty binds the land in the hands of a purchaser under a power of sale, in respect of the extinction of an annual charge, even although not overridden by the power (*k*). In a recent case, where A. was tenant for life, and B. remainderman in fee, A. and B. conveyed their estates for money to C. in fee, and C. afterwards died, having devised to D. in fee; D. then paid duty on his succession from C. and sold; it was held that on A.'s death subsequently no further succession duty was payable beyond that already paid by D. (*l*). This case is important not only for the point above stated, but also for the other propositions which are laid down in an elaborate judgment by Sir G. Jessel on the subject of succession duty. These may be summarized as follows:—(1) The words in section 15, "have become vested by alienation or by any title not conferring a new succession," mean either by alienation or by any title other than alienation, where neither kind of title confers a new succession. (2) Where the purchaser of a succession dies, and there is a title conferring a new succession, the successor coming in under that title has only to pay one succession duty. (3) The object of the Act in the case of real estate is to let the last succession prevail in distinction to the purpose expressed in section 14 as to personal estate. (4) The words "every past or future disposition of property" in section 2 include an alienation for value, and thus bring a purchaser within the section.

(*h*) *Cooper* v. *Trewby*, 28 B. 194; and *vide ante*, p. 316.

(*i*) See and consider *Barraud* v. *Archer*, 2 Si. 433; 2 R. & M. 751; *Bliss* v. *Putnam*, 7 B. 40; *Hales* v. *Freeman*, 1 Br. & B. 391; *Farwell* v. *Seale*, 18 L. J. Ch. 189.

(*k*) *Dugdale* v. *Meadows*, 6 Ch. 501; see *Lord Hatherley's* judgment, which is rested entirely on the 42nd section, and does not advert to the 5th section.

(*l*) *Re Cooper and Allen's Contract*, 4 Ch. D. 802.

Succession duty on sale under Settled Land Act.

It has been held (*m*), that on a sale under the Settled Estates Act, 1877, the land becomes freed from succession duty, since such a sale operates to revoke the uses of the settlement (*n*), and the duty is therefore shifted from the land to the purchase-money or the investments representing it (*o*). The principle would apparently apply with equal force to a sale under the Settled Land Act, 1882 (*p*); and it is conceived that a purchaser from a tenant for life, selling under the Act, takes the land free from all liability to succession duty.

As to timber.

In purchasing an estate comprised in a past succession, and which has timber upon it, the future liability to succession duty, under the 23rd section of the Act in respect of monies to be received from *subsequent* sales of timber, should be borne in mind: it is conceived that in such a case the vendor is bound to procure an assessment of such future liability, and to pay the amount of the assessment. And he should also produce a proper discharge for the duty, if any, which has become due in respect of sale of the timber cut by him prior to the contract, although it is far from clear that the duty could be made a charge on the ground where the felled timber formerly grew (*pp*).

As to trust estates vested in trustees apparently as absolute owners.

Where, as is commonly the case upon a purchase or loan by trustees, the conveyance or mortgage is taken in their names as joint tenants, without disclosing the trust, and death occurs, a difficulty is sometimes experienced in practice by reason of the provision in the 3rd section of the Act, under which the accruer of interest by survivorship, by reason of the death of a joint-tenant, confers a succession on the survivors. In such a case, the disclosure of the trust may often be the only mode of satisfying a purchaser who persists in requiring to be assured that no duty is payable.

(*m*) *Re Warner's S. E.*, 17 Ch. D. 711.

(*n*) 40 & 41 V. c. 18, s. 22.

(*o*) 16 & 17 V. c. 51, s. 2; see and distinguish s. 42.

(*p*) 45 & 46 V. c. 38, s. 20.

(*pp*) 16 & 17 V. c. 51, s. 42.

Chap. XIII. Sect. 2.

Quietus under 2 & 3 Vict. c. 11.

The 2 & 3 Vict. c. 11, s. 10, provided for the registration of a *quietus*, and the discharge of the Crown debtor or accountant from all subsisting and future liability to the Crown, except as to the rents and covenants in leases; and now, under the 23 & 24 Vict. c. 115, satisfaction of a registered Crown debt may be entered up by the Registrar, upon a certificate of the Commissioners, or of the principal officer of the public department holding the bond, being filed.

Discharge of incumbrances under the L. C. C. Act, 1845.

The Lands Clauses Consolidation Act, 1845, enables promoters of undertakings to dispense with the concurrence of incumbrancers who refuse to receive their money, or to release, or who cannot make out a satisfactory title (*q*): and also provides for cases where part only of incumbered lands is required for the purposes of the undertaking.

Section 3.

As to liability of purchaser from trustees to see to application of purchase-money.

(3.) *As to purchaser's liability to see to application of trust purchase-money.*

Since the two earliest editions of this work, there have been three important enactments, which have materially affected the law as to the liability of a purchaser from trustees to see to the application of his purchase-money.

Lord St. Leonards' Act.

By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 23, it is provided that "the *bonâ fide* payment to, and the receipt of, any person to whom any *purchase* or *mortgage* money shall be payable, upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof; unless the contrary shall be expressly declared by the instrument creating the trust or security."

Lord Cranworth's Act.

By Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 29, it is provided that "the receipts in writing of any trustees or trustee, for *any money* payable to them or him, by reason or in exercise of any trust or powers reposed or vested in them

(*q*) See s. 108 *et seq.*; 115 *et seq.*

or him, shall be sufficient discharges for the money therein expressed to be received; and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof;" but the powers given by the Act may be negatived by express declaration, and are restricted to instruments executed after the 28th August, 1860.

The Conveyancing Act.

By the Conveyancing Act, 1881 (*r*), it is provided that "the receipt in writing of any trustees or trustee for any money, securities, *or other personal property or effects*, payable, transferable, or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication, thereof;" and the powers given by this section not only apply to trusts created before or after the 31st of December, 1881, but also cannot be restricted by express declaration.

Remarks on statutory powers.

These statutory powers (which, it will be observed, are most comprehensive in the last statute) have for the future, in cases falling within their scope, rendered the subject which we are now considering of little practical moment; but it is still necessary, with respect to old titles, to consider in what cases, independently of legislative enactment, trustees were competent to give valid receipts, since the provisions of the Conveyancing Act can only apply to receipts given since the 31st of December, 1881.

The doctrine as to the liability of a purchaser from trustees to see to the application of his purchase-money could not, apart from the above acts, be considered to be precisely defined, and is still important with reference to purchases from trustees made prior to the 1st of January, 1882: but the general principles, which were enunciated by

(*r*) S. 36.

Chap. XIII. Sect. 3.

the author in former editions as the foundation of the rule, have been confirmed by later authorities, and are here again repeated. And it must always be remembered that in every case the question still remains whether there is any trust or power under which "the money securities or other personal property or effects are payable, transferable, or deliverable."

Purchaser's exemption from liability to be tested by intention of author of trust.

Primâ facie, every purchaser from trustees was, in Equity, bound to see to the application of his purchase-money; and the question whether he was, in any particular case, exempt from this liability seems to have been simply one of *intention* on the part of the author of the trust: or, in other words, the power of his trustees to give receipts depended solely upon the degree of confidence which he had, either expressly or impliedly, reposed in them.

As either expressed or implied.

This intention might be either expressed or implied. Expressed; as where the will or trust deed contained a clause which, in terms, empowered the trustees to give valid discharges for the purchase-money. Implied; as where the trusts were of such a nature as that a contrary intention could not reasonably be attributed to the author of the trust.

Matters posterior to the creation of the trust neither take away,

And if this intention were expressed, or could be implied, the trustees, upon a sale apparently in pursuance of the trust, had, under all circumstances, a power to give receipts. Of course, it might be shown that the sale was in fact a breach of trust: but then the objection was to the sale itself, and was not a question of application of purchase-money.

nor confer a power to give discharges.

And, on the other hand, where this intention was not expressed, and could not be implied, the mere fact that the parties beneficially interested at the time of sale were infants, or unascertained, or any other similar circumstance, would not enable the trustees to give a valid discharge; but the purchaser was bound to see to the application of the money.

What circumstances attending the trust confer such a power by implication—trusts being for payment of debts

For instance,—to consider, first, the question of implied intention, and what sufficiently indicates it—where the trust (*s*) is for payment of debts generally, or for payment of debts generally in priority to, or along with specified debts, legacies, or annuities, the trustees take, by implication, a power to give discharges; for no purchaser upon a sale during the existence of general debts, could be expected to take an account of them (*t*). So, where the trust is for payment to a person or persons who *may* be unascertained, or under age, or subject to any other incapacity or inability to receive the purchase-money, and a sale during the existence of such uncertainty, minority, incapacity, or inability, seems contemplated by the author of the trust: for, if the trustees cannot receive the money, there would, upon a sale under such contemplated circumstances, be *no* hand to receive it (*u*). So, where the money "is to be applied upon trusts which require time and discretion" (*x*); for no purchaser could be expected to involve himself therein. So, where the money is to be invested, it is sufficient if the purchaser see that this is done, and that a declaration of trust is executed (*y*).

or in favour of unascertained or incompetent *cestui que trust*;

or requiring time and discretion;

or where money is to be invested.

So, executors can give a good discharge for the purchase-money of chattels real, although specifically bequeathed (*z*):

So, executors can give good discharges;

(*s*) Including under the term, a fiduciary power of sale, such as is created by a mere charge of debts, although subject thereto the estate be devised over; *Dolten* v. *Hewen*, 6 Mad. 9.

(*t*) *Johnson* v. *Kennett*, 3 M. & K. 624; *Eland* v. *Eland*, 4 M. & C. 420; *Forbes* v. *Peacock*, 1 Ph. 717; *Page* v. *Adam*, 4 B. 269, 283; *Glynn* v. *Locke*, 3 D. & War. 11, 22; *Robinson* v. *Lowater*, 5 D. M. & G. 272; *Dowling* v. *Hudson*, 17 B. 248; *Re Langmead*, 7 D. M. & G. 353; and see *Stroughill* v. *Anstey*, 1 D. M. & G. 635.

(*u*) *Sowarsby* v. *Lacey*, 4 Mad. 142; *Lavender* v. *Stanton*, 6 Mad. 46; *Balfour* v. *Welland*, 16 V. 151; *Breedon* v. *Breedon*, 1 R. & M. 413.

(*x*) Sug. 659; citing *Doran* v. *Wiltshire*, 3 Sw. 699.

(*y*) Sug. 660.

(*z*) See *Ewer* v. *Corbet*, 2 P. Wms. 148; *Burting* v. *Stonard*, *ibid.* 150; *Andrew* v. *Wrigley*, 4 Br. C. C. 125. But as the executor's assent vests the term in the legatee, it is desirable to have the latter's concurrence in the sale: see *Thomlinson* v. *Smith*, Finch, 378; *A.-G.* v. *Potter*, 9 Jur. 241; see 2 Wms. Exors. 937, n. (*i*). As to evidence of assent, see *Trail* v. *Bull*, 1 Coll. 352; *Cole* v. *Miles*, 10 Ha. 179; *Fenton* v. *Clegg*, 9 Ex. 680. Where the executor is himself the legatee, the title is clearly good: *Taylor* v. *Hawkins*, 8 V. 209; unless he be apparently selling for an im-

Chap. XIII. Sect. 3.

for an appointment of an executor, is, in effect, a bequest to him of the personalty in trust to sell for the payment of general debts. And the same rule seems to apply to cases where executors take, either expressly or by implication, a power to sell freeholds or copyholds, and the proceeds of sale are to be applied by them as a mixed fund with the residuary personal estate (*a*) : and, as respects chattels real, it has been held that any one of several executors can sell, and can give a good discharge for the entire purchase-money (*b*) ; although the power of either party to enforce specific performance of a contract entered into by less than the entire body of executors seems doubtful (*c*).

or any single executor.

In what cases no such power is implied.

But, on the other hand, where the trusts are for payment of the purchase-money, or some definite part of it, to some ascertained person or persons, whose incapacity or inability to receive the same at the time of sale does not appear to be contemplated by the author of the trust, there is no sufficient indication of an intention that the trustees shall give good discharges: and the purchaser was therefore bound, previously to the Acts above referred to, to see to the application of the whole or part (as the case may be) of the purchase-money.

Where trust is for definite payments to ascertained and competent parties.

For instance, where the trust (as respects the whole or some definite portion of the purchase-money) is to pay scheduled or specified debts only (*d*), or legacies only (*e*), or legacies and scheduled or specified debts only, or to divide it between two or more adults (*f*), in all these and similar cases, as nothing seems to be contemplated which would impose upon a purchaser any greater hardship than that of

proper purpose ; *Elliot* v. *Merryman*, Barn. C. 78, 81; *Cole* v. *Miles*, *suprà*; *Brettle* v. *Burdett*, 2 D. J. & S. 244, and cases there cited.

(*a*) *Tylden* v. *Hyde*, 2 S. & S. 238 ; *Jones* v. *Price*, 11 Si. 557.

(*b*) *Cole* v. *Miles*, 10 Ha. 179 ; *Sneesby* v. *Thorne*, 7 D. M. & G. 399.

(*c*) *Sneesby* v. *Thorne*, *ibid.* p. 403.

(*d*) *Lloyd* v. *Baldwin*, 1 V. sen. 173 ; *Ithell* v. *Beane*, *ib.* 215 ; *Binks* v. *Lord Rokeby*, 2 Mad. 227, 238 ; Sug. 658 ; see *Cotterel* v. *Hampson*, 2 Vern. 5, where the trust was to pay certain specified expenses, and invest the residue.

(*e*) *Johnson* v. *Kennett*, 3 M. & K. 630 ; *Horn* v. *Horn*, 2 S. & S. 448.

(*f*) *Forbes* v. *Peacock*, 12 Si. 528, 546.

paying the whole, or a definite part (as the case may be), of his purchase-money, to A., the beneficial, rather than to B., the legal, owner of the property, no intention can be implied of relieving the purchaser from his *primâ facie* obligation of seeing that his money reaches the hand substantially entitled to it.

The question is one of construction, not of convenience.

In any of the above cases, where the original incapacity of the trustees to give a good discharge is admitted, no judicial mind could, it is conceived, hold for a moment that such incapacity was removed by the mere accidental absence or incompetency of the *cestui que trust;* and this, if admitted, leads clearly to the conclusion that in the general class of cases under discussion, the question is one of construction, or intention, and not of convenience: for if convenience be the test, then the incompetency of a *cestui que trust* would always create competency in the trustee.

Subsequent events immaterial;

And it appears to be consistent with authority to say, that the power, or want of power, (as the case may be,) to give valid discharges, being dependent upon intention as evidenced in the instrument declaring the trust, is unaffected by any subsequent matter or event.

in cases where power to give receipt is expressed or implied.

This doctrine is, (it is believed,) generally admitted in cases where the intention is evidenced by an express power to give receipts (*g*): and, (it is submitted,) the result cannot be affected by the circumstance of the intention being evidenced by one rather than another set of expressions.

Modern authorities.

Nor are authorities wanting in support of this view: for instance, where the trusts were for payment of debts, and for other purposes also requiring a sale, the non-existence of debts at the time of sale, although disclosed to the purchaser, has been held immaterial (*h*): so, where the trust was to sell

(*g*) *Keon* v. *Magawly*, 1 D. & War. 401.

(*h*) *Page* v. *Adam*, 4 B. 269; *Johnson* v. *Kennett*, 3 M. & K. 624; *Eland* v. *Eland*, 4 M. & Cr. 420; *Forbes* v. *Peacock*, 1 Ph. 717, 722, n.;

Chap. XIII. Sect. 3.

and pay the debts of such creditors as should execute the deed within a specified period, it was held, that, upon a sale after the expiration of that period, and although the creditors were then ascertained, the receipt of the trustees alone was a good discharge; Sir W. Grant observed, "according to the frame of the deed the purchasers were, or were not, liable to see to the application of the money; and their liability could not depend upon any subsequent event" (*i*).

Remarks on *Balfour* v. *Welland*.

This last decision, it is conceived, goes the full length of the rule contended for. In *Page* v. *Adam* (*k*), *Johnson* v. *Kennett* (*l*), and *Eland* v. *Eland* (*m*), the rule was but partially recognized; inasmuch as (they being cases upon wills) it was only decided that the existence of debts at the death of the testator was sufficient: nor did the judgment even in *Forbes* v. *Peacock* (*n*) go any further. In fact, in all these cases, it was sufficient, for the purpose of deciding the question before the Court, to hold that the existence of debts at the death would sustain the power. It appears, however, from the reporter's note to the last case, that Lord Lyndhurst recognized what is here contended for as the true principle; *viz.*, that the question is one of construction or intention;—a principle which has since been in terms recognized by Lord St. Leonards (*o*) and Sir James Parker (*p*)—and it is, of course, evident that in considering a will, upon a question of this nature, it must be held to speak from the date of its execution.

Attainment of majority by infant *cestui que trust*, immaterial, *semble*.

So, if the trust were for immediate sale, and to divide the proceeds among infants, and a sale were not to take place, until some, or even all, of the infants attained majority, the

Sabin v. *Heape*, 27 B. 553; and *vide ante*, p. 66; and see judgment of Lord St. Leonards in *Stroughill* v. *Anstey*, 1 D. M. & G. 653, 654; Lewin, p. 456 *et seq.* and cases there cited.

(*i*) *Balfour* v. *Welland*, 16 V. 151, 156.

(*k*) 4 B. 269.

(*l*) 3 M. & K. 624.

(*m*) 4 M. & Cr. 420.

(*n*) 1 Ph. 717.

(*o*) *Stroughill* v. *Anstey*, 1 D. M. & G. 653.

(*p*) See *Locke* v. *Lomas*, 5 De G. & S. 329.

power of the trustees to give receipts would not be affected: the attainment of majority by the infants would be precisely the same, in principle, as the execution of the deed by the creditors in *Balfour* v. *Welland* (*q*). Unless, however, it is clear that the trustees have got the legal estate, it is prudent in such a case to obtain, if possible, the concurrence of the adult *cestui que trust*, as, in the absence of the legal estate, the defence of purchase for valuable consideration will be useless, the entire equitable estate having passed from the trustees to the *cestui que trust*.

Nor can subsequent events confer such a power.

And, on the other hand, if the intention to confide such a power to the trustees be not evidenced by the instrument creating the trust, subsequent events will not confer it on them: if, for instance, the trust be to sell and divide the proceeds between A. and B., and they so deal with their interests as to vest the beneficial estate in infants, or to make it the subject of contingent rights, so that a valid discharge by themselves or parties claiming under them becomes impracticable, this, it is conceived, would clearly not enlarge the powers of the trustees.

Distinction between the above cases and those in which, all the purposes of the trust being satisfied, the sale is a breach of trust.

But cases where, as in *Forbes* v. *Peacock* (*r*), the trustees have power to sell for several purposes, and it is held to be immaterial that the purchaser has notice of the non-existence of that particular purpose, the contemplated existence of which alone indicated an intention to confer a power to give receipts, must be carefully distinguished from cases where a purchaser has notice that the *sole purpose* of the trust is satisfied. In the one case, the only question is, whether the trustees can give a good discharge for the money: and it has been held, and (it is submitted) properly held, that the confidence of the author of the trust is to be considered, not as varying, or temporary, but uniform and co-extensive with the duration of the trust. But, in the other case, *the trust*

(*q*) 16 V. 151. Cf. *Re Cotton and London School Board*, 19 Ch. D. 624.

(*r*) 1 Ph. 717; and *vide ante*, p. 65.

Chap. XIII. Sect. 3.

for sale no longer exists: so that if, in *Forbes* v. *Peacock*, the payment of debts had been the *only* object for which a sale was authorized, the purchaser, having implied notice that the debts were paid, would have also had notice that the sale itself was a breach of trust (*s*). So if, in dealing with an executor, the purchaser know that all the purposes, for the performance of which the Law empowers him to sell have been already answered (*t*), or that he is selling not for the purposes of the trust (*u*), or that he is selling for his own private benefit, the sale will be impeachable in Equity (*x*): and a mortgagee or purchaser who has notice that the executor is dealing with the assets in part, but not altogether, for administration purposes, is bound, if the transaction come to be impeached, to show how much of the money raised was, in fact, properly raised (*y*): so, if a trustee sell to pay his own debts, or for any other unauthorized purpose, and the purchaser have notice that such is the case (*z*): but the mere fact of a beneficial devisee and executor, who has an estate subject to a charge of debts, selling it as his own, is no evidence of an intended breach of trust; for he is in truth the owner, subject to the charge, and it is his duty to satisfy the debts, which the sale may be the very means of enabling him to do (*a*): and such a devisee can make a good title to a purchaser or mortgagee without the concurrence of his co-executors; although the will contains a general, in addition to the specific, charge of debts and

Improper sale by executor to purchaser with notice confers no title.

(*s*) 1 Ph. 721; *Watkins* v. *Cheek*, 2 S. & S. 199; *Eland* v. *Eland*, 4 M. & C. 427; and cf. *Stroughill* v. *Anstey*, 1 D. M. & G. 651.

(*t*) *Ewer* v. *Corbet*, 2 P. W. 148.

(*u*) *Howard* v. *Chaffers*, 2 Dr. & S. 236.

(*x*) *Elliot* v. *Merryman*, 1 Wh. & T. L. C.; Sug. 661; *Chambers* v. *Howell*, 11 B. 6; *Miles* v. *Durnford*, 2 D. M. & G. 641; *Stroughill* v. *Anstey*, 1 D. M. & G. 648; *Haynes* v. *Forshaw*, 11 Ha. 99; *Collinson* v. *Lister*, 7 D. M. & G. 634.

(*y*) *Carter* v. *Sanders*, 2 Dr. 248.

(*z*) See *Eland* v. *Eland*, 4 M. & C. 427; and see *Rogers* v. *Rogers*, 6 Si. 364; *Braithwaite* v. *Britain*, 1 Ke. 206; *Stroughill* v. *Anstey*, 1 D. M. & G. 654; *M'Neillie* v. *Acton*, 4 D. M. & G. 744; *Colyer* v. *Finch*, 5 H. L. C. 905; *Howard* v. *Chaffers*, 2 Dr. & S. 236; *Walker* v. *Taylor*, 8 Jur. N. S. 681.

(*a*) *Eland* v. *Eland*, *suprà*; *Higgins* v. *Shaw*, 2 D. & War. 356; *Stroughill* v. *Anstey*, *suprà*; *Dowling* v. *Hudson*, 17 B. 248.

legacies (*b*). And where a trustee professedly sells for payment of debts, or for any other authorized purpose, he is not bound to prove the existence of debts, or to give any information respecting them (*c*).

Purchaser with notice that sale is unauthorized.

Where, however, the purchaser has notice, or the circumstances are such that he must be presumed to have had notice, that the sale is being made for an unauthorized purpose, he takes the property subject to all the liabilities of the trust (*d*). But the fact of the devisee including in the sale or mortgage other property of his own, raises no presumption that he is dealing with the devised property for any improper purpose (*e*). Nor does the fact that the vendor is interested in the property in other capacities than that of executor, where there is a charge of debts, impose on the purchaser any obligation to see to the application of the purchase-money, or to inquire in what capacity the vendor is selling, if in one of them he has the power (*f*). And, so, where a person had power as executrix to sell, but did in fact sell as trustee, which office she also held, but under which she could make no title, the purchaser was held not liable to see to the application of the purchase-money (*g*).

Voluntary conveyance by trustee to devisee.

It has been held that where there is a general charge of debts and legacies, a voluntary conveyance (*h*) from the trustee and executor to the beneficial devisee, reciting that the debts and legacies are all paid, confers a good title (*i*). This decision seems to have rested on the unsatisfactory ground of the

(*b*) *Corser* v. *Cartwright*, 8 Ch. 971; L. R. 7 H. L. 731.

(*c*) *Forbes* v. *Peacock*, 1 Ph. 717; *Mather* v. *Norton*, 21 L. J. Ch. 15; *Sabin* v. *Heape*, 27 B. 553; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; *Re Molyneux and White*, 13 L. R. Ir. 382; *Re Ryan and Cavanagh*, 17 L. R. Ir. 42.

(*d*) *Walker* v. *Taylor*, 8 Jur. N. S. 681; *Watkins* v. *Cheek*, 2 S. & S. 199; *Corser* v. *Cartwright*, L. R. 7 H. L. pp. 741, 743.

(*e*) *Barrow* v. *Griffith*, 11 Jur. N. S. 6.

(*f*) *Corser* v. *Cartwright*, *supra*.

(*g*) *West of England Bank* v. *Murch*, 23 Ch. D. 138.

(*h*) Which, however, could have operated only as a release, as he took no estate.

(*i*) *Storry* v. *Walsh*, 18 B. 559.

Chap. XIII. Sect. 3.

inconvenience of binding the purchaser from the devisee to see to the performance of an indefinite trust: such inconvenience being considered not as an element in deciding the true construction of the trust instrument, but with reference merely to circumstances as existing at the time of the sale.

Distinction between the above and cases where object of the sale is to provide for deficiency in personal estate.

Somewhat similar in principle to the distinction above referred to is that which exists between cases where the trustee is to sell, and apply the proceeds in making good a deficiency in the personal estate to answer debts and legacies, and those in which he is only authorized to sell in the event of the personal estate proving deficient. In neither case is there any difficulty as to payment of the purchase-money to the trustee: for it cannot be presumed to have been intended that a purchaser should involve himself in the administration of the estate. And even in the second of the two cases, if there be a mere trust for sale, and a good title can, independently of its exercise, be made to the legal estate, a purchaser will, it appears, be protected from the necessity of ascertaining the existence of a deficiency, although the trust instrument do not (as it should) contain a declaration to that effect (*k*). But if there be a *mere power* of sale, the title to the legal estate will depend upon the occurrence of the specified event (*l*): and the trustees' receipt clause will be ineffective unless it be so worded as in terms to enlarge the power (*m*).

Purchaser, when entitled to evidence of estates being sold in due rotation.

And where a testator devised estates A. and B., upon trust, if any debts remained unpaid, to sell first A., and then (if necessary) B., it was held that while estate A. remained unsold a good title could not be made to B., without clear

(*k*) Sug. 662. It is clearly otherwise where the purchaser has notice that the debts have all been paid; *Carlyon* v. *Truscott*, 20 Eq. 348.

(*l*) See *Dike* v. *Ricks*, Cro. Car. 335; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Culpepper* v. *Austin*, *ib.* 221; Sug. 662.

(*m*) See Sug. 663. *Lord Rendlesham* v. *Meux*, 14 Si. 249: where the opinion of the trustees was in terms made the test of the necessity for a sale.

evidence being adduced that the proceeds of A. would be insufficient for the purposes of the trust (*n*).

On death of vendor, purchase-money is payable to executor.

Where a testator himself contracts to sell the estate, the purchase-money must be paid to his executor; and the ordinary receipt clause in the will does not enable his trustees to give a discharge for it, although the estate be devised to them in trust to complete the contract (*o*).

Surviving trustees, when able to sell, and receive purchase-money.

It has been held, that where the instrument creating the trust *directs* that any vacancy in the trust shall be filled up within a specified period, which direction is not complied with, the surviving trustees can nevertheless sell and give a good discharge for the purchase-money under the usual receipt clause (*p*): but this doctrine should perhaps be cautiously acted on.

Sale by continuing trustees when trust instrument provides for appointment of new trustees.

In one case, where real estate was vested in three trustees upon trusts for sale, and the trust instrument contained a power for the appointment of new trustees, and "thereupon" the property was to be conveyed to the continuing and new trustees, and upon the appointment of a new trustee no conveyance was made, the two old trustees were held competent to convey, on the purchase-money being paid to them and the new trustee (*q*).

Disclaimer by trustees extinguishes powers.

Where realty was devised in trust for sale, with power for "the trustee acting in the execution of the trusts" to give receipts, and the devisee and executor disclaimed; it was held by Lord Romilly that the heir of the testator, having taken out administration with the will annexed, could sell the estate, and give a valid discharge for the purchase-money (*r*); but this has been in effect overruled by a later

(*n*) *Pierce* v. *Scott*, 1 Y. & C. 257.

(*o*) *Eaton* v. *Sanxter*, 6 Si. 517. In cases coming within sect. 4 of the Conveyancing Act, 1881, the executors can now convey and complete the contract.

(*p*) *Warburton* v. *Sandys*, 14 Si. 622.

(*q*) *Welstead* v. *Colville*, 28 B. 537; *Noble* v. *Meymott*, 14 B. 471; Lewin, 650.

(*r*) *Austin* v. *Martin*, 29 B. 523.

Chap. XIII. Sect. 3.

case (*s*), where it was properly held by Lord Westbury that where lands are devised to trustees in fee upon trusts or with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will. But a power to sell real estate, exercisable by the testator's "executor or administrator for the time being," may be exercised by his administrator *durante minoritate* (*t*).

Payment to trustees, some of whom are not duly appointed, whether valid.

It has also been held that payment of money to three persons, nominally trustees, but only one of whom was competent to receive it, and a joint and several receipt given by the three, sufficiently discharged the purchaser (*u*). This also, it is conceived, is a doctrine open to observation: it is clear that the effect of such a mode of payment might often be to bring the money under the sole eventual control of persons who had no right whatever to deal with it.

Cooke v. *Crawford.*

In one case, which has been frequently questioned, but never overruled, where there was a devise of a fee simple estate to trustees, upon trust that they, or the survivors or survivor of them, or the heirs of such survivor, (without mentioning the "assigns,") should sell, it was held that the devisees of the surviving trustee could not give a good title to a purchaser (*x*); the ground of this decision being that without an express authority the trust could not be delegated. This decision was afterwards dissented from by Sir G. Jessel, M. R. (*y*), who held that, where real estate was

(*s*) *Robson* v. *Flight*, 4 D. J. & S. 608, 613.

(*t*) *Monsell* v. *Armstrong*, 14 Eq. 423; but see *Re Robinson and Sords*, 3 L. R. Ir. 429.

(*u*) *Miller* v. *Priddon*, 18 L. J. Ch. 226, affirmed, on the ground that the trustees were well appointed, 1 D. M. & G. 335.

(*x*) *Cooke* v. *Crawford*, 13 Si. 91; and see a modern case at law, *Stevens* v. *Austen*, 7 Jur. N. S. 873. See, too, comments on *Cooke* v. *Crawford*, in *Wilson* v. *Bennett*, 5 De G. & S. 475, 479; *Ashton* v. *Wood*, 3 S. & G. 436, 445.

(*y*) *Re Osborne to Rowlett*, 13 Ch. D. 774.

devised to trustees "and their heirs" (omitting "assigns") on trust for sale, the trust was to be considered as annexed not to the person, but to the fee simple estate taken by the trustees, so that the trust could be executed by the devisees of trust estates of the surviving trustee. But in a subsequent case (*z*) the Court of Appeal hesitated to accept this view, and expressed their opinion that *Cooke* v. *Crawford* was still good law. And it has recently been held in Ireland (*a*) that, notwithstanding the 30th section of the Conveyancing Act, the doctrine of *Cooke* v. *Crawford* (*b*) still applies to a case where the devise does not mention the heirs of the survivor, on the ground that as the heir would not formerly have been able to sell, and the personal representative is by the section to be deemed the heir, the latter has no larger powers than the heir formerly had.

Where the trust is that the trustee, his heirs and "assigns," shall sell.

It is now settled that where the devise is to the trustees and their heirs upon trust to sell, the heir of the surviving trustee is a trustee under the will and can make a title (*c*). And where the devise is upon trust that the trustees or the survivor of them, his heirs and "assigns," shall sell, the surviving trustee, though he cannot transfer the trust by act *inter vivos*, may nevertheless devise it, and the devisee can make a good title (*d*); and it appears to be considered immaterial whether the instrument creating the trust does, or does not, contain a power to appoint new trustees. Where it does not contain such a power, no reasonable explanation of the use of the word "assigns" can be given, unless there is implied in the surviving trustee a capacity to transfer the trust by will (*e*). Where, however, such a power is expressly given, the use of the word "assigns" may be explained without any necessity for implying a right in the trustee to

(*z*) *Re Morton and Hallett*, 15 Ch. D. 143.

(*a*) *Re Ingleby and Norwich Ins. Co.*, 13 L. R. Ir. 326.

(*b*) 13 Si. 91.

(*c*) *Re Morton and Hallett, suprà.*

(*d*) See and consider *Hall* v. *May*, 3 K. & J. 585; *Titley* v. *Wolstenholme*, 7 B. 425; but see *Ashton* v. *Wood*, 3 S. & G. 436.

(*e*) *Titley* v. *Wolstenholme, suprà.*

Chap. XIII. Sect. 3.

devise the trust estate, so as to confer on the devisee an authority to execute the trust; and in such a case the rule above stated is based on the assumption, that the settlor must have intended to provide a permanent machinery for the execution of the trust, and must be taken to have contemplated the possible incapacity of the heir of the surviving trustee; whence arises this reasonable inference that, by confiding the trust to the trustee, his heirs and "assigns," he intended to confer upon him a discretionary power of vesting the trust in a devisee (*f*).

Conveyancing Act, 1881, s. 30.

These questions have, however, become altogether unimportant in cases where the testator has died subsequently to the 31st of December, 1881, since by sect. 30 of the Conveyancing Act, 1881, trust estates in all cases, and notwithstanding any testamentary disposition, pass to the personal representatives for the time being of the deceased, who are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. Apparently the only cases in which it is possible that the old learning can now be of any importance are: *first*—where the last surviving trustee dies without having appointed an executor, so that the personal representative when appointed is an administrator whose title does not relate back: and in such a case it would seem that the heir-at-law or devisee, as the case may be, may still have power to make a title under the old law (*g*); *secondly*—where the heir would, under the old law, have been unable to make a title as not being within the terms of the instrument creating the power: *e. g.*, where the power was to the trustees and the survivor of them without any mention of the heirs of the survivor (*h*).

All trustees must join in receipt.

In the case of several trustees, all who have not effectually disclaimed (*i*) must join in the receipt (*k*); although any

(*f*) See judgment of V.-C. Wood in *Hall* v. *May*, *suprà*; Lewin, 232.

(*g*) But see *Re Pilling's Trusts*, 26 Ch. D. 432, where Pearson, J., expressed a doubt on this point. See *Re Williams' Trusts*, 36 Ch. D. 231, for the means of getting over the difficulty.

(*h*) *Re Ingleby and Norwich Ins. Co.*, 13 L. R. Ir. 326.

(*i*) As to which see Lewin, 471.

(*k*) See *Crewe* v. *Dickin*, 4 V. 97; Sug. 664.

one alone can give a valid discharge at Law (*l*): and in one case it appears to have been intimated by an eminent judge, that, even in Equity, payment to one of several trustees upon a receipt signed by all would discharge the purchaser (*m*); and, in another case, the Court seems to have held that such a receipt would discharge the purchaser, although the money was in fact paid not to the trustees, but, by their direction, to a stranger (*n*); but these decisions can no longer be regarded as sound law. As a general rule, under ordinary circumstances, trustees are not justified in allowing their solicitor or other agent to receive purchase-money which ought to be paid personally to them (*o*). Nor has the 56th section of the Conveyancing Act, 1881, affected the necessity of payment either to the trustees, or to their joint account at a bank (*p*). Where the trustees have the estate and not a mere power of sale, the concurrence of a disclaiming trustee is unnecessary in Equity (*q*); even although the receipt clause specially refer to receipts by the trustees or the *survivor*, &c. (*r*): but a mere

(*l*) *Husband* v. *Davis*, 10 C. B. 645.

(*m*) See *Webb* v. *Ledsam*, 1 K. & J. 338, considered in *Re Bellamy and Metr. Board of Works*, 24 Ch. D. 387; *Charlton* v. *Earl of Durham*, 4 Ch. 433.

(*n*) See and consider *Hope* v. *Liddell*, 21 B. 202, 203; *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56; but this is a principle which must be very cautiously acted on; see Lewin, 473; *vide infrà*.

(*o*) *Per* Cotton, L. J., in *Re Bellamy and Metr. Board*, 24 Ch. D. at p. 387; *Re Flower and Metr. Board*, 27 Ch. D. 592, 597.

(*p*) *Ibid.*

(*q*) *Crewe* v. *Dickin*, 4 V. 97, 100; *Nicloson* v. *Wordsworth*, 2 Sw. 375; *Hawkins* v. *Kemp*, 3 Ea. 410, 421, 434, 437.

(*r*) *Adams* v. *Taunton*, 5 Mad. 435. The fact of the receipt clause being so worded does not appear by the report, but it is stated in a MS. opinion of the late Mr. Duval, who caused the will to be searched for, with reference to Lord Eldon's observation on *Crewe* v. *Dickin* in 2 Sw. 371. The following remarks, taken by permission from an opinion given by Mr. Hayes, are pertinent to the matters treated of in the text: "As a general rule, where the legal estate is vested in two or more as trustees for sale or other purposes, *the trust survives and devolves with the estate*, notwithstanding any loose expressions of a different tendency; which, in sound construction, ought to be rejected as informalities, or reconciled with a due regard to the nature of the property and other circumstances. In such cases (*i.e.*, where the trust is created in respect of an estate vested in the trustees) it ought to be treated as wholly immaterial whether in point of form the trust is simply 'to sell, &c.,' or 'that they the said trustees do and shall sell, &c.,' or 'that they the said trustees

Chap. XIII. Sect. 3.

power of sale is strictly construed, and can only be exercised by the persons who are, expressly or by reference, designated as donees of the power, in the trust instrument (*s*); except where, in the case of executors, the disclaimer of some of them is remedied by statute (*t*). But now by sect. 6 of the Conveyancing Act, 1882, it is provided that any person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power, and that on such disclaimer the power may be exercised by the other or others of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power. And it has been held in Ireland that a renunciation of probate by an executor is equivalent to a disclaimer by deed and falls within the section (*u*).

Reference to power of sale in prior instrument, held not to extend to power to give receipts.

Where a testatrix purported to give to a tenant for life the same powers of sale and exchange as were given by her father's will to his trustees, this was held to confer no power to give receipts, although such a power was contained in the father's will (*v*).

or the survivor, &c.,' or 'that they the said trustees, their heirs or assigns, *or* their heirs, executors, administrators, or assigns,' &c., &c., and so as to the power to give discharges, &c. It must be confessed, however, that this plain rule has been lost sight of in some of the later cases; and that, in deciding upon the effect of such expressions, *trusts* have been confused with *powers*, to an extent which renders it very difficult to advise upon titles which involve questions of this nature. Another sound rule is that trustees have impliedly all the powers of giving discharges, &c., which are requisite to enable them to execute the trusts with effect. But this rule has also been much broken in upon by decisions which greatly embarrass its application in practice."

(*s*) See *Townsend* v. *Wilson*, 1 B. & Ald. 608; *Hall* v. *Dewes*, Jac. 189, 193; *Wilson* v. *Bennett*, 5 De G. & S. 475; *Newman* v. *Warner*, 1 Si. N. S. 457, and cases cited; and *Brassey* v. *Chalmers*, 16 B. 235, rev. 4 D. M. & G. 528; *Lane* v. *Debenham*, 11 Ha. 188; *Hinde* v. *Poole*, 1 K. & J. 383; *Saloway* v. *Strawbridge*, 1 K. & J. 371; aff. 7 D. M. & G. 594; and see *Monsell* v. *Armstrong*, 14 Eq. 423; *Re Robinson and Sords*, 3 L. R. Ir. 429.

(*t*) 21 Hen. VIII. c. 4, s. 1, which gives the power to the acting executors. There is no corresponding statute in Ireland; and it was therefore held that where there was a mere power in the executors to sell, it could not be exercised by the acting executor after the renunciation of the other; *Thompson* v. *Todd*, 15 Ir. Ch. R. 337. But see and distinguish *Re Fisher and Haslett*, 13 L. R. Ir. 546.

(*u*) *Re Fisher and Haslett*, *supra*.

(*v*) *Cox* v. *Cox*, 1 K. & J. 251.

Trustees appointed by the Court.

When the trust-instrument contains no power to appoint new trustees, trustees duly appointed by the Court, were, if competent to sell, competent also to exercise the power of giving discharges for the purchase-money (*x*); and also to exercise any discretionary powers given to the trustees or trustee for the time being (*y*); or which, by fair construction, might be considered to be annexed to the office (*z*): and, by a modern enactment, every trustee appointed by the Court, whether before or after the passing of the Act, has the same powers, authorities, and *discretions*, and may in all respects act, as if he had been originally nominated a trustee by the instrument creating the trust (*a*).

Investment in breach of trust; power of trustees to sell or release.

When, as frequently happens, trust moneys have, in breach of trust, been invested upon mortgage, or in the purchase of real estate, and the trust appears upon the title, a question often arises as to the competency of the trustees to deal with the property without the concurrence of their *cestuis que trust*. In the case of a mortgage, if the entire amount advanced is cleared by the sale, no difficulty, it is conceived, can exist; as the trustees do only their duty in remedying the breach of trust and realising the fund. Even where less than the sum advanced is realised, it seems to be the opinion of some experienced equity lawyers, as well as conveyancers, that the purchaser acquires a good title. The practical inconvenience of a contrary doctrine is, perhaps, the strongest argument in favour of this conclusion. Where trustees had, in breach of trust, advanced the trust fund upon a third mortgage, and then joined with the mortgagor and first and second mortgagees in selling the property, but received no part of the purchase-money, which was insufficient to pay off the prior charges, opinions in favour of

(*x*) *Drayson* v. *Pocock*, 4 Si. 283; *Newman* v. *Warner*, 1 Si. N. S. 457, 461.

(*y*) *Bartley* v. *Bartley*, 3 Dr. 384.

(*z*) *Byam* v. *Byam*, 19 B. 58; where the discretionary power was given to "the *undersigned* trustees" of marriage articles, but was considered to be conferred upon them in their character of trustees, and not as individuals; see *ibid.* p. 66.

(*a*) 44 & 45 V. c. 41, s. 33.

Chap. XIII. Sect. 3.

the title were given by eminent conveyancers. It was suggested that the power of the trustees to release might be considered to be analogous to the power of assignees in bankruptcy to disclaim in a foreclosure suit; but the title was sustained mainly on the broad principle that a trustee having, whether in due execution of the trust, or in breach of trust, advanced the trust money upon a security which proves to be insufficient, is not only justified in making, but is bound to make, the best of his position (*b*); and is therefore competent by all available means to realise the security; or, if it be worthless, then by abandoning it, to avoid litigation and costs. There seems, however, to be a difficulty in holding that the *cestuis que trust*, who have a lien on the improper security (*c*), can be bound by the trustee's *opinion* as to its worthlessness. Suppose an equity of redemption were mortgaged to A. in trust for B., an infant, and the first mortgagee were to file a bill to foreclose, A. could not by his mere disclaimer bind the infant: there must, it is conceived, be an inquiry whether such disclaimer would be for the infant's benefit. The case of assignees in bankruptcy was, perhaps, hardly analogous: as to them is confided the general administration and winding up of the bankrupt's estate.

So, in case of unauthorized purchase.

In the case of an unauthorized *purchase* with trust funds, the right of the *cestuis que trust* (*d*) to elect to take the property as land instead of money, creates a serious difficulty in the way of a sale by merely the trustees: but where the whole amount originally invested is realised, a *cestui que trust* could scarcely be advised to impeach the sale; unless he had been personally competent, and had previously claimed so to elect. And where there are several *cestuis que trust*, the concurrence of any one of them in the sale, or the personal incompetency of any one of them to elect to take the property as land, would render the sale valid, at any rate if the sum

(*b*) See *Collinson* v. *Lister*, 20 B. 366.

(*c*) *Mant* v. *Leith*, 15 B. 524.

(*d*) See *Wiles* v. *Gresham*, 2 Dr. 258, 270; *Garner* v. *Moore*, 3 Dr. 277.

invested were realised; for the election to continue the property in its state of unauthorized investment must be the act of all (*e*). In a case where trustees under a will who had no power to invest in real estate bought land, and afterwards contracted to sell it, and the purchasers required the concurrence of all the beneficiaries, it was held that they must be satisfied with the consent of one only, since the concurrence of that one alone was sufficient to show that all the beneficiaries had not elected to take the property in its unauthorized condition (*f*).

Where a settlement contained a power to vary securities, a mere declaration that purchased realty should be considered personalty, has been held to give the trustees an implied power of sale (*g*).

Whether mortgage trustees can release without receiving purchase-money.

The competency of trustees, upon the sale of a portion only of the property comprised in their security, to release it from the mortgage debt, without receiving the purchase-money or an adequate proportion of it, is also a doubtful point; nor is it altogether clear that the question does not arise, even where the trust instrument contains the usual power to vary securities. Such a power, it may perhaps be contended, refers rather to a calling in of one mortgage and a putting out on another, &c., than to a mere *abandonment* of part of a security. Admitting that the transaction is unobjectionable, if the trustees in fact retain property, the value of and title to which are such that the Court will hold them justified had they originally accepted it as a security for the money, may not the purchaser's title depend upon this being the fact? It is sometimes urged that if the conveyance were to recite that the vendor had, to the satisfaction of the trustees, secured the money by a mortgage of another estate, this would clearly be sufficient to discharge the purchaser: admitting this to be correct, it may yet be argued

(*e*) See *Holloway* v. *Radcliffe*, 23 B. 163.

(*f*) *Re Patten and Edmonton Guardians*, 52 L. J. Ch. 787.

(*g*) *Tait* v. *Lathbury*, 1 Eq. 174.

Chap. XIII. Sect. 3.

that in such a case there would be no ground for presuming that the new security was in any way inferior to the old: whereas this must necessarily be so where there is a mere release of part of the land. Borrowers seldom press too ample a security upon lenders; and it is not to be supposed that the caution exercised by the trustees upon the original advance was *excessive*. An evident increase in the value of the property would, of course, furnish an exceptional case. The preponderance of professional opinion, however, so far as the author has been able to ascertain it, is in favour of the absolute competency of trustees to release under such a power; and of the right of a purchaser of part of the land to assume that they use their power properly, and to abstain from making inquiries if there be nothing in the transaction suggestive of fraud: but the point cannot yet be regarded as settled. So it is conceived that a trustee may release an equity of redemption which is clearly valueless, in order to avoid being made a defendant to a foreclosure suit. In the case of *Pell* v. *De Winton* (*h*), no question appears to have been raised as to the competency of trustees, with a power to vary securities, to release part of the property from the mortgage, on having an adequate portion of their debt satisfied.

Trustees Relief Act—payment into Court under.

The difficulty arising from the inability of trustees, whether vendors or mere incumbrancers, to give discharges for the purchase-money, may generally be overcome by their receiving the money and paying it into Court under the Trustees Relief Act (*i*); or, where the fund is under £500, into a post-office savings bank, under the Acts conferring an equitable jurisdiction on County Courts (*k*), or by an application in Chambers by an originating summons (*l*).

As to application of purchase-money

As respects moneys charged upon the estate by the author of the trust, there is a difference between charges the satis-

(*h*) 2 D. & J. 13; Lewin, 593.

(*i*) See *Cox* v. *Cox*, 1 K. & J. 251; Lewin, 996, n.

(*k*) See 30 & 31 V. c. 142, s. 24.

(*l*) R. S. C. 1883, O. 55, r. 3; and this last course should always be adopted where practicable.

faction of which by means of a sale appears to be contemplated, and those for which the estate seems intended to be a continuing security (*m*).

in payment of charges.

Distinction between cases where estate is intended to be a continuing security for legacy;

If, for instance, a legacy be charged upon the estate and made payable at a future period, (as where it is given to an infant, and made payable, at twenty-one,) and there be nothing to show that the author of the trust intended the property to be sold before the arrival of the time for payment, and discharged from the legacy, no sale can in the interval be safely effected, except subject to the legacy (*n*).

or annuity;

The same remarks apply to a life annuity charged upon the estate (*o*), which in fact stands on precisely the same reasoning, for a life annuity is merely a series of contingent legacies (*p*), payable at stated intervals and without interest. In all these cases the apparent intention of the charge is, that the estate shall remain a security for the money. In the case of portions for children it seems doubtful whether the estate can, except under special powers in the settlement, be discharged from any sums which have not become absolutely vested (*q*).

and those where an immediate sale seems to be contemplated.

If, on the other hand, the moneys charged be made payable at the time appointed for sale, the charge seems to be merely equivalent to a trust for payment out of the proceeds of sale: so, as we have already seen (*r*), when the charge is subject to a prior trust for payment of debts or other general purposes, a purchaser is unaffected thereby (*s*).

Residuary devise—is subject to legacies.

It may be useful here to remark that under a gift of a residue of real and personal estate in a will bequeathing

(*m*) See on a similar point, *Mills* v. *Osborne*, 7 Si. 30.

(*n*) *Dickinson* v. *Dickinson*, 3 Br. C. C. 19.

(*o*) *Elliot* v. *Merryman*, Barn. C. 82.

(*p*) See *Heath* v. *Weston*, 3 D. M. & G. 606.

(*q*) *Sheppard* v. *Wilson*, 4 Ha. 392; *Wynter* v. *Bold*, 1 S. & S. 507, *et contrà Gillibrand* v. *Goold*, 5 Si. 149, where the power was in a special form; *Leech* v. *Leech*, 2 D. & War. 568.

(*r*) *Ante*, p. 673.

(*s*) *Page* v. *Adam*, 4 B. 269.

Chap. XIII. Sect. 3.

legacies, such legacies are held to be charged on the real as well as on the personal estate, although real estate has been previously devised (*t*); the principle being that the whole is given as one mass, and that, the legacies being a part of that mass, the rest of it is given minus them (*u*).

Where there is a mere testamentary charge of debts.

We have hitherto been considering the case of trustees, who are authorized to sell, and who, by the expressed or implied intention of the author of the trust, are competent to give a valid discharge for the purchase-money. In close connection with, or rather forming part of, our present subject is the question as to who are the parties with whom a purchaser may safely deal, where, instead of an express trust for sale, there is a mere testamentary charge for the payment of debts, either with or without a devise of the estate.

Charges, how created.

We may premise that such a charge is created by not only a direct expression of intention to that effect, but even a mere direction that the debts shall be paid (*v*); and the result is the same, although a time be fixed for their payment (*w*). A direction, however, that the debts shall be paid *by the executors* does not create the charge (*x*), the ground for the distinction being that such a direction indicates an intention on the part of the testator that the debts are to be paid only out of the property which passes to the executors (*y*). But if the executors be also devisees of all the testator's interest in the lands, whether beneficially or on trust, the real estate is

(*t*) *Bench* v. *Biles*, 4 Mad. 187; *Francis* v. *Clemow*, Kay, 435; *Gallimore* v. *Gill*, 2 S. & G. 158; aff. 8 D. M. & G. 567; *Preston* v. *Preston*, 2 Jur. N. S. 1040; *Wheeler* v. *Howell*, 3 K. & J. 198; *Greville* v. *Browne*, 7 H. L. C. 689; *Hall* v. *Hall*, 51 L. T. 86. But no such intention is shown, where, after a gift of legacies, the testator devises and bequeaths all his real estate and *all the residue of his personal estate;* and in such a case the real estate is exonerated; *Wells* v. *Row*, 48 L. J. Ch. 476; and see *Gyett* v. *Williams*, 2 J. & H. 429; *Re Brooke*, 3 Ch. D. 630.

(*u*) *Greville* v. *Browne*, 7 H. L. C. 689.

(*v*) *Legh* v. *Earl of Warrington*, 1 Br. P. C. 511; 2 Jarm. 584 *et seq.*

(*w*) *Mirehouse* v. *Scaife*, 2 M. & C. 695.

(*x*) *Brydges* v. *Landen*, 3 V. 550; *Keeling* v. *Brown*, 5 V. 359; *Powell* v. *Robins*, 7 V. 209.

(*y*) *Cook* v. *Dawson*, 29 B. 12

charged (*z*); and this is the case whether the executors take the whole beneficial interest (*a*), or only a life interest (*b*), or an estate tail (*c*), or only a trust estate (*d*). So, too, where the executors, after various specific devises, take the whole of the residuary realty on trust (*e*); or where the whole of the real estate is devised to them upon trust for one of them for life with remainder to the other (*f*). And where the devise to the trustees (who were also executors) in terms passed only a life estate to them, it was held that a mere direction that his debts should be paid, without specifying the person to pay them, showed that the testator intended the executors to take the fee (*g*). The question, however, is one of intention which is to be collected from the whole will (*h*); and it has been held that the intention is not shown where the devise is to one of several executors (*i*), unless the devise to him is expressed to be "*subject as aforesaid*" (*k*). So, too, where, after directing his debts to be paid by his executrix (his wife), the testator gave her a life interest in his estate, with a power of mortgaging it "for her maintenance and comfort," followed by a gift over at her death, the intention to charge the real estate was held not to be so clearly manifested as to enable the widow to force the title on a purchaser (*l*). But Lord Romilly at the same time expressed an opinion that, although the fee was not, the life estate of the widow was charged.

Executors can sell, when:

Where, instead of a mere charge, the testator, either in express terms or by equivalent expressions, directs the land

(*z*) *Aubrey* v. *Middleton*, 2 Eq. Ca. Ab. 497; *Alcock* v. *Sparhawk*, 2 Vern. 228; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, 479.

(*a*) *Henvell* v. *Whitaker*, 3 Rus. 343; *Cross* v. *Kennington*, 9 B. 150.

(*b*) *Finch* v. *Hattersley*, 3 Rus. 345 n.

(*c*) *Clowdsley* v. *Pelham*, 1 Vern. 411.

(*d*) *Dormay* v. *Borradaile*, 10 B. 263; *Hartland* v. *Murrell*, 27 B. 204.

(*e*) *Bailey* v. *Bailey*, 12 Ch. D. 268.

(*f*) *Re Tanqueray-Willaume and Landau*, *ubi suprà*.

(*g*) *Marshall* v. *Gingell*, 21 Ch. D. 790; and see *Creaton* v. *Creaton*, 3 S. & G. 386.

(*h*) *Bailey* v. *Bailey*, *suprà*.

(*i*) *Keeling* v. *Brown*, 5 V. 359; *Warren* v. *Davies*, 2 M. & K. 49; *Wasse* v. *Heslington*, 3 M. & K. 495.

(*k*) *Dowling* v. *Hudson*, 17 B. 248.

(*l*) *Cook* v. *Dawson*, 29 B. 123; 3 D. F. & J. 127.

Chap. XIII. Sect. 3.

to be sold in order that the proceeds of sale may be applied in the payment of debts only, or debts and legacies, or may form a general fund with the moneys arising from the conversion of the personal estate, and no person is named to carry his wishes in this respect into effect, and the land itself is not devised upon trusts for payment or subject to a charge of debts, the executors seem to be the proper parties to sell and give receipts for the purchase-money; and they can make a good title even to the legal estate (*m*).

where there is a mere charge of debts.

So, where there was a mere charge of debts,—either by express words of charge, or by virtue of a general direction that the debts should be paid,—and, subject thereto, the land was so limited by the will as to preclude the possibility or reasonable probability of any sale being effected, except by means of a power in the executors, the executors took an equitable power of sale (*n*). And, although they had not the legal estate (*o*), yet the person in whom the legal estate was vested, whether as trustee, devisee, or heir, was a trustee thereof for the executors, and was bound in that capacity to convey the legal estate to any purchaser with whom the executors had entered into a contract for sale: and, if he refused to do so, the legal estate might by means of the Trustee Act be vested in the purchaser (*p*).

Mere lapse of time does not affect the authority to sell.

Nor does the lapse of a considerable time since the testator's death affect the authority of executors to sell under the power which is implied from a charge of debts. Thus, on the sale of a testator's real estate by the executors of the original executor, the title was forced on the purchaser, notwithstanding that twenty-seven years had elapsed since the

(*m*) *Bentham* v. *Wiltshire*, 4 Mad. 44; *Tylden* v. *Hyde*, 2 S. & S. 238; *Forbes* v. *Peacock*, 11 M. & W. 637; see and consider *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *West of England Bank* v. *Murch*, 23 Ch. D. 138.

(*n*) *Robinson* v. *Lowater*, 5 D. M. & G. 275; *Storry* v. *Walsh*, 18 B. 568; *Hamilton* v. *Buckmaster*, 3 Eq. 323; *Greetham* v. *Colton*, 34 B. 615.

(*o*) *Doe* v. *Hughes*, 6 Ex. 223; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 477.

(*p*) *Hodkinson* v. *Quinn*, 1 J. & H. 303; *Re Wise*, 5 De G. & S. 415.

death of the testator, and seven since the death of the executor; and it was also held that the vendors were not bound to satisfy the purchaser of the existence of debts which rendered a sale necessary (*q*). But it has recently been laid down by the Court of Appeal that twenty years is the reasonable limit within which a sale may be made for payment of debts, on the ground that after that period, as being sufficient to bar mortgage and all other specialty debts, it must be presumed that the debts have been satisfied (*r*). It has, however, been held in a very recent case by Kay, J., that the rule is not to be extended to the case of an executor selling leaseholds (*rr*).

Lord St. Leonards' Act, s. 16.

But in the case of wills coming into operation since the 13th of August, 1859, if the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or of any legacy, or other specific sum of money, and shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee, the executors (if any) have by statute (*s*) a power, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or sum of money by a sale and absolute disposition, or mortgage of the said hereditaments or any part thereof; and the same power devolves to and becomes vested in the persons (if any) in whom the executorship for the time being is vested (*t*); but any such sale or mortgage only operates on the estate and interest, whether legal or equitable, of the tes-

(*q*) *Sabin* v. *Heape*, 27 B. 553; see too *Forbes* v. *Peacock*, 1 Ph. 717, where twenty-five years, and *Wrigley* v. *Sykes*, 21 B. 337, where thirty-three years had elapsed; and *vide ante*, p. 65.

(*r*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 477; which has been followed in Ireland; see *Re Molyneux and White*, 15 L. R. Ir. 382; *Re Ryan and Cavanagh*, 17 L. R. Ir. 42. But it is a question which has not been decided, whether the effect of the Real Property Limitation Act, 1874, as interpreted in the cases of *Sutton* v. *Sutton*, 22 Ch. D. 511, and *Fearnside* v. *Flint*, *ibid.* 579, has not been to reduce the period of twenty years for presuming payment to twelve years.

(*rr*) *Re Whistler*, 35 Ch. D. 561.

(*s*) 22 & 23 V. c. 35, s. 16.

(*t*) The section does not extend to the case of an administrator: *Re Clay and Tetley*, 16 Ch. D. 3.

Chap. XIII. Sect. 3.

tator, and does not render it unnecessary to get in any outstanding subsisting legal estate.

Devisees in trust, sell,—when.

Where, however, the testator charged his real estate with the payment of debts, either expressly or by legal implication, and then devised his real estate to trustees upon trusts which did not include, or even, it may be, negatived the payment of debts by them, there was much doubt whether they or the executors were the proper persons to sell. There was no doubt that they and the executors could together make a good title: but whether either could do so without the others' concurrence was so doubtful that it was never attempted; and consequently the question was never definitely decided. In all the reported cases the trustees have in fact sold, either in the dual capacity of trustees and executors, or with the concurrence of the executors. At the same time there are dicta which seem to imply that the concurrence of the executors was unnecessary (*u*). And this would on principle appear to be the true view, since by a devise to the trustees of the real estate, charged with debts, the duty of finding money to pay them is thrown upon the trustees; and that being so the purchaser ought not to have any other obligation cast upon him than that of taking care that he is paying his purchase-money to the person whom the testator has selected to pay his debts (*x*).

Lord St. Leonards' Act, ss. 14, 15.

The question, however, is now of little practical importance, since as to wills coming into operation since the 13th of August, 1859, it is provided (*y*) that where the testator creates such a charge as above described, and devises the estate so charged to trustees for the whole of his interest and estate therein, and makes no express provision for the raising of the debts, legacies, or sum of money, the devisees in trust, notwithstanding any trusts actually declared by the testator, may raise the same by sale or mortgage. And this power is

(*u*) *Hodkinson* v. *Quinn*, 1 J. & H. 303.

(*x*) *Ex p. Turner*, 9 Mod. 418; *Doe* v. *Hughes*, 6 Ex. at p. 231; and see *Colyer* v. *Finch*, 5 H. L. C. 922.

(*y*) 22 & 23 V. c. 35, s. 14.

extended (*z*) to any person taking the devised estate by survivorship, descent or devise, and to any person appointed, either under the will, or by the Court, to succeed to the trusteeship.

Whether beneficial devisee, subject to charge, can sell.

But the point of greatest difficulty and importance arose when a will contained a charge of debts, and a devise of the land to A. in fee beneficially:—A. not being the executor (*a*). In such cases it had been the practice to accept titles from the devisee alone, without requiring evidence of the debts having been paid, or causing the executors to concur in the conveyance. Later decisions, however (*b*), tended to raise a very serious question as to whether this practice had not been erroneous, and as to whether the sale should not have been by the executors, or, at any rate, with their concurrence; even the efficacy of such concurrence was doubted by many practitioners, upon the ground that the power of the executors to sell, if it existed, was a collateral power, and was incapable of being released (*c*). On the other hand, it was decided at Law (*d*), that as against the heir—and his case seemed undistinguishable from that of a devisee—the executors had no power of sale.

Remarks on the cases.

In the cases to which we have referred the beneficial devisee was either himself the executor, or the executor concurred in the sale: but in one case (*e*) where there was a direction to pay debts, followed by a devise to A., one of two executors, subject to the payment of debts and legacies, it was held that A., selling as beneficial owner, could make a good title without the concurrence of his co-executor: the contention was that a purchaser could only take a title from

(*z*) *Ib.* s. 15.

(*a*) See an article, 2 Jur. N. S. 68.

(*b*) *Robinson* v. *Lowater*, 17 B. 592; 5 D. M. & G. 272; *Wrigley* v. *Sykes*, 21 B. 337; *Gosling* v. *Carter*, 1 Coll. 650; *Hodkinson* v. *Quinn*, 1 J. & H. 309; *Cook* v. *Dawson*, 29 B. 123; *Greetham* v. *Colton*, 34 B. 615.

(*c*) But this doubt can no longer exist, because, as to instruments coming into operation either before or after the commencement of the Conveyancing Act, 1882, such a power may now be released; sect. 6.

(*d*) *Doe* v. *Hughes*, 6 Ex. 223.

(*e*) *Corser* v. *Cartwright*, 8 Ch. 971.

Chap. XIII. Sect. 3.

both executors selling under the implied power; but the Court of Appeal, without laying any stress on the circumstances of A. being himself an executor, held, on the authority of *Colyer* v. *Finch* (*f*), that the doctrine of an implied power of sale in the executors has no application to a case where the estate is devised to another charged with debts; and that, in such a case, the money must be raised through the instrumentality of a sale by the devisee; who is the person, and the only person, that can make a legal title. This decision was affirmed by the House of Lords on the ground that the devisee was himself one of the executors; and Lord Cairns carefully abstained from expressing an opinion as to what the result would be in the case of a stranger, that is to say, a person who is not an executor, being devisee of estates charged with the payment of debts (*g*). The same reasoning which is applicable to the case of a *fiduciary*, seems to apply with still stronger force to the case of a *beneficial* devisee; for where no express trust intervenes, a power of sale may more readily be implied. If such a power is to be implied from a mere charge of debts, the person who takes the estate so charged seems to be the proper person to exercise it; and this, whether the estate comes to him subject only to the general charge, or is expressly devised subject to the charge of debts. Executors, as such, have nothing to do with the administration of the proceeds of real estate; a direction that debts are to be paid by *them* is, as we have seen, insufficient to create a charge upon the realty, unless they are also devisees of the estate. Why should a general charge, where they are not devisees, and are not named as the persons who are to pay the debts, give them by implication a power which is denied them when they are so named? In one case (*h*), it was assumed as clearly established, that where there is a charge of debts, and no distinct provision as to the person by whom the sale is to be made, then the executors take an implied power to sell, though the persons beneficially interested are capable of con-

(*f*) 5 H. L. C. 922.

(*g*) *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

(*h*) *Hodkinson* v. *Quinn*, 1 J. & H. 309.

curring; but the general tendency of the later authorities (*i*) seems to warrant the former understanding of the profession, *viz.*, that the owner of the estate, whether he hold it beneficially or in trust, is the only person whose duty it is to proceed to a sale, and to apply the fund under the power given to raise the charge (*k*).

The case of *Corser* v. *Cartwright*, as decided by the Court of Appeal, almost justified this conclusion; still, having regard to the dicta of Lord Cairns, when that case was before the House of Lords (*l*), the question whether a beneficial devisee, not being himself an executor, of an estate subject to a general charge of debts, but not expressly charged therewith, or the executor selling under an implied power of sale, is the proper person to sell and make a good title, cannot be regarded as finally settled; and in cases not coming within the operation of the 22 & 23 Vict. c. 35 (*m*), it will still be a wise precaution for a purchaser from the devisee to satisfy himself that all the debts have been paid, or to require the executors to authorize the proposed payment of the purchase-money to the vendor; and whatever doubts may formerly have been entertained as to the efficacy of such a plan, it is now perfectly clear that the executors may release their power, if they have any, and can make a good title by their concurrence (*n*), and bind all parties claiming in respect of a right to have the moneys raised out of the land, which, if so raised, would have to pass through their hands for administration purposes. The point, in fact, seems to have been, in effect, decided by a case (*o*) already referred to; and which, even if not altogether satisfactory in itself, and although by no means universally approved of in the profession, is yet of

(*i*) See *Johnson* v. *Kennett*, 3 M. & K. 624; *Eland* v. *Eland*, 4 M. & Cr. 428; *Ball* v. *Harris*, 4 M. & Cr. 267; *Stroughill* v. *Anstey*, 1 D. M. & G. 635; *Ogden* v. *Lowry*, 25 L. J. Ch. 198.

(*k*) See *Eidsforth* v. *Armistead*, 2 K. & J. 333; and see Lewin, 467 *et seq.*, and an article 2 Jur. N. S. 68; *Corser* v. *Cartwright*, 8 Ch. 971.

(*l*) L. R. 7 H. L. 737.

(*m*) Sects. 14 to 18.

(*n*) 45 & 46 V. c. 39, s. 6.

(*o*) *Storry* v. *Walsh*, 18 B. 559; and see *Hope* v. *Liddell*, 21 B. 183; *Howard* v. *Chaffers*, 2 Dr. & S. 236.

Chap. XIII. Sect. 3.

great importance on the present question, by reason of its having been decided by the same learned judge whose decisions in *Robinson* v. *Lowater*, and *Wrigley* v. *Sykes*, have given rise to the existing difficulty.

Lord St. Leonards' Act, s. 18.

It is remarkable that this difficult case is not definitely provided for by Lord St. Leonards' Act, unless the last clause of the 18th section can be held to be declaratory of the Law. That section declares that the provisions of the 14th, 15th and 16th sections "shall not extend to a devise to any person or persons in fee or in tail or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage *as he or they may by law now do.*" In order to give these words a meaning consistent with that of sect. 14, the devise referred to must mean *a beneficial devise.* But to hold that the words, "as he or they may by law now do," are intended to declare that such a beneficial devisee has a power of sale, is to give a very definite meaning to very vague words, which would almost seem to have been purposely left vague on account of the uncertain condition of the law. In a recent case (*p*) Kay, J., stated that the meaning of the 18th section was that "where a testator has devised his whole estate and interest directly to A., or to A. and B., or any number of persons, as tenants in common, or as joint tenants, in fee or in tail, *so that the devisees could themselves mortgage the property*, the executors are not to have the power." This *dictum* was not, however, necessary for the decision of the case, the devise being to A. and B. for life, with remainders over; and the question for decision was whether the executors could mortgage. The obvious criticism on the *dictum* is that it assumes the very point which is doubtful: *viz.*, that the beneficial devisees could themselves mortgage the property without the concurrence of the executors.

Effect of the Settled Land Act on sales

It is necessary in this connection to consider how far (if at all) the Settled Land Act has affected this question. Sect. 56,

(*p*) *Re Wilson*, 34 W. R. 512.

under a charge of debts.

sub-sect. 2, provides that "in case of conflict between the provisions of a settlement (which includes a will by which land stands for the time being limited to or in trust for any persons by way of succession (*q*)), and the provisions of the Act relative to any matter in respect whereof the tenant for life exercises any power under the Act, the provisions of the Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall be necessary to the exercise by the trustees of the settlement or other persons of any power conferred by the settlement, exerciseable for any purpose provided for in the Act." Serious doubts have been suggested as to whether this provision renders the consent of the tenant for life necessary to a sale for the purpose of paying debts under a charge. On the one hand, it is contended that the power of sale implied by a charge of debts is not a power conferred by the settlement, but is paramount both to the settlement and the title of the tenant for life, and that at any rate such a power is not exerciseable for the purposes of the Act, which, it is said, mean purposes connected with the settlement and the settled land. On the other hand, it is argued that one of the purposes for which the tenant for life may exercise the powers of the Act is that of paying off incumbrances on the inheritance (*r*): that the power of sale implied by a charge of debts is a power conferred by the settlement; that it is exerciseable by the tenant for life, and that therefore the trustees cannot exercise this power without the consent of the tenant for life. Until some judicial authority shall have set at rest this conflict of opinion, it would seem to be the more prudent course in such a case to insist upon the formalities of the Settled Land Act being observed.

But statutes making real estate assets for payment do not amount

The statutory power possessed by creditors, upon taking proper proceedings for that purpose, of obtaining payment of their debts out of the descended or devised real estate (*s*) in

(*q*) Sect. 2, sub-s. 1.

(*r*) Sect. 21, sub-s. 2.

(*s*) Before the Wills Act it was well settled that general pecuniary legatees had a right of marshalling as against descended real estate, so that, if the personal estate proved insufficient for the payment of debts

Chap. XIII. Sect. 3.

to a charge of debts.

the hands of the heir or devisee (*t*), does not, in the absence of an express charge of debts, bar the widow's right to dower or freebench (*u*); and the statutory right may be defeated by a prior alienation for valuable consideration; and in the hands of the alienee the land is discharged, although the heir or devisee remains personally liable to the extent of the value of land alienated (*x*). Thus where a person, seised in trust for himself and another as tenants in common in fee, retained all the rents, it was held that the trustee's beneficial interest in the property was not chargeable for the debt in favour of his co-tenant, as against a purchaser without notice from the trustee (*y*). And therefore, since the land itself is free, the existence of debts does not relieve a purchaser from the

and legacies, the legatees were entitled to come upon the descended real estate to the extent that the personal estate had been exhausted by the creditors. But there was no such right as against real estate specifically devised; and, as a residuary devise could only pass real estate of which the testator was seised at the date of his will, it was immaterial, for the purposes of this rule, whether the devise was, in form, specific or residuary. It was for a long time doubted whether since the Wills Act a residuary devise was still in substance specific. In *Hensman* v. *Fryer*, 2 Eq. 627, V.-C. Kindersley, following his previous decision in *Dady* v. *Hartridge*, 1 Dr. & S. 236 (and see *Rotherham* v. *Rotherham*, 26 B. 465; *Bethell* v. *Green*, 34 B. 302), held that the effect of the 24th section, which makes a will speak as if it had been executed immediately before the testator's death, was that a devise residuary in form could no longer be treated as specific in substance. This decision, which was at variance with previous decisions by V.-C. Stuart, was reversed by Lord Chelmsford on appeal, 3 Ch. 420; (and see *Gibbins* v. *Eyden*, 7 Eq. 371); and after some conflict of the authorities it is now well settled that a residuary devise is still specific (*Lancefield* v. *Iggulden*, 10 Ch. 136); and that the specific devisees must contribute rateably with the residuary devisee towards the deficiency of the personal estate for payment of debts; but notwithstanding Lord Chelmsford's decision in *Hensman* v. *Fryer*, the sounder opinion seems to be that general pecuniary legatees have no right of marshalling as against the devised real estate; and see *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109; *Hannington* v. *True*, 33 Ch. D. 195.

(*t*) 3 & 4 W. & M. c. 14; 47 G. III. c. 74, s. 2; 3 & 4 W. IV. c. 104.

(*u*) *Spyer* v. *Hyatt*, 20 B. 621; *Jones* v. *Jones*, 4 K. & J. 361; and cf. *Rowland* v. *Cuthbertson*, 8 Eq. 466. But see *Lacey* v. *Hill*, 19 Eq. 346; *Re Thomas*, 34 Ch. D. 166.

(*x*) *Richardson* v. *Horton*, 7 B. 112; *Spackman* v. *Timbrell*, 8 Si. 253; *Pimm* v. *Insall*, 1 M. & G. 449; *Kinderley* v. *Jervis*, 22 B. 1; cf. *Hynes* v. *Redington*, 10 Ir. Ch. R. 206; and see *The Hedgely*, 34 Ch. D. 379, where the liability was held to extend to the interest of the devisee, although settled by her on her marriage.

(*y*) *British Mutual Investment Co.* v. *Smart*, 10 Ch. 567.

devisee from the necessity of seeing to the payment of legacies, &c. (*z*): while, on the other hand, a purchaser, either from the heir or devisee, is not bound to see to the payment of either specialty or simple contract debts (*a*): but he may, at the suit of creditors, be restrained by injunction from parting with the money (*b*).

Right of creditor as against equitable mortgagees of heir.

It has been held that the right of the creditor will prevail against parties claiming under the heir as equitable mortgagees by deposit (*c*); and their case seems to be undistinguishable from that of a purchaser, who has paid part of his purchase-money, but has not taken a conveyance.

Receipt under usual powers of attorney on mortgage of a fund charged on land, whether a good discharge in Equity.

It has been doubted when a sum charged upon an estate is assigned by way of mortgage, with the usual power of attorney to receive and give discharges, whether, upon the estate itself being sold, and the sum being paid off out of the proceeds of sale, the assignee can, as against incumbrancers on the equity of redemption of the sum, give a good discharge for the same in Equity under the power of attorney; especially if the deed contain a power to sell the security, and the usual clause expressly making his receipts a good discharge in Equity, in respect of the proceeds of any sale under the power (*d*); but this doubt has been removed by later authorities (*e*).

Lands Clauses Consolidation Act, 1845.

Upon a sale of superfluous lands under the Lands Clauses Consolidation Act, 1845, a receipt under the common seal of the undertaking, or under the hands of two of the directors or managers of the undertaking acting by the authority of the body, is a sufficient discharge for the purchase-money (*f*).

(*z*) *Horn* v. *Horn*, 2 S. & S. 448; *Ball* v. *Harris*, 4 M. & C. 264, 268.

(*a*) Sug. 661; *Higgins* v. *Shaw*, 2 D. & War. 356.

(*b*) *Green* v. *Lowes*, 3 Br. C. C. 217.

(*c*) *Carter* v. *Saunders*, 2 Dr. 248.

(*d*) *Brasier* v. *Hudson*, 9 Si. 1.

(*e*) See *Desborough* v. *Harris*, 5 D. M. & G. 439, 458; and see 2 Dav. pt. 2, p. 133; Sug. 660.

(*f*) 8 & 9 V. c. 18, s. 131.

Chap. XIII. Section 4.

As to the amount payable in respect of purchase-money; how ascertained, increased, or diminished.

Purchase-money determined by arbitration.

(4.) *As to the amount payable in respect of purchase-money;—how ascertained, increased, or diminished.*

When the contract leaves the price to be fixed by arbitration, the arbitrators (*g*) must strictly pursue the terms of their authority (*h*): if directed to choose an umpire, they must do so by an exercise of discretion, and not by lot (*i*); or chance (*k*): nor can they, nor can the umpire previously agree to adopt, although they may be assisted by and act upon, the opinion of a third person (*l*). Misconduct in making the valuation will invalidate the award (*m*); as, *e.g.*, if trustees appoint one of their own number, who happens to be a surveyor, to act as surveyor for the purposes of the L. C. C. Act (*n*); but either party to the contract may, in Equity, bind himself by acquiescence, in a voidable award (*o*): and mere irregularity in the proceedings, *e.g.*, the election by lot of an umpire, may, even at Law, be waived by the parties or their agents authorized to act in the matter of the reference (*p*): and where the parties have left the price to be determined between them by a sole valuer, the Court, in the absence of fraud or mistake, will enforce the contract, notwithstanding that the price fixed is exorbitant (*q*). Where, however, the arbitrator has, *upon his own showing*, made a mistake, either as to the subject-matter of the reference, or as to the legal principle on the basis of which the award was to be

(*g*) The appointment of an arbitrator must be communicated to the other party within the time limited for making the appointment; *Tew* v. *Harris*, 11 Q. B. 7.

(*h*) See *Emery* v. *Wase*, 5 V. 846; *Milnes* v. *Gery*, 14 V. 400, 406; *Gourlay* v. *Duke of Somerset*, 19 V. 432.

(*i*) *Re Hodson and Drewry*, 7 Dowl. 569; *Backhouse* v. *Taylor*, 2 Pract. R. 75; and see Russell, Arb. 237 *et seq.*

(*k*) See *Re Greenwood and Titterington*, 9 A. & E. 671, 699.

(*l*) *Emery* v. *Wase*, 5 V. 848; *Hopcraft* v. *Hickman*, 2 S. & S. 130; *Anderson* v. *Wallace*, 3 C. & F. 26.

(*m*) *Re Hawley*, 2 De G. & S. 33.

(*n*) *Peters* v. *Lewes, &c. R. Co.*, 18 Ch. D. 429.

(*o*) *Blundell* v. *Brettargh*, 17 V. 241; *Re Elliott*, 2 De G. & S. 17; *Ex p. Harrison*, 13 Jur. 381.

(*p*) *Backhouse* v. *Taylor*, 2 Pract. R. 70, and see *ante*, p. 257.

(*q*) *Collier* v. *Mason*, 25 B. 200; and see *Fuller* v. *Fenwick*, 3 C. B. 705; *Hodgkinson* v. *Fernie*, 27 L. J. C. P. 66. As to invalidating an award on the ground that the arbitrator has not used his own judgment, see *Eads* v. *Williams*, 4 D. M. & G. 674.

made, the award may either be set aside, or referred back to him (*r*); and his own evidence is admissible in explanation of the award (*s*); but he cannot be asked what passed in his own mind when exercising his discretionary power in the matters submitted to him (*t*). Where the award or valuation is made by two arbitrators, it should be signed by them both at the same time and place (*u*).

Under Lands Clauses Consolidation Act.

The 9th section of the Lands Clauses Consolidation Act (*x*) provides that, in the case of a party under disability or incapacity, the purchase or compensation money payable to him shall not, except where the same shall have been determined by the verdict of a jury or by arbitration, or by the valuation of a surveyor appointed by two justices under the Act, be less than shall be determined by two able practical surveyors, one nominated by the promoters, and the other by the party under disability, or incapacity; with provision for the appointment of a third surveyor, in case the two originally named fail to agree. The requirements of this section must be strictly complied with; in one case, where a railway company agreed with a charitable corporation for the purchase of part of their lands, but there was no regular nomination of surveyors, nor any certificate from them as to the adequacy of the price, the Lords Justices held, affirming the decision of Lord Romilly, that there was no complete contract capable of being enforced in Equity (*y*). This section applies

(*r*) *Re Dare Valley R. Co.*, 4 Ch. 554.

(*s*) *Ibid.*

(*t*) *Duke of Buccleuch* v. *Metrop. Board*, L. R. 5 H. L. 418; see opinions of judges, p. 432 *et seq.*

(*u*) *Wade* v. *Dowling*, 4 E. & B. 44; and see *Eads* v. *Williams*, 4 D. M. & G. 674, 684, 688. Where arbitrators are appointed by both parties under sect. 25 of the L. C. C. Act, there is a "submission to arbitration by consent" within the meaning of sect. 5 of the Common Law Procedure Act, 1854; *Ex p. Harper*, 20 Eq. 39; *Re Dare Valley R. Co.*, *supra*; *Rhodes* v. *Airedale Drainage Commissioners*, 1 C. P. D. 402; and consequently they may state a special case for the opinion of the High Court. And from the High Court an appeal will lie on such a special case, *Bidder* v. *N. Staff. R. Co.*, 4 Q. B. D. 412.

(*x*) 8 & 9 V. c. 18.

(*y*) *Wycombe R. Co.* v. *Donnington Hospital*, 1 Ch. 268; *Bridgend Gas Co.* v. *Dunraven*, 31 Ch. D. 219.

Chap. XIII. Sect. 4.

to compensation for injuriously affecting lands not taken, as well as to compensation for land actually taken (*z*).

Provisions as to arbitration.

The following are, stated concisely, the provisions of the Act for fixing the value of lands by means of arbitration. Where the two parties cannot agree upon a single arbitrator, each is to appoint one; and if either party fail to make an appointment for fourteen days after being called upon by the other to do so, the arbitrator who has been appointed may proceed, and his award will be binding (*a*). Provision is also made for the case of an arbitrator dying during the proceedings (*b*). Where each party has appointed an arbitrator, the arbitrators must before proceeding appoint an umpire (*c*); and if they cannot agree upon, or shall for seven days after request of either party to the arbitration neglect to appoint, an umpire, the Board of Trade may on application by either party appoint one (*d*). If after the appointment of more than one arbitrator, either of those appointed shall refuse, or for seven days neglect, to act, the other arbitrator may proceed *ex parte;* and his award will be binding (*e*).

How umpire is to be appointed.

In cases of arbitration under this Act, the umpire (*f*) may under sect. 31 be appointed by the arbitrators (*g*), after the expiration of the time within which they are themselves competent to make an award (*h*): if they cannot agree upon an umpire, and the time allowed to the Board of Trade (*i*) for appointing one has expired, the landowner is entitled to

(*z*) *Stone* v. *Mayor of Yeovil*, 2 C. P. D. 99; and see this case as to the meaning of "such lands."

(*a*) Sect. 25.

(*b*) Sects. 26 and 29.

(*c*) Sect. 27.

(*d*) Sect. 28.

(*e*) Sect. 30.

(*f*) The umpire's declaration under s. 33, need not be taken, &c., before a justice of the particular locality in which the lands are situate; *Re Davies and S. Staff. R. Co.*, 2 Pract. R. 599.

(*g*) See as to the appointment by one party, of an arbitrator to act for both parties, *Bradley* v. *L. and N. W. R. Co.*, 5 Ex. 769. An arbitrator ought not to be in the personal interest of the party appointing him; see *In re Elliot*, 2 De G. & S. 17. Time for application to set aside award not extended, because of illness of party; see *Guadiano* v. *Brown*, 2 Jur. N. S. 358. As to appointment of a surveyor under the 85th section, see now 30 & 31 V. c. 127, s. 36.

(*h*) *Re Bradshaw*, 12 Q. B. 562.

(*i*) See sects. 28 and 23.

an assessment by jury, and may enforce his right by mandamus (*k*). But where two arbitrators had been appointed, and one refused to appoint an umpire, or to act, it was held that the other might proceed *ex parte* to make an award, and that a previous application to the Board of Trade was not necessary (*l*). The umpire, if appointed, may make his award at any time within three months after the duty devolves upon him (*m*): it need not assess different sums for the price of land and for damage by severance (*n*); but it must not determine the one point, and leave the other undecided (*o*): nor can it be set aside on the ground of its being contrary to evidence (*p*): although this relief has been afforded chiefly on the ground of an omission to allow one of the parties an opportunity of producing further evidence (*q*). The company are bound at their own expense to take up the award, and furnish a copy to the landowner (*r*). Where, land having been taken under the 68th section, the landowner gives notice

(*k*) *Re South Yorkshire, &c. R. Co.*, 18 L. J. Q. B. 333.

(*l*) *Shepherd* v. *Norwich Corporation*, 30 Ch. D. 553, *sed quære.*

(*m*) *Re Bradshaw, suprà; Skerratt* v. *N. Staff. R. Co.*, 2 Ph. 476. The three months within which the umpire must make his award date from his actual appointment, and not from the expiration of the awarding power of the arbitrators; *Re Pullen and Liverpool Corp.*, 51 L. J. Q. B. 285.

(*n*) *Re Bradshaw, suprà;* so in cases where the amount is assessed by a jury; see *Corrigal* v. *L. and Blackwall R. Co.*, 5 Man. & G. 219; *Re L. and Greenwich R. Co.*, 2 A. & E. 678; *Cobb* v. *Mid Wales R. Co.*, L. R. 1 Q. B. 342. See as to an omission to specify the interests of the claimants in the land, *Re N. Staff. R. Co.*, 2 Ex. 235. And see, as to other cases of doubtful or bad awards under the Act, *Re Wilts and Somerset R. Co.*, 3 Ex. 728; *Lindsay* v. *London and Portsmouth R. Co.*, 1 Pract. R. 529; *Bradley* v. *L. & N. W. R. Co.*, 5 Ex. 769; *Re N. Staff. R. Co.*, 6 R. C. 25; and see *In re Dare Valley R. Co.*, 4 Ch. 554 (where the arbitrator admitted his mistake), and cases there cited.

(*o*) *Wakefield* v. *Llanelly R. Co.*, 3 D. J. & S. 11; and as to the finality of an award where one of the points referred is not specifically disposed of, see *Jewell* v. *Christie*, L. R. 2 C. P. 296.

(*p*) *Re Bradshaw, ubi suprà.*

(*q*) *Re Hawley*, 2 De G. & S. 33, 48.

(*r*) *Railstone* v. *York R. Co.*, 15 Q. B. 404; *Burnard* v. *Wainwright*, 19 L. J. Q. B. 423. The costs of the arbitration are to be borne by the company unless the sum awarded is less than the sum offered by the company, sect. 34; and must be paid within a reasonable time, the company not being entitled to wait till the execution of the conveyance, *Capell* v. *G. W. R. Co.*, 11 Q. B. D. 345.

Chap. XIII. Sect. 4.

of his claim, exceeding 50*l.*, and of his desire to have compensation assessed by a jury, he is not entitled to a notice from the company of their intention to issue a warrant to summon a jury (*s*).

Increase or diminution of purchase-money.

The amount originally fixed or subsequently ascertained to be *primâ facie* payable in respect of the purchase-money may in the several ways hereinafter noticed be increased or diminished.

Increased by interest;—rate of, if no agreement.

The most ordinary mode of increase is by the accrual of interest: as respects which, it will be convenient to consider, first, those cases where there is no special agreement as to interest; premising that, in such cases, interest, when payable, is payable at Law after such rate, not exceeding 5*l. per cent.*, as may be allowed by the jury (*t*); and in Equity (as a general rule) after the rate of 4*l. per cent.* (*u*) *per annum.*

Payable from time fixed for completion, if delay rests with purchaser.

If, then, a time be fixed for completion of the contract, and there be delay attributable to the purchaser, he must from that time pay interest upon his purchase-money, although it has been lying idle and appropriated to the purchase (*x*), and although he has not had possession of the estate, which (as in the case of a house bought for a residence) has therefore been unproductive; but he will be entitled to any actual profits arising from it (*y*).

(*s*) *Reg.* v. *South Devon R. Co.*, 20 L. J. Q. B. 145.

(*t*) 3 & 4 Will. IV. c. 42, s. 28; see 17 & 18 V. c. 90, s. 3. As to whether compound interest can be claimed, see *Attwood* v. *Taylor*, 1 Man. & G. 279, 332; *Stratton* v. *Symon*, 2 Mo. P. C. 125.

(*u*) Sug. 643; *Calcraft* v. *Roebuck*, 1 V. 221. In Ireland, on a sale by the Court, only 3*l.* 10*s.*, *per cent.* has been charged; *Hutchinson* v. *Cathcart*, J. & C. 260, 268.

(*x*) *Calcraft* v. *Roebuck*, *suprà*; *Enraght* v. *Fitzgerald*, 2 Ir. Eq. R. 87; Sug. 628. See *Hyde* v. *Price*, 8 Si. 593; *A.-G.* v. *Corp. of Ludlow*, 1 H. & Tw. 218. If the agreement fix the rate, any subsequent agreement for reduction will be construed strictly against the purchaser; *Attwood* v. *Taylor*, 1 Man. & G. 279; and see *Minchin* v. *Nance*, 4 B. 332.

(*y*) *Ante*, p. 286.

From what time payable if delay rests with vendor.

If, on the other hand, (a time being fixed for completion,) there be delay attributable to the vendor, the purchaser, if he has been in actual possession, or in receipt of the rents and profits, of the estate, must pay interest, unless and until his money has been appropriated to the purchase and lying idle, and notice of such being the case has been given to the vendor (*z*); and, in one case, where, after notice of appropriation given to the vendor, the purchase-money had, through his default, lain idle, the vendor was disallowed interest on the purchase-money, though held accountable for the rents (*a*): but it appears that, (if out of possession,) he will be charged with interest only from the time when he might prudently have taken possession: *i. e.*, when a good title was shown (*b*) and verified (*c*): and although he may, if he please, in the interim, pay interest and take the rents and profits from the time fixed for completion, he is not bound to do so, where the interest exceeds the rents and profits (*d*). Where the purchaser pays interest on the purchase-money from the date fixed for completion, but the vendor is in possession, the latter must pay a fair occupation rent (*e*). The vendor may, like a mortgagee, be made to account for not only what he actually has, but for what he might, without wilful default, have received (*f*); but such a direction is not of course, but must be founded on a special case made against him (*g*).

(*z*) *Powell* v. *Martyr*, 8 V. 146; *Roberts* v. *Massey*, 13 V. 561; *Howland* v. *Norris*, 1 Cox, 59, 62; Sug. 628.

(*a*) *Regent's Canal Co.* v. *Ware*, 23 B. 575; and see *Vickers* v. *Hand*, 26 B. 630.

(*b*) *Forteblow* v. *Shirley*, cited 2 Sw. 223; *Binks* v. *Lord Rokeby*, 2 Sw. 222; *Jones* v. *Mudd*, 4 Rus. 118; *Monk* v. *Huskisson*, 4 Rus. 121; *Carrodus* v. *Sharp*, 20 B. 56.

(*c*) *Parr* v. *Lovegrove*, 4 Dr. 170.

(*d*) *Esdaile* v. *Stephenson*, 1 S. & S. 123; *Jones* v. *Mudd*, 4 Rus. 118, 123; *Paton* v. *Rogers*, 6 Mad. 257; *Collard* v. *Roe*, 4 D. & J. 525.

(*e*) *Met. R. Co.* v. *Defries*, 2 Q. B. D. 387; and cf. *Leggott* v. *Met. R. Co.*, 5 Ch. 716.

(*f*) *Aeland* v. *Gaisford*, 2 Mad. 28; *Wilson* v. *Clapham*, 1 J. & W. 37; *Crosse* v. *Duke of Beaufort*, 5 De G. & S. 7.

(*g*) *Sherwin* v. *Shakspeare*, 5 D. M. & G. 517; but see and consider *Phillips* v. *Sylvester*, 8 Ch. 173, where the doctrine of a vendor's liability seems to be too broadly stated; and *vide post*, pp. 733 *et seq.*, as to his liability for deteriorations of the estate while he remains in possession.

Whether until title is shown, purchaser may appropriate his money and claim exemption from interest.

And, on the other hand, it has been held that a purchaser, if out of possession, is not justified in laying aside his purchase-money, and rendering it wholly or in part unproductive, until the time when a good title is shown by the vendor; and that if he do so, it will be at his own risk and loss (*h*). This doctrine, however, seems open to observation (*i*); and is opposed by a later decision (*k*), in which the rule as above stated was treated as well settled.

Interest payable by purchaser in possession notwithstanding ambiguity in contract.

And the cases seem to show, that when a purchaser is in actual possession or receipt of the rents and profits, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion, even although the vendor delay to show a good title, and the contract do not in terms make the purchase-money payable until a good title is shown. For instance, where parties already in possession agreed to purchase land, the purchase-money to be paid on the 25th of March next, "on a good and valid title being made and executed," and a title was not made until many years afterwards, but they continued in possession, and did not appropriate the purchase-money, they were held liable to pay interest from the above date (*l*).

Claim not confined by statute to six years' arrears.

And inasmuch as, until a title is shown, there is no right to either principal or interest, arrears of interest, not for six years only, but for an indefinite period, may be recovered when a title is shown: the case in the interval not being within the Statute of Limitations (*m*).

Agreement giving pur-

And a special agreement purporting to give the purchaser

(*h*) *De Visme* v. *De Visme*, 1 M. & G. 336, stated, *post*, p. 720.

(*i*) *Vide post*, p. 721.

(*k*) *Dyson* v. *Hornby*, 4 De G. & S. 481.

(*l*) *A.-G.* v. *Christ Church*, 13 Si. 214; *Powell* v. *Martyr*, 8 V. 149; *Fludyer* v. *Cocker*, 12 V. 25; *Birch* v. *Joy*, 3 H. L. C. 565; *Ballard* v. *Shutt*, 15 Ch. D. 122.

(*m*) *Toft* v. *Stephenson*, 5 D. M. & G. 735; nor does the Limitation Act of 1874 (37 & 38 V. c. 57) contain any provision applicable to the case.

chaser rents and interest.

both the rents and interest, will be narrowly scrutinized by the Court (*n*).

If no time fixed for completion, interest is payable from possession taken or title shown.

If no time be fixed for completion, the purchaser pays interest upon his purchase-money, unless lying idle with notice of the fact to the vendor, from (it is conceived) the date of the contract, if the purchaser be then in possession, &c. (*o*): or, if he be not then in possession, from the time of his taking possession (*p*); or from the time at which he might prudently have taken possession (*q*),—supposing it to have been offered to him;—*i.e.*, the time when a good title was shown.

The rule as to interest on purchases under statutory powers.

With regard to purchases by a railway company under its statutory powers, there is some difficulty in reconciling the judicial decisions as to the date from which interest is to be calculated. It was held in one case by Bacon, V.-C., that interest ran from the date of the verdict of the jury, although the company did not, and could not, then take possession (*r*). The same Judge, however, in a case where the company took possession, but the exact amount of compensation was not satisfactorily decided till long afterwards, had previously held that interest ran from the date not of the verdict, but of taking possession (*s*). The true principle has, it is conceived, been laid down by Jessel, M. R.: *viz.*, that the ordinary rule as between vendor and purchaser applies to purchases by a railway company, and that therefore interest is to be calculated from the time when the company might prudently take possession (*t*).

(*n*) *Birch* v. *Joy*, 3 H. L. C. 565.

(*o*) *Ex p. Manning*, 2 P. W. 410.

(*p*) *Fludyer* v. *Cocker*, 12 V. 25; *A.-G.* v. *Christ Church*, 13 Si. 214.

(*q*) *Binks* v. *Lord Rokeby*, 2 Sw. 226; and see *Portman* v. *Mill*, 3 Jur. 356.

(*r*) *Re Eccleshill Local Board*, 13 Ch. D. 367; and see *Blount* v. *G. S. & W. R. Co.*, 2 Ir. Ch. R. 40.

(*s*) *Rhys* v. *Dare Valley R. Co.*, 19 Eq. 93.

(*t*) *Re Pigott and G. W. R. Co.*, 18 Ch. D. 146; *Spencer-Bell* to *L. & S. W. R. Co.*, 33 W. R. 771; and see *Re Shaw and Birmingham Corporation*, 27 Ch. D. 614, a case under the analogous provisions of the Artizans' Dwellings Act, 1875. It should be observed that, even after possession taken, and the verdict of a jury assessing the value, there is no such

Chap. XIII. Sect. 4.

Right to in ordinary cases, how affected by production or non-production of evidence.

And a vendor's claim to interest from the time when a good title was actually shown, may be enforced, notwithstanding his having subsequently and unnecessarily adduced further evidence upon which the purchaser accepted the title (*u*). And the non-production of material evidence will not negative the vendor's claim to interest, if it has been occasioned by the purchasers having taken and insisted on an untenable objection to the title, and has not in itself been a point in dispute (*x*).

Payment cannot be evaded by giving up possession.

And a purchaser taking possession subsequently to the contract, cannot, by giving up possession, escape his liability even to subsequent interest (*y*).

Wasting of particular estate on sale of reversion equivalent to possession.

Upon the purchase of a reversion, the mere wasting of the particular estate by lapse of time appears to be (for the purpose of the above rules) equivalent to possession by the purchaser (*z*); and where an estate which has been long let for a term, which has some years to run, at a rent originally representing its agricultural value, is sold as building land, subject to the term, the purchase may be considered as the buying of a reversion, within the stringency of the rule (*a*).

debt due from the railway company, as to be attachable under a garnishee order: *Howell* v. *Metr. R. Co.*, 19 Ch. D. 508; and see *Re Milford Docks Co.*, 23 Ch. D. 292.

(*u*) *Litchfield* v. *Brown*, 23 L. J. Ch. 176.

(*x*) *Monro* v. *Taylor*, 3 M. & G. 713.

(*y*) See note (*q*).

(*z*) *Ex p. Manning*, *suprà*; *Owen* v. *Davies*, 1 V. sen. 82; *Child* v. *Lord Abingdon*, 1 V. 94; *Davy* v. *Barber*, 2 Atk. 490; *Trefusis* v. *Lord Clinton*, 2 Si. 359; *Vesey* v. *Elwood*, 3 D. & War. 82; Sug. 631 *et seq.*; *Hutchinson* v. *Catheart*, J. & C. 260, where there was a small present profit arising from the property; *Champernowne* v. *Brooke*, 3 C. & F. 4; *Brooke* v. *Champernowne*, 4 C. & F. 589; where the vendor's *primâ facie* right to interest was excluded by the terms of the contract; *Lewis* v. *Tucker*, 5 Jur. 1105; *Wallis* v. *Sarel*, 5 De G. & S. 429; *Bailey* v. *Collett*, 18 B. 179; but see also *Enraght* v. *Fitzgerald*, 2 D. & War. 43, where interest seems to have been allowed only from the time when a good title could have been made; *Blount* v. *Blount*, 3 Atk. 636; *Growsock* v. *Smith*, 3 Anst. 877. *Weddell* v. *Nixon*, 17 B. 160, seems to have been decided on the special wording of the contract, see p. 170.

(*a*) *Williams* v. *Glenton*, 1 Ch. 200.

In an unreported case, where delay had occurred in making out the title upon a sale by the Court of an estate subject to a lease for a life at a low rent, it was contended and acquiesced in, and subsequently arranged, that the purchaser, paying interest during the delay, should be allowed by way of compensation the difference between such interest and the sum of the rents received, and the increase in value of the reversion by the wearing out of the life, such increase being ascertained by an actuary; so that he was, in effect, charged with, in lieu of interest, merely his actual receipts and the estimated improvement of the reversion; and this seems correct (*b*).

Mortgagee—interest set off on purchase by.

Upon a purchase by a mortgagee, the Court after the lapse of several years held that, in the absence of any express agreement, interest upon his mortgage debt must be set off against the interest of a corresponding portion of the purchase-money, from the time of his taking possession (*c*).

Interest upon valuation of timber, from what date payable.

Growing timber.

Interest upon the purchase-money of timber taken at a valuation is payable only from the date of the actual valuation (*d*). This, however, it is conceived, can only apply to growing timber; the reason for the rule being, that its augmented value by growth is included in the valuation, and is an equivalent to interest: upon which Lord St. Leonards has remarked, "but this, which was a good reason during the war, will not, in all times, justify the withholding of interest: many cases have occurred, in which the augmented value by growth, between the time of entering into the contract and the completion of it, has not been equal to the depreciation in the market price of the timber during the same period." This remark, however, is omitted from the last edition of his lordship's work, and it seems to be scarcely pertinent to the principle upon which the rule may be supported with respect to young growing timber; *viz.*, that

Principle which should determine the liability.

(*b*) *Morris* v. *Wood*, 15 Nov. 1850, M. S.

(*c*) *Wallis* v. *Bastard*, 4 D. M. & G. 251.

(*d*) See *Waldron* v. *Forester*, cited Sug. 631.

Chap. XIII. Sect. 4.

there is an increase (not in the market price, but) in the actual quantity or quality of the subject-matter of the contract. The case in effect, is this: the vendor agrees to sell the timber as existing at the time of contract, *plus* its future increase up to the date of the valuation, upon being paid the then estimated value of such timber and increase. He takes the chance of a rise or fall in the market value of timber as a commodity: and a fall can, it is submitted, no more justify him in requiring interest prior to the valuation, (*i.e.*, in effect an increase of purchase-money,) than an unexpected rise would warrant the purchaser in claiming a reduction of the purchase-money, upon the ground of its being of larger amount than he had anticipated.

Timber arrived at maturity.

Nor does it appear that, in the case of timber which has arrived at maturity, interest ought, as a general rule, to be paid prior to the actual valuation; for there has been no increase, nor any advantage to the purchaser: the case might, however, probably be different, if he had been the cause of, or consenting to, the delay in the valuation; or if, the chief value of the timber consisting in its ornamental character, he had been in possession of the estate.

In all the above cases it must be assumed that the valuation has been delayed beyond the date at which it ought to have been made: *i.e.*, the time, if any, specified in the contract, or, if no such time be specified, then the time fixed for completion. Any claim to interest, or abatement in respect of the intermediate period, whether the timber be growing or decaying, may be negatived by the argument that the parties having elected upon the act of valuation for fixing the time at which the price is to be determined, must be deemed to have weighed all the consequences which would render the price, fixed at that time and in that manner, a fair equivalent for the transfer. If a vendor agreed to convey forthwith, in consideration of 1,000*l.* to be paid at the expiration of two years, it could scarcely be contended that he would be entitled to interest in the mean time. If no

time were originally fixed either for valuation or for completion, the time for valuation might, it is conceived, be fixed by notice from either party requiring it to be made immediately.

Interest upon valuation of fixtures—occupation rent in respect of;

The case of fixtures, agreed to be taken at a valuation, seems to be the converse of that of growing timber; they being a *deteriorating* property. Where they are of large value, the purchaser, if let into possession after the time at which the valuation ought to be, but before it is actually made, should, it is conceived, pay an occupation rent for the intermediate period: the case seems to be conversely within the principle of *Dyer* v. *Hargrave* (*e*), where it was decided that when, upon the sale of leaseholds, the vendor retains possession after the time fixed for completion, he must pay an occupation rent to the purchaser, and receive interest upon the purchase-money.

and of leaseholds.

Compensation for coal worked during delay.

Where through the vendor's fault there was a delay of two years in completing the purchase of a mine, and during the interval the vendor continued to work the colliery, specific performance was granted at the suit of the purchaser, with compensation for the coal so worked (*f*).

Where price payable by instalments.

Where the price is payable by instalments, and nothing is said as to possession, it would appear that the purchaser is entitled to possession only from the time of paying the *last* instalment (*g*).

The general rule is subject to variation.

The rule, however, that a vendor retaining possession after the time fixed for completion must pay an occupation rent to the purchaser is not an invariable one. Thus, where on a sale to a railway company the delay in completion was solely attributable to the purchasers, and, under the pressure arising from their default, the vendor continued to

(*e*) 10 V. 510; and see *Cheetham* v. *Sturtevant*, 3 De G. & S. 468.

(*f*) *Brown* v. *Dibbs*, 37 L. T. 171; and see *S. C.* as to mode of valuation.

(*g*) *Kenney* v. *Wexham*, 6 Mad. 335, a case of an annuity.

Chap. XIII. Sect. 4.

occupy the premises for his business, which he carried on for his own benefit, the company were held liable to pay interest upon the purchase-money as from the date fixed for completion, without being entitled to any allowance for occupation rent (*h*).

Vendors retaining possession of trade premises yet not held liable to occupation rent.

So where, upon a sale of the lease of a public-house, and the stock in trade, the purchaser wrongfully refused to perform the contract, and the vendors retained possession and carried on the business, the purchaser was compelled to pay interest on his purchase-money, and also all sums which the vendors had laid out for the rent, taxes, and other necessary outgoings, with interest; and was not allowed to charge the vendors with an occupation rent (*i*). It may be observed of this case, that the vendors could not have discontinued the business without incurring the risk of the property being seriously depreciated while the completion of the contract yet remained uncertain: but it was, nevertheless, held on appeal, that they carried it on at their own risk, (and, it is presumed, for their own benefit,) subject to their liability to account to the purchaser for so much of the stock included in the contract as they had actually disposed of.

Appropriation of purchase-money: its effect on interest.

Before proceeding to examine the cases in which appropriation of the purchase-money has been held to be sufficient to prevent interest from running, it ought to be remarked that the principle upon which these cases proceed is extremely unsatisfactory. Whether there is, or is not, an express stipulation for payment of interest, it is equally difficult to see why any dealing by the purchaser with the purchase-money, short of payment to the vendor under the contract, should prevent interest being payable. It must surely be in the power of the vendor to stand upon his legal rights and say "*non hæc in fœdera veni*," unless in attempting to avail

(*h*) *Leggott* v. *Metr. R. Co.*, 5 Ch. 716; but the vendor had to pay the outgoings during his occupancy; and see *Metr. R. Co.* v. *Defries*, 2 Q. B. D. 189.

(*i*) *Dakin* v. *Cope*, 2 Rus. 176.

himself of those legal rights he is in substance seeking to take advantage of his own wrong. The authorities (*k*), however, appear to establish that appropriation may in certain cases prevent interest from running, although it is believed that these authorities have not been followed in unreported cases by eminent Judges. While the Law and practice remain thus unsettled, it seems desirable that the contract or conditions should expressly limit the purchaser's liability for payment of interest to cases where the delay in completion has arisen from wilful default on the part of the vendor or from his capricious refusal to deduce a title to, or to assure, the property; and where there has been no such wilful default or capricious refusal on the part of the vendor, but the delay in completion is nevertheless attributable to him, a purchaser should be allowed to determine his liability to pay interest by appropriating his purchase-money, and giving notice in writing of such appropriation to the vendor or his solicitor (*l*).

What a sufficient appropriation of purchase-money to relieve purchaser from interest.

The cases do not seem to define satisfactorily what is a sufficient appropriation of money by the purchaser to relieve him from the liability to interest. In *Winter* v. *Blades* (*m*), the purchaser, upon entering into the contract, paid into his general account at his banker's a sum less than the purchase-money, but which, together with his existing balance, exceeded the purchase-money: and until completion his balance was never less than the purchase-money, except for a period of three days; and the Court discharged him from payment of interest, in respect of the difference between his average balance for the period between the date of his notice to the vendor and completion, and his average balance for three

(*k*) *Williams* v. *Glenton*, 34 B. 528; 1 Ch. 200; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Golds and Norton*, 33 W. R. 333, which appear to overrule *Vickers* v. *Hand*, 26 B. 630; but see *Re Riley to Streatfield*, 34 Ch. D. 386, where the authorities were fully discussed, and it was held that mere appropriation by the purchaser, with notice to the vendor, will not relieve the purchaser from paying interest.

(*l*) The common form conditions of the Birmingham and other provincial law societies contain such a provision.

(*m*) 2 S. & S. 393; and see *Kershaw* v. *Kershaw*, 9 Eq. 56, where the money was transferred to a separate account.

years immediately preceding the contract: thus establishing (apparently,) two principles; *viz.*, first, that appropriation of a *part* of the purchase-money coupled with the fact of the residue being immediately appropriable, relieves the purchaser from payment of interest *pro tanto;* and secondly, that payment into his general banking account is an appropriation: the latter (if not the former) of which seems to be disapproved of by Lord St. Leonards (*n*); and both appear to be questionable.

Actual *bonâ fide* appropriation requisite.

Lord St. Leonards observes, "If the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any way made use of it, the Court would compel him to pay interest." If, therefore, the purchaser pay the money into a bank at which he has an account, it is at least prudent to make the payment to a separate account. In many of the joint-stock banks interest, at a rate somewhat lower than the ordinary rate, is allowed upon sums deposited; and it is conceived, that, in such a case, if the money were payable at call or upon short notice, the purchaser upon giving the usual notice to the vendor would escape liability in respect of the difference of interest.

Payment into bank at call.

Purchaser acceding to delay cannot afterwards appropriate purchase-money.

When it appears that some considerable time must elapse before the title can be perfected, and the purchaser agrees to take possession and pay interest, he cannot, (unless there be great and unexpected delay,) by subsequently appropriating the purchase-money and giving notice, escape his liability to interest (*o*); but in one case (*p*), where, subsequently to the purchaser being let into possession, a difficulty arose in completing the title, and the purchaser paid, to a separate account at his bankers, a sum, as he thought, sufficient, but which was not quite sufficient to answer his purchase-money, and gave notice of the payment to the vendors, who merely objected to the form of the notice; the

(*n*) Sug. 628; and see *Macdonnell* v. *Harding*, 7 Si. 178; *Kershaw* v. *Kershaw*, 9 Eq. 56.

(*o*) *Dickinson* v. *Heron*, Sug. 630, n.

(*p*) *Kershaw* v. *Kershaw*, *suprà*.

appropriation was treated as valid *pro tanto*, and as relieving the purchaser from liability to interest. In the case just referred to, the purchaser seems to have been entitled to take possession under the contract, before payment of the purchase-money.

Rule where the condition provides for payment of interest.

In *Esdaile* v. *Stephenson* (*q*), Sir John Leach laid it down that where there is an express stipulation as to the payment of interest by the purchaser it applies to every delay, however occasioned; unless, of course, the delay is owing to the gross misconduct or wilful delay of the vendor; and after some fluctuation of the authorities, to which we will shortly refer, this rule is now well established. In two subsequent cases, where the agreement was to pay interest during delay caused "by any unforeseen or unavoidable obstacles" (*r*), or "by any unavoidable obstacle" (*s*), it was held that the stipulation did not apply to delays in making out the title. Where, however, the agreement was to pay interest during delay arising "from any cause whatever except the wilful (*t*) default of the vendor" (*u*), or simply "from any cause whatever" (*x*), (an expression not so strong against the purchaser as the former one, inasmuch as the particular exception of "wilful default" increased the stringency of the first part of the sentence,) it was held, that interest was payable during delays occasioned by the state of the title; but, in the latter case, the order was made without prejudice to any application by the purchaser for compensation; and a different decision was come to, when the expression was, "if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest" (*y*); and, of course, a condition containing the

"Purchaser making default."

(*q*) 1 S. & S. 122; *Jones* v. *Mudd*, 4 Rus. 118; *Matson* v. *Swift*, 5 Jur. 645.

(*r*) *Monk* v. *Huskisson*, 4 Rus. 121, n., which cannot be reconciled with Sir J. Leach's previous decision in *Esdaile* v. *Stephenson*.

(*s*) *Birch* v. *Podmore*, Sug. 635.

(*t*) As to what is wilful default, see *Elliott* v. *Turner*, 13 Si. 477; *Ex p. Bradshaw*, 16 Si. 174; *Re Windsor W. R. Act*, 12 B. 522; *Gregory* v. *Wilson*, 9 Ha. 689; and *post*, p. 723.

(*u*) *Oxenden* v. *Lord Falmouth*, Sug. 637.

(*x*) *Greenwood* v. *Churchill*, 8 B. 413.

(*y*) *Denning* v. *Henderson*, 1 De G.

Chap. XIII. Sect. 4.

"Purchaser failing in making payment."

De Visme v. *De Visme.*

words "any cause whatever," even without anything to qualify their effect, would not authorize wilful delay on the part of the vendor (*z*). In a later case, where the expression, upon a sale by the Court, was, "if the purchaser shall fail in making such payments at the time and in manner aforesaid, then, and in such case, from whatever cause the delay may have arisen," interest to be paid at 5*l. per cent.*, and no abstract was delivered until after the time fixed for completion, and the supplemental abstracts, showing a good title, were not delivered, although repeatedly applied for, until eighteen months after the time fixed for completion, and the purchaser at the commencement of the delay paid the purchase-money into a bank at a low rate of interest, and gave notice thereof to the vendors, and that he should require compensation, and then, upon the title being cleared up, obtained an order for a conveyance and for payment of his purchase-money into Court, without prejudice to his right (if any) to compensation, and the purchase was accordingly completed, a petition for compensation in respect of the loss of interest was dismissed by Sir J. Wigram, V.-C., with costs, upon the ground of the purchaser having completed the contract: but it seems to have been admitted that while the contract remained incomplete, he might have obtained relief, or might probably have abandoned the contract (*a*): and the decision of the V.-C. was reversed by Lord Cottenham on appeal: his Lordship holding, either that interest did not begin to run until the delivery of an abstract showing a good title; or that, if the condition bound the purchaser to pay interim interest, he was entitled to compensation for the non-performance by the vendor of his part of the contract (*b*).

But, in the same case, it having been decided that the right to interest on the one hand, and to the income of the estate

& S. 689; and see, at Law, *Perry* v. *Smith*, 1 Car. & M. 554; stated *ante*, p. 143.

(*z*) See *Paton* v. *Rogers*, 6 Mad. 256.

(*a*) *De Visme* v. *De Visme*, 18 L. J. Ch. 159.

(*b*) *S. C.* on app., 1 M. & G. 336; and see *Robertson* v. *Skelton*, 12 B. 363. In *Morris* v. *Wood*, stated *ante*, p. 713, Lord Cranworth stated that he adopted the latter of Lord Cottenham's two alternatives.

on the other, was not to commence until a good title was abstracted, the purchaser, when he applied for it, was refused compensation in respect of his money having been comparatively unproductive in the interim (it having, as before stated, been paid into a bank at a low rate of interest upon notice to the vendors). His Lordship held that such a claim could not be sustained: that the vendors being in default, the delay having been occasioned by their not performing their part of the contract, were not to exact from the purchaser the payment of interest until the time they showed a good title on their abstract: but they were not, therefore, to make compensation for any loss not arising out of their contract; such default on their part not making it, in his Lordship's opinion, necessary or proper for the purchaser to lay his money by and make it unproductive, for the purpose of throwing the loss of that unproductiveness on the vendors: and that it was carrying the principle out strictly, to postpone the time for paying the purchase-money till the time a good title was shown (*c*).

Remarks on *De Visme* v. *De Visme*.

This decision was generally disapproved of, and seems to be open to criticism. It may be admitted that when a purchaser has agreed to pay interest and take the profits from a specified day, notwithstanding delay arising from any cause whatever, there would be much hardship (at least in cases where personal possession of the property is essential to its due enjoyment) in holding this agreement to extend to a delay in showing such a title as would justify a prudent purchaser in accepting possession, and so receiving the equivalent for his interest. But if, on the ground of hardship, the strict words of the agreement (which are sufficiently large in terms, and are notoriously intended in practice, to extend to delays in making out the title) may be disregarded, surely, on the like principle, the purchaser (who may possibly have called in money upon the faith of the vendor's agreement to complete on a certain day) ought to be allowed to appropriate and re-

(*c*) 1 M. & G. 353.

Chap. XIII. Sect. 4.

invest it in such a manner as that it may produce some income and yet be ready when required, and to throw the loss of interest on the vendor (*d*). In the particular case, the purchaser, although he had the satisfaction of establishing a principle, seems practically to have been left in no better position than that in which he was placed by the decision of the Vice-Chancellor.

Later decisions.

Later decisions have brought the doctrine back into much the same state as that in which it was before *De Visme* v. *De Visme*, *viz.*, that where there is neither vexatious conduct, dealing in bad faith, nor gross negligence on the part of the vendor, the special condition containing the expression "from any cause whatever," will extend to delays fairly arising from the state of the title (*e*). Thus, where a vendor died on the eve of completion, having devised the estate to an infant, which rendered a suit necessary, the purchaser was held liable to pay interest from the time originally fixed for completion (*f*); so, also, where, after the contract, a suit was found to be necessary in order to clear the title (*g*): and, in a modern case, where there was a contract for the purchase of an undivided moiety of an estate subject to a lease, and, in consequence of the owner of the other moiety claiming the entirety, and refusing to produce the deeds, the vendor was compelled to file a bill for partition against him, but died pending the suit, having devised his estate to infants, and there was a delay of eleven years before a title was made, it was held by Lord Romilly that the purchaser was not under the circumstances compellable to complete; but that if he elected to do so, he must pay interest from the time fixed for completion (*h*). In this case the delay was not wholly caused by the difficulties of the title, but was partly attributable to the vendor. There had, however, been no appropriation of the

(*d*) See *Dyson* v. *Hornby*, 4 De G. & S. 481; where, however, there was no special condition.

(*e*) See *Sherwin* v. *Shakspear*, 5 D. M. & G. 517.

(*f*) *Bannerman* v. *Clarke*, 3 Dr. 632; and see *Tewart* v. *Lawson*, 3 S. & G. 307; *Vickers* v. *Hand*, 26 B. 630.

(*g*) *Lord Palmerston* v. *Turner*, 33 B. 524.

(*h*) *Williams* v. *Glenton*, 1 Ch. 200.

purchase-money; and the purchaser, who was not prejudiced by the delay, had neither threatened to rescind the contract nor taken active measures to enforce completion. On appeal this decision was affirmed; and Lord Justice Turner appears to have considered that there was no obligation on a vendor to enter into litigation with an adverse claimant in order to perfect his title (*i*); but it is conceived that this observation must have been intended to apply only to cases where the vendor, at the time of entering into the contract, is not aware of any adverse claim which may probably give rise to litigation.

Meaning of "wilful default."

The rule, however, as above propounded, affords ample scope for future litigation by leaving open the question as to what, in any given case, may be considered to amount to wilful default. Indeed, it is not possible to give any definition of this or similar terms which will apply generally to all cases. "*Default* is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances;—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. *Wilful* is a word of familar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent" (*k*). Thus, the omission to deliver any abstract whatever, until long after the time fixed for completion, is *primâ facie* gross negligence which avoids the condition (*l*): although even such an omission might admit of a satisfactory explanation. So, where the

(*i*) *S. C.*, at p. 208.

(*k*) Per Bowen, L. J., in *Re Young and Harston*, 31 Ch. D. 168, 174.

(*l*) *Wallis* v. *Sarel*, 5 De G. & S. 429.

vendor went abroad two days before the day fixed for completion, he was allowed no interest beyond a period of a fortnight, which was held by the Court to be a reasonable period within which to obtain the execution of the conveyance by certain necessary parties (*m*). And, where the draft conveyance was sent to the vendor's solicitors six days before, but was not returned till six days after, the day fixed for completion, and a still further delay then occurred through the absence of the vendor's solicitors, no interest was allowed, except that allowed by the bank at which the money had been deposited (*n*).

The mere fact, however, of the abstracts delivered prior to the time fixed for completion having shown an imperfect title, or having been supported by insufficient evidence, will not negative the vendor's claim to interest (*o*), even in cases where a period is fixed for the delivery of the abstract (*p*); but the fact of the completion of the agreement having been intercepted by negotiations, which resulted in a variation of the agreement, has been considered material in fixing the period from which interest is to run (*q*).

Conclusions to be drawn from the recent decisions.

From the cases cited above, it will be seen that the condition as to the payment of interest during delay in completion has been construed most strongly against the purchaser; and the rule, which in former editions we ventured to suggest as that which should ultimately prevail, has in a great measure been adopted; *viz.*, that the condition—whether with or without the words "from any cause whatever"—should be held to apply only to the case of a vendor who, selling without the knowledge or reasonable suspicion of any fact, which will probably pre-

(*m*) *Re Young and Harston, ibid.*

(*n*) *Re Gold and Norton*, 33 W. R. 333; and see *Re Monckton and Gilzean*, 27 Ch. D. 555.

(*o*) *Rowley* v. *Adams*, 12 B. 476; *Cowpe* v. *Bakewell*, 13 B. 421.

(*p*) *Vickers* v. *Hand*, 26 B. 630.

(*q*) *Sherwin* v. *Shakspear*, 5 D. M. & G. 517; *Southby* v. *Hutt*, 2 M. & C. 207; 1 Dav. 456; as to what is a perfect abstract, see *Parr* v. *Lovegrove*, 4 Dr. 177; and *ante*, p. 321, and cases there cited.

vent completion within the time specified, subsequently uses all due diligence to procure completion within such time: and that the rule should not be broken in upon by exceptions based upon the use of doubtful expressions referring to "default" or "failure" on the part of the purchaser; expressions which in some cases have been resorted to, probably rather from a willingness to adopt any plausible ground for depriving the vendor of the benefit of that which proves to be an inequitable stipulation, than from any settled judicial conviction that they were intended to point to a dereliction of a duty, as distinguished from the mere non-performance of an act, by the purchaser. And in adopting such a rule, all technical distinctions between questions of title, and questions of evidence of title, and questions of conveyance, may well be disregarded. The actual or implied stipulations in every contract which fixes a time for completion are, that the vendor shall, by that time, do three distinct things, *viz.*, abstract a sufficient title, verify a sufficient title, and give a proper conveyance: the stipulation on the part of the purchaser is that he shall, on the specified day, pay the purchase-money, which, if not then paid, is to carry interest. If then the money is not so paid, the only pertinent inquiry seems to be, whether the purchaser was or was not, through the default of the vendor, so situated as to be unable prudently to make the payment. If the purchaser, being ready with his money, is, through the default of the vendor, obliged to keep it wholly or in part unproductive, it is difficult to see why the liability to interest should depend upon the circumstance of such default consisting in the non-performance of one rather than of another of the vendor's several stipulated duties.

Savory v. *Underwood.*

A case (*r*), before the Court of Queen's Bench, deserves attention with reference to the present subject. It was that of a vendor selling an estate in mortgage, and stipulating that the purchase should be completed on a day earlier by

(*r*) *Savory* v. *Underwood*, 23 L. T. O. S. 141.

some months, as he must have known, than the day on which the mortgagees were bound to receive their money: the common condition was held to apply; the existence of the incumbrance was not a question of *title*, and the purchaser was without remedy. Now in such a case the equitable arrangement would seem to be, that the purchaser should take a conveyance of the equity of redemption, with a covenant by the vendor to get in the incumbrances; and should retain the amount of such incumbrances out of the purchase-money, paying such interest thereon as the amount so retained may actually produce—and the vendor keeping down the interest on the incumbrances: or that the purchaser, if unwilling to take an equity of redemption, in lieu of the legal estate for which he had contracted, should be at liberty to vacate the contract. To allow a vendor, who has contracted to do that which he must have known he could not perform, to escape all liability for his own default, and at the same time to enforce the performance by the purchaser of his reciprocal obligation, is merely to encourage chicanery in the preparation of contracts and conditions of sale.

Where the condition is for payment of interest according to an ascending scale.

A stipulation binding the purchaser to pay interest during delay in completion, according to an ascending scale, is not in the nature of a penalty from which he may be relieved, but a separate contract which may be enforced against him (*s*).

Delay caused by adverse claim.

Where, after the title had been accepted, long delay resulted from notice being given of an adverse claim which was subsequently ascertained to be unfounded, the purchaser was held liable to pay interest from the time fixed by the contract (*t*).

Agreement to take rents and profits.

An agreement which reserves to the vendor the rents and profits of the estate until actual completion, precludes any claim to interest on the purchase-money (*u*).

(*s*) *Herbert* v. *Salisbury and Yeovil R. Co.*, 2 Eq. 221.

(*t*) *Grove* v. *Bastard*, 1 D. M. & G. 79; and see *Williams* v. *Glenton*, 1 Ch. 200.

(*u*) *Brooke* v. *Champernowne*, 4 C.

Acquiescence.

A purchaser's silence may amount to acquiescence in the vendor's claim to interest (*x*): so, too, a mere repudiation of liability to pay interest, not followed up by active measures of resistance (*y*).

As to cases under the L. C. C. Act, 1845.

It was considered doubtful in one case whether the Court, upon a petition under the Lands Clauses Consolidation Act, has any jurisdiction to direct payment by the company of interest upon purchase-money which has been paid into Court, but has remained uninvested (*z*); and it has since been held that the Court has no such jurisdiction (*a*).

Deposit.

The vendor cannot claim from the purchaser interest upon the deposit for the time during which it has, through the latter's default, been retained by the auctioneer (*b*); but can claim interest upon purchase-money left in the purchaser's hands, to answer incumbrances payable at a future date (*c*). Lord St. Leonards considered it doubtful whether the vendor could be compelled to pay interest on the deposit (*d*); but in one case where the vendor was plaintiff, asking for specific performance, he was ordered to repay the deposit with interest at 4 per cent. (*e*).

Income tax.

In paying the interest the purchaser may deduct income tax (*f*).

As to quantity—Statutory Acre.

By the 5 Geo. IV. c. 74, ss. 1 and 2, the pole or perch is to contain in length five standard yards and a half; the rood,

& F. 589; *Sweetland* v. *Smith*, 1 Cr. & M. 585, where a like effect was attributed to a condition providing for payment of expenses, but not referring to interest.

(*x*) *Ex p. Lord Hardwicke*, 1 D. M. & G. 297.

(*y*) *Williams* v. *Glenton*, *supra*.

(*z*) See *Ex p. Lord Hardwicke*, 1 D. M. & G. 304; in this case the company were ordered to pay interest, but the jurisdiction was given by consent.

(*a*) *Re Crystal Palace R. Co.*, 1 Jur. N. S. 995; *Ex p. Topple*, 19 W. R. 1058.

(*b*) *Bridges* v. *Robinson*, 3 Mer. 694.

(*c*) *Hughes* v. *Kearney*, 1 Sch. & L. 134; *Comer* v. *Walkley*, Sug. 677, n.

(*d*) See Sug. 638; but allowed in bankruptcy, see *Re Page*, 1 D. & Wal. 31.

(*e*) *Turner* v. *Marriott*, 3 Eq. 744.

(*f*) *Bebb* v. *Bunny*, 1 K. & J. 216.

Chap. XIII. Sect. 4.

1210 standard square yards; and the acre, 4840 standard square yards, being 160 square poles: and, by sect. 15, after the 1st May, 1825, "all contracts, bargains, sales, and dealings which shall be made or had within any part of the United Kingdom, for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be had and made according to the standard weights and measures ascertained by the Act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void."

Local measures abolished.

The 5 & 6 Will. IV. c. 63, s. 6, enacts "that the measure called the Winchester bushel and the lineal measure called the Scotch ell, and all local customary measures (*g*), shall be abolished."

Customary variations in the acre.

Before the passing of these Acts, considerable diversity existed in the size of the acre (*h*); in some places (as in Cheshire) the customary acre contained nearly two statutory acres; while, occasionally, the variation was nearly as much the other way (*i*). The applicability of the 15th section of the Act of Geo. IV. to contracts for sale of land is not altogether clear (*j*); but it is conceived that, under the later Act, any quantities mentioned either in a contract or a conveyance would be referred to the standard measurement,

(*g*) See on the construction of the Act, as to dry goods, *Hughes* v. *Humphreys*, 3 E. & B. 954; and weights, &c., *Jones* v. *Giles*, 10 Ex. 119.

(*h*) Owing to variations in the length of the pole or measuring rod, the acre always containing 160 square poles or rods. Eight yards to the rod is the longest which has come under the author's observation. It gives 10,240 square yards to the acre instead of 4,840.

(*i*) *Portman* v. *Mill*, 2 Rus. 570.

(*j*) Sug. 324.

without regard to any local custom (unless expressly referred to) (*k*).

Vendor's right to compensation is generally questionable.

Where there is no express agreement on the subject, and the contract in general terms includes property which it was not proposed to sell, Equity would not enforce it against the vendor, without at least giving him compensation (*l*); but it is clear on principle that a vendor has no general right to additional purchase-money, merely because the estate exceeds the quantity stated in the particulars. Since, however, if it were sold professedly by the acre, the excess, if taken, must, it is conceived, clearly be paid for, it seems to follow, from the doctrine laid down in *Hill* v. *Buckley* (*m*) (*viz.*, that where the quantity is stated the price must be considered as fixed with reference thereto), that if called upon to fulfil the contract, he might, independently of agreement, refuse to complete unless he were allowed compensation; and this, at any rate as regards cases where the excess is considerable, is in accordance with modern decisions (*n*).

Alleged undervalue from measurement being given in customary instead of statutory acres—no compensation.

A special condition for compensation has been, as respects different lots on the same sale, held to apply as well in favour of as against a vendor (*o*); but this was on a special case, and not in a suit. Where fields described as "fourteen acres more or less," were sold for 973*l.*, under an order of the Court, and with the usual condition as to misdescription, a petition stating that the fields in fact contained twenty-seven statutory acres (the acres mentioned in the particulars being intended for customary acres), and that the real value was 1,600*l.*, and praying that the purchaser might

(*k*) And see *Portman* v. *Mill*, 2 Rus. 570.

(*l*) See *A.-G.* v. *Sitwell*, 1 Y. & C. 559; *Marquis Townshend* v. *Stangroom*, 6 V. 328; see *Tyler* v. *Bevershan*, Finch, 80; *Alvanley* v. *Kinnaird*, 2 M. & G. 1.

(*m*) 17 V. 394, 401.

(*n*) See *Leslie* v. *Tompson*, 9 Ha. 273; *Newby* v. *Paynter*, 17 Jur. 483; but see *Re Orange* to *Wright*, 54 L. J. Ch. 590, where there was a compensation clause.

(*o*) *Leslie* v. *Tompson*, 9 Ha. 268; and see *Painter* v. *Newby*, 11 Ha. 26.

pay the difference, or that the property might be re-sold, was dismissed with costs (*p*). The decision, however, was chiefly on the ground of delay, four years having elapsed since the sale; and the case may, perhaps, be considered to differ in principle from cases where there is a misstatement of quantity, incapable of being explained by the difference between statutory and customary measurement; for, possibly, the purchasers at the sale might have bid under the full impression that the fourteen acres were in fact customary acres, and this was alleged to have really happened. Lord St. Leonards' comment (*q*) upon the case is, "that no doubt it would be difficult in such a case to make a *bonâ fide* purchaser buy an estate twice as large as that for which he had contracted, and pay double the amount of the purchase-money for it:" and it may be doubted whether a purchaser ought ever to be compelled, under such conditions, to pay a sum materially exceeding the contemplated amount of purchase-money; such an unexpected liability might, it is obvious, be often productive of the most oppressive and ruinous consequences: in the above case, the Court seems to have considered, that had any relief been granted, it must have consisted in avoiding the sale altogether; and thus nullifying the condition. There seems, however, to be no reason to doubt that such a condition can be insisted on by a vendor as defendant: but his right to enforce it as plaintiff has yet to be established.

Difficulty of forcing a more expensive purchase on a purchaser.

Case of large excess of acreage, and condition against compensation.

A condition that "the description and quantity stated are believed to be correct; and that the sale shall not be annulled or rendered voidable, neither shall any compensation be required by vendors or purchaser, in case any inaccuracy or omission shall be discovered therein," may bind the vendor, although there has been a gross error, shared in by all parties, as to the acreage. Thus in a

(*p*) *Price* v. *North*, 2 Y. & C. 620; and *vide ante*, p. 157. See *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89, where the misdescription was against the purchaser, and, being of a trivial character, was held to be covered by the condition.

(*q*) Sug. 320.

curious unreported case of *Walker* v. *Barnett* (1864), in which the author was counsel for the purchaser, a house and grounds near London, which belonged in moieties to an eminent London solicitor and to his client, were advertised for sale by private contract, by a well-known firm of London estate agents. There was a printed form of contract, with a lithographed plan, but no scale. The property was described as containing "about ten acres;" and there was a condition, in the terms above stated, as to misdescriptions. Upon inspecting the property, the intending purchaser was incredulous as to the acreage amounting to ten acres. After some correspondence on the point, which failed to satisfy him, an offer was made in writing to and accepted by him, for the sale of the property for 10,000*l.*, upon the terms of the printed contract; but subject to a stipulation that if, upon measurement, the land was found to contain *less* than ten acres, the deficiency should be made up by a slice from adjoining land, also belonging to the vendors; nothing being provided in respect to the non-compensation clause, so far as such clause might operate against the vendors. The land was not measured until the surveyors on each side met for the purpose of setting out the compensation-slice; and was then found to contain not *less* than ten acres, but upwards of eighteen acres. The vendors, upon this, refused to complete, except at an advance in price: but, upon a bill being filed, a decree for a conveyance on payment of the 10,000*l.* was made against them, by V.-C. Stuart, with costs: and their advisers, although they expressed a strong disapproval of the decision—which may, to some extent, be attributable to the special nature of the property—did not venture to appeal against it.

Case of deficiency of acreage, and condition against compensation.

However, in a modern case, where property, sold under a decree of the Court, was described in the particular as containing 753 square yards, but in fact contained only 573 square yards, and there was the usual condition against any compensation for misdescription being allowed by either vendor or purchaser, it was held that the condition was

Chap. XIII. Sect 4.

intended only to cover small unintentional errors, and that, as the vendor by his counsel insisted on specific performance, the purchaser was entitled to compensation (*r*).

Variations in quality of estate—no allowance *semble* in favour of vendor.

As to the right to compensation in respect of variations in the quality of the estate,—there does not appear to be any case in which a vendor has obtained an increase of purchase-money, upon the ground of the character of the property being better than he had himself described it. And, as we have seen (*s*), he cannot claim any allowance for his own unauthorized expenditure upon the property subsequently to the contract.

Purchase-money, how diminished.

On the other hand, the purchase-money is liable to be diminished by deductions, either in respect of proceeds of the estate received, or which ought to have been received by the vendor, and which belong to the purchaser; or in respect of mere deteriorations to the estate; or of original defects in the estate.

By proceeds of estate received or which might have been received by vendor.

As to deductions of the first description;—We have already seen that the entire inheritance belongs to the purchaser from the date of the contract (*t*); but that the profits or income belong to him only from the time fixed for completion. If, therefore, timber be blown down (*u*), or felled, or stone or materials be quarried or worked, after the date of the contract, the proceeds must be accounted for at completion; so, the vendor must account for such rents and profits as he has, or might, but for his wilful default, (*x*), have received from the time appointed for completion up to such time as the purchaser has, or might safely have, taken possession (*y*): and, in one case, where many years' delay had occurred by the default of the vendor, who had received part of the purchase-

(*r*) *Whittemore* v. *Whittemore*, 8 Eq. 603; and *vide ante*, p. 159; and see this case discussed in *Re Terry and White*, 32 Ch. D. 14; *post*, p. 740.

(*s*) *Ante*, p. 286, n. (*u*).

(*t*) *Ante*, p. 286.

(*u*) *Ibid.*

(*x*) *Acland* v. *Gaisford*, 2 Mad. 28; *Wilson* v. *Clapham*, 1 J. & W. 36; see *Crosse* v. *Duke of Beaufort*, 5 De G. & S. 7; *vide ante*, p. 709.

(*y*) *Vide ante*, p. 709.

money and retained possession of the estate, he was charged with interest at 4*l. per cent.* upon a proportionate part of the rents (*z*).

By amount of deteriorations to estate, through fault of vendor.

As to deductions of the second description;—The vendor from the date of the contract holds the estate in trust for the purchaser, subject to payment of the purchase-money (*a*); with a right, until the time fixed for completion, to receive the interim profits. If, therefore, by his wilful acts (*b*), or mere negligence (*c*), he cause or permit the property to deteriorate,—as by allowing hedges and fences to get out of repair, or the land to remain uncultivated (*d*), or by an improper course of husbandry (*e*), or by ejecting tenants, or acting so improvidently as to occasion their loss (*f*),—the purchaser is entitled to an allowance: and, of course, deterioration may be of such a nature, or to such an extent, as to relieve him from the contract (*g*): and the vendor must answer for deteriorations occasioned by the conduct of his tenant, even although the lease has expired (*h*): but not for deteriorations after the time fixed for completion, if the title shown were such that the purchaser ought to have taken possession (*i*).

Phillips v. *Sylvester.*

But in one case (*k*) the rule as to a vendor's liability for deteriorations to the estate was carried much further than in the cases to which we have just referred. There was a dispute between the vendor and purchaser as to what was included in the contract, the latter claiming, and the former not admitting, that a small strip of land formed

(*z*) *Burton* v. *Todd*, 1 Sw. 255. See the order, *ib.* 263, 264.

(*a*) *Vide ante*, p. 283.

(*b*) *Foster* v. *Deacon*, 3 Mad. 395.

(*c*) See *Regent's Canal Co.* v. *Ware*, 23 B. 575.

(*d*) *Foster* v. *Deacon*, *supra*; *Townsend* v. *Champernowne*, 3 Y. & C. 505, 508.

(*e*) *Lord* v. *Stephens*, 1 Y. & C. 222.

(*f*) *Harford* v. *Purrier*, 1 Mad. 532.

(*g*) *Vide post*, p. 1215 *et seq.*

(*h*) *Foster* v. *Deacon*, 3 Mad. 395.

(*i*) *Binks* v. *Lord Rokeby*, 2 Sw. 222, 226; *Minchin* v. *Nanee*, 4 B. 332.

(*k*) *Phillips* v. *Sylvester*, 8 Ch. 173; *Royal Bristol Building Soc.* v. *Bomash*, 35 Ch. D. 390.

part of the purchase; pending the dispute, the vendor (*l*) refused to give up possession of the estate, except upon payment of the whole purchase-money, and took no steps either to procure a tenant for the property, or to preserve it from dilapidation. After fruitless negotiations, extending long past the time fixed for completion, the vendor filed a bill and obtained a decree for specific performance, excluding the strip. It was held by Lord Selborne, affirming Lord Romilly, that, as a set off to the interest payable by the purchaser under the contract on his purchase-money, the vendor must be charged with what he would, but for wilful default, have received for rent, and also with the dilapidations; and accounts between the parties were directed on this footing. It was admitted that the delay in completion was solely attributable to the purchaser, and that the vendor in refusing to give up possession acted only within his strict rights; but it was held that having retained possession, he was under the same obligations as any other person who, having a charge on the land, insists on the possession of the land itself as a further security. This decision was strongly disapproved of by Sir George Jessel, M. R., when the cause came on before him for further consideration. As his Honour remarked, the reasoning upon which it is based is wholly inconsistent with the law as laid down by the Court, in *Sherwin* v. *Shakspear*, and followed in subsequent cases. A vendor who retains possession of the estate until completion of the purchase, does so, not in the character of a mortgagee for better protecting his lien for unpaid purchase-money, but in the character of a trustee (using the term in a qualified sense, and not as implying the active obligations of an ordinary trusteeship) for the purchaser; and, as such trustee, it is his duty to keep the property in a proper state of cultivation, reasonable regard being had to his incurring liability (*m*). As in the case of a trustee, so *à fortiori*, in the

(*l*) The dispute was in fact between the purchaser and the representatives of the vendor, who had died shortly after the contract.

(*m*) *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; in which case the vendor

case of a vendor so circumstanced, it is only under special circumstances that he ought to be charged with wilful default as respects the due preservation of the property; especially where, as in the case just referred to, the non-completion of the purchase by the appointed time is occasioned by the purchaser's own default. If the rule were otherwise, a vendor might find himself compelled to make a heavy outlay for repairs or the like (as, *e. g.*, on the sale of a mill and machinery), which might be objected to by the purchaser as unnecessary or improper; and, unlike a mortgagee or trustee, he would have no means except by a suit, or possibly by a summons under the Vendor and Purchaser Act (*n*), of recovering from the purchaser the amount which he has so expended.

Abatement in purchase-money in respect of original defects in estate.

As to deductions of the third description;—Compensation may be due to the purchaser out of the purchase-money in respect of original defects in the estate, either as respects its quantity, or quality, or the extent of the vendor's interest therein. It may be convenient here to consider those questions which relate merely either to the quantity or quality of the estate; reserving for separate discussion, under the head of specific performance, those questions which are in fact questions of title (*o*).

Abatement allowed for deficiency, although land not professedly sold by the acre.

The purchaser will be entitled to compensation for a deficiency in quantity, even although the estate be not sold professedly by measurement (*p*): and although, of course, he could not claim compensation if it appeared that he contracted with a knowledge of the deficiency, such knowledge will not be assumed from the fact of his being intimately acquainted with the property (*q*), or even being the occupying

had allowed the farms to remain unlet; and see the remarks of Jessel, M. R., in that case on the duties generally of a vendor in possession.

(*n*) Sect. 9.

(*o*) *Vide* Ch. XVIII.

(*p*) *Hill* v. *Buckley*, 17 V. 394, 401; *King* v. *Wilson*, 6 B. 124; and see *McKenzie* v. *Hesketh*, 7 Ch. D. 675.

(*q*) See *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609. And his knowledge of

Chap. XIII. Sect. 4.

tenant (*r*): nor is the right to compensation precluded by a condition that he shall not object to complete his purchase, if the quantity should turn out less than that stated in the particulars (*s*); nor by acts which amount to a waiver of objections to the title (*t*).

As to the effect of the expressions "by estimation," "more or less," &c.

The above rule, where the estate is professedly bought by the acre, or (which is the same thing) (*u*) where the quantity is stated, and there is nothing to rebut the ordinary presumption of price having been fixed with reference to quantity, may, it is conceived, be strictly enforced, where no words are introduced to qualify the statement as to quantity. The qualifying expressions, "by estimation," and "be the same more or less," are, however, in very general use; and the cases do not seem to define their precise effect (*x*): they have been held to include a small adjoining strip of land over which the grantor had exercised acts of ownership, although the dimensions and boundaries of the property conveyed were stated in the description (*y*); so, on the other hand, they have been held to cover a deficiency of upwards of five out of forty-one acres (*z*); but not of 100 out of 349 acres (*a*); so, in a case of *Gell* v. *Watson* (*b*), similar expressions were not allowed to cover a deficiency of two acres in two closes forming part of a much larger estate, the quantity of the two closes being stated to be (*according to a specified plan*) 8 a. 1 r. 4 p.

What deficiency they will cover.

Cordingley v. *Cheeseborough.*

In a modern case, on a sale by auction, the property was,

the error may not preclude him from compensation, where there is a condition that it shall be allowed; *Lett* v. *Randall*, 49 L. T. 71; and cf. the principle of *Cato* v. *Thompson*, 9 Q. B. D. 616.

(*r*) *King* v. *Wilson*, 6 B. 124.

(*s*) *Frost* v. *Brewer*, 3 Jur. 165.

(*t*) *Calcraft* v. *Roebuck*, 1 V. 221.

(*u*) 17 V. 401

(*x*) See *Marquis Townshend* v. *Stangroom*, 6 V. 328, 341; *Hill* v. *Buckley*, 17 V. 394; *Neale* v. *Parkin*, 1 Esp. 229; *Anon.*, cited Freem. 106; *Davis* v. *Shepherd*, 1 Ch. 416, 418.

(*y*) *Simpson* v. *Dendy*, 8 C. B. N. S. 433; aff. 7 Jur. N. S. 1058.

(*z*) *Winch* v. *Winchester*, 1 V. & B. 375.

(*a*) *Portman* v. *Mill*, 2 Rus. 570. N.B.—In this case, the deficiency appears to have been in the cultivated land.

(*b*) Sug. 325; and see *Leslie* v. *Tompson*, 9 Ha. 268, 273.

by an unintentional error, described as containing "an area of 7683 square yards, or thereabouts," when in fact it contained only 4350 square yards. By the 10th condition it was provided that if the purchaser should make any requisition as to title, compensation, &c., which the vendor should be unwilling to comply with, the latter should have the usual power of vacating the sale; and by the 17th condition the admeasurements were "to be presumed correct," and no compensation allowed or required in respect of any inaccuracy. The purchaser, after having taken possession, and after the date fixed for the completion of the contract, claimed compensation, whereupon the vendor elected to rescind the contract. On a bill by the purchaser for specific performance with a compensation, V.-C. Stuart decreed specific performance, but only upon payment of the purchase-money in full: the purchaser being willing to take the land at the full price rather than lose it altogether. On appeal, this decision was affirmed by Lord Westbury: but his Lordship in his judgment expressed his opinion that the 17th condition was intended to cover only the consequences of inconsiderable errors; and intimated that upon the case before him the condition could not have been enforced by the vendor had he been plaintiff instead of defendant in a suit for specific performance (*c*). On the same principle in a later case, where the contract was for the sale of an estate containing 21,750 acres, the actual acreage being afterwards ascertained to be only 11,814 acres, and the price appeared to have been fixed with reference to the rental, the Court refused, at the suit of the purchaser, to decree specific performance on payment of the purchase-money, less a proper compensation for the deficiency in quantity (*d*).

Semble—only deficiencies in

Where land is described particularly, by stating not

(*c*) *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379; *Whittemore* v. *Whittemore*, 8 Eq. 603; *ante*, pp. 159, 732. The former case (see the Report) was in effect an appeal from the author's opinion given as referee; and see *Re Terry and White*, 32 Ch. D. 14.

(*d*) *Earl of Durham* v. *Legard*, 34 B. 611.

Chap. XIII. Sect. 4.

the fractional parts of the acre, when the description particularizes fractional parts.

only the acres but also the roods, or roods and poles, the qualifying expressions "by estimation," "more or less," or "thereabouts," cannot, perhaps, be held to provide for more than inaccuracies in the roods or poles (*e*): and, of course, a vendor cannot, in any case, rely upon such expressions, if he fraudulently misstate the quantity (*f*).

Purchaser's right confined to compensation.

The purchaser's right is strictly to compensation, and not necessarily to an abatement of purchase-money proportionate to the surface deficiency: thus, where, upon the sale of woodlands, the value of the timber was correctly stated, but the land was represented to contain more by twenty-six acres than the actual quantity, he was allowed, as compensation, the estimated value of twenty-six acres of woodland *minus* the wood (*g*). The case is valuable as illustrating a principle; but, as a decision between parties, its justice may be thought questionable: for it is clear that in purchasing woodland (unless there be no *growing timber*), the value of the estate depends, not only upon the present worth of the timber and of the land apart from it, but upon the two taken together, with reference to the relative situations of the trees being such as to afford them sufficient nourishment and full space to arrive at maturity.

Surface deficiency on sale of woods.

Abatement in purchase-money in respect of deficiency in quality may be claimed, when.

As respects the quality of the estate,—A purchaser, it appears, may claim compensation in respect of any deficiency which "admits of a certain estimation" (*h*): for instance, he may claim it for dilapidations of a house described as "in good repair" (*i*); or for the want of cultivation of land described as being in "a high state of cultivation" (*k*); or for the want of a natural water supply, where a manufactory in a place abounding in springs was described as well supplied with water, and there was in fact only an

(*e*) *Hill* v. *Buckley*, 17 V. 401; 9 Jarm. Conv. 37.

(*f*) 1 V. & B. 377; *Duke of Norfolk* v. *Worthy*, 1 Camp. 340; Sug. 325.

(*g*) *Hill* v. *Buckley*, 17 V. 394; see form of order, Seton, 1314.

(*h*) 10 V. 508.

(*i*) *Dyer* v. *Hargrave*, 10 V. 505; *Grant* v. *Munt*, G. Coop. 173.

(*k*) *Dyer* v. *Hargrave*, *supra*.

artificial supply on payment of a water rate (*l*); but not for that which does not admit of a pecuniary equivalent: for instance, it is doubtful whether compensation could be claimed in respect of the land lying dispersed, instead of within a ring fence, as described (*m*); although such a variation might be sufficient to avoid the sale; and he cannot claim compensation in respect of a misdescription known to him when he entered into the contract (*n*).

Interest on abatement.

If the vendor have received the purchase-money, he must, in refunding the amount of abatement, pay interest upon it (*o*).

Investment of purchase-money—loss or gain on.

If the purchaser, without the vendor's sanction, invest the purchase-money, he of course takes all the risk of the investment, and is entitled to the profit, if any; but the risk and possible benefit of the investment are alike shifted to the vendor if it be made with his approval (*p*).

Summary of the law on compensation for errors.

It may here be convenient to sum up shortly the law as it now seems to be established on the subject of compensation, and in doing so it is essential to distinguish between the relative positions of vendor and purchaser in this relation.

1. In the absence of any condition.

I. In the absence of any express stipulation, where the error is considerable, so as in fact to be of the substance of the contract, the vendor cannot insist upon specific performance by the purchaser, even though he be willing to allow compensation for the error. The purchaser, on the other hand, can, alike whether the error be substantial or trivial, insist upon the vendor giving him as much as he is able of what he has contracted to sell, with compensation in respect of such part as he is unable to convey (*q*), except in certain

(*l*) *Leyland* v. *Illingworth*, 2 D. F. & J. 248.

(*m*) *S. C.*; *Fewster* v. *Turner*, 6 Jur. 144.

(*n*) See last note.

(*o*) *Ferguson* v. *Tadman*, 1 Si. 530.

(*p*) *Burroughes* v. *Browne*, 9 Ha. 609, 613.

(*q*) *Mortlock* v. *Buller*, 10 V. 305; and for other cases, see Fry, pt. v.

Chap. XIII. Sect. 4.

cases where the purchaser was aware of the defect when he entered into the contract, or where the error had arisen *bonâ fide* by a mistake, and the enforcement of the contract would be unjust (*q*). Where the error is inconsiderable, the vendor is entitled to enforce the contract, with compensation allowed to the purchaser for the deficiency (*qq*).

2. Where there is a condition excluding compensation.

II. Judicial opinions and dicta on the exact application of the condition, that no error or misdescription shall annul the sale, and that no compensation shall be allowed for the same, are somewhat conflicting. The better opinion on its construction would seem to be that, while it applies both to great and small errors, so as to exclude the purchaser's right to specific performance with compensation in *every* case, yet at the same time it does not enable a vendor to force upon a purchaser a property which he has substantially misdescribed. The difference, in fact, between the position of vendor and purchaser under this condition, is that while a vendor cannot, where there is a substantial error, insist on specific performance, the purchaser may insist upon the vendor carrying out the contract; but, in order to do so, he must pay the purchase-money in full (*r*). Where the error is inconsiderable, either party is entitled to specific performance without compensation.

3. Where there is a condition providing for compensation.

III. A condition, that compensation should be allowed for any error or misdescription, only applies, as regards the vendor, to unsubstantial errors, and does not enable him to

c. 2. The ground of Lord Eldon's judgment, apparently, is that the purchaser is entitled to a remedy in respect of the vendor's representation. This, however, is somewhat difficult to reconcile with modern legal principle. Representation can hardly amount to a new contract, co-existent with the express one, nor can it, in the absence of knowledge, form the ground for an action of deceit. The doctrine, however, appears to be too firmly established to be questioned at this date.

(*q*) *Earl of Durham* v. *Legard*, 34 B. 611; *sed qu.* cf. *Burrow* v. *Scammell*, 19 Ch. D. 176.

(*qq*) See *post*, p. 1205.

(*r*) *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379; *Whittemore* v. *Whittemore*, 8 Eq. 603, where the action was practically a vendor's suit for specific performance; *Re Terry and White*, 32 Ch. D. 14, although Lopes, L. J., took a different view.

insist upon the purchaser taking a property essentially different from that which he contracted to buy. On the other hand, such a condition would not seem either to add to or to diminish the rights of the purchaser, since, as we have seen, he is, independently of any condition, entitled to insist on the vendor carrying out so much of the contract as he can, and at the same time allowing compensation; nor does it prevent the purchaser from refusing to carry out the contract in any case, where he would, in the absence of the condition, have been entitled to avoid it (*s*).

(5.) *As to execution by the parties.*

Section 5.

As to execution by the vendor.

As the law now stands, the purchaser is not entitled to require the conveyance to be executed in his presence, but is entitled to have at his own cost the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor (*t*). This section, which applies only to sales made after the 31st of December, 1881, precludes the class of questions which used to arise under the old law (*u*).

General rules as to vendor's duties may be modified by circumstances.

In the practice of conveyancers many of the general rules laid down in the present work, relating to the liability of vendors, in respect to their personal action, must be considered to depend in some indefinable degree upon the extent and value of the property agreed to be sold and the personal status of the parties. Requisitions on the part of a purchaser

(*s*) In *Dunn* v. *Flood*, 28 Ch. D. 586, Baggallay, L. J., suggests that a condition for compensation might have altered the decision; but it is difficult to see how such a condition would have made a condition which was depreciatory to be otherwise. If there were easements, &c., which lessened the value of the property, the purchaser would be entitled to compensation, in the absence of a condition expressly excluding it; and therefore the insertion of a compensation clause would not have been sufficient to reassure an intending purchaser who was frightened by the suggestion of easements, &c.

(*t*) 44 & 45 V. c. 41, s. 8.

(*u*) *Viney* v. *Chaplin*, 2 D. & J. 468; *Essex* v. *Daniell*, L. R. 10 C. P. 538; and see the 5th ed. of this work for the old law.

Chap. XIII. Sect. 5.

which might be perfectly reasonable upon the sale of a considerable estate, or even on a small transaction between parties in the same rank and station in life, might be evidently unreasonable if insisted upon in a petty transaction between parties of widely different stations and positions. So, too, other circumstances personal to the vendor may occasionally render that an unreasonable, which would otherwise be a reasonable, requisition on the part of a purchaser.

Section 6.

(6.) *To whom and how purchase-money should be paid.*

To whom and how purchase-money should be paid.

1. Old law.

The agent of the vendor cannot (*x*), nor formerly could the vendor's solicitor (*y*), without special authority, receive and give a discharge for the purchase-money: and the usual indorsed receipt was, in Equity, no conclusive evidence of payment (*z*). The money, therefore, should in strictness be paid to the vendor personally, or upon his written authority; and it was held that a purchaser might insist either on personal payment, or on the production of a written authority (*a*). And the mere fact of the solicitor having in his possession a deed executed by his client gave him no authority to receive the purchase-money; and a mortgage deed was declared void as against the trustee in bankruptcy of the mortgagor, where the money had thus been paid to his solicitor who absconded (*b*).

2. Present law.

But in cases arising since the 31st of December, 1881, the rule established by the cases of *Viney* v. *Chaplin* (*c*), and *Ex parte Swinbanks* (*d*), has been altered by the Conveyancing

(*x*) *Ante*, p. 213.

(*y*) Sug. 667; and see *Re Fryer*, 3 K. & J. 317.

(*z*) *Winter* v. *Lord Anson*, 3 Rus. 488; *post*, p. 825; and see *Hawkins* v. *Gardiner*, 2 S. & G. 441; nor is an indorsed receipt, even at Law, conclusive evidence of payment, see *Straton* v. *Rastall*, 2 T. R. 366.

(*a*) *Viney* v. *Chaplin*, 2 D. & J. 468, 482.

(*b*) *Ex p. Swinbanks*, 11 Ch. D. 525. But see and distinguish *Gordon* v. *James*, 30 Ch. D. 249.

(*c*) *Suprà*.

(*d*) *Suprà*.

Act, 1881, which provides (*e*) that where a solicitor (*f*) produces a deed, having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

To trustees.

In the case of a fiduciary vendor, care should be taken that the proposed mode of payment does not involve a breach of trust (*g*); *e.g.*, it is a breach of trust for trustees for sale to authorize their solicitor to receive the purchase-money (*h*); every trustee authorizing such receipt will be liable, nor can the purchaser be considered safe. However, in a modern case, Lord Romilly held that where there is the usual declaration that the trustees' receipt shall be a good discharge, the purchaser is bound, upon the trustees signing the usual receipt, to pay the money as they direct; that such a payment is equivalent to a payment to the trustees themselves; and that the purchaser is exonerated from the consequences of misapplication of the money, unless he pays it under express notice that the proposed recipient is about to deal with it in such a manner as will amount to a breach of trust (*i*). So, in a later case, the same learned judge laid it down that "where a person is authorized by trustees to receive trust money, and receives it accordingly,

(*e*) S. 56.

(*f*) It is apprehended that the words "a solicitor" mean the vendor's solicitor, but the language of the section is not precise.

(*g*) See *Webb* v. *Ledsam*, 1 K. & J. 385.

(*h*) See *Ghost* v. *Waller*, 9 B. 497; *Rowland* v. *Witherden*, 3 M. & G. 568; *Waugh* v. *Wyche*, 2 Dr. 326; *Griffiths* v. *Porter*, 25 B. 236; *Bostock* v. *Floyer*, 1 Eq. 26; but see *Re Bird*, 16 Eq. 203. See, however, as to assignees in bankruptcy, *Hughes* v. *Morris*, 9 Ha. 636, but note the grounds of the decision, p. 646; *Bourdillon* v. *Roche*, 27 L. J. Ch. 681.

(*i*) *Hope* v. *Liddell*, 21 B. 183, 202, 203; *McCarogher* v. *Whieldon*, 34 B. 107; but see *Pell* v. *De Winton*, 2 D. & J. 13; Lewin, 473.

the receipt of the money by the agent binds the trustees and discharges the person who pays it (*k*). So, where two sets of trustees were entitled in unequal shares to the money secured by a mortgage, and sold, under the power of sale, a portion of the mortgaged property, it was held that the purchaser must be satisfied with the joint receipt of the vendors, on payment of the purchase-money into their joint account, and could not insist on having the purchase-money apportioned in the conveyance (*l*).

The opinions of eminent practitioners are understood to differ as to the soundness of the doctrine above stated. Its practical convenience is unquestionable. Of course, the money cannot, except under a special power in the instrument creating the trust, be safely paid upon the receipt of fewer than the entire body of trustees (*m*); and every trustee who joins in the receipt will be *primâ facie* responsible for the whole amount; and although he may discharge himself by showing that he joined merely for conformity, he will still be chargeable if he allow the money to remain unnecessarily in the hands of the actual recipient (*n*). It was remarked in a late case by an eminent judge, that he knew of no authority for holding a man liable to pay over again his purchase-money which he has paid to one of several trustees on a receipt signed by all (*o*): the point, however, was not decided, and seems to be questionable: and such a mode of payment can scarcely be recommended in practice. The opinion of Lord St. Leonard's on the point may be surmised from his advising (*p*) that where all the trustees cannot be got together, the money should be paid into a bank, to their joint account, on their written authority; which seems to be an unexceptionable arrangement. And this has been acted on

(*k*) *Robertson* v. *Armstrong*, 28 B. 123; *sed quære.*

(*l*) *Re Parker and Beech*, 55 L. J. Ch. 815.

(*m*) *Brice* v. *Stokes*, 11 V. 319; 2 Wh. & T. L. C.; *Hall* v. *Franck*, 11 B. 519; *et vide ante*, pp. 684 *et seq.*

(*n*) *Brice* v. *Stokes*, *suprà*; *Thompson* v. *Finch*, 22 B. 316.

(*o*) *Webb* v. *Ledsam*, 1 K. & J. 385; and see and consider *Charlton* v. *Earl of Durham*, 4 Ch. 433, and remarks of V.-C. James in note at p. 437.

(*p*) Sug. 667; see Lewin, p. 448.

in a recent case (*q*), where the purchaser was held entitled to require either that all the trustees should be present to receive the purchase-money, or that the trustees should have a bank at which the money might be paid to their joint account.

C. A., s. 56 does not apply to sales by trustees.

The effect of the 56th section of the Conveyancing Act being merely to make a deed in the form there described equivalent to an authority to the solicitor to receive the purchase-money, it has no application to sales by fiduciary vendors, except in cases where they would otherwise be justified in giving such an authority to their solicitor, and does not in any way enlarge the power of trustees to give such an authority (*r*).

Liability of trustees *inter se*.

Where, on a sale by two trustees, a cheque for the proceeds was handed by one to the other, who misapplied it, both were held liable (*s*); but where a trustee obtains possession of the money by an act of dishonesty, and without the knowledge of his co-trustee, the latter is not liable for its misapplication (*t*). Of course, a receipt signed by one trustee on behalf of himself and his co-trustee, is not a sufficient discharge to the purchaser (*u*); and in one case, where property was in mortgage to three trustees, and a solicitor on behalf of his client prepared a transfer, which was executed by the mortgagor and two of the trustees, though no money was actually paid, the deed was held inoperative as against both the mortgagor and the truseees (*v*). Where trustees for sale employ one of their own number as

(*q*) *Re Flower and Metrop. Board of Works*, 27 Ch. D. 592.

(*r*) *Re Bellamy and Metrop. Board of Works*, 24 Ch. D. 387.

(*s*) *Trutch* v. *Lamprell*, 20 B. 116; and see *Griffiths* v. *Porter*, 25 B. 236; *Rodbard* v. *Cooke*, 25 W. R. 555. Even the innocent trustee was not under the Bankruptcy Act, 1869, relieved from his liability by a discharge, *Cooper* v. *Prichard*, 11 Q. B. D. 351; but under the Act of 1883 this rule is apparently altered by the addition of the words "to which he was a party." See s. 30.

(*t*) *Barnard* v. *Bagshaw*, 3 D. J. & S. 355. See as to trustee not being responsible for failure of the bank in which the purchase-money is temporarily invested, *Wilks* v. *Groom*, 3 Dr. 584.

(*u*) *Hall* v. *Franck*, 11 B. 519; and see *Heath* v. *Crealock*, 18 Eq. 215.

(*v*) *Griffin* v. *Clowes*, 20 B. 61.

Chap. XIII. Sect. 6.

their solicitor in the transaction, payment of the purchase-money to him will be considered as made in his capacity of trustee, and not as solicitor (*x*).

Payment to agents.

When an agent is empowered to receive the money, there must be a *bonâ fide* payment; for instance, it cannot be set off against a private debt due from him to the purchaser (*y*), unless the vendor, being indebted to the agent, have authorized him not merely to receive, but to pay himself out of it (*z*): and where the same solicitors acted for both parties, being authorized by the vendors to receive the purchase-money, and by the purchaser to apply for that purpose money of his which they had in their possession, and the agents in their accounts with their respective clients credited the vendors and debited the purchaser with the amount, the latter, on the bankruptcy of the solicitors, was still held liable to pay the purchase-money, the vendors not having sanctioned that particular mode of payment (*a*). So, if an agent be authorized to receive the money according to the contract, and it be paid to him in anticipation of the time therein named, the purchaser is liable for its due application (*b*). In short, an agent has *primâ facie* authority to receive payment only in money or its equivalent; and it is not sufficient that the money be written off against other money due from the agent, or otherwise set off in account merely (*c*). In a case where the purchaser's attorney was appointed for that turn deputy steward of a manor, for the purpose of taking the

(*x*) *Re Fryer*, 3 K. & J. 317.

(*y*) *Young* v. *White*, 7 B. 506.

(*z*) *Barker* v. *Greenwood*, 2 Y. & C. 414; *Hanley* v. *Cassan*, 11 Jur. 1088. As to how the loss of money by the fraud of a person acting as agent for both parties, is to be borne see *Vandaleur* v. *Blagrave*, 6 B. 565; on app. 11 Jur. 935; *Young* v. *Guy*, 8 B. 147; *Hiorns* v. *Holton*, 16 B. 259; *West* v. *Jones*, 1 Si. N. S. 205; *Griffin* v. *Clowes*, 20 B. 61. As to the purchaser's liability for a fraudulent application of the purchase-money, to which his solicitor, acting also for the vendor, was privy, see *Doe* v. *Martin*, 4 T. R. 39, 66; see, too, *Hicks* v. *Morant*, 3 Y. & J. 286; *Bowles* v. *Stewart*, 1 Sch. & L. 222.

(*a*) *Wrout* v. *Dawes*, 25 B. 369.

(*b*) *Parnther* v. *Gaitskell*, 13 Ea. 432; *Cotman* v. *Orton*, 5 Jur. 142; *et vide ante*, p. 221; *Hughes* v. *Morris*, 9 Ha. 646.

(*c*) *Sweeting* v. *Pearce*, 7 C. B. N. S. 449, 485; 9 *ibid.* 534; *Pearson* v. *Scott*, 9 Ch. D. 198.

purchaser's admittance, and received from him payment of the lord's fine, steward's fees, and his own professional charges in a single cheque, which on being paid into his bankers, was retained by them in part discharge of his overdrawn account, it was held in an action by the lord against the purchaser, that the steward having been authorized to receive the amount of the fine, payment by cheque to him was equivalent to payment in cash, and was good as against the lord (*d*).

Payment by cheque.

If a cheque be given for it, and, by reason of an unintentional non-compliance with the Stamp Act, be so drawn that no action could be maintained upon it, and the bankers upon whom it is drawn fail before payment, or if (supposing it to be valid and to be presented within a reasonable time), the bankers, upon receiving it with instructions to transmit the amount to London, on the same day, and before the usual hour for closing business, stop payment, the loss falls on the purchaser (*e*) : so, if presentation of the cheque be delayed at his request, and the bank fail in the interval (*f*). Of course, the vendor may decline to take a cheque (*g*). A mutual agent, upon whom a bill of exchange is, according to the contract, drawn by the purchaser in favour of the vendor, cannot, without the consent of the latter, enter the same to his credit before it arrives at maturity ; so that if the agent fail in the interval, the loss falls on the purchaser, although the bill has been so entered, and might have been drawn against by the vendor (*h*).

Joint vendors.

Any one of several joint vendors can, at Law, give a discharge for the entire purchase-money (*i*) ; but this is not

(*d*) *Bridges* v. *Garrett*, L. R. 5 C. P. 451 ; and it would seem that payment to an agent may be well made by cheque, *Farrer* v. *Lacy-Hartland*, 31 Ch. D. 42.

(*e*) *Bond* v. *Warden*, 1 Coll. 583 ; *Lord Ward* v. *Oxford, &c., R. Co.*, 2 D. M. & G. 750 ; the Court will not compel the delivery up of a void cheque, *Carrington* v. *Pell*, 3 De G. & S. 512.

(*f*) *Lord Ward* v. *Oxford, &c., R. Co.*, 2 D. M. & G. 750.

(*g*) *Clarke* v. *King*, 2 C. & P. 286.

(*h*) *Maxwell* v. *Deare*, 1 C. L. R. 776.

(*i*) See *Wallace* v. *Kelsall*, 7 M. & W. 264 ; *Husband* v. *Davis*, 10 C. B. 645.

Chap. XIII. Sect. 6.

the rule in Equity: nor does it in Law extend to a case where persons collectively entitled to an estate agree to sell under terms constituting several contracts in relation to their respective shares. In one case, where an equitable charge was vested in two persons as joint tenants in their own right, and one only without the express authority of the other signed a receipt for the whole mortgage debt, it was held that the land was not effectually discharged, and that the title could not be forced on an unwilling purchaser (*k*).

Sale under power of attorney.

Where the conveyance is executed under a power of attorney, the proper course seems to be to let the purchase-money be invested in the names of trustees, at the expense and risk of the vendor, until satisfactory evidence is adduced of the validity of the power at the date of the execution of the conveyance. But this of course does not apply to powers declared to be irrevocable under the Conveyancing Act, 1882 (*l*).

On sale in bankruptcy.

Under the Bankruptcy Act of 1869, it was (*m*), and under the Act of 1883 (*n*) it is now, the duty of the trustee to sell the bankrupt's property, and he is competent to give receipts for the purchase-money.

Lien of third party advancing part of the purchase-money, as against purchaser's assignee's in bankruptcy.

Where A., in ignorance of the purchaser being an uncertificated bankrupt, advanced part of the purchase-money, and paid it direct to the vendor, and the conveyance was handed over to him immediately after its execution, he was held to have a valid lien upon the property; although the purchaser at the same time signed a memorandum stating that he had deposited the deed with A. as a security for the advance (*o*). But a purchaser, who has contracted with a person who before conveyance becomes bankrupt to buy property, and after the date of the bankruptcy *bonâ fide* pays him the

(*k*) *Matson* v. *Dennis*, 4 D. J. & S. 345.

(*l*) Ss. 8 and 9, and see 44 & 45 V. c. 41, ss. 46—48.

(*m*) See 32 & 33 V. c. 71, s. 25.

(*n*) 46 & 47 V. c. 52, s. 56.

(*o*) *Meux* v. *Smith*, 11 Si. 410; which see also as to the usual mode of payment for public houses.

purchase-money, is not protected, and will have to pay the purchase-money over again to the trustee, although he had no notice of the adjudication when he paid his money to the bankrupt vendor (*p*).

Trustees' Relief Acts.

A purchaser of land subject to a pecuniary *charge* cannot pay the amount into Court under the Trustees' Relief Act (*q*): but this course may be adopted as a mode of perfecting the title, when trustees have power to sell but no power to give receipts (*r*): so, also, which can rarely happen, if there be a charge payable to trustees who have no power to give a valid discharge for it: so, if by reason of adverse claims, or the disability of the mortgagor, a mortgagee, selling under his power is unable to obtain a discharge for the surplus proceeds of sale (*s*). So, where there are conflicting claims to the proceeds of sale, the amount can, by arrangement, be paid to trustees, in trust for the rightful owners: the right to be ascertained, if necessary, by means of a payment into Court, and a petition under the Act (*t*). And the Act affords a convenient means of securing the safe custody of money or stock appropriated as an indemnity against future or contingent incumbrances or liabilities. It is not, however, likely that the provisions of the Trustee Relief Act will in future be often employed for this purpose, as the 5th section of the Conveyancing Act, 1881, provides a means of getting rid of an incumbrance by paying into Court the amount of the incumbrance together with a margin of 10 per cent. (*u*).

Payment of consideration-

Upon a sale by a mere statutory owner, under the Lands

(*p*) *Ex p. Rabbidge*, 8 Ch. D. 367. It is conceived that the difference between this case and *Meux* v. *Smith*, is that while this case depended on absence of title in the bankrupt, the latter was based on the inability of the trustee to take advantage of the transaction, without bearing its disadvantage.

(*q*) 10 & 11 V. c. 96; 12 & 13 V. c. 74; *Re Buckley*, 17 B. 110; *Re Cooper's Legacy*, 17 Jur. 1087; Lewin, pp. 996 *et seq.*; and see now as to the procedure under this Act, Rule 34 of the Chancery Rules of Dec. 1874, and Rule 41 of the Supreme Court Funds Rules, 1886; and see *Re Stening*, W. N. 1884, p. 142. The County Courts have no jurisdiction where the sum exceeds 500*l.*; see 28 & 29 V. c. 99, s. 1; 30 & 31 V. c. 142, s. 24.

(*r*) *Cox* v. *Cox*, 1 K. & J. 254; and see Trustee Act, 1850, s. 48.

(*s*) *Roberts* v. *Ball*, 1 Jur. N. S. 585.

(*t*) *Re Russell Road*, 12 Eq. 78.

(*u*) *Re Sanderson* and *G. N. R. Co.*, 25 Ch. D. 788.

Chap. XIII. Sect. 6.

money upon sale by statutory owners to railway companies, &c.

Clauses Consolidation Act, 1845, the entire purchase and compensation moneys, if amounting to 200*l.*, must be paid into the bank, or (if under 200*l.* but exceeding 20*l.*), into the bank or to trustees, and be applied in manner directed by the 69th and following sections of the Act: and no part thereof can be safely paid to such statutory owner. The above provisions extend to moneys agreed to be paid to him for assenting to, or not opposing, the passing of the bill authorising the taking of the lands; but the Court of Chancery or the trustees, as the case may be, may allot to him a portion of the sum so paid, as a compensation for personal injury, inconvenience or annoyance (*x*). Statutory vendors, having pressed for and received the purchase-money, have been compelled, on the application of the purchasers, to bring it into Court (*y*). Where, after the amount of the purchase-money has been ascertained or agreed upon, the owner (*z*) refuses to convey, or cannot be found, or does not make a satisfactory title (*a*), the purchase-money may be paid into Court (*b*), and upon the execution of a deed poll by the company, the lands purchased vest in the company (*c*).

How moneys deposited are to be applied under the 69th section.

The moneys so paid into Court are to remain deposited until applied for some one or more of the following purposes; *viz.*, the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance, affecting the land, or other lands settled to the same uses,—the purchase of other lands to be settled to the same uses, &c., as the lands taken, —the removing and replacing of buildings and substituting others in their stead, where the money is paid in respect of any buildings taken,—or the payment to any person becoming absolutely entitled to the money (*d*).

Cases on this section:

The Settled Land Act, 1882, has largely extended the

(*x*) Sect. 73; see *Re Duke of Marlborough's Estates*, 13 Jur. 738; *Ex p. Rector of Little Steeping*, 5 R. C. 207.

(*y*) *L. & N. W. R. Co.* v. *Corp. of Lancaster*, 15 B. 22.

(*z*) *Douglass* v. *L. & N. W. R. Co.*, 3 K. & J. 173; *Wells* v. *Chelmsford Local Board*, 15 Ch. D. 108.

(*a*) *Re Manor of Lowestoft*, 24 Ch. D. 253.

(*b*) Sect. 76.

(*c*) Sect. 77. As to the formalities to be observed, see *Ex p. Winder*, 6 Ch. D. 696.

(*d*) 8 & 9 V. c. 18, s. 69.

scope of this section: but independently of that Act it has been liberally construed; thus it has been held that a tenant for life, who has redeemed the land-tax, may recoup himself out of the purchase-moneys paid into Court (*e*); so, the buying up of a quit-rent (*f*), or of a tithe rentcharge (*g*), or of a lessee's interest (*h*), the enfranchisement of copyholds (*i*), and the redemption of land-tax (*k*), have been held to be a discharge of incumbrances within the Act: so, too, the purchase-money of lands of a municipal corporation may be applied in redeeming incumbrances upon any other lands of the same corporation (*l*); or in paying off bonds issued for repayment of moneys raised for other purposes (*m*), and, in the case of a rector, may be applied in discharging his other lands from the expenses of an inclosure (*n*). By the Settled Land Act, 1887 (*nn*), these powers are extended to the case of a terminable rent-charge, created under an Improvement Act, the decision in *Re Knatchbull's Settled Estate* (*o*) being thus repealed.

as to the discharge of incumbrances, &c.;

The purchase-money of freehold or leasehold lands may be invested in the purchase of copyholds of inheritance (*oo*); or in buying up the reversion in fee of other leaseholds belonging to the same parties (*p*); but the purchase-moneys of freehold and copyhold lands will not be re-invested in the purchase of leaseholds (*q*).

as to purchase of other lands;

So, too, the purchase-moneys may be applied in doing anything which adds something new to the estate, as, *e. g.*, the

as to expenditure on permanent improvements.

(*e*) *Ex p. Lord Northwick*, 1 Y. & C. 166; and see *Re L. B. & S. C. R. Co.*, 18 B. 608; but see *Ex p. Tottenham*, 13 L. R. Ir. 479.

(*f*) *Ex p. Studdert*, 6 Ir. Ch. R. 53.

(*g*) *Ex p. Lord Leconfield*, 8 I. R. Eq. 559.

(*h*) *Re M. S. & L. R. Co.*, 21 B. 162; see also *Ex p. Bishop of London*, 2 D. F. & J. 14.

(*i*) *Dixon* v. *Jackson*, 25 L. J. Ch. 588; *Re Cheshunt College*, 3 W. R. 638.

(*k*) *Re Bethlem Hospital*, 19 Eq. 457; *Ex p. Hospital of St. Katharine*, 17 Ch. D. 378.

(*l*) *Ex p. Corp. of Cambridge*, 6 Ha. 30.

(*m*) *Re Derby Municipal Estates*, 3 Ch. D. 289.

(*n*) *Ex p. Lockwood*, 14 B. 158; *Ex p. Queen's College*, *ib.* 159, n.

(*nn*) 50 & 51 V. c. 30.

(*o*) 29 Ch. D. 588.

(*oo*) See *Re Liverpool Docks*, 1 Si. N. S. 202; *Re Cann's Estate*, 19 L. J. Ch. 376. *Vide post*, p. 760, n. (*i*).

(*p*) *Re Brasher's Trusts*, 6 W. R. 406.

(*q*) *Re L. & Y. R. Co.*, 2 W. R. 667.

Chap. XIII. Sect. 6.

erection of a new parsonage-house (*r*), or permanent improvements and additions to the parsonage-house (*s*); or the addition of a new wing to an existing house (*t*); or of new farm-buildings in substitution for others rendered useless or less convenient by the proximity of the railroad (*u*); or by the re-building of houses upon other portions of the settled property which the Metropolitan Building Acts required to be reinstated (*x*); or by the erection of cottages upon a part of the estate, which was lying unproductive (*y*); or of new farm-houses and cottages (*z*). And, although in some cases the Court has sanctioned the expenditure of money on improvements which, though of a permanent character, yet do not amount to an actual augmentation of the estate (*a*); yet the true principle seems to be that only such an application ought to be allowed as actually amounts to an augmentation of the estate, and so is equivalent to the purchase of new property (*b*). But, the Court will not, it seems, allow the purchase-money to be applied in building or re-building on other portions of the estate, at any rate if the remainderman object (*c*), or in reimbursing the tenant for life what he has expended in repairs or permanent improvements (*d*); or in recouping a rector the costs which he has himself incurred in re-building the parsonage-house (*e*); or in the restoration of the chancel, or in paying off money borrowed from Queen

(*r*) *Re Incumbent of Whitfield*, 1 J. & H. 610; and see *Ex p. Rector of Hartington*, 23 W. R. 484.

(*s*) *Ex p. Rector of Claypole*, 16 Eq. 574; *Ex p. Rector of Grimoldby*, 2 Ch. D. 225.

(*t*) *Re Speer's Trusts*, 3 Ch. D. 262.

(*u*) *Ex p. Melward*, 27 B. 571.

(*x*) *Re Davis' Estate*, 3 D. & J. 144.

(*y*) *Re Dummer's Will*, 2 D. J. & S. 515.

(*z*) *Drake* v. *Trefusis*, 10 Ch. 364.

(*a*) *Ex p. Shaw*, 4 Y. & C. 506; *Re Wigan Glebe Act*, 3 W. R. 41; *Re Vicar of Queen Camel*, 11 W. R. 503; and see *Re Leslie's Settlement*, 2 Ch. D. 185.

(*b*) *Re Newman's S. E.*, 9 Ch. 681; *Drake* v. *Trefusis*, 10 Ch. 364; *Re Nether Stowey Vicarage*, 17 Eq. 156; *Brunskill* v. *Caird*, 16 Eq. 493; *Re Speer's Trusts*, 3 Ch. D. 262; *Re Lytton's S. E.*, W. N. 1884, p. 193.

(*c*) *Re Leigh's Estate*, 6 Ch. 887; *Drake* v. *Trefusis*, 10 Ch. 364; but in certain cases the concurrence of the remainderman will be dispensed with, *Re Aldred's S. E.*, 21 Ch. D. 228.

(*d*) *Re Leigh's Estate, suprà.*

(*e*) *Williams* v. *Aylesbury R. Co.*, 9 Ch. 684. But see *Ex p. Rector of Shipton-under-Wychwood*, 19 W. R. 549; *Ex p. Rector of Gamston*, 1 Ch. D. 477; *Ex p. Rector of Holywell*, 27 W. R. 707, which seem scarcely reconcileable with the cases in the Court of Appeal.

Anne's Bounty (*f*); or in paying off by a lump sum money due by fixed instalments to an incumbrancer for improvements made by a former rector (*g*). And in the absence of special circumstance showing that such a re-investment will be beneficial to the *cestuis que trust*, the Court will not allow the purchase-money to be laid out in buildings which will produce no income; thus, where a corporation was authorized to erect public offices and to levy rates for defraying the expense, L. J. Turner (*dissentiente*, L. J. Knight Bruce) was of opinion that the purchase-money for a portion of the municipal property, not consisting of buildings, could not be applied in the erection of the public offices, as this would be an unproductive investment (*h*). Where, however, the effect of the construction of the line was to divert business from trade premises on another portion of the estate, and thus render them useless for trade purposes, part of the purchase-money was ordered to be applied in taking down the existing buildings and erecting dwelling-houses on their site (*i*); so, also, in the removal of a stack-yard, and the roofing with slate or tile farm-buildings which were rendered uninsurable by the proximity of the railroad (*k*).

Where balance in Court is less than 20*l*.

An order for the re-investment of part of the money in land may also direct that the balance, if less than 20*l*., be paid to the tenant for life (*l*); and, in one case, a balance of 30*l*., remaining after the purchase of an estate, was ordered to be paid to the tenant for life, on his undertaking to apply it in permanent improvements (*m*); but where the balance was 20*l*. 10*s*., the Court refused to order payment to the tenant for life in liquidation of extra costs beyond those allowed by the Act (*n*).

(*f*) *Ex p. Rector of Grimoldby*, 2 Ch. D. 225.

(*g*) *Ex p. Rector of Kirksmeaton*, 20 Ch. D. 203.

(*h*) *Ex p. Corp. of Liverpool*, 1 Ch. 596.

(*i*) *Re Johnson's Settlements*, 8 Eq. 348.

(*k*) *Ibid.*

(*l*) See s. 72. *Re Lord Egremont*, 12 Jur. 618; *Ex p. Rector of Little Steeping*, 5 R. C. 207.

(*m*) *Ex p. Barrett*, 19 L J. Ch. 415; but see *Re Bateman's Estate*, 21 L. J. Ch. 691.

(*n*) *Ex p. Vicar of Bredicot*, 5 R. C. 209.

Money in Court may be dealt with under Settled Land Act.

Money paid into Court under any Act incorporating wholly or in part the Lands Clauses Consolidation Acts, and liable to be laid out in the purchase of land, to be made subject to a settlement, may now be invested or applied as capital money arising under the Settled Land Act, on the like terms as to costs and other things as nearly as circumstances admit, and (notwithstanding anything in the Settled Land Act), according to the same procedure, as if the modes of investment or application by the Settled Land Act were authorized by the Act under which the money is in Court (*o*). The effect of this section is to materially enlarge the range of application of moneys in Court under the Lands Clauses Consolidation Acts (*p*).

Apportionment of purchase-money as between tenant for life and remainderman.

Questions arising between tenant for life and remainderman as to the disposition and application of purchase-moneys in which both are interested, are dealt with by the 74th section (*q*). The principle is that the limited owner shall get what he would have got, had the land not been taken: and the object of the section is to give the trustees or the Court a discretion to put the tenant for life and the remainderman in the same position as if there had been no sale. The practical working of this principle is illustrated in the following instances:

1. On sale of leaseholds.

I. Where leaseholds for years are compulsorily taken, the principle of apportionment has now, after much variation and difference in the practice, been finally settled. The purchase-money is to be invested in the purchase of an annuity, having as many years to run as there are remaining years of the term; or if an annuity is not purchased it must be referred to an actuary to calculate what yearly sum, if raised out of the dividends and corpus of the fund, will ex-

(*o*) 45 & 46 V. c. 38, s. 32. This section is to be read with s. 69 of the L. C. C. Act, 1845, *Re Byron's Charity*, 23 Ch. D. 171; and see *Cottrell* v. *Cottrell*, 28 Ch. D. 628.

(*p*) See 45 & 46 V. c. 38, ss. 21 to 26 inclusive; *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541.

(*q*) 8 & 9 V. c. 18, s. 74. Analogous provisions are contained in 40 & 41 V. c. 18, s. 37, and 45 & 46 V. c. 38, s. 34.

haust the fund in the number of years which the lease had to run, and the amount so ascertained will be paid yearly to the tenant for life (*r*). If the leaseholds were renewable, or were supposed to be so, although not so in fact, and the intention of the settlor clearly was that they should be renewed for the benefit of the remaindermen, the tenant for life will be entitled only to the income of the purchase-money (*s*). And the same principle applies to any fund set apart for meeting the expenses of renewal, when renewal has become impossible (*t*).

2. On sale of land *let* on lease.

II. Where freeholds, subject to leases, are compulsorily sold, the tenant for life of the reversion is not entitled to any benefit from the sale, and is therefore entitled to only so much of the dividends as is equivalent to the rent which he would have received had the lease been still running, while the surplus dividends must be accumulated and added to the capital. If the tenant for life survive the period at which the lease would have determined, he will be entitled to the income of the whole fund (including the accumulations), after deducting an amount equivalent to the rent reserved by the lease which has determined (*u*). No case has, so far as we are aware, arisen where the dividends amounted to less than the rent reserved by the lease; but it is conceived that in such a case the tenant for life would still be entitled to a yearly income equivalent to the rent, the principle being that the remainderman is entitled on the determination of the lease to have the value of the whole fee forthcoming. If the property were let at more than a rack-rent—in which con-

(*r*) *Askew* v. *Woodhead*, 14 Ch. D. 27, 34; *Re Walsh's Trusts*, 7 L. R. Ir. 554; *Re Hunt's Estate*, W. N. 1884, p. 181.

(*s*) *Re Wood's Estate*, 10 Eq. 572; *Hollier* v. *Burne*, 16 Eq. 163; *Maddy* v. *Hale*, 3 Ch. D. 327; *Re Barber's Settled Estate*, 18 Ch. D. 624; *Re Lord Ranelagh's Will*, 26 Ch. D. 590.

(*t*) *Maddy* v. *Hale*, *supra*; *Gould* v. *Tripp*, W. N. (1883), 72; *Crompton* v. *Lady Catheart*, W. N. (1886), 104.

(*u*) *Re Wootton's Estate*, 1 Eq. 589; *Re Mette's Estate*, 7 Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597, which see for form of order; *Re Griffith's Will*, 49 L. T. 161; *Cottrell* v. *Cottrell*, 28 Ch. D. 628. It is conceived that the amount deducted as equivalent to the rent reserved by the lease which has determined must be added in each year to the capital.

Chap. XIII. Sect. 6.

tingency this case could alone arise,—the value of the fee at the end of the term might very possibly be less than the sum originally assessed as the value of the fee, minus the value of the lease at more than a rack-rent (*x*). The rule applies equally to lands of which the reversion is vested in an ecclesiastical corporation, or a corporation sole; so that in such cases the corporation is entitled only to so much of the dividends, as is equivalent to the amount of the rent reserved (*y*).

Land subject to annuity.

Where the estate taken is charged with an annuity which the income of the fund is insufficient to satisfy, a periodical sale of a sufficient part of the fund may be directed to meet the accruing payments (*z*).

Lessor and lessee.

As between lessor and lessee, the Court has, it would seem, no jurisdiction to order an apportionment of the corpus of the purchase-money; and they should therefore deal separately with the company as to their respective interests (*a*).

Primâ facie right thereto of parties in possession of the land.

Where a Railway Act provided that where any question should arise upon the Act touching the title to any lands, &c., "the parties who should have been in possession or receipt of the rents or profits of such lands at the time of such purchase," &c., "should be deemed to have been lawfully entitled, &c., according to such possession until the contrary should be shown to the satisfaction of the Court," and the capital and income of the funds, &c., representing the purchase-money were to be paid and applied accordingly; it was held that the party in possession, but whose

(*x*) See Hood & C. 314.

(*y*) *Ex p. Rector of Lambeth*, 4 R. C. 231; *Ex p. Archbishop of Canterbury*, 23 L. T. O. S. 219; *Ex p. Dean of Gloucester*, 19 L. J. Ch. 400; *Ex p. Bishop of Winchester*, 10 Ha. 137; *Ex p. Dean of Christ Church*, 23 L. J. Ch. 149. As to claims for compensation by ecclesiastical bodies in respect to loss of fines on renewal, see *Ex p. Bishop of Winchester, suprà; Ex p. Dean of St. Paul's*, 1 K. & J. 538; *Ex p. Dean of Westminster*, 18 Jur. 1113; *Ex p. Archbishop of Canterbury, suprà; Re Dean of Westminster*, 26 B. 214.

(*z*) *Ex p. Wilkinson*, 3 De G. & S. 633; *Re Tinkler*, 19 L. T. O. S. 338.

(*a*) *Ex p. Ward*, 2 De G. & S. 4.

title was objected to by the company, was entitled to have the money paid out of Court on his own affidavit of title (*b*). The 79th section of the Lands Clauses Consolidation Act, 1845, contains provisions of a similar nature; but it has been held that this section was intended only as a direction to the Court how it should act in cases where, upon application for money deposited, it should be unable to arrive at a satisfactory conclusion as to what parties are lawfully entitled to the land (*c*); it being the object of the Legislature not to disturb the person in possession, unless it is clearly shown that he has no title (*d*): but where the title is proved to be doubtful, the Court is bound to try the question (*e*).

What affidavit necessary on petition for payment out of Court.

In all applications under Acts of Parliament for sale of property for public purposes, when the purchase-money is directed by the Act to be paid into Court, the petitioners claiming to be entitled to the corpus of the money so paid in, must, personally, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum mentioned in the petition, or any part thereof (*f*); and an affidavit to this effect will not be dispensed with, although the petitioner be aged and infirm, and the company have contracted with him, accepted his title, and consented to the prayer of the petition (*g*): and the affidavit of title is required where the application is merely for the dividends (*h*); but the party in possession of the land is *primâ*

(*b*) *Ex p. Grainge*, 3 Y. & C. 62; and see cases cited, p. 66.

(*c*) See *Ex p. Freemen of Sunderland*, 1 Dr. 184, 191. See too, remarks of V.-C. Wood, in *Re St. Paneras Burial Ground*, 3 Eq. 173, 183.

(*d*) *Re Perry's Estate*, 1 Jur. N. S. 917; *Re Alston's Estate*, 5 W. R. 189.

(*e*) See *Ex p. Freemen of Sunderland, suprà;* and remarks of V.-C. K. 1 Dr. 189; 25 & 26 V. c. 42; *Brandon* v. *Brandon*, 2 Dr. & S. 305.

(*f*) R. S. C. 1883, O. LII., r. 18.

(*g*) *Ex p. Hollick*, 16 L. J. Ch. 71. But the affidavit need not under special circumstances be made by the person entitled; *Re Smith's Leaseholds*, 14 W. R. 949; and see Annual Practice, O. LII., r. 18.

(*h*) See *Ex p. Warden of Winchester College*, 14 W. R. 788; differing from *Re Braye*, 9 Ha. Ap. vii.

Chap. XIII. Sect. 6.

facie entitled to the dividends, although his title be doubtful (*i*). Where the application is made by a married woman, there must be an affidavit of no settlement (*k*). Where she is entitled to the fund for her separate use, or under the Married Women's Property Act, 1882, her separate examination is not necessary; but in other cases it is *primâ facie* necessary (*l*). Where a person entitled to an aliquot share of a sum of money so brought into Court petitions for payment of his share, he need not give notice to the parties entitled to the other shares (*m*), nor, where an order has been made for the payment of the interest to a single woman, need the company be served with a petition for its payment to her and her husband on her marriage (*n*).

Who are persons "absolutely entitled."

The following have been held to be persons "becoming absolutely entitled" within the meaning of sect. 69 of the Lands Clauses Consolidation Acts, so as to entitle them to have money in Court paid out to them.

1. Trustees for sale, or with a power of sale (*o*), even though the power of sale has not become exerciseable (*p*), but it seems doubtful whether this is the case, when the power is only exerciseable at the request of another (*q*). Capital money under the Settled Land Act may be applied in payment to any person, empowered to give an absolute discharge (*r*); and this the trustees of the settlement can give (*s*). Hence money may be ordered to be paid out to them (*t*).

(*i*) *Re Perry's Estate*, 1 Jur. N. S. 917.

(*k*) Supreme Court Funds Rules, 1886, r. 61; and see *Britten* v. *Britten*, 9 B. 143.

(*l*) Annual Practice, notes on O. XVI., r. 16.

(*m*) *Re M. R. Co.*, 11 Jur. 1095.

(*n*) *Exp. Hordern*, 2 De G. & S. 263.

(*o*) *Re Gooch's Estate*, 3 Ch. D. 742; *Re Hobson's Trusts*, 7 Ch. D. 708; *Re Thomas' Settlement*, 30 W. R. 244; which have overruled *Re Reaston's Estate*, 13 Eq. 564.

(*p*) *Re Evans*, 14 Ch. D. 511; *Re St. Luke's, Middlesex*, W. N. (1886), 58.

(*q*) *Re Ward's Estate*, 28 Ch. D. 100.

(*r*) Sect. 21 (ix).

(*s*) Sect. 40.

(*t*) *Re Harrop's Trusts*, 24 Ch. D. 717; *Re Wright's Trusts*, *ibid.* 662; *Re Duke of Rutland's Settlement*, 31 W. R. 947, where the tenant for life himself presented the petition. The petition, or summons, need not, it seems, in such cases be served on the

2. Charity trustees and the official trustee of charitable funds (*u*); and it seems that where money is so paid out, it is unnecessary to serve the petition or summons upon, or to obtain the sanction of, the Charity Commissioners (*v*).

3. A dowress is entitled to be paid the value of her right of dower out of the fund (*x*).

4. A tenant in tail on executing a disentailing assurance (*y*).

5. A statutory corporation (*yy*).

As to service on incumbrancers.

Upon a petition by a tenant for life for the re-investment of the money paid into Court, it is necessary to serve incumbrancers upon the life estate (*z*): but not parties entitled in remainder (*a*); nor the tenant for life, where the incumbrance only affects his estate (*b*); unless the Court or the company require his appearance (*c*): but in other cases, incumbrancers must be served (*d*), except where the mortgage only affects land not taken by the company (*e*), or has been created since the purchase-money was paid into Court.

cestuis que trust; Re Thomas' Settlement, 30 W. R. 244.

(*u*) *Re Lathropp's Charity*, 1 Eq. 467; *Ex p. Trustees of Tid St. Giles' Charity*, 17 W. R. 758; *Re Spurstone's Charity*, 18 Eq. 279; *Re Faversham Charity*, 10 W. R. 291; *Ex p. Haberdashers' Co.*, 55 L. T. 758. But see *Ex p. Governors of Norfolk Clergy Charity*, W. N. (1882), 53. And where the money is paid out to the trustees as persons absolutely entitled, the company will not have to bear the costs of re-investment, *Ex p. Trustees of Bishop Monk's Charity*, 29 W. R. 462.

(*v*) *Re Lister's Hospital*, 6 D. M. & G. 184; *Re St. Giles' Volunteer Corps*, 25 B. 313; *Re Kyngeston's Charity*, 30 W. R. 78. But it has been held otherwise, where the trustees had no power of sale; *Re Faversham Charity*, *suprà*; and see *Re Parson of St. Alphage*, 55 L. T. 314.

(*x*) *Re Hall*, 9 Eq. 179.

(*y*) *Re Butler's Will*, 16 Eq. 479; *Re Norcop's Will*, 31 L. T. 85; *Re Broadwood's S. E.*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. D. 61; which decide finally that in such cases a disentailing deed is essential.

(*yy*) *Re Chelsea Waterworks Co.*, 56 L. T. 421.

(*z*) *Ex p. Smith*, 6 R. C. 150.

(*a*) *Ex p. Staples*, 1 D. M. & G. 294.

(*b*) *Ex p. Smith*, 6 R. C. 150.

(*c*) *Re Smith*, 14 W. R. 218; *Re Hungerford*, 1 K. & J. 413; 3 K. & J. 455.

(*d*) *Ex p. Peyton*, 2 Jur. N. S. 1013; *Re Nash*, 25 L. J. Ch. 20; but see *Re Hadfield*, 29 B. 370.

(*e*) *Re Yeates*, 12 Jur. 279.

Chap. XIII. Sect. 6.

If there has been an order for temporary investment, the Judge who made it or his successor should also hear the petition for investment in land (*f*).

What mode of re-investment thereof will be sanctioned by Court.

The Court has refused to sanction the investment of money, so paid into Court, in the purchase of an equity of redemption (*g*): and has refused to interfere with the Master's decision who reported generally against the propriety of an investment on mortgage (*h*). An investment in land of a different tenure from that which produced the fund is generally improper (*i*): but the rule does not prevent the application of money arising from the sale of freeholds in enfranchising copyholds limited to corresponding uses (*k*), or in buying up a beneficial lease which forms an incumbrance on other freeholds settled to the same uses (*l*); and in a very recent case, where a freehold chapel vested in trustees had been taken under compulsory powers, the Court authorized an investment in the purchase of a leasehold chapel, a suitable freehold tenement not being readily procurable (*m*). The Court will ordinarily require the title to be approved in the usual way; *viz.*, under the present practice, by the conveyancing counsel of the Court; but the Court is at liberty to adopt any other mode of satisfying itself of the sufficiency of the title (*n*); and a strictly marketable title will not always be insisted on (*o*). Where the fund has arisen from

(*f*) *Re Harman's Estate*, 1 Eq. R. 246.

(*g*) *Ex p. Craven*, 17 L. J. Ch. 215; *Ex p. Portadown R. Co.*, 10 I. R. Eq. 368; and see *Ex p. Metherell*, 20 L. J. Ch. 629, where all the necessary directions are embodied in a single order.

(*h*) *Ex p. Francklyn*, 1 De G. & S. 528; *Barry* v. *Marriott*, 2 De G. & S. 491.

(*i*) *Ex p. Macaulay*, 23 L. J. Ch. 815, where the Court disapproved of *Re Cann's Estate*, 19 L. J. Ch. 376; *Re Liverpool Dock Acts*, 1 Si. N. S. 202; and see *Re Brasher's Trusts*, 6 W. R. 406.

(*k*) *Re Cheshunt College*, 1 Jur. N. S. 995; *Dixon* v. *Jackson*, 25 L. J. Ch. 588.

(*l*) *Re Manchester R. Co.*, 2 Jur. N. S. 31; and see *Ex p. Bishop of London*, 2 D. F. & J. 14; *Ex p. Corp. of Sheffield*, 21 B. 162.

(*m*) *Re Rehoboth Chapel*, 19 Eq. 180; and see *Ex p. Trin. Coll., Cam.*, 18 L. T. 849.

(*n*) *Re Jones' S. E.*, 1 Jur. N. S. 817; *Ex p. Vicar of East Dereham*, 21 L. J. Ch. 677; *Re Hichin's Estate*, 1 W. R. 505.

(*o*) *Ante*, p. 99.

land belonging to an ecclesiastical corporation sole, the income has been ordered to be paid to the petitioning incumbent, so long as he remained incumbent, and afterwards to the incumbent *for the time being* (*p*): so, in the case of a charity, the order has been for payment to any two of the trustees for the time being (*q*).

Death of petitioner, when a corporation sole.

A reference directed on the petition of an ecclesiastical corporation sole, may, notwithstanding his decease, be proceeded with by consent of his successor, without any supplemental order (*r*).

Conveyance to a charity on re-investment requires enrolment.

A conveyance to a charity, upon a re-investment in land of the purchase-moneys of their sold estate, requires enrolment under the Mortmain Act (*s*).

Effect of compulsory sales in relation to conversion.

Where trustees, with power to sell and convert at the request of a tenant for life, join with him in conveying to a railway company, this is a conversion, and the money is personal estate, although the sale was compulsory, and the price was fixed by a jury (*t*); but purchase-money paid into Court, being the value of lands taken compulsorily, and which could only be taken under the compulsory powers given by the Act, and being under the terms of the 69th section applicable to the purchase of other lands, remains land for all purposes of devolution (*u*).

Apportionment of fund in Court, if title shown to part of land.

Where purchase-money has been paid into Court by a company, by reason of the vendors failing to make a title, and they subsequently make out a title to part only of the

(*p*) *Re Archbishop of Canterbury*, 2 De G. & S. 365.

(*q*) *Re Collins' Charity*, 20 L. J. Ch. 168; *Ex p. Shrewsbury Hospital*, 9 Ha. App. xlv.; *Re Lucas' Charity*, V.-C. W., 8th March, 1856, *Re Clinton*, 8 W. R. 492. See as to evidence, *Re Lowndes' Trusts*, 20 L. J. Ch. 422.

(*r*) *Ex p. Rector of Lea*, 21 L. J. Ch. 776.

(*s*) See *Ex p. Christ's Hospital*, 12 W. R. 669.

(*t*) *Re Taylor's Settlement*, 9 Ha. 596.

(*u*) *Kelland* v. *Fulford*, 6 Ch. D. 491; *Re Horner*, 5 De G. & S. 483; *Re Stewart*, 1 S. & G. 32; *Re Harrop*, 3 Dr. 726.

Chap. XIII. Sect. 6.

land, an order may be made for the apportionment of the fund in Court, and giving consequent directions (*x*).

Interest.

The Court has no jurisdiction to give to the landowner interest on the amount which has been paid into Court by the company, as the value of land on the assessment of a jury (*y*).

Section 7.

(7.) *As to purchaser's right to deeds, attested copies, &c.*

As to purchaser's right to deeds, attested copies, &c.

Purchaser's right to delivery of muniments of title.

The purchaser, upon completion, is entitled (subject to the exceptions hereinafter noticed) to all deeds and other muniments of title, however ancient, which are in the possession or power of the vendor (*z*): and it is conceived that the vendor, (unless he retain property held under a common title,) has in general no right to keep copies of any documents other than those which subject him to some future personal liability (*a*).

Where he purchases only part of the estate.

Where, however, the purchaser does not buy all the estate, but any portion, however small, remains in the vendor, it has often been discussed, though not judicially decided, whether the vendor or the purchaser ought to have the custody of the deeds. In former editions of this work, we suggested as the sounder view, that in the absence of any stipulation, the vendor was entitled to retain the deeds on his covenanting to produce them (*b*); and such, under the Vendor and Purchaser Act, 1874, is now the rule on the completion of any contract for sale of land, made since December, 1874 (*c*).

Where the whole estate is sold to

Where the whole estate is sold to different purchasers, the practice (in the absence of agreement) has hitherto been

(*x*) *Re Parks*, 1 S. & G. 545.

(*y*) *Re Divers*, 1 Jur. N. S. 995.

(*z*) Sug. 433; 1 Jarm. Conv. 63; *Austin* v. *Croome*, Car. & M. 653; *Smith* v. *Chichester*, 2 D. & War. 393. As to the destruction of the deeds, *vide ante*, pp. 159, 477.

(*a*) See *Re Wade and Thomas*, 17 Ch. D. 348, 352.

(*b*) But see Sug. 434.

(*c*) Sect. 2.

different purchasers.

for the purchaser of the portion of largest value (*d*) to take the deeds and covenant for their production; and this practice does not seem to be interfered with by recent legislation. Where there was a condition that the purchaser of "the largest lot" should have the deeds, the purchaser of the largest single lot was held entitled to them in preference to a purchaser of several lots of an aggregate larger extent (*e*).

Vendor having covenanted to produce deeds to other parties not therefore entitled to retain them.

The fact of the vendor having already covenanted for production to a former purchaser, will not, in the opinion of Lord St. Leonards (*f*), justify him in refusing to deliver the deeds, if the second purchaser will allow notice of the covenant to appear in or upon his conveyance, and will covenant to perform the prior covenant: this covenant by the second purchaser would, of course, be entered into with the first purchaser, if the vendor's covenant was made determinable upon his procuring, or the first purchaser will accept, such a substituted covenant; or otherwise with the vendor himself, and would then take the shape of a covenant to produce the deeds, &c., and to indemnify him against liability under the former covenant.

Sale under a settlement.

Where property is sold under a trust for sale in a settlement, which goes on to declare trusts of the purchase-money (whether the same is to continue money or to be re-invested in real estate), it is conceived that the existence of the trusts gives no right to the trustees to retain the settlement, unless they also retain part of the settled estate; but the purchaser must covenant to produce it, even although he buy the entire property. In order to avoid this difficulty, it is usual, where an absolute conversion is intended, to settle the money by a deed distinct from that containing the trust for sale. Possibly the proper rule in cases of several sales under a settlement may be, that, unless the trustees retain part of the estate, it should be deposited, for

Deposit of settlement until completion of trusts.

(*d*) *Griffiths* v. *Hatchard*, 1 K. & J. 17.

(*e*) *Scott* v. *Jackman*, 21 B. 110.

(*f*) Sug. 435.

Chap. XIII. Sect. 7.

the benefit of all parties, until performance of the trusts; and then delivered to the largest purchaser upon his entering into covenants for its production: the right to the deed, considered as an instrument creating *terminable* trusts, may perhaps be considered as governed by a case (*g*) in which, upon the purchase of a part of an estate in lease, the Court thought that the counterpart of the lease ought to be deposited for the benefit of all parties.

Of lease on purchase of reversion.

Liability of mortgagee settling several mortgages by one deed.

Where a mortgagee of distinct properties, belonging to distinct mortgagors, transfers the mortgage debts by one deed without their consent, he will have to pay for the necessary attested copies of the deeds which he has thus made common to the several titles, and of the necessary covenants for their production (*h*): so where he settles the debt in such a manner as to make the settlement part of the title (*i*). And indeed in any case where he so deals with the estate as to cast on the mortgagor a heavier expense than is necessary (*k*). Nor on being paid off is a mortgagee entitled to keep a copy of the mortgage deed, and, apparently, even though it may have been made at his own expense (*l*).

Purchaser not entitled to deeds used as negative evidence.

And the purchaser, it appears (*m*), has no right either to the custody, or to a copy, of instruments produced merely as negative evidence to satisfy him that they contain nothing affecting the title (*n*); nor to any covenant for their production, unless they are in the custody or power of the vendor.

Purchaser's right to at-

If the deeds themselves are not delivered, the purchaser

(*g*) *Shore* v. *Collett*, G. Coop. 234.

(*h*) *Capper* v. *Terrington*, 1 Coll. 103; as to the practice of requiring an affidavit of documents from a mortgagee in a foreclosure suit, see *Weeks* v. *Stourton*, 11 Jur. N. S. 278.

(*i*) *Dobson* v. *Land*, 4 De G. & S. 581; where the question whether the mortgagor could claim to hold the settlement, although waived, seemed to be concluded by the form of the decree. *Qy.* as to the general right in such a case?

(*k*) *Re Radcliffe*, 22 B. 201; *Martin* v. *Baxter*, 5 Bing. 160.

(*l*) *Re Wade and Thomas*, 17 Ch. D. 348.

(*m*) *Vide ante*, pp. 364, 375.

(*n*) Sug. 436.

tested copies of originals not given up.

(in the absence of stipulation (*o*)) might formerly require attested copies at the vendor's expense (*p*); and this right was not taken away or qualified by the Vendor and Purchaser Act, 1874 (*q*). But the expense of making any copy, attested or unattested, of any document, retained by the vendor is, in the case of sales made since the 31st of December, 1881, thrown on the purchaser (*r*). It has been observed by Lord Eldon, that purchasers set an undue value upon these copies; that, except as between the parties themselves, they are waste paper upon an ejectment (*s*). Nevertheless they are, it is conceived, of considerable practical importance, if the property is likely to be re-sold: for the ordinary condition, making them evidence without production of the originals, seldom damps a sale; whereas the absence both of originals and attested copies—supposing the former to have been subsequently lost or destroyed—might cause a serious deficiency in price.

Purchaser also entitled to covenant for production of originals.

Previously to the 37 & 38 Vict. c. 78, the purchaser, as respects deeds of which he could claim attested copies at the vendor's expense, was also entitled (at the like expense) to a covenant for the production of the originals, and also to a covenant for the production of such copies of Court Roll, and instruments on record, as were in the vendor's possession or power (*t*): but the expenses of future production were borne by the purchaser (*u*). But now on the completion of any contract made since December, 1874, subject to any stipulation to the contrary in the contract, such covenants for production as the purchaser can and shall require are to be furnished at his expense, and the vendor is only to bear his

(*o*) As to such a stipulation, see *Cotton* v. *Seudamore*, 1 K. & J. 321; *Boughton* v. *Jewell*, 15 V. 176; *Griffiths* v. *Hatchard*, 1 K. & J. 17.

(*p*) *Dare* v. *Tucker*, 6 V. 460; *Boughton* v. *Jewell*, 15 V. 176; *Berry* v. *Young*, 2 Esp. 640, n.; and see *Peterson* v. *Elwes*, 6 W. R. 611, where the purchaser of the largest lot kept the deeds.

(*q*) 37 & 38 V. c. 78, s. 2.

(*r*) 44 & 45 V. c. 41, s. 3 (6).

(*s*) *Dare* v. *Tucker*, 6 V. 460; see *Doe* v. *Brydges*, 7 Sc. N. R. 339.

(*t*) *Berry* v. *Young*, 2 Esp. 640, n.; *Cooper* v. *Emery*, 1 Ph. 388.

(*u*) *Berry* v. *Young*, 2 Esp. 640, n.

Chap. XIII. Sect. 7.

own costs of perusal and execution (*c*). The vendor's liability in this respect is now satisfied by his giving a statutory acknowledgment (*d*).

In a case of sale in lots under order of the Court, where the purchasers had notice that the deeds would be delivered to the largest purchaser, who would enter into the usual covenants for production, it was held that, in the absence of any stipulation, each purchaser must bear the expense of his own deed of covenant (*e*).

Mortgagee holding deeds as owner of other land.

A mortgagee concurring in the sale, and retaining the deeds in respect of property of large value held by him as owner under the same title, would *primâ facie* be bound to covenant for their production (*f*).

Indorsement of notice of covenant.

Where the title deeds are retained by the vendor on his covenanting to produce them, it is prudent to require notice of the covenant to be indorsed on the deeds covenanted to be produced: but, in the absence of agreement, the purchaser, it is conceived, could not insist on such an indorsement.

Absence of copies of Court Roll and deeds where production cannot be enforced should be explained.

Whitbread v. *Jordan*.

And it must be remembered, that although the purchaser cannot require the production of original copies of Court Roll, or enrolled deeds, &c., if not in the possession or power of the vendor, he yet may, and should in all ordinary cases, inquire into the reason of their non-production; that is, if their date and character warrant the supposition that they may be denied with an improper motive: for in the well-known case of *Whitbread* v. *Jordan* (*g*), the omission of a mortgagee to make inquiry on the subject was, under the particular circumstances, attributed to wilful blindness (*h*): and this doctrine has been recognized in later decisions (*i*).

(*c*) 37 & 38 V. c. 78, s. 2, rule 4.

(*d*) 44 & 45 V. c. 41, s. 9 (8).

(*e*) *Strong* v. *Strong*, 6 W. R. 455.

(*f*) See *Yates* v. *Plumbe*, 2 S. & G. 174.

(*g*) 1 Y. & C. 303.

(*h*) *Jones* v. *Smith*, 1 Ph. 255; and see a note on the subject in 4 Y. & C. 564.

(*i*) *Worthington* v. *Morgan*, 16 Si. 547; *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Ratcliffe* v. *Barnard*, 6 Ch. 652; *et vide post*, p. 979; Sug. 767.

(8.) *As to matters necessary to insure the full effect of the executed conveyance.—Registration, enrolment, &c.*

Registration, enrolment, &c.

The old Law on the subject of registration has been revolutionized by the Yorkshire Registries Acts, 1884 and 1885 (*k*), so far as concerns lands in that county; but as those Acts do not affect anything done under the old Law (*l*), or apply at all to lands elsewhere, a knowledge of the Law as it formerly existed in Yorkshire, and as it still exists in Middlesex is as essential as it formerly was.

And *first* as to the Law as it still exists in Middlesex, and as it formerly existed in Yorkshire.

Conveyance should be entered in local register (if any).

If the property be subject to the operation of any of the local Registration Acts, a memorial of the conveyance should be registered as soon as practicable after execution; the register having (as before observed) been searched as closely as possible before completion; and not only must the register be searched, but the deeds must be inquired for, and examined (*m*). When dealing with respectable parties this rule as to immediate registration is often not very strictly attended to; but any departure from it is at the peril of the solicitor. By delay the purchaser is exposed to the risk not only of a subsequent fraudulent sale or mortgage by the vendor, (which may generally be considered merely nominal,) but also of prior unregistered incumbrancers (*n*), whose claims may perhaps be unknown even to the vendor, acquiring priority by registration between the execution and the registration of the conveyance.

Importance of immediate registration.

As to registration of an equitable charge.

In *Sumton* v. *Cooper* (*o*), the Court of King's Bench held what appears to be sufficiently evident, *viz.*, that the local

(*k*) 47 & 48 V. c. 54; 48 & 49 V. c. 26.

(*l*) 47 & 48 V. c. 54, s. 51.

(*m*) *Kettlewell* v. *Watson*, 26 Ch. D. 501.

(*n*) As in *Martinez* v. *Cooper*, 2 Rus. 198.

(*o*) 2 B. & Ad. 226; *Re Burke's Estate*, 9 L. R. Ir. 24.

Chap. XIII. Sect. 8.

Registry Acts do not apply to the case of a mere equitable mortgage by deposit of deeds unaccompanied by any memorandum; nor do they to a vendor's lien for unpaid purchase-money (*p*). And in *Wright* v. *Stanfield* (*q*) it was held by Lord Romilly that a memorandum of equitable charge on land in Middlesex, consisting merely in an undertaking to execute a legal mortgage, and containing no words of present charge, did not require registration: in a later case (*r*), the same learned Judge postponed an unregistered equitable memorandum of present charge to a subsequent registered mortgage; and distinguished the case before him from that of *Wright* v. *Stanfield*. In a later case (*s*), where the previous authorities were cited, it was distinctly laid down that a memorandum of equitable charge is a document requiring registration under the 9 Anne, and the distinction which was acted on by Lord Romilly was treated as unsatisfactory; and in a still more recent case (*t*), an unregistered memorandum of equitable charge was postponed to a subsequent registered mortgage; and it is now well settled that every instrument which transfers an interest in, or creates a charge on, land, is a "conveyance" within the meaning of the Registry Acts. Thus, it has been held that a further charge in favour of a mortgagee, whose prior security is registered, is a conveyance requiring registration, and that if unregistered it will be postponed to a subsequent registered incumbrance, taken without notice of the further charge (*u*). And a mortgage to a bank to secure future advances, duly registered, has priority to a later mortgage, taken without notice, and also registered, for all advances made up to the date of notice given to the bank of the later mortgage (*v*). And it must be observed that registration cannot make good an instrument which is otherwise fraudulent and void (*w*).

(*p*) *Kettlewell* v. *Watson*, 26 Ch. D. 501.

(*q*) 27 B. 8.

(*r*) *Moore* v. *Culverhouse*, 27 B. 639.

(*s*) *Neve* v. *Pennell*, 2 H. & M. 170, 186.

(*t*) *Re Wight's Mortgage*, 16 Eq. 41.

(*u*) *Credland* v. *Potter*, 10 Ch. 8.

(*v*) *Re O'Byrne's Estate*, 15 L. R. Ir. 373.

(*w*) *Cooper* v. *Vesey*, 20 Ch. D. 611.

As to priority between deeds registered at the same time.

Where two deeds are registered on the same day, and at the same hour, the memorial which is denoted by the earlier number will, in the absence of direct evidence to the contrary, be presumed to have been first registered (*x*).

What interests are excepted from Registration Acts.

The exceptions in the Acts are of copyhold estates, leases at a rack-rent, and leases not exceeding twenty-one years where the actual possession and occupation go along with the lease.

Copyholds.

The exception of copyholds is not considered in practice to extend to such leases as would require registration if the estate were freehold (*y*); and the registration of all such deeds affecting this description of property, as are not usually recorded by the steward of the manor, has been recommended (*z*).

Leases at rack-rent—to what the exception of extends.

The exception of the greatest practical importance is that of leases at rack-rent: Lord St. Leonards considers it to be the better opinion that the assignment of a lease, held at what was originally a rack-rent, need not be registered in respect of its having become a valuable property: perhaps, however, this is a doctrine which should be cautiously received in practice (*a*). A lease which contains any *engagement* on the part of the lessee to build upon, or otherwise improve, the property, cannot, it is conceived, be considered as a lease at a rack-rent within the meaning of the exception; although the rent may be reserved from the date of the lease, and may exceed what would be the annual value of the property if let for any other purpose.

Whether to building or repairing leases.

Leases for twenty-one years, or under.

Of the third exception it need only be observed, that the words "possession and occupation" are in the conjunctive (*b*): so that, in order to avoid registration the

(*x*) *Neve* v. *Pennell*, 2 H. & M. 170.

(*y*) Sug. 732.

(*z*) Rigge on Registration, 88, n.

(*a*) *Ibid.*

(*b*) *Ibid.*; see *Fury* v. *Smith*, 1 Hud. & B. 735, 751.

Chap. XIII. Sect. 8.

purchaser must not only buy the present interest in the lease, but must actually become the occupier of the premises.

London not affected by Registration Act.

The Middlesex Act has no operation within the City of London (*c*).

As to registration of assignment of money charged on land.

Of deed of appointment.

It appears that a deed assigning a legacy charged upon land (*d*), or a share of the proceeds of a sale of lands, devised upon trust for sale (*e*), does not require registration; but registration is not rendered unnecessary by the circumstance of the conveyance operating as an appointment pursuant to a power in a registered instrument (*f*).

Of railway conveyances, &c.

Conveyances of lands taken under the provisions of the Lands Clauses Consolidation Act, 1845, are, it is believed, in practice registered in the local registers, in the same way as ordinary purchase-deeds; and this seems to be the proper course.

Of conveyances by Commissioners of Woods and Forests.

By the 16 & 17 Vict. c. 56, s. 6, any deed affecting crown lands in England or Wales to which the Commissioners of Woods and Forests are parties, and which has been enrolled in the office of Land Revenue Records and Enrolments, does not require registration in the local Registry.

Local registry superseded where title registered under Land Registry Act.

The local registries no longer apply to land which has been registered under the Indefeasible Title and Registry Act (*g*), so long as it continues so registered.

Of will.

Upon purchasing from a devisee, the purchaser should ascertain that the will has been registered, or procure the

(*c*) Sug. 732.

(*d*) *Malcolm* v. *Charlesworth*, 1 Keen, 63, 73; but see 2 Dav. pt. 2, 219. An assignment of a contract for a mortgage has been held to be within the Irish Act; *Gardiner* v. *Blesinton*, 1 Ir. Ch. R. 64, 79; and see *Bushell* v. *Bushell*, 1 Sch. & L. 90, and *Drew* v. *Lord Norbury*, 3 J. & L. 303, as to the registration of mere equitable contracts in Ireland; and *vide ante*, p. 768, as to registration of equitable charges.

(*e*) *Arden* v. *Arden*, 29 Ch. D. 702.

(*f*) *Scrafton* v. *Quincey*, 2 V. sen. 413.

(*g*) 25 & 26 V. c. 53, s. 104.

omission to be supplied. Prior to the 37 & 38 Vict. c. 78, it was generally considered that where the will had not been, or could not be, registered within the period allowed by the Act, a good title could not be made without the concurrence of the heir (*h*). In a case under the East Riding Registry Act, it was held that a will, which was not discovered until the expiration of six calendar months from the testator's death, and where, in consequence, there had been no registration of the will, or of the impediment preventing registration, was void as against registered purchasers and mortgagees from the testator's heir (*i*). The East Riding Registry Act (6 Anne, c. 62 (Ruff. c. 35), s. 15) is the only one which requires a memorial to be registered of the impediment to the registration of the will. The Middlesex Act (7 Anne, c. 20), and the North Riding Act (8 Geo. II. c. 6) both provide that the titles of purchasers and mortgagees shall not, in case of concealment or suppression of the will, be disturbed after the expiration of five years in the case of lands in Middlesex, and of three years in the case of lands in the North Riding.

Where will not registered within the prescribed period.

On a proposal to invest part of the funds in Court under Carew's Estate Act, 1867, the author, advising on the title, brought this point under Lord Romilly's consideration, and his lordship wrote as follows :—"I am of opinion, that in the present state of the authorities on this subject, and having regard to the very distinct expression contained in the Registry Act for Middlesex, it is not safe to lend money on a title derived from the devisees of lands in Middlesex under a will not registered within the space of six calendar months after the death of a testator who died in Great Britain, and also that this investment cannot be sanctioned by the Court."

The practical inconvenience of this doctrine was very great—registration of a will within the statutory period being the exception rather than the rule—and doubtless led to the

(*h*) See an article in 14 Jur. pt. 2, p. 267.

(*i*) *Chadwick* v. *Turner*, 1 Ch. 310.

Chap. XIII. Sect. 8.

37 & 38 Vict. c. 78, sect. 8, which provides that where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him, shall, if registered before, take precedence of and prevail over, any assurance from the testator's heir-at-law.

Title marketable if heir concur.

It is not quite clear whether this section has given a retrospective validity, as against the heir, to a previously registered assurance by the devisee under a will not registered within the statutory period; and in the investigation of the title, prior to the Act, of land in Yorkshire or Middlesex, it will still be a wise precaution, if not absolutely necessary, to ascertain whether the will under which the title is derived was registered within the time allowed by law, and if not, whether the omission has been effectively cured. If the heir has concurred, or, which is the same thing, if the devisee was himself the heir, the title would appear to be marketable, although the will was not registered within the statutory period: so, also, if the statutory period of non-claim has elapsed since the death of the testator: so, also, if the sale be of a leasehold estate by an executor or legatee: the presumption in every case being against the existence of suppressed documents: but it seems to be going too far to say with Lord St. Leonards (*i*) that, in these cases, registration of the will is *immaterial:* it may be unnecessary as regards the possibility of any subsequent alienation by the heir, devisee, executor, or legatee (as the case may be): but it would seem to be of some importance with a view to the possible existence of unregistered assurances by the deceased owner; which assurances could only, it is conceived, be displaced by a registered assurance from a person claiming under a duly registered will; or, possibly, by a registered assurance from the heir, in case of intestacy. In a recent case Chitty, J. held a purchaser to his contract to buy freeholds in Middlesex which had been

(*i*) Sug. V. & P. 676, 11th edit.

devised by a testator, who had died in 1875, to the vendors, and which had been sold by them under a condition that no objection should be taken "on account of any document not being registered," although the vendors knew that the will had not been registered, and that the want of registration could not be cured because it was unknown who was the heir (*j*).

Memorial—its contents.

A statement of the contents of the memorial which are required by the Legislature, is given in Lord St. Leonards' work (*k*). In recent practice, however, a somewhat fuller statement of the contents and effect of the deed is required at the registration offices, where forms are supplied for the guidance of the public. The registrars, it appears, may be required to register a *lithographed* memorial (*l*).

Attestation of.

The memorial itself may be executed (*m*) either by the vendor or purchaser, or by the heirs, executors, administrators, guardians, or trustees of either: but one of the two attesting witnesses to the memorial should be a witness who attested the execution of the deed by (it has been said) a *granting* party (*n*). Where the attesting witnesses are dead, re-execution of the deed in the presence of a witness for the purpose of registration is useless (*o*).

Where deed operates as a conveyance of several shares or estates.

And it may perhaps deserve consideration whether the above doctrine, (which was first advanced by Lord St. Leonards,) does not admit of extension. His observation, (which gave rise to the decision in *Essex* v. *Baugh* (*p*),) is as

(*j*) *Girling* v. *Girling*, W. N. (1886), 18.

(*k*) V. & P. 730; 2 Dav. pt. 1, 197; and see *Reg.* v. *Middlesex Registrars*, 15 Q. B. 976, where the memorial was held insufficient: and as to Ireland, see *Gardiner* v. *Blesinton*, 1 Ir. Ch. R. 79. The stamp under the Stamp Act, 1870, is reduced to 2*s.* 6*d.*

(*l*) *Ex p. Ivemey*, 9 Jur. 371; *Reg.* v. *Middlesex Registrars*, 7 Q. B. 156.

(*m*) The seal of a corporation aggregate would seem to be sufficient: see *Doe* v. *Hogg*, 1 B. & P. N. R. 306.

(*n*) It was so decided in *Jack* v. *Armstrong*, 1 Hud. & B. 727, 732; but see 9 Jarm. Conv. 683; contending that it is sufficient if the witness attested the execution of the deed by *either party*; and see Sug. 730.

(*o*) *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

(*p*) *Ibid.*; see now Sug. 730.

Chap. XIII. Sect. 8.

follows, "One of the witnesses" (*i.e.* to the memorial) "must be a witness to the execution of the deed (*q*); and this must be understood to mean, not merely the execution by an unnecessary party, as the grantee, but the execution by the party from whom the estate moves." Now where the estate is conveyed by several owners, say A., B., and C., each seised of an undivided share, and whose execution of the conveyance is attested by different witnesses, a memorial, attested only by the witness who attested A.'s execution of the deed, is evidently not attested by any witness to the execution of the deed considered as a conveyance of the shares of B. and C., such shares possibly constituting the bulk of the estate. This will, perhaps, appear more obvious if we suppose a purchaser to take by a single deed a conveyance of several distinct estates from several owners. It would seem to be prudent in all such cases to have the memorial attested by a witness or witnesses to the execution of the deed by all the several owners (*r*).

Yorkshire Registries Acts, 1884 and 1885.

Secondly, under the law as it now exists with respect to lands in the three ridings and Kingston-upon-Hull under the Yorkshire Registries Acts (*s*), which have repealed the former Acts, and established one uniform law applicable to the whole county.

The acts apply to all kinds of assurances and to wills (*t*). All assurances executed or made, and all wills of testators dying after the 31st of December, 1884, may be registered (*u*); and such assurances will have priority only according to the date of registration, while wills, if registered within six months of the testator's death, will have priority as from the date of his death, but if registered after that period only from the date of registration (*x*). Where any lien or charge on

(*q*) In the North Riding Registry Act, this provision is omitted, apparently by mistake.

(*r*) But see 9 Jarm. Conv. 683.

(*s*) 47 & 48 V. c. 54; 48 & 49 V. c. 26.

(*t*) 47 & 48 V. c. 54, s. 3.

(*u*) S. 4.

(*x*) S. 14.

any lands is claimed in respect of any unpaid purchase-money, or by reason of any deposit of title deeds, a memorandum of such lien or charge, signed by the person against whom it is claimed, must be registered in order to acquire priority over any assurance for valuable consideration (*y*). A caveat, registered by any person, claiming to be entitled to any interest in lands in favour of any person therein named, will have the effect of giving to any assurance made between the parties respectively by whom and in whose favour it was given, and registered within six months of the registration of the caveat, priority as from the date of the registration of the caveat (*z*). If notice of a will, to the proof of which there is some impediment, be registered within six months of the testator's death, and the will is itself subsequently registered within two years of the testator's death, the registration of the notice will, for all purposes, be deemed to be registration of the will (*a*). Any person, claiming as heir of a person whom he believes to have died intestate, may, at any time after the expiration of six months from the testator's death, register an affidavit of intestacy; and the effect is to give priority to any assurance for valuable consideration, made by any person entitled under the intestacy, and duly registered, as against any will of the supposed intestate subsequently registered (*b*). Any person or corporation in whom lands have vested by statute without any conveyance, may register an affidavit of such vesting (*c*). Registration itself was, by the Act of 1884 (*d*), made actual notice for all purposes; but that section has been repealed (*e*): and the old rule that registration does not *per se* constitute notice still prevails. No

(*y*) S. 7.

(*z*) S. 10, repealed and re-enacted by 48 & 49 V. c. 26, s. 3.

(*a*) S. 11.

(*b*) S. 12.

(*c*) S. 13.

(*d*) S. 15.

(*e*) 48 & 49 V. c. 26, s. 5. The repeal was due to the practical inconvenience caused by the necessity of searching the register before any fresh advance could be made by bankers and others similarly situated. It is difficult, however, to see how the repeal of s. 15 can be of much avail in such cases, unless s. 16 is also repealed, and protection is restored to the holder of the legal estate; *vide post*, p. 962 *et seq.*

Chap. XIII. Sect. 8.

protection will be afforded by the legal estate or by tacking (*f*); and all priorities given by the Acts are to be destroyed only by actual fraud, and no priority will be lost, either by actual or constructive notice, unless tainted with fraud. But a volunteer will not, by means of registration, obtain a better title than the person through whom he claims; nor will registration make good any disposition which would otherwise be fraudulent and void (*g*). A purchaser who claims under a registered instrument still has the same right to relief as the person through whom he claims, against anyone who claims under an instrument, later in date, but earlier in registration (*h*). The Acts do not apply to copyholds, or to any lease, not exceeding twenty-one years, or any assignment thereof, where it is accompanied by actual possession from the making of such lease or assignment (*i*). The Act contains elaborate provisions for its administration, as to the mode of registration (*k*), as to what the various memorials, memoranda, notices and affidavits must contain (*l*), and as to official and private searches (*m*).

Registration under Bedford Level Act.

As respects lands situate in the Bedford Level, it appears that conveyances omitted to be registered under the Bedford Level Act (*n*) are nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the Act on the owners of lands within the Level, and for the other purposes of the Act (*o*).

Conveyance to charity trustee, as apparent beneficial owner, must be enrolled under Mortmain Act.

Where a conveyance was made to a purchaser apparently as the beneficial owner, but the purchase-money was in fact part of a charitable fund, and the nominal purchaser, by a subsequent deed, in execution of a power reserved by the conveyance, settled the property in favour of the charity, it was held that both the conveyance and the subsequent

(*f*) 47 & 48 V. c. 54, s. 16.
(*g*) S. 14; and see *Cooper* v. *Vesey*, 20 Ch. D. 611.
(*h*) S. 17.
(*i*) S. 28.
(*k*) S. 5.
(*l*) Sects. 6 *et seq.*
(*m*) Sects. 19 *et seq.*
(*n*) 15 Car. II. c. 17.
(*o*) *Willis* v. *Brown*, 10 Si. 127.

settlement required to be enrolled in Chancery under the Statute of Charitable Uses (*p*).

As to enrolment of assurances omitted to be enrolled under Mortmain Act.

By the 24 & 25 Vict. c. 9, certain assurances, notwithstanding non-compliance with the requirements of the 9 Geo. II. c. 36, as to enrolment, were made valid, if enrolled within twelve months after the passing of the Act; and the provisions of this Statute have been recently extended (*q*). Under the 29 & 30 Vict. c. 57, any trustee, governor, director, or manager of a charity may, on application by summons, obtain from the Court of Chancery an order authorizing the enrolment of a deed conveying or charging land for charitable uses; but he must satisfy the Court that the deed was *bonâ fide*, and for full value, and that the omission to enrol it has arisen from ignorance, inadvertence, or accident (*r*). By the 35 & 36 Vict. c. 24, an application to the Court may be dispensed with, if the Clerk of Enrolments is satisfied with the evidence, and will himself enrol the deed (*s*).

(*p*) 9 Geo. II. c. 36; *A.-G.* v. *Gardiner*, 2 De G. & S. 102; *A.-G.* v. *Munro*, 2 De G. & S. 122: *quære*, as to the effect on the deed of the death of any subscriber within twelve months after its execution? See *Price* v. *Hathaway*, 6 Mad. 304; 2 De G. & S. 116; and, as to the attestation, *Doe* v. *Munro*, 12 M. & W. 845. As to the effect of non-enrolment, see *A.-G.* v. *Ward*, 6 Ha. 477, 482. As to the effect of the witnesses not signing the attestation clause, though present at the sealing and delivery of the deed, see *Wickham* v. *Marquis of Bath*, 1 Eq. 17. As to whether a power to *devise* land to a charity can be implied from the fact of the charity being by special Act empowered to *hold* land taken by devise, see *Perring* v. *Trail*, 18 Eq. 88; and cf. *Robinson* v. *London Hospital*, 10 Ha. 19, a far stronger case. Where a charity corporation has power under a statute prior to 9 Geo. II. c. 36, to hold lands, &c. subsequent acts, relating to the old statute, but not referring to 9 Geo. II. c. 36, will not exempt the charity from the operation of the latter; *Luckcraft* v. *Pridham*, 6 Ch. D. 205.

(*q*) See 25 V. c. 17; 27 V. c. 13; 29 & 30 V. c. 57; and see now the Charitable Trustees Incorporation Act, 1872 (35 & 36 V. c. 24), which enables the Charity Commissioners to grant a certificate of registration to trustees of a charity; but does not dispense with the necessity of compliance with the provisions of the Mortmain Act.

(*r*) The application is by summons; see Dan. C. F., 2045 *et seq.*

(*s*) S. 13. The office of Clerk of Enrolments is to be abolished on the occurrence of the next vacancy; 42 & 43 V. c. 78, s. 14 (2); and the application will then be made to the person who may be substituted for the Clerk of Enrolments; see *ibid.* s. 27.

Chap. XIII. Sect. 8.

On sale of land already in mortmain to a charity.

Assurances to a charity of land already in mortmain do not seem to require enrolment (*t*): but a conveyance upon a reinvestment of the proceeds of the sale of charity lands compulsorily taken must be enrolled (*u*). A deed duly enrolled takes effect from the date of its execution (*x*).

Religious, &c. Buildings (Sites) Act, 1868.

By a modern statute (*y*), all conveyances or other dispositions, except by will, *bonâ fide* made after the passing of the Act to a trustee or trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, arts, literature, or other like purposes, of land for the erection of a building for such purposes, or whereon a building used, or to be used for such purposes, shall have been erected, are exempted from the provisions of the Mortmain Acts; but the piece of land must not, in any case, exceed two acres in area or extent (*z*). And by the same Act, acknowledgment of the deed with a view to enrolment is rendered unnecessary.

Enrolment on alienation of lands within Duchy of Cornwall.

By the provisions of the Duchy of Cornwall Management Act, 1863, every deed or instrument whereby any hereditaments forming parts of the Duchy are sold, leased, or disposed of, under the Act, must be enrolled in the office of the Duchy within six months from its date (*a*).

On sale by tenant in tail —disentailing deed to be enrolled.

Where the vendor is tenant in tail, it is essential to the validity of the deed, as against the issue in tail and remaindermen, that it should be enrolled in Chancery within six calendar months after its execution by the vendor (*b*): but, if so enrolled, it takes effect from the time of execu-

(*t*) *A.-G.* v. *Glyn*, 12 Si. 84; *Walker* v. *Richardson*, 2 M. & W. 882; *Ashton* v. *Jones*, 28 B. 460.

(*u*) See *Re Christ's Hospital*, 12 W. R. 669.

(*x*) *Trye* v. *Corp. of Gloucester*, 14 B. 173.

(*y*) 31 & 32 V. c. 44.

(*z*) S. 1; and see the provisions of the Literary and Scientific Institutions Act, 1854, 17 & 18 V. c. 112; 38 & 39 V. c. 68; and see for other similar Acts, the General Index to Statutes, sub tits. "Mortmain," "Charities."

(*a*) Sec 26 & 27 V. c. 49. See this Act as to the alienation of lands forming parts of the Duchy.

(*b*) 3 & 4 Will. IV. c. 74, s. 41.

tion (*c*): except as against persons claiming for valuable consideration under a prior enrolled deed (although subsequently executed) and without express notice of the voidable estate created by the prior assurance (*d*). The enrolment may be made by either vendor or purchaser.

Consent of protector.

If there be a protector of the settlement, and his consent to the assurance be given by a separate deed, the consent-deed must be executed on or before the day on which the assurance is made by the tenant in tail; and must be enrolled in Chancery either at or before the time when the assurance is so enrolled (*e*). Where a married woman is protector in right of her separate estate, she can, without her husband's concurrence, consent to an absolute disposition by the tenant in tail (*f*). Where the tenant in tail in possession is a lunatic, the Lord Chancellor has a discretionary power under the Act to consent to the first tenant in tail in remainder barring the entail (*g*).

When a married woman.

When a lunatic.

Entries and enrolments on sale by legal or equitable tenant in tail, of copyholds.

A legal tenant in tail of lands held by copy of Court Roll may bar the entail by surrender: and an equitable tenant in tail may bar the entail either by surrender or by deed (*h*). If the assurance be by deed, the same must be entered on the Court Rolls of the manor (*i*); and, notwithstanding some ambiguity in the frame of the Act, it is now clearly settled

(*c*) *Cattell* v. *Corrall*, 4 Y. & C. 228.

(*d*) See sects. 38 and 74.

(*e*) Sects. 42 and 46.

(*f*) *Keer* v. *Brown*, John. 138. A bare trustee, who under the 31st section is protector, can insist on retaining the legal estate only so long as the purposes of the trust exist; thus, where there was a devise to trustees upon trust for a married woman for life for her separate use, with remainder to the use of her children as tenants in common in tail, it was held that the tenant for life having become *discoverte* could compel a conveyance; *Buttanshaw* v. *Martin*, John. 89.

(*g*) See *Re Blewitt*, 6 D. M. & G. 187, overruling a decision of Lord Brougham in the same case; see 3 M. & K. 250; and also a decision of Lord Cottenham, *Re Wood*, 3 M. & C. 266. See also as to the powers of the L. C. as protector, *Grant* v. *Yea*, 3 M. & K. 245; *Re Starkie*, *ib.* 248; and where the protector under the settlement has been convicted of treason or felony, *Re Wainewright*, 1 Ph. 258.

(*h*) S. 50.

(*i*) See s. 53.

Chap. XIII. Sect. 8.

that a deed barring an estate tail in copyholds must be entered on the Rolls of the manor within six calendar months after its execution (*k*); an understanding to the contrary was extensively acted on in practice for many years after the passing of the Act, and constitutes a frequent source of danger in copyhold titles. The consent of the protector (if any) may be given by deed, (whether the estate be legal or equitable,) or personally to the person taking the surrender (in those cases where the tenant in tail surrenders) (*l*).

Where tenant in tail is a bankrupt.

Under both the Bankruptcy Act of 1869 (*m*), and that of 1883 (*n*), where any portion of the bankrupt's estate consists of copyhold or customary property, or any like property passing by surrender or admittance or in any similar manner, the trustee is not to be compellable to be admitted, but may deal with such property in the same manner as if it had been capable of being, and had been in fact, duly surrendered to such uses as the trustee may appoint; and an appointee of the trustee is to be admitted or otherwise invested with the property accordingly. And the trustee might and may deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same; the provisions of the Fines and Recoveries Act being expressly extended to proceedings in bankruptcy (*o*).

Consent of protector to barring entail in copyholds.

If the tenant in tail convey by surrender, and the protector consent by deed, such deed must be executed and produced to the Lord of the Manor, his steward or steward's deputy, at or previous to the surrender; and he is to endorse thereon an acknowledgment (which is made *primâ facie* evidence of the

(*k*) *Honywood* v. *Forster*, 30 B. 1; *Gibbons* v. *Snape*, 1 D. J. & S. 621; *Green* v. *Paterson*, 32 Ch. D. 95. An indorsement by the steward on the disentailing assurance is not sufficient; *Boyd* v. *Pawle*, 14 W. R. 1009. The deed need not be enrolled in Chancery; 3 & 4 Will. IV. c. 74, s. 54.

(*l*) See sects. 51, 52.

(*m*) 32 & 33 V. c. 71, s. 22.

(*n*) 46 & 47 V. c. 52, s. 50 (4).

(*o*) 32 & 33 V. c. 71, s. 25; 46 & 47 V. c. 52, s. 56 (5).

fact) of the deed having been so produced; and is to enter the deed and indorsement on the Court Rolls: and then to indorse a memorandum of such entry upon the deed (*p*).

Where consent of protector not given by deed.

If the consent of the protector be not given by deed, it must be given to the person taking the surrender by the tenant in tail: and evidence of such consent is to be preserved on the Court Rolls, in manner provided in the 52nd section of the Act.

Must be by deed, if equitable tenant in tail disentailed by deed.

Where the equitable tenant in tail himself assures by deed, the consent of the protector must be given by deed; and if given by a deed distinct from the principal assurance, such deed must be executed on or before the day of the execution of such assurance by the tenant in tail, and must be entered on the Court Rolls (*q*): and an assurance by deed, by an equitable tenant in tail, is to be void against any person claiming for valuable consideration under any subsequent assurance,—(which would include a surrender)—duly entered on the Court Rolls before the entry thereon of such deed of assurance (*r*).

Entail in land tax.

An entail in fee farm rents in the nature of land tax may be barred by deed acknowledged and enrolled or registered in manner directed by the 42 Geo. III. c. 116 (*s*).

Acknowledgment by married women.

We have already referred (*t*) to the acknowledgment of conveyances by married women: and to the extended power conferred upon them by modern statutes (*u*).

(*p*) 3 & 4 Will. IV. c. 74, s 51.

(*q*) The Act does not say that the deed of consent must be entered on the Court Rolls at or before the time when the principal assurance is so entered; but such, it is conceived, is the intention, and it would be prudent so to enter it. The 53rd section of the Act does not seem to apply to customary freeholds; *Reg.* v. *Lord of the Manor of Ingleton*, 8 Dowl. 693; and see *Doe* v. *Towns*, 2 B. & Ad. 585.

(*r*) S. 53. Lord St. Leonards considers it probable that notice would not be held in Equity to supply the want of entry on the Court Rolls; V. & P. 471.

(*s*) S. 157; and see 38 Geo. III. c. 60, s. 40.

(*t*) *Ante*, p. 643 *et seq.*

(*u*) *Ante*, p. 651 *et seq.*

Chap. XIII. Sect. 8.

Statutory provisions for immediate entry on court rolls of copyhold assurances.

By the 89th section of the 4 & 5 Vict. c. 35, it is enacted "that after the 31st day of December, 1841, every surrender and deed of surrender which the lord shall be compellable to accept or shall accept, and also every will and codicil a copy of which respectively shall be delivered to the lord of the manor of which the lands affected by such surrender, deed of surrender, will and codicil, are parcel, or to his steward, or the deputy of such steward, either at any Court holden for such manor at which there shall not be any homage assembled, or out of Court, and also every grant and admission by the lord of any manor, or his steward, or the deputy of such steward, pursuant to this Act, shall be forthwith entered on the Court Rolls of the manor by such lord, or steward, or deputy; and every entry made on the Court Rolls of any manor pursuant to this present clause shall for all purposes whatsoever be deemed and taken to be an entry made in pursuance of a presentment made at a Court holden for such manor by the homage assembled thereat; and the steward, or his deputy, shall be entitled to the same fees and other charges for making such entry on the Court Rolls as he would have been entitled to in respect of such entry, in case the same had been made in pursuance of a presentment made at a Court holden for such manor by the homage assembled thereat."

Conveyance of contingent interest in copyholds under late Act.

The 6th section of the 8 & 9 Vict. c. 106, appears to extend to contingent interests in copyholds (which previously to the passing of that Act were incapable of alienation except by way of contract in Equity) (*x*); and it is of course desirable, although not essential, that the deed of disposition should be entered upon the Court Rolls.

Assurance of copyholds taken under the Lands Clauses Con-

Where lands of copyhold or customary tenure are taken under the Lands Clauses Consolidation Act, 1845, the conveyance is to be entered by the steward of the manor upon

(*x*) Scriven, 401 (n.). As to the purchaser's power of compelling admittance by *mandamus*, see *ibid.*; admittance may now be granted out of Court, and out of the manor, 4 & 5 V. c. 35, s. 88.

the Court Rolls; and, upon payment to him of such fees as would be due to him on the surrender of the same lands to the use of a purchaser, he is bound to make such enrolment; and the conveyance, when so enrolled, is to have the effect in respect of such lands as if the same were of freehold tenure (*y*); but until the same are enfranchised (*z*), they are to continue subject to the accustomed fines, rents, heriots, and services. It has been held that, under this provision, the steward cannot claim the fee which would be due to him on the *admittance* of a purchaser (*a*).

solidation Act, 1845, to be entered on court rolls.

Where the estate is not situate in a register county, and the title deeds are retained by the vendor, it is prudent for the purchaser to procure the indorsement of the conveyance upon the leading document of title; that is, upon the document which the vendor would have to produce in proof of his title were he to attempt to make any disposition of the estate inconsistent with the rights of the purchaser. The doing so has been referred to judicially as being merely an ordinary and proper precaution (*b*); but it has not yet been decided, nor is it commonly considered, that a purchaser has any right, independently of agreement, to insist upon such an indorsement.

Expediency (if land not in register county) of indorsing notice of conveyance on leading title deed if remaining with vendor.

Such a memorandum need only specify the date of, and parties to, the conveyance; and particularize the property therein comprised. It is, of course, important to the vendor, that this should be expressed in definite terms; for, if the memorandum were so worded as to leave any doubt as to the precise amount of property comprised in the conveyance, the production of such conveyance would be necessary upon any future dealing with the residue of the estate.

Form of notice.

And, as we have already seen, upon the completion of the purchase of an equitable interest in real estate, it is prudent

Propriety of giving notice to trustees on

(*y*) S. 95.

(*z*) See sects. 95 and 96.

(*a*) *Cooper* v. *Norfolk R. Co.*, 3 Ex. 546.

(*b*) See *Keates* v. *Lyon*, 4 Ch. 218, 226.

Chap. XIII. Sect. 8.

purchase of equitable interest.

Importance of notice to mortgagee on purchase of equity of redemption.

to give notice of the transaction to the owners of the legal estate: but, as a general rule, a purchaser's priority is not affected by his giving, or omitting to give, such notice (*c*). However, upon the purchase of an equity of redemption, such a notice should always be given to the mortgagee, and an inquiry made of him as to the amount due to him, and whether he is entitled to any other charges created by the same mortgagor; for, except in cases occurring between the 7th August, 1874, and the 1st January, 1876, when the 7th section of the Vendor and Purchaser Act (*d*) was in force, and the right of tacking was in all cases in abeyance, any further advances which he may make to the mortgagor upon the security of the equity of redemption, in ignorance of the sale, will be valid as against the purchaser (*e*). Notice, however, though expedient, would not seem to be necessary in order to prevent consolidation, as, independently of the Conveyancing Act, the purchaser of an equity of redemption could not be affected by any dealings with the estate subsequently to his purchase (*f*). And now the doctrine of consolidation does not apply in any case where either of the mortgages has been made subsequently to the 31st December, 1881 (*g*), unless the operation of the section is expressly excluded by the terms of one or both of the mortgages.

Admittance to copyholds.

If the estate be copyhold, admittance is essential in order to perfect the legal title. Before admittance, the surrenderee has, at Law, no assignable interest (*h*): although the rule is

(*c*) *Ante*, p. 518.

(*d*) 37 & 38 V. c. 78. The section was repealed by 38 & 39 V. c. 87, s. 129, which was itself repealed by the Stat. Law Rev. Act, 1883, without, however, bringing the repealed section of the V. & P. Act again into operation. See *Robinson* v. *Trevor*, 12 Q. B. D. 423, 433. As to lands in Yorkshire, tacking is abolished by sect. 16 of 47 & 48 V. c. 54; see *ante*, p. 776; *post*, p. 963.

(*e*) *Goddard* v. *Complin*, 1 Ch. Ca. 119; *Blackston* v. *Moreland*, 2 Ch. Ca. 20; *Wrightson* v. *Hudson*, 2 Eq. Ca. Abr. 609, pl. 7; *Vint* v. *Padgett*, 2 D. & J. 611; *post*, p. 1036 *et seq.*

(*f*) *Jennings* v. *Jordan*, 6 Ap. Ca, 698; *Harter* v. *Colman*, 19 Ch. D. 630, overruling *Beevor* v. *Luck*, 4 Eq. 537; and see *Bird* v. *Wenn*, 33 Ch. D. 215; *post*, p. 1036 *et seq.*

(*g*) 44 & 45 V. c. 41, s. 17; and see *De Caux* v. *Skipper*, 31 Ch. D. 635.

(*h*) *Matthew* v. *Osborne*, 13 C. B. 938.

of course different in Equity (*i*): and even if the assignee actually himself procure admittance, this will not vest in him the legal estate (*k*).

Section 9.

(9.) *As to the stamps.*

As to the stamps.

Stamps: deed not evidence without.

It is also necessary that the conveyance should be duly stamped; the want of a proper stamp does not, however, affect its validity, but merely renders it inadmissible in evidence (*l*): except in criminal proceedings (*m*); or for some collateral purpose, as *e. g.*, to prove fraud (*n*), or an act of bankruptcy (*o*) consisting in the execution of the deed itself.

What is a conveyance on sale for the purposes of the Act.

For the purposes of the late Stamp Act (*p*), the term, "conveyance on sale," includes every instrument, and every decree or order of any Court, or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or according to his direction (*q*).

Deed may be stamped after execution—penalty.

A deed not stamped, or insufficiently stamped, at the time of execution, might, formerly, be stamped at any subsequent period upon payment of the duty and a penalty (*r*); and, if brought to be stamped within twelve months after execution, the commissioners were empowered to remit all or any part of the penalty (*s*): but after the expiration of

(*i*) *Wainewright* v. *Elwell*, 1 Mad. 632.

(*k*) *Matthew* v. *Osborne*, *suprà*. Under the Wills Act, copyholds and customary freeholds are devisable notwithstanding that the testator may not have surrendered them to the use of his will, or have been admitted thereto; and the Act overrides any custom negativing the right to devise, and the want of any custom to devise; 1 V. c. 26, s. 3.

(*l*) *Robinson* v. *Macdonnell*, 5 M. & S. 228, 234; *Duck* v. *Braddyll*, 13 Pr. 455, 469; Tilsley on Stamps, 199; *Browne* v. *Savage*, 4 Dr. 635.

(*m*) 17 & 18 V. c. 83, s. 18.

(*n*) *Holmes* v. *Sexsmith*, 7 Ex. 302.

(*o*) *Ex p. Squire*, 4 Ch. 47; *Ex p. Wensley*, 1 D. J. & S. 273; *Ponsford* v. *Walton*, L. R. 3 C. P. 167.

(*p*) 33 & 34 V. c. 97.

(*q*) S. 70.

(*r*) 37 Geo. III. c. 136, s. 2; *Rex* v. *Preston*, 5 B. & Ad. 1028.

(*s*) 44 Geo. III. c. 98, s. 24.

Chap. XIII. Sect. 9.

that time they had no such discretion (*t*). Under the 33 & 34 Vict. c. 97 (*u*), adopting a similar provision in the 13 & 14 Vict. c. 97 (*x*), any unstamped or insufficiently stamped instrument, may be stamped after execution on payment of a penalty of 10*l.* and the unpaid duty; and if such duty exceed 10*l.*, then, by way of further penalty, interest at 5*l. per cent.* on its amount, calculated from the first execution of the instrument: but the sum payable for interest is not to exceed the amount of such unpaid duty. Payment of the penalty, duty, and interest is to be denoted by an appropriate stamp: and the commissioners retain the power of remitting the penalty within twelve calendar months after the first execution of the instrument; and where the instrument has been first executed out of the United Kingdom, it may be stamped at any time within two months after it has been first received in the United Kingdom, on payment of the unpaid duty only (*y*). The known want of proper stamps upon a lost deed cannot be supplied (*z*).

Payment of duties in Court, under 17 & 18 Vict. c. 125.

The 17 & 18 Vict. c. 125 (*a*), and now the 33 & 34 Vict. c. 97 (*b*), contain provisions under which, in any Court of civil judicature in the United Kingdom, an instrument not stamped, or insufficiently stamped, and of such a nature as to admit of its being stamped on payment of the duty and a penalty, may be rendered admissible in evidence, *pro hâc vice*, on payment of the duty, the penalty required by the Stamp Acts, and an additional penalty of 1*l.*; and the document is to be subsequently stamped by the commissioners, on request, and on production of the receipt given by the officer of the Court for the duty and the penalties.

(*t*) Tilsley, 242.

(*u*) S. 15.

(*x*) S. 12. These provisions do not seem to apply to instruments executed before the passing of the Act.

(*y*) See 33 & 34 V. c. 97, s. 15; 13 & 14 V. c. 97, s. 13

(*z*) *Rippiner* v. *Wright*, 2 B. & Ald. 478; *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624; but see, as to agreements, *ante*, p. 275, and as to presuming stamps, *ante*, p. 370.

(*a*) See s. 16.

(*b*) Sects. 28 and 29.

Ad valorem duty—amount of, depends solely on consideration stated.

As we have already seen (*c*), the amount of *ad valorem* duty is determined solely by the consideration appearing on the face of the conveyance; all the facts and circumstances affecting the liability to *ad valorem* duty, or the amount, must be fully and truly stated (*d*); and although a misstatement of the consideration neither avoids the deed, nor affects its admissibility in evidence (*e*), yet any person who, with intent to defraud the Crown, either executes or is employed or concerned in the preparation of an instrument which does not fully and truly set forth all the facts and circumstances affecting duty, is liable to a penalty of 10*l.* (*f*); and, where the full purchase or consideration money is not truly stated, the purchaser, or his representatives, may recover from the vendor or his representatives so much of it as is not so stated (*g*). The commissioners may, upon an application being made to them respecting stamps, require to be furnished with an abstract of the instrument, and also with such evidence as they deem necessary to satisfy them that the consideration is truly stated (*h*).

Is payable, on what consideration.

By the 48 Geo. III. c. 149, s. 22, and the 55 Geo. III. c. 184, *ad valorem* duty was made payable in respect of any money consideration, directly or indirectly paid or secured or agreed to be paid, or of a debt due to the purchaser and charged on the property, or of any gross or entire sum of money to be afterwards paid by the purchaser. When on a sale of an equity of redemption it was stipulated (*i*) that the purchaser should pay the mortgage debt, the duty was payable under this provision on the amount of the debt; but where there was no such stipulation, it was

(*c*) *Ante*, p. 597.

(*d*) 33 & 34 V. c. 97, s. 10.

(*e*) *Ante*, p. 785, n. (*l*).

(*f*) 33 & 34 V. c. 97, s. 10.

(*g*) *Vide ante*, p. 597; 48 Geo. III. c. 149, s. 24; *Gingell* v. *Purkins*, 4 Ex. 720.

(*h*) See 33 & 34 V. c. 97, s. 20; and see 17 & 18 V. c. 83, s. 17.

(*i*) As to whether a mere covenant to *indemnify* the vendor would amount to such a stipulation, see and consider *Huntley* v. *Sanderson*, 1 C. & M. 467; and *Collinge* v. *Heywood*, 9 A. & E. 633: a recital of an agreement to pay, followed by a covenant to indemnify, would let in the duty; see *Carr* v. *Roberts*, 5 B. & Ad. 78.

Chap. XIII. Sect. 9.

held (*k*) that the duty did not attach. This, however, was altered by the 16 & 17 Vict. c. 59 (*l*), which imposed the duty upon the amount of any mortgage, bond, or other debt, or any gross or entire sum of money, subject to which the property might be sold and conveyed; and this, irrespectively of the question of liability on the part of the purchaser to pay such amount, or to indemnify the vendor, or any other person, against the same. But whether a conveyance in discharge of a *bonâ fide* existing debt not charged upon the property came within the provisions of these Acts was considered doubtful, although in practice it was usual in such a case to affix the *ad valorem* stamp (*m*). This doubt, however, is for the future removed by the 33 & 34 Vict. c. 97, s. 73, which provides that where the consideration consists wholly or in part of a debt due to the purchaser, or where the property is sold subject, either certainly or contingently, to the payment or transfer of any money or stock, whether being or constituting a charge on the property or not, such debt, money, or stock is to be chargeable with the duty.

On valuation of timber, fixtures, &c.

Where timber, fixtures, or any other parts of the inheritance, or the goodwill of a business, if made the subject of assignment (*n*), are valued separately, the amount of valuation must be stated as part of the consideration. On a sale of premises to which goodwill is attached, it was formerly considered, on the authority of a reported dictum of Lord Ellenborough, that no *ad valorem* duty was payable in respect of the value of the goodwill; but on a case being stated by the Commissioners, the Court of Exchequer held that goodwill is property within the Stamp Acts (*o*); and by the 17 & 18 Vict. c. 83, s. 19, past transac-

(*k*) *Marquis of Chandos* v. *Com. of I. R.*, 6 Ex. 464.

(*l*) S. 10.

(*m*) And see *Gingell* v. *Purkins*, 4 Ex. 720.

(*n*) *Potter* v. *Com. of I. R.*, 10 Ex. 147.

(*o*) *Ibid.* As to the stamp duty payable on a deed of dissolution where the continuing partner purchases the retiring partner's interest, see *Christie* v. *Com. of I. R.*, L. R. 2 Ex. 46; *Phillips* v. *Com. of I. R.*, *ibid.* 399; *ante*, p. 598.

tions were relieved against the penalties incurred in consequence of the mistake.

On life annuity, stock—several considerations.

Where the amount was incapable of being ascertained, (as where the consideration was a life annuity (*p*),) no *ad valorem* duty was formerly payable: but this, as respects an annuity, was altered by the 16 & 17 Vict. c. 63, and 17 & 18 Vict. c. 83 (*q*), which imposed *ad valorem* duties upon a conveyance in consideration of an annual sum payable "in perpetuity, or for any indefinite period:" if, however, the annual sum were redeemable, the amount of the redemption-money or stock, &c., was to be considered the purchase-money, and to be charged with duty as such; and this, whether such redemption was optional or otherwise (*r*). So, formerly, no *ad valorem* duty attached when the consideration consisted of stock; but this, as we have seen (*s*), has been altered; and now, under the 33 & 34 Vict. c. 97, where the consideration consists wholly or in part of any stock or security (whether marketable or not) (*t*), or of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, or of money payable periodically in perpetuity or for an indefinite period not terminable with life, or of money payable periodically during any life or lives (*u*), in all these cases duty attaches; and the Act contains provisions for ascertaining the amount of duty payable in each particular case (*x*). Where the consideration is a periodical payment in perpetuity or for an indefinite period not terminable with life, the duty is calculated on the basis of what will be payable during twenty years, and where it is a periodical payment for life, during twelve years next after the date of the instrument (*y*).

(*p*) *Blandy* v. *Herbert*, 9 B. & C. 396.

(*q*) See Sched., tit. "Conveyance."

(*r*) See 16 & 17 V. c. 59, s. 11; and see 13 & 14 V. c. 97, and as to the latter Act, *Re Gill*, 8 Ex. 376, which gave rise to it.

(*s*) *Ante*, p. 599.

(*t*) S. 71.

(*u*) S. 72; *Limmer Paving Co.* v. *Com. of I. R.*, L. R. 7 Ex. 211.

(*x*) See sects. 11—13, 71 and 72.

(*y*) S. 72.

Chap. XIII. Sect. 9.

Purchase-money may be reduced to lessen duty.

The vendor might and may, if he pleases, *bonâ fide* accept a less sum than the amount originally agreed to be paid, although the reduction be little more than nominal, and the sole object be to avoid a higher duty (*z*).

Duty not payable on money paid as part of family arrangement.

And no duty is payable in respect of a sum not paid to, or for the benefit of, the person who conveys, or directs the conveyance of, the estate (*a*); but paid to, or settled upon, other parties, as part of a family arrangement (*b*).

Bankrupt's estate.

By the Bankruptcy Acts of 1869 (*c*) and 1883 (*d*), every deed, &c., relating to a bankrupt's estate remaining vested in him or in his trustee is exempted from stamp duty, except in respect of fees under the Acts.

Assurances to friendly societies.

By the Friendly Societies Act, 1875 (*e*), no power, warrant, or letter of attorney, granted by any person as trustee for the transfer of any money of the society invested in his name in the public funds; nor any order or receipt for money contributed to, or received from, the funds of the society by virtue of its rules or of the Act; nor any bond given to, or on account of, the society, or by the treasurer or other officer thereof; nor any draft or order, or form of policy, or appointment or revocation of appointment of agent, or "other document required or authorized by the Act or by the rules of the society," is to be subject to stamp duty. It was held that similar general words in a former statute must be restricted to acts done immediately by the society as such, or by their trustees in that capacity, and that a transfer of a mortgage to the trustees, the money being advanced out of the funds of the society in pursuance of their rules, is not exempt from duty (*f*).

(*z*) *Shepherd* v. *Hall*, 3 Camp. 180; Sug. 570.

(*a*) 4 B. & C. 246.

(*b*) *Denn* v. *Diamond*, 4 B. & C. 243; *Massy* v. *Nanney*, 3 Bing. N. C. 478; *Re Kerrey Glazier*, cited in Tilsley, 194; *Wigmore* v. *Joyce*, 13 Ir. L. R. 164.

(*c*) 32 & 33 V. c. 71, s. 113.

(*d*) 46 & 47 V. c. 52, s. 144; G. R. 1886, 60.

(*e*) 38 & 39 V. c. 60, s. 15 (2).

(*f*) *Re Royal Liver Friendly Society*, L. R. 5 Ex. 78. And see generally as to exemptions from stamp duty, Tilsley, 531 *et seq.*

By the law now regulating benefit building societies (*g*), the purpose for which such a society may be established is limited to raising, by subscriptions, a fund for making advances to members by way of mortgage (*h*); and any surplus may be invested upon real or leasehold securities (*i*). The Act contains a general exemption from stamp duty in favour of the society, but this does not extend to a mortgage (*k*); and apparently there is no distinction, as respects the liability to duty between a mortgage by a member of the society, and one by a stranger on an advance out of the surplus funds.

Duty payable on money paid by lessee to party holding agreement for lease.

It has been decided, that where a person having an agreement for a lease sells his interest, and procures the lessor to grant the lease direct to the purchaser, and himself joins in the lease as a directing party, the purchase-money is liable to duty, and must be set forth as the consideration on the face of the lease (*l*): and the result, it is conceived, must be the same, although the holder of the original agreement be not made a party to the lease.

On building leases.

It was generally considered that a building lease was chargeable only with *ad valorem* duty on the rent; but in a modern case, the Court of Exchequer held that a lease containing a covenant for the erection of houses by the lessee was a lease made upon a further, or other valuable, consideration within the 17 & 18 Vict. c. 83, s. 16, and required to be also impressed with a deed stamp (*m*). This decision led to the 33 & 34 Vict. c. 44, which remedies past omissions, and provides for the future that no additional stamp duty is to be payable in respect of such further con-

(*g*) See 37 & 38 V. c. 42; repealing the 6 & 7 Will. IV. c. 32, except as to subsisting societies.

(*h*) S. 13.

(*i*) S. 25.

(*k*) S. 41.

(*l*) *A.-G.* v. *Brown*, 3 Ex. 662; see indemnity clause, 13 & 14 V. c. 97, s. 10, in respect of penalties incurred under this doctrine, prior to the 20th March, 1850; *Gingell* v. *Purkins*, 4 Ex. 720; and see now 33 & 34 V. c. 97, ss. 10, 74.

(*m*) *Re Bolton's Lease*, L. R. 5 Ex. 82.

Chap. XIII. Sect. 9.

sideration; and the General Stamp Act, 1870 (*n*), contains a similar provision.

Duties payable under 33 & 34 Vict. c. 97.

The following scale of duties is payable under the 33 & 34 Vict. c. 97 (*o*); *viz.*, where the amount or value of the consideration does not exceed 5*l.*, a duty of 6*d.*; where it exceeds 5*l.* and does not exceed 25*l.*, a duty of 6*d.* for every entire sum of 5*l.*, and for any fractional part of such sum; where it exceeds 25*l.* and does not exceed 300*l.*, a duty of 2*s.* 6*d.* for every entire sum of 25*l.* and for any fractional part of such sum; and where it exceeds 300*l.*, a duty of 5*s.* for every entire sum of 50*l.* and for any fractional part of such amount or value. The ordinary deed stamp is reduced from 35*s.* to to 10*s.* (*p*); and the old progressive duty is abolished. But every instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters (*q*).

Commissioners may determine proper amount of duty.

The commissioners may now be required, apparently without fee or charge, to state their opinion whether any executed instrument is chargeable with duty, and with what amount (if any) of duty it is chargeable; and may stamp the deed with a stamp (which is to be evidence) denoting either that the instrument is not chargeable with duty, or that it is duly stamped, as the case may require (*r*).

Certain conveyances exempted from increase of duty.

And (*s*) where any lands or other property shall have been actually and *bonâ fide* contracted to be sold prior to the 20th March, 1850, by any contract or agreement in writing duly stamped, or shall have been actually and *bonâ fide* sold under the decree of any Court made prior to the said 20th March,

(*n*) 33 & 34 V. c. 97, s. 98.

(*o*) S. 78.

(*p*) S. 4.

(*q*) S. 8. As to how the duty on leases is to be calculated, see sects. 96 *et seq.*; and as to the former scale of duties, see 13 & 14 V. c. 97, Sched.

(*r*) See s. 18, and compare the similar provision in 13 & 14 V. c. 97, ss. 14 and 15, and 16 & 17 V. c. 59, s. 13; and see *Morgan* v. *Pike*, 14 C. B. 473.

(*s*) 13 & 14 V. c. 97, s. 16.

and shall be conveyed to the purchaser, or any other person, by his direction after the 10th October (*t*) and before or on the 31st March, 1851, the conveyance is to be exempt from any *ad valorem* duty of a greater amount than would have been payable under the old law; but the grounds of exemption are to be proved to the satisfaction of the Commissioners, and a certificate of the matter so proved is to be written on the deed, and signed by them or some or one of them.

Vesting orders, liable to duty.

By the 15 & 16 Vict. c. 55 (*u*), vesting and releasing orders of the Court of Chancery, operating as conveyances, were subjected to the duties to which they would have been liable if they had been deeds; and under the Act of 1870 (*x*), every decree or order of any Court whereby any property on the sale thereof is legally or equitably transferred to or vested in the purchaser is liable to duty.

Apportionment of consideration.

Where property sold for one entire consideration is conveyed to the purchaser in separate parts by different instruments, the consideration is to be apportioned as the parties think fit, but the distinct consideration for each separate part is to be set forth in the conveyance relating thereto. In the case of a joint purchase, where the property is conveyed in parts by separate instruments, the conveyance of each separate part is chargeable with duty in respect of the distinct part of the consideration therein specified (*y*).

In case of sub-sale—sub-purchaser alone considered the purchaser.

Upon a sub-sale by a purchaser who has not obtained a conveyance, such purchaser and his sub-purchaser are considered to be the vendor and purchaser within the meaning of the Stamp Acts; and the duty payable upon the conveyances to the sub-purchaser (although the original vendor join therein) is determined solely by the amount paid by such sub-purchaser; and if the original vendor do not join in the conveyance to the sub-purchaser, and the same is duly

(*t*) 1850 seems to be accidentally omitted.

(*u*) S. 13.

(*x*) 33 & 34 V. c. 97, ss. 70, 78.

(*y*) S. 74, sub-ss. 1 and 2.

Chap. XIII. Sect. 9.

stamped, no *ad valorem* duty is payable upon any subsequent conveyance of the legal estate by the original vendor.

None on deed of confirmation.

A deed executed by way of confirmation of a previous deed purporting to be a conveyance, and which has paid the *ad valorem* duty, is not itself liable to such duty, although the former deed was inoperative (*z*).

Is payable on principal assurance.

Where there are several assurances, the *ad valorem* duty is payable on the principal assurance; and the others are chargeable with such other duty as they may be liable to, not, however, exceeding the *ad valorem* duty payable in respect of the principal assurance (*a*); and what is to be deemed such in certain specified cases is defined by the Acts: and in any other case the parties may determine for themselves which is to be considered the principal instrument (*b*).

Stamps on collateral deeds of covenant.

And, under the 33 & 34 Vict. c. 97, any separate deed of covenant, not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage, made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or for all or any of those purposes, is charged with the *ad valorem* duty payable on the conveyance, if not exceeding 10*s.*, or if such *ad valorem* duty exceed 10*s.*, then with 10*s.* (*c*).

And on duplicates.

And any duplicate or counterpart of any instrument is charged with the duty charged on the original, if not amounting to 5*s.*, and in any other case with 5*s.* (*d*).

Copies of court roll procured to

The Act contains special provisions with reference to the stamping of the Court Rolls of surrenders and grants

(*z*) *Doe* v. *Weston*, 2 Q. B. 249.

(*a*) 33 & 34 V. c. 97, s. 76.

(*b*) S. 77; and see 1st Sched. to 55 Geo. III. c. 184, tit. "Conveyance."

(*c*) See Sched. to 33 & 34 V. c. 97, tit. "Covenant;" and compare 13 & 14 V. c. 97.

(*d*) 33 & 34 V. c. 97, Sched., tit. "Duplicate."

be stamped by steward of manor.

of copyholds, and makes the steward's certificate sufficient evidence that the documents are duly stamped (*e*). No instrument is chargeable more than once with duty by reason of its relating to several distinct tenements, in respect of which several fines or fees are due to the lord or steward of the manor (*f*). All the facts and circumstances affecting duty are to be fully stated in a note to be delivered to the steward before the surrender or grant is made; and if the parties or the steward proceed before such note has been delivered, they are liable to heavy penalties. The steward must, within four calendar months after the date of any surrender or admittance, under a penalty of 50*l*., deliver out the usual copy of Court Roll duly stamped (*g*); but he may insist on payment of his fees and the stamp duty, before accepting the surrender or granting the admittance (*h*).

Conveyance by several owners, what stamps are necessary.

Where persons having separate estates or interests in the same property join in the conveyance, only one set of stamps is necessary (*i*): but several stamps are requisite where several parties deal by one assurance with their separate interests in separate properties. Such questions can seldom, if ever, arise upon a conveyance liable to *ad valorem* duty, but may occasionally have to be considered with reference to collateral deeds. In a case (*k*), where five tenants in common of copyholds contracted to sell at an entire price, the Court of Queen's Bench determined that, although only one stamp was payable upon the surrender, the purchaser must be admitted separately to each of the five estates in common, and that a separate stamp was payable for each admittance.

Further duty when deed has a double operation:

It was provided, by the 55 Geo. III. c. 184 (*l*), that "where any deed or instrument operating as a conveyance

(*e*) 33 & 34 V. c. 97, s. 81.

(*f*) S. 82.

(*g*) S. 85.

(*h*) S. 86; and compare 48 Geo. III. c. 149, ss. 33 and 34.

(*i*) Sug. 567; *Wills* v. *Bridge*, 4 Ex. 193; *Doe* v. *Tidbury*, 14 C. B. 304.

(*k*) *Reg.* v. *Eton College*, 8 Q. B. 526.

(*l*) See Schedule, tit. "Conveyance;" see, too, Schedule to 13 & 14 V. c. 97, tit. "Settlement."

Chap. XIII. Sect. 9.

shall operate also as a conveyance of any other than the property sold by way of settlement or for any other purpose, or shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property, or relate to the title thereto, the same shall be charged with such further duty as any separate deed containing the other matter would have been chargeable with, exclusive of the progressive duty."

As on a conveyance and mortgage.

Thus, where the conveyance operates also as a mortgage, the double duty is payable: however, in a case (*m*), where a purchaser of a copyhold estate from parties entitled thereto as equitable tenants in common, agreed with a third party for a loan upon a mortgage of the estate in order to enable him to complete the purchase; and the conveyance and mortgage were effected by the vendors surrendering the estate to the use of the mortgagee, and, subject thereto, to the use of the purchaser, (which surrenders, it is presumed, bore the proper *ad valorem* stamps,) a contemporary deed, by which the vendors to the extent of their respective shares entered into covenants for title with the purchaser, and also separately with the mortgagee, and which contained the usual covenant by the purchaser with the mortgagee for payment of principal and interest, and to insure against fire, and a power of sale, was held to be sufficiently stamped with a single deed stamp and followers. The case, of course, was not within the above clause of the 55 Geo. III.; but it was contended that it was a multifarious deed, and fell within the general provisions of the 13 Anne, c. 18, s. 24 (*mm*); but a contrary doctrine was laid down very broadly by the Court (*o*).

But not on a conveyance to uses directed by purchaser.

Lord St. Leonards (citing Mr. Coventry) remarks that the clause above cited from the 55 Geo. III. c. 184, "does not seem to affect a conveyance of the property sold to such uses as the purchaser may choose to direct" (*p*).

(*m*) *Rushbrook* v. *Hood*, 5 C. B. 131; and see, as to conveyances not on sale, *Doe* v. *Fereday*, 12 A. & E. 23.

(*mm*) Ruff. 12 An. sess. 2, c. 9.

(*o*) 5 C. B. 131; see the observations of Maule, J., and Wilde, C. J.

(*p*) Sug. 570.

By the 33 & 34 Vict. c. 97 (*q*), any instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters; and an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration, is to be charged with duty as if it were a separate instrument in respect of such last-mentioned consideration.

Matters which do not involve additional duty.

But a covenant to produce title deeds, or an assignment of a term in trust to attend, does not involve the payment of additional duty (*r*); nor is it payable in respect of an agreement for a lease of the property to the vendor being included in the conveyance, such agreement being considered as forming part of the contract (*s*).

Deed stamp unnecessary although *ad valorem* duty less than deed stamp.

And a deed stamp is not necessary by reason of the *ad valorem* duty being less than the amount of a deed stamp (*t*).

Appropriate stamps to be used.

Under the 33 & 34 Vict. c. 97 (*u*), a stamp, which by any word or words on the face of it is appropriated to any particular description of instrument, is not to be used, or if used is not to be available, for an instrument of any other description; and an instrument falling under the particular description to which any stamp is so appropriated, is not to be deemed duly stamped unless it is stamped with the stamp so appropriated. Except where otherwise expressly provided by the Act, all duties are to be denoted by impressed stamps only (*x*).

Presumption in favour of instruments having been stamped.

We have seen (*y*) that, in the absence of evidence to the contrary, the Courts will presume that a conveyance, which was duly executed, was also duly stamped.

(*q*) See s. 8.

(*r*) Sug. 570; *Wolsley* v. *Cox*, 2 Q. B. 321; and see *Rushbrook* v. *Hood*, 5 C. B. 131.

(*s*) *Doe* v. *Phillips*, 11 A. & E. 796; *aliter* if there be an agreement for the sale of goods, *Clayton* v. *Burtenshaw*, 5 B. & C. 41.

(*t*) Sug. 571.

(*u*) S. 9.

(*x*) S. 23.

(*y*) *Ante*, p. 370.

Chap. XIII. Sect. 9.

Fresh stamps not necessary if instrument altered while *in fieri*.

As to whether fresh stamps become necessary by reason of alterations in the instrument the general rule appears to be (*z*), "that where, by reason of an alteration made in it, an instrument becomes a new one, a fresh stamp is requisite;" but not in any other case. It has been held that where the only conveying party to a marriage settlement had executed it, and then, upon the objection of other parties, a clause was struck out, and the deed was re-executed by the conveying party, the execution was only *in fieri*, and no new stamp was necessary (*a*); and it appears that, where only some of the parties to a deed have executed it, the filling up of blanks, or even making alterations which solely affect the interests of the parties who have not executed, will not involve the payment of additional duty (*b*): but this would not extend to a substitution of the name of a sub-purchaser, in place of that of the original purchaser, after the conveyance had been executed by the vendor (*c*).

Conveyances of land in colonies.

Lastly, we may remark that duty attaches upon assurances of land in the colonies, or elsewhere, if executed in this country (*d*).

Section 10.

(10.) *As to the costs.*

As to the costs.

Costs of conveyance are borne by purchaser: of execution by vendor.

The purchaser (in the absence of any express agreement) prepares, and pays for the preparation of, his conveyance (*e*): but the costs of perusal and execution by all necessary conveying parties fall on the vendor (*f*); including, it is conceived, the costs of all matters essential to the validity of the deed as a perfect conveyance, *e. g.*, the acknowledgment by married women and the filing of the certificate of acknowledgment, and the enrolment of a disentailing deed and deed of consent by the protector upon a sale by a

(*z*) See Tilsley, 304.

(*a*) *Jones* v. *Jones*, 1 C. & M. 721.

(*b*) See Tilsley, 312, and cases cited.

(*c*) *L. B. & S. C. R. Co.* v. *Fairclough*, 2 Man. & G. 674.

(*d*) *Re Wright and Com. of I. R.*, 11 Ex. 458.

(*e*) Sug. 561.

(*f*) *Ibid.*

tenant in tail; nor will a condition throwing the expense of the conveyance, surrender, &c., on the purchaser, extend to the expense of procuring the concurrence of necessary parties; or, in the case of copyholds, of procuring their necessary previous admission on the Court Rolls, although rendered necessary by events subsequent to the contract (*g*); or of proceedings under the Trustee Act (*h*): but a purchaser always pays for the registration of his conveyance (*i*): as an unregistered deed is valid except as against adverse claimants under a registered instrument; and he must now, in the case of a sale since 1874, in the absence of stipulation to the contrary in the contract, pay the costs of any covenant for, or acknowledgment of the right to, the production of deeds, other than the costs of perusal and execution on behalf of and by the vendor and other necessary parties (*k*).

Of getting in legal estate from infant devisee of vendor.

Where will before contract.

Where a testator, having devised an estate in strict settlement, contracted to sell part and died before conveyance, the costs of the necessary suit for obtaining a conveyance under the 1 Will. IV. c. 60, s. 17, were directed to be paid out of the vendor's estate (*l*): but, in a modern case, where, on a purchase by a railway company under its compulsory powers, the vendor died before conveyance, having by his will, made before the contract, devised his estate to his children, some of whom were infants, it was held that the company were not liable to pay the vendor's costs of a suit for specific performance (*m*); and it seems to be now settled that where the suit is occasioned by a will made previously to the contract (*n*), or by an intestacy (*o*), no costs will be given on either side.

(*g*) *Paramore* v. *Greenslade*, 1 S. & G. 541.

(*h*) *Bradley* v. *Munton*, 16 B. 294; *Re South Wales R. Co.*, 14 B. 418. But see now *Re Liverpool Improvement Act*, 5 Eq. 282.

(*i*) *Mittelholzer* v. *Fullarton*, 6 Q. B. 989, 1019.

(*k*) 37 & 38 V. c. 78, s. 2, r. 4.

(*l*) *Farrar* v. *Earl of Winterton*, 4 Y. & C. 472; and see *Heard* v. *Cuthbert*, 1 Ir. Ch. R. 369.

(*m*) *L. & S. W. R. Co.* v. *Bridger*, 12 W. R. 948.

(*n*) *Wortham* v. *Lord Dacre*, 2 K. & J. 437; *Hall* v. *Bushill*, 35 L. J. Ch. 381; *Murdin* v. *Patey*, 1 N. R. 566; see also *Bannerman* v. *Clarke*, 3 Dr. 632; where, however, it does not appear whether the will was made before or after the contract.

(*o*) *Hodson* v. *Carter*, 1 N. R. 179; *Purser* v. *Darby*, 4 K. & J. 41.

Chap. XIII. Sect. 10.

Where will after contract.

Where, however, the vendor, after the date of the contract, devises the estate in strict settlement or to an infant, so that a suit is necessary to obtain a conveyance, his estate must bear the whole of the costs thus occasioned (*p*). And where a will is so ambiguous as to necessitate a judicial interpretation, the vendor must bear the cost (*q*).

Of getting in legal estate from infant heir of vendor.

Where a vendor died intestate before conveyance, leaving an infant heir, the costs of the necessary suit, and of the conveyance being settled in Chambers, were ordered by Shadwell, V.-C., to be paid out of the purchase-money (*r*): but in a later case, where the death occurred within two months after the contract, Knight-Bruce, V.-C, refused to give costs, and suggested that there must have been some default on the part of the vendor in the case last referred to (*s*); and it is now well settled that, where the difficulty arises from a common calamity, no costs will be given on either side as between vendor and purchaser (*t*): but the infant heir, not disputing the contract, may be entitled to have his costs out of the purchase-money, on the ground that he is a mere trustee (*u*); if, however, he dispute the contract, he will have to pay the costs of a suit to compel a conveyance from him (*x*). Where, after the contract, one of several vendors became of unsound mind, no costs of a suit to obtain a vesting order were given on either side (*y*). But where at the date of the contract the legal estate is in an infant the expenses of having the conveyance settled by the Court must be borne by the vendor, although the purchaser bought with notice of the state of the title (*z*).

(*p*) *Wortham* v. *Lord Dacre*, 2 K. & J. 437; *Purser* v. *Darby*, 4 K. & J. 41; *Sanderson* v. *Chadwick*, 2 N. R. 414; *Williams* v. *Glenton*, 1 Ch. 200.

(*q*) *Re Hill* to *Chapman*, 54 L. J. Ch. 595.

(*r*) *M. R. Co.* v. *Westcomb*, 11 Si. 57.

(*s*) *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Hinder* v. *Streeten*, 10 Ha. 18; *Armitage* v. *Askham*, 1 Jur. N. S. 227; *Re Manchester, &c. R. Co.*, 19 B. 365.

(*t*) See cases cited above, and *Barker* v. *Venables*, 13 W. R. 803; and see *post*, p. 1262 *et seq.*

(*u*) *Barker* v. *Venables*, *supra*.

(*x*) *Hoddel* v. *Pugh*, 33 B. 489.

(*y*) *Cresswell* v. *Haines*, 8 Jur. N. S. 208.

(*z*) *Brown* v. *Lake*, 15 L. J. Ch. 34.

Much of the learning contained in the two preceding paragraphs is now rendered obsolete by the 4th section of the Conveyancing Act, 1881, which enables the personal representatives of any person, against whose heir or devisee there is subsisting at his death an enforceable contract, to convey the property (*a*).

Conveyancing Act, 1881, s. 4.

A purchaser of copyholds pays the fine on admittance, and the steward's fees, both on the surrender and admittance (*b*); but, of course, the vendor pays the private expenses of both himself and the other necessary parties to the surrender. An agreement to surrender and assure the estate at his own costs and charges will not render him liable to the fine payable upon admittance (*c*). It seems that the steward has power to authorize his deputy to receive the fine for the lord (*d*).

Purchaser of copyholds pays for surrender and admittance;

And if the vendor must himself be admitted and pay a fine before surrendering, he of course bears these additional expenses (*e*).

but vendor pays for his own admittance if necessary.

The lord's right to the fine accrues only on actual admittance; so that the steward cannot refuse to admit until the fine is paid (*f*): and an agreement to pay the "costs and charges of admittance" does not extend to the fine (*g*). If copyholds are devised to uses to be declared by executors or trustees for sale, and the heir is admitted *quousque*, and then buys of the executors or trustees, who appoint to his use, he must be re-admitted, and pay a second fine (*h*).

Fine not claimable before admittance.

(*a*) See *ante*, p. 294.

(*b*) *Drury* v. *Man*, 1 Atk. 95, n.; Scriven, 315. As to the charges in respect to several tenements, *vide ante*, p. 571; and as to stamp duties in respect of several distinct tenements comprised in the same instrument, see 33 & 34 V. c. 97, s. 82; *ante*, p. 795.

(*c*) *Graham* v. *Sime*, 1 East, 632.

(*d*) *Bridges* v. *Garrett*, L. R. 5 C.P. 451; and *vide ante*, p. 746 *et seq.*

(*e*) See *Drury* v. *Man*, 1 Atk. 95, n.; and see *Paramore* v. *Greenslade*, 1 S. & G. 541.

(*f*) *Reg.* v. *Wellesley*, 2 E. & B. 924; Scriven, 5th ed. 204.

(*g*) *Barrow* v. *Barrow*, 3 W. R. 587.

(*h*) *Reg.* v. *Corbett*, 1 E. & B. 836; Scriven, 5th ed. 203.

Chap. XIII. Sect. 10.

Steward's fees on admittance to an allotment held under several titles.

Where an allotment under an Inclosure Act had been made generally in respect of the landowner's several copyhold tenements, and the custom of the manor was to pay the same fee on admission to part as on admission to the whole of a tenement, the steward, upon the subsequent admittance of a purchaser to part of the allotment, was held to be entitled to as many fees as the allottee had tenements at the time of the inclosure (*i*).

The lord is not entitled to any fine or compensation upon a conveyance by a copyholder under the 95th section of the Lands Clauses Consolidation Act; or upon the enrolment of such conveyance (*k*).

Costs of lease.

Upon the grant of a lease the lessor's solicitor usually, but not invariably, prepares the lease; and the well-known practice is, for the lessee to pay both his own and the lessor's expenses.

Of conveyance in consideration of rent-charge.

Where land is sold in consideration of a rent-charge, the assurance partakes of the natures of a conveyance and a lease: upon this ground it is suggested, in a work of considerable reputation (*l*), that the costs should be equally divided between the parties. If the vendor require a counterpart of the deed, he may, it is conceived, be fairly asked to pay for the counterpart: but (with this exception) it seems difficult to understand why the circumstance of his sustaining a mixed character of vendor and lessor should be a reason for his paying a proportion of costs which neither vendor nor lessor singly is ever liable to pay.

Purchasers pay vendor's costs on sale under Lands Clauses Consolidation Act.

Upon a sale under the Lands Clauses Consolidation Act, 1845, the company must pay the vendor's costs, either under sect. 80 or sect. 82, according as the land has been taken (*m*) in exercise of their compulsory powers, or by

(*i*) *Evans* v. *Upsher*, 16 M. & W. 675; *sed vide ante*, p. 571.

(*k*) *Eccl. Comm.* v. *L. & S. W. R. Co.*, 14 C. B. 743. As to steward's fees under the section, see *Cooper* v. *Norfolk R. Co.*, 3 Ex. 546. As to enfranchisement: *Re Wilson's Est.*, 3 D. J. & S. 410; *Re Marquis of Salisbury and L. & N. W. R. Co.*, W. N. (1879), 214.

(*l*) 9 Jarm. Conv. 518.

(*m*) Lands upon which the com-

As to costs of conveyance, &c. under sect. 82.

agreement with the landowner. By the latter section, which is applicable to purchases by agreement, the company must pay the vendors all their costs of the conveyance, and the costs of making out and proving their title (*n*): such costs (if the parties differ) to be taxed by the Master (*o*). This section provides simply for the legal expenses of making out the title to, and of conveying, the property; taking these expenses in their largest sense: but not for any costs of ascertaining what that is which is to be put into the document (*p*): thus, the costs of apportioning an entire ground-rent, between houses taken by the company and others retained by the vendor, have been held not to fall upon the company (*q*). As respects, therefore, such preliminary and other expenses of sale as are not provided for by this section, the vendor should either expressly stipulate for their payment, or he may make them a ground for claiming larger compensation if he goes before a jury. And the costs payable by the company under the 82nd section include the expense of getting in any outstanding legal estates, terms, or interests (*r*). In the case just referred to, the costs of taking out administration, which was necessary in order to obtain a legal assignment of the property, were held to fall within this section. The vendor has no lien for the amount of his costs upon the moneys deposited under the 85th section (*s*).

General expressions,

It had been considered that general expressions referring

pany has entered under the 85th section are lands "taken" within the meaning of sect. 80, so as to render the company liable to pay the costs of ascertaining the amount of compensation; *Charlton* v. *Rolleston*, 28 Ch. D. 237. As to the meaning generally of the word "take" in the Act, see *Spencer* v. *Metrop. Bd. of Works*, 22 Ch. D. 142.

(*n*) *Re Spooner's Est.*, 1 K. & J. 220.

(*o*) S. 83. The company cannot get the costs taxed after they have paid them. Taxation, if required, must be obtained before payment is made; *Ex p. Somerville*, 23 Ch. D. 167.

(*p*) Per V.-C. W. in *Ex p. Buck*, 1 H. & M. 519.

(*q*) *Ibid.*

(*r*) *Re Liverpool Improvement Act*, 5 Eq. 282, overruling the earlier cases, and especially *Re S. Wales R. Co.*, 14 B. 418, a decision by the same judge, Ld. Romilly.

(*s*) *Re L. & S. W. R. Co.*, 2 Ph. 772; *Ex p. G. N. R. Co.*, 16 Si. 171.

Chap. XIII. Sect. 10.

whether sufficient to throw costs of re-investment on purchasers.

to costs to be incurred in consequence of the sale, or the proposal for the sale, or the taking of the land, whether occurring in an Act of Parliament or a private agreement (*t*), would not throw upon the purchasers the costs of re-investment: but it has been decided that such costs are included in a provision for payment of costs "attending the application for re-investment" of money paid into Court (*u*).

As to costs under sect. 80.

Where the land is taken by the company in the exercise of their compulsory powers, and the purchase-money has been deposited in the bank under the provisions of the Act, the company is liable to pay the costs of the purchase or taking of the land, or which shall have been incurred in consequence thereof (other than such costs as are otherwise provided for by the Act); and the costs of the investment of such moneys in government or real securities; and of the re-investment thereof in the purchase of other lands; and also the costs of obtaining the proper orders for any of the above purposes; and of the orders for payment of income, and for payment out of Court of the principal, and of all proceedings relating thereto, except such as are occasioned by adverse claimants: but those cases are excepted where the moneys are so deposited by reason of the wilful refusal of the party entitled thereto to receive the same, or to convey or release the lands, or by reason of the wilful neglect of any party to make out a good title to the land required: *e. g.*, where the owner failed to make out his title within the time prescribed by the statutory notices (*v*).

As to costs under the 80th section.

We may here refer, on the question of costs under this section, to what we have stated above, as to the re-investments which will be sanctioned under the 69th section (*x*); and, in addition to the cases there cited, we may remark that the costs payable by the company under the 80th section include

(*t*) See *Re London Bridge Acts*, 13 Si. 180.

(*u*) *Re Byron*, 4 D. M. & G. 694; a case under a kindred Act; *Lake* v. *E. C. R. Co.*, 19 L. T. O. S. 323.

(*v*) *Ex p. Dowling*, 7 L. R. Ir. 173.

(*x*) *Vide ante*, p. 750 *et seq.*

costs of brokerage payable on the investment of the purchase-money in stock (*y*); of a power of attorney to get the money out of Court (*z*); of a disentailing assurance, where necessary (*a*); of enrolling a purchase-deed on re-investment (*b*); of apportioning the ground rent on the sale of part of a leasehold estate (*c*); of taking out administration in order to complete the title to leaseholds (*d*); of a reference in lunacy (*e*); of the proceedings in a pending suit relating to the land, and not occasioned by adverse litigation (*f*), as *e. g.*, where the land is the subject of an administration suit, and a reference as to the propriety of the proposed purchase and other proceedings is necessary (*g*); or of an inquiry for the purpose of ascertaining the parties entitled to the purchase-money paid into Court (*h*); of an abortive attempt to ascertain the price (*i*); of an abortive *bonâ fide* attempt to re-invest (*k*), except where it fails by reason of the Court disapproving the proposed purchase; of repeated applications for payment of dividends to successive incumbents of a living (*l*); of the transfer of the purchase-money from the account of the railway to that of a pending administration suit (*m*); of interim investments in stock (*n*); of successive

(*y*) *Ex p. Braithwaite*, 1 S. & G. App. xv.; *Ex p. Trinity House*, 3 Ha. 95.

(*z*) *Re Godley*, 10 Ir. Eq. R. 222; *Ex p. Incumbent of Guilden Sutton*, 8 D. M. & G. 380.

(*a*) See *Re Brooking's Devisees*, 2 Gif. 31; such a deed is generally necessary, see *Re Butler's Will*, 16 Eq. 479; and cases cited *ante*, p. 759, n. (*y*). In Ireland the Court leaves it to the taxing master to find what costs are necessary; *Ex p. Allen*, 7 L. R. Ir. 124.

(*b*) *Re Christ's Hosp.*, 12 W. R. 669.

(*c*) *Ex p. Flower*, 1 Ch. 599.

(*d*) *Re Liverpool Improvement Act*, 5 Eq. 282; overruling *Re South Wales R. Co.*, 14 B. 418.

(*e*) *Re Taylor*, 1 M. & G. 210; *Re Walker*, 7 R. C. 129; *Re Briscoe*, 2 D. J. & S. 249.

(*f*) *Haynes* v. *Barton*, 1 Dr. & Sm. 483; 1 Eq. 422; and see cases cited in Morgan & Wurtzburg, 291.

(*g*) *Picard* v. *Mitchell*, 12 B. 486; *Henniker* v. *Chafy*, 28 B. 621.

(*h*) *Re Singleton*, 9 Jur. N. S. 941.

(*i*) *Ex p. Morris*, 12 Eq. 418.

(*k*) *Ex p. Rector of Holywell*, 2 Dr. & Sm. 463; *Ex p. Vaudrey's Tr.*, 3 Giff. 224; *Re Carney*, 20 W. R. 407; but see *Ex p. Copley*, 4 Jur. N. S. 297; *Re Hardy's Est.*, 18 Jur. 370; *Re Woolley's Est.*, 17 Jur. 850.

(*l*) *Re Birkenhead R. Co.*, 2 Jur. N. S. 793; and see *Ex p. Incumbent of Guilden Sutton*, 8 D. M. & G. 380.

(*m*) *Dinning* v. *Henderson*, 2 De G. & S. 485; and see *Melling* v. *Bird*, 22 L. J. Ch. 599.

(*n*) *Re Liverpool R. Co.*, 17 B. 322; *Re Gould*, 24 B. 442; *Re Blyth's*

Chap. XIII. Sect. 10.

re-investments in land (*o*); of a petition for laying out money in building, including costs incidental to the scheme (*p*); or for removing and rebuilding buildings injured by the railway (*q*); and the petitioners may select what land they please; and if, by reason of litigation which is not occasioned by adverse claims, or by a suit to which the land when taken was subject, additional costs are incurred, the company must bear them (*r*). And generally, it may be laid down that the costs payable by the company include all costs ordinarily payable by the purchaser, but not any which, by the special terms of the contract, are to be borne by the purchaser instead of by the vendor (*s*).

Where there has been a re-settlement since the purchase.

So, where, after the purchase, but before re-investment, there was a re-settlement of the property in pursuance of a previously-subsisting trust to re-settle, the company was ordered to pay all the costs of re-investment (*t*): and although

Tr., 16 Eq. 468; *Re Stewart's Tr.*, 18 Eq. 278; but see *Re Lomax*, 34 B. 294, where a second investment on mortgage security was directed to be treated as a permanent investment as respects costs payable by the company; *Re Flemon's Tr.*, 10 Eq. 612; *Re Rectory of Gedling*, 53 L. T. 244.

(*o*) *Re St. Katharine's Dock Co.*, 3 R. C. 514; *Ex p. St. Bartholomew's Hosp.*, 4 Dr. 425; *Ex p. Bouverie*, 4 R. C. 229; *Brandon* v. *Brandon*, 11 W. R. 53; *Re Merchant Tailors' Co.*, 10 B. 485, where the costs of a fourth and last re-investment were allowed, the balance sought to be invested being only 63*l.*; *Ex p. Rector of Loughton*, 14 Jur. 102, where the amount of the second investment was only 6*l.*, part of a balance of 20*l.* 9*s.* 5*d.*, and the Court directed the balance to be paid to the purchaser, and fixed the company with the costs: and *Jones* v. *Lewis*, 2 M. & G. 163, where it was held (reversing the decision of V.-C. K. B.) that the vendors were entitled to an unlimited number of re-investments, unless made vexatiously, or in an unreasonable exercise of the direction to invest: and the reasoning of the Court would seem to apply to cases within the Lands Clauses Act.

(*p*) *Re Incumbent of Whitfield*, 1 J. & H. 610; *Ex p. Rector of Shipton-under-Wychwood*, 19 W. R. 549; *Ex p. Rector of Holywell*, 27 W. R. 707; *Ex p. Rector of Claypole*, 16 Eq. 574; *Re Lytton's S. E.*, W. N. (1884), 193.

(*q*) *Re Chelsea Waterworks Co.*, 28 L. T. O. S. 173. The cases of *Re Bucks R. Co.*, 14 Jur. 1065, and *Ex p. Milward's Devisees*, 27 B. 571, must be taken to be overruled by the cases cited in this and the preceding note.

(*r*) *Carpmael* v. *Profitt*, 17 Jur. 875; *Eden* v. *Thompson*, 2 H. & M. 6; *Haynes* v. *Barton*, 1 Eq. 422; *Re Bareham*, 17 Ch. D. 329.

(*s*) *Ex p. Christ's Hosp.*, 20 Eq. 605.

(*t*) *Re De Beauvoir*, 2 D. F. & J. 5.

it seems clear that a person, who at the time of purchase is absolute owner of the land, has no right to insist on having a re-investment at the expense of the company (*u*), it is doubtful whether the fact of a person becoming absolute owner subsequently to the purchase, relieves the company from the liability to pay the costs of re-investment (*x*). As a general rule, it may be laid down that, in doubtful cases, the Court leans towards making the company pay the costs (*y*); but, at the same time, such costs will not be allowed to be unnecessarily increased; as, *e. g.*, by the introduction of irrelevant matter into the petition (*z*); or by presenting a second petition by reason of a defect in the first (*a*); or by the investment of other moneys besides those paid by the company (*b*).

The rule that the company are not to bear the additional costs thus occasioned seems a very proper one, but its practical operation must vary with the state of the title to the land purchased. In the case of a large estate, held under the same title, the difference of stamp duty may fully represent the difference between the necessary expenses of a purchase of ten acres, and a purchase of 1,000 acres; while, on the other hand, where land is held under different titles, a small

(*u*) But see *Re Pick*, 10 W. R. 365.

(*x*) See *Re De Beauvoir*, 2 D. F. & J. 5.

(*y*) See *Ex p. Marshall*, 1 Ph. 560; *Re Jones' S. E.*, 4 Jur. N. S. 581. Whether the costs of a new scheme, on the taking of charity lands, are to be borne by the company seems to be still unsettled; *Shakespeare Walk Est.*, 12 Ch. D. 178; *St. Paul's Schools, Finsbury*, 52 L. J. Ch. 454.

(*z*) *Ex p. Osbaldiston*, 8 Ha. 31.

(*a*) *Re L. B. & S. C. R. Co.*, 18 B. 612; *Re Byron*, 5 Jur. N. S. 261; but *secus* where the defect is in the order made on the first petition, *Re Goe's Est.*, 3 W. R. 119.

(*b*) *Re Braumer*, 14 Jur. 236; *Ex p. Hodge*, 16 Si. 159; *Ex p. Lord Palmerston*, 4 R. C. 57, n.; *Re Elliott*, 17 L.T.O.S. 241; *Ex p. King's College*, 5 De G. & S. 621. See as to costs which are not payable by the company, being paid out of the fund in Court, *Ex p. Newton*, 4 Y. & C. 518; *Ex p. Archbishop of Canterbury*, 1 Coll. 154; *Ex p. Bishop of Hereford*, 5 De G. & S. 265 (cases under the Copyhold Enfranchisement Act); *Re Woolley's Est.*, 17 Jur. 850; *Re Aubrey*, 17 Jur. 874; *Re Hardy's Est.*, 18 Jur. 370. As to costs of opposing the bill in Parliament not being allowed to the tenant for life out of the fund, see *Re Earl of Berkeley's Will*, 10 Ch. 56.

addition to the purchase-money may involve a very serious additional amount of costs.

The existence of a contract for a purchase by way of permanent re-investment, is no ground for refusing the costs of a temporary re-investment made pending such contract (*c*).

What costs are not within the 80th section.

The fines payable on an investment in copyholds do not, but the fees do, fall on the company (*d*). The costs of applying the money in paying off incumbrances affecting other parts of the settled estates are not expressly provided for by the Act. In several cases it has been held that such costs are not payable by the company (*e*); and it has been held that, where a portion of the land taken was subject to a mortgage, the company need not pay the costs of an application necessary for the discharge of the incumbrance (*f*). "Reasonable charges and expenses incident" to re-investment have been held not to include surveyors' and architects' charges in respect of buildings which were sanctioned as the purpose for which the money was paid out (*g*).

What is "wilful refusal."

The wilful refusal and neglect mentioned in the 80th section, which exempt the company from liability to payment of costs, are such as arise from mere will or caprice; and not from an exercise of reason (*h*), or where there is a *bonâ fide* legal doubt. Thus, where a landowner being advised by counsel that certain commissioners were not entitled to take his land, refused to convey, and the purchase-money was paid into Court, it was held that he was not disentitled to his

(*c*) See *Re Liverpool R. Co.*, 17 B. 392.

(*d*) *Ex p. Vicar of Sawston*, 27 L. J. Ch. 755.

(*e*) See *Ex p. Corp. of Sheffield*, 21 B. 162; *Ex p. Town Trustees of Sheffield*, 8 W. R. 602. See, upon similar clauses in other Acts, *Ex p. Earl of Hardwicke*, 17 L. J. Ch. 422; *Re Yeates*, 12 Jur. 279; *Ex p. Trafford*, 2 Y. & C. 522; *Ex p. Northwick*, 1 Y. & C. 166; *Re Lord Stanley*, 14 Eq. 227.

(*f*) *Re L. & S. W. R. Co.'s Act*, 3 D. J. & S. 341.

(*g*) *Re Butchers' Co.*, 53 L. T. 491.

(*h*) *Ex p. Bradshaw*, 16 Si. 174; *Re Windsor, &c. R. Act*, 12 B. 522; *Ex p. Railston*, 15 Jur. 1028; *Re Divers*, 1 Jur. N. S. 995.

costs (*i*); so where the vendor cannot convey, by reason of his inability to clear off incumbrances of greater amount than the value of the land taken, he will not be deprived of his costs (*k*). But where a vendor insisted on payment of his costs, as well as of his purchase-money before giving up possession, and the purchase-money was paid into the bank under the 76th section, he had to pay his own costs of the petition for payment out (*l*); and a vendor may, under special circumstances, even be ordered to pay the costs of the company (*m*); as, *e.g.*, where the vendor, by his wilful default to make out a title, caused the money to be deposited under sect. 76 (*n*).

What is "adverse litigation.

We have already seen that the existence of a pending administration suit, or other suit relating to the land taken, which necessitates service of the petition on other parties, or an inquiry as to the propriety of the proposed sale, or as to the parties entitled to the purchase-money, is not "adverse litigation" within the meaning of the 80th section (*o*). And in fact, in order to bring a case within the exception, there must be an actual *litis contestatio* (*p*): that is, different parties must set up adverse titles to the estate (*q*). Thus, a contest between tenant for life and remainderman, as to their respective interests in the fund, is not adverse litigation (*r*), nor an enquiry as between mortgagor and mortgagee as to what is due on the mortgage (*s*).

As to costs of service and appearance.

The rule which throws upon the company the costs of the service of the petition upon all necessary parties, and of

(*i*) *Ex p. Dashwood*, 3 Jur. N. S. 103.

(*k*) *Re Divers*, 1 Jur. N. S. 995.

(*l*) *Re Turner's Est.*, 10 W. R. 128; he had also to pay the costs of calling in the sheriff to give possession.

(*m*) *Ex p. Hyde*, cited Seton, 1443.

(*n*) *Ex p. Dowling*, 7 L. R. Ir. 173.

(*o*) *Haynes* v. *Barton*, 1 Eq. 422; *Henniker* v. *Chafy*, 28 B. 621; and *vide ante*, p. 805.

(*p*) *Re Longworth's Est.*, 1 K. & J. 1; *Re Spooner's Est.*, *ib.* 220; *Re Hungerford's Tr.*, *ib.* 413; *Re Singleton*, 9 Jur. N. S. 941; *Re Cant's Est.*, 1 D. F. & J. 153; and for form of order, Seton, 1441, and see generally, Morgan, 44; Browne & T. 207.

(*q*) *Askew* v. *Woodhead*, 14 Ch. D. 27, 36.

(*r*) *Ibid.*

(*s*) *Re Bareham*, 17 Ch. D. 329.

Chap. XIII. Sect. 10.

their appearance thereon, does not hold where the costs are vexatiously increased; as, *e.g.*, where parties, who ought to have appeared together, appear separately (*t*); or where parties unnecessarily appear (*u*); or where, through the fault of the person entitled, it has become necessary to serve some extra party, *e.g.*, the official solicitor (*x*); and where the application is merely that the fund may be transferred to the credit of the cause, it is unnecessary to serve all the parties to the suit; and, if they appear, they will not be allowed their costs (*y*); and, in one case (*z*), the company, although ordered to pay the costs of serving the respondents, had not to pay their costs of appearance. Where the application is for payment out or re-investment of the fund, all the parties to the suit (including those who have obtained leave to attend the proceedings) must be served; and they will, as a general rule, be allowed their costs of appearance (*a*); but, in one case, where the land taken formed part of an estate which was being administered in Court, and a petition for re-investment was presented by the tenant for life, it was laid down that the trustees and remaindermen, if they approved of the application, should either be made co-petitioners, or abstain from appearing (*b*); and where the petitioners were entitled to part of the money paid in under a will and to part under a settlement, and two petitions were presented, the trustees of the will being made parties to one, and the trustees of the settlement to the other, the costs of only one petition were allowed (*c*).

Where no suit is pending.

Where no suit is pending, the petition of a tenant for life for re-investment need not be served on the remaindermen;

(*t*) *Ex p. Baroness Braye*, 11 W. R. 333.

(*u*) See *Ex p. Bishop of London*, 2 D. F. & J. 14.

(*x*) *Re Clarke's Est.*, 21 Ch. D. 776.

(*y*) *Melling* v. *Bird*, 22 L. J. Ch. 599.

(*z*) *Sidney* v. *Wilmer*, 31 B. 338.

(*a*) *Haynes* v. *Burton*, 1 Eq. 422; *Re Long*, 12 W. R. 460; *Bradshaw* v. *Fane*, 1 N. R. 159.

(*b*) *Wilson* v. *Foster*, 26 B. 398; and cf. *Re Romney*, 3 N. R. 287; *Ex p. Baroness of Braye, suprà*; and see *Re Crane's Est.*, 7 Eq. 322, where the remainderman was served, and allowed his costs against the company.

(*c*) *Re Pattison's Est.*, 4 Ch. D. 207.

and the company will not have to pay their costs of service and appearance (*d*) : but, according to the present practice, trustees who have been served and who appear, will be allowed their costs against the company (*e*). After considerable conflict of the authorities, the established rule now is, that on a petition for payment out, or re-investment, either to or with the consent of incumbrancers, the only costs which the company can be required to pay, in addition to those of the petitioner, are the sum of 30*s.* for the incumbrancers' costs and a further sum to cover the costs of the affidavit of service (*f*), and the company is not bound to pay the costs of serving incumbrancers whose charges have been created since the date of payment into Court (*g*).

Costs of mortgagee.

Where land of the same owner is taken by several companies, they must pay in equal shares the costs of a petition for re-investment; but they pay *ad valorem* stamp and surveyor's fee in proportion to the amount of the purchase-money which they respectively contribute (*h*). The rule, however, is not inflexible, and will be departed from in a case of peculiar hardship (*i*) ; but not on the mere ground of the inequality of the sums paid into Court by the several companies (*k*). The order for payment out or re-investment may be obtained on one petition (*l*). In one case, where the several companies had amalgamated since the payment into Court, Lord

How costs are borne where there are several companies.

(*d*) *Ex p. Staples*, 1 D. M. & G. 294; *Re Legge's Est.*, 8 W. R. 559; *Re Bowes' Est.*, 4 N. R. 315; *Wilson* v. *Foster*, 26 B. 298; but see *Re Crane's Est.*, *suprà*.

(*e*) *Re Duke of Cleveland's Harte Est.*, 1 Dr. & Sm. 480.

(*f*) *Re Gore-Langton's Est.*, 10 Ch. 328; *Re Halstead Charities*, 20 Eq. 48; Morgan, 42; R. S. C. 1883, O. LXV., r. 27 (19). And under the Artizans' Dwelling Act, see *Ex p. Jones*, 14 Ch. D. 624.

(*g*) *Re Jones' Tr. Est.*, 39 L. J. Ch. 190; *Re Gough's Tr.*, 24 Ch. D. 569.

(*h*) *Ex p. Bishop of London*, 2 D. F. & J. 14; *Ex p. Earl of Lonsdale*, 32 B. 397; *Re Merton College*, 33 B. 257; *Re Carlisle and Silloth R. Co.*, *ib.* 253; and as to surveyor's fee, see *Ex p. Corp. of London*, 5 Eq. 418. The cases of *Ex p. St. Thomas's Hosp.*, 7 W. R. 425, and *Ex p. Christ Church*, 9 W. R. 474, are overruled. See, however, *Ex p. St. Bartholomew's Hosp.*, 20 Eq. 369.

(*i*) *Re Byron*, 1 D. J. & S. 358.

(*k*) *Ex p. Christ's Hosp.*, 2 H. & M. 166.

(*l*) *Re Lord Broke's Est.*, 1 N. R. 568.

Chap. XIII. Sect. 10.

Romilly held that for the apportionment of the costs of petition, they must be treated as separate companies (*m*); but in a subsequent case (*n*), the same learned judge ordered the costs to be paid equally by the subsisting companies.

The only uniform principle which can be traced in the authorities is, that the company is not to be needlessly burdened with costs; and the above rules must be regarded merely as examples of its application. What are necessary costs must depend, in each particular case, upon the special circumstances; and it would be impossible to lay down any inflexible rule upon the subject (*o*).

Costs under Act later than L. C. C. Acts, but incorporating earlier Act.

The question whether an Act, which although passed since the L. C. C. Act, 1845, yet incorporates sections of an earlier Act authorizing the compulsory purchase of land, incorporates also the provisions of the L. C. C. Act, including those as to the payment of costs, has been the subject of conflicting

(*m*) *Re Maryport R. Co.*, 32 B. 397.

(*n*) *Ex p. C. C. C. Oxford*, 13 Eq. 334.

(*o*) See as to costs under cognate private Acts, *Ex p. Marshall*, 1 Ph. 560; *Ex p. Molyneux*, 2 Coll. 273, and cases there cited; *Mitchell* v. *Newell*, 3 R. C. 515; *Ex p. Gore-Langton*, 11 Jur. 686; *Ex p. Thoroton*, 12 Jur. 130; *Re Robertson*, 23 B. 433; *Re Land's Tr.*, 4 K. & J. 81; *Re Harrison's Est.*, 10 Eq. 532; *Re St. Dunstan's Schools*, 12 Eq. 537; and *Re Lord Stanley of Alderley's Est.*, 14 Eq. 227, which all proceeded on the principle that only such costs as are specially authorized by the particular Act can be awarded. And see *Re Mouseley's Tr.*, 4 K. & J. 86; *Re Burnell's Est.*, 10 Jur. N. S. 1089; *Re Tiverton Market Act*, 26 B. 239; *Re Acker's Tr.*, 9 Jur. N. S. 224; *Ex p. Crober*, 13 Jur. 481; *Ex p. Slater's Devisees*, 5 R. C. 700; *Ex p. Rector of Loughton*, 14 Jur. 102; *Re Strachan's Est.*, 9 Ha. 185; *Re Laverick*, 18 Jur. 304. As to payment out of the fund in Court, of such costs as the purchasers under a private Act are not liable to pay, see *Ex p. Pasmore*, *Ex p. Layfield*, *Ex p. Tougood*, 1 Y. & C. 75, 79, 588; *Re Bishop of Salisbury*, 16 L. T. O. S. 122. Where a private Act omitted to provide for the costs consequent on payment of the money into Court by reason of the title being doubtful, the Court refused to throw such costs on a public body purchasing under the Act: *Ex p. Angell*, 4 Y. & C. 496. As to costs where old companies are amalgamated under an Act embodying the general Act: *Ex p. Eton Coll.*, 20 L. J. Ch. 1; *Re Bristol Dock Co.*, 21 L. T. O. S. 17; *Re Ellison*, 1 Jur. N. S. 1155; but see *contrà*, *Re Holden*, 11 Jur. N. S. 995; *Re Neachell*, 25 L. T. O. S. 280. And see generally as to costs under similar private Acts, Seton, 1449, and as to costs under Defence Acts, *ib.* 1471.

decisions. In *In re Cherry's Settled Estates* (*p*), a public improvements Act, passed after the L. C. C. Act, enacted that "all and singular the enactments and provisions" of a like Act passed before the L. C. C. Act should extend to the new improvements as if they had been authorized by the former Act: and Lord Westbury held that the incorporation of the L. C. C. Act was excluded, so that a landowner could not claim the costs which would be payable by the public body under the latter Act. The Court of Appeal has recently refused (*q*) to follow this decision, where the later Act was not the same as that to which Lord Westbury's judgment applied, although the difference between the two Acts was very slight; and Lord Esher, M. R., went so far as to express his entire disapproval of the Lord Chancellor's decision. But in a still more recent case (*r*), arising under the same Act as was the subject of decision in *In re Cherry's Settled Estates*, Cotton, Bowen, and Fry, L. JJ., followed the decision in the earlier case, and expressed their entire concurrence with that decision and their disagreement from the dicta of the M. R.

Jurisdiction as to costs not enlarged by Judicature Acts.

It may now be taken to be established, after much conflict of opinion, that Ord. LV. r. 1 of the R. S. C. 1883, does not give the Court any jurisdiction to order the payment of costs in cases where, before the Judicature Acts and Rules, there would have been no jurisdiction to make such an order (*s*).

Costs of arbitration under L. C. C. Act.

Upon an arbitration under the Lands Clauses Consolidation Act, the costs need not be incorporated in the award, but may be ascertained at any subsequent period by the persons or person (whether arbitrators or umpire) by whom the award is

(*p*) 4 D. F. & J. 332; see and distinguish *Re St. Sepulchre's Est.*, 4 D. J. & S. 232, where both the special Acts were passed subsequently to the L. C. C. Act.

(*q*) *Re Wood's Est.*, 31 Ch. D. 607.

(*r*) *Re Mills' Est.*, 34 Ch. D. 24.

(*s*) *Ibid.*, overruling *Ex p. Mercers' Co.*, 10 Ch. D. 481; *Re St. Katharine's Hosp.*, 17 Ch. D. 278; *Re Lee and Hemingway*, 24 Ch. D. 669. See also, *Re Wood's Est.*, *suprà*; *Re Knight's Will*, 26 Ch. D. 82, 91.

Chap. XIII. Sect 10.

made (*t*). And by a recent statute, either party may require the costs of the arbitration to be settled by one of the taxing-masters of the Superior Courts of Law (*u*).

Vendor bears additional expenses when estate is incumbered, &c.

The purchaser, it appears, may generally (*x*), although not universally (*y*), require the vendor to get in, at his own expense, outstanding estates or incumbrances, by deeds distinct from the conveyance: or, if that course be not adopted, he may require him to bear the increased expense occasioned by the concurrence of trustees and incumbrancers in the conveyance. When, upon a large transaction, an estate was subject to incumbrances, which, to save expense, were got in by separate deeds, and paid off out of the purchase-money, the Court considered that the purchaser should have insisted upon the vendor preparing the deeds, and furnishing an abstract of them; (delaying the execution of them, it is presumed, until such abstract was approved, and the engrossed deeds themselves were examined by the purchaser;) and that the latter, having laid the drafts of these deeds before counsel to peruse and settle on his behalf, could not throw the expenses upon parties who were liable to pay his costs properly incurred (*z*). But such a requisition in ordinary cases, where the expense is inconsiderable, is unusual in practice, and is generally regarded as vexatious.

But not if purchaser keep incumbrances on foot as a protection.

If, however, a purchaser keep incumbrances on foot for his own protection (which he has a right to do, even where the contract is for the sale of the estate free from incumbrances (*a*)) he cannot throw upon the vendor the costs of the necessary assignment; whether the same be effected by the principal conveyance or by a collateral deed (*b*).

(*t*) *Gould* v. *Staffordshire Waterworks Co.*, 5 Ex. 214.

(*u*) 32 V. c. 18, s. 1. And see the 3rd section as to compensation for lands in Westminster, which is now to be settled by the high bailiff, or his deputy. And see 30 & 31 V. c. 127, s. 37.

(*x*) Sug. 555; *Jones* v. *Lewis*, 1 De G. & S. 245; and *vide ante*, p. 572.

(*y*) *Reeves* v. *Gill*, 1 B. 375; and see note to 9 Jarm. Conv. 30.

(*z*) *Jones* v. *Lewis*, 1 De G. & S. 245.

(*a*) *Cooper* v. *Cartwright*, John. 679.

(*b*) *Ib.*

If a solicitor, without special instructions, prepare the conveyance during the existence of a known impediment to completion, upon which the matter eventually goes off, he ordinarily cannot claim the costs of the conveyance (*c*).

Trustee acting as solicitor can only charge costs incurred.

If a solicitor, who is either alone or jointly with others a trustee for sale, acts professionally in the sale, he can in strictness charge only costs out of pocket (*d*); and if he procure another solicitor to transact the business on agency terms, the benefit thus secured will enure to the trust estate (*e*); and if the trustee is in partnership the same disability to make a profit out of the trust attaches to the firm. Under the Bankruptcy Act, 1883, the trustee of the bankrupt's property may not, without the consent of the committee of inspection, or, where there is none, of the Board of Trade, employ a solicitor or other agent; but if he be himself a solicitor, he may contract to be paid a certain sum by way of per-centage or otherwise, as remuneration for his professional and other services as trustee (*f*).

Taxation of conveyancing costs under 6 & 7 Vict. c. 73, s. 36.

And we may here refer to the 6 & 7 Vict. c. 73, by which a solicitor's bill of costs (*g*), although composed entirely of conveyancing charges, might formerly be referred for taxation upon petition presented either to the Lord Chancellor or the Master of the Rolls, and may now be referred on summons in Chambers (*h*). The order upon an application made within twelve months after delivery but before payment of the bill is of course (*i*); although part of the items be covered by a special agreement (*k*), or although the application be made

(*c*) *Potts* v. *Dutton*, 8 B. 493.

(*d*) *Ante*, p. 95.

(*e*) *Re Taylor*, 18 B. 165.

(*f*) 46 & 47 V. c. 52, s. 57 (3). The consent of the Board of Trade may be given by the Official Receiver; s. 22 (9) and G. R. 1886, 337.

(*g*) See s. 36; and see, for fuller information, an article in 15 Jur., pt. 2, p. 379; and as to costs in respect of business done while the solicitor is uncertificated, see s. 26, and *Re Jones*, 9 Eq. 63.

(*h*) R. S. C. 1883, O. LV. r. 2 (15).

(*i*) See *Re Gaitskell*, 1 Ph. 576; *Re Pender*, 2 Ph. 73; *Re Steele*, 20 L. J. Ch. 562; want of signature by the solicitor is immaterial on an application by the client for taxation, *S. C.*, *ib.* 69; *Re Gedye*, 14 B. 56; as to the principle on which a bill will be taxed, see *Cooper* v. *Ewart*, 2 Ph. 362; *Re Smith*, 9 B. 182; and where additional costs are added, and items disallowed, see *Re Hartley*, 2 Jur. N. S. 449.

(*k*) *Re Eyre*, 2 Ph. 367; *Re Mackrill*, 11 B. 42; *Re Rhodes*, 8 B. 224; *Re*

Chap. XIII. Sect. 10.

by a third party liable to pay (*l*); but after twelve months from delivery, taxation will be ordered only under special circumstances (*m*). So, under special circumstances (*n*), the bill may be referred at any time within, but not after, twelve months *after payment* (*o*).

Such special circumstances are usually pressure by the solicitor (*p*); as when immediate payment is required at a time when delay in completing the business would seriously inconvenience the client (*q*); and secondly, error or overcharge in the bills. The overcharges may be such as of themselves to afford evidence of fraud, or quasi-fraud,—as when they are in respect of business which, in the exercise of an honest and fair discretion, ought not to have been transacted (*r*)—and then very slight, if any, evidence of pressure is necessary to induce an order for taxation (*s*); but mere overcharge, unless of so gross a character as

Thompson, 8 B. 237; and *Re Whitcombe*, *ib.* 121, 140.

(*l*) *Re Bracey*, 8 B. 338.

(*m*) *Re Bush*, 8 B. 66; *Re Harper and Jones*, 10 B. 284; *Re Gedye*, 14 B. 56; *Re Bagshawe*, 2 De G. & S. 205.

(*n*) As to which see *Re Drake*, 8 B. 123; *Re Wells*, *ib.* 416; *Re Bennett*, *ib.* 467; *Re Jones*, *ib.* 479; *Re Fyson*, 9 B. 117; *Re Colquhoun*, *ib.* 146; *Re Currie*, *ib.* 602; *Re Neate*, 10 B. 181; *Re Drew*, 10 B. 368; *Re Bagshawe*, 2 De G. & S. 205; *Re Gedye*, 14 B. 56; *Re Williams*, 15 B. 417; *Re Barnard*, 2 D. M. & G. 359; *Ex p. Barton*, 4 D. M. & G. 112; *Re Cattin*, 18 B. 508; *Re Ranee*, 22 B. 177.

(*o*) S. 41; *Re Massey*, 8 B. 458; *Re Harper and Jones*, 10 B. 284, 290; *Re Rees*, 12 B. 256; but the Court, under its general jurisdiction, will enforce with costs a solicitor's undertaking to deliver his bill, although more than twelve months have elapsed since payment, it having been paid on the faith of such undertaking; *Re Foljambe*, 9 B. 402; see *Re Ker*, 12 B. 390. The payment must be a complete discharge in order to relieve from taxation; *Re Angove*, 46 L. T. 280; retention of the amount of his bill out of moneys belonging to his client, together with signature of the account by the client, does not constitute delivery and payment; *Re Street*, 10 Eq. 165; *Re Stogdon*, 56 L. T. 355. But the cases of taxation after payment are not to be extended; and an unexplained delay of nine months after payment in presenting the petition has been held fatal to the application. See *Re Browne*, 1 D. M. & G. 322. And see as to mode of enforcing delivery, *Ex p. Bilton*, 25 B. 368.

(*p*) *Re Browne*, 1 D. M. & G. 322.

(*q*) See *Ex p. Wilkinson*, 2 Coll. 92; *Re Tryon*, 7 B. 496; see also *Re Jones*, 8 B. 479; *Re Harrison*, 10 B. 57; *Re Elmslie*, 12 B. 538; *Re Blackmore*, 13 B. 154.

(*r*) *Re Barrow*, 17 B. 547, 557; *Re Pybus*, 35 W. R. 770.

(*s*) *Re Harding*, 10 B. 250, 252; *Re Sladden*, 10 B. 488; *Re Welchman*, 11 B. 319; *Re Hubbard*, 15 B. 251.

to be tantamount to fraud, is in itself insufficient (*t*), even although the bill was paid under protest (*u*): so, where the bill has been paid, it has been held, that pressure alone is insufficient, unless accompanied by overcharge (*x*): but, before payment, pressure alone without overcharge, or gross overcharge alone without pressure, will constitute special circumstances, so as to re-open the question of taxation; nor is it necessary to show want of knowledge in the client, or previous opportunity for taxation (*y*). In a very recent case it was said that pressure or overcharge amounting to fraud were not the only special circumstances upon which a bill might be referred for taxation, and that special circumstances were those which appeared to the judge so special and exceptional as to justify taxation (*z*).

Giving security equivalent to payment.

Giving security seems to be equivalent to payment (*a*): but mere retention of the amount of the bill out of moneys in the hands of the solicitor does not amount to payment, unless there is also a settlement of account (*b*): nor does a settlement by way of compromise, if effected under pressure (*c*), oust the jurisdiction (*d*); but the order must, in any case after payment, be obtained specially (*e*). The Court,

(*t*) *Re Stirke*, 11 B. 304; *Re Walsh*, 12 B. 490; specific items of overcharge must generally be alleged and proved, *Re Thompson*, 8 B. 237; *Re Vardy*, 20 L. J. Ch. 325; *Re Browne*, 1 D. M. & G. 331, 333; *Re Foster*, 2 D. F. & J. 105; *Re Boycott*, 29 Ch. D. 571. But see the judgment of Bowen, L. J., and *Re Dickson*, 3 Jur. N. S. 29; *Watson* v. *Rodwell*, 11 Ch. D. 150; *Re Norman*, 16 Q. B. D. 673. As to what charges are allowed for abstracts, *vide suprà*, p. 346, n. (*g*).

(*u*) *Re Stirke*, 11 B. 304; *Re Welchman*, *ib.* 319; *Re Harrison*, 10 B. 57; *Re Browne*, 15 B. 61: as to the meaning of the words "under protest," see 8 B. 462; but see *contrà* at Law, *Re Deardon*, 17 Jur. 993.

(*x*) *In re Hubbard*, 15 B. 251; *Re Finch*, 4 D. M. & G. 108; *Re Bayley*, 18 B. 415; *Re Abbott*, 18 B. 393.

(*y*) *Re Strother*, 3 K. & J. 518, 527, 528.

(*z*) *Re Norman*, 16 Q. B. D. 673; explaining *Re Boycott*, 29 Ch. D. 571.

(*a*) *Re Boyle*, 5 D. M. & G. 540.

(*b*) See *Re Cattlin*, 8 B. 121; *Re Bignold*, 9 B. 270; *Re Steele*, 20 L. J. Ch. 562; *Re Hunt*, 18 L. T. O. S. 82: and, as to payment by a promissory note, see *Sayer* v. *Wagstaff*, 5 B. 415; *Re Currie*, 9 B. 602; see also *Re Harper and Jones*, 10 B. 284.

(*c*) *Aliter*, if no pressure; *Stedman* v. *Collett*, 17 B. 608.

(*d*) *Re Stephen*, 2 Ph. 562; *Re Whiteombe*, 8 B. 140.

(*e*) *Re Hunt*, *suprà*; *Re Winterbottom*, 15 B. 80.

Chap. XIII. Sect. 10.

however, upon an application under the Act, can only ascertain by the ordinary rules of practice the amount payable: and cannot determine whether, prior to the business being done, any special agreement existed as to the manner in which the costs were to be charged, or the mode by which the amount should be ascertained (*f*); or in any way interfere with such special agreement (*g*): but an improper agreement will not preclude taxation (*h*).

"Third party" clause.

Under the 38th section, the right of referring the bill is given, not only to the immediate client, but also to any persons who, as between themselves and such client, may be liable to payment (*i*): but, in such a case, the bill must be taxed as between the solicitor and his immediate client (*j*); so that if a purchaser has agreed to pay the vendor's costs, the vendor's solicitor, upon taxation on the application of the purchaser, will be allowed costs properly incurred as between himself and the vendor, although they may have been improperly incurred as between the vendor and the purchaser: so also, as in an ordinary case, special circumstances must be proved if the bill has been paid, although the payment were by the immediate client (*k*); and the lapse of twelve months since payment precludes taxation under the Act (*l*); and a bill cannot be taxed at the instance of a person who, under no previous liability, voluntarily pays it (*m*). A bill when delivered is *primâ facie* binding on the solicitor for the purposes of taxation: and he is not entitled, as of course, either on the one hand to reduce the demand (*n*); or on the other, to increase the rate of charges (*o*); but he may obtain leave to carry in an additional bill of items accidentally

(*f*) *Re Rhodes*, 2 Ph. 575; and see *Re Thompson*, 8 B. 237; *Re Beale*, 11 B. 600; *Foley* v. *Smith*, 20 L. J. Ch. 621; *Re Moss*, 17 B. 340.

(*g*) Seton, 833.

(*h*) *Re Ingle*, 21 B. 275.

(*i*) *Re Heritage*, 3 Q. B. D. 726.

(*j*) See *Re Jones*, 8 B. 479; *Re Fyson*, 9 B. 117; *Re Bignold*, *ib.* 269; *Re Harrison*, 10 B. 57; *Re Blackmore*, 13 B. 154.

(*k*) *Re Bennett*, 8 B. 467.

(*l*) *Re Downes*, 5 B. 425; *Re Massey*, 8 B. 458; *Re Rees*, 12 B. 256.

(*m*) *Re Becke and Flower*, 5 B. 406.

(*n*) *Re Carven*, 8 B. 436.

(*o*) *S. C.*, and *Re Wells*, *ib.* 416; *Re Walters*, 9 B. 299.

omitted (*p*). And, after a bill has once been delivered, the solicitor cannot escape taxation by withdrawing it and delivering an amended bill (*q*). Where all the papers had been handed over, and the solicitor swore that he had no documents or memoranda from which he could make out a bill, the Court refused to order its delivery (*r*). It has been held that under this Act, a country solicitor can procure the taxation of the charges of his town agent (*s*) : but it does not authorize the taxation of the fees of the steward of a manor, (who is a solicitor,) in respect of matters in which he acts only as a steward (*t*). Interest, it appears, will not be allowed upon costs while under taxation (*u*).

Taxation at instance of *cestui que trust*.

A *cestui que trust* may obtain an order for the taxation of the bill of costs delivered to his trustees by their solicitor (*x*) ; and no other mode of procedure will be encouraged. Thus, in an action by a *cestui que trust* against his trustees for charging what were alleged to be grossly exorbitant charges paid to their solicitor, he was not allowed to join the solicitor and ask in that action for taxation against him (*y*).

Where solicitor, being trustee, pays his own bill.

Where the solicitor avails himself of some special fiduciary relation in which he stands to his client to pay his own bill of costs out of his client's moneys, which may happen to be in his hands, the lapse of time which in an ordinary case would be sufficient, will not, it seems, bar the client's right to have the bill taxed. Thus, where a solicitor, in his capacity of executor, retained the whole amount of his bill

(*p*) *Re Walters, ibid.*

(*q*) *Re Heather*, 5 Ch. 694; *Re Holroyde*, 29 W. R. 599; *Re H. C. Jones*, 54 L. T. 648. But these cases do not decide that the solicitor is to get nothing for work fairly done, merely because he has charged for it in a form which cannot be allowed on taxation; *Re Russell Son and Scott*, 55 L. T. 71.

(*r*) *Re Ker*, 12 B. 390.

(*s*) *Smith* v. *Dimes*, 13 Jur. 518. The Act of 1870 does not apply as between a country solicitor and his town agent; *Ward* v. *Eyre*, 15 Ch. D. 130.

(*t*) *Allen* v. *Aldridge*, 5 B. 401; and see *Re Inderwick*, 25 Ch. D. 279.

(*u*) *Re Smith*, 9 B. 342.

(*x*) S. 39.

(*y*) *Re Spencer*, 51 L. J. Ch. 271. As to the taxation of a mortgagee's bill by the mortgagor's trustee in bankruptcy, see *Re Marsh*, 15 Q. B. D. 340; *Re Allingham*, 32 Ch. D. 36.

Chap. XIII. Sect. 10.

for professional services rendered to his testator out of his client's assets, it was held, in a suit for the administration of the testator's estate, twenty-six years after his death, that the parties beneficially interested were entitled to question the amount of the bill of costs; and the taxing master was directed to state whether any of the items objected to were fair and proper to be allowed, and to what amount (*z*).

Taxation under general jurisdiction if solicitor claim lien on papers.

And the Court may, under its general jurisdiction, order taxation of a bill consisting wholly or in part of conveyancing costs, if the solicitor refuse to deliver up deeds and papers in his possession except upon payment of the bill (*a*).

Costs of conveyance under 8 & 9 Vict. c. 119, how to be taxed.

The 8 & 9 Vict. c. 119 (*b*), enacts that in taxing any bill for preparing and executing any deed *under that Act*, it shall be lawful for the taxing officer, and he is thereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but *only* the skill and labour employed and responsibility incurred in the preparation thereof: an enactment which in principle is unexceptionable, but in theory throws a most heavy responsibility upon the taxing masters: it is, however, believed that their duties under the Act have practically been hitherto far from onerous.

Attorneys and Solicitors Act, 1870.

By the 33 & 34 Vict. c. 28 (*c*), a solicitor may fix the amount of his remuneration by agreement in writing with his client, either in respect of past or of future professional services; but if in respect of business done in any action or suit, the agreement must be examined and allowed by the taxing master before payment is made (*d*). The agreement,

(*z*) *Allen* v. *Jarvis*, 4 Ch. 616.

(*a*) *Re Murray*, 1 Russ. 519; *Re Rice*, 2 Ke. 181.

(*b*) Sect. 4.

(*c*) And see 35 & 36 V. c. 81.

(*d*) S. 4; *Re Russell*, 30 Ch. D. 114. The agreement must be signed by both solicitor and client; *Re Lewis*, 1 Q. B. D. 724; *Re Raven*, 30 W. R. 134; *Re Stogdon*, 56 L. T. 355. It need not be in writing, where it is to charge nothing if the action fails, and to take nothing for costs out of any money that may be awarded to the client in the action; *Jennings* v. *Johnson*, L. R. 8 C. P. 425.

unless specially framed for the purpose, excludes any claim of the solicitor for further remuneration (*e*), and a provision exempting him from liability for professional negligence is made wholly void (*f*). The Act provides a summary mode for testing the validity or effect of the agreement, and for setting it aside, and for re-opening it after payment in specified cases (*g*); and, except where otherwise provided in the Act, the bill of the solicitor under such an agreement is exempt from taxation (*h*). The Act also enables a solicitor to take security for his future costs (*i*), and allows interest to be charged on disbursements by the solicitor, and also on moneys improperly retained by him belonging to his client (*k*).

Solicitors' Remuneration Act, 1881.

The system of solicitor's remuneration for conveyancing business has been greatly altered, and is now regulated by the Solicitors' Remuneration Act, 1881 (*l*), and the rules thereunder.

Agreement under the Act.

A solicitor may still make an agreement with his client, before, after, or in the course of, the transaction of any business, that he shall be paid either by a gross sum, or by commission or percentage, or by salary or otherwise (*m*); and the amount agreed upon may be made to include all out of pocket expenses (*n*). The agreement must be in writing signed by the person to be bound, or by his agent (*o*), and may be sued upon, impeached, or set aside in the like manner, and on the like grounds, as an agreement not relating to a solicitor's remuneration; and if upon any order for taxation of costs it shall be objected to by the client as unfair or unreasonable, the facts may be inquired into by the taxing master, who must certify them to the Court; and the Court may cancel, or reduce the amount payable under, the agree-

(*e*) S. 6.
(*f*) S. 7.
(*g*) S. 8; *Rees* v. *Williams*, L. R. 10 Ex. 200; and sects. 9 and 10.
(*h*) S. 15.
(*i*) S. 16.
(*k*) Sects. 17 and 18.
(*l*) 44 & 45 V. c. 44.
(*m*) S. 8, sub-s. 1.
(*n*) S. 8, sub-s. 3.
(*o*) S. 8, sub-s. 2.

Chap. XIII. Sect. 10.

ment (*p*). The above provision is intended to supersede that made for agreements between solicitor and client by the Attorneys and Solicitors Act, 1870, which is not to apply to any business to which the Act of 1881 relates (*q*).

Scale charges.

Independently of agreement, the system of remuneration in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business (*r*), not being business in any action, or transacted in any Court, or in the chambers of any judge or master, is divided into three classes. A. Relating to *completed* sales, purchases, and mortgages, the remuneration for which is regulated by the scale contained in Schedule I., Part I., and the rules made thereunder (*s*). B. Relating to *completed* leases, and agreements for leases, or conveyances reserving rent, or agreements for the same, the remuneration for which is regulated by the scale contained in Schedule I., Part II. (*t*). C. Relating to *uncompleted* business of the kind

(*p*) S. 8, sub-s. 4. The section does not give any right to an order for taxation where the applicant would not formerly have been entitled to such an order, *e.g.*, where the solicitor denies that he acted in that capacity; *Re Inderwick*, 25 Ch. D. 279.

(*q*) S. 9.

(*r*) These words include conveyancing business done under the direction of the Court, as well as that done out of Court; *Stanford* v. *Roberts*, 26 Ch. D. 155; *Re Merchant Taylors' Co.*, 30 Ch. D. 28; *Fleming* v. *Hardcastle*, 33 W. R. 776.

(*s*) The scale for conducting a sale by auction will only apply where the auctioneer's duties are confined to duties in the sale room; Sched. I., pt. 1, r. 11; *Re Wilson*, 29 Ch. D. 790; *Re Sykes*, 56 L. T. 425; and see *Wood* v. *Calvert*, 34 W. R. 732; *Re Harris*, 56 L. T. 477. So, too, the scale for negotiating will only apply where the solicitor does all the work, and no commission is paid to anyone else. A mortgagee's solicitor will only be allowed the scale charge where he arranges and obtains a loan from a person for whom he acts; *Re Weddall*, W. N. (1884), 217. And in order to enable a solicitor to charge the scale for deducing, preparing conditions or contract, if any, perusing and completing, he must do all three things required: and the omission of any one of them will relegate him to the third class of remuneration; *Re Lacey*, 25 Ch. D. 301; *Ex p. Mayor of London*, 34 Ch. D. 452; *Re Harris*, 56 L. T. 477. Where part of the purchase-money is allowed to remain on mortgage, the solicitor cannot charge the scale fee under this schedule for investigating the mortgagor's title; *Re Glascodine*, 52 L. T. 781. And generally, in order that the *ad valorem* scale may be applicable, the whole of the work must be done by the solicitor; *Re Hickley*, 54 L. J. Ch. 608.

(*t*) This scale includes all preliminary negotiations and attendances; and no separate charge can be made for them; *Re Field*, 29 Ch. D. 608; *Re Emanuel*, 33 Ch. D. 40.

provided for in the two preceding classes, and to settlements, mining leases, or licences or agreements therefor, reconveyances, transfers of mortgage, or further charges not so provided for, to assignments of leases not by way of purchase or mortgage, and to all other deeds or documents, and to all other business, the remuneration for which is not in the preceding classes prescribed (*u*), for all of which the remuneration is regulated by the old system as altered by Schedule II.

General provisions of the Act.

The Act applies to pending business, commencing before, but concluded after, the 31st December, 1882, when the general order under the Act came into operation (*x*). A solicitor may before undertaking (*y*) any business, by writing under his hand, communicated to the client, elect to charge upon the old system as altered by Schedule II.; but unless he make such election, his remuneration will be governed by the scale (*z*). In cases of re-investment of money under the L. C. C. Act, the promoters are bound by an election duly notified to the landowner by his solicitor (*zz*).

Contract with unqualified conveyancer —is void.

Lastly, we may remark that the 44 Geo. III. c. 98, s. 14, imposes a penalty on unqualified persons acting as conveyancers; and that consequently any special contract by such persons for remuneration for their services, is illegal and void (*a*).

(*u*) *Humphreys* v. *Jones*, 31 Ch. D. 30.

(*x*) S. 7; *Re Lacey*, 25 Ch. D. 301; *Re Field*, *suprà*; *Fleming* v. *Hardcastle*, 33 W. R. 776.

(*y*) The election must be made and expressed before any expenses have been incurred which would be included in the scale fee, *e. g.*, any preliminary expenses with reference to the renewal of a lease; see *suprà*, n. (*t*); *Re Allen*, 34 Ch. D. 433; *Hester* v. *Hester*, *ibid.* 607.

(*z*) Gen. Or. 6. Where business was already being conducted when the order came into operation, it is not very clear how the solicitor was intended to express his option; at any rate, if he did not do so, he came within the new scale; *Re Field*, 29 Ch. D. 608. The election must be express, and is not sufficiently manifested by delivering a bill, made out under the old system; *Fleming* v. *Hardcastle*, 33 W. R. 776.

(*zz*) *Re Bridewell Hosp.*, 57 L. T. 155.

(*a*) *Taylor* v. *Crowland Co.*, 10 Ex. 293.

Chap. XIV.

CHAPTER XIV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE RELATIVE RIGHTS OF VENDOR AND PURCHASER.

1. *Vendor's lien on estate for unpaid purchase-money.*
2. *Whether he has any remedy if estate has been sold at undervalue: or more has been conveyed than was intended.*
3. *His right of pre-emption under Lands Clauses Consolidation Act*, 1845.
4. *His remedies at Law and in Equity on purchaser's covenants.*
5. *Purchaser's remedies on vendor's covenants.*
6. *His remedy in Equity under special circumstances if title defective.*
7. *His right to pay off incumbrances out of purchase-money.*
8. *His remedy in Equity if he buy his own estate, &c.;—or if lands are omitted from conveyance—and as to further assurance in Equity and by Statute.*
9. *His general rights and liabilities under the conveyance.*

Section 1.

Vendor's lien on estate for unpaid purchase-money.

(1) THE conveyance, if purporting to comprise "all the estate and interest" of a conveying party (and this is now the effect of every conveyance executed since the 31st December, 1881, unless a contrary intention is expressed in it (*a*)), will not be restricted in its operation by the circumstance of his having concurred in any particular and specified character (*b*).

(*a*) Conv. Act, 1881, s. 63.

(*b*) *Drew* v. *Earl of Norbury*, 3 J. & L. 267; *Stronge* v. *Hawkes*, 4 D. M. & G. 186: and see *Johnson* v. *Webster*, *ib.* 488; *Beaumont* v. *Lord Salisbury*, 19 B. 198; see, as to general expressions in a decree, *Drought* v. *Jones*, 4 D. & War. 174; and *vide ante*, p. 613.

Vendor has a lien on estate for unpaid purchase-money.

In the absence, however, of an express agreement, and of those circumstances from which the Court can imply a contrary intention, the vendor, notwithstanding the execution of a conveyance containing the above expressions and acknowledging payment of the purchase-money and bearing an indorsed receipt for the amount (*c*), or what is now equivalent, a receipt in the body of the deed (*d*), and notwithstanding delivery of possession to the purchaser, retains a lien (*e*) upon the estate, whatever may be its tenure, for so much of the purchase-money as in fact remains unpaid (*f*); and even, it has been held, for further advances made by him to the purchaser, for the purpose of improving the property, but without any agreement in writing (*g*). The lien is valid against volunteers, creditors, (whether claiming under a composition deed or in bankruptcy (*h*),) and sub-purchasers with notice, claiming under the first purchaser (*i*): and a sub-purchaser or mortgagee, even without notice, is postponed, unless he has the legal estate (*k*), or a better equity (*l*), *e.g.*, by obtaining possession of the title deeds through the negligence of the vendor (*m*). It has even been held, that a

Lien is valid as against whom.

(*c*) *Coppin* v. *Coppin*, 2 P. W. 291, 295; *Croly* v. *Callaghan*, 5 Ir. Eq. R. 25; *Hawkins* v. *Gardiner*, 2 S. & G. 441; *Winter* v. *Lord Anson*, 3 Rus. 488. Even at Law the *indorsed* receipt was not conclusive evidence of payment; *Straton* v. *Rastall*, 2 T. R. 366; *Skaife* v. *Jackson*, 3 B. & C. 421; *Lee* v. *L. & Y. R. Co.*, 6 Ch. 527, 535. See, as to its effect in Equity, under special circumstances, as tending to mislead one of several joint payers, *West* v. *Jones*, 1 Si. N. S. 205.

(*d*) 44 & 45 V. c. 41, s. 54.

(*e*) As to the mode of enforcing it, see *Rome* v. *Young*, 3 Y. & C. 199. As to the distinction between the vendor's lien and the right of stoppage *in transitu* on a sale of personal chattels, see *M'Ewan* v. *Smith*, 2 H. L. C. 309; *Spartali* v. *Benecke*, 10 C. B. 212; *Coventry* v. *Gladstone*, 4 Eq. 493; and as to the right of stoppage *in transitu*, and the jurisdiction in Equity to enforce it, see *Schotsmans* v. *L. & Y. R. Co.*, 2 Ch. 332; *Berndston* v. *Strang*, 3 Ch. 588; and see generally as to the conditions on which the right of stoppage depends, *Lickbarrow* v. *Mason*, 1 Sm. L. C.

(*f*) *Winter* v. *Lord Anson*, 3 Rus. 488; and see the judgment in *Mackreth* v. *Symmons*, 15 V. 336.

(*g*) *Ex p. Linden*, 1 M. D. & D. 428; *sed quære*.

(*h*) *Fawell* v. *Heelis*, Amb. 724; *Blackburn* v. *Gregson*, 1 Br. C. C. 420; *Bowles* v. *Rogers*, cited 6 V. 95; *Grant* v. *Mills*, 2 V. & B. 306, 309.

(*i*) 15 V. 337, 341.

(*k*) *Mackreth* v. *Symmons*, 15 V. 329; *Frere* v. *Moore*, 8 Pr. 475.

(*l*) See *Rice* v. *Rice*, 2 Dr. 85; *Kettlewell* v. *Watson*, 26 Ch. D. 501.

(*m*) See Sug. 682, citing *Nairn* v.

Chap. XIV. Sect. 1.

sub-purchaser or mortgagee acquiring the legal estate, but neglecting to ask for the deeds, is to be postponed to the original vendor who holds them as a security for his unpaid purchase-money (*n*). But the rule is now well settled that a mortgagee, having the legal estate, is not to be postponed, merely by reason of carelessness and want of prudence on his part (*o*).

Does not protect title deeds at Law.

But if the vendor, after conveyance, retain the title deeds, the purchaser can recover them, although the purchase-money be unpaid; unless he also retain part of the estate to which they show title, or unless the conveyance were executed as an escrow, to take effect on payment of the money (*p*), which may be shown by parol evidence (*q*). It is difficult to see how the Judicature Act can have made any difference to this rule, except in so far as it would enable the vendor to counter-claim in such an action to have his lien enforced.

Is not in nature of an express trust;

The lien is a charge, and not in the nature of an "express trust" within the 25th section of the 3 & 4 Will. IV. c. 27; and is therefore barred by the 8th section of the Real Property Limitation Act, 1874 (*r*), after twelve years from

Prowse, 6 V. 752; *Stanhope* v. *Lord Verney*, 2 Ed. 81; *Rice* v. *Rice*, 2 Dr. 73, 82: and cf. *Perry Herrick* v. *Attwood*, 2 D. & J. 21; *Lloyd* v. *Attwood*, 3 D. & J. 614; *Briggs* v. *Jones*, 10 Eq. 92; and see the subject fully considered *post*, p. 950 *et seq.*

(*n*) *Worthington* v. *Morgan*, 16 Si. 547; *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Colyer* v. *Finch*, 5 H. L. C. 905.

(*o*) *Colyer* v. *Finch*, *ubi suprà*; *Northern Ins. Co.* v. *Whipp*, 26 Ch. D. 482; *Manners* v. *Mew*, 29 Ch. D. 725; and see *post*, p. 952 *et seq.*

(*p*) *Goode* v. *Burton*, 1 Ex. 189, in which see the remarks made by the Court upon Mr. Justice Holroyd's dictum in *Esdaile* v. *Oxenham*, 3 B. & C. 229. The conveyance of the legal inheritance carries with it the right to the deeds; *Austin* v. *Croome*, Car. & M. 653; *Harrington* v. *Price*, 3 B. & Ad. 170; *Wakefield* v. *Newbon*, 6 Q. B. 276; unless other property held under the same title is retained by the party making the conveyance; *Yea* v. *Field*, 2 T. R. 708; and see 6 Q. B. 446; 37 & 38 V. c. 78, s. 2; and *vide ante*, p. 762. See, as to a mortgagee, *Davies* v. *Vernon*, 6 Q. B. 443, 447, which *qy.* As to whether the releasee to uses, or the *cestui que trust* (when a different person) is entitled, see *Reece v. Trye*, 1 De G. & S. 273.

(*q*) *Bowker* v. *Burdekin*, 11 M. & W. 128; *Gudgen* v. *Besset*, 3 Jur. N. S. 212.

(*r*) 37 & 38 V. c. 57; see sect. 40 of 3 & 4 Will. IV. c. 27.

the day fixed for payment: there having been no interim payment nor written acknowledgment of title (*s*).

nor within Locke King's Act;

It was held not to be money charged on land "by way of mortgage" within the meaning of Locke King's Act (*t*) so as to deprive the heir or devisee of the purchaser of his right to have the unpaid purchase-money discharged out of the personal estate (*u*); but by the 30 & 31 Vict. c. 69, the word "mortgage" in the construction of these statutes, has been extended to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator;* and this provision does not appear to be limited to the case of a testator dying after the 31st December, 1867, when the Act came into operation. It was observed in the 4th edition of this work, that this extended meaning of the word "mortgage" did not apply to lien for unpaid purchase-money upon lands purchased by an *intestate;* and that, in such a case, the heir was still entitled to have the purchase-money satisfied out of the personal estate; and this was afterwards so decided (*x*).

but within the Amendment Act.

Amending Act, 1877.

This defect was, however, remedied by the 40 & 41 Vict. c. 34, which enacted that the former statutes should, as to any testator or intestate dying after the 31st of December, 1877, extend to a person dying intestate; and that the devisee, or legatee or heir should not be entitled to have the sum owing discharged out of any other estate of the testator or intestate, unless (in the case of a *testator*) he should, within the meaning of the Acts, have signified a contrary intention: and that such contrary intention should not be deemed to be signified by a charge of, or direction for payment of, debts upon or out of residuary real and personal estate, or residuary real estate.

(*s*) *Toft* v. *Stephenson*, 5 D. M. & G. 735, which see as to interest.

(*t*) 17 & 18 V. c. 113.

(*u*) *Hood* v. *Hood*, 3 Jur. N. S. 684; *Barnwell* v. *Iremonger*, 1 Dr. & S. 255, which did not turn on the construction of the Act.

(*x*) *Harding* v. *Harding*, 13 Eq. 493. A bequest of "securities for money" does not include the lien; *Goold* v. *Teague*, 7 W. R. 84; *sed quære.*

Chap. XIV. Sect. 1.

Remarks on the Act.

It has been suggested that, as this Act confines the expression of a contrary intention to the case of a *testator*, no expression of such an intention by deed or other document would have the effect of freeing the purchased estate from an existing vendor's lien in the hands of the heir; although in the case of a mortgagee such a contrary intention might be sufficiently expressed under the 17 & 18 Vict. c. 113, by deed or other document, as well as by will (*y*).

Is assignable by parol.

The lien is assignable or chargeable by parol (*z*); but the assignee or incumbrancer takes subject to any prior equitable incumbrances created by the vendor (*a*). Where a vendor, between whom and his purchaser there were unsettled accounts, was allowed to retain the title deeds, and deposited them by way of equitable mortgage without notice, and became bankrupt, the equitable mortgage was upheld, to the extent of the unpaid purchase-money, against the purchaser who had not appropriated, in satisfaction of it, a balance which was due to him from the vendor on the unsettled accounts (*b*).

Is within Mortmain Act.

As we have seen (*c*), the lien is within the Statute of Charitable Uses; but not within the Judgment Act, 18 & 19 Vict. c. 15 (*d*).

Marshalling for lien.

And it appears to be the result of the modern authorities (*e*) that where the vendor's claim is satisfied out of the personal estate of a deceased purchaser, Equity will, by marshalling the purchased estate and the personal estate, give the benefit of the vendor's lien to simple-contract creditors and

(*y*) Per Kay, J., in *Re Cockcroft*, 24 Ch. D. 94, 100. See, on the Acts generally, *post*, p. 920 *et seq.*

(*z*) *Dryden* v. *Frost*, 3 M. & C. 670; *Burn* v. *Carvalho*, 4 M. & C. 690; *Rodick* v. *Gandell*, 1 D. M. & G. 763, and cases cited; *Ball* v. *L. & N. W. R. Co.*, 15 B. 548; *Morrell* v. *Wootton*, 16 B. 197; *Riccard* v. *Prichard*, 1 K. & J. 277.

(*a*) *Lacey* v. *Ingle*, 2 Ph. 313; *Mangles* v. *Dixon*, 3 H. L. C. 702.

(*b*) *Rayne* v. *Baker*, 1 Gif. 241; *Peto* v. *Hammond*, 29 B. 91.

(*c*) *Ante*, p. 303.

(*d*) *Ante*, p. 539.

(*e*) See Sug. 680.

legatees (*f*) of the purchaser, if he have died intestate as respects the purchased estate; and to simple-contract creditors (*g*) if the estate be devised. Whether legatees are entitled to this benefit, if the estate be devised, appears to be still doubtful (*h*).

Waiver of lien: what amounts to.

The question whether the vendor has abandoned his lien is in all cases one of intention and construction; the test being whether the vendor has taken some other security, in substitution for the ordinary lien; and the burden, of course, rests on those who deny the existence of the lien to make out their case. The cases on the subject are very numerous (*i*), and are all consistent with the principle thus laid down.

Not, as a rule, taking personal security.

Primâ facie, the taking of a mere personal security for the purchase-money, *e. g.*, a promissory note (*k*), or a bill of exchange (*l*), even although it be negotiated (*m*), or a bond (*n*), is not evidence of an intention to abandon the lien. Nor will the joining of a surety in a note or bill of exchange make any difference, since these are considered merely as modes of payment (*o*). But whether this would be so where a bond or covenant is taken from a third person has not been actually decided (*p*).

But it may be

Cases may, however, arise where the circumstances under

(*f*) *Trimmer* v. *Bayne*, 9 V. 209; see 4 Rus. 339, n.; *Sproule* v. *Prior*, 8 Si. 189, 193; and see 2 M. & K. 645.

(*g*) *Selby* v. *Selby*, 4 Rus. 336; see earlier cases, cited p. 338.

(*h*) *Wythe* v. *Henniker*, 2 M. & K. 635, 645. See *contrà*, *Lord Lilford* v. *Powys-Keck*, 1 Eq. 347, a case of specific devise; see, too, *Hensman* v. *Fryer*, 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq. 371; *Dugdale* v. *Dugdale*, 14 Eq. 234; cf. *Birds* v. *Askey*, 24 B. 618.

(*i*) *Mackreth* v. *Symmons*, 1 Wh. & T. L. C., and notes thereto.

(*k*) *Gibbons* v. *Baddall*, 2 Eq. Ca. Ab. 682 n.; *Hughes* v. *Kearney*, 1 Sch. & L. 132; *Ex p. Peake*, 1 Mad. 346.

(*l*) *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31; *Grant* v. *Mills*, 2 V. & B. 306.

(*m*) *Ex p. Loaring*, 2 Ro. 79; and see as to goods, *Gunn* v. *Bolckow*, 10 Ch. 492, which seems to overrule *Bunney* v. *Poyntz*, 1 N. & M. 229.

(*n*) *Winter* v. *Lord Anson*, 3 Rus. 488; *Collins* v. *Collins*, 31 B. 346.

(*o*) *Hughes* v. *Kearney*, *suprà*; *Grant* v. *Mills*, *suprà*, at p. 309.

(*p*) *Grant* v. *Mills*, *suprà*. The decision in *Cood* v. *Cood*, 10 Pr. 109, seems to imply that the lien would then be gone.

Chap. XIV. Sect. 1.

which a merely personal security has been taken would show "a clear and manifest intention of the parties" (*q*), that the lien should be abandoned: *e. g.*, where a mortgage of the estate was taken for part of the purchase-money, and a note for the rest (*r*). And it may be that the personal security is itself the actual consideration, and not merely a security for the purchase-money (*s*).

Lien in cases of annuity consideration not affected by bond;

And where the consideration for the sale is an annuity or other periodical payment, the vendor will not lose it in the absence of circumstances negativing the intention to retain the lien (*t*), by taking a bond or covenant for payment (*u*). Nor does the fact of the payment of the purchase-money being postponed till the death of the vendor, but secured by a bond, of itself evidence an intention to abandon the lien (*x*).

except under special circumstances.

Where, however, from the form of the transaction, or other circumstances, it appears that the bond or covenant is in fact given in substitution, and not as mere security for the payment of the consideration money, the lien is lost. Thus, where an equity of redemption was sold in consideration of two annuities, which were granted and covenanted to be paid by a deed of even date with the conveyance, and the conveyance was expressed to be made by the mortgagor and mortgagee in consideration of the annuities having been so granted, and of the mortgage debt having been paid by the purchaser, it was held, that the circumstance of the separate

(*q*) Per Lord Lyndhurst in *Winter* v. *Lord Anson*, 3 Rus. at p. 492.

(*r*) *Bond* v. *Kent*, 2 Vern. 281; and see *Capper* v. *Spottiswoode*, Taml. 21; *Re Brentwood Brick Co.*, 4 Ch. D. 562.

(*s*) See *Re Albert Ass. Co.*, 11 Eq. 178.

(*t*) As to what will amount to such evidence, see *Dixon* v. *Gayfere*, 1 D. & J. 655.

(*u*) *Tardiffe* v. *Scrughan*, cited 1 Br. C. C. 423, which though criticised by Lord Eldon in *Mackreth* v. *Symmons*, 15 V. 352, and by Shadwell, V.-C., in *Clarke* v. *Royle*, 3 Si. 502, is now an established authority; see *Richardson* v. *M'Causland*, Beat. 457, 460; Sug. 676; and *Buckland* v. *Pocknell*, 13 Si. 412. See also *Matthew* v. *Bowler*, 6 Ha. 110; *Collins* v. *Collins*, 31 B. 346.

(*x*) *Winter* v. *Lord Anson*, 3 Rus. 488.

deed being taken as a security for the annuities, and the mode in which the consideration was stated in the conveyance, evidenced an intention that there should be no lien (*y*).

Whether affected by bond in case of sale of reversion.

So, where a reversion was sold in consideration of immediate life annuities, which were secured by bond, Lord Eldon, looking to the nature of the estate, and the fact of a bond being taken, held, that there was no lien: the annuities might all determine before the reversion fell into possession; and this, coupled with the fact of the vendor taking the bond, showed that he did not intend the lien to subsist (*z*): but there were special circumstances in this case, which showed an intention on the vendor's part to rely merely on the personal security; and it cannot be (as it has sometimes been) regarded as an authority for the proposition that there can be no lien where the estate is sold in consideration of an annuity, secured by a bond or covenant (*a*).

Lien waived by special terms of contract.

In a modern case, where the contract was to sell in consideration of an annuity for three lives payable quarterly, and "to be secured by bond," it was held, that the land was free; though the vendor was entitled to have the annuity secured by a bond, before he could be called on to convey the estate. The Court did not dispute the authority of *Winter* v. *Lord Anson;* but considered that the terms of the contract, and the circumstance that the existence of such an annuity as a charge upon the property would have seriously interfered with alienation, rebutted the general presumption (*b*).

General rule as to waiver of lien.

And generally where the mortgage, bond, or other security is taken by way of substitution for the purchase-money, and

(*y*) *Buckland* v. *Pocknell*, 13 Si. 406; *Frail* v. *Ellis*, 16 B. 350.

(*z*) See *Mackreth* v. *Symmons*, and generally the notes thereto in Wh. & T. L. C.

(*a*) See Sug. 869, 11th ed., and see 14th ed., p. 676, note.

(*b*) *Dixon* v. *Gayfere*, 1 D. & J. 655, see and consider judgment: *Dyke* v. *Rendall*, 2 D. M. & G. 209.

Chap. XIV. Sect. 1.

is in fact itself the consideration, no lien exists (*c*). Whether or not this is the case is a question of intention, which must be decided by looking "at the instruments executed by the parties at the time" (*d*).

Presumable intention either way may be rebutted.

And since, as we have seen, taking a substantive and independent security destroys the lien, not by virtue of any technical rule, but merely by indicating the intention of the vendor, the lien may, notwithstanding the security, be preserved, either by express agreement, or by any expressions negativing the presumable intention to abandon it (*e*); *e. g.*, a stipulation that the estate shall not be sold until the money is paid, or unless with the consent of the vendor and the surety (*f*); or by parol evidence negativing such presumable intention (*g*); and this, although such intention be collected from the terms in which the consideration is stated on the face of the conveyance, and acknowledged in the indorsed receipt (*g*). And, on the other hand, the intention to abandon the lien, in cases where only a note or bond is taken, may be evidenced by a parol express agreement (*h*); or by expressions inconsistent with its continuance; *e. g.*, expressions referring to a re-sale of the property before the time fixed for payment of the amount due to the vendor (*i*); and the same would no doubt be the rule in a case where no security was taken. And it was decided by Lord Eldon that the nature of the transaction may show that the lien is to subsist as to part of the unpaid purchase-money, but not as to the residue (*k*).

Not lost by unauthorized payment to agent.

The lien is not lost by an unauthorized or improper payment to the vendor's agent (*l*).

(*c*) *Parrott* v. *Sweetland*, 3 M. & K. 655; *Re Albert Ass. Co.*, 11 Eq. 164; *Re Brentwood Brick Co.*, 4 Ch. D. 562.

(*d*) *Parrott* v. *Sweetland*, *suprà*, at p. 664.

(*e*) *Austen* v. *Halsey*, 6 V. 475, 483.

(*f*) *Elliot* v. *Edwards*, 3 B. & P. 181.

(*g*) *Frail* v. *Ellis*, 16 B. 350.

(*h*) *Winter* v. *Lord Anson*, 1 S. & S. 445.

(*i*) *Ex p. Parkes*, 1 Gl. & J. 228.

(*k*) *Mackreth* v. *Symmons*, 15 V. 351.

(*l*) *Wrout* v. *Dawes*, 25 B. 369 *Wilson* v. *Keating*, 5 Jur. N. S. 815.

Lien, how lost as against third parties.

Where a vendor joined in a deed by which the purchaser mortgaged the estate to a third party, who advanced part of the purchase-money, he, of course, was held to have, as against such mortgagee, no lien for the unpaid balance (*m*): so, where a vendor, without receiving the purchase-money, signed the conveyance for the purpose of enabling the purchaser to execute a mortgage, he was held to have no lien as against the mortgagee (*n*): so, where, upon a purchase by trustees, the vendor, knowing the money to be trust money, signed the usual indorsed receipt, but allowed part of it to remain in the hands of one of the trustees without the knowledge of his co-trustees, or *cestuis que trust*, he was held to have no lien (*o*). So, where a trustee purchased on behalf of his *cestui que trust*, and the recitals of the conveyance disclosed the trust, and contained a statement that a sufficient portion of the trust funds had been called in to provide the purchase-money, for the whole of which there was an indorsed receipt, the real fact being that part of the price was contributed by the trustee personally, and was secured by his bond and a deposit of the title deeds with the vendor, it was held that the latter had no lien on the deeds for the balance due to him (*p*). So, where trustees sold land intended for building purposes, and signed a receipt indorsed on the conveyance for the whole of the purchase-money, though only a part of it was in fact paid, and then at the purchaser's request registered a memorandum of the conveyance in the West Riding registry, in order that a good title might be made to the property, but retained the conveyance; it was held that the vendors had by their conduct lost their lien as against persons who had sub-purchased parts of the property from the original purchasers (*q*).

None implied in favour of

And no lien will be assumed in favour of parties who

(*m*) *Cood* v. *Pollard*, 9 Pr. 544.

(*n*) *Smith* v. *Evans*, 28 B. 59; *Rice* v. *Rice*, 2 Dr. 73.

(*o*) *White* v. *Wakefield*, 7 Si. 401; *Price* v. *Blakemore*, 6 B. 507.

(*p*) *Muir* v. *Jolly*, 26 B. 143.

(*q*) *Kettlewell* v. *Watson*, 26 Ch. D. 501. The circumstances of this case were very special, and some of the purchasers had omitted to take reasonable precautions.

disqualified parties.

are, by law, disqualified from holding such an interest in real estate (*r*).

Is a protection against purchaser's judgment creditors,—when.

Where prior to the 27 & 28 Vict. c. 112 the vendor conveyed the estate to the purchaser, and took a re-conveyance, by way of mortgage, for securing payment of part of the purchase-money, his lien appeared to render the security unimpeachable by judgment creditors of the purchaser: but the validity, as against such creditors, of powers of sale and leasing, and other special powers in the mortgage, probably depended upon their having been stipulated for, as part of the agreement for sale, or if subsequently thereto, then prior to the judgments becoming a charge. Even when the conveyance and mortgage were embodied in the same instrument, which in that case sometimes took the form of a covenant by the vendor to convey on payment of the balance, the validity of the powers would seem to have depended upon either their having been previously stipulated for as above suggested, or upon the fact of the vendor having taken them as part of his security without notice of the judgments being a charge on the land; which want of notice, if he came to exercise the powers, he could never conclusively prove as against an intending purchaser or lessee. The only safe course was to bargain in the original contract of sale for the insertion of the powers.

Where a purchaser paid part of his purchase-money, and was let into possession, but took no conveyance, and the vendor obtained a decree for sale, it was held, that a purchaser under the decree was not compellable to complete without the concurrence of the registered judgment creditors of the original purchaser, who were not parties to the suit, and whose judgments were prior to the decree (*s*).

Illegal contract.

Where the original contract is tainted with illegality, this is a defence to an action by the vendor upon any security

(*r*) *Ante*, p. 506; *Harrison* v. *Southcote*, 2 V. sen., 389, 393.

(*s*) *Re Grey-coat Hosp.*, 1 D. & J. 531; *Knight* v. *Pocock*, 24 B. 436.

which may have been given for the balance of the purchase-money (*t*).

Vendor's lien for unpaid purchase-money on sale to a railway company.

We have already seen that the vendor to a railway company has no lien for his unpaid purchase-money upon the moneys deposited in Court under the Lands Clauses Consolidation Act (*u*): he has, however, the ordinary vendor's lien upon the land taken, in respect not only of unpaid purchase-money, but also of compensation for consequential damage (*x*); unless such compensation is the subject of a separate agreement between him and the company (*y*); and the fact of a deposit and bond having been made under the 85th section, does not prejudice his lien for the excess of the purchase and compensation moneys over the sum deposited (*z*). The lien does not extend to the costs of the arbitration under which the price has been ascertained (*a*); and it has been held that on a sale to a public company in consideration of a yearly rent-charge, the vendor has no lien (*b*); the ground of the decision being that in such a case it cannot be supposed to have been the intention of the parties that the vendor was to reserve to himself a right at some future time to enter and destroy a public work, if the annual rent should fall into arrear (*c*).

Vendor's lien, how enforced.

A vendor's lien, when established by a judicial decree (*d*), may be enforced by sale (*e*). Where purchase-money is to be paid by instalments, some of which are in arrear, and some of which are not yet due, the vendor, on bringing an action for specific performance, may obtain a declaration of lien for both

(*t*) *Fisher* v. *Bridges*, 3 E. & B. 642. As to illegal agreements, *vide ante*, p. 277 *et seq.*

(*u*) *Vide ante*, p. 803.

(*x*) *Walker* v. *Ware R. Co.*, 1 Eq. 195.

(*y*) *Ibid.*

(*z*) *Ibid.*

(*a*) *Earl Ferrers* v. *Stafford R. Co.*, 13 Eq. 524.

(*b*) *Earl of Jersey* v. *Briton Ferry Co.*, 7 Eq. 409.

(*c*) *Ibid.* 413.

(*d*) *A.-G.* v. *Sittingbourne R. Co.*, 1 Eq. 636.

(*e*) *Hope* v. *Booth*, 1 B. & Ad. 498.

Chap. XIV. Sect. 1.

the arrears and future instalments (*f*). A vendor's lien is recognized and can be enforced only in Equity. In one case (*g*) it was held that a vendor could not at the same time sue in Equity to enforce his lien, and also bring an action at Law upon a bond or any other security which he might have taken for payment of the money, although if he failed in one remedy, he might resort to the other. This decision seems, however, to be open to question, on the ground that there is no distinction in principle between a vendor seeking to enforce his lien, and a mortgagee who may pursue both his remedies concurrently (*h*).

Lien, how enforced against a railway company.

The lien may in the same way be enforced against lands taken by a railway company, although the line is open for traffic (*i*). But the Court will not upon an interlocutory application restrain the company from using the lands bought by them for the purposes of their undertaking until payment of the purchase-money (*k*). Where, however, a decree was made against the company for specific performance of the contract, and for payment of the purchase-money within a limited period, leave was granted to the plaintiff to apply for an injunction in default of payment (*l*): and it seems clear that in such a case on decree (*m*), but not upon an interlocutory application (*n*), the landowner is entitled to have a receiver appointed.

(*f*) *Nives* v. *Nives*, 15 Ch. D. 649.

(*g*) *Barker* v. *Smark*, 3 B. 64.

(*h*) *Farrer* v. *Lacy Hartland & Co.*, 31 Ch. D. 42.

(*i*) *Wing* v. *Tottenham R. Co.*, 3 Ch. 740; *Walker* v. *Ware R. Co.*, 1 Eq. 195; *Allgood* v. *Merrybent, &c. R. Co.*, 33 Ch. D. 571; see *post*, p. 1220.

(*k*) *Pell* v. *Northampton R. Co.*, 2 Eq. 100; *Munns* v. *Isle of Wight R. Co.*, 5 Ch. 414; *Latimer* v. *Aylesbury R. Co.*, 9 Ch. D. 385.

(*l*) *Bishop of Winchester* v. *Mid Hants R. Co.*, 5 Eq. 17.

(*m*) *Bishop of Winchester* v. *Mid Hants R. Co.*, *suprà*; *Williams* v. *Aylesbury R. Co.*, 28 L. T. 547; but see *Pell* v. *Northampton R. Co.*, *suprà*, where Turner, L. J., seems to have had some doubt upon the point. See as to appointment of a receiver against a railway company, 30 & 31 V. c. 127, s. 4.

(*n*) *Latimer* v. *Aylesbury R. Co.*, *suprà*.

(2.) *Whether the vendor has any remedy if the estate has been sold at an undervalue;—or more has been conveyed than was intended.*

Vendor has no claim in respect of mistake as to extent or value of the property,

The vendor, after conveyance, has no remedy, if the property prove to be, as respects either quantity or quality, more valuable than was imagined; for instance, where the residue of a lease, of which twenty years were in fact unexpired, was sold under the impression that there were only eight years to run, and the price was fixed on that supposition, the vendors, although trustees, were held bound by the conveyance: Lord Cottenham, in affirming the decree of V.-C. K. Bruce dismissing the vendor's bill, observed, "Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that supposition; but it afterwards turned out to be 250 acres, could he afterwards come and ask for a re-conveyance of the farm or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or larger acreage is immaterial" (*o*).

or the extent of his interest therein.

Nor, where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterwards heard to say that he was under a misapprehension as to the extent of his interest in the property (*p*). In one case where a woman, who had a life interest settled to her separate use, joined with her supposed husband (who was in fact married to another woman) in assigning it to a purchaser, she was held bound by the assignment (*q*): but in this case it is difficult to see how any fair question could be raised; since the woman assigned the property not *quâ* a *feme covert*, but as being, in regard thereto, a *feme sole*, in contemplation of a Court of Equity.

(*o*) *Okill* v. *Whittaker*, 2 Ph. 338; 1 De G. & S. 83.

(*p*) *Malden* v. *Merick*, 2 Atk. 8; *Marshall* v. *Collett*, 1 Y. & C. 232; *Evans* v. *Jones*, Kay, 29; and see *Horne* v. *Barton*, 2 Jur. N. S. 1032.

(*q*) *Sturge* v. *Starr*, 2 M. & K. 195.

Chap. XIV. Sect. 2.

And, in the absence of express qualifying words, it will be presumed that each conveying party intended to pass all his different rights and interest in the property. But in one case (*r*), where a vendor was beneficially interested in one share, and was also trustee of another share, it was held by the House of Lords that the purchaser did not acquire the legal estate in the latter share, notwithstanding that the *cestui que trust* joined in the conveyance for the purpose of passing the beneficial interest; but this decision has been universally disapproved (*s*).

Nor in respect of price paid to another, at his request.

And where the owner of an estate has sold and conveyed it in consideration of the purchase-money being, at his request, paid to a third person, he cannot afterwards impeach the sale upon the ground of such person having exercised undue influence over him :—unless he can clearly fix the purchaser with a *quasi*-fraudulent knowledge of such being the case (*t*).

Aliter, if property not intended to be dealt with is conveyed.

But the above cases must be distinguished from those where the conveyance, by mistake, comprises more than *either* party intended to deal with (*u*) : as where, upon a contract for sale of farm A., the conveyance by mistake includes lands parcel of farm B.; or where the plan on the deed comprises more land than was intended to be conveyed (*x*) ; or where the words of conveyance are more comprehensive than the recitals as to the property to be conveyed (*y*) ; or where a clause is accidentally inserted in the deed contrary to the agreement (*z*) : and if, in any other respect, the deed fails to carry out that which is proved to

(*r*) *Fausset* v. *Carpenter*, 2 Dow & C. 232.

(*s*) *Carter* v. *Carter*, 3 K. & J. 635; Sug. 743.

(*t*) See and consider *Blackie* v. *Clark*, 15 B. 595, 601.

(*u*) *Tyler* v. *Beversham*, Finch, 80; *Thomas* v. *Davis*, 1 Dick. 301; see *Beaumont* v. *Bramley*, T. & R. 41; *Marquess* v. *Marchioness of Exeter*, 3 M. & C. 321; *Mortimer* v. *Shortall*, 2 D. & War. 363.

(*x*) *Harris* v. *Pepperell*, 5 Eq. 1.

(*y*) *Jenner* v. *Jenner*, 1 Eq. 361; and see *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Crompton* v. *Jarratt*, 30 Ch. D. 298.

(*z*) *Rob* v. *Butterwick*, 2 Pr. 190.

have been the common intention of all material parties, a Court of Equity will rectify the error (*a*); but the mistake must, if it is to be rectified, be mutual (*b*), and must be clearly proved (*c*); and the extent of the proposed alteration should be ascertained by evidence contemporaneous with, or anterior to, the deed (*d*). Where the mistake is only unilateral, the Court cannot rectify, because the parties have never been at one, and there has, therefore, never been a contract in existence; all that the Court can do is, in a sufficient case, to declare that there has been no contract. In three cases it has been said that the Court had power to give the complaining party the option of taking what the other intended to give under the penalty of rescission if such option were not exercised (*e*). It is, however, difficult to understand the ground of these decisions (*f*). Either there has originally been a contract, in which case the Court cannot make a new one, or there has been no contract, in which case neither at Law nor in Equity is there anything to enforce.

In a modern case at Law, where A., being seised in fee of an undivided moiety of a messuage, and having a lease of the other moiety with a covenant not to assign without licence, after reciting that he was seised in fee of the entirety, granted to B., by way of mortgage, all his estate and interest in the messuage, and by the same deed assigned other leasehold property of which he was possessed, it was held that only the moiety of which he was seised in fee passed by the deed (*g*). Stress was laid on the fact that the deed was only

(*a*) *Wright* v. *Goff*, 22 B. 207.

(*b*) *Earl of Bradford* v. *Earl of Romney*, 30 B. 431; but see *Garrard* v. *Frankel*, *ib.*, 445; *Harris* v. *Pepperell*, 5 Eq. 1; *Paget* v. *Marshall*, 28 Ch. D. 255; and see *Bloomer* v. *Spittle*, 13 Eq. 427, where after the time which had elapsed the Court declined to rectify the deed, but gave the plaintiff (the purchaser) the option of dismissing his bill without costs, if the defendants would not rectify the deed.

(*c*) *Marquis of Breadalbane* v. *Marquis of Chandos*, 2 M. & C. 711.

(*d*) *Earl of Bradford* v. *Earl of Romney*, 30 B. 431; and see *Wilkinson* v. *Nelson*, 7 Jur. N. S. 480.

(*e*) *Garrard* v. *Frankel*, *Harris* v. *Pepperell*, and *Paget* v. *Marshall*, *suprà*.

(*f*) See *Gun* v. *M'Carthy*, 13 L. R. Ir. 304.

(*g*) *Francis* v. *Minton*, L. R. 2 C. P. 543.

Chap. XIV. Sect. 2.

a security for a debt, and not an absolute purchase; but the only sufficient ground, if it be one, for the decision was that if the leasehold moiety had been held to pass there would have been a forfeiture. No doubt the fact of part of the messuage being held under a lease was overlooked, and it was the intention of both parties that the whole should be included in the deed. The covenant in the lease was against assignment only; and if the question had come before a Court of Equity, the mortgagee would probably have been entitled to require an underlease.

Distinction between cases where conveyance is rectified on ground of mistake and where vendor has no remedy.

The difference between cases where the conveyance is rectified on the ground of mistake, and cases where the vendor has no remedy for his own mistake in the conveyance as to the quantity or quality of the estate, is this, *viz.*, that in the former the parties never intended to deal with the property which is conveyed; while, in the latter (*h*), the vendors do intend to sell all their remaining interest in the property, but by their own mistake they misdescribe what that interest is (*i*): so, in the case put by Lord Cottenham, the vendor would really intend to sell the entire farm, and the only mistake would be as to the quantity. We may here remark that at Law evidence cannot be received to contradict the conveyance by showing that property, which would, *primâ facie*, pass under general words, was not intended to be included in the purchase (*k*).

Relief in cases of fraud and distress.

In cases where an undue advantage has been taken, amounting to fraud, the party imposed on is entitled to rescission. Thus, relief has been afforded, where a purchaser knowingly obtained, for an inadequate consideration, a conveyance from a vendor in humble circumstances and ignorant of his rights (*m*); and, in other cases, where

(*h*) *Okill* v. *Whittaker*, 2 Ph. 338.

(*i*) *Ibid.* 341; *Howkins* v. *Jackson*, 2 M. & G. 372. The rule does not, however, apply to voluntary deeds; *Lindo* v. *Lindo*, 1 B. 496; *Turner* v. *Turner*, 14 Ch. D. 829.

(*k*) *Doe* v. *Webster*, 4 P. & D. 270.

(*m*) *Evans* v. *Llewellyn*, 2 Br. C. C. 150; see *Groves* v. *Perkins*, 6 Si. 576; *Sturge* v. *Sturge*, 12 B. 229.

advantage has been taken of the vendor's distress to procure an unfair bargain (*n*). And where a person, who well knew the value of the property, obtained from a young man, a common sailor, lately come ashore, and much pressed for money, an estate for a grossly inadequate price, the Court, even as against the devisees of the purchaser, appointed a receiver before the hearing (*o*).

General rule as to distress.

It was laid down by Lord Langdale (*p*), that a man who is in distress may nevertheless contract; and if, being in distress, he procure other persons to consent to an agreement which he would not himself have requested or consented to if he had not been in distress, and afterwards successfully urges and obtains the performance of that agreement, and, after that, acquiesces for a length of time in the performance without any notice of dissatisfaction or complaint, he is not entitled to set aside the transaction on the mere ground of his poverty or distress, in the absence of any deception or fraud proved to have been practised on him.

Release by mortgagor to mortgagee of equity of redemption.

Where a mortgagor in consideration of the mortgage debt releases the equity of redemption to the mortgagee, the parties are to be regarded, until the contrary is shown by the party impeaching the deed, as on the ordinary footing of vendor and purchaser (*q*).

Inadequacy of consideration,

We shall hereafter see (*r*), that, upon the purchase of an estate in possession, and where no fiduciary relation exists

(*n*) See *Pickett* v. *Loggon*, 14 V. 215, 231; *Murray* v. *Palmer*, 2 Sch. & L. 474, 486; *Wood* v. *Abrey*, 3 Mad. 417; *Gordon* v. *Crawford*, cited Sug. 276. See *Curson* v. *Belworthy*, 3 H. L. C. 742.

(*o*) *Stillwell* v. *Wilkins*, Jac. 280; see *Farmer* v. *Farmer*, 1 H. L. C. 724, where the vendor was deaf and dumb, but under the circumstances relief was refused; and cf. *George* v. *Evans*, 4 Y. & C. 211.

(*p*) *Knight* v. *Marjoribanks*, 11 B. at 349.

(*q*) *Melbourne Banking Co.* v. *Brougham*, 7 Ap. Ca. 307; and see *Knight* v. *Marjoribanks*, 2 M. & G. 10, per Ld. Cottenham.

(*r*) *Post*, p. 1207.

Chap. XIV. Sect. 2.

no general reason for setting aside conveyance.

between the parties (*s*), mere inadequacy of consideration (*t*), unless shown to be the result of fraud, surprise, misrepresentation (*u*), or improper concealment on the part of the purchaser, will be no defence even to a suit for specific performance, unless the inadequacy be so great as in itself to furnish evidence of fraud (*x*): and a case sufficient as a defence to a suit for specific performance may be insufficient to enable the vendor to rescind the contract after conveyance (*y*).

Mutual ignorance.

And it has been held that, where both parties at the time of the contract are equally in the dark as to the value of the property (as where the sale was of an allotment under an Inclosure Act, which had not yet been set out), mere inadequacy of consideration is no defence to a suit for specific performance (*z*): but the inadequacy might, it is conceived, be so gross as to take a case out of the general rule.

Uncertainty of amount of consideration.

A distinction has been made between cases where the consideration is for a stated sum, and where it is for an uncertain amount, as, *e. g.*, a life annuity. In the latter class of cases, it has been thought that while the contract is executory, the Court will entertain the question of the adequacy of the consideration: but it seems more than doubtful whether this distinction is sustainable. In all the cases where a contract

(*s*) *Harrison* v. *Guest*, 8 H. L. C. 481; *Denton* v. *Donner*, 23 B. 285.

(*t*) See 31 V. c. 4; *Morris* v. *Earl of Aylesford*, 8 Ch. 484.

(*u*) See *Pickett* v. *Loggon*, 14 V. 215; *Reynell* v. *Sprye*, 1 D. M. & G. 660; and see *Haygarth* v. *Wearing*, 12 Eq. 320, where, although the fiduciary relation was not established, the conveyance was set aside for misrepresentation.

(*x*) See *Rice* v. *Gordon*, 11 B. 265; *Drought* v. *Eustace*, 1 Moll. 328, 338; *Tyler* v. *Yates*, 6 Ch. 665.

(*y*) See Sug. 244; *Vigers* v. *Pike*, 8 C. & F. 645; *Playford* v. *Playford*, 4 Ha. 546; *Bellamy* v. *Sabine*, 2 Ph. 425; *Wilde* v. *Gibson*, 1 H. L. C. 617; *Falcke* v. *Gray*, 4 Dr. 661. Lord Eldon seems to have entertained a different opinion; see *Coles* v. *Trecothick*, 9 V. 234. As to a misstatement of the consideration in the conveyance, see *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Bowen* v. *Kirwan*, L. & G. temp. S. 47, 65; *Ahearne* v. *Hogan*, Dru. 310, 320, 326.

(*z*) *Anon.*, cited 1 B. C. C. 158, and 6 V. 24; see also *Baxendale* v. *Seale*, 19 B. 601.

for sale in consideration of an annuity, or other uncertain payment, has been set aside, there appears to have been some other ground for relief besides mere inadequacy of consideration; as, *e. g.*, fraud or undue influence (*a*).

Want of professional advice.

The non-employment of a solicitor on the vendor's behalf will not make a sale for undervalue impeachable, if the vendor were fully aware of the nature of the transaction (*b*). Thus, where the consideration was a provision of board and lodging for the vendor, a bed-ridden old man, during the rest of his life, and he refused all professional advice, and deliberately pressed the sale upon the purchaser, the transaction was upheld, notwithstanding the inadequacy of the consideration (*c*): but a purchase from a poor sick man, shortly before his death, partly in consideration of a weekly payment, under circumstances of great precipitation, and without proper protection, was set aside (*d*). So, also, a purchase by a solicitor of an equity of redemption from a day labourer without legal advice, where the fairness of the transaction was not proved by the purchaser (*e*). So, also, a purchase from a poor aged woman, without professional assistance, who believed that she could not, though the purchaser knew that she could, make a good title (*f*). So, also, where the consideration was an inadequate weekly payment, and the vendor, an old and infirm woman, was ignorant of the value of the property, and had no professional advice (*g*). So, also, where the vendor had no knowledge of the property or its value, nor any legal advice, but relying on the representations of A., the agent of a former owner, conveyed the property to A.'s daughter for an inadequate price (*h*).

(*a*) See *Davies* v. *Cooper*, 5 M. & C. 270; *Valentine* v. *Dickinson*, 7 Jur. N. S. 857; and *vide post*, p. 1209.

(*b*) *Harrison* v. *Guest*, 8 H. L. C. 481.

(*c*) *Harrison* v. *Guest*, *suprà*.

(*d*) *Clark* v. *Malpas*, 31 B. 80; 10 W. R. 677.

(*e*) *Prees* v. *Coke*, 6 Ch. 645. But this case was based on the special obligation of the solicitor to his client.

(*f*) *Summers* v. *Griffiths*, 35 B. 27.

(*g*) *Baker* v. *Monk*, 33 B. 419; 10 Jur. N. S. 691.

(*h*) *Haygarth* v. *Wearing*, 12 Eq. 320.

Chap. XIV. Sect. 2.

Distinction in cases of reversionary interests.

Onus probandi was, till lately, on purchaser.

Except where vendor fixed the price.

But until the statute 31 Vict. c. 4, which we shall presently notice, there was a well-recognized distinction between sales of estates in possession and estates in reversion: and on sales of the latter description, if effected by private contract, mere inadequacy of consideration would enable the Court to decree a re-conveyance: and the *onus probandi* did not, as in ordinary cases, rest with the plaintiff seeking to impeach the sale, but with the defendant who upheld it (*i*); except where the vendor himself fixed the price, and there were no special circumstances (*k*).

The rule applied where the transaction was a mortgage.

And the rule was held to apply equally where the transaction was a mortgage or charge, and not an absolute sale (*l*); and it was not material that the reversioner was of mature age, and fully cognizant of the nature and effect of the transaction (*m*); nor was it necessary for him to show that at the time he was in pecuniary distress (*n*); and, notwithstanding the most perfect *bona fides*, the transaction might be set aside, unless full value was given (*o*).

What interests are reversionary within the rule.

The relief was afforded where a small part of the property was in possession and the bulk was reversionary (*p*): in one case, where the value of the property in possession was 1331*l.*, and of that in reversion only 312*l.*, the purchase was nevertheless set aside for undervalue (*q*); but the rule did not apply where the tenant for life concurred with the immediate reversioner, so that the sale was, in effect, of an estate in possession (*r*); nor where the sale was made by a vendor

(*i*) See *Coles* v. *Trecothick*, 9 V. 246; *Gowland* v. *De Faria*, 17 V. 24; *Hincksman* v. *Smith*, 3 Rus. 433; *Kendall* v. *Beckett*, 2 R. & M. 90; *Addis* v. *Campbell*, 1 B. 262.

(*k*) *Perfect* v. *Lane*, 3 D. F. & J. 369.

(*l*) *Bromley* v. *Smith*, 26 B. 644; *Tottenham* v. *Green*, 32 L. J. Ch. 201.

(*m*) *Ib.*; *Emmet* v. *Tottenham*, 10 Jur. N. S. 1090.

(*n*) *Bromley* v. *Smith*, 26 B. 644.

(*o*) *St. Albyn* v. *Harding*, 27 B. 11; *Foster* v. *Roberts*, 29 B. 467; see also *Salter* v. *Bradshaw*, 26 B. 161.

(*p*) *Lord Portmore* v. *Taylor*, 4 Si. 182.

(*q*) *Nesbitt* v. *Berridge*, 32 B. 282; 10 Jur. N. S. 53.

(*r*) *Wood* v. *Abrey*, 3 Mad. 417; see *Cooke* v. *Burtchaell*, 2 D. & War. 165; and *Sibbering* v. *Earl of Balcarres*, 3 De G. & S. 735.

entitled to what was, substantially, an estate in possession, and to the ultimate reversion, subject only to an intervening life estate (*s*); nor where the contract was entered into between a tenant and the person entitled to the reversion and to the rents during the term (*t*); nor where the transaction was in the nature of a family arrangement (*u*); nor where the sale was of a life estate in possession, subject to rent-charges which absorbed nearly the whole of the income (*x*).

Where their value depends on incalculable contingencies.

The relief was more sparingly afforded where the reversion was subject to an almost incalculable contingency; as where it was expectant on the death, without issue, of a tenant for life aged sixty-three and unmarried (*y*): but the fact that the reversion was dependent upon contingencies, which could not be estimated by actuaries, did not relieve the purchaser from the burden of showing that full value was given (*z*).

Relief given to vendors of reversions as well as to expectant heirs.

And the relief was afforded, not only to the mere owners of reversionary interests (*a*), but also to heirs or devisees in remainder (*b*) dealing with their mere expectancies (*c*); although an extraordinary protection was afforded to the

(*s*) *Wardle* v. *Carter*, 7 Si. 490.

(*t*) *Scott* v. *Dunbar*, 1 Moll. 459.

(*u*) *Talbot* v. *Staniforth*, 1 J. & H. 484.

(*x*) *Webster* v. *Cook*, 2 Ch. 542. But this case has been adversely criticised, on the ground that it was in effect the sale of a reversion; *Tyler* v. *Yates*, 11 Eq. 276; and see *Helsham* v. *Barnett*, 21 W. R. 309; *Howley* v. *Cook*, 8 I. R. Eq. 570.

(*y*) *Baker* v. *Bent*, 1 R. & M. 224; and see *Whicheote* v. *Bramston*, cited 4 Si. 202; and *Sherwood* v. *Robins*, M. & M. 194.

(*z*) *Talbot* v. *Staniforth*, 1 J. & H. 484; *Viset. Valentia* v. *Denton* (1867, V. No. 34), M. R. 29 July, 1872, where the purchaser's actuary admitted that the contingency was incalculable, and the sale was set aside; and see *Barnardiston* v. *Lingood*, 2 Atk. 133, 135; *Addis* v. *Campbell*, 4 B. 401; *Davies* v. *Cooper*, 5 M. & C. 270; *Boothby* v. *Boothby*, 1 M. & G. 604; *Woodroffe* v. *Allen*, 1 Hay. & J. 73; Sug. 277. Father and son, when dealing with a third person, need not be represented by separate solicitors, *S. C.*; *Cooke* v. *Burtehaell*, 2 D. & War. 165.

(*a*) *Kendall* v. *Beckett*, 2 R. & M. 88; *Bawtree* v. *Watson*, 3 M. & K. 339; *Davies* v. *Cooper*, 5 M. & C. 270; *Edwards* v. *Browne*, 2 Coll. 100; see *Sewell* v. *Walker*, 12 Jur. 1041.

(*b*) See *Edwards* v. *Burt*, 2 D. M. & G. 57.

(*c*) In *Nevill* v. *Snelling*, 15 Ch. D. 679, relief was afforded to a younger son of a peer who had no other expectations than such as arose from the social position of his father; see p. 702.

Chap. XIV. Sect. 2.

latter classes of vendors (*d*). A distinction would, however, probably have been drawn between the owner of a reversion claiming by descent, devise, or settlement, and one who had himself acquired it by ordinary sale and purchase.

Relief afforded against sub-purchaser with notice, notwithstanding voluntary confirmation by reversioner.

And where a person bought a reversion, at a gross undervalue, from an heir in distressed circumstances, and re-sold it at a large profit to a sub-purchaser who had full notice of the original fraud, and the reversioner, being still in distress, was induced, by the original purchaser, to join in and confirm the re-sale, and to concur in suffering recoveries which were necessary to perfect the title, but nothing was paid or secured to him as a consideration for such concurrence, the transaction was set aside as against the sub-purchaser, on re-payment of the price paid on the first purchase (*e*): but the case would have been different if the sub-purchaser had had no notice of the original fraud, even although he might not have acquired the legal estate (*f*).

What circumstances will deprive heir of special protection—rules laid down in *King* v. *Hamlet*.

It was laid down by the Court, in deciding a modern case (*g*), First, that this extraordinary protection must be withdrawn from the heir, "if it shall appear that the transaction was known to the father or other person standing *in loco parentis*,—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession,—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him,

(*d*) *Lord Chesterfield* v. *Janssen*, 2 V. sen. 125; and see generally the notes to that case, 1 Wh. & T. L. C.; *Wiseman* v. *Beake*, 2 Vern. 121; *Cole* v. *Gibbons*, 3 P. W. 293; Sug. 276; *King* v. *Savery*, 1 S. & G. 271; *Morris* v. *Earl of Aylesford*, 8 Ch. 484.

(*e*) *Addis* v. *Campbell*, 4 B. 401; and see *Savery* v. *King*, 5 H. L. C. 627.

(*f*) See *Nagle* v. *Baylor*, 3 D. & War. 60; see too *Sibbering* v. *Earl of Balcarres*, 3 De G. & S. 735; and at Law, *Stevenson* v. *Newnham*, 17 Jur. 600; but see *contrà*, where the property is an equitable *chose in action*, *Cockell* v. *Taylor*, 15 B. 103. See, however, *Barnard* v. *Hunter*, 2 Jur. N. S. 1213, where this decision was disapproved by Lord Cranworth.

(*g*) *King* v. *Hamlet*, 2 M. & K. 473.

and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the old bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing."

Lord St. Leonards' and V.-C. Wood's comments thereon.

The first of these propositions has been criticized by Lord St. Leonards, on the ground that the equity is that of the son, not of the parent: and in a modern case V.-C. Wood considered its meaning to be, that where the heir deals not behind the back of his father, but with his sanction and assistance, he has all the protection which his father can give him, and is not entitled to the same relief as if the contract had been entered into without such parental protection (*h*); and it is conceived that, except in the sense so attributed to it, the proposition cannot now be sustained (*i*). As to the second of the above propositions, Lord St. Leonards has observed, that without the concluding qualification it could not safely be acted upon (*k*).

Family arrangements not within the exceptional rule.

Family arrangements are exempt from the strict rules applicable to cases between ordinary vendors and purchasers (*l*); and a transaction of this nature between father (tenant for life) and son (tenant in tail) does not fall within the exceptional rule which we are now considering (*m*). But such arrangements

(*h*) *Talbot* v. *Staniforth*, 1 J. & H. 484, 502; Sug. 316.

(*i*) *O'Rorke* v. *Bolingbroke*, 2 Ap. Ca. 814; and see per Lord Selborne in *Morris* v. *Lord Aylesford*, 8 Ch. at p. 491.

(*k*) See comments on *King* v. *Hamlet*, Sug. 1084, 11th ed.

(*l*) *Tweddell* v. *Tweddell*, T. & R. 1, 13; see *Devey* v. *Devey*, 9 Ha. 230; *Houghton* v. *Lees*, 1 Jur. N. S. 862; see cases of such arrangements being set aside, *Sturge* v. *Sturge*, 12 B. 229; *Hoghton* v. *Hoghton*, 15 B. 278; *Lawton* v. *Campion*, 18 B. 87; *Bury* v. *Oppenheim*, 26 B. 594.

(*m*) See *Bellamy* v. *Sabine*, 2 Ph. 425; *Lord Aldborough* v. *Trye*, 7 C. & F. 436; *Cooke* v. *Burtchaell*, 2 D. & War. 165. See also, as to family arrangements generally, *Stapilton* v. *Stapilton*, 1 Atk. 2; 2 Wh. & T. L. C.; *Neale* v. *Neale*, 1 Ke. 672, 684; *Farmer* v. *Farmer*, 1 H. L. C. 724; and *Persse* v. *Persse*, 7 C. & F. 279; *Wallace* v. *Wallace*, 2 D. & War.

Chap. XIV. Sect. 2.

are justly regarded with jealousy by the Court (*n*); especially when entered into shortly after the child attains majority, or when the parent derives considerable benefit (*o*). The onus in such a case is on the father to show that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it; and this onus extends to any volunteer, or purchaser with notice, claiming through the father, but not to a purchaser for value without notice (*p*). At the same time, if there is no misrepresentation or suppression (*q*), and the transaction is in the nature of a re-settlement for the common good of the family (*r*), it will be supported, notwithstanding the exercise of parental influence (*s*), or the non-employment of an independent professional adviser (*t*). Nor is it necessary in order to support such an arrangement that it should be a compromise of doubtful or disputed rights; the preservation of the estate may be a sufficient motive: and, in such cases, the Court does not minutely weigh the *quantum* of the consideration (*u*). But where the motive for the settlement is a representation which, though innocently made, is in fact erroneous, the settlement will be set aside (*x*), and the transaction, if it is to be supported, must be strictly a family arrangement: thus, where a tenant for life purchased from his nephew the reversion in the family estate, without any provision for its re-settlement, the case was held to fall

452, 470; *Westby* v. *Westby*, *ib.* 502; *Smith* v. *Pincombe*, 3 M. & G. 653; *Baker* v. *Bradley*, 7 D. M. & G. 597; *Head* v. *Godlee*, John. 536; *Dimsdale* v. *Dimsdale*, 3 Dr. 556; *Berdoe* v. *Dawson*, 11 Jur. N. S. 254.

(*n*) *Tweddell* v. *Tweddell*, and *Hoghton* v. *Hoghton*, *suprà*; and see *Wright* v. *Vanderplank*, 8 D. M. & G. 133; *Turner* v. *Collins*, 7 Ch. 329.

(*o*) *Wright* v. *Vanderplank*, *Turner* v. *Collins*, *suprà*; *Kempson* v. *Ashbee*, 10 Ch. 15; *Bainbrigge* v. *Browne*, 18 Ch. D. 188.

(*p*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 196.

(*q*) *Greenwood* v. *Greenwood*, 2 D. J. & S. 28; *Brooke* v. *Lord Mostyn*, *ib.* 373.

(*r*) *Baker* v. *Bradley*, 7 D. M. & G. 597; *Talbot* v. *Staniforth*, 1 K. & J. 484.

(*s*) *Hartopp* v. *Hartopp*, 21 B. 259; see too *Wakefield* v. *Gibbon*, 1 Gif. 401.

(*t*) *Jenner* v. *Jenner*, 2 D. F. & J. 359.

(*u*) *Williams* v. *Williams*, 2 Ch. 294.

(*x*) *Fane* v. *Fane*, 20 Eq. 698; and see *Gordon* v. *Gordon*, 2 Sw. 467.

within the general rule as to reversionary interests (*y*). There ought, however, to be no unnecessary delay in seeking to set aside such a transaction (*z*).

Adequacy of consideration, how determined.

The question of adequacy of consideration must be determined with reference to circumstances as existing at the date of the contract, and not to subsequent events (*a*). It was formerly held (*b*) sufficient to avoid the sale of a reversionary interest, that the price paid was not the estimated value according to the tables used by actuaries; but subsequent decisions and authorities established the more reasonable doctrine, that the market value (which is generally about two-thirds of the estimated value (*c*)), was alone to be regarded (*d*): and, on a *bonâ fide* sale by auction, under circumstances calculated to insure a fair sale, its result was considered in itself to fix the market value (*e*): so, on a sale by private contract, the circumstance of the bargain having been declined by various parties (*f*), or of the property having been valued by competent parties (*g*), was material. In one case, where the market value appeared to have been rather better than 1,900*l.*, and the price paid was 1,700*l.*, the Court held, that the inadequacy was sufficient to entitle the

(*y*) *Talbot* v. *Staniforth*, 1 J. & H. 484; in this case there was a subsequent re-settlement by will, but it formed no part of the consideration.

(*z*) See *Turner* v. *Collins*, 7 Ch. 329; and cf. *Kempson* v. *Ashbee*, 10 Ch. 15, where under the circumstances a considerable time was allowed.

(*a*) *Gowland* v. *De Faria*, 17 V. 20; *Boothby* v. *Boothby*, 2 H. & Tw. 214; natural love and affection may, it appears, if stated in the deed, (see *Willan* v. *Willan*, 2 Dow, 274,) aid an inadequate pecuniary consideration; *Whalley* v. *Whalley*, 3 Bli. 1.

(*b*) *Gowland* v. *De Faria*, *suprà*; and see *Peacock* v. *Evans*, 16 V. 512.

(*c*) See *Potts* v. *Curtis*, You. 543; Sug. 279; *Bettyes* v. *Maynard*, 31 W. R. 461; as to the value of surveyor's evidence, *vide ib.* 491; and see *Edwards* v. *Burt*, 2 D. M. & G. 55; and as to small reliance being placed upon it, see *Waters* v. *Thorn*, 22 B. 547; *Foster* v. *Roberts*, 29 B. 470, 471.

(*d*) *Lord Aldborough* v. *Trye*, 7 C. & F. 436; *Hineksman* v. *Smith*, 3 Rus. see p. 435; *Headen* v. *Rosher*, M'C. & Y. 89; *Potts* v. *Curtis*, You. 543; *Newton* v. *Hunt*, 5 Si. 521; *Wardle* v. *Carter*, 7 Si. 490; *Sewell* v. *Walker*, 12 Jur. 1041.

(*e*) *Shelly* v. *Nash*, 3 Mad. 232; *Fox* v. *Wright*, 6 Mad. 111; *Lord Aldborough* v. *Trye*, 7 C. & F. 436.

(*f*) *Moth* v. *Atwood*, 5 V. 845; *Perfect* v. *Lane*, 3 D. F. & J. 369.

(*g*) *Edwards* v. *Burt*, 2 D. M. & G. 63.

Chap. XIV. Sect. 2.

vendor to relief (*h*) : so, where the value was assumed to be 580*l.*, and the price was 500*l.*, and 50*l.* payable on a future contingency (*i*) ; so, where the value was 238*l.*, and the price 200*l.* (*k*); so, where the value was 400*l.*, and the price 370*l.* (*l*); and the tendency of the latest decisions was to establish that unless a person gave much more than the value, it was impossible to purchase a reversionary interest with safety, except under a sale by auction (*m*). Where, however, bank stock was valued by actuaries at 200*l.* per cent. when its then market value was in fact 215*l.* per cent., this was not considered sufficient proof of a purchase at undervalue (*n*).

General remarks on the cases.

The cases which we have just cited abundantly prove the wisdom of the ordinary rule which refuses to set aside a conveyance on the mere ground of inadequacy of consideration. If undervalue, not so gross as to be indicative of fraud, and unaccompanied by pressure, is of itself to be a sufficient ground for granting such relief, the question whether the undervalue is gross, or only trivial, cannot arise ; and the Court must set aside the deed in every case where the actual consideration falls short of the full value. The paternal care thus exhibited towards expectant heirs and reversioners, not always the most deserving objects, overstepped the bounds of a legitimate protection ; and rendered their expectant interests practically unsaleable, except in the comparatively rare instances where they were willing to encounter the publicity, delay, and additional expense of a sale by auction.

Change made by 31 Vict. c. 4.

It was therefore no matter of surprise that the Legislature interposed, and, by a late Statute (*o*), provided that no pur-

(*h*) *Edwards* v. *Browne*, 2 Coll. 100. Of course, the circumstance of a lot sold by auction being conveyed in the same deed with property purchased for an inadequate consideration by private contract, was no bar to the relief as respects the latter. *Newton* v. *Hunt*, 5 Si. 511.

(*i*) And see *Edwards* v. *Burt*, 2 D. M. & G. 62.

(*k*) *Jones* v. *Ricketts*, 31 B. 130.

(*l*) *Foster* v. *Roberts*, 29 B. 467.

(*m*) See dictum of the M. R. in *Foster* v. *Roberts*, 29 B. 471.

(*n*) *Perfect* v. *Lane*, 3 D. F. & J. 369.

(*o*) 31 Vict. c. 4 ; see the extended meaning of the word "purchase."

chase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall in future be opened or set aside merely on the ground of undervalue: but this enactment does not apply to any purchase concerning which a suit was pending on the 1st January, 1868. The rule as to non-interference after conveyance, on the mere ground of undervalue, is now the same whether the estate sold be in possession or a reversion; and, as in the former case, the inadequacy may be so great as of itself to furnish evidence of fraud, so, notwithstanding the late Act, the same rule also applies with equal, if not greater force, to the purchase of a reversionary interest (*p*).

Present state of the law.

The operation of the Act is strictly limited to abolishing the rule that in every case of sales of reversions and expectancies mere inadequacy of consideration was sufficient ground for setting aside the transaction. The effect of the Act, and the present state of the law on the subject, cannot be more clearly and concisely stated than in the words of Lord Selborne (*q*): "The Act is carefully limited to purchases 'made *bonâ fide*, and without fraud or unfair dealing,' and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. Those changes of the law have in no degree altered the *onus probandi* in those cases which, according to the language of Lord Hardwicke (*r*), raise 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as to raise this presumption the transaction cannot stand, unless the person claiming the

(*p*) *Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665; both cases since the Act, where mortgages given under extreme pressure and at an exorbitant rate of interest were ordered to stand as securities for the moneys actually advanced, with interest at 5 per cent.

(*q*) *Morris* v. *Earl of Aylesford*, 8 Ch. 484, 490.

(*r*) *Lord Chesterfield* v. *Janssen*, 2 V. sen. at p. 155.

Chap. XIV. Sect. 2.

benefit of it is able to repel the presumption by contrary evidence proving it to have been in point of fact fair, just, and reasonable." "The conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it" (*s*) thus remain the same as they were before the Act, with the exception only that undervalue alone is not sufficient to avoid the sale (*t*), as may be gathered from the cases collected in the preceding pages.

Security for price of goods bought to re-sell and so raise money, supported.

It was held in a modern case, that where goods were sold to a person in distressed circumstances by a tradesman, who knew that they were bought merely with a view to raise money by selling them again, and they were charged at fair and reasonable prices, and the purchaser, by way of security for the price, mortgaged his reversionary interests as expectant heir, the Court would not set aside the securities (*u*). In an earlier case, a bond given for silks taken up to sell to raise money, was allowed to stand as a security only for the sum really raised (*x*): but the decision turned upon the transaction being a loan at usurious interest; the transfer of goods being a shift or cloak for usury (*y*).

Sale fraudulent as against tenant in tail, when set aside at suit of remainderman.

It would seem that where fraud has been practised on a tenant in tail, and has been carried into effect by barring the entail, and he dies without issue, and without confirming the transaction, the next remainderman may file a bill to set it aside; but not if there were an independent intention to bar the entail, and the fraud applied only to some part of the transaction distinct from that object (*z*).

Terms on

When relief is given, the conveyance will, unless the trans-

(*s*) 8 Ch. 492.

(*t*) *Morris* v. *Earl of Aylesford*, *suprà*; *Beynon* v. *Cook*, 10 Ch. 389; *O'Rorke* v. *Bolingbroke*, 2 Ap. Ca. 814, 833; *Nevill* v. *Snelling*, 15 Ch. D. 679.

(*u*) *King* v. *Hamlet*, 2 M. & K. 456; 9 Bli. N. R. 610; see Sug. H. L. 65 *et seq.*

(*x*) *Barker* v. *Vansommer*, 1 Br. C. C. 149.

(*y*) *Per* Lord Brougham, C., 2 M. & K. 485.

(*z*) See *Bellamy* v. *Sabine*, 2 Ph. 425; *Tarleton* v. *Liddell*, 17 Q. B. 390.

which vendor was entitled to relief.

action were merely colourable (*a*), stand as a security for the principal sum and simple (but not compound (*b*)) interest (*c*); and for moneys expended by the purchaser in lasting and valuable improvements, and interest (*d*); and it would seem that where interest has been charged to the expectant heir at an exorbitant rate, it will be reduced, notwithstanding the repeal of the usury laws (*e*).

Purchaser's rights on keeping up policies.

In one case where, on the sale of a reversionary interest, the purchaser took an assignment of life policies, which were then valueless, and kept them up at his own expense, he was held entitled to the moneys received in respect of the policies before the transaction was impeached (*f*); but in another case, a mortgagee was disallowed what he had paid for premiums on life policies included in his security, notwithstanding that the deed provided in the usual way for keeping the policies on foot (*g*): the contract as to paying the premiums was treated as altogether void; and both cases were rested on the principle that there was no obligation on the purchaser or mortgagee to keep up the policies; if he did so, and the result was favourable to himself, he might retain the benefit; if it turned out otherwise, he had no charge on the estate for payments voluntarily made (*h*). Where the policies are effected by the purchaser simply for his own security, and the vendor derives no benefit therefrom, the principle above stated seems to apply: but where, on the transaction being set aside, the vendor takes a re-assignment of the policies,

(*a*) *Wilkinson* v. *Fowkes*, 9 Ha. 592.

(*b*) *Gowland* v. *De Faria*, 17 V. 20; *Bellamy* v. *Sabine*, 2 Ph. 442.

(*c*) *Gowland* v. *De Faria*, *suprà*; see the decree in *Savery* v. *King*, 5 H. L. C. 627. And see *Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665.

(*d*) *Murray* v. *Palmer*, 2 Sch. & L. 490; *Salter* v. *Bradshaw*, 26 B. 161. See, as to allowance for improvements of charity property, *A.-G.* v. *Kerr*, 2 B. 420.

(*e*) *Croft* v. *Graham*, 2 D. J. & S. 155; and see *Miller* v. *Cook*, *Tyler* v. *Yates*, *suprà*; both cases since the late Act.

(*f*) *Foster* v. *Roberts*, 29 B. 467; and see *Bell* v. *Ahearne*, 12 Ir. Eq. R. 576.

(*g*) *Pennell* v. *Millar*, 23 B. 172; see and consider this case; and see *Darcy* v. *Croft*, 9 Ir. Ch. R. 19.

(*h*) See and consider *Nesbitt* v. *Berridge*, 10 Jur. N. S. 53.

Chap. XIV. Sect. 2.

and keeps them on foot for his own benefit, he clearly ought to re-pay what has been expended by the purchaser for premiums (*i*).

Terms on which sale is set aside.

Where the transaction is set aside the purchaser will be charged with what he has actually received, and interest: and, in one case, where he had received from the vendor interest on the purchase-money, such payments were held to have been in reduction of the principal, and he himself was charged with interest upon them (*k*): but he will not, like a mortgagee, be charged with what without wilful default he might have received (*l*). Where inadequacy of price is the *sole* ground for the interference of the Court, the defendant has been allowed his costs (*m*), except those of the reference as to value (*n*); but slight additional circumstances have induced the Court to refuse them (*o*). The tendency, however, of the late decisions has been to deal with the costs of such a suit not as in a suit for redemption, but to throw the whole costs on the defendant, even where inadequacy of value has been the sole title to relief (*p*). In an action by the heir of a deceased vendor alleging that the purchase-money is in part unpaid, the personal representative must be made a party, as being interested in maintaining the validity of the contract (*q*).

Costs.

(*i*) See further as to whether the lender or the borrower is entitled on repayment of the loan to a policy effected by the former on the life of the latter, *Bruce* v. *Garden*, 5 Ch. 32; *Foster* v. *Roberts*, and *Bell* v. *Ahearne*, *suprà*; and *Morland* v. *Isaac*, 20 B. 389; *Courtenay* v. *Wright*, 2 Gif. 337; *Freme* v. *Blade*, 2 D. & J. 582; *Knox* v. *Turner*, 9 Eq. 155. And see generally, on the subject of lien for payment of premiums, the law summarized by Fry, J., in *Leslie* v. *French*, 23 Ch. D. 552.

(*k*) *Murray* v. *Palmer*, 2 Sch. & L. 488.

(*l*) See Sug. 254; Seton, 1365; and the judgment in *Murray* v. *Palmer*, 2 Sch. & L. 489, against such liability, but see *contrà* the decree, *ib.* 490; and *Re Slater's Tr.*, 11 Ch. D. 227.

(*m*) *Bawtree* v. *Watson*, 3 M. & K. p. 341; see Sug. 286.

(*n*) *Boothby* v. *Boothby*, 15 B. 212.

(*o*) *Wood* v. *Abrey*, 3 Mad. 417, 424; *Newton* v. *Hunt*, 5 Si. 523.

(*p*) See *Edwards* v. *Burt*, 2 D. M. & G. 55; *Foster* v. *Roberts*, *suprà*; *Talbot* v. *Staniforth*, 1 J. & H. 484; but see *Miller* v. *Cook*, 10 Eq. 641, where the defendant was allowed to add his costs to his security.

(*q*) *Wilkinson* v. *Fowkes*, 9 Ha. 193.

Right to reconveyance lost by acquiescence or confirmation.

And, of course, long delay (*r*) and clear (*s*) acquiescence on the part of the vendor,—(and this notwithstanding his poverty)—or his advised confirmation of the sale (*t*),—which confirmation may be as well by will as by deed (*u*)—will bar the right to relief (*x*): nor will relief be given to the prejudice of a *bonâ fide* sub-purchaser without notice (*y*). It has been held, that in the case of the sale of a reversion for undervalue, time does not begin to run against the vendor until the reversion falls into possession (*z*). We may here remark, that the statement of consideration in the conveyance is not conclusive; but any additional consideration, not inconsistent with the terms of the deed, may be established by parol evidence (*a*).

Distinction between right and remedy.

In the case of a voidable transaction of this nature, a clear distinction must be drawn between the right and the remedy (*b*). Where the property has passed at Law, the remedy is one belonging to the exclusive jurisdiction of Equity, which can therefore impose its own terms on the party seeking relief. Mere lapse of time for a period which may, the jurisdiction being exclusive and not concurrent, be less than that prescribed at Law by the Statute of Limitations, will deprive a sluggish plaintiff of his remedy. On the other hand, mere lapse of time can hardly, in the absence of circumstances

(*r*) *Moth* v. *Atwood*, 5 V. 845; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; *Willoughby* v. *Brideoake*, 11 Jur. N. S. 706; *Lord Clanricarde* v. *Henning*, 7 Jur. N. S. 1113.

(*s*) *Gerrard* v. *O'Reilly*, 3 D. & War. 414; *Sibbering* v. *Earl of Balcarres*, 3 De G. & S. 735.

(*t*) *Lyddon* v. *Moss*, 4 D. & J. 104; but there is no confirmation unless the vendor is fully aware of the voidability of the transaction.

(*u*) *Stump* v. *Gaby*, 2 D. M. & G. 623.

(*x*) *Cole* v. *Gibbons*, 3 P. W. 290, 294; *vide ante*, p. 54; and see *Knight* v. *Marjoribanks*, 11 B. 322; *Farmer* v. *Farmer*, H. L. C. 724; *Sibbering* v. *Earl of Balcarres*, *suprà*.

(*y*) *Thomas* v. *Davis*, 1 Dick. 301; *Cobbett* v. *Brock*, 20 B. 524; and see, at Law, *Parker* v. *Patrick*, 5 T. R. 175; *Load* v. *Green*, 15 M. & W. 219; *White* v. *Garden*, 10 C. B. 919; *Stevenson* v. *Newnham*, 17 Jur. 600.

(*z*) *Salter* v. *Bradshaw*, 26 B. 161; where the transaction was set aside after the lapse of forty years.

(*a*) *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; *Nixon* v. *Hamilton*, 2 D. & Wal. 364, 387; *Keenan* v. *Handley*, 2 D. J. & S. 283; see *post*, pp. 1018 *et seq.*

(*b*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587; *Wright* v. *Vanderplank*, *suprà*.

Chap. XIV. Sect. 2.

raising the inference of acquiescence or presumed release, bar the right:—a right which nevertheless is enforceable only by an equitable remedy. Thus, where the disability arises only on grounds of public policy, and there has been no unfair dealing, the plaintiff, although he has done nothing to release his right, may yet find himself unable to enforce it. In cases where there has been something in the nature of fraud, a release is not presumed in the absence of knowledge by the plaintiff of his rights; and probably in such a case the principle above laid down with regard to the remedy would be held not to apply.

Conveyance, when reformed in Equity.

And, as a general rule, where it is clearly shown that through mutual mistake, or by reason of fraud, the conveyance fails to express the intention of the parties, and what that intention really was (*c*), a Court of Equity will rectify it (*d*); but will not supply terms which have been intentionally omitted under the mistaken notion of their illegality (*e*).

Court preserves property pending litigation.

The Court will, if necessary, in a suit to set aside a conveyance, make an order to preserve the property pending litigation: *e.g.*, in case of an advowson, by restraining the defendant from presenting to a vacancy; and this, even although he be a sub-purchaser for value, and deny notice of the original fraud (*f*).

Illegal motive of purchaser does not avoid conveyance.

We may remark, that if a grantee fraudulently conceal and subsequently act on an intention of using the premises for an immoral and illegal purpose, this will not prevent the estate from passing to him at Law under the executed assurance (*g*).

(*c*) *Brougham* v. *Squire*, 1 Dr. 151.

(*d*) *Marquis of Breadalbane* v. *Marquis of Chandos*, 2 M. & C. 711; *post*, sect. 8. For marriage settlement rectified, see *Bold* v. *Hutchinson*, 5 D. M. & G. 558; *Rogers* v. *Earl*, 1 Dick. 294; Sug. 172. For rectification refused, see *Elwes* v. *Elwes*, 7 Jur. N. S. 747.

(*e*) *Post*, p. 1159.

(*f*) *Greenslade* v. *Dare*, 17 B. 502.

(*g*) *Feret* v. *Hill*, 15 C. B. 207.

As to power of Divorce Court to alter marriage settlements.

Lastly, we may remark, as connected with the present subject, that under the 22 & 23 Vict. c. 61, s. 5, the Court of Divorce may, after a final decree of nullity of marriage or dissolution of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree: and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective *parents*, as to the Court shall seem fit. It has been held, that the Court has no jurisdiction, under this section, to make an order as to the application of the property, unless there is issue of the marriage living at the time when the order is applied for (*h*).

(3.) *Vendor's rights of pre-emption under the Lands Clauses Consolidation Act*, 1845.

Rights of pre-emption, &c. of vendors under Lands Clauses Consolidation Act, 1845, in respect of superfluous lands.

By the Lands Clauses Consolidation Act, 1845, the promoters of the undertaking authorized by the special Act are required, within the periods thereby prescribed, or, if no period be prescribed, within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking (*i*). Such superfluous lands, unless they be situate in a town, or be lands built upon or used for building purposes, are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed: and if he refuse, or for six weeks neglect, to signify his wish to purchase, the same, or cannot be found, then to the immediately adjoining owners (*k*): and unless a sale be made either to such person, or adjoining owners, or some other person, the superfluous lands remaining unsold at the expiration of such period are to vest in, and become the

(*h*) *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; *Bird* v. *Bird*, L. R. 1 P. & D. 231; *Corrance* v. *Corrance*, *ib.* 495; *Graham* v. *Graham*, *ib.* 711.

(*i*) S. 127.

(*k*) S. 128.

Chap. XIV. Sect. 3.

property of, the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same (*l*).

Mode of sale.

A sale by the company of superfluous land under sect. 127 must be an absolute sale: and the company cannot reserve to itself a right of re-purchase (*m*). But the company may sell such lands in the manner most advantageous to itself, and may, with that object, impose conditions as to user (*n*).

Test of land being superfluous.

The test of land being superfluous is whether or not, at the expiration of the period of ten years, there is good reason to believe that by the ordinary development of the railway or neighbourhood, the land will be required for the purposes of the undertaking (*o*).

Cases where the right of re-purchase arises.

The statutory provisions have been held to apply to lands of which the company has only acquired the reversion, subject to a term (*p*). The right of re-purchase is not merely personal to the original proprietors, but devolves upon future owners of the estate from which the superfluous lands were severed (*q*): and may be exercised, within the prescribed period of ten years, if the company attempt to sell the lands to some other person (*r*). It would seem probable that, where the land is taken by the company for other than the authorized purposes, the landowner may, on re-payment of a proportionate price for the land, claim a re-conveyance (*s*).

(*l*) S. 127. The Metrop. Dist. R. Co. are by their special Acts exempted from the obligations of these sections, and have an unrestricted power of sale; see *Tomlin* v. *Budd*, 18 Eq. 368.

(*m*) *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562.

(*n*) *Re Higgins and Hitchman*, 21 Ch. D. 95.

(*o*) *Betts* v. *G. E. R. Co.*, 3 Ex. D. 182; aff. 49 L. J. C. L. 197, following the principle laid down in *G. W. R. Co.* v. *May*, L. R. 7 H. L. 283, and *Hooper* v. *Bourne*, 5 Ap. Ca. 1; see also *Hobbs* v. *M. R. Co.*, 20 Ch. D. 418.

(*p*) *Moody* v. *Corbett*, L. R. 1 Q. B. 510.

(*q*) *Lord Carington* v. *Wycombe R. Co.*, 2 Eq. 825; affd. 3 Ch. 377; but see *Highgate Archway Co.* v. *Jeakes*, 12 Eq. 9, a case under a special Act, where the former case was not cited.

(*r*) *Ibid.*

(*s*) *Lord Beauchamp* v. *G. W. R. Co.*, 3 Ch. 381, *per* Lord Cairns.

Where, after service of notice to treat, the company acquires the land for their ordinary purposes by agreement, the landowner does not lose his statutory right of re-purchase if the land become superfluous (*t*); but the right does not arise where the company has acquired the land by agreement for extraordinary purposes (*u*). Land which has been acquired and used for the purposes of the company will, on ceasing to be so used, become superfluous within the meaning of the Act; and, if not sold within the prescribed period, will vest in the adjoining landowners (*x*). If a sale is attempted by the company within the prescribed period, the statutory right of re-purchase at once arises (*y*). But in a recent case, where one company sold land to another, it was held that, although the attempted sale was *ultra vires*, it was not a sale of the lands as "*superfluous*"; and that therefore, on the sale being set aside, the adjoining landowner had no right to have the land conveyed to him (*z*).

Title in adjoining owner under Statute of Limitations.

An adjoining owner may acquire under the Statute of Limitations a good title to land purchased by the company, but not used for the purposes of its undertaking, and which has in fact become superfluous land (*a*). And this doctrine was in one case extended to land which had not become superfluous (*b*). The doctrine would seem naturally to follow from the rule that a railway company has the rights of an ordinary owner, and can do any acts necessary to prevent an easement being acquired over its land (*c*).

Cases where it does not arise.

Superfluous land must be land separated by a vertical, not a horizontal, boundary line from the land required for the

(*t*) *Lord Carington* v. *Wycombe R. Co.*, 3 Ch. 377; *Hooper* v. *Bourne*, 3 Q. B. D. 258.

(*u*) *City of Glasgow R. Co.* v. *Caledonian R. Co.*, L. R. 2 Sc. Ap. 160.

(*x*) *May* v. *G. W. R. Co.*, L. R. 7 H. L. 283.

(*y*) *L. & S. W. R. Co.* v. *Blackmore*, L. R. 4 H. L. 610; *Lord Carington* v. *Wycombe R. Co.*, *ubi suprà*.

(*z*) *Hobbs* v. *M. R. Co.*, 20 Ch. D. 418.

(*a*) *Norton* v. *L. & N. W. R. Co.*, 13 Ch. D. 268.

(*b*) *Bobbett* v. *S. E. R. Co.*, 9 Q. B. D. 424.

(*c*) *Bonner* v. *G. W. R. Co.*, 24 Ch. D. 1; *Bayley* v. *G. W. R. Co.*, 26 Ch. D. 434.

purposes of the undertaking. Thus, land over a railway tunnel or arch is not superfluous (*d*), nor is land under a railway constructed on arches (*e*). But where a person is in possession of such land as a *bonâ fide* purchaser from the railway company, a fair sale by him to another will be upheld (*f*). The right of re-purchase does not, however, arise, where the company, having abandoned its original undertaking, uses the land for some new purpose, for which they have obtained the sanction of the Legislature (*g*); nor where the enterprise is entirely abandoned (*h*); in which case, under the 218th section of 6 Will. IV. c. 75, the abandoned railway, at the end of three years from the date of the abandonment, passes to the owners for the time being of the adjoining land on either side. In one case, where the company used a narrow strip, part of land purchased from A. for the purpose of providing B. with a means of access to his severed lands, it was held that this was an accommodation work within the meaning of the Act, and that A. had no right of re-purchase as regards the narrow strip (*i*). It would seem that even although lands become superfluous, the mines and minerals under them do not become so, and that the company can deal with them independently of the provisions of these sections (*k*).

Meaning of the word "town" in these sections;

The word "town" has been held to mean, the space on which the dwelling-houses are collected so near each other that they may be said to be continuous; so also, an open space, occupied as a mere accessory to the convenience of a

(*d*) *Re Metr. Distr. R. Co. and Cosh*, 13 Ch. D. 607.

(*e*) *Mulliner* v. *M. R. Co.*, 11 Ch. D. 611.

(*f*) *Rosenberg* v. *Cook*, 8 Q. B. D. 162; and see *Best* v. *Hamand*, 12 Ch. D. 1.

(*g*) *Astley* v. *M. S. and L. R. Co.*, 2 D. & J. 453.

(*h*) *Smith* v. *Smith*, L. R. 3 Ex. 282; and see as to abandoned lines, 13 & 14 Vict. c. 83, s. 27; and the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114); *Re Potteries R. Co.*, 25 Ch. D. 251; *Re Ruthin R. Act*, 32 Ch. D. 438.

(*i*) *Lord Beauchamp* v. *G. W. R. Co.*, 3 Ch. 745.

(*k*) *Hooper* v. *Bourne*, 3 Q. B. D. 278, 284; 5 Ap. Ca. 12. It should be remembered that the purchaser of superfluous lands from a railway company acquires no greater right of support than the company itself had; *Pountney* v. *Clayton*, 11 Q. B. D. 820.

dwelling-house, would seem to come within the term (*l*); but lands situate within the limits of a borough, but beyond the mass of houses forming the town, have been held not to be within the section (*m*).

of lands "used for building purposes";

Lands actually laid out for building purposes, or, it would seem, let on building leases, are lands "used for building purposes" within this section; but land which is merely fit to be used for such purposes, even though it may be unsuited to any other purpose, is not within the term (*n*).

of "adjoining owners."

A lessee whose land was separated from the superfluous land by a private road, of which during his tenancy he had the exclusive right of user, has been held to be an immediately adjoining owner within the section (*o*). Where there are several owners whose properties immediately adjoin the superfluous land, it is divisible among them rateably, in proportion to the frontage of each property; that is, "the length of the line of contact of each property, if such line was made straight from the point of intersection of the boundaries on one side, to the point of intersection of the two boundaries on the other side" (*p*). The adjoining owner is *primâ facie* the person to whom the soil belongs: *e. g.*, the lord of the manor as opposed to the persons entitled to a right of herbage (*q*). And in connection with the expression, "adjoining owner," it must be clearly understood that there is a plain and obvious distinction between the person in whom, under the 127th section, the superfluous lands are, in default of sale, to vest, and

(*l*) *Elliot* v. *South Devon R. Co.*, 5 R. C. 500; see *Ex p. Incumbent of Brompton*, 5 De G. & S. 626.

(*m*) *Lord Carington* v. *Wycombe R. Co.*, 3 Ch. 377. See too *Coventry* v. *L. B. & S. C. R. Co.*, 5 Eq. 104, where land in a suburban district was held not to be in a "town." See too *L. & S. W. R. Co.* v. *Blackmore*, L. R. 4 H. L. 610, where land at Teddington, close by the railway station, was held not to be in a "town." The exception is omitted from some of the private Acts.

(*n*) *Coventry* v. *L. B. & S. C. R. Co.*, 5 Eq. 104; *L. & S. W. R. Co.* v. *Blackmore, suprà.*

(*o*) *Coventry* v. *L. B. & S. C. R. Co., suprà; Hobbs* v. *M. R. Co.*, 20 Ch. D. 418.

(*p*) *Per curiam*, in *Moody* v. *Corbett*, L. R. 1 Q. B. 510. See too *Smith* v. *Smith*, L. R. 3 Ex. 282, 287.

(*q*) *Hooper* v. *Bourne*, 3 Q. B. D. 279.

Chap. XIV. Sect. 3.

the persons to whom the option of purchase is to be given under the 128th section (*r*).

The right of pre-emption above noticed would seem not to affect a contract entered into with a third party for the sale of superfluous land, if the offer to the parties entitled to pre-emption be made and rejected before conveyance (*s*).

Section 4.

(4.) *Vendor's remedies at Law and in Equity on purchaser's covenants.*

Vendor's remedies at Law and in Equity on purchaser's covenants.

We have already seen that covenants are occasionally entered into as well by the purchaser with the vendor, as by the vendor with the purchaser; and that such covenants will sometimes, both at Law and in Equity, bind a purchaser who accepts the benefit of a conveyance, although he do not execute it (*t*); but it is conceived that this can only be so, on the principle, either that the performance of the covenant is a condition of the grant, or else that the quantum of the grant is restricted by the covenant (*u*).

Classification of covenants.

Covenants entered into by vendors and purchasers (*x*) are, broadly speaking, of one or other of two kinds, viz., affirmative and negative, the distinction carrying with it important consequences. The following remarks, it must be premised, have no application to the law as to covenants between lessor and lessee, which stands in this respect on an altogether special footing both at common law and by statute. Putting this exception aside, it may be broadly stated that the leading incident of the distinction between affirmative and negative covenants is, that it is only in the case of the latter that the burden,—*i.e.*, the liability to be sued,—as dis-

Distinction between affirmative and negative covenants.

(*r*) *Hobbs* v. *M. R. Co.*, 20 Ch. D. 418.

(*s*) *London and Greenwich R. Co.* v. *Goodchild*, 8 Jur. 455.

(*t*) *Ante*, p. 634.

(*u*) See and consider *Aspden* v. *Seddon*, 1 Ex. D. 496.

(*x*) See generally on the subject the Third Report of Real Property Commissioners, 1 Dav. 116; and *Spencer's case*, 1 Sm. L. C.

tinguished from the benefit, or right to sue, runs with the land. It must further be added that by the common law the burden never runs in any case.

True principle of negative covenants running in Equity.

It will be convenient at this stage, in the first place, to state what has at last been established as the principle upon which the burden of a negative covenant has been held to run in Equity. The leading cases upon the subject are *Tulk* v. *Moxhay* (*y*) and *London and South Western R. Co.* v. *Gomm* (*z*). The covenant in the former case was affirmative in its terms, but was held to imply a negative; and the doctrine laid down by the Court was explained by Jessel, M. R., in the latter of the two cases referred to, in the following words (*a*) :—"Where there is a negative covenant, expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds" (viz., that the doctrine of *Tulk* v. *Moxhay* is either an extension in Equity of the doctrine of *Spencer's case* to another line of cases, or else an extension in Equity of the doctrine of negative easements). "This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land, or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that, if he acquired the legal estate for value without notice, he was freed from the burden. This qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." It is here distinctly laid down,—and it is conceived with perfect accuracy,—that the question of notice to the purchaser has nothing whatever to do with the question

(*y*) 2 Ph. 774.
(*z*) 20 Ch. D. 562.
(*a*) *Ibid.* 583.

Chap. XIV. Sect. 4.

whether the covenant binds him, except in so far as the absence of notice may enable him to raise the plea of purchaser for valuable consideration without notice.

Instances of negative covenants running in Equity.

The following are instances of negative covenants which Courts of Equity have recognized as running with the land :— Where A. covenanted with his vendor to keep a certain plot of land unbuilt upon, and the land was afterwards sold to B., who had notice of the covenant, the original vendor was held entitled to an injunction restraining B. from violating the covenant (*b*). So, where a vendor had covenanted with a purchaser not to build on his land remaining unsold, a person claiming through the vendor was held bound by the covenant (*c*). So, where on a sale of a building estate, there was a general deed of covenant, prohibiting the various purchasers from using, or allowing their lots to be used, for certain purposes, persons claiming through purchasers, who had been parties to this deed, were restrained from using their lots for any of the prohibited purposes (*d*). Where there was a covenant by purchasers of adjoining lots not to build on the garden spaces which were specified in the general building plan, a person claiming through one of the original covenantors was restrained from throwing out a bow window into the garden at the back of his house (*e*). And where a brewer sold a piece of freehold land, and the purchasers covenanted that the vendor, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected, the covenant was held to imply the negative, and an alienee of a purchaser was restrained from supplying his own beer to a public-house which he had erected upon the land (*f*).

(*b*) *Tulk* v. *Moxhay*, 2 Ph. 774: and see *Bristow* v. *Wood*, 1 Coll. 480 (more fully, 14 L. J. Ch. 50), where the existence of a covenant by the vendor not to build houses of less than a certain value was held to be a good ground for relieving the proposed purchaser from his contract.

(*c*) *Mann* v. *Stephens*, 15 Si. 377; *Coles* v. *Sims*, 5 D. M. & G. 1; and see *Patching* v. *Dubbins*, Kay, 1; 23 L. J. Ch. 45, where the principle was affirmed.

(*d*) *Whatman* v. *Gibson*, 9 Si. 196.

(*e*) *Western* v. *Macdermot*, 2 Ch. 72; *Lord Manners* v. *Johnson*, 1 Ch. D. 673.

(*f*) *Catt* v. *Tourle*, 4 Ch. 654; see *Luker* v. *Dennis*, 7 Ch. D. 227, the case of a lease. The same principle

Validity of negative covenants not affected by rule against perpetuities or restraint of trade.

The validity of these negative covenants, which is well established, is not affected by the rule against perpetuities (*g*), to which they form an exception, nor by considerations as to their being in unreasonable restraint of trade, since they are always limited in space (*h*).

Burden of affirmative covenant never runs.

It may now be taken as settled law that the burden of an affirmative covenant cannot run with the land in equity, any more than at law (*i*).

Benefit of covenants made with owner of the land.

With regard to the benefit of covenants made with the owner of the land, whether affirmative or negative, which will be more fully dealt with later on (*k*), it is sufficient here to state that by the common law there are certain cases in which it runs with the land to each successive transferee, provided that such transferee be in of the same estate which the original covenantee had, and that the covenantee, at the date of the covenant being entered into, had the land to which the covenant relates (*l*).

Restrictive covenants on sale of building estate.

Keates v. *Lyon*.

A question not unfrequently arises on the sale of a building estate as to the devolution of the benefit and of the burden of covenants of this description. In the case of *Keates* v. *Lyon* (*m*), the subject was considered, and the earlier authorities reviewed by the Court of Appeal; and it was laid down that restrictions of this sort are not in the nature of a

applies to leasehold interests; *Parker* v. *Whyte*, 1 H. & M. 167; *Hemingway* v. *Fernandes*, 13 Si. 228; *Robson* v. *Flight*, 4 D. J. & S. 608; *Wilson* v. *Hart*, 1 Ch. 463; *Clements* v. *Welles*, 1 Eq. 200; *Fielden* v. *Slater*, 7 Eq. 523.

(*g*) *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562.

(*h*) *Tailors of Aberdeen* v. *Coutts*, Rob. Ap. Ca. 296, 324; *Keppel* v. *Bailey*, 2 M. & K. 517, 529; *Hodson* v. *Coppard*, 29 B. 4; *Catt* v. *Tourle*, 4 Ch. 654. And there is no distinction on this point between noxious trades and the sale of liquor; *Earl of Zetland* v. *Hislop*, 7 Ap. Ca. 427, 445.

(*i*) *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *L. & S. W. R. Co.* v. *Gomm*, *supra*, at p. 583; *Austerberry* v. *Oldham Corp.*, 29 Ch. D. 750.

(*k*) *Post*, p. 877 *et seq.*

(*l*) *Spencer's Case*, 5 Co. 16; *Webb* v. *Russell*, 3 T. R. 393.

(*m*) 4 Ch. 218.

Chap. XIV. Sect. 4.

reservation to the vendor, devolving on his subsequent purchasers as attached to the property: but are enforceable in Equity, as entirely depending on the contract and intention of the parties:—an intention which is strongly evidenced where the land is being dealt with according to some prescribed plan: as where it forms part of an existing building scheme. In the case just referred to, A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs and assigns, with A., his heirs, executors, administrators and assigns, as to the buildings to be erected thereon: but there were no similar covenants by A. in respect of the land retained; nor was there any general building scheme affecting the property. A. subsequently sold other portions of the estate to different purchasers, and afterwards bought back from B. the lot which he had sold to him. It was held, in a suit for specific performance, that the benefit of B.'s covenants did not pass to A.'s other purchasers; and that persons claiming through A. could make a good title to the re-purchased land, discharged from the covenants. In this case, there was no evidence to show whether the other purchasers bought with notice of B.'s restrictive covenants, or were themselves similarly bound.

The principle of these cases.

The principle governing this class of cases, as now well established, cannot be better expressed than in the language of Hall, V.-C. (*n*): "that anyone who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right—*i. e.*, the benefit of the covenant—enures to the assign, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established."

(*n*) *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 129.

Question is one of intention.

The question, therefore, resolves itself into one of intention: *viz.*, "whether the restrictions are merely matters of agreement between the vendor and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers" (*o*);—a question which can only be determined from the circumstances of each particular case. "If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit" (*p*).

Intention that they shall not be for common benefit.

The fact that the several purchasers were not aware, at the date of their common purchase, of the existence of any such covenants, seems to be almost conclusive evidence of an intention that the covenants were not entered into for the benefit of the purchasers *inter se*, but for the advantage of the vendor himself (*q*).

Intention that they shall be for common benefit.

On the other hand, the intention that such covenants shall run with the land for the benefit of the various purchasers *inter se* may be either express: as, for instance, where on the sale of a building estate in lots by the trustees of a building society, each purchaser covenanted with the vendors to observe and perform certain building stipulations, and the covenants were not only to enure to the benefit of the persons for the time being entitled under conveyances to be thereafter made by the covenantees, but the covenantees were to be deemed trustees of the covenants for the benefit of the persons claiming under any conveyance already made by the trustees, it was held that every allottee and purchaser had an

(*o*) *Per* Wills, J., in *Nottingham Brick Co.* v. *Butler*, 15 Q. B. D. at p. 268.

(*p*) *Ibid.*; *Collins* v. *Castle*, 36 Ch. D. 243.

(*q*) *Keates* v. *Lyon*, 4 Ch. 218; *Master* v. *Hansard*, 4 Ch. D. 718; *Renals* v. *Cowlishaw*, 11 Ch. D. 866; and see *Hislop* v. *Leckie*, 6 Ap. Ca. 560, 573.

Chap. XIV. Sect. 4.

equity to enforce the covenants (*r*). Or the intention may be implied from the surrounding circumstances: as, for instance, where land is put up to auction in lots under conditions which define the restrictions to be placed upon, and the covenants to be entered into by, the various purchasers (*s*); or where land is sold either together, or in lots, to be built upon in accordance with a general building scheme (*t*); or where a vendor selling part of an estate covenants, for himself and his assigns, to place certain restrictions on the use of the adjoining land which he retains (*u*). And the mere fact that the common vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers is not material, if the intention is otherwise clear that the purchasers are to be bound *inter se* (*x*). And it is evident that such a covenant cannot be released by the original vendor as regards land with respect to which he has parted with the benefit of it (*y*).

Constructive notice of the covenant sufficient.

In order that the covenants may be enforceable in Equity, it is essential that the purchaser should not be able to set up the defence of purchaser for valuable consideration without notice (*z*). Mere constructive notice will be sufficient to preclude this defence (*a*): and a purchaser has such notice of everything which an examination of the usual length of title would have disclosed (*b*); so that an omission on his part to satisfy himself as to the nature of his vendor's title, will

(*r*) *Eastwood* v. *Lever*, 4 D. J. & S. 114; *Jackson* v. *Winnifrith*, 47 L. T. 243.

(*s*) *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778; *Chitty* v. *Bray*, 48 L. T. 860.

(*t*) *Coles* v. *Sims*, 5 D. M. & G. 1; *Child* v. *Douglas*, Kay, 560; *Western* v. *McDermott*, 2 Ch. 72; *Harrison* v. *Good*, 11 Eq. 338; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Brown* v. *Inskip*, C. & E. 231.

(*u*) *Mann* v. *Stephens*, 15 Si. 377; *Coles* v. *Sims*, *suprà*; *Nicoll* v. *Fenning*, 19 Ch. D. 258; and see *Whatman* v. *Gibson*, 9 Si. 196, where there was a mutual deed of covenant.

(*x*) *Harrison* v. *Good*, 11 Eq. 338; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778, 791.

(*y*) *Western* v. *McDermott*, 1 Eq. 499, 506.

(*z*) *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. at p. 583; *ante*, p. 765.

(*a*) *Patman* v. *Harland*, 17 Ch. D. 353; *Nottingham Brick Co.* v. *Butler*, *suprà*.

(*b*) *Post*, p. 980.

render him liable for an unconscious breach of the covenant (*c*). In one case (*d*), a yearly tenant, without express notice that his landlord was bound by a covenant not to use the premises as a beershop, was restrained from doing so; upon the ground that, although only a yearly tenant, he was as much bound to inquire into his landlord's title, as if he had been the purchaser of a larger interest (*e*). So, too, an underlessee has been held to be bound by covenants in the original lease of which he had no actual notice, on the ground that he ought to have satisfied himself as to his lessor's title (*f*): and, in a modern case, where a purchaser of the fee simple entered into restrictive covenants as to the user of the land, and afterwards granted a lease which did not contain any similar prohibition, the lessee, though he had no actual notice of the covenants, was restrained at the suit of the original vendor from committing a breach (*g*). The 2nd section of the V. and P. Act, and sect. 3 (1) of the Conveyancing Act, 1881, which preclude a purchaser of a leasehold interest from requiring title to the freehold or leasehold reversion in the absence of express stipulation, do not relieve such a purchaser from constructive notice of anything which he would have discovered had he examined that title. The effect, in fact, of not stipulating for the production of the lessor's title is, since the Act, the same as was formerly that of a stipulation not to call for it (*h*).

Effect of V. & P. Act, and Conv. Act, 1881.

The primary equitable remedy is, as we have seen, an injunction to restrain a breach of the covenant; but now, since the passing of Lord Cairns' Act (21 & 22 Vict. sect. 2), the Court may, in all cases where it has jurisdiction to entertain

Damages may now be awarded under Lord Cairns' Act.

(*c*) *Parker* v. *Whyte*, 1 H. & M. 167; *Robson* v. *Flight*, 4 D. J. & S. 608.

(*d*) *Wilson* v. *Hart*, 1 Ch. 463; cf. *Williams* v. *Carter*, 9 Eq. 678, where the covenant being contained in a deed which did not necessarily form part of the title, no examination of the full title would have brought it to light.

(*e*) See too *Clements* v. *Welles*, 1 Eq. 200; *Morland* v. *Cook*, 6 Eq. 252; *Feilden* v. *Slater*, 7 Eq. 523.

(*f*) *Parker* v. *Whyte*, 1 H. & M. 167; see *Wilson* v. *Hart*, and *Clements* v. *Welles*, *suprà*; *Evans* v. *Davis*, 10 Ch. D. 747.

(*g*) *Feilden* v. *Slater*, *suprà*.

(*h*) *Patman* v. *Harland*, 17 Ch. D. 353; *Thornewell* v. *Johnson*, 50 L. J. Ch. 641; *post*, p. 981.

Chap. XIV. Sect. 4.

an application for an injunction against a breach of covenant, or against the commission or continuance of any wrongful act, award damages to the party injured either in addition to, or in substitution for, such injunction; and such damages may be awarded, even though not specifically claimed (*i*). Where the plaintiff is entitled to an injunction, the Court will, in addition, award damages in respect of past breaches of the covenant (*k*); or in substitution, where, after the issue of the writ, an injunction has become impossible (*l*); or where the plaintiff has been guilty of laches (*m*); or where damages are the more appropriate remedy (*n*). But, in the recent case of *Doherty* v. *Allman* (*o*), it was laid down by Lord Cairns, in the House of Lords, that where there is a negative covenant a Court of Equity has no discretion to exercise; that if parties for valuable consideration with their eyes open contract that a particular thing shall not be done, all that a Court of Equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done. It is not in such a case a question of the balance of convenience or inconvenience, or of the amount of damage, or of injury; it is the specific performance by the Court of that negative bargain which the parties have made, with their eyes open, between themselves. This doctrine, though startling in its terms, has generally been accepted by the profession. It is subject, of course, to the general qualification, established by such cases as the *Duke of Bedford* v. *Trustees of British Museum* (*p*), which emphasizes the equitable nature of the jurisdiction, by laying down that the plaintiff who is entitled to the benefit of the restrictive covenant may by his conduct, or omissions, place himself in such an altered relation to the person bound by it, as makes it manifestly unjust for him to ask a Court to insist upon its enforcement by injunction. It must not be supposed that

Where injunction the only remedy.

Principle upon which acquiescence affects remedy.

(*i*) *Carlton* v. *Wyld*, 32 B. 266. As to the remedy by injunction on a representation not amounting to a covenant, see *Piggott* v. *Stratton*, 1 D. F. & J. 33; *Martin* v. *Spicer*, 34 Ch. D. 1.

(*k*) *Hindley* v. *Emery*, 1 Eq. 52.

(*l*) *Carlton* v. *Wyld*, 32 B. 266.

(*m*) *Senior* v. *Pawson*, 3 Eq. 330, not a case under a covenant.

(*n*) *Martin* v. *Headon*, 2 Eq. 425.

(*o*) 3 Ap. Ca. 709, 720; and see *Richards* v. *Revitt*, 7 Ch. D. 224.

(*p*) 2 M. & K. 552.

this qualification suggests that a contractual obligation can disappear, even as regards the equitable remedy attaching to it, as circumstances change. It applies only where such an alteration takes place through the acts or permission of the plaintiff, or those under whom he claims, that his enforcing his covenant becomes unreasonable. And upon the same principle an amount of acquiescence, less than that which would be a bar to all remedy, may operate on the discretion of the Court, and induce it to give damages instead of an injunction (*q*).

General remarks on Ld. Cairns' Act.

It may be remarked, in this connection, (1) that the repeal of Lord Cairns' Act by 46 & 47 Vict. c. 49, has not affected the jurisdiction of the Court, under the Judicature Acts, to give damages alternatively to, or concurrently with, an injunction (*r*); and (2) that the principle of this jurisdiction does not enable the Court to compel a person to sell his property, where he has a right to an injunction, unless it be in the case of a merely nominal injury (*s*).

No remedy by injunction in the County Courts.

We may here remark that the power of the County Courts, under the Acts conferring on them an equitable jurisdiction, to issue orders in the nature of injunctions, is confined to cases where an injunction is requisite for granting relief under their other heads of equitable jurisdiction (*t*): so that, even in cases where the injury sustained by a breach of covenant is merely nominal, the proper remedy is still by an action in the Chancery Division.

Instances of

Acting on the principle explained above, the Court has

(*q*) *Sayers* v. *Collier*, 28 Ch. D. 103, 110.

(*r*) Sect. 5. *Sayers* v. *Collier*, *supra*.

(*s*) *Krehl* v. *Burrell*, 7 Ch. D. 551; 11 Ch. D. 146; *Aynsley* v. *Glover*, 18 Eq. 544; *Smith* v. *Smith*, 20 Eq. 500. It is conceived that the judgment of Pearson, J., in the recent case of *Holland* v. *Worley*, 26 Ch. D. 578, and *Allen* v. *Ayres*, W. N. (1884) 242, in so far as it seeks to recognize a discretion in the Court, where the damages are otherwise relatively very small, cannot be supported. See *Greenwood* v. *Hornsey*, 33 Ch. D. 471.

(*t*) See 28 & 29 V. c. 99, s. 1; County Court Rules, 1886, O. XXII. r. 12.

Chap. XIV. Sect. 4.

application of the principle.

refused to interfere on behalf of the plaintiff by way of injunction in the following cases. Where the leases of an estate contained covenants by the lessees which were intended to be for the general benefit of the property (*e. g.*, covenants to build upon an uniform plan), and the landlord released some of his tenants, the Court would not at his suit restrain a similar infringement of the covenants by the others (*u*). So, where on the sale of a building estate in lots, the purchasers entered into restrictive covenants with the vendor, and also *inter se*, and the vendor permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, it was held that he could not enforce them against a purchaser who bought *after* the breaches had been committed (*x*). Where a lease of a house contained a covenant by the lessee to use it as a private dwelling-house only, with a proviso that, if any of the adjoining houses of the lessor should be turned into shops, the lessee might convert the demised premises to a similar use, and one of the adjoining houses was subsequently let to a photographer, who, without making any structural or architectural alterations in the building, used the front ground-floor room for the display and sale of photographs and albums, it was held that this was a conversion into a shop, and that the lessee was discharged from his covenant (*y*).

In doubtful cases.

Restrictive covenants of this kind, as being against common right, are in doubtful cases construed favourably to the covenantor. Thus, where the covenant was not to use the building "as a public-house for the sale of beer, wine, malt liquors, or spirits," it was held that the sale of beer by retail, under a licence not to be drunk on the premises, was not a breach of the covenant (*z*). So, a covenant not to engage in a specified trade, "or in any matter relating

(*u*) *Roper* v. *Williams*, T. & R. 18.

(*x*) *Peek* v. *Matthews*, 3 Eq. 515.

(*y*) *Wilkinson* v. *Rogers*, 2 D. J. & S. 62; *Kelsey* v. *Dodd*, 52 L. J. Ch. 34, where Jessel, M. R., held that the remedy in damages was lost, as well as the right to an injunction.

(*z*) *Pease* v. *Coats*, 2 Eq. 688; see cases cited *ante*, p. 138.

thereto," within a given district, does not prevent the covenantor from lending money to persons engaged in that trade within the prohibited limits; even though the mortgagor's only means of re-payment are out of the profits of the trade (*a*); nor does it prevent him from selling houses within the district for the purposes of the prohibited trade (*b*). But a covenant in a lease of cellars under a chapel, that they shall be used "as for wine-cellars only, and *not for interment or burial*" has been held to be broken by their user for the storage and sale of beer and spirits (*c*). So, a covenant not to erect buildings is broken by throwing out bow-windows (*d*).

Effect of partial acquiescence.

Acquiescence, or even participation, in trivial breaches of the covenant, will not of itself, in the absence of special circumstances, deprive a person, injured by a substantial breach, of his equitable remedy. Thus, in a modern case, where each of several owners of houses in a row had entered into restrictive covenants with the owner of the building estate, as to building and planting trees upon their properties, an injunction was granted at the suit of the owner of one house restraining a breach of the building covenants, notwithstanding that the plaintiff and the other owners had committed breaches of the covenants as to planting, which had not been interfered with (*e*); and it was held that he might obtain relief without bringing the other owners before the Court (*f*); nor is the principle of acquiescence to be carried so far as to hold that a man who has permitted one infringement is bound to permit another (*g*); and the mere fact of not taking legal proceedings cannot in general be construed as acquiescence (*h*): especially where the party, whose rights

(*a*) *Bird* v. *Lake*, 1 H. & M. 338.

(*b*) *Ib.*

(*c*) *Turner* v. *Marriott*, V.-C. K., 31 July, 1866.

(*d*) *Western* v. *McDermott*, 1 Eq. 499; *Lord Manners* v. *Johnson*, 1 Ch. D. 673.

(*e*) *Western* v. *McDermott*, 2 Ch. 72; *Jackson* v. *Winnifrith*, 47 L. T. 243; *Chitty* v. *Bray*, 48 L. T. 860.

(*f*) *Ib.*

(*g*) *Per* L. J. Turner in *Lloyd* v. *L. C. & D. R. Co.*, 2 D. J. & S. 578; *Richards* v. *Revitt*, 7 Ch. D. 224.

(*h*) *Rochdale Canal Co.* v. *King*, 2 Si. N. S. 78, 89; *Duke of Northumberland* v. *Bowman*, 56 L. T. 773.

Chap. XIV. Sect. 4.

are invaded, is ignorant of the invasion (*i*). There may be in the same case acquiescence as to one breach and not as to another, as, *e. g.*, where a purchaser bought lands upon which, four years previously, buildings had been erected in violation of a covenant of which the purchaser had notice, and then proceeded to erect further buildings in violation of the same covenant, a mandatory injunction to pull down the old buildings which had been acquiesced in for five years was refused, but as to the new buildings was granted (*k*). What degree of acquiescence will be a sufficient bar to relief, must, in each case, depend upon the nature of the breach; as, *e. g.*, whether it is incurable, or merely temporary (*l*). In one case, where the covenant was not to use the house "as a public-house," and the breach was manifest, a delay of nearly six months did not deprive the vendor of his relief (*m*). But this case depended on special circumstances; and where there is a substantial breach, as, *e. g.*, where, in contravention of the covenant, a noxious trade is being carried on, or a new building is being erected, or a structural or architectural alteration is being made in an existing building, a far shorter period will suffice to bar the title to relief (*n*).

Relief granted though the damage sustained is trivial.

And, although the Court will not entertain frivolous applications, it yet will, in any doubtful case, restrain a violation of a deliberate engagement: thus, where an agreement had been entered into between neighbouring landowners as to their mutual user of rights of water, the Court restrained a clear violation of the contract by one of the parties, without entertaining the question as to how far or whether the other was prejudiced thereby (*o*): and, in another case, the Court,

(*i*) *L. C. & D. R. Co.* v. *Bull*, 47 L. T. 412.

(*k*) *Gaskin* v. *Balls*, 13 Ch. D. 324.

(*l*) See *Kemp* v. *Sober*, 1 Si. N. S. 517; cf. *Duke of Bedford* v. *Trustees of British Museum*, 2 M. & K. 552; *Roper* v. *Williams*, T. & R. 18; *Peek* v. *Matthews*, 3 Eq. 515; *German* v. *Chapman*, 7 Ch. D. 271, 279.

(*m*) *Mitchell* v. *Steward*, 1 Eq. 543.

(*n*) See further as to the effect of delay and acquiescence on the equitable right to relief for breach of covenant, Kerr on Injunctions, 387 *et seq.*

(*o*) *Dickenson* v. *G. J. C. Co.*, 15 B. 260; *Tipping* v. *Eckersley*, 2 K. & J. 264; *Johnstone* v. *Hall*, ib. 420; *Leech* v. *Schweder*, 9 Ch. 465, n.

with reference to an infringement of a covenant by using adjoining premises as a school, well observed that "the feeling of anxiety is damage" (*p*); and it must be clear that there is no appreciable or, at all events, no substantial damage, before the Court will, merely on the ground of the smallness of the damage, withhold its hand from enforcing the covenants (*q*). Indeed, where there is a clear breach of covenant, the covenantees are entitled to an injunction without the necessity of showing any damage (*r*).

It has been held that the establishment of a national school is not a "nuisance" within the strict legal meaning of the term (*s*).

Covenants void as contrary to rule against perpetuities.

It must here be noticed that any covenant, the benefit or burden of which runs with the land, which gives a present right to an interest in land which may arise at a period beyond the legal limit, is void, notwithstanding that the person entitled to the benefit of it may release it (*t*). Thus, a covenant by a purchaser, that he, his heirs, and assigns, will re-convey to the vendor at any time, on being required to do so, at a fixed price, is void as transgressing the rule against

(*p*) *Kemp* v. *Sober*, 1 Si. N. S. 520. As to keeping a school being a breach of a covenant to use the premises as a private dwelling-house only, see also *Wickenden* v. *Webster*, 6 E. & B. 387; *Johnstone* v. *Hall*, 2 K. & J. 414. And it makes no difference that no benefit or profit is derived from the school or institution, and that it is wholly charitable; *German* v. *Chapman*, 7 Ch. D. 271; *Bramwell* v. *Lacy*, 10 Ch. D. 691 (a hospital); *Rolls* v. *Miller*, 27 Ch. D. 71.

(*q*) *Per* L. J. Turner, in *Lloyd* v. *L. C. & D. R. Co.*, 2 D. J. & S. 580; *Western* v. *McDermott*, 1 Eq. 499. See *Johnstone* v. *Hall*, 2 K. & J. 414, where relief was refused in a suit by a remainderman, no special damage being proved.

(*r*) *Lord Manners* v. *Johnson*, 1 Ch. D. 673; and see *Doherty* v. *Allman*, 3 Ap. Ca. 709.

(*s*) *Harrison* v. *Good*, 11 Eq. 338, where the covenant was not to do or suffer anything which might be deemed a nuisance; but see *Walter* v. *Selfe*, 4 De G. & S. 315; *Hole* v. *Barlow*, 4 C. B. N. S. 334; with which cf. *Bamford* v. *Turnley*, 3 B. & S. 66; and see judgment of Sir W. Erle in *Brand* v. *Hammersmith R. Co.*, L. R. 2 Q. B. 246, 248. As to what is a nuisance, see Kerr on Injunctions, 169 *et seq.*

(*t*) *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562; overruling *dicta* in *Gilbertson* v. *Richards*, 4 H. & N. 277, 297; and *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421.

Chap. XIV. Sect. 4.

perpetuities (*u*). So, too, an unlimited power of re-entry in the event of a breach of covenant (*x*). But these cases must be carefully distinguished from those in which the covenant is a purely personal one, and does not relate to, or give any interest in, land. Such a covenant,—*e.g.*, to pay money in an event which may only arise at a distant period of time,—is not obnoxious to the rule (*y*).

Covenants for title and production.

As regards covenants for title and for production, &c., of title deeds, they stand on the same footing as other affirmative covenants, the benefit of which runs with the land, though the burden does not (*z*); and the Conveyancing Act, 1881 (*a*), which enacts, that the benefit of an implied covenant for title is to run with the land simply declares the law. But in the case of an acknowledgment for production, or undertaking for safe custody (*b*), there is this important difference; that by the statute the burden of the acknowledgment, or undertaking, is made to run so as to bind the individual having possession or control of the documents, so long only as he has such possession or control.

Mention of assigns not necessary.

It may here be pointed out that by sect. 58 of the same Act, the mention of assigns is made unnecessary for the purpose of making the covenant run with the land (*c*). But the section, of course, does not make the covenant run in cases where it would not formerly have run, even though assigns were expressly mentioned.

Covenantor and his representatives liable on covenants in gross.

The covenantor and his real and personal representatives may, even after alienation (*d*), be sued upon covenants of any of the above kinds, although they may not bind the alienees of the land (*e*).

(*u*) *L. & S. W. R. Co.* v. *Gomm*, *suprà*; *Trevelyan* v. *Trevelyan*, 53 L. T. 853.

(*x*) *Dunn* v. *Flood*, 25 Ch. D. 629.

(*y*) *Witham* v. *Vane* (H. L.), cited in Challis' R. P. 341, 352; *Walsh* v. *Secretary for India*, 10 H. L. C. 367.

(*z*) Third Rep. of R. P. Commrs., 52; *Spencer's Case*, 1 Sm. L. C. 87.

(*a*) S. 7, sub-s. 6.

(*b*) S. 9.

(*c*) See *Spencer's Case*, 5 Co. 16.

(*d*) *Millar* v. *Small*, 1 Macq. 345; and see *King's Coll.*, *Aberdeen* v. *Hay*, *ib.* 526; and cf. *Burns* v. *Bryan*, 12 Ap. Ca. 184.

(*e*) See and consider *Stokes* v. *Russell*, 3 T. R. 678.

Liability of covenantor, how affected by bankruptcy.

Under the Bankruptcy Act of 1883, as we have already seen, where the property of the bankrupt consists of land of any tenure burdened with onerous covenants, the trustee may within a limited time disclaim it, notwithstanding prior acts of ownership; but any person injured by the disclaimer is to be deemed a creditor of the bankrupt to the extent of such injury; and his debt is made proveable in the bankruptcy (*f*).

Not affected by alienation.

Where land is sold in consideration of a perpetual rent-charge which the purchaser covenants to pay, he and his estate remain for ever liable under the covenant, although the land itself be sold and conveyed, *cum onere*, to a sub-purchaser (*g*).

Section 5.

(5.) *Purchaser's remedies on vendor's covenants.*

Purchaser's general remedies on vendor's covenants.

We may now consider the remedies of the purchaser, after the execution of the conveyance, upon the vendor's covenants.

And to consider first the legal rights of the purchaser and his representatives under the covenants for title.

Who are bound.

Such covenants, it may be observed, bind only the covenantor and his representatives, and not alienees as such; it is therefore only necessary to consider who are entitled to the benefit of them.

Benefit of covenants for title runs with seisin,

Such covenants may be enforced not only by the covenantee and his representatives, but by alienees who claim under the seisin vested in the original covenantee, or, as it is expressed, by privity of estate (*h*): for instance, if A. convey land to B. and his heirs to certain specified uses, or to such uses as C. shall appoint, and covenant for title with B. and his heirs, the right to sue upon the covenants will go with the seisin to the

(*f*) 46 & 47 V. c. 52, s. 55, and *vide ante*, p. 292.

(*g*) *Millar* v. *Small*, 1 Macq. 345; *King's Coll., Aberdeen* v. *Hay*, *ib.* 526.

(*h*) 3 T. R. 402.

Chap. XIV. Sect. 5.

persons from time to time claiming under the uses limited by the conveyance, or under any appointment by C. under his power (*i*): so, if the conveyance were to B. and his heirs, to such uses as C. shall appoint, and in default of appointment to the use of C. in fee, and A. covenant with C. and his heirs, and C. (instead of exercising his power of appointment) convey the estate limited to him in default of appointment, his alienee can sue upon A.'s covenants (*k*): so, if C., in exercise of his power, appoint the land to the use of D., and covenant with him and his heirs for title, C.'s covenants can be sued upon by the alienees of D.: and in the two former cases, the right to sue upon A.'s covenants, and, in the last case, the right to sue upon C.'s covenants, will go with the land to all successive owners (*l*): and the heir or assignee although not named in the covenants for title may, even independently of sect. 58 of the Conveyancing Act, 1881, nevertheless sue thereupon (*m*).

to *cestui que use* and his alienees.

So covenants with *cestui que use* will run with his estate.

But, in the case last supposed, D.'s alienee, although he might sue upon C.'s covenant, could not sue upon A.'s; as he would not take the estate of A.'s covenantee (*n*): so if C., instead of appointing to the use of D., were to appoint to such uses as D. should appoint, D.'s appointee could not sue upon C.'s covenant: for he would not take the estate of C.'s covenantee.

But cannot be sued on by alienee not claiming in privity of estate.

In all these cases of covenants entered into with the owner of the land, *i. e.*, the vendor's covenants with the purchaser, while it is not necessary that the covenantor should have any interest in the land, in order to render him liable on them, it is essential that the covenantee should, at the date of the covenant being entered into, have the land to which the covenant relates, in order to enable him to sue (*o*).

What estate covenantor and covenantee must have.

(*i*) See Sug. 578.

(*k*) See Sug. 579, where the point is held to be free from doubt.

(*l*) See Sug. 578 *et seq.*

(*m*) *Spencer's Case*, 5 Co. 16; *Lougher* v. *Williams*, 2 Lev. 92; see 2 Bac. Ab. 349.

(*n*) *Roach* v. *Wadham*, 6 East, 289.

(*o*) 1 Sm. L. C. 89 *et seq.*, and cases there cited.

Whether there must be privity of estate, as well with covenantor as covenantee.

Lord St. Leonards suggests a doubt (*p*) whether the doctrine of privity of estate may not apply as well to covenantor as to covenantee; that is, whether, in order that the alienee may sue, he must not only claim the estate of the covenantee, but also claim it under a conveyance or appointment by the covenantor; which, in a large proportion of conveyancing transactions, is not the case. The Real Property Commissioners consider that the doubt is set at rest by authority (*q*); and it is impossible to see how this conclusion can be otherwise than correct, if the *Prior's Case* (*r*) and other well-known authorities (*s*) are good law.

Covenants run with leaseholds or copyholds.

Privity at date of covenant essential.

And the benefit of the covenants will go with the estate of the original covenantee, although leasehold (*t*), or copyhold (*u*). Where, as is frequently the case on a sale of copyholds, the covenants for title were contained in the deed of covenant to surrender, V.-C. Shadwell seems to have entertained no doubt that the covenants would run with the land: inasmuch as the covenant to surrender, and the surrender, are parts of the same transaction (*v*). But as the covenantee had no estate at the date of entering into the covenant, this decision cannot be supported, and has not been relied on in practice (*x*).

Benefit of covenants apportioned with land and estate.

Whether, where land is divided, the benefit of attendant covenants will go to each alienee in respect of the portion of land taken by him, is apparently a question of intention in each case, although there is an absence of authority upon the point; thus, where the *estate* is divided, as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance, the owner of each portion of the inheritance can sue for damages proportioned

(*p*) Sug. 581.

(*q*) See Third Rep. 52; 1 Dav. 137; and 9 Jarm. Conv. 356; 1 Sm. L. C. 88.

(*r*) Co. Litt. 385a.

(*s*) 1 Sm. L. C. 87.

(*t*) *Noke* v. *Awder*, Cro. El. 436; and *Lewis* v. *Campbell*, 8 Taunt. 715; *Campbell* v. *Lewis*, 3 B. & Ald. 392.

(*u*) See *Riddell* v. *Riddell*, 7 Si. 529.

(*v*) *Ibid.* 534, 535, and Sug. 579.

(*x*) See 1 Dav. 116.

Chap. XIV. Sect. 5.

to the extent of his estate (*y*); so, where the estate is cut up into undivided shares (*z*).

Remedy on covenants in conveyance of equitable estate.

Where the estate is merely equitable, there can be no assignee at Law, and the covenants cannot be enforced at Law by an equitable assignee; so, if the conveyance, although intended so to do, do not in fact pass any legal estate, the assignee cannot sue (*a*); but, in either case, the assignee, although unable to sue in his own name, would probably be entitled to sue in the name of the original covenantee (*b*).

Assignee may sue in name of covenantee.

Remedy in Equity.

Equity will assist a covenantee who has lost his legal remedy by the contrivance of the covenantor (*c*); but it will not, as a mode of enforcing the covenant for quiet enjoyment, interfere by injunction against an illegal distress by the vendor after conveyance (*d*).

Condition as to absence of covenants for title.

It is common upon sales, even by the Court, to stipulate that the absence of covenants for title running with the land shall not be made the subject of objection or requisition by the purchaser; and such condition is not found to have any depreciatory effect. It is however inserted rather *ex abundante cautelâ* than as a matter of necessity; for there is no authority for holding that the absence of such a covenant constitutes a valid ground of objection to the title.

Inability to give legal covenant for production not an objection to title.

The Vendor and Purchaser Act (*e*) provides that the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of the documents of title shall not be an objection to title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

(*y*) See 9 Jarm. Conv. 404; *Noble* v. *Cass*, 2 Si. 343.

(*z*) *Badeley* v. *Vigurs*, 4 E. & B. 71.

(*a*) 9 Jarm. Conv. 366.

(*b* See *Riddell* v. *Riddell*, 7 Si. 529.

(*c*) *Thornton* v. *Court*, 3 D. M. & G. 393.

(*d*) *Drake* v. *West*, 22 L. J. Ch. 375.

(*e*) 37 & 38 V. c. 78, s. 2 (3).

As to breach of covenants for title.

In considering what amounts to a breach of the several usual covenants for title, it may be premised, that, as respects the covenants for seisin in fee, (or, in the case of a lease, that the lease is valid,) and for right to convey, surrender, or assign, and also the usual trustee's covenants against incumbrances, the same, if broken at all, are necessarily broken immediately upon the execution of the assurance which contains them (*f*); so that the Statute of Limitations immediately begins to run in favour of the covenantor: and this, although the covenantee be in ignorance of the breach (*g*); and be kept in such ignorance by the fraud of the covenantor (*h*). On the other hand, the usual covenants, that the purchaser shall enjoy the estate (*i*) free from incumbrances (*k*), and for further assurance, can only be broken by subsequent events; and the Statute does not begin to run until there is an actual breach, and then only in respect of that particular breach (*l*).

Statute of Limitations runs, from what time.

Covenants for seisin and right to convey, how broken.

A covenant that the vendor is seised in fee of an estate, conveyed as freehold, is, of course, broken, if the estate be copyhold (*m*); and a covenant that the vendor and another conveying party have good right to convey is broken, if such other party, although having the estate, be personally incompetent to transfer it (*n*).

Where leaseholds were assigned for the lives of A., B. and C., and the survivors and survivor of them, and the assignor

(*f*) See *Salman* v. *Bradshaw*, Cro. Jac. 304: as to whether recitals of the vendor's title in the conveyance can estop the purchaser, *vide ante*, p. 595; see, too, and consider *Spoor* v. *Green*, L. R. 9 Ex. 99.

(*g*) *Short* v. *M'Carthy*, 3 B. & Ald. 626.

(*h*) *Imperial Gas Co.* v. *London Gas Co.*, 10 Ex. 39. This case was dissented from by the majority of the C. A. in *Gibbs* v. *Guild*, 9 Q. B. D. 59; which is inconsistent with the proposition in the text; *sed quære* whether this latter case was rightly decided. And see *Armstrong* v. *Milburn*, 54 L. T. 247, 723; *Barber* v. *Houston*, 14 L. R. Ir. 273.

(*i*) See *Ireland* v. *Bircham*, 2 Sc. 207.

(*k*) *Vane* v. *Lord Barnard*, Gilb. R. 6, 8.

(*l*) See 9 Jarm. Conv. 402.

(*m*) *Gray* v. *Briscoe*, Noy, 142; the word "not" in the report is evidently a clerical error; see context.

(*n*) *Nash* v. *Aston*, T. Jones, 195.

Chap. XIV. Sect. 5.

covenanted that the lease was valid and subsisting "for the three lives, and the survivors and survivor of them," and B. was dead at the date of the deed, the Court of Exchequer Chamber held that this was merely a covenant that the lease was subsisting, not that the three lives were still in existence (*o*).

How usually restricted.

The covenant for seisin or right to convey is usually restricted to the acts of the covenantor where he has acquired the estate by purchase, and to the acts of himself, his ancestors or testators, where he claims by descent or devise; and, so qualified, is merely a warranty on his part "that he sells the estate in the same plight that he received it, and not in any degree made worse by him" (*p*). Even without express words of restriction, the form of the deed may show that the covenant was intended to be qualified.

May be qualified, without express words.

Purchaser may sue before eviction.

The purchaser may, if he please, bring an action immediately on discovering the defect in title, without waiting to be evicted or disturbed (*q*), or may wait until eviction (*r*).

Covenant for quiet enjoyment and freedom from incumbrances.

The common covenant for quiet enjoyment (*s*), although not broken until some entry or other actual disturbance be made upon the title (*t*), is apparently broken by a decree in a suit in Equity, although equitable disturbances be not specified (*u*), or by the obstruction of a necessary right of way (*x*), or a notice to tenants to pay rent to the adverse claimant (*y*), or a claim in respect of subsequent arrears of a quit rent incident to the tenure of the property (*z*). And it has been

(*o*) *Coates* v. *Collins*, L. R. 7 Q. B. 144.

(*p*) Per Lord Eldon, in *Browning* v. *Wright*, 2 B. & P. 22.

(*q*) Sug. 610.

(*r*) See *King* v. *Jones*, 5 Taunt. 418, 428.

(*s*) As to a clause of warranty being equivalent thereto, see *Williams* v. *Burrell*, 1 C. B. 402.

(*t*) Shep. T. 170.

(*u*) *Hunt* v. *Danvers*, T. Raym. 370; and see *Morgan* v. *Hunt*, 2 Ventr. 213; Sug. 600. But see and distinguish *Howard* v. *Maitland*, 11 Q. B. D. 695.

(*x*) *Andrews* v. *Paradise*, 8 Mod. 318; *Morris* v. *Edgington*, 3 Taunt. 24.

(*y*) *Edge* v. *Boileau*, 16 Q. B. D. 117; *Hunt* v. *Danvers*, T. Raym. 371; but cf. *Witheot* v. *Nine*, Brownl. 81.

(*z*) *Hammond* v. *Hill*, Com. 180 (the covenant *specified* rents and rentcharges).

recently laid down that it is in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant is broken, although neither the title to the land nor the possession of the land may be otherwise affected (*a*).

How broken.

The covenant, if general, is not broken by a *wrongful* claim or eviction (*b*), unless it be the act of the covenantor himself or his heirs or executors (if named) (*c*); in which case the wrongful act, if intended as a claim to title (*d*), is a breach even of a covenant against lawful disturbances (*e*); and a covenant in terms extending to pretended claims (*f*), or a general covenant against disturbances by specified individuals (*g*), or by claimants in general (with a specified exception) (*h*), is broken by a wrongful disturbance. It was held in one case (*i*), that covenants for seisin in fee, and good right to convey free from incumbrances, were not broken when parties were, at the date of the conveyance, in actual possession of part of the estate under leases made by a stranger under a mistake: but the decision seems to be of very doubtful authority (*k*). In a recent case the ordinary covenants for title and quiet enjoyment were held by a majority of the Court of Exchequer not to be broken by the subsistence of a mining lease, where the purchaser, when he took his conveyance, knew that the minerals were sub-

(*a*) *Sanderson* v. *Mayor of Berwick*, 13 Q. B. D. 547. The covenant is independent of the performance of the other covenants, and can be sued upon although the plaintiff is at the time guilty of breaches of other covenants; *Dawson* v. *Dyer*, 5 B. & Ad. 584; *Edge* v. *Boileau*, 16 Q. B. D. 117.

(*b*) See *Kirby* v. *Hansaker*, Cro. Jac. 315; *Dudley* v. *Folliott*, 3 T. R. 584; *post*, p. 887.

(*c*) See 9 Jarm. Conv. 376; *Forte* v. *Vine*, 2 Rol. R. 19.

(*d*) See *Penn* v. *Glover*, Cro. El. 421; *Morgan* v. *Hunt*, 2 Vent. 213; *Lloyd* v. *Tomkies*, 1 T. R. 671; and Ld. Ellenborough's remarks in *Seddon* v. *Senate*, 13 Ea. 72.

(*e*) *Lloyd* v. *Tomkies*, *supra*.

(*f*) *Chaplain* v. *Southgate*, 10 Mod. 384.

(*g*) *Foster* v. *Mapes*, Cro. El. 212; *Perry* v. *Edwards*, 1 Str. 400; *Nash* v. *Palmer*, 5 M. & S. 374; *Fowle* v. *Welsh*, 1 B. & C. 29.

(*h*) *Woodroff* v. *Greenwood*, Cro. El. 518.

(*i*) *Jerritt* v. *Weare*, 3 Pr. 575.

(*k*) See Sug. 601.

Chap. XIV. Sect. 5.

stantially worked out, or by a subsidence of the surface, caused by the previous workings, although the party suing on the covenants, who was an assignee of the purchaser, did not know of the existence of the lease, or that the minerals had been worked (*l*).

Meaning of particular expressions—"acts;" "means;"

The word "acts" means something done by the person against whose acts the covenant is made; and the word "means" has a similar meaning, *viz.*, something proceeding from the person covenanting (*m*) or the person against whose acts, &c. the covenant is made. Where A. procured a fine to be levied to himself and his wife and his own heirs, an entry by the widow was held to be a breach of his covenant with a lessee for quiet enjoyment against himself (A.) and all persons claiming by his "means" (*n*).

"claiming under;"

So, a covenant for quiet enjoyment against all persons claiming "under" the covenantor, is broken by an entry by his widow (*o*), or by a person claiming under the prior exercise by the covenantor of a power of appointment, although the estate was never vested in the covenantor (*p*), or under a joint appointment by the covenantor and A. B. (*q*), or by mortgagees of a term which was created with his concurrence, though the estate did not move from him (*r*). But a covenant for quiet enjoyment against persons claiming "by, from, or under" him, seems not to extend to persons claiming by title paramount in respect of his mere default (*s*), although it may be otherwise where the paramount title is brought into operation by his "acts" (*t*).

General effect of the covenant.

The ordinary covenant for quiet enjoyment, we may observe, is to be regarded merely as a covenant to secure

(*l*) *Spoor* v. *Green*, L. R. 9 Ex. 99, *sed quære*.

(*m*) *Per Cur.* in *Spencer* v. *Marriott*, 1 B. & C. 459; and see *Dennett* v. *Atherton*, L. R. 7 Q. B. 316.

(*n*) *Butler* v. *Swinerton*, Cro. Jac. 656.

(*o*) *Anon.*, Godb. 333.

(*p*) *Hurd* v. *Fletcher*, Doug. 43; *Evans* v. *Vaughan*, 4 B. & C. 261, 267.

(*q*) *Calvert* v. *Sebright*, 15 B. 156.

(*r*) *Carpenter* v. *Parker*, 3 C. B. N. S. 206.

(*s*) *Stanley* v. *Hayes*, 2 G. & D. 411; 3 Q. B. 105, a case of distress for land tax, which the covenantor ought to have paid; but see *Ireland* v. *Bircham*, 2 Sc. 207.

(*t*) See a note to 9 Jarm. Conv.

title and possession, not as a guarantee that the lessee may use the land for any purpose he pleases. Thus, where A., on taking a conveyance in fee, covenanted with B., his vendor, not to carry on the trade of a beer-seller on the premises, and afterwards leased part of the property without any restriction as to this particular trade, though other specified trades were expressly prohibited, and the lease was assigned to C., who, without notice of A.'s covenant, opened and carried on a beer-shop, until he was restrained by injunction at the suit of B., it was held by the Court of Exchequer Chamber in an action by C. against A. for breach of the covenant for quiet enjoyment, that the covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not falling within the prohibited trades (*u*).

"default;"

A covenant for quiet enjoyment against persons claiming "by or through his default," would, it appears, be broken by an entry by parties whose title he had it in his own power to bar;—*e. g.*, if he were tenant in tail in possession, and the entry were made by remaindermen (*x*);—and such a covenant has been held to extend to claims in respect of arrears of quit rent, although they accrued due before he acquired the estate (*y*): the decision, however, is disapproved of by Lord St. Leonards (*z*). But the omission by the covenantor to acquire from other parties a valid title, although he knew the defect, is not a "neglect or default" within the meaning of such a covenant (*a*).

"neglect or default;"

"permitted or suffered;"

A covenant that the covenantor has not knowingly or willingly "permitted or suffered" (*b*) any act, &c., does not extend to a defect in title occasioned by the act of God, *e. g.*,

380, where the learned editor, coming to a different conclusion, contends that for this purpose acts and defaults are identical, as to which, query; and see Sug. 603, where the decision in *Stanley* v. *Hayes* is approved of.

(*u*) *Dennett* v. *Atherton*, L. R. 7 Q. B. 316; see and consider this case, and *Porter* v. *Drew*, 5 C. P. D. 143.

(*x*) *Lady Cavan* v. *Pulteney*, 2 V. 544.

(*y*) See *Howes* v. *Brushfield*, 3 Ea. 491.

(*z*) Sug. 602.

(*a*) See *Woodhouse* v. *Jenkins*, 9 Bing. 431; *Ireland* v. *Bircham*, 2 Sc. 207.

(*b*) As to the word "suffer" having a passive, and not an active, signification, see *Roffey* v. *Bent*, 3 Eq. 759; see, too, a case of mistake in parcels, *Wild* v. *Hillas*, 4 Jur. N. S. 1166.

the death of the *cestui que vie* (*c*); or to an act by others which the covenantor was a party to, but had no power to prevent; *e. g.*, a mortgage in which he (as trustee to bar dower) has concurred (*d*): but, of course, in such a case, the covenant would have been broken had it proceeded in the usual form, "or been party or privy to" (*e*).

"party or privy to."

Acknowledgment which has prevented apparent from becoming real easement.

In one case, where a house was sold with all easements, &c., and certain lights which had been actually used for more than the statutory period, were apparently subsisting easements at the time of sale, it was held that the fact of the vendor having signed a memorandum which prevented the Statute from running, did not amount to a breach of the ordinary covenant: inasmuch as such covenant referred only to actual and not to apparent easements (*f*).

As to covenants against known defects.

Although the fact of the purchaser having notice of a defect cannot prevent the covenants for title from extending to it, since extrinsic evidence of intention is inadmissible for the purpose of construing a deed; yet, in an action to rectify the covenant, that fact may be used as the basis of an inference, that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware. It has accordingly been suggested that, if the purchaser consents to take a defective title, in reliance on the covenant for title, so that the covenant is intended to cover a known defect, this intention should be clearly expressed in the covenant itself (*g*). If, however, the defect be not so apparent, it is conceived that a memorandum, signed by the covenantor and admitting that the defect was known, and intended to be provided for by the covenants, would be sufficient: for as the covenantor, seeking to escape the general terms of the covenant, must then, by evidence, dehors the deed, show that the covenantee had

(*c*) *Stannard* v. *Forbes*, 6 A. & E. 572.

(*d*) *Hobson* v. *Middleton*, 6 B. & C. 295.

(*e*) See 6 B. & C. 303.

(*f*) *Thackeray* v. *Wood*, 6 B. & S. 766, *sed quære.*

(*g*) Co. Litt. 384a, Butler's note, *ad fin.*; 9 Jarm. Conv. 381. It may be observed that none of the authorities warrant the proposition that it is doubtful whether the covenant would extend to a known defect.

notice of the defect, so the covenantee might, in like manner, show that the defect, though known, was not intended to be excepted (*i*); but the defect, if apparent on the conveyance, should be specified in the covenants; or be noticed in the recitals as intended to be covered by the covenants.

Qualification in words of grant.

It has been held, in the case of a lease, that the effect of a covenant for quiet enjoyment as against parties claiming under the lessor is not restricted by the introduction into the words of demise of the qualification "so far as in his power lies or as he lawfully can or may;" there being nothing else on the face of the lease to intimate that there was any doubt as to the title (*k*).

Case of wrongful eviction.

It is well settled that a general covenant for quiet enjoyment is confined to a lawful, and does not extend to a wrongful, eviction (*l*); but when the covenant is against the acts of particular persons, it extends to all their acts, whether lawful or not (*m*).

Covenant for further assurance—what acts not comprised in;

The ordinary covenant to do all "reasonable" acts for further assurance, or all such acts, &c., as the purchaser shall reasonably require, is not broken by a refusal to do an unnecessary act (*n*); or by a refusal occasioned by the act of God; *e. g.*, the insanity (*o*), death, or severe illness of the party whose further assurance is required (*p*); or by a refusal to give a bond for quiet enjoyment (*q*), or, according to some authorities, a covenant for production of title deeds (*r*); or, perhaps, to enter into fresh covenants for title (*s*). And

(*i*) See 1 S. & S. 445.

(*k*) *Calvert* v. *Sebright*, 16 B. 156.

(*l*) *Dudley* v. *Folliott*, 3 T. R. 584.

(*m*) *Nash* v. *Palmer*, 5 M. & S. 374.

(*n*) *Warn* v. *Bickford*, 9 Pr. 43.

(*o*) *Pet and Cally's case*, 1 Leon. 304.

(*p*) See *Nash* v. *Aston*, T. Jones, 195; and *Anon.*, Moore, 124, where sickness was held a valid reason for a married woman not levying a fine: and the Court agreed that the case would be the same "*si la feme soit grosement enseint sic ut ne poit traveller.*"

(*q*) *Staynroyde* v. *Locock*, Cro. Jac. 115.

(*r*) See *Hallett* v. *Middleton*, 1 Rus. 243; Sug. 613; but see *Fain* v. *Ayers*, 2 S. & S. 533, 535, *et quære.*

(*s*) *Coles* v. *Kinder*, Cro. Jac. 571;

Chap. XIV. Sect. 5.

a Court of Equity has refused, in a suit for the specific performance of the covenant for further assurance, to compel a mortgagor, tenant in tail, to execute a disentailing assurance; there being, in the opinion of the Court, nothing on the face of the deed to show that the parties contemplated the enlargement of the base fee created by the deed into a fee simple absolute (*t*). But it is otherwise, where the covenant is specific and shows an intention to enlarge the estate (*tt*).

what are comprised in.

But such covenant will be broken by a refusal to convey any interest acquired in the estate, even by purchase for valuable consideration (*u*); or to remove a judgment or other incumbrance (*x*): or to execute a duplicate of the conveyance, if the original has been burnt (*y*), or (*semble*) has been handed over to a sub-purchaser of part of the estate (*z*): but, in such cases, either the conveyance should bear an indorsement expressing that it is a duplicate (*a*), or it should upon the face of it purport to be merely a deed of confirmation.

Time allowed to party required to execute further assurance.

The party called upon to execute the further assurance may claim a reasonable time in which to procure professional assistance (*b*); and according to modern practice, which the Courts would doubtless recognize, a draft of the proposed assurance is furnished to him, that he may submit it to his legal advisers (*c*): and his costs ought, in strictness, to be tendered to him along with the assurance (*d*).

Covenants for title, how restricted.

A vendor's covenants for title are, as we have seen, generally limited to the acts of himself, his ancestors, devisors, grantors, or donors (if he have taken the estate otherwise

but the point is not clear; see Sug. 614; and 9 Jarm. Conv. 401, n.; *Lassels* v. *Catterton*, 1 Mod. 67.

(*t*) *Davies* v. *Tollemache*, 2 Jur. N. S. 1181; but see the special circumstances of this case.

(*tt*) *Bankes* v. *Small*, 34 Ch. D. 415, aff. 35 W. R. 765.

(*u*) *Taylor* v. *Debar*, 1 Ch. Ca. 274; 2 Ch. Ca. 212; *Otter* v. *Lord Vaux*, 6 D. M. & G. 638; but see *Davies* v. *Tollemache*, 2 Jur. N. S. 1181, a case of mortgage.

(*x*) *King* v. *Jones*, 5 Taunt. 418, 427.

(*y*) *Bennett* v. *Ingoldsby*, Finch, 262; Sug. 438, 613.

(*z*) *Napper* v. *Lord Allington*, 1 Eq. Ca. Ab. 166.

(*a*) *Ibid.*

(*b*) *Bennet's case*, Cro. El. 9.

(*c*) See Sug. 614.

(*d*) *Heron* v. *Treyne*, 2 Raym. 750.

than by purchase for value), and persons claiming by, through, under or in trust for him or them respectively; and this is so with the implied statutory covenants (*e*). It, however, frequently happens either that some of the covenants are general and others limited, or that the limited covenants are not consistent in their restrictions: in such cases, questions arise as to how far the restrictions in one covenant affect another.

Only by clearly expressed intention.

A covenant, general in terms, will be so construed, unless a contrary intention clearly appear (*f*); this, however, may be evidenced by any part of the instrument (*g*).

Covenants for title, how classified.

Before considering the effect of restrictive words in the covenants themselves, we may remark, that the five usual covenants may be divided into three classes, having distinct objects; *viz.*, first, the covenants for seisin and right to convey, which are strictly covenants for title; secondly, the covenants for quiet enjoyment, and *that* free from incumbrances (not a covenant that the estate *is free* from incumbrances, but merely that there shall be no disturbance by incumbrancers); and thirdly, the covenant for further assurance: and that the first class may be broken without there being any breach of the second or third; for the purchaser, although not acquiring a marketable title, may be undisturbed in the possession, and may never require any further assurance, or may obtain what he does require: also that, if either of the second class be broken (unless the covenant be so worded as to extend to wrongful disturbances), there must have been a breach of the first class: and lastly, that the covenant for further assurance may be broken without there being any breach of any of the other covenants.

Restrictive words, effect of; Lord St.

Upon this subject the four following propositions are laid down by Lord St. Leonards: *viz.*, first, that "where restrictive

(*e*) 44 & 45 V. c. 41, s. 7.

(*f*) See Sug. 605; *Cooke* v. *Founds*, 1 Lev. 40; *Barton* v. *Fitzgerald*, 15 Ea. 530, 541.

(*g*) See 2 B. & P. 22, 25; *Brown* v. *Brown*, 1 Lev. 57; and see *Delmer* v. *McCabe*, 14 Ir. C. L. R. 377.

Chap. XIV. Sect. 5.

Leonards' propositions respecting:

words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct" (*h*); secondly, that "where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent" (*i*); thirdly, that "as on the one hand a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant" (*k*); and fourthly, that "where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others" (*l*).

how far maintainable.

Of the above propositions, the first, if read in connection with the above classification of the covenants and of their separate objects, seems to be warranted by the authorities (*m*). The second proposition (which together, or rather as connected, with the first, has been disputed (*n*)) is, perhaps, hardly accurate; for, although a prior general covenant will not, it appears, be restrained by a subsequent limited covenant having a different object (*o*), yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first (*p*). The third and fourth propositions seem to be unimpeachable.

(*h*) Sug. 605.

(*i*) Sug. 607.

(*k*) Sug. 608.

(*l*) Sug. 609; see *Crayford* v. *Crayford*, Cro. Car. 106; *Hughes* v. *Bennet*, *ibid.* 495, where the covenants were for seisin notwithstanding any act, &c., and that the lands were of a stated value; *contrà*, where the covenants were that the lands were of a stated value, and should so continue, notwithstanding any act, &c.; *Lady Rich* v. *Lord Rich*, Cro. El. 43; *Young* v. *Raincock*, 7 C. B. 310; *Crossfield* v. *Morrison*, *ib.* 286.

(*m*) See *Nervin* v. *Munns*, 3 Lev. 46; *Browning* v. *Wright*, 2 B. & P. 13; *Foord* v. *Wilson*, 2 J. B. Mo. 592; as controlled by *Howell* v. *Richards*, 11 Ea. 633; *Stannard* v. *Forbes*, 6 A. & E. 572.

(*n*) See 9 Jarm. Conv. 383.

(*o*) *Barton* v. *Fitzgerald*, 15 Ea. 530; *Gainsford* v. *Griffith*, 1 Saund. 58; *Smith* v. *Compton*, 3 B. & Ad. 189.

(*p*) See *Nind* v. *Marshall*, 1 Br. & B. 319; but not necessarily, see *Hesse* v. *Stevenson*, 3 B. & P. 565 *Saward* v. *Anstey*, 10 J. B. Mo. 55;

Grammatical construction generally determines connection of covenants.

And, of course, restrictive words occurring in one covenant may extend to another, if the grammatical connection of the two require, and no inconsistency would result from, such a construction (*q*): "and the Court will endeavour to ascertain the intention of the parties from an attentive consideration of the whole deed, and construe the covenants either as independent or as restrictive of each other, according to such apparent intention" (*r*): and Equity will relieve against general covenants entered into contrary to the intention of the parties (*s*).

Whether real or personal representative of covenantee may sue for breach.

Upon the death of a covenantee, or other person entitled to the benefit of covenants for title which run with the land, and have been broken in his lifetime, the right of action, so far as any actual damage has been sustained by him, belongs to his executors or administrators (*t*); but, except to the extent of such actual damage, the right to sue descends with the land, if freehold or copyhold, to the heir or devisee (*u*); or, if leasehold, to the executors or administrators; or (if specifically bequeathed) to the legatee (after the assent of the personal representative to the bequest).

Customary heir may sue before admittance, *semble*.

The customary heir of a copyholder in fee might, it is conceived, sue upon the covenants before admittance: "being a complete tenant against all persons but the lord" (*x*): but

see also *Martyn* v. *M'Namara*, 4 D. & War. 411, where Sugden, C., appears to have considered that a general covenant with A. might be cut down by restrictive words in a covenant entered into upon the same subject-matter with B. upon the same instrument.

(*q*) *Broughton* v. *Conway*, Dy. 240; *Peles* v. *Jervies*, Dy. 240, n.; and see 6 A. & E. 587; *Lady Rich* v. *Lord Rich*, Cro. Eliz. 43.

(*r*) 1 Saund. 60, n. (*l*); and see generally as to the effect of qualifying words in one covenant only, Elphinstone on Deeds, Chap. 30, and cases there cited.

(*s*) *Coldcot* v. *Hill*, 1 Ch. Ca. 15; *Feilder* v. *Studley*, Finch, 90, cited by Lord Eldon, 2 B. & P. 26; and by Lord Alvanley, 3 *ibid.* 575.

(*t*) *Lucy* v. *Levington*, 2 Lev. 26.

(*u*) *Kingdon* v. *Nottle*, 4 M. & S. 53; *King* v. *Jones*, 5 Taunt. 418; *Jones* v. *King*, 4 M. & S. 188.

(*x*) Scriven, 290.

Chap. XIV. Sect. 5.

this probably would not be so where the admittance is in terms merely for the life of the tenant, with a mere customary right of renewal in the heir (*y*).

Damages, what amount of, recoverable where no eviction.

Where the title is defective, and an action is brought upon the covenants before eviction, there seems to be no general rule by which the amount of damages should be determined. Where the purchaser has acquired an indefeasible estate, but of a less extent than that which he contracted for, the amount (if he choose to retain the estate) would seem to be, the difference between the value of the property as it is, and its value as it was warranted to be; as if, for instance, the land prove to be copyhold instead of freehold (*z*). Lord St. Leonards seems to consider (*a*) that where the title is defective within the covenant, the purchaser, before eviction, may offer to re-convey the estate and claim the entire purchase-money; but no authority is cited for this proposition, which appears to be untenable; the extent of the damnification being the difference between that which the covenantee has and that which he ought to have: but possibly such an action might lie, if the alleged breach consisted in a refusal by the defendant to perfect the title (*b*); and if the defect in title is so complete that nothing passes from the grantor to the grantee, it is conceived that as the grantee has lost no land by the breach of covenant, but only the consideration which he paid for it, the measure of damages is the amount of the consideration with interest (*c*).

(*y*) See *Doe* v. *Thompson*, 13 Q. B. 670.

(*z*) *Gray* v. *Briscoe*, Noy, 142; see *Wace* v. *Bickerton*, 3 De G. & S. 751; and *Guthrie* v. *Pugsley*, 12 Johnson's Rep. 126, a case in New York, where, on a similar covenant, the grantors having in fact the fee in two-sixths only of the premises, and a life estate in the remainder, it was held that the damages were to be assessed upon the principle that the title to four-sixths had failed, except as to the life estate of the vendor therein, the value of which must therefore be deducted, and no interest allowed during the existence of the life estate.

(*a*) Sug. 611.

(*b*) See 5 Taunt. 428.

(*c*) See *Bickford* v. *Page*, 2 Mass. 455, 461.

Where a reversionary lease was granted to a lessee in possession by a tenant for life who had no power to make such a demise, the lessee was held entitled, under the covenant for quiet enjoyment, to recover, not merely the premium paid and the costs of the void lease, but also the difference between the value of the lease which was professed to be granted, and that of a lease which he actually obtained from the reversioners for a shorter term and at an increased rent (*d*).

What amount of, recoverable where there is eviction.

Where there has been actual eviction, the purchaser may, under the name of damages, recover interest or mesne profits for the time during which he has been out of possession (*e*). Upon the same principle, he would be entitled to interest upon any charge on the estate which he has been compelled to satisfy: it seems, however, to be doubtful whether he could recover it for such period as he had, without reasonable excuse, neglected to sue upon the covenant (*f*).

Moneys paid by way of compromise, and costs, when recoverable.

So if he, without communicating with the vendor, compromise an adverse claim or suit, he may recover the amount paid by him, and his costs of suit as between attorney and client, subject only to the right of the vendor to show, either that the claim was wholly, or in part, unfounded, or that better terms might have been procured (*g*); and it would appear that, if the vendor, upon notice given to him of a suit within the terms of his covenant for quiet enjoyment, refuse to defend it, he could not, as against the purchaser, dispute the validity of the claim (*h*): it does not, however, appear that the latter could safely defend an action without giving

(*d*) *Lock* v. *Furze*, L. R. 1 C. P. 441, in the Exch. Ch.; see comments in judgment on *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Hopkins* v. *Grazebrook*, 6 B. & C. 31; *Sikes* v. *Wild*, 4 B. & S. 421; and see now *Bain* v. *Fothergill*, L. R. 7 H. L. 158. See further on this subject, *post*, pp. 1077 *et seq.*

(*e*) *King* v. *Jones*, 5 Taunt. 418; see 422.

(*f*) *Anderton* v. *Arrowsmith*, 2 P. & D. 408.

(*g*) *Smith* v. *Compton*, 3 B. & Ad. 407.

(*h*) See *Duffield* v. *Scott*, 3 T. R. 377.

Chap. XIV. Sect. 5.

notice to the vendor or the party liable upon his covenants (*i*), and obtaining his directions, if the defence is apparently hopeless (*k*); and if he disregards the notice, and the purchaser, acting on his own judgment, defends the action and has to pay damages and costs, the latter has been held entitled to recover in an action on the covenant the amount so paid, and also the expenses which he had himself incurred in defending the action (*l*).

Whether the value of improvements.

It has been considered doubtful whether, in any case, the purchaser could recover the expenses of improvements, although stated as special damages in his declaration (*m*): but a difference has been taken between improvements, consisting in additions to the property,—*e. g.*, expensive buildings erected upon the land,—and mere improvements of the land itself (*n*). A distinction may also, it is conceived, be made between the amount recoverable in an action on the covenants for seisin or right to convey—which in their terms refer merely to things as existing at the date of the conveyance, and if broken at all are broken immediately—and the amount recoverable in an action on the covenant for quiet enjoyment, which is, in its very terms, prospective: in the latter case, it seems difficult to understand why the full value of the property as existing at the time of the breach of covenant, should not be recoverable; especially when (*o*) the property has been professedly bought for the purpose of being improved by building on or otherwise. In one case, it was laid down that the measure of damages in the event of eviction includes the amount expended in converting the land to the purpose for which it was bought; and that the pur-

(*i*) See 3 B. & Ad. 408; *Lewis* v. *Peake*, 7 Taunt. 153; and see *Smith* v. *Howell*, 6 Ex. 730.

(*k*) See *Gillett* v. *Rippon*, M. & M. 406; *Short* v. *Kalloway*, 11 A. & E. 28.

(*l*) *Rolph* v. *Crouch*, L. R. 3 Ex. 44; and see cases there cited.

(*m*) *Lewis* v. *Campbell*, 3 J. B. Mo. 35; 8 Taunt. 715.

(*n*) See 3 J. B. Mo. 52, 54, 57; and see *Bunny* v. *Hopkinson*, 27 B. 565; and *post*, p. 1077.

(*o*) See *Hadley* v. *Baxendale*, 2 Ex. 341, 354; and see *Hochster* v. *De Latour*, 2 E. & B. 678; *Walker* v. *Broadhurst*, 21 L. T. O.S. 68; *Fletcher* v. *Tayleur*, 17 C.B. 21; *Cory* v. *Thames Shipbuilding Co.*, L. R. 3 Q. B. 181.

chaser may recover, not merely the value of the land, but also the amount spent in the erection of houses subsequent to his conveyance (*p*).

As to restricting the liability of tenants in common, &c., upon covenants for title.

It is not an unfrequent practice on a sale by tenants in common, or other persons having partial interests in the estate, to restrict their liability under the covenants for title, not to their respective interests in the estate, which is a proper restriction, but to the amount of their respective shares of the purchase-money. This practice, however, is scarcely defensible; and seems to be founded on the notion that the measure of damages, in case of eviction, cannot exceed the amount of the purchase-money: a notion which is erroneous in cases where there has been an expenditure in improvements of the property.

Mortgagee cannot release covenants as against mortgagor.

A mortgagee cannot, in Equity, without the consent of the mortgagor, release covenants for title entered into by the vendor from whom the mortgagor purchased (*q*).

Formerly no action of covenant against devisee.

If the covenantor died before the 16th July, 1830, no action for a breach of covenants for title, or of any other covenant, would lie against his devisee (*r*); whether the breach occurred before (*s*) or after the decease: but if the covenant had been for payment of a sum by way of liquidated damages, and "heirs" were named in the covenant, the devisee would have been liable, jointly with the heir, in an action of debt, in respect of a breach occurring in the lifetime of the covenantor (*t*); although, if there were no heir, no action would have lain against the devisee alone (*u*).

(*p*) *Bunny* v. *Hopkinson*, 27 B. 565; and see and consider *Duckworth* v. *Ewart*, 10 Jur. N. S. 214, and the judgment of Blackburn, J.; *Rolph* v. *Crouch*, L. R. 3 Ex. 44, where the grantee, a florist, recovered the value of a conservatory which he had built; and in America; *Hale* v. *City of New Orleans*, 18 Louisiana, 321, where costs of paving in front of building lots were recovered.

(*q*) *Thornton* v. *Court*, 3 D. M. & G. 293.

(*r*) *Wilson* v. *Knubley*, 7 Ea. 128; and see *Dilkes* v. *Broadmead*, 7 Jur. N. S. 56.

(*s*) *S. C.*

(*t*) See *Jenkins* v. *Briant*, 6 Si. 603, 607; *Coope* v. *Cresswell*, 2 Ch. 112.

(*u*) *Hunting* v. *Sheldrake*, 9 M. & W. 256.

Chap. XIV. Sect. 5.

The heir, if named in the covenant, is liable to the amount of descended assets, whether the breach occur before or after the death of the covenantor (*x*).

Alteration effected by 1 Will. IV. c. 47.

And under the 1 Will. IV. c. 47 (*y*), devisees are, to the extent of the devised assets, rendered liable to be sued upon the covenants of their testators, jointly with the heir taking assets by descent, or solely if there be no such heir.

Damages for breach of covenant, when claimable as debt in administration suit.

And it has been held in a modern case (*z*), that damages upon covenants for title, in which the heir was named, for breaches happening after the covenantor's decease, will, even as against the devisee, be considered as within the meaning of a testamentary charge of *debts:* and it seems that a claimant for unliquidated damages in respect of a breach of covenant may himself institute a suit for the administration of the covenantor's estate (*a*); but the devisee, or (it is conceived) the heir, in an administration suit, is not bound by the result of proceedings by the covenantee against the personal representatives of the covenantor; but may have the question determined in an action to which he is himself a party (*b*): nor can interest be claimed prior to the amount of damages being so determined: but where devisees, having insisted on this right, were unsuccessful in the action, the covenantee was allowed the amount of the damages assessed upon the trial, his costs of defending the ejectment upon which he had been evicted, and of an action brought by him against the personal representatives of the covenantor, and by the result of which the devisees had refused to be bound, of the action to which the devisees were parties, and of the suit in Equity, and also interest on the damages and costs, to be computed from the time when the amount was ascertained and judgment entered up in the action against the devisees (*c*).

(*x*) See Shep. T. 177.

(*y*) See sects. 2, 3, 4, and 8. The Act came into operation on the 16th July, 1830.

(*z*) *Morse* v. *Tucker*, 5 Ha. 79; *Bermingham* v. *Burke*, 2 J. & L. 699.

(*a*) *Burch* v. *Coney*, 14 Jur. 1009.

(*b*) *Morse* v. *Tucker*, *suprà;* and see *Cox* v. *King*, 9 B. 530; *Norman* v. *Stiby*, 9 B. 560.

(*c*) 5 Ha. 79.

No apportionment of damages in favour of remainderman.

A remainderman has no equitable claim upon damages recovered by the tenant for life upon breach of covenants for title (*d*); as he himself can bring an action for the injury (if any) sustained by him as owner of the reversion.

Covenants relieved against in Equity.

A vendor selling, at a great undervalue, an estate with a title which proved bad, has been relieved in Equity against an action on the covenants for title, upon the terms of his refunding the price and interest and being charged with the mesne profits (*e*); but the contract is described as a "catching bargain" on the part of the purchaser; and it is conceived that no such relief would be afforded where the lowness of price could be referred to the known state of the title.

Conveyance set aside for fraud,—on what terms as against innocent sub-purchaser.

Where a bill was filed to set aside a conveyance as fraudulent, and the defendant, *pendente lite*, sold parts of the estate to parties who had no notice of the fraud, and died, and a supplemental bill was filed against his representatives and the purchasers; the latter, being evicted, were held entitled in the suit to repayment of the purchase-money by his representatives; and, as against the plaintiff, to an allowance for lasting repairs and substantial improvements (*f*).

Purchaser's remedies on vendor's covenants other than for title.

The rights arising under a vendor's covenants (other than covenants for title), appear to be subject to the same rules as have been already considered with reference to a purchaser's covenants (*g*).

Need not execute conveyance before suing.

Lastly, we may here remark that, where the conveyance contains covenants by the purchaser, his non-execution of the deed would not, at Law, be any defence to an action by him for breach of the vendor's covenants (*h*).

(*d*) *Noble* v. *Cass*, 2 Si. 343.

(*e*) *Zouch* v. *Swaine*, 1 Vern. 320.

(*f*) *Trevelyan* v. *White*, 1 B. 588.

(*g*) *Vide ante*, sect. 4, and authorities cited; and see *Brewster* v. *Kidgil*, Raym. 317, 322; and 5 Mod. 369; and *Holmes* v. *Buckley*, 1 Eq. Ca. Ab. 27; and the remarks on these decisions in 1 Sm. L. C. 91 *et seq.*

(*h*) See *Morgan* v. *Pike*, 14 C. B. 473; *Northampton Gas Co.* v. *Parnell*, 15 C. B. 630.

Chap. XIV. Sect. 6.

(6.) *Purchaser's remedy under special circumstances, in respect of defects.*

Purchaser's remedy, &c., in respect of defects.

Purchaser accepting defective title through fraud of vendor, relieved in Equity.

Misrepresentation, under such circumstances as would sustain an action of deceit at Law, affords ground for setting aside a purchase after completion (*i*); nor need the purchaser wait until eviction, but he may, at once, claim to have the contract rescinded (*k*); and he should be prompt in applying to the Court (*l*). This doctrine is not likely ever to be extended beyond sales of real estates.

So in case of fraudulent concealment.

A fraudulent concealment, by the vendor, of a material fact which the purchaser has no sufficient means of discovering (*m*), may entitle the purchaser to relief (*n*). Thus, where a purchaser in possession was fraudulently induced by the vendor and his solicitor, in the absence of his own professional adviser, to pay the purchase-money and execute covenants for the production of title deeds, while the title to part of the property was under investigation with reference to a known defect, he was held entitled to rescind the contract, to recover his purchase-money, with his costs, charges, and expenses, and to have the deeds of covenant delivered up to be cancelled (*o*).

Distinction between rescission before, and setting aside after, completion.

A distinction must be carefully drawn between the ordinary right to rescind an executory contract before completion, and the right to have the transaction set aside after completion.

(*i*) *Edwards* v. *M'Leay*, G. Coop. 308, 312; 2 Sw. 287; *Berry* v. *Armistead*, 2 Ke. 221; *Lovell* v. *Hicks*, 2 Y. & C. 46; *Roddy* v. *Williams*, 3 J. & L. 1; see *Jillard* v. *Edgar*, 3 De G. & S. 507; *Money* v. *Jorden*, 2 D. M. & G. 318; rev. 5 H. L. C. 185; *Hutton* v. *Rosseter*, 7 D. M. & G. 9.

(*k*) G. Coop. 318; 2 Ke. 221.

(*l*) *Ante*, p. 54; 3 & 4 W. IV. c. 27, s. 24; and see *Jennings* v. *Broughton*, 5 D. M. & G. 126.

(*m*) *Conybeare* v. *New Brunswick R. Co.*, 1 D. F. & J. 578; *New Brunswick R. Co.* v. *Muggeridge*, 1 Dr. & S. 363. *Aliter*, if the defect be patent; *ante*, p. 102; and see *Lowndes* v. *Lane*, 2 Cox, 363.

(*n*) *Edwards* v. *M'Leay*, G. Coop. 312; *Early* v. *Garrett*, 4 Man. & R. 687, 690; and see 2 Y. & C. C. C. 577; and the judgment in *Small* v. *Attwood*, You. 455; 6 Cl. & F. 232.

(*o*) *Berry* v. *Armistead*, 2 Ke. 221.

The principle upon which Courts of Equity recognise the right to rescind executory contracts on the ground of innocent misrepresentation, was very clearly enunciated by Jessel, M.R., in the well-known case of *Redgrave* v. *Hurd* (*p*). "According to the decisions of Courts of Equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'a man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it, he did not know it to be false: he ought to have found that out before he made it.' The other way of putting it was this, 'even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.' The rule in Equity was settled, and it does not matter on which of the two grounds it rested. As regards the rule of Common Law, there is no doubt it was not quite so wide. There were indeed cases in which, even at Common Law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly, and without care whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in Equity was settled beyond controversy, and it is enough to refer to the judgment of Lord Cairns in *The Reese River Silver Mining Co.* v. *Smith* (*q*), in which he lays it down in the way which I have stated."

(*p*) 20 Ch. D. 1, 12.

(*q*) L. R. 4 H. L. 64.

Chap. XIV. Sect. 6.

What is sufficient to set aside purchase after completion.

This passage shows that the principle in question is applicable only to executory contracts. A Court of Equity would not only refuse its discretionary remedy of specific performance, but would go further and restrain a vendor from asserting his legal right to claim damages in a Court of Law, on the ground that it was unconscientious in him to do so. But the principle could not be extended to the taking away after completion the price of the property, which at Law had become absolutely the vendor's, without advancing the interference of the Court of Equity further than has yet been authorized by judicial decision. In other words, it seems that misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in Equity for rescission of an executory contract, but also is deceitful in contemplation of a Court of Law (*r*). Whether or not this limitation of the jurisdiction of Courts of Equity is satisfactory, either in practice or in principle, the present state of the authorities justifies its enunciation.

General doctrine as to how far vendor is responsible for his agent.

The general doctrine as to the responsibility of a vendor for the acts of an agent, whom he has either expressly authorized, or, by his conduct, adopted, is well established both at Law and in Equity; but it is extremely difficult to define what sort or degree of misrepresentation on the part of the agent will entitle the purchaser to set aside a purchase which has been completed by conveyance and by payment of the purchase-money. We have already (*s*) referred to this subject in treating of the relative duties of vendors and purchasers before entering into an agreement

(*r*) *Wilde* v. *Gibson*, 1 H. L. C. 605, reversing Knight-Bruce, V.-C., 2 Y. & C. C. C. 542, and following *Edwards* v. *M'Leay*, 2 Sw. 287, and *Legge* v. *Croker*, 1 B. & B. 506; *Hart* v. *Swaine*, 7 Ch. D. 42; *Brett* v. *Clowser*, 5 C. P. D. 376; *Brownlie* v. *Campbell*, 5 Ap. Ca. 925; *Joliffe* v. *Baker*, 11 Q. B. D. 255; and see Fry, 295. The authority of the Irish case of *Phelps* v. *White*, 7 L. R. Ir. 160, cannot be considered sufficient to shake this doctrine, although it certainly contains *dicta* inconsistent with it.

(*s*) *Ante*, p. 103.

for sale; and we shall again refer to it more fully in treating of the grounds of defence to a suit for specific performance.

Cases in which the vendor has been held responsible.

In a case, which has often been the subject of comment, where a public way over the estate had been so blocked up, under a mere temporary arrangement, that it could not be discovered by the purchaser, and the vendor's solicitor (the vendor herself having no personal knowledge of its existence) omitted to disclose the same, or to produce the deed establishing it; but not, as the Court considered, "with any intention to do or sanction anything he thought wrong;" and the conditions of sale required the purchaser to build a wall which in fact interfered with such right of way,—it was held, that this was such implied fraud in the vendor as enabled the Court to decree a reconveyance (*t*). The bill, however, which rested the purchaser's case upon the ground of personal fraud, was, on appeal, dismissed by the Lords (*u*); they being of opinion that the vendor had no actual knowledge of the circumstances, and that the agent's knowledge could not sustain a charge of personal fraud against the principal; and that the plaintiff, putting his case on the ground of personal fraud, could not rest it on any other ground: and Lord Cottenham cited, and seemed to approve of, a case (*x*), where a lessor having informed his intended lessee (in answer to an inquiry on the point), that no public right of way existed over the estate, a bill to rescind the executed lease, on the ground of the ascertained existence of such right of way, was dismissed, there having been no wilful misrepresentation.

Purchaser must show wilful misrepresentation, *semble*.

It may be remarked of one of the above cases (*y*), that the misrepresentation evidently resulted from mere carelessness in not ascertaining whether certain mark-stones denoted the

(*t*) *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542.

(*u*) *Wilde* v. *Gibson*, 1 H. L. C. 605. See Lord St. Leonards' remarks on the case in his treatise on the Law of Property; but see also V.-C. Wood's remarks in *Parr* v. *Jewell*, 1 K. & J. 673; and *Brett* v. *Clowser*, 5 C. P. D. 376.

(*x*) *Legge* v. *Croker*, 1 B. & B. 506.

(*y*) *Gibson* v. *D'Este*, *supra*.

Chap. XIV. Sect. 6.

centre or the side of the way; and, of the other (*z*), that the lessor had grounds for believing his statement to be correct. In each case the misrepresentation, if discovered in time, would probably have been a sufficient reason for refusing to complete the contract. But, as observed by Lord Cottenham (*a*), there is a marked distinction made by Courts of Equity between what is necessary to resist a suit for specific performance of a contract, and what is necessary to support a suit to set aside a deed executed and an arrangement completed. It seems that, in such cases the principal would, as a general rule, be bound by the fraud of the agent (*b*); but not by his mere non-communication of his constructive knowledge, or of knowledge acquired by him otherwise than as agent (*c*).

Principal bound by fraud of agent.

Nor, it is conceived, will a misrepresentation of the agent, made *bonâ fide* and in ignorance of the true facts, entitle a purchaser to have his money returned after conveyance: although, as we have already seen (*d*), the innocent misstatement by an agent upon a material point, *e. g.*, the existence of a nuisance, unknown to himself, but known to his principal—or even, it is conceived, if unknown to the principal—or a *bonâ fide* assertion of the existence of a right of way, without the authority of the vendor (*e*), may be a good defence to a suit for specific performance of the contract, or a good ground for rescission of it, so long as it remains executory.

Case of *bonâ fide* misstatement by agent.

A purchaser after completion could not, it is conceived, in the absence of fraud, obtain relief on the ground of the price having been unreasonable (*f*).

Excessive price no ground for relief.

(*z*) *Legge* v. *Croker*, 1 B. & B. 506.

(*a*) *Vigers* v. *Pike*, 8 C. & F. 645.

(*b*) See per Lord Campbell, 1 H. L. C. 615; *Wilson* v. *Fuller*, 3 Q. B. 58; Sug. 248; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *ante*, p. 103 *et seq.*; *Conybeare* v. *New Brunswick R. Co.*, 1 D. F. & J. 578; *National Exchange Co.* v. *Drew*, 2 Macq. 103; *Barry* v. *Crosskey*, 2 J. & H. 1; *Ludgater* v. *Love*, 44 L. T. 694. As to corporations, see *Ranger* v. *G. W. R. Co.*, 5 H. L. C. 86.

(*c*) *Wilde* v. *Gibson*, 1 H. L. C. 605; and see *Alvanley* v. *Kinnaird*, 2 M. & G. 1, 6.

(*d*) *Ante*, p. 103, and cases there cited.

(*e*) *Brett* v. *Clowser*, 5 C. P. D. 376.

(*f*) See *Small* v. *Attwood*, 6 C. & F. 232; *Pike* v. *Vigers*, 2 D. & Wal. 1, 252; *Cockell* v. *Taylor*, 15 B. 103.

Terms on which purchaser is relieved in Equity.

Where a reconveyance is decreed, the purchaser will be credited, in addition to his purchase-money, not only with necessary outgoings in respect of the estate, but also with the amount of repairs and improvements, if executed before the discovery of the defect in title, and if their repayment is specially claimed (*g*): and, probably, of necessary repairs executed during or pending litigation, if specially prayed (*h*). He will also be allowed his costs of the purchase and conveyance (*i*), and interest upon all these several sums at the rate of 4*l.* (*k*) *per cent.* from the times of their respective payments or expenditure; and will be debited with such rents and profits as he has, or without wilful default (*l*) might have, received; and with an occupation rent in respect of any part of the estate which has been in his own possession (*m*). Where a purchase was set aside for fraud on the part of the purchaser, and the rents exceeded the interest of the purchase-money, annual rests were directed until the principal should be liquidated (*n*): but a special case must be shown to warrant such a direction (*o*).

Allowed to follow purchase-money, *semble.*

In one case the purchaser, obtaining a decree for rescinding a purchase on the ground of fraud, was allowed to follow the stock in which part of the purchase-money had been invested (*p*); but the decree rescinding a purchase was subsequently reversed; and it became unnecessary to prosecute an appeal to the House of Lords which had been lodged by the holders of the stock. Lord St. Leonards remarks that this is the only case in which Equity has, under such

(*g*) See *Edwards* v. *M'Leay*, 2 Sw. 289; *Hart* v. *Swaine*, 7 Ch. D. 42; and see Seton, 1351.

(*h*) See Sug. 254.

(*i*) 2 Sw. 289. See the decree.

(*k*) See 2 Y. & C. C. C. 581. 5*l.* *per cent.* was formerly allowed; see Jac. 166.

(*l*) See the decrees in *Gibson* v. *D'Este*, 2 Y. & C. C. C. 581; *Wilde* v. *Gibson*, 1 H. L. C. 636; and *Murray* v. *Palmer*, 2 Sch. & L. 490; but see, *contrà*, the judgment, *ibid.* 489; and see *Summers* v. *Griffiths*, 35 B. 27; *Prees* v. *Coke*, 6 Ch. 645, where a direction as to annual rests was on appeal struck out of the decree.

(*m*) See 2 Y. & C. C. C. 581.

(*n*) *Donovan* v. *Fricker*, Jac. 165.

(*o*) See *Neesom* v. *Clarkson*, 4 Ha. 97; *Prees* v. *Coke*, 6 Ch. 645, 651.

(*p*) *Small* v. *Atwood*, 6 C. & F. 232; *Ernest* v. *Croysdill*, 2 D. F. & J. 175; see pp. 188, 197.

Chap. XIV. Sect. 6.

circumstances, followed the purchase-money, and that the order, if the appeal had been prosecuted, could hardly have been maintained (*q*).

Bill for compensation not attainable.

A bill filed, after conveyance, simply for compensation in respect of defects in the estate, will be dismissed in the absence of an express condition for compensation (*r*); although such defects, accompanied by fraudulent misrepresentation or concealment, may be a ground for rescinding the executed contract.

Effect of condition for compensation after completion.

The question of the nature and extent of the common condition for compensation may be considered here, with a view to ascertaining the circumstances under which this condition may be enforced after completion. The true theory of the operation of this condition appears to be as follows:—While the contract is still executory, and rescission upon ordinary equitable grounds is therefore still possible, the condition would appear simply to provide an additional remedy, alternative to that of rescission. But rescission may become impossible, either by the contract having been executed (*s*), or by the purchaser having otherwise affirmed the contract. In such cases it is a question of intention only, whether the remedy by way of compensation for the error, misstatement or omission remains, although the other remedy has become impossible. It is true that where parties enter into a preliminary contract, which is afterwards to be carried out by a deed, the contract becomes extinguished in the deed when it is executed, and can no longer be looked at for any purpose. But the ordinary contract for compensation is not one which, according to the interpretation which the Courts have put upon the language of the parties, is intended to be carried out by the deed of conveyance, but continues to exist outside it. It does not merely cover the interval before the

(*q*) Sug. 256.

(*r*) *Newham* v. *May*, 13 Pr. 749; *Leuty* v. *Hillas*, 2 D. & J. 110. The Court has no jurisdiction under Lord Cairns' Act to give compensation after conveyance.

(*s*) *Ante*, p. 900.

formal deed of conveyance, but continues to exist after it. This must be taken to be finally settled by the authorities (*t*). The condition for compensation thus, after conveyance, gives a remedy, which would not exist in its absence.

Remedy on condition barred six years after contract.

It is conceived that as the cause of action arises at the date of the contract for purchase, the remedy will be barred after six years, where that contract is not under seal.

Action for damages.

A purchaser may, after conveyance, bring an action for damages for a fraudulent misrepresentation of the property (*u*) or the title, although it be made not directly to the purchaser, but to a person in treaty for the property, and who communicates it to the purchaser (*x*): or may recover the purchase-money, if the circumstances of the case entitle him to set aside the transaction (*y*).

Section 7.

(7.) *As to purchaser's right to pay off incumbrances out of unpaid purchase-money.*

As to purchaser's right to pay off incumbrances, &c.

After the conveyance has been executed, the purchaser may (*z*) discharge out of any purchase-money which remains unpaid, (although secured,) any incumbrances which either

Whether he can, after con-

(*t*) *Cann* v. *Cann*, 3 Si. 447; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Re Turner and Skelton*, 13 Ch. D. 130; *Palmer* v. *Johnson*, 13 Q. B. D. 351; *Phelps* v. *White*, 7 L. R. Ir. 160; *Flewitt* v. *Walker*, 33 W. R. 894. *Manson* v. *Thacker*, 7 Ch. D. 620; *Besley* v. *Besley*, 9 Ch. D. 103; *Allen* v. *Richardson*, 13 Ch. D. 524; and *Joliffe* v. *Baker*, 11 Q. B. D. 255, on this point, must be considered to be now overruled; see *Palmer* v. *Johnson*.

(*u*) *Dobell* v. *Stevens*, 3 B. & C. 623; *Mummery* v. *Paul*, 1 C. B. 316; *Gerhard* v. *Bates*, 2 E. & B. 476; *Fuller* v. *Wilson*, 3 Q. B. 58, 68; although made by an agent, *S. C.*; but see, *contrà*, Lord Campbell's dictum, 1 H. L. C. 615, as to the distinction in this respect between actions on the contract and on the case; *Brownlie* v. *Campbell*, 5 Ap. Ca. 925, 949.

(*x*) *Pilmore* v. *Hood*, 5 Bing. N. C. 97; and see *Langridge* v. *Levy*, 2 M. & W. 519, 532.

(*y*) *Early* v. *Garrett*, 4 Man. & R. 687.

(*z*) See *Serjeant Maynard's case*, Freem. 1; *Anon.*, *ibid.* 106. A payment made by the purchaser to an incumbrancer on the estate is *primâ facie* in discharge of the incumbrance, although the latter may have other claims on the purchaser: *Brett* v. *Marsh*, 1 Vern. 468; *Heyward* v. *Lomax*, *ibid.* 24; *Smith* v. *Smith*, 9 B. 80; *Peters* v. *Anderson*, 5 Tau. 596.

Chap. XIV. Sect. 7.

veyance, retain incumbrances out of unpaid purchase-money.

have been created by the vendor himself, or are covered by his covenants for title (*a*) : but not incumbrances paramount to his title, and not covered by his covenants (*b*) : and this right, it is conceived, would not, where security has been given for the purchase-money, prevail as against an assignee for valuable consideration and without notice, and who, previously to taking the assignment, had ascertained from the purchaser the existence of the debt ; otherwise, no one could safely take a transfer of a mortgage by a purchaser to a vendor for securing part of the purchase-money. The case seems to be within the principle of one where it was decided that, where a tenant for life with power of sale had sold an estate, and covenanted that it was free from incumbrances, and the money had been paid to the trustees of the settlement and invested, the purchaser, on discovering the existence of incumbrances, had no claim upon the vendor's life-interest in the money as against an annuitant, to whom, for valuable consideration, and without notice of the fraud committed by the vendor, the trustees of the stock had, at the vendor's request, given an irrevocable power of attorney to receive the dividends (*c*) : and Lord Thurlow, on appeal, intimated an opinion, (which, however, was extra-judicial,) that (irrespectively of the claim of the annuitant) the purchaser could not have followed the money when deposited with the trustees. The case is cited by Lord St. Leonards as an authority for the proposition that, notwithstanding incumbrances have been fraudulently concealed, "the purchaser has no lien on the purchase-money after it is appropriated by the vendor" (*d*).

Out of purchase-money paid to solicitor as common agent.

But where the same solicitor, acting for both parties, had received the purchase-money, with, as alleged by the purchaser, the knowledge of an incumbrance, the Court held that he had so received it as agent of the vendor, and the

(*a*) Sug. 548 ; *Tourville* v. *Naish*, 3 P. W. 306.

(*b*) *Thomas* v. *Powell*, 2 Cox, 394 ; *Vane* v. *Lord Barnard*, Gilb. R. 6.

(*c*) *Cator* v. *Lord Pembroke*, 2 Br. C. C. 282.

(*d*) Sug. 553.

purchaser's petition to have it applied in discharge of the incumbrance was dismissed with costs (*e*).

Purchaser buying up incumbrances.

A purchaser, buying up incumbrances which the vendor is bound to satisfy, can charge, as against the latter, only the price actually paid for them (*f*).

Section 8.

(8.) *Purchaser's remedy in Equity if he buy his own estate—or if lands are omitted from conveyance—and as to further assurance in Equity and by Statute.*

Purchaser's remedy in Equity, &c.

Purchaser buying his own estate relieved in Equity.

If it appear that the estate belonged to the purchaser, he can, in Equity, and probably at Law (*g*), recover his purchase-money; although he might have discovered his right from the abstract of title (*h*); nor is it clear that the absence of fraud in the vendor will bar the relief (*i*).

Whether so if he buy estate which has no existence:

And it has been held (*j*), that a purchaser who, although without any fault on the part of the vendor, buys an estate which in fact has no existence, (*e.g.*, a remainder expectant on an estate tail which has been barred,) can obtain relief in Equity; but it is, of course, otherwise, if the purchaser buys an estate the existence of which he knows to be doubtful (*k*). The principle has been doubted by Lord St. Leonards (*l*): but it has been decided that, even at Law, an action lies in such a case to recover the purchase-money as money paid without consideration:—as where a life annuity is sold after the death of the *cestui que vie* (*m*).

(*e*) *Tylee* v. *Webb*, 14 B. 14.

(*f*) *Cane* v. *Lord Allen*, 2 Dow, 289, 296.

(*g*) *Strickland* v. *Turner*, 7 Ex. 208.

(*h*) *Bingham* v. *Bingham*, 1 V. sen. 126; *Cochrane* v. *Willis*, 1 Ch. 58; *Jones* v. *Clifford*, 3 Ch. D. 779; and see, as to cases of compromise of doubtful rights, *Lansdown* v. *Lansdown*, Mos. 364; *Leonard* v. *Leonard*, 2 B. & B. 171; *Stewart* v. *Stewart*, 6 C. & F. 911.

(*i*) *Bingham* v. *Bingham*, *suprà*.

(*j*) *Hitchcock* v. *Giddings*, 4 Pr. 135; *Ridgway* v. *Sneyd*, Kay, 635; and see *Stent* v. *Bailis*, 2 P. W. 217, 220, the judgment in which contains evidently bad law; and see *Clare* v. *Lamb*, L. R. 10 C. P. 334.

(*k*) *Griffin* v. *Caddell*, 9 I. R. C. L. 488.

(*l*) See Sug. 247.

(*m*) *Strickland* v. *Turner*, 7 Ex.

Chap. XIV. Sect. 8.

or known to the vendor to be utterly worthless.

In one case, where a creditor of an insolvent firm, one of the members of which was also separately insolvent and *non compos*, in order to procure a title to the separate interest of the *non compos* partner, issued an execution against him, and sold by the sheriff, with the intention of himself purchasing, so as to facilitate dealings with the partnership estate, but was in fact outbidden by a stranger, the purchaser was relieved from his purchase, with costs against the vendor; on the ground that the property was utterly worthless, within the vendor's knowledge; and that the execution and sale were entirely under his control (*n*).

Purchaser may claim in Equity lands shown to him or accidentally omitted.

If lands shown to a purchaser are excepted from the conveyance under a name by which he did not know them, he can claim them in Equity; and by getting in an outstanding legal estate may hold them, even as against a subsequent purchaser for valuable consideration and without notice (*o*); and he could, doubtless, enforce a conveyance of them, as against the vendor, or volunteers. He has also, it would appear, the same rights as respects lands accidentally omitted from the conveyance, if shown to him as part of his purchase (*p*), or if he can prove an agreement for their purchase sufficient within the Statute of Frauds (*q*). And, as a general rule, where the conveyance is executed for the purpose of giving effect to and executing the agreement, and by fraud, accident, or mistake, it gives to the purchaser less than he is entitled to under the agreement, he may call upon the Court to rectify the defective conveyance, and give him all that the agreement comprehended (*r*): but not where the omitted property has in the meantime been conveyed to another purchaser without notice; and in such a case, unless there

208; *Barr* v. *Gibson*, 3 M. & W. 399; *Hastie* v. *Couturier*, 9 Ex. 102; *Gompertz* v. *Bartlett*, 2 E. & B. 849; *Chapman* v. *Speller*, 14 Q. B. 621; *Kearney* v. *Ryan*, 2 L. R. Ir. 61.

(*n*) *Smith* v. *Harrison*, 26 L. J. Ch. 412.

(*o*) *Oxwick* v. *Brockett*, 1 Eq. Ca. Ab. 355.

(*p*) See *Cass* v. *Waterhouse*, Ch. Prec. 29.

(*q*) *S. C.*; and see *Nelson* v. *Nelson*, Nels. 7 (which, however, was a case between principal and agent); and *Calverley* v. *Williams*, 1 V. 210.

(*r*) *Vide ante*, p. 838 *et seq.*

be actual fraud, it would seem that no compensation can be given (*s*).

When relief afforded.

And relief upon a defective instrument is the more readily afforded when the party to be charged thereon is himself the person who prepared or perfected it (*t*). But where the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion that the latter may be the best evidence of the terms of the actual agreement (*u*). If the purchaser's bill in such a case is dismissed, and the purchase-money has been paid by him into Court, and not invested, he must pay interest upon it to the vendor, although it has been unproductive (*x*). Of course, the Court will not interfere if the agreement was, in the technical sense of the word, inequitable (*y*).

May require vendor to convey subsequently-acquired interests.

So, also, the purchaser may in Equity, under the covenant for further assurance, although not running with the land (*z*), require the vendor to perfect a defective title, even by conveying any interest in the estate which he may have subsequently acquired for valuable consideration (*a*) : and the right seems to exist independently of such a covenant (*b*) : and may be enforced against the vendor's representatives, and parties claiming under him for valuable consideration with notice (*c*) : and the rule seems to be the same even when he has no estate in the land at the date of the conveyance. It was, however, decided in an old case (*d*), that such an

(*s*) *Leuty* v. *Hillas*, 2 D. & J. 110, upon the ground that the particulars did not warrant the purchaser's belief. This case does not seem to fall within Lord Cairns' Act.

(*t*) See *Ex p. Wright*, 19 V. 257 ; *Collett* v. *Morrison*, 9 Ha. 176. In some parts of the West of England, there is a pernicious practice of stipulating that the vendor or his solicitor shall prepare the purchaser's conveyance.

(*u*) Per V.-C. Wigram, *Humphries* v. *Horne*, 3 Ha. 277, 278.

(*x*) *S. C.*

(*y*) *Johnson* v. *Nott*, 1 Vern. 271.

(*z*) See *Spencer* v. *Boyes*, 4 V. 370.

(*a*) *Taylor* v. *Debar*, 2 Ch. Ca. 212 ; *Otter* v. *Lord Vaux*, 6 D. M. & G. 638.

(*b*) See *Noel* v. *Bewley*, 3 Si. 116 ; *Seabourne* v. *Powel*, 2 Vern. 11.

(*c*) *Jennings* v. *Blincorne*, 2 Vern. 609.

(*d*) *Morse* v. *Faulkner*, 1 Anst. 11.

Chap. XIV. Sect. 8.

equity could not be enforced against the heir: but there seems to be no good ground for such a distinction, and it has been judicially disapproved of by Lord St. Leonards (*e*). So, the assignees of a bankrupt tenant in tail, who has professedly aliened the fee simple, have been required to bar the entail (*f*).

Where a man conveyed his contingent remainder in fee by way of mortgage, and covenanted for further assurance, and the remainder was afterwards destroyed by his mother, the tenant for life, (who was also the reversioner in fee,) he was held liable in Equity to perfect the security out of an interest in the estate which he took under her will (*g*). So, where a man who was supposed to have a reversion in fee, but in fact had no estate in the land, executed what purported to be a conveyance of the same for valuable consideration, he was held liable, under his covenant for further assurance, to convey the estate on its subsequently coming to him as heir at law (*h*). The cases seem, as observed by Lord St. Leonards (*i*), "to establish this, that if a man sells an estate, and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title:" but, in applying this rule, the word *estate* must be strictly construed; for evidently no such equity could exist where the contract had been for the purchase of a professedly contingent interest at a price fixed with a view to the contingency. And in one case, where a tenant in tail in remainder, by an unenrolled deed, mortgaged the land, for his life "and all other his estate and interest" therein, and entered into the usual covenant for further assurance, it was held that this did not bind him subsequently to execute a disentailing assurance. But the Court admitted that such

(*e*) See 1 D. & War. 159.

(*f*) *Pye* v. *Daubuz*, 3 Br. C. C. 595; *Ex p. Fripp*, De G. 293 (in each case there was a covenant for further assurance); and see judgment in *Davies* v. *Tollemache*, *infrà*.

(*g*) *Noel* v. *Bewley*, 3 Si. 103.

(*h*) *Smith* v. *Baker*, 1 Y. & C. C. C. 223.

(*i*) See *Jones* v. *Kearney*, 1 D. & War. 159.

right would have existed if the tenant in tail had professed to convey the fee (*k*). But a purchaser cannot claim the *subsequently acquired* interest of a person who is present at and assents to the purchase, but is no party to the conveyance (*l*) or contract.

Although the sale were of a mere expectancy, *semble*.

It seems probable that the purchaser could come into Equity for further assurance, even in the case of a conveyance by a mere expectant heir professedly selling the estate in the lifetime of his ancestor (*m*).

But cannot require further evidence.

A purchaser cannot, it would seem, file a bill to enforce the production of evidences of title which at the time of completion he treated as unimportant (*n*).

No estoppel by doubtful recital.

A conveyance by lease and release, containing no precise recital of the vendor's seisin, but only a recital that he is "legally or equitably entitled to the property," cannot operate by way of estoppel so as to pass the after-acquired legal estate (*o*): nor can a recital that the vendor "is seised *or otherwise well and sufficiently entitled* for an estate of inheritance in fee simple in possession free from incumbrances" (*p*): but a particular recital of title, "precise and unambiguous," as *e.g.*, that the vendor is seised of the legal estate (*q*), or even that the vendor is seised (*r*), has the effect

(*k*) *Davies* v. *Tollemache*, 2 Jur. N. S. 1181; see and consider judgment, and Sug. 468; cf. *Bankes* v. *Small*, 34 Ch. D. 415, aff. 35 W. R. 765.

(*l*) *Thompson* v. *Simpson*, 2 J. & L. 110.

(*m*) 1 Fonb. on Eq. b. i. ch. 4, s. 2; *Wethered* v. *Wethered*, 2 Si. 183; *Harwood* v. *Tooke*, 2 Si. 192; but see *Carleton* v. *Leighton*, 3 Mer. 667; *Jones* v. *Roe*, 3 T. R. 93. An equitable charge upon an expected legacy was supported in *Bennett* v. *Cooper*, 9 B. 252.

(*n*) See *Hallett* v. *Middleton*, 1 Rus. 243, 256.

(*o*) *Right* v. *Bucknell*, 2 B. & Ad. 278; and see Sug. 739, n.; and *Lloyd* v. *Lloyd*, 4 D. & War. 354.

(*p*) *Heath* v. *Crealock*, 10 Ch. 22, 30; but see and dist. *Re Horton*, 51 L. T. 420, a case of a marriage settlement.

(*q*) *Heath* v. *Crealock*, 10 Ch. at p. 30.

(*r*) *Bensley* v. *Burdon*, 2 S. & S. 519; on app. 8 L. J. Ch. O. S. 85. This case is said to be overruled by *Right* v. *Bucknell*, see 4 D. & War. 369; and 10 Ch. D. 22, per Jessel, M. R. See *Carpenter* v. *Buller*, 8 M. & W. 209; *Doe* v. *Stone*, 3 C. B. 176; *Wiles* v. *Woodward*, 5 Ex. 557; *Horton* v. *Westminster I. Commrs.*,

Chap. XIV. Sect. 8.

of an estoppel, unless it be contradicted by other parts of the same deed (*s*). A covenant that a mortgagor has power to convey the legal estate is not such a precise averment that he has the legal estate as to create an estoppel; and it is more than doubtful whether an estoppel can in any case be created by a covenant (*t*). A mortgagor who has attorned tenant to his mortgagee, is estopped from disputing his title, or his right to distrain (*u*); and this doctrine of estoppel, which depends on the agreement between the parties to create the relation of landlord and tenant, has, at Law, been applied to a case where it was apparent on the face of the deed, which was not executed by the mortgagee, that there was no legal reversion to support the right to distrain (*x*). A recital in a mortgage deed that the mortgagor is indebted to the mortgagee, and has agreed to secure the sum by a mortgage, creates no estoppel as against a subsequent mortgagee for value (*y*).

Voidable estate created by tenant in tail; confirmation of by subsequent assurance.

Where a voidable estate has, either before or after the passing of the 3 & 4 Will. IV. c. 74, been created by a tenant in tail in favour of a purchaser for valuable consideration, any subsequent assurance under the Act, (other than a lease not requiring enrolment,) whatever may be its object or the extent of estate intended to be thereby created, confirms the previous voidable estate to the extent to which the tenant in tail alone, or the tenant in tail with the consent of the protector, (if there be one, and he consent to such subsequent assurance,) could confirm the same under the Act: but this is not to affect any purchaser for valuable consideration, to whom such subsequent assurance may be made, without express notice of the previous voidable estate (*z*). So, before

7 Ex. 780; *Faweus* v. *Porter*, 3 C. & K. 309; and see *Heath* v. *Crealock*, *supra*.

(*s*) *Crofts* v. *Middleton*, 8 D. M. & G. 192.

(*t*) *General Finance Co.* v. *Liberator Benefit Society*, 10 Ch. D. 15.

(*u*) *Jolly* v. *Arbuthnot*, 4 D. & J. 224.

(*x*) *Morton* v. *Woods*, L. R. 4 Q. B. 293.

(*y*) *Cracknall* v. *Janson*, 11 Ch. D. 1.

(*z*) 3 & 4 W. IV. c. 74, s. 38; and see, as to bankruptcy of a tenant in tail who has created a voidable estate, sect. 62 of Act; and see, as to con-

the Act, a fine by a tenant in tail confirmed his previous voidable conveyance (*a*).

Verbal agreement for indemnity enforced.

Equity, it appears, will, after conveyance, enforce a verbal agreement, entered into by a purchaser of leaseholds, before the sale, to indemnify the vendor against the rent and covenants (*b*).

Fire policies —right to.

Property contracted to be sold is at the purchaser's risk from the date of the contract; and the mere fact that it is subsequently destroyed by fire, or otherwise, can afford no defence to the vendor's action for specific performance (*c*). As regards fire insurance, it is now settled that the contract for fire insurance is a contract for mere personal indemnity (*d*); and that, accordingly, the benefit of it does not pass to the purchaser under his contract (*e*). Applying the same principle, it is further settled that where a vendor receives his purchase-money without any abatement on account of damage by fire pending completion, the insurance company is entitled to recover from the vendor out of the purchase-money a sum equal to the insurance money upon the principle of subrogation (*f*). It follows from this that the common practice of inserting in conditions of sale that the purchaser shall have the benefit of any insurance, effected by the vendor, exposes the vendor to the danger of having to hand over the insurance money to the purchaser, and at the same time of being liable to the insurance company for an equivalent amount of his

firmation of the voidable estates of purchasers under the bankruptcy of a tenant in tail, sects. 60, 61, and 65 of Act; *Sturgis* v. *Morse*, 2 D. F. & J. 223. And as to the power of a trustee under the Act of 1883 over the bankrupt's estate tail, see 46 & 47 V. c. 52, s. 56 (5).

(*a*) *Lloyd* v. *Lloyd*, 4 D. & War. 354.

(*b*) *Pember* v. *Mathers*, 1 Br. C. C. 52. As to the liability under an implied contract of each successive assignee of a lease to indemnify the original lessee, notwithstanding an express covenant to indemnify the immediate assignor, see *Moule* v. *Garrett*, L. R. 7 Ex. 101.

(*c*) *Poole* v. *Adams*, 12 W. R. 683; *Collingridge* v. *Royal Exchange Corp.*, 3 Q. B. D. 173; *Rayner* v. *Preston*, 18 Ch. D. 1; *Edwards* v. *West*, 7 Ch. D. 858; Fry, 403.

(*d*) *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.

(*e*) *Rayner* v. *Preston*, *suprà*.

(*f*) *Castellain* v. *Preston*, 11 Q. B. D. 380.

Chap. XIV. Sect. 8.

purchase-money (*g*). This difficulty might be obviated, were the contract of insurance originally effected, not merely for the benefit of the vendor, but for the benefit also of any subsequent purchaser. But this is never, in fact, the contract; and of course nothing which subsequently occurs between himself and a purchaser can increase the liability of the insurer: *e. g.*, a stipulation that the purchaser shall be entitled to the benefit of the insurance, upon paying the vendor the amount of the last premium paid thereon.

Section 9.

(9.) *As to the general rights and liabilities of purchaser under the conveyance.*

As to the general rights and liabilities of purchaser under the conveyance.

Purchaser's right to rent, if property in lease, &c.

If the conveyance be executed during the existence of a tenancy, the purchaser of the reversion, although merely for years (*h*), thereupon becomes entitled to the accruing (*i*) and future rent, whether reserved at short periods or half-yearly (*k*); and may recover it by action, or (after giving notice of the conveyance) by distress (*l*): but he cannot recover arrears due before the conveyance (*m*); or subsequent rent which the tenant, in ignorance of the conveyance, has paid to the vendor (*n*). So, it would appear, the purchaser of a part only of a rent-charge, may, after conveyance, distrain for his proportionate part (*o*): but a severance of the reversion destroys the right to distrain for by-gone rent (*p*). The Act 4 & 5 Will. IV. c. 22 for the apportionment of rents does not appear to apply to the case of a sale; or, as between vendor and purchaser, to affect the latter's right

(*g*) *Vide ante*, p. 197.

(*h*) *Harmer* v. *Bean*, 3 C. & K. 307.

(*i*) *Flight* v. *Bentley*, 7 Si. 149; and a parol agreement for apportionment is invalid, *Flinn* v. *Calow*, 1 Man. & G. 589.

(*k*) *Hughes* v. *Wells*, 1 Dav. 603.

(*l*) *Moss* v. *Gallimore*, 1 Doug. 279; although the rent was due at the date of the notice; *Rogers* v. *Humphreys*, 4 A. & E. 299; and see *Cadle* v. *Moody*, 7 Jur. N. S. 1249.

(*m*) *Flight* v. *Bentley*, 7 Si. see p. 151.

(*n*) 4 & 5 Anne, c. 3 (Ruff. 4 Anne, c. 16), s. 10; *Birch* v. *Wright*, 1 T. R., see p. 385.

(*o*) *Rivis* v. *Watson*, 5 M. & W. 255.

(*p*) *Stavely* v. *Alcock*, 16 Q. B. 636; see *Beer* v. *Beer*, 12 C. B. 60.

to accruing rents (*r*). By the Apportionment Act, 1870 (*s*), all rents (*t*) are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly; but the Act expressly provides that the person liable to pay the rent is not to be resorted to for an apportioned part; but the entire rent is to be paid to the person who would have been entitled to receive it, if not apportionable; and the right to an apportioned part is to be enforced against him, not against the tenant (*u*). In one case (*x*), where a company in liquidation continued in the possession of leasehold premises for the purpose of carrying on their business, it was held that the rent was apportionable under this Act, the landlord being entitled to prove jointly with the other creditors for so much of the rent as was due up to the commencement of the winding up, *i.e.* the presentation of the petition, and being entitled to distrain for the full rent due after that day. The language of the Act is certainly wide enough to include an apportionment of rent as between vendor and purchaser, but the point has not as yet been expressly decided.

(*r*) See and consider *Browne* v. *Amyot*, 3 Ha. 173; *Beer* v. *Beer*, 12 C. B. 60. For decisions under the Act, see *Knight* v. *Boughton*, 12 B. 312; *Lock* v. *De Burgh*, 4 De G. & S. 470, deciding that rents are apportionable as between the real and personal representatives, where the lease is granted *after*, but under a power created *before* the Act came into operation; see also *Re Clulow's Est.*, 3 K. & J. 689: but a devisee for life is not entitled, as against the remainderman, to apportionment upon parol leases from year to year created by the testator, and not determined by himself by act *inter vivos*; *Cattley* v. *Arnold*, 1 J. & H. 651: and it seems now well settled that the Act applies to all cases where either the lease reserving the rent, or the deed creating the life interest, are subsequent in date to the Act; *Plummer* v. *Whitelap*, John. 585; *Llewellyn* v. *Rous*, 2 Eq. 27. Dividends declared by joint-stock companies are not apportionable; *Re Maxwell's Trusts*, 1 H. & M. 610; *Bates* v. *Mackinley*, 31 B. 280; unless, perhaps, the dividends are payable on certain precise days. Orders of the Court are not instruments in writing within the meaning of the Act; see *Re Lawton's Est.*, 3 Eq. 469; *Jodrell* v. *Jodrell*, 7 Eq. 461; but an award of the Tithe Commissioners has been held to be so; *Heasman* v. *Pearse*, 8 Eq. 599.

(*s*) 33 & 34 V. c. 35.

(*t*) The term includes rent-service, rent-charge, rent-seck, tithes, and periodical payments in lieu of or in the nature of rent or tithe.

(*u*) S. 4.

(*x*) *Re South Kensington Coop. Stores*, 17 Ch. D. 161; and cf. *Swansea Bank* v. *Thomas*, 4 Ex. D. 94.

Chap. XIV. Sect. 9.

And to sue for breach of covenant.

If the tenancy be under a lease by deed (*y*), for a term which is subsisting at the date of the conveyance, the purchaser of the reversion may sue upon breaches of covenants which occurred before conveyance (*z*); but not, it would seem, if the lease be determined before the conveyance, although the tenancy continue (*a*). His right to sue exists, although he have purchased the reversion only of part, or even of only an undivided part (*b*), of the demised premises; and, although the term may, as respects the residue of the premises, have merged in the reversion (*c*). Thus, where there are mutual covenants by owners of land for themselves, their heirs and assigns, with adjoining owners, their heirs and assigns, to comply with certain conditions, a lessee of one of the adjoining owners is an assign within the covenant,

To re-enter.

and may sue to restrain breaches thereof (*d*). But a purchaser of the reversion cannot enter in respect of a breach of condition which occurred prior to the conveyance of the reversion (*e*); nor, until the late Act (*f*), could he enter for conditions broken, unless he had the reversion in the entirety (*g*). An entry might, however, be made by the purchaser of the immediate part of the reversion in the entirety; *e.g.*, if a termor underlet to A., and then assigned to B. the whole of the demised premises for the residue of the original term wanting one day, B. might and may enter for condition broken by A. (*h*) subsequently to the assignment (*i*). And in none of the above cases is it necessary that the tenant should attorn to (*k*), or other-

(*y*) *Standen* v. *Christmas*, 10 Q. B. 135.

(*z*) Sug. 181. As to the allegations necessary in a suit by an assignee of the reversion on covenants, see *Phillipps* v. *Phillipps*, 4 Q. B. D. 127; *Davis* v. *James*, W. N. (1884) 44; *Danford* v. *McAnulty*, 8 Ap. Ca. 456.

(*a*) See *Johnson* v. *St. Peter's, Hereford*, 6 N. & M. 106, 115.

(*b*) *Badeley* v. *Vigars*, 4 E. & B. 71.

(*c*) *Twynam* v. *Pickard*, 2 B. & Ald. 106; and see *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.

(*d*) *Taite* v. *Gosling*, 11 Ch. D. 273.

(*e*) *Crane* v. *Batten*, 23 L. T. O. S. 220; and see *Hunt* v. *Remnant*, 9 Ex. 635.

(*f*) 22 & 23 V. c. 35, s. 3, and *vide post*, p. 917.

(*g*) *Wright* v. *Burroughes*, 4 D. & L. 438, see p. 448; 32 Hen. VIII. c. 34.

(*h*) *Wright* v. *Burroughes*, *suprà*.

(*i*) *Crane* v. *Batten*, *suprà*.

(*k*) See 4 & 5 Anne, c. 3, (Ruff. 4 Anne, c. 16,) s. 9; 1 Doug. 282; reporter's note to *Brown* v. *Storey*, 1 Man. & G. 128. See *Doe* v. *Brown*,

wise acknowledge the title of, the purchaser. Where the lease is by writing not under seal, the right to sue upon it as a contract does not pass with the reversion; and the lessor may, after conveying the reversion, sue the lessee in respect of breaches of agreement (*e. g.*, to repair the premises), committed during the tenancy but subsequently to the conveyance of the reversion (*l*): but the assignee of the reversion may maintain an action against the tenant for use and occupation (*m*).

Next estate is now the reversion.

Under a modern Act, where the immediate reversion on a lease is surrendered or merged after the 1st of October, 1845, the next estate is to be deemed the reversion as respects both rights and liabilities (*n*): and this clause is retrospective (*o*).

And, under a late Act, where the reversion on a lease is severed, and the rent is *legally* apportioned (*p*), the assignee of each part of the reversion has, in respect of his apportioned rent, the benefit of the original conditions or powers of re-entry for non-payment (*q*). And, by the same statute, a licence, or partial licence, to do any act which, without such licence, would create a forfeiture, or give a right to re-enter, does not destroy the right of re-entry in respect of any subsequent breach of condition by the licensee, or any breach by his co-lessee (*r*): and, by a supplemental statute, the effect of an actual waiver is confined to the particular breach to which the waiver specially relates (*s*).

2 E. & B. 331. The statute gives no right where the person, who is the object of the suit, has no particular estate left in the land by reason of his having assigned his interest; *Allcock* v. *Moorhouse*, 9 Q. B. D. 366.

(*l*) *Bickford* v. *Parson*, 5 C. B. 920; *Standen* v. *Christmas*, 10 Q. B. 135.

(*m*) *S. C.*

(*n*) 8 & 9 V. c. 106, s. 9.

(*o*) *Upton* v. *Townend*, 17 C. B. 50. As to the remedies of remaindermen or reversioners on leases granted under powers, see *Greenaway* v. *Burt*, 18 Jur. 449.

(*p*) As to apportionment, see 1 Dav. p. 544 *et seq.*; Hood & C. 137.

(*q*) 22 & 23 V. c. 35, s. 3; Conv. Act, 1881, s. 10.

(*r*) Sects. 1 and 2.

(*s*) 23 & 24 V. c. 38, s. 6.

Chap. XIV. Sect. 9.

Tenancy continues until determined.

A subsisting tenancy will continue after the purchase, upon the same terms as previously, until it be regularly determined by either the purchaser or the tenant (*t*).

Purchaser's rights and liabilities, as lessee, cease on conveyance.

Where the purchaser is himself lessee, the execution of the conveyance at once determines all the covenants in the lease which subsisted between himself and the vendor as lessee and lessor (*u*). So, the purchase by a lessee of part only of the demised land, will destroy his right of pre-emption over the residue (*x*).

Vendor retaining possession, not liable for use and occupation.

Encroachments.

It has been held, that the mere retention by the vendor of the actual possession of the property, subsequently to the execution of the conveyance, will not subject him to an action by the purchaser for use and occupation (*y*). If he make encroachments, these will presumably be for the benefit of the purchaser (*z*).

Purchaser's will, how affected by conveyance.

We have seen (*a*) that, under the old law, where a testator, having entered into a contract for purchase which was not binding on the vendor, devised the estate, such devise was inoperative on any interest which he subsequently acquired in the property, although a case of election might, in some cases, be raised against the heir: so also, that if, having contracted for an estate, he devised it, and then took a conveyance in terms inconsistent with the contract, the devise was thereby revoked: but that a devise contained in a will coming within the provisions of the Act of 1 Vict. c. 26, will pass to the devisee the rights, whatever they may be, acquired by the testator under the subsequent conveyance (*b*).

Purchase of equity of redemption, whether real or personal

Upon the purchase of an estate in mortgage, the debt as between the purchaser's real and personal representatives, *primâ facie*, and in the absence of evidence of a contrary

(*t*) *Greenwood* v. *Bairstow*, 5 L. J. Ch. 179.

(*u*) *Paton* v. *Brebner*, 1 Bli. 69.

(*x*) *Sparrow* v. *Cooper*, Hay. & J. 504; *et vide ante*, p. 311.

(*y*) *Tew* v. *Jones*, 13 M. & W. 12; *vide ante*, p. 505.

(*z*) *Doe* v. *Tidbury*, 14 C. B. 304.

(*a*) *Ante*, p. 306.

(*b*) *Sed vide ante*, p. 308.

estate liable to mortgage debt.

intention, and even in cases not affected by Locke King's Act (*c*), remains primarily charged on the land. Such intention is not evidenced by a mere covenant with the *mortgagor* to pay the debt (*d*); nor does such a covenant create any personal liability to the mortgagee (*e*), nor come within the operation of a charge of debts in the purchaser's will (*f*). A similar covenant with the *mortgagee* may, perhaps, be sufficient for the purpose (*g*); but the authorities do not clearly warrant this proposition in cases where the covenant is unaccompanied by a variation of the original contract for payment: and it has, apparently, yet to be decided that a mere covenant by the purchaser with the mortgagee to pay the debt without such variation or other special circumstances, is sufficient to make the personal estate of the purchaser the primary fund for payment (*h*). A distinction, not altogether satisfactory, has been made between a contract for the purchase of the equity of redemption, and a contract for the purchase of the unencumbered estate at a price out of which the debt is eventually allowed in abatement; the personalty being, in the latter case, considered the primary fund (*i*): but, in one case, where the estate was proposed to be conveyed free from the mortgage, and the mortgagee was made a party to the conveyance, but did not execute it or receive his money, the debt was held to be primarily charged on the land (*k*).

(*c*) 17 & 18 V. c. 113; and see now the Amendment Act, 30 & 31 V. c. 69.

(*d*) *Tweddell* v. *Tweddell*, 2 Br. C. C. 101, 152; *Evelyn* v. *Evelyn*, 2 P. W. 664; *Butler* v. *Butler*, 5 V. 534; *Barham* v. *Earl of Thanet*, 3 M. & K. 607, 624; *Barry* v. *Harding*, 1 J. & L. 475, 485; see, too, *Bond* v. *England*, 2 K. & J. 44; *Bagot* v. *Bagot*, 10 Jur. N. S. 1169.

(*e*) *Forrester* v. *Leigh*, Amb. 173; *Butler* v. *Butler*, 5 V. 534.

(*f*) *Duke of Ancaster* v. *Mayer*, 1 Br. C. C. 454; 1 Wh. & T. L. C.; *Hamilton* v. *Worley*, 2 V. 62; *Butler* v. *Butler*, 5 V. 534.

(*g*) *Woods* v. *Huntingford*, 3 V. 128; *Lord Oxford* v. *Lady Rodney*, 14 V. 417; *Waring* v. *Ward*, 7 V. 332; but in these cases there were strong circumstances showing the intention of the purchaser to make the debt his own.

(*h*) And see Coote, 1045.

(*i*) *Parsons* v. *Freeman*, Amb. 115; 2 P. W. note to 664; *Belvedere* v. *Roehfort*, 5 Br. P. C. 299; *Cope* v. *Cope*, 2 Salk. 449.

(*k*) *Barry* v. *Harding*, 1 J. & L. 475, 485.

Chap. XIV. Sect. 9.

Where part of purchase-money is borrowed and secured by mortgage of the estate.

It is clear, however, that a sum borrowed in order to complete the contract, even for paying off existing charges, and secured by a contemporaneous mortgage of the estate, is *primâ facie* payable primarily out of the personalty (*l*) : and the same rule prevails when the consideration is an annuity, secured by a charge on the estate and by the purchaser's covenant (*m*).

Locke King's Act.

The general rule, as above stated, in respect to mortgage debts, was altered by Locke King's Act (*n*) ; which provides that in the case of any person dying after the 31st December, 1854, seised of or entitled to any land or hereditaments, which at the time of his death are subject to the payment of any sum or sums of money by way of mortgage, and who shall not by his will, or by deed or other instrument, have expressed any contrary or other intention, the heir or devisee shall, as between the different persons claiming through the deceased, be primarily liable to the payment of the mortgage debt: but this provision is not to affect or diminish the rights of the mortgagee ; nor the rights of any person claiming under a will, deed, or document, prior to the 1st January, 1855.

Cases within the Act.

In order to bring a case within the Act, the charge must be for a specified sum, and on a specified estate ; a mere general charge by a testator on real estate in aid of his personalty is insufficient (*o*). But it applies to cases of contribution : so that where different parts of the mortgaged property are given to different devisees, they must all bear their rateable proportion of the mortgage debt (*p*). The Act has been held to apply to the case of an equitable charge by memorandum and deposit of title deeds (*q*) ; and this decision does not appear to have been rested on the ground

(*l*) *Waring* v. *Ward*, 7 V. 332.
(*m*) *Yonge* v. *Furse*, 24 L. J. Ch. 643.
(*n*) 17 & 18 V. c. 113.
(*o*) *Hepworth* v. *Hill*, 30 B. 476.
(*p*) *Re Newmarch*, 9 Ch. D. 12.
(*q*) *Pembrooke* v. *Friend*, 1 J. & H. 132 ; *Coleby* v. *Coleby*, 2 Eq. 803.

of there being an undertaking to execute a legal mortgage (*r*); so that, in principle, it would seem to apply to every case of equitable charge, although not strictly a mortgage. But a vendor's lien for unpaid purchase-money was held not to be a sum charged by way of mortgage within the Act, so as to entitle the heir or devisee to have it satisfied out of the personal estate (*s*). The Act applies to copyholds (*t*), but not to leaseholds (*u*); and where real and personal estate are comprised in the same mortgage, the mortgage debt must be borne rateably by the real and personal estate subject thereto (*x*).

Where the estate is a collateral security.

The Act provides that every part of the mortgaged land, according to its value, shall bear a proportionate part of the mortgage debts charged upon the whole; but, of course, this does not throw the primary liability on a security which is merely collateral, *i.e.*, secondary, or one which is not to be resorted to until the primary security is exhausted (*y*).

Where several mortgages of various properties are made to secure one debt.

Where a testator gives a mortgage for a certain debt, and afterwards further mortgages the same property as well as other property to secure that and further advances, it is a question of construction whether all the advances are intended to be treated as one debt, and so are to be borne rateably by the various properties, or whether the land first charged is intended to be the primary security (*z*). So, too, where several properties are mortgaged contemporaneously by different deeds, but one is *called* a collateral, though not, in fact, a collateral in the sense of being a secondary secu-

(*r*) In *Coleby* v. *Coleby* there was such an undertaking; but this does not appear to have been the case in *Pembrooke* v. *Friend*.

(*s*) *Hood* v. *Hood*, 3 Jur. N. S. 684; *Barnwell* v. *Iremonger*, 1 Dr. & S. 255; but see *Lord Lilford* v. *Powys Keck*, 1 Eq. 347; and see now the Amendment Act, *post*, p. 923.

(*t*) *Piper* v. *Piper*, 1 J. & H. 91.

(*u*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; *Re Wormsley's Est.*, 4 Ch. D. 665; *Gall* v. *Fenwick*, 43 L. J. Ch. 178.

(*x*) *Trestrail* v. *Mason*, 7 Ch. D. 655.

(*y*) *Stringer* v. *Harper*, 26 B. 33.

(*z*) *Leonino* v. *Leonino*, 10 Ch. D. 460; *Re Athill*, 16 Ch. D. 211, 223.

Chap. XIV. Sect. 9.

rity (*a*); and it would seem that if the word "collateral" is to have this meaning, and not be treated as equivalent to "parallel" or "additional," this should be expressly stated in the contract (*b*).

The statute does not operate against the Crown where there are no next of kin.

As against the Crown claiming in default of next of kin the devisee is not entitled to have the mortgage debt satisfied out of undisposed-of personal estate (*c*).

As to the exceptions in the Act:

Where a testator, by a will made in 1847, devised his mortgaged real estate, and directed his debts to be paid out of his personalty, and by a testamentary instrument in 1861 merely gave a pecuniary legacy, but did not refer to the former will, it was held that the will must be treated as already made at the date of the Act; and that the devisee was entitled to have the mortgage debt satisfied out of the personal estate (*d*); so, the heir of an intestate, who before the 1st of January, 1855, executed a mortgage, reserving the equity of redemption to himself and his heirs, is not within the exception (*e*); and an heir taking by descent an estate, the devise whereof has lapsed, is not a person "claiming under or by virtue of a will," within the Act (*f*).

What is proof of "a contrary intention."

As might have been anticipated, there have been numerous decisions as to what is evidence of a "contrary or other intention" within the meaning of the Act; but these have been rendered of little practical importance by the recent Amendment Act. It will be sufficient to remark that, in cases not coming within the Amendment Act, where a specific source of payment is provided or indicated, as where other real estate is devised in trust to sell and pay debts (*g*),

(*a*) *Re Athill*, 16 Ch. D. 211; *Early* v. *Early*, *ib.* 214.

(*b*) *Ibid.*

(*c*) *Dacre* v. *Patrickson*, 1 Dr. & S. 186.

(*d*) *Rolfe* v. *Perry*, 9 Jur. N. S. 853.

(*e*) *Piper* v. *Piper*, 1 J. & H. 91.

(*f*) *Nelson* v. *Page*, 7 Eq. 25.

(*g*) *Newman* v. *Wilson*, 31 B. 33; and see *Maxwell* v. *Hyslop*, L. R. 4 H. L. 506, where a Scotch estate charged with a Scotch heritable bond was held to be exonerated by a direction in an English will for payment of the testator's debts out of his residuary real and personal estate.

or where there is a direction that the debts shall be paid out of the "personal estate" (*h*), it is considered that there is sufficient evidence of intention to exonerate the realty; but that no such intention is evidenced by a mere direction that the debts shall be paid (*i*), or shall be paid by the testator's "executors out of his estate" (*j*); or, generally, "shall be paid out of his estate" (*k*). Whether a simple direction that they shall be paid "by his executors," they not being also devisees in trust for sale of the real estate, would take the case out of the Act, is not clear; although such, it is conceived, would be the decision. It would seem that land devised upon trust for sale, and taken in its converted state, is not an interest in land within the Act (*l*).

Amendment Act, 1867.

But now by the Amendment Act it is provided, that in the construction of the will of any person dying after the 31st day of December, 1867, a general direction that all his debts shall be paid out of his *personal* estate is not to be deemed to be a declaration of an intention to exonerate the realty, unless such intention be further declared by words, expressly or by necessary implication, referring to mortgage debts (*m*): and in the construction of Locke King's Act, and of the Amendment Act, the word "mortgage" is extended to a lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator (*n*); but, when the last edition of this work was published, a lien for unpaid purchase-money upon lands purchased by a person who died *intestate*, was not within the Act (*o*).

Amending Act, 1877.

But since the last edition, a further amending Act has been passed (*p*), extending the previous Acts to a testator or

(*h*) *Moore* v. *Moore*, 1 D. J. & S. 602; *Eno* v. *Tatham*, 3 *ib.* 443.

(*i*) *Pembrooke* v. *Friend*, 1 J. & H. 132; see observations on this case in *Coote* v. *Lowndes*, 10 Eq. 376.

(*j*) *Woolstencroft* v. *Woolstencroft*, 2 D. F. & J. 347.

(*k*) *Brownson* v. *Lawrance*, 6 Eq. 1.

(*l*) *Lewis* v. *Lewis*, 13 Eq. 218.

(*m*) 30 & 31 V. c. 69, s. 1; *Re Rossiter*, 13 Ch. D. 355.

(*n*) Sect. 2. This section seems to be retrospective; but not to apply to the case of lands purchased by an intestate; *vide suprà*.

(*o*) *Harding* v. *Harding*, 13 Eq. 493.

(*p*) 40 & 41 V. c. 34.

Chap. XIV. Sect. 9.

intestate dying seised or possessed of, or entitled to, any land or other hereditaments of whatever tenure (*p*) which shall, at the date of his death, be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money, and providing that the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (*in the case of a testator*) he shall, within the meaning of the said Acts, have signified a contrary intention; and that such contrary intention shall not be deemed to be signified by a charge, or direction for payment, of debts upon or out of the residuary real and personal or residuary real estate.

Criticism of terms of Act.

It is unfortunate that the exception of the expression of a contrary intention should have been limited by the Act to the case of a testator, the draftsman apparently forgetting that such intention might be expressed by deed or other document, as well as by will (*q*).

Law prior to 1877.

It will still be useful to point out the state of the law prior to the last amending Act. It was observed in the last edition that the Act does not meet the case of a testator directing his debts to be paid out of his residuary real and personal estate; and it was suggested that in such a case the specific devisee of an estate subject to a mortgage would be entitled to have it exonerated; but in one case, V.-C. Malins appears to have been of the contrary opinion, though it was not necessary to decide the point (*r*). In a later case where part of a mortgaged estate was devised to A. for life, and the rest to B., who was residuary devisee, in fee, and there was a charge of debts on the residuary real estate, in the event of the personal estate proving deficient, it was held by Sir G. Jessel, M. R., that the life estate of A. was not exonerated, but was proportionately liable to keep down the

(*p*) These words would seem to be wide enough to include leaseholds; see Theobald, 123.

(*q*) *Re Cockcroft*, 24 Ch. D. 94, 100.

(*r*) *Lewis* v. *Lewis*, 13 Eq. 215.

interest on the mortgage (*s*), and where the testator made a mixed fund and directed payment out of it of his debts, it was held that no intention was shown to exclude the Acts (*t*). But of course the concluding words of the Act of 1877 render the above doctrine obsolete.

Conveyance of equitable estate, why requisite.

Even in the case of a mere equitable estate, a conveyance seems to be necessary to enable the purchaser to enforce, as against third parties, any equities attaching to the property (*u*).

Conveyance with power of re-purchase,—when not a mortgage.

And we may here remark, that if a *bonâ fide* sale and absolute conveyance are accompanied by a power reserved to the vendor to re-purchase the property, this will not turn the transaction into a mortgage, if such does not appear to have been the intention of the parties. Thus, where A. sold a life estate to B., and there was a contemporaneous deed giving to A., who paid all the costs of the transaction, the right of re-purchase at the price paid, and B. entered into possession, and, after keeping up an insurance on A.'s life, had a surplus income from the property of about 6*l.* per cent. on his purchase-money, it was held that the transaction was a sale, and not a mortgage; and that A. was not entitled to an account of the rents and profits received by B. (*x*). Nor does the circumstance that the parties already stand in the relation of mortgagor and mortgagee preclude the former from making an absolute sale to the latter of the equity of redemption, coupled with a right of re-purchase (*y*). The best general test of the intention of the parties in these cases seems to be the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such

(*s*) *Sackville* v. *Smyth*, 17 Eq. 153; *Hannington* v. *True*, 33 Ch. D. 195; cf. *Brownson* v. *Lawrance*, 6 Eq. 1, which can no longer be considered good law.

(*t*) *Elliott* v. *Dearsley*, 16 Ch. D. 322.

(*u*) See *Tasker* v. *Small*, 3 M. & C. 70, *per* Lord Cottenham; *ante*, p. 284.

(*x*) *Alderson* v. *White*, 2 D. & J. 97. The decision was rested on the true ground, *viz.*, the intention of the parties as appearing on the face of the instruments; but query whether the transaction was not intended and treated as a mortgage.

(*y*) *Gossip* v. *Wright*, 9 Jur. N. S. 592; *Ensworth* v. *Griffiths*, 5 Br. P. C. 184.

Chap. XIV. Sect. 9.

re-purchase: if there is no such power there is no mortgage (*z*). A right of re-purchase must, as we have already observed (*a*), be exercised in its literal terms (*b*); and be promptly enforced (*c*).

Purchaser's remedy for injury to property through prior act of vendor.

It has been held, that a lessee can recover damages against the lessor for injury which, after the execution of the lease, is sustained by the property, through the prior negligent construction by the lessor of a sewer upon adjoining property retained by him (*d*): and the same right would seem to exist in case of a sale.

(*z*) See *Perry* v. *Meddoweroft*, 4 B. 203; *Williams* v. *Owen*, 5 M. & C. 303; *Verner* v. *Winstanley*, 2 Sch. & L. 393; *Neal* v. *Morris*, Beat. 597; but see *Fee* v. *Cobine*, 11 Ir. Eq. R. 406; *Ogden* v. *Battoms*, 1 Jur. N. S. 791.

(*a*) *Ante*, p. 240.

(*b*) *Barrell* v. *Sabine*, 1 Vern. 268; *Ensworth* v. *Griffiths*, 5 Br. P. C. 184; *Davis* v. *Thomas*, 1 R. & M. 506; *Joy* v. *Birch*, 4 C. & F. 57, 89. See *Pegg* v. *Wisden*, 16 B. 239; *Brooke* v. *Garrod*, 2 D. & J. 82; and cf. *Ward* v. *Wolverhampton Waterworks Co.*, 13 Eq. 243.

(*c*) See *Chesterman* v. *Mann*, 9 Ha. 206.

(*d*) *Alston* v. *Grant*, 3 E. & B. 128.

CHAPTER XV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE ADVERSE RIGHTS OF THIRD PARTIES.

1. *Purchaser without notice, protected by legal estate against prior claimants.*
2. *With mere equitable title, postponed to prior equitable claimants.*
3. *How far protected against defective execution of powers —against prior claimants who have encouraged him to purchase —and by Statute in various cases.*
4. *As to priority under the Registration Acts.*
5. *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates, and fraudulent or voluntary conveyances—equitable relief against purchasers with notice.*
6. *As to contribution to paramount charges.*
7. *Rights of third parties after conveyance in various cases.*

Section 1.

Where equities are equal, legal estate prevails.

(1) WHERE two persons have, in conscience, an equal claim to the same property, Equity will not interfere against the one who acquires a legal right to hold it; even although his equitable title be of later date than that of his opponent (*a*). The rule is subject to no exception—not even in favour of charities (*b*).

Purchaser buying, without notice, protected by legal estate;

Now no person can have an equity of a higher kind in respect to property, than that which arises from his having fairly bought and paid for it. The execution of a conveyance

(*a*) *Oxwick* v. *Plumer*, Bac. Abr. Mortgage, (E.) s. 3.

(*b*) *A.-G.* v. *Wilkins*, 17 B. 285.

Chap. XV. Sect. 1.

to a *bonâ fide* purchaser for valuable consideration, or to his trustee, will, therefore, under the above rule, render his title indefeasible as against all equitable claimants (invoking the auxiliary, as distinguished from the concurrent, jurisdiction of the Court of Chancery), even for valuable consideration, of whose claims he had no notice prior to the execution of the conveyance (*c*) and actual payment of the purchase-money (*d*). Of course, if the purchaser knows of an incumbrance, either before (*e*) or after the execution of his conveyance, but before the payment of the whole of his purchase-money, he will be liable to the extent of any purchase-money which he subsequently, without the consent of such incumbrancer, pays to the vendor.

In what cases.

Where the contract has been completed by a conveyance which proves defective, by reason of some prior conveyance, charge, or incumbrance, the purchaser may, at any subsequent period, get in any outstanding legal estate (*f*), (unless he know that it is held expressly in trust for an adverse claimant (*g*),) and use it against all parties of whose claims he had no notice at the time of the completion of his purchase (*h*). Where the conveyance is executed and the

(*c*) *Wigg* v. *Wigg*, 1 Atk. 382, 384; *sed vide post*, p. 935.

(*d*) *Tourville* v. *Naish*, 3 P. W. 307; (where the money being secured by bond was held insufficient;) *Jones* v. *Stanley*, 2 Eq. Ca. Ab. 685, pl. 9; *Story* v. *Lord Windsor*, 2 Atk. 630; *Frere* v. *Moore*, 8 Pr. 475, 489; see *Davies* v. *Thomas*, 2 Y. & C. 234. Under the Irish Registration Act, the legal estate and want of notice are no protection against an equity arising under a prior registered instrument, *Mill* v. *Hill*, 3 H. L. C. 828; and all unregistered deeds, though prior in date, are absolutely void as against the registered deed; *Carlisle* v. *Whaley*, L. R. 2 H. L. 391. As to registration under the Yorkshire Reg. Acts, see *ante*, p. 774 *et seq.* The equity applies to purchasers as well of personal as of real estate; *Dawson* v. *Prince*, 2 D. & J. 41; and see Lord Selborne's statement of the law on this subject in *Blackwood* v. *London Chartered Bank of Australia*, L. R. 5 P. C. 111.

(*e*) See *Rayne* v. *Baker*, 1 Giff. 241.

(*f*) *Bassett* v. *Nosworthy*, Finch, 102; 2 Wh. & T. L. C. 1; and this notwithstanding the inadequacy of the consideration.

(*g*) *Saunders* v. *Dehew*, 2 Vern. 271; *Mumford* v. *Stohwasser*, 18 Eq. 556.

(*h*) *Stanhope* v. *Earl Verney*, 2 Ed. 81; and Butler's note to Co. Litt. 290 b., n. xv.; *Willoughby* v. *Willoughby*, 1 T. R. 763; and see *Jones* v. *Smith*, 1 Ha. 43; 1 Ph. 244. As to the priority acquired by registration, *vide post*, p. 958 *et seq.* As to the equitable

purchase-money is secured, he may come into Equity to have it employed in discharge of newly discovered incumbrances (*i*), if created by the vendor or covered by his covenants for title (*k*): and where the conveyance has been executed, and part only of the money paid, before notice, he may, it is conceived, clearly avail himself of the legal estate as a security to the extent of the sum so paid. The protection of the legal estate extends to a trustee who, having the legal estate, takes an assignment of the equitable interest of his *cestui que trust*, by way of security for money advanced; and he can avail himself of this protection as against a prior incumbrance of which he had no notice (*l*).

Although procured by fraud of a stranger.

And whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the property, he is entitled to the benefit of it (*m*): and even the circumstance of the execution of the conveyance having been procured by the fraud of a third party has not been allowed, in Equity, to prejudice an innocent purchaser without notice;—the deed remaining unimpeached at Law (*n*): but even an otherwise innocent purchaser can derive no advantage from the acquisition of the legal estate, if acquired by means of his own fraud, or the known fraud of another person (*o*).

Where the fraud is by a person in a fiduciary character.

Where a trustee of two different settlements, misapplied the trust funds under one, and transferred the trust funds of the other to make good the misappropriation, it was held that the transfer was, in effect, an alienation for value without notice, the consideration being the forbearance to sue for the misappropriation; and that the *cestuis que trust* under the latter settlement could not follow the trust funds into the

right of a person to bar known existing adverse claims by fine and nonclaim under the old law, see *Langley* v. *Fisher*, 9 B. 90.

(*i*) *Tourville* v. *Naish*, 3 P. W. 307.

(*k*) *Ante*, p. 906.

(*l*) *Newman* v. *Newman*, 28 Ch. D. 674.

(*m*) *Per* L. J. James in *Pilcher* v. *Rawlins*, 7 Ch. 259, 270.

(*n*) *Hiorns* v. *Holtom*, 16 B. 259.

(*o*) See and consider the judgments in *Pilcher* v. *Rawlins*, *suprà*, and in *Heath* v. *Cradock*, 10 Ch. 22.

Chap. XV. Sect. 1.

hands of the transferee (*p*). So where A., solicitor for B., a mortgagee, put up the mortgaged estate for sale without his client's authority, and bought it himself, and then procured B., who had been informed of the sale, to execute a conveyance and sign the endorsed receipt for the purchase-money, on the faith of representations, which, however, were not considered to be such as affected the validity of the deed at Law, and A. afterwards deposited the title deeds with C. as security for an advance, it was held that C. had priority over B., on account of the latter's negligence in executing the conveyance which enabled A. to commit the fraud (*q*).

Where vendor's title depends on a forged or fraudulent instrument.

And, for the above purposes, it has been considered immaterial that the vendor had no equitable interest in the property:—thus it has been held that a bare trustee, or a vendor whose apparent *equitable* title depends upon a forged instrument (*r*), or a false representation as to his title (*s*), can make a good title to a purchaser paying his money without notice, and then, or subsequently, acquiring the legal estate by means of a valid assurance. But where A. procured a mortgage from B., without any consideration, and then deposited it as a security for money advanced to him by C., who had no knowledge of the circumstances under which the deed was originally obtained, it was held that C. could stand in no better position than A.; and that the deed, being void as to A., was also void as to C. (*t*). So, where a solicitor procured his client to execute a mortgage to himself, on the pretence that it was only a covenant for production of deeds like several which he had previously executed, and afterwards transferred the mortgage to a *bonâ fide* holder for value, it was held that the mortgage was

(*p*) *Thorndike* v. *Hunt*, 3 D. & J. 563; *Taylor* v. *Blakelock*, 32 Ch. D. 560; and cf. *Case* v. *James*, 3 D. F. & J. 256, where the plaintiff had concurred in the breach of trust, and was therefore held entitled to no relief.

(*q*) *Hunter* v. *Walters*, 7 Ch. 75.

(*r*) See *Jones* v. *Powles*, 3 M. & K. 581; and *Bowen* v. *Evans*, 1 J. & L. 264.

(*s*) *Young* v. *Young*, 3 Eq. 801; but see and consider observations of the L. JJ. in *Heath* v. *Crealock*, 10 Ch. 22.

(*t*) *Parker* v. *Clarke*, 30 B. 54.

void at Law, and the transfer was necessarily void also: and in such cases the Court will not merely abstain from enforcing the invalid securities, but will cause them to be cancelled (*u*). So, where a son who was heir to his father, and one of the trustees of his will, possessed himself of the title deeds of his father's property, and representing himself as his father, whose names were identical with his own, obtained a loan on a mortgage of the property, it was held, in an action by the trustees of the father's will, that the mortgage deed was, in effect, a forgery, and therefore passed nothing to the mortgagee (*x*).

Protection afforded although the legal estate is acquired by a different title from that which is deduced.

In one case (*y*) which has been much discussed and which is now, in effect, overruled, where J. C., believing himself to be entitled under his father's will to undivided shares in real estate, conveyed them to a *bonâ fide* purchaser for value (*z*), and subsequently a later will was discovered, under which J. C. took the fee simple in the entire estate—but only as trustee for himself for life, with remainder over, V.-C. Wood held that the purchaser was not entitled to hold the legal estate as against the *cestui que trust* in remainder; inasmuch as the will under which J. C. alone derived his title to the fee disclosed the existence of a trust inconsistent with an absolute beneficial ownership. But in a later case (*a*) where a mortgage was taken by trustees, disclosing the trust, and the surviving trustee reconveyed part of the property to the mortgagor on payment of a portion of the mortgage debt which he appropriated for his own use, and the mortgagor then conveyed the part so released to new mortgagees, suppressing, by the connivance of the trustee, both the prior mortgage

(*u*) *Vorley* v. *Cooke*, 1 Gif. 230; and see *Rushout* v. *Turner*, 5 W. R. 670. In neither of these cases nor in the preceding case does it seem that the word "void" can strictly be applied to the transaction, so as to sustain, with regard to either transaction, a plea of *non est factum*; see *per* James, L. J., in *Hunter* v. *Walters*, 7 Ch. 85. And it is at least doubtful whether the first case would be followed at the present day, as being inconsistent with the principle of *Bickerton* v. *Walker*, 31 Ch. D. 151; see *French* v. *Hope*, 56 L. J. Ch. 363.

(*x*) *Cooper* v. *Vesey*, 20 Ch. D. 611.

(*y*) *Carter* v. *Carter*, 3 K. & J. 617.

(*z*) The transaction was in fact a mortgage.

(*a*) *Pilcher* v. *Rawlins*, 7 Ch. 259.

and the reconveyance, the Court refused at the instance of the *cestuis que trust* to deprive the new mortgagees of the legal estate which they acquired by means of the reconveyance, although it formed no part of the title deduced. In the same case, the surviving trustee fraudulently procured an absolute conveyance to himself of other parts of the mortgaged property without payment of any consideration; and then, concealing both the trust and the prior mortgage, under which alone he had a legal title, conveyed the property to a new mortgagee; the Court in like manner declined to interfere to deprive the new mortgagee of the legal estate, which he innocently acquired by means of an assurance which formed no part of his apparent title.

Notice of another having better right to call for legal estate, is notice of all his equities.

But the legal estate will not protect a purchaser against the claims of persons whose prior right to its protection was known to him before the completion of the purchase, even although the *extent* of such claims was unknown: for instance, where A., knowing that B. had a charge on the property, accepted a mortgage of the estate, relying on the mortgagor's covenants, and then got in an old outstanding term for years, it was held, that B., having in respect of A.'s notice of the first incumbrance, a preferable right to require an assignment of the term, was entitled to priority, not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A. had no notice at the date of his advance (*c*). So, where a purchaser bought a leasehold messuage, which was subject to three mortgages, two only of which were disclosed to him, and took an assignment, and paid the purchase-money by cheque, but shortly afterwards, having some misgivings, stopped the cheque, and then, for the first time, had actual notice of the third incumbrance, but eventually, under a threat of legal proceedings, allowed the cheque to be paid to the vendor, it was held that he was not a purchaser without notice, and that he was bound to redeem the third mortgagee (*d*). In

(*c*) *Willoughby* v. *Willoughby*, 1 T. R. 763.

(*d*) *Tildesley* v. *Lodge*, 3 S. & G. 543.

one case, a transfer of shares to a mortgagee, who had no notice of a trust affecting them, was upheld, notwithstanding that he received notice before the transfer was registered (*e*).

Legal estate got in from unsatisfied incumbrancer, available against subsequent incumbrancers.

It is clear that a purchaser by paying off, and getting in a legal estate from an *unsatisfied* mortgagee, may hold it as against all mesne incumbrances of which he had no notice at the time of completion; and this may be done *pendente lite*, at any time before a decree to settle priorities (*f*). Thus, in the case of *Bates* v. *Johnson*, which well exemplifies the rule, where there were successive mortgagees (the first taking the legal estate) of property subject to a prior trust, which was fraudulently concealed by the mortgagor, it was held that the last mortgagee might, after he had received notice of the trust, and pending a suit by the *cestuis que trust* for the redemption of the first mortgage, pay off the several prior incumbrancers, and, having obtained the legal estate, hold it until he was paid in full (*g*). In this case the claim of the first mortgagee was still unsatisfied when he parted with the legal estate, and the decision was quite in accordance with the earlier authorities.

No distinction on principle between satisfied and unsatisfied incumbrancer.

As regards a satisfied mortgagee or bare trustee, it is apprehended that no distinction can, on principle, obtain. Where such a person, in breach of his duty, conveys away a legal estate which comes into the possession of a purchaser for valuable consideration without notice, such purchaser can hold the

(*e*) *Dodds* v. *Hills*, 2 H. & M. 424; but cf. *Ortigosa* v. *Brown*, 47 L. J. Ch. 168, where the transferor was not the legal owner; and his title therefore remained to be completed before the transferee's could possibly be complete.

(*f*) *Belchier* v. *Renforth*, 5 Br. P. C. 292; *Marsh* v. *Lee*, 2 Vent. 337; 1 Wh. & T. L. C.; *Brace* v. *Duchess of Marlborough*, 2 P. W. 491; *Robinson* v. *Davison*, 1 Br. C. C. 63; *Barnett* v. *Weston*, 12 V. 130; and see *Ex p. Knott*, 11 V. 619; *Spencer* v. *Pearson*, 24 B. 266: the general doctrine will probably eventually be destroyed by a General Registration Act.

(*g*) *Bates* v. *Johnson*, John. 304; and see cases there cited, and *Carter* v. *Carter*, 3 K. & J. 617; *Prosser* v. *Rice*, 28 B. 68; *Young* v. *Young*, 3 Eq. 801; see too *Pease* v. *Jackson*, 3 Ch. 576.

Chap. XV. Sect. 1.

property against the owners of equitable interests who were defrauded by the conveyance. And it makes no difference that, if the purchaser is challenged and an action is brought against him to recover possession, he may have to rely upon some deed disclosing the equitable title, but of which at the date of the conveyance he had no notice (*h*).

Distinction between doctrine of tacking and inability to deprive legal owner of his legal rights.

It will be convenient in this place to draw attention to a distinction, which is apt to be overlooked, between the doctrine of the priority given to the owner of an equitable interest, in that capacity, when he holds the legal estate (as *e. g.*, in the case of tacking), and the established doctrine that Equity will not deprive the owner of the legal estate of his legal rights, in the absence of notice. In the former case, the acquisition of the legal estate, even with notice, may give priority to the owner of an equitable interest, acquired without notice of a prior equitable interest. Such priority depends upon equitable considerations, and is wholly unconnected with the legal rights which are incident to the legal estate. In the latter case, notice may always deprive the owner of the legal estate of his legal right. But it is no less absolutely true that, when the legal estate is acquired without notice (at all events, if acquired for valuable consideration), these legal rights remain in full force. It is apprehended that the doubt expressed by Sir G. Jessel in *Mumford* v. *Stohwasser* (*i*), as to the position of an innocent purchaser of the legal estate from a trustee in fraud of his *cestuis que trust*, applies only to the former of these cases, and cannot mean that the rights at Law of the legal owner, who has acquired his legal estate for valuable consideration without notice, can be questioned, even where the conveyance to him was the grossest breach of trust.

Illustrations of the distinction.

So far as concerns the giving of priority to equitable interests, a trustee can only transfer the property subject to the trusts upon which he holds it. Thus, where the

(*h*) *Pilcher* v. *Rawlins*, 7 Ch. 259, 274.

(*i*) 18 Eq. 556, 563.

person having the legal estate, holds it in the character of trustee for several successive incumbrancers, he may not create a priority by transferring it to any of them (*j*). But, for the purposes of this doctrine, he must be strictly a trustee: thus, where the equitable owner of freeholds charged them in favour of A., and covenanted to execute a legal mortgage to him, and afterwards, having got in the legal estate, mortgaged the property in fee to B., who had notice of the prior charge, B. was held to have priority to A., no trust having been created of the legal estate for the latter (*k*). On the other hand, wherever the purchaser has notice, either express or constructive, of the existence of such a trust at the time of getting in the legal estate, he will take subject to the claims of the *cestuis que trust* (*l*). Thus, where a purchaser had notice, after payment of his purchase-money, but before execution of the conveyance, he was held entitled to no benefit from subsequently acquiring the legal estate (*m*). And where property, which was already subject to an equitable mortgage, was settled, and the trustee made no inquiry as to the deeds, he was held to have been guilty of such negligence as affected him with constructive notice, and the beneficiaries under the settlement were therefore postponed (*n*).

Best right to call for legal estate a protection in Equity.

It may be added, that where a purchaser, not having got in an outstanding legal estate, has nevertheless the best right to call for it, he will in Equity be entitled to its protection (*o*).

(*j*) *Sharples* v. *Adams*, 32 B. 213; see too *Colyer* v. *Finch*, 19 B. 500; 5 H. L. C. 905; *Maxfield* v. *Burton*, 17 Eq. 15, and see comments on *Sharples* v. *Adams*, p. 17.

(*k*) *Garnham* v. *Skipper*, 55 L. J. Ch. 263.

(*l*) *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Ha. 272, aff. 11 Jur. 527; *Mumford* v. *Stohwasser*, 18 Eq. 556, and see judgment of Jessel, M.R.; *Prosser* v. *Rice*, 28 B. 68; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

(*m*) *Wigg* v. *Wigg*, 1 Atk. 382; and see *Davies* v. *Thomas*, 2 Y. & C. 234.

(*n*) *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 230.

(*o*) See *Blake* v. *Hungerford*, Ch. Prec. 158; *Wilker* v. *Bodington*, 2 Vern. 559; *Willoughby* v. *Willoughby*, 1 T. R. 763, 768; *Charlton* v. *Low*, 3 P. W. 328; *Ex p. Knott*, 11 V. 618; *Bowen* v. *Evans*, 1 J. & L. 264; *Parker* v. *Carter*, 4 Ha. 410.

Chap. XV. Sect. 1.

Rule as to notice extends to further advances.

The rule which forbids tacking by a subsequent incumbrancer, or purchaser, who at the date of his advance, or of completion, has notice of an intermediate incumbrance, extends to the case of further advances made by a first mortgagee after notice of charges subsequent to his own first mortgage. Thus, where a landowner deposited his title deeds with a bank, as security for the balance of his current account, and afterwards, with the knowledge of the bank, contracted to sell the land to a purchaser who had notice of the deposit of the title deeds, the bank was held to have no charge upon the land, as against the purchaser, for further advances made to the vendor after it had received notice of the contract (*p*).

Effect of endorsed receipt under Building Societies Acts; under the Act of 1836;

In this connection it may be convenient to call attention to the cases which have arisen under the provisions of the Building Societies Acts. The 6 & 7 Will. IV. c. 32 (*q*), provides that a receipt endorsed by the trustees of a benefit building society upon any mortgage given by any member of the society for all moneys secured by the mortgage, "shall be sufficient to vacate the same, and vest the estate of and in the property comprised in such security *in the person or persons for the time being entitled to the equity of redemption*," without the necessity of any reconveyance from the trustees. To whom does this description apply? Two alternative meanings have been suggested by Lord Cairns (*r*): (i) that if the mortgagor pays off the mortgage and gets back the

(*p*) *London & County Banking Co.* v. *Ratcliffe*, 6 Ap. Ca. 722; *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Re Macnamara's Est.*, 13 L. R. Ir. 158. The rule cannot be affected by any alleged custom of trade to the contrary: *Dann* v. *City of London Brewery Co.*, 8 Eq. 155; *Menzies* v. *Lightfoot*, 11 Eq. 459.

(*q*) Sect. 5.

(*r*) *Pease* v. *Jackson*, 3 Ch. 576, 582. A third possible meaning was suggested, only to be rejected, viz., that, if the mortgagor pays off the money, the legal estate is, by virtue of the endorsed receipt, to vest in the next equitable incumbrancer in point of time. This, however, is the interpretation which was preferred by Kay, J., in *Sangster* v. *Cochrane*, 28 Ch. D. 298, 303, though not adopted. And see the view of Jessel, M. R., in *Marson* v. *Cox*, 14 Ch. D. 150.

security with a receipt endorsed, stating that he, in one sense certainly the owner of the equity of redemption, has paid off the mortgage money, thereupon the property shall *ipso facto* vest in him; or, (ii) that, no matter who pays off the mortgage money, the receipt endorsed is to operate so that the legal estate in the mortgaged premises is to go at large to whichever of all the persons entitled in any shape or form to the equity of redemption has the best equity to call for the legal estate. Accordingly, where a member of a building society mortgaged property to the society, and gave a subsequent equitable charge on it to A.; then, at the request of the mortgagor, B. without notice of A.'s charge paid off the society's mortgage, and took it with a receipt endorsed and the other title deeds away, and the mortgagor then executed a mortgage of the property to B. for the sum paid by him to the society and a further advance: it was held that B. had the better equity, so as to displace A.'s earlier title, and that on either of the above constructions he had the legal estate (*s*).

under the Act of 1874.

The Building Societies Act, 1874 (*t*), is very similar to the above-mentioned section of the Act of 1836, except that it provides an alternative method to that of an endorsed receipt, by giving the trustees power to reconvey to the then owner of the equity of redemption, or to such persons and to such uses as he may direct. It was held by Jessel, M. R. (*u*), that the effect of the receipt under this section is to vest the legal estate in the person who in Equity is best entitled to call for it, and not necessarily in the person who actually pays off the society. Thus, A. mortgaged property to a building society, and subsequently to B., who had no notice of the prior mortgage; A. paid off the society out of the money advanced by B., and took the mortgage deed with a statutory receipt endorsed, B. having no knowledge of the transaction; A. then mortgaged the property to C., who had no notice of

(*s*) *Pease* v. *Jackson*, *suprà*; and see *Robinson* v. *Trevor*, 12 Q. B. D. 423; *Lawrence* v. *Clements*, 31 L. T. 670.

(*t*) 37 & 38 V. c. 42, s. 42.

(*u*) *Fourth City Mutual Soc.* v. *Williams*, 14 Ch. D. 140.

Chap. XV. Sect. 1.

B.'s mortgage, and shortly afterwards executed to B. a further charge, and subsequently paid off B.'s mortgage and further charge, and took a reconveyance; A. then executed a further charge to C., who had no notice of anything but his own prior mortgage, and shortly afterwards mortgaged the property to D., who transferred it to E., neither of whom had notice of any prior incumbrance: the M. R. held that the endorsed receipt vested the legal estate in B., because at its date he had the best right to call for a conveyance, that it passed to A. on the reconveyance to him by B., and thence to D. and E. in turn (*x*). So, where A. mortgaged property to a building society, and then to B., and then to C., who, during the negotiations, became aware of the mortgage to the society, and, immediately after the execution of the mortgage to him, paid off the society at A.'s request, and took the society's mortgage with an endorsed receipt; it was held that C. had the best right to call for a conveyance, and that therefore the legal estate was in him (*y*). In a later case, A., in 1872, mortgaged four freehold houses to a building society; in 1881, B., at A.'s request, paid off the society and took away the mortgage deed with an endorsed receipt; on the following day A. executed a mortgage of the four houses to B., in consideration of the sum paid to the building society and a further advance, B. being ignorant of the fact that A. had, in 1877, conveyed one of the houses to C., who had been in possession ever since without notice of any incumbrance: Kay, J., held, in pursuance of the authorities, but against his own judgment, that B. was entitled, in priority to C. (*z*).

Priority given by endorsed receipt only extends to money paid to the society.

The priority given to the legal estate, however, only extends to the amount actually paid in discharge of the society's mortgage, and not to any further advance then or subsequently made to the mortgagor by the person paying off the society (*a*). But it is otherwise where there is a recon-

(*x*) *Fourth City Mutual Soc.* v. *Williams*, 14 Ch. D. 140.

(*y*) *Marson* v. *Cox*, 14 Ch. D. 147.

(*z*) *Sangster* v. *Cochrane*, 28 Ch. D. 298.

(*a*) *Pease* v. *Jackson*, 3 Ch. 576; *Robinson* v. *Trevor*, 12 Q. B. D. 423; *Sangster* v. *Cochrane*, *suprà*. These cases must upon this point be taken to have overruled the opinion of

veyance, and not merely an endorsed receipt. Thus, where the first mortgagee, a friendly society, having no notice of a second mortgage, reconveyed to the mortgagor, who immediately afterwards mortgaged the property to X., with whose money the society's mortgage had been paid off, for that sum and a further advance, it was held that the legal estate having been reconveyed gave priority for the whole sum advanced (*b*).

Defence of purchaser for valuable consideration without notice.

It will be convenient to consider here the plea, so often urged in Equity, of purchase for value without notice. It has been described, by a very eminent judge, as "an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of" a Court of Equity (*c*). This statement, however, is too wide. The doctrine, it is conceived, is more correctly stated by a late writer (*d*). "The defence was an absolute bar where a Court of Equity was asked to afford assistance to the legal title by the exercise of some special kind of jurisdiction, such as discovery, removal of terms, &c., or where it was asked to exercise some special head of jurisdiction, such as those founded on fraud, accident, or mistake, but it was no such bar where the Court was merely asked to adjust the equitable rights of the plaintiff and others in the exercise of ordinary jurisdiction, the exercise of which it could not have declined without leaving those rights unsettled and in confusion; but in the latter case, while assuming and exercising jurisdiction, it gave to any purchaser for value, who might have acquired a legal estate, the full benefit of that legal estate, as an adjunct to his equitable right."

Explanation of the doctrine.

But this statement, again, requires some explanation. It is clear that where a Court of Equity exercises a *concurrent* jurisdiction with a Court of Law, *i.e.* has concurrent juris-

Jessel, M.R., in *Marson* v. *Cox*, 14 Ch. D. 151, that the legal estate, being by the statute in the person best entitled to call for it, is in him for all purposes and with all its consequences.

(*b*) *Carlisle Banking Co.* v. *Thompson*, 28 Ch. D. 398.

(*c*) *Pilcher* v. *Rawlins*, 7 Ch. 259, 269, *per* James, L. J.

(*d*) Haynes' Outlines of Equity, 449, 5th edit.

Chap. XV. Sect. 1.

diction to give effect to the legal title, the defence does not apply (*e*). Such concurrent jurisdiction is illustrated by actions for tithes (*f*), and for dower (*g*). In so far as *Gomm* v. *Parrott* (*h*) is inconsistent with this, it must be taken to have been founded on a misapprehension of the nature of the equitable plea by the Common Law judges.

Lord Westbury's classification.

In *Phillips* v. *Phillips* (*i*), which is now the leading authority upon this doctrine, Lord Westbury classifies the cases in which this defence applies; and of these the most familiar instance is the application to the auxiliary jurisdiction of the Court in aid of a legal title, as *e. g.* where discovery is wanted (*k*).

Effect of the Judicature Acts.

It must not, however, be overlooked that the Judicature Acts, which have provided new means of enforcing judgments, and given to the Court power in all cases to administer both legal and equitable relief, have somewhat diminished the importance of the doctrine. For example, when the legal title has once been established, it is not now necessary, as was formerly the case (*l*), to apply to a Court of Equity for delivery up of title deeds: and the defence, therefore, is now no answer in such a case (*m*). But it is as true to-day as it

(*e*) *Phillips* v. *Phillips*, 4 D. F. & J. 208.

(*f*) *Collins* v. *Archer*, 1 R. & M. 284.

(*g*) *Williams* v. *Lambe*, 3 Br. C. C. 263.

(*h*) 3 C. B. N. S. 47.

(*i*) *Suprà*. It will be convenient here to make a remark by way of criticism upon the above classification. Lord Westbury in substance divides the cases into three classes: (1) Where the application is to the auxiliary jurisdiction; (2) where there are several purchasers or incumbrancers, each claiming an equity, and one who is later in time succeeds in obtaining an outstanding legal estate, his *tabula in naufragio*; (3) where what is relied on by the purchaser is an equity as distinguished from an equitable estate. But the first and third of these are, apparently, merely species of the genus defined in the text, *i. e.* of all equitable jurisdiction other than what is concurrent; while the priority obtained in cases coming under the second class is a consequence neither of the application, nor of the non-application, of the defence, but of the wholly different principle, that in administration equity may give priority to an equitable estate which is later in time than another equitable estate, on the ground of its owner having the legal estate.

(*k*) *Wallwyn* v. *Lee*, 9 V. 24.

(*l*) *Joyce* v. *De Moleyns*, 2 J. & L. 374.

(*m*) *Manners* v. *Mew*, 29 Ch. D. 725.

ever was, that, to an application for the mere purpose of establishing, as distinguished from enforcing, the legal title, the defence is an answer.

Bearing of the doctrine on the administrative jurisdiction in Equity.

It may here be pointed out, that in reality this doctrine has very little, if any, bearing upon the well-known principle of a Court of Equity, that in its administrative capacity it will not deprive a purchaser for value of an equitable interest of the advantages, in the way of a power to tack or otherwise, which he may obtain by the proper acquisition of the legal estate—his *tabula in naufragio*. Not only will a Court of Equity not disarm such a purchaser, but it will arm him by giving him priority in the administration of the property, the subject of litigation in equity, on the footing that he who has acquired the legal estate has the best title in equity. The reason of this is, that the Court cannot stay its hand without failure to accomplish what under such circumstances is its very function—viz., the administration of the property. *Heath* v. *Crealock* (*n*) is an admirable illustration of this distinction. In that case, while the Court decreed foreclosure against a purchaser for valuable consideration, it refused to make an order for sale, on the ground that such an order would in effect take away from him the title deeds which he had bought.

Possession of legal estate not necessary to the defence.

It would seem that, on principle, notwithstanding certain *dicta* to the contrary, it is immaterial whether the person setting up the defence has or has not the legal estate in a case where the defence would otherwise be a bar to the jurisdiction of the Court: as, *e.g.*, where discovery is sought in aid of the legal title.

Ind, Coope & Co. v. *Emmerson.*

In a very recent case, since the foregoing pages were written, the question of the effect of the Judicature Acts upon the doctrine has been discussed by the House of Lords, and conclusions, which have a very important bearing on the statements in the text, arrived at (*nn*).

(*n*) 10 Ch. 22, 32; and see *Colyer* v. *Finch*, 5 H. L. C. 905, 920 *et seq.*

(*nn*) 12 Ap. Ca. 300; see Appendix, *post*, p. 1357.

Chap. XV. Section 2.

(2.) *Purchaser with mere equitable title, is postponed to prior equitable claimants.*

Purchaser with mere equitable title, is postponed to prior equitable claimants.

As between mere equitable claimants prior title prevails.

Where the purchaser has neither taken a conveyance of the legal estate, nor taken such a conveyance of the equitable estate as would seem to give him an absolute and indefeasible right to call for the legal estate, the ordinary rule of Equity, "*Qui prior est tempore potior est jure*," will be allowed to operate in favour of an adverse claimant having, in other respects, an equal equity (*r*). In a case, in which the prior authorities were fully reviewed, the rule was thus stated: "as between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by his own act or neglect; and relief will not be refused to him, as against a subsequent incumbrancer, on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate, or the best right to call for it" (*s*). Thus, where a mortgagee lent money upon a conveyance of what he knew to be a mere equity of redemption, it was held by Lord Thurlow that he must be postponed to mesne incumbrancers of whom he had no notice (*t*); and the decision has been several times recognized by Lord Eldon (*u*): so, where bankers took an equitable mortgage by deposit of title deeds of an estate which was subject to a secret trust of which they had no notice, it was held that such trust must prevail against their security (*x*): so, a purchaser of a legacy takes subject to the liability to refund for payment of debts (*y*): and, as a general rule, the purchaser

Mortgagees by deposit, bound by secret trust.

(*r*) *Rice* v. *Rice*, 2 Dr. 85; *Lane* v. *Jackson*, 20 B. 535, case of mortgagee and judgment creditor, and see *Thorpe* v. *Holdsworth*, *infrà*, and cases there cited.

(*s*) *Per* V.-C. Giffard in *Thorpe* v. *Holdsworth*, 7 Eq. 139; and see *Rooper* v. *Harrison*, 2 K. & J. 86; *Stackhouse* v. *Lady Jersey*, 1 J. & H. 721.

(*t*) *Beckett* v. *Cordlay*, 1 Br. C. C. 353.

(*u*) See 1 Gl. & J. 243; *Evans* v *Bicknell*, 6 V. 192; *Martinez* v. *Cooper*, 2 Rus. 214; see *Jones* v. *Jones*, 8 Si. 642; *Tourville* v. *Naish*, 3 P. W. 308.

(*x*) *Manningford* v. *Toleman*, 1 Coll. 670; see *A.-G.* v. *Flint*, 4 Ha. 156; *Stackhouse* v. *Lady Jersey*, 1 J. & H. 721; *Cave* v. *Cave*, 15 Ch. D. 639.

(*y*) *Jennings* v. *Bond*, 2 J. & L. 720; but see *contrà* as to legacy duty, *Farwell* v. *Seale*, 3 De G. & S. 359.

of an equitable *chose in action* takes it subject to all prior equities (*z*); and the rule applies even in cases where the purchase is made in market overt, and in the ordinary course of business (*a*); but a prior incumbrancer, seeking the aid of Equity against a *bonâ fide* purchaser without notice, should be prompt in his proceeding (*b*).

In one case (*c*), where A., an owner of railway bonds, entered into a contract with B., who falsely represented himself to be the vendor's agent, for the purchase of an estate to be paid for by means of the bonds, and one of them was transferred in part payment to B., who assigned it over for value to C., who had no notice of the fraud, it was held that A. could not sustain a suit against C. for the delivery of the bond. The deposit of the bond was treated as merely giving a right of action against the depositee in case the purchase fell through, and not as constituting him a trustee for the purchaser, so as to attach any equity to the bond.

On purchase of equitable interest in land, no priority acquired by notice to owner of legal estate.

And it has been decided in several cases (*d*), that, as respects equitable estates in land, the priority of a purchaser or incumbrancer is not affected by his giving, or neglecting to give, notice of his purchase or security, to the trustees, mortgagees, or other persons in whom the legal estate may

(*z*) *Priddy* v. *Rose*, 3 Mer. 86; *Morris* v. *Livie*, 1 Y. & C. C. C. 380; *Molloy* v. *French*, 13 Ir. Eq. R. 261; *Barnett* v. *Sheffield*, 1 D. M. & G. 371; *Cockell* v. *Taylor*, 15 B. 103; *Smith* v. *Parkes*, 16 B. 115; *Ford* v. *White*, *ibid.* 123; *Cole* v. *Muddle*, 10 Ha. 186; *Mangles* v. *Dixon*, 3 H. L. C. 702, 735; *Clack* v. *Holland*, 19 B. 262; *Irby* v. *Irby*, 4 Jur. N. S. 989; *Brandon* v. *Brandon*, 7 D. M. & G. 365; *Athenæum Ass. Soc.* v. *Pooley*, 3 D. & J. 294; *Rolt* v. *White*, 31 B. 520; *Re Natal Investment Company*, 3 Ch. 355.

(*a*) *Athenæum Ass. Soc.* v. *Pooley*, 3 D. & J. 294.

(*b*) See *Sibson* v. *Fletcher*, 1 Ch. R. 32; *Wallace* v. *Marquis of Donegal*, 1 D. & Wal. 461, 488.

(*c*) *Ashwin* v. *Burton*, 9 Jur. N. S. 319.

(*d*) *Peacock* v. *Burt*, 4 L. J. Ch. 33; *Jones* v. *Jones*, 8 Si. 633; *Wiltshire* v. *Rabbits*, 14 Si. 76; *Wilmot* v. *Pike*, 5 Ha. 14; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 392; *Rooper* v. *Harrison*, 2 K. & J. 105: but see *Cathrow* v. *Eade*, 21 L. T. O. S. 179; as to judgment debts, *Stocks* v. *Dobson*, 17 Jur. 539; and see *Consolidated Investment, &c. Co.* v. *Riley*, and V.-C. Stuart's comments on *Wiltshire* v. *Rabbits*, 1 Gif. 371.

Chap. XV. Sect. 2.

happen to be vested; and that the ordinary rule, as to notice of assignments of *choses in action*, does not apply. But the rule holds good in respect to the proceeds of sale of real estate vested in trustees upon trusts for sale, although no sale may have been effected (*e*).

Effect of premature notice.

We may remark that notice of an equitable assignment of a *chose in action*, given *before* the fund has come into the hands of the trustee or stakeholder, does not affect the question of priorities (*f*): thus, an equitable assignee, who gave notice before the fund was parted with, was held entitled to priority over a subsequent assignee who had given earlier notice (*g*).

Concealed incumbrance thrown wholly on puisne equitable purchaser.

Where the property is subject to a concealed incumbrance, it seems that a purchaser of part, having merely the equitable estate, may throw the entire charge upon a subsequent innocent purchaser of the equitable estate in the residue (*h*).

Rule as to priority, how far applicable as against charities.

Incumbrances in favour of a charity seem to be subject to the same rules as those in favour of a private individual; except that notice to the first purchaser is said to bind subsequent purchasers without notice (*i*); but if the incumbrance be merely equitable, it seems that the purchaser without notice is not affected by it (*k*). We may remark here, that before the 3 & 4 Will. IV. c. 27, mere length of possession was no protection, in Equity, to a purchaser who bought with notice of the charitable trust (*l*); but it would

(*e*) *Lee* v. *Howlett*, 2 K. & J. 531; *Re Hughes' Trusts*, 2 H. & M. 89; *Consolidated Investment, &c. Co.* v. *Riley*, 1 Gif. 371.

(*f*) *Webster* v. *Webster*, 31 B. 393; *Somerset* v. *Cox*, 33 B. 634.

(*g*) *Buller* v. *Plunkett*, 1 J. & H. 441.

(*h*) See *Hartly* v. *O'Flaherty*, L. & G. temp. P. 208, 216; *Averall* v. *Wade*, L. & G. temp. S. 252; *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444, 474; *Hughes* v. *Williams*, 3 M. & G. 683.

(*i*) *East Grinsted case*, Duke's Char. Uses, 640: *sed qu.*; and see *Comm. of Charitable Donations* v. *Wybrants*, 2 J. & L. 194.

(*k*) Sug. 722; Tudor's Char. Trusts, 333.

(*l*) *A.-G.* v. *Mayor of Coventry*, 2 Vern. 399; *A.-G.* v. *Christ's Hosp.*, 2 M. & K. 344: as to the effect of the statute, *vide ante*, p. 440.

seem that a purchaser with notice of the charitable trust is only liable for the rents and profits which have accrued since his purchase (*m*).

Application of the rule of priority in time to dealings with trust estates.

A well-known class of cases may be here referred to, as illustrating the principle that equitable estates take priority according to the date of their creation. It is well settled that a person, who takes an equitable mortgage from a person who is in fact, whether expressly or only constructively, a trustee, without notice of any trust, is postponed to the *cestuis que trust*. The principle of these cases is that the creation of the trust vests an actual estate and interest in the subject-matter of the trust in the persons in whose favour the trust is created, and that this actually existing estate can only be displaced by such conduct on the part of its owners as gives those dealing with it a higher equity; and further, that it is not negligence to take a title in the name of a trustee (*n*). The fact that the *cestui que trust* has made no inquiry into the disposition of the trust funds does not amount to such conduct (*o*); nor does the fact that the trustee has himself a partial beneficial interest in the property, and that it has been allowed to remain in his name (*p*). The conduct of the *cestui que trust* must, it would seem, amount to a holding out of the trustee as the equitable owner, in order to deprive him of priority (*q*); and the fact that the mortgagee has obtained the title deeds from the trustee, does not make his right any better as against the *cestui que trust*.

Effect of negligence on priorities of

Negligence will, of course, operate to postpone a prior equitable title (*r*); and it is conceived that a less degree of

(*m*) Tudor's Char. Trusts, 333.

(*n*) *Cory* v. *Eyre*, 1 D. J. & S. 167; *Shropshire Union R. Co.* v. *Reg.*, L. R. 7 H. L. 511; *Bradley* v. *Riches*, 9 Ch. D. 189; *Hartopp* v. *Huskisson*, 55 L. T. 773.

(*o*) *Cory* v. *Eyre*, *suprà*.

(*p*) *Shropshire Union R. Co.* v. *Reg.* and *Bradley* v. *Riches*, *suprà*; *Harpham* v. *Shacklock*, 19 Ch. D. 207; *Re Vernon, Ewens & Co.*, 33 Ch. D. 402.

(*q*) *Waldron* v. *Sloper*, 1 Dr. 193; *Rice* v. *Rice*, 2 Dr. 73.

(*r*) *Ibid.*; *Roberts* v. *Croft*, 2 D. & J. 1; *Layard* v. *Maud*, 4 Eq. 297; and see *Bickerton* v. *Walker*, 31 Ch. D. 151.

Chap. XV. Sect. 2.

equitable estates.

negligence is necessary for the postponement of a prior equitable title to a subsequent one, than is required in order to postpone a legal to an equitable title; for "as between equitable claimants the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other" (*s*).

Section 3.

(3.) *Purchaser, how far protected against defective execution of powers;—against prior claimants who have encouraged him to purchase;—and by Statute in various cases.*

Purchaser, how far relieved against defective execution of powers.

Equity will, except in favour of a mere volunteer, supply the defective execution of a power, if the defect consist merely in the non-observance of some formality (*t*), but not if such formality be positively required by the Legislature (*u*): nor can it supply a defect which goes to the species of the power; as where a power to appoint by will is attempted to be executed by deed (*x*): and the Legislature has expressly excluded the interference of Equity, where a contract by a tenant in tail is not perfected in manner required by the 3 & 4 Will. IV. c. 74 (*y*).

22 & 23 Vict. c. 35.

By the 22 & 23 Vict. c. 35 (*z*), a deed executed in the presence of, and attested by, two or more witnesses in the usual way, is, so far as respects the execution and attestation thereof, to be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding that any additional or other formalities may have been expressly imposed upon an exercise of the power: but this provision does not dispense with any consent, or with the performance of any act, not relating to the

(*s*) *Nat. Prov. Bank* v. *Jackson*, 33 Ch. D. 1, 13, per Cotton, L. J.

(*t*) *Tollet* v. *Tollet*, 2 P. W. 489; 1 Wh. & T. L. C.; see Sug. Pow. 530 *et seq.*; Farwell, 268 *et seq.*

(*u*) Sug. 501, 742.

(*x*) *Reid* v. *Shergold*, 10 V. 370; *Archibald* v. *Wright*, 9 Si. 161.

(*y*) Sect. 47. See as to the scope of this sect., *Bankes* v. *Small*, 35 W. R. 765; *Hall-Dare* v. *Hall-Dare*, 31 Ch. D. 251; and cf. *Davis* v. *Tollemache*, 2 Jur. N. S. 1181; and see Lord St. Leonards' comments, Sug. 468. Cf., too, *Hilbers* v. *Parkinson*, 25 Ch. D. 200, a case arising out of a covenant to settle after-acquired property; see *post*, p. 1117, n. (*c*).

(*z*) Sects. 12 and 13.

mode of execution or attestation, which may be required by the instrument creating the power: nor does it prevent the donee from exercising it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed. We may also refer here to the provisions of the Wills Act (*a*); by which an appointment by a will, executed in the ordinary form, is made valid, although all the formalities prescribed by the instrument creating the power have not been observed.

Relieved against incumbrancers, &c., who encourage purchase of the property.

The purchaser will also be protected in Equity against any person (even an infant or married woman), who, having a prior interest in the property, encourages, or permits him to complete his purchase in ignorance of its existence (*b*); and if a married woman, not restrained from anticipation, does not, when she has the opportunity, repudiate her fraudulent act committed under her husband's coercion, she will be bound by it as against a purchaser who bought without notice. Thus, where a woman, shortly after her marriage, under threats from her husband, wrote and signed a paper, dated before the marriage, whereby she purported to give him her reversionary interest in a sum of stock, which the husband subsequently sold to a purchaser who had no notice of the fraud, and the wife, on being applied to on his behalf, and not being then under duress, stated that she had before her marriage made over her interest to her husband, it was held that, as against the purchaser, she had lost her equity to a settlement when the

(*a*) 1 V. c. 26, s. 10.

(*b*) See *Watts* v. *Creswell*, 2 Eq. Ca. Ab. 515; *Savage* v. *Foster*, 9 Mod. 35; *Ibbotson* v. *Rhodes*, 2 Vern. 554; *Draper* v. *Borlace*, *ib.* 370; *Berrisford* v. *Milward*, 2 Atk. 49; *Govett* v. *Richmond*, 7 Si. 1; *Clare* v. *Earl of Bedford*, 13 Vin. Ab. 536; *Boyd* v. *Belton*, 1 J. & L. 730; *Thompson* v. *Simpson*, 2 J. & L. 110; *Overton* v. *Banister*, 3 Ha. 503; *Nicholson* v. *Hooper*, 4 M. & C. 179; *Hammersley* v. *De Biel*, 12 C. & F. 45, 62, 88; see further as to infants, *Stikeman* v. *Dawson*, 1 De G. & S. 90; *Esron* v. *Nicholas*, *ib.* 118; *Wright* v. *Snowe*, 2 De G. & S. 321; *Re King*, 3 D. & J. 63; *Nelson* v. *Stocker*, 4 *ib.* 458; *Sharpe* v. *Foy*, 4 Ch. 35; fraud by married woman; *Re Lush's Trusts*, *ib.* 591; and see and distinguish *Arnold* v. *Woodhams*, 16 Eq. 29; and *vide ante*, pp. 4, 13; *post*, p. 1120.

fund fell into possession (*c*). So, where a married woman fraudulently concealed a settlement, in order to induce a mortgagee to advance his money, and the mortgage was completed, but, before the deed was acknowledged by the married woman, the mortgagee received notice of the settlement, it was held that her estate was bound, and that she could not defeat the mortgage (*d*).

Effect of misrepresentation.

A misrepresentation as to an existing state of facts will bind the party making it, although he make it in ignorance or mistake, if he might have known the truth (*e*): and, where it is material, the purchaser may elect either to have it made good or the purchase set aside (*f*): but a mortgagee, it appears, need not answer an inquiry as to the extent of his claims, unless the intended purchaser be entitled and offer to redeem him (*g*); nor need he voluntarily communicate his claim to a person whom he knows to be about to purchase (*h*); unless he have reason to believe that a fraud is contemplated by the vendor (*i*). Nor will mere assent to a purchase bind the assenting party's subsequently acquired interest in the property (*k*).

Subsequent expenditure on the property.

The purchaser will also be protected in Equity against any person who, knowing his own title, encourages, or fraudulently permits the former, in ignorance of it, to lay out money in improving the property (*l*): but when a party has once given a distinct notice of his claim, and the pur-

(*c*) *Re Lush's Trusts*, 4 Ch. 591.

(*d*) *Sharpe* v. *Foy*, *ib.* 35.

(*e*) See *Pearson* v. *Morgan*, 2 Br. C. C. 388; and *West* v. *Jones*, 1 Si. N. S. 205; *ante*, p. 118, where the rule is laid down yet more generally; *Hammersley* v. *De Biel*, 12 C. & F. 88; *A.-G.* v. *Stephens*, 1 K. & J. 749; *Crofts* v. *Middleton*, 2 K. & J. 299; *Maddison* v. *Alderson*, 8 Ap. Ca. 467, 473; but see Sug. p. 744, n., where Lord St. Leonards seems inclined to restrict the operation of this rule to the case of fraud.

(*f*) *Rawlins* v. *Wickham*, 3 D. & J. 304.

(*g*) *Ante*, p. 517. A trustee, however, must; for the purchaser has implied authority from the vendor to make the inquiry.

(*h*) *Osborn* v. *Lea*, 9 Mod. 96.

(*i*) *Ante*, p. 517.

(*k*) *Thompson* v. *Simpson*, 2 J. & L. 110; *Mangles* v. *Dixon*, 3 H. L. C. 733; see *Jorden* v. *Money*, 5 H. L. C. 185.

(*l*) *Dann* v. *Spurrier*, 18 V. 328; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Kenney* v. *Browne*, 3 Ridg. 518.

chaser subsequently lays out money, it lies on him to show that the other has abandoned, or given reason to believe that he has abandoned, his claim (*m*); and this, whether the claim extend to the entirety, or only an undivided part of the estate (*n*). Nor need the notice disclose the particulars of the claimant's title; nor, if the claim exceed what he is entitled to, is the party in possession therefore justified in disregarding it (*o*). But though a general notice of the claimant's title, as *e. g.*, of the deed under which he claims, may be sufficient, it will be otherwise where it is accompanied by an imperfect or erroneous statement of its contents (*p*); and where a purchaser acquires merely a temporary or partial interest in the land, his expenditure, being referable to that interest, will give him no additional rights as against the reversioner or joint owner (*q*). Thus a tenant building on his landlord's property does not, except under special circumstances, acquire any right to prevent the landlord from taking possession at the end of the term; but if, being mere tenant at will, he builds in the belief that this will entitle him to a specific lease, and the landlord, knowing his error, omits to correct it, Equity will interfere to compel the grant of such a lease (*r*). In a recent case, where a person was in possession of land in virtue of a mere licence, and at the request of the owner executed works on it at his own expense, it was held that the licence had become irrevocable from that date (*s*).

Reversioners, whether bound.

The acquiescence of a mere tenant for life, &c., cannot bind the reversioner: but it has been held that the purchaser of a reversion, buying under conditions which recognized the future user by other parties of an easement over

(*m*) See *Clare Hall* v. *Harding*, 6 Ha. 297; *Crosse* v. *Reversionary Co.*, 3 D. M. & G. 712. As to what constitutes acquiescence sufficient to deprive a person of his legal rights, see *Willmott* v. *Barber*, 15 Ch. D. 96, 105.

(*n*) See *Clare Hall* v. *Harding*, 6 Ha. 296.

(*o*) *S.C.* at p. 273.

(*p*) *Re Bright's Trusts*, 21 B. 430.

(*q*) *Pilling* v. *Armitage*, 12 V. 78; *Clare Hall* v. *Harding*, 6 Ha. 273 *Duke of Beaufort* v. *Patrick*, 17 B. 75

(*r*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.

(*s*) *Plimmer* v. *Mayor of Wellington*, 9 Ap. Ca. 699.

Chap. XV. Sect. 3.

the estate, could not afterwards dispute the right of user, although the reversioner himself had never previously recognized it (*t*). This is not so in the case of the easement of light, the acquisition of which depends upon statutory conditions (*u*).

Possession of title deeds, how far material.

The mere fact of a purchaser or mortgagee not having possession of the title deeds, will not, in the absence of other circumstances indicative of fraud, affect his legal title as against *subsequent* purchasers or incumbrancers (*x*): even the fact of a mortgagee having *returned* the deeds to the mortgagor, will not, in itself, necessarily have this effect (*y*): and the same would hold good in the case of a purchaser, if a plausible reason were given for his assenting to what would, *primâ facie*, be an unreasonable and suspicious request: but, if deeds are borrowed for a temporary purpose, they should be diligently reclaimed (*z*). If they are handed over to the mortgagor for the purpose of enabling him to mortgage for a specified amount in priority to the first mortgagees, he can fraudulently confer a good title on a mortgagee without notice, for a sum exceeding the authorized amount (*a*).

General principle as to postponement.

The true principle (*b*) deducible from the authorities seems to be, that mere indiscretion or inactivity is insufficient to postpone a purchaser or mortgagee, who has the legal estate: there must, to have this effect, be an intent to facilitate a fraud, or a wilful indifference to a fraud which there was good reason to suspect was about to be committed (*c*); and the omission to make any inquiry respecting the deeds, is, in

(*t*) *Duke of Beaufort* v. *Patrick*, 17 B. 79.

(*u*) *Ladyman* v. *Grave*, 6 Ch. 763, 769.

(*x*) See *Evans* v. *Bicknell*, 6 V. 174; *Harper* v. *Faulder*, 4 Mad. 129; *Martinez* v. *Cooper*, 2 Rus. 198; *Stevens* v. *Stevens*, 2 Coll. 20; *Allen* v. *Knight*, 5 Ha. 272; aff. 11 Jur. 527; *Farrow* v. *Rees*, 4 B. 21; *Finch* v. *Shaw*, 19 B. 500; *Colyer* v. *Finch*, 5 H. L. C. 905.

(*y*) See *Martinez* v. *Cooper*, and *Stevens* v. *Stevens*, *suprà*; *Waldron* v. *Sloper*, 1 Dr. 193.

(*z*) *Waldron* v. *Sloper*, 1 Dr. 200.

(*a*) *Perry-Herrick* v. *Attwood*, 2 D. & J. 21; *Lloyd* v. *Attwood*, 3 *ib.* 614; *Smith* v. *Evans*, 28 B. 59.

(*b*) *Northern Ins. Co.* v. *Whipp*, 26 Ch. D. 482.

(*c*) See *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Rooper* v. *Harrison*, 2 K. & J. 105.

itself, evidence, though not conclusive evidence (*d*), of this wilful and fraudulent indifference (*e*); but where the contest lies between parties having mere equities, anything which raises a positive equity against the one, "upon the principle which in equity, as distinct from law, is designated by the term 'estoppel'" (*f*), will give the other, although his equity be posterior in creation, a better claim on the assistance of the Court (*g*).

As to custody of deeds.

Where, in answer to a *bonâ fide* inquiry for the deeds, a reasonable excuse is given for their non-delivery, their absence does not affect a purchaser with constructive notice that they have been deposited as a security (*h*): so, where an actual memorandum of charge was accompanied by a deposit of what, although not so represented, were in fact only the earlier title deeds, the omission to call for the later deeds, which alone showed any title in the mortgagor, was held insufficient to postpone the incumbrancer to a depositee of the later deeds (*i*).

Assignees of insolvent, not asserting their rights for nineteen years, yet not postponed.

It has been even held, that if the assignees of an insolvent for nineteen years omit to sell or take possession of his copyhold property, or of the copies of Court Roll, or to enter their title upon the Court Rolls, whereby the insolvent is enabled to retain the property as if owner, and mortgage it for value to a person without notice of the insolvency, this will not give the mortgagee priority to the assignees (*k*).

The cases on the effect of negligence in postponing the prior incumbrancer may be summarized as follows:—

(*d*) *Rateliffe* v. *Barnard*, 6 Ch. 652.

(*e*) *Hewitt* v. *Loosemore*, *supra*.

(*f*) *Dixon* v. *Muckleston*, 8 Ch. 155, 160, *per* Ld. Selborne; and see *Nat. Prov. Bank* v. *Jackson*, 33 Ch. D. 1.

(*g*) *Waldron* v. *Sloper*, 1 Dr. 200; *Hunter* v. *Walters*, 7 Ch. 75; *Rice* v. *Rice*, 2 Dr. 83; *Layard* v. *Maud*, 4 Eq. 397; and consider the observations of Lord Cairns in *Pease* v. *Jackson*, 3 Ch. 581.

(*h*) *Espin* v. *Pemberton*, 3 D. & J. 547.

(*i*) *Roberts* v. *Croft*, 2 *ib.* 1; and see *Thorpe* v. *Holdsworth*, 7 Eq. 139, and cases there cited.

(*k*) *Cole* v. *Coles*, 6 Ha. 517, aff. 524.

Chap. XV. Sect. 3.

The rule as to the effect of negligence illustrated.

1. Where prior estate is legal.

First. Where the prior interest is legal, and the other equitable. In this case the prior legal estate will not be postponed to the subsequent equitable estate "on the ground of any mere carelessness or want of prudence on the part of the legal owner" (*l*). But the Court will postpone the prior legal estate to a subsequent equitable estate:

(i.) Where the owner of the legal estate has either wittingly or unwittingly "assisted in or connived at the fraud which has led to the creation of the subsequent equitable estate without notice of the prior legal estate;" and evidence of such innocent assistance or connivance may be afforded by the absence of ordinary care in inquiring for or keeping title deeds, and such conduct, if not satisfactorily explained, will be sufficient to postpone the legal estate (*m*).

(ii.) Where the owner of the legal estate has constituted the mortgagor his agent to raise money, and has for that purpose either left the deeds in his custody (*n*), or returned them to him (*o*), and the mortgagor has by means of the possession of the deeds created the equitable estate without notice of the prior legal estate, even although the principal had no intention that his agent should commit a fraud, or knowledge that he was doing so.

2. Where both estates are equitable.

Secondly. Where the prior interests are both equitable, although it would seem that a less degree of negligence on the part of the prior equitable incumbrancer is necessary in

(*l*) *Northern Ins. Co.* v. *Whipp*, 26 Ch. D. 482, 494, per Fry, L.J. See *Head* v. *Egerton*, 3 P. W. 280; *Hunt* v. *Elmes*, 2 D. F. & J. 578; *Hewitt* v. *Loosemore*, 9 Ha. 449; in all of which the mortgagor was solicitor to the legal mortgagee. *Evans* v. *Bicknell*, 6 V. 183; *Martinez* v. *Cooper*, 2 Rus. 198; *Harper* v. *Faulder*, 4 Mad. 129; *Espin* v. *Pemberton*, 4 Dr. 333; 3 D. & J. 547; *Colyer* v. *Finch*, 5 H. L. C. 905; *Ratcliffe* v. *Barnard*, 6 Ch. 652; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Manners* v. *Mew*, 29 Ch. D. 725.

(*m*) *Worthington* v. *Morgan*, 16 Si. 547; *Whitbread* v. *Jordan*, 1 Y. & C. 303; *Peto* v. *Hammond*, 30 B. 495; *Maxfield* v. *Burton*, 17 Eq. 15; *Clarke* v. *Palmer*, 21 Ch. D. 124; *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221.

(*n*) *Perry-Herrick* v. *Attwood*, 2 D. & J. 21.

(*o*) *Briggs* v. *Jones*, 10 Eq. 92.

order to postpone him than will suffice to postpone the owner of a prior legal estate (*p*), yet here, too, there must be something done, or omitted to be done, by the prior incumbrancer, which arms the owner of the estate with the power of going into the world under false colours (*q*). Thus, where B. the solicitor of A., a second mortgagee, put up the property for sale by auction, and professing to have bought it, induced A. to execute a conveyance of the property by which A. purported to convey it to B. under his power of sale: and B. afterwards made an equitable mortgage of the estate to C., representing it to be his own and unincumbered; it was held that A. had by executing the conveyance enabled B. to commit the fraud on C. and must be postponed to him (*r*); and, on the same principle, a vendor with an equitable lien for unpaid purchase-money will be postponed to a mortgagee from the purchaser who has been allowed to carry away the title deeds and conveyance (*s*). But the mere fact that a subsequent incumbrancer has got the title deeds does not entitle him to priority, unless there has been some active omission or negligence of the kind above described; and where a person has in good faith relied on a positive statement by the mortgagor that the latter is depositing all the necessary deeds, without any examination into the truth of it, he will not be postponed to a later equitable mortgagee who has got important title deeds which the mortgagor had in fact kept back (*t*).

(*p*) *Ante*, p. 946.

(*q*) *Dixon* v. *Muckleston*, 8 Ch. 155, 160.

(*r*) *Hunter* v. *Walters*, 7 Ch. 75; *Waldron* v. *Sloper*, 1 Dr. 193; *Re Lambert's Est.*, 13 L. R. Ir. 234; *Dowle* v. *Saunders*, 2 H. & M. 242.

(*s*) *Rice* v. *Rice*, 2 Dr. 73; *Kettlewell* v. *Watson*, 26 Ch. D. 501. So, too, where a mortgagor gives a receipt for more than he has actually received, he will not be allowed to redeem as against a transferee who has taken a transfer on the faith of the receipt, except on payment of the amount advanced by the transferee; *Bickerton* v. *Walker*, 31 Ch. D. 151; *French* v. *Hope*, 56 L. J. Ch. 363.

(*t*) *Roberts* v. *Croft*, 2 D. & J. 1; *Thorpe* v. *Holdsworth*, 7 Eq. 139; *Dixon* v. *Muckleston*, 8 Ch. 155; and see *Spencer* v. *Clarke*, 9 Ch. D. 137. It would appear that the ground of the decision in *Layard* v. *Maud*, 4 Eq. 397, is overruled by the above cases, though the actual decision may possibly be supported on the grounds mentioned by Giffard, V.-C., 7 Eq. 147.

Chap. XV. Sect. 3.

Protection of purchaser from bankrupt as against trustee.

The Bankruptcy Act, 1883, enacts (*u*) that, subject to the provisions of the Act with respect to the effect of bankruptcy on an execution or attachment (*x*), and with respect to the avoidance of voluntary settlements (*y*), and preferences (*z*), nothing in the Act shall invalidate in the case of bankruptcy any payment by the bankrupt to any of his creditors, any payment or delivery to the bankrupt, any conveyance or assignment by the bankrupt for valuable consideration (*a*), or any contract, dealing, or transaction (*b*) by or with the bankrupt for valuable consideration, provided (*c*) that (1) the payment, delivery, conveyance, assignment, contract, dealing, or transaction takes place before the date of the receiving order; and that (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, &c., notice of any available act of bankruptcy committed by the bankrupt before that time.

Remarks on the language of the section.

It will be observed that the present Act by omitting *bona fides* and good faith, which were elements essential under the former Acts (*d*) to the protection of a transaction with the bankrupt, would seem to extend its protection to all transactions with the bankrupt which are included, and comply with the conditions laid down, in the section.

Goods in the order and dis-

By the 44th section of the Act (*e*) the property of the

(*u*) 46 & 47 V. c. 52, s. 49.

(*x*) Sects. 45 and 46.

(*y*) Sect. 47.

(*z*) Sect. 48.

(*a*) See as to the old law on conveyances by a bankrupt, *Nunes* v. *Carter*, L. R. 1 P. C. 349, per Ld. Westbury.

(*b*) As to what was included in this word under the old statutes, prior to the Act of 1869, in which it was omitted, see Yate-Lee, 441 *et seq.*

(*c*) As to the effect of an unprotected payment, see *Ex p. Rabbidge*, 8 Ch. D. 367, *ante*, p. 749. It may be observed that a husband is not precluded by his bankruptcy from concurring in a disposition by his wife to which his concurrence is necessary under the Fines and Recoveries Act; *Re Jakeman's Trusts*, 23 Ch. D. 344.

(*d*) As to which, see Yate-Lee, 436 *et seq.*

(*e*) Sub-sect. 3.

position of the bankrupt divisible among creditors.

bankrupt divisible among his creditors comprises all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business (*f*), by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof. But the section expressly excepts *things in action* (*g*), other than debts due or growing due to the bankrupt in the course of his trade or business.

The doctrine of reputed ownership.

All that is strictly necessary in order to exclude the doctrine of reputed ownership is that "the situation of the goods was such as to exclude all legitimate grounds from which those who knew anything about that situation could infer the ownership to be in the person having actual possession" (*h*). Nor does it seem to be an inexorable rule that, in the case of chattels personal not passing by delivery, the doctrine will not be excluded, unless "the persons, to whom anyone, who took a subsequent conveyance from the person once the owner of the property, would have to apply in order to perfect that title," have knowledge of the equitable title of the first assignee (*i*). At the same time knowledge in those persons is a sufficient circumstance to prevent reputed ownership (*k*); and it is therefore most important (*l*) that the purchaser or mortgagee of a reversionary interest, or any chattel personal not passing by delivery, should use every means in his power to fix such persons with knowledge.

Purchaser of equitable interest, when

It has been decided by Lord St. Leonards, that the title of an assignee for value of an equitable *chose in action*, who

(*f*) These words are new, and their precise application has yet to be determined. The corresponding words in the 15th section of the Act of 1869, "as a trader," are clearly not identical in their application. *Colonial Bank* v. *Whinney*, 11 Ap. Ca. at p. 445; *Ex p. Nottingham Bank*, 15 Q. B. D. 441.

(*g*) As to what are things in action within the section, see Yate-Lee, 408.

(*h*) Per Lord Selborne, in *Ex p. Watkins*, 8 Ch. 529.

(*i*) Per Lord Blackburn, in *Colonial Bank* v. *Whinney*, 11 Ap. Ca. 435.

(*k*) *Ibid.*

(*l*) See judgment of Ld. Cairns, in *Lloyd* v. *Banks*, 3 Ch. 490.

Chap. XV. Sect. 3.

protected against prior insolvency or bankruptcy.

buys without notice of a prior insolvency, and is first to give notice of his claim to the trustee of the fund, is good as against the assignee in the insolvency (*m*); and assignees in bankruptcy, omitting to give such notice, have been postponed to a subsequent purchaser for value, who gave due notice of his assignment (*n*). And although express actual notice is not absolutely necessary, yet it ought in every case to be given. Thus, where a trustee had acquired knowledge of his *cestui que trust's* insolvency by reading an advertisement of it, it was held that a subsequent incumbrancer, who gave formal notice to the trustee, thereby acquired no priority over the assignee in insolvency (*o*). Upon the same principle, the title of a *bonâ fide* purchaser of an equitable interest in land, buying without notice of the vendor's bankruptcy, and subsequently getting in the legal estate, would, it is conceived, be good as against the trustee in bankruptcy. And a *bonâ fide* vendor has been held entitled to retain the deposit paid to him by a bankrupt who fraudulently purported to enter into a contract for the purchase of the vendor's estate (*p*).

We have already taken a general view of the law relating to judgments; and have adverted to the 2 & 3 Vict. c. 11, which preserves to *bonâ fide* purchasers without notice (*q*), all those means of defence which were available before the passing of the 1 & 2 Vict. c. 110; and to the 3 & 4 Vict. c. 82, which, in effect, provides that notice of an unregistered judgment shall not subject a purchaser to the extended remedies given to a creditor by the 1 & 2 Vict. c. 110; also

(*m*) *Re Atkinson*, 2 D. M. & G. 140; *Re Barr's Trusts*, 4 K. & J. 219; cases under the old statutes. And under the Acts of 1869 and 1883, the result would seem to be the same. *Palmer* v. *Locke*, 18 Ch. D. 381; and see B. A. 1883, s. 50 (6). It was held to be otherwise, however, under the Act of 1849, where there were strictly negative words; *Re Coombe's Trusts*, 1 Gif. 91; *Re Bright's Settlement*, 13 Ch. D. 413.

(*n*) *Bartlett* v. *Bartlett*, 1 D. & J. 130; *Ex p. Boulton*, *ib.* 163; *Day* v. *Day*, *ib.* 144; *Rickards* v. *Gledstanes*, 3 Gif. 298; *Thompson* v. *Tomkins*, 8 Jur. N. S. 185.

(*o*) *Lloyd* v. *Banks*, 3 Ch. 488.

(*p*) *Collins* v. *Stimson*, 11 Q. B. D. 142.

(*q*) As to Palatinate judgments, *vide ante*, p. 553.

to the provisions of the 18 & 19 Vict. c. 15; and to the 23 & 24 Vict. c. 38, which provides that no judgment shall affect land as to a *bonâ fide* purchaser or mortgagee, even with notice, unless a writ of execution has been issued and registered, and put in force within three months from registration (*r*); and to the 27 & 28 Vict. c. 112.

It may be further remarked, that an equitable incumbrancer or purchaser will, in Equity, be protected against a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit*, without notice of the mortgage or purchase (*s*): but, as we have seen (*t*), the purchaser, after notice of the subsequent judgment having become a charge on the land, could not, without the consent of the creditor, safely pay to the vendor any part of the purchase-money which happened to remain unpaid.

The 14 Geo. II. c. 20, and the 3 & 4 Will. IV. c. 74 (*u*), contain provisions for giving, in certain specified cases, validity to defective fines and recoveries, either generally, or as in favour of purchasers: and the 5 & 6 Vict. c. 32 (*x*), contains provisions for giving, in certain specified cases, validity to fines and recoveries levied and suffered in the now abolished Courts of Great Session in Wales; and of Session in Cheshire; and the 11 & 12 Vict. c. 70, supplies the want of proclamations, as respects fines levied at Westminster (*y*).

Title in insolvency.

The 11 Geo. IV. & 1 Will. IV. c. 38, s. 6, sets up previous conveyances which have been made by any provisional assignee in insolvency to the creditor's assignee by order of the court (*z*).

Error in sales of land tax.

The 54 Geo. III. c. 173 (*a*), and the 57 Geo.

(*r*) *Vide ante*, p. 551 *et seq.*

(*s*) See *Whitworth* v. *Gaugain*, 1 Ph. 728; and cases there cited; see, too, *Cooke* v. *Wilton*, 29 B. 100; *Eyre* v. *M'Dowell*, 9 H. L. C. 620; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 546.

(*t*) *Ante*, p. 540.

(*u*) See sects. 4 to 12; see *Wickens* v. *Windus*, 14 Jur. 836; *Lockington* v. *Shipley*, 1 Bing. N. C. 355; *Totton* v. *Vincent*, 5 *ib.* 626; *Re Nicholas and Davies*, 17 L. T. O. S. 64.

(*x*) See sects. 2 and 3; *Doe* v. *Price*, 16 M. & W. 603.

(*y*) Sects. 1 and 3.

(*z*) *Doe* v. *Story*, 7 A. & E. 909.

(*a*) See sect. 12.

Chap. XV. Sect. 3.

Inclosure.

III. c. 100 (*b*), contain provisions for confirming, in certain specified cases, defective titles to land tax. The 3 & 4 Will. IV. c. 87, remedies defective titles under Inclosure Acts in specified cases. By the 2 & 3 Vict. c. 11, purchasers, without express notice, are protected against future obligations to the Crown, and against any *lis pendens*, unless the same respectively are registered as directed by the Act; and there must be re-registry every five years (*c*); and the 18 & 19 Vict. c. 15, s. 11, protects purchasers claiming under paid-off mortgagees, against the obligations of such mortgagees to the Crown. By the 48 Geo. III. c. 47, defective titles in Ireland are, in the cases therein specified, rendered valid as against the Crown.

Lis pendens.

Crown debts.

Succession duty.

Sales by commissioners of Woods and Forests.

The 16 & 17 Vict. c. 51, s. 52, protects *bonâ fide* purchasers, in certain cases, against claims by the Crown in respect to succession duty. And the 10 Geo. IV. c. 50, contains provisions (ss. 46 and 73) for the protection of parties taking conveyances or leases from the Commissioners of Woods and Forests; and the 26 & 27 Vict. c. 43, contains similar provisions on any sale, exchange, or lease of land by the Postmaster-General. So, on the sale of land forming part of the possessions of the Duchy of Cornwall, purchasers are expressly exempted from the necessity of seeing that the provisions of the Duchy Management Act have been complied with (*d*).

Section 4.

(4.) *As to priority under the Registration Acts.*

As to priority under the Registration Acts.

The old Local Registry Acts for the various ridings of Yorkshire (*e*), now repealed (*f*), and the existing Middlesex

(*b*) See sects. 22 to 26; *Doe* v. *Phillips*, 1 Q. B. 84; and see as to sales by rector for redemption of land-tax, *Doe* v. *Woodward*, 1 Ex. 273; *Beaden* v. *King*, 9 Ha. 499. As to merger of land-tax, *vide ante*, p. 398, n. (*f*).

(*c*) Sect. 7; *vide ante*, p. 565.

(*d*) See 26 & 27 V. c. 49, s. 19.

(*e*) West Riding, 6 Anne, c. 20 (Ruff. 5 Anne, c. 18); East R., 6 Anne, c. 62 (Ruff. c. 35); North R., 8 Geo. II. c. 6.

(*f*) 47 & 48 V. c. 54, s. 51.

Or against unregistered deeds in register counties.

Registry Act (*g*) purport to render any deed affecting either the legal or equitable estate, void as against a purchaser or mortgagee claiming under an instrument of an earlier date of registration. Under these Acts, at Law, notwithstanding notice, mere priority of registration absolutely determined the right to the property as between parties claiming under adverse registered instruments purporting to pass the legal estate (*h*). In Equity, however, a different construction has been put upon the Acts; viz.: that the intention of the Acts was to protect parties against charges of which they would otherwise have no notice, and not on the one hand to vitiate an unregistered instrument, nor on the other hand to give to a registered one any greater force by virtue of its registration (*i*). Thus, in Equity, registration was no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security (*k*): and his assignee for value and without notice was in no better position, if the interest assured were merely equitable, and he did not get in the legal estate (*l*). Registration was not, however, of itself notice to the world (*m*): and therefore registration of an equitable incumbrance did not prevent the person who then had, or subsequently acquired, the legal estate from using it for the protection of any equitable interest which he might have acquired in the property without notice of the registered incumbrance (*n*): and in like manner it was held that a pur-

Prior registration conclusive at Law but not in Equity.

(*g*) 7 Anne, c. 20.

(*h*) *Doe* v. *Allsop*, 5 B. & Ald. 142.

(*i*) *Johnson* v. *Holdsworth*, 1 Si. N. S. 106; *Blades* v. *Blades*, 1 Eq. Ca. Ab. 358; *Wrightson* v. *Hudson*, 2 *ib.* 609; Fisher, 618.

(*k*) *Cheval* v. *Nichols*, 1 Str. 664; *Le Neve* v. *Le Neve*, 3 Atk. 646, 651; *Sheldon* v. *Cox*, Amb. 624; *Tunstall* v. *Trappes*, *Gosling's case*, 3 Si. 301; and see *Jolland* v. *Stainbridge*, 3 V. 478; *Davies* v. *Earl of Strathmore*, 16 V. 419. And by analogy the want of registration of an annuity deed under 18 & 19 V. c. 15, s. 12, is no protection to a subsequent purchaser with notice; *Greaves* v. *Tofield*, 14 Ch. D. 563; and see the same principle applied with reference to stop-orders, *Re Holmes*, 29 Ch. D. 786; and cf. *Mutual Society* v. *Langley*, 32 Ch. D. 460; *post*, p. 966.

(*l*) *Ford* v. *White*, 16 B. 120.

(*m*) *Morecock* v. *Dickins*, Amb. 678; *Williams* v. *Sorrell*, 4 V. 389; *Wiseman* v. *Westland*, 1 Y. & J. 117.

(*n*) See *Morecock* v. *Dickins*, Amb. 678; *Bedford* v. *Bacchus*, *ib.* 680, cited, *Wrightson* v. *Hudson*, 2 Eq. Ca. Ab. 609; *contrà*, in Ireland, *Mill* v. *Hill*,

chaser advancing his money and taking a conveyance without notice of a prior deed unregistered (*o*) : or only imperfectly registered, might, upon acquiring notice of it, register his own deed, and so gain priority on the same principle which allows a purchaser without notice of a prior incumbrance, upon afterwards getting notice of it, to get in an outstanding legal estate (*p*). But a purchaser or mortgagee, who, at the date of the conveyance or mortgage, had notice of a prior unregistered instrument, did not acquire priority by registering his own deed (*q*) : the policy of the Acts being to protect parties against charges of which they had no notice, and not against those which were known to them (*r*) : and of course the registration of a forged deed could give it no validity (*s*).

But it was only by actual notice clearly proved that a registered deed would be postponed to a prior unregistered instrument (*t*) ; and although in many cases notice to the solicitor or agent was held sufficient to bind the client or principal (*u*), yet even in such cases there must have been direct, as distinguished from merely imputed, notice (*x*). In one case the omission of a solicitor, when preparing a marriage settlement of land in Middlesex to examine the earlier title, was treated as constructive notice of a prior unregistered equitable charge ; and the settlement, although registered without any actual notice of the charge, was postponed to it (*y*) : but in a later case under the Irish Act, the House of

3 H. L. C. 828 ; and see *Re Russell Road Purchase*, 12 Eq. 78.

(*o*) *Elsey* v. *Lutyens*, 8 Ha. 159.

(*p*) *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

(*q*) *Cheval* v. *Nichols*, 1 Str. 664 ; *Blades* v. *Blades*, 1 Eq. Ca. Ab. 358 ; *Bushell* v. *Bushell*, 1 Sch. & L. 90, 99, where all the earlier cases are considered.

(*r*) *Johnson* v. *Holdsworth*, 1 Si. N. S. 106, 108.

(*s*) *Cooper* v. *Vesey*, 20 Ch. D. 611.

(*t*) *Wyatt* v. *Barwell*, 19 V. 435 ; and see judgment of Sugden, L. C., in *Majoribanks* v. *Hovenden*, Dru. 11, 22. A purchaser claiming under a registered voluntary settlement has been held to have priority over persons claiming under an earlier unregistered voluntary settlement of which he had no notice ; *Re M'Donagh's Est.*, 3 L. R. Ir. 408.

(*u*) See *Le Neve* v. *Le Neve*, 3 Atk. 646 ; *Sheldon* v. *Cox*, Amb. 624 ; *Nixon* v. *Hamilton*, 2 D. & Wal. 364 ; *Lenehan* v. *M'Cabe*, 2 Ir. Eq. R. 342.

(*x*) *Majoribanks* v. *Hovenden*, *suprà* ; *Ratcliffe* v. *Barnard*, 6 Ch. 652 ; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*y*) *Wormald* v. *Maitland*, 35 L. J. Ch. 69.

Lords expressly disapproved of this decision, and held that the mere omission on the part of a solicitor, when preparing a legal mortgage of land in Ireland to require production of the title deeds, for the non-production of which a reasonable excuse was given, did not postpone the legal mortgage, which was duly registered, to a prior unregistered equitable charge (*z*).

Priorities *inter se* of judgments on local register.

As respects lands situate in a register county, the priorities of judgments *inter se* depend on the order of their registration in the local register (*a*).

Where deeds are registered at the same time.

Where two deeds are registered on the same day, and at the same hour, the document denoted by the earlier number will be presumed to have been first registered (*b*).

Old law and authorities still apply to lands in Middlesex.

With regard to lands in Middlesex, the statute of Anne is still in force, and the law laid down by the authorities on that and the kindred Yorkshire Acts still applies.

The law under Yorkshire Registries Acts, 1884 and 1885.

But with regard to lands in Yorkshire, a great change has been made by the Yorkshire Registries Acts, 1884 and 1885 (*c*), which apply to the whole county. The Acts contain no declaration that all unregistered instruments shall be deemed to be fraudulent and void: but provision is made, and elaborate machinery provided, for the registration of assurances, charges and wills (*d*). The 14th section enacts that all assurances entitled to be registered under the Act shall have priority according to the date of registration thereof, and not according to their date, and that every will so registered shall have priority according to the date of the testator's death, if the date of registration is, or is to be

(*z*) *Agra Bank* v. *Barry*, *suprà*; *Ratcliffe* v. *Barnard*, *suprà*.

(*a*) *Neve* v. *Flood*, 33 B. 666; and see *Benham* v. *Keane*, 3 D. F. & J. 318; *Westbrooke* v. *Blythe*, 3 E. & B. 737; *Hughes* v. *Lumley*, 4 *ib.* 685.

(*b*) *Neve* v. *Pennell*, 2 H. & M. 170.

(*c*) 47 & 48 V. c. 54; 48 & 49 V. c. 26.

(*d*) 47 & 48 V. c. 54, ss. 4—13; and see *ante*, p. 774 *et seq.*

Chap. XV. Sect. 4.

deemed to be, within six months after the testator's death, or according to the date of registration thereof, if the registration is not, or is not to be deemed to be, within such period of six months; but nothing in the Act is to interfere with the priorities as between themselves of any assurances or wills, the dates of registration of which may be identical. Under the same section all priorities given by the Act are to have full effect in all Courts except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests are to be entitled to corresponding priorities, and no such person is to lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; but nothing in the section is to operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims; and any disposition of land or charge on land which if unregistered would be fraudulent and void will, notwithstanding registration, be fraudulent and void in like manner.

Remarks on the 14th section.

It will be observed that this provision makes registration the absolute test of priority, and expressly abolishes the old equitable rule, which prevailed under the former Acts, that registration was no protection against an unregistered assurance, of which the party claiming under the registered assurance had notice at the date of completing his purchase or security (*e*).

The 15th section repealed.

The 15th section of the Act of 1884 made registration actual notice *per se*. But this was found to be of great commercial inconvenience, inasmuch as it prevented bankers and other persons in like situations from ever making even the smallest further advance to a customer, or even allowing a fresh overdraft of his account, without searching the register on each occasion for registered charges, intermediate between

(*e*) *Ante*, p. 959.

Tacking abolished by the 16th section.

their last advance and that in contemplation. The section was accordingly repealed in the following year (*f*). The repeal, however, did not extend to the 16th section, which was allowed to remain intact, and which provides that in any case in which priority or protection might but for the Act have been given or allowed to any estate or interest in lands by reason or on the ground of such estate or interest being protected by or tacked to any legal or other estate or interest in such lands, no such priority or protection shall after the commencement of the Act be so given or allowed to any estate or interest in lands within the three Ridings, except as against any estate or interest which shall have existed prior to such commencement; and full effect is to be given in every Court to this provision, although the party claiming such priority or protection as aforesaid shall claim as purchaser for valuable consideration and without notice.

Inefficacy of the repeal of the 15th section.

It is not quite clear how the repeal of the 15th section alone can remedy the difficulty which that section had caused, so long as no priority is given to the legal estate, and tacking is disallowed. A banker who has security for an overdraft of £1,000 cannot safely make the smallest further advance without searching the register, since, although registration of an intermediate charge is not of itself notice, yet by reason of the 16th section he will not be able to tack the new advance on to the old one as against an intermediate registered charge of which he was ignorant.

Purchaser's title, how impeachable under Register Acts.

It may be laid down, as a general rule, that a purchaser can be evicted under the Registration Acts, only by a person claiming under an instrument executed by the party under whom the two adverse titles are derived or parties taking under him by act in Law, and whose conveyance is registered prior to the registration of the document which forms the root of the purchaser's adverse title. For instance, if A.

(*f*) 48 & 49 V. c. 26, s. 5.

convey first to B. who does not register, and then to C. who does not register, and then C. convey to D. who registers, D. acquires no title against B. unless he can procure a conveyance from A. to C. to be duly registered (*g*); which would, it is conceived, be impracticable if A. and the witnesses attesting his execution of his original conveyance to C. were dead (*h*): so where a lease is unregistered, no statutory title is acquired against the owner of the reversion by registering an assignment of the lease (*i*): but if A. (a woman), after conveying to B., marry, and her husband convey the estate which he takes *in jure mariti* to C., who registers before B.'s conveyance is registered, C. thereby acquires priority (as intimated by the terms of the above proposition) (*k*): and the same rule would, it appears, prevail, if A., after conveying to B., were to die intestate, and her heir-at-law were to convey to C., who were to register before any registration by B. (*l*). So, if A. convey to B., who does not register, and then B. convey to D., who registers merely his own conveyance, and then A. convey to C., who registers, D., it is conceived, has no title as against C. and parties claiming under him: for the registered conveyance to C. displaces B.'s title under his unregistered conveyance; and this being gone, the conveyance to D. goes with it: and, in such a case, a person searching the register could not search as to B., and would have no reason to suppose that the property conveyed by B. to D. had ever been held by A.: nor, as respects parties claiming under C., would it make any difference that the assurances by C. were unregistered (*m*). But the case would probably be different if A. were made a party to the conveyance from B. to D. (*n*). The principle upon which these cases have been decided would seem to have

(*g*) *Jack* v. *Armstrong*, 1 Hud. & B. 727; *Fury* v. *Smith*, *ib.* 735.

(*h*) *S. C. Essex* v. *Baugh*, 1 Y. & C. C. C. 620; *vide ante*, p. 773, as to the necessity for the memorial being attested by a witness to the execution of the deed by the grantor.

(*i*) *Honeycomb* v. *Waldron*, 2 Str. 1064; *Battersby* v. *Rochfort*, 2 J. & L. 431.

(*k*) See *Warburton* v. *Loveland*, 2 Dow & C. 480.

(*l*) *Ibid.*

(*m*) *Ibid.*

(*n*) *Hunter* v. *Kennedy*, 1 Ir. Ch. R. 225.

been preserved intact by the Yorkshire Registries Act, 1884 (*o*).

Effect of V. & P. Act on assurance by devisee as against heir.

We have already referred to the 37 & 38 Vict. c. 78, which provides (*p*) that where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or some one deriving title under him shall, if registered before, take precedence of, and prevail over, any assurance from the testator's heir-at-law (*q*).

Priorities under Fines and Recoveries Abolition Act.

We have also referred to the provisions in the 3 & 4 Will. IV. c. 74, as to the priorities of parties claiming under disentailing assurances, both of freeholds and copyholds (*r*).

Section 5.

(5.) *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates and voluntary or fraudulent conveyances—equitable relief against purchaser with notice.*

As to notice, &c.

Purchaser only affected by actual notice of unregistered assurance or judgment.

Notice of an unregistered security must, in order to affect a purchaser claiming under a registered instrument, be actual notice (including constructive or imputed notice, but excluding mere suspicion), affecting him with fraud, if he disregard it (*s*): so, also, notice of an unregistered judgment must, it would seem, be actual in order to affect a purchaser (*t*).

(*o*) 47 & 48 V. c. 54, s. 17.

(*p*) See sect. 8; *ante*, p. 771 *et seq.*

(*q*) See before the Act, *Chadwick* v. *Turner*, 1 Ch. 310; and *vide ante*, p. 771.

(*r*) *Vide ante*, p. 779 *et seq.* We may remark here that the consequence of avoiding an unregistered bill of sale by execution is not merely to neutralize it, so far as the execution creditor is concerned, but to displace it altogether; *Richards* v. *James*, L. R. 2 Q. B. 285; *Hue* v. *French*, 26 L. J. Ch. 317.

(*s*) See *Hine* v. *Dodd*, 2 Atk. 275; *Jolland* v. *Stainbridge*, 3 V. 478, 486; *Wyatt* v. *Barwell*, 19 V. 435; *Buckley* v. *Lanauze*, L. & G. temp. P. 327, 341; *Nixon* v. *Hamilton*, 2 D. & Wal. 364, 388; *Wallace* v. *Marq. of Donegal*, 1 D. & Wal. 461, 488; and see judgment of Sugden, L.C., in *Majoribanks* v. *Hovenden*, Dru. 11, 22; *Rolland* v. *Hart*, 6 Ch. 678, 681.

(*t*) See *Tunstall* v. *Trappes, Gosling's case*, 3 Si. 301; and see *Benham* v. *Keane*, 3 D. F. & J. 318.

As to notice to trustees.

Notice to one of several trustees is, as a general rule, notice to all (*u*), the reason being that a subsequent incumbrancer or assignee is under an obligation to inquire of every one of the trustees; and the only exception to the rule is, where the person giving the notice knows, or must be taken to know, that the trustee, to whom alone notice is given, has an adverse interest under such circumstances as render it probable that he will commit a fraud (*x*). So, where one of several executors took an assignment from a *cestui que trust* of his expectant share in a residue, without disclosing the circumstance to his co-executors, a subsequent purchaser of the same share, who gave due notice to the surviving executor, was held entitled to priority (*y*). Where notice of a charge is duly given to the trustees for the time being, and afterwards other trustees are appointed in their place, who, without notice of the charge, distribute the funds among the beneficiaries, the new trustees are not liable, as for a misapplication of the fund, on the ground that on their acceptance of office they ought to have inquired whether notice of any charge had been given (*z*). If assignees of an equitable interest desire to be perfectly safe, they should either obtain a distringas on the funds, or an endorsement on the trust deed, or a transfer of the funds into Court. And it must be observed that a second incumbrancer on a fund in Court, who had notice of a prior incumbrance when he took his security, does not gain priority by obtaining a stop order as against the prior incumbrancer, even though the latter has got no stop order (*a*).

Notice to solicitor is notice to client.

Actual notice to the solicitor of the trustees, or to the solicitor, or agent in the transaction, is actual notice to all the

(*u*) *Ex p. Rogers*, 8 D. M. & G. 271; *Smith* v. *Smith*, 1 Y. & C. 338; *Willes* v. *Greenhill*, 4 D. F. & J. 147; and see *Wise* v. *Wise*, 2 J. & L. 412.

(*x*) *Brown* v. *Savage*, 4 Dr. 635; *Willes* v. *Greenhill*, *suprà*.

(*y*) *Timson* v. *Ramsbottom*, 2 Ke. 35.

(*z*) *Phipps* v. *Lovegrove*, 16 Eq. 80; see *Newman* v. *Newman*, 28 Ch. D. 674.

(*a*) *Re Holmes*, 29 Ch. D. 786; but it is otherwise where the subsequent incumbrancer had no notice at the time of taking his security, although he had notice before obtaining his stop-order; *Mutual Society* v. *Langley*, 32 Ch. D. 460.

trustees, or the client or principal (*b*), but only when there is an actual employment of the solicitor extending to receiving such notice (*c*); and notice to the solicitor is not notice to the client, when the person giving the information knows, or has good reason to believe, that it will not be communicated to the client (*d*). Where the principal is affected with personal knowledge, it is, of course, immaterial whether he acquired it in one or another character (*e*).

Actual notice, when, by whom, and how to be given.

Actual notice, according to Lord St. Leonards (*f*), "must be given by a party interested in the property (*g*), and in the course of the treaty for the purchase:" and he also cites a remark made by the Master of the Rolls, in *Jolland* v. *Stainbridge* (*h*), intimating a doubt whether a general notice of title is sufficient, and whether it is not necessary to specify the instrument under which the claimant is entitled.

General remarks on the doctrine.

Perhaps all these points should be cautiously acted on in practice (*i*). It is one thing to say that mere "flying reports" (*k*) are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim, unless made by a party interested. The credibility of the informant must surely be considered (*l*). Nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the Court should not consider whether, (as in the case of an agent or solicitor,) such notice

(*b*) *Willes* v. *Greenhill*, *suprà*; *Rickards* v. *Gledstanes*, 3 Gif. 298; and see *Tunstall* v. *Trappes*, *suprà*; *Le Neve* v. *Le Neve*, 3 Atk. 646; 2 Wh. & T. L. C.; *Davis* v. *Earl of Strathmore*, 16 V. 419; *Sheldon* v. *Cox*, 2 Ed. 224; *Nixon* v. *Hamilton*, 2 D. & Wal. 391, 393; *Rolland* v. *Hart*, 6 Ch. 678.

(*c*) *Saffron Walden Society* v. *Rayner*, 14 Ch. D. 406.

(*d*) *Sharpe* v. *Foy*, 4 Ch. 35; and see *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*e*) See *Meux* v. *Bell*, 1 Ha. 88.

(*f*) Sug. 755; and see 1 J. & L. 442.

(*g*) See *Wildgoose* v. *Wayland*, Gould. 147.

(*h*) 3 V., at p. 486.

(*i*) See, as to the first and third, *Butcher* v. *Stapely*, 1 Vern. 363; and *Fry* v. *Porter*, 1 Mod. 311.

(*k*) Gould. 147.

(*l*) But see *Barnhart* v. *Greenshields*, 9 Mo. P. C. 18.

must not have been present to his mind during the treaty. Of the case cited by Lord St. Leonards in support of the unqualified proposition (*m*) it may be remarked, that considering its date (*n*), and the cautious character of the Judge, (Lord Keeper Coventry,) an unwillingness to do anything which might be construed as a breach of parliamentary privilege may have influenced the decision: which was, that a member of the House of Commons was not to be considered as affected with notice of what came to his knowledge as parliamentary business within the walls of the House. But general reputation cannot be constructive notice of any fact in proof of which such reputation would be inadmissible in evidence (*o*).

So, the doctrine hinted at in *Jolland* v. *Stainbridge* seems to be at variance with a later case, where it was held that a purchaser, having notice that A. had a judgment or warrant of attorney affecting the estate, was bound in Equity, although the incumbrance was in fact a mortgage (*p*): so, a general recital in a deed that there were mortgages on the estate, has been held, by Lord Langdale, to amount to notice of a mortgage, affecting the estate, although no other mention was made of it in the deed (*q*): but where two charges were contained in one deed, and a notice of one only was given to the trustees, it was held that notice of the other could not be imputed to them (*r*).

In one case (*s*), where a trustee had only indirect notice of his *cestui que trust's* insolvency, the assignee, having omitted to give formal notice, was postponed to a subsequent incumbrancer, who gave due notice of his claim; but, on appeal, this decision was reversed as inconsistent with the

(*m*) *East Grinstead case*, Duke's Char. Uses, 640.

(*n*) A.D. 1633.

(*o*) *Greenslade* v. *Dare*, 20 B. 284.

(*p*) *Taylor* v. *Baker*, 5 Pr. 306; and see 1 Ha. 58.

(*q*) *Farrow* v. *Rees*, 4 B. 18; see *Lacey* v. *Ingle*, 2 Ph. 413; *Gibson* v. *Ingo*, 6 Ha. 124.

(*r*) *Re Bright's Tr.*, 21 B. 430; and *vide post*, p. 970.

(*s*) *Lloyd* v. *Banks*, 4 Eq. 222; see *Re Brown's Tr.*, 5 Eq. 88.

established principles of the Court; and it was laid down by Lord Cairns that if the trustee can be shown to have in any way acquired a knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge so acquired, then there is fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way which would be inconsistent with the claim of the incumbrancer (*t*).

Purchaser, whether affected by notice of construction of doubtful instrument.

It seems probable that a purchaser having notice of an executory instrument—(*e.g.*, marriage articles,)—of doubtful meaning, would, as a general rule, be bound to take notice of the construction which would be put upon it by a Court of Equity; and must, therefore, see that any instrument which may have been executed in pursuance thereof, and which is material to the title, has been framed in accordance with such construction (*u*): but, where a long period has elapsed since the sale, the Court may decline to fix upon a purchaser a difficult construction of a doubtful instrument, although it might have granted relief as between the parties thereto if there had been no sale (*x*).

Constructive notice—nature of.

Constructive notice, (which, in its general effects, is similar to actual notice (*y*),) has been defined to be, "evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted" (*z*). This, perhaps, scarcely conveys a satisfactory notion of the nature of the doctrine; the reported decisions upon which clearly show, that constructive notice is often held to exist in the absence of any idea by the Court of the existence of actual personal knowledge. If, for instance, a purchaser

(*t*) *Lloyd* v. *Banks*, 3 Ch. 488. The question whether actual knowledge, however acquired, is or is not notice, was discussed but not decided by the H. L. in *Mildred* v. *Maspons*, 8 Ap. Ca. 874, 885, 888.

(*u*) Sug. 781; *Davies* v. *Davies*, 4 B. 54.

(*x*) *Thompson* v. *Simpson*, 1 D. & War. 459.

(*y*) *Sheldon* v. *Cox*, Amb. 626.

(*z*) *Plumb* v. *Fluitt*, 2 Anstr. 438; and see Sug. 755.

Chap. XV. Sect. 5.

has notice of a deed relating to the title, and forming part of the chain of title, he has notice of the contents of that deed: and it is no excuse to him for not looking at it to say that he was told that it contained nothing which it was necessary for him to see, even although he show conclusively that he believed the statement so made to him (*a*). In such a case he will be fixed with notice not only of the contents of the deed, whether he actually see it or not, but also of everything which he might reasonably have learned from insisting on an inspection of it, as *e.g.*, that it had been deposited as a security (*b*). Of course, however, there may be cases where the deed cannot be got at, or where for some other reason with the exercise of all the prudence in the world a purchaser cannot see it: and then there may be no constructive notice affecting the title (*c*). But the doctrine of constructive notice does not apply to cases either where the deed of which notice is sought to be imputed does not form part of the chain of title, or where it may or may not affect the title, and the purchaser is induced to dispense with its production in *bonâ fide* reliance on a false or erroneous statement that it does not affect the title (*d*). For instance, if on a purchase of land from a married man the purchaser is told that there is a settlement but that it does not affect the land in question, and he completes the purchase, *bonâ fide*, relying on that statement, he will not be fixed with constructive notice of the contents of the settlement (*e*). On the same principle, where property was subject to restrictive covenants contained in a separate and collateral deed which was not in any way referred to in, and did not form any part of, the necessary title, the purchaser was held to have no constructive notice of the contents of that deed (*f*). Constructive notice may, perhaps, be rather considered to consist in those circumstances

(*a*) *Patman* v. *Harland*, 17 Ch. D. 353, 357, per Jessel, M R.; *Jackson* v. *Rowe*, 2 S. & S. 472; *Whitbread* v. *Jordan*, 1 Y. & C. 303; *Kennedy* v. *Green*, 3 M. & K. 699.

(*b*) *Peto* v. *Hammond*, 30 B. 495; *vide post*, p. 875.

(*c*) *Patman* v. *Harland*, *supra*.

(*d*) *Ibid.*

(*e*) *Jones* v. *Smith*, 1 Ph. 244; and see *Re Bright's Tr.*, 21 B. 430.

(*f*) *Carter* v. *Williams*, 9 Eq. 678.

under which the Court concludes, either that notice must be imputed on grounds of public policy to an innocent person, or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud, and which, therefore, the common interests of society require should, in its consequences, be treated as equivalent to actual notice. The 3rd section of the Conveyancing Act, 1882,—in enacting that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him,—has merely enunciated the principle above stated (*g*). What degree of negligence is sufficient for this purpose remains to be considered.

Propositions of Wigram, V.-C., as to constructive notice,

In a case, before V.-C. Wigram, it was asserted by the Court, that the cases in which constructive notice has been established resolve themselves into two classes; first, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; and the Court has, thereupon, bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry for the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry, for the very purpose of avoiding notice (*h*); and is therefore guilty of wilful ignorance, which is not to be distinguished in its equitable consequences from actual knowledge (*i*). And, in a later case, the V.-C., with refer-

(*g*) *Earl of Gainsborough* v. *Watcombe Co.*, 54 L. J. Ch. 991. As to the effect of the sub-section dealing with constructive notice through a solicitor, &c., see *post*, p. 988.

(*h*) *Jones* v. *Smith*, 1 Ha. at p. 55; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135, 146.

(*i*) *Owen* v. *Homan*, 17 Jur. 861; see *Northern Ins. Co.* v. *Whipp*, 26 Ch. D. 482.

Chap. XV. Sect. 5.

ence to his previous judgment, repudiates the notion, (which had been attributed to him,) "that there may not be a degree of negligence so gross that a Court of Equity may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent;" and further remarks, "Negligence, as I understand the term, supposes a disregard of some fact known to the purchaser, which, at least, indicated the existence of that fact, notice of which the Court imputes to the purchaser (*k*)."

are capable of extension—*semble*.

Mere negligence may have the effect of notice.

The propositions of the V.-C. seem, however, scarcely to provide for those cases in which a purchaser is affected with constructive notice, not through his personal knowledge of any fact leading him to actual notice, but by his neglect of the usual and recognised means for acquiring such knowledge or notice (*l*). For instance, a public Act of Parliament is notice to all the world (*m*): so is a *lis pendens* (*n*), if registered under the Act of 2 & 3 Vict. c. 11 (*o*); or a deed or will registered in a registered county or entered on Court Rolls (if the purchaser search over the period within which the

(*k*) *West* v. *Reid*, 2 Ha. 257, 259.

(*l*) See *Ware* v. *Lord Egmont*, 4 D. M. & G. 460; *Jones* v. *Williams*, 24 B. 47; *Boursot* v. *Savage*, 2 Eq. 134; *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221.

(*m*) Sug. 758; although it be a local Act; *Barraud* v. *Archer*, 2 Si. 433; aff. 2 R. & M. 751. *Quære*, as to a private Act made public; Sug. 758.

(*n*) *Ibid.* Whether it is actual notice, so as to prevail against a registered instrument, *quære*; *Wallace* v. *Marquis of Donegal*, 1 D. & Wal. 461, 488.

(*o*) See sect. 7. But it is said to be only notice of what is charged on the bill, and not of equities which may possibly arise out of the matters in question in the suit; see *Shalleross* v. *Dixon*, 5 Jarm. Conv. 493; *Bull* v. *Hutchins*, 9 Jur. N. S. 954; see as to Ireland, 7 & 8 V. c. 90; *Jennings* v. *Bond*, 2 J. & L. 720, *et quære*. A special case filed under the 13 & 14 V. c. 35, is a *lis pendens* (sect. 17); so is an administration suit, as respects estates sold under the decree, *Drew* v. *Earl of Norbury*, 3 J. & L. 267; cf. *Price* v. *Price*, 35 Ch. D. 297. Filing of the bill and not service of the subpœna, is the commencement of a *lis pendens*, 3 J. & L. 267. A petition for winding up a public company under the Act of 1862 was, by the 114th section, made a *lis pendens*; which, however, only affected the company in its corporate character, and not the individual contributories; see *Ex p. Thornton*, 2 Ch. 171: but this section has been repealed; see 30 & 31 V. c. 47, s. 1. As to the doctrine of *lis pendens* being notice, see *Bellamy* v. *Sabine*, 1 D. & J. 566, and *post*, p. 982.

instrument is registered (*p*) or the entry is made); or a judgment entered at the Common Pleas, if the purchaser search the register: so, if a person being referred for information to another, neglect to apply to him, he will be held to have had notice of what he might have learnt on inquiry (*q*): so, if a purchaser, without any fraudulent intention (*r*), (the absence of which might be evidenced by his payment of a full price for the property,) were to accept a conveyance without any previous investigation of title, relying on the mere assurance of the vendor that he was absolute owner, he would, nevertheless, be held to have constructive notice of any defect appearing on the title (*s*), although he could be scarcely said to have actual notice of any fact indicating the existence of such defect.

Purchaser having notice of a particular fact or instrument held to have notice of connected facts and instruments.

To consider, however, the cases falling within the rules laid down by V.-C. Wigram, and which, with the above exceptions, seem to comprise the authorities on the subject. It has been held, that notice of a post-nuptial, and apparently voluntary, settlement is constructive notice of the ante-nuptial agreement on which it is founded (*t*); that actual notice to a purchaser, of an instrument as one affecting the estate, is constructive notice of all instruments to which an examination of the first would have led him (*u*); even although such

(*p*) *Hodgson* v. *Dean*, 2 S. & S. 221; see, as to the extent to which a memorial is notice, *Rochard* v. *Fulton*, 1 J. & L. 413; and see *Kettlewell* v. *Watson*, 26 Ch. D. 501. But under the Yorkshire Registries Acts, 1884 and 1885, although by sect. 5 of the latter Act registration is not itself notice, yet a registered deed has priority over an unregistered instrument; sect. 14 of Act of 1884.

(*q*) *Wason* v. *Waring*, 15 B. 151.

(*r*) See *Proctor* v. *Cooper*, 2 Dr. 1; affd. 1 Jur. N. S. 149.

(*s*) See Lord Lyndhurst's remarks on *Jackson* v. *Rowe*, in 1 Ph. 255; and see to the same effect Sir J. Wigram's remarks in *Neesom* v. *Clarkson*, 2 Ha. 173, and *West* v. *Reid*, 2 Ha. 260; *Patman* v. *Harland*, 17 Ch. D. 353. As to the effect of the non-production of title deeds in reference to the doctrine of constructive notice, see *post*, p. 980; and *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*t*) *Ferrars* v. *Cherry*, 2 Vern. 384; as to the authority of the case which has been questioned, see Mr. Raithby's note, 3rd edit.

(*u*) *Coppin* v. *Fernyhough*, 2 Br. C. C. 291; *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 287, 291; *Tanner* v. *Florence*, *ib.* 259, 260.

Chap. XV. Sect. 5.

prior instruments are not actually recited, but there is only a recital that the property is subject to limitations which in fact correspond with the limitations thereby created (*x*) : that actual notice of a deed is constructive notice of everything which might be learnt from requiring its production,—as, *e.g.*, that it was deposited as a security (*y*) :—and that notice of a prior conveyance, and of the then vendor's title, is notice of his lien for unpaid purchase-money (*z*) : so, an inaccurate recital of a will has been held to be notice of its real contents (*a*). It has even been held that a recital that the property was held upon such trusts for the use of A., B., and C. (parties to the conveyance) "for such estates in possession, reversion, or remainder as they became entitled to after the death of D.," was notice of *prior* trusts in favour of other parties, which would have been discovered by an examination of the instrument creating the trusts which were referred to in the recital (*b*). This, however, seems to be an improper extension of the ordinary doctrine. As observed by Mr. Pepys (Lord Cottenham), *arguendo* for the purchaser, "notice of the existence of a trust for A. cannot impose on a purchaser an obligation to inquire whether there is not also a trust for B." So, notice of an equitable claim, as affecting an unspecified portion of the property, is notice of the claim as in fact affecting the entirety (*c*).

Notice from physical condition of the property.

A purchaser of a house has been held to have notice of an agreement to grant a smoke easement to an adjoining owner, from the mere fact of there being fourteen chimney-pots on the top of the chimney-stack, and only twelve flues in the house (*d*). So, if the condition of the property at the date of the contract is such as to suggest inquiry, the purchaser may be fixed with constructive notice of rights of way, or other

(*x*) *Neesom* v. *Clarkson*, 2 Ha. 163; see p. 165.

(*y*) *Peto* v. *Hammond*, 30 B. 495.

(*z*) *Davies* v. *Thomas*, 2 Y. & C. 234. See *Cator* v. *Earl of Pembroke*, 1 Br. C. C. 301, 302; Sug. 553; and *Butler* v. *Lord Portarlington*, 1 D. & War. 20; *A.-G.* v. *Hall*, 16 B. 388; and see cases cited, *suprà*, n. (*s*).

(*a*) *Hope* v. *Liddell*, 21 B. 183.

(*b*) *Malpas* v. *Ackland*, 3 Rus. 273.

(*c*) *A.-G.* v. *Flint*, 4 Ha. 147.

(*d*) *Hervey* v. *Smith*, 22 B. 299; 2 K. & J. 389; *sed quære*.

easements affecting it: thus, where A. purchased from B. a house, part of an estate agreed to be let to B. on a building agreement, and the house was built partly over an archway leading to mews in the rear, but not then forming the only means of access thereto, it was held that A. had constructive notice that when the building scheme was completed, the road under the archway would be the only approach to the mews; and that a right of way, though not expressly reserved in the assignment to A., was reserved by implication (*e*). But the doctrine of notice from physical facts will not be extended. Thus, the mere fact of there being windows in a house overlooking property does not affect a purchaser with any notice of an agreement as to the right of light through them (*f*).

Notice from dealing with rightful owner in possession.

Where a rightful owner is in possession of corporeal hereditaments, a purchaser, dealing for any interest in the property, is presumed to have notice of the title under which such possession is held: thus, where the purchasers of mines entered into possession under the agreement, but never took a conveyance, a subsequent purchaser of the land, without any exception of the minerals, was held to have notice of the agreement (*g*).

Notice of occupier's interests from fact of occupation.

Notice of the land, being in the occupation of a person other than the vendor, is notice to a purchaser that the person in possession has some interest in the land, for possession is *primâ facie* evidence of seisin (*h*), and a purchaser having notice of that fact is bound either to inquire what that interest is, or to give effect to it whatever it may be (*i*). On this principle a purchaser is bound by all the equities which the tenant could enforce against the vendor; and the equity of the tenant has been held to extend not only to interests con-

(*e*) *Davis* v. *Sear*, 7 Eq. 427; and see *Morland* v. *Cook*, 6 Eq. 252.

(*f*) *Allen* v. *Seckham*, 11 Ch. D. 790.

(*g*) *Holmes* v. *Powell*, 8 D. M. & G. 572; and see the remarks of L. J. Knight Bruce, pp. 580, 581.

(*h*) Per Wigram, V.-C., in *Jones* v. *Smith*, 1 Ha. at p. 60.

(*i*) *Barnhart* v. *Greenshields*, 9 Mo. P. C. 18, 32.

Chap. XV. Sect. 5.

nected with his tenancy (*k*), but also to his interests under collateral agreements, *e.g.* an agreement for the sale to him of the fee simple (*l*); and although the latter has been said to be an extreme case (*m*), it follows logically from the principle above stated, and has been so recognized (*n*). In every case a prudent purchaser, who has notice that the property is not in hand, will make inquiry as to the nature and extent of the interest of the occupying tenant; but the doctrine that notice of a tenancy is notice of the tenant's equities, has reference merely to equities between the tenant and purchaser after completion of the contract; and is not necessarily notice as between vendor and purchaser, so as to affect their relative rights and liabilities while the contract is still incomplete (*o*). Nor does any constructive notice arise from failure to inquire of the last occupier, where the possession is vacant (*p*).

Notice of payment of rents to other than the vendor.

Notice that the occupier holds as tenant to A., is notice of A.'s title (*q*). So, notice that the rents are received by A., is notice of A.'s title, and of the instrument under which he claims (*r*), and of the character in which he receives them (*s*). So, notice that receipts have been given to, and accepted by, the vendor for an annual payment as "rent," but which the vendor and purchaser claiming under him subsequently contend was in fact a rent-charge, is notice to the purchaser of the payee's title to the freehold (*t*).

(*k*) *Taylor* v. *Stibbert*, 2 V. 437; *Meux* v. *Maltby*, 2 Sw. 277, 281.

(*l*) *Daniels* v. *Davison*, 16 V. 249, 254; *Allen* v. *Anthony*, 1 Mer. 282; *Crofton* v. *Ormsby*, 2 Sch. & L. 583.

(*m*) Per V.-C. Wigram, 1 Ha. 62; *Miles* v. *Langley*, 2 R. & M. 626, 629; Sug. 762; see *Penny* v. *Watts*, 2 De G. & S. 501; 1 M. & G. 150, 165.

(*n*) *Bailey* v. *Richardson*, 9 Ha. 734; *Barnhart* v. *Greenshields*, *suprà*; so, too, in *James* v. *Lichfield*, 9 Eq. 51; *Phillips* v. *Miller*, L. R. 9 C. P. 196 (rev. but on other grounds in Ex. Ch. 10 *ib.* 420); *Carroll* v. *Keayes*, 8 I. R. Eq. 97. But the extension of the doctrine by these latter cases to cases which still rest in contract cannot be sustained; *Caballero* v. *Henty*, 9 Ch. 447.

(*o*) *Caballero* v. *Henty*, 9 Ch. 447; Sug. 774; and *vide ante*, p. 519.

(*p*) *Miles* v. *Langley*, *suprà*.

(*q*) *Bailey* v. *Richardson*, 9 Ha. 734.

(*r*) *Knight* v. *Bowyer*, 23 B. 640.

(*s*) *S.C.*, 2 D. & J. 421; and see *Mumford* v. *Stohwasser*, 18 Eq. 556.

(*t*) *A.-G.* v. *Stephens*, 1 K. & J. 750; rev. on other points, 6 D. M. & G. 111.

Notice of late occupation.

But a demise of property "as the same was late in the occupation of H. C." has been held not to be notice of an easement to which it was subject during H. C.'s tenancy (*u*); and if the reference were to an existing occupation it does not seem that this could amount to notice of any rights except those of the occupier. A statement in the particular of sale, that "the property is now, or lately was, in the occupation of H. R. and others," the conditions providing that upon completion the purchaser was to be let into receipt of rents, was held not to be notice of the property being let on leases for lives at low rents (*x*); but in this case there was a suppression equivalent to misrepresentation.

Notice of legal estate being outstanding, its effect.

Notice of the legal estate being outstanding, is notice of the trusts on which it is held (*y*): and notice that the title deeds are in the possession of a third party, is, *primâ facie*, notice of any charge he has upon the property (*z*): so, notice that the title is a mortgage title, seems to be notice of any dealings by the mortgagee with the mortgagor which may have kept alive the equity of redemption (*a*).

Purchaser held to have notice of facts which he ought to have known.

Where a person, entitled only for life, represented that she was seised in fee, and conveyed as if so seised, a person claiming under her for valuable consideration was held to be affected with notice; the settlement being the only document under which she could claim the estate (*b*). And, as observed

(*u*) *Martyr* v. *Lawrence*, 2 D. J. & S. 261; *diss.* L. J. Knight-Bruce, and *quære:* see, too, *Baird* v. *Fortune*, 4 Macq. 127, and *Polden* v. *Bastard*, L. R. 1 Q. B. 156; cf. *Francis* v. *Hayward*, 22 Ch. D. 177, which was really a case of parcel or no parcel, not of an easement.

(*x*) *Hughes* v. *Jones*, 3 D. F. & J. 307.

(*y*) *Anon.*, Freem. 137.

(*z*) *Hiern* v. *Mill*, 13 V. 122; *Dryden* v. *Frost*, 3 M. & C. 670; and see 1 Ha. 61; *Worthington* v. *Morgan*, 16 Si. 547; see Sug. 772. In order to create a good equitable mortgage by deposit, it is not necessary that all the material title deeds should be deposited; *Lacon* v. *Allen*, 3 Dr. 579; *Roberts* v. *Croft*, 2 D. & J. 1.

(*a*) *Hansard* v. *Hardy*, 18 V. at p. 462; and as to titles under a foreclosure decree, see *ante*, p. 468.

(*b*) *Jackson* v. *Rowe*, 2 S. & S. 472, 475; and see *Roddy* v. *Williams*, 3 J. & L. 1; *Peto* v. *Hammond*, 30 B. 405.

by Lord Lyndhurst (*c*), no one could find fault with that decision; for either the party did or did not investigate the title; if he did not, he was guilty of great negligence; if he did, he must have seen that the party conveying to him had only a life estate. So, a lessee (*d*), or a sub-lessee (*e*), has notice of the title of the immediate, and (in the case of a sub-lessee) original lessor (*f*), and the mere fact that he is precluded either by the terms of the contract, or by recent statutes (*g*), from calling for the lessor's title, does not exempt him from the consequences of notice (*h*).

Where deed is executed in an unusual manner.

A person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed ought to have suggested to his solicitor (*i*): so, where a family solicitor, who had prepared a marriage settlement, became the apparent purchaser of the estate under a fictitious exercise of the usual power of sale, and subsequently executed instruments purporting to vest the estate in the husband, and then, as the husband's solicitor, applied for a loan on mortgage, and delivered an abstract of the title as above referred to, and indorsed in the usual way with his name as solicitor, it was held that the purchaser had implied notice of his having been the solicitor who prepared the settlement, and of the irregularity of the nominal purchase (*k*).

Where purchaser, having notice of

Where a purchaser had notice of another person having a judgment or warrant of attorney affecting the estate, and

(*c*) *Smith* v. *Jones*, 1 Ph. 255; and see V.-C. Wigram's remarks in *Neesom* v. *Clarkson*, 2 Ha. 173.

(*d*) *A.-G.* v. *Backhouse*, 17 V. 293; *Butler* v. *Lord Portarlington*, 1 D. & War. 20; *A.-G.* v. *Hall*, 16 B. 388.

(*e*) *Steedman* v. *Poole*, 6 Ha. 193; *Cosser* v. *Collinge*, 3 M. & K. 283; *Bank of Ireland* v. *Brookfield Linen Co.*, 15 L. R. Ir. 37.

(*f*) See as to affording a sufficient opportunity for examination, *Brumfit* v. *Morton*, 3 Jur. N. S. 1198.

(*g*) V. & P. Act, s. 2; Conv. Act, 1881, s. 3 (1).

(*h*) *Patman* v. *Harland*, 17 Ch. D. 353; and see *post*, p. 980.

(*i*) *Kennedy* v. *Green*, 3 M. & K. 699; *Greenslade* v. *Dare*, 20 B. 284.

(*k*) *Robinson* v. *Briggs*, 1 S. & G. 188. See and distinguish *Earl of Gainsborough* v. *Watcombe Co.*, 54 L. J. Ch. 991.

refrained from making any inquiry, he was held bound; although the incumbrance was in fact a mortgage (*l*); and, as a general rule, if a person knows that another has or claims an interest in the property for which he is dealing, he ought to inquire what that interest is; and if he omit to do so, he may be bound, although the notice was inaccurate as to the particulars or extent of such interest (*m*); *e. g.* a purchaser, having notice that a legatee had released the executrix from a legacy, and that, *in lieu thereof*, the latter had by will devised a freehold estate to such legatee, was held to have notice of such devise being pursuant to a written agreement between the parties (*n*): so, where a mortgagee or purchaser is informed that there are charges on the property, and he is aware of the existence of certain charges, but neglects, without any fraudulent motive, to make further inquiry, he is liable to be fixed with notice of all charges, the existence of which he might have learnt if he had made the inquiry (*o*). So, where a mortgagee had notice that a bill, which formed part of the consideration for the purchase of the estate by the mortgagor, remained unpaid, he was held to be bound to inquire whether the vendor had any lien on the estate, the deed of conveyance leaving the point doubtful (*p*); whether the circumstance that a bill of exchange is made payable to the order of a married woman is notice that it relates to her separate estate, appears doubtful (*q*).

Where he has notice that another has or claims, abstains from inquiry.

A mortgagee not inquiring for the deeds has been postponed to a prior equitable incumbrancer (*r*) upon the ground (*s*) of his having purposely abstained from making inquiry, the mortgage being for securing a pre-existing debt; that, in short, there was wilful blindness: and it has been held, in some cases, that the mere omission to ask for the deeds may be sufficient to postpone a mortgagee or purchaser to the

Where he omits to inquire for the title deeds.

(*l*) *Taylor* v. *Baker*, 5 Pr. 306.
(*m*) See *Gibson* v. *Ingo*, 6 Ha. 124.
(*n*) *Penny* v. *Watts*, 1 M. & G. 150, 158.
(*o*) *Jones* v. *Williams*, 24 B. 47, 59.
(*p*) *Frail* v. *Ellis*, 16 B. 350.
(*q*) *Dawson* v. *Prince*, 2 D. & J. 41.
(*r*) *Whitbread* v. *Jordan*, 1 Y. & C. 303.
(*s*) See *Jones* v. *Smith*, 1 Ph. at p. 255.

Chap. XV. Sect. 5.

equitable lien of the actual holder (*t*); although the case is different if a *bonâ fide* inquiry is made, and a reasonable excuse given for their non-production (*u*). In one case, the mere omission of a solicitor in preparing a marriage settlement of land in Middlesex, to examine the earlier title, was held sufficient to postpone the settlement to a prior unregistered charge (*x*); but in a later case in the House of Lords, where the authorities were fully reviewed, it was held that the omission of the solicitor of a legal mortgagee to require production of the title deeds, where a reasonable excuse was given for their non-production, was insufficient to postpone the legal mortgagee to a prior equitable incumbrancer (*y*); and it seems to be now well settled that, although the omission to call for the deeds may be evidence of a design, inconsistent with *bonâ fide* dealing (*z*), to avoid knowledge of the true state of the title, yet it does not of itself amount to constructive notice, except under circumstances from which a fraudulent intention must be presumed (*a*).

Purchase under a short title does not relieve from notice of anything on the full title.

The rule being that a purchaser has notice of all deeds relating to and forming part of the full title allowed by law, and of their contents (*b*), he cannot relieve himself from the notice, which an examination of the full title would have given him, by contracting to buy under a shorter title; and he will be fixed with notice of everything appearing on the full title, although prior to its stipulated commencement (*c*). On the same principle, it being well settled that a lessee has notice of his lessor's title, no contract abbreviating the title can alter the rule; and a lessee or purchaser of a lease will be affected with notice of everything of which he would have

(*t*) *Worthington* v. *Morgan*, 16 Si. 547; *Peto* v. *Hammond*, 30 B. 493; *Clarke* v. *Palmer*, 21 Ch. D. 124; *ante*, p. 952.

(*u*) *Hewitt* v. *Loosemore*, 9 Ha. 449; and see *ante*, p. 951.

(*x*) *Wormald* v. *Maitland*, 35 L. J. Ch. 69; but see comments on this case in *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*y*) *Agra Bank* v. *Barry*, *suprà*.

(*z*) Per Lord Selborne, in *Agra Bank* v. *Barry*, *suprà*.

(*a*) *Ratcliffe* v. *Barnard*, 6 Ch. 652.

(*b*) *Ante*, p. 969 *et seq.*

(*c*) *Robson* v. *Flight*, 4 D. J. & S. 608; *Peto* v. *Hammond*, 30 B. 495; *Morland* v. *Cook*, 6 Eq. 266; *Chinnery* v. *Evans*, 11 H. L. C. 115.

had notice, had he examined the lessor's full title (*d*). And it must be observed that the statutory enactments (*e*), restricting the right of a lessee or purchaser of a leasehold interest to require the title to the reversion, have not altered the rule, but have merely placed the lessee or purchaser in the same position as he formerly occupied where he had stipulated not to require such title (*f*).

Cases in which a purchaser is not affected with notice.

But, on the other hand, a private Act of Parliament, or a private Act made public (*g*), is not, in itself, notice to a purchaser: nor is registration of a deed, &c., in a county register notice (*h*), nor the entry of a document on the court rolls of a manor (*i*), unless the purchaser make a search extending over a period comprising the entry in the register or court rolls (*k*), as the case may be. The issuing of a fiat or of a commission of bankruptcy was not of itself notice (*l*), although gazetted (*m*); nor is a decree in a Court of Equity (*n*), nor a *lis pendens*, unless registered (*o*), although in all these cases the purchaser has the means of acquiring notice.

(*d*) *Parker* v. *Whyte*, 1 H. & M. 167; *Clements* v. *Welles*, 1 Eq. 200; *Wilson* v. *Hart*, 1 Ch. 463; *Fielden* v. *Slater*, 7 Eq. 523. See and distinguish *Carter* v. *Williams*, 9 Eq. 678, where a full examination of the title would not have disclosed the covenants, of which notice was sought to be imputed, as they were contained in a separate deed, without which an apparently perfect title was made out.

(*e*) V. & P. Act, s. 2; Conv. Act, 1881, s. 3 (1).

(*f*) *Patman* v. *Harland*, 17 Ch. D. 353; *Thornewell* v. *Johnson*, 50 L. J. Ch. 641; see *ante*, p. 869.

(*g*) *Hesse* v. *Stevenson*, 3 B. & P. 578; Sug. 758; see *Dawson* v. *Paver*, 5 Ha. 415.

(*h*) *Morecock* v. *Dickins*, Amb. 678; *Bushell* v. *Bushell*, 1 Sch. & L. 90; *Wiseman* v. *Westland*, 1 Y. & J. 117; and see 48 & 49 V. c. 26, s. 5, repealing 47 & 48 V. c. 54, s. 15; *ante*, pp. 959, 962 *et seq.*

(*i*) *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377; and see *Lane* v. *Jackson*, 20 B. 535.

(*k*) *Hodgson* v. *Dean*, 2 S. & S. 221; and see *Proctor* v. *Cooper*, 2 Dr. 1, the case of a search for judgments.

(*l*) See *Hitchcox* v. *Sedgwick*, on appeal, Sug. 762; *Re Atkinson*, 2 D. M. & G. 140; *Cannan* v. *S. E. R. Co.*, 7 Ex. 843: and see, as to notice, *Pike* v. *Stephens*, 12 Q. B. 465; *Pennell* v. *Stephens*, 7 C. B. 987; *Green* v. *Laurie*, 1 Ex. 335; *Re Barr's Trusts*, 4 K. & J. 219, and cases cited: notice to a solicitor's clerk held insufficient.

(*m*) *Sowerby* v. *Brooks*, 4 B. & Ald. 523. As to what is notice of an act of bankruptcy, see Yate-Lee, p. 172 *et seq.*

(*n*) Sug. 760.

(*o*) 2 & 3 V. c. 11, s. 7; and see *Plant* v. *Pearman*, 41 L. J. Q. B. 169.

As to *lis pendens.*

Bellamy v. *Sabine.*

The general doctrine of *lis pendens* has already been referred to; but requires to be more carefully considered. In *Bellamy* v. *Sabine* (*p*), the principles on which the doctrine depends were fully discussed. The circumstances were shortly these: In 1827, A., a tenant for life, sold his life estate to B., tenant in tail in remainder; shortly afterwards, B. suffered a recovery, and sold the estate to C. in fee; in 1828 B. died, leaving D. his heir-at-law, who, if no recovery had been suffered by B., would have been next tenant in tail. D., in 1830, filed a bill against A. and C. to set aside both sale transactions, on the ground of fraud. Pending the suit, and before a decree was made, C. mortgaged part of the estate to E. In 1835 a decree was made, dismissing the bill against A., but setting aside the sale to C. as fraudulent, and directing a reconveyance from C. to D. free from incumbrances, on payment of what should be found due from D. to C. Subsequently, A., who had not received his purchase-money, filed a bill against D., C., and C.'s incumbrancers, for specific performance of his contract, and the question was as to the right of priority between A. for his unpaid purchase-money, and E. the mortgagee *pendente lite* for his mortgage debt. V.-C. Wood, on the ground that a person who buys pending a suit is to be bound by the result in the same way as if he had been a party to it (*q*), postponed the claim of E. to that of A.: but, on appeal to the full Court, Lord Cranworth, after reviewing the earlier authorities, rested the doctrine, not on the ground of implied notice; the consequence of which might be that the person affected with notice is affected with notice of everything reasonably deducible from or appearing in the suit; but on the ground that a litigant party cannot, pending the litigation, confer any right to the property in dispute, so as to prejudice the opposite party; and held that the pendency of D.'s suit against A. and C. did not amount to notice of the equitable rights of A. against C.: and Lord Justice Turner also laid it down that the doctrine is not founded

(*p*) 3 Jur. N. S. 943; 1 D. & J. 566.

(*q*) See shorthand writer's note of the V.-C.'s judgment, 3 Jur. N. S. 943.

upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice; but that it is a doctrine which prevails alike both at Law and in Equity; resting on this foundation, *viz.*, that it would be impossible that any action or suit could be brought to a successful termination, if alienation *pendente lite* were permitted to prevail.

Remarks on the doctrine.

This case seems to have established the rule, that *lis pendens* does not affect a defendant with notice of the plaintiff's rights, other than those asserted in the pending litigation (*qq*). Of course, where the plaintiff claims no interest in the property, as in an interpleader suit, the pendency of the suit will protect the interests of the defendants *inter se*. In one case (*r*), where the deficiency of the testator's personal estate was raiseable out of two real estates separately devised to A. and B., and an order was made in 1846, in a creditor's administration suit, for the sale of A.'s estate alone without prejudice to his right of contribution against B.'s estate, and in 1852 the suit was registered as a *lis pendens*, and shortly afterwards B. mortgaged to C. who had notice of A.'s claim, it was held that there was a *lis pendens* as regarded A.'s rights, and that C.'s claim must be postponed thereto. But in this case the Court had made a decree in favour of one defendant as against his co-defendant, before the registration of the *lis pendens* and the creation of the mortgage; which sufficiently distinguishes it from *Bellamy* v. *Sabine;* and justifies Lord Romilly's decision, that a purchaser, having notice of a registered *lis pendens*, must be taken to have notice also that the Court had made a decree, that one defendant had a right to stand in the place of another (*s*).

Notice of a past tenancy;

Notice of a past tenancy is no notice of the tenant's equitable interests (*t*); nor is a purchaser from a derivative lessee

(*qq*) See *Price* v. *Price*, 35 Ch. D. 297, where the subject of notice by *lis pendens* is fully considered with reference to all the authorities.

(*r*) *Tyler* v. *Thomas*, 25 B. 47.

(*s*) But see Lord St. Leonards' comments, Sug. 760.

(*t*) *Miles* v. *Langley*, 1 R. & M. 39; and see *Martyr* v. *Lawrence*, 2 D. J. & S. 261; and *vide ante*, pp. 519, 976.

Chap. XV. Sect. 5.

of a lease.

affected with constructive notice of peculiar and unusual covenants in the original lease (*u*); nor, although a purchaser of a lease is bound to know from whom the lessor derived his title, is he affected with notice of all the circumstances under which he so derived it (*x*); but if he buy under an engagement not to call for his lessor's title, he will have imputed to him all the knowledge, which, by prudent inquiry, he might have obtained (*y*). Notice of a lease is not, it would seem, notice of collateral facts mentioned in the lease (*z*): and in order to fix notice, there ought to be a reasonable opportunity of examining the lease (*a*).

Notice from occupation does not extend beyond equities of occupier.

The rule, that a purchaser, having notice of a tenant being in possession of the property, has notice of all the equities subsisting between him and the vendor (*b*), does not extend to any other equities than those of the occupier. Hence, notice of a tenancy is not constructive notice of the lessor's title (*c*): nor, where the vendor is himself the tenant, and has acknowledged payment of the purchase-money both in the body of the conveyance and by the usual indorsed receipt, is the tenancy notice of his lien for any part thereof which may in fact remain unpaid (*d*): nor will a *bonâ fide* purchaser, otherwise without notice, be affected by the mere circumstance of the vendor having been out of possession for many years (*e*).

Miscellaneous instances of notice not being imputed.

The mere absence of the title deeds does not seem in itself to be notice of the interest of the person holding them (*f*);

(*u*) See *Hanbury* v. *Litchfield*, 2 M. & K. 633, and 1 Ha. 62; *Wilbraham* v. *Livesey*, 18 B. 209.

(*x*) *A.-G.* v. *Backhouse*, 17 V. 203.

(*y*) *Robson* v. *Flight*, 4 D. J. & S. 608; *ante*, p. 980.

(*z*) See *Darlington* v. *Hamilton*, Kay, 556.

(*a*) *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Hyde* v. *Warden*, 3 Ex. D. 72, 80.

(*b*) *Ante*, p. 975.

(*c*) Sug. 762. *Barnhart* v. *Greenshields*, 9 Mo. P. C. 18: see and distinguish *Bailey* v. *Richardson*, 9 Ha. 734.

(*d*) See *White* v. *Wakefield*, 7 Si. 401.

(*e*) See *Oxwick* v. *Plumer*, Gilb. R. 13; 5 Bac. Ab. Mortgage (E), s. 3, p. 664; and see *Jones* v. *Smith*, 1 Ha. 63; *Barnhart* v. *Greenshields*, 9 Mo. P. C. 34.

(*f*) *Plumb* v. *Fluitt*, 2 Anstr. 432; *Evans* v. *Bicknell*, 6 V. 174; and see *Jones* v. *Smith*, 1 Ha. 63; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

although it may be otherwise if their absence is not explained or accounted for (*g*). Notice of the preparation of a draft does not seem in itself to be notice of the executed deed (*h*). On the purchase of A., one of two adjoining estates belonging to the same owner, notice of building covenants entered into by such owner with a mortgagee of the adjoining estate B., is not notice of the expenditure on both estates of money which, under the covenant, ought to have been expended on B. exclusively (*i*). In a modern case, slight discrepancies in the plans on the deeds which, if inquired into, might have led to the detection of a fraudulent dealing with the property, were held not to be constructive notice of it (*k*). It can hardly be doubted, that the mere fact of attesting the execution of a deed will not fix the witness with notice of its contents (*l*). Where a sale by fiduciary vendors is apparently regular, a purchaser need not inquire into collateral questions—such as the mode in which the sale has been conducted (*m*)—although he will be affected with notice of a breach of trust clearly deducible from facts appearing on the face of the assurance (*n*), or suggesting inquiry (*o*).

Notice of a deed forming no necessary part of the title is not notice.

Where a purchaser is informed of the existence of an instrument which may, but does not necessarily, affect the property, and he is assured that the instrument does not affect that property, but relates to other property, and he, acting fairly and honestly, believes such statement, and it turns out that he is misled, and that the instrument does relate to the property, he will not be fixed with a notice of its

(*g*) *Worthington* v. *Morgan*, 16 Si. 547; *Peto* v. *Hammond*, 30 B. 495; *Clarke* v. *Palmer*, 21 Ch. D. 124; and *vide ante*, p. 980.

(*h*) *Cothay* v. *Sydenham*, 2 Br. C. C. 391; *Williams* v. *Williams*, 17 Ch. D. 437.

(*i*) *Harryman* v. *Collins*, 18 B. 19.

(*k*) *Hunter* v. *Walters*, 7 Ch. 75; *Re Arnold*, 14 Ch. D. 270, 281.

(*l*) *Beckett* v. *Cordley*, 1 Br. C. C. 357; *Welford* v. *Beezeley*, 1 V. sen. 7; Sug. 781; *Small* v. *Currie*, 2 Dr. 115; and see *Hunter* v. *Walters*, 7 Ch. 75.

(*m*) See *Borell* v. *Daun*, 2 Ha. 440, 450. So, as regards a purchase by trustees; *Ware* v. *Lord Egmont*, 4 D. M. & G. 460.

(*n*) See *A.-G.* v. *Pargeter*, 6 B. 150; *Ker* v. *Lord Dungannon*, 1 D. & War. 509, 542.

(*o*) *Boursot* v. *Savage*, 2 Eq. 134.

Chap. XV. Sect. 5.

contents (*p*): and it has even been held that where he is aware that the instrument affects the property, and he has not availed himself of the opportunity of examining it, that he is not affected with notice, if he, in good faith, relies on the vendor's statement of its contents (*q*): but it is the clear duty of the purchaser in such a case to satisfy himself, by having the deed examined on his behalf; and this decision must be cautiously followed (*r*).

Ambiguous recitals and statements.

Nor will a purchaser be affected by an ambiguous recital (*s*): though, as we have seen, an erroneous recital of an instrument may fix him with knowledge of its true contents, if he has had the opportunity of testing it (*t*); nor is he bound by circumstances inducing merely a suspicion of fraud (*u*); or by the usual trusts of a term assigned to attend the inheritance (*x*), where no reference is made to any particular instrument or course of limitations: so, notice of there being a change in the solicitors who are professionally to represent a particular interest, is not, in itself, notice of a change in the ownership of such interest (*y*). In a modern case, where the legatee of a legacy charged on land, assigned it for value, and then, without the concurrence of the assignee, joined in mortgaging the estates first to A. and then to B., the latter mortgage being expressed to be "subject to prior incumbrances," but B. had no notice of the assignment of the legacy, and the mortgagors did not appear to have intended to include it among "prior incumbrances," B. was held to have priority of the assignee (*z*).

Purchaser, whether

And it appears that, as a general rule, the mere omission

(*p*) See *Jones* v. *Smith*, 1 Ph. 244, 253; *West* v. *Reid*, 2 Ha. 260; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Williams* v. *Williams*, 17 Ch. D. 437; *vide ante*, p. 970.

(*q*) *Cox* v. *Coventon*, 31 B. 378.

(*r*) See *Jones* v. *Smith*, 1 Ph. 253; and *vide ante*, p. 979.

(*s*) *Kenney* v. *Browne*, 3 Ridg. 512; and see 2 Ha. 175.

(*t*) See *Hope* v. *Liddell*, 21 B. 183; and *vide ante*, p. 974.

(*u*) Sug. 779; *M'Queen* v. *Farquhar*, 11 V. 467; and see *Cockroft* v. *Sutcliffe*, 2 Jur. N. S. 323.

(*x*) Sug. 779.

(*y*) *West* v. *Reid*, 2 Ha. 249.

(*z*) *Greenwood* v. *Churchill*, 6 B. 314.

bound to use excessive caution.

to pursue inquiries to the extent to which a prudent, cautious, and wary person would ordinarily extend them, is not, in itself, sufficient to fix a *bonâ fide* purchaser with notice of what he might have ascertained by pursuing such inquiries (*a*): the fact of the conveyance being in consideration of a pre-existing debt, would, of course, induce a doubt whether the purchaser were acting *bonâ fide;* and the omission to inquire after the title deeds of a property, unless otherwise satisfactorily explained (*b*), would probably be attributed to a suspicion that the inquiry if made would lead to disclosures affecting the title (*c*).

Whether his omitting to examine the deeds sufficient to postpone him.

Where A., a solicitor, mortgaged property to B., his client, and handed over to him a bundle of documents which he falsely represented to be the title deeds, and afterwards sold the property to C., and delivered to him the title deeds which he had fraudulently retained, it was held that B.'s negligence in not examining the parcel of deeds was not sufficient to postpone him to C. (*d*): so, where the earlier title deeds were deposited with A., and the later with B., as securities for moneys severally advanced by them, A.'s deposit being prior in point of time, it was held that A.'s omission to call for the later deeds, which alone showed any title in the mortgagor, did not postpone his security to that of B. (*e*): so, the omission of a transferee of a mortgage to give notice of the transfer to the mortgagor, who has, for want of such notice, dealt with the original mortgagees as if they were still his creditors, has been held not to prejudice the transferee's right of foreclosure (*f*).

Notice to counsel, solicitor or

In the last edition of this work it was stated that the purchaser (although an infant purchasing under the sanction

(*a*) See *Jones* v. *Smith*, 1 Ph. 257; 1 J. & L. 441; Sug. 772, 775; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Williams* v. *Williams*, 17 Ch. D. 437.

(*b*) *Agra Bank* v. *Barry*, *suprà;* *Ratcliffe* v. *Barnard*, 6 Ch. 652.

(*c*) *Hewitt* v. *Loosemore*, 9 Ha. 458; *Worthington* v. *Morgan*, 16 Si. 547; *Penny* v. *Watts*, 1 M. & G. 150.

(*d*) *Hunt* v. *Elmes*, 2 D. F. & J. 578; *Ratcliffe* v. *Barnard*, *suprà;* and *vide ante*, pp. 953, 980.

(*e*) *Roberts* v. *Croft*,, 2 D. & J. 1.

(*f*) *Withington* v. *Tate*, 4 Ch. 288.

Chap. XV. Sect. 5.

agent is notice to purchaser.

of a Court of Equity (*g*)), is bound by notice to his counsel (*h*), solicitor, or agent (*i*), or, perhaps, trustee (*k*), if acquired either in the same transaction (*l*), or in a prior transaction under circumstances which satisfy the Court that the notice must have been recollected (*m*). The presumption against such recollection, would, no doubt, be stronger in the case of counsel than of a solicitor (*n*); and, even as respects a solicitor, there seems to be a difficulty in holding that a purchaser, employing one who has not acted for the vendor, can be affected by notice acquired by him previous to retainer (*o*). In one case, where an annuity deed was prepared by the grantee's solicitor, containing a covenant by the grantor that the property was free from other incumbrances, the grantee was held not to have constructive notice of an undisclosed mortgage which his solicitor, in conjunction with other persons, had upon the property (*p*).

Alteration of the law by C. A. 1882, s. 3.

The law, however, upon the subject has been materially altered by the 3rd section of the Conveyancing Act, 1882, which provides that a purchaser—which expression includes a lessee or mortgagee and an intending purchaser, lessee, or mortgagee or other person who for valuable consideration takes or deals for any property (*q*),—shall not be prejudicially

(*g*) *Toulmin* v. *Steere*, 3 Mer. 210.

(*h*) *Sheldon* v. *Cox*, Amb. 624.

(*i*) *Toulmin* v. *Steere*, *supra*; *Cookson* v. *Lee*, 23 L. J. Ch. 473; *Wilkins* v. *Sibley*, 9 Jur. N. S. 888.

(*k*) *Wise* v. *Wise*, 2 J. & L. 403; but see *Re Macnamara's Est.*, 13 L. R. Ir. 158.

(*l*) *Brotherton* v. *Hatt*, 2 Vern. 574; *Lowther* v. *Carlton*, 2 Atk. 242; *Wilde* v. *Gibson*, 1 H. L. C. 614, 624; *Twycross* v. *Moore*, 13 Ir. Eq. R. 250.

(*m*) *Hargreaves* v. *Rothwell*, 1 Ke. 154; *Brothers* v. *Bence*, Fitzg. 118; *Perkins* v. *Bradley*, 1 Ha. 219 (in which two cases the solicitor was his own client in the later transaction); *Fuller* v. *Bennett*, 2 Ha. 394; *Nixon* v. *Hamilton*, 2 D. & Wal. 391, 393; *Lenehan* v. *M'Cabe*, 2 Ir. Eq. R. 342, 352; *Gerrard* v. *O'Reilly*, 3 D. & War. 414, 431; and see *Tylee* v. *Webb*, 6 B. 552.

(*n*) See 5 Jarm. Conv. 490; *Brine* v. *Featherstone*, 4 Taun. 873.

(*o*) See *Fuller* v. *Bennett*, 2 Ha. 394, 404, and Lord Cottenham's remarks as to Mr. Wightwick's evidence in *Wilde* v. *Gibson*, 1 H. L. C. 614, 624.

(*p*) *Thompson* v. *Cartwright*, 2 D. J. & S. 10.

(*q*) Conv. Act, 1881, s. 2, sub-s. 8. As the definition is confined to cases where there is valuable consideration, it would seem that the enactment as to constructive notice does not apply to the case of a voluntary conveyance.

affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him: or, unless in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Operation of the section.

The effect of the section is to repeal the evil consequences of the doctrine laid down in *Hargreaves* v. *Rothwell* (*r*), where it was held that notice was to be imputed to the client if there was such a distance only between the former transaction, and that under consideration as left the Court under the impression that the solicitor had actually remembered the former transaction, and that knowledge must therefore be imputed through him to the client. The section allows constructive notice only when three conditions are present: (1) the knowledge must have been acquired in the same transaction: (2) it must have come, or be deemed to have come, to the knowledge of the counsel, solicitor, or other agent (*s*): (3) the knowledge must have come to the counsel, solicitor, or other agent, *as such*. Thus, where A. mortgaged his share of trust property to E. by a deed which disclosed no prior charge, and contained the usual covenant for title by A., although, in fact, A.'s share was subject to a prior mortgage to B., which had been transferred to C. and D. a year before the date of E.'s mortgage; and B. was the solicitor of the trustees and of A., and had also acted as solicitor for C. and D. in their mortgage transactions, and also for E. in his; it was held that E., who had first given notice to the trustees

(*r*) 1 Ke. 154.

(*s*) There is a curious distinction drawn in the section, whether accidentally or not, between the position of a counsel, whose knowledge must have been actual, and that of a solicitor or other agent, whose knowledge may be merely imputed.

Chap. XV. Sect. 5.

of the property, was entitled to priority, as his mortgage deed showed clear title in A., the Court declining to infer that B. had any recollection of the former transactions in which he had been employed, or that reasonable inquiries of A., made by him as E.'s solicitor, would have brought to light the prior mortgage of C. and D. (*t*).

Solicitor with knowledge selling or mortgaging to his client.

It may be observed that the section will not apply to a case where the solicitor is himself selling or mortgaging to the client with knowledge of an undisclosed blot on the title which he had acquired in a former transaction, but which, as a party to the sale or mortgage in question, he must be deemed to possess in the latter transaction.

Although solicitor, &c., is employed by both parties, or is himself the vendor.

In the third edition of this work it was stated that, as a general rule, the purchaser is equally affected, with notice, although the solicitor, &c., be also employed by the vendor (*u*), or be himself the vendor (*x*), but later decisions have somewhat modified this rule. Thus, the mere fact of the mortgagor being a solicitor and himself preparing the deed, and of the mortgagee employing no independent professional adviser, has been held insufficient to fix the latter with notice of a prior incumbrance known to the solicitor (*y*) : the mortgagee or purchaser may not desire to employ a solicitor, but if he knowingly constitute the relation of solicitor and client between himself and the solicitor of the party with whom he is dealing, he will, of course, be affected with notice of any prior incumbrances of which the solicitor is cognizant (*z*) : and though a purchaser is not necessarily to be held to have employed his vendor's solicitor, because he employed no other, yet if he employ no solicitor, he must be

(*t*) *Re Cousins*, 31 Ch. D. 671.

(*u*) *Le Neve* v. *Le Neve*, 3 Atk. 648 ; *Dryden* v. *Frost*, 3 M. & C. 670 ; *Sharpe* v. *Foy*, 4 Ch. 35 ; *Rolland* v. *Hart*, 6 Ch. 678.

(*x*) *Sheldon* v. *Cox*, Amb. 624 ; *Dryden* v. *Frost*, *suprà* ; *Hewitt* v. *Loosemore*, 9 Ha. 449 ; *Robinson* v. *Briggs*, 1 S. & G. 188 ; *Spencer* v. *Topham*, 22 B. 573.

(*y*) *Espin* v. *Pemberton*, 3 D. & J. 547.

(*z*) *Ib.* ; see *Perry* v. *Holl*, 2 D. F. & J. 38.

held to have exactly the same knowledge, and be liable for negligence to the same extent, as if he had employed one (*a*). But if the mortgagor is a solicitor, and is shown to have become the solicitor of the mortgagee, it can hardly be doubted that the latter must be taken to have had constructive notice (*b*).

Client, how far affected with notice of fraud by his solicitor.

It was decided by Lord Brougham, in opposition to the opinion of Sir J. Leach, that a client is not to be affected with notice of a prior *fraud* committed by his solicitor, which the latter would, of course, conceal (*c*). This principle, which is now well established, is perfectly consistent with the cases in which it has been held that a mortgagee, employing the mortgagor as his counsel or solicitor, is affected with constructive notice of a prior,—and, as against the client mortgagee not having actual notice of it, fraudulent,—incumbrance created by such mortgagor. Thus, where a solicitor took a mortgage of an equity of redemption, which he submortgaged, and afterwards joined with the first mortgagee and the mortgagor in a new mortgage of the property, acting as the solicitor of all parties in the transaction, but not disclosing the existence of the submortgage, it was held that the new mortgagee was affected with the solicitor's knowledge, and his security was to that extent displaced (*d*). So, in a recent case (*e*), where a solicitor on behalf of A., one of his clients, procured from B., another client, an advance on mortgage of A.'s land in Middlesex, and then, concealing the incumbrance,

(*a*) Per Lord Romilly, in *Atterbury* v. *Wallis*, 2 Jur. N. S. 344; 8 D. M. & G. 454.

(*b*) In *Espin* v. *Pemberton*, 3 D. & J. 517, Lord Chelmsford must be taken to have overruled Kindersley, V.-C., 4 Dr. 333, who held, on the strength of some ambiguous language of Turner, V.-C., in *Hewitt* v. *Loosemore*, 9 Ha. 457, that this was not so.

(*c*) *Kennedy* v. *Green*, 3 M. & K. 699; *Atterbury* v. *Wallis*, *suprà*; *Willes* v. *Greenhill*, 29 B. 387; *Ex p. Rogers*, 8 D. M. & G. 271; and cf. *Rolland* v. *Hart*, 6 Ch. 678; *Kettlewell* v. *Watson*, 21 Ch. D. 714.

(*d*) *Atterbury* v. *Wallis*, 8 D. M. & G. 454; see, too, *Roberts* v. *Croft*, 2 D. & J. 1; *Hunt* v. *Elmes*, 2 D. F. & J. 578; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; 6 Jur. N. S. 970; cases of *subsequent* fraud by the solicitor.

(*e*) *Rolland* v. *Hart*, 6 Ch. 678, 683.

induced C., also a client, to lend money on mortgage of the same estate, and C.'s security was the first registered, it was held that the case did not fall within the principle of *Kennedy* v. *Green;* and that C., having notice through the solicitor of B.'s mortgage, could not gain priority over it by registration.

Distinction between the two classes of cases.

The distinction between the first and second class of cases is this. The duty of the solicitor being to inform the client of the defect in the title, the presumption that he has done so is treated as being one *juris et de jure*, the danger of perjury being too great to admit of the presumption being rebutted by evidence. But in the first class of cases, *i.e.*, those which fall within the doctrine of *Kennedy* v. *Green*, something has been done, prior to the transaction, in respect of which the question of notice arises, by the solicitor, which is fraudulent in itself, and not merely in relation to the client by reason of its not having been communicated to him. In the second class of cases, the very question being whether the client had or had not notice, the absence of notice which is requisite to make the transaction fraudulent cannot be assumed (*f*).

A third class.

There is a third class of cases in which, if there were no fraud, the client would be affected with constructive notice of a defect of title, the existence of which is known to his solicitor; and the fact that the solicitor is committing a fraud in relation to what is relied on as a defect cannot here afford any reason why the client should not be affected with constructive notice of the defect. It is the existence of the defect, and not of the fraud, with notice of which the client is affected. Therefore, where a purchaser employed one of three fiduciary owners as his solicitor in the purchase, he was fixed with constructive notice of the trust (*g*).

Criticism of the rule as

It follows from what has been said that the rule is too

(*f*) *Atterbury* v. *Wallis*, *suprà*. (*g*) *Boursot* v. *Savage*, 2 Eq. 134.

broadly stated by Bacon, V.-C. (*h*), viz, that where the disclosure of the fact, of which knowledge is sought to be fixed on the client, would have imputed fraud to the solicitor, it is not to be presumed that the solicitor made disclosure. And in a recent case (*i*) it was held that the mere fact that there is a conflict between the interest of the solicitor and his duty to make disclosure is not sufficient to rebut the presumption that he did his duty.

stated by Bacon, V.-C.

The tendency of the recent decisions is to restrict the doctrine of constructive notice, so far as is compatible with the rules of the Court applicable to fraud; especially so in cases where it is only through the employment of a solicitor, who is, or must be supposed to be, cognizant of the concealed incumbrance or defect, that notice of it is brought home to the client: and it may be laid down as a general rule, that where the solicitor is acting *bonâ fide*, the mere omission on his part to adopt all the precautions which a prudent professional adviser would have taken on behalf of his client will not, in the absence of gross negligence or other circumstances indicative of fraud, fix the client with constructive notice of what might have been elicited by inquiry.

Tendency of recent decisions.

Notice to a town or country agent, would, in general, be notice to the principal solicitor (*k*); but, probably, the mere fact of the purchaser's solicitor allowing (from motives of private friendship) the vendor's solicitor to transact, for his own benefit, the principal part of the business which is usually done by the former, would not be sufficient to constitute an agency (*l*).

Notice to town agent of solicitor.

For the purpose of fixing a purchaser with notice, the evidence of his counsel (*m*), solicitor (*n*), or certificated con-

Professional confidential communica-

(*h*) *Waldy* v. *Grey*, 20 Eq. 238, 251.

(*i*) *Bradley* v. *Riches*, 9 Ch. D. 189.

(*k*) See and consider *Norris* v. *Le Neve*, 3 Atk. 37; Sug. 756.

(*l*) See *Kendall* v. *Hulls*, 11 Jur. 864.

(*m*) *Knight* v. *Marquis of Waterford*, 2 Y. & C. 39; 2 Sw. 221, n.

(*n*) See *Parkhurst* v. *Lowten*, 2 Sw. 194; *Volant* v. *Soyer*, 13 C. B. 231.

Chap. XV. Sect. 5.

tions, notice not to be proved by.

veyancer (*o*), or legal agent generally (*p*), respecting confidential (*q*) professional communications, is inadmissible: and the rule includes the clerk of the professional adviser (*r*) and the agent (*s*), even though that agent be the client himself (*t*), or accountant (*u*) employed by the solicitor; and also, according to a modern decision in Equity, a person whom the client consults as, and supposing him to be, a solicitor, but who is not so in fact (*x*): but not (it would appear) an unprofessional agent employed by the purchaser himself (*y*), unless he be used merely as the medium of communication with the professional adviser (*z*): and the privilege extends to communications made through an unprofessional agent to the professional adviser (*a*).

Who are within the rule.

Who are not within the rule.

But the rule does not include a solicitor whom the purchaser consults, not professionally, but as a friend, agent, or steward (*b*); nor, where the same solicitor is employed by both parties, does it extend to communications which the purchaser makes to him as solicitor for the vendor (*c*): nor to communications made to the solicitor from collateral quarters (*d*), nor to a map of the estate which the owner

(*o*) *Cromack* v. *Heathcote*, 2 Br. & B. 4.

(*p*) *Lyell* v. *Kennedy*, 9 Ap. Ca. 81, 86.

(*q*) *Walsh* v. *Trevanion*, 15 Si. 577.

(*r*) *Taylor* v. *Forster*, 2 C. & P. 195; *Foote* v. *Hayne*, Ry. & Mo. 165; *Chant* v. *Brown*, 9 Ha. 794.

(*s*) *Steele* v. *Stewart*, 1 Ph. 471; *Lafone* v. *Falkland Islands Co.*, 4 K. & J. 34.

(*t*) Per Jessel, M.R., in *Anderson* v. *Bank of Brit. Columbia*, 2 Ch. D. at p. 650.

(*u*) *Walsham* v. *Stainton*, 2 H. & M. 1.

(*x*) *Calley* v. *Richards*, 19 B. 404; see *contrà*, at Law, *Fountain* v. *Young*, 6 Esp. 113. Generally, as to the persons within the privilege, see Bray, 357.

(*y*) *Kerr* v. *Gillespie*, 7 B. 572; and see *Carpmael* v. *Powis*, 1 Ph. 693; *Glyn* v. *Caulfield*, 3 M. & G. 463; *Slade* v. *Tucker*, 14 Ch. D. 824.

(*z*) *Reid* v. *Langlois*, 1 M. & G. 627.

(*a*) *Carpmael* v. *Powis*, 1 Ph. 687; *Russell* v. *Jackson*, 9 Ha. 387.

(*b*) See *Wilson* v. *Rastall*, 4 T. R. 753, 759; *Hughes* v. *Biddulph*, 4 Rus. 190; *Greenlaw* v. *King*, 1 B. 137; and see *Blenkinsopp* v. *Blenkinsopp*, 10 B. 277; reversed on further evidence, 2 Ph. 607; *Goodall* v. *Little*, 1 Si. N. S. 155; *Ex p. Hawley*, 20 L. T. O. S. 258; *Smith* v. *Daniell*, 18 Eq. 649; and see per James, L.J., in *Original Hartlepool Co.* v. *Moon*, 30 L. T. 585.

(*c*) *Perry* v. *Smith*, 9 M. & W. 681.

(*d*) *Sawyer* v. *Birchmore*, 3 M. & K. 572. As to documents being privileged on the ground of their political

leaves with his solicitor for the purpose of effecting a sale (*e*); nor to matters which have come to his knowledge unprofessionally (*f*); nor to communications between co-defendants (*g*), or between the solicitors of adverse parties (*h*); nor to such as involve fraud or other criminality (*i*): but it extends to all communications which take place between the purchaser and his solicitor (as such) with reference to the purchase (*k*), and to documents belonging to the purchaser which he leaves with his solicitor (*l*): nor does the privilege cease by reason of the professional adviser acquiring a personal interest in the property to the title of which the confidential communication related (*m*); or of his having ceased to practise (*n*).

To whom the privilege extends.

The privilege is for the protection of the client, not for the benefit of the solicitor; and it is good as against all persons claiming adversely to the client; but not as between persons claiming under him (*o*). In one case it appears to have been considered doubtful whether the privilege does not cease on the death of the client (*p*).

Nor will purchaser be

It appears that even the purchaser himself will not, if an

character, see *Wadeer* v. *The East India Co.*, 2 Jur. N. S. 407. As to illegal secrets, see *Gartside* v. *Outram*, 26 L. J. Ch. 113; *Reg.* v. *Cox*, 14 Q. B. D. 153.

(*e*) *Doe* v. *Lord Hertford*, 13 Jur. 632.

(*f*) *Dwyer* v. *Collins*, 7 Ex. 639.

(*g*) *Goodall* v. *Little*, 1 Sim. N. S. 155; *Glyn* v. *Caulfield*, 3 M. & G. 463; and see *Jenkins* v. *Bushby*, 2 Eq. 547.

(*h*) *Gore* v. *Harris*, 15 Jur. 1168; *S. C.*, as *Gore* v. *Bowser*, 5 De G. & S. 30.

(*i*) *Gartside* v. *Outram*, *suprà*; *Follett* v. *Jefferyes*, 1 Sim. N. S. 3; *Reg.* v. *Cox*, 14 Q. B. D. 153; *Re Postlethwaite*, 35 Ch. D. 722.

(*k*) See *Clagett* v. *Phillips*, 2 Y. & C. C. C. 82; *Carpmael* v. *Powis*, 1 Ph. 692; *Herring* v. *Cloberry*, 1 Ph. 91; *Jones* v. *Pugh*, 1 Ph. 96. Generally as to what is within the scope of the solicitor's business, see Bray, 373 *et seq.*

(*l*) Sug. 785; but where land was recovered in ejectment, the solicitor of the defendant was held bound in Equity to state to whom he had on behalf of his client delivered the title deeds; *Banner* v. *Jackson*, 1 De G. & S. 472. So, at Law, the solicitor of a mortgagee has been compelled to show a deed for the mere purpose of identification; *Phelps* v. *Prew*, 3 E. & B. 430.

(*m*) *Chant* v. *Brown*, 7 Ha. 79.

(*n*) *Calley* v. *Richards*, 19 B. 404.

(*o*) *Gresley* v. *Mousley*, 2 K. & J. 288; *Russell* v. *Jackson*, 9 Ha. 387.

(*p*) *Charlton* v. *Coombes*, 4 Giff. 372.

Chap. XV. Sect. 5.

obliged to produce cases, opinions, &c.

action be brought against him, be bound to produce letters written, or cases stated, for the opinion of counsel, either by himself or his solicitor, with a view either to that suit or even to a suit with third parties, if respecting the same matter and involving the same question to which such letters and cases relate; nor, *à fortiori*, the opinions obtained on such letters and cases (*q*); and, according to modern decisions, the same privilege seems to exist in favour of cases laid before counsel and letters written to a solicitor for legal advice with reference to a known defect in title, although not with any view to threatened litigation (*r*): but, of course, an opinion which, in effect, was taken for the joint benefit of the party seeking and the party refusing production is not protected (*s*). An opinion taken by another party in the same interest, and confidentially communicated to the purchaser, the latter not only need not produce, but is actually bound to conceal (*t*).

Effect of notice.

As to the effect of notice when established:—It may be laid down as a general rule, that a purchaser with notice, is, in Equity, "bound to the same extent, and in the same

(*q*) *Holmes* v. *Baddeley*, 1 Ph. 476; and see earlier cases there cited. *Brown* v. *Oakshott*, 12 B. 252; *Thompson* v. *Falk*, 1 Dr. 21; *Wright* v. *Vernon*, *ib.* 344; *Jenkyns* v. *Bushby*, 2 Eq. 547.

(*r*) *Pearse* v. *Pearse*, 1 De G. & S. 12; *Herring* v. *Cloberry*, 1 Ph. 91; *Holmes* v. *Baddeley*, *ib.* 476; *Lord Walsingham* v. *Goodricke*, 3 Ha. 122; *Reece* v. *Trye*, 9 B. 316; *Penruddock* v. *Hammond*, 11 B. 59, 61; *Hawkins* v. *Gathercole*, 1 Sim. N. S. 150; *Manser* v. *Dix*, 1 K. & J. 451; *Calley* v. *Richards*, 19 B. 401; *Manby* v. *Bewicke*, 8 D. M. & G. 476; but see *Beadon* v. *King*, 17 Si. 34; *Flight* v. *Robinson*, 8 B. 22; *Minet* v. *Morgan*, 8 Ch. 361; Bray, 368. As to cases of fraud, see *Addis* v. *Campbell*, 1 B. 258; *Bassford* v. *Blakesley*, 6 B. 131, and cases there cited; *Kelly* v. *Jackson*, 13 Ir. Eq. R. 129; *Swift* v. *M'Ternan*, 13 Ir. Eq. R. 119; *Follett* v. *Jefferyes*, 1 Sim. N. S. 1; 13 Jur. 972; *Reynell* v. *Sprye*, 10 B. 51; 11 B. 618; 21 L. J. Ch. 13; *Chadwick* v. *Chadwick*, 16 Jur. 1060. The mere connection of the documents with the acts impeached by the bill is no ground for their production, see 13 Jur. 972; and see *Russell* v. *Jackson*, 9 Ha. 387; *Stainton* v. *Chadwick*, 3 M. & G. 575.

(*s*) *Reynell* v. *Sprye*, 10 B. 51; and see *Warde* v. *Warde*, 3 M. & G. 365, a case of husband and wife; and *Tugwell* v. *Hooper*, 10 B. 348, where the solicitor taking the opinion was a trustee for both the litigants; *Devayness* v. *Robinson*, 20 B. 42.

(*t*) *Enthoven* v. *Cobb*, 2 D. M. & G. 632; *Few* v. *Guppy*, 13 B. 457.

manner as the person was of whom he purchased" (*u*); for instance, he will be bound by a trust, or incumbrance, or by any agreement respecting the estate, of which he has notice, and which would have bound the estate in the hands of the vendor (*x*).

Notice of void or voidable estates, agreements, &c., how far binding.

The consideration of how far the purchaser is bound by notice of an executory or executed agreement, which is, either wholly or in part, void or voidable, gives rise to questions of greater difficulty.

Purchaser from tenant for life and remainderman held bound to give effect to agreement by former for grant of unauthorized lease: *sed qu.*

Where A., seised in fee, in consideration of his son's marriage settled the estate on himself for life, with remainder to his son for life, with the usual limitations in strict settlement on his son's issue, with remainder to himself (A.) in fee; and with power for A. to lease, and with his son to sell the estate; and A. agreed to grant a lease exceeding the power; and then A. and his son sold the estate, the purchaser, who had notice of the agreement, was compelled to perform it at the suit of the intended lessee (*y*). Lord Rosslyn thought that A.'s agreement bound the estate except as against the son and other remaindermen claiming under the settlement, and that the sale took the estate out of the settlement and left it indefeasibly impressed with the agreement (*z*). Lord Redesdale has expressed an opinion that the purchaser, except to the extent of A.'s life estate and remainder in fee, ought not to have been bound (*a*). Lord St. Leonards seems to consider (*b*) that the decision can be supported on the ground that the purchaser was bound to indemnify the vendor against his liability to damages under the contract; and he refers to a case (*c*) where a copyholder having granted a lease renewable with

(*u*) Sug. 749; *Taylor* v. *Stibbert*, 2 V. 439.

(*x*) *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Rose* v. *Watson*, 10 H. L. C. 672.

(*y*) *Taylor* v. *Stibbert*, 2 V. 437; *Steele* v. *Mitchell*, 2 D. & Wal. 568, 596; Sug. Pow. 765.

(*z*) 2 V. 442.

(*a*) See *Crofton* v. *Ormsby*, 2 Sch. & L. 599; and *Harrisson* v. *Duignan*, 2 D. & War. 304.

(*b*) Sug. 751.

(*c*) *Lufkin* v. *Nunn*, 11 V. 170; and see *Nokes* v. *Gibbon*, 3 Dr. 681.

Chap. XV. Sect. 5.

the lord's licence, and the lord having, in the name of a trustee, purchased the copyhold interest with notice of the lease, and having refused to renew, a bill was filed by the lessee for specific performance, and Lord Eldon directed a case to be submitted to the Common Pleas as to whether damages could be recovered by the lessee upon the lessor's covenants, and upon receiving an opinion in the negative dismissed the bill. This, however, can scarcely be considered a decision: and it may be doubted whether the vendor's right to an indemnity (supposing it to exist) can give to the lessee a better hold *upon the estate* than he originally possessed.

Purchaser who buys expressly subject to non-existent or voidable interest, bound thereby.

It has been held that a purchaser who buys expressly subject to a partial interest which has no existence (*d*) or is voidable (*e*), cannot dispute the right of the party in whose favour the reservation is made. But this doctrine only applies to cases where the interest created is of such a character as to enable the person entitled to it to obtain damages if he be disturbed in its enjoyment (*f*). Thus, where a mortgage to A. falsely recited an equitable charge in favour of B., and such charge was subsequently created by the owner of the equity of redemption, it was held that A. must stand as first incumbrancer (*g*): so, where a mortgage was given by A. and B. as his surety, to secure C. against the payment of a sum of money which the deed represented him to be liable to pay to D. as surety for A. and B., or one of them, and C., though morally bound, was in fact under no legal obligation to repay D., it was held that B. was not liable under the mortgage for the debt due to D. (*h*).

Where sold subject to

It has even been held in Ireland (*i*) that where an estate

(*d*) *Prettyman's case*, cited in *Walton* v. *Earl of Stanford*, 2 Vern. 279; but the rule seems to be otherwise at Law, see *Doe* v. *Archer*, 1 B. & P. 531.

(*e*) See *Neild's case*, cited 1 Moll. 453.

(*f*) *Smith* v. *Widlake*, 3 C. P. D. 10, 17.

(*g*) *Fraser* v. *Jones*, 5 Ha. 475; affd. 12 Jur. 443.

(*h*) *Lake* v. *Brutton*, 8 D. M. & G. 440.

(*i*) *Maguire* v. *Armstrong*, 2 B. & B. 538, 548; and see *Blakeney* v. *Bagott*, 3 Bl. N. S. 248, 257.

voidable leases.

is sold, subject to void or voidable leases, the vendor may set them aside for his own benefit, upon securing to the purchaser the payment of the rents and performance of the covenants: but the point is treated as doubtful by Lord St. Leonards (*k*); although he judicially admits that "if a man buys an estate subject to an incumbrance, and it turns out that it is not a valid incumbrance, yet he may so buy it as not to leave him the power to impeach it" (*l*).

Remarks on *Maguire* v. *Armstrong*.

In the case last referred to (*m*), where the vendors attempted to set aside leases for their own benefit without the consent of the purchaser of the reversion, Sugden, C., held that they had no such equity, and could not impeach the leases, unless they could also impeach the sale of the reversion (*n*). This decision was reversed by Plunket, C.: he considered *Maguire* v. *Armstrong* an authority, and as founded on the clearest principles of common sense. He, however, went on to observe (*o*), that "the purchaser had a right to be secured in his rents by proper covenants in any new leases; this was done in *Maguire* v. *Armstrong:*" thus admitting the right of the purchaser to have as good a security as he had under the original leases;—and not adverting to the impossibility of determining the relative values of covenants by the lessees and covenants by the vendors (*p*). Now *Maguire* v. *Armstrong* seems to be no authority for disregarding this difference; for the Court there appears (*q*) to have recognized the purchaser's right to have as good a security as he before had for the rents and covenants, and to have founded its decision

(*k*) Sug. 752.

(*l*) L. & G. temp. S. 215, 216; *Wood* v. *Marquis of Londonderry*, 10 B. 465.

(*m*) *Muskerry* v. *Chinnery*, L. & G. temp. S. 185; 7 C. & F. 1; 1 H. L. C. 576.

(*n*) L. & G. temp. S. 219. See, as to the confirmation of voidable leases, 12 & 13 V. c. 26, and 14 V. c. 17; *Hallett* to *Martin*, 24 Ch. D. 624; *Gas Light Co.* v. *Towse*, 35 Ch. D. 519, 539, as to the scope of the statute.

(*o*) L. & G. temp. P. 196.

(*p*) "I apprehend that this Court can never enter into the question whether the covenant which binds the assets of the executors and trustees of W. P. is or is not an equivalent for the original covenant by W. P.," per V.-C. Shadwell, 16 Si. 320; and see *Ridgway* v. *Gray*, 1 M. & G. 109; *Farebrother* v. *Gibson*, 1 D. & J. 602.

(*q*) See 2 B. & B. 548.

upon the assumption (which seems to have been acquiesced in by the plaintiff) that, in the particular case before the Court, the covenants of the defendant might be considered equivalent to the covenants of the lessees. An appeal to the Lords from Lord Plunket's decision went off upon another point (*r*).

But it seems clear, on principle, that if a vendor possess any such right, the substituted security for the rent and covenants should be given to the purchaser before the commencement of litigation against the tenants; and should be binding whatever may be its result: for, "the very litigation might unsettle and ruin the tenant and after all prove unsuccessful" (*s*).

Purchaser, when able to avoid lease.

"Where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance with full notice, yet he will not be bound by it" (*t*): but where land subject to a lease of a way-leave at a reserved rent determinable by the lessee, was sold apart from the rent, and the purchaser of the land agreed with the lessee to determine the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent, the latter was held entitled to have it made good out of the new contract (*u*). So, a purchaser buying a lease, with notice of a charge upon it, cannot in Equity, as against the incumbrancer, merge the lease in the reversion (*x*).

Purchaser of estate in mortgage—when able to dispute voidable leases.

It was held, in a modern case, where a person, having mortgaged in fee, demised the property without the concurrence of the mortgagee, that a purchaser of the fee-simple, who by one deed took a conveyance of the legal estate from the mortgagee, and of the equity of redemption from the representative of the mortgagor, was not estopped at Law,

(*r*) *Sheehy* v. *Muskerry*, 7 C. & F. 1.
(*s*) L. & G. temp. S. 218.
(*t*) Sug. 751, citing *Lufkin* v. *Nunn*, 11 Ves. 170.
(*u*) *Wood* v. *Marquis of Londonderry*, 10 B. 465.
(*x*) *Haig* v. *Homan*, 4 Bl. N. S. 380; *Rutledge* v. *Rutledge*, 2 *ib.* 352.

although he received rent from the tenant; but might eject him after the expiration of the usual notice to quit (*y*): he would, however, have been estopped, if the mortgagor had got in the legal estate prior to the conveyance, and the want of title had not appeared on the face of the lease (*z*). And, in a later case, where a mortgagor in possession granted a lease, which did not disclose the fact of the mortgage, or that the legal estate was outstanding in a trustee for the mortgagor; and subsequently, by apt words of conveyance, granted the reversion by a deed which showed the want of legal title, it was held that the assignee had the reversion by estoppel, and could sue the lessee on covenants running with the land (*a*); and, conversely, the assignee of the equity of redemption is liable to the lessee on the lessor's covenants (*b*). It was treated by the Court as well established, that where a lessor without any legal estate or title, demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; and it is immaterial that it appears on the face of the deed that the lessor has only an equitable title (*c*). If the lessor subsequently acquires a title, the lease and reversion then take effect in interest, and not by estoppel; and an action will lie, either way, for breach of the covenants in the lease. And the Court also laid down the doctrine that the assignee of a lessor, who has no estate in the land, has the reversion by estoppel as against the lessee (*d*).

Assignee of reversion on voidable lease entitled by estoppel.

On a demise of an estate in mortgage, the lessees' covenants are usually entered into with the mortgagees, in order that they may run with the reversion at law: and where a leasing power is expressly reserved to the mortgagor, it is generally made a condition of its exercise, that the appointee shall covenant with the mortgagees by name, and that the right

Where a leasing power is reserved to the mortgagor.

(*y*) *Doe* v. *Thompson*, 9 Q. B. 1037.

(*z*) See *Right* v. *Bucknell*, 2 B. & Ad. 278; *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 *ib.* 135.

(*a*) *Cuthbertson* v. *Irving*, *suprà*.

(*b*) *Hartcup* v. *Bell*, C. & E. 19.

(*c*) *Morton* v. *Woods*, L. R. 4 Q. B. 293.

(*d*) See cases cited in *Cuthbertson* v. *Irving*, *suprà*.

Chap. XV. Sect. 5.

of re-entry shall be limited to them. But it seems the sounder view that, where the lease operates under a power, the benefit of the covenants devolves with the legal reversion, whether the reversioners at Law be named as covenantees or not (*e*). In cases coming within the Conveyancing Act, 1881 (*f*), it is now beyond question that the benefit of the covenants does devolve with the reversion both legal and equitable.

Notice of fraudulent conveyances, &c., immaterial.

Notice of a conveyance which comes within the provisions of the 27 Eliz. c. 4 (*g*), as being made for the purpose of defrauding purchasers, or as reserving a power of revocation to the grantor (*h*), is immaterial; and the purchaser's title will be good at Law and in Equity (*i*): and the volunteers have no claim against the purchase-money paid to the settlor (*k*). And although the contract cannot be specifically enforced by the settlor against a proposed purchaser, on the ground that equity will not assist him to defeat his own act in making the settlement (*l*), yet it may be enforced by the purchaser against the settlor, or, if he die before completion, against the volunteers (*m*). In a recent case it has been decided that where a mortgagee of property previously subjected to a voluntary settlement by the mortgagor, subsequently obtains from the mortgagor another security, the statute of Elizabeth does not enable him to consolidate as against the volunteers (*n*). This case affords an example of the tendency of modern decisions to confine the doctrine of consolidation within the narrowest possible limits. It has also been decided that the volunteers are entitled to marshal

(*e*) See and consider *Greenaway* v. *Hart*, 14 C. B. 340. Since the 8 & 9 V. c. 106, s. 5, a person not named as party to a deed may take the benefit of a covenant or condition respecting hereditaments.

(*f*) Sect. 18; and see sect. 10.

(*g*) See 39 Eliz. c. 18, s. 31.

(*h*) See sect. 5.

(*i*) *Gooch's case*, 5 Co. 60; *Evelyn* v. *Templar*, 2 Br. C. C. 148; *Buckle* v. *Mitchell*, 18 V. 100.

(*k*) *Daking* v. *Whimper*, 26 B. 568.

(*l*) *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*m*) *Buckle* v. *Mitchell*, 18 V. 100; *Rosher* v. *Williams*, 20 Eq. 210.

(*n*) *Re Walhampton Est.*, 26 Ch. D. 391.

the mortgagees of the estate under a subsequent mortgage which included other property (*o*).

Who are purchasers within the statute.

A legal mortgagee is, of course, a purchaser *pro tanto* (*p*): so, also, is an equitable mortgagee by deposit, with memorandum of agreement for a legal mortgage (*q*): but a mortgage made seven years after the advance which it purported to secure, in pursuance of no agreement to that effect, and without any pressure from the lender, was held void as against a subsequent mortgagee for value (*r*). A lessee at rack-rent (*s*) is within the Statute, but not a lessee without fine or rent (*t*): so, also, a purchaser under an ante-nuptial settlement (*u*); or one who, in consideration of the conveyance, waived a disputed right (*x*): and, in one case, a person claiming for value under a general assurance of "all the estate" of the conveying party, was held to be within the Act (*y*). But it has been held in Ireland (*z*), and more recently in England (*a*), that a registered judgment creditor is not a purchaser within the meaning of the Statute.

What conveyances are fraudulent within the statute.

It is settled that a mere voluntary conveyance (unless, perhaps, it be in favour of a charity (*b*)) is fraudulent within the meaning of the Statute, even although made by the direction of the Court (*c*): *e.g.*, a conveyance in trust to sell,

(*o*) *Hales* v. *Cox*, 32 B. 118.

(*p*) *Doe* v. *Webber*, 1 A. & E. 733; *Chapman* v. *Emery*, Cowp. 279.

(*q*) *Lister* v. *Turner*, 5 Ha. 281; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; but the deeds may be recovered at Law, *Kerrison* v. *Dorrien*, 9 Bing. 76.

(*r*) *Cracknall* v. *Janson*, 11 Ch. D. 1.

(*s*) *Goodright* v. *Moses*, 2 W. Bl. 1019; and see this case discussed, 6 Ch. D. 90.

(*t*) *Upton* v. *Bassett*, Cro. Eliz. 444, and cited in *Twyne's case*, 1 Sm. L. C. 9.

(*u*) *Douglasse* v. *Waad*, 1 Ch. Ca. 79; but not, of course, where it is post-nuptial.

(*x*) *Hill* v. *Bishop of Exeter*, 2 Taun. 69.

(*y*) *Stone* v. *Van Heythuysen*, 11 Ha. 126.

(*z*) *Evans* v. *Evans*, 2 Ir. Ch. R. 242.

(*a*) *Beavan* v. *Lord Oxford*, 6 D. M. & G. 507; and see cases there cited, and judgment.

(*b*) As to whether there is any exception in favour of a charity, *vide post*, p. 1008.

(*c*) *Martin* v. *Martin*, 2 R. & M. 507; and there is no exception in favour of the Crown, *semble*; see *Cholmley's case*, 2 Co. 50; *Magdalen College case*, 11 *ib.* 66 b.

Chap. XV. Sect. 5.

and to pay creditors who are not parties to the arrangement (*d*); or a post-nuptial settlement upon the settlor's wife, husband, or family (*e*), unless made in pursuance of a binding (*f*) ante-nuptial agreement (*g*), or of a further portion (*h*), or of an agreement to pay a further portion which is afterwards paid (*i*), or (on a settlement of the husband's estate) of the wife relinquishing her interests under an existing settlement (*k*), or her jointure or dower (*l*) (if married before the Dower Act came into operation); or of her mortgaging her separate estate (*m*), or property over which she has a joint power of appointment (*n*), to pay his debts; or (on a settlement of the wife's estate) of the husband's relinquishing his estate *in jure mariti* (*o*). The true test of the validity of all

(*d*) *Leech* v. *Leech*, 1 Ch. Ca. 249; *Walwyn* v. *Coutts*, 3 Mer. 707; *Acton* v. *Woodgate*, 2 M. & K. 492; *Garrard* v. *Lord Lauderdale*, 3 Si. 1; 2 R. & M. 451; *Wilding* v. *Richards*, 1 Coll. 655; *Smith* v. *Keating*, 6 C. B. 136; *Simmonds* v. *Palles*, 2 J. & L. 489; *Mackinnon* v. *Stewart*, 1 Si. N. S. 76, 89; *Griffith* v. *Ricketts*, 7 Ha. 307; *Smith* v. *Hurst*, 10 Ha. 30: on the subject of such deeds, see *post*, p. 1020; but see *Langton* v. *Tracy*, 2 Ch. R. 16, and Sug. 713; *La Touche* v. *Earl of Lucan*, 7 C. & F. 772; *Field* v. *Lord Donoughmore*, 1 D. & War. 227; *Siggers* v. *Evans*, 5 E. & B. 567; *Glegg* v. *Rees*, 7 Ch. 71. See the judgment in *Synnot* v. *Sympson*, 5 H. L. C. 121. In *Rosher* v. *Williams*, 20 Eq. 210, Malins, V.-C., decided that a conveyance in consideration of a covenant by the grantee to build on the property, for breach of which there was no other remedy than a right to recover merely nominal damages, was voluntary within the meaning of the statute. Unless this decision can be supported as distinguishable from *Price* v. *Jenkins*, 5 Ch. D. 619, it is scarcely consistent with the rule that adequacy of consideration will not be inquired into.

(*e*) *Evelyn* v. *Templar*, 2 Br. C. C. 148; *Doe* v. *Roe*, 6 Sc. 525; *Currie* v. *Nind*, 1 M. & C. 17, a case of copyhold settled by a married woman during coverture. See, too, as to copyholds being within the Act, *Doe* v. *Bottriell*, 5 B. & Ad. 131.

(*f*) See *Randall* v. *Morgan*, 12 V. 74; *Doe* v. *Rowe*, 4 Bing. N. C. 737; and see *Warden* v. *Jones*, 2 D. & J. 76; *Caton* v. *Caton*, L. R. 2 H. L. 127; and see *post*, p. 1140 *et seq.*

(*g*) *Griffin* v. *Stanhope*, Cro. Jac. 454; *Randall* v. *Morgan*, *suprà*; *Ex p. Hall*, 1 V. & B. 112; see *Battersbee* v. *Farrington*, 1 Sw. 106.

(*h*) *Brown* v. *Jones*, 1 Atk. 190; *Stileman* v. *Ashdown*, 2 *ib.* 479; *Ramsden* v. *Hylton*, 2 V. sen. 308.

(*i*) *Brown* v. *Jones*, *suprà*.

(*k*) *Ball* v. *Burnford*, Ch. Prec. 113; *Parker* v. *Carter*, 4 Ha. 409; *Harman* v. *Richards*, 10 Ha. 81; and see *Clerk* v. *Nettleship*, 2 Lev. 148.

(*l*) See Sug. 718.

(*m*) *Carter* v. *Hind*, 22 L. T. O. S. 116.

(*n*) *Whitbread* v. *Smith*, 3 D. M. & G. 727, 740.

(*o*) *Hewison* v. *Negus*, 16 B. 594; 22 L. J. Ch. 655.

such transactions is whether there was a *bonâ fide* bargain by which the respective rights of husband and wife were altered (*p*); "if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife, which is not a transaction without valuable consideration" (*q*). If a stranger concur, and provide for payment of the settlor's debts, he will be considered to have purchased the benefit of the settlement for the settlor's family (*r*); and, in separation deeds, the covenant usually entered into by the trustees to indemnify the husband against the wife's debts, will as against creditors (*s*), and also, it is conceived, as against subsequent purchasers, support any further settlement he may make upon her.

Small unnoticed consideration may support a settlement.

Where the owner of a valuable equity of redemption, settled it upon his wife and children at the request of a near relative, and in consideration of a small advance by way of loan, upon the security of his promissory note, to enable him to pay off the arrears of interest on the mortgage debt; the settlement was upheld as against a subsequent mortgagee from the settlor, notwithstanding the inadequacy of the consideration which was not even mentioned in the deed (*t*).

So, where husband and wife, jointly seised in fee, mortgaged the estate, limiting the equity of redemption to such uses as they or the survivor should appoint, and the property was reconveyed by their appointment to the use of the wife

(*p*) *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; 5 *ib.* 630; *Re Foster and Lister*, 6 Ch. D. 87; *Schreiber* v. *Dinkel*, 54 L. T. 911; *Lynch* v. *Lynch*, 4 L. R. Ir. 210; *Re Bell's Est.*, 11 L. R. Ir. 512; and see *Green* v. *Paterson*, 32 Ch. D. 95.

(*q*) Per V.-C. B. 4 Ch. D. 90; and see 5 Ch. D. 631.

(*r*) *Ford* v. *Stuart*, 15 B. 493; and see *Townend* v. *Toker*, 1 Ch. 446; and see *Bayspoole* v. *Collins*, 6 Ch. 228.

(*s*) *Stephens* v. *Olive*, 2 Br. C. C. 90; *Worrall* v. *Jacob*, 3 Mer. 256; but the introduction of such a covenant is not, as has been often supposed, essential; but any other good consideration will be equally effective: see *Frampton* v. *Frampton*, 4 B. 294; *Wilson* v. *Wilson*, 14 Si. 405; 1 H. L. C. 538; 5 H. L. C. 40.

(*t*) *Bayspoole* v. *Collins*, 6 Ch. 228.

Chap. XV. Sect. 5.

for life, with remainder to the use of the husband for life, with remainder to uses in favour of their issue, it was held that her concurrence in the settlement made by the reconveyance, was a sufficient consideration to support it against a subsequent purchaser for value from the husband (*u*).

Assignment of leaseholds, whether in itself valuable consideration.

The *quantum* of consideration is in these cases immaterial, and on this ground it has been held that the assignment of leaseholds, to which a liability, however trivial, attaches, is in itself a valuable consideration, so as to prevent the transaction being voluntary within the statute (*x*). This principle has, however, in this country been hitherto confined strictly to cases coming under the 27 Eliz. (*y*), while in Ireland it seems to be now settled, that in all cases the question whether an assignment of leaseholds is for value depends on the precise circumstances of each particular case (*z*). "The question in each case is whether the assignment was a bargain or a gift. The existence of onerous liabilities from which the assignee covenants to indemnify the assignor may give the transaction of transfer the character of a bargain for good and valuable consideration; on the other hand, the gift of a valuable interest in lands is not less a gift because the property so given carries with it certain obligations" (*a*). Thus, where an assignment was made to trustees, by way of settlement, of renewable leaseholds upon trust out of the yearly profits to pay the yearly rent, and then, upon further trusts, it was held that the settlement was voluntary and void as against a subsequent purchaser for value from the settlor (*b*); so, too, an assignment of leaseholds held for an unexpired residue of

(*u*) *Atkinson* v. *Smith*, 3 D. & J. 186.

(*x*) *Price* v. *Jenkins*, 5 Ch. D. 619, *sed qu.*

(*y*) It has been held not to apply to cases under the 13 Eliz., *Ridler* v. *Ridler*, 22 Ch. D. 81; or to cases under the 91st section of the Bankruptcy Act, 1869 (sect. 47 of the Act of 1883), *Ex p. Hillman*, 10 Ch. D. 622, in effect overruling *Re Doble*, 26 W. R. 407; *Re Lulham*, 32 W. R. 1013.

(*z*) *Gardiner* v. *Gardiner*, 12 I. C. L. R. 565.

(*a*) Per May, C. J., 6 L. R. Ir. 535.

(*b*) *Hamilton* v. *Molloy*, 5 L. R. Ir. 339.

twenty-five years subject to a yearly rent of 30*s.*, the consideration being expressed to be natural love and affection and a nominal sum (*c*). It seems probable that the doctrine of *Price* v. *Jenkins* will not be extended, and that the test applied in the Irish Courts will ultimately prevail here.

Post-nuptial settlement may be supported, when.

If a post-nuptial settlement be made with the aid of another person whose concurrence is essential to its full validity—as in the case of a settlement by tenant for life and tenant in tail in remainder—this may take from the instrument its voluntary character (*d*): but the concurrence of the husband in a settlement of property belonging to the wife for her separate use has been held not to have this effect, since the husband gave no consideration for the settlement (*e*). So, a family compromise founded on a doubtful intestacy is valid (*f*). Where A. and B. were seised of lands as tenants in common, and A. at B.'s request conveyed his moiety upon trust for B., if he should survive A., and after B.'s death for A.'s children, and B. by the same deed conveyed his moiety upon the same trusts after his own death in favour of A. and his children, it was held that the limitations of B.'s moiety in favour of A. and his children were for valuable consideration, and were not void as against a subsequent purchaser for value from B. (*g*). But, of course, the fact of the grantees having had estates in the property, which—as in the case of estates in remainder on an estate tail—have been destroyed by the settlor, will not support the settlement (*h*).

Family compromise.

(*c*) *Lee* v. *Mathews*, 6 L. R. Ir. 530.

(*d*) *Myddleton* v. *Lord Kenyon*, 2 V. 391, 410; *Roe* v. *Mitton*, 2 Wils. 356; and cases cited in *Doe* v. *Rolfe*, 8 A. & E., see p. 659; but see also that case, *post*, p. 1016; and *Tarleton* v. *Liddell*, 17 Q. B. 390.

(*e*) *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; and *Butterfield* v. *Heath*, 15 B. 408; but *quære*, whether there was not valuable consideration in this case; cf. *Re Foster and Lister*, 6 Ch. D. 87, 95; *Greene* v. *O'Kearney*, 2 Ir. C. L. R. 267; and see, on the general subject, *Scott* v. *Scott*, 18 Jur. 755.

(*f*) *Heap* v. *Tonge*, 9 Ha. 90; see *Stapilton* v. *Stapilton*, 1 Atk. 2; 2 Wh. & T. L. C.; *vide ante*, p. 848; *Harman* v. *Richards*, 10 Ha. 81; *Ex p. Lucy*, 17 Jur. 1143; *Stone* v. *Godfrey*, 5 D. M. & G. 76.

(*g*) *Mullins* v. *Guilfoyle*, 2 L. R. Ir. 95.

(*h*) *Cormick* v. *Trapaud*, 6 Dow, 60.

Chap. XV. Sect. 5.

Purchase in the name of trustees upon voluntary trusts is within the Act.

And the Act extends to a case where A., having contracted to purchase an estate, takes the conveyance in the names of trustees, upon voluntary trusts (*i*).

Whether a voluntary conveyance to a charity may be avoided by a subsequent sale for value.

It is generally said, that where a person has endowed a charity, he cannot afterwards avoid his own act under the 27 Eliz. c. 4, by a sale to a purchaser for value (*k*); but the point does not appear to have been expressly decided. In one case (*l*), a municipal corporation founded a hospital, and procured estates to be conveyed direct from the vendors to the hospital, and it was held that the corporation could not defeat the conveyance by a subsequent sale for value. But, in this case, there never was any estate vested in the corporation. In a later case (*m*), the point was left open; and it must be regarded as still unsettled.

Marriage a sufficient consideration.

Marriage is in itself a sufficient consideration for an antenuptial settlement upon the husband, wife, or issue (*n*): and, in the absence of fraud, the settlement made by one of the contracting parties is not invalidated, by reason of the settlement made by the other proving ineffective; as *e.g.*, by reason of his or her infancy; nor does any case of election arise as against the other party or his or her representatives (*o*).

The doctrine of election.

The principle of the doctrine of election in such cases appears to rest "not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it. This general and presumed intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contem-

(*i*) *Stone* v. *Van Heythuysen*, 11 Ha. 126.

(*k*) See Tudor's Char. Trusts, 253.

(*l*) *A.-G.* v. *Corp. of Newcastle*, 12 C. & F. 402.

(*m*) *Trye* v. *Corp. of Gloucester*, 14 B. 173.

(*n*) See *Brown* v. *Jones*, 1 Atk. 190; *Nairn* v. *Prowse*, 6 V. 752; *O'Gorman* v. *Comyn*, 2 Sch. & L. 147; *Ex p. M'Burnie*, 1 D. M. & G. 441.

(*o*) *Campbell* v. *Ingilby*, 21 B. 567; 1 D. & J. 393; see, however, *Codrington* v. *Lindsay*, 8 Ch. 578, 593; L. R. 7 H. L. 854, where election was allowed.

plation of the author of the instrument (*p*); but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention" (*q*). Thus, where, on the marriage of an infant, property was settled to her separate use for life without power of anticipation, and the settlement also contained a covenant by her and her husband to settle after-acquired property, it was held that, on the wife becoming subsequently entitled to a fund for her separate use, she was not put to her election between this fund and the settled property, but was entitled to both, on the ground that the restraint on anticipation constituted a declaration inconsistent with the doctrine of election, and therefore excluded it (*r*).

Where the marriage is not a valid one.

But a settlement made in pursuance of an agreement entered into in contemplation of a marriage not recognized as valid by the laws of this country—as, *e.g.*, between a man and his deceased wife's sister—cannot (at any rate so far as it is executory (*s*)) be supported (*t*); even as respects a provision thereby made for children of the former legal marriage (*u*). And the same rule, it is conceived, will equally apply, where the marriage, though a *bonâ fide* one, is invalid by reason of one of the parties having contracted a previous marriage which, although not known to be so, is still subsisting. In the case of a settlement executed as part of the arrangements for a marriage within the prohibited degrees, there is not merely the absence of a good consideration, but the presence of that which the Courts necessarily treat as an immoral consideration—*viz.*, an agreement for concubinage instead of coverture. But a voluntary settlement upon the woman herself, if not founded upon any agreement for, although it in fact precedes, a concubinage of this description,

(*p*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

(*q*) Per Fry, L. J., 31 Ch. D. 279.

(*r*) *Re Vardon's Tr.*, 31 Ch. D. 275.

(*s*) *Ayerst* v. *Jenkins*, 16 Eq. 275.

(*t*) *Coulson* v. *Allison*, 2 D. F. & J. 521.

(*u*) *Chapman* v. *Bradley*, 33 B. 61.

Chap. XV. Sect. 5.

and which purports on the face of it to be voluntary, cannot be set aside by the settlor or his representatives, if it has been perfected by an actual transfer of the property to the trustees (*x*).

Distinction between ante-nuptial and post-nuptial settlements as to parties to sue.

A distinction must be drawn in this connection between ante-nuptial and post-nuptial settlements as regards the parties who may sue upon them. The former constitute an exception, at all events in equity, to the general rule (*y*) that a person cannot sue on a contract to which he is not a party, inasmuch as children born of the marriage, in contemplation of which a settlement is made, are treated as quasi parties to that contract, and can sue upon the stipulations contained in it (*z*). The rule, on the other hand, is applied strictly to a post-nuptial settlement: and children in whose favour it is made are mere volunteers, and cannot, unless parties to it, enforce it. Thus, where a husband and wife by a post-nuptial settlement covenanted to assign for the benefit of their children the life interests which they respectively took under an ante-nuptial settlement, the children were held not to be entitled to sue for performance of the contract (*a*). So, too, where a husband and wife executed a post-nuptial settlement, whereby the husband gave up an interest which he possessed in his wife's property, and joined with her in assigning the property to trustees in favour of the children of the marriage, it was held that the children were volunteers and could not enforce the settlement (*b*). This doctrine, it must be observed, is quite distinct from that which is examined in the succeeding paragraphs.

How far the consideration of marriage extends.

A question is frequently raised as to how far the consideration of marriage extends. As against the settlor and his

(*x*) See and consider judgment in *Ayerst* v. *Jenkins*, *suprà*.

(*y*) *Re Empress Engineering Co.*, 16 Ch. D. 125.

(*z*) *Hill* v. *Gomme*, 5 M. & C. 250, 254.

(*a*) *Joyce* v. *Hutton*, 11 Ir. Ch. R. 123.

(*b*) *Green* v. *Paterson*, 32 Ch. D. 95; and see *Gandy* v. *Gandy*, 30 Ch. D. 58, a case arising under a separation deed; cf. *Chetwynd* v. *Morgan*, 31 Ch. D. 596.

heirs, limitations in favour of collaterals, contained in an ante-nuptial settlement, are binding (*c*); but whether they will be supported as against subsequent *bonâ fide* purchasers for value has been the subject of frequent discussion.

Limitations in favour of collaterals.

Unnecessary difficulty appears to have been thrown over the cases upon the subject by a confusion between the contract and the consideration for the contract. The common form of objection is, that collaterals are "not within the consideration of the marriage" (*d*). Now this expression is, it is submitted, scarcely accurate. If A. agreed with B. to pay him 10,000*l.*, in consideration of his conveying his estate to the use of A. for life, with remainders over in favour of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise whether the remaindermen took beneficially, or in trust for A.; but subsequent purchasers from B. could hardly contend that the limitations in the settlement, *ultra* A.'s life estate, were void, upon the ground of the remaindermen not being "within the consideration of the 10,000*l.*" (*e*). "The considerations of the contract, though founded on marriage, must extend to all those terms of the contract on which depend the interests of the persons who are within the consideration of the marriage: and when they take only on terms which admit to the participation with them other persons who would not otherwise be within the consideration, then not the matrimonial consideration, properly so called, but the considerations of the mutual contract, extend to and comprehend them" (*f*). In the case of a marriage settlement, the only important questions seem to be, first, whether the collaterals were within the contract: and secondly, whether (if so) there was a sufficient consideration for such a contract.

(*c*) *Davenport* v. *Bishopp*, 1 Ph. 698; 2 Y. & C. C. C. 451; in which see the earlier cases cited; see, however, an exceptional case of *Wollaston* v. *Tribe*, 9 Eq. 44, where the settlement in favour of collaterals was set aside.

(*d*) *Pulvertoft* v. *Pulvertoft*, 18 V. 92.

(*e*) See *Ford* v. *Stuart*, 15 B. 499.

(*f*) *Mackie* v. *Herbertson*, 9 Ap. Ca. 303, 337, per Ld. Selborne.

Chap. XV. Sect. 5.

Such limitations should be considered within marriage contract —when.

Upon the first question (considered merely as one of principle), it is submitted, that where the limitations over are in favour of the collateral relations or connections, not of the settlor, but of the other contracting party (whether wife or husband), the settlement itself may be considered *primâ facie* evidence of such other party having stipulated for their insertion. So, where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations, in derogation from the husband's marital right by survivorship (in case of personalty), or as tenant by the curtesy (in case of realty). Where, in any case, other than that last referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bonâ fide* purchaser.

Nor do the reported cases (*g*), where limitations in a marriage settlement in favour of collaterals have been held invalid, appear to be inconsistent with the above suggestions.

Clarke v. *Wright.*

In a case in the Exchequer Chamber (*h*), a settlement by a woman out of her own estate, made previously to her marriage, in favour of her illegitimate child, was supported as against a subsequent mortgagee from her husband and herself. One of the learned judges (*i*), after citing the above remarks, was of opinion that the principle there suggested was the only

(*g*) See *Osgood* v. *Strode*, 2 P. W. 245; *Sutton* v. *Chetwynd*, 3 Mer. 249, 253; *Johnson* v. *Legard*, 3 Mad. 283; T. & R. 281; *Cotterell* v. *Homer*, 13 Si. 506; *Staepoole* v. *Staepoole*, 2 Con. & L. 489; and see *Kekewich* v. *Manning*, 1 D. M. & G. 176; see also *Cramer* v. *Moore*, 3 S. & G. 141, where it was held that the wife, having survived her husband, was not bound by his covenant contained in marriage articles for the settlement of her reversionary property; no settlement having been executed, and the only persons who could derive any benefit from enforcing the covenant being her next of kin.

(*h*) *Clarke* v. *Wright*, 6 H. & N. 849.

(*i*) Blackburn, J., with whom Willes, J., concurred.

one which could reconcile the conflicting decisions; and added, that though it is to be presumed that the wife and her friends stipulate only for the limitations in favour of the husband, wife, and issue of the marriage, yet where, as in *Newstead* v. *Searles* (*k*), and *Clayton* v. *Lord Wilton* (*l*), the limitations so far interfere with those which would naturally be made in favour of the husband, wife, and issue, as to indicate that the limitations must have been discussed, and made part of the marriage contract, and part of the reciprocal considerations between the husband and the wife, that presumption is rebutted, and the limitations are not voluntary. Two of the other judges (*m*) were of opinion that, with two exceptions, the rule was well established that a limitation in a marriage settlement in favour of the relations of the settlor, other than the issue of the marriage, is not within the consideration of the marriage:—one of these exceptions being, that a limitation may be introduced in favour of the children of a former marriage (*n*); and the other, that a similar limitation may be made in favour of the settlor's issue by a future wife, in default of issue of the intended marriage (*o*); and held that the illegitimacy of the child in the case before them did not take it out of the principle of the former exception. The judge (*p*) who formed the minority was of opinion that *Newstead* v. *Searles* was decided before the principles of law applicable to the subject were well understood, and was no longer a binding authority.

Remarks on this case.

In *Clarke* v. *Wright*, there was no proof that the husband had stipulated for the provision in favour of the settlor's illegitimate child; nor could this be presumed from the form of the limitations. The child was to take only *after* the

(*k*) 1 Atk. 265.

(*l*) 3 Mad. 302.

(*m*) Cockburn, C. J., and Wightman, J., who agreed that the judgment of the Court below should be affirmed, though on different grounds from Blackburn and Willes, JJ.

(*n*) *Newstead* v. *Searles*, 1 Atk. 265; but query whether the same principle applies where the husband is the settlor.

(*o*) *Clayton* v. *Lord Wilton*, 3 Mad. 302.

(*p*) Williams, J.

Chap. XV. Sect. 5.

husband's life estate had determined, nor did the settlement in any way derogate from the marital right by survivorship; and the only reasonable presumption was that the stipulation emanated from the settlor herself. The facts, therefore, do not seem to justify the inference on which two of the learned judges relied, *viz.*, that the limitation in favour of the child was stipulated for by the husband; and, unless there is a recognized exception to the general rule, where the limitation is in favour of the settlor's own issue by a former marriage, the provision for the child was purely voluntary, and void as against a subsequent *bonâ fide* purchaser. In *Newstead* v. *Searles* (*q*), there appear to have been reciprocal considerations both on the part of the husband and the wife; but the main ground of Lord Hardwicke's decision was that, if he laid down any other rule, it would become impossible for a widow, on her second marriage, to make any certain provision for her issue by a former one. The same reason, of course, does not apply where the husband, on his second marriage, makes a settlement which embraces his issue by a former wife; and it may be doubted whether such a case falls within the exception. In *Price* v. *Jenkins* (*r*), Hall, V.-C., held that, as regarded a son by a former marriage of the husband, the settlement made on his father's second marriage was voluntary, there being no evidence of any stipulation to that effect as part of the marriage consideration. The case afterwards went to the Court of Appeal (*s*), where the decision was reversed on another point, the Court expressing no opinion on the point here under discussion; and the decision of the Vice Chancellor has been in a very recent case expressly followed by Kay, J. (*ss*). In *Clayton* v. *Lord Wilton*, the limitation in favour of the settlor's issue by any future wife was upheld, because, from the manner in which it was introduced into the settlement, such a construction was necessary, in order to support a limitation in favour of children of the intended

(*q*) 1 Atk. 264, 267; *Gale* v. *Gale*, 6 Ch. D. 144; and see Sug. 717.

(*r*) 4 Ch. D. 483.

(*s*) 5 Ch. D. 619.

(*ss*) *Re Cameron and Wells*, 36 W. R. 5.

marriage; and it cannot be regarded as an authority that a limitation, in a marriage settlement, in favour of issue by any future marriage, whether of husband or wife, will in every case be supported as against a subsequent *bonâ fide* purchaser (*t*). So, where on his marriage the husband settled an estate upon himself for life, with remainder to the sons of the intended marriage, in tail male, with remainder to his brother in tail male, with remainder to all the daughters of the marriage as tenants in common in tail male, it was held that the limitation in favour of the settlor's brother, standing where it did, was valid as against a subsequent purchaser for value from the settlor (*u*).

In a modern case, where a woman being indebted, though not to the extent of insolvency, at the time of her marriage, settled all her real and personal property (with a trifling exception) upon herself for life, with remainder to the children of the marriage, and, in default of children, in favour of certain collateral relatives, including a favourite niece whom she had adopted as her daughter, and, having survived her husband, died without having had issue and leaving no assets, it was held that the settlement, *quoad* the collaterals, was voluntary, and must be set aside to the extent of the settlor's indebtedness (*x*).

If within contract, marriage forms sufficient consideration to support them, *semble*.

As to the second point—If upon marriage the husband's estate were settled upon the wife, giving her an absolute power of sale and control over the purchase-money, effectually excluding him from any future participation therein, and without securing to him the indirect advantage of a permanent provision for her, the marriage, it is conceived, would clearly be a sufficient consideration for such a settlement; although she might at once sell the estate and hand over the purchase-money to her own relations: and, if so, upon what principle can it be contended that the marriage would

(*t*) See Lord St. Leonards' comments, Sug. 716, note.

(*u*) *Re Sheridan's Est.*, 1 L. R. Ir. 54; and see *Mackie* v. *Herbertson*, 9 Ap. Ca. 303.

(*x*) *Smith* v. *Cherrill*, 4 Eq. 390.

Chap. XV. Sect. 5.

not equally have been a sufficient consideration for any limitations in favour of such relations, which might, upon her stipulation, have been introduced into the settlement? The case of a woman marrying, and stipulating for a provision in favour of parents, or others, who had previously been dependent on her exertions for support, may suggest the hardships which might result from maintaining a contrary doctrine. The impossibility of restoring the consideration by replacing either party in his or her original *status* is, in itself, a sufficient reason why full effect should be given to any arrangements which were considered to form the equivalent, or part of the equivalent, to such consideration (*y*).

Such limitations supported by necessary concurrence of third person in settlement;

And where the settlement is made by aid of a party other than the husband and wife—as where, on the marriage of tenant in tail, the tenant for life in possession concurs in barring the entail and re-settling the estate—the validity of limitations in favour of other branches of the family, or (it is conceived) of strangers, seems to be unquestionable (*z*): so, even the mother of the husband releasing the lands from an annuity, and accepting a substituted security for its payment, has been held a sufficient consideration for limitations in favour of her younger children (*a*). A settlement, not on marriage, by tenant for life and tenant in tail, was, under special circumstances, held void as against a purchaser in a modern case (*b*); but the decision seems to be disapproved of by Lord St. Leonards (*c*).

or by being prior to limi-

And limitations to collaterals, which precede a limitation

(*y*) See *Jenkins* v. *Keymis*, 1 Lev. 237, where it was held that the wife's marriage portion was a sufficient consideration for limitations to the issue of the husband by a second marriage. And see *Heap* v. *Tonge*, 9 Ha. 104; *Ford* v. *Stuart*, 15 B. 500.

(*z*) See *Jenkins* v. *Keymis*, 1 Lev. 150, 237; *Osgood* v. *Strode*, 2 P. W. 256; and *Pulvertoft* v. *Pulvertoft*, 18 V. 92. But see *Wollaston* v. *Tribe*, 9 Eq. 44; where, however, the Court considered that the settlor intended to reserve to herself a power of appointment among the collaterals who were the objects of the ultimate trust.

(*a*) *Roe* v. *Mitton*, 2 Wils. 356.

(*b*) *Doe* v. *Rolfe*, 8 A. & E. 650; and see *Tarleton* v. *Liddell*, 17 Q. B. 390; 4 De G. & S. 538; *Wakefield* v. *Gibbon*, 1 Gif. 401.

(*c*) Sug. 716.

in favour of issue of the marriage, will, it seems, be valid (*d*): so, the remoteness of a limitation (*e*), or its being subsequent to a vested estate tail (*f*), may perhaps be sufficient to sustain it.

tations to issue of marriage.

And a settlement by a widow, before her second marriage, upon her children by a deceased husband, is not fraudulent within the Act: even although they are themselves married and have issue (*g*): and the husband is not a purchaser within the Act (*h*). So, a settlement by a woman upon her marriage, in favour of her illegitimate issue, may be supported, as against a subsequent purchaser from her and her husband (*i*).

Settlement by widow, valid.

But even a settlement in consideration of marriage may be shown to have been executed by all parties for the purpose of defrauding creditors, and therefore to be void as against creditors (*k*); as where a man, on marrying a woman with whom he had cohabited for several years, executed an antenuptial settlement for the sole purpose of defeating his creditors, the wife being implicated in the fraud (*l*). And where such is the object of the deed, the fact of the marriage being solemnized in pursuance of a long-standing engagement will not validate the settlement (*m*).

Marriage settlement may be shown to be fraudulent.

Where A., being indebted, but not to the extent of insolvency, applied to his mother for a loan, which she consented to make, and in fact made, only on condition that he settled his landed property, the settlement was upheld (*n*); but the

Bonâ fide settlement by indebted settlor.

(*d*) *Clayton* v. *Lord Wilton*, 3 Mad. 302, n.; and see Sug. 716; and *vide ante*, p. 1013.

(*e*) 2 P. W. 255.

(*f*) See Sug. 716; *Lord Tenham's case*, 2 Lev. 105.

(*g*) *Newstead* v. *Searles*, 1 Atk. 265; and see *King* v. *Cotton*, 2 P. W. 674; *Doe* v. *Lewis*, 11 C. B. 1035.

(*h*) *S. C.*

(*i*) *Clarke* v. *Wright*, 6 H. & N. 849; and *vide ante*, p. 1012.

(*k*) *Colombine* v. *Penhall*, 1 S. & G. 228.

(*l*) *Bulmer* v. *Hunter*, 8 Eq. 46; *Acraman* v. *Corbett*, 1 J. & H. 410.

(*m*) *Fraser* v. *Thompson*, 4 D. & J. 659.

(*n*) *Thompson* v. *Webster*, 4 D. & J. 600; 7 Jur. N. S. 531, and *vide ante*, p. 1015, and comments on *Thompson* v. *Webster*, in *Smith* v. *Cherrill*, 4 Eq. 390.

Chap. XV. Sect. 5.

transaction was *bonâ fide*, and there was no intention to defraud creditors. So, where the owner of a freehold estate worth, beyond a mortgage upon it, about 1,300*l.*, at the solicitation of a relative who, as an inducement, lent him 150*l.* on his promissory note, made a post-nuptial settlement of it on his wife and children, which did not disclose the advance or any other valuable consideration, the settlement was upheld as against a subsequent mortgagee from the settlor (*o*).

Unspecified consideration.

Where a settlement is expressed to be made in consideration of 5*s.*, and for divers other good and valuable, but unstated, considerations, it rests with the party setting up the settlement to show their actual existence (*p*).

Consideration not expressed may be proved.

Settlement may be supported by

A settlement or conveyance, apparently voluntary (*q*), may be supported by any evidence (consistent with its terms), which proves that it was in fact made for good consideration (*r*): so, although originally voluntary, it may be

(*o*) *Bayspoole* v. *Collins*, 6 Ch. 228.

(*p*) *Kelson* v. *Kelson*, 10 Ha. 385.

(*q*) As to when a voluntary settlement cannot be enforced by the apparent beneficiaries, see *Ward* v. *Audland*, 8 B. 201, and cases collected in reporter's note, 213; also *Searle* v. *Law*, 15 Si. 95; *Bridge* v. *Bridge*, 16 B. 315; *Gilbert* v. *Overton*, 2 H. & M. 110; *Price* v. *Price*, 1 D. M. & G. 308; *Beech* v. *Keep*, 18 B. 285; *Sewell* v. *Moxsy*, 2 Si. N. S. 189; *Cox* v. *Barnard*, 8 Ha. 310; *Jones* v. *Lock*, 1 Ch. 25: *et contrà*, *Ellison* v. *Ellison*, 6 V. 656; 1 Wh. & Tu. L. C.; *Sloane* v. *Cadogan*, Sug. 719; *Fortescue* v. *Barnett*, 3 M. & K. 36; *Wheatley* v. *Purr*, 1 Ke. 551; and *Blakely* v. *Brady*, 2 D. & Wal. 311; *Beatson* v. *Beatson*, 12 Si. 281; *Kekewich* v. *Manning*, 1 D. M. & G. 176; *Voyle* v. *Hughes*, 2 S. & G. 18; *Donaldson* v. *Donaldson*, Kay, 711; *Dening* v. *Ware*, 22 B. 184: and see *Airey* v. *Hall*, 3 S. & G. 315, and *Kiddill* v. *Farnell*, *ibid.*, 428, where the stock, the subject of settlement, had not been actually transferred at the settlor's death; *Debrow* v. *Bone*, 8 Jur. N. S. 276; *Richardson* v. *Richardson*, 3 Eq. 686, where the promissory notes comprised in the deed were never indorsed over; *Re Way's Trusts*, 2 D. J. & S. 365, where the settlor retained the deed which was never acted on, or communicated to the volunteers or the trustees, and afterwards destroyed it, and yet it was held to be an effectual disposition of the fund: cf. *Hall* v. *Hall*, 8 Ch. 433.

(*r*) See *Ferrars* v. *Cherry*, 2 Vern. 384; *Pott* v. *Todhunter*, 2 Coll. 76; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; *Harman* v. *Richards*, 10 Ha. 81; *Bayspoole* v. *Collins*, 6 Ch. 228; and see as to connecting deeds, as being parts of one transaction, *S. C.*, and

made good by subsequent matter, in the hands of those who have given value on the faith of it; *e.g.*, the marriage of the party claiming under it beneficially (*s*)—even although its existence be not shown to have been considered in the marriage treaty (*t*),—or a sale or mortgage, for valuable consideration, by the voluntary grantee (*u*); or, probably (in the case of a creditor's deed), the fact of creditors having, upon the faith of it, refrained from enforcing their remedies against the debtor (*x*), may be sufficient to support the deed. The principle upon which evidence is admitted to show that the consideration expressed on the deed is not the real or the only consideration is not very clear. "It is very difficult to understand how that is not in contradiction of the deed. The transaction, purporting to be represented by an entire instrument, is the conveyance of an estate for natural love and affection; and then it is said that there is some other consideration. However, there is the rule in law and in equity that you can give evidence of that other consideration. But such evidence must be to the utmost extent satisfactory and conclusive. It really must be proved beyond the shadow of a doubt that there was that additional consideration which the parties did not choose to express on the face of the instrument itself" (*y*).

matter *ex post facto*.

The distinction between deeds vesting property in trustees upon trust for the benefit of particular persons,—which

Distinction between creditors'

Ford v. *Stuart*, 15 B. 493; *Whitbread* v. *Smith*, 3 D. M. & G. 727; *Pryor* v. *Pryor*, 12 W. R. 781.

(*s*) *Kirk* v. *Clark*, Ch. Prec. 275; *East India Co.* v. *Clavel*, *ibid.* 377, and other cases cited, 3 Bac. Abr. tit. Fraud, C. 781 *et seq*; *Johnson* v. *Legard*, T. & R. 294; *Payne* v. *Mortimer*, 4 D. & J. 447.

(*t*) See *Brown* v. *Carter*, 5 V. 862, 876; *Roddy* v. *Williams*, 3 J. & L. 1, 17.

(*u*) *Prodgers* v. *Langham*, 1 Sid. 133; *George* v. *Milbanke*, 9 V. 190; *Parr* v. *Eliason*, 1 Ea. 92, 95.

(*x*) See *Acton* v. *Woodgate*, 2 M. & K. 492; *Hinde* v. *Blake*, 3 B. 234; *Kirwan* v. *Daniel*, 5 Ha. 493; *Johnson* v. *Kershaw*, 1 De G. & S. 260; *Harland* v. *Binks*, 15 Q. B. 713; *Mackinnon* v. *Stewart*, 1 Si. N. S. 76; *Griffith* v. *Ricketts*, 7 Ha. 307; *Smith* v. *Hurst*, 10 Ha. 30, 46; *Synnot* v. *Sympson*, 5 H. L. C. 121; *Siggers* v. *Evans*, 1 Jur. N. S. 851; but see also *Cornthwaite* v. *Frith*, 4 De G. & S. 552; *Nicholson* v. *Tutin*, 2 K. & J. 18; 3 *ib.* 159.

(*y*) Per James, L. J., in *Levy* v. *Creighton*, 22 W. R. 605.

Chap. XV. Sect. 5.

deeds and other trust deeds.

deeds cannot be revoked, altered, or modified by the party who has created the trust;—and deeds purporting to be executed for the benefit of creditors,—where the question whether the trusts can be revoked, altered, or modified, depends upon the circumstances of each particular case—has been laid down as follows; *viz.*,—In cases of trust for the benefit of particular persons the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created; and, the trust being well created, the property in Equity belongs to the *cestuis que trust* as much as it would belong to them at Law, if the legal interest had been transferred to them. But in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been, either to benefit his creditors, or to promote his own convenience; and the Court there has to examine into the circumstances, for the purpose of ascertaining what was the true purpose of the deed: and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred; because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself (*z*). In the case of the latter class of deeds, it is inaccurate to speak of the revocation of the deed; what is revoked is not the deed, but the directions given by the deed to the trustee, who is in fact the assignor's agent, as to what he shall do with the proceeds. Such deeds are to be construed as mandates; "the same sort of mandate that a man gives when he gives his servant money, with directions to pay it in a particular way; they do not create any equitable or legal right in a particular creditor. The right to the direction of the money is the right of the person who has put the money in the hands of his agent or steward or whoever he may be" (*a*).

(*z*) Per Turner, V.-C., *Smith* v. *Hurst*, 10 Ha. 47.

(*a*) Per James, L. J., in *Johns* v. *James*, 8 Ch. D. 744, 749. And see *Walwyn* v. *Coutts*, 3 Mer. 707; *Garrard* v. *Lauderdale*, 3 Si. 1; 2 R. & M. 451; *Acton* v. *Woodgate*, 2 M. & K. 492; *Henderson* v. *Rothschild*, 33 Ch. D. 459.

Whether heir or devisee can set aside voluntary or fraudulent deed.

A settlement "really fraudulent or fraudulently kept on foot" (*b*), would seem to be void as against a *bonâ fide* purchaser even from the heir or devisee of the settlor (*c*); but a merely voluntary deed cannot, it would appear, be avoided by a sale by the heir or devisee; the principle upon which a sale by the settlor himself avoids such a deed being, that the subsequent sale shows the existence of an originally fraudulent intention (*d*): so, a wife, surviving her husband, cannot, by an assignment for value, avoid his voluntary assignment of her legal term for years (*e*). Of course, a voluntary deed will not be avoided by a subsequent conveyance apparently made for value, but in fact voluntary (*f*). It has been held in Ireland that in the case of several voluntary grantees of the same estate, the one who first sells confers a good title on the purchaser (*g*): but this seems to be bad law (*h*). A purchaser without notice from a volunteer claiming under a registered settlement was held to have priority over a volunteer claiming under an earlier unregistered settlement (*i*).

Settlements with power of revocation are within the Act.

The 5th section of 27 Eliz. c. 4, seems to comprise all settlements, although made for valuable consideration (*k*), which reserve what is, either expressly or virtually, a power of revocation to the settlor; *e.g.*, an unlimited power to charge by way of mortgage (*l*); or a power to revoke on payment of 10*s.* (*m*), or with the consent of a person nominated by the settlor (*n*), or, simply, at a future date (*o*): but a power

(*b*) Sug. 713.

(*c*) *Burrel's case*, 6 Co. 72; and see *Warburton* v. *Loveland*, 6 Bl. N. S. 1, 31.

(*d*) *Parker* v. *Carter*, 4 Ha. 409; *Doe* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. & J. 132, 150.

(*e*) *Doe* v. *Lewis*, 11 C. B. 1035.

(*f*) *Roberts* v. *Williams*, 4 Ha. 130; *Humphreys* v. *Pensam*, 1 M. & C. 580; *Doe* v. *Webber*, 1 A. & E. 733, 740; and see *General Meat Association* v. *Bouffler*, 40 L. T. 126; aff. on other grounds, 41 L. T. 719.

(*g*) *Jones* v. *Whittaker*, Long. & T. 141.

(*h*) *Doe* v. *Rusham*, 17 Q. B. 723.

(*i*) *Re M'Donagh's Est.*, 3 L. R. Ir. 408.

(*k*) See Sug. 721; *Smith* v. *Hurst*, 10 Ha. 30.

(*l*) *Turback* v. *Marbury*, 2 Vern. 510.

(*m*) See *Griffin* v. *Stanhope*, Cro. Jac. 455.

(*n*) *Twyne's case*, 1 Sm. L. C. 1.

(*o*) See *Bullock* v. *Thorne*, Moo. 615; *S. C.*, cited 3 Co. 82 b.: but it seems

Chap. XV. Sect. 5.

to charge a reasonable specified sum (*p*), or to revoke upon terms which are fairly calculated to preserve the substantial rights of the parties interested under the limitations (*q*), seems to be unobjectionable. Lord St. Leonards expresses an opinion (*r*), that where a settlement made for valuable consideration contains a power of revocation which is afterwards released for valuable consideration, a purchaser, buying subsequently to such release, would be postponed to the settlement: probably the result might be the same, although there were no consideration for the release, if the purchaser had notice of it: but a secret release will not affect a purchaser (*s*).

Power of revocation should be expressly reserved, where so intended.

We may remark here that a solicitor, when preparing a voluntary settlement, ought to ascertain from his client whether it is to be revocable or not; and where it is intended to be of a *quasi* testamentary character, a power of appointment which will override the trusts, or a power of revocation, should be expressly reserved (*t*). The absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case (*u*). And, although there is no rule of law that a voluntary deed will be void unless the solicitor takes the settlor's express direction as to the insertion or omission of such a power (*x*), yet in several cases voluntary settlements, apparently irrevocable, have been rectified by the introduction of a power of general appointment (*y*). In

that the title under the settlement will be valid until the specified time arrives.

(*p*) *Jenkins* v. *Keymis*, 1 Lev. 150.

(*q*) See *Doe* v. *Martin*, 4 T. R. 39; Sug. 721.

(*r*) Sug. 722.

(*s*) *Bulloek* v. *Thorne*, Moo. 615.

(*t*) *Anderson* v. *Elsworth*, 3 Gif. 154; *Coutts* v. *Acworth*, 8 Eq. 558; *Everitt* v. *Everitt*, 10 Eq. 405. The onus of showing that the gift was intended to be irrevocable may be thrown on the party claiming it; *Coutts* v. *Acworth*, *supra*; and see *Wollaston* v. *Tribe*, 9 Eq. 44; but will not necessarily, *Phillips* v. *Munnings*, 7 Ch. 244; *Henry* v. *Armstrong*, 18 Ch. D. 668.

(*u*) *Toker* v. *Toker*, 3 D. J. & S. 487, 491; *Hall* v. *Hall*, 8 Ch. 430, 438.

(*x*) *Hall* v. *Hall*, *ibid.*; *Henry* v. *Armstrong*, *supra*.

(*y*) *Harbidge* v. *Wogan*, 5 Ha. 258; *Nanney* v. *Williams*, 22 B. 452; *Forshaw* v. *Welsby*, 30 B. 243.

Ireland it has been said that in the absence of a power of revocation, it must be proved (1) that the deed is the free act of a settlor who knows what he is doing: and (2) either that the deed is provident and just in itself, or that any apparent improvidence and injustice is in accordance with the actual intention of the settlor (*z*). But where the intention to make an irrevocable settlement is clear, the Court will not interfere, merely because the deed is voluntary (*a*).

Personal settlements not within 27 Eliz.

We may here remark that the 27 Eliz. does not affect settlements of personal chattels (*b*).

Purchaser with notice buying from vendor without notice, protected;—when.

A purchaser will not be affected by notice of an equitable claim, if he purchase from a vendor who himself bought *bonâ fide* without notice (*c*). It has been held that, in the case of a charitable trust, want of notice, in order to be effectual, must have existed on the part of the *first* purchaser who held adversely to the trust; and that, if he bought with notice, the want of notice in any subsequent purchaser is immaterial (*d*). This is a doctrine which the Courts would probably be unwilling to countenance. But no length of possession will, irrespectively of the Statute of Limitations, protect a purchaser buying with notice of the charitable trust (*e*). If trust-property which has been improperly sold finds its way back to the trustee, it becomes re-impressed with the trust, notwithstanding any want of notice on the part of intervening purchasers (*f*).

(*z*) *Horan* v. *MacMahon*, 17 L. R. Ir. 641, 654, per Fitzgibbon, L. J.

(*a*) *Phillips* v. *Munnings*, and *Henry* v. *Armstrong*, *suprà*.

(*b*) *Stone* v. *Van Heythuysen*, 11 Ha. 126; *Re Walhampton Est.*, 26 Ch. D. 391.

(*c*) See *Brandlyn* v. *Ord*, 1 Atk. 571, and *Lowther* v. *Carlton*, 2 Atk. 242; *Sweet* v. *Southcote*, 2 Br. C. C. 66; *Peacock* v. *Burt*, 4 L. J. Ch. 33; but the doctrine is not to be extended, *West London Bank* v. *Reliance Building Soc.*, 29 Ch. D. 954, 963.

(*d*) See *East Grinstead case*, Duke's Ch. Uses, 640, A. D. 1633; and see *Sutton Coldfield case*, *ib.* 642; and *Comm. of Charitable Donations* v. *Wybrants*, 2 J. & L. 194; Tudor's Char. Trusts, 332, 333.

(*e*) *Ante*, p. 440.

(*f*) *Kennedy* v. *Daly*, 1 Sch. & L. 379.

Chap. XV. Sect. 5.

Settlements to defraud creditors, void under 13 Eliz. c. 5.

By the 13th Eliz. c. 5 (made perpetual by the 29th Eliz. c. 5), conveyances made of fraud, to the intent to delay, hinder, or defraud creditors (*g*), are declared to be void: but the Act is not to extend to conveyances made upon good consideration and *bonâ fide* to persons without notice of the intended fraud (*h*). The mere fact of a settlement being voluntary is not enough to render it void against creditors (*i*); nor, on the other hand, is a good consideration sufficient to support it, if the intention be to defraud creditors (*k*); though the existence of a valuable consideration is a circumstance in favour of the validity of the deed (*l*). Thus, where a woman married in 1864, became at various dates after her marriage entitled to sums of money under her father's and grandfather's wills, which she lent to her husband for the purpose of his business, on the express understanding that he would execute a settlement of the monies upon her: and the husband did so in 1883, and thenceforward continued until his bankruptcy to pay her interest on the sums borrowed by him, the settlement was held to be good as against the husband's creditors, there having been consideration for it in the waiver by the wife of her equity to a settlement (*m*). A deed executed on the eve of bankruptcy will not be upheld, if it is, in effect, an assignment of the debtor's solvency (*n*). Nor is the absence of any fraudulent intention on the part of the debtor, or the fact that the settlement was procured from him

(*g*) *Vide post*, p. 1026 *et seq.*

(*h*) Sect. 6; see *Wood* v. *Dixie*, 7 Q. B. 892; *Colombine* v. *Penhall*, 1 S. & G. 228; *Penhall* v. *Elwin*, *ib.* 258; *Ex p. Burnie*, 1 D. M. & G. 441; *Marlow* v. *Orgill*, 8 Jur. N. S. 789, 829; *Darvill* v. *Terry*, 6 H. & N. 807; and see, on the general construction of the statute, *Twyne's case*, 1 Sm. L. C.; and *Skarf* v. *Soulby*, 1 M. & G. 364; *Townsend* v. *Westacott*, 2 B. 340; *Goldsmith* v. *Russell*, 5 D. M. & G. 547; *Christy* v. *Courtenay*, 13 B. 97; *French* v. *French*, 6 D. M. & G. 95; *Neale* v. *Day*, 4 Jur. N. S. 1225; *Acraman* v. *Corbett*, 1 J. & H. 410; *Thompson* v. *Webster*, 7 Jur. N. S. 531; and see, as to settlements, *pendente lite*, *Blenkinsopp* v. *Blenkinsopp*, 1 D. M. & G. 495.

(*i*) *Holmes* v. *Penney*, 3 K. & J. 90, 99.

(*k*) *Bott* v. *Smith*, 21 B. 511.

(*l*) *Holmes* v. *Penney*, *suprà*.

(*m*) *Ex p. Home*, 54 L. T. 301.

(*n*) *Goodricke* v. *Taylor*, 2 H. & M. 380; 2 D. J. & S. 135.

by the fraud of others, sufficient to uphold the deed, if the effect of the transaction is to defeat the claims of creditors (*o*), but on the other hand false recitals and the fact that the settlement was one of non-existing property made by a husband in insolvent circumstances on his marriage, the wife being no party to the fraud, have been held insufficient to upset the deed (*p*). A surety is no more justified in placing his property out of the reach of liability for the debt than if he were the principal debtor (*q*).

The fact that the settlor at the date of the settlement was largely engaged in speculative transactions (*r*), or was about to engage in a hazardous business (*s*), is of course strong evidence that, notwithstanding his apparent solvency, the real intention of the settlor was to place the property beyond the reach of his creditors; and the fact that he has already made provision for the objects of the settlement may not be immaterial in estimating the *bona fides* of the transaction (*t*).

What property is within it.

It has been repeatedly held that an assignment of property incapable of being taken in execution, is not, within the words of the Statute, an assignment with intent to delay creditors (*u*). Thus, copyholds, and money and securities for money were not within the original scope of the Act (*x*): and it was considered a doubtful point whether a person largely indebted might not purchase and settle property, which his creditors, in the absence of direct fraud, would be unable to follow (*y*). Now, however, by the 1 & 2 Vict. c. 110, copyholds may be taken in execution under a writ of *elegit*, and money, bank notes, and securities for money under

(*o*) *Cornish* v. *Clark*, 14 Eq. 184.

(*p*) *Keevan* v. *Crawford*, 6 Ch. D. 29.

(*q*) *Goodricke* v. *Taylor*, *suprà*; see *Ridler* v. *Ridler*, 22 Ch. D. 74.

(*r*) *Crossley* v. *Elworthy*, 12 Eq. 158; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*s*) *Mackay* v. *Douglas*, 14 Eq. 106; *Ex p. Russell*, 19 Ch. D. 588.

(*t*) *Crossley* v. *Elworthy*, *suprà*.

(*u*) *Rider* v. *Kidder*, 10 V. 360; and see *Barrack* v. *M'Culloch*, 3 K. & J. 110, and cases there cited and judgment.

(*x*) See *Mathews* v. *Fraser*, 1 Cox, 278.

(*y*) *Fletcher* v. *Sedley*, 2 Vern. 490; but see *Stone* v. *Van Heythuysen*, 11 Ha. 126; Sug. 706; and see judgment in *Neale* v. *Day*, 4 Jur. N. S. 1225.

Chap. XV. Sect. 5.

a writ of *fi. fa.* (*z*). Since this extension of the law of judgments, a voluntary purchase of stock, by a person largely indebted, in the names of trustees, upon trust for the benefit of his children, has been held fraudulent within the Act (*a*); so, also, an assignment by a person *in extremis* of a policy on his life (*b*).

Tests of validity.

The simple test to be applied in each case is, whether the transaction is *bonâ fide*, or a mere contrivance for the personal benefit of the settlor, or of others whom he wishes improperly to favour. Thus, an ordinary creditor's deed is not within the Act (*c*); unless it be so framed that a creditor, willing to take his fair share of the property, cannot reasonably be expected to accede to it (*d*). So, where a trader debtor, knowing that a writ of sequestration was about to be issued against him, vested the whole of his property in trustees for the benefit of certain of his creditors, and the deed contained a proviso that he should remain in possession for six months, and that if any sequestration should be enforced his possession was to cease, it was held that the deed, although an act of bankruptcy, if any of the excluded creditors had filed a petition upon it, was not void under the 13th Eliz. c. 5 (*e*). Where, as in the case just cited, the transaction is in the nature of a mortgage, retention of possession by the grantor until default is made is no evidence of fraud; but it is otherwise where the possession is retained after what purports to be an absolute conveyance of the property (*f*); though, even in this case, the presumption of fraud may be rebutted (*g*); and

(*z*) See sects. 11 and 12.

(*a*) *Barrack* v. *M'Culloch*, 3 K. & J. 110.

(*b*) *Stokoe* v. *Cowan*, 29 B. 637; as to policies of insurance being securities for money within the 1 & 2 V. c. 116, s. 12, see *Law* v. *Indisputable Life Ass. Co.*, 1 K. & J. 223; *Robson* v. *M'Creight*, 25 B. 272.

(*c*) *James* v. *Whitbread*, 11 C. B. 406.

(*d*) *Owen* v. *Body*, 5 A. & E. 28; see 11 C. B. 418; and *Holt* v. *Kelly*, 13 Ir. L. R. 33.

(*e*) *Alton* v. *Harrison*, 4 Ch. 622; *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 51; see and distinguish *Spencer* v. *Slater*, 4 Q. B. D. 13.

(*f*) *Edwards* v. *Harben*, 2 T. R. 587.

(*g*) *Latimer* v. *Batson*, 4 B. & C. 652.

the fact of a man by a voluntary settlement giving himself a life estate determinable on bankruptcy has been held to be a sufficient indication of a fraudulent intention (*h*). But where a creditor was entitled to a memorandum by which the debtor had a fortnight before his death, insolvent, declared himself trustee of certain property then in mortgage to him and of a bill which he had endorsed to the creditor to secure repayment of a sum of money, it was held that the creditor was entitled to the security as against the other creditors, the debtor having gained no personal benefit by the transaction (*i*). And even on the eve of bankruptcy, suspected by both parties, a *bonâ fide* negotiation for security will be supported (*k*). Where A. conveyed all her property in trust for her daughters in consideration of a covenant by them to pay all her debts incurred up to date in connection with the property, and to maintain her, the transaction was held to be a *bonâ fide* family arrangement not intended to defraud creditors (*l*).

Tarleton v. *Liddell.*

Where a recovery was suffered by A., tenant for life, and B., his son, tenant in tail in remainder, and by the deed leading the uses of the recovery, A.'s life estate was limited to B., in order to defraud A.'s creditors, and, subject thereto, the property was settled on B. for life, with remainder to his first and other sons in tail, but B. was not privy to the fraud, it was held that the recovery was good, and that the deed leading the uses was bad; so that A.'s life estate passed to his assignees in a subsequent bankruptcy, and subject thereto, B. became entitled in fee simple (*m*). A voluntary conveyance with the intention of depriving the plaintiff in an action of the fruits of his verdict has been held to be void (*n*); so, also, where the object of the deed was to defeat proceedings under

(*h*) *Ex p. Stephens*, 3 Ch. D. 807.

(*i*) *Middleton* v. *Pollock*, 2 Ch. D. 104.

(*k*) *Smith* v. *Pilgrim*, 2 Ch. D. 127, and cases there cited.

(*l*) *Golden* v. *Gillam*, 20 Ch. D. 389.

(*m*) *Tarleton* v. *Liddell*, 17 Q. B. 390; 4 De G. & S. 538; *Wakefield* v. *Gibbon*, 1 Giff. 401.

(*n*) *Barling* v. *Bishopp*, 29 B. 417.

Chap. XV. Sect. 5.

a winding up order (*o*). But the intention to defraud must be clear; thus, where A. married in Hong Kong on May 31st, and on October 8th in the same year was served with a writ in a breach of promise action, brought against him in England, and nine days later made a voluntary settlement of a fund which had fallen into possession on May 11th, a fact of which he had not been aware when he married, the settlement was held to be good, there being no sufficient evidence of an intention to "delay, hinder, or defraud creditors" (*p*), and a conveyance, pending an action or judgment, is not necessarily void if supported by a valuable consideration (*q*).

Who may impeach.

It has been held that a conveyance can be set aside as fraudulent against creditors only at the instance of a person who was a creditor at the time; though, when it shall have been set aside, subsequent creditors may be let in (*r*): but the former branch of the proposition cannot now be relied on (*s*); except perhaps in cases where all debts due at the date of the deed have been paid, and there is no evidence of an intention to defraud future creditors (*t*); or in cases where the deed is impeached only on account of the presumption of fraud which arises from its being voluntary (*u*). The whole subject was fully considered in the case of *Spirett* v. *Willows* (*x*); in which Lord Westbury, after remarking on the inconsistency of the authorities, expressed his opinion that the following conclusions were well founded:—"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that his remedy is defeated or delayed by the

(*o*) *Reese River Co.* v. *Atwell*, 7 Eq. 347.

(*p*) *Ex p. Mercer*, 17 Q. B. D. 290. See judgment of Lindley, L. J., p. 301.

(*q*) *Marlow* v. *Orgill*, 8 Jur. N. S. 789, 829; *Darvill* v. *Terry*, 6 H. & N. 807.

(*r*) *Ede* v. *Knowles*, 2 Y. & C. C. C. 178; see *Re Magawley's Trust*, 5 De G. & S. 1; *Stone* v. *Van Heythuysen*, 11 Ha. 126, 133; *Strong* v. *Strong*, 18 B. 408.

(*s*) See *Stone* v. *Van Heythuysen*, 11 Ha. 124; *Graham* v. *Furber*, 14 C. B. 410; *Jenkin* v. *Vaughan*, 3 Dr. 419; *Crossley* v. *Elworthy*, 12 Eq. 158; *Mackay* v. *Douglas*, 14 Eq. 106; and *vide post*.

(*t*) See 3 Dr. 425.

(*u*) *Holmes* v. *Penney*, 3 K. & J. 90, 99.

(*x*) *Spirett* v. *Willows*, 3 D. J. & S. 293.

existence of the settlement, it is immaterial whether the debtor was, or was not, solvent, after making the settlement (*y*); but if a voluntary settlement, or deed of gift, be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show, either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that, after the settlement, he had not sufficient means or reasonable expectation of being able to pay his then existing debts—that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is, therefore, fraudulent and void." And in a later case (*z*), where a trader settled all his property, present as well as future, reserving to himself the control over his stock in trade, and continued to trade, the settlement was held to be void as against his creditors, although he did not appear to have been indebted at the date of its execution. And where a father had given to a bank a guarantee to secure his son's balance up to £1,000, and, when it was already overdrawn to the extent of £1,500, made a voluntary settlement of leaseholds worth £200 a year subject to a ground rent of £3 10*s.* 0*d.*—his only other property being a small amount of furniture and a debt of £1,500 due from his same son—it was held that the settlement was void as against creditors, as amounting in fact to a settlement of all the settlor's property, since the liability under the guarantee must be regarded as substantial, and the settlor would, after the settlement, have nothing to meet that liability except the debt due from his son, which *ex hypothesi* could only be a dividend on his son's estate (*a*).

Remarks on *Spirett* v. *Willows*.

The dicta of Lord Westbury in the case of *Spirett* v. *Willows* have not met with unqualified approval (*b*); and, if taken as abstract propositions of law, are stated somewhat

(*y*) See, however, as to this *dictum*, *Freeman* v. *Pope*, 5 Ch. 538.

(*z*) *Ware* v. *Gardner*, 7 Eq. 317.

(*a*) *Ridler* v. *Ridler*, 22 Ch. D. 74.

(*b*) *Freeman* v. *Pope*, 5 Ch. 538; and see *Kent* v. *Riley*, 14 Eq. 190.

Chap. XV. Sect. 5.

too broadly. The mere circumstance that the debt of the creditor impeaching the deed was existing at the date of the settlement will not of itself entitle him to relief against it, unless from all the circumstances an intention to defraud creditors must be presumed. Actual proof of an express fraudulent intention is not required, except, it has been said, in cases where the settlement sought to be set aside is founded on a valuable consideration (*c*); and even in these cases, it is submitted, the difference consists not so much in the nature of the proof required, as in the degree of its cogency—the fact of a valuable consideration of itself rebutting any *primâ facie* presumption of fraud.

Mere delay no bar to creditor's rights under statute.

Where the deed comes within the statute, the creditor's right is a legal one, and will not be affected by any delay in enforcing it, short of such a delay as bars the debt altogether (*d*).

Person who has assisted in preparing a voluntary deed may not claim adversely to it.

It was held, by an eminent Judge, that a person who has assisted in the preparation and carrying out of a voluntary deed, is not thereby necessarily precluded from enforcing his claim adversely to it, as a creditor of the settlor; but this was reversed on appeal (*e*). It has also been decided that an indictment will lie against both the grantor and grantee in a fraudulent deed (*f*); and therefore where a bill is filed to set aside a deed as fraudulent under the Statute, a defendant who is a party to the deed, either as grantor or grantee, may decline to answer the interrogatories (*g*).

How voluntary settlements may be avoided under the new

The Bankruptcy Act of 1883 (*h*) has introduced several important provisions with reference to the avoidance of voluntary settlements. By the 47th section, any settlement

(*c*) See judgment of L. J. Giffard, in *Freeman* v. *Pope*, *suprà*.

(*d*) *Three Towns Banking Co.* v. *Maddever*, 27 Ch. D. 523.

(*e*) *Oliver* v. *King*, 1 Jur. N. S. 1066; rev. 8 D. M. & G. 110.

(*f*) *Reg.* v. *Smith*, 6 Cox, C. C. 31.

(*g*) *Wych* v. *Parker*, 22 B. 59.

(*h*) 46 & 47 V. c. 52. The 91st sect. of the Act of 1869 was confined to settlements made by traders, while in the present Act no distinction is drawn between classes; and the 47th sect. of the later Act is not retrospective so as to apply to a settlement made prior to its coming into operation; *Ex p. Todd*, 19 Q. B. D. 186.

of property (not being a settlement made before and in consideration of marriage, or in favour of a purchaser (*i*) or incumbrancer in good faith and for valuable consideration, or a settlement, made on or for the wife or children of the settlor, of property, which has accrued to him after marriage in right of his wife (*k*)), is made void as against his trustee under the Act, if he becomes bankrupt within two years after the date of the settlement; and if he becomes bankrupt at any subsequent time within ten years from such date, then it is also to be void, unless the parties claiming under it can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement (*kk*), and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. And any covenant, or contract made in consideration of marriage, for the future settlement upon or for the settlor's wife or children of any money or property wherein he had not, at the date of the marriage, any estate or interest whether vested, or contingent, in possession, or remainder, and not being money or property of or in right of his wife, is made void as against his trustee under the Act, in the event of his becoming bankrupt before such property or money has been actually transferred or paid, pursuant to such contract or covenant; and the word "settlement" is for the purposes of this section to include any conveyance or transfer of property. But it has been held not to include a gift of money to a son for the purpose of setting him up in business (*l*). The section does not apply, where the estate of the settlor is being administered as insolvent by the Court of Bankruptcy (*ll*).

Under the 48th section.

By the 48th section, every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or

(*i*) A purchaser in the ordinary commercial, and not in the legal, sense is meant, so that a trustee of a post-nuptial settlement is not a purchaser within the sect.; *Ex p. Hillman*, 10 Ch. D. 622.

(*k*) *Ex p. Home*, 54 L. T. 301.

(*kk*) But this does not include the interest which the settlor himself takes under the settlement; *Re Lowndes*, 18 Q. B. D. 677.

(*l*) *Ex p. Harvey*, 15 Q. B. D. 682.

(*ll*) *Re Gould*, 19 Q. B. D. 92.

Chap. XV. Sect. 5.

suffered by any person unable to pay his debts as they become due, from his own moneys, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference (*m*) over the other creditors, is to be deemed fraudulent and void under the Act, in the event of the person making, taking, paying, or suffering the same being adjudged bankrupt on a bankruptcy petition presented within three months (*n*) after the date of making, taking, paying, or suffering the same; but the section is not to affect the rights of any person making title in good faith, and for valuable consideration, through or under a creditor of the bankrupt (*o*). And by the 49th section certain transactions with the bankrupt, or in relation to his property, are protected from the operation of the Statute (*p*).

On what terms purchaser is evicted in Equity.

Where a purchaser for value is evicted in Equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements (*q*) (except improvements made after he has discovered the defect of title (*r*)); and will be debited with the rents which he has received: but, unless guilty of actual fraud or purchasing with notice of an infant's title (*s*), the account will not extend to such rents as, without his neglect or default, he might have received (*t*): nor will he be conclusively bound by his admissions in his answer as to receipts (*u*): nor, except in cases where the defendant fills a fiduciary character, will the account, as a general rule, be carried back beyond the filing of the bill (*x*). Where a mortgagee, claim-

(*m*) As to what is a fraudulent preference, see *Ex p. Griffith*, 23 Ch. D. 69; *Ex p. Hill*, *ib.* 695; *Ex p. Taylor*, 18 Q. B. D. 295; Yate-Lee, 422 *et seq.*

(*n*) See *Re Liverpool Guarantee Co.*, 30 W. R. 378.

(*o*) It would seem that the protection is not under this section extended to the creditor himself as well as to those claiming under him, as was held to be the case under s. 92 of the Act of 1869; see *Butcher* v. *Steed*, L. R. 7 H. L. 839.

(*p*) See *ante*, p. 951.

(*q*) *Mill* v. *Hill*, 3 H. L. C. 828.

(*r*) *Kenney* v. *Browne*, 3 Ridg. P. C. 518; *Clare Hall* v. *Harding*, 6 Ha. 273.

(*s*) *Blomfield* v. *Eyre*, 8 B. 250.

(*t*) *Howell* v. *Howell*, 2 M. & Cr. 478.

(*u*) *S. C.*

(*x*) *Thomas* v. *Thomas*, 2 K. & J. 79, 85; and see *Hicks* v. *Sallitt*, 3 D. M. & G. 782, 813; *Nanney* v. *Williams*, 22 B. 470; *Hicks* v. *Hastings*, 3 K. & J. 701; and compare *Penny*

ing under a tenant for life, remained in possession after the death of the tenant for life, of which he was in ignorance, it was held that he must, in default of equitable considerations, account to the remainderman for six years' arrears of rents prior to the filing of the petition, on the analogy of a legal claim (*y*). Annual rests will not be directed, unless a special case for that form of decree be made on the pleadings (*z*): and the decree should contain a direction for just allowances (*a*). Where a man completed the purchase of, and paid for, an estate which his wife had contracted for before marriage, and then sold it without her concurrence, the purchasers, upon being evicted by the wife's heir after the husband's death, were allowed a lien on the estate for the purchase-money paid by the husband and for moneys expended in lasting improvements from the date of his purchase, with interest: but, accepting this relief, they were treated as mortgagees in possession; and were debited with rents received, or which might but for wilful default have been received, during the like period (*b*).

Whether he can claim for improvements or repairs.

A person claiming under a fraudulent deed, voidable at Law, cannot, however, claim for improvements or repairs (*c*); but the rule may be different when relief against the deed can be afforded only in Equity (*d*): and the deed, though invalid, is not actually fraudulent (*e*): and even at Law, in an action for mesne profits, an allowance may be made for

v. *Allen*, 7 D. M. & G. 409, 427; *Morgan* v. *Morgan*, 10 Eq. 99.

(*y*) *Hickman* v. *Upsall*, 4 Ch. D. 144.

(*z*) *Neesom* v. *Clarkson*, 4 Ha. 97; see *Donovan* v. *Fricker*, Jac. 165.

(*a*) *Howell* v. *Howell*, 2 M. & C. 478.

(*b*) See *Neesom* v. *Clarkson*, 2 Ha. 176; 4 Ha. 97; *quære* whether an allowance should not have been made for interest upon the difference between Clarkson's and Syke's purchase-money, the account of rents and profits being carried back to the date of Syke's purchase. And see and consider *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, and Lord Westbury's comments on *Neesom* v. *Clarkson*; see too *Maddison* v. *Chapman*, 1 J. & H. 470.

(*c*) *Musadee* v. *Meerza*, 8 Mo. P. C. 90, 113.

(*d*) *Hamblyn* v. *Ley*, 3 Sw. 301; *Trevelyan* v. *White*, 1 B. 588; *Stepney* v. *Biddulph*, 13 W. R. 576.

(*e*) *Stepney* v. *Biddulph*, *ibid.*

Chap. XV. Sect. 5.

ground-rent, rates, and taxes (*f*); and where there is a mere legal right to be determined at Law, it seems doubtful whether, according to present practice, a Court of Equity has any jurisdiction to make an allowance to the evicted party for money expended in repairs (*g*).

If estate belonged to infant.

Where the purchase is of the estate of an infant, the purchaser may, it seems, be treated as a bailiff, and be charged with interest on his balances, and with such rents as he might have received but for wilful default (*h*): and the account will not be limited to a period of six years next before the filing of the bill, but will be carried back to the commencement of the purchaser's possession (*i*). It has, however, been held that this extraordinary relief is to be confined to cases where the infant has been in possession by himself or his guardian; and does not extend to an ordinary case of adverse title (*k*), or of a purchaser buying from another an estate which really belongs to an infant.

Purchase by trustees.

As a general rule, where the defendant fills a fiduciary character the account is directed, either from the commencement of his occupancy, or from six years before the commencement of the action, at the discretion of the Court (*l*).

Statute of Limitations begins to run on conveyance by trustees.

Where land vested in trustees upon an express trust is sold by them in breach of trust, the conveyance to the purchaser sets the Statute of Limitations running as against the *cestui que trust* (*m*). But, as we have already seen (*n*), a much shorter time than the statutory limit will bar a *cestui que trust* who, without reasonable excuse, knowingly

(*f*) *Barber* v. *Brown*, 1 C. B. N. S. 121.

(*g*) *Hooper* v. *Cooke*, 20 B. 639.

(*h*) *Blomfield* v. *Eyre*, 8 B. 250; and see *Wyllie* v. *Ellice*, 6 Ha. 505.

(*i*) *Hicks* v. *Sallitt*, 3 D. M. & G. 782; *Schroder* v. *Schroder*, Kay, 590; *Hicks* v. *Hastings*, 3 K. & J. 701; *Nanney* v. *Williams*, 22 B. 452.

(*k*) *Crowther* v. *Crowther*, 23 B. 305.

(*l*) *Thomas* v. *Thomas*, 2 K. & J. 85; and see *Penny* v. *Allen*, 7 D. M. & G. 409; and see cases cited *ante*, p. 1032.

(*m*) 3 & 4 Will. IV. c. 27, s. 25.

(*n*) *Ante*, p. 54.

neglects to prosecute his claim to the property. In cases of concealed fraud the Statute does not begin to run until the fraud is or might be discovered (*o*).

Section 6.

(6.) *As to contribution to paramount charges.*

Contribution by purchasers to paramount charge.

Where an estate subject to a paramount charge becomes divided amongst several *bonâ fide* purchasers, it becomes a matter of some difficulty to determine the proportions in which they are to bear it as between themselves. The authorities on the subject will be found stated in full in a learned note by the editor of Mr. Jarman's work on Conveyancing (*p*), and seem to lead to the following conclusions, *viz*:—

If two estates, X. and Y., are subject to a common charge, and estate X. be sold to A., A. will, as against the vendor and his representatives, have a *primâ facie* equity, in the absence of express agreement, and whether or no he had notice of the charge, to throw it primarily on estate Y. in exoneration of estate X. (*q*).

If, then, estate Y. be subsequently sold to B. with notice of the charge and of the prior sale of X. to A., B. purchases with notice of A.'s equity, and the entire charge must rest primarily upon Y. (*r*).

If B., at the time of his purchase, have notice of the charge as affecting Y., but be not led to suppose that estate X. is also subject to it, or if he purchase without notice of the charge, and A. purchased with notice of the charge as affecting Y., in either of these cases, it is conceived, B.'s

(*o*) See sect. 26.

(*p*) Vol. IX. pp. 127 *et seq.*; and see *Aicken* v. *Macklin*, 1 D. & Wal. 621; *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

(*q*) The marginal note to *Barnes* v. *Racster*, 1 Y. & C. C. C. 401, is incorrect; the first mortgage in that case was of only *one* estate, see p. 403. *Tidd* v. *Lister*, 10 Ha. 157.

(*r*) See and consider *Hamilton* v. *Royse*, 2 Sch. & L. 315, 328.

Chap. XV. Sect. 6.

equity is inferior to A.'s, and the entire charge must rest primarily upon Y.

If B. purchase with notice of the charge as affecting Y., and with no notice of the sale to A., and be led to suppose that X. is subject to the charge, or if both purchase without notice of the charge, B.'s equity would appear in either case to be equal in degree to A.'s: so that, either party, by taking a transfer of the charge and the securities (supposing them to be such as to give the incumbrancer a claim at Law against the two estates), would, it is conceived, be able to throw the charge exclusively upon the other (*s*). So, the incumbrancer, himself, if able to proceed at Law against the estates, might proceed against the two in such proportions, or against such one only, as he saw fit: and the purchasers, if they had the legal estate (as might happen in the case of the incumbrance being a rent-charge), would have no remedy as between themselves (*t*): but if their estates were equitable, or if the incumbrancer were obliged to, or did in fact, resort to a Court of Equity for payment of his claim, then the equities being equal, A.'s would prevail as being prior in date.

In case of mortgages.

So, in the case of mortgages, if two estates, X. and Y., are subject to a common charge in favour of A., and afterwards X. alone is mortgaged to B., B. is entitled to have the securities marshalled, and to throw A.'s mortgage primarily on

Consolidation.

estate Y. in exoneration of estate X. (*u*). And where two separate estates, each of which was subject to a prior mortgage, were by the same deed mortgaged to A. for securing an entire sum, and the two prior mortgages were subsequently transferred to B., who had notice of A.'s charge, it was held, in a suit for foreclosure by B., that A. could not insist on

Extent of the doctrine.

redeeming one estate without the other (*x*). In this case it

(*s*) See *Titley* v. *Davies*, 2 Y. & C. C. C. 399; and see *Sober* v. *Kemp*, 6 Ha. 155.

(*t*) But the grantee of a rent-charge cannot *distrain* for part upon one, and for another part upon another, tenant: *Owens* v. *Wynne*, 4 E. & B. 579.

(*u*) See *Gibson* v. *Seagrim*, 20 B. 614; and see *Liverpool Marine Co.* v. *Wilson*, 7 Ch. 507, 512.

(*x*) *Vint* v. *Padgett*, 2 D. & J. 611.

will be observed that both the equities of redemption were vested in the same person, and the decision may perhaps be supported on that ground (*y*), although it was not the ground stated for the actual decision. The principle which now governs the doctrine of consolidation, so far as that doctrine still exists in spite of the Conveyancing Act, 1881 (*z*), is that the purchaser of an equity of redemption takes it subject to all other equities which at the date of his purchase affected it in the hands of his vendor—of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor is one—and subject to those equities only; so that he cannot be affected by any equities subsequently created by the mortgagor (*a*). Thus, where a mortgagor assigned the equity of redemption of one property to A., and afterwards mortgaged another property to the mortgagee of the first, A. was held entitled to redeem the first mortgage without redeeming the second (*b*). And where a mortgagor makes mortgages of two separate properties to separate mortgagees, and then assigns the equity of redemption of one of them (whether by way of sale or mortgage is immaterial), and the two mortgages subsequently become united in the same mortgagee, he cannot insist on the assignee redeeming both together (*c*).

Arises in foreclosure and redemption actions;

The right to consolidate two or more securities from the same mortgagor arises not only where the action is for redemption, but equally in a foreclosure action (*d*), on the ground that the latter action is in its nature a claim that the owner of the equity of redemption shall exercise his equitable right then or never. But in order to enable the mortgagee to bring an action and to consolidate there must be two debts

(*y*) Per Fry, J., 19 Ch. D. at p. 635.

(*z*) Sect. 17.

(*a*) *Jennings* v. *Jordan*, 6 Ap. Ca. 698, 701.

(*b*) *Ibid.*

(*c*) *Harter* v. *Colman*, 19 Ch. D. 630; and see *Bird* v. *Wenn*, 33 Ch. D. 215. *Tassell* v. *Smith*, 2 D. & J. 713, and *Beevor* v. *Luck*, 4 Eq. 537, must now be treated as overruled.

(*d*) *Selby* v. *Pomfret*, 3 D. F. & J. 598.

Chap. XV. Sect. 6.

but only where default is made on both securities.

due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem; and that cannot apply to a case where as regards one of the securities there has been no forfeiture at all, where the debt is not due, and where as regards that estate and that security—an independent security—steps could not be taken, as against the owner of the equity of redemption, to bring him into court, and to call upon him to redeem or be foreclosed (*e*).

Effect of Conv. Act, 1881.

It must, however, be observed that in the case of any mortgage made since the 31st of December, 1881, the old equitable doctrine of consolidation does not apply, unless it forms a term of the contract between the parties that it shall do so, notwithstanding the statute. In the absence of the expression of such an intention a mortgagor seeking to redeem is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem (*f*). And the principle is applicable not only to the debts, but also to the costs of an action to foreclose two separate mortgages. Thus, where a mortgagee brought an action to foreclose two mortgages which were not liable to be consolidated, it was held that the whole of the costs could not be charged against each estate, because that would amount to a consolidation as to costs: but that each estate must bear the costs of the foreclosure and redemption so far as they were attributable to itself (*g*).

Extends to costs as well as to debts.

Purchaser subject to common charge supposed to be invalid.

If A. and B. simultaneously purchase estates X. and Y., with notice of a common charge, supposed to be invalid, but which eventually proves not to be so, and without making any provision for such a contingency, such charge, it is conceived, would, as between the purchasers, be borne by the

(*e*) *Cummins* v. *Fletcher*, 14 Ch. D. 699, 712, per Cotton, L. J.

(*f*) Conv. Act, 1881, s. 17.

(*g*) *De Caux* v. *Skipper*, 31 Ch. D. 635, overruling *Clapham* v. *Andrews*, 27 Ch. D. 679.

two estates, in shares proportioned to their respective values at the date of the purchase.

Land-tax.

The 38 Geo. III. c. 60, contains provisions for the apportionment of land tax, where lands which have been rated together, are severed.

Fee-farm rents, &c.

We have already referred to the provisions usually made for the apportionment of a fee-farm rent or rent-charge, or of the rent and liabilities under a lease on the sale of freeholds or leaseholds in lots (*h*); and to the provisions of the Apportionment Acts (*i*).

Section 7.

(7.) *As to the rights of third parties after conveyance in various cases.*

As to the rights of third parties after conveyance in various cases.

Provision in Lands Clauses Consolidation Act, 1845, for purchase of omitted interests.

The Lands Clauses Consolidation Act, 1845, contains provisions which enable the promoters of an undertaking, upon the discovery at any time of the existence of any outstanding estates or interests, to purchase the same compulsorily (*k*).

Estate sold subject to charge known, but treated as invalid, incumbrancer has no claim on vendor.

Where an estate was devised to A., subject to the payment of a legacy—which was held to charge only the estate, and not A. personally—and A. sold the estate to B. with notice of the legacy, but without any reduction of purchase-money being made in respect thereof (the parties having determined that the charge was, upon technical grounds, inoperative), it was held that the legatee could not treat A. as a trustee in respect of so much of the purchase-money as would answer the legacy (*l*).

(*h*) *Vide ante*, p. 147.

(*i*) *Vide ante*, p. 915.

(*k*) See 8 V. c. 18, s. 124 *et seq.*; *Hyde* v. *Manchester Corp.*, 5 De G. & S. 249. As to the effect of a conveyance of copyholds according to a form prescribed in a private Act, see *Grand Junction Canal Co.* v. *Dimes*, 15 Si. 402.

(*l*) *Jillard* v. *Edgar*, 3 De G. & S. 502; and see *Newman* v. *Kent*, on app. *ib.* 510; reported below, 1 Mer. 241.

Chap. XV. Sect. 7.

Conveyance of equity of redemption to mortgagee.

It was long considered that where a mortgagee purchases and takes a conveyance to himself of the equity of redemption, he thereby lets in all intermediate incumbrances of which he had notice (*m*); unless the property is conveyed to a trustee, for the express purpose of keeping the charge alive (*n*). The general doctrine was doubted by Knight-Bruce, L.J. (*o*); and upon examining the registrar's book, it appears that the leading case on the subject is no authority whatever for the proposition in support of which it has been usually cited. The facts were these—the estate was mortgaged by Walker to Marsham; then two judgments were entered up against Walker; then Walker sold and conveyed the equity of redemption to Marsham; "before the deed of sale the defendant Marsham had notice thereof (*viz.*, the judgments), and therefore had the premises for 245*l.* less than the premises were worth:" the amount struck off from the purchase-money being the estimated amount due on the judgments; and the amount actually paid by Marsham to Walker being 600*l.*: so that the case was clear for relief against Marsham, not *quâ* mortgagee, but *quâ* the purchaser of the equity of redemption (*p*).

The scope of the doctrine defined.

Since the publication of the last edition of this work the doubt above expressed has been justified. In a recent case (*q*), the Court of Appeal intimated that the doctrine of *Toulmin* v. *Steere* (*r*), if, indeed, binding upon them, would not be extended, and that the question was to be treated as one simply of intention, the practice of conveying to a trustee being merely an unnecessarily formal mode of expressing

(*m*) *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Brown* v. *Stead*, 5 Si. 535; and see *Toulmin* v. *Steere*, 3 Mer. 210; *Smith* v. *Phillips*, 1 Ke. 694; *Squire* v. *Ford*, 9 Ha. 60; *Tildesley* v. *Lodge*, 3 S. & G. 543; *Chesshyre* v. *Biss*, 2 Gif. 287.

(*n*) *Bailey* v. *Richardson*, 9 Ha. 734; and see *Watts* v. *Symes*, 1 D. M. & G. 240, 243; *Davis* v. *Barrett*, 14 B. 542; and also the third point decided in *Mocatta* v. *Murgatroyd*, 1 P. W. 393.

(*o*) 1 D. M. & G. 244.

(*p*) *Greswold* v. *Marsham*, Hil. T. 1 Jac. II., Reg. Lib. A. 1685, fo. 399.

(*q*) *Adams* v. *Angell*, 5 Ch. D. 634, 645.

(*r*) 3 Mer. 210.

such intention. It was pointed out that the mere fact of paying off a charge does not decide the question whether it is extinguished; that, if a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance, on the ground of presumed intention; that, where, as in the case of an owner in fee paying off the charge, there is no reason for keeping it alive, Equity will destroy it; but that, if there is any reason for keeping it alive, such as the existence of another incumbrance, Equity will not destroy it; that in the case of a purchase, if without going through the ceremony of the assignment to a trustee for the purchaser of the equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot, then the charge is treated as remaining on foot; that, if no intention is expressed or implied, then it is true, as was said in *Toulmin* v. *Steere*, that the incumbrance which was paid off is merged, and the subsequent incumbrancers are let in. And in a still more recent case, on appeal from India, the Privy Council laid down the same doctrine upon general principles (*s*).

Illustrations of the principle.

The following cases illustrate the principle that intention is the test. Where A. and B., joint owners, mortgaged their estate to C. to secure a common debt, and B. then sold his share to A., leaving the purchase-money a charge upon the estate, and A. subsequently sold the equity of redemption to C., in consideration of being released from the original mortgage debt, for which the estate was an insufficient security, it was held that C.'s first mortgage was not extinguished as against B., so as to give B. priority over C. (*t*). In this case, B., by the sale of the equity of redemption to C., was released from his liability under the first mortgage; and it was obviously inequitable that, while getting the benefit of the extinction of the first charge, he should at the same time

(*s*) *Gokuldoss* v. *Rambux*, 11 Ind. Ap. 126. And see *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515.

(*t*) *Hayden* v. *Kirkpatrick*, 34 B. 645.

claim, as against C., priority for his second mortgage. So, where a legal mortgagee of leaseholds, with the concurrence of the executor of the mortgagor, assigned the property to a new mortgagee, in consideration of the discharge of his debt and a further advance to the executor, and the deed contained no assignment of the mortgage debt, it was, nevertheless, held that the debt was not extinguished, so as to give priority to a *mesne* incumbrancer (*u*). The Court considered it clear that there was an intention to preserve the priority of the first charge; but the decision was mainly rested on the ground that the maintenance of the original debt, as a debt, was not essential to the continuance of the security. If a mortgagee surrenders his security to the trustee in bankruptcy of the mortgagor, the effect is not to merge the security in the equity of redemption which is vested in the trustee, but to place the trustee for all purposes in the position of the original mortgagee, as against other incumbrancers (*x*). And the case is the same, where the trustee purchases the security of a mortgagee (*y*).

Mortgagor buying from his first mortgagee cannot defeat mesne incumbrancers.

If a mortgagor purchase from his first mortgagee, selling under his power of sale, he takes the property subject to any subsequent incumbrances which he himself may have created (*z*).

Mortgagee selling after foreclosure.

If a mortgagee having no power of sale, foreclose, and then fairly sell the estate for less than the amount due to him, he cannot afterwards recover from the mortgagor, upon his collateral personal security, the amount remaining unsatisfied (*a*): but the principle of this decision—such principle, it is conceived, being that the action would open the foreclosure—would not apply to the case of a sale under the usual power or trust. And the mere attempt to sell will not,

(*u*) *Phillips* v. *Gutteridge*, 4 D. & J. 531.

(*x*) *Cracknall* v. *Janson*, 6 Ch. D. 735.

(*y*) *Bell* v. *Sunderland Building Soc.*, 24 Ch. D. 618.

(*z*) *Otter* v. *Lord Vaux*, 6 D. M. & G. 638.

(*a*) *Lockhart* v. *Hardy*, 9 B. 349.

in Equity, disentitle the mortgagee to prove against the mortgagor's estate in an administration suit: but he will not be allowed the costs of the foreclosure (*b*); and, of course, not of the attempted sale.

Purchaser from mortgagee bound by his agreement with mortgagor.

A person who, having contracted with a mortgagee for the purchase of the property under his power of sale, entered into a subsequent agreement with the mortgagor to allow him to redeem, and then took a conveyance of the property, has been held bound by such agreement (*c*).

Judgment creditor purchasing part of the lands extended.

Where a judgment creditor, having become tenant by elegit, buys part of the lands extended, this will discharge the residue of the lands, and satisfy the judgment (*d*). So, in the case of a rent-charge, the purchase of part of the land by the grantee discharges the residue: *sed aliter*, in the case of a rent-service (*e*).

Purchase of copyholds by one of several lords of a manor.

Where several persons were seised of a manor as tenants in common in fee, and one of them purchased copyholds of the manor, and was admitted thereto, with the concurrence of the other lords, it was held that his copyhold interest in the lands was, to the extent of his undivided interest in the manor, extinguished or merged in the freehold (*f*).

Conveyance determines parol licence.

The conveyance, we may remark, puts an end to a parol licence from the vendor to a stranger, to enjoy an easement over the estate; and if he afterwards enter on the land, his ignorance of the sale will be no defence to an action of trespass at the suit of the purchaser (*g*); and although the

(*b*) *Haynes* v. *Haynes*, 3 Jur. N. S. 504; Seton, 1089.

(*c*) *Orme* v. *Wright*, 3 Jur. 19, 972.

(*d*) *Ross* v. *Pope*, Plow. 72; Shep. T. 366; 3 Bac. Ab. Execution, B. 370; *Handcock* v. *Handcock*, 1 Ir. Ch. R. 467; *Hele* v. *Lord Bexley*, 17 B. 14; 20 B. 127.

(*e*) Co. Litt. 147 b, 148 a.

(*f*) *Cattley* v. *Arnold*, 4 K. & J. 595; see judgment and cases cited.

(*g*) *Wallis* v. *Harrison*. 4 M. & W. 538; and see *Wood* v. *Leadbitter*, 13 M. & W. 838; *Coleman* v. *Foster*, 1 H. & N. 37; and see *Frogley* v. *Lord Lovelace*, John. 339; *Taplin* v. *Florence*, 10 C. B. 744.

licensee may have incurred expense upon the faith of the licence, this does not destroy its revocable character (*h*).

Purchaser of part of rent-charge may distrain.

A rent-charge may be divided without the consent of the owner of the lands charged; and it would appear that, if conveyed to several purchasers, each may distrain upon the tenant before attornment (*i*); but if the rent-charge be severed there can be no distress for arrears (*k*).

Effect now of release of part of lands from rent-charge.

It was formerly a rule of law that a release of any part of lands charged with a rent-charge necessarily operated as a release of the rent-charge on the whole of the lands charged (*l*). Various ingenious contrivances were adopted by conveyancers to evade this rule (*m*), until it was abolished by Lord St. Leonards' Act (*n*), which provides that the release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all parties interested in the hereditaments remaining unreleased, and not concurring in or confirming the release. The effect of the latter part of this section has been held to be neither, on the one hand, to extinguish the whole rent-charge, nor, on the other hand, to make the whole rent-charge payable out of the unreleased portion of the lands; but to make the unreleased portion of the lands chargeable with such part of the whole rent-charge as is proportionate to its value (*o*).

Upon a question of boundaries between purchasers of adjoining lots who have obtained their conveyances, the

(*h*) *Adams* v. *Andrews*, 15 Q. B. 284; as to the licensee being entitled to reasonable notice of the revocation of the licence, see *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400.

(*i*) *Rivis* v. *Watson*, 5 M. & W. 255; and see 4 & 5 Anne, c. 3 (Ruff. 4 Annè, c. 16), s. 9.

(*k*) *Stavely* v. *Alcock*, 16 Q. B. 636.

(*l*) Co. Litt. 147 b.

(*m*) Shep. T. 345.

(*n*) 22 & 23 V. c. 35, s. 10.

(*o*) *Booth* v. *Smith*, 14 Q. B. D. 318.

advertisement of sale under which they bought may, under special circumstances, be received as evidence of reputation (*p*).

Purchaser, when liable for nuisance.

In *Rex* v. *Pedly* (*q*) it was laid down by Littledale, J., that if a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the purchase, so that he has no opportunity of removing the nuisance, yet, by purchasing the reversion, he makes himself liable for the nuisance. But if, after the reversion is sold, the nuisance is erected by the occupier, the reversioner incurs no liability. If, however, there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with a nuisance upon it. But in one case (*r*) the Court of Common Pleas held that although a man may be liable for demising premises when the nuisance exists, or for re-letting them after their user has created a nuisance, or for not doing that which he had undertaken to do, and which would have prevented the nuisance, yet he is not responsible for the acts of his tenant in creating a nuisance by the manner in which he uses the premises, they being such as may or may not become a nuisance (*s*).

As to liability of leaseholder for rent and covenants after sale.

A lessee, although he may have sold and assigned away the term, continues liable for the performance of the covenants as well as for the payment of the rent, during the continuance of the term: but a person who claims merely as assignee, as

(*p*) *Murley* v. *M'Dermott*, 3 N. & P. 356, 360.

(*q*) 1 A. & E. 827; and see *Rosewell* v. *Prior*, 2 Salk. 460.

(*r*) *Rich* v. *Basterfield*, 4 C. B. 783, 805.

(*s*) As to what is a nuisance, see *Walter* v. *Selfe*, 4 De G. & S. 322, and the definition there given: *Soltan* v. *De Held*, 2 Si. N. S. 133; and see *St. Helen's Company* v. *Tipping*, 11 H. L. C. 642; *Crump* v. *Lambert*, 3 Eq. 409; and see *Harrison* v. *Good*, 11 Eq. 338, where the establishment of a national school was held not to be a nuisance within the meaning of the ordinary restrictive covenant. Noise, noxious vapour and smoke, though not injurious to health, have been held to be a nuisance to an adjoining owner; see *Inchbold* v. *Robinson*, 4 Ch. 388, and cases there cited; and see Kerr, Inj. 397.

there is no privity of contract between him and the reversioner, is liable only for such breaches of covenant and such rent as occur or accrue due during his individual ownership; and for these, he may be sued at law even after having assigned over (*t*): but, of course, he remains liable under such covenants for indemnity, &c., as he may have entered into with the party from whom he himself purchased. It has been held, at Law, that each successive assignee of a lease is under an implied obligation to indemnify the original lessee against all breaches committed during the continuance of his own interest; and that this implied contract is not negatived by an express covenant to indemnify the immediate assignor (*u*).

(*t*) See *Harley* v. *King*, 2 C. M. & R. 18; *Pitcher* v. *Tovey*, 1 Salk. 81; 2 Platt, 417, 418; but see *Fagg* v. *Dobie*, 3 Y. & C. 103; *Moule* v. *Garrett*, L. R. 5 Ex. 132; 7 *ib.* 101.

(*u*) *Moule* v. *Garrett*, *supra*.

CHAPTER XVI.

AS TO THE RIGHTS, UNDER THE CONVEYANCE, OF JOINT PURCHASERS, AND PERSONS OTHER THAN THE NOMINAL PURCHASERS.

1. *As to joint purchasers.*
2. *As to purchases in name of nominal purchaser.*

Purchasers joint-tenants at Law, and when in Equity.

(1.) A CONVEYANCE of land to two or more persons without words indicating that they are to take as tenants in common, constitutes, at Law, a joint tenancy (*a*) : and the rule is the same in Equity (*b*), if they advance the money in equal proportions (*c*), and do not purchase as partners, or for the purposes of trade or speculation.

Not if they contribute unequally to purchase-money ;

If, however, two purchase, and one advance more of the purchase-money than the other, there will, in Equity, be no survivorship, although there are no words indicating a tenancy in common (*d*) ; but they will, in the absence of any stipulation to the contrary, be interested in proportion

(*a*) Co. Litt. 180 b ; *Aveling* v. *Knipe*, 19 V. 441, 444. Husband and wife, acquiring lands either by gift or conveyance during coverture, formerly held by entireties, *per tout et non per my ;* Litt. sect. 291 ; Co. Litt. 187 a ; Challis, R. P. 303. On the effect of the Married Women's Property Act, 1882, on the doctrine, see Challis, 305 ; *Mander* v. *Harris*, 27 Ch. D. 166. The result of this case, taken in connection with the Act, seems to be that the question is one of intention, but that in the absence of such an intention husband and wife take as separate persons.

(*b*) *Moyse* v. *Giles*, 2 Vern. 385 ; *Rea* v. *Williams*, Sug. 698, where the conveyance was taken in the name of the trustee ; *Bone* v. *Pollard*, 24 B. 283.

(*c*) Sug. 697, 698 ; and see *Robinson* v. *Preston*, 4 K. & J. 505, and the cases there reviewed.

(*d*) *Rigden* v. *Vallier*, 2 V. sen. 252, 258 ; *S. C.*, 3 Atk. 731, 735 ; but see *Harris* v. *Fergusson*, 16 Si. 308 ; as to the soundness of the distinction between equal and unequal advances of the purchase-money, see reporter's note in *Jackson* v. *Jackson*, 9 V. 597 ; Sug. 698 ; 1 Wh. & T. L. C. 223.

Chap. XVI. Sect. 1.

to their shares of the purchase-money. In *Lake* v. *Gibson* (*e*), the proposition is qualified by the expression, "if the proportions of the money are not equal, *and this appears on the deed itself*" (*f*), and the *dictum* is thus cited by Lord St. Leonards (*g*): but the rule is laid down by Lord Hardwicke without qualification (*h*). It is, however, conceived that the inequality in the sums advanced, must, to have this effect, be in accordance with the original or some subsequent express agreement between the parties; and not be the mere result of any temporary pecuniary arrangement at the time of the completion of the purchase (*i*).

although circumstances may raise a presumption of a tenancy in common,

And, although the purchase-money may have been contributed in equal proportions, an intention to hold in severalty may be presumed *aliunde*. Thus, where two sisters paid the rents of certain lands of which they were tenants in common to a joint account at their banker's, and sums of stock were from time to time purchased in their joint names out of the balance in the banker's hands, the Court, looking at the source whence the funds were derived, held that there was a tenancy in common in the stock (*k*). And, notwithstanding the Statute of Frauds, parol evidence of the cotemporaneous circumstances, and of the subsequent dealings with the property, is admissible to prove an intention to hold in severalty; but such evidence must be confined to facts, as distinguished from mere statements of intention (*l*). In one case, however, a declaration, by affidavit, of intention, made long after the date of the transaction, was admitted in evidence (*m*).

and parol evidence of *facts* is admissible for the purpose;

(*e*) 1 Eq. Ca. Ab. 291; 1 Wh. & T. L. C.

(*f*) See, as to the words italicized, *Harrison* v. *Barton*, 1 J. & H. 287, and V.-C. Wood's comments, p. 293; and see Sug. 698, note.

(*g*) Sug. 698.

(*h*) 2 V. sen. 258; 3 Atk. 735; and see judgment in *Robinson* v. *Preston*, 4 K. & J. 505.

(*i*) See *Wood* v. *Birch*, Sug. 698, and *Aveling* v. *Knipe*, 19 V. 445.

(*k*) *Robinson* v. *Preston*, 4 K. & J. 505; *Re Jackson*, 34 Ch. D. 732; but see *contrà*, *Re Hughes' Tr.*, 19 W. R. 468.

(*l*) *Harrison* v. *Barton*, 1 J. & H. 287, where the purchase-money was contributed equally.

(*m*) *Devoy* v. *Devoy*, 3 S. & G. 403; and *quære*, *vide post*, p. 1060.

or being tenants in common of mortgage, buy equity of redemption, or purchase for purpose of trade or speculation;

So, it has been held that tenants in common of a mortgage, buying the equity of redemption, shall hold it also in common (*n*); so, where land is conveyed to partners as joint tenants for the purposes of trade, there is no survivorship in Equity (*o*); so, also, if it be conveyed to purchasers, not otherwise in partnership, as joint tenants, but for the purpose of a joint adventure or speculation (*p*); "the purchase of the land being made to the intent that they shall become partners in the improvement; it being only the substratum for an adventure in the profits of which it was intended they should be concerned" (*q*).

or, being joint-tenants, subsequently agree to hold property as if in trade.

So, if joint tenants subsequently contract to deal with the property as if in trade, or if other dealings rebut the presumption of joint tenancy (*r*), *e.g.*, if they agree to, and do, make mutual wills by which the survivor is to take for life, and the property is on her death to be held in trust for others (*s*), the Court will receive evidence of such contract or dealing, and will hold that there is no survivorship (*t*).

And where partners purchased land out of partnership profits, and *let* it, but brought the profits into the partnership accounts, it was held that there was no survivorship, although the conveyance was to them as joint tenants (*u*). So, where

(*n*) *Edwards* v. *Fashion*, Ch. Prec. 332; 19 V. 444.

(*o*) *Morris* v. *Barrett*, 3 Y. & J. 384; *Elliott* v. *Brown*, 3 Sw. 489; *Houghton* v. *Houghton*, 11 Si. 491.

(*p*) *Lake* v. *Cradock*, 3 P. W. 158; *Lyster* v. *Dolland*, 1 V. 431; *Dale* v. *Hamilton*, 5 Ha. 369; 2 Ph. 266; *Clements* v. *Hall*, 2 D. & J. 173; *Darby* v. *Darby*, 3 D. 495; and cf. *Steward* v. *Blakeway*, 4 Ch. 603.

(*q*) Per Lord Eldon, 9 V. 597.

(*r*) See *Harrison* v. *Barton*, 1 J. & H. 287; *Robinson* v. *Preston*, 4 K. & J. 505; *Re Jackson*, 34 Ch. D. 732.

(*s*) *Re Wilford's Est.*, 11 Ch. D. 267.

(*t*) *Jeffereys* v. *Small*, 1 Vern. 217; see 5 Ha. 384; and see also cases cited 1 Wh. & T. L. C. 225 *et seq.*

(*u*) *Morris* v. *Barrett*, 3 Y. & J. 334. The share of a deceased partner in realty, forming part of the partnership property, must be regarded as personalty in the absence of any binding agreement between the partners to the contrary: and probate duty is payable thereon, independently of any question whether there has been any actual conversion into personalty; *A.-G.* v. *Hubbuck*, 13 Q. B. D. 275. So, too, with respect to legacy duty, *Forbes* v. *Steven*, 10 Eq. 178. It would seem that *Custance* v. *Bradshaw*, 4 Ha. 315, is overruled; see 13 Q. B. D. 275.

Chap. XVI. Sect. 1.

three brothers, tenants in common of a farm, carried on business together, and one of them, on dying, left his one third to A., who conveyed it for value to the surviving brothers, B. and C., as joint tenants, and they continued to carry on the business: it was held that, on a sale after the death of B., C. was not entitled to more than a half of the proceeds of the one third conveyed by A., on the ground that it had become involved in partnership dealings, and must be regarded as partnership property (*x*). So, where two partners purchased real estate out of partnership moneys, and had it conveyed to them in separate moieties to uses in bar of dower, it was held that the entire estate was partnership property; notwithstanding that each partner had, at his own expense, built a private residence for himself upon a portion of the estate set apart for this purpose (*y*): the bulk of the estate appeared from the books of the partnership to have been treated as a joint speculation; and there was no sufficient evidence of any specific appropriation of the dwelling-houses as part of the separate estates of the partners.

Joint tenant has a lien on estate for expenses of repairs, &c., and renewal fines.

And in the case of a joint purchase, if one joint tenant lay out money in repairs or improvements (*z*),—which may be either necessary, or sanctioned by the other joint tenants,—or, in the case of renewable leaseholds, advance money for the expense of a renewal (*a*), he has a lien upon the estate for the amount: but not, it would seem, upon the share of the other joint owner, for moneys which he has advanced to him, and which, without any agreement, have been laid out in the repairs of the property (*b*): and if one purchaser advance more than his share of the purchase-money, he acquires no lien on the estate; nor, it would appear, has he any remedy except a suit for contribution (*c*).

(*x*) *Davies* v. *Games*, 12 Ch. D. 813; *Murtagh* v. *Costello*, 7 L. R. Ir. 428.

(*y*) *Bank of England case*, 3 D. F. & J. 645.

(*z*) *Lake* v. *Gibson*, 1 Eq. Ca. Abr. 291; 1 Wh. & T. L. C.

(*a*) *Hamilton* v. *Denny*, 1 B. & B. 199.

(*b*) *Kay* v. *Johnston*, 21 B. 536.

(*c*) See *Wood* v. *Birch*, Sug. 700.

Joint tenancy created by devise.

Where, however, the property is acquired in joint tenancy, not by *purchase* but by *devise*, then, although it may be used for partnership purposes, a tenancy in common will not be inferred in Equity; unless by express agreement, or by the mode of dealing with the property for a long period, an intention to sever the joint tenancy must be presumed (*d*).

Tenant in common receiving entire profits.

If one tenant in common take the rents of the entirety, or of more than his own proportionate share, he is liable to an action of account at the suit of his co-tenant: but he is not liable to account for the crops or other profits (not pecuniary) of the land received by him during a sole occupancy (*e*). Where two persons were tenants in common of a mine, and owners in severalty of different portions of the surface, and their lessee of the mine sunk a shaft in the estate belonging to one for the purpose of raising the minerals, it was held that both were entitled to the benefit of it (*f*). A tenant in common, who cannot prove the relative actual or minimum amount of his share, can recover nothing at Law (*g*), nor in Equity.

Any advantage secured by purchasing partner, enures to benefit of co-partners.

And, where purchasers stand in the relation of partners, any advantage secured by one (*h*) by means of any dealings which are within the scope of the partnership business (*i*)—*e.g.*, the renewal of a lease (*k*), or an abatement of incumbrances charged on the property (*l*), or a secret bonus from the vendor for effecting the sale (*m*)—enures to the benefit of the others.

(*d*) *Jackson* v. *Jackson*, 9 V. 591, reversing *S. C.*, 7 V. 535; *Brown* v. *Oakshot*, 24 B. 254; but see *Morris* v. *Barrett*, 3 Y. & J. 384; *Essex* v. *Essex*, 20 B. 442; *Waterer* v. *Waterer*, 15 Eq. 402; and *vide post*, p. 1052.

(*e*) *Henderson* v. *Eason*, 17 Q. B. 701; 2 Ph. 308; and see *M'Mahon* v. *Burchell*, 2 Ph. 127; *Bewley* v. *Hancock*, 6 D. M. & G. 391.

(*f*) *Clegg* v. *Clegg*, 8 Jur. N. S. 92.

(*g*) *Doe* v. *King*, 6 Ex. 791.

(*h*) *Somerville* v. *Mackay*, 16 V. 382.

(*i*) *Dean* v. *MacDowell*, 8 Ch. D. 344, 351.

(*k*) *Featherstonhaugh* v. *Fenwick*, 17 V. 298; *Clegg* v. *Fishwick*, 1 M. & G. 294.

(*l*) *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7, which, according to the report, was a mere case of a joint-purchase; and see 1 M. & G. 300.

(*m*) *Beck* v. *Kantorowicz*, 3 K. & J. 230.

Chap. XVI. Sect. 1.

On joint purchase by way of speculation, partner must conform to agreement.

If the land is bought as a speculation—*e.g.*, under an agreement between the partners that it shall be laid out, allotted, and sold for building purposes—no partner can enforce a partition or sale in contravention of the terms of such agreement (*n*). If, however, the management of the concern be entrusted to certain partners, who refuse to execute the duty they have undertaken, the Court will, upon a suit being instituted by another partner, take on itself, so far as it can, to put him in the situation in which he would have been had the trusts been properly performed (*o*).

Land bought for partnership purposes, or by way of joint speculation, is personal estate.

In the case of a partnership, where there is no special stipulation on the point, and the partners purchase freehold estates so as to make them partnership property, they are in Equity converted into personalty; not merely as between the purchasers *inter se*, but also as between the real and personal representatives of a deceased partner: and the rule prevails in the case of land bought as a joint speculation, for the purpose of selling it again in smaller parcels (*p*). Nor, as respects this doctrine of conversion, can any distinction, it is conceived, be drawn between cases where the land used for the purposes of the partnership has been purchased out of partnership moneys, and where it has been acquired in any other way, as by descent or devise (*q*).

Where the partnership trade is merely ancillary to the land.

In a late case, where land, with a quarry on it, was vested in co-owners, who worked the quarry and let the remainder of the land for agricultural purposes, and the yearly rents and profits, though generally divided amongst them, were occasionally invested in the purchase of other lands which were conveyed to the managing owner, and partly used in connection with the quarry, it was held that the share in

(*n*) *Peck* v. *Cardwell*, 2 B. 137; see *Dale* v. *Hamilton*, 2 Ph. 266.

(*o*) See 2 Ph. 276.

(*p*) *Darby* v. *Darby*, 3 Dr. 495; *Essex* v. *Essex*, 20 B. 450; *Waterer* v. *Waterer*, 15 Eq. 402; and see Lindley, 667 *et seq.*

(*q*) See *Waterer* v. *Waterer*, 15 Eq. 402, where the land used for the business of a nurseryman was acquired partly by devise and partly by purchase.

the purchased lands of one of the co-owners who died intestate descended on his heir, although in the books of account the purchases were treated as if they had been purchases of stock in trade, on the ground that, in spite of appearances to the contrary, the land had always been treated as real estate held in co-ownership, and that no one of the so-called partners could have insisted on a sale (*r*).

Land of surviving partner —when reconverted into realty.

It is conceived that the land of a surviving partner will remain personal estate, as between his real and personal representatives, unless and until he indicates an intention that it shall be reconverted into realty. His mere winding up and discontinuing the business would probably be held to have that effect, the reason for the rule having then ceased to exist.

If conveyance be not taken in names of all the purchasers, trust may be proved by any subsequent writing signed by nominal purchasers.

Where, upon an agreement for a joint-purchase, the conveyance is taken in the names of some, but not all, of the intended purchasers, the interests of the others may be established by any subsequent writing, signed by the fiduciary partners, and which acknowledges or proves the existence of the trust (*s*); and this, although the agreement be that the one purchaser shall find the money, and the other contribute his skill in purchasing and subsequently allotting and selling the land (*t*). Lord St. Leonards, however, considers it to be the better opinion (*u*), that the mere fact of one of two parties in treaty for an estate desisting therefrom under a parol agreement that the other shall complete for their joint benefit, is not such a part per-

(*r*) *Steward* v. *Blakeway*, 4 Ch. 603; and see *Randall* v. *Randall*, 7 Si. 271; 1 Wh. & T. L. C. 233.

(*s*) *Forster* v. *Hale*, 3 Ves. 696; *S. C.*, 5 V. 308; *Randall* v. *Morgan*, 12 V. 74; and cf. *Barkworth* v. *Young*, 4 Dr. 1; Lindley, 643.

(*t*) *Dale* v. *Hamilton*, 2 Ph. 266; but see and consider *Caddick* v. *Skidmore*, 2 De G. & J. 52; a case of alleged partnership in a mine; *Smith* v. *Matthews*, 3 D. F. & J. 139, 151; and see Lindley, 88 *et seq.*

(*u*) Sug. 700; *Atkins* v. *Rowe*, Mos. 39; *Lamas* v. *Bayley*, 2 Vern. 627; see *Donohoe* v. *Conrahy*, 2 J. & L. 688, 695; *Caddick* v. *Skidmore*, *suprà*. But may not such a case be treated as one merely of fraud on the part of an *agent? vide ante*, p. 212; 2 H. & Tw. 230.

Chap. XVI. Sect. 1.

formance as takes the case out of the Statute of Frauds; and that, in the absence of any subsequent written admission of the trust, the aggrieved party, unless he can establish a resulting trust, by proof of his having paid or contributed to the purchase-money, has no remedy. Where there is an actual declaration of trust, of course it is not necessary that the party seeking to enforce it should himself have been a party to it (*x*). But if a nominal purchaser assume to act as sole owner, the other party must be prompt in coming to the Court (*y*).

Declaration of trust should be signed by *beneficial* owner.

Where land is held in trust, the declaration must, under the Statute of Frauds, "be manifested and proved by some writing, signed by the party who is *by law* enabled to declare such trust" (*z*); by which is meant the beneficial owner (*a*), not the trustee having the legal estate: and the declaration may be sufficient, though the trusts are not to take effect until after the settlor's death, and the declaration itself cannot operate as a testamentary instrument. In one case, Lord Cranworth is reported to have said that a mere declaration of trust in favour of a volunteer is inoperative (*b*); but, in a later case, his lordship repudiated this *dictum* as a general statement of the law (*c*).

Section 2.

(2.) *As to purchases in the name of a nominal purchaser.*

So, if consideration has been paid by others than nominal purchasers, there will be

Where, upon a purchase, either by one or several, the conveyance is taken in the name of a stranger; or where, in the case of a joint-purchase, the conveyance is taken in the names of some, but not all, of the purchasers who pay

(*x*) 2 Ph. 275.

(*y*) See *Cowell* v. *Watts*, 2 H. & Tw. 224.

(*z*) Sect. 7; see Lewin, 55.

(*a*) See *Dye* v. *Dye*, 13 Q. B. D. 147, where it was held that an agreement, made upon marriage, that the intended wife's freeholds should be for her separate use, and signed by the husband alone, was invalid as a declaration of trust within the section.

(*b*) *Scales* v. *Maude*, 6 D. M. & G. 43.

(*c*) *Jones* v. *Lock*, 1 Ch. 25.

a resulting trust without writing.

for the estate (*d*), there will—subject to the exceptions subsequently noticed, and subject, of course, to any express stipulation (even by parol) on the point (*e*)—be a resulting trust in favour of the other parties who have paid, or helped to pay, the consideration-money: and this, whatever may be the tenure of the estate, or the mode in which the property is conveyed (*f*); unless the effect would be to break in upon the policy of an Act of Parliament (*g*): and no written declaration of trust is necessary, resulting trusts being expressly excluded from the operation of the Statute of Frauds (*h*). But, it is conceived, the mere fact of the money being so paid, not in pursuance of the original agreement, but either as a matter of necessity, or by virtue of a pecuniary arrangement between the parties at the time of completion, would not have this effect (*i*). If, for instance, A. and B. agree to purchase an estate, the money as between themselves to be advanced in certain specified proportions, and, at the time fixed for completion, A., either through B.'s temporary inability to pay, or merely for his convenience, advances the entire amount, this, it appears, will not give A. a claim to the whole estate, the amount paid by A. for B.'s share being merely a loan of that amount from A. to B. (*k*).

Custom negativing doctrine of resulting trust, bad.

A manorial custom that a nominal purchaser of copyholds shall, notwithstanding the doctrine of resulting trusts, take beneficially unless the trust is mentioned on the Rolls of the Manor, is bad (*l*).

No resulting

Where an assurance is taken in the joint names of A. the

(*d*) *Wray* v. *Steele*, 2 V. & B. 388.

(*e*) *Lady Bellasis* v. *Compton*, 2 Vern. 294; *Rider* v. *Kidder*, 10 V. 360.

(*f*) See *Dyer* v. *Dyer*, 2 Cox, 92, 93; 1 Wh. & T. L. C.

(*g*) See *Ex p. Houghton*, 17 V. 251; *Ex p. Yallop*, 15 V. 68; cases under the Ship Registry Acts; and see the Merchant Shipping Act, 1854 (17 & 18 V. c. 104), amended by 25 & 26 V. c. 63; and *Armstrong* v. *Armstrong*, 21 B. 71, 78; Sug. 701.

(*h*) 29 Car. II. c. 3, s. 8.

(*i*) See *Wood* v. *Birch*, Sug. 700.

(*k*) *S. C.*; *Aveling* v. *Knipe*, 19 V. 445; *Bartlett* v. *Pickersgill*, 1 Ed. 515.

(*l*) *Lewis* v. *Lane*, 2 M. & K. 449, overruling *Edwards* v. *Fidel*, 3 Mad. 237; see *Edwards* v. *Edwards*, 2 Y. & C. 123; *Jeans* v. *Cooke*, 24 B. 513.

Chap. XVI. Sect. 2.

trust where intention of survivorship is clear.

purchaser, and B., and there is clear evidence of A.'s intention that B., if he survives, shall take beneficially, and not as a trustee for A.'s estate, B. surviving will be entitled, notwithstanding that the income has, with his concurrence, been enjoyed by A. alone during his life (*m*).

Payment of consideration may be proved by parol evidence.

For the purpose of raising a resulting trust, the mode in which the consideration has been paid may be proved by parol evidence (*n*), either during the life of the nominal purchaser, or, according to the weight of authority, after his decease (*o*), though, whether it can prevail against a direct denial in his answer seems to be doubtful (*p*); and it will, in any case, be received with great caution (*q*): nor can it be received to prove that a person who has paid for the estate with his own money, and taken a conveyance in his own name, was, in fact, the agent of another (*r*); nor to raise a resulting trust in favour of a vendor who has conveyed the estate without receiving the purchase-money; even although there be parol evidence to show that the transaction was

(*m*) *Garrick* v. *Taylor*, 29 B. 79; aff. 10 W. R. 49.

(*n*) Although opposed to inconclusive written evidence; *Cripps* v. *Jee*, 4 Br. C. C. 472; see *Leman* v. *Whitley*, 4 Rus. 423, 427.

(*o*) See *Sir John Peechy's case*, Sug. 702; *Lench* v. *Lench*, 10 V. 511, 517; Sug. V. & P. 11th ed. 910.

(*p*) *Newton* v. *Preston*, Ch. Prec. 103; see *Smith* v. *Wilkinson*, cited 3 V. 705; Sug. 701.

(*q*) *Gascoigne* v. *Thwing*, 1 Vern. 366; *Groves* v. *Groves*, 3 Y. & J. 163.

(*r*) *Bartlett* v. *Pickersgill*, 1 Cox, 15; 1 Ed. 515; and see comments thereon, 4 Ch. 549; and his conviction for perjury will not entitle the plaintiff to a decree; see *Rex* v. *Boston*, 4 Ea. 562; *Bartlett* v. *Pickersgill*, *ib.* 577, n.; see, however, *Fell* v. *Chamberlain*, 2 Dick. 484. But specific performance of a contract for purchase made by an agent, although appointed merely by parol, will be enforced; *Heard* v. *Pilley*, 4 Ch. 549; and where the agency is proved, but there is uncertainty as to what portion of the estate the agent was buying for himself, and what for his principal, specific performance was decreed with a reference to chambers to ascertain this point; *Chattock* v. *Muller*, 8 Ch. D. 177. In this connection the case of an agent must be distinguished from that of a trustee to this extent, that, though on the signing of the contract the estate passes in Equity to the real purchaser,—and he may be shown by parol evidence,—yet the nominal is not a trustee for the real purchaser so as to come within s. 7 of the statute, but a mere agent under s. 4, whose appointment need not be in writing; *Cave* v. *Mackenzie*, 46 L. J. Ch. 564.

really a conveyance in trust, and not a sale (*s*). But where such evidence is received it need not be confined to the direct fact of payment: for instance, evidence of the poverty of the nominal purchaser has been received in proof of the impossibility of his having paid for the estate (*t*).

Conveyance may be shown to be mortgage.

And parol evidence is admissible to prove that what purports to be an absolute conveyance was, in fact, a mortgage (*u*).

But *primâ facie* no trust results on purchase in name of wife or child.

As a general rule, no resulting trust arises when the conveyance is taken in the name of a child (*x*), grandchild (*y*), (if the father be dead) (*z*), or wife (*a*) of a sole (*b*) purchaser; or in the names of several children, either alone (*c*) or associated with the wife (*d*), and the rule seems to include the illegitimate children, if recognized as such (*e*) of the purchaser (*f*): so, also, persons to whom the purchaser has placed himself *in loco parentis* (*g*); and adult (*h*) as well as infant,

(*s*) *Leman* v. *Whitley*, 4 Rus. 423; Lord St. Leonards puts a query to the case, Sug. 702.

(*t*) *Ryal* v. *Ryal*, cited Amb. 413; *Willis* v. *Willis*, 2 Atk. 71; and see *Lench* v. *Lench*, 10 V. 511, 519; *Heard* v. *Pilley*, 4 Ch. 549, 552.

(*u*) *Cripps* v. *Jee*, 4 Br. C. C. 472; *Muttyloll Seal* v. *Annundo-chunder Sandle*, 5 Mo. Ind. C. 72.

(*x*) *Mumma* v. *Mumma*, 2 Vern. 19; *Grey* v. *Grey*, 2 Sw. 594; *Redington* v. *Redington*, 3 Ridg. 180; *Sidmouth* v. *Sidmouth*, 2 B. 447; *Christy* v. *Courtenay*, 13 B. 96; *Lee* v. *Flood*, 17 Jur. 544; and cf. *Stock* v. *McAvoy*, 15 Eq. 55, where there were acts of ownership by the father sufficient to rebut the presumption of advancement. The presumption arises in the case of personal as well as of real property; *Crabb* v. *Crabb*, 1 M. & K. 511; *Sidmouth* v. *Sidmouth*, 2 B. 447; *Hepworth* v. *Hepworth*, 11 Eq. 10. As to a father remaining liable for calls in a winding up, after a *bonâ fide* transfer into the name of his infant son, see *Reid's case*, 24 B. 318; *Weston's case*, 5 Ch. 614; *Richardson's case*, 19 Eq. 588; and cf. *Maxwell's case*, 24 B. 321. See Buckley, 38 *et seq.*

(*y*) See *Kilpin* v. *Kilpin*, 1 M. & K. 520; *Loyd* v. *Read*, 1 P. W. 607.

(*z*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

(*a*) *Glaister* v. *Hewer*, 8 V. 199; 1 Wh. & T. L. C. 255.

(*b*) See *Finch* v. *Finch*, 15 V. 51.

(*c*) *S. C.*, *ib.* 43; *Murless* v. *Franklin*, 1 Sw. 13.

(*d*) *Back* v. *Andrew*, 2 Vern. 120.

(*e*) See *Beckford* v. *Beckford*, Lofft, 490; and see 1 M. & K. 542.

(*f*) See *Tucker* v. *Burrow*, 2 H. & M. 515; where an illegitimate grandchild, though maintained by his grandfather, was thought not to be within the rule, *sed quære.*

(*g*) See *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; *Currant* v. *Jago*, 1 Col. 261;

(*h*) *Grey* v. *Grey*, 2 Sw. 594; *Sidmouth* v. *Sidmouth*, 2 B. 456.

Chap. XVI. Sect. 2.

and female (*i*) as well as male children; and to extend to purchases by a female as well as by a male ancestor or *quasi* ancestor (*k*); but not to purchases in the name of a parent (*l*), brother (*m*), or other remoter relative; or of a woman with whom the settlor is living in concubinage (*n*), or—which in legal contemplation is the same thing—under the sanction of a marriage rendered void by the 5 & 6 Will. IV. c. 54 (*o*).

Although purchaser's name be also inserted; or nominees take successively.

And although the point was otherwise decided by Lord Hardwicke (*p*), the same rule will, it is conceived, prevail, when, upon a purchase by a father, the conveyance is taken in the joint names of himself and his child (*q*), or in the names of himself, his wife, and child (*r*). So, in the case of copyholds, the children take beneficially, although they are named to take in succession after the father (*s*); so, on a purchase by a husband in the joint names of himself and his wife, the latter surviving will take beneficially (*t*); so, if

Soar v. *Foster*, 4 K. & J. 152, 157; *Tucker* v. *Burrow*, 2 H. & M. 515, see judgment; *Skidmore* v. *Bradford*, 8 Eq. 134; case of nephew adopted as a son, and induced to sign the contract. A person may stand *in loco parentis* to a child living with and maintained by his father; *Powys* v. *Mansfield*, 3 M. & C. 359; *Pym* v. *Lockyer*, 5 M. & C. 29. As to the meaning of "*in loco parentis*," see *Fowkes* v. *Pascoe*, 10 Ch. 343, 350; and see *Pollock* v. *Worrall*, 28 Ch. D. 552.

(*i*) See *Lady Gorge's case*, cited Cro. Car. 550; *Bone* v. *Pollard*, 24 B. 283.

(*k*) See *Loyd* v. *Read*, 1 P. W. 607; *Sayre* v. *Hughes*, 5 Eq. 376; *Batstone* v. *Salter*, 19 Eq. 250; but see *Re De Visme*, 2 D. J. & S. 17; *Bennet* v. *Bennet*, 10 Ch. D. 474; for the case of a step-mother, see *Todd* v. *Moorhouse*, 19 Eq. 69.

(*l*) See *Grey* v. *Grey*, 2 Sw. 598.

(*m*) *Maddison* v. *Andrew*, 1 V. 57, 61; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Robinson* v. *Preston*, 4 K. & J. 505.

(*n*) *Rider* v. *Kidder*, 10 V. 360.

(*o*) *Soar* v. *Foster*, 4 K. & J. 152.

(*p*) *Stileman* v. *Ashdown*, 2 Atk. 477, 480.

(*q*) *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Back* v. *Andrew*, 2 Vern. 120.

(*r*) *Devoy* v. *Devoy*, 3 S. & G. 403.

(*s*) *Dyer* v. *Dyer*, 2 Cox, 92; *Swift* v. *Davis*, 8 Ea. 354, n.; *Murless* v. *Franklin*, 1 Sw. 13; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; which together overrule *Dickenson* v. *Shaw*, 1 Wat. Cop. 222; and see *Jeans* v. *Cooke*, 24 B. 513.

(*t*) See *Dummer* v. *Pitcher*, 2 M. & K. 262; and 2 Vern. 120, 683. As to the effect on right of survivorship in respect to a joint banking account of husband and wife, see *Marshal* v. *Crutwell*, 20 Eq. 328; *Lloyd* v. *Pughe*, 8 Ch. 88; and cf. *Trye* v. *Sullivan*, 28 Ch. D. 705.

a stranger's name be also inserted, he will, it appears, take as a trustee for the children or wife, as the case may be (*u*). And where stock was transferred by a husband into the joint names of himself, his wife, and two strangers who were two of the trustees of his marriage settlement, it was held to be an advancement of the wife and not an augmentation of the settlement funds, and that the strangers were trustees of it for the wife on her surviving her husband (*x*). But where the father of a family advances to the trustees of his settlement money to make up the deficiency on a contemplated purchase with settlement funds, the presumption is that the advance was intended for the benefit of all persons interested under the settlement (*y*).

Presumption in favour of advancement may be rebutted by contemporaneous acts or declarations; but not by subsequent acts or declarations of purchaser; *aliter* of nominee.

But although, where property is purchased in the name of a wife or child, the purchase is, *primâ facie*, an advancement, still, the relation between the parties only raises a presumption of the intention of the purchaser to advance the nominee, which presumption may be rebutted by evidence manifesting a contrary intention. That contemporaneous acts (*z*) and even contemporaneous declarations (*a*) of the purchaser, may amount to such evidence, has been often decided (*b*); and it would seem that surrounding circumstances may be taken into consideration, to show whether a gift or a trust was intended (*c*); but subsequent acts (*d*) and declarations (*e*) of the purchaser are not, although the

(*u*) *Lamplugh* v. *Lamplugh*, 1 P. W. 111; *Crabb* v. *Crabb*, 1 M. & K. 511; and *ib.* 543; but see *Skeats* v. *Skeats*, *suprà*; and *Kingdon* v. *Bridges*, 2 Vern. 67.

(*x*) *Re Eykyn's Tr.*, 6 Ch. D. 115.

(*y*) *Ouseley* v. *Anstruther*, 10 B. 461; *Re Curteis' Tr.*, 14 Eq. 217.

(*z*) *Murless* v. *Franklin*, 1 Sw. 13; *Prankerd* v. *Prankerd*, 1 S. & S. 1.

(*a*) *Williams* v. *Williams*, 32 B. 370. Closely antecedent acts and declarations may be admitted, see 1 M. & K. 539.

(*b*) *Sidmouth* v. *Sidmouth*, 2 B. 455; *Collinson* v. *Collinson*, 3 D. M. & G. 409; and see *Kilpin* v. *Kilpin*, 1 M. & K. 520, where the declarations were made verbally to the purchaser's solicitor.

(*c*) *Fowkes* v. *Pascoe*, 10 Ch. 343, 352; *Marshal* v. *Crutwell*, 20 Eq. 328, 329.

(*d*) *Mumma* v. *Mumma*, 2 Vern. 19; *Crabb* v. *Crabb*, 1 M. & K. 511, 518.

(*e*) See *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Redington* v. *Redington*, 3 Ridg. 200; *Woodman* v. *Morrel*, Freem. 32;

Chap. XVI. Sect. 2.

subsequent acts or declarations of both parties (*f*), or of the child or other nominee of the purchaser (*g*), are, evidence to support the trust: but, generally speaking, we are to look at what was said and done at the time (*h*). In one case, which seems scarcely consistent with the authorities, where a father had transferred stock into the joint names of himself, his wife, and child, an affidavit by the transferor nine years afterwards that no trust was intended, and that the transfer was made under a misapprehension as to its legal effect, was admitted to rebut the presumption of advancement (*i*).

By what contemporaneous acts or circumstances.

Where a copyholder, upon taking a purchase in his son's name, at the same Court surrendered it to the use of his own will (*k*); or, taking a purchase in the joint names of himself and two sons, at the same Court took a licence to lease for seventy years (*l*), it was held to be no advancement. So, where by the custom of a manor, copyholds were held for lives *successivè*, the legal estate being in the *cestui que vie*, and it appeared that on previous renewals the beneficial owner had selected other nominees, it was held that the insertion of the name of an illegitimate grandchild, who lived with and was maintained by him, was insufficient to raise a presumption of advancement (*m*): but where a father purchased copyholds, paid the fine, and was admitted to hold to himself without words of limitation during the lives of his three sons and the life of the longest liver—the custom

but see *Robinson* v. *Preston*, 4 K. & J. 505; *Devoy* v. *Devoy*, 3 S. & G. 403; *Stone* v. *Stone*, 3 Jur. N. S. 708.

(*f*) *Grey* v. *Grey*, 2 Sw. 597.

(*g*) *Seawin* v. *Seawin*, 1 Y. & C. C. C. 65; *Sidmouth* v. *Sidmouth*, 2 B. 455.

(*h*) *Sidmouth* v. *Sidmouth*, 2 B. 447, 455; and see 1 M. & K. 532; *Currant* v. *Iago*, 1 Coll. 267; *Christy* v. *Courtenay*, 13 B. 96; *Jeans* v. *Cooke*, 24 B. 513; *Ford* v. *Tynte*, 2 H. & M. 324; *Williams* v. *Williams*, 32 B. 370.

(*i*) *Devoy* v. *Devoy*, 3 S. & G. 403. *Sed quære*, see *O'Brien* v. *Sheil*, 7 I. R. Eq. 255.

(*k*) *Prankerd* v. *Prankerd*, 1 S. & S. 1; and see *Murless* v. *Franklin*, 1 Sw. 13.

(*l*) *Swift* v. *Davis*, 8 Ea. 354, n.

(*m*) *Tucker* v. *Burrow*, 2 H. & M. 515.

of the manor being to hold for lives *successivè*, and to require the first *cestui que vie* on the rolls to be admitted—this was held, after the father's death, to be an advancement (*n*). Where a father took a mortgage in his son's name, the presumption of advancement was rebutted by the evidence of the solicitor who prepared the deed, and who explained the circumstances under which the son's name was used; although there was evidence of a subsequent declaration by the father that the mortgage was taken in the son's name for the purpose of advancement and of escaping the payment of duty (*o*). So, where a father has purchased in his son's name, the fact of his having from the first treated him as a mere trustee, rebuts the presumption of advancement (*p*); so, where the purchase is made with some particular object, as to sever a joint-tenancy (*q*). But the general presumption in favour of advancement cannot be negatived or qualified by transactions relating merely to other estates (*r*).

Prior advancement of child, whether material.

In the case of a child, it is a material circumstance that a provision has been previously made for him; but this is far from being decisive (*s*). In the older cases (*t*) it was held that the child, if already fully advanced, could not take; but, as observed by Eyre, L. C. B. (*u*), "the father is the only judge as to the question of a son's provision; the distinction, therefore, of the son being provided for or not is not very solidly taken or uniformly adhered to:" and it has been observed by Lord Eldon that "the presumption of advancement in favour of a child is not to be frittered away by nice refinement" (*x*). At any rate, it appears that an advance-

(*n*) *Jeans* v. *Cooke*, 24 B. 513.

(*o*) *Dumper* v. *Dumper*, 3 Gif. 583.

(*p*) *Collinson* v. *Collinson*, 3 D. M. & G. 409.

(*q*) Sug. 705, citing *Baylis* v. *Newton*, 2 Vern. 28; and *Birch* v. *Blagrave*, Amb. 264, where the object was to avoid serving as sheriff; and *Sir W. Raleigh's case*, cited Hard. 497, where the object was to avoid a merger; and see *Bone* v. *Pollard*, 24 B. 287, where the intention seems to have been to avoid legacy duty.

(*r*) *Murless* v. *Franklin*, 1 Sw. 19.

(*s*) Per Lord Brougham, 1 M. & K. 542.

(*t*) *Elliot* v. *Elliot*, 2 Ch. Ca. 231, A.D. 1677; *Grey* v. *Grey*, 2 Sw. 600, A.D. 1667; and see Sug. 704.

(*u*) *Dyer* v. *Dyer*, 2 Cox, 94; 1 Wh. & T. L. C. 203.

(*x*) See 15 V. 50.

ment which is (*y*), or which the parent considers to be (*z*) only in part, will not rebut the presumption of advancement. A reversion expectant on a life estate, is *primâ facie* only a part advancement (*a*).

By what subsequent acts or circumstances.

A subsequent parol admission by a child that he holds only as trustee, may rebut the presumption in favour of advancement (*b*); but the fact that the child, even although adult, allows the parent to take and keep possession (*c*), is insufficient: nor is the result altered by the child actively assisting the parent in taking the profits; as, in the case of a purchase of stock in the child's name, by his executing a power of attorney for the father to receive the dividends (*d*): or by money being subsequently laid out on the property by the parent (*e*). But where a father bought a cottage in the name of his son, and shortly afterwards served the tenant with notice to quit, and during his life always received the rents and profits, it was held that the notice to quit was an act so strong as to rebut the presumption of advancement (*f*).

If, on the death of the purchaser, any part of the purchase-money remains due, it must, it seems, be paid out of his estate (*g*).

Election.

But although, as already noticed, no subsequent act on the part of the purchaser can affect the rights of the nominee, if the presumption in favour of advancement has once arisen,

(*y*) *Grey* v. *Grey*, 2 Sw. 600.

(*z*) *Redington* v. *Redington*, 3 Ridg. 106, 191.

(*a*) *Lamplugh* v. *Lamplugh*, 1 P. W. 111.

(*b*) See 2 B. 456; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

(*c*) See *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Taylor* v. *Taylor*, 1 Atk. 386; *Grey* v. *Grey*, 2 Sw. 600; and see 2 B. 456; *Alleyne* v. *Alleyne*, 2 J. & L. 544, 555; *Christy* v. *Courtenay*, 13 B. 96.

(*d*) *Sidmouth* v. *Sidmouth*, 2 B. 456.

(*e*) *Mumma* v. *Mumma*, 2 Vern. 19; *Shales* v. *Shales*, Freem. 252.

(*f*) *Stock* v. *M'Avoy*, 15 Eq. 55.

(*g*) *Redington* v. *Redington*, 3 Ridg. 201; and see *Skidmore* v. *Bradford*, 8 Eq. 134.

yet a clear devise to another of the estate will raise a case of election against the nominee (*h*).

Presumption of advancement where a father settles his own along with trust moneys.

And where the father of a family has allowed money of his own to be invested in the purchase of an estate, along with other moneys subject to the trusts of his marriage settlement, it will require very strong evidence of intention to show that he did not intend it as an advancement (*i*): and where a father conveys land to his son, as a qualification for an office, or franchise, which requires in the holder a *bonâ fide* beneficial ownership, he cannot maintain that the transaction was intended to be in fraud of the law, so as to throw on the child a resulting trust (*k*). But a conveyance by a father to his son as a qualification for the parliamentary franchise is not in itself illegal (*l*). So, where A., under a groundless fear of being indicted for bigamy, conveyed his real estate to B., on a secret understanding that B. was to hold it merely as a trustee, and no consideration was paid, Lord Romilly, M. R., held that the transaction was free from any taint of illegality; and compelled B., who denied the trust and claimed the benefit of the Statute of Frauds, to execute a reconveyance (*m*).

Purchases in name of child or wife not within 27th or 13th Eliz.; *semble*.

A purchase in the name of a child (*n*), or, it is conceived, a wife, whether solely or jointly with the purchaser, is not within the 27 Eliz.: nor, it would seem (except in cases of actual fraud) within the 13 Eliz. (*o*); inasmuch as the settlor might have handed the money to his child and the child might have made the purchase: and as the money could not

(*h*) *Dummer* v. *Pitcher*, 5 Si. 35; 2 M. & K. 262.

(*i*) *Ouseley* v. *Anstruther*, 10 B. 462; *Gray* v. *Gray*, 2 Sim. N. S. 273; *Re Curteis' Tr.*, 14 Eq. 217.

(*k*) *Childers* v. *Childers*, 3 K. & J. 310; reversed on appeal, other facts being adduced, 1 D. & J. 482.

(*l*) *May* v. *May*, 33 B. 81.

(*m*) *Davies* v. *Otty*, 35 B. 208; and see *Manning* v. *Gill*, 13 Eq. 485.

(*n*) See *Lady Gorge's ease*, cited Cro. Car. 550; *Bone* v. *Pollard*, 24 B. 283; Sug. 703, 704.

(*o*) See *Fletcher* v. *Sedley*, 2 Vern. 490; *Proetor* v. *Warren*, Sel. Ch. Ca. 78; Sug. 706; but see the *dictum* in *Christ's Hosp.* v. *Budgin*, 2 Vern. 684; *et vide ante*, p. 1024; and see *Drew* v. *Martin*, 2 H. & M. 130, 133.

Chap. XVI. Sect. 2.

formerly have been taken under an execution, there was no fraudulent alienation against creditors within the scope of the statute. But the 1 & 2 Vict. c. 110, by making money, bank-notes, and securities seizable under a writ of *fieri facias*, has considerably enlarged the operation of the 13 Eliz. Thus, where a settlor, largely indebted at the time, purchased stock in the names of trustees, upon trust for his children, the settlement was declared fraudulent and void as against his creditors (*p*). The principle of this decision seems applicable to every case, whatever may be the subject of the purchase: and it may now, it is conceived, be laid down, as a general rule, that where the necessary or probable effect of the advancement, even without actual fraud, is to defeat or delay the settlor's creditors, it may be declared fraudulent and void within the 13 Eliz.

Purchase by trader in name of child or wife, whether voidable in case of bankruptcy.

The benefit of a purchase by a trader in the name of his child, or wife (*q*), was by the 1 Jac. I. c. 15, s. 5, transferred to his assignees in a subsequent bankruptcy. A conveyance by himself, *if at the time insolvent*, to his child or wife was avoided, as against such assignees by the 6 Geo. IV. c. 16, s. 73 (*r*), which has been also considered to extend to purchases (*s*); whether correctly or not, may be doubted, as the Statute of James in terms included not only estates which the trader "conveyed," but those which he "caused or procured to be conveyed," which words are omitted in the 73rd section of the statute of 6 Geo. IV., and in the corresponding provision of the 12 & 13 Vict. c. 106 (*t*). Mere voluntary expenditure upon property already belonging to the wife or child, *e.g.*, the redemption and merger (*u*) of the land tax (*x*),

(*p*) *Barrack* v. *M'Culloch*, 3 K. & J. 110; and see as to a settlement of life policies being within the 13 Eliz., *Stokoe* v. *Cowan*, 29 B. 637; 7 Jur. N. S. 901.

(*q*) *Glaister* v. *Hewer*, 8 V. 195; 9 V. 12; 11 V. 377.

(*r*) Which has no retrospective operation; see *Wombwell* v. *Laver*, 2 Si. 360.

(*s*) See Sug. 705.

(*t*) See sect. 126.

(*u*) *Aliter* if there were no merger; see *Emly* v. *Guy*, 3 Mer. 702.

(*x*) *Borough* v. *Anon.*, cited 17 V. 205.

or the erection of buildings, or even the enfranchisement of the property, if copyhold (*y*), was held not to be a purchase within the above rule. And now, as we have seen (*z*), by the Bankruptcy Act of 1883 (*a*) any conveyance or transfer of property not falling within certain specified exceptions, may be rendered void by subsequent bankruptcy within a limited period.

On purchase in name of stranger, resulting trust may be rebutted by parol evidence.

And even upon a purchase in the name of a stranger, clear parol or other evidence is admissible to rebut the presumption in favour of a resulting trust; and to show that, as respects either the whole or part of the land, or the interest therein, the purchaser intended the nominee to take beneficially (*b*): but the onus of proof lies on the nominee (*c*).

Land purchased with trust money becomes impressed with trust.

As to proof of application of money.

Where trustees (*d*) for the purchase of land, lay out the trust moneys and take the conveyance in their own names, the *cestuis que trust*, in order specifically to claim the lands, or to establish a lien upon them, must, of course, prove that they were purchased with the trust moneys. This may be proved either by direct evidence,—as where trust money was paid to a trustee by a cheque, which was next day paid over by him in part payment for the estate (*e*),—or by mere parol evidence of declarations by the trustees: but these, in the absence of corroborating circumstances, will be received with

(*y*) *Campion* v. *Cotton*, 17 V. 263, 273; and cf. *Frazer* v. *Thompson*, 4 D. & J. 659, reversing V.-C. S. 1 Gif. 49.

(*z*) *Ante*, p. 1030 *et seq.*

(*a*) 46 & 47 V. c. 52, s. 47.

(*b*) See *Maddison* v. *Andrew*, 1 V. sen. 57, 61; *Lloyd* v. *Spillett*, 2 Atk. 148; *Lane* v. *Dighton*, Amb. 409; *Rider* v. *Kidder*, 10 V. 360, 367; *Benbow* v. *Townsend*, 1 M. & K. 506, 510; *Deacon* v. *Colquhoun*, 2 Dr. 21; *Fowkes* v. *Pascoe*, 10 Ch. 343.

(*c*) *Redington* v. *Redington*, 3 Ridg. 178.

(*d*) Including in the term, agents. So, where a solicitor fraudulently purchased an estate in his own name out of his client's moneys, the client was held to have a lien on the estate; *Hopper* v. *Conyers*, 2 Eq. 549; *Middleton* v. *Pollock*, 4 Ch. D. 49. For the purposes of the doctrine there is no "distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position;" *Re Hallett's Est.*, 13 Ch. D. 696, 709; *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 374, 383.

(*e*) *Price* v. *Blakemore*, 6 B. 507; see *Ex p. Chadwick*, 15 Jur. 597.

great caution (*f*). The presumption, however, is that a purchase made by a trustee, whose duty is so to invest trust money, has been made in execution of the trust (*g*). And where a trustee paid in trust moneys (applicable to be invested in the purchase of real estate), and moneys of his own, to his general account at his bankers', and then bought real estate, and paid for it by a cheque on his bankers, the Court—the purchase having proved a beneficial one—decided that the *cestuis que trust* were entitled to hold that such payment was made out of that part of the moneys standing to the general account which it was proper so to employ: *i.e.*, the trust moneys (*h*). But where a trustee *bonâ fide*, and at the request of the *cestui que trust*, advances money to make up the deficiency on a purchase for the benefit of the settlement, he is entitled to be indemnified out of the purchased property, and to enforce the indemnity by sale of the property (*i*).

Purchase with wife's separate estate.

So, where land is purchased with the savings of a married woman's separate estate, and is conveyed to the husband, the wife's right will be established in Equity, on its being shown that the land was intended to be her separate property (*k*): so, where the wife's separate estate was invested in bank shares in the joint names of her husband and herself, and the husband procured them to be sold, and, unknown to his wife, invested the produce in part-payment of the purchase-money of an estate which was conveyed to himself, the wife was held to have a lien upon the estate for the amount of the

(*f*) Sug. 919; *Lench* v. *Lench*, 10 V. 519.

(*g*) *Trench* v. *Harrison*, 17 Si. 111; see, as to evidence of a contrary intention, *Perry* v. *Phelips*, 4 V. 108, 116; 17 V. 173; *Lewis* v. *Madocks*, 8 V. 150; 17 V. 48; *Denton* v. *Davies*, 18 V. 499, 502; *Bennet* v. *Mayhew*, cited 1 Br. C. C. 232; *Mathias* v. *Mathias*, 3 S. & G. 552, and cases there cited; *Wadham* v. *Rigg*, 10 W. R. 365; *Williams* v. *Thomas*, 8 Jur. N. S. 250.

(*h*) *Manningford* v. *Toleman*, 1 Col. 670, 674; and generally as to following trust moneys, see *Birt* v. *Burt*, 11 Ch. D. 772, n.; *Re Hallett's Est.*, 13 Ch. D. 709; *Gibert* v. *Gonard*, 33 W. R. 302.

(*i*) *Worcester Banking Co.* v. *Blick*, 22 Ch. D. 255.

(*k*) *Darkin* v. *Darkin*, 17 B. 578.

moneys so invested (*l*): so, where a *feme sole* contracted to purchase, but the conveyance was, after her marriage, taken in her husband's name, it was held that the estate belonged to the wife, subject to a charge in the husband's favour for the portion of the purchase-money which he had contributed (*m*).

If purchase be breach of trust *cestuis que trust* can claim money or land.

And where trust moneys are, in breach of trust, invested in the purchase of real estate, the *cestuis que trust* have the option of proceeding either for the money or the estate; or for a proportionate part of the estate, if the trust fund formed only a part of the consideration money (*n*): and a purchase of the fee simple by the executor of a mortgagee for a term of years has been considered to fall within the rule (*o*): so, where a trustee improperly advanced the trust funds to enable one of the *cestuis que trust* to purchase an estate, the other *cestuis que trust* were held entitled to a lien upon the estate for the moneys so advanced (*p*). The claim of the *cestuis que trust* will prevail against that of the lord of the fee claiming by escheat (*q*).

The distinction between the remedy of the *cestuis que trust*, where the purchase is clearly made with trust money, and their remedy where the trustee has mixed trust money with his own, must be carefully borne in mind. In the first case, the *cestui que trust* "has a right to elect either to take the

(*l*) *Scales* v. *Baker*, 28 B. 91.

(*m*) *Maddison* v. *Chapman*, 1 J. & H. 470.

(*n*) *A.-G.* v. *Corp. of Newcastle*, 5 B. 307; 12 C. & F. 402; *Wiles* v. *Gresham*, 2 Dr. 258; *Garner* v. *Moore*, 3 Dr. 277; *vide ante*, p. 688. As to merger of charges, as between the real and personal representatives of the incumbrancer, on his purchasing the estates, see *Lord Selsey* v. *Lake*, 1 B. 146; *Hood* v. *Phillips*, 3 B. 513; in case of owner paying off incumbrances, *Pitt* v. *Pitt*, 2 Jur. N. S. 1010; buying up a lease, *Gunter* v. *Gunter*, 23 B. 571; in case of tenant in tail paying off a mortgage, *Horton* v. *Smith*, 4 K. & J. 624; or tenant for life, *Jameson* v. *Stein*, 21 B. 5; *Morley* v. *Morley*, 5 D. M. & G. 618; *Lord Kensington* v. *Bouverie*, 7 D. M. & G. 134; and see, generally, notes to *Forbes* v. *Moffatt*, Tud. L. C.; and see *ante*, p. 1040 *et seq.* As to merger by way of reduction into possession, see *Allday* v. *Fletcher*, 1 D. & J. 82.

(*o*) *Fosbrooke* v. *Balguy*, 1 M. & K. 226.

(*p*) *Birds* v. *Askey*, 24 B. 618.

(*q*) *Hughes* v. *Wells*, 9 Ha. 749.

Chap. XVI. Sect. 2.

property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase, or, in other words, he is entitled at his election either to take the property, or to have a charge on it for the amount of the trust money. But, in the second case, the *cestui que trust* can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase, and that charge is quite independent of the fact of the amount laid out by the trustee" (*r*).

Purchase, when to be considered in performance of covenant to settle land.

Where a man, having expressly agreed (*s*), or being under a statutory (*t*) or equitable (*u*) liability, to purchase and settle, or to find the money for purchasing and settling (*x*), lands, buys, but neglects to make a settlement, the purchased lands, or an adequate part thereof, will, if of a suitable nature and tenure (*y*), be taken, in Equity, to have been bought in performance, or, if their entire value be inadequate, in part performance (*z*), of his agreement or liability (*a*).

How far the form of the covenant is material.

Nor will the result be altered by any peculiar terms in the original agreement which do not, in the events which have occured, go to discharge his general liability; *e.g.*, a stipulation that the purchase shall be made with the approbation of trustees, whose consent he has not applied for (*b*); or within a limited time, which has expired (*c*); or an option

(*r*) *Re Hallett's Est.*, 13 Ch. D. 696, 709, per Jessel, M. R.

(*s*) *Deacon* v. *Smith*, 3 Atk. 323; *A.-G.* v. *Whorwood*, 1 V. sen. 534, 540.

(*t*) *Tubbs* v. *Broadwood*, 2 R. & M. 487.

(*u*) *Wilson* v. *Foreman*, cited 10 V. 519; *Manningford* v. *Toleman*, 1 Col. 670.

(*x*) *Sowden* v. *Sowden*, 1 Br. C. C. 582; *Ex p. Poole*, De G. 581.

(*y*) *Deacon* v. *Smith*, 3 Atk. 323; *A.-G.* v. *Whorwood*, 1 V. sen. 534, 541; *Pinnell* v. *Hallett*, Amb. 106; *et vide post*, p. 1069.

(*z*) *Gartshore* v. *Chalie*, 10 V. 9; *Ex p. Poole*, *suprà*; *Lechmere* v. *Earl of Carlisle*, 3 P. W. 228.

(*a*) *Wilcocks* v. *Wilcocks*, 2 Vern. 558; 2 Wh. & T. L. C., and notes thereto.

(*b*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 218.

(*c*) *Ex p. Poole*, De G. 581.

reserved to him of making a substitutional arrangement, if he have not made his election (*d*).

After-acquired land may be liable to satisfy the covenant.

So, where the agreement was to convey and settle lands, and the covenantor had either no land, or insufficient suitable land to perform the agreement, it has been held that after-purchased land was liable to supply either the entire want or partial deficiency (*e*); but, as a general rule, a covenant to convey and settle lands, which are not expressly defined by the covenant, will not create a specific lien on the lands of the covenantor, except in cases where the lands have been acquired with the intention of satisfying the covenant (*f*).

Who are bound by the equity.

The right of the parties interested under the proposed settlement (*g*) seems clear as against the legal representatives of the purchaser. It was held by Lord Hardwicke (*h*) that such right would not prevail as against a sub-purchaser or mortgagee; as the subsale or mortgage "would have taken off all evidence of intention to bind" the land by the previous agreement; and a beneficial devise of the land would apparently come within the same reasoning. However, in a case in Bankruptcy, it was held by V.-C. Knight Bruce, that a subsequent mortgage, although conferring a good title on the mortgagee (who took his security without notice), left the equity of redemption impressed with the trusts of the settlement (*i*): and it appears from the judgment that even the mortgagee's title was considered to depend upon his want of notice.

Remarks on Lord Hardwicke's *dictum*

Lord Hardwicke's *dictum*, although cited as law by Lord St. Leonards, is, it is very deferentially submitted, open to

(*d*) *Deacon* v. *Smith*, 3 Atk. 328.

(*e*) See *Deacon* v. *Smith*, 3 Atk. 328; *Wellesley* v. *Wellesley*, 4 M. & C. 561, and cases cited, 580.

(*f*) *Mornington* v. *Keane*, 2 D. & J. 292, and see comments on *Wellesley* v. *Wellesley*.

(*g*) The maxim that Equity looks upon that as done which ought to be done cannot be invoked in favour of volunteers; *Chetwynd* v. *Morgan*, 31 Ch. D. 596.

(*h*) *Deacon* v. *Smith*, 3 Atk. 327.

(*i*) *Ex p. Poole*, De G. 581.

Chap. XVI. Sect. 2.

as to purchasers and mortgagees.

this criticism, *viz.*, that it does not distinguish between intention, as existing at the date of the purchase, and intention, as existing at the date of the subsequent sale or mortgage. If the original purchase be unaccompanied by evidence of a contemporaneous contrary intention, Equity, it may be contended, will assume that the purchaser intended then to do that which it was his duty to do, and will not recognize any subsequent alteration of purpose.

So, where the land comes within the terms of the agreement, its alleged unsuitability to answer the purposes of the settlement, should perhaps be hardly relied on by parties claiming against the settlement. Where, however, the land is of a different nature or tenure from that covenanted to be purchased, no presumption of an intention to perform the covenant can arise (*k*).

Expenditure on settled land, not a satisfaction of covenant to settle money.

It has been held that expenditure by the covenantor in erecting buildings, &c., upon land already in the stipulated course of settlement, is not a fulfilment in Equity of his engagement to pay money to the trustees for the purpose of being invested and settled upon trusts corresponding with the uses of the land (*l*).

Who may enforce covenant to settle.

An agreement to purchase and settle, where the ultimate limitation in the settlement is to be to the use of the settlor himself in fee, may be enforced not only by his wife and children, but even by his own heir as against his personal representatives, in cases where any of the intermediate uses of the settlement subsist at the death of the settlor (*m*).

(*k*) *Lechmere* v. *Earl of Carlisle*, 3 P. W. 227; *Deacon* v. *Smith*, 3 Atk. 323; *Lewis* v. *Hill*, 1 V. sen. 274; *A.-G.* v. *Whorwood*, *ib.* 540.

(*l*) *Horlock* v. *Smith*, 17 B. 572; see *Wiles* v. *Gresham*, 2 Dr. 258, 271; aff. 3 Eq. R. 116; *Robinson* v. *Sykes*, 2 Jur. N. S. 895; *Mathias* v. *Mathias*, 3 S. & G. 552.

(*m*) *Barham* v. *Lord Clarendon*, 10 Ha. 126.

CHAPTER XVII.

REMEDIES AT LAW FOR BREACH OF CONTRACT.

1. *Purchaser's remedies against vendor.*
2. *Vendor's remedies against purchaser.*
3. *Plaintiff how far bound to perform his part of agreement before action.*
4. *As to the agreement—how far affected by parol evidence.*
5. *Grounds of defence—the agreement being admitted.*
6. *Remedy by Mandamus against Railway Companies, &c.*

Section 1.

Purchaser's remedies against vendor.

(1.) We have, in the preceding pages, discussed those matters which have appeared most naturally to present themselves for consideration, in cases where an ordinary contract between vendor and purchaser is perfected in the usual way by conveyance of the estate and payment of the purchase-money, without the course of events being disturbed by litigation, either actual or threatened, between the parties. It remains to consider the respective rights and liabilities of the parties, and their representatives, in cases where either party disputes the validity of the contract, or, on other grounds, refuses, neglects, or is unable to perform it.

Vendor in default, purchaser's rights of action.

Where there is default on the part of the vendor, the purchaser, as a general rule, may either rescind the contract, although under seal (*a*), and sue for the deposit (*b*) as for

(*a*) *Greville* v. *Da Costa*, Pea. A. C. 113.

(*b*) *Gosbell* v. *Archer*, 4 N. & M. 485; and for expenses, &c., *semble*, *De Bernardy* v. *Harding*, 8 Ex. 822.

Chap. XVII. Sect. 1.

money had and received to his, the purchaser's, use; or may affirm the contract, and sue for damages upon the ground of its non-performance (*c*), adding a claim for money had and received in respect of the deposit (if any has been paid) (*d*): and he has a good defence to an action by the vendor upon an I O U for part of the purchase-money (*e*): but he cannot, it seems, rescind the contract unless *restitutio in integrum* can substantially be made (*f*).

Agents may sue and be sued, when.

Where the contract, not being under seal, has been entered into by an agent, the principal may sue upon it in his own name (*g*); unless the agent be specially described or referred to in the contract, in terms inconsistent with the idea of agency (*h*): so, also, a purchaser who has paid the deposit through an agent, can sue for it in his own name, although the facts of the agency were undisclosed (*i*): and, upon similar principles, it has been held that a nominal agent cannot sue, without first disclosing that he is in fact the principal (*k*): and his right to sue is even then doubtful, in cases where the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract; unless the contract has been partly performed with a knowledge by the defendants of

(*c*) See *Moses* v. *Macferlan*, 2 Burr. 1011, and *Dutch* v. *Warren*, there cited; *Farrar* v. *Nightingal*, 2 Esp. 639; *Squire* v. *Tod*, 1 Camp. 293.

(*d*) Although part of the subject-matter of the contract has been enjoyed; see *Wright* v. *Colls*, 8 C. B. 158.

(*e*) *Wilson* v. *Wilson*, 14 C. B. 616.

(*f*) *Erlanger* v. *New Sombrero Co.*, 3 Ap. Ca. 1218; Fry, 319.

(*g*) Story, Ag. s. 160; and see *Sims* v. *Bond*, 5 B. & Ad. 389, 393; notes to *Thomson* v. *Davenport*, 2 Sm. L. C.

(*h*) See *Humble* v. *Hunter*, 12 Q. B. 310, where the agent was described as "owner."

(*i*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; Story, Ag. s. 435. But of course the principal's rights are subject to any equities which may have arisen between the vendor and the agent, prior to disclosure of the fact that the agent is merely an agent; *George* v. *Clagett*, 2 Sm. L. C. and notes thereto. The mere fact that the agent is known to be such, although the name of the principal has not been disclosed is, it is conceived, sufficient to exclude such equities; *Irvine* v. *Watson*, 5 Q. B. D. 414; *Mildred* v. *Maspons*, 8 Ap. Ca. 874.

(*k*) *Bickerton* v. *Burrell*, 5 M. & S. 383; Story, Ag. s. 406, and American cases there cited.

who is the real principal (*l*). It has been held that a person contracting as agent can, if his authority be repudiated by the principal, and the other party with knowledge of this proceed with the contract, sue in his own name (*m*): and a person contracting as agent for an unnamed and unknown principal, may sue in his own name, unless the defendant contracted upon the faith of the agency (*n*).

Their powers and liabilities.

The considerations as to personal character or responsibility which often arise in respect to contracts for the performance of services, or the sale of goods, can seldom have much weight in the case of a contract for the sale of land. Where an agent contracts apparently on his own account—and *primâ facie*, a person, who signs in his own name, contracts as principal (*o*)—an action on the contract may be brought against either him or his principal (*p*): but the plaintiff must, within a reasonable time, elect against which of them he will proceed (*q*). If the contract be under seal, the agent, although described as such, appears to be personally liable (*r*), but if it be not under seal, the agent describing himself and signing (*s*) as such, and naming his principal, is not

(*l*) See *Rayner* v. *Grote*, 15 M. & W. 359, 365, 366.

(*m*) *Langstroth* v. *Toulmin*, 3 Stark. 145.

(*n*) *Schmaltz* v. *Avery*, 16 Q. B. 655. As to liability of undisclosed principal for unauthorized act of agent, see *Thomson* v. *Davenport*, 2 Sm. L. C. and notes thereto; Story, Ag. s. 406 and note.

(*o*) *Cooke* v. *Wilson*, 1 C. B. N. S. 153; and see *Paice* v. *Walker*, L. R. 5 Ex. 173. As to the usage of the wool trade in Liverpool as respects contracts entered into by an agent, see *Cropper* v. *Cook*, L. R. 3 C. P. 194; and in the rice trade, *Bacmeister* v. *Fenton*, C. & E. 121. As to a broker being unable to sue in his own name upon contracts made by him as broker, see *Fairlie* v. *Fenton*, L. R. 5 Ex. 169. Generally as to evidence and effect of custom, see *Fleet* v. *Murton*, L. R. 7 Q. B. 126; notes to *Thomson* v. *Davenport*, 2 Sm. L. C. 424 *et seq.*

(*p*) *Higgins* v. *Senior*, 8 M. & W. 844; *Jones* v. *Littledale*, 6 A. & E. 486; see *Ex p. Hartop*, 12 V. 352; *Williamson* v. *Barton*, 2 F. & F. 544; *Fowkes* v. *Lamb*, 8 Jur. N. S. 385; *Paice* v. *Walker*, L. R. 5 Ex. 173.

(*q*) *Smethurst* v. *Mitchell*, 1 E. & E. 622.

(*r*) *Appleton* v. *Binks*, 5 Ea. 148; Sug. 57; Story, Ag. s. 155.

(*s*) See *Paice* v. *Walker*, *supra*, where an agent *signing* without qualification was held bound, notwithstanding the disclosure of the agency in other parts of the contract; and see notes to *Thomson* v. *Davenport*, 2 Sm. L. C.

Chap. XVII. Sect. 1.

personally liable unless he had no authority to make the contract, or in making it exceeded his authority (*t*): and even if a person, without authority, contract in the name of and as agent for another, it appears that he cannot be sued on the agreement, unless he be shown to have been really the principal: but if, professing to have authority, he enters into a contract, he would seem to be liable to the person with whom he contracts, for damages sustained by reason either of any express false assertion of authority, untrue to his knowledge (*u*), or of breach of the implied warranty of authority (*x*).

And since, as a general rule, a person who signs a contract in his own name without qualification, is *primâ facie* contracting on his own account (*y*), it is prudent for an agent entering into a contract by his signature expressly to state that he does so in that character. But it seems to be now settled that it is not necessary that the signature itself should be qualified by the addition of words implying agency, if the Court can infer that relation from the body of the agreement (*z*).

Contracting party though signing as agent may be personally liable, when.

But if the terms of a contract are such, as in the opinion of the Court to show an intention that the contracting party shall be personally liable, the mere fact of his signing it "by authority of and as agent for" another person, does not necessarily save him from liability (*a*); so, too, if the Court is

(*t*) *Jones* v. *Downham*, 4 Q. B. 235; *S. C. sub nom. Downman* v. *Williams*, 7 Q. B. 103; *Lewis* v. *Nicholson*, 18 Q. B. 503; see *Humfrey* v. *Dale*, 7 E. & B. 266; E. B. & E. 1004; *Southwell* v. *Bowditch*, 1 C. P. D. 374.

(*u*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Lewis* v. *Nicholson*, *suprà*; and see *Collen* v. *Wright*, 7 E. & B. 301; aff. 8 *ib.* 647; *Randell* v. *Trimen*, 18 C. B. 786; *Pow* v. *Davis*, 1 B. & S. 220.

(*x*) *Collen* v. *Wright*, *suprà*; *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D. 1; *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54. On the damages recoverable from an agent in such cases, see *Re Nat. Coffee Palace Co.*, 24 Ch. D. 367.

(*y*) 2 Sm. L. C. 420.

(*z*) *Gadd* v. *Houghton*, 1 Ex. D. 367; and see comments on *Paice* v. *Walker*, L. R. 5 Ex. 173; *Pike* v. *Ongley*, 18 Q. B. D. 708; and see 2 Sm. L. C. 417 *et seq.*

(*a*) *Lennard* v. *Robinson*, 5 E. & B. 125.

of opinion that the words "as agents for" in the body of the deed are mere description (*b*); so, too, the addition of the word "brokers" to the signature is a mere description and does not relieve the persons so signing from liability (*c*). Where money has been properly received by an agent, the action to recover it must be brought against the principal, although it may not have come to his hands (*d*): but a sum paid to an agent, under protest, in respect of a wrongful claim, may, it appears, be recovered from the agent (*e*).

Agent may sue for money fraudulently obtained from him.

In a case of payment improperly procured from an agent, by means of a fraudulent misrepresentation, either he or his principal may sue for its recovery (*f*). Of course a payment by a principal to his own agent does not bind the other principal except under special circumstances (*g*). In actions on the contract, the representations of the agent are the representations of the principal (*h*).

Auctioneer may be sued for deposit.

On a sale by auction the deposit, unless otherwise expressed, is paid to the auctioneer as stakeholder, not as agent for the vendor; and as such he may be sued for it (*i*): but, if paid to the vendor's solicitor, he holds it, in the absence of express stipulation to the contrary, as agent for the vendor, and not as stakeholder (*k*). And it is a common practice for the auctioneer to receive and give a receipt for the deposit expressly as agent for the vendor.

What purchaser can recover in action after rescinding contract.

In an action for money had and received, rescinding the contract, interest upon the deposit may, under a modern Act, be recovered from such time as demand of payment was

(*b*) *Paice* v. *Walker*, *suprà*; *Hough* v. *Manzanos*, 4 Ex. D. 104.

(*c*) *Hutcheson* v. *Eaton*, 13 Q. B. D. 861.

(*d*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; and *Edden* v. *Read*, 3 *ib.* 338; *Bamford* v. *Shuttleworth*, 11 A. & E. 926; *Hurley* v. *Baker*, 16 M. & W. 26; and see *Edgell* v. *Day*, L. R. 1 C. P. 80, and cases there cited.

(*e*) *Smith* v. *Sleap*, 12 M. & W. 585.

(*f*) *Holt* v. *Ely*, 1 E. & B. 795.

(*g*) *Heald* v. *Kenworthy*, 10 Ex. 739.

(*h*) *Per* Lord Campbell, *Wilde* v. *Gibson*, 1 H. L. C. 615.

(*i*) *Lee* v. *Munn*, Holt, 569; *Edgell* v. *Day*, *suprà*.

(*k*) *Edgell* v. *Day*, *suprà*.

Chap. XVII. Sect. 1.

made in writing giving notice to the vendor that interest would be claimed from the date of demand until payment (*l*); but it does not appear to be otherwise recoverable (*m*). Of course, the purchaser can make no claim in respect of any increase in the value of the estate; and it would seem, upon principle, to be equally clear that he cannot be prejudiced by any diminution in its value; although some old authorities leave the point doubtful (*n*).

What he can recover in action for damages founded on contract.

In an action for damages, affirming the contract, the purchaser, if the contract be proved to have been binding upon the vendor (*o*), can recover his expenses of preparing, stamping, and entering into the agreement (*q*), of investigating and endeavouring to clear up the title (*r*), of searching for incumbrances, of comparing the abstract with the deeds (*s*), of preparing the conveyance (if the sale go off by reason of a concealed incumbrance) (*t*), and interest upon his deposit (*u*), and upon the residue of his purchase-money, if lying idle (*x*); and he may recover the deposit itself, as money had and received: and, although a Court of Equity might, before the Judicature Act, 1873, pending a suit by the vendor for specific performance, restrain an action for the recovery of the deposit (*y*), it would not, as a general rule, grant an injunction (*z*), unless the vendor consented to the deposit

(*l*) See 3 & 4 Will. IV. c. 42, s. 28.

(*m*) *Fruhling* v. *Schroeder*, 2 Bing. N. C. 77.

(*n*) Sug. 237.

(*o*) *Gosbell* v. *Archer*, 4 N. & M. 485; see as to this, *Jeakes* v. *White*, 6 Ex. 873, *ante*, pp. 231, 232; *Simmons* v. *Hesseltine*, 5 C. B. N. S. 554.

(*q*) *Hanslip* v. *Padwick*, 5 Ex. 615.

(*r*) See *Hanslip* v. *Padwick*, *ib.* Including costs due, but not actually paid to his solicitor, *Richardson* v. *Chasen*, 10 Q. B. 756; and a letter from the purchaser's solicitor to the vendor's solicitor stating that unless certain evidence is supplied, and which is not supplied, the purchase must go off, does not affect the right to recover such expenses; *Hall* v. *Betty*, 5 Sc. N. R. 508.

(*s*) *Hodges* v. *Lord Litchfield*, 1 Bing. N. C. 492.

(*t*) Sug. 362.

(*u*) *Hodges* v. *Lord Litchfield*, *suprà*; *Farquhar* v. *Farley*, 7 Taun. 592.

(*x*) *Sherry* v. *Oke*, 3 Dowl. 349, 361.

(*y*) See *Kell* v. *Nokes*, 11 W. R. 978, where an injunction was granted.

(*z*) *Tanner* v. *Smith*, 4 Jur. 310. But see comments on this case in *Kell* v. *Nokes*, *suprà*.

being brought into Court (*a*), or unless there had been a decree, or the purchaser's demurrer had been overruled (*b*).

What he cannot recover.

The purchaser cannot, however, recover expenses incurred prior to the contract, or the costs of a survey (*c*), or of preparing a conveyance (*d*) (except under special circumstances), or any allowance for loss by selling out of the funds (*e*), or for money laid out in repairs (*f*), or improvements (*g*), or the expenses of raising the purchase-money (*h*), or expenses incurred in expectation of the contract being completed (*h*), or the difference between his costs taxed as between party and party and his costs as between solicitor and client in an unsuccessful suit by the vendor for specific performance (*i*), or the costs of a suit by himself (the purchaser) for specific performance when the action is dismissed without costs on the chief clerk certifying against the title (*j*); but where the action is dismissed without costs on the ground of the vendor's mistake, the purchaser may, it seems, include his costs of suit in any action which he may bring for damages (*k*).

What damages are, as a general rule, recoverable at Law, for breach of contract.

The rule as to the damages which may be recovered for breach of a contract for the sale of land forms, in one respect, and in one respect only, there being on the general principle no difference (*l*), an exception from the ordinary rule as to damages for breach of contract. In the case of non-delivery of goods contracted to be sold, the purchaser is entitled to recover either such damages as may fairly be considered to have been the natural result of the breach of the contract, or such as may reasonably be supposed to have been contem-

(*a*) *S. C.*, *Annesley* v. *Muggridge*, 1 Mad. 593.

(*b*) *Duke of Beaufort* v. *Glynn*, 3 S. & G. 213.

(*c*) *Hodges* v. *Lord Litchfield*, *suprà*. As to taxing costs of a survey, see *Bellas* v. *Harmer*, 3 De G. & S. 454.

(*d*) *S. C.*, *Jarmain* v. *Egelstone*, 5 C. & P. 172.

(*e*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078.

(*f*) *Bratt* v. *Ellis*, Sug. 812.

(*g*) *Worthington* v. *Warrington*, 8 C. B. 134.

(*h*) *Hanslip* v. *Padwick*, 5 Ex. 615.

(*i*) *Hodges* v. *Lord Litchfield*, *suprà*; *Cockburn* v. *Edwards*, 18 Ch. D. 449, affords an additional reason for this rule.

(*j*) *Malden* v. *Fyson*, 11 Q. B. 292.

(*k*) *Wood* v. *Scarth*, 2 K. & J. 33, 44.

(*l*) *Noble* v. *Edwardes*, 5 Ch. D. 378.

Chap. XVII. Sect. 1.

plated by both parties, at the time when they entered into the contract, as the probable result of a breach (*m*). Thus, where there was a contract for the sale of a threshing machine to be delivered on the 14th August, and the vendor knew the purpose for which it was required, but, notwithstanding repeated promises did not send it until the 10th of September, it was held that the purchaser was entitled to recover for loss sustained by injury to his wheat from rain, and for expenses incurred in carting, stacking, and kiln-drying it; but not for loss occasioned by a fall in the market price of wheat (*n*).

On contract for sale of land, no damages for loss of bargain, unless under special circumstances.

But on a contract for the sale of land, the exceptional rule first laid down in *Flureau* v. *Thornhill* (*o*), and confirmed by recent authorities, is that the purchaser is not entitled to damages for the loss of his bargain, where the vendor through want of title or otherwise (*p*), having acted *bonâ fide* (*q*), is unable to convey the estate (*r*); but can recover merely his expenses incurred in relation to the attempted purchase: and where a purchaser, upon the delivery of an abstract showing an apparently good title, resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale; there being nothing more on the part of the vendor than negligence in the preparation of the abstract, and the purchaser himself being equally negligent in reselling before he had tested its accuracy (*s*).

The rule introduced by *Flureau* v. *Thornhill*, which engrafts an exception upon the Common Law, was, how-

(*m*) *Hadley* v. *Baxendale*, 9 Ex. 341.

(*n*) *Smeed* v. *Foord*, 1 E. & E. 602; see, too, *Simons* v. *Patchett*, 7 E. & B. 568.

(*o*) 2 W. Bl. 1078.

(*p*) See *Tyrer* v. *King*, 2 C. & K. 149; a case of sale by an agent after the estate has been sold by his principal, but query, whether this is essential. See Lord Chelmsford's judgment in *Bain* v. *Fothergill*, *infrà*.

(*q*) *Walker* v. *Moore*, 10 B. & C. 416, 421.

(*r*) *Flureau* v. *Thornhill*, *suprà*; and see Lord Alvanley's remark, *Johnson* v. *Johnson*, 3 B. & P. 167; *Clare* v. *Maynard*, 6 A. & E. 519; and *Hanslip* v. *Padwick*, 5 Ex. 615; *Bain* v. *Fothergill*, L. R. 7 H. L. 138.

(*s*) *Walker* v. *Moore*, *suprà*.

ever, in the subsequent case of *Hopkins* v. *Grazebrook* (*t*), considered not to apply to the case of a person who having a mere agreement for the purchase of an estate resold it at a profit, and was unable to complete the sub-contract by reason of want of title in the original vendor. So the case of a vendor contracting with a knowledge that he had no title was held not to be within the rule: the reason being that the ordinary contract for the sale of real estate is deemed to be made merely on the implied condition that the vendor has a good title, and that, if he has not, certain expenses only are to be incurred as damages: which condition is excluded by evidence of the knowledge of the vendor that he has not such a title (*u*). So, where a vendor who was merely a partial owner assumed to sell the entire estate without having obtained the consent of his co-owners, and the sale fell through in consequence of their refusal to concur in it, the purchaser was held entitled to recover his costs of investigating the title and of endeavouring to enforce the purchase, and also the difference between the contract price and the market price of the estate; and the price at which the estate was afterwards sold was treated as *primâ facie* evidence of the market price (*x*). And the same principle was recognized in other cases (*y*); although in some of them the circumstances were held to be such as took them out of the exception introduced by *Hopkins* v. *Grazebrook* to the rule established by *Flureau* v. *Thornhill:* which rule was considered to be rested upon an implied condition, incident to every contract for the sale of land, that, in the event of the title proving defective, no damages shall be awarded on account of the

(*t*) 6 B. & C. 31. As to goods, see *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Valpy* v. *Oakeley*, 16 Q. B. 941; *Waters* v. *Towers*, 8 Ex. 401; and see *Worthington* v. *Warrington*, 8 C. B. 134; *Hadley* v. *Baxendale*, 9 Ex. 341; *Peterson* v. *Ayre*, 13 C. B. 353; *Owen* v. *Routh*, 14 C. B. 327; *Walker* v. *Broadhurst*, 8 Ex. 889; *Cory* v. *Thames Shipbuilding Co.*, L. R. 3 Q. B. 181; and see as to the measure of damages, *Spedding* v. *Nevell*, L. R. 4 C. P. 212, case of breach of contract to grant a lease.

(*u*) *Robinson* v. *Harman*, 1 Ex. 850.

(*x*) *Godwin* v. *Francis*, L. R. 5 C. P. 295.

(*y*) See *Worthington* v. *Warrington*, 8 C. B. 134; *Pounsett* v. *Fuller*, 17 C. B. 660; *Sikes* v. *Wild*, 1 B. & S. 587; 4 *ib.* 421.

supposed goodness of the bargain (*z*): and doubts were entertained whether misconduct, though good ground for avoiding the contract, would justify a departure from the rule.

In a later case (*a*), where mortgagees had contracted to sell and to give possession on a specified day, and the purchaser was ready to complete, but the mortgagor refused to give up possession, and the vendors, rather than oust him, broke the contract, it was held by the Court of Exchequer Chamber, affirming the decision of the Court of Queen's Bench, that the purchaser, who had contracted to resell at a profit, was entitled to recover his deposit and expenses of investigating the title, and also damages for the loss of his bargain. Cockburn, C. J., in delivering the judgment of the Court, rested the exceptional rule, which was first laid down in *Flureau* v. *Thornhill*, on this ground, *viz.*, that in the complicated state of the law of real property, the owner of an estate is often unable to make out such a title as a purchaser is compellable to accept; and the parties are, therefore, only placed on fair terms, if on the purchaser rejecting the title the liability of the vendor is limited to the repayment of the deposit and the purchaser's expenses of investigating the title. But the Court, it is conceived unnecessarily for the purpose of deciding the case before it, which was a case not of inability but of wilful refusal on the part of the vendor, recognized *Hopkins* v. *Grazebrook* and *Robinson* v. *Harman* as authorities; and drew a distinction between the case of an undoubted owner, in actual possession, who fails to deduce a marketable title, and the case of a person who, having merely a contract for purchase, assumes to sell it as if he were the actual owner; the difficulty of making out the title, which exists in the one case, and which justifies the exceptional departure from ordinary principles, being wholly wanting in the other. It also laid down that the rule in *Flureau* v. *Thornhill* does not hold where the non-performance arises, not from a difficulty as to title, but from the fact of the vendor

(*z*) See judgment of Parke, J., in *Walker* v. *Moore*, 10 B. & C. 416.

(*a*) *Engell* v. *Fitch*, L. R. 3 Q. B 314; aff. 4 Q. B. 659.

not having first secured to himself the property which he assumes to sell: and, *à fortiori*, it cannot apply where the failure either to make out the title, or to deliver possession arises, not from the vendor's inability, but from his unwillingness, on the ground of expense or otherwise, to remedy the defect or to procure possession for the purchaser.

Bain v. *Fothergill.*

The whole question, however, came before the House of Lords, on an appeal direct from the Court of Exchequer, in a case of *Bain* v. *Fothergill* (*b*), which seems to have been erroneously considered as identical with *Engell* v. *Fitch*, and for that reason was not brought before the Court of Exchequer Chamber. In *Bain* v. *Fothergill*, A., having contracted for the purchase of the W. R. mine, held under an agreement for a lease, with a clause against assignment without licence, entered into possession, and, without taking any assignment, agreed to sell to B. At the date of this sub-contract A. was aware that the assent of the lessors was necessary to complete his title, but did not anticipate any difficulty in obtaining it; and, treating the matter as unimportant, did not mention it to B. Subsequently the lessors, having first verbally promised, withdrew their assent, and the sale to B. consequently fell through. In an action by B. against A., for non-performance of the contract, the House of Lords, affirming the decision of the Court of Exchequer, held that B. could only recover the expenses which he had incurred, not damages for the loss of his bargain (*c*); and, after expressly overruling *Hopkins* v. *Grazebrook*, laid it down that the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate must be taken to be without exception (*d*): and Lord Chelmsford expressed it as his opinion, though it was not necessary to decide the point, that even where there has been *mala fides* on the part of the vendor the same rule still applies; and that the appropriate remedy, if full damages are claimed, is by an action for deceit, not by an action for breach of contract (*e*).

(*b*) L. R. 7 H. L. 158.

(*c*) L. R. 6 Ex. 59.

(*d*) See the judgments, and the opinions given by the Common Law Judges on the points submitted to them.

(*e*) L. R. 7 H. L. 207.

Chap. XVII. Sect. 1.

Remarks on *Bain* v. *Fothergill*.

It will, however, be observed that this decision applies merely to cases where the vendor is *bonâ fide* unable to give a title, and does not conflict with the only point which was really decided in *Engell* v. *Fitch*, *viz.*, that a purchaser is entitled to substantial damages from a vendor who, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses, or, which is the same thing, wilfully neglects, to perform, to the best of his ability, his part of the contract (*f*). Notwithstanding some doubtful expressions in the judgments by Lords Chelmsford and Hatherley in *Bain* v. *Fothergill*, it can hardly be that this right will be denied to a purchaser, should the point again fairly arise for decision. Cases might be put in which an action for deceit would not lie; and where even a decree in a suit for specific performance, although supplemented by damages under Lord Cairns' Act, or its equivalent under the Judicature Acts (*g*), would afford no adequate remedy for a breach of contract consisting in the wilful refusal or neglect of the vendor to carry it into effect. A purchaser who has agreed to buy under the well-founded expectation of being able to realize large profits by means of a special mode of dealing with the property, which expectation is frustrated by the tortious act or omission of the vendor, may, under many supposable circumstances, reasonably object to be burdened, even at a greatly reduced price, with an estate which he has no longer any means of utilizing to a profit. It is hard to understand the principle, if there be any, upon which a purchaser, who has sustained a definite loss by reason of the wilful refusal of the vendor to do what he had agreed to do, should be deprived of his right to indemnification merely because the subject-matter of the contract was real instead of personal property. It must not, however, be considered that in every case a vendor is bound to enter into doubtful litigation in order to perfect his title (*h*).

Application of the rule.

It has been held that where A. agrees to convey at a

(*f*) See L. J. Turner's judgment in *Williams* v. *Glenton*, 1 Ch. 209.

(*g*) *Sayers* v. *Collyer*, 28 Ch. D. 103.

(*h*) See *ib.* 208.

future date, for a consideration to be *immediately* given by B., and it appears on the face of the agreement that A. has not yet acquired a sufficient title, his engagement will be considered to be an absolute one; and if he is unable to perform it he is liable to full damages (*i*). But the rule of *Bain* v. *Fothergill* has been held to apply to a case where it would have been a breach of trust in trustees to renew a lease under a covenant contained in the lease granted by their predecessors in the trust; and the lessee was not allowed damages for the refusal to renew (*ii*); and it excludes damages for delay arising from want of title no less than for non-performance (*iii*).

The rule applies only to a broken *contract*, not to a broken covenant in a conveyance.

This exceptional rule above referred to is, however, strictly confined to the case of a *contract* for the sale of land, and does not hold where the land has been actually conveyed, and the vendor has entered into a covenant for quiet enjoyment. Thus, where A., lessee in possession under a lease which had several years to run, obtained from B. a renewed lease to commence from the expiration of the subsisting term, and it subsequently transpired that B. had only a partial interest, and was incompetent to grant a reversionary lease, A. was held entitled to recover not merely the consideration money and the costs of preparing the void lease, but also the difference between the value of the lease which B. professed to grant, and the value of a lease for a shorter period and at an increased rent which was procured from the reversioners (*k*).

Want of title to part, when fatal.

The want of title to any part of the property is fatal at Law, unless the Court can make out a distinct contract in

(*i*) *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249.

(*ii*) *Gas Light Co.* v. *Towse*, 35 Ch. D. 519.

(*iii*) *Hyam* v. *Terry*, 25 Sol. J. 371; *Rowe* v. *London School Board*, 57 L. T. 182. It is not, however, easy to reconcile this decision with an earlier one of the same judge in *Royal Bristol Building Soc.* v. *Bomash*, 35 Ch. D. 390, in which he did allow the purchaser damages, under the title of compensation, for a delay in completion, arising from the state of the title in a manner closely similar to that in the later case.

(*k*) *Lock* v. *Furze*, L. R. 1 C. P. 441. And see as to damages for breach of covenant, *Williams* v. *Earle*, 3 Q. B. 739; and *vide ante*, pp. 869, 892.

Chap. XVII. Sect. 1.

respect of the residue (*l*); or unless there is a condition for compensation, and the case can be brought within it. And although, on a purchase in lots, a separate contract arises upon every lot, a want of title to one will enable the purchaser to avoid the contract as to the others, if either they were complicated as respects enjoyment, or there was an understanding that he should not take any unless he could have all (*m*).

Death of purchaser, right of action goes to personal representatives.

Upon the death of the purchaser, the right to sue in respect of any damages which may have been sustained by his personal estate,—*e.g.*, loss of interest on the deposit, or the expenses of investigating the title,—descends upon his personal representative (*n*); and no action upon the agreement can be brought by the heir (*o*), whose only resource is a suit in Equity.

Section 2.

(2.) *Vendor's remedies at Law against purchaser.*

Right of action in vendor or his representatives, against purchaser or his representatives for breach of contract.

Upon default by the purchaser, the vendor, or, if he be dead, his personal representatives, can sue the purchaser, or, if he be dead, his personal representatives, or his real representatives, if the agreement were under seal and the heirs were named therein, for damages sustained by the breach of the contract (*p*).

Vendor cannot recover entire purchase-money, if no conveyance.

Where a purchaser has been let into possession, and refuses to complete, the vendor cannot, if no conveyance has been executed, recover from him the whole amount of the purchase-money, but only the damages actually sustained by the breach of contract (*q*); for it would be unjust that the vendor should have both the purchase-money and the estate; but where he has executed, or offered to execute, the

(*l*) *Johnson* v. *Johnson*, 3 B. & P. 162.

(*m*) See *Gibson* v. *Spurrier*, Pea. A. C. 49; *Chambers* v. *Griffiths*, 1 Esp. 150; *Dykes* v. *Blake*, 4 Bing. N. C. 463; *et post*, 1203.

(*n*) *Orme* v. *Broughton*, 10 Bing. 533.

(*o*) Sug. 238.

(*p*) *Vide ante*, p. 896, as to the liability of the heir and devisees upon the covenant. See *De Bernardy* v. *Harding*, 8 Ex. 822, as to rescinding the contract and suing on a *quantum meruit* for expenses incurred.

(*q*) *Laird* v. *Pim*, 7 M. & W. 474 *Moor* v. *Roberts*, 3 C. B. N. S. 842.

conveyance, and the purchaser has possession, the vendor may recover the whole amount of the purchase-money. His right of action is not taken away by a stipulation that if the purchaser should fail to comply with any of the conditions the deposit shall be forfeited as liquidated damages (*r*).

May recover title deeds.

If the title deeds have been delivered to the purchaser, in order that he might prepare the conveyance, the vendor may recover them at Law (*s*).

Purchaser in possession, whether liable for use and occupation if no title.

If the purchase go off through defect of title in the vendor, the purchaser, if he have been let into possession, cannot be sued for use and occupation for the time during which the contract was pending, although the occupation have been a beneficial one (*t*), on the ground that his possession cannot be ascribed to any implied contract, inconsistent with the express contract. In the two principal reported cases it appears that the purchaser had paid, in one case all, and in the other part, of the purchase-money; but although this was in some degree relied on in the earlier, it does not seem to have been considered material in the later, of the two decisions. If, however, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation (*u*); and whether in such a case his possession is to be attributed to a new tenancy at will, or is a mere trespass, is a question of fact (*x*). The purchaser when let into possession is, during the subsistence of the contract, only a tenant at will, although there may be a stipulation for payment of interest on the purchase-money until completion (*y*); but (unless under an agreement to quit in some specified event which has happened (*z*)) he cannot, while such tenancy continues, be ejected without notice (*a*). This,

(*r*) *Icely* v. *Grew*, 6 N. & M. 467.

(*s*) *Parry* v. *Frame*, 2 B. & P. 451.

(*t*) *Kirtland* v. *Pounsett*, 2 Taun. 145; *Winterbottom* v. *Ingham*, 7 Q. B. 611; and see Sug. 179.

(*u*) *Howard* v. *Shaw*, 8 M. & W. 118.

(*x*) *Markey* v. *Coote*, 10 I. R. C. L. 149.

(*y*) *Doe* v. *Chamberlaine*, 5 M. & W. 14.

(*z*) *Doe* v. *Sayer*, 3 Camp. 8.

(*a*) *Doe* v. *Stanion*, 1 M. & W. 700; *Right* v. *Beard*, 13 Ea. 210; and see

however, does not apply to a case where the purchaser's occupation, after rescission of the contract, is held not to be referable to a new tenancy at will, but to be a mere trespass; and in such a case he will be liable for damages in respect of such trespass, and may be ejected without notice (*b*).

Section 3.

(3.) *Plaintiff, how far bound to perform his part of the agreement before action.*

Plaintiff, how far bound, &c.

Performance of contract on part of plaintiff, how far necessary to support action.

As a general rule, the mutual engagements of the parties will be considered dependent on each other; and either must (unless discharged therefrom by the other (*c*)) perform his liabilities before he seeks to enforce his rights under the contract. So that, on the one hand, the purchaser cannot, in general, sue upon the agreement without tendering the conveyance (*d*), and the sum (if any) due in respect of the purchase-money and interest (*e*);—unless the vendor have neglected to furnish or verify (*f*) his abstract of title, or have shown a bad title (*g*), or, by conveying away the estate (*h*) or otherwise (*i*), have disabled himself from completing the contract:—and, on the other hand, it has been held that the vendor, if he sue merely upon the agreement, and not upon some security which he has taken for the purchase-money (*k*), must have shown a good title and executed, or offered to execute (*l*), or, according to a modern decision (*m*), have been

Doe v. *Caperton*, 9 C. & P. 112; *Doe* v. *Chamberlaine*, 5 M. & W. 14.

(*b*) *Markey* v. *Coote*, 10 I. R. C. L. 149.

(*c*) *Jones* v. *Barkley*, Doug. 684; *Laird* v. *Pim*, 7 M. & W. 474; *Cort* v. *Ambergate R. Co.*, 17 Q. B. 127; if the agreement is by deed, the discharge must also be under seal; see *Thames Haven Co.* v. *Brymer*, 5 Ex. 711.

(*d*) *Knight* v. *Crockford*, 1 Esp. 190; *East London Union* v. *Metr. R. Co.*, L. R. 4 Ex. 309.

(*e*) Sug. 241, and cases there cited.

(*f*) See *Berry* v. *Young*, 2 Esp. 640, n.; *Clarke* v. *King*, 2 C. & P. 286.

(*g*) *Seaward* v. *Willock*, 5 Ea. 202.

(*h*) *Loveloek* v. *Franklyn*, 8 Q. B. 371; *Knight* v. *Crockford*, 1 Esp. 190.

(*i*) *Duke of St. Albans* v. *Shaw*, 1 H. Bl. 270; *Caines* v. *Smith*, 15 M. & W. 189; *Short* v. *Stone*, 8 Q. B. 358.

(*k*) *Moggridge* v. *Jones*, 14 Ea. 486; *Spiller* v. *Westlake*, 2 B. & Ad. 155.

(*l*) *Phillips* v. *Fielding*, 2 H. Bl. 123; *Laird* v. *Pim*, 7 M. & W. 474.

(*m*) *Poole* v. *Hill*, 6 M. & W. 835, 841; *Thames Haven Co.* v. *Brymer*, 5 Ex. 711; but see Sug. 240.

ready and willing to execute, a conveyance in the terms of the contract; the rule, in the absence of stipulation, being, that the purchaser must prepare and tender the conveyance (*n*); and even in the case of a compulsory purchase under the Lands Clauses Consolidation Act, no action can be maintained for the compensation money, until a conveyance has been executed (*o*), whether the amount has been fixed by an award (*o*), or by the verdict of a jury (*p*); and the effect of the 49th and 50th sections is not to create an absolute debt due from the company to the landowner (*q*).

Mutuality of the obligations.

The same principle applies to every case where the mutual stipulations of vendor and purchaser are interdependent. Thus, where by a memorandum in writing, A. agreed to sell to B. certain seams of coal, and to purchase from B. all the coals which he might require, it was held that the stipulations were concurrent, and that B. could not sue A. for not taking the coal, without averring performance of, or a readiness to perform, his part of the agreement (*r*). And the mutuality of the obligations may be inferred from the nature of the transaction: thus, where in an agreement for a lease it was provided that the lessors should supply to the lessees the whole of their chlorine-still waste at a given rate, and should not, during the tenancy, part with any of it to other persons, it was held that the promise to sell implied a promise to take, and that the lessees were bound to take the whole of the waste (*s*).

May be inferred from the nature of the transaction.

But the contract may show that the stipulations are independent.

But, of course, the contract *may* be so worded as to show that the mutual stipulations were, to a certain extent, independent; it being a general rule, that if a day be appointed

(*n*) *Stephens* v. *De Medina*, 4 Q. B. 422; *Poole* v. *Hill*, 6 M. & W. 835; and cf. *Standley* v. *Hemmington*, 6 Taun. 461.

(*o*) *East London Union* v. *Metr. R. Co.*, L. R. 4 Ex. 309.

(*p*) *Howell* v. *Metr. Dist. R. Co.*, 19 Ch. D. 508, 515.

(*q*) *Ib.*

(*r*) *Bankart* v. *Bowers*, L. R. 1 C. P. 484; *Atkinson* v. *Smith*, 14 M. & W. 695.

(*s*) *Bealey* v. *Stuart*, 7 H. & N. 753; and cf. *Sykes* v. *Dixon*, 9 A. & E. 693.

for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance: for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent (*t*). For instance, where a vendor agreed that he would, within one month from the date of the contract, or from being required so to do, deliver an abstract of title and deduce a clear title, and the purchaser agreed to pay part of the purchase-money down, and the residue on or before four years after date, with interest payable half-yearly on certain fixed days, it was held, that the vendor could sue for interest which had become due, although no abstract might have been delivered (*u*). So, where the purchaser agreed to pay the purchase-money on a specified day, and the vendor agreed, upon payment of the money, to convey the land, it was held that the latter could sue for the money without tendering a conveyance (*x*).

Refusal by either party to perform is an immediate breach.

It has been held that if one of the parties to the contract absolutely refuses to perform, or renders himself incapable of performing, his side of it, this amounts to an immediate breach; and that he may be sued at once, although the day

(*t*) *Pordage* v. *Cole*, 1 Saund. 320 *b*, n.; see 9 C. B. 114; *Mattock* v. *Kinglake*, 2 P. & D. 343; *Porcher* v. *Gardner*, 8 C. B. 461; and *Thames Haven Co.* v. *Brymer*, 5 Ex. 710; *Wood* v. *Copper Miners' Co.*, 14 C. B. 428; see too *Roberts* v. *Brett*, 11 H. L. C. 337; and see notes to *Cutter* v. *Powell*, 2 Sm. L. C.

(*u*) *Dicker* v. *Jackson*, 6 C. B. 103, 114; and see *Sibthorp* v. *Brunel*, 3 Ex. 826; *Lloyd* v. *Lloyd*, 2 M. & C. 192; *Wilks* v. *Smith*, 10 M. & W. 355; *Friar* v. *Grey*, 5 Ex. 584; 4 H. L. C. 565; *Lindsay* v. *London and Portsmouth R. Co.*, 1 Pract. R. 529, 537; but see *Manby* v. *Cremonini*, 6 Ex. 808; *Bland* v. *Crowley*, *ib.* 522; *Weedon* v. *Woodbridge*, 13 Q. B. 462; *Neale* v. *Ratcliff*, 15 Q. B. 916; *Eastern C. R. Co.* v. *Philipson*, 16 C. B. 1; *Stratton* v. *Pettit*, *ib.* 420; *Bond* v. *Rosling*, 1 B. & S. 371; *Phelps* v. *Prothcroe*, 3 C. L. R. 906; see *S. C.*, in Equity, 7 D. M. & G. 722; *Anderson* v. *Baigent*, 4 W. R. 265.

(*x*) *Yates* v. *Gardiner*, 20 L. J. Ex. 327.

fixed for performance has not arrived (*y*): but it must not be inferred from this decision that, in every case, the refusal of one party to complete will dispense with the performance by the other of his obligations under the contract (*z*).

Action on a bill or note for consideration —what a defence to.

It has been held that where a bill or note is given as the consideration for a lease, and the lessee is let into possession, the refusal of the lessor to execute the lease is no defence to his action on the bill or note: for he is not bound to execute till the price is paid, and as the lessee was let into possession the consideration fails in part only; and the sum to be allowed for such failure is matter not of more calculation, but of unliquidated damages (*a*). So, on a sale, the fact of no conveyance having been executed, is no defence to an action on a bill or note for the purchase-money; at least, if it was not the vendor's fault that he did not convey (*b*); but it would be an answer to the action that the purchaser had a right to rescind the contract, and had in fact rescinded it (*c*).

Deposit.

The recent case of *Howe* v. *Smith* (*d*) has finally settled that, even where there is no condition respecting the forfeiture of the deposit, and the purchaser by his own default loses his right to enforce the contract, he has no right to recover his deposit; and will not acquire such right by reason of the estate being subsequently sold by the vendor (*e*); nor, if subsequently to his own default and the consequent forfeiture of the deposit, it turns out that the vendor had in fact no title (*f*). In one case where the contract was a parol contract only and not binding, the purchaser on refusing to

(*y*) *Hoehster* v. *De la Tour*, 2 E. & B. 678; *Frost* v. *Knight*, L. R. 7 Ex. 111; and cf. *Johnstone* v. *Milling*, 16 Q. B. D. 460.

(*z*) *Reid* v. *Hoskins*, 6 E. & B. 953. See notes to *Pordage* v. *Cole*, 1 Wms. Saund. 319; *Freeth* v. *Burr*, L. R. 9 C. P. 208; *Mersey Steel Co.* v. *Naylor*, 9 Ap. Ca. 434.

(*a*) *Moggridge* v. *Jones*, 14 Ea. 486; 3 Camp. 38; Byles, 152.

(*b*) *Spiller* v. *Westlake*, 2 B. & Ad. 155, 157.

(*c*) Bayley on Bills, 507.

(*d*) 27 Ch. D. 89.

(*e*) *Ib.*; Sug. 40; and *Depree* v. *Bedborough*, 4 Gif. 479, a sale by the Court; *Ex p. Barrell*, 10 Ch. 512; but cf. *Palmer* v. *Temple*, 9 A. & E. 508; and see comments on this case in *Howe* v. *Smith*, *suprà*.

(*f*) *Soper* v. *Arnold*, 35 Ch. D. 384.

Chap. XVII. Sect. 3.

complete was held to be entitled to the return of his deposit (*z*). But where the purchaser paid the deposit, knowing that the vendor's name did not appear on the memorandum, and some time afterwards repudiated the contract, he was not allowed to recover the deposit (*a*).

Section 4.

(4.) *As to the agreement;—how affected by parol evidence.*

As to agreement;—how affected by parol evidence.

What a sufficient contract within Statute of Frauds.

We have already considered (*b*) what is a sufficient agreement within the Statute of Frauds: we may here remark, that the doctrine acted upon in Courts of Equity as to parol agreements being taken out of the Statute by part performance was never recognized by a Court of Law (*c*).

No parol variation of contract allowed at Law.

The contract, as originally entered into, cannot, at Law be altered by evidence of a parol variation in favour of either plaintiff or defendant (*d*); but an action may lie on a parol agreement, which varies, but does not actually conflict with, the terms of the written instrument (*e*): and, as we have already seen (*f*), parol evidence may be admitted to prove that an agreement, absolute in form, was intended to operate only on the happening of certain contingencies.

Parol evidence, how far admissible in explanation of contract.

As respects the reception of parol evidence in order to explain agreements of doubtful or ambiguous meaning, the following seems to be the general result of the authorities. The Courts will always, if necessary, receive evidence to enable them to decipher, or, if written in a foreign language, to interpret, the instrument; that is, to ascertain what are the expressions, or the English equivalents to the expres-

(*z*) *Casson* v. *Roberts*, 31 B. 613.

(*a*) *Thomas* v. *Brown*, 1 Q. B. D. 714.

(*b*) *Ante*, Ch. VI.

(*c*) Sug. Ch. IV. s. 7.

(*d*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *ante*, p. 123; *Henson* v. *Coope*, 3 Sc. N. R. 48; *Stead* v. *Dawber*, 10 A. & E. 57; *Marshall* v. *Lynn*, 6 M. & W. 109; *Emmet* v. *Dewhirst*, 3 M. & G. 596, 597; *Canham* v. *Barry*, 15 C. B. 597; *Noble* v. *Ward*, L. R. 2 Ex. 135; *Sanderson* v. *Graves*, 10 *ib.* 234.

(*e*) *Nash* v. *Armstrong*, 10 C. B. N. S. 259.

(*f*) *Vide ante*, p. 268.

sions, which the parties have actually used. They will also receive parol evidence of the meaning which local custom (*g*), or professional or trade usage (*h*), or the former practice of the parties themselves (*i*), has attached to particular expressions: so as, in fact, to ascertain what is (with reference to the particular subject-matter of the contract) their strict and primary meaning (*k*);—unless such a construction would be inconsistent with the terms of the instrument (*l*), or some express provisions of the Legislature; for instance, local custom cannot vary the statutory meaning of expressions referring to weights and measures (*m*);—or to annex any customary incidents to the contract which are not expressly or impliedly excluded by the terms of the written instrument (*n*). Where construing the expressions according to such strict and primary meaning would render them meaningless with reference to extrinsic circumstances, the Courts will receive parol evidence of the circumstances and situations of the parties and the state of the property at the date of the agreement, for the purpose of ascertaining whether such expressions have not been used in some secondary sense consistent with such circumstances, &c. (*o*). So, where an agent contracts, parol

(*g*) *Smith* v. *Wilson*, 3 B. & Ad. 721; *Doe* v. *Benson*, 4 B. & Ald. 588, where evidence was admitted to show that by Lady-day was meant old Lady-day; *Tucker* v. *Linger*, 8 Ap. Ca. 508, where evidence of a custom for tenants to remove and sell flints, turned up in cultivation, was allowed to show that they were not included in a reservation of mines and minerals. And see as to evidence of custom, generally, notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C.

(*h*) *Clayton* v. *Gregson*, 4 N. & M. 602; *Hutchison* v. *Bowker*, 5 M. & W. 535; and see *Lewis* v. *Marshall*, 8 Sc. N. R. 477, 493; *Sotilichos* v. *Kemp*, 3 Ex. 105; *Malcolm* v. *Scott*, 3 M. & G. 29; *Smith* v. *Thompson*, 8 C. B. 44; *Simpson* v. *Margitson*, 11 Q. B. 32; *Fawkes* v. *Lamb*, 8 Jur. N. S. 385; *Newell* v. *Radford*, L. R. 3 C. P. 52.

(*i*) *Bourne* v. *Gatliff*, 11 C. & F. 45, 70.

(*k*) See *Colpoys* v. *Colpoys*, Jac. 463; *Simpson* v. *Margitson*, 11 Q. B. 23; *Doe* v. *Langton*, 2 B. & Ad. 695; *Doe* v. *Birch*, 1 M. & W. 402; *Parker* v. *Gossage*, 2 C. M. & R. 617.

(*l*) See *Spartali* v. *Benecke*, 10 C. B. 212; *Field* v. *Lelean*, 7 Jur. N. S. 918.

(*m*) *St. Cross Hosp.* v. *Lord Howard de Walden*, 6 T. R. 338.

(*n*) *Hutton* v. *Warren*, 1 M. & W. 466; *Syers* v. *Jonas*, 2 Ex. 111; *Spartali* v. *Benecke*, 10 C. B. 212; *Dale* v. *Humfrey*, E. B. & E. 1004.

(*o*) See *Eden* v. *Earl of Bute*, 3 Br.

Chap. XVII. Sect. 4.

evidence is admissible to prove who is the principal (*p*); or to show that the apparent agent is himself the principal (*q*). And where, as respects all or any part of the subject-matter of the contract (*r*), or the identity of places, documents (*s*), or persons (*t*) referred to, there is a *latent* ambiguity—that is, where the words of the agreement, although certain in point of grammatical construction and apparently definite, are rendered of doubtful (*u*) application by circumstances which appear *aliunde* (*x*), or according to a modern decision (*y*), upon the face of the agreement itself,—parol evidence of the *intention* of the parties at the date of the agreement is admissible, in order to identify the estate, document, plan or other thing or person intended; but such evidence is not admissible in aid of a *patent* ambiguity; *i. e.*, an ambiguity which is either directly suggested by the terms of the instrument (*z*), or is occasioned by the grammatical uncertainty of the expressions therein used; nor, *à fortiori*, to control the clear effect of an unambiguous instrument.

Lyle v. *Richards.*

In one case in the House of Lords (*b*) the boundary in a mining sett was described as "a line drawn from J. V.'s house" to a bound-stone, and the parcels were described by

P. C. 679; *Allen* v. *Cameron*, 1 C. & M. 832; *Simpson* v. *Henderson*, M. & M. 300; *Shore* v. *Wilson*, 9 C. & F. 355; *Innes* v. *Sayer*, 3 M. & G. 614; *Newell* v. *Radford*, L. R. 3 C. P. 52.

(*p*) *Morris* v. *Wilson*, 5 Jur. N. S. 168; *Dale* v. *Humfrey*, E. B. & E. 1004.

(*q*) *Schmaltz* v. *Avery*, 16 Q. B. 655; *Carr* v. *Jackson*, 7 Ex. 382; *Young* v. *Schuler*, 11 Q. B. D. 651.

(*r*) *Longchamps* v. *Fawcett*, Peak. Ca. 101; *Doe* v. *Burt*, 1 T. R. 701; *Jones* v. *Newman*, 1 W. Bl. 60; *Murray* v. *Parker*, 19 B. 305.

(*s*) *Hodges* v. *Horsfall*, 1 R. & M. 116; *Shortrede* v. *Check*, 1 A. & E. 57; *Morris* v. *Wilson*, 5 Jur. N. S. 168.

(*t*) *Doe* v. *Westlake*, 4 B. & Ald. 57; *Towle* v. *Topham*, 37 L. T. 308; and see *ante*, p. 251 *et seq.*, for other cases in equity.

(*u*) There must be a reasonable and not a merely conjectural doubt; *Clifton* v. *Walmesley*, 5 T. R. 564; *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138, 149; *Smith* v. *Jeffryes*, 15 M. & W. 561. As to evidence in explanation of the ambiguity, see *Thomas* v. *Thomas*, 6 T. R. 671; *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72; *Doe* v. *Hiscocks*, 5 M. & W. 363, 369.

(*x*) *Doe* v. *Morgan*, 1 C. & M. 235.

(*y*) *Doe* v. *Needs*, 2 M. & W. 129; *Colpoys* v. *Colpoys*, Jac. 464.

(*z*) See *Brodie* v. *St. Paul*, 1 V. 326; and see 1 Sch. & L. 36.

(*b*) *Lyle* v. *Richards*, L. R. 1 H. L. 222; see and consider this case.

reference to an endorsed plan. The site of J. V.'s house, from the north-east corner of which the line was drawn, was inaccurately shown on the plan, and the dispute lay between two coterminous grantees as to what was the true boundary between their respective setts; the question depending upon what part of the house was to be taken as the starting point for the line. It was held by Lords Cranworth and Chelmsford that the plan, though inaccurate as to the site of the house, clearly indicated that the line was to be drawn from its north-east corner; and that the judge below was right in directing the jury that the line was to be drawn as marked on the map. Lord Westbury dissented from this view, and held, that as the error in the plan could not be discovered without the aid of extrinsic evidence, there was a latent ambiguity, which was matter of fact to be determined by a jury upon the evidence, not matter of law depending upon the construction of the deed. A plan is part of a deed to be interpreted, like every other portion of the instrument, by the judge; but, as was observed by Lord Westbury, the question here was not one of the interpretation of the deed itself, or even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects, one of which was proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence (*c*). The latter seems the sounder view: the construction of the plan was matter of law, so long only as its accuracy was unimpeached: being proved to be inaccurate, it became a question of fact what parcels were comprised in the lease; for it did not follow that, because the boundary line was drawn from the north-east corner of the house as incorrectly represented on the plan, it would have been drawn from the same point, if the true site of the house had been shown. A plan, though a useful adjunct to a specific de-

(*c*) See judgment of Lord Westbury, *ib.* 241.

Chap. XVII. Sect. 4.

scription, can seldom, especially when drawn on an inadequate scale, show with strict accuracy the objects and relative situations which it purports to represent; and in every case there ought to be an independent substantive description of the site, quantity, and dimensions of the property intended to be conveyed. A tithe commutation map cannot be used as evidence to show boundaries in a case of disputed title (*d*).

Agreement merely collateral to the land may be proved by parol.

An agreement merely collateral to the land, not being within the Statute of Frauds (*e*), may be supported by parol evidence, if not at variance with the terms of a written contract relating to the land. Thus where a lessee before executing a lease stipulated that the rabbits on the farm should be destroyed, and that a clause to that effect should be inserted in the lease, but on the lessor's assurance that the rabbits should be destroyed, signed the lease without insisting on the alteration, parol evidence in support of the agreement was admitted in an action by the lessee against the lessor for damage done by the rabbits (*f*). So a consideration not expressed, but not inconsistent with the consideration which is expressed, may be proved by parol (*g*).

Subsequent acts of the parties immaterial.

It seems to be the better opinion that, both at Law (*h*) and in Equity (*i*), the acts of the parties subsequent to the making of the agreement, are, as such, inadmissible for the purpose of determining its meaning.

Want of date.

As a general rule an instrument without a date operates from the date of its execution; but parol evidence is admissible to show that it was not intended to take effect until a

(*d*) *Wilberforce* v. *Hearfield*, 5 Ch. D. 709.

(*e*) *Vide ante*, p. 231.

(*f*) *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 146; *Angell* v. *Duke*, *ib.* 174; *Erskine* v. *Adeane*, 8 Ch. 756; *Salaman* v. *Glover*, 20 Eq. 444.

(*g*) See *Leifchild's case*, 1 Eq. 231; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; but see *Levy* v. *Creighton*, 22 W. R. 635; *ante*, p. 1019.

(*h*) *Iggulden* v. *May*, 5 Ea. 237; *Simpson* v. *Margitson*, 11 Q. B. 23; *Lewis* v. *Nicholson*, 18 Q. B. 503.

(*i*) *Monro* v. *Taylor*, 8 Ha. 56.

future period (*k*): so also, to show that the execution of a dated instrument was merely conditional (*l*). An executory agreement for a lease will not satisfy the Statute of Frauds, unless it can be collected from the agreement itself on what day the term is to begin; and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion (*m*). But where the agreement actually operates as a demise the rule is otherwise (*n*).

Section 5.

(5.) *Grounds of defence at Law, the agreement being admitted.*

Grounds of defence at Law, &c.

Supposing the agreement and its breach to be *primâ facie* capable of proof against the defendant, he may, by way of defence to the action, show, either that the agreement was originally invalid, or that it has since its execution ceased to be binding, or that satisfaction has been made for its breach: or that it was to be conditional upon some event which has not occurred (*o*).

Grounds of defence to action on contract duly executed.

Original invalidity of contract;

For instance, he may show that, at the time of the execution of the contract, he was under some personal incapacity to contract (*p*); or was under duress (*q*); or was fraudulently induced to enter into it (*r*); in which case it is voidable at

(*k*) *Davis* v. *Jones*, 25 L. J. C. P. 91.

(*l*) *Gudgen* v. *Besset*, 3 Jur. N. S. 212; which see as to "delivery."

(*m*) *Marshall* v. *Berridge*, 19 Ch. D. 233, overruling *Jaques* v. *Millar*, 6 Ch. D. 153; *Rock Portland Co.* v. *Wilson*, 52 L. J. Ch. 214; *Wyse* v. *Russell*, 11 L. R. Ir. 173. Cf. *Phelan* v. *Tedcastle*, 15 L. R. Ir. 169, where the date could be collected on the contract; and see *ante*, p. 263, n. (*f*).

(*n*) *Doe* v. *Benjamin*, 9 A. & E. 644; *Marshall* v. *Berridge*, *suprà*.

(*o*) *Pym* v. *Campbell*, 6 E. & B. 370.

(*p*) *Ante*, Ch. I.; see as to intoxication, *Gore* v. *Gibson*, 13 M. & W. 623; *Molton* v. *Camroux*, 4 Ex. 17; *Matthews* v. *Baxter*, L. R. 8 Ex. 132; Pollock, 87 *et seq.*

(*q*) Bac. Abr. tit. "Duress;" Pollock, 553 *et seq.*

(*r*) *Vide ante*, p. 102 *et seq.*; and *Pasley* v. *Freeman*, and notes thereto, 2 Sm. L. C.; actual fraud in the agent, in respect to matters within the scope of his authority (*Barwick* v. *English and Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire* v. *Francis*, 3 Ap. Ca. 106; *Barnett* v. *South London Tramways Co.*, 18 Q. B. D. 815; *Brit. Mut. Banking Co.* v. *Charnwood R. Co.*, *ib.* 714) is the same as fraud in the principal, *Doe* d. *Willis* v. *Martin*, 4 T. R. 39; *Wilson* v. *Fuller*, 3 Q. B. 68; see 1 H. L. C. 615; *National Exchange Co.* v. *Drew*, 2 Macq. 108, 145; *Ludgater* v. *Love*, 44 L. T. 694.

Chap. XVII. Sect. 5.

his election (*s*); or that it contains provisions against public policy (*t*); or was entered into for or with reference to some unlawful purpose (*u*). But a contract legal in its inception cannot be rendered illegal by matter *ex post facto* (*x*); although it may be avoided by a collateral and contemporary illegal agreement (*y*).

or subsequent waiver;

So, admitting its original validity, he may show that it has been since avoided by having without his concurrence, been altered by the plaintiff in a material part (*z*); or by a waiver in writing duly signed by the plaintiff (*a*), before the breach which is relied on in the action. Where a parol has been substituted for a written agreement, no action will lie on the substituted agreement (*b*); and it seems to be now well settled (*c*) that a verbal waiver of a written agreement is no defence at Law. For example, where there was a written

which, if verbal, is no defence at Law, where the agreement

(*s*) *White* v. *Garden*, 10 C. B. 919.

(*t*) *Vansittart* v. *Vansittart*, 4 K. & Jo. 62; *Ayerst* v. *Jenkins*, 16 Eq. 275, and judgment of Ld. Selborne; and see Pollock, 271 *et seq.*

(*u*) *Bartlett* v. *Vinor*, Carth. 251; *Langton* v. *Hughes*, 1 M. & S. 596; *De Begnis* v. *Armistead*, 10 Bing. 107; *Gas Light Co.* v. *Turner*, 5 Bing. N. C. 666; *Ritchie* v. *Smith*, 6 C. B. 462; *Fisher* v. *Bridges*, 3 E. & B. 642; and see *Ewing* v. *Osbaldiston*, 2 M. & C. 53; and note, anything to which a statute attaches a penalty is unlawful, although not expressly prohibited, *S. C.*; and see *Duke of Roxburgh* v. *Ramsay*, 7 Bell's Ap. C. 248; *Appleton* v. *Campbell*, 2 C. & P. 347; *M'Gregor* v. *Dover R. Co.*, 17 Jur. 21; *Tullis* v. *Tallis*, 1 E. & B. 391; *Taylor* v. *Crowland Gas Co.*, 10 Ex. 293; *Jones* v. *Orchard*, 3 C. L. R. 1275; Pollock, 323 *et seq.*

(*x*) *Fraser* v. *Hill*, 1 Macq. 392; *Armstrong* v. *Armstrong*, 3 M. & K. 64; Pollock, 329.

(*y*) *Armstrong* v. *Lewis*, 2 C. & M. 298; cf. *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; but an estate conveyed cannot be divested by the existence of an unlawful purpose on the part of the grantee, and fraudulent misrepresentation by him; *Feret* v. *Hill*, 15 C. B. 207; and see *Ayerst* v. *Jenkins*, 16 Eq. 275.

(*z*) *Ante*, p. 274.

(*a*) See *Goss* v. *Lord Nugent*, 2 N. & M. 28; *Harvey* v. *Grabham*, 6 N. M. 754, 762; *Sanderson* v. *Graves*, L. R. 10 Ex. 234.

(*b*) *Stead* v. *Dawber*, 10 A. & E. 57; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 66; *Plevins* v. *Downing*, 1 C. P. D. 220.

(*c*) *Vide Noble* v. *Ward*, L. R. 2 Ex. 135; *Moore* v. *Campbell*, 10 Ex. 323; *Goss* v. *Lord Nugent*, and *Stead* v. *Dawber*, *supra*; *Marshall* v. *Lynn*, 6 M. & W. 109; but see *Clark* v. *Upton*, 3 Man. & R. 89, where the purchaser's action was held to be barred by his own application to the vendor to rescind the contract, and which the latter had, substantially, though not in terms, complied with; see, too, *Nash* v. *Armstrong*, 10 C. B. N. S. 259; Sug. 164, 165.

contract for the sale of goods, to be delivered within a specified period, and there was a subsequent parol extension of the time for delivery, it was held that the subsequent parol agreement could not operate either as a rescission of the written contract, or as creating a new contract; and that the seller might revert to his original position, and sue on the written contract (*d*). But even at Law a distinction has been drawn between an alteration of the contract by enlarging the time, or the substitution of a new parol contract, and a mere dispensation of its performance at the time stipulated, or the substitution of a new mode of performance (*e*); and it is not clear that a parol waiver would not be admissible as a defence under the Judicature Act.

was in writing.

Where a right of action has actually arisen, this can be discharged only by a release under seal, or by the acceptance of something by way of satisfaction (*f*). Where the contract is under seal, there can be no parol discharge before breach (*g*).

So the defendant, admitting the agreement and its breach, may show that the plaintiff has executed a release under seal; or has accepted something in satisfaction of the breach (*h*); or has already recovered damages in an action upon the agreement (*i*); or that the action has not been brought within the time allowed by the Statutes of Limitation.

Or release; or satisfaction.

So, on the principle of the maxim *lex non cogit ad impossibilia*, where a lessor covenanted that neither he nor his assigns would, during the term, permit any building to be erected on land fronting the demised property, and this land was under the compulsory provisions of a subsequent Act taken by a

Or the impossibility of performing it.

(*d*) *Noble* v. *Ward*, L. R. 2 Ex. 135.

(*e*) *Ogle* v. *Earl Vane*, L. R. 3 Q. B. 272; *Hickman* v. *Haynes*, L. R. 10 C. P. 598; *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140; *Plevins* v. *Downing*, 1 C. P. D. 220.

(*f*) *Willoughby* v. *Backhouse*, 2 B. & C. 821, 824; see *Baylis* v. *Usher*, 7 Bing. 153.

(*g*) *Spence* v. *Healey*, 8 Ex. 668; *Mayor of Berwick* v. *Oswald*, 1 E. & B. 295.

(*h*) *Willoughby* v. *Backhouse*, and *Baylis* v. *Usher*, *supra*.

(*i*) See 10 Bing. 538.

Chap. XVII. Sect. 5.

railway company who erected a station thereon, the covenantor was held to be discharged by the Act from his obligations under the covenant (*k*).

Section 6.

(6.) *Remedy by Mandamus against Railway Companies, &c.*

Remedy by mandamus against railway companies, &c.

Mandamus to complete granted against company which has given notice to take land;

When a railway or other land-taking company have, under their compulsory powers, entered into a valid statutory contract to take lands, the Court of Queen's Bench will, if necessary, enforce by mandamus the completion of the purchase. For instance, if before the expiration of the period (*l*) limited for the exercise of their compulsory powers, they have served the usual notice on the landowner, and then fail to proceed, he may thus summarily compel an assessment of value by jury; and this even after the expiration of the limited period; at least if he have, within that period, served them with notice of his desire to have the price ascertained by a jury (*m*): and an action for mandamus will lie, even though no actual damage may have been sustained (*n*).

or has not entered into an agreement with the landowner;

As we have already seen (*o*), the service of a notice to treat by a railway company, though not of itself constituting a contract (*p*), creates a quasi-relation of vendor and purchaser which is binding on both parties (*q*); but the notice,

(*k*) *Bailey* v. *De Crespigny*, L. R. 4 Q. B. 181. And see, generally, on impossible agreements, Pollock, Ch. VII.

(*l*) *Viz.*, three years, unless a different period is specified in the special Act. See L. C. C. Act, s. 123.

(*m*) See *Reg.* v. *Birmingham & Oxford R. Co.*, 15 Q. B. 634, 647; and see *Pinchin* v. *L. and Blackwall R. Co.*, 5 D. M. & G. 851, 864. And see *Reg.* v. *Ir. S. E. R. Co.*, 13 I. C. L. R. 119. It has been held that a company cannot, under the L. C. C. Act, s. 7, buy up a lessee's interest without also purchasing the estate of the reversioner; *Legg* v. *Belfast R. Co.*, 13 I. C. L. R. 124, n.; *Reg.* v. *L. & N. W. R. Co.*, 3 E. & B. 443. Costs were refused where the sum assessed by the jury was less than the price previously offered by the company; *Reg.* v. *Waterford R. Co.*, 13 Ir. L. R. 272. See, now, as to the appointment of surveyor under the 85th section of the L. C. C. Act, 30 & 31 Vict. c. 127, s. 36, and *vide ante*, p. 705 *et seq.*

(*n*) *Fotherby* v. *Metr. R. Co.*, L. R. 2 C. P. 188.

(*o*) *Vide ante*, pp. 242 *et seq.*

(*p*) See and consider *Haynes* v. *Haynes*, 1 Dr. & S. 426.

(*q*) *Marquis of Salisbury* v. *G. N. R. Co.*, 17 Q. B. 840; *Tiverton R. Co.* v. *Loosemore*, 9 Ap. Ca. 480, 493.

if not acted on by the company within a reasonable period, may be treated as abandoned (*r*). Until the terms have been agreed upon between the landowner and the company, or the price has been fixed by arbitration, there is no contract which is capable of being enforced in Equity (*s*). But wherever a company is entitled to take land compulsorily under the powers of an Act of Parliament, if they give notice of their intention to take the land, that is an exercise of their option from which they cannot recede (*t*); and in such a case the proper remedy of the landowner is by mandamus to compel the company to proceed with the other steps directed by their Act (*u*). So soon, however, as the price is ascertained, the agreement is complete, and if broken, the ordinary remedies for a breach are available (*x*).

or where the price is to be settled by arbitration;

If, after the usual notice by the company, the landowner desire the price to be settled by arbitration, and the reference prove abortive, owing to the non-appointment of an umpire, the landowner may, after the time has expired within which the Board of Trade can make an appointment, apply for a mandamus to compel an assessment by jury (*y*). So, where the price is to be settled by arbitration, a mandamus will be granted to compel the company, at their own expense, to take up the award (*z*).

or where the company has entered on land under Lands Clauses Consolidation Act.

So, where a company, not being a railway company (*a*), within the limited period, enter upon land under the 85th section of the Lands Clauses Consolidation Act, making the deposit and giving the bond required by that section, and

(*r*) *Richmond* v. *N. L. R. Co.*, 5 Eq. 352.

(*s*) *Haynes* v. *Haynes*, *suprà*; *Re Arnold*, 32 B. 591, and *vide ante*, p. 242; Sug. 79, 80.

(*t*) *Rex* v. *Hungerford Market Co.*, 4 B. & Ad. 327.

(*u*) *Ibid.*; *Fotherby* v. *Metr. R. Co.*, L. R. 2 C. P. 188; *Morgan* v. *Metr. R. Co.*, 4 *ib.* 97.

(*x*) *Harding* v. *Metr. R. Co.*, 7 Ch. 154.

(*y*) *Re South Yorkshire R. Co.*, 14 Jur. 1093.

(*z*) *Reg.* v. *S. Devon R. Co.*, 15 Q. B. 1043; but see, as to the return to a mandamus, *Reg.* v. *Cambrian R. Co.*, L. R. 4 Q. B. 320.

(*a*) As to which, see next paragraph.

retain possession until after the expiration of that period, the landowner may, and it rests with him to, take steps to have the amount of compensation settled under the 68th section: he is to state what sum he claims; and if the company within twenty-one days enter into a written agreement to pay that sum, the question of compensation is settled; but if they dispute the amount, it is then to be settled by arbitration; or, if the owner give notice of his wish to have a jury, then by a jury, which the company are required to summon within twenty-one days, and in default thereof are liable to pay the sum claimed (*b*); or he may sue them upon the bond. Where the company appointed an arbitrator under protest, and to a mandamus to compel them to take up the award made a return that the prosecutor had not been injuriously affected and was not entitled to compensation, the return was held to be good (*c*). We may remark that a bond conditioned for payment "at any time hereafter," is not a proper bond within the Act (*d*).

In the case of a railway company entering upon land under the 85th section, the surveyor must now be appointed by the Board of Trade and not by two justices, and the company are to give not less than seven days' notice of their intention to apply to the Board for his appointment; the valuation is to include compensation for all damage, so far as it can be estimated, to be sustained by the exercise of the statutory powers; and the sureties to the bond are to be approved by the Board of Trade, after hearing the parties, instead of by two justices (*e*).

Mandamus to complete line and make

And even where there has been neither notice given nor entry made, the Court, in cases where the *duty* of construct-

(*b*) See *Doe* v. *N. S. R. Co.*, 16 Q. B. 526; *Barker* v. *N. S. R. Co.*, 2 De G. & S. 55.

(*c*) *Reg.* v. *Cambrian R. Co.*, L. R. 4 Q. B. 320. See *S. C.*, on the question of whether compensation was due, 6 *ib.* 422.

(*d*) *Cotter* v. *Metr. R. Co.*, 12 W. R. 1021.

(*e*) 30 & 31 V. c. 127, s. 36; *Field* v. *Carnarvon R. Co.*, 5 Eq. 190.

necessary purchases.

ing the line is imposed upon the company, will, upon the application of a landowner over whose land the line is to be made (*f*), although he be a shareholder (*g*), compel the company to proceed to complete their railway, and to purchase the necessary land for the purpose (*h*) : and the near expiration of the time limited for the compulsory purchase of land, is no answer to the application, unless it be shown that there is not time to take the necessary steps to entitle the company to the requisite land (*i*) : nor is it sufficient to show that the company have no funds in hand (*k*). But the application will be refused if the company show their actual inability to construct the line (*l*) ; and it has been decided that the words commonly inserted in the special Acts "it shall be lawful, &c.," are merely permissive and not obligatory (*m*). And the Court will not thus interfere against commissioners under a public Act (*n*).

Action of mandamus.

The Common Law Procedure Act, 1854 (*o*), introduced a novelty in the shape of an action for a mandamus "to fulfil any duty in the fulfilment of which the plaintiff is personally interested;" but the new mode of procedure, which was seldom resorted to, was held to apply, not to the enforcement of a duty arising out of a personal contract, as, *e. g.*, an agreement to grant a lease, but only to duties of a quasi-public character (*p*), although it has been said that it is not confined strictly to cases in which the prerogative writ would formerly have been granted (*q*). In such cases the Statute facilitated the remedy, and also extended to the other superior Courts of Law a jurisdiction which had

(*f*) *Reg.* v. *York R. Co.*, 20 L. J. Q. B. 503.

(*g*) *Reg.* v. *Ambergate R. Co.*, 15 Jur. 993.

(*h*) *Reg.* v. *York R. Co.*, *suprà*.

(*i*) *Ibid.*

(*k*) *Reg.* v. *L. and Y. R. Co.*, 20 L. J. Q. B. 507, n.

(*l*) *Reg.* v. *G. W. R. Co.*, 1 E. & B. 774, 874.

(*m*) *York & N. M. R. Co.* v. *Reg.*, 1 E. & B. 858 ; and see *Edinburgh, Perth & Dundee R. Co.* v. *Philip*, 2 Macq. 514.

(*n*) *Reg.* v. *Commrs. of Woods and Forests*, 15 Q. B. 761.

(*o*) 17 & 18 V. c. 125, s. 68.

(*p*) *Benson* v. *Paull*, 6 E. & B. 273 ; *Reg.* v. *Commrs. of I. R.*, 32 W. R. 543.

(*q*) *Norris* v. *Irish Land Com.*, 8 E. & B. 512.

exclusively belonged to the Court of Queen's Bench (*r*). The sections, however, of the C. L. P. Act, 1854, which dealt with this subject (*s*) have been repealed (*t*); and the practice relating to such actions is now governed by Order 53 of the R. S. C. 1883, while the practice as to the prerogative writ of mandamus is regulated by the Crown Office Rules, 1886 (*u*). Such writs can only be obtained in the Queen's Bench Division; and the Judicature Acts do not seem to have enlarged the jurisdiction of the Chancery Division, so as to enable it to usurp the jurisdiction of the old Courts of Law to compel a public body to do its duty (*x*); although it has ample jurisdiction, as has every division of the High Court, to grant a mandatory injunction (*y*).

(*r*) *Benson* v. *Paull*, 6 E. & B. 273; *Wodehouse* v. *Farebrother*, 5 *ib.* 277; *Wood* v. *Copper Miners Co.*, 17 C. B. 561; *Clerk* v. *Lawrie*, 1 H. & N. 452.

(*s*) Sects. 68—77.

(*t*) 46 & 47 V. c. 49.

(*u*) Rules 60 *et seq.*

(*x*) *Glossop* v. *Heston Local Board*, 12 Ch. D. 102, 115.

(*y*) *Ib.* 122.

CHAPTER XVIII.

AS TO SPECIFIC PERFORMANCE.

1. *Matters relating to the jurisdiction generally.*
2. *By whom specific performance may be enforced.*
3. *Against whom it may be enforced.*
4. *As to the parties to the suit.*
5. *As to how the plaintiff's case may be sustained in the absence of a written agreement—fraud—part-performance—admission by defendant of parol agreement—parol variation of written agreements.*
6. *As to grounds of defence negativing plaintiff's right to specific performance except with a variation of the original agreement; viz., fraud—mistake—surprise—misrepresentation—unfulfilled promise—parol variation, &c.*
7. *As to grounds of defence negativing* in toto *plaintiff's right to specific performance; viz., personal incapacity—nature of contract, of fraud, &c., &c., attending its execution—matters relating to the estate—title—or consideration—plaintiff's conduct, &c., after contract—election of other remedy.*
8. *As to the proceedings in the suit; viz., payment of purchase-money into Court—reference of title and proceedings thereon—decree for plaintiff—conveyance—decree dismissing bill.*
9. *As to costs.*

Section 1.

Specific performance, the primary remedy in Equity.

(1.) The primary (and, until recently, the only) relief to be obtained in Equity for the non-performance of the contract, is a decree for specific performance. At one time there was a floating idea in the profession that the Court might, under its general jurisdiction, award compensation for non-performance, in the event of the primary relief failing. Possibly the power of granting such subsidiary relief may

Chap. XVIII. Sect. 1.

be inherent in the Court (*a*), but if so, the whole current of modern authorities is against its exercise (*b*); nor, in cases prior to Lord Cairns' Act, did it make any difference that compensation was sought not against the owner of the estate, but against a person who falsely assumed authority to sell (*c*): nor, except under special circumstances, would a prayer in the alternative for the return of the deposit prevent the dismissal of the bill (*d*).

As to damages under Lord Cairns' Act and 46 & 47 V. c. 49.

Lord Cairns' Act (*e*) has been repealed (*f*), but the effect of the repealing Act is to preserve, if not to enlarge, the jurisdiction which the former Act conferred (*g*); and, accordingly, now, whenever the Court has jurisdiction to entertain a suit for specific performance, it may, in its discretion, award damages to the party injured, either in addition to, or substitution for, the primary relief; such damages to be assessed as the Court shall direct. It need hardly be added that the jurisdiction conferred by Lord Cairns' Act related to the remedy only, and created no new right to damages, where none were formerly recoverable (*h*). It must be remembered that an alternative claim for damages, merely as a substitute for specific performance, cannot succeed, if the plaintiff has himself made the performance of the contract impossible, and in order to obtain damages for the defendant's breach in such a case, the plaintiff should at once on his becoming incapable of performing his part amend his claim to that effect (*i*).

Only awarded when a suit for specific performance would lie.

The statutory remedy by way of damages being merely subsidiary to the primary equitable relief, it is only necessary to consider in what cases a suit for specific performance will

(*a*) See *Nelson* v. *Bridges*, 2 B. 239; and Sug. 233.

(*b*) *Todd* v. *Gee*, 17 V. 273; *Sainsbury* v. *Jones*, 5 M. & C. 1, 3; *Williams* v. *Higden*, C. P. Coop. 500.

(*c*) *Sainsbury* v. *Jones*, 5 M. & C. 1.

(*d*) *Kendall* v. *Beckett*, 2 R. & M. 90, 91.

(*e*) 21 & 22 V. c. 27, s. 2. See as to damages in suits for injunction, *ante*, p. 869 *et seq.*

(*f*) 46 & 47 V. c. 49.

(*g*) *Sayers* v. *Collyer*, 28 Ch. D. 103.

(*h*) *Rock Portland Co.* v. *Wilson*, 52 L. J. Ch. 214.

(*i*) *Hipgrave* v. *Case*, 28 Ch. D. 356. Cotton, L. J., seems to have thought that leave to amend, if asked for, might have been granted at the trial.

lie. The jurisdiction, we may premise, is purely equitable; but since the Judicature Acts every Division of the High Court has possessed it.

Inadequacy of damages, principle on which specific performance decreed.

The principle by which Courts of Equity have professed to be guided in decreeing specific performance of a contract for purchase is, that damages at Law may not, in the particular case, afford a complete remedy (*k*): they will, therefore, decline to interfere if the subject-matter of the contract be such that both vendor and purchaser would be reimbursed by damages; as on an ordinary (*l*) agreement for the sale of stock (*m*). In the case of land, the purchaser's right to sue can seldom if ever be questioned upon this ground; for the land may, to him, have "a peculiar and special value" (*n*).

The jurisdiction, not confined to contracts for sale of land;

The jurisdiction, however, is not confined to contracts for the sale of an interest in land; for although the Court will seldom interfere in respect of chattels, partly because of their fluctuating value, and partly because damages are a sufficient remedy for a breach of contract, yet, where it is shown that damages are not an adequate compensation, the principle on which the Court decrees specific performance is just as applicable to a contract for the sale of chattels as to a contract for the sale of land. Thus, a contract for the sale of articles of unique character, as rare china (*o*), may be enforced; so too, it is conceived, where the chattels can only be advantageously procured from the person who has contracted to sell them. So, a contract for the sale of a barge (*p*) has been enforced; so of a patent (*q*); so, of the

but may extend to chattels;

(*k*) See *Adderley* v. *Dixon*, 1 S. & S. 610; *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 S. & G. 119.

(*l*) As to what special circumstances will affect the general rule, see cases cited *post*, p. 1106; *Doloret* v. *Rothschild*, 1 S. & S. 590; *Pooley* v. *Budd*, 14 B. 34.

(*m*) *Cuddee* v. *Rutter*, 1 P. W. 570; 1 Wh. & T. L. C.; *Nutbrown* v. *Thornton*, 10 V. 159, 161.

(*n*) 1 S. & S. 610.

(*o*) *Falcke* v. *Gray*, 4 Dr. 651, 658; see *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. W. 390; 1 Wh. & T. L. C.

(*p*) *Claringbould* v. *Curtis*, 21 L. J. Ch. 541.

(*q*) *Cogent* v. *Gibson*, 33 B. 557. As to chattels generally, and the

Chap. XVIII. Sect. 1.

goodwill of a business, where it is sold in connection with the property (*r*). The High Court has power to order specific delivery of the chattels or goods sold, although sect. 78 of the Common Law Procedure Act, 1854, has been repealed (*s*).

or railway shares.

So, although an ordinary agreement for the transfer of stock will not be enforced (*t*), yet, in the case of shares in a railway or other public company, which are limited in number, and not always to be had in the market (*u*), specific performance may be decreed (*x*); even though nothing has been paid upon them, and there is no pecuniary consideration for the transfer (*y*): and, in one case, where the deed of settlement of a joint-stock company provided that no shareholder should be at liberty to transfer his shares, except in such manner as the board of directors should sanction, specific performance of a contract for the sale of shares was decreed, notwithstanding the refusal of the directors to allow the transfer (*z*); and the fact of a call, of which the purchaser has no notice, having been made at the date of the purchase, does not invalidate the contract (*a*). If the shares are

distinction between contracts and trusts, see *Pooley* v. *Budd*, 14 B. 34; *Pollard* v. *Clayton*, 1 K. & J. 462.

(*r*) *Darbey* v. *Whittaker*, 4 Dr. 134; and see *Cooper* v. *Hood*, 26 B. 293.

(*s*) 46 & 47 V. c. 49; *Manners* v. *Mew*, 29 Ch. D. 725; *Cooper* v. *Vesey*, 20 Ch. D. 611.

(*t*) *Cuddee* v. *Rutter*, 1 Wh. & T. L. C.; but a contract for the sale of an annuity payable out of the dividends of stock may be enforced; see *Withy* v. *Cottle*, 1 S. & S. 174; 1 T. & R. 78.

(*u*) *Duncuft* v. *Albrecht*, 12 S. 199.

(*x*) *Shaw* v. *Fisher*, 2 De G. & S. 11; *Wynne* v. *Price*, 3 *ib.* 310.

(*y*) *Cheale* v. *Kenward*, 3 D. & J. 27.

(*z*) *Poole* v. *Middleton*, 29 B. 646.

(*a*) *Hawkins* v. *Maltby*, 3 Ch. 188. See this case as to the right of the original vendor to enforce specific performance against a sub-purchaser, where there has been a series of successive sales and purchases; but in a case in Ireland, *Sheppard* v. *Murphy*, 2 I. R. Eq. 544, specific performance has been refused in such a case on the ground of want of privity of contract between the vendor and sub-purchaser. See, too, *Grissell* v. *Bristowe*, L. R. 3 C. P. 112; and see now *Nickalls* v. *Merry*, L. R. 7 H. L. 530, where it was held that the contract is not between the vendor's broker and the purchaser's broker, but between the vendor and the purchaser named in the ticket, who are brought together by means of the jobber; and that the latter is not discharged from liability, if he give the name of an infant. See, too, *Loring* v. *Davis*, 32 Ch. D. 625; and on the subject generally, Fry, 620 *et seq.*

bought through a broker the purchaser takes subject to the established rules and regulations of the stock exchange, under which the contract is complete on the delivery by the vendor of the transfer and share certificates. Hence, the refusal of directors to register the purchaser cannot relieve him from the contract (*b*).

Where damages would be an inadequate remedy.

Before, however, the Court would decree specific performance of a contract to take shares, it was formerly necessary to show conclusively that the remedy at Law was inadequate (*c*); and although, as a general principle, the Judicature Acts affect procedure only, and merely enable every Division of the High Court to administer Law and Equity concurrently, yet this very change of procedure has a tendency to enlarge the class of cases in which specific performance will be granted.

Where the land is out of the jurisdiction.

The fact of the land, the subject-matter of the contract, being out of the jurisdiction, is no bar to the suit, if the parties are subject to the jurisdiction of the Court (*d*). But this must be taken subject to this qualification, that the Court will not decide questions relating to the title to immoveable property situate abroad (*e*).

On ground of mutuality of remedy, vendor wanting only purchase-money, may sue in Equity.

A vendor has a mere pecuniary demand against his purchaser who refuses to complete, which may be enforced by an action at Law. If the conveyance has been executed, he may in such an action recover the whole purchase-money; if no conveyance has been executed, he has the land, and may recover the difference between the price agreed upon and the

(*b*) *Stray* v. *Russell*, 1 E. & E. 888; and see cases in last note.

(*c*) *Oriental Steam Co.* v. *Briggs*, 2 J. & H. 625.

(*d*) *Penn* v. *Lord Baltimore*, 1 V. sen. 445; 2 Wh. & T. L. C.; *Jackson* v. *Petrie*, 10 V. 164; *Cood* v. *Cood*, 33 B. 314; Fry, 45 *et seq.* As to enforcing claim against the proceeds of sale of land out of the jurisdiction, see *Waterhouse* v. *Stansfeld*, 9 Ha. 234; 10 Ha. 254; see also, as to foreclosure of a mortgage of land in an English colony, *Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, 18 Eq. 118.

(*e*) *Graham* v. *Massey*, 23 Ch. D. 743.

estimated price on a resale; and, in either case, any special damage which he may have sustained by reason of the breach. His case, therefore, is not one in which the relief at Law is inadequate; but upon the principle of affording mutual remedies, the Courts have nevertheless entertained a vendor's bill (*f*), in every case where the purchaser might sue for specific performance of the contract; and it makes no difference whether the consideration be a life annuity, or a gross sum (*g*); and although the consideration be paid, the right of the vendor to be relieved from liabilities attaching to the ownership will sustain the suit (*h*).

Purchase by railway company.

Upon a purchase by a railway company, it is no defence to the landowner's suit, that the price of the land, and the compensation for damage consequential on its purchase, are by the agreement amalgamated in a single sum (*i*).

As to building contracts.

In some of the earlier cases specific performance of contracts to build and execute works has been decreed in Equity; but in one case (*k*), V.-C. Wood considered that the later authorities were entirely opposed to such a practice, and that the proper course in such cases was to direct an inquiry as to damages. Thus, where the agreement was to grant a lease, so soon as the lessee should have built a house of a specified value "according to a plan to be submitted to

(*f*) *Withy* v. *Cottle*, 1 S. & S. 174; *Adderley* v. *Dixon*, *ib.* 607; *Kenny* v. *Wexham*, 6 Mad. 355; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; see V.-C. Wigram's judgment in *Adams* v. *Blackwall R. Co.*, 13 Jur. 621, which, however, was reversed, 2 M. & G. 118; see, too, *Webb* v. *Portsmouth R. Co.*, 1 D. M. & G. 528; *Regent's Canal Co.* v. *Ware*, 23 B. 575; *Cogent* v. *Gibson*, 33 B. 557.

(*g*) *Clifford* v. *Turrell*, *suprà*; aff. 9 Jur. 633. As to the small amount of the purchase-money being no bar to the jurisdiction, see *Bennett* v. *Smith*, 16 Jur. 421; *sed quære*, when the vendor is plaintiff.

(*h*) See *Shaw* v. *Fisher*, 5 D. M. & G. 596; *Cheale* v. *Kenward*, 3 D. & J. 27; *Wynne* v. *Price*, 3 De G. & S. 310; see *Humble* v. *Langston*, 7 M. & W. 517; *Walker* v. *Bartlett*, 18 C. B. 845.

(*i*) *Webb* v. *Portsmouth R. Co.*, 9 Ha. 129, 139; rev. on the general question, 1 D. M. & G. 521.

(*k*) *Kay* v. *Johnson*, 2 H. & M. 118; see, too, *Wheatley* v. *Westminster Brymbo Co.*, 9 Eq. 538, a covenant to work a coal pit "according to the usual and most improved practice."

and approved by the lessor," and which the lessee agreed to do, and to take the lease, specific performance, at the suit of the lessor, was refused (*l*). In a later case, where there was an agreement for a lease, with a stipulation that the lessor should put the house "in substantial and decorative repair," the Court decreed specific performance at the suit of the lessee, with an inquiry whether the repairs had been properly executed; and if not, then an inquiry as to damages (*m*). Here, however, the Court did not affect to enforce the agreement to repair. In an earlier case, the Court of Appeal held that an agreement to take a lease, if the house were put "into thorough repair," and the drawing-rooms "handsomely decorated according to the present style," could not be enforced at the suit of the lessor: but the decision seems to have been rested on the ground that the terms used were too indefinite to be enforced (*n*).

Distinction where the building or other work is by way of easement or accommodation.

A distinction has, however, been drawn between the case of a contract with a builder to build a house, and the case of a contract for the sale and purchase of land, where some stipulated building or work has to be carried out by either party, by way of easement, or of accommodation for the other. Thus, where A. agreed to sell a piece of land to B., and A. was to make a new road of which B. was to have the user, and B. was to expend £3,000 in building a house upon the land, it was held that there was nothing in the nature of the contract to prevent its being specifically enforced (*o*). So, where a railway company agreed with a landowner, through whose estate their line would pass, to construct and maintain a siding, with all necessary approaches for public use, the Court decreed specific performance of the contract, so far as it related to the construction of the siding; and a stipulation in

(*l*) *Brace* v. *Wehnert*, 25 B. 348; *Norris* v. *Jackson*, 1 J. & H. 319.

(*m*) *Samuda* v. *Lawford*, 4 Gif. 42.

(*n*) *Taylor* v. *Portington*, 7 D. M. & G. 328; but see *Dear* v. *Verity*, 38 L. J. Ch. 486. *Vide post*, p. 1147.

(*o*) *Wells* v. *Maxwell*, 32 B. 408; aff. 9 Jur. N. S. 1021; but the point which we are considering does not appear to have been argued on the appeal; and see *Cubitt* v. *Smith*, 10 Jur. N. S. 1123; *Hepburn* v. *Leather*, 50 L. T. 660.

the agreement as to the proper maintenance of the work when constructed was held to be no reason for withholding relief (*p*). So, where a railway company in purchasing land agreed with the vendor that a portion of it should be "for ever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers," the vendor was held entitled to a decree ordering the company to supply the necessary accommodation for a first-class station (to be ascertained at Chambers) (*q*). So, too, in a suit for specific performance, a railway company was compelled to construct a drain under their line for the convenience of an adjoining proprietor (*r*). Where, however, the agreement by the company was merely to erect a station on part of the lands purchased from the landowner, but there was no stipulation as to the kind of station, or as to the mode of using it, the Court held that the agreement was too indefinite to be specifically enforced, but directed an inquiry as to damages (*s*).

Where vendor is in default.

Where the default is on the part of the vendor, the Court may in some cases virtually enforce the contract by allowing the purchaser to execute the work, and to deduct his costs of doing so from his unpaid purchase-money (*t*).

Where there has been part performance of a contract of this description.

So, part performance of a contract of this description has, in some cases, been held to give the Court a jurisdiction to enforce it, which it would not have had, if the contract had remained wholly incomplete. Thus, where a conveyance contained a covenant by the purchasers with the vendor that they would make a road and erect a market-house, and they entered into possession and made the road, but neglected to

(*p*) *Moseley* v. *Virgin*, 3 V. 184; *Lytton* v. *G. N. R. Co.*, 2 K. & J. 394; see, too, *Sanderson* v. *Cockermouth R. Co.*, 11 B. 497; *Greene* v. *West Cheshire R. Co.*, 13 Eq. 44; *Firth* v. *M. R. Co.*, 20 Eq. 100.

(*q*) *Hood* v. *N. E. R. Co.*, 5 Ch. 525; and see *Burnett* v. *G. N. of Scotland R. Co.*, 10 Ap. Ca. 147.

(*r*) *Powell* v. *G. W. R. Co.*, 1 Jur. N. S. 773.

(*s*) *Wilson* v. *Northampton R. Co.*, 9 Ch. 279.

(*t*) See and consider *Wells* v. *Maxwell*, 32 B. 408; 9 Jur. N. S. 1021.

build the market-house, V.-C. Wigram observed that the purchasers having had the benefit of the contract *in specie*, the Court would go any length that it could to compel them to perform their obligations under it (*u*). But unless the terms of the contract are sufficiently definite, part performance cannot be relied on as a ground for enforcing it (*x*).

General remarks on the cases.

The result seems to be that, as a general rule, the Court will not entertain a suit for the specific performance of a contract, wholly or principally for the erection of buildings, or the execution of other specified works, by either party; but that, where the contract has been partly performed, and the parties cannot be restored to their original position, or where the execution of the stipulated work is only a subsidiary term of the contract, specific performance may, but will not necessarily, be decreed.

Contract for sale of good-will not enforced, except in what cases;

So, too, partly on the ground of the incapacity of the Court to execute the contract, and partly in consequence of the uncertainty of the subject-matter, specific performance of an agreement for the sale of the good-will of a business is refused (*y*); except in cases where the good-will is sold in connection with the property to which it is attached (*z*). But the Court will interfere by injunction to restrain a breach of an agreement not to carry on a similar business within specified limits (*a*), which, however, must be reasonable (*b*).

nor a contract to become partners;

So, as a general rule, the Court will not enforce an agreement to become partners (*c*), or to contribute a specified sum

(*u*) *Price* v. *Corp. of Penzance*, 4 Ha. 506; see, too, *Storer* v. *G. W. R. Co.*, 2 Y. & C. C. C. 48; *Wilson* v. *Furness R. Co.*, 9 Eq. 28; *Greene* v. *West Cheshire R. Co.*, 13 Eq. 44; and see *Oxford* v. *Provand*, L. R. 2 P. C. 135.

(*x*) *South Wales R. Co.* v. *Wythes*, 1 K. & J. 200, and see judgment; aff. 5 D. M. & G. 880; *Wilson* v. *Northampton R. Co.*, 9 Ch. 279.

(*y*) See *Baxter* v. *Conolly*, 1 J. & W. 576; *Coslake* v. *Till*, 1 Rus. 376.

(*z*) See *Darbey* v. *Whittaker*, 4 Dr. 134, 140.

(*a*) *Avery* v. *Langford*, Kay, 663.

(*b*) As to the test of reasonableness, see *Roussillon* v. *Roussillon*, 14 Ch. D. 351; and comments on that case in *Davies* v. *Davies*, C.A., 9 Aug. 1887; and generally on the subject of such covenants, see Kerr on Injunctions, 399 *et seq.*

(*c*) See *Sheffield Gas Co.* v. *Harrison*, 17 B. 294; *Scott* v. *Rayment*, 7 Eq. 112; and see Lindley, 914 *et seq.*

Chap. XVIII. Sect. 1.

towards the partnership capital (*d*); or to borrow or lend money on mortgage (*e*); for in such cases its decree would either be altogether nugatory, or incapable of being adequately enforced.

nor a contract for a yearly tenancy.

The Court has refused to enforce, on behalf of a lessor, a contract for a yearly tenancy (*f*); nor will it, except under very special circumstances, enforce an agreement for a lease, when the term has expired by effluxion of time (*g*).

Specific performance by and against a railway company.

It is now, as we have seen (*h*), well settled that where the land is taken by a company under their compulsory provisions, mere service of notice to treat, though it entitles the landowner to proceed by *mandamus*, does not of itself constitute an agreement which can be specifically enforced in Equity. Where the contract is completed by the ascertainment of the purchase-money, whether by means of the machinery of the Lands Clauses Consolidation Act (*i*), or otherwise (*k*), the Court will exercise its jurisdiction and decree specific performance at the suit of either party; and the fact that there is an alternative remedy by way of *mandamus* is, it is conceived, no bar to the remedy by way of specific performance. But, in one case, where the company might have obtained the same advantage by proceeding under their Act, they were not, even though successful, allowed their costs of a suit for specific performance (*l*).

Where a railway company takes land by private contract, the jurisdiction of the Court to enforce particular stipulations

(*d*) *Sichel* v. *Mosenthal*, 30 B. 471.

(*e*) *Rogers* v. *Challis*, 27 B. 175; *Larios* v. *Bonany y Gurety*, L. R. 5 P. C. 346; see *post*, p. 1164.

(*f*) *Clayton* v. *Illingworth*, 10 Ha. 451; and see an article, 3 Jur. N. S. 201.

(*g*) *Walters* v. *Northern Coal M. Co.*, 5 D. M. & G. 629.

(*h*) *Vide ante*, pp. 242 *et seq.*, 1098 *et seq.*

(*i*) *Mason* v. *Stokes Bay Co.*, 11 W. R. 80; *Harding* v. *Metrop. R. Co.*, 7 Ch. 154; *Nash* v. *Worcester Improvement Commrs.*, 1 Jur. N. S. 973.

(*k*) *Inge* v. *Birmingham and S. V. R. Co.*, 3 D. M. & G. 658; *Regent's Canal Co.* v. *Ware*, 23 B. 575; *Watts* v. *Watts*, 17 Eq. 217.

(*l*) *Regent's Canal Co.* v. *Ware*, *suprà*.

as to easements, &c., is not ousted by the provisions of the Railway Acts (*m*).

Plaintiff could not proceed at once at Law and in Equity.

Formerly, if a plaintiff proceeded both at Law and in Equity for the same subject-matter, he might, by order of course, be compelled to elect between his action and suit (*n*); but now, when Law and Equity are concurrently administerd in every Court, a plaintiff may at the same time obtain both legal and equitable relief in respect of the same subject-matter, although, of course, the extent of neither remedy is enlarged.

Specific performance, when decreed, although contract may vest estate in purchaser.

And although the agreement may in itself vest in the purchaser the interest contracted for (*o*), yet, if it appear on its face that a further instrument is necessary to carry out the intentions of the parties, the Court will decree specific performance of the agreement in that particular (*p*). And the Court will decree specific performance of a special stipulation in the agreement, *e.g.*, that the vendor shall give a bond against carrying on a specified trade within certain limits (*q*): that is, if the agreement be one which has been performed, or can be enforced, in all its other material terms (*r*).

The relief is purely discretionary.

Lastly, we may remark that the granting or withholding of relief in suits for specific performance is always a matter of discretion with the Court (*s*),—a discretion, however, which is to be exercised, not arbitrarily, but according to fixed and settled

(*m*) *Sanderson* v. *Cockermouth R. Co.*, 2 H. & Tw. 327; *Lytton* v. *G. N. R. Co.*, 2 K. & J. 394.

(*n*) Dan. C. P. 718 *et seq.*, 5th ed.; *Royle* v. *Wynne*, Cr. & P. 252; *Anon.*, 20 L. T. O. S. 60; and see *Faulkner* v. *Llewellyn*, 10 W. R. 506; *Gedye* v. *Duke of Montrose*, 26 B. 45, 47. As to election between home and colonial litigation, *Anstruther* v. *Arabin*, 6 Mo. P. C. 286.

(*o*) *Sed vide ante*, p. 284.

(*p*) *Fenner* v. *Hepburn*, 2 Y. & C. C. C. 159.

(*q*) *Avery* v. *Langford*, Kay, 663; and see *ante*, p. 1111.

(*r*) *South Wales R. Co.* v. *Wythes*, 5 D. M. & G. 880; *Pollard* v. *Clayton*, 1 K. & J. 462.

(*s*) *Cox* v. *Middleton*, 2 Dr. 209; *Pyrke* v. *Waddingham*, 10 Ha. 1; *Watson* v. *Marston*, 4 D. M. & G. 230; *Bennett* v. *Smith*, 16 Jur. 421.

Chap. XVIII. Sect. 1.

rules; and to be regulated upon grounds which will make it judicial (*t*).

Section 2.

(2.) *By whom specific performance may be enforced.*

By whom specific performance may be enforced.

Enforced in Equity at suit of purchaser, or his representatives in interest;

Equity will enforce specific performance of the contract for sale at the suit of the purchaser himself, or of his representatives in interest,—such interest, it must be remembered, being the right to take the estate on payment of the purchase-money;—*e.g.*, his alienees by act *inter vivos* (*u*), including a mortgagee (*x*), or trustee in bankruptcy (*y*), or committees in lunacy (*z*), or in case of his death, by his real or personal representatives (according to the nature of the estate contracted for).

or of vendor or his representatives in interest.

So, the contract for purchase may be enforced at the suit of the vendor himself, or his representatives in interest;—such interest, it must be remembered, being the right to receive the purchase-money on a conveyance being given of the estate;—*e.g.*, his alienees by act *inter vivos* (*a*), or trustee in bankruptcy (*b*), or committees in lunacy (*c*), or (in the case of death) by his executors or administrators (*d*): so, if the contract have been entered into by a tenant for life, in due (*e*) exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman (*f*).

Contracts under the Settled Land Act.

Under the Settled Land Act, 1882 (*g*), a tenant for life has power to contract to sell, exchange, partition, or charge the

(*t*) *White* v. *Damon*, 7 V. 30, 35; *Haywood* v. *Cope*, 25 B. 140, 151.

(*u*) *Nelthorpe* v. *Holgate*, 1 Col. 218.

(*x*) *Browne* v. *London Necropolis Co.*, 6 W. R. 188.

(*y*) 12 & 13 V. c. 106, s. 146; 32 & 33 V. c. 71, s. 15; 46 & 47 V. c. 52, s. 44 (i); and see as to disclaimer by trustee, s. 55; and *post*, p. 1126.

(*z*) See 16 & 17 V. c. 70, s. 122; Pope, 241 *et seq.*

(*a*) See Calv. on Par., 314; Dan. C. P. 204.

(*b*) See 32 & 33 V. c. 71, s. 15; 46 & 47 V. c. 52, s. 44 (i).

(*c*) Shelf. on Lun. 564; and see *suprà*, n. (*z*).

(*d*) *Roberts* v. *Marchant*, 1 Ph. 370.

(*e*) But not otherwise, *Ricketts* v. *Bell*, 1 De G. & S. 335; and see *Gas Light Co.* v. *Towse*, 35 Ch. D. 519.

(*f*) *Shannon* v. *Bradstreet*, 1 Sch. & L. 52, 65; *Lowe* v. *Swift*, 2 B. & B. 529; Sug. Pow., 557; 1 De G. & S. 344.

(*g*) Sect. 31.

settled land; and every such contract is binding on and enures for the benefit of the settled land, and is enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself. The right or liability, therefore, seems to be attached to the estate itself, thus making it unnecessary, in an action for the specific performance of the contract of a deceased tenant for life, to bring any other person before the Court than his successor for the time being having power to convey the estate.

Contracts by Commissioners of Woods and Forests.

It has been held that the Commissioners of Woods and Forests are neither entitled to sue nor liable to be sued for the specific performance of contracts entered into with or by them, on the ground that they have merely a statutory power to enter into contracts, but no estate (*h*).

Section 3.

(3.) *Against whom specific performance may be enforced.*

Specific performance may be enforced against vendor, and parties claiming under him by subsequent title (except purchasers without notice).

Equity will enforce specific performance of the contract for sale, against the vendor himself, and also (on the footing not of contract but of trusteeship) against, *first*, persons claiming under him by a title arising subsequently to the contract (except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract): *e.g.*, his assignees or trustee in bankruptcy (*i*), or committees in lunacy (*k*), or voluntary alienees (*l*), or judgment creditors (*m*), or the aftertaken wife or husband of the vendor (*n*), or the vendor's alienees for value (if they purchased with notice of the prior contract (*o*), or have not

(*h*) *Nurse* v. *Lord Seymour*, 13 B. 254.

(*i*) *Orlebar* v. *Fletcher*, 1 P. W. 737; *Taylor* v. *Wheeler*, 2 Ver. 564; and see 2 V. sen. 633; *Parker* v. *Smith*, 1 Coll. 608.

(*k*) Shelf. on Lun. 564; *suprà*, n. (*z*).

(*l*) See *Hinton* v. *Hinton*, 2 V. sen. 631, 633.

(*m*) *Brunton* v. *Neale*, 14 L. J. Ch. 8.

(*n*) See 2 V. sen. 633.

(*o*) *Daniels* v. *Davison*, 16 V. 249; 17 V. 433; *Lightfoot* v. *Heron*, 3 Y. & C. 586; *Cutts* v. *Thodey*, 1 Col. 223;

Chap. XVIII. Sect. 3.

taken a conveyance,) or (in case of his death) against his real (*p*) or personal representatives (according to the nature of the estate contracted for).

Notice of possession, notice of title of possessor.

A person who is of right and *de facto* in the possession of a corporeal hereditament, is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title, or alleged title, under which he is in possession, or which he has a right to connect with his possession of the property: nor can a person who is aware of such possession be heard to deny that he has thereby notice of the title, or alleged title, under which the possession is claimed or enjoyed (*q*): nor is it necessary, for the purpose of fixing notice, that the possession should be continually visible, or without cessation actively asserted, unless there is evidence of intentional abandonment. Thus, where purchasers of mines entered into possession under an agreement, but took no conveyance, a subsequent purchaser of the land without any exception of the mines, was held to have bought with notice of the agreement, and to be bound specifically to perform it; although there was evidence that mining operations had been suspended prior to the date of his purchase (*r*).

It appears, however, to have been held in *Dawson* v. *Ellis* (*s*) that if A. enters into a verbal contract to purchase, he is not bound by a notice of a subsequent written contract for sale to B.; but may, if he can, obtain a conveyance from the vendor in pursuance of the verbal contract: the argument to which the Court seems to have acceded being that although

Fewster v. *Turner*, 6 Jur. 144; *Potter* v. *Sanders*, 6 Ha. 1; *Hersey* v. *Giblett*, 18 B. 174; *Shaw* v. *Thackray*, 1 S. & G. 537; *Barnes* v. *Wood*, 8 Eq. 424; *Bishop of Winchester* v. *Mid-Hants. R. Co.*, 5 Eq. 17, where specific performance of a contract with a railway company was enforced against another company, who had leased the line.

(*p*) Although not named, *Gell* v. *Vermedun*, Freem. 199.

(*q*) *Taylor* v. *Stibbert*, 2 V. 437; and see *ante*, p. 975.

(*r*) *Holmes* v. *Powell*, 8 D. M. & G. 572, 580, 581.

(*s*) 1 J. & W. 524; Sug. 142.

the Statute of Frauds will not allow a parol contract to be actively enforced, it may be used for defensive purposes, to establish a prior equity.

Specific performance may be enforced against parties claiming under a prior title, which he might have displaced by conveyance.

And, *secondly*, Equity will enforce specific performance of the contract for sale against persons claiming under a title which, although prior to the contract and known to the purchaser, might have been displaced by a conveyance by the vendor; *e. g.*, voluntary alienees (*t*); wife entitled to freebench (if, as is the case in most manors, her title depends upon her husband dying seised) (*u*); dowress who married since the late Dower Act came into operation (*x*); vendor whose wife, married before the Act, refuses to release her dower, where the purchaser is willing to take the estate with compensation (*y*); joint tenants claiming by survivorship (*z*), the contract for sale operating as a severance (*a*); and remaindermen, or *cestuis que trust*, in cases where the vendor has contracted in due exercise of a power or pursuant to a trust (*b*); subject, nevertheless, to these exceptions, *viz.*, that the contract of a tenant in tail who dies before executing the conveyance, does not affect the interests of the issue in tail or remaindermen (*c*): and that the contract of a trustee will not

(*t*) *Buckle* v. *Mitchell*, 18 V. 100; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180; *Willats* v. *Busby*, 5 B. 193; *Staepoole* v. *Staepoole*, 4 D. & War. 320, 352; *Rosher* v. *Williams*, 20 Eq. 210.

(*u*) *Hinton* v. *Hinton*, 2 V. sen. 631; *Brown* v. *Raindle*, 3 V. 256; freebench is not within the Dower Act, *ante*, p. 583.

(*x*) 3 & 4 Will. IV. c. 105, ss. 4, 5.

(*y*) *Wilson* v. *Williams*, 3 Jur. N. S. 810; *Barnes* v. *Wood*, 8 Eq. 424; *Barker* v. *Cox*, 4 Ch. D. 464.

(*z*) See *Hinton* v. *Hinton*, 2 V. sen. 631, 634; *Burnett* v. *Kinaston*, Ch. Prec. 120; Bacon's Law Tracts, 80.

(*a*) *Brown* v. *Raindle*, 3 V. 257; *Frewen* v. *Relfe*, 2 Br. C. C. 220, 224; *Kingsford* v. *Ball*, 2 Gif. *App.* 1. As to severance being effected by an agreement to settle, see *Caldwell* v. *Fellowes*, 9 Eq. 410; *Baillie* v. *Treharne*, 17 Ch. D. 388; *Burnaby* v. *Equitable Rev. Soc.*, 28 Ch. D. 416, the case of an infant.

(*b*) *Mortlock* v. *Buller*, 10 V. 315; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; cf. *Gas Light Co.* v. *Towse*, 35 Ch. D. 519; and see cases cited, *ante*, p. 1114.

(*c*) 3 & 4 Will. IV. c. 74, s. 47; and the same was the rule before the Act, *Frank* v. *Mainwaring*, 2 B. 115; and see Sug. 467. The section does not exclude the ordinary jurisdiction of the Court to rectify a duly enrolled disentailing deed on the ground of mistake, *Hall-Dare* v. *Hall-Dare*, 31 Ch. D. 251. The Court will not compel a woman, under a covenant to settle after-acquired property, to settle an estate tail to which she be-

be enforced if the attendant circumstances constitute it a breach of trust (*d*). In one case, trustees of a turnpike road were compelled to complete a contract which they had entered into, in forgetfulness of a statutory right of pre-emption under the General Turnpike Act (*e*), although the right was insisted on: but in this case the purchaser was willing to take such estate as the vendors could convey (*f*).

Contract by one of several executors.

Where one of two executors entered into a contract for the sale of his testator's leaseholds, in the erroneous belief that he had the authority of his co-executor, it was held, on the ground of the mistake, that the purchaser could not insist on the sale being completed; and the Court of Appeal declined to express any opinion as to whether specific performance of a contract for sale by one executor, apart from his co-executor, can be enforced (*g*). Where two trustees refused to concur in the conveyance of land which the third trustee had agreed to sell, the Court refused specific performance (*h*).

Voluntary settlor cannot enforce his contract to sell.

A voluntary settlor will not be restrained from selling (*i*); but if he contract to sell he cannot himself enforce specific performance (*k*); except, perhaps, against a purchaser who is willing to complete, on a good title being shown (*l*). On the other hand, the purchaser can enforce the contract against

comes entitled in possession, *Hilbers* v. *Parkinson*, 25 Ch. D. 200. But where a tenant-in-tail in remainder sells a base fee, and covenants for further assurance with an express mention of a disentailing assurance, he may be compelled, on acquiring the estate in possession, to execute a disentailing deed, *Bankes* v. *Small*, 34 Ch. D. 415; aff. 35 W. R. 765. In *Davis* v. *Tollemache*, 2 Jur. N. S. 1181, Stuart, V.-C., refused to order the execution of a disentailing deed in pursuance of a mere general covenant for further assurance; but see comments on this case, Sug. 468.

(*d*) *Mortlock* v. *Buller*, 10 V. 292; *White* v. *Cuddon*, 8 C. & F. 766; *Shrewsbury R. Co.* v. *L. & N. W. R. Co.*, 4 D. M. & G. 115; 6 H. L. C. 113; *Maw* v. *Topham*, 19 B. 576.

(*e*) 3 Geo. IV. c. 126, s. 67.

(*f*) *Barrett* v. *Ring*, 2 S. & G. 43, *sed quære.*

(*g*) *Sneesby* v. *Thorne*, 7 D. M. & G. 399; and see *Tarratt* v. *Lloyd*, 2 Jur. N. S. 371.

(*h*) *Naylor* v. *Goodall*, 47 L. J. Ch. 53.

(*i*) *Pulvertoft* v. *Pulvertoft*, 18 V. 48.

(*k*) *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281.

(*l*) *Peter* v. *Nicolls*, 11 Eq. 391, *sed quære.*

the voluntary settlor (*m*); or, if he reject the title, can recover his deposit at Law (*n*). But although the Court will not force the title on the purchaser, and so make him the instrument of avoiding the voluntary settlement (*o*), yet when the deed has been avoided under the 27 Eliz. by a *bonâ fide* sale for value, the title may, but not necessarily will, be forced on a subsequent purchaser. Although the volunteers have no equity against the purchase-money payable to the settlor (*p*), yet they are necessary parties to an action which depends upon the decision whether the settlement is or is not voluntary (*q*). But as they are brought before the Court for the purpose of getting rid of the settlement made in their favour by the defendant vendor, they will, in an ordinary case, neither be ordered to pay, nor be allowed, costs (*r*).

Disability of married women at common law to contract.

At Common Law, a married woman was incapable of contracting in her own right; and, accordingly, in Equity specific performance could not, prior to the Fines and Recoveries Act (*s*), be decreed against her on the footing of contract properly so called, although on the footing of intended disposition a Court of Equity could make a decree against her separate estate, but against this only (*t*).

Effect of Fines and Recoveries Act.

The effect of the 77th section of the Fines and Recoveries Act was to enable every married woman to dispose of her lands by acknowledged deed, with the concurrence of her husband (*u*), as fully as if she were a *feme sole*; and the words of this

(*m*) *Buckle* v. *Mitchell*, and cases cited *ante*, p. 1117, n. (*t*).

(*n*) *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*o*) *S. C.*

(*p*) *Pulvertoft* v. *Pulvertoft*, 18 V. 84; *Daking* v. *Whimper*, 26 B. 568; *Re Walhampton Est.*, 26 Ch. D. 391.

(*q*) *Townend* v. *Toker*, 1 Ch. 446, 457.

(*r*) *Daking* v. *Whimper*, 26 B. 568. Trustees of a voluntary settlement will not, as of right, be allowed their costs, if the settlement is set aside *ab initio*; *Dutton* v. *Thompson*, 23 Ch. D. 278.

(*s*) 3 & 4 Will. IV. c. 74.

(*t*) *Francis* v. *Wigzell*, 1 Mad. 258; *Aylett* v. *Ashton*, 1 M. & C. 105, 111; *Cahill* v. *Cahill*, 8 Ap. Ca. 426.

(*u*) This might be dispensed with by leave of the Court; sect. 91; *Goodchild* v. *Dougal*, 3 Ch. D. 650; *Re Caine*, 10 Q. B. D. 284.

power have been treated as enabling her to bind her lands, even where not settled to her separate use, by a contract under seal which complies with the requisites of the section (*x*), to the extent of exposing herself to the liability of having such a contract specifically enforced against the land, but not so as to subject herself to any personal liability for damages or otherwise (*y*). And this power to contract has been held to extend to lands of which she is a trustee for sale (*z*). The incapacity of a married woman to contract *modo et formâ*, does not, however, affect the possibility of her estate becoming bound by reason of her inability to set up her own fraud (*a*), as in *Sharpe* v. *Foy* (*b*), or by her election where she acquires the property only on a condition which puts her to her election (*c*).

Where she is entitled for her separate use or has power to appoint.

If, having a power of appointment, she entered into a contract executed with the formalities required by the power (*d*); or if, as respects estate settled merely to her separate use with no restraint on anticipation, she entered into such a contract as would bind her if a *feme sole* (*e*), the estate, in either case, was bound, although here, too, no decree could be made

(*x*) Except in compliance with the statutory conditions, no contract relating to lands, not settled to her separate use, could be enforced; *Cahill* v. *Cahill*, 8 Ap. Ca. 428; and see *Lassence* v. *Tierney*, 1 M. & G. 551; *Field* v. *Moore*, 7 D. M. & G. 705, 718; *Nicholl* v. *Jones*, 3 Eq. 696; *Castle* v. *Wilkinson*, 5 Ch. 534.

(*y*) *Crofts* v. *Middleton*, 8 D. M. & G. at p. 219. The question has never arisen, so far as the editors are aware, whether under Lord Cairns' Act a charge for damages could be decreed against a married woman's property, in lieu of specific performance; but it is conceived that this question is simply one of construction of the words of the Act, and should be answered in the negative.

(*z*) *Avery* v. *Griffin*, 6 Eq. 606

(*a*) Per Lord Blackburn, 8 Ap. Ca. 437. It is very difficult to reconcile with this proposition such cases as that of *Stanley* v. *Stanley*, 7 Ch. D. 590, and *Re Lush's Tr.*, 4 Ch. 591, 594, n.

(*b*) 4 Ch. 35, 41.

(*c*) *Cahill* v. *Cahill*, 8 Ap. Ca. 426, per Lord Selborne.

(*d*) See Sug. 206; *Daniel* v. *Adams*, Amb. 498; *Martin* v. *Mitchell*, 2 J. & W. 425; *Heather* v. *O'Neill*, 2 D. & J. 417, 418; *Atkinson* v. *Smith*, 3 D. & J. 186; and see Sug. Pow. 280.

(*e*) *Grigby* v. *Cox*, 1 V. sen. 518; *Wainwright* v. *Hardisty*, 2 B. 363; *Stead* v. *Nelson*, 2 B. 245; but see *Harris* v. *Mott*, 14 B. 169; *quære* the *dictum*, *ib.* 170; and see *Chester* v. *Platt*, cited Sug. 206.

against her personally (*f*). In the case of an agreement in exercise of a power, the want of mere formalities might, it seems, be supplied: *e. g.*, where a married woman, having a power to appoint by deed, entered into a contract not under seal, specific performance was decreed (*g*); but this would not be the case where the omission went to the substance of the power, or consisted in the want of formalities which were intended for her protection (*h*). Thus, where a trustee had power to lease at the request in writing of a married woman, and she gave her parol consent to, and executed, a lease, but before the lease was delivered and the counterpart executed, withdrew her consent, it was held that there was no contract binding upon her (*i*).

Effect of restraint on anticipation.

Formerly, where her separate estate was subject to a restraint on anticipation, this could not be waived by the Court, however much such waiver might apparently be for her advantage (*k*). But under the Conveyancing Act, 1881 (*l*), the Court may, if it thinks fit, where it appears to the Court to be for her benefit, with her consent, bind the married woman's interest in any property, notwithstanding the restraint upon anticipation. And a restraint upon anticipation in the settlement will not prevent the exercise by a married woman of any power under the Settled Land Act (*m*).

A husband may enforce his wife's contract for purchase.

A husband might adopt and enforce his wife's contract for purchase. Thus, where a married woman, without her husband's knowledge, induced her father to sell her a field, to

(*f*) *Nantes* v. *Corrock*, 9 V. 189; *Aylett* v. *Ashton*, 1 M. & C. 112; *Francis* v. *Wigzell*, 1 Mad. 258.

(*g*) *Stead* v. *Nelson*, *suprà*; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345.

(*h*) *Martin* v. *Mitchell*, 2 J. & W. 413, 425; *Lassence* v. *Tierney*, 1 M. & G. 551, 572; *Thackwell* v. *Gardiner*, 5 De G. & S. 58, 65; *Hughes* v. *Wells*, 9 Ha. 749; *Hopkins* v. *Myall*, 2 R. & M. 86.

(*i*) *Phillips* v. *Edwards*, 33 B. 440.

(*k*) *Robinson* v. *Wheelwright*, 6 D. M. & G. 535; *Re Glanvill*, 31 Ch. D. 532; and *vide ante*, p. 10.

(*l*) S. 39; and see cases on the sect., *ante*, p. 11.

(*m*) S. 61; cf. 40 & 41 V. c. 18, s. 50.

Chap. XVIII. Sect. 3.

be paid for out of her private savings, and he, after some reluctance, accepted the money and put the husband into possession, which was retained for ten years without payment either of rent or of interest on the purchase-money, it was held that the husband, who had remained in ignorance of the transaction, was entitled to have the contract specifically performed (*n*).

Whether wife surviving is barred by husband's contract for sale of her chattels real.

Formerly, if a husband by act *inter vivos*, as by assignment or underlease, disposed of his wife's chattels real, whether legal or equitable, her right by survivorship was defeated (*o*); but it does not appear to have been settled (*p*), whether the husband's mere contract to sell or underlease the term for years (whether legal or equitable), of his wife, would bind her surviving. Some early authorities were in favour of the purchaser (*q*); but, in the more recent decisions, a strong inclination was shown to limit the husband and his alienees to their strict legal rights (*r*); except, perhaps, in cases where the contract has in substance, though not in form, been completed, as where the purchaser has been let into possession.

Married Women's Property Act, 1870.

The Married Women's Property Act, 1870 (*s*), does not appear to have affected the marital rights of a husband over chattels real belonging to his wife at the date of the marriage or which she acquires during the coverture, otherwise than

(*n*) *Millard* v. *Harvey*, 34 B. 237.

(*o*) See 1 Rop. H. & W. 173; 1 Preston on Abstracts, 344; 1 Wms. Exors. 696 *et seq*. But if he disposed of them by will the wife's right by survivorship was not defeated: 1 Preston on Abstracts, 343; nor, it would seem, if he mortgaged them, reserving the equity of redemption to himself, unless there was something in the form of the deed which rebutted the ordinary presumption that it was intended only as a security; see and consider *Clark* v. *Burgh*, 2 Col. 221; and see *Pigott* v. *Pigott*, 4 Eq. 549.

(*p*) See the query of V.-C. K. Bruce, in *Clark* v. *Burgh*, 2 Col. 226.

(*q*) See *Steed* v. *Cragh*, 2 Eq. Ca. Ab. 37, 130; 9 Mod. 42; and Lord Eldon's remarks in *Druce* v. *Denison*, 6 V. 394; and see 1 Wms. Exors. 700.

(*r*) See *Sturgis* v. *Champneys*, 5 M. & C. 97; *Elwyn* v. *Williams*, 7 Jur. 337; *Ashby* v. *Ashby*, 1 Col. 553; *Newenham* v. *Pemberton*, 1 De G. & S. 644; *Whittle* v. *Henning*, 2 Ph. 731.

(*s*) 33 & 34 V. c. 93.

under an intestacy: but the 7th section provides that personal property (which term, it is conceived, includes leaseholds) to which a woman married since the passing of the Act (*t*) becomes entitled during the coverture, shall belong to her for her separate use.

Married Women's Property Act, 1882.

By the Married Women's Property Act, 1882, every woman who marries after the 31st December, 1882, is entitled to hold as her separate property all real and personal property which belongs to her at the date of her marriage or is acquired by, or devolves upon, her after marriage (*u*); and a woman, married, it would seem, either before or since the commencement of the Act, is capable of acquiring, holding, and disposing of, by will (*x*) or otherwise, any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*y*). She may, also, enter into, and render herself liable in respect of, and to the extent of, her separate property on, any contract; and may sue and be sued, either in contract or tort, or otherwise, in all respects as if she were a *feme sole;* and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in such action will be her separate property, and any damages or costs recovered against her in any such action will be payable out of her separate property, and not otherwise (*z*). Every contract entered into by a married woman is to be deemed to be a contract entered into by her with respect to, and to bind, her separate property, unless the contrary be shown (*a*); and every such contract will bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire (*b*). Every woman married before the commence-

(*t*) *I. e.*, 9th August, 1870.
(*u*) S. 2.
(*x*) See *Re Price*, 28 Ch. D. 709.
(*y*) S. 1, subs. 1.
(*z*) *Ib.*, subs. 2.
(*a*) *Ib.*, subs. 3.
(*b*) *Ib.*, subs. 4. This sub-sect. is not retrospective; so that upon a

Chap. XVIII. Sect. 3.

ment of the Act is entitled to hold and dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which first accrues (*c*) after the commencement of the Act (*d*).

Effect of Act upon property of women married before and after the Act.

The result of these provisions, taken together, seems to be that, *first*, as to a woman married before the 1st January, 1883, the old law (*e*) prevails with reference to all such property, not settled to her separate use (*f*), as belonged to her, or to her husband in her right, whether in possession or in reversion (*g*), prior to the 1st January, 1883. But all real and personal estate to which she first becomes entitled (*h*) after the 31st December, 1882, she holds, and can dispose of, as if she were a *feme sole*, without the interposition of any trustee. *Secondly*, a woman married after the 31st December, 1882, holds, and can dispose of, all real and personal estate which belongs to her at the date of her marriage, or which is acquired by, or devolves upon, her after marriage.

Power to contract under the Act.

With reference, therefore, to all real and personal property, either settled to her separate use, or by statute made her separate property, a married woman can, unless she is restrained from anticipation (*i*), contract in every respect as if she were a *feme sole*. It is plain that a contract by a married woman relating to her separate property, if at the date of the contract she is possessed of any (*k*), may now be

contract made before the Act, a married woman can, on the principle of *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, only be made liable as to the separate property which she possessed at the date of making the contract: *Turnbull* v. *Forman*, 15 Q. B. D. 234. Nor does the sub-sect. give a married woman who has no separate property power to bind by contract separate property which she may thereafter acquire: *Re Shakespear*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519.

(*c*) *Reid* v. *Reid*, 31 Ch. D. 402, 411.

(*d*) S. 5.

(*e*) Modified, as regards acknowledgments, by s. 7 of the Conv. Act, 1882; see *ante*, p. 645 *et seq.*

(*f*) Or not made so by s. 7 of the Married Women's Property Act, 1870.

(*g*) *Reid* v. *Reid*, 31 Ch. D. 402.

(*h*) *Ibid.*

(*i*) See *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

(*k*) See *Re Shakespear*; *Palliser* v. *Gurney*, *suprà*.

specifically enforced to the extent of both the separate property which she then possesses, and of all her future separate property. But as the Act only enables her *to the extent of her separate property* (*l*), to be sued as if she were a *feme sole*, and confines execution within that limit, it would appear that her liability to attachment now is not greater than it formerly was.

As respects land-tax belonging to wife.

In cases to which the Act does not apply, where a married woman is proprietor of redeemed land tax, and her husband procures the marriage to be registered at the Land-tax Office, pursuant to the 38 Geo. III. c. 60, s. 78, he thereby acquires an absolute power of disposition over it (*m*): but it is conceived that he could not bind the wife's right by a mere contract: and even if he mortgage the land tax, reserving the equity of redemption to himself, this will not defeat her right by survivorship (*n*).

Whether wife may adopt her husband's contract.

In one case (*o*) a question arose, but was not decided, as to whether the wife surviving may adopt her husband's contract for sale of her real estate. Upon principle it would seem that she cannot (*p*).

Vendor's contract cannot be enforced against parties claiming under prior absolute title.

And the vendor's contract will, of course, not be enforced against persons claiming under a prior title which he himself could not have displaced by a conveyance; *e. g.*, a dowress under the old law (*q*), or a wife seised of an estate of inheritance: nor would the contract of a tenant for life be enforced against the trustees of the reversion who are empowered but decline to sell at his request (*r*); but such a contract may now be enforced against the successor, under the Settled Land Act (*s*).

(*l*) See, as to the limit thus imposed, *Ex p. Gilchrist*, 17 Q. B. D. 521, 526, a case on s. 1, subs. 5.

(*m*) *Pigott* v. *Pigott*, 4 Eq. 549.

(*n*) *Ibid.*

(*o*) *Humphreys* v. *Hollis*, Jac. 76.

(*p*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Re Empress Engineering Co.*, 16 Ch. D. 125.

(*q*) See *Wilson* v. *Williams*, 3 Jur. N. S. 810, *ante*, p. 313.

(*r*) *Thomas* v. *Dering*, 1 Ke. 729.

(*s*) S. 31; see *ante*, p. 1114.

Chap. XVIII. Sect. 3.

Purchaser's contract will be enforced against himself and his representatives.

So, the contract for purchase will be enforced against the purchaser himself, his committees in lunacy (*t*), and real and personal representatives. If he become bankrupt, his trustee under the recent Acts has (as the assignees under the old law had) the option of abandoning the contract or of completing it (paying, of course, the entire amount due for purchase-money); and the vendor may, by application in writing, compel the trustee to make his election within the time prescribed by the Act (*u*). Specific performance, however, cannot be decreed against the trustee in bankruptcy of the purchaser (*x*). But in the case of the vendor, it is conceived that the section cannot exempt land in the hands of his trustee, as distinguished from the general estate, from liability *in rem*, on the footing of trusteeship, to specific performance of a contract entered into with respect to it. Where the purchaser, having paid part of the purchase-money, became insolvent, and his assignees, upon a bill being filed against them, disclaimed, the Court declared the representatives of the vendor absolutely entitled to the estate (*y*).

Section 4.

(4) *As to the parties to the suit.*

Practice under present rules as to parties.

Under the present rules no action for specific performance can be defeated merely by reason of the joinder or misjoinder of parties; and the Court has power to deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it, and at any stage of the proceedings to direct that parties be added or struck out (*z*). But misjoinder or non-joinder may occasion serious consequences as regards delay and costs; and it is, therefore,

(*t*) Shelf. on Lun. 564; Sug. 208; *vide ante*, p. 1114, n. (*z*).

(*u*) 32 & 33 V. c. 71, ss. 23, 24; 46 & 47 V. c. 52, s. 55; and see as to election and disclaimer, *ante*, p. 291 *et seq.*

(*x*) *Holloway* v. *York*, 25 W. R. 627. As to resale by vendor and proof for deficiency, see *Bowles* v. *Rogers*, 6 V. 95, n. As to forfeiture of deposit as against the trustee, see *Ex p. Barrell*, 10 Ch. 512; *Collins* v. *Stimson*, 11 Q. B. D. 142.

(*y*) *Gabriel* v. *Sturgis*, 5 Ha. 97.

(*z*) R. S. C. 1883, O. XVI. r. 11.

necessary to preserve much of the old learning as to the parties to a suit for specific performance.

General rule. Parties to contract alone necessary parties.

In general, it is proper to make those persons only parties to an action for specific performance who were parties to the contract (*a*). In the words of Lord Cottenham (*b*), "generally to a bill for a specific performance of a contract for sale the parties to the contract only are the proper parties; and when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered, it could not properly be otherwise. The Court assumes jurisdiction in such cases because a Court of Law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But in Equity, as well as at Law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it. And so is the admitted practice of the Court."

Purchaser cannot join as co-defendant, receiver or steward;

For instance, it was held under the old practice that a purchaser should not join as co-defendants the receivers or stewards of the owners of the estate, although they are in that capacity possessed of the title deeds, delivery of which is sought by the suit (*c*); nor, it would seem, the wife of the vendor who has possessed herself of the deeds (*d*); nor a mortgagor, whose mortgagee, or mortgagee's trustee, has entered into the contract under a mortgage power of, or trust

(*a*) *Humphreys* v. *Hollis*, Jac. 75; *Wood* v. *White*, 4 M. & C. 460; cf. *Daking* v. *Whimper*, 26 B. 568.

(*b*) *Tasker* v. *Small*, 3 M. & C. 63, 68.

(*c*) *M'Namara* v. *Williams*, 6 V. 143.

(*d*) *Muston* v. *Bradshaw*, 15 Si. 192.

for, sale (*e*); nor, upon a sale by a mortgagor, the mortgagee, nor any person interested in the equity of redemption (*f*); nor a person who has joined the vendor in the sale in respect of other property, under conditions, as to laying out roads, &c., affecting the whole estate (*g*); nor, as a general rule, any person upon the ground of his claiming any adverse interest which was vested in him prior to the contract (*h*).

Or parties claiming adverse interests prior to the contract.

Person interested in contract, and bound to join in conveyance, not a necessary party.

Nor need a stranger to a contract be made a party to an action on the ground of his being interested in the contract, or bound to concur in the conveyance; as where, on the sale in two lots of leaseholds held under an entire rent, it was stipulated that the purchaser of each lot should be a party to the assignment of the other lot, for the purpose of entering into the covenants by way of indemnity usual in such cases, it was held that the purchaser of lot 2 was not a necessary party to the vendor's bill for specific performance of the purchase of lot 1 (*i*): so, where a landowner agreed to sell land to a railway company, and to buy up his tenant's interest, it was held that the tenant was not a necessary party to the vendor's bill for specific performance and to restrain trespass by the company (*k*). But in an action not merely for specific performance, but also for recovery of the possession, the party actually in possession, although no party to the contract, may properly be made a defendant (*l*). So, too, a stranger to the contract may, by intermeddling in it,—as, *e. g.*, by claiming an interest in the purchase-money—

(*e*) *Clay* v. *Sharpe*, 18 V. 346, n.; *Corder* v. *Morgan*, *ibid.* 344.

(*f*) *Tasker* v. *Small*, 3 M. & C. 63; *Long* v. *Bowring*, 33 B. 585; see and consider *West Midland R. Co.* v. *Nixon*, 1 H. & M. 176; *Fenwick* v. *Bulman*, 9 Eq. 165, case of sub-purchaser.

(*g*) *Peacock* v. *Penson*, 11 B. at 359.

(*h*) *Delabere* v. *Norwood*, 3 Sw. 144; *Petre* v. *Duncombe*, 7 Ha. 24; Sug. 232; but see *Collett* v. *Hover*, 1 Coll. 227.

(*i*) *Paterson* v. *Long*, 5 B. 186.

(*k*) *Robertson* v. *G. W. R. Co.*, 10 Si. 314.

(*l*) *Bishop of Winchester* v. *Mid-Hants R. Co.*, 5 Eq. 17. As to making persons who are not parties to a contract defendants in a suit to rescind it, see *Aberaman Ironworks Co.* v. *Wickens*, 4 Ch. 101.

make himself a proper party to an action for specific performance (*m*).

Purchaser of one lot when necessary party to suit in respect of another lot.

Where, at a sale by auction, it was arranged that a portion of lot A. should be sold as part of lot B., it was, on a bill being filed by the purchaser of lot A. for specific performance according to the particulars, held that the purchasers of lot B. were necessary parties: upon the special ground that the vendor ought not to remain exposed to another suit by the purchaser of lot B. for specific performance according to the arrangement at the sale (*n*).

Agent must be party if contract under seal.

If the contract were entered into by an agent, and were under seal, the other party may insist upon the agent being included in an action for specific performance by the principal: inasmuch as the performance of the covenant with the principal would be no defence to an action at Law by the agent (*o*).

When to be made party, if contract not under seal.

Generally, however, the contract is not under seal; but, even then, if the agency be not apparent on the contract, the nominal contractor should (unless the plaintiff can prove the agency) be made a party to the action, as a defendant (*p*), in order to bind his apparent interest (*q*): and if a bill was filed the parties beneficially interested in the contract were proper parties to the suit (*r*). So, an auctioneer is sometimes made a co-plaintiff with the vendor, or is joined as a co-defendant with the purchaser. But although he may be so joined, it is not the usual or proper practice to join him,

Auctioneer, when and why made party.

(*m*) *West Midland R. Co.* v. *Nixon*, 1 H. & M. 176.

(*n*) *Mason* v. *Franklin*, 1 Y. & C. C. C. 239. In general, purchasers of different lots cannot be joined as co-defendants: *Rayner* v. *Julian*, 2 Dick. 677; *Brookes* v. *Lord Whitworth*, 1 Mad. 86.

(*o*) *Cooke* v. *Cooke*, 2 Vern. 36; *Cope* v. *Parry*, 2 J. & W. 538.

(*p*) See and consider *Fulham* v. *M'Carthy*, 1 H. L. C. 703; *Chadwick* v. *Maden*, 9 Ha. 188.

(*q*) *Taylor* v. *Salmon*, 4 M. & C. 134; and see *Nelthorpe* v. *Holgate*, 1 Coll. 217, 218, where it was held that an agent might join as co-plaintiff.

(*r*) *Small* v. *Attwood*, You. 457; the words "suit" and "contract" in lines 10 and 11, should evidently be transposed.

Chap. XVIII. Sect. 4.

unless the deposit is large, or unless, on being applied to, he refuses to pay the money into Court (*s*). Where a vendor brought an action for specific performance against a purchaser, who pleaded that he was induced to purchase by an advertisement issued, as the vendor alleged, without authority, by the auctioneer, the defendant was not allowed to bring in the auctioneer as a co-defendant (*t*). But, if the agent has or claims no interest in the contract or the subject-matter thereof, and is under no liability in respect of the contract, he is an improper party to the action (*u*); and it seems probable that he ought not, at least as a defendant, to be made a party in respect of his supposed liability to pay damages or restore the deposit (*x*), unless it is large (*xx*).

Agent, when an improper party.

Death of vendor—who then entitled to sue purchaser, and who proper parties to suit.

If the vendor die before completion, his personal representatives, as being entitled to the purchase-money, and also as being now the persons to convey (*y*), are *primâ facie* the proper plaintiffs. If the personal estate has been vested in trustees under an order of the Court, and an action is brought by such trustees, the personal representative is still a necessary party (*z*); and unless the plaintiffs have power to convey the vendor's interest in the estate (*a*), the heir or other person in whom the same is vested, whether legally or equitably, must also be made a party as having an interest in resisting the contract (*b*); but if there are devisees, or if the executors are empowered to sell, the heir is said to be an unnecessary party, as the purchaser has no right to insist on proof of the will against the heir (*c*); or to require his concur-

Heir, when unnecessary party.

(*s*) *Earl of Egmont* v. *Smith*, 6 Ch. D. 469, 474; and see *ante*, p. 206.

(*t*) *Catton* v. *Bennett*, 26 Ch. D. 161.

(*u*) *King of Spain* v. *Machado*, 4 Russ. 225, 240; *Kingsley* v. *Young*, cited Dan. C. P. 205, 236, 264.

(*x*) *Kendall* v. *Beckett*, 2 R. & M. 90; *Sainsbury* v. *Jones*, 5 M. & C. 1, 4.

(*xx*) *E. of Egmont* v. *Smith*, *suprà*.

(*y*) Conv. Act, 1881, s. 30, and s. 4, as to which see *ante*, p. 294.

(*z*) See *Cave* v. *Cork*, 2 Y. & C. C. C. 130, 133.

(*a*) *I. e.*, the estate, whether legal or merely equitable, which the vendor held subject to the contract; see *Roberts* v. *Marchant*, 1 Ha. 547.

(*b*) *Roberts* v. *Marchant*, 1 Ha. 547.

(*c*) *Colton* v. *Wilson*, 3 P. W. 192; *Bellamy* v. *Liversidge*, Sug. 439; and see *Morrison* v. *Arnold*, 19 V. 673; *Weddall* v. *Nixon*, 17 B. 160; see *Boyse* v. *Rossborough*, 6 H. L. C. 2; *Colclough* v. *Boyse*, 6 H. L. C.

rence (*d*) ; unless, it is conceived, there is reasonable ground for disputing the validity of the will. If the vendor has devised the estate in strict settlement, the trustees, the persons (if any) in whom the first estate of inheritance is vested (*e*), and the intermediate tenants for life (*f*), and the owners (if ascertained) of any intermediate contingent or executory estates (*g*), must be made parties.

Who, in such a case, proper parties to purchaser's action.

So, the personal representatives of the vendor, who, since the Conveyancing Act, are generally the persons having power to convey his estate, are the proper parties to a purchaser's action (*h*).

Alienation of vendor's interest by act *inter vivos* —who proper parties to suit against or by purchaser.

So, if the vendor have, by act *inter vivos*, assigned his interest under the contract, he, or, if he be dead, his personal representative, must be a party to the assignee's action. So, if subsequently to the contract the vendor have aliened or incumbered the estates contracted for, the weight of authority seems to show that the alienees or incumbrancers, if they took with notice of the contract, may be made defendants to the purchaser's action (*i*).

Cestuis que trust, when unnecessary parties.

When the estate is vested in trustees, the *cestuis que trust* are not necessary parties to the action (*k*).

Death of purchaser— who entitled to sue vendor, and who proper parties to action.

If the purchaser die before completion, his heir or devisee (if the estate be one of inheritance), is the party entitled to sue for specific performance, making the personal representa-

1 ; *Chadwick* v. *Maden*, 9 Ha. 188 ; *Lovett* v. *Lovett*, 3 K. & J. 1 ; and as to how the right of the heir to an issue *devisavit vel non* may be lost, see *Williams* v. *Williams*, 33 B. 306 ; see, too, *Cowgill* v. *Rhodes*, *ib.* 310.

(*d*) *M'Culloch* v. *Gregory*, 3 K. & J. 12.

(*e*) *Hopkins* v. *Hopkins*, 1 Atk. 590.

(*f*) *Gore* v. *Staepoole*, 1 Dow, 18, 31.

(*g*) Dan. C. P. 225.

(*h*) Conv. Act, 1881, ss. 4 and 30 ; and see *ante*, p. 294.

(*i*) *Daniels* v. *Davison*, 16 V. 249 ; *Echliff* v. *Baldwin*, *ib.* 267 ; *Spence* v. *Hogg*, 1 Col. 225 ; *Collett* v. *Hover*, *ib.* 227 ; *Potter* v. *Sanders*, 6 Ha. 1 ; *Shaw* v. *Thackray*, 1 S. & G. 537 ; but see *contrà*, *Cutts* v. *Thodey*, 1 Col. 223 ; *Leuty* v. *Hillas*, 2 D. & J. 110 ; Calv. on Parties, 325 ; Dan. C. P. 228.

(*k*) R. S. C. 1883, O. XVI. r. 8.

tives parties, if he seek payment of the purchase-money out of the personal estate (*l*): so, on an action brought by the vendor, the heir or devisee of the purchaser is a necessary party (*m*); so if, in a case to which Locke King's Acts (*n*) do not apply, an action be brought against the heir or devisee of the purchaser, the personal representatives must be made parties, because the purchase-money is primarily payable out of the personal estate.

Or to action by vendor.

Alienation of purchaser's interest by act *inter vivos* —who proper parties to action by or against vendor.

If the purchaser has assigned the benefit of the contract, the action against the vendor for specific performance should, it would seem, be by the assignee (*o*) making the purchaser a defendant. If, however, the purchaser merely enter into an ordinary agreement for a sub-sale, agreeing himself to convey the estate, and not that the original vendor shall convey it, the sub-purchaser is not, in general, a necessary or proper party to an action for the performance of the original contract (*p*).

Purchaser not to be party if his assignee has been accepted by vendor.

And where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's action (*q*).

Third party procedure and by counter-claim.

It should be here mentioned that besides the provisions already referred to as to the joinder of parties, the practice under the R. S. C. 1883 affords further facilities for disposing of all questions at issue by means of the third party procedure, which enables a defendant, with the leave of the Court, to

(*l*) *Broome* v. *Monck*, 10 V. 597; *Buckmaster* v. *Harrop*, 13 V. 456; *vide ante*, p. 304; but see now 30 & 31 V. c. 69.

(*m*) *Townsend* v. *Champernowne*, 9 Pri. 130.

(*n*) See *ante*, p. 920 *et seq.*

(*o*) See *Fulham* v. *M'Carthy*, 1 H. L. C. 703, 717; *Padwick* v. *Platt*, 11 B. 503; but see *Nelthorpe* v. *Holgate*, 1 Col. 203; *Moxhay* v. *Inderwick*, 1 De G. & S. 708.

(*p*) *Anon.* v. *Walford*, 4 Rus. 372; *Chadwick* v. *Maden*, 9 Ha. 188; see, a case of special circumstances, *S. E. R. Co.* v. *Knott*, 10 Ha. 122; cf. *Fenwick* v. *Bulman*, 9 Eq. 165; *Aberaman Company* v. *Wickens*, 4 Ch. 101.

(*q*) *Holden* v. *Hayn*, 1 Mer. 47; *Hall* v. *Laver*, 3 Y. & C. 191; see *Hemingway* v. *Fernandes*, 13 Si. 228; *Shaw* v. *Fisher*, 5 D. M. & G. 596.

bring in as a co-defendant any person against whom he claims to be entitled to contribution or indemnity (*r*); and also by means of the procedure by way of counterclaim (*s*).

Section 5.

(5) *As to how the plaintiff's case may be sustained in the absence of a written agreement:—fraud:—part performance:—admission by defendant of parol agreement:—parol variation of written agreement.*

As to how plaintiff's case may be sustained, &c.

Written agreement, when dispensed with on ground of fraud.

Although in general (*t*) there must, in order to sustain a suit for specific performance, be a contract in writing within the Statute of Frauds (*u*), the Court, in certain cases, decrees specific performance of a parol agreement, upon the ground, 1st, of fraud having been the cause of the non-compliance with the requisitions of the Statute: 2ndly, of the parol agreement having been in part performed; or, 3rdly, of its existence being admitted by the defendant (*x*).

Part performance, or defendant's admission.

Fraud takes case out of Statute.

1st. If by fraud the defendant has prevented a compliance with the requisitions of the Statute, this will not avail him, but the plaintiff will be entitled to relief on proving the fraud and the parol contract (*y*). But it is not fraud in a purchaser to decline to sign the fair copy of an agreement

(*r*) O. XVI. rr. 48 *et seq.* As to the practice under these rules, see Ann. Practice.

(*s*) O. XIX. r. 3; O. XXI., rr. 11, 12; and see *Dear* v. *Sworder*, 14 Ch. D. 482.

(*t*) As to a clause of pre-emption in a parol agreement for a partnership not being within the statute, see *Essex* v. *Essex*, 20 B. 442. But see *Caddick* v. *Skidmore*, 2 D. & J. 52.

(*u*) As to what is a sufficient memorandum within the statute, see *ante*, Ch. VI.

(*x*) As to the distinction between agreements and declarations of trust, see *Dale* v. *Hamilton*, 2 Ph. 266, 275; *Smith* v. *Matthews*, 3 D. F. & J. 139, and cases there cited. "When the Court is called upon to establish or act upon a trust of lands, by declaration or creation, it must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, that there is a trust; but it must also be manifested and proved by writing, signed as required, what that trust is;" *per* Turner, L. J., *ibid.* 151.

(*y*) *Whitchureh* v. *Bevis*, 2 Br. C. C. 565; and note to *Pym* v. *Blackburn*, 5 V. 38, and cases there collected; and *Morse* v. *Merest*, 6 Mad. 26; *Lincoln* v. *Wright*, 4 D. & J. 16.

Chap. XVIII. Sect. 5.

which he had assented to when in draft, and had promised to sign as soon as it was fair copied (*z*).

Part performance, the principle of the doctrine.

2ndly, As to acts of part performance (*a*) sufficient to take a case out of the Statute of Frauds.—It is, in general, of the essence of such an act, that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract (*b*). The equitable doctrine of part performance has been said to rest upon the principle of fraud, *i. e.* that the Court will not allow one party to a contract to take advantage of part performance, and to permit the other party to change his position under the contract, and then to allege that the contract does not exist, since this would be contrary to conscience. But this way of stating the principle is not an adequate explanation, either of the precise grounds, or of the established limits, of the doctrine (*c*). The true theory of the doctrine cannot be more clearly stated than in the language of Lord Selborne (*d*) :—"In a suit founded on part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the Statute to estop any Court which may have to exercise jurisdiction in the matter from

(*z*) *Wood* v. *Midgley*, 5 D. M. & G. 41.

(*a*) *A.-G.* v. *Day*, 1 V. Sen. 218, 221; *Taylor* v. *Beech*, *ib.* 297.

(*b*) *Per* V.-C. W., in *Dale* v. *Hamilton*, 5 Ha. 381.

(*c*) *Britain* v. *Rossiter*, 11 Q. B. D. 123, 130; *Maddison* v. *Alderson*, 8 Ap. Ca. 467, 474.

(*d*) *Maddison* v. *Alderson*, *ib.* 475.

inquiring into, and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and the test of their legal and equitable character and consequences. If, therefore, in such a case, a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of these *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the Statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

Limits of the doctrine.

The doctrine has, however, been confined within strict limits, so as to prevent a recurrence of the mischief which the statute was passed to suppress. The acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged (*e*). Nor does the doctrine extend to any other contracts than such as

(*e*) *Cooth* v. *Jackson*, 6 V. 38; *Frame* v. *Dawson*, 14 V. 386; *Morphett* v. *Jones*, 1 Sw. 181.

Chap. XVIII. Sect. 5.

relate to real estate (*f*). It has, however, very recently been said by Kay, J., to apply to any case in which the Court would enforce the contract, were it in writing; and he accordingly granted specific performance of a verbal agreement to grant an easement, where the plaintiff had performed his part (*ff*).

Illustration of the doctrine and its limits: what acts are sufficient; delivery of possession;

Thus, delivery of possession is a sufficient part performance on the part of the vendor to sustain his action against the purchaser (*g*), and acceptance of possession is a sufficient part performance on the part of the purchaser to sustain his action against the vendor (*h*). The fact of the purchaser being, without liability to a charge of trespass, in possession of the vendor's land, is considered as showing unequivocally that some contract has taken place between the litigant parties (*i*); and the Court will then receive parol evidence of the terms of such contract. So, where there was a parol agreement for a mortgage, and that the mortgagor should continue in the occupation of part of the property, but an absolute conveyance was taken, it was held that the retention of possession by the mortgagor after the execution of the conveyance was a sufficient part performance to exclude the operation of the Statute; and parol evidence was admitted to prove the terms of the contract (*k*). Where the relation of landlord and tenant exists, the mere continuance in possession by the latter cannot *per se* be relied on as a part performance of a parol contract for the purchase of the property (*l*): but the execution by a tenant, who was let into possession, of certain repairs pursuant to a parol agreement for a lease, has been held sufficient (*m*); so, the retention of possession by a tenant after the determination of the original tenancy, may,

retention of possession;

(*f*) *Britain* v. *Rossiter*, 11 Q.B.D.123.

(*ff*) *McManus* v. *Cooke*, 35 Ch.D.681.

(*g*) *Pyke* v. *Williams*, 2 Vern. 455; *Lacon* v. *Mertins*, 3 Atk. 1, 4; *Bowers* v. *Cator*, 4 V. 91; *Buckmaster* v. *Harrop*, 13 V. 456; *Reynolds* v. *Waring*, You. 351, 353.

(*h*) *Clinan* v. *Cooke*, 1 Sch. & L. 41; *Gregory* v. *Mighell*, 18 V. 328; *Morphett* v. *Jones*, 1 Sw. 172; *Surcome* v. *Pinniger*, 3 D. M. & G. 571; *Ungley* v. *Ungley*, 5 Ch. D. 887, a case of a verbal promise by a father on his daughter's marriage to give her a certain house, followed by delivery of possession to the daughter.

(*i*) *Per* V.-C. W., 5 Ha. 381; *Wilson* v. *West Hartlepool Ry. Co.*, 2 D. J. & S. 475.

(*k*) *Lincoln* v. *Wright*, 4 D. & J.16.

(*l*) *Wills* v. *Stradling*, 3 V. 381; *Morphett* v. *Jones*, 1 Sw. 181.

(*m*) *Shillibeer* v. *Jarvis*, 8 D. M. & G. 79; and see *Powell* v. *Lovegrove*, *ib.* 357.

under special circumstances, amount to part performance (*n*); so, also, if a tenant in possession lay out money on the premises, upon the faith of the parol agreement (*o*), or, it is conceived, commit acts which would, (if he were merely tenant,) subject him to the loss of his lease (*p*), or to proceedings on the part of the landlord (*q*): so, it has been held, that the mere payment of additional rent entitles the tenant to an answer from the landlord as to the existence of an agreement for a renewed lease, although the Court intimated an opinion against the admissibility of parol evidence in opposition to the answer (*r*). And, in one case, where a landlord verbally agreed with his yearly tenant to grant him a lease at an increased rent, with an option of purchasing the fee, the mere payment of the additional rent was held, after the landlord's death, to be a sufficient part performance to take the case out of the Statute (*s*). But, although this case has been very recently followed in two Irish cases (*t*), its authority has been impugned in this country (*u*), and cannot but be regarded as doubtful, on the ground that payment of increased rent, like payment of purchase-money (*x*), is not an act necessarily and unequivocally referable to the contract which it is relied on to support.

except where the acts relied on are referable to the pre-existing tenancy.

In one case, it appears to have been doubted by Knight Bruce, L. J., whether a retention of possession by the tenant after a parol agreement, could be such a part performance as

(*n*) *Dowell* v. *Dew*, 1 Y. & C. C. C. 345.

(*o*) *Wills* v. *Stradling*, 3 V. 382; *Ex p. Hooper*, 19 V. 479; *Lester* v. *Foxcroft*, Colles, 108; 1 Wh. & T. L. C. and notes thereto; *Mundy* v. *Jolliffe*, 5 M. & C. 167; *Sutherland* v. *Briggs*, 1 Ha. 26.

(*p*) See and consider *Parker* v. *Smith*, 1 Col. 608.

(*q*) See 5 M. & C. 177; and *Sutherland* v. *Briggs*, *ubi suprà*.

(*r*) *Wills* v. *Stradling*, 3 V. 378, 382.

(*s*) *Nunn* v. *Fabian*, 1 Ch. 35. In this case a written receipt was given by the landlord for a quarter's rent at the increased rate; and see *Clarke* v. *Reilly*, 2 I. R. C. L. 422; *Howe* v. *Hall*, 4 I. R. Eq. 242; *Archbold* v. *Lord Howth*, 1 I. R. C. L. 608, 621.

(*t*) *Conner* v. *Fitzgerald*, 11 L. R. Ir. 106; *Lanyon* v. *Martin*, 13 *ib.* 297.

(*u*) *Humphreys* v. *Green*, 10 Q. B. D. 148; *Maddison* v. *Alderson*, 8 Ap. Ca. 467, 489.

(*x*) *Post*, p. 1138, n. (*e*).

Chap. XVIII. Sect. 5.

to exclude a defence founded on the Statute (*y*): but the later cases have extended the doctrine; and it is now well settled that if the acts relied on are sufficient for the purpose, and are such as can only be referred to the parol agreement, the mere circumstance that the tenant was already in the occupation of the property is not material (*z*). It is, of course, open to the vendor to show that the acts of part performance are properly referable to the pre-existing tenancy.

And where the parties have for many years acted upon the assumption that a contract existed, acts which might not in themselves, and irrespectively of the lapse of time, have been sufficient to take the case out of the Statute, have been held to have that effect (*a*).

What acts are insufficient.

But there can be no part performance of an incomplete contract (*b*); and an act which is merely introductory or ancillary to a contract, or which, though in truth done in performance of a contract, admits of explanation without supposing a contract, is not sufficient to take the case out of the Statute (*c*): *e.g.*, delivery of the abstract, or giving directions for the conveyance, or having the estate surveyed or valued, is insufficient (*d*): so, also, is payment of a sum alleged to be part or even all of the purchase-money (*e*); or

(*y*) *Pain* v. *Coombs*, 1 D. & J. 34, 46.

(*z*) See *Nunn* v. *Fabian*, *supra*.

(*a*) *Blachford* v. *Kirkpatrick*, 6 B. 232.

(*b*) *Thynne* v. *Earl of Glengall*, 2 H. L. C. 131, 158; and see *Parker* v. *Smith*, 1 Col. 623; *Phillips* v. *Edwards*, 33 B. 440.

(*c*) 5 Ha. 381; and see *Gunter* v. *Halsey*, Amb. 586; *Lacon* v. *Mertins*, 3 Atk. 4; *Ex p. Hooper*, 19 V. 479.

(*d*) *Whaley* v. *Bagnel*, 1 Br. P. C. 345; *Cole* v. *White*, cited 1 Br. C. C. 409; *Redding* v. *Wilkes*, 3 *ib.* 400; *Whitehurch* v. *Bevis*, 2 *ib.* 559; *Clerk* v. *Wright*, 1 Atk. 12; *Bawdes* v. *Amhurst*, Ch. Prec. 402; *Cooke* v. *Tombs*, 2 Anst. 425; *Thomas* v. *Blackman*, 1 Col. 301; *Phillips* v. *Edwards*, 33 B. 440; Sug. 140.

(*e*) *Clinan* v. *Cooke*, 1 Sch. & L. 40; *Watt* v. *Evans*, 4 Y. & C. 579; *Hughes* v. *Morris*, 2 D. M. & G. 356; and see 5 Ha. 381; *Stroughill* v. *Gulliver*, 2 Jur. N. S. 700, which was the case of a parol agreement in anticipation of marriage; *Humphreys* v. *Green*, 10 Q. B. D. 148; *Maddison* v. *Alderson*, 8 Ap. Ca. 479.

the advance of money on a verbal promise by the borrower to charge the rent of a farm for payment of the loan (*f*): or procuring, and paying a valuable consideration for, a release by a third party (*g*); or the mere retention of possession by a tenant after the determination of his tenancy, but before notice to quit (*h*); or an expenditure by the tenant to which he is liable under the terms of his lease (*i*): so, possession obtained wrongfully by the plaintiff, of course, cannot avail him (*k*); nor will the fact of his having done acts which would, except under a contract, have amounted to trespass (*l*).

Application of the doctrine to contracts of corporations.

With reference to contracts of corporations, it is submitted that the doctrine of part performance is confined to cases where, as under the Statute of Frauds, special evidence of the contract is made necessary: and that it cannot be made use of to defeat the doctrine of *ultra vires* (*m*). But a corporation, equally with an individual, may, it would seem, be bound by part performance where the contract is *intra vires*, and at all events where it is such as need not be under seal (*n*).

Change of residence;

Where A. removed his place of business to a house belonging to B., his father-in-law, upon the faith of an alleged parol promise that he should occupy it rent-free for his life, it was held, in a suit to restrain an action of eject-

(*f*) *Ex p. Hall*, 10 Ch. D. 615, 619. It seems to be unsettled whether a deposit of title deeds is sufficient to take a parol contract to charge the lands out of the statute; *Whitmore* v. *Farley*, 45 L. T. 99; and see *Ex p. Broderick*, 18 Q. B. D. 380.

(*g*) *O'Reilly* v. *Thompson*, 2 Cox, 271.

(*h*) *Wills* v. *Stradling*, 3 V. 381; *Brennan* v. *Bolton*, 2 D. & War. 349.

(*i*) *Frame* v. *Dawson*, 14 V. 386; *Lindsay* v. *Lynch*, 2 Sch. & L. 1.

(*k*) Sug. 151; *Cole* v. *White*, 1 Br. C. C. 409.

(*l*) *Phillips* v. *Alderton*, 24 W. R. 8. A person who enters into a parol contract for the purchase of land from a person who assumes without authority to act as agent for sale, has no remedy against the true owner for damages for the agent's misrepresentations on the ground of part performance; *Warr* v. *Jones*, 24 W. R. 695.

(*m*) See *Hunt* v. *Wimbledon Local Bd.*, 3 C. P. D. 208, 214; cf. *Crook* v. *Corp. of Seaford*, 6 Ch. 551.

(*n*) *Wilson* v. *West Hartlepool R. Co.*, 2 D. J. & S. 475. As to contracts of corporations, see *ante*, pp. 217, 273.

Chap. XVIII. Sect. 5.

ment, that the change of residence was an insufficient consideration to support the parol agreement; and that A. had no lien for money which during the period of his occupation he had expended in ordinary repairs (*o*); but in a recent case, where the decision just referred to does not appear to have been cited, V.-C. Malins held, following *Loffus* v. *Maw* (*p*), under very similar circumstances, that the mere change of residence, and the alteration in the mode of life which resulted from it, were sufficient to support a parol agreement to let the house rent-free (*q*). *Loffus* v. *Maw* has, however, been overruled (*r*); and it would seem to follow that *Coles* v. *Pilkington* cannot be sustained. In *Maddison* v. *Alderson* (*s*), A., being in the service of B., contemplated leaving him, but was induced to remain as his housekeeper without wages, and to give up other prospects in life, by a verbal promise, made by B. to her, that he would make a will leaving her a life estate in a farm which belonged to him. B. died intestate, having made an unattested will by which he purported to fulfil his promise to A. It was decided by the House of Lords, that A.'s service was not unequivocally, and in its own nature, referable to any contract, and, therefore, not a sufficient part performance to take the case out of the Statute of Frauds.

marriage.

Marriage is not, for the purposes of specific performance, considered as a part performance of a parol contract, for which it forms the consideration (*t*). Thus, where instructions were given to a solicitor to prepare a settlement of the intending husband's property, but it could not be ready by the time fixed for the marriage, and there was no antenuptial contract, a settlement made shortly after the

(*o*) *Millard* v. *Harvey*, 34 B. 237.
(*p*) 3 Giff. 592.
(*q*) *Coles* v. *Pilkington*, 19 Eq. 174.
(*r*) 8 Ap. Ca. 467, 473.
(*s*) *Ibid.*; cf. *Britain* v. *Rossiter*, 11 Q. B. D. 123.
(*t*) *Spurgeon* v. *Collier*, 1 Ed. 55; *Taylor* v. *Beech*, 1 V. sen. 298; *Lassence* v. *Tierney*, 1 M. & G. 572; *Goldicutt* v. *Townsend*, 28 B. 445; *Hammersley* v. *De Biel*, 12 C. & F. 45, 64, n.; *Caton* v. *Caton*, L. R. 2 H. L. 127.

marriage was held fraudulent and void as against the husband's creditors (*u*). And where an infant before marriage by letter promised to settle certain specified property on his wife, and fifteen years after the marriage by a deed, which did not refer to the letter, settled other property than that mentioned in the letter, and upon different trusts, it was held that the settlement was merely voluntary, and that a purchaser from the husband of part of the settled property was entitled to specific performance (*x*). So, where a draft settlement was prepared according to instructions given by the intending husband, but, before it was finally approved, the idea of a settlement was abandoned on his verbal promise that he would forthwith execute a will leaving his wife all her own property, and such a will was executed immediately after the marriage ceremony, but was subsequently revoked, it was held that the execution of the will, which was in itself a mere revocable instrument, was not sufficient to constitute part performance (*y*). On appeal to the House of Lords the question of part performance was not argued; and the decision of Lord Cranworth was affirmed, on the simple ground that there was no sufficient memorandum signed by the party to be charged (*z*).

But part performance of a parol agreement, independently of the marriage, may take the case out of the Statute.

But where there is a written agreement after, in pursuance of a parol agreement before, marriage, or where, after the marriage, possession of the property is given up, or some other act is done, in pursuance of the parol agreement, which, independently of the marriage, will constitute part performance, the contract may be enforced (*a*): thus, where one of the contracting parties verbally agrees, as the consideration for the marriage, to settle an estate, and, on the faith of that promise, the other contracting party, or

(*u*) *Warden* v. *Jones*, 2 D. & J. 76; in effect overruling *Dundas* v. *Dutens*, 1 V. 199.

(*x*) *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*y*) *Caton* v. *Caton*, 1 Ch. 137; cf. *Vineent* v. *Vineent*, 56 L. T. 243.

(*z*) L. R. 2 H. L. 127.

(*a*) *Surcome* v. *Pinniger*, 3 D. M. & G. 571; *Barkworth* v. *Young*, 4 Dr. 1; *Ungley* v. *Ungley*, 5 Ch. D. 887; and see *Cooper* v. *Wormald*, 27 B. 266.

Chap. XVIII. Sect. 5.

some person acting on his or her behalf, makes a settlement and the marriage is solemnized, the settlement so made is a sufficient act of part performance to take the case out of the Statute (*b*) : so, where a marriage was contracted, and a settlement made by the husband, on the faith of representations by his wife's father, that his daughter upon the decease of her parents would become absolutely entitled to one-third of certain trust funds, the sole surviving child of the marriage was held entitled to have the representations made good, and to have a subsequent appointment by her grandfather, which prevented the devolution of the one-third share, set aside (*c*). But in these cases, too, the rule holds good that the act relied upon as part performance must be unequivocally referable to the contract which it is intended to support. Thus, where A. consented to the marriage of her daughter with B., on the faith of an unattested paper signed by C., stating that as a mark of his esteem and friendship for B., he agreed to allow him £500, and that he had left him after his own death £10,000 in lieu of the £500 a year: it was held that there was no sufficient connection between C.'s promise and representation, and the consent given by A., to sustain a claim against C.'s estate (*d*).

As to expenditure by tenant.

So, if, in the case of moneys expended by a tenant, the circumstances were such as would, if there were no contract for sale, enable him to recover the amount from the landlord, the case would not appear to be different in principle from that of payment of purchase-money. The same remark applies to the case of the payment of additional rent (*e*) ; where, however, as we have seen, the decision was, that the landlord, who had pleaded the Statute, should answer.

(*b*) *Hammersley* v. *De Biel*, 12 C. & F. 45 ; *sed quære* whether this case was decided on the Statute of Frauds ; see *Maunsell* v. *White*, 4 H. L. C. 1055.

(*c*) *Walford* v. *Gray*, 13 W. R. 761 ; *Coverdale* v. *Eastwood*, 15 Eq. 121.

(*d*) *Dashwood* v. *Jermyn*, 12 Ch. D. 776.

(*e*) *Wills* v. *Stradling*, 3 V. 378 ; and see *Nunn* v. *Fabian*, 1 Ch. 35 ; and *vide ante*, p. 1137.

In the case of *Mundy* v. *Jolliffe* (*f*), the defendant, in pursuance of a parol agreement for a lease, had laid down a field in pasture, and executed draining and repairs; acts which are referred to by Sir J. Wigram, V.-C. (*g*), as "certainly equivocal:" the bill was dismissed by Sir L. Shadwell, V.-C., but this decision was reversed by Lord Cottenham on appeal. His lordship, in giving judgment, indicated a willingness rather to extend than to contract (*h*) the jurisdiction: "Courts of Equity" observed his lordship, "exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting the party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect what the terms of it really were" (*i*): and when it finds that possession is fairly referable to an express agreement to give a fair rent or consideration, the exact amount of which has not been settled, it will strain its jurisdiction to fix the amount of such rent or consideration (*k*).

As to a parol family arrangement.

Where a father by his will left his real estate to his two sons, but the will, for want of due attestation, could not be admitted to probate, and the elder son, who inherited the estate, told his brother on several occasions that the property should be "not mine, nor thine, but ours," and it was accord-

(*f*) 9 Si. 413; 5 M. & C. 167.

(*g*) 5 Ha. 381.

(*h*) See Sug. 156.

(*i*) 5 M. & C. 177; see *Gregory* v. *Wilson*, 9 Ha. 690; *Pain* v. *Coombs*, 1 D. & J. 34; *Nunn* v. *Fabian*, 1 Ch. 35; and see *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, and Lord Kingsdown's judgment, *ib.* p. 170.

(*k*) See *Gregory* v. *Mighell*, 18 V. 328; *Meynell* v. *Surtees*, 3 S. & G. 101; 1 Jur. N. S. 737.

ingly held by them as tenants in common for nearly twenty years, the Court considered this to be a sufficient proof of a family arrangement, enforceable against the elder brother (*l*).

Verbal notice and retention of possession by tenant, sufficient declaration of option to purchase.

In one case, where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, V.-C. Wigram appears to have considered, that his verbal notice of intention to take the new lease, accompanied by retention of possession, was binding upon him (*m*).

Ejectment by landowner restrained on ground of mere acquiescence in expenditure.

And where a colliery proprietor, under the mistaken notion that he had a power of compulsorily purchasing land for the purpose of a railway, wrote to the landowner, and, referring to such supposed power, offered to purchase the land at a fair valuation, and, no reply being given, the railway was made over the land without further communication with him, but with his full knowledge, and then, after a fruitless negotiation as to the price to be given for the land, the landowner commenced an ejectment upwards of three years after the railway had been finished; the same learned judge, on motion, restrained the action, upon the colliery proprietor giving judgment in the action, and paying into Court the utmost valuation of the land (*n*). So, where a canal was made over land with the consent of the freeholder, and compensation was paid to the tenant, but the amount of compensation which the freeholder was to receive remained unsettled, his representatives and parties claiming under him by purchase, with notice of the facts, were restrained at the expiration of the tenancy from asserting their legal rights (*o*).

(*l*) *Williams* v. *Williams*, 2 Dr. & S. 378; 2 Ch. 294; see, too, *Cood* v. *Cood*, 33 B. 314.

(*m*) *Beatson* v. *Nicholson*, 6 Jur. 620.

(*n*) *Powell* v. *Thomas*, 6 Ha. 300; *Clavering's case*, 5 V. 690; *Duke of Devon* v. *Elgin*, 14 B. 530; cf. *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 170; *Bankart* v. *Tennant*, 10 Eq. 141; *Plimmer* v. *Mayor of Wellington*, 9 Ap. Ca. 699; and see on this doctrine, *ante*, p. 948.

(*o*) *Duke of Beaufort* v. *Patrick*, 17 B. 60.

But when the party in possession has acquired a statutory right to purchase and hold the land, there is no longer the same reason as before for straining the jurisdiction of the Court (*p*).

Case of sale under a power: remainderman not bound.

In the case of a power of sale or leasing the parol contract of a tenant for life, followed by expenditure, would, it is conceived, be insufficient to bind a remainderman who had not acquiesced in such expenditure (*q*), unless after the death of the tenant for life he lie by and allow the purchaser or lessee to improve the estate (*r*): for the plaintiff's contention, in cases of part performance, is, that it is a fraud on a party permitting an expenditure on the faith of a parol agreement, to attempt to take advantage of its not being in writing (*s*).

Plaintiff, how far bound to show precise terms of contract.

It seems to be clear, upon the modern authorities (*t*), that the Court, being satisfied of the existence of an agreement, will, if possible, ascertain the real terms. Lord St. Leonards, however, remarks, that "the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract" (*u*); and in a case in Ireland, a reference was refused at the hearing, on the ground that the party setting up the agreement had not produced evidence which, if uncontradicted, would be sufficient to establish its essential terms; the Court holding that a reference should be directed only in cases where the

(*p*) *Meynell* v. *Surtees*, 1 Jur. N. S. 737; but see *Somerset Coal Co.* v. *Harcourt*, 2 D. & J. 596.

(*q*) *Blore* v. *Sutton*, 3 Mer. 247; *Lowry* v. *Lord Dufferin*, 1 Ir. Eq. R. 281; *Morgan* v. *Milman*, 3 D. M. & G. 33; *vide ante*, p. 949.

(*r*) *Stiles* v. *Cowper*, 3 Atk. 692.

(*s*) 3 Mer. 246; but as to this not being an adequate explanation of the doctrine, see *ante*, p. 1134.

(*t*) See *Allan* v. *Bower*, 3 Br. C. C. 149; *Clinan* v. *Cooke*, 1 Sch. & Lef. 38; *Boardman* v. *Mostyn*, 6 V. 467, 471; *Morphett* v. *Jones*, 1 Sw. 172; *Price* v. *Assheton*, 1 Y. & C. 82; *Dale* v. *Hamilton*, 5 Ha. 381; *Mundy* v. *Jolliffe*, 5 M. & C. 167, 177; and see *Crook* v. *Corp. of Seaford*, 6 Ch. 551; *Laird* v. *Birkenhead R. Co.*, Johns. 500; *Wilson* v. *West Hartlepool R. Co.*, 2 D. J. & S. 475; Sug. 148.

(*u*) Sug. 155; see *Price* v. *Assheton*, 1 Y. & C. 441.

Chap. XVIII. Sect. 5.

Immaterial terms of agreement, although stated in bill, need not be proved;

fact of a contract is fully proved, but the evidence is contradictory as to its terms (*x*). But it has been held, that where the bill states, as part of the agreement, a stipulation which would operate against the plaintiff, and which created a liability to which he would, in the absence of agreement, have been liable,—(*e.g.*, an agreement by an intended lessee to pay taxes and make necessary repairs (*y*),)—or which has been satisfied, and so rendered immaterial, so far as relates to anything remaining to be done (*z*), the failure to prove such statement is unimportant.

but it must be shown that the acts of part performance are solely referable to the agreement;

Where a parol agreement is sought to be specifically enforced, on the ground of part performance, it must be distinctly shown what are the terms of the agreement which has been partly performed, and that the acts of part performance are referable to that agreement alone (*a*).

and the material terms must ultimately be clearly shown.

But, although the Court will endeavour to put a reasonable interpretation upon vague expressions (*b*); and, in construing them, will consider the surrounding circumstances, and the conduct of the parties in their dealings with the subject-matter of the contract (*c*); yet if the final result of all the evidence which can be procured, is, to leave the material terms of the agreement doubtful, it can, of course, make no decree. Thus, where it remained uncertain whether the purchase-money did or did not include the timber, the Court declined to interfere (*d*); so, where an agreement for

(*x*) *Savage* v. *Carroll*, 1 B. & B. 283, 550, 551; this case, however, was not one between vendor and purchaser; but the validity of the contract was discussed upon the collateral question whether the heir of a purchaser who had died before completion was entitled to have the purchase-money paid out of the personal estate.

(*y*) *Gregory* v. *Mighell*, 18 V. 328.

(*z*) *Mundy* v. *Jolliffe*, 5 M. & C. 167, 176.

(*a*) Per Lord Romelly, *Price* v. *Salusbury*, 32 B. 446, 459; aff. *ib.* 461.

(*b*) *Sanderson* v. *Cockermouth R. Co.*, 11 B. 497; *Richardson* v. *Eyton*, 2 D. M. & G. 79.

(*c*) See *Oxford* v. *Provand*, L. R. 2 P. C. 135; and cf. *Rumble* v. *Heygate*, 18 W. R. 749.

(*d*) *Reynolds* v. *Waring*, You. 346; in this case no reference appears to have been asked for by the plaintiff. See *Monro* v. *Taylor*, 8 Ha. 51; 3 M. & G. 713.

a lease did not state the length of the term to be granted (*e*), or the date at which it was to commence (*f*), or at which an increased rent was to become payable (*g*); so, where on a contract for a lease for lives the lives were not named, nor the person who was to name them (*h*); so, where the construction of the agreement depended upon the meaning of an "&c." (*i*); so, where the agreement was to take a lease of a house if the drawing-rooms were "handsomely decorated according to the present style" (*k*); so, in the absence of special circumstances, the Court will not enforce specific performance of a contract for the sale of land, which is silent as to the means of access to it, when it is reasonably uncertain whether a permanent right of way can be conferred on the purchaser (*l*).

Act by defendant, merely to his own prejudice, no part performance;

And it appears that, as a general rule, the plaintiff cannot rely upon any act by the defendant which can merely tend to his own prejudice, and not affect the plaintiff; *e.g.*, payment of auction duty by the purchaser (*m*); or the execution and registration by the vendor of the conveyance (*n*). Nor, in the case of a purchase of separate lots under separate parol contracts, does part performance as to one lot set up the agreement as to another lot (*o*).

nor does part performance, as to one lot, affect another lot.

Sales by auction and in bankruptcy within Statute.

We may here remark, that sales by auction (*p*), and in bankruptcy (*q*), are both within the Statute of Frauds.

(*e*) *Clinan* v. *Cooke*, 1 Sch. & L. 22.

(*f*) *Blore* v. *Sutton*, 3 Mer. 237.

(*g*) *Lord Ormond* v. *Anderson*, 2 B. & B. 363.

(*h*) *Wheeler* v. *D'Esterre*, 2 Dow, 359; but see *Fitzgerald* v. *Vicars*, 2 D. & Wal. 298.

(*i*) *Price* v. *Griffith*, 1 D. M. & G. 80; and see *Tatham* v. *Platt*, 9 Ha. 660; *Stuart* v. *L. & N. W. R. Co.*, 1 D. M. & G. 721. But see *Haywood* v. *Cope*, 25 B. 140; *Parker* v. *Taswell*, 2 D. & J. 559; *Cooper* v. *Hood*, 26 B. 293, and *vide ante*, p. 255.

(*k*) *Taylor* v. *Portington*, 7 D. M. & G. 328; but see *Samuda* v. *Lawford*, 4 Gif. 42; and *Dear* v. *Verity*, 38 L. J. Ch. 486.

(*l*) *Denne* v. *Light*, 8 D. M. & G. 774.

(*m*) *Buckmaster* v. *Harrop*, 13 V. 465; the particular case cannot again arise, the duty having been repealed.

(*n*) *Hawkins* v. *Holmes*, 1 P. W. 770.

(*o*) *Buckmaster* v. *Harrop*, 13 V. 465, 474.

(*p*) *Ibid.*; *Blagden* v. *Bradbear*, 12 V. 466.

(*q*) *Ex p. Cutts*, 3 Dea. 267.

Admission of agreement by defendant, and Statute not insisted on.

3rd. Where the defendant, by his defence, admits the agreement as alleged in the statement of claim, and does not claim the benefit of the Statute, the Court will order specific performance against him; or, if he die before judgment, against his representatives (*r*). So, if he admit a different agreement from that alleged in the statement of claim, the plaintiff may amend and take the benefit of the admission (*s*); but, in any case, the latter, in relying on the admission, is bound by its terms, and cannot vary them by parol evidence (*t*). If the defendant, although admitting the agreement, insist upon the Statute, no order can be made against him (*u*); but if he intend to rely on the Statute, he must plead it (*x*). Under the old practice the defence under the Statute might be raised by demurrer (*y*). But under the new practice, since the Judicature Acts, it could not be so raised (*z*); nor can it now, it would seem, be raised under the new procedure in lieu of demurrer (*a*).

Parol variation in favour of defendant.

Where a plaintiff alleges a written agreement with a parol variation in favour of the defendant, and offers to perform the agreement with the variation, the Court will, of course, enforce specific performance although the defendant insist on the Statute (*b*).

(*r*) *Gunter* v. *Halsey*, Amb. 586; *A.-Gen.* v. *Day*, 1 V. sen. 221; Sug. 156; see *Parker* v. *Smith*, 1 Coll. 615; *Ridgway* v. *Wharton*, 3 D. M. & G. 677, 689; 6 H. L. C. 238.

(*s*) *Lindsay* v. *Lynch*, 2 Sch. & L. 9.

(*t*) *Pym* v. *Blackburn*, 3 V. 34.

(*u*) *Whitchurch* v. *Bevis*, 2 Br. C. C. 559; *Blagden* v. *Bradbear*, 12 V. 466; see *Moore* v. *Edwards*, 4 V. 23; *Cooth* v. *Jackson*, 6 V. 37; *Rowe* v. *Teed*, 15 V. 375; *Jackson* v. *Oglander*, 2 H. & M. 465.

(*x*) R. S. C. 1883, Ord. XIX. r. 15; and it has been held in the Q. B. D. that he should set out the facts which bring his case within the statute; *Pullen* v. *Snelus*, 27 W. R. 534; but *quære* whether this is the practice now.

(*y*) *Wood* v. *Midgley*, 5 D. M. & G. 41; *Barkworth* v. *Young*, 4 Dr. 1, 9; *Rummens* v. *Robins*, 3 D. J. & S. 88; *Pain* v. *Coombs*, 1 D. & J. 34.

(*z*) *Catling* v. *King*, 5 Ch. D. 660; *Futcher* v. *Futcher*, 29 W. R. 884. Where the point of the statute had been raised on demurrer, it was held unnecessary to mention it in the pleadings; and the defendant was allowed to raise it at the trial; *Johnasson* v. *Bonhote*, 2 Ch. D. 298.

(*a*) R. S. C. 1883, O. XXV.

(*b*) *Martin* v. *Pyeroft*, 2 D. M. & G. 785; *Vouillon* v. *States*, 2 Jur. N. S. 847.

Purchaser cannot, in general, enforce specific performance of written contract with parol variation.

The plaintiff, however, as a general rule, if suing on a written contract, is bound by its terms; and cannot, upon the ground of fraud, surprise, or mistake, seek to vary, add to, or explain its contents (*c*): except, perhaps, where the fraud consists in a refusal to accede to a promised variation upon the faith of which the plaintiff entered into a written agreement (*d*); or in a fraudulent preparation or alteration of the agreement so as to make it inconsistent with the real intention of the parties, and with the understanding of the plaintiff at the time he executed it; or where, by mistake, an agreement not expressing the real intention of the parties, is entered into, and the mistake is admitted by the defence, or, not being denied by the defence, is proved by unexceptionable evidence (*e*). But in a very recent case (*f*), where the plaintiff alleged that he had executed an agreement to erect six houses by mistake for four houses, and that he had erected the four houses which was the number intended, and claimed damages for breach of the contract on the defendant's part, while the defendant denied the mistake but did not plead the Statute, North, J., admitted parol evidence to prove the mistake, and expressed his opinion that under the Judicature Act, 1873 (*g*), the Court had jurisdiction to order the agreement to be rectified, and to go on to order specific performance

(*c*) *Marquis of Townshend* v. *Stangroom*, 6 V. 328; *Price* v. *Dyer*, 17 V. 356; *Clowes* v. *Higginson*, 1 V. & B. 524; *Earl of Darnley* v. *L. C. and D. R. Co.*, L. R. 2 H. L. 43; *Snelling* v. *Thomas*, 17 Eq. 303.

(*d*) *Pember* v. *Mathers*, 1 Br. C. C. 52, 54; Sug. 174; but see *Clarke* v. *Grant*, 14 V. 519, 525, *et quære*.

(*e*) See note to *Pym* v. *Blackburn*, 3 V. 38, and cases as to fraud there cited; Lord Thurlow's judgment in *Lord Irnham* v. *Child*, 1 Br. C. C. 94; Lord Eldon's remarks, 6 V. 339; Sir John Leach's argument as counsel for the defendant, in *Woollam* v. *Hearn*, 7 V. 215; 2 Wh. & T. L. C.; and the judgment in *A.-G.* v. *Sitwell*, 1 Y. & C. 583. As to admitting evidence in explanation of particular expressions, *vide ante*, p. 1091 *et seq.* Parol evidence even of collateral matters is inadmissible; *Rich* v. *Jackson*, 4 Br. C. C. 514; *Hare* v. *Shearwood*, 1 V. 241; *Marquis Townshend* v. *Stangroom*, 6 V. 328. It seems to be doubtful whether a defendant falsely in his defence denying the agreement can be convicted of perjury; *Rex* v. *Dunston*, Ry. & M. 109: at any rate, his conviction will not entitle the plaintiff to a decree: see *Bartlett* v. *Pickersgill*, 4 Ea. 577, n.: cited 4 Burr. 2255; *ante*, p. 1056.

(*f*) *Olley* v. *Fisher*, 34 Ch. D. 367.

(*g*) S. 24, sub-s. 7.

Chap. XVIII. Sect. 5.

by the defendant of the contract so rectified. And if the defendant wishes to resist specific performance with a variation, he should state precisely the true terms of the agreement, and how the actual agreement differs from that set up by the plaintiff, and should offer to perform the contract alleged by himself to be the true one (*h*). A *subsequent* parol variation cannot be enforced by the plaintiff (*i*), unless there have been such a part performance of the varied agreement as would support a judgment in the case of an original independent agreement (*k*); or, (it is conceived,) unless the defendant by his defence admit the variation and do not insist on the Statute.

Subsequent parol variation can only be enforced if part performed.

Defendant precluded from relying on omission to send abstract.

We may here remark that a defendant admitting by his defence that the plaintiff at the date of the contract was *entitled*, has been held to be unable at the hearing to object that no abstract was delivered (*l*).

Generally as to statement of claim.

Where contract conditional, performance of the condition should be stated.

Generally, in reference to the statement of claim, it may here be said that, where the contract is originally conditional, the performance of the condition should be alleged; so, where it purports to be signed by an agent, the fact of the agency and the authority of the agent should be alleged; so, also, the plaintiff should state that he has performed, or been ready and willing to perform, his part of the agreement; and that there is no incapacity in the defendant to complete it (*m*). Where the consent of a third party is necessary to enable the plaintiff to carry out the agreement, it would not seem to be necessary for him to allege in his statement of claim the fact of such consent having been obtained, because that may reasonably be included in the general allegation of readiness and

(*h*) *Smith* v. *Wheatcroft*, 9 Ch. D. 223, 229.

(*i*) *Robson* v. *Collins*, 7 V. 130, 133; *Nurse* v. *Lord Seymour*, 13 B. 254.

(*k*) See *Jordan* v. *Sawkins*, 1 V. 402; *Price* v. *Dyer*, 17 V. 356; *Van* v. *Corpe*, 3 M. & K. 269, 277; and Sug. 164.

(*l*) *Phipps* v. *Child*, 3 Dr. 709.

(*m*) *Columbine* v. *Chichester*, 2 Ph. 27; and see *Noble* v. *Edwardes*, 5 Ch. D. 378; *Hipgrave* v. *Case*, 28 Ch. D. 356; *Williams* v. *Brisco*, 22 Ch. D. 441, 449.

willingness to perform the contract, and the time for obtaining such consent is the time when he has to make out his title (*n*).

Prayer for general relief under the old practice.

Under the old practice, the plaintiff could not under the prayer for general relief obtain a decree inconsistent with either the specific case made, or the specific relief prayed by the bill (*o*). For instance, it was held that a vendor, who through want of title failed to obtain a decree for specific performance against a purchaser in possession, could not, under the prayer for general relief, obtain an account of the rents and profits, although the defendant by his answer stated his readiness to pay a fair rent (*p*). Nor, where he failed in proving the agreement alleged by his bill, could he, in general, take a decree for performance of a different agreement admitted by the defendant's answer (*q*). Nor could he, under the general prayer, obtain relief which, although consistent with the specific relief, was yet sustained only by allegations which had been introduced, merely as showing his right to the specific relief (*r*); and where a bill was filed, making a case of actual fraud (*s*), the right to relief being rested on that ground, and such fraud was disproved or not established, the Court did not allow the bill to be used for any secondary purpose, but dismissed it with costs (*t*), unless it alleged other matter on which the Court could ground a decree (*u*).

The new practice under the Judicature Acts and Rules.

The Judicature Acts and the rules thereunder have, however, made great changes in the practice in this respect.

(*n*) *Ellis* v. *Rogers*, 29 Ch. D. 661, 672.

(*o*) See cases cited in four following notes, and *Hiern* v. *Mill*, 13 V. 119; *Cockerell* v. *Dickens*, 1 M. D. & D. 45, 81; *Hill* v. *G. N. R. Co.*, 5 D. M. & G. 72.

(*p*) *Williams* v. *Shaw*, 3 Russ. 178, n.

(*q*) *Legal* v. *Miller*, 2 V. sen. 299; *Lindsay* v. *Lynch*, 2 Sch. & L. 1; and see these cases discussed in *Smith* v. *Wheatcroft*, 9 Ch. D. 223. See, too, *Jeffrey* v. *Stephens*, 6 Jur. N. S. 947; and cf. *Hanbury* v. *Litchfield*, 2 M. & K. 629.

(*r*) *Stevens* v. *Guppy*, 3 Russ. 171, 185.

(*s*) The mere use of the *word* "fraud" is immaterial, if acts are alleged which amount to fraud; *M'Calmont* v. *Rankin*, 8 Ha. 15.

(*t*) *Glascott* v. *Lang*, 2 Ph. 310; and see *Wilde* v. *Gibson*, 1 H. L. C. 621; *Ferraby* v. *Hobson*, 2 Ph. 255; Dan. C. P. 430.

(*u*) *Arehbold* v. *Commrs. of Char. Donations*, 2 H. L. C. 440, 446, 459; Dan. C. P. 431.

Chap. XVIII. Sect. 5.

With a view to prevent multiplicity of legal proceedings, the Court must now grant, in any matter or cause pending before it, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter (*x*). And it is no longer necessary to ask for general or other relief, which may always be given, as the Court may think just, to the same extent as if it had been asked for (*y*). But it must be borne in mind that these provisions, while they require the Court to deal finally with every claim which properly comes before it (*z*), do not entitle a plaintiff to any relief except *secundum allegata et probata*, since the Court will not, under the above-stated rules, grant further relief than would be covered by the general prayer; and this is "limited by two things—the facts which are alleged and the relief which is expressly asked:" nor, under such a prayer, can any relief be obtained inconsistent with that relief which is expressly asked for (*a*). And, although the powers of the Court to allow amendment are very wide, they will only be exercised where in the discretion of the Court justice requires the amendment (*b*).

(*x*) Jud. Act, 1873, s. 24, sub-s. 7.

(*y*) R. S. C. 1883, O. XX. r. 6.

(*z*) *Breslauer* v. *Barwick*, 24 W. R. 901; *Howe* v. *Smith*, 27 Ch. D. 89, 97; *Olley* v. *Fisher*, 34 Ch. D. 367; and see *Serrao* v. *Noel*, 15 Q. B. D. 549.

(*a*) *Cargill* v. *Bower*, 10 Ch. D. 502, 508.

(*b*) R. S. C. 1883, O. XXVIII. r. 1; *Hipgrave* v. *Case*, 28 Ch. D. 360; *Cargill* v. *Bower*, *suprà*; see Ann. Prac.; Wilson, 243.

(6.) *As to grounds of defence negativing plaintiff's right to specific performance except with a variation of the original written agreement;* viz., *fraud—mistake—misrepresentation—unfulfilled promise—parol variation, &c.*

As to ground of defence, &c.

On the other hand, it is quite competent for the defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect; so that all parties may have the benefit of what they contracted for (*e*).

Defence negativing plaintiff's right to specific performance except with variation.

The admissibility of parol evidence by way of defence to a bill for specific performance of a written agreement, in its literal unvaried terms, may be conveniently considered with reference to four classes of cases: *viz.*:

1st—Fraud or mistake affecting terms of agreement.

1st. Cases where the defence is, that by fraud, or mistake, the written agreement is, *in terms*, different from that which the defendant supposed it to be, when he executed it; this, if proved, will negative the plaintiff's right to specific performance except with the variation (*d*).

2ndly—Fraud, mistake, or surprise, inducing defendant to enter into agreement misapprehending its effect;

2nd. Cases where the defence is, that by fraud, mistake, or surprise, the defendant executed the written agreement under a reasonable misapprehension as to its effect as between himself and the plaintiff: here, also, the Court will refuse to make a decree according to the literal terms, or strict construction, of the agreement.

(*e*) Per Lord Cottenham, Cr. & Ph. 62.

(*d*) See *Joynes* v. *Statham*, 3 Atk. 388; *Woollam* v. *Hearn*, 7 V. 211; 2 Wh. & T. L. C.; Sug. 157; *Marquis Townshend* v. *Stangroom*, 6 V. 328; *Ramsbottom* v. *Gosden*, 1 V. & B. 165; *Garrard* v. *Grinling*, 2 Sw. 244; *Lord Gordon* v. *Marquis Hertford*, 2 Mad. 106; *Clinan* v. *Cooke*, 1 Sch. & L. 38, 39; *Humphries* v. *Horne*, 3 Ha. 277; *Wood* v. *Searth*, 2 K. & J. 33; *Wright* v. *Goff*, 2 Jur. N. S. 481; and see *Vouillon* v. *States*, *ib.* 845.

Chap. XVIII. Sect. 6.

as where the terms of the agreement are ambiguous;

Thus, where the terms of the agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce it (*e*); and this, even where the defendant himself was the author of the ambiguity, and the plaintiff certainly supposed himself to be buying all he claimed (*f*). So, where the defendant, by his answer, alleged that he made his offer, and signed a contract for the purchase of an undivided moiety of an estate, under the erroneous belief that the rental stated in the particulars was that of the moiety, and not of the whole estate, and the wording of the particulars justified a doubt as to its meaning, the Court refused to enforce specific performance (*g*): so, where the defendant assumed that his contract for the purchase of a dwelling-house included an adjoining yard, and the contract was so framed as to leave it doubtful whether it was included or not (*h*). So, where the defendant was misled by the sale plan as to the boundaries of the purchased property (*i*). So, where the defendant made a mistake in calculating the purchase-money which he was willing to take, and offered to sell the estate for 1,250*l.* instead of 2,250*l.* as he had intended (*k*). So, where the written contract which the plaintiff sought to enforce was silent as to any restrictive conditions, extrinsic evidence was admitted to prove a prior

(*e*) *Calverley* v. *Williams*, 1 V. 210; *Higginson* v. *Clowes*, 15 V. 516; *Clowes* v. *Higginson*, 1 V. & B. 524; V.-C. Wigram's judgment in *Manser* v. *Back*, 6 Ha. 447; and see *Alvanley* v. *Kinnaird*, 2 M. & G. 8; *Wood* v. *Scarth*, 2 K. & J. 33. In *Jenkinson* v. *Pepys*, cited 6 V. 330, the evidence appears, in fact, to have been offered on behalf of the plaintiff instead of the defendant: see 15 V. 522, and 6 Ha. 447.

(*f*) *Neap* v. *Abbott*, C. P. Coop. 333; *Manser* v. *Back*, *suprà*. As to alteration of an agreement, *vide ante*, p. 274, and cases cited; see also *Twentyman* v. *Barnes*, 12 Jur. 743, where a plaintiff alleged that the agreement had been altered by chemical agency, and moved that the paper might be subjected to chemical tests; but the Court refused the application.

(*g*) *Swaisland* v. *Dearsley*, 29 B. 430.

(*h*) *Moxey* v. *Bigwood*, 8 Jur. N. S. 803; and see *S. C.*, 10 *ib.* 597.

(*i*) *Denny* v. *Hancock*, 6 Ch. 1; *Brewer* v. *Brown*, 28 Ch. D. 309.

(*k*) *Webster* v. *Cecil*, 30 B. 62; in this case the mistake was clearly proved by a written calculation made before the sale.

restricted parol agreement, and specific performance of the open contract was refused (*l*).

but mere suspicion of fraud is not a sufficient ground for relief;

In one case (*m*), James, L. J., observed that some of the cases had gone too far, but that most of those in which a defendant had escaped on the ground of mistake, not contributed to by the plaintiff, were cases where hardship amounting to injustice would have been inflicted on him by holding him to his bargain, and it would be unreasonable to hold him to it. The principle on which the Court in such cases withholds relief from the plaintiff is, that it is against conscience for a man to take advantage of a reasonable and *bonâ fide* mistake of another; or, at least, that a Court of Equity will not assist him in doing so; but the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, have been held insufficient to negative the right to specific performance—no fraud being shown (*n*): nor will the Court allow a mistake in law (*o*), or as to the legal effect of the language of the contract (*p*), to be set up as a ground for resisting specific performance (*q*). So, where the defendant speculates upon facts, which turn out contrary to his expectation, he cannot rely on his mistaken view; and his own personal mistake as to the use which he might make of the property is unimportant (*r*). And a purchaser must show that he took reasonable care to ascertain what he was buying before he will be allowed to set up the defence of mistake. Thus, where a purchaser, relying on his knowledge of a property, bought it without looking at a plan which

(*l*) *Barnard* v. *Cave*, 26 B. 253.

(*m*) *Tamplin* v. *James*, 15 Ch. D. 215, 221.

(*n*) *Lightfoot* v. *Heron*, 3 Y. & C. 586.

(*o*) "It is said, '*Ignorantia juris haud excusat;*' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application." Per Lord Westbury, in *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170; and see *Earl Beauchamp* v. *Winn*, 6 *ib.*, 234.

(*p*) *Powell* v. *Smith*, 14 Eq. 85.

(*q*) *Marshall* v. *Collett*, 1 Y. & C. 232, 238; *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*r*) *Mildmay* v. *Hungerford*, *suprà*.

Chap. XVIII. Sect. 6.

would have shown him his mistake, he was held to his bargain (*s*).

and mistake, if relied on, must be clearly proved.

Mistake, if relied on, must be clearly proved (*t*), and parol evidence is admissible for the purpose. The acts of the parties subsequent to the contract may, in some cases, be material as evidence of mistake (*u*).

3dly—Misrepresentation, or unfulfilled promise, inducing defendant to enter into agreement knowing its terms and effect.

3rd. Cases where the defendant has obtained the like protection, when he has executed the agreement, knowing its terms and understanding its effect, but relying upon some misrepresentation (*x*) by the plaintiff, or his agent (*y*), or upon some stipulation upon his part, which goes to vary the written agreement, but which he refuses to fulfil: *e.g.*, a parol promise to vary the terms of the written agreement has been admitted as a defence to a bill seeking its specific performance (*z*). So, too, where there was a parol promise that a vendor should have a lease of the property which he had in writing agreed to sell (*a*): and the same decision has been come to in the case of a parol promise by the auctioneer, on behalf of the vendor, to allow compensation for a deficiency in quantity: the right to which was in effect negatived by the particulars (*b*). So, where the vendor refused to perform his agent's engagement, that improvements should be executed on adjoining property (*c*). But if the plaintiff offer to perform the agreement with—if the defendant so desire—

(*s*) *Tamplin* v. *James*, *suprà*; *Goddard* v. *Jeffreys*, 30 W. R. 269; and cf. *Preston* v. *Luck*, 27 Ch. D. 497.

(*t*) *Clay* v. *Rufford*, 14 Jur. 803; and see *Alvanley* v. *Kinnaird*, 2 M. & G. 1; *Earl of Darnley* v. *L. C. & D. R. Co.*, L. R. 2 H. L. 43.

(*u*) *Monro* v. *Taylor*, 8 Ha. 56.

(*x*) *Buxton* v. *Lister*, 3 Atk. 386; 7 V. 219; *Lovell* v. *Hicks*, 2 Y. & C. 46; *ante*, p. 101 *et seq.*, and 150 *et seq.*; *Harris* v. *Kemble*, 5 Bli. N. S. 730, 754.

(*y*) *Mullens* v. *Miller*, 22 Ch. D. 194.

(*z*) *Clarke* v. *Grant*, 14 V. 519; *Micklethwait* v. *Nightingale*, 12 Jur. 638; *Hammersley* v. *De Biel*, 12 C. & F. 45, 88.

(*a*) *Vouillon* v. *States*, 2 Jur. N. S. 845, 847.

(*b*) *Winch* v. *Winchester*, 1 V. & B. 375, 378; and see Lord St. Leonards' remarks, V. & P. 161, 162, upon Sir Thomas Plumer's remarks in *Clowes* v. *Higginson*, 1 V. & B. 526.

(*c*) *Myers* v. *Watson*, 1 Sim. N. S. 523, 529; *Rose* v. *Watson*, 10 H. L. C. 672.

the parol variation or addition, this is sufficient; and the defendant cannot set up the want of a perfect written contract (*d*).

Cases of contemporaneous but separate agreement must be distinguished.

The foregoing cases must be distinguished from those in which the purchaser relies for his defence on the non-performance of a parol representation, made by the vendor contemporaneously with the written contract, and having relation to the same subject-matter, but which in fact forms an independent and separate agreement. Non-performance by the plaintiff is in such cases no defence to an action by him for specific performance of the written contract (*e*). Thus, a parol agreement on the sale of a flooded mine to pump it dry (*f*) is no defence to the vendor's action for specific performance of the written contract. So, where A., in consideration of B.'s building a house, agreed to grant him a lease, and in case of any breach the agreement was to be void, and A. was to have the right to re-enter, and by the same agreement A. agreed that B. should have the option of purchasing the fee at a stipulated price within a specified period, it was held that a breach by B. of provisions as to the insurance of the property was no defence to a suit by B. to enforce his right of pre-emption (*g*). The defendant's right in such cases is to counter-claim for specific performance by the plaintiff of his part of the agreement, and for damages for its non-performance.

Croome v. *Lediard.*

So, where A. agreed to purchase Black Acre of B., and B. by the same instrument agreed to purchase White Acre of A., and no title could be shown to Black Acre, it was held that, in a suit by A. for specific performance of the agreement for the sale of White Acre, B. could not, as a defence, show that the performance of one agreement was intended to be conditional on the performance of the other; and that the

(*d*) *Martin* v. *Pycroft*, 2 D. M. & G. 785.

(*e*) Fry, 411.

(*f*) *Phipps* v. *Child*, 3 Dr. 709.

(*g*) *Green* v. *Low*, 22 B. 625; cf. *Re Adams and Kensington Vestry*, 27 Ch. D. 394.

intention was to effect an exchange, and not independent sales. Lord Brougham, C., in affirming the judgment of Sir J. Leach, observed, that "parol evidence of matter collateral to the agreement might be received; but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract" (*h*). Upon which Lord St. Leonards observes that the evidence was inadmissible, "not because it was not to enforce a collateral stipulation; but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, *viz.*, for an exchange between the parties" (*i*).

Parol addition to written agreement, when inadmissible as defence.

The meaning of the above extract from the judgment in *Croome* v. *Lediard*, is, perhaps, not very obvious. If meant to intimate that the non-fulfilment of a stipulation upon a point collateral to the written agreement, and not inconsistent with such agreement, nor shown to have formed any special inducement to its execution, is a good defence in Equity, the *dictum* seems of questionable authority; it having been held that the defendant cannot set up an additional parol stipulation (*e.g.*, as to the time for delivery of possession), which was agreed upon by the parties at the time of their signing the written contract (*k*).

Remarks upon cases.

The distinction in principle between such cases would seem to be this. In the one case, the object of the defence is not to invalidate or vary the written agreement, except so far as such effect may be incidentally produced by proving a parol agreement relating to the same subject-matter; and this is contrary to the statute. In the other case, the object of the defence is to directly attack the written agreement itself, by showing that it was executed under mistake, or on the faith of a misrepresentation by the other party, or of a promise made by him, and which, from his refusal to fulfil it, must be taken to have been originally fraudulent. And where the

(*h*) *Croome* v. *Lediard*, 2 M. & K. 251, 260; and see *Lloyd* v. *Lloyd*, 2 M. & C. 192.

(*i*) Sug. 163.

(*k*) *Omerod* v. *Hardman*, 5 V. 722, 730; and see Sug. 163 *et seq.*

collateral parol agreement is inconsistent with the written contract, the conclusion would seem to be almost inevitable, that the latter was executed by the party favoured by the parol agreement, either under a mistake as to the contents of the written contract, or under a reliance on the good faith of the other party in performing the parol variation. And the fact of the point being provided for by the written contract, would seem to show, that the parties deemed it important: whereas the contrary may be reasonably presumed of a parol stipulation of a point which is in no way provided for by the written contract (*l*).

Stipulation omitted by consent, no defence.

But where a stipulation is omitted from the written agreement, upon the supposition that it is illegal (*m*); or where a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted (*n*), Equity will hold the omission binding.

4th—Subsequent parol variation, part performed.

4th. Cases where the written agreement is varied by parol subsequently to its execution: in which cases the variation, to be available as a defence, must be accompanied by such a part-performance as would enable the Court to enforce it if it were an original independent agreement (*o*): subject, nevertheless, to the doctrine of Equity which allows parties, by their acts, to vary the original agreement in respect of matters relating to title and the time for completion (*p*).

(*l*) And see and consider *Phipps* v. *Child*, 3 Dr. 709; *Vouillon* v. *States*, 2 Jur. N. S. 845.

(*m*) *Lord Irnham* v. *Child*, 1 Br. C. C. 92; see 6 V. 332; Sug. 173.

(*n*) See *Shelburne* v. *Inchiquin*, 1 Br. C. C. 350; *Jackson* v. *Cator*, 5 V. 688; *Rich* v. *Jackson*, 4 Br. C. C. 514, 518.

(*o*) See *Legal* v. *Miller*, 2 V. sen. 299; *Price* v. *Dyer*, 17 V. 356, 364; *Robinson* v. *Page*, 3 Rus. 114; Sug. 165.

(*p*) Sug. 165; *ante*, p. 489 *et seq.*

Chap. XVIII. Section 7.

As to grounds of defence, &c.

(7.) *As to grounds of defence negativing* in toto *plaintiff's right to specific performance; viz., personal incapacity;—nature of contract, or fraud, &c., &c., attending its execution;—matters relating to the estate,—title—or consideration;—plaintiff's conduct, &c. after contract;—election of other remedy.*

Defences negativing *in toto* plaintiff's right to specific performance.

We may next consider those grounds of defence which, assuming the existence of a *primâ facie* valid agreement, go to negative *in toto* the right to specific performance: and these may, perhaps, be conveniently considered under the several heads of, 1st, matters relating to the personal capacity of the parties to contract; 2nd, matters relating to the nature of the agreement, or to the circumstances under which it was entered into; 3rd, matters relating to the estate contracted for; 4th, matters relating to the title thereto; 5th, matters relating to the consideration; and 6th, matters relating to the conduct of the plaintiff subsequently to the date of the agreement.

1st—Personal incapacity to contract—on part of defendant.

Intoxication.

As to the 1st of the above heads.—Personal incapacity on the part of the defendant to enter into the contract (*q*) is, of course, a sufficient defence to a suit for specific performance; unless, having acquired or recovered his contracting capacity, he has confirmed or adopted the agreement. We may here remark, that although intoxication, if excessive, amounts to a temporary deprivation of reason (*r*), and is a good defence although the party may not have been drawn in to drink by the plaintiff (*s*), yet it has been held that the mere fact of the defendant having partaken freely of liquor at the time of entering into the contract is not, in the absence of fraud, or of evidence that he was without the full understanding and knowledge of what he was doing, a reason for refusing

(*q*) As to which *vide*, Ch. 1.

(*r*) See *Cooke* v. *Clayworth*, 18 V. 12, 16; *Cragg* v. *Holme*, *ib.* 14 n.; *Say* v. *Barwick*, 1 V. & B. 195; *Nagle* v. *Baylor*, 3 D. & War. 60. The incapacity of a drunken man stands on the same footing as that of a lunatic, as to which see *ante*, p. 6, and 1095, n. (*p*).

(*s*) *Malins* v. *Freeman*, 2 Ke. 34.

specific performance (*t*): especially as against a person who, with notice of the prior contract, has procured a conveyance of the property from the vendor (*u*).

Personal incapacity on part of plaintiff, how far defence.

Personal incapacity on the part of the plaintiff at the date of the contract may, or may not, be a good defence. If the contract is void for incapacity on the part of one of the parties,—*e. g.*, coverture at common law,—it is plain that the defence is complete both at Law and in Equity, because there is no contract to enforce. If the contract is voidable merely,—*e. g.*, the contract of an infant at common law—it is enforceable both at Law (*x*) and in Equity (*y*), and in the latter case specifically, if—but, it is conceived, only if—the plaintiff has done some act after the incapacity has ceased, evidencing an affirmance of what was before voidable, *e. g.*, by bringing an action on the contract. In the case of an infant, he appears to have had a special privilege to sue at Law, even during his minority (*z*), which has not been recognized in Equity (*a*): the principle, apparently, being applied that, where there is no legal invalidity in the contract, affecting the specific performance of it by a Court of Equity, the jurisdiction to enforce it is a matter of judicial discretion (*b*). The general rule, in cases of incapacity, rendering the contract voidable merely, appears, therefore, to be that the party not affected by incapacity, although bound and liable at Law, will not have specific performance decreed against him in Equity, unless the incapacity of the plaintiff has ceased before the commencement of the action.

A contract by husband and wife for the sale of the wife's estate, may also, perhaps, be considered an exceptional case; that is, if the purchaser, at the date of the contract, be aware

(*t*) *Lightfoot* v. *Heron*, 3 Y. & C. 586.

(*u*) *Shaw* v. *Thackray*, 1 S. & G. 537.

(*x*) *Warwick* v. *Bruce*, 2 M. & S. 205; Co. Litt. 2 b.

(*y*) *Clayton* v. *Ashdown*, 9 Vin. Abr. 393, 394.

(*z*) *Warwick* v. *Bruce*, *suprà*.

(*a*) *Flight* v. *Bolland*, 4 Rus. 298.

(*b*) *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 62.

Chap. XVIII. Sect. 7.

that the property belongs to the wife, because he must be taken to have bought subject to the risk of the wife repudiating the contract (*c*). A married woman, since the Married Women's Property Act came into operation, may clearly enforce her contract for purchase, at all events if her separate estate is sufficient to discharge her liabilities under it (*d*); and she may of course enforce a contract for the sale of property settled to her separate use, and her husband will not be a necessary or proper party to the action. An agreement for purchase, entered into in the names of husband and wife has been held under the old law to enure for the benefit of the wife surviving, on the ground of its being an advancement (*e*), and there seems to be no reason why this should not be so now.

2nd—Matters relating to contract, &c.: illegality.

As to the 2nd of the above heads.—Where the contract has been entered into for an illegal purpose, whether the same be expressly prohibited or be merely the subject of a statutory penalty, Equity will refuse to enforce it either directly or indirectly (*f*); but if the agreement is not positively illegal, the Court will not refuse specific performance, merely because it "savours of illegality" (*g*); and if a legal agreement be intended in all events to be executed according to its terms, it will not necessarily be avoided by a collateral parol stipulation

(*c*) 2 Y. & C. C. C. 62.

(*d*) *Dowling* v. *Maguire*, L. & G. temp. P. 1, 19.

(*e*) *Drew* v. *Martin*, 2 H. & M. 130; and see *ante*, p. 1057.

(*f*) *Thomson* v. *Thomson*, 7 V. 470; *Sykes* v. *Beadon*, 11 Ch. D. 170, 197; *Knowles* v. *Haughton*, 11 V. 168; *De Begnis* v. *Armistead*, 10 Bing. 107; *Ewing* v. *Osbaldiston*, 2 M. & C. 53, 85; *Gas Light Co.* v. *Turner*, 8 Sc. 609; and see *Tomlinson* v. *Manchester and Birmingham R. Co.*, 2 R. C. 104; *Ritchie* v. *Smith*, 6 C. B. 462; *G. N. R. Co.* v. *E. C. R. Co.*, 9 Ha. 306, 312; *L. B. & S. C. R. Co.* v. *L. & S. W. R. Co.*, 4 D. & J. 389; *Shrewsbury R. Co.* v. *L. & N. W. R. Co.*, 4 D. M. & G. 115; 6 H. L. C. 112; but the defence is not favoured in Equity: *S. C.* 16 B. 451; and it is allowed effect only for the public benefit, and not for the benefit of the defendant; *Holman* v. *Johnson*, 1 Cowp. 343; and see *Williams* v. *Bayley*, L. R. 1 H. L. 200, where an equitable mortgage, given by A. as an inducement to forbear taking criminal proceedings against his son, was ordered to be delivered up to be cancelled; cf. *Re Great Berlin Steamboat Co.*, 26 Ch. D. 616. See on the subject of illegality generally, Fry, 209 *et seq.*

(*g*) *Aubin* v. *Holt*, 2 K. & J. 66, 70.

for something not *malum in se* but merely prohibited (*h*); so, too, a distinction is drawn between enforcing, either directly or indirectly, *i.e.* by means of damages and compensation, an illegal contract, and asserting a title to money which has arisen from it. For example, where A. and B. fraudulently registered a ship in the United States, and their subsequent employment of her, so registered, was a fraud upon the English Navigation Laws, it was held that A. might nevertheless maintain a suit against B. for an account and payment of his share of the *realized* profits of the speculation (*i*). So, where A. employed B. for a commission to make bets for him, and B. having done so received the winnings, A. was held entitled, notwithstanding that all contracts by way of wagering are void by statute, to recover from B. the moneys received by him (*k*). And the case is the same where moneys have been paid under the contract to a third person for the use of one of the parties to the contract (*l*). It would seem that an agent for purchase cannot, as against his principal, set up the illegality of the contract (*m*).

Interference with the rights of a third party.

So, also, if the contract be in contravention of the rights of a third party (*n*), Equity will refuse to interfere; as

(*h*) *Carolan* v. *Brabazon*, 3 J. & L. 200.

(*i*) *Sharp* v. *Taylor*, 2 Ph. 801; see *Butt* v. *Monteaux*, 1 K. & J. 98, 115; *Sheppard* v. *Oxenford*, *ib.* 491.

(*k*) *Bridger* v. *Savage*, 15 Q. B. D. 363; and see cases there cited.

(*l*) *Tenant* v. *Elliott*, 1 B. & P. 3; *Farmer* v. *Russell*, *ib.* 296.

(*m*) *Mullock* v. *Jenkins*, 14 B. 628. As to champerty, *vide ante*, p. 277 *et seq.* As to an agreement to give a qualification to sit in Parliament, see *Callaghan* v. *Callaghan*, 8 C. & F. 374; *Harris* v. *Amery*, L. R. 1 C. P. 148; and see *May* v. *May*, 33 B. 81; where a conveyance by a father to his son in order to qualify him as a voter was upheld. As to the Mortmain Act, see *A.-G.* v. *Wilson*, 2 Ke. 680. As to the Ship Registry Acts, see *Hughes* v. *Morris*, 2 D. M. & G. 349; *M'Calmont* v. *Rankin*, *ib.* 403; *Armstrong* v. *Armstrong*, 3 Eq. R. 973; *Duncan* v. *Tindall*, 13 C. B. 258; *Parr* v. *Applebee*, 7 D. M. & G. 585; *European Mail Co.* v. *Royal Mail Co.*, 4 K. & J. 676. As to illegal associations under the Companies Acts, see *Re Arthur Average Assoc.*, 10 Ch. 542: *Sykes* v. *Beadon*, 11 Ch. D. 170, overruled by *Smith* v. *Anderson*, 15 Ch. D. 247; *Re Padstow Assoc.*, 20 Ch. D. 137; *Jennings* v. *Hammond*, 9 Q. B. D. 225; *Shaw* v. *Benson*, 11 Q. B. D. 563; *Re Siddall*, 29 Ch. D. 1. As to trades unions, see *Rigby* v. *Connol*, 14 Ch. D. 482; *Duke* v. *Littleboy*, 28 W. R. 977; *Strick* v. *Swansea Tin Plate Co.*, 35 W. R. 831.

(*n*) See *Harnett* v. *Yielding*, 2 Sch.

Chap. XVIII. Sect. 7.

where it derogates from a previous voluntary settlement by the plaintiff vendor (*o*); but specific performance will be enforced, at the suit of the purchaser, against the voluntary settlor (*p*).

Inability of the Court to execute the contract.

So, also, if the contract be one which the Court cannot execute in all its material terms (*q*): so, where there are mutual rights incapable of being enforced by an immediate decree (*r*): so, where the consideration for the contract is the execution of works which the Court cannot superintend (*s*): so, where it involves a contract for personal services of an uncertain duration (*t*); as *e.g.*, where it was one of the terms of an agreement for the lease of a coal-wharf, that the lessor should act as the lessees' agent in carrying on the business (*u*); so, an agreement either to borrow or to lend a sum of money upon mortgage cannot be specifically enforced (*x*). But where money has been advanced upon the faith of an agreement to execute a mortgage, even with an immediate power of sale, the Court will decree specific performance of the agreement by ordering the execution of the mortgage (*y*).

Impolicy.

So, where the enforcement of the contract would be against

& L. 549, 554; *Gas Light Co.* v. *Towse*, 35 Ch. D. 519; and see and consider *Peacock* v. *Penson*, 11 B. 355; *Willmott* v. *Barber*, 15 Ch. D. 96.

(*o*) *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; *Campbell* v. *Ingilby*, 1 D. & J. 393.

(*p*) *Buckle* v. *Mitchell*, 18 V. 101; *Daking* v. *Whimper*, 26 B. 568; and *vide ante*, p. 1119.

(*q*) *Gervais* v. *Edwards*, 2 D. & War. 80; *Counter* v. *Macpherson*, 5 Mo. P. C. 83; *Downs* v. *Collins*, 6 Ha. 437; *Ford* v. *Stuart*, 15 B. 493; *Williamson* v. *Wootton*, 3 Dr. 210; *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 S. & G. 119; *Waring* v. *Manchester R. Co.*, 7 Ha. 492; *Hope* v. *Hope*, 22 B. 351; *S. Wales R. Co.* v. *Wythes*, 5 D. M. & G. 880; *Vansittart* v. *Vansittart*, 4 K. & J. 62.

(*r*) *Blackett* v. *Bates*, 1 Ch. 117; *Gervais* v. *Edwards*, 2 D. & War. 80; *Hills* v. *Croll*, 2 Ph. 60; *Firth* v. *Ridley*, 33 B. 516.

(*s*) See *Peto* v. *Brighton & Uckfield R. Co.*, 1 H. & M. 468; and as to builders' contracts, *vide ante*, p. 1108.

(*t*) *Firth* v. *Ridley*, 33 B. 516; *Sykes* v. *Dixon*, 9 A. & E. 693.

(*u*) *Ogden* v. *Fossick*, 32 L. J. Ch. 73; and see *White* v. *Boby*, 26 W. R. 133.

(*x*) *Rogers* v. *Challis*, 27 B. 175; *Sichel* v. *Mosenthal*, 30 B. 371; *Larios* v. *Bonany y Gurety*, L. R. 5 P. C. 346.

(*y*) *Hermann* v. *Hodges*, 16 Eq. 18; Seton, 1125.

public policy; as where it originated in the improper disclosure of evidence taken in a Chancery suit, the Court will not interfere (*z*); so, if its completion would amount to a breach of trust (*a*); even by reason of any stipulation collateral to the mere agreement for sale; as where it was agreed that the purchaser should out of the purchase-money retain a debt due to him from the selling trustee (*b*): so, where trustees concurred with other fiduciary vendors in a sale of three several properties for an entire sum, which they agreed to apportion among themselves, specific performance against the purchaser was refused (*c*).

Breach of trust.

An agreement between husband and wife, providing for their future separation, is contrary to public policy, and cannot be enforced (*d*); but if entered into after the separation has taken place, or on the eve and in contemplation of an intended separation, it may be upheld. Where the agreement is between the husband and a trustee for the wife, and is supported by a good consideration, as *e.g.*, an indemnity by the trustee against the wife's debts, it can be specifically enforced (*e*); and the agreement of either party not to sue for a restitution of conjugal rights, will be enforced

Agreements for separation of husband and wife.

(*z*) *Cooth* v. *Jackson*, 6 V. 12, 30.

(*a*) *Mortlock* v. *Buller*, 10 V. 292, 313; *Ord* v. *Noel*, 5 Mad. 438; *Bridger* v. *Rice*, 1 J. & W. 74; *Turner* v. *Harvey*, Jac. 178; *Wood* v. *Richardson*, 4 B. 174; *Baylies* v. *Baylies*, 1 Col. 546; *Bellringer* v. *Blagrave*, 1 De G. & S. 66; *White* v. *Cuddon*, 8 C. & F. 766; *Sneesby* v. *Thorne*, 7 D. M. & G. 399; *Maw* v. *Topham*, 19 B. 576; *Naylor* v. *Goodall*, 47 L. J. Ch. 53; *Shrewsbury R. Co.* v. *L. & N. W. R. Co.*, 4 D. M. & G. 115; *Dance* v. *Goldingham*, 8 Ch. 902, where trustees were selling under depreciatory conditions; *Dunn* v. *Flood*, 28 Ch. D. 586. We have seen that an agreement giving A. a right of pre-emption over B.'s estate in consideration of A. not opposing B. on a sale by auction of other property, is not illegal: *Galton* v. *Emuss*, 1 Col. 243.

(*b*) *Thompson* v. *Blackstone*, 6 B. 470.

(*c*) *Rede* v. *Oakes*, 4 D. J. & S. 505; but as to the law at the present day, see *ante*, p. 76. See as to several mortgagees of the same estate concurring in a sale, *McCarogher* v. *Whieldon*, 34 B. 107; *Re Parker and Beech*, 55 L. J. Ch. 815, aff. 56 *ib.* 358.

(*d*) *Westmeath* v. *Westmeath*, 1 Dow. & C. 519; *H.* v. *W.*, 3 K. & J. 382.

(*e*) *Wilson* v. *Wilson*, 1 H. L. C. 538; *Hunt* v. *Hunt*, 4 D. F. & J. 221; and see *Walrond* v. *Walrond*, Joh. 18; *Williams* v. *Baily*, 2 Eq. 731.

by injunction. An agreement for a separation deed, made by way of a compromise of proceedings, will be specifically enforced; and the Court will decide what are "usual covenants," and will settle the deed in Chambers in case of difference between the parties (*f*).

In one case an agreement entered into between A. and B. his father-in-law upon the occasion of a separation between A. and his wife, whereby A. undertook to execute a formal deed of separation and to secure an annuity for the maintenance of his wife and child, was decreed to be specifically enforced, notwithstanding the absence of any indemnity to the husband against his legal liabilities; upon the ground that the agreement had been acted on by B., who had, at his own expense, maintained his daughter and her child upon the faith of it (*g*).

Improvident contract by agent.

It has been held that, if an agreement be entered into by an agent, the omission of all usual and proper stipulations in favour of his principal (*h*) may be a reason for refusing specific performance: although, as a general rule, the Court will not decline to enforce a contract on the mere ground of its improvidence (*i*). But it is conceived that the decision in question may be explained on the ground of mistake, and that a contract entered into through an agent stands on no different footing from a contract made directly by the principal.

Agreement for a partnership.

So, although the Court will not, as a general rule, decree specific performance of an agreement to enter into a partnership which may at once be dissolved (*k*), or to contribute a

(*f*) *Hart* v. *Hart*, 18 Ch. D. 670; see generally on such agreements, Fry, 648 *et seq.*, and *Cahill* v. *Cahill*, 8 Ap. Ca. 420.

(*g*) *Gibbs* v. *Harding*, 5 Ch. 336.

(*h*) *Helsham* v. *Langley*, 1 Y. & C. C. C. 175. As to the authority of an agent to enter into a contract for sale, see *Hamer* v. *Sharp*, 19 Eq. 108; *Saunders* v. *Dence*, 52 L. T. 644; *Prior* v. *Moore*, 3 Times L. R. 624.

(*i*) *Sullivan* v. *Jacob*, 1 Moll. 472, 477.

(*k*) *Hercy* v. *Birch*, 9 V. 357; *Sheffield Gas Co.* v. *Harrison*, 17 B. 294; 2 Lindley, 914. A contract to

share of partnership capital (*l*); it has been held that where the parties had agreed to execute a formal instrument, which, if executed, would alter their position at law, and enable them to assert a legal right, the execution of the formal instrument might be decreed, notwithstanding that the partnership thus created might be at once dissolved (*m*). As legal and equitable remedies are now administered concurrently, it seems no longer necessary to direct the execution of a partnership deed, in order to give the plaintiff legal rights (*n*).

Contracts containing positive and negative terms.

A contract not infrequently contains on the one side a negative, on the other a positive, stipulation. The jurisdiction of the Court of Chancery to restrain a breach of the negative covenant was formerly regarded as being, except in partnership agreements, confined to those cases where it could also specifically enforce the positive side of the contract (*o*). But this limitation of the jurisdiction was finally broken down by the decision of Lord St. Leonards in *Lumley* v. *Wagner* (*p*). The principle acted upon in that case was, apparently, intended to apply only to cases in which there is an express negative covenant (*q*); it has, however, been extended to many cases in which a negative stipulation could only be implied from that which was in terms positive (*r*). But while, on the one hand, to limit the jurisdiction by way of injunction to cases where there is an express negative

take shares in a joint stock company differs from a contract to enter into a partnership at will in this respect, *viz.*, that the person contracting to take shares cannot retire at will without getting rid of his shares to a transferee; *New Brunswick Co.* v. *Muggeridge*, 4 Dr. 686.

(*l*) *Sichel* v. *Mosenthal*, 30 B. 371; *Scott* v. *Rayment*, 7 Eq. 112.

(*m*) *Buxton* v. *Lister*, 3 Atk. 385; and see *Stocker* v. *Wedderburn*, 3 K. & J. 403.

(*n*) Fry, 642. As to the power of the Court to compel a partner to insert in the Gazette a notice of dissolution, see *Hendry* v. *Turner*, 32 Ch. D. 355.

(*o*) *Kemble* v. *Kean*, 6 Si. 333; *Kimberley* v. *Jennings*, *ib.* 340; *Baldwin* v. *Soc. for Diffusing Knowledge*, 9 Si. 393; *Hills* v. *Croll*, 2 Ph. 60.

(*p*) 1 D. M. & G. 604.

(*q*) *Ib.* 622.

(*r*) *Catt* v. *Tourle*, 4 Ch. 654; *Webster* v. *Dillon*, 5 W. R. 867; *Fechter* v. *Montgomery*, 33 B. 22; *Montague* v. *Flockton*, 16 Eq. 189; *De Mattos* v. *Gibson*, 4 D. & J. 276; *Sevin* v. *Deslandes*, 9 W. R. 218.

stipulation is not a rational distinction, because many contracts, positive in terms, are in substance also negative: yet, on the other hand, as almost every contract may be so analysed as to imply a negative, it is difficult to place any limits on the remedy by injunction in the case of positive contracts, if, where specific performance is impossible, the Court will indirectly grant it by means of an injunction wherever a negative stipulation can be implied (*s*).

The principle of jurisdiction proposed by Lord Selborne.

The whole subject is in the present condition of the authorities in a most unsatisfactory state of confusion; and the most rational principle upon which the jurisdiction of the Court should be exercised seems to be that which was expressed by Lord Selborne and which has been approved by Fry, L. J., both in his treatise on Specific Performance (*t*), and also in a recent decision (*u*); especially when, under a system of concurrent administration of both legal and equitable remedies, the old inconvenience of remitting a plaintiff to his legal remedy in damages now no longer exists. Lord Selborne, in criticising *Lumley* v. *Wagner*, thus expressed his view of what the practice should be (*x*):—"It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case for specific performance; the technical distinction being made that, if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on the implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing

(*s*) Fry, 373; *Heatheote* v. *N. Staff. R. Co.*, 2 M. & G. 100, 112; *Fothergill* v. *Rowland*, 17 Eq. 132.

(*t*) p. 374 *et seq.*

(*u*) *Donnell* v. *Bennett*, 22 Ch. D. 835.

(*x*) *Wolverhampton R. Co.* v. *L. & N. W. R. Co.*, 16 Eq. 433, 440.

sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative." There is, however, a serious difficulty in the way of this theory in the fact that the House of Lords has more recently laid it down (*y*) that, where there is an express negative covenant, the Court has no discretion to refuse to enforce its observance by injunction, and has thereby apparently emphasised the artificial distinction between a negative covenant expressed and one which is only implied.

Contracts of this class between brewers and publicans.

Contracts of the class in question often occur in dealings between brewers and publicans. Thus, in one case, where A., a brewer, sold a freehold plot to trustees of a building society, who covenanted that A., his heirs and assigns, should have the exclusive right of supplying beer to any public-house to be erected on the land, but there was no covenant on the part of A. to supply the beer, and B, having notice of the covenant, erected a public-house on part of the land purchased from the trustees, which he supplied with his own beer, it was held that the covenant was not void, either for uncertainty, or want of mutuality, or as being in unreasonable restraint of trade, or as creating a perpetuity; and that, although positive in terms, it was in substance a negative covenant, the breach of which might be restrained in Equity (*z*). In another case (*a*), A., a publican, on taking a lease of a public-house from B., a brewer, covenanted, for himself and his assigns, to buy from B. all the beer to be consumed not only at that public-house, but also at another

(*y*) *Doherty* v. *Allman*, 3 Ap. Ca. 709, 719.

(*z*) *Catt* v. *Tourle*, 4 Ch. 654. On the question of whether such covenants are void as being in restraint of trade, see *Tailors of Aberdeen* v. *Coutts*, 1 Rob. Ap. Ca. 296, 324; *Earl of Zetland* v. *Hislop*, 7 Ap. Ca. 427.

(*a*) *Luker* v. *Dennis*, 7 Ch. D. 227.

which he held under a lease from a different landlord; and B. covenanted to supply both houses with beer of a specified quality and at a specified price. In an action by B. to restrain A. from buying beer elsewhere, A. pleaded that B. had not fulfilled his part of the contract; and it was held that, in order to entitle him to the injunction, B. must show that he had observed his covenant. In the same case an assignee of the second house,—who, having bought with notice of the covenant relating to it, was held to be bound by it,—had borrowed money from B. upon a mortgage which contained a covenant by him to buy all beer consumed at the public-house from B.; and it was held that this covenant was subject to an implied covenant by B. to supply good marketable beer. And in a later case (*b*), the same implication was made on a positive covenant by the tenant; and it was said that, if the implied obligation on the part of the landlord was not fulfilled, the tenant was at liberty to buy his beer elsewhere.

Hardship.

Equity has refused to enforce contracts on the mere ground of their hardship as against the defendants: as where one-half the purchase-money would, under a clause of forfeiture contained in the will of a prior owner, have gone to a third party (*c*); or, as where the contract provided that a road should be made by the vendor over property retained by him, and it appeared that the making of the road would risk the forfeiture of the lease of part of the estate (*d*). And the case is the same, where specific performance would involve the breach of a prior agreement made by the defendant with a third party. Thus, where A., who held under a lease from B., with a covenant not to assign or underlet without B.'s consent, agreed to underlet part of the property to C., with the option of purchasing the whole within five years, and B. refused his consent: it was held that C. was not entitled to a

(*b*) *Edwick* v. *Hawkes*, 18 Ch. D. 199.

(*c*) *Faine* v. *Brown*, cited 2 V. sen. 307.

(*d*) *Peacock* v. *Penson*, 11 B. 355; cf. *Helling* v. *Lumley*, 3 D. & J. 493.

decree for specific performance against A., as that would involve a breach of the latter's covenant with B. (*e*). But before the validity of such a defence is admitted, the Court requires to be satisfied that forfeiture will be the necessary result of enforcing the contract, and also takes into consideration who is responsible for the forfeiture (*f*) : for example, it will not permit a defendant to put himself in such a position as that his performance of the agreement shall create a forfeiture, and then to turn round and say that the plaintiff shall not have specific performance of the agreement, because the defendant has, by his own act, enabled the landlord to enter, upon the agreement being performed (*g*). So, it has been held, that a mortgagor, contracting to grant a lease should not be compelled to pay off the mortgage in order to enable him to complete the contract (*h*). So, where a mortgagee, after foreclosure, contracted to sell at a profit, and inadvertently contracted in the character of a mortgagee with a power of sale, the Court refused to compel him to exercise the power, and so run the risk of being held accountable for the purchase-money as mortgagee instead of absolute owner (*i*) ; and where there was a *mutual* understanding, but no definite agreement between the mortgagee and intending lessee that the agreement for a lease should be approved by the mortgagor, and he declined to concur, the Court refused to enforce the agreement against the mortgagee, or to hold him liable in damages (*k*). So, it is conceived, specific performance would be refused against a mortgagee with no power of sale, who enters into the contract in the mistaken belief that his mortgagor will concur. And where an estate, subject to a rent-charge of 63*l*., was contracted to be sold for 868*l*., "free from incumbrances," the Court refused to insist on the vendor paying into Court

(*e*) *Willmott* v. *Barber*, 15 Ch. D. 96.

(*f*) *Helling* v. *Lumley*, 3 D. & J. 493, 498.

(*g*) *Per* Turner, L. J., in *Helling* v. *Lumley*, *supra*, 499.

(*h*) *Costigan* v. *Hastler*, 2 Sch. & L. 160. But damages might in such a case be awarded under Lord Cairns' Act, see *Howe* v. *Hunt*, 31 B. 420.

(*i*) *Watson* v. *Marston*, 4 D. M. & G. 230.

(*k*) *Franklinski* v. *Ball*, 33 B. 560.

Chap. XVIII. Sect. 7.

the value of the charge under sect. 5 of the Conveyancing Act, 1881, and allowed him to rescind (*l*).

So, where a tenant for life, who, upon the settlement by him of lands of equal value, would have been absolutely entitled to the settled estates, contracted to sell them, the Court would not order him to procure and settle other lands, and so acquire a title (*m*); so, where the vendor entered into the contract in the belief that he was the absolute owner, and it subsequently turned out that he had only a power of sale and exchange, and was bound to reinvest the purchase-money, specific performance was refused (*n*).

Breach of trust, where a defence on ground of hardship.

So, where the completion of the contract would involve a breach of trust, the Court will, partly, as we have seen (*o*), on the ground of the impolicy, or quasi-illegality of the transaction, and partly on the ground of hardship, decline to interfere. Thus, where a sale by trustees under a power was so disadvantageous as to be a breach of trust, the Court refused to enforce the contract (*p*); so, where the trustees of an estate joined, expressly in that capacity, with the beneficial owners in a contract for sale, and all agreed to exonerate the estate from any incumbrances which might affect it, the Court refused to enforce this agreement against the trustees, when it seemed probable that the incumbrances might, and perhaps materially, exceed the amount of purchase-money (*q*); and the validity of this defence is not confined to cases where an express trust would be violated if the contract were enforced, but applies to every case where its enforcement would involve a breach of confidence (*r*).

(*l*) *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788.

(*m*) *Howell* v. *George*, 1 Mad. 1; and see *Southwell* v. *Nicholas*, cited *ib.* 9, n.

(*n*) *Hood* v. *Oglander*, 34 Beav. 513, 519; *sed quære.*

(*o*) *Vide ante*, p. 1165.

(*p*) *Mortlock* v. *Buller*, 10 V. 292, 313; and see other cases cited in note (*a*), *ante*, p. 1165.

(*q*) *Wedgwood* v. *Adams*, 6 B. 600; 8 B. 103; and see as to hardship, *Talbot* v. *Ford*, 13 Si. 173; *Hemingway* v. *Fernandes*, *ib.* 243; *Kimberley* v. *Jennings*, 6 Si. 340; and *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 129.

(*r*) See *Mortlock* v. *Buller*, 10 V. 292, 313; *Shrewsbury and Birmingham*

Failure of one of two inter-dependent contracts.

So, where the contract was intended by both parties to be the means of forwarding a *common* object which had utterly failed before the bill was filed, the Court refused to interfere (*s*). So, in case of mutual, though distinct, agreements, the subject-matter of the one *may* be so connected with that of the other, that the Court will enforce both or neither (*t*). Where, however, the contracts, though contained in the same instrument, are really independent, the breach of one is no defence to an action for specific performance of the other (*u*).

Hardship when not available as a defence.

But where a solicitor contracted in his own name for the purchase of an estate, the fact of his having purchased for an undisclosed client, was held to be an insufficient defence on the ground of hardship (*x*) ; so, also, where a person contracted for the lease of a mine, his ignorance of mining matters, and the fact of the mine having proved worthless, were held an insufficient defence (*y*).

Hardship on members of a corporation.

And in cases against public companies, the Court will not consider the hardship inflicted upon individual members, if the contract be enforced, but will look to the rights and liabilities of the corporation itself (*z*).

We may here remark that the fact of the time within which a railway company is empowered to take land having expired is no defence to a suit to enforce against them their previous contract for purchase (*a*).

Hardship when ascertained.

Hardship, in order to constitute a sufficient defence, must, as a general rule, be proved to have existed at the date of the

R. Co. v. *L. & N. W. R. Co.*, 4 D. M. & G. 115 ; 6 H. L. C. 113 ; and see Fry, 179.

(*s*) *Padwick* v. *Hanslip*, 14 L. T. O. S. 543. *Sed aliter*, if there was no such community of purpose: see *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 129.

(*t*) *Croome* v. *Lediard*, 2 M. & K. 260; and see *Merchants' Trading Co.* v. *Banner*, 12 Eq. 18 ; and *vide ante*, p. 1157.

(*u*) *Green* v. *Low*, 22 B. 625.

(*x*) *Saxon* v. *Blake*, 29 B. 438.

(*y*) *Hayward* v. *Cope*, 25 B. 140.

(*z*) *Per* Lord Cottenham in *Edwards* v. *Grand Junction R. Co*, 1 M. & C. 650, 674.

(*a*) *Eastern Counties R. Co.* v. *Hawkes*, 5 H. L. C. 331 ; and see 13 & 14 V. c. 83, s. 20.

Chap. XVIII. Sect. 7.

contract (*b*); unless, perhaps, it has been occasioned by the subsequent acts of the party seeking specific performance.

Fraud, mistake, surprise, misrepresentation, or concealment.

So, Equity will refuse to enforce a contract which was procured by fraud (*c*), or duress, or was entered into under a common mistake (*d*), or, in many cases, a mistake only by the defendant (*e*); or under the influence of surprise (*f*); or was founded on a fraudulent or material misrepresentation or concealment (*g*) of facts by the plaintiff (*h*).

Mistake.

Thus, where a vendor made a *bonâ fide* mistake as to the authority which he had given to the auctioneer, and the property was knocked down at a less sum than he had intended to accept, specific performance was refused (*i*): but a mere inadvertent omission to insert an intended term in the contract (*k*), or a mistake as to the legal consequences of an act (*l*), or as to the legal effect of the agreement (*m*), or as to

(*b*) *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 129.

(*c*) Fry, 300 *et seq.* As to evidence of fraud, see *Griggs* v. *Staplee*, 2 De G. & S. 572.

(*d*) *Calverley* v. *Williams*, 1 V. 211; *Stapylton* v. *Scott*, 13 V. 425, 427; *Clowes* v. *Higginson*, 3 V. & B. 524; *Lord Gordon* v. *Lord Hertford*, 2 Mad. 106; *Colyer* v. *Clay*, 7 B. 188; *Monro* v. *Taylor*, 8 Ha. 56; *Higgins* v. *Samels*, 2 J. & H. 460; *Cochrane* v. *Willis*, 1 Ch. 58. See generally on the subject, Fry, 324 *et seq.*

(*e*) See *Malins* v. *Freeman*, 2 Ke. 25; *Harnett* v. *Yielding*, 2 Sch. & L. 549, 554; *Howel* v. *George*, 1 Mad. 1, 11; *Baxendale* v. *Seale*, 19 B. 601; *Attenborough* v. *Edwards*, 3 Eq. R. 124; *Swaisland* v. *Dearsley*, 29 B. 430; *Hood* v. *Oglander*, 34 B. 513.

(*f*) See *Evans* v. *Llewellyn*, 2 Br. C. C. 150; *Twining* v. *Morrice*, *ib.* 326; *Lord Townshend* v. *Stangroom*, 6 V. 328, 338; *Mortlock* v. *Buller*, 10 V. 305; *Willan* v. *Willan*, 16 V. 72; aff. 2 Dow. 274; and see Story's Eq. Jur. note to sect. 120.

(*g*) As to what is, see *Irvine* v. *Kirkpatrick*, 7 Bell, Ap. C. 186, 232 *et seq.*; *Reynell* v. *Sprye*, 1 D. M. & G. 660; *Blake* v. *Mowatt*, 21 B. 603; *Mullens* v. *Miller*, 22 Ch. D. 194; but see *Hayward* v. *Cope*, 25 B. 140; concealment by vendor of a mine.

(*h*) See the subject discussed *ante*, Ch. III. and Ch. IV. p. 153 *et seq.*; and *Lord Clermont* v. *Tasburgh*, 1 J. & W. 112; *Cadman* v. *Horner*, 18 V. 10; *Lovell* v. *Hicks*, 2 Y. & C. 46; *Cox* v. *Middleton*, 2 Dr. 208; *Barker* v. *Harrison*, 2 Coll. 546; *Harris* v. *Kemble*, 5 Bli. N. S. 730; and *Denny* v. *Hancock*, 6 Ch. 1; and *Brewer* v. *Brown*, 28 Ch. D. 309, cases of a misleading sale plan; Sug. 211.

(*i*) *Day* v. *Wells*, 30 B. 220.

(*k*) *Parker* v. *Taswell*, 2 D. & J. 559; but see *Broughton* v. *Hutt*, 3 D. & J. 501.

(*l*) *G. W. R. Co.* v. *Cripps*, 5 Ha. 91.

(*m*) *Powell* v. *Smith*, 14 Eq. 85.

the purposes for which the property may be used (*n*) is an insufficient ground of defence.

Fraud.

Where a mortgage was intended, but an absolute conveyance was in fact taken, the setting up of the latter by the mortgagee was held to be a fraud, and parol evidence was admitted to prove the terms of the contract (*o*); and where a contract for the purchase of a partial interest in an estate has been procured by fraud, a subsequent contract for the purchase of the residue, if fairly referable to the prior contract, will share its fate (*p*).

Duress.

In one case, a security obtained from a father for his son's debt, under a tacit or implied threat that the son would be prosecuted for felony unless matters were satisfactorily arranged, was held to be invalid; not merely as being a misprision of felony, but also on the ground that the father was so circumstanced as not to be a free and voluntary agent (*q*): but the mere fact of the defendant being in prison at the time of signing the contract, is not of itself a sufficient defence (*r*).

Remarks on misrepresentation.

And where one party induces the other to contract on the faith of material representations made to him, any one of which has been untrue, the whole contract may in a Court of Equity be set aside; for none can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed. The subject of misrepresentation has been so fully dealt with in earlier parts of this work, in its relation both to executory (*s*), and to executed (*t*) contracts, that it is unnecessary to enter further into it in this place.

(*n*) *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*o*) *Lincoln* v. *Wright*, 4 D. & J. 16.

(*p*) *Reynell* v. *Sprye*, 1 D. M. & G. 660; *Yonge* v. *Reynell*, 9 Ha. 809.

(*q*) *Williams* v. *Bayley*, L. R. 1 H. L. 200; and see pp. 210, 211, 218, 219.

(*r*) *Brinkley* v. *Hann*, Dru. 175; see *Cumming* v. *Ince*, 12 Jur. 331; *Petre* v. *Espinasse*, 2 M. & K. 426; *Selby* v. *Jackson*, 6 B. 192.

(*s*) *Ante*, Ch. III.; Ch. IV., p. 150 *et seq.*

(*t*) *Ante*, p. 898 *et seq.*

Agreement fair, as between parties, not avoided by fraud of third person.

An agreement, fair as between the parties, is not invalid merely because it may have been concocted and brought about by a third person with a fraudulent intention of benefiting himself (*u*).

Want of mutuality may be either legal or equitable. Want of mutuality at law occurs where in a bilateral contract a promise which is the consideration for another promise,—*e.g.*, to pay the purchase-money in consideration of a promise to convey the estate,—is not enforceable. Want of mutuality in equity is a ground of defence not infrequently relied on; and respecting which the rules of the Court are apparently somewhat undefined. The principle would seem to be an illustration of the judicial discretion to which the remedies of a Court of Equity are subject: *viz.*, that a defendant ought not to be harassed with litigation founded on an agreement which he himself could not enforce if the plaintiff were to think fit to stop proceedings. Apparently, by reason of want of mutuality at law, it was once doubted whether a plaintiff could enforce a written agreement which he himself had not signed: but it was ultimately decided (*x*) that he could, inasmuch as filing the bill bound him to the contract, and from that time there was mutuality (*y*). So, as we have seen, the personal incapacity of the plaintiff to enter into the contract, is generally, if subsisting at the time of the bill being filed, a good defence (*z*). But the fact of one party to a contract having so acted as to preclude his right (*a*), or even having by accident lost his right (*b*) to enforce it in Equity, will not affect the remedies of the other party: and it not unfrequently happens, in other cases, that plaintiffs obtain decrees for specific performance of agreements, the specific performance

Want of mutuality of remedy—whether a defence,

(*u*) *Bellamy* v. *Sabine*, 2 Ph. 425.

(*x*) See 2 Coll. 161.

(*y*) *Martin* v. *Mitchell*, 2 J. & W. see p. 427; *Coleman* v. *Upcot*, 5 Vin. Abr. 528; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Butler* v. *Powis*, 2 Coll. 161; see *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57; but see also *Gaskarth* v. *Lord Lowther*, 12 V. 107.

(*z*) *Vide ante*, p. 1161; and see 1 D. M. & G. 525.

(*a*) *S. E. R. Co.* v. *Knott*, 10 Ha. 122; *E. C. R. Co.* v. *Hawkes*, 1 D. M. & G. 758; 5 H. L. C. 331.

(*b*) 1 D. M. & G. 758.

of which could not have been enforced against them as defendants (*c*).

when founded on alleged want of title in plaintiff vendor.

The defence of non-mutuality in Equity has generally been grounded upon the alleged entire, or partial, want of title in a plaintiff vendor. Thus, it has been held, that A. cannot enforce, against C., an agreement for the sale to him of B.'s estate; even although B. be willing to confirm the contract (*d*): and it has been considered doubtful by Lord St. Leonards (*e*) "whether there is *any* case in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report" (*f*).

Theory of the foundation of the doctrine.

The reason of this rule would seem to be that the Court has a judicial discretion (*i.e.*, a discretion to be exercised on certain settled principles) to refuse specific performance, where it is apparent that the plaintiff is not in a position to fulfil his part of the contract, notwithstanding that no legal breach by him could be alleged in an action at law, the time for completion not having arrived. But in order to exclude the ordinary right to judgment with a reference, upon which the vendor might be able to make a good title, the defendant purchaser must be able to prove that, on discovering the plaintiff's want of title, he at once gave notice of his intention to treat the contract as not binding. To found the rule in this way on the discretionary character of the jurisdiction with regard to specific performance is, it is conceived, more accurate than to treat it as being based upon a purchaser's right to rescind for misrepresentation,—the supposed misrepresentation lying in the fact of the vendor having purported to sell that which he did not possess. To rest the rule

(*c*) See *Martin* v. *Pycroft*, 2 D. M. & G. 785, 795.

(*d*) *Noel* v. *Hoy*, cited Sug. 217; and see *Tendring* v. *London*, 2 Eq. Ca. Ab. 680; *Armiger* v. *Clarke*, Bunb. 111; *Hamilton* v. *Grant*, 3 Dow, 33, 42.

(*e*) Sug. 12th edit., 241, n. (*p*).

(*f*) See on this point, *Bryan* v. *Lewis*, Ry. & Mo. 386 (a case at Law on a sale of goods); *Lechmere* v. *Brasier*, 2 J. & W. 289; *Dalby* v. *Pullen*, 3 Si. 29; 1 R. & M. 296; and the cases cited *infrà*, n. (*l*).

Chap. XVIII. Sect. 7.

on this latter ground is in effect to assert that the alleged misrepresentation would be an answer to an action at law by the vendor against the purchaser for damages for breach of his contract to buy. This, however, would clearly not be the case, if in such an action the vendor could show that at the date fixed for completion he in fact had a good title, since the representation as to his title, if any was implied, must be referred to that date.

The jurisdiction is discretionary with the Court.

The doctrine appears, in fact, to be an illustration of the general rule that where no legal invalidity affects the contract, the enforcement of it in Equity is a matter of judicial discretion (*g*). Consistently with this, in several cases, specific performance has been decreed at the suit of vendors who, contracting under the *bonâ fide* belief that they could make a good title, afterwards, on discovering that they had no title, either legal or equitable, procured the concurrence of the necessary parties (*h*): as, also, at the suit of vendors who had contracted to sell the fee simple, knowing that they had only a life estate or other limited interest, and relying on being able to procure the concurrence of the parties entitled in remainder (*i*). So, it would seem that a vendor who has contracted to sell in the *bonâ fide* belief that he is absolutely entitled, when in fact he has only a partial interest, may enforce the contract, if he is ultimately able to complete the title (*k*). But it must be observed that in none of these cases did the purchaser, on discovering the defect, repudiate the contract.

Where ven-

It seems by no means clear whether, even in the extreme

(*g*) 2 Y. & C. C. C. 64; and see remarks of Lord Eldon in *White* v. *Damon*, 7 V. 35, as to how the discretion is to be exercised.

(*h*) *Hoggart* v. *Scott*, 1 R. & M. 293, a case of mistake as to the proper parties to exercise a power of sale under a will; *Chamberlain* v. *Lee*, 10 Si. 444, where the frontage of the estate was found to belong to a third person; *Eyston* v. *Simmonds*, 1 Y. & C. C. C. 608, where the estate had escheated to the Crown; and see *Williams* v. *Carter*, Sug. 217; *Graham* v. *Oliver*, 3 B. 124; *E. C. R. Co.* v. *Hawkes*, 5 H. L. C. 331.

(*i*) *Lord Stourton* v. *Meers*, cited 2 P. W. 630; *Wynn* v. *Morgan*, 7 V. 202; *Coffin* v. *Cooper*, 14 V. 205; *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54.

(*k*) *Murrell* v. *Goodyear*, 1 D. F. & J. 432.

case of A. contracting to sell the estate of B., A. would not be entitled to specific performance, if by procuring a conveyance from B., he were able to make a good title on the reference, unless, indeed, the purchaser has on discovering the defect immediately repudiated the contract (*l*). In fact in such cases the material question seems to be, whether the purchaser has, on discovering that the estate is not bound, at once refused on his part to be bound, or has continued to negotiate upon the footing of the contract being still valid and subsisting (*m*). At any rate, if a purchaser intends to rely on the objection that the vendor has only a limited interest, he must do so at once, and cannot avail himself of it, after he has required the concurrence of persons who can complete the title, or after the vendor has brought his action (*n*). In an action at Law for damages, it is clear that, at any rate before the Judicature Acts, A. contracting to sell B.'s estate could not have recovered damages against the purchaser for refusing to complete, unless he could show that at the date fixed for completion he could have made out a good title (*o*).

Nock v. *Newman*.

In *Nock* v. *Newman*, A. B., who had an interest in the property, was no party to the contract for sale. Specific performance having been resisted on other grounds, the title was referred, and the abstract, as carried in before the Master, stated that A. B. was willing to join in the conveyance. Exceptions were taken to the Master's report in favour of the title, and on the hearing (6th July, 1837), upon the exceptions and further directions, the defendants for the first time raised the objection that A. B.'s interest was not bound by the contract. Upon this the vendors produced a signed agreement, procured just before the hearing,

(*l*) See *Mortlock* v. *Buller*, 10 V. 315; *Bochm* v. *Wood*, 1 J. & W. 422; and see 2 Y. & C. C. C. 64; and *Ellis* v. *Rogers*, 29 Ch. D. 672.

(*m*) *Eyston* v. *Simmonds*, and *Salisbury* v. *Hatcher*, *suprà*; and see *Weston* v. *Savage*, 10 Ch. D. 736.

(*n*) *Hoggart* v. *Scott*, 1 R. & M. 296; *Murrell* v. *Goodyear*, *suprà*; *Wylson* v. *Dunn*, 34 Ch. D. 569, 577.

(*o*) *Noble* v. *Edwardes*, 5 Ch. D. 378.

Chap. XVIII. Sect. 7.

by which A. B. agreed to join in the conveyance; and Shadwell, V.-C., held that it would not do thus "to bolster up the case at the last moment," and dismissed the bill with costs; but this decision was reversed without hesitation by Lord Cottenham (*p*).

Where the purchaser on discovering the defect repudiates.

Several cases, however, afford an illustration of the exercise by the Court of its discretionary jurisdiction to refuse specific performance, where the purchaser has, on discovering the defect in the vendor's title, forthwith repudiated the contract. Thus, where the contract was for a yearly tenancy, with an option of taking a lease for twenty-one years, and the tenant on finding that the landlord could only grant a lease for twenty years and a quarter, repudiated the contract, it was held that the landlord, who, before the cause was heard, but not till after he had filed his bill for specific performance, was in a position to grant the stipulated lease, could not enforce the contract, which was void for want of mutuality (*q*). So, where A. contracted to sell to B. an agreement for a lease from C. to A., which was at the date of the contract voidable at the option of C., and B., on discovering this fact, at once repudiated the contract, an action by A. for specific performance by B. of the contract was dismissed (*r*).

Contract dependent on condition precedent.

Where the contract itself depends on the performance of a condition precedent, the party to fulfil the condition cannot obtain specific performance without showing that he has

(*p*) *Ex relatione* Mr. Hayes, and from his brief on the appeal.

(*q*) *Forrer* v. *Nash*, 35 B. 167.

(*r*) *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Wylson* v. *Dunn*, 34 Ch. D. 569. In *Adams* v. *Broke*, 1 Y. & C. C. C. 627, 630, where trustees with a power of sale exerciseable with the consent of the tenant for life, entered into a contract, and filed a bill for specific performance, but did not procure the requisite consent until after the commencement of the suit. Knight-Bruce, V.-C., expressed a doubt whether the bill should not be dismissed. But this doubt is at variance with the general rule that it is sufficient for the vendor to make out a title at the hearing or on the reference; see *Ellis* v. *Rogers*, 29 Ch. D. 661, where the C. A., though not expressly deciding the point, intimated that a purchaser of a lease could not resist specific performance, on the ground that the vendor had not obtained a licence to assign at the date of the writ.

fulfilled it. Thus, where a lessee offered to surrender his lease, and to take a fresh lease to a nominee, or to a company which he intended to form, and his offer was accepted: but the lessor afterwards refused to grant the lease; it was held that the lessee could not obtain specific performance, as he had not fulfilled the precedent condition of appointing a nominee or forming a company (*s*).

Purchaser when precluded from taking the objection.

But the purchaser may, by his contract, preclude himself from objecting that the consent of a specified person is necessary, or that the sale is a breach of trust; thus, *e. g.*, where trustees for sale, who had no power of leasing, granted leases which materially lessened the value of the property, and then expressly sold the estate, subject to the unauthorized leases—the want of authority being plainly disclosed—the title was forced upon the purchaser (*t*).

The existence of an incumbrance not a matter of defence.

The existence of a heavy incumbrance on the estate, and the mental incapacity of the incumbrancer, being matters of conveyance and not of title (*u*), are no conclusive defence to a vendor's suit (*x*).

Difficulty on assignment of contract for a lease.

A difficulty sometimes arises on the assignment of a contract to grant a lease in the fact that the lessor does not get the covenants of the person to whom he contracted to grant the lease, but only those of the assignee of the contract. It appears, however, to be no answer to an action by the assignee of the contract for specific performance against the lessor, that the plaintiff cannot procure covenants from the person with whom the lessor originally contracted, and who has assigned the contract to the plaintiff. The question whether the lessor is himself entitled to the covenants of the party with whom he originally contracted, as of a *persona*

(*s*) *Williams* v. *Briscoe*, 22 Ch. D. 441; see especially p. 449, judgment of Cotton, L. J.

(*t*) *Nicholls* v. *Corbett*, 3 D. J. & S. 18; and see *Want* v. *Stallibrass*, L. R. 8 Ex. 175, 179.

(*u*) *Ante*, p. 324.

(*x*) *Duke of Beaufort* v. *Glynn*, 3 S. & G. 213; 1 Jur. N. S. 890.

designata, would seem to be one of construction of the original contract; and, in the absence of an expression of intention to that effect, it is conceived that he would not be so entitled (*y*).

Nominal contractor.

The fact that the vendor contracted to sell his own estate, in the name of, or as agent for, another (*z*); or that the nominal purchaser was in fact the agent for a third person with whom the vendor has quarrelled upon other matters (*a*), or to whom he has given a bare refusal (*b*) to deal for the estate, is not, in general, any defence to a suit for specific performance: unless the case can be brought within the class of cases previously noticed (*c*), by showing that the misrepresentation was used as the inducement to the defendant to enter into the contract (*d*).

Whether it is a good defence to a purchaser's action for specific performance that the vendor, when he signed the contract, supposed the purchaser to be another person of the same name, is a question of construction; and evidence may possibly be admissible to show that the contract was intended to be for sale to a particular person (*e*).

Insertion of penalty, no defence.

The insertion in the contract of a penalty in case of non-

(*y*) *Buckland* v. *Papillon*, 2 Ch. 67.

(*z*) *Fellowes* v. *Lord Gwydyr*, 1 R. & M. 83.

(*a*) *Hall* v. *Warren*, 9 V. 605.

(*b*) Sug. 219, citing *Lord Irnham* v. *Child*, 1 Br. C. C. 92, 95; *sed quære*, whether this doctrine can be extended to cases of refusal grounded on any particular and specified reason: see 1 Coll. 219; and see *Popham* v. *Eyre*, Lofft, 786; *Bonnett* v. *Sadler*, 14 V. 528; *O'Herlihy* v. *Hedges*, 1 Sch. & L. 123.

(*c*) P. 898 *et seq.*

(*d*) *Phillips* v. *Duke of Bucks.* 1 Vern. 227; *Scott* v. *Langstaffe*, cited Lofft, 797; and see *Nelthorpe* v. *Holgate*, 1 Coll. 203. It appears that specific performance was decreed in *Phillips* v. *Duke of Bucks.* see 14 V. 527, n. The Duke's equity seems to have been of (according to modern notions) a very doubtful character: amounting, in substance, to his having sold the estates at an undervalue, by way of bribe to the Chancellor before whom causes, in which the Duke was interested, were depending: see the account of the transaction from Roger North, cited Sug. 219. As to personal objections as an element of defence, see Fry, 90; *Smith* v. *Wheateroft*, 9 Ch. D. 223.

(*e*) See *Smith* v. *Wheateroft*, 9 Ch. D. 223.

performance, is no defence to a suit for specific performance (*e*) : nor, it seems, is a stipulation for the payment of a specified sum as liquidated damages (*f*) : in fact, decrees have been made upon agreements which took the shape of bonds (*g*) : but the obligee must elect between his legal and equitable remedies (*h*). A bond void at Law may be a good agreement in Equity (*i*).

Inability to recover damages at Law, how far a defence.

The circumstance that damages could not be recovered upon the contract at Law, has not been universally considered a good defence to a suit for specific performance, although, as observed by Lord Hardwicke (*k*), "There are very few cases in which a Court of Equity can decree a performance of a covenant or agreement upon which there can be no action at Law, according to the words of the articles and the events which have happened." In his treatise on specific performance (*l*), Lord Justice Fry points out that, by the principles of the Common Law, exact performance by the plaintiff of his part of the contract according to its very terms must be averred and proved, whereas in Equity a distinction has been made between those terms which are of the essence of the contract, and those which are not thus essential, and a breach of which it is inequitable for either party to set up against the other as a reason for refusing to execute the contract between them. On this ground, he says, the jurisdiction rests in all cases where specific performance is decreed with compensation to the plaintiff. And it must be noticed that the modern tendency

(*e*) *Howard* v. *Hopkyns*, 2 Atk. 371 ; *Coles* v. *Sims*, 5 D. M. & G. 1 ; and see *Logan* v. *Wrenhall*, 1 C. & F. 611, 630.

(*f*) *Darby* v. *Whitaker*, 4 Dr. 134.

(*g*) *Hobson* v. *Trevor*, 2 P. W. 191 ; *Butler* v. *Powis*, 2 Coll. 156 ; but not if the plaintiff have enforced the penalty, *Sainter* v. *Ferguson*, 1 M. & G. 286. As to the jurisdiction of a Court of Equity to restrain a breach of an agreement secured by a bond, see *Clarkson* v. *Edge*, 33 B. 227 ; *Fox* v. *Scard*, *ib.* 327, 328 ; and see 36 & 37 V. c. 66, s. 24, sub-s. 5.

(*h*) *Fox* v. *Scard*, *suprà*.

(*i*) *Squire* v. *Whitton*, 1 H. L. C. 333.

(*k*) See *Whitmel* v. *Farrel*, 1 V. sen. 256, 258.

(*l*) Fry, 15.

Chap. XVIII. Sect. 7.

of the Court is to hold people to the actual bargains they have made, and thus indirectly to confine the jurisdiction within the limits of legal relief (*m*).

Contract incapable of complete performance.

And Equity will not decree specific performance of part of a contract, if unable to enforce specific performance of all its material terms (*n*).

3rd—Matters relating to estate:—original defects in, how far a defence;

As to the 3rd of the above heads.—Upon defects in the estate itself, we may refer to former observations respecting misdescriptions and compensation (*o*): we may also remark that, although either the original non-existence of, or the want of a sufficient title to, a material part of the property or that part of it which may have formed the inducement to the purchaser, is a sufficient defence to an action for specific performance, yet mere non-existence of a part does not, universally, as a ground of defence, stand so high as want of title; for it may, obviously, be often a very different matter to a purchaser whether he be simply unable to get a particular part of what he contracted for, or whether such part will be liable to be held by another person, and converted into a nuisance (*p*).

public nuisance;

It was considered, in one case, that the existence of a public nuisance in the immediate neighbourhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose (its existence, however, being unknown to either party, although easily ascertainable by the vendor), is no defence to his suit for specific performance, although it will induce the Court to try the case strictly (*q*).

(*m*) *Knatchbull* v. *Grueber*, 3 Mer. 146; *Re Arnold*, 14 Ch. D. 279, 284.

(*n*) *Ante*, p. 1164, n. (*q*).

(*o*) *Ante*, Ch. III., sect. 1, and p. 150 *et seq.* As to how far the purchases of several lots are connected, *vide post*, p. 1203. And see the judgment in *Knatchbull* v. *Grueber*, 1 Mad. 167.

(*p*) See *S. C. ib.* 153, 165.

(*q*) *Lucas* v. *James*, 7 Ha. 410, 418; but *quære*, whether this would be so, if the nuisance were such as the vendor ought to have been aware of.

public inconvenience.

So, where, pending a suit for specific performance, the defendants, a railway company, prosecuted their works in a manner contrary to the terms of the contract, and opened the line, it was held that the inconvenience which would be caused to the public by interfering with the traffic, was not an available defence (*r*).

Destruction of estate, not a purchaser's defence.

We have already seen (*s*) that the accidental destruction or deterioration of the estate subsequently to the contract is no defence to the vendor's action for specific performance.

4th—Matters relating to title: want of title, considered as vendor's defence.

As to the 4th of the above heads.—Want of title to the estate is a defence which may occasionally be available as well to vendor as to purchaser. As a general rule, however, a vendor will be compelled to convey his interest, if an imperfect one, in the estate, if the purchaser choose to accept it without compensation (*t*); so he will be compelled to make good the contract out of any interest which he has subsequently acquired (*u*): or to procure the concurrence of parties who are bound to convey at his request (*x*) *e.g.*, trustees of the legal estate (*y*): and in one case a purchaser of copyholds, who had acquired the whole legal and beneficial interests, was nevertheless held entitled in a suit against his vendor to require the concurrence of mere nominal trustees, who had never been admitted under a voluntary covenant to surrender (*z*). So, a vendor, professing to sell an unincumbered estate, but having in fact only an equity of redemption, as a general rule, will be compelled to redeem the mortgage, and obtain a conveyance from a mortgagee (*a*). So a tenant in tail in remainder will

(*r*) *Raphael* v. *Thames Valley R. Co.*, 2 Ch. 147.

(*s*) *Ante*, pp. 286, 287.

(*t*) *Harnett* v. *Yielding*, 2 Sch. & L. 554; Sug. 218; *Bradley* v. *Munton*, 15 B. 460; *Barrett* v. *Ring*, 2 S. & G. 43.

(*u*) See cases cited *ante*, p. 909, and *Carne* v. *Michell*, 10 Jur. 909.

(*x*) See 1 Mad. 11; *Costigan* v. *Hastler*, 2 Sch. & L. 160, 166.

(*y*) See Sug. 349; *Crop* v. *Norton*, 2 Atk. 74, 75.

(*z*) *Steele* v. *Waller*, 28 B. 466; but the plaintiff did not get his costs; *sed quære* this case, and see *Minton* v. *Kirwood*, 3 Ch. 614.

(*a*) But compare *Wedgwood* v. *Adams*, 8 B. 103, where the Court on the ground of hardship refused to interfere; and *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788.

Chap. XVIII. Sect. 7.

be decreed to convey a base fee, and covenant to bar the remainders over upon becoming tenant in tail in possession (*b*).

Cases in which it is available.

But Equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to require; *e. g.*, a husband to procure the concurrence of his wife (*c*), or son (*d*), except, perhaps, where he has expressly agreed to procure such concurrence (*e*); or a tenant for life to procure the concurrence of trustees for sale of the reversion, they being under no obligation to comply with his request(*f*); nor will it compel him to purchase and convey the tithes of an estate contracted to be sold as tithe free (*g*).

The true ground of the decisions.

The defence, however, is not one favoured by the Court, which in such cases only holds its hand on the ground of the actual impossibility of enforcing its decree (*h*). A vendor cannot be permitted to say that he did not mean to acquire an interest which is necessary to enable him to convey the property (*i*). If he can get it, he may and will be compelled to do so; and it is no available defence that he had not got it at the commencement of the action. Specific performance will be decreed against him, if he have got the necessary interest at the date for showing a title on the reference; and if it then be shown that he can get it he will be ordered to do so (*k*).

(*b*) *Lord Bolingbroke's case*, cited 1 Sch. & L. 19, n. As to contracts to disentail, see 3 & 4 Will. IV. c. 74, s. 47; *Petre* v. *Duncombe*, 7 Ha. 24; *Dering* v. *Kynaston*, 6 Eq. 210; *Hilbers* v. *Parkinson*, 25 Ch. D. 200; and see *ante*, p. 1117.

(*c*) *Emery* v. *Wase*, 8 V. 505, 514; *Howel* v. *George*, 1 Mad. 1, 6; see *Jordan* v. *Jones*, 2 Ph. 170; *Ex p. Blake*, 16 B. 471; and cf. *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*d*) *Howel* v. *George*, *supra*.

(*e*) See *Emery* v. *Wase*, 8 V. 505, where the earlier cases are cited; but the point seems very doubtful, see Sug. 206; *Innes* v. *Jackson*, 16 V. 367.

(*f*) *Thomas* v. *Dering*, 1 Ke. 729.

(*g*) *Todd* v. *Gee*, 17 V. 273.

(*h*) See *Seawell* v. *Webster*, 29 L. J. Ch. 71, 73.

(*i*) *Browne* v. *Warner*, 14 V. 409, 413.

(*k*) *Holroyd* v. *Marshall*, 10 H. L. C. 191, 211; *Carne* v. *Mitchell*, 15 L. J. Ch. 287; *Walker* v. *Barnes*, 3 Mad. 247; *Clayton* v. *Duke of Newcastle*, 2 Ch. Ca. 112; and see Fry, 430 *et seq.*

Mistake the real ground of many of the cases.

It will be found on examination that many of the cases usually referred to this head were really decided on the ground of the vendor's mistake. For this reason, the Court has refused to compel the vendor to perfect his title by exercising a power of purchasing and settling another estate in lieu of that which he had contracted to sell (*l*); or to make himself the personal representative of a deceased owner (*m*); or to complete a contract which he had entered into in the belief that he was absolute owner, when in fact he was only able to sell under a power of sale and exchange, and was under a liability to re-invest the purchase-money (*n*); or to convey, as mortgagee under a power of sale, an estate which he claimed as absolute owner by foreclosure, and thus to render himself liable to account for the purchase-money (*o*); or, where he was a trustee, to carry out a contract, which might reasonably expose him to liability at the suit of his *cestuis que trust* (*p*). So, where a tenant for life, with the ultimate reversion in fee, contracted, as it appeared to the Court, merely as the agent of his trustees (who had a power to sell the fee simple), he was not bound, upon the contract being held void as against the trustees, to make it good out of the fee simple, which had subsequently vested in himself by the failure of the intervening limitations (*q*). The decision, however, was different, where a tenant for life, similarly circumstanced, contracted in his own name, as if seised in fee simple (*r*). But the Court will not decree specific performance by directing an invalid insurance to be executed by a tenant for life, which might encumber and embarrass remaindermen (*s*).

Vendor generally compelled to

Where the want of title is only partial,—*i. e.*, where it affects only part of the estate, or only part of that interest

(*l*) *Howel* v. *George*, 1 Mad. 1.

(*m*) *Williams* v. *Bland*, 2 Col. 575.

(*n*) *Hood* v. *Oglander*, 34 B. 513.

(*o*) *Watson* v. *Marston*, 4 D. M. & G. 230.

(*p*) *Sneesby* v. *Thorne*, 7 D. M. & G. 399; and see cases cited *ante*, p. 1165, n. (*a*).

(*q*) *Mortlock* v. *Buller*, 10 V. 292, 316.

(*r*) *Butler* v. *Powis*, 2 Col. 156.

(*s*) *Ellard* v. *Lord Llandaff*, 1 B. & B. 241, 251.

Chap. XVIII. Sect. 7.

convey part of *estate* with abatement.

in it which was agreed to be sold,—the question arises, whether the vendor can resist the purchaser's claim to specific performance with a compensation, or, to speak more accurately, an abatement of the purchase-money. This right generally, but not universally (*r*), exists in each class of cases (*s*). The general rule which guides the Court in such cases has been thus laid down by Lord Eldon (*t*), and may now be regarded as well established. "If a man, having partial interests in an estate, chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent to him afterwards to say that, though he has valuable interests, he has not the entirety, and that, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction the person contracting under these circumstances is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that and to an abatement." But it is conceived that this rule must be qualified by the addition of the words "in the absence of a condition expressly excluding any claim for compensation" (*u*).

Instances of the rule.

Thus, want of title to the entire interest contracted for will not, it seems, be available as a defence for the vendor, if the purchaser elects to take such estate as the vendor can convey (*x*); or to dispense with the concurrence of a person having a partial interest in the property,—as, *e. g.*, a wife entitled to dower,—upon being allowed an abatement from his purchase-money (*y*). So, where a person, entitled in fee, subject to a life estate, contracted to sell the estate, relying on obtaining the concurrence of the tenant for life, which was in fact withheld, specific performance was decreed at the suit of the purchaser with an abatement in respect of the life estate (*z*). So,

(*r*) *Paton* v. *Rogers*, 1 V. & B. 353.

(*s*) 10 V. 316; 17 V. 401; 1 V. & B. 353; 3 V. & B. 192.

(*t*) *Mortlock* v. *Buller*, 10 V. 315.

(*u*) *Re Terry and White*, 32 Ch. D. 14, although Lopes, L. J., was of opinion that such a condition applies only to trivial errors; and see *post*, p. 1190.

(*x*) *Barret* v. *Ring*, 2 S. & G. 43.

(*y*) *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*z*) *Nelthorpe* v. *Holgate*, 1 Col. 203.

where the contract was, in effect, for an absolute term of twenty-one years, and it was found that the actual term might expire by the cesser of certain lives, specific performance was decreed against the vendor, with an abatement in respect of the difference between the absolute and defeasible interests (*a*). The decision was the same where a term was sold with the benefit of A.'s covenants for renewal, and such covenants were found to be not absolute, but binding only a contingent portion of his assets (*b*). So, where A. contracted for the purchase of an estate from B., who represented himself to be the owner in fee, but was in fact entitled only *pur autre vie*, with remainder to his wife in fee, specific performance was decreed at the suit of A., with compensation in respect of the interest of B.'s wife (*c*). So—there being the common condition for compensation—when property sold as a renewable leasehold was in fact merely for a term certain, the contract was enforced with an abatement (*d*). So, where vendors had agreed to sell two-sixths of certain leaseholds, whereas, in fact, they could only make a title to four-twentieths, specific performance was decreed against them with an abatement in respect of the defect (*e*). So, where an administrator granted an underlease of a leasehold estate belonging to his intestate, with an option to the underlessee to purchase at a fixed price within a specified period, the Court refused to enforce specific performance of the option to buy the whole, on the ground that it was *ultrà vires* of the administrator to give such an option; but as to one-third of the property, to which the administrator was entitled beneficially, specific performance was decreed against him (*f*).

(*a*) *Dale* v. *Lister*, cited 16 V. 7.

(*b*) *Milligan* v. *Cooke*, 16 V. 11, 12; but, *semble*, the Court will not now consider the comparative values of covenants; see *Ridgway* v. *Gray*, 1 M. & G. 109; and *Law* v. *Urlwin*, 16 Si. 390; *Farebrother* v. *Gibson*, 1 D. & J. 602; *Cato* v. *Thompson*, 9 Q. B. D. 618.

(*c*) *Barnes* v. *Wood*, 8 Eq. 424, and see *Wilson* v. *Williams*, 3 Jur. N. S. 810; and see and distinguish *Castle* v. *Wilkinson*, 5 Ch. 534; *post*, p. 1195.

(*d*) *Painter* v. *Newby*, 11 Ha. 26; see p. 30 as to church leases.

(*e*) *Jones* v. *Evans*, 17 L. J. Ch. 469.

(*f*) *Oceanic Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, 246.

Nor is the want of title to a very considerable part of the estate any reason why the vendor should not be compelled to convey so much as he has (*g*). Thus, where a vendor agreed to sell the entirety of a freehold estate, and it was subsequently discovered that an undivided moiety belonged to other parties, the purchaser was held to be entitled to a conveyance of the vendor's moiety on payment of one-half of the purchase-money (*h*). So, where a person granted a lease with an option to the lessee to purchase the whole, and it was discovered on an examination of the title that the lessor was only entitled to a moiety of the property, she was ordered to convey all the interest she had, allowing an abatement of half the purchase-money (*i*). So, where A. and B. agreed to sell property, and it turned out that B. had no interest in it, and that A. was entitled to only a moiety, which was subject to a mortgage, the purchaser was held entitled to a conveyance of A.'s moiety subject to the mortgage, with an abatement which, in the circumstances of the case, swallowed up all the purchase-money due to A. (*k*). And the result is the same where, owing to the death of one of two tenants in common, and the devolution of his moiety, specific performance becomes impossible as to the share of the deceased (*l*). The rule may also be applied to a case of deficiency in quantity (*m*).

Vendor's rights under condition for rescission.

The right, however, of a purchaser to require specific performance, with an abatement of the purchase-money, is subject to the vendor's right to rescind the contract, where such a right is reserved by the conditions (*n*). Thus, it has been held that a condition for rescinding the contract, if counsel should be of opinion that a marketable title could not

(*g*) *Western* v. *Russell*, 3 V. & B. 187, 192.

(*h*) *Hooper* v. *Smart*, 18 Eq. 683.

(*i*) *Burrow* v. *Scammell*, 19 Ch. D. 175.

(*k*) *Horrocks* v. *Rigby*, 9 Ch. D. 180.

(*l*) *A.-G.* v. *Day*, 1 V. sen. 218, 224; and see *Barker* v. *Cox*, 4 Ch. D. 464.

(*m*) *Mackenzie* v. *Hesketh*, 7 Ch. D. 675.

(*n*) *Re Terry and White*, 32 Ch. D. 14; *Heppenstall* v. *Hose*, 33 W. R. 30.

be made, enabled the vendor to rescind upon counsel rejecting the title to one undivided third of the property (*o*). And, *à fortiori*, in the converse case, where the purchaser had a right to rescind, in case his objections to title were not removed, and he gave notice of rescission on the ground of the vendor's want of title to a small portion of the estate, it was held that he could not be compelled to complete with an abatement (*p*). But when the vendor agreed to sell the fee, with full knowledge that he could not do so without the concurrence of a tenant for life, and failed to obtain such concurrence, he was not allowed to avail himself of the condition for rescission (*q*). So, where there was a condition enabling the vendor to rescind if unwilling to comply with a requisition as to title *or conveyance*, Pearson, J., held that he was not entitled to put the condition into force because the purchaser objected to take a conveyance, subject to an obligation to repair which was not mentioned in the particulars or conditions (*r*). And, of course, no such question can be raised by a vendor, when, upon the purchase of several lots by the same purchaser, the title to one or more of such lots is found to be defective.

No abatement for defect in title.

We have seen that, as a general but not universal rule, every purchaser has a right to take what he can get, with compensation for what he cannot get (*s*); but he cannot claim a conveyance of an interest to which a vendor shows a doubtful or defective title, with an abatement in respect of the imperfection in title (*t*), except, perhaps, where the defect is of a temporary character, or is otherwise a fit subject for

(*o*) *Williams* v. *Edwards*, 2 Si. 78; and see *Mawson* v. *Fletcher*, 6 Ch. 91; *Re Terry and White*, *suprà*.

(*p*) *Ashton* v. *Wood*, 3 Jur. N. S. 1164; but see *Hanbury* v. *Litchfield*, 2 M. & K. 629, where the purchaser had notice of the defect when he entered into the contract.

(*q*) *Nelthorpe* v. *Holgate*, 1 Col. 203; but *quære* now, see *Gray* v. *Fowler*, L. R. 8 Ex. 249, 282.

(*r*) *Hardman* v. *Child*, 28 Ch. D. 712; but cf. *Re Glenton and Haden*, 53 L. T. 434; *Re Terry and White*, *suprà*.

(*s*) *Ante*, p. 1187 *et seq.*; and see *per* Turner, L. J., in *Hughes* v. *Jones*, 3 D. F. & J. 307, 315.

(*t*) *Williams* v. *Higden*, C. P. Coop. 500.

Chap. XVIII. Sect. 7.

compensation; as, *e.g.*, where a good title was deduced, but the vendor's wife refused to release her dower, and specific performance was decreed at the purchaser's suit with a compensation (*u*). Conduct or acquiescence on the part of the purchaser which amounts to an acceptance of the title, may yet be insufficient as a waiver of his right to compensation (*x*).

Difficulties of and exceptions to the rule.

It is manifest, however, that, in carrying out the above expressed rule of making the vendor convey what he has with an abatement for what he has not, the Court is either making a new contract between the parties, or is at best executing the original contract only *cy près* (*y*). On this ground, in a case (*z*) where a tenant for life, with remainders to his first and other sons in tail, with remainder to himself in fee, contracted to sell the fee simple, speculating on the consent of his trustees, which in fact he was unable to obtain, Lord Langdale refused to enforce specific performance to the extent of the life estate and remainder in fee, with an abatement. The decision is, however, disapproved of by Lord St. Leonards (*a*); and in a subsequent case Lord Langdale appears to refer to his former judgment, as if not altogether satisfied of its propriety (*b*). Cases, too, might occur where, on the ground of serious hardship, the Court would refuse to assist a purchaser: as, *e.g.*, in the case, put by Lord St. Leonards (*c*), of a vendor showing a good title to his mansion-house and park, but having no title to a "large adjoining estate held and sold with it." Partly apparently on this ground, and partly on the ground of mistake in the vendor, in a case where, upon a contract to sell

(*u*) *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*x*) *Hughes* v. *Jones*, 3 D. F. & J. 307, 316; *Perriam* v. *Perriam*, 32 W. R. 369.

(*y*) Fry, 537; *Thomas* v. *Dering*, 1 Ke. 729, 746; and see *ante*, p. 739, n. (*g*).

(*z*) *Thomas* v. *Dering*, *suprà*.

(*a*) Sug. 308; as to the difficulty of fixing the amount of abatement being a reason for refusing relief, see *White* v. *Cuddon*, 8 C. & F. 766, 792.

(*b*) *Graham* v. *Oliver*, 3 B. 128.

(*c*) Sug. 316.

the entirety of a lace manufactory, it appeared that the vendors had only nine-sixteenths, and that the remaining shares clearly belonged to another party, who had also a charge on the vendor's shares for a sum nearly equal to the purchase-money, Shadwell, V.-C., on an interlocutory application, refused the purchaser specific performance with an abatement (*d*): a decision which Lord St. Leonards suggests may be referred to the nature of the property (*e*), but otherwise disapproves of (*f*): he seems, however, to consider that the decision would have been correct, had the remaining shares been held by the vendors themselves under a defective title.

Where there are rights of third parties.

So, too, the rule will not be applied so as to interfere with the rights of third parties (*g*), or to cause or encourage breaches of trust. Thus, where the vendor could only make a title to three-fourths of the property, the remaining fourth being vested in other parties, and trust-money was invested on the security of the vendor's interest to an amount exceeding the purchase-money which would be payable if the claim for abatement succeeded, the purchaser's claim for specific performance with an abatement was refused (*h*). So, where a trustee, who was also beneficially entitled to one-fifth of the proceeds of sale, contracted to sell the whole, but failed to obtain the concurrence of his co-trustees, specific performance was refused (*i*).

Result of the authorities.

The result then of the authorities appears to be that, except where there is a good defence on the ground of hardship, mistake, or injury to third parties, the Court will insist on a vendor making good his contract to the extent of his ability, and on his submitting to a proportionate reduction of the

(*d*) *Wheatley* v. *Slade*, 4 Si. 126.

(*e*) And see *Price* v. *Griffith*, 1 D. M. & G. 80, 85; *Burrow* v. *Scammell*, 19 Ch. D. 183.

(*f*) Sug. 318; see Fry, 534.

(*g*) Fry, 537.

(*h*) *Maw* v. *Topham*, 19 B. 576.

(*i*) *Naylor* v. *Goodall*, 47 L. J. Ch. 53.

Chap. XVIII. Sect. 7.

purchase-money, if the purchaser was ignorant of the defect at the date of the contract, and is willing to complete on these terms; and that in applying this rule no distinction will be drawn between cases where a vendor has contracted to sell an entire estate, when he has only part of it, and cases where he has contracted to sell undivided shares in the estate, and has not so many shares as he contracted to sell.

Indemnity, neither given nor taken compulsorily.

In two cases above referred to (*j*), where the vendor's title was only contingently defective, it was held, that the purchaser might take the estate with an indemnity; but it has been settled by subsequent decisions, that an indemnity will not be enforced against either party (*k*), unless it be provided for by special agreement (*l*). For example, where trustees of a settled estate, which, with other properties, was subject to a pecuniary charge, were empowered to sell at the request, and by the direction, of the tenant for life, a contract entered into by the latter, without the consent of the trustees, was enforced after his death; but, in the absence of any special agreement, without any indemnity against the charge (*m*).

Vendor's and purchaser's rights in respect of abatement, not reciprocal.

And matters which would not be considered fit subjects for compensation as against a purchaser, may entitle him to an abatement of purchase-money, if he elect to take the estate; *e. g.*, the existence of mining rights (*n*), or rights of common

(*j*) *Dale* v. *Lister*, cited 16 V. 7; *Milligan* v. *Cooke*, 16 V. 1. As to the damages which may be recovered by the purchaser in such a case, *vide ante*, p. 1077 *et seq.*

(*k*) *Balmanno* v. *Lumley*, 1 V. & B. 224; *Paton* v. *Brebner*, 1 Bl. 42, 66; *Aylett* v. *Ashton*, 1 M. & C. 105; *Nouaille* v. *Flight*, 7 B. 521; *Ridgway* v. *Gray*, 1 M. & G. 109, 111; see at Law, *Blake* v. *Phinn*, 3 C. B. 976.

(*l*) *Walker* v. *Barnes*, 3 Mad. 247; *Aylett* v. *Ashton*, 1 M. & C. 105; *Paterson* v. *Long*, 6 B. 598; nor has an arbitrator on the agreement any implied authority to award an indemnity; *Ross* v. *Boards*, 8 A. & E. 290, 294. As to the mode of indemnity on purchase by railway company of part of lands subject to rent-charge, see *Powell* v. *South Wales R. Co.*, 1 Jur. N. S. 773.

(*m*) *Bainbridge* v. *Kinnaird*, 32 B. 346.

(*n*) *Seaman* v. *Vawdrey*, 16 V. 390; *Martin* v. *Cotter*, 3 J. & L. 496, 509 (right of turbary and getting limestone); but see *Smithson* v. *Powell*, 20 L. T. O. S. 105; *Ramsden* v. *Hirst*, 4 Jur. N. S. 200, where the mines had been abandoned, though the right to work them continued.

over the estate (*o*), or the want of a road which the vendor had agreed, but was unable, to make (*p*).

Right to abatement lost, by contracting for estate with notice of defect.

Another ground upon which the Court will almost invariably refuse to put the general rule into force, and decree specific performance against the vendor with an abatement, is the knowledge of the defect by the purchaser at the date of his contract. Thus, where the purchaser was aware at the date of entering into the contract that the vendor could only carry it out with the consent of the trustees of his settlement, specific performance was refused (*q*). So, where a husband and wife agreed to sell the wife's estate in fee simple, and the purchaser knew that the estate belonged to the wife, who refused to convey, it was held that he could not compel the husband to convey his interest at an abated price (*r*). Nor will an abatement be allowed in respect of a lease granted by the vendor, but which is void by statute (*s*). And in one case, where the purchaser, knowing that the estate was copyhold, had agreed to take a lease for thirty-one years, and entered and spent money upon the land, and it subsequently turned out that the lord of the manor could not grant a lease for more than twenty-one years, on a bill filed by the purchaser for repayment of the money expended, the Court went so far as to order the purchaser to accept a lease for twenty-one years with a covenant for a further term of ten years, and compensation in respect of the difference in value between such a lease and covenant, and a legal term of thirty-one years (*t*). So, where a purchaser was told at the auction that premises, which were in the particulars stated to be let to a company, were in fact let to an individual, and subsequently tried to get off his bargain on the ground of the misrepresentation, it was held that, whether he was to be treated as plaintiff in a suit for rescission, or

(*o*) Sug. 312.

(*p*) *Peacock* v. *Penson*, 11 B. 355.

(*q*) *Lawrenson* v. *Butler*, 1 Sch. & L. 13, 19; *Harnett* v. *Yielding*, 2 Sch. & L. 549, 560; *Nelthorpe* v. *Holgate*, 1 Col. 203, 215.

(*r*) *Castle* v. *Wilkinson*, 5 Ch. 534.

(*s*) *Morris* v. *Preston*, 7 V. 557.

(*t*) *Hanbury* v. *Litchfield*, 2 M. & K. 629.

as defendant in a suit for specific performance, he must be held to his bargain (*u*). On the same principle, the omission of the purchaser to make proper inquiries before accepting the title, may preclude him from claiming compensation for a defect which, with a little more diligence, he would have discovered. Thus, where on an agreement for the purchase of an advowson, nothing was said on either side as to the amount of the income of the living, or as to the basis of calculation on which the purchaser's offer was founded, and the living was in fact charged with the repayment of a loan from Queen Anne's Bounty, the purchaser suing for specific performance was held not to be entitled to an abatement; inasmuch as the charge was an ordinary liability, the existence of which he would have learnt by prudent inquiry (*x*). In one case, where the purchaser at the date of the contract was aware that the property was in the occupation of a tenant, and made no previous inquiry as to the nature and duration of the tenant's interest, it was held that he was not entitled to specific performance with an abatement, on the ground that the property was subject to an undisclosed lease (*y*). And this case has been followed in Ireland (*z*). But the tendency of recent decisions is against such an extension of the doctrine of constructive notice to the relation of vendor and purchaser while the matter rests in contract (*a*). And it is conceived that, unless the undisclosed tenants' rights are of a very trifling nature, as in *Hall* v. *Smith* (*b*), a vendor who had not disclosed equities, existing as between him and his tenants, could not enforce a contract against a purchaser, on the ground that the latter knowing of such tenancy had constructive notice of such equities (*c*). Where a plaintiff had obtained an agreement for an exchange

(*u*) *Farebrother* v. *Gibson*, 1 D. & J. 602, 605.

(*x*) *Edwards-Wood* v. *Marjoribanks*, 3 D. & J. 329; 7 H. L. C. 806.

(*y*) *James* v. *Lichfield*, 9 Eq. 51.

(*z*) *Carroll* v. *Keayes*, 8 I. R. Eq. 97.

(*a*) *Caballero* v. *Henty*, 9 Ch. 447; and see, as to the doctrine, *ante*, pp. 519, 976.

(*b*) 14 V. 433.

(*c*) *Caballero* v. *Henty*, *suprà*; *Phillips* v. *Miller*, L. R. 10 C. P. 420, 427.

with immediate possession, under a false representation to the defendant that the tenants of the latter would accede to the arrangement, he was not allowed to claim specific performance subject to the tenants' interests (*d*).

Knowledge not invariably fatal to claim for abatement.

But the knowledge of the purchaser is not always fatal to his claim for specific performance with compensation. Thus, where an estate was limited to such uses as A. and B., husband and wife, should appoint, and in default of appointment to the use of trustees during B.'s life for her separate use, with remainder to A. in fee, and A. entered into a contract for sale to C., who had notice of the settlement, agreeing to obtain the concurrence of all necessary parties, and after C. had actually paid his purchase-money to the trustees, B. refused to concur in the conveyance, Bacon, V.-C., decreed specific performance at the suit of the purchaser, with compensation in respect of B.'s life interest, and with a lien for such compensation on the purchase-money in the hands of the trustees (*e*). So, where property was put up for sale by auction under particulars and conditions which stated that it was subject to a term of years less by eight years than was really the case, and the purchaser took out a summons under the Vendor and Purchaser Act, asking that he might be allowed compensation in respect of the mis-statement, which the vendor refused, on the ground that the purchaser knew the real facts and gave proportionately less for the property, Kay, J., held that he was entitled to compensation under the usual condition on that behalf (*f*).

The cases which have been considered above, being cases in which the purchaser, having had knowledge of a defect,

(*d*) *Lord Clermont* v. *Tasburgh*, 1 J. & W. 112.

(*e*) *Barker* v. *Cox*, 4 Ch. D. 464; and see *Wilson* v. *Williams*, 3 Jur. N. S. 810, a similar case before Wood, V.-C.

(*f*) *Lett* v. *Randall*, 49 L. T. 71. In *English* v. *Murray*, *ib.* 35, where the purchaser attempted to get off his contract on the ground of a defect, of which he had been warned by the vendor, he was held to his bargain, but his right to compensation under the common condition was admitted by the vendor.

Chap. XVIII. Sect. 7.

seeks specific performance with abatement against the vendor, must be distinguished from those in which the knowledge of the purchaser is relied on by the vendor in an action to enforce a defective title against a purchaser. This latter class of cases has already been considered (*g*).

Vendor, how far bound to make good interest contracted for, out of his own higher interest.

It may occasionally happen that the vendor's interest is found to exceed that which he contracted to sell: in which case he must, as a general rule, make good the latter to the best of his ability: for instance, where a vendor, in fact seised in fee, contracted to sell the estate as copyhold, stating it to be equal in value to freehold, it was held that he ought (but for other grounds of defence) to have conveyed the freehold (*h*). It has, however, been held, that, on an agreement to assign a lease, Equity cannot decree an underlease, although the assignment would induce a forfeiture; since the vendor's motive for agreeing to assign may have been to escape the rent and covenants (*i*); but the defence, as Lord St. Leonards remarks, is one which could seldom be set up by a vendor (*k*).

Distinction between purchaser's rights as plaintiff and defendant.

Although a purchaser may not be entitled to specific performance of the contract with an abatement, it does not follow that the vendor can enforce the contract against him, as it stands; different considerations applying to misdescription and error when regarded as elements in a purchaser's action for specific performance with abatement, and when regarded as elements in a purchaser's defence to a vendor's action (*l*). It remains for us to consider the various defences open to a purchaser in an action by the vendor for specific performance.

Consideration of purchaser's defences.

Want of title,

If the purchaser be unwilling to complete with an abate-

(*g*) *Ante*, pp. 128 *et seq.*, 152 *et seq.*; *post*, p. 1204; and see *Re Gloag and Miller*, 23 Ch. D. 320; *Cato* v. *Thompson*, 9 Q. B. D. 616.

(*h*) *Twining* v. *Morrice*, 2 Br. C. C. 331.

(*i*) *Anon.*, Sug. 301; and consider *Bartlett* v. *Salmon*, 6 D. M. & G. 33.

(*k*) *Ibid.*

(*l*) See notes to *Woollam* v. *Hearn*, 2 Wh. & T. L. C.

ment, he may resist specific performance (*m*), on the ground of the tenure of the property, or of a material part of it, varying from that to which he is entitled under the contract; *e.g.*, he will not be compelled to take a term (even for 4000 years) (*n*), or a copyhold (*o*), for a freehold, or mere sheep walks for a freehold (*p*), or enfranchised copyhold for a freehold, where the rights of the lord in respect of minerals are reserved (*q*).

where a defence for purchaser declining abatement.

When estate is of different tenure;

So, also, the purchaser may resist specific performance on the ground of the property being held in a manner different from that which is expressed or implied in the contract; *e.g.*, he will not be compelled to take an assignment of an underlease, instead of an original lease (*r*); or of a redeemable, instead of an absolute interest (*s*); or of an improved, instead of a ground rent (*t*); or of a ground rent to which the remedies of a reversioner are not incident (*u*): or on the ground of no title being shown to that extent of interest which he contracted for; *e.g.*, he cannot be compelled to take, instead of an estate in possession, a reversion expectant on a life estate (*x*), or on a subsisting, or, *à fortiori*, a reversionary lease (*y*); or a life estate, and (subject to an intervening estate tail) the remainder in fee,

or held in different manner;

or no title shown to extent of interest contracted for;

(*m*) If he rely on want of title as a defence he should not formerly have filed a cross bill to have the contract rescinded; *Hilton* v. *Barrow*, 1 V. 284. So, now he should not counterclaim to that effect.

(*n*) *Drewe* v. *Corp*, 9 V. 368; and see *Fordyce* v. *Ford*, 4 Br. C. C. 494, cited 13 V. 78; *Wright* v. *Howard*, 1 S. & S. 190; *Price* v. *Ley*, 4 Gif. 235.

(*o*) *Twining* v. *Morrice*, 2 Br. C. C. 326, 331; *Hick* v. *Phillips*, Ch. Prec. 575; Sug. 303; *Ayles* v. *Cox*, 16 B. 23; unless the incidents of tenure are trivial, *ante*, p. 154.

(*p*) *Vancouver* v. *Bliss*, 11 V. 458; see p. 446.

(*q*) *Upperton* v. *Nickolson*, 6 Ch. 436.

(*r*) *Madeley* v. *Booth*, 2 De G. & S. 718; *Brumfitt* v. *Morton*, 3 Jur. N. S. 1198; Sug. 300. But it is otherwise where on the particulars it is obvious that what is being sold is an underlease; *Camberwell Building Soc.* v. *Holloway*, 13 Ch. D. 754; and see *ante*, p. 134.

(*s*) *Coverley* v. *Burrel*, Sug. 299.

(*t*) *Stewart* v. *Alliston*, 1 Mer. 26.

(*u*) *Langford* v. *Selmes*, 3 K. & J. 220; *Smith* v. *Watts*, 4 Dr. 338.

(*x*) *Collier* v. *Jenkins*, You. 295; *Hughes* v. *Jones*, 3 D. F. & J. 301.

(*y*) *Linehan* v. *Cotter*, 7 Ir. Eq. R. 176; Sug. 304.

Chap. XVIII. Sect. 7.

instead of the fee simple in possession (*z*): nor, having contracted for the entirety, can he be compelled to take undivided parts of the estate (*a*), even although the vendors were tenants in common of the entirety (*b*): and the same decision has been come to, where, on a contract for two-sevenths of an estate, a title could only be made to one-seventh (*c*): nor can he, on the purchase of a leasehold interest, be compelled to accept a term "considerably less" (*d*) than that contracted for; *e.g.*, a term for six instead of sixteen years (*e*); or one which, instead of being twelve and a half years certain, may be determined at the lessor's option at the end of five years (*f*): or on the ground of no title being shown to a material part of the estate; such materiality consisting either in the proportion which such part bears to the entirety, or in its being important with regard to the enjoyment of the residue, or as possessing an adventitious value in the estimation of the purchaser (*g*); *e.g.*, "a purchaser cannot be compelled to take compensation for a large portion of the estate" (*h*); as, where the property was stated to contain 753 square yards or thereabouts, but in fact contained only 573 square yards (*i*): so, in the case of building land, a deficiency inconsiderable as regards actual quantity may be material by reason of its interfering with the profitable user of the land for building purposes, as when the deficiency exists mainly in the frontage measurement (*k*). Nor, having entered into a single contract for two estates,

or no title shown to material part of estate;

or to one of

(*z*) Sug. 308.

(*a*) *Dalby* v. *Pullen*, 1 R. & M. 296; see *Price* v. *Griffith*, 1 D. M. & G. 80; *Re Arnold*, 14 Ch. D. 270.

(*b*) *A.-G.* v. *Day*, 1 V. sen. 218, 224.

(*c*) *Roffey* v. *Shalleross*, 4 Mad. 227; cited 2 M. & K. 726.

(*d*) Sug. 299; see *Mortlock* v. *Buller*, 10 V. 306; *Halsey* v. *Grant*, 13 V. 77, 78; *Vignolles* v. *Bowen*, 12 Ir. Eq. R. 194, 198.

(*e*) *Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5.

(*f*) *Weston* v. *Savage*, 10 Ch. D. 736.

(*g*) See 1 Mad. 167; and 13 V. 79; *Magennis* v. *Fallon*, 2 Moll. 588; *Stewart* v. *Marq. Conyngham*, 1 Ir. Ch. R. 534, 573.

(*h*) Sug. 316.

(*i*) *Portman* v. *Mill*, 2 Rus. 570; *Whittemore* v. *Whittemore*, 8 Eq. 603; in which case there was a condition that no compensation should be allowed for misdescription; and *vide ante*, pp. 732, 735 *et seq.*

(*k*) Cf. *Brewer* v. *Brown*, 28 Ch. D. 309.

two estates included in a single contract;

could the purchaser probably be compelled to take one without the other (*l*), although the estate with the defective title were let upon, and sold subject to, a fee-farm grant at a large rent (*m*): so, where on the purchase of a mansion and 700 acres, the title to 12 acres proved defective, such 12 acres being opposite the park gates and containing brick earth, which rendered it probable that they might be built upon, the purchaser was held free (*n*): so, also, where, on the purchase of a wharf and jetty, no title could be made to the jetty (*o*): so, where no title could be made to a strip of land forming the frontage to the highway (*p*). So, he may resist specific performance on the ground of the existence of incumbrances or liabilities which would interfere with the enjoyment of the estate; *e.g.*, liabilities to tithe (if the estate is sold as tithe free) or subject to a modus or commuted rent-charge (*q*), or to a ground rent, not mentioned in the particulars, on the purchase of leaseholds (*r*), or to rights of mining (*s*), common (*s*), or waterway with power of entry for the purpose of making, opening, or cleansing water-courses, or to rights of entry for making reservoirs, or of planting ladders for the repair of adjoining houses (*t*), or to an easement in another to use the kitchen

or where incumbrances or liabilities exist which would affect its enjoyment;

(*l*) *Prendergast* v. *Eyre*, 2 Hog. 81.

(*m*) See *S. C.*, p. 94; Sug. 313, 315; *sed quære.*

(*n*) *Knatchbull* v. *Grueber*, 1 Mad. 153; 3 Mer. 124, 141; and see 2 M. & K. 728.

(*o*) *Peers* v. *Lambert*, 7 B. 546; and see 6 V. 678; 13 V. 78; Sug. 316; where earlier decisions of a contrary tendency have been disapproved of.

(*p*) *Perkins* v. *Ede*, 16 B. 193.

(*q*) *Ker* v. *Clobery*, Sug. 321; *Binks* v. *Lord Rokeby*, 2 Sw. 222. The question of tithe free, or not, has been said to be a question of fact and not of title; *Wallinger* v. *Hilbert*, 1 Mer. 104; *Smith* v. *Lloyd*, 2 Sw. 224, n.; *sed qu.*, whether this statement, although theoretically accurate, is correct for practical purposes. Freedom from the tithe is a fact which does not relate to the physical condition of the property, and must, nevertheless, be proved by the vendor before he can be said to have shown a good title to the estate as described in the contract.

(*r*) *Jones* v. *Rimmer*, 14 Ch. D. 588.

(*s*) See *Seaman* v. *Vawdrey*, 16 V. 390; Sug. 312; *Martin* v. *Cotter*, 3 J. & L. 496, 509; *Hayford* v. *Criddle*, 22 B. 480; *Ramsden* v. *Hirst*, 4 Jur. N. S. 200; *Kerr* v. *Pawson*, 25 B. 394; *Pretty* v. *Solly*, 26 B. 606; and see *Upperton* v. *Nickolson*, 6 Ch. 436. See now 21 & 22 V. c. 94, s. 2, by which the 11th sect. of 15 & 16 V. c. 51, is repealed; but see on that section, *Myers* v. *Hodgson*, 1 C. P. D. 609.

(*t*) See *Shackleton* v. *Sutcliffe*, 1

Chap. XVIII. Sect. 7.

for certain purposes (*x*), or to restrictive covenants as to user (*y*), or to a right of sporting (*z*), or to the repairs of the chancel of a church (*a*), or to quit-rents or rent-charges, if of a large amount (*b*), or to keep up the fences, water-courses, &c., upon the land itself (*c*), have been held to be defects which do not admit of compensation.

or matters exist which increase proposed liability of purchaser;

Upon a similar principle, it has been held, at Law, that a purchaser having contracted for the assignment of a subsisting lease, cannot be required to accept a new lease as original lessee: his liability being greater under the lease than it would be under the assignment (*d*). So, where, on the purchase of leaseholds, the lease was found to contain covenants to build additional houses, and to deliver them up at the end of the term, and the houses had not been built, but the covenant to build had been waived, it was held that the liability under the covenant to deliver up at the end of the term was a sufficient defence to the suit: although such liability might have been escaped by assigning the term to a pauper even only a day before its termination (*e*).

or which affect the enjoyment of material part of property.

Where only part of an estate is affected by a liability which, if affecting the entirety, would enable the purchaser to resist specific performance, the purchaser's right to avoid

De G. & S. 609, where only about four and a half out of thirty acres contracted for were subject to the easements. As to the importance of such an easement, see *Goodhart* v. *Hyett*, 25 Ch. D. 182.

(*x*) *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

(*y*) *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778; and see *Cato* v. *Thompson*, 9 Q. B. D. 616.

(*z*) See *Burnell* v. *Brown*, 1 J. & W. 172; Sug. 311.

(*a*) *Forteblow* v. *Shirley*, cited 2 Sw. 223.

(*b*) *Portman* v. *Mill*, 1 R. & M. 696.

(*c*) *Larkin* v. *Lord Rosse*, 10 Ir. Eq. R. 70. See as to a charge on a living in favour of Queen Anne's Bounty not entitling a purchaser to compensation, *Edwards-Wood* v. *Marjoribanks*, 3 D. & J. 329; 7 H. L. C. 806.

(*d*) *Mason* v. *Corder*, 2 Marsh. 332; see Sug. 300, where the case seems to be cited doubtfully: but the principle seems a sound one; and see *Darlington* v. *Hamilton*, Kay, 558; *Bartlett* v. *Salmon*, 6 D. M. & G. 33; *Hayford* v. *Criddle*, 22 B. 477; *Creswell* v. *Davidson*, 56 L. T. 811.

(*e*) *Nouaille* v. *Flight*, 7 B. 521.

the contract would seem to depend upon whether the part so affected is material to the enjoyment of the residue. Where the part so affected is not material to such enjoyment, and is not the purchaser's principal object in purchasing, he may, it seems, be compelled to take the remainder of the land at a proportionate price; but, in such a case, there will be a reference to chambers to inquire as to the materiality of the part to which a title cannot be made (*f*).

Defect in title to one of several lots, how far defence in respect of remaining lots.

Where, on the purchase of several lots by the same person, the title to one or more proves defective, this may or may not, according to circumstances, be a ground for the purchaser resisting specific performance in respect of the remaining lots. An express agreement that the purchaser shall not take any unless he can have all, will be sufficient to blend the whole into one contract; "but the same complication may be effected, or rather evidenced, without any such agreement. It is a question of circumstances: the lots may be connected from their nature: it may be shown that the purchase of the one was made with reference to the other. A mere suggestion by the party, a mere statement of his inclination or fancy, will not be sufficient: nor may the proof of anything of a private nature, not known to the vendor, suffice: but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all" (*g*).

Benefit of defence, how lost to purchaser.

Knowledge by the purchaser of a defect when he enters into the contract may be fatal, not only, as we have seen (*h*), to a claim by him for specific performance with abatement,

(*f*) Sug. 315.

(*g*) *Per* Lord Brougham, *Casamajor* v. *Strode*, 2 M. & K. 725; *Poole* v. *Shergold*, 2 Br. C. C. 118; Lord Eldon's remarks in *Drewe* v. *Hanson*, 6 V. 675, as stated Sug. 320; *Lewin* v. *Guest*, 1 Rus. 325.

(*h*) *Ante*, p. 1195.

Chap. XVIII. Sect. 7.

but even in some cases to his defence to a vendor's action against him for specific performance. "When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title" (*i*). Accordingly a purchaser has been held to have lost his right to resist specific performance and his right to compensation or abatement (*k*) on the ground of the estate being of a different tenure (*l*), or subject to a liability affecting its beneficial enjoyment (*e.g.*, a right of sporting (*m*)), or of there being no title to a material part of it (*n*), or of a variation from the description in the particulars (*o*), where, at the time of entering into the contract, he had knowledge of the defect. And the rule has been once or twice extended to cases where the defect was patent (*p*), and where it might have been discovered by due diligence (*q*). So, too, he may lose his right if, after having become acquainted with it, he, without insisting thereon, proceed in the treaty (*r*); or, *à fortiori*, take possession (*s*). If, although insisting on the objection he take possession and endeavour to prevent the vendor from removing the defect, or even proceed in the treaty, he may be compelled to complete with an abatement (*t*): and when a railway company agreed to buy from a tenant for life an estate not within their special Act, and to procure an Act enabling him to convey the fee, which they failed to do, they were ordered to pay the

(*i*) *Per* Fry, J., *Re Gloag and Miller*, 23 Ch. D. 327.

(*k*) See *Horner* v. *Williams*, 1 J. & C. 274.

(*l*) *Fordyce* v. *Ford*, 4 Br. C. C. 494; *sed vide ante*, p. 1199.

(*m*) *Burnell* v. *Brown*, 1 J. & W. 168.

(*n*) See *Drewe* v. *Hanson*, 6 V. 679; *Martin* v. *Cotter*, 3 J. & L. 508.

(*o*) *Dyer* v. *Hargrave*, 10 V. 505, 508.

(*p*) *Oldfield* v. *Round*, 5 V. 508; *Davies* v. *Scar*, 7 Eq. 429; but, *quære*, see *Cato* v. *Thompson*, 9 Q. B. D. 617; Sug. 328.

(*q*) *James* v. *Lichfield*, 9 Eq. 51; *Carroll* v. *Keayes*, 8 I. R. Eq. 97; but these cases are of doubtful authority, see *ante*, p. 1196.

(*r*) 4 Br. C. C. 498; 6 V. 679; 10 V. 508; *Kingsley* v. *Young*, 17 V. 468; 18 V. 207; *Farebrother* v. *Gibson*, 1 D. & J. 602.

(*s*) 1 J. & W. 168; *Re Gloag and Miller*, 23 Ch. D. 320.

(*t*) *Calcraft* v. *Roebuck*, 1 V. 221.

entire purchase-money into Court upon his conveying his life estate (*u*).

Secus, if contract is expressly for good title.

"But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title" (*x*). Thus, where a vendor agreed to sell freeholds and to make "a good marketable title," and it appeared that the property was in fact subject to restrictive covenants of such a kind as were inconsistent with a marketable title, it was held, in an action by the purchaser to recover his deposit, that evidence that the purchaser knew of the defect was not admissible to vary the express contract, and that he was entitled to repayment of his deposit (*y*).

Immaterial defects in title not available as a defence to purchaser: limited right of common; small quit-rents or rents-charge;

Nor will a purchaser be allowed to resist specific performance, if the misdescription or defect is immaterial; as, *e.g.*, where an estate having been sold with what was represented in general terms as an unlimited right of common, the same proves to be a right of common only for sheep (*z*); or on the ground of the estate being subject to quit-rents or rent-charges of small amount (*a*), or of a slight misdescription of the

(*u*) *E. C. R. Co.* v. *Hawkes*, 5 H. L. C. 331.

(*x*) *Per* Fry, J., *Re Gloag and Miller*, 23 Ch. D. 327.

(*y*) *Cato* v. *Thompson*, 9 Q. B. D. 616.

(*z*) *Howland* v. *Norris*, 1 Cox, 59; but suppose the known object of the purchaser in buying had been to breed horned cattle or horses?

(*a*) *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Portman* v. *Mill*, 1 R. & M. 696; *Wood* v. *Bernal*, 19 V. 221; *Prendergast* v. *Eyre*, 2 Hog. 81, 94, and see Lord St. Leonards' remarks (V. & P. 313), disapproving of the decision in *Howland* v. *Norris*, *supra*, that a tithe rent-charge of 14*l. per annum* was a matter for compensation. As to a misstatement of the amount of ground rent on the sale of a lease, see *Pope* v. *Garland*, 4 Y. & C. 394. It may be remarked that, in the absence of any statement on the subject, the existence of a tithe-commutation rent-charge, or of tithe, must be presumed, and is no objection to the title, nor ground for claiming compensation; see Sug. 322.

vendor's interest on a sale of leasehold (*b*), or quit-rents (*c*), or a want of title to immaterial (*d*) portions of the estate. But in such cases, in the absence of a condition excluding compensation (*e*), the purchaser who is compelled to specifically perform the contract will be allowed an abatement for the defect.

tithe—when the freedom from tithe was no part of inducement to purchase;

So, where on the sale of 140 acres, the particulars stated that about 32 acres were tithe-free, and no evidence of exemption could be produced, Lord Eldon held that the right to the tithe of this part of the property could not be considered the inducement to the purchase; and decreed specific performance with an abatement (*f*). So, where the purchaser's agent having by letter agreed to purchase an estate, consisting of a house and nineteen acres of land, twelve of which were occupied by the house, offices, garden, and pleasure grounds—no mention being made of tithes—and on a more formal contract being prepared, the great tithes were inserted by the purchaser's solicitor, but without any increase of price or further treaty on the subject, and no title could be made to the tithes, Sir J. Leach held that the tithe could have formed no part of the inducement to the contract, and decreed specific performance with an abatement (the same having been offered by the vendor (*g*)).

Upon the last case, we may, however, remark, that the purchaser's agent appears to have actually entered by letter into a binding agreement to purchase subject to the tithe. It may also be observed that a liability to the render of

(*b*) See cases cited, *ante*, p. 1200 *et seq.*

(*c*) *Cuthbert* v. *Baker*, Sug. 313; and see *Browne* v. *Warnock*, 7 L. R. Ir. 3, where on the grant of a lease for ever the lessee was not allowed to resist specific performance on the ground of the property being subject to a fee-farm rent smaller than the rent to be reserved by the lease.

(*d*) *M'Queen* v. *Farquhar*, 11 V. 467; *Bowyer* v. *Bright*, 13 Pr. 698, 704; *ante*, p. 1200; *Stewart* v. *Marquis Conyngham*, 1 Ir. Ch. R. 573.

(*e*) See *ante*, p. 739 *et seq.*, where the effect of the condition is considered.

(*f*) *Binks* v. *Lord Rokeby*, 2 Sw. 222.

(*g*) *Smith* v. *Tolcher*, 4 Rus. 302.

tithe in kind constitutes an objection of a very different character from that which arises from the existence of a mere pecuniary liability of defined amount.

5th—Matters relating to consideration.

As to the 5th of the above heads.—The amount of the consideration to be paid may be a ground of defence by either party: and its inadequacy, or excess, will, of course, be determined with reference to matters as existing at the date of the contract, irrespectively of subsequent events (*h*).

Inadequacy of, when a vendor's defence.

Inadequacy of consideration is not, however, a defence available to the vendor of an estate in possession (*i*), unless it can be shown to have originated in fraud, surprise, or misrepresentation (whether wilful or not (*k*)), or improper concealment on the part of the purchaser (*l*), or in advantage taken of the distress of the vendor (*m*), or according to Lord Eldon, "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction" (*n*),—but this *dictum* would probably at the present day be hardly sustained in its full extent (*o*),—or unless the vendor be a trustee for sale (*p*): but even in the case of a trustee the Court will enforce against him an agreement to sell at a fair specified price, although a much larger sum may have been subsequently offered and accepted (*q*).

(*h*) See Sug. 273; *Poole* v. *Shergold*, 2 Br. C. C. 118, 119; *Coles* v. *Trecothick*, 9 V. 246; *ante*, p. 849.

(*i*) *Coles* v. *Trecothick*, 9 V. 246; *Burrowes* v. *Lock*, 10 V. 470; *Lowther* v. *Lowther*, 13 V. 103; *Borell* v. *Dann*, 2 Ha. 450.

(*k*) 1 Mad. 81; *Brealey* v. *Collins*, You. 317; and see next note.

(*l*) See cases cited in n. (*i*); also *White* v. *Damon*, 7 V. 30; *Western* v. *Russell*, 3 V. & B. 187; *Deane* v. *Rastron*, 1 Anst. 64; *Cadman* v. *Horner*, 18 V. 10; *Turner* v. *Harvey*, Jac. 169; *Wall* v. *Stubbs*, 1 Mad. 80; *Lukey* v. *O'Donnel*, 2 Sch. & L. 471; Sug. 274. See, too, *Falcke* v. *Gray*, 4 Dr. 651, where the Court refused specific performance of a contract to sell articles of *vertu*, on the ground that the purchaser was well acquainted with their value, while the vendor was wholly ignorant of it. But as to the duties of a purchaser with reference to the disclosure of advantages, see *ante*, p. 118 *et seq.*

(*m*) See *Martin* v. *Mitchell*, 2 J. & W. 413, 424; *et vide ante*, p. 841.

(*n*) 9 V. 246; and see Jac. 282.

(*o*) See Sug. 275; *Vigers* v. *Pike*, 8 Cl. & F. 645.

(*p*) *Goodwin* v. *Fielding*, 4 D. M. & G. 90.

(*q*) *S. C.*

Seal not a consideration.

In order to bring a contract within this equitable jurisdiction, there must be a consideration moving from the party who seeks specific performance (*r*). It is, therefore, immaterial for this purpose that the contract is under seal (*s*)—a circumstance which of itself imports consideration at Law,—if, in point of fact, there is no consideration at all (*t*).

On sale of a reversionary interest;

The distinction which for a long time existed between the purchase of an interest in possession, and of a reversionary interest, as respects mere inadequacy of price being an available defence for the vendor, has, as we have already seen (*u*), been removed by a modern Statute: which provides that no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, is for the future to be opened, or set aside, merely on the ground of undervalue (*x*). But, although inadequacy *per se* is no longer a sufficient ground for setting aside such a transaction, yet it is still an element of weight when taken into account with other circumstances (*y*); and, as in the case of an interest in possession, so, *à fortiori*, in the case of a reversionary interest, if the value is capable of estimation, and the price paid is so grossly inadequate as to be in itself evidence of fraud, this may be a sufficient defence to the purchaser's suit for specific performance. And a degree of inadequacy which would be insufficient to induce the Court to interfere and set aside an executed contract may be a valid defence in a suit for specific performance (*z*); especially if the contract has not been acted on, or attempted to be enforced, until the reversion has fallen into possession (*a*).

(*r*) *Ord* v. *Johnston*, 4 W. R. 37; *Walrond* v. *Walrond*, John. 18.

(*s*) See *Kekewich* v. *Manning*, 1 D. M. & G. 176, 188.

(*t*) It may, however, be doubted whether this is so, where a Court of Equity is exercising a concurrent, as distinguished from a non-concurrent, jurisdiction.

(*u*) *Ante*, p. 850 *et seq.*

(*x*) 31 V. c. 4.

(*y*) *Morris* v. *Earl of Aylesford*, 8 Ch. 484; and see the subject fully discussed, *ante*, p. 851 *et seq.*

(*z*) See *Ryle* v. *Swindells*, M'Cl. 519; *Playford* v. *Playford*, 4 Ha. 546; *Vigers* v. *Pike*, 8 C. & F. 645.

(*a*) *Playford* v. *Playford*, *suprà*.

sale by auction; sale of unascertained interest.

The fact of the sale being by auction, although not absolutely conclusive (*b*), much increases the difficulty of showing fraudulent inadequacy (*c*); and the fact of neither party being aware of the value of the estate at the time of the contract, seems to reduce the chance of succeeding in such a defence to a minimum; as in a case where a person sold, for what proved to be one-tenth only of its real value, the allotment to which he might be entitled under an expected Inclosure Award (*d*).

Consideration uncertain in amount—whether question of inadequacy thereby excluded.

It is laid down by Lord St. Leonards (*e*), that "if an uncertain consideration (as a life annuity) be given for an estate, and the contract be executory, Equity, it seems, will enter into the adequacy of the consideration." However, in a case (*f*) before Sir J. Wigram, V.-C., his Honor, in deciding that an inadequacy of seven or eight *per cent.* was insufficient as a defence, made observations indicating a doubt whether the older cases are to be regarded as authorities; they having been decided before the modern rule of treating inadequacy of price in contracts for the purchase of interests in possession as nothing more than an ingredient in evidence, was perfectly established: at any rate the circumstance of the contingency having turned out unfavourably to the vendor, is no ground of defence (*g*).

But although, in sales of property in consideration of a life annuity, the Court will decree specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy as to the fairness of the transaction, and require a clear case for specific performance under such circumstances (*h*).

(*b*) *Collet* v. *Woollaston*, 3 Br. C. C. 228.

(*c*) *White* v. *Damon*, 7 V. 30, 35; *Ex p. Latham*, *ib.* 35, n.; *Ord* v. *Noel*, 5 Mad. 440; *Borell* v. *Dann*, 2 Ha. 450.

(*d*) *Anon.*, cited 6 V. 24; and see *Knight* v. *Majoribanks*, 11 B. 322; 2 M. & G. 10.

(*e*) Sug. 273; *Pope* v. *Roots*, 1 Br. P. C. 370; *Mortimer* v. *Capper*, 1 Br. C. C. 156; *Jackson* v. *Lever*, 3 *ib.* 605.

(*f*) *Bower* v. *Cooper*, 2 Ha. 408.

(*g*) *Coles* v. *Trecothick*, 9 V. 246; *Kenney* v. *Wexham*, 6 Mad. 355.

(*h*) *Per* Lord Cottenham, in *Davies* v. *Cooper*, 5 M. & C. 279; and see *Valentine* v. *Dickenson*, 7 Jur. N. S. 857; *Baker* v. *Monk*, 10 *ib.* 691.

Failure of contingent consideration, in general no defence.

We have already seen that where the estate is sold for a contingent consideration, *e. g.*, a life annuity, the occurrence of the contingency which determines the consideration, is, in general, no defence to the purchaser's suit for specific performance (*i*).

Excessive purchase-money, when a purchaser's defence.

So, on the other hand, it has been held that the mere excessive (*k*) amount of the purchase-money (even although not attributable to fraud, misrepresentation, or concealment on the part of the vendor (*l*)), is a defence available to a purchaser (*m*): and Lord St. Leonards remarks that "few contracts can be enforced in Equity where the price is unreasonable, because contracts are not often strictly observed by either party: and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, Equity will not compel a performance *in specie*" (*n*).

Remarks on the doctrine.

It is, however, submitted, that such a defence by a purchaser deserves but little favour in a Court of Equity. There is a great difference between proofs of inadequacy and of excess of price. Inadequacy can be ascertained by reference to an extrinsic standard: *viz.*, the general market value of similar property; and there is no difficulty in comparing money with money: but the Court when required to pronounce a price excessive, is called upon to do what it has, apparently, no satisfactory means of doing: *viz.*, to determine what represents the money value, to a specified individual, of a specified estate. There is no extrinsic standard by which such value can be certainly determined. The mere fact of the contract having been entered into, knowingly and *bonâ fide*, may, it is conceived, be not unreasonably considered in itself to determine the real value of the estate,

(*i*) *Ante*, p. 288, *et vide* p. 1208.

(*k*) At the date of the contract; see *Poole* v. *Shergold*, 2 Br. C. C. 119.

(*l*) Which, if proved, would of course be a bar to specific performance; *Buxton* v. *Lister*, 3 Atk. 386; *Shirley* v. *Stratton*, 1 Br. C. C. 440.

(*m*) *Day* v. *Newman*, cited 10 V. 300; *Squire* v. *Baker*, 5 Vin. Ab. 549; *Abbott* v. *Sworder*, 4 De G. & S. 448.

(*n*) Sug. 273.

to the purchaser, at the time of the contract: whatever may be its value to third persons, and however much its value to the purchaser himself may have been altered by subsequent events (*o*).

Where the property is of uncertain value, as, *e.g.*, a mine.

Where the subject-matter of the contract is property of a speculative description, as, *e.g.*, a mine, which may or may not turn out profitable, the excessive amount of the purchase-money can seldom be an available defence to the purchaser (*p*): and it may be doubted whether the Court ought in any case, on the mere ground of the hardship of the bargain, to withhold relief from the vendor, if the circumstances, which are relied on as constituting the hardship, may be supposed to have been present to the mind of the defendant, at the time of his entering into the contract (*q*).

Purchase connected with loan.

Where a contract for purchase is complicated with, and forms a subordinate part of an agreement for, a loan to the purchaser, the latter has evidently a ground of defence which does not exist in ordinary cases (*r*).

Future consideration which cannot be enforced.

Where the consideration, moving from one party to the contract, consists of something to be done at a future time, and which the Court could not enforce, it will not decree specific performance against the other party (*s*).

When price fixed by valuation.

When the price is to be fixed by valuation or arbitration (*t*), the decision of the valuer, arbitrators, or umpire

(*o*) See *Adams* v. *Weare*, 1 Br. C. C. 567; *Cockell* v. *Taylor*, 15 B. 115; and cf. *Re Cape Breton Co.*, 29 Ch. D. 795, as to the market value of land.

(*p*) See *Haywood* v. *Cope*, 25 B. 140; where a contract to purchase a colliery, which proved to be worthless, for 1400*l.*, was forced on the purchaser; *Jefferys* v. *Fairs*, 4 Ch. D. 448; and see *Ridgway* v. *Sneyd*, Kay, 627.

(*q*) See *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 140; rev. 1 D. M. & G. 521; *E. C. R. Co.* v. *Hawkes*, *ib.* 754; 5 H. L. C. 331; and see judgment in *Ridgway* v. *Sneyd*, Kay, 635.

(*r*) *Cockell* v. *Taylor*, 15 B. 103.

(*s*) *Waring* v. *Manchester R. Co.*, 7 Ha. 492; *Blackett* v. *Bates*, 1 Ch. 117.

(*t*) As to ascertaining the price by arbitration, *vide ante*, p. 257.

Chap. XVIII. Sect. 7.

is generally conclusive on the question of value (*u*); and, in the absence of fraud or mistake, the Court will not relieve the purchaser on the mere ground that the price awarded is exorbitant (*x*), or the vendor on the ground that the price fixed is below the real value (*y*); but the misbehaviour, or mere negligence, of the valuers may afford grounds for the Court's refusal to enforce a contract (*z*) which is not regarded with much favour (*a*).

6th—Conduct of plaintiff after contract —when a defence.

As to the sixth of the above heads: comprising those grounds of defence which consist of matters relating to the conduct of the plaintiff subsequent to the contract: these may be conveniently treated of with reference to—

Release of, waiver of, or delay to enforce the contract.

1st. Cases, where the defence is, that the plaintiff (whether vendor or purchaser) has released, expressly waived, or improperly delayed to enforce, his rights under the contract.

Conduct of plaintiff.

2ndly. Cases, where the defence is, that the plaintiff has, by his conduct, in respect of the estate, or towards the other party, forfeited his rights under the contract.

Election of other remedy for breach of contract.

3rdly. Cases, where the defence is, that the plaintiff (whether the vendor or purchaser) has already chosen his remedy, and obtained satisfaction for the alleged breach of contract.

Release, waiver of, or delay to enforce the contract.

As to the first class of cases.—An actual release by deed, or a mere written waiver of the contract, will, of course, be a good defence in Equity: so will a mere parol waiver (*b*); "but such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and

(*u*) *Belchier* v. *Reynolds*, 2 Ken. pt. 2, 87, 91; *Emery* v. *Wase*, 5 V. 846; 8 V. 505, 517; Sug. 287.

(*x*) *Collier* v. *Mason*, 25 B. 200.

(*y*) *Weekes* v. *Gallard*, 18 W. R. 331.

(*z*) *S. C.*, *et vide ante*, p. 257; *Eads* v. *Williams*, 4 D. M. & G. 674.

(*a*) See 5 V. 849; *Parker* v. *Whitby*, T. & R. 366; *sed quære* whether that decision would be now followed.

(*b*) See *Pitcairn* v. *Ogbourne*, 2 V. sen. 376; *Morris* v. *Timmins*, 1 B. 411; *Dawson* v. *Yates*, ib. 301.

abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into" (*e*): and Lord St. Leonards remarks, that "the Court will look at the evidence with great jealousy" (*d*): and has held, judicially, that there must be as clear evidence of the waiver as of the existence of a contract (*e*); and the abandonment of the contract by one of several purchasers is no defence to a suit by his co-purchasers (*f*). Whether a parol waiver of a written contract was a sufficient defence at Law, was at one time considered doubtful; but now, as we have seen, mere equitable defences may be made available at Law (*g*).

What delay in filing a bill a defence.

We have already considered (*h*) how far time is in Equity of the essence of the contract: even, however, where a clear right has existed to enforce the contract, such right may be lost by delay in resorting to the Court; *e. g.*, an unexplained delay of seven years (*i*), in another of six years (*k*), and, in another case, of four years and eight months (*l*), and in another of three years (*m*), in filing the bill, has in itself been considered a sufficient answer to the suit; but in one case where possession was referable only to a contract for a lease, a delay of eighteen years was held to be no bar to a claim for specific performance (*n*). Where the bill was filed within fourteen months after a correspondence upon objections to the title had ceased, by the defendants returning no answer to the last letter which called for a distinct answer and

(*e*) *Per* Lord Lyndhurst, in *Robinson* v. *Page*, 3 Rus. 114, 119; and see *Price* v. *Dyer*, 17 V. 364.

(*d*) Sug. 168.

(*e*) *Carolan* v. *Brabazon*, 3 J. & L. 200; as to the alteration of an agreement by either party, *vide ante*, p. 274.

(*f*) *Hood* v. *Pimm*, 1 Coop. t. Cott. 279.

(*g*) As to effect at Law of a parol variation of a written contract, see *ante*, pp. 1090, 1096.

(*h*) *Ante*, p. 482 *et seq.*, and as to a mere option of purchase, *vide ante*, p. 240 *et seq.* And see generally, Fry, 477.

(*i*) *Milward* v. *Earl of Thanet*, 5 V. 720, n.; and see *S. E. R. Co.* v. *Knott*, 10 Ha. 122.

(*k*) *Harrington* v. *Wheeler*, 4 V. 686.

(*l*) *Alley* v. *Deschamps*, 13 V. 225.

(*m*) *Firth* v. *Greenwood*, 1 Jur. N. S. 866; and see *Lamare* v. *Dixon*, L. R. 6 H. L. 414.

(*n*) *Shepheard* v. *Walker*, 20 Eq. 659.

Chap. XVIII. Sect. 7.

threatened to file a bill, specific performance was decreed: the Court observing, that one could easily imagine that circumstances might have happened which would have made it peevish to file the bill immediately (*o*).

Less time allowed where there is a refusal to perform the contract.

Less time, however, will in general be allowed when the defendant has expressly refused, than when he merely tacitly neglects, to perform the agreement (*p*): in cases of the former description, periods of delay, varying from two years and a half (*q*) to twelve months (*r*), have been held sufficient to bar the relief (*s*); it does not, however, appear, that time will run against the plaintiff so long as the question of completion remains under discussion (*t*): or while he is substantially in possession of the benefit contracted for (*u*): as *e.g.*, where under a contract for a lease, possession was taken, and rent paid for several years (*x*). But in order that possession may have this effect, it must be possession under the contract, and the vendor must have known, or have been bound to know, that the purchaser claimed to be in possession under the contract (*y*).

Tendency of modern decisions as to delay.

The modern tendency of the Court, however, has been to require the plaintiff to be prompt in seeking his equitable

(*o*) *Marquis of Hertford* v. *Boore*, 5 V. 719.

(*p*) *Haywood* v. *Cope*, 25 B. 140, 150.

(*q*) *Stewart* v. *Smith*, 6 Ha. 222, n.; and see *Eads* v. *Williams*, 4 D. M. & G. 674.

(*r*) *Watson* v. *Reid*, 1 R. & M. 236.

(*s*) See *Heaphy* v. *Hill*, 2 S. & S. 29, about two years' delay; *Walker* v. *Jeffreys*, 1 Ha. 341, two years; *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213, nineteen months; *Moore* v. *Marrable*, 1 Ch. 217, five years.

(*t*) See *Southcomb* v. *Bishop of Exeter*, *supra*; and *Moxhay* v. *Inderwick*, 11 Jur. 837, where a correspondence upon the shape of the conveyance was carried on at considerable intervals for nearly four years; and see *Gee* v. *Pearse*, 2 De G. & S. 325, 346, where V.-C. K. B. remarked that a purchaser, not ready with the price according to the contract, ought to show a very special case for the interference of the Court against the vendor. See, too, *Colby* v. *Gadsden*, 34 B. 416.

(*u*) *Clarke* v. *Moore*, 1 J. & L. 723; and see *Hersey* v. *Giblett*, 18 B. 174. But delay will be material on the question of costs: see *Burke* v. *Smyth*, 3 J. & L. 193; *Fleetwood* v. *Green*, 15 V. 594; *King* v. *King*, 1 M. & K. 442.

(*x*) *Sharp* v. *Milligan*, 22 B. 606.

(*y*) *Mills* v. *Haywood*, 6 Ch. D. 196.

remedy (*z*): and relief will be more readily refused on the ground of delay if the contract were originally (*a*), or have by subsequent events become (*b*), a hard one: or if he have acted vexatiously (*c*), or have entered into the contract without present means of performing it (*d*): or where the matter has not merely slept, but the defendant has actually refused to complete (*e*); or where the plaintiff has acted in reference to the estate in a manner inconsistent with the existence of the contract (*f*); or where the property is of fluctuating value (*g*). Where the purchase was to be completed on the 24th of April, with a condition allowing a resale if the conditions were not adhered to, and the vendor agreed at the purchaser's request not to put the condition into force for six weeks after the date fixed for completion, and on the 20th of June agreed to a further extension of time for a month, the purchaser's action for specific performance brought on the 25th of July was dismissed, and his deposit forfeited (*h*). In the case of an agreement for a lease, it could be only under very special circumstances, if at all, that the Court would enforce specific performance after the stipulated term had expired (*i*).

Waste of estate, when a defence;

As to the second class of cases.—We have already seen that any act by the vendor—*e.g.*, the felling of ornamental timber —which prevents his giving to the purchaser that which was substantially the subject-matter of the contract, will be a defence to his action for specific performance (*k*); but that he may, in due course of husbandry, cut coppice, and get in crops,

(*z*) *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213; *Nunn* v. *Truscott*, 3 De G. & S. 304; *Parkin* v. *Thorold*, 16 B. 59, 62; *Mills* v. *Haywood*, 6 Ch. D. 196.

(*a*) *Ante*, p. 1173.

(*b*) See *Alley* v. *Deschamps*, 13 V. 225, 230.

(*c*) See *Spurrier* v. *Hancock*, 4 V. 667; *Pope* v. *Simpson*, 5 V. 145.

(*d*) See *Gee* v. *Pearse*, 2 De G. & S. 346.

(*e*) *Guest* v. *Homfray*, 5 V. 818.

(*f*) *Chambers* v. *Betty*, Beat. 488.

(*g*) *Pollard* v. *Clayton*, 1 K. & J. 462; *Lloyd* v. *Wilkes*, 2 Eq. R. 1081; *Macbryde* v. *Weekes*, 22 B. 533; *Haywood* v. *Cope*, 25 B. 140; *Alloway* v. *Braine*, 26 B. 575; *Mills* v. *Haywood*, 6 Ch. D. 202.

(*h*) *Howe* v. *Smith*, 27 Ch. D. 89.

(*i*) See *Nesbitt* v. *Meyer*, 1 Sw. 223; *Walters* v. *Northern Coal Co.*, 5 D. M. & G. 629; *De Brassac* v. *Martyn*, 11 W. R. 1020.

(*k*) *Ante*, p. 286.

accounting to the purchaser for the net profits received subsequently to the time at which according to the contract they are to belong to the purchaser in the event of the sale being completed (*l*).

or ejectment of purchaser rightfully in possession.

So, the circumstance of the vendor having turned the purchaser out of possession (which he was entitled to under the contract, and had been allowed to take), has been held a sufficient defence to the vendor's suit (*m*).

In the case just cited the purchaser had stipulated for immediate possession, which was not to be deemed an acceptance of the title: and the decision has been held not to apply to a case where a purchaser is, under the common condition, let into possession on the day fixed for completion, but pays no portion of his purchase-money, nor any interest upon it: under such circumstances a vendor may resume possession—as, *e.g.*, by giving the tenants notice not to pay rent to the purchaser—without showing an intention to abandon his contract, or forfeiting his right to enforce it (*n*).

Or inability of vendor to perform a material stipulation under the contract.

So, if the plaintiff refuse or be unable to perform a material stipulation under the contract (*o*)—as if it had been agreed that the vendor should become tenant of the estate for a term of fourteen years at a specified rent, and he become insolvent (*p*); or that he should procure the unqualified withdrawal of a restrictive covenant and he fail to do so (*q*)—this may be a reason for refusing specific performance against the purchaser; but this defence was overruled when the agreement was for merely a yearly tenancy, and especially as the vendor's embarrassments were known to the purchaser (*r*).

(*l*) *Ibid.*

(*m*) *Knatchbull* v. *Grueber*, 3 Mer. 144.

(*n*) *Colby* v. *Gadsden*, 34 B. 416.

(*o*) See *Hunter* v. *Daniel*, 4 Ha. 433; *Counter* v. *Macpherson*, 5 Mo. P. C. 83. And see, as to the rule that "he who comes for Equity must do Equity," *Hanson* v. *Keating*, 4 Ha. 1; *Gibson* v. *Goldsmid*, 5 D. M. & G. 757.

(*p*) See 1 Y. & C. 228; *Neale* v. *Mackenzie*, 1 Ke. 473.

(*q*) *Reeves* v. *Greenwich Tanning Co.*, 2 H. & M. 54.

(*r*) *Lord* v. *Stephens*, 1 Y. & C. 222, 228; *sed qu.*, whether the length of the tenancy is material; see Sug. 297.

Or act of forfeiture by purchaser.

So, where a party in possession under an agreement for a lease, has done acts which would, had the lease been actually granted, have clearly entitled the lessor to re-enter for a forfeiture, specific performance at the suit of the former will be refused (*s*). And where there is a conflict of evidence as to whether there has been such a breach as will create a forfeiture, or as to whether it has been waived by receipt of subsequent rent, or otherwise, the Court, in decreeing specific performance, will direct the lease to bear date prior to the alleged breach, so as to give the lessor the opportunity of proceeding by ejectment or action of covenant: the lessee being put upon an undertaking to admit, in any such action, that the lease was executed on the day of its date (*t*).

Action brought and damages recovered.

As to the third class of cases.—If the plaintiff has brought an action and has recovered damages for breach of contract, he will be held to have elected his remedy (*u*) : but it must be remembered that he may now apply for alternative remedies in the same action.

Section 8.

As to the proceedings in the action, &c.

(8.) *As to the proceedings in the action;*—viz., *payment of purchase-money into Court;—reference of title and proceedings thereon;—decree for plaintiff;—conveyance;—decree dismissing bill.*

Purchaser in possession when ordered to pay purchase-money into Court.

Where the purchaser is in possession of the estate, he may (*x*), even before he has delivered his defence (*y*), be ordered upon motion to pay the purchase-money into Court. This relief,

(*s*) *Gregory* v. *Wilson*, 9 Ha. 683; *Nunn* v. *Truscott*, 3 De G. & S. 304; *Lewis* v. *Bond*, 18 B. 85; and see *Rogers* v. *Tudor*, 6 Jur. N. S. 692, and cases there cited.

(*t*) *Pain* v. *Coombs*, 3 S. & G. 449; 1 D. & J. 34; *Lillie* v. *Legh*, 3 D. & J. 204; *Rankin* v. *Lay*, 2 D. F. & J. 65; *Rogers* v. *Tudor*, 6 Jur. N. S. 692; *Poyntz* v. *Fortune*, 27 B. 393; *Morley* v. *Clavering*, 29 B. 87. As to the lessee not being liable for breaches committed between the date of the lease and the time of its execution, see *Shaw* v. *Kay*, 1 Ex. 412; *Jervis* v. *Tomlinson*, 1 H. & N. 206.

(*u*) See *Sainter* v. *Ferguson*, 1 M. & G. 286; *Orme* v. *Broughton*, 10 Bing. 533, 538.

(*x*) *Burroughs* v. *Oakley*, 1 Mer. 52.

(*y*) *Dixon* v. *Astley*, 1 Mer. 133; *Blackburn* v. *Stace*, 6 Mad. 69.

Chap. XVIII. Sect. 8.

it seems, will be afforded, when "the possession by the purchaser, without payment of the purchase-money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, whereby the value of the property is deteriorated; for example, cutting timber, or selling the estate" (*z*), or dealing with it in a manner contrary to former usage, or to the usual course of husbandry (*a*); so, in one case, where the purchaser in possession improved the property, but changed the tenants (*b*). In such cases the Court will not give the purchaser the option of going out of possession, instead of paying the money into Court; as where a railway company, without payment of the purchase-money, have entered into possession, and used the land taken, either by agreement, or under their powers of compulsory purchase, for the purposes of their undertaking (*c*). So, where the defendant entered into possession of a coal mine under an agreement for a lease at a certain royalty and worked the mine for five years, but refused to execute a lease at the royalty fixed by the agreement, the Court declined to give him the option of going out of possession, and ordered him at once to pay into Court the amount of the royalty during his possession at the rate alleged by him to be the true one (*d*).

But, according to Lord St. Leonards, this relief will not be afforded "where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate" (*e*). This last proposition must, however, be taken subject to the following qualifications, *viz.*, that where a purchaser has been *long* in possession, *e.g.*, three

(*z*) Sug. 230; 2 Dan. C. P. 1738 *et seq.*; *Dixon* v. *Astley*, *suprà*; *Bonner* v. *Johnston*, 1 Mer. 366; *Cutler* v. *Simons*, 2 Mer. 103, 106; *Bramley* v. *Teal*, 3 Mad. 219; but see *Gell* v. *Watson*, *ib.* 225.

(*a*) *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116.

(*b*) *Bramley* v. *Teal*, 3 Mad. 219.

(*c*) See *Pope* v. *G. E. R. Co.*, 3 Eq. 171; *Cosens* v. *Bognor R. Co.*, 1 Ch. 594.

(*d*) *Lewis* v. *James*, 32 Ch. D. 326.

(*e*) Sug. 231; *Gibson* v. *Clarke*, 1 V. & B. 500; *Clarke* v. *Elliott*, 1 Mad. 607; *Fox* v. *Birch*, 1 Mer. 105.

Purchaser allowed to elect,—either to pay or vacate possession.

years (*f*), he will generally,—though, as we have seen, he will not always have the option,—be required either to give up (*g*) possession, or to pay in his purchase-money within a short date, *e.g.*, two months (*h*); and this was ordered in a case where, according to the agreement, the greater part of the purchase-money was to remain on mortgage of the estate for twelve months after the conveyance (*i*); a similar order was made, in one case by Lord Langdale, although the purchaser had taken possession for the benefit of the vendor, and expressly without prejudice to any objection he might afterwards make to the title, and had retained possession for about a year and a half: and although the above proposition of Lord St. Leonards was cited in argument, his Lordship seemed to consider that, as a general rule, a purchaser could not be allowed to retain both the estate and the money (*k*); but such rule must evidently be subject to an exception when his possession can be referred to a title prior to the contract (*l*). Where the *corpus* of the property is being enjoyed, as in the case of mines (*m*), or leaseholds, this furnishes an additional argument against the purchaser.

Where contract provides for the delay, no order made.

In one case, where a railway company was let into possession under the contract, which provided that if from any cause whatever, other than the vendor's default, the

(*f*) *Tindal* v. *Cobham*, 2 M. & K. 385; *Younge* v. *Duncombe*, You. 275.

(*g*) *Clarke* v. *Wilson*, 15 V. 317; *Morgan* v. *Shaw*, 2 Mer. 138; but see *Bradshaw* v. *Bradshaw*, *ib.* 492; and *Crutchley* v. *Jerningham*, *ib.* 502, where payment was required; and *Lewis* v. *James*, *suprà*. Where possession, having been taken by an agent in mistake, had been restored, the motion for payment was refused; *Tomlinson* v. *Manchester and Birmingham R. Co.*, 2 R. C. 104.

(*h*) *Younge* v. *Duncombe*, You. 275; as to what acts of improper ownership will deprive the purchaser of the option of giving up possession, see *Pope* v. *G. E. R. Co.*, 3 Eq. 171.

(*i*) *Younge* v. *Duncombe*, *suprà*; *sed qu.* whether the purchaser, if the point had been pressed on the Court, would not have been allowed to give his bond or covenant for the amount agreed to be left on mortgage; and see the judgment in *Clarke* v. *Elliott*, 1 Mad. 606, 607.

(*k*) *Fowler* v. *Ward*, 6 Jur. 547; *Wood* v. *Edwards*, W. N. (1876), 15; and see *Adams* v. *Heathcote*, 10 Jur. 301; *Gibson* v. *Clarke*, 1 V. & B. 500; *Smith* v. *Lloyd*, 1 Mad. 83; *Boothby* v. *Walker*, *ib.* 197; and *Wickham* v. *Evered*, 4 Mad. 53.

(*l*) *Bonner* v. *Johnston*, 1 Mer. 366; *Freebody* v. *Perry*, G. Coop. 91.

(*m*) *Buck* v. *Lodge*, 18 V. 450.

purchase should not be completed in six months, the purchase-money should carry interest at an increased rate, the Court, upon the ground that the parties themselves had specially provided for the delay, refused to order payment of the purchase-money into Court, notwithstanding that three years had elapsed since the date of the contract (*n*).

Quantity of land taken when uncertain, no order made.

In a case where, according to the bill, there was a parol agreement for sale at 80*l.* per acre, with possession given of five acres, but, according to the answer, only of three acres, a motion that the purchaser should pay in the purchase-money for the five acres, or else for the three acres, was refused (*o*).

Under special circumstances, receiver appointed.

In another case, where there was a sort of mixed possession, the great proportion of it being in the purchaser, but the vendor not being entirely out of possession, and part of the purchase-money was paid, but the purchaser was in a state of insolvency, and admitted his intention to convey the estate to trustees for the benefit of his creditors, the Court appointed a receiver (*p*).

Where a railway company has entered into possession before payment of the purchase-money.

In one case, where a railway company, by agreement with the landowner, entered into possession, and constructed part of their line over the property, but made default in payment of a bond which they had given for the purchase-money, the Court of Appeal refused, on interlocutory motion, to restrain the company from continuing in possession until the purchase-money was paid; but intimated that the landowner might be entitled to have a receiver appointed, or the purchase-money paid into Court (*q*). In a later case, the

(*n*) *Pryse* v. *Cambrian R. Co.*, 2 Ch. 444; and compare *Pell* v. *Northampton R. Co.*, *ib.* 100; and see *Capps* v. *Norwich, &c. R. Co.*, 9 Jur. N. S. 635.

(*o*) *Benson* v. *Glastonbury Canal Co.*, 1 Coop. t. Cott. 350.

(*p*) *Hall* v. *Jenkinson*, 2 V. & B. 125, 126.

(*q*) *Pell* v. *Northampton, &c. R. Co.*, 2 Ch. 100. See, too, *Munns* v. *Isle of Wight R. Co.*, 5 Ch. 414; *Lycett* v. *Stafford and Uttoxeter R. Co.*, 13 Eq. 261; and see *Latimer* v. *Aylesbury R. Co.*, 9 Ch. D. 385, where on the motion the appointment of a receiver was also refused.

Court, in ordering payment of the purchase-money into Court by the railway company, gave leave to the landowner, in the event of its not being so paid, to apply for an injunction, or for the appointment of a receiver (*r*); and it appears to be now well settled that the vendor of land to a railway company has all the remedies of an ordinary vendor for enforcing his lien for unpaid purchase-money, even though the line may have been opened for public traffic (*s*); but until the lien is enforced by sale, the Court will not, as a rule, restrain the company from running trains over the land (*t*). Where, however, an attempt to sell has proved abortive (*u*), or the Court is convinced that the land is either unsaleable or will not realize the sum owing from the company (*x*), an order will be made for payment by the company into Court, and, in default of such payment, an injunction will be granted to restrain the company from running trains over the land, and from continuing in possession (*y*). The lien does not extend to the landowner's costs of the arbitration by which the price was ascertained (*z*).

Rights of debenture holder.

We may, in connection with the present subject, remark that the holder of a railway debenture has not a specific charge on the superfluous lands of the company, or on the proceeds of sale thereof, which entitles him to have a receiver appointed (*a*).

Or occupation rent set on estate.

Sometimes an occupation rent is set on the estate, deducting interest at 5*l. per cent.* on the deposit (*b*): where a yearly tenant in possession filed a bill claiming an option to purchase, the Court would only restrain an ejectment by the

(*r*) *Bishop of Winchester* v. *Mid-Hants R. Co.*, 5 Eq. 17.

(*s*) *Wing* v. *Tottenham R. Co.*, 3 Ch. 740; *Walker* v. *Ware R. Co.*, 1 Eq. 195.

(*t*) *Munns* v. *Isle of Wight R. Co.*, *Lycett* v. *Stafford and Uttoxeter R. Co.*, *supra*.

(*u*) *Williams* v. *Aylesbury R. Co.*, 21 W. R. 819.

(*x*) *Allgood* v. *Merrybent R. Co.*, 33 Ch. D. 571.

(*y*) See for form of order, Seton, 1331.

(*z*) *Earl Ferrers* v. *Stafford and Uttoxeter R. Co.*, 13 Eq. 524.

(*a*) *Gardner* v. *L. C. and D. R. Co.*, 2 Ch. 201.

(*b*) *Smith* v. *Jackson*, 1 Mad. 618.

landlord on the terms of the tenant continuing to pay the rent, without prejudice (*c*).

Public body, unless proceeding under its statutory powers, is treated as ordinary purchaser.

It must be borne in mind that a public body which has statutory powers of purchase must comply strictly with the statutory conditions, or it will be in no better position than a private individual. Thus, where the Metropolitan Board of Works, instead of proceeding under the Lands Clauses Consolidation Act, contracted for the purchase of property, and then refused to complete without abatement of the price agreed upon, the Court of Appeal refused to give them possession before completion, treating the case as an ordinary contract between vendor and purchaser (*d*).

Injunction against waste by purchaser in possession.

Against exercise by vendor of his legal rights.

A purchaser in possession, even under the contract, who has not paid his purchase-money, may be restrained on motion from waste or destruction of the property; *e.g.*, from felling timber (*e*): so the vendor may, under special circumstances, as where he has given up possession and received part of the purchase-money (*f*), be restrained from conveying away the legal estate, or contracting to re-sell the property (*g*): but it has been said that, in general, in a suit by the purchaser for specific performance he is not entitled to restrain the owner from dealing with his property, as a different doctrine would operate to control the rights of ownership, although the agreement were such as could not be performed (*h*). However, in a modern case, the authority of this *dictum* as a general statement of the law was questioned; and the rule of the Court was stated to be, that if there is a clear valid contract for sale, the Court will not permit the vendor afterwards to transfer the legal estate to

(*c*) *Pyke* v. *Northwood*, 1 B. 152.

(*d*) *Bygrave* v. *Metr. Board*, 33 Ch. D. 147.

(*e*) *Crockford* v. *Alexander*, 15 V. 138; *vide ante*, pp. 289, 501 *et seq.*

(*f*) *Spiller* v. *Spiller*, 3 Sw. 556.

(*g*) *Echliff* v. *Baldwin*, 16 V. 267; *Curtis* v. *Marquis of Buckingham*, 3 V. & B. 168. See *Shrewsbury and Chester R. Co.* v. *Shrewsbury and Birmingham R. Co.*, 15 Jur. 548.

(*h*) *Per* Lord Eldon, *Spiller* v. *Spiller*, *supra*; *Turner* v. *Wight*, 4 B. 40; see *Haigh* v. *Jagger*, 2 Coll. 231.

a third person, even although such third person may be affected with notice of the *lis pendens;* but where the validity of the contract is open to question, or the issue of a suit for specific performance of it is doubtful, it then becomes a question of comparative convenience or inconvenience, whether the vendor shall, or shall not, be allowed to transfer the estate to a third party (*i*). After the relation of vendor and purchaser has determined by the execution of the conveyance, the Court has no jurisdiction, at the suit of the purchaser, to restrain the vendor from interfering with the property, as, *e.g.*, by vexatiously distraining on the tenants (*k*).

On sale of a next presentation.

In a suit to enforce an agreement for sale of a next presentation, the vendor may be restrained from presenting any clerk not nominated by the purchaser; and the injunction has even been extended so as to restrain the Bishop from presenting, except on the like nomination, or from collating in the event of a lapse pending the suit (*l*).

Reference of title on motion before hearing.

Where the question of title is the only one in dispute, the Court, in order to save time (*m*), may, at the instance of either party, direct a reference (*n*) of the title upon motion before the hearing, or even, at the instance of the plaintiff (*o*), before answer (*p*), unless the defendant's counsel can state that other matters are in question (*q*); and this, although the only question of title is one which might be conveniently determined at the hearing without a reference (*r*); or although specific performance be resisted upon the ground that time was of the essence of the contract, and that a good

Unless contract resisted on grounds other than of title.

(*i*) *Per* Turner, L. J., *Hadley* v. *London Bank of Scotland*, 3 D. J. & S. 63, 70, 71.

(*k*) *Best* v. *Drake*, 11 Ha. 369.

(*l*) *Nicholson* v. *Knapp*, 9 Si. 326; see *Greenslade* v. *Dare*, 17 B. 502.

(*m*) *Dorin* v. *Harvey*, 15 Si. 49.

(*n*) The reference is now to the Judge at Chambers; see as to the practice, Dan. C. P. 1374, 1376; Fry, 571 *et seq.*

(*o*) *Curling* v. *Flight*, 5 Ha. 247.

(*p*) *Balmanno* v. *Lumley*, 1 V. & B. 224; *Bennett* v. *Rees*, 1 Ke. 408.

(*q*) *Matthews* v. *Dana*, 3 Mad. 470.

(*r*) *Curling* v. *Flight*, 5 Ha. 248.

Chap. XVIII. Sect. 8.

title was not shown within the specified period (*s*): but in a case where the purchaser in his answer relied on two grounds of defence, *viz.*, that the vendor could not make a good title, and that, even if he could, he had not done so within the time specified, his motion for a reference as to title, without waiving his objection as to time, was dismissed, but without costs, and Turner, L. J., expressed a doubt whether a defendant could ever move before the hearing (*t*). It has been laid down in the Court of Appeal (*u*), that "in almost every case it is the duty of a vendor, where there is no question but that of title between him and the purchaser to avail himself of the opportunity of having an immediate reference as to title, and so saving the multiplication of unnecessary costs." Such an order, if obtained by the plaintiff before answer, will not preclude the defendant from making any defence which he thinks proper (*x*).

Present practice is the same.

The cases cited above occurred prior to the Judicature Acts; but under the new practice (*y*) the power of the Court to order a reference or inquiry at any stage of proceedings is at least as large as it was under the old practice; and it is conceived that the statements in the preceding paragraph are *mutatis mutandis* applicable to the present procedure. Thus, where in an action for specific performance the defendant put in a defence which "did not admit that he had accepted the title of the plaintiff, or had waived all objections thereto," but did not deny specifically the facts alleged by the plaintiff as entitling him to judgment, the Court, on a motion for judgment on the admissions in the pleadings, made the ordinary decree for specific performance, even though issue had been joined, and notice of trial given (*z*).

(*s*) *Foxlowe* v. *Amcotts*, 3 B. 496.

(*t*) *Reed* v. *Don Pedro Gold Mining Co.*, 3 D. J. & S. 593, 595; and see Dan. C. P. 1372.

(*u*) *Phillipson* v. *Gibbon*, 6 Ch. 428, 435; it is conceived that the rule must be confined to cases where the vendor is plaintiff.

(*x*) *Emery* v. *Pickering*, 13 Si. 583.

(*y*) R. S. C. 1883, O. XXXIII. r. 2; O. XXXII. r. 6; and see Ann. Prac.; Wilson, 270, 272.

(*z*) *Brown* v. *Pearson*, 21 Ch. D. 716. The practice as to verifying the statement of claim by an affidavit, where in an action for specific

Frivolous defence.

It is stated by Lord St. Leonards, that "in every case, where the answer, upon reasons solid or frivolous, insists that the agreement ought not to be executed, the Court must first dispose of the question raised" (*a*); and, according to some authorities, such question could only be disposed of upon the hearing (*b*). However, in a case (*c*) where the question arose whether a defence, even although frivolous, is necessarily an answer to the motion, Wigram, V.-C., observed, that such had "not been the practice, at least since the case of *Withy* v. *Cottle* (*d*). Since the decision in that case, the practice of the Court has been to look into the answer for the purpose of seeing whether that which the defendant calls an objection to performing the contract is an open question. A point raised by the answer as an objection other than to title, may be so surrounded and governed by authority, as, in fact, to create no difficulty, and, to be in effect, frivolous; and in that case the Court does not yield to the objection by refusing the reference": but in a later case the Lords Justices (affirming the decision of Stuart, V.-C.) (*e*), in refusing the purchaser's motion for a reference as to title, did not entertain the question whether his other defence to the vendor's suit, *viz.*, that the title, even if a good one, had not been deduced by the time specified, was frivolous or not, on the ground that, if it was a good defence, the vendor's suit would be dismissed, while, if it were not, the form and extent of the reference would depend in some measure upon whether the purchaser's notice to rescind was reasonable or not.

May be disposed of on motion—*semble*.

performance judgment is applied for on motion in default of defence, is not uniform. In *Holmes* v. *Shaw*, 52 L. T. 797, Kay, J., required an affidavit; while Stirling, J., does not require or allow the costs of one; *Bagley* v. *Searle*, 35 W. R. 404; and this latter would seem to be the more correct practice, when none of the defendants are under disability.

(*a*) Sug. 352; and see cases there cited.

(*b*) See *Blyth* v. *Elmhirst*, 1 V. & B. 1; *Withy* v. *Cottle*, 1 S. & S. 174; *Gordon* v. *Ball*, *ib.* 178.

(*c*) *Wood* v. *Machu*, 5 Ha. 161; and see *Boyes* v. *Liddell*, 1 Y. & C. C. C. 133.

(*d*) T. & R. 78.

(*e*) *Reed* v. *Don Pedro Gold Mining Co.*, 3 D. J. & S. 593.

Question of title concluded by decree.

A question of title may, in substance, be concluded by the decree, affirming the validity of the contract; and, if so, it cannot be gone into upon the reference (*f*). But, in general, the question whether a good title can be made or not will not be decided by the Court, until after an inquiry has been directed. And the Court will not, as a rule, stay the inquiries ordered by the judgment, pending an appeal (*g*).

Practice under V. & P. summons.

The Vendor and Purchaser Act, 1874, has greatly simplified and cheapened the mode of procedure. Whatever could be done in chambers, upon a reference as to title under a decree where the contract was established, can now be done on a summons under sect. 9 of the Act, which, in effect, enables the parties to dispense with pleadings, and at once to put themselves in the position in which they would have stood, and with all the rights which they would have had, under the old form of decree (*i*). A purchaser, who has availed himself of this procedure and has on a summons under this section obtained an order, must proceed in chambers to carry it into effect, and not bring an action for specific performance for that purpose (*k*). But, as the order cannot, either expressly or by implication, deal with the validity of the contract itself, specific performance of the *contract* can only be obtained in an action.

No contract.

If the contract is pronounced not to be binding, by reason of the non-assent of parties whose concurrence was by its terms made essential to its validity, no reference will be directed as to the title, or as to whether such concurrence can be procured (*l*).

Objections to title, what are, for purposes of motion.

It was also decided by Wigram, V.-C., that for the purposes of such a motion, objections to the title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; *e. g.*, objections depending on the application of conditions of sale (the propriety or validity of the conditions themselves not being

(*f*) *Wilkinson* v. *Hartley*, 15 B. 183.
(*g*) *Hyam* v. *Terry*, 29 W. R. 32.
(*i*) *Re Burroughs, Lynn, and Sexton*, 5 Ch. D. 601, 604.
(*k*) *Thompson* v. *Ringer*, 29 W. R. 520.
(*l*) *Clay* v. *Rufford*, 5 De G. & S. 768.

questioned) (*m*); or on the liability of the vendor to furnish any particular evidence of title, or on his ability to furnish such evidence (*n*).

Order refused on ground of delay;

And since the object of granting the reference before the hearing is merely to save time, the Court in one case refused such a motion by a plaintiff vendor, who, for eleven months after answer, had taken no proceedings in the suit (*o*).

or waiver of title;

And, of course, no reference will be directed even at the hearing, if the Court be satisfied that the purchaser has intentionally waived his right to investigate the title (*p*): and it has been refused on the mere ground of long possession and vexatious objections on the part of the purchaser (*q*). So, an admission by the purchaser in his answer to the suit, that at the date of the contract the vendor was "entitled" to the subject-matter, has been held to be an acceptance of the title which precludes him from insisting on a reference (*r*).

acceptance of conditional title—effect of.

We have already seen that a purchaser who accepts a title, conditionally on the vendor complying with a specified requisition, which is not complied with, is entitled to a general reference of title (*s*).

Order of reference—subject-matter and form of.

The reference, when directed, should be complete and extend to all that regards the title, but not to other matters (*t*). The order is, to inquire whether the vendor can, at the time of the reference (not at the date of the contract) show a good title (*u*); and it should contain a direction that if it shall be found that a good title can be shown, then it shall be ascertained when it was first shown; and so the order is now always made; unless, for

(*m*) *Wood* v. *Machu*, 5 Ha. 158.

(*n*) *Curling* v. *Flight*, 5 Ha. 248.

(*o*) *Dorin* v. *Harvey*, 15 Si. 49.

(*p*) *Fleetwood* v. *Green*, 15 V. 594; *Margravine of Anspach* v. *Noel*, 1 Mad. 310; *Burroughs* v. *Oakley*, 3 Sw. 168, and earlier cases cited in argument; *Blacklow* v. *Laws*, 2 Ha. 47; *Southby* v. *Hutt*, 2 M. & C. 207; *Bown* v. *Stenson*, 24 B. 631.

(*q*) *Hall* v. *Laver*, 3 Y. & C. 191; *King* v. *King*, 1 M. & K. 442.

(*r*) *Phipps* v. *Child*, 3 Dr. 709.

(*s*) *Ante*, p. 495; *Lesturgeon* v. *Martin*, 3 M. & K. 255.

(*t*) *Jennings* v. *Hopton*, 1 Mad. 212; *Bennett* v. *Rees*, 1 Ke. 405.

(*u*) *Langford* v. *Pitt*, 2 P. W. 630.

some reason stated at the time, and by the express direction of the Court, the inquiry as to the time when a good title was first shown be omitted (*x*); or unless the contract itself be disputed in the cause (*y*). The order may be to inquire whether a good title can be shown "subject to the conditions of sale" (*z*): but even without this qualification the inquiry will be restricted in Chambers to the deduction of a good title, having regard to the terms of the contract (*a*). So, also, an inquiry will, if desired, be directed, whether the defendant ever, and when, required of the plaintiff any, and what, evidence in proof of a point material to the title (*b*); but not as to a matter which has no reference to the title; *e.g.*, the sufficiency of the abstract delivered (*c*).

Procedure on reference.

The reference of title is now to the Judge in Chambers. Upon the summons to proceed, the chief clerk usually directs a statement to be brought into Chambers showing the points in dispute between the parties, and refers such statement, together with the abstract of title, requisitions, replies thereto, and any other necessary documents, to one of the Conveyancing Counsel of the Court for his opinion. The opinion having been obtained, a further appointment is taken before the chief clerk, when any point raised by the opinion is discussed and, if necessary, adjourned for argument before the Judge, either at Chambers or in Court. The ultimate decision of the Court, either for or against the title, is embodied in the chief clerk's certificate, which becomes binding on the parties, unless within eight days an application be made to discharge or vary it (*d*).

Course of proceeding on reference.

Pending the reference, the defendant cannot dismiss the action for want of prosecution (*e*).

(*x*) *Per* Lord Langdale in *Bennett* v. *Rees*, 1 Ke. 409; Seton, 1297.

(*y*) See *Gibbins* v. *N. E. M. Asylum*, 11 B. 1, 5; and *Keyse* v. *Haydon*, 9 Ha. App. lviii.; *Potter* v. *Crossley*, 5 W. R. 35; *Parr* v. *Lovegrove*, 4 Dr. 170; and for forms of orders, see Seton, 1297 *et seq.*

(*z*) *Wood* v. *Machu*, 5 Ha. 158, 162.

(*a*) *Re Banister*, 12 Ch. D. 131; *Smith* v. *Robinson*, 13 Ch. D. 148; and see *McMurray* v. *Spicer*, 5 Eq. 527; *Upperton* v. *Nickolson*, 6 Ch. 436.

(*b*) 1 Ke. 408.

(*c*) *Ibid.*

(*d*) R. S. C. 1883, O. LV. r. 70.

(*e*) *Collins* v. *Greaves*, 5 Ha. 596; *Gregory* v. *Spencer*, 11 B. 143.

A purchaser will not be compelled to take a doubtful title (*g*).

What is meant by a *doubtful* title.

It not infrequently happens that the title shown, although the Court can pronounce it to be either good or bad, is not of such a nature that the Court is satisfied that in different proceedings, probably between different parties, in which the decision will not operate as an estoppel, that title may not be held to be insufficient. In such a case the title becomes what is called *doubtful*, notwithstanding the fact that the Court which adjudicates upon it may have no doubt about it (*h*). There then arises a question of the greatest difficulty in the present state of the authorities: *viz.*, what is the kind of title which the Court regards as too doubtful to be forced upon a purchaser?

Sketch of the practice as to doubtful titles.

The old practice of the Court of Chancery has been stated by Lord Eldon (*i*) to have been, to decide the dry question whether the title was good or not, and to leave the purchaser to appeal, if he were dissatisfied with the decision. Lord Eldon, however, cites no authority for this statement, nor have we been able to find any; and certainly as early as 1723, Jekyll, M. R., refused to compel a purchaser to take a title which depended on a question as to what passed under a certain devise (*k*); and Grant, M. R., states (*l*) that this practice was repeatedly followed by Lord Hardwicke. At any rate, it was so well established by Lord Eldon's time that, though strongly disapproving of the change from what he stated to be the original practice, he felt bound himself to adhere to it (*m*); and the practice of holding a title doubtful

(*g*) *Shapland* v. *Smith*, 1 Br. C. C. 75; *Vancouver* v. *Bliss*, 11 V. 458, 465; *Sloper* v. *Fish*, 2 V. & B. 145; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559, 569; *Earl of Lincoln* v. *Arcedeckne*, 1 Col. 98; *Blosse* v. *Lord Clanmorris*, 3 Bl. 62; see the argument of defendant's counsel in *Howarth* v. *Smith*, 6 Si. 161; Sug. 403; *Palmer* v. *Locke*, 18 Ch. D. 381.

(*h*) See *Pyrke* v. *Waddingham*, 10 Ha. 1.

(*i*) *Vancouver* v. *Bliss*, 11 V. 465.

(*k*) *Marlow* v. *Smith*, 2 P. W. 201.

(*l*) *Sloper* v. *Fish*, 2 V. & B. 149.

(*m*) *Vancouver* v. *Bliss*, *supra*;

and not such as to be forced upon a purchaser became more and more firmly established, until a partial re-action set in in quite recent times.

Principle upon which the practice is founded.

The principle upon which this rule depends is, that a purchaser contracts *primâ facie* to buy a marketable title, and that to force upon him a title which may fairly be questioned by third persons, not before the Court, and upon whom the decision of the Court as between vendor and purchaser is not binding, is to make him accept something different from that which he agreed to buy, and is, in fact, to tell him "to try the opinion of the Court at his own expense" (*n*).

Various classes of doubts.

Some of the cases have, no doubt, gone very far in the direction of giving effect to doubts in favour of a purchaser; further, indeed, than on the more recent authorities the Courts would probably now go; and it is therefore very difficult to classify the cases in which the Courts will or will not compel the purchaser to take a doubtful title. The doubt affecting the title may be in respect either of a question of law or of matters of fact, or it may even be a mixed question of law and fact; and the question of law may again be a question arising on the construction either of an Act of Parliament or other public document, or one of a private instrument: or, again, it may be a question involving some general principle of construction or law which is in an unsettled condition. The facts, too, which may render a title doubtful may be facts arising on the title itself, or facts outside it, and yet affecting it by raising presumptions as to the title itself (*o*).

Doubt must be a reasonable doubt.

It used to be said that a doubt, whether upon law or fact, must, in order to be a ground for rejecting the title, be a "grave and reasonable doubt" (*p*): and, as respects a question of law, must be founded on the present state of

Stapylton v. *Scott*, 16 V. 274; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559.

(*n*) *Per* Lord Eldon, *Rose* v. *Calland*, 5 V. 186; and see *Sharp* v. *Adcock*, 4 Rus. 375.

(*o*) Fry, 387.

(*p*) See 1 Coll. 102.

the authorities (*q*). According to Lord Hardwicke, "the Court, in carrying agreements into execution, must govern itself by a moral certainty; for it is impossible in the nature of things that there should be a mathematical certainty of a good title: there are often suggestions of old entails, and often doubts of what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate" (*r*): and the above remarks are cited with approbation by Sir. W. Grant (*s*). However, in a case before Mr. Baron Alderson, upon the above *dicta* as to moral and mathematical certainties being cited, the Court observed, "that only means that you cannot prove a title by means of reasoning, but only with the help of evidence; those sort of apothegms get a great deal more reputation than they deserve" (*t*).

Classification.

Any attempt to classify decisions which have proceeded apparently on the way in which the particular circumstances of the case have influenced an individual judge, rather than on the basis of any well-defined principle, must always be difficult, and cannot be expected to attain to any great measure of certainty; but it seems necessary to try to extract from the mass of authority on the subject some general rules for the guidance of the profession. The following classification is based upon that formulated by Lord Justice Fry in his work on Specific Performance (*u*).

1. Titles too doubtful to be forced on purchaser.

The Court will apparently consider the title too doubtful to be forced upon a purchaser,

1. Where a Court of co-ordinate, or superior, jurisdiction has expressed an opinion adverse to the title, even though the Court may think that opinion wrong (*x*).

(*q*) See *Eno* v. *Eno*, 6 Ha. 177.

(*r*) *Lyddal* v. *Weston*, 2 Atk. 20.

(*s*) *Hillary* v. *Waller*, 12 V. 252; Sug. 392.

(*t*) *Hutchinson* v. *Morritt*, 3 Y. & C. 554.

(*u*) P. 388 *et seq.*

(*x*) *Rose* v. *Calland*, 5 V. 186; *Shapland* v. *Smith*, 1 Br. C. C. 75; and see *Collier* v. *Walters*, 17 Eq. 252, 260, where Jessel, M. R., held himself bound by a decision of his predecessor against the title, until he was freed from it by leave of the

2. Where a Court of co-ordinate, or inferior, jurisdiction has expressed an opinion in favour of the title, and the Court thinks that opinion wrong (*y*). If the earlier decision were that of a superior Court, it is conceived that an inferior Court, though dissenting from it, would be bound by it, and would decide in favour of the title.

3. Where the question arises "on the true construction and legal operation of some ill-expressed and inartificial instrument" (*z*).

4. Where the title depends on a general question of law which is unsettled. As to such a title, Wigram, V.-C., laid down the rule as follows (*a*): "The question is not whether there may not have been a time in the history of the law at which a title depending upon such a limitation would have been unmarketable, but whether the present state of the authorities is not such as to remove all objection to it." On this principle, the Court has refused to force upon a purchaser a title to which there was attached a covenant, as to which the Court did not feel competent to say definitely whether or not it ran with the land (*b*). So, too, Lord Romilly refused to decide a point of law "of much nicety, on which opposite judgments might be expected from different judges" (*c*). And in *Pyrke* v. *Waddingham* (*d*), Turner, V.-C., although he held

Lords Justices. In *Marlow* v. *Smith*, 2 P. W. 201, the Court was influenced by the fact that there was "the opinion of learned men against the title." But this fact would scarcely weigh so heavily now; *Hamilton* v. *Buckmaster*, 3 Eq. 323.

(*y*) *Collard* v. *Sampson*, 4 D. M. & G. 224; *Sheffield* v. *Lord Mulgrave*, 2 V. 525; *Wilcox* v. *Bellaers*, T. & R. 491.

(*z*) *Roake* v. *Kidd*, 5 V. 647; *Sharp* v. *Adcock*, 4 Rus. 374; *Price* v. *Strange*, 6 Mad. 159; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; *Sloper* v. *Fish*, 2 V. & B. 145.

(*a*) *Eno* v. *Eno*, 6 Ha. 177; and see *Blosse* v. *Lord Clanmorris*, 3 Bl. 62, 71.

(*b*) *Potter* v. *Parry*, 7 W. R. 182. But see now as to covenants running with the land, *ante*, p. 862 *et seq.*

(*c*) *Burnell* v. *Firth*, 15 W. R. 546; and see *Cook* v. *Dawson*, 29 B. 123.

(*d*) 10 Ha. 1; and see *Rogers* v. *Waterhouse*, 4 Dr. 329.

a clear view on the subject, did not feel justified in compelling a purchaser to accept a title depending on a then unsettled rule of construction: while Lord Romilly some years later, considering the rule more settled and fortified by the opinion of the Vice-Chancellor, forced the same title upon a purchaser (*e*). To this head may be attributed titles depending on the true legal effect of certain acts, the point of law being unsettled, and the rights of third persons depending on the actual effect in Law of those acts (*f*).

5. Where a third party puts in a claim, not obviously frivolous, so that the purchaser will be involved in immediate litigation (*g*). On the same principle, although the mere fact of pending litigation against the vendor in respect of his title is not *per se* a fatal objection (*h*), the Court has refused to force the title on the purchaser, until the pending litigation has been disposed of (*i*).

6. Where the title rests on a presumption of fact of such a kind that a judge in charging a jury would leave it to them to say whether the presumption was so strong as to be conclusive of the fact (*k*). Thus, where the title depended on a deed, the execution of which would be an act of bankruptcy if there were any creditors at the date of its execution, the Court refused to presume that there were none (*l*); so, also, it has refused to presume absence of notice of an incumbrance (*m*); or that an act which

(*e*) *Mullings* v. *Trinder*, 10 Eq. 449.

(*f*) See *Sloper* v. *Fish*, 2 V. & B. 145; *Cooper* v. *Denne*, 4 Br. C. C. 80.

(*g*) *Heseltine* v. *Simmons*, 6 W. R. 268; *Pegler* v. *White*, 33 B. 403.

(*h*) *Osbaldeston* v. *Askew*, 1 Rus. 160.

(*i*) *Bentley* v. *Craven*, 17 B. 204. But the pendency of a suit for the administration of the trusts of the settlement will not prevent a tenant for life from exercising his power of sale under the Settled Land Act; *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531.

(*k*) *Emery* v. *Grocock*, 6 Mad. 57; Fry, 388.

(*l*) *Lowes* v. *Lush*, 14 V. 547; *Franklin* v. *Lord Brownlow*, *ib.* 550.

(*m*) *Freer* v. *Hesse*, 4 D. M. & G. 495.

might have been an act of bankruptcy was in fact done *bonâ fide* (*n*); or that a right to work mines had been abandoned by non-user (*o*); or that a close, not mentioned by its present name, in the title deeds, was not so called at the date of the conveyance of the property to the vendor's ancestor (*p*). So, too, a title, derived through a voluntary conveyance which may have been since confirmed by a consideration, may be treated as one depending on a doubtful state of facts (*q*).

7. Where there are circumstances which raise a strong presumption, though they may be short of conclusive proof, of a fact fatal to the title; *e. g.*, that the exercise of a power, under which the vendor claimed, was a fraud on the power (*r*).

2. Titles which the Court will force upon a purchaser.

On the other hand, the Court has considered the title not to be doubtful,

1. Where there has been an opinion of another Court, and *à fortiori* of a Court of superior jurisdiction in favour of the title (*s*).
2. Where there has been an opinion against the title of an inferior Court, which a superior Court holds to be wrong (*t*).

(*n*) *Hartley* v. *Smith*, Buck, 368.

(*o*) *Seaman* v. *Vawdrey*, 16 V. 390; and see *Martin* v. *Cotter*, 3 J. & L. 496; *Barton* v. *Lord Downes*, Fl. & K. 505.

(*p*) *Eyton* v. *Dicken*, 4 Pr. 303.

(*q*) *Clarke* v. *Willott*, L. R. 7 Ex. 313, where the purchaser was held entitled to recover his deposit; and see and distinguish *Peter* v. *Nicolls*, 11 Eq. 391. Compare *Smith* v. *Garland*, 2 Mer. 123; and *Johnson* v. *Legard*, T. & R. 294, where the voluntary settlor was the plaintiff seeking specific performance, and the Court refused to assist him to defeat his own grant. And see *ante*, p. 1118.

(*r*) *Warde* v. *Dickson*, 7 W. R. 148; and see *Weir* v. *Chamley*, 1 Ir. Ch. R. 295.

(*s*) *Clonmert* v. *Whitaker*, cited 2 Jarm. 460, n.; *Rushton* v. *Craven*, 12 Pr. 599, 624; *Mullings* v *Trinder*, 10 Eq. 499, even though the judge had refused to make the purchaser accept his favourable opinion.

(*t*) *Sheppard* v. *Doolan*, 3 D. & War. 1, 8; *Beioley* v. *Carter*, 4 Ch. 230; *Alexander* v. *Mills*, 6 Ch. 124, 131; *Radford* v. *Willis*, 7 Ch. 7. In *Collier* v. *McBean*, 1 Ch. 81, the Lords Justices refused, although they thought the title good, to force it upon the purchaser, having regard to an adverse decision of the M. R.; and in *Cook* v. *Dawson*, 3 D. F. & J. 130, Turner, L. J., inti-

3. Where the question depends on the general law (*u*). Under this head may be included questions depending on the construction of an Act of Parliament (*x*). This rule, however, it is conceived, would not apply where the question, whether it be one of general law or of construction of a statute, is by reason of conflicting decisions involved in doubt and uncertainty (*y*).
4. Where the title depends upon a presumption of fact of such a nature that a judge when charging a jury would direct them to find the fact proved (*z*). Thus, the Court has presumed legitimacy (*a*); the abandonment of a right to work mines (*b*); the surrender of a term (*c*); the reconveyance of the legal estate (*d*); that no execution had been levied under a judgment within a certain period (*e*).
5. Where the title depends upon a fact which is capable of proof, and is satisfactorily proved (*f*); *e. g.*, adverse

mated that the case ought to be clear to demonstration in order to enable the Court of Appeal to force on a purchaser a title found bad by an inferior Court. But this view cannot be said to be the law now; see the cases cited above, and *Collier* v. *Walters*, 17 Eq. 260; except, perhaps, where the question depends upon the construction of a particular private instrument; cf. *Peppercorn* v. *Peacock*, 4 Jur. 1122, where Ld. Cottenham refused to force upon a purchaser a title depending upon a point which had been adversely decided by a Court of Law.

(*u*) *Eno* v. *Eno*, 6 Ha. 171; *Flower* v. *Hartopp*, 6 B. 476, question whether a right of re-entry was extinguished; cf. *Dunn* v. *Flood*, 25 Ch. D. 629, question whether a right of re-entry was invalid; and see *Austin* v. *Towney*, 2 Ch. 143; *Bull* v. *Hutchens*, 32 B. 615; *Wise* v. *Piper*, 13 Ch. D. 848, 855, with which cf. *Wheate* v. *Hall*, 17 V. 80; *Osborne to Rowlett*, 13 Ch. D. 774, 781; and see *Re Wright's Trustees and Marshall*, 28 Ch. D. 93, a case under the V. & P. Act.

(*x*) *Highgate Archway Co.* v. *Jeakes*, 12 Eq. 9; *Bell* v. *Holtby*, 15 Eq. 178.

(*y*) See *ante*, p. 1232, class 4; *Blosse* v. *Lord Clanmorris*, 3 Bl. 62, 71; and see *Palmer* v. *Locke*, 18 Ch. D. 381, though in that case the Court practically decided that the title, as made out, was bad. In *Earl of Lincoln* v. *Arcedeckne*, 1 Col. 98, Knight-Bruce, V.-C., refused to construe an ambiguous private Act of Parliament; but *quære*, whether the Court would not in such a case now give a definite opinion one way or the other.

(*z*) *Emery* v. *Grocock*, 6 Mad. 57.

(*a*) *Lord Braybroke* v. *Inskip*, 8 V. 417, 428.

(*b*) *Lyddal* v. *Weston*, 2 Atk. 20.

(*c*) *Emery* v. *Grocock*, 6 Mad. 54.

(*d*) *Hillary* v. *Waller*, 12 V. 239.

(*e*) *Causton* v. *Macklew*, 2 Si. 242.

(*f*) *Smith* v. *Death*, 5 Mad. 371.

possession for a sufficient number of years (*g*); non-user of rights of common, the existence of which the vendor denied (*h*); the validity of a purchase by a solicitor from his client (*i*); and in one case Lord Hardwicke expressed himself satisfied that there were no minerals upon which a reservation of mines could operate (*k*).

6. Where the doubt rests upon mere suspicion; *e. g.*, a suspicion from the absence of a recited deed (*l*); a mere suspicion of fraudulent preference (*m*); or of a fraud on a power (*n*); or of a breach of trust (*o*).

Remarks on the general practice of the Court.

The cases cited above sufficiently illustrate the difficulty of laying down any definite rule, applicable to all cases, as to what is and what is not a title too doubtful to be forced on a purchaser. On the whole, however, the present practice of the Court seems to be guided by the rule laid down by James, L. J., in *Alexander* v. *Mills* (*p*), that, "as a general and almost universal rule, the Court is bound as much between vendor and purchaser as in every other case to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined" (*q*). The rule so stated would seem to extend to all questions depending on the general law, as opposed to a particular question of the construction of some private instrument, and also to questions of fact. But as the title which a purchaser

As to titles depending on question of law.

(*g*) *Sands to Thompson*, 22 Ch. D. 614; *Games* v. *Bonnor*, 33 W. R. 64.

(*h*) *Re Bridges and McRae*, 30 W. R. 539.

(*i*) *Spencer* v. *Topham*, 22 B. 573; but see *contrà*, *Boswell* v. *Mendham*, 6 Mad. 373.

(*k*) *Lyddal* v. *Weston*, 2 Atk. 20.

(*l*) *Prosser* v. *Watts*, 6 Mad. 59; see judgment of Leach, V.-C.; but as to the importance of such a deed sometimes, see *English* v. *Murray*, 49 L. T. 35.

(*m*) *Cattell* v. *Corrall*, 4 Y. & C. 228; and see comments there made on the judgment of Leach, V.-C., in *Hartley* v. *Smith*, Buck, 368.

(*n*) *Green* v. *Pulsford*, 2 B. 71; *M'Queen* v. *Farquhar*, 11 V. 467; *Re Huish's Charity*, 10 Eq. 5.

(*o*) *Alexander* v. *Mills*, 6 Ch. 124; and see *Biscoe* v. *Perkins*, 1 V. & B. 485, 493; *Moody* v. *Walters*, 16 V. 283, 312.

(*p*) 6 Ch. 131.

(*q*) See *Collier* v. *Walters*, 17 Eq. 252, 260; *Forster* v. *Abraham*, *ib.* 355; *Osborne to Rowlett*, 13 Ch. D. 774.

contracts to buy is a marketable title, the Court cannot justly compel him to accept a title which involves an altogether unsettled point of law, and which depends for its validity in the purchaser's hands upon the decision of the Court upon that doubtful point, since a purchaser cannot in such a case be said to have a marketable title in the sense of being able to raise money on it. For instance, while the law remained unsettled as to the true construction of the 5th section of the Married Women's Property Act, 1882, it would have been a grievous hardship to force a purchaser to accept a title the validity of which depended on the decision in *Baynton* v. *Collins* (*r*). To have done so, would have been, in the words of Lord Eldon, to have compelled the purchaser to try the decision at his expense. Such a case falls, it is conceived, within the qualifying words of the Lord Justice that there may be "cases in which a question of law may be considered so doubtful that a Court would not, on its own view, compel a purchaser to take a title" (*s*); and was, in fact, so treated by the Court of Appeal in *Palmer* v. *Locke* (*t*). In such a case the Court does not feel such confidence in its own opinion as to be sure that another Court will not adopt a different view; and the title cannot, therefore, be strictly called marketable. This reasoning, of course, applies, *à fortiori*, to titles which depend "on the true construction and legal operation of some ill-expressed and inartificial instrument."

As to titles depending on questions of fact.

With regard to titles depending upon facts, or presumptions of facts, inasmuch as the decision of the Court is not a judgment *in rem*, and is conclusive proof only "as against parties and privies of facts directly in issue in the case, actually decided by the Court" (*u*), it is clear, that in order to justify the Court in forcing such a title upon a purchaser, it must entertain no reasonable doubt as to the correctness of its decision.

(*r*) 27 Ch. D. 604; overruled by *Reid* v. *Reid*, 31 Ch. D. 402.

(*s*) 6 Ch. 131.

(*t*) 18 Ch. D. 381.

(*u*) Stephen on Evidence, Art. 41.

Conclusion as to effect of *Alexander* v. *Mills*.

To sum up, then: it would seem that the rules above formulated are still generally applicable, although some of the cases cited against forcing titles on purchasers would perhaps not be followed at the present day; and that the chief, if not only, change made by the decision in *Alexander* v. *Mills* (*x*), read in connection with *Palmer* v. *Locke* (*y*), is to give a superior Court full discretion, in reliance on its own opinion, to force a title upon a purchaser without regard to the adverse decision of the Court below.

Third parties may be bound under Land Transfer Act.

With reference to the inability of the Court in a case, as between vendor and purchaser, to bind the interests of third parties, it should be mentioned that in actions for specific performance of contracts relating to registered land, or a registered charge, the Land Transfer Act, 1875 (*z*), has empowered the Court to cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same, to appear in such action and show cause why such contract should not be specifically performed; and the Court may direct that any order made in such action shall be binding on such parties or any of them.

Questions of title now decided under the V. & P. Act.

The necessity for bringing an action for specific performance has been in a great measure superseded by the more summary procedure provided by the Vendor and Purchaser Act, 1874 (*a*), which may be resorted to for the determination of any question arising out of or connected with the contract, not being a question affecting the existence or validity of the contract; *i.e.*, in its inception (*aa*). In such a proceeding the parties are in the same position as they would have been under a reference as to title in a suit for specific performance (*b*), and any question of difficulty on the title may be solved.

(*x*) 6 Ch. 124.

(*y*) 18 Ch. D. 381.

(*z*) 38 & 39 V. c. 87, s. 93. As to the costs of such parties, see s. 94, which, however, seems to be confined to actions against a vendor.

(*a*) S. 9.

(*aa*) *Re Jackson and Woodburn*, W. N. (1887), 182.

(*b*) *Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601.

Thus, in *Re Hill to Chapman* (*c*), the purchaser took objection to the vendor's power to sell, and made a requisition that he should obtain a judicial decision on the construction of the will under which he claimed. The vendor declined to do so, and took out a summons under the Act, asking for a declaration that the requisition had been sufficiently answered. The question of construction was thus immediately raised; and, on its being decided against the vendor, he was ordered to pay the costs of the summons. It is conceived that the rules above formulated as to doubtful titles apply no less to the procedure by summons under this Act than to a reference as to title.

Outstanding interest when a ground for reporting against title.

Where a necessary party to the title is, neither in Law nor in Equity, subject to the control of the vendor, but has an independent interest, and no evidence is furnished of a legal or equitable obligation on the part of such stranger to concur in the sale, the certificate should be against the title (*d*), on the ground of such non-concurrence: not that a good title can be made upon the stranger concurring (*e*). But where such necessary party is bound, as in the case of a trustee (*f*) or mortgagee, or agrees (*g*) to concur, the certificate may be in favour of the title (*h*). The certificate, however, should, in the case of an incumbrance, it is conceived, be, that a good title can be shown subject to the incumbrance, and that the incumbrancer is bound to concur: not that a good title can be made upon payment of the incumbrance (*i*).

Certificate when absolute opened only on very special grounds.

We may here remark that it is only on very special grounds that a certificate will be opened after it has become absolute by the lapse of the eight days from the date of its being filed (*k*); but a summons, if applied for and obtained within

(*c*) 54 L. J. Ch. 595.

(*d*) *Esdaile* v. *Stephenson*, 6 Mad. 366; *Douglass* v. *L. & N. W. R. Co.*, 3 K. & J. 173, 181.

(*e*) *S. C.*, as reported in Sug. 350.

(*f*) *Avarne* v. *Brown*, 14 Si. 303; *Jumpson* v. *Pitcher*, 1 Col. 13.

(*g*) *Paton* v. *Rogers*, 6 Mad. 256; *Sidebotham* v. *Barrington*, 4 B. 110.

(*h*) 6 Mad. 367; Dan. C. P. 1377.

(*i*) Sug. 350; *Magennis* v. *Fallon*, 2 Mol. 575.

(*k*) R. S. C. 1883, O. LV. r. 71; and see Wilson, 424; *Howell* v.

Chap. XVIII. Sect. 8.

the eight days, is sufficient to arrest the certificate (*l*). The time within which the application must be made runs during the vacations (*m*).

Where the certificate is in favour of the title.

If the certificate be in favour of the title, and no application be made to discharge or vary it, a decree for specific performance will be made on the hearing on further consideration, unless in the interim any matter appear which affects the title, in which case, although the time for applying to discharge or vary the certificate may have expired, a further reference may be ordered, under special circumstances, on motion (*n*), or now probably on summons.

If objections allowed, a fresh reference will be directed at vendor's request.

If an application be made to discharge or vary the certificate in favour of the title, and if, on hearing the motion, the Court considers the certificate erroneous, on the ground of a mistake having been made as to the title which the purchaser can require (*o*), or as to the sufficiency of the evidence in support of the title (*p*), or as to the construction of an instrument (*q*), the title will, at the vendor's request, be again referred, in order that he may have an opportunity of removing the defect. It was held by Sir J. Wigram, V.-C., that the reference back is not a matter of course, but depends on the vendor satisfying the Court that he has a fresh case to bring forward (*r*); but in a later case before Lord Cottenham, his Lordship laid down, as a general rule, that no special case need be made by the vendor; but that

Kightley, 8 D. M. & G. 325; *Lamb* v. *Orton*, 6 Jur. N. S. 61; see, too, *Ashton* v. *Wood*, 3 Jur. N. S. 146; *Bousfield* v. *Dove*, 27 Ch. D. 687, cases of mistake.

(*l*) *Wycherley* v. *Barnard*, Johns. 41; as to the practice where the application to vary is by motion, see *Henshaw* v. *Angell*, 9 Eq. 451; *Cross* v. *Maltby*, 8 W. R. 646.

(*m*) *Ware* v. *Watson*, 7 D. M. & G. 739.

(*n*) *Jeudwine* v. *Alcock*, 1 Mad. 597; and see now O. LV. r. 71.

(*o*) *Fildes* v. *Hooker*, 2 Mer. 429.

(*p*) *Andrew* v. *Andrew*, 3 Si. 390; 8 D. M. & G. 336; *Fildes* v. *Hooker*, 3 Mad. 193; *Curling* v. *Flight*, 2 Ph. 613; Dan. C. P. 1377.

(*q*) *Egerton* v. *Jones*, 3 Si. 392, 409; 1 R. & M. 694; and see *Portman* v. *Mill*, *ibid.* 696.

(*r*) *Dawes* v. *Betts*, 12 Jur. 412; the exceptions were overruled on appeal, 12 Jur. 709.

where the report is in favour of the title, and the Court holds a different opinion, and the vendor desires an opportunity of making out a better title, the Court will deal with the matter in the view that a conclusion in favour of the title has been prematurely come to, and will therefore send it back for further investigation: that there is no reason why the same practice should not prevail whether the original reference be made on motion or by decree; but that in both cases, if the vendor wishes for an opportunity of making a better title, the Court should give him the option of doing so, and only conclude the matter when he says he can go no further (*s*). Upon the fresh reference the purchaser seems not to be restricted to his original objections (*t*). Objections to a title should not be general, but specific (*u*).

Dismissal of action.

If the objections to the title are allowed, and no further reference be asked by the vendor, his action will be dismissed; but the purchaser, if plaintiff, may in general elect to take the defective title (*x*). Whether the objections to the title are finally allowed in chambers, or are allowed in open Court, either upon an adjourned summons, or upon a motion to discharge or vary a certificate in favour of or against the title, the action cannot be dismissed, without the cause being heard on further consideration; but it may be set down to be heard on further consideration, along with the hearing of the adjourned summons, or of the motion to discharge or vary the certificate.

Fresh objections.

If all the objections are overruled, the purchaser cannot make other objections to the title (*y*); except, it is conceived, in the case of fresh matter, which affects the title, being subsequently discovered (*z*).

(*s*) *Curling* v. *Flight*, 2 Ph. 616; and see *S. C.*, 12 Jur. 423; and see *Dawes* v. *Betts*, on appeal, 12 Jur. 709.

(*t*) *Fildes* v. *Hooker*, 3 Mad. 193; Sug. 350.

(*u*) *Flower* v. *Hartopp*, 6 B. 476.

(*x*) *Post*, p. 1245.

(*y*) *Brooke* v. *Anon.*, 4 Mad. 212.

(*z*) *Jeudwine* v. *Alcock*, 1 Mad. 597.

Certificate against title.

If the certificate be against the title, and there be no application to discharge or vary it, or if such application be made, and prove unsuccessful, the vendor's action may be dismissed with costs on the hearing on further consideration.

Reference back, when directed.

If the application to discharge or vary the certificate against the title be unsuccessful, the Court will sometimes send the case back to chambers (*a*); but not, it is conceived, upon mere speculation, nor unless the vendor can satisfy the Court of the probability of the title being perfected (*b*) within a reasonable time (*c*). Long previous delay, of course, would be a reason for less additional time being allowed (*d*); and the Court will not allow a seller to lie by, during the reference, and then, upon further consideration, attempt to make a title (*e*); nor will it show any favour to a vendor who, or whose solicitor, has improperly concealed a defect in the title (*f*); nor allow further time, when, owing to the long interval which has elapsed since the contract, and the altered situation of the parties, substantial justice would not be done by decreeing specific performance (*g*); the rule being, that although a vendor may, up to the time of making the certificate, do everything he can to perfect his title, the allowance of further time beyond that period is matter of indulgence (*h*).

Certificate against title absolute; yet decree will be made on

So if, no application being made to discharge or vary the certificate, the cause comes on for further consideration, or for original hearing if the reference were made before

(*a*) *Sidebotham* v. *Barrington*, 3 B. 524; 4 B. 110; 5 B. 261; and see *Fraser* v. *Wood*, 8 B. 342; *Smith* v. *Capron*, 13 Jur. 148; *Chamberlain* v. *Lee*, 10 Si. 444.

(*b*) See judgment of V.-C. Wigram in *Dawes* v. *Betts*, 12 Jur. 416.

(*c*) *Fraser* v. *Wood*, 8 B. 339; and see *Whittaker* v. *Whittaker*, cited 10 V. 599, and *Lechmere* v. *Brasier*, 2 J. & W. 289; *Magennis* v. *Fallon*, 2 Mol. 566; *Lachlan* v. *Reynolds*, Kay, 52.

(*d*) See *Fraser* v. *Wood*, *supra*.

(*e*) *Esdaile* v. *Stephenson*, Sug. 350.

(*f*) See *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. 369, 377.

(*g*) *Paton* v. *Rogers*, 6 Mad. 256; *Dawes* v. *Betts*, 12 Jur. 416; *Nock* v. *Newman*, *ante*, p. 1179.

(*h*) See *Garnett* v. *Acton*, 28 B. 333, 337.

hearing, and the vendor can satisfy the Court that he can remove the defect in the title,—as where he can procure the concurrence of a party having an interest,—specific performance will be decreed without a reference back to Chambers (*i*).

hearing, if vendor can then remove objections to title.

So if, the certificate being against the title, and there being no application to discharge or vary it, the purchaser moves that he may be discharged from the contract, the vendor may show that the title has been perfected subsequently to the certificate; *e. g.*, by a private Act of Parliament (*k*).

Removal of objections, an answer to purchaser's motion to be discharged.

We have seen that, as a general rule, the purchaser may insist upon a reference as to title; and the Court will not tie him down to the objections raised upon the pleadings: he may, however, waive such *primâ facie* right wholly or in part: but he will not be compelled to take a defective title merely because, being plaintiff, he filed his bill with notice of the defect (*l*). A general admission by the purchaser in his answer that, according to his belief, the plaintiff was entitled to the property, the subject of the suit, has been held to be an admission of the fact which he could not afterwards question (*m*).

Purchaser's general right to reference of title—how it may be waived.

Where a purchaser was let into possession, and soon afterwards received the abstract and retained it for four years without objecting to the title, he was held to have waived his right to a reference (*n*); but, in a later case, it was held that, even after great delay and acquiescence (there being no express waiver), the Court will not compel the purchaser to complete if the title is manifestly bad (*o*): and, though he may

By acquiescence.

Purchaser after great delay not forced to take clearly bad title.

(*i*) *Coffin* v. *Cooper*, 14 V. 205; *Moulton* v. *Edmonds*, 6 Jur. N. S. 305.

(*k*) *Jenkins* v. *Hiles*, 6 V. 653, 654, and V.-C. Wigram's remarks in *Lucas* v. *James*, 7 Ha. 425; and *Harris* v. *Mott*, 14 B. 170.

(*l*) *Stapylton* v. *Scott*, 16 V. 272; and see at Law, *Barnett* v. *Wheeler*, 7 M. & W. 364.

(*m*) *Phipps* v. *Child*, 3 Dr. 709; and see *Brown* v. *Pearson*, 21 Ch. D. 716.

(*n*) *Fleetwood* v. *Green*, 15 V. 594; *Margravine of Anspach* v. *Noel*, 1 Mad. 310; *Wallis* v. *Woodyear*, 2 Jur. N. S. 179; Sug. 353.

(*o*) *Blachford* v. *Kirkpatrick*, 6 B.

Chap. XVIII. Sect. 8.

have waived all objections appearing on the abstract, he may not be precluded from objecting to the title *aliunde* (*p*).

Decree for specific performance—its form.

According to the old practice, there were two ways of framing a decree in a suit for specific performance. The one was to declare that the plaintiff was entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title. The other, to refer the title, and to follow up that direction by a declaration that if a good title was shown the agreement ought to be specifically performed (*q*). The mere direction of the reference seems, however, to be an implied declaration of the right to specific performance (*r*): so that, on the hearing on further consideration, the Court will not enter upon any other defence set up by the answer (*s*). The present practice, however, in suits where, by reason of the contract itself having been disputed, the cause is heard before the reference, seems to be, to declare absolutely that the plaintiff, where he is the purchaser, is entitled to specific performance of the agreement, and to direct a reference to inquire whether a good title can be made;—not to declare that the plaintiff is entitled, &c., *if* a good title can be made, since the purchaser may always waive the inquiry (*t*). In general there should be an inquiry as to when a good title was first shown (*u*); unless the Court expressly orders it to be omitted (*x*), as it generally does where the contract is the subject of dispute (*y*); and although the inquiry is directed in general terms, regard will be had, in prosecuting it, to the terms of the contract (*z*). Under the

232; *Warren* v. *Richardson*, You. 1; *Hume* v. *Bentley*, 5 De G. & S. 527; *Darlington* v. *Hamilton*, Kay, 556.

(*p*) *Bown* v. *Stenson*, 24 B. 631.

(*q*) *Per* Lord Eldon in *Stevens* v. *Guppy*, 3 Rus. 182.

(*r*) See *Mole* v. *Smith*, Jac. 495.

(*s*) *Le Grand* v. *Whitehead*, 1 Rus. 309.

(*t*) *Clive* v. *Beaumont*, 1 De G. & S. 408; *Gibbins* v. *N. E. Metr. Asylum*, 11 B. 5. The latter form does not seem to be inappropriate where the vendor is plaintiff; see Seton, 1297.

(*u*) Seton, 1303.

(*x*) *Barrett* v. *Rees*, 1 Ke. 405; and see Seton, 1303.

(*y*) *Gibbins* v. *N. E. Metr. Asylum*, 11 B. 5; *Morris* v. *Wilson*, 5 Jur. N. S. 168.

(*z*) *Upperton* v. *Nickolson*, 6 Ch. 436; *Re Banister*, 12 Ch. D. 131; *Smith* v. *Robinson*, 13 Ch. D. 148.

common decree for specific performance and for inquiry as to title, the purchaser may, it seems, raise objections, which he had abandoned before the suit was instituted (*a*); and if the vendor wishes to prevent the abandoned objections being raised again in the course of the inquiry, this point should be disposed of at the hearing and noticed in the decree (*b*).

Plaintiff may take a decree adopting parol variation proved by defendant's agent.

Where the agreement was in writing, and a parol variation, not set up by the answer, came out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses, the Court seemed to consider that this was a proper subject for inquiry before finally disposing of the case; but on the plaintiff consenting to adopt the parol variation as part of the contract, specific performance was at once decreed with costs (*c*). So, too, where the defendant pleaded that the statement of claim did not set out the true terms of the agreement, and the plaintiff amended but still asked for specific performance of the contract as stated by him, but at the trial submitted to specific performance of the agreement with the defendant's variation, a decree was made accordingly (*d*).

May elect to take defective title.

The purchaser, it appears, may elect to take a defective title (*e*): "the covenants being so framed as not to leave the seller exposed to an action on account of the flaw: but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller," the purchaser seems to have no such right (*f*).

(*a*) *Curling* v. *Austin*, 2 Dr. & S. 129; see this case; and comments of Sir. W. M. James, L. J., upon it in *Upperton* v. *Nickolson*, *suprà*, where a valid objection, taken for the first time pending a reference as to title, was held to be too late. For forms of decree, see Seton, 1297 *et seq.*; and see Fry, 574 *et seq.*

(*b*) *Upperton* v. *Nickolson*, *suprà*.

(*c*) *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57.

(*d*) *Smith* v. *Wheatcroft*, 9 Ch. D. 223; but the decision would probably have been different, if the defendant had in his defence specifically alleged the variation upon which he relied; and see *ante*, p. 1151.

(*e*) *Bennett* v. *Fowler*, 2 B. 302.

(*f*) Sug. 355.

Decree for specific performance, no bar to claims by persons not parties.

We may here remark, that a decree, even by the Lords (*g*), for specific performance, in a suit between vendor and purchaser, is no protection against the adverse claims of persons not parties to the suit (*h*): except so far as that, if any particular question of title be decided in favour of the vendor, such decision forms a precedent which probably would, and in any inferior Court ought to, be followed on a future occasion, and in fact constitutes as good a warranty as can be procured (*i*); also, that such a decree may be abandoned or waived by delay, or by the conduct of the parties entitled to the benefit of it (*k*).

In a case in Ireland, where, pursuant to an order of the House of Lords, a decree was made by the Court of Chancery directing a conveyance, and before it was executed the party bound to convey purchased, and procured a conveyance to himself of, other interests which the decree was not intended to affect, it was held that he could not set up any right in respect of them, until he had first obeyed the decree; and this decision was affirmed by the House of Lords (*l*).

Plaintiff not allowed to take decree according to that construction of agreement which he had repudiated.

Where the plaintiff in his bill offered to perform an ambiguous agreement, "according to the true intent and meaning thereof," but uniformly up to the hearing insisted on his own construction, as the only contract between himself and the defendants, not offering to take up the other construction which the defendants were at one time willing to perform, Sir T. Plumer held the case to be perfectly different from one where the plaintiff calls upon the Court to declare the true construction, submitting to perform according to the same; and, his opinion being against the plaintiff's construction, he refused to enforce specific perform-

(*g*) See *Blosse* v. *Lord Clanmorris*, 3 Bl. 62, 71; and *per* Ld. Eldon, 11 V. 465; 1 J. & W. 569.

(*h*) See *Wood* v. *White*, 4 M. & C. 470.

(*i*) *Per* Ld. Eldon, *Vancouver* v. *Bliss*, 11 V. 465.

(*k*) See *Lord Rosse* v. *Sterling*, 4 Dow, 442.

(*l*) *Persse* v. *Persse*, 7 C. & F. 318.

ance against the defendants according to the construction contended for by their answer (*m*).

Plaintiff offering to perform contract with parol variations for defendant's benefit entitled to decree.

And where the plaintiff by his bill, praying the performance of a written agreement, offered to the defendant the benefit of certain subsequent parol variations, the Court decreed specific performance with the variations, if the defendant should elect to take advantage of them; or otherwise of the original agreement (*n*).

Parol variation proved by defendant—no decree for plaintiff: but defendant may take decree without cross bill.

So, where the plaintiff by his bill offered to perform the agreement (*o*), and the defendant proved a parol variation, the Court, at his request, without a cross bill, decreed specific performance with the variation, and even fixed the plaintiff with the costs (*p*).

Decree should direct accounts, &c.

The decree should also (unless the particular circumstances of the case render such a direction unnecessary) direct the usual accounts to be taken of the rents and profits of the estate, and of interest on the purchase-money; and should order payment of the balance due from the purchaser, and the execution of the conveyance, and delivery of the deeds, by the vendor (*q*): and an account may be decreed on the footing of the agreement; although, as in the case of a lease, the subject-matter of the contract has expired by lapse of time before the hearing (*r*). When the purchaser, having paid his purchase-money into Court, is ascertained to be entitled to an abatement in respect of deteriorations, &c., the ascertained amount of abatement will be repaid to him with interest (*s*).

Abstraction

Where part of the subject-matter of the contract was

(*m*) *Clowes* v. *Higginson*, 1 V. & B. 535.

(*n*) *Robinson* v. *Page*, 3 Rus. 114.

(*o*) *Fife* v. *Clayton*, 1 C. P. C. temp. C. 353.

(*p*) *S. C.*, 13 V. 546; *Gwynn* v. *Lethbridge*, 14 V. 585; see *Higginson* v. *Clowes*, 15 V. 525.

(*q*) See Seton, 1303.

(*r*) *Wilkinson* v. *Torkington*, 2 Y. & C. 726.

(*s*) *Ferguson* v. *Tadman*, 1 Si. 530; see Seton, 1309.

Chap. XVIII. Sect. 8.

of part of property by vendor.

abstracted by the vendor, *pendente lite*, Equity gave relief, even upon supplemental bill after a decree for specific performance; and in order to assess the amount of damages, allowed the plaintiff to bring an action to ascertain *quantum damnificatus*, and required the defendant to admit the necessary facts (*t*); but now, wherever the Court has jurisdiction to entertain a suit for specific performance, it may award damages, without sending the plaintiff to Law (*u*).

Decree in vendor's suit may direct a re-sale, and payment of the deficiency by purchaser.

If, in an action by the vendor, the purchaser be considered unable to pay what is due in respect of purchase-money, interest, and costs, the decree may direct that, in default of payment, the premises be sold for the purpose of satisfying the amount so due; and that the deficiency, if any, be paid by the purchaser (*x*). The common form of decree, however, is to declare the plaintiff entitled to a lien in respect of the purchase-money, with interest until payment, and also for his costs, and to give the plaintiff liberty to apply to enforce such lien in default of payment; and the order for sale is made on a subsequent application (*y*). Under the former order, the vendor can prove as a specialty creditor (*z*) in respect of the deficiency (*a*) in an action instituted for the administration of the assets of the purchaser; the amount to be found due upon the reference constituting a judgment debt within the 1 & 2 Vict. c. 110, s. 13 (*b*); and being proveable in bankruptcy (*c*).

Direction that all necessary parties shall concur.

A direction is sometimes inserted in the decree that "all other necessary parties (if any)" shall join in the conveyance;

(*t*) *Nelson* v. *Bridges*, 2 B. 239, 244.

(*u*) *Ante*, p. 1104.

(*x*) See *Haydon* v. *Bell*, 1 B. 337, 343; *Rome* v. *Young*, 3 Y. & C. 199; *Duke of Beaufort* v. *Phillips*, 1 De G. & S. 321.

(*y*) Seton, 1330. A declaration of lien will not, however, be made upon motion for judgment in default of pleading, unless it be expressly asked for in the claim; *Tacon* v. *National Standard Co.*, 56 L. T. 165; and see *Stone* v. *Smith*, 35 Ch. D. 188.

(*z*) *Duke of Beaufort* v. *Phillips*, *suprà*.

(*a*) *Rome* v. *Young*, 3 Y. & C. 204.

(*b*) *Duke of Beaufort* v. *Phillips*, *suprà*; *Popple* v. *Hansom*, 5 De G. & S. 318.

(*c*) *Ex p. Hunter*, 6 V. 94; *Bowles* v. *Rogers*, cited *ib.* 95.

but the omission of these words is wholly immaterial; as a direction that the vendor shall convey includes, in effect, the concurrence of his mortgagees and all other necessary conveying parties (*d*).

As to conveyance being settled by the Court.

The usual direction as to the conveyance is that it shall be settled by the Court "if the parties differ about the same" (*e*); the effect of the words being to make it unnecessary to have the conveyance settled by the judge, unless the parties differ. These latter words were, however, it seems, formerly omitted, if an infant were a necessary party to the conveyance (*f*); or if it would by Statute, operate to convey the infant's estate, although he might not actually be a party (*g*); but not merely on the ground of his being interested in the estate, as in the case of an infant *cestui que trust* whose trustees have power to sell and give receipts (*h*). In sales under the Settled Estates Acts they are not used (*hh*); but the practice, where infants are concerned, seems now to be to insert the words, in all other cases except that of the Settled Estates Act (*i*). In one case the decree went on to direct that the conveyance should contain a particular clause in favour of the plaintiff (*k*): but it does not appear that the Court will, in general, deliver any positive direction or declaration as to the rights of the parties (*l*). If the decree omit the usual direction as to the conveyance, the omission may be supplied formerly on petition (*m*), now on motion.

Course of proceeding in Master's office, under old practice.

Under the old practice, if the matter came before the Master, the practice, as settled by the 76th Order of April, 1828 (*n*), was, for the party entitled to prepare the conveyance to bring the draft thereof into the Master's office

(*d*) *Minton* v. *Kirwood*, 3 Ch. 614, 617.

(*e*) Seton, 1303, Form 1.

(*f*) *Calvert* v. *Godfrey*, 2 B. 267.

(*g*) *Cheese* v. *Cheese*, 15 L. J. Ch. 28.

(*h*) *Richardson* v. *Ward*, 11 B. 378.

(*hh*) *Re Eyre's S. E.*, 4 K. & J. 268; although even in such cases the practice does not seem to be uniform.

(*i*) Seton, 1407; but see Dan. C. P. 1094; *post*, p. 1344.

(*k*) *Blakesley* v. *Whielden*, 1 Ha. 183; and see *Gale* v. *Squier*, 4 Ch. D. 226; 5 *ib.* 625.

(*l*) *Williams* v. *Teale*, 6 Ha. 254.

(*m*) *Trevelyan* v. *Charter*, 9 B. 140.

(*n*) See Edwards' Orders, 27, and Dan. C. P. 1191, 2nd ed.

and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party might inspect the same without fee, and might take a copy thereof if he thought fit: and at or before the expiration of the eight days, or such further time as the Master in his discretion allowed, such other party was obliged, either to agree to adopt the conveyance, or to signify his dissent therefrom; and in the latter case he had to deliver a statement in writing of the alterations which he proposed in the draft of the conveyance. But if he delivered no such statement in writing, or if the party bringing in the draft refused to adopt the proposed alterations, the Master proceeded to settle the conveyance according to the practice of the Court. And in case the Master adopted the proposed alterations, the costs of the proceedings were borne by the party preparing the draft.

Effect of appeal.

If an appeal was pending, the Master nevertheless proceeded to settle the conveyance, and only its execution was stayed (*o*).

Exceptions to Master's certificate.

Exceptions lay to the Master's certificate (*p*); but if no exceptions were filed the conveyance had to be executed by the parties (*q*).

New practice.

Under the present practice (*r*) the Judge settles the draft in chambers; and (*s*) in any case of apparent difficulty, or where the draft is likely to be available as a precedent for others in the same cause or matter, generally requires it to be laid before one of the conveyancing counsel of the Court for his opinion. A certificate is given by the chief clerk approving of the draft as ultimately settled; and the approval of the Judge is signified by a memorandum written in the margin of the engrossment and signed by the chief clerk.

(*o*) *Gywnn* v. *Lethbridge*, 14 V. 585.

(*p*) *Lloyd* v. *Griffith*, 1 Dick. 103; *Wakeman* v. *Duchess of Rutland*, 3 V. 504; *Moxhay* v. *Inderwick*, 1 De G. & S. 708, 711.

(*q*) Dan. C. P. 1192, 2nd ed.

(*r*) See Dan. C. P. 1069 *et seq.* An order by the judge settling the form of a conveyance is subject to appeal, *Pollock* v. *Rabbits*, 21 Ch. D. 466.

(*s*) *Re Bennett*, 18 Jur. 33; *Harvey* v. *Brooke*, 9 Ha. *App.* xi.

Order where purchaser evades judgment.

Where in an action by the vendor for specific performance the purchaser obstinately evades judgment, and neglects to furnish a draft conveyance, the Court may, on the chief clerk certifying that a good title has been shown, order that the plaintiff be at liberty to prepare and execute a conveyance to the defendant as an escrow to be delivered to the purchaser on payment of the purchase-money within the time limited, such conveyance to be settled by the Judge (*t*); and if the purchaser fail to attend and pay the purchase-money, the Court will, on the conveyance and title deeds being deposited in Court, order the purchaser to pay the money found due from him by the chief clerk's certificate (*u*).

Conveyance under the Trustee Act, 1850.

In various cases of necessary parties being under disabilities, a conveyance might, formerly, have been procured under the 1 Will. IV. c. 60, and 4 & 5 Will. IV. c. 23 (*x*); and now, under the 13 & 14 Vict. c. 60, the principal provisions of which (*y*) we have already noticed (*z*), the Court may declare any of the parties to the suit to be trustees within the Act, and vest their estate and interest in the purchaser (*a*).

Conveyance under 16 & 17 Vict. c. 70, in case of lunatic vendor.

And by the 16 & 17 Vict. c. 70, when any person having contracted to sell any land becomes lunatic, and the contract is not disputed, or is such as the Lord Chancellor thinks ought to be performed, or a specific performance of the contract, either wholly or so far as the same remains to be performed, has been decreed either before or after the lunacy, the committee of the estate of the lunatic may, in his name, and on his behalf, by direction of the Lord Chancellor, signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in the suit, on the petition of the party

(*t*) *Morgan* v. *Brisco*, 31 Ch. D. 216.

(*u*) *S. C.* 32 Ch. D. 192; and see *Bell* v. *Denvir*, 34 W. R. 638.

(*x*) See *In re Lowe's Est.*, 2 Ph. 690: these Acts have been repealed.

(*y*) See, in particular, sect. 30, *ante*, pp. 659, 661, and see on the Act, generally, Lewin, 1011 *et seq.*

(*z*) *Ante*, pp. 655 *et seq.*

(*a*) For form of such a declaration, with the consequent directions, see *Hargreaves* v. *Wright*, 1 W. R. 408; and see Seton, 529.

claiming the benefit of the contract with the lunatic, or any plaintiff in the suit, receive and give an effectual discharge for the money payable to the lunatic, or so much thereof as remains unpaid, and make such conveyance of the land to such person, and in such manner, as the Lord Chancellor may order; and such conveyance is to be as valid and legal, to all intents and purposes, as if the lunatic had been of sound mind, and had executed the same (*b*).

Conveyance how to be obtained when party refuses to convey.

Two modes of proceeding might formerly have been adopted when a party refused upon order to execute the necessary assurance. The first under the 1 Will. IV. c. 36 (*c*), which authorized the Court to appoint one of the Masters to execute the conveyance; but only when the recusant party had been in prison for two months (*d*): or, secondly, the party ordered to convey might, upon his refusal or default for twenty-eight days after tender of the conveyance, be treated as a trustee, and a conveyance might be obtained under the 1 Will. IV. c. 60, s. 8 (*e*). The Trustee Act, 1850, repealing the 1 Will. IV. c. 60, contains, as we have seen, an express provision authorizing the Court to declare that any of the parties to a suit for specific performance are trustees within the meaning of the Act, and to make a similar declaration as respects unborn persons in certain cases (*f*); and in cases coming within its provisions, has superseded, although it does not repeal, the 1 Will. IV. c. 36 (*g*). It was held by Jessel, M. R., that, although sect. 30 of the Act gives the Court power to appoint a person to convey in lieu of a vendor refusing to do so, yet it confers no such jurisdiction as to the execution of a lease, where the decree is for specific performance of an agreement to grant a lease (*h*), the only remedy in such a case being by attachment (*i*). But

(*b*) Sects. 122, 139; and Lunacy Orders, 1883, R. 96.

(*c*) See sect. 15.

(*d*) See 9 B. 275.

(*e*) See *Warburton* v. *Vaughan*, 4 Y. & C. 247; *Thomas* v. *Gwynne*, 9 B. 275.

(*f*) 13 & 14 V. c. 60, s. 30.

(*g*) See Seton, 1563.

(*h*) *Grace* v. *Baynton*, 25 W. R. 506.

(*i*) R. S. C. 1883, O. XLII. r. 7.

in a very recent case, when specific performance had been decreed of such an agreement, Kay, J., declared the lessor to be a trustee, and appointed a person to execute the lease in lieu of him (*k*). And now this difficulty has been solved by the Judicature Act, 1884, which provides (*l*) that where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed by such person as the Court may nominate for that purpose; and that in such case the conveyance, contract, or document so executed shall operate and be for all purposes available, as if it had been executed by the person originally ordered to execute it.

Interest on money re-funded on appeal, not generally allowed.

We may here remark, that where money has been paid under a decree or order, which is reversed on appeal, interest will not be allowed except by special direction (*m*): but where money has been recovered at Law, Equity, in decreeing its re-payment, has also given interest (*n*).

Ne exeat, when granted.

If the purchaser have accepted the title (*o*), or the title have been established in a suit against him for specific performance (*p*), a writ of *ne exeat regno* will lie against him, if it can be collected that he intends to go abroad before paying the purchase-money (*q*): and this, although his intended absence cannot be attributed to the purpose of avoiding payment (*r*); and although he may be leaving behind him property sufficient to answer the demand (*s*): and the writ

(*k*) *Hall* v. *Hale*, 51 L. T. 226.

(*l*) 47 & 48 V. c. 61, s. 14; and see *Re Edwards*, 33 W. R. 578; *Howarth* v. *Howarth*, 11 P. D. 68, 95.

(*m*) *Parker* v. *Morrell*, 2 Ph. 469; and see 3 Y. & C. 131.

(*n*) *Young* v. *Guy*, 8 B. 147.

(*o*) *Goodwin* v. *Clarke*, 2 Dick. 497; and *Jackson* v. *Petrie*, 10 V. 164.

(*p*) See *Raynes* v. *Wyse*, 2 Mer. 472; *Morris* v. *M'Neil*, 2 Rus. 604.

(*q*) *Boehm* v. *Wood*, T. & R. 332; see Dan. C. P. 1648 *et seq.*; Seton, 316. The Judicature Acts have not enlarged the jurisdiction as to the issue of the writ, see *Drover* v. *Beyer*, 13 Ch. D. 242.

(*r*) See T. & R. 345; *Stewart* v. *Graham*, 19 V. 313.

(*s*) See T. & R. 338; Dan. C. P. 1650.

Chap. XVIII. Sect. 8.

will be marked for the full amount of the purchase-money (*t*).

Vendor's remedy for payment of money.

If the purchaser fail to pay the money within the time named in the decree or order, the judgment may be enforced by execution or any of the other modes by which a judgment for payment of money may be enforced (*u*). Or the vendor may move in the action to have the contract rescinded and all further proceedings stayed (*x*). If in such a case the purchaser asks for time to pay, it seems that the Court will generally fix a time within which he is to pay the purchase-money, and will order that in default of payment at the date fixed the contract be rescinded and proceedings stayed (*y*); but, if it appears that the purchaser is and will be unable to, or will not, pay, an immediate order for rescission will be made (*z*). The purchaser will be ordered to pay the costs of the motion (*a*); and the vendor will be entitled to retain the benefit of any order as to costs made in the action (*b*), and also, apparently, the deposit (*c*). Although in one case (*d*) Stuart, V.-C., excepted from the stay of proceedings any application which the vendor might make to assess damages for breach of the contract, yet it appears to be now settled that an order cannot be obtained at the same time for rescission of the contract and for damages for its breach (*e*). Thus, where the plaintiff had obtained an order for specific performance on payment by him to the defendant (the vendor) of a sum found due for occupation rent and of a further sum for alterations made by the defendant, and also of the defendant's costs: and, on the plaintiff failing to pay

(*t*) *Boehm* v. *Wood*, T. & R. 332, 345.

(*u*) See R. S. C. 1883, O. XLII. r. 3; Ann. Prac.; Seton, 1555 *et seq.*

(*x*) *Simpson* v. *Terry*, 34 B. 423; *Henty* v. *Schröder*, 12 Ch. D. 666; *Dunn* v. *Vere*, 19 W. R. 151.

(*y*) *Foligno* v. *Martin*, 16 B. 586; *Simpson* v. *Terry*, *suprà*.

(*z*) *Clark* v. *Wallis*, 35 B. 460; *Henty* v. *Schröder*, *suprà*; *Hutchings* v. *Humphreys*, 54 L. J. Ch. 650.

(*a*) *Dunn* v. *Vere*; *Henty* v. *Schröder*, *suprà*.

(*b*) *Hutchings* v. *Humphreys*, *suprà*; *Watson* v. *Cox*, 15 Eq. 219; *Clark* v. *Wallis*, *suprà*.

(*c*) *Dunn* v. *Vere*, *suprà*.

(*d*) *Sweet* v. *Meredith*, 4 Gif. 207.

(*e*) *Henty* v. *Schröder*; *Clark* v. *Wallis*, *suprà*; but see Fry, s. 1142.

any of such sums, the defendant moved to rescind, it was held that the order could only be made on his foregoing payment of the sums ordered to be paid to him for rent and damages (*f*). In one case, where at the trial the defendant admitted the title and all the facts alleged, and did not resist the decree, an order was made for specific performance, and in default of payment of what should be found due for a re-sale of the property by the Court, and for payment of the deficiency (if any) by the purchaser (*g*).

Decree dismissing vendor's bill —return of deposit when ordered.

Where the vendor's action is dismissed for want of title, the Court in general will direct him, if he have received the deposit, to repay it with interest (*h*) : or, if in the hands of the auctioneer, would probably direct the vendor to concur with the purchaser in an order for its payment (*i*) : but where the vendor's bill was dismissed on the ground of laches, and without any decision on the question of title, Wigram, V.-C., refused to order the return of the deposit; and intimated that such an order should only be made in cases where the decree dismissing the bill would entitle the purchaser to an injunction, if the vendor attempted to enforce his legal remedies upon the contract (*j*) : so, where the vendor's suit for specific performance was dismissed without costs by the Court of Appeal, reversing a decision of the Court below, and the purchaser did not wish for any order for the return of the deposit, unless it was ordered to be repaid with interest, the Court made no order, and left the defendant to his remedy at Law (*k*). This, however, is a case to which the Judicature Act, 1873, would now apply (*l*).

(*f*) *Hutchings* v. *Humphreys*, *suprà*.

(*g*) *Nash* v. *Worcester Commissioners*, 1 Jur. N. S. 973.

(*h*) *Hays* v. *Bailey*, cited Sug. 621; *Lord Anson* v. *Hodges*, 5 Si. 227; *ante*, p. 222; and see Seton, 1312.

(*i*) *Bryant* v. *Busk*, 4 Rus. 6. As to joining the auctioneer in an action for specific performance, see *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; *ante*, p. 205.

(*j*) *Southcomb* v. *Bishop of Exeter*, 6 Ha. 225; and see *Madeley* v. *Booth*, 2 De G. & S. 718, 722.

(*k*) *Rede* v. *Oakes*, 2 D. J. & S. 518; L. J. Turner expressed no opinion.

(*l*) S. 24, sub-s. 7.

Chap. XVIII. Sect. 8.

The return of the deposit could not, according to the old practice (*m*), be ordered when the purchaser's bill was dismissed; and in such a case the Court would seem to have had no power under the 21 & 22 Vict. c. 27 to award damages to the purchaser, as compensation for the loss of his deposit. But in one case V.-C. K. Bruce, in adhering to the rule, refused the vendor costs on his declining to return the deposit (*n*); and since the Judicature Act, 1873, the Court has jurisdiction in any action, whether for the specific performance or rescission of the contract, to direct a return of the deposit where the purchaser would be entitled at Law to recover it (*o*).

Dismissal without prejudice.

Formerly, if a bill were dismissed on grounds which would not in themselves be a defence to an action at Law, it was not necessary to express in the decree that the dismissal was without prejudice to the legal remedy (*p*). Where the dismissal was on a point not raised by the pleadings, the decree was made without prejudice to any other bill by the plaintiff (*q*). And now, where a bill would formerly have been dismissed without prejudice to an action at Law, the Court will go on to consider the question of damages (*r*).

Delivery of possession.

Where the decree or order directs that possession of the premises shall be delivered up, the party entitled to the possession may, on its being refused, obtain the same by means of a writ of possession, which has superseded the old writ of assistance (*s*).

Section 9.

(9.) *As to costs.*

As to costs.

Costs, as a general rule, are borne by unsuccessful litigant.

In Equity, as at Law, the party who fails is, *primâ facie*, liable to costs (*t*): and, although the question of costs rests

(*m*) *Ante*, p. 223.

(*n*) *Gee* v. *Pearse*, 2 De G. & S. 346.

(*o*) S. 24, sub-s. 7.

(*p*) See *Wedgwood* v. *Adams*, 8 B. 105.

(*q*) *Clay* v. *Rufford*, 5 De G. & S. 768.

(*r*) *Tamplin* v. *James*, 15 Ch. D. 215.

(*s*) R. S. C. 1883, O. XLVII. r. 1; and see Seton, 1562; Dan. C. P. 948 *et seq.*

(*t*) *Vancouver* v. *Bliss*, 11 V. 463.

entirely in the discretion of the Court (*u*), yet it is for the unsuccessful litigant to show (if he can) the existence of circumstances sufficient to negative his *primâ facie* liability (*x*); and the present disposition of the Courts appears to be, to adhere, with considerable strictness, to the general rule. It has been pointedly observed by Lord Cottenham, "Parties may have more or less reason for coming here; but the question is, whether those who are right, or those who are wrong, are to pay the costs of their so doing. The rule I always act upon is, to order costs to be paid by those who are wrong" (*y*).

The cases upon the subject may be conveniently classified as follows, *viz.* :—

1st. Cases where the general rule, fixing the unsuccessful litigant with costs, is enforced with more than ordinary stringency:

2ndly. Cases where it is merely allowed to operate:

3rdly. Cases where it is modified, so as to deprive the successful litigant of his costs, wholly or in part:

And 4thly. Cases where the successful litigant is wholly or in part fixed with payment of costs.

Cases where general rule is enforced with more than ordinary stringency.

As to the 1st class of cases.—A vendor, obtaining a decree for specific performance, has been held entitled to costs on the special ground of the purchaser having persisted in an objection to the title which he knew had been decided against another purchaser in a former suit (*z*): so, where an action is dismissed on the ground of misrepresentation (*a*), or fraud,

(*u*) Sug. 646; *Gerahty* v. *Malone*, 1 H. L. C. 81.

(*x*) *Vancouver* v. *Bliss*, *suprà*.

(*y*) *Hunter* v. *Nockolds*, 2 Ph. 545; and see *Green* v. *Briggs*, 6 Ha. 633; and *Earl Nelson* v. *Lord Bridport*, 10 B. 305; *Pattison* v. *Graham*, 2 S. & G. 211.

(*z*) *Biscoe* v. *Wilks*, 3 Mer. 456.

(*a*) *Buxton* v. *Lister*, 3 Atk. 387; *Vancouver* v. *Bliss*, 11 V. 463.

Chap. XVIII. Sect. 9.

or contains groundless imputations of moral (*b*) fraud against the defendant (*c*), or where the claim is dishonourable and contrary to moral equity (*d*), or against a clear stipulation in the contract (*e*), the dismissal will be with costs: so, where the unsuccessful litigant has acted fraudulently in the subject-matter of the suit, or has acted vexatiously, and refused fair offers of accommodation, the decree against him will generally be with costs (*f*).

Cases where general rule is allowed to operate.

As to the 2nd class of cases.—A purchaser resisting specific performance, on grounds which the Court considers clearly untenable, will not be relieved from costs because he acted under counsel's opinion (*g*); or even upon the recommendation of the Master under the old practice (*h*): so, where he omitted to take a valid objection to the title which was not removed until after the bill was filed, and insisted on objections which the Court considered untenable, he was ordered to pay all the costs of the suit (*i*): so, where he is held by his conduct to have waived the usual reference as to the title (*k*), or any particular objection arising on the title (*l*), and he has rested his defence on the question of title, the

(*b*) See the conclusion of V.-C. Wigram's judgment in *Marshall* v. *Sladden*, 7 Ha. 444.

(*c*) Morgan & W. 106; *Scott* v. *Dunbar*, 1 Moll. 442, 460; *Langley* v. *Fisher*, 9 B. 90; see *Glascott* v. *Lang*, 2 Ph. 310, 322; *Knight* v. *Majoribanks*, 2 M. & G. 16; *Price* v. *Berrington*, 15 Jur. 999.

(*d*) *Davis* v. *Symonds*, 1 Cox, 402, 408, and other cases cited in Beames on Costs, 37.

(*e*) *Williams* v. *Edwards*, 2 Si. 78, 83.

(*f*) Morgan & W. 113, 114; *Clowes* v. *Beck*, 2 D. M. & G. 731; *Sherwin* v. *Shakespeare*, 17 B. 267; 5 D. M. & G. 517; and see *Jones* v. *Farrell*, 1 D. & J. 208.

(*g*) *Maling* v. *Hill*, 1 Cox, 186; and see *Firmin* v. *Pulham*, 12 Jur. 410, where it would appear that a trustee acting under advice was nevertheless fixed with costs; and *Peers* v. *Ceeley*, 15 B. 209; *Boulton* v. *Beard*, 3 D. M. & G. 608, where the fact of the trustees having acted on counsel's advice, though stated at the bar, does not appear to have been proved, and is not noticed in the judgments; see Lewin, 347. See also *Osborne* to *Rowlett*, 13 Ch. D. 790, where, the difficulty having arisen entirely from conflicting decisions, no order was made as to costs.

(*h*) *Earl Nelson* v. *Lord Bridport*, 10 B. 305.

(*i*) *Bridges* v. *Longman*, 24 B. 27.

(*k*) *Fleetwood* v. *Green*, 15 V. 595; *Margravine of Anspach* v. *Noel*, 1 Mad. 317.

(*l*) *Burnell* v. *Brown*, 1 J. & W. 175.

decree against him will be with costs: so, where the vendor's action is dismissed merely for want of title and the title is clearly bad, the decree against him is with costs (*m*), although he be merely a trustee for sale (*n*), or although the title have become defective through the accidental destruction of the deeds subsequently to the contract (*o*): so, where a purchaser had objected that a good title could not be shown unless certain accounts were taken, and, this being resisted, each party filed a bill for specific performance, the Court, holding the purchaser to be right, made a decree, in the second suit, and gave him the costs of both suits (*p*). And even, where the title is such that a purchaser could not be advised to accept it without taking the opinion of the Court, and it is held to be good, the purchaser will generally have to pay the costs, "to make his title sure," by showing that the Court entertains no doubt about it (*q*); although the rule may be relaxed where the doubt arises from conflicting decisions, even though the Court is confident of its own view (*r*).

But in one case where there was a substantial objection to the title, which the vendor ought to have known, but which the purchaser did not discover until after the institution of the suit, the Court, although it overruled all the purchaser's objections to the title which were the immediate cause of the litigation, refused the vendor his costs (*s*).

Purchaser's costs of successful action may be deducted from purchase-money.

A purchaser obtaining a decree for specific performance on a counter-claim against a vendor, who had brought an action for a declaration that the contract for sale had been determined, was allowed to deduct his costs of the claim and the counter-claim from the purchase-money, in priority to a

(*m*) *Walters* v. *Pyman*, 19 V. 351; *Playford* v. *Hoare*, 3 Y. & J. 175; *Blosse* v. *Lord Clanmorris*, 3 Bl. 62.

(*n*) *Ante*, p. 94.

(*o*) *Bryant* v. *Busk*, 4 Rus. 1, 5.

(*p*) *Burton* v. *Todd*, and *Todd* v. *Gee*, 1 Sw. 255, 262.

(*q*) *Hall* v. *May*, 3 K. & J. 590; *M'Queen* v. *Farquhar*, 11 V. 482; *Osborne* to *Rowlett*, 13 Ch. D. 798.

(*r*) *Osborne* to *Rowlett*, *ibid.*

(*s*) *Phillipson* v. *Gibbon*, 6 Ch. 428.

Chap. XVIII. Sect. 9.

mortgagee of the vendor whose mortgage had been created after the date of the contract, but before the commencement of the action (*t*).

Cases where general rule is modified so as to deprive successful litigant of costs, wholly or in part.

Where vendor obtains decree.

As to the 3rd class of cases (*u*).—A vendor obtaining a decree, has been refused costs on the ground of his having unsuccessfully contended that the purchaser had waived his right to investigate the title (*x*): so, a vendor has been refused costs where the purchaser's objection to the title, although overruled, has been considered a fair objection (*y*); or has been overruled merely on the authority of an unreported decision (*z*); or has been occasioned by the vendor or his solicitor (*a*); or has arisen from a mutual misunderstanding (*b*): so, where the title was not clear on the abstract as delivered before bill filed (*c*); or the vendor has refused to furnish necessary evidence in support of the title (although the purchaser's requisitions embraced unnecessary evidence) (*d*); or where he has obtained a decree on the ground of the purchaser's acquiescence in a voidable contract (*e*).

Where vendor's action is dismissed.

So, the dismissal of the vendor's bill has been without costs, in cases where the dismissal was merely on the ground of his own *laches* in applying to the Court (*f*), or of the title being merely doubtful (*g*), or on the ground of agency being denied (*h*), or of the general inaccuracy of the transactions

(*t*) *Green* v. *Sevin*, 13 Ch. D. 589; for form of order in such a case, see Seton, 1304.

(*u*) See Beames on Costs, 39.

(*x*) *M'Queen* v. *Farquhar*, 11 V. 482; *Sidebotham* v. *Barrington*, 5 B. 261.

(*y*) *Cox* v. *Chamberlain*, 4 V. 631; *Powell* v. *Martyr*, 8 V. 149; *Staines* v. *Morris*, 1 V. & B. 8; *Aislabie* v. *Rice*, 3 Mad. 261; *Thorpe* v. *Freer*, 4 Mad. 466; *M'Queen* v. *Farquhar*, 11 V. 482; but see *Osborne* to *Rowlett*, *suprà*.

(*z*) *Corder* v. *Morgan*, 18 V. 344.

(*a*) See *Fenton* v. *Browne*, 14 V. 144, 150; *Dakin* v. *Cope*, 2 Rus. 175.

(*b*) *Calverley* v. *Williams*, 1 V. 210, 213.

(*c*) *Anon.* v. *Collinge*, 3 V. & B. 143, n.; *Wilson* v. *Clapham*, 1 J. & W. 36.

(*d*) *Newall* v. *Smith*, 1 J. & W. 263.

(*e*) *Dickenson* v. *Heron*, cited Sug. 630, n., 649.

(*f*) *Guest* v. *Homfray*, 5 V. 824.

(*g*) *Rose* v. *Calland*, 5 V. 189; *White* v. *Foljambe*, 11 V. 337, 352; *Willcox* v. *Bellaers*, T. & R. 491; *Mullings* v. *Trinder*, 10 Eq. 449; but see *Pyrke* v. *Waddingham*, 10 Ha. 11.

(*h*) *Howard* v. *Braithwaite*, 1 V

relied on as constituting the contract (*i*), or upon a ground of defence which the purchaser did not resort to until after the institution of the suit (*k*): so, where a purchaser had, in the first instance, by his acts, waived the time for completion, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon discovering that vacant possession could not be given according to stipulation, declined to complete (*l*): so, according to Lord St. Leonards, "if, after a bill filed for specific performance, the plaintiff, in pursuance of a power in the instrument, determines the contract, the bill will be dismissed without costs" (*m*): so, the Court has, by way of compromise, refused to fix the vendor with costs, he on his part consenting to give up his legal right of action under the agreement (*n*).

Where purchaser obtains decree.

So, a purchaser obtaining a decree for specific performance, has been refused his costs, on the ground of the inadequacy of the consideration (*o*): so, where a purchaser's bill for the performance of a contract alleged to arise out of correspondence, was dismissed on the ground of the language being equivocal and not clearly amounting to an agreement, costs were refused (*p*): so, where it was dismissed on the ground of delay, and the vendor had not objected to the delay (*q*): so, also, on the ground of the defendant having in his answer alleged fraud and circumvention, which he failed to prove (*r*), or having set up a false defence which the plaintiff has been

& B. 202, 374; *Blore* v. *Sutton*, 3 Mer. 237; *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554.

(*i*) *Marquis Townshend* v. *Stangroom*, 6 V. 341.

(*k*) *Winch* v. *Winchester*, 1 V. & B. 380; and see 3 Y. & C. 517.

(*l*) *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444; and see *Deverell* v. *Lord Bolton*, 18 V. 505, 514; *ante*, p. 494.

(*m*) Sug. 654, referring to *Western* v. *Pim*, 3 V. & B. 197.

(*n*) *Buxton* v. *Lister*, 3 Atk. 387; and see 2 De G. & S. 346.

(*o*) *Burrowes* v. *Lock*, 10 V. 470.

(*p*) *Stratford* v. *Bosworth*, 2 V. & B. 348; and see 6 V. 341.

(*q*) *Firth* v. *Greenwood*, 1 Jur. N. S. 866.

(*r*) *Thomas* v. *Phillipps*, 11 Jur. 80.

obliged to disprove (*s*); so, also, on the ground of the hardship of the case, and the novelty of the point raised (*t*).

Costs of action caused by vendor's death.

So, where the vendor has by a will subsequent to the contract devised the property to an infant, or in such a manner as to render a suit necessary, his estate must bear the costs (*u*): but if the will be prior to the contract it seems that no costs will be given (*x*). This distinction, which is now well established, does not seem to have been taken in some of the earlier cases, which were decided without reference to the date of the will (*y*). In a modern case, where a suit was rendered necessary by the vendor having, subsequently to the contract, devised the estate to infants who were also his co-heirs, and the purchaser, while desirous of completing the purchase, claimed exemption from payment of interest under the contract on the ground of delay on the vendor's part in making out his title, and the suit was instituted by the vendor's representatives, Lord Romilly decreed specific performance, and held the purchaser liable for the whole costs of the suit (*z*): but, on appeal, the purchaser was held to be wrongly charged with the costs, so far as the suit related to getting in the legal estate from the infants, and an apportionment was directed; Knight Bruce, L. J., being of opinion that they ought to fall entirely on the vendor, and Turner, L. J., that, under the special circumstances, no costs should be given (*a*). Where the vendor dies before the completion of the contract intestate, and leaving an infant heir, it is now well settled that no costs are given of the necessary suit for specific performance (*b*). The costs of

(*s*) *Field* v. *Churchill*, 4 Jur. 739.

(*t*) *Job* v. *Bannister*, 2 K. & J. 382; aff. 5 W. R. 177; see Morgan & W. 109, 110.

(*u*) *Purser* v. *Darby*, 4 K. & J. 41; *Sanderson* v. *Chadwick*, 2 N. R. 414; cf. *White* v. *Beck*, 6 I. R. Eq. 63, 71.

(*x*) *Murdin* v. *Patey*, 1 N. R. 566; *L. & S. W. R. Co.* v. *Bridger*, 4 N. R. 261; and see *ante*, p. 799.

(*y*) See *Wortham* v. *Lord Dacre*, 2 K. & J. 437, where the vendor's estate paid the costs, but the date of the will is not given; *Hinder* v. *Streeten*, 10 Ha. 18; *Bannerman* v. *Clarke*, 3 Dr. 632; and see Morgan & W. 262.

(*z*) *Williams* v. *Glenton*, 34 B. 528.

(*a*) *S. C.*, 1 Ch. 200.

(*b*) Morgan & W. 261; *Hanson* v.

such an action are costs "occasioned by adverse litigation" within the 80th section of the L. C. C. Act, and are not payable by the company (*c*). And where, after the contract, one of several vendors became of unsound mind, no costs of a suit to obtain a vesting order were given (*d*).

Purchaser electing to have action dismissed.

If the purchaser elect to have his action dismissed, upon its appearing that the vendor cannot make a title, the present practice seems to be to dismiss it without costs (*e*); unless, perhaps (*f*), the statement of claim alleges that the vendor cannot make a title (*g*): so costs have been refused on the ground of delay in the commencement and prosecution of the suit (*h*).

And where a bill was correctly filed on the authority of a reported decision, there being no authorities in conflict with it, and such decision was reversed during the progress of the suit, it was held that the plaintiff might thereupon, on motion, dismiss his bill without costs (*i*): so, where the plaintiff has been misled by an oversight of the Court, as, *e.g.*, in not having seen what were the provisions of an Act of Parliament applicable to the case, he has been allowed, on motion, to dismiss his bill without costs, and without prejudice to his right to file a new bill (*k*): so, where the defendant

Lake, 2 Y. & C. C. C. 328; *Scott* v. *Scott*, 11 W. R. 766; *Longinotto* v. *Morss*, 26 L. T. 828; *Hodson* v. *Carter*, 1 N. R. 179. The costs of the infant heir will come out of the purchase-money; *Barker* v. *Venables*, 13 W. R. 803. Such an action will now rarely be necessary; see Conv. Act, ss. 4, 30; and see *ante*, p. 294.

(*e*) *Armitage* v. *Askham*, 1 Jur. N. S. 227; and see *L. & S. W. R. Co.* v. *Bridger*, 4 N. R. 261.

(*d*) *Cresswell* v. *Haines*, 8 Jur. N. S. 208.

(*e*) *Malden* v. *Fyson*, 9 B. 347; *Lewis* v. *Loxham*, 3 Mer. 429; see Morgan & W. 253.

(*f*) See Sug. 646, n. (*e*); 3 M. & C. 710.

(*g*) *Nicloson* v. *Wordsworth*, 2 Sw. 365.

(*h*) *Thornhill* v. *Glover*, 3 D. & War. 195, 229; *Nunn* v. *Fabian*, 1 Ch. 35, 41.

(*i*) *Robinson* v. *Rosher*, 1 Y. & C. C. C. 7; and see *Lancashire R. Co.* v. *Evans*, 14 B. 529; *Sutton Harbour Commrs.* v. *Hitchins*, 1 D. M. & G. 170; *Dyke* v. *Rendall*, 2 D. M. & G. 220; but see, *contrà*, *Biscoe* v. *Wilks*, 3 Mer. 456; *Russell* v. *Dickson*, 4 H. L. C. 293; and in Ireland, *Cronin* v. *Murphy*, 1 Ir. Ch. R. 233; and see Morgan & W. 110.

(*k*) *Lister* v. *Leather*, 1 D. & J. 361, 368.

Chap. XVIII. Sect. 9.

put an end to the subject-matter of the suit;—as by surrendering a lease on a bill being filed for its assignment, and absconding (*l*).

Cases where, in contravention of general rule, successful litigant is made to pay costs.

As to the 4th class of cases.—It not unfrequently happens that the party obtaining a decree has been clearly in the wrong, during all or a part only of the litigation; and if so, he must, as a general rule, pay all or a proportionate part (*m*) of the costs of the suit: *e. g.*, in an exceptional case, where the plaintiff obtained a decree not in accordance with the prayer of his bill (*n*), he was made to pay the costs of the suit: so, it has been said that, "if a purchaser file a bill insisting that the vendor cannot make a title, he must pay the costs, whether he accept or refuse the title" (*o*): so, if a purchaser, being a plaintiff and aware of objections to the title, require a reference, and, on the chief clerk certifying against the title, agree to waive the objections, he must pay the costs of the unnecessary investigation (*p*). So, if prior to the filing of the vendor's bill, the contract was resisted merely on the ground of want of title, and no title was shown before bill filed, the plaintiff, although he obtain a decree, will have to pay the costs up to the time when he showed a title (*q*); unless, as we have seen, the purchaser has resisted specific performance solely on other grounds which are held to be untenable (*r*): but the vendor is liable to pay the costs until a good title is shown; and this, although the purchaser, by his answer, unsuccessfully insist on the alleged illegality or abandonment of the contract (*s*); or even the general costs

Vendor liable for costs till good title shown.

(*l*) *Knox* v. *Brown*, 2 Br. C. C. 186; and see *Goodday* v. *Sleigh*, 1 Jur. N. S. 201.

(*m*) See *Farrow* v. *Rees*, 4 B. 25; *Freer* v. *Hesse*, 4 D. M. & G. 505.

(*n*) *Mortimer* v. *Orchard*, 2 V. 243.

(*o*) Sug. 646, citing *Nicloson* v. *Wordsworth*, 2 Sw. 365, but with a query; a case before the Master under the old practice, see Morgan & W. 110.

(*p*) *Bennett* v. *Fowler*, 2 B. 302. But *secus*, where no abstract is produced until the parties are in Chambers, though the only defect is one previously known to the purchaser, *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*q*) *Wilson* v. *Allen*, 1 J. & W. 623; *Lewin* v. *Guest*, 1 Rus. 330; Sug. 650; *Wilkinson* v. *Hartley*, 15 B. 183, 188; *Flood* v. *Pritchard*, 40 L. T. 873; Morgan & W. 254 *et seq.*

(*r*) *Bridges* v. *Longman*, 24 B. 27.

(*s*) *Smith* v. *Leigh*, Sug. 648; but

of the suit (*t*) except such costs as have been occasioned by improper contentions or objections made or taken by the defendant in the course of the suit (*u*): so, where a vendor, when before the Master, abandoned the ground on which he had previously relied, but established his title on another ground, and the Master reported generally in favour of the title, the purchaser was allowed the costs of the reference and the several applications to the Court (*x*): and, as a general rule, if a party having committed an unintentional error offers to the aggrieved party all that he is entitled to, and this is refused, such refusal, and not the original error, must, for the purpose of determining the liability to costs, be considered to be the cause of any subsequent litigation (*y*). But the rule will not prevail where the purchaser, by resisting the contract on grounds other than of title (*z*), or by his improper conduct (*a*), or claim (*b*), has occasioned the litigation; or where, insisting on other objections, he has not accepted the vendor's offer to procure evidence which, if produced, would have perfected the title (*c*): and where a good title was not shown until after the institution of the suit, and then only by the production of evidence which had not been previously required, and was not the cause of dispute, the purchaser who had insisted on untenable objections, was ordered to pay all

the purchaser will not be allowed the extra costs occasioned by this unsuccessful defence, *S. C.*

(*t*) *Knight* v. *Harden*, Beames on Costs, 38; *Townsend* v. *Champernowne*, 3 Y. & C. 528.

(*u*) *S. C. Weddall* v. *Nixon*, 17 B. 160.

(*x*) *Fielder* v. *Higginson*, 3 V. & B. 142; *Harrison* v. *Coppard*, 2 Cox, 318.

(*y*) See and consider *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379, 383, and judgment.

(*z*) *Croome* v. *Lediard*, 2 M. & K. 293; *Scoones* v. *Morrell*, 1 B. 251; *Taylor* v. *Brown*, 2 B. 180; *Abbott* v. *Sworder*, 4 De G. & S. 448; *Abbott* v. *Calton*, 22 L. J. Ch. 936; *Peers* v. *Sneyd*, 17 B. 151; *Carrodus* v. *Sharp*, 20 B. 56; but see Sug. 651, 652.

(*a*) *Oxenden* v. *Lord Falmouth*, cited Sug. 650.

(*b*) *Wyvill* v. *Bishop of Exeter*, 1 Pr. 292; *Fife* v. *Clayton*, 13 V. 546; 1 Coop. temp. Cott. 351 (costs of cross bill filed unnecessarily); and see *M'Nicoll* v. *Kay*, 4 W. R. 801.

(*c*) *Long* v. *Collier*, 4 Rus. 269; *Holwood* v. *Bailey*, *ib.* 271; *Townsend* v. *Champernowne*, 3 Y. & C. 520; *Monro* v. *Taylor*, 8 Ha. 70; aff. 3 M. & G. 713.

Chap. XVIII. Sect. 9.

the costs of the vendor's suit (*d*); so, too, where a vendor offered and showed a good title by possession for twelve years, although he did not strictly prove his title until the reference, he was held entitled to his costs (*e*). In one case, where the plaintiff had agreed to grant a lease as if he were owner in fee simple, being, in fact, as to part of the property, only entitled as lessee, and his title was not disclosed until after the institution of the suit, his bill for specific performance was dismissed with costs, notwithstanding that the intending lessee had primarily rested his defence on other grounds which were not discussed at the hearing (*f*).

Where compensation is the only question.

So, if a purchaser bring an action for specific performance with an abatement of purchase-money, the question of abatement being the only one in dispute, if he fail upon this point the judgment for specific performance will give costs against him (*g*); so, also, where the question of compensation is the only material one in dispute, and the vendor's non-compliance with a requisition made before issue of the writ is attributable to the unfounded claim for compensation, the purchaser must pay the costs of the suit, so far as it relates to that claim (*h*); but, as a general rule, where a purchaser obtains a decree for specific performance with compensation, it will be with costs (*i*).

Unfounded allegations as to character.

So, if the successful litigant introduce upon the pleadings unfounded allegations affecting the character (*k*) of his opponent, he will have to pay the costs thereby occasioned (*l*). But where the Court, merely on the ground of the personal

(*d*) *Bridges* v. *Longman*, 24 B. 27; and see V.-C. Wood's statement of the rule, *Lyle* v. *the Earl of Yarborough*, Johns. 70, 77; *Murrell* v. *Goodyear*, 6 Jur. N. S. 356.

(*e*) *Games* v. *Bonnor*, 33 W. R. 64.

(*f*) *Baskcomb* v. *Phillips*, 6 Jur. N. S. 363.

(*g*) *Fewster* v. *Turner*, 6 Jur. 144; *White* v. *Cuddon*, 8 Cl. & F. 766.

(*h*) *Lyle* v. *Earl of Yarborough*, Johns. 70; see, too, *Williams* v. *Edwards*, 2 Si. 78; *Re Terry and White*, 32 Ch. D. 14.

(*i*) *Leyland* v. *Illingworth*, 2 D. F. & J. 248; *Gedye* v. *Duke of Montrose*, 26 B. 45.

(*k*) See 7 Ha. 444.

(*l*) *Wright* v. *Howard*, 1 S. & S. 205; *Bower* v. *Cooper*, 2 Ha. 408; see *Thomas* v. *Phillipps*, 11 Jur. 80.

hardship of the case as against the defendant, refuses to enforce specific performance, it has not made him pay the plaintiff's costs (*m*).

Costs of preventing reference.

Where a purchaser sets up a defence which prevents the plaintiff from obtaining the usual reference of title on motion, and fails to establish it, he may be at once directed to pay costs up to and inclusive of the hearing, without regard to the result of the reference (*n*).

Costs of action include costs of all inquiries properly made under the order.

The costs of an action include not only the costs up to the hearing, but also the costs of all accounts and inquiries requisite for carrying out the decree; nor are these latter costs costs for subsequent consideration: but at the same time the Court will not allow its order to be abused so as to be the cause of oppression to the adverse litigant. Thus, where the plaintiff obtained a decree for specific performance with costs, and an inquiry as to damages caused by the defendant's acts of waste, and the chief clerk's certificate giving damages was varied by allowing none, the Court of Appeal held that nevertheless the plaintiff was entitled to the costs of the inquiry, so far as it related to damages within the scope of the order, but that he must pay the costs of all the other inquiries which were not intended by the order, and had been wrongfully gone into in Chambers (*o*).

Costs, when defendant submits to plaintiff's demand.

Where the defendant submits to the whole demand of the plaintiff, and to pay costs, he may at once stop all further proceedings (*p*); and, if the question of liability to costs be the only one remaining in dispute, it has been held that the proper course is, to apply to the Court by motion or petition (*q*); and where a plaintiff omitted so to do, but

(*m*) *Wedgwood* v. *Adams*, 8 B. 103.

(*n*) *Hyde* v. *Dallaway*, 4 B. 606.

(*o*) *Krehl* v. *Park*, 10 Ch. 334.

(*p*) *Damer* v. *Earl of Portarlington*, 2 Ph. 30; *Sivell* v. *Abraham*, 8 B. 598, and cases there cited; *Lill* v. *Robinson*, Beat. 85; *Sawyer* v. *Mills*, 1 M. & G. 390; *Hennet* v. *Luard*, 12 B. 479; see Morgan & W. 77 *et seq.*

(*q*) *Sivell* v. *Abraham*, *suprà*; *Price* v. *Corp. of Penzance*, 4 Ha. 506; *Tapp* v. *Tanner*, 20 L. J. Ch. 559. *Sed vide infrà.*

Chap. XVIII. Sect. 9.

brought the cause to a hearing, the Court refused him any costs subsequent to the time at which his original demand had been submitted to (*r*). It was, however, unwillingly held by Knight-Bruce, V.-C., that this course could not, without the defendant's consent, be adopted before answer; inasmuch as he had a right to put in his answer, and to read it on the question of costs at the hearing (*s*); and in a later case (*t*) the same judge refused a similar application by a plaintiff after answer; but merely on the ground of the novelty of the proceeding: and where the defendant by an agreement for compromising the suit had admitted his liability to costs, and failed to fulfil the agreement, but subsequently satisfied the plaintiff's demand except in respect of costs, Lord Langdale, upon motion before answer, ordered their payment (*u*). The rule, however, has been settled by a decision of the Court of Appeal, in which it was laid down that the Court will not, on motion by the plaintiff to stay proceedings, order the defendant to pay the costs of the suit, unless by consent (*x*); Turner, L. J., remarking that the case of *Sivell* v. *Abraham* had been misunderstood, and that all that was there decided was, that a plaintiff might apply to the Court to stay proceedings, and order the defendant to pay the costs of the suit; and that, if the defendant made no objection, the suit might be disposed of in that way. In one case, Stuart, V.-C., while refusing the motion as irregular, made the costs of it costs in the cause, as "being a well meant endeavour on the part of the plaintiffs to put an end to a useless litigation" (*y*).

(*r*) *Sivell* v. *Abraham*, 8 B. 598; and see *Hennet* v. *Luard*, 12 B. 479; *Sentance* v. *Porter*, 13 Jur. 980; and see *Woodward* v. *Miller*, 16 L. J. Ch. 16; *North* v. *G. N. R. Co.*, 2 Gif. 64; *Nicholls* v. *Elford*, 5 Jur. N. S. 264; *Tompson* v. *Knight*, 7 *ib.* 704; *Wilde* v. *Wilde*, 10 W. R. 368, rev. *ib.* 503.

(*s*) *Langham* v. *G. N. R. Co.*, 1 De G. & S. 505.

(*t*) *M'Naughtan* v. *Hasker*, 12 Jur. 956. See, too, *Burgess* v. *Hill*, 26 B. 244; *Wallis* v. *Wallis*, 4 Dr. 458.

(*u*) *Tapp* v. *Tanner*, 20 L. J. Ch. 559.

(*x*) *Wilde* v. *Wilde*, 4 D. F. & J. 348; and see *Morgan* v. *G. E. R. Co.*, 1 H. & M. 78, where this decision was reluctantly followed. See, too, Dan. C. P. 1173.

(*y*) *Ventilation Co.* v. *Edelsten*, 2 N. R. 53.

When defendant disclaiming is entitled to costs.

It was laid down (*z*) by Wigram, V.-C., as a general rule, that where a defendant so disclaims as to show that he had no interest in the property *when the bill was filed*, he is entitled to his costs (*a*): but where he is properly brought before the Court in respect of an interest at the *time the bill was filed*, and then says, "I now abandon my interest," it is a question of discretion with the Court either to order the plaintiff to pay the defendant's costs or not; with reference to the circumstances which may have rendered the suit necessary or proper (*b*). In a later case (*c*) the rule was thus stated by Lord Romilly: First, where a defendant disclaims in such a manner as to show that he never had, and never claimed, an interest, at or after the filing of the bill, then he is entitled to his costs; secondly, if a defendant having an interest, shows that he disclaimed, or offered to disclaim, before the institution of the suit, there also he is entitled to his costs (*d*); and thirdly, that where a defendant, having an interest, allows himself to be made a party to the suit, and does not disclaim, or offer to disclaim, till he puts in his defence or disclaimer, in that case he is not entitled to his costs.

Where a defendant has never claimed any interest, it is not necessary, in order to entitle him to his costs, that he should have given notice of his intention to disclaim before issue of the writ (*e*); but if he omit to say that he never claimed, the dismissal will be without costs (*f*); so, also,

(*z*) *Gabriel* v. *Sturgis*, 5 Ha. 101; and see *Appleby* v. *Duke*, 1 Ha. 303; *Grig* v. *Sturgis*, 5 Ha. 93.

(*a*) *Glover* v. *Rogers*, 11 Jur. 1000.

(*b*) See *Ohrly* v. *Jenkins*, 1 De G. & S. 543; *Staffurth* v. *Pott*, 2 *ib.* 571; *Benbow* v. *Davies*, 11 B. 369; *Fewster* v. *Turner*, 6 Jur. 144; *Gurney* v. *Jackson*, 1 S. & G. 97; *Ford* v. *White*, 16 B. 120; *Ford* v. *Lord Chesterfield*, 16 B. 516; *Lock* v. *Lomas*, 15 Jur. 162; *Williams* v. *Lomas*, 16 Jur. pt. 2, p. 94; *Hiorns* v. *Holton*, 16 Jur. 1077; *Hurst* v. *Hurst*, 22 L. J. Ch. 546.

(*c*) *Ford* v. *Chesterfield*, 16 B. 516; see *Bellamy* v. *Brickenden*, 4 K. & J. 670, where Lord Romilly's statement of the rule is approved.

(*d*) *Ward* v. *Shakeshaft*, 1 D. & S. 269.

(*e*) *Bellamy* v. *Brickenden*, 4 K. & J. 670.

(*f*) *Ohrly* v. *Jenkins*, 1 De G. & S. 543.

Chap. XVIII. Sect. 9.

where he simply alleges that he was applied to before action, and did not "refuse" to disclaim (*g*), or that if he had been applied to he would have released his interest (*h*). A person who is properly made a defendant ought to offer to be dismissed without costs; and if the action is persevered in against him, he will, in such case, be entitled to his subsequent costs (*i*). Where a party improperly refuses either to claim or disclaim, and simply remains passive, he may, it seems, be ordered to pay costs (*k*).

Vendor obtaining title pending suit.

Where a vendor, having a bad title, brings an action for specific performance, and his title is perfected pending the suit, it is his duty to offer to the purchaser his costs up to that time, and to give him a conveyance (*l*).

Possession—how far important.

In general, a purchaser is less favoured on the question of costs when he has taken possession of the estate before the title is made out: but this does not apply to cases where, according to the contract, possession is to be taken before a title is shown; or where it is taken at the instance of the vendor (*m*). A purchaser who, for many years, retained possession without payment, and refused either to vacate the contract or accept the title, was fixed with the costs of a suit by the vendor, although the title was ascertained to be defective (*n*).

Deposit, not set off against costs.

Where the Court actually dismissed a purchaser's bill with costs, it refused, on a subsequent application, to allow him to set off against them the deposit paid to the vendor, but left him to his legal right (*o*); but the Court, as we have

(*g*) *Harrison* v. *Pennell*, 4 Jur. N. S. 682.

(*h*) *Collins* v. *Shirley*, 1 R. & M. 638; but see *Gurney* v. *Jackson*, 1 S. & G. 97.

(*i*) See *Talbot* v. *Kemshead*, 4 K. & J. 93; *Davies* v. *Whitmore*, 28 B. 617.

(*k*) *Re Primrose*, 23 B. 590, see judgment.

(*l*) *Freer* v. *Hesse*, 4 D. M. & G. 505. As to the duty of an auctioneer in this respect, see *Heatley* v. *Newton*, 19 Ch. D. 326; *ante*, p. 206.

(*m*) *Vancouver* v. *Bliss*, 11 V. 458, 464.

(*n*) *King* v. *King*, 1 M. & K. 442.

(*o*) *Williams* v. *Edwards*, 2 Si. 84.

seen, has refused to give costs unless the vendor would return the deposit (*p*).

Costs of case sent to Law.

Where a defendant, a purchaser, asked for a case to be sent to a Court of Law, which was granted, and the opinion of the Judges was against him, but ultimately the bill was dismissed with costs upon another ground, he was allowed his costs at Law as well as in Equity (*q*); but, in other cases, the costs of what may be termed collateral litigation, have either been refused, or have been thrown upon the party failing therein, although held entitled to the general costs of the suit (*r*). It would appear that, as a general rule, such costs are not included in a mere order for payment of the costs of the suit (*s*).

No interest payable on costs refunded.

Where either party has received costs under an order or decree which is subsequently reversed on appeal, he will not, in repaying such costs, be compelled to pay interest upon them (*t*).

Mortgagee refused costs of unsuccessful suit.

A mortgagee has been refused, as against the mortgaged estate, his costs of an unsuccessful suit against a purchaser for specific performance, although instituted under the best advice (*u*).

Solicitor's lien on purchase-money.

In one case an order is stated to have been made on the petition of the vendor's solicitor, restraining the vendor from receiving, and the purchaser from paying, the purchase-money, until the solicitor's lien for costs was satisfied (*x*).

(*p*) *Gee* v. *Pearse*, 2 De G. & S. 346.

(*q*) *Forbes* v. *Peacock*, 12 Si. 528; the Vice-Chancellor's decision on the general merits was reversed by Lord Lyndhurst, 1 Ph. 717.

(*r*) See *Townsend* v. *Champernowne*, 3 Y. & C. 528; *Smith* v. *Leigh*, cited Sug. 648; *Grove* v. *Bastard*, 1 D. M. & G. 69; but see *Mackrell* v. *Hunt*, 2 Mad. 34, 37, n.

(*s*) *Salkeld* v. *Johnston*, 1 M. & G. 533.

(*t*) *Small* v. *Attwood*, 3 Y. & C. 131; and see 2 Ph. 469.

(*u*) *Peers* v. *Ceeley*, 15 B. 209.

(*x*) *Birch* v. *Padmore*, cited 1 Jur. N. S. 123, and as *Bovil* v. *Padmore*, 7 D. M. & G. 27.

Costs on a V. & P. summons.

As a general rule, the parties under a vendor and purchaser summons have the same rights, and are subject to the same liabilities as to costs as the parties to an action for specific performance. The words in the ninth section, "the Judge shall make such order on the application as to him shall appear just," have been held by the Court of Appeal (*y*) to confer on the Judge jurisdiction to give the purchaser interest on the deposit, and also his costs of investigating the title, as damages which naturally flow from the order made in his favour, but not damages of an extraordinary kind, such as were unsuccessfully claimed in *Bain* v. *Fothergill* (*z*).

Costs where the suit might have been instituted in the County Court.

Where the suit might have been commenced in the County Court under the Act (*a*) conferring an equitable jurisdiction upon County Courts, it has been held that the plaintiff, if he succeed, is only entitled to such costs as he would have obtained in the County Court (*b*); unless there are special circumstances which render it desirable to have recourse to the Court of Chancery (*c*): but in a recent case Jessel, M. R., held that the acts impose no restriction on a plaintiff in his choice of a tribunal; and that if he comes into Chancery, he is not to be deprived of his costs merely because he might have sued in the County Court (*d*).

(*y*) *Re Hargreaves and Thompson*, 32 Ch. D. 454.

(*z*) L. R. 7 H. L. 158.

(*a*) 30 & 31 V. c. 142, s. 9; see Pitt-Lewis, 210.

(*b*) *Simons* v. *McAdam*, 6 Eq. 324; *Crozier* v. *Dowsett*, 31 Ch. D. 67; cases of foreclosure. And see a case before V.-C. W. referred to in *Scotto* v. *Heritage*, 3 Eq. 212.

(*c*) See *Scotto* v. *Heritage*, *suprà*.

(*d*) *Brown* v. *Rye*, 17 Eq. 343; see Pitt-Lewis, 134.

The following classification of several cases where titles have, upon questions of construction, law, or fact, been considered by Courts of Equity, to be good or bad, or too doubtful to be forced upon a purchaser, may be found of use.

1. *Construction*—Title held good on questions of:—*Warneford* v. *Thompson*, 3 V. 513, obscure power of sale: *Jones* v. *Price*, 11 Si. 557; *Lane* v. *Debenham*, 11 Ha. 188, power of sale in surviving trustee: *Re Earle and Webster*, 24 Ch. D. 144, whether land vested in trustees on trust for sale is subject to sect. 63 of S. L. Act: *Lord Rendlesham* v. *Meux*, 14 Si. 249, discretionary power of sale:

Mather v. *Norton*, 21 L. J. Ch. 15, validity of power of sale: *Young* v. *Roberts*, 15 B. 558; *Saloway* v. *Strawbridge*, 1 K. & J. 371; aff. 7 D. M. & G. 594; *Hind* v. *Poole*, 1 K. & J. 383; *Tracey* v. *Lawrence*, 2 Dr. 403; and see *Dicker* v. *Angerstein*, 3 Ch. D. 600, validity of mortgage power of sale: *Re Twcedie and Miles*, 27 Ch. D. 315; *Re Cotton and London School Board*, 19 Ch. D. 624, whether trust for sale exerciseable after beneficiaries had attained vested interests, (and see *Peters* v. *Lewes R. Co.*, 18 Ch. D. 429; *Re Cooke's Contract*, 4 Ch. D. 454): *Hamilton* v. *Buckmaster*, 3 Eq. 323; *Re Davies* to *Jones*, 24 Ch. D. 190, power of sale in executor over real estate: *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *West of England Bank* v. *Murch*, 23 Ch. D. 138, power of sale by devisee of land charged with debts who is also executor: *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, power of executors to sell for payment of debts within twenty years: *Hall* v. *May*, 3 K. & J. 505; *Stevens* v. *Austin*, 3 E. & E. 685; *Osborne* to *Rowlett*, 13 Ch. D. 774, competency of devisee of surviving trustee to make good title: *Re Morton and Hallett*, 15 Ch. D. 143, competency of heir of surviving trustee: *Balfour* v. *Welland*, 16 V. 151, competency of trustees to give discharges for purchase-money (and see cases cited, *ante*, p. 673 *et seq.*): *Collier* v. *Walters*, 17 Eq. 252, whether trustees took the fee: *Re Garnett-Orme & Hargreaves*, 25 Ch. D. 595, whether trustees of a settlement were trustees for purposes of the S. L. Act: *Re Countess of Dudley's Contract*, 35 Ch. D. 338, competency of persons appointed to act for an infant tenant for life under S. L. Act to sell, without having trustees appointed to whom to give notice: *Peers* v. *Sneyd*, 17 B. 151, power of agent to contract to grant lease: *Lord Braybroke* v. *Inskip*, 8 V. 417; *Re Stevens' Will*, 6 Eq. 597; *Re Brown and Sibly*, 3 Ch. D. 156, devolution of trust and mortgaged estates by general devise: *Rushton* v. *Craven*, 12 Pr. 599; *Jenkins* v. *Herries*, 4 Mad. 67; *Wood* v. *Richardson*, 5 Jur. 623; *Clonmert* v. *Whittaker*, 2 Jarm. 460, n.; *Beaumont* v. *Lord Salisbury*, 19 B. 198; *Mullings* v. *Trinder*, 10 Eq. 449; *Re White and Hindle*, 7 Ch. D. 201 (on rule in *Shelley's Case*), what estate taken under will or settlement: *Re Hutchinson and Tennant*, 8 Ch. D. 540; *Re Adams and Kensington Vestry*, 27 Ch. D. 394, whether vendor took an absolute estate unfettered with precatory trust: *Re Coleman and Jarrom*, 4 Ch. D. 165, whether issue of deceased child were included in a class gift to children: *Fillingham* v. *Bromley*, T. & R. 530, clause of forfeiture for non-residence: *Nichols* v. *Hawkes*, 10 Ha. 342, duration of annuity charged on estate: *Re Portal and Lamb*, 30 Ch. D. 50, whether a devise of "all my land at S." passed a house and land of a different character subsequently bought by the testator: *Re Glenny and Hartley*, 25 Ch. D. 611; *Re Coates* to *Parsons*, 34 Ch. D. 370, whether "continuing" trustee includes one who is retiring: *Re Walker and Hughes*, 24 Ch. D. 698, whether an appointment of a trustee in place of one remaining out of the kingdom under sect. 31 of Conv. Act, was good (and see *Re Coates* to *Parsons*, 34 Ch. D. 370): *West of England Bank* v. *Murch*, 23 Ch. D. 138, whether appointment of a single trustee by the retiring sole survivor of two trustees is good.

2. *Construction*—Title held bad or doubtful on questions of:—*Sheffield* v. *Lord Mulgrave*, 2 V. 526, whether lease for lives passed by will, or devolved on heir as special occupant: *Willcox* v. *Bellaers*, T. & R. 491; and see *Pyrke* v. *Waddingham*, 10 Ha. 1; *Freer* v. *Hesse*, 4 D. M. & G.

Chap. XVIII. Sect. 9.

495; *Goldney* v. *Crabb*, 19 B. 338, whether devisee took an estate tail: *Playford* v. *Hoare*, 3 Y. & J. 175, estate taken under will, whether legal or equitable, so as to let in the rule in *Shelley's case*: *Colmore* v. *Tyndall*, 2 Y. & J. 605, legal estate where vested under limitations in a settlement (but see *Beaumont* v. *Lord Salisbury*, 19 B. 198): *Re Lechmere and Lloyd*, 18 Ch. D. 524, whether vendors constituted the whole class entitled: *Okeden* v. *Clifden*, 2 Rus. 309, whether a general devise of estates "in the kingdom of England" passed an estate in Wales: *Re Paekman and Moss*, 1 Ch. D. 214; *Re Bellis's Tr.*, 5 Ch. D. 504, mortgaged estate held not to pass under general devise: *Sharp* v. *Adcock*, 4 Rus. 374, whether the fee passed by a devise without words of inheritance: *Rogers* v. *Waterhouse*, 4 Dr. 329, whether the fee passed under the word "estate:" *Nicholson* v. *Wright*, 5 W. R. 431, as to validity of appointment of new trustees: *Ashton* v. *Wood*, 3 Sm. & G. 436, as to competency of devisee of surviving trustee to make a good title: *Collier* v. *McBean*, 1 Ch. 81, estate taken by trustees under a will: *Cooper* v. *Denne*, 4 Br. C. C. 80; 1 V. 565, construction of leasing power: *Crewe* v. *Dicken*, 4 V. 97; and *Wilson* v. *Bennett*, 5 De G. & S. 475, power to sell and give receipts: *Price* v. *Strange*, 6 Mad. 159, meaning of the expression "legal representative or representatives:" *Casamajor* v. *Strode*, 2 M. & K. 706, construction of Inclosure Act: *Earl of Lincoln* v. *Areedeckne*, 1 Col. 98, extent of descriptive words in schedule to private act: *Nouaille* v. *Flight*, 7 B. 521, extent of covenants.

3. *Law*—Titles held good on questions of:—*Burnaby* v. *Griffin*, 3 V. 271, and *Nouaille* v. *Greenwood*, T. & R. 26, validity of recovery: *Re Dudson's Contract*, 8 Ch. D. 628, validity of disentailing deed: *Vick* v. *Edwards*, 3 P. W. 372, title by fine and estoppel: *Walker* v. *Bentley*, 9 Ha. 629, merger of tithe: *Smith* v. *Death*, 5 Mad. 371, extinguishment of power of appointment by a recovery: *Stanhouse* v. *Gaskell*, 17 Jur. 157, title depending on doctrine of election: *Lutwytch* v. *Winford*, 2 Br. C. C. 248, excessive sale by Court: *Powell* v. *Powell*, 6 Mad. 53, non-joinder of infants on sale by Court: *Lysaght* v. *Edwards*, 2 Ch. D. 499, devise of trust estates passes estate which testator has contracted to sell: *Bishop of Winchester* v. *Payne*, 11 V. 194, effect of decree of foreclosure on mortgage, incumbrancers not being parties to suit: *Edgeworth* v. *Edgeworth*, 12 Ir. Eq. R. 81, validity of sale of terms for raising charges, as against infant tenant in tail in remainder: *Re Chapman and Hobbs*, 29 Ch. D. 1007, enlargement of long term at a nominal rent into a fee simple: *Dykes* v. *Taylor*, 16 Si. 563, power of Master to sell before report: *Poole* v. *Shergold*, 1 Cox, 160, extent, by Crown, in hands of sheriff, unexecuted, and debt compromised: *Lord Braybroke* v. *Inskip*, 8 V. 417, sufficiency of general release: *Hume* v. *Bentley*, 5 De G. & S. 523, performance or waiver of breach of covenant: *Bridges* v. *Longman*, 24 B. 27, waiver by receipt of rent: *Havens* v. *Middleton*, 10 Ha. 641, sufficiency of insurance: *Currie* v. *Nind*, 1 M. & C. 17; *Price* v. *Jenkins*, 4 Ch. D. 483 (rev. on another point, 5 Ch. D. 619; and see *ante*, p. 1006); *Butterfield* v. *Heath*, 15 B. 408 (but see, as to this case, *Re Foster and Lister*, 6 Ch. D. 87), title against voluntary conveyance: *Prosser* v. *Watts*, 6 Mad. 59, non-production of early deeds: *Re Hall-Dare*, 21 Ch. D. 41, effect of s. 70 of Conv. Act in curing irregularity in order of Court for sale: *Ex p. Holland*, 4 Mad. 483, validity of bargain and

sale of copyholds, from commissioners in bankruptcy, direct to purchaser: *Minet* v. *Leman*, 7 D. M. & G. 340, validity of exchange of land of different tenures by Inclosure Commissioners: *Lodge* v. *Lyseley*, 4 Si. 70, validity of power of sale, as against subsequent judgments: *Biddle* v. *Perkins*, 4 Si. 135; *Powis* v. *Capron*, *ib.* 138, n., and *Nelson* v. *Callow*, 15 Si. 353, validity of unlimited power of sale: *Russell* v. *Plaice*, 18 B. 21, validity of power of sale in mortgage by administratrix; and see *Selby* v. *Cooling*, 23 B. 418; *Bridges* v. *Longman*, 24 B. 27; *Re Chawner's Will*, 8 Eq. 569; *Cruikshank* v. *Duffin*, 13 Eq. 555; and *ante*, p. 89 (but see *Sanders* v. *Richards*, 2 Col. 568; and *Whitmore* v. *Drake*, 19 L. T. O. S. 243, where the Court refused to insert a power of sale in a mortgage; *Clarke* v. *Royal Panopticon Co.*, 4 Dr. 26): *Bradshaw* v. *Fane*, 3 Dr. 534, title under partition: *Re Frith and Osborne*, 3 Ch. D. 618, validity of partition made under a power to sell and exchange: *Glass* v. *Richardson*, 2 D. M. & G. 658, validity of power to appoint copyholds: *Peppercorn* v. *Wayman*, 5 De G. & S. 230, that copyholds are within the 21 Hen. VIII. c. 4, authorizing sale by acting executors: *Kerr* v. *Pawson*, 25 B. 394, effect of enfranchisement under the Copyhold Acts: *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531, power of sale by tenant for life under S. L. Act not affected by pendency of suit for administration of the trusts of the settlement: *Falkner* v. *Equitable Reversionary Society*, 4 Dr. 352, power of mortgagee to sell under special conditions: *Drayson* v. *Pocock*, 4 Si. 283, power of trustees appointed by Court to give receipts: *Howard* v. *Ducane*, T. & R. 81; *Dicconson* v. *Talbot*, 6 Ch. 32, validity of sale to tenant for life whose consent was required to any exercise of the power: *Adams* v. *Taunton*, 5 Mad. 435, power of trustees, accepting trust, to give receipts without the concurrence of renouncing trustee: *West* v. *Berney*, 1 R. & M. 451, validity of settlement by donee of power of appointment and an object of the power: *Morris* v. *Debenham*, 2 Ch. D. 540; *Re Cooper and Allen*, 4 Ch. D. 802; and see *Re Parker and Beech*, 55 L. J. Ch. 815; 56 *ib.* 358, validity of sale by trustee of trust property jointly with other property: *Walmsley* v. *Jowett*, 23 L. J. 425, extinguishment of power: *Sands* to *Thompson*, 22 Ch. D. 614, legal estate of mortgagee extinguished by thirteen years' possession by mortgagor after payment off: *Hasker* v. *Sutton*, 2 S. & S. 573, title founded on destruction of contingent remainders: *Mole* v. *Smith*, Jac. 490, term to be relied on as a sufficient protection against dower: *Scoones* v. *Morrell*, 1 B. 251, presumption as to ownership of strips of waste: *Dunn* v. *Flood*, 25 Ch. D. 629; 28 *ib.* 586, right of re-entry void under the rule against perpetuity: *Clarke* v. *Royle*, 3 Si. 499, whether a covenant by a prior purchaser to pay the then vendor an annuity created a lien on the estate: *Re Kearley and Clayton*, 7 Ch. D. 615, validity of sale by a compounding debtor: *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616, validity of notice to trustees under Settled Land Act.

4. *Law*—Titles held bad or doubtful on questions of:—*Rose* v. *Colland*, 5 V. 186, lay impropriator barred by non-payment of tithes: *Shapland* v. *Smith*, 1 Br. C. C. 75, validity of recovery: *Blosse* v. *Lord Clanmorris*, 3 Bl. 62, validity of recovery as against reversion in the Crown: *Stewart* v. *Marq. Conyngham*, 1 Ir. Ch. R. 534, effect of a fine: *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559, trust, whether executed or executory, and whether an estate tail: *Sloper* v. *Fish*, 2 V. & B. 145, whether a deed

operated as an escrow: *Tolson* v. *Sheard*, 5 Ch. D. 19, whether trustees of two adjoining estates for two distinct *cestuis que trust* could grant one mining lease of both: *Wheate* v. *Hall*, 17 V. 80, validity of power of sale introduced in settlement under decree: *Macdonald* v. *Walker*, 14 B. 556, validity of exercise of power of sale by devisee: *Nichols* to *Nixey*, 29 Ch. D. 1005, validity of exercise of general power of appointment by the trustee in bankruptcy of the donee, after donee's death: *Blacklow* v. *Laws*, 2 Ha. 40, premature sale under power: *Collard* v. *Sampson*, 4 D. M. & G. 224, effect of 1 Vict. c. 26, on execution of power, and see an Article xi. Jur. N. S. 107: *Wolley* v. *Jenkins*, 23 B. 53, extinguishment of power: *Bradshaw* v. *Fane*, 3 Dr. 534, whether the ordinary power of sale and exchange authorizes a partition: *Cruse* v. *Nowell*, 2 Jur. N. S. 536, validity of exercise of power of sale after a sub-mortgage, and *vide ante*, p. 61: *Langford* v. *Selmes*, 3 K. & J. 220, in estoppel: *Re Hodson and Howes*, 35 Ch. D. 668, inability of equitable mortgagee to convey the legal estate under Conv. Act, s. 21: *Calvert* v. *Godfrey*, 6 B. 97, and *Garmstone* v. *Gaunt*, 1 Col. 577, 582, jurisdiction of Court to sell infant's estate: *Craddock* v. *Piper*, 14 Si. 310; *Greycoat Hosp.* v. *Westminster Improvement Commrs.*, 1 D. & J. 531, legal liability to judgments: *Palmer* v. *Locke*, 18 Ch. D. 381, priority of title of trustee in bankruptcy: *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. 369, validity of exchange under a power: *Barclay* v. *Raine*, 1 S. & S. 449; *Potter* v. *Parry*, 7 W. R. 182, whether covenant for production of deeds ran with land: *Ellis* v. *Rogers*, 29 Ch. D. 661; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778, whether restrictive covenants as to user ran with land: *Roake* v. *Kidd*, 5 V. 647, destruction of contingent remainders: *Wood* v. *Beetlestone*, 1 K. & J. 213, power of tenant for life of copyholds to bar contingent interests under 1 Will. IV. c. 47: *Nicloson* v. *Wordsworth*, 2 Sw. 365, whether release operated as a disclaimer: *Johnson* v. *Legard*, T. & R. 281, validity of limitations to collaterals in settlement: *Re Foster and Lister*, 6 Ch. D. 87 (see *ante*, p. 1005), validity of settlement alleged to be voluntary: *Sidebottom* v. *Barrington*, 4 B. 110, conflicting claims of assignees in bankruptcy and insolvency: *Re Mercer and Moore*, 14 Ch. D. 287, effect of disclaimer by bankrupt's trustee: *Bristow* v. *Wood*, 1 Col. 480, whether land bound by covenant of which purchaser had notice: *Law* v. *Urlwin*, 16 Si. 377, merger and breach of trust: *Williams* v. *Bland*, 2 Col. 575, sufficiency of probate in Consistorial Court to keep up representation to prerogative executor.

5. *Fact*—Titles held good on questions of:—*Maling* v. *Hill*, 1 Cox, 186, possible forfeiture of life estate by donee of power, and consequent extinguishment of power: *McQueen* v. *Farquhar*, 11 V. 467, suspicion of fraud insufficient: *Green* v. *Pulsford*, 2 B. 70, notice not followed up by proceedings: *Howarth* v. *Smith*, 6 Si. 161, reference in codicil, raising question as to existence of another will: *Simpson* v. *Gutteridge*, 1 Mad. 609, presumed extinguishment of ancient fee-farm rents: *Hillary* v. *Waller*, 12 V. 239, and *Nouaille* v. *Greenwood*, T. & R. 26, 29, presumption of reconveyance of legal estate: *Gibson* v. *Clark*, 1 J. & W. 159, and *Monck* v. *Huskisson*, 1 Si. 280, presumption of ancient grants: *Long* v. *Collier*, 4 Rus. 267, identity of copyholds: *Major* v. *Ward*, 5 Ha. 604, identity of land in respect of which allotments are claimed: *Causton* v. *Macklew*, 2 Si. 242, presumption of

payment of old judgments: *Emery* v. *Grocock*, 6 Mad. 54, and *Townsend* v. *Champernown*, 1 Y. & J. 538, presumption of surrender of term; presumption of custom in manor: *Goold* v. *White*, Kay, 683; *Scott* v. *Nixon*, 3 D. & War. 388; 2 Con. & L. 185; and *Tuthill* v. *Rogers*, 1 J. & L. 36, 72, bar under statutes of limitations and *nullum tempus*: *Games* v. *Bonnor*, 33 W. R. 64, adverse possession for statutory period: *Alexander* v. *Crosbie*, 1 J. & L. 66, nonproduction of old deeds: *Binks* v. *Lord Rokeby*, 2 Sw. 224, estate whether tithe free: *Martin* v. *Cotter*, 3 J. & L. 509, reservation of manorial rights, clearly none existing (and see *Seaman* v. *Vawdrey*, 16 V. 390): *Flower* v. *Hartopp*, 6 B. 476, right of entry which cannot be exercised: *Spencer* v. *Topham*, 22 B. 573, title depending on validity of a prior sale by a client to his solicitor.

6. *Fact*—Titles held bad or doubtful on questions of:—*Hartley* v. *Smith*, Buck, 368, title depending on the unascertainable *bona fides* of the transaction (and see *Smith* v. *Death*, 5 Mad. 272): *Lowes* v. *Lush*, 14 V. 547, act of bankruptcy, although no debt shown to exist: *Beale* v. *Symonds*, 16 B. 406, insufficiency of evidence that a party was merely a trustee: *Boswell* v. *Mendham*, 6 Mad. 373 (and see *Weir* v. *Chamley*, 1 Ir. Ch. R. 295), evidence required of fairness of transaction between father and son: *Sloper* v. *Fish*, 2 V. & B. 145, whether a deed operated as an escrow: *Stapylton* v. *Scott*, 16 V. 272, will suggesting a doubt of testator's title: *Grove* v. *Bastard*, 2 Ph. 619, disputed will: *Cann* v. *Cann*, 1 S. & S. 284, commission of bankrupt, before contract, against vendors, although not proceeded in: *Pierce* v. *Scott*, 1 Y. & C. 257, rotation of sale: *Townsend* v. *Champernown*, 1 Y. & J. 538, identity, whether lands parcel of manor: *Fort* v. *Clarke*, 1 Rus. 601, insufficient evidence of pedigree: *Larkin* v. *Lord Rosse*, 10 Ir. Eq. R. 70, and *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *Heywood* v. *Mallalieu*, 25 Ch. D. 357, liability to repairs or easements: *Re Higgins and Hitchman*, 21 Ch. D. 95, or to covenants restrictive as to user: *Webb* v. *Kirby*, 7 D. M. & G. 376, doubt as to whether a person on whose life the vendor's title depended was in fact alive.

CHAPTER XIX.

AS TO THE POWER OF THE COURT TO SELL UNDER RECENT STATUTES.

1. *The Settled Estates Act*, 1877.
2. *The Confirmation of Sales Act.*
3. *The Partition Acts*, 1868 *and* 1876.

Section 1.

Power of Court to sell under recent statutes.

(1.) It remains to consider how far the ordinary relative rights and liabilities of vendor and purchaser are varied or affected by the circumstance of the sale being made under the decree of the Court of Chancery; but before doing so, it will be convenient to notice here several modern statutes, by which the jurisdiction of the Court to order a sale of real estate has been greatly enlarged, although the first and second of those statutes have lost much of their importance since the Settled Land Act came into operation.

Court may authorize sales of settled estates;

By the 16th section of the "Settled Estates Act, 1877" (*a*), the Chancery Division of the High Court (*b*) is empowered, so far as relates to estates in England, "if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, from time to time to authorize a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing thereon (*c*); and every such sale shall be

(*a*) 40 & 41 V. c. 18, by which the earlier Acts, 19 & 20 V. c. 120; 21 & 22 V. c. 77; 27 & 28 V. c. 45; 37 & 38 V. c. 33; 39 & 40 V. c. 30, have been repealed (see s. 58), except where their provisions have been incorporated with a private Act; see *Re Bolton Est. Act*, W. N. (1878) 65; cf. the incorporation of ss. 23 to 25 of the Act of 1856 by s. 8 of the Partition Act, 1868, *post*, p. 1302.

(*b*) Sect. 3.

(*c*) Where an order has been made under this Act authorizing a sale by the trustees, the order must be suspended before the tenant for life can

conducted and confirmed in the same manner as by the rules and practice of the Court for the time being, is, or shall be required in the sale of lands sold under a decree of the Court" (*d*). Where the land is sold for building purposes, a fee-farm rent may be reserved as the consideration (*e*); and minerals may be excepted and the right of working them may be reserved, the purchaser of the land being liable to enter into any covenant, or to submit to any restrictions which the Court may deem advisable (*f*). It has been held that a sale of minerals apart from the surface may be made under these sections (*g*); and in such a case a rent-charge may, it seems, be reserved in respect of the surface from time to time damaged by the workings (*h*).

and may reserve minerals;

The Court may, on any sale (*i*) under the Act, direct that any part of the settled estates shall be laid out for streets, roads, paths, squares, gardens, sewers, &c., either to be dedicated to the public or not; and may direct that the parts

and authorize dedication of part of settled estate for roads.

exercise the powers given by the S. L. Act; *Re Barrs-Haden's S. E.*, 32 W. R. 194; and for this purpose a petition must be presented under the S. E. Act; *Re Poole's S. E.*, *ib.* 956.

(*d*) This is now regulated by R. S. C. 1883, O. LI. r. 3; and see *post*, p. 1313 *et seq.* The sale is generally made in Court; *Re Dryden's S. E.*, 50 L. J. Ch. 752; *Re Harvey's S. E.*, 30 W. R. 697; *Re Smith's S. E.*, W. N. (1878) 196; but under special circumstances it has been allowed out of Court; *Re Adams' S. E.*, 9 Ch. D. 116; and see generally Middleton, 45 *et seq.*

(*e*) Sect. 18. The Court cannot under this section give the trustees a general power to make fee-farm rents, but must itself consider each proposed grant of the kind; *Re Elliott's S. E.*, W. N. (1879) 135. Cf. s. 10 of the S. L. Act, 1882, which empowers the Court in certain cases "to authorize *generally* the tenant for life to make from time to time grants" at fee-farm rents for building or mining purposes.

(*f*) Sect. 19; cf. S. L. Act, s. 17, which is wider in its terms, not being confined to a sale of the surface without the minerals, but extending to a sale of the minerals without the surface; and which further allows not only a sale, but also an exchange, partition, or mining lease.

(*g*) *Re Law*, 7 Jur. N. S. 511; *S. C.* sub nom. *Re Mallin's S. E.*, 3 Gif. 126; *Re Gray's S. E.*, W. N. (1875) 106. Until the 25 & 26 V. c. 108 (*vide post*, p. 1296 *et seq.*), this could not be effected under an ordinary power of sale.

(*h*) *Re Milward's Est.*, 6 Eq. 248.

(*i*) The provisions of this section are confined to the development of a building estate, and do not apply to drainage for agricultural purposes; *Re Poynder's S. E.*, 50 L. J. Ch. 753. As to the latter, see S. L. Act, s. 25.

Chap. XIX. Sect. 1.

so laid out shall remain vested in the trustees of the settlement, or be conveyed to other trustees for securing the continued appropriation thereof (*k*); but it has no power to direct roads or sewers to be made, and can only sanction a building plan providing for their construction (*l*). Unless the roads are beneficial to the property in its existing condition, or there is an intention of immediately using it for building purposes, the Court will not make any order under this section (*m*); nor would it, under the earlier Acts, sanction the sale of part of the estate in order that the proceeds might be applied in laying out roads over other portions, and in thus rendering them available for building purposes (*n*); but it would authorize building leases on the terms of the lessees making the roads (*o*). But by the Act of 1877 (*p*) this defect has been supplied; and the Court may now provide for the expenses of development by a sale or mortgage of, or charge upon, all or any part of the settled estates, or may order them to be raised and paid out of the rents and profits of the settled estates, or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of any accumulations of rents, profits, or income; and it may further provide for the maintenance of the roads and works out of income.

What is a "settlement" and a "settled estate" within the Act.

For the purposes of the Act, the word "settlement" signifies any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments (*q*), under which any hereditaments of whatever

(*k*) Sect. 20; and see sect. 22, as to how the conveyance is to be executed, Middleton, 51. Cf. with s. 20, S. L. Act, s. 16.

(*l*) *Re Venour's S. E.*, 2 Ch. D. 522, 525.

(*m*) *Re Hurle's S. E.*, 2 H. & M. 196.

(*n*) *Re Chambers' S. E.*, 28 B. 653; *Re Hurle's S. E.*, *suprà*.

(*o*) *Re Chambers' S. E.*, *suprà*. And as to the power of the Court to authorize leases of settled estates, see sects. 4—15, and for cases and practice under them, see Middleton, 32 *et seq.*; and cf. S. L. Act, ss. 6—15.

(*p*) Sect. 21; cf. S. L. Act, s. 25, sub-s. 17.

(*q*) Where the original settlement is complete, it is for the purposes of the Act, *the settlement*, independently of any derivative settlements which

tenure, or any estates or interests therein, stand limited to, or in trust for, any persons, by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively; and the term "settled estates" is defined as "all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement" (*r*): and all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator are to be deemed to be estates coming to such settlor or heir under or by virtue of the settlement; and in determining what are "settled estates" within the Act, the Court is to be governed by the state of facts, and by the trusts or limitations of the settlement, at the time of the said settlement taking effect (*s*). Where an estate was devised to A. for life, with remainder to A.'s children equally at twenty-one, and some of the children had attained twenty-two (two of them having resettled their shares), and the others were still infants, it was held, after the death of A., that this was a settled estate within the meaning of the Act; and, on the parties absolutely entitled joining in the petition, a sale was directed (*t*); and it was also held that a clause of survivorship and accruer contained in the will was a limitation "by way of succession" (*u*); but this was considered doubtful by the Lords Justices in a previous case (*x*). The fact of the settlement containing a trust for

may have been made of interests, not yet in possession, by persons who take under it; *Re Knowles' S. E.*, 27 Ch. D. 707, a case under the S. L. Act.

(*r*) *E. g.*, copyholds, *Re Adair's S. E.*, 16 Eq. 124; an equity of redemption, *Eyre* v. *Saunders*, 5 Jur. N. S. 704; but not chattels, so that the Court had no jurisdiction to order a sale of heirlooms under the Act; *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635. But see S. L. Act, s. 37; *Re Brown's Will*, 27 Ch. D. 179; *Re Rivett-Carnac*, 30 Ch. D. 136; *Constable* v. *Constable*, 32 Ch. D. 233. As to application of proceeds, see *Re Houghton's Est.*, 30 Ch. D. 102; *Re Duke of Marlborough*, 32 Ch. D. 1.

(*s*) S. 2; cf. S. L. Act, s. 2.

(*t*) *Re Goodwin's S. E.*, 3 Gif. 620.

(*u*) *Ibid.*

(*x*) *Re Burdin's Will*, 5 Jur. N. S. 1378; but see *Re Clark*, 1 Ch. 292; and see and consider *Re Shepheard's S. E.*, 8 Eq. 571, in which case the fact of the estate not being limited by way of succession appears to have been overlooked.

Chap. XIX. Sect. 1.

sale, and of the trusts being declared merely of the sale proceeds, does not prevent the estate being considered as "settled" within the meaning of the Act (*y*).

Order for sale, how obtained, and by whom.

An order for the sale of a settled estate may be obtained upon the application by petition of any person entitled (*z*) to the possession or to the receipt of the rents and profits for a term of years determinable on his death, or for an estate for life (which has been held to include an estate *durante viduitate* (*a*)), or any greater estate, or of any assignee of such person (*b*). But where there is a tenant in tail under the settlement in existence and of full age, such tenant in tail, or if there are more than one, then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under the settlement prior to such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail, must, subject to the qualification mentioned below, either concur in, or consent to, the application; and, in every other case, there must, as a general rule, be either the concurrence or consent of all persons in existence having any beneficial estate or interest under the settlement, and of all trustees having any estate or interest on behalf of any unborn child (*c*). It has been held under these sections, that although trustees, without any power of sale, can only consent on behalf of unborn children, yet if they have such a power, and concur

(*y*) See *Re Greene*, 10 Jur. N. S. 1098; *Re Laing's Tr.*, 1 Eq. 416; *Collett* v. *Collett*, 2 Eq. 203; and see *Re Chamberlain*, 23 W. R. 852; *Re Morgan's S. E.*, 49 L. J. Ch. 577.

(*z*) A person entitled to only a share may apply, without joining as co-petitioners all the rest of the persons entitled; *Re Dryden's S. E.*, 50 L. J. Ch. 752. Where no person is beneficially entitled to the rents, the trustees may present a petition; *Vine* v. *Raleigh*, 24 Ch. D. 238.

(*a*) *Williams* v. *Williams*, 9 W. R. 888; where, however, the parties entitled in remainder joined.

(*b*) Sect. 23; the Court will not decide questions of title on a petition under the Act; but where the petitioners are alone entitled, and the only question is as to their title *inter se*, the Court may order a sale; *Re Williams' S. E.*, 20 W. R. 967. Cf. S. L. Act, s. 50, which does not allow the powers of a tenant for life under the Act to be exercised by his assignee; and an assignee must therefore resort to this Act; see *post*, p. 1295.

(*c*) S. 24.

in the application, their *cestuis que trust* will be bound (*d*); so, also, if they are competent to receive and give a valid discharge for the purchase-money (*e*). But according to the later decisions all the beneficiaries who are *in esse* must concur in the application (*f*). And the rule has been held to extend even to persons claiming under the trusts of a term for raising portions (*g*); and should any of them, except perhaps from mere caprice, refuse to do so, no order would formerly be made (*h*); but the Court now has power to dispense with their concurrence in the cases to be hereafter considered.

Difficulty of obtaining consent provided for.

The difficulty of obtaining the consent or concurrence of parties interested was often a serious, and sometimes an insuperable, obstacle in the way of proceeding under the original Act. This was partly removed by the Amending Act, 37 & 38 Vict. c. 33, and still further by the Act of 1877.

In case of infant tenant in tail.

Thus, where an infant is tenant in tail under the settlement, the Court may now dispense with the concurrence or consent of any persons entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant (*i*).

Court may direct notice to be given.

Where, on an application under the Act, the concurrence or consent of any person, whose concurrence or consent is required, has not been obtained, notice is to be given in such manner as the Court shall direct, requiring him to notify, within a specified time, whether he assents to, or dissents

Notification.

(*d*) *Grey* v. *Jenkins*, 26 Beav. 351; *Re Potts*, 15 W. R. 29.

(*e*) *Eyre* v. *Saunders*, 4 Jur. N. S. 830.

(*f*) *Re Ives*, 3 Ch. D. 690; *Re Dendy*, 4 Ch. D. 878; and see remarks in the former case on the cases last cited.

(*g*) *Re Boughton*, 12 W. R. 34; and see *Re Chamberlain*, 23 W. R. 852.

(*h*) *Re Hurle's S. E.*, 2 H. & M. 196, 202; *Re Hutchinson*, 14 W. R. 473; *Re Merry's S. E.*, 15 W. R. 307.

(*i*) S. 25. As to obtaining consent of infant, see *post*, p. 1291.

from, such application, or submits his rights or interests to be dealt with by the Court; and in case no notification shall be delivered in the manner specified by the notice, the person affected by the notice will be deemed to have submitted his rights and interests to be dealt with by the Court (*k*). The notice is, unless the Judge shall otherwise direct, within the jurisdiction to be given by personal service, except in the case of a person of unsound mind not so found by inquisition (*l*). In the latter case (*m*), or where the person is out of the jurisdiction, an *ex parte* application may be made to the Court for directions (*n*). And if (1) the person whose consent is necessary cannot be found, or (2) it is uncertain whether he is alive or dead, or (3) he cannot be served without expense disproportionate to the value of the subject-matter of the application, the Court may dispense even with notice, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person, or on any other (*o*) ground; and the effect of the notice being dispensed with is that the persons not served are to be deemed to have submitted their rights and interests to be dealt with by the Court (*p*). The application for an order dispensing with notice may, it seems, be made either before or at the hearing of the petition (*q*).

Mode of giving notice.

Notice may in some cases be dispensed with.

The Court also has power to make an order upon any application, notwithstanding that the concurrence or consent of any person, whose concurrence or consent is required, has not been obtained, or has been refused; but the Court, in dealing with the application, is to have regard to the number

Court may even dispense with consent in some cases.

(*k*) S. 26.

(*l*) S. E. Act, Orders 1878, O. IV.

(*m*) See *Re Crabtree's S. E.*, 10 Ch. 203; *Re Franklin's S. E.*, 7 W. R. 45; Seton, 1475, for form of order.

(*n*) See *Re Rylar*, 24 W. R. 949; and *Re Slark's S. E.*, W. N. (1875) 224.

(*o*) *Quære*, whether this is to be construed broadly, or as confined to other grounds *ejusdem generis* with those before mentioned.

(*p*) S. 27; and see *Re Earl of Kilmorey's S. E.*, 26 W. R. 54. Cf. s. 3 of Partition Act, 1876, *post*, p. 1302.

(*q*) Seton, 1476.

of the parties who concur in or consent to it, and who dissent from it, or submit their rights and interests to be dealt with by the Court, and to the estates or interests which they have or claim to have; and every order so made is to have the same effect as if all such persons had been consenting parties thereto (*r*). The discretion of the Court under this section is to be exercised having regard to two sets of circumstances, namely, "number and value," and not simply according to its own notion of what would be best to be done with the property; and the jurisdiction, in fact, will be exercised only in cases of comparatively unimportant persons—*i. e.*, unimportant as regards value or interest in the estate—dissenting (*s*). Thus, the concurrence of a person, who would be entitled only in the event of four children all dying, sons under twenty-one, and daughters under that age or before marriage, was dispensed with (*t*). So, also, was that of a woman who, under a settlement made by her first husband, was entitled to a life interest in one-tenth of the property (*u*); so, too, where a married woman was entitled to one-eighth of the property, and the seven other persons all consented, her concurrence was dispensed with, on the petition being served on her and her husband (*x*). But notice under the 26th section must be given to the persons whose concurrence has been dispensed with (*y*), unless the Court has expressly dispensed with service of such notice (*z*).

Power of the Court under this section, how limited.

The Court may also give effect to any petition, subject to, and so as not as to affect, the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted, or is not deemed to have submitted, his rights or interests to be dealt with by the Court, or whose

Court may make order saving rights of persons not consenting.

(*r*) S. 28.

(*s*) *Taylor* v. *Taylor*, 1 Ch. D. 426, 433, per Jessel, M. R.; aff. 3 Ch. D. 145.

(*t*) *Re Spurway's S. E.*, 10 Ch. D. 230.

(*u*) *Re Cundee's S. E.*, 37 L. T. 271.

(*x*) *Re Thorp's S. E.*, W. N. (1876) 251.

(*y*) *Re Rylar*, 24 W. R. 949; and see *Re Thorp's S. E.*, *suprà*.

(*z*) *Re Lewis' S. E.*, 24 W. R. 103; *Re Hooke's Est.*, W. N. (1875) 29.

Chap. XIX. Sect. 1.

rights, estate, or interest ought, in the opinion of the Court, to be excepted (*a*).

Notices must be served on trustees.

Notice of any application under the Act must, unless dispensed with by the Court, be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence is required, and on any other persons who, in the opinion of the Court, ought to be served (*b*). In every case where there are such trustees, evidence must be produced at the hearing that such notice has been served (*c*); and if upon the hearing of the petition the Court is of opinion that any other person should be served, the petition will stand over generally, or so long as the Court shall direct (*d*).

Mode of procedure under the Act.

Advertisements.

Under the old practice advertisement of any application under the Acts was imperative (*e*); but now (*f*) notices of applications are necessary only if the Court shall so direct at the hearing, in which case the Court gives directions as to the newspapers in which the advertisement is to be made (*g*), and the petition stands over generally, or to such time as the Court shall direct (*h*). The Court may, on motion, permit persons or bodies corporate, whether interested or not, to appear and oppose or support any application on such terms as to costs and otherwise as the Court thinks fit (*i*). And when the Court has at the hearing directed advertisements of an application, leave to be heard in opposition to, or in support of, the application may be obtained on motion *ex parte*, or upon notice to the petitioner (*k*); but the order giving such leave, if made *ex parte*, must be served on the petitioner's

(*a*) S. 29. See *Re Legge's S. E.*, 6 W. R. 20; *Re Parry's Will*, 34 B. 462; Seton, 1489, 1499.

(*b*) S. 30. They are entitled to a copy of the petition, and to peruse and inspect it; see O. XXII.

(*c*) S. E. Orders, 1878, O. XVI.; and see App. thereto, Form No. 12.

(*d*) O. XVIII.

(*e*) See 5th edit. of this work, p. 1176; Seton, 1485.

(*f*) S. 31.

(*g*) On the practice as to advertisements, see Middleton, 97; and for the form to be used, see App. to Orders, Form No. 13.

(*h*) O. XVIII.

(*i*) S. 31.

(*k*) O. XIX.

solicitor (*l*). Any person obtaining such leave is entitled to inspect and peruse and to be furnished with a copy of the petition (*m*).

What evidence is required at the hearing.

It must, of course, at the hearing be shown that all persons beneficially entitled, or whose concurrence or consent is required by the 23rd and 24th sections are before the Court either as petitioners or respondents, or that they have been duly served with notice under sect. 26, or that notice has been dispensed with under sect. 27. And the Court further requires satisfactory proof as to there having been no previous application to Parliament which has been rejected or reported against (*n*); and also that it is proper and consistent with the interests of all parties entitled under the settlement that the sale should take place, and the grounds upon which it is stated to be so (*o*); and also that notice has been served upon the trustees (if any) of persons whose consent is necessary (*p*). Occasionally, the petition is adjourned into chambers for further examination of the evidence; but, as a general rule, the order is made in Court at the hearing. Notice of the order must be endorsed on the settlement, or otherwise recorded as the Court directs (*q*); and if the estate is in a Register County, notice of the order is sufficiently given by registering a memorial of the order (*r*); and in all cases where notice of the order is dispensed with, the order must expressly state the fact (*s*). The proceedings on a sale under the order are the same as under a decree in an action (*t*).

Application of sale moneys.

All money received on any sale effected under the authority of the Act may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or (so far as relates to

(*l*) O. XXI.

(*m*) O. XX.; and see R. S. C. 1883, O. LXVI. r. 7 (*h*), (*i*), (*l*), (*m*).

(*n*) S. 32; O. XVII., and see *Re Wilson's Est. Bill*, 1 L. T. 25.

(*o*) O. XV., following ss. 16 and 17.

(*p*) S. 30; O. XVI.; see *ante*, p. 1286.

(*q*) S. 33; and see *Re Boyd's S. E.*, 8 I. R. Eq. 76.

(*r*) O. XXIII.

(*s*) *Ibid.*

(*t*) As to which *vide post*, Ch. XX.

estates in England) into Court *ex parte* the applicant in the matter of the Act; and, in either case, is to be applied in the purchase or redemption of the land-tax; or in the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or in the purchase of other hereditaments to be settled in the same manner as the hereditaments, in respect of which the money was paid; or in the payment to any person becoming absolutely entitled (*u*). And now, by sect. 32 of the Settled Land Act, any money which was under this Act on the 1st of January, 1883, in Court, or has been, or is afterwards paid into Court, may, in addition to any mode of dealing with it authorized by the Settled Estates Act, be invested or applied as capital money under the Settled Land Act (*x*), on the like terms as to costs and other things, and according to the same procedure as if the modes of investment and application authorized by the later Act were authorized by the Settled Estates Act. Until the money can be applied to any of the authorized purposes it is to be invested as the Court shall direct, in some or one of the investments in which cash under the control of the Court is for the time being authorized to be invested, and the interest and dividends of such investments are to be paid to the person who would have been entitled to the rents and profits of the lands if the money had been invested in the purchase of land (*y*). Trustees, to whom the money is ordered to be paid, may apply it as directed by the Act, without the necessity of any application to the Court (*z*). And if there are no existing trustees, the Court

(*u*) S. 34.

(*x*) See S. L. Act, s. 21. As to what investments were allowed under the S. E. Act, see the cases on the analogous 69th sect. of the L. C. C. Act, *ante*, p. 751 *et seq.*

(*y*) S. 36; as to what are included, see Middleton, 67. The 32nd sect. of the S. L. Act, by making money in Court under this Act capital money under the later Act, apparently extends the range of investments to those included in S. L. Act, s. 21, sub-s. 1. An investment once made cannot under the later Act be changed without the consent of the tenant for life, s. 22, sub-s. 4. But *quære*, whether this applies to the S. E. Act.

(*z*) S. 35. For the practice and orders under this sect., see Middleton, 66; Seton, 1496.

will, it seems, appoint new trustees for the purposes of the Act (*a*).

When, as is usually the case, the estate of a tenant for life is without impeachment of waste, the Court might advantageously be more particular than it commonly is, in inquiring what will be the effect of the sale and reinvestment upon the relative rights of tenant for life and remaindermen. A sale of a settled estate without timber or minerals, and a subsequent purchase of a mineral or timber estate, may obviously be a source of great and improper benefit to the tenant for life.

The Act is retrospective.

The Act extends to all matters existing on the 1st of November, 1877, whether proceedings were actually pending or not (*b*); and the Court may exercise the powers conferred upon it repeatedly in respect of the same property, notwithstanding that the settlement contains similar powers (*c*), unless the exercise of them is expressly negatived by the settlement (*d*). But its power to authorize a sale is limited to the extent to which such power might have been authorized by the settlement (*e*). The Court has full jurisdiction as to costs, which may be charged upon the hereditaments which are the subject of the application, or upon any other hereditaments held under similar limitations, and may be ordered to be raised and paid by sale or mortgage, or out of rents and profits (*f*).

Purchaser acquires an indefeasible title.

It was provided that a sale, purporting to be in pursuance of the Act, should not be invalidated, after completion, on the ground that the Court was not authorized to make it; but that it should have no effect as against any person whose consent or concurrence was necessary, and had not been

(*a*) *Re Sexton Barns S. E.*, 10 W. R. 416.

(*b*) S. 57; and see s. 61.

(*c*) See *Re Thompson's S. E.*, John. 423; *Grey* v. *Jenkins*, 26 B. 351.

(*d*) S. 38.

(*e*) S. 39.

(*f*) S. 41; see Middleton, 73; and cf. S. L. Act, s. 47.

obtained, or who ought to have been, and had not been, served, unless service upon him had been dispensed with (*g*). Subject to this qualification, it would seem that a purchaser, having obtained his conveyance, had an unimpeachable title, notwithstanding formal irregularities, or an excess in the exercise of the jurisdiction (*h*); but the section did not preclude him from raising the objection that the Court, in making the order, was exceeding its statutory powers (*i*). Now, however, under the 70th section of the Conveyancing Act, 1881, an order of the Court under any statutory or other jurisdiction cannot as against a purchaser be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not; and it is especially provided that the section shall apply to any sale under the Settled Estates Act, 1877, notwithstanding the exception in sect. 40, or under any of the Acts repealed by the Act of 1877, notwithstanding any exception in them (*k*).

Mode of procedure where any of the parties are under disability.

From the short sketch given above of the mode of procedure under the Act, it will be obvious that, even in a simple case, it is not always an easy matter to obtain an order for the sale of a settled estate: but the difficulties and expense are greatly increased where, as must nearly always happen, some of the parties interested, whose concurrence or consent is necessary, are under disability. In the case of infants, lunatics, and bankrupts or insolvents, the powers conferred by the Act, and the applications under it, and the consents to, and notifications respecting, such applications may be executed, made, or given by, and all notices under the Act may be given to, their guardians, committees, trustees, or assignees, as the case may be: but in the case of an infant, or lunatic tenant in tail, no such application is to be made, or consent or notification given by any guardian or committee,

(*g*) S. 40.

(*h*) See *Re Thompson's S. E.*, John. 418, 423; *Re Woodcock's Tr.*, 3 Ch. 230.

(*i*) *Ibid.*

(*k*) See *Re Hall-Dare's Contract*, 21 Ch. D. 41.

without the special direction of the Court (*l*). It has been held, contrary to what was the previous established practice (*m*), that a testamentary guardian of an infant is not a guardian within the meaning of this section (*n*); nor is the infant's father, although he has no adverse interest (*o*); so that in every such case a guardian must be specially appointed by the Court.

As to infants.

The practice under this section is now regulated by the Orders of 1878, made under the Act, and is as follows:—The application for the appointment of a guardian must in all cases be made by the petitioner by summons in Chambers (*p*). If the infant is the petitioner, the petition may be presented by his next friend; and after the petition has been presented and answered and a guardian appointed, the word "guardian" will be substituted for the words "next friend," and his name for that of the next friend (if they are not the same person); and the guardian will thenceforth carry on the proceedings (*q*).

Where infant is petitioner.

Where the infant is respondent, the petitioner must apply after presenting the petition for the appointment of a guardian (*r*). In either case, whether the infant is petitioner or respondent, the summons must be served on the infant's parent or testamentary or other guardian (if any), unless the Court dispense with service (*s*).

Where he is respondent.

Where infant is tenant-in-tail.

The special directions required in the case of an infant tenant-in-tail may be obtained by the petitioner on summons; and the application for them may be combined with the application to appoint a guardian (*t*). The summons for special directions must be served on the guardian appointed or proposed to be appointed (*u*); and must on the

(*l*) S. 49.

(*m*) Dan. Ch. Pr. 1811, 4th ed.

(*n*) *Re Robert James*, 5 Eq. 334.

(*o*) *Re Caddick*, 7 W. R. 334. This rule does not seem to have been altered with regard to this Act in spite of the decision of the C. A. in *Re Marquis of Salisbury*, 2 Ch. D. 29.

(*p*) O. V. As to the evidence necessary in support of the application, see O. X.

(*q*) O. V.

(*r*) See Middleton, 5, 92.

(*s*) O. VIII.

(*t*) O. VI.

(*u*) O. IX.

Chap. XIX. Sect. 1.

hearing be supported by evidence that it is, and that the guardian believes it to be, proper and consistent with a due regard for the interest of the infant that the special direction shall be given (*x*).

As to lunatics.

In the case of a lunatic, the committee must, before he can make or consent to any application, or give a notification under sect. 26, obtain an authority from the Lords Justices to do so. Evidence of his having obtained this authority must be produced by him, and is sufficient evidence, unless the Court shall require something further, upon which the Court may direct the committee to act in conformity with such authority (*y*). But where the lunatic is tenant-in-tail, he must also get special directions from the Chancery Division (*z*), which are to be obtained, after the presentation of the petition, by the petitioner on summons in Chambers (*a*); and the summons must be served on the committee (*b*).

As to persons of unsound mind.

The Act does not expressly provide for the case of a person of unsound mind not so found by inquisition; but such a case falls within sect. 26, and the notice to be given in such a case is prescribed in Ord. IV. (*c*).

As to married women.

A married woman, whether of full age or an infant, is competent to make, or consent to, any application under the Act (*d*); nor will a restraint on anticipation prevent her from exercising any of the powers given by the Act, and such exercise of them will not occasion any forfeiture, notwithstanding any provisions in the settlement for that purpose (*e*). But before making or consenting to any application she must, whether the hereditaments are settled upon

(*x*) O. XII.

(*y*) O. XI., adopting the practice established by *Re Woodcock's Tr.*, 3 Ch. 229.

(*z*) S. 49.

(*a*) O. VI.

(*b*) O. IX.

(*c*) See *ante*, p. 1284, and cases cited in n. (*m*). The Court itself had no jurisdiction to consent on behalf of such a person, *Re Clough's Est.*, 15 Eq. 284.

(*d*) S. 52.

(*e*) S. 50; cf. S. L. Act, s. 61, sub-s. 6.

Separate examination.

trust for her separate use or not (*f*), be separately examined as to her knowledge of, and free consent to, the application (*g*). If, however, she has been married since the 31st of December, 1882, or if the settled property has become hers since that date, the Married Women's Property Act applies, and her separate examination is unnecessary (*h*), but the Act does not render her separate examination unnecessary in any other cases (*i*). The Court has, however, in some cases of great inconvenience, or where her interest is small or remote, or where her interest is sufficiently represented by trustees, dispensed with the separate examination of a married woman (*k*). The examination may be taken at any time after the petition is presented and answered (*l*). Where the married woman is within the jurisdiction, her examination may be made either by the Court, or by a solicitor duly appointed by the Court for that purpose (*m*). An examination by the Court may be made either in open Court, or in chambers. In the former case a note of it is made by the Registrar; in the latter, a minute of it will be indorsed on the petition, and signed by the Chief Clerk (*n*). If it is desired that the examination shall be made by a solicitor, a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for the purpose by the judge at chambers, without summons or order, upon the request of the petitioner, and a certificate of his solicitor that

(*f*) Hence an affidavit of no settlement is unnecessary, *Re Standish's S. E.*, 25 W. R. 8.

(*g*) S. 50. The examination is necessary where she is only entitled to an interest, *e. g.* a jointure, in the settled property, *Re Turbut's S. E.*, 2 N. R. 487; and even if she is an infant, *Re Broadwood's S. E.*, 7 Ch. 323.

(*h*) *Riddell* v. *Errington*, 26 Ch. D. 220.

(*i*) *Re Harris' S. E.*, 28 Ch. D. 171; and on an application for the investment of moneys in Court under the S. E. Act, her separate examination was required, notwithstanding s. 32 of the S. L. Act, *Re Arabin's Tr.*, 52 L. T. 728.

(*k*) See the cases collected in Middleton, 83, 84.

(*l*) O. XIII. In one case the Court allowed the examination to be taken after the order on the petition had been made, and ordered an application to be made after the examination to have the original order post-dated; *Re Turbutt's S. E.*, 8 L. T. 657.

(*m*) S. 51.

(*n*) Middleton, 7.

the person nominated for appointment is not solicitor for the petitioner or for any party whose concurrence or consent is necessary (*o*). Where the married woman is out of the jurisdiction, her examination may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the Court (*p*). In such cases—and also in special cases where, although the married woman is within the jurisdiction, an examination by a solicitor, who is a commissioner to take acknowledgments, would cause unreasonable expense, delay, or inconvenience—the petitioner may apply *ex parte* at chambers for the appointment of a solicitor, if she is within the jurisdiction, or, if she is outside it, of a person, whether a solicitor or not, to take her examination (*q*). In every case where the examination is not made by the Court, the person taking it must certify the result of it (*r*); and there must also be an affidavit of an independent person verifying the examination and certificate (*s*).

General remarks on the Act.

The provisions of this Act and the repealed Acts were largely resorted to, and proved extremely beneficial in numerous cases where, from the want of an adequate trust or power in the settlement, the opportunity of effecting an advantageous sale would otherwise have been perhaps irretrievably lost; but their practical utility was greatly impaired by the stringent statutory requirements as to notices, consents, &c., by the cumbrous machinery which has been provided for the exercise of the jurisdiction, and by the necessity, in all cases, of an application to the Court before any of the powers under the Act could be exercised.

Extension of powers and simplification of procedure by Settled Land Act.

The Settled Land Act, by giving to a tenant for life generally wider powers of dealing with settled property than those which could be exercised under the Settled Estates Act,

(*o*) O. XIV.; for form of certificate, see Form No. 7 in App. to Orders; Middleton, 248.

(*p*) S. 51. In *Re Johnson's S. E.*, W. N. (1869) 87, the British Consul at Boulogne was appointed.

(*q*) O. XIV.

(*r*) S. 51. See forms 9 and 10, App. to Orders.

(*s*) Form 11, App. to Orders.

and by dispensing with the necessity of applications to the Court, has rendered it unnecessary, except in a few cases, to have recourse to the Settled Estates Act. But where there are no trustees of the settlement, and it is undesirable or impossible to appoint any, the requisite notice under sect. 45 of the Settled Land Act cannot be given; and it may therefore, in such a case, be necessary to resort to the Settled Estates Act. Again, the power of the Court to allow grants of the settled estate at fee-farm rents is, under the Settled Land Act (*t*), confined to cases where such grants are customary in the district, or where it is difficult to make grants on any other terms, while under the Settled Estates Act the discretion of the Court is unfettered (*u*). So, too, with regard to the laying out and dedication of streets, the discretion of the Court is less fettered under the Settled Estates Act (*x*) than under the Settled Land Act (*y*). If more than one person constitutes the tenant for life under the Settled Land Act (*z*), and one of such persons refuses to join in exercising the powers of a tenant for life, or his concurrence is difficult to obtain, it may be necessary to resort to the means provided by the Settled Estates Act (*a*). So, too, in the case of a married woman whose interest is, neither by the settlement nor by statute, her separate property, it may be necessary to resort to the Settled Estates Act (*b*), in order to obviate the refusal or inability of her husband to concur (*c*). And since the powers of a tenant for life under the Settled Land Act are not in any way assignable (*d*), it follows that, if the assignee, or trustee in bankruptcy, of a tenant for life desires to exercise the statutory powers of the latter, he must seek the aid of the Court under the Settled Estates Act (*e*).

Settled Estates Act still necessary in some cases.

As to grants at fee-farm rents.

Laying out streets.

Where tenant for life not a single person.

Assignee or trustee in bankruptcy of tenant for life.

(*t*) S. 10.
(*u*) S. 18.
(*x*) S. 20.
(*y*) S. 16.
(*z*) S. 2, sub-s. 6.
(*a*) Sects. 26—29; and see *ante*, p. 1283 *et seq.*
(*b*) Sects. 50, 51.
(*c*) S. L. Act, s. 61, sub-s. 3.
(*d*) S. L. Act, s. 50.
(*e*) Sects. 23 and 49; and see Middleton, 15 *et seq.*

(2.) *Confirmation of Sales Act.*

Confirmation of Sales Act.

By the Confirmation of Sales Act (*f*), after giving retrospective validity to sales by trustees of land, with an exception of minerals, though not expressly authorized by the terms of the trust or power under which the sale was made, it is enacted that "every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals; or may (unless forbidden as aforesaid) dispose of, by way of sale, exchange, or partition, the minerals with or without such rights or powers separately from the residue of the land; and, in either case, without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land" (*g*). Before, however, any such disposition is made, the sanction of the Court of Chancery must be obtained on petition in a summary way; but when once obtained, no further application is necessary for its future exercise (*h*).

Buckley v. *Howell.*

This short Act was rendered necessary by the decision in *Buckley* v. *Howell* (*i*), which threw considerable doubt on the validity of sales by trustees, under the common power, of the surface apart from the minerals. In that case the property was devised to trustees for a term upon trusts for payment of debts, &c., and subject thereto to A. for life, without impeachment of waste, with limitations over in strict settlement; and after giving to any person in possession power to demise all or any of the mines, whether opened or not, the will empowered the trustees at the request of A during his

(*f*) 25 & 26 V. c. 108.
(*g*) S. 2.
(*h*) For form of petition, see Dan. C. F., 2183.
(*i*) 29 B. 546.

life absolutely to make sale of *all or any* part of the devised estate. The trustees having contracted to sell the surface, with a reservation of the minerals, the purchaser objected that this was not a valid exercise of the power, and Lord Romilly, on the authority of *Cholmeley* v. *Paxton* (*k*), held that the objection was a good one. The principle of this decision was, that the power ought not to be so exercised as to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised; and that this would be the case if the purchase-money for the surface of the settled estate were re-invested in land with valuable minerals under it, inasmuch as the tenant, being unimpeachable for waste, might thus obtain the minerals out of the two estates; and it was stated that the remaindermen would have no equity to restrain the tenant for life from working the mines under the purchased estate (*l*). The grounds of this decision do not seem satisfactory. The risk of litigation and of giving an undue advantage to a tenant for life may be a sufficient reason why, as a matter of discretion, a trustee ought not so to exercise his power, but ought not to invalidate the exercise of the power as respects a purchaser; nor does the same reasoning apply where there is a trust for sale of the whole or any part of the land. The Act, however, it will be observed, draws no distinction between the two cases.

Cases and mode of procedure under the Act.

With regard to the construction of the Act, it has been held that the words "other person" at the beginning of the section include a mortgagee (*m*), and that on a petition by him under the Act service is unnecessary on subsequent incumbrancers and on the mortgagor (*n*). All parties who are beneficially interested should be served with notice of

(*k*) 3 Bing. 207; in which it was held that trustees, having a power of sale only, could not sell the estate without the timber, or *vice versâ*.

(*l*) See 29 B. 533, and *quære*.

(*m*) *Re Beaumont's Est.*, 12 Eq. 86; *Re Wilkinson's Est.*, 13 Eq. 634. On the practice under the Act, and for forms of orders, see Seton, 1258.

(*n*) *Ibid.*

Chap. XIX. Sect. 2.

any application under the Act (*o*) : but where the power of sale is exerciseable with the consent of the tenant for life, the petition need not be served on the persons entitled in remainder (*p*) ; and an order will be made in general terms, without reference to any particular sale (*q*). The necessity of applying to the Court is, in the case of all well-drawn settlements, since the passing of the Act, avoided by the insertion of a power to sell the minerals apart from the surface, or *vice versâ*, wherever minerals are known, or are supposed, to exist (*r*), and also by the exercise by a tenant for life of the powers of sale under the Settled Land Act, 1882 (*s*).

Section 3.

(3.) *Partition Acts*, 1868 *and* 1876.

Partition Act, 1868.

By the Partition Act, 1868 (*t*), "in a *suit* for partition where, if the Act had not been passed, a decree for partition might have been made; then, if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested, or presumptively interested, therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property, and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and give all necessary or proper consequential directions (*u*) ;" and "if the party or parties interested, individually or collectively,

(*o*) *Re Brown's Est.*, 11 W. R. 19; *Re Palmer's Will*, 13 Eq. 408.

(*p*) *Re Pryse's Est.*, 10 Eq. 531; *Re Nagle's Tr.*, 6 Ch. D. 104.

(*q*) *Re Willway's Tr.*, 1 N. R. 469; *Re Wynn's Est.*, 16 Eq. 237.

(*r*) See Lewin, 432; 3 Dav. 295; 4 *ib.* 81, where a form is given.

(*s*) S. 17.

(*t*) 31 & 32 V. c. 40.

(*u*) S. 3; which is retrospective, and applies to a suit instituted before the Act; see *Lys* v. *Lys*, 7 Eq. 126; but the Court cannot under this section direct a sale in a suit, where a decree for partition though not acted on, was made *before* the passing of the Act; *Pryor* v. *Pryor*, 10 Ch. 469.

to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among them, the Court *shall*, unless it sees good reason to the contrary, direct a sale of the property accordingly (*x*);" and "if *any* party interested in the property to which the suit relates, requests the Court to direct a sale of the property, and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court *may*, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit" (*y*).

Difficulty of construing the sections.

These three sections, and especially the 5th section, have been the subject of much judicial difference of opinion; but their true construction and effect may, it is conceived, be now stated as follows.

Construction of them as a whole.

The three sections are to be read together, although they are independent of one another, and although neither the 4th nor 5th section is to be construed as a proviso to or as restricting the operation of the 3rd section (*z*). And it is therefore important that a plaintiff should state in his Statement of Claim under which section he is applying, and if he is applying under the third section he should state that a sale will be more beneficial (*a*).

Construction of them in detail.

Considering the sections in detail, the *third section* confers upon the Court power, at the request of any party interested

(*x*) S. 4; this section is imperative; see *Pemberton* v. *Barnes*, 6 Ch. 685; *post*, p. 1300.

(*y*) S. 5.

(*z*) *Drinkwater* v. *Ratcliffe*, 20 Eq. 528; *Pitt* v. *Jones*, 5 Ap. Ca. 651, 659.

(*a*) *Evans* v. *Evans*, 31 W. R. 495.

Chap. XIX. Sect. 3.

Sect. 3.

in however small a degree, to order a sale in any case where prior to the Act a decree for partition might have been made, if in its unfettered discretion (*b*), it is of opinion that a sale would be more beneficial than a partition (*c*). What, therefore, a party claiming a sale under this section has to do, is to satisfy the Court that a sale is more beneficial (*d*) for the parties interested generally, and not for all or for any one particularly (*e*); and the test of advantage is a pecuniary one, to which questions of sentiment do not apply (*f*). The fact that the will under which the property is held directs that no sale shall take place until the youngest tenant in common attains twenty-one, has been held in Ireland not to prevent the Court from exercising its powers under this section if it thinks fit during the minority of some of the owners (*g*). The Court has full power to make an order for partition instead of sale, if it think fit (*h*), and may even do so in opposition to the Chief Clerk's certificate (*i*).

Sect. 4.

The fourth section throws on the parties resisting a sale which is claimed by persons interested to the extent of a moiety or upwards, the onus of proving that a partition is more advantageous than a sale; and unless this onus is discharged, the Court has no discretion to refuse a sale (*k*). Mortgagees are "parties interested" within this section, and

(*b*) The Court of Appeal will not as a rule interfere with the judge's discretion as to this; *Dyer* v. *Painter*, 33 W. R. 806.

(*c*) For the settled form of order under this sect. see *Re Hardiman*, 16 Ch. D. 360; *Waite* v. *Bingley*, 21 Ch. D. 683.

(*d*) *Drinkwater* v. *Ratcliffe*, *suprà*; *Allen* v. *Allen*, 21 W. R. 842; *Dyer* v. *Painter*, 33 W. R. 806.

(*e*) *Fleming* v. *Crouch*, W. N. (1884) 111.

(*f*) *Drinkwater* v. *Ratcliffe*, *suprà*, 533.

(*g*) *Thompson* v. *Richardson*, 6 I. R. Eq. 596; but see *Swaine* v. *Denby*, 14 Ch. D. 326.

(*h*) *Dicks* v. *Batten*, W. N. (1870) 173; *Williams* v. *Games*, 10 Ch. 204; *Dyer* v. *Painter*, 33 W. R. 806.

(*i*) *Allen* v. *Allen*, 21 W. R. 842.

(*k*) *Lys* v. *Lys*, 7 Eq. 126; *Pemberton* v. *Barnes*, 6 Ch. 685; cf. *Saxton* v. *Bartley*, 27 W. R. 615, where the Court refused an order for sale. The mere fact of the resisting party being in possession is not a "contrary reason," *Wilkinson* v. *Joberns*, 16 Eq. 14; *Roughton* v. *Gibson*, 25 W. R. 268; nor is a possible loss of income to an infant defendant entitled to one moiety, *Rowe* v. *Gray*, 5 Ch. D. 263; *Re Whitwell's Est.*, 19 L. R. Ir. 45; and see generally, *Porter* v. *Lopes*, 7 Ch. D. 358.

are to be reckoned in calculating the proportion of parties interested on an application for sale (*l*). And on the same principle a tenant in common who has mortgaged his share cannot claim a partition or sale without the consent of his mortgagee, or without offering to redeem the mortgage (*m*). The fact that one of the persons entitled to less than a moiety is a lunatic does not bar the rights of the owners of the greater portion under this section (*n*). The Court has, however, no jurisdiction under this section to direct a sale where there is subsisting a valid trust for sale (*o*); although a mere discretionary power in trustees has not the effect of excluding the statutory power of the Court (*p*).

Sect. 5.

On the fifth section a question has been raised whether the election of the other parties interested in the property to purchase the share of the party requesting a sale deprives the Court of its power to order a sale under the 3rd section. It is now settled, after much conflict of judicial opinion, that the 5th section is not a proviso to the 3rd; and that where the 3rd section applies, the 5th has no operation. Thus, where parties entitled to three-sixteenths of house property in a town asked for a sale, which was resisted by the owners of the other thirteen-sixteenths, who offered to take the plaintiffs' shares at a valuation, the Court, being satisfied that a sale would be more beneficial, held that the case fell under sect. 3, and ordered a sale of the whole (*q*). And even where the Court is not satisfied that a sale will be beneficial, it will not compel the plaintiffs who have claimed a sale of the whole to sell their interest at a valuation to the

(*l*) *Davenport* v. *King*, 31 W. R. 911.

(*m*) *Gibbs* v. *Haydon*, 30 W. R. 726; nor does s. 25, sub-s. 2 of the Conv. Act, 1881, alter the rule; *ibid.*

(*n*) *Re Barker*, 17 Ch. D. 241.

(*o*) *Biggs* v. *Peacock*, 22 Ch. D. 284; and see *Cass* v. *Wood*, 30 L. T. 670. Nor where there are overriding trusts to be administered can the Court decree partition or sale; *Taylor* v. *Grange*, 15 Ch. D. 165.

(*p*) *Boyd* v. *Allen*, 24 Ch. D. 622.

(*q*) *Pitt* v. *Jones*, 5 Ap. Ca. 651, affirming *S. C.* sub nom. *Gilbert* v. *Smith*, 11 Ch. D. 78.

Chap. XIX. Sect. 3.

defendants, but will order a partition if the plaintiffs are unwilling to sell their shares (*r*).

Powers of the Court as regards the sale.

On any sale under the Act the Court may authorize any of the parties interested to bid at the sale (*s*) on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase-money or any part thereof, instead of paying the same, or as to any other matters as it shall think fit (*t*).

Incorporation of sect. 30 of Trustee Act, 1850;

The provisions of the 30th section of the Trustee Act, 1850, are made applicable to all cases where a sale is directed (*u*), and the powers of the Court under that Act are extended to the interests of persons who, having been advertised for under the 3rd section of the Act of 1876, have not come in and established their claims, as if they had been parties to the action. Thus, a decree for sale in a partition action may be made to bind the legal interests not only of non-existent persons (*x*), but also of persons who, although they may be in being, cannot be ascertained, *e. g.*, the right heirs of a living person (*y*); and also of the persons mentioned in the 3rd section of the Act of 1876. Nor does the express inclusion of sect. 30 of the Trustee Act, 1850, exclude the powers of the Trustee Extension Act, 1852 (*z*); and, therefore, where an order for sale had been made in a partition action, but one of the necessary parties to the conveyance was out of the jurisdiction, the Court, on a petition under the Trustee Act and the Trustee Extension Act, made an order declaring that the persons entitled were to be deemed seised upon a trust within the meaning of the former Act, and appointed a person to convey for them (*a*).

of sects. 23–25 of Settled

The provisions of sects. 23 to 25 of the Leases and Sales of

(*r*) *Williams* v. *Games*, 10 Ch. 204; *Pitt* v. *Jones*, 5 Ap. Ca. 651.

(*s*) Leave to bid will not be given to the persons having the conduct of the sale; *Verrall* v. *Catheart*, 27 W. R. 645, not following *Pennington* v. *Dalbiac*, 18 W. R. 684; but in the latter case none of the parties objected.

(*t*) S. 6. *Wilkinson* v. *Joberns*, 16 Eq. 14; *Gilbert* v. *Smith*, 11 Ch. 78.

(*u*) S. 7.

(*x*) *Lees* v. *Coulton*, 20 Eq. 20.

(*y*) *Basnett* v. *Moxon*, *ib.* 182.

(*z*) *Beckett* v. *Sutton*, 19 Ch. D. 646.

(*a*) *Ibid.*

Estates Act, 1856.

Settled Estates Act, 1856, are also incorporated in the Act (*b*), the effect of which is, in the case of all persons under disability, to reconvert the proceeds of sale into realty (*c*); and this applies to all sales under the Partition Acts, whether or not the estate sold was settled (*d*). But it would seem to be otherwise in the case of persons *sui juris* (*e*); so that if a person *sui juris* dies entitled to the proceeds of a sale made under the Acts, the money, not having been re-invested in land, will as between his real and personal representatives belong to the latter (*f*).

Order may now be made in the absence of some of the parties interested.

In an ordinary partition action it was essential that all persons legally interested should be parties before an order could be obtained (*g*). But the 9th section of the Partition Act, 1868, provided that an action might be maintained against one or more of the parties interested without service upon the others, and that at the hearing the Court might direct such inquiries as it should think necessary or proper, with a view to an order for partition or sale being made on further consideration (*h*); but that all persons who would before the Act have been necessary parties must be served with notice of the order on the hearing, and would thereafter be bound by all subsequent proceedings, as if they had been originally parties (*i*). Under this enactment it was impossible

(*b*) S. 8. It must be remembered that these sections, and especially the 25th section, are not so comprehensive as the corresponding sects. 34—36 of the S. E. Act, 1877, which do not apply; see *ante*, p. 1288.

(*c*) *Foster* v. *Foster*, 1 Ch. D. 588; *Mildmay* v. *Quicke*, 6 Ch. D. 553; a curator *ad bona* of a lunatic's estate, appointed by a foreign Court to get in and administer, cannot obtain a transfer of proceeds of sale in a partition action; *Grimwood* v. *Bartels*, 25 W. R. 843.

(*d*) *Re Barker*, 17 Ch. D. 241.

(*e*) *Steed* v. *Preece*, 18 Eq. 192; *Arnold* v. *Dixon*, 19 Eq. 113; and see *Hyett* v. *Mekin*, 25 Ch. D. 735.

(*f*) *Mordaunt* v. *Benwell*, 19 Ch. D. 302; *Re Pickard*, 53 L. T. 293.

(*g*) Seton, 1016.

(*h*) It was formerly held that after directing inquiries the Court would not go on at once to direct a sale, but would await the result of the inquiries; *Buckingham* v. *Sellick*, 22 L. T. 370; *Harper* v. *Bird*, 23 W. R. 646; *Lawe* v. *Stoney*, W. N. (1876) 141. But now it seems that an order for sale may be made at the hearing, subject to the result of the inquiries being satisfactory; *Powell* v. *Powell*, 10 Ch. 130; and see *post*, p. 1310.

(*i*) In *Stace* v. *Gage*, 8 Ch. D. 451, where the plaintiffs were trustees for

Chap. XIX. Sect. 3.

to proceed until notice of the order had been served on all persons interested who were not parties (*k*).

Service of notice may be dispensed with.

But by the Act of 1876 (*l*) the service of notice may by the leave of the Court be dispensed with in cases where service is impossible or can only be effected at an expense disproportionate to the value of the property; and in lieu thereof the Court will order advertisements (*m*) to be issued for all persons upon whom service has been dispensed with. At the expiration of the time fixed by such advertisements for them to come in and establish their claims, those who have not done so, whether within or without the jurisdiction (including persons under disability), will be bound by the proceedings as if they had been served with notice of the judgment; and thereupon the powers of the Court under the Trustee Act, 1850, will extend to their interests in the property to which the action relates, as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

Practice where notice has been dispensed with and the property has been sold.

Where an order has been made under the last section dispensing with service of notice of the judgment and the property is sold by the order of the Court, the 4th section provides that: (1) The proceeds of sale shall be paid into Court to abide further order; (2) The Court shall fix a time at the expiration of which the proceeds will be distributed, and may from time to time extend the time so fixed; (3) The Court shall direct such notices to be given, by advertisements or otherwise, for notifying to any persons on whom service is

sale of two-thirds of the property, and defendants were trustees for sale of the remaining one-third subject to the life interest of a co-defendant, it was held that the interests of the beneficiaries were sufficiently represented, and a sale and partition were directed without notice to them. And as R. S. C. O. XVI. r. 8 applies to partition actions this is clearly so; *Simpson* v. *Denny*, 10 Ch. D. 28.

(*k*) *Hurry* v. *Hurry*, 10 Eq. 346; *Peters* v. *Bacon*, 8 Eq. 125; *Mildmay* v. *Quicke*, 20 Eq. 537.

(*l*) S. 3.

(*m*) The Court has no power to dispense with these; *Hacking* v. *Whalley*, 51 L. J. Ch. 944.

dispensed with, and who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made (*n*); (4) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons; (5) If at the expiration of the time so fixed or extended, the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservation (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not), who may appear from the evidence before the Court to have any *primâ facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons. And the effect of such a distribution is to exclude all such other persons from participation in the proceeds, but not to prejudice the right of any person so excluded to recover from any person who has participated the portion of the share to which such excluded person is entitled. And where the whole property is not sold at one sale, the 5th section provides a further remedy for any person who, although really entitled, has been thus excluded from participation, by directing that if any such person establishes his claim before the distribution in a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent to which they were

Saving of rights of absent parties.

(*n*) This sub-section is imperative, and the Court has no jurisdiction to dispense with the advertisements of an intended distribution. The order dispensing with service of the judgment should provide for the issue of advertisements; *Phillips* v. *Andrews*, 56 L. T. 108.

Chap. XIX. Sect. 3.

increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale, if his claim thereto had been established in due time.

Difficulties where any of the parties were infants.

Before the Act of 1868 was passed, an order for sale could only be made, where any of the parties interested were infants, by the circuitous process of first obtaining a declaration that their costs of suit were properly chargeable on their shares; and the Court, on being satisfied that a sale would be for the benefit of the infants, would then make an order for the sale of the entirety, instead of a partition (*o*). The powers given by the Act of 1868 are, as we have seen (*p*), exerciseable, notwithstanding the disability of any persons interested (*q*). But even under that Act where the plaintiff requesting the sale was an infant, it was apparently considered necessary, as an infant's request was a nullity, to go through the form of having his costs of suit declared a charge on his share of the estate (*r*). But the Court could, under the Act, direct a sale at the request of a married woman, not entitled to her separate use (*s*). On the other hand, the next friend of a person of unsound mind, not so found by inquisition, was held to be unable to file a bill for the partition of his real estate (*t*).

Remedy provided by sect. 6 of Act of 1876 as to persons under disability.

These defects were remedied by the 6th section of the Act of 1876, which provides that in an action for partition a request for sale may be made, or an undertaking to purchase given, on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the

(*o*) *Thackeray* v. *Parker*, 1 N. R. 567; *Davis* v. *Turvey*, 32 B. 554; *Hubbard* v. *Hubbard*, 2 H. & M. 38, which see for form of order.

(*p*) *Ante*, p. 1303.

(*q*) S. 3.

(*r*) *France* v. *France*, 13 Eq. 173; *Young* v. *Young*, *ib.* 175; but see *Davey* v. *Wietlisbach*, 15 Eq. 269; *Grove* v. *Comyn*, 18 Eq. 387.

(*s*) *Higgs* v. *Dorkis*, 13 Eq. 280; *Leigh* v. *Edwards*, 21 W. R. 835.

(*t*) *Halfhide* v. *Robinson*, 9 Ch. 373.

next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale will be for his benefit.

Practice under the section.

Infants.

With reference to the construction and practice under this section, it must, in the first place, be observed that it applies only to cases within the Act of 1868, and therefore gives the Court no jurisdiction to order a sale at the request of infants where, before that Act, a decree for partition could not have been made, *e. g.*, where the estate was liable to be divided into an unascertained number of shares (*u*). Secondly, the words of the section are not to be construed *reddendo singula singulis*, as was held in one case by Malins, V.-C. (*x*). And accordingly, the guardian, to make the request on behalf of an infant, need not be a testamentary guardian or one appointed by the Court, but may be merely the guardian *ad litem* (*y*).

Person of unsound mind.

So, too, a person of unsound mind not so found may, under this section, be plaintiff by his next friend in an action instituted for the purpose of obtaining a sale (*z*).

Married women.

As regards a married woman consenting to or requesting a sale of her real estate under this section, the effect of the Act is to put her in the same position as if she had converted the property by an acknowledged deed (*a*). Hence the Court is very particular that her consent shall be fully proved; and for this purpose there should be a request in writing

(*u*) *Miles* v. *Jarvis*, 50 L. T. 48.

(*x*) *Platt* v. *Platt*, 28 W. R. 533.

(*y*) *Rimington* v. *Hartley*, 14 Ch. D. 630.

(*z*) *Watt* v. *Leach*, 26 W. R. 475; and see *Rimington* v. *Hartley*, *supra*, per Jessel, M. R. It would seem that *Halfhide* v. *Robinson*, 9 Ch. 373, is no longer law.

(*a*) *Wallace* v. *Greenwood*, 16 Ch. D. 362, 367; and see *Fowler* v. *Scott*, 19 W. R. 972. If money is in Court representing the share of a married woman in an estate sold in a partition action, but without her consent or request, she may on being separately examined elect to take the proceeds as money, and not as land (*Standering* v. *Hall*, 11 Ch. D. 652; *Re Robins' Est.*, W. N. (1879) 95); and the separate examination will not be dispensed with even where the fund is under 200*l.*; *Topham* v. *Burgoyne*, 49 L. J. Ch. 213.

Chap. XIX. Sect. 3.

signed by the married woman, authorizing and requesting her solicitor to instruct counsel to ask for a sale (*b*). Of course, the provisions of this section only apply to those cases where the married woman's share is neither her separate property, nor affected by the Married Women's Property Act, 1882; in either of which cases she can deal with it as a *feme sole*.

Lunatics.

Where the committee of a lunatic, entitled as tenant in tail to three-fourths of an estate, applied in lunacy to be authorized to request a sale, the petition was referred to the Master; and on his reporting that a sale would be most beneficial, a sale was directed, and the committee ordered to join; but the proceeds were directed to be paid into Court, to remain subject to the same trusts as the estate sold was formerly subject to (*c*).

Act of 1868 applied only where there was a suit for partition.

By an apparent oversight the Act of 1868 applied only where there was a *suit* for partition, so that as a matter of form it was still necessary that the bill should pray for a partition, and in the alternative for a sale under the Act (*d*).

The defect remedied by Act of 1876.

This defect has been remedied by a provision in the later Act (*e*), that for the purposes of the Act of 1868, and of the Act of 1876, an action for partition shall include an action for sale and distribution of the proceeds, and that in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Sale when ordered at the hearing.

A sale may be ordered at the hearing if all the parties interested (*f*) are before the Court and the title is then

(*b*) *Grange* v. *White*, 18 Ch. D. 612; *Wallace* v. *Greenwood*, *suprà*; and see *Crookes* v. *Whitworth*, 10 Ch. D. 289, which must probably be regarded as overruled.

(*c*) *Re Pares*, 12 Ch. D. 333.

(*d*) *Teall* v. *Watts*, 11 Eq. 213; *Holland* v. *Holland*, 13 Eq. 406; and see *contrà*, *Aston* v. *Meredith*, 11 Eq. 601.

(*e*) S. 7.

(*f*) An annuitant is not a necessary party to a partition action; but the order will contain a declaration that it is without prejudice to the rights of the annuitant; *Poole* v. *Poole*, W. N. (1885) 15.

proved (*g*) or admitted (*h*). In such cases no preliminary inquiries need be ordered; but any consequential or necessary inquiries may be directed in the same order which directs the sale (*i*). If all the persons interested are parties, but their titles are not proved at the hearing, an order for sale may be made, subject to the Chief Clerk certifying that all persons interested are before the Court (*k*). But until all parties interested are before the Court, or are presumed by the Court to be dead (*l*), or they have all been served with notice of the judgment, or the Court has, under the Act of 1876 (*m*), dispensed with service upon them, the Court cannot order a sale. If it is uncertain whether some of the interested persons are out of the jurisdiction, an inquiry may be directed as to the parties interested and in what shares and whether such persons were out of the jurisdiction (*n*).

Where parties interested are not before the Court.

If all the persons interested are not before the Court, it was held under the Act of 1868 (*o*) that an inquiry must first be directed, and that an order for sale could only be made on further consideration (*p*), although the consideration need not be a formal one in Court, but might consist in liberty to apply in chambers as to a sale after certificate that all persons interested had been either parties to the cause, or had been served with notice of the judgment (*q*). But it seems that now it is not absolutely necessary to reserve further consideration, but that an immediate order may be made subject to the result of the inquiries (*r*). Where, however, by the

(*g*) *Lees* v. *Coulton*, 20 Eq. 20.

(*h*) *Burnell* v. *Burnell*, 11 Ch. D. 213.

(*i*) *S. C.*

(*k*) *Senior* v. *Hereford*, 4 Ch. D. 494. In such a case the judgment must not be prefaced with a statement that in the opinion of the Court a sale will be more beneficial than a partition; *Re Hardiman*, 16 Ch. D. 360.

(*l*) *Jackson* v. *Lomas*, 23 W. R. 744; *Rawlinson* v. *Miller*, 1 Ch. D. 52.

(*m*) *Ante*, p. 1304.

(*n*) *Silver* v. *Udall*, 9 Eq. 227; where James, V.-C., intimated that if they had been out of the jurisdiction he would have made an immediate order for sale; and see *Teall* v. *Watts*, 11 Eq. 213.

(*o*) S. 9.

(*p*) See *Mildmay* v. *Quicke*, 20 Eq. 537.

(*q*) *S. C.*

(*r*) Seton, 1016; and *ib.* 1004, for forms of order.

Chap. XIX. Sect. 3.

decree a sale is directed if on inquiry it be found that a sale will be more beneficial than a partition, and that all the parties interested are before the Court, the sale cannot be made until the Chief Clerk has made his certificate (*s*). But where in fact all the parties interested were before the Court, and a title could have been made independently of the Act, a purchaser was not allowed to get off his bargain on the technical objection that there had been no certificate to that effect (*t*). Where the defendant admits the plaintiff's title, the latter may on motion under R. S. C. 1883, O. XXXII. r. 6, at once obtain an order for the usual inquiries as to the persons entitled (*u*). And in the same way an order for sale may be made upon admissions in the pleadings (*x*), or in default of a defence being put in even where the defendant is an infant, and the guardian *ad litem* fails to deliver a defence (*y*). Where the action is brought in a District Registry, the usual inquiries may be made there; but the order for sale can only be made on an application to chambers (*z*). A sale out of Court will not be ordered, where some of the persons beneficially interested are not *sui juris*, and the trustees have no power of sale under their trust deed (*a*).

Court may adopt and confirm previous contract.

The Court may instead of ordering a sale adopt and confirm a previous contract for sale entered into by the parties, where they are all before the Court and the title is proved (*b*); or it may order a partition of part of the property and a sale of the rest (*c*); but where one part-owner desired a sale, and

(*s*) *Powell* v. *Powell*, 10 Ch. 130; *Mildmay* v. *Quicke*, 20 Eq. 537.

(*t*) *Rawlinson* v. *Miller*, 1 Ch. D. 52; and the Conv. Act, 1881, s. 70, would seem to be a bar to such an objection by a purchaser, see *Re Hall-Dare*, 21 Ch. D. 41.

(*u*) *Gilbert* v. *Smith*, 2 Ch. D. 686.

(*x*) *Burnell* v. *Burnell*, 11 Ch. D. 213.

(*y*) *Fitzwater* v. *Waterhouse*, 52 L. J. Ch. 83; and Pearson, J., dispensed with any affidavits verifying the statement of claim; *Ripley* v. *Sawyer*, 31 Ch. D. 494.

(*z*) *Sykes* v. *Schofield*, 14 Ch. D. 629.

(*a*) *Strugnell* v. *Strugnell*, 27 Ch. D. 258.

(*b*) *Grove* v. *Comyn*, 18 Eq. 387; and see Seton, 1007.

(*c*) *Roebuck* v. *Chadebert*, 8 Eq. 127; *Allen* v. *Allen*, 21 W. R. 842; and see *Pennington* v. *Dalbiac*, 18 W. R. 684, where it was left to be settled in Chambers which part should be sold, and which partitioned. Seton, 1011.

others a partition, the Court held that it had no jurisdiction to order a sale by the one part-owner to the others and then to decree a partition (*d*). Where a married woman was entitled to a part for her separate use but with a restraint on anticipation, the Court has got rid of the restraint by making her costs a charge on her share of the estate, and ordered a sale (*e*); but it has refused to order a sale reserving the minerals (*f*).

Costs.

Previously to this Act, the practice of the Court of Chancery as to costs in a partition suit, was to give none on either side up to the hearing, and to make all the parties bear the subsequent costs in proportion to their interests (*g*). But the Court is, by the Act of 1868, empowered to "make such order as it thinks just respecting costs up to the time of hearing" (*h*); and although it was at first held that this provision did not alter the old rule (*i*), it is now the settled practice to order the entire costs, both up to and subsequently to the hearing, to come out of the estate (*k*) and to be borne by the parties in proportion to their interests (*l*), unless the Court is of opinion that there are special circumstances to which the rule must yield (*m*). The costs will be taxed only as between party and party, unless the parties consent to their being taxed as between solicitor and client (*n*). The costs of a summons taken out to determine the rights of the defen-

(*d*) *Williams* v. *Games*, 10 Ch. 204.

(*e*) *Fleming* v. *Armstrong*, 34 B. 109; and see *Higgs* v. *Dorkis*, 13 Eq. 280.

(*f*) *Lawe* v. *Stoney*, W. N. (1876) 141.

(*g*) *Agar* v. *Fairfax*, 17 V. 542, 547; Seton, 1018.

(*h*) S. 10.

(*i*) *Landell* v. *Baker*, 6 Eq. 268.

(*k*) *Osborn* v. *Osborn*, 6 Eq. 338; *Miller* v. *Marriott*, 7 Eq. 1; *Simpson* v. *Ritchie*, 16 Eq. 103; *Gilbert* v. *Smith*, 8 Ch. D. 548, 558.

(*l*) *Cannon* v. *Johnson*, 11 Eq. 90; *Thompson* v. *Richardson*, 6 I. R. Eq. 596; *Ball* v. *Kemp-Welch*, 14 Ch. D. 512; and the rule is the same where partition, and not sale, is asked for, *Bowes* v. *Marq. of Bute*, 27 W. R. 750.

(*m*) *Wilkinson* v. *Joberns*, 16 Eq. 14, 17; *Simpson* v. *Ritchie*, *ib.* 103; *Porter* v. *Lopes*, 7 Ch. D. 358, 367; *Corp. of Huddersfield* v. *Jacomb*, W. N. (1874) 80; and see further cases Dan C. P. 1360.

(*n*) *Ball* v. *Kemp-Welch*, *supra*. As to solicitors' costs in reference to the conveyance in a partition action, see *Humphreys* v. *Jones*, 31 Ch. D. 30.

dants among themselves, pending the usual inquiries in Chambers, will have to be borne by the share of the defendants, and will not come out of the whole estate (*o*).

We may here refer to the power of the Court to direct a sale of lands delivered in execution to a judgment creditor under the 27 & 28 Vict. c. 112 (*p*); and to the provisions of sect. 25 of the Conveyancing Act, 1881 (*q*), under which the Court may now direct a sale instead of a foreclosure.

(*o*) *Foster* v. *Jennings*, W. N. (1884) 200.

(*p*) As to which, *vide ante*, p. 544 *et seq.*

(*q*) See *post*, p. 1317 *et seq.*

CHAPTER XX.

AS TO SALES BY THE COURT OF CHANCERY OR THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE.

1. *As to the time for, conduct of, and manner of the sale.*
2. *As to the rights and liabilities of the highest bidder, after the sale, but before the certificate of the result of the sale becomes absolute;—and as to the late practice of opening biddings.*
3. *As to the purchaser's rights and liabilities after the certificate of the result of the sale becomes absolute.*
4. *As to the investigation of title;—payment and application of purchase-money;—possession;—and preparation and execution of the conveyance.*
5. *As to the purchaser's rights after completion.*
6. *As to the practice where the purchaser fails to complete.*

Section 1.

As to the time for, conduct of, and manner of the sale.

(1.) An estate, when sold by the Court, is usually sold by public auction (*a*); the Court will, however, at once accept an advantageous offer actually made for the property (*b*); and if the affidavits on an application in Court are satisfactory, the matter need not be referred to chambers (*c*). Occasionally a sale is effected by means of sealed tenders sent into the judge's chambers (*d*); or by auction before the Chief Clerk (*e*): and the Court has power to authorise the sale to be carried out either by laying proposals before the judge in chambers, or by proceedings altogether out of

Sale by Court may be by auction or private contract.

(*a*) See Dan. C. P. 1074 *et seq.*

(*b*) See *Dowle* v. *Lucy*, 4 Ha. 311; *Bousfield* v. *Hodges*, 33 B. 90. For form of order confirming a contract, see Seton, 1393.

(*c*) *Pimm* v. *Insall*, 10 Ha. App. lxxiv.

(*d*) *Osborne* v. *Foreman*, 8 D. M. & G. 122; aff. *sub nom. Barlow* v. *Osborne*, 6 H. L. C. 566; *Waterhouse* v. *Wilkinson*, 1 H. & M. 636; and see Dan. C. P. 1085 *et seq.*

(*e*) *Pemberton* v. *Barnes*, 13 Eq. 349.

Chap. XX. Sect. 1.

Court, any moneys produced thereby being paid into Court, or to trustees, or otherwise dealt with as the Judge in chambers may order (*f*): but where the order is for a sale in any specified manner, and an abortive attempt is made to sell in that way, a further order should be obtained before the estate can be sold by means of sealed tenders (*g*). Where the cause is proceeding in the district registry, the sale may take place there; but whether it shall take place there or in chambers is a question entirely within the discretion of the judge (*h*).

When made in administration action.

Where the decree in an administration suit directed the Master to inquire and state what real estate passed by the will, and that the estates which he should find to have passed be sold with his approbation, it was held that he might, after having informed himself what estates passed, proceed to sell them, without making any previous report upon the preliminary inquiry (*i*): but where an infant was interested in the real estate, it was doubtful whether the Court would direct a sale until the accounts had been taken, and the cause had been heard on further directions (*k*).

Sale may now be directed before decree.

But under the 15 & 16 Vict. c. 86 (*l*), a sale might be made in an administration (*m*) suit before decree (*n*); but only in cases where under the old practice a sale could have been directed at the hearing (*o*), and in which for the protection of the property or other like cause it was necessary to come to the Court; and not so as to enable a party in a contested suit, and upon an interlocutory application before the hearing, to obtain a decision upon the main questions at

(*f*) R. S. C. 1883, O. LI. r. 1A.

(*g*) *Berry* v. *Gibbons*, 15 Eq. 150.

(*h*) *Macdonald* v. *Foster*, 6 Ch. D. 193.

(*i*) *Dykes* v. *Taylor*, 16 Si. 563; but see and compare *Powell* v. *Powell*, 10 Ch. 130, a case under the Partition Act, and *vide ante*, p. 1310.

(*k*) See *Baillie* v. *Jackson*, 10 Si. 167, where Shadwell, V.-C., refused to insert a direction for sale in the decree; but, in Lord St. Leonards' opinion, there is no invariable rule upon the subject; see *Lynch* v. *Joyce*, 3 D. & War. 349.

(*l*) S. 55.

(*m*) See *London and County Banking Co.* v. *Dover*, 11 Ch. D. 204.

(*n*) *Bell* v. *Turner*, 2 Ch. D. 409.

(*o*) *Mandeno* v. *Mandeno*, Kay, App. ii.

issue in it (*p*). A sale might, if necessary, be directed for payment of costs, although infants were interested (*q*). This section has been repealed (*r*); but its effect has been preserved by O. LI. r. 1 of the R. S. C. 1883, which provides that if in any cause or matter relating to real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a judge may order the same to be sold. It has been held that, in spite of the omission from the rule of the words "for the purposes of the suit," the rule must be confined to cases where a sale is necessary for the purposes of the action, and does not enable the Court to sell real estate when it would otherwise have no power to do so, *e.g.* the real estate of an infant (*s*). An action, in terms for administration, but in reality for an account of rents and profits, has been held not to be "a cause or matter relating to real estate" (*t*). And the order will now be made on summons in chambers (*u*).

When sale will not be directed in an administration action.

But a sale will not be ordered in an administration action, when the testator has himself directed all necessary expenses to be raised by mortgage (*x*): so, where a testatrix directed that an advowson which she devised to trustees should be sold by them immediately after the death of the then incumbent, the Court refused, in his lifetime, to direct a sale of the next presentation for the benefit of the *cestuis que trust* (*y*). As against a specific incumbrancer, a sale could not be directed in an administration suit without his express consent, except subject to his charge (*z*). But now

(*p*) *Prince* v. *Cooper*, 16 B. 546; *Tulloch* v. *Tulloch*, 3 Eq. 574.

(*q*) *Mandeno* v. *Mandeno*, *suprà*; and *vide ante*, p. 1306, and cases cited in n. (*o*).

(*r*) 46 & 47 V. c. 49, s. 4.

(*s*) *Pickard* v. *Wheater*, 31 Ch. D. 247; and see *Miles* v. *Jarvis*, 50 L. T. 48.

(*t*) *Staines* v. *Staines*, 33 Ch. D. 172.

(*u*) O. LV. r. 2 (14); and see Ann. Prac. notes to O. LI. r. 1; Wilson, 382.

(*x*) *Drake* v. *Whitmore*, 5 De G. & S. 619.

(*y*) *Bristow* v. *Skirrow*, 27 B. 590.

(*z*) *Langton* v. *Langton*, 7 D. M. & G. 30; *Wickenden* v. *Rayson*, 6 D. M. & G. 210; Seton, 1396. See under 15 & 16 V. c. 86, s. 48, *Wickham* v. *Nicholson*, 19 B. 38, where a sale instead of a foreclosure was ordered, notwithstanding the dissent of a mortgagee, and *vide infrà*.

Chap. XX. Sect. 1.

under sect. 5 of the Conveyancing Act, 1881 (*a*), where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court in order to meet the incumbrance to be ascertained as therein provided. It is conceived that the Court will not exercise its discretionary power under this section so as to materially alter the rights of the parties (*b*). Where trustees with a discretionary power of sale disclaim, the Court will exercise the power, although infants are interested (*c*).

Under 3 & 4 Will. IV. c. 104, in suit by person claiming under will.

The Court may sell the real estate of a testator for payment of his debts under the 3 & 4 Will. IV. c. 104, although the suit be instituted by a person interested under the will, instead of by a creditor (*d*); so, also, for the purpose of raising the arrears of a rent-charge (*e*).

Sale when directed in a foreclosure action.

Under the 15 & 16 Vict. c. 86, a sale, even of an infant's estate (*f*), might be directed (*g*) in a foreclosure suit, at the hearing; but not on a prior interlocutory application (*h*); nor, it would seem, after a decree for foreclosure (*i*), except

(*a*) See on the section *Patching* v. *Bull*, 30 W. R. 244; *Dickin* v. *Dickin*, W. N. (1882) 113.

(*b*) See *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788.

(*c*) *Browne* v. *Paull*, 16 Jur. 707; and see *Prentice* v. *Prentice*, 10 Ha. App. xxii.

(*d*) *Price* v. *Price*, 15 Si. 484; *Rodney* v. *Rodney*, 16 Si. 307; *Dinning* v. *Henderson*, 2 Col. 330. As to a sale for payment of legacies, see *Rowley* v. *Adams*, 7 B. 548.

(*e*) *Cupit* v. *Jackson*, 13 Pr. 721; *White* v. *James*, 26 B. 191; *Horton* v. *Hall*, 17 Eq. 437; *Scottish Widows' Fund* v. *Craig*, 20 Ch. D. 208, where the rent-charge was charged upon the inheritance of glebe lands. Although future payments of an annuity may be secured by a charge on the real estate (see Seton, 960), the property will not be ordered to be sold as long as payments are punctually made; *Re Potter*, 50 L. T. 8.

(*f*) *Mears* v. *Best*, 10 Ha. App. li.; *Siffken* v. *Davis*, Kay, App. xxi.

(*g*) Sect. 48; *Jenkin* v. *Row*, 5 De G. & S. 107; and for form of order, see *Staines* v. *Rudlin*, 9 Ha. App. liii. n.; *Cator* v. *Reeves*, 16 Jur. 1004. As to the practice under the section, see Seton, 1046 *et seq.*; Dan. C. P. 1409 *et seq.*

(*h*) *Wayn* v. *Lewis*, 1 Dr. 487; *London and County Banking Co.* v. *Dover*, 11 Ch. D. 204.

(*i*) *Girdlestone* v. *Lavender*, 9 Ha. App. liii.; *Campbell* v. *Moxhay*, 18 Jur. 641.

by consent (*k*); nor on the application of the mortgagor, unless he made a deposit to cover the probable expenses of the sale (*l*); and the money so paid into Court was, in the first instance, to be applied in indemnifying the mortgagee entitled to a foreclosure decree, against any costs which he might incur by the sale, or attempted sale (*m*). A sale might be directed, notwithstanding the dissent of the mortgagor (*n*), or some of the incumbrancers (*o*); so, also, although the mortgage deed contained the usual power of sale, and the bill prayed only for a sale, and not for foreclosure (*p*). Where a sale was directed at the instance of a *puisne* incumbrancer, besides a deposit to cover the probable sale expenses, a bidding was ordered to be reserved sufficient to cover the amount found due to the first mortgagee (*q*); and where a second mortgagee of a moiety of the estate was plaintiff, the conduct of the sale was given to a defendant, the first mortgagee of the entirety, as being a more convenient and less expensive course (*r*).

Sale under Conveyancing Act.

Now, under the Conveyancing Act, 1881 (*s*), which has repealed sect. 48 of the 15 & 16 Vict. c. 86, any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him, either for redemption alone, or for sale alone, or for sale or redemption in the alternative; and in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mort-

(*k*) *Laslett* v. *Cliffe*, 2 S. & G. 278; and see *Woodford* v. *Brooking*, 17 Eq. 425.

(*l*) *Boydell* v. *Manby*, 9 Ha. App. liii.; *Bellamy* v. *Cockle*, 18 Jur. 465; and see *Whitfield* v. *Roberts*, 5 Jur. N. S. 113.

(*m*) *Corsellis* v. *Patman*, 4 Eq. 156.

(*n*) *Newman* v. *Selfe*, 33 B. 522; and see *Woodford* v. *Brooking*, *supra*, where judgment went against him by default.

(*o*) *Wickham* v. *Nicholson*, 19 B. 38.

(*p*) *Hutton* v. *Scaly*, 4 Jur. N. S. 450; see, too, *Macrae* v. *Ellerton*, *ib.* 967. Where the decree was simply for foreclosure, liberty might be reserved to apply in chambers for a sale; *Greenough* v. *Littler*, 15 Ch. D. 93.

(*q*) *Whitfield* v. *Roberts*, 5 Jur. N. S. 113. For forms, see Seton, Forms 9 and 10, p. 1039.

(*r*) *Hewitt* v. *Nanson*, 7 W. R. 5.

(*s*) S. 25.

gage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including at its discretion the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale, and to secure performance of the terms. Nor is it necessary that the priorities of incumbrancers should be determined prior to the sale (*t*). Where the action is brought by a person interested in the right of redemption, and he seeks a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as it thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit concerning the costs of any of the defendants (*u*). The above provisions apply to actions brought either before or since the 1st of January, 1882 (*x*).

Order for sale may be made at any time prior to foreclosure absolute.

Under this section an order for sale may be made at any time before the order for foreclosure has been made absolute (*y*), even on the motion for making the foreclosure order absolute (*z*); and it may be made on an interlocutory application before the trial (*a*), or on motion for judgment in default of appearance or of defence (*b*), and the sale may be directed to take place out of Court (*c*). The discretionary power given

(*t*) Sub-s. 4.

(*u*) Sub-s. 3.

(*x*) Sub-s. 5.

(*y*) *Union Bank of London* v. *Ingram*, 20 Ch. D. 463.

(*z*) *Weston* v. *Davidson*, W. N. (1882) 28. In this case the Court ordered the defendant (the mortgagor) to deposit 150*l.*, and to pay the costs of the application, within a month.

(*a*) *Woolley* v. *Colman*, 21 Ch. D. 169, where a reserved price was fixed, and the conduct given to the mortgagor, he being ordered to pay 150*l.* as security. But in *Davies* v. *Wright*, 32 Ch. D. 220, the mortgagor having been given the conduct of the sale, was not ordered to give security. As to the conduct of the sale generally, see *post*, p. 1323.

(*b*) *Wade* v. *Wilson*, 22 Ch. D. 235; *Oldham* v. *Stringer*, 33 W. R. 251.

(*c*) *Woolley* v. *Colman*, 21 Ch. D. 169.

by the section is, however, to be exercised judicially; and, accordingly, where the first mortgagees asked for foreclosure, and produced evidence to show that a sale would not realize the amount of their mortgage, the Court refused to order a sale at the instance of the mortgagor and subsequent mortgagees (*cc*).

Sale or foreclosure may be obtained in chambers.

Where a mortgagee or mortgagor, whether legal or equitable, or a person entitled to, or having property subject to, a legal or equitable charge, or a person having the right to foreclose or redeem any mortgage, whether legal or equitable, requires only a sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, or delivery of possession by the mortgagee, he may obtain such relief by means of an originating summons (*d*); and unless he wishes to combine other relief with one of those above enumerated, he will not be allowed the costs of proceeding by an action (*e*).

An immediate sale ordered only under special circumstances.

Under the old practice, an immediate sale would not be ordered, unless all parties interested in the equity of redemption were before the Court and gave their consent: and, as in the case of foreclosure, a day was in the first instance fixed for payment; and in default of payment a sale was directed (*f*). Where, however, the mortgaged property consisted of leaseholds, the rents of which were insufficient to keep down the interest and other charges upon it, an immediate sale was ordered at the instance of the first mortgagee (*g*); so, also, in other cases where special circumstances made this the most desirable course (*h*); but this discretionary power was exercised (unless with consent) only under special circumstances,—*e.g.*, where there was such a complication of

(*cc*) *Merchant Banking Co.* v. *London & Hanseatic Bank*, 55 L. J. Ch. 479.

(*d*) R. S. C. 1883, O. LV. r. 5A; see Wilson, 406.

(*e*) *O'Kelly* v. *Culverhouse*, W. N. (1887) 36.

(*f*) *Smith* v. *Robinson*, 1 S. & G. 140; and see Seton, 1047.

(*g*) *Phillips* v. *Gutteridge*, 4 D. & J. 531; *Foster* v. *Harvey*, 4 D. J. & S. 59.

(*h*) *Marriott* v. *Kirkham*, 3 Gif. 536; *Newman* v. *Selfe*, 33 B. 522. As to a sale being ordered against the Crown, see *Scott* v. *Robarts*, 4 W. R. 499, and cases there cited.

Chap. XX. Sect. 1.

interests that the common decree could not be conveniently worked out (*i*)—and was exercised for the general benefit of the estate, and not so as to operate injuriously or oppressively on any person interested (*j*). The jurisdiction under the Conveyancing Act is also discretionary; and the discretion to order an immediate sale will not apparently be exercised in cases where the defendant does not appear. In such cases the practice still seems to be to postpone the sale till after the certificate; thus one month seems in one case (*k*) to have been allowed after the certificate; in another (*l*), three. Where the writ only asked for foreclosure, and the defendant did not appear, an order was made for foreclosure, with liberty to apply in Chambers for a sale, on giving the mortgagor notice of the intention to do so (*ll*). Where the mortgagor appeared but put in no defence, an immediate order for sale was made (*lll*).

Whether sale or foreclosure is the appropriate remedy for an equitable mortgagee.

It was formerly much doubted whether sale or foreclosure is the proper remedy for an equitable mortgagee; and a distinction was sometimes drawn between a case where the mortgagee had an agreement for a legal mortgage and a case where he had a mere equitable charge. The preponderance of the later authorities was in favour of a decree for sale (*m*): but the Lords Justices, on the authority of a previously unreported decision of the Court of Appeal, held in a modern case that the relief to which an equitable mortgagee by deposit

(*i*) See *Hiorns* v. *Holtom*, 16 Jur. 1077; *Wickham* v. *Nicholson*, 19 B. 38; *Probert* v. *Price*, 1 Eq. R. 51.

(*j*) *Hurst* v. *Hurst*, 16 B. 372; and see *Smith* v. *Robinson*, 1 S. & G. 140.

(*k*) *Wade* v. *Wilson*, 22 Ch. D. 235.

(*l*) *Green* v. *Biggs*, W. N. (1885) 128.

(*ll*) *S. W. District Bank* v. *Turner*, 31 W. R. 113.

(*lll*) *Charlewood* v. *Hammer*, 28 Sol. J. 710.

(*m*) Per Lord Hatherley in *Tennant* v. *Trenchard*, 4 Ch. 537, 542; and see *Footner* v. *Sturgis*, 5 De G. & S. 736; *Lloyd* v. *Whittey*, 17 Jur. 754; *Nash* v. *Worcester Commissioners*, 1 Jur. N. S. 973; and see *Tuckley* v. *Thompson*, 1 J. & H. 126. For cases directing a sale, see *Pain* v. *Smith*, 2 M. & K. 417; *Tipping* v. *Power*, 1 Ha. 410; *Matthews* v. *Goodday*, 8 Jur. N. S. 90; and for cases directing foreclosure, see *Price* v. *Carver*, 3 M. & C. 163; *Creswick* v. *Harrison*, *ib.* 444; *Moore* v. *Perry*, 1 Jur. N. S. 126; see, too, *Jones* v. *Bailey*, 17 B. 582; *Cox* v. *Toole*, 20 B. 145.

was entitled was foreclosure, not sale (*n*). And the rule as there laid down seemed to apply to every description of equitable charge; but under the 15 & 16 Vict. c. 86, where the deposit was accompanied by an agreement to execute a legal mortgage, the Court would decree a sale (*o*). Now under the 25th section of the Conveyancing Act, 1881, combined with the definition of a mortgage, as including any charge on any property for securing money or money's worth (*p*), the Court has power to order a sale of property subject to an equitable mortgage, whether the deposit of deeds is or is not accompanied by an agreement to execute a legal mortgage (*q*).

Remedy of judgment creditor.

Whether a registered judgment creditor, prior to the recent statute, was entitled to a sale, or to an absolute conveyance of the property free from all equity of redemption has been the subject of conflicting decisions; but the balance of authority seems to prescribe the latter remedy (*r*). When the land has been delivered in execution, or the forms of legal process have been as far as possible exhausted, the creditor may now obtain a summary order for sale under the late Judgment Act (*s*).

Tennant v. *Trenchard.*

In one case, where property was conveyed to two sons of the settlor upon trusts for his children, &c., and the deed provided that any child advancing money to the settlor, or towards the discharge of a mortgage then subsisting on the property, should be entitled to "a charge by way of mortgage," it was held by Lord Hatherley, C., reversing V.-C. Giffard, that a trustee, who had advanced a considerable sum to the settlor and paid off part of the mortgage debt,

(*n*) *James* v. *James*, 16 Eq. 153; *Pryce* v. *Bury*, *ib.*; *Backhouse* v. *Charlton*, 8 Ch. D. 444.

(*o*) *Woof* v. *Barron*, W. N. (1873) 71; *Yorkshire Banking Co.* v. *Artley*, 11 Ch. D. 205.

(*p*) S. 2, sub-s. 6.

(*q*) *Oldham* v. *Stringer*, 33 W. R. 251; *Wade* v. *Wilson*, 22 Ch. D. 235; *Davies* v. *Wright*, 32 Ch. D. 220.

(*r*) *Footner* v. *Sturgis*, 5 De G. & S. 736; *Simpson* v. *Morley*, 2 K. & J. 71; but see *Jones* v. *Bailey*, 17 B. 582.

(*s*) 27 & 28 V. c. 112, s. 4, and *vide ante*, p. 543.

Chap. XX. Sect. 1.

was only entitled to a sale of so much of the estate as was necessary to repay the advances, and not to a formal mortgage giving him the right to foreclose; and his lordship, without however deciding the case on this ground, appears to have considered that where a trustee is also mortgagee, the Court, in order to prevent the conflict of duty and interest, will not allow him to foreclose (*t*).

Who may bid.

As a general rule, no party to the suit ought to bid for the estate without the previous permission of the Court (*u*); and the party permitted to bid will not be allowed to conduct the sale (*x*); and where, without such permission, the party conducting the sale purchased, and under a feigned name, the Court, even after the purchase had been confirmed, ordered the estate to be put up again at the price for which he had bought it; and if there should be no higher bidding, he was to be held to his bargain (*y*). A residuary legatee (*z*), or tenant for life, or owner of a reversionary interest in the estate, may, (subject to the above restriction,) purchase on a sale by the Court; and Lord Eldon, although disapproving of the rule, has referred to its existence as free from doubt (*a*). But leave to bid has been refused to an executor in an administration suit (*b*); so also, to a receiver (*c*), and to a

(*t*) *Tennant* v. *Trenchard*, 4 Ch. 537, 544.

(*u*) *Elworthy* v. *Billing*, 10 Si. 98; Sug. 99. But the sale will not necessarily be set aside on the ground of his having bid; *Wilson* v. *Greenwood*, 10 Si. 101, n. Under the Partition Act leave may be given; see *ante*, p. 1302.

(*x*) *Domville* v. *Berrington*, 2 Y. & C. 723; and see *Verrall* v. *Catheart*, 27 W. R. 645. And the rule will not be departed from, even where the persons having the conduct are guilty of delay (*Ex p. M'Gregor*, 4 De G. & S. 603); but it may perhaps be relaxed where the property is clearly insufficient to pay the debt, and sale has already been attempted, without producing any *bonâ fide* bid; *Spaight* v. *Patterson*, 9 Ir. Eq. R. 149; *Steele* v. *Devonport*, 11 *ib.* 339.

(*y*) *Sidny* v. *Ranger*, 12 Si. 118. Such an order may be brought under the review of the House of Lords by a purchaser, although he is not a party to the cause; *Bailey* v. *Maule*, 7 C. & F. 121, n.

(*z*) *Hooper* v. *Goodwin*, G. Coop. 95.

(*a*) See *Williams* v. *Attenborough*, T. & R. 76.

(*b*) *Geldard* v. *Randall*, 9 Jur. 1085.

(*c*) *Alven* v. *Bond*, Fl. & K. 196.

guardian *ad litem* (*d*), and to trustees (*e*). The stringency of the rule may, however, be relaxed where all parties who are *sui juris* consent, and an advantageous sale cannot be otherwise effected (*f*). If leave to bid is not given by the order for sale, an application for leave must be made by summons in chambers (*g*), which must be served on all parties interested (*h*).

Effect of leave to bid on relation of vendor and purchaser.

The effect of leave to bid is not, as has been sometimes erroneously supposed, to place the person obtaining leave in a fiduciary position towards the Court; and such person assumes only the duties and obligations as to disclosure and good faith which are incumbent upon an ordinary purchaser from an ordinary vendor (*i*). And it seems that leave to bid, once given, unless in terms confined to bidding at a specific auction, removes the disability and puts the parties at arm's length as regards the property, so as to enable the person obtaining leave subsequently, and after failure of the auction, to become the purchaser (*k*).

Who conducts sale.

In general, the plaintiff, or other person having the carriage of the decree, conducts the sale (*l*), in which case his solicitor is considered, as between the vendors and the purchaser, to be the agent of all the parties to the action (*m*); but where in an administration action an order is made for the sale of any property vested in any executor, administrator, or trustee, the conduct of the sale will be given to him, unless the Court otherwise directs (*n*). The Court, however, may,

(*d*) *Dodson* v. *Bishop*, Seton, 1396.

(*e*) See *Tennant* v. *Trenchard*, 4 Ch. 546.

(*f*) *Campbell* v. *Walker*, 5 V. 678, 682; *Farmer* v. *Dean*, 32 B. 327; *Tennant* v. *Trenchard*, 4 Ch. 547.

(*g*) R. S. C. O. LV. r. 2 (14).

(*h*) Dan. C. P. 1082. For form of summons, see Dan. C. F. 550.

(*i*) *Coaks* v. *Boswell*, 11 Ap. Ca. 232.

(*k*) *Coaks* v. *Boswell*, 11 Ap. Ca. 242.

(*l*) *Knott* v. *Cottee*, 27 B. 33; even though he would not conduct the sale, if it were out of Court, *Dale* v. *Hamilton*, 10 Ha. App. vii.

(*m*) *Dalby* v. *Pullen*, 1 R. & M. 296.

(*n*) R. S. C. 1883, O. L. r. 10. The Court of Appeal will not interfere with the exercise of the judge's discretion; *Hill* v. *Spurgeon*, 29 Ch. D. 349.

if it be for the benefit of the parties to the action, and a sufficient case is made out, give the conduct of the sale to a person other than the plaintiff (*o*); and, in determining the question, does not necessarily consider the extent of the interests of the several parties, nor the possession of the title deeds; inasmuch as every party to the suit is bound to facilitate the sale (*p*). Under the Conveyancing Act, 1881 (*q*), the conduct of a sale in a foreclosure or redemption action may be given to any defendant; and it has accordingly been given in several cases to the person having the most interest in obtaining a large price (*r*). But there is no definite rule to that effect, at any rate where the property is an ample security (*s*).

Court when executing trust cannot anticipate time thereby fixed for sale.

Where a suit is instituted to carry into execution the trusts of an instrument which directs a sale upon the occurrence of a specified event, and some of the parties interested in the proceeds of sale are not *sui juris*, the Court has no power, under its general jurisdiction, to direct a sale before the occurrence of such event (*t*); however injurious delay may be to the property (*u*); nor even, it would seem, where all the parties are *sui juris*, if the intention of the testator in fixing a time for sale would be defeated (*x*).

Sale may be in town or country.

Assuming the Court to have properly directed a sale, the estate may be sold at such place either in London or in the country, and by such person, as the Court shall think fit (*y*); and where the action is proceeding in a district registry, the judge has an absolute discretion whether the sale shall be

(*o*) *Dixon* v. *Pyner*, 7 Ha. 331; *Hewitt* v. *Nanson*, 7 W. R. 5.

(*p*) *Knott* v. *Cottee*, 27 B. 33.

(*q*) S. 25, sub-ss. 2 and 3.

(*r*) *Davies* v. *Wright*, 32 Ch. D. 220; *Woolley* v. *Colman*, 21 Ch. D. 169.

(*s*) *Christy* v. *Van Tromp*, W. N. (1886) 111.

(*t*) *Blacklow* v. *Laws*, 2 Ha. 40; *Carlyon* v. *Truscott*, 20 Eq. 348.

(*u*) *Johnstone* v. *Baber*, 8 B. 233.

(*x*) *Bristow* v. *Skirrow*, 27 B. 590, *ante*, p. 1315.

(*y*) Cons. Ord. XXXV. r. 61, which has not been reproduced by the R. S. C. 1883; but the practice would seem to be the same. See R. S. C. 1883, O. LXXII. r. 2.

made there or in chambers (*z*). A sale in a manner different from that directed by the decree, and unperfected by conveyance, will be treated as a nullity (*a*).

Relative duties of vendors and purchasers prior to sale.

The general rules, to which we have before adverted, respecting the relative duties of intending vendors and purchasers prior to the contract, apply as well to sales under an order of the Court as to ordinary sales: *e.g.*, puffing cannot be supported in the one case more than in the other (*b*).

Particulars of property to be sold.

Where the sale is made in an administration suit, the trustees or other real representatives of the deceased person must make an affidavit (*c*) as to the particulars of the real estate, and the incumbrances affecting it; and in other cases similar evidence is required by the Court. The particulars of sale are prepared by the solicitor of the party conducting the sale, and are in the ordinary form, except that they are intituled in the cause or matter, and that the sale is stated to be made with the approbation of the Judge, under a decree or order. The solicitor of the party conducting the sale also prepares the abstract, which, before the property is offered for sale, must, according to the present practice, "be laid before some conveyancing counsel approved by the Court for his opinion thereon, to enable proper directions to be given respecting the conditions of sale and other matters connected with the sale;" and a time for the delivery of the abstract to the purchaser or his solicitor is to be specified in the conditions (*d*). Under this provision the abstract, with a copy of the particulars as settled in chambers, and a draft of the ordinary formal conditions employed on sales by the

Preparation of abstract.

To be laid before conveyancing counsel.

(*z*) *Macdonald* v. *Foster*, 6 Ch. D. 193.

(*a*) *Annesley* v. *Ashurst*, 3 P. W. 282; *Ex p. Hughes*, 8 V. 617; *Bowen* v. *Evans*, 1 J. & L. 178, 266.

(*b*) *Dimmock* v. *Hallett*, 2 Ch. 21, 29; and see Sug. 109; and see *Coaks* v. *Boswell*, 11 Ap. Ca. 232.

(*c*) For form of affidavit, see R. S. C. 1883, App. L. No. 11.

(*d*) R. S. C. 1883, O. LI. r. 2. How far the proceedings in the action should be shown on the abstract, see *Waters* v. *Waters*, 15 W. R. 191.

Court, is usually laid before one of the six conveyancing counsel of the Court; with instructions to advise whether the sale should be made subject to any and what special conditions (*e*). The Court has, however, a discretion to dispense with this rule, upon the ground of expense (*f*), or for any other special reason (*g*).

In considering the conditions, the expression "the vendors," if unexplained, has been held by V.-C. Wood, at chambers, to include *all* the parties to the suit.

Court will not knowingly allow defective title.

As between vendor and purchaser, the conveyancing counsel is the agent of the vendor, even though he is so appointed by the Court, and the vendor himself has no voice in his selection (*h*); and in sales by the Court there must be at least as much good faith shown towards the purchaser as, and perhaps a little more than, is required from ordinary vendors out of Court (*i*). The Court, therefore, will not knowingly pass off an absolutely bad title by the aid of special conditions (*k*); but in one case, where there was an apparently good title commencing with a recent assurance on the purchase by a late owner, but a defect, which had then apparently been overlooked, existed in the prior title, such defect consisting in a possible claim to a reversionary estate for life in a part of the property, the enjoyment of which was essential to the enjoyment of the residue, Lord Romilly, than whom there has been no more conscientious Judge, upon the matter being brought before him privately at chambers, decided that the property should be put up for sale under a condition that the abstract to be delivered to the purchaser at the expense of the vendors should commence

(*e*) A form of the common conditions ordinarily used on sales by the Court is given in R. S. C. 1883, App. L. No. 15; and see 1 Dav. 584 *et seq.*, 5th ed.

(*f*) *Chamberlain* v. *Chamberlain*, 1 S. & G. App. xxviii.

(*g*) *Gibson* v. *Wollard*, 5 D. M. & G. 835; *Re Jones*, 3 W. R. 564; *Relph* v. *Horton*, 19 W. R. 220.

(*h*) *Re Banister*, 12 Ch. D. 131, 141.

(*i*) *Ibid.*

(*k*) *Bennett* v. *Wheeler*, 1 Ir. Eq. R. 18; and see *Hume* v. *Bentley*, 5 De G. & S. 527; *Nunn* v. *Hancock*, 6 Ch. 850; *Else* v. *Else*, 13 Eq. 196; *Re Banister*, *supra*.

with the assurance above referred to; but that the purchaser might have a full abstract of the prior title if he chose to pay for it, and was to be allowed to investigate it; which it was considered very unlikely that he would do. The case was a very difficult one; for the sale, which was in a creditors' suit, was a matter of necessity; and to explain the real state of the earlier title would have been instantly to bring down a claim which was not based on any moral equity, and which, in the absence of such disclosure, in all probability would never be made.

Particulars and conditions settled in chambers.

When the conveyancing counsel has added such special conditions as he thinks necessary, the particulars and conditions are finally settled in chambers, the time and place of sale are fixed, and the auctioneer is appointed, and the amount of his remuneration is determined (*l*).

Reserved bidding and deposit.

The common conditions provide for a reserved bidding (*ll*), and also for the payment of a deposit by the purchaser: the latter, however, is often not required. When a deposit is paid the person appointed to receive it must usually give security (*m*). Under the old practice, the Court has refused to sanction its payment to the Master's clerk, but has allowed it to be paid to the solicitors of a defendant in the cause, they undertaking by counsel to account for it, and the defendant submitting to be bound by any future order which the Court might make respecting it (*n*).

Highest bidding by person incompetent, or of insufficient means—effect of.

If an incompetent person (as a lunatic) is declared the highest bidder, the Court cannot hold the next bidder to his bidding, or even allow him to stand as purchaser with the

(*l*) See Dan. C. P. 1078 *et seq.*

(*ll*) This, however, is not the case in the Form No. 15, App. L. to R. S. C. 1883, which is also otherwise deficient, see *post*, p. 1333 n. (*m*). For better form of conditions, see 1 Dav. 588, 5th ed.; Dan. C. F. 543.

(*m*) Dan. C. P. 1079.

(*n*) *Lyon* v. *Colvill*, 6 Jur. 680. And on small sales security is dispensed with on the auctioneer undertaking to pay the deposit into Court; Dan. C. P. 1080; Dan. C. F. 552.

Chap. XX. Sect. 1.

consent of the parties to the cause (*o*). In a modern case, where the offer of the highest bidder was rejected, under the idea that he was of insufficient means, and the next bidder was declared the purchaser, the Court did not treat the sale as void; but seemed to consider that the highest bidder should have moved that he, instead of the other, might be declared the purchaser (*p*).

Bidding after estate bought in.

Where a purchaser made an offer after the auctioneer had declared the amount of the reserved bidding, it was held that this was an offer respecting which a special application to the Court was necessary (*q*): but in one case, where the property was bought in, but before the auctioneer left the rostrum, a person, to whom the reserved price had been improperly divulged, agreed to purchase for that amount, the contract was held to be binding upon him (*r*); and the learned Judge observed that it is very usual for the reserved bidding to be known; and a constant practice for persons to take the property at the reserved bidding (*s*).

Section 2.

(2.) *As to the rights and liabilities of the highest bidder, after the sale, but before the certificate of the result of the sale becomes absolute;—and as to the late practice of opening biddings.*

As to the rights and liabilities of highest bidder, &c.

Highest bidder not the purchaser until certificate of sale becomes absolute.

After the sale, the auctioneer and the solicitor of the party having the conduct of the sale certify the result (*t*), and their certificate must be left at chambers one clear day before that fixed for settling the chief clerk's certificate (*u*). The chief

(*o*) Sug. 102; *Blackbeard* v. *Lindigren*, 1 Cox, 205; *sed quære*, whether the Court might not treat the case as one of an offer to purchase by private contract.

(*p*) *Hughes* v. *Lipscombe*, 6 Ha. 142.

(*q*) *Dowle* v. *Lucy*, 4 Ha. 311.

(*r*) *Else* v. *Barnard*, 28 B. 228; aff. 232; and see *Bousfield* v. *Hodges*, 33 B. 90.

(*s*) And see Sug. 96; Dan. C. P. 1083.

(*t*) R. S. C. 1883, O. LI. r. 6A; App. L. No. 16.

(*u*) O. LI. r. 6. These two rules are not easily reconcileable; but it would seem that "certificate" must be read in substitution for "affidavit" in Rule 6; see Wilson, 384.

clerk of the Judge to whose branch of the Court the cause is attached, proceeds, on a day named in the conditions of sale, to certify the result; and the purchasers may, if they think fit, attend at chambers, by their solicitors, to settle the certificate. The certificate having been settled need not be signed by the Judge, and will be deemed to be approved and adopted by him, unless an order is made to discharge or vary it (*x*); it is then filed, and after eight days, if no application be made in the interval to discharge or vary it, becomes absolute (*y*), although it may under special circumstances be at any time thereafter discharged or varied (*z*). Until the certificate becomes absolute the bidder has not absolutely assumed the character of purchaser; so that in the interval a loss by fire falls on the vendors (*a*): and a motion that the best bidder shall complete, and pay his purchase-money, by a certain day, will be refused (*b*): but, if the interest purchased be in its own nature determinable—*e.g.*, a life estate—it seems that he must pay the purchase-money, although the event upon which the interest determines occur before the certificate becomes absolute (*c*): so, if the certificate become absolute, he will, in the case of a life estate, be entitled to the intermediate income (*d*): and if, before the certificate become absolute, a loss arises by an accident involving a legal obligation which must be immediately satisfied, the expense incurred by the vendor must be paid by the purchaser (*e*).

Death of, before certificate becomes absolute.

The death of the purchaser before the certificate becomes absolute, does not, however, vacate the sale, even although he never signed an agreement, sales by the Court, not being

(*x*) O. LV. r. 65.

(*y*) O. LV. r. 70; see, under the old practice, *Bridger* v. *Penfold*, 1 K. & J. 28; and cf. Wilson, 425.

(*z*) O. LV. r. 71; see *Howell* v. *Kightley*, 8 D. M. & G. 325; Ann. Prac.

(*a*) *Ex p. Minor*, 11 V. 559; cited 13 V. 518.

(*b*) *Anon.*, 2 V. 335.

(*c*) *Anson* v. *Towgood*, 1 J. & W. 639; and see *Vesey* v. *Elwood*, 3 D. & War. 74, overruling *Vincent* v. *Going*, cited *ibid.* p. 75.

(*d*) *Anson* v. *Towgood*, 1 J. & W. 637.

(*e*) *Robertson* v. *Skelton*, 12 B. 260; and see *Paramore* v. *Greenslade*, 1 S. & G. 541; and *Palmer* v. *Goren*, 4 W. R. 688.

Chap. XX. Sect. 2.

within the Statute of Frauds (*f*); but the contract, it is said, cannot be enforced against his representatives without suit (*g*); and it was the practice in such a case not to serve the heir with notice of an application to open the biddings (*h*).

Sub-sale at profit.

If, before the certificate becomes absolute, the purchaser resell at a profit, the sub-purchaser becomes the purchaser under the Court at the advanced price (*i*). In one case, where the first purchaser had received the advance in price and had absconded, the Court directed the property to be resold: reserving the question whether, if it should not produce the sum offered by the sub-purchaser, he should not be answerable to the Court for the difference; and reserving all questions of liability in the original purchaser (*k*); and, in another case, where, before the certificate became absolute, the original purchaser sold at a profit, a re-sale was ordered, upon the terms of his paying into Court the amount of the advance offered by the sub-purchaser (*l*). If the purchaser resell after the certificate has become binding, the original purchaser as being in Equity the owner is entitled to any increase in the price (*m*).

Opening bidding—what is.

Until the certificate became absolute (*n*), the purchaser might, before the recent Statute (*o*), have lost his bargain by the Court opening, (as it is termed,) the biddings; that is, directing a re-sale, on the application of a person willing to give a higher price for the property; and this, although he were interested in the proceeds of sale (*p*), or were present

(*f*) See *A.-G.* v. *Day*, 1 V. sen. 221.

(*g*) *Lord* v. *Lord*, 1 Si. 503, *sed quære.*

(*h*) *Templer* v. *Sweet*, 8 B. 464. Lord Langdale's private opinion seems to have been that the heir should be served.

(*i*) *Hodder* v. *Ruffin*, Taml. 341; and see Seton, 1409.

(*k*) *Holroyd* v. *Wyatt*, 2 Col. 329.

(*l*) *Re Goodwin's S. E.*, 4 Gif. 90; and see *Pearce* v. *Pearce*, 7 Si. 138.

(*m*) *Dewell* v. *Tuffnell*, 1 K. & J. 324.

(*n*) *Bridger* v. *Penfold*, 1 K. & J. 28.

(*o*) 30 & 31 V. c. 48, s. 7, and *vide infra.*

(*p*) *Hooper* v. *Goodwin*, G. Coop. 95.

at the sale (*q*): but, in the last case, the Court regarded the application with some jealousy, and required a larger advance than under ordinary circumstances (*r*): and they might be opened a second time (*s*) on the application of the same person (*t*): but could not be opened until the certificate had been filed (*u*). And the Court had the same power to open biddings upon a sale by sealed tender, as on a sale by public auction (*x*); but the practice was not extended to a sale strictly by private contract (*y*); not even in a case where trustees sold under a power, for a lower price than they might have obtained under a more spirited competition (*z*).

Practice abolished except in what cases.

The practice of opening biddings after a contract had been entered into, which, in any ordinary case, would have been treated as binding on both parties, was frequently productive of serious mischief and inconvenience: but, though reluctantly sanctioned by eminent judges (*a*), was too deeply rooted in the procedure of the Court to be eradicated, except by the aid of the legislature. The practice has now been abolished by statute; and the highest *bonâ fide* bidder at any sale by auction under the decree of the Court, provided he shall have bid a sum equal to or higher than the reserved price (if any), is to be declared and allowed the purchaser; unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land,

(*q*) *Thornhill* v. *Thornhill*, 2 J. & W. 347, overruling earlier cases there cited; see Sug. 118, n.

(*r*) *Tyndale* v. *Warre*, Jac. 525, 526; *Lefroy* v. *Lefroy*, 2 Rus. 606; *Shalleross* v. *Hibberson*, 1 Coop. t. Cott. 380; as to what constituted an advance in price, see *Re Carew's Est.*, 26 B. 187.

(*s*) *Scott* v. *Nesbit*, 3 Br. C. C. 475; *Walond* v. *Walond*, 8 B. 352.

(*t*) *Preston* v. *Barker*, 16 V. 140; Sug. 115.

(*u*) *Lovegrove* v. *Cooper*, 9 Ha. 279.

(*x*) *Osborne* v. *Foreman*, 2 Jur. N. S. 361; affd. *sub nom. Barlow* v. *Osborne*, 6 H. L. C. 556; *Waterhouse* v. *Wilkinson*, 1 H. & M. 636.

(*y*) *Millican* v. *Vanderplank*, 11 Ha. 136.

(*z*) *Harper* v. *Hayes*, 2 D. F. & J. 542.

(*a*) See Lord Eldon's remarks in *White* v. *Wilson*, 14 V. 151, 153; and Lord Redesdale's in *Fergus* v. *Gore*, 1 Sch. & Lef. 350; and *Barlow* v. *Osborne*, 6 H. L. C. 556.

Chap. XX. Sect. 2.

either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and direct a resale; but any such application must be made to the Court or Judge before the chief clerk's certificate of the result of the sale shall have become binding (*b*). And the statute applies equally to a sale by private contract under the sanction of the Court (*c*).

Section 3.

(3.) *As to the certificate of sale becoming absolute;—and as to the purchaser's rights and liabilities thereafter.*

As to certificate of sale, &c.

Purchaser henceforth *primâ facie* entitled to estate subject to payment of price.

Upon the certificate becoming absolute, the purchaser becomes the owner of the estate, subject to payment of the purchase-money. In a modern case, where, on a sale under the direction of the Court, two persons agreed not to bid against each other, but that one should bid up to a stated sum, which, though they did not know it, was in excess of the reserved price, and that the property should be divided between them, it was held that this was not a sufficient reason on the ground of fraud for opening the biddings after the sale had been confirmed (*d*). When the certificate has become absolute, the purchaser may resell at a profit for his own benefit (*e*). He is also liable to any loss which may happen in connection with the estate; as, in a modern case, the expenses of making good damages caused to adjoining property by the fall of the houses which he had purchased (*f*); but he may, it seems, be discharged by the improper conduct of the vendors; as, *e.g.*, by their neglect to insure leaseholds pursuant to their covenant (*g*).

(*b*) 30 & 31 V. c. 48, s. 7. As to what amounts to fraud or improper conduct in the management of the sale, see *Delves* v. *Delves*, 20 Eq. 77; *Brown* v. *Oakshott*, 38 L. J. Ch. 717.

(*c*) *Re Bartlett*, 16 Ch. D. 561; *Re Oriental Bank Corp.*, 56 L. T. 868.

(*d*) *Re Carew's Est.*, 26 B. 187.

(*e*) *Dewell* v. *Tuffnell*, 1 K. & J. 324; and cf. *Goodwin's S. E.*, 4 Gif. 90.

(*f*) *Robertson* v. *Skelton*, 12 B. 260.

(*g*) *Palmer* v. *Goren*, 4 W. R. 688.

May move to pay in purchase-money, or to discharge incumbrances.

The purchaser might formerly apply by summons for leave to pay his purchase-money into the Bank, and to be let into possession; or, if incumbrances appeared by the certificate, or (*semble*), although not so appearing, were known to exist, and all parties to the suit were *sui juris* and agreed to their discharge, for leave to pay them off out of the purchase-money, and to pay in the balance (*h*): the payment, however, must be an entire payment, although the lot were sold to joint purchasers (*i*); and now the Court may in any case allow the amount of the incumbrance, together with a margin of ten per cent., to be paid into Court (*k*). No order for payment in of purchase-money is now necessary, except in very special cases, *e.g.*, where the application is to confirm a sale by private contract, or where there are difficulties in the way of completion. In ordinary cases of sale by auction, followed by certificate of result, the certified purchaser can bring his purchase-money into Court upon a schedule signed by the chief clerk (*l*). The conditions usually provide that the purchaser may deduct property tax from any interest payable by him on his purchase-money (*m*): where this is not the case, the interest must be paid in full without deducting the tax (*n*); but the purchaser may, it seems, apply for repayment when the purchase-money is dealt with by the Court (*o*). If the money is invested at the vendor's request, the purchaser will not be affected by any variation in the funds (*p*); and, therefore, the order should always state at whose request the investment is made (*q*). Nor will the purchaser, in the absence of any improper delay on his part, have to bear any extraordinary expense neces-

(*h*) Dan. C. P. 1101; Seton, 1407.

(*i*) *Darkin* v. *Marye*, 1 Anst. 222.

(*k*) Conv. Act, 1881, s. 5; *Patching* v. *Bull*, 30 W. R. 244; *Dickin* v. *Dickin*, W. N. 1882 (113).

(*l*) R. S. C., O. LI. r. 3A; see Wilson, 384.

(*m*) But this is not so provided in the form given in R. S. C. 1883, App. L. No. 15. See, however, 1 Dav. 586, 591, 5th ed.; Dan. C. F. 543.

(*n*) *Holroyd* v. *Wyatt*, 1 De G. & S. 125; *Dawson* v. *Dawson*, 11 Jur. 984; *Humble* v. *Humble*, 12 B. 43.

(*o*) *Bebb* v. *Bunny*, 1 K. & J. 216; and see *Duval* v. *Mount*, there cited.

(*p*) *Ambrose* v. *Ambrose*, 1 Cox, 194; *D'Oyley* v. *Countess Powis*, *ib.* 206; *Gell* v. *Watson*, 2 S. & S. 402; *Humphries* v. *Horne*, 3 Ha. 276, 279.

(*q*) Seton, 1406.

sary to complete the conveyance, as, *e.g.*, the fine in the admittance of the heir of a vendor who has died since the contract was entered into, but before completion of the sale (*r*). The order for payment in by the purchaser does not allow deduction of the rents and profits, although the conditions provide that he shall be let into possession of them as from the day fixed for completion (*rr*).

Substitution of purchaser allowed, on what terms.

The Court will, either before or after the certificate of sale has become absolute, discharge the purchaser and substitute any other person (*s*), upon his paying in the entire purchase-money; and such an order has been made where the first purchaser, after confirmation of the report, had agreed in writing to sell the property, and had since died, and his heir was abroad (*t*); and, where the application is at the same time for such substitution and for leave to pay in the money and be let into possession, since no additional costs are incurred by the parties to the cause than would have been incurred on the usual application to pay in purchase-money, no costs will be given (*u*). If the application were made before the certificate of sale became absolute an affidavit was formerly required that there was no underbargain (*x*); but since the Sales by Auction Act, the practice seems to be to dispense with this (*y*). And such affidavit always was unnecessary after the certificate had become absolute, as the purchaser had thereby become the absolute owner.

Where a purchaser died after confirmation, the Court ordered the estate to be conveyed to his devisee, although the heir was an infant (*z*).

(*r*) *Paramore* v. *Greenslade*, 1 S. & G. 541.

(*rr*) *Day* v. *Bonaini*, 55 L. T. 329.

(*s*) *Miller* v. *Smith*, 6 Ha. 609.

(*t*) *Pearce* v. *Pearce*, 7 Si. 138.

(*u*) *Christian* v. *Chambers*, 4 Ha. 307. For form of order, see Seton, 1403.

(*x*) *Rigby* v. *Macnamara*, 6 V. 515; *Vale* v. *Davenport*, *ib.* 615; see *Dewell* v. *Tuffnell*, 1 K. & J. 324; see, too, *Goodwin's S. E.*, 4 Gif. 90.

(*y*) As to the expediency of this practice, see Seton, 1409.

(*z*) *Rex* v. *Gregory*, 4 Pr. 380.

(4.) *As to the investigation of the title;—payment and application of purchase-money;—possession;—and preparation and execution of the conveyance.*

As to the investigation of the title, &c.

Abstract—and title.

Delivery of the abstract may, if necessary, be compelled by an order obtained on summons (*a*): and, if dissatisfied with the title shown thereby, the purchaser may procure an order that the title be referred to chambers; upon which reference the proceedings will be similar to those in a suit for specific performance (*b*). When a decree was manifestly wrong by reason of the absence of a necessary party to the record, the purchaser was formerly entitled to be discharged without a reference; but not where the question, whether all proper persons were parties, depended on extraneous circumstances which were a proper subject for inquiry (*c*). And the 70th section of the Conveyancing Act, 1881, being an enactment in favour of purchasers, would not seem to have altered the rule. Contrary to the rule which prevails in ordinary sales, the Court will compel the purchaser to take an equitable title (*d*); but only where the legal estate is outstanding without any claim of interest on the part of the person in whom it is vested (*e*); or is outstanding in an infant from whom it may be readily got in (*f*); and the rule is strictly confined to such cases (*g*): nor will it compel him to take a doubtful equitable title (*h*); nor, perhaps, where there is material error in the decree, to wait until the same is rectified (*i*). So, where the recitals in one of the abstracted deeds were so framed as to conceal a defect in the prior title, the purchaser

(*a*) Dan. C. P. 1086.

(*b*) *Ibid.* 1087; *ante*, 1223 *et seq.* For form of order, see Seton, 1398.

(*c*) *Whitfield* v. *Lequestre*, 3 De G. & S. 464, 467.

(*d*) 14 Si. 312; and see Sug. 397.

(*e*) *Craddock* v. *Piper*, 14 Si. 312; and see 3 V. 23; cf. *Freeland* v. *Pearson*, 7 Eq. 246.

(*f*) Sug. 397.

(*g*) See *Freeland* v. *Pearson*, 7 Eq. 246, 249.

(*h*) *Marlow* v. *Smith*, 2 P. W. 201.

(*i*) *Lechmere* v. *Brasier*, 2 J. & W. 287; *Whitfield* v. *Lequestre*, 3 De G. & S. 467; but see *Sherwood* v. *Beveridge*, *ib.* 425; *Calvert* v. *Godfrey*, 6 B. 97, 110; *Plumtre* v. *O'Dell*, 4 Ir. Eq. R. 602.

Chap. XX. Sect. 4.

was discharged from the purchase and was allowed his costs, notwithstanding that by the conditions he was precluded from inquiring into the prior title, and the recitals were made conclusive evidence (*k*). In one case, where a purchaser had accepted the title and paid in his purchase-money, he was discharged from the contract upon a deed being discovered which showed that the plaintiffs could not make a title to more than a moiety of the estate (*l*): but a purchaser, who, having discovered a supposed defect in the title, buys in the interest of the party who alone could take advantage of it, will not be allowed the benefit of the general rule as to doubtful titles (*m*). Where the abstract was erroneous and misled the purchaser's counsel on a material point, and the mistake remained for a time undiscovered owing to the negligence of the solicitor in failing to examine the original will, the purchaser having paid his purchase-money into Court, was allowed to be discharged; but he was not allowed interest on his purchase-money, and he had to pay the costs of all parties, except the person who had the conduct of the sale (*n*). Where the title was rendered bad by the vendor's default to keep the property insured, the purchaser was discharged (*o*).

Costs of reference.

It is stated by Lord St. Leonards (*p*), that, in every case, the purchaser is entitled to the costs of the application for a reference of title, and to the costs of that reference: it appears, however, from a later case (*q*), that the decision, upon which the above proposition was founded, is misreported: and that the Court only held that the purchaser was not liable to *pay* costs, on the certificate being in favour of the title: if, however, the title were made out,

(*k*) *Else* v. *Else*, 13 Eq. 196; and see *Re Banister*, 12 Ch. D. 131; see an anonymous case before Lord Romilly, cited *ante*, p. 1326.

(*l*) *Ward* v. *Trathen*, 14 Si. 82.

(*m*) *Sheppard* v. *Doolan*, 3 D. & War. 1.

(*n*) *McCulloch* v. *Gregory*, 1 K. & J. 286.

(*o*) *Palmer* v. *Goren*, 4 W. R. 688.

(*p*) Sug. 107, citing *Camden* v. *Benson*, 1 Ke. 671.

(*q*) *Flower* v. *Hartopp*, 8 B. 200; and see *Holland* v. *King*, 20 L. T. O. S. 123.

in chambers, on grounds not appearing on the abstract, he would be entitled to receive costs (*r*): and if the title is found to be good upon grounds appearing on the abstract, he may be ordered to pay costs, if his objections are frivolous and vexatious (*s*). If the title prove bad, the purchaser, unless precluded by the conditions, is entitled to receive his costs (*t*), charges, and expenses (*u*), out of the fund in Court (if any) (*x*); or, if there be none, from the party having the conduct of the sale, who may recover them in the action (*y*): but a defendant, to whom the conduct of the sale has been given, will not, it seems, be ordered to pay the purchaser's costs, where there are funds in Court which may be made primarily answerable: in such a case leave will be given to the purchaser to apply for payment (*z*). It is said to have been held by Sir J. Leach that, where exceptions were allowed to the Master's report in favour of the title, the Court would not thereupon direct that the purchaser be discharged and his costs be paid, but that some specific application must be made for the purpose (*a*): notice of which must have been given to all parties interested in the purchase-money (*b*). It appears that, where the title is decided to be bad, the purchaser must be actually discharged by order, before there can be a re-sale (*c*).

(*r*) *Fieldier* v. *Higginson*, 3 V. & B. 142, where the purchase seems to have been made under a decree; see 2 S. & S. 117.

(*s*) *Thorpe* v. *Freer*, 4 Mad. 466; *Wyman* v. *Carter*, 12 Eq. 315; Dan. C. P. 1088; Morgan & W. 378.

(*t*) See *Leland* v. *Griffith*, 2 Mol. 150; *Pleasants* v. *Roberts*, *ib.* 507; *Barton* v. *Lord Downes*, Fl. & K. 633; *Weir* v. *Chamley*, 2 Ir. Ch. R. 566.

(*u*) See form of order, *Perkins* v. *Ede*, 16 B. 268; and *Powell* v. *Powell*, 19 Eq. 422, 425.

(*x*) *Reynolds* v. *Blake*, 2 S. & S. 117; *A.-G.* v. *Corp. of Newark*, 8 Si. 71; *Calvert* v. *Godfrey*, 6 B. 97; *Ward* v. *Trathen*, 14 Si. 82; *Lachlan* v. *Reynolds*, Kay, 52.

(*y*) *Berry* v. *Johnson*, 2 Y. & C. 564, 565; *Smith* v. *Nelson*, 2 S. & S. 557.

(*z*) *Mullins* v. *Hussey*, 1 Eq. 488.

(*a*) *Hide* v. *Hide*, 1 Coop. t. Cott. 379; and see *Howell* v. *Kightley*, 8 D. M. & G. 325. It appears that on a sale by the Crown under the 25 Geo. III. c. 35, authorizing the sale of the lands of Crown debtors or their sureties, the purchaser gets no costs if the title prove bad; *Rex* v. *Craeroft*, 1 M'C. & Y. 460.

(*b*) *Sherwood* v. *Beveridge*, 3 De G. & S. 425.

(*c*) *Williams* v. *Wace*, C. P. Coop. 42.

Condition as to discharge of purchaser and return of deposit.

A condition is not unfrequently inserted providing that if the purchaser shall make any valid objection or requisition which the vendors shall be unable to remove or comply with, the purchaser may be discharged by an order of the Judge; and shall thereupon be entitled to a return of his deposit, but not (unless the Judge shall otherwise direct) to any interest, costs, expenses, or damages in respect of his purchase (*d*).

Where the sale has taken place under circumstances which, in the case of an ordinary sale, would be a defence to a suit for specific performance, except with a variation, but would not be a ground for rescinding the contract, the Court, as the property must be sold, is obliged to decide whether the sale is to be carried into effect, or the property is to be resold: but, as far as possible, the rules which regulate such cases between ordinary vendors and purchasers will be adapted to purchases under orders of the Court (*e*).

Purchase-money may, under special circumstances, be paid in without accepting title.

Although the practice has varied (*f*), it is now clearly the rule of the Court that, in a special case, as where the purchaser is entitled to relieve himself from paying interest, the Court will receive the purchase-money on his application, without his accepting the title (*g*): but the order will not be made except in a special case (*h*): nor, while the title remains unaccepted, will he be let into possession (*i*). The acceptance of the title, subject to a mere reservation of a claim to compensation in case the property should prove not to be tithe

(*d*) See Dan. C. P. 1088, n. As to the effect of such a condition, see *Powell* v. *Powell*, 19 Eq. 422, where the purchaser was, under the circumstances, held entitled to interest on his deposit, with costs, charges, and expenses; and as to such a condition being a proper one for fiduciary vendors to employ, see *Falkner* v. *Equitable Reversionary Society*, 4 Dr. 352; *ante*, p. 84.

(*e*) *Alvanley* v. *Kinnaird*, 2 M. & G. 1, 8.

(*f*) See Sug. 103; *Denning* v. *Henderson*, 1 De G. & S. 689; and *Rutter* v. *Marriott*, 10 B. 33.

(*g*) Per Lord Cottenham, *De Visme* v. *De Visme*, 1 M. & G. 344; *Hindle* v. *Dakins*, 1 Coop. t. Cott. 378; *Morris* v. *Bull*, 1 De G. & S. 691, n.; *Rutley* v. *Gill*, 3 *ib.* 640.

(*h*) *Ouseley* v. *Anstruther*, 11 B. 399.

(*i*) *Hutton* v. *Mansell*, 2 B. 260; *Rutter* v. *Marriott*, 10 B. 33; *Dempsey* v. *Dempsey*, 1 De G. & S. 691; Dan. C. P. 1091.

free, has, however, been held sufficient (*k*). Where a purchaser, without the authority of the Court, enters into possession, although with the consent of the vendor's solicitor, he will be held to have accepted the title (*l*), and will be at once ordered to pay in his purchase-money (*m*): so, if in possession, without having paid for the estate, he may, on motion, without suit, be restrained from waste (*n*).

As to its application and distribution.

When the purchase-money is paid into Court, it will not, prior to the execution of the conveyance, be applied, without the purchaser's consent, in discharge of incumbrances, even where he has been guilty of delay in preparing the draft conveyance (*o*): the object of impounding it being to preserve a lien to the purchaser. In order, however, to make this certain, it is usual, upon paying in the money, expressly to ask that it may not be paid out again without notice to the purchaser; an order to which effect prevents the distribution of the fund without the purchaser's consent given in Court, or upon his non-appearance and an affidavit of his having been served with a copy of the order for setting down the cause for further consideration, or of the application for distribution (*p*). Where, however, a purchaser accepted the title, with knowledge of an incumbrance, and paid his purchase-money into Court, it was held that he had no lien upon it in respect of the incumbrance (*q*). In one case, where the fund was small, the Court inserted in the order for sale a special direction that the proceeds of sale should be distributed upon the chief clerk's certificate; but that before distribution the purchasers should be served with a summons to show cause why the money should not be so distributed (*r*). In another case, Lord Langdale appears to have held that,

(*k*) *Man* v. *Ricketts*, 5 De G. & S. 116.

(*l*) *Wilding* v. *Andrews*, 1 Coop. t. Cott. 380.

(*m*) *S. C.*; and see *Anon.*, cited Sug. 105.

(*n*) *Casamajor* v. *Strode*, 1 S. & S. 381.

(*o*) *Bevan* v. *Bevan*, 1 Coop. t. Cott. 381; and see Dan. C. P. 1095, n.

(*p*) Seton, 1406; Dan. C. P. 1099 *et seq.* For form of order, see Seton, 1399.

(*q*) *Miller* v. *Pridden*, 5 W. R. 171.

(*r*) *Thorp* v. *Owen*, 2 S. & G. App. i.

Chap. XX. Sect. 4.

although the estate was sold for payment of debts, the Court ought not to distribute the fund until an effectual conveyance could be made to the purchaser (*s*). But where the title had been accepted and the conveyance executed, the purchaser was unable to prevent the distribution of the fund, although an adverse claim had been made to the estate (*t*). He is not in any way responsible for its application; for by payment into Court he has discharged the only condition incumbent upon him (*u*).

Is legal assets.

The purchase-money of real estate paid into Court in a creditor's action, has been held to be legal assets (*x*); and where it proves insufficient for the payment in full of the debts and there is no personalty, it has been held that it ought to be applied, first in payment of the costs of the plaintiff and the defendants, who are beneficially entitled, *pari passu* as between party and party, then in payment of the plaintiff's extra costs as between solicitor and client, and then towards satisfaction of the debts (*y*): but, as a general rule, where there is personal estate to be administered, and the assets prove insufficient for the payment of debts in full, the legal personal representative is entitled to payment of his costs, charges, and expenses in priority to the plaintiff's costs of sale of the real and leasehold estate (*z*).

Application of, where estate is incumbered.

We may here observe that an incumbrancer consenting to a sale in a legatee's administration action, is entitled to be paid his principal, interest, and costs, out of the purchase-money, in priority to the costs of the plaintiff in the cause (*a*);

(*s*) *Heming* v. *Archer*, 9 B. 366; see and consider *Morris* v. *Clarkson*, 3 Sw. 558, and other cases cited in reporter's note, *et quære*.

(*t*) *Thomas* v. *Powell*, 2 Cox, 394.

(*u*) *Todd* v. *Studholme*, 3 K. & J. 324, 338; *Cavendish* v. *Cavendish*, 10 Ch. 319.

(*x*) *Lovegrove* v. *Cooper*, 2 S. & G. 271; as to whether it is subject to the legacy duty, *vide ante*, p. 313.

(*y*) *Henderson* v. *Dodds*, 2 Eq. 532; *Ferguson* v. *Gibson*, 14 Eq. 379.

(*z*) *Re Spensley's Est.*, 15 Eq. 16, administration suit by a mortgagee; and see *Wetenhall* v. *Dennis*, 33 B. 285, administration suit by a legatee; but see *Pinchard* v. *Fellowes*, 17 Eq. 421.

(*a*) *Hepworth* v. *Heslop*, 3 Ha. 485; and see *Tipping* v. *Power*, 1 Ha. 405.

but in a creditor's action, it has been held that he is only entitled to have his costs of the actual sale paid out of the proceeds, leaving his other costs and expenses to be borne by the general assets (*b*). He may put a stop order on the fund (*c*); but, even if he omit to do so, the plaintiff may be made responsible, if he permit the purchase-money to be paid out of Court without satisfying the incumbrance (*d*). As a general rule, a decree for sale of an encumbered estate does not, of itself, alter the rights of the parties: so that where estates subject to numerous and complicated incumbrances were sold, by consent, it was held that to authorise payment of the costs of sale in the first place out of the general fund there should have been a special direction in the decree; and that, there being no such direction, the money arising from the sale of each estate ought to be treated as the estate itself would have been; and that the mortgagees ought to be paid their principal, interest, and costs according to their respective priorities (*e*): so where a devisee in trust for sale is himself a creditor of the testator, his right to retain his own debt out of the proceeds of sale is not prejudiced by their payment into Court (*f*); and the ultimate surplus of the proceeds of sale belongs to the heir or devisee (*g*). If a mortgagee brings an action for the administration of the estate of his deceased mortgagor, his costs are those of a plaintiff in an ordinary administration action (*h*); and where a first mortgagee with power of sale unnecessarily filed a bill praying a sale, subsequent incumbrancers, although they consented to the sale, were allowed their costs out of the purchase-money, although it was insufficient to pay off the first charge (*i*). A mortgagee, in an administration action, has no specific claim on the proceeds of

(*b*) *Berry* v. *Hebblethwaite*, 4 K. & J. 80. See as to the principle and authorities, Dan. C. P. 1183.

(*c*) *Todd* v. *Studholme*, 3 K. & J. 324.

(*d*) *Ibid.*

(*e*) *Wild* v. *Lockhart*, 10 B. 320; and see *Aldridge* v. *Westbrook*, 5 B. 188; and *Hall* v. *Macdonald*, 14 Si. 1; *Crosse* v. *Revy. Socy.*, 3 D. M. & G. 698; *Wonham* v. *Machin*, 10 Eq. 447.

(*f*) *Hall* v. *Macdonald*, 14 Si. 1.

(*g*) *Cooke* v. *Dealey*, 22 B. 196.

(*h*) *Wright* v. *Kirby*, 23 B. 463; and see *Re Spensley's Est.*, 15 Eq. R. 16.

(*i*) *Cooke* v. *Brown*, 4 Y. & C. C. C. 227.

sale paid into the general credit of the estate, so as to entitle him to the accumulations (*k*).

Purchaser should require the deeds to be handed over.

Purchasers on taking a conveyance should be careful that the deeds are not improperly left in the possession of the releasing incumbrancer. Where such is the case, although they may not be postponed to him in the event of the money not reaching his hands, his action against them may be dismissed without costs, unless they have a covenant for the production of the deeds (*l*).

Purchaser's costs of appearing on petition for its distribution of purchase-money, when allowed.

If the purchaser, before completion, is served with notice of an application for the payment of the purchase-money out of Court, he is entitled to his costs of appearing on the application, although he make no opposition (*m*); but such costs will (as a general rule) be disallowed if he appear after the conveyance is executed: in such a case his proper course is merely to inform the applicants that he has no claim on the fund (*n*). Under special circumstances, however, he may, after conveyance, be allowed his costs of such appearance (*o*).

If invested at purchaser's request, he takes proceeds of investment, if contract rescinded.

If the money has been invested on his application, he must, if the purchase is rescinded, take the stock, notwithstanding any variation in the funds (*p*): but when, in a foreclosure action, the estate is sold by consent, and the purchase-money invested in Consols, pending an inquiry as to the amount due on the security, the mortgagee is not prejudiced by a fall in Consols; and, if the ultimate proceeds are insufficient, may claim the deficiency in an administration action (*q*).

Possession—from what time purchaser entitled to.

Where the conditions of sale are silent as to the time when he is to have possession, and as to interest upon the purchase-money, the rule of the Court is, that he shall be let into possession from the quarter-day preceding the time when the chief clerk's certificate of his being the purchaser

(*k*) *Irby* v. *Irby*, 22 B. 217.

(*l*) See *Todd* v. *Studholme*, 3 K. & J. 324, 338, 339.

(*m*) *Bamford* v. *Watts*, 2 B. 201.

(*n*) *Barton* v. *Latour*, 18 B. 526.

(*o*) *Strong* v. *Strong*, 4 Jur. N. S. 943; *Noble* v. *Stow*, 30 B. 272.

(*p*) *Hodder* v. *Ruffin*, cited Sug. 119; *ante*, p. 1330.

(*q*) *Tompsett* v. *Wickens*, 3 S. & G. 171.

becomes absolute, he paying his purchase-money into Court before the following quarter-day (*r*): and although he may not pay his purchase-money into Court until the quarter is nearly expired, yet he will not be liable to pay interest (*s*), unless the estate be a reversion, or a life annuity payable quarterly (*t*); in which case interest is payable from the date of the purchase (*u*). If he delay payment, he will take the rent only from the quarter-day preceding payment (*x*): nor will he be allowed the rents from an earlier day on the ground of his money having lain idle (*y*). Where, as in the case of a colliery, the profits are ascertained monthly or weekly, he will be entitled to them from the commencement of the month or week (as the case may be) in which he pays his money (*z*), and the same principle would, it is conceived, prevail where, as often happens with house property, the rents are paid at shorter intervals than a quarter: while, on the other hand, if rents are reserved half-yearly, the purchaser would seem, on principle, to be entitled to them from the commencement of the current half, instead of quarter, year; and this has been so decided (*a*): on the purchase of a manor, fines on descent are, for the purpose of the above rules, considered to accrue due on the death of the copyholder, and not on the admission of his heir or devisee (*b*). Where the conditions provide that the purchaser shall pay interest, and shall be entitled to the rents and profits, from the day fixed for completion, and an order is subsequently made for payment in of the purchase-money and interest, the

(*r*) See *Twigg* v. *Fifield*, 13 V. 518; *Gowan* v. *Tighe*, L. & G. t. Pl. 168, 176; but see, as to Ireland, *Prendergast* v. *Eyre*, L. & G. t. Pl. 180; *Maurice* v. *Wainewright*, 1 Coop. t. Cott. 378.

(*s*) *S. C.*

(*t*) As to which, *vide post*, p. 1344.

(*u*) *Trefusis* v. *Lord Clinton*, 2 Si. 359; *ante*, p. 712; see, as to the practice in Ireland, *Hutchinson* v. *Cathcart*, J. & C. 260.

(*x*) Sug. 104.

(*y*) *Ibid.*; *Barker* v. *Harper*, G. Coop. 32; *Hindle* v. *Dakins*, 1 Coop. t. Cott. 378. As to the case of a mortgagee, see *Bates* v. *Bonnor*, 7 Si. 427.

(*z*) *Wren* v. *Kirton*, 8 V. 502; *Williams* v. *Attenborough*, T. & R. 73.

(*a*) *Hughes* v. *Wells*, V.-C. Wood, 1 Dav. 603.

(*b*) *Garrick* v. *Lord Camden*, 2 Cox, 231; the marginal note is incorrect; it will be seen from the case that the admissions were *after* and not *before* the time fixed for completion: see *Earl Hardwicke* v. *Lord Sandys*, 12 M. & W. 761; *Cuddon* v. *Tite*, 1 Gif. 395.

Chap. XX. Sect. 4.

purchaser will not be allowed to deduct the amount of rents and profits (*bb*).

Where an offer was made, out of Court, to purchase a deteriorating property (leaseholds), and the Court, upon the Master reporting in favour of the sale, accepted the offer, the purchaser was held entitled to the rents from the date of the order of reference (*c*).

On purchase of life interest or life annuity.

On the purchase of a life interest in stock, the purchaser pays interest and takes the dividends from the day of sale (*d*); but on the purchase of a life annuity, secured by bond and payable quarterly, he must pay interest and take the annuity from, it is conceived, the day on which the chief clerk's certificate of the sale became absolute (*e*).

As to abstract, &c.

The remarks already made (*f*) as to the abstract, searches for incumbrances, and matters arising between its delivery and the preparation of the conveyance, are generally applicable as well to sales by the Court as to ordinary sales.

Conveyance—when to be settled in Chambers.

The conveyance, if an infant be a necessary conveying party (*g*), or if, although he be not a party, it will by Statute have the effect of divesting his estate (*h*), was, as a general rule, settled by the Judge at Chambers (*i*): but this practice does not seem to be now observed. It is, however, still generally required, where the estate is sold under the provisions of the Leases and Sales of Settled Estates Act (*k*). Subject to this exception, it is usual to direct only that the draft be settled by the Judge "in case the parties differ;" and when the order is so worded, a purchaser going before

(*bb*) *Day* v. *Bonaini*, 55 L. T. 329.

(*c*) *Cheetham* v. *Sturtevant*, 3 De G. & S. 468.

(*d*) *Anson* v. *Towgood*, 1 J. & W. 637.

(*e*) See *Twigg* v. *Fifield*, 13 V. 517.

(*f*) Chaps. VIII., X., XI.

(*g*) *Calvert* v. *Godfrey*, 2 B. 267.

(*h*) *Cheese* v. *Cheese*, 15 L. J. Ch. 28; *aliter*, if the infant be only interested in the proceeds of sale, *Richardson* v. *Ward*, 11 B. 378: the consequent costs must be borne by the funds in Court; *Brown* v. *Lake*, 15 L. J. Ch. 34.

(*i*) But see as to leases, *Day* v. *Croft*, 14 B. 219. As to leases under the Settled Estates Act, no form of lease need now be settled in Chambers except in special cases; *Re Doring's S. E.*, 14 W. R. 125; and see now S. E. Act, 1877, ss. 14 and 15.

(*k*) *Re Eyre's S. E.*, 4 K. & J. 268; Dan. C. P. 1094; Seton, 1407; *ante*, p. 1249; but see *Re Sheffield's S. E.*, W. N. (1876) 152.

the Judge pays his own costs, unless he can make out special grounds for exemption (*l*); and by the Rules of the Supreme Court, 1883 (*m*), all proper parties must join in the conveyance as the Judge shall direct. The practice at Chambers is similar to that in a suit for specific performance (*n*). Where the estate belongs to an infant, the order for conveyance should be distinct from and should recite the order for payment of the purchase-money into Court (*o*). The order of the Judge as to the form of conveyance is subject to review (*p*). Thus, where a condition of sale provided that the form of a covenant should be settled by the Judge, in case of dispute, it was held by the Court of Appeal that the form settled by the Judge was not in accordance with the terms of the contract as expressed in the conditions (*q*).

Executor of lessee entitled to indemnity from purchaser of leaseholds.

Upon the sale by the Court of leaseholds of a testator his executor, although he have not been in possession, is entitled to an indemnity against the rent and covenants (*r*), by the covenant of the purchaser, and also by a retainer of part of the assets, or by a security from the legatees to refund (*s*). And it would seem that a sum which had been set apart to answer such liabilities, will not be paid out without notice to the landlord (*t*).

Purchaser may require concurrence of all necessary parties.

The purchaser may require the concurrence of all persons having a legal title to, or remedy against, the property, although not parties to the action (*u*); except, perhaps, a dowress, whose dower is barred by a term or equitable jointure (*x*), or a person who claims in respect of an estate held merely in trust, or by way of mortgage (*y*); as also of equitable

(*l*) *Hodgson* v. *Shaw*, 11 Jur. 95.

(*m*) O. LI. r. 3.

(*n*) *Vide ante*, p. 1249 *et seq.*

(*o*) *Harvey* v. *Brooke*, 17 Jur. 1.

(*p*) *Pollock* v. *Rabbits*, 21 Ch. D. 466.

(*q*) *S. C.*

(*r*) *Cochrane* v. *Robinson*, 11 Si. 378; see, too, *Garratt* v. *Lancefield*, 2 Jur. N. S. 177; *Dean* v. *Allen*, 20 B. 1; *Brewer* v. *Pocock*, 23 B. 310; *Waller* v. *Barrett*, 24 B. 413.

(*s*) *Dobson* v. *Carpenter*, 12 B. 370; *Smith* v. *Smith*, 2 Eq. R. 727; Dan. C. P. 1022.

(*t*) *Bunting* v. *Marriott*, 7 Jur. N. S. 565; but see *King* v. *Malcott*, 9 Ha. 692.

(*u*) See and consider *Craddock* v. *Piper*, 14 Si. 310.

(*x*) *Vide ante*, pp. 584, 585.

(*y*) *Ante*, p. 585.

claimants or incumbrancers who are not parties to the action (*z*); but cannot, it would seem, "if he acquire the legal estate, require at the seller's expense, a release from equitable incumbrancers whose demands have been satisfied by the Court" (*a*): nor does it, in fact, appear, that he can insist on the concurrence, even at his own expense, of parties having mere equitable interests and who are bound by the decree (*b*); and the Court has refused to make, under the Trustee Act, an order purporting to vest such an interest in the purchaser (*c*). Any right of the purchaser to require the concurrence of such parties is very commonly expressly negatived by condition. If the decree direct that all proper parties convey, and a party to the action, or creditor coming in under the decree (*d*), whom the Judge considers a proper party to the conveyance, refuses to concur, the purchaser's application should be against the recusant party (and not against the plaintiffs) that he do convey (*e*). It appears that a mortgagee, who has proved his debt, may be required to receive his money and to concur without the usual six months' notice (*f*); but in a modern case, Lord Romilly stated the rule to be that a mortgagee consenting to a sale is entitled to six months' interest from the date of his consent, if paid within that period; but if paid afterwards, then interest down to the time of actual payment (*g*). Where the

Who are such.

Party refusing may be ordered to convey.

(*z*) *Piers* v. *Piers*, 1 D. & Wal. 265; *Rolleston* v. *Morton*, 1 D. & War. 171, 177; *Grey Coat Hosp.* v. *Westminster Commrs.*, 1 D. & J. 531; and see *Knight* v. *Pocock*, 24 B. 436.

(*a*) Sug. 107, citing *Keatinge* v. *Keatinge*, 6 Ir. Eq. R. 43; and *Webber* v. *Jones*, *ib.* 142.

(*b*) *Webber* v. *Jones*, *supra*; *Cole* v. *Sewell*, 17 Si. 40; and see *Thompson* v. *Raine*, 28 L. T. 362, where an annuitant, who had a power of distress but had agreed to a compromise of an action whereby the owner of the legal estate was authorized to sell, was held not to be a necessary party.

(*c*) *Re Williams' Est.*, 5 De G. & S. 515; but see *Lechmere* v. *Clamp*, 31 B. 578, where a mortgagor who could not be found was declared to be a trustee, and a vesting order made.

(*d*) See *Usher* v. *Scanlan*, Fl. & K. 243. A direction that the vendor shall convey is tantamount to a direction that he and all necessary parties shall convey: *Minton* v. *Kirwood*, 3 Ch. 614; and see R. S. C. 1883, Ord. LI. r. 3.

(*e*) *Stilwell* v. *Mellersh*, 4 M. & C. 581.

(*f*) *Matson* v. *Swift*, 5 Jur. 645.

(*g*) *Day* v. *Day*, 31 B. 270.

conveyance to the purchaser depended in some measure upon a resettlement, which was impeached by annuitants who were parties to the suit, they were ordered to join in the conveyance without prejudice to their rights against the purchase-money (*h*).

Against whom order will be made.

Such an order will not be made against a married woman in respect of her real estate not settled to her separate use (*i*); but will be made against an infant (*k*); and if he refuse to execute, an attachment may issue against him (*l*).

Party refusing may be declared a trustee.

But the more usual course of proceeding, where a party to the suit refuses to execute, has been to treat such party as a trustee within the Trustee Act, 1850 (*m*), and to obtain an order for a conveyance, or a vesting or releasing order having

(*h*) *Sullivan* v. *Sullivan*, 28 B. 102; but see *Thompson* v. *Raine*, 28 L. T. 362.

(*i*) *Jordan* v. *Jones*, 2 Ph. 170; but in such a case the married woman may now be declared a trustee, and a vesting order obtained under the Trustee Act.

(*k*) As to conveyances on sales in creditors' actions, see 1 Will. IV. c. 47, ss. 11 and 12, amended by 2 & 3 V. c. 60, and 11 & 12 V. c. 87; and see *Penny* v. *Pretor*, 9 Si. 135; *Walker* v. *Aston*, 14 Si. 87; *Heming* v. *Archer*, 7 B. 515; 8 B. 294; see Seton, 713 *et seq.*; Dan. C. P. 1065. An infant tenant in tail may be ordered to convey, *Radcliffe* v. *Eccles*, 1 Ke. 130; *Penny* v. *Pretor*, *supra*; it is doubtful whether a conveyance by a person appointed to convey in place of infant would have the same effect, *Wood* v. *Beetlestone*, 1 K. & J. 213; and see now Trustee Extension Act, 1852, s. 1. An action by an equitable mortgagee praying a sale is within the statute; and the infant heir of the mortgagor will be ordered to convey, although the mortgagee is, with the permission of the Court, the purchaser; and although, if the decree has been for foreclosure, the infant would have been allowed to show cause on coming of age; see *Scholefield* v. *Heafield*, 7 Si. 669; 8 Si. 470; *Redshaw* v. *Newbold*, 12 Jur. 833; *Clinton* v. *Bernard*, 1 Dru. 287. A conveyance may still be enforced under the above Acts, but, in practice, recourse is now generally had to the Trustee Act, 1850, see ss. 29 and 30; see *Wolverhampton Banking Co.* v. *George*, 24 Ch. D. 707; *Mellor* v. *Porter*, 25 Ch. D. 158; and see *ante*, p. 655 *et seq.*; Seton, 537 *et seq.*; Lewin, 1025 *et seq.* In an action by a registered judgment creditor to realize his security, a tenant in tail in possession may be directed to execute a disentailing assurance: *Lewis* v. *Duncombe*, 20 B. 398. *Quære*, whether under the 1 Will. IV. c. 47 and the 3 & 4 Will. IV. c. 104, the Court can sell copyholds: see *Branch* v. *Browne*, 12 Jur. 768.

(*l*) *Thomas* v. *Gwynne*, 8 B. 312; and see *Re Beech*, 4 Mad. 128.

(*m*) Sect. 2; see *ante*, pp. 659 *et seq.*, 1251 *et seq.*; Dan. C. P. 2099.

Chap. XX. Sect. 4.

the effect of a conveyance (*n*): and this course may be adopted when the recusant party is a married woman (*o*), infant (*p*), lunatic (*q*), or mere tenant for life (*r*); and the mere decree directing a sale and all proper parties to convey, makes the owner of the legal estate, if party to the suit, a trustee within the Act (*s*). Where property was sold in lots to several purchasers, it was held that each purchaser might separately petition for an order vesting the estate of an infant, and that the vendors must pay the costs (*t*). And now, where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, the Court may on such terms and conditions as may be just, order that such conveyance shall be executed by such person as the Court may nominate for that purpose; and the conveyance so executed will have the same effect as if the person originally directed to execute it had done so (*u*).

Section 5.

(5.) *As to the purchaser's rights after completion.*

As to purchaser's rights after completion.

Upon the execution of the conveyance the purchaser is, as a general rule, entitled to have the title deeds delivered to him; and an order for their delivery, if not provided for in

(*n*) Ss. 29, 30; *ante*, p. 658.

(*o*) *Jordan* v. *Jones*, 2 Ph. 170; *Billing* v. *Webb*, 1 De G. & S. 716; and see *Jumpson* v. *Pitchers*, 1 Col. 13; *Hood* v. *Hall*, 14 Jur. 127.

(*p*) *Walters* v. *Jackson*, 12 Si. 278; *Warburton* v. *Vaughan*, 4 Y. & C. C. C. 247; *Thomas* v. *Gwynne*, 9 B. 275.

(*q*) *Re Blake*, 3 J. & L. 265; and see 16 & 17 V. c. 70, ss. 124, 139.

(*r*) *Re Milfield*, 2 Ph. 254.

(*s*) See ss. 29, 30, and cases cited in last four notes; and *King* v. *Leach*, 2 Ha. 57; *Robinson* v. *Wood*, 5 B. 246; *Jackson* v. *Milfield*, 5 Ha. 538; *In re Blackwell*, 7 Jur. 9; *Barfield* v. *Rogers*, 8 *ib.* 229. As to the application of the Trustee Act, 1850, to cases of partition where an infant is legally interested, see *Bowra* v. *Wright*, 4 De G. & S. 265; *Re Bloomar*, 2 D. & J. 88; and *ante*, p. 1302.

(*t*) *Ayles* v. *Cox*, 17 B. 584; *Bradley* v. *Munton*, 16 B. 294.

(*u*) 47 & 48 V. c. 61, s. 14; and see *Re Edwards*, 33 W. R. 578; *Howarth* v. *Howarth*, 11 P. D. 95. The words of the section seem wide enough to include a disentailing deed; but it is very doubtful whether the Court would appoint anyone under the section to execute a disentailing deed which a tenant in tail had in disobedience of the Court's order refused to execute. The point was raised, but not decided, by the C. A., in *Bankes* v. *Small*, 35 W. R. 765.

Purchaser, after conveyance executed, may claim the deeds.

the order for payment of the purchase-money, may be obtained on summons (*x*). On a sale in lots, the purchaser of the largest lot is, in the absence of special agreement, entitled to the deeds as against the purchaser of several lots of larger aggregate amount (*y*); if the purchaser, instead of applying to the Court, bring an action at Law against parties to the suit for a document to which he is entitled, he will be restrained by injunction (*z*). Where mortgagees, parties to the suit, consented to the sale, they were ordered to leave the deeds in the Master's office, but it was directed that they should not be delivered to the purchaser, without notice to the mortgagees (*a*). The solicitor conducting the sale is the proper person to apply for the delivery to the purchaser of the deeds deposited in Court (*b*).

As to attested copies.

The purchaser is also, in the absence of stipulation, entitled to attested copies, and a covenant for the production of the originals of such documents of title as are not delivered to him (*c*); it may, however, be remarked that, in *Dare* v. *Tucker* (*d*), Lord Eldon qualified his order for delivery of attested copies by the expression, "unless you leave the originals, or make some other proposal in the Master's office;" so that, possibly, upon a sale by the Court, a deposit of the deeds in the Central Office might be sufficient to preclude the right to attested copies: but such a deposit could probably not be enforced against a purchaser who had purchased to an amount exceeding that of any other purchaser, and the part (if any) remaining unsold. It is a not uncommon practice in Court sales, after providing by the conditions for the custody

(*x*) Dan. C. P. 1098; Seton, 1403, for form of order.

(*y*) *Lord Kinnaird* v. *Christie*, cited Dan. C. P. 1099; *Scott* v. *Jackman*, 21 B. 110. The conditions ought always to provide that the purchaser of the largest part in *value* of property, held under the common title, shall have the custody of the deeds. As to the right of a vendor who retains any part of the estate to retain the documents of title, see now 37 & 38 V. c. 78, s. 2, and *ante*, Ch. XIII., sect. 7.

(*z*) *Stubbs* v. *Sargon*, 4 B. 90.

(*a*) *Livesey* v. *Harding*, 1 B. 343, 346; *Knott* v. *Cottee*, 27 B. 33; but see *Fowler* v. *Scott*, 20 W. R. 199.

(*b*) See Dan. C. P. 1098.

(*c*) As to the qualification of this right, *vide ante*, p. 626.

(*d*) 6 V. 460.

Chap. XX. Sect. 5.

of the deeds, to reserve a general power for the vendors to make any other arrangement respecting them which the Judge may approve of.

Purchaser will be protected against all parties to action.

Where the estate is sold in accordance with the decree, the Court "will protect the purchaser against the parties to the action (*e*), and all parties coming in under the decree" (*f*); and Lord St. Leonards considers it to be a general rule that even as against absent parties (*g*), the purchaser shall not lose the benefit of his purchase by any irregularity in the proceedings in the action (*h*). So, if the Court being authorized by a private Act to ascertain the amount of A.'s debts, and to sell for their payment, sell in a manner authorized by the Act, but under a wrong conclusion as to the amount of the debts, the error will not affect a purchaser (*i*). So, as we have already seen (*k*), where the sale is made under the provisions of the Leases and Sales of Settled Estates Act (*l*), it is not to be invalidated on the ground that the Court was not empowered to authorize the same.

Unless Court exceed its jurisdiction.

Formerly, however, if the Court clearly exceeded its jurisdiction, as if, in cases not falling within the scope of the Partition Act, or the Settled Estates Act (*m*), it assumed to sell the real estate of infants upon the mere notion that a sale was beneficial (*n*), or, as against *cestuis que trust*, not

(*e*) Although claiming by title acquired subsequently to the decree; *Massy* v. *Batwell*, 4 D. & War. 58, 80.

(*f*) Sug. 111; *Usher* v. *Seanlan*, Fl. & K. 243; *Staepoole* v. *Curtis*, 2 Moll. 504; *Tommey* v. *White*, 3 H. L. C. 63.

(*g*) Sug. H. L. 682.

(*h*) Sug. 110, and cases cited in the judgment in *Bowen* v. *Evans*, 1 J. & L. 256 *et seq.*; and see *Baker* v. *Sowter*, 10 B. 343; *Edgeworth* v. *Edgeworth*, 12 Ir. Eq. R. 81; *Keogh* v. *Keogh*, 13 *ib.* 284; *Dixon* v. *Wilkinson*, 22 L. J. Ch. 981; and see *Blackie* v. *Clark*, 15 B. 606.

(*i*) *Vans Agnew* v. *Stewart*, Sug. 68.

(*k*) *Ante*, p. 1290.

(*l*) 40 & 41 V. c. 18, s. 40.

(*m*) *Vide ante*, p. 1289.

(*n*) *Calvert* v. *Godfrey*, 6 B. 97; *Russel* v. *Russel*, 1 Mol. 525; *Daly* v. *Daly*, 2 J. & L. 758; *Weir* v. *Chamley*, 1 Ir. Ch. R. 317; see *Peto* v. *Gardner*, 2 Y. & C. C. C. 312. See, as to special circumstances warranting a sale, *Garmstone* v. *Gaunt*, 1 Col. 577; and see *Nunn* v. *Hancock*, 6 Ch. 850; and as to cases in which, before

sui juris, to anticipate, without special grounds, the time fixed by the author of the trust for the sale of the estate (*o*), it was not clear that the purchaser would be protected by the decree; at any rate, he would not be compelled to accept the title (*p*), and a purchaser, especially if he were the plaintiff in the cause (*q*), was always bound to see that the sale was according to the decree (*r*); although he was not bound to see that no more property was sold than would be sufficient for the purposes for which a sale was directed (*s*), nor would he, apparently, be affected by fraud in the proceedings of which he himself was innocent (*t*), unless it were apparent

the late Partition Act, the Court directed a sale of an estate in which an infant was interested, *vide ante*, p. 1306, and cases there cited. And see, as to the sale by the Court of charity lands, *A.-G.* v. *Corp. of Newark*, 1 Ha. 395; *A.-G.* v. *South Sea Co.*, 4 B. 453, and cases cited; *A.-G.* v. *Pilgrim*, 12 B. 57, 60; it has been doubted whether the Court can direct a sale upon petition under Sir S. Romilly's Act (52 Geo. III. c. 101); see *Re Parke's Charity*, 12 Si. 329; *Re Newton's Charity*, 12 Jur. 1011; *Re Suir Island Charity*, 3 J. & L. 171; *Re Ecclesall*, 16 B. 297; and, as to the statute generally, see reporter's note, 14 B. 120: however, it has been held that the Court has such a power, and that the title acquired thereby can be forced on an unwilling purchaser: *Re Ashton's Charity*, 22 B. 288. See now 16 & 17 V. c. 137, s. 24, 18 & 19 V. c. 124, s. 38, 23 & 24 V. c. 136, 25 & 26 V. c. 112, 32 & 33 V. c. 110, s. 12, which gives a power to the majority of the trustees of a charity to carry out a sale of the charity estate. Under the 1 Will. IV. c. 65, the Court has ordered the reversionary interest of a lunatic in realty to be sold for his maintenance: *Re Burbidge*, 3 M. & G. 1; see *Re Vavasour*, *ib.* 275; *Re Fisher*, 2 H. & Tw. 449; and this is now expressly authorized, see 16 & 17 V. c. 70, ss. 116, 124, 125, 139. Where the lunatic is tenant for life, and the income is more than sufficient for his maintenance, the Court has no power, under the 125th section, to sell the land for building purposes: *Re Corbett*, 1 Ch. 516. The Act does not interfere with the additional requirements of private Acts: *Re Bingley School*, 2 Dr. 283. As to the rights of real representative to surplus proceeds, see the Acts, and *Re Wharton*, 5 De G. M. & G. 33.

(*o*) *Blacklow* v. *Laws*, 2 Ha. 40; *Johnston* v. *Baber*, 8 B. 233; and see *Bristow* v. *Skirrow*, 27 B. 590.

(*p*) *Ante*, p. 1335.

(*q*) *Talbott* v. *Minnett*, 6 Ir. Eq. R. 83.

(*r*) *Colclough* v. *Sterum*, 3 Bl. 181, 186, 188; *Lutwych* v. *Winford*, 2 Br. C. C. 248, 251; and see *Re Thompson's S. E.*, Johns. 418, 423; *Re Woodcock's Tr.*, 3 Ch. 230.

(*s*) *S. C.*; *Thomas* v. *Townsend*, 16 Jur. 736; *Dixon* v. *Wilkinson*, 22 L. J. Ch. 911.

(*t*) See Sug. 111; *Bowen* v. *Evans*, 1 J. & L. 178; 2 H. L. C. 257; *Edgeworth* v. *Edgeworth*, 12 Ir. Eq. R. 81. If participating in the fraud, of course he is liable: *Colclough* v. *Bolger*, 4 Dow, 54; *Lord Bandon* v. *Becher*, 9 Bl. N. S. 532; see, also, on the general subject, *Thornhill* v. *Glover*, 3 D. & War. 195.

Chap. XX. Sect. 5.

on the face of the decree (*u*): nor was a sale impeachable on the ground of its having been the object for which the suit, professedly directed to other purposes, was in fact instituted (*x*). And the decree was no protection against persons of whom the purchaser had actual notice that they ought to have been, but were not, parties to the suit (*y*); or against a judgment creditor, who did not come in under the decree (*z*); so that in every such case the purchaser was bound to see that he obtained a discharge.

Order for sale not now invalidated as against a purchaser.

But now no order of the Court under any statutory or other jurisdiction can, as against a purchaser, whether made before or since the 1st of Jan. 1882, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service, whether the purchaser has notice of any such want or not (*a*); and it is conceived that this enactment is wide enough to cover all the above cases in favour of a purchaser.

Cestuis que trust when unnecessary parties to conveyance.

Where the property is vested in trustees who have power to give a discharge for the purchase-money, and are bound by the decree, it is unnecessary that *cestuis que trust* who are not before the Court should be made parties to the conveyance (*b*).

Purchaser allowed compensation for mis-description of estate.

A purchaser, after conveyance, has been allowed compensation out of his purchase-money, on the ground of the rent of the estate having been misstated in the particulars (*c*), or

(*u*) *Gore* v. *Stacpoole*, 1 Dow, 30; *S. C.* cited 1 J. & L. 257.

(*x*) *Bowen* v. *Evans*, 1 J. & L. 178; 2 H. L. C. 257.

(*y*) *Colclough* v. *Sterum*, 3 Bl. 181—186; *Piers* v. *Piers*, 1 D. & Wal. 265; *Rolleston* v. *Morton*, 1 D. & War. 177; and see Sug. H. L. 682; *Doody* v. *Higgins*, 9 Ha. *App.* 37; *Goldsmid* v. *Stonehewer*, *ib.* 38; as to representation, *Hanman* v. *Riley*, *ib.* 40; *Densem* v. *Elsworthy*, *ib.* 42; and see *ib.* 47, 48.

(*z*) *Knight* v. *Pocock*, 24 B. 436.

(*a*) Conv. Act, 1881, sect. 70.

(*b*) *Walters* v. *Jones*, 6 Jur. N. S. 530.

(*c*) *Cann* v. *Cann*, 3 Si. 447; *Palmer* v. *Johnson*, 13 Q. B. D. 351, where the conditions provided that compensation should be allowed for any error in the particulars; and see the subject discussed, *ante*, p. 904.

the length of an outstanding term (*d*). But this has not been allowed, if he purchased with notice of the error (*e*). When he claims compensation, he should apply by summons to have it either paid, or deducted from his purchase-money. Under special circumstances, he has been allowed to pay the purchase-money into Court and take possession without prejudice to his claim for compensation (*f*).

Section 6.

(6.) *As to the practice, when the purchaser fails to complete.*

As to the practice, &c.

Course to be adopted if purchaser refuse to complete.

As we have already seen (*g*), under the present practice, no step need be taken by the highest bidder in order that he may assume the character of purchaser; the conditions of sale fix a time at which all parties may, if they think fit, attend by their solicitors at the judge's chambers to settle the certificate of sale; if a bidder fails to attend, the certificate is settled in his absence; and, when settled, is signed and filed, and becomes binding on him without notice. If he take no step to complete the purchase, and he be supposed to be incompetent in point of means, the vendors may apply, on notice, that he be discharged, and that the estate be re-sold (*h*); or, as is now the more usual course, may obtain an order, not that the purchaser be discharged, but that the estate be re-sold, and that he may pay the expenses arising from his non-completion of the purchase, the expenses of the application to the Court, and of the re-sale, and any deficiency in price on the re-sale (*i*): under such an order, however, the purchaser has still a *locus pœnitentiæ;* so that if the

If supposed to be irresponsible.

(*d*) *Horner* v. *Williams*, J. & C. 274. As to whether, in an ordinary case, the *quantum* of compensation can be determined under the provisions of the Common Law Procedure Act, see *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Re Dawdy*, 15 Q. B. D. 426; following *Collins* v. *Collins*, 26 B. 306; and cf. *Re Hopper*, L. R. 2 Q. B. 367; and *vide ante*, p. 260.

(*e*) *Campbell* v. *Hay*, 2 Mol. 102.

(*f*) *Man* v. *Ricketts*, 5 De G. & S. 116.

(*g*) *Ante*, pp. 1328, 1329.

(*h*) *Hodder* v. *Ruffin*, 1 V. & B. 544; *Cuningham* v. *Williams*, 2 Anst. 344; Dan. C. P. 1105; Sug. 102.

(*i*) *Harding* v. *Harding*, 4 M. & C. 514; *Saunders* v. *Gray*, *ib.* 515; *Gray* v. *Gray*, 1 B. 199. The conditions should provide for this; see R. S. C. 1883, App. L. No. 15.

Chap. XX. Sect. 6.

property, being a reversion, fall into possession before a re-sale, he may claim it on paying his purchase-money with costs (*k*). Where the purchaser makes default in payment of the purchase-money and takes no step to complete the sale, an order may, it is conceived, be obtained to rescind the contract altogether (*l*).

Purchaser becoming bankrupt before completion.

Where, before the time fixed for completion the purchaser became bankrupt, and his assignees declined to complete, the Court held that the deposit was forfeited, and made an order for re-sale; but refused to make it without prejudice to any right which the vendors might have against the bankrupt or his assignees, in the event of a less price being obtained (*m*).

If supposed to be responsible.

If the purchaser is responsible, the vendors may take out a summons requiring him to show cause why he should not be ordered within a given time to pay his money into Court, and to pay the costs of the summons (*n*); if he appear on the summons, he is *primâ facie* entitled to have a reference on the title; and, if he do not appear, it seems to be requisite, before any order can be made, that the vendors shall have delivered the abstract, and procured the chief clerk's certificate in favour of the title (*o*): or that the purchaser shall have accepted the title (*p*). Where defendants to the action, who were entitled with the plaintiff to shares in the estate, purchased a part of it of which they were in possession, and the conditions precluded any objection to the title, they were ordered to pay in the *entire* purchase-money, although they claimed allowances for improvements, and the estate was incumbered (*q*).

(*k*) *Robertson* v. *Skelton*, 13 B. 91.

(*l*) Cf. *Foligno* v. *Martin*, 16 B. 586; *Sweet* v. *Meredith*, 4 Gif. 207; *Watson* v. *Cox*, 15 Eq. 219, cases of specific performance; and see the question considered *ante*, p. 1254.

(*m*) *Depree* v. *Bedborough*, 4 Gif. 479. See *Moeser* v. *Wisker*, L. R. 6 C. P. 120.

(*n*) *Lansdown* v. *Elderton*, 14 V. 512.

(*o*) Dan. C. P. 1103, and cases cited; and see *Bulmer* v. *Allison*, 8 Jur. 440.

(*p*) *Rutter* v. *Marriott*, 10 B. 33.

(*q*) *Bulmer* v. *Allison*, 15 L. J. Ch. 11.

Purchaser, whether allowed to forfeit deposit and abandon contract.

On the other hand, where the contract is inequitable (*r*), or where to enforce it would be attended with great hardship, as in the case of a sudden and violent change in the money market (*s*), or where the purchaser has by mistake given an unreasonable price for the estate (*t*), and is expeditious in applying to the Court (*u*), he will, according to some authorities, be allowed to forfeit his deposit (if any), and abandon the contract; but this will not be conceded on the mere ground of the price being excessive (*x*); nor in the case of a person without authority buying the estate to prevent a sale at an undervalue (*y*); nor, it is conceived, under any ordinary state of circumstances.

(*r*) Sug. 119; Dan. C. P. 1089.

(*s*) *Savile* v. *Savile*, 1 P. W. 745, *sed quære.*

(*t*) *Morshead* v. *Frederick*, cited, but with disapprobation, Sug. 120; see *Coote* v. *Coote*, 2 Ir. Eq. R. 159.

(*u*) See *Price* v. *North*, 2 Y. & C. 620, 626.

(*x*) *Re Birch*, cited Sug. 119.

(*y*) *Nelthorpe* v. *Pennyman*, 14 V. 517; *Ex p. Tomkins*, Sug. 120.

APPENDIX.

IND, COOPE & Co. *v.* EMMERSON (*a*) was a case in which an action had been brought in the Chancery Division for the recovery of possession of land, and for discovery in the nature of production and delivery of documents alleged to be material to the plaintiff's title. The defendants pleaded that they were in possession, and, so far as the claim for discovery was concerned, that they were purchasers for valuable consideration without notice. Mr. Justice Chitty held that this defence of purchase for valuable consideration without notice was a good answer to the claim for discovery, but the Court of Appeal reversed this decision, and the defendants appealed to the House of Lords, contending that the Judicature Acts, which as a rule related to procedure only, had not deprived them of the right, which they would have had under the practice of the Court of Chancery, to set up this plea. The House of Lords, however, affirmed the decision of the Court of Appeal on the grounds indicated in the following passages, which are cited from the speech of the Earl of Selborne: —

"The argument for the appellants has been, that under sect. 24 (sub-sect. 2) of the Judicature Act of 1873, the Court and every judge is bound to give to 'every *equitable defence*' properly alleged 'such and the same effect by way of defence *against the claim* of the plaintiff or petitioner as the Court of Chancery ought to have given, if the same or the like matter had been relied on by way of defence *in any suit or proceeding instituted in that Court for the same or the like purpose* before the passing of the Act.' It was contended that, in the

(*a*) 12 Ap. Ca. 300.

Court of Chancery, before the passing of the Act of 1873, a plea of purchase for valuable consideration without notice would have been a good equitable defence to a bill for discovery only; and, therefore, that it is now a good equitable defence against discovery in the present action, which is (in effect) an action of ejectment brought by the plaintiff upon an (alleged) legal title: or, at all events, against the production of those deeds and documents of which production and delivery are expressly asked by the plaintiff's amended statement of claim, and which she therein alleges to be necessary to establish her title.

"The first observation to be made is, that the Court of Chancery, when it allowed a plea of purchase for valuable consideration without notice to a bill for discovery only, allowed it, not to particular discovery (as *e. g.*, of certain deeds and documents), but to the whole; not on the ground that certain things ought not to be inquired into, but because the Court ought not, as against such a purchaser, to give any assistance whatever to a plaintiff suing upon a legal title in another jurisdiction. And upon the same ground a like plea would have been allowed to a suit asking for more than discovery (*e. g.*, for an injunction to restrain the defendant at law from setting up outstanding terms), when the object of the suit was still to obtain from the Court of Chancery assistance to the suit of the plaintiff, suing upon a legal title in another jurisdiction. The defence was, in effect, '*no equity*,' which is a different thing from an 'equitable defence.' It was thought inequitable generally, that a man should defeat a legal title by keeping back facts in his own knowledge, or by setting up outstanding terms; it was thought *not* inequitable that a purchaser for value without notice should use any such *tabula in naufragio*, as best he could. But in the present case there is no suit in any other jurisdiction. The High Court of Justice is asked, and is competently asked, to exercise a principal, and not an auxiliary, jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself. If a like suit had been formerly brought in the Court of Chancery it would

have been demurrable; not because there was an equitable defence, but because the title was legal, and the plaintiff stated no equity. To abolish that division of jurisdictions was the very object of the Judicature Act. As against '*the claim*' of the plaintiff, in this suit, it is not, and it cannot be, pretended that purchase for valuable consideration is a good equitable defence. Why, then, should it be an equitable defence against the discovery which is sought only as incident to, and as evidence in support of, the claim? In the class of cases referred to, the separation and division of jurisdictions between the Courts of Equity and the Courts of Common Law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. But it is impossible, without departing from that ground, to make the same defence available against discovery (otherwise proper) in a suit in which it is not available against the relief, and in which the High Court has proper jurisdiction to try, and must try and determine, the question of title. And, accordingly, we find that there is no instance of any suit competently brought in the Court of Chancery, for relief as well as discovery, in which the defence of purchaser for value without notice has been held available against discovery incident to the relief, and not against the relief itself also. That defence was never admitted as an objection to particular discovery; it went to all or none. And in those cases, in which the Court of Chancery had concurrent jurisdiction with the Common Law Courts upon legal titles, it was not available against either discovery or relief. *Williams* v. *Lambe* (*b*); *Collins* v. *Archer* (*c*); *Phillips* v. *Phillips* (*d*).

"In the words, therefore, of that section of the Judicature Act on which the appellant's reliance was placed, this would not, before 1873, have been a good equitable defence to discovery in the Court of Chancery 'in any suit or proceeding instituted in that Court *for the like purpose.*'"

(*b*) 3 Br. C. C. 264. (*c*) 1 R. & M. 292. (*d*) 4 D. F. & J. 217.

INDEX.

ABANDONED RAILWAY,
land bought for, is not superfluous, 860.
withdrawal of notice to treat, in respect of, 243, n. (*o*).

ABANDONMENT. *See* RELEASE; WAIVER.
of contract,
acts of possession by vendor, are, how far, 1216.
by assignee of bankrupt, 291, 292.
by infant, 30.
by purchaser, effect of, on rights of vendor's representatives, 300.
by trustee in bankruptcy, 292.
by vendor, effect of, on rights of his representatives, 301.
defence to specific performance, 1212.
mutual, before death of party, effect of, 300.
of improper investment by trustee, how far good, 687, 688.
of lien, is question of intention, 829--832.
of mine or quarry, what is, 448, n. (*m*).
of notice to treat, presumed, if not acted on, 248, 249.
of possession by husband and wife, time runs from date of, 448.
tenant relieves purchaser from inquiry, 520.
of railway, rights of adjoining owners to lands on, 860.
of right of light, what is evidence of intention, 406, 407.
of way, presumption of, 413.
to pollute stream, by non-user of privilege, 417.

ABATEMENT. *See* COMPENSATION.
of incumbrances by purchasing partner enures for benefit of firm, 1051.
of prices—
for defects in estate, 735 *et seq.*, 1184, 1191 *et seq.*
title to part, 1185 *et seq.*
for deteriorations, 284, 733, 1247.
purchaser compelled to accept, when, 1205 *et seq.*
costs of unsuccessful claim by, 1266.
right to, lost by knowledge of defect, when, 1203—1205.
vendor compelled to allow, when, 1188 *et seq.*
of rent, agreement for, must be in writing, 236.

ABSENCE,
of husband, evidence of illegitimacy, 381, 382.
of title-deeds, how far notice, 766, 984, 985. *See* NOTICE; TITLE-DEEDS.
presumption of death from, 385 *et seq.* *See* DEATH.

ABSTRACT,
acceptance of, is waiver of condition as to time, 490.
title does not preclude verification of, 496.
shown by, extends only to defects on its face, 350.
commencement of, by lease, actual possession by lessee must appear, 338.
deeds prior to, should not be set out, 337.
when required, 337, 339.
effect of Conv. Act upon, 337.
what is proper, 338, 339.
whether document must be, 337, 340.
condition against delivery of, where necessary, 141.
for delivery of, inserted on sale by Court, 1325.
must be strictly adhered to, 141.
unnecessary, 140, 141.
consent of parties joining, how to be shown on, 322.
contents, should contain table of, when, 346.
contract, purchaser of, entitled to what, 319.
copy of, solicitor's charges for, 320.
what is proper, 346.
cost of, vendor bears, 320.
counsel's opinion on, necessary for purchaser generally, 348.
vendor, when, 346.
not binding on purchaser, 350, 495.
right of purchaser to, after rescission, 319.
covenants not appearing on, conveyance cannot be subject to, 576, n. (*c*).
delivery of defective, precludes vendor from enforcing condition as to time, 180, 184.
action for deceit for, 184, n. (*n*).
means delivery of perfect abstract, 141, 142.
not part-performance, 1138.
perfect, effect of want of, on purchaser's liability, 142.
time for requisitions runs from, 180, 184.
documents forming part of title should appear in chief, 341.
should contain what, 340—345.
what, may be produced only, not abstracted, 340.
drainage loans should be set out in, 345.
imperfections in, not defects in title, when, 321.
incumbrances must be set out in, 345.
inspection of, opportunity of, when to be given prior to sale, 174.
land-tax, need not mention existence of, when, 323.
should set out certificate of redemption of, when, 323.
memorandum of deposit, after discharge, not set out in, 342.
non-application for, may be waiver of condition as to time, 490, 491.
non-delivery of, effect of, on purchaser's liability under contract, 346.
how to be dealt with by purchaser, 347.
may be "wilful default," 723, 724.
not a defence at trial, after admission of title, 1150.
objection not appearing on, waiver of, not implied, 496.
of common title, owner of moiety, how far entitled to, 320.
of estate with registered title, 347.

ABSTRACT—*continued.*
on sales by the Court,—
defective, how far ground for discharging purchaser, 1335, 1336.
delivery of, may be obtained on summons, 1335.
preparation of, 1325.
outstanding estate, must show in whom vested, 322.
partner, entitled to what, on purchase of share of dead partner, 320.
pedigree, matters of, how to be stated, 341.
perfect, what is, 141, 142, 321.
plans and tracings to be included in, 345.
possession without requiring, is waiver of title, 500.
purchaser's right to, 319.
retention of, may be waiver of objections, 496, 497.
return of, on abandonment of contract, 319.
showing certain delay in completion should be objected to promptly, 491.
future title to property, whether sufficient, 323.
tenant in tail in possession, whether sufficient, 325.
tenant in common, when entitled to, of common title, 326.
tithes, exemption from, must be shown, when, 323.
trover for, when maintainable by purchaser, 319.
verification of, by production of originals, 159.
copies, when allowed, 159.
condition relieving vendor from, must be clear, 163.
expense of, how borne, 159, 348, 471, 1272.
on sale in lots, 176.
and of furnishing complete abstract, distinction between, 159, n. (*y*).
when to be made, 348, 472.
waiver of right to, is not waiver of objections, 496.
what required in various sales,
of advowson, 334.
of allotments, 326.
of enfranchised copyholds, 330.
of equitable estate, 336.
of estate with attendant terms, 329, 335.
of exchanged land, 326—328.
of leaseholds, 330, 331.
of lease under power, 331.
of lands derived under Charitable Trusts Act, 329.
held from Crown, 336.
of company, forming security for debentures, 333.
tithe free, 336.
of pew, 333.
of renewable leaseholds, 332.
of reversionary interest, 335.
of settled land under S. L. Act, 332.
of shares in mine, 332.
railway, 332.
of term for years, 335.
in gross, 335.
of tithes, 336.

ACCEPTANCE,
acts of purchaser, when occupier, whether an, 501 *et seq.* *See* PURCHASER IN POSSESSION.
examination of abstract, how far, 472.
of abstract, after time for delivery, effect of, 346, 347, 490.
of bill by purchaser, not a good payment to vendor's agent, 221.
of goods under Statute of Frauds, s. 17..233.
of offer, binding if not conditional, 264 *et seq.* *See* OFFER.
by post, 253, 254, 268.
of right of pre-emption, 240—242.
of title shown by abstract,
conditional on removal of defect, 495, 1227.
delay in requisitions amounts to, when, 490, 494.
effect of, 350, 495, 496.
not binding in case of fraudulent concealment, 496.
required by purchaser on payment of money into Court, when, 1338.
waiver of right to verification, when, 496.
compensation, when, 503, 736, 1192.

ACCESS,
non-access, how proved, 382.
declarations of husband and wife, when allowed, 382, 383.
presumption of legitimacy from, 381.
rebutted by proof of non-access, 381, 382.
to estate, want of, is defect in title, 129.

ACCESSION. *See* CONTRACT; LETTERS.
to terms of contract by both parties necessary, 264.

ACCIDENTAL,
loss or benefit after contract belongs to purchaser, 286 *et seq.*
omission of parcels, rights of purchaser as to, 908.

ACCOMMODATION WORKS,
agreement for sale to public company, should refer to, 238.
contract for, how far enforceable, 1108—1110.
effect of part performance, 1110.

ACCOUNT,
against claimant under fraudulent deed, 1033.
invalid deed, 1033, 1034.
purchaser evicted by Crown, 562, 563.
under prior title, 1032, 1033.
in fiduciary position, 1032, 1034.
of infant's estate, 1034.
tenant-in-common, extent of, 1051.
trustee on setting aside sale, 51.
vendor for dilapidations, 733, 735.
on delay, 709.
in charity informations, 20, n. (*m*).
on judgment for specific performance, 1247.
on setting aside fraudulent sale,
as against purchaser, 504, 854.
vendor, 903.
order for, not a judgment within 1 & 2 Vict. c. 110..535.
settlement of, with agent, how far payment to vendor, 221, 746.

ACCOUNTANT,
communications to, how far privileged, 994.
to Crown, lands of, how far liable, 562.
who is, 562, n. (*p*).

ACCRETION,
to riparian property, follows title to adjoining land, 380.

ACCRUER,
clause of, whether limitation by way of succession, 1281.
of title. *See* STATUTE OF LIMITATIONS.

ACCRUING,
benefit after contract, purchaser entitled to, 286.

ACKNOWLEDGMENT,
of right to money charged on land,
admission in will of judgment debt, 458.
writing by debtor of debt, 458.
affidavit or answer in chancery suit, 458.
agreement to refer disputed debt, 458.
by one devisee, 457, n. (*u*).
mortgagee, 457, n. (*u*).
chief clerk's certificate, 458.
entries in debtor's account, 459.
letter professing inability and asking indulgence, 459.
proposing composition, 458.
must be in writing, 453.
prevents time running, 453.
of title of dowress does not revive right to arrears, 459.
by tenant, unnecessary on purchase of reversion, 916, 917.
of title under Statute of Limitations,
equity of redemption barred by twelve years from, 451.
equivalent to possession or receipt of rent, 444.
inscription on wall may be, 445.
letters may constitute, 445.
signature of agent, insufficient, 445, 446.
party in possession, necessary, 445.
speaks from date, not execution, of deed, 445.
sufficiency of, is question for jury, 445.
time runs from last, 444.
what sufficient, 445, n. (*o*).

ACKNOWLEDGMENT BY MARRIED WOMAN,
by lunatic, not dispensed with, 8.
by whom taken,
commission may issue in blank, 646.
special commissioners appointed by Q. B. D., 645.
strangers may be substituted, 645, 646.
certificate of, is evidence of, 356.
costs of, vendor bears, 798.
effect of M. W. P. Act, is to render obsolete, 647.
may be taken at any time after execution, 646.
memorandum by person taking, 646.

ACKNOWLEDGMENT BY MARRIED WOMAN—*continued.*
necessary in what cases,
assignment by husband of her equitable chattels real, 649.
equity of redemption, 649.
concurrence in sale of land to be converted for her, 643.
conveyance by husband of her freeholds, 649.
of her contingent interests, 651.
equitable interests, 648, 649.
freeholds, 643.
reversion in personalty, 651, 652.
reversionary interests, 648.
disclaimer of her interest or estate, 651.
lease by husband and wife, 643.
to pass the fee under M. W. P. Act, 1870..645.
not necessary in what cases,
conveyance by her as bare trustee, 645.
as trustee under Court, 643, n. (*j*).
where husband's concurrence dispensed with, 649, 650.
of deeds executed since 1882 requires no certificate, 646.
before 1883, formalities of, 647.
not impeachable for interest of party taking it, 646.
of disentailing deed, need not precede enrolment, 646.
search for, 568.

ACKNOWLEDGMENT FOR PRODUCTION. *See* COVENANT FOR PRODUCTION.
binds person giving, during retainer of deeds, 161, 627, 876.
by separate deed, when, 626.
costs of, borne by purchaser, 799.
enfranchisement, lord of manor need not give on, 478, n. (*i*), 627, n. (*m*).
must extend to court rolls, 627.
what documents, 627, 628.
person retaining deeds gives, 161.
stamps on, 626, n. (*d*).
substituted for covenant for production, 160, 161, 615, 627, 766.

ACQUIESCENCE,
confirmation distinguished from, 57.
forbearance to sue, whether, 873.
in acts based on parol contract, how far part performance, 1138, 1143, 1144.
in breach of covenant, effect of, 874.
in claim for interest, what amounts to, 727.
in expenditure by person in possession, how far part performance, 1144.
of purchaser by adverse claimant, 948, 949.
binds remainderman, how far, 949, 1145.
in mistake of purchaser by vendor, 104.
in notice to treat, 297, 299.
in voidable award, 704.
lapse of time is evidence of, 54.
right to compensation, when barred by, 1192.
injunction for breach of covenant, how affected by, 871, 873.
set aside fraudulent sale, lost by, 841, 855.

ACQUIESCENCE—*continued.*
Statute of Limitations does not preclude rule as to, 440.
what is, 54, n. (*b*).
sufficient to bar relief for breach of covenant, 874.
postpone legal rights, 949, n. (*m*).
who may be bound by,
charity, 19, 440, 441.
cestui que trust, 55, 56.
infant after majority, 30.
married woman after coverture, 33.
as to separate estate, 56.
restrained from anticipation, *quære*, 56.
person in distress, 841.
principal as to unauthorized act of agent, 216.

ACRE,
local variations in, now abolished, 728, 729.
presumption of measurement by, 738.
quantity of, now fixed by statute, 727, 728.

ACREAGE,
excess of, compensation for, 729, 730.

ACT OF PARLIAMENT,
Crown not affected by, unless named, 468.
private, affecting property should be stated in particulars, 131.
copy of, should accompany abstract, 345.
how proved, 351.
not notice, 972, n. (*m*), 981.
public, local, need not be stated in particulars, 132.
search to be made for charges under, 523, 524.
notice to all the world, 972.
even though local, 972, n. (*m*).
recitals in, how far evidence, 397.
relieves covenantor from liability for breach, 1097, 1098.

ACTION,
administration, costs of, where payable by company under L. C. C. Act, 805.
caused by death of vendor, costs of, 799, 800, 1262.
for breach of condition for compensation, 158.
covenant, on death of covenantee, belongs to whom, 891.
for commission by agent, 214.
auctioneer, 207.
for deposit. *See* DEPOSIT.
for ejectment, against purchaser rejecting title, 503, 504.
for misrepresentation. *See* MISREPRESENTATION.
for mortgage debt not restrained by reason of agreement to sell, 311.
for nuisance against purchaser, 1045.
for rents, &c., by purchaser of reversion, 914.
leaseholder liable to, after assignment, 1045.
for use and occupation,
against purchaser in possession, 290, 504. *See* PURCHASER IN POSSESSION.

ACTION—*continued.*
for use and occupation—*continued.*
by purchaser against tenant, 291, 505.
not against vendor in possession, 918.
pendency of, how far adverse litigation under L. C. C. Act, 809.
real, effect of abolition of, 450, n. (*v*).
right of, accrual of, in titles depending on Stat. of Lim., 462, 463.
release of, must be under seal, 1097.
upon covenants. *See* COVENANTS.

ACTS,
meaning of, in covenants for title, 884.
of ownership, by purchaser, effect of, 501, 502.
vendor, effect of, 507, 1215.
of purchaser, what will rebut presumption of advancement, 1059.
subsequent, cannot explain agreement, 1094.

ACTUARY,
opinion of, how far evidence of value of reversionary interest, 849.

ADDITION,
verbal, to written agreement,
admissible as defence in Equity, 1152 *et seq.*
inadmissible at Law, 124.
in Equity, 1149.

ADEMPTION of devise by conveyance under old law, 918.

ADEQUACY. *And see* INADEQUACY.
of consideration for reversionary interest, how determined, 849.

ADJOINING OWNER. *And see* SUPERFLUOUS LANDS.
who is, under L. C. C. Act, 861.

ADMINISTRATION,
action,
claimant in respect of breach of covenant may bring, 896.
costs of, when payable by company under L. C. C. Act, 805.
damages for breach of covenants for title, when claimable in, 896.
devisee or heir of covenantor, how far bound by, 896.
is *lis pendens*, how far, 972, n. (*o*).
mortgagee bringing, entitled to what costs, 1341, 1342.
not adverse litigation within L. C. C. Act, s. 80..809.
of mortgagee's estate, what arrears of interest recoverable in, 460.
sale in,
affidavit as to real estate, 1325.
incumbrances how dealt with on, 1315, 1316.
of infant's estate not ordered, 1315.
not ordered, when, 1315.
ordered only for purposes of action, 1315.
under old practice, when, 1314.
on summons, 1315.
trustee cannot sell in, without leave of Court, 64.
costs of taking out, are costs of title under L. C. C. Act, 803, 805.
in bankruptcy of settlor's estate, settlement not impeachable in, 1031.
letters of, received as evidence of intestacy, 380.

ADMINISTRATOR,
adoption by, of contract made before grant of letters, 216.
appointment of distant relative as, failure of issue presumed from, 390.
must be within twelve years of death, where no executor, 436.
assignment of leaseholds by, before grant, bad, 653.
one of several, good, 652.
relieves from liability, 631.
de bonis non, title of, how far forced on purchaser, 164.
durante minoritate, may exercise powers given to "executors or administrators," 682.
has conduct of sale, when, 1323.
has not power of sale for debts, under Lord St. Leonards' Act, s. 16.. 695, n. (*t*).
of convict's property, 16, 33. *See* CONVICT.
of intestate mortgagee entitled to vesting order, 658, n. (*h*).
purchase by, voidable, 40.
time runs against, from death of intestate, 436.
title of, does not relate back generally, 216, n. (*q*).

ADMISSION,
of agreement in pleadings cures want of stamp, 276.
of title in pleadings entitles plaintiff to judgment, 1148, 1224.
precludes purchaser's right to reference, 496, 1227.

ADMITTANCE,
costs of, who pays, 801.
custom to take, to all tenements good, 571.
customary heir may sue before, 891.
each, requires separate stamp, 571.
expense of, saved by surrender to uses, 579.
fee for, steward cannot claim, on entry of sale under L. C. C. Act, 783.
grant of, may be out of Court and out of manor, 782, n. (*x*).
mandamus to compel, purchaser entitled to, 782, n. (*x*).
necessary to give legal estate, 784.
of allottee to one allotment for several tenements, 802.
of necessary parties, vendor pays costs of, 799, 801.
of one trustee only on purchase, 589.
of purchaser from non-admitted vendor does not give legal estate, 785.
of tenants in common require separate stamps, 795.
of testator unnecessary to give power to make good devise, 785, n. (*k*).
quousque does not preclude necessity of fresh, on purchase, 801.
right to, when barred, 467.
fine only accrues on actual, 801.
steward need not grant till payment of fees and stamp duty, 795.
to one of several, where fine payable once only, 571.
unnecessary on vesting order under Trustee Act, 659.

ADOPTION,
by heir of ancestor's parol contract, 296.
by husband of wife's contract for purchase, 1121.
by infant of contract to buy land, 30.
by widow of husband's contract for sale, 1125.
of acts of unauthorized agent, 216, 217.
of contract of promoters by public company, 219.

ADULTERY,
in proceedings out of, declarations of husband and wife admissible, 383.
of mother, does not bastardise child, 381.

ADVANCEMENT,
contract of husband and wife for purchase enures to wife as, 1162.
gift to son by way of, not voluntary settlement, 1031.
of stranger on purchase in his name may be proved, 1065.
presumption of,
from advance of moneys to buy settled estate, 1063.
from conveyance of land to qualify for vote, 1063.
how rebutted, 1059 *et seq.*
by contemporaneous acts or declarations, 1059, 1060.
what sufficient, 1060, 1061.
by prior advancement of child, how far, 1061.
by subsequent acts or declarations of both parties, 1059, 1060.
what sufficient, 1062.
by subsequent acts of nominee of purchaser, 1060.
what sufficient, 1062.
how not rebutted, 1059 *et seq.*
by dealings with other estates, 1061.
by subsequent acts or declarations of purchaser, 1059.
possession of purchaser, 1062.
purchase in name of what persons amounts to, 1057, 1059.

ADVANCES. *See* FURTHER ADVANCES.

ADVANTAGES,
incident to estate pass on sale, 129.
obtained by partner enure to partnership, 1051.
purchaser need not point out, 118 *et seq.*

ADVENTURE,
property purchased as an, is held in common, 1049.

ADVERSE CLAIM. *See* CLAIM.

ADVERSE INTEREST,
persons having, prior to contract, not proper parties to action, 1128.

ADVERSE LITIGATION,
what is within sect. 80 of L. C. C. Act, 809, 1263.

ADVERTISEMENT,
of insolvency is notice to trustees seeing it, 956.
of resale, how far evidence of acceptance of title, 498.
of sale by fiduciary vendors, proper, 78.
under Partition Acts, 1304.
under Settled Estates Act, 1286.

ADVICE,
want of, by incompetent vendor, 44.
deed of covenant may be set aside for, 898.
on family arrangement, 848.
on sale of reversion at undervalue, 843.
by client to solicitor, 45.
specific performance not precluded by, 1155.

ADVOWSON,
agreement by vendor to pay interest till vacancy, effect of, 281.
grant from Crown of, when presumed, 366.
judgment affects, how far, 526, 531, 536.
"living," whether passes by conveyance of, 335.
"manor," passes under conveyance of, 139.
next presentation, purchase of estate for life in, not purchase of, 281, n. (*r*). *And see* PRESENTATION.
presentation,
by purchaser restrained pending action to set aside fraudulent sale, 856.
till payment, 1223.
till title accepted, 287.
remainderman, how affected by, under Stat. of Lim., 453.
rightful, effect of, on time under Stat. of Lim., 453.
right of presentation,
how barred, 452, 453.
of patron, in remainder on estate tail, when barred, 452, 453.
on vacancy occurring pending dispute as to title, 287.
sale of, by trustees, time for, 73.
law of simony as to, 280.
title to, what to be shown, 334.

AFFIDAVIT,
adverse possession, proof of, by, 462, n. (*u*).
as to pedigree, inadmissible, 395, n. (*p*).
of acknowledgment, when necessary, 646, 647.
of intestacy in Yorkshire, heir may register, 775.
of no settlement on petition for payment out, 758.
of purchaser, how far admissible to rebut presumption of advancement, 1060.
of real estate prior to sale in administration action, 1325.
of title on petitions for payment under L. C. C. Act, 757.
of vesting without conveyance in Yorkshire, effect of, 775.
on application to dispense with husband's concurrence, 651, n. (*r*).
signature to, prior to swearing, presumed, 250.
sufficient acknowledgment of debt within Stat. of Lim., 458.
memorandum within Stat. of Frauds, 240, 249.
verifying statement of claim, in default of defence, 1224, n. (*z*).

AGE,
for child-bearing, presumption as to, 391.
of tenant for life, on sale of reversion, misstated, 157.

AGENCY,
allegation of, in statement of claim, when necessary, 1150.
alleged agent may be examined as to, 270.
may be established by any of the parties, if denied, 211.
parol evidence, when, 1091, 1092.
principal estopped from denying, when, 211.

AGENT,
acknowledgment of title by, effect of, under Stat. of Lim., 444, 445, 451, 457.

AGENT—*continued.*
acquires no title against principal by non-payment of rents, 435.
appointment of, by parol, 210, 1056, n. (*r*).
approval of draft agreement by, is not signature of principal, 272.
auctioneer is not vendor's, in respect of deposit, 1075.
authority of,
as to price, does not authorize open contract, 210.
general binds principal, 210.
special may bind principal by estoppel, 210.
variation of, does not bind purchaser without notice, 210.
bargain by, unknown to principal, bad, 217.
commission of. *See* COMMISSION.
consular, acts of, how proved, 361.
contract by,
acting as principal, how far enforceable, 211, 212.
agent can sue upon, when, 1072.
where it is for undisclosed principal, 1073.
agency is denied, 1073.
illegality of, agent cannot set up, against principal, 1163.
implied warranty of authority to make, 1074.
improvidence of, how far defence to specific performance, 1166.
in his own name, agent or principal may be sued on, 1073.
liability of, for breach of warranty of authority, 1074.
not discharged by subsequent principal, 216, 217.
liable personally on, when, 212, 213.
if contract is under seal, 1073.
if signature is not as agent, 1074.
not if contract is not under seal, 1073, 1074.
professing to be principal, 212.
principal may sue on, when, 1072.
only subject to equities since contract, 1072, n. (*i*).
signature of, binds principal, 270.
should express agency, 212, 1074.
covenant by deed, personal liability on, 212.
deposit should not be paid to, without authority, 220.
estoppel of principal from denial that apparent is real agent, 211.
examination of, to prove or disprove agency, 270.
express trustee of money for principal, 438.
failure of, before payment of bill, falls on purchaser, 747.
for management of estate, purchase by, when set aside, 43.
for purchase,
binds principal as to price, unless restricted, 211.
cannot exceed fixed price, 211.
sell his own estate to principal, 23.
remedy of principal against, where agent sells his own estate, 51, n. (*a*).
written authority of, as to price, may be extended, 211.
for sale,
authority of, does not authorize signature of absolute contract, 74, 210, 1166, n. (*h*).
must be adhered to strictly, 73, 74.

AGENT—*continued.*
for sale—*continued.*
authority to, to pay purchase-money to third party, not revocable, 213, 214.
cannot receive purchase-money, 213, 242.
clerk of, cannot bind principal, 217.
not liable for purchase-money, after rescission, 214.
purchase by, from purchaser, after completion, 40.
while contract executory, is bad, 40.
sale by, may be by auction or private contract, 75.
should be promptly made, 59.
to himself voidable, 35, 39.
fact of his making no advantage immaterial, 37, 39, n. (*i*).
trustee employing, is responsible for his acts, 85.
fraud of, principal how far bound by, 902.
joinder of, as defendant in action for specific performance, 1156.
knowledge of, binds principal, how far, 902.
land steward is not, to contract for granting leases, 217.
misrepresentation of, as to variation of contract, is defence to specific performance, 1156.
binds principal, when, 103, 104, 1075.
ground for rescission, how far, 901, 902.
must be proved against principal in action of deceit, 104.
money properly paid to, action against principal for, 1075.
paid under protest to, recoverable from agent, 1075.
nominal, appointment of, need not be in writing, 1056, n. (*r*).
contract by, how far enforceable, 1182.
may sue upon contract, when, 1072.
purchaser is, for real purchaser, 1056, n. (*r*).
notice to, is notice to principal, 966, 967, 988.
of corporation, appointed under seal, 217. *See* CORPORATION.
of mortgagee, purchase of mortgaged property by, 40.
of vendor cannot sign as purchaser's, within Stat. of Frauds, 213.
act as purchaser's, and without authority, 210.
payment to, cannot be set-off in account, 221, 746.
must be in cash or by cheque, 221, 746, 747.
unauthorized, does not destroy vendor's lien, 832.
possession of, is possession of principal under Stat. of Lim., 435.
professional communications with solicitor's, privileged, 994.
purchase by, from principal, how far valid, 49.
in his own name, remedy of principal upon, 1065.
of person disqualified to purchase, 42.
secret, set aside, 50.
wife as agent for husband, 32.
purchaser cannot act as vendor's, within Stat. of Frauds, 210.
reference as to what part agent bought for himself, 1056, n. (*r*).
title may be acquired by principal against, 435.
trustees cannot authorize receipt of purchase-money by, 685, 743 *et seq.*
unless trust deed gives them power, 743, 744.

AGENT—*continued.*
unauthorized acts of,
acquiescence of principal may be ratification of, 216.
adoption by principal of, 216.
vendor cannot act as purchaser's, within Stat. of Frauds, 210.

AGISTMENT,
parol agreement for, valid, 235.

AGREEMENT. *And see* CONTRACT; PAROL; STATUTE OF FRAUDS.
ante-nuptial, good consideration for post-nuptial settlement, 1004.
not to bar dower, effect of, 313.
between solicitor and client, under Attorneys Act, 1870..820, 821.
Solicitors' Rem. Act, 1881..821, 822.
by deed, not within Stat. of Frauds, 227, 228.
by letter. *See* LETTER.
by purchaser to take rents, &c., from completion, effect of, 291.
by stranger to procure sale and conveyance to purchaser within Stat. of Frauds, 231.
by tenant to give up possession within Stat. of Frauds, 230, 231.
cancels previous negotiations, how far, 121.
clause contrary to, effect of insertion of, in deed, 838.
collateral to dealing with land not within sect. 4 of Stat. of Frauds, 231, 1094.
instances of, 231, 232, n. (*i*).
may be inseparable from rest of contract, 236, 237.
for concurrence perfects title, how far, 322.
for illegal purpose, void, 277.
for lease. *See* LEASE.
for letting is agreement for valid lease, 331.
for payment of interest till vacancy, by vendor of advowson, 281.
to tenant for surrender, within Stat. of Frauds, 231.
for price of lands which may eventually be taken, not conversion, 299.
for purchase of lease and possession taken, effect of, 311.
underlease by lessor, effect of, 312.
for redemption with mortgagor binds purchaser from mortgagee, 1043.
for sale and division by claimants of property is conversion, 296.
"at fair valuation," enforceable, 257 *et seq.* *See* VALUATION.
conditions implied by V. & P. Act and Conv. Act apply to, 238.
must be in writing, 227.
signed by person to be charged, 227.
of reversion should provide for succession duty, 238.
on vendor becoming entitled under will of living owner, 279.
to company should provide for what, 238.
what comprised in, 128.
what should be contained in, 237, 238.
for settlement of wife's freeholds, signed by husband alone, not binding, 1054, n. (*a*).
for transfer of tenancy, within Stat. of Frauds, 231.
formal, condition for, on acceptance of offer, effect of, 265, 266.
illegal, entered into in country where it is valid, 277.
what is, by statute, 277 *et seq.*
lease, not by deed, may be good as an, 228, 229.

AGREEMENT—*continued.*
lost, copy of, from recollection, 276.
not to bid at auction, valid, 121.
call for legal estate, effect of, on title, 336, 337.
parol, for assignment of residue of term, when an underlease, 228.
for indemnity of vendor of leaseholds, enforceable after conveyance, 913.
for letting may be good as a lease, 229.
signature necessary to, under Stat. of Frauds. *See* SIGNATURE.
stamps on,
evasion of, renders unenforceable, 276.
want of, immaterial where defence admits, 276.
what exempt from, 276.
what required, 275, 276.
title dependent on, to bar estate tail, defective, 322.
for concurrence of married woman, defective, 322.
unstamped, effect of loss of, 276.
voidable, purchaser bound by, how far, 997, 998.

AIR,
right to access of, cannot be acquired by prescription, 410.
must be expressly granted, 410.
none to chimney or windmill, 410.

ALIEN,
British subject may become, how, 28.
denization of, 28.
enemy, wife of, regarded as *feme sole*, 32.
incapacity of, to hold land, old law as to, 26.
how affected by Naturalization Act, 27.
lien on land not presumed in favour of, 833.

ALIENATION,
consent of lessor to, dispensed with on sale to R. Co., 244.
covenant binds after, 876, 877.
restraining not "usual" in lease, 192.
of life estate, effect of, upon powers, 87.
restraint on,
acquiescence of married woman, effect of, 56.
attachable to married woman's estate, in spite of M. W. P. Act, 15.
by statute, prevents sale by tenant in tail, when, 17.
by tenant for life, effect of, on powers, 17.
charter of common law corporation may create, 21.
declaration creating, generally void, 22.
exercise of powers under S. E. Act, not prevented by, 11, 1292.
S. L. Act, not prevented by, 11, 1121, 1292.
fraud, effect of, on, 11, 57.
irremovable under old law, 10, 1121.
removable by Court, in what cases, 11, 23, 1121.
under Partition Act, 1311.
trustee not necessary to, 10.
valid, how far, 22.
right of, generally inseparable from beneficial ownership, 22.

ALIENEES. *See* ASSIGNS; PURCHASER.

ALIUNDE,
misdescription discovered, how far ground for rescission, 350, n. (*x*).
objection to title generally, purchaser may take, 169, 171, 500.
to enfranchise, purchaser may take, 330.

ALLOTMENT,
identity of parcels in, presumption of, 378.
passes under conveyance of manor, 139.
with property contracted to be sold, 130, 187.
reservation in, to be noticed in conditions, 187.
tenure of, 326.
title of lands, in respect of which made, right of purchaser to, 186.
to be shown on sale of, 326.
unascertained, sale of, at inadequate price, enforced, 1209.
under inclosure, entitled to support from minerals, 422.
in respect of several tenements, admittance to, 802.

ALLOWANCE. *See* ACCOUNTS; EXPENDITURE.
to person claiming under fraudulent deed, none, 1033.
invalid deed, what, 1033, 1034.
to purchaser on ejectment by Crown, none, 563.
on eviction under prior title, 1032, 1033.
of infant's estate, none, 1034.
in possession, for improvements, what, 503, 504.
to tenants, condition as to, 148.
to vendor, for improvements after contract, none, 732.

ALTERATION,
of advertised mode of sale, 78.
of building does not destroy right to light, 405—407.
of deed requires fresh stamps, when, 798.
of draft conveyance, whether equivalent to agreement, 272.
after approval, 638.
of property by infant purchaser, effect of, 31.
purchaser in possession, effect of, 502, 503.
ground for payment into Court, 1217, 1218.
vendor may avoid contract, 286, 507.
measure of damages for, 507, n. (*b*).
of time fixed for sale by author of trust inadmissible, 70.
of will, presumption as to, 480, 481.
of written contract, effect of, 274, 1090, 1096, 1097.
purchaser in possession liable for, on rescission, 505, 506.

AMBIGUITY,
defence in equity, how far, 1154.
evidence to explain, how far admissible, 1090 *et seq.*
ground for allowing defendant variation, how far, 1154.
refusal of costs, 1261.
liability for interest, effect of, on, 710.
patent and latent, distinguished, 1092.
distinguished from imperfect reference, 262.
effect of, 261, 262.

ANCESTOR,
purchase in name of, no advancement, 1058.
vendor covenants against acts of, when, 888, 889.

ANCIENT DEMESNE,
lands in, affected by judgments, how far, 525.

ANCIENT LIGHTS. *See* LIGHTS.

ANNUITY,
arrears of, not barred while interest reversionary, 460.
not recoverable for more than six years, 461.
none recoverable after twelve years without action, 461, n. (*r*).
bond taken for, how far waiver of vendor's lien, 830, 831.
charged on estate purchased is charged on personalty, 920.
charged on land,
payment of, prevents time running, 436.
release of, by committee of lunatic, 93, n. (*f*).
rent within Stat. of Lim., 433.
sale cannot be made free from, 691.
not ordered as long as payment made, 1316.
charged on personalty, not within sect. 42 of the Stat. of Lim., 462.
rectory, purchase of, by bishop, bad, 42.
contract for sale of by infant, formerly void, 5, 30.
covenant against, should provide for payment, 625.
deed, preparation of, does not create fiduciary relation, 108.
extinguished by sale under power, succession duty not payable for, 668.
grant of, what disclosure necessary on, 107.
judgment under 1 & 2 Vict. c. 110, affects, how far, 537.
under present law affects, how far, 539.
life, time essential in contract for sale of, 484.
misrepresentation as to character of, 112.
payment of, by trustee in possession, binds *c. q. t.*, 462, n. (*r*).
purchaser of, on sale by Court, rights of, 1343.
redeemable, description of, in particulars, 131.
release of, supports voluntary settlement, how far, 1016.
reserved on resettlement, succession duty on, 317, n. (*n*).
sale of, after death of *c. q. v.*, relief on, 907.
sale in consideration of,
contract for, effect of death of annuitant on, 1209, 1210.
death of *c. q. v.* before completion, effect of, 288.
evidence of inadequacy, how far admissible, 842, 843, 1209.
stamp duty payable on, 789.
trustees cannot make, 90.
vendor entitled to what covenants, 634.
satisfaction of, on sale of land under L. C. C. Act, 756.
registration of, 555.
search for, where necessary, 568.
succession duty payable for cesser of, 318.
does not bind purchaser under power of sale, 668.
time does not run during term for raising, 453, 454.
trust for payment of, is express trust, 438.
unregistered, good against purchaser, with notice, 568, 959, n. (*k*).

ANTICIPATION,
of time for sale fixed by trust not allowed, 70, 1323, 1324.
restraint on. *See* ALIENATION.

APARTMENTS,
agreement for letting, not within Stat. of Frauds, 236.

APPEAL,
inquiries as to title not stayed pending, 1226.
money refunded on, does not carry interest, 1253, 1271.
order of judge as to form of conveyance is subject to, 1250, n. (*r*), 1345.

APPLICATION. *See* PURCHASE-MONEY.

APPOINTMENT,
by covenantor, effect of, on person claiming under him, 881.
effect of, on prior covenants for title, 878.
inquiry by purchaser as to, 373, 374.
of agent. *See* AGENT.
of Inclosure Commissioners, 370, 380, n. (*o*).
of officials, presumed to be regular, 380.
power of,
deed exercising, registration of, 770.
exercise of, defeated judgment under old law, 530, 554.
does not defeat Crown debt, 562.
sale by tenant for life under L. C. C. Act is not, 299.
succession duty payable on, 315.
under will of domiciled foreigner, 317.
general, lands subject to, extendible under judgment, 531, 536.
joint effect of judgment on, 537.

APPORTIONMENT
of benefit of covenants for title, 879.
of consideration, for stamp duty, on conveyance of one estate by different deeds, 793.
on sale of lands of different tenures, 597, 598.
of dividends, allowance by way of, to tenant for life, on sale of stock, 98.
of ground rent, under L. C. C. Act, payable by company, 805.
of land tax on severance of lands, 1039.
of purchase-money,
on sale by two sets of trustees, 744.
under L. C. C. Act, between tenant for life and remainderman, 754—756.
none as between lessor and lessee, 756.
to annuitant, 756.
where title is shown to part only, 761, 762.
of rent on sale of leasehold in lots, conditions as to, 148.
on severance of reversion, effect of, 147, 148, 917.
and outgoings on completion, 146, 147.
under Apportionment Act, 1870..914, 915, n. (*r*).
application of, to vendor and purchaser, *quære*, 915.
what are rents under, 915, n. (*p*).
under 4 & 5 Will. IV., c. 22..914, 915, n. (*r*).

APPORTIONMENT—*continued.*
of rent-charge, condition as to, 147.
of rent-service, condition as to, 147.
of tithe rent-charge by commissioners, 400.
under power, in registered deed, must be registered, 770.

APPROPRIATION OF PURCHASE-MONEY,
by vendor, effect of, on incumbrances afterwards discovered, 906.
effect of, on purchaser's liability to pay interest,
conditions should terminate liability by, 717.
payment by way of, should be to separate account, 718.
purchaser after possession cannot relieve himself by, when, 718.
how far liable for unproductive, 710.
in possession pays interest until, 709.
rule as to, discussed, 716, 717.
what sufficient, 717 *et seq.*

APPROVAL,
of draft, amounts to agreement, when, 272.
waiver of title, when, 497.
of title by counsel, not binding on client, 495, 530.

"APPURTENANCES,"
not necessary to pass easements and rights of user, 609, 610.

ARBITRATION,
agreement to fix price by, enforceable, 257, 1211, 1212.
bond of reference as to price may be agreement, 240.
compensation to be settled by, condition for, 158.
irregularity in, may be waived, 704.
mode of, fixed by contract, must be strictly followed, 704, 1212.
under Common Law Procedure Act, 259 *et seq.*
amount of compensation not generally subject for, 260.
award may be made rule of Court, 260.
does not apply to mere valuation, 260.
under Lands Clauses Consolidation Act,
costs of, borne by company generally, 707, n. (*r*).
must be paid before conveyance, 707, n. (*r*).
need not be incorporated in award, 813.
vendor has no lien for, 515, 835, 1221.
mode of, provisions as to, 705 *et seq.* *See* ARBITRATOR; UMPIRE.
option of landowner as to fixing price by, 510, 1099.
sales by limited owners by means of, 92, 243, 705, 1099.
submission by consent within C. L. P. Act, when, 705, n. (*u*).

ARBITRATOR,
appointment of, must be communicated within limited time, 704, n. (*g*).
under C. L. P. Act, 1854..259.
valuers not arbitrators within the act, 260.
authority revoked by death of either party, 257, 258.
not, if date fixed for award, 258.
terms of, must be followed, 704, 1212.
award of, must be signed by both, at same time and place, 705.
misconduct of, invalidates award, 704.

ARBITRATOR—*continued.*
must use his own judgment, 704, n. (*q*).
purchase by, of unascertained claims under reference, voidable, 42.
sole, award of may be enforced, 704.
unless he admits mistake, 704, 705.
may give evidence to explain award, 705.
third person, assistance of, may be taken, 704.
opinion of, not to be adopted, 704.
umpire cannot be chosen by lot, 704.
under L. C. C. Act,
death of one during proceedings, 706.
each party appoints one, 706.
each, should be impartial person, 706, n. (*g*).
failure of either party, enables other to act *ex parte*, 706.
refusal of one to act, enables other to proceed *ex parte*, 706.
or appoint umpire, enables other to proceed, 707.
special case may be stated by, 705, n. (*u*).
umpire, appointment of, 706. *See* UMPIRE.

ARCH,
building over land is "taking" within L. C. C. Act, 242, n. (*m*), 244, n. (*e*), 511.
land over or under, is not superfluous, 860.

ARREARS,
not recoverable for more than six years,
of annuity, 461; and *see* ANNUITY.
of dower, 459.
of interest on legacy, 459.
mortgage, 459, 460
except where there is prior incumbrance, 459.
reversionary, 460.
of money charged on land, 459.
of rent, 459.

ARTICLES,
marriage, post-nuptial settlement is notice of, 973.
should be recited in settlement, 596.

ASSENT,
to delay, precludes appropriation of purchase-money, 718.
to investment of deposit by purchaser, effect of, 221.
purchase-money on sale by Court, 1342.
to purchase does not bind after-acquired interest, 948.

ASSESSMENT,
for taxation, when property incapable of, 318.
to land tax, evidence of occupancy, 379.

ASSETS,
heir or devisee liable to extent of, 895, 896.
marshalled for vendor's lien, when, 828.
purchase-money in Court in creditor's action is, 1340.
order of distribution of, 1340.

ASSIGNEE,
covenants for title, may sue on, though not named, 878.
equitable, of lease, liability of, 311.
where lessor is, 312.
priority of, over subsequent judgment, 549, 550.
remedy of, on covenants for title, 880.
intended, of leaseholds, whether entitled to freehold title, 330.
in bankruptcy. *See* TRUSTEE IN BANKRUPTCY.
duties of, 38, n. (*t*).
election of, under old law, 291.
leave to bid, when given or refused, 38.
of bankrupt tenant in tail must concur to disentail, 291.
purchase of bankrupt's estate by, bad, 37.
may be confirmed, 38.
sale of bankrupt's property by, 59.
secret purchase by, void, 38.
of lease, when bound to give indemnity, 311, 629.
of part of reversion, has benefit of apportioned rents, &c., 147, 148.
of purchaser, relief to, granted on what terms, 285.
of tenant for life cannot exercise powers of S. L. Act, 1282, n. (*b*), 1295.
may obtain sale under S. E. Act, 1282, 1295.

ASSIGNMENT,
how far necessary to keep charge alive, 575, 576, 1041.
of contract, effect of, on parties to specific performance, 1132.
of interest of purchaser, under contract, good, 278.
of lease. *See* LEASE.
of parol agreement, when a good consideration, 232.
of right of action, to set aside voidable transaction, 278.
by trustee in bankruptcy, 278, n. (*n*).
of subject-matter of action, 279.
of term. *See* TERM.
of vendor's lien, by parol, valid, 828.
what to be entered in county register, 767, 770.

ASSIGNS,
covenant binds, when. *See* COVENANTS.
mention of, in covenant, unnecessary, 876, 878.

ASSISTANCE, WRIT OF,
superseded by writ of possession, 1256.

ASSURANCE. *See* CONVEYANCE.
further. *See* FURTHER ASSURANCE.

ATTACHMENT,
for non-payment of purchase-money, 1254.
for refusal to convey, 1252, 1347.
execute lease, 1252.
prior to bankruptcy, valid, 529.

ATTAINDER,
of vendor, effect of subsequent pardon on, 15.
effect of, on his title, 15.
how affected by Act of 1870..16.
what is, 15.

ATTESTATION,
of deed, examination of, 480.
unusual, notice of fraud, when, 978.
of execution by attorney, 642.
of memorial, impossible when both witnesses to deed are dead, 773, 774.
must be by one of witnesses to deed, 773.

ATTESTED COPIES,
condition as to, 159.
costs of, borne by purchaser, 161, 162, 765.
importance of, 765.
of lost deeds, admissible as evidence, when, 353.
purchaser's right to, on completion, 160, 764, 765.
on sale by Court, 1349.

ATTESTING WITNESS,
evidence of, to prove execution, right to, 353.
has not notice of contents of deed, 985.
signature of, to contract does not bind him, 271.
to deed, proof of, raises presumption of due execution, 369.
to memorial, must have witnessed execution of deed, 773, 774.
effect of death of witness to execution, 773, 774.
two, sufficient for execution of power, 946.

ATTORNEY. *See* SOLICITOR.
execution of deed by, in whose name, 642.
requisitions and inquiries on, 353.
married woman may appoint, 12, 642.
authority of, limited by her capacity, 642, n. (*f*).
power of,
costs of, to get payment out under L. C. C. Act, 805.
on mortgage of charge, good receipt may be given under, 703.
payment of purchase-money under, 748.
purchaser need not accept conveyance under, 641, 642.
unless irrevocable under Conv. Act, 642.
revoked by death or lunacy of donor, 641, 642.
purchaser may appoint, to witness vendor's execution, 741.
surrender of copyholds by, evidence necessary in case of, 352.

ATTORNMENT,
to mortgagee by mortgagor, creates estoppel, 912.
to purchaser of part of rent-charge unnecessary, 1044.
reversion, unnecessary, 916.

AUCTION,
Act as to sales by, 1867, remarks on, 126, 127, 225, 226.
agreement not to bid at, good, 121.
purchase by incompetent person at, whether valid, 44.
sale by, is within Stat. of Frauds, 227, 1147.
prevents defence of inadequacy of price, 849, 1209.
recital of, improper in conveyance, 596.
what is, 203.
sale by Court is usually by, 1313.
may be by, before chief clerk, 1313.
trustees may fix reserved bidding on sale by, 90. *See* BIDDING.
should sell by, 90, 92.

AUCTION DUTY,
abolished by 8 Vict. c. 15..1147, n. (*m*).
payment of, not part-performance, 1147.
AUCTIONEER,
action by, against purchaser, for whom he signed as agent, *quære*, 209.
appointment of, on sale by Court, 1327.
authority of,
implied, to bind both parties by his signature, 209.
revocation of, before fall of hammer, 209.
none implied to warrant title, 203, n. (*a*).
to delegate sale, 204.
to receive more than deposit, 204.
to vary terms of contract, 204.
revocation of, binds purchaser, though ignorant, 209.
to bind vendor by special conditions, *quære*, 204.
bid by vendor, liability to purchaser for accepting, 204.
vendor's agent, must not knowingly accept, 126, 204.
commission,
executor acting as, not allowed, 208.
fixed by agreement or custom, 207.
lost by negligence, 208.
may deduct, when defendant to specific performance, 205.
mortgagee acting as, how far allowed, 96, 208.
on sale by Court, 208, n. (*y*).
right to, 207.
trustee acting as, not allowed, 208.
defendant to specific performance, joinder of, as, 206, 1129, 1130.
deposit,
action against, for, 1075.
commission out of, cannot retain, on interpleader, 205.
costs out of, cannot retain, on interpleader, 206.
fiduciary position of, as to, 204.
interest on, not liable for, on contract going off, 207.
interpleader by, as to, 205.
not vendor's agent, as to, 1075.
payment of, must be in full, 204, 205.
by cheque or in money, 140, 205.
into Court under Trustee Relief Act, 206.
to solicitor having conduct of sale, good, 205, n. (*s*).
to vendor after completion, good, 206.
purchaser may recover, on contract going off, 207.
stakeholder of, 205, 1075.
insolvency of, loss by, falls on vendor, 208, 223.
not on trustee vendor personally, 208, 223.
liability of, for costs in action for rescission, when, 203, 204.
to purchaser for not disclosing principal, 203.
for want of authority, 203.
none, for misrepresentations innocently made, 206.
parol variation of particulars by, effect of, 124, 125.
private contract at reserved price by, after auction, good, 209.
promise by, to vary particulars, a defence to specific performance, 1156.

AUCTIONEER—*continued.*
purchase by, voidable, 40.
sale of his own property, not voidable by purchaser, 204.
third party, should not be made, for innocent misrepresentations, 1130.
trustee acting as, cannot make profit costs, 96.

AUTHORITY,
of agent. *See* AGENT.
of auctioneer. *See* AUCTIONEER.
of trustees to appoint agent to receive purchase-money, 743 *et seq.*
warranty of, by agent implied, 1074.

AWARD,
fixing purchase-money must be settled before death of either party, 257.
inclosure, appointment of persons making, presumed, 370.
enrolment of, time for, may be extended, 187.
evidence of validity of, should be excluded, 186.
proof of, 351.
reservations in, should be stated in conditions, 187.
validity of, under General Inclosure Act presumed, 186, 187.
may be made rule of Court, 260.
still enforceable in equity, 261, 1211, 1212.
of arbitrator guilty of mistake may be set aside, 704, 705.
under C. L. P. Act, good, 259.
of sole arbitrator when enforced, 704.
of Tithe Commissioners admissible as evidence, 399, n. (*m*).
conclusive unless appealed against, 400.
of valuer merely not within C. L. P. Act, 260, n. (*n*).
signature of, by both arbitrators at same time and place, proper, 705.
under Copyhold Enfranchisement Act, how proved, 360.
under L. C. C. Act,
company may be compelled by mandamus to take up, 1099.
but may be relieved, 1100.
costs of arbitration need not be included in, 813.
of arbitrator,
may be binding though proceeding *ex parte*, 706, 707.
of umpire,
cannot be set aside as contrary to evidence, 707.
company must take up and furnish copy to landowner, 707.
must assess compensation for damage and price, 707.
must be made within three months of appointment, 707.
voidable, may become binding by acquiescence, 704.

BAILIFF,
purchaser of infant's estate chargeable as, 1034.

BANK,
of England, practice of, respecting proof of death, 361, n. (*e*).
payment into, on sale by statutory vendors, 750 *et seq.*
by trustees whether they are responsible for its failure, 745, n. (*t*).

BANKRUPT. *And see* BANKRUPTCY.
after-acquired property of, who entitled to, 34.
assignee of. *See* ASSIGNEE.
is trustee within Trustee Act, 1850..655, n. (*q*).
compounding. *See* COMPOSITION.
concurrence of, husband in conveyance by wife under Fines Act, 954, n. (*c*).
may be dispensed with, 650.
in conveyance unnecessary, 583, 624.
consent of, to exercise of power, 86 *et seq.*
contract for sale of estate of, not liable to stamp duty, 275.
conveyance of estate of, not liable to stamp duty, 790.
covenants for title by, have no value, 583, 624.
creditor may insist on sale of property of, 59.
dealings with, prior to receiving order, how far protected, 567, 954.
deposit by, on contract to buy, vendor may keep, 956.
discharge of, effect of, 34.
disclaimer of contract of, 291, 292, 877.
rights of person injured by, 877.
leaseholds of. *See* TRUSTEE IN BANKRUPTCY.
lien for advance without notice to, on purchase of property, 748.
may be ordered to join in conveyance, 583.
new trustee may be appointed in lieu of, under Trustee Act, 660.
"order and disposition," what is within, 955.
property of, sale of, by trustee, how to be made, 75.
vests in official receiver till trustee appointed, 75.
purchase of estate of, by creditor set aside, 44.
purchaser from Court becoming, remedies against, 1364.
of equitable interest of, how far protected against trustee, 955, 956.
paying to, without notice, not protected, 748, 749.
"reputed ownership," doctrine of, 955.
right of action of, trustee may assign, 278, n. (*n*).
statutory powers of, tenant for life, how exerciseable by trustee, 1295.
tenant in tail, trustee of, may bar entail, 780.
title, incapable of making, 17.
trustee of. *See* TRUSTEE IN BANKRUPTCY.

BANKRUPTCY,
conditions to take effect on, 22.
conveyance on eve of, bad under 13 Eliz., 1024.
discharge frees innocent trustee from liability for breach of trust, 745, n. (*s*).
effect of, on judgments under old law, 529.
Act of 1883..529.
execution prior to, valid, 529.
life estate determinable on, reservation of, by voluntary settlor, evidence of fraud, 1027.
mortgagee buying on sale in, must usually obtain leave to bid, 41.
notice of, effect of, on dealing with bankrupt, 567.
immaterial after three months, 568.
of covenantor, effect of, on his covenants, 877.
of either or both parties to contract, effect of, 291 *et seq.*
of husband, does not prevent his concurrence in conveyance by wife, 954, n. (*c*).

BANKRUPTCY—*continued.*
of one partner enables the other to sell partnership property, 95.
order in, how far a judgment, 535.
proceedings in, how proved, 359.
enrolment of, when necessary, 359.
under Act of 1883, evidence of, 360.
purchase in name of wife or child, voidable in, 1064, 1065.
sale in, is within Statute of Frauds, 227, 1147.
search for, cannot be made in Central Office, 522.
when necessary 567, 568.
trustee in. *See* TRUSTEE IN BANKRUPTCY.
unstamped conveyance admissible as evidence of act of, 785.
vendor may prove in, for deficiency on resale, 1248.
voluntary settlement, when voidable in, 1031.

BARGAIN,
loss of, not generally ground for substantial damages, 1076 *et seq.*
secret, by agent, invalid, 217.
unconscionable, relief against, not affected by repeal of usury laws, 146.

BARGAIN AND SALE,
enrolled, office copy of, sufficient proof of original, 355.

BARRATRY,
common, what is, 280, n. (*k*).

BASE FEE,
created by non-consent of protector, 450.
remainders on, when barred under Stat. of Lim., 450.
tenant in tail in remainder must convey, 582, 1185, 1186.

BEDFORD LEVEL,
register of conveyances of land in, 776.

BEER-HOUSE,
distinguished from beer-shop, 138.

BENEFICE,
agreement on exchange of, that dilapidations be not made good, not simony, 281.
judgment is not a charge on, 541.

BENEFIT
of covenants. *See* COVENANTS.

BIBLE,
entries in, evidence in matters of pedigree, 394, 395.

BID,
on sale by Court,
leave to, effect of, on duties of bidder, 1323.
obtained by summons if not on order for sale, 1323.
who may, 1322, 1323.
not, 1322, 1323.

BIDDER,
auctioneer is agent for, 209.
employment of, under Sale of Land by Auction Act, 1867..126, 225, 226.

BIDDER—*continued.*
formerly allowable in equity to protect property, 126, 225.
but not at law, 126, 225, 226.
on sale by Court, highest, death of, before certificate absolute, effect of, 1329.
not necessarily purchaser, 1327, 1328, 1329.
rights and liabilities of, 1328 *et seq.*
vendor cannot on sale without reserve employ, 126.

BIDDING,
agreement not to bid against one another is good, 121.
how far enforceable if parol only, 1053, 1054.
auctioneer liable for accepting vendor's, 204.
on sale by Court, after estate withdrawn, effect of, 1328.
power to retract, 139.
purchasers must not influence, 120.
reserved,
auctioneer may sell at, by private contract, after auction, 209.
conditions of sale under Court provide for, 1327.
fixed by trustees, will bind bidders, 91.
right to make, effect of not reserving, 126.
must be stated, 126, 140, 225, 226.
strictly adhered to, 127, 140, 227, n. (*i*).
trustees may fix, and buy in at, 90.
have been allowed to purchase at, 91.
vendor cannot employ agent to bid up to, 127, 206.

BILL OF EXCHANGE,
drawn on agent, loss on, falls on purchaser, 747.
for deposit, auctioneer cannot take, 205.
not a good payment, 221.
for purchase-money, not evidence of waiver of lien, 829.
unless itself the consideration, 831, 832.
notice of unpaid, is notice of vendor's lien, 979.
what a defence to action on, 1089.
payable to married woman, whether notice that it relates to separate estate, *quære*, 979.

BIRTH. *See* PEDIGREE.
declaration as to, how far evidence, 393.
register, extract from, when evidence of, 362, 392.
not evidence of time of, 392.
of, kept by order of Indian Council, is evidence, 357.

BISHOP,
purchase by, of annuity charged on rectory set aside, 42.
restrained from presenting or collating pending suit, 1223.
sale of lease from, abstract required, 330.

BLANK,
in agreement for signature, effect of, 270.
in deed filled up after execution, effect of, 274, n. (*h*).

BOND,
agreement to give, specifically enforced, 1113.
arrears of interest on, not recoverable for more than six years, 460.
collateral, for payment of mortgage debt barred by twelve years, 67, 454.

BOND—*continued.*
for purchase-money,
not evidence of waiver of lien, 829.
even where consideration is annuity, 830.
is evidence where it is itself the consideration, 831, 832.
given by third party, whether, *quære*, 829.
for quiet enjoyment, cannot be required as "further assurance," 887.
money due on ancestor's, not within sect. 40 of Stat. of Lim., 455.
of indemnity, how construed, 625, 626.
of mortgagee for loss of title deeds, 478.
for reference, may constitute agreement, 240.
under sect. 85 of L. C. C. Act,
includes compensation for lands taken, 508, n. (*f*).
not for minerals, 508, n. (*f*).
must be for price of whole house under sect. 92..245.
cover mortgage debt on land, 511.
include fixtures, 245, n. (*g*).
new bond, if informal, may be replaced, 508, 509.
should be in terms of statute, 508, 1100.
sureties to, 508, n. (*i*).
void at law, enforceable in equity, 1183.

BOUNDARIES,
evidence of reputation as to, 1044.
of lands of different tenures must be distinguished, 175.

BREACH. *And see* RE-ENTRY.
of contract. *See* CONTRACT.
of covenant. *See* COVENANT.
of trust. *See* TRUST.

BREWER,
contract of, involving affirmative and negative covenants, 1169.

BRICK-BUILT,
house, meaning of, 137.
misdescription of, as, 155.

BROKERAGE,
costs of, on investment under L. C. C. Act payable by company, 805.

BROTHER,
purchase in name of, not an advancement, 1058.

BUILDING,
accounts of, when pulled down, how taken, 52.
compensation for disrepair of, 152, n. (*y*).
condition of, ruinous, is patent defect, 101, 102.
misleading statement as to, may avoid contract, 152.
costs of investment in, under L. C. C. Act, payable by company, 806.
surveyor's fees not included in, 808.
destruction of, should be referred to in sale of leaseholds, 134.
after contract falls on purchaser, 287.
erection of new, payable out of money under L. C. C. Act, 752, 753.
insurance of, condition as to, 196, 197, 913.
light can only be claimed in respect of, 405.
what is, for this purpose, *quære*, 405, n. (*h*).

BUILDING—*continued.*
repairs to old, not payable out of money under L. C. C. Act, 752, 753.
restrictive covenants as to erection of, 874 *et seq.*
support to, right of,
extraordinary, whether within Prescription Act, 420.
acquired, how, 420.
implied, when, 421.
if subsidence caused, 420.

BUILDING CONTRACT,
not within Stat. of Frauds, 232, n. (*i*).
subject of specific performance, 305, 1108, 1109.
unless work is specifically defined, 1109.
unless there has been part performance, 1110, 1111.

BUILDING LAND,
adjoining land stated to be, effect of, 136, 985.
development of, under S. E. Act, 79, 1279, 1280.
S. L. Act, 79.
fee farm rent, reservation of under S. E. Act, 1279.
joint purchase of, rights of partners on, 1052.
speculation in, converts land into personalty, 1052.
lease of, ususal covenants in, 192, n. (*s*).
on sale of,
model, form of conveyance convenient, 570.
plan, measurements on, must be correct, 137, 601.
power to modify, should be reserved, 200.
showing intended roads, effect of, 136.
purchaser of one lot must covenant on failure of sale of other lot, 628.
reservation of, effect of, on right to light, 136.
restrictive covenants, 864, 865, 872, 873.
right of way over land sold as, avoids sale, 156.
under L. C. C. Act, s. 128, what is, 861.

BUILDING LEASE,
covenants in, what usual, 192, n. (*s*).
liable to stamp duty on rent only, 791.
not *lease at rack rent* within Registry Acts, 769.
under S. E. Act, 1280.
S. L. Act, 1280, n. (*o*).

BUILDING SOCIETY,
endorsed receipt by, effect of on priorities, 936, 937, 938.
only extends to sum paid to society, 938.
powers of, to purchase and hold land, 24, n. (*p*).
reconveyance by, under Act of 1874, effect of, 937, 938.
extends to whole sum advanced, 939.

BURIAL,
certificate of, evidence of death, 392.

CAIRNS' (LORD) ACT. *See* DAMAGES.

CAMBRIDGE, UNIVERSITY OF,
powers of, to sell real estate, 21.

CANAL,
riparian owners have no right to water of, 418.

CAPITAL MONEY,
costs of developing estate may be paid out of, 79, 80, 1280.
investment of, 96, n. (*g*), 97, 754, 1287, 1288.
option of tenant for life as to, 97.

CASE,
for opinion of counsel, privileged, 374, 375, 996.
not evidence of pedigree, 395.
Court of Law, costs of, 1271.

CASES SPECIALLY MENTIONED OR COMMENTED ON,
Adams v. *Angell*, 1040, 1041.
Adams v. *Taunton*, 683, n. (*r*).
Alexander v. *Mills*, 1236, 1238.
Angus v. *Dalton*, 426.
Asher v. *Whitlock*, 465.
Backhouse v. *Bonomi*, 421.
Bain v. *Fothergill*, 1081, 1082.
Balfour v. *Welland*, 676, 677.
Bedford, Duke of, v. *Trustees of British Museum*, 870.
Bos v. *Helsham*, 260.
Buckley v. *Howell*, 1296.
Burnell v. *Brown*, 499, 500.
Cholmeley v. *Paxton*, 1297.
Clarke v. *Wright*, 1012—1014.
Clayton v. *Lord Wilton*, 1014, 1015.
Coles v. *Pilkington*, 1140.
Collins v. *Collins*, 260.
Cooke v. *Crawford*, 682.
Cooper v. *Emery*, 365.
Cordingley v. *Cheeseborough*, 736, 737.
Corser v. *Cartwright*, 697—699.
Cotterell v. *Hughes*, 578, 579.
Croome v. *Leddiard*, 1157, 1158.
De Visme v. *De Visme*, 720 *et seq.*
Dixon v. *Gayfere*, 465.
Doe v. *Jones*, 577, 578.
Doe v. *Phillips*, 442, 443.
Doe v. *Price*, 577.
Doherty v. *Allman*, 870, 1169.
Dowley v. *Winfield*, 389.
Drummond v. *Tracey*, 343.
East Grinstead Case, 968.
Engell v. *Fitch*, 1080, 1082.
Flureau v. *Thornhill*, 1078.
Forbes v. *Peacock*, 65, 66, 676, 677.
Gomm v. *Parrott*, 940.
Greswold v. *Marsham*, 1040.
Hargreaves v. *Rothwell*, 989.
Hatton v. *Haywood*, 546, 547.
Hill v. *Buckley*, 738.

CASES SPECIALLY MENTIONED OR COMMENTED ON—*continued.*
Hopkins v. *Grazebrook*, 1079.
Ind, Coope & Co. v. *Emmerson*, Appendix.
Ithel v. *Potter*, 272.
Jolland v. *Stainbridge*, 967, 968.
Keates v. *Lyon*, 866.
Kennedy v. *Green*, 991, 992.
King v. *Hamlet*, 846.
Lechmere v. *Brotheridge*, 644.
Loffus v. *Maw*, 1140.
L. & S. W. Rail. Co. v. *Gomm*, 863.
Lumley v. *Wagner*, 1167, 1168.
Maguire v. *Armstrong*, 999.
Miller v. *Priddon*, 682.
Mortimer v. *Bell*, 126, 225.
Mumford v. *Stohwasser*, 934.
Mundy v. *Joliffe*, 1143.
Newstead v. *Searles*, 1014.
Palmer v. *Locke*, 1237, 1238.
Phillips v. *Phillips*, 940.
Phillips v. *Sylvester*, 733—735.
Price v. *Jenkins*, 1006, 1007.
Re Cherry's S. E., 813.
Re Cooper and Allen's Contract, 668.
Re Cowbridge R. Co., 545, 546.
Re Duke of Newcastle, 546.
Re Ford and Hill, 66, n. (*y*) ; 167, n. (*n*).
Re Pope, 559.
Re Tanqueray-Willaume and Landau, 65, 66
Re Wilson, 700.
Redgrave v. *Hurd*, 899.
Rosher v. *Williams*, 1004, n. (*d*).
Russell v. *M'Culloch*, 537—539.
Sabin v. *Heape*, 66.
Savory v. *Underwood*, 725, 726.
Spirett v. *Willows*, 1028—1030.
Stanton v. *Tattersall*, 153.
Storry v. *Walsh*, 679.
Taylor v. *Meads*, 643, 644.
Tiverton R. Co. v. *Loosemore*, 513.
Toulmin v. *Steere*, 1040.
Tulk v. *Moxhay*, 863.
Vint v. *Padgett*, 1036, 1037.
Waldy v. *Grey*, 993.
Walsh v. *Lonsdale*, 229.
Watts v. *Porter*, 549.
White v. *Bradshaw*, 153.

CAVEAT,
registration of, under Yorkshire Registration Acts, 775.

CELLAR,
want of title to, a fatal defect, 129, 130.

CERTIFICATE
of acknowledgment, how far necessary, 646, 647.
evidence, 356.
vendor pays costs of filing, 798.
of burial, proper evidence of death, 392.
of Chief Clerk. *See* CHIEF CLERK.
of commissioners, evidence of redemption of land tax, 398.
of death, purchaser not bound to accept, 392.
of district registrar and registrar-general, distinction between, 392, n. (*l*).
of judgment obtained in Ireland or Scotland, registration of, 556.
of legacy duty paid, discharges from succession duty, 315.
of satisfaction of judgment, 555, 556.
of search in Central Office, effect of, 522.
is a document of title, 524.
of steward is evidence of proper stamp, 795.
of succession duty, effect of, 314.

CESTUI QUE TRUST,
advance to, for purchase of estate, trustee has lien for, 1066.
annuity, payment of, by trustee binds, 462, n. (*r*).
concurrence of, unnecessary on conveyance of outstanding legal estate, 94.
on sale by Court, when, 1352.
confirmation by, of breach of trust should be by separate deed, 572.
contract by, subject to trustee's assent, good, 91.
under power, enforceable, 1117.
conveyance of outstanding legal estate may be required by, 653.
on determination of trusts may be required by, 653, 654.
covenants for title by, on sale by trustees, practice as to, 617, 618, 624, 625.
lien on estate bought by other *cestui que trust* with trust funds, 1067.
improper security taken by trustee, 688.
not necessary party to action against trustees for specific performance, 1131.
priority of,
negligence of trustee may postpone, when, 935.
to equitable mortgagee from trustee, 945.
what conduct of *cestui que trust* necessary to destroy, 945.
to judgment creditor, 548, 549.
to legal estate, taken with notice of trust, 935.
purchase by trustee from,
acquiescence in, when presumed, 55.
even where interest sold is reversionary, 55.
by active trustee, how established, 49.
confirmation of, requisites of valid, 55, 56.
costs of action to set aside, paid by trustee, 53, 54.
distinguished from purchase by trustee from himself, 35, 36, 38, 48.
poverty of *cestui que trust*, how far excuse for laches in not impeaching, 55.
principle of doctrine as to, 36.
solicitor of *cestui que trust* cannot consent to, 50.
time for impeaching, 54.
runs against, from what date, 55.

CESTUI QUE TRUST—continued.
purchase by trustee from—*continued.*
under order of Court good, 50.
undue influence, effect of, 24.
void, where trustee is both buyer and seller, 36, 38.
voidable, where trustee is not seller, 36, 38, 48.
remedies of *cestui que trust* in respect of, 51 *et seq.*
purchase by trustee in his own name,
benefit of, enures to *cestui que trust*, 39, 1065.
out of trust moneys must be proved, 1065.
what evidence admissible to prove, 1065, 1066.
remedies against trustee,
for delay in re-selling, 91.
for money charged on land, when barred, 438.
for purchase of land in breach of trust, 1067.
distinction where purchase is made out of mixed fund, 1067, 1068.
prevail against title by escheat, 1067.
for voidable purchase by trustee, 51 *et seq.*
not barrable by Jud. Act, 1873..438.
sale of land improperly purchased, any *cestui que trust* may require, 688, 689.
taxation of bill of trustees' solicitor may be required by, 819.
tenant-at-will to trustee, how far, within sect. 7 of Stat. of Lim., 442, 443.
time under Statute of Limitations,
does not run against, where fund paid to wrong person by mistake, 454.
where he is person to receive and pay, 456.
does not run as between trustee and *cestui que trust*, 439.
runs against, so as to give fee to occupier, 443.
runs as between *cestui que trusts*, *inter se*, 440.
and strangers, 440.
runs from conveyance by trustees to stranger, 1034.
what constitutes express trust, 437—439.
title deeds, right of, to, as against releasee to uses, 826, n. (*p*).
title in fee may be acquired against, not in possession, 443.

CESTUI QUE VIE,
death of, before completion, effect of, 287, 288.
presumption of, from recital in renewed lease, 392, n. (*f*).
health of, disclosure of, on sale of reversion, 107.
presumed to be dead failing proof of life, 387.
production of, may be compelled, 387.
renewal on death of, effect of covenant for, 623.

CHAMPERTY,
what is, 279, 280.

CHANCEL,
property in, who has, 334, n. (*g*).
repair of, liability for, is defect in title, 131, 1202.
not payable out of moneys under L. C. C. Act, 752.

CHANCEL—*continued.*
seats in, 333.
cannot be placed without rector's consent, 334.
distinguished from seats in body of church, 334, n. (*g*).

CHARGE. *See* INCUMBRANCE.
abstract should disclose, 345.
equitable, presumption of satisfaction of, 367.
of debts. *See* DEBTS.
on land, is within Mortmain Act, 303.
on reversionary interest, rule as to setting aside, 844 *et seq.*
paramount, contribution of purchasers *inter se* to, 1035, 1036.
registered judgment under 1 & 2 Vict. c. 110, how far a, 531, 532.
equitable remedies on, 542.
succession duty is first, 314.
payable on extinction of, 318.
suppression of, criminal liability for, 344.
under Local and Public Acts, search for, 523, 524.
Metropolitan Acts, search for, 524.

CHARITY,
accounts, what directed in informations as to, 20, n. (*m*).
bequest to, of legacy charged on land, void, 303.
of premium on lease, void, 303.
of vendor's interest under contract, void, 303, 828.
conveyance of lands to, upon re-investment requires enrolment, 761.
to secret trustee for, must be enrolled, 776.
equitable estate of, postponed to legal estate, 927.
infant may sell for purposes connected with, 3.
institutions for, what are not, 33, n. (*l*).
lands,
allowances to purchaser of, for improvements, 853, n. (*d*).
exchange of, to church, valid, 327, n. (*k*).
exempt from land-tax, remain so after charity exhausted, 399.
lease of, to governor, voidable, 39.
power to acquire, by will, effect of, 24, n. (*q*).
to hold, implies power to acquire by devise, how far, 777, n. (*p*).
prior to Mortmain Act, effect of later act on, 777, n. (*p*).
Roman Catholics, position of, as to, 33, n. (*l*).
sale of,
by charity trustees, 19, n. (*g*).
by order of Court, 19, 1351, n. (*n*).
onus of establishing, on purchaser, 19.
right of, by charity trustees, extent of, 329.
presumption against, 19.
how rebutted, 19.
under 16 & 17 Vict. c. 137..19.
taken in exchange, title to be shown to, 328, 329.
what are, 20, n. (*m*).

CHARITY—*continued.*
moneys under L. C. C. Act, s. 69,
official trustee, when entitled to payment of, 759.
service of petition on commissioners, when necessary, 759.
trustees, when entitled to income of, 761.
payment of, 759.
mortgage, lands held in, must be sold when redemption barred, 19.
power to invest in, 97, n. (*i*).
notice of claim of, to first purchaser binds later purchaser, how far, 944, 1023.
trust for, possession could not relieve against, 944, 1023.
renders purchaser liable from purchase only, 945.
scheme, costs of, whether company must pay under L. C. C. Act, 807, n. (*y*).
Stat. of Limitations applies to, in what cases, 440, 441, 944.
trustees, valid appointment of, presumed, 380, n. (*o*).
voluntary conveyance to, fraudulent within 27 Eliz...1003.
whether voidable by subsequent sale, *quære*, 1008.

CHARTER
of corporation, restraint of alienation in, how far binding, 21.

CHATTELS,
contract for sale of,
cannot be specifically enforced, 1105.
exceptions to rule, 1105, 1106.
damages for breach of, 1077, 1078.
requirements of, 233.
separately from land, 258.
conveyance should not include, 597.
delivery of, may be ordered, 1106.
not within 27 Eliz. c. 4..1023
wife's real, husband's rights as to, 9, 10, 649, 1021, 1122.

CHEQUE,
action on, for deposit, purchaser may resist, 221.
delivery up of void, not enforced, 747, n. (*e*).
deposit, payment of, by, is good, 104, 205, 221.
directors' signature to, presumption of valid appointment from, 218.
loss from non-payment of, purchaser bears, 747.
payment of purchase-money by, to agent, good, 221, 746, 747.
vendor need not accept, 747.

CHIEF CLERK,
certificate of,
not acknowledgment of debt under Stat. of Lim., 458.
of result of sale by Court,
absolute, when, 1329.
discharge or variation of, 1329.
how made, 1328.
signature of judge, unnecessary, 1329.

CHIEF CLERK—*continued.*
certificate of—*continued.*
on reference as to title,
against title, specific performance may be decreed after, 1242, 1243.
application to vary may be made within eight days, 1239, 1240.
binding after eight days, 1228, 1239.
except under special circumstances, 1239.
form of, as to concurrence of necessary party, 1239.
where incumbrances outstanding, 1239.
further reference, allowed to vendor after adverse certificate, when, 1242.
new matter affecting title is ground for, 1240.
ground for varying, what is, 1240.
order to vary, ground for further reference, 1240.
time for varying runs during vacation, 1240.
under Partition Act,
order for sale, made in spite of, 1300.
subject to, as to parties, 1309
purchaser cannot object on ground of no, 1310.
sale cannot be made before, where all parties not present, 1309, 1310.
sale may be by auction before, 1313.

CHILD,
purchase in name of,
does not raise resulting trust, 1057.
extends to adult children, 1057, 1058.
illegitimate children, 1057.
not within 27 Eliz., 1063.
voidable in bankruptcy, when, 1064, 1065.
within 13 Eliz., when, 1063, 1064.
purchase in joint names of child
and self, does not raise resulting trust, 1058.
even though named to take in succession after self, 1058.
and wife, does not raise resulting trust, 1057.
and self, does not raise resulting trust, 1058.
transactions of, with parent, 23, 847, 848.
voluntary expenditure upon estate of, not bad on bankruptcy, 1064.

CHINA CLAY,
is mineral within L. C. C. Act, 130, n. (*g*).

CHIROGRAPH,
proper evidence of fine, 356.

CHOSES IN ACTION,
not within "order and disposition" of bankrupt, 955.
notice of
assignment of, equitable, gives priority over trustee in bankruptcy, 955, 956.
premature, gives no priority, 944.
rule as to, does not apply to sales of land, 943, 944.
bankruptcy should be given to trustees of bankrupt's equitable, 956.
purchaser of, takes subject to prior equities, 943.
even in market overt, 943.

CHURCH. *See* CHANCEL.
conveyance of site for, exempt from stamp-duty, 275.
by infant, good, 3, n. (*h*).

CHURCHWARDENS,
appointment of, presumed to be valid, 380, n. (*o*).
constitute corporation to purchase land, 25.
purchase by, *eo nomine*, bad, 25.

CHURCHYARD,
site for, infant may sell, 3, n. (*h*).
limited owner may sell, 18.

CLAIM. *And see* STATEMENT OF CLAIM; INCUMBRANCES.
"adverse litigation" under L. C. C. Act, not constituted by, 809.
covenant for quiet enjoyment, how far broken by, 882.
decree for specific performance does not bar, of persons not parties, 1237, 1246.
delay arising from, does not relieve purchaser from interest, 726.
denial of, binds party making it, 109, 517.
dishonest, special ground for costs, 1258.
doubtful, trustees may satisfy, how far, 95.
evidence to negative, whether vendor must produce, 374.
inquiry as to, by purchaser, effect of, 108, 109.
moneys paid to compromise, when recoverable, 893.
mortgagee, postponed for fraudulent concealment of, 517, 947.
notice of,
affecting part, is notice of its true extent, 974.
form of, 949.
intention to enforce, should be given, 121.
mortgagee should give, how far, 517, 948.
notice of all that might have been learned on inquiry, 978, 979.
precludes acquiescence, 948, 949.
on purchase by railway company, how enforced, 512.
possibility of, by unknown heir, danger of, under Stat. of Lim., 462.
publication of, no liability for, 120.
release of, full recitals necessary in, 591.
satisfaction of, by payment under Trustee Relief Act, 749.
silence as to, during expenditure by purchaser postpones, 948, 949.
title rendered doubtful by, how far, 1233.

CLASS,
longer time for impeaching sale allowed to, than to individuals, 54.
unincorporated, cannot purchase, 25.

CLEAR YEARLY RENT,
what is, 137.

CLERGY,
acts authorizing sale for residence of, 17.
conveyance for residence of, exempt from stamp duty, 275.
gifts to, how affected by undue influence, 24.

CLERICAL ERROR,
in contract will be rectified, 269.
in lease corrected by counterpart, 366, n. (*i*).

CLERK
in orders, purchase by, of advowson, 281.
next presentation, 281.
of agent cannot bind principal, 281.
of auctioneer is agent for both parties, 281.
of solicitor
cannot bind vendor to give compensation, 503, n. (*q*).
may not disclose professional communication, 944.
notice to, of bankruptcy, insufficient, 981, n. (*l*).
purchase by, of client's property, 47.
of the Peace, purchase by, 25.

CLIENT. *And see* SOLICITOR.
communications by, privilege of, 993—995.
lien of, on estate bought by solicitor with his money, 1035, n. (*d*).
solicitor purchasing property of, may take objections, how far, 492.
solicitor's clerk, purchase of property of, by, 47.

CODICIL,
execution of, republishes will, 307.
production of, by vendor, in making title, 375.

COHABITATION,
marriage may be presumed from, how far, 383.
settlement after long, may be fraudulent, 1017.

COLLATERAL
agreement,
defendant should counter-claim for performance of, 1157.
must be in writing, if inseparable from agreement as to land, 236, 237, 258.
need not be in writing, 231, 232, 258, 259, 1094.
non-performance of, by plaintiff, no defence to his action for specific performance, 1157, 1158, 1173.
purchaser has notice of tenant's equities under, 975, 976.
deed to title, notice of, not notice of its contents, 970.
relations,
concurrence of stranger supports settlement in favour of, 1016.
marriage, how far consideration for limitations in favour of, 1015, 1016.
position of limitations in favour of, important, 1014, 1015, 1017.
within consideration,
children of former marriage, how far, 1013, 1017.
illegitimate child of wife, 1012.
issue of settlor by future wife, 1013, 1014.
niece in default of issue is not, 1015.
within consideration and contract distinguished, 1011, 1012.
security, meaning of, where several properties mortgaged together, 922, 923.
mortgagee after foreclosure cannot enforce, 1042.
not primary fund, under Locke-King's Act, 921.

COLLIERY,
concealment of previous workings of, by purchaser, effect of, 118, 119.
profits of, purchaser under Court, when entitled to, 1343.

COLONIES,
conveyance of lands in, requires stamps, when, 798.
probate of will in, how far evidence, 364.

COMMENCEMENT
of action, what is, within Stat. of Lim., 434.
of recitals, in deed, 592.
of term must be fixed by agreement for lease, 256, 263, n. (*f*), 1095.
of title, condition as to, 171, 172.
what is sufficient, 334 *et seq.* *See* ABSTRACT.

COMMENDATION,
by vendor, how far allowed, 110 *et seq.*

COMMISSION,
agent,
entitled to, if contract goes off through principal's fault, 214.
if sale not effected, when, 215.
on introduction of purchaser, 214.
where several agents employed, how far, 214.
not entitled to, from other contracting party, 215.
if he exceed authority, 215.
on revocation of authority, 216.
on unpaid purchase-money, 214.
auctioneer's. *See* AUCTIONEER.
broker's, allowed in costs of re-investment under L. C. C. Act, 805.
corrupt, agreement for, is bad, 215, 216.
mortgagee, auctioneer, may deduct, on sale of mortgaged property, when, 96, 208.
partner must account for, 1051.
trustee not entitled to, 95, 96.

COMMISSIONERS,*
certificate of, evidence of redemption of land-tax, 398.
Charity, power of sale of, not abridged by Allotments Act, 1882..19.
service on, of petition for payment out, when unnecessary, 759.
for acknowledgments of married women, 645.
Improvement, limited powers of, to purchase land, 25.
Inclosure, are now Land Commissioners, 42.
award of, conclusive evidence, 327, n. (*m*).
disabled from purchasing lands in parish, 42.
exchange of lands of different tenure by, 328, n. (*p*), 1275.
validity of appointment of, presumed, 380, n. (*o*).
Inland Revenue, may be required to give opinion as to stamp duty, 792.
power of, to commute succession duty, 317.
Land, disabled from buying lands in parish, 42.
Tithe, award of, conclusive, unless appealed against, 400.
can only decide questions between titheowner and landowner, 399, 400.
cannot decide questions between rival claimants of tithes, 400.
confirmation of void exchange by, 327, n. (*k*).

* NOTE.—The Copyhold, the Inclosure, and the Tithe Commissioners have now been amalgamated, and constitute one body under the title of the Land Commissioners; S. L. Act, s. 48.

COMMISSIONERS—*continued.*
under public act may bind landowner to take lands, 242, n. (*l*).
Woods and Forests, contract of, not enforceable, 1115.
conveyance by, exempt from stamp duty, 275.
need not be registered, 770.
purchasers from, protected, 958.

COMMITTEE,
consent of, to exercise of power, on behalf of lunatic, 86.
Chancellor to sale by, under statutory powers, 8, 93.
contract of lunatic purchaser, enforceable against, 1126.
by, 1114.
vendor, enforceable against, 1115.
by, 1114.
conveyance by, execution of, manner of, 642.
order for on specific performance, 1251, 1252.
exchange by, may reserve minerals, 7, n. (*o*).
may set aside sale or purchase by lunatic, 6, 31, 32.
powers of S. E. Act, exerciseable by, 8, 1290, 1292.
tenant for life under S. L. Act, exerciseable by, 8.
purchase by, of lunatic's lands, voidable, 39.
release by, of annuity charged on land, 93, n. (*f*).
sale by, power of, extends to what estates, 7, 8.
under L. C. C. Act, 8.
under Partition Acts,
reference as to whether sale beneficial, 1308.
request for sale by, 8, n. (*o*), 1306, 1308.
undertaking to purchase by, 1306.

COMMON,
appendant, whether any can be except that of pasture, *quære*, 427, n. (*i*).
in gross, not within Prescription Act, 427, n. (*d*).
of fishery. *See* FISHERY.
right of,
absolute after sixty years' enjoyment, 424.
acquired by thirty years' enjoyment, 424.
defeated by showing illegal origin, 425.
fatal defect on title, if not stated, 131, 1201.
unless purchaser accept compensation, 1194, 1195.
not acquired, where claim cannot lawfully be made, 425.
not re-created by general words, 605, n. (*y*).
purchaser compelled to take compensation for, when, 1205.

COMMON LAW PROCEDURE ACT,
arbitration under, 259.
award under, how enforced, 260, 261.
mandamus, action for. *See* MANDAMUS.
proof of deeds under, 353.
valuation is not arbitration within, 260.

COMMON, TENANT IN. *See* TENANT IN COMMON.

COMMONERS,
purchase of waste by, *co nomine*, bad, 25.

COMMONS INCLOSURE ACT. *And see* INCLOSURE.
allotments under, tenure of, 326.
award under, how proved, 351.
instruments under, exempt from stamp duty, 275.
limited owners may sell under, 17.
title to lands held under, 326, 327.
valuers under, may not buy land in parish, 33.

COMMUTATION
of succession duty. *See* SUCCESSION DUTY.
of tithe. *See* TITHE.

COMPANY. *And see* CORPORATION.
acquisition of lands by, how far good, 25.
bound by acts of promoters, how far, 282, n. (*u*).
fraud of, remedies of purchaser for, 117, 118.
illegal association purporting to be, 1163, n. (*m*).
majority, power of, to bind minority, must be express, 56.
misrepresentation, remedies of purchaser for, 118.
power of, to refuse to register transfer, 333.
purchase by directors from, voidable, 39.
sale by, of property subject to debentures, evidence required on, 333.
seal may be for use in foreign countries, 219.
shares in, evidence of title on sale of, 332.
agreement for sale of, when to be in writing, 233.
vendor to, in consideration of rent-charge has no lien, 333.
winding-up, effect of, 566.

COMPENSATION,
absence of condition for, effect of,
for defect in quality, 738, 739.
for deficiency in quantity, 133, 735.
right of purchaser to,
affected by knowledge, how far, 735, 1195 *et seq.* *See* KNOWLEDGE.
qualifying expressions, how far, 736.
generally, 739, 740.
not allowed, if he take doubtful title, 1191.
where performance of contract would injure third parties, 1193.
where purchaser has knowledge of defect, 1195.
subject to vendor's right to rescind, 1190, 1191.
vendor's position as to,
can compel purchaser to accept, when, 152, 1205, 1206.
cannot compel purchaser to accept, when, 151, 739, 1191, 1198—1202.
has no general right to, for excess of quantity, 729.
higher value of property, 732.
must convey what he can give with compensation, 739, 740, 1185, 1188, 1193.
must give, at option of purchaser, for
absence of necessary parties, 1188.
inability to make road, 1195.
misstatement as to rents and profits, 145.

COMPENSATION—*continued.*
absence of condition for, effect of—*continued.*
vendor's position as to—*continued.*
must give, at option of purchaser, for
quit-rents, 133.
refusal of wife to concur to release her interest, 313, 1189.
rights of common, 1194.
mining, 1194.
want of title to part, 1188, 1190, 1202, 1203.
after conveyance,
no jurisdiction to allow under Cairns' Act, 904, n. (*r*).
not allowed in absence of condition, 904.
on sale by Court, when allowed, 1352, 1353.
under condition, allowed, 603, 604, 904.
after forcible possession may be allowed, 499.
alterations by vendor may be matter for, 507.
assessment of, confined to surface value, 738.
charge of portions, not allowed in respect of, 585, n. (*b*).
coal worked out, vendor in possession must pay, for, 715.
concurrence of parties, want of, subject for, 1188.
wife, want of, subject for, 585, n. (*b*), 1189.
condition against,
effect of, on respective rights of vendor and purchaser, 740.
enforceable against vendor, 731.
not enforceable by vendor, where error is large, 159, 731, 732, 740.
purchaser cannot claim specific performance with compensation, 158, 736, 737, 740.
condition for,
applies,
after conveyance, 603, 604, 904.
at suit of purchaser generally, 730, 741.
in favour of vendor, how far, 151, n. (*n*), 730.
to absence of right of renewal on sale of leaseholds, 1189.
to misstatements as to repairs, how far, 152, n. (*y*).
to small errors only, at suit of vendor, 151, 152, 157, 740.
does not apply,
to material errors, at suit of vendor, 154 *et seq.*, 159, 719, 730, 740, 1200.
to unassessable error, 157.
where purchaser has knowledge of defect, 1195 *et seq.* *See* KNOWLEDGE.
not inconsistent with condition for rescission, 180, 182, 1190.
rights of vendor and purchaser respectively under, 740, 741.
trustees may use, how far, 158, 200.
condition for completion does not exclude right to, 736.
costs of dispute as to, when borne by purchaser, 1266.
dower, right to, how far subject for, 313, 585, 1192.
execution of conveyance, not waiver of claim to, 498.
for improvements not allowed to purchaser on rejection of title, 503.
for loss of deeds, mortgagor entitled to, 477.
for timber felled by vendor pending completion, 286.
interest on, payable by vendor, when refunded out of purchase money, 739.

COMPENSATION—*continued.*
solicitor's clerk cannot bind vendor to give, 503, n. (*q*).
under L. C. C. Act,
for consequential damage, when vendor has lien for, 835.
for damage, not liable to stamp duty, 599.
for loss of fines for renewal, on sale by ecclesiastical body, 756, n. (*y*).
for severance, rules as to conversion apply to, 299.
lord of manor not entitled to, on sale of copyholds, 802.
not a debt, 711, n. (*t*), 1087.
under sect. 85,
assessment of, on sale to public body, 1099, 1100.
railway company, 1100.
bond does not include, for minerals, 508, n. (*f*).
must be paid or deposited before entry, 508.
waiver of objections to title, not always waiver of claim for, 503, 736, 1192.

COMPLETION,
condition for, 142 *et seq.*
death of purchaser before, rights of representatives on, 303 *et seq.* *See* REPRESENTATIVES.
intestate without heir before, effect of, 289, 290.
vendor before, rights of representatives on, 293 *et seq.*
further evidence of title cannot be required after, 911.
interest payable from date fixed for, 708 *et seq.*
effect of delay upon, 708 *et seq.*, 718 *et seq.* *See* DELAY.
interest payable from what date, where no time fixed for, 711.
meaning of, in conditions, 143, n. (*u*).
non-delivery of abstract ground for refusing, 347.
notice before, postpones purchaser, 928, 932.
of railway, mandamus to compel, 1101.
purchaser must press for, 486.
refusal of, by vendor, may entitle purchaser to damages, 1080, 1082.
rescission after and before, distinguished, 898.
for misrepresentation, 898.
of agent, 901.
rights of purchaser prior to, 284 *et seq.*
vendor prior to, 289.
time for, when of essence of contract, 482 *et seq.* *See* TIME.

COMPOSITION
by debtor, nature of, 17.
for tithe, how established, 401 *et seq.* *See* TITHE.

COMPROMISE,
agreement for separation by way of, enforceable, 1166.
by Court, may be made, in respect of costs, 1261.
family, not voluntary within 27 Eliz., 1007.
purchaser's right to recover from vendor moneys paid for, 893.

COMPULSORY POWERS. *See* L. C. C. ACT; RAILWAY COMPANY.
notice under. *See* NOTICE TO TREAT.
of railway company, time for exercise of, 61, 513.

COMPULSORY POWERS—*continued.*
purchase under, how far a conversion, 297—299.
public body, not proceeding under, treated as private individual, 1222.

CONCEALED FRAUD. *See* FRAUD.

CONCEALMENT
by purchaser,
inadequacy caused by, may be defence for vendor, 1207.
relief for, 840, 841.
of advantages, lawful, 118, 119.
of previous trespass precludes specific performance, 118, 119.
by vendor of material facts,
effect of, at law, 104, 115.
in equity, 115, 116.
ground for relief after completion, when, 898.
of claim by incumbrancer, how far lawful, 517.
of document material to title, criminal liability for, 108, 344.
of intrinsic and extrinsic circumstances, distinguished, 104, n. (*a*).
of value, not fatal, 105.
specific performance refused on ground of, 1174.

CONCUBINE,
purchase in name of, not an advancement, 1058.

CONCURRENCE
of bankrupt unnecessary, 583.
of dower trustee, how far necessary, 584, 585, 614.
of dowress, when necessary, 583 *et seq.*
of first purchaser on conveyance to sub-purchaser, 581.
of heir, under unregistered will, effect of, 771, 772, 985.
of husband,
in conveyance by wife under Fines Act, how dispensed with, 649, 650.
not prevented by his bankruptcy, 954.
of separate estate, unnecessary, 587 *et seq.*
in settlement of wife's separate estate does not make it good, 1008.
of impossible parties,
purchaser may dispense with and claim compensation, 1188.
vendor not ordered to procure, 1186.
of incompetent persons, effect of condition for, 165.
of judgment creditors, how far necessary, 580, 581.
of mortgagee, on sale of equity of redemption, necessary, 582, 654.
of mortgagor in sale by mortgagee, unnecessary, 59, 60, 582.
of necessary parties,
condition that purchaser shall procure, 176.
costs of, borne by vendor, 176, 799, 1185.
failure to obtain may avoid contract, 165.
settlement may be made good by, 1007.
vendor must procure, 582, 1185 *et seq.*

CONCURRENCE—*continued.*
of necessary parties in proceedings for specific performance,
certificate as to title, how affected by want of, 1239.
direction for, unnecessary in decree, 1248, 1249.
vendor must procure after certificate, 1242, 1243.
of necessary parties on sale by Court,
direction for, unnecessary in decree, 1345.
order for, how made, 1346.
purchaser entitled to, 1345—1347.
who are, 1345, 1346.
of *cestuis que trust*, when unnecessary, 1352.
of mortgagee, ordered on what terms, 1346.
of nominal trustees under covenant to surrender must be obtained, 582, 1185.
of parties, requisition for, should be made at once, 494.
to conveyance. *See* PARTIES.
of stranger, in settlement in favour of collaterals, makes it good, 1016.
to pay debts is for benefit of settlor's family, 1007.
of trustees with other owners on joint sale, when good, 76.
of unnecessary party, requisition for, may involve costs, 493.
of wife on conveyance of freeholds must be acknowledged, 643.

CONDITION,
breach of,
notice of, effect of, on purchaser, 73.
to give notice upon sale by mortgagee, effect of, 82, 83.
what, justifies entry by purchaser of reversion, 916.
devise of one estate upon condition of purchase of another, effect of, 98.
must be strictly adhered to in power of sale affecting legal estate, 72.
on acceptance of offer imports new term, 266.
subject to approval of title by solicitor, 267.
references being good, 267, n. (*y*).
performance of, should be alleged in action on conditional contract, 1150.
power of sale dependent on, whether precedent or subsequent, 72.
precedent must be fulfilled to make contract, 240, 241.
performance of, necessary for specific performance, 1180, 1181.
to exercise of power of sale in mortgage, relieved against, 72, 73.
powers in S. L. Act, purchaser protected against, 73.
to right of pre-emption, strictly construed, 240.
to take effect on bankruptcy, how far good, 22, 23.

CONDITIONAL
acceptance of offer does not constitute contract, 266, 267.
on formal agreement, effect of, 265.
of title, on acceptance of proposed conveyance, 498.
on compliance with requisition, 495, 1227.
on verification, 495, 496.
agreement, parol evidence to show, 268.
devise, on purchase of other estate, effect of neglect to purchase on, 98.

CONDITIONAL—*continued.*
power of sale and trusts, nature of, 72.
purchase and mortgage distinguished, 925.
waiver of notice of abandonment construed strictly, 490.

CONDITIONS OF SALE,
ambiguous, allowed if brought to purchaser's knowledge, 123.
as to title to be shown are bad, 163.
construed in favour of purchaser, 122.
do not exclude purchaser's general rights, 122.
as to abstract,
delivery of, 140, 141.
inspection of, before sale, 174.
of satisfied terms, 330.
as to apportionment
of covenants, on sale of freeholds, 196.
of rent-charge, on sale in lots, 147.
of rent-service, on sale in lots, 147.
of rents and outgoings, 146, 147, 195, 196.
on sale of leaseholds in lots, 148.
of tithe rent-charge, 400.
as to attested copies of deeds, 159, 160.
as to charges subsisting on property, 177, 178.
as to compensation. *See* COMPENSATION.
effect of, after completion, 603, 604.
use of, by trustees, 158, 200.
as to completion, should make time of essence, 142, 143.
as to concurrence of incompetent persons, effect of, 165.
of parties, binds vendor, 581, 582.
as to conveyance being prepared by customer does not make him liable for costs of concurrence of parties, 170, n. (*e*), 176.
as to covenants for title by trustee or mortgagee, 146, 197.
as to crops, 148.
as to deeds, 159 *et seq.*
custody of, on sale in lots, 162.
on sale of part of mortgaged land, 162.
as to deposit, forfeiture of, and resale, unnecessary, 184, 185, 1089.
as to easements, applies to what extent, 176, 177.
as to evidence
for acceptance of specified, does not relieve vendor from producing all in his possession, 173.
from recitals, 166.
from statutory declarations, 167.
of identity from twenty years' possession, 167, 168.
of performance of covenants in lease, 193—195.
as to execution of conveyance, unnecessary, 146.
as to fire insurance, 196, 197.
as to fixtures, 149.
as to identity, construction of, 174, 175.
where tenures are mixed, 175.
as to interest, 142, 143.
as to modification of building plan, 200.

CONDITIONS OF SALE—*continued.*
as to opinion of counsel being binding must not suppress unfavourable opinion, 174.
as to outstanding estate being got in by purchaser, 170.
does not include mortgage, 176.
as to receipt of rents and profits from completion, 144, 145.
as to reserved bidding, 140.
as to retracting bidding, 139, 140.
as to succession duty, on sale of reversion, 238.
as to timber, 149.
as to time,
acceptance of abstract is waiver of, 490.
requisitions is waiver of, 490.
for further requisitions, expedient, 179, 180.
for requisitions, 178.
runs from delivery of perfect abstract, 184.
may be enlarged or waived expressly, or by conduct, 489, 490.
non-application for abstract may be waiver of, 490, 491.
non-delivery of abstract, effect of, 346.
vendor, not observing, cannot insist on, 489.
as to title,
against production of earlier title does not preclude investigation *aliunde*, 173.
against requiring earlier title, 172, 173, n. (*p*).
ambiguous do not bind purchaser, 163.
explicit bind purchaser, 168—170.
knowledge of defect by purchaser, effect of, 1203—1205.
misleading, what are, 170.
must not require assumption of facts known to be otherwise, 170.
must not state conclusion of law as a fact, 171.
must state irregularity in root of title, 171, 174, 337.
not to inquire into lessor's title, effect of, 169, 190, 869, 978.
to sell such as vendor has binds purchaser, 169.
to show possessory, precludes purchaser from requiring marketable, 171.
title need only be shown according to, 494, n. (*h*).
as to trustees' receipt being sufficient discharge, 200, 201.
as to validity of lease, bad, if lease invalid, 163, 164.
as to want of covenants for title, 880.
registration, 190.
stamps, 190.
as to withdrawing lots, 140.
circulation of, prior to sale, expedient, 139.
construction of, is according to legal and customary meaning, 122, 123.
covenants not mentioned in, conveyance cannot be subject to, 576, n. (*c*).
depreciatory. *See* DEPRECIATORY.
for covenant as to user, how to be carried out in conveyance, 633, 634.
for rescission, 178 *et seq.* *And see* RESCISSION.
applicable to objections on conveyance, how far, 178.
consistent with condition for compensation, 178, 180, 1190, 1191.
form of, 182, 183.
frivolous objections may give rise to exercise under, 493.

CONDITIONS OF SALE—*continued.*
for rescission—*continued.*
vendor cannot rely on
to show no title, 181.
where he conceals defects, 180, 1191.
where objections not apparent on abstract, 180.
incorporated in offer to purchase by letter after auction, how far, 266.
"month," meaning of in, 492.
mortgagee selling has discretion as to use of, 84.
"next," as attribute of day for completion, meaning of, 142 n. (*r*), 492, n. (*u*).
on sale by Court,
as to deduction of property tax, 1333.
as to discharge of purchaser and return of deposit, 1338.
as to reserved bidding, 1327.
form of, 1327.
how prepared, 1325, 1326.
settled in Chambers, 1327.
parol declarations cannot vary, except for purpose of defence, 123, 124.
party, consenting to sale, bound by, 127.
reading aloud at auction not sufficient publication of, 139.
rules as to, apply to sale by private contract, 237, 238.
special, authority of auctioneer to bind vendor by, *quære*, 204.
general remarks on, 201, 202.
if unnecessary, are depreciatory, 197 *et seq.* *See* DEPRECIATORY.
special, to be used, on various sales
of copyholds, formerly waste, 189, 190.
of encroachments, 188.
of enfranchised copyholds, 189.
of inclosed lands, 186, 187.
of leaseholds, 190 *et seq.*
as to evidence of observance of covenants, 193—195.
must not refer to covenants as "usual," 191, 192.
of renewable leaseholds, 196.
of strips of waste, 187.
of tithes, 188.
on resale of reversion, 196.
superfluous lands, 170.
stereotyped form of, practice of using, 139.
stringent, not favoured by Court, 175, 176.
to relieve vendor from giving information must be precise, 167.
trustees' discretion as to use of, how limited, 84, 85.
undertaking in, construed strictly against vendor, 123.

CONDUCT,
amounting to acquiescence, not necessarily confirmation, 57.
evidence against advancement, how far, 1059, 1060.
of illegitimacy, how far, 382.
misrepresentation by, 114, 115.
of plaintiff after contract, how far defence to specific performance, 1212.
of purchaser in defence, effect of, on costs, 1265.
of sale, purchase by solicitor having, voidable, 39.

CONDUCT—*continued.*
of sale by Court,
improper, in management, purchaser discharged by, when, 1332.
what is, 1332, n. (*b*).
in foreclosure or redemption action, 1324.
judge's discretion as to, will not be interfered with, 1323, n. (*n*).
person having, cannot bid, 1322.
purchase by, may be set aside, 39, 1322.
solicitor of, prepares abstract and particulars, 1325.
to whom given, 1323, 1324.
right to injunction for breach of covenant lost by, 870, 872.
waiver of conditions as to time by, 489, 490.
by neglect to require possession, 490.
by proceeding with purchase, 489, 490.
waiver of objections may be implied from, 496, 497.

CONFIDENTIAL COMMUNICATIONS. *See* PRIVILEGE.
vendor need not disclose, 374, 375.
what are protected as such, 993, 994.

CONFIRMATION. *And see* RATIFICATION.
acquiescence distinguished from, 57.
by *cestui que trust*, what amounts to, 55, 56.
by infant, 30.
by married woman, 33, 56.
deed of, not liable to *ad valorem* duty, 794.
should recite objections, 596.
lapse of time amounts to, when, 54, 1034.
of alien's title, by Crown, before denization, 28.
of doubtful title, whether purchaser can require, by separate deed, 572.
of void exchange by Tithe Commissioners, 327, n. (*k*).
of voidable contract, 117.
estate created by tenant in tail, 912.
sale advised bars relief, 855.
transaction may be by will or deed, 855.
right to re-conveyance, lost by, 855.
voluntary, of voidable sale, when invalid, 596, n. (*h*), 846.

CONFIRMATION OF SALES ACT,
application under, now avoided, how, 1298.
construction of, 1297.
effect of, 1296—1298.
order made under, without reference to particular sale, 1298.
procedure under, 1297.
retrospective operation of, 1296.
sanction of Court necessary to disposition under, 1296.
under, how obtained, 1296.

CONSENT
by *c. q. t.* to improper purchase, when presumed, 55.
by parties, agreeing to join in conveyance, should be in writing, 322.
by protector. *See* PROTECTOR.
by Treasury, necessary to sale by municipal corporation under L. C. C. Act, 93.

CONSENT—*continued.*
contract to sell without owner's, how far enforceable, 1178, 1179.
order for sale by Court not invalidated by want of, 1290.
to exercise of power,
alienation affects right of, how far, 87.
by bankrupt and his trustee, 86, 87.
by *c. q. t.* becoming trustee, 71.
by committee of lunatic, 86.
by surviving legatees after death of one, held insufficient, 86.
general, whether sufficient, 86.
may be given after exercise, 86.
must be for general not individual benefit, 71.
not invalid because it benefits consenting party, 71, 86.
parol, how far insufficient, 86.
to sale does not bind future interest of consenting party, 948.
under Inclosure Acts, award is evidence of, 327, n. (*m*).
under Settled Estates Act,
of parties under disability, 1290 *et seq.*
infant, 1291.
lunatic, 1292.
married woman, 1292—1294.
person of unsound mind, 1292.
of persons interested, when dispensed with, 1283, 1284.
under Settled Land Act, of tenant for life, when necessary, 85, 86.

CONSIDERATION,
action cannot be brought on parol contract for, 231.
adequacy of, how determined as to reversions, 849.
apportionment of, on conveyance of lands of different tenure, 597, 598, 793.
assignment of leaseholds, how far valuable, 1006, 1007.
condition as to sufficiency of, on resale of reversion, 196.
evidence as to, may be required for stamp duty, 787.
excessive, defence to specific performance, how far, 1210, 1211.
no ground for relief after completion, 902.
fixed by valuation, Court will enforce, 257, 258, 1211, 1212.
for family arrangement, Court will not scrutinize, 848.
for mining licence, whether purchase-money or rent, 293, n. (*x*).
for sale by limited owner need not be gross sum, 90.
how to be paid, 749, 750.
mortgagee cannot be free gift to charity, 93.
trustees cannot be rent-charge or annuity, 90.
must be gross sum, 90.
to railway company should not include compensation for damage, 599.
settlement, loan may be good, 1017, 1018.
may be past, 1019.
proved by parol, 1018, 1019, 1094.
future, if unenforceable, contract for, is not enforced, 1211.
inadequacy of,
defence to specific performance, when estate in possession is not, 1207.
reversion, how far, 1208.

CONSIDERATION—*continued.*
inadequacy of—*continued.*
does not make conveyance fraudulent within 27 Eliz...1005, 1006.
effect of, on dealings with reversion under old law, 844 *et seq.*
present law, 850.
evidence of fraud, when, 851.
ground for refusing costs on specific performance, 1261.
relief, when, 840—842.
misstatement as to, effect of, 842, n. (*y*).
supported by natural love and affection, when, 849, n. (*a*).
marriage, is valuable, 1008.
unless settlement is to defraud creditors, 1017.
marriage, collaterals, how far within, 1010—1017. *See* COLLATERALS.
misstatement of, does not avoid deed, 787.
mortgagee selling may allow part to remain on mortgage, 90.
of annuity, effect of annuitant's death on contract in, 1209, 1210.
liable to stamp duty, 789.
of costs, purchase by solicitor from client in, 45.
of debt, due to purchaser, liable to stamp duty, 597, 787.
of past debt, conveyance in, puts purchaser on inquiry, 987.
of security, liable to stamp duty, 599, 789.
of transfer of stock, liable to stamp duty, 599, 789.
on conveyance must be truly stated, 596, 597, 787.
penalties for misstatement of, 597.
on conveyance must include fixtures and timber, 597.
on sale of goodwill in partnership, liable to stamp duty, 599.
share in partnership, liable to stamp duty, 598, 599.
paid to another at vendor's request, good, 838.
parol evidence may establish, 855, 1018, 1019, 1094.
of payment of, to raise resulting trust, 1056.
purchaser may recover balance of, beyond sum stated, 787.
seal is not for purposes of specific performance, 1208.
settlement, fraudulent under 13 Eliz. not established by, 1024. *See* FRAUDULENT CONVEYANCE.
is evidence in favour of validity of, 1024.
settlement, post-nuptial, what is good, for, 1004.
true test of, 1005.
several, stamp-duty on, 789.
stamp-duty payable on, 597 *et seq.*, 787 *et seq.*
statement of, in conveyance, not conclusive, 855.
transfer in writing of parol contract is good, 232.
uncertain, how far Court will consider adequacy of, 842, 1209.
waiver of disputed right is valuable, 1003.

CONSOLIDATION,
applies to foreclosure and redemption action, 1037, 1038.
only when default has been made on both securities, 1038.
doctrine of, as applied in *Vint* v. *Padgett*, 1036.
excluded by Conv. Act, how far, 324, n. (*t*), 574, 1038.
mortgagee from voluntary settlor cannot have, as against volunteers, 1002.
notice of purchase of equity of redemption, not necessary to exclude, 784.

CONSOLIDATION—*continued.*
of costs cannot exist, where debts cannot be consolidated, 1038.
prior dealings with equity of redemption, not affected by, 784, 1037.
purchase of equity of redemption, how affected by, 324, 573, 574.

CONSTRUCTION,
of agreement, effect of offer by plaintiff as to, 1246.
of ambiguous instrument, how far purchaser affected with notice of, 969.
of restrictive covenants, 872.
words in covenants for title, 889 *et seq.*
of will, requisition for, good, 495.
costs of, how borne, 495, 800, 1239.
questions of, may be decided on vendor and purchaser's summons, 1238, 1239.

CONSUL,
notarial acts by, how proved, 361.

CONTINGENT,
consideration, failure of, how far defence to specific performance, 1210.
inadequacy of, how far defence to specific performance, 1212.
interest in copyholds now capable of alienation, 782.
married woman can convey by acknowledged deed, 648, 651.
may be conveyed by deed, 281.
owners of, when to be parties to specific performance, 1131.
title founded on, destruction of, held good, 1275.
reversion, inadequacy of consideration affects sale of, how far, 845.
time does not run against *c. q. t.*, while his interest is, 55.

CONTRACT. *See* AGREEMENT; FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE.
abandonment of. *See* ABANDONMENT.
purchaser must return abstract on, 319.
acquiescence in notice to treat may amount to, 297.
action on, at law, defences to, 1095 *et seq.* *See* DEFENCE.
adoption of ancestor's, by heir, effect of, 296.
after-acquired interest bound by, when, 910.
alteration of, destroys rights of party under, 274.
property by vendor may avoid, 286, 507.
approval of draft, by solicitor, whether an agreement, 272.
auctioneer cannot vary terms of, 204.
bankruptcy,
disclaimer of, trustee of purchaser has right of, on, 292.
election of assignee under old law, 291, 292.
of either party does not avoid, 291.
building, how far enforceable, 305, 1108—1111. *See* BUILDING CONTRACT.
by agent. *See* AGENT.
by company. *See* CORPORATION.
by corporation. *See* CORPORATION.
by directors of company, 273.
by letter. *See* LETTER.
by promoters before registration, 282.

CONTRACT—*continued.*
conversion, effected by, 295 *et seq.* *See* CONVERSION.
conveyance cannot be explained by, 603.
copy of, should accompany abstract, 350.
costs, caused by will made after, vendor's estate bears, 800.
before, not given, 799.
of, include costs of abstract, 320.
not allowed to plaintiff rescinding after action brought, 1261.
death before completion,
of either party does not avoid, 291.
after mutual rescission, effect of, 300.
of purchaser, effect of, on rights of representatives, 303 *et seq.* *See* REPRESENTATIVES.
effect of Locke King's Acts on, 303, 304, 923, 924. *See* LOCKE KING'S ACTS.
of vendor, effect of, on rights of representatives, 295, 296, 300. *See* REPRESENTATIVES.
vests legal estate in whom, 293.
who must convey on, 294, 295.
devise, effect of, on. *See* DEVISE.
distress not a defence to action on, 841.
document of title, must be kept as, after conveyance under sect. 4 of Conv. Act, 1881..294, 295.
enforceable against heir may be carried out by personal representatives, 294, 663.
evidence of waiver of lien, when, 831.
explicit, must be, to exclude purchaser's right to title, 122.
for compensation. *See* COMPENSATION.
for lease, lessor's right to covenants on assignment of, 1181.
for purchase,
by lessee is acknowledgment of lessor's title, 311.
dower, how affected by, 313.
of equity of redemption by mortgagees,
at date of mortgage bad, 282.
does not merge security in favour of mesne incumbrancer, 313.
ground for refusing relief to mortgagor on ejectment, 311.
lets in dower, how far, 312.
purchaser of, when party to specific performance, 1132.
for sale,
at specified price plus share of profits, how construed, 257.
by bachelor marrying before conveyance, effect of on dower, 312.
by joint-tenant is severance, 312.
by mortgagee does not bar action for mortgage debt, 311.
by one of several executors of leaseholds, whether enforceable, 674.
by tenant for life, under power, how far enforceable, 325, 1114.
S. L. Act, how far enforceable, 1114, 1115 1125.
in tail not enforceable against remainderman, 325, 946, 1117.
in possession, how far enforceable, 325.
by testator entitles executor to purchase-money, 681.
Court may adopt under Partition Act, 1310.

CONTRACT—*continued.*
for sale—*continued.*
dower, how affected by, 313.
purchaser of, entitled to what abstract, 319.
purchaser's tenancy determined by, when, 290, 501.
illegality of, a defence to action on contract, 834, 835, 1096.
interest under,
of purchaser is devisable, 306.
insurable, 197, 913.
of vendor is that of trustee, how far, 283, 284, 734.
within Mortmain Act, 303, 828.
judgment entered up after, but before conveyance, effect of, 530, 540.
lien of vendor under. *See* LIEN.
lunacy of either party does not avoid, 291.
committee in, rights and liabilities of, under. *See* COMMITTEE.
mortgage subsequent to, postponed to purchaser's lien, 506.
non-delivery of abstract, effect of, on purchaser's liability under, 346, 347.
not presumed as against heir, 309.
parol, when enforceable, 1133 *et seq.* *See* PART-PERFORMANCE.
when bad under Stat. of Frauds. *See* FRAUDS, STATUTE OF.
evidence, admissible to prove conditional character of, 268, 1090.
to explain, how far, 1090 *et seq.* *See* PAROL.
plaintiff at law must show performance of his part, 1086—1088.
preliminary for lease, intended assignee not entitled to, 331.
recital of, in conveyance, when proper, 595, 596.
refusal to perform is immediately actionable breach, 1088, 1089.
rescission of,
by plaintiff after action brought disentitles him to costs, 1261.
defendant in specific performance should not counter-claim for, 1198, n. (*m*).
right of purchaser after,
damages for breach, 1072.
what recoverable, 1076.
not recoverable, 1077.
loss of bargain not recoverable, 1078—1082.
right of purchaser to,
for delay, 486 *et seq.*
for misrepresentation, 106, 898 *et seq.* *See* MISREPRESENTATION.
for misrepresentation of vendor's agent, 103, 104, 902, 903.
distinction between executed and executory contract, 898, 899.
on executed contract, what is ground for, 900—902.
on vendor's default, though contract under seal, 1071.
only if restitution can be made, 1072.
rights of purchaser under, 284 *et seq.*
vendor under, 285, 289—291.
stamps on, 275, 276.
what are exempt from, 275.
stranger to, not proper party to specific performance, 1127.
subsequent acts of parties inadmissible to explain, 1094.
time for enforcing, tendency of Court is to limit, 486, 1214.

CONTRACT—*continued.*
under L. C. C. Act. *See* LANDS CLAUSES CONSOLIDATION ACT; RAILWAY COMPANY.
under Public Health Act. *See* PUBLIC HEALTH ACT.
under seal, release of, must be by deed, 1086, n. (*e*).
unstamped receipt, whether evidence of, 275.
variation of, evidence of, how far admissible at law, 1090.
admissible to defendant in specific performance, 1153 *et seq.*
inadmissible to plaintiff in specific performance, 1149, 1150.
vendor, how far trustee till completion, 283, 284, 294, 661, 662.

CONTRIBUTION,
action for, by joint purchaser advancing whole purchase-money, 1050.
by purchasers *inter se* to charge supposed to be invalid, 1038, 1039.
paramount charges, 1035, 1036.
claim for, may now be made under third party procedure, 1133.
of purchase-money in unequal shares makes tenancy in common, 1047.

CONVERSION,
adoption by heir of ancestors parol contract is, 296.
agreement by claimants to sell and divide produce is, 296.
fixing price of land to be contingently taken is not, 299.
contract for sale, when binding, is, 299.
under L. C. C. Act, when binding, is, 297, 298.
even in case of settled estate, 299.
joint speculation in building land is, 1052.
of land of surviving partner into realty, how effected, 1053.
operates only from date fixed for completion, 293, 295.
option to purchase works, as from date of its exercise, 296.
order of Court works, as to all lands sold, 298, 299.
under Partition Act, does not work as against persons under disability, 299, n. (*g*), 1303.
purchase of land for partnership works, 1052.
may be rebutted by circumstances of user, 1052, 1053.
sale in testator's life without his authority, whether a, 297.
sale under L. C. C. Act by persons entitled is, 761.
by persons under disability is not, 298, 761.

CONVEYANCE,
agreement in, for lease to vendor does not pay duty, 797.
"all estate clause" unnecessary in, 613.
appointment of person to convey estate of necessary party under Partition Act, 1302.
make, on vendor's refusal, 660, 663, n. (*f*), 1251, 1252.
purchaser's solicitor to make, on vendor's refusal, 663.
by alien to subject before Naturalization Act, 26.
by committee of lunatic vendor, 1251, 1252.
mortgagee must be preceded by vesting order, 656, n. (*t*).
by heir or devisee frees land from liability to creditors, 702.
by husband bars right to dower, 584, 614. *See* DOWER.
by personal representatives on contract enforceable against heir, 294, 295, 663.

CONVEYANCE—*continued.*
by tenant in tail and remainderman, form of, 582.
requires enrolment, 778 *et seq.* *See* ENROLMENT; TENANT IN TAIL.
should be separate from disentailing deed, 575.
by trustees to *c. q. t.* on determination of trusts, 653, 654.
concurrence of husband, effect of dispensing with, under Fines Act, 650.
proper parties, order for specific performance implies, 582, 1248, 1249.
purchaser from Court entitled to, 1345.
vendor in specified capacity does not restrict effect of, 824.
condition against purchaser of several lots having more than one, 141.
for covenant as to user how to be secured in, 633, 634.
rescission may extend to objections on, 182.
whether, should extend to objections on, 178, 179.
confirmation of breach of trust may be kept off, 572.
consideration for. *See* CONSIDERATION.
misstatement of, effect of, on right to set aside, 842, n. (*y*).
of annuity, how to be secured in, 634.
of waiver of disputed right is valuable, 1003.
contract cannot explain, 603.
covenants in, against known defects, form of, 886.
to be contained in, may be decided on V. and P. summons, 635.
death of vendor before, effect of, on persons to make, 293 *et seq.*
defective, may be supported by getting legal estate, 928.
devise revoked by, how far, 306, 918.
dower, uses to bar, should be omitted in, 613, 614.
draft. *See* DRAFT.
duplicate of, proper form of, 888.
refusal to execute, when breach of covenant for further assurance, 888.
easements and rights,
cannot be made subject to, not appearing in abstract or particulars, 576, n. (*c*).
continuous and discontinuous, no distinction between, 610, 611.
how reserved under, 576.
necessary pass under, 608 *et seq.*
reservation of, should be express, 611, 612.
what pass by implication, 605.
engrossment of. *See* ENGROSSMENT.
evidence to contradict, inadmissible, when, 840.
execution of,
as escrow may be proved by parol, 826.
precludes purchaser's right to title deeds, 826.
by attorney, how far purchaser must accept, 641, 642.
by necessary parties, vendor pays costs of, 798.
by person appointed by Court for the purpose, 660, 1253, 1348.
by vendor personally, 641.
condition as to, unnecessary, 146.
need not be in purchaser's presence, 741.
not necessary to bind covenantor, 634, 862.
not waiver of compensation, 498.

CONVEYANCE—*continued.*
execution of—*continued.*
of foreign land requires stamps, 798.
want of, defence to specific performance, how far, 1089.
no defence to action on covenants, 897.
feoffment when employed as, 600.
fixtures, enumeration of, when proper, 606.
pass by, without mention, 606.
fraudulent. *See* FRAUDULENT CONVEYANCE.
general words implied by Conveyancing Act, 605.
pass necessary rights of user, 609, 610.
unnecessary in, 605. *See* GENERAL WORDS.
give, meaning of, in, 635.
grant, meaning of, in, 635.
under L. C. C. Act, 635.
of deeds, unnecessary in, 613.
heirs of equitable vendor when necessary parties, 293.
impossibility of immediately procuring, not fatal to title, 324.
incumbrances should be got in by separate deeds where property sold in lots, 575.
judgment entered up before, but after contract, effect of, 530, 540.
matter of, defined by Lord Langdale, 324.
incumbrances deemed to be in Equity, 324.
memorial of, must be registered in register counties, 767, 776. *See* REGISTER; REGISTRATION.
necessary matter only should be contained in, 572, 573.
notice of, effect of, on priorities, 927, 928. *See* NOTICE; PRIORITIES.
should be endorsed on leading title deed retained, 783.
of copyholds, effect of general words in, 605, n. (*y*).
by surrender to uses, 579, 580.
of equitable interest, purchaser entitled to formal, 571.
of equity of redemption,
affected by doctrine of consolidation, how far, 573, 574, 654. *See* CONSOLIDATION.
mortgage may be kept alive on, 574, 575, 1040—1042.
mortgagee should concur in, 654.
proper form of, 574, 575.
to mortgagee, effect of, 1040—1042.
of estate contracted for does not adeem devise, 918.
of goodwill of partnership subject to *ad valorem* duty, 599.
of land adjoining road or river, effect of, 602.
of legal estate in breach of trust to purchaser without notice gives him legal rights, 934.
under Trustee Act, 293.
of reversion, form of, 604, 605. *See* REVERSION.
when presumed, 367.
of satisfied terms, purchaser entitled to, 577.
of separate estate, husband unnecessary to, 587 *et seq.*
of subsequently acquired interest, when purchaser entitled to, 909.
operating as mortgage also pays double duty, 796.
order as to, where purchaser evades judgment, 1251.
order for, by means of Trustee Act, 1347, 1348.

CONVEYANCE—*continued.*
order for, may be made against party refusing, 1346, 1347.
under 47 & 48 Vict. c. 61, s. 14..1348.
settling, is subject to appeal, 1250, n. (*r*), 1345.
outstanding interests should be got in by separate deeds, when, 572, 575, 814.
whether to be included in, 572.
parcels, description of, in, 600 *et seq.*
parol evidence to prove conveyance in fact mortgage, 1057.
parties to. *See* PARTIES.
payment of purchase-money entitles purchaser to, 146.
pending suit to set aside, Court preserves property, 856.
perusal of, by necessary parties, vendor pays for, 798.
prejudicial matters to title should be kept off, 572.
preparation of,
by vendor a bad practice, 909, n. (*t*).
costs of, borne by purchaser, 798.
duty of purchaser, 146, 570, 798.
except when, 570.
is not part performance, 1138.
prior to production of deeds, inexpediency of, 472, 571, 572.
waiver of objection to title, how far, 497, 571.
only conditionally on its acceptance, 498.
recitals in, and their effect. *See* RECITALS.
reference to occupancy, how far descriptive or restrictive, 602.
registration of. *See* REGISTRATION.
remedies after,
compensation under conditions, 603, 604, 904.
damages when recoverable, 905.
for excess of quantity or quality vendor has none, 837.
purchase-money when recoverable, 905.
rectification of, when, 838, 839, 908, 909.
set aside not on ground of purchaser's illegal motive, 856.
on what terms, 852, 854, 856.
against sub-purchasers without notice, 897.
requisition as to, should be made at once, 494.
rescission for matter of, precludes vendor from specific performance, 494, 495.
restrictive covenants, how created in, 576.
"reversion clause" unnecessary in, 613.
rights of user if necessary pass under general words, 609, 610.
separate, purchaser when entitled to, 573.
settlement by judge, practice as to direction for, 1249, 1344.
of, in action for specific performance, practice as to, 1249, 1250.
Stamp Acts, what is, within, 277.
tender of, by purchaser, 146, 570, 798.
necessary to action at law, 1086.
to charity. *See* CHARITY.
to railway company,
by deed poll on refusal or want of title of owner, 653.
minerals must be specified in, if included, 604.

CONVEYANCE—*continued.*
to railway company—*continued.*
reservation of minerals on, implies obligation to support, 604.
should not include compensation for damage, 599.
statutory form of, effect of, 575.
to secret trustee for charity requires enrolment, 776. *See* ENROLMENT.
to unincorporated body, effect of, 24, n. (*o*), 25.
under Religious Buildings Acts does not require enrolment, 778.
under Trustee Act, 655 *et seq.* *See* TRUSTEE ACT.
vendor liable for all defects until, 665.
incumbrances until, 666.
voluntary, not good root of title, 339.

CONVEYANCER,
evidence of, as to professional communications inadmissible, 993, 994.
opinion of, does not make title doubtful, 1232, n. (*x*).
unqualified person acting as, liable to penalty, 823.

CONVICT,
administrator of property of, may be appointed, 16.
powers of, 16.
what property vests in, 33.
contract as to property acquired by, under licence, good, 33.
curator of property of, limited powers of, 16.
when and by whom appointed, 16.
forfeiture of property of, now abolished, 16.
husband, concurrence of, dispensed with under Fines Act, 650.
incapable of contracting, 16, 33.
selling, 15, 16.
leaseholds of, formerly forfeited, 15.
meaning of, within 33 & 34 Vict. c. 23..16.
money of, under compulsory sale considered realty, 298.
pardon of, enables, to acquire property, 16; and see 15, n. (*a*), 33.
or death of, restores property, 16.
powers of, as protector of settlement, may be exercised by Lord Chancellor, 779, n. (*g*).
trust and mortgage estates of, do not escheat, 661.
wife of, regarded as *feme sole*, 32.

COPARCENER,
judgment affects estate of, how far, 525, 526.
possession of one, not that of another, 446.
trustee, is seised jointly within Trustee Act, 656, n. (*x*).

COPIES. *See* ATTESTED COPIES.
certified, when admissible, 357, 361, 362.
condition that purchaser shall pay for, mortgagee may use, 198.
covenant for right to take, of deeds retained by vendor, 626.
of abstract, what are proper, 346.
of crown grant, when evidence, 359.
of deeds, relating to dealings with mortgaged estate, mortgagee liable for, 764.
when evidence, 353—357.
of documents, dated before commencement of title, cannot be demanded, 337.

COPIES—*continued.*
of documents, not to be called for, cannot be demanded, 376, 377.
of enrolments, when evidence, 354.
of fines and recoveries, when evidence, 356.
of instruments on record, verification of abstract by, 159, 472.
of memorial of registered deed, when evidence, 354.
of mortgage deed, mortgagee not entitled to keep on payment off, 478, 764.
of plan should accompany abstract, when, 345.
of private act should accompany abstract, 345.
of statutory declaration should accompany abstract, when, 346.
of title-deeds, vendor not entitled to keep, 762.
except where they subject him to future liability, 762.
of will, should accompany abstract, when, 345.
office, of enrolled bargain and sale, proves original, 355.
of will, when probate lost, sufficient evidence, 362.
what are, 361.
when evidence, 361.
purchaser's right to, on completion, 1349.

COPPICE,
agreement for sale of, must be in writing, 234.
purchaser entitled to profits of, from date of completion, 285.
purchaser in possession may cut, 502.
may take fall of, 502.
restrained from cutting when, 289.
vendor in possession may cut for purchaser's benefit, 285, 507, 1215, 1216.

COPY OF COURT ROLL,
covenant for production need not extend to, 160.
formerly extended to, 765.
examined, unsigned by steward, does not require stamp, 352, n. (*k*).
must be stamped by steward, 794, 795.
obtained by vendor for verification, belongs to whom, 352.
secondary evidence of, vendor may produce, 159.
signed by steward proves copyhold assurance, 351.
what a sufficient, 352.

COPYHOLDS. *See* ENFRANCHISEMENT.
abstract to, should contain what, 339.
admittance to,
custom to take, all tenements is good, 571.
on purchase by trustees, 589.
one of several not enforceable where fine payable once only, 571.
possession without, effect of, 467.
right of customary heir to sue on covenants for title before, 891.
right of, when barred, 467.
assurance of, how proved, 351.
conveyance by married woman,
of equitable estate in, by acknowledged deed good, 9, 648.
husband's concurrence may be dispensed with, when, 650.
of equitable estate in, by surrender is binding, 9, 648.
of legal estate in, must be by surrender, 9, 648.

COPYHOLDS—*continued.*
conveyance of,
by surrender to uses, 579.
lord of manor must act on, if accepted, 580.
need not accept, 579, 580.
contingent interest in, should be entered on court rolls, 782.
effect of general words in, 605, n. (*y*).
must be entered forthwith on court rolls, 782.
under L. C. C. Act does not work enfranchisement, 783.
must be entered on court rolls, 782, 783.
covenants for title in covenant to surrender, effect of, 628, 879.
run with, when, 628, 879.
description of, as freehold *primâ facie* bad, 154, 1199.
devise of, effect of, 306.
lawful, 580, 785, n. (*k*).
Dower Act does not apply to, 586.
dower in, extends to third of each tenement, 585.
encroachments, doctrine of, in relation to, 188.
enfranchised,
description of, as freeholds, wrong, 155, 1199.
identity of, 378, n. (*y*).
in Kent often not gavelkind, 369.
minerals under, may be reserved to lord, 155.
pass under conveyance of manor, 138, 139.
rights of purchaser of, 330.
title of lord need not be produced, 189.
enfranchisement of. *And see* ENFRANCHISEMENT.
minerals must be expressly included in, 604.
presumed, when, 366, 367.
entail may be barred in,
by equitable tenant in tail by deed or surrender, 779.
deed is void as against later assurance previously enrolled, 781.
must be entered on court rolls within six months, 348, n. (*w*), 780.
protector must consent by deed, 780, 781.
by legal tenant in tail by surrender, 779.
protector may consent by deed, 780, 781.
personally, 780, 781.
by trustee in bankruptcy of tenant in tail, 780.
extendible under 1 & 2 Vict. c. 110..536.
23 & 24 Vict. c. 38..532, 533.
formerly waste, condition necessary on sale of, 189, 190.
heir of vendor of, dying before surrender, is trustee within Trustee Act, 662.
inspection of court rolls, who are entitled to, 478.
leases of, affected by judgments, 525.
Locke King's Acts apply to, 921.
may be equivalent to freeholds, 154.
purchased with money under L. C. C. Act, 751, 760.
merger of tithes in, does not increase amount of fines, 398, n. (*f*).
may be effected, 398, n. (*f*).
mixed with freeholds, conditions as to not distinguishing tenures, 150.

COPYHOLDS—*continued.*
not extendible under Crown process, 563.
except what leases, 563.
old law, 526.
notice to enfranchise, whether a contract, *qu.*, 249.
on sale of,
vendor must pay fines for getting in legal estate, 170, n. (*c*).
need not disclose fines, 132.
incapacity to cut timber, 132.
to work mines, 132.
with lands of different tenure stamp duty must be apportioned, 597, 598.
Registry Acts do not apply to, 567, 769, 776.
Satisfied Terms Act does not apply to, 576, 577.
searches to be made on purchase of, 566, 567.
surrender,
by married woman bars right to freebench, 648.
custom for steward to prepare, good, 570.
parcels in, 604.
presumed, when, 366, 367.
vendor holding in trust for purchaser till surrender is trustee within Trustee Act, 662.
vesting order under Trustee Act renders surrender and admittance unnecessary, 659.

CORNWALL,
Duchy of,
adverse possession, effect of, against, 468.
deeds relating to land in, how proved, 355.
disposition of lands of, must be enrolled, 778.
formalities of Act, purchaser not bound to see to, 958.
subject to same limitations as to time as Crown, 468.
title by adverse possession against, may be forced on purchaser, 468.
mining customs of, 133, n. (*h*).

CORPORATION,
agent of, must be appointed under seal, 217, 218.
presumption of valid appointment of, 218.
unauthorized, act of, may be ratified by, 218, 219.
collusive alienation by, 22, n. (*x*).
common law, clause in charter of, restraining alienation except in certain form, 21.
powers of, may be restricted by duty to the public, 22, n. (*x*).
with regard to real estate same as of an individual, 21.
contract of,
formalities of, may be assumed by stranger, 274.
must be under seal, 217, 273.
not in existence at its date, cannot ratify, 216.
not under seal, effect of, 273, 274.
may be ratified under seal, 219.
when enforceable, 219, 220.
part performance, how far applicable to, 273, 274, 1139.

CORPORATION—*continued.*
contract of—*continued.*
party bound to see whether *intra vires*, 218.
promoters prior to incorporation of, invalid, 219.
of, for good consideration, when enforceable, 219.
under Public Health Act, 218.
under seal, when presumed, 274.
conveyance by feoffment, on sales by, 600.
ecclesiastical, limited powers of alienation of, 21.
may sell lands for redemption of land tax, 21, n. (*s*).
rights of, in purchase-money on sale under L. C. C. Act, 756.
to compensation for loss of renewal fines, 756, n. (*y*).
investment by, on real security, 97, n. (*i*).
liable at law for use and occupation, 274.
memorial for registration may be executed by seal of, 773, n. (*m*).
municipal, lands of, extendible under judgment, 541.
sales by. *See* MUNICIPAL CORPORATION.
parson and churchwardens may be, to purchase lands, 25.
power of, to hold land, how limited, 24.
statutory, easements cannot be prescribed for against, 20, n. (*p*).
how far, has rights of ordinary owner, 20.
powers of, how limited, 20.

CORPORATION SOLE,
barred by what period, 452.
modus belonging to, not rent within Stat. of Lim., 433.
petition of, for re-investment may be assumed by successor, 761.
right of, to income of moneys invested under L. C. C. Act, 761.
to purchase-money under L. C. C. Act, 756.
tithes belonging to, not land within Stat. of Lim., 433.

CORRECTION
of signed contract, effect of, 274.

CORRESPONDENCE. *See* LETTERS.

COSTS,
agreement by solicitor for share of estate in lieu of, void, 278.
auctioneer cannot deduct his, out of deposit on interpleader, 206.
effect of joining as co-defendant in action for specific performance, 205, 206.
liable for, in action of rescission, when, 203, 204.
conveyancing, taxation of. *See* SOLICITOR; TAXATION.
frivolous objections may involve purchaser in, 493.
indemnity against, effect of, on assignment of subject-matter of action, 279.
jurisdiction to allow, not enlarged by Judicature Acts, 813.
of abstract, copy of, how far solicitor entitled to, 320.
examination of, vendor pays if title bad, 348.
included in condition as to costs of contract, 320.
who pay, 320.
of action by mortgagee against mortgagor for administration, 1341.
purchaser if unsuccessful, not allowed against estate, 1271.
of action for foreclosure cannot be consolidated when debts cannot, 1038.
for partition, 1311.

COSTS—*continued.*
of action for specific performance,
capable of being brought in County Court, 1272.
delay in taking objection may be ground for refusing, 494.
disclaimer by defendant entitles him to, when, 1269, 1270.
further proceedings in, not allowed after submission by defendant, 1267, 1268.
include costs of inquiry ordered, 1267.
plaintiff may apply for, on submission by defendant, 1268.
successful litigant not allowed, when, 1260.
purchaser, electing to have action dismissed, 1263.
obtaining decree, 1261.
on dismissal of vendor's action, 1260, 1261.
taking frivolous objections, 493.
vendor obtaining decree, 1260.
successful litigant ordered to pay, when, 1264 *et seq.*
of unnecessary reference, 1264.
vendor must pay to date of showing title, 1264.
unless purchaser defend on other grounds, 1265, 1266.
where compensation is alone disputed, 1266.
where unfounded allegations as to character, 1266.
trustees may be liable for, 94.
recover from *c. q. t.*, when, 94.
unsuccessful litigant must generally pay, 1256, 1257.
application of general rule, 1258, 1259.
opinion of counsel does not relieve from, 1258.
purchaser forced to take doubtful title generally liable, 1259.
exception where doubt arises from conflicting cases, 1259.
where vendor conceals the doubt, 1259.
special grounds, what are, 1257, 1258.
of action occasioned by devise of estate, how borne, 799, 800, 1262.
by improper dealings of trustee, borne by him, 53.
by vendor becoming lunatic, 1262.
of arbitration under L. C. C. Act,
borne by company, 707, n. (*r*).
may be taxed, 814.
need not be incorporated in award, 813.
vendor's lien does not extend to, 835.
of assessment by jury refused where less than offer was found, 1098, n. (*m*).
of carrying out agreement for partition on death of co-owner, 305, n.(*f*).
of collateral litigation, depend on its own result, 1271.
of construction of will, borne by unsuccessful party, 495, 800, 1239.
of conveyance in consideration of costs, how borne, 802.
of defending action included in covenant for indemnity, 631, n. (*k*).
adverse claim, when recoverable by purchaser from vendor, 893.
of executing further assurance, should be tendered, 888.
of getting in legal estate from infant, 302, n. (*a*), 800, 1262.
and incumbrances, borne by vendor, 814.
of investigating title, purchaser may recover as damages for breach of contract, 1076.

COSTS—*continued.*
of keeping incumbrances alive, purchaser must pay, 814.
of lease borne by lessee, 802.
of payment out and re-investment, company has not to bear unnecessary, 812.
of perusal and execution of conveyance, vendor pays, 798.
of preparation of conveyance during defect in title, solicitor not entitled to, 815.
of purchase under L. C. C. Act. *See* L. C. C. Act.
of purchaser of copyholds, 801, 802.
on summons for distribution of purchase-money, 1342.
of reference as to title on sale by Court, 1336, 1337.
of unnecessary search, 569.
of vendor and purchaser summons, include what, 1272.
of withholding fatal objections, liability of purchaser for, 494.
vendor may set off, 494.
order for payment of, how far judgment within 1 & 2 Vict. c. 110..535.
out of purchase-money, on sale by Court,
in creditors' action, 1340.
of incumbrancer consenting to sale, 1340, 1341.
possession of purchaser affects, how far, 1270.
purchase by solicitor from client in consideration of, 45.
purchaser can recover what, as damages for breach of contract, 1076, 1077.
may deduct from purchase-money, how far, 1259, 1260, 1270.
deposit from, when, 1270.
preventing reference must pay, up to hearing, 1267.
refunded on appeal, no interest allowed on, 1253, 1271.
sale set aside, how dealt with on, 854.
security for, solicitor may take, on subject-matter of action, 278.
trustee-solicitor not entitled to profit, 95, 96.
of voluntary settlement how far entitled to, on its being set aside, 1119.
under Act later than L. C. C. Act incorporating earlier Act, rule as to, 812, 813.
vendor acquiring title pending action pays, to that date, 1270.

CO-TRUSTEE,
contract of one trustee, not enforceable against, 1118.
employed as solicitor not entitled to profit costs, 95.
to receive purchase-money liable as trustee, 745, 746.
liability of, *inter se*, as to receipt of purchase-money, 745.
opinion of, trustee need not adopt, 62.
trustee responsible for acts of, on a sale, 85.

COUNSEL,
acceptance of defective title by, does not bind client, 350, 495.
conveyancing,
conveyance, when ordered to be settled by, 1250.
is agent of vendor on sale by Court, 1326.
opinion of, usually taken on sale by Court, 201.

COUNSEL—*continued.*
conveyance—*continued.*
particulars and abstract on sale by Court are laid before, 1325, 1326.
title referred to, on reference, 1228.
evidence of, as to professional communications inadmissible, 374, 375, 993, 994.
notice to, how far notice to purchaser, 988.
provision in Conv. Act, 1882, as to, 988, 989.
opinion of,
as to searches protects solicitor, how far, 523.
case for, inadmissible as evidence of pedigree, 395.
condition as to, being accepted, 174.
does not relieve unsuccessful litigant from costs, 1258.
how far privileged, 995, 996.
on abstract, purchaser's rights concerning, 319.
solicitor usually justified in taking, 348.
on title, trustees may take, 201.
purchase by, from late client, when set aside, 43.
unnecessary searches advised by, solicitor may have to pay, 569.

COUNTER-NOTICE,
to take a different portion is bad, 245.
to take, acceptance of bad, does not bind company, 245.
to take whole of house under L. C. C. Act, s. 92..244.
company restrained from taking part only under, 244.
effect of, 244.
may be given on refusal of company to give price asked for part, 245.
not essential, 244, n. (*b*).
value of whole must be deposited before company can take possession, 245.

COUNTERPART,
lease corrected by, when, 366, n. (*i*).
presumed on production of, 366.
liable to what stamp duty, 794.
who pays for, 802.

COUNTY COURT,
costs of action for specific performance which might be brought in, 1272.
jurisdiction of, to grant injunction, 871.

COURT,
decree of, purchase under, by incompetent person not valid, 44.
excessive sale by, whether a conversion, 298.
leave to bid, has always power to grant, 41.
order of, for purchase by trustee made, when, 50.
trustee can purchase safely under, 50.
proof of seal of, unnecessary, 359.
purchases by trustees, what, sanctioned by, 99, 100.
sale by. *See* SALE BY COURT.
trustees appointed by, powers of, 687.

COURT ROLLS,
assignees omitting to enter their title on, not postponed, 951.
assurances of,
contingent interests in copyholds should be entered on, 782.
copyholds must be immediately entered on, 782.
under L. C. C. Act must be entered on, 782, 783.
copies of, covenant for production of, whether purchaser entitled to, 160, 765.
if authenticated are evidence, 351, 352.
deed barring equitable estate tail must be entered on, within six months, 780.
of consent by protector must be entered on, 781.
evidence of personal consent of protector must be entered on, 781.
inspection of, order for, may be made against lord of manor, 478.
production of, covenant for, on sale of freeholds held of manor, 627.
on enfranchisement, 478.
search in, must be made on purchase of copyholds, 522, 566.
not included in search in Central Office, 522.
of, gives purchaser notice of all that is on them, 972, 981.

COVENANTS,
affirmative and negative, distinguished, 862.
burden of, never runs, 865.
against underletting, how waived, 195, n. (*f*).
apportionment of, upon sale in lots, 196.
arrears of interest on, not recoverable for more than six years, 460.
assigns need not now be mentioned in, 876.
bankruptcy of covenantor, effect of, on his, 877.
benefit of, not affected by non-execution of conveyance, 634, 862, 897.
runs with land, when, 865.
runs with reversion under Conveyancing Act, 1002.
breach of,
acquiescence in, effect of, 871, 873, 874.
assignee of mutual covenants may restrain, 916.
clear, entitles to injunction without proof of damage, 875.
continuing, effect of, on condition as to last receipt for rent, 194.
damages for, awarded under Cairns' Act, when, 869 *et seq.*
not restricted by rule in *Bain* v. *Fothergill*, 1083.
liability for,
of devisee of covenantor under old law, 895.
present law, 896.
of equitable assignee of lease to lessor, 311, 312.
of sub-assignee of lease to original lessee, 311.
not to assign, effect of, 840.
past, purchaser of reversion may sue for, 916.
remedy for
equitable, primarily injunction, 869.
how affected by plaintiff's conduct, 870, 872.
proper, action in High Court, 871.
to insure, formerly a forfeiture, 194.
under Conveyancing Act, 195.
vendor of leaseholds must covenant against, what, 621.
waiver of, applies to particular breach only, 917.
what, justifies entry by purchaser of reversion, 916.

COVENANTS—*continued.*
burden of, never runs at common law, 863.
only runs of negative covenants, 862.
construction of, for renewal, 332, n. (*u*).
restrictive, generally in favour of covenantor, 872, 873.
to make roads, 136, n. (*e*).
to procure supply of water, 634, n. (*r*).
deed of, liable to what stamp duty, 794.
destroyed by purchase of reversion by lessee, 918.
estoppel, whether created by, 912.
for payment of money, remedy on, barred by twelve years, 67, 454, 455.
to trustees of settlement, not satisfied by expenditure on settled land, 1070.
for production of deeds. *See* COVENANT FOR PRODUCTION.
for purchase and settlement,
how far affected by subsequent sale or mortgage, 1069, 1070.
may create lien on subsequently-acquired lands, 1069.
non-performance of exact terms not material, 1068, 1069.
not satisfied by purchase of unsuitable land, 1070.
presumed to have been performed by purchase, 1068.
who may enforce, 1070.
for safe custody, undertaking substituted for, by Conv. Act, 161. *See* UNDERTAKING.
for settlement of future interest, how voidable in bankruptcy, 1031.
for title. *See* COVENANTS FOR TITLE.
habendum subject to rent is not covenant for payment, 629, n. (*y*).
in lease by mortgagor under power runs with reversion, 1001, 1002.
in voidable lease, lessor may sue or be sued on, 1001.
last receipt for rent to be evidence of performance of, 193.
lessor's right to, on assignment of contract for lease, 1181.
liability on, discharged by compulsory breach under statute, 1097, 1098.
of covenantor after alienation, 876, 877.
of lessor equitable assignee of underlease, 312.
of purchaser of one lot on sale of building estate, when other lots unsold, 628.
vendor need not state whose is, 134.
must be by deed, 615.
nature of, if fatal to purchaser's object in buying should be pointed out, 106.
on sale of leaseholds need not be pointed out, 105.
needs no particular form of words, 615.
negative,
breach of, injunction the only remedy, 870.
constructive notice of, sufficient, 868.
Court has no discretion to refuse to enforce, 1169.
distinguished from affirmative, 862.
implied, how far enforceable, 1167—1170.
instances of, running in Equity, 864.
new easement can only be created by, 612.
not affected by rule against perpetuities, 865.
restraint of trade, 865.
notice of, liability of purchaser, how affected by, 863.

COVENANTS—*continued.*
negative—*continued.*
principle of, running in Equity, 863.
unenforceable against purchaser for value without notice, 868.
notice of, in deed not forming part of title, purchaser has not, 970, 981, n. (*d*).
unusual, in head-lease, purchaser of derivative lease has not, 983, 984.
of agent by deed renders him personally liable, 212.
of lessor and lessee stand on special footing, 862.
of purchaser with vendor,
against user, agreement for, how secured in conveyance, 633, 634.
may be binding though he do not execute conveyance, 634, 862, 897.
on purchase by trustees of settlement, by tenant for life, 633.
not personal, 633.
in consideration of annuity, 634.
of equity of redemption, 628, 629.
of freeholds subject to quit rents or covenants, 631.
of leaseholds, 629, 631.
from executor or administrator, 630, 631.
of bankrupt from trustee, 629.
of minerals to be paid for by instalments, 634.
of residue of estate after previous sale of part, 633.
of reversion, 629, 668.
remedies on, 862 *et seq.*
of vendor to be entered into, with whom, 628.
restrictive,
as to user will vitiate sale, 156.
construction of, generally in favour of covenantor, 872, 873.
created on conveyance by exception, 576.
inquiry should be made for, 520.
not in particulars, conveyance cannot be made subject to, 576, n. (*c*).
not on abstract, conveyance cannot be made subject to, 576, n. (*c*).
on sale of building estate, 864, 865.
whether enforced a question of intention, 866, 867.
power of original vendor to release, 868, 872.
vendor bound to enter into, as to lot retained by him, 136.
statement as to, must not be misleading, 108, 134, 156, 191.
to pay off mortgage on purchase of equity of redemption,
made with mortgagor,
does not constitute charge of debts, 919.
create personal liability to mortgagee, 919.
discharge land, 919.
made with mortgagee,
whether shows intention to charge land, *quære*, 919.
to pay rates, &c., includes what, 192.
to settle after-acquired property, not extended by recital, 595.
to surrender, effect of covenants for title in, 879.
usual in lease, what are, 191 *et seq.*
separation deed, Court will decide what are, 1166.
void as contrary to rule against perpetuities, when, 875, 876.
what to be contained in conveyance, may be decided on vendor and purchaser's summons, 635.

COVENANT FOR PRODUCTION,
acknowledgment, substituted for, 160, 161, 627. *See* ACKNOWLEDGMENTS FOR PRODUCTION.
benefit of, runs with land, 876.
burden of, does not run with land, 876.
by purchaser of largest lot, costs of, borne by other purchasers, 766.
expense of, formerly borne by vendor, 161, 765.
now borne by purchaser, 161, 162, 765, 766, 799.
inability of vendor to give, does not remove liability to produce, 470.
not a blot on title, when, 160, 322, 626, 627, 880.
indorsement of, on title deeds retained, expedient, 766.
mortgagee bound by, how far, 476.
concurring in sale must give, as to deeds retained, 766.
of negative evidence as to title, purchaser not entitled to, 764.
on purchase of estate to be settled, who gives, 633.
purchaser entitled to, on completion, 160, 626.
extent of the right, 160.
refusal to give, whether breach of covenant for further assurance, 837.
stamp duty payable on, 626, n. (*d*), 794, 797.
vendor liable under, entitled to indemnity from purchaser, 633.
cannot retain as against purchaser, 763.

COVENANTS FOR TITLE,
against known defect should be express, 625, 886.
subsisting charges should provide for payment, 625.
benefit of,
apportionment of, 879.
heir or assignee not named in, entitled to, 878.
in covenant to surrender does not run, 879.
runs with estate of original covenantee, 879.
land, 876.
who entitled to, 877, 878.
bind whom, 877, 895.
breach of,
damages for, measure of, 892—894.
recovered by tenant for life not apportioned for remainderman, 897.
when claimable in administration action, 895.
not effected by act of God, 885.
remainderman can sue for, 897.
remedy for, in equity, 880.
right of action on, survives to whom, 891.
Statute of Limitations runs from what date in respect of, 881.
burden of, does not run with land, 876.
by bankrupt, may be dispensed with, 583.
by beneficiaries on sale by trustees, 617, 618, 624, 625.
by husband on sale of wife's property, 620, 621.
by joint tenants, how restricted, 624.
by mortgagee concurring to release debt, 623, 624.
selling under power, 94, 146, 197, 622 *et seq.*
condition as to, is usual, 146, 197.

COVENANTS FOR TITLE—*continued.*
by mortgagor concurring in sale by mortgagee, 624.
by tenant for life, 618.
whether should extend to acts of testator, 619, 620.
by tenant in common, how far limited, 621, 622, 624, 895.
by trustees, generally, 94, 146, 197, 622 *et seq.*
condition as to, is usual, 94, 146.
classification of, 889, 890.
Crown gives no, 624.
easements actual not apparent covered by, 886.
estoppel does not create, 595, 636, 912.
examination of, on examination of deeds, 480.
extent of, 616, 617, 888, 889.
for freedom from incumbrances, how broken, 882.
for further assurance,
applies to disentailing assurance, how far, 888, 910.
how broken, 887, 888.
time allowed for performance of, 888.
title perfected under, instances of, 909, 910.
for quiet enjoyment,
"acts" and "defaults," distinction between, in, 884.
breach of, is question of fact, 883.
effect of, 884.
extends to wrongful eviction, when, 887.
how broken, 882, 884—887.
in lease, restrictive words in, 886.
is independent covenant, 883, n. (*a*).
not a warranty to use land for any purpose, 885.
not enforced by injunction against illegal distress by vendor, 880.
for production. *See* COVENANT FOR PRODUCTION.
for renewal, reversioner must give on death of *c. q. v.*, 623.
for right to convey,
how broken, 881.
how restricted, 882.
purchaser may sue upon, before disturbance, 881.
for validity of lease, construction of, 881.
"give," "grant," do not imply, 635.
implied, as to leaseholds, when, 636, n. (*e*).
implied by Conveyancing Act, 615.
by beneficial owner, 615, 616.
extent of, 616, 617.
on conveyance of leaseholds, 616.
by person directing as beneficial owner, 620, n. (*h*).
on sale by joint tenants should be restricted, 624, n. (*t*).
implied by "demise," 636.
"recital," when, 636.
in bargains and sales in Yorkshire, when, 635.
in conveyances under L. C. C. Act, by word "grant," 635.
incumbrances covered by vendor's, purchaser may discharge out of purchase-money, 905, 906.
meaning of particular expressions in, 884—886.
mortgagee cannot release, as against mortgagor, 895.

COVENANTS FOR TITLE—*continued.*
on sale of leaseholds in lots by way of underlease, 621.
whether should extend to breaches before vendor's title, 621.
to railway company, 618.
relieved against in equity, when, 897.
restrictive words in, construction of, 889—891.
solicitor liable for allowing improper, 614.

COVERTURE. *See* MARRIED WOMAN.
effect of, on right of married woman concurring in improper sale, 297.
estate of husband during, bound by judgments, 526.
fraud not relieved against by, 13, 32, 517, 947.

CREDITOR,
assisting in preparation of fraudulent settlement, 1030.
deed for benefit of, not fraudulent under 13 Eliz., 1026.
not parties to it, revocable, 1020.
principle governing, 1020.
execution, purchase by, of property taken under execution, good, 44.
judgment. *See* JUDGMENT.
lands delivered in execution to, Court may direct sale of, 1312.
may obtain appointment of receiver, where he has legal remedy, 547.
without redemption action, 548.
summary order for sale under 27 & 28 Vict. c. 112.. 543, 544.
not a purchaser within 27 Eliz., 540, 1003.
not registered at date of foreclosure decree, rights of, 1115.
postponed to *cestui que trust*, 548, 549.
priority not obtained by, by giving notice, 550.
proper party to conveyance, when, 580, 581, 834.
purchase by, of part of extended lands satisfies judgment, 1043.
remedy of, by sale not enforceable for a year, 542, 543.
rights of, under 1 & 2 Vict. c. 110..531.
takes subject to equities against debtor, 548, 549.
may restrain purchaser from heir or devisee from paying purchase-money, 703.
of purchaser entitled to relieve against vendor, on what terms, 285.
priority of, to equitable mortgagee from heir, 703.
purchaser before conveyance, 703.
purchase by, of bankrupt's estate, voidable, 44.
rights of, against land descended or devised for debts, 701, 702.
fraudulent settlement not barred till debt is, 1030.
time, what allowed to, for impeaching sale, 54.
trustee for, purchase by, with consent of majority, 50.
vendor's lien, entitled to marshalling for, when, 828, 829.
postponed to, 825.
protection against judgment, when, 834.
what, may impeach fraudulent settlement under 13 Eliz., 1028, 1030.

CROPS,
agreement for sale of,
after severance, not within s. 4 of Stat. of Frauds, 234.
between outgoing and incoming tenants may be parol, 235.

CROPS—*continued.*
agreement for sale of—*continued.*
by landlord to incoming tenant must be in writing, 235.
emblements may be by parol, 235.
growing, must be in writing, 234.
condition for taking over, by purchaser, 148.
growing, are within Bills of Sale Acts, 234, n. (*h*).
purchaser entitled to, from completion, 148, 149.
tenant in common need not account for, 1051.
value of, may be recovered on *quantum valet*, 235.
vendor entitled to, till date of completion, 285.
in possession may cut, 285, 507, 1215.
must account to purchaser for, 285, 1215.

CROWN,
Act of Parliament not naming, does not bind, 468.
allowances not made on ejectment by, 563.
claim by, for succession duty, purchaser how far protected against, 958.
claim of, on conviction for felony, now abolished, 16.
compulsory sale of convict's lands does not entitle, to purchase-money, 298.
costs, on sale by, of debtor's lands, not allowed, 1337, n. (*a*).
covenants for title, not given by, 624.
debts do not affect lands, till registry of execution, 524, n. (*r*), 563, 564, 958.
registration of, 563, 958.
satisfaction of, 564, 670.
entered in Central Office, 564.
search for, against mortgagees, &c. unnecessary, 539.
how far necessary, 562.
estates granted by, affected by judgment, 525.
abstract on sale of, how framed, 336.
grant of several fishery in tidal waters, bad since Magna Charta, 426.
reverting to Crown, good, 426, n. (*x*).
grant presumed, when, 366.
proved, how, 359.
to fluctuating body raises presumption of incorporation, 24, n. (*o*).
vendor must protect himself from production of, 188, 189.
state place for inspection of, 472.
lien of, extent of, 562.
Locke King's Acts do not apply to, 922.
purchase by lunatic, when set aside by, 31, 32.
rights of, against estates of aliens, 26.
to property of traitor or felon, under old law, 15, 33.
soil of inland fresh water lakes does not belong to, 428.
Statute of Limitations does not apply to, 467, 468.
tidal river bed vested in, unless granted, 419.
title to, extends how far, 419.
is subject to public right of navigation, 419.
title by adverse possession against, may be forced on purchaser, 468, n. (*r*).
voluntary conveyance to, within 27 Eliz., 1003, n. (*c*).

CULTIVATION,
compensation for misdescription as to, 738.
vendor in possession liable to maintain, 284, 733.

CURATOR
of convict's property. *See* CONVICT.

CURTESY,
estate by, subject to judgments, 526.

CUSTODY,
of deeds. *See* COVENANT FOR PRODUCTION; TITLE DEEDS; UNDERTAKING.
proper, what is, of documents for purpose of evidence, 353, n. (*t*).

CUSTOM,
as to right to light, of no effect since Prescription Act, 404.
condition not construed so as to contravene, 122.
contract explainable by evidence of, 262, 1091.
local mining, 133, n. (*h*).
local, tithes by, outside jurisdiction of commissioners, 400.
married woman could convey land by, 9.
notorious, need not be disclosed by particulars, 132.
of manor,
as to tithes not within 2 & 3 Will. IV. c. 100..401, n. (*f*).
evidence of, 358, n. (*g*).
for steward to prepare surrender, good, 570.
particulars need not mention, 132.
precluding resulting trust, bad, 1055.
to take admittance to all tenements, good, 571.
parson and churchwardens are by, corporation to purchase land, 25.
timber, meaning of, interpreted by custom, 150.

CUSTOMARY FREEHOLDS,
devise of, lawful, 580, 785, n. (*k*)
Dower Act does not apply to, 586, 781, n. (*q*).
enfranchised, right of purchaser of, to call for title to enfranchise, 330.
equitable estate of married woman in, passes by acknowledged deed, 648.
extendible under old law, how far, 527.
present law, 531—534, 537.
liable to heriots, 131, n. (*e*).
on sale of, liability of, to heriots need not be stated, 131.
quit rent need not be disclosed, 132.
with land of other tenure, stamp duty must be apportioned, 597, 598.
Satisfied Terms Act does not apply to, 330, 576, 577.

CUSTOMARY HEIR
may sue for breach of covenants for title before admittance, 891.

DAMAGES,
against grantee of riparian owner only if damage proved, 415.
agent liable in, for want of authority to contract, 1074.
auctioneer when liable to purchaser in, 203, 204. *See* AUCTIONEER.
condition for liquidated, in lieu of deposit, 185.
costs of defending action on covenant recoverable as, 631, n. (*k*).

DAMAGES—*continued.*
for alteration of property by vendor, measure of, 507, n. (*b*).
for breach of contract,
condition as to, no defence to specific performance, 1182, 1183.
inability to recover at law, how far a defence to specific performance, 1183.
inadequacy of as remedy, is foundation of specific performance, 1105.
not recoverable formerly in equity, 1103, 1104.
in the alternative, when, 1104.
recoverable in action for specific performance, 1113, 1248, 1256.
equity, in lieu of or as well as specific performance, 1104.
only where action for specific performance would lie, 1104.
on sale of chattels, what, 1077, 1078.
recovery of, defence to action on contract, 1097.
specific performance, how far, 1217.
right to, of purchaser,
after conveyance, in what cases, 905.
at law, 1072.
descends to his personal representatives, 1084.
what, 1076, 1077.
right to, of vendor,
condition for forfeiture of deposit does not destroy, 1085.
descends to his representatives, 1084.
where purchaser is in possession, 1084.
for breach of covenant for title,
not apportioned for remainderman, 897.
when claimable in administration action, 896.
for breach of negative covenant,
person not bound to accept, in lieu of injunction, 870.
for deficiency on re-sale, 185, 1248.
deposit calculated in estimating, 185.
forfeiture of deposit no bar to, 185.
for interference with access to adjoining road or river, 412, n. (*z*).
for loss of bargain, purchaser cannot recover, 1078.
exceptions to rule of *Flureau* v. *Thornhill*, 1079—1081.
rule applies to damages for delay as well as non-performance, 1083.
where performance would be breach of trust, 1083.
rule confined to cases of contract, 1083.
rule established by *Bain* v. *Fothergill*, 1081.
for misrepresentation, none in equity on rescission, 116.
for prior act of vendor, purchaser may recover after conveyance, 926.
for subsidence, right to, arises when, 421.
for want of title in mortgagor to grant lease, 1171, n. (*h*).
in lieu of injunction,
awarded where acquiescence has barred right to injunction, 871.
jurisdiction to award, not altered by repeal of Lord Cairns' Act, 871.
not forced on person entitled to injunction, 871, 872.
under Lord Cairns' Act, when, 869 *et seq.*

DAMAGES—*continued.*
measure of,
in action on covenants for title, 892, 893, 894.
may exceed purchase-money, 895.
on breach of divided covenant for title, 879.
on lease granted without title, 893.
when purchaser claims specific performance, 286, n. (*t*).

DEAN AND CHAPTER,
on sale by, time is of essence of contract, 484.
on sale of lease granted by, title to be shown, 331.

DEAN FOREST,
mining customs of, 133, n. (*h*).

DEATH,
after certificate absolute, of purchaser from Court, 1344.
before certificate absolute, of highest bidder on sale by Court, 1329.
before completion, of either party does not avoid contract, 291.
before completion, of purchaser,
intestate and without heir, vendor's rights on, 289.
rights of representatives on, 303 *et seq.*
before completion, of vendor,
on sale of fee by tenant in tail in possession, 325.
rights of representatives on, 293 *et seq.*
certificate of, purchaser need not accept as evidence, 392.
declarations as to, how far evidence, 393. *And see* PEDIGREE.
evidence of, burial register is proper, 392.
what required by Bank of England, 361, n. (*c*).
of ancestor, right of heir on, to have buildings contracted for completed, 305.
of annuitant pending contract, effect of, 286, 287.
of *cestui que vie*, pending contract, effect of, 286, 287.
proof of, 387.
of husband, effect of, on contract to sell wife's chattels real, 9, 1122.
whether wife may adopt his contract after, *quære*, 1125.
of proposer, revokes unaccepted offer, 267.
of tenant for life, pending contract, effect of, 286, 287.
presumption of,
arises in Scotland after seven years, 385, n. (*o*).
between rival claimants, how raised, 385—387.
by non-receipt of tidings, 386, 387.
evidence required that all inquiries have been made, 386.
between rival claimants not applicable as between V. & P., 389.
between V. & P. depends on circumstances of case, 385.
does not arise after seven years, 385.
of steward of manor, on sale of copyholds, 351, n. (*g*).
of time of, 387 *et seq.*
none at law, 388, 389.
without issue, proof of, 390.

DEBENTURE,
holder of, has no charge on superfluous lands, 1221.
land subject to, what evidence purchaser may require, 333.

DEBT,
charge of,
beneficial devise with, whether concurrence of executors necessary to sale under, 697 *et seq.*
Lord St. Leonards' Act, s. 18, does not meet difficulty, 700.
devise subject to, does not create express trust, 439.
devise to trustees with, gives trustees power of sale, 696.
whether consent of tenant for life is necessary, 700, 701.
executor selling under, may sell pending creditors' action, 65.
time allowed to, 65 *et seq.*, 694, 695.
implied, how, 692, 693.
may be express or implied, 692.
not an express trust, 439.
where no one to make sale, gives executors power of sale, 694.
under Lord St. Leonards' Act, s. 16..695.
does not give administrator power, 695, n. (*t*).
compensation payable by R. Co. is not, 711, n. (*t*), 1087.
conveyance in consideration of, is liable to stamp duty, 597.
pre-existing, puts purchaser on inquiry, 987.
deficiency on resale is, provable in bankruptcy, 1248.
specialty, 1248.
payment of,
direction for,
and devise subject to, upon trust, is express trust, 439.
not evidence of contrary intention within Locke-King's Act, 923.
sale of land for, gives executors power of sale, 693, 694.
infant may convey for, of ancestor, 3.
purchaser from heir or devisee not bound to see to, 703.
residuary devise is specific for contribution to, 309, n. (*i*), 701, n. (*s*).
trust for, enables trustees to give good receipt for purchase-money, 673, 674.
not if debts are specified, 674.
not if purchaser has notice that all debts are paid, 678.
trust for, is express trust, 438.
trustee selling for, need not show their existence, 679.
rights of creditors against testator's realty for, 701, 702.
destroyed by alienation by heir or devisee, 702.
do not bar widow's right to dower, 702.
remain against heir or devisee personally, 702.

DECEIT,
action of, against stranger, what will found, 104, 114.
vendor, what will found, 113, 114.
for delivery of defective abstract, 184, n. (*n*).
misrepresentation sufficient for, is ground for setting aside after completion, 898 *et seq.*
principles of, 115.

DECEPTIVE. *See* MISDESCRIPTION; MISREPRESENTATION.
plan, reference to, in particulars, is fatal, 133, 134, 152, 153.
statements, as to occupancy, 127, n. (*f*).
in particulars, are fatal, 133, 134.

DECISION,
of inferior Court, effect of, in making title doubtful, 1231, 1232, 1234, 1236.
reversed during action, action founded on, dismissed without costs, 1263.

DECLARATION,
by dead relatives admissible to prove failure of issue, 390.
as to pedigree, 393.
who are relatives in this reference, 393.
by husband and wife inadmissible to prove non-intercourse, 382.
by party in the same interest admissible, 397.
by strangers acquainted with family, 393.
must be made *ante litem motam*, to be admissible, 395, 396.
of identity of parties should accompany extracts from registers, 392.
of trust must be signed by beneficial owner, 1054.
not necessary to raise resulting trust, 1055.
parol, varying particulars, effect of, 123, 124.
recitals, when treated as, 397.
statutory,
by vendor, value of, *quære*, 377.
copy of, should accompany abstract, 346.
defect in evidence may be supplied by, 166, 167.
of identity, acceptance of, may waive strict right, 496.
of non-exercise of power, whether claimable, 372, 373.
of non-payment of land tax, not evidence of redemption, 398.
particulars of, should be stated in conditions, 167.
purchaser entitled to, that vendor has no other evidence than that specified, 173.
what, admissible to prove purchase out of trust moneys, 1065, 1066.
rebut resulting trust, 1059.

DECREE. *See* ORDER.
for foreclosure. *See* FORECLOSURE.
for partition, who bound by, 1302. *See* PARTITION.
for specific performance. *See* SPECIFIC PERFORMANCE.

DEED,
accidental insertion in, of clause contrary to agreement, effect of, 838.
agreement by, not within Statute of Frauds, 227, 228.
ancient, construed by reference to modern usage, 377.
attesting witness has not notice of contents of, 985.
blank, effect of filling up, after execution, 274, n. (*h*).
covenant for production should include what, 626 *et seq.* *See* COVENANT FOR PRODUCTION.
defective, relief on, when afforded, 909.
proof of, how far supplied by presumption, 365.
delivery of, what constitutes, 639.
enrolled, how proved, 354.
not included in search in central office, 522.
in Chancery, copy when evidence of, 357.
evidence of enrolment of, 356.
entered on court rolls, purchaser has notice of, if he search court rolls, 972, 981.

DEED—*continued.*
erasures in, presumed to have been prior to execution, 480.
execution of, by attorney, mode of, 642.
requisitions and inquiries on, 353.
how far necessary to give remedy on covenant, 634, 862, 897.
irregular, gives purchaser notice of fraud, 978.
formalities of, presumed, 369.
from proof of signature, 369.
rule applies to all written documents, 369.
whether applicable to deed of corporation, *quære*, 369.
lease for more than three years must be by, 228.
mutilation of, does not render inadmissible, 369.
notice of, forming part of title gives purchaser notice:
of all he might have learned on examination, 970, 973, 980.
of its deposit on mortgage, 970, 974.
secus, if it is not part of title, 970, 981, n. (*d*).
of infant, effect of, 2, n. (*a*).
of lunatic, how impeached, 6.
of married woman. *See* ACKNOWLEDGMENT BY MARRIED WOMAN, and MARRIED WOMAN.
produced as negative evidence, purchaser not entitled to custody of, 764.
proof of, 353 *et seq.*
rectification of, failing to carry out common intention, 838.
for mutual mistake, 839.
registered, purchaser has notice of, if he search register, 972, 981.
relating to several matters liable to stamp for each, 792, 795, 796, 797.
stamps obliterated on, presumed to have been correct, 370.
stamps on lost, presumed to have been proper, 370.
not, if shown to have been improperly stamped, 370.
burden of rebutting presumption on person denying, 370.
statutory forms as to, compliance with, no presumption of, 370.
e.g. enrolment of charity conveyance, 370.
surrender of estate to make recovery valid, 370, 371.

DEFAMATION
of title, when action lies for, 120.

DEFAULT,
account on footing of, when allowed against purchaser on eviction, 1032—1034.
condition for payment of interest in case of purchaser's, effect of, 143.
meaning of, in covenant for title, 885.
of purchaser, renders him liable for interest, 708 *et seq.* *See* INTEREST.
of vendor, relieves purchaser from notice of appropriation, 709 *et seq.* *See* INTEREST.
remedies of purchaser at law on vendor's, 1071 *et seq.*
wilful default,
account on footing of, when allowed against vendor, 709, 733, 854, 903.
of vendor alone, prevents interest from running, 144, 719, 722.
what is, 723.
delay from adverse claim is not, 726.
going abroad just before date for completion, 724.

DEFAULT—*continued.*
wilful default—*continued.*
what is—*continued.*
imperfect title is not, 724, 725, 726.
omission to deliver abstract, 723.
suggestions as to what should be the rule, 724, 725, 726.
wilful and unnecessary delay, 724.

DEFECTS. *See* LATENT; PATENT.
acts of ownership after discovery of, effect of, 502, 503.
compensation for assessable, purchaser entitled to, 738, 739. *See* COMPENSATION.
what are assessable, 738, 739.
compensation forced on purchaser for what, 1205, 1206.
concealed, acceptance of title does not include, 496.
concealment of, from agent, renders vendor liable for his representation, 103.
prevents vendor from rescinding, 180, 184.
contract avoided by what, 129.
contract, not avoided by, if clearly stated, 168—170.
defence to specific performance, what are, 1198—1204.
in execution of power, what may be supplied, 946.
in title. *See* SPECIFIC PERFORMANCE; TITLE.
knowledge of, evidence of, when admissible, 125, 129, 1203—1205.
immaterial, if good title contracted for, 165, 1205.
known, covenant against, must be express, 625, 886.
on sale by Court,
Court will not conceal by special conditions, 1326.
entitle purchaser to be discharged, when, 1335, 1336.
reconveyance ordered for, on what terms, 903.
remedies of purchaser for, after completion, 898 *et seq.*
vendor must not conceal, or divert attention from, 102.

DEFENCE,
of purchase for value without notice, when available, 939—941. *See* PURCHASER FOR VALUE WITHOUT NOTICE.
should state true terms of agreement, 1150.
Statute of Frauds,
is not, to parol in defendant's favour, 1148.
must be pleaded, 1148.
not raiseable as on demurrer as, 1148.
to action for specific performance,
non-performance by plaintiff of collateral agreement is not, 1157.
omission of term of contract by consent is not, 1159.
part performance of subsequent parol variation is, 1159.
to action on bill or note for purchase-money by vendor, what is, 1089.
contract at law, 1095 *et seq.*
impossibility of performance, 1097, 1098.
invalidity of contract, 1095.
release of breach, 1097.
waiver of contract, 1096, 1097.
I.O.U. for purchase-money, vendor's default is, 1072.

DEFENCE ACTS,
limited owner may sell under, 18.

DEFENDANT
may have conduct of sale in foreclosure or redemption action, 1324.

DEFICIENCY,
compensation for, 735 *et seq.*
effect of condition against, 736, 737.
knowledge on, 735.
how far covered by qualifying expressions, 736, 738.
in proof of document, how far supplied by presumption, 365.
of evidence of identity, how far covered by ordinary condition, 174.
on re-sale,
condition providing for, proper, 184.
forfeited deposit taken into account, 680.
how provided for in decree for specific performance, 1248.

DELAY,
by public company, remedy of landowner for, 248, n. (*b*), 1100, 1101.
costs, how affected by, 1214, n. (*u*), 1260, 1263.
defence to specific performance, when, 1213—1215.
in claim for compensation, effect of, 730.
in completion,
arising from title may be cured upon reference, 487.
does not entitle purchaser to damages, 1083.
" from whatever cause," interest payable for, 143, 144, 719, 720.
interest, when payable by purchaser, 708 *et seq.* *See* INTEREST.
purchaser acceding to, cannot appropriate purchase-money, 718.
shown on abstract, mere protest as to, not sufficient, 491.
must be promptly objected to, 491.
purchaser should rescind on delay becoming certain, 491.
wilful, by vendor relieves purchaser from interest, 723, 724.
may avoid contract, 486.
in delivery of abstract, effect of, 140, 141, 346, 347.
letter, in reply to offer, effect of, 254.
arising in post office, effect of, 254.
in payment of annuity, where it is consideration for sale, 288.
purchase-money, vendor's remedies for, 1217—1220.
in re-sale by trustees may make them liable, 91.
in sale by executors under implied power, effect of, 694, 695.
trustees, purchaser should inquire into, 62, 63.
rights of *c. q. t.* for, 62, 63.
in setting aside,
family arrangement, 849.
voidable transaction, effect of, 54, 841, 855.
amounts to confirmation, when, 54.
infant, when barred by, 30.
less period allowed than Statute of Limitations, 54.
poverty, how far excuse for, 55.
remedy may be barred by, while right subsists, 855.

DELAY—*continued.*
in suing on covenants,
bars relief, when, 874.
ground for giving damages, not injunction, when, 870.
reference back after certificate precluded by, 1242.
before trial precluded by, 1227.

DELEGATION,
of sale by auctioneer, improper, 204.

DELIVERY,
of abstract,
condition as to, 140, 141.
neglect of, effect of, 346, 347.
not part-performance, 1138.
on sales by Court, how obtained, 1335.
waiver of, not waiver of objections, 496, 497.
of bill by solicitor may be compelled after payment, 816, n. (*o*).
of deed, presumption of, 369.
what constitutes, 639.
of deeds, by mortgagee to mortgagor, effect of, on priority, 950—953.
can be enforced outside Equity under Judicature Acts, 940.
decree for specific performance should direct, 1247.
how far enforced against *bonâ fide* purchaser without notice, 939—941.
written direction as to, may constitute agreement, 239.
of land in execution. *See* JUDGMENT.
of possession, how enforced, 1125.
part-performance, how far, 1136.
to purchaser does not affect vendor's lien, 825.

DEMISE. *See* LEASE.
use of word, implies covenant for title, when, 636.

DEMURRER,
Statute of Frauds cannot be raised by practice in lieu of, 1148.

DENIAL,
of claim on estate binds party making it, 109, 517.

DENIZATION,
effect of, 28.
letters of, may still be granted, 28.

DEPOSIT,
action for, after default on notice to complete, need not be brought, 488.
restrained pending vendor's suit for specific performance, 1076, 1077.
auctioneer,
cannot deduct commission out of, on interpleader, 205.
costs out of, on interpleader, 206.
entitled to interest on, 207.
insolvency of, vendor bears loss of, arising from, 223.
is stakeholder of, 205, 1075.
may be sued for, 1075.
may interplead as to, 205.

DEPOSIT—*continued.*
auctioneer—*continued.*
may pay into Court under Trustee Relief Act, 206.
to vendor after completion, 206.
not liable for, after payment to solicitor having conduct of sale, 205, n. (*s*).
not vendor's agent in respect of, 1075.
should not be defendant in action for specific performance where, small, 206.
by railway company,
application for, how made, 510, n. (*w*).
landowner has no lien upon, for costs, 510.
when entitled to, 510, n. (*w*).
lien for unpaid purchase-money not precluded by, 514, 515.
mortgage on land must be covered by, 511.
must be for price of whole house under sect. 92..245.
include fixtures, 245.
not applicable for payment of mortgage on lands, 511.
payment out of,
consent of landowner to, 510, n. (*x*).
landowner entitled to costs on, 510.
not made to company without notice to landowner, 510.
remains as security for performance of bond, 510.
to be for value of all land in notice to treat, 508.
made before entry, 508.
how, 508.
within what time, 509.
capital money as between tenant for life and remainderman, 234.
condition for,
forfeiture of, does not destroy vendor's right to damages, 1085.
payment and investment of, 140.
of liquidated damages in lieu of, 185.
forfeiture of,
after, and re-sale, vendor cannot sue for original purchase-money, 185.
may be made in absence of condition, 185.
no bar to action for damages, 185.
relieved against, when, 222.
interest on,
included in costs of vendor and purchaser summons, 1272.
purchaser entitled to, on its return, 727.
not liable for, 727.
recoverable in action for damages on contract, 1076.
on rescission, when, 1075, 1076.
investment of, purchaser not affected by, 221.
except in sale under Court, 221, 222.
lien for, purchaser has, where no title shown, 223.
will be declared, 116.
not only part payment, but also earnest of performance, 185, 220.
of deeds forming part of title, purchaser not inquiring for, has notice of, 970, 974.

DEPOSIT—*continued.*
of deeds, how far part performance of contract for mortgage, 1139, n. (*f*).
of incomplete title deeds does not destroy priority of mortgagee, 987.
on sale by Court, condition as to return of, and discharge of purchaser, 1338.
person appointed to receive, 1327.
security for, 1327.
payment of,
full, should be made, 205.
may be by cheque, 140, 205, 221.
must not be by bill, 221.
should be in cash, 221.
to agent must be made at time and in manner specified, 220.
should not be made without authority, 220.
procured by false statement may amount to obtaining money by false pretences, 117.
purchaser,
cannot elect to forfeit, and avoid contract, 220.
entitled to, may resist action on cheque, 221.
forfeits, if he fails to perform contract, 222, 1089.
from voluntary settlor may recover, 1119.
may recover, after rescinding for vendor's default, 1071.
on contract going off, 207, 222.
with damages for breach of contract, 1072.
must not set off, in account with vendor, 221.
not entitled to recover, where action for specific performance dismissed, 223.
receipt for, may satisfy Stat. of Frauds, 240.
not unless it shows its relation to whole purchase-money, 256.
return of,
not necessary after default on notice to complete, 488.
ordered in action for specific performance, when, 1255.
on rescission for misrepresentation, 116.
where paid under superseded bankruptcy, 223.
purchaser could recover at law, 1256.
purchaser entitled to, with interest, on contract going off, 221.
vendor not bound to make, to lunatic purchaser, 234.
taken into account in assessing damages, 185.
vendor may hold, paid by bankrupt against trustee in bankruptcy, 956.
retain, on death of purchaser intestate without heir, 223.
solicitor of, holds, as vendor's agent not as stakeholder, 220, 1075.

DEPRECIATORY,
condition as to absence of covenant for title, not, 880.
want of stamps and registration may be, 190.
for rescission, not, 178, 198.
conditions,
implied by V. & P. Act and Conv. Act, not, 84.
not to be used by fiduciary vendors, 83, 197 *et seq.*
use of, an objection to title, 198, 200.
what are, 83, 199.
not, 84, 198.

DEPRECIATORY—*continued.*
remarks by purchaser, effect of, 120.
special conditions, if necessary, are not, 200, 201.
power to sell under, does not authorize, 199, 200.
unless necessary, are, 198—200.

DERBYSHIRE,
mining customs of, 133, n. (*h*).

DESCENT,
of legal estate on death of vendor before conveyance, 293, 294.
presumption that person last entitled was stock of, 380, 381.
proof of ancestor's intestacy required, if recent, 376.

DESCRIPTION,
accurate, though misleading, not misdescription, 152, 153.
condition as to identity does not meet erroneous, 174.
in particulars. *See* PARTICULARS.
of parcels, by reference to occupancy, effect of, 602.
full not affected by subsequent error, 602, 603.
particular controls general, 603.
of parties in conveyance, 589.
of writer is not signature to contract, 269.
specific, in devise, when limited to date of will, 308, 309.
vague, on court rolls sufficient, 175.
what insufficient within Stat. of Frauds,
of parties,
"vendor," unless described in writing connected with contract, 252.
"your client," in letter to solicitor, 252.
what sufficient within Stat. of Frauds,
of parties,
abstract may be read with contract for purposes of, 253, n. (*e*).
"by direction of the proprietor," 253.
endorsed on envelope, connected with enclosed letter, 253.
letter, 253.
entry in seller's book, aided by parol evidence, 252.
"executor of A. B.," 253.
supplied by writing connected with contract, 253.
"the vendor," if described in writing connected with contract, 252.
"trustees selling under a power of sale," 253.
of the property, 254, 255.
may be aided by parol evidence, 255.

DESTRUCTION,
of conveyance, vendor must execute duplicate, 888.
of deeds, effect of, on title, 159.
liability of mortgagee for, 477.
of estate. *See* DETERIORATION.

DETERIORATION,
abatement for, after payment into Court, 1247.
accidental, after contract, purchaser bears, 197, 286, 287, 913, 1329, 1332.

DETERIORATION—*continued.*
accidental, no defence to specific performance, 1185.
by purchaser in possession, remedy for, 1218. *See* PURCHASER IN POSSESSION.
when restrained, 1222.
trustee liable for, on his purchase being set aside, 52.
vendor liable after contract for, what, 284, 733.
whether as mortgagee in possession, *quære*, 733—735.

DETERMINABLE,
interest, purchaser from Court bears loss of, before certificate absolute, 1329.
when sold, should be so described, 131.
nature of property sold makes time essential, 483, 484.

DEVISE,
ademption of, by sale to railway company, 298.
beneficial, of estate charged with debts, whether devisee can sell alone under, *quære*, 697 *et seq.*
by specific description,
applicable at death, but not at date of will, 300.
of land subject to option of purchase in strict settlement, effect of, 302.
conditional on purchase of other estate, effect of neglect to purchase on, 98.
general,
bars right to dower, 614.
effect of devise of trust estates on, 301, n. (*y*).
on lands contracted for, 307.
to be sold, 301.
republication of will under old law on, 308.
insufficient root of title, 338.
raises election, 614, n. (*h*).
trust estates pass under, when, 376.
joint tenancy by, how converted into tenancy in common, 1050, 1051.
of copyholds by unadmitted testator, good, 785, n. (*k*).
lawful, 580, 785, n. (*k*).
of estate bought in child's name may put nominee to election, 1062, 1063.
contracted for did not operate after conveyance, 918.
power to, to charity, whether implied from power to hold land, 777, n. (*p*).
prior, effect of contract on, under old law, 295, 301.
present law, 296, 300, 302, 303.
residuary, still specific, 309, n. (*i*), 701, n. (*s*).
revoked by conveyance under old law, when, 306.
specific, ineligible root of title, 338.
of lands contracted to be sold, effect of, 302.
subsequently-acquired interest passes under, 918.
to infant of property contracted to be sold, effect of, 302.
to trustees of estate charged with debts gives them power of sale alone, 696, 697.

DEVISEE,
beneficial, of land charged with debts not an express trustee, 439.
contract enforceable against, may be carried out by representatives, 663.

DEVISEE—*continued.*
conveyance by, liability to creditor, of land discharged by, 702.
personal, not discharged by, 702.
costs of getting in legal estate from infant, how borne, 799, 800.
estopped from denying testator's title, 466.
in remainder dealing with expectancy, what relief granted to, 845.
of covenantor, how far bound by administration action, 896.
liability of, under old law, 895.
present law, 896.
of estate charged with debts, power of sale of, without executor, *quære*, 647 *et seq.*
directed by will to be purchased, rights of, 305, n. (*d*).
of executory, right of, dates from possession under Stat. of Lim., 446.
of mortgaged property bear the debt rateably, 920.
of purchaser,
dead before completion, power of disposition of, 304.
relative rights of heir and, under old law, 895.
present law, 896.
rights of, how affected by Locke King's Acts, 304.
of surviving trustee can make good title, when, 682, 683. *And see* HEIR.
of vendor,
generally entitled to property till time fixed for completion, 296, 302.
not entitled to vendor's lien, 300.
rights of, how affected by Wills Act, 303.
on mutual abandonment of contract, 300, 303.
takes land usually merely as trustee to carry out contract, 302.
purchasers from,
has priority over purchaser from heir, if he first register, 772.
must see to payment of legacies, 703.
registration of will, 770, 771.
not bound to see to payment of debts, 703.
residuary and specific, contribute rateably to debts, 701, n. (*s*).
sale by, of property already his with devised property, is not notice of breach of trust, 679.
who is executor may sell estate as his own, 678.
need not obtain concurrence of co-executors, 678.

DEVON,
mining customs of, 133, n. (*h*).

DIGNITIES,
judgments affect estates granted in support of, 525.

DILAPIDATIONS,
after contract vendor liable for, 733.
on what footing, 733—735.
amount due for, may be set off against retiring pension, 281, n. (*q*). *And see* ADDENDA.
compensation for, 152, n. (*y*), 733, 738.
stipulation as to not making good, not simony, 281.

DILIGENCE,
vendor bound to use, in describing property, 152.

DIMENSIONS,
misstatement as to, may be too large for compensation, even at suit of purchaser, 151.
what is material, 157.
should be accurately stated in the particulars, 133.
DIRECTION,
for payment of purchase-money to stranger, when irrevocable, 213, 214.
in creditor's trust deed, when revocable, 1020.
DIRECTOR,
power of, to contract on behalf of company, 273.
purchase by, from company voidable, 39.
DISABILITY. *See* LIMITED OWNERS.
condition for concurrence of person under, fraudulent, 165.
does not prevent jurisdiction under S. E. Act, 1290 *et seq.*
prevents conversion on compulsory sale, 297, 298.
sale under Partition Act, 1303.
remainderman on estate tail barred by time has no period allowed for, 449.
request of person under, for sale under Partition Act, 1306, 1308.
under Stat. of Lim., does not apply as between mortgagor and mortgagee, 434, n. (*c*).
maximum period allowed for, is thirty years, 435.
six years allowed from cesser of, 434.
even where there is a succession of, 434.
DISCHARGE,
inability to give, for purchase-money, a defect in title, 322.
of bankrupt, effect of, 34.
of incumbrances. *See* INCUMBRANCE.
of purchaser on certificate against title, 1242, 1243.
trustee's receipt to be a, condition for, 200, 201.
when a good. *See* INTENTION; PURCHASE-MONEY; RECEIPT.
DISCLAIMER,
by defendant in action for specific performance, effect of, on costs, 1269, 1270.
when, necessary, 1269, 1270.
by trustee, dispenses with his concurrence in exercise of trust, 685.
does not give heir his powers under will, 681, 682.
effect of, on exercise of power, 686.
by trustee in bankruptcy,
of leaseholds or onerous property, 292, 1126.
powers of Court as to, 630.
purchaser preventing, how far liable to covenants, 630.
relieves trustee from date of vesting, 629.
infant electing to avoid contract must execute, 30.
of interest by married woman must be by acknowledged deed, 651.
of power by executor does not prevent exercise by others, 686.
seeus, in Ireland, 686, n. (*t*).
may now be by deed, 686.
of sale, gives Court jurisdiction to sell, 1316.
renunciation of probate is, by deed, 686.

DISCLOSURE,
duty of purchaser as to, generally, 119, 120.
solicitor acting for both parties, as to, 350.
vendor as to, extends only to material facts, 107.
of change between offer and acceptance, proper, 116.
of defects by vendor, 102 *et seq.* *And see* DEFECTS.
of incumbrances, how far necessary from incumbrancer, 517.
of nature of tenancies, 112.
of professional confidence not allowed, 993, 994.
of value by purchaser unnecessary, 118.
vendor unnecessary, 105.

DISCONTINUANCE,
of possession under Stat. of Lim., 435, n. (*h*).
of user, is not adverse interruption, 432.

DISCOVERY,
against purchaser for value without notice, 939—941.

DISCRETION,
of trustees,
as to mode of investment, 98.
as to time of investment, 98.
sale, 64.
to sell, Court will not compel exercise of, 96.
trusts involving, purchaser need not see to performance of, 673.

DISENTAILING. *See* ENROLMENT.
assurance,
abstract of, should contain deed creating entail, 339.
appointment of person to execute, *quære*, 1348, n. (*u*).
concurrence of protector in, does not destroy power of consent to sale, 88.
costs of, on purchase under L. C. C. Act, payable by company, 805.
enrolled, may be rectified, 1117, n. (*e*).
what evidence of, 357.
enrolment of, evidence of, 356.
vendor pays costs of, 798.
execution of, by tenant in tail in possession on sale of fee, 325, 910.
enforced under specific covenant, 1117, n. (*e*).
necessary to obtain payment out of fund, 759.
not enforced under covenant for further assurance, 888, 1117, n. (*e*).
to settle after-acquired property, 1117, n. (*e*).
order for, under judgment, 537.
of copyholds to be entered on court rolls, 348, n. (*u*), 779, 780. *And see* COPYHOLDS.
order for, at suit of judgment creditor, 1347, n. (*k*).
recitals in, improper, 590.
should be by separate deed from conveyance to purchaser, 575.
contract, defects in not supplied, 946.
not enforceable after death of tenant in tail, 1117.

DISMISSAL OF ACTION,
by plaintiff without costs, when allowed, 1263.
for want of prosecution, pending reference, irregular, 1228.
on failure to pay purchase-money, terms of, 1254, 1255.
on further consideration after reference, 1241.
return of deposit, when ordered on, 222, 1255.
vendor's, without costs, when, 1260, 1261.
without prejudice to action, present practice as to, 1256.

DISPOSITION,
by owner of adjoining tenements, effect of, 408, 409.
power of, of heir or devisee of purchaser dying before completion, 304.

DISPOSSESSION,
under Stat. of Lim., 435, n. (*h*).

DISPUTE,
agreement to accept title "without," is binding, 169.

DISQUALIFIED,
persons, no lien presumed in favour of, 833.

DISSEISOR,
can devise or alien his interest, 465.
persons entering as, are joint tenants, 446.
title of, good after twelve years, 466.
as against all but disseisee, 465.
series of, *inter se*, 466.

DISTRESS,
contract by person in, valid, 841.
defence to specific performance, when, 1207.
for rent,
by vendor after conveyance, not restrained, 1223.
mortgagee's right to, by attornment of mortgagor, 912.
on any part, while whole not barred, good, 467.
on purchase of reversion on lease, what recoverable, 914.
performance of service not subject to, does not prevent statute running, 446.
subject to, is payment of rent, 444.
tenant-in-tail's right to, if barred, bars remainderman, 448, 449.
want of right to, a defect in title to ground rents, 129.
for rent-charge, purchaser of part entitled to, 914, 1044.
not for arrears, 1044.
severance of reversion destroys right of, 914.
laches not excused by, 55.
purchase from person in, relief for, 840, 841.
set aside, when, 46.

DISTRIBUTION,
of purchase-money,
on sale by Court, 1339.
under Partition Act, notice of, how given, 1304, 1305.

DISTURBANCE,
what is a, within covenants for title, 883.

DIVIDENDS,
apportionment of, of joint stock company not allowed, 915, n. (*r*).
to tenant for life on sale of stock, 98.
costs of applications as to, under L. C. C. Act, 805.
on money under L. C. C. Act, person in possession entitled to, 757, 758.
affidavit necessary on petition for payment of, 757.

DIVISION,
of estate, effect of, on prior covenants, 879, 880.

DIVORCE,
child born after period of gestation from, illegitimate, 381.
Court, power of, to alter marriage settlement, 857.
decree of, destroys right to dower, 586.
wife after, is *feme sole*, 13.

DOCKETING,
law of, abolished, 551.
non-registration of docketed judgment, effect of, 555.
notice of undocketed judgments affected purchaser, 528.
under old law, how far necessary, 528.

DOCUMENTS,
abstract should commence with what, 337. *See* ABSTRACT.
contain what, 340, 341. *See* ABSTRACT.
to be compared with when, 348.
condition as to production of, 160, 161.
defective proof of, how far supplied by presumption, 365.
enrolled in Chancery, what copies of, are evidence, 357.
is evidence of enrolment of, 356.
lost, condition as to, 174.
lost, when vendor must prove contents and execution of, 340, 345.
materiality, purchaser's solicitor is judge of, 342.
privileged, what are, 993—996.
production of, not forming part of title, sometimes required, 364.
proof of, by certified copies, 357—361.
examined copies, 361.
public, statements for public purposes in, are evidence, 557.
what are, 357.

DOMICIL,
foreign, appointee under exercise of power by will of person having, liable to duty, 317.
devisee of English realty from testator having, liable to duty 317.
legacies given by person having, whether liable to duty, 317.
law of, does not govern validity of will of immoveables, 364.

DONEE. *See* POWER.
of power of sale, purchase by, how voidable, 35.

DOUBTFUL TITLE,
meaning of, 1229.
practice as to, formerly, 1229.

DOUBTFUL TITLE—*continued.*
practice as to, foundation of, 1230.
now, on questions of fact, 1237.
law, 1236, 1237.
what doubts constitute a, 1230, 1231.
what will be forced on purchaser, 1234—1236.
instances of, on question of construction, 1272, 1273.
fact, 1276.
law, 1274, 1275.
what will not be forced on purchaser, 1231—1234.
instances of, on question of construction, 1273, 1274.
fact, 1277.
law, 1275, 1276.

DOWER
Act, applies to gravelkind lands, 586.
Act, does not apply to copyholds or customary freeholds, 586.
ante-nuptial agreement not to bar, effect of, 313.
arrears of, not recoverable for more than six years, 459.
acknowledgment of title, of no effect, 459.
assignment of term, how far protection against, 583, 584.
compensation for, allowed to purchaser, 313, 1192.
not forced on purchaser, 584, 585.
concurrence in husband's mortgage bars, how far, 584.
contract, effect of, under present law, 313.
for purchase of equity of redemption by mortgagee, affected how far, 312.
for sale by bachelor, married before conveyance, affected how far, 312.
conveyance by husband bars, 583, 614.
decree of divorce bars, 586.
equitable jointure in bar of, purchaser entitled to what title, 584.
extends to actual possession of part of land, 584.
separate third of each tenement in copyholds, 585.
general devise of husband bars, 614.
may raise right of election, 614, n. (*h*).
legal jointure in bar of, title must be produced to land charged with, 584.
liability to, purchaser entitled to information as to, 584.
not barred by creditors' rights against testator's realty, 702.
out of minerals, 586.
out of trust and mortgage estates, not allowed, 586.
release of, good consideration of settlement by husband, 1004.
trustee, concurrence of, should be procured, 585, 614, 1345.
uses to bar should not be inserted in conveyance, 613, 614.

DOWRESS,
concurrence of, in conveyance, unnecessary, 583.
when barred, unnecessary, 1345.
entitled to value of her right out of fund in Court under L. C. C. Act, 759.
married before Dower Act, contract not enforceable against, 1125.
since Dower Act, contract enforceable against, 1117.
payment of interest on mortgage by, may bind heir, 457.

DRAFT,
agreement, signature of, whether binding under Stat. of Frauds, 271, 272.
conveyance,
alterations in, should be communicated before engrossment, 638.
whether solicitor entitled to fee for re-perusing, 638.
belongs to purchaser, not to his solicitor, 638.
condition as to furnishing, 146.
conveyancer's duty as to perusal of, 637.
copy of, purchaser must furnish, 637.
practice as to settlement of, by judge, 1249, 1344, 1345.
signature of, whether binding under Stat. of Frauds, 271, 272.
deed of further assurance should be submitted to vendor, 888.
preparation of, not notice of executed deed, 985.
whether waiver of title, 497.

DRAINAGE,
Acts for facilitating, 17, n. (*t*).
authorized by Improvement of Land Act, 97.
charges need not be disclosed on sale of land in the Fens, 132.
easement of, inquiry should be made for, 520.
when patent, not defence to specific performance, 520.
loans to be noticed in abstract, 345.
repayment of, under Settled Land Act, 1887..751.
under Land Improvement Acts, search for, 569.
under local and public Acts, search for, 523, 524.

DUPLICATES,
stamps on, 794.

DURESS,
defence to action for specific performance, 1175.
on contract, 1095.
what amounts to, 1175.

DURHAM UNIVERSITY,
powers of, to sell real estate, 21.

DUTY,
legacy. *See* LEGACY DUTY.
proceeds of realty, subject to reinvestment, what payable on, 316.
probate. *See* PROBATE DUTY.
stamp. *See* STAMPS.
succession. *See* SUCCESSION DUTY.

EARTHQUAKE,
loss by, after contract, borne by purchaser, 287.

EASEMENT,
common law, may still be claimed at, 403.
compulsory purchase extinguishes, if compensated for, 130, 404, n. (*a*).
does not prevent revival of, on re-sale, when, 404, n. (*a*).
condition as to liability to, 176, 177.

EASEMENT—*continued.*
continuous and discontinuous, no distinction between, as to passing under conveyance, 610, 611.
conveyance must exclude, if not intended to pass, 611.
corporation, cannot be prescribed for, against statutory, 20, n. (*p*).
covenants for title cover only actual, 886.
creation of, on sale, can only be by way of negative covenant, 612.
defect in title, how far constituted by, 129, 131, 156, 157, 741, n. (*s*), 1201, 1202.
grant, may still be claimed by, 403.
of, must be by deed, 230, 403.
of, presumed, when, 368, 608.
necessary,
continuous or discontinuous, impliedly granted or reserved, 608 *et seq.*
existence of latent, a defence to specific performance, 1201.
patent, not a defence to specific performance, 520.
general words unnecessary to pass, 605.
may pass or be reserved by implication, 520, 605.
not extinguished by unity of seisin, 431, n. (*q*).
not within sect. 85 of L. C. C. Act, 244, n. (*e*), 511, n. (*d*).
notice of, from physical facts, how far, 521, 974, 975.
of light, 404 *et seq.* *See* LIGHT.
of support, 419 *et seq.* *See* SUPPORT.
of water. *See* POLLUTION; WATER; WATERCOURSE.
of way. *See* WAY.
part performance applies to contract to grant, 1136.
railway company,
cannot grant over its land, 20.
may be acquired against, 859.
specific performance of agreement by, for, 1109, 1110.
reservation of,
apparent and continuous, implied, 409.
implied on simultaneous sale of house and land, 409.
not implied, if common owner retain house, 410.
on conveyances, 576.
on sale by common owner should be express, 410, 611, 612.
right to discharge water on adjoining land is, 418.
draw water from spring is, 429.
under Prescription Act, how established, 403 *et seq.*
becomes absolute after forty years, 410.
becomes valid *primâ facie* after twenty years, 410.
disability and particular estate excluded from, 430.
evidence of enjoyment should be supported by title to servient tenement, 431.
grant may be presumed during the period, 410, 411.
unless it would have been illegal, 411.
may be defeated during the forty years period, how, 410.
reversioner allowed three years from end of period, 429, 430.
undisclosed, inquiry to be made for, 520.
user incapable of interruption and not actionable cannot found, 404.
user, purchaser may by contract be bound to recognize, 949.

ECCLESIASTICAL CORPORATION. *And see* CORPORATION SOLE.
compensation to, under L. C. C. Act, for loss of renewal fines, 756, n. (*y*).
identity of lands of, 378, n. (*y*).
lands taken in exchange from, title to be shown to, 327.
limited power of, to sell lands, 21.
recitals in renewed lease by, evidence of old lease, 356.
right of, when barred by Stat. of Lim., 452.
stat. applies to Ecclesiastical Commissioners, 452.
stat. does not apply to lay successor, 452.

EDUCATION,
infant may convey lands for purposes of, 3.
limited owners may convey lands for purposes of, 18.

EJECTMENT,
adverse possessor may maintain, 464.
by Crown, no allowances made to purchaser on, 562.
contract by tenant to purchase, evidence of lessor's title to maintain, 311.
costs of defending, recoverable under covenant for quiet enjoyment, 893, 896.
damages recoverable for, under covenant for quite enjoyment, 893.
mortgagee after purchase of equity of redemption may maintain against mortgagor's lessee, 1000, 1001.
may maintain after contract to purchase equity of redemption, 311.
must bring within twelve years, 436.
of occupier, precluded by acquiescence in expenditure, 1144.
of purchaser in possession,
as trespasser, may be without notice, 1086.
by judgment creditor, restrained, 530.
by vendor, on rejection of title, 503, 504.
defence to specific performance, 1216.
during contract, cannot be without notice, 1085.
under registered title, when possible, 963—965.
of railway company, impossible after lawful entry, 514.
of tenant claiming option of purchase, when restrained, 1221, 1222.
of tenants by vendor after contract, ground for compensation, 733.
satisfied term cannot be used as means of, 577.
wrongful, not covered by covenant for quiet enjoyment, 887.

ELECTION. *See* OPTION.
by assignee of bankrupt to perform contract, 291, 292, 1126.
by *c. q. ts.* to continue improper investment must be unanimous, 689.
by child, in case of apparent advancement, 1062, 1063.
by heir, on conveyance to purchaser of devised estate, 306, 918.
by married woman, between devised estate and dower, 614, n. (*h*).
binds her, 1120.
under Partition Act, 1307, n. (*a*).
by plaintiff between home and colonial litigation, 1113, n. (*n*).
legal and equitable remedy, 1113, 1217.
by purchaser to pay money into Court or go out of possession, 1219.

ELECTION—*continued.*
by purchaser to take part with compensation, 1188 *et seq.* *See* COMPENSATION.
by solicitor to charge under the old scale, how signified, 823.
doctrine of, explained, 1008, 1009.
invalidity of marriage settlement by one party does not raise, 1008, 1009.
parliamentary, purchase for obtaining vote at, when good, 280.
purchaser not entitled to vote at, before completion, 288.
title depending on question of, held good, 1274.
to purchase, what amounts to, 296, n. (*h*).

ELEGIT,
ejectment on, against purchaser in possession, restrained, 530.
equitable relief formerly not granted till suing out of, 528.
now granted without suing out of, 542, 547, 548, 559.
not a charge on land till delivery in execution, 533, 547.
what is delivery, 545 *et seq.*
purchase by judgment creditor under, discharges lands, 1043.
registration of, unnecessary except for sale, 552.
want of, makes difficulty in searches, 558.
sheriff's return to, equivalent to seizure, 529, n. (*d*).

EMBLEMENTS,
crops in the nature of, not within sect. 4 of Stat. of Frauds, 235.
what are, 235.

ENCROACHMENT,
agreement that tenant holds on terms of original lease, implied, 188.
by stream does not give owner encroached upon right of fishery, 380.
loss of, falls on owner encroached upon, 380.
by tenant does not create tenancy at will, 443.
by trustees, 188, n. (*n*).
by vendor in possession enures to purchaser, 918.
conditions on sale of, necessary, 188.
copyholds, whether affected by doctrine of, *quære*, 188.
on strips of waste by adjoining owner, 379.
presumption that landlord is entitled to, 188.
may be rebutted by proving tenant's title, 188.
not rebutted by landlord's assent to, 188.
rebutted by fresh demise excluding encroachment, 188.
settlement of, 188, n. (*s*).
time does not run in favour of, till lease determines, 443.

ENFRANCHISEMENT. *See* COPYHOLDS.
acknowledgment for production need not be given on, 478, n. (*i*), 627, n. (*m*).
award under the Act proves itself, 360.
conveyance under L. C. C. Act does not operate as, 783.
enlarges estate of grantee, 604.
freebench destroyed by, 586.
minerals, title to, how affected by, 155, 604.
moneys in Court under L. C. C. Act may be expended on, 751, 760.
not complete, till confirmed by commissioners, 189.
notice of, whether a contract, 249.

ENFRANCHISEMENT—*continued.*
power of sale authorizes, 89.
presumed, when, 366, 367.
production of court rolls on, 478.
title to make, on purchase of enfranchised copyholds, cannot be called for, 330.
who may make, 189.

ENGROSSMENT,
belongs to purchaser, 638.
purchaser pays for, 638.
vendor has lien on, for unpaid purchase-money, 638.
right of, to, on purchase going off, 638, 639.
solicitor of, has no lien on, for costs, 638.

ENJOYMENT,
quiet. *See* COVENANTS FOR TITLE.

ENLARGEMENT,
of ancient light, effect of, 405—407.
of base fee by subsequent enrolled assurance, 912.
of time for completion, 489, 490.

ENROLMENT,
copy of, how far evidence of original enrolled deed, 354, 357.
costs of, vendor bears, 798.
of conveyance of copyholds under L. C. C. Act, no fine payable for, 802.
lands of Duchy of Cornwall, necessary, 778.
on re-investment, company pays for, 805.
to charity,
of land in mortmain unnecessary, 778.
not presumed, 370.
takes effect from its date, 778.
upon re-investment, necessary, 761, 778.
want of, effect of, 777, n. (*p*).
how remedied, 777.
of conveyance to secret trustee for charity, necessary, 776.
under Fines Act by tenant in tail,
consent of protector must be enrolled before, 779.
made by vendor or purchaser, 779.
necessary, 778.
takes effect from its date, 778.
except as against purchaser under prior enrolled deed, 779.
of conveyance under Religious Buildings Acts, unnecessary, 778.
of deed barring entail in copyholds, unnecessary, 780, n. (*k*).
enrolled in Chancery, evidence of, 356.
of inclosure award, want of, how remedied, 187.

ENTAIL,
instrument creating should be abstracted, when, 339.

ENTIRETIES,
husband and wife, acquiring lands jointly formerly held by, 1047, n. (*a*).
Married Women's Property Act has affected doctrine of, how far, 1047, n. (*a*).

ENTRY,
by auctioneer binds parties, how far, 240. *See* AUCTIONEER.
by person barred by Stat. of Lim. is trespass, 463, n. (*y*).
by purchaser of reversion for breach of condition, how far lawful, 916.
by railway company, how made, 508 *et seq.* *And see* RAILWAY COMPANY.
cannot be made upon previous valuation, 509.
injunction against, when granted, 511.
making tunnel under, or arch over, is, 511.
on part of land does not relieve from payment of whole purchase-money, 508.
precludes ejectment, 514.
sheriff's assistance may be called for, 512.
under sect. 85, precludes enforcement of previous agreement, 509, 510.
when lawful, 509.
wrongful, penalties for, 512.
by uncle on lands of niece, not entry of stranger, 443, 444.
compromise of ejectment, action constitutes actual, 441, 442.
of satisfaction of crown debts, 564.
judgment, 555, 556.
on court rolls of assurances generally, 782.
disentailing deeds, 778, 779.
possession, how far effected by, 441.
right of,
accrues to mortgagee, when, 436.
by stranger a defect in title, 1201.
by tenant in tail barred by Stat. of Lim. is barred for remaindermen, 448, 449.
covenant for, vendor entitled to, on sale of minerals, 634.
may be secured by, 633, 634.
on tenancy at will, when barred, 444.
sale of, how far good, 281, 282.
by married woman, 651.
unlimited, obnoxious to rule against perpetuities, 880.

EQUITABLE ESTATE,
contract gives purchaser, 284, 285.
conveyance of, necessary to enable purchaser to enforce equities, 284, 925.
purchaser entitled to, 571, 925, 1113.
depending on forged deed, may be protected by legal estate, 927.
documents affecting, how far to be abstracted, 341 *et seq.*
escheat applies to, 289, 290, 661.
heirs of vendor should join in conveyance of, 293, 294.
judgment affects, how far under Stat. of Frauds, 526.
in equity, how far, 528, 531 *et seq.*
purchaser's, under contract, 285.
negligence may postpone, 945, 946.
as to title-deeds, what will postpone, 952, 953.
notice to trustees of purchase of, binding though accidental, 956.
of purchaser under contract, vests in whom at his death, 303.

EQUITABLE ESTATE—*continued.*
prior, postponed to later, supported by legal estate, 927.
rights of, should be promptly enforced, 943.
priority of, against registered assurance, when, 959.
depends on date, 942.
purchaser of,
bankrupt's giving notice, has priority to trustee in bankruptcy, 955, 956.
may protect himself by legal estate, 956.
from trustees postponed to rights of *cestuis que trust*, 945.
in land acquires no priority by notice, 109, 518, 943, 944.
must inquire of trustees, 109, 518.
must give notice to trustees, 109, 518, 783, 784, 956.
trustee for sale of, can require conveyance of legal estate, 94.

EQUITABLE TITLE.
purchaser from Court must accept, 1335.

EQUITIES,
assignment of vendor's lien is subject to prior, 828.
being equal, legal estate has priority, 927.
even as against charity, 927.
documents relating to, how far to be abstracted, 341.
enforceable only after conveyance, 284, 925.
judgment affects lands, only subject to prior, 548 *et seq.*, 957.
notice of past tenancy, not notice of tenant's, 983.
tenancy is notice of tenant's, 518, 519, 975, 976.
extends to equities arising out of collateral agreements, 975, 976.
does not extend beyond equities of occupier, 984.
principal's rights, subject to, between vendor and agent prior to disclosure, 1072, n. (*i*).
under defeated contract apply to subsequently-acquired title, 910.

EQUITY OF REDEMPTION,
acknowledgment necessary to husband's assignment of wife's, 649.
barred after twelve years from acknowledgment of title, 451.
what is acknowledgment of title, 451. *See* ACKNOWLEDGMENT.
after twelve years from possession by mortgagee, 451.
cannot be revived by subsequent acknowledgment, 452.
destroys trust of surplus proceeds of sale, 451, 452.
even though sale be made under power, 452.
investment in, of moneys under L. C. C. Act, not allowed, 760.
judgment affects in equity, how far, 536.
does not affect, at law, 541.
lien of crown extends to, 562.
notice of title under mortgage, is notice of dealings with, 977.
postponement of, how far valid, 654.
purchase of,
concurrence of mortgagee should be obtained to conveyance on, 654.
consolidation affects, how far, 324, 573, 574, 784.
does not make mortgage debt a personal liability, 918, 919.
unless intention is clear, 919.

EQUITY OF REDEMPTION—*continued.*
purchase of—*continued.*
inquiry of mortgagee on, 517, 518.
notice to mortgagee of, prevents tacking, 784.
not necessary to prevent consolidation, 784.
stamp duty on, payable on mortgage debt, 787, 788.
purchase of, by mortgagee,
contract for, at date of mortgage, bad, 282.
does not let in mesne incumbrancers, 312, 313.
effect of, on right to dower, 312.
does not estop mortgagee from ejecting mortgagor's lessee, 1000.
good, 40, 41, 282, 841.
lets in mesne incumbrancers, how far, 1040—1042.
mortgagor may reserve right of repurchase, 925.
solicitor from client as security only, 45.
purchaser of,
may sue or be sued on voidable lease, 1001.
must covenant to pay mortgage debt, 628, 629.
postponed to mesne incumbrancers, even without notice, 942.
right to production of deeds goes with, 476.
trustees may release to avoid foreclosure action, 690.

EQUITY TO SETTLEMENT,
interposition of jointure term may give wife, tenant-in-tail, an, 649.
not affected by husband's assignment of wife's equitable term for years, 10.
waiver of, may be consideration to support settlement, 1024.

ERASURES
in deed, presumed to have been made prior to execution, 480.
in will, presumed to have been made after execution, 481.

ERROR,
clerical. *See* CLERICAL ERROR.
correction of, in signed agreement, 274.
in decree for sale, effect of, 1335, 1350—1352.
in description of parcels, 150 *et seq.*, 601, 603, 730 *et seq.*
in plan on conveyance, 601.

ESCHEAT,
claim of *e. q. t.* on lands bought in breach of trust prevails against title by, 1067.
equitable estate, affected by, 289, 290, 661.
for felony of lands, held in trust or on mortgage, not allowed, 661.
on attainder, 15, 16.

ESCROW,
execution of conveyance as, excludes purchaser's right to deeds, 826.
may be proved by parol evidence, 826.

ESTATE. *See* SETTLED ESTATE.

ESTATE FOR LIFE,
includes estate *durante viduitate*, 1282.
misrepresentation as to character of life, on sale of, 111, 112.
time is essential, on sale of, 484.

ESTATE TAIL. *See* DISENTAILING; TENANT-IN-TAIL.
barred by fraud, remedy of remainderman on, 852.
Stat. of Lim., bars all remainders capable of being barred, 448, 449.
extendible under judgment, how far, 536, 537.
married woman, tenant-in-tail to her separate use, may bar, 12.
of lunatic, Court may bar, 8, n. (*o*).
of married woman, subject to jointure, whether legal or equitable, 649.
portion of advowson in remainder on, when barred, 452, 453.

ESTIMATION. *And see* QUANTITY.
quantity described as by, 735, 736.

ESTOPPEL,
against disputing voidable lease by either party, 1001.
by attornment of mortgagor to mortgagee, 912.
by misrepresentation, 114.
by recital of vendor's title binds purchaser, how far, 595.
passes estate, when, 595, 911, 912.
covenant for title does not create, 595, 636, 912.
of devisee from denial of testator's title, 466.
of principal from denying special authority of agent, 210.
that apparent agent is in fact his agent, 211.
of tenant against landlord, 291.
purchase by mortgagee of equity of redemption does not create, 1000, 1001.
purchaser of reversion on voidable lease has reversion by, 1001.
entitled to sue or be sued on covenants, 1001.
surrender of lease, on grant of concurrent lease operates by, 437, 446.

ETON COLLEGE,
limited power of alienation of, 21.

EVASION
of stamp laws, agreement in, is void, 277.

EVICTION. *See* EJECTMENT.

EVIDENCE,
altered contract, how far admissible, 274, n. (*h*).
as to formalities in deeds. *See* DEEDS.
by statutory declaration of vendor, how far useful, 377.
certified copies are, equally with original of what documents, 357, 361.
condition to produce certain, does not justify withholding of other, 173.
defective, as to documents, how far supplied by presumption, 365 *et seq.*
may be supplied by statutory declaration, 166, 167.
vendor bound to make inquiries to improve, 378.
entries in register kept by order of India Council are, 357.
examined copies under Act to amend law of evidence are, 361.
in support of abstract, what, necessary when surrender has been by attorney, 352.
mutilation of deed affects weight, not admissibility of, 369.
of actual consideration for settlement admissible, 1018, 1019.
of appointment of executors, 363.

EVIDENCE—*continued.*
of arbitrator to explain award, how far admissible, 705.
of boundaries, tithe commutation map is not, 1094.
of collateral contract, how far admissible, 1158.
of contract must be memorandum in writing, 227.
of customs of manors, 358, n. (*g*).
of death. *See* DEATH.
of deficiency, necessary when power of sale only arises in that event, 680.
of execution of conveyance as escrow may be proved by parol, 826.
lease for year, when recital sufficient, 356.
of exemption from tithe. *See* TITHE.
of existence of debts, trustee selling for payment need not give, 679.
of facts, vendor must produce, 372 *et seq.*
of failure of issue, what, admissible, 390.
of fraud. *See* FRAUD.
of identity, may be supplied by possession for twenty years, 167, 168.
of individuals may be supplied by presumption, 378.
of parcels may be supplied by presumption, 378.
of illegitimacy, what, sufficient, 381, 382.
declarations of husband and wife inadmissible, 382.
except in cases arising out of adultery, 383.
of intention regarding restrictive building covenants, 867, 868.
to defeat creditors under 13 Eliz., what is, 1026—1028.
of knowledge of releasors may be produced, 593, 594.
of life of *cestui que vie* necessary under 13 Car. II. c. 6..387.
of lost deed, copy may be sufficient, 353.
of marriage is the register, 392. *And see* MARRIAGE.
supplied by presumption, 383.
of payment, endorsed receipt is not conclusive, 742.
of pedigree, admissible to show identity of parties, 395. *And see* PEDIGREE.
of performance of covenants, what sufficient, 193, 194.
of proceedings in bankruptcy, under Act of 1883..360.
equity, 359.
of proper stamps, steward's certificate is, 795.
of redemption of land-tax is certificate of commissioners, 398.
of seisin may be supplied by presumption, 378, 379.
possession is *primâ facie*, 975.
of subsequent acts of parties inadmissible to explain contract, 1094.
of surveyor, value of, 849, n. (*c*).
of survivorship, 390.
of time of death, 387, 388.
of title, production of further, cannot be required after completion, 911.
vendor refusing to produce, not allowed costs, 1260.
of waiver of lien, what is, 829—832. *See* WAIVER.
of what passed under ancient grant presumed from modern usage, 377.
of will, what sufficient, 362.
of woman past child-bearing, what necessary, 391.
office copies received by conveyancers as, 361.
on application under S. E. Act, what required at hearing, 1287.
opinion of counsel, &c., as to title, purchaser need not produce, 995, 996.
parol. *See* PAROL.

EVIDENCE—*continued.*
professional communication with client inadmissible, 993, 994.
exceptions to the rule, 994, 995.
purchaser cannot require deeds produced as negative, 764.
may require information, though not entitled to, 186.
of facts stated in restrictive condition, 186.
what, in verification of abstract, 350 *et seq.*
recitals,
in Acts of Parliament good, 397.
in deeds twenty years old, rule as to being, 166, 371.
does not apply to right of pre-emption created before V. & P. Act, 371.
in private Acts not formerly good, 356.
in renewed ecclesiastical lease, when conclusive, 356.
of lost instrument, when sufficient, of contents and execution, 355.
required where two estates devised for payment in specified order, 680, 681.
secondary,
examined copy of memorial of registered deed, how far, 354.
of contents of deed, when admissible, 353.
of title deeds, when admissible, 159.
probate not strictly, of will as to realty, 362.
recital may be, 159, n. (*u*).
registered memorial is good, of lost document, 340.
statement of lost power of attorney on court rolls is, 352.
statement for public purpose in public documents is, 357.
to contradict conveyance, when not allowed at law, 840.
to explain conveyance contract not admissible, 603.
to rebut presumption on advancement, what admissible, 1059 *et seq.*
to show surplus against mortgagee inadmissible after 6 years, 438, n. (*e*).
that purchase by trustees was made with trust money, what admissible, 1065, 1066.
unstamped conveyance inadmissible as, 785.
except in special cases, 785.
unstamped document admitted as, on what conditions, 276.
receipt, how far admissible as, of contract, 275.
vendor must produce codicil subsequent to will under which he holds, 375.
proof of all facts material to title from its root, 372.
will alleged not to affect property, 375.
on invalidity of which he claims, 375.
of surviving trustee if not within Con. Act, sect. 30..375, 376.
supply all, in his possession, 167, 372.
need not produce negative, by documents not in his possession, 376, 377.
of facts which are merely negative evidence, 372, 373.
e.g., as to no marriage settlement, 373.
intestacy of ancestor through whom he claims, 373, 376.
non-exercise of power, 372.
of motive in making appointment, 373, 374.

EVIDENCE—*continued.*
verdict or judgment on same matter is, 396.
vesting order under Trustee Act is, of matters alleged as foundation thereof, 661.
want of, may be supplied by presumption, 377 *et seq.*

EXAMINATION,
of lease, purchaser should be afforded opportunity for, 984.
of property by purchaser may cure inaccuracy in particulars, 154.
of title deeds, expense of, borne by purchaser, 471.
recoverable where contract goes off, 472.
necessary in register county, 767.
neglect of, on delivery does not postpone purchaser, 987.
time for, 472.
what to be observed on, 480.
separate, necessary on petition for payment out, 758. *See* MARRIED WOMAN.
unless fund is her separate estate, 758.

EXCESS,
compensation for, vendor not entitled to, 729.
none after conveyance, 837, 838.
in sale for limited purpose, conversion not effected by, 298, 299.
purchaser not affected by, 78.
of purchase-money,
no relief for, after conveyance, 902.
not ground for discharging purchaser from Court, 1355.
purchaser's defence to specific performance, how far, 1207, 1210.

EXCHANGE,
alienation of estate under Common Law, effect of, 327.
bill of. *See* BILL OF EXCHANGE.
Common Law, future operation of, 327.
liability to land-tax not transferred by, 399.
of benefices, stipulation as to dilapidations on, 281.
of charity lands to church valid, though bishop consenting be a trustee, 327, n. (*k*).
of freeholds subject to heriots, 328, n. (*p*).
of gavelkind lands for those of other tenure, 328, n. (*p*).
of settled lands, succession duty on, 316.
owner of estate under, may compel production of title-deeds, 473.
power of sale and, authorizes enfranchisement, 89.
partition, 89.
may be accelerated, 70.
subject to, and in consideration of, reservation of minerals, 78.
title depending on validity of, good, 1375.
title to be shown to lands acquired by, 326—329.
void, confirmed by commissioners, 327, n. (*k*).

EXECUTION. *And see* JUDGMENT.
creditor, purchase by, of property taken under, good, 44.
equitable by appointment of receiver, 542, 559.
issue of elegit not necessary to, 542, 543, 558, 559.

EXECUTION—*continued.*
for Crown debts, extent of, 562.
registration of, necessary, 563, 564.
lands delivered in, power of Court to direct sale of, 1312.
legal against trust estates, 541, 542.
equity of redemption not subject to, 541.
of conveyance,
as escrow, may be proved by parol, 826.
precludes purchaser's right to deeds, 826.
by necessary parties, vendor pays costs of, 798.
need not be in purchaser's presence, 741.
not necessary to bind purchaser by covenants, 634, 862.
of deed,
alteration made before, does not require fresh stamps, 798.
by attorney, may be in his own or principal's name, 642.
by committee, must be in lunatic's name, 642.
erasures presumed to have been made after, 480.
irregular, gives purchaser notice of fraud, 978.
must be carefully examined, 480.
of instrument may be shown to be conditional only, 1095.
of memorial, impossible where both witnesses are dead, 773, 774.
must be by one of witnesses to deed, 773.
of power,
by deed attested by two witnesses is good, 946.
by will duly attested is good, 947.
defective, Equity will supply when, 946.
how far supplied against married woman, 1121.
of will, erasures presumed to have been made before, 481.
on judgment after contract cannot be levied, 540.
barred by twelve years' non-payment, 453, n. (*l*).
preparation of draft, not notice of, 985.
prior to bankruptcy, valid, 529.
proper stamps presumed from due, 797.
railway plant cannot be taken in, 541.
undated instrument operates from date of, 1094.
evidence admissible to show contrary intention, 1094.
under 1 & 2 Vict. c. 110, effect of, 531.
under 23 & 24 Vict. c. 38,
cannot be registered after three months, 552.
fresh writ may be issued under same judgment, 552.
must be enforced within three months, 552.
writ of, must be registered, 533, 551.
under 27 & 28 Vict. c. 112,
delivery in, necessary, 533, 536, 544, 545 *et seq.*, 552.
difficulty of discovering from absence of registration, 558.
in case of equitable execution, 559.
formerly confined to legal execution, 545, 546.
includes equitable execution, 547, 548, 559.

EXECUTOR. *And see* REPRESENTATIVES.
appointment of, is bequest of personalty for payment of debts, 674.
probate is proof of, 363, 652, 653.

EXECUTOR—*continued.*
assent of, to legacy, vests leaseholds in legatee, 673, n. (*z*).
auctioneer, not allowed commission, 208.
charge of debts makes owner of legal estate trustee thereof for, 694.
concurrence of, in sale,
under beneficial devise charged with debts should be required, 697—699.
Lord St. Leonards' Act, s. 18, does not meet, 700.
under devise to trustees charged with debts, not necessary, 696.
conduct of sale when given to, 1323.
direction that debts be paid by, does not charge realty, 692.
unless the realty is devised to, 692, 693.
direction that land be sold for payment of debts gives power of sale to, 693, 694.
express trustee for legatee, when, 439, n. (*q*).
lien of solicitor of, on title deeds, 476, 477.
not giving notice to co-executors postponed to later purchaser, 966.
of last surviving trustee is trustee within Trustee Act, 655, n. (*q*).
of mortgagee of leaseholds, cannot buy fee simple, 1067.
power of sale in, gives power to give good receipt, 674.
purchase by, voidable, 40.
not proving, 40, n. (*n*).
purchaser from, with notice that sale is improper, is liable, 678.
purchase-money under contract by testator belongs to, 681.
sale of leaseholds by,
contract for, by one of several, how far enforceable, 674, 1118.
death before probate, does not invalidate, 652.
during pendency of administration action, 64.
entitled to indemnity, how far, 631.
on sale by Court, 1345.
legatee's concurrence, how far desirable, 673, n. (*z*).
need not be within twenty years, 695.
one of several, 652.
can give good receipt on, 674.
receipt of, for purchase-money, good, 673.
relieves him from liability, 631.
retainer of assets on, to meet liability, 1345.
sale by, under charge of debts,
during creditor's action, 65.
good, where no one to make sale, 694.
latitude of time allowed to, 65, 694.
must be within twenty years, 66, 67, 695.
under Lord St. Leonards' Act, s. 16..695.
where he holds other capacity, purchaser not liable, 679.
where he is beneficial devisee, 678.
without assent of co-executors, 678.
where he sells as trustee, 679.
time does not run against legacy severed, in hands of, 454, 455.
time runs in favour of, paying over assets, 456, n. (*r*).

EXECUTORY CONTRACT,
distinction between remedy on, and on executed contract, 898, 899.

EXECUTORY INTEREST,
may now be disposed of by deed, 281.

EXEMPLIFICATION,
evidence of fine or recovery, 356.
proceedings at Law or in Equity, 359.

EXEMPTION,
from tithe, how established, 401, 402. *See* TITHE.

EXPECTANCY. *And see* REVERSION.
relief granted to persons dealing with, 845.
sale of, not illegal, 278, 279, 281.
purchaser can require further assurance on, 911.
undue influence, material question on, 24, n. (*m*).

EXPENDITURE,
by licensee does not make licence irrevocable, 1044.
unless incurred at request of licensor, 949.
by purchaser, what recoverable,
for breach of contract, 1076, 1077.
covenant for title, 894.
of limited estate, 949.
on rescission or eviction, 51, 52, 503, 504, 853, 903, 1032—1034.
permitted by adverse claimant, 948, 949, 1144.
by tenant, how far part-performance, 1139, 1142, 1143.
by vendor, after contract, not allowed for, 286, n. (*u*), 291, 732.
joint purchaser has lien for, 1050.
upon estate of wife or child, not bad in bankruptcy, 1064.
upon settled land does not satisfy covenant to pay money to trustees, 1070.

EXPENSES. *And see* COSTS—DAMAGES.
of attested copies and deed of covenant, 161, 764—766.
of conveyance borne by railway company, 802 *et seq.*
of examination of abstract, 348 *et seq.*
deeds, borne by purchaser, 470, 471.
of production of deeds by mortgagee, borne by mortgagor, 476.
not in vendor's possession, 471.
of purchaser, to be provided for on sale to railway company, 238.
of verifying abstract on sale of copyholds, 351, 352.
what recoverable by purchaser as damages on breach of contract, 1076, 1077, 1272.

EXPIRATION,
of term, agreement for lease, whether enforced after, 1215.

EXPLANATION,
of absence of deeds absolves purchaser, how far, 950, 979, 980.
of written contract by parol evidence, how far admissible, 1090 *et seq.*

EXTENT,
of property greater than imagined, vendor has no remedy after conveyance, 837, 838. *See* EXCESS.
of right to light, what may be claimed, 407, 408.
of vendor's interest in property, mistake as to, 837.
on Crown process, before conveyance, binds purchaser, 289.

EXTINGUISHMENT,
of charge, not presumed, if reversionary, 177, 178.
on payment off, how far presumed, 1040—1042.
on purchase by mortgagee, 574, 575, 1040—1042, 1067, n. (*n*).
of copyhold tenure by purchase by tenant in common of manor, 1043.
under Stat. of Lim., 467.
of power, title depending on, 1275.
of rent-charge by non-payment, 466, 467.
not effected by release of part of lands charged, 1044.

EXTRACTS,
from parochial and general registers, how far evidence, 362, 392.
from French registers, how far evidence, 393, n. (*o*).
from Probate Act book, when evidence, 363.
official, of fines and recoveries not strictly evidence, 358.

FAILURE,
of contingent consideration before completion, not a defence, 288, 1209, 1210, 1329.
of issue, how proved, 390.
of subject-matter of contract does not preclude account, 1247.

FALL. *See* COPPICE.
of buildings before completion, purchaser bears loss by, 287, 1332.
of timber before completion, right of purchaser on, 286, 507.

FAMILY,
declarations by members of, evidence of pedigree, 390, 393.

FAMILY ARRANGEMENT,
acquiescence in, may be part performance, 1143, 1144.
delay in setting aside, effect of, 849.
not fraudulent within 13 Eliz., 1027.
not voluntary within 27 Eliz., 1007.
regarded with suspicion, 848.
settlement of purchase-money by way of, not liable to stamp duty, 790.
validity of, not subject to rule as to sales of reversions, 845, 847—849.
what constitutes, 848.

FARM,
includes woodland, 138.

FATHER,
arrangements between, and son, validity of, 847—849.
in possession of infant's lands is trustee, 443.
purchase by, in name of child is advancement, 1057 *et seq.* *See* ADVANCEMENT.

FAULTS,
sale "with all," 102, 103, 106.

FEE FARM RENT,
arrears of, not recoverable for more than six years, 459.
entail in, may be barred, 781.
in lieu of land tax is real estate, 398, n. (*f*).
sale under S. E. Act for, 1279, 1295.
S. L. Act for, 1295.
subject for compensation, when, 1206, n. (*e*).

FEE SIMPLE,
vendor's interest on sale presumed to be, 128, 129.

FEES. *See* STEWARD.

FELON. *See* CONVICT.

FEME COVERT. *See* MARRIED WOMAN.

FENCES,
liability to repair, defect in title, 1202.
vendor in possession liable to maintain, 733.

FENS,
drainage charges need not be disclosed on sale of lands in, 132.

FEOFFMENT,
conveyance by, of infant's gavelkind lands, 4, 600.
on sales of corporation lands, 600.

FIAT IN BANKRUPTCY,
issue of, is not notice *per se*, 981.

FICTITIOUS,
sale by trustees set aside, 70.

FIDUCIARY CHARACTER,
person having,
conditions implied by V. & P. Act and Conv. Act may be used by, 84, 201.
special, may be used by, how far, 197, 198.
mortgagee is not, as against mortgagor, 35.
purchase by, general rule as to, 35—37.
how and when voidable, 35, 37, 44.
remedy of *cestui que trust* on, 51 *et seq.*
subsequent to retirement from office, 44.

FINE,
admittance cannot be refused till payment of, 801.
quousque, does not relieve purchaser from second, 801.
agreement to pay "costs of charges and admittance" does not include, 801.
conditions as to, read according to legal meaning, 122, 123.
copyholds taken under L. C. C. Act are subject to, till enfranchised, 783.
custom to pay one, on admittance to all tenements, 571.
joint purchaser paying, has lien for, 1050.
loss connected with, pending completion, who bears, 287.
need not be stated on sale of copyholds, 132.

FINE—*continued.*
not payable on conveyance under L. C. C. Act, 802.
on admittance of widow to freebench, is certain, 123.
purchaser pays, 801.
surrender to uses saves, 579.
on investment under L. C. C. Act in copyholds does not fall on company, 808.
on renewal, compensation for loss of, on sale under L. C. C. Act, 756, n. (*y*).
particulars should not describe as small, 111.
payable on first admittance only does not entitle to admittance to one tenement only, 571.
right to, accrues only on actual admittance, 801.
as rents and profits, how determined, 1343.
pending completion, 285, n. (*o*).
steward may authorize deputy to receive, 801.

FINE AND RECOVERY,
defective validity given to, 957.
how proved, 356, 358.
non-claim on, right to bar adverse claim by, 928, n. (*h*).

FINES AND RECOVERIES ABOLITION ACT. *And see* ACKNOWLEDGMENTS BY MARRIED WOMEN.
contract of married woman under, 10, 1119, 1120.
conveyance of married woman under, 9, 643.
husband's concurrence may be dispensed with, 649, 650.
effect of, on conveyance, 650.
on husband's rights, 651.
deeds enrolled under, not included in search in Central Office, 522.
enrolment under, 778, 779. *See* ENROLMENT.
proof of deeds under, 358.

FIRE. *And see* INSURANCE.
insurance, condition as to, 197, 913.
purchaser not entitled to, 913, 914.
purchaser after contract bears loss by, 287, 913, 1332.
vendor bears loss by, prior to certificate, 1329.
need not insure against, 287.

FIRM,
disability from buying of partner in, affects co-partner, 37.
fraud of partner in, prevents time running in favour of co-partner, 440.
trustee-partner cannot charge costs for benefit of, 815.

FISHERY. *And see* FISHING.
common of, definition of, 427.
may be either appurtenant or in gross, 427.
whether it may be appendant, *quære*, 427, n. (*i*).
free, definition of, 427.
grant of, does not exclude grantor, 428.
passes no right in soil, 428.
may be claimed in gross or as appurtenant to land, 427.
grant of, passes largest right grantor has, 428.
reservation of, reserves to grantor largest right, 428.

FISHERY—*continued.*
several, definition of, 426.
grant of, does not exclude grantor, 428.
whether passes soil, *quære*, 428.
in gross, claim to, not within Prescription Act, 427, n. (*d*).
may be claimed by stranger by grant or prescription, 426, 427.
in gross or as appurtenant to manor, 427, n. (*d*).
primâ facie belongs to owner of soil, 426.

FISHING,
right of,
common, in lake, effect of, 312.
exclusive, lost by permanent alteration of channel, 380, n. (*m*).
not affected by deviation of stream, 380, n. (*m*).
in lake, is owner's where soil is his, 428.
in non-tidal lakes, *quære*, 428.
not in the public, 428.
in tidal waters,
belongs to the public, 426.
only so far as tide flows and reflows, 426.
several, Crown could formerly grant to subject, 426.
claimable still by grant prior to Magna Charta or prescription, 426.
reverting to Crown may now be granted, 426, n. (*x*).
is profit *à prendre*, 425.
not subject for reservation, 425, n. (*n*).
of riparian owner in adjoining stream, 414.
public, in non-tidal waters cannot be acquired by immemorial usage, 426.
tithes of, excepted from commissioners' jurisdiction, 400.

FIXTURES,
belong to purchaser under contract in default of condition, 149.
condition for payment for, by purchaser, 149.
conveyance passes, without mention, 606.
enumeration of, desirable, 606.
included in consideration for conveyance, 597.
"house" under L. C. C. Act, s. 92..245, n. (*g*).
"manufactory" under L. C. C. Act, s. 92..247.
interest not payable from date of valuation of, 715.
purchaser in possession must pay rent for, 715.
sale of, by tenant to landlord, not within Stat. of Frauds, s. 4..236.
stamp duty payable on value of, 597, 788.
to be taken at valuation separately from land, 258, 259.
trade, pass by mortgage, 607.
rule as to, does not apply between mortgagor and mortgagee, 606.
what are, 607.
what are generally, 607, 608.

FLUCTUATING
body cannot buy, 25.
body, time essential on sale by, 484.
value, effect of, on delay in specific performance as to, 1214, 1215.
value may make time essential, 484.

FOOTPATH. *And see* WAY.
existence of, how far a defect, 102, 131.

FORBEARANCE,
may be consideration for transfer of trust funds to make good breach, 929.
to bid under parol contract, how far enforceable against purchaser, 1053, 1054.

FORCIBLE
possession by purchaser is acceptance of title, 499.

FORECLOSURE,
action against mortgagor on covenant prevented by sale and, 1042.
action,
claim should be added for possession in, 455, n. (*l*).
consolidation applies to, as well as to redemption action, 1037.
if default made on both securities, 1037, 1038.
costs of, cannot be consolidated, if debts cannot be, 1038.
not allowed in action on covenant against mortgagor, 1043.
is action for recovery of land, not of money charged on land, 453, n. (*n*), 455, n. (*l*).
not within sect. 40 of Stat. of Lim., 455.
sale in, conduct of, to whom given, 1324.
when ordered under Conv. Act, s. 25..1317, 1318.
15 & 16 Vict. c. 86..1316, 1317.
trustees may release equity of redemption to avoid, 690.
decree,
against purchaser without notice does not order sale, 941.
effect of registering judgment after, 549.
excessive sale by Court under, not a conversion, 299, n. (*h*).
nominal reversion in mortgagor included in, when, 662.
obtainable now in Chambers, 1319.
on equitable mortgage may add vesting order and declaration of trust, 665.
reopening of,
order for, granted, on what grounds, 468, 469.
is discretionary, 468.
ordered, even though absolute, 468.
purchaser with notice not protected against, 469.
right of action for possession runs from date of, 436.
equitable mortgagee entitled to sale or, 543, 1320, 1321.
judgment creditor formerly entitled to, not sale, 543.
mortgagee not compelled to sell under power after, 1171.
of mortgage of land outside jurisdiction, 1107, n. (*d*).
sale in lieu of, Court may direct, 1312.
transferee does not lose right of, by not giving notice to mortgagor, 987.

FOREIGN LAND,
contract for sale of, may be enforced, 1107.
mortgage of, remedies on, 1107, n. (*d*).
title to, Court will not decide questions as to, 1107.

FOREIGN LANGUAGE,
evidence admissible to interpret agreement in, 1090.

FORESHORE,
grant of, when presumed, 366.
owner of, may bring action of trover for seaweed gathered, 429.
title to, is in adjoining owner to level of medium high-tide, 419.
shingle on, is in owner, 419, n. (*z*).

FORFEITURE,
acts by tenant involving, how far part performance of agreement for purchase, 1137.
acts of, by person in possession, avoid contract for lease, 1217.
purchaser preclude him from specific performance, 1217.
contract involving, not enforceable, 287, 1170, 1171.
for breach of covenant,
as to waiver of. *See* WAIVER.
against purchaser of leaseholds, 193, 194.
relief against, under Conv. Act, 195.
to insure, 194, 195.
for treason and felony,
does not affect trust or mortgage estates, 661.
now abolished, 16.
except as to outlawry, 16.
old law of, 15.
property under, vests in Treasury solicitor, 16, n. (*e*).
licence to commit, does not destroy right of re-entry, 917.
of deposit. *See* DEPOSIT.
title depending on, held good, 1273.
vendor rendering property liable to, cannot enforce contract, 287.
waiver of, by Crown, 195, n. (*g*).
reversioner, does not affect rule as to the time running from possession, 446.
confined to particular breach, 917.

FORGED INSTRUMENT,
purchaser under, stands on same footing as vendor, 930, 931.
of equitable title under, protected by legal estate, 930.
registration does not establish, 768, 776.

FORMAL. *See* NOTICE.

FORMALITIES,
of contract of corporation may be assumed, 274.
of deeds presumed, 369.
not if required by law, 370.
want of, in execution of power by married woman, 1121.
what may be supplied, 946.

FRAUD. *And see* MISREPRESENTATION.
award is avoided by, 704.
by concealment of material document, liability for, 344.
by falsification of pedigree, liability for, 344.
charge of, special ground for costs, 1258.
concealed, purchaser without notice not affected by, 440.
time runs from discovery of, 440, 1035.
conveyance set aside for, on what terms, against innocent sub-purchaser, 897.

FRAUD—*continued.*
defence to action on contract, 1095.
specific performance, 1175.
suspicion of, is not, 1155.
dismissal of action for, special ground for costs, 1257.
evidence of, in transactions between persons in fiduciary position, 24.
inadequacy of consideration may be, 851.
secret purchase by trustee or agent, usually, 50.
unstamped deed admissible as, 705.
infant has no privilege to commit, 4.
in management of sale, what amounts to, 1332, n. (*b*).
in procuring one contract may invalidate another, 1175.
not true basis of doctrine of specific performance, 1134.
notice of,
discrepancy in plans is not, 985.
sub-purchaser without, whether affected by fraud in original purchase, 846.
suspicious circumstances alone are not, 985.
unusual mode of execution may be, 978.
of agent, binds principal, how far, 902, 1095, n. (*r*).
of company, remedies for, 117, 118.
of infant, remedies for, 4, 5, 31.
of married woman does not remove restraint on anticipation, 11.
effect of, on her status, 13, 33.
how far binding on her estate, 948, 1120.
if not communicated to purchaser, postpones her, 947.
of partner, prevents time running in favour of other partners, 440.
of solicitor, absolves client from notice, 991—993.
must have been completed prior to transaction, 992.
caused by client's negligence, gives purchaser priority, 930.
of stranger, does not destroy protection of legal estate, 929.
secus, if with knowledge of purchaser, 929.
of third party, for his own benefit, does not invalidate fair contract, 1176.
parol variation of contract may be allowed defendant on ground of, 1153.
enforced on ground of, 1149.
preventing compliance with statute is ground for enforcing parol contract, 1133.
refusal to sign agreement assented to in draft is not, 1133, 1134.
sale in, of tenant in tail, when allowed to be set aside by remaindermen, 852.
secret purchase from person *non compos mentis* is, 440, n. (*c*).
voluntary confirmation of sale obtained by, useless, 596, n. (*k*).
what sufficient to found action of deceit, 114.

FRAUDS, STATUTE OF,
acceptance of offer in writing of purchaser may be by parol, 266.
not binding, if conditional, 266.
subject to formal agreement, how far binding, 265, 266.
agent need not be appointed by writing under, 210.
of vendor, cannot sign for purchaser within, 213.
vendor and purchaser cannot act as the, of the other, to sign within, 210.

FRAUDS, STATUTE OF—*continued.*
agreement,
collateral, is not within, 231, 232, 1094.
unless inseparable from rest of agreement, 236, 237.
for lease for less than three years must be in writing under, 228.
for sale of interest in land in effect, though not nominally, is within, 230, 231.
e. g., to give up possession, 230, 231.
to surrender and procure another to be admitted tenant, 231.
signed, but corrected by unsigned memorandum written on it, valid under, 275.
to assign a residue of less than three years must be in writing under, 228.
to charge lands, is within, 231, n. (*f*).
to deposit deeds, is within, 231, n. (*f*).
applies to sales by auction, 227.
in bankruptcy, 227.
approval of draft, how far binding under, 271, 272.
auctioneer has implied authority to sign contract within, 209.
contract by letter, when complete. *See* LETTER.
defence to parol variation of written contract, 237.
does not apply to agreements by deed, 227.
purchases under order of the Court if report confirmed, 227.
sales by the Court, 227, 1329, 1330.
by signature make an instrument a contract if not intended to be so, 228.
execution under, affected terms of years, how far, 527.
does not affect what equitable estates, 526, 541, 542.
4th section,
does not extend to,
agreement for increased rent for improvements, 236.
crops, timber or minerals after severance, 234, 235.
emblements, 235.
furnished lodgings in a boarding-house, 236.
grass to be fed off by vendor and purchaser jointly, 235.
growing crops as between outgoing and incoming tenants, 235.
shares in a railway company, 233.
water company, 233.
tenant's fixtures as between landlord and tenant, 236.
extends to,
agreement for abatement of rent, 236.
growing crops, standing timber, mowing grass, &c., 234.
partnership in land, 233.
right to kill and take away game, 234.
sale of growing crop by lessor to incoming tenant, 235.
shares in mining company, 233.
if not a cost-book company, 233.
Westminster Improvement Bonds, 233.
grant of easement is within, 230.

FRAUDS, STATUTE OF—*continued.*
leases, &c. must be in writing under, 229.
unless for less than three years, 228. *See* LEASE.
licences are not within sect. 1..229. *And see* LICENCE.
unless they create irrevocable interest, 230.
must be pleaded if relied on, 250, 1148.
cannot be raised as on demurrer, 1148.
offer may be withdrawn till accepted, 267, 268.
parol agreement,
agent may sue principal upon, if executed, 232.
enforceable if compliance with statute prevented by fraud, 1133.
may be good if part of it relating to land has been executed, 232.
may operate as a licence, 232.
to let, may be construed as a lease for less than three years, 229.
transfer of, may be good between transferor and transferee if executed, 232.
part performance in relation to. *See* PART PERFORMANCE.
signature, what sufficient under. *See* SIGNATURE.
trust, declaration of, must be signed by beneficial owner, under, 1054.
trust, resulting, not within, 1055.
writing containing all the terms binding within, though put into more formal shape, 268.
written memorandum within,
is necessary to contract for sale of lands, 227.
must contain description,
of parties, 252, 253. *See* DESCRIPTION.
of property, 255.
what is sufficient description, 254, 255.
must contain names of both parties, 252.
name of either party may be supplied by connected writing, 253.
or signature of both parties, 251.
subsequent signature by auctioneer for purchaser, bad, 252.
must fix essential terms, 256.
but means of fixing them may be sufficient, 256.
may be collected from whole correspondence, 261.
need not appear on contract if sufficiently referred to, 261.
imperfect reference may be supplied by parol evidence, 262.
reference need not be express if intention clear, 262.
when intention held to be clear, 262 *et seq.*
length and commencement of term, 256, 263, 1095.
price and quantity, 256.
vendors' interest, 256.
what insufficient, 250 *et seq.*
delivery of rent-roll and abstract with letter by vendor, 250.
letter suggesting abandonment of parol agreement, 250, cf. 272.
petition for investment by vendor of purchase-money and order for inquiries, 251.
receipt for deposit not showing its proportion to purchase-money, 256.

FRAUDS, STATUTE OF—*continued.*
what sufficient, 239 *et seq.*
admission of agreement without claiming benefit of the statute, 249, 1148.
affidavit may be, 240, 249.
document relied on as, must consist with parol agreement, 251.
letter asking to be off, 272.
complaining of delay, 272, n. (*t*).
may be, 239.
receipt for purchase-money or deposit may be, 240.
recital of parol agreement in collateral agreement, 250.
written agreement after, in pursuance of parol before marriage, 250.

FRAUDULENT CONVEYANCE. *And see* VOLUNTARY CONVEYANCE.
for splitting votes, effect of, 280.
not validated by registration, 768, 776.
purchaser claiming under, must account, how far, 1033, 1034.
under 13 Eliz. c. 5,
assignment for value of debtor's solvency is, 1024.
consideration does not except settlement if intent fraudulent, 1024, 1030.
conveyance of property not extendible is not, 1025.
fraudulent intent unnecessary, if deed voluntary and in fraud of creditors, 1024, 1025, 1030.
indictment lies against grantor and grantee, 1030.
must be in fraud of creditors, 1024.
right against is legal, and not barred till debt is, 1030.
test of validity of, and instances, 1026—1028.
voluntary settlement need not be, 1024.
waiver of equity to settlement may support, 1024.
what is evidence of fraudulent intention, 1025.
who may impeach, 1028—1030.
under 27 Eliz. c. 4,
cannot be defeated by heir or devisee, 1021.
notice of, does not invalidate purchaser's title, 1002.
purchase from heir or devisee without notice may defeat, 1021.
voluntary conveyance is, 1003. *See* VOLUNTARY CONVEYANCE.
even when made to charity, 1003.
who are purchasers within, 1003.

FRAUDULENT PREFERENCE,
bad under Bankruptcy Act, 1883..1031, 1032.
what is, 1032, n. (*m*).

FREEBENCH,
attaches, when, 313.
contract enforceable against wife entitled to, 1117.
creditor's right against testator's real estate does not bar, 702.
Dower Act does not affect, 313, n. (*l*).
fine on admittance of widow to, always certain, 123.
surrender of copyholds by wife bars, 648.
wife entitled to, must concur in conveyance, 586.

FREE PUBLIC HOUSE,
meaning of, 138.

FREEHOLD,
affected by judgment, 525.
description of copyhold as, bad, 154, 1199.
enfranchised copyhold as, bad, 155, 1199.
leaseholds as, bad, 154, 1199.
land, subject to restrictions as to user, as, bad, 156.
held of manor on sale of, covenant for production should include court rolls, 627.
land presumed to be, unless otherwise described, 128, 129.
wife's, agreement signed by husband only to settle, not binding, 1054, n. (*a*).

FRIENDLY SOCIETY,
conveyance to, not liable to stamp duty, 790.
mortgage to, is liable to stamp duty, 791.

FRIVOLOUS,
defence, disposed of, before reference, 1225.
special ground for costs, 1257.
objections to title, danger of taking, 493.
effect of, on sale of advowson, 288.

FUND IN COURT. *See* STOP-ORDER.

FUNDS,
variation in, loss by, falls on purchaser, how far, 53, 221, 222, 1333, 1342.
not recoverable as damages, 1077.

FURNISH,
agreement to, not within Stat. of Frauds, 232, n. (*i*).
secus, if inseparable from agreement to let, 236.
whether enforceable, 1109, 1147.

FURNISHED HOUSE,
implied warranty of fitness for habitation on letting, 102.
secus, on letting unfurnished house, 103, n. (*l*).

FURTHER ADVANCES,
charged on different properties, whether to be borne rateably, 921.
made after notice, are postponed, 936.
mortgage to secure, must be registered, 768.
has priority for advances made till date of notice, 768.
postponed to mesne incumbrance, under Yorkshire Reg. Acts, 963.
vendor's lien may extend to, 825.

FURTHER ASSURANCE. *See* COVENANTS FOR TITLE.

FURTHER CONSIDERATION,
specific performance may be decreed upon, notwithstanding adverse certificate, 1242, 1243.
vendor's action not dismissed without, 1241.

GAME,
agreement to kill down, not within Stat. of Frauds, 232, n. (*i*).
right to kill and carry away is within Stat. of Frauds, 234.
profit *à prendre*, 425.

GARNISHEE ORDER,
does not apply to purchase-money payable by railway company, 711, n. (*t*).

GAVELKIND,
Dower Act applies to, 586.
exchange of, by Commissioners for lands of other tenure, 328, n. (*p*).
infant conveys lands of, by feoffment, 4, 600.
land in Kent presumed to be, 369.
presumption may be rebutted, how, 369.

GAZETTE,
not notice of bankruptcy, *per se*, 981.
notice of dissolution, Court can compel insertion of, in, 1167, n. (*n*).

GENERAL DEVISE. *See* DEVISE.

GENERAL RELIEF,
prayer for, abolished, 1151, 1152.
under old practice, 1151.

GENERAL WORDS,
easements, not intended to pass, should be excluded from, 611.
which would not otherwise pass, do not pass by, 605.
implied by Conv. Act, 605.
omission of any ordinary item important in use of, 606.
unnecessary generally, 605.

GLEBE,
extendible under new law, 531.
not extendible under old law, 526.
purchase by rector of, voidable, 42.
sale of, authorized by statute, 17.
ordered for arrears of rent-charge, 1316, n. (*e*).

GOODWILL,
contract for sale of, not enforceable, 1111.
unless sold with property, 1106, 1111.
stamp duty payable on, 599, 788.

GOVERNOR,
of charity, lease of lands to, voidable, 39.

GRANDCHILD,
purchase in name of, on advancement, 1057.
quære, if illegitimate, 1057, n. (*f*).

GRANT,
ancient and modern usage admissible to explain what passed by, 377.
common of fishery in gross may be claimed by, 427.
Crown,
presumed, when, 366.
proved, how, 359.

GRANT—*continued.*
Crown,
title to be abstracted under, 336.
to unincorporated body, incorporation presumed from, 24, n. (*o*).
vendor must afford inspection of, 472.
should protect himself from production of, 188, 189.
easement may still be claimed by, 403.
re-grant of, not desirable in conveyance, 576.
implies no covenants for title, 635.
of deeds, unnecessary in conveyance, 613.
of easement, cannot be presumed, where it would have been illegal, 411.
may still be presumed, after twenty years, 368, 410, 411.
of fishery in tidal waters, not now possible, 426. *See* FISHING.
of light, cannot be presumed, 404.
except where Prescription Act does not apply, 404, 405.
implied on sale of house by owner of adjoining land, 408, 409.
of minerals, does not destroy right of surface to support, 421, 422.
of private way, is for all purposes unless restricted, 414. *See* WAY.
presumed from twenty years' enjoyment, 412.
of several fishery, effect of, 427, 428.
of waste, title of lord to make, condition as to, 189, 190.
of way of necessity, implied, 412, 413. *See* WAY.
several, fishery may be claimed by, 427.
supplementary, when presumed, 366.

GRASS. *See* CROPS.

GRAVEL,
proceeds of, dug after contract, purchaser is entitled to, 286.

GROUND-RENT,
improved rent is not, 1199.
meaning of, 138.
misstatement as to amount of, may avoid contract, 152.
of sum secured on personal covenant, as, 155.
particulars should state, 133, 1201.
without remedies, purchaser need not accept, 1199.

GUARANTEE,
of certain income from property, may found action of tort, 113.
of solvency, must be in writing, 115.

GUARDIAN,
ad litem, not allowed to bid on sale by Court, 1323.
father's possession of infant's lands presumed to be that of, 443.
may sell infant's lands, for what purposes, 3.
transactions of, with ward, 23, 43.
under Partition Act,
who may be, to request sale, 1307.
under Settled Estates Act,
application for appointment of, to consent to sale, 1291.
father cannot give consent to sale, 1291.
testamentary, cannot give consent to sale, 1291.

HABENDUM,
subject to rents is not covenant for payment, 629, n. (*y*).

HANDWRITING,
proof of, of entries in questions of pedigree, 394, n. (*y*).

HARDSHIP,
defence to purchaser's action for specific performance, 1192, 1193.
defence to vendor's action for specific performance, 1170—1173.
excessive price amounts to, how far, 1211.
must exist at date of contract, 1173, 1174.
negligence does not amount to, 1173.
relation of, to mistake, 1155, 1172.
upon individual members of corporation, not a defence, 1173.
where performance would involve forfeiture, 1170, 1171.
breach of trust, 1172.
defendant does not pay costs where action is dismissed for, 1266, 1267.
delay in case of, more readily received as defence, 1215.
purchaser from Court, when discharged on ground of, 1355.
obtaining decree may be deprived of costs on ground of, 1262.

HEIR. *And see* REPRESENTATIVES.
adoption by, of ancestor's parol contract for sale, 296.
concurrence of,
impossibility of, does not vitiate title, 773.
of equitable vendor, when necessary, 293.
on sale by devisee cures non-registration, 772.
contract enforceable against, may be carried out by vendor's representatives, 294, 663.
not presumed against, 309.
conveyance by,
has priority to conveyance by devisee under unregistered will, 771.
unless purchaser from devisee first register, 772, 965.
of descended realty does not discharge personal liability, 702.
frees land from liability to creditor, 702.
costs of getting in legal estate from infant, how borne, 800, 1263, n. (*b*).
customary, may sue on covenants before admittance, 891, 892.
dealing with expectancy,
purchaser may require further assurance from, 911.
relieved against exorbitant interest, 853.
sale, 845, 846, 847.
election by, under will of purchaser before conveyance, 918.
existence of concealed, renders proof of title by adverse possession difficult, 462.
Locke-King's Acts apply to, how far, 303, 304, 922.
of covenants, how far bound by administration action, 896.
liability of, under old law, 895.
present law, 896.
of mortgagee, trustee of legal estate for executors, 664.
of purchaser,
cannot sue for damages on contract, 1084.
dying before completion, power of disposal of, 304.
may sue on covenants for title, though not named, 878.

HEIR—*continued.*
of purchaser—*continued.*
rights of, and of devisee under old law, 306.
present law, 308.
when necessary party to specific performance, 1131, 1132.
of settlor, cannot defeat limitations in favour of collaterals, 1010, 1011.
voluntary settlement, 1021.
of surviving trustee dying without executor, can make title, *quære*, 684.
of vendor,
action by, for unpaid purchase-money, who must be parties to, 854.
entitled to property till time for completion, 296.
when necessary party to specific performance, 1130.
possession of relative of, not possession of, 446.
registration of affidavit of intestacy in Yorkshire by, 775.
trust for sale,
by trustees and their heirs includes devisee, 683.
heir of survivor, 683.
or heir of survivor does not include devisee, 682, 683.
by heirs and assigns of survivor includes devisee, 683.
not mentioning heirs precludes s. 30 of Conv. Act, 683.
will of ancestor, covenant for production of, may be required from, 627, 628.
negativing claim of, production of, 375.
proof of, by vendor against, may be required, 374.
within Trustee Act,
vesting order made when
heir of mortgagee unknown, 658.
trustee unknown, 657.
who may be trustee
of deceased mortgagee, 655, n. (*q*).
of vendor contracting to sell after direction to executors to sell, 664.
dying before completion on compulsory sale, 663.
of copyholds dying before surrender, 662.

HEIRLOOM,
Court has no jurisdiction to order sale of, under S. E. Act, 1281, n. (*r*).

HERALDS' COLLEGE,
books of, evidence of matters of pedigree, 394.
only up to date of last judicial visitation, 357, 394.
date of last visitation, 394, n. (*u*).

HERBAGE,
exclusive right to, whether within Prescription Act, 429.

HERIOTS,
commissioners on exchange cannot make allotted lands subject to, 328, n. (*p*).
liability to, conveyance under L. C. C. Act does not destroy, 783.
need not be stated on sale of customary freeholds, 132, n. (*c*).

HERIOTS—*continued.*
of customary freeholds, 132, n. (*c*).
should be stated in particulars, 131.
rent under Stat. of Lim., 433.
unless payable at uncertain intervals, 434.

HIGHWAY,
common, what constitutes, 411.
presumption of dedication of,
onus of rebutting lies on person denying public right, 411, n. (*r*).
raised by user by public, 411.
rebutted by showing dedication impossible, 411.
user only permissive, 411.
right of, may be resumed after nonuser, 411.
not destroyed by nonuser, 411.
soil of, passes under conveyance of adjoining land, 411, 412, 602.
under Public Health Act vests in whom, 411, n. (*u*).
vests in adjoining owners, 411.
strips of waste adjoining, presumption as to ownership of, 379.
does not arise where highway is new, 379, 380.
road has not been dedicated, 379, n. (*e*).
may be rebutted, 379.

HOUSE,
"brick built," meaning of, 137.
"furnished." *See* FURNISHED HOUSE.
misstatement of materials or number of, fatal, 155.
"newly built," meaning of, in contract to let, 102.
precautions to be used on sale of, 137.
"substantial and convenient," meaning of, 137.
what constitutes a, within L. C. C. Act, s. 92..245 *et seq.* *And see* NOTICE TO TREAT *and* COUNTER-NOTICE.
general result of cases as to, 247.
includes trade fixtures, 245, n. (*g*).
meaning of "part only of," 244, n. (*c*).
price of whole must be deposited before possession under s. 85..245.

HUNTING,
right of, when a profit *à prendre* under Prescription Act, 425.

HUSBAND,
abandonment of possession by, bars wife, how far, 448.
rights of, good consideration for settlement by wife, 1004.
acquisition of land by, and wife jointly, effect of, 1047, n. (*a*).
advance by, to trustees of settlement, effect of, 1059.
concurrence by, in wife's conveyance,
bankruptcy does not prevent, 954, n. (*c*).
dispensed with under Fines Act, when, 649 *et seq.*
order for, effect of, 651.
refusal to concur gives jurisdiction, 651, n. (*q*).
contract by,
and wife enforceable, if purchaser knew her incapacity, 1161, 1162.
for purchase enures for her benefit, if surviving, 1162.
for sale of wife's chattels real, 9, 10, 649, 1122. *See* TERM FOR YEARS.
to settle wife's freeholds, not binding, 1054, n. (*a*).

HUSBAND—*continued.*
contract by wife,
enforceable against, when, 1115.
may be adopted by, 1121, 1122.
covenants for title by, on sale of wife's estate, 620, 621.
has no title to estate bought with separate estate, 1066, 1067.
of trustee is trustee within Trustee Act, 655, n. (*q*).
post-nuptial settlement by, what a good consideration for, 1004, 1005.
of wife's separate estate, concurrence in, is not good consideration, 1007.
purchase by, from wife of her property, 49.
in name of wife or child, an advancement, 1057 *et seq.*
of administratrix from co-administratrix, 40.
wife may be annulled by, 32.
voluntary assignment of wife's legal term for years cannot be defeated by her surviving, 1021.
wife's term does not merge in fee of, during her life, 310.

HUSBANDRY,
improper, by purchaser, ground for ordering payment in of purchase money, 1217, 1218.
depreciation by, must be compensated, 733.
purchaser in possession may manage estate according to proper, 502.
vendor in possession may manage estate according to proper, 286, 507, 1215.
profits of management belong to purchaser, 286, 507.

IDENTITY,
condition as to, does not cover entire absence of evidence, 174.
is generally a contract that deeds shall show, 175.
provides only against deficiency of evidence, 174.
that possession for twenty years shall be evidence of, 167, 198.
declaration as to acceptance of, may waive strict right, 496.
latent ambiguity respecting, removable by evidence of intention, 1092.
of persons, declarations and evidence of pedigree admissible to show, 395.
presumption as to,
of enfranchised copyholds, 378, n. (*y*).
of land charged with tithe commutation charge, 378, n. (*y*).
of lands of ecclesiastical corporation, 378, n. (*y*).
of parcels, 378.
of persons, 378.
want of, will vitiate sale, 155.

IDIOT. *See* LUNATIC.

IGNORANCE,
misrepresentation due to, binds maker, when, 948.
mutual, of value, effect of inadequacy of consideration in case of, 842.
of rightful owner does not prevent time running, 440.
of vendor, when ground for relief, 840.
wilful, may amount to constructive notice, 971.

ILLEGAL,
contract,
cannot be enforced, 277 *et seq.*, 1162.
collateral, does not avoid legal contract, 1162.
illegality of, cannot be set up by agent against principal, 1163.
defence to action on contract, 1096.
legal contract cannot become, 1096.
money arising under, recoverable, 1163.
security given under, void, 834, 835.
what is, 277 *et seq.*
conveyance to son to qualify as voter, not, 1063.
trustee in fear of indictment, not, 1063.
motive of purchaser does not avoid conveyance, 856.
omission of stipulation supposed to be, is binding, 1159.
sale or purchase of pretended title, when, 277.
unsuccessful defence that contract is, effect of, on costs, 1264.

ILLEGIBLE,
interest which is, may be refused, 346.
agreement, evidence admissible to decipher, 1090.

ILLEGITIMACY,
of child born in wedlock, proof of, 381, 382.
presumption of advancement not rebutted by, 1057.
whether so in case of grandchild, *quære*, 1057, n. (*f*).

IMMATERIAL,
terms of agreement need not be proved, 1146.

IMPRISONMENT. *See* DURESS.

IMPROVEMENTS. *See* ACCOUNTS; EXPENDITURE.
after contract belong to purchaser, 286, 287.
by purchaser,
acquiesced in by owner, effect of, 948, 949.
allowances for, on conveyance being set aside, 903.
on eviction by Crown, none, 562.
prior claimant, what, 1032.
on rescission, what, 503, 504, 852—854.
prior to completion, whether recoverable, 1077.
value of, whether recoverable under covenants for title, 894.
by vendor, after contract, no allowance for, 732.
capital money under S. L. Act may be applied in, 97.
claimant under fraudulent deed, allowed for what, 1033.
invalid deed, allowed for what, 1033, 1034.
intended, of adjacent land, effect of plan showing, 136.
lien of joint-tenant for, extent of, 1050.
of charity property, when allowed for, 853, n. (*d*).
parol agreement to make, when valid, 236.
power to invest in, authorized by Improvement of Land Act, 97.
whether authorized by power to invest in land, 97.
refusal to execute promised, defence to specific performance, 1156.
what are permanent within L. C. C. Act, s. 69..751—753.

IMPROVIDENT,
contract by agent can be resisted, how far, 1166.

INADEQUACY,
of consideration,
effect of mutual ignorance in case of, 842.
how determined, 849.
how far defence to specific performance, 1207—1208.
on sale of estate in possession, 1207.
reversion, 1208.
uncertain interest, 1209.
where consideration uncertain, 1209.
how far ground for setting aside sale of reversion, 8, 840 *et seq.*, 850.
in dealings with reversion, rules as to, under old law, 844 *et seq.*
may be evidence of fraud, 851.
ground for not allowing purchaser costs, 1261.
terms on which sale set aside on ground of, 854.
of damages as remedy, is foundation of specific performance, 1105, 1107.

INCAPACITATED OWNERS. *See* LIMITED OWNERS.

INCAPACITY. *See* CONVICT; INFANT; LUNATIC; MARRIED WOMAN.
of legatee, when evidence of intention that trustees shall have power of sale, 673, 674.
personal, defence to action on contract, 1095.
specific performance, 1160—1162.
to convey a breach of covenant for right to convey, 781.
to sell or buy, classification of, 1.
sale of property of person under, how far a conversion, 298, 299, 1303.

INCLOSED LANDS,
on sale of, evidence of award should be excluded, 186.
title of lands for which allotments have been made should be excluded, 186.
strips of waste presumed to belong to adjoining, 379.
title to be shown to, 326—328.

INCLOSURE. *And see* COMMONS INCLOSURE ACT.
admittance to allotment under, to several tenements, 802.
allotment made after contract passes with property, under General Inclosure Act, 130, 187.
award, conclusive evidence of performance of terms of Act, 327, n. (*m*).
condition as to, 186, 187.
due appointment of persons making, presumed, 370.
how proved, 350.
commissioners. *See* COMMISSIONERS.
defective title to, may be confirmed, 958.
does not deprive surface of support from minerals, 422.
exchange of lands under, does not transfer land-tax, 399.
expense of, limited owners may sell to meet, 17.
reservations may affect land sold by commissioners, for expenses of, 187.

INCOME,
guaranteed by vendor, 113.
mis-statement as to, 156.

INCOME TAX,
purchaser may deduct from interest on purchase-money, 727.
secus, on sale by Court, unless provided for in conditions, 1333.

INCOMPETENT,
purchaser bidding on sale by Court, 1327, 1328.
bound at option of parties interested, 43.
buying at auction, 44.
under decree of Court, 44.
remedies against, by *c. q. t.*, 51.

INCORPOREAL HEREDITAMENTS,
escheat now applies to legal or equitable interest, 290.
V. and P. Act applies to, how far, 336, n. (*t*).

INCREASE
of rent, agreement for, must be in writing, 236.
of value of estate, purchaser cannot claim on rescission, 1076.

INCUMBRANCER. *See* INCUMBRANCES; MORTGAGEE; NOTICE; PRIORITY.
concurrence of, may be dispensed with under L. C. C. Act, 670.
equitable, on sale by Court, how far necessary, 1345, 1346.
costs of, on sale by Court, out of purchase-money, 1341.
has no claim against vendor selling land subject to charge, 1039.
interests of, how dealt with on sale by Court, 1315, 1316.
may make mortgagee with notice liable for surplus, 95.
must be served with petition for re-investment under L. C. C. Act, 759.
unless land taken is not affected by charge, 759.
unless mortgage is subject to payment in, 759, 811.
what costs allowed, 811.
not prejudiced by mortgagor's waiver of notice on sale, 82.
of purchaser, on what terms relieved against vendor, 285.
payment to, by purchaser *primâ facie* in discharge of incumbrance, 905, n. (*z*).
petition under L. C. C. Act should not be served upon, whose securities were created since payment in, 811.

INCUMBRANCES. *And see* MORTGAGE; MORTGAGEE; NOTICE.
abstract must mention, 345.
concealed, purchaser of part may throw on later purchaser of residue, 944.
concealment of, criminal liability for, 108, 344.
conditions as to presumed extinction of, 177, 178.
may offer indemnity against, 177, 178.
must mention subsisting, 177.
contribution to, by purchasers *inter se*, 1035, 1036.
supposed to be invalid, 1038, 1039.
covenant against by trustees and mortgagees, 94, 146, 197, 622 *et seq.*
subsisting, should provide for payment, 625.
discharge of,
costs of, fall on vendor, 84.
on sales by Court out of purchase-money before conveyance, 1333, 1339.

INCUMBRANCES—*continued.*
discharge of—*continued.*
on sales by Court purchaser has lien for, on unpaid purchase-money, 1339.
out of unpaid purchase-money after conveyance, 666, 905 *et seq.*
even when secured, 928, 929.
purchase-money being required for, makes time essential, 485.
purchaser must pay interest on money retained for, 727.
should see to, before paying purchase-money, 666, 928.
refusal of, is breach of covenant for further assurance, 888.
under Conv. Act, s. 5..176, 177, n. (*p*), 666, 749, 1315, 1316, 1333.
under L. C. C. Act,
costs of, on other lands, does not fall on company, 808.
what are within s. 69..751.
where part only of land is taken, 670.
disclosure of, is duty of vendor, 105.
equitable, registration of, under Registry Acts, 767, 768, 774, 775.
satisfied, how far to be abstracted, 341 *et seq.*
existence of,
affects form of certificate as to title, how far, 1239.
defence to specific performance, how far, 321, 324, 1181, 1201.
matter of conveyance only, when, 324, 1181.
future, money may be paid in, under Trustee Relief Act, to meet, 749.
getting in, by separate deed, how far vendor's duty, 572, 814.
on sale in lots, 575.
inquiries as to,
costs of, recoverable as damages, 1076.
mortgagee, whether bound to answer, 517, 948.
proper form of, 516 *et seq.*
to be made of trustees on purchase of equitable estate, 109, 518.
keeping alive, is at purchaser's expense, 814.
purchaser entitled to, 575, 576, 1040—1042.
merger of, 1067, n. (*n*), 1040—1042.
purchaser of lease subject to, cannot effect, of lease, in reversion, 1000.
in favour of mesne, not affected by contract of mortgagee to purchase equity of redemption, 313.
mesne, purchase of equity of redemption by mortgagee lets in, how far, 1040—1042.
notice of one, postpones purchaser to all subsisting, 932. *See* NOTICE.
to purchaser before completion, 285, 928.
to vendor, 285.
particulars must mention subsisting, 131.
power of consent by tenant for life to sale, how far affected by, 87.
prior, effect of, on recovery of arrears, 459, 460.
purchase by counsel of, on client's estate, when voidable, 43.
purchaser buying up, can only charge actual price paid, 907.
vendor liable for, till conveyance, 666.
voidable, purchaser buying subject to, is bound, how far, 999.
INDEMNITY,
against charges, covenant for, whether sufficient, 625.
costs contained in assignment of action, how far bad, 272.

INDEMNITY—*continued.*
against covenants of vendor, purchaser must give, 631, 632.
defect in title, purchaser not entitled to, 1194.
future charges, money must be paid in under Trustee Relief Act as, 749.
liabilities of estate, purchaser must give, 628, 631.
production of deeds, purchaser must give, 633, 763.
quit rents, purchaser must give, 631.
rents and covenants, purchaser of leaseholds must give, 629.
rents, &c., successive assignees must give, to original lessee, 913, n. (*b*), 1046.
subsisting charge, construction of bond of, 625, 626.
succession duty, should be taken on purchase of reversion, 238.
wife's debts is good consideration for separation deed, 1005.
arbitrator on contract has not authority to award, 1194, n. (*l*).
condition to give enforced, even after conveyance, 178, 913.
covenant for, includes costs of action for breach of covenant, 631, n. (*k*).
fire insurance is contract for personal, 197, 913.
for loss of deeds to mortgagor, 477, 478.
on purchase by railway company of lands subject to rent-charge, 1194, n. (*l*).
purchaser of leaseholds from executors, whether liable to give, 631, 1345.
must give to lessee, 311, 631.
third-party procedure in cases of, 1133.

INDICTMENT,
lies against grantor and grantee of fraudulent conveyance under 13 Eliz., 1030.

INDORSED RECEIPT. *And see* RECEIPT.
not conclusive evidence of payment, 742, n. (*z*), 825.
under Building Society Act, 6 & 7 Will. IV., effect of, 936, 937.
1874, effect of, 937, 938.
gives priority only for sum advanced, 938.
unusual position of, may be notice, 480, 978.

INDORSEMENT. *And see* INDORSED RECEIPT.
of conveyance on leading title-deed retained, 783.
of entry on Court rolls of protector's consent, 780.
of notice of covenant for production on deeds retained, 766.
on deed, that it is duplicate, 888.

INFANT,
contract of,
avoidance of, 31, n. (*s*).
election as to, what time allowed for, 30.
electing to abandon ought to disclaim, 30.
adopt ought to have a new contract, 30.
enabled him to be sued for specific performance if after majority he affirmed contract, 1161.
sue at law not in Equity, 1161.
sue for specific performance after majority, 1161.

INFANT—*continued.*
contract of—*continued.*
may be adopted or abandoned at majority, 29, 30, 1161.
on abandonment of, whether money paid recoverable, 31.
voidable not void at Common Law, 1161.
conveyance by, practice as to settling, by Court, 1249, 1344.
when ordered, 1347.
conveyance of,
by deed void not voidable, 2, n. (*a*).
for certain charitable religious and other purposes good, 3.
not binding, 2.
under power of what kind good, 3.
under the Court for payment of ancestor's debts, good, 3.
conveyance of lands of, form of order for, 1344, 1345.
devisee of vendor, costs of getting in legal estate from, 799, 800.
gavelkind lands of, conveyed by feoffment, 600.
heir of vendor, costs of, when allowed, 800, 1262.
married woman may appoint attorney, 12.
may be declared trustee of portions allotted on partition to other parties, 665.
notice to, by mortgagee of intention to sell, good, 82.
order for sale in partition action when, interested how formerly made, 1306.
possession of land of, by father is that of trustee, 443.
powers of Partition Acts exerciseable though, interested, 1306.
procedure on application under S. E. Act when, interested, 1283, 1290, 1291.
purchase by, good, 29.
of annuity formerly but not now void, 30.
purchaser of estate of, must account how far, 1034.
rent-charge of, Court cannot sell lands free from, 2, n. (*b*).
request of, for sale under Partition Act, how made, 1306.
reversionary legacy of, Court may sell, 2, n. (*c*).
sale by, of annuity or rent-charge formerly, but not now, void, 5.
remedies against fraudulent, 4, 5.
purchaser only entitled to relief if he fraudulently misrepresent his age, 5.
sale of lands of,
cannot be ordered in administration action, 1315.
secus where trustees disclaim discretionary power, 1316.
Court can make under Partition Acts, 2, 1306.
sometimes to raise costs, 2.
cannot make except by statute, 2.
in gravelkind, good, 4.
under S. E. Act and Conv. Act, 3, 4.
under S. L. Act, 4.
when ordered in foreclosure action, 1316, 1317.
security given by, personally, void, 31.
settlement by, how valid, to be made, 3.
trustee, vesting order as to lands of, 656. *See* TRUSTEE ACT.
undertaking of, to purchase under Partition Acts, how given, 1306.

INFANTS RELIEF ACT,
application of, 6.
whether, applies to contracts by infants, 30.

INFANTS SETTLEMENT ACT,
settlement by infant under, 3.

INFERENCE. *See* PRESUMPTION.

INFLUENCE. *See* UNDUE INFLUENCE.

INFORMATION. *And see* KNOWLEDGE.
purchaser precluded from evidence may be entitled to, 186.
trustee liable for giving wrong, 518.
vendor bound to produce other than that specified, if he have it, 173.
supply all in his power, 167.

INHABITANTS,
purchase by, *eo nomine*, bad, 25.

INHERITANCE,
Act, presumption as to stock of descent under, 380, 381.
belongs to purchaser from date of contract, 284, 285.
conveyance of, carries right to title-deeds, 826, n. (*p*).
owner of first estate of, when proper party to specific performance, 1131.
portion of, can sue on covenants for title, 879, 880.
purchase of, by termor, effect of, 310.
trustees may sell apart from minerals, 77, 78, 1296—1298.
must sell timber along with, 76.

INITIALS,
signature by, sufficient, 269.

INJUNCTION,
against action by mortgagee for mortgage debt after contract to sell, none, 311.
for deposit by purchaser pending vendor's action for specific performance, 1076.
against breach of covenant,
acquiescence, effect of, generally on right to, 871 *et seq.*
may substitute damages in lieu of, 869—871.
damages not generally enforced in lieu of, 871, n. (*s*).
evidence of damage not necessary, 874, 875.
jurisdiction of County Court to grant, 871.
against breach of negative covenant Court cannot refuse, 870, 1169.
carrying on business after sale of goodwill, 1111.
ejectment by judgment creditor of purchaser in possession, 530.
when owner has encouraged expenditure, 1144.
grantee of riparian owner, only if damage proved, 415.
landlord, vendor distraining, pending completion, 290.
payment of purchase-money till discharge of solicitor's lien, 1271.
polluting percolating underground water, 417.
presentation of parson not nominated by purchaser, 1223.
purchaser from heir or devisee paying purchase-money, by creditor, 703.

INJUNCTION—*continued.*
against railway company,
by adverse claimants, not granted, 512.
by landowner after delay not granted, 512.
by mortgagee, 511, 512.
by person whose estate has determined since notice to treat, 244, n. (*z*).
entering, when granted, 511.
taking part only of house, 244.
working traffic, on failure to pay, 1220, 1221.
against re-sale by vendor pending contract, 1222, 1223.
sale by trustees only on breach of trust, 95.
vendor distraining on tenants after conveyance, not granted, 1223.
waste by purchaser in possession, 289, 1222.
withdrawing support, 421.
implied negative covenant, how far enforceable by, 1167—1170.
right to, in equity is test of satisfied term, 578.

INJURY,
through prior act of vendor, remedy for, 926.

IN LOCO PARENTIS,
purchase by person, an advancement, 1057.

INQUIRIES. *And see* NOTICE.
as to and for what to be made,
claim, failure to make, gives purchaser notice, 978, 979.
consideration being pre-existing debt, 987.
evidence in vendor's possession, 372, 373.
incumbrances, 516, 517.
marriage settlement, 373, 970, 985, 986.
non-exercise of power, 373, 374.
restrictive covenants, 520.
suspicious matters, 373, 374, 970, 985, 986.
tender and refusal of mortgage money, 374.
title deeds, 520.
answered by reasonable excuse absolves purchaser, 951, 953, 970, 980.
necessary in register county, 767.
omission to make, postpones purchaser, 520, 521, 766, 979.
writs of execution, 558.
costs of, as to persons entitled to money under L. C. C. Act, 805.
action include costs of, 1267.
document prior to root of title, none can be made as to, 337.
fishing, need not be answered, 373, 374.
incumbrancer need not answer, 517, 948.
of whom to be made,
of incumbrancer, as to his claim, 109, 516, 517.
of sheriff, as to writs of execution, 558.
of tenants, 518, 519, 558.
not after abandonment of possession, 520.
of trustees on purchase of equitable estate, 109, 518.

INQUIRIES—*continued.*
on reference as to title,
form and scope of, 1227, 1228.
not stayed pending appeal, 1226.
trustees liable for false information in answer to, 109, 110, 518.
when to be made,
on purchase of leaseholds, 520, n. (*x*). *See* LEASEHOLDS.
legacy, 110. *See* LEGACY.

INROLLED DEEDS. *See* DEEDS; ENROLMENT.

INROLMENT. *See* ENROLMENT.

INSANITY. *See* LUNATIC.
covenant for further insurance not broken by inability through, 887.
evidence of, 6, 7, 32, n. (*d*).

INSCRIPTION,
evidence of pedigree, 394.
whether acknowledgment of title under Stat. of Lim., 445.

INSOLVENCY. *See* BANKRUPT; BANKRUPTCY.
of auctioneer, loss by, falls on vendor, 208, 223.
of principal, agent need not disclose, 214.
of purchaser, may be ground for appointing receiver, 1220.
proceedings in, how proved, 359.

INSPECTION. *And see* PRODUCTION; TITLE-DEEDS.
of abstract, prior to sale, 174.
of court-rolls, how obtained, 478.
of lease, opportunity of, should be given, 106, 132.
of property by purchaser, effect of, on misdescription, 154.
of title-deeds, earlier than root of title, 105, 171, 172.
of will, when required, 365.
power of Court to compel, 478, 479.

INSTALMENT,
purchaser entitled to possession on payment of last, of purchase-money, 715.

INSTRUCTIONS,
for preparation of contract may amount to agreement, 268.
private, to agent, effect of, 210.

INSURANCE,
breach of covenant as to,
equivalent to other covenants as regards forfeiture, 196.
formerly worked forfeiture, 194.
purchaser protected against forfeiture for, 195.
condition as to, on sale of buildings, 196, 197, 913.
contract between vendor and purchaser, does not affect insurer's liability, 914.
for, benefit of, does not pass to purchaser, 913.
for, is contract of indemnity, 197, 913.
money, vendor must repay, after payment by purchaser, 913.
title depending on sufficiency of, held good, 1274.
vendor, effecting improper, 287.
whether bound to keep up, after contract, 287.

INTENTION,
apportionment of benefit of covenants for title is question of, 879.
common, deed failing to carry out, may be rectified, 838.
compensation after conveyance is question of, 904.
contrary, under Locke King's Acts, what is, 922, 923.
covenants for title can only be restricted by clear expression of, 889.
construed according to, 891.
evidence of statement of, to prove tenancy in common, 1048.
merger of charge on payment off, is question of, 1040—1042.
on purchase of equity of redemption, to discharge land, what is, 919.
that charge shall be paid on sale, discharges land, 691.
that devisee of vendor shall take rents till completion, 296.
of vendor shall take proceeds, 302.
that trustees' receipt shall be good discharge,
how implied,
by trust for investment, 673.
payment of debts, 673.
even though the class of creditors is specified, 676.
even though none at date of sale, 675.
by trust for payment to person known to be incapable, 673.
requiring time and discretion, 673.
how not implied,
by trust for division among specified adults, 674.
one purpose only, after its determination, 677, 678.
payment of specified debts or legacies, 674.
to persons not known to be incapable, 674.
not affected by attainment of majority of *cestuis que trust*, 676, 677.
convenience or inconvenience, 675.
subsequent acts of beneficial owners, 677.
events, 672, 675 *et seq.*
trust instrument alone is evidence of, 672, 675.
that restrictive building covenants are for mutual benefit, 866, 867.
that will shall not speak from death, 309.
to defeat creditors necessary to bring settlement within 13 Eliz., 1004, 1026—1028, 1030.
waiver of lien is question of, 829 *et seq.* *See* WAIVER.

INTEREST,
arrears of, how far recoverable, 459 *et seq.* *See* LIMITATIONS, STATUTE OF.
condition for payment of,
frame of, 142 *et seq.*
on increasing scale, not usurious, 145.
rent by way of, not usurious, 145.
lien of purchaser for, on purchase-money, after rescission, 506.
mortgagee not liable for, on surplus, in case of rival claims, 95.
on compensation repaid out of purchase-money, vendor liable for, 739.
on costs, none allowed during taxation, 819.
refunded on appeal, not allowed, 1253, 1271.

INTEREST—*continued.*
on deposit,
auctioneer not liable for, 207.
included in costs of vendor and purchaser summons, 1272.
purchaser may recover in action for damages on contract, 1076.
on rescission, when, 221, 1075, 1076.
vendor must pay, on return of, 727.
not entitled to, 727.
on purchase-money,
acquiescence in claim for, or refusal of, what is, 727.
agreement for reduction of rate of, construed against purchaser, 708, n. (*x*).
that vendor shall take rents till actual completion precludes claim for, 726.
to allow purchaser rents and, suspicious, 710, 711.
to pay by vendor of advowson till vacancy, 281.
to pay in ascending scale not a penalty, 726.
appropriation prevents running of, how far, 716 *et seq.* *See* APPROPRIATION.
compound, claim for, 708, n. (*t*).
for fixtures, what payable, 715.
income tax may be deducted from, 727.
paid into Court under L. C. C. Act, not allowed, 727, 762.
payable from what date,
by railway company, 711.
for growing timber, 713, 714.
for mature timber, 714.
in default of agreement for time for completion, 711.
on sale of reversion or wasting property, 712, 713.
where purchaser is in possession, 709, 710.
out of possession, 709, 710, 712.
payable on vendor's default, when, 709 *et seq.*
doubt raised by *De Visme* v. *De Visme*, 720, 721.
except where default is gross and wilful, 719, 722.
meaning of "wilful default," 723. *See* DEFAULT.
where action caused by vendor's death, 722.
necessary to clear title, 722.
payment of, by purchaser in possession does not preclude tenancy will, 504.
purchaser in possession cannot relieve himself by going out, 712.
rate allowed in default of agreement, 708.
recoverable as damages in action on contract, 1076.
retained by purchaser to satisfy incumbrances, 727.
set-off against that on mortgage, on purchase by mortgagee, 713.
Stat. of Lim. does not begin to run, till good title shown, 710.
on rents received while in possession, vendor may have to pay, 732, 733.
on sale by Court,
on deposit, condition against allowing, 1338.
on purchase-money, payable from what date, 1342, 1343.
on sale of annuity or life interest, 1344.
purchaser may be relieved from, by payment into Court, 1338.
purchaser may deduct income tax, 1333.

INTEREST—*continued.*
on setting aside dealings with reversions, 851, n. (*p*), 853.
purchase by trustee, 52.
payment of, what is sufficient within Stat. of Lim., 456, 457.

INTERLINEATIONS
in deed, presumed to have been made prior to execution, 480.
in will presumed to have been made after execution, 481.

INTERLOCUTORY APPLICATION,
sale of mortgaged property may be ordered on, 1318, 1319.

INTERPLEADER
summons, auctioneer may take out, as to deposit, 205.

INTERROGATORIES,
party to deed fraudulent under 13 Eliz. may refuse to answer, 1030.

INTERRUPTION,
by stranger, fatal to acquisition of easement, 432.
during last year of enjoyment, effect of, 432.
not adverse, does not preclude prescriptive right to light, 405, 431.
payment of rent is not adverse, so as to affect right to light, 432.
user incapable of, will not found easement, 404.
what amounts to, 432.

INTESTACY,
affidavit of, heir may register, 775.
evidence of, supplied by letters of administration, 380.
what vendor must produce, 373, 376.
of purchaser without heir before completion, 289.
of vendor, costs of action occasioned by, 799, 1262.
title depending on, supported by Stat. of Lim., 462.

INTOXICATION,
defence to action for specific performance, how far, 1160.
on contract, 1095, n. (*p*).

INVALIDITY
of marriage, makes settlement invalid, 1009.

INVESTIGATION. *And see* TITLE.
of title, costs of, included in costs of vendor and purchaser summons, 1272.
recoverable as damages in action on contract, 1076.

INVESTMENT. *And see* PURCHASE-MONEY.
by father of his own money with settled funds, an advancement, 1063.
of deposit,
condition for, 140.
purchaser not affected by, unless at his request, 221.
under order of Court, 221, 222.
of moneys under L. C. C. Act, 751—754.
costs of interim, payable by company, 805, 808.
in copyholds, what payable by company, 808.
payable generally by company, 804 *et seq.*

INVESTMENT—*continued.*
of purchase-money,
is at purchaser's risk, 739.
on sale by Court, is at vendor's risk, if made at his request, 1333.
order for, should state at whose request made, 1333.
rescission affects, how far, 1342.
under power of attorney, 748.
with declaration of trust, discharges purchaser, 673.
power of, in land, does not authorize purchase of leaseholds, 96, 97.
whether authorizes substantial improvements, 97.
real securities conferred on trustees, 97.
does not extend to Scotland, 97, n. (*j*).
does not authorize purchase, 97.
power to vary, may authorize trustees to release part of the mortgaged lands on sale, 689, 690.
imply power of sale, 689.
trustees cannot make, in real estate, without authority, 96.
discretion of, as to, not interfered with, 98.
may release improper, 687, 688.
should stipulate for costs on sale to railway company, 92.
time allowed to, for, 98.
under S. E. Act, what allowed, 1288.
under S. L. Act, cannot be changed without consent of tenant for life, 1288, n. (*y*).
increased range allowed by, for moneys under L. C. C. Act, 751, 754.
option of tenant for life as to, 97.

I O U,
auctioneer accepting, for deposit, may sue on it, 205.
vendor's default is defence to action on, for purchase-money, 1072.

IRRIGATION,
right of riparian owner to use water for, 415.
works authorized under Improvement of Land Act, 97.

ISSUE,
failure of, how presumed, 390.
in tail. *See* REMAINDERMAN; TENANT IN TAIL.
presumption against woman having, when raised, 391.

JOINT PURCHASERS. *And see* JOINT TENANCY; PARTNERS; PARTNERSHIP.
abandonment of contract by one, not defence to specific performance by others, 1213.
advance by one of more than his share gives him no lien, 1050.
payment of purchase-money by, on sale by Court, 1333.
resulting trust for, how rebutted, 1055, 1056.
not rebutted by loan of part of purchase-money, 1055.
trust for, when not parties to conveyance, how proved, 1053, 1054.

JOINT-STOCK COMPANY. *See* COMPANY; CORPORATION.

JOINT TENANCY,
by devise not easily rebutted, 1051.
presumption of, on joint purchase at Law, 1047.
presumption of, on joint purchase does not arise in Equity,
if contrary intention can be shown, 1048.
parol evidence of facts showing, admissible, 1048.
if purchase-money is advanced unequally, 1047, 1048.
if tenants in common of mortgage buy equity of redemption, 1049.
if joint-tenants subsequently deal with land as if for trade, 1049, 1050.
on purchase of land for trade purposes, 1049.
out of partnership assets, 1049, 1050.
severed by contract of one tenant to sell, 312, 1117.

JOINT TENANTS. *And see* JOINT TENANCY.
contract of deceased, enforceable against survivor, 1117.
one, severs joint tenancy, 312, 1117.
covenant for title by, extent of, 624.
with, on sale to, should be joint, 628.
dealings with land by, as if for trade, create tenancy in common, 1049, 1050.
disseisors are, 446.
lands of, not extendible under old law, except for life, 526.
now extendible against survivor, 536.
lien of, for improvements, extends how far, 1050.
renewal of renewable lease, 1050.
possession of one, not possession of other within Stat. of Lim., 446.
production of deeds compellable by, 473.
receipt of one for whole purchase-money, not a good discharge, 748.
seised *per mie et per tout*, 624.
seeus, as to husband and wife, 1047, n. (*a*).
succession duty payable by, for accruer by survivorship, 669.
creates difficulty on sale by surviving mortgagee or trustee, 669.

JOINT VENDORS
must give separate receipts for purchase-money, 747, 748.

JOINTURE,
equitable, what title purchaser is entitled to, 584.
equity of person entitled to reconvert money into land, 301.
in bar of dower, title to land charged with, must be shown, 584.
release of, is good consideration for husband's settlement, 1004.
succession duty in respect of, on sale of settled estate, 316.

JOURNEYS
for examination of deeds, expenses of, 470, 471.

JUDGMENT,
affects only debtor's interest capable of being charged, 548, 549.
after contract, enforceable against purchase-money, 540, 957.
against vendor, is lien on unpaid purchase-money, 289, 530, 540.
arrears of, not recoverable for more than six years, 459, n. (*t*).
bankruptcy does not affect creditor without notice, 529.
debt, admission of, in will sufficient acknowledgment, 458.

JUDGMENT—*continued.*
docketed, non-registration of, effect of, 555.
elegit need not be issued in order to obtain equitable relief, 542, 543.
equity of redemption, not extendible at law under, 541.
evidence on same matter, 396.
execution cannot issue on, after twelve years' non-payment, 453, n. (*l*).
Irish or Scotch, how enforceable, 556.
Irish memorial of assignment of, how far evidence, 354, n. (*l*).
money secured by, barred by twelve years from payment or acknowledgment, 453.
notice of, to trustees does not give priority, 550.
postponed to interest of *c. q. t.*, 548, 549.
prior equitable incumbrancer, 549, 957.
where foreclosure decree prior to registration, 549 *et seq.*
purchase of part of extended lands by creditor satisfies, 1043.
purchaser's interest under contract, how far affected by, 285.
railway plant not extendible under, 541.
reform of law as to, suggestions for, 560 *et seq.*
registration of,
does not operate retrospectively, 543.
prevent time running in favour of debtor, 560, n. (*l*).
how far necessary under various Acts, 551.
in register county determines priorities, 961.
is necessary, 555.
is notice if purchaser search, 973.
reform of law as to, suggestions for, 559.
satisfaction of, 555, 556.
re-registration of, necessary every five years, 553.
release of part of lands from, does not release whole, 550, 551.
search for,
against former owners, when necessary, 559.
difficulty as to, 558, 559.
for five years preceding purchase, 551.
summary of law as to what are necessary, 556, 557.
solicitor buying in consideration of, from client, 45.
trust for sale not affected by, 530.
under old law,
docketing, how far necessary, 527, 528.
ejectment under, against purchaser in possession, 530.
entered up after contract, before conveyance, immaterial, 530.
except as lien on unpaid purchase-money, 530, 828.
entry of, in county register, necessary, 528.
equitable estate affected by, how far, 526, 528.
no priority in bankruptcy, unless execution had issued, 529.
power of appointment defeated by, 530.
purchaser without notice of, protected by legal estate, 529.
trust for sale not affected by, 530.
undocketed, affected purchaser having notice, 528.
what estates affected by, 525 *et seq.*
under 1 & 2 Vict. c. 110,
benefice not affected by, 510.
deficiency on re-sale is debt within, 1248.

JUDGMENT—*continued.*
under 1 & 2 Vict. c. 110—*continued.*
equitable remedies on, 542.
operation of, 531, 532.
immediate charge in Equity, 536.
lands of municipal corporation, how far affected by, 541.
legal operation of, 531.
mortgagees affected by, how far, 537, 538.
must be for payment of money, 535.
property extendible under, 536.
registration of, 551.
sale not ordered under, for one year, 542, 543.
what are, 534, 535.
under 18 & 19 Vict. c. 15, s. 11,
effect of, on mortgagees' charges, &c., 538 *et seq.*
search need not be made against mortgagees under, 539, 540.
under 23 & 24 Vict. c. 38,
freeholds, copyholds, and leaseholds affected by, 532.
registration under, 533, 551, 552.
what are, 535, 536.
writ of execution must be registered within three months, 552.
under 27 & 28 Vict. c. 112,
delivery in execution formerly confined to legal execution, 515, 546.
now includes equitable execution, 547, 548.
enforceable by sale, 534.
lands not affected by, till delivery in execution, 533, 536, 552.
priorities, how determined, 550.
receiver may be appointed without redemption action, 548.
registration of, unnecessary except for sale, 533, 552.
summary order for sale under, 543, 544, 1321.
binds all parties claiming through debtor, 544.
inquiries, when ordered on, 548.
proceedings on, 544.
what are, 535, 536.
unregistered, notice of, affects purchaser, how far, 554, 973.
vendor's lien, when a protection against, 834.
voluntary settlement, affected by, how far, 530.

JUDICATURE ACTS,
Cairns' Act superseded by, 871.
damages on rescission not recoverable under, 116.
delivery up of deeds, enforceable under, 940.
effect of, on equitable rule as to forfeiture of deposit, 223.
on plea of purchaser for value without notice, 940, 941.
on position of tenant under agreement for lease, 229.
jurisdiction as to costs, not enlarged by, 813.

JURISDICTION,
as to compensation after conveyance, none under Cairns' Act, 904, n. (*r*).
costs not enlarged by Judicature Acts, 813.
damages, unaffected by repeal of Cairns' Act, 871.

JURISDICTION—*continued.*
concurrent, plea of purchaser for value without notice, not admissible in, 939, 940.
examples of, 940.
land out of, agreement relating to, enforced, 1117.
of County Court to grant injunction, 871.
person out of, notice to, under Partition Act, dispensed with, 1304—1306.
to direct sale of charity property, 19.
under Partition Act, 1298 *et seq.*
to enforce contract for sale of fee by tenant in tail excluded, 325, 1117.
to rectify enrolled disentailing deed not excluded, 1117, n. (*c*).
trustees out of. *See* TRUSTEE ACT.
want of, does not invalidate order for sale against purchaser, 1290, 1350, 1351.
purchaser from Court entitled to discharge for, 1335.

JURY,
landowner desiring, not entitled to notice of intention to summon, 707, 708.
entitled to, where time for appointing umpire has expired, 706, 707, 1099.
may compel assessment by, by mandamus, 1098.
costs not allowed where assessment less than sum offered, 1098, n. (*m*).
price to be fixed by, under L. C. C. Acts, where good title not shown, 92.

JUSTICES,
clerk of the peace may enter to contract for purchase on behalf of, 25.

KENT,
land in, presumed to be gavelkind, 369.
presumption may be rebutted, how, 369.
often erroneous, 369.

KEYS,
acceptance of, equivalent to possession, 500.
fixtures, 606.

KITCHEN,
right of user of, vitiates sale, 156, 1201, 1202.

KNOWLEDGE,
easement can be acquired only with, of persons adverse to it, 430.
of purchaser,
of defect, effect of, 102 *et seq.*, 495, 739.
evidence of, when admissible, 125, 129.
immaterial when contract for good title, 165, 1205.
secus, if contract silent as to title, 1204.
precludes his right to compensation, 1195—1197, 1203.
of deficiency not readily assumed, 735.
precludes his right to compensation, 735.
of incapacity of married woman precludes him from resisting specific performance of contract of husband and wife, 1161, 1162.
of tenancy does not preclude right to compensation, 1195—1197, 1203.
professional, may preclude objections to conditions, 170, 171.
that he is buying an underlease, 135, n. (*u*).

KNOWLEDGE—*continued.*
of solicitor, distinguished from knowledge of counsel, 989, n. (*s*).
to bind client must be acquired in same transaction, 989.
of vendor,
of defect prevents rescission, 180, 1191.
of want of title entitles purchaser to damages, how far, 1079 *et seq.*
of worthlessness of estate ground for relief, when, 908.
personal, not necessary to impute constructive notice, 969.

LACHES. *And see* DELAY.
ground for refusing remedy by injunction, 870.
poverty not an excuse for, in impeaching transaction, 55.

LAKE,
fishery in, belongs to owner of soil, if one person, 428.
co-ownership of, 312.
large inland, in whom vested, *quære*, 428.
not in public, 428.
riparian owners have what title to, 414, n. (*q*).
soil of, no presumption as to ownership of, 414, n. (*q*).

LAND,
agreement to sell, means fee simple, 128, 129.
under L. C. C. Act does not include minerals, 130.
"for building purposes," what is, under L. C. C. Act, 861.
includes what,
under Judgments Act, 1864..545.
under Sale by Auction Act, 126, n. (*z*).
under Satisfied Terms Act, 330.
under Stat. of Lim., 433, 454.
under Trustee Act, sects. 13–15, 657, n. (*y*).
under V. & P. Act, 160.
intermixed, of different tenure, condition as to distinguishing, 175.

LAND DRAINAGE ACTS, 17, n. (*t*).

LANDLORD. *See* TENANCY; TENANT.
agreement by, with tenant, what must be in writing, 235, 236.
for sale to tenant, effect of, 290.
presumption of title of, to encroachment, 183. *See* ENCROACHMENT.
purchase by, of lease, effect of, on sub-terms, 917.
relation of tenant and, is legal, not equitable, 312.

LANDOWNER. *See* LANDS CLAUSES CONSOLIDATION ACT; NOTICE TO TREAT; RAILWAY COMPANY.

LAND REGISTRY ACT,
assurance of land under, need not be registered in local registry, 770.
search need not be made in local registry against land in, 567.
title under, what to be shown, 347, 348.

LAND TAX,
apportionment of, on severance of lands, 1039.
charity lands exempt from, remain so after charity exhausted, 399.

LAND TAX—*continued.*
defective title to, may be confirmed, 957, 958.
entail in fee farm rent in nature of, how barred, 781.
existence of, when defect in title, 323.
fee farm rent in lieu of, is real estate, 398, n. (*f*).
merger of, 398, n. (*f*).
not transferred on exchange under Inclosure Act, 399.
presumed to be borne by landlord, 137.
charge on land, 323, 398.
redeemed by limited owner is personal estate, 398, n. (*f*).
misdescription of, in particulars, 133.
not revived by subsequent inclosure of waste lands, 398, n. (*f*).
of wife, husband's rights over, 1125.
tenant for life may repay out of money under L. C. C. Act, 751.
redemption of,
acts for, ecclesiastical corporation may sell under, 21, n. (*s*).
limited owners may sell under, 17.
by tenant for life, 398, n. (*f*).
certificate of, abstract should contain, when, 323.
how proved, 398.
may be effected out of moneys under L. C. C. Act, 751.
not proved by statutory declaration of non-payment, 398.
reservation of minerals implied on sale for, 422.
sale for, 398, n. (*f*).
sale for, by rector, 42, 958, n. (*b*).
may make tithes lay property, 336, n. (*s*).

LANDS CLAUSES CONSOLIDATION ACTS. *And see* RAILWAY COMPANY.
"adjoining owner" in, meaning of, 861.
after possession taken under, landowner can obtain valuation, 62.
agreement for purchase of extra land enforceable after period for compulsory purchase, 513.
to sell land under, does not include minerals, 130.
building purposes in, meaning of, 861.
compensation under, does not constitute debt from company to landowner, 711, n. (*t*), 1087.
for damage not liable to stamp duty, 599.
on entry under s. 85, how settled, 1099, 1100.
vendor cannot claim before execution of conveyance, 1087.
compulsory power of purchase under, exhausted when scheme is impossible, 61.
limit of time for exercise of, 61.
powers under, how far exerciseable after period for completion, 513, 514.
concurrence of incumbrancers may be dispensed with on sale under, 670.
contract under, essentials of, 242, 243. *And see* NOTICE TO TREAT; RAILWAY COMPANY.
specifically enforceable, 243, 1099, 1112.

LANDS CLAUSES CONSOLIDATION ACTS—*continued.*
conveyance under,
by promoters by deed poll on refusal of landowner, 653, 750.
"grant," effect of word in, 635.
of copyholds, does not entitle lord to fine, 802.
must be entered on Court rolls, 782, 783.
should be registered, 770.
statutory, effect of, 575.
copyholds taken under, are subject to fines, heriots, &c., 783.
costs of abstract under, on whom thrown, 320.
costs of conveyance,
must be taxed, if at all, before payment, 803, n. (*o*).
under s. 80,
of proceedings as to purchase-money, 809, 810.
of reinvestment, 804—808. *See* REINVESTMENT.
what included under, 804.
what not included under, 808.
"adverse litigation," what is, 809, 1263.
unnecessary costs, 807.
"wilful refusal," what is, 808, 809.
where several companies purchase, 811.
under s. 82,
general expressions do not include reinvestment, 803, 804.
include getting in outstanding estates, 803.
purchaser must stipulate for payment of extra, 803.
what included under, 803.
vendor has not lien for, on moneys deposited under s. 85..803.
easements not extinguished by purchase under, unless compensated for, 404, n. (*a*).
within s. 85..244, n. (*c*), 511, n. (*d*).
remedy for destruction of, is under sect. 68..404, n. (*a*).
entry under,
by company, assistance of sheriff to, when necessary, 512.
can only be made, on what conditions, 508 *et seq.*, 1100.
compensation, how to be settled on, 1099, 1100.
deposit and, lawful if within period of compulsory purchase, 509.
injunction against, when granted, 511.
penalties for wrongful, 512.
prevents ejectment, 514.
remedy of landowner is under sect. 68..514.
under sect. 85 after binding agreement, option of landowner as to, 510.
not justifiable, unless urgent, 509.
prevents enforcement of previous agreement, 509, 510.
what amounts to, 511.
within period entitles company to hold after period expired, 509.
equitable tenant for life cannot convey under, without concurrence of trustees, 92.
lessor and lessee, interests of, must be treated for separately, 756.
lien for costs of arbitration under, none, 515, 1221.
unpaid purchase-money under, how far enforceable, 514, 515.

LANDS CLAUSES CONSOLIDATION ACTS—*continued.*
mode of procedure under, where title cannot be made, 92, 653, 670.
money in Court under, what arrears of interest on mortgage recoverable out of, 461.
notice of intention to apply for appointment of surveyor under, must be given, 509.
does not amount to contract binding company, 509.
notice to take part of house under sect. 92..244 *et seq.* *See* HOUSE.
manufactory under sect. 92..247. *See* MANUFACTORY.
notice to treat under. *And see* NOTICE TO TREAT.
abandoned if not acted upon, 248, 249.
alone, does not constitute contract, 242.
alone, within period, good, 62.
followed by bond within period, good, 62.
possession within period, good, 61, 248.
summoning of jury within period, good, 62.
may be deemed to be abandoned, 248, 249.
remedy of owner as to lands included in, but not taken, 515.
person served with, mandamus, 248. *See* MANDAMUS.
outstanding estates may be brought at any time under, 1039.
payment in under, does not prevent Stat. of Lim. running, 463, n. (*y*).
out of deposit moneys under, 757 *et seq.* *See* PAYMENT OUT.
under, in case of adverse claims, 653, n. (*d*).
persons absolutely entitled within sect. 69, who are, 758, 759.
petition for re-investment under. *See* RE-INVESTMENT.
price under, must cover mortgage on land, 511.
provision for payment of incumbrances on purchase under, of part only, 670.
purchase-money under,
application of, paid in,
balance of re-investment payable to tenant for life, when, 753.
in discharge of incumbrances, 750, 751.
in expenditure on permanent improvements, 751—753.
in manner authorized by S. L. Act, 754.
in payment to persons "absolutely entitled," 751.
in purchase of other lands, 751.
apportionment of, between tenant for life and remainderman,
none as between lessor and lessee, 756.
on sale of freeholds, subject to leases, 755, 756.
land charged with annuity larger than income of fund, 756.
leaseholds, 754.
renewable leaseholds, 755.
rule applies to lands belonging to ecclesiastical corporations, 756.
interest not allowed upon, paid in, 727, 762.
on refusal to convey or want of title, &c., to be paid into Court, 750.
remedy of person whose estate has determined, under, 244, n. (*z*).
reversioner's interest must be bought as well as lessee's, 1098, n. (*m*).
right of pre-emption of vendors under, of superfluous lands, 857—860.

LANDS CLAUSES CONSOLIDATION ACTS—*continued.*
rights and interests in land continue till compensated for under, 130.
may be destroyed by compensation under, 130.
rights of adverse claimant on purchase by company, 512.
mortgagee on purchase by company, 511, 512.
sale by limited owners under,
acts incorporating, good, 17, 18.
good, 17.
need not be for gross sum, 90.
price must be fixed under sect. 9, on, 243, 705 *et seq.* *See* PRICE.
purchase-money must be paid into bank, 750.
sale by municipal corporation under, can only be made with consent of Treasury, 93.
sale under, of lunatic's lands, 8.
works conversion, when, 761.
"take," meaning of, 515, n. (*f*), 802, n. (*m*).
"town" in, meaning of, 860.
trustees for absolute equitable owner cannot contract under, 93.
tunnelling, whether a "taking" of land under, 242, n. (*m*), 511.
warrant for jury under, may be enforced by mandamus, 62.

LARGEST LOT. *And see* LOT.
means largest in value, 162.
area, where value equal, 162.
means a single lot, not largest aggregate lots, 162, 763.
purchaser of,
covenant for production by, other purchasers must pay for, 766.
entitled to deeds, generally, 762, 763.
on sale by Court, 1349.
settlement, when, 763, 764.
not entitled to deeds, if vendor retains any lot, 162, 163.

LATENT,
ambiguity in agreement, evidence admissible to explain, 1092.
defect, meaning of, 102.
vendor must disclose, 103.

LAW,
conclusion of, not to be stated in conditions as a fact, 171.
election between remedies in equity, and at, 1113, 1217.
inability to recover damages at, how far defence to specific performance, 1183.
knowledge of, may prevent purchaser from objecting to misleading conditions, 170, 171.
mistake in, not a defence to specific performance, 1155.
proceedings at, how proved, 359.
time essential at, 482.
title doubtful on question of, 1230, 1232, 1235, 1236.
instances of, 1274—1276.

LEASE. *And see* LEASEHOLDS; TERM FOR YEARS.
abstract commencing with, actual possession by lessee must generally be shown, 338.

LEASE—*continued.*
agreement for,
acts of forfeiture avoid, 1217.
assignment of, effect of, on lessor's right to covenants, 1181.
for term less than three years must be in writing, 228.
land steward has not authority to enter into, 217.
may simply covenant for lessor's title, 636, n. (*e*).
must specify commencement of term, 256, 263, 1095.
not if agreement operates as a demise, 1095.
length of term, 256.
not enforceable after expiration of term, 1112, 1215.
position of tenant holding under, *quære*, 229.
prior to root of title may have to be produced, 171.
purchase-money for, liable to stamp duty, 791.
assignee of, how far liable to lessor, 1045, 1046.
must indemnify original lessee, 1046.
assignment of,
agreement for, of which residue less than three years must be in writing, 228.
containing covenant not to assign, effect of, 849.
contract for, not satisfied by grant of new lease, 1202.
does not relieve lessee from liability, 1045.
to alien artificers, valid, 27.
at rack rent,
described as at ground rent is bad, 155.
not within Local Registry Acts, 567, 769.
what is, within meaning of Middlesex Registry Acts, 769.
by mortgagor, mortgagee purchasing equity of redemption not estopped from denying, 1000, 1001.
under power, covenants run with reversion, 1001, 1002.
comprising more than described in particulars, binds vendor, 135.
other property than intended, time runs in respect of, 447.
that sold should be stated, 134, 164.
concurrent, grant of, does not give reversioner estate in possession, 437, 446.
on grant of, surrender of old lease is merely by estoppel, 437, 446.
corrected by counterpart when, 366, n. (*i*).
covenant for quiet enjoyment in, restrictive words in, 887. *See* COVENANTS FOR TITLE.
for validity of, construction of, 881.
implied under Conveyancing Act, 616.
covenants in, should not generally be referred to as "usual," 191. *And see* COVENANTS.
vendor must not mis-state, 108, 134.
"demise" implies covenants for title in, when, 636.
ecclesiastical, recitals in, renewed, when conclusive, 356.
examination of, by purchaser precludes him from relying on non-disclosure, 106.
execution of,
can now be ordered, 1253.
does not preclude lessee from damages for prior act of lessor, 925.
whether Court could appoint person for, under Trustee Act, s. 30, *quære*, 1252, 1253.

LEASE—*continued.*
existence of, is defect in title, 1199.
for a year, execution of, when proved by recital, 356.
for less than three years may be by parol, 228.
twenty-one years not within Middlesex Registry Acts, 769.
possession and occupation must go with, 769, 770.
twenty-one years not within Yorkshire Registry Acts, 776.
actual possession must date from lease or assignment, 776.
for more than three years must be by deed, 228.
for short term, on sale of, time of essence of contract, 484.
grant of, by purchaser equivalent to possession, 500.
land subject to,
on sale in lots of, lease may be deposited till completion of sales, 764.
tenant's consent requisite to apportionment, 147.
purchase-money under Lands Clauses Consolidation Act for, rights of tenant for life and remainderman to, 755, 756.
where income larger than rent reserved, 755.
smaller than rent reserved, 755, 756.
licence to assign, vendor need not obtain, before bringing action, 1180, n. (*r*).
loss of, on sale of long leaseholds, whether an objection to title, 335, 339.
may be shown to be invalid in spite of condition, 163, 164, 191.
measure of damages when, granted without title, 893, 1083.
mining, on sale of, time of essence of contract, 484.
mis-statement as to length of, may avoid sale, 156.
rent of, may avoid sale, 155.
not under seal, right to sue upon, does not pass with the reversion, 917.
notice of, is notice of its contents, 105. *See* LESSEE; NOTICE.
limits of the rule, 106, 107.
notice of, not notice of collateral facts, 984.
of copyholds, Crown debts affect, how far, 563.
judgments affect, 525.
whether within Local Registry Acts, 567.
of lands in Duchy of Cornwall must be enrolled, 778.
on sale of leaseholds, should be produced for inspection, 106, 132.
option to lessor to determine, must be stated, 156.
to purchase reserved by, does not subject it to agreement stamp, 276, n. (*t*).
to renew, conditions of, how fulfilled, 241, 242.
premium payable for, within Mortmain Act, 303.
preparation of, by lessor's solicitor, lessee pays costs of himself and lessor, 802.
presumed on production of counterpart, 366.
purchase of, agreement for, and possession taken, effect of, 311.
purchaser of,
has notice of lessor's title, 191, 978, 980, 981, 984.
should be given opportunity of examining, 106, 132, 191, 984.
subject to charge, cannot merge it in reversion, 1000.
sub-lease has notice of covenants in original lease, how far, 984.

LEASE—*continued.*
receipt of rent under, by wrongful claimant, effect of, on right of reversioner, 447.
requisitions as to earlier, must be excluded by explicit condition, 106.
reversion on, effect of apportionment of rent on severance of, 147, 148.
right of pre-emption,
lease containing, should provide for title to be furnished, 238.
may be extended if lease is, 242.
whether attached to, so as to pass to personal representatives, 241.
terms of, must not be mis-stated on sale, 133, 134.
to alien artificer formerly void, 27.
under pretended title void, 278.
unregistered, registration of assignment of, gives no title against reversioner, 964.
void, different rule of Law and Equity as to, now abolished, 228, 229.
if a good agreement, may be sued upon, 229.
not being by deed, may be good as an agreement, 228.
voidable, both parties estopped from disputing, 1001.
purchaser of reversion on, how far bound by, 998, 999.
may avoid, when, 1000.
may sue on covenants, 1001.
takes effect in interest, on lessor acquiring reversion, 1001.
whether proper root of title, 338.

LEASEHOLDS. *And see* LEASE.
after conveyance of, agreement to indemnify vendor may be enforced, 913.
assignee of,
equitable, not liable after alienation of, 631.
jurisdiction of Court as to disclaimer by, 631.
must indemnify lessee, 631.
assignment of,
by administrator who has not letters, bad, 653.
by executor dying before probate, good, 652.
by one of several executors, good, 652.
how far good consideration *per se*, 1006, 1007.
benefit of covenants for title run with, 879.
costs of taking out administration to, under L. C. C. Act, payable by company, 805.
description of, as freeholds, bad, 154.
executor of mortgagee of, cannot buy fee simple, 1067.
for lives, V. & P. Act and Conv. Act do not apply to, 331.
general bequest does not pass, at date of will contracted to be sold, 302.
judgments affect, 525, 531, n. (*s*), 532, 533.
liable to succession duty, 315.
Locke King's Act, 1854, does not apply to, 921.
not within Satisfied Terms Acts, 577.
of bankrupt. *See* TRUSTEE IN BANKRUPTCY.
of married woman. *See* MARRIED WOMAN; TERMS FOR YEARS.
of traitors and felons, formerly forfeited on conviction, 15.

LEASEHOLDS—*continued.*
on sale of,
conditions implied by Conv. Act, 193.
special, what necessary, 190, 191. *See* LEASE.
covenants implied by beneficial owner, 616.
whether extend to breaches during vendor's possession, 621.
for lives, evidence must be given that lives in existence, 332.
in lots, apportionment of rent, 148, 195, 196.
by underlease, covenants must be with sub-lessees, 621.
covenant against rent must be given by each purchaser, 629.
lessor's title need not be produced, 190, 191, 330. *See* LESSOR.
nature of covenants need not generally be pointed out, 105, 132.
when to be pointed out, 106.
only part of land leased should be so stated, 134.
renewable, condition as to earlier title than subsisting lease, 196.
what should be shown by abstract, 332.
terms of lease must not be mis-stated, 133.
under L. C. C. Act, lessor's licence unnecessary, 244.
vendor must generally produce lease, 335.
onerous covenants are defect in title to, 1202.
probate of, 364.
purchase of,
cannot be made with money, under L. C. C. Act, arising from freeholds, 751, 760.
except under special circumstances, 760.
inquiries to be made on, 520, n. (*x*).
not authorized by power to invest in real estate, 96, 97.
purchase-money of, under L. C. C. Act, apportionment of between tenant for life and remainderman, 754.
application of rule to renewable leaseholds, 755.
fund set apart for renewal, 755.
purchaser need not accept, on contract for freeholds, 1199.
of, impliedly contracts to indemnify original lessee, 913, n. (*b*).
of, must covenant to pay and perform rent and covenants, 629.
renewable Irish, as to investment in, 96, n. (*i*).
renewal of,
by partner, for benefit of partnership, 1051.
covenant for, implies perpetual right, 622.
fund for, how apportioned between tenant for life and remainderman, 755.
joint tenant has lien for, how far, 1050.
married woman may convey right of, 648.
right of, indefinite, not a perpetuity, 241, n. (*f*).
right of third person to purchase should be stated in particulars, 131.
vendor in possession must pay rent for and receive interest, 715.
vesting order of, under Trustee Act, how made, 657, n. (*y*).

LEGACY,
annuity charged on personalty is not, within sect. 42 of Stat. of Lim., 462.
assent of executor to, vests leaseholds in legatee, 673, n. (*z*).

LEGACY—*continued.*
charge on expected, held good, 911, n. (*m*).
realty and personalty, when both lumped together as residue, 691, 692.
charged on land,
affected by judgment, how far, 538, 539.
assignment of, need not be registered, 770.
barred by twelve years from death of testator, 436.
part payment or acknowledgment, 453.
time does not run after legacy has been severed, 454, 455.
during subsistence of prior charge, 454.
bequest of, void under Mortmain Act, 303.
duty. *See* LEGACY DUTY.
inquiries to be made on purchase of, 110.
interest on, not recoverable for more than six years, 459.
notice to be given of charge on, 110.
payable *in futuro* does not empower sale till time for payment, 691.
out of realty or personalty, within sect. 40 of Stat. of Lim., 455.
payment of, not presumed, when, 367.
purchaser from heir or devisee, bound to see to payment of, 702, 703.
of, is liable for debts unpaid, 942.
share of residue is, within sect. 40 of Stat. of Lim., 455.
stop-order should be obtained on, where fund in Court, 110.
trust to pay does not enable trustee to give good discharge, 674.
under will of person domiciled abroad, not liable to duty, 317.

LEGACY DUTY,
certificate of payment of, discharges land from succession duty, 315.
legacy under will of domiciled foreigner not liable to, 317.
on sale by Court, not payable, 314.
power of sale does not let in, 313.
trust for sale, although not acted upon, lets in, 314.

LEGAL ESTATE. *See* NOTICE; PRIORITY.
abstract must set out all deeds relating to, 342.
acquired with notice of trust is subject to trust, 928, 935.
without notice gives indefeasible legal rights, 934.
even though conveyance was breach of trust, 934.
conveyance of, by vendor, pending action, when restrained, 1222, 1223.
under Trustee Act. *See* TRUSTEE ACT.
devolution of, on death of vendor before conveyance, 293, 294.
equity will not interfere with, 927, 934.
estoppel by recital does not pass, 595, 911, 912.
executors have no title under charge of debts, 694.
general devise passes, in property contracted to be sold, 301.
indorsed receipt by building society, vests in whom, 936—938.
extends only to amount actually paid to society, 938.
married woman trustee may convey, 588, 589.
notice does not preclude equitable right of tacking, 934.
may deprive owner of legal rights given by, 934.

LEGAL ESTATE—*continued.*
outstanding,
abstract must show in whom vested, 322.
condition that purchaser shall get in, binding, 170.
does not include mortgage, 176.
costs of getting in, from infant devisee of vendor, 799, 800, 1262.
heir of vendor, 800, 1262.
payable by company under L. C. C. Act, 803.
vendor, 814.
in married woman, when defect in title, 321.
in trustee, not a defect in title, 321.
notice of, is notice of its trusts, 977.
separate deed, how far vendor bound to get in, by, 572, 575, 814.
owner of, is trustee for executors selling under charge of debts, 694.
priority of,
absolute where equities are equal, 927.
against charity, 927.
registration under Yorkshire Registry Acts, 776, 963.
judgment creditor does not acquire against prior equities, 548, 550, 957.
negligence amounting to fraud destroys, 950, 952.
merely does not destroy, 826, 950—952.
what is evidence of fraudulent intention, 950, 951, 952.
protection afforded by,
against judgment, 529.
as to part of purchase-money paid before notice, 929.
not, if purchaser has notice before completion, 932.
though acquired by fraud of stranger, 929.
unless purchaser has notice of it, 929.
acquired from satisfied or unsatisfied incumbrancer, 933, 934.
not acquired under title deduced, 931, 932.
to equitable title under forged deed, 930.
to purchaser having best right to call for it, 935.
of bankrupt's equitable interest, 956.
with notice, how far, 285.
to registered equitable title without notice, 959.
to trustee against prior mortgagee from *cestui que trust*, 929.
reconveyance by building society gives, for whole sum advanced, 938, 939.
of, when presumed, 366, 1276.

LEGATEE,
concurrence of, in sale by executor of specific bequest, desirable, 673, n. (*z*).
consent of surviving, to exercise of power, insufficient, 86.
has no claim against vendor of estate, charged with legacy supposed to be invalid, 1039.
lien of, on land for personalty improperly received by real representatives, *quære*, 306, n. (*i*).
marshalling by, against descended, not devised, realty, 701, n. (*s*).
for vendor's lien, 828, 829.
must have administrator appointed within twelve years where no executor, 436.

LEGATEE—*continued.*
residuary, allowed to bid on sale by Court, 1322.
sale of real estate may be made at suit of, for payment of debts, 1316.
search for judgments against, unnecessary, 539.
specific, of term, how affected by purchase of fee by testator, 310.

LEGITIMACY,
declaration of, obtainable under Legitimacy Declaration Act, 384, 385.
petition for, affects only persons cited, 385.
of child born in wedlock, presumed, 381.
not rebutted by mother's adultery, 381.
suspicious circumstances, 381.
voluntary living apart, 381.
rebutted by lapse of period of gestation from divorce, 381.
proof of husband's absence at date of conception, 381.
impotence, 381.
rebutted by proof of non-access, 381.
what amounts to proof of non-access, 382.
declarations of husband and wife, inadmissible, 382.
except in proceedings consequent on adultery, 383.

LESSEE. *See* LANDLORD; TENANT.
agreement by, to purchase reversion, acknowledgment of title to sustain ejectment, 311.
assignee of, how far liable for rents, &c., to lessor, 1045, 1046.
must indemnify original lessee, 311, 1046.
at rack-rent is purchaser within 27 Eliz., 1003.
description of occupier as, not subject for compensation, 157.
encroachment by, enures for lessor's benefit, 188.
executors of intending, give what covenants, 622.
has notice of lessor's title, 862.
liable for rent, &c., after assignment, 1045.
liable to purchaser of reversion on covenants, 916.
licence to, to commit forfeiture does not destroy right of re-entry, 917.
light, right to, acquired against, is good against reversioner, 405.
must treat under L. C. C. Act, separately from lessor, 756.
of mortgagor cannot dispute lessor's title, 1001.
liable on covenants, 1001.
mortgagee purchasing equity of redemption may eject, 1000.
purchasing reversion, no longer subject to covenants, 918.
waiver of forfeiture by, applies only to particular breach, 917.
way, right of, may be acquired by, against other lessee, 430, n. (*n*).

LESSOR,
agreement by, to buy underlease, effect of, 312.
barred, bars persons claiming through him, 447.
unless saved by intervening estate, 447, 448.
consent of, how far necessary for specific performance, 1180, n. (*r*).
need not be alleged in claim for specific performance, 1150.
to alienation, dispensed with under L. C. C. Act, 244.
to apportionment of rent, necessary, 196.
equitable assignee of lease is not liable to, 311.

LESSOR—*continued.*
covenants on assignment of contract for, entitled to what, 1181.
liable for injuries prior to lease, 925.
liable to full damages for *ultra vires* grant of reversionary lease, 1083.
must treat under L. C. C. Act separately from lessee, 756.
of lease not under seal may sue after assignment of reversion, 917.
of voidable lease cannot dispute its validity, 1001.
remedy of, on sale by executors is against assets, 631.
title of,
condition against requiring, effect of, 163, 164, 190, 191, 980, 984.
where waiver of forfeiture relied on, 195.
not to inquire into, 169, n. (*z*), 191, 984.
lessee has notice of, 862.
notice of tenancy is not notice of, 984.
production of, unnecessary under V. & P. and Conv. Acts, 190, 191, 331.
purchaser has notice of, 191, 978, 980, 981, 984.
statutory rule as to production of, has same effect as condition, 191, 869, 978, 981.

LETTER,
binds sender from date of postage, 253.
construction of, with reference to Stat. of Frauds, 239, n. (*o*).
contract by, when concluded, 264.
acceptance clear of clear offer, 264.
conditional, not binding, 266, 267.
accession of both parties to same terms, necessary, 264.
all correspondence must be read together, 265, n. (*n*).
offer may be withdrawn before acceptance, 267.
reference to formal agreement, not necessarily new term, 265.
may be term of assent to contract, 265.
description of party in, may be endorsed direction, 253.
essential terms of contract may be contained in series of, 261.
reference to one another need not be express, if clear, 262 *et seq.*
offer by, after auction, how far incorporates conditions of sale, 266.
post office is agent of sender and receiver for carriage of, 251.
sender not responsible for delay in transmission of, 254.
sender's name need not be signed, if endorsed, 253.
statements in, may be evidence of pedigree, 394.
sufficient acknowledgment of debt, when, 458, 459.
memorandum within Stat. of Frauds, 239, 240.
waiver of objection may be implied from, 496.

LICENCE,
agreement for, must be in writing, 230.
consideration for mining, whether purchase-money or rent, 293, n. (*x*).
grant with licence annexed and, distinguished, 230, n. (*a*).
irrevocable, after request to licensee to improve, 949.
must be in writing, 230.
of easement by vendor extinguished by conveyance to purchaser, 1043.
parol, does not affect acquisition of right to light, 431.
prevents acquisition of other easements, 430.

LICENCE—*continued.*
public-house, failure to prove transfer of, effect of, 483.
revocable by grantor at any time, 230.
even though licensee expended money on faith of it, 1044.
revocable, not within Stat. of Frauds, 229.
revocation of, notice should be given of, 230, 1044, n. (*h*).
to assign, vendor need not obtain before action for specific performance, 1150, 1180, n. (*r*).
to commit forfeiture does not destroy right of re-entry, 917.

LIEN,
for money advanced without notice to bankrupt purchaser, 748.
for personalty, improperly received by real representative, legatee has none, 306, n. (*i*).
for premium paid on policy, 854, n. (*i*).
incumbrancer has none on purchase-money in hands of vendor, 1039.
joint purchaser advancing purchase-money, has not, 1050.
tenant has, for improvements, how far, 1050.
renewal of leaseholds, 1050.
of *c. q. t.* on estate purchased by other *c. q. t.* out of trust funds, 1067.
trustee with mixed funds, 1068.
of client, on estate purchased with his money by solicitor, 1065, n. (*d*).
of judgment creditor on unpaid purchase-money, 289, 530, 828.
of purchaser,
for costs of action,
has priority to mortgage by vendor after contract, 506.
none if purchaser abandons contract, 506.
rescission is for illegality of contract, 506.
where purchase-money paid by mistake, 506.
for deposit, declared on rescission, 116, 223.
for purchase-money and interest on rescission, 506.
from husband, evicted by wife's heir, 1033.
on purchase-money, none after appropriation by vendor, 906.
of solicitor,
on engrossment, none for costs, 638.
payment and receipt of purchase-money restrained till discharge of, 1271.
of sub-purchaser on purchaser's interest under contract, 506, 507.
of trustee for advance to *c. q. t.* for purchase of estate, 1066.
of vendor,
against railway company, 514.
how enforceable, 515, 836, 1220, 1221.
none for costs of arbitration, 515, 1221.
not affected by bond and deposit, 514.
assignable by parol, 828.
assignee takes, subject to equities, 828.
barred by twelve years from payment or acknowledgment, 453, 454, 826, 827.
bequest of "securities for money" does not pass, 827, n. (*x*).
cannot be registered in Middlesex, 768.
charge, not express trust, 439, 826, 827.
chargeable by parol, 828.
declaration of, in decree for specific performance, 1248.

LIEN—*continued.*
of vendor—*continued.*
declaration of, must be expressly claimed, 1248, n. (*y*).
may be obtained, though only part of purchase-money owing, 835.
devisee of vendor not entitled to, for unpaid purchase-money, 300.
differs from stoppage *in transitu*, how, 825, n. (*e*).
does not enable vendor to retain title-deeds, 826.
enforceable how, 825, n. (*e*), 835, 836.
for further advances to purchaser for improvements, 825.
for unpaid purchase-money, 289, 825 *et seq.*
how lost, as against third parties, 833, 834.
memorandum of, must be registered in Yorkshire, 773.
mortgagee of, takes subject to equities, 828.
none implied in favour of disqualified person, 833.
none on moneys deposited under L. C. C. Act, 803.
not lost by receipt in full, 825.
unauthorized payment to agent, 832.
notice of purchaser having given unpaid bill of exchange, is notice of, 979.
occupation of vendor as tenant, not notice of, 984.
on engrossment, 638.
on sale to company, 835.
postponed, by negligence in allowing purchaser to take deeds, 953.
protects against purchaser's judgment creditors, when, 834.
valid against whom, 825.
waiver of, what amounts to, 829 *et seq.* *See* WAIVER.
within Locke King's Acts, 827, 921. *See* LOCKE KING'S ACTS.
within Mortmain Act, 303, 828.
of wife on estate purchased with her separate property, 1066.
on title-deeds, as against trustee in bankruptcy, 477, n. (*x*).
of solicitor of executor, 476, 477.
mortgagee, 476.
mortgagor, 477.
order establishing, renders creditor necessary party to conveyance, 581.
solicitor claiming, taxation ordered against, 820.
vendor claiming, search need not be made against, 539.

LIFE,
dropping of, before conveyance, effect of, 288, 1329.
estate, on sale of, misdescription of, 111, 112.
time essential, 484.
purchaser of, from Court entitled from date of sale, 1344.
existence of, must be shown on sale of renewable lease, 332.
production of, 357.

LIGHT,
"access and use of," under s. 3 of Prescription Act, meaning of, 407.
angle of 45°, no definite rule as to, 408, n. (*z*).
easement of,
abandonment of, not proved by mere alteration, 406.
what constitutes, 407.
acquired against lessee binds reversioner, 405, 431.

LIGHT—*continued.*
easement of—*continued.*
Act of Parliament may destroy, 404, n. (*a*).
claimant's remedy is under s. 68 of L. C. C. Act, 404, n. (*a*).
claim to, must be in respect of building, 405.
whether timber stage is building, *quære*, 405 (*h*).
enjoyment must be as of an easement, apart from land, 431.
need not be as of right, 405, 431.
continuous, if interruption not adverse, 405, 431.
established by enjoyment for twenty years, 404.
unless rested on agreement, 404.
as to requisites of agreement, 404, n. (*z*).
extent of, same in town and country, 408.
sufficiency of, for reasonable purposes is test of, 408.
foundation of, is Prescription Act, 404.
not presumed grant, 404, 405.
unless Act does not apply, 405.
grant of, implied on conveyance, 608.
extent of, measured by grantor's interest, 610.
grant or reservation of, may be implied, 520.
on sale of adjoining tenements, 137, 408, 410, 611, 612.
inquiry should be made for, 520.
local customs do not interfere with, 404.
not extinguished on compulsory sale, unless compensated for, 404, n. (*a*).
not lost by acquisition of larger amount of light, 406.
advancing site of old buildings, 407.
alteration or enlargement, 405, 406.
destruction of dominant tenement, 406.
unless abandonment intended, 406.
setting back site of old building, 407.
windows in new building not being identical with old, 406, 407.
owner of site of demolished building may restrain obstruction, 406, n. (*k*).
parol licence does not affect title to, 431.
patent, not a defence to specific performance, 520.
reversioners not protected against acquisition of, 405.
no period for disability allowed to, 431.
unity of possession interrupts, does not extinguish, 405.
sale of house "with all its lights," prevents vendor from obstructing, 136.

LIMITATIONS,
to collaterals,
binding against settlor, 1010, 1011.
good against purchaser, how far, 1011, 1017.
concurrence of stranger in settlement supports, 1016.
position of, in the settlement may support, 1014, 1015, 1016 1017.
when there is consideration for contract, 1015, 1016, 1017.
when within contract, 1011, 1012, 1013, 1014, 1015.

LIMITATIONS, STATUTE OF,
acknowledgment of title under sect. 14 equivalent to payment of rent, 444. *And see* ACKNOWLEDGMENT.
signature of, must be by party in possession, not agent, 445, 446.
sufficiency of, is question for jury, 445.
time runs from last, 444.
what is sufficient, 445.
acquiescence, rules as to, not affected by, 440, 855.
administrator, must be appointed within twelve years from death of testator, 436.
times runs against, from death of intestate, 436.
admittance, right of, may be barred by twenty years, 467.
with possession, effect of neglect of, 467.
advowson, right of presentation to, when barred by, 452. *See* ADVOWSON.
agent cannot acquire title against principal by, 435.
possession of, is not that of principal, 435.
principal may acquire title against, under, 435.
annuitant, time does not run against, during payment, 436.
annuity, arrears of, how far recoverable, 461, 462.
arrears, claim to, time runs against, from issue of writ, 459, n. (*u*).
in administration action from carrying in claim, 462.
base fee, remainders on, when barred by, 450.
cestui que trust may be tenant at will to trustee so as to bar him, 442.
not tenant at will under sect. 7..442.
out of possession may be barred by adverse possession of tenant, 443.
time runs against, from conveyance by trustee in breach of trust, 1034.
charities barred by, 440, 441.
collateral bond on mortgage, remedy on, barred by twelve years, 67, 460.
company, title may be acquired against, under, 859.
compensation, right to, when barred, 904.
co-parcener, possession of one, is not that of other, 446.
covenant for title, remedy for breach of, when barred, 881.
in mortgage, remedy on, barred after twelve years, 67, 455, 460.
Crown not affected by, 468.
delay in setting aside voidable transaction, less than statutory period may bar relief, 54, 855.
disability, six years allowed after cesser of, 434.
maximum period for, is thirty years, 435.
rule applies where there is a series of disabilities, 434, 435.
rule does not apply between mortgagor and mortgagee, 434, n. (*e*).
dower, arrears of, not recoverable for more than six years, 459.
acknowledgment of title does not affect rule, 459.
ecclesiastical corporation sole, when barred by, 452.
sect. 29 does not protect lay successor of, 452.
entry, by itself, does not constitute possession under, 441.
if hostile, does constitute possession under, 441, 442.
may constitute new tenancy, 442.

LIMITATIONS, STATUTE OF—*continued.*
equity of redemption, when barred by, 451 *et seq.* *See* ACKNOWLEDGMENT; EQUITY OF REDEMPTION; MORTGAGOR.
estate, barred by, is not pretenced title, 278, n. (*k*).
tail, barred by, bars remainders, 448, 449.
executory devisee, right of, accrues on possession, 446.
what time allowed to, 447, n. (*d*).
express trust,
applies only between *c. q. t.* and trustee, 439.
not between *c. q. t.* or trustee and stranger, 440.
c. q. t.'s inter se, 440.
to personalty and realty, 437, n. (*i*).
definition of, 437.
does not prevent time running as to money charged on land, 438.
instances of, generally, 438, 439.
intention to constitute is question of intention, 438.
Judicature Acts affect, how far, 438.
liability for unpaid purchase-money is not, 439, 826.
not implied, 437.
trust for payment of debts or annuities is, 438.
foreclosure decree, right of action for possession runs from date of, 436, n. (*m*).
fraud of partner prevents time running in favour of others, 440.
heir's relative, possession of, is not that of heir, 446.
interest on purchase-money, time does not run against, till good title shown, 710.
issue of original writ is commencement of action, 434.
joint tenant, possession of one, is not that of other, 446.
judgment not kept alive against debtor by re-registration, 560, n. (*ll*).
"land" under, includes all corporeal hereditaments, 433.
tithes, except those belonging to corporation sole, 433.
not as between tithe-owner and terre-tenant, 433.
legacy charged on land barred by, twelve years from testator's death, 436.
arrears of, recoverable, if incumbrancer has been in possession, 459.
in case of series of incumbrancers, 459, 460.
interest on, not recoverable for more six years, 459.
lessor barred by, bars persons claiming under him, 447.
unless land is recovered in respect of intervening estate, 447.
married woman, when barred by, 448.
money charged on land,
includes proceeds of sale of land, 459, n. (*t*).
interest on, not recoverable for more than six years, 459.
right to recover, when barred by, 453.
mortgage debt, when barred as to arrears on land and covenant, 67, 455, 460.
mortgagee,
acquires good title by twelve years' possession, 436.
even though he keeps account of rents, 436.
barred by twelve years from last receipt, 436.

LIMITATIONS, STATUTE OF—*continued.*
mortgagee—*continued.*
not barred by twelve years from right of entry, 436.
though stranger has acquired title against mortgagor, 436.
unless no payment has been made by mortgagor, 436.
purchaser from, stands on same footing, 436.
mortgagor is not tenant at will to mortgagee, 442.
non-adverse possession, doctrine of, abolished by, 433.
performance of service, distrainable, is payment of rent, 444.
not distrainable, does not prevent time running, 446.
possession under, extinguishes right as well as remedy, 463.
remainderman must bring action of waste within twelve years from act, 437.
right of, accrues on possession, 437, 446.
time allowed to, 447, n. (*d*).
rent, arrears of, not recoverable for more than six years, 459.
"rent" does not include heriots payable at uncertain intervals, 434.
moduses of corporation sole, 433.
rent payable at greater interval than twenty years, 434.
"rent" includes annuities charged on land, 433, 461.
fee-farm rent, 459.
heriots, 433.
quit rents, 433.
services for which distress may be made, 444.
tithe rent-charge, 403, 434.
rent under lease, receipt of, by wrongful recipient bars reversioner, 447.
rent-charge extinguished by non-payment, 466.
payment of part of, does not prevent time running, 467.
secus, where separate parts of land are charged, 467.
reversioner, granting concurrent lease, time does not run against, 437.
right of, accrues on possession, 446.
time allowed to, 447, n. (*d*).
title of, transferred to wrongful recipient of rent, 447.
right of action accrues under,
from becoming entitled to possession, 435.
from cesser of possession, 435.
right of action, proof of accruer of, necessary to make title under, 462.
rightful owner barred after twelve years against everyone, 464.
section 40,
acknowledgment under, what sufficient, 458 *et seq.* *See* ACKNOWLEDGMENT.
action for unpaid purchase-money not within, 455.
arrears not recoverable for more than six years under, 459.
foreclosure action is not within, 455.
land within, means land within jurisdiction, 455, n. (*e*).
payment under, what is, 455 *et seq.* *See* MONEY CHARGED ON LAND.
personal estate of intestate is within, 455.
what cases fall within, 454.
specialty debt barred by twenty years, 67.
tenancy at will, what is determination of, 444, n. (*z*).

LIMITATIONS, STATUTE OF—*continued.*
tenant at will, time runs against, from what period, 442.
in common, possession of one is not that of other, 446.
time for recovery of land or rent, formerly, 432, 433.
now, 433.
tithes affected by, only as between rival claimants, 403.
not as between landowner and occupier, 403.
tithe rent-charge, arrears of, not recoverable for more than six years, 459.
title acquired by two under, is joint tenancy, 446.
title under, does not operate as conveyance, 463, 464.
may be forced on purchaser, 462.
proof of adverse must be strict, 462.
nature of, 464.
trespassers acquire what title under, *inter se*, 464 *et seq.*

LIMITED OWNERS. *See* LANDS CLAUSES CONSOLIDATION ACT; RAILWAY COMPANY.
compulsory sale by,
not a conversion, 298, 761.
purchase-money on, must be paid into bank, 749, 750.
if received by, must be paid into Court, 750.
refusal to convey on, remedies for, 653.
power of sale of, under Statute, 17, 58.
price cannot be fixed by, 92. *See* PRICE.
sale by, need not be for gross sum, 90.
what period allowed for, 61, 62.

LIS MOTA,
declarations, &c., admissible, only if made before, 395, 396.
definition of, 396.

LIS PENDENS,
administration action is, how far, 972, n. (*o*), 983.
order under s. 63 of S. L. Act must be registered as, 566.
registered, purchaser has notice of, if he search, 972, 981.
not of equities arising from it, 972, n. (*o*), 982.
registration of, 564, 958.
binds purchaser, how far, 564.
may be vacated by summary order, 565, 566.
satisfaction of, may be registered, 555, 565.
search for, for what period to be made, 565.
may be made in Central Office, 522, 565.
on purchase from trustees, the only necessary search when, 565.
what to be made, 523.
special case is, if filed, 972, n. (*o*).
title, how far made doubtful by, 564, 1233.
title of purchaser, effect of, on, extent and doctrine of, 982, 983.
winding-up petition is not, 566, 972, n. (*o*).

LIVERY OF SEISIN,
by infant personally on sale of gavelkind lands necessary, 4.
presumed after twenty years' possession, 369, 370.

LOCAL,
Act. *See* ACT.
custom. *See* CUSTOM.
measures abolished, 728.

LOCAL BOARD OF HEALTH,
power of, to purchase land, 25.
sell or let land, 21.

LOCKE KING'S ACTS,
Act of 1854..920—923.
collateral security, how affected by, 921, 922.
Crown not affected by, 922.
evidence of "contrary intention," what is, 922, 923.
exceptions from, 922.
vendor's lien not within, 304, 827, 921, 922.
what cases fall within, 920—922.
Act of 1867..923.
cases under, 924, 925.
"contrary intention," must be express, 923.
vendor's lien within, where purchaser dies testate, 304, 827, 923.
Act of 1877..923, 924.
vendor's lien within, though purchaser die intestate, 304, 827, 924.
whether "contrary intention" can be expressed except by will, *quære*, 827, 828, 924.

LODGINGS,
agreement to take furnished, need not be in writing, 236.

LONDON,
Middlesex Registry Act does not apply to City of, 770.
tithes in, excepted from jurisdiction of Commissioners, 400.
tithes, statutory, in, not within 2 & 3 Will. IV. c. 100..400.

LORD OF MANOR,
acknowledgment for production on enfranchisement, unnecessary by, 478, n. (*i*), 627, n. (*m*).
consent of, necessary to petition for vesting order, 659.
how evidenced, 659, n. (*l*).
entitled to new tenant, on death before enfranchisement, 189.
separate fees on several admittances, 571.
grant of waste, validity of, must be proved, 189, 190.
need not accept surrender to uses, 579, 580.
admit to one tenement, where fine only payable on first admittance, 571.
order for inspection of court rolls, how made against, 478.
person acting as, may probably enfranchise, 189.
purchase of copyholds by, extinguishes copyhold tenure, 1043.
Stat. of Lim., application of, as between copyholder and, 467.
title of, need not be produced on sale of enfranchised copyholds, 189, 330.

LOSS,
by accidental destruction after contract, falls on purchaser, 286.
on sale by Court, 1329, 1332.
by bankruptcy of auctioneer, 208, 223.

LOSS—*continued.*
by breach of contract. *See* DAMAGES.
by deviation of stream. *See* ENCROACHMENT.
by investment. *See* INVESTMENT.
of deeds by mortgagee, 477, 478.
secondary evidence, when admitted to supply, 159, 353.
what sufficient evidence of, 159, n. (*t*).
whether an objection to title, 335, 339, 345.
of early title, condition as to, 174.
of right of way, how effected, 413.
of unstamped agreement, 276, 370.

LOTS,
alteration in, *c. q. t.* cannot make, on resale after purchase by trustees, 53.
should be advertised, 78.
condition for withdrawing, 140.
largest. *See* LARGEST LOT.
on sale in,
custody of deeds, must be provided for, 162. *See* LARGEST LOT.
who entitled to, 762, 763, 1349. *See* LARGEST LOT.
deceptive statement as to mutual covenants, 136.
employment of bidders, how far good, 225.
expense of verifying abstract, how to be borne, 176.
inadequacy of price as to one, does not affect another, 850, n. (*h*).
incumbrances may be released by separate deed, 575.
of leaseholds, apportionment of rents, 148, 195, 196.
by underlease, covenants by vendor, 621.
of property held under various titles, difficulty as to identity, 167, 168.
in lease, apportionment of rent service, 147.
lease deposited till completion of sales, 764.
subject to rent-charge, apportionment, 147.
of settled land, settlement deposited till completion of sales, 763, 764.
part performance as to one does not affect contract as to other, 1147.
purchaser of each lot, entitled to vesting order, 1348.
one lot, cannot refuse to covenant on ground of another being unsold, 628.
not proper party to action by purchaser of another, for specific performance, 1129.
several lots, entitled to only one abstract, 141, 326.
separate conveyances, 141.
separate contract for each lot should be entered into, 237.
stamps, how far necessary on contract as to several lots, 275, 276.
want of title to one lot vitiates contract as to another, how far, 1084, 1203.
trustees may sell in, 76.

LUNACY. *And see* LUNATIC.
costs of reference in, on purchase under L. C. C. Act, payable by company, 805.
evidence of, admissible to fix purchaser with notice, 6, 7.

LUNACY—*continued.*
of either party after contract, does not avoid it, 291.
orders in, how proved, 361.
power of attorney determined by, unless irrevocable, 642.

LUNATIC,
compulsory sale of lands of, not a conversion, 297, 298.
consent of, to exercise of power, may be given by committee, 86.
contract of, committee may convey in pursuance of, 7. *See* COMMITTEE.
executed and executory, distinguished, 7, n. (*i*).
how regarded at Law and in Equity, 6.
person becoming, how enforceable, 7, n. (*h*), 1114, 1115, 1126. *See* COMMITTEE.
conveyance, committee may be ordered to make, on behalf of, 1251, 1252.
costs of vesting order not allowed, when vendor becomes, 800.
deed of, committee must execute in name of, 642.
estate tail of, may be barred by Court, 8, n. (*o*), 1308.
fine or recovery by, 7, n. (*k*).
husband, concurrence of, dispensed with under Fines Act, 649.
lands bought with money of, by order of L.JJ., whether liable to probate duty, 314, n. (*s*).
lunacy may be established by himself or his representatives, 6.
married woman's acknowledgment not dispensed with, 8.
mortgagee, vesting order may be obtained of lands of, 656. *See* TRUSTEE ACT.
notice of intention to sell by mortgagee may be given to, 82.
partition of lands of. *See* PARTITION ACT.
action, request for sale in, how made by, 1306, 1308.
proceeds of sale in, how dealt with, 1308.
purchase by, how far voidable, 31.
purchaser not entitled to return of deposit, 224.
sale of lands of, for maintenance, 1351, n. (*n*).
tenant for life. *See* TENANT FOR LIFE; SETTLED LAND ACT.
trustee, vesting order of lands of, may be obtained, 656. *See* TRUSTEE ACT.
voluntary disposition by, void, 7.

MAINTENANCE,
what is, 280, n. (*k*).

MAJORITY,
attainment of, effect of, on power of trustees to give good discharge, 676, 677.
of *c. q. ts.* cannot bind minority, 56.
of creditors, whether able to bind minority to validate purchase by trustee for sale, 50.
of trustees of charity, power of, to carry out sale, &c., 329.

MALICE,
must be proved in action for slander of title, 120, 121.

MANAGEMENT,
acts of, by purchaser, not waiver of title, 502. *See* PURCHASER IN POSSESSION.
acts of, duty of vendor in possession to do, 733—735. *See* VENDOR IN POSSESSION.

MANDAMUS,
action of, introduced by C. L. P. Act, 1854..1101.
nature and scope of, 1101.
procedure in, how regulated, 1102.
against railway company, to buy land and complete line, when granted, 1100, 1101.
to have valuation made, 62, 1098.
to take up award, 1099.
what is good answer to, 1100.
by person served with notice to treat, 248, 1098, 1099.
whose estate has determined since notice to treat, 244, n. (*z*).
by purchaser to compel admittance to copyholds, 782, n. (*x*).
for assessment by jury after time for appointing umpire has expired, 706, 707, 1099.
right to, does not exclude specific performance, 1112.
writ of, Chancery Division does not claim jurisdiction under, 1102.
writ of, procedure as to, 1102.

MANOR. *And see* COPYHOLDS; LORD OF MANOR.
bounds of, depositions of deceased tenants admissible as to, 358
conveyance of, what included in, 138, 139.
customs of, depositions of deceased tenants admissible as to, 358.
evidence of, 358, n. (*g*).
need not be stated on sale of copyholds, 132.
on sale of enfranchised copyholds, title to, need not be shown, 189.
freeholds held of, covenant for production must include court rolls, 627.
heriots and quit rents need not be mentioned, 132.
precautions to be taken, 138, 139.
to whom fines belong, pending completion, 285, n. (*o*).
who bears loss arising from diminished fines, 287.
purchase by tenant in common of, of copyholds merges tenure, 1043.
waste of, condition on sale of, under grant, 189, 190.
declarations of deceased lord admissible as to extent of, 358.

MANSION,
hardship may be ground for refusing to enforce sale of, apart from land, 1192.

MANUFACTORY,
meaning of, within s. 92 of L. C. C. Act, 247.
includes machinery and fixtures, 247.
shares in, conveyance of, not enforced on want of title to whole, 1192, 1193.

MAP. *And see* PLAN.
tithe commutation, not evidence of boundary on question of title, 378, n. (*y*).

MARKETABLE TITLE. *See* TITLE.

MARRIAGE,
consideration for limitations to collaterals, how far, 1010, 1011 *et seq.*
binding as against purchasers, when and how far, 1011—1017.
settlor, 1010, 1011.
consideration for settlement, 1008.
not where settlement is to defraud creditors, 1017.
evidence of,
by declarations of relatives, &c., 393. *And see* PEDIGREE.
from baptism of child as if legitimate, 383.
from cohabitation and repute, 383.
not, if illicit *ab initio*, 383.
from description of husband as wife's uncle's nephew, 383, 384.
from execution of marriage articles and royal licence, 383.
from register, 392.
kept by Indian Council, 357.
may be supplied by presumption, 383.
invalid, no consideration for settlement, 1009.
renders wife *feme sole* only, 13.
not part-performance, 1140.
settlement. *See* SETTLEMENT.
subsequent, prior voluntary settlement may be supported by, 1019.
to British subject, naturalises female alien, 29.
validity of, generally presumed, 384.
may be declared on petition under Legitimacy Act, 385.
where necessity precluded proper form, 384, n. (*m*).
where solemnized in barbarous country, *quære*, 384.
written agreement after, in pursuance of parol contract before, is good, 250.

MARRIED WOMAN,
abandonment of possession by husband and, time runs from date of, 448.
acknowledgment of lunatic, not dispensed with, 8.
acquiescence binds, how far, 56.
by, in contract, after cesser of coverture, 33.
agreement by, to concur, title founded on when defective, 322.
affidavit of no settlement required on petition by, for payment out, 758.
assignment of equitable term of, her concurrence necessary to, 10. *And see* TERM FOR YEARS.
legal term of, by husband good, 9, 1122.
reversionary term of, when good, 9, 10.
term of, contract by husband for, whether binding on her surviving, 9, 1122.
attorney may be appointed by, even though infant, 12, 642.
capacity of, to contract,
limited by extent of separate estate, 32, 1124.
under Married Women's Property Act, 1122—1125.
want of, principle of the law as to, 10, 1119.
concurrence of, in unauthorized sale, effect of, 297.
sale by trustee of land, to proceeds of which she is entitled, must be acknowledged, 643.

MARRIED WOMAN—*continued.*
consent of, as protector of settlement, need not be with husband's concurrence, 779.
to application under S. E. Act, 1292.
to sale under Partition Act, 1306, 1307.
contract of,
and husband, enforceable if purchaser knew her incapacity, 1161, 1162.
as to separate estate, 32, 1119, 1120. *And see* SEPARATE ESTATE.
as to trust estates, 1120.
binds lands only, not her personally, 1120, 1125.
damages for, in lieu of specific performance, whether given against, *quære*, 1120, n. (*y*).
under Fines Act, 10, 1119, 1120.
Married Women's Property Acts, 1122—1125.
power of appointment, 1120.
void at common law, 10, 1119, 1161.
conveyance by,
not ordered, except as to separate estate, 1347.
of copyholds, how made, 9, 648. *And see* COPYHOLDS.
of equitable interest, must be acknowledged, 648.
of freeholds by acknowledged deed, 9, 643. *See* ACKNOWLEDGMENT BY MARRIED WOMEN.
customary power of, not affected by Fines Act, 9.
void at common law, 9, 643.
of property held by her as bare trustee, 13, 587, 588.
of reversionary interest, 648 *et seq.* *See* REVERSION.
of separate estate, 11, 587. *See* SEPARATE ESTATE.
of trust estates, 13, 588, 589.
under order, need not be acknowledged, 643, n. (*j*).
to husband, good, 12.
unacknowledged with husband, time runs against, from what date, 448.
under power, 11, 587.
disclaimer of interest by acknowledged deed, 651.
dissolution of marriage remits to possession of *feme sole*, 13.
election of, to take proceeds of sale under Partition Act, 1307, n. (*a*).
equity of redemption of, conveyance of, by husband, must be acknowledged, 649.
examination of, how far necessary on petition for payment out, 758.
under S. E. Act, how and when taken, 1293, 1294.
Partition Act, not dispensed with, 1307, n. (*a*).
fraud of, how far binds her estate, 947, 948, 1120.
husband, silence as to, postpones her to purchaser, 947, 948.
fraudulent act of, not impeachable by herself, 56, n. (*e*).
purchase by, relieved against, 33.
sale by, as *feme sole*, 13.
husband can purchase from, 49.
judicial separation makes, *feme sole* as to after-acquired property, 12, 32, 652.
effect of, upon intestacy of, 12.
lease by husband and, must be acknowledged, 643.

MARRIED WOMAN—*continued.*
legal estate outstanding in, how far defect in title, 321.
marriage must be valid to constitute a, 13.
position of, under M. W. P. Acts. *See* MARRIED WOMEN'S PROPERTY ACTS.
powers of, under S. E. Act, exerciseable by, though restrained from anticipation, 11, 1292.
S. L. Act, exerciseable by, without husband's concurrence, 587.
protection order has same effect upon property of, as judicial separation. 12, 32.
restraint on alienation. *See* ALIENATION.
settlement by, of real estate, must be acknowledged, 9.
subject of State of which her husband is subject, 29.
tenant for life, husband of, entitled to custody of deeds, 474, n. (*b*).

MARRIED WOMEN'S PROPERTY ACTS. *And see* SEPARATE ESTATE.
Act of 1870,
conveyance of fee not good under, without acknowledgment, 645.
disposition of equitable life interest, good under, 645.
general effect of, as to separate estate, 14, 644, 645, 1122.
repealed, 13, 14.
restraint on anticipation removed under, when, 57.
Act of 1882,
capacity to contract, how affected by, 1124.
contract cannot be enforced against married woman personally, under, 1125.
only binds, if at its date she has separate estate, 1124.
prior to, only bound separate estate at date of contract, 1123, n. (*b*).
conveyance of trust estates, whether enabled by, 588, 589.
under, husband's concurrence unnecessary in, 587.
covenants for title by husband cannot be required, 620, 621.
personal status, how affected by, *quære*, 15, n. (*p*).
property, how affected by, 14, 652, 1123, 1124.
restraint on anticipation not prevented by, 15.
reversion, vested prior to Act, not affected by, 652, 1124.

MARSHALLING,
by legatees against descended, not devised, realty, 701, n. (*s*).
by volunteers, as against mortgagees under settlement, 1002, 1003.
for vendor's lien, creditors entitled to, 828, 829.
legatees entitled to, when, 829.
of estates subject to mortgages by mortgagees, 1036.
paramount charge by purchasers *inter se*, 1035, 1036.

MATERIAL,
facts, change of, between offer and acceptance, must be disclosed, 116.
facts, concealment of, may be misrepresentation, 104, 106, 115.
facts, what are, for purposes of disclosure, 107.
misdescription. *See* MISDESCRIPTION.

MATERIAL—*continued.*
misrepresentation. *See* MISREPRESENTATION.
part, want of title to, vitiates sale, 155, 156, 1185 *et seq.* *See* SPECIFIC PERFORMANCE.
purchaser's solicitor is judge whether documents are, to title, 342.

"MEANS,"
meaning of in covenant for quiet enjoyment, 884.

MEASURES,
local abolished, 728, 729.
regulated by statute, 727, 728.
statutory meaning of, not varied by parol, 1091.

MEDICAL MAN,
transactions with patient, 24.

MEMORANDUM,
of association, powers of company limited by, 20.
of covenant for production to be endorsed on leading title-deed, 766.
of equitable charge to be registered in register county, 775.

MEMORIAL,
notice of, how far, 973, n. (*p*).
of conveyance in Middlesex, registration of, 767.
attestation of, 773.
contents of, 773.
execution of Corporation by seal, 773, n. (*m*).
may be lithographed, 773.
stamp on, 773.
of conveyance in Yorkshire, 776.

MERGER,
assignment of mortgage to trustee in bankruptcy of mortgagor does not create, 1042.
of beneficial interest in charge and estate constitute satisfied term, 578.
of charge,
contract for purchase of equity of redemption does not effect, 313.
on payment off, by tenant for life, not presumed, 1041, 1067, n. (*n*).
on purchase of equity of redemption by mortgagee, how far presumed, 1040—1042.
of copyholds by purchase by tenant in common of manor, 1043.
of land tax, 398, n. (*f*).
of lease in reversion, purchaser with notice of charge cannot effect, 1000.
of reversion, effect of, under 8 & 9 Vict. c. 106..917.
of satisfied terms, 576, 577.
of term,
in part, action on covenants by purchaser of reversion not precluded by, 916.
none in husband's fee during wife's life, 310.
not presumed contrary to intention, 310.
of tithe, 336.

MERGER—*continued.*
of tithe rent-charge,
by equitable owner, 399, n. (*l*).
by whom, may be effected, 399, n. (*l*).
in copyholds, 399, n. (*l*).
value of copyholds for fines not increased by, 399, n. (*l*).
prevented by declaration of intention to keep charge alive, 310, 576.
time runs against reversion and particular estate without, 447.

METROPOLITAN ACTS,
charges under, search to be made for, 524.

METROPOLITAN DISTRICT RAILWAY COMPANY,
unrestricted power of sale of superfluous lands, 858, n. (*l*).

MINERALS. *And see* MINES.
adjoining R. Co., right of owner to work, 604, n. (*u*).
agreement to sell, after severance, need not be in writing, 235.
land to R. Co. should provide for, 238.
under L. C. C. Act does not include, 130, 423, 604.
bond and deposit under L. C. C. Act does not include compensation for, 508, n. (*f*).
conveyance of manor passes what, 138.
to R. Co. should expressly include, 604.
dower out of what, payable, 586.
enfranchisement of copyholds must expressly include, if intended to pass, 604.
grant of, does not authorise withdrawal of support, 421, 422.
even though incapable of working without damage to surface, 422.
inability to work need not be stated on sale of copyholds, 132.
notice to treat should state intention as to, 238, n. (*l*).
on sale of, vendor when entitled to covenant for right of entry, 634.
must account to purchaser for workings after contract, 732.
purchaser entitled to, after contract, 286, 732.
reservation of,
does not authorise withdrawal of support, 421, 422.
even though incapable of working without damage to surface, 422.
entitles owner to use space occupied for any purpose, 423.
except under copyholds, 423.
implied in Land Tax Redemption Acts, 422.
in allotment should be noticed in conditions, 187.
to lord, on enfranchisement, implied, 604.
under Partition Act not allowed, 1311.
right to get, claimable by prescription, not by custom, 428.
in another, must be stated, 131.
is profit *à prendre*, 428, 429.
support from,
allotment of surface under inclosure, entitled to, 422.
power to work minerals under inclosure does not affect right to, 422.
R. Co. may acquire at any time by purchase of minerals, 423.
not entitled to, 423, 424.
to sewer, compensation for leaving, 424.

MINERALS—*continued.*
tithes of, excepted from commissioners' jurisdiction, 400.
tithes, what, are subject to, 400, n. (*s*).
trustees may sell apart from surface, 77, 1279, 1296.
under railway may be worked without compensation for subsidence, 423.
right of adjoining owner to work, 604, n. (*u*).
under superfluous land do not become superfluous, 860.
want of title to, defect in title. *See* MINES.
what are, under L. C. C. Act, 130, n. (*g*), 429, n. (*y*).

MINES. *And see* MINERALS.
abandonment of,
opened, when presumed after twenty years, 448, n. (*m*).
unopened, non-user is not, 448, n. (*m*).
what is, 448, n. (*m*).
compensation for communication between, on opposite sides of railway, 424, n. (*e*).
contract to buy, enforceable, though valueless, 1211.
customary rights to, in mining districts, need not be disclosed, 132, 133.
existence of, purchaser need not disclose to vendor, 118.
on sale of share in, what title to be shown, 332.
vendor need not disclose unprofitable nature of, 105.
plan of, on conveyance, must be accurate, 601.
purchaser working, ordered to pay purchase-money into Court, 1217, 1218.
rent of, reserved in specie under s. 9 of Stat. of Lim., 447, n. (*g*).
reservation of, by trustees on sale under L. C. C. Act, 77, n. (*s*).
leaves space worked out in grantor, 423.
except in copyholds, 423.
right to open, defect in title, 131, 157, 1201.
not, if Court presumes abandonment, 1234.
purchaser may elect to take compensation for, 1194.
under superfluous lands do not become superfluous, 860.
vendor in possession must pay compensation for coal worked out, 715, 732.

MINORITY,
of *c. q. t.'s* not generally bound by majority, 56.
of creditors, whether bound by majority, 50.

MISAPPROPRIATION,
of trust funds cured by transfer of funds of other settlement, 929.

MISDEMEANOUR,
concealment of incumbrance, 108, 344.
execution of fraudulent deed is, 1030.
falsification of pedigree is, 108, 344.
purchaser of annuity or rent-charge from infant formerly guilty of, 5.

MISDESCRIPTION. *And see* COMPENSATION; MISREPRESENTATION.
accurate, though accidentally misleading, description is not, 152, 153.
assessable, entitles purchaser to compensation, 738, 739.
what is, 738, 739.
auctioneer, when liable to vendor for, 208.

MISDESCRIPTION—*continued.*
condition for compensation for,
general effect of, 150 *et seq.*, 740, 741.
how far consistent with right to rescind, 178, 180, 182, 1190, 1191.
material errors not covered by, 151.
what errors are covered by, 133, 150 *et seq.*
wilful errors not covered by, 151.
contract avoided by,
arising from gross negligence, 152.
if not assessable for compensation, 157, 740.
material, 154 *et seq.*, 1199 *et seq.*
as to identity of property, 155.
as to nature and character of property, 154, 155, 1199 *et seq.*
as to quantity, 157, 735 *et seq.*
as to redeemed land tax, 133.
as to rights of enjoyment of, 156, 1201.
as to title to part of property, 155.
conveyance does not preclude compensation, 603, 604.
examination of property by purchaser may cure, 154, 1195.
immaterial, not a purchaser's defence to specific performance, 152, 1205, 1206.
in particulars, effect of, 127 *et seq.*
possession does not waive objection for, 500.
rescission allowed on discovery of, even after acceptance of title, 350, n. (*x*).

MISINFORMATION, trustees how far liable for, to purchaser, 109, 110, 518.

MISREPRESENTATION,
action for, in Equity rests on same principles as action of deceit, 115, 899.
may be brought by purchaser after conveyance, 905.
rescission, ability of purchaser to discover, no defence to, 154.
of deceit, may be founded on what, 104, 113.
as to age, by infant, relief for, 5.
as to character of annuity, 112.
as to fact, distinguished from puffing statement, 111.
as to insurable character of life, on sale of life estate, 111, 112.
as to nature of covenants, 107, 112.
as to offer by third person for estate, 113.
as to terms of lease, 133.
as to title in conditions, does not bind purchaser, 163—165.
as to title, precludes vendor from enforcing condition for rescission, 180.
as to valuation, 112, 113.
as to water supply, may vitiate sale, 157.
bonâ fide, binding in Equity, 118.
by agent, of his authority, 212. *And see* AGENT.
binds principal, how far, 103, 104, 900—902, 1075.
by auctioneer, must be fraudulent to make him liable, 206.
by company, remedies for, 117, 118.
by solicitor, makes him personally liable, 108.
by stranger, must be fraudulent to make him liable, 113, 114.
And see FRAUD; DECEIT.
conduct may amount to, 114, 115.
contract not enforced on ground of, though rescission refused, 106.

MISREPRESENTATION—*continued.*
contract variation allowed to defendant on ground of, 1156—1159.
defence to specific performance, 1175.
dismissal of action on ground of, special ground for costs, 1257.
equity will compel, to be made good, 114.
estoppel by, 114.
executory contract rescinded for, principle of, 899.
knowledge of purchaser of untruth of, precludes relief, 111.
maker bound by, though made by mistake, when, 948.
money paid by agent upon, recoverable, 1075.
purchase set aside for, after completion, when, 898, 900, 901.
purchaser must not be guilty of, 119.
remedy of purchaser for, 948.
silence is, when, 104, 106, 115.

MISTAKE. *And see* CLERICAL ERROR; MISDESCRIPTION.
as to bidding, defence to specific performance, how far, 225.
as to meaning of contract how far ground for allowing variation, 1153—1155.
contract may be rectified for, in action for specific performance, 1149.
in law not a defence to specific performance, 1155, 1174.
what is implied by maxim "*ignorantia juris haud excusat*," 1155, n. (*o*).
lands omitted by, purchaser entitled to, after conveyance, 908.
misrepresentation made by, binds maker, when, 109, 110, 518, 948.
mutual is ground for rectification, 839.
of arbitrator may avoid award, 704, 705.
of purchaser, defence to specific performance, how far, 1174.
of vendor, defence to specific performance, how far, 1187, 1192, 1193.
parol evidence admissible to prove, 1156.
proof of, must be precise, 839, 1156.
purchase-money paid by, purchaser has lien for, 506.
purchaser buying his own estate by, may recover purchase-money, 907.
unilateral, cannot be ground for rectification, 839.
remedy for, 839.
vendor's remedy after conveyance for his own, 837—840.

MODUS. *And see* TITHE.
how established, 401 *et seq.*
"rent" under Stat. of Lim. does not include, 433.

MONEY CHARGED ON LAND,
arrears of interest on, not recoverable for more than six years, 459.
barred by twelve years from right to receive, 453.
unless there has been payment by person liable to pay, 453.
or acknowledgment, 453.
intention that land shall be continuing security for, prevents sale, 691.
payable on sale proceeds and not land are security for, 691.
payment of, by person in dual capacity, effect of, 456, n. (*r*).
will be attributed to the one of several debts not barred, 457.
payment of, what is sufficient to prevent time running,
by debtor as against surety, 457.
by devisee for life of testator's specialty debt as against remainderman, 456.

MONEY CHARGED ON LAND—*continued.*
payment of, what is sufficient to prevent time running—*contd.*
by dowress in possession with consent of mortgagor's heir, 457.
by executors to beneficiaries, 456, n. (*r*).
by person authorised, 455, 456.
claiming the land or his trustees, 456.
by receiver, as being agent, 457.
money need not be actually paid, if receipt given, 457.
the hand to receive and to pay must be different, 456.
payment, what is insufficient to prevent time running,
by one partner after dissolution as against co-partner, 456, n. (*p*).
by stranger, 455, 456.
by tenant for life of charge which is barred, 457.
of mortgaged property, of rent, 456.
to different trustees for the same beneficial owner, 456.
where same hand pays and receives, 456.
produce of land directed to be sold is, how far, *quære*, 454.
remedy for, on collateral bond on mortgage, when barred, 67, 454, 455.
personal covenant in mortgage, when barred, 67, 454, 455.
time excluded from period for limitation of,
term assigned in trust for mortgagee, 454.
term vested in trustees for raising annuities, 453.
portions, 453.
while land and charge are vested in same person, 453.
rents have been exhausted by prior charges, 453.
wrong person is receiving it by mistake, 454.
within Locke King's Act, what is. *See* LOCKE KING'S ACTS.

MONTH,
meaning of, in Act of Parliament, 492.
conditions of sale or contract, 492.

MONUMENT,
inscription on, is evidence as to pedigree, 394.

"MORE OR LESS,"
description of quantity as, effect of, 736.

MORTGAGE,
abstract should contain reconveyance and, 341.
advance on promise to execute, is not part performance, 1139.
assignment of, to trustee in bankruptcy of mortgagor, effect of, 1042.
by husband, concurrence in, of wife bars dower, 584.
by purchaser, effect of vendor joining in, on lien, 833.
to vendor, special provisions in, when valid, 834.
collateral, meaning of, on simultaneous mortgage of several properties, 921, 922.
not liable to debt till exhaustion of primary mortgage, 921.
consolidation of. *See* CONSOLIDATION.
contract to lend or borrow on, not enforceable, 1112.
conveyance also operating as, pays double duty, 796.
reserving right to repurchase does not constitute, 925.
even where mortgagor sells equity of redemption to mortgagee, 925.
test to be applied on such transaction, 925, 926.

MORTGAGE—*continued.*
conveyance to purchaser may keep alive, 574.
debt,
barred by twelve years from payment or acknowledgment, 453.
devisees of mortgaged estate must bear rateably, 920.
on purchase of equity of redemption remains charged on land, 919.
what is contrary intention, 919.
presumption of payment of, when it arises, 367.
real and personal estate included in, must bear rateably, 920.
equitable,
absence of title-deeds how far notice of, 478, 520.
by deposit must be registered in Yorkshire, 773.
need not be registered in Middlesex, 767, 768.
memorandum of, must be registered in register county, 768, 775.
presumed satisfied or released, when, 367.
sale or foreclosure is remedy on, 1320, 1321.
unregistered, postponed to subsequent registered charge, 768.
within Locke King's Act, 920.
existence of, generally considered matter of conveyance, 324.
whether a defect in title, 323, 324.
exorbitant interest on, when relieved against, 851, n. (*p*).
for term, whether proper root of title, 338.
in form of trust for sale not an express trust, 439.
interest on. *And see* LIMITATIONS, STATUTE OF.
not recoverable for more than six years, 459.
neither as against land not on covenant, 67, 455, 460.
not even where mortgage is of a reversion, 460.
unless there is provision for capitalisation of interest, 460.
what recoverable if heir wishes to redeem, 461.
in administration action, 460, 461.
where money in Court under L. C. C. Act subject to mortgage, 461.
long after alleged advance in pursuance of no agreement void against mortgagee for value, 1003.
meaning of, within Locke King's Acts, 304.
not included in condition for getting in outstanding estate, 176.
notice of transfer of, neglect to give, does not destroy right of foreclosure, 987.
of charge on estate, power of attorney in, enables mortgagee to give receipt, 703.
of foreign land may be foreclosed, 1107, n. (*d*).
of reversionary interest formerly set aside for inadequacy, 844.
on sale in lots, should be released by separate deed to vendor, 575.
parol contract for deposit of deeds, how far part performance of, 1139, n. (*f*).
parol evidence admissible to prove sale in fact, 1057.
power of sale,
authorizes mortgagee, when, 88.
in, exerciseable upon condition, 72.
in, provides for conveyance of legal estate, 664.
in, under Conv. Act, exerciseable by person entitled to money, 664.
purchaser under, protected, 73.

MORTGAGE—*continued.*
power of trustees to release part of lands from, on sale, *quære*, 689, 690.
power to, authorizes mortgage with power of sale, when, 89.
proceeds of sale, trust of surplus, destroyed by extinction of equity of redemption, 451, 452.
even though sale made under power, 452, n. (*f*).
purchase of equity of redemption by mortgagee extinguishes, when, 1040—1042.
purchaser must covenant to pay, on, 625, 629.
purchase-money may be allowed to remain on, on sale by mortgagee, 90.
under Conv. Act, may be applied in satisfaction of, 176, 666, 667, 749.
under L. C. C. Act must cover, 511.
purchaser of lease subject to, cannot merge lease in reversion, 1000.
remedy on collateral bond on, barred after twelve years, 67, 454.
personal covenant in, barred after twelve years, 67, 454.
satisfaction of, creates tenancy at will, 444.
several, constitute same debt for Locke King's Act, when, 922.
simultaneous, of several properties, application of Locke King's Act to, 921.
subsequent to contract postponed to vendor's lien, 506.
suppression of, danger and impropriety of, 341, n. (*s*).
title, purchaser of, has notice of dealings with equity of redemption, 977.
trade fixtures pass by, 606, 607.
to secure future advances must be registered, 768.

MORTGAGEE,
acknowledgment of title by one, does not affect interests of others, 451.
And see ACKNOWLEDGMENT.
agent of, purchase of mortgaged property by, 40.
arrears of interest, what, recoverable by, 460, 461.
auctioneer, not allowed commission, 208.
except on sale under Court, 208, n. (*y*).
barred by twelve years from right of entry in default of payment of interest, 436.
claim of, duty to answer purchaser's inquiries concerning, 109, 517, 948.
particulars of, need not be stated except on offer to redeem, 517, 948.
complication of title by, renders him liable to expenses, 764.
concurrence of,
in conveyance of equity of redemption should be procured, 654.
lots, how dispensed with, 575.
on sale by Court ordered on what terms, 1346.
under L. C. C. Act may be dispensed with, 670.
necessary on sale by mortgagor, 582.
conduct of sale formerly commonly given to legal, 41.
contract by,
for purchase of equity of redemption, 282.
does not merge security in favour of mesne incumbrancers, 313.

MORTGAGEE—*continued.*
contract by—*continued.*
for purchase of equity of redemption whether dower let in, under old law, 312.
for sale under power for more than sum due, effect of, 311.
conveyance by,
cannot be required before time fixed for redemption, 654.
without six months' notice or interest, 654.
equities of adverse claimants should be reserved on, 655.
must be made to person from whom he accepted tender, 654, 655.
costs of bringing administration action, entitled to what, 1341, 1342.
unnecessary action by, against purchaser not allowed against estate, 1271.
costs on sale by Court of, paid out of purchase-money, 1340, 1341.
costs, profit, out of mortgagor cannot be made by, 96.
covenant for production of deeds retained on sale must be given by, 766.
with, by purchaser of equity of redemption for payment of debt constitutes personal liability, how far, 919.
covenants by, on release, 623, 624.
for title, cannot release, as against mortgagor, 895.
joint and several, can be required by, 624.
only limited, given by, 146.
devolution of estate of, under Conv. Act, 18, 294.
discretion of, under Conv. Act as to use of conditions of sale, 84.
equitable,
from heir postponed to creditor of intestate, 703.
judgment creditor postponed to prior, 548, 549.
mortgagor may be declared trustee for, on foreclosure, 665.
remedy of, now foreclosure or sale, 543, 1320, 1321.
right of, as to fixtures, 608, n. (*u*).
without notice, takes subject to secret trust, 945.
equity of redemption,
purchase of, by,
does not estop mortgagee ejecting mortgagor's lessee, 311, 1000.
extinguishes mortgage, how far, 1040—1042.
from mortgagor may be good, 40.
interest on mortgage may be set off against interest on purchase-money, 713.
set aside for undervalue, 41.
solicitor from client treated as security, 45.
release of, by mortgagor to, 841.
gift by, to charity of mortgaged land by way of sale, bad, 93.
heir of, is trustee within Trustee Act, 655, n. (*q*).
was trustee for executors of legal estate, 664.
judgment no longer affects lands of, 538 *et seq.*
under 1 & 2 Vict. c. 110, affected lands of, 537, 538.
leave to bid given to legal, conducting sale, under special circumstances, 42.
usually applied for by, on sale in bankruptcy, 41.
when given, on sale by Court, 41.
lunatic, vesting order as to lands of. *See* TRUSTEE ACT.

MORTGAGEE—*continued.*
mortgage deed, copy of, cannot be retained by, after satisfaction, 478, 764.
mortgagor cannot be sued by, after sale and foreclosure, 1042.
may be sued by, after sale under power, 1042.
not an express trustee except of surplus moneys, 437.
no evidence admissible after six years to prove surplus, 438, n. (*e*).
notice of claim, should give to purchaser, when, 517.
incapacity in mortgagor affects, 51.
of bankrupt preventing disclaimer must covenant against rents, &c., 630.
of charge on estate can give good discharge under power of attorney, 703.
of land taken under L. C. C. Act,
entitled to be present at assessment of price, 511, 512.
have debt satisfied, 511, 512.
may obtain injunction against Co. when, 571.
of leaseholds, executor of, cannot buy fee simple, 1067.
of life estate must account for rents after death of tenant for life, 1032, 1033.
of purchaser may enforce his contract, 1114.
of vendor's lien takes subject to prior equities, 828.
party interested within Partition Act, 1868, s. 4..1300.
possession of, for twelve years bars equity of redemption, 436, 451.
even though he keep account of rents, 436.
may be of any part of mortgaged land, 451.
unless he is also entitled to equity of redemption, 451.
postponed,
by delivery of title deeds to mortgagor, not necessarily, 950.
by non-possession of title deeds not necessarily, 950.
by what negligence as to title deeds, 950—952.
in respect of further advances after notice, 936.
to lien of purchaser if subsequent to contract, 506.
vendor, when, 825.
to prior judgment if he has notice, 550.
to purchaser by fraudulent concealment of claim, 517.
silence as to claim, when, 947, 948.
power of sale of,
does not enable him to sell to himself, 35, 40.
disability is analogous to disability at law of pledgee, 36.
gives him right to sell, not to take at a valuation, 35.
may be exercised to clear mortgagor's title, 85.
not extinguished by his concurrence in demise, 60, 61.
under Conv. Act, 59, 60.
may be excluded, 60.
whether suspended or extinguished by sub-mortgage, 61.
priority of. *See* PURCHASER FOR VALUE WITHOUT NOTICE; PRIORITY.
production of deeds by, when enforced, 475, 476, 477.
if he consent to sale, 477.
if production covenanted for by mortgagor, 476.
not without consent of mortgagor, 476.
want of notice may protect mortgagee, 476.
under Conv. Act, 476.

MORTGAGEE—*continued.*
proof by, in administration action after abortive sale allowed, 1042, 1043.
purchase-money, not compelled to pay in for incumbrances larger sum than, 1171.
paid into Court, not entitled to accumulations on, 1341, 1342.
purchaser from, bound by prior agreement with mortgagor, 1043.
within 27 Eliz. c. 4..1003.
remedies of, may all be pursued concurrently, 81.
representatives of,
could not convey to transferee under V. & P. Act, 664.
under power of sale under V. & P. Act, 665.
persons to convey under Conv. Act, 665.
right of pre-emption given to, by mortgagor, 282.
redemption may be postponed by, how far, 654.
sale by,
after satisfaction, 80, n. (*k*).
after tender of payment at his own risk, 80, 81.
before notice given to mortgagor, effect of, on purchaser, 82.
cannot be made pending redemption action, 80.
concurrence of mortgagor unnecessary to, 59, 582.
depreciatory conditions should not be used on, 197, 198.
does not place him in fiduciary position to mortgagor, 35, 81, n. (*m*).
even though mortgage in form of trust for sale, 35.
general rules as to staying, 81, 82.
improvident or harsh, not set aside, 80.
may be by public auction or private contract, 75.
made in spite of offer, not tender, of payment, 80, 81.
oppressive, may be restrained, 81.
purchase-money on, may be allowed to remain on mortgage, 90.
under power after extinction of equity of redemption, does not make him trustee of proceeds, 452, n. (*f*).
under power not compelled after foreclosure, 1171.
with notice of later incumbrancers renders him liable to them, how, 95.
satisfied term can be set up by, how far, 578, 579.
second, leave to bid refused to, being also creditor's assignee, 38.
may sell subject to first mortgage, 80.
purchase by, of interest of first, *pendente lite*, good, 299.
selling under power of sale, 41.
solicitor of, bidding at sale, not allowed to retract, 140.
lien of, on deeds as against mortgagor, 476.
mortgagor's trustee in bankruptcy, 476, n. (*x*).
mortgagor, mortgagee has constructive notice through him, 991.
surplus proceeds, how to be dealt with by, on sale, 95.
may be paid in under Trustee Acts in case of disputes, 95, 749.
tenant at will to mortgagor after payment off, 444.
time does not run against,
where tenant in common with others of property, 454.
while tenant for life of mortgaged estate, 451.

MORTGAGEE—*continued.*
time runs against,
from last receipt, 436.
not from right of entry, 436.
even though stranger has got title against mortgagor, 436.
purchaser from mortgagee is equally protected, 436.
title of, barred by statute, not revived by vesting order, 463, n. (*y*).
purchaser buying from, under Conv. Act, 60.
title-deeds, duties of, as to, 477, 478.
liability of, for destruction or loss of, 477.
what sufficient indemnity to mortgagor for, 478.
transfer by, must be made if required, 654.
trustee, of equitable estate from *c. q. t.* protected by legal estate, 929.
of nominal reversion for purchaser under Trustee Act, when, 662.
power of, to release part of lands on sale, *quære*, 689, 690.
remedy of, is sale, 1321, 1322.
under voluntary settlement cannot consolidate against volunteers, 1002.
vesting order as to lands of. *See* TRUSTEE ACT.
does not revive title of, barred by statute, 463, n. (*y*).
wife of, not entitled to dower, 586.

MORTGAGOR,
agent of, has not general authority to receive mortgage money, 742.
secus, if he produce client's deed and receipt, 742, 743.
agreement with, by purchaser from mortgagee, binds him, 1043.
attornment of, to mortgagee creates estoppel, 912.
barred after twelve years from possession by mortgagee, 451.
or from acknowledgment of title, 451.
what is acknowledgment. *See* ACKNOWLEDGMENT.
can be sued on covenant after sale under power, 1042.
cannot be sued on covenant after foreclosure and sale, 1042.
cannot prejudice subsequent incumbrancers by waiving notice of sale, 82.
concurrence of, in sale by mortgagee, covenants for title on, 624.
under power, unnecessary, 582.
contract by, for sale to mortgagee of equity of redemption, at date of mortgage, 282.
to postpone right of redemption, how far valid, 654.
conveyance by, mortgagee necessary party to, 582.
costs paid to mortgagee's solicitor under threat recoverable by, 81, n. (*n*).
entitled to,
discharge where purchaser keeps mortgage on foot, 575.
expenses incurred by complication of title by mortgagee, 764.
mortgage deed on payment off, 478.
production of deeds, 476.
what indemnity in respect of title deeds, 477, 478.
falsifying title, criminally liable, 108.
fraudulently suppressing material document, liability of, 344.
if more than one, must covenant jointly and severally, 624.
lease by, to himself, when good, 47.
under power, covenants in, run with reversion, 1001, 1002.
may be declared trustee for equitable mortgagee, 665.

MORTGAGOR—*continued.*
mortgagee is tenant at will to, after satisfaction, 444.
selling has no fiduciary relation to, 35.
may be restrained by, when, 81, 82.
not compelled to pay off mortgage on contract to grant lease, 1171.
not tenant at will to mortgagee, 442.
payment by, what sufficient under Statute of Limitations, 456.
of interest by receiver is payment by agent of, 457.
rent by tenant of, does not bind mortgagor, 456.
purchase of first mortgage by, does not defeat mesne incumbrancers, 1042.
receipt of, for more than actual advance binds him as against transferee, 953, n. (*s*).
refusing to surrender, person may be appointed in lieu of, 662, n. (*c*).
release by, of equity of redemption to mortgagee, 84.
relief to, against mortgagee enforcing legal title when refused, 311.
right of pre-emption given to mortgagee by, 282.
sale at suit of, not immediately ordered in default of appearance, 1320.
ordered on what terms, 1317, 1318.
sale by, mortgagee consenting to, must produce deeds, 477.
of estate as unincumbered involves payment off of incumbrances by him, 1185.
solicitor, affects his client with notice, 991.
trustee in bankruptcy of, taking surrender of mortgage, stands in place of mortgagee, 1042.
voidable lease by, mortgagor cannot dispute validity of, 1001.
rights of purchaser under, 1000, 1001.

MORTMAIN. *And see* CHARITY ENROLMENT.
Act,
conveyance to charity requires enrolment under, 761, 776.
under Religious Buildings Act not subject to, 778.
exemptions from, 777.
legacy charged on land, within, 303.
power to hold in mortmain may not relieve from, 777, n. (*p*).
premium payable for lease, within, 303.
vendor's lien, within, 303, 828.
conveyance of lands in, does not require enrolment, 778.
corporations can hold lands under licence in, 24.

MOTIVE,
for objections not considered, 495, 496.
illegal, of purchaser, does not avoid conveyance, 856.
undisclosed, for purchase does not make time essential, 485.
secus, where motive disclosed, 485.

MUNICIPAL CORPORATION,
cannot sell under L. C. C. Act without consent of Treasury, 93.
general power of alienation of, 93.
how restricted 21.
money under L. C. C. Act may be applied by, in paying off bonds, 751.

MURDER,
conviction for, effect of, under old law, 15.
present law, 16.

MUTILATION,
deeds, how affected by, as evidence, 369.

MUTUAL COVENANTS,
on sale of building estate, 865—868.
purchaser of reversion may restrain breaches of, 916.

MUTUALITY,
of obligations inferred from nature of transaction, 1087.
plaintiff's rights at law, how far affected by, 1086—1089.
want of, at law, 1176.
in equity, how far defence to specific performance, 1176.
discretionary character of jurisdiction is foundation of the defence, 1177.
founded on want of title in plaintiff, 1177.
not where plaintiff perfects his title, 1178.
unless purchaser repudiates on discovery, 1178—1180.

NAME,
in whose, attorney should execute deed, 642.
of parties to contract necessary, 251—253.
of principal, agent should sign in, 212, 213.
auctioneer, not disclosing, liable, 203.
of stranger, contract in, how far enforceable, 211, 212, 1182.

NATURAL,
love and affection may aid inadequate consideration, 849, n. (*a*).
subjects, declaratory decree that persons are, how obtained, 28.
who are, 27.

NATURALIZATION,
Act, 1870, not retrospective, 27.
certificate of, effect of, 27.
how and when obtainable, 29.
Crown title previously acquired not affected by, 29.
in the Colonies, 28, n. (*e*).
of subjects of the United States, 28, n. (*e*).
special Act formerly necessary for, 28.

NAVIGABLE RIVER. *See* RIVER.

NE EXEAT,
jurisdiction as to, not enlarged by Judicature Acts, 1253, n. (*q*).
when granted against purchaser after decree for specific performance, 1253.

NEGATIVE,
covenants. *See* COVENANTS.
evidence. *See* EVIDENCE.

NEGLECT,
meaning of, in covenant for title, 885.
to deliver abstract, 346, 347.

NEGLECT—*continued.*
to examine title gives purchaser notice of all that is on it, 973, 977, 978.
title-deeds, deposited, does not postpone mortgages, 987.
to proceed with contract may entitle other party to rescind, 486.
to require performance, when waiver of time, 489, 490.
to re-register judgment, 553.

NEGLIGENCE,
as to description of property on material point avoids contract, 152.
as to title deeds,
bonâ fide inquiry for, with reasonable excuse, is not, 951, 961.
equitable estate, when postponed by, 952, 953.
legal estate not postponed by, 826, 950, 952.
unless there is evidence of fraudulent intent, 950, 951, 952.
what is evidence of fraudulent intent, 950, 951, 952.
not notice of registered deed in register county, 960, 961.
enabling fraud by solicitor postpones client to purchaser, 930.
equitable title postponed by, 945.
not mistake, so as to be defence to specific performance, 1155, 1173.
of auctioneer, effect of, on right to commission, 208.
of solicitor in not making searches, 522, 523.
passing defect in title, 522, n. (*k*).
stating case for counsel, 522, n. (*k*).
of trustee may postpone *e. q. t.* to equitable mortgage, 935.
of valuer may be defence to specific performance, 1212.
what sufficient to fix purchaser with notice, 971, 972.

NEGOTIATIONS,
by purchaser in possession preclude him from resisting specific performance, 1204.
right to rescind under condition, how affected by, 183.
subsequent, may amount to waiver of notice given, 83.

NEPHEW,
purchase in name of, may be advancement, 1057, n. (*g*).

NEXT PRESENTATION. *See* PRESENTATION.

NOMINAL PURCHASER. *And see* RESULTING TRUST.
appointment of, need not be in writing, 1056, n. (*r*).
not being real purchaser, how far defence to specific performance, 1182.
parol evidence admissible to prove that purchaser is merely, 1056, 1057.

NON-EXISTENCE,
of estate in part distinguished as defence from want of title, 1184.
whether any relief for, after conveyance, 907.

NOTARIAL ACTS,
by diplomatic or consular agents, how proved, 361.

NOTICE,
actual, how far necessary to effect purchaser, 967, 968.
actual, what is sufficient, 967, 968.

NOTICE—*continued.*
constructive,
classification of Wigram, V.-C., 971.
criticisms of the classification, 972, 973.
Conveyancing Act, 1882, merely enunciates principle of, 971.
lessee has, of lessor's title, 869.
may exist without personal knowledge, 969.
of negative covenants sufficient, 868.
purchaser has, of all he might have learned on inquiry, 973.
examining title, 868, 973.
of judgment entered up if he search register, 973.
real nature of, 970, 971.
conveyance in consideration of pre-existing debt is, how far, 987.
deed entered on Court Rolls is, if purchaser search them, 972, 981.
deed registered is, if purchaser search register, 972, 981.
equitable right of tacking legal estate not prevented by, 934.
executor not giving, to co-executors postponed to later purchaser, 966.
from physical facts, how far, 521, 974, 975.
further advances subsequently made postponed by, 936.
judgment creditor does not obtain priority by, 550.
legal estate without, gives indefeasible rights, 934.
lis pendens is, to all the world if registered, 972, 981. *And see* LIS PENDENS.
mortgagee with, cannot set up satisfied term, 579.
neglect to inquire for deeds may amount to, 935.
of annuity unregistered postpones purchaser, 568, 959, n. (*k*).
of application under S. E. Act, on whom to be served, 1286.
of bankruptcy immaterial after three months, 568.
invalidates dealings with bankrupt, 567.
of bill by purchaser being unpaid, notice of vendor's lien, 979.
of bill payable to order of married woman, whether notice that it binds separate estate, *quære*, 979.
of breach of trust renders purchaser liable, 678, 679.
what will affect purchaser with, 985.
of change of ownership, change of solicitor is not, 986.
of charge at date of security prevents priority from stop order, 966.
on lease prevents purchaser merging it in reversion, 1000.
of charitable mortgage to first purchaser binds subsequent purchaser, *quære*, 944, 1023.
not where mortgage is equitable, 944.
trust, effect of, on purchaser, 944, 945, 1023.
of claim affecting part, notice of its true extent, 974.
affects purchaser who makes no inquiry, 978, 979.
mortgagee must give, when, 947, 948.
purchaser with, not allowed for improvements, 948, 949.
of collateral matters, purchaser has not, 984, 985.
of contract renders alienee of vendor's interest proper party to specific performance, 1131.
of covenant for production should be indorsed on deeds retained, 766.

NOTICE—*continued.*
of deed,
forming part of title is notice of its contents, 969, 970.
not forming part of title, not notice of its contents, 970, 981, n. (*d*), 985.
e.g. of collateral deed of covenant, 970.
of settlement alleged not to affect title, 970, 986.
notice of all, purchaser would have learned by its examination, 973, 977, 978.
notice of its deposit, when, 970.
unregistered, must be actual, 960, 961, 965.
of deposit of deeds, excuse for non-delivery is not, 951.
of equitable mortgage from absence of deeds, 478, 520.
of facts, inquiry into which is barred, purchaser has, 200.
of fraud by solicitor client not affected with, when, 991—993.
from unusual mode of execution, 978.
in original purchase, whether sub-purchaser affected, 846.
of fraudulent conveyance does not affect purchaser, 1002.
of grounds for reopening foreclosure, purchaser when affected with, 469.
of incumbrance postpones purchaser to all subsisting incumbrances, 932.
to purchaser, effect of, 285.
to vendor, effect of, 285.
of intention of company to take, acquiescence by owner in, 297, 299.
service of, effect of, defined, 297.
of interest of holder of title-deeds, non-possession of vendor is not, 984, 985.
of judgment postpones subsequent mortgagee, 550.
registration does not amount to, 525.
unregistered affects purchaser, how far, 554, 965.
of lease is notice of its contents, 105.
to what extent, 106, 107.
of legal estate outstanding, notice of trusts of it, 977.
of lessor's title, purchaser has, though he may not call for it, 191, 977.
effect of Conv. Act on the rule, 978, 981.
of lien, effect of, on rights of sub-purchaser or mortgagee, 825.
of mortgage title, notice of dealings with equity of redemption, 977.
of mortgagee of circumstance which may invalidate purchaser's title, 51.
of negative covenants affects purchaser's liability, how, 863.
constructive notice sufficient, 868.
of objections to title may preclude requisitions, 495.
of occupancy, effect of, 519, 976, 977, 983.
of order under Partition Acts, service of, when dispensed with, 1304.
S. E. Act must be indorsed on settlement, 1287.
when land in register county, what sufficient, 1290.
of original lease, how far purchaser of sub-lease has, 983, 984.
of partnership on purchase of share of tenant in common, 519, 520.
of payment of rent to A., notice of A.'s title, 976.
of post-nuptial settlement, notice of ante-nuptial agreement, 973.
of preparation of draft, not notice of executed deed, 985.
of previous satisfaction of mortgage debt, effect of on purchaser, 80, n. (*k*).
of prior equity unnecessary to give priority over judgment, 549, 550.

NOTICE—*continued.*
of purchase,
mortgagee having, postponed for not stating claim, 518, 947.
of chose in action, premature, gives no priority, 944.
of equitable estate in land gives no priority, 109, 518, 943, 944.
may be protected by legal estate, 956.
of equitable estate should be given to trustees, 109, 518, 783, 784, 956.
of equity of redemption to mortgagee not necessary to prevent consolidation, 784.
prevents tacking, 784.
of legacy gives priority over subsequent stop order, 110.
of proceeds of future sale of land gives priority, 944.
of reversion at undervalue, relief afforded against sub-purchaser with, 846.
of sale by mortgagee,
duly given, may be waived by subsequent negotiation, 83.
failure to give, invalidates sale, when, 82.
good, if proper period elapses between it and sale, 83.
may be given to blind or deaf person, 82.
infant, 82.
lunatic, 82.
to be given under Conv. Act, 83.
of sub-purchaser of circumstance which may invalidate purchaser's title, 51.
of subsequent incumbrances, effect of, on mortgagee's duties as to surplus, 95.
of tenancy,
notice of landlord's title, 976, but cf. 984.
tenant's equities, 518, 519, 975, 984.
as between purchaser and tenant after completion, 519, 976.
does not extend beyond equities of occupier, 984.
preclude right to specific performance with abatement, 1196.
extends to equities of tenant under collateral agreement, 975, 976.
not as between vendor and purchaser, 519, 976, 1196.
of title of person in possession, purchaser dealing with, has, 975.
vendor, purchaser has, whether he inquire into it or not, 977, 978, 980, 981.
contract to accept short title does not relieve from, 980.
of transfer, failure to give, does not destroy right of foreclosure, 987.
of trust renders legal estate liable to it, 935.
when not to appear on abstract, 341.
of voidable agreement binds purchaser, how far, 997, 998.
of want of necessary notice to mortgagor, effect of, 82.
owner of legal estate may be postponed by, 934.
priority by registration,
not affected by, under Yorkshire Registry Acts, 776, 962.
prevented by, at date of conveyance, 959.
secus, if notice acquired after conveyance, 959, 960.
must be express to postpone registered deed, 960, 961.

NOTICE—*continued.*
priority destroyed by, before payment, 928.
after part payment legal estate may protect amount paid, 929.
private Act is not, 981.
professional communications not admissible to prove, 993—996.
public Act is, to all the world, 972.
purchaser bound by, to same extent as his vendor, 996, 997.
from person without, not affected with notice, 1023.
not postponed by, prior to registration of transfer of shares, 933.
of estate subject to paramount charges, how far affected by, 1035, 1036.
with, not relieved by failure to re-register, 553.
that freehold title cannot be produced, contracting for leaseholds, 331.
recital may be, 968, 974, 986.
not if ambiguous, 986.
registration is not, *per se* in Middlesex, 959.
Yorkshire, 775, 962, 963.
requiring consent to or dissent from application under S. E. Act,
how given, 1284.
when dispensed with, 1284.
suspicious circumstances alone are not, 986.
time for completion may be limited by, 487.
deposit need not be sued for or returned on expiration of, 488.
must be reasonable, 488.
to agent of solicitor is notice to principal solicitor, 993.
to rescind by purchaser good on vendor's refusal to remove objection, 489.
must be reasonable, 488, 489.
to solicitor,
affects his client taking mortgage from him, 991.
employed by both parties affects purchaser, how far, 990, 991.
in prior transaction formerly bound client, 988.
provision of Conv. Act as to, 988, 989.
effect of provision, 989.
does not apply where solicitor himself vendor, 990.
notice to client, 966, 967, 987.
tendency of decisions as to, 993.
to treat. *See* NOTICE TO TREAT.
to trustees, after appointed trustee not affected by, 966.
notice to co-trustees, 966.
unless he have adverse interest, 966.
of assignment of equitable interest binds though indirect, 956, 968, 969.
want of, may protect mortgagee from liability under covenant for production, 476.
order of Court not invalidated against purchaser for, 1290.
will entered on Court Rolls is, if purchaser search, 972, 981.
will registered is, if purchaser search register, 972, 981.

NOTICE TO TREAT. *See* COUNTER-NOTICE; HOUSE; RAILWAY COMPANY.
abandonment of,
good, on counter-notice being given to take whole, 244, n. (*d*).
presumed when, 248, 249, 1098, 1099.
company is bound by and cannot withdraw, 242, 1099.
deposit must be for all lands comprised in, 508.
for estate which determines, not enforceable against company, 244.
for part of house may be met by counter-notice to take whole, 244.
revives on refusal or inability to sell whole, 244.
for part of manufactory may be met by counter-notice to take whole, 247.
heir not bound by, till terms and price fixed, 243, 244.
intention as to minerals should be stated in, 238.
landowner not bound by, till terms and price fixed, 243, 1098.
lands included in, but not taken, remedy for, 515.
must be acted upon within reasonable time, 248.
notice of enfranchisement, whether has same effects as, *quære*, 249.
remedy upon is mandamus, not specific performance, 248, 1099.
second, may be given to take further authorized lands, 247.
unauthorized object cannot be gained by, 248.
under earlier Act not available for compulsory powers under new Act, 513.

NUISANCE,
defence to specific performance, how far, 1184.
establishment of national school not, 875.
purchaser of reversion on lease, how far liable for subsisting, 1045.
vendor liable for concealing from his agent, 103.
what is a, 875, n. (*s*), 1045, n. (*s*).

NUN,
capacity of, to take or dispose of property, 23.

OBJECTIONS. *And see* REQUISITIONS.
acceptance of title, not waiver of, unless disclosed by abstract, 350.
as to certain delay in completion, must be taken promptly, 491.
mere protest not sufficient, 491.
as to inability to deliver possession, may involve costs, 493.
as to time, how far defence to specific performance, 490.
condition as to time for, how waived, 346.
for rescission, applies to what, 181.
not enforceable before answering, 179, 183.
should give opportunity to withdraw, 183.
costs affected by character of, 1257, 1258, 1259, 1264.
costs, purchaser withholding fatal, may be liable for, 494.
for want of certificate of chief clerk in partition action, 1310, n. (*t*).
frivolous, danger of taking, 493.
new, may be taken in defence to specific performance, 494, n. (*h*), 1245.
on reference as to title. *See* REFERENCE.
recital of, proper in deed of confirmation of title, 596.
reference as to title ordered as to what, 1226.
solicitor cannot take, on purchase from client, 492.

OBJECTIONS—*continued.*
to title *aliunde*, may be taken when, 169, 170.
waived, must be precluded on reference as to title, 494, n. (*h*), 1245.
waiver of,
not effected by waiver of right to abstract, 496.
possession is, when, 499, 500.
purchaser must pay costs of reference on, 1264.
subject to specified condition, effect of, 495.

OBSTRUCTION,
of light. *See* LIGHT.
of necessary way, is breach of covenant for quiet enjoyment, 882.

OCCUPATION. *And see* POSSESSION.
compensation not precluded by purchaser's, 133.
description of, in conveyance, 602, 603.
misdescription of, in particulars, effect of, 127, n. (*f*), 157, 158.
notice of, affects purchaser, how far, 519, 975, 976.
as tenant, how far notice of landlord's title, 976, 984.
how far notice of occupier's equities, 518, 519, 975, 984.
late, does not affect purchaser, 976, 977, 983.
of vendor, as tenant, not notice of his having lien, 984.
possession does not necessarily mean personal, 145.
seisin how far presumed from, 379.

OCCUPATION RENT,
condition for receipt of rents and profits includes, 145.
mis-statement as to, in particulars, 155.
purchaser in possession,
liable for, after rescission, 504, 505, 1085, 1086.
for fixtures, 715.
with interest deducted, 1221.
not liable for, on title proving defective, 504.
purchaser of reversion on lease, not under seal, may sue for, 917.
sub-purchaser, entitled in Equity only, how far entitled to, 505.
vendor in possession, how far liable for, 291, 709, 715, 918.
where purchaser solely in default, 715, 716.

OFFER,
acceptance of,
by post, dates from posting, 253, 254.
conditional, imports new term, 265.
must be complete and unequivocal to form contract, 264, 265—267.
within reasonable time, 268.
parol evidence admissible to show conditional nature of, 268.
written, may be by parol, 266.
of purchase by third party, false assertion of, by vendor, 113.
revocation of, by death or bankruptcy, 267.
need not be express, 268.

OFFICE COPIES. *See* COPIES.

OFFICIAL,
appointment of, presumption of, 380.
receiver, may sell property of bankrupt before appointment of trustee, 75, n. (*c*).
property of bankrupt vests in, till trustee appointed, 75.

OMISSION,
condition against compensation for, 158, 159, 740.
in operative part of deed, when supplied by recitals, 594, 595.
of parcels from conveyance, purchaser when relieved against, 908.
of stipulations, if deliberate, bind the parties, 1159.
to inquire for title-deeds. *See* NEGLIGENCE.

ONUS,
in transactions between persons in fiduciary position, 35, 49.
of proof,
of consideration for voluntary deed is on person setting it up, 1018.
of inaccuracy of recitals on purchaser, when, 340.
of sale of charity lands being beneficial is on purchaser, 19.
of supporting family arrangement between father and son, 848.
of title being "pretenced" is on plaintiff, 278, n. (*k*).
of voluntary settlement being intended to be irrevocable, 1022, 1023.
of waiver of lien, on person denying it, 829.
under sect. 3 of Partition Act, 1868..1300.
under sect. 4 of Partition Act, 1868..1300.
on person relying on acquiescence, 55.
on sale of reversion, on purchaser, 844, 851.

OPERATIVE PART,
in present tense except in feoffment, 600.
recitals affect, how far, 594, 595.

OPINION,
of conveyancer. *See* CONVEYANCER.
of counsel. *See* COUNSEL.
on title, old, how far valuable, 348.
on behalf of purchaser and mortgagee differ, how far, 349.
statement of, of vendor as to value does not avoid contract, 111.

OPPOSITION,
contract in consideration of withdrawal of, to bill, enforceable, 219.

OPPRESSIVE,
sale by mortgagee may be restrained, 81.
not invalid, 80, 81.

OPTION. *And see* PRE-EMPTION.
of adoption or abandonment of contract by infant, 29.
of going out of possession instead of paying in purchase-money, when allowed, 1217—1219.
of purchase,
conditions of, strictly enforced, 240, 926.
does not make lease liable to agreement stamp, 276, n. (*t*).
exercise of, effect of, on rights of representatives, 296, 305.
exerciseable only within prescribed period, 485.
trustees cannot give, at fixed price, 90.

ORDER,
for account against purchaser on eviction under prior title, 1033.
for payment has effect of judgment, 535.
of purchase-money to third person, when irrevocable, 213, 214.
for sale, defective or informal, binding in favour of purchaser, 1352.
formerly invalid, 1350—1352.
ground for discharging purchaser, 1335.
makes consent of tenant for life unnecessary, 86.
for transfer of property liable to stamp duty, 793.
form of, in specific performance. *See* SPECIFIC PERFORMANCE.
in lunacy, how proved, 361.
not notice, 981.
of Court not instrument in writing within Apportionment Act, 915, n. (*r*).
of reference of title, 1226 *et seq.* *See* REFERENCE.
purchase by trustee under, valid, 50.
sale under. *See* SALE BY COURT.
not within Statute of Frauds, 227, 1329, 1330.
under Trustee Act, its effect, 661. *And see* TRUSTEE ACT.
what, equivalent to judgment, 534, 535.

ORIGINALS,
condition against production of, 163.
loss of, when may be supplied by secondary evidence, 159.

ORIGINATING SUMMONS,
as to purchase-money where trustees unable to give receipt, 690.

ORNAMENTAL TIMBER. *See* TIMBER.

OUSTER,
of *c. q. t.* not within Stat. of Lim., s. 25..440.

OUTGOINGS,
condition for apportionment of, should include what, 147.
meaning of, 137, n. (*k*).
vendor pays till completion, 142.

OUTLAWRY,
forfeiture upon, in civil procedure, abolished, 16, n. (*e*).
not abolished, 16.

OUTSTANDING INTERESTS. *And see* INCUMBRANCES; LEGAL ESTATE.
certificate as to title, form of, how affected by, 1239.
condition as to expense of getting in, 176.
defect in title, when not, 321.
may be got in by separate deed, 572.
on conveyance of, to trustees of equitable fee, concurrence of *c. q. t.* unnecessary, 94.
purchase of, may be made under L. C. C. Act, 1039.
purchaser without notice of judgment protected by getting in, under old law, 529.
trustee of, must convey at request of *c. q. t.*, 653.
vendor must generally pay for getting in, 814.

OWNER. *And see* LIMITED OWNER; LANDS CLAUSES CONSOLIDATION ACT.
adjoining, right of pre-emption of, under L. C. C. Act, 857 *et seq.*
who is, within L. C. C. Act, 861.
compulsory purchase from, under disability, not a conversion, 297, 298.
covenants by, of estate sold by Court, or by his trustees, 617.
of common right, how he may alien, 312.
party in possession selling to R. Co., when deemed to be, 756.
purchaser acting as, accepts title, how far, 502 *et seq.*
after contract is equitable, 284.
sale by beneficial devisee and executor as, no breach of trust implied by, 678.
true, bound by valuation of jury under L. C. C. Act, 92.

OWNERSHIP,
acts of, by purchaser in possession, effect of, 502, 503, 1217—1219.

OXFORD, UNIVERSITY OF,
limited powers of alienation by, 21.

PALATINATE COURTS,
orders by, under Trustee Act, may be made, 655.
whether evidence under 44th section, 661, n. (*r*).
registration of judgments in, 534, 535, 551, 553, 554.

PARAMOUNT,
charge, contribution by purchasers *inter se* to, 1035, 1036.
title, act of person claiming by, when breach of covenant for quiet enjoyment, 884.
contract to sell not enforceable against person claiming under, 1125.
person claiming under, not proper party to specific performance, 1128.
purchaser in possession rescinding and assenting need not make formal entry, 504.

PARCELS,
contract not admissible as to, after conveyance, 603.
description of,
by reference to occupancy, effect of, 602.
fixtures, how far desirable, 606.
in conveyance, how to be made, 600, 601.
by reference to plan, 601.
importance of plan on sale of mines and building estate, 601.
on sale of reversion by reference to preceding estate, 604.
particular controls general, 603.
subsequent error does not affect full, 602.
general words unnecessary for, 605.
identity of. *See* IDENTITY.
improperly included in or omitted from conveyance, 838, 908.
in surrender of copyholds, 604.
minerals must be expressly included in, on conveyance to company, 604.
on enfranchisement, 604.
trustees may sell in, 76.
whether piece included in, question for jury, 601.

PARCENER,
may compel production of title deeds, 473.

PARDON,
of treason or felony, effect of, 15.

PARENT,
purchase in name of, not an advancement, 1058.
transactions between child and, 23, 847—849.

PARISH,
property of, may be sold under 5 & 6 Vict. c. 18..21.
purchase by inhabitants of, *eo nomine*, bad, 25.
register of, extract from, whether evidence, 362.

PAROL,
acceptance of written offer of purchaser constitutes good contract, 266.
agent may be appointed by, 210, 1056, n. (*r*).
agreement. *See* FRAUDS, STATUTE OF.
agreement before may be carried out by written, after marriage, 250.
contract, adoption by heir of ancestor's, effect of, 296.
distinguished from parol declaration of trust, 1133, n. (*x*).
effect of Stat. of Frauds upon, 227, n. (*c*).
varying but not conflicting with written, action lies on, 1090.
declarations generally admissible on behalf of defendant, 125.
of auctioneer, effect of, on position of purchaser, 124, 125.
evidence,
admissible of collateral agreement, how far, 1158, 1159.
of payment, to raise resulting trust, 1056, 1057.
to explain generally, 1090 *et seq.*
local, professional, or trade meaning, 262, 1090, 1091.
reference to terms in agreement, 262.
to help out description in writing, 252, 255.
to prove collateral agreement, 1094.
tenancy in common on joint purchase, 1048.
to show contract was subject to contingencies, 1090.
deed was not to take effect from execution, 1094.
execution of deed as escrow, 826, 1095.
sale in fact mortgage, 1057.
true construction, 1019, 1094.
license, whether valid, 229, 230.
nominal purchaser may be appointed by, 1056, n. (*r*).
promise to vary written agreement is defence to specific performance, 1156.
release of contract under seal, invalid, 1097.
variation,
alleged by defendant, effect of offer of plaintiff to perform, 1148, 1156.
of conditions admissible in equity only in defence, 123, 124.
of contract, evidence of, inadmissible at law, 1090.
is a new contract liable to Stat. of Frauds, 237.
part performance of subsequent, defence to specific performance, 1159.

PAROL—*continued.*
vendor's lien assignable by, 828.
waiver of contract, how far defence to specific performance, 1212, 1213.
in writing not defence to action on contract, 1096, 1213.

PARSON,
when with churchwardens a corporation to purchase land, 25.

PART,
material, want of title to, defence to specific performance, 1184, 1200, 1202, 1203.
will vitiate sale, 155, 156.
notice of claim affecting unspecified, notice as to entirety, 974.
trust to sell any, authorizes sale of entirety, 76, n (*l*).
vendor compelled to convey, when, 1187, 1188.

PART OWNER,
may enforce production of deeds, 473.

PART PERFORMANCE,
acts of,
binding tenant for life may not bind remainderman, 1145.
must be unequivocally referable to alleged contract, 1134, 1135.
what insufficient,
acts admitting of other explanation than contract, 1138.
acts of defendant to his own prejudice, 1147.
acts of trespass, 1139.
advance of money on promise to execute charge, 1139.
change of residence, 1139, 1140.
continuance of service with alleged promissor, 1140.
delivery of abstract, 1138.
directions for preparation of conveyance, 1138.
execution of revocable instrument, *e. g.* will, 1141.
expenditure by tenant, 1142.
proper under lease, 1139.
marriage, 1140.
payment of increased rent, how far evidence of agreement for lease, 1137.
money to stranger for release, 1139.
purchase-money, 1138.
retention of possession by tenant not evidence of contract to purchase, 1136.
after term, but before notice to quit, 1139.
survey and valuation of property, 1138.
what sufficient,
acquiescence in expenditure by person in possession, 1144.
in status of contract for long period, 1138, 1143, 1144.
acts unequivocally referable to parol ante-nuptial promise, 1141, 1142.
delivery or acceptance of possession, 1136.
expenditure by tenant may be evidence of contract for lease, 1143.
possession without liability for trespass, 1136.

PART PERFORMANCE—*continued.*
acts of—*continued.*
what sufficient—*continued.*
retention of possession by mortgagor after absolute conveyance, 1136.
tenant and execution of repairs, 1136.
effect of generally, 1136—1138.
with option to take new lease, 1144.
application of, to contract by corporation, 219, 273, 1139.
doctrine of,
applies to contract to grant easement, 1136.
does not apply where no contract, 274.
fraud not true ground of, 1134.
limited to contracts relating to real estate, 1135, 1136.
not recognized at law, 1090.
only allows evidence of what contract was, 274.
principle of, 232, n. (*k*), 1134.
statement of, by Lord Selborne, 1134, 1135.
forbearance to bid on parol agreement that purchase shall be for joint benefit, whether, 1053, 1054.
none of incomplete contract, 274, 1138.
of building contract may give jurisdiction for specific performance, 1110, 1111.
of contract as to one lot does not extend to another, 1147.
of subsequent parol variation is good defence, 1159.
reference as to terms of contract on proof of contract by, 1143, 1145—1147.
only if material terms are proved, 1146, 1147.
terms of contract must be proved, how far, 1145—1147.

PARTICULARS,
covenants, &c., not mentioned in, cannot be included in conveyance, 576, n. (*c*).
examination by purchaser may cure misdescription in, 154.
meaning of "land" in, 128, 129.
must be clear and unambiguous, 122, 127.
must contain full information, 127, 128.
must disclose defects, 129, 131.
must not be deceptive or calculated to deceive, 133, 134.
need not disclose facts of which purchaser has notice, 131, 132.
notorious or customary in district, 132 *et seq.*
on sale by Court, preparation of, 1325, 1326.
settled in chambers, 1327.
plan, if referred to in, must be accurate, 127, 128.
qualifying expressions in, as to quantity, effect of, on right to compensation, 736.
variation of, by parol only admissible as defence in equity, 123, 124, 125.
vendor's name or description should be stated in, 252, 253.

PARTIES,
admittance of one trustee only on purchase of copyholds, 589.
arrangement of, 589.
capacity of, should not generally be specified, 589, 600.

PARTIES—*continued.*
to action by one of several covenantors, who are necessary, 873.
for partition, annuitants are not necessary, 1308, n. (*f*). *And see* PARTITION ACTS.
not allowed to bid at sale by Court, 1322.
to action for specific performance,
agent should be, where contract by him not under seal, how far, 1129.
under seal, 1129.
auctioneer should be, when, 1129, 1130.
c. q. ts. unnecessary where trustees have legal fee, 1131.
Court may add or strike out, 1126.
effect of third party procedure on, 1132, 1133.
heir of vendor, when necessary, 1130.
nonjoinder or misjoinder of, does not defeat, 1126.
may effect costs, 1126, 1127.
parties to contract should generally be only, 1127.
person claiming adverse interest prior to contract should not be joined, 1128.
personal representatives of vendor, 1130, 1131.
purchaser how far proper, after assignment of contract, 1132.
of one lot when necessary to action on other lot, 1129.
with notice of contract, 1131.
receiver or steward having deeds should not be joined, 1127.
stranger to contract bound to convey should not be joined, 1128.
unless action is also for possession, 1128.
unless he claim interest in purchase-money, 1128.
to contract, name of, necessary, 251—253.
to conveyance,
bankrupt need not be but usually is, 583.
dower trustee proper, when, 585.
doweress unnecessary under new law, 583, 584.
husband unnecessary to conveyance of separate estate, 587.
under M. W. P. Act, 587.
under power, 587.
under S. L. Act, 587.
judgment creditor when, under old law, 580.
27 & 28 Vict. c. 112, 581.
mortgagee necessary on sale by morgagor, 582.
mortgagor not necessary on sale under power, 582.
on sale by Court, who are necessary, 1345, 1346.
on sub-purchase original purchaser should not be, 581.
requisitions as to, whether an objection to title, 182.
stipulated for, must be, though unnecessary, 581, 582.
unnecessary, though compellable, vendor need not procure, 582.
vendor in order for specific performance implies concurrence of, necessary, 582.
vendor must procure all necessary, 582.
who should be, generally, 580 *et seq.*
wife entitled to free bench, necessary, 586.
how far necessary, where land has been enfranchised, 586.
wife, of mortgagee or trustee, entitled to dower unnecessary, 586.

PARTITION. *See* PARTITION ACTS.
agreement for, costs of carrying out on death of co-owner, 305, n. (*f*).
authorised by power of sale and exchange, 89.
by Commissioners under Inclosure Act, 328, n. (*o*).
Court may direct in place of sale, 1300.
deed, Court may require production of, 473, n. (*u*).
deed, penalties under Stamp Act do not apply to, 597, n. (*l*).
infant may be declared trustee of other portions allotted on, 665.
may be made subject to and in consideration of reservation of minerals, 78.
of lands of lunatic may be made by committee, 7.
of settled property, what, liable to succession duty on, 316.
parties to action for, may be declared trustees within Trustee Act, 659, 660, 1302.
production of deeds compellable by owner of estate under, 473.

PARTITION ACTS,
Act of 1868,
applied only where a suit for partition, 1308.
construction of, 1299 *et seq.*
incorporates sects. 23—25, S. E. Act, 1856..1302.
sect. 30, Trustee Act, 1302.
next friend of person not so found could not file bill under, 1306.
person under disability whether able to request sale under, 1306.
powers of Trustee Act, 1852, not excluded by, 1302.
sect. 3 retrospective, 1299, n. (*u*).
sect. 4 imperative, 1299, n. (*x*).
sect. 5 not a proviso on sect. 3..1301.
advertisements under, 1304, 1305.
costs under, 1311.
decree for sale under, who bound by, 1302, 1304.
order under, for sale,
can only be made in Chambers where action in district registry, 1310.
form of, 1309, n. (*k*) and n. (*r*).
made at hearing, when, 1308, 1309.
made in default of defence, 1310.
made on defendant's admissions, 1310.
out of Court refused, when, 1310.
where infant interested, how formerly made, 1306.
where necessary party out of jurisdiction, how carried out, 1302.
where parties interested not before Court, when made, 1304, 1309.
with reservation of minerals refused, 1311.
order under,
may be made in absence of interested parties, 1303, 1304.
all legally interested persons formerly essential parties, 1303.
service of notice of, when dispensed with, 1304.
power of Court under, to adopt previous contract, 1310.
to direct sale, 1298 *et seq.*
to order part sale and part partition, 1310.
powers of Court under, may be exercised though interested party under disability, 2, 1298, 1306.

PARTITION ACTS—*continued.*
practice under, when parties under disability request sale or undertake to purchase, 1307.
service of notice dispensed with and property sold, 1304.
procedure under, 1303, 1304.
request for sale under, by infant, Court not bound to comply with, 1307.
by person under disability, how to be made, 8, n. (*o*), 1306, 1307.
sale under,
cannot be made before Chief Clerk's certificate where inquiries directed, 1309, 1310.
leave to bid at, Court may give on terms, 1302.
not given person having conduct of sale, 1302, n. (*s*).
proceeds of, reconverted in case of persons under disability, 1303.
rights of absent parties, how saved on, 1305.
statement of claim under, need not now claim partition, 1308.
should state, what, 1299.
undertaking to purchase by person under disability how given, 1306, 1307.

PARTNER,
benefits secured by one, are for advantage of all, 1051.
fraud of, prevents statute running in favour of others, 440.
in building speculation, rights of, 1052.
land of surviving, personalty until reconverted, 1053.
of bankrupt or deceased can make good title to partnership property, 94.
of trustee cannot make costs out of the trust, 96.
of bankrupt cannot purchase the estate for firm, 37.
on sale by, to co-partner what stamp duty payable, 598, 599.
payment by one, of firm debt after dissolution not binding on other, 456, n. (*p*).
secret profit cannot be made by, 1051.
share of deceased, co-partner purchasing, to what abstract entitled, 320.
in land is personalty for purposes of duty, 1049, n. (*u*).

PARTNERSHIP,
contract for, not enforceable, 1111, 1166.
division of assets of, not liable to *ad valorem* stamp, 598, 599.
goodwill of, assignment of, liable to *ad valorem* stamp, 599, 788.
in mine not sufficiently proved by receipts for payments, 256.
notice of dissolution of, Court can compel insertion of, in Gazette, 1167, n. (*m*).
purchase of land for purposes of, converts it, 1052, 1053.
creates tenancy in common, 1049.
out of assets of, creates tenancy in common, 1049, 1050.
share of tenant in common may be notice of, 519, 520.
sale of share of, liable to stamp duty, 598, 599.

PARTY OR PRIVY,
in covenants for title, effect of words, 886.

PASTURAGE,
common of, limited, may be claimed by prescription, 429.
right of sole, whether within Prescription Act, *quære*, 429.

PATENT,
ambiguity. *See* AMBIGUITY.
defect, meaning of, 101.
purchaser taking possession with notice of, must complete, 102.
vendor need not point out, but must not conceal, 102.

PATIENT,
transactions of, with medical man, 24.

PAYMENT,
by agent induced by fraud, who may recover, 1075.
of charge, when, presumed, 367.
of deposit. *See* DEPOSIT.
of legacies, presumption of, when not warranted, 367.
of money, what decrees and orders for, equivalent to judgments, 535.
of mortgage debt, what sufficient within Stat. of Lim., 455—457.
when presumed, 367.
of purchase-money after notice renders purchaser liable, 928.
even though made under protest, 932.
not sufficient act of part performance, 1138.
on completion. *See* PURCHASE-MONEY.
when presumed, 367.
of rent to A., notice of, is notice of A.'s title, 976.
what equivalent to, within sect. 8 of Stat. of Lim., 444.
of solicitor's bill, giving security amounts to, 817.
what is, to avoid taxation, 816, n. (*o*).
terms of, agent of undisclosed principal may vary, 213.
to agent, action to recover, to be brought against whom, 1075.
to bankrupt, when protected, 954 *et seq.*

PAYMENT IN,
of amount of incumbrances and ten per cent. margin, Court may allow, 1333.
of purchase-money,
made on schedule signed by chief clerk, 1333.
order for, not now generally necessary, 1333.
when made, 1217 *et seq.*
whether purchaser affected by variation of funds, 53, 221, 222, 1333, 1334, 1342.

PAYMENT OUT,
under L. C. C. Act,
affidavit necessary even for payment of dividends, 757, 758.
what necessary on petition for, 757, 758.
married woman must make affidavit of no settlement, 758.
need not be examined where fund is her separate estate, 758.
may be obtained on same partition as reinvestment, 811.
of apportioned part to persons making title to part only, 761, 762.

PAYMENT OUT—*continued.*
under L. C. C. Act—*continued.*
persons "absolutely entitled," who are, 758, 759.
charity trustees, 759.
dowress, 759.
official trustee of charitable funds, 759.
statutory corporation, 759.
tenant in tail on execution of disentailing deed, 759.
trustees for, or with power of, sale, 758.
not if power exercisable at request of another, 758.
trustees of settlement under S. L. Act, 758.
tenant for life may present petition, 758.
persons in possession, right of, to, 756, 757.
service of petition for, costs of, what allowed, 809—811.
on all parties to suit, when necessary, 810.
when and on whom necessary, 758.

PEAK,
mining customs of the, 133, n. (*h*).

PEDIGREE,
evidence of,
admissible to prove identity of parties, 395.
by books and records of Herald's College, 394.
by declaration of party in same interest, 397.
relations, 393.
strangers, 393.
by entries in books belonging to the family, 394.
family Bible, 394, 395.
by inscriptions on monuments, &c. 394.
by old pedigrees, 395.
by recitals, how far, 397.
in Acts of Parliament, how far, 397, 398.
by statements in letters, 394.
must be created, "*ante litem motam*," 395, 396.
falsification of, criminal liability for, 108, 344.
matters of, how to be abstracted, 341.
presumption of, 381 *et seq.*

PENALTY,
agreeement to pay interest in ascending scale is not, 726.
condition for payment of, distinguished from condition for forfeiture of deposit, 185.
for acting as conveyancer, unless qualified, 823.
for unlawful entry by railway company, 512.
for untrue statement of consideration, 597, 787.
does not apply to partition deed, 597, n. (*l*).
insertion of, no defence to specific performance, 1182, 1183.
payable for subsequently stamping deed, 785, 786.
statutory, contract subject to, unenforceable in equity, 1162.
unstamped agreement admissible on payment of what, 276, 786.
deed admissible on payment of what, 786.

PENCIL,
alterations, binding, 270.
signature, binding, 270.

PENDENTE LITE,
abstraction of subject-matter of action, relief for, 1247, 1248.
legal estate may be got in from incumbrancer, 933, 934.
property will be preserved by Court, 856.
purchase by second mortgagee of interest of first mortgagee, valid, 279.
solicitor of subject-matter of action, void, 278.

PENITENT. *See* SPIRITUAL ADVISER.

PEPPERCORN,
receipt for, not receipt for rent within Conv. Act, 193.

PERCH,
statement of roods and, effect on expression "more or less," 736.
statutory length of, 727.

PERFECT ABSTRACT. *See* ABSTRACT.

PERFORMANCE,
impossibility of, defence to action on contract, 1097.
of covenants, condition as to evidence of, on sale of lease, 193—195.
to settle, 1068—1070.
on part of plaintiff of contract at law must be shown, how far, 1086—1088.
refusal of, is breach of contract immediately actionable, 1088, 1089.

PERJURY,
defendant falsely denying agreement by defence, whether indictable for, *quære*, 1149, n. (*e*).

"PERMITTED OR SUFFERED,"
effect of words, in covenants for title, 885, 886.

PERPETUITY,
rule against,
covenants, negative, not within, 865.
covenants void as contrary to, when, 875, 876, 1169.
indefinite right of pre-emption, a violation of, 241.
renewal not precluded by, 241, n. (*f*).
unlimited power of re-entry, a violation of, 241, n. (*f*), 876.
sale, not within, 68.
theories as to relation of, to, 68, 69.

PERSONAL ESTATE. *And see* EXECUTOR.
conversion into, what is. *See* CONVERSION.
deficiency of, as to sale to make good, 680.
partnership property is. *See* PARTNER; PARTNERSHIP.
unpaid purchase-money is, on death of vendor before completion, 293.

PERSONAL REPRESENTATIVES. *See* REPRESENTATIVES.

PERUSAL
of abstract,
as to mode of, 348 *et seq.*
on behalf of purchaser or mortgagee, distinguished, 349.
purchaser objecting to delay in delivery should abstain from, 347.
solicitor's fees for, 348.
of conveyance, vendor pays costs of, 798.
of draft, how to be made, 637.

PETITION
for payment out under L. C. C. Act. *See* PAYMENT OUT.
and re-investment may be joined, 811.
for re-investment under L. C. C. Act,
by corporation sole may be continued by its successor, 761.
costs of, payable by company, 807.
by several companies equally, 811.
service of, on all parties to action, 810.
on improper parties, costs of, not allowed, 810.
on incumbrancers, necessary, 759.
since payment in, costs of, not allowed, 811.
what costs allowed, 811.
on remainderman, unnecessary, 759, 810.
on trustees, costs of, allowed, 811.
should be heard by same judge who made order for investment, 760.
under S. E. Act, procedure on, 1286, 1287.
winding-up, not a *lis pendens*, 566, 972, n. (*o*).

PEW,
action for perturbation may be brought by tenant with permissive right to, in chancel, 334, n. (*g*).
in chancel, cannot be introduced without rector's consent, 334.
how different from one in body of church, 334, n. (*g*).
right to, how proved, 333.

PHOTOGRAPH
of inscription, whether evidence, 395, n. (*l*).

PHRASES,
"be the same more or less," 736, 738.
"by estimation," 736, 738.
"*cujus est solum, ejus est usque ad cœlum*," application of, to particulars, 129.
"free of all outgoings," 192.
"*ignorantia legis haud excusat*," 1155, n. (*o*).
"*in loco parentis*," 1057, n. (*g*).
"known and defined channel," 416, n. (*b*).
"newly-built house," meaning of, in contract to let, 102.
"*per tout et non per my*," 1047, n. (*a*).
"right of ingress, egress and regress," 414, n. (*p*).
"*tabula in naufragio*," 941.
"usual covenants," 191, 192.
"with all convenient speed," meaning of investment, 98.
sale, 62, 63.
"with all faults," effect of sale, 102, 103.

PLAINTIFF,
generally has conduct of sale, 1323.
subsequent parol variation enforceable by, when, 124, 1150.

PLAN,
ambiguity in, defence to specific performance, 1154.
building, correct measurements should be shown by, 137.
vendor must not materially deviate from, 136.
should reserve power to modify, 200.
discrepancies on, not notice of fraudulent dealing, 985.
evidence admissible to explain inaccurate, 1092—1094.
neglect to examine, not mistake by way of defence, 1155, 1156.
not within rule as to privileged communication, 994, 995.
on conveyance should be strictly accurate, 601.
especially where sale is of mines or building land, 601.
on deed comprising more than intended to be conveyed, effect of, 838.
reference to deceptive, in particulars, fatal, 133, 134, 135, 136.
must be accurate, 135.
roads shown on, as intended, need not be made by vendor, 136.
should be subordinate to full description of parcels, 1093, 1094.
tithe commutation, not evidence of boundaries on disputed title, 1094.
tracing of, referred to in abstract, should accompany it, 345.
whether, can be insisted on, 346.

PLEA,
of purchaser for value without notice. *See* PURCHASER FOR VALUE WITHOUT NOTICE.

POLE. *See* PERCH.

POLICY,
against fire. *See* INSURANCE.
right of purchaser keeping up, when sale set aside, 853.
to, effected by lender on life of borrower, 854, n. (*i*).

POLLUTION,
of percolating underground water may be restained, 417.
right of,
cannot be increased, 417.
interruption of, by natural causes, 417, n. (*m*).
may be acquired by prescription, 417.
lost by non-user, 417.
suspended, 417, n. (*m*).
of streams and rivers generally, 417, n. (*m*).

POOR LAW,
Acts, agreements under, exempt from stamp duty, 275.

PORTION,
compensation not necessarily allowed for charge of, 585, n. (*b*).
consent of person entitled to, to retention of real estate as personalty, 301,
further, consideration for settlement, 1004.
land cannot be sold free from, till absolute vesting, 691.

"*POSSESSIO FRATRIS*,"
doctrine of, destroyed, 446.

POSSESSION,
acceptance of, is part performance, 1136.
keys, equivalent to, 500.
adverse,
by a series of trespassers, effect of, 464—466.
Crown, how affected by, 467, 480.
Duchy of Cornwall, how affected by, 468.
for twelve years bars rightful owner, 464.
title by, good as against all but rightful owner, 464.
may be devised, inherited or conveyed, 464.
may be forced on purchaser, 462, 468.
difficulties of such title, 462, 463.
may be increased by lapse of time, 463.
will found ejectment, 464.
what constitutes, 463, n. (*y*).
agreement for purchase of lease and, taken, effect of, 311.
claim for, in specific performance may make stranger proper party, 1128.
condition specifying time for, 142.
demand of, usually necessary before purchaser in possession can be ejected, 290.
delivery of,
agreement for, does not make time of essence, 486.
what is meant by, 486.
is part performance, 1136.
not made to public body under private contract, 1222.
vendor's lien not destroyed by, 825.
disseisor can recover, against all but disseisee, 466.
entry *per se* does not constitute, under Stat. of Lim., 441.
evidence of acceptance of title, when, 499, 500.
when admissible as proof of title, 340.
for full period in absence of designed fraud gives good title against owner in ignorance, 440.
for statutory period does not operate as conveyance, 463, 464.
extinguishes right as well as remedy, 463.
forcible, compensation may be allowed after, 499.
grant of lease by purchaser, equivalent to, 500.
interest runs from, when no date fixed for completion, 711.
or from date when possession might be taken, 711.
meaning of, in conditions, 145.
misdescription subsequently discovered, not waived by, 500.
not to be taken while title in dispute, 503, 504.
objections not appearing on abstract, not waived by, 500.
occupation and, must go with lease to except it from Registry Acts, 769, 770.
of owner gives purchaser notice of his true title, 975.
of purchaser after rescission, effect of, 1085, 1086.
during contract creates tenancy at will, 1085.
in child's name does not rebut presumption of advancement, 1062.
under tenancy not acceptance of title, 501.
of tenant is notice of equities between him and vendor, 975, 976, 984, 1116.
of title deeds. *See* PRIORITY; TITLE DEEDS.

POSSESSION—*continued.*
of vendor as tenant not notice of his lien, 984.
on sale by Court,
before payment is acceptance of title, 1339.
not allowed, 1338.
purchaser entitled to, from what date, 1342—1344.
presumption of, under ancient document, 354.
purchaser entitled to, from payment of last instalment of purchase-money, 715.
purchaser in. *See* PURCHASER IN POSSESSION.
retention of,
after absolute conveyance evidence of contract for mortgage, 1136.
by tenant, evidence of contract for lease, how far, 1136—1138, 1139, 1144.
not evidence of contract to purchase, 1136.
by vendor, after date fixed for completion, 291.
does not subject him to action for occupation, 918.
seisin, *primâ facie* evidence by, 975.
tenant estopped from disputing title of person from whom he receives actual, 291.
time runs from, in case of remainderman, reversioner, and executory devisee, 446.
rule not affected by possession prior to creation of particular estate, 446.
title accepted by, with refusal to discuss title, 503.
title waived by, without requiring abstract, 500.
under contract or with vendor's consent not acceptance of title, 499, 500.
under lease, how far evidence of performance of covenants, 193.
unity of, right of user during, may pass on severance of tenements, 610.
vendor in. *See* VENDOR IN POSSESSION.
without liability for trespass is part performance, 1136.

POSSESSION, WRIT OF,
order for delivery of possession enforceable by, 1256.

POSSIBILITY,
coupled with interest may be disposed of by deed, 281.
mere, evidence to negative, cannot be required, 373, 374.

POST,
offer made by, binding if at once accepted, 268.
party sending letter by, not responsible for delay, 254.

POVERTY,
not in itself an excuse for laches, 55.
of nominal purchaser may be proved to show resulting trust, 1057.

POWER,
deed creating, absence of, whether an objection to title, 339.
abstract containing exercise of power should contain, 339.
purchaser not entitled to, exercised by root of title, 172.
disclaimer of, formerly impossible, 686.
may now be made by deed, 686, 697, n. (*c*), 699.
renunciation of probate is such disclaimer, 686.

POWER—*continued.*
execution of, by deed attested by two witnesses, good, 946.
by will properly attested, good, 947.
defective, how far supplied against married woman, 1121.
supplied, when, 946.
infant may convey under, 3.
lease under, covenants in, run with reversion, 1001, 1002.
married woman may convey under, 11.
non-exercise of, statutory declaration of, 372, 373.
vendor need not produce evidence of, 372.
of appointment. *See* APPOINTMENT.
overriding trusts should be inserted in voluntary settlement, 1022.
of attorney. *And see* ATTORNEY.
evidence that principal alive when, acted on generally necessary, 352.
irrevocable, how made under Conv. Act, 1882..352.
if given for value, 352.
statement of lost, on Court rolls, secondary evidence, 352.
of consent. *And see* CONSENT.
not extinguished by alienation of estate, 87, 88.
concurrence as protector in disentail, 88.
of investment with certain consent may amount to trust, 96.
of mortgage authorizes mortgage of chattels with power of sale, when, 89.
real estate with power of sale, when, 89.
of revocation in voluntary settlement, 1022. *And see* REVOCATION.
of sale,
authorizes mortgage, when, 88.
by auction does not authorize private sale, 73.
by private contract does not authorize sale by auction, 73.
charge of debts gives executors, when, 693, 694.
contract under, enforceable against estate of married woman, 1120.
whom, 1117.
destroyed on satisfaction of sole purpose for which given, 677, 678.
secus, if satisfied purpose only one of several, 677, 678.
disclaimer of, gives Court jurisdiction to sell, 1316.
exercise of, must be for general benefit of parties entitled, 71.
exerciseable by wife without husband, when, 587.
with consent. *See* CONSENT.
implied from power to vary, with declaration that realty is personalty, 689.
in case of deficiency, renders purchaser liable to see that event has happened, 680.
in trustees under Conv. Act, 74.
Cranworth's Act, 74.
in will, whether legacy duty let in by, 313.
not exerciseable after alienation to defeat prior interests, 87, 88.
by testator's heir on disclaimer by trustees, 681, 682.
of executor. *See* EXECUTOR.
of minerals and surface separately now common in settlements, 1298.
of mortgagee. *See* MORTGAGEE.
of official receiver, 75, n. (*e*).

POWER—*continued.*
of sale—*continued.*
of trustee in bankruptcy, 75.
presumed under special circumstances, 19.
purchase by donee of, how voidable, 35, 37.
sale under, does not preclude action on covenant against mortgagor, 1042.
surrender of previous life estate may accelerate, 70.
to A. does not authorize sale to B., 74.
trustees of,
cannot exercise power, except *bonâ fide*, 70.
cannot sell after beneficiaries become entitled, 67.
unless contrary intention clear, 67, 68.
cannot sell estate without timber, 1297, n. (*x*).
duties of, as to selling, 67.
may dispose of surface and minerals separately, 1296.
should not exercise power after trusts, satisfied, 69.
unlimited, does not offend against rule of perpetuities, 68.
under S. L. Act to be exercised by tenant for life as trustee, 71, 72.
upon condition, rules as to, 72. *And see* CONDITION.
validity of, in mortgage by purchaser to vendor, on what dependent, 834.
of sale and exchange,
authorizes enfranchisement, 89.
partition, 89.
may be accelerated, when, 70, 71.
of trustees,
appointed by Court to exercise powers of original trustees, 687.
to give receipt for purchase-money. *And see* INTENTION.
must appear on trust instrument, 675 *et seq.*
when implied, 673.
when not implied, 674.
recital of, in conveyance, 593.
reference to one, in former instruments does not carry any other, 686.
statutory, to convey of legal personal representatives, when exerciseable, 294.
to vary securities, whether trustees can release part of lands from mortgage under, 689, 690.

PRÆMUNIRE,
incurred by purchaser, effect of, 33.
vendor, effect of, on his title, 15.

PRAYER. *See* GENERAL RELIEF.

PRECEDENT. *See* CONDITION.

PRE-EMPTION. *And see* OPTION.
right of,
at reasonable price, to be decided by persons named, 242.
bad as perpetuity, if indefinite, 241.
condition precedent to, must be fulfilled to make contract, 240, 241.
conditions as to exercise of, strictly construed, 240, 242, 926.
destroyed by purchase of part only, 918.

PRE-EMPTION—*continued.*
right of—*continued.*
document giving, should contain what clauses, 238.
may be given to mortgagee by mortgagor, 282.
may continue if term is extended, 242.
must be exercised within fixed period, 485.
notice of lease, how far notice of, 107.
of superfluous lands, 857. *See* SUPERFLUOUS LANDS.
contract for sale to third persons, effect of, 862.
distinction between, and vesting in default of sale, 861.
parol declaration of intention to exercise, how far good, 240, 242, 1144.
particulars should notice, 131.
tenant in common with, whether entitled to abstract of common title, 320.
trustees cannot give at fixed price, 90.
whether attached to lease or not, 241.
written acceptance of exercise of, sufficient, 485, n. (*u*).

PREJUDICE,
acts done to party's own, not part performance, 1147.
without, approval of draft conveyance, 497, 498, 571, 572.
replies returned, effect of, on vendor's right to rescind, 183, 184.

PRELIMINARY INQUIRIES,
sale by Court can be made before, 1314.

PREMIUM,
for lease, not recoverable by infant having occupied, 31.
obtained by fraud on infant, return of, ordered, 5.
within Mortmain Act, 303.
on policy, lien for, summary of law as to, 854, n. (*i*).
right of purchaser to repayment of, when sale of policy set aside, 853.

PREPARATION,
of abstract on sale by Court, 1325.
of conveyance,
during defect, solicitor cannot recover costs of, 815.
duty of purchaser, 146, 570, 798.
purchaser can recover costs of, in action for damages, when, 1076.
must pay costs of, 798.
should not be before production of deeds, 472, 571, 572.
waiver of objections, how far, 497, 571.
only conditionally, on acceptance of conveyance, 498.
of lease by lessor's solicitor, lessee pays costs of himself and lessor, 802.

PRESCRIPTION,
right to
access of air cannot be acquired by, 410.
common of fishery may be claimed by, 427.
extraordinary support may be acquired by, 420.
pew by, what evidence necessary to prove, 333, n. (*f*).
pollute stream by, 417. *And see* POLLUTION.
several fishery may be claimed by, 427.

PRESCRIPTION—*continued.*
right to—*continued.*
take herbage, &c. in common with others may be claimed by, 429.
take minerals in another's land may be claimed by, 428, 429.
take soil of another without limit cannot be claimed by, 428, 429.
user of artificial water cannot be acquired by, 417, 418.
way by, limited as to user, 413, 414.

PRESCRIPTION ACT,
applies only to claims which might be made at Common Law, 425, n. (*i*).
claim by express grant not prevented by, except as to light, 403.
continuous user should be proved by vendor, 432.
discontinuance, voluntary or adverse, question for jury, 432.
enjoyment,
must be for whole period under, 403.
nature of, required by, 430.
not good against reversioner, not good against particular estate, 430.
period of, under, must be that preceding action, 404.
prior to, included, 404.
under, may be for several successive periods, 431.
interruption for less than a year may be material evidence, 432.
must be adverse, 432.
within last year of enjoyment, effect of, 432.
presumption of lost grant, whether necessity of, superseded by, 368, n. (*a*).
procedure at Common Law not prevented by, 403.
right to
common and profit *à prendre*, under,
absolute after sixty years, 424, 429.
unless enjoyed by consent, 424, 425.
may be defeated, how, 424, 425.
valid after thirty years, 424, 429.
excluding disability or particular estate, 430.
easements other than light under,
absolute after forty years, 410, 429.
may be defeated, how, 410.
reversioner allowed three years to resist, after determination of particular estate, 429, 430.
valid after twenty years, 410, 429.
excluding disability or particular estate, 430.
extraordinary support for buildings, whether within, *quære*, 420.
light under. *See* LIGHT.
sole and several pasturage, whether within, *quære*, 429.
rights under, extinguished by union of both tenements, when, 403, 404.
may revive on severance of ownership, 404.
watercourse, what is a, within, 418.

PRESENTATION. *And see* ADVOWSON.
list of, should accompany abstract to advowson, 334.
next, may alone pass by word "living," 335.
on sale of, bishop restrained from presenting vendor's nominee, 1223.
purchase of, by clerk when simoniacal, 281.
right to sell, when it exists, 280, 281.
right of, when barred by statute, 453.

PRESENTMENT
of copyhold assurance dispensed with, 782.

PRESERVATION
of property by Court pending litigation, 856.
by purchaser in possession allowed for on rescission, 504.
by vendor, his duty as to after-contract, 734.
his rights in respect of, 291.

PRESUMPTION,
as between vendor and purchaser of all matters which judge would not leave to jury, 371, 377.
as to encroachments. *See* ENCROACHMENT.
as to failure of issue arises from what evidence, 390.
as to land tax being a charge on property, 398.
as to matters of pedigree, 381 *et seq.*
as to survivorship, none, 390.
as to tithe being burden on property, 399.
as to woman past child-bearing, 391.
deficiencies in proof of documents, how far supplied by, 365.
facts, how far supplied by, 377.
of absolute title in fee, evidence raising, 340.
of acceptance of title easier in leaseholds than freeholds, 501.
of advancement, how raised, 1057—1059.
rebutted, 1059 *et seq.*
of appointment of officials being regular, 380.
of award under Inclosure Act, regularity of, 370.
of consent of *c. q. t.* to improper purchase after lapse of time, 55.
of conveyance of reversion, 367.
not rebutted by subsequent treatment of property as leasehold, 367.
of death. *See* DEATH.
of existence of contract as against heir, none, 309.
of extinction of charge, none, where charge reversionary, 177, 178.
of fact or document which ought to be on record, difficult, 371.
of formalities in deeds, 369.
even after mutilation, 369.
in all written documents thirty years old, 369.
whether rule applies to deed of corporation, *quære*, 369, n. (*k*).
of sealing and delivery, 369.
of grant, 366. *And see* GRANT.
after twenty years' enjoyment admissible, 410, 411.
lost, whether necessity of superseded by Prescription Act, 368, n. (*a*).
not admissible in claim of light, 404, 405.
where grant would have been illegal, 411.
of easement, 368, 608 *et seq.*
of soil from grant of several fishery, none, *quære*, 427, 428.
of identity. *See* IDENTITY.
of incorporation on Crown grant to fluctuating body, 24, n. (*o*).
of internal management of company, 370, n. (*n*).
of intestacy, 380.
of knowledge by purchaser of deficiency, not readily made, 735.
of lease from production of counterpart, 366.
of legitimacy, 381 *et seq.* *And see* LEGITIMACY.

PRESUMPTION—*continued.*
of livery of seisin after twenty years' possession, 370.
of marriage, 383. *And see* MARRIAGE.
of matter of fact may supply want of evidence, 377.
e. g., from modern usage of extent of ancient grant, 377.
of merger, when none, 310.
of mesne assignment of attendant term, 367.
of ownership,
of soil in lakes, none, 414, n. (*g*), 419, n. (*c*), 428.
of road or river, 379, 411, 419.
how rebutted, 379.
not in case of modern highway, 379, 380.
road not actually made, 379, n. (*o*), 411, n. (*u*).
only as between owner of adjoining lands and lord of manor, 379.
of strips of waste, 187, n. (*m*), 379.
of payment,
of debts after twenty years, 65, 66, 695.
of legacy, when not warranted, 367.
of mortgage debt and reconveyance, 367.
of purchase-money, 367.
of performance of covenant to settle lands, from purchase, 1068.
of person in possession being owner within L. C. C. Act, 756.
last entitled being purchaser, and stock of descent, 380.
vendor may rely on, without adducing evidence, 381.
of possession under ancient grant, 354.
of proper stamps from due execution, 797.
of purchase with trust moneys by trustees for purchaser, 1066.
of reconveyance, 366, 367.
of reservation of right to support on grant of minerals, 422.
not rebutted on award under Inclosure Act, 422.
of satisfaction of equitable charge, 367.
of seisin, 378, 379.
by grant of annuity by possessor, 378.
and receipt of rent under, leases, 378.
by receipts of rent from occupiers, 379.
continuance of, 380.
of signature of affidavit, 250.
of stamps having been regular, 276, 370.
rebutted by showing want of stamp at some time, 370.
of statutory forms having been complied with, none, 370.
e. g., enrolment of charity conveyance, 370.
of surrender of attendant term, 368.
copyholds, 366.
prior life estate to support recovery, none, 370.
of tenancy in common, 1047, 1048.
of time of death, 387 *et seq.* *And see* DEATH.
of validity of marriage. *See* MARRIAGE.
of waiver of lien may be rebutted, 832.
that bed of tidal river belongs to Crown, 419.
that charity lands, inalienable, 19.

PRESUMPTION—*continued.*
that contract by corporation was under seal, when, 274.
that conveying party intended to pass all his rights, 838.
that lands in Kent gavelkind, 369.
how rebutted, 369.
that term became attendant on purchase of fee by termor, 310.
title based on, how far forced on purchaser, 1233, 1234, 1235, 1237.

"PRETENCED" TITLE,
right purchased under, barred by Stat. of Lim. at date of contract, 278, n. (*k*).
sale or purchase of, when illegal, 277.
what is a, 278, n. (*k*).

PRICE. *And see* CONSIDERATION.
authority of agent to bind principal as to, 211, 212.
bond of reference to settle, may amount to agreement, 240.
contract for sale at specified, and share of profits, how construed, 257.
excessive, no ground for relief after completion, 902.
fixed by valuation. *See* ARBITRATION; VALUATION.
fixed on incorrect supposition binds vendor, 837.
instructions as to, do not authorize agent to sign open contract, 210.
trustees may ascertain, by valuation, 90.
must not agree to give option to buy at fixed, 90.
must obtain highest possible, 90.
under L. C. C. Acts,
ascertained by valuation includes what, 508.
includes compensation for damage, 705, 706.
for land, not for minerals, 508, n. (*f*).
must be fixed by jury where good title cannot be made, 92.
on sales by limited owners in one of following modes, 92, 243, 705 *et seq.*
by arbitration. *See* ARBITRATION; UMPIRE.
by surveyor appointed by parties. *See* SURVEYOR.
by valuation of surveyor appointed by magistrates. *See* SURVEYOR.
by verdict of jury. *See* JURY.
must be fixed to make binding contract, 242, 243, 248.
must cover mortgage on land, 511.

PRINCIPAL. *See* AGENT.
must be in existence at date of contract by agent in order to ratify it, 216.

PRIORITY,
advances made after notice have none, 936.
against all claims lost by notice of any, 932.
against charity, rules as to, 944.
by indorsed receipt under Building Societies Acts, 936—938.
extends only to sum paid society, 938.
by getting in legal estate from satisfied incumbrancer, 933, 934.

PRIORITY—*continued.*
by getting in legal estate from unsatisfied incumbrancer, 933.
though not under deduced title, 931, 932.
by re-conveyance by building society extends to whole sum advanced, 939.
conveyance and payment give, against equities, 927, 928.
secus, if purchaser have notice before payment, 928.
mortgagor buying first mortgage does not get, 1042.
neglect to examine title deeds on delivery does not destroy, 987.
notice gives, over subsequent stop-order, 110.
judgment creditor does not obtain, by, 550.
of assignment of chose in action does not give, if premature, 944.
of purchase of equitable estate in land does not give, 109, 518, 944.
interest of bankrupt gives, 956.
proceeds of sale gives, 518, 944.
even though sale has not been made, 518.
of *c. q. t.* over purchaser of equitable estate from trustee, 945.
of deeds registered at same time determined by their numbers, 769.
of earlier equity may be lost by negligence, 945, 946.
of equitable estate is according to date, 942.
lost by what negligence as to title deeds, 952, 953.
of judgment creditor against prior equities, none, 548, 549, 957.
creditors *inter se*, how determined, 546, 548, 550.
of legal estate,
absolute when equities equal, 927.
even as against charity, 927.
may be postponed where purchaser has notice, 934.
not lost by mere negligence, 826.
not lost by non-possession of title deeds, 950.
what negligence as to title deeds will lose, 950—952.
without notice is indefeasible, 934.
of mortgagee lost by not giving notice of claim to purchaser, when, 518, 947.
with notice against judgment creditor, none, 550.
of purchaser,
from heir over one from devisee under unregistered will, 771.
unless latter be first to register, 772.
from solicitor of client's estate through negligence of client, 930.
of part as to concealed mortgage over later purchaser of residue, 944.
over third party who gives no notice of his claim, 947.
of secret trust to equitable mortgage, 942.
of vendor's lien over sub-purchaser or mortgagee, 825, 826.
purchaser with notice of unregistered annuity deed has no, 568, 959, n. (*k*).
stop-order does not give, 166.
registered mortgage has over earlier unregistered, 768.
to secure advances has over later, to date of notice, 768.
registration gives absolute, in Ireland, 928, n. (*d*).
of title acquired under unregistered deed gives no, 963, 965.

PRIORITY—*continued.*
under Middlesex Registry Act
and old law in Yorkshire,
at Law, determined absolutely by registration, 959.
in Equity, notice must be express to postpone registered deed, 960, 961.
registration gave none, if there was notice at date of conveyance, 959, 960.
secus, if notice acquired after conveyance, 960.
of judgments determined *inter se* by date of registration, 961.
registered voluntary settlement has, over prior unregistered, 960, n. (*t*).
under Yorkshire Registry Act,
by registration not affected by notice, 776, 962.
dates from registration, 774, 961.
of mesne incumbrancer against further advance, 963.
of unregistered assurance over unregistered lien or charge, 775.

PRISON,
contract executed in, held valid, 1175.

PRIVILEGED
communications,
to solicitor, vendor need not disclose, 374, 375.
what are, 993, 994.
not, 994, 995.
who may take advantage of the rule as to, 995.
opinions of counsel, &c., are, how far, 995, 996.

PRIVITY
of estate essential to confer benefits of covenants for title, 877, 879.

PRIVY,
effect of expression in covenants for title, 886.

PROBATE,
Court of, powers of, 364.
duty, payable on land contracted to be sold, 296.
duty, payable on land purchased with lunatic's personalty, 314, n. (*s*).
partner's share of realty, 1049, n. (*u*).
grant of, must be by proper Court, 364.
in colony, whether sufficient evidence, 364.
in solemn form, effect of, 363.
of leaseholds, 364.
of will, lost, office copy sufficient evidence, when, 362, 363.
usually sufficient evidence, 362, 363.

PROCEEDINGS,
foreign and colonial, proof of, 359, n. (*l*).
in bankruptcy and insolvency, proof of, 359.
under Act of 1883, evidence of, 360.
in Courts of Law and Equity, how proved, 359.

PROCLAMATIONS,
evidence of fines having been levied with, supplied, 358, 359.

PRODUCTION,
acknowledgment for. *See* ACKNOWLEDGMENT FOR PRODUCTION.
covenant for. *See* COVENANT FOR PRODUCTION.
equitable right to, meaning of, in V. & P. Act, 160.
for verification of abstract. *See* ABSTRACT.
of agreement for purpose of stamping, 276.
of cases, opinions, &c., 995, 996.
of *c. q. v.* may be compelled, 387.
of court rolls on enfranchisement, 478.
of Crown grant unnecessary, 472.
of documents,
dated before commencement of title, purchase can require, when, 337, 339.
not forming part of title, purchaser can require, when, 364.
to copy or covenant for production of which vendor not entitled, 365.
when sufficient without abstracting, 340.
of evidence. *See* EVIDENCE.
of lease at sale expedient, 191.
of office copies of instruments on record, 472.
of title of lessor. *See* LESSOR.
of title deeds,
by mortgagee under Conv. Act, 476.
old law, 475, 476.
compellable by,
joint tenant, 473.
mortgagor, 475, 476.
owner of any estate under settlement, exchange or partition, 473.
person whose title depends thereon, 474, n. (*g*).
purchaser on resale from vendor who has retained, 473.
remainderman on purchase deed against co-purchaser, 475.
tenant in common, 473.
vested remainderman, 474.
condition against, effect of, 163, 164.
conveyance should not be prepared prior to, 472.
duty of vendor as to, 105, 159, 470, 472.
expense of, when not in vendor's possession, 471.
omission to require may amount to notice of deposit, 479.
on reconveyance compelled before payment, when, 52.
ordered against purchasers for value without notice, how far, 939—941.
place for, 470, 471, 472.
under covenant for further assurance, whether compellable, 473, n. (*z*), 887.
vendor must procure, 472.
order for, power of Court to make, 478, 479.

PROFESSIONAL,
advice. *See* ADVICE.
communications. *See* PRIVILEGED.
usage, evidence of, admissible to explain agreement, 1091.

PROFIT. *And see* RENTS AND PROFITS.
agreement for sale at specified price and share of, how construed, 257.
of land, belongs to whom, on death of vendor before completion, 293.
vendor generally entitled to, till time for completion, 285.
trustee purchasing and making must account, 51, 53.
solicitor cannot make, 95, 96.

PROFIT A PRENDRE,
claims of, absolute after sixty years' enjoyment, 424.
may still be defeated, how, 424, 425.
claims of, limit of, 425, n. (*n*).
must be reasonable, 425, n. (*n*).
valid after thirty years' enjoyment, 424.
interest in land within Stat. of Frauds, 425.
right to dig and take soil without stint cannot be claimed by prescription, as, 428, 429.
enter and draw water from spring is not, 429.
fish is, 425.
not taking away fish, may be, 425.
get minerals in land of another is, 428.
may be claimed by prescription, not by custom, 428.
hawk is, 425.
hunt, not generally, but may be, 425.
kill and take away is, 234.
shoot is, 424.
take minerals from soil of another is, 423, n. (*y*).
take produce of soil in common with others is, 429.
may, if reasonable, be claimed by prescription, 429.

PROMISE,
to accede to parol variation, defence to specific performance, when, 1156.
whether enforced, 1149.
to pay, when sufficient acknowledgment within Stat. of Lim., 458.

PROMISSORY NOTE,
for purchase-money,
not evidence of waiver of lien, 829.
although stranger join as surety, 829.
unless itself the consideration, 831, 832.
what is defence to action on, 1089.

PROMOTERS,
company, how far bound by acts of, 282, n. (*u*).
contract by, as to, generally, 62, n. (*e*).
before complete registration, 282.
unless ratified cannot bind company, 62.
power of, to convey to themselves, when, 653.
dispense with concurrence of incumbrancers, 670.
provisions to be inserted in agreement with, 238.
superfluous lands must be sold by, within what time, 857.
transactions by, with company, 24, n. (*k*).

PROPOSAL,
for lease, contract to buy benefit of, 162, n. (*q*).

PROTECTION ORDER,
effect of, on contracting capacity of married woman, 32.
property of married woman, 12.
PROTECTOR OF SETTLEMENT,
concurrence of, in disentail does not destroy power to consent to sale, 88.
consent of,
bare trustee cannot refuse, 779, n. (*f*).
enrolment of, vendor pays for, 798.
given by separate deed must be enrolled prior to enrolment of assurance, 779, 781.
on sale of copyholds,
may be by deed, 780.
must be enrolled on court rolls, 780, 781.
may be personally given where estate surrendered, 780.
must be entered on court rolls, 781.
want of, effect of, under Stat. of Lim., 450.
when married woman, may be given without husband's concurrence, 779.
where convicted of felony, 779, n. (*g*).
powers of Lord Chancellor as, of lunatic, 779.
PROTEST,
on ground of probable delay, insufficient, 491.
payment under, effect of, 817.
"under protest," meaning of, 817, n. (*u*).
PUBLIC BODY. *And see* COMPANY; LANDS CLAUSES CONSOLIDATION ACTS; RAILWAY COMPANY.
diverting stream, right of proprietors against, 414, n. (*g*).
proceeding by private contract, in position of ordinary purchaser, 1222.
PUBLIC DOCUMENT,
statements in, evidence, 357.
PUBLIC HEALTH ACT,
charges under, search to be made for, 524.
contract of authority under, essentials of, 218.
soil of highways, vesting of, under, 411, n. (*u*).
support for sewer must be left under, 424.
compensation to landowner for, 424.
PUBLIC HOUSE,
deeds of, in London, usually mortgaged to brewers, 479.
description of tied, as free, bad, 138.
house for sale of beer "not to be drunk on the premises," is not, 138.
restrictive covenants in connection with, 864, 872, 874.
time is of essence of contract on sale of, 483.
usual mode of payment for, 748, n. (*o*).
what is a, 872.
PUFFER,
allowed, where right reserved in conditions, 226.
employment of, favoured in Equity, 225.
not allowed on sale without reserve, 224, 225.
not more than one allowed, 224.
except on sale in lots, 225.

PUFFING,
may preclude vendor obtaining specific performance, 110, 111.
must be distinguished from misstatements, 111.
not allowed on sale by Court, 1325.
not sufficient to avoid contract, 110.
statements, what are, 110.

PURCHASE. *And see* AGENT; OPTION; PRE-EMPTION; SOLICITOR; TRUSTEE.
satisfies covenant to convey and settle, how far, 1069.
purchase and settle, how far, 1068—1070.
under Court not within Stat. of Frauds, after confirmation of report, 227.
under sect. 69 of L. C. C. Act, what allowed, 751.

PURCHASE-MONEY. *And see* CONSIDERATION; PRICE.
advance of,
by one joint purchaser gives him no lien, 1050.
in equal shares does not always imply joint tenancy, 1048.
in unequal shares makes tenancy in common, 1047, 1048.
joint purchasers take property in proportion to their, 1047, 1048.
to vendor on behalf of bankrupt purchaser gives lien, 748.
agent not liable to purchaser for, after rescission, 214.
application of,
liability of purchaser from trustees, as to, 670—672.
rule was universal unless exempted, 672.
exemption from question of intention of author of trust, 672.
intention might be express or implied, 672. *See* INTENTION.
matters subsequent to creation of trust could not affect, 672.
under Conv. Act, 671.
remarks on extended scope of this enactment, 671.
under Cranworth's Act, 670.
under St. Leonards' Act, 670.
purchaser is liable to see to,
where he has notice that sale is for improper purpose, 678, 679.
sole purpose of power exhausted, 677, 678.
purchaser is not liable to see to,
if vendor has in any capacity power to sell, 679.
on purchase of leaseholds from executor, 673, 674.
on receipt by surviving trustees during vacancy, 681.
where trust is to sell on deficiency arising, 680.
in case of power only he must see that event has arisen, 680.
where trust is to sell to make up deficiency, 680.
appropriation of, effect of, on interest. *See* APPROPRIATION.
arising from exercise of option to purchase,
after death of vendor, belongs to whom, 296.
of lands devised in strict settlement, held on same limitations, 302.
compensation repaid out of, bears interest, 739.
deduction of costs from, when allowed, 1259, 1260.

PURCHASE-MONEY—*continued.*
interest on. *See* INTEREST.
investment of, at vendor's request, effect of, 1333. *And see* INVESTMENT.
purchaser how affected by, 53, 222, 739.
trustee not liable for failure of bank, 745, n. (*t*).
left on mortgage is charge on personalty, 920.
lien for. *See* LIEN.
may be reduced to lessen stamp duty, 790.
measure of damages may exceed, 895.
mortgagee, duty of, as to surplus, 95.
may allow, to remain on mortgage, 90.
of lands taken under L. C. C. Act. *See* LANDS CLAUSES CONSOLIDATION ACT.
on death of purchaser contracting in child's name must be paid out of his estate, 1062.
rights of his representatives as to, under old law, 303.
effect of Locke King's Acts on, 304.
of vendor, rights of his representatives as to, 293 *et seq.*
on sale by Court,
costs of incumbrancer consenting, how far borne by, 1340, 1341.
discharge of incumbrances out of, not allowed prior to conveyance, 1339.
interest on, payable from what date, 1342—1344.
investment of, rights of purchaser as to, on rescission, 1342.
legal assets, 1340.
order of application of, in creditor's action, 1340.
payment in before title accepted, effect of, 1333.
ordered on purchaser taking possession, 1339.
purchaser, costs of appearance of, on summons for distribution of, 1342.
entitled to deduct property tax on interest payable on, when, 1333.
notice of application for distribution of, 1339, 1340.
has lien on, for payment of incumbrances, 1339.
not after conveyance, 1340.
rents and profits not deducted from, on order for payment in, 1343.
on sale by executor. *See* EXECUTOR.
on testator's contract, executor must receive, 681.
payable by instalments, purchaser entitled to possession on payment of last, 715.
railway company, not an attachable debt, 711, n. (*t*).
payment into Court of. *And see* LANDS CLAUSES CONSOLIDATION ACT; TRUSTEE RELIEF ACT.
in action for specific performance, 1217—1221.
not ordered if quantity to be purchased uncertain, 1220.
where contract provides for delay, 1219, 1220.
option of going out of possession, when given, 1218, 1219.
ordered where purchaser in possession commits waste, 1217, 1218.
railway company makes default, 1220, 1221.

PURCHASE-MONEY—*continued.*
payment into Court of—*continued.*
made on schedule signed by chief clerk, 1333.
order for, not now generally necessary, 1333.
to meet incumbrances, 666, 667, 749, 1333.
whether purchaser affected by variation in funds, 53, 221, 222, 1333, 1334, 1342.
payment of,
after notice of incumbrance renders purchaser liable, 928.
even though made under protest, 932.
by bill of exchange drawn on agent, loss on, falls on purchaser, 747.
by cheque, loss on, falls on purchaser, 747.
by purchaser from heir or devisee may be restrained by creditor, 703.
not part performance, 1138.
not to be made without evidence of discharge of incumbrances, 666.
on sale by attorney under power, 748.
parol evidence admissible to prove mode of, to raise resulting trust, 1056.
presumed, when, 367.
restrained till satisfaction of solicitor's lien, 1271.
to agent, bad unless he has authority to receive, 213, 742.
cannot be set off in account, 746.
must be in money or by cheque, 746, 747.
trustees cannot authorize, 685, 743—745.
to bankrupt without notice is not protected, 748, 749.
to joint vendors must be separately acknowledged, 747, 748.
to solicitor,
as common agent, effect of, 906.
for vendor or mortgagor formerly bad, 742.
production of client's deed and receipt did not authorize, 742.
now authorizes, 742, 743.
to stranger at vendor's request, 838.
instructions of agent for, not revocable, 213, 214.
to trustee in bankruptcy, good, 748.
to trustees,
all must receive and all must sign receipt for, 684, 685, 744.
or it must be paid to their joint account, 685, 744, 745.
Conv. Act, s. 56, does not enlarge their powers, 745.
liability of trustees *inter se*, on, 745, 746.
must be to them personally, 743.
unless they have power to authorize another to receive, 743.
whether receipt clause gives them power, *quære*, 743, 744.
purchaser cannot insist on apportionment where two sets of trustees sell, 744.
receipt by one for the rest does not discharge purchaser, 745.
some of whom are not able to receive it, effect of, 682.
payment out of, under L. C. C. Act. *See* PAYMENT OUT.
person claiming right to, should be party to specific performance, 1128, 1129.
purchaser may deduct cost of executing works from, when, 1110.
purchaser may follow, after rescission, *quære*, 903.
must tender before suing at law on contract, 1086.

PURCHASE-MONEY—*continued.*
receipt for,
condition that, of trustees shall be discharge, 200, 201.
heir after disclaimer by trustees cannot give, 681, 682.
inability to give, defect in title, 322.
inability to give, of trustees may be got over,
by application by originating summons, 690.
by payment into Court under Trustee Relief Act, 690.
savings bank where under £500..691.
may be given under power of attorney in mortgage of charge, 703.
may satisfy Statute of Frauds, 240.
must be given by all trustees, 684, 685, 744.
on sale of superfluous lands, form of, 703.
surviving trustees during vacancy may give, 681.
who can give, where a mere charge of debts, 692 *et seq.*
charge of debts, how implied, 692, 693.
executor can, when, 693, 694.
recoverable after conveyance, when, 905, 907.
from or by infant, when, 31.
lunatic, when, 31, 32.
secured may be used to discharge mortgages discovered after conveyance, 928, 929.
settled for other than vendor, does dot pay duty, 790.
unpaid,
action for, by heir of vendor, who necessary parties, 854.
not within sect. 40 of Statute of Limitations, 455.
assignee of, takes subject to purchaser's rights, 666.
devisee of vendor has no lien for, 300.
judgment entered up after contract affects, how, 289, 530, 540, 957.
liability for, not express trust, 439.
part of vendor's personal estate, 293.
purchaser cannot retain against contingent charge, 666.
may discharge incumbrances out of, 666, 905.
sometimes even after conveyance, 666.
vendor has lien on estate for, 300.
vendor may obtain specific performance even after payment of, 1108.
must repay on eviction of purchaser before conveyances, 665, 666.
volunteers have no claim against, paid to settlor, 1002.

PURCHASER,
accidental benefits and losses after contract taken and borne by, 286.
action for damages after conveyance may be brought by, when, 905.
bound by extent on Crown process before conveyance, 289.
compromising or defending adverse claim may recover what from vendor, 893.
covenant of, remedies of vendor on, 862 *et seq.*
to pay perpetual rent-charge, liability on, 877.
death of. *See* DEATH.
equitable ownership of, nature of, 284 *et seq.*
equities not enforceable by, against stranger before completion, 284.
from trustee for sale not bound to see that sale is not excessive, 78.

PURCHASER—*continued.*
illegal motive of, does not avoid conveyance, 856.
incompetent, bound at option of parties interested, 43.
may be forced to account for profit if he has sold, 51.
let estate be re-sold, 51.
reconvey, 51.
interest of, under contract formerly bound by judgment, 285.
may be assigned, 285.
notice to. *See* NOTICE.
of lands of charity must show that sale was beneficial to charity, 19.
on sale by Court. *See* SALE BY COURT.
order of Court not invalidated against, for want of jurisdiction, consent, notice, or service, 1290.
profits of estate as from date of contract belong to, 507, 708, 732.
remedies of,
against vendor under contract, 284 *et seq.*
at law, on vendor's default, 1071 *et seq.*
may affirm contract and sue for damages, 1072.
may rescind contract and sue for deposit, 1071.
only if restitution can be made, 1072.
buying estate which is his own, 907.
known to vendor to be worthless, 908.
non-existent, 908.
for misrepresentation, 948.
in respect of defects under special circumstances, 898.
on vendor's covenants, 877 *et seq.*, 882, 897.
right of,
to abstract. *See* ABSTRACT.
to discharge incumbrances out of unpaid purchase-money, 905.
to lands accidentally omitted from conveyance, 908.
to lien. *See* LIEN.
to recover purchase-money after conveyance exists, when, 905.
value of improvements exists, when, 894.
to subsequently-acquired interest of vendor, 909.
under S. E. Act acquires indefeasible title, 1289.
vendor, how far a trustee for, 283, 294, 295.

PURCHASER FOR VALUE WITHOUT NOTICE,
contract of vendor not enforceable against, 1115.
exonerated by receipt for succession duty, 314.
from felon or traitor was subject to Crown's rights, 15.
from vendor, with notice of charitable trust, how far affected, 1023.
legal estate
gives indefeasible rights to, 934.
even though conveyance breach of trust, 934.
may be got in by, 928, 929.
protects how, 342, 927, 928.
though not acquired under deduced title, 931, 932.
when got in from satisfied incumbrancer, 933, 934.
unsatisfied incumbrancer, 933.
not compelled to give up title deeds, 941.
of bankrupt's equitable estate has priority to notice to trustees, 956.
may protect himself by legal estate, 956.

PURCHASER FOR VALUE WITHOUT NOTICE—*continued.*
of client's estate from solicitor through negligence of client protected, 930.
of equitable title postponed to earlier equity, 908, 942, 943.
trust estate postponed to *c. q. t.*, 945.
of extrinsic circumstance conferring succession whether liable for duty, 315.
of land which ought to have been conveyed to prior purchaser, 908.
plea of,
classification of cases to which it applies, 940.
criticism of Lord Westbury's classification, 940, n. (*i*).
doctrine of, 939.
does not apply to equities under administrative jurisdiction, 941.
where jurisdiction is concurrent, 939, 940.
effect of Jud. Acts on, 940, 941,
Ind, Coope & Co. v. *Emmerson*, 941, 1355.
possession of legal estate not material, 941.
precluded by constructive notice of negative covenants, 868.
renders negative covenants unenforceable against, 868.
postponed if trust property is reimpressed with trusts, 1023.
protected against judgment not entered up under old law, 529.
purchaser from, not affected with notice, 1023.
under forged or void deed, gets no title, 930, 931.
under voidable deed has priority, 931, n. (*u*).

PURCHASER IN POSSESSION,
acts by,
of forfeiture, avoid contract for lease, 1217.
of ownership,
after discovery of defect, effect of, 502, 503.
modified by continual application for title, 503.
what allowed, 501 *et seq.*
may alter property, how far, 502.
may do any proper act of management, 502.
may take fall of timber, 502.
underwood, 502.
of waste restrained, 1222.
after rescission on ground of title paramount need not make formal entry, 504.
after rescission whether tenant at will or trespasser, 1085.
if trespasser is liable in damages, 1086.
compensation to, for improvements not allowed on rejection of title, 503, 504.
what allowed on rescission by vendor, 504.
ejectment of,
by judgment creditor restrained, 530.
by vendor restrained on what terms, 1221.
defence to specific performance, 1216.
during contract cannot be without notice, 1085.
on rejection of title, 503, 504.
prior to conveyance entitles to re-payment of purchase-money, 665, 666.

PURCHASER IN POSSESSION—*continued.*
estopped from denying vendor's title to eject, 503, n. (*t*).
liable for
alteration on rescission, 505, 506.
interest from date for completion, 710.
of notice of appropriation, 709.
cannot relieve himself by going out, 712.
occupation rent, after abandonment of contract, 1085.
for fixtures, 715.
when, 504, 505.
not when vendor's title bad, 1085.
may rescind on ground of misdescription, 350, n. (*x*), 500.
ordered to pay occupation rent, 1221.
ordered to pay purchase-money into Court, when, 1217—1221.
in cases of possession by railway company, 1220, 1221.
not if delay is provided for by contract, 1219, 1220.
not if quantity to be purchased uncertain, 1220.
option to pay or go out of possession when granted, 1218, 1219.
where he has committed waste, 1218.
refusing to complete what damages recoverable against, 1084.
tenant at will to vendor during contract, 503, 504, 1085.
value of improvements by, recoverable from vendor, when, 894.

QUALIFICATION,
parliamentary, agreement to give, 1163, n. (*m*).
purchase to give son, not illegal, 1063.

QUALIFYING EXPRESSIONS,
in covenants for title, 882—885, 887.
in operative part of conveyance, 600, 887.
in statement of quantity in particulars, 736.

QUALITY,
compensation for deficiency in to purchaser, 738.
superior not allowed to vendor, 729, 730, 837.

QUANTITY,
misdescription of,
compensation for, allowed to purchaser, when, 152, 157, 735, 736, 739, 740.
how far allowed to vendor, 729 *et seq.*
not allowed to purchaser, when, 737, 740.
vendor, after conveyance, 837.
material, avoids sale at purchaser's option, 151, 157, 739.
of light, what may be claimed, 407, 408.
qualifying expressions as to, effect of, 736.
uncertainty precludes order for payment in of purchase-money, 1220.

QUANTUM MERUIT,
agent entitled to, for services prior to revocation, 216.

QUARRY,
opened, filled up, and cultivated, title to, barred after twelve years, 448, n. (*m*).
purchaser entitled to produce of, from date of contract, 286.

QUARRY—*continued.*
unopened, omission to work, is not abandonment of, 448, n. (*m*).
what is abandonment of, 448, n. (*m*).

QUEEN ANNE'S BOUNTY,
charge under, does not entitle purchaser to compensation, 1196, 1202, n. (*c*).
governors of, powers of sale of, 21.
purchase of, 25.

QUI PRIOR EST TEMPORE, POTIOR EST JURE,
meaning and application of maxim, 942 *et seq.*

QUIETUS,
registration and effect of, 564, 670.

QUIT RENT,
compensation allowed for, 132, 1205.
unless amount is large, 1202.
disclosure of, unnecessary on sale of customary freeholds, 132.
moneys in Court under L. C. C. Act may be used to buy up, 751.
purchaser must covenant for payment of, 631.
rent within Stat. of Lim., 433.

RACK-RENT,
lease at, need not be registered in register county, 769, 770.
lessee at, is purchaser within 27 Eliz., 1003.
misdescription of, as ground rent, fatal, 155.

RAILWAY COMPANY. *And see* LANDS CLAUSES CONSOLIDATION ACTS.
abstract, costs of, payable by, 320.
adverse claimants, remedy of, against, 512.
arbitration, costs of, payable by, 707, n. (*r*). *See* ARBITRATION.
compensation for damage not to be included in consideration, 599. *But see* "Addenda."
completion not necessary within period limited by Act, 489.
of purchase and line when compelled, 1100, 1101.
compulsory powers of, exerciseable within what period, 61, 513, 514.
contract by, for purchase, enforceable when complete, 243, 1099, 1112.
should provide for accommodation works, 238.
purchase of mines, 238.
when complete, 243.
prior to enabling Act, when enforceable, 61.
incorporation may be adopted, 219, n. (*g*).
contract of promoters does not bind until ratified, 62.
conveyance, effect of statutory, 575.
registration of, in register county, 770.
covenants, on sale to, whether proper, 618, 619.
easement alone cannot be taken by, 244, n. (*c*).
can be acquired over lands of, 859.
cannot be granted by, over its lands, 20.
entry by, cannot be made without consent or payment or deposit, 508. *See* DEPOSIT.
may be made after deposit and bond, 508. *See* BOND.
ejectment cannot be brought after lawful, 514. *And see* ENTRY.

RAILWAY COMPANY—*continued.*
indemnity to, for rent-charge on lands purchased, 1194, n. (*l*).
injunction against,
running trains on failure to pay purchase-money, 1220, 1221.
user of lands by, till payment, 836.
whether person whose estate has ceased can have, *quære*, 244, n. (*z*).
interest payable by, on purchase-money, from what date, 711.
judgment against, remedy on, is by receiver, 541.
rolling stock not extendible under, 541.
leaseholds may be taken by, without lessor's licence, 244.
lessee must be indemnified by, 631, n. (*k*).
lessor and lessee must be separately treated with, 756.
lien against, for unpaid purchase-money. *See* LIEN.
enforceable by sale, 514, 515, 835, 836.
even after opening of line, 1221.
lien against, none for costs of arbitration, 515, 835, 1221.
mandamus against,
for valuation of lands, 62.
obtainable where specific performance impossible, 248, 1099.
whether person whose estate has ceased can have, *quære*, 244, n. (*z*).
mines and minerals,
adjoining, right of owner to work, 604, n. (*u*).
communications between, must be compensated for, 424, n. (*e*).
conveyance must include, if intended to pass, 130, 508, n. (*f*), 604.
purchase of, may be made after purchase of surface, 423, n. (*e*).
reservation of, on conveyance to, implies obligation to support, 604.
support from, may be acquired by purchase, 423.
no right to, unless purchased, 423, 424.
mortgagee's remedy against, 511, 512.
notice to, by landowner to take, constitutes contract, 248.
notice to treat. *See* NOTICE TO TREAT.
abandonment of, when presumed, 248, 249.
binds and cannot be withdrawn by, 242, 243.
counter-notice affects, how far. *See* COUNTER-NOTICE.
enforceable contract not constituted by, 248.
for house. *See* HOUSE.
for manufactory. *See* MANUFACTORY.
fresh, may be given to take further lands, 247.
landowner has what remedy for lands included in, but not taken, 515.
not bound by, till price fixed, 243.
must be acted on within reasonable time, 248.
not enforceable against, after determination of interest, 244.
price of lands taken by, how fixed. *See* PRICE.
purchase by, by agreement, time for, 61.
conversion when effected by, 297, 761.
purchase-money not an attachable debt, 711, n. (*t*), 1087.
payment of, into Court, when ordered, 1218, 1220, 1221.
on purchase from statutory owners, 750 *et seq.*
payment-out of. *See* PAYMENT-OUT.
receiver appointed against, on failure to pay purchase-money, 836, 1220, 1221.

RAILWAY COMPANY—*continued.*
reconveyance of land taken by, for unauthorized purpose, claimable by landowner, 858.
refusal of possession, remedy for, against landowner, 512.
shares in, agreement for sale of, not within Stat. of Frauds, 233.
what title to be shown to, 332.
"taking" by, how far tunnelling is a, 242, n. (*m*).
time, expiration of, no defence to landowner's action for specific performance, 1173.
value of lands to be taken by, should be fixed by jury, 92.

RATES,
made before, but not payable till after, completion, condition as to, 147.
what included in covenant to pay rates, &c., 191.

RATIFICATION,
by company, by conduct, of contract, 219.
under seal of contract not under seal, 219.
by corporation, other party not bound till, 218, 219.
by infant, of contract, 30.
of unauthorized contract of agent, 216.
cannot be, by party non-existent at date of contract, 216.

RE-ALLOTMENT,
of trust estate on sale should be advertised, 78.
on resale of estate bought by trustee not permitted, 53.

REASONABLE,
acts, what are in covenant for further assurance, 887.

RECEIPT,
by joint vendors must be separate, 747, 748.
by one joint tenant for whole purchase-money, not a good discharge, 748.
by trustee in bankruptcy is good discharge, 748.
by trustees. *And see* PURCHASE-MONEY.
all must join in, 684—686, 744, 745.
inability to give, may be cured by conditions, 200, 201.
power to give, is question of intention, 672. *See* INTENTION.
for deposit not sufficient memorandum within Stat. of Frauds, when, 256.
or purchase-money, may be sufficient memorandum, 240.
for mortgage-money binds mortgagor as against transferee, 953, n. (*s*).
for rent,
affidavit may be received in lieu of, 193, n. (*a*).
condition as to, construction of, 194.
does not apply, where reversioner is doubtful, 194.
last, acknowledgment of title equivalent to, 435, 444.
last, evidence of performance of covenants, &c., 193.
last, must be for money rent, 193, n. (*z*).
last, time runs from, 435, 444, 466.
for succession duty, effect of, 314.
inability to give, is defect in title, 322.
indorsed, not conclusive evidence of payment, 742, 825. *And see* INDORSED RECEIPT.

RECEIPT—*continued.*
indorsed, production of, did not authorize payment to solicitor, 742.
now authorizes payment to solicitor, 742, 743.
except where trustees are vendors, 743—745.
unusual position of, may be notice, 480, 978.
mortgagee of charge on estate can give, under power of attorney, 703.
on sale of superfluous lands, 703.
unstamped, how far evidence of contract, 275.
vendor's lien not destroyed by, for full purchase-money, 825.

RECEIVER. *And see* OFFICIAL RECEIVER.
appointment of,
affects time under Stat. of Lim., how far, 434.
by judgment creditor makes him necessary party to conveyance, 581.
is delivery in execution, 547.
obtainable when legal remedy is open, 547.
without redemption action, 548.
search for, difficulty of, 558, 559.
express trustee of money for persons entitled, 438.
not allowed to bid on sale by Court, 1322.
not proper defendant to action for specific performance, 1127.
of railway appointed on failure to pay purchase-money, 836, 1220, 1221.
does not preclude vendor's lien, 515.
remedy by, under judgment, 541.
on judgment, issue of elegit not necessary to get, 542, 543.
obtainable in equity, 542.
payment of interest by, is payment by agent of mortgagor, 457.
purchase by, when set aside, 43.

RECITAL,
abstract must not set out material deeds by way of, 341.
must set out, fully in first abstracted deed, 340.
ambiguous, does not affect purchaser with notice, 986.
convenient, not necessary, 593, 594.
covenant, implied by, when, 636, n. (*e*).
declaration in pedigree question, when admissible as, 397.
evidence by,
condition as to, binds purchaser how far, 166.
does not preclude evidence of inaccuracy, 166.
effect of, on suspicious recital, 171, 172.
Conv. Act affects, how far, 173, n. (*p*).
applies to what documents, 371, 372.
does not extend to sub-recitals, 166.
in deed prior to root of title presumed accurate, 172, 337, 371, 372.
onus of proving inaccuracy is on purchaser, 340.
in deed twenty years old sufficient, under V. & P. Act, 166, 371.
must be direct, not merely matter of inference, 166.
general words may be cut down by, 594, 838.
in Act of Parliament, good evidence, 397, 398.
in conveyance, arrangement of, 592.
commencement of, should be clear root of title, 592.
may be inserted as evidence of other matters, 591.
necessary, alone should be inserted, 589, 590.

RECITAL—*continued.*
in conveyance, title of vendor to convey should be shown by, 591.
in deed confirming title should state objections fully, 596.
in disentailing deed, improper, 590.
in post-nuptial settlement should set out ante-nuptial contract, 596.
in release should be full, 591, 593.
in renewed ecclesiastical lease, how far evidence, 356.
notice from, purchaser may have, 968, 974, 986.
of agreement may be sufficient memorandum within Stat. of Frauds, 250.
of contract when necessary in conveyance, 596.
of freedom from land-tax, not evidence of redemption, 399.
of lease for a year, evidence of its execution, 356.
of lost agreement to bar entail, when evidence, 355.
deed, when evidence, 159, n. (*u*), 354.
will, inaccurate, held to be notice, 974.
when evidence, 355.
of power, mode of, 593.
of sale by auction, generally improper, 596.
of chattels lets in stamp duty, 597.
of vendor's title, binds vendor and parties claiming through him, 595, n. (*f*), 911, 912.
does not pass legal estate by estoppel, 595, 911, 912.
whether estoppel on purchaser, 595.
operative part may restrict, 594, 595, 838.
e.g., covenant to settle after-acquired property, 595.
operative part not generally restricted by, 594.

RECONVEYANCE,
abstract should set out mortgage and, 341.
by building society under Act of 1874, effect of, 937, 938.
priority of, extends to all money advanced, 939.
by trustee purchasing, ordered on what terms, 51 *et seq.*
for defect in title, ordered on what terms, 903.
of land taken by public body for unauthorized purpose, 858.
of reversionary interest,
acquiescence may preclude right to, 855, 856.
inadequacy of consideration alone formerly sufficient ground for, 844 *et seq.*
not now sufficient ground for, 850.
on what terms ordered, 852—854.
presumed, when, 366, 367.

RECORD,
from Heralds' College, how far evidence, 394.
instruments upon,
certified copies of, as good as originals, 357, 361, 362.
covenant for production formerly extended to, 765.
need not extend to, 160.
purchaser need not examine originals of, 472.
secondary evidence of, when admissible, 159.
vendor must produce office copies of, or extracts from, 472.

RECORD—*continued.*
instruments or facts, which should be on, not presumed, 371.
of inquiry into facts by competent Court, when evidence, 357.

RECOVERY AND FINE,
condition precedent to validity of, not presumed, 370, 371.
defects in, remedied by statute, 957.
fraud in, relieved against, 852.
fraudulent and bad uses upon, do not invalidate it, 1027.
proof of, 356, 358.
unenrolled, what sufficient evidence of, 358.

RECOVERY DEED,
defects in, remedied by Statute, 957.
not good root of title, 339.
search for, when to be made, 568.

RECTIFICATION,
knowledge of defect may be ground for, of covenant for title, 886.
mistake to be ground for, must be clearly proved, 839.
mutual, 839.
of conveyance, when granted in Equity, 856, 908.
of settlement by Divorce Court, 857.
of voluntary irrevocable settlement, 1022, 1023.

RECTOR,
application by, of moneys under L. C. C. Act,
allowed for discharge of incumbrances, 751.
erection of parsonage, 752.
not allowed for payment of money due to Queen Anne's Bounty, 752, 753.
in lump sum of money due by instalments, 753.
repair of chancel, 752.
repayment to himself of previous outlay, 752.
pews cannot be placed in chancel without consent of, 334.
purchase by, of glebe, invalid, 42.
sale by, for redemption of land tax, 958, n. (*b*).

RECTORY,
annuity charged on, bishop cannot purchase, 42.
benefice not included in, under 1 & 2 Vict. c. 110..541.
extendible under judgment, 531.

REDEMPTION. *And see* EQUITY OF REDEMPTION.
action for,
conduct of sale in, to whom given, 1324.
consolidation applies in, as well as in foreclosure action, 1037, 1038.
sale may be ordered in, under Conv. Act, s. 25..1317, 1318.
unnecessary for appointment of receiver by judgment creditor, 546.
of land tax. *See* LAND TAX.
on judgment, registered after foreclosure decree, 549 *et seq.*

RE-ENTRY,
condition for, on breach of covenant, not "usual" in lease, 192.
right of, for breach of condition, how far assignable, 281, 282.
on purchase of reversion, how far purchaser has, 916, 917.
unlimited, as to freeholds, void as a perpetuity, 241, n. (*f*), 876.
waiver of forfeiture does not destroy, 917.
want of, a defect of title, 129.

REFERENCE,
arbitrator cannot purchase unascertained claims on, 42.
as to terms of contract or part performance, 1143, 1145—1147.
not ordered, unless material terms are clear, 1146, 1147.
in administration action, costs of, under L. C. C. Act, payable by company, 805.
in lunacy, costs of, under L. C. C. Act, payable by company, 805.
to documents, incorporated with written agreement, what will satisfy Stat. of Frauds, 261 *et seq.*
imperfect, distinguished from patent ambiguity, 261, 262.
parol evidence admissible to explain, 262.

REFERENCE AS TO TITLE,
absence of necessary party, effect of, on certificate, 1239.
acquiescence in title may preclude right to, 1243.
not as to matters appearing *aliunde*, 1243, 1244.
admission of title in defence precludes right to, 1224, 1243.
as to title at date of reference, not of contract, 1227.
as to date of first showing title may be dispensed with, 1244.
before trial,
defence precludes, when, 1226.
delay may preclude, 1227.
may be directed at suit of either party, 1223.
vendor should apply for, when, 1224.
defect in title may be remedied upon the, 487, 1179, 1242.
defendant cannot have action dismissed pending, 1227.
form of, 1227, 1228.
general, may be ordered, where there has been conditional waiver of requisitions, 495, 1227.
is now to judge at Chambers, 1223, n. (*n*), 1228.
judgment concluding question precludes, 1226.
that there is no contract precludes, 1226.
not generally dispensed with, 1226.
not stayed, pending appeal, 1226.
objections allowed are ground for dismissing vendor's action, 1241, 1242.
not without further consideration, 1241, 1242.
specific performance in spite of certificate against title, when, 1242, 1243.
vendor, when allowed further reference back, 1242.
objections must be specific, 1241.
overruled, preclude purchaser from raising fresh objections, 1241.
waived may be raised on, unless precluded, 494, n. (*h*), 1245.
waiver of, precludes right to, 1227.
what, are ground for, 1226.

REFERENCE AS TO TITLE—*continued.*
on sale by Court,
costs of, 1336, 1337.
defect in title is ground for discharging purchaser, 1335, 1336.
purchaser entitled to, 1335.
compelled to take equitable title, when, 1335.
vendor not entitled to, where judgment defective, 1335.
order for further,
purchaser may raise fresh objections on, 1241.
where after certificate new matter arises, 1240, 1241.
where Court differs from certificate in favour of title, 1240, 1241.
outstanding incumbrance, effect of, on certificate, 1239.
purchaser may waive right to, 1243.
procedure on, 1228.
summons under V. & P. Act supplies place of, 1226, 1238.
unnecessary, purchaser pays costs of, 1264.
vendor, compelled to make title upon, if he can, 1186.

REFORMATION. *See* RECTIFICATION.

REFUSAL,
by company to register transfer, effect of, 332, 333.
by purchaser to complete, misrepresentation is ground for, 902.
on sale by Court, 1353—1355.
by vendor to complete, entitles purchaser to rescind, 489.
to accept or discuss title, by purchaser in possession, effect of, 503, 505, 1270.
to convey, how far breach of covenant for further assurance, 887, 888.
makes delay in bringing specific performance fatal, 1214, 1215.
remedy for, in specific performance, 1252—1254.
on sale by Court, 1346.
under Trustee Act, 654 *et seq.*
to perform contract is immediately actionable breach, 1088, 1089.
wilful, of vendor, to complete may entitle purchaser to damages, 1080, 1082.
"wilful," what is, under sect. 80 of L. C. C. Act, 808, 809.

REGISTER,
county, judgment must be entered in, 528, 555.
land in, notice of order under S. E. Act as to, 1287.
search in, does not dispense with examination of deeds, 767.
must still be made in, 522, 560, 567, 767.
need not be made in, under Land Transfer Act, 567.
French, entries from, when admissible, 393, n. (*o*).
general, is proper evidence of birth, death, marriage, 362, 392.
Indian council, entries of births and marriages in, are evidence, 357.
non-parochial, deposited under 3 & 4 Vict. c. 92, good evidence, 393.
received by conveyancers as evidence, 392, 393.
parochial, extract from, when evidence, 362.
identification of, 362, n. (*i*).
proper evidence of birth, death, marriage, 392.

REGISTRATION,
condition as to want of, good against irremediable defect known to vendor, 190.
when expedient, 190.

REGISTRATION—*continued.*
memorial of, is notice, how far, 973, n. (*p*).
of annuity deed after notice does not give priority, 568, 959, n. (*k*).
of assignment of unregistered lease gives no title against reversioner, 964.
of Crown debts, 563.
of deed, must be observed on examining deeds, 480.
or will give purchaser notice, if he search register, 972, 981.
want of, not a defect in title, 321.
of execution necessary for Crown debts, 563, 564.
of Irish or Scotch judgment, 556.
of judgment,
after foreclosure decree, effect of, 549.
does not prevent time running in favour of debtor, 560, n. (*ll*).
operate retrospectively, 543.
must be repeated every five years, 553.
applies to Palatinate judgments, 553, 554.
neglect to repeat, does not relieve purchaser with notice, 553.
of inferior Courts under 1 & 2 Vict. c. 110..533.
of Palatinate Courts, effect of, 534, 535.
reform of law as to, suggestions for, 559, 560.
under 23 & 24 Vict. c. 38..533, 551.
27 & 28 Vict. c. 112..533, 551.
want of, notice of, affects purchaser, how far, 554.
of docketed judgment, effect of, 555.
of *lis pendens*, effect of, 564, 565.
of quietus, effect of, 564, 670.
of satisfaction of judgment, how entered, 555, 556.
of title acquired under unregistered deed, gives no priority, 568, 959, n. (*k*).
of transfer of shares, effect of, 333.
of void or fraudulent deed does not validate it, 768, 776, 960.
of writ of execution, unnecessary except for sale, 551, 553.
purchaser after, can only be evicted under earlier registered title from same author, 963—965.
under Bedford Level Act,
unnecessary except to give privileges of the Act, 776.
under Irish Act,
legal estate does not give priority against, 928, n. (*d*).
under Middlesex Act and old law in Yorkshire,
after notice, gives priority, when, 959, 960.
at law, determines priorities absolutely, 959.
exceptions from Act,
copyholds, 769.
lands in City of London, 770.
leases at rack-rent, 769.
what are included in, 769.
for less than twenty-one years, 769.
occupation and possession must go with lease, 769, 770.
in equity, notice of unregistered deed affects purchaser from person having, 959.

REGISTRATION—*continued.*
under Middlesex Act and old law in Yorkshire—*continued.*
in equity, of no avail after notice at date of conveyance, 959, 960.
legal estate got in may support unregistered deed, 959.
not *per se* notice to the world, 959.
notice must be actual to postpone registered deed, 960, 961, 965.
of appointment under power, necessary, 770.
of assignment of legacy charged upon land, unnecessary, 770.
share of proceeds of sale under trust, unnecessary, 770.
of conveyance by Commissioners of Woods and Forests, unnecessary, 770.
under L. C. C. Act is proper, 770.
of equitable mortgage by deposit, unnecessary, 767, 768.
of further charge, necessary, 768.
of memorandum of equitable charge, necessary, 768.
of memorial of conveyance should be immediate, 767.
contents of, 773.
of mortgage to secure further advances, necessary, 768.
of vendor's lien, unnecessary, 768.
of voluntary settlement gives priority over earlier unregistered, 960, n. (*t*).
of will, necessary, 770 *et seq.*, 965. *See* HEIR; WILL.
priority of judgments *inter se*, determined by date of, 961.
where two deeds are registered at same hour, 769, 961.
stamp on memorial, 773.
under Yorkshire Registry Acts, 1884 and 1885,
copyholds and leases for less than twenty-one years excepted from, 776.
costs of, purchaser must pay, 799.
gives person claiming under deed same right as his assignor, 776, 964, 965.
legal estate and tacking give no priority against, 775, 776, 963.
not *per se* notice, 775, 962, 963.
of affidavit of intestacy, effect of, 775.
of vesting without conveyance, effect of, 775.
of all assurances and wills, 774, 961.
of caveat, effect of, 775.
of memorandum or lien or deposit, necessary, 775.
of notice of will, effect of, 775.
priority by, dates from registration, 774, 961.
not destroyed except by fraud, 776, 962.
notice does not affect, 962.
volunteer does not acquire better title than his assignor by, 776, 962.

REINSTATEMENT
of premises after alteration, liability of purchaser for, 505, 506.

REINVESTMENT,
conveyance to charity upon, requires enrolment, 761.
costs of,
company is bound by election of vendor's solicitor to charge under old scale, 823.

REINVESTMENT—*continued.*
costs of—*continued.*
resettlement subsequent to purchase, 806, 807.
successive reinvestments, 805, n. (*n*), 806, n. (*o*).
trustees of settled estate, with power of sale, should provide for, 92.
under sect. 80 of L. C. C. Act,
of "adverse litigation" not included, 809.
of "wilful refusal" not included, 808, 809.
what expressions will throw, on purchaser, 803, 804.
what are included in, 804—808.
what are not included in, 808.
income of, how paid to charity, 761.
corporation sole, 761.
mode of, equity of redemption not allowed as, 760.
investment in land of different tenure not allowed as, 760.
master's discretion as to, not interfered with, 760.
title required on, 760.
petition for. *See* PETITION.
proceeds of realty subject to trust for, duty payable on, 316.

RELATION,
declaration by, how far evidence of pedigree, 393 *et seq.* *See* PEDIGREE.
purchase by, of person disqualified, how far voidable, 47.
in name of, raises resulting trust, when, 1058.

RELEASE
by deed, is defence to specific performance, 1212.
by husband's mother of annuity is consideration for limitations in settlement, 1016.
by husband or wife of rights prevents settlement being voluntary, 1004, 1005.
by trustee of improper security, how far good, 687, 688.
of part of mortgaged lands on sale, whether good, 689, 690.
of valueless equity of redemption, is good, 690.
costs of procuring, condition that purchaser shall bear, 176.
covenants for title by vendor with mortgagor, mortgagee cannot release, 895.
evidence of knowledge of releasors admissible, 593, 594.
mortgagee on, covenants against his own acts only, 623, 624.
notice of, when notice of consideration for it, 979.
of breach is good defence to action on contract, 1097.
of contract under seal must be under seal, 1086, n. (*e*), 1097.
of equitable charge, when presumed, 367.
of goodwill liable to *ad valorem* stamp, 599.
of incumbrances on sale in lots, by separate deed, 575.
of part of lands from judgment does not release whole, 550.
rent-charge, effect of, 1044.
of power of revocation, whether settlement made good by, 1022.
of restrictive covenants to some covenantees, effect of, 872.
purchase by grantor of part of lands subject to rent-charge is, 1043.
rent-service is not, 1043.
recitals in, should be full, 591.

RELEASEE TO USES,
right of, to title deeds as against *c. q. t.*, 826, n. (*p*).

RELIGIOUS, &c. BUILDINGS ACTS,
conveyance under, must not exceed two acres, 778.
not subject to Mortmain Acts, 778.
limited owners may sell under, 18.

REMAINDER,
contingent, married woman may convey by acknowledged deed, 648, 651.
judgment in equity affects, 536.
tenant in tail must covenant to bar, when, 582.

REMAINDERMAN,
action for waste must be brought by, within twelve years of act committed, 437.
authorized sale may prejudice, 71.
barred by twelve years from date of title to possession, 437.
breach of covenant for title, action for damages for, may be brought by, 897.
damages for, not apportioned in favour of, 897.
contest between tenant for life and, not "adverse litigation," 809.
contingent, cannot enforce production of title deeds, 474.
contract of tenant for life enforceable by, 1114.
of tenant in tail not enforceable against, 1117.
under power enforceable against, 325, 1117.
money paid for redemption of land tax may be repaid by, 398, n. (*f*).
on base fee, when barred by Stat. of Lim., 450.
on estate tail, how far affected by judgment, 537.
on purchase deed may enforce production of title deeds against co-purchaser, 475.
part performance against tenant for life does not bind, 1145.
patron of advowson expectant on estate tail, when barred by Stat. of Lim., 452, 453.
payment of charge already barred, does not bind, 457.
interest by tenant for life on testator's debt binds, 457.
petition for reinvestment need not be served on, 759.
right of, accrues on possession, 446.
in purchase-money under L. C. C. Act, 754—756.
in fund set apart for renewal of lease, 755.
on sale of freeholds, 755, 756.
leaseholds, 754, 755.
renewable leaseholds, 755.
preserved where Court bars lunatic's estate tail, 8, n. (*o*), 1308.
sale fraudulent against tenant in tail set aside at suit of, 852.
succession duty, how borne on sale by tenant for life and, 317, 667.
vested, may enforce production of title deeds, 474.
voidable agreement by, purchaser how far bound by, 997, 998.

REMEDY,
for evasion of judgment by purchaser, 1251.
for refusal by purchaser to complete on sale by Court, 1353.
to convey, 1252, 1253.

REMUNERATION,
of auctioneer, how regulated, 207. *See* AUCTIONEER.
of solicitor, regulated by statute, 28, 820—823. *See* SOLICITOR.
improper bargain by plaintiff as to, does not invalidate his action, 280.
trustee may stipulate for, 96.

RENEWABLE LEASEHOLDS. *And see* LEASEHOLDS.
condition against producing title to, prior to subsisting lease, 196.
title to be shown to, in absence of condition, 332.
trustee cannot renew for his own benefit, 39.

RENEWAL,
by joint tenant gives him a lien, 1050.
by trustee cannot be for his own benefit, 39.
by vendor after contract, expense of, not allowed, 291.
compensation for loss of fines for, on compulsory sale, 756, n. (*y*).
covenant for, implies perpetual right of, how far, 332, n. (*u*), 623.
perpetual, does not preclude necessity of showing existence of lives, 332.
funds set apart for, right to, on compulsory sale, 755.
right of, married woman may convey by acknowledged deed, 648.
want of, vendor must give compensation for, 1189.

RENT. *And see* RENT-CHARGE; RENTS AND PROFITS.
acknowledgment of title is equivalent to receipt of, 444.
apportionment of, under statute, 914, 915.
whether applies as between vendor and purchaser, 915.
arrears of, how far recoverable, 459 *et seq.*
recoverable against land only for six years, 461.
assignment of lease, liability for, how far affected by, 1045, 1046.
"clear yearly," meaning of, 137.
complaint by tenant, as to, vendor need not disclose, 105.
condition as to property being sold, subject to, 176, 177.
for apportionment of, on sale of leaseholds in lots, 148.
on severance of reversion, 147, 148.
for last receipt being evidence of payment, 193, 194.
money rent necessary under Conveyancing Act, 193, n. (*z*).
covenant for quiet enjoyment broken by notice to tenants to pay to adverse claimants, 882.
equitable assignee of lease, liability of, to lessor for, 312.
express trust does not prevent time from running as to, 438.
ground. *See* GROUND RENT.
increased, agreement for, not within Statute of Frauds, s. 4..236.
payment of, is not part performance, 1137.
last receipt of, time runs from, 444, 466.
mis-statement as to, by vendor is actionable, 113.
non-payment of, by vendor for twenty years, extinguishes, 445, 466.
notice of payment of, is notice of payee's title, 976.
occupation. *See* OCCUPATION RENT.
of mines reserved *in specie*, 447, n. (*g*).
on sale to tenant, landlord restrained from enforcing payment of, pending completion, 290.

RENT—*continued.*
on voidable lease, vendor setting aside must secure to purchaser, 998, 999.
payment in respect of part of land prevents time running, 466, 467.
of, by tenant to mortgagee is not payment of interest on mortgage, 456.
of, what amounts to, 444.
purchaser of leaseholds must covenant to pay, 629.
of reversion entitled to accruing and future, 914.
not entitled to part, 914.
rack. *See* RACK-RENT.
receipt for, how far evidence of seisin, 378, 379. *And see* RECEIPT.
of, by wrongful claimant affects reversioner, how far, 447.
of, effect of, between landlord and tenant, 446.
reduced, agreement for, is within Stat. of Frauds, s. 4..236.
retention of, by tenant confers no title against reversion, 447.
under Stat. of Lim., what is, 433, 434.
s. 9, what is, 447, n. (*f*).
water rates do not constitute, 156.
"wrongfully received," what is, 447, n. (*f*).

RENT-CHARGE,
apportionment of, condition as to, on sale in lots, 147.
arrears of, purchaser of part of, cannot distrain for, 1044.
recoverable against land only for six years, 461.
sale may be ordered for payment of, 1316.
contract for sale of, by infant, formerly void, 5.
conveyance in consideration of, costs of, how borne, 802.
prepared by purchaser, 570.
covenant by purchaser to pay perpetual, effect of, 877.
for indemnity against value of, 625.
for drainage loans, search for, 569.
interest on one, payment of, does not affect other, 467.
judgment affects, how far, 525, 531.
liability to, how far defect in title, 1201, 1205.
non-payment for how long, extinguishes, 461, 466.
on sale to public company for, vendor has no lien, 835.
payment in respect of part of land prevents time running, 466, 467.
purchase of part of land subject to, by grantee releases, 1043.
purchaser of part of, entitled to distrain, 914, 1044.
release of part of lands, effect of, 1044.
sale not ordered as long as payment is made, 1316, n. (*e*).
satisfaction of, may be registered, 555.
search for, enrolled, 568.
severance may be made without consent of owner of lands charged, 1044.
terminable, may be discharged under S. L. Act, 1887..751.
time runs from last receipt of, 466.
tithe. *See* TITHE.
trustees must not sell in consideration of, 90.

RENT-SECK,
not extendible under old law, 526.

RENT-SERVICE,
apportionment of, condition as to, on sale in lots, 147.
purchase of part of lands subject to, by grantee does not release, 1013.

RENTS AND PROFITS. *See* ACCOUNT.
account of, ordered in decree for specific performance, 1247.
acknowledgment of title by person in receipt of, amounts to possession under Stat. of Lim., 444.
agreement giving purchaser interest and, not favoured, 710, 711.
that vendor shall take, till actual possession precludes interest, 726.
condition for letting into receipt of, 142.
may include occupation rent, 145.
refers to ordinary tenancy, 144, 145.
deduction of, not allowed on order to pay in purchase-money on sale by Court, 1343.
mortgagee of life estate after death of tenant for life must account for what, 1032, 1033.
of estate devised in trust for sale, tenant for life entitled to, 63.
purchaser entitled to, as from date of completion, 507, 708, 732.
purchaser evicted may recover as damages, 893.
purchaser evicted under prior title must account for what, 1032, 1033.
where he stands in a fiduciary position, 1032.
purchaser from Court entitled to, from what date, 1342, 1343.
in possession liable to account for, when, 505.
must account for, on sale being set aside, 903.
of infant's estate, must account for what, 1034.
with notice of charitable trust liable for, from purchase, 945.
receipt of, by purchaser in child's name may rebut advancement, 1062.
reservation of, to vendor, his heirs, &c. till completion, effect of on prior devise, 296.
tenant in common must account for, how far, 1051.
trustee purchaser must account for, 52.
vendor entitled to, till time for completion, 285, 286, 293, 733.
in possession must account for, 709, 732.
in special case, for what he might have received, 709.
may have to pay interest on, 709, 732.

REPAIRS. *And see* EXPENDITURE.
agreement for, if not collateral, must be in writing, 226, 237.
not specifically enforceable, 1108, 1109.
execution of, by tenant, how far part-performance, 1136.
joint tenant has lien for, 1050.
liability for, in chancel is defect in title, 131, 1202.
mis-statement as to, may be subject for compensation, 152, n. (*y*).
moneys under L. C. C. Act cannot be used for, 752, 753.
person claiming under fraudulent deed allowed for what, 1033.
invalid deed allowed for what, 1033, 1034.
purchaser allowed what, as damages on contract, 1076, 1077.
in possession, allowed for what, on rescission, 504.
on eviction allowed for what, 1032.
by Crown, not allowed for, 563.
on sale being set aside allowed for what, 903.
vendor in possession, duty of, to execute, 733.

REPRESENTATION. *See* AGENT; DECEIT; MISREPRESENTATION.
as to nature of covenants must not be misleading, 107.
enforced by injunction, 870, n. (*i*).
erroneous, though innocent, may be ground for setting aside family arrangement, 848.
of agent binds principal, how far, 103, 104, 1075.
of solvency must be in writing, 115.
previous, execution of agreement affects, how far, 121.

REPRESENTATIVES. *And see* LOCKE KING'S ACTS.
of lunatic may set aside his purchase when, 32.
of purchaser can enforce his contract, when, 1114.
contract enforceable against, 1126.
of vendor can enforce his contract, when, 1114.
contract enforceable against, 1116.

personal,
of bare trustee under Land Transfer Act can convey, 665.
Vendor and Purchaser Act can convey, 665.
of mortgagee under Vendor and Purchaser Act can convey, 664, 665.
of purchaser are proper parties to specific performance, when, 1131, 1132.
can recover damages on contract, when, 1084.
of vendor can convey under contract enforceable against heir, 294, 302, 663, 801.
proper parties to specific performance, when, 854, 1130, 1131.
purchase of estate by, voidable, 40.
trust and mortgage estates devolve on, 18, 294, 665, 684.
trust estates good title to cannot be made by,
where heir could not under old law have made title, 294, n. (*c*), 684.
where surviving trustee dies without executor, 684.
Trustee Act, recourse to, generally unnecessary, 659, 665.

real,
liable for mortgage debt on purchase of equity of redemption, 918, 919.
what is contrary intention, 919.
of purchaser may enforce his contract for purchase, when, 1114.
rights of to have purchase-money paid out of personal estate, 303, 305.

real and personal,
action by which, for damages on covenant for title, 891.
of purchaser, rights of, on his death before completion,
depend on his liability to perform contract, 303, 304.
events subsequent to his death do not affect, 304.
of vendor, rights of on his death before completion,
contract binding purchaser only does not affect, 300.
enforceable against vendor only affects, how far, 301.
depend on his liability to perform contract, 295.
events subsequent to his death do not affect, 300, 304.

REPUBLICATION,
of will, effect of, 307.
what amounted to, under old law, 307.

RE-PURCHASE,
of superfluous lands, who has right of, 858, 859, 860.
right of, in vendor does not constitute mortgage, 925.
mortgagor may reserve on sale of equity of redemption to mortgagee, 925.
must be exercised strictly, 926.
test to be applied to agreements for, 925, 926.

REPUTATION,
advertisement of sale may be evidence of, as to boundaries, 1044, 1045.
evidence of, admissible, though unsupported by proof of usage, 358.
by declarations, 393 *et seq.*
failure of issue, admissible as, 390.
marriage, admissible as, 383.
must be that of persons having competent knowledge, 357.
notice from, how far imputed, 967, 968.

REPUTED OWNERSHIP,
doctrine of, 954, 955.

REQUISITIONS. *And see* OBJECTIONS.
acceptance of, after time is waiver of condition, 490.
answer to, necessary to give right of rescission, 179, 183.
as to conveyance, rescission for, precludes vendor from specific performance, 494, 495.
should be made at once, 494.
as to exercise of power of attorney, 352, 353.
as to title dependent on acknowledged deed, 356.
as to undisclosed incumbrance, 344.
for concurrence of necessary parties, 494.
for document dated before commencement of title, 337.
for entry of bankruptcy proceedings as of record, 360.
for evidence of steward's handwriting on copyright assurances, 351.
for incumbrances being got in by separate deed, 814.
for judicial construction of will, 495.
for proof by attesting witness of execution of deed, 353.
for proof of will disputed by heir, 374.
for search in Central Office, 521.
frivolous, danger of, 493.
insistence on, what is, 182, 183.
motive for, not considered by Court, 495, 496.
propriety of, may depend on circumstances of case, 741, 742.
time for sending in, condition as to, 178, 180.
not binding where defects are concealed, 180.
time for withdrawing, condition for rescission should state, 183.
vague and fishing, need not be answered, 373, 374.
waiver of all except one, effect of, 495.
withholding fatal, may be ground for refusing costs, 494.

RE-SALE,
attempted, when acceptance of title, 498.
condition as to right of, 184.
costs of, not allowed to purchaser as damages on contract, 1078.
on sale by Court, not allowed for bad title till discharge of purchaser, 1337.
order for, where purchaser from Court fails to complete, 1354.
order made on what terms against trustee purchaser, 52.
pending action for specific performance, when restrained, 1222, 1223.
purchaser may enforce production of title-deeds upon, 473.
right to, and to damages, exists independently of condition for, 185.
trustees may be liable for delay in, 91.
vendor may claim damages for deficiency upon, 185.
cannot after, sue for original purchase-money, 185.
need not account for surplus on, 185.

RESCISSION,
agent for purchase selling his own property entitles principal to, 51, n. (*a*).
alterations may preclude purchaser's right to, 505, 506.
alterations, purchaser liable for, on, 505, 506.
auctioneer liable for costs of action for, when, 203, 204.
before and after completion, grounds for distinguished, 898 *et seq.*
by purchaser in possession under paramount title does not require formal entry by him, 504.
by vendor allowed after decree for specific performance, on what terms, 1254, 1255.
condition for,
action for specific performance is evidence of intention not to enforce, 179, 183.
answer to requisitions must precede enforcement of, 179.
applies to case for compensation, how far, 180, 1190, 1191.
objections on conveyance, how far, 178, 1191.
what objections, 181.
authorizes rescission after action for specific performance commenced, 179.
elements necessary to give right under, 182.
not enforceable except *bonâ fide*, 180, 181.
if objection at once waived, 179.
unreasonably against willing purchaser, 181, 182.
where vendor guilty of misrepresentation, 180.
has no title, 179.
knowingly sells defective title, 180, 1191.
option under, must be exercised in reasonable time, 179.
precludes purchaser's right to compensation if exercised, 1190, 1191.
renders frivolous requisitions dangerous, 493.
rescission under, not affected by subsequent waiver of objection, 179.
waiver of right under, what amounts to, 183, 184.
default of vendor entitles purchaser to, when, 1071, 1072.
defence to vendor's action on bill or note for purchase-money, 1089.
delay, if certain, is ground for, by purchaser, 491.
deposit and interest, purchaser entitled to, on, 207, 1075, 1076.
expression of vendor's opinion not a ground for, 111.

RESCISSION—*continued.*
for illegality of contract gives purchaser no lien, 506.
for non-disclosure of change between offer and acceptance, 117.
for refusal to remove objections, 489.
precludes vendor from specific performance, 494, 495.
for want of title must be immediate, 1179, 1180.
improvements, what allowances made for, on, 504.
inadequate consideration, when ground for, 842.
increase or loss on estate, purchaser cannot claim on, 1076.
incumbrances exceeding purchase-money may be ground for, by vendor, 1171.
lien, how far purchaser has, on, 506.
misdescription, when ground for, after acceptance of title, 350, n. (*x*).
misrepresentation precluding specific performance not always ground for, 106.
untrue to purchaser's knowledge not ground for, 111.
when ground for, after completion, 898, 900—902.
before completion, 116, 899.
mutual, before death of party to contract, effect of, 300.
notice of, by purchaser must be reasonable, 488, 489.
possibility of discovery by purchaser no defence to action for, 154.
puffing statement not ground for, 110.
purchaser in possession after, is either tenant at will or trespasser, 1085, 1086.
liable to occupation rent, 504, 505, 1085, 1086.
obtaining order for, may follow purchase-money, 903, 904.
tenancy at will of purchaser determined by, 504, n. (*y*), 1085, 1086.
undue advantage may entitle party imposed on, to, 840.
waiver of right of, 117.

RESERVATION,
of easement on conveyance, how made, 576.
must be express, 611, 612.
of light implied on sale by common owner of house and land, 409.
must be express, 409, 410, 611, 612.
not implied on sale by common owner of land adjoining house, 409.
of minerals, does not affect right of support to surface, 421, 422, 604.
implied upon sale for redemption of land tax, 422.
leaves vacant space in grantor, 423.
except in copyholds, 423.
under Inclosure Act, effect of, 422.
of necessary easement implied in conveyance, 608.
of right of fishing reserves all the grantor's right, 428.
of way of necessity implied, 412, 608.
is really re-grant, 412, n. (*c*).
re-grant and, distinguished, 612.
right of sporting is not subject of, 612.
what is proper subject of, 612.

RESERVED BIDDING. *See* BIDDING.

RESIDENCE,
change of, whether part-performance, 1139, 1140.
intention to use property as a, makes time essential, how far, 484, 485.
purchaser of, pays interest for delay, though out of possession, 708.

RESIDUE,
devise of, still specific, 309, n. (*i*), 701, n. (*s*).
realty and personalty lumped together as, make legacies a charge on both, 691, 692.

RESIGNATION,
of office or trust does not enable trustee, &c. to purchase, 50.

RESTORATION,
by purchaser of altered premises, when compelled, 505.

RESTRAINT ON ANTICIPATION. *See* ALIENATION.

RESTRICTIVE COVENANTS. *See* COVENANTS.

RESTRICTIVE WORDS,
in covenants for title, effect of, 882, 887, 889 *et seq.*

RESTS,
directed against purchaser, on reconveyance for his fraud, 903.
not directed against purchaser, on eviction under prior title, 1033.

RESULTING TRUST. *And see* ADVANCEMENT.
advancement distinguished from, 1057 *et seq.*
conveyance in groundless fear of indictment raises, 1063.
to one joint purchaser raises, 1054, 1055.
to stranger raises, 1054, 1055.
custom of manor against, is bad, 1055.
not within Statute of Frauds, 1055.
on purchase in name of stranger may be rebutted, 1065.
parol evidence as to payment admissible to prove, 1056.
inadmissible to prove, in favour of vendor, 1056, 1057.
presumption of, how rebutted, 1055.
rebutted by evidence of intention that survivor shall take beneficially, 1055, 1056.

RETAINER,
notice to solicitor before, does not affect client, 988—990.

RETENTION,
of abstract, how far waiver of delay, 347, 490, 497.
of deeds by vendor, how far notice, 951, 980.
not good as against purchaser, 826.
of incumbrances out of unpaid purchase-money, 665, 666, 905, 906.
of possession by purchaser, how far ground for costs, 1270.
may be acceptance of title, 505.
tenant, how far part performance, 1136, 1137, 1139.
of rent by tenant gives him no title against reversioner, 447.

RETRACTION,
of bidding, allowable till fall of hammer, 139.
condition against allowing, how far good, 139, 140.
RETURN. *And see* DEPOSIT.
of deposit, on rescission by vendor, 488.
when ordered, 221—223, 1255, 1338.
REVERSION,
annuity charged on, arrears on, how far recoverable, 460.
clause conveying, not now used in conveyances, 613.
conveyance of, by married woman by acknowledged deed,
in money subject to be invested in land, 648.
in personally, 651, 652.
does not apply to interest under marriage settlement, 652.
in proceeds of sale of land still unsold, 648.
of contingent remainder, 648, 651.
of future interest in renewable leaseholds, 648.
vested prior to 1883..652.
conveyance of, by married women under M. W. P. Act, 652.
form of, 694.
on lease not under seal does not preclude lessor from suing on covenants, 917.
covenants, benefit of, runs with, under Conv. Act, 1002.
in lease by mortgagor under power run with, 1001, 1002.
equitable vendor of, is trustee of legal estate for purchaser, 663.
inadequacy of consideration,
alone sufficient to set aside sale of, under old law, 844 *et seq.*
defence to specific performance, how far, 1208.
family arrangement not within rule as to, 847, 848.
not now sufficient *per se* to set aside sale of, 850—852.
test of, 849, 850.
what interests are within rule as to, 844—846.
judgment effects, how far, 526, 536.
light, right to, acquired against leasehold is good against, 405.
merger of, effect of, under 8 & 9 Vict. c. 106..917.
moneys under L. C. C. Act may be invested in purchase of, 751.
mortgage, arrears of interest on, how far recoverable, 460.
nominal, on mortgage of leaseholds by demise,
foreclosure decree may include in default of mortgagor's appearance, 662.
mortgagee is trustee of, for purchaser within Trustee Act, 662.
of infant in personalty, Court may sell, 2, n. (*c*).
on lease, purchaser of, how far liable for nuisance, 1045.
on voidable lease, purchaser of, can sue and be sued on covenants, 1001.
purchaser from lessor on voidable lease has, by estoppel, 1001.
need not accept, instead of estate in possession, 1199.
of lease with notice of charge cannot merge lease in, 1000.
of, may be bound to recognize user as easement, 949, 950.
purchaser of, rights of, for breaches of covenant,
attornment of tenants unnecessary, 916.
may bring action for past, 916.
allegations necessary in claim, 916.
even where he has bought part only, 916.

REVERSION—*continued.*
purchaser of, rights of, for breaches of covenant—*continued.*
may not enter for past, 916.
merger of term in part of reversion does not preclude in respect of other part, 916.
on lease not under seal does not prevent lessor from suing, 917.
may sue for use and occupation, 917.
remainder not included in, within Prescription Act, 430, n. (*e*).
re-sale of, condition as to adequacy of consideration necessary on, 196.
sale of,
abstract on, must show what title, 335.
accruing rents belong to purchaser on, 914, 915.
apportionment of rents on, right of purchaser to, 914, 915, 917.
disclosure of health of *c. q. v.* necessary on, 107.
dropping of lives enures for purchaser's benefit on, 286.
in consideration of annuity waiver of lien when presumed on, 831.
interest payable from date of contract on, 712.
misstatement of age of *c. q. v.* may be fatal to, 157.
not within 32 Hen. VIII., as a pretenced title, 279, 280.
notice of lease on, how far notice of right of pre-emption, 107.
on incalculable contingency not readily set aside, 845.
onus of supporting is on purchaser generally, 844, 851.
right to avoid, how lost, 855.
right and remedy as to, distinguished, 855.
sub-purchaser with notice, not protected, 846.
succession duty, contract for, should provide for, 238, 316, 317.
purchaser must covenant to pay, when, 629.
time is essential on, 484.
to tenant, destroys covenants in lease, 918.
want of right of distress, is defect in title on, 129.
severance of, destroys right of distress for past rent, 914.
effect of apportionments of rents on, 147, 148.
surrender of, effect of, under 8 & 9 Vict. c. 106..917.
trustees for sale must sell promptly, 63, 64.
wife's legal, in leaseholds assignable by husband, 9.

REVERSIONER. *And see* REVERSION; REMAINDERMAN.
acquiescence of tenant for life does not bind, 949.
allowed to bid on sale by Court, 1322.
c. q. t. may assent to purchase by trustee, 55.
concurrence of tenant for life with, renders sale valid, 844.
confirmation of voidable sale may be inoperative, 846.
covenant for renewal by, on death of *c. q. t.*, 623.
entitled also to particular estate, time runs against, 447.
even though no merger takes place, 447.
granting concurrent lease, time does not run against, 437.
receipt of rent by wrongful claimants, affects rights of, how far, 447.
registration of assignment of unregistered lease gives no title against, 964.
remainderman and, distinguished under Prescription Act, 430, n. (*c*).

REVERSIONER—*continued.*
right of, accrues on possession, 446.
even though he have waived forfeiture, 446.
or granted concurrent lease, 446.
or been in possession prior to particular estate, 446.
rights of, not reserved in acquisition of easement of light, 405, 950.
three years beyond prescriptive period allowed to upset easements, 429, 430.
time does not run against *c. q. t.*, while he is, 55.
undue influence is important in dealings with, 24, n. (*m*).

REVOCATION,
of agent's authority may be made before contract is binding, 216.
of auctioneer's authority may be made before fall of hammer, 209.
of creditor's deed allowed on what principle, 1020.
of devise by contract for sale, 295.
conveyance, 306, 307, 918.
of licence, grantor should give notice of, 230.
of offer before acceptance, 267.
of power of attorney, evidence negativing, how far necessary, 352, 641, 642.
power of, in voluntary settlement,
absence of, may be ground for setting aside, 1022.
what persons, claiming under, must prove, 1022, 1023.
solicitor should consult settlor as to insertion of, 1022.
power of, reserved to settlor makes settlement voluntary, 1021.
need not be express, 1021, 1022.
release of, effect of, 1022.

RIGHT OF ENTRY. *See* ENTRY.

RING-FENCE,
misdescription of land as being in, whether subject for compensation, 739.

RIPARIAN OWNER,
accretions from action of river belong to, 380.
action against grantee from, by lower proprietors will lie, 415.
from, will not lie if no injury proved, 415.
from, form of relief in, 415, n. (*u*).
bed of river belongs to, how far, 379, 419.
cannot grant use of water, 415.
lakes, rights of, on, 414, n. (*q*), 419, n. (*c*).
loss by encroachment of river falls on, 380.
may fish water adjoining, 414.
may use stream, 414.
not so as to injure lower owners, 415.
for irrigation, how far, 415.
navigable river, right to user of, 414, n. (*q*).
user of, by, is subject to public right of navigation, 419.
on canal has no right to water, 418.
rights of, against public body under statutory powers, 414, n. (*q*).
who is, 415, nn. (*r*) and (*y*).

RIVER. *And see* RIPARIAN OWNER.
access to, right of, owner of wharf has implied, 412, n. (*z*).
accretions by action of, belong to adjoining land, 380.
bed of, belongs to adjoining owners, 379, 419.
deviation of, effect of, on right of fishery, 380, n. (*m*).
encroachments by, loss of, falls on land encroached upon, 380.
fishing in, belongs to adjoining proprietors, 414.
navigable, bed of, belongs to Crown, 419.
in law, means tidal, 419.
public rights of navigation in, paramount to rights of owners, 419.
user of, by riparian owner, 414, n. (*q*).
non-tidal, bed of, passes by conveyance of adjoining land, 602.
public has no right of fishing in, 426.
pollution of, right of, how acquired and limited, 417.
rights of owner of bed of, subject to public rights of navigation, 419.
tidal, right of fishing in. *And see* FISHERY.
claimable by individual by grant or prescription, 426.
is in the public, 426.
may revert to Crown and be granted out, 426, n. (*x*).

ROAD. *And see* WAY.
access to, owner of land adjoining, has implied right of, 412, n. (*z*).
diversion of, under R. C. C. Act vests soil in proprietor, 414, n. (*q*).
highways, when, 411. *And see* HIGHWAY.
power to lay out, under S. E. Act, 79, 1279, 1280.
S. L. Act, 79, 80.
reservation of, on sales in mineral districts, effect of, 80.
sale-plan showing intended, does not bind vendor, 136.
soil of intended only, no presumption of vesting of, 411, n. (*u*), 602.
is not boundary, but part of property sold, 412, n. (*x*).
passes by conveyance of adjoining land, 411, 412, 602.
vests in adjoining owners, 411.

ROMAN CATHOLICS,
disabilities of, to buy land now removed, 33.

ROOD,
statutory contents of, 727, 728.

ROOT OF TITLE. *See* TITLE.

RULE OF COURT,
effect of, making reference, 260, 261.

SALE,
after foreclosure, prevents action on covenants against mortgagor, 1042.
agreement for. *See* AGREEMENT; CONTRACT.
by Court. *See* SALE BY COURT.
by executor. *See* EXECUTOR.
by trustee. *See* TRUSTEES.
compulsory, whether a conversion, 297 *et seq.*
equitable mortgagee now entitled to, 543.

SALE—*continued.*
judgment not enforced by, in Equity, for a year, 542, 543.
of pretenced title, illegal, 277.
of settled property, what liable to succession duty, 316.
power of. *See* POWER.
power of Court to direct,
instead of foreclosure, 1312.
of lands delivered in execution, 1312.
under Confirmation of Sales Act, 1296.
Partition Acts, 1298 *et seq.*
S. E. Act, 1278 *et seq.*
proceeds of, under trust for sale, subject to either legacy or succession duty, 315.
set aside, on what terms, 852, 854.
summary order for, under 27 & 28 Vict. c. 112, on judgment, 543, 544.
inquiries, when ordered prior to, 548.
only obtainable after delivery in execution, 545 *et seq.*
including equitable execution, 547, 548.
only obtainable while registry of writ continues, 552.
under power, does not prevent action on covenant against mortgagor, 1042.
under S. L. Act, what liable to succession duty, 316.
" without reserve," 126, 127, 225, 226.

SALE BY COURT,
abstract, delivery of, may be obtained on summons, 1335.
how prepared, 1325, 1326.
settled, 1327.
by auction, before Chief Clerk, 1313.
usually, 1313.
by sealed tenders left in chambers, 1313.
certificate of result of. *See* CHIEF CLERK.
concurrence of *c. q. t.*, when unnecessary, 1352.
parties, how obtained, 1345—1347.
conditions of sale, form of, 1327.
how settled, 1325, 1326.
conduct of. *See* CONDUCT.
conveyance on, how enforced, 1347, 1348.
practice as to settlement of, 1344, 1345.
conveyancing counsel is agent of vendor on, 1326.
covenants for title by owners on, 616, 617.
death of purchaser after certificate absolute, to whom estate conveyed, 1334.
defective order, ground for discharging purchaser, 1335.
title not allowed by Court, 1326.
delivery of title deeds, purchaser should obtain, 1342.
duties of vendor and purchaser on, before sale, 1325.
excessive, whether a conversion, 298.
for payment of arrears of rent-charge, 1316.
debts of a testator, 1316.
rent-charge not ordered while payment made, 1316, n. (*o*).
highest bidder on. *See* BIDDER.

SALE BY COURT—*continued.*
in action for administration,
affidavit by trustees or real representatives, 1325.
limits of jurisdiction, 1315.
may now be ordered before decree, 1314, 1315.
not ordered before event on which power arises, 1324.
when not ordered, 1315.
when ordered under old practice, 1314.
in action for foreclosure under 15 & 16 Vict. c. 86..1316, 1317.
not immediately ordered, 1319.
interest payable from what date, 1342—1344.
leave to bid on. *See* BID.
when given to mortgagee, 41.
legacy duty does not attach on, 314.
may be made in district registry, 1314, 1324.
out of Court, 1313, 1314.
mortgagee consenting to, must produce title deeds, 477.
not within Statute of Frauds, 227, 1330.
of mortgaged property may be ordered on summons, 1319.
on equitable mortgage may be ordered, 1320, 1321.
on judgment under 27 & 28 Vict. c. 112, proceedings on and effect of, 543, 544.
equitable execution gives jurisdiction to order, 547.
opening biddings on,
abolished in what cases, 1331.
application for, when to be made, 1332.
formerly possible before certificate absolute, 1330.
not extended to sale by private contract, 1331.
power of Court of, when exercised, 1330, 1331.
what is, 1330.
order for, in specified manner, does not authorize different method, 1314, 1325.
order for payment in of purchase-money,
deduction of rents and profits not allowed on, 1334, 1343.
not now generally necessary, 1333.
particulars, how prepared, 1325, 1326.
settled, 1327.
payment and application of purchase-money. *See* PURCHASE-MONEY.
possession given, from what date, 1342—1344.
private offer may be accepted without reference to Chambers, 1313.
purchase-money, how brought into Court after certificate absolute, 1333.
reference as to title on. *See* REFERENCE.
remedies where purchaser fails to complete,
where he is able to pay, 1354.
bankrupt, 1354.
impecunious, 1353.
resale not allowed till discharge of previous purchaser, 1337.
rights and liabilities of purchaser,
after certificate absolute, 1332 *et seq.*
discharged by improper conduct of vendor, 1332.
liable to any loss happening to estate, 1332.

SALE BY COURT—*continued.*
rights and liabilities of purchaser—*continued.*
after certificate absolute—*continued.*
may move to pay in purchase-money and discharge incumbrances, 1333.
may rescind, when, 1355.
may re-sell at profit, 1332.
after completion,
compensation allowed, when, 1352, 1353.
delivery of attested copies, order for, 1349.
title deeds, order for, 1348, 1349.
production of title deeds, right to covenant for, 1349.
protected against all parties, 1350—1352.
sub-sale at profit after certificate absolute, effect of, 1330.
before certificate absolute, effect of, 1330.
substitution of purchaser allowed on what terms, 1334.
under Conv. Act, s. 25..1317—1321.
discretionary, 1318—1320.
may be ordered out of Court, 1318.
not immediate in default of appearance, 1320.
under Judgment Act, 1321.
under S. E. Act, equivalent to sale under power in settlement, 316.
transfers succession duty to purchase-money, 316.
where made, 1324.

SANITARY AUTHORITY,
jurisdiction of Local Board of Health and Burial Board now transferred to, 25.
limited power to purchase land of, 25.
soil of highway vests in, 411, n. (*u*).

SATISFACTION,
of breach, receipt in, defence to action on contract, 1097.
of Crown debt, 564, 670.
of equitable charge, when presumed, 367.
of judgment, 555, 556.
of *lis pendens*, 555, 565.

SATISFACTORY TITLE,
meaning of, 179.

SATISFIED TERMS,
assignment of, to person not really entitled, does not constitute merger, 578.
unnecessary under Act for merger of, 576.
beneficial interest in charge and estate must be merged in same person, 578.
cannot be used in ejectment, though it may as defence, 577.
mortgagee can set up, how far, 579.
with notice cannot set up, 578.
presumption of merger of, 310, 311, 578.
surrender of, 367, 368, 1277.
protection against dower, when, 584.
purchaser entitled to have surrendered or assigned, 577.

SATISFIED TERMS—*continued.*
test of, is whether Equity would restrain setting up of term, 578.
title to, how to be abstracted, 329.
what estates are within Act for merger of, 330, 576, 577.
what is a, 329, n. (*z*), 330.

SCHEME,
building, costs of, under L. C. C. Act, payable by company, 806.
on taking charity lands, costs of, whether payable by company, *quære*, 807, n. (*y*).

SCHOOL,
restrictive covenants as to, 875.
site for, infant may convey, 3.
limited owner may sell, 18.

SEAL,
agent of corporation to be appointed under, 217.
agreement by deed under, not within Stat. of Frauds, 227, 228.
contract by corporation must generally be under common, 273.
want of, on, effect of, 273, 274.
contract under, agent is personally liable upon, 1073.
secus, if not under seal, 1073, 1074.
must be released by deed under seal, 1086, n. (*c*), 1097.
purchaser may rescind on vendor's default, 1071.
corporation may execute memorial by, 773, n. (*m*).
delivery of deed not constituted by, 639.
dispensed with, when, 220.
loss of, on document, immaterial if it come from proper custody, 356, n. (*q*).
not consideration for purpose of specific performance, 1208.
of company for use abroad, 219.
on deed may be presumed, when, 369.
whether in case of corporation, *quære*, 369, n. (*k*).

SEARCHES,
advised by counsel, solicitor need not go beyond, 523.
advised usually, what, 523.
against annuitant, legatee or vendor with lien, unnecessary, 539, 540.
so also against their incumbrancers, 539, 540.
costs of premature, vendor liable for, when, 569.
costs of unnecessary, solicitor liable for, 569.
expense of, when recoverable by purchaser in action for damages, 1076.
for annuities, 568.
for bankruptcy, when necessary, 567, 568.
for Crown debts, 562, 564.
may be made in Central Office, 564.
for drainage, loans and charges under local or public Acts, 523, 524, 569.
for inrolled deeds and acknowledgements, 568.
for judgments,
against former owners, when necessary, 560.
mortgagee, formerly necessary, 537, 538.
now unnecessary, 538 *et seq.*

SEARCHES—*continued.*
for judgments—*continued.*
difficulty of, in case of equitable execution, 559.
where *elegit* has not been registered, 558.
summary of law as to what should be made, 556, 557.
to be made for five years preceding purchase, 551.
for *lis pendens*, 564, 565.
often alone necessary against trustees, 565.
for registered writs under 23 & 24 Vict. c. 38..552.
in Central Office, certificate of, effect of, 522.
how far exhaustive, 522.
under Conv. Act, nature of, 521, 522, 560.
in county register necessary, 566, 567.
on purchase from company, 566.
of copyholds, 566.
on sale by Court, 1344.
solicitor's liability for not making, 522.
time for making, 569.

SEA,
estuaries, bed of, belongs to Crown, 419.
up to level of medium high water, 419.
estuaries of, right of fishing in. *See* FISHING.
lands gained from the, title to, 419.

SEASHORE. *See* FORESHORE.

SECRET,
bargain by agent for his own benefit, 217.
purchase by trustee or agent, *primâ facie* fraudulent, 50.
trust, equitable mortgagee bound by, 942.

SECURITY. *And see* MORTGAGE.
agent cannot accept for deposit, 221.
collateral, not primarily liable under Locke King's Act, 921.
floating, for debentures, abstract of property forming part of, 333.
for goods bought to re-sell to raise money, supported, 852.
"for money," bequest of, does not pass vendor's lien, 827, n. (*x*).
mortgagor obtaining order for sale must give, what, 1318.
personal, of infant, void, 31.
vendor taking, does not waive lien, 829.
unless intention clear, 829, 830.
security itself the consideration, 830, 831.
railway company before entry must give what, 508.
real, power to invest in, does not authorize purchase, 97.
vendor refusing to convey may sue on, 1089.

SEISIN,
benefit of covenants for title run with, 877 *et seq.*
covenant for, how broken, 881, 882, 883.
presumption of,
continuance of, 380.
from acts of possession, 378, 379, 975.

SEISIN—*continued.*
presumption of—*continued.*
from grant of annuity, 378, 379.
leases and receipt of rent thereunder, 378.
from receipts of rent given to occupiers, 379.
mere personal occupation insufficient to raise, 379.
recital of vendor's, how far an estoppel, 911.

SEPARATE DEED,
covenants, when to be entered into by, 625, 886.
purchaser can require outstanding estates to be got in by, whether, 572, 814.

SEPARATE ESTATE,
concurrence of husband in conveyance of, unnecessary, 587.
settlement of, does not make it good, 1007.
covenants for title on sale of, cannot be required from husband, 620, 621.
in fund under L. C. C. Act, petition for payment out of, 758.
interposition of trustees unnecessary, 644.
married woman,
bill of exchange payable to, whether notice that it binds, *quære*, 979.
entitled to estate bought by her husband with, 1066, 1067.
may bar entail in, 12.
may bind, by acquiescence, 56.
quære, when restrained from anticipation, 56.
by contract, 32, 1119.
if it exists at date of contract, 1123, n. (*b*).
may contract to extent of, 32, 1124.
may dispose of, as if *feme sole*, 11.
may enforce contract as to, 1162.
mortgage of, to pay husband's debts, good consideration for settlement, 1004.
must be annexed to whole fee, not to a particular estate, 644.
right of alienation a necessary incident of, 643.
subject to restraint, not liable to replace other separate estate fraudulently disposed of, 57.
under Act of 1870. *See* MARRIED WOMEN'S PROPERTY ACTS.

SEPARATION,
ante-nuptial settlement contemplating, void, 277.
deed, Court will decide what are usual covenants in, 1166.
indemnity to husband in, good consideration for, 1005.
when enforceable, 1165, 1166.
will be settled in chambers, 1166.
judicial, effect of, on after-acquired property of married woman, 12.
contracting capacity of married woman, 32.
voluntary, child born during, legitimate, 381.

SERVICE,
contract involving personal, not specifically enforceable, 1164.
want of, order of Court as against purchaser not invalidated by, 1290.
what, equivalent to rent within sect. 8 of Stat. of Lim., 446.

SET-OFF,
of costs, occasioned by withholding fatal objection, 494.
of deposit against costs ordered to be paid, 1270, 1271.
damages for deficiency on resale, 185.
in account, not open to purchaser, 221.
of interest on mortgage against that on purchase-money on purchase by mortgagee, 713.
on payment to agent not allowed, 746.

SETTLED ESTATES ACT,
application of Conv. Act to, for sale of infant's lands, 3, 4.
application under,
advertisement of, formerly imperative, 1286.
now only necessary if directed by Court, 1286.
costs of, Court has full jurisdiction as to, 1289.
Court may dispense with what consents on, 1283, 1284.
evidence required at hearing of, 1287.
for order dispensing with notice, when to be made, 1284.
leave to be heard in opposition or support of, how obtained, 1286.
notice of, on whom to be served, 1286.
notice requiring notification of consent to or dissent from,
how given, 1284.
when dispensed with, 1284, 1285.
when to be given although consent dispensed with, 1285.
procedure on, 1286, 1287.
where any of the parties under disability, 1290 *et seq.*
infant, 1291.
lunatic, 1292.
married woman, 1292, 1293, 1294.
person not so found, 1292.
costs of development of building estate may be raised by mortgage under, 80.
exercise of powers under, by committee of lunatic, 8.
in spite of restraint on alienation, 11.
investments allowed under, 1288, n. (*x*), n. (*y*).
order under,
for sale, by whom obtainable, 1282.
how obtained, 1282.
must be suspended before tenant for life can exercise powers of S. L. Act, 1278, n. (*s*).
proceedings on, same as under decree in action, 1287.
purchaser obtains indefeasible title under, 1289.
who must consent to application for, 1282.
notice of, if dispensed with, must be so stated on order, 1289.
must be indorsed on settlement, 1287.
when land in register county, how given, 1287.
petition under, Court will not decide question of title on, 1282, n. (*b*).
who entitled to copies of, 1286, 1287.
powers of Court under,
may be negatived by settlement, 1289.
to authorize dedication for roads, &c., 1279.
leases, 1280, n. (*o*).

SETTLED ESTATES ACT—*continued.*
powers of Court under—*continued.*
to authorize sale, 1278 *et seq.*
sale, how limited, 1289.
to dispense with consents, how limited, 1285.
to make order saving rights of persons not consenting, 1285.
recourse to, when still necessary, 1282, 1295.
retrospective, 1289.
sale under,
application of money arising from, 1287, 1288.
equivalent to sale under powers in settlement, 316.
for building purposes, 79, 1279.
for fee farm rents, 1279, 1295.
frees land from succession duty, 316, 669.
limited owners may obtain, 17.
of minerals and surface apart, 77, 1279.
powers of trustees receiving money arising from, 1288.
settlement of conveyance by judge on, 1249, 1344.
settled estate, what is, within, 1280.
settlement, what is a, within, 1280.

SETTLED LAND,
expenditure upon, does not satisfy covenant to pay money to trustees, 1070.
on sale of, forfeited deposit goes as purchase-money, 224.
in lots, settlement may be deposited until completion of sales, 763, 764.
liability to succession duty, how affected, 316.
to railway company, trustees should stipulate for costs of re-investment, 92.
trustees how far entitled to retain settlement, 763.

SETTLED LAND ACT. *And see* TRUSTEES FOR PURPOSES OF SETTLED LAND ACT.
application of money in Court under L. C. C. Act, under, 750, 754.
order under s. 63 must be registered as *lis pendens*, 566.
purchase of lands by trustees may sometimes be dispensed with under, 97, 98.
sale under, discharges land from succession duty, 316, 669.
what dealings material to title, 332.
tenant for life under,
cannot sell or lease to himself, 37, 42, 47.
consent of, when necessary, 85, 86, 1288, n. (*y*).
covenants by, on sale, 620.
how affected by order under S. E. Act, 1278, n. (*c*).
made up of several, and one refusing to join in exercise of powers, 1295.
may convey free from term, when, 336.
may dedicate streets, 1295.
may defray costs of development out of capital, 80.
may develope estate as building land, 79.
may exercise option as to investment or application of capital, 97.
may grant at fee-farm rents, whether, 1295.

SETTLED LAND ACT—*continued.*
tenant for life under—*continued.*
may sell, exchange, &c., mines and surface apart, 77.
must sell at best price, 90, n. (*h*).
powers of, infant, by whom exerciseable, 4.
lunatic, by whom exerciseable, 8.
married woman, exerciseable without her husband, 587.
not affected by restraint on anticipation, 11.
not assignable, 88, 1282, n. (*b*).
should concur in sale by trustees under charge of debts, *quære*, 700, 701.
trustee for all parties interested under the settlement, 42.

SETTLEMENT. *And see* VOLUNTARY SETTLEMENT.
advance to trustees of, is for benefit of persons interested under, 1059.
affidavit of no, necessary on petition by married woman for payment out, 758.
alleged not to affect title does not fix purchaser with notice, 970.
ante-nuptial,
children not parties may sue on, 1010.
contemplating future separation void, 277.
how far voluntary as to limitations to collaterals, 1010—1017.
limitations to children of former marriage, good, 1012, 1013, 1017.
future marriage, good, 1013, 1014.
in consideration of invalid marriage, bad, 1009.
invalid on one side, does not raise election, 1008.
may be fraudulent, 1017.
not voluntary, 1008.
purchaser under, purchaser within 27 Eliz. c. 4..1003.
by infant, 3. *And see* INFANTS' SETTLEMENT ACT.
by married woman of real estate must be acknowledged, 9.
concealment of, by married woman, may postpone her to purchaser, 948.
consent of tenant for life necessary where there is conflict between S. L. Act and, 85.
consideration for, may be past, 1018, 1019.
proved, 1018, 1019.
contract for, of future interest, how voidable in bankruptcy, 1031.
covenant for,
how far affected by subsequent sale or mortgage, 1069, 1070.
may create lien on after-acquired lands, 1069.
not satisfied by purchase of unsuitable property, 1070.
presumed to be performed by purchase, 1068.
who may enforce, 1070.
covenant for payment to trustees of, not satisfied by expenditure, 1070.
family, set aside where motive innocent but erroneous representation, 848.
funds of one, transferred to make good breach in another, belong to latter, 929.
in favour of creditors and for specified persons, distinguished, 1019, 1020.
revocation of former allowed on what principle, 1020.

SETTLEMENT—*continued.*
marriage,
covenants on sale by person claiming through, 616.
not affecting property, vendor need not produce, not in his possession, 373.
power of Divorce Court to alter, 857.
reversion in personalty under, not within Malins' Act, 652.
of encroachment, validity of, 188, n. (*s*).
of mortgage debt, mortgagee liable for expense to title by, 764.
of purchase-money, not liable to stamp duty, 790.
owner of estate under, may compel production of title deeds, 473.
parties to sue on ante- and post-nuptial, are different, 1010.
post-nuptial,
concurrence of stranger in, to pay settlor's debts is for benefit of family, 1005.
in consideration of loan is not fraudulent, 1017, 1018.
notice of, notice of ante-nuptial agreement for, 973.
parties to, can alone enforce it, 1010.
should recite articles, 596.
voluntary, when, 1004, 1005.
postponement of, to prior mortgage, through negligence of trustee, 935.
trustees of,
not entitled to retain on sale under trust for sale, 763.
purchaser must covenant to produce, 763.
settlement may be deposited for all parties where sale is in lots, 763, 764.
purchasing need not covenant personally, 633.
what is, within S. E. Act, 1280.

SEVERANCE,
compensation for, on compulsory purchase, subject to same rules as purchase-money, 299.
of joint tenancy, contract for sale is, 312.
of reversion on lease, effect of, 147, 148, 914, 917, 1044.
of unity of ownership, effect of, on easements, 403, 404.

SEWER,
no right of lateral support to, 424.
subjacent support for, must be left, under Public Health Act, 424.

SHARES,
contract for sale of, enforceable, 1106.
notwithstanding refusal of directors to allow transfer, 1106.
to register purchaser, 1107.
subsequent call, 1106.
contract for sale of, made through broker is subject to rules of Stock Exchange, 1106, 1107.
in mines, what abstract should show on sale of, 332.
within Stat. of Frauds, s. 4..233.
in railway company, not within Stat. of Frauds, s. 4..233.
what abstract should show on sale of, 332.
in water company, not within Stat. of Frauds, s. 4..233.

SHARES– *continued.*
registration of transfer of, notice before, does not postpone purchaser, 933.
secus, where transferor has not legal title, 933, n. (*e*).
transferee of, rights of, 333.

SHEEP-WALK,
purchaser need not take, instead of freehold, 1199.

SHERIFF,
return of writ by, is delivery in execution, 545, 546.
unnecessary when receiver appointed, 547, 548.
return to elegit by, equivalent to seizure, 529, n. (*d*).

SHOP,
licence to build, does not authorize a tavern, 138.

SIGNATURE,
of contract,
binds party signing, 269.
blank left for, effect of, 270, 271.
by agent binds principal, 270.
evidence admissible to show that, is on his own behalf, 269.
should show agency, 212, 1074.
when sufficiently shown, 1074, 1075.
by both parties, proper, 251.
by initials, binding, 269.
by public company, 273, 274.
by purchaser binding if vendor sufficiently described, 252, 253.
by witness, may be binding on party signing as, 271.
evidence admissible to show intention of, 271.
only conditional, 268.
in pencil binding, 270.
mere description is not, 269.
party signing may call on other to affirm or disaffirm, 269.
position of, 270.
printed or stamped, binding, 269.
supplied by signature to instructions for telegram, 269.
of deed, proof of, by witness raises presumption of due execution, 369.
presumption of due execution from proof of, 369.
of draft agreement or conveyance, effect of, 271, 272.
of judge, proof of, unnecessary, 359.
of memorandum written on and correcting signed agreement, unnecessary, 274.
of steward, when to be proved, 351.
to affidavit, presumed, 250.

SILENCE,
as to claim by mortgagee postpones him to purchaser, when, 947.
of third party, how far allowed, 109.
equivalent to acquiescence, when, 727.
misrepresentation, when, 106.
ground for action of deceit when, 104, 115.

SIMONY,
what transactions are, 281.

SLANDER,
of title, what must be proved in action for, 120, 121.

SOIL. *See* ROAD.
of bed of stream, to whom it belongs, 419.

SOLICITOR,
bill of. *And see* TAXATION.
c. q. t. can obtain taxation of his trustee's, 819.
delivery, cannot be withdrawn after, 819.
of, binds him, 818.
may be ordered after payment, 816, n. (*o*).
payment of, what is, 816, n. (*o*).
taxation of, agreement with client, if improper, does not preclude, 818.
where costs are retained out of *c. q. t.*'s money, 819, 820.
change of, not notice of change of ownership, 986.
clerk of, cannot bind vendor to allow compensation, 503, n. (*q*).
purchase by, from client, 47.
costs, agreement by, to take part of estate in lieu of, 278.
allowed under Solicitors' Remuneration Act, 822, 823.
security for future, may be taken by, 821.
on subject-matter of action, 278.
counsel's opinion,
as to searches, protects how far, 523.
fees for, allowed, 348.
on abstract does not relieve from duty to peruse, 348.
may be taken by purchaser's, 348.
vendor's, when, 346.
deposit received by, as vendor's agent, not as stakeholder, 205, n. (*s*), 1075.
draft conveyance is not property of, 638.
reperusing altered, fees how far allowed for, 638.
examination of title deeds, duty as to, 480.
town agent may be employed for, 470.
execution of conveyance, presence of purchaser's, at, 741.
fraud of, caused by client's negligence, does not postpone purchaser from, 930.
client not affected with notice of, 991.
limits of doctrine, 992, 993.
inquiry to be made by, on purchase by trustees, 518.
liability of,
as trustee, if employed by co-trustees, 745, 746.
for concealing incumbrance, &c., 342, 344.
for costs of unnecessary search, 569.
for disclosing defect in client's title, 350.
for falsification of title, 108.
for insertion of improper covenant, 614.
for misrepresentation, 108.
for not making searches, 522, 523.

SOLICITOR—*continued.*
lien of,
available against trustee in bankruptcy, how far, 477, n. (*x*).
of executor upon title deeds of leaseholds, how far, 476, 477.
of mortgagee against mortgagor, how far, 476.
mortgagor's trustee in bankruptcy, 476, n. (*t*).
of mortgagor upon reconveyance to mortgagor, 477.
on engrossment, none, 638.
payment of purchase-money restrained till discharge of, 1271.
taxation ordered on claim for, 820.
negligence of. *See* NEGLIGENCE.
non-employment of, effect of, on rights of vendor as to undervalue, 843.
not trustee for client within Stat. of Lim., 437.
notice to,
acting for vendor and purchaser binds purchaser, how far, 990.
agent of, is notice to, 993.
binds mortgagee purchasing from his own solicitor, 991.
in prior transaction binds client, how far, 988.
Conv. Act, 1882, s. 3, effect of, 988, 989.
does not apply where solicitor is vendor, 990.
is notice to client, 966, 967, 988.
of *c. q. t.* has no authority to authorise purchase by trustees, 50.
of mortgagee bound by condition against retracting biddings, 140.
of person having conduct of sale is agent for all parties, 1323.
of purchaser is proper judge of necessity of abstracting documents, 342.
professional communications of, with client, privileged, 994.
exceptions to rule, 994, 995.
purchase by,
from client, 35, 44.
precludes objections, how far, 492.
title deeds must be produced on, 52.
having conduct of sale is voidable, 39.
of person disqualified to purchase, 42.
of subject-matter of action, *pendente lite*, is bad, 278.
with client's money, remedy of client for, 1065, n. (*d*).
purchase-money,
cannot be received by, for trustees, 685, 743—745.
generally, 742.
production of client's execution and receipt authorises receipt by, 742, 743.
receipt of, by, as common agent, effect of, 906.
remuneration,
agreement for, under Solicitors Act, 1870..820.
does not exempt from negligence, 821.
must be signed by solicitor and client, 820, n. (*d*).
validity of, may be tested, 821.
agreement under Solicitors' Remuneration Act, 1881..821.
fairness of, may be tested, 821.
must be in writing signed by person bound, 821.
supersedes agreement under Act of 1870..822.
for copy abstract, 320.
improper bargain as to, effect of, 280.

SOLICITOR—*continued.*
secret profit cannot be made by, 46.
trustee, firm of, not entitled to profit costs, 815.
not entitled to profit costs, 95, 96, 815.
in bankruptcy may employ, when, 815.
may contract for remuneration as, 815.
undertaking by, to clear up title, not summarily enforced, 501.
voluntary settlement, duties of, as to preparation of, 1022.

SON. *And see* ADVANCEMENT; FAMILY ARRANGEMENT.
arrangements between father and, validity of, 846 *et seq.*
of trustee not incapable of purchasing, 47.

SPECIAL ACT,
powers of statutory corporation, how limited by, 20.

SPECIAL CASE,
when a *lis pendens*, 972, n. (*o*).

SPECIAL CONDITIONS. *See* CONDITIONS OF SALE.

SPECIALTY DEBT,
purchase-money ordered to be paid, when proveable as, 1248.
purchaser from heir or devisee need not see to payment of, 703.

SPECIFIC DEVISE,
contract to sell, how affected by, 302.
residuary devise is still, 309, n. (*i*), 701, n. (*i*).

SPECIFIC PERFORMANCE,
action for, order on V. & P. summons precludes, when, 1226.
action for, proceedings in,
injunction against waste by purchaser, 1222.
vendor parting with estate, 1222, 1223.
payment of purchase-money by railway company, how enforced, 1220, 1221.
into Court, when ordered, 1217—1220.
receiver, when appointed, 1220.
reference as to title may be ordered before trial, 1223 *et seq.* *And see* REFERENCE AS TO TITLE.
against whom enforceable,
dowress married since Dower Act, 1117.
joint-tenants, claiming by survivorship, 1117.
married woman, 1119 *et seq.*
against her separate estate, prior to Fines Act, 1119.
since Fines Act, 1120.
on husband's contract as to her chattels real, *quære*, 1122.
on valid appointment, 1120, 1121.
contract under Fines Act, 1119, 1120.
under Married Women's Property Act, 1882..1123, 1124.
person buying from purchaser from voluntary settlor, how far, 1119.
purchaser and his representatives, 1126.
with notice of possession of third party, 1116.
railway company, after opening of line, 1185.

SPECIFIC PERFORMANCE—*continued.*
against whom enforceable—*continued.*
remainderman or *e. q. t.*, when contract is good exercise of power, 1117.
tenant for life, contracting as tenant in fee, 1187.
tenant for life's successor under S. L. Act, 1125.
tenant in tail in remainder, 582, 1185.
vendor, 1115.
vendor's alienees with notice, 1115.
committee in lunacy, 1115.
judgment creditors, 1115.
representatives, 1116.
trustee in bankruptcy, 1115, 1126.
voluntary alienees, 1002, 1115, 1117.
wife or husband, married after contract, 1115.
voluntary settlor, 1002, 1118, 1119, 1164.
wife entitled to freebench, 1117.
against whom not enforceable,
executor in respect of co-executor's contract, *quære*, 1118.
married woman personally, 1120, 1125.
restrained from anticipation, 1121.
person claiming under paramount title to vendor, 1125.
purchaser for value without notice of contract, 1115.
from voluntary settlor, 1119.
railway company during period allowed by its Act, 489.
remainderman of tenant in tail, 1117.
trustee in respect of co-trustee's contract, 1118.
trustee in bankruptcy of purchaser, 1126.
award on reference, made rule of Court, is subject to, 261.
breach of contract, primary relief in equity for, is by, 1103, 1104.
by whom enforceable,
husband of wife, who has contracted to purchase, 1121, 1122.
one executor as to leaseholds, *quære*, 674.
purchaser or his representatives, 1114.
relation of trustee, who is disqualified, 47.
vendor or his representative, 1114.
by whom not enforceable,
commissioners of Woods and Forests, 1115.
railway company, after exercise of compulsory powers, 509, 510.
voluntary settlor, 1002, 1164.
compensation, when and when not allowed in. *See* COMPENSATION.
contracts, what, are subject to,
agreement in form of bond, 1183.
as to easement with railway company, 1112, 1113.
as to user of station, 1110.
for indemnity, 178.
for purchase by railway company, 242, 243, 1112.
for sale in consideration of annuity, even after death of annuitant, 287.
of annuity out of dividends on stock, 1116, n. (*t*).
of fixtures at valuation apart from land, 258, 259.
of land at valuation, 257, 258, 1211, 1212. *See* VALUATION.
out of jurisdiction, 1107.

SPECIFIC PERFORMANCE—*continued.*
contracts, what, are subject to—*continued.*
for sale of shares in company, 1106.
specifies chattels, 1105, 1106.
for separation, 1165.
of agent appointed by parol, 1056, n. (*r*).
of corporation, not under seal, when, 273.
of trustee for sale, though better sum afterwards offered, 1207.
to execute mortgage on receipt of loan, 1164.
to make road for land sold, 1109.
siding, 1109, 1110.
when contract itself vests property, 1113.
contracts, what, are not subject to,
building or repairing, 1108, 1109, 1164.
for future separation, 1165.
for lease, after expiration of term, 1112.
for loan of money on mortgage, 1112, 1164.
for partnership, 1111, 1112, 1166, 1167.
for sale of chattels generally, 1105.
of goodwill, *per se*, 1111.
or transfer of stock, 1105, 1106.
for yearly tenancy, 1112.
to build a station, 1110.
conveyance of larger interest than contracted for, when enforced by, 1198.
costs of. *See* COSTS.
covenant against vendor's liabilities must be given by purchaser on, 631, 632.
damages may be given in lieu of, or addition to, 1104. *See* DAMAGES.
order for, may award, 1113, 1256.
decree for,
accounts ordered in, 1247, 1248.
binds what persons, 1237, 1238, 1246.
concurrence of necessary parties, direction for, unnecessary, 582, 1248, 1249. *See* CONCURRENCE.
conveyance, direction in, as to settlement of, 1249, 1250.
declaration of vendor's lien in, 1248.
must be expressly claimed, 1248, n. (*y*).
enforcement of,
by rescission by vendor, 1254.
effect of rescission on vendor's rights, 1254, 1255.
by writ of *ne exeat* against purchaser, 1253.
by writ of possession, 1256.
payment of purchase-money under, 1254.
where purchaser evades judgment, 1251.
vendor is lunatic, 659, 1251, 1252.
refuses to convey, 660, 1252, 1253.
form of, 1244.
may be waived, 1246.
re-sale when ordered at suit of plaintiff vendor, 1248.
reversed does not carry interest, 1253.
defective title, when purchaser may elect to take, 1245.

SPECIFIC PERFORMANCE—*continued.*
defence to, what is,
breach of public policy, 1164, 1165.
trust, 1165, 1172.
concealment of change between offer and acceptance, 116.
latent defect, 112.
nature of tenancies, 112, 1196.
previous trespass by purchaser, 118, 119.
conduct of plaintiff after contract, 1212—1216.
act of forfeiture by purchaser in possession, 1217.
vendor, 287.
damages recovered in action on contract, 1217.
delay in bringing action, 490, 1213—1215.
ejectment of purchaser in rightful possession, 1216.
inability to perform material part of contract, 1216.
parol waiver, 1212, 1213.
release by deed, 1212.
waste of estate, 1215, 1216.
written waiver, 1212.
contravention of rights of third party, 1163, 1193.
duress, 1175.
excessive price, 1210.
failure of one of two inter-dependent stipulations, 1173.
fraud, 1175.
hardship, 1170—1173, 1192.
illegality, 1162.
improvidence of contract by agent, *quære*, 1166.
inability of Court to enforce whole contract, 1184.
execute contract, 1164.
inadequacy of consideration, 842, 1207.
misdescription, 151.
of underlease as lease, 135.
misrepresentation, 163—165, 1175.
as to offer by third party, 113.
of agent, 103, 106.
mistake, 165, 1174, 1187.
non-existence of part of property, 1184.
non-performance of condition precedent, 1180, 1181.
personal incapacity,
coverture, unless purchaser knew of it, 1161, 1162.
infancy, 1161.
intoxication, 1161.
want of mutuality, 1176 *et seq.* *See* MUTUALITY.
title, 1184, 1198 *et seq.*
by reason of incumbrances or easements, 1201, 1202.
matters increasing purchaser's liability, 1202.
in respect of difference of tenure, 1199.
interest of vendor being smaller than described, 1199.
to one of two estates sold together, 1200, 1201.
to part of estate, 1200, 1202, 1203.

SPECIFIC PERFORMANCE—*continued.*
defence to, what is not,
accidental destruction of property after contract, 1185.
existence of incumbrances, 1181.
patent easements, 520.
expiration of fixed period is not defence to Ry. Co. against land-owner, 1173.
inability to recover damages at law, 1183.
nominal, not being real contractor, 1182.
non-performance of collateral agreement, 1157, 1173.
unless the contracts are inter-dependent, 1156, 1173.
nuisance affecting property, 1184.
public inconvenience, 1185.
stipulation for penalty for non-performance, 1182, 1183.
deposit, action for, restrained pending vendor's action for, 1076.
order for return of, in action for, 222, 223, 1259.
dower may be subject for compensation in, 313, 584, 585.
equities cannot before completion be enforced against vendor without offer of, 284.
excess of quantity, compensation for, must be given by purchaser claiming, 730.
not forced on purchaser, 729, 730.
jurisdiction as to, is discretionary, 1113, 1161, 1176, 1177, 1178, 1180.
foundation of, is inadequacy of damages as remedy, 1105.
knowledge of defect precludes purchaser resisting, 1204.
unless contract is expressly for good title, 1205.
notice of lease notice of equities under it, how far applies to, 106, 107, 976, 1196.
notice to treat *per se* cannot be enforced by, 242, 248.
of ambiguous agreement refused, where plaintiff declines defendant's construction, 1246.
of contracts containing affirmative and negative terms, 1167.
brewers' contracts under this head, 1169.
principle of jurisdiction proposed, 1168.
of contract varied at suit of defendant, 1247.
of parol agreement, when obtainable, 1133 *et seq.*
where defendant admits, and does not plead the statute, 1148.
different agreement, and plaintiff submits, 1148, 1245, 1247.
where fraud has precluded compliance with statute, 1133.
where there has been part performance, 1134 *et seq.* *See* PART PERFORMANCE.
parol evidence of variation as defence, when admissible, 123 *et seq.*, 1153 *et seq.*
fraud, mistake, or surprise, as to meaning of contract, 1153.
or mistake affecting terms of contract, 1153.
misrepresentation inducing defendant to enter into contract, 1156—1159.
part performance of subsequent parol variation, 1159.

SPECIFIC PERFORMANCE—*continued.*
parol evidence of variation at suit of plaintiff, when admissible,
defendant should state terms and offer to perform them, 1149, 1245.
in what cases of fraud or mistake, 1149.
subsequent parol variation not enforceable, 1150.
parties to. *See* PARTIES.
portions, compensation for, not allowed in, 585, n. (*b*).
refusal to comply with requisition as to conveyance may preclude vendor from, 494, 495.
remedy by, open to vendor no less than to purchaser, 1107, 1108.
rescission not allowed after commencement of action for, 179.
statement of claim in action for, 1150—1152.
statement of defence in action for, 1148—1150.
admitting belief as to title may be admission of fact, 496.
may raise new objections, 494, n. (*h*).
want of title may entitle purchaser to, with abatement, 1187—1190.
not if he contract with knowledge of defect, 1195—1197.
not in cases of mistake or hardship, 1192, 1193.
subject to vendor's right under contract to rescind, 1190.

SPECULATION,
property bought for purposes of,
is held as tenancy in common, 1047 *et seq.*
is personal estate, 1052.
unless trade is merely ancillary to land, 1052, 1053.
joint purchasers of, bound by agreement as to, 1052.
reconversion into realty, how effected, 1053.

SPIRITUAL ADVISER,
transactions of, with penitent, 24.

SPORTING, RIGHT OF. *And see* GAME.
fatal defect, when not disclosed in particulars, 131, 1202.
legal grant of, may be compelled under agreement for, 230.
not subject of reservation, 612.
objection as to, waived by possession, 499, 500.

STAKEHOLDER,
auctioneer is, of deposit, 205, 1075.
premature notice of equitable assignment to, has no effect, 944.
vendor's solicitor is not, of deposit, 205, n. (*s*), 1075.

STAMPS AND STAMP DUTY.
acknowledgment of right to production requires what, 626, n. (*d*).
admittances of tenants in common require separate, 795.
several require separate, 571.
agreement, 275.
as to separate lots requires separate, 275, 276.
for lease, assignment of, liable to, 791.
in evasion of, void, 277.
may be affixed, within what time, 275.
not payable, in what cases, 275.
want of, immaterial, if defence admits agreement, 276.
alteration in deed requires new, 798.

STAMPS AND STAMP DUTY—*continued.*
appropriate must be used, 797.
building lease liable to, on amount of rent only, 791.
Commissioners' opinion may be taken as to amount payable, 792.
compensation under L. C. C. Act, how far liable to, 599.
consideration must include fixtures and timber, 597, 788.
penalties for untrue statement of, 597, 788.
conveyance, Commissioners may require abstract of, 787.
recital in, of sale of chattels, lets in duty, 597.
"conveyance on sale," what is, 785.
copies of Court Rolls do not require, when, 352, n. (*k*).
must be stamped by steward, 794, 795.
counterpart liable to what, 794.
covenant, deed of, liable to, what, 794.
for production of title deeds liable to, what, 626, n. (*d*).
deed operating in double capacity pays double duty, 796, 797.
except in what cases, 797.
deed, ordinary, liable to what stamp, 792.
deed, prior to 1850, how far exempt, 792, 793.
deed-stamp not necessary where greater than duty, 797.
division of assets of partnership not liable to, 598, 599.
duplicate liable to, what, 794.
examination of, on inspecting title deeds, 480.
memorial of conveyance for registration requires what, 773.
obliterated, presumed to have been correct, 276, 370.
on conveyance, how payable, 597, 787.
addition of, may be made on payment of penalties, 276, 785, 786.
by original vendor to sub-purchaser, 793, 794.
by separate deeds, apportionment of, 793.
in consideration of annuity, 789.
debt, 597, 787.
transfer of stock, 599, 788.
of bankrupt's estate, not payable, 790.
of equity of redemption, payable on mortgage debt, 787.
of foreign land, executed here, 798.
of goodwill, 599, 788.
of lands of different tenure, apportionment of, 597, 598.
of separate estates in different properties, separate stamps, 795.
same property, one duty only, 795.
of share in partnership, 598, 788.
to friendly society, not payable, 790.
to several companies under L. C. C. Act, payable rateably, 811.
want of, does not affect its validity, 785.
on lost deed, presumption of, 276, 370.
burden of rebutting on person denying, 370.
rebutted by showing deed to have been unstamped, 370, 786.
on sub-purchase payable on consideration for, 598, 793.
orders of Court transferring property are liable to, 793.
penalties for, do not apply to partition deed, 597.
principal assurance pays where there are several, 794.
proper, presumption of, from due execution, 797.
purchaser entitled to, on title deeds, 480, n. (*r*).

STAMPS AND STAMP DUTY—*continued.*
purchase-money may be reduced to lessen duty, 790.
settled for others than vendor not liable to, 790.
scale of duties, 792.
vesting order under Trustee Act, liable to, as conveyance, 661, 793.
want of, condition as to, how far expedient, 190.

STATEMENT OF CLAIM,
affidavit verifying, practice as to, in default of defence, 1242, n. (*z*).
in action for partition, 1299, 1308.
for specific performance, 1150—1152.
on covenants by purchaser of reversion, 916.
prayer for general relief now unnecessary, 1152.
under old practice, effect of, 1151.
in, for rescission after completion, 903.
relief under, how limited, 1152.

STATEMENT OF DEFENCE,
in action for specific performance, 1148—1150.

STATUTORY
acre, what it contains, 727, 728.
charges need not be disclosed in particulars, 132.
declaration. *See* DECLARATION.
form of conveyance under L. C. C. Act, 575.
owner. *See* LIMITED OWNER.
remedy. *See* MANDAMUS.

STEWARD,
admittance cannot be refused by, until payment of fine, 801.
certificate of, is evidence of proper stamps, 795.
consent of protector must be entered on court rolls by, 780, 781.
conveyance under L. C. C. Act must be entered by, 782.
copies of surrender, &c., must be stamped by, 794.
deputy, infant, may take surrender of married woman, 648, n. (*n*).
may be authorised by, to receive fine, 801.
description of parcels in surrender, what may be required by, 604.
fees for admittance under L. C. C. Act cannot be claimed by, 783.
fees and stamp duty may be claimed by, before admitting, 795.
fees of, not open to taxation, 819.
on admittance to an allotment for several tenements, 802.
on investment in copyholds under L. C. C. Act fall on company, 808.
fees, several, for admittances on general fine cannot be claimed by, 571.
land-, has no authority to contract to grant lease, 217.
not, as such, proper party to specific performance, 1127.
of manor, when evidence of handwriting of, may be required, 351.
penalties against, under Stamp Acts, 795.
preparation of surrender by, custom for, is good, 570.
purchase by, from employer when set aside, 43.

STIPULATION. *See* AGREEMENT; CONDITION.

STOCK,
contract for sale of, not enforceable, 1106.
Exchange, customs of, imported into contract, 333, n. (*d*).
sale in consideration of transfer of, liable to *ad valorem* stamp, 599, 789.

STOCK OF DESCENT,
presumption as to, 380, 381.

STONE,
agreement for sale of, whether within sect. 4 of Stat. of Frauds, 235.
belongs to purchaser from contract, 286, 732.
is mineral as between vendor and purchaser, 130, n. (*g*), 429, n. (*y*).

STOP-ORDER,
gives no priority as against prior notice to trustees, 110.
to purchaser with notice at date of security, 966.
on fund in Court, when to be obtained, 110.
on purchase-money in Court, incumbrancer entitled to, for costs, 1341.
on undivided share, has priority against later one on share carried over, 110.
purchaser of equitable interest should obtain, 966.

STOPPAGE *IN TRANSITU*,
difference between vendor's lien and, 825, n. (*e*).

STRANGER,
equities not enforceable against, prior to conveyance, 284.
fraud of, does not invalidate contract as between parties, 1176.
liable for misrepresentation, when, 113, 114.
slander of title, when, 120.
not proper party to specific performance, 1127.
exceptions to rule, 1128.
purchase in name of, and of wife and children makes him trustee, 1059.
raises resulting trust, 1054.
may be rebutted, 1065.
to contract cannot sue thereon, 1010.
exception in case of children on ante-nuptial settlement, 1010.
to contract may be bound by conditions if he consent to sale, 127.

STREETS,
Court may direct, to be laid out under S. E. Act, 79, 1279.
power of tenant for life under S. L. Act to lay out, 79, 1295.
trustees on sale for building purposes to lay out, 78, 79.

STRIPS,
of waste inclosed without authority, title to, 187, 188.
of waste, presumption as to ownership of, 187, n. (*m*), 379.
between owner of adjoining land and lord of manor only, 379.
how rebutted, 379.

SUB-LESSEE,
has implied notice of original and derivative lease, 983, 984.
vendor must covenant with, for payment of original rent, 621.

SUBMISSION. *And see* REFERENCE.
to plaintiff's demands, effect of, on costs of specific performance, 1267, 1268.

SUB-MORTGAGE,
power of sale in mortgage, how far affected by, 61.

SUB-PURCHASER,
buying with notice of invalidating circumstance in title of purchaser, 51.
conditions of sale of original purchaser cannot be varied by, 124.
conveyance set aside for fraud against innocent, on what terms, 897.
conveyance, when to be made direct to, 581.
legal estate or better equity may give priority to, 828, 829.
lien of, for money paid to purchaser, 506, 507.
lien of vendor valid against, 828.
not necessary party to specific performance, 1106, n. (*a*), 1131.
on sale by Court before certificate absolute, 1330, 1334.
relief afforded against, with notice, on purchase of reversion at under-value, 846.
stamp duty payable on his purchase-money, 598, 793.
none on subsequent conveyance of legal estate by vendor, 793, 794.
use and occupation may be maintained by, on equitable title, when, 505.
without notice of fraud in original purchase, whether affected, 843.

SUB-RECITAL,
purchaser not bound to accept, as evidence under the common condition, 166.

SUBSTANTIAL
house, what is, 137.

SUBSTITUTION
of purchaser from Court, on what terms allowed, 1334.

SUBTERRANEOUS
entry by railway company before payment or deposit, illegal, 511.
streams, right to, 415 *et seq.*

SUCCESSION DUTY,
assessment of value for, when to be made, 318.
commutation of, power of commissioners as to, 317.
is first charge on property, 314.
joint-tenant pays on accruer by survivorship, 669.
trust may have to be disclosed to avoid difficulty, 669.
leaseholds are subject to, 315.
new succession created on purchase of prior succession alone liable to, 668.
on annuity, cesser of, 318.
purchaser under power of sale protected against, 668.
on annuity, reserved to tenant in tail on re-settlement liable to, 317, n. (*n*).
on real estate in England devised by foreign testator, 317.
on re-settlement of property after disentailer, 317.
on sale by tenant for life and remainderman, 316, 667.
of disentailed property, 317.
of reversion, 238, 316, 317.
purchaser must covenant to pay, 629, 668.
of settled estate, subject to jointure, 316.
under power overriding limitations, 316, 667.
with timber, 669.

SUCCESSION DUTY—*continued.*
on sale under S. E. Act, 316, 669.
S. L. Act, 316, 669.
propositions of Jessel, M. R., as to, 663.
purchaser protected against claims for, 958.
without notice of succession, how far liable for, 315.
receipt for, effect of, 314.
legacy duty may free land from, 315.
who accountable for, 314.

SUMMONS,
sale or foreclosure may be ordered on, 1319.
vendor and purchaser,
applies to what cases, 1238.
costs of, what included in, 1272.
covenants to be contained in conveyance may be decided on, 635.
equivalent to reference as to title, 1226, 1238.
facilitates decision as to doubtful title, 1238, 1239.
order on, must be worked out in Chambers, 1226.

SUPERFLUOUS LANDS,
adjoining owners, division between, how made, 861.
title may be acquired by, under Stat. of Lim., 859.
who are, 861.
condition as to admitting that lands were, is binding, 170.
debenture holder has not specific charge on, 1221.
lands for building purposes are not, 857, 861.
in town are not, 857, 860.
over tunnel or under arch are not, 860.
rights of repurchase in original vendors, 857.
arise, where, 858, 859.
do not arise, where, 860.
sale of,
failure to make, effect of, 857.
Metropolitan District Railway Company has full power of, 858, n. (*l*).
mode of, 858.
order for, under judgment, 548, n. (*m*).
promoters must make, within what time, 857.
receipt on, form of, 703.

SUPPORT,
extraordinary,
grant of, may be implied, on sale by common owner, 420, 421.
right of, acquired by twenty years' enjoyment, 420.
not natural, 420.
whether within Prescription Act, *quære*, 420.
lateral, right to, for buildings, 420.
for soil, 419, 420.
how limited, 420, n. (*g*).
necessary, right to, impliedly granted or reserved on conveyance, 609.
railway company has no right to, from minerals, 423, 424.
may purchase minerals to acquire right of, 423.
reservation of mines in conveyance to, effect of, 604.

SUPPORT—*continued.*
right of, belongs to allottee of surface under inclosure, 422.
grant or reservation of minerals does not destroy, 421, 422.
sewer has no right to lateral, 424.
under Public Health Act entitled to subjacent, 424.
mine-owner entitled to compensation for, 424.
subterranean water gives no right of, 422.
withdrawal of, each fresh subsidence caused by, is new cause of action, 421.
gives no right of action till damage done, 421.

SUPPRESSION,
fraudulent, of charges, &c. is a misdemeanour, 344.
of instruments affecting only equitable title, 341 *et seq.*

SURETY,
cannot defeat creditors of debtor by fraudulent conveyance, 1027.
joinder of, in bond for purchase-money, not waiver of lien, 829.
liability of, for arrears on bond, not limited to six years, 460.
payment of interest by debtor may bind, 457.
to bond under L. C. C. Act, 508, n. (*i*).

SURPRISE,
as to meaning of contract, ground for allowing defendant parol variation, 1153.
defence to specific performance, how far, 1174, 1207.
parol variation not allowed to plaintiff on ground of, 1149.

SURRENDER,
of attendant terms, when presumed, 368.
of copyholds,
by married woman, 9, 648. *See* COPYHOLDS.
by tenant in tail, 779—781. *See* COPYHOLDS.
costs of, purchaser pays, 801.
covenant for, should not contain covenants for title, 628.
custom for steward to prepare, is good, 570.
parcels how to be described in, 604.
steward must stamp, 794, 795.
to uses, lord must act upon, if he accept, 580.
need not accept, 579, 580.
to use of will always valid, 580.
unnecessary to establish devise, 785, n. (*k*).
vesting order under Trustee Act makes, unnecessary, 659.
of lease, on grant of concurrent lease, operates by estoppel, 437.
of life estate to make recovery valid not presumed, 370, 371.
of reversion, effect of, on merger, 917.
of satisfied term, purchaser entitled to, 577.

SURVEY,
costs of, not recoverable by purchaser as damages, 1077.
entry for, not entry within s. 85 of L. C. C. Act, 508, 511.
not part-performance, 1138.

SURVEYOR,
evidence of, value of, 849, n. (*e*).
fees of, not payable by company on investment in buildings, 808.
under L. C. C. Act,
appointment and certificate of, necessary to make contract binding, 705.
of, by magistrates, 705.
of notice of application for, is necessary, 509.
of one, by each party, 705.
of one of themselves by trustees is bad, 704.
of third, in case of difference, 705.
valuation of lands by, includes what, 508.
valuation of estate by, effect of false statement of, by vendor, 112, 113.

SURVIVORSHIP. *And see* JOINT PURCHASERS; JOINT TENANTS.
clause of, whether a limitation by way of succession, 1281.
presumption of, from age or sex, none, 390.
on joint purchase, 1047 *et seq.*
succession duty payable on accruer by, 669.
wife's right of, destroyed by husband's assignment of her leaseholds, 9, 10, 1122.
wife's right of, on purchase by husband in joint names, 1058, 1059.

SUSPICION,
explanation of matter of, how far required from vendor, 374.
of fraud, does not render title doubtful, 1236.
not a defence to specific performance, 1155.
not notice, 986.

TACKING,
allowed to purchaser even after notice, 934, 941.
not allowed under Yorkshire Registries Acts, 776, 963.

TAIL. *See* ESTATE TAIL; TENANT IN TAIL.

TAKING,
tunnelling, how far, within L. C. C. Act, 242, n. (*m*).
what is, 515, n. (*f*), 802, n. (*m*).

TAVERN,
licence to build shops does not authorize, 138.

TAX,
local, need not be mentioned in particulars, 132.
property, right of purchaser from Court to deduct, 1333.

TAXATION,
bill under agreement under 33 & 34 Vict. c. 28, exempt from, 821.
of abstract, 346, n. (*g*).
of costs of arbitration under L. C. C. Act, 814.
conveyance under L. C. C. Act must be before payment, 803, n. (*o*).
of fees of steward of manor not ordered, 819.

TAXATION—*continued.*
of solicitor's conveyancing costs,
application for, within twelve months of delivery before payment, 815.
c. q. t. may obtain order for, of his trustees' solicitors, 819.
may be made by person liable to pay, 816, 818.
previous liability necessary, 818.
bill once delivered binds solicitor for purpose of, 818.
cannot be withdrawn to escape, 819.
improper agreement does not exclude, 818.
interest not allowed on costs during, 819.
of solicitor trustee's bill, no limit as to time for, 819, 820.
of town-agent's bill may be obtained by country solicitor, 819.
ordered on summons of course, 815.
order for, under special circumstances within twelve months from payment, 816.
settlement under pressure does not prevent, 817.
what are special circumstances, 816, 817.
what constitutes payment, 816, n. (*o*), 817.
special agreement as to, Court will not inquire into or interfere with, 818.
under general jurisdiction, where solicitor claims lien, 820.

TELEGRAM,
offer by, should be accepted by, 254.
signature to instructions for, good within Stat. of Frauds, 269.

TENANCY,
character of, should be disclosed, if affecting the property, 112.
from year to year, not enforceable, 1112.
notice of, is notice of tenant's equities, 518, 519, 975, 976, 984.
as between purchaser and tenant, after completion, 519, 976.
extends to equities arising under collateral agreements, 975, 976.
does not extend beyond equities of occupier, 984.
not as between vendor and purchaser, pending completion, 519, 976, 1196.
notice of, is notice of landlord's title, how far, 976.
past, is not notice of tenant's equities, 983.
of purchaser determined by conveyance, 918.
contract, how far, 290, 501.
of vendor is not notice of his lien, 984.
permission to retain possession creates new, 442.
purchase of reversion does not determine, 918.

TENANCY AT WILL,
contract for purchase determines, 501.
parol evidence of facts admissible to show, 1048.
presumption of, on joint purchase, 1047 *et seq.* *See* JOINT TENANCY.
purchaser's possession after rescission, whether trespass or, 1085.

TENANT,
agreement by, for abatement of rent is within Stat. of Frauds, 236.
for increased rent for improvements not within Stat. of Frauds, 236.

TENANT—*continued.*
allowances to, condition as to, is usual, 148.
attornment by, to purchaser of reversion is unnecessary, 916.
consent of, necessary to apportionment on sale of property in lots, 147.
contract by, for purchase determines tenancy, 290, 501.
prevents landlord distraining, 290.
conveyance to, determines his liability under lease, 918.
deteriorations caused by, after contract, vendor is liable for, 733.
ejectment of, after contract, vendor liable for, 733.
encroachment by, is held upon terms of original lease, 188.
title to, how proved, 188.
estopped from denying title of persons giving him possession, 291.
expenditure by, how far evidence of contract for lease, 1139, 1142, 1143.
on property enures to landlord, how far, 949.
inquiry need not be made of, when out of possession, 520.
to be made of, on purchase, 518, 519.
not proper party to vendor's action for specific performance, 1128.
notice of tenancy is notice of equities of, how far. *See* TENANCY.
notice by vendor to, to pay rent to another, when a disturbance, 882.
payment of increased rent by, not evidence of contract for lease, 1137.
purchase by, does not preclude his claim for compensation, 735, 736.
purchaser of reversion of lease not under seal may sue, for occupation, 917.
relation of landlord and, is legal, not equitable, 312.
retention of possession by, how far evidence of contract for lease, 1136—1138, 1139.
not evidence of contract to purchase, 1136.
under agreement for lease, whether more than yearly tenant, *quære*, 229.

TENANT AT WILL,
contract for purchase determines tenancy of, 290, 501.
expenditure by, with acquiescence of landlord, effect of, 949.
purchaser in possession after rescission, whether trespasser or, 504, n. (*y*), 1085.
during contract is, 442, 503, 504, 1085.
right of entry against, when barred, 444.
tenancy of, how determined, 444, n. (*z*).
time runs, against, from what date, 442.
c. q. t. is not, within Statute, 442.
may be, to trustee, 442, 443.
mortgagor is not, within Statute, 442.
mortgagee is, to mortgagor after repayment, 444.
tenant encroaching is not, 443.

TENANT FOR LIFE,
acquiescence of, does not bind reversioner, 949, 950.
allowance to, by way of apportionment on sale of stock, 98.
assignee of, must resort to S. E. Act, 1282, 1295.
consent to sale,
alienation of life estates affects power of, how far, 87, 88.
bankruptcy affects power of, how far, 86 *et seq.*
before prescribed period may be given, 70.
cannot be given or withheld for his own benefit, if trustee, 71.

TENANT FOR LIFE—*continued.*
consent to sale—*continued.*
concurrence as protector does not destroy power of, 88.
how far necessary under charge of debts, 700, 701.
contract of, as tenant in fee, how far enforceable, 1187.
part-performance of verbal, does not bind remainderman, 1145.
covenants for title by, on sale, extent of, 619, 620.
damages recovered by, for breach of covenant for title not apportioned, 897.
deposit forfeited does not belong to, as against remainderman, 224.
equitable, cannot convey under L. C. C. Act without concurrence of trustees, 92.
legal, entitled to custody of title deeds, 473.
as against contingent remainderman, 474.
vested remainderman, 474.
Court will interfere with, when, 473, 474.
not as against trustees, when, 474.
legal, how far bound to produce title deeds, 474.
lunatic, exercise of powers under S. E. Act by, 8, 1290, 1292.
S. L. Act by, 8.
married woman, husband of entitled to custody of title deeds, 474, n. (*b*).
on purchase by trustees must covenant with vendor, 633.
on sale by Court may purchase, 1322.
payment by, of charge which is barred does not bind remainderman, 457.
by, of interest on testator's specialty binds remainderman, 456.
off of charge by, does not extinguish it, 1041.
power of sale,
cannot sell to himself under, 37, 42, 47.
contract under, enforceable against remainderman, 325, 1117.
by remainderman, 1114.
may accelerate by surrender of life estate, 70.
purchaser remaining in possession after death of, must account, how far, 1033.
purchase-money under L. C. C. Act, rights of, in,
balance on reinvestment, when paid to, 753.
contest between remainderman and, not adverse litigation, 809.
may recoup himself for redemption of land tax, 751.
not for repairs or improvements, 752.
on fund set apart for renewal of lease, 755.
on sale of freeholds subject to lease, 755, 756.
leaseholds, 754, 755.
renewable leaseholds, 755.
petition by, for payment out to trustees of settlement, 758.
for reinvestment, when to be served on, 759.
redemption of land tax by, how far repayable, 398, n. (*f*).
restrained from alienation may sell, when, 17.
sale by reversioner and, not within rules as to sales of reversions, 844.
succession duty
on sale by, payable as against purchaser, when, 667.
remainderman and, is payable, 667.

TENANT FOR LIFE—*continued.*
succession duty—*continued.*
on sale by, under S. E. Act, land is discharged from, 669.
S. L. Act, land is discharged from, 669.
trustee of bankrupt, must apply under S. E. Act to exercise powers, 1295.
under Settled Land Act. *And see* SETTLED LAND ACT.
consent of, necessary where settlement and Act conflict, 85.
unnecessary where there is absolute trust or order for sale, 86.
contract of, enforceable by or against successor, 1114, 1115, 1125.
conveyance by, may destroy term, 336.
development of estate by, 79, 1280, n. (*k*).
notice of intention to exercise powers may be general, 86, n. (*b*).
option of, as to disposition of capital money, 97. *See* CAPITAL MONEY.
powers of, are inalienable, 88, 1282, 1295.
trustee for other parties of exercise of powers, 71, 72.

TENANT FROM YEAR TO YEAR,
contract by, for purchase, how far determines tenancy, 290.
person inclosing waste without authority is, 188.
time runs in favour of, from what date, 444.

TENANT IN COMMON,
admittances of several, require separate stamps, 795.
contract by, to sell whole, enforceable as to his share, 1189, 1190.
covenants for title by, how limited, 621, 622, 624, 895.
liable to account to co-tenants, how far, 1051.
of manor, buying copyholds, merges them in the freehold, 1043.
of mortgage, buying equity of redemption, holds it in common, 1049.
parts of copyhold tenement held by, are separate tenements, 571.
possession of one, is not that of another, within Stat. of Lim., 446.
production of title-deeds may be compelled by, 473.
purchase by one, from another, entitles him to what abstract, 326.
of share of, may be notice of partnership, 519, 520.

TENANT IN TAIL,
abstract showing vendor is, in possession, whether sufficient, 325.
bankrupt, assignee of, when required to bar entail, 910.
base-fee, conveyance of, with covenant to bar remainders when required from, 582, 1185, 1186.
contract by, equity will not supply defects in, 946.
conveyance by, must be enrolled, 778 *et seq.*
of copyholds by, 779, 781. *And see* COPYHOLDS.
disentailing deed must be executed by,
by separate deed at purchaser's election, 575.
on application of judgment creditor, 537, 1347, n. (*k*).
on sale as owner in fee if in possession, 325, 910, 911.
to obtain payment out of moneys under L. C. C. Act, 759.
infant, application by, under S. E. Act, how made, 1283, 1291.
infant, may be ordered to convey, 1347, n. (*k*).
is person absolutely entitled under L. C. C. Act, s. 69..759.
lands of, not extendible under old law, 526.

TENANT IN TAIL—*continued.*
lands of, now extendible, how far, 536, 537.
lunatic, application by, under S. E. Act, how made, 1292.
precluded by statute from alienation may sell under L. C. C. Act, 17.
sale fraudulent against, when remainderman can set aside, 852.
Statute of Limitations, affects rights of, how far,
barred, bars all remainders which he might have barred, 448, 449.
creating base fee, time runs against, from what period, 450.
deceased, time running against, continues to run against remainderman, 449.
except where he has purported to convey by illegal method, 449.
remainderman has no extra period for disability, 449.
incapable of barring estate tail, time does not run against, 449, n. (*n*).
time does not run against, during incapacity to bar estate tail, 449.
succession duty payable by, in remainder after entail barred, 317.
in respect of annuity reserved to, on re-settlement, 317, n. (*n*).
title dependent on agreement by, to bar estate tail is defective, 322.
to her separate use may bar entail, 12.
voidable estate, effect of bankruptcy of, after creation, 912, n. (*z*).
created by, how confirmed, 912.

TENDER,
of annuity, necessary on death of *c. q. v.*, 288.
of conveyance and purchase-money necessary to action on contract, 1086.
of deposit unnecessary on rescission by vendor, 488.
of mortgage-money, inquiry by purchaser as to, 374.
necessary to prevent sale by mortgagee, 81.
sale under Court may be by sealed, 1313, 1314.

TENURE,
lands of different, how far to be distinguished in contract, 175, 255.
mis-statement of, how far subject for compensation, 154, 155, 1199.
of allotments under Inclosure Act, 326.
variation of, is breach of covenant for seisin, 881.

TERM FOR YEARS. *And see* LEASE; LEASEHOLDS; SATISFIED TERMS.
assignment of, by executors is good, 652.
attendant, assignment of, in conveyance not liable to extra duty, 797.
is not protection against Crown debts, 562.
mesne assignment of, generally presumed, 367.
surrender of, when presumed, 368.
barred, is "pretenced title," 278.
bequest of, how affected by purchase of reversion, 310.
extendible under Stat. of Frauds, how far, 527.
in gross not affected by Crown debts, 563.
judgment affects, how far, 526.
loss of deed creating, effect of, 335.
purchaser need not accept shorter, than contracted for, 1200.
tenant for life selling under S. L. Act may discharge, 336.
termor contracting to sell the fee must assign, 1189.
title to old, in gross, what to be shown, 335.

TERM FOR YEARS—*continued.*
wife's,
bequest of, by husband does not defeat her title, 1122, n. (*o*).
death of husband before actual assignment, effect of, *quære*, 9, 1122.
equitable, concurrence of wife necessary to assignment of, 10, 649.
legal, assignment of, by husband, 9, 649, 1122.
mortgage of, by husband, does not defeat her title, 1122, n. (*o*).
reversionary, assignment by husband of, 9, 10, 649.
voluntary assignment of, by husband, wife cannot defeat, 1021.

TERMS,
of contract. *See* CONTRACT.
outstanding. *See* OUTSTANDING.

TIMBER,
consideration includes, for purpose of stamp duty, 597, 788.
Court can authorize sale of, under S. E. Act, 1278.
fall of, or felled, after contract, vendor must account for, 286, 732.
felling ordinary, by vendor is matter for compensation, 286, 507.
felling ornamental, by infant may confirm voidable purchase, 31.
by purchaser in possession, effect of, 502.
by vendor avoids contract, 286, 507, 1215.
growing, is within Stat. of Frauds, s. 4..234.
inability to cut, need not be disclosed on sale of copyholds, 132.
interest payable on, from date of valuation, 713, 714.
misdescription of, may not admit of compensation, 157.
ornamental, what is, 31, n. (*k*).
payment for, conditions should provide for, 149.
under condition, must be made, though purchaser cannot cut, 150.
purchaser in possession, restrained from cutting, 289, 1222.
severed, not within Stat. of Frauds. s. 4..234.
succession duty for past sales, vendor must produce receipt for, 669.
payable in respect of future sales of, 669.
vendor must assess and pay, 669.
taking fall of, by purchaser in possession is not acceptance of title, 502.
trustees cannot sell, separately from estate, 76, 1297, n. (*k*).

TIME,
for completion,
condition as to, vendor not observing, cannot insist on, 489.
deposit need not be returned on expiration of, 488.
essential, how and when,
by express agreement, 483.
by implied intention, 483 *et seq.*
e. g. from construction and nature of property, 484, 485.
on exercise of right of pre-emption, 485.
on sale by fluctuating body, 484.
on sale of property for immediate residence, 484.
of fluctuating value, 484.
public-house and goodwill, 483.
wasting property, 484.
where purchase-money is required to pay off incumbrances, 485.

TIME—*continued.*
for completion—*continued.*
essential, how and when—*continued.*
condition as to time for objections, affects, how far, 485.
for delivery of possession, affects, how far, 486.
payment of interest, affects, how far, 486.
private motive for purchase does not affect, 485.
purchaser must press for completion, 486.
wilful delay in making title, affects, how far, 486.
enlargement of, by vendor is not waiver, 490.
enlargement or waiver of, may be express or by conduct, 489. *And see* CONDUCT.
objection on ground of delay in, must be taken promptly, 490.
rule of Equity as to, not being essential, 143, 482, 483.
rule of Law as to, being essential, 482.
subsequent notice may limit, 487.
must be reasonable, 487, 488.
variation of, affects right to crops, how far, 285.
waiver of, by acceptance of abstract showing certain delay, 491.
non-application for abstract may be, 490, 491.
for delivery of abstract,
condition as to, 141, 142, 346, 347.
waived by acceptance after time fixed, 490.
for election by assignee of bankrupt, 291.
infant to avoid contract, 30.
for examination of deeds, 472.
for execution of further assurance, 888.
for impeachment by *c. q. t.* of purchase by trustee, 55.
of sale of reversion, 855.
of voidable sale, 54, 898.
for investment by trustees, 98.
for requisitions,
condition as to, 178.
does not apply in case of defective abstract, 180, 184.
waived by acceptance after date, 490.
enlarged by fresh evidence on defective point, 184.
runs from delivery of perfect abstract, 184.
for sale by executors under implied power, 65—67, 693—695.
trustees, 62—64.
may not be anticipated, 70.
when may be postponed, 70.
fixed by trust deed, Court will not anticipate, 1324, 1350, 1351.
for searches, 569.
for showing title, is date of judgment or reference, 487, 1179, 1242.
lapse of, evidence of acquiescence, 54.
less than statutory period, may bar relief in Equity, 855.
married woman restrained from alienation, how far affected by, 56.
precludes specific performance, when, 1212 *et seq.*
of death, no presumption of, 387.
priorities of equities governed by, 942 *et seq.* *See* PRIORITY.
registers of birth, &c., when evidence of, 392.
under Stat. of Lim. *See* LIMITATIONS, STATUTE OF.

TITHE,
benefice not included in, under 1 & 2 Vict. c. 110..541.
Commissioners,
award of, conclusive, 400.
is evidence, 399, n. (*m*).
jurisdiction of, to decide questions, 399, 400.
exceptions to, are,
tithes by local custom, 400.
in City of London, 400.
of fish, 400.
of minerals, 400.
Commutation Acts, instruments under, exempt from stamp duty, 275.
compensation, when allowed for, 1206.
composition real for, must have been created since 13 Eliz., 401.
Crown grant of, vendor must produce, 188, 189.
exemption from, proof of,
by showing that land belonged to monastery, 400.
under 2 & 3 Will. 4, c. 100..400, 401.
exceptions from Act, 402.
title of monastery need not be shown, 402.
extendible under judgment, 531.
impropriate, judgment binds, how far, 525.
no merger of, 336, n. (*u*).
is fatal defect, where land is sold tithe-free, 1201.
is presumed to be burden on the land, 398, 1205, n. (*a*).
is question of fact, not of title, how far, 1201, n. (*q*).
merger of, 336.
modus for, belonging to corporation sole, not "rent" within Stat. of Lim., 433.
modus for, proof of,
formerly by proof of payment during legal memory, 401.
may still be by same evidence as formerly, 402.
under 2 & 3 Will. 4, c. 100..401, 402.
exceptions from the Act, 402.
custom of manor not within Act, 401, n. (*f*).
statutory tithes in the City not within Act, 403.
rent-charge,
abstract should state amount of, 345.
apportionment of, 400.
arrears of, not recoverable for more than six years, 459.
extraordinary, commissioners might formerly create, 401.
cannot by subsequent award create, 401.
identity of lands subject to, 378, n. (*y*).
is "rent" within Stat. of Lim., s. 1..403, 434.
merger of, 399, n. (*l*).
moneys under L. C. C. Act may be expended in buying up, 751.
not a charge on inheritance so as to entitle Court to sell, 400.
sale of, abstract should show what title, 336.
for redemption of land tax, may make tithe lay property, 336, n. (*s*).
not within V. and P. Act, 336, n. (*t*).

TITHE—*continued.*
sale of land freed from, abstract should show what title, 336.
ground of exemption, 329.
by exchange, what title to be shown, 329.
Stat. of Lim. applies to, only as between rival claimants, 403, 433.
does not apply to, belonging to corporation sole, 433.

TITLE,
abstract showing vendor tenant in tail in possession is good, 325.
acceptance of,
does not include concealed defects, 350, 496.
examination of deeds may be evidence of, 472.
implied from attempted resale, when, 498.
letters or conduct, 496, 497.
preparation of conveyance, when, 497.
taking possession, when, 499.
not if taken under contract or by consent, 499, 500.
taking possession without requiring abstract, 500.
more easily as to leaseholds than as to freeholds, 501.
payment in by purchaser from Court, when allowed without, 1339.
possession by purchaser under tenancy is not, 501.
taken by purchaser from Court is, 1339.
purchaser, whether entitled to abstract after, 319.
what acts by purchaser in possession do not amount to, 501, 502.
acceptance of offer, conditional on approval of, 267.
all documents necessary to, must be produced, 105.
application for, by purchaser in possession, may modify acts of ownership, 503.
approval of, counsel's opinion as to, cannot be repudiated, 495.
auctioneer has no implied authority to warrant, 203, n. (*a*).
bankrupt cannot make, 17.
by adverse possession,
against Crown, may be forced on purchaser, 468, n. (*r*).
for twelve years, bars rightful owner, 464.
founds action of ejectment, 464.
good against all except rightful owner, 464.
may be devised, inherited, or conveyed, 464.
commencement of, 334.
document dated before, purchaser's rights as to, 337, 339.
concurrence of heir in sale under unregistered will, gives good, 772.
condition as to,
binds, if explicit, 168—170.
misrepresentation in, avoids contract, 163—165.
in, ground for setting aside sale, 898, 900, 901.
And see MISREPRESENTATION.
mistake in, effect of, 165.
must be clear and unambiguous, 163.
on sale of copyholds, formerly waste of manor, 189, 190.
should be inserted where right of preemption given, 238.
condition against requiring lessor's title does not prevent purchaser from showing that lease is invalid, 163, 164, 169, n. (*z*).
for such title as bankrupt held under is binding, 169.
vendor has is binding, 169.

TITLE—*continued.*
condition for rescission on objections as to, 178, 179, 181. *And see* RESCISSION.
restricting, does not relieve purchaser from notice, 200, 980.
to make good, not affected by purchaser's knowledge of defect, 165, 1205. *And see* KNOWLEDGE.
contract may show that purchaser required no, 170, 171.
costs of complication in, caused by himself, mortgagee must pay, 764.
examination of, purchaser may recover, on breach by vendor, 348, 1076.
investigation of, included in cost of V. & P. summons, 1272.
making out on sale under L. C. C. Act, purchaser bears, 803.
covenants for. *See* COVENANTS FOR TITLE.
deed confirming, should recite objections in full, 596.
defect in,
client's, solicitor is liable for disclosing, 350.
existence of incumbrances not dischargeable before completion, is, how far, 323, 324.
land tax, on sale free from it, is, 323.
tithe, on sale free from it, is, 1201.
imperfection in abstract is not, when, 321.
inability to give covenant for production is not, 160, 322, 626, 627, 880.
title is not, 880.
discharge for purchase-money is, 322.
obtain concurrence of necessary party is, 322.
need not be specially pointed out, 105.
occasioned by act of God, is not breach of covenant for title, 885.
defective,
Court will not sell under special conditions, 1326.
not made good till after death of purchaser, effect of on rights of his representatives, 305.
purchaser accepting through fraud of vendor may be relieved, 898.
from Court, may be discharged for, 1335, 1336.
knowingly taken, proper form of conveyance to, 886.
may elect to take, when, 1185 *et seq.*, 1245.
not bound by his counsel's acceptance of, 350, 495.
reconveyance decreed for, on what terms, 903.
vendor must convey with compensation, 1185 *et seq.*
perfect by conveying after-acquired interest, 909, 1185.
dependent on agreement by tenant in tail to bar, objections to, 322, 325.
married woman to concur, how far defective, 322.
doubtful, 1229 *et seq.* *See* DOUBTFUL TITLE.
equitable, prior to specified root, when to be produced, 171.
evidence as to, cannot be required after completion, 911.
purchaser not entitled to custody of negative, 764.
of possession, when admissible as proof of, 340.
falsification of, criminal liability for, 108.
good, means consistent with contract, 494, n. (*h*).
good, when first shown, 325, n. (*x*).

TITLE—*continued.*
interest runs from date of showing good, 711, 712.
although vendor afterwards supplements title, 712.
lease granted without, damages for, 893.
length of, what now requisite, 99, n. (*s*), 105.
loss of deeds, when an objection to, 339, 345. *See* TITLE-DEEDS.
marketable, fiduciary vendors must show, 94.
knowledge of purchaser immaterial, where contract is for, 165, 1205.
not always required for re-investment under L. C. C. Act, 760.
right to, may be waived, 495.
vendor must make, 105, 495, 1205, 1230, 1236.
mortgagee may enforce legal, by ejectment, 311.
requires different, from that required by purchaser, 349.
selling under power confers irredeemable, 41.
even though second mortgagee be purchaser, 41.
notice,
of dealings with equity of redemption, purchaser of mortgage title has, 977.
of defects, purchaser has, from neglect to examine, 973, 977, 978.
of everything which examination would show, purchaser has, 868.
of lessor's, lessee has, 869.
purchaser has, though precluded from inquiry, 191, 978, 980, 981, 984.
under Conv. Act, 981.
of payment of rent to A., is notice of A.'s, 976.
of tenancy, is notice of landlord's, 976, 984.
of vendor's, purchaser has, though he does not examine, 978, 980.
of administrator, does not generally relate back, 216, n. (*q*).
of Crown, adverse possession affects, how far, 467, 468.
of disseisor, is good absolutely after twelve years, 466.
against all but disseisee, 465.
of Duchy of Cornwall, adverse possession affects, how far, 468.
of reversioner, must be produced where waiver of forfeiture relied on, 195.
of series of disseisors *inter se*, 466.
of tenant in tail in possession is defeasible on his death before completion, 325, 326.
of testator, devisee estopped from denying, 466.
perfect, what is, 321, 324.
possessory, what constitutes, 172.
"pretenced." *See* PRETENCED TITLE.
purchaser can only require such as he contracted for, 171.
not liable for use and occupation in default of, 290.
recitals should show vendor's, when, 591.
reference as to, 1223—1228. *See* REFERENCE AS TO TITLE.
root of,
Conv. Act does not authorize misleading statement as to, 172, 173.
devise, general, is bad, 338.
specific, is not proper, 338.
disentailing deed, not good, 339.
false, vendor cannot require purchaser to assume, 170.

TITLE—*continued.*
root of—*continued.*
if irregular must be so stated, 171, 172, 174, 337.
instrument dependent on prior instrument not good, 339.
throwing doubt on earlier, is bad, 339.
lease not good, on sale of fee simple, 338.
mortgage for term not good, on sale of fee simple, 338.
title prior to, may be investigated *aliunde*, 173.
voluntary conveyance is not good, 173, 339.
what is good, 338.
"satisfactory," means marketable, 179.
slander of, what will found action for, 120, 121.
time for showing is date of decree or reference, 487, 1179, 1242.
was at law date of trial, 487.
to inclosure, defective, may be confirmed, 958.
to land out of jurisdiction, Court will not decide questions as to, 1107.
to land-tax, defective, may be confirmed, 957, 958.
to satisfied term, what to be shown, 329.
trustees may take counsel's opinion upon, 201.
purchasing must require what, 99.
under foreclosure decree, dangers of, 468, 469.
under Stat. of Limitations,
by adjoining owner against railway company, 859.
danger of, may be increased by lapse of time, 463.
does not operate as conveyance, 463, 464.
how proved, 462, 463.
nature of, 464.
purchaser compelled to accept, 462.
undertaking by solicitor to clear up, not specifically enforced, 501.
want of,
at date of contract, how far defence to specific performance, 1178—1180.
purchaser cannot require indemnity for, 1194.
may preclude himself from objecting to, 1181.
must rescind at once on discovering, 1179, 1180.
not entitled to damages for, 1078 *et seq.*
to any part, fatal at law, 1083.
to material part, fatal, 155, 156, 1198 *et seq.*
to one lot, may vitiate contract as to others, 1084, 1184, 1203.
to small part, is matter for compensation, 1202, 1203.
vendor cannot generally raise as defence to specific performance, 1185 *et seq.*
secus, on ground of mistake or hardship, 1192—1194.
where specific performance impossible, 1186.
vendor may remedy, on the reference, 1179, 1242.
what to be shown on various sales,
of advowson, 334.
of allotments, 186, 326.
of contract for purchase, 319.
of copyholds formerly waste of manor, 189, 190.
of enfranchised copyholds, 189, 330.
of exchanged lands, 326—329.

TITLE—*continued.*
what to be shown on various sales—*continued.*
of land depending on Stat. of Lim., 462, 463.
of lands acquired from charity, 323, 329.
subject to debentures, 333.
tithe free, 329.
of leaseholds, 330—332.
of old term of years, 335, 336.
of pew with house, 333, 334.
of property held under Crown grant, 336.
of registered estate, 347.
of reversionary interest, 335.
of shares, 332, 333.
under agreement not to call for legal estate, 336.

TITLE DEEDS,
conveyance of inheritance carries right to, 826, n. (*p*).
notice of, should be indorsed on leading deed retained, 783.
copies of, how rendered admissible, 159.
mortgagee not entitled to, on payment off, 478.
relating to dealings with mortgaged property, mortgagee must pay for, 764.
custody of,
c. q. t., how far entitled to, 826, n. (*p*).
condition for, by purchaser of largest lot, 162.
on sale of part of mortgaged estate, 162.
legal tenant for life entitled to, 473. *See* TENANT FOR LIFE.
when deprived of, 473, 474.
married woman tenant for life, husband of, entitled to, 474, n. (*b*).
whether his trustee in bankruptcy entitled to, *quære*, 474, n. (*b*).
mortgagee not entitled to, on payment off, 478.
person having possession of, entitled to, as against owners under same title, 473.
purchaser entitled to, on completion, 160, 762.
of largest lot entitled to, 162, 762, 763.
on sale by Court, 1349.
vendor entitled to, if he retain any part of estate, 162, 163, 762.
delivery of,
enforceable now, not only in equity, 940.
not ordered against purchaser for value without notice, 941.
order for specific performance should direct, 1347.
purchaser from Court should see to, 1341, 1348, 1349.
vendor entitled to, from purchaser on failure to complete, 1085.
evidence by, condition as to, 166.
examination of,
evidence of acceptance, how far, 472.
expense of, falls on purchaser, 471.
when recoverable by purchaser, 471, 472.
extraordinary expense of, vendor must bear, 471.
must be made in register county, 767.
neglect of, on delivery, does not postpone purchaser, 987.
when to be made, 472, 569.

TITLE DEEDS—*continued.*
grant of, unnecessary in conveyance, 613.
inquiry for, answered by reasonable excuse absolves purchaser, 951, 961, 980.
neglect to make, effect of, 520, 950, 951, 979.
lien of vendor does not entitle him to retain, 826.
lien upon, by solicitor of executor, 476, 477.
mortgagee, 476.
mortgagor, 477.
enforceable against trustee in bankruptcy, how far, 477, n. (*x*).
loss of, effect of, 159, 339, 345, 353.
makes secondary evidence admissible, 159.
mortgagee liable for, 477.
non-possession of, may not postpone legal estate, 950.
not notice of interest of holder, 984, 985.
non-production of, may be notice of their deposit, 478, 520, 766.
possession of, effect of, on priorities, 950 *et seq.*
delivery of incomplete set may absolve purchaser, 951, 961.
to mortgagor may not postpone mortgagee, 950.
to borrow specified sum, effect of, 950.
negligence as to, of assignees of insolvent may not postpone them, 951.
per se does not postpone legal estate, 826, 950, 961.
where both titles are equitable, 951, 952, 953.
prior estate is legal, 952.
possession of, by third party, notice of, is notice of charge, 977.
production of,
acknowledgment for. *See* ACKNOWLEDGMENT FOR PRODUCTION.
against mortgagee, 475, 476.
condition against, must be unambiguous, 163.
costs of, liability to, how affected by Conv. Act, 470.
when they are not in vendor's possession, 159, 160.
covenant for, inability to give not a fatal defect, 160, 322, 470.
includes what, 160.
notice of, should be indorsed on leading deed retained, 766.
purchaser entitled to, on completion, 160, 762.
to another does not entitle vendor to retain, 763.
vendor must procure their production under, 472.
for verification of abstract is vendor's duty, 105, 159, 470.
on purchase by solicitor from client, 52.
place for, 470, 471.
notice of, should be given to purchaser, 471, 472.
who may compel, 473 *et seq.* *And see* PRODUCTION.
trustees selling under trust cannot retain settlement, 763.
undertaking by mortgagor on loan of, how enforced, 477.
upon record, secondary evidence of, admissible, 159.

TOLLS
not within sect. 40 of Stat. of Lim., 455.

TOMBSTONE
evidence of pedigree, 394.

TOWN,
meaning of, in L. C. C. Act, 860.

TRADE,
covenant in restraint of,
construction of, against covenantee, 872, 873, 874.
test of reasonableness of, 1111, n. (*b*).
when enforceable, 870, 1113.
dealings with land by joint tenants for, create tenancy in common, 1049, 1050.
evidence as to custom of, admissible to explain contract, 1091.
injunction against carrying on, after sale, 1111.
joint purchase of land for purposes of, creates tenancy in common, 1049.
purchase of premises for, makes time essential, 484.
restraint of, rule against, does not apply to negative covenants, 865.

TRADER,
Bankruptcy Act, 1883, s. 47, not confined to settlements by, 1030, n. (*h*).

TRADES-UNION,
illegality of, 1163, n. (*m*).

TRAITOR. *And see* CONVICT.
incapacity of, to purchase, 33.
to sell, 15.

TRANSFER,
instrument operating as, liable to stamp duty, 277.
of funds of one settlement to make good default in other, is for valuable consideration, 929.
of mortgage, neglect to give notice of, does not preclude foreclosure, 987.
subject to receipt given by mortgagor, 953.
of shares,
contract for, specifically enforceable, 1106.
registration of, company may refuse, 333.
of, notice before, does not postpone purchaser, 933.
secus, where transferor has not legal title, 933, n. (*e*).
registration of, purchaser must see to, 333.
want of, effect of, 333.
written, of parol contract good, 232.

TRAVELLING. *See* JOURNEYS.

TREASON. *And see* CONVICT.
attainder for, effect of, on right to sell or purchase, 15, 33.

TRESPASS,
against railway company, adverse claimant may bring, 512.
commission of acts of, not part performance, 1139.
entry by person barred by Stat. of Lim. is, 463, n. (*y*).
possession without liability for, part performance, 1136.
purchaser in possession after rescission may be liable for, 1085, 1086.
vendor's licensee using easement after conveyance to purchaser is guilty of, 1043.
void agreement for lease may operate as licence so as to excuse, 232.

TROVER,
action of, will lie for gathering sea-weed, 429.

TRUST. *And see* TRUSTEE.
breach of,
confirmation of, by *c. q. t.* may be kept off conveyance, 572.
contract involving, not enforceable, 1165, 1172.
conveyance of legal estate in, does not deprive purchaser of legal rights, 934.
funds transferred from one settlement to another to make good, belong to latter, 929.
land held in, concurrence of one *c. q. t.* on sale of, makes good title, 688, 689.
power of trustees to sell or release, *quære*, 687, 688.
married woman restrained from anticipation, whether can acquiesce in, *quære*, 57.
sale in, may be restrained, 95.
use of depreciatory conditions is, 198, 200.
declaration of, must be signed by beneficial owner, 1054.
not enforceable, unless in writing, 1133, n. (*x*).
party enforcing, need not be party to, 1054.
unnecessary to raise resulting trust, 1055.
estate, escheat of. *See* ESCHEAT.
held for adverse claimant, purchaser cannot get in, 928.
how far extendible, 541, 542.
lien of Crown extends to, 562.
executory for conveyance of land to alien, Crown's claim to benefit of, 26.
within s. 7 of Stat. of Lim., 443, n. (*r*).
express, under Stat. of Lim., 437 *et seq.*
charge of debts is not, 439.
devise of realty charged with debts is not, 439.
direction to pay and divide upon trust subject to debts is, 439.
does not prevent time from running as to money charged on land, 438.
instances of, 438, 439.
intention to constitute, is question of construction, 438.
mortgage in form of trust for sale is not, 439.
must be express, not implied, 437.
purchaser's liability for unpaid purchase-money is not, 439.
relation of trustee and *c. q. t.* must be clear, 437.
rule as to, applies only as between *c. q. t.* and trustee, 439.
does not apply as between *c. q. t.* and stranger, 440.
c. q. ts. inter se, 440.
trust for payment of debt is, 438.
word "trust" not necessary to constitute relation, 437.
for creditors and for specified person distinguished, 1019, 1020.
is revocable, 1020.
for sale,
absolute, renders consent of tenant for life unnecessary, 86.
devisee of survivor can exercise, when, 682, 683.
in will, makes legacy duty payable, 313, 314.
judgment does not affect, 530.
mortgage in form of, does not make mortgagee trustee, 35.
time fixed by, cannot be anticipated, 1324.

TRUST—*continued.*
for sale—*continued.*
under Conv. Act, how to be exercised, 74.
whether Lord Cranworth's Act extends to, *quære*, 74.
notice of legal estate outstanding is notice of, 977.
prior unrecited, recital of trust is, 974.
should not appear on abstract, when, 341.
purchaser of equitable estate takes subject to, 945.
with notice, takes legal estate subject to, 945.

TRUST-MONEY,
lands purchased with, impressed with trust, 1065.
proof of, 1065.
remedies of *c. q. t.* in respect of, 1067, 1068.

TRUSTEE,
admittance of one only, on purchase of copyholds, 589.
agent cannot be authorised by, to receive purchase-money, 685, 743.
Conv. Act, s. 56, does not authorise receipt by, 685, 745.
may be authorised by, to receive purchase-money, when, 743, 744.
employed by, in ordinary course of business, 85, n. (*y*).
auctioneer, commission not allowed to, 178.
loss by insolvency of, does not fall on, 185.
bare, estate of, vests in representatives, 665.
equitable, concurrence of, unnecessary on sale by Court, 1345.
married woman can convey as if *feme sole*, 13, 587.
meaning of, under V. and P. Act, 587, 588.
purchase by, of trust property, 48.
cestui que trust,
advances to, for purchase of estate, trustee has lien for, 1066.
bound by payment of annuity by, 462, n. (*r*).
claim of, against, cannot be barred under Jud. Act, 438.
as to money charged on land, when barred, 438.
covenants for title by, on sale by trustees, 617, 618, 624, 625.
dealings with, impeachable, 24, 36 *et seq.*
purchase from, may be authorised by Court, 50.
solicitor of, cannot authorise, 50.
when valid, 49.
remedy of, against, for purchase of land in breach of trust, 1067.
on purchase of trust property by, 51 *et seq.*
charge need not be assigned to, in order to keep it alive, 1040, 1041.
charity, "absolutely entitled" under L. C. C. Act, s. 69, how far, 759.
incapacity of, to sell generally, 19. *See* CHARITY.
conditions of sale,
as to time for requisitions may be used by, 178.
depreciatory, must not be used by, 83, 84, 197 *et seq.* *See* DEPRECIATORY.
discretion as to use of, under Conv. Act, does not authorise depreciatory, 84, 85.
for compensation, use of, by, 158, 200.
for forfeiture of deposit, omission by, to enforce, 185.
for no compensation, use of, by, 741, n. (*s*).
implied by V. and P. Act and Conv. Act, may be used by, 84, 201.

TRUSTEE—*continued.*
continuing, can give good receipt in spite of direction to appoint, 681.
contract by *c. q. t.* should be adopted by, if beneficial, 91, 653.
enforced in spite of better offer subsequently, 1207.
not enforced, if improvident, 1172, 1207.
conveyance by, description of property in, 654.
of outstanding legal estate at request of *c. q. t.*, 653.
to *c. q. t.* on determination of trusts, 653.
costs,
occasioned by improper dealings with trust estate, to be borne by, 53.
of attempted unauthorised sale, not allowed to, 70.
of petition under L. C. C. Act, allowed to, 811.
of satisfying doubtful claim, allowed to, 95.
out of pocket alone, allowed to, 95, 96.
counsel's opinion on title may be taken by, 201.
covenant for production, need not give personal, 633.
title by. *See* COVENANTS FOR TITLE.
demise of two estates by one lease, bad, 76, n. (*o*).
devisee of realty charged with debts is not express, 439.
devolution of estates on death of, 18, 294, 665.
disclaimer by,
makes concurrence in sale under power unnecessary, 685, 686.
trust unnecessary, 685.
vests estate, not powers, in heir, 681, 682.
dower, concurrence of, when necessary, 585, 614.
may purchase from *c. q. t.*, 48.
encroachment by, 188, n. (*n*).
equity of redemption may be released by, to avoid foreclosure action, 690.
escheat on death of. *See* ESCHEAT.
father in possession is, of estate of infant child, 443.
for creditors, purchase by, with consent of majority, 50.
for purchase,
can only buy for benefit of trust, 39.
presumed to buy with trust money, 1066.
for sale,
"absolutely entitled" within L. C. C. Act, s. 69..758.
cannot receive purchase-money on testator's contract, 681.
sell after administration action begun, 64.
delay by, in selling, effect of, 62, 63.
discretion of, as to time for sale, 62.
duties of, generally, 64, 78.
interests of tenant for life and remainderman must be observed by, 63.
of reversionary interest, duty of, 63, 64.
purchase by, generally invalid, 35, 38, 48, 49, 50, 51.
may be supported, 49.
nature of invalidity of, 36.
no inquiry allowed as to advantage or disadvantage of, 37.
settlement may be retained by, how far, on sale, 763.
time fixed for sale, cannot be anticipated by, 70.
may be postponed by, when, 70.
in bankruptcy. *See* TRUSTEE IN BANKRUPTCY.

TRUSTEE—*continued.*
investment,
discretion of, as to, not interfered with, 98.
in real estate, power of, does not authorize purchase of leaseholds, 96, 97.
without authority is bad, 96.
securities, power of, does not authorize purchase of leaseholds, 97.
power to vary authorizes release of part of lands from mortgage, 689, 690.
may give power of sale, 689.
time allowed to, for, 98.
legal estate protects, against prior incumbrancers, from *c. q. t.*, 929.
purchaser cannot protect himself by getting in, from, 928, 934.
liability of,
discharge in bankruptcy relieves innocent trustee from, 745, n. (*s*).
for acts of agent for sale, 85.
co-trustee selling, 85.
for delay in reselling after default made, 91.
for purchase-money *inter se*, 745, 746.
persons assuming to act as, 95.
to purchaser is that of beneficial owner, 94.
of equitable interest for false information, 109, 110, 518.
married woman, power of, to convey legal estate, 13, 588, 589.
nominal, concurrence of, may be required, 582.
notice to,
binds him, however acquired, 956, 968, 969.
new trustees are not affected by, 966.
of purchase of equitable interest to be given, 109, 518, 783, 784, 956.
in land gives no priority, 942, 943.
gives priority as against trustee in bankruptcy, 956.
proceeds of sale vested in them, 944.
one, is notice to all, 966.
unless he has adverse interest, 966.
solicitor of, is notice to trustees, 966, 967.
of attendant term, purchase by, 48.
of estate charged with debts has power of sale, 696, 697.
consent of tenant for life, whether necessary under S. L. Act, 700, 701.
of legal estate, necessary party to conveyance by *c. q. t.*, 582.
of settlement, advances by husband to, are for benefit of trust, 1059.
not purchaser within Bankruptcy Act, s. 47..1031.
offer by, at specified price need not be withdrawn for better, 91.
payment by, to other trustees for same *c. q. t.* prevents time running, 456.
power of original, trustee appointed by Court has, 687.
to give good receipt depends on construction of trust deed, 672 *et seq.* *See* INTENTION; PURCHASE-MONEY.
to release part of lands from mortgage, *quære*, 689, 690.
to sell or release lands held in breach of trust, *quære*, 687, 688.
property recovered by, becomes subject to trusts, 1023.

TRUSTEE—*continued.*
purchase-money must be received by all, 685, 744, 745.
purchaser from, when affected with notice of breach of trust, 985.
with notice of sale being improper is liable, 678, 679.
receipt must be given by all, 684, 744, 745.
relation of, purchase of trust property by, 47.
resignation of, does not remove incapacity to buy trust property, 50.
sale is proper remedy of, on mortgage, 1321, 1322.
sale by,
advertisements of, 78.
by auction or private contract, 75.
relieves from liability, 92.
for annuity or rent-charge, bad, 90.
for best price, 90.
for building purposes, duties and powers in respect of, 78, 79.
for payment of debts, evidence of their existence unnecessary on, 679.
jointly with other owners, 76.
mode of, under Conv. Act, 74.
not restrained unless in breach of trust, 95.
of minerals apart from surface, good, 77, 1296.
of timber apart from estate, bad, 76.
of undivided share, bad, 76.
reserved bidding may be fixed on, 90.
rescission of contract for better offer is bad, 78.
together or in parcels, 76.
sale by Court, conduct of, when given to, 1323.
not allowed to bid on, 1323.
secret purchase of trust property by, is voidable, 50.
solicitor is not express, for client, 437.
stranger is, of lands purchased in his own and wife's name, 1059.
surviving during vacancy, can give good receipt, 681.
title to be required by, on purchase, what, 99.
shown by, must be marketable, 94.
to preserve contingent remainders, purchase by, when valid, 35, 48.
undertaking by for safe custody, 622, n. (*m*).
vendor is, for purchaser, how far, 18, n. (*e*), 283, 294, 295. *See* VENDOR IN POSSESSION.
wife of, not entitled to dower, 586.
with power of sale. *See* POWER.

TRUSTEES FOR PURPOSES OF SETTLED LAND ACT,
appointment of, necessary before dealing with lunatic's estate, 8, n. (*s*).
unnecessary, where persons have been appointed to act for infant, 1273.
are "absolutely entitled" within sect. 69 of L. C. C. Act, 758.
must be independent persons, 72.

TRUSTEE IN BANKRUPTCY. *And see* ASSIGNEE.
appointment of, by creditors, 75.
certificate of, 75.
assignee of mortgage stands in same position as mortgagee, 1042.
consent of, to exercise of power by bankrupt, 86 *et seq.*

TRUSTEE IN BANKRUPTCY—*continued.*
deposit paid by bankrupt to vendor, not recoverable by, 956, 1126, n. (*x*).
disclaimer of leaseholds by, 292, 629, 877.
destroys all liability from date of vesting, 629.
purchaser preventing, must covenant against rent, &c., 630.
disclaimer by, remedies of person injured by, 877.
leaseholds,
arrears of rent of, &c., prior to appointment, no liability for, 630, n. (*d*).
assignment of, to pauper relieves, from liability for, 630.
liable on, so long as he holds, 629.
may be sold by, 629.
vest in, from appointment, 629.
what covenants may be required by, on sale of, 630.
of grantor of annuity, cannot claim unregistered annuity, 568.
of husband, whether entitled to custody of wife's title-deeds, *quære*, 474, n. (*b*).
of purchaser, contract not enforceable against, 1126.
may enforce contract, 1114.
of tenant for life, cannot exercise powers of S. L. Act, 1295.
in tail, may deal with estate tail, 780.
of vendor, contract enforceable against, 1115, 1126.
may enforce contract, 1114.
partner of, cannot purchase bankrupt's estate for his firm, 37.
postponed to purchaser of equitable interest of bankrupt, giving notice to trustees, 955, 976.
without notice of equitable interest, acquiring legal estate, 956.
purchase by, of bankrupt's estate, is bad, 37.
may be confirmed, 38.
purchase-money, can give good receipt for, 748.
paid to vendor after bankruptcy, can claim, 748, 749.
relation of, cannot purchase bankrupt's estate, 37.
sale of bankrupt's estate,
contract for, exempt from stamp duty, 275.
power of, 75.
title to, 583.
should be made without delay, 59.
sale of bankrupt's right of action is good, 278, n. (*n*).
solicitor's lien, how far available against, 477, n. (*x*).

TRUSTEE ACT, 1850,
appointment under, in lieu of bankrupt trustee, 660.
petition for, not to be presented if new trustee can be appointed, 660, n. (*q*).
conveyance by means of, formerly necessary on death of vendor intestate and without heir, 293.
in sales by Court, 1347, 1348.
costs of proceedings under, necessary to conveyance, vendor must pay, 799.
declaration of trusteeship under,
in action for foreclosure, of mortgagor for equitable mortgagee, 665.
partition, 659, 660, 1302.

TRUSTEE ACT, 1850—*continued.*
declaration of trusteeship under—*continued.*
in action for specific performance, 659, 660.
of infant of parts allotted to others on partition, 665.
of unborn or unascertained persons, 660, 1302.
devolution under Conv. Act, sects. 4 and 30 renders, generally unnecessary, 293, 294, 659, 665.
execution of lease by stranger, jurisdiction to order, under, *quære*, 1252.
incorporated with Partition Acts, how far, 1302.
lands in Ireland not within, 655, n. (*r*).
except under jurisdiction in lunacy, 655, n. (*r*).
petition, how to be entitled, 655, n. (*r*).
trustee within,
heir of mortgagee is, of legal estate for executors, 664.
vendor dying before completion of compulsory sale, 663.
of copyholds, dying before surrender, is, 662.
who has by will directed executors to sell, 664.
wife dying before performance of covenant to surrender, 662, n. (*c*).
mortgagee of leaseholds is, how far, of mortgagor's nominal reversion, 662.
mortgagor refusing to surrender is, 662, n. (*c*).
vendor is not, until decree for specific performance or declaration of trust, 284, n. (*b*), 661, 662.
of legal estate after sale of equitable reversion, 663.
refusing to execute conveyance settled by judge is, 663.
under covenant to stand seised in trust till surrender is, 663.
who is, generally, 655, n. (*q*).
vesting order under,
as to copyholds, lord's consent to petition for, is necessary, 659.
makes admittance and surrender unnecessary, 659.
committee of lunatic mortgagee must obtain, before conveying, 656, n. (*t*).
is evidence of matters alleged as its foundation, 661.
liable to stamp-duty as a conveyance, 661, 793.
operates as assurance, 658.
person may be appointed to convey in lieu of, 659, 1252.
purchaser of each lot entitled to, 1348.
re-conveyance may be ordered on setting aside, 661.
vesting order may be made of lands,
of heir of mortgagee out of jurisdiction or unfound, 658.
refusing to convey, 658.
of infant, 656.
trustee when lunatic is within jurisdiction of Chancery Division, 656, n. (*t*).
trustee, service of petition on, whether necessary, 656, n. (*t*).
of lunatic mortgagee or person of unsound mind, 656.
costs caused by mortgagee becoming of unsound mind, 656, n. (*u*).
of lunatic trustee or person of unsound mind, 656.
need not be sole trustee, 656, n. (*t*).
new trustee must be appointed before conveyance to person entitled, 656, n. (*t*).

TRUSTEE ACT, 1850—*continued.*
vesting order may be made of lands—*continued.*
of mortgagee dying without known heir or devisee, 658.
of trustee dying without known heir or devisee, 657.
does not apply to leaseholds, 657, n. (*y*).
effect of Conv. Act, s. 30, on this section, 657, n. (*a*).
may be made in person absolutely entitled, 657, n. (*a*).
of trustee refusing to convey, 657.
of trustee seised solely or jointly with others, 656.
applies to coparceners, 656, n. (*x*).
of unborn trustee contingently entitled, 657.
where it is uncertain whether surviving devisee of mortgagee is dead, 658.
where it is uncertain which devisee of mortgagee was survivor, 658.
where it is uncertain which trustee was survivor, 657.
does not apply to leaseholds, 657, n. (*y*).
where it is unknown whether survivor is dead, 657.
does not apply to leaseholds, 657, n. (*y*).

TRUSTEE RELIEF ACT,
auctioneer may pay in deposit under, 206.
money to meet future contingency may be paid in, under, 749.
mortgagee should pay in surplus under, in case of disputes, 95, 749.
trustees unable to give receipt may pay in purchase-money under, 690, 749.
vendor is not trustee for purchaser within, 284, n. (*b*).

TUNNELLING,
how far a "taking" of land under L. C. C. Act, 242, n. (*m*), 244, n. (*c*), 511.

TURNPIKE TOLLS,
are not money charged on land within s. 40 of Stat. of Lim., 455.

ULTRA VIRES. *See* CORPORATION.
contract, inquiry should be made whether it is, 218.
contract not, may be adopted by company, 219.

UMPIRE. *And see* AWARD.
award of, when enforceable, 261, 1211, 1212.
choice of, by lot is bad, 704.
may be waived, 704.
under L. C. C. Act,
arbitrators failing to appoint, Board of Trade may appoint, 706.
may appoint after expiration of their powers, 706.
Board of Trade failing to appoint, landowner entitled to jury, 706, 707.
declaration of, need not be before local magistrate, 706, n. (*f*).
must make award within three months from appointment, 707.

UNASCERTAINED,
e. g. t., trustee for, can give good receipt, 673.
interest, partition decree may bind, 659, 660, 1302.
interest under expected inclosure award, contract for sale of, enforceable, 1209.

UNAUTHORIZED
acts of agent. *See* AGENT.

UNCERTAINTY,
as to consideration, effect of, as to adequacy, 842, 1209.
as to quantity of land to be taken, 1220.
in material term of agreement, fatal, 256, 261, 1146, 1147.

UNCONSCIONABLE BARGAIN,
repeal of usury laws does not preclude relief for, 146.

UNDERLEASE,
agreement for purchase of, by lessor, effect of, 312.
apportionment of rent may be made by way of, 196.
description of, in particulars and conditions, 134, 155, 164.
invalidity of, may be shown in spite of condition, 164.
not ordered, where contract is for assignment, 1198.
purchaser need not accept, 134, 135, 155, 164, 1199.
purchaser of, has notice of covenants in original lease, 984.
sale of leaseholds in lots by way of, covenants for title on, 621.
each purchaser must covenant against rent, 629.
synonymous with derivative lease, 134, n. (*s*).

UNDERLESSEE. *See* SUB-LESSEE.

UNDERTAKING,
by solicitor to clear up title, not summarily enforced, 501.
complete purchase, enforceable as a contract, 263.
by vendor in conditions, strictly construed, 123.
for delivery of possession, not enforceable, 486.
for payment of costs by mortgagee on taking deeds, how enforced, 477.
for safe custody, binds only during possession of deeds, 627, 876.
by trustees, 622, n. (*m*).
substituted for covenant, 161.

UNDERVALUE,
not sufficient alone to avoid sale, 852.
sale at,
relief against covenants for title on, 897.
of vendor on, 729, 732, 837 *et seq.*
how far affected by want of advice, 843.
terms of, 852.
what sufficient proof of, 849.

UNDERWOOD. *See* COPPICE.

UNDIVIDED SHARES,
owners of, may compel production of title-deeds, 473.
purchaser of entirety need not accept, 1189, 1190, 1200.
trustees must not sell

UNDUE INFLUENCE,
by parent, to effect family arrangement, how far good, 848.
by solicitor, must be proved, 44, 45.
by stranger, purchaser not responsible for, 838.
c. q. t. confirming voidable purchase, must not be under, 56.
on sale by mortgagor to mortgagee, 41.
transactions set aside for, 23, 24, 35.

UNINCORPORATED,
conveyance to body, effect of, 24, n. (*o*).
purchase by body, how made, 25.

USAGE,
modern, is evidence to show what passed under old grant, 377.
of Stock Exchange, effect of, on contract, 333, n. (*d*).
trade, evidence admissible to prove, in explanation of contract, 262, 1091.

USE AND OCCUPATION. *And see* OCCUPATION; OCCUPATION RENT.
corporation may be liable for, 274.

USER,
condition as to, binds purchaser, though not constituting easement, 949.
continuous, of easement other than light, should be proved, 432.
covenant restrictive of, how conveyance should secure performance of, 633, 634.
vitiates sale, 156.
incapable of interruption, does not found easement, 404.
necessary rights of, must be expressly excluded, if so intended, 611.
pass under general words, 609, 610.
non-user of way, does not destroy right, 413.
of prescriptive way, limited to user by prescription, 413, 414.
of way of necessity, restricted to necessary purposes, 412, 413.

USUAL,
covenants in lease should not be described as, in particulars, 191, 192.
what are, 191, 192.
in separation deed, Court will decide what are, 1166.

USURY,
condition for payment of interest on increasing scale, is not, 145.
interest amounting to, may be reduced, 853.
repeal of laws against, does not preclude relief for unconscionable bargain, 146.

VACANCY,
in trust, how far continuing trustee can sell during, 681.
of possession, not notice of vendor's want of title, 984.
pending contract for sale of advowson, effect of, 287, 288.

VALUATION. *And see* ARBITRATOR; AWARD.
arbitration under C. L. P. Act distinguished from, 260.
contract for sale at, enforceable, 1211, 1212.
contract for sale "at fair," enforceable, 257.
mode of, if specified, must be followed, 257.
reference directed to ascertain price, 257, 258.

VALUATION—*continued.*
contract for sale of fixtures at, apart from land, 258.
contract as to the land may be enforced, if separable, 258, 259.
should contain what terms, 259.
vendor will be compelled to allow valuation to be made, 259, n. (*i*).
"fair," meaning of, with regard to farming stock, 258, n. (*g*).
misrepresentation as to, by vendor, effect of, 112, 113.
mistake in, rectification of, 704, 705.
mortgagee with power of sale cannot take over at, 35.
of fixtures, interest not payable from date of, 715.
of property, is not part-performance, 1138.
of timber, interest runs from date of, 713, 714.
trustees allowed costs of, previous to sale, 90.
may not sell at price to be fixed by, 90.
under L. C. C. Act,
entry cannot be made upon previous, 509.
includes what, 508.
price of lands may be fixed by, 92, 508, 704 *et seq.*
vendor need not disclose result of recent, 105.

VALUE,
alteration of, after contract, 286, 733.
does not affect question of adequacy of consideration, 849, 1207, 1210, 1211.
purchaser on rescission has no claim for, 1076.
fluctuating, makes time essential, 484.
of covenants, Court will not assess relative, 999, n. (*p*), 1189, n. (*s*).

VALUERS. *And see* ARBITRATOR; VALUATION.
under Inclosure Act cannot buy lands in parish, 42.

VARIATION,
between local and statutory measures, 727, 728.
in funds. *See* FUNDS.
in quantity or quality. *See* COMPENSATION.
of contract by auctioneer, 204. *See* AUCTIONEER.
how far defence to action on contract, 1096.
of terms of payment by agent, 213, 214.
parol. *See* PAROL; SPECIFIC PERFORMANCE.

VENDOR AND PURCHASER SUMMONS. *See* SUMMONS.

VENDOR IN POSSESSION,
accounts to purchaser for minerals worked after contract, 715, 732.
rents, how far, 709, 715, 732.
whether as mortgagee in possession, 733—735.
action for use and occupation does not lie against, 918.
alterations by, may avoid sale, 507.
may be matter for compensation, 507.
deterioration allowed by, may avoid sale, 733, 1215.
may be compensated for, 284, n. (*e*), 733.
encroachment by, enures to purchaser, 918.
interest on money appropriated, whether allowed to, 709.

VENDOR IN POSSESSION—*continued.*
occupation rent must be paid by, while purchaser pays interest, 709.
unless delay is solely purchaser's fault, 715, 716.
preservation of property, duty of, as to, 733—735.
trustee for purchaser, how far, 18, n. (*e*), 283, 294, 295, 733.
not within Trustee Act, 284, n. (*b*), 661, 662.

VERBAL. *See* PAROL.

VERDICT,
evidence on same matter, 396.

VERIFICATION,
of abstract, evidence for. *See* ABSTRACT.
expenses of, 159 *et seq.*, 176.
vendor's liability for, 159, 160, 163, 176, 470.
not excluded by acceptance of title, 496.
condition against production, 160.
of court rolls, 351, 352.

VESTING ORDER. *See* TRUSTEE ACT, 1850.

VEXATIOUS. *See* FRIVOLOUS.

VOID,
agreement, contrary to public policy is, 277.
for illegal purpose is, 277.
for lease, when, 228. *See* LEASE; STATUTE OF FRAUDS.
in evasion of stamp laws is, 277.
may operate as licence, 232.
bequest to charity within Mortmain Act is, 303.
covenants against rule as to perpetuities are, 875.
deed, purchaser under, acquires no title, 930, 931.
deed, registration does not validate, 768, 776.
grant presumed to supplement originally void grant, 366.
lease may bind as agreement, 228.
lease, no abatement allowed to purchaser for, 1195.
secret purchase by creditor's assignee is, 38.
unlimited right of re-entry is, 876.

VOIDABLE,
contract, alteration by vendor makes, how far, 286.
may be set up, how, 117.
of infant. *See* INFANT; INFANTS' RELIEF ACT.
purchaser bound by, how far, 997, 998.
conveyance, purchaser claiming under, must account, 1033, 1034.
deed, priority of purchaser under, 931, n. (*u*).
estate created by tenant in tail, how confirmed, 912.
purchaser buying subject to, how far bound by, 998.
infant's void and voidable assurance distinguished, 2, n. (*a*). *See* INFANT.
lease by mortgagor, parties to, cannot dispute validity of, 1001.
rights of purchaser on, 1000, 1001.
lease, purchaser, how far bound by, 998, 999.
purchase by donee of power of sale whether, 35 *et seq.*
person in fiduciary position, how and when, 35 *et seq.*

VOLUNTARY. *And see* VOLUNTARY CONVEYANCE; VOLUNTARY SETTLEMENT.
confirmation of fraudulent sale, not to be relied on, 596, n. (*k*).
settlor, contract of, enforceable against, 1002, 1118, 1119.
not enforceable by, 1002, 1119.
with purchaser from, how far enforceable, 1119.

VOLUNTARY CONVEYANCE,
by trustee to devisee, whether confers good title, *quære*, 679, 680.
of wife's legal term for years, wife cannot defeat after husband's death, 1021.
title derived through, is doubtful, 1234.
within 13 Eliz. c. 5,
conveyance defeating proceedings under winding-up order is, 1027, 1028.
depriving plaintiff of fruits of action is, 1027.
post-nuptial settlement in pursuance of verbal contract is, 1140, 1141.
who may impeach, 1028—1030.
within 27 Eliz. c. 4,
assignment of leaseholds is not, 1006, 1007.
conveyance on trust to sell for creditors, not parties, is, 1003, 1004.
personal chattels are not, 1023.
post-nuptial settlement is, when, 1004.
test of validity of, 1004, 1005.
to charity, whether voidable by subsequent sale, *quære*, 1008.

VOLUNTARY SETTLEMENT,
ante-nuptial contract, settlement in pursuance of, is not, 1141.
of property other than referred to in, is, 1141.
ante-nuptial settlement is not, 1008.
after long cohabitation may be, 1017.
consideration for, may be past, 1019.
proved, 1018, 1019.
family compromise is not, 1007.
heir or devisee of settlor cannot defeat, 1021.
unless it was really fraudulent, 1021.
judgment affects, how far, 530.
creditor cannot avoid, 540.
later voluntary settlement, apparently for value, will not defeat, 1021.
post-nuptial settlement is not, when, 1004.
amount of consideration is not test, 1005, 1006.
test of validity, 1005, 1007.
purchaser can enforce contract against settlor, 1002.
registered, has priority over earlier unregistered, 960, n. (*t*), 1021.
revocation, power of,
duty of solicitor as to, in preparing, 1022.
reservation of, to settlor makes, 1021.
power need not be express, 1021, 1022.
release of power, effect of, 1022.
want of, may be ground for setting aside, 1022, 1023.
settlement in consideration of invalid marriage is, 1009.
settlor cannot set aside, 1009, 1010.

VOLUNTARY SETTLEMENT—*continued.*
settlement in consideration of loan is not, 1017, 1018.
favour of collaterals, how far, 1010—1017. *See* COLLATERALS.
settlor cannot enforce contract against purchaser, 1002.
trustees of, not entitled to costs on settlement being set aside, 1119.
under Bankruptcy Act, 1883,
how avoided, 1031.
not confined to traders, 1030, n. (*h*).
sect. 47 does not apply where estate is administered in bankruptcy, 1031.
include gift for advancement of son, 1031.
not retrospective, 1030, n. (*h*).
trustee of settlement not a purchaser, 1031, n. (*i*).
under 13 Eliz. c. 5,
bad, if intended to defraud creditors, 1024.
even though there is consideration, 1024.
cases under, 1026—1028.
purchase in name of wife or child is not, 1063, 1064.
unless fraudulent as against creditors, 1064.
test of validity, 1026.
what property is within, 1025, 1026.
who may impeach, 1028—1030.
VOLUNTEERS,
assignment of subject-matter of action to, is good, 279.
children, not parties to post-nuptial settlement, are mere, 1010.
contract with settlor is after his death enforceable against, 1002, 1115 1117.
defective execution of power may be supplied in favour of, 946.
lien of vendor good against, 825.
marshalling by, against mortgagees of other property, 1002, 1003.
maxim that Equity considers done what ought to be done cannot be invoked by, 1069, n. (*g*).
mortgagee cannot consolidate against, 1002.
purchase-money paid to settlor cannot be claimed by, 1002.
registration gives no better title to, 776.
who are first to sell, whether they can give good title, 1021.
VOTES,
conveyance for splitting, effect of, 280.
to son to qualify for, is an advancement, 1063.
purchaser not entitled to, before completion, 288.

WAIVER,
of abstract, does not waive objections, 496.
of compensation not implied by execution of conveyance, 498.
of contract,
how far defence to action on it, 1096.
in writing, defence to specific performance, 1212.
should itself be in writing, 1096, 1097, 1213.
parol, how far defence to specific performance, 1212, 1213.
variation of terms may amount to, 1096.
of decree for specific performance, 1246.

WAIVER—*continued.*
of disputed right is valuable consideration within 27 Eliz., 1003.
of forfeiture, applies only to particular breach, 917.
does not prevent time running against reversioner, 446.
presumption of, 193, 194.
title of landlord must be shown to prove, 195.
of irregularities in voidable award is good, 704.
of lien of vendor,
as to part, not as to balance, 832.
contract may show, 831.
joining of surety in bill or note, is not, 829.
onus of proving is on person denying the lien, 829.
presumable intention may be rebutted, 832.
question of construction and intention, 829.
taking bond for annuity, when consideration is not, 830.
unless given as itself the purchase-money, 830.
or where sale is of reversion, 831.
taking bond from third person, whether is, *quære*, 829.
taking personal security, not generally evidence of, 829, 830.
taking security in substitution is, 829.
secus if security is itself consideration, 831, 832.
of marketable title, 495.
of misdescription, subsequently discovered, possession is not, 500.
of objections,
acquiescence amounts to, when, 1243, 1244.
admission in pleadings amounts to, 1227, 1243.
conditional on acceptance of conveyance, 498.
implied from attempt to resell, 498.
forcible possession, 499.
letters, 496.
possession alone, 499, 500.
and dealings with estate, 497, 500.
preparation of conveyance, 498.
retention of abstract, 496.
implied more readily as to leaseholds than freeholds, 501.
not implied from possession under contract or by consent, 499, 500.
where abstract did not disclose objections, 350, 496.
title is pressed for, 503.
not waiver of compensation, 503, 736, 1192.
precludes right to reference, 1227, 1243.
rescission precludes, 179.
subject to specified requisition, effect of, 495, 1227.
subsequently discovered, possession is not, 500.
of right to have tenures distinguished, 496.
of rescission, action for specific performance is evidence of, 179.
of voidable contract, 117.
should be guarded against in conditions, 183, 184.
what amounts to, 183, 184.
of time, by acceptance of abstract, 490.
requisitions, 490.
conditional, construed strictly, 490.
conduct amounts to, when, 489, 490.

WAIVER—*continued.*
of time, enlargement of time is not, 490.
of title, possession without requiring abstract is, 500.
of verification of abstract, acceptance is not, 496.

WARD. *See* GUARDIAN.

WARRANTY,
of authority, implied, agent liable for breach of, 1074.
of right of user, covenant for quiet enjoyment is, how far, 885.

WASTE,
action for, by remainderman, when barred, 437.
by purchaser, ground for ordering payment in of purchase-money, 1217, 1218.
when restrained, 289, 1222.
by vendor, defence to specific performance, how far, 1215, 1216.
liability for, 733.
of manor, condition on sale of copyholds, formerly, 189, 190.
strips of. *See* STRIPS.

WASTING ESTATE,
delay in proceeding is defence to specific performance, 1215.
purchaser of property subject to, pays interest from contract, 712, 713.

WATER,
alteration of user does not destroy right to flow of, 415.
artificial flow of, prescription cannot give permanent right to, 417, 418.
covenant to procure supply of, construction of, 634, n. (*r*).
flowing from spring in natural channel may not be cut off at spring, 416.
may not be intercepted by tapping underground water, 416, 417.
natural right to, only where channel is defined, 415 *et seq.*
particulars must mention rights of, 131.
percolating, may be granted, when, 416, n. (*b*).
intercepted, 416.
pollution of, no right of, 417.
right to discharge, after interception, 416.
permeating, no right to, 415, 416.
pollute, right to, acquired by prescription, 417.
cannot be increased, 417.
lost by abandonment, 417.
property is not "well supplied with," if supplied artificially, 157.
reservation of "water and soil," effect of, 418.
right to take from spring is not profit *à prendre*, 429.
riparian owner, rights of, to, 414 *et seq.* *See* RIPARIAN OWNER.
subterranean, right to, 416.
support, no right to, from, 422.

WATERCOURSE,
right in another to open, &c., avoids contract, 156, 1201.
of user of, limited by original purpose, 417.
to discharge rain water from house is right of, 418.
to pump water from mine and discharge it is right of, 418.
user of, does not give prescriptive right of permanent user, 417, 418.

WATERWORKS COMPANY,
compulsory purchase by, 510.
contract for sale to, should contain what, 238.
provide for minerals, 238, 604.
shares in, agreement for sale of, need not be in writing, 233.

WAY. *And see* ROAD.
enjoyment of, by one lessee against another for full period gives title, 430, n. (*n*).
of necessity,
absolute necessity alone creates, 413.
devise of land-locked tenement may create, 413.
existence of patent, not a defence to specific performance, 520.
implied grant of, 412, 520, 608.
reservation or regrant of, 412, 608, 609.
inquiry should be made for undisclosed, 520.
principle of the doctrine of, 412.
right of, ceases with cesser of necessity, 413.
site of, grantor determines, 413, 609, n. (*b*).
once granted cannot be altered, 413.
user of, limited by necessary purposes, 413.
private right of,
claimed by express grant or reservation, 412.
grant of, construed as right of way for all purposes, 414.
unless restricted in terms, 414.
may include right of space for turning, 414, n. (*o*).
restricted, may be lost by different user, 414.
to wicket gate, is grant of carriage-way, 414.
with "right of ingress, egress, and regress," how construed, 414, n. (*p*).
not lost by agreement to substitute new way, 413.
non-user except for interruption, 413.
presumed from twenty years' enjoyment, 412.
user of, restricted to prescriptive mode of user, 413, 411.
public, what constitutes, 411. *See* HIGHWAY.
right of,
not implied over roads shown on sale plan, 136.
particulars must state, 131, 133, 134, 156.
passes under general words, 610.
refusal of vendor to grant over roads when made, effect of, 136, n. (*d*).
to road or river skirting property, implied, 412, n. (*z*).
action lies for obstruction of, 412, n. (*z*).
want of, a defect in title, 129.
substitution of new, under R. C. C. Act, vests soil of diverted, in proprietor, 414, n. (*q*).

WEDLOCK,
child born in, presumed to be legitimate, 381.

WEIGHTS AND MEASURES. *See* MEASURES.

WESTMINSTER IMPROVEMENT BONDS,
are within sect. 4 of Stat. of Frauds, 233.

WHARF,
owner of, has implied right of access to river, 412, n. (*z*).

WIDOW. *And see* MARRIED WOMAN.
adoption by, of husband's contract for sale, *quære*, 1125.
alien by marriage, may resume her nationality, 29.
settlement by, on children of former marriage, good, 1013, 1014.

WIFE. *And see* MARRIED WOMAN.
contract enforceable against, entitled to free bench, 1117.
of, to purchase, husband may adopt, 1121, 1122.
of husband and, enforceable if purchaser knew her incapacity, 1161, 1162.
for purchase enures to her as advancement, 1162.
for sale enforceable against, 1115.
dower of. *See* DOWER.
estate bought with her separate estate, title to, 1066, 1067.
freeholds of, agreement to settle signed by husband alone is bad, 1051, n. (*a*).
no merger of term of, in husband's fee, during her life, 310.
not proper party to specific performance against husband, 1127.
purchase by husband of property of, is good, 49.
purchase in name of,
and children, 1057.
and self, 1058.
and self, gives her beneficial interest on survival, 1058.
and stranger, makes him trustee for her, 1059.
not within 27 Eliz., 1063.
voidable in bankruptcy, when, 1064, 1065.
within 13 Eliz., when, 1063, 1064.
redeemed land-tax, husband's rights over, 1125.
right of, by survivorship in joint banking account, 1058, n. (*t*).
voluntary assignment by husband of her term of years cannot be defeated by, 1021.
expenditure upon estate of, not bad in bankruptcy, 1064.

WILFUL,
default. *See* DEFAULT.
neglect to complete may entitle purchaser to damages, 1080, 1082.
refusal to convey under L. C. C. Act, what is, 808, 809.

WILL. *And see* DEVISE; DEVISEE.
alterations in, presumed to have been made after execution, 481.
secus, in soldier's will, 481, n. (*b*).
construction of, requisition for, 495, 800, 1239.
copyholds are devisable by, 580, 785, n. (*k*).
costs of action occasioned by, 799, 800, 1262.
entered on court rolls, purchaser searching them has notice of, 972.
evidence of, what is sufficient, 362—364.
execution of power by, what is good, 947.
foreign, duties payable on gifts under, 317.
general devise in, bars right to dower, 614.

WILL—*continued.*
non-mention of issue in, raises presumption of failure, 390.
passes estate conveyed to testator after its date, 918.
probate in colony, how far evidence, 364.
production of alleged, not to affect property, 375.
of last-surviving trustee, 375, 376.
subsequent, by devisee vendor, 375.
to negative claim of heir, 375.
proof of, in Equity, unnecessary, 364.
necessary against heir impeaching it, 374.
recital of, is notice of its contents, 974.
registered, purchaser searching register has notice of, 972.
registration of,
concurrence of heir will supply, 772.
necessary within six months, 770, 771.
of leaseholds, unnecessary on sale by executors, 772.
provisions of V. & P. Act as to, 772, 965.
whether retrospective, 772.
under Yorkshire Registries Act, 775.
want of, condition as to, 190.
relative rights of representatives, how affected by. *See* REPRESENTATIVES.
speaks from what date, 307, 308.
surrender to use of, when presumed, 367.

WINCHESTER COLLEGE,
limited powers of alienation of, 21.

WINDFALLS
belong to purchaser from date of contract, 286.

WINDING-UP
order, effect of, on power of disposition, 566.
petition not a *lis pendens*, 566, 972, n. (*o*).

WINDOW. *And see* LIGHT.
alteration or enlargement of, effect of, on right to light, 405—407.

WITHDRAWAL
of lots, condition as to, 140.
of notice to treat not allowed, 242, 243. *See* NOTICE TO TREAT.
of offer before acceptance, 267.
of parliamentary opposition to bill, agreement for, 219, n. (*g*).

WITHOUT RESERVE, SALE. *See* BIDDING.

WITNESS. *See* ATTESTING WITNESS.
to contract may be bound by his signature, 271.

WOMAN PAST CHILD-BEARING,
presumption of, how raised, 391.

WOODLAND,
compensation for deficiency in, what allowed, 738.
included on sale of "farm," 138.

WOODS AND FORESTS. *See* COMMISSIONERS.

WORDS. *See also* PHRASES.
"acts" in covenant for title, 884, 887.
"adjoining owner" under L. C. C. Act, 861.
"beer-house," 138.
"beer-shop," 138.
"blood-relation," for purpose of declaration as to pedigree, 393, n. (*r*).
"brick-built house," 137.
"building purposes" under L. C. C. Act, 861.
"claiming under," in covenant for title, 884.
"clear yearly rent," 137.
"default" in covenant for title, 885.
"demise," effect of, 636.
"derivative lease" synonymous with "underlease," 134, n. (*s*).
"farm," 138.
"free public-house," 138.
"give," "grant," in conveyance, 635.
"grant" under L. C. C. Act, 635.
"grant, bargain and sell" under Yorkshire Registries Acts, 635.
"ground-rent," 138.
"land." *See* LAND.
"living," what passes by, 335.
"means," in covenant for title, 884.
"my," in description of specific devise, 309.
"neglect or default," in covenant for title, 885.
"next," as attribute of date in conditions, 142, n. (*r*), 492, n. (*u*).
"now," in residuary devise, 309.
"outgoings," 137, n. (*k*).
"party or privy to," in covenant for title, 886.
"permitted or suffered," in covenant for title, 885.
"public-house," 138.
"reasonable," in covenant for title, 887.
"take," under L. C. C. Act, 515, n. (*f*).
"tavern," 138.
"town" in L. C. C. Act, 860.

WRIT.
issue of, is commencement of action, under Stat. of Lim., 434.
of possession. *See* POSSESSION, WRIT OF.

YARD,
want of title to, is fatal defect, 156.

YEARLY TENANCY,
contract for, not enforceable, 1112.

LONDON :
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE—E.C.

Smith's Compendium of Mercantile Law.—*Tenth Edition.* By JOHN MACDONELL, Esq., one of the Masters of the Supreme Court, assisted by GEO. HUMPHREYS, Esq., Barrister-at-Law. 2 *Vols. Royal* 8*vo.* 1890. *Price* 2*l.* 2*s. cloth.*

"Of the greatest value to the mercantile lawyer."—*Law Times.*

Stringer's Oaths and Affirmations in Great Britain and Ireland; being a Collection of Statutes, Cases, and Forms, with Notes and Practical Directions for the use of Commissioners for Oaths, and of all Courts of Civil Procedure and Offices attached thereto. [In succession to "Braithwaite's Oaths."] By FRANCIS A. STRINGER, of the Central Office, Supreme Court of Judicature, one of the Editors of the "Annual Practice." *Crown* 8*vo.* 1890. *Price* 3*s.* 6*d. cloth.*

"Indispensable to all Commissioners."—*Solicitors' Journal.*

Thring's Joint Stock Companies' Law.—The Law and Practice of Joint Stock and other Companies, including the Companies Acts, 1862 to 1886, with Notes, Orders, and Rules in Chancery, a Collection of Precedents of Memoranda and Articles of Association, and other Forms required in Making and Administering a Company. By Lord THRING, K.C.B. *Fifth Edition.* By J. M. RENDEL, Esq., Barrister-at-Law. *Royal* 8*vo.* 1889. *Price* 1*l.* 10*s. cloth.*

"The highest authority on the subject."—*The Times.*

Woodfall's Law of Landlord and Tenant.—With a full Collection of Precedents and Forms of Procedure; containing also a Collection of Leading Propositions. *Fourteenth Edition.* By J. M. LELY, Esq., Barrister-at-Law. *Royal* 8*vo.* 1889. *Price* 1*l.* 18*s. cloth.*

Lely and Peck's Precedents of Leases for Years, and other Contracts of Tenancy, and Contracts relating thereto, mainly selected or adapted from existing Collections, including many additional Forms, with a short Introduction and Notes. By J. M. LELY and W. A. PECK, Esqrs., Barristers-at-Law. *Royal* 8*vo.* 1889. *Price* 10*s.* 6*d. cloth.*

Oldham and Foster on the Law of Distress.—A Treatise on the Law of Distress, with an Appendix of Forms, Table of Statutes, &c. *Second Edition.* By ARTHUR OLDHAM and A. LA TROBE FOSTER, Esqrs., Barristers-at-Law. *Demy* 8*vo.* 1889. *Price* 18*s. cloth.*

Daniell's Chancery Forms.—*Fourth Edition.* Forms and Precedents of Proceeding in the Chancery Division of the High Court of Justice and on Appeal therefrom. *Fourth Edition.* With Summaries of the Rules of the Supreme Court, Practical Notes and References to the Sixth Edition of "Daniell's Chancery Practice." By CHARLES BURNEY, B.A. (Oxon.), a Chief Clerk of the Hon. Mr. Justice Chitty. *Royal* 8*vo.* (1260 pp.) 1885. *Price* 2*l.* 10*s. cloth.*

Chambers' Law relating to Local Rates, with especial reference to the Powers and Duties of Rate-levying Local Authorities, and their Officers. Comprising the Statutes in full and a Digest of 718 Cases. By G. F. CHAMBERS, Esq., Barrister-at-Law. *Royal* 8*vo.* 1889. *Price* 10*s.* 6*d. cloth.*

Macnamara's Law of Carriers.—A Digest of the Law of Carriers of Goods and Passengers by Land and Internal Navigation. By WALTER HENRY MACNAMARA, Esq., Barrister-at-Law, Registrar to the Railway Commission. *Royal* 8*vo.* 1888. *Price* 1*l.* 8*s. cloth.*

"We cordially approve of the general plan and execution of this work."—*Solicitors' Journal.*

Browne and Theobald's Law of Railway Companies.—Being a Collection of the Acts and Orders relating to Railway Companies in England and Ireland, with Notes of all the Cases decided thereon, and Appendix of Bye-Laws and Standing Orders of the House of Commons. *Second Edition.* By J. H. BALFOUR BROWNE, Esq., one of Her Majesty's Counsel, and H. S. THEOBALD, Esq., Barrister-at-Law. *Royal* 8*vo.* 1888. *Price* 1*l.* 15*s. cloth.*

"Contains in a very concise form the whole law of railways."—*The Times.*

Geare's Investment of Trust Funds.—Incorporating the Trustee Act, 1888. *Second Edition.* Including the Trusts Investment Act, 1889. By EDWARD ARUNDEL GEARE, Esq., Barrister-at-Law. *Royal* 12*mo.* 1889. *Price* 7*s.* 6*d. cloth.*

Brooke's Notary.—A Treatise on the Office and Practice of a Notary of England. With a full Collection of Precedents. *Fifth Edit.* By GEORGE F. CHAMBERS, Esq., Barrister-at-Law. *Demy* 8*vo.* 1890. *Price* 1*l.* 1*s. cloth.*

Pollock's Digest of the Law of Partnership.—Incorporating the Partnership Act, 1890. *Fifth Edition.* By SIR FREDERICK POLLOCK, Bart., Barrister-at-Law. *Demy* 8*vo.* 1890. *Price* 8*s.* 6*d. cloth.*

Pollock's Law of Torts.—A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law. *Second Edition*, to which is added the draft of a Code of Civil Wrongs, prepared for the Government of India. By SIR FREDERICK POLLOCK, Bart. 8*vo.* 1890. *Price* 1*l.* 1*s. cloth*

Pollock's Princi
the General Princip
Fifth Edition. Wi
M.A., LL.D., Barri

Marsden's Treat
With an Appendix
national Regulation
purpose in force in
MARSDEN, Esq.,
Hon. J. W. MANSI

Webster on Cond
ticulars and Conditi
WEBSTER, Esq., F
"A full account of case
precedents. The book is fit t

Browne and Pov
Matrimonial Causes
Demy 8*vo.* 1889.

Wheaton's Elem
Edition, with Notes
Price 1*l.* 10*s. cloth.*

Smith's Practica
illustrated by the Le
tioners. *Second Ea*
Barrister-at-Law.

Shirley's Sketch
By CHARLES STE
Price 7*s.* 6*d. cloth.*

Shirley's Selectio
with Notes. By W
1888. *Price* 6*s. cloth*

Smith's Manual
Students. Comprisi
Decisions. By JO
TRUSTRAM, LL.M

Smith's Manual
Equity Jurisprudenc
Story, Spence, and
points of Equity usu
Q.C. *Fourteenth E*
12*mo.* 1889. *Price*

Harris' Hints on
Criminal. Classes of Witnesses and Suggestions for Cross-examining them, &c., &c., By RICHARD HARRIS, one of Her Majesty's Counsel. *Ninth Edition.* With a New Chapter on "Tactics." *Royal* 12*mo.* 1889. *Price* 7*s.* 6*d. cloth.*
"Full of good sense and just observation. A very complete Manual of the Advocate's art in Trial by Jury."—*Solicitors' Journal.*

The Pocket Law Lexicon.—Explaining Technical Words, Phrases and Maxims of the English, Scotch and Roman Law, to which is added a complete List of Law Reports, with their Abbreviations. *Second Edition.* Revised and Enlarged. By HENRY G. RAWSON, B.A., of the Inner Temple, Esq., Barrister-at-Law. *Fcap.* 8*vo.* 1884. *Price* 6*s.* 6*d. limp binding.*
"A wonderful little legal Dictionary."—*Indermaur's Law Students' Journal.*