AN

ANALYTICAL DIGEST

OF THE

REPORTED CASES

IN

THE COURTS OF EQUITY,

AND THE

HIGH COURT OF PARLIAMENT,

FROM THE

EARLIEST AUTHENTIC PERIOD

TO

THE PRESENT TIME;

TO WHICH ARE ADDED,

THE DECISIONS OF THE

COURTS OF EQUITY AND PARLIAMENT

IN IRELAND,

WITH

A REPERTORIUM OF THE CASES,

DOUBLY ARRANGED.

BY RICHARD WHALLEY BRIDGMAN, ESQ.

FIRST AMERICAN,
FROM THE THIRD AND LAST LONDON EDITION:

BY R. O. BRIDGMAN, ESQ.
Of Lincoln's Inn, Barrister at Law.

VOLUME I.

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ADVERTISEMENT

to

THE PRESENT EDITION:

The original Compiler of the "Analytical Digest" had made considerable progress in the preparation of a Third Edition of the Work, when his hand was arrested by a sudden malady, which in a few weeks proved fatal, and the task of completing what had been thus begun devolved on his Son, the present Editor.

Since the Publication of the last Edition, upwards of forty Volumes of Equity Reports have issued from the Press. The cases they contain, so far as they come within the plan of this Digest, have been now introduced under their proper titles.

The heads of "Bankrupt," "Tithe," and "Vendors and Purchasers," being considered not sufficiently full, have been newly arranged, and the number of their respective sections and sub-divisions considerably increased. A head of "Partnership" has been introduced, for the first time into this Edition. In some titles new sections have been introduced, whilst from others, such as were thought superfluous, have been taken out; these minor alterations, however, being somewhat numerous, need not, it is presumed, be specified, as they may be readily ascertained by a comparison between the Table of Titles to the last and to the present Editions.

The arrangement of the Repertorium, or Table of Cases, according to Mr. Locke's system of common
placing, having been found inconvenient, an entirely new Table has been made for the present Edition, after the common and more familiar alphabetical mode.

The great increase of matter contained in the present Edition, has induced the Editor, in order to prevent the Work from swelling to an inconvenient size, to effect every possible curtailment; by this means, and by using a smaller type, it has been kept down to the same number of Volumes as before.

Those Gentlemen who are acquainted with the Analytical Digest, must be aware that its original plan studiously excluded Cases decided on questions of Practice and Pleading, which arose from an apprehension that the bulk of the Work would be otherwise too great. The Editor, unwilling so far to deviate from a plan which had been sanctioned by the approbation of the Profession, as to introduce practical Cases into the present Work, intends publishing a distinct Volume, which will form a "Digest of Cases decided in the Courts of Equity on points of Practice and Pleading, and of the Rules and Orders of the same Courts, from the earliest time down to the latest possible period."

The Editor cannot speak with certainty as to the time when the publication of the Practical Digest will take place, but he hopes to offer it to the Profession about the close of the present Year.

R. O. B,

3, New Square Lincoln's Inn,

Hilary Term, 1822.
ADDRESS

PREFIXED TO THE FIRST EDITION OF THIS WORK.

TO THE PROFESSORS

OF

THE LAWS OF ENGLAND.

In every state, where the laws and decrees of the empire have increased to a pile so stupendous as to threaten their own destruction by their massive weight, the first object of the legislature has been to form a design for reducing the great body of those pandects and decrees into a narrow compass, and more regular system, for ordinary study and inquiry.

In the reign preceding that of the Emperor Justinian, when the edicts of the Roman empire became so burthensome, that they were computed by Eunapius to be a load for many camels, several formed a design to bring about a reductive and compressible system; and, among those industrious and persevering men, we find the names of Crassus, Pompey, Cæsar, Cicero, and Sulpicius: the great work, however, was reserved for Justinian himself, under whose auspices was compiled the Codex Justinianus, or Corpus Juris Civilis, the wholesome principles of which, in a great degree, prevailed in Britain, (in cases where the common law was silent or defective,) even to the reign of our king Edward III. and in some instances they still prevail in matters of our civil law.
Many learned men of later times, and especially Sir Edward Coke, Sir Matthew Hale, Judge Jenkins, Sir Thomas Reeve, the Earl of Mansfield, Sir William Blackstone, &c. &c. have earnestly and strongly recommended and promoted the adoption of every measure that can accelerate the study and reading of the English law. Various attempts, in consequence, have been made, and every report of adjudged cases, as well as every correct abridgment of the statutes, and of the reported law, has been encouraged, not only as a digest to assist the memory of the professor, but as a key to the records themselves, which may always be searched in cases of doubt or difficulty, for, *satis est petere fontes quam sectari rivulos.*

We have judged it expedient to increase the text of this work in a very small degree, by noticing all the cases which have been questioned, doubted, or denied, and, by adding a note of reference to those places where all the authorities upon any leading point are collected; *a species of information* which, we submit, no other digested index has conveyed to the reader.

In some instances, we have taken the liberty to use our own language, in connecting synonymous cases into one *section,* and often into one *placitum;* and in others we have taken a greater liberty, by using the language of the learned editors of the several reports; yet we have not done this with a view to pirate the labours of other men, but with a more laudable intent—a zeal to render the diligence and industry of those indefatigable men more extensively beneficial.

We find it necessary to make some few observations upon our mode of indexing the titles of *Devise, Estate, Legacy,* and *Will.* The learned reader must be aware
how frequently a *Legacy* or *Bequest* is improperly termed a *Devise*, not only in the penning of wills, but even in some of our law books of very respectable authority, and hence a testator's intention to *bequeath*, is too often confused and blended with his intention to *devise*. A like want of general discrimination also prevails in speaking of wills and testaments, for it is not sufficiently considered that a *Will* (*ultima voluntas*) is a writing declaring the uses to which lands shall be subject, and requires great solemnities in the execution of it, before such lands can pass to the devisee; and that a *Testament* (*testatio mentis*) is simply a disposition of personal estate, by a writing freed from those solemnities, and consequently less liable to such disputes as are frequently occasioned by the unskilfulness of the scrivener. We have been solicitous to observe these distinctions, and to avoid confusion, by transferring to the head of *Devise* all dispositions of lands and chattels real (except by deed;) and to the head of *Legacy* all matters of personal bequest; and the general construction of will and testaments, to the title *Will*.

In further explanation of the present mode of arrangement, it is equally essential to observe, that as the titles of *Devise* and *Estate* are so closely connected in their subject-matter, we have endeavoured to show, under title *Devise*, by what words in a will, estates of several kinds may be created; and, under title *Estate*, the incidents thereto, and the condition of the tenant of every such estate when so created.

R. W. B.

*Michaelmas Term,*

1804.
GLOSSARY

OF

ABBREVIATIONS AND REFERENCES USED IN THIS WORK.

Acc.  Accord, or agrees.
Amb.  Ambler's Reports.
And.  Anderson's Reports.
Andr.  Andrew's Reports.
Anon.  Anonymous.
Anstr.  Anstruther's Reports.
Atk.  Atkins' Reports.
B. & A.  Barnwell and Alderson's Rep. in the King's Bench.
B. Com.  Blackstone's Commentaries.
Bac. Abr.  Bacon's Abridgment.
Ball & Be.  Cases in the Time of Ld. Ch. Manners, by Ball and Beatty.
B. R.  Banco Regis, King's Bench.
Bar. or B.  Baron.
Barn. or Barnard.  Barnardiston's Reports in Equity.
Bridg.  Bridgman's Reports.
Brod. & Bing.  Broderip and Bingham's Reports in the Common Pleas.
Buck  Buck's Reports of Cases in Bankruptcy.
Bull. N. P.  Buller's Nisi Prius.
Bulst.  Bulstrode's Reports.
Burr.  Burrow's Reports.
Burr. S. C.  Burrow's Settlement Cases.
C. or Chan.  Chancellor.
C. B.  Communi Banco, Common Pleas.
C. Bar. or C. B.  Chief Baron.
C. J.  Chief Justice.
C. S.  Custos Sigilli, Lord Keeper.
Cam. Duc.  Camera Ducata, Duchy Chamber.
Cam. Scacc.  Camera Scaccarii, Exchequer Chamber.
Cam. Stell.  Camera Stellata, Star-Chamber.
Cart.  Carter's Reports.
Carth.  Carthew's Reports.
Cas. B. R.  Cases temp. W. 3.—12 Mod.
Cas. L. Eq.  Cases in Law and Equity.
Ca. temp. Talb. or Forr.  Cases in the time of Lord Ch. Talbot.
Ch. Ca.  Cases in Chancery.
Vox. R.  (Place, Volume, etc.)
GLOSSARY.

Clay. Clayton's Reports.
Co. Ent. Coke's Entries.
Co. Lit. Coke on Littleton.
Com. and B. Com. Comyns' Reports—Blackstone's Commentaries.
Com. Dig. Comyns' Digest.
Camb. Comberbach's Reports.
Cooke B. L. Cooke's Bankrupt Laws.
Coop. Cooper's Reports of Cases in Chancery.
Contr. or cont. Contra, against, or on the contrary.
Cor. Coram, before.
Cwmp. Cowper's Reports in B. R.
Cox Cases in Equity by Samuel Compton Cox, Esq.
Cro. 1—2—S. Croke, temp. Eliz.—James—Charles.
Cromp. Crompton.
Cull. B. L. Cullen's Bankrupt Laws.
Dah. Dalison's Reports.
D'An. D'Anvers's Abridgment.
Dict. Dictum, Dictionary.
Dig. Digest.
D. R. Deputy Remembrancer.
Dow's P. C. Dow's Reports of Cases in the House of Lords.
Dub. Dubitatur, doubted.
Duraf. and E. Durnford and East's Term Reports.
E. Easter Term.
Ent. or Co. Ent. Ld. Coke's Entries.
Eq. Abr. Equity Cases abridged.
Farr. Farrasley's Reports.
Fitz. Fitzherbert.
Fitzg. Fitzgibbons' Reports.
F. N. B. Fitzherbert's Natura Breviam.
For. Forrester's Cases temp. Talbot, C.
Forrest. Forrest's Exchequer Reports.
Fort. or Fortesc. Fortescue's Reports.
Foubl. Tr. Eq. Fonblanque's Treatise on Equity.
Freem. Freeman's Reports.
Gilb. Gilbert's Reports.
Godb. Godbolt's Reports.
Goldeb. Goldsborough's Reports.
H. or Hil. Hilary Term.
Hardr. Hardres' Reports.
Het. Hetley's Reports.
Hob. Hobart's Reports.
Hut. Hutton's Reports.
Jac. & Walk. Jacob and Walker's Reports in Chancery.
Inst. Ld. Coke's Institutes.
J. Justice.
Jenk. Jenkins' 8 Centuries of Reports.
Jon. 1—2. Jones W. or T. Reports.
GLOSSARY.

Keble's Reports.
Kelynge's Reports.
Reports temp. Ld. King.
Keilway's Reports.
Lane's Reports.
Latch's Reports—Latiat.
Leonard's Reports.
Levinz's Reports.
Liber Assisnarum, Book of Assize.
Register Book.
Littleton's Tenures.
Lutwiche's Reports.

Maddock's Reports of Cases, before Plamer, and Leach, V. C.
Maule and Selwyn's Reports in the King's Bench.
Michaelmas Term.
Master of the Rolls.
March's New Cases.
Mervile's Reports of Cases in Chancery.
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Madd.
M. & S.
M. or Mich.
M. R.
Mar.
Mariv.
Mitf. Ch. Pl.
Mod.
Montag. B. L.
Mo.
Mos.

Note.
Nisi Prius.
New Benloue's Reports.
Old Benloue's Reports.
Officina Brevium.
Office of Executors.
Ordinances—Orders.
Owen's Reports.
Parker's Reports in Exchequer.
Easter Term, Termnfo Paschae.
Placitum.
Placita Corone, Pleas of the Crown.
Parliamentary Cases.
Peere Williams' Reports.
Pigot.
Plowden's Commentaries.
Pollexfen's Reports.
Popham's Reports.
Powell.
Practical Register in Chancery.
Precedents in Chancery.
Price's Reports of Cases on the Equity Side of the Exchequer.

Res.
GLOSSARY.

Rol. Rolle's Reports.
Rose. Rose (Geo.) Reports of Cases in Bankruptcy.
Rot. or Roll. Roll of the Term.

Sch. & Lef. Cases in the Time of Ld. Chancellor Redesdale, by
S. or Sect. Schoales and Lefroy.
S. C. Section.
S. P. Same Case.
S. T. Same Point.
Salkl. Same Term.
Sav. Salkeld's Reports.
Saund. Saville's Reports.
Scace. Saunders' Reports.
Sec. Scaccarii Curia, Court of Exchequer.
Selden. Secus, otherwise.
Sel. Select Cases.
Sel. Ch. Ca. Select Chancery Cases.
Sembl.Semble, it seems.
Show. Shower's Reports in King's Bench.
Sid. Siderfin's Reports.
Skin. Skinner's Reports.
Som. Somers.
Spel. Spelman.
Spel. Statute.
St. or Stat. Stamford's Pless, or Prerogative.
Stamf. Pl. or Prerog Statute of Gloucester.
Str. or Str. Style's Reports.
Str. Tr. State Trials.
Swanst. Swanston's Reports of Cases in Chancery.
Swinburne. Swinburne.
Swinb. Triniy Term.
T. or Trin. Tempore, in the time of.
Temp. Term Reports.
T. R. Tothill's Reports.
Toth. Treatise of Equity.
Tr. Eq. Tremayne's Pleas of the Crown.
Trem. Vaughan's Reports.
Vaugh. Vice Chancellor.
V. Ch. Ventriss's Reports.
Vent. Vernon's Reports.
Vern. Irish Term Reports, by Vernon and Scriven.
Vern. & Scriv. Vesey's Reports.
Ves. or Vez. Reports by Vesey and Beames.
Ves. or B. Viner's Abridgment.
Vin. Abr. or Vin. Watson.
Wats. Wilson's Common Pleas Reports.
Wills. Wilson's Exchequer Reports.
Wightw. Wightwick's Reports of Cases on the Equity Side of
Win. the Exchequer.
Winch. Winch's Reports.
Yr. B Year Book.
Yelv. Yelverton's Reports.
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**Feme Covert.** Vide *Baron and Feme.*
ABEYANCE.

Where an Estate may be in Abeyance, and where not.

1. If lands be leased to A. for life, remainder to B. for years, the remainder to B. is in abeyance during the life of A. and then it shall vest in B. as a purchaser, and as a chattel go to his executors. *Lord Cromwell's Ca.* M. 1573. 3 Leon. 33.

2. In Freeman, ex d. Vernon, v. West, E. 1763. 2 Wils. 165. it was admitted, that there were some cases in which the inheritance, when separated from the freehold, might be in abeyance, but it was agreed, that it should be allowed upon none but the most urgent occasions. The reason of this may be found in Blackstone's argument in the case of Perryn v. Blake, and Mr. Hargrave's observations on the rule in Shelly's Ca. To these reasons the modern lawyers have added their marked odium of every restraint upon alienation. The same principles have in some degree given rise to the rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder, and they influence in some degree the doctrines respecting the destruction of contingent remainders. Vide 1 Inst. 216 a. 342 b. and the notes thereon.

3. Where the remainder is devised in contingency, the reversion in fee is not in abeyance, but descends to the heir. *Carter v. Barnardiston*, M. 1718 1 P. W. 516. *Vide* Fearne's Cont. Rem. 275.

Note. A distinction is here made between a remainder created by conveyance and one arising by will. The editor says, *quære tamen*, upon what foundation this distinction depends, since there does not appear to be any such difference taken in Plunkett v. Holmes, 1 Lev. 11. and Purefoy v. Rogers, 2 Saund. 380?


5. Though the freehold cannot be kept in abeyance, but must vest in somebody, yet there is no such rule with regard to personal estates, which may wait till a contingency happens. *Studholme v. Hodgson*, T. 1754. 3 P. W. 305. *Vide* Green v. Ekins, 2 Atk. 473. Nicholls v. Osborne, 2 P. W. 419.


7. This court never puts the inheritance in abeyance, but in cases of absolute necessity, and will, by opening the estate, so mould it as best to answer the purposes of the limitations. *Cunningham v. Meody*, M. 1748. 1 Ves. 174. *Vide* Bowles* C. 31. Co. 79.
ACCOUNT.

I. Who are entitled to an Account; against whom it lies; and in what Cases an Account is directed, et contra.

II. Course of the Court, where an Account is directed.

III. Where binding and conclusive, and on whom(a); where to be opened, or unravelled(b).

IV. What shall be a good Bar to an Account.

V. In what cases, and in what Manner an Accountant shall be charged and discharged; and what Allowance he shall have.

VI. Account of Profits; where from the Title accruing(c), and where from the Filing of the Bill only(d).

VII. Of mutual Accounts Current between Merchants and Traders; how the same shall be taken, or where allowed in Equity.

ACCOUNT I.

Who are entitled to an Account; against whom it lies; and in what Cases an Account is directed, et contra.

1. A surviving factor must account both for himself and his co-factor, though admitted that the executors of the deceased was compellable. Holtecomb v. Rivers, E. 1669. 1 Ch. Ca. 127.


3. A. had a title to some houses which, on going abroad, he committed to the care of his brother, who afterwards becoming a prisoner, defendant entered and enjoyed several years. Decreed, he should account to A. Lister v. Lister, H. 1677. Ca. temp. Finch, 285.


5. A trustee empowered J. S. to manage a trust estate. J. S. accounted to him. The trustee died, yet J. S. was decreed to account again to castus que trust. Pollard v. Downes, T. 1682. 2 Ch. Ca. 121.

6. One of three part-owners of a ship refuses to fit out or navigate the ship. The ship is fitted out by the others, and lost. The loss shall be borne equally by all three, for he that refused might have had an account of profits. Bratly v. Watson, H. 1684. 1 Vern. 297. Vide Horn v. Gilpin, Amb. 255.

7. An infant shall have an account of profits against an intruder as against a guardian; but where a verdict has passed against his title, he shall have no account of profits until he has recovered at law. Lord Newburgh v. Bickerstaffs, H. 1684. 1 Vern. 296. Vide Falkland v. Bertie, 2 Vern. 342.

8. An account was decreed of an intestate's personal estate, though one had been before taken, and distribution decreed, in the spiritual court. Bissett v. Astrell, E. 1688. 2 Vern. 47. 1 Eq. Ab. 12, pl. 9. 136, pl. 4.


10. Defendant lived with an infant aunt, and received her monies. The aunt died intestate. Plaintiff being entitled to a distributive share, brought a bill for an account of the monies so received. Defendant set out the several sums received, and how applied. The cause being heard without proof, an account was decreed and referred to a master. The master charged defendant with the sums confessed to be received, and submitted if she ought not to be discharged by the same answer. Per cur.—Referred back to the master for defendant to prove her answer. If disproved, no credit to be given to it; if otherwise, the
ACCOUNT I.

Where, and for whom it lies.

court inclined it should be a discharge as well as a charge. Bayley v. Hill, T. 1702. 1 Eq. Ab. 10 pl. 10.

11. A., governor of an island, near which a ship was cast away, on pretence of recovering the cargo for the seamen, seized it all to his own use as wreck-fishing. On his return to England he was decreed to account for the whole. Trotz v. Le Clé, M. 1702. Colles' P. C. 219. Pre. Ch. 230.

12. A. appoints B. his deputy in an office, and by articles it is agreed, that B. shall account with A. for all fees, &c. according to the table in the office, and pay him three-fourths parts thereof, and retain the rest for his trouble. Fees are received by B., which he insists upon solely, because not contained in the table. Held that B. should account with A. for three-fourths of all fees according to the table, and for all fees not mentioned therein, according to his receipts. Macken v. Stanton, M. 1704. 1 Bro. P. C. 87.

13. Where, on a bill to call a trustee to account, he by answer submits readily, though found in debt, he shall pay interest for the balance only to the time the account is liquidated, and no costs. Secus if he controverts the account. Parrot v. Treby, H. 1705. Pre. Ch. 254. 1 Eq. Ab. 122, pl. 4.

14. A. pretending he had a term of 16 years in a house, B. agreed with him for it, and paid 100l., part of the purchase-money. B. entered, but finding A. had only six years, brought his bill to have an account, and his money refunded. B. decreed to account for the profits, the 100l. to be refunded, and B. upon his account to have tenant allowances. Long v. Fletcher, T. 1708. 2 Eq. Ab. 5, pl. 4.

15. A., before marriage, covenanted that his intended wife should receive the profits of her own estate, and that he would give acquittances, and also that she should have the free disposal of her property. He got up the marriage articles, and then prevailing on his wife to levy a fine, he sold her lands and some of her goods, and died. Bill by the widow against her husband's executors, for an account of profits during coverture, and for a satisfaction of the goods sold. Decreed, no account of profits, nor any satisfaction for goods sold; but if any of the goods were not sold, they should be restored to the wife. Harrison v. Constantine, E. 1709. 2 Eq. Ab. 147, pl. 1.

16. Plaintiff's bill suggested that defendant had lent him money, and that he had trusted defendant to compute the interest; that there was a miscomputation, and that plaintiff had paid more than was due; and prayed that defendant might set forth how much interest was due, and how much overpaid. Defendant pleaded the statute against usury as to legal interest. Defendant shall only answer to what he did receive more than the interest. The plea was over-ruled as to all but the words "legal interest." Anon. M. 1709. 2 Eq. Ab. 70, pl. 7.

17. An administrator of a captain of a company of marines is entitled to an account as well of the pay of the company as of the personal pay of the captain and his servants. Bellasis v. Churchill, H. 1711. 2 Vern. 652.

18. A captain of a trading vessel died, leaving money on board to be improved in trade; the mate becomes captain; he is liable not for the interest only, but the profits, having reasonable allowances made to him for his care. Brown v. Littton, E. 1711. 1 P. W. 140. 10 Mod. 20. Vide 15 Vin. 348.

19. T. lent D. 600l. D. assigned a part in a ship, and by defences it was declared, that plaintiff out of the earnings should pay himself, and should account to D. for the overplus gained; but there was no covenant to pay the money. The ship was lost, and plaintiff brought his bill against D.'s executrix for the debt. Defendant denied assets prater to satisfy specially debts. Decreed, defendant to account for testator's estate, and plaintiff to account for the earnings, and to be allowed for the outfite of the ship, though she was cast away. Tyrrell v. Thomas, M. 1713. 1 Vin. 183, pl. 5. 2 Eq. Ab. 5, pl. 9.

20. Bill by the heir and residuary legatee of A. against his widow and execu- trix for an account of his estate. It was proved that A. was very infirm seven years before his death, and though he signed receipts and executed leases, the money was paid to defendant. Decreed, defendant to account for what she had received seven years before her husband's death, but the master to be easy in taking the account, and to allow for housekeeping without vouchers. Buckle v. Mitman, M. 1716. 4 Vin. Ab. 129, pl. 8. 2 Eq. Ab. 6, pl. 10. 158, pl. 8.

21. Equity will not decree an account of mesne profits, unless in case of a trust, or an infant, where no entry has been.
ACCOUNT I.

Where, and for whom it lies.


22. Bill by an only child of a freeman, for her share of her father's personal estate. Plaintiff at several times received sums of her father in his life-time, and he had transferred 1700l. stock, in trust for himself, in order to dispose of it by his will to defendants. *Per cur.*—An account shall be taken of what plaintiff had received from her father in his life-time, and on what account, reserving the consideration, whether such money should be taken in part of her customary share, or whether she should have a moiety of her father's estate besides what he had given her in his life-time, there being no other child. *Stanley v. Nordiffe*, T. 1717. 7 Vin. Ab. 215, pl. 13. 2 Eq. Ab. 265, pl. 11.

23. The child of a freeman of London is not obliged to make his election whether he will abide by the will or by the custom, until after the account taken. *Hender v. Rose*, T. 1718. 3 P. W. 124. (a) *Vide* Frederick v. Frederick, 1 P. W. 722.

24. After a decree to account, if an executor or administrator does not revive within six years, it is not within the statute of limitation. *Hollingshead's Ca. M.* 1721. 1 P. W. 742.


26. An obligor on payment of 20l. to the obligee, a weak man, procured a bond and notes for money to be delivered up to him upon pretence that he was poor, and nearly related to the obligee, but neither of those considerations being proved, he was decreed to account for the bond and notes. *Lucas v. Adams*, M. 1725. 9 Mod. 118.

27. Where one claims an absolute gift of a personal estate by the intestate in his life-time, and it plainly appears to be a trust, the court will order him to account. *Mitford v. Ld. Herbert*, M. 1725. 9 Mod. 113.

28. Equity will never countenance a demand for attending at auctions as a puff; nor will equity suffer it to be set up against a just demand. *Walker v. Gascoigne*, E. 1726. 2 Eq. Ab. 161, pl. 13. 13 Vin. Ab. 543, pl. 12, cited as from a MS. said to be Lord Harcourt's.

29. Bill for an account of the produce of 20,000l. *S. S.* stock, mortgaged by plaintiff to defendant, (and after principal and interest paid,) to be paid the balance. At the hearing, an issue was directed; but upon appeal to the Lords the order was repealed, and an account directed for all monies received on the sale of the pledged stock, though the day of redemption was past, it not appearing defendant had sufficient stock to answer plaintiff; and after principal and interest satisfied, the residue to be paid, and the stock not sold to be transferred to plaintiff. *Harrison v. Hart*, M. 1727. Com. Rep. 899. *Vide* Mercer v. Tutt, 3 Bro. P. C. 142. Merrick v. Spark, Com. Rep. 401.

30. Two persons agreed for the purchase in moieties, of an estate, subject to several incumbrances, to be discharged out of the purchase-money; one of them had abatements made to him by some of the incumbrancers, in consideration of services, and which were directed to be for his own use. On a bill for an account of rents and profits, the court would not allow him the benefit of these abatements exclusive of the other. Held, he must account for them, the purchase being made for their equal benefit, and on a mutual trust. *Carter v. Horne*, T. 1728. 1 Eq. Ab. 7, pl. 13.

31. Lands were devised, in trust, to maintain an infant till 23, and then to account to, and pay him the rents, and convey the estate to him; but if he died before, to convey it to another. The infant is not entitled to an account till 23, for that is a condition precedent, but the surplus profits, if he die before, go to the heir of the testator, not being devised over. But the infant and the heir, on suggestion of insolvency in the trustees, may bring a bill for an account. *Tilly v. Simpson*, M. 1729. Mos. 244. *Vide* 1 Vern. 21. 2 Vern. 158. 247. 425. 571. 644. 645. 1 Ch. Ca. 96.

32. If a lease, household, and shop goods are assigned over to another, and he comes into possession, and carries on the trade, from that time they are to be considered as money received, and an account thereof taken accordingly. *Clayton v. Luckin*, M. 1729. Mos. 252.

33. Plaintiff in his bill having assigned 150 errors in five stated accounts. An order was made on him, to pick out those he would insist on, and if the court should be of opinion they were
not errors, to consent to waive the rest; if the court thought them errors, there would be good cause either to decree an open account, or give plaintiff leave to surcharge or falsify. Rodney v. Hare, H. 1730. Mos. 296.

34. Defendant was master and part owner of the C. In 1733, by deed-poll, (reciting that the King of Spain had granted liberty to the S. S. Company (in whose service defendant was) to fish for wrecks,) in consideration of 700l. paid by plaintiff to defendant, he assigned over 700l. to be issuing out of his part of the C. together with all profits arising from the wrecks mentioned, after just allowances made. Defendant covenanted to warrant to plaintiff his share, and it was agreed that said 700l. should be liable to all losses and gains on account of the intended voyage. Defendant carried contraband goods, and plaintiff brought his bill for a general account of the voyage. M. R. decreed a general account. Defendant appealed, insisting that if the ship had been forfeited, plaintiff would not have contributed to the loss, and therefore ought not to have the gain of a clandestine freightage. But per Ld. Ch.—Defendant ought not to expose the ship to forfeiture, nor to have the advantage of unfair dealing. Decree affirmed. Dr. Dover v. Opey, E. 1733. 2 Eq. Ab. 1. pl. 18.

35. Bill by assignees of J. S., against defendant, as executor of D., who had lent J. S. several sums upon bonds at 6l. per cent. interest, and taking advantage of his necessities, had compelled him to pay 10l. per cent., which he entered into agreements to do. Decreed at the Rolls, and affirmed by Lord Talbot, that defendant should account; that only legal interest should be allowed; that he had been paid above legal interest to be deducted out of the principal, which plaintiffs were to pay off, after such deduction; the bonds to be then delivered up. Busanquet v. Dashwood, M. 1755. Ca. temp. Talb. 38. Vide Ld. Clancarty v. Latouche, 1 Ball & B. 430.

36. Where an attorney's bill has been taxed at law, equity will not decree an account; for if the prothonotary does not make all just allowances, the court will refer it back to be re-considered. Osbalister v. Cross, H. 1738. Comm. Rep. 612.

37. In a bill for an account, all persons possessed of a testator's estate, should be made defendants. Anon. H. 1740. Barn. Eq. Rep. 332. 2 Atk. 121. This case is named Glass v. Oxenham, in Atk. 38. Goods are assigned to plaintiff for securing a debt; assignor afterwards becomes a bankrupt, and his assignee possesses himself of these goods. Plaintiff brought his bill against them for an account. Demurrer, for that this matter was receivable at law, non allocatur, for though plaintiff might bring trover, yet as the goods were assigned as a security, there is matter of account, and plaintiff's proper remedy is in equity. Ryat v. Roberts, E. 1740. Barnard. Eq. Rep. 38.

39. If defendant, by his answer, acknowledges any sum due, though he swears those sums were discharged, it is a ground for directing an account. Braces v. Taylor, H. 1741. 2 Atk. 254.

40. In a case entangled, and the transactions of long standing, the court will rather dismiss the bill, and leave plaintiff to his action at law, than direct an account before the master. Sturt v. Mellish, T. 1743. 2 Atk. 610. Vide Sharmar v Sharmar, 2 Vern. 276.

41. Colleges are not obliged to account so strictly, and so far back as common persons are. Att. Gen. v. Batiol Coll. M. 1744. 9 Mod. 409.

42. A college made a lease, and the rent was subject to taxes; the tenant by mistake did not deduct them. Equity will not allow those already paid, nor decree the account back. S. C.

43. Previous to the marriage of G. S., the father of the intended wife covenanted to pay 1000l. to the husband on the marriage, and that his heirs, executors, &c. should pay likewise to the husband, his executors, &c. six months after the father's death, 500l. as the remainder of the wife's portion; and by the same deed the husband contracted to give security by specialty, that in case his wife survived him, his heirs, executors, &c. should, within six months after his death, pay her 1000l. He gave a bond three days after the marriage, and then became bankrupt; but before the bankruptcy, and after the father-in-law's death, the husband being indebted to plaintiff, assigned the 500l. to him as a security for the debt. On a bill by the assignee of the 500l. against the executors of the wife's father, the bankrupt and his wife, and the assignee under the commission, for this 500l.,
ACCOUNT I.

Where, and for whom it lies.

22. Bill by an only child of a freeman, for her share of her father's personal estate. Plaintiff at several times received sums of his father in his lifetime, and had transferred 1700l. stock, in his name, in order to dispose will to defendants. Petition shall be taken from her father and on what account and on what consideration, whether be taken in part of the estate of his widow or out of her father's estate, and otherwise if it would entail in abatement in his widow.

29. Bill for the produce of an infant's estate, belonging to an infant, to the acting executor in directed to be taken annually.

31. Admission, that any timber has been wrongfully cut, gives a right to an account. Les v. Aliston, M. 1789. 5 Bro. C. C. 37. 1 Ves. jun. 82.


33. There may be a decree for an account, without declaring a will well proved, where one of the witnesses is abroad. Fitzuckerby v. Fitzuckerby, H. 1793. 4 Bro. C. C. 231.


35. An account directed four years after dissolution of a partnership, it appearing that one partner had retired, from a conviction that the partnership was insolvent. Anderson v. Malby, H. 1795. 4 Bro. C. C. 423.

36. An answer need not set forth an account, where the ground upon which it is prayed, is denied. M. of Donnagel v. Stewart, T. 1797. 3 Ves. 446.

37. An account between principal and agent was settled from loose papers, the agent having kept no regular books. After his death, liberty was given to surcharge and falsify, upon allegation of errors since discovered. Lez HARDWICKS v. Vernon, H. 1798. 4 Ves. 411.

38. On the ground of fraud, a general account was decreed, and the securities to stand only for the balance, though the vouchers had been destroyed by general consent. Wharton v. May, H. 1799. 5 Ves. 27.

39. On a suspicious circumstance in the answer, a general account was decreed against a steward, notwithstanding a receipt in full, which was admitted
only as evidence of the particular payment, not of a general discharge on an account stated, though under circumstances it might have that effect, as upon proof that the principal never would give any vouchers, and the account was kept by the steward. *Middleton v. Sharland*, M. 1799. 5 Ves. 87.

60. Account of arrears of an annuity decreed against a purchaser with notice, the length of time not being sufficient to raise a presumption of satisfaction. *Wyman v. Williams*, M. 1799. 5 Ves. 130.

61. Device to trustees and their heirs, to the use of other trustees for 1000 years, upon trust, by sale or otherwise, to raise and pay what the personal estate should fall short of the debts, and then in strict settlement. A bill being filed by creditors, the personal estate proving deficient, and the trustees having contracted to sell under their power, upon their supplemental bill, praying the benefit of the accounts against the surviving trustee of the term, (though no party to the original cause,) that the debts may be paid out of the purchase-money, and that on payment the term may be assigned to the purchasers, it was so decreed, defendant not objecting. *Fletcher v. Houghton*, T. 1800. 5 Ves. 550.

62. Bill by the bailiff of London, est
titled under a grant of Edw. VI. to the execution and return of all process in Southwark, against the sheriff of Surrey, for an account of the fees, dismissed: *Loves v. Sutton*, M. 1800. 5 Ves. 683.

63. To sustain a bill for an account, there must be mutual demands. *Dawdell v. Bailey*, T. 1801. 6 Ves. 141.

64. Notwithstanding an admission of assets by mistake, the court will, upon a strong and clear case, permit an account to be taken. *Young v. Walter*, E. 1804. 9 Ves. 365. *Vide Dolder v. Bank of England*, 10 Ves. 284.

65. Motion for an injunction to restrain the sheriff from selling plaintiff's goods under an execution obtained by defendant for carriages sold to plaintiff since 1791. Defendant by his answer denied that the charges were unreasonable, and stated that bills were regularly delivered. In 1793, a negotiation took place, and a bond was given by plaintiff, on condition that he should not be thereby precluded from examining the bills. Afterwards plaintiff applying through his agent for further time, defendant gave him till 1799, on the terms of having his account then settled, which settlement he insisted upon. The court refused this injunction, as no misrepresentation appeared. The bills were regularly delivered, and after an agreement for an examination of the bills an account had long been settled in a deliberate transaction, with the intervention of an agent upon giving further time. *Lord Courtenay v. Godschall*, T. 1804. 9 Ves. 473. *Vide Ld. Donnegal v. Stewart*, 3 Ves. 446.


67. Where the wife has permitted her husband to receive her separate income, the court will only give the account for one year. *Parkin v. White*, T. 1805. 11 Ves. 223.

68. But where the wife was insane and maintained by her brother in Scotland at her husband's expense, before as well as after she had any separate estate; the court directed an account as to past maintenance, and the husband's ability, with due regard to her comfort. *Brodie v. Barry*, T. 1813. 2 Ves. & B. 36. which see more fully, *past, tit. Baron & Femae*, iv.

69. The court will not restrain a man from proceeding to recover the amount of a promissory note, on the ground that there were accounts subsisting, which accounts have been settled and signed, leaving a balance in favour of defendant in equity, and though there may have been other subsequent accounts between them; yet the court will not interfere, if defendant states that plaintiff has withheld his accounts, and refused, though often requested, to come to a settlement.—*Held also, that charges for business done, as attorney or agent, will not raise an equity against the holder of his promissory note, like money mutually due, for such demands are matters of set-off; neither does it destroy the effect of a settlement that charges for business done before the liquidation of the accounts were not included in the account so settled; for, to constitute a material exception, on which an injunction will be granted, the charge must not only be fully answered, but the charge itself of such import as that the answer will serve plaintiff in his
ACCOUNT I. & II.

Where, and for whom it lies. 

Course of the Court.

72. Were trust property is continued and employed in trade without authority, the infant centus que trusts may elect whether they will take the profits or the interest for the whole period, but they cannot proceed for both; nor would they be at liberty to take profits from one part of the period, and interest from another, unless something should happen to put an end to the consent, which must be implied from the acceptance of profits at all. Heathcote v. Hulme, M. 1819. 1 Jac. & Walk. 122.

73. It is the first duty of an accounting party, whether an agent, trustee, receiver, or executor, to be constantly ready with his accounts, and neglect in this respect, is a sufficient ground for charging him with interest and costs. Per M. R. in Pearse v. Green, M. 1819. 1 Jac. & Walk. 140.

ACCOUNT II.

Course of the Court, where an Account is directed.

74. It is the constant course of the court, where a mutual account is decreed, to reserve costs till after the report, that the court may have it in their power to punish the wrong-doer. Rider v. Bailey, H. 1709. 6 Vin. Ab. 382, pl. 32. 2 Eq. Ab. 237, pl. 5.

75. Costs generally follow the event of an account; but where the account is intricate or doubtful, there shall be no costs. Pitt v. Page, T. 1716. 1 Bro. P. C. 372.

76. An account was directed after 33 years nonsequence. But why, the book is silent. Kingsland v. Tyrconnel, H. 1724: 1 Vin. Ab. 186, pl. 10. 2 Eq. Ab. 11. pl. 15.

77. By the course of the court, where an account must necessarily be directed at the hearing, a commission before the licensing shall never be granted to examine witnesses beyond sea, when the granting such commission will delay the directing the account; and the proper time to apply for such commission is after the account is directed. Adam v. Dobbs, H. 1740. Barnard. 270. 271.

78. The Lords very often, in matters of account which are intricate, refer it to two merchants, named by the parties, to consider and report their opinions, rather than leave it to a jury. Gyles v. Willer, E. 1740. 2 Atk. 144.

79. The course of this court is analogous to proceedings at law, where an account was to be taken by auditors; but the modern practice is to refer matters of account to a Master. Exp. Bax, T. 1751. 2 Ves. 388.

80. Money in the funds, belonging to wards of the court, cannot be transferred into the name of the accountant-general to the credit of the cause, until the account is taken by a Master, and his report made. Bencliff v. Rich, E. 1779. 1 Bro. C. C. 56.

81. In an account directed against the husband’s estate of dividends of the wife’s separate property received by him, consideration was had of his extra expense of maintaining her in consequence of her being a lunatic. Att. Gen. v. Parther, T. 1793. 4 Bro. C. C. 409. Vide Brodie v. Barry, 2 Ves. & B. 35. S. P.

82. In a suit for an account, an answer proceeding only to enable plaintiff to go into the Master’s office, is not sufficient. He is entitled to the fullest information from defendant’s answer, not by long schedules in an oppressive manner, but giving the best account they can, stating that it is so, referring to the books, &c. so as to make them a part of the answer, and the fullest opportunity of inspection. White v. Williams, E 1803. 8 Ves. 198.
ACCOUNT II. & III.

Course of the Court.—Where binding, or to be opened.

83. Chancery will take cognizance of matters, which, though cognizable at law, are involved in accounts too complex to be accurately taken on a trial at law. O’Connor v. Speight, H. 1804. 1 Sch. & Lef. 309.

84. In account, though bail may be had at law, the court will grant a ne exeat regno. Hawmay v. M’Entire, E. 1805. 11 Ves. 54.

85. When the parties who might claim do not attend, the Master ought to take the account as carefully as if they did. Carson v. Johnson, H. 1805. 2 Sch. & Lef. 300.

86. To a bill for an account, a settled account was suggested by the answer, but not proved; the court gave liberty to surcharge and falsify, if the Master should find any settled account. Knapp v. Barker, E. 1808. 14 Ves. 379.

87. But a bill impeaching an account, must allege some specific errors, or the court will not grant the liberty to surcharge and falsify. S.C.

88. An agent confounding his principal’s property with his own, was charged with the whole, except what he could prove to be his own; and in this case, there being a breach of the terms whereon the court had dissolved an injunction, such enquiry was directed, with costs. Lupton v. White, M. 1808. 15 Ves. 482.

89. The court, in the above case, refused to give a prospective direction to the Master to admit books, not legal evidence, but gave liberty for him to apply to the court for further directions, if any doubtful question of evidence should arise. S. C. 443.

90. After a decree to account, the statute of limitations is no bar to a bill of Revivor, but it is in the discretion of the court to grant or refuse relief. E. of Egremont v. Hamilton, E. 1811. 2 Ball & B. 531. Et vidi Hollingshead’s Ca. 1 P. W. 742. Hovenden v. Ld. Annesley, 2 Sch. & Lef. 607.

ACCOUNT III.

Where binding and conclusive, and on whom.(a) Where to be opened, or unravelled.(b)

(a) Where binding and conclusive, and on whom.

91. A settles an equity of redemption for a jointure, and afterwards becomes a bankrupt, the assignee settles an account with the mortgagee; the jointress shall be bound by this account, unless she can show particular errors. Knight v. Bampfield, T. 1683. 1 Vern. 179.

92. F. being guardian to appellant’s wife during minority, placed her with C. for her education, and ordered respondent to pay C. what sums should be called for. Several sums were paid on account, and were allowed. Appellant’s wife, when of age, as by order of F. desired more money, and two sums were paid her. She afterwards came to an account with F., and general releases were executed, but said two sums were not entered in the account. Respondent not having received any allowance for these two sums, preferred his bill in equity, and appellant’s wife, by her answer, admitted the receipt of them.—Chancery decreed, that there appearing no positive orders from F. for payment of these two sums, appellants ought to pay the principal, interest, and costs. This decree was affirmed by the Lords. Dolphin v. Haynes, H. 1697. Show F. C. 17.

93. A., tenant for life of a trust estate, remainder to his sons. A., before a son born, brings a bill against the trustees, an account is decreed and taken. This account shall bind the sons, for all persons that could be, were parties to the suit. Leonard v. Lady Sussex, M. 1705. 2 Vern. 527.

94. If the immediate parties to a dealing account together, the representatives of either may not object to it. Gis v. Lewis, M. 1709. Collie’s P. C. 416.

95. The guardian of an infant prevailed on her, about a month after she came of age, to sign and allow two several accounts of his receipts and disbursements touching her estate; on the balance of both which accounts, there appeared to be a considerable sum due to him. But as neither of them were perused or examined by any person on behalf of the young lady, nor any vouchers produced, they were both set aside, and a general account directed. Wych v. Packington, T. 1712. 1 Bro. P. C. 372.
ACCOUNT III.

Where binding, and on whom.

96. A receiver to the guardian of an infant, whose account is allowed by the guardian, shall not be obliged to account again to the infant when of age. Clovering's Ca. T. 1720. Pre. Ch. 535.

97. Stated accounts by men of full age, after a great length of time, not to be set aside against an executor. Western v. Cartwright, T. 1725. Scl. C. C 34.

98. In a decree of foreclosure against an infant, though the infant has six months after full age to show cause, &c., yet he cannot avail into the account, nor even redeem, but only show an error in the decree. Mallock v. Galten, H. 1734. 3 P. W. 352. In Lyne v. Willis, cor. M. R. 13th May, 1790, this was admitted to be the settled practice.

99. There is no rule more strictly adhered to in this court than that when defendant sets forth a stated account he shall not be obliged to go on upon a general one. Summer v. Thorpe, H. 1736. 2 Atk.


101. A plea of a stated account is bad, unless it shows the account was in writing, and what the balance was. Bux v. Brown, T. 1712. 2 Atk. 599.

102. A plea of a stated account to all matters before accounted for is bad; it should aver that it is just and true to the best of defendant's knowledge and belief. Anon. E. 1748. 3 Atk. 70.

103. Account of mortgage-money, made up between the mortgagee and the executor of the mortgagor, does not bind the specific devisees of the mortgage. Secus if the mortgage were devised generally to pay debts and legacies. Langley v. E. of Oxford, T. 1743. Amb. 17.

104. A general account was not set aside or opened on a new discovery, for a new discovery does not open such account; otherwise, if it had been a minute, strict account originally. Sewell v. Bridge, T. 1749. 1 Ves. 297.

105. If some merchant sends an account current to another abroad, upon which there appears a balance due to himself, and the other keeps the account by him for two years without an objection, the rule of this court, and of merchants, is, that it is considered as a stated account. Tickell v. Short, E. 1750. 2 Ves. 299.

106. No settled account ought to be opened upon mere suggestions of a bill in equity, especially when the truth of such suggestions is substantially denied by the answer. Dunbar v. Lim, E. 1772. 6 Bro. P. C. 503.

107. Where a balance of accounts is taken, and a note given for it as the balance, that must be paid, although there are subsequent accounts upon which the payee may eventually be in arrear. Preston v. Stratton, E. 1792. 1 Anst. 60.

108. In order to set aside an account to impeach it for error, or to surcharge and falsify it, very strong ground must be shown. Chambers v. Goldwin, E. 1801. 5 Ves. 837.

109. After account taken under decree, a party shall not be allowed to bring an action at law on the same subject-matter; in such case, equity will stay proceedings at law by injunction. Bell v. O'Reilly, T. 1805. 2 Sch. & Lef. 430. In this case, defendant at law was held liable to pay the costs of that action, having filed a bill for an injunction, and in the mean time suffered the action at law to go on; whereas he ought not to have appeared to the action at law, but have applied to Chancery for an attachment against plaintiff at law. S. C.

110. A decree made in 1812, was objected to, because it ordered payment of a sum found due, and directed to be paid with interest, by a former decree in 1776, on the foot of accounts settled in 1756 and 1761, between attorney and client, in which the attorney had charged interest upon interest, with interest on the consolidated sum from 1766 to 1812. That sum having been acknowledged by the solemn deed of the objecting party, (executed in 1783,) to be due with interest: it was held, that the objections came too late; but if they had been recently made in order to open the accounts, they would certainly have been effectual. Rosse v. Sterling, H. 1816. 4 Dow. P. C. 442.

111. On an enquiry into very remote transactions, accounts kept by a deceased party at the time, will be considered prima facie evidence, throwing on the other the necessity of impeaching them. Chalmers v. Bradley, T. 1819. 1 Jac. & Walk. 66.
ACCOUNT III.

Where to be opened, or unravelled.

(a) Where to be opened, or unravelled.

112. Defendant's testator stated an account with plaintiff, which was signed by the parties; plaintiff afterwards finding his servant had paid 200l. for which he had no credit, prayed a new account against the executor, who pleaded the former account stated, and that he was but an executor. Plea over-ruled; but plaintiff to proceed no further without leave of the court. Wright v. Cozen, 1675. 2 Ch. Ca. 262. Chandler v. Dorsett, 1679. Rep. temp. Finch, 481. S. P. Vide etiam Osbome v. Chapman, 2 Ch. Ca. 137.

113. A gave in an account, which being taken as true, a release was given. The court relieved against the release, and let them in to disprove the items. Anon. 1668. Skin. 148.

114. The workmen, &c. employed to build Blenheim-house, having accounted with the crown, and the Duke being afterwards called upon for a surplus charge, thought himself not concluded by those accounts, and brought a bill for an account of what monies had been received of the crown by the overseers. Decreed they should account again before a Master. D. of Marlborough v. Sir J. Vanburgh, T. 1723. 9 Mod. 23. Vide, 2 Ch. Ca. 32. 1 Ves. 163. 1 Vern. 179. 465.

115. A bill lies for errors in an account, though settled for three or four years. Roberts v. Kaffin, H. 1740. 2 Atk. 113.

116. Where fraud appeared in a stated account, the whole may be opened, though a stated account of 23 years standing Vernon v. Wavrrey, H. 1740. 2 Atk. 119.

117. An account settled ten years before the bill filed, though containing very gross items, shall not be opened; but plaintiff may surcharge and falsify. Brownell v. Brownell, E. 1786. 2 Bro. C. C. 62. And on him lies the onus probandi. Pitt v. Cholmondeley, T. 1754. 2 Ves. 565.

118. A party seeking to open an account, must point out specific errors by his bill, or he will not be permitted to prove them at the hearing. Taylor v. Hayling, H. 1788. 1 Cox 435.


120. And it is sufficient, if, upon the whole, the court see an unfair account, although the objections raised by the bill are not made out in evidence. S. C. 121. If, in such a suit, the vouchers have been delivered up, and lost, the oath of the party must be admitted as to their import. S. C. Vide Vaughan v. Lloyd, cor. Lord Thurlow, 1781. See this important case of Lewis v. Morgan, fully stated in 5 Price 42. 468. 518, where the reporter has followed it in all its various complicated stages:—First, the court of Exchequer (in 5 Price 42) held, that a settlement of accounts between attorney and client, were not to be deemed conclusive, as the nature of their connection excepted their accounts from the operation of the general rule in equity; therefore, though the attorney's accounts were settled and signed, and the vouchers were delivered up, and a note given for the balance, they will be re-opened a considerable time afterwards: and on taking such accounts before the deputy remembrancer it will not be enough that bonds are produced to show that the debt for which they were given, existed, but the obligor must give evidence of the actual payment of the consideration money: yet, after so long a time, the party may make oath of the existence of any voucher not forthcoming; and where such an account is so decreed, the court (on application) will order (if the transactions warrant it,) that their officer take a separate account of the mortgage made by the client, and report specially, and if that appears satisfied, they will permit the mortgagee to redeem; or if not satisfied, then on payment of what may remain due; Wood, B. contra. In 5 Price 468. the attorney applied to suspend the order of the Exchequer till his appeal, of which he had given notice, should be determined, but the Exchequer thought that application would be more properly made to the court of appeal, as it had already interfered in the cause, but they suspended their order to a certain extent, to give the attorney time to apply to the upper house, to which he appealed, and by whom the decision of the court of Exchequer was affirmed, their lordships having resolved that the whole transaction should be sifted, and the accounts.
ACCOUNT III. & IV.

Where to be opened, or unravelled.—What a good Bar.


122. A settled account between attorney and client, opened upon the client's general allegation of errors admitted, though no specific errors pointed out. Matthews v. Walsyn, T. 1798. 4 Ves. 118.

123. Accounts were opened, and a general account decreed against an agent, who was also tenant to his principal, for a fraud; the situation of defendant, as agent and tenant, deprived him of the objection that plaintiff did not bring his demand forward earlier. Beaumont v. Boulbee, T. 1800. 5 Ves. 485.

124. A verbal statement of an account, and a receipt in full given for the balance then agreed to be due, are no bar to a bill for opening the account, if there have been mistakes. Walker v. Consitt, T. 1801. Forrest 157.

125. A bankrupt cannot surcharge and falsify in the master's office, accounts settled by the commissioners long ago; but palpable errors pointed out may be rectified on petition. Twogood v. Swanson, M. 1801. 6 Ves. 485.

126. The court will not open a settled account where signed, or a security taken on the foot of it, unless the whole transaction appears fraudulent upon errors specified in the bill and supported by evidence. Drew v. Power, T. 1803. 1 Sch. & Lef. 192.

127. A plea of account stated and settled, must be supported by averments, showing an actual (though not final) settlement, as where security is given for the balance, or where all vouchers are delivered up; and it is not sufficient that the last fact is stated in a schedule of the statement of the account referred to by the answer, without a positive averment of it in the plea. Hodder v. Watts, E. 1817. 4 Price 8. Vide Drew v. Power, supra.

ACCOUNT IV.

What shall be a good Bar to an Account.

128. Bill for an account of the rents and profits of land. Per cur.—When a person has been ejected at law, and the other party has been in possession above 20 years, and no account demanded or bill filed, the statute of limitations will bar an account in Chancery, as well as an action at law for the same profits, for jus possessios is gone by the statute; and if once the statute begins to attach, incapacity will not aid it. Newarre v. Rutten, 1715. Vin. Ab. 185. pl. 7. 2 Eq. Ab. 9. pl. 6. This statute, however, does not extend to a trust. S. C. Et vide Norton v. Turvil, 2 Eq. Ab. 152. pl. 14. 2 P. W. 144.

129. Bill for an account by a merchant against his partner. Defendant pleads,—that the dealings were transacted above 20 years before bill brought, plaintiff's acquiescence without suit,—and the statute of limitations—in bar of the account. Plea allowed; for forbearance of suit for 20 years, is a good bar in equity, though between merchant and merchant. Bridges v. Mitchell, H. 1726. Gilb. Eq. Rep. 224. Note. The distinction is, that if open accounts are continued by subsequent acts, they are not barred by such a length of time; after if deserted; for then the court will presume the balance settled. Et vide Foster v. Hodgson, 19 Ves. 180.

130. A. and B. were entitled to a personal estate by the statute of distributions, and an account thereof was stated between them; afterwards A. by bill demanded a discovery of particular items, supposed not to be comprised in it, and at the same time allowed the account to have been fairly taken. Defendant pleaded the stated account in bar; and insisted, that either the items must be denied in particular, by falsifying them, or saying they were not allowed, or else a surcharge must be brought in; but that neither of these ways is taken, so that plaintiff would unravel the account without pointing out one error in it. Plea allowed. Burke v. Bridgeman, M. 1730. 2 Barnard. 272. Vide Hart v. King, Bunn. 764.

131. When a bill is for a general account, and defendant sets forth a stated one, it is prima facie a bar to a general one, till particular errors are assigned to the stated account. Dawson v. Dawson, M. 1737. 1 Atk. 1.
ACCOUNT IV. & V.

What a good Bar.—Accountant's Allowances.

132. It will not support a stated account to allege there has been a dividend made between the parties; for that may be made subject to an account to be afterwards taken. Dawson v. Dawson, supra.

133. Length of time is sometimes a bar in equity to an account; but not against an administrator for execution of a trust of real estate, though stale accounts are much discouraged by the court. Pomfret v. Windsor. T. 1752. 2 Ves. 483. 485.

134. An offer to account will take a case out of the statute of limitations. S. C.

135. The statute of limitations is an answer to a bill for an account between merchants, where the bill admits that no demand was made for 12 years. Foster v. Hodgson, T. 1812. 19 Ves. 180.

136. The court is not bound to limit an account of tithes to 6 years. Ward and Cansley v. Dean of St. Paul's, E. 1817. 1 Wils. Exc. 1. 4 Price 65.

137. Courts of equity, in applying length of time as a bar to relief, do not proceed on the ground of individual hardship or loss; public policy requires that persons should not lie by and call for accounts at a distant period, when the accounting party is dead, and under all the difficulties that arise when the vouchers are lost, and the memory of witnesses is gone. Chalmers v. Bradley, T. 1819. 1 Jac. & Walk. 63.

ACCOUNT V.

In what Cases, and in what Manner, an Accountant shall be charged and discharged, and what Allowance he shall have.

138. A gave 250l. to his son, and made his wife executrix, who married again, on a bill by the son for his legacy, defendants claimed allowance for maintenance and education. Sed non allocatur, but a sum paid as apprentice fee was allowed them. Anon. M. 1681. 2 Vent. 353.

139. In account, no allowance is made for diet of a guest upon invitation. Arundel v. Roll, M. 1681. 1 Vern. 197.

140. An accountant shall be allowed all sums under 40s. on his oath; but he must mention in his affidavit to whom paid, for what, and when. Anon. M. 1684. 1 Vern. 284. Vide Marshfield v. Weston, 2 Vern. 176. and vide note to next case.

141. And the whole so allowed not to exceed 100l. Wickerley v. Wickerley, T. 1686. 1 Vern. 470. Note. The Chancellor, not satisfied with this rule, said he would consider how to rectify it. And in 1 Eq. Ab. (5th ed.) 11. pl. 14. n. to Marshfield v. Weston, it is said to be now the established practice in Chancery that a defendant shall be allowed sums under 40s. by way of discharge, upon his oath, but plaintiff not any thing on his oath.

142. R. married N.'s widow, who was executrix of her husband, and kept a book of accounts relating to his estate; after she married R. the same book was continued. Afterwards R. went governor to Barbadoes with his wife, and the servant who kept the book; they all died there. It was proved in the cause, that the book was made up from vouchers, and that great part of the money was paid; and the witness believed the whole was paid. Upon exceptions to the Master's report, the court adjudged the book should be allowed as a discharge, as well as a charge. Darston v. E. of Oxford, M. 1701. Colles' P. C. 299. Pre. Ch. 188. S. C. differently stated. Vide Mellish v. Turner, where books were lost in the earthquake at Smyrna, and defendant's books, which were charged against him, were allowed to be his discharge.

143. Lord Keeper thought it a good rule to establish, that where a man was charged by an oath, or a book, the same should be his discharge. S. C.

144. The court allowed the executrix of a master of a ship sums under 40s., which the testator had fairly entered in an account-book, without proof, for the same would have been allowed to the testator on his own oath. Merey v. Benge, M. 1729. Mos. 253. Vide 1 Vern. 470. 2 Vern. 176.

145. When at law, sums are allowed under 40s. on oath, it must be positive, and not to belief only, and the same directions are given under a decree in equity. Robinson v. Cumming, M. 1742. 2 Atk. 410.
ACCOUNT V. & VI.

Accountant's Allowances.—Account of Profits, and from what Time.

146. An allowance made to a solicitor employed by the mother of an infant, in receiving rents which were in danger of being lost, was given as a just allowance to the mother, supposing her the accounting party. Stewart v. Hoare, T. 1789. 2 Bro. C. C. 663.

147. A son employed under, paid by, and accounting to, his father, may be a witness, but is not accountable to his father's principal. Cartwright v. Halsey, T. 1791. 1 Ves. jun. 292.

148. A party charged by his answer or examination cannot discharge himself by it, unless the whole is stated as one transaction, as that on a particular day he received a sum, and paid it over, not that on a particular day he received a sum, and on a subsequent day he paid it over. Thompson v. Lambe, T. 1802. 7 Ves. 587. Note. Ld. Ch. wished that the Masters would be strict upon those who would not attend them, and make their reports ex parte, adding, that the court would always support them in such cases. Vide etiam Ridgway v. Darwin, 7 Ves. 404.

ACCOUNT VI.

(c) Account of Profits; where from the Title accruing. (d) Where from the Filing of the Bill only.

(c) Account of Profits; where from the Title accruing.

149. If a lease, household, and shop goods are assigned over to another, and he comes into possession, he must account from that time. Clayton v. Luckin, M. 1729. Mos. 252.

150. Where one is in possession of lands belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title. Bennet v. Whitehead, M. 1791. 2 P. W. 645.

151. So defendant shall account for profits from the time plaintiff's title accrued, if he had concealed deeds and writings making out plaintiff's title. S. C. El vide Dormer v. Fortescue, 3 Atk. 124. Ld. Townshend v. Ash, 3 Atk. 34.

152. Where plaintiff has been kept out of possession by the fraud, concealment, or misrepresentation of defendant; an account of the profits will be decreed from the time the title accrued. Dormer v. Fortescue, T. 1744. Ridg. Ca. temp. Hardw. 184. 4 Bro. P. C. 355. 405.

153. So, where plaintiff's title is an equitable one. S. C.

154. An account of rents of an estate held of trustees, ordered only for the last six years before the bill filed, the statute of limitations being insisted on. Hercey v. Ballard, M. 1793. 4 Bro. C. C. 468.

155. Account of rents will be confined to six years, by an analogy to an action for mesne profits. Reade v. Read, H. 1801. 5 Ves. 744.

156. Account of mesne profits since the title accrued, decreed against executors, upon the special ground that plaintiff was prevented from recovering in ejectment by a rule of the common law, and by an injunction at the instance of the occupier, who ultimately failed both at law and in equity. Pulteney v. Warren, E. 1801. 6 Ves. 73.

157. Death of the occupier will not sustain a bill for account of mesne profits, under the head of accident. S. C.

158. Account of rents and profits confined to the filing of the bill, where filed on grounds of equitable relief against a mere adverse possession, without fraud or concealment of some instrument necessary to enable plaintiff to proceed. S. C.

159. On a bill for assignment of dower, and an account of arrears, after 12 years had elapsed:—Held, that the widow is prima facie entitled from the time her title accrued, and it is upon defendant to show why she should not have it. Account decreed from the death of the husband. Oliver v. Richardson, M. 1803. 9 Ves. 222.

160. In Barnewall v. Barnewall, H. 1794. Dom. Proc. Ire. Ridg. Ca. temp. Hardw. 192. (n.) the doctrine in Dormer v. Fortescue, sup. was very fully discussed, when Fitzgibbon, C. held, that a suit for recovery of possession is properly cognizable in equity, and plaintiff shall obtain a decree for possession there, and that the court will direct an account of rents and profits as incident
ACCOUNT VI.

Account of Profits, and from what Time.

to the relief. But one having a mere legal title cannot come into equity for the recovery of it. So, if he has originally recovered possession at law, he has no right to proceed in equity for an account of rents and profits, for as his title to the possession was at law, he must proceed for the whole there; but if a man is obliged to come into equity for aid to enable him to prosecute his title at law, after possession recovered at law, there may be cases in which he may come back for an account of rents and profits in the suit depending in equity. So, if he has been prevented from entering, by fraud, a bill in equity will lie for account of rents during the fraudulent possession; but a man having recovered possession in an ejectment, cannot afterwards be allowed to file an original bill in equity for an account of rents and profits during the tortious possession.

161. Devise to a corporation upon trust that they should be, from time to time, yearly for ever, "lay out the rents and "profits in the repair of a road of their "discretion." The corporation had always, upon application, advanced such sums as were necessary to put the roads in good condition. It was enacted by the Turnpike Act, which included the road in question, that all lands, &c. should remain chargeable with the repairs of the said road, as they were before the act. On an information by the trustees for an account, it was directed to be taken from the time of passing the act. Att. Gen. v. Brewer's Co. T. 1816. 1 Meriv. 495.

(d) Where from the Filing of the Bill only.

162. If an estate is devised in trust to pay debts, the heir must account for rents and profits, from the time of filing bill. Chambers v. Harvest, H. 1729. Mos. 124. Vide Montagu v. Ford, 2 Ch. Ca. 225. 1 Ver. 282.

163. Defendants set up a deed of trust of an estate, which was declared fraudulent against plaintiffs; as judgment creditors, who petitioned for an account of profits from the filing of the bill. Per cur. — As there are more judgment creditors than one, equity can direct an account of the profits from the decree. It is usual for a judgment creditor to require from the heir, an account of the profits received by him as the assets of his ancestor: for, if he should bring an action, he would have judgment for the value of the estate, and therefore, equity decrees accordingly. Higgins v. York Buildings Co. M. 1740. 2 Atk. 107.

164. Where a mortgagor is in possession, a mortgagor can never have an account of profits for any past years during his possession. S. C.

165. Equity will not do more than remove a fraudulent conveyance out of the way. The court will not decree profits back against the original debtor and owner of the estate, received pendente lite, in favour of judgment creditors, from the filing of the bill; nor decree a sale, but will follow the law, and leave them to their remedy by ejectment. S. C.

166. Where defendant had no notice of plaintiff's title, nor had any of the deeds in his custody, equity will decree an account only from the filing of the bill. Dormer v. Fortescue, T. 1744. Ridg. Ca. temp. Hardw. 183.

167. So, where plaintiff hath lain by. S. G.

168. In a doubtful case, account of rents and profits directed only from the time of the bill being filed. Forster v. Wade, H. 1794. 4 Bro. C. C. 321.

169. The grant of the office of register in Chancery for lives, in trust for the D. of St. A. his heirs and assigns, descends to the heirs general, and does not follow the title; and, being assignable, the claim of a mortgagee was established, but not to the past profits. The Duke being trustee, but having obtained possession without title, as heir, though plaintiff was an infant, the court inclined not to carry the account further back than the filing of the bill, (if the profits had not been paid into court at an earlier date,) on the suit instituted by the mortgagee. Drummond v. D. of St. Albans, T. 1800. 5 Ves. 433.

170. Under a conveyance of a W. India estate, which was in effect a mortgage, though expressed as a trust, an assignee was held liable to account as a mortgagee, and not entitled to charge as trustee or agent; therefore, the accounts settled with the executors of mortgagor, since his death in 1791, were declared not to be so considered, but the prior accounts to stand, with liberty to surcharge and falsify, though not further back than 1785. Chambers v. Goldwin, E. 1791. 5 Ves. 834.
ACCOUNT VI. & VII.

Account of Profits, and from what Time.—Accounts Current in Equity.

171. Strong grounds are necessary to set aside settled accounts; or error to surcharge and falsify. Chambers v. Goldswain, supra.

172. On an appeal from the Rolls, petitioner stated error in making defendant answerable for any part of the accounts of a mortgagee in trust, in declaring that he and such mortgagee were not entitled to charge for commission or agency, except what should appear that they had actually paid to others, and in opening the account settled with the mortgagee’s executors. Ld. Ch. varied the decree, first, by confining the liberty to surcharge and falsify to the accounts of the defendant as assignee of the mortgagee in trust, without prejudice to any suit against the representatives of the assignor. Secondly, by confining the declaration against the right to commission to the period of residence in England, leaving open to investigation before the Master the right to commission while in the W. Indies, which point was not made by the pleadings. As to the opening of the accounts settled with the executors of the mortgagee as original owner of the estate since his death, decree was affirmed. Chambers v. Goldswain, H. 1804. 9 Ves. 254.

173. The law, as well as the act of the parties, provides, that accounts settled shall not be set aside but for fraud, or surcharged and falsified but for error; and for the purpose of surcharging and falsifying accounts, some specific error must be charged. S. C. 265, 266.

174. The court will confine an account of rents and profits to the filing of the bill under special circumstances, such as laches by the cestui que trust, in not asserting his right. Pettitson v. Prescott. T. 1802. 7 Ves. 540.

ACCOUNT VII.

Of mutual Accounts Current between Merchants and Traders: how the same shall be taken, or where allowed in Equity.

175. It was allowed to be a custom among merchants, that all accounts should be evened between them, by way of estoppel, especially in business of the same nature. Fashon v. Atwood, M. 1679. 2 Ch. Ca. 7.

176. Though length of time is no bar, where accounts have long depended between merchants, yet if dealings between them have ceased for several years, and one dies, and the survivor brings a bill for an account, the court will not decree it, but leave plaintiff to his remedy at law. Sherman v. Sherman, M. 1692. 2 Vern. 276.

177. If an account current is sent by one merchant to another, who receives it, and makes no objections for two or three posts, it is looked upon among merchants to be an allowance of the account. S. C. Vide Tickell v. Short, ante, pl. 105.

178. Where there is a decree for a mutual account, plaintiff on his own bill may be decreed to pay the balance of the account. Stowell v. Cole, T. 1693. 2 Vern. 297.

179. A. sends B. as a factor abroad, and commissions him to draw on a foreign merchant, which he does, and so states in the account furnished. A. gives credit for the bills drawn as cash; but the bills are not accepted by the contrivance of A.—B. shall not be concluded by that account, but be paid. Warr v. Fred, H. 1698. Colle’s P. C. 57.

180. A. indebted to B. in 600l., finds him in great distress, and gives him 50l. as a loan, and takes his promissory note for money borrowed. This note is no evidence that B. was not indebted in the larger sum. S. C.

181. Two had mutual dealings, but before their accounts were settled, one died, and the survivor brought a bill against his executors for an account, and that plaintiff might deduct what he was to pay out of what the executors were to pay him. Decreed accordingly, although objected that it might make a devastavit in the executor. Becanum v. Grover, M. 1701. 1 Eq. Ab. 8. pl. 7.

182. There was a mutual credit between A. a goldsmith and B., and A. became a bankrupt, only the balance shall be liable to the bankruptcy; and it is not material whether the mutual credit was by open account or mutual stated debts. Lanesborough v. Jones, T. 1716. 1 P. W. 325. Note, this subject has received further regulation by stat. 5 Geo. II. c. 30. Vide Ryall v. Rowles, 1 Ves. 375.
ACCOUNT VII.

Accounts Current in Equity.


183. There being accounts current between A. and B., B. gives out his cash note to C. for 500l., and A. mortgages his estate as a collateral security for the money. B. gives C. 100l. for his favour in the matter, who keeps the note by him. Some time after the mortgage forfeited, B. becomes a bankrupt. A. prays relief, because C. neglected to turn the note into money when he might have directed an account to be taken how matters stood between A. and B. Mason v. Lake, H. 1717. 2 Eq. Ab. 451, pl. 14, cited as a MS. report, said to be Lord Harcourt's. 13 Vin. Ab. 524, pl. 4. 1 Bro. P. C. 579. As to the manner in which interest accounts are to be kept between bankers and their customers. See post, tit. Bankers—Trade, viii.

184. A. and B. had mutual dealing in the way of their trade, which were carried on for several years without payment of money on either side; B. dies intestate and indebted to others by specialties, who, as principal creditors, take out administration to him, and sue A. at law. Equity will join in the action, and order an account, and that A. shall be allowed by way of discount, what was due to him from B., and his costs. Downham v. Matthews, H. 1721. Pre. Ch. 580. Vide 1 P. W. 325. 2 P. W. 128. 130. 1 Atk. 228. S. P. 236. S. C. cited 8 Vin. Ab. 560, pl. 26. Bla. Rep. 653. Vide 1 Vern. 122. 2 Vern. 428. 2 P. W. 130. As to where stoppage will be allowed as good payment, vide also 7 Geo. I. c. 31. 5 Geo. II. c. 30, respecting mutual credits in cases of bankruptcy.

185. Plaintiffs and B. had mutual dealings as tradesmen. Plaintiffs were indebted to B. 30l. and B. to plaintiffs 100l. B. died intestate, leaving no assets to pay. Defendant administering as principal creditor, sues plaintiffs for goods sold by intestate, and gets a verdict and judgment. Plaintiffs bring their bill, suggesting a mutatus, and praying an account, and that, deducting the debt due by them to the intestate, they may have satisfaction out of the assets. Decreed, that defendant shall acknowledge satisfaction on the judgment, and that an account be taken between the parties, and the balance due to plaintiffs be paid in a due course of administration, but without costs, because defendant is an administrator. Hawkins v. Freeman, M. 1724. 8 Vin. Ab. 560, 561. 2 Eq. Ab. 10, pl. 10. Vide Downham v. Matthews, Pre. Ch. 580, cited for plaintiff. Note, in all mutual dealings between traders, it is supposed they intend one debt should be set against the other, and the balance only to be paid, as in cases of bankruptcy, and therefore the least evidence of such an intent is sufficient. Dict. per Ld. Ch. in S. C.

186. Where persons have mutual dealings, signing the account is not necessary to make it a stated one; but keeping it any length of time without objecting, binds the person to whom it is sent, and prevents his entering into an open account afterwards. Willis v. Jernegan, H. 1741. 2 Atk. 232.

187. The delivering up vouchers is an affirmation that the account between the parties is a stated one; but it is not necessary they should be delivered up at the time the account is settled. S. C.
AGREEMENT.

I. Where an Agreement shall be binding in Equity; by whom to be performed; and where the Person or Estate is made liable to a Covenant or Agreement.

II. Where Equity will relieve against unreasonable and other Agreements.

III. Where a specific Performance of a Covenant or Agreement will be decreed, (a) and where not, (b)

IV. What shall be deemed a sufficient Performance, or shall go in Satisfaction of the Whole or Part of an Agreement.

V. Of parol Agreements, within the Statute of Frauds. (a)—Without the Statute, (b)—Part Performance; its Effect, (c)

VI. How far Equity will decree the Performance of a voluntary Agreement, and particularly as against Creditors.

VII. Underhand private Agreements.

AGREEMENT I.

I. Where an Agreement shall be binding in Equity; by whom to be performed; and where the Person or Estate is liable to a Covenant or Agreement.

1. A agrees in writing, with B. and C. to pave the streets in the parish of D.; B. and C. on behalf of themselves and the rest of the parish, agree to pay A. The agreement is lodged in the hands of B. A shall have his remedy against B. and C., and they must resort to the rest of the parish. Merid. v. Wymondsall, M. 1661. Hard. 205.

2. I. S. purchased church lands in fee, under the usurper's title, and sold them to defendant's testator, covenanting that he was lawfully seized. The church being restored, I. S. was relieved from his covenant, upon proof that at the time of the sale he undertook for his own acts only. Caldecot v. Hill, M. 1662. 1 Ch. Ca. 13.

3. A. seized in tail of freehold lands, and in fee of copyhold lands, devised the copyholds to defendant, who was entitled to the remainder of the freehold lands, and devised the freehold to plaintiff. Defendant, apprehending that A. had suffered a recovery, agreed with plaintiff, without consideration, that each should enjoy according to the will; but discovering afterwards that no recovery had been suffered, he sued for the freehold lands. Plaintiff brought his bill to establish the agreement, and it was decreed to him accordingly. Frank v. Frank, E. 1667. 1 Ch. Ca. 84. See Leonard v. Leonard, 2 Ball. & Ba. 183, where Manners, C. said, this was a very unsatisfactory decision, and in a book of very doubtful authority.

4. A purchaser of crown lands, during the late wars, sold part to plaintiff, with a covenant for farther assurance; on the Restoration he obtained a lease from the crown. He shall assign to plaintiff his term in the part he sold him. Taylor v. Debar, H. 1675. 1 Ch. Ca. 270. 2 Ch. Ca. 212.

5. A. sold to B. and covenanted against himself and all claiming under him: B. secured the purchase-money, and was evicted by a title paramount A.'s title; B. was relieved from the payment of the purchase-money. Anon. 1679. 2 Ch. Ca. 19.

6. If a lessee for a long term covenants to lay out 200l., and lays out but 30l., and after 30 years the lessee recovers 150l. damages at law; equity will not relieve against the damage as excessive, nor order the money to be laid out in improvements. Barker v. Holder, E. 1685. 1 Vent. 316.

7. A man buys at an under-rate, and has a covenant and collateral security for quiet enjoyment, the land is evicted, the purchaser shall recover back only the consideration money, and not the full value of the land. Zouch v. Swaine, E. 1685. 1 Vern. 320.

8. A. agrees with B., lord of a manor, to purchase a copyhold for two lives, such as A. shall name; A. pays 200l. part of the purchase-money, and was to pay the rest in three months; a court is held, three months pass, B. died suddenly, and the manor came to one who was not bound by this contract. Executors of B. decreed to refund this 200l. Audry v. Keen, M. 1687. 1 Vern. 472.

9. A copyholder for life, where by the
AGREEMENT I.

On whom binding.

custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he should leave at his death; the widow not bound by this agreement. Murgave v. Dashwood, E. 1688. 2 Vern. 45. 63. In Hinton v. Hinton, Amb. 277, Lord Hardwicke questions this case; but his reasoning was against the sentiments of the bar. No statement of this case, however, appears in the register book.

10. If a person covenants to settle land, or an annuity out of land, and has no land at the time, but afterwards purchases land, that land shall be liable to the covenant, and that against a voluntary devisee. Tooke v. Hastings, E. 1689. 2 Vern. 97. Note, in Deacon v. Smith, 3 Atk. 329, Lord Hardwicke said, this was only a saying of the court; and dicta in reports are not greatly to be relied on without the state of the case. His Lordship, therefore, sent to the register for the decree; but it did not appear by the register book whether the estate of B. was purchased before or after the bond to settle land.

11. An agreement for stinting a common between lord and tenants shall be performed, though opposed by one or two, such an agreement being more favoured than an agreement to inclose. Dalabeere v. Bedingfield, T. 1689. 2 Vern. 103.

12. A. makes a voluntary settlement on B., who afterwards agrees to deliver it up without consideration; this agreement shall bind in equity, for a voluntary settlement may be surrendered voluntarily. Wentworth v. Devereiny, II. 1696. Pre. Ch. 69.

13. As a beneficial bargain ought to be decreed in equity, so by the same reason a losing one ought. City of London v. Richmond, E. 1701. 2 Vern. 423. Pre. Ch. 156. Affirmed in parliament, 1 Bro. P. C. 30. Vide 5 Co. 16. 10 Vin. 250, pl. 13. 1 Ves. 56.


15. A. makes a lease for three years, and in consideration of lessee's laying out 100L in improvements, according to his covenant, A.'s covenants at the end of the term to grant a new lease at the same rent; the purchaser of the inheritance was decreed to make good the covenant. Richardson v. Sydenham, M. 1703. 2 Vern. 447. Note, here the consideration was a covenant from the lessee, that he would lay out 100L, which distinguishes this case from Robertson v. St. John, 2 Bro. C. C. 140.

16. A. was entitled under a settlement to an annuity of 60L, expectant on the death of his father, and to a contingent interest in the real estate, in case his brother should die without issue. The father agrees to pay A. 50L, and to secure him a present annuity of 60L for his life, in lieu and satisfaction of all his future interests under the settlement; the court established this agreement, but without prejudice to A.'s issue. Grene v. Grene, H. 1710. 1 Bro. P. C. 516. 5 Vin. 538, pl. 19.

17. One agrees for a valuable consideration to convey lands to J. S. and afterwards confesses a judgment to J. N. If the money paid by J. S. be anywise adequate to the value of the land, it binds the land in equity, and defeats the judgment. Secus of a mortgage or inadequate consideration. Finch v. E. of Winchelsea, T. 1715. 1 P. W. 277.


19. Agreement to assign a lease, whether it shall be carried into execution against an executrix. By two barons (abs. Montague,) it would be good against the executrix. Smith v. Watson, H. 1719. Bunb. 55.

20. The owners of land in the parish of C. enter into an agreement, that a particular common should be enjoyed as common pasture for 99 years, and this agreement is signed by the bailiff of one of the owners, so far as he had power. Though no particular authority could be shown, yet, after an acquiescence of above 30 years on the part of this owner, an authority shall be presumed, and he shall be bound by the act of his servant. Tufton v. Wentworth or Creswell, E. 1720. 2 Bro. P. C. 243. 5 Vin. 8, pl. 32. 15 Vin. 314, pl. 10. 2 Eq. Ab. 207, pl. 3.

21. A. agrees with builders, before the act for building Benheim House at the
 AGREEMENT I.

On whom binding.

expense of the crown, and recites, that he made such agreement at the instance of the Duke of M. The Duke is bound by such agreement, and liable to pay for work done as well after the statute as before. *D. of Marlborough v. Strong*, T. 1721. 5 Vin. Abr. 533. 2 Eq. Ab. 19, pl. 11.

22. A. on behalf of B., enters into a contract with the workmen for building a house; this contract is binding on B., though no special authority is proved to have been given by him to A. empowering him to enter into such contract. S. C. 2 Bro. P. C. 302.

23. Upon a contest between M. and T. (who had a joint undivided interest in an estate, and who had agreed to sell a price upon each other's moiety,) concerning the meaning of their articles in writing, by which it was declared, that T. should set the price, and that upon payment of such price, together with the repayment of 600L. and interest paid by T. to H., he was to convey. T. sets 700L. for his right in writing, and M. accepts thereof; then M. prefers a bill to have the agreement performed according to the parties meaning. T. insists that he was to have 700L. besides the 600L. and interest; but M. says, that T., at the contract, valued his half but in 700L., (and the whole in 1400L.,) and that it was the intent of all parties that the 600L. should be included in the 700L., and not to be taken as two different sums. Ld. Ch. dismissed the bill, it appearing that, as the agreement was made in writing, it was unequal and against reason; for the 600L. paid by T. was towards a mortgage to H., and M. had paid towards the same about 300L. which was 70L. short of T.'s payment; and though M. by answer offered to let his part go in payment of 700L., including 600L. paid, yet the other had 70L. advantage, and so unequal and unjust in T. to have 1300L. for his moiety, which made the estate 2600L. in value: but cause excused on account of an imperient examination on M.'s part. *Tristram v. Melhuish*, M. 1722. 5 Vin. Ab. 549, pl. 10. 2 Eq. Ab. 56, pl. 4.

24. Two articles that whatever J. S. shall leave to either of them, shall be equally divided betwixt both; such agreement is good, and shall be carried into execution; also, if after this, one of them contrives that J. S. shall leave part of his estate to a third person in trust for him; this is within the articles. *Buckley v. Newland*, T. 1723. 2 P. W. 182. *Vide Hobson v. Trevor*, 2 P. W. 191. *Brady v. Cubitt*, Doug. 40.

25. Plaintiff's house being so near the church, that the ringing of the five o'clock bell in the morning disturbed his lady; plaintiff agreed in writing with the churchwardens and inhabitants at a vestry, that he would erect a cupola and clock at the church, in consideration of which, the bell was not to be rung in the morning. This is a good agreement, and decreed binding in equity; and the court granted an injunction to stay the ringing of the bell. *Dr. Martin v. Nutkin*, H. 1724. 2 P. W. 266.


27. Contracts entered into for a valuable consideration between two persons to restrain one of them from setting up or exercising a particular trade within a certain district, are valid. *Chesman v. Nairby*, H. 1725. 3 Bro. P. C. 549.

28. Agreement, signed by the parties, and by consent made an order of court, to submit to such decree as the court should make, and neither party to bring his appeal; yet the cause was allowed to be reheard. *Buck v. Fawcett*, H. 1735. 3 P. W. 242.


31. Though by a deed 5 per cent. per annum was agreed to be allowed, yet, it appearing that the money had been placed in the government funds, which yielded but 4, the court reduced the interest to 4 per cent. S. C.

32. An attorney, on behalf of his client, the defendant, promises to pay 500L. to plaintiff; this being done by the autho-
AGREEMENT I.

On whom binding.

riety of the client, the attorney is not liable, but only the client. Secus if the attorney had no such authority. Johnson v. Ogilby, E. 1734. 3 P. W. 277. 279.

33. Brokers or factors, who act (or agree) for their principals, are not liable in their own capacities. S. C.

34. A trust-estate was decreed to be sold for payment of debts and legacies, to the best purchaser. A. articles to buy the estate, and brings a bill to compel the trustees to perform the contract. The trustees by their answer disclose the matter: the court will make no new decree, but leave the former to be pursued. Annescley v. Ashurst, T. 1734. 3 P. W. 282.

35. An agreement signed only by one party, if acquiesced in and acted upon, is binding, for it is the agreement of all. Owen v. Davies, H. 1748. 1 Ves. 82.

36. A covenant that a specific sum should be paid to B. if B. survived: A. having aliened part of it; on a bill by B., A. gave security that it should be forthcoming. Flight v. Cook, T. 1755. 2 Ves. 619. Vide Warrington v. Langham, Pres. Ch. 89. 1 Eq. Ab. 132.

37. Agreements are to be so construed as to give every word operation, yet the acts of the parties will be some evidence how they themselves understand their own agreements. All instruments, however, shall be presumed complete before the date and execution; and any word written afterwards, whether on the face or back of the deed, shall be taken to be fabricated, unless noticed in the attestation. Davies v. Oliver, E. 1784. 1 Ridg. P. C. 9. 10. 13.

38. He who seeks relief in equity on the foot of an agreement, must show that he has performed his part. Stratford v. Aldborough, E. 1786. 1 Ridg. P. C. 287.

39. The court will not decree contracts to be carried into execution merely for the purpose of harassing the parties. Smith v. Morris, E. 1768. 2 Bro. C. C. 311. Dick. 607.

40. Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, if it was not in the contemplation of either party at the time of the purchase or conveyance, and the purchaser referred to a more particular description, which did not include that part, the surrender having been made according to that and from his own instructions. Calverley v. Williams, T. 1790. 1 Ves. jun. 210.

41. If one party thought he had purchased, bona fide, a part of an estate, which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must be; otherwise if neither understood so. S. C.

42. Small variation in a general description of land, is not material. S. C.

43. Any person undertaking to describe, bound by the description, whether conscious or not. Auctioneer at a sale cannot contradict the written conditions; such verbal declarations being inadmissible. S. C. 1 T. R. C.B. 289.

44. Agreements for sale of an estate, especially if by auction, depend on the bona fides of the transaction; therefore trifling errors in the description are not material. Calcraft v. Roebuck, T. 1790. 1 Ves. jun. 221.

45. An advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will. After execution of articles, a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, purchaser took possession forcibly, but proceeded in the treaty afterwards till he finally refused to agree to the purchase. On bill by vendor the purchase-money was decreed to be paid, with 4 per cent. from the time it ought; but an inquiry was directed as to what ought to have been the compensation at that time for the part not freehold, and that, with the outgoings, to be deducted. S. C.

46. The acts of the parties at the time of agreement may be resorted to for the purpose of explaining their intention. Redington v. Redington, E. 1794. 3 Ridg. P. C. 194.

47. At an auction one person only bid for the vendor to 75l. an acre, upon a private notice to the auctioneer: then, after a contest with real bidders, the estate was bought at 101l. 17s. an acre, and the purchaser some days afterwards paid the duty, and confirmed the purchase. He was decreed to perform the contract, with costs. Bramley v. Alt, H. 1798. 3 Ves. 620. As to the point whether a vendor's having employed persons to bid for him at an auction, discharges the purchaser from his contract, vide Conolly v. Parsons, 3 Ves. 625. (n.) Calverley v. Williams, 1 Ves. jun. 210. Calcraft v. Roebuck, 1 Ves. jun. 221.

48. Where all the bidders at an auction, except the buyer, are bidding for the seller, without notice, and the buyer...
AGREEMENT I.

On whom binding,

is thereby induced to give more than the value, neither courts of law nor equity will support such a contract. *Bravley v. Alt., supra.*

49. It is no objection to a sale by auction, that persons are employed by the vendor to bid for him without public notice. *S. C. (n.)*

50. One trustee for the sale of an estate having conveyed to his co-trustee, refused to join in the receipt for the purchase-money. On the special expression in the deed, the purchaser was not held bound to the co-trustee. *Secus, if one trustee had renounced. *Crewe v. Dicken, T. 1798. 4 Ves. 97.*

51. Undertaking to do a thing, if the will is not changed, is binding. *Byrne v. Godfrey, T. 1798. 4 Ves. 10. Vide post, tit. Promises parol.*

52. A parol agreement may be discharged by parol. *Gibbons v. Caunt, T. 1799. 4 Ves. 848.*

53. An agreement, to be enforced in equity, must be proved: it must be reasonable, and the parties must have full knowledge of the rights they act upon, and of all the doubts and difficulties that arise. With these requisites an agreement shall be binding, though it afterwards turns out that one party gains a superior advantage. *S. C.*

54. Transfer of stock by way of luan, at 5 per cent. secured by bond, with condition to replace the stock in six months, and to pay 5 per cent. interest in the mean time. The stock was not replaced, and being depreciated, the obligee is entitled to the value of the stock at the time of the transfer, with interest at 5 per cent. to the date of the report, credit being given for some payments, on account of the principal. *Forrest v. Elwes, E. 1799. 4 Ves. 492.*

55. The time at which a contract is to be performed is material. *S. C. Harrington v. Wheeler, 4 Ves. 689. S. P.*

56. Under an agreement to take off a discount above 5 per cent. for prompt payment, though according to the custom of the trade, the creditor cannot, upon failure, charge more than 5 per cent. *Exp. Aynsworth, T. 1799. 4 Ves. 678.*

57. Compensation for non-performance of an agreement is not a mode of equitable relief. *Climm v. Cooke, M. 1802. 1 Sch. & Lef. 25.*

58. If there be an uncertainty as to the terms of an agreement, it cannot be carried into execution, even though reduced to writing. *Lindsay v. Lynch, T. 1804. 2 Sch. & Lef. 7. Vide Brodie v. St. Paul, 1 Ves. jun. 326.*

59. If a person contracts to do a thing which he can do himself, or has the means of compelling others to do, equity will compel him to do it unless it be highly unreasonable, in which case the other party shall not be held to the contract; and if he refuses to give it up, equity will not decree a specific performance, but leave him to recover damages at law. *Costigan v. Hastler, M. 1804. 2 Sch. & Lef. 166.*

60. The court will execute a contract in equity though the consideration be inadequate, if no fraud, but without costs. *Burrowes v. Lock, E. 1805. 10 Ves. 471.*

61. In the case of a conveyance by bargain and sale, which cannot be completed as a legal conveyance without enrolment, yet that very instrument, though only inchoate and not complete to pass the property, is in equity evidence of an agreement to convey, and the conscience is bound to make further assurance, that obligation arising from the payment of the money. *Messer v. Gillespie, E. 1806. 11 Ves. 625.*

62. Contracts contrary to the policy of the law may be set aside without evidence of fraud; as, for instance, a deed of gift by a client to an attorney, by an heir to his guardian, the purchase of a reversion from a young heir, a trustee selling to himself, &c. *Morse v. Royal, H. 1806. 12 Ves. 371. Vide Wells v. Middleton, cor. Thurlow, C. cited from a MS. note.*

63. Where the object of one of the parties contracting would be defeated by delay in the execution of it, if the other party delay, he shall not afterwards be allowed to insist on a performance. *Crofton v. Ormsby, H. 1806. 2 Sch. & Lef. 604.*

64. A fixed price is an essential ingredient in a contract of sale, without which it is valid and complete only when, and if, the party to whom it is referred shall fix it; otherwise the contract is totally inoperative. *Milles v. Gery, M. 1807. 14 Ves. 407.*

65. An agreement for the purchase of an attorney's business not such as equity can carry into execution, because the business arises out of the confidence reposed by others in the skill and integrity of the individual, and therefore the
AGREEMENT I. & II.

On whom binding.—Unreasonable, where relieved against.

68. Trustees will not be compelled to perform an agreement, entered into under mistake, to sell for an inadequate consideration. Briger v. Rice, M. 1819. 1 Jac. & Walk. 74.

69. A party obtaining an agreement by a partial misrepresentation, is not entitled to a specific performance, even on waiving the part affected by the misrepresentation; for the effect of partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely, and to operate as a personal bar to the party who has practised it, because of the mala fides of the transaction.—Viscount Clermont v. Tasburgh, M. 1819. 1 Jac. & Walk. 112. See Cadman v. Horner, 18 Ves. 10.

See more as to the specific performance of contracts between vendor and purchaser, post, tit. Purchaser, i. iv.

AGREEMENT II.

Where Equity will relieve against unreasonable and other Agreements.

70. A. an attorney, being sick of the disorder whereof he died, takes B. as his clerk, and receives with him 120l., and by articles agrees with the father of B. to return 60l. of the money if A. died within the year; A. died within three weeks. The executor of A. decreed to pay back 100 guineas. Newton v. Rowe, T. 1687. 1 Vern. 460. 1 Eq. Ab. 308, pl. 3.

71. Agreements obtained from young heirs, and securities taken for the payment of great sums of money on the death of their ancestors for goods sold at extravagant prices, will be set aside on payment of the true value which each person respectively received; and though the security given by the young gentleman was joint, yet one shall not answer for what the other received. Bill v. Price, T. 1687. 1 Vern. 467.

72. A. articles to sell lands to B. for 15,000l., the whole to be paid in money, or so much land returned as would make up what he paid short of 15,000l. A conveys part of the lands to B., and by his persuasion values that part at an under-value, and then B. sells this part to C., and afterwards would have returned so much of the lands as would make up the 15,000l. Articles set aside as unreasonable, but the sale to C. to stand. Whorwood v. Simpson, M. 1690. 2 Vern. 186.

73. A. articles on behalf of B. to purchase some houses in Jamaica, and covenants to pay 800l. for the same, but the houses are afterwards destroyed by an earthquake; though A. had no effects of B. in his hands, yet decreed to pay him the 800l. Cass v. Rudele, M. 1692. 2 Vern. 280. In Pope v. Roots, 7 Bro. P. C. 184, Lord Apsley said, this case was wholly misrepresented by Vernon. Note. By the printed cases in the House of Lords, it appears that A. admitted in his answer to have 700l. of B.'s in his hands, residue of the purchase-money; and the decree for payment was founded on a good title having been made to him of the premises.

74. Equity will not relieve against the terms of an agreement, though it may seem in the nature of a penalty. Small v. Lord Fitzwilliam, M. 1699. Pre. Ch. 102.

75. A party to an agreement cannot allege it unfair against a person to whom
 AGREEMENT II.

Unreasonable, where relieved against.

it is assigned, he himself being a subscribing witness to the assignment. Firebrace v. Moore, E. 1701. Colles' P. C. 188.

76. Agreement to pay <600l. on the other's procuring a commission in the marines for him, and bond for the money, if the commission be procured; though the obligor refuse to accept it, on the scruple of taking an oath required by statute, yet he will not be relieved against the bond in a court of equity. Iveys v. Ashe, H. 1702. Colles' P. C. 267. Pre-

Ch. 199. 4 Vin. 406. 10 Vin. 129. 1 Vern. 98, 99. Forr. 104. See Law v. Law, Forr. 141. 3 P. W. 393; and in Harrington v. Duchastel, 1 Bro. C. C. 121, a perpetual injunction was granted upon public policy, though the office was not within the statute of 5 & 6 Ed. 6.

77. Equity will not carry unreasonable bargains into execution; and therefore where A. agreed to pay B. 240l. a year for his beard, lodging, &c., the agreement was set aside, and the Master directed to inquire what accommodation A. had, and what B. reasonably deserved for the same, and to make him an allowance accordingly. Stanhope v. Toppe, T. 1720. 2 Bro. P. C. 183. 5 Vin. 583, pl. 32.

78. Equity will not supply a defect in a written agreement, intended to be a part of the agreement, but not inserted in it. Binsted v. Coleman, T. 1720. Bubb. 65.

79. A. articles to buy land, and pays part of the purchase-money; afterwards he enters into several orders of court to pay the residue by such a day, or in default to give up the articles, and lose what he had paid. The court will relieve, though these articles have not been complied with. Vernon v. Stephens, T. 1722. 2 P. W. 66. Vide Mackreth v. Marlar, cor. M. R. 10th July, 1786, where his Honour decreed a contract to be delivered up, the purchaser having died shortly after, and a suit for an account of his assets being then depending.


81. Equity will relieve against the penalty, for not performing an unreasonable contract. Thompson v. Harcourt, H. 1722. 2 Bro. P. C. 415. 5 Vin. 348, pl. 9.

82. An agreement between two who had a joint undivided interest, set aside, because upon partition it proved unequal and unreasonable on the part of one. Tristram v. Milhuirch, M. 1722. 2 Eq. Ab. 26, pl. 4. ante, pl. 23.

83. If an agreement or contract for South Sea stock be executed, the court will not break into it: if it be executory, the plaintiff must seek his remedy at law. Cappo v. Harris, M. 1723. Bubb. 135.

84. It is against natural justice that any one shall pay for a bargain which he cannot have; as if I article to buy a house, and the house is burnt down before the day of payment, I am not bound to pay the money. Stent v. Baitis, E. 1724. 2 P. W. 220. Vide, Cass v. Rudge, 2 Vern. 280. This case was reheard before Lord King in M. 1725. Vide 2 Eq. Ab. 57, (b.)

85. A written agreement being unreasonable, the court would not carry it into execution, but decreed that it be delivered to the party for whose benefit it was designed, that he may have an opportunity to make the most of it at law. Squire v. Baker, H. 1726. 5 Vin. Ab. 549, pl. 12. 2 Eq. Ab. 58, pl. 9.

86. Bill for performance of an agreement comprised in the condition of an obligation: plaintiff's father had five houses in B. in right of his first wife; he took a second, by whom he had the defendant, and he then purchased two other houses in B. On the marriage of plaintiff with E., plaintiff entered into a bond to his father, conditioned thus: "Whereas the obligee had given all his houses in B. to the heirs of the body of plaintiff for ever, by will;" but no statement was made of what sum plaintiff was to pay, in defeasance of the obligation. Defendant was executor and residuary legatee to the father: the will mentioned in the bond was not to be seen. It was proved that the father never intended that plaintiff should have more than the five houses, and that he had settled the other two on defendant. But plaintiff desired to take advantage of the scrivener's error in drawing the obligation. Bill dismissed as against reason and equity. Hamburn v. Curtis, H. 1730. Fit. 118.

87. An executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act; but he dying before the trust was completed,
AGREEMENT II. & III.

Unreasonable, where relieved against.—Specific Performance decreed.


88. There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this court will not set them aside, but will refuse its aid to carry them into execution; and if the party who obtained such articles hath been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles and account for the profits; otherwise, if he goes to law, and fails there. Savage v. Taylor, H. 1736. For. 234.

89. In treaties for an agreement, a wilful concealment of a material fact by one of the parties, in order to keep the other in ignorance, and to profit by that ignorance, is a gross fraud, and will in equity set aside the contract. Made v. Webb, E. 1744. 4 Bro. P. C. 497.

90. Agreement, if reasonable, and to settle family disputes, and no unfair advantage, ought not to be set aside because the party was drunk, or paternal authority exercised. Cory v. Cory, T. 1747. 1 Ves. 19. See Lord Eldon’s observations on this case, in Stockley v. Stockley, 1 Ves. & B. 25.

91. Agreement relating to distribution of personal estate, set aside though ratified, the value appearing to be greater than was known at the time of agreement. Cocking v. Pratt, E. 1730. 1 Ves. 401.

92. Court relieved against breach of an agreement by receiving rent, on making compensation. Rose v. Rose, M. 1736.


93. An agreement for an annuity, to be paid during the joint lives of plaintiff and his uncle, in consideration of a sum to be paid on the death of the uncle without issue, and the annuity paid during the uncle’s life. Bill to set it aside dismissed. Henley v. Acton, H. 1786. 2 Bro. C. C. 17.

94. An apothecary gave his patient fifty guineas to receive 500l. or an annuity of 100l. if he should survive a year, which he did: bill against executors dismissed, as plaintiff could not succeed at law, but without costs, on account of the money actually advanced, which must have been repaid upon a bill to set aside the agreement. Priestley v. Wilkinson, T. 1790. 1 Ves. jun. 214.

95. A. agreed to sell goods to B., to be accounted for in part of a debt to B.; C. with notice agreed to sell the goods as factor; he was not allowed to retain for a debt due to him from A. Weymouth v. Boejer, H. 1792. 1 Ves. jun. 416.

96. Property in a cargo transferred by bill of sale signed by vendor and vendee; but by a new agreement, signed by them before they parted, that it shall be sold and accounted for by the factor for the vendor, it is reduced to an agreement, and therefore there is a remedy in equity.—S. C.

97. Covenants are construed in equity as at law, but the court will relieve against a strict performance upon equitable circumstances, and no wilful default. Eaton v. Lyon, E. 1793. 3 Ves. 790.

98. A legal instrument is not to be construed by the acts of the parties. S. C.

AGREEMENT III.

Where a specific Performance of a Covenant or Agreement will be decreed. (a) Where not. (b)

(a). Where decreed.

99. An uncle, in consideration of natural love, and in order to reconcile the family, covenants to settle his estate on his nephew. This covenant shall be executed in specie, though objected that the remedy is at law. Wissman v. Roper, 1645. 1 Ch. Rep. 138. The like agreement was decreed in specie, under the like objection. Wood v. Tyrrle, 1645. Cary, 84.

100. A. had a lease from a dean and chapter, which he sold to B., and it was agreed, that upon A.’s abating part of the purchase-money, B. should, upon the restoration of the king, and dean and chapter, re-convey to A. Objected that this
AGREEMENT III.

Specific Performance desired.

101. A man covenants that lands settled for a jointure are 400l. per annum, the jointure being deficient, the heir decreed to make good the covenant in specie. *Speake v. Speake*, H. 1683. 1 Vern. 217.

102. Covenant to save harmless decreed in specie, to wit, the principal was decreed to indemnify the surety. *E. of Banleagh v. Hayes*, M. 1688. 1 Eq. Ab. 17, pl. 6. 1 Vern. 189. 2 Ch. Rep. 146.

103. The condition of a bond was to settle certain lands in such a manner by such a day: the obligor died before the day, and so saved the bond at law. Decreed the lands to be settled. *Holtham v. Ryland*, E. 1697. Nels. C. C. 205.


105. One is bound to transfer stock before a certain day. Though the stock was much risen, yet the defendant decreed to transfer the stock in specie, and to account for all dividends from the time it ought to have been transferred. *Gardner v. Pullen*, M. 1700. 2 Vern. 394.

106. A. made a lease of ground, and lessee covenanted to build; he then assigned his lease by way of mortgage, and died insolvent. Bill by lessee against the mortgagee to execute this agreement in specie. Decreed, the mortgagee to build according to the agreement, and not to quit the lease, though he should be content to lose his money. *Amos*, M. 1701. 2 Freem. 253. *Vide* Pilkington v. Shaller, 2 Vern. 374. Sparkes v. Smith, 2 Vern. 275.

107. If a man (in company) make an offer of a bargain, and write it down and sign it, and another take it up, and prefer his bill, equity will decree a specific performance of his bargain. *Coleman v. Upcott*, H. 1706. 5 Vin. Ab. 527, pl. 17. 2 Eq. Ab. 16, pl. 3. 45, pl. 9. (n.)

108. A., coterie of N., covenanted with B. to build a house upon the glebe land. B. brings a bill for a specific performance of the agreement, and it was insisted for defendant that the covenant was too loose and uncertain to be performed in specie, both in respect to time and value, and sounds only in damages; decreed, a convenient house to be built, and for that purpose each party to choose two commissioners, and if they cannot agree, then to resort to the ordinary of the diocese. *Allen v. Harding*, T. 1709. 2 Eq. Ab. 17, pl. 6.

109. The partners in certain works enter into articles with A. that he shall serve them as their manager and overseer during his life; and, besides a stipulated yearly salary, he was to have 3s. 6d. for every cwt. of wire made by him, or any other person during his life. A. was afterwards discharged by the partners from their service, and on a bill brought for a specific performance of these articles, it was decreed, that plaintiff was entitled to all the advantages thereby stipulated for, him except 3s. 6d. payable to him for every cwt. of wire made at the mills; which Lord Cooper conceived was intended as a reward attending the produce of the works, during such time only as plaintiff supervised the same. But this part of the decree was reversed, and he was held to be entitled to this allowance during his life. *Ball v. Cogge*, E. 1710. 1 Bro. P. C. 296.

110. A. enters into an agreement in writing with C. for the purchase of an estate, if a good title could be made. B. (a stranger) afterwards files a bill, claiming part of the lands; C. boys in his claim. C. is entitled to a specific execution of the agreement. *Master v. Cook*, H. 1712. Colles' P. C. 438.

111. A. being tenant for life under a settlement, with remainder to his wife for her jointure, remainder to the issue male of the marriage; remainder over, with a power to revoke all the uses, except those to his wife and her issue; agrees, that in consideration of her surrendering her jointure estate, so as to enable him to suffer a recovery, and raise 6000l. to pay his debts, he would re-settle his whole estate to particular uses. The surrender was made and the money raised, but no re-settlement made according to the agreement. Held, that this agreement having been in part performed, the parties were entitled to a specific execution, and decreed accordingly. *Herbert v. Id. Winchelsea*, E. 1714. 1 Bro. P. C. 440.

112. Bill for specific performance of an agreement. A., during his minority, by himself and guardian, having entered into articles with defendant to let him a farm at a certain rate, &c.; defendant enters upon the farm, and continues the possession, and pays the rent after A.
AGREEMENT III.

Specific Performance Decreed.

case of age. After that A. conveys the
inheritance to plaintiff, and then defendant
sets the farm, insisting that he was
only a tenant at will, and refuses to ac-
cept a lease or execute a counterpart, be-
cause A. being an infant at the time of
making the agreement, was not bound, and
therefore defendant ought not to be bound
by it. Decreed per Harcourt, C. That
plaintiff should execute a lease to de-
fendant, and defendant execute a coun-
terpart of such lease to plaintiff, in pursu-
ance of the articles; and defendant to
9 Vin. Ab. 393, pl. 4. 2 Eq. Ab. 516,
pl. 4.

113. C. by articles on his marriage
with his first wife covenanted, that all
the lands which he should purchase dur-
ing her life should descend to, or be set-
cled upon her heirs male by him. No
settlement was made pursuant to these
articles, but C. upon his second mar-
rriage settled his estate to different uses.
Had, that the only son of the first mar-
rriage was entitled to a specific perform-
ance of these articles, and a conveyance
to him was decreed. Cusack v. Cusack,
T. 1714. 1 Bro. P. C. 470.

114. Two captains of ships of war enter
into an agreement, that all prizes taken
by either of them, whether in the ships
they then had, or in any other ships
which they might then after command,
should be equally divided between them.
One of them changed his ship, which,
meeting with an accident, was ordered to
be laid up, and it was some time before
he got another; the other captain con-
tinued cruising all the time, but objected
to account for the prizes which he took,
during the interval of his partner being
unemployed. Held, that he was account-
able for all the prizes taken, from the
date of the agreement. Ogles v. Samsom,
T. 1713. 1 Bro. P. C. 580.

115. Bill to have execution of articles
for the sale of some copyhold lands to
plaintiff, on payment of 538l. to defendant R., a guinea being paid in part; and
to compel the lord of the manor to admit
plaintiff in fee according to the agree-
ment, which was decreed; but there being no
tender of a surrender to the lord, and
consequently no refusal, he was to have
his costs. Segal v. Rees, H. 1722.
said, this seemed to be a bill brought
to get at the opinion of the court, who-
ther plaintiff had bought a good title;
but that the court would not determine
upon.

116. B. being seized in fee of an estate
in H. by articles, sold same to A., cov-
enanting to make a good title by the 29th
September, 1720, and A. agreed to pay
for same 800l., being forty years pur-
chase. A bill was filed in the Exche-
quer for a specific performance of this
agreement, which was decreed. It being
proved in the cause that B. had left his
deed with A., and that there was no just
objection to his title, this was admitted in
the Exchequer, and therefore the proofs
were not read, or marked as read. The
Lords did not resolve whether an exor-
bibitant bargain of forty years purchase
should be decreed to be carried into exe-
cution in equity, because B. did not prove
that he had made out his title by 29th
September, according to his covenant,
inasmuch as his proofs were not read or
marked in the Exchequer, and the ap-
pellant's admittance of that indenture was
Vide Lewis v. Ld. Lochmere, post.

117. A. being seized of a copyhold es-
tate, attempts to surrender it to the use of
his will, with a resolution to devise it to
B. his sister's son; but a surrender not
being practicable (by reason of some ac-
cidents,) he prevails upon his sister, who
was his heir at law, to give a bond condi-
tioned to surrender at her son's request
upon payment of 200l. A. dies; B. re-
ceives the rents and profits some time,
and then dies intestate, leaving only two
sisters. The mother administers, and
having procured herself to be admitted
tenant to the copyhold, &c. devises it by
will to one of her daughters, and sister of
B. The other brings her bill against
the devisee for a specific performance of
the condition of the bond, by which she
would be entitled to a moiety of the
land. Decreed, that the mother should
be considered as a trustee for B. her
son, and that a surrender and con-
voyance should be made accordingly,
upon payment of the 200l., with interest
from the death of A. Parks v. Wilson,
M. 1724. 10 Mod. 515. Alison’s Ca.
9 Mod. 62. is said to be S. C.

118. A. and B. enter into articles for
the purchase of part of A.'s estate. A.
dies before a conveyance is made, and his
executors pay away the personal assets
in discharge of specialty debts which
were a lien on the real estate. A specific
Specific Performance decreed.

performance of these articles decreed, for that the sale of the estate, in consideration of the purchase money, was a specific lien on the lands by the constant course of the court, and for so much of the purchase-money as the lands fall short to answer B., he shall come in as a specially creditor. Charles v. Andrews, T. 1725, 9 Mod. 151. 158.

119. A. covenanted for himself and his heirs to surrender a copyhold estate to certain uses, and died before it was done. A bill was brought against the heir for a specific performance of the covenant, and a surrender decreed accordingly. Nourse v. Keck, M. 1725, 9 Mod. 106.

120. On a bill to compel performance of an agreement for transferring 5000l. York Buildings stock at 7l. 5s. per cent. Defendant demurred, but demurrer overruled; for the case might be attended with such circumstances as would make it just to decree a specific performance of the party's own agreement, or at least to pay the difference. Colt v. Netterville, M. 1725, 2 P. W. 304.

121. Bill for the execution of articles for the sale of lands against the executors and devisees of the land for life, and the infant heir of the vendor. Decreed, that the articles be carried into execution, and plaintiff, upon paying the purchase-money to the executors, be let into possession, and the executors and devisees make a conveyance to plaintiff at his cost, and plaintiff, to hold the premises against the infant heir, who, when of age, was to convey to plaintiff and his heirs, unless he shows cause to the contrary within six months after he comes of age. Sikes v. Lister, H. 1726, 5 Vin. Ab. 541, pl. 28. 2 Eq. Ab. 25, pl. 28.

122. The reason why specific performances are decreed in Chancery, is because the lien is subsisting at law, and the law can only give damages which may not be adequate. Dr Bettesworth v. Dean & Chapter of St. Paul's, M. 1726, Sel. Ca. Ch. 56, 3 Bro. P. C. 389.

123. Where an equal agreement cannot, by reason of a subsequent act of parliament, or some other lawful impediment, be performed in the whole, the same shall be specifically executed in such part of it as remains lawful. S. C.


125. A bond, conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie. The obligee having been in possession twenty years need not prove the money paid. Anon. M. 1728, Mos. 37.

126. Articles by a guardian for sale of timber have been carried into execution by a court of equity. Clavering v. Clavering, M. 1729, Mos. 224.


128. A. devised money to be laid out in land and settled to the use of B. in tail, remainder to C. in fee. B. and C. agreed by articles to divide the money. B. died without issue before a division of the money. A specific execution of the articles decreed at the Rolls in favour of B.'s executor, and affirmed by Lord Talbot. Carter v. Carter, E. 1733, For. 271, 273, 274. In which it is said, Lord Talbot laid much stress on tenant in tail's dying without issue.

129. A court of equity is very desirous of laying hold of any just grounds to carry agreements into execution where entered into to establish the peace or save the honour of a family; and where they are reasonable, the court will, if possible, decree a performance. Stapleton v. Stapleton, T. 1739, 1 Atk. 2 to 10. See Stockley v. Stockley, 1 Ves. & B. 23, per C.

130. Where there is a valuable consideration for an agreement on all sides, there is sufficient ground to come into a court of equity; but a mere volunteer is not entitled to come there for execution of an agreement. S. C.

131. An agreement upon a supposition of a right, or a doubtful right, though it may afterwards come out on the other
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Specific Performance decreted.

side, is binding; and the right shall not prevail against the agreement of the parties. Stapleton v. Stapleton, supra. Vide Cann v. Cann, 1 P. W. 726, 7.

132. But otherwise the constant rule of the court is to order the money to be laid out in land, to give the remainderman his chance. S. C.

133. Specific performance of a parol agreement will be decreed, if it is admitted in the answer, or if material and unequivocal acts are done in part performance. Gunter v. Halsey, T. 1739. Amb. 386.

134. Where a part of the agreement is performed on one side, it is but common justice it should be carried into execution on the other. Walker v. Walker, M. 1740. 2 Atk. 100.

135. If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, &c.; or attempt to set the agreement aside on that account, for a court of equity will decree a specific performance of the remaining part of it. E. of Anglesey v. Amnesley, E. 1741. 4 Bro. P. C. 421.

136. Agreement on marriage, to settle a jointure in consideration of a portion to be paid by the wife’s father, though the portion was not paid, the settlement was decreed to be performed.—Perkins v. Thornton, T. 1741. Amb. 502.

137. A proviso in articles for the purchase of an estate, that if either should break the agreement, he should pay 100l. to the other. Defendant, on being offered two years purchase more, accepted it, notwithstanding his agreement.—Lord Hardwicke decreed a specific performance of the articles. Howard v. Hopeyus, T. 1742. 2 Atk. 371.

138. The offering to pay the stipulated sum will not vacate the agreement; for it is no more than the common case of a penalty. S. C.

139. A penalty has never been held to release parties from their agreement; for though incurred, they must perform it notwithstanding. S. C.

140. H. in her life-time, agreed with M. to convey to him her interest in a leasehold estate for 300l., to be paid at three instalments, two of which were paid by M. accordingly; but before the third payment an accident happened, which made the thing more valuable, and H. insisting on an advance, M. agreed to give 140l. more, but H. dying soon after, nothing further was done, nor the conveyance executed. Lord Hardwicke decreed the agreement to be carried into execution in favour of the administrator of each against M. and the heir at law of H. Lazon v. Marnet, M. 1743. 3 Atk. 1.

141. By articles between R. F. and J. F., his son, previous to the marriage of the latter, an estate of 820l. per annum was limited to the son for life, and after the determination of that estate, to raise a jointure of 400l. per annum rent-charge for the wife, and then to trustees to preserve contingent remainders to the sons in tail male, and afterwards to sons by another marriage, and there is no other limitation; then the articles take up the consideration of another part of the estate, and limit the uses there to the same persons as in the first mentioned lands, with a charge by way of additional portion of 4000l. to the daughters of R. F., the father; and after limitations to plaintiff, Lady G., one of his daughters, and her heirs male, unless R. F. should appoint other uses under his band and seal, then to his other daughters in tail, then to J. F., then to the right heirs of R. F.—The father died in 1736, the son survived, who directed a draft to be prepared for carrying the articles into execution, but died before it was finished; the legal estate in some of the lands descended to the four sisters in fee, as heirs both of father and brother. Upon a bill brought by Lady G. to carry the articles into execution, and to have the entail of the estate limited to her settled accordingly.—The articles made previous to the marriage of J. F. decreed to be carried into execution for the benefit of plaintiff, his eldest sister. Goring v. Nash, M. 1744. 3 Atk. 186.

142. The specific execution of articles being the most adequate justice in general, the court will not leave it to an action at law. Vide Jenkins v. Keynes, E. 1668. 1 Lev. 150. 257; 238, and 1 Ch. Ca. 103.

143. Though it is discretionary in the court whether they will decree a specific execution, yet it is so on certain grounds, and not arbitrary, but governed by the rules of equity. Goring v. Nash, supra. Jones v. Stephane, M. 1746. 3 Atk. 389. S. P.

144. In a question between relations in the same degree, the rule that governs
the court in these cases is, whether it would be attended with hardship or not? Or whether a superior or inferior equity arises on the part of the person who comes for a specific performance? Vide Finch v. Ed. Winchelsey, 1 P. W. 277. Holt v. Holt, 2 P. W. 648.

145. Specific performance of marriage articles has been decreed in the court of Chancery even as to collaterals. Vernon v. Vernon, T. 1731. 2 P. W. 594.

146. The court will not decree a partial performance of articles, but where some parts appear unreasonable, they always dismiss the bill. In cases of fraud or mistake, the court goes upon another ground, and relieves against the settlement itself. S. C.

147. In general, the court of Chancery will not entertain a bill for a specific performance of contracts for chattels, or which relate to merchandise, but leave it to law, where the remedy is much more expeditious; but in the present case the agreement not being final, but to be made complete by subsequent acts, a bill to carry it into execution was allowed. Burton v. Letter, T. 1745. 3 Atk. 383. 385. 386. Vide etiam Cudd v. Rutter, 1 P. W. 573. Cappur v. Harris, Bubn. 135. Dennis v. Westbrook, 2 Eq. Ab. 161, pl. 8. 5 Vin. 540, pl. 22. Nutbrown v. Thornton, 10 Ves. 161. Mason v. Armitage, 13 Ves. 37. where, however, the party wants the thing in specie, he can only have it in equity.—Errington v. Aynesley, 2 Bro. C. C. 343. 10 Ves. 165. Fasy v. Fasy, 1 Vern. 273. D. of Somerset v. Cookson, 3 P. W. 390. Fell v. Reed, 3 Ves. 70. Lloyd v. Waring, 6 Ves. 775. Lady Arundell v. Phipps, 10 Ves. 159. but the court will not enforce a contract for the sale of a business, or of the good-will of a trade. Bozon v. Farlow, 1 Meriv. 449. Bed vide Crutwell v. Lye, 17 Ves. 353. Vide etiam Wright v. Bell, Dan. 95.

148. The court will weigh with great nicety cases where it is a mere personal chattel, and every agreement of this sort ought to be certain, fair, and just in all its parts, or the court of Chancery will not decree a specific performance. S. C. Underwood v. Hithco, T. 1749. 1 Ves. 279. S. P. Jekyll, M. R. in Cad v. Rutter, 1 P. W. 570, decreed a specific performance in the case of a chattel, but Lord Parker reversed it; and it has been ever since the constant rule not to retain such a bill.

149. In this case a specific performance of articles executed in England, concerning the boundaries of two provinces in America was decreed. And the court said, that decrees in specie were preferable to damages at law. Penn v. Lud. Baltimore, T. 1750. 1 Ves. 444.

150. A specific performance of agreements will not be decreed without consideration, but lapse of time may be relieved against. S. C.

151. An agreement may be decreed in specie, though it could not be enforced in rem. S. C.

152. A copyholder for lives where there was a customary right for the widow to enjoy for life the whole estate of which her husband died seised, articulated for the sale of his estate for a valuable consideration, but died before the surrender. The widow contended her free-bench was not bound by the articles. Per Ld. Hardwicke—Where there is an agreement for the sale of a copyhold estate, the court will decree a performance against the assignees of a bankrupt, and against an heir at law; so in strong equity the widow should be bound. Hinton v. Hinton, T. 1755. Amb. 277. Note. In this case Lord Hardwicke denied the authority of Maccrave v. Dashwood, 2 Vern. 45. 69. but his Lordship's reasoning seemed to be against the sentiments of the bar.

153. Agreements are not carried into execution against issue in tail or remainder, claiming per formas doni. S. C. 2 Ves. 684.

154. An undertaking by letter, from A., devisee of real estate to B., a legatee, to pay interest upon her legacy, (which was charged on the estate) provided B. would join in a sale;—held to be on sufficient consideration, it appearing that several suits, in which A. was engaged, would be thereby terminated, and the estate bettered (a) and a neglect to notice such undertaking in a subsequent agreement to sell, is no waiver of specific performance, therefore decreed. Griffith v. Sheffield, 1 Edw. 758. 1 Eden 75. Vide (a) Stapilton v. Stapilton, 1 Atk. 6. ante, pl. 129.

155. Sale of an estate for a certain sum of money, and an annuity for life, the agreement being fair, a court of equity will decree a specific performance, although the party die before any payment of the annuity. Mortimer v. Copper, T. 1782. 1 Bro. C. C. 156.
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Specific Performance decreed.

156. Bill for performance of an agreement for a lease from plaintiff to defendants, A. & B., had become incapable from infirmity, of doing any act. Ordered that A. should execute the counterpart, and B. also when he should be capable. Pege v. Skynner, E. 1784. 1 Cox 23.

157. B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of a corporation is necessary; but A. refuses to treat on condition; B. fails in obtaining consent; this failure in his speculation, is no defence against a bill for specific performance. Adams v. Weare, E. 1784. 1 Bro. C. C. 587.

158. Bill for specific performance against vendor, the vendee being in possession, and an account being necessary of the vendee's personal estate, referred to the Master to fix a short day for the payment of the purchase-money, otherwise the bill to be dismissed with costs. Sir James Lovather v. Lady Andover, T. 1784. 1 Bro. C. C. 396.

159. Specific performance not decreed where there is a concealment of an outgoing on the part of the vendor. Shirley v. Stratton, E. 1785. 1 Bro. C. C. 446.

160. Contract for purchase in lots.—No title can be made to two of them, and others had been deteriorated: if the former are not so blended with the others as to injure them, a specific performance shall be decreed. Pool v. Shargold, T. 1786. 2 Bro. C. C. 118.

161. Equity will exercise its discretion in decreasing a specific performance; or dismiss the bill, though the same circumstances would not induce the court to cancel an agreement on a bill filed for that purpose. Davis v. Symonds, M. 1787. 1 Cox. 402.

162. Small deviations from a plan agreed upon for building, not material, otherwise, if obstinate or corrupt.—Crawen v. Tickell, M. 1789. 1 Ves. 69.

163. A court of equity will, in many cases, enforce the specific execution of agreements, where the deed will not enable the party to recover damages at law. Chandos v. Brownlow, E. 1791. 2 Ridg. P. C. 416.

164. A contract that one party shall convey an estate, and the other grant an annuity, shall be carried into execution, though the vendor died previous to any payment of the annuity, one having accrued due, and having been tendered. Jackson v. Lever, T. 1792. 3 Bro. C. C. 605.

165. Specific performance of an agreement to purchase may be decreed after considerable delay, if the vendor has not demanded his deposit, or shown a determination not to proceed in the purchase. Pinck v. Curtis, T. 1793. 4 Bro. C. C. 329.

166. Upon a sale of reversion, a condition that the purchase-money should be paid by a certain time, not being complied with by the vendee, vendor was discharged from his contract. Newman v. Rogers, T. 1793. 4 Bro. C. C. 391.

167. The conduct of parties, inevitable accident, &c. may induce the court to relieve against lapse of day fixed for completing a purchase. Lloyd v. Collett, M. 1793. 4 Bro. C. C. 469. 4 Ves. 689. (n.) Vide Alley v. Deschamps, 13 Ves. 225.

168. Specific performance of articles to grant a lease to plaintiff. Decreed though he had contradicted to underlet contrary to those articles. Williams v. Cheyne, H. 1796. 3 Ves. 59.

169. Agreement in writing between landlord and tenant, signed by the landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed: but blanks were left for the day of the commencement. The repairs being completed, the landlord tendered a lease to commence from that time, and on refusal filed a bill. The answer admitted that the agreement was accepted, but insisted that the new lease was not to commence till the expiration of the old; and so it was decreed, parol evidence being refused. Pym v. Blackburn, H. 1796. 3 Ves. 34.

170. An agreement was entered into between a landlord and his tenant, for a lease, which, when prepared, the tenant refused to execute, saying he was content with the agreement, which he did, not attempt to repudiate. This is no ground for refusing him a specific performance of the agreement. Gourlay v. D. of Somerset, M. 1812. 1 Ves. & B. 68. See this case fully stated, post, tit. Landlord & Tenant, 1.

171. On a bill for specific performance of a contract, in the case of a purchase, a question arose on the clause for a reference, which was confused to the expenses of the conveyance, but the parol
evidence of the attorney who drew the contract was admitted on the part of defendant, to prove that it was the intention of both parties, and agreeable to his verbal instructions that plaintiff, the purchaser, should also pay the expense of making out defendant's title. 

Et vide Joynes v. Statham, 3 Atk. 388. 
6 Ves. 354. (n.)

172. Bill for specific performance of a contract, must charge that it was signed by the party, or his agent duly authorized, and that authority must be either proved or admitted, before a decree can be made. Per Elden, C. in Howard v. Ratthwaite, M. 1812. 1 Ves. & B. 208. 

Vide post, title Principal & Agent, i.

173. Where the terms of a contract are ambiguous, as excluding or including the timber, the purchaser's bill for a specific performance will be dismissed, and if he insists on his own construction throughout, he cannot compel the vendor to convey upon the terms he originally offered. 


Vide S. C. post tit. Evidence, iv, for the distinction between the admission of parol evidence to support or re-strict the specific performance of a contract for land.

The cases that have been exempted from the operation of the statute of frauds, upon equitable grounds, are,

174. First, where, in consequence of fraud, the provisions of the statute have not been complied with. 

Vide Thynn v. Thynn, 1 Vern. 396. 
Oldham v. Litchford, 2 Vern. 606. 
Lady Montacuto v. Maxwell, Pre. Ch. 326. 
1 P. W. 618. 
1 Str. 235. 
Sellack v. Harris, 5 Vin. 521, pl. 31. 
Walker v. Walker, 2 Atk. 98. 
Beech, Potter v. Potter, 1 Ves. 82. 218. 
297. 437. 
Redding v. Wilkes, 3 Bro. C. C. 400. 
Several other cases are collected, 5 Vin. tit. Contract.

176. It is now established, that if defendant has concurred in a material unequivocal act, by which he has obtained a substantial part of his object, as taking possession or accepting a considerable part of the purchase-money, he shall not be allowed to retract, and plaintiff's right to a full execution of the contract has attached; but acts merely ancillary and introductory, as preparing conveyances, making surveys, valuations, &c. though attended with some expense to plaintiff, will not sustain an agreement upon the ground of part performance. — Acceptance of a trivial earnest would probably not be deemed sufficient. As binding the parties, it is not the mode prescribed by the statute; and as a part performance, it is too inconsiderable in value. This, however, appears doubtful. Vide Simmons v. Cornelius, 1 Ch. Rep. 128. 
Voll v. Smith, 3 Ch. Rep. 16.

Anon. 2 Freem. 128. 
Seagood v. Meale, Pre. Ch. 560.

177. A third exception in equity, where the answer admits an agreement, has prevailed, to bind defendant by that admission. 

In Mortimer v. Orchard, 2 Ves. jun. 245. as there was a part performance, evidence was received of the terms of the agreement; but it has never been pretended that the admission of an agreement authorizes plaintiff to give evidence of the terms.

178. The frauds against which the statute is directed, are those of setting up fictitious contracts and wills, and supporting them by perjury; though the statute could not be intended to counteract fraud or perjury, a temptation to perjury is held out to defendant, who may be released by his own oath from an agreement, which, if not denied by his answer, may be enforced against him, but which plaintiff is not permitted to support by evidence. The relief sought is in opposition to the statute, which is to prevent, by a general rule,
mischiefs arising from loose contracts, and not to give way to particular instances of hardship. The principal cases on this subject, are Child v. Ld. Gedolphin, cor. Maclesfield, C. Whaley v. Begenal, 6 Bro. P. C. 45. Whitbread v. Brockhurst, 1 Bro. C. C. 404. and Whitchurch v. Bevis, 2 Bro. C. C. 559. The result seems to be, that the statute may be used as a bar to the discovery.

179. The efficacy of the statute has been further restrained by Goman v. Salibury, 1 Vern. 240. 5 Vin. 522, pl. 38, and Legal v. Miller, 2 Ves. 299. In the first case, it was held, that a written agreement, made since the statute, might be discharged by parol; and the bill for specific performance was dismissed. In each of the two last cases, an agreement executed according to the statute was discharged by a subsequent parol agreement, of which evidence was given on the ground of part performance; for this purpose the evidence must prove a distinct, subsequent, independent agreement; for, except in a case of direct fraud, evidence of what passed before, or at the time of the transaction, cannot be received to contradict or vary an agreement conformable to the statute, or to introduce any new term. Vide Binsted v. Coleman, Bunb. 65. Ld. Irnham v. Child, 1 Bro. C. C. 92. Hare v. Shearwood, 3 Bro. C. C. 168. 1 Ves. 1261. Brodie v. St. Paul, 1 Ves. jun. 526. Jordan v. Sawkins, 3 Bro. C. C. 388. 1 Ves. jun. 402. Rich v. Jackson, 4 Bro. C. C. 514. and Rosamond v. Ld. Milsington; in which Ld. Kenyon, when M. R. refused parol evidence that an annuity was to be redeemable. See observations on the Statute of Frauds, 1 Fonbl. Tr. Eq. 168. n. (d.) 171. n. (e.)

180. In Foster v. Hall, 3 Ves. 712. Arden, M. R. thought the court had gone too far in taking cases out of the statute of frauds, on the ground of part performance of an agreement. The relief should have been confined to compensation.

181. Specific performance of an agreement to build may be decreed if sufficiently certain, but a general covenant to lay out a certain sum in a building of a certain value, cannot be so executed. Mosely v. Virginia, T. 1706. 3 Ves. 184.

182. Though a formal mistake in a deed may be rectified by articles of which it purports to be an execution, essential additions cannot be made to a conveyance from articles of which it does not purport to be an execution; nor can the transaction be rescinded by the court. S. C.

183. A bill alleging a written agreement may be sustained by evidence of a parol agreement, and after answer admitting an agreement, and submitting to perform it, the bill being amended, as to other circumstances, the defendant shall not take advantage of the statute or frauds by his answer to the amended bill, but a specific performance shall be decreed. Spurrier v. Fitzgerald, M. 1801. 6 Ves. 548. Vide Whitchurch v. Bevis, 2 Bro. C. C. 559. Child v. Gedolphin, ibid. 566.

184. Objections by a purchaser at an auction, 1st, that a way round and across a meadow was not specified; 2d, on account of a bidding for plaintiff; a specific performance was decreed, with costs. Oldfield v. Round, T. 1800. 5 Ves. 508.

185. Where the time at which a contract is to be executed is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but, is able to make a title at the hearing; is entitled to a specific performance. Wynn v. Morgan, T. 1802. 7 Ves. 202. A vendor is entitled to the opportunity of making a better title before the master. Jenkins v. Stiles, 6 Ves. 648.


187. By the rule of law, independent of the statute of frauds, parol evidence cannot be received to contradict a written agreement. S. C.


189. Mere difference in value, though considerable, is not of itself a sufficient ground for refusing a specific perform
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Specific Performance decreed.

Emery v. Wase, T. 1806. 8 Ves. 517.

190. In a bill for specific performance of an agreement for sale of an estate by defendant to plaintiff: plaintiff stated that defendant had proposed to convey all his estates at A. to C. and W. S. in trust to sell for payment of debts, and accordingly an agreement was endorsed by way of defeasance on a warrant of attorney to convey judgment at the suit of T. and another, by which defeasance it was declared, that execution should not issue for two months, upon condition that defendant should, within a month, make out his title to the estate at A., and within the other month convey to C. and W. S. in trust to sell, and after discharging incumbrances to pay the remainder to defendant, and the judgment in the mean time to stand as a security. No conveyances were executed, but preparations were made for the sale, under the sole direction of defendant, with the consent of the trustees. On 26th June, defendant gave the trustees a written authority to sell the estate to any one offering 110,000l., though the conveyance was not executed; and on 6th July, defendant by letter, directed the auctioneer to sell the estate to the highest bidder above 109,500l. There being no bidder at the sale, it was resolved to dispose of the estate in lots: and the estate was divided into 22 lots by defendant, his solicitor, and the auctioneer, who fixed the prices, but the trustees did not interfere. At the sale the principal lot was bought in for 19,350l. Several lots were afterwards sold by private contract, the auctioneer's authority being general; defendant was so anxious to get rid of the whole, that when the auctioneer went out of town, defendant asked him what was to be done, if any purchaser should offer in his absence, to which the auctioneer replied, that he transacted great part of his business through two confidential clerks P. and G. who would enter into contracts for him. In evidence for plaintiff it appeared, that after the sale a meeting was had to consider of the lots unsold, at which defendant's solicitor declared that defendant has desired him to offer the principal lot to C. the trustee, or to his father the plaintiff. C. being a trustee, declined the purchase, but he afterwards informed the auctioneer and defendant's solicitor that his father would become the purchaser at 20,000l., whereupon, in the absence of the auctioneer, an agreement was written on one of the particulars, and signed for plaintiff by his solicitor and by the auctioneer's clerk, thus, "Witness E. P. for Mr. S. agent for the seller." Plaintiff's solicitor paid down a deposit of 2000l; but soon after defendant applied to C. requesting that plaintiff's father would relinquish the purchase, as another person had offered 25,000l., but plaintiff refused. Defendant by his answer, insisted that C. was not authorized by his father to offer 20,000l., and he relied on the statute of frauds; he also insisted that S. and P. were not authorized to sell, and that payment of 2000l. could not be considered a part performance. P. depos'd that he signed or witnessed the contract for S. as agent for the seller in the usual course of business in his absence. C. depos'd, that he was authorized by his father to offer 20,000l. The receipt for 2000l. not being stamped, an objection was taken, whereupon it was allowed to be stamped during the hearing. Ld. Ch. declared his full opinion that P. as the clerk of S. was in this case an agent lawfully authorized within the meaning of the statute of frauds, to sign the contract, but his Lordship did not agree that auctioneers' clerks in general had that authority. His Lordship then proceeded to state two questions in this case; first, whether there was any such agreement, as the court can carry into execution? secondly, if there was, whether the circumstances which have led the parties to contract were such, not as to call upon the court to say, the contract did not bind them, but that the court will refuse plaintiff the relief beyond the law, of a specific performance, leaving him to make what he can of his action for damages at law? His Lordship said, that this case, as a contract, was proved beyond all possibility of doubt; it was an agreement made under the sole interposition of defendant, without any interference of the trustees, except their sanction, and therefore not to be impeached. As to a purchase by a trustee from the cestui que trust, his Lordship agreed, that a cestui que trust may deal with his trustee, so that the trustee may become the purchaser of his estate, but it is a transaction of much delicacy, and which the court will watch so diligently, that it is very hazardous. (Vide post, tit. Trust and Trustee, v.) Considering this case then
with reference to the delicacy of a purchase by a creditor (for plaintiff was a creditor of defendant,) it was clearly proved, that defendant meant to sell his lot for 20,000L. and that 25,000L. was not offered him till after he had closed with plaintiff’s son. Inadequacy of price is out of the question here; in fact, inadequacy, unless amounting in itself to conclusive and decisive evidence of fraud, is not a sufficient ground for refusing a specific performance. Accidental subsequent advantage is nothing, for it has been held, that a contract to sell an estate for a life annuity, if signed, must be executed, though the vendor dies before the end of the first half year. * His Lordship was clearly of opinion, that this contract must be executed, if duly signed, unless some want of principle, duty, and obligation, be infused into the character of one of the parties, so as to withhold the equitable relief prayed. Upon the statute of frauds, this case produces a great and important question. If the different expressions of the statute as to wills and agreements be compared, it would seem that the legislature never used stronger words than they have in this statute as to wills; if a testator intending to devise his lands, begins one simultaneous act, “I, A. B. do make this my will,” though there is no signature, yet if it be attested by the witnesses, it is a good will; but as to personal estate, if it appears upon a will, that something more is intended to be done, and the party is not arrested by sickness or death, the usual declaration at the beginning, that it is his will, is not sufficient. * If, therefore, it is sufficient in a will devising lands, it is hard to say upon what grounds such a signature should not constitute an effectual agreement as to lands or goods, construing the very same words in one simultaneous act, comprising the whole of the terms. Much perplexity has arisen by the case of auctions. In Simon v. Metivier (1 Bla. 599. 3 Burr. 1921.) it was held, that as to goods, the auctioneer taking down the buyer’s name, was a signing within the statute; but Eyre, C. J. held, that it would not do as to land, and yet the form of the two clauses is not the same, but the terms as to the memorandum in writing are exactly the same; next follows, Walker v. Constable (1 Bos. & P. 306,) which was not much discussed. Unless some distinction can be pointed out, Ld. Ch. said the law is very inconvenient as to sales by auction, particularly if the auctioneer is to be considered the agent of one only, and if after putting down the name, and ascertaining the sum, and putting that down upon the conditions of sale, which ascertains all the other terms, it is competent for the vendor to say, according to Payne v. Cave (9 T. R. 148.) that although the other party is bound in a degree, by the knocking down the hammer, yet he may at that moment revoke the authority. Upon such terms mankind will not very readily engage in these transactions. If the putting down the name and the sum by the auctioneer, is a signing, that would furnish a new class of cases; that the effect being to ascertain the terms of the agreement, it should be good both in law and equity. It is now settled, that an agent need not be authorized in writing, also that an agreement in writing may be dissolved by parol. Legal v. Millies (2 Vesc. 293.) in Bawdes v. Amhurst (Pre. Ch. 402,) Ld. Ch. expressed a clear opinion that the party resisting what the ecclesiastical courts call olograph, and inserting his name is not a signing, and so far Simon v. Metivier agrees. In Welford v. Beazley, (9 Atk. 504,) Lord Hardwicke professed not to disturb Bawdes v. Amhurst; but he proceeded to say, that the party may be supposed making up his mind, while writing, till he gets to the end, and may at the end mean something more to be added hereafter; but Lord Hardwicke distinguished that from the case before him, viz. that it was not necessary the identical agreement should be signed, for any note or memorandum would do, and he put a strong case of a subsequent letter; though the agreement be not signed, yet if that letter contains all the terms, and so describes the consideration and all the circumstances, that by its contents, it can be connected and identified with the agreement, that letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed, which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute. It is true, that where a party to be bound, signs as a witness (which he cannot be,) he must be understood to sign as a principal. As to that, Lord Hardwicke has said, that his decision went upon the assumption of the fact, that the intention of the party was, not to sign an instru-
ment which would be binding upon him as an agreement. His distinction was, that in Bawdes v. Amhurst, there was no signature but in the introduction, and the instrument might not then be completely contemplated, but in the other case, she had signed it, and though not meaning to be a party, yet acknowledging that there was an agreement, and if she had not signed, but had written a letter confessing the terms, that would have been sufficient; and speaking of the certainty as avoiding the mischief, he put himself upon a principle that would support this case, if it can be made out that P. was sufficiently authorized to sign as an agent, and did so. This brought the Ld. Ch. to the point, whether P. was duly authorized. His Lordship thought it a very dangerous doctrine to say, that if an auctioneer is authorized to sell, all his clerks are agents, in his absence, for the person who employed him, but in this case it was proved that defendant consented to the deputation of Mr. S.'s clerk, to sign contracts for him when out of town, and therefore this cannot be objected to. Next, as to the signature of P.—S. was agent for defendant, and for his trustees by whom defendant was authorized to act. Defendant's agreement with S. gave validity to the signature of P.; and as to the objection of law, Lord Hardwicke has already decided, that where either the party himself, or a person duly authorized by him, ascertains the agreement by a signature, not in the body of the instrument (which seems to be doubtful,) but in the form of addition, the signature of that instrument ascertains the agreement sufficiently within the statute, though not a signing as an agreement, yet enough to identify the agreement; the instrument itself containing the terms, and therefore sufficient within the statute of frauds. Unless the objection as to signing can be maintained, the rest of the case does not form any reasonable doubt. Decreed an execution of the agreement, but no costs. Coles v. Trecottick, H. 1804. 9 Ves. 234. Vide Jackson v. Lever, 3 Bro. C. C. 605. Griffin v. Griffin, G Ves. 179. (n.) See Buckmaster v. Harrop, 7 Ves. 341.

191. Specific performance of a contract by a competent party, and in its nature and circumstances unquestionable, is as much of course as damages at law. Hall v. Warren, H. 1804. 9 Ves. 608. Vide White v. Damon, 7 Ves. 30.

192. Where the objection of a purchaser applies only to a small part of the estate, a specific performance with compensation will be decreed. M'Queen v. Farquhar, T. 1805. 11 Ves. 467.

193. Further evidence on both sides may be produced before the Master upon a question of title as to a specific performance. Vancouver v. Bliss, T. 1805. 11 Ves. 448.

194. C. being about to marry, applied to A. his landlord, and requested him to change a cessui que rie in his lease, by inserting the name of his intended wife in place of an old life, which A. by letter promised to do, and upon faith of such promise the marriage was had, and the demised premises settled on the wife, who (C. being dead) filed a bill for a specific performance, which was decreed against O., who had purchased the estate of A., under circumstances that implied notice of such a subsisting agreement. Crofton v. Ormsby, H. 1806. 2 Sch. & Lef. 583.

195. Equity will decree a specific execution of agreements, where, as damages would not put plaintiff in a situation equally beneficial for them, a specific performance becomes essential to justice. But where the specific performance of a conveyance has from circumstances become unconscionable, equity will only decree it subject to a conscientious modification. Davis v. Home, H. 1805. 2 Sch. & Lef. 341. Harnett v. Yielding, T. 1805. 16 Ves. 553.

196. A person having bid at an auction under the private direction of the vendors for the purpose of preventing a sale under a sum specified as the value, is no objection to a specific performance. Smith v. Clarke, T. 1806. 12 Ves. 477.

197. But whether a bidding for the purpose of enhancing the price, vitiated the sale, quære. S. C.

198. A re-conveyance of the legal estate presumed in this case, under obscure circumstances, after a great lapse of time, and a specific performance decreed against a purchaser. Hillary v. Walker, E. 1806. 12 Ves. 299.

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Specific Performance decreed.

Ett side Dyer v. Hargrave, 10 Ves. 505. But if the purchaser cannot have what was his strong inducement to the contract, a specific performance with compensation will not be enforced. Stapylton v. Scott, H. 1807. 15 Ves. 426.

200. Where defendant by his answer proves an agreement different from that insisted on by plaintiff's bill, he may have a decree upon his answer, submitting to perform the agreement he thereby proves. Ede v. Clayton, E. 1807. 15 Ves. 546. Lindsay v. Lynch, T. 1804. 2 Sch. & Lef. 9. S. P.

201. A specific performance decreed without the usual reference as to title, the purchaser having taken possession, and not making objection to the abstract. Fletwood v. Green, E. 1809. 15 Ves. 594.

202. To obtain a specific performance of a contract, the subject must be proved as described. Daniels v. Davison, T. 1809. 16 Ves. 249. This case having stood over, Ld. Ch. again stated his former opinion, that plaintiff was entitled to a performance of the original contract for a safe to him, and with regard to a subsequent sale which defendant had made to one C. (also a defendant.) His Lordship thought plaintiff was entitled to a conveyance from him also; for C. must be considered as having notice of plaintiff's equitable title under the original agreement, and therefore was bound to inquire. Held, that plaintiff should have a conveyance at the original sale price, and his costs. S. C. H. 1811. 17 Ves. 483. Vide Crofton v. Ormsby, 2 Sch. & Lef. 583. See tit. Vendor & Purchaser, ii. S. C. more fully.

203. A specific performance of a contract for sale of an allotment, under an inclosure act, was decreed in this case before the award made, the act having expressly enabled a sale, and declared the conveyance valid, though the award was not made, of which matter the purchaser had notice; and the court said, that an award, under an inclosure act, was to be considered rather eviidence of a title than constituting one. Kingsley v. Young, T. 1811. 18 Ves. 207.

204. An agreement having been entered into to compromise doubtful rights after a family meeting, and that agreement having been part performed by possession taken and improvements made, and also by an acquiescence of near nineteen years, was decreed to be performed; for the court will favor a family compromise even in the strongest case of a doubtful right, and even so though one party was drunk at the time, if the agreement be fair and reasonable. Stockley v. Stockley, M. 1812. 1 Ves. & B. 23. Vide Cory v. Cory, 1 Ves. 19. Stapilton v. Stapilton, 1 Atk. 2. 10. Cann v. Cann, 1 P. W. 723. Pullen v. Ready, 2 Atk. 587.

205. In 1800 A. agreed to grant to B. a lease of a farm for three lives generally, but none were named. C. afterwards purchased the farm from A. subject to the agreement, and received rent from B. who occupied the farm till 1808, when B. discontinued the payment of his rent, because C. who had not seen the agreement till 1807, then refused to perform it. In 1809, B. filed his bill for specific performance, and named the lives of three of his tenant's children. A lease was accordingly decreed to B. and that decree was affirmed by the lords. Eldon, C. observing, that as the estate was purchased subject to the agreement, the equity of the case was, that it should have been performed at that time; and though it was objected that the naming of the lives afterwards rendered the performance a different thing, since lives might then have been originally named, which might have dropped, yet it was clear that the parties were going on as if all had been settled at first; so there seems to have been a mutual default. Lord Eldon said he made this remark lest this should be understood as a decision, that under a like agreement a party may lay by as long as he pleases, and then apply for a specific performance with effect, and not as a case taken out of a general rule. Ed. Kensington v. Philips, E. 1817. 5 Dow P. C. 61.

206. In order to form a contract by letter, which the court will specifically perform, nothing more can be necessary than that the amount and nature of the consideration to be paid on one side, and received on the other, should be ascertained, as also a reasonable description of the subject of the contract. The established doctrine is, that the court will carry into execution an agreement so constituted. It is not necessary to show that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising de facto out of the terms of the correspondence. Kennedy v. Lee, M. 1817. 3 Meriv. 441.

207. The court will decree a specific performance for the purchase of a debt.
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Specific Performance refused.

Wright v. Bell, H. 1818. 5 Price, 325; for it is not within the rule which denies the performance of contracts for the sale of chattels; as to which see S. C. in Dan. 101, with a note. See also Buxton v. Lister, 3 Atk. 383; and ante, pl. 147.

(b) Where not decreed.

208. Bill for execution of an agreement, it appearing by proof that it was only to quit the possession, and not to convey the lands, was dismissed. Gerrard v. Vaux, H. 1682. 1 Vern. 121.


210. If an heir sells a reversion on the life of his father, at an undervalue, equity will not decree the heir specifically to perform a covenant for farther assurance. Johnson v. Notte, M. 1684. 1 Vern. 271.

211. A. on his son's marriage covenants to buy lands and settle them on his son for life, remainder to the heirs male of his body. The son dies, leaving a son, who brings a bill against the executors of A. for a performance of this covenant. Bill dismissed, for plaintiff's father would have been tenant in tail if the estate had been settled, and might have barried it. Cann v. Cann, M. 1697. 1 Vern. 480.

212. A. having taken a lease of a brewhouse, and covenanted to repair, assigns it by way of mortgage to B. The premises being out of repair, the lessor brings his bill against B. to compel him to perform the covenant. B. never having been in possession, the court would not decree him to perform the covenant in specie, but left plaintiff to recover at law as he could. Sparks v. Smith, M. 1692. 2 Vern. 275. Vide Pilkington v. Shailer, 2 Vern. 374, where an assignee, though he never entered, and had lost his mortgage-money, was compelled by law to pay the rent, and having sued in equity could have no relief.

213. Where no action at law will lie to recover damages, there equity will not execute an agreement in specie, and make that good which is not so by law. Normanby v. Duke of Devon, M. 1697. 2 Freem. 216, 217. Bromley v. Fettiplace, 2 Freem. 246. S. P.

214. A. on marriage of his daughter to B. covenants that B. shall have certain land for 1500l. less than any other person, and dies. The court refused to decree a specific performance of this agreement, by reason of the uncertainty and its not being mutual. Bromley v. Jeffries, H. 1700. 2 Vern. 415. Pre. Ch. 138. S. C. thus reported. One settles his estate on trustees to be sold for payment of his debts, with power of revocation; then he marries a daughter, and covenants that the husband shall have the estate 1500l. cheaper than any other person. After, by will, he revokes the settlement, and gives the husband 1500l., and dies. This legacy held to be a satisfaction of the 1500l. secured by settlement. Vide Fitzherbert's Ca., cited in Shelly's Ca. 1 Co. 100. Gainsborough's Ca., 2 Vern. 252.

215. A. supposing he has right, enters into an agreement to sell to B. who brings a bill for specific execution against A., and also against C., who appears to be the true owner, and so insists in his answer. This bill dismissed, as well against A. as C., and the decree of discharge was affirmed. Cornwall v. Williams, E. 1701. Colles' P. C. 117.

216. Where one party to an agreement trifles, or show a backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially, if the circumstances of the other party are materially altered in the mean time. Hayes v. Caryll, H. 1702. 1 Bro. P. C. 27.

217. By a settlement A. is made tenant for life; remainder to the heirs of his body by his wife; and in the same deed A. covenants not to suffer a recovery, but that the lands shall be enjoyed according to those limitations. A. afterwards suffers a recovery, and devises these lands. On a bill for specific performance of the covenants, it was decreed that the lands devised were not affected, though the covenant was good to bind the assets, and such covenant being at first accepted, equity ought not to vary or alter it. Collins v. Plummer, H. 1708. 1 P. W. 107. Gilb. Ch. 252. Bowd v. Brander, T. Ch. 1718. 1 P. W. 461. Vide Warrington v. Langham, Pre. Ch. 89.

218. A man on his marriage makes a settlement, whereby the lands were limited in remainder, after his and his wife's death, to the heirs of his body, begotten of his wife, and covenants not to bar the entail or suffer a recovery; and having one daughter, to whom on her
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marriage he had given a good portion, he suffers a recovery, and by will devises the estate to his daughter for life, and to her first, &c. sons in tail, with remainders over. On a bill for specific performance of the covenant, the court would not decree it, but left the party to recover damages at law for breach of the covenant. Collins v. Plummer, supra, as reported in 2 Vern. 635.

219. Husband and wife, for a reasonable consideration, by lease and release, conveyed the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser. She refused to levy a fine. Plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited, where a specific performance had been decreed in the like case; but Ld. Ch. would not decree a specific performance in this case, because upon such a decree the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the cited case. His Lordship therefore directed defendant to refund the purchase-money with costs. Outram v. Round, M. 1718.

4 Vin. Ab. 203, pl. 4. 2 Eq. Ab. 145, pl. 4.
Lord Cowper in this case said, it is a great breach of the wisdom of the law to compel a husband to procure his wife to levy a fine, and force her to part with her land without her consent. Vide Barrington v. Horn, 2 Eq Ab. 17, pl. 7, where a specific performance was decreed; and Hall v. Hardy, 3 P. W. 189. S. P. and Winter v. Devereux, there cited.

220. A bill will not lie for a specific performance of an agreement to transfer South Sea stock.—Secus, where the thing contracted for may beparticularly commodious to the party. Cod v. Rutter, M. 1719. 1 P. W. 570. Cited in Pre. Clr. 534, nomine Scould v. Butter.

221. Bargain for corn to be delivered on a certain day at such a market, at such a price, and the corn is not delivered according to the contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but is left to his remedy at law for breach of the agreement to recover damages, (i.e.) the difference between the price agreed on by the parties, and the price of corn upon the market day. Cuddee v. Rutter, T. 1720. 5 Vin. Ab. 538, pl. 21. 2 Eq. Ab. 160, pl. 6.

222. A court of equity will not decree a specific execution of articles, where they appear to be unreasonable, or founded in fraud. Young v. Clerk, M. 1720. Pre. Ch. 538.

223. Where a manner of obtaining an agreement is not strictly just and regular, a court of equity ought not to decree a specific performance, although the agreement be in part executed. Rockfort v. Creswick, T. 1721. 2 Bro. P. C. 296.

224. A. articles with B. for the purchase of an estate of 180l. per annum, for which he was to give 35 years purchase, and pays 50l. in part; but discovering that 30l. per annum of the lands were cophold, refused to go on. On a bill by A., equity will not decree a specific execution of this agreement, being unequitable, but will order the 30l. to be paid back. Hicks v. Phillips, T. 1721. Pre. Ch. 575. Part of the decree in this case appears to be inaccurately reported. Vide notes in this case in Pre. Ch. 575, (corrected from the registrar's book.)

225. Where a contract has lain dormant for many years, and nothing done by either party in pursuance of it, a court of equity ought not to decree a specific performance. Wingfield v. Whalley, E. 1722. 2 Bro. P. C. 447.

226. Bill for specific performance of articles for the purchase of lands dismissed, because the lien of remedy was not mutual. Armiger v. Clarke, T. 1722. Bunb. 111.

227. Bill for a specific performance of a contract for 1000l. York Buildings stock, at 105 per cent. dismissed, for that this court will not carry these sorts of contracts into execution, but leave the parties to their remedy at law for the difference, but no costs, because defendant's answer was falsified in several particulars. Dorison v. Westbrook, T. 1722. 5 Vin. Ab. 540, pl. 22. 2 Eq. Ab. 161, pl. 8.

228. Bill for a specific performance of articles for the purchase of an estate dismissed with costs, because the title was not laid before the vendee's counsel within the time limited, and the South Sea stock from whence the purchase-money was to be raised, having fallen in the mean time 168 per cent. (a) Lewis v. Lord Leckmere, T. 1722. 10 Mod. 503.
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Specific Performance refused.

(a) It appears his Lordship's decree was swayed by this circumstance.

229. Bill brought by the vendor for a specific performance of articles dismissed, because the vendor had covenanted to convey freehold, and one or two acres proved copyhold, though the vendor offered to procure an enfranchisement of the copyhold, or make any compensation in the price. S. C. Vide Hicks v. Philips, Pre. Ch. 575. 2 Eq. Ab. 18. 168. In Keen v. Stukeley, in Scacc. Gilb. Eq. Rep. 155, it was determined to enforce a specific performance of an agreement for a purchase if the price was reasonable at the time of the sale, however disproportionate after-accidents might make it; but in the principal case the price agreed for was 40 years purchase. The Lords therefore reversed the decree of the court of Exchequer enforcing specific performance. Upon mutual articles there ought to be mutual remedies; and therefore the vendor may come into equity as well as the vendee.

250. willful misrepresentation of the yearly value of an estate is reason for equity to refuse decreeing specific performance of a contract for its sale. Breton v. Cooper, E. 1724. 2 Bro. P. C. 553.

231. Plaintiff sold defendant a copyhold estate of 16l. per annum value (on which was timber of 150l. value,) for 630l., and covenanted to surrender on or before Michaelmas then next. Defendant paid 10l. earnest, entered on the premises and cut down timber, stocked the land, and acted as owner. On a bill for a specific performance of covenants, plaintiff proved he gave notice that he would surrender next court day, which does not appear to have been before Michaelmas, and attended accordingly. On defendant's part it was proved, that he was disordered in his senses; and though there be proof of the timber's value, yet, as no custom is alleged of the tenant's having power to cut it down, it must be according to the common law by which the tenant has no power over it, and therefore a plain imposition. Ld. Ch. was of opinion, that it was a great overvalue, and that his cutting down timber was a proof of his folly, being a direct forfeiture; but said it is a matter merely at law. If the surrender had been, an action would have lain at law. Bill dismissed. Edwards v. Heather, M. 1724. Sc. Ch. Ca. 3.

232. Bill for a specific performance of an agreement comprised in the condition of an obligation. J. S., plaintiff's father, had five houses in B. in right of his first wife, and after her death he takes a second wife, by whom he had issue defendant, and then purchases two other houses in B. Afterwards, upon an intended marriage between plaintiff and E., plaintiff entered into an obligation to his father, the condition of which ran thus:—

"Whereas J. S., the obligee, had given all his houses in B. to the heirs of the body of plaintiff for ever, by his will, of such a date;" and here breaks off, and did not state what sum plaintiff was to pay in defasance of the obligation. Defendant was made executor and residuary legatee to J. S.; the will mentioned in the obligation was not to be seen; and it was proved in the cause, that J. S. never intended more for plaintiff than the five houses he possessed in right of his mother, that he had settled the two other houses on defendant, and that plaintiff had declared he was well assured his father never intended him more than the five houses; but still he would take advantage of the scrivener's mistake in the obligation. But the court dismissed the bill, as against reason and equity, that plaintiff should take advantage of this mistake against the true intent and disposition the party meant to make of his estate. Humburn v. Curtis, H. 1730. Fitzgerald. 118.

233. Where a person undertakes to make out the title of another to an estate, and to have a part of the lands as a satisfaction for his trouble, though the agreement for this purpose is artfully drawn, in order to keep it out of the statute of champerties, he will not be entitled to have a specific performance decreed here, but will be left to his remedy at law. Powell v. Knowler, M. 1741. 2 Atk. 224.

234. If a father possessed of an advowson, apparently designed for his son, be prevailed on, when in an infirm state of mind, to enter into articles for the sale of it to another person, a court of equity will not compel a specific performance, although there is no imposition of fraud imputable to the purchaser. Bell v. Howard, E. 1742. 9 Mod. 302. For cases where equity will set aside a conveyance obtained from a person of a weak mind, vide White v. Small, 2 Ch. Ca. 103. — Clarkson v. Hanway, 2 P. W. 203. James
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235. If parties are entering into an agreement, and the will out of which a forfeiture arose was lying before them and their counsel, while the drafts were preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point. Pullen v. Ready, H. 1743. 2 Atk. 591.

236. After an agreement has entirely settled all disputes between parties and their several rights, the court will not enter into a question which might have been started had there been no such agreement. S. C.

237. A husband covenants in marriage articles, six months after the death of his mother, and that he should be in possession of the estate, in joinder to settle 100L. per annum for every 1000L. upon his wife for life, remainder to the issue of the marriage, remainder to his heirs. He died in the life-time of his mother, leaving no issue. The estate reverts to his heir, who shall not be compelled by his wife to a specific performance. Whistler v. Farrel, T. 1749. 1 Ves. 257.


239. Husband and wife having joint power over the wife’s estate, empower an agent to sell part of it by auction. He articles to sell it, by private contract, for more than the price required. The husband had written a letter to the agent, in which he only desired his wife’s compliments, that is no proof of her joining in giving an authority to the agent; and the buyer shall not compel a specific performance. Daniel v. Adams, T. 1765 Amb. 495. Vide Drury v. Drury, Baker v. Child, 2 Vern. 62. Barrington v. Horn, M. 1 G. 2. Hall v. Hardy, S. P. W. 187.

240. J. S. agrees to sell his estate for his life. The time limited for the conveyance was the 31st of October; but the annuity was to commence, and A. was to have the rents and profits of the estate, from the 5th of April preceding. J. S. died on the 12th of November, before any conveyance was executed. Bill, by A. for a specific performance, dismissed but without costs. Pope v. Roots, T. 1774. 7 Bro. P. C. 184. Mr. Cox, in his note to White v. Nutt, 1 P. W. 62. Vot. 7.

241. says, that Lord Apsley in this case, questioned the statement of Cass v. Rudele, 1 Vern. 280.; but nothing of that kind appears in Bro. P. C.

242. Equity will not decree specific execution of an article which is contrary to the powers in a settlement. Stratford v. Aldborough, E. 1786. 1 Ridgw. P. C. 281.

243. Equity will not decree specific execution of a covenant in a lease violating the restrictions of a prior settlement, of which the lessee had notice. Crawford v. Oliver, E. 1786. 1 Ridgw. P. C. 315.

244. Promise by a letter to renew a lease, in consideration of money already laid out by the tenant, is nuntium pactum, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards: but, if previous to the promise defendant had signified his intention to lay out money, and on that consideration the promise had been made, specific performance would be decreed. Robertson v. St. John, M. 1786.

2 Bro. C. C. 140.

245. At a sale by auction the seller’s agent bid for the purchaser, a specific performance refused. Train v. Morrison, or Taggart v. Twining, E. 1788.


246. Where plaintiff had received a promissory note without a stamp, the court directed a proper note to be made according to the agreement, before defendant should have execution of the other parts of the contract. Aylett v. Bennet, E. 1792. 1 Anstr. 45.

247. A purchaser will not be compelled to take a doubtful title, as it is discretionary in the court to decree specific performance of an agreement for a purchase, or to leave it at law. Cooper v. Denne, T. 1792. 1 Ves. jun. 565.


248. On a bill for specific performance
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of an agreement for sale of a lease, the court cannot apportion the price according to the time already expired. King v. Wightman, M. 1792. 1 Anstr. 80.

249. Specific performance of an agreement cannot be decreed with a variation made in it by the court. Jordan v. Sackius, M. 1798. 4 Bro. C. C. 477.

250. Bill for specific performance of an agreement to grant a lease to plaintiff would, on evidence of his fraud, misrepresentation, and insolvency, have been dismissed with costs, if not compromised. Willingham v. Joyce, T. 1796. 3 Ves. 168, 169.

251. The court would not execute an agreement to grant a lease to a man who had committed felony. S. C.

252. Specific performance refused on the laches of plaintiff, the contract being for a sale to him under a bankruptcy, of a reversionary interest for life, which, in the interval, fell into possession. Defendants being also remiss, bill dismissed without costs, on delivering up the agreement. Spurrier v. Hancock, T. 1799. 4 Ves. 667. Omerod v. Hardman, H. 1801. 5 Ves. 722. S. P.

253. In the performance of a contract the time is material; therefore, upon the gross laches of plaintiff, his bill for specific performance was dismissed, with costs. Harrington v. Wheeler, T. 1799. 4 Ves. 686.

254. A purchaser under a bankruptcy must take the bankrupt's title, though objectionable. In such a case, the purchaser having objected to the title, but insisting on his purchase, his bill for specific performance was dismissed, with costs, except as to some irrelevant matter in the answer and depositions. Pope v. Simpson, M. 1799. 5 Ves. 145.

255. A vendor cannot come for a performance at any distance of time, but upon a bill, filed 14 months after a correspondence, upon objections to the title, had ceased, from defendant's not having returned an answer to the last letter, which required a distinct answer, and threatened a suit; and the auctioneer not having been called upon to return the deposit, the court referred it to the Master. M. of Hertford v. Boore, Aston v. Boore, H. 1800. 5 Ves. 719.

256. Bill for specific performance dismissed, the agreement appearing, from letters produced, to be different from that set up by the bill, and proved by one witness. Leigk v. Haverfield, T. 1800. 5 Ves. 452.

257. To a bill for a specific performance of an agreement, a plea of the statute of frauds being coupled with another defence, was ordered to stand till the hearing. Cooth v. Jackson, H. 1801. 6 Ves. 12.

258. Where an agreement originated in communications by the commissioners who took the depositions in a cause, and by the witnesses to defendant, as to the nature and effect of the evidence; though plaintiff was not implicated in the transaction, yet his bill for a specific performance was dismissed, on grounds of public policy. S. C.

259. Parol evidence is admissible in opposition to a specific performance of a written agreement, upon the heads of mistake or surprise, as well as of fraud; and upon such evidence the bill was dismissed: so was another bill for a specific performance of the agreement, corrected according to the same evidence contradicted by the answer. M. of Townsend v. Stangroom, H. 1801. 6 Ves. 328.

260. The rule that a written agreement within the statute of frauds, cannot be varied by parol evidence, does not affect a subsequent, distinct, collateral agreement. S. C. 387. (n.)

261. Specific performance refused to the laches of plaintiff, the vendor. A small incumbrance which may rest in compensation, is no objection to a specific performance. Guest v. Homfrey, E. 1801. 5 Ves. 818.

262. Though a person may agree to sell at a price to be fixed by an award, and though the award can only be impeached for fraud or gross mistake, yet, upon such an agreement, where some of the persons to be bound were married women, and one of them had not executed, the court refused a specific performance, leaving plaintiff to law. Emery v. Wase, E. 1801. 5 Ves. 846. On appeal, his Honour's decree was affirmed, on the ground, that the evidence did not prove satisfactorily as it ought (especially in the case of married women,) that the valuation was made with due attention and care. S. C. T. 1805. 8 Ves. 505.

263. Bill for specific performance of an agreement to refer to arbitration, will not lie. Street v. Rigby, E. 1802. 5 Ves. 818.

264. The court decreed specific performance of an agreement to grant a lease, of which only one part, signed by plaintiff, was found in possession of
defendant, upon the circumstances of possession, drafts prepared and approved, and the execution deferred only till the repairs were completed; but an extension of the term according to a variation of the agreement, also in writing, was refused, on the ground of want of consideration. Robinson v. Collins, T. 1802. 7 Ves. 130.

265. The court can decree a specific performance of a written agreement with a variation by writing; but not with a variation by parol. S. C. ibid. 133. Et cide Jordan v. Sawkins, 1 Ves. jun. 404. 3 Bro. C. C. 398.

266. Where nothing has been done under an agreement, the court ought not to decree a specific performance, except where the right to compel it is mutual. Lewerson v. Butler, M. 1802. 1 Sch. & Lef. 13. Vide Bromley v. Jeffries, 2 Vern. 415. Armiger v. Clarke, Dunb. 111. where the ground of refusal was want of mutuality.

267. A. being insolvent, suffered another person to become the apparent owner of his farm, though under a secret trust for him; A. shall not have a specific execution of an agreement made by him with the trustee, the landlord having supposed the trustee to have been the rightful owner, and confiding in his solvency. O'Hertihy v. Hedges, E. 1803. 1 Sch. & Lef. 123.

268. Plaintiff and defendant were bankers; by their articles of partnership, it was agreed, that if, after the end of the partnership term, either of them should continue to carry on the business, either alone or in partnership, until one of them should have a son, legitimate or illegitimate, whom the father should, by writing or by his will, desire to introduce into the business, and who should live to attain sixteen, the party so continuing the business should take such son apprentice for five years, and at the age of twenty-one, he should admit him as a partner in the house. The business was carried on for seven years, when one of the partners died, and it was afterwards continued by the survivors. The deceased partner by his will appointed an illegitimate son to be bound apprentice at the age of sixteen, and at twenty-one to be admitted into the firm. At the age of sixteen (fifteen years after the commencement of the partnership) this illegitimate son filed his bill for a specific performance of the agreement contained in the original articles of co-partnership. Per Eldon, C. With respect to the object of this covenant, no one ever heard of the execution of an agreement for a partnership, when the parties might dissolve it immediately afterwards; this is such a covenant as the court cannot specifically execute.—Bill dismissed. Herey v. Birch, E. 1804. 9 Ves. 357.

269. It is now perfectly settled that this court will not enforce the specific performance of an agreement for a transfer of stock. Nutbrown v. Thornton, M. 1804. 10 Ves. 161. stated at large, post, tit. Landlord & Tenant, 1.

270. Bill for specific performance of a contract for sale of an estate. By settlement previous to the marriage of defendant, estates were limited (subject to a term) to the use of defendant for life, sans waste; remainder to trustees to preserve, &c.; remainder to E. Y. for life, sans waste; remainder to same trustees for 2000 years to raise younger children's portions, and subject thereto, to the use of the first and other sons in tail male; remainder to defendant in fee. The settlement contained a power for trustees, with the consent of defendant and his wife, or after their decease, in their own discretion, to sell or exchange, and if sold to lay out the produce after payment of incumbrances, in the purchase of other lands, to be settled to the same uses.—The trust estates being advertised for sale by auction, plaintiff applied to the auctioneer, whereupon a meeting took place with defendant, who asked plaintiff 26,500£ for the whole, plaintiff bid him 20,000£., which defendant refused, but plaintiff afterwards signed an agreement with the auctioneer to purchase at the full price, and his agent paid the deposit accordingly. The trustees did not interfere, otherwise than by consenting to the acts of defendant, under whose sole management the sale was conducted. The conveyance was prepared and approved by defendant, and his trustees; but the trustees having learnt that plaintiff had re-sold part of the estates for 34,000£., and that a considerable part remained undisposed of, they refused to concur in the conveyance. After the answers were filed, defendant's wife died without issue, and plaintiff sought relief against defendant by a supplemental bill. The defence in this case rested wholly upon inadequacy of consideration, and misinformation as to the value of the
estate, not imputing any fraud to plaintiff; but want of care and attention, and mismanagement in defendant's agent. Ld. Ch. after citing the cases of Twining v. Morrison, 2 Bro. C. C. 326. ante, pl. 245. Emery v. Wase, 8 Ves. 505. ante, pl. 262. and Townsend v. Stangroom, 6 Ves. 328. ante, pl. 259. said, Lord Thurlow referred the doctrine of specific performance to this, that it is scarcely possible there may not be some small mistake or inaccuracy, as that a leasehold interest represented to be for twenty-one years, may be for twenty-one years and nine months; such little circumstances might defeat an action at law, and yet they lie so clearly in compensation, that they ought not to prevent the execution of the contract; but that doctrine had been extended to a great length in equity; the rule is clear, that the application of it must be discretionary in the judge; it is like the case of fraud, for which this court will set a bargain aside, but the court has never ventured to lay down what shall constitute fraud as a general proposition. His Lordship proceeded to observe, that this case is extremely important not only to the parties, but to the general interests of justice as administered in equity. There is nothing in it to restrain defendant from using all his remedies at law, if a bill had been filed to have the contract delivered up; it is too late to discuss whether the court ought to order a contract that it will not perform, to be delivered up, and to decree the performance of a contract which it will not direct to be delivered up, for there are many cases in which the party has obtained a right to sue upon the contract at law, and under such circumstances that cannot be affected here, so as to deprive him of that remedy, and yet the court declaring he ought to have liberty to proceed at law will not actually interpose to aid him, and specifically perform the contract. In a trust of the nature now before the court, it is a most Improvident course to allow the tenant for life the execution of such a power as this, for it is generally his interest to convert the estate absolutely into money (Vide post, tit. Estate, v.) Here all the trustees meaning to act properly made defendant their agent, which they ought not to have done, for they are interposed to guard against what the tenant for life may propose. The conduct of the auctioneer, (who was told to sell by auction, unless he could sell advantageously by private contract) is unaccountable, and without example even in cases where difficulties have been raised by the conduct of auctioneers: as to plaintiff, there is an evidence of his enquiries as to the value from all sources of information, which he was at liberty to do, and having satisfied himself that he had made a lucrative bargain, he might have honestly contracted with persons at arms length, and dealing for themselves, but then he is to be considered as a man containing himself with a contract instead of a conveyance. It is clear a plaintiff suing at law for damages, or in equity for a specific performance, must allege a contract binding some one; and where a man is imprudent enough to deal with an agent without seeing that he has a written authority for sale, he must take the consequence of dealing with a man not duly authorized. In order to make the present contract that of the trustees, plaintiff must prove that they authorized the auctioneer by parol, without further consultation as to the sale or price. Ld. Ch. said, if in this case he should hold that the trustees had given the auctioneer an express and clear pledge of their authority, he should carry it to such an extent, as would make the doctrine, that the authority may be by parol, though the agreement must be in writing, the most mischiefous evasion of the statute. Here it is impossible to say that there was a parol authority (within the sense required) to enter into the written agreement. Next, it is clear, that the trustees are not bound by their subsequent conduct, as if there had been antecedent authority; they never had the approbation of the husband and wife, they never can be bound by the drafts settled by their solicitor, and the very circumstance of the sale gave them locus pani tentia, the moment they were informed that there was a question whether the price was reasonable; but supposing them bound, that will not help plaintiff to the relief prayed for; their conduct was a breach of trust, (though unintentional,) their duty being not to exercise their powers of selling, unless they knew a discretion had been fully exerted upon the point of reasonable price, and unless they were satisfied, that upon that point no reasonable objection could be made with reference to the interest of defendant, his wife, or the children: if the court had been called
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upon in the wife's life-time for a specific execution, there is here so little ground for it, that on the contrary, at the suit of the cestui que trust, the trustees would have been restrained from executing. Ld. Ch. then went on to say, that this case might be determined, without going very accurately into the doctrine of inadequacy of value, upon which he did not mean to decide. Lord Roslyn in White v. Damon (1 Bro. C. C. 156. 7 Ves. 35.) might not have put the decision upon the inadequacy of the contract, yet he might still have thought, that there were other circumstances in no manner connected with the conduct of the vendee, which this court ought to attend to, upon the subject of specific performance. Ld. Ch. said, in the case before him (the vendor having, by the silence of the agent, with regard to the last survey, by which the estate was estimated at a value considerably greater than the former) lost all opportunity of dealing, with the knowledge of that survey, by the agent himself, and of the fact, which was excessively material, that the estate if sold in lots might probably produce so much more, the vendor is probably full as much prejudiced as the vendors in Twining v. Morrison were by the accidents attending that sale.—His Lordship's opinion therefore was, first, That this was a sale in which the trustees had not given sufficient lawful authority to contract on their behalf within the statute, and therefore they were not bound; and, secondly, supposing that they had given sufficient authority, still considering the nature of their interest, this court could not have compelled an execution against the cestui que trust, if they had been living, but his Lordship did not decide as to any remedy the plaintiff might have against the trustees for damages.—Ld. Ch. continued by saying that the supplemental bill in this case did not vary the original statement, but truly set forth that the trustees had only an estate to preserve contingent remainders during the marriage, and that in the event of the wife's death, without issue, the defendant's life estate and his remainder in fee being brought together, the power of the trustees was extinguished; but, though the power was gone at law, yet if the purchaser had contracted with the trustees, with the approbation of defendant and his wife, according to the deed, that contract once entered into, and having bound the estate though it could not be executed by the power of sale, should be made good by those who had an interest by the effect of their intent, if not by the authority of the trustees, and that is the meaning of the present bill. Ld. Ch. agreed, that if a person carries an estate to market, not having any title at the time, it is too late to discuss the question, whether it would have been right to have held that he should not have a specific performance. His Lordship said there was a difference between an estate subject to incumbrances, and the case he put, where the vendor, at the time of the contract, had not a title. Some authorities go the length of giving a specific performance, if the vendor can even by an act of parliament obtain a title before the report. Ld. Ch. agreed, if a man having partial interests in an estate chooses to enter into a contract representing it, and agrees to sell it, as his own, it is not competent for him afterwards to say, though he has valuable interests, he has no entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract, and if the vendor chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection of the vendor that the purchaser cannot have the whole, but that always turns upon this, that it is, and is intended to be, the contract of the vendor. His Lordship thought, that in the present case, it was not the contract of defendant, and that it was not in the contemplation of the agent, the trustees, or any one, excluding the plaintiff, that it should be the contract of defendant, if it was not the contract of the trustees. As to the conduct of the agent, plaintiff has no contract but with him, and upon his evidence the trustees were his principals, and it was not defendant's intention to give any authority binding himself, that did not bind the trustees. It was for the sale of their inheritance, not his, including minors, interests if not affecting theirs. It is impossible therefore to say it was the double contract, that of the trustees, and if not theirs, his, and it was not his intention to part with his partial interest. His intention was to give, not his authority to the agent, but that of the trustees, and if their au-
thority was not effectually given, whatever may be the remedy at law, it cannot be partially executed in equity; and it would be strange if that contract which never could have been executed unless it was the contract of the trustees for the substitution of other lands to be settled to the same uses, should have been executed in this court by tearing to pieces the family property that was the subject of the contract. The result is, that nothing was intended to be bound but the inheritance of the trustees, that the trustees have not given such an authority as binds them within the statute; that if they had, the execution of this contract would under the circumstances, have been such a breach of trust that this court could not have permitted them to carry into execution farther than, that if plaintiff cannot have a decree for the whole, he cannot for a part, and the subsequent event makes no alteration, for the contract of the trustees, and not of defendant, must have been the foundation of the decree, and if so, it cannot become his contract by the event of his wife’s death without children. These are the grounds upon which his Lordship said this case may be determined without saying more upon the inadequacy, or the retention of that important fact by the agent, which alone is a sufficient ground for dismissing the bill. The decree (drawn up by the Ld. Ch. himself) declared that it appeared to him, that at the time the alleged contract (the specific performance of which was sought) was made, the power of selling the whole inheritance of the estates in question was by the settlement reserved to trustees to be executed for certain limited purposes at a reasonable price, and with such consent as prescribed, and that the trustees were not bound in the event of the wife’s death without issue, nor would they have been bound in this case (if such event had not happened) by the contract to have executed their power, and it having been contended, that defendant’s wife having died without issue pending the suit, defendant had acquired such an interest as would enable him to convey the fee-simple to the plaintiff, he ought to make such conveyance. It was further declared, that due regard being had to the proofs respecting the value of the premises, and to the fact of re-valuation, and that such revaluation had not been disclosed before the contract was signed, either to the vendors or to any other person interested in the sale, though made under the direction of the persons authorized to sign such alleged contract, and to all other the circumstances of the case, the court ought not, if defendant’s wife, or any child had been living, to direct that the contract, which appears intended to be the contract of the trustees, acting under their power to sell the inheritance, should be executed by defendant only as to his partial interests; and it was further declared, that under all the circumstances, the court ought not to decree that defendant should convey the enlarged estate to plaintiff in specific performance of the alleged contract, but that plaintiff ought to be left to his remedy, without prejudice to which remedy, both bills were dismissed without costs. Mortlock v. Buller, M. 1804. 10 Ves. 292. Vide * Calcraft v. Roebuck, 1 Ves. jun. 221. † Twining v. Morrison, 2 Bro. C. C. 326. ‡ Jenkins v. Miles, 6 Ves. 646. N. B. Lord Mansers, in O’Rourke v. Percival, 2 Bell. & Be. 60. said, this was a decision on which he should always entertain a doubt. See also S. C. post, tit. Estate, v.

271. Equity will not decree a specific execution of a contract, when the terms of it are uncertain as to its extent. Harrett v. Yielding, T. 1805. 2 Sch. & Lef. 549.

272. Nor will equity decree a specific execution against a party not lawfully competent to execute the contract. S. C.

273. Where a specific performance had become impossible, owning to vendor having disposed of the premises to another; the court, on the authority of Denton v. Stuart, (T. 1806. 1 Fonbl. Eq. 44.) directed a reference to the Master to enquire what damage plaintiff had sustained by the non-performance of vendor’s contract. Greenaway v. Adams, T. 1806. 12 Ves. 393.


275. The court dismissed plaintiff’s bill for a specific performance on account of the great lapse of time, during which no step had been taken towards
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276. If a purchaser cannot have what was his strong inducement to the contract, equity will not enforce a specific performance. *Stapylton v. Scott*, H. 1807. 13 Ves. 426.

277. Specific performance of an agreement in writing for a lease for 50 years, was refused upon parol evidence of an alteration stipulated for at the time, and upon the faith of which, the party executed. *Clark v. Grant*, M. 1808. 14 Ves. 519.

278. An act of bankruptcy committed by plaintiff, though no commission had issued, was held an objection sufficient to induce the court to refuse a specific performance of a contract for sale of premises which he had entered into with defendant; for a purchaser shall not be compelled to take a doubtful title. *Lowes v. Lock*, H. 1808. 14 Ves. 547. And that too, though part of the purchase-money had been paid, and sub-contracts entered into by plaintiff. *Franklin v. Bramlow*, E. 1808. 14 Ves. 550.

279. A bill for specific performance of an agreement, is an application to the discretion, or rather to the extraordinary jurisdiction of the court, which cannot be exercised in favour of persons who have slept on their rights, or acquiesced for a long time in a title and possession adverse to their claims, and in such cases laches is equally strong against a plaintiff as in not proceeding, as in not commencing a suit. *Moore v. Blake*, M. 1808. 1 Ball & Be. 63. And it does not appear to be yet decided, though often discussed, whether a bill seeking a specific performance of an agreement for a lease was ever entertained on behalf of a person who after the contract had become bankrupt or insolvent. See Williams *v. Joyce*, 3 Ves. 168. *Brooke v. Hewitt*, ibid. 253. *Boardman v. Mostyn*, 6 Ves. 467. *Buckland v. Hall*, 8 Ves. 92. *O’Herlihy v. Hodges*, 1 Sch. & Lef. 129. *Weatherhall v. Goering*, 12 Ves. 504.

280. Where an agreement was entered into for a new lease, in consideration of the surrender of a former lease, and the tenant had concealed the fact that the last life named in the former lease was in *extremis* at the time the agreement for a renewal was signed, the court refused a specific performance of the agreement, for as the lease, if granted, would not be binding on the inheritance, (it being to be granted under a power) the court would not embarrass the remainder-man by directing such a lease to be executed. *Ellard v. Ld. Landaff*, H. 1810. 1 Ball & Be. 241. 251. *Et vide* *Lawrenson v. Butler*, 1 Sch. & Lef. 13. *Vide etiam* *Buxton v. Lyster*, 3 Atk. 383. where Lord Hardwicke said, nothing was more fully established in equity, than that every agreement of this sort ought to be certain, fair, and just, in all its parts, and if any of those ingredients are wanting, the court will never decree a specific performance.

281. A very slight misrepresentation is a sufficient objection to the specific performance of a contract, but where the court is called upon to rescind a contract and to decree a consequent conveyance to be delivered up, it requires a different consideration. *Cadman v. Horner*, H. 1811. 18 Ves. 12.

282. Where a tenant under an agreement for a lease, is guilty of waste or want of good husbandry, he is not entitled to a specific performance of that agreement. *Hill v. Barclay*, E 1811. 18 Ves. 69.

283. The assignees of a bankrupt are not entitled to the specific performance of a contract for a lease entered into for the personal accommodation of a bankrupt. *Flood v. Finlay*, M. 1811. 2 Ball & Be. 9. In this case, Manners, C. said, that to obtain a specific performance, the case should be clear of doubt. *Vide Ellard v. Ld. Landaff*, supra.

284. Bill for a specific performance opposed by the testimony of a single witness who over-heard the conversation between the parties from behind a window-cot partition.—A specific performance was decreed. *Savage v. Brockopp*, *Brockopp v. Lucas*, M. 1811. 18 Ves. 335. *Vide post*, *tit Agreement*, v. S. C. 285. Bill for specific performance of an agreement for a lease signed by the grantor only, and contrary to his leasing power, of which the plaintiff had notice. The bill was afterwards amended, praying an execution of the agreement for the life of the grantor, without requiring compensation for the difference of interest, but it was dismissed. (a) The case proved for plaintiff creating suspicions of the fairness of the transaction, *Manners*, C. observed, that unless
it appears the party seeking a specific execution of an agreement, has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere; (b) for if there be a reasonable doubt upon the transaction, the party will be left to his legal remedy. And his Lordship further said, that where a person contracts to grant a certain interest, which is afterwards appears he cannot carry into execution to the extent agreed on, yet the grant shall be available as far as his interest will permit. O'Rourke v. Percival, M. 1811. 2 Ball & Be. 58. Vide (a) Calcraf v. Roebeck, 1 Ves. jun. 221. (b) Ellard v. Ld. Landaff, 1 Ball & Be. 241.

286. An agreement was entered into between a landlord and his tenant, in a lease which, when prepared, the tenant refused to execute, saying he was content with the agreement, which he did not attempt to repudiate. This is no ground for refusing him a specific performance of the agreement. Goulday v. D. of Somerset, M. 1812. 1 Ves. & Be. 68. See this case fully stated, post, tit. Landlord & Tenant, i.

287. The court will not decree performance of an agreement for a lease to be collected from letters where there is a definite term expressed for which the lease was to be granted, nor any reference altius, by which it might be ascertained. Secus ut semble, if the letters had been more explicit, or had afforded any criterion for defining the object of the parties. Gordon v. Trevallyan, T. 1814. 1 Price, 64.

288. The court will not decree a specific performance of an agreement merely on the ground of want of specific mutuality or of laches, or of bare misapprehension in the parties of its nature and effect, inequality, imprudence, &c. Hamilton v. Grant, E. 1815. 3 Dow P. C. 33. Vide Collins v. Plummer, 1 P. W. 104.

289. Decree for specific performance of an agreement to grant a lease, rejecting one term, 'for such conditions, &c. as shall be judged proper by J. G. ' and substituting a reference to the Master, the agency of J. G. not being of the essence of the contract. Goulday v. D. of Somerset, T. 1815. 19 Ves. 429.

290. A., tenant for life, with a power to lease by deed under hand and seal, reserving the best yearly rent. Plaintiff entered into possession, and expended money in building under an agreement for a lease evidenced only by a memo-

random in writing entered in the book of A.'s authorized agent, signed, not by the agent himself, but by his clerk, though it was proved to have been approved by him, and agreeable to the usual course of business. A. died, on which the tenant sought a specific performance from the remainder-man:—Held, first, that there was no sufficient agreement in writing, for even if it had been signed by an agent properly authorized, yet, as the memorandum did not contain some of the material terms of a lease, they were left to be made out by parol evidence; secondly, this could not be established as a parol agreement in part performed, as it was neither the agreement of the principal nor her authorized agent, nor had the remainder-man been guilty of any fraud upon which to charge him with the consequences of the contract:—Held, also, that plaintiff was not entitled to compensation from A.'s representatives for the money he had paid, and this out of the faith of the alleged agreement, for such compensation must be considered in nature of damages, and the fault lay entirely on plaintiff's own negligence. Biers v. Sutton, T. 1817. 3 Meriv. 287. Vide Shannon v. Bradstreet, 1 Sch. & Lef. 52. Denton v. Stewart, 1 Cox. 238.

291. Bill for a specific performance of an agreement for a lease; the term for which the lease was to have been granted, having expired before the hearing, dismissed; the only object which could be obtained, being to permit an action to be brought against defendant for acts of waste committed by him while in possession, but which were of so trifling a nature, that a jury would have given only nominal damages. The M. R. was not prepared however, to say that there may not be cases in which, though by inevitable accident, the term may have expired before the hearing, and in the interval, important rights have arisen, the court would not have power to anticipate the lease, and prevent the party from availing himself of that circumstance as an objection to any proceeding at law. Nesbit v. Mayer, E. 1819. 1 Swans. 223. 1 Wils. C. C. 97. Vide Weston v. Pymm, 1 Swans. 255. (a.) 3 Ves. & B. 197. nom. Western v. Ferrin.

See more as to the specific performance of contracts for the sale and purchase of estates, post, tit. Purchaser, i. iv.
AGREEMENT IV.

What shall be deemed a sufficient Performance, or shall go in Satisfaction of the Whole or Part of an Agreement.

292. Subsequent agreement with A. by a factor of a merchant for freight at 6½ 10s. per ton, good, though A. took no notice he had made a former agreement with the merchant at 3½ 10s. per ton, that agreement having been obstructed by an embargo. Draddy v. Deacon, M. 1681. 2 Vern. 242.

293. A., an officer in the army, agrees to surrender his commission to B. for 100£, for which B. gives bond to A.—A. surrenders, but B. is refused to be admitted. No relief against this bond, save only against interest and costs.—Berrisford v. Done, M. 1682. 1 Vern. 98, 99. Vide Morris v. Mc Cullock, Amb. 432.

294. Where a creditor agrees to accept a lesser sum in satisfaction of a greater, the agreement ought to be precisely performed. Sewell v. Musson, M. 1683. 1 Vern. 210.

295. The husband, by articles before marriage, covenants to add 500£ to his wife's portion, and that it should be laid out in land, and settled on the wife and the issue of the marriage. The husband, without the trustees' consent, lays out the money in a fine house, garden, and farm. Allowed a sufficient performance of the covenant. Tunbridge v. Teather, M. 1683. 1 Vern. 845.

296. By marriage articles it was covenanted, that the intended husband, if his wife survived him, should secure to her half her fortune, to be at her disposal. The husband never altered the nature of the securities, but by his will, gave his wife more than she could claim under the marriage agreement; the rest be disposed of in other legacies, and died. Per cur. — The legacy to the wife shall be taken to be in pursuance of the agreement, and shall discharge it; but if it be more beneficial to the wife to claim under the agreement than under the will, she shall have her election. Corus v. Farmer, M. 1708. 2 Eq. Ab. 34, pl. 1.

297. A. married B.'s daughter. Before marriage, they made an agreement contained in the conditions of two bonds; A. to settle lands on his wife and her heirs male by him; B. to pay A. 800£ as his daughter's portion; part of the principal was paid by B. and all the interest. B. by will devised his copyhold lands to A.'s wife, on condition she did not disturb his executors for the 800£, and died, leaving his wife executrix, who married C., defendant. A. enjoys the copyhold estate; his wife dies, no settlement being made upon her; then A. dies, leaving a son only, whom he makes executor. A.'s son sues B.'s executrix upon B.'s bond, and recovers; B.'s executrix sues A.'s son upon his father's bond, and recovers. A.'s son then brought his bill, alleging, that a sufficient estate descended to him from the father, which was an equivalent performance of the settlement which his father had obliged him to make, and prayed relief against the proceedings at law. Ld. Ch.—If A. had left any other son, the intent of the condition would be evaded by the son's leaving a daughter; but as he had not, it was an equitable performance; if there had been another son besides plaintiff, he would have entailed the estate. Held also, that though B.'s devise of the copyhold to the wife was no bar to the husband's demand, yet that should be taken in part satisfaction of the 800£. Bridges v. Beere, E. 1709. 2 Eq. Ab. 34, pl. 2.

298. A. agreed by parol, with B., to make him a lease, rendering rent, B. paying A. 150£. fine; B. paid 100£, in part to A.'s agent, which A. knew of, and ordered his agent to prepare the lease; but before it was executed A. repented, and refused to grant the lease. Bill by B. for a specific performance. Per Ld. Ch.—The payment of this 100£ is not such a performance of the agreement on one part as to decree an execution on the other; there must be something more than a bare payment of money on the one part, to induce the court to decree a performance on the other. Ld. Penglatt v. Ross, M. 1709. 2 Eq. Ab. 46, pl. 12. post, pl. 397. more fully.

299. A marriage agreement was contained in the condition of a bond, "that the husband should purchase lands of "800£. value, to be settled upon himself "for life, remainder to his wife for life, "remainder to the heirs male of the "marriage, remainder to the husband's "right heirs." The eldest son brings a bill against the father's executors to have
the benefit of this agreement. Defendants insisted the father purchased a copyhold which descended to plaintiff, and likewise devised 100l. to him, to be raised out of land, and that these ought to be taken in satisfaction of the marriage agreement, especially as husband and wife were tenants in tail, and might bar the issue. Decreed plaintiff a satisfaction of the agreement in the bond, with interest at 4 per cent. from the father's death.—The copyhold estate descended to be taken in satisfaction pro tanto, but not the 100l. legacy. As to a conveyance of six acres, said to be made to plaintiff by the father, to inquire if voluntary and then to go pro tanto; but if the purchase-money was paid to the father, then no part satisfaction. Wilks v. Wilks, T. 1714. 5 Vin. Ab. 293, pl. 39. 2 Eq. Ab. 35, pl. 3.

300. One living in Oxfordshire, covenants to purchase lands of 80l. a year, to be settled, &c. The parties entitled desiring the money, were decreed to have 24 years purchase, the price lands bore in that county, and 80l. a year for the time past, but not the interest for the purchase-money. Badger v. Badger, H. 1729. Mos. 117. Vide 2 Vern. 551. 428.

301. Plaintiff (by attorney by articles, dated November, 1725,) agreed to convey lands in C. to D. and his heirs before next Lady-day, and D. covenanted to pay him 1500l. D. lived till after Lady-day, but had in 1722 made his will, by which he devised all his real estate to his son R., for life, remainder to R.'s eldest son, J., for life, remainder to his first, &c. son in tail male, with several remainders over, and thereby bequeathed all his personal estate to trustees to be invested in land, and settled as above; and dying soon after Lady-day, 1725, R., his eldest son and heir, claimed the lands as descending to him, and made his will, and by express words he devised the premises thus article to be purchased, to trustees to pay his debts, &c. and died, leaving said J., his son and heir, to whom D. had devised all his estate expectant on the death of R. D.'s will being made prior to the articles for this purchase, before he had any equitable interest in the lands, and consequently when he had no kind of title, he could devise nothing, so that this interest in the premises gained by D.'s articles must have descended to his son, R., as heir at law, who might well devise the same; and though it may at first look strange, that when D. devised all his real and personal estate, these words should not carry all, yet it will not seem so when it is considered that an estate purchased after the will, cannot pass thereby, and these articles are a purchase subsequent. Per M. R. who decreed the devise by R. good, and that the Master inquire whether plaintiff can make a title; if he can, the purchase-money to be paid by D.'s executors out of his assets: the Master to see who has been in possession since Lady-day, 1726, at which time the purchase-money was to be paid, and the conveyance completed. Interest and costs to be reversed. Langford v. Pitt, T. 1731. 2 P. W. 630. Vide Ld. Stourton v. Meers. Greenhill v. Greenhill, 2 Vern. 679. Pre. Ch. 320. Green v. Smith, 1 Atk. 572. Potter v. Potter, 1 Ves. 437. Affirmed by Ld. King, on appeal.

302. Money is covenanted to be laid out in land. It need not be laid out all in one purchase; and if the covenantor dies, having after the covenant purchased some lands which are left to descend, this will be a satisfaction pro tanto.—Lechmere v. Ld. Carlisle, M. 1733. 3 P. W. 228. Ca. temp. Talb. 80. Vide Deacon v. Smith, 3 Atk. 523. Att. Gen. v. Whorewood, 1 Ves. 540. Davys v. Howard, 5 Bro. P. C. 352. Sowden v. Sowden, 1 Cox, 165.

303. A. by articles previous to his marriage, agreed to settle certain lands to the use of himself and his intended wife for their lives and the life of the survivor, and after the survivor's decease, to the use of the heirs of the body of the said A., by his wife, with remainders over. The marriage took effect; and by deed, reciting the said articles, and which is declared to be in performance of the true intent and meaning thereof, A. settled the same lands to the use of himself and his wife for their lives, remainder to the heirs of the marriage, remainder to the right heirs of A. There is issue of the marriage, one son and two daughters, M. and N. Upon the marriage of A.'s son, A. settles other lands to the use of his son for life, remainder to the daughters of this marriage, remainder in fee to the son, with a power to raise money for younger children; after the son's death, A. levies a fine of the former lands to the use of himself in fee, and then makes his will, and devises part of the
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What is a sufficient Performance.

former lands to his said two daughters, M. and N., and all the rest of his real estate to trustees, to the use of plaintiff, his grandson, for life, remainder to his first, &c. son in tail male, remainder to his daughters in tail, remainder to testator's said daughters M. and N., with several remainders over; and with directions out of the profits to educate the grandson, and to place out the rest of the profits at interest, to be paid to the grandson at 21, and if he does not attain that age, to be paid to his said daughters M. and N., their executors, &c. The question was, whether the settlement was a proper execution of the articles previously made, and if not, whether the general devise to plaintiff should be taken as a satisfaction for what he was entitled to under the articles:—Held, per Ld. Talbot, that plaintiff, the grandson, is not bound by the deed which did not pursue the articles; but then he shall elect (within six months after he comes of age,) whether he will stand to the will or the articles; and if he elects to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to the daughters, his aunts, to be conveyed to them in fee. 

Streatfield v. Streatfield, H. 1755. 2 Eq. Ab. 32, pl. 5. Forr. 1766. Note. When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, equity will compel the devisee, if he will take advantage of the will, to take entirely, but not partially under it, (per Ld. Ch.) which is the case of Noyes v. Mordan, 2 Vern. 581.) there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the deviser has made. So are the several cases which have been decreed upon the custom of London. Vide Forrester v. Cotton, Amb. 388. 1 Eden. 532. as to the construction of the rule, that he who takes under a will cannot dispute any part of it.

304. Any acts pleaded to be done in part performance, must be such as could be done with no other view than to perform the agreement. Gunter v. Halsey, T. 1758, Amb. 386. Vide Frame v. Dawsons, 14 Ves. 386.

305. Articles are considered in this court as minutes only, which the deed may afterwards explain more at large.


306. There is no difference between articles unexecuted in toto, or in part only; for all the cases go upon this ground, that what is covenanted to be done, is considered as done. S. C. The ruling case on this point is Coventry v. Coventry, 1 P. W. 222. Francis's Max. 15.

307. Delivery of possession or payment of money is part performance of an agreement not reduced into writing. Laxen v. Mertins, M. 1748. 3 Atk. 4.

308. An agreement not signed by one party is binding on him, where acquiesced in and acted upon, for it is the agreement of all. Owen v. Davies, H. 1745. 1 Ves. 82.

309. Covenant in marriage articles to buy land of the yearly value of 500£ and settle the same; he directs by will that the moiety of a house and copyhold estate should be taken as part. Held, they should not. He also directs his estate at M., on lease at 150£ per annum, to be taken in part satisfaction; the rent was reduced to 150£ per annum. Held, to be taken as at his death. Pinn v. Halliett, T. 1751. Amb. 196. Vide Tyronnell v. Ancaster, Amb. 237. Ld. Londonderry v. Waine, Amb. 424. 2 Eden, 170.


311. Marriage articles, to settle land on husband and wife, and the issue of the marriage. After marriage a settlement was made, reciting the articles, and said to be in performance of them, by which the estate was conveyed in the words of the articles. Husband and wife levied a fine, and agreed to sell the estate. Bill by son of the marriage to carry the articles into execution, by a strict settlement; bill dismissed, on the ground of the articles not being produced by which alone the court could alter the settlement. Cordwell v. Mackrill, H. 1766. Amb. 515. 2 Eden 344. Vide West v. Erriss, 2 P. W. 349. Trevor v. Trevor, 1 Eq. Ab. 387. Collins v. Plummer, 1 P. W. 106.

312. G. covenanted by his marriage articles, that if he died in the life-time of
AGREEMENT IV. & V.

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his wife, his executors should, within three months after his decease, pay her 3000l.; and by his will he gave all his property to his executors in trust (after payment of his debts) at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them should appear right." Testator died during the life of his wife, and his executors were either dead or had renounced. Held, that his property was divisible according to the statute of distributions, and as the widow's distributive share exceeded 3000l. it was a performance of the testator's covenant in his marriage articles. Goldsmid v. Goldsmid, E. 1818. 1 Swanst. 211. In which case the court took a distinction between a satisfaction and performance. Vide S. C. post, tit. Covenant 1. Et vide Blandy v. Widmore, 1 P. W. 324. 2 Vern. 709. Garthshore v. Chalie, 10 Ves. 1. 13. Lee v. D'Aranda, 1 Ves. 1. 3 Atk. 419. Barrett v. Beckford, 1 Ves. 519. Haynes v. Mico, 1 Bro. C. C. 129. Devose v. Pontet, Pre. Ch. 240 (n). 1 Cox, 158. See also a note by the reporter, in which he has collected some of the principal cases in which it has been determined that a benefit accruing from the intestacy or will of the coventator, is a performance or satisfaction of a coventator for securing a sum at his death, et e contra.

AGREEMENT V.

Of Parol Agreements within the Statute of Frauds (a). Without the Statute (b). Part Performance, its Effect (c).

(a) Within the Statute.


314. A. by parol agrees with B. for a lease, which is drawn, and then perused and corrected by A.'s counsel, and afterwards engrossed and executed by B. Upon a bill to compel A. to execute a counterpart, she pleaded the statute of frauds in bar. Ld. Keeper ordered A. to answer and to save the benefit of the pleas to the hearing. Lowther v. Carill, H. 1683. 1 Ver. 221.

315. One that could read, made an agreement for 21 years. The lessor drew the lease for one year, and read it twenty-one. Equity would not relieve the lessee in this case, for it was within the statute of frauds. Sed secus, if the lessee had been unlettered. Anon. H. 1684. Skin. 359.

316. A. and B. being joint lessees of a building lease, A. by parol agrees to sell his interest to B. and accepts a pair of compasses in hand to bind the bargain. Defendant pleads the statute of frauds, but is ordered to answer, and the benefit of his plea is saved to the hearing. Allsopp v. Patten, M. 1687. 1 Vern. 472.

317. A. and B. being severally in treaty to purchase a house and land, agree by parol that A. shall desist, and that B. shall purchase, and let A. have part of the ground at a proportionable price. B. purchases, and refuses to perform the agreement. This being a parol agreement, is within the statute of frauds. Lamas v. Bailey, M. 1708. 2 Vern. 627.

318. In another report of S. C. it is said, that though the agreement was positive, the words were uncertain: and Ld. Ch. said that the statute intended to oust all such ambiguous agreements. S. C. 5 Vin. 521, pl. 32. Et vide Sgd. Vend. 527.

319. On a marriage treaty, the intended husband and lady's father went to a counsel to have a settlement drawn, in consideration of the portion the father proposed to give. Minutes of the agreement were taken down by the counsel, and given by him to his clerk to be drawn up in form. The next day the father dies, and the day following the marriage was solemnized. This agreement, notwithstanding these preparations, held to be within the statute of frauds. Bawdes
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**v. Amhurst, E. 1715.** Pre. Ch. 402. 2 Ch. Rep. 284. Vide Mallet v. Halfpenny, 2 Vern. 573. and 1 Eq Ab. 20, pl. 6. In Welford v. Beesly, 3 Atk. 504. Lord Hardwicke denied the general doctrine, as laid down in this case, though true as applied to this case by Lord Cowper, and said the difference between this case and Welford v. Beesly was, that there defendant signed a complete agreement, knowing the contents, and was bound by it, but here the writing was only a sketch not confirmed, and in the father’s hands.

320. A agrees with B, a broker, for South Sea stock. The broker, according to usage, made an entry of this agreement in his pocket-book, it being no otherwise reduced into writing, is within the statute of frauds. *Mussell v. Cooke, T. 1720. Pre. Ch. 533. Vide Colt v. Netterville, 2 P. W. 308. 5 Vin. Ab. 507. pl. 18. Et vide Cud v. Rutter, 1 P. W. 370. 2 Eq. Ab. 18, pl. 8, where M.R. decreed a specific performance of a contract for South Sea stock; but his Honour’s decree was reversed on appeal to the Ld. Ch.; and in Buxton v. Lister, 3 Atk. 583, Lord Hardwicke said, that ever since this reversal of his Honour’s decree, it has been the constant rule not to entertain a bill for a specific performance in case of a chattel.

321. In pleading the statute of frauds, it is necessary to say that the agreement was not reduced into writing. *S.C.*

322. One alters a draft with his own hand for purchasing an estate. This is not a signing to take it out of the statute of frauds, though the seller afterwards executes the conveyance, and causes it to be registered in Middlesex. *Hawkins v. Holmes, M. 1721. 1 P. W. 770. Itbell v. Potter, at the Rolls, T. 1719. Vide Stokes v. Moore, H. 1786. 1 Cox. 219. Tawney v. Crowther, 3 Bro. C. C. 318, where a letter referring to and promising to perform an agreement, though not signed, was held to take it out of the statute. *Note.* Where one party has been permitted by the other to act upon parol agreement, it is considered a species of fraud in the latter to insist upon the statute as a bar to a specific performance of the whole agreement. *Vide Hollis v. Edwards, 1 Vern. 159. Foxcroft v. Lister, cited 2 Vern. 456. Floyd v. Buckland, 2 Freem. 208. Savage v. Foster, 9 Med. 37. Anon. 2 Eq. Ab. 48, pl. 16. Seagood v. Meale, Pre. Ch. 561. Aylesford’s Ca., 2 Str. 783. Gunter v. Halsey, Amb. 586. Whaley v. Bagenal, 6 Bro. P. C. 45. Whitbread v. Brockhurst, 1 Bro. C. C. 404; and the cases cited post, pl. 400. In what cases, and in what manner the statute of frauds may be pleaded to a bill for a specific performance of a parol agreement, vide Whitbread v. Brockhurst, supra. Whitchurch v. Bevis, 2 Bro. C. C. 559; and the cases there mentioned.

323. A agrees for the purchase of an estate, but not in writing. Although A. in confidence thereof went several times to view the estate, and gave orders for conveyances to be drawn, this court will not carry such agreement into execution, and the statute of frauds may be pleaded. *Clerk v. Wright, H. 1737. 1 Atk. 12.*

324. M. being seized in fee of lands borrowed 100£. of J. C. on mortgage of them on 7th October, 1730, and afterwards M., by letter dated 18th April, 1731, authorised K., an attorney, to sell the estate, which he sold to plaintiff for 300 guineas by parol, and received one guinea in earnest. K. by letter advised M. of the sale, which M. accepted by letter, dated 8th June, 1731. In July, 1731, M. wrote to one H. offering to sell the same premises to him for 300 guineas. H. and defendant, C. C., (on behalf of J. C., the mortgagee,) agree with M. for the purchase at that price, and accordingly M., by indenture, dated 16th August, 1731, conveyed the premises to J. C., in consideration of 300 guineas then paid, before this conveyance. H. and C. C. had notice of plaintiff’s title, but being examined as witnesses for J. C., they both swore, that before the conveyance was executed to him they sent for plaintiff, who agreed that all prior contracts between him and M. should be void, and that it should be referred to M. whether plaintiff or J. C. should be the purchaser, and that M. by letter preferred J. C. Plaintiff brought his bill for a specific performance of the contract with K., and confirmed by letter from M. To take off the testimony of the witnesses who swore to the waiver of the contract, it was proved, that C. C. was tenant of the land and paid rent to J. C., and that H. had declared that he and J. C. were to divide the purchase between them.—*Per cur.*—The objection as to C. C. was sufficient entirely to take off his testimony, but as to H. it went only to his credit. Decreed for plaintiff with costs. Ld. Ch. said, here was a contract on the part of M., and though it was suggested that a mutual contract in writing should
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appear on both sides, yet that objection has been as often over-ruled. If a contract in writing was to be waived by parol, very clear proof is expected, which, in the principal case, was not so clear.—The statute of frauds requires all contracts concerning land should be in writing. An agreement to waive a purchase contract is as much concerning lands as the original contract; but no occasion now to determine this point. Buckhouse v. Crosby, E. 1737. 2 Eq. Ab. 32, pl. 44.

325. A. agrees by parol with B. for the purchase of lands. B. delivers a rent-roll, which was dated and altered in his own hand-writing, and showed by the title of it, that an agreement had been made between them for the sale of the estate at 21 years purchase. An abstract of the title was also delivered to A., together with the deeds, in order to be compared with the rent-roll. B. likewise wrote letters to several of his creditors, informing them, that he had contracted with A. for the sale of his estate at 21 years purchase, and sent the tenants to treat with A. for a renewal of their leases. Notwithstanding all these circumstances, upon A.'s filing a bill for a specific execution of this agreement, B. pleaded the statute of frauds in bar to both the discovery and relief, and the plea was allowed. Whaley v. Bage- nal, E. 1763. 6 Bro. P. C. 45.

326. Yet, under some circumstances, a mere parol agreement is binding, and will be carried into specific execution by a court of equity. Lady Herbert v. E. of Povis, E. 1766. 6 Bro. P. C. 102.

327. An agreement for the sale of lands and chattels, if void as to the land by the statute of frauds, is void in toto.—Cooke v. Toms, H. 1794. 2 Anstr. 426. Vide Lea v. Barber, 1794. 2 Anstr. 425. (n.)

328. A letter from a father to his daughter, by which he agrees to give her a portion, and this not shown to the man who afterwards marries her, does not take the promise out of the statute of frauds; for he could not have formed a letter which he had not seen. Agliffe v. Tracey, T. 1722. 1 P. W. 65.

329. Defendant, a broker, had 5,000l. stock of plaintiff's to sell when stock came to a stipulated price. Defendant made a pretended sale, and entries were made in books accordingly, but so that it looked as if done after the rise of stock, and only designed as an evidence in case of a dispute. Plaintiff insisted, that at the time of the pretended sale, stock was above the stipulated price. The court was of opinion it was a fraudulent transaction, and that on the sale, if such there was, he should have taken earnest; for it has been determined, that such a bargain is within the statute of frauds, and without earnest only nudum pactum. The decree should have been to account for 5000l. and the produce of it; but as plaintiff acquiesces under the decree, and it is re-heard on defendant's petition, the court would do no more than affirm the decree. Crull v. Dodson, T. 1725. Sel. Ch. Ca. 41. 5 Vin. Ab. 508, pl. 18. Vide Capper v. Harris, Bumb. 135, where it is said, per Baron Gilbert, that if a contract for South Sea stock be executed, equity will not unravel or break into it; if executory, equity will not aid, but leave plaintiff to seek his remedy at law.

330. In Colt v. Netterville, M. 1725. 2 P. W. 808, Ld. Gb. said, that the judges equally divided on the question, whether a contract for stock be within the statute of frauds, which mentions goods, wares, and merchandises, so as to require the contract to be in writing, or earnest money to be paid. Pickering v. Appleby, Com. R. 354, seems to be the case where the judges were divided in opinion on this point. Sed vide Crull v. Dodson, ante.

331. Bill for a specific performance of a parol promise by defendant to procure plaintiff to be made deputy to defendant's son as clerk of the House of Peers, or otherwise to provide for him, in consideration of plaintiff's insisting upon soliciting in procuring a reversionary grant of that place for defendant's son, which defendant now enjoyed. Defendant pleaded the statute of frauds, and not to be performed within one year; and also the statute of limitations, that the promise was made above six years before the bill filed. Both pleas allowed. Reynolds v. Cooper, T. 1726. 5 Vin. Ab. 324, pl. 47. Vide contra, Bac. Ab. 75.


333. A. on an account stated, owes B. 400l. A. agrees to give bond for 100l. and to secure the remaining 300l. by mortgage. A. delivers a deed of conveyance to C, an attorney, who takes in-
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Instructions to draw the mortgage; but before the bond or mortgage is executed, A. dies.—Though this agreement by parol be proved, yet on a bill brought against the heir of A., the court refused to carry it into execution. 

Brick v. Manners, E. 1742. 9 Mod. 284.

334. It is not only contrary to the statute of Frauds, but to the common law before the statute, to add any thing to an agreement in writing by parol evidence; 


Sawkins, 3 Bro. C. C. 388.

335. A mother attesting marriage articles of her daughter (but not a party to them) by which 1000L. was to be settled on her daughter to her separate use, decreed to perform them, for although the bare attesting a deed as a witness, will not create a presumption of knowledge so as to affect with any fraud; yet if there is knowledge of the contents signing as a witness is a sufficient signing within the statute of Frauds to bind. 


336. The substance of the statute of Frauds being complied with in the material parts, the forms have never been insisted upon where an agreement has been reduced to a certainty. S. C. 3 Atk. 503.

337. The rule, that a parol agreement ought not to be admitted to contradict the terms of an agreement in writing, is generally true; but it is also true, that a written agreement may be waived or varied by a subsequent parol agreement, 


338. The mere circumstance of a party's name being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within the statute of Frauds. 

Stokes v. Moore, H. 1786. 1 Cox. 219. 1 P. W. 771. (n.) S. C.

339. Putting a deed into the hands of a solicitor, to prepare a conveyance to a son-in-law after marriage, not a part performance of a parol agreement so as to take it out of the statute of Frauds. 


340. Whilst an arbitration was proceeding, the parties agreed by parol, that the arbitrators should determine as to a lease to be granted:—Hold, that such an agreement is within the statute of Frauds. 

Walters v. Morgan, M. 1792. 2 Cex. 369.

341. Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense, and continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement. Plea of the statute of Frauds ordered to stand for an answer, with liberty to except. 

Wills v. Stratting, T. 1797. 3 Ves. 378. 


342. Bill for performance of a parol agreement to grant a lease. Plea, the statute, an answer, denying part performance. Plea saved to the hearing, with liberty to except; for where the agreement is admitted, the statute may be used as a defence. 

Moors v. Edwards, T. 1798. 4 Ves. 23.

343. Ld. Loughborough was of opinion that upon a bill for a specific performance of a parol agreement within the statute of Frauds, defendant, though admitting the agreement by his answer, may, if he insist upon the statute, have the benefit of it at the hearing. 

Coot v. Jackson, H. 1800. 6 Ves. 17.

344. And Ld. Eldon, in S. C. was of opinion, that a specific performance of a parol agreement cannot be decreed, though the agreement is admitted by the answer, if defendant insists upon the statute of Frauds; if he does not, he must be taken to renounce the benefit of it. 

S. C. H. 1801. 6 Ves. 57.

345. A question arose in this case whether the executing of arbitration bonds is not a writing to take an agreement out of the statute of Frauds? Ld. L. would not decide, but thought it was. 

S. C. ibid. 17.

346. In equity, the denial by the answer of a parol agreement, within the statute of Frauds, is conclusive. S. C. ibid. 39.

347. An agreement, signed by one party only, good to charge him within the statute of Frauds. 

Seton v. Slade, or Hunter v. Seton, T. 1802. 7 Ves. 265.

348. An agreement for the sale of an estate is binding, though signed only by the vendor, but followed up by a direction to his attorney to prepare a proper agreement for both parties to sign. 

Fowle v. Freeman, E. 1804. 9 Ves. 351. So decrees have been founded on letters not intended at the time to be a complete final agreement. S. C.

349. An agreement for an abatement
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of rent out of lands, is within the statute of Frauds, and ought to be signed pursuant thereto. O'Conner v. Spaight, H. 1805. 1 Sch. & Lef. 306.

350. An agreement for the sale of an estate resulting out of a correspondence by letters, is good within the statute of Frauds; and the admission by answers of letters stated by the bill, will dispense with the necessity of evidence; and though, if defendant refuses to produce the office copy of the bill, the draft of it cannot be read, yet the court will decree a specific performance upon inspection of the record of the bill. Huddleston v. Briscoe, T. 1805. 11 Ves. 583. As to the stamping of the letters constituting this agreement, vide post, tit. Stamps.

351. The court will not decree a specific performance, unless it can collect, upon a fair interpretation of letters, that they import a concluded agreement: if it rest reasonably doubtful whether what passed was only treaty, let the progress towards the confines of the agreement be more or less, the court ought rather to leave the parties to law, than specifically to perform what is doubtful as a contract; but the court is to put the same interpretation upon correspondence with respect to this subject, as other persons would, reading the correspondence fairly, with a view to collect the sense of it. Huddleston v. Briscoe, sup. ibid. 591.


353. But the auctioneer's receipt for the deposit not containing expressly, or by reference, the terms, viz. the price, cannot have the effect of an agreement binding the vendor within the statute of Frauds. Blagden v. Bradbeer, sup. And quare whether the statute is satisfied by the auctioneer, as the agent of both parties, putting down the biddings. Buckmaster v. Harrop, sup. Et vide Coles v. Trenchforth, 9 Ves. 249.


(b) Without the Statute.

355. A parol agreement, and 20l. paid for the sale of a house, was decreed with- out farther execution proved. His Honour said, he should have demurred to the bill, but now having proceeded to proof, he would decree it. Admis. T. 1667. 2 Freem. 128.

356. Agreement parol by a female whilst sole, that if she died without issue, she would leave her heir at law the land or 500l. Agreement decreed to be executed. Goisme v. Battison, E. 1682. 1 Vern. 48. Vide Maynard v. Moseley, I Ch. Rep. 253, where such an agreement, after an estate tail, was decreed.

357. A. and B. agreed, that B. should assign a term for years in his house and certain vessels of beer for 200 guineas, whereof one guinea was paid down, and 19 guineas more next day. Part of the agreement was, that it should be reduced into writing. On a bill for performance, B. pleaded the statute, and insisted that the 20 guineas were paid for the lease. Plea overruled. Leak v. Morrice, H. 1683. 2 Ch. Ca. 155.

358. A father on a treaty of marriage of his daughter, does, by a letter written to a third person, agree to give 1500l. portion to his daughter, and to charge it upon his land: this, as it is a writing signed by the party, takes it out of the statute of Frauds; and it being to charge land, is properly suable in equity. Moore v. Hart, M. 1683. 1 Vern. 110. 201. Vide Bird v. Blesse, 2 Vent. 651.

359. There is a difference between money laid out in necessary repairs and lasting improvements, and money laid out for fancy and humour; the former shall be allowed, though not the latter. Where there was a parol agreement for a lease, and part of the agreement was that the same shall be put into writing: the question whether such agreement be binding, was referred to a court of law. Hollis v. Edwards, or Whiteing, Deane v. Ixord, M. 1683. 1 Vern. 151. 159.—Note. As the statute of Frauds and Perjuries was made with a design to prevent, either in marriage or in any other treaties, incertainty, perjury, or contradictions of evidence, several cases not liable to these inconveniences have been determined to be out of the statute, upon the distinctions in the following cases, which seem the more necessary to be mentioned, as many of the printed cases on this subject take no notice of them, and by not giving all the circumstances of the case, frequently contradict each other. First as to the distinction, that though the agreement be by parol, and in
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...no part executed, yet if there be no inactivity, the court will decree it; as in Croyston v. Baynes, Pre. Ch. 208. Symondson v. Tweed, Pre. Ch. 374. Gunter v. Halsey, Amb. 586. Sed quere, Whether in these cases defendant insisted on the statute. Vide Eyre v. Iverson, T. 1785, cited 2 Bro. C. C. 563, and Stewart v. Careless, cited 2 Bro. C. C. 564, 565; and in Whitchurch v. Bevis, 2 Bro. C. C. 559, where Ld. Thurlow allowed a plea of the statute of Frauds, though a parol agreement was confessed by the answer. Secondly, That though the agreement be by parol, yet if it be agreed to be reduced into writing, and part of the agreement is executed, but the reducing of it into writing is prevented by fraud, it may be good; as in Maxwell v. Montacute, Pre. Ch. 526, and 1 P. W. 618. Thirdly, Where the agreement is signed but by one party, yet it may be decreed on the circumstances of fraud; as in Bawdes v. Anhurst, Pre. Ch. 402, and Mallet v. Halfpenny, 2 Vern. 373, nominem Halfpenny v. Ballett.

360. Administratrix and her two children, entitled to a lease of a house, agreed by parol to make a lease to J. S., and the administratrix executes the lease. Upon a bill to compel the children to join, they cannot plead the statute of Frauds, Heighter v. Sturman, M. 1633. 1 Vern. 210.

361. A sold houses to B., and a note was made by A. of the agreement, but it was only signed by B. Decreed, that both parties were bound. Hatton v. Gray, 1684. 2 Ch. Ca. 164.

362. A man having made his will, and his wife executrix, the son prevails on the mother to get his father to make a new will, and that he might be named executor, and promises to be a trustee for his mother. The mother had but a small legacy under the will. Trust decreed upon the point of fraud, notwithstanding the statute. Thynn v. Thynn, II. 1684. 1 Vern. 296.

363. By the custom of a manor, every tenant had a right to nominate his successor. B., the wife of a tenant, seeing that her husband was about to nominate his godson to a part, persuaded him to nominate her to the whole, and promised to give the godson the part designed for him. Upon a bill against B. by the godson, she pleaded the statute of Frauds, and that there was no memorandum in writing. Per cur. This is not an agreement, nor a trust, but a fraud; and as by the custom of the manor, an estate may be created by parol, a trust of such estate may likewise be raised without writing, notwithstanding the statute. Devenish v. Baines, II. 1689. Pre. Ch. 3.


365. Marriage agreement is reduced into writing, but not signed by either party, yet decreed to be performed. Cokes v. Mascall, H. 1690. 2 Vern. 34. 200.

366. One by letter promised 1000l. with his niece, but in his letter dissuaded her from marrying plaintiff; and though he was afterwards present at the marriage, and gave her away, yet the court would not decree the payment of the 1000l., but left plaintiff to his action at law. Douglas v. Vincent, II. 1690. 2 Vern. 202.

367. One by letter says he will give 1500l. with his daughter; the daughter marries, and the father is privy to it, and seems to approve of it: the daughter dies, and the husband administers. The father decreed to pay the portion. Wankford v. Fotherley, M. 1694. 2 Vern. 322. Affirmed in Dom. Proc. 1 Eq. Ab. 22, pl. 17. 2 Freem. 201. S. C. where the reporter says, that Lord Keeper cited two cases, viz. Hart v. Moore, where a portion was decreed upon a letter written; and Masquill v. ———, where writings were prepared and approved, but being blotted, were ordered to be written fair, and were so; but before they were sealed the party died, and equity charged the executors with the portion.


369. Agreements since the statute of Frauds, are not to be part parol and part in writing, yet a deposit for a performance of a written agreement, though there is no writing declaring the deposit to be a security, is not within the purview of the statute. Hales v. Vanderchem, M. 1703. 2 Vern. 617.
370. The father purchases lands to him and his heirs, and when he was on his death-bed, sends for his eldest son, and tells him that these lands were bought with his second son's money, and that he intended to give them to him; whereupon the eldest son promised that he should enjoy them accordingly. The father dies. Held per Wright, C. S. and the M. R. that the eldest son ought to have these lands, because, by the statute of Frauds, there should have been a declaration of the use or trust in writing. But Comper v. Clarke, E. 1709. 2 Eq. Ab. 46, pl. 13.

371. J. C. being seised of copyhold lands, as a provision for his son, surrendered the reversion after his decease to him in tail, and 14 years after treats with Sir C. C. for a marriage between his son and Sir C.'s daughter. Sir C. proposed to give with his daughter 2000l., if J. C. would make a suitable jointure; and thereupon J. C. proposed to settle houses in A. and in Q.; but he having only a term for years in them, Sir C. rejected the offer, and said that he wished the copyholds might be the lands and the houses in Q. J. C. replied, that the copyholds were already settled, and that the houses in Q. should be settled on his daughter. Upon this assurance the marriage proceeded, and the houses in Q. were covenanted to be settled for her jointure, and to the heirs of her body in satisfaction of dower. The 2000l. is paid, and the marriage took effect. Afterwards J. C. the father married a second wife; before which second marriage, in consideration of a certain portion to be paid, (part of which was not paid,) he covenants with the plaintiff to joinure the copyholds upon his intended wife; and to show that he had a power so to do, he produced the settlement upon his son's wife, wherein no mention of the copyholds: and to carry those last articles into execution, plaintiff being trustee, preferred this bill, and alleged that the surrender to J. C.'s son was fraudulent. Id. Ch. was of opinion it stood clear of all fraud, and was well designed as a provision for the son, which is by the father declared to be the cause of the surrender: the subsequent agreement renders the son a valuable purchaser, and the case stands clear of the statute of Frauds; for it was not necessary that that part of the agreement which relates to the copyholds should be reduced into writing; for the son then had a legal estate in him, and the marriage must be understood to proceed both upon the assurance of copyholds being settled upon the son, and that part of the agreement comprised in the deed. Bill dismissed with costs as against the son. Heisier v. Clarke, E. 1709. 2 Eq. Ab. 47, pl. 11.

372. A. encouraged the courtship of his son with B.'s daughter, who promised by letter to give her 500l., if A. would settle 100l. per annum on the son, which A. refused. The son and daughter married privately; and after this letter, A. consented, and B. refused. On a bill for performance of this agreement it was objected, that these promises were within the statute of Frauds, and that the letter, being after the marriage, should not bind. But decreed contra by C. S. on the circumstances of the father's consent to the match, and to the marriage, by afterwards approving it. That it was out of the statute, if no letter had been written, for the agreement is admitted by the answer; but this case does not depend on parol evidence or admissions; for the letter after marriage, considering the transactions before, is sufficient. The offer to settle 100l. per ann., shall be in tail, with a power to the husband to charge it with 500l. for younger children, being the mother's portion; and decreed accordingly. Hodgson v. Hutchinson, 1712. 5 Vin. Ab. 522, pl. 54, 2 Eq. Ab. 47, pl. 14.


374. A parol agreement being confessed in answer, shall be executed, though not in writing. The agreement in this case was originally in writing, but was lost. H. v. Read, H. 1724. 9 Mod. 86.

375. H. enters into a contract in writing with plaintiff for the purchase of a college lease. Plaintiff agrees to renew the lease in H.'s name, or such persons as he should appoint. H. directs plaintiff to renew the lease in C.'s name, and declares he bought it for him as his agent. Plaintiff brings a bill against both for the residue of the purchase money. The de-
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cree at the Rolls was against both defendants to pay the money; and in case H. should pay it, then he to be at liberty to prosecute the decree in plaintiff's name against defendant C., the principal. C. appeals; for that he did not give any authority in writing to H. to buy it for him, and therefore by the statute of Frauds he ought not to be bound by the contract. Macclesfield, C. affirmed the decree; for that the authority to treat or buy for him may be good without writing; (a) though the contract itself must be in writing by the statute of Frauds. Weller v. Hendon, M. 1724. 5 Vin. Ab. 924, pl. 45. 2 Eq. Ab. 50, pl. 26. (a) Visic Clinan v. Cooke, 1 Sch. & Lef. 31; post, pl. 389.

376. A having lands and a personal estate, before her marriage conveys all her estate to her separate use; to which the intended husband was a party, and he covenanted that he would not interfere with it. On this estate there was a mortgage for 500l., which, before these conveyances executed (the word executed is not in the original,) he verbally promised to discharge. During the coverture the mortgage was assigned over, and he covenanted thus: That I or my wife shall pay it. The husband and wife lived with great affection together, and instantly received all the profits of the separate estate. He died, never having paid off the mortgage, leaving fortunes to children which he had by a former venture; these the wife maintained after his decease. She brings her bill, 1st, that her husband's effects should be applied to the redemption of the mortgage; 2dly, to have an account of the profits of her separate estate received by the baron; 3dly, to have an allowance for the maintenance of his children after his decease. Decreed, that the husband's effects should not be charged to redeem the mortgage, nor be accountable for the profits of her separate estate received by him: and that the maintenance should be counterbalanced by the interest of their fortunes. On a re-hearing, King, C. said, that there is no foundation to charge the husband with the payment of the mortgage; for by the statute of Frauds, it is not a charge unless reduced into writing. All is at an end when there is an agreement in writing; all the conversation was only a previous step. This is the ultimate settlement of the whole affair, on mature consideration of every thing as between him and the mortgagee,—he might be charged, but not by the wife. As to the receipt of the separate maintenance, if they lived together amicably, it shall be looked upon as done by the wife's consent. As to the maintenance, she has taken it upon herself, and it doth not appear but the interest is sufficient for that purpose. Decree affirmed. Christmas v. Christmas, T. 1725. Sel. Ch. Ca. 20.

377. If two neighbours agree that one shall take a lease of houses for the benefit of both, the other shall have the benefit, though the agreement is not in writing; and defendant's plea of the statute of Frauds was ordered to stand for an answer, with liberty to except, and the benefit of it saved to the hearing. Atkins v. Rowe, M. 1729. Mos. 39.

378. On a treaty of marriage between defendant's son and plaintiff's daughter, defendant agreed to settle an estate in fee on his son, and take him into partnership; and plaintiff agreed to give a leasehold estate as a portion with his daughter. The son wrote his father the nature of this agreement, and received his approbation. The marriage took effect, and on the same day the wife fell sick of the small-pox; she recovered; but the son caught it and died. He had made a will, and devised the leasehold to his father. The widow and her father brought their bill to have the agreement performed in specie, insisting that the son's letter, and the father's answer, would carry it out of the statute of Frauds: but the father denied the contents of the son's letter, and said he had burnt it among waste paper. The Chancellor doubted if he could relieve plaintiffs, and recommended a compromise. Hall v. Bestler, H. 1740. 1 Eq. Ab. 20. pl. 7.

379. A case may be taken out of the statute, by admitting parol evidence to show the trust, from the mean circumstances of the pretended owner of the real estate, that makes it impossible for him to be the purchaser. Willis v. Willis, M. 1740. 2 Atk. 71.

380. The statute requires that all declarations of trust should be in writing; otherwise they are absolutely void, except such as arise by construction of law. S. C.

381. The Court of Chancery has, in many cases, considered an agreement as out of the statute of Frauds, in which there is no danger of fraud or perjury. Att. Gen. v. Day, T. 1749. 1 Ves. 221. See the cases collected, ante, pl. 359.
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382. If there be general instructions or an agreement, consisting of material circumstances to be hereafter extended of ore at large, and to be put into the form an instrument, with a view to be signed the parties, and no fraud, but the party takes advantage of the locus penitentiae, he shall not be compelled to perform such agreement if he insists upon the statute of Frauds. Whitechurch v. Bevis, 11 1789. 2 Bro. C. C. 559. Vide Child v. Godolphin, M. 1723. Whaley v. Baggenal, 6.Bro. P. C. 45. Cottingham v. Fletcher, 2 Atk. 155. Ld.-Aylesford's Ca. contra, 2 Stra. 783.


384. Parol agreement for a settlement upon marriage cannot be sued on afterwards, on ground of part performance; but no case of settlement reciting an agreement before marriage is within the statute. Dundas v. Dutens, T. 1790. 1 Ves. jun. 199. Vide Montanae v. Maxwell, 1 P.-W. 620.

385. Refusal after marriage to perform a previous agreement to settle, is a fraud against which equity will relieve. S. C.


387. Bill for specific performance of a parol agreement for a lease, charging possession, and other acts of part performance. Plea, the statute, and answer, not denying the facts alleged as part performance, but stating, that being advised he entered as a tenant at will: he gave notice to quit. Plea over-ruled. Bowes v. Cator, T. 1798. 4 Ves. 91.

388. A. by public advertisement offered lands to be let for three lives or thirty-one years, and proposals having been made by B. and accepted, an agreement was executed between B. and the agent of A. authorized to contract for him for a lease of the lands, in which agreement the term for which the lease was to be made was not mentioned. A. is not bound to perform the contract, there being no evidence in writing of the term to be demised. And there being no reference in the agreement to the advertisement, parol evidence cannot be received to connect the one with the other so as to ascertain the term. Clinan v. Cooke, M. 1802. 1 Sch. & Lef. 22.

389. An agent contracting for the sale or demise of lands need not, under sec. 2. of the statute of Frauds, be authorized in writing. S.-C. ibid. 31.

390. A letter to a solicitor, with directions to prepare the conveyance of a purchase, described generally as the land bought of A., and not specifying the terms, is not sufficient evidence of a contract within the statute of Frauds. Rose v. Cunynghame, M. 1805. 11 Ves. 550.

391. A letter from a mother to her son, beginning "my dear Robert," and concluding "the most affectionate of mothers," but not signed, is not sufficient to constitute a binding agreement on the part of the mother within the statute of Frauds; for there must be a signing, i.e. either an actual signature of the name, or something equivalent, as a mark; and it is not enough that the writer can be identified. Selby v. Selby, E. 1817. 3 Meriv. 2.

(e) Part Performance, its Effects.

392. A parol agreement for a purchase, and possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance, and had paid his money. Butcher v. Stephen, II. 1685. 1 Vern. 363. Vide Pyke v. Williams, 2 Vern. 425.

393. B. in consideration of a parol agreement with A. for a lease pulled down houses, erected new ones, granted leases, received rents, and acted as owner. A., when sick, bade B. get leases prepared from a precedent he gave him, and then died. Though this agreement was not in writing, yet it was so far materially executed on B.'s part that it ought to be performed on the other, and so decreed. Lester v. Forcroft, E. 1717. Colles' P. C. 108. Gilb. Eq. Rep. 4. 11. S. C.

394. Equity will relieve in case of a fraud, although there be nothing in writing to charge the party: as if A. agrees with B. by parol for a lease of ground, B. enters and builds, and then A. refuses to grant him a lease. On a bill by B. to have this agreement executed, A. pleads the statute of Frauds; the agreement being parol, the court over-ruled, the plea, and the M. R. afterwards decreed A. to perform the agreement, and to pay the costs. Floyd v. Buckland, M. 1703. 2 Freem. 268. Vide Twyne's Ca. 3 Co. 82.

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395. A public survey is held for sale of an estate, and A’s offer is accepted. Conveyances are ordered, and A is put into possession; but disputes arising about the conveyance, A gets an assignment of a mortgage on the estate, and antedates it, and then refuses to go on with the purchase. A was decreed to proceed in the purchase, though the agreement was only parol. Pyke v. Williams, H. 1703. 2 Vern. 455.

396. Where a parol agreement is begun to be put in execution, and intended to be continued, equity will enforce the execution of it, notwithstanding the statute of Frauds. Ld. Gurnsey v. Rodbridge, H. 1707. Glib. Eq. Rep. 4.

397. A agreed with B. by parol, to grant him a lease of land, rendering rent, B. paying 150l. fine, he paid 100l. in part to A’s agent, who was ordered to prepare the lease, but before it was done A refused to grant it. Bill by B. for performance of the agreement. Per curiam: the payment of the 100l. is not such a performance on one part as to decree an execution on the other; for the statute of Frauds makes personal contracts good, if money is paid in earnest; but by that statute, no agreement concerning lands shall be good except in writing, and therefore a parol agreement in this case cannot be good: there must be something more than a bare payment of money; it must either be out of the party’s power to undo the thing, or it must be a prejudice to the party performing his part, as beginning to build, letting into possession, &c. In a case where the agreement has proceeded so far on one part, the statute never intended to restrain the court from decreeing a performance on the other. Ld. Ch. would not leave plaintiff, in this case, to recover his 100l. at law, but decreed it to be refunded. Ld. Pengall v. Ross, M. 1709. 2 Eq. Ab. 46, pl. 12.

398. A tenant for life under a settlement, remainder to his wife for her jointure, remainder to the issue male of the marriage, remainders over, with a power to revoke all uses except those to the wife and her issue. A agreed, that upon her surrendering her jointure so that he might suffer a recovery and raise 6000l. to pay his debts, he would re-settle the whole estate to particular uses. The surrender was made and the money raised, but no re-settlement was made. Held, that the agreement being in part performed, it should be specifically executed, and decreed accordingly Herbert v. Ld. Winchelsea, E. 1714. 1 Bro. P. C. 440.

399. A steward has a general authority to contract with tenants, &c. This will not bind the lord without his consent, nor unless part of the bargain is executed. Anon. E. 1717. 5 Vin. 522, pl. 35.

400. An agreement, not in writing, being executed on one part, and an enjoyment accordingly, could not be so far impeached as to lay the party open to an account for the profits he had received under this enjoyment; for this would be much harder than setting aside the agreement at first for want of writing, which yet, if executed on one part, had been always looked upon so far conclusive as to induce the court to decree an execution on the other part, and not to destroy or avoid the agreement, so far as it was already carried into execution. Lockey v. Lockey, T. 1719. Pre. Ch. 518. Vide Croyton v. Baynes, Pre. Ch. 208. Symmonds v. Tweed, ibid. 374. Bawdes v. Amburs, ibid. 402. Hollis v. Whiteing, 1 Vern. 151. Butcher v. Stapely, ibid. 363. Pyke v. Williams, 2 Vern. 455. Pengall v. Ross, 2 Eq. Ab. 46, pl. 12. 16. Owen v. Davis, 1 Ves. jun. 82. Potter v. Potter, post, pl. 408. Bindsted v. Coleman, Bunb. 65. Clerk v. Wright, post, pl. 405. Lason v. Mertins, 3 Atk. 4. Walker v. Walker, 2 Atk. 100. Whichurch v. Bevis, 2 Bro.C.C. 559. Lucas v. Bailey, 2 Vern. 627, contra.

401. Upon a marriage treaty, instructions are given by the husband to draw a settlement, and by him privately countermanded, and afterwards he persuades the woman, by assurances of such a settlement, to marry him. This agreement shall be executed. Lady Montacute v. Sir G. Maxwell, E. 1720. 1 P. W. 618. Pre. Ch. 526. 1 Str. 236. Glib. Ch. 244. Vide Hollis v. Edwards, ante. Pyn v. Blackburn, 3 Ves. 34.

402. A agrees with B. for the purchase of nine houses which were in mortgage to J. S., and pays him a guinea in earnest. B. writes a note to J. S., and desires him to deliver up his writings to the bearer, he having agreed to dispose of them, which J. S. refused, unless all the mortgage money was paid him down, and afterwards purchase the houses himself. On a bill brought by A. for a specific execution of the agreement, it was held, that neither the guinea paid
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down nor the note (which was only an evidence of assent, but did not ascertain the terms of the agreement) were sufficient to take it out of the statute of Frauds. Seagood v. Meale, E. 1721. Pre. Ch. 560. 1 Stra. 426. 2 Eq. Ab. 49, pl. 20. S. C. Vide Main v. Melbourne, 4 Ves. 720. post, pl. 412. — Note. In this case the statute was insisted upon by way of answer.

403. Equity will not decree performance of an agreement, though in part executed, if it be not justly and regularly obtained, Rochfort v. Crewe, T. 1721. 2 Bro. P. C. 296.


405. A letter is not sufficient evidence of the agreement, unless the terms of the agreement are mentioned therein. But where a man takes possession, or does any act of the like nature in pursuance of an agreement, this court will decree an execution of it. Clerk v. Wright, II. 1737. 1 Atk. 12.

406. Any act or act to be done in part performance of an agreement, must be such as could be done with no other view than to perform the whole. Gunter v. Halsey, T. 1739. Amb. 586. And when part performed by one party, it is too late for the other to complain of fraud or surprise. Anglsey, E. v. Amstey, E. 1741. 4 Bro. P. C. 421.

407. Plea of statute of Frauds to discovery of a parol agreement is not allowed, where part of the agreement is performed. Taylor v. Beach, T. 1749. 1 Ves. 297.

408. Although an agreement is not reduced into writing and signed by the party, yet it is well known, that if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution by the court. Potter v. Potter, T. 1750. 1 Ves. 441. Owen v. Davies, H. 1748. 1 Ves. 441. S. P.

409. Defendant agreed by parol that upon plaintiff's procuring a release of a right from a stranger, defendant would convey. Plaintiff procured the release by paying a valuable consideration. This is not a part performance, and the statute of Frauds may be pleaded to a bill for performance of it. O'Rielly v. Thompson, E. 1791. 2 Cox 271.

410. Both parties giving instructions to an attorney to prepare a conveyance of land, and the vendor delivering to him a particular of the estate, signed by himself, as instructions for the deed, which was accordingly prepared, does not take the case out of the statute; there must be a part execution of the substance of the agreement itself. Cook v. Tombs, H. 1794. 2 Anstr. 420.

411. The court has gone rather too far in permitting part performance and other circumstances to take cases out of the statute of Frauds, and then unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. Part performance might be evidence of some agreement, but of what must be left to parol evidence. The remedy ought to rest in compensation. A man having laid out a great deal of money, does not prove he is to have a 99 years lease; he must bring his action for the money. Förster v. Hall, H. 1798. 3 Ves. 712. In this case the M. R. said, 'Tawney o. Crowther, 3 Bro. C. C. 161. 318. O'Hara o. O'Neil, 2 Bro. P. C. 89, are very strong authorities for raising trusts from letters.

412. Though payment of a substantial part of the purchase-money will take an agreement as to the land, out of the statute; on the ground of part performance, payment of a small part, as five
AGREEMENT V.

Part Performance.

per cent. on the purchase-money, will not do. Plea of the statute in such case allowed. *Main v. Melbourne*, T. 1799. 4 Ves. 720. See post, pl. 416.

415. Upon a parol agreement for a compromise, and a division of the estate by arbitration, acts done by the arbitrators, such as surveying, &c. towards the execution of their duty, cannot be considered as acts of part performance, so as to sustain an agreement. *Cooth v. Jackson*, H. 1801. 6 Ves. 41.

414. Bill for specific performance of a parol agreement, to grant a farm lease with the usual and customary covenants of the neighbourhood, and an injunction to prevent an ejectment; plaintiff having taken possession. Upon the answer, stating the insolency of plaintiff, and various breaches of the agreement, during five years possession, to the ruin of the estate, the conjuction was continued on an undertaking to give judgment in ejectment to go to commission, and set down the cause for next term, paying the rent into court. Defendant also insisting on a covenant not to assign, that is a subject of enquiry as to the custom of the neighbouring. *Boardman v. Mostyn*, M. 1804. 6 Ves. 467.

415. Payment of the auction duty is not a part performance to take an agreement out of the statute of Frauds: for the ground of the doctrine of part performance is fraud. *Buckmaster v. Harrop*, H. 1802. 7 Ves. 341. Affirmed by Ld. Ch., on appeal from the above decree at the Rolls. E. 1807. 13 Ves. 456.

416. Payment of money is not such a part performance as will take an agreement touching lands out of the statute. *Climan v. Cooke*, M. 1802. 1 Sch. & Lef. 49. There appears, however, to be some contrariety in the cases on this point.

In Seagood v. Meale, Pre. Ch. 560, a guinea only was paid as earnest, and it was held of no consequence in an agreement touching lands. So was Fingal (or Fingal) v. Rose, 2 Eq. Ab. 48; and so it was said arg. in Coles v. Trescothick, 9 Ves. 242; & contra, see a case said to have been decided by Lord Nottingham, Anon. Freem. 281, where the purchase-money was paid, and the deeds refused to be sealed, he decreed the sealing of them. *Vide etiam Lacou v. Mertins*, 3 Atk. 1. *Main v. Melbourne*, 4 Ves. 720. *Buckmaster v. Harrop*, 7 Ves. 341. There seems to have been the same contrariety in the cases before the statute, upon the effect of a sum paid by way of earnest on an agreement relating to lands. *Vide Simmons v. Cornellius*, 1 Ch. Rep. 128. *Volts v. Smith*, 3 Ch. Rep. 16. Anon. Freem. 124 which seems to be S. C.

417. Nothing in such case is part performance, that does not put the party into a situation that is a fraud upon him, if the agreement is not performed. *Climan v. Cooke*, sup. *Et vide Fawcett v. Lister*, Pre. Ch. 519. 2 Ver. 456, Colles' P. C. 108.

418. A parol agreement, while it remains executory, may be discharged by parol. *Crozer v. Wadesworth*, T. 1805. 6 East, 602.

419. Parol evidence is not to be admitted on the ground of part performance, unless the agreement stated appears clearly to be the very same with that which was partly performed. *Lindsey v. Lynch*, T. 1804. 2 Sch. & Lef. 8.

420. To enforce a parol agreement on the ground of part performance, the act done must be unequivocal, and such as of itself to infer some agreement, the terms of which may then be proved by parol. But if the act is equivocal, and easily admits compensation, it will not be sufficient; as for instance, a tenant building a party-wall; for that must have been rebuilt under the act of parliament, if there had been no agreement. *Franks v. Dawson*, M. 1807. 14 Ves. 386. *Vide Climan v. Cooke*, 1 Sch. & Lef. 40. ante, pl. 416. Gunter v. Halsey, Amb. 586. ante, pl. 406. Morphett v. Jones, 1 Swanst. 172.

421. Where possession is taken with reference only to a contract for sale, it is a part performance, and parol evidence may be given of the terms of such contract. *Savage v. Carril*, H. 1810. 1 Ball & Be. 282. *Vide Wills v. Stradling*, 3 Ves. 378.

422. A parol agreement proved by one witness, and corroborated by others, and not denied by defendant in his answer, will be enforced on the ground of part performance, and the court will vary the old rule, which was never to execute an agreement denied by the answer, and proved by one witness only, (a) where there are other circumstances to support the evidence. Furthermore, the court will admit parol evidence of the delivery of possession, and the expenditure of money in permanent improvements, for that implies the existence of an agreement, and is a part performance of it. *Toole v. Medlicott*, M. 1810. 1 Ball & Be. 593. 405.
AGREEMENT V. & VI.

Part Performance.—Voluntary as against Creditors.

`Et vide` Mortimer v. Orchard, 2 Ves. jun. 243. See also Davis v. Hone, 2 Sch. & Lef. 341. Where Lord Redesdale said the court will decree a covenant according to the conscientious modification of it, to do justice as far as circumstances will admit. N. B. At the hearing, Lord Manners took a distinction between Toole v. Medlicott, supra and Lindsay v. Lynch, 2 Sch. & Lef. 1.

423. On a bill for a specific performance, relying on part performance, the agreement must be proved as stated. _Savage v. Carrol_, E. 1811. 1 Ball & Be. 551. _Et vide_ Daniels v. Davison, 16 Ves. 249.

424. Bill by a tenant for a specific execution of a parcel agreement, for a lease for twenty-one years, in part performed, by his taking possession without the landlord’s express consent, but acquiesced in by him, and he also permitted the tenant to expend money on the premises. The bill alleged also, that plaintiff was to pay taxes, and do all necessary repairs; but that not being proved, was held no substantial variation nor material, by reason of the tenant’s legal liability, besides, it was an admission against himself. Defendant by his answer, and the testimony of one witness, asserted a right of resumption: but he did not prove that such right was ever admitted, and the plaintiff’s witness denied such assertion. A specific performance was decreed with a reference to the Master to ascertain the rent. _Gregory v. Mighell_, M. 1811. 18 Ves. 328.

425. After a written agreement that B. should take an assignment of L.’s interest in the remainder of a term granted of a public-house, and should grant a lease to S.; the two latter planned to get rid of B., and deal together. They then appointed a meeting at ten at night, to execute the deeds, from which time the new interests were to commence. B. attended, but without his money, expecting to receive that of S.; he found the other parties attending by their attorneys, and a brewer’s clerk. L.’s attorney objected to the execution of the assignment to B., as he had not the money, and as it was too late to send for it, he offered to pay next morning, but the contract was declared to be at an end. The bill in the first cause was to have the agreement delivered up, representing B. as a trustee for S., upon the evidence of one witness, who overheard the conversation behind a wainscot partition, opposed to the statement of the conversation by the answer. Specific performance decreed with costs against both defendants. _Savage v. Brockopp ; Brockopp v. Lucas_, M. 1811. 18 Ves. 335.

426. In order to amount to part performance, an act must be unequivocally referrible to the contract. Entering into possession under circumstances establishing the existence of a contract, (though parol only,) and the terms of it, has constantly been received as evidence of an antecedent contract, and is therefore a part performance, sufficient to prevent the operation of the statute of Frauds. Specific performance decreed. _Morphett v. Jones_, H. 1818. 1 Swanst. 172. 1 Wils. C. C. 100.

AGREEMENT VI.

How far Equity will decree the Performance of a voluntary Agreement, and particularly as against Creditors.

427. Where there are two voluntary conveyances of the same estate, the first shall prevail. _Goodwin v. Goodwin_, 1638. 1 Ch. Rep. 173.

428. A husband who had made no provision for his wife, agrees that her fortune, which was in trustees hands, should be laid out in lands, to be settled on them and the heirs of their bodies. This agreement, though accompanied by a judgment, and after marriage, not to be considered as voluntary, so as to be set aside in favour of a creditor. _Moore v. Rycault_, E. 1691. Pre. Ch. 22.

429. A makes a voluntary settlement on B., who after agrees to deliver it up without consideration: this agreement shall not bind in equity, for a voluntary settlement may be surrendered voluntarily. _Wentworth v. Devergyn_, H. 1696. Pre. Ch. 69.

430. A voluntarily agrees to give certain houses to his niece and the heirs of her body, after the death of himself and
AGREEMENT VI. & VII.

Voluntary as against Creditors.—Underhand.

his wife, if they should leave no issue; but no conveyance was executed by A., though he lived many years afterwards. In the mean time A. becomes indebted by mortgage, judgment, &c., and by his will devises all his estate, both real and personal, to his wife. This agreement not good against a purchaser for valuable consideration, although he had notice, by being a subscribing witness to it. *Powell v. Pleydell*, H. 1702. 1 Bro. P. C. 5.


435. A. covenanted to convey all his lands (part being in mortgage) to himself and wife for their lives, and the heirs of the marriage, remainder to a stranger in tail male, and having no issue, (and his wife being dead,) devised the mortgaged premises to defendant, and died; plaintiff brought his bill to have the covenant executed in favour of him, but it was dismissed. Otherwise, if such covenant had been in favour of children, creditors, or on such other good considerations, for though the making of the agreement was voluntary, yet the motive inducing it was good. So in favour of a purchaser, the saller after purchase being considered only as his trustee. *Parry v. Hughes*, E. 1731. 2 Eq. Ab. 54. pl. 12.


437. Where a deed is not sufficient to pass the estate, but the party must come into equity, the court will never execute a voluntary agreement. *Colman v. Sarrell*, M. 1789. 5 Bro. C. C. 12. 1 Ves. jun. 54. *Vide etiam Williamson v. Coddrington*, 1 Ves. 514.

AGREEMENT VII.

Underhand private Agreements.

438. An underhand agreement to defeat an agreement on marriage, was set aside as fraudulent. *Peyton v. Bladwell*, E. 1684. 1 Vern. 240.


AGREEMENT VII.

Underhand.

1 H. Bl. 363. Jackson v. Duchaire, H. 1790. 3 T. R. 551. Most of the cases on this subject are collected and stated in 2 Pow. Contr. 163. 1777.

441. A father covenants to settle an estate on the marriage of his son, who privately agrees to pay so much out of it to his father, equity will relieve against this private agreement. No difference between such a covenant and a marriage brocage bond. D. of Hamilton v. Id. Mohun, E. 1710. 1 P. W. 121. Salk. 158. 10 Mod. 447. It does not appear that this decree was ever appealed from; but in Bro. P. C. 54, there was another branch of this cause from which defendants appealed, and the decree was reversed.—The cases in which courts of equity will relieve against unequal contracts on principles of public policy, arising either from the subject-matter of the contract, or the relative situations of the contracting parties, are stated by Mr. Cox, in a note to Osmond v. Fitzroy, 3 P. W. 131. The following decisions have been made on points similar to that in the last-mentioned case: Pearce v. Waring, cited in Hylton v. Hylton, 2 Ves. 547. Defendant having been guardian to A., by A.'s directions immediately upon his coming of age, invested a considerable sum of A.'s money in the purchase of stock in defendant's name, which A. soon after confirmed to defendant by deed of gift. The deed was set aside. So in Hylton v. Hylton, where defendant was acting executor in a will under which plaintiff was entitled to considerable property, and soon after plaintiff's coming of age he granted to defendant an annuity of 60l., gave him a general release, and two written discharges, upon his delivering up several papers. The court set aside the grant, and directed a conveyance and account. The same principle is applied to transactions of other persons, between whom a similar confidence has existed; as in Osmond v. Fitzroy, supra, where defendant, having been employed as a servant to attend upon A., then an infant, to prevent his being imposed upon, and continued in A.'s service afterwards; when A. was about twenty-seven years of age, prevailed upon him to give a bond, which was kept secret from A.'s friends, and there were some proofs of the weakness of A.'s capacity. So also Griffin v. Devaille, cited in a note to Osmond v. Fitzroy, where plaintiff lived some time before he came of age, with his sister and her husband, and the court set aside securities obtained from him by them on his coming of age. The following cases have been decided on the same ground, between parent and child: Glisson v. Okeden, 2 Atk. 258. 3 Bro. P. C. 560. Young v. Pearson, 2 Atk. 266. Cocking v. Pratt, 1 Ves. 400. Hawkes v. Wyatt, 3 Bro. C. C. 156.

442. A. treated for the marriage of his son, and in the settlement on the son there was a power reserved for the father to jointure any wife with whom he should marry, in 200l. per annum paying 1000l. to the son. The father treating about marrying a second wife, the son agreed with the second wife's relations to release the 1000l., and did release it, but took a private bond from the father for the payment of this 1000l. Equity would not set aside this bond, because it would be injurious to the first marriage, which being prior in time was preferred. Roberts v. Roberts, T. 1730. 3 P. W. 66.

443. A son on his marriage is to have 3000l. with his wife, and privately agrees to pay back 1000l. to his wife's father in seven years: this is void in equity, and an assignment to creditors does not make it better. Turton v. Benson, M. 1718. 1 P. W. 496. 2 Vern. 764. Gilb. 288. Pre. Ch. 522. 10 Mod. 445. 1 Stra. 240. Vide Roberts v. Roberts, 3 P. W. 66. and Mr. Cox's notes thereon: et vide Hill v. Caillowel, 1 Ves. 122, as to the point of assignment.

444. A son in consideration of a marriage portion of 2500l., covenanted that his father would settle 300l. per annum on his wife as a jointure, and the father settled it accordingly. The son gave a bond to leave his wife 1000l., if she survived him. The son died, and the father contended the wife ought not to have the benefit of the bond, for it was a fraud on the marriage agreement. The court distinguished this from the case of Butler v. Chancey, cited 1 P. W. 121, for here the son only is a party to the articles (and not the father,) and he might give all the portion if he pleased. Decree, there should be no relief. Gifford v. Gifford, M. 1699. 1 Eq. Ab. 89. pl. 3.

445. A tradesman failing, compounded, but made an underhand agreement with some of his creditors to pay them the whole. This is a fraud, and on a bill by him against some of the creditors who refused to take the composition after the time of payment was past, the court

446. A. intrusted by B. to receive interest on tallies, received the principal and failed, and afterwards compounded, but B. would have more than the rest of the creditors, which A. agreed to give. Upon a bill by A. to be relieved against this private agreement, the court refused him; for he had been guilty of a great breach of trust, and had agreed to make some satisfaction. *Small v. Brackley*, H. 1707. 2 Vern. 602.


448. A separate agreement securing to some creditors who had executed a deed of composition a greater share than the rest, and without the knowledge of the rest, was set aside. *Mawson v. Stock*, T. 1801. 6 Ves. 300.

449. I. O. was owner of a vessel, employed as a post-office packet. On his application the officers of the post-office promised that if he would convey the vessel to his son, they would appoint the son commander instead of the father. Accordingly the father conveyed the vessel to his son, in consideration of $800. Which conveyance being registered, the son was appointed. Afterwards a private agreement was entered into between the father and son, at the instance of the former, who was to take the profits, and the son a salary only; but that agreement being declared a fraud on the post-office, and against the public policy and that of the registry acts (of 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.) was deemed illegal and void; and after the death of both, the court decreed the father’s executor to account for the profits. Both parties were guilty of a violation of the law; but as to the rule *in pari delicto potior est conditio possidentis*, the court said it was not universal in preventing suits (b), but admitted of degrees of guilt; and here the act was substantially that of the father. *Osborne v. Williams*, T. 1811. 18 Ves. 379. *Vide (a) Hartwell v. Hartwell*, 4 Ves. 811. *Thompson v. Thompson*, 7 Ves. 470. *Parsons v. Thompson*, 1 H. Bl. 322. *Gardeforth v. Fearon*, ibid. 327. *Vide etiam Neville v. Wilkinson*, 1 Bro. C. C. 543. 548. Where Lord *Thurlow* stated it as his opinion, that in all cases where money was paid for an illegal purpose, it might be recovered back again. *Et vide (b) Morris v. M‘Cullock*, Amb. 432. and *Goldsmith v. Bruning*, 1 Eq. Ab. 89, which was a marriage brocage case.
ALIENS.

Their Capacities (a).

(a) Their Capacities.

1. Bill for an account against the representatives of an E. India Governor, who pleaded that plaintiff was born an alien and an infidel. Plea over-ruled; for plaintiff’s demand was merely personal. *Ramskissenseat v. Barker*, M. 1737. 1 Atk. 30.

2. The depositions of Gentoo witnesses, sworn according to their own ceremonies, read as evidences. *Omychund v. Barker*, M. 1744. 1 Atk. 21.

3. Heathens have been admitted as witnesses by the civil law, the law of nations, and the common consent of mankind. S. C. and in *Fachina v. Sabine*, 2 Stra. 1104, where a Mahometan was sworn on the Koran.

4. A Jew is a competent witness to prove a murder. S. C.

5. Oaths should be administered according to religious opinions by the policy of all countries. S. C.

6. Turks and infidels may be admitted witnesses; for they are not *perpetui inimici*, as has been supposed. S. C.

7. The rigour of the old law in restraint of aliens has been modified by the necessity of trade; and a Jew may now bring an action, which formerly he could not do. S. C.

8. If alien witnesses were here, they might be specially indicted for perjury. S. C.

9. Lee, C. J. considered that the testimony of a foreign notary to a contract would be allowed to authenticate the contract, on a question here. S. C.

10. If a heathen, not an alien enemy, brings an action, and the defendant files a bill for an injunction, the plaintiff at law shall answer according to his own form of oath. S. C.

11. Information against A., in the service of the E. I. Co. for an account of his dealings, he pleaded he was an alien. Over-ruled; for he had taken the oaths of allegiance, and acted in a civil and judicial capacity. *Bolts v. Att. Gen. E.* 1773. 7 Bro. P. C. 35.

12. The right of a foreigner by contract entered into during peace, is only suspended by a subsequent war; and may be enforced upon the restoration of peace, *Esp. Coussmaker*, T. 1806. 13 Ves. 71.

13. Commerce by a person resident in an enemy’s country, even as a representative of the crown of England, is illegal; and the subject of prize, however beneficial to this country, unless authorized by license; but having such a license, an English subject trading in an enemy’s country may recover his debts here, and even petition for a commission of bankruptcy. *Esp. Bagthole*, T. 1812. 18 Ves. 525. 1 Rose. 271. *Et vide* *McConnell v. Hector*, 3 Bos. & P. 113. *Kensington v. Inglis*, 8 East 273.

(b) Their Incapacities.

14. Choses in action, belonging to an alien enemy, are forfeited to the crown; but there must be a commission and inquisition to entitle the king, and a peace before inquisition discharges the cause of forfeiture. *Att. Gen. v. Weedon*, M. 1699. Parker, 267.

15. An alien may take by purchase, but then it is for the benefit of the crown. *Burke v. Brown*, T. 1742. 2 Atk. 397.

16. No instance where a man, marrying an alien, is seised of her purchased estate, for it belongs to the crown. S. C.

17. Some infidels may, under certain circumstances, be admitted as witnesses; but, the essence of an oath is a belief in a God, as the rewarder of truth and the avenger of falsehood, in a future state. *Omychund v. Barker*, M. 1744. 1 Atk. 21.

18. No alien born can take by grant, devise, or purchase, any freeholds or chattels real, but for the benefit of the crown; yet this disability being neither a penalty nor forfeiture, the alien cannot demur to a bill for discovering the place of his birth, in order to establish the fact of alienage. *Duplessis v. Att. Gen. E.* 1753. 5 Bro. P. C. 91. 2 Ves. 286.

ALIENS.—AMERICAN LOYALIST.

20. Alien, devisee in trust to sell, joined in a conveyance, and afterwards obtained an act of naturalization, by which it was declared, that he was "from thenceforth naturalized, and should be and was enabled to take, have, and enjoy, &c. all lands which he might or should have by purchase or gift." Held, that this act did not confirm the title of a purchaser under a conveyance previously made. *Fish v. Klein,* E. 1817. 2 Meriv. 431.

AMERICAN LOYALIST.

1. Under the forfeiting act in America, the estates of loyalists were to be sold for the payment of debts. This is no ground for an injunction to restrain an action here on a bond. *Kemp v. Antill,* M. 1785. 2 Bro. C. C. 11.

2. A creditor, having it in his power to obtain warrants for payment of an American loyalist's debt out of his estate there, is bound, on being referred to that property by the debtor, to make it available as far as he can: but where the creditor is not informed of that property, no leaches can be imputed to him; he therefore shall not be restrained by injunction from prosecuting his suit here, although the debtor shall have liberty to make use of the creditor's name to obtain the warrants to make them available as far as may be.—*Peters v. Erving,* H. 1790. 3 Bro. C. C. 54.

3. The property of an American loyalist having been confiscated during the American war, subject to the claims of such of his creditors as were friendly to American independence, to be made within a limited time, and, in fact, according to the evidence further restrained to the inhabitants of the particular state: a bill to have the bonds delivered up, or to compel the creditors to resort in the first instance to the funds arising from the confiscation, dismissed, on the ground that it did not appear that the creditor had the clear means of making his demand effectual against that fund. *Ld. Ch. also expressed an opinion in favour of the right to sue personally, even in such case, against the authority of Wright v. Nutt,* 3 Bro. C. C. 326. 1 Hen. Bla. 136. *Wright v. Simpson,* E. 1801. 6 Ves. 714.
ANNUITY.

I. What shall be construed a good Annuity, and whose Persons and Estates are liable to pay the same, and what are the Remedies for the Recovery thereof.

II. Of Annuities created by Will, and what the Parties entitled can claim under the Words of the Devise.

III. In what Cases an Annuity given by Will shall be secured to the Devisee.

IV. Of Escheuer Annuities.

V. Of the Apportionment, Continuance, and Determination of an Annuity.

VI. How far Equity will assist in the Recovery of an Annuity, where there is no Remedy at Law.

VII. Where, and from what Time an Annuity shall carry Interest, (a) and where Taxes, or other Deductions, shall be allowed. (b)

VIII. Of the Memorial and Enrolment under the Statute 17th Geo. III. c. 26.

IX. Of the Assignment of an Annuity.

X. Of the Re-purchase and Redemption of an Annuity.

ANNUITY I.

What shall be construed a good Annuity, and whose Persons and Estates are liable to pay the same, and what are the Remedies for the Recovery thereof.

1. An annuity provided by marriage articles to be paid to the wife, if she survived, out of the husband’s real estate; if that fund fail, decreed a charge upon his personal property. Griffith v. Anvill, H. 1698. Coles’ P. C. 52.

2. The testator was making his will, and was directing an annuity of 40l. per annum to be paid to plaintiff by defendant, the testator’s brother. Defendant being present, desired the testator not to put it in his will, but said, he would take care to see it paid, whereupon it was omitted. M. R. decreed the payment of this annuity, and that it should be charged upon the real estate. On appeal, C. S. affirmed the decree as to the payment of the annuity, but said he could not decree it a charge upon the land; but the M. R. said, the reason he went upon the charge was, because the maintenance of a poor scholar was a charity, and within the statute of 43 Eliz., and it might amount to an appointment within the statute. In S. C. as reported in 2 Vern. 506. it is said the land was charged, which seems incorrect. Oldham v. Litchford, E. 1725. 2 Freem. 284. 2 Vern. 596. S. C. differently stated. Vide Dutton v. Poole, 1 Vent. 818. where testator was making his will, and intending to raise portions by selling timber, his eldest son desired him not to cut down the timber, for that he would answer the value to the younger children, but refusing to make good his promise, plaintiff, the husband of one of the daughters, brought his action upon the promise, and recovered.


4. One devises that his executors shall sell his lands, and invest the money in purchasing an annuity for J. S.; testator dies, and the annuitant dies three months after, yet the administrator of the annuitant shall compel a sale, and shall have the money arising therefrom, and also the rents and profits till sale, for it was the intention of the will to give away all from the heir, and turn the land into personalty. Yates v. Compton, M. 1725. 2 P. W. 309. Sel. Ch. Ca. 54. Vide Cruse v. Barley, 3 P. W. 20. "And the heir to join in the sale." Reg. Lib. 1725. B. fo. 242. Note. Though by the register’s book the decree appears as stated by the reporter, yet it is not mentioned in what right the court took plaintiff to be entitled.
ANNUITI.

Where good.—Who liable.—Equitable Remedies.


6. A bond given to a kept mistress for the payment of an annuity for the maintenance of herself, and provision for a child she had by the obligor, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud. But the annuity was decreed per M. R., to be paid even after simple contracts, this being a voluntary bond; and that in that course of payment, a fund should be set apart out of the personal estate; but his Honour having given no direction whether the real estate should be chargeable in case of a defect of the personal assets, on appeal Ld. Ch. Talbot held the real estate liable in case of a deficiency in the personal estate, and decreed, that if the same should fail short, upon payment of the arrears and growing payments by affidavit (the heir) and that upon his securing the annuity out of a sufficient part of the real estate when of age, the obligee be restrained from proceeding upon the bond at law. Gray v. Roeke, M. 1785. 2 For. 153. Vide Jones v. Powell, 1 Eq. Ab. 84, pl. 2. Fairhead v. Bowers, 2 Vern. 202. Pre. Ch. 17.

7. An annuity will not be set aside for being bought somewhat too cheap, where there is no imposition. Floyer v. Sherard, H. 1743. Amb. 18.

8. An annuity granted out of government securities standing in trustees’ names; bill to be paid out of the dividends; decreed accordingly. S. C.

9. The late Duke of W. granted two annuities to Dr. Y., chargeable on his lands; the first, in consideration of his great learning; and the second, in consideration that the doctor, at the request of the duke, had quitted the service of Lord E., and had thereby lost an annuity of 100L. Decreed, that the first annuity shall not prevail against either bond or simple contract creditors for valuable consideration; but the latter shall take place of both, and that the former shall be paid out of the surplus, if any, in the hands of the duke’s representatives. Bedford v. Gibson, M. 1744. 9 Mod. 412. 2 Atk. 152. S. C. nomine Siles v. Atk. Gen.

10. An annuity in fee, granted by Cha. H. out of the Barbadoes duties, is not a rent, nor realty, nor within the statute of frauds, nor statute de donis; but being settled on A., and the heirs of her body, is a fee-simple conditional at common law, the remainder over void in case of a common person, and A., having had issue may bar possibility of a reversioner. E. Stafford v. Buckley, H. 1750. 2 Ves. 170. 178, 179. Vide Forth v. Chapman, 1 P. W. 663. Miles v. Williams, 1 P. W. 252.

11. Part of a rent may be granted, but not a new rent reserved or granted out of the old one. Advowsons are rents within the statute of frauds, but an annuity in fee is not a personal inheritance. An annuity in fee is not assets, neither does it go to executors. S. C. Vide Co. Lit. 20.

12. An annuity to a minister of Baptists established as a good charity, like that to Quakers, and to go to the successor for the time being. Att. Gen. v. Cock, T. 1751. 2 Ves. 273.

13. Annuity to a guardian or trustee, soon after coming of age, set aside upon general principles of public utility, and also upon particular circumstances of imposition, but not so if done with opera eyes, and as a remuneration, after the ward is put into possession and in liberty, sui juris. Hylton v. Hylton, T. 1754. 2 Ves. 548.


15. N. T. devised an annuity to his wife for life, then to accumulate to make a portion for his first daughter who should marry; then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body; and in case of his having no issue, remainder to his (testator’s) next eldest son, and his heirs male. The daughters married in
Where good.—Who liable—Equitable Remedies.

the life of the wife; the eldest and two other sons of testator died leaving a wife without issue. This is not personal estate vesting absolutely in the eldest son, (on the principle that it would be an estate tail in land,) neither does it vest as an executory devise in the fourth son of testator who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it as such, sinks into the residuary estate of the testator. *Turner v. Turner.* M. 1783. 1 Bro. C. C. 316. Amb. 778.

16. An annuity charged upon the post-office until a certain sum should be paid, in order to be laid out in land, continues to be a mere personal annuity, and as such passes by grant or transfer. *Holderness v. Carmarthen.* E. 1784. 1 Bro. C. C. 377.

17. Annuity for the joint lives of plaintiff and his uncle, for a sum of money to be paid on the death of the uncle without issue, and the annuity paid during the uncle’s life. Bill to set it aside dismissed. *Henley v. Acton.* H. 1786. 2 Bro. C. C. 19.

18. Grant of an annuity for four years’ purchase on a life of 30, was set aside at the Rolls, for inadequacy of price, it seems; but, on appeal, Lord Thurlow thought mere inadequacy was scarcely a sufficient ground, though there is a difference between that and evidence arising from inadequacy. Where there is such an inadequacy as to show that the person did not understand the bargain he made, or that knowing it, he was, by oppression, obliged to make it, it will discover such a command over the grantor as may amount to a fraud. Here is no evidence of distress nothing but inadequacy; and, if that could be made a rule, the least circumstance varying the next case which occurred might make the difference. Lord Thurlow said further, if he should declare, that having given but two-fifths of the value for the annuity in this case, secured as it was by an insurance, was taking advantage of distress, that would be a proper preface to the affirmation of the decree, but it would decrease the future price of annuities. He could not say, that being at all under the greatest price that could be obtained, would be a sufficient reason for rescinding the transaction. Decree affirmed; but it does not absolutely appear upon what ground the annuity was set aside. *Heathcote v. Paignon.* E. 1787. 2 Bro. C. C. 167. In Mac Ghee v. Morgan, 2 Sch. & Lef. 395. (n) Lord Rosedale said, that this case was disapproved of, and not considered as an authority; and that Lord Thurlow himself had expressed great doubts upon the soundness of the decision, and upon the re-hearing of Mac Ghee v. Morgan, Lord Rosedale observed, that upon the case of Heathcote v. Paignon, if it were law, no annuity could be safely bought, that it was impossible to read that case and not perceive that Lord Thurlow’s mind was in such a state as to make him feel incapable of deciding the case, and anxious to avoid sanctioning the decree of the M. R. Lord Manners also, in Bruce v. Rogers, 2 Sch. & Lef. 395, (n) said, that Lord Thurlow felt great difficulty in affirming the decree in Heathcote v. Paignon.

19. Grant of annuities at six years’ purchase, where the grantee was accountable to the grantor for the price obtained for an estate of which he was trustee to sell for payment of debts, set aside. *Fox v. Mackreth, Pitt v. Mackreth.* M. 1788. 2 Bro. C. C. 400.


22. Where an annuity bond is lost, the annuitant shall claim the arrears, which is the real debt due to him in equity. *Toulmin v. Price.* H. 1800. 3 Ves. 236.

23. No execution can issue for the penalty of an annuity bond, but only *toutes quotas for the accruing payments. Toulmin v. Price, sup. But if those payments exceed the penalty, they cannot be
Where good.—Who liable.—Equitable Remedies.

24. An attorney granted an annuity to his client, aged above 70, and very infirm, for her own life, at eight years purchase, upon the security of his own bond: it appeared she could have made a more advantageous purchase even at a public office. The old lady died three days after the first quarter. Upon a bill by her administrator this annuity was set aside, not upon the ground of inadequacy of consideration, but because the attorney might have taken better care of his client’s interest. The court ordered the attorney to refund the purchase-money with interest, but would not order him to replace the stock which was sold out to complete the purchase. Gibson v. Jeyes, T. 1801.

6 Ves. 266.

25. An annuity cannot be set aside for mere inadequacy of price; for that can only be applied as evidence of fraud.—The notion of a market price ascertained in the usual way upon the principle of calculation at an insurance office, is not a just criterion of the value of an annuity. Therefore where a bill was preferred to set aside an annuity, and the circumstances did not amount to fraud, it was dismissed with costs. Lowe v. Burchard, H. 1803. 8 Ves. 133. Vide Gwynne v. Heaton, 1 Bro. C. C. 1. Heathcote v. Paignon, 2 Bro. C. C. 167. Griffith v. Spratley, 2 Bro. C. C. 179. (n.) White v. Damon, 7 Ves. 30. Coles v. Trecothick, 9 Ves. 234. In Bromley v. Holland, 6 Ves. 610. 7 Ves. 3. It has been determined that an annuity can be set aside in equity upon legal objections, but that when so set aside, the purchase-money may be recovered at law.

26. Payment of the consideration money for an annuity by an agent, is a good payment by the principal. Phillips v. Crawford, M. 1803. 9 Ves. 221. Vide Coare v. Giblett, 4 East 58. where it was so held not upon the annuity act, but upon the general principle of law.

27. Soon after the marriage of A. with defendant, it was discovered that he had a former wife alive, and to make her some compensation, he gave her a bond to pay her 40l. per annum for life, and 500l. in case she should survive him.—The annuity being three years in arrear, he assigned to her some leasehold premises in consideration of 330l., of which the arrear of 120l. was part. A. became a bankrupt, having received 40l. of de-

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28. In 1796, E. and F., partners in trade, agreed, in consideration of 1400l., to grant an annuity to W. of 155l., being nine years purchase, for the lives of the grantees and four other persons; accordingly a bond was prepared, purporting that A., B., C., D., E., and F., were jointly and severally bound to W. in 2800l., with condition reciting the agreement to grant the annuity in consideration of 1400l., which sum W. had that day paid to the grantees, to be void if any of them, &c. should pay the annuity during the life of the survivor, &c.—A memorandum for redemption was endorsed on the bond. The bond and warrant of attorney were executed, and the receipt was signed by C., E., and F., in London: whereupon W. went with them to his bankers and paid 1400l. into the hands of F., who paid the money into the Bank in the joint names of himself and L., the solicitor for W., taking an accountable receipt as A. and B. had not then executed, and D. was prevented from attending, on which account G. was substituted as a surety, who executed a separate bond the next day, taking an indemnity from C. and others of the obligors. On the same day the bond
ANNUITY I.

Where good.—Who liable.—Equitable Remedies.

and warrant of attorney were executed by A. and B. at Leicester, for which purpose F. went down, and on his return he received the money from L., at the Bank. A bill was filed by C. praying that the securities might be declared void under the act of 17 Geo. 3. c. 29., also an account of the principal and interest and past paymen'ts under the annuity, and that the balance may be paid out of the personal estate of E. and by defendant F.; and in case the court should hold that the securities ought not to be declared void, then for a redemption, and that plaintiff may be indemnified, and the other securities contribute. &c. The memorial stated, that the bond was not yet executed by D.; that the consideration was 1400l. that day paid to A., B., C., D., E., and F.; that the sum was paid to F. for the use of himself, A., B., C., D., and E. by W.; that these six persons merely became bound, not that they were jointly and severally bound, except that it is so recited in stating G.'s bond, and did not notice that the heirs were bound, but the condition was for the obligor, his heirs, executors, &c. Upon these points some additional objections besides those which were brought before the King's Bench, were brought forward. L. by his deposition, stated that he asked whether they were all principals to W. and he was answered in the affirmative by F. Per Ld. Ch. It is necessary to advert to the various grounds on which this bill is filed, in order to sustain the jurisdiction of the court. 1st. As to the validity of the instruments. 2dly. Admitting their validity, then whether the court should order them to be delivered up, on the ground that the contract was unconscionable; and finally, if there ought to be a redemption by force of the contract. As to the jurisdiction upon the validity of instruments from defects in the memorial, it is inherent in this court to order them to be delivered up, though the courts of law for some time mis-read the act, and in their zeal to destroy annuities, they supposed they had that power. As to the unconscionable nature of the bargain, if the terms are so extremely inadequate as to satisfy the conscience of the court, by the amount of the inadequacy, that there must have been imposition, or that pressure upon distress which amounts to oppression, this court will order the instruments to be delivered up, though the courts of law might hold that judgment not within the sphere of their powers. Ld. Ch. expressed his surprise at the evidence in this case attempting to prove that an annuity for six lives was worth but little more than an annuity for one life. No reason was assigned for such a calculation. In Thellusson's case, Thellusson v. Woodford, 4 Ves. 227. the accumulation of nine lives was considered an evil not to be tolerated by courts of justice. His Lordship said he could not ascertain what was the real value: it rested therefore upon some inquiry. His Lordship then cited Hodgson v. Pagnion, 2 Bro. C. C. 167. ante. pl. 17. In Bromley v. Holland, 7 Ves. 251. his Lordship ordered the deeds to be delivered up, considering, that upon objections to the legal effect of the instruments, he ought to decide the question, though a court of equity ought to be very cautious not to exercise that jurisdiction if the point is reasonably doubtful. Upon the result of the whole, the court must decide whether the bond in question is a legal instrument, and this may be decided without sending it to law, but his Lordship was far from thinking if all the objections had been originally made, it would have been proper to decide upon them in the first instance, and it was still less proper, some of them having received decisions at law denying their validity. The best course will be, that some of the actions that are brought should be tried, giving liberty to any of the parties to introduce objections to the memorial by way of plea, and all parties were to be at liberty to attend the hearing of the cause. If so, there will be no room to raise the question as to G. whether he is bound at any rate, and if he is, whether equity will interfere to prevent his making use of his bond of indemnity. Neither of those questions will arise, if any of the objections to the memorial are good. If, therefore, in any of the actions that are brought, these objections can be introduced upon the record, they shall go to the trial, and all parties shall be at liberty to attend the trial. Underhill v. Horwood, M. 1804—10 Ves. 299. this decree was on a re-hearing affirmed. Ware v. Horwood, T. 1807. 1 Ves. 28. Vide Coare v. Giblett, 3 East 401. 4 East 85. Gibson v. Jeyes, 6 Ves. 273. See also Mortlock v. Buller, 10 Ves. 292.
ANNUITY I. & II.

Where good.—Who liable.—Equitable Remedies.—Created by Will.

29. W. lent B. 200l. on the bond of B. and V. bearing interest at 5 per cent. and at the same time purchased from B. a rent-charge for lives of 50l. per annum, for 300l., with a covenant that B. should be at liberty to repurchase the rent-charge on three months' notice, and payment of 350l. and all arrears of interest. V. and B. executed their joint and several bond to W. in the penal sum of 700l. conditioned for the payment of 30l., and for the regular payment of the rent-charge. The assignment of the rent-charge was held to be a security for the loan of 200l. and 300l., on the ground that defendant was at all events secured by the bond for 700l. Verner v. Winstanley, E. 1805. 2 Sch. & Lef. 393.

30. The court will restrain an executor from proceeding at law, on a promissory note given to his testator, on the ground that the testator had agreed to accept an annuity in satisfaction of it, and had received part of that annuity on account, although nothing more conclusive had been done by the parties, nor any bond or other security had been given to the grantee, but the court will require the party against whom the action was brought, to pay the money into court. Dalby v. Catchlove, T. 1817. 4 Price 147.

31. The estates which by stat. 5 Ann. c. 3, for perpetuating the great actions of the Duke of M. are limited to the then Duke for life, remainder to S. his Duchess for life, remainder to the heirs male of the body of the duke, remainder to all and every his daughters in such manner as the titles are therein limited, in order that they may always "go along and be enjoyed with the titles and dignities," with a proviso restraining alienation to the prejudice of the persons in remainder, were held not inalienable, and the rents and profits may be effectually aliened by the person in possession as against himself. But the pension granted by stat. 5 Ann. c. 4, for the more honorable support of the dignities of the Duke of M. and his posterity, payable out of the post-office revenues, to such person, successively, to whom the same should come by virtue of that act, with a proviso, that the acquittance of every such person should be a sufficient discharge, is inalienable; motion therefore, by an annuitant, for a receiver, to secure whose annuity the duke had executed an indenture for conveying the estates and the pension to a trustee, was granted as to the estates, but refused as to the pension. Davis v. D. of Marlborough, H. 1818. 1 Swans. 74.


ANNUITY II.

Of Annuities created by Will, and what the Parties entitled can claim under the Words of the Devise.

33. An annuity of 20l. was devised out of a rectory where the glebe was only 40l. per annum, and the tithes were not distrainable, yet the whole rectory was decreed liable to the annuity. Thorn-dike v Collington, H. 1667. 1 Ch. Ca. 79.

34. A. devised all his lands for payment of debts, and gave an annuity out of certain lands which the trustees sold. Decreed, the annuity should be a charge on the lands unsold, there being sufficient to pay the debts. Ld. Kinnoul v. E. of Bedford, M. 1676. 1 Ch. Ca. 295.

35. A. devised his land to his executors for payment of debts, and then gave his wife 50l. per annum, charged on the land. Decreed, the lands being devised to the executors, the debts shall be paid before the annuity, which was but a legacy. Foley's Ca. H. 1879. 2 Eq. Ab. 459. pl. 4.

36. A. devised 5l. per annum to his eldest son for 40 years, if he should live so long, and gave his real estate to his second son, whom he made executor and residuary legatee, with remainderers over. The executor paid the annuity 20 years, and died. Decreed, the land should be liable, though not expressly charged, the devisee being executor, and the heir having no other provision. Elliot v. Hancock, T. 1690. 2 Vern. 143.

37. A. and B. were devises of rent-charges of 10l. per annum each, both issuing out of the same land; both were in arrear, and each recovered in eject-
ANNUITY II.

Created by Will.

A, being in possession, B brought his bill for an account, and that one moiety of the profits might be applied towards his arrears, and it was so decreed. *Eur. v. Europ.* H. 1697. 1 Eq. Ab. 115. pl. 15.

33. B. S. in 1661, made his will, and devised an annuity of 20l. to C, payable quarterly, and then has this clause: "All the rest of my real and personal estate not before bequeathed, my debts being paid, I give to my brother J. S.," and makes him sole executor; and he paid the annuity several years, and made his will, and charged all his real and personal estate with this annuity, and devised all his real and personal estate in England to his two daughters, defendants, and all in Barbadoes to his two daughters there, who were not parties to this suit. Defendant paid the annuity several years, and then stopt, pretending that the words in the will of B. S. did not charge his real estate with the annuity; or if they did, yet the personal estate ought to be first exhausted, which it did not appear to be: and the real and personal estate in Barbadoes being equally liable by the will of J. S., the daughters here ought to have been parties, for they might have made satisfaction, or they ought to be before the court, that they might be decreed to pay their proportion. *Per cur.*—That is not practicable in this case, and ought not to be required: the lands were charged by the will of B. S., and if any satisfaction has been made by the daughters in Barbadoes, defendants must show it. *Quinteps v. Yard.* E. 1702. 1 Eq. Ab. 74. pl. 19.

39. J. devises 100l. *per annum* to his son A. and his wife, for their respective lives. 60l. whereof to be paid to the wife for the support of herself and daughter, the remaining 40l. to the son; the son dies; his wife shall have the whole 100l. *per annum*. *Couter v. Scott.* H. 1731. 3 P. W. 121.

40. An annuity of 40l. devised to a wife, is no satisfaction of a bond for 1000l. settled on her previous to her marriage. *Jobson v. Pelly.* T. 1774. 9 Mod. 437.


42. A legacy given in consideration of paying an annuity. Legatee dies in the life-time of testator. The legacy shall fall into the residuum, but the annuity shall be a subsisting charge thereon. *Oke v. Heath.* M. 1748. 1 Ves. 141.

43. Testatrix gave 500l. long annuities, to A; the same to B; 200l. long annuities to C; the interest thereof to accumulate; an inquiry was admitted into the state of her property, to show she meant such sums of money, not annuities of this amount. *Fohnereau v. Peyntz.* T. 1785. 1 Bro. C. C. 472.

44. Testator made his will, and gave to his daughter 100l. a-year long annuities; he then gave plaintiff 50l. long annuities, and to J. B. 50l. long annuities. These legacies shall be 50l. a-year annuities. *Stafford v. Horton.* T. 1785. 1 Bro. C. C. 482.

45. A devisee for life of a rent-charge assigned it to his creditors. The tenant for life of the estate, with intent to redeem it for the annuitant, gave bonds to the creditors, on condition of giving up their securities to be cancelled. The obligor’s executors paid all the bonds but one, which they disputed, because, though delivered by the obligor to a third person, for a creditor, when he should agree; it was not accepted till after the death of the obligor. This bond was recovered upon at law. The annuitant is entitled against the executors to the annuity disencumbered, but not to the arrears incurred in the life of the obligor, and as against the tenant of the estate to the arrears since the death of the obligor, but the future payments, must be left to agreement, as the heir at law of the devisor of the annuity not being a party, execution of the trusts of the will could not be decreed. *Graham v. Graham.* H. 1791. 1 Ves. jun. 271.


47. Bequest of an annuity to A. with a condition that it should fall into the residue, in case A. should sign any instrument agreeing to sell, assign, charge, or dispose of, or empower any person to receive, &c., the said annuity. Held, that this condition was broken by A. taking the benefit of an insolvent act, for then he signed the petition and schedule, and voluntarily made over the annuity.
ANNUITY II. III. & IV.

Created by Will.—How to be secured.—Eschequer.

but had he been made a bankrupt, which is a compulsory act of the law, it would have been otherwise. See v. Hale, E. 1807. 13 Ves. 404.

45. A bequeathed an annuity to B, as an unalienable provision for his personal use and support, not subject to be anticipated or aliened, or liable to his debts, control, or engagements, with a proviso that if B should sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate the said annuity, or should do or execute any act, deed, matter, or thing to charge, alienate, or affect the same, it should thereupon be suspended:


49. When annuities are given out of a residue, and no time of payment is mentioned in the will, the court doubted whether the principle must not be the same as if there were one tenant for life of the residue, and the annuities be payable only from the end of one year after the testator’s death. But where the time of payment is fixed by the will, the annuities must be paid as directed. Storer v. Prestage, E. 1818. 3 Madd. 167.

ANNUITY III.

In what Cases an Annuity given by Will, shall be secured to the Devisee.

50. One by will gives an annuity out of his personal estate; if the executor has misbehaved himself, by threatening to defeat the annuity, the court will order part of the personal estate to be set aside to secure this annuity. Batten v. Earley, T. 1728. 2 P. W. 163.

51. A man makes a deed-poll for payment of an annuity, and after by will subjects his estate to the payment of it, he shall have further security, and not rest on the deed-poll. Grenon v. Rawson, T. 1726. Sel. Ch. Ca. 57.

52. Where one by will charged the residue of his personal estate with 40l. per annum to his wife, to be paid quarterly, the executor was ordered to bring before the Master sufficient in bonds and securities to be set apart to answer this annuity. Slattery v. Style, M. 1734. 3 P. W. 386. Vide Batten v. Earley, 3 P. W. 163. Rex v. Raynes, 3 P. W. 387, (n.) and Salk. 209. and 1 Vent. 335. S. C.

53. An administrator de bonis non, verbally promising to pay an annuity given by the testator’s will, does, under certain circumstances, make himself personally liable to such payment. Lady Herbert v. E. of Powis, E. 1766. 6 Bro. P. C. 102. Vide Oldham v. Litchfield, 2 Freem. 284. S. P. where a devisee of land was charged upon his verbal promise, and Dutton v. Poole, 1 Vent. 318. S. P.

54. Testator having by his will devised all his lands to A. subject to an annuity for his wife, and afterwards by a codicil devised part of those lands to B. and C. confirming all his devises and bequests in favour of his wife. The lords held that she ought not to be restrained from resorting to this part of the lands for her annuity, and reversed a decree for an injunction made by the court of Eschequer. Reeves v. Newenham, E. 1788. 2 Ridg. P. C. 11. Vern. & Scriv. 482.

ANNUITY IV.

Of Eschequer Annuities.

55. There is a difference between mortgages of Eschequer annuities and of common stock, which is of imaginary value only, but annuities are a certain security, and carry a constant interest; there is no necessity, however, upon a forfeited mortgage of Eschequer annuities, previously to foreclose the equity of redemption, as in the case of land; for where Eschequer annuities were assigned by way of mortgage to secure £5000 and interest, the money not being paid, the mortgagor sold the annuities on the Exchange at the market price.
which, by the Lords, was held a good sale; and Lord Harcourt’s decree in this case to the contrary was reversed upon the present appeal. Tooker v. Wilson, T. 1714. 1 Bro. P. C. 494. 1 P. W. 261.—In Manning v. Scott, 14th Nov. 1714, annuities mortgaged were held irredeemable after forfeiture, unless there be an express agreement that the mortgagor may sell after forfeiture.

ANNUITY V.

Of the Apportionment, Continuance, and Determination of an Annuity.


58. One devises a house to his cousin, with an annuity of £1200, and that she shall maintain her son there: the son goes from her: she shall have her annuity the same as if he had died. Blackburn v. Edgley, H. 1719, 1 P. W. 604.

59. C. in 1720, gave £300 for an annuity of £30 per ann. for her life, payable out of a person’s estate, who becomes a bankrupt in 1738. The commissioners to settle the value of her life, and C. directed to be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole £300. Exp. Le Compte, T. 1738. 1 Atk. 251. Exp. Belton, T. 1744. 1 Atk. 251. S. P.

60. D. by will gave to S. an annuity of £50 to be paid by his executor during the life of the executor. S. died in the executor’s life-time. Per cur. The annuity is not determined, but shall go to the executors of S. during the life of D.’s executor. Savery v. Dyer, H. 1752. Amb. 139.

61. An annuity by will to a wife unprovided for, upon deficiency of assets, not abated in proportion with other legatees upon the intent of testator. Lewin v. Lewin. T. 1752. 2 Ves. 415. Vide Brown v. Allen, 1 Vern. 21.

62. A bond given to A. in trust to secure the payment of an annuity of £10 during the joint lives of S. and petitioner, the bankrupt’s wife; he delivers up the bond on his last examination; she applies to the court, and prays the assignee may deliver the bond to her trustee; and that, the arrears of the annuity, and all future payments, may be made to her. Ld. Ch. ordered it accordingly. Exp. Coyle, game, H. 1758. 1 Atk. 192.

63. One devised a personal annuity de novo to his wife for life, remainder to A. his eldest son, and his heirs male, remainder to his next eldest son, and his heirs male: he left several sons. A. the eldest son died without issue; held the annuity was determinable. Turner v. Turner, M. 1783. Amb. 778. Vide Weeks v. Peach, 2 Lutw. 1218.

64. Annuity by will charged upon real estate for A. for life, payable to him only, upon his own receipt, and no other, and to cease immediately on alienation; ceases by the bankruptcy, and bargain and sale of the estate of A. Domett v. Bedford. T. 1796. 3 Ves. 149. Vide Shoe v. Hale; 13 Ves. 404. Wilkinson v. Wilkinson, 2 Wils. 647.

65. An annuity given to a femo covert, for her solo and separate use, is not apportionable for the period between the day of her death and the gale day preceding. Anderson v. Dyer, H. 1804, 1 Sch. & Lof. 301.

66. An annuity by will was charged on the real estate in aid of the personality, and ordered to be paid out of a fund in court half-yearly, at Midsummer and Christmas. The annuitant having died between Lady-Day and Midsummer, the
ANNUITV V. & VI.

Appointment and Determination.—Aid in Equity.

court ordered payment to her representatives of the quarter to Lady day. 

W ell v. Shaftesbury, T. 1805. 11 Ves. 361. Vide 


67. An interest by will in the nature of an annuity, shall not be apportioned in favour of the executor of the tenant for life. 

F rank v. Noble, T. 1806. 12 

V es. 484.

68. On setting aside an annuity for want of a memorial being registered, the payments from the beginning are to be brought into the account, and if the payments exceed the principal and interest, the balance must be repaid. The securities were ordered to be delivered up, and a reconveyance made. 

H olbrook v. 

S harpey, T. 1812. 19 Ves. 131.

ANNuity VI.

How far Equity will assist in the Recovery of an Annuity where there is no Remedy at Law.

69. Where a man grants a rent-charge on all his lands, and then sells them in parcels, equity will restrain the grantee from levying the whole on one purchaser. 

A non. Cary 3.

70. Eton college was entitled to 34s. per annum, under a royal grant, issuing out of certain lands, but the college did not know the particular lands. Decreed, the executors of the terre-tenant should be answerable for the arrears. 

E ton Coll. v. 

B eau champ, H. 1668. 1 Ch. Ca. 121.

71. Where the deeds by which a rent-charge was granted were lost, and the rent had been paid 12 years, equity decreed the arrears and future payments to be secured. 

C ollet v. 

J acques, H. 1669. 1 Ch. Ca. 120.

72. Defendant, to prevent plaintiff from distraining for his rent-charge, converted the land into tillage. 

L d. Ch. directed an issue to try if fraud; and declared, if fraud was found, he would relieve. 

D azy v. 

D azy, M. 1650. 1 Ch. Ca. 144. But the court will rarely relieve or change the nature of the rent, where there is a remedy at law. 

P almer 

v. W hetten hall, N'. 1570. 1 Ch. Ca. 185.

73. An annuity is granted by one to his house-keeper, with a bond for payment of it; the bond is lost; equity will decree payment of the annuity, for service is a consideration, and no turpis contractus is proved, therefore cannot be presumed. 

L ightone v. 

W eeden, H. 1700. 1 Eq. Ab. 24, pl. 7.

74. It seems that arrears of an annuity or jointure, which accrued due during the time of a public rebellion, cannot be recovered under a bill in equity. 

K irby v. 


75. A grants an annuity for his own life to B., and charges it upon an estate; 

B. agrees that A. shall be at liberty to redeem the annuity at six months' notice, on payment of the purchase-money and all arrears. A. sues for the annuity to run greatly in arrear, and the estate turns out to be subject to prior incumbrances, exceeding its annual income. On a bill filed against A. for a specific performance of his covenant to pay this annuity, the court decreed accordingly, and held, that B. was not obliged to resort to a remedy at law, or to the insufficient security of the estate. 

L d. C arbery v. 

W eston, T. 1737. 5 Bro. P. C. 240.

76. Courts of law have no authority to order instruments void under the annuity act to be delivered up farther than the act expressly gives it. 

B romley v. 

H olland, T. 1802. 7 Ves. 18.

77. Annuity void under the act; at law the balance of the consideration may be recovered, deducting the payments under the annuity.S. C.

78. Annuity void under the act; upon an account of the consideration and the payments under the annuity, if the balance is against the grantee, it has been decided in equity that it cannot be recovered, S. C. 

See more of this case, post, s. ix.

79. Arrears of annuity ordered to be paid to a widow and executrix, although no report of debts had been made, it being stated by the answer that there was no deficiency of the grantees' assets. 

S kinner v. 

S teet, T. 1813. Coop. 54.

80. A. by marriage settlement covenanted to pay to the trustees within four years the sum of 4000l., the dividends of which and of other funds, were thereby
settled on himself for life. He afterwards obtained a pension, made payable by a Treasury warrant to him and his assigns during his life as grantee. A being largely indebted to the Crown, afterwards absconded, without having paid the 4000L, whereupon the pension was withdrawn by order of council. The trustees then stopped the payment of the dividends of the other funds to which A was entitled for life under the settlement. A, having granted annuities, secured by assignments of his pension, and of the dividends to which he was entitled under his settlement, the annuitants filed their bill for recovery of what was in the hands of the Treasurer of the Navy, on account of the pension, and against the trustee of the settlement for the dividends accrued since A's departure. But the court held, that as to the first the court had no jurisdiction, though a suit may be maintained against a public officer who has the money of government in his hands belonging to an individual. And as to the second point it was held that the trustees who had no notice of the assignments were entitled to retain the dividends in satisfaction of the covenant, and the bill was therefore dismissed against all the defendants. Priddy v. Rose, T. 1817. 3 Meriv. 86.

ANNUITY VII.

Where, and from what Time an Annuity shall carry Interest; (a) and where Taxes or other Deductions shall be allowed. (b)

(a) Where, and from what Time an Annuity shall carry Interest.

81. An annuity left to the wife by the husband's will shall carry interest from the very day on which it was payable, and not from the subsequent day of payment only after the arrears incurred. Litton v. Litton, T. 1719. 1 P. W. 541. Vide Batten v. Earnley, 2 P. W. 165. Lady Ferrers v. Earl Ferrers, Forr. 2. Robinson v. Cumming, 2 Atk. 411. Newman v. Auling, 3 Atk. 579. Anon. 2 Ves. 661. Note. To this case the reporter adds a quare, for it seems the arrears should carry interest only from the first day of payment after the annuity became due, whether half-yearly or quarterly; but the hardship of the principal case, and the weight of Ld. Cowper's decree, by whom all the merits of this case were heard, seemed to influence the court in this matter.

82. Interest was allowed on the arrears of an annuity, from the confirmation of the Master's report, viz. 25 years, in favour of the annuitant's representative. Draper's Co. v. Davies, T. 1741. 2 Atk. 211.

83. There is no certain rule for allowing interest on an annuity, but it is generally where it was the support of a wife or child. S. C.

84. Where an annuitant has entered, and is in possession of the estate charged, the court will not oblige him to quit the possession till the grantor allows him interest for the arrears of his annuity down to the day. Robinson v. Cumming, M. 1742. 2 Atk. 411.

85. Bill for the arrears of an annuity secured by bond, and an account decreed, with interest at 4 per cent. The annuity being given for maintenance, and a bond to secure it; plaintiff is clearly entitled to interest. Newman v. Auling, M. 1747. 3 Atk. 579.


87. Interest is sometimes allowed on arrears where frequent demand has been made. Stapleton v. Consay, E. 1750. 1 Ves. 427.

88. But in this case interest on the arrears was refused, though reserved by the decree. Bigual v. Beretton, T. 1755. Dick. 278. Anon. 2 Ves. 661. cited in C.S.

89. Interest at 4 per cent. was allowed on arrears of an annuity from the filing of the bill only, where the annuitant had been negligent in recovering his arrears, and the fund was effective. Morgan v. Morgan, T. 1784. Dick. 643.
90. A son tenant in tail in remainder, joined his father, tenant for life, in suffering a recovery, and then they mortgaged the land, whereupon the mortgagee executed a bond conditioned for performance of covenants in a deed to secure an annuity to the son. Held, that as damages may be recovered at law for a breach, not exceeding the penalty, equity will give interest upon the arrears of such annuity. Gray v. Cox, T. 1784. 1 Ridg. P. C. 155.

91. I. H. on his marriage settled a jointure of 80l. per annum on his wife for life, if she should survive him. Afterwards on the marriage of one of his daughters with L. P. (appellant’s father,) he settled the lands charged therewith on the issue male of that marriage, subject to his wife’s annuity. L. P. died, and then I. H. leaving his wife surviving, Appellant entered on the lands, but never paid the widow, who was supported by respondent, to whom, on her death, she bequeathed the arrears of her annuity. The court ordered the lands to be sold to raise the arrears of the annuity together with interest, even though they had been conveyed to another clear of all annuities. Power v. Beviste, E. 1790. 2 Ridg. P. C. 256.

92. Interest of arrears of an annuity settled in bar of dower refused, some contract being necessary for such interest; compass, poverty, or that the same borrowed money not being sufficient. Tew v. Earl of Winterston, E. 1792. 1 Ves. jun. 451.

93. There is a distinction between an annuity and a legacy; for the former commences from the death; and the first payment is due at the end of the year; but a legacy, generally, does not begin to carry interest till the end of the year. Gibson v. Bott, T. 1802. 7 Ves. 96.

94. Interest shall not be given on the arrear of an annuity bequeathed to a married woman for her sole and separate use, though the fund was productive, and though there was a large residuum. Anderson v. Dwyer, H. 1804. 1 Sch. & Lef. 301. Vide Creuze v. Hunter, 2 Ves. jun. 157. 4 Bro. C. C. 316, and the cases there cited.

95. The sale of an annuity before the Master takes effect from the confirmation of the report; and in this case interest was given upon the purchase-money from the first day on which the report could have been confirmed, viz. the first seal before the Term. Twigg v. Fife, E. 1807. 13 Ves. 517. Vide Jackson v. Lever, 3 Bro. C. C. 605. Exp. Minor, 11 Ves. 559.

96. Where the grantee is prevented from recovering his arrears by an injunction, the court will allow him interest and full costs if the suit in equity be vexatious. O’Donnel v. Browne, H. 1810. 1 Ball & Be. 262. Et vide S. C. post, tit. Rents, i. with references.

(b) Where Taxes or other Deductions shall be allowed.

97. If one covenants to pay an annuity to J. S. the covenator shall not deduct for taxes; for the charge is on the person of the covenator, and not the land. Robinson v. Stevens, M. 1739. 2 Salk. 616, 617.

98. So if H. having a term for years, devises an annuity to J. S. and his heirs, there can be no deduction for taxes; for the term of years is no otherwise chargeable with it than as it is part of the personal estate, for it cannot be said to issue out of the term, when, in point of duration, it may continue much longer. S. C.

99. So if H. grants an annuity to J. S. and afterwards secures it out of a real estate, there shall be no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax free. S. C.

100. A. in satisfaction of a widow’s dower, mortgaged lands on condition to pay her 20l. per annum. This being an annual payment secured out of land, shall be liable to the same taxes as the land, but the annuitant shall not refund in respect of the payments she has received, tax free. Atwood v. Lampey, M. 1719. 3 P. W. 128.(d).

101. A devise to trustees of a sum of money to be laid out in the purchase of an annuity clear for A. Per cur.—The proper meaning of the word clear is free from all taxes. Hodgworth v. Cruvelly, T. 1742. 2 Atk. 376.

102. Where an annuity is given to a relation for life, and it has been paid for any length of years without a deduction for the land-tax, it will be presumed to have been so paid by mutual consent, and the prayer is not entitled to be relieved. Nicholls v. Leeson, M. 1747. 2 Atk. 273.
ANNUITY VIII.

Of the Memorial and Enrolment under the Statute 17 Geo. III. c. 26.

103. Tenant in fee, or in tail in equity, is within the exception in the annuity act, 17 Geo. 3. as to the annuity being registered. *Shrapnel v. Vernon, Levick v. Morton*, N. 1787. 2 Bro. C. C. 268.

104. The warrant of attorney to confess judgment is an assurance within the annuity act of 17 Geo. 3.; therefore if the memorial enrolled does not recite it, the memorial and all subsequent proceedings are void. *Davidson v. Foley*, H. 1791. 2 Bro. C. C. 598. *Vide Hodges v. Money*, 4 T. Rep. 500.

105. The court will not suffer the cause to stand over to enrol a new memorial. S. C.

106. But a memorial of a contract to give good and sufficient landed security for payment of an annuity, as a consideration for the conveyance of a real estate need not be enrolled. *Jackson v. Lever*, E. 1792. 3 Bro. C. C. 603.

107. Deed reciting an agreement for sale of a life interest in Stock, a memorial being registered, under the annuity act, and there being a covenant to pay any deficiency beyond the produce to the extent of the annual sum specified, and a proportionable share in case of death between the days of payment, this is an annuity, not a sale. *Hood v. Burlton*, M. 1792. 2 Ves. jun. 29. 4 Bro. C. C. 121.

108. Deeds to secure annuities are within the annuity act as well as deeds granting them. S. C.

109. Assignment of stock in trust to pay two annuities of 50l. each, to different persons for separate considerations of 400l. each, the memorial was of one annuity of 100l., to the trustee in trust to pay 50l., to each *cestus que trust* for the sum of 600l., and omitted a contingent interest. The annuities are void, the memorial not being sufficient within the annuity act, as not containing a true description of the annuities, nor stating all the interest. S. C.

110. The real amount, the consideration, and mode of payment not being truly stated in the memorial, and the bond and warrant of attorney being only generally mentioned without the dates and names of the parties, the annuities were held void. *D. of Bolton v. Williams*, T. 1793. 2 Ves. Jan. 138. 154. 4 Bro. C. C. 297.

111. All the instruments securing an annuity make but one assurance; and if the memorial is defective as to one, that vitiates the whole. S. C.

112. Courts of common law, which will, on their general jurisdiction enter into the validity of the warrant of attorney or judgment on motion, in the particular application under the annuity act, will only set aside the judgment or execution or warrant, but cannot order the bond to be delivered up. S. C.

113. The word "such" in the first section of the annuity act, means every deed, &c. by which an annuity is granted, and does not refer merely to the instrument defectively stated in the memorial. S. C.

114. An annuity secured by a bond, and a term for years, being void, in regard the memorial did not notice the term, or the clause for redemption, and had stated the consideration which was paid by a declaration, to be paid in money; a general account was decree of the consideration money, with interest and costs, and of all the monies received under the annuity, and that upon payment of the balance due the securities should be delivered up, and the estate reconveyed to the grantor. *Byne v. Vivian*, H. 1800. 5 Ves. 604. *Vide Holbrook v. Sharpey*, 19 Ves. 131.

115. So in a like case of a void annuity, for the same imperfections where the grantee has over-paid himself out of the rents, the same decree was made. *Byne v. Potter*, E. 1800. 5 Ves. 609.

116. So in another case, with the same imperfections, where plaintiff, after having failed in two applications at law, had joined in an assignment of his annuity to the defendant. The court confined the account to the filing of the bill, and held defendant entitled to the original consideration, though exceeding the sum paid on the assignment. *Bromley v. Holland*, T. 1800. 5 Ves. 610. 617, 618. But this decree was reversed by *Eldon*, C. in T. 1802. 7 Ves. 8. Coop. 9.

117. The refusal of a summary application to set aside an annuity, is no objection to the same ground being taken again upon an attempt to enforce it. S. C.
ANNUITY VIII.

Memorial.

118. An annuity being void, the memorial not stating the clause of redemption, the grantor was not allowed either the costs of insurance, or of supporting the annuity, for the insurance is part of the speculation. *Exp. Shaw*, T. 1800. 5 Ves. 620.

119. An annuity secured by bond, and a trust of rents and dividends, being void for defects in the memorial, a general account was decreed of the purchase-money, from the actual payment, which was subsequent to the date of the deeds, and of the premiums of insurance, paid by the grantee, and of all sums received under the annuity with interest respectively, and on payment of the balance and costs, the deeds were ordered to be delivered up; the bill offering to pay principal and interest, and other reasonable demands. A letter from the grantor written prior to the grant, in another negotiation, which did not take place, was admitted as evidence; but only that he had upon that occasion proposed the insurance of his life, as a reasonable thing. *Hoffman v. Cooke*, M. 1800. 5 Ves. 623.

120. The annuity act with respect to annuities subsisting at that time, only restrains the action, till its provisions are complied with, not limiting the time, and does not, as in the case of subsequent annuities, make the security void. In the former case therefore, the bond being by accident lost, the annuitant was admitted for the arrears of the annuity, which is the real debt in equity. *Toulmin v. Price*, H. 1800. 5 Ves. 235.—As to cases in which equity will assist where annuities are void by the act, *vide ante*, sec. vi.

121. Stock was vested in trustees to the uses of a settlement. An annuity was granted by the husband out of the dividends to which he was entitled for life, and the trustees gave the grantee a power of attorney to receive the dividends, which they covenanted not to revoke but to execute any other, &c. This annuity requires a memorial; not being an actual transfer within the 8th section of the annuity act. And a memorial was registered accordingly, but it was objected that it did not state the covenant by the trustees, or that the consideration was paid to the grantee by a draft drawn by a third person. The annuity for these causes was set aside but without costs, the grantor not taking the objection till the consideration was re-paid, and the chance turned against him. *Duff v. Atkinson*, Atkinson v. *Peers*, T. 1803. 8 Ves. 577.

122. Plaintiff sought by his bill to set aside an annuity granted by him and one L. on their own lives to defendant, secured by bond and warrant of attorney, and by a demise of real estate. The grounds of objection were, 1st. That the memorial expressed the consideration to have been paid at the date and execution of the deeds, whereas only one of the grantees executed on the day of the date, and the other some days afterwards at his residence in Wales. 2dly. That the grantor immediately on receiving the consideration paid 30£. to the attorney for the expense of the transaction, not by way of a colourable reduction of the consideration. 3dly. That the consideration-money was paid by an agent as appeared by the receipt indorsed, and by the memorial, but it was not so stated in the body of the deed. As to the 1st objection M. R. said, the annuity act does not require the time of payment to be stated either in the deed or memorial. The deeds in this case could not be said to be executed till completely executed, so as to entitle the grantor to the money. The statement in the memorial therefore that the money was paid upon the execution is substantially fair and correct. (Coare v. Giblett, 4 East 85. Underhill v. Horwood, 10 Ves. 279.) 2dly. If the grantor is to pay for preparing the deeds, it can make no difference whether he pays the attorney out of the consideration-money or any other fund, but if an extravagant charge is made as a colour for reducing the consideration, it is otherwise. 3dly. As to the question, whether it be necessary to state, not only with whose money, but by what hand the payment was made? Considerable doubt yet remains, but it is one of the points referred to the judges in Ascough v. Mackreth now depending in the Lords. It has been lately resolved in Coare v. Giblett, not upon the annuity act, but upon the general principle of law, that payment by the agent is payment by the principal. In the present case, however, the purpose of the act is substantially answered, by inserting the name in the receipt indorsed on the deed, so that whenever the deed is produced, the fact must be known, which is all that the statute requires. *Phillips v. Crawford*, M. 1803. 9 Ves. 214. On appeal from his Honour's de-
ANNUITY VIII.

Memorial.

cree, the Ld. Ch. affirmed it by dismissing the bill. E. 1807. 13 Ves. 473.

123. An annuity granted by a *feme covert*, charged upon her separate estate being void under the statute for want of inserting the clause of redemption in the memorial, the consideration cannot be recovered out of her separate estate, though part of the money was applied in paying the fines upon admission to her copyhold estates. *Jones v. Harris*, T. 1804. 9 Ves. 486.

124. It is now a settled point that the party liable to pay an annuity may come into equity to have the instruments delivered up, upon the ground, that though void at law, they may be used for the purposes of vexation. S. C. *Et vide Byrne v. Vivian, Byrne v. Potter*, 5 Ves. 604. 609. Bromley v. Holland, 5 Ves. 610. 7 Ves. 3. Hoffman v. Cooke, 5 Ves. 623. *Duff v. Atkinson*, 8 Ves. 577. *Underhill v. Horwood*, 10 Ves. 209.

125. The first clause of the annuity act directs, that a memorial shall be enrolled within 20 days of the execution, and shall contain the day the deed bears date. The question in law, therefore is, what is "the day of the date"; it certainly means the day of the execution—it may be otherwise where the expression is "the day the deed bears date," but whether the legislature meant "the day of execution," may require some argument. If the day the deed bears date, means expressly the day put upon the parchment, that certainly may be a day on which no party executes, it may be the day on which some execute and some do not; and then the question is, from what time are the 20 days to be accounted. Suppose two bonds were executed, one on the 1st January, and one on the 2d January, and the bond was the several bond of each, and no relief was to be had in equity; then a memorial enrolled to the 22d of January would be good as to the man who executed on the 2d, and bad as to him who executed on the 1st. There would be a great singularity in the law, if those words, "the day of execution," and "the day the deed bears date," have not the same meaning. *Per Elden, C. in Underhill v. Horwood*, M. 1804 10 Ves. 228.—See this case more at large, ante, tit. Annuity, i. pl. 28.


127. An agreement to grant an annuity is not within the annuity act; and the execution of such an agreement was enforced against the grantor's executors. *Nield v. Smith*, H. 1808. 14 Ves. 491. *Vide Jackson v. Lever*, 3 Bro. 36. *Vide Capper*, 1 Bro. C. C. 156.

128. An equity of redemption being within the exception of 17 Geo. 3. c. 26. s. 8, need not be enrolled when charged with an annuity. *Tucker v. Thursian*, T. 1810. 17 Ves. 151.

129. Courts of equity have jurisdiction upon objections arising out of defects in the memorial of enrolment, and have often exercised it; and therefore it was held, that where an annuity was granted and secured on the dividends of stock standing in trust (int. al.) for the grantor for life, it is not within the exception of the annuity act (a) and an omission in the memorial under the statute 17 Geo. 3. c. 26. (repealed by 53 Geo. 3. c. 141.) of a proviso for staying of execution under a judgment; which was one of the securities until 20 days after default, was held fatal. (b) Held also, that it was not necessary (under the statute of 17 Geo. 3. c. 26.) to state in the memorial a covenant for payment (c) or any particular remedy, except as creating a trust within the act; and as to the necessity of stating trusts, the court doubted, that point having been questioned by the court of King's Bench. (d) *Dupuis v. Edwards*, E. 1811. T. 1813. 18 Ves. 358. *Vide (a) Duff v. Atkinson*, 8 Ves. 577. (b) *Cunningham v. M'Kenzie*, 2 B. & P. 598. *Orton v. Knight*, 3 B. & P. 153. (c) *O'Callaghan v. Ingilby*, 9 East 153. (d) *Defaria v. Sturt*, 2 Taunt. 225.


131. Where an annuity has been duly registered according to the statute, it is not necessary that an equitable mortgage taken afterwards as a further security, should be also registered. *Exp. Price*, H. 1818. Buck 221.
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ANNUITY IX.

Of the Assignment of an Annuity.

132. An assignment of an annuity is within the annuity act; and if void, the assignee has no right to stand in the place of the original grantee, whom he has paid, for want of a good assignment; nor will the court direct an assignment, if the 20 days for enrolling the memorial are elapsed, for it would be void at law. D. of Bolton v. Williams, T. 1793. 2 Ves. jun. 189. 4 Bro. C. C. 297.

133. The memorials of assignments of parts of a subsisting annuity must set out all the securities and the whole transactions. Where this was not the case, the court would not order a return of the purchase-money out of the arrears in court. S. C.

134. A grantor discovering that his annuity was bad, and complaining of distress or circumvention after he had joined the grantee in an assignment of it, which he ratified, and undertook to pay, has but a slender equity, and the assignee ought not to be assisted; but Arden, M. R., would not refuse relief on that ground.

135. Plaintiff was entitled to an annuity of 200l. per annum for life out of Sir R. L.'s estate, who was his eldest brother. Plaintiff sold to R. D. 150l., part of the annuity, for 1050l.; and in the deed there was a proviso, that if plaintiff should at any time be desirous to repurchase the said 150l. per annum, and give six months notice in writing to R. D., his executors, &c. and pay the 1050l., then R. D., his executors, &c. should reassign to plaintiff. At the time the parties met for the execution of the deed, plaintiff was in perfect health, and under the age of 22 years, but was a prisoner in the Fleet. R. D. insisted upon an indorsement on the back of it, and signed by plaintiff, that if plaintiff should repurchase or redeem the said 150l. per annum, it should be upon payment of 1050l., and 73., and all arrears. Plaintiff now brought his bill to be relieved, and that on payment of what shall be due for principal and interest, defendant may be decreed to reassign the annuity. Lord Hardwicke was of opinion, plaintiff in this case was entitled to a redemption, and that the annuity he granted ought to be re-conveyed on his payment of the 1050l., with legal interest, plaintiff being a prisoner and in distress at the time, he was obliged to sign the indorsement for varying the original agreement, by contracting to pay the 73l. and all arrears; and his Lordship directed, that if any sums were advanced for the insurance of plaintiff's life, they should be added to the 1050l., and carry interest: and farther, that what should have been received on account of said annuity, should be applied in part payment of the principal, interest, and insurance. Lawley v. Hooper, M. 1745. 3 Atl. 278, 279, 280.

136. There is little difference between the word redemption and repurchase; and in the indorsement in this case, they are used promiscuously, which shows the parties themselves considered it as a power to redeem: S. C.

137. Lady H. gave the residue of her estate in trust to pay the produce thereof to Lady D. for life, for her separate use, and after her death to her children, and
ANNUTY X.

Of the Re-purchase and Redemption of an Annuity.

appointed B. executor; Lady D. wanting money, took up 120l. of B., and granted him an annuity of 20l. during his life, and directed B. to pay himself out of the produce of H's estate by quarterly payments. Lt. Hardwicke said, Lady D. might contract to raise money by loan, but not by annuity, as it is too large an anticipation, and therefore she was allowed to redeem the annuity from the beginning, though made irredeemable; and the payments already made were directed to be applied in discharge of the interest in the first place, and afterwards in sinking the principal, and the residue to be paid out of the produce of the testatrix's estate. Coverley v Dudley, T. 1747. 3 Atk. 541.

138. A grant of annuities during the life of the grantor, in satisfaction and discharge of a debt, with power to re-purchase and redeem the annuities, held part of the personal estate of the grantee. Langset v Scouen, E. 1750. 1 Ves. 402. 405.

139. The court leans against a contract for liberty to re-purchase, where made at the same time with the grant, and endeavours to make it a redemption. S. C.

140. Taking an annuity worth nine years purchase at five years, is an unconscientious bargain, and the court will give the taker no assistance in a bargain for a re-purchase. Vaughan v Thomas, M. 1783. 1 Bro. C. C. 356. Vide Heathcote v Osborn, 2 Bro. C. C. 167.

APPEAL.

From whence, whither, and for whom it lies.—Where not.

(a) From whence, whither, and for whom it lies.


2. So from the court of equity at Lancaster, to the duchy court. Addison v. Hindmarsh, H. 1686. 1 Vern. 443.(a)

3. So a person, feeling himself injured by a general order of a court not made in any cause, (as for the filling an ancient record, many years mislaid,) may appeal to the Lords, and the person at whose instance the order was made, cannot decline the Lords' jurisdiction, by alleging that it is original and not appellate, or that many not before the house are interested in the record. Lt. Wharton v. Squire, H. 1702. Colles' P. C. 276.

4. So in a libel of heresy, the refusal of a citation by the dean of arches was held a good cause of appeal to the delegates. Pilling v. Whiston, H. 1709. 1 Com. R. 199.

5. So in a matter of ecclesiastical cognizance, though there was an appeal from the presbytery to a provincial synod, an appeal lies to the Lords from the lords of session in Scotland. Greenshields v. Provost of Edinburgh, E. 1710. Colles' P. C. 427.

6. So from a decree in the Isle of Man to the King in council, appeal lies; and no words in a grant from the crown can deprive a subject of his right of appeal, much less if the grant be silent. Christian v. Corren, M. 1716. 1 P. W. 329.

7. So from a decree made in the plantations, appeal lies to the King in council. Fryer v. Bernard or Vernon, M. 1724. 2 P. W. 262. Sel. Ch. Ca. 5. 9 Mod. 124.

8. So from the Ld. Ch.'s decree touching idiots and lunatics, to the King in council only. Exp. Pitt, H. 1726. 3 P. W. 108(a).

9. But all appeals from Chancery to the Lords must be made within five years from the signing and enrolment of the decree. Hill v. White, M. 1728. Mes. 30. Smythe v. Clay, H. 1770. 6 Bro. P. C. 395; and the enrolment is considered by legal relation to be the act of the same day on which the decree was pronounced. S. C.

10. So an appeal to the Emperor must
APPEAL.

From whence, whither, and for whom it lies. (a)—Where not (b)

be brought within two years. Hill v. White, sup.

11. And from the spiritual court, within 15 days. S. C.

12. Ld. Ch. doubted in this case, whether after a re-hearing at the Rolls it was fit for him to re-hear the cause, or whether it ought to go immediately to the Lords. He said, it is obvious that if the rule laid down by Ld. Thurlow, in Fox v. Mackrell, H. 1789, 2 Cox 158, 1 Harg. Jur. Arg. 421, is a wholesome rule, there shall not be a second re-hearing, but the parties are to go to the Lords; and, on the other hand, if the practice is according to what has happened here, that where the case begins at the Rolls it may be re-heard there, and here again upon an appeal before it goes to the Lords, the suitors will have the expense of four hearings in one case, and three in the other. Ld. Ch. would, not however, in the first instance which occurred in experience, decline the duty of hearing the cause. His Lordship said, the suitors had a right to the deliberate attention and judgment of every court, in every stage in which the cause might proceed, according to the constitution; and there could be no circumstance under which he would permit himself to say, that as the cause was to go elsewhere he would give his judgment pro forma only; for if it should be thought right to prevent the like in future, it would be much better done by some rule of practice, to regulate all future cases. Brown v. Higgs, M. 1803, 8 Ves. 566. Affirmed in Parl. 18 Ves. 192.

13. An appeal lies at the suit of a tenant in tail in remainder against a decree affecting his rights obtained by a prior tenant in tail; and such remainder-man may file a supplemental bill, to make himself a party to the former suit for the purpose of appealing. Giffard v. Hori, T. 1804, 1 Sch. & Lef. 386.

14. Even creditors, not parties to the suit, but who came in under the decree, may appeal or re-hear; and so may any person having a right in any way. S. C. Ibid. 409. Vide Osborne v. Usher, 2 Bro. P. C. 314. Vide Bond v. Hopkins, post, tit. Title.

15. The abuse of the right of appeal to the Lords is guarded against not only with reference to the costs, but by the pledge of good cause of appeal, under the signature of counsel Munckhouse v. Bedford Corporation, M. 1810. 17. Ves.


16. A fact misunderstood by the court, and not introduced into the decree, may be a ground for appeal, but not a bill of review. O'Brien v. O'Connor, E. 1815, 2 Ball & Be, 154. Vide Brend v. Brend. 1 Vern. 213.

17. The resolution of the Lords to take their appeal causes in rotation, does not preclude their discretionary power of calling on at any time such as appear to be brought before them merely for delay. Hearn v. Cole, T. 1813, 1 Dow P. C. 463.

18. Where one party appealed to the Ld. Ch. for a part of the decree affirmed on a re-hearing at the Rolls, and the other party had previously appealed from another part of the decree, the second appeal was brought up to the first. Blackburn v. Jepson, H. 1814, 2 Ves. & B. 359.

19. Where a decision is clearly right, the Lords will not remit the cause merely because the court below has decided it on a different ground from that on which the Lords themselves decide. Young v. Leven, E. 1816, 4 Dow P. C. 135.

(b) Where not.

20. An appeal lies not to Chancery from a county palatine; but a certiorari bill may be brought to remove the cause. Portington v. Tarbock, T. 1838, 1 Vern. 177. Jenett v. Bishop, 1 Vern. 184.

21. Nor from a sentence in the delegates, nor from a decree on the stat. of Charitable Uses, to the Lords. Saul v. Wilson, M. 1809, 1 Vern. 118.

22. Nor where the matters complained of have been once settled by the Lords. Bumpfield v. Popham, H. 1697. Colles' P. C. 2.

23. Nor can any person, not a party in the original cause, be suffered to interplead by a petition of appeal. Handcock v. Shaen, E. 1701. Colles' P. C. 12.

24. H. B. was sued in the court of chivalry, for usurping his armorial bearing: he appealed, and petitioned Chancery for a commission of delegates to determine his appeal. Ld. Ch. saw no objection to the jurisdiction of the court of chivalry, but only to an appeal from the acts of that court in their ordinary jurisdiction; and the question was, whether an appeal from that court will lie for any
APPEAL.—ASSIGNMENT AND Assignee.

From whence, whither, and for whom it lies (a).—Where it lies not.

sentence but a definitive one, such as the

civilians call graminem irreparabile. Ld.
Ch. did not think this was such a sentence,
and he objected to issue a commission; lest
it should make a precedent for dilatory
appeals; for, as the court of Admiralty
proceeds by the same law, it would be an
authority for appeals from the interlocu-
tory orders of that court; where the sui-
tors are too poor to admit of affected de-
lay. Petition was dismissed. Sir H.
Blount’s Ca. T. 1737. 1 Atl. 293.

25. No appeal lies to the House of
Lords in Ireland, from the judgment or
decree of any court in that kingdom; for
the statute 6 Geo. 1. c. 5, only declared
what was the old law, and did not intro-
duce any new one. Vernon v. Vernon,
E. 1740. 4 Bro. P. C. 383.

26. Nor to the Lords, against an order
awarding a commission of lunacy or idio-
ocy, by the great seal, nor against any pro-
cedings touching the awarding or refus-
ing such commission. Rockfort v. E. of

27. An appeal lies not from the court
of Exchequer to the House of Lords in
Ireland, complaining of an order made in
that court 12 years before, nor after five
years (unless disability be shown), by the
95th standing order of that house. Hearns

28. The Lords will not (upon appeal)
reverse a decree in equity founded on an
order made by consent. Blundell v.
Macartney, T. 1793. 2 Ridg. P. C. 557.

29. The appellant in this case brought
his appeal evidently for delay. Per El-
don, C. The late order of the Lords,
which requires all appellants to print their
cases forthwith, applies generally to all
appeals, and its object is to check the
abuse of appealing merely for vexation or
delay, and it proved to have that effect.
Ld. Ch. ordered the present appellant to
pay over the money, on security to refund,
if the decree should be reversed. Way
v. Foy, H. 1812. 18 Ves. 452.

ASSIGNMENT AND Assignee.

I. Of what Things an Assignment may be made, and where the Assignee is or
is not liable.

II. Where two Assignments are made of the same Thing, which of the As-
signees shall hold.

ASSIGNMENT AND Assignee I.

Of what Things an Assignment may be made, and where the Assignee is or is
not liable.

1. One settles lands so that in case his
eldest daughter paid 6000L. within six
months after his death to the use of his
other daughters, she should have the lands;
but if she failed, the second daughter to
have the like privilege. The six months
being past without payment, whether the
eldest daughter has assignee of his privi-
lege to a creditor in Curia advisare cult.
Woodman v. Blake, T. 1690. 2 Vern.
165. In 2 Vern. 222, this case is diffe-
rently stated. Nothing is there said about
the daughter’s assignment. The question
there is, whether the court can enlarge
the time for payment, notwithstanding the
devise over.

2. A bill of exchange was given by A.
for value received. B. assigns it to C.
for a just debt; C. brings an action on
this bill against A., and had judgment. A.
brings his bill to be relieved against this
judgment, because there was really no
value received at the time of giving this
bill, and C. would have no prejudice,
as he might still resort to B. upon his
original debt. It was insisted that A.
might be relieved against B., or any
claiming as servant or factor of or to the
use of B. But Somers, C. S. held, that U. being an honest creditor, and coming by this bill fairly for the satisfaction of a just debt, he could not relieve against him, because it would tend to destroy trade, which is carried on everywhere by bills of exchange; and his Lordship would not lessen an honest creditor’s security. Anon. M. 1697. Comyns 43.

3. One being unduly drawn in to execute a conveyance of his estate, after makes his will, and thereby devises all his land to be sold for payment of his debts. Held, that his creditors may set aside the conveyance, having a right in nature of an equity of redemption as the testator himself had, which may be assigned, though urged that it was in nature of a chose en action, and not assignable. Blake v. Johnson, H. 1700. Pre. Ch. 142.

4. A remainder of a term is an assignable interest; as if J. G., being possessed of a term of 2000 years, devised the estate to his wife for 50 years, if she should so long live; and after her decease to his son for 50 years, if, &c.; and after his decease to his two grand-children, for the remainder of the term. One of the grand-children assigns his interest in the life of the father or grandmother. Per cur.—This is an assignable interest, and a moiety passed by the assignment. So decreed. Kingsclere v. Courtney, T. 1700. 2 Freem. 238. Kimpland v. Courtney, 2 Freem. 250. seems to be the same case. Vide Lampett’s Ca., 10 Co. 51; though this is a stronger case.

5. A seaman assigns his wages to J. S. as a security for a debt he owed to J. S., and died intestate. It was insisted that this was only in nature of a letter of attorney, and died with the person, and that there were bond debts. Decreed, J. S. shall be paid in a course of administration. Mitchell v. Eades, M. 1700. 2 Vern. 391. Pr. Ch. 123, where it is stated that the seaman made a letter of attorney, and not an assignment; yet same resolution. Vide Crouch v. Martin, post, pl. 8. S. P.

6. Husband assigns a mortgage in fee, or a chose en action, which he has in right of his wife. This will not bind the wife if she survives. Burnett v. Kinnaston, M. 1700. 2 Vern. 401. Pr. Ch. 118, pl. 5. 2 Freem. 239. Vide 2 Vern. 68. Gilb. Rep. 98. 2 P. W. 111. Ca. temp. Talb. 68 to 170. 1 Atk. 280. 459. 2 Atk. 207.

7. A possibility cannot be assigned, but it may be released; for it is unreasonable there should be an incumbrance on any man’s estate which cannot be discharged. Thomas v. Freeman, M. 1706. 2 Vern. 563. *A possibility may be both released and assigned. Vide Higgden v. Williamson, 3 P. W. 132.


9. A by will gives 300l. to a female covert without creating any separate trust of it, made payable out of a reversion expectant on an estate for life. The legatee’s husband makes an assignment of this legacy to trustees for the benefit of his children; and after by will, taking notice of the legacy, devises it in like manner for the benefit of his children, and makes his wife executrix, and dies. The estate for life drops, and the widow applies to the executor of the first testator for the 300l. legacy. The widow and executor come to an agreement that she should accept of 200l. in full, and the land was sold. The widow joined in the sale, and the 200l. was paid, and the widow gave a release. Bill brought by the children for the 300l. legacy under their father’s assignment and will. Decreed that the husband had a power to extinguish or release the legacy, and had made a good assignment in equity (though not at law as a chose en action only), which he confirming by his will, had bound his wife the legatee. The widow, giving no notice of this assignment to the executor, should be answerable for the 200l. to the children: but as to the 100l., which the executor had drawn her in to release, he should stand charged with, for he ought at first to have paid. The whole legacy; and though this legacy was charged on a fund which was not immediate for raising it, yet, being given to the wife in præsenti, when the fund comes in, it shall carry interest from testator’s death, which must likewise go to the children. Atkins v. Davvery, M. 1714. Gilb. Eq. Rep. 88. Vide 1 Ch. Ca. 232. 3 Ch. Rep. 90. 1 Roll. Ab. 880. 2 Vent. 362. 2 Vern. 391. 428. 563. 395. 764.

10. A devisee in remainder of a term articles for a valuable consideration to sell it. This is a good assignment in equity, and the devisee in remainder is afterwards a trustee for the purchaser. Wind v. Jekyll, M. 1719. 1 P. W. 574.
ASSIGNMENT AND ASSIGNEE I.

What assignable.—Liability of Assignee.


11. A chose en action, though not assignable at law, yet is so in equity, where the husband may assign it alone, as he may any other part of the wife’s personal estate; so may a contingent interest, which the husband has in right of his wife, or a possibility of a term, which though not good strictly by way of assignment, yet will operate as an agreement where for a valuable consideration. D. of Chandos v. Tabbot, T. 1731. 2 P. W. 608. Vide Jacob v. Williams, 1 P. W. 385. Higden v. Williamson, 3 P. W. 132. Theobald v. Duffay, 9 Mod. 101. Beckley v. Newland, 2 P. W. 182.

12. A man possessed of a chose en action in his own right may assign it, though without any consideration. Id. Carteret v. Paushal, T. 1733. 3 P. W. 199. This decree was affirmed in the Lords. 4 Bro. P. C. 168.

15. If the wife has a judgment, and it is extended upon an elegit, the husband may assign it without a consideration: so if a judgment be given in trust for a feme sole who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the interest; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an execut. S. C. Vide Cleland v. Cleland, Pre. Ch. 63. Blois v. Hereford, 2 Vern. 501. Parker v. Windham, Pre. Ch. 412. A Roll. Ab. 358. Turner's Ca., 1 Vern. 7. Tudor v. Samyne, 2 Vern. 270. Squib v. Wynn, 1 P. W. 378. Vide Jewson v. Moulsom, 2 Atk. 417. post, tit. Baron and Feme, sect. ix.

14. 300L. was to be raised by a trust term in a settlement, for portions of daughters as should be living, and not advanced by the father at his death. There being several daughters, B., one of them, after she came of age in the life-time of her father, and whilst unmarried, releases all her share in the 300L. to the owner of the inheritance. B. marries, the father dies, and to a bill brought by her as in her right, to have her share &c., defendant pleads the release in bar, and insisted that this share of B., though a possibility only at the time of the release, was assignable in equity, though not at law; and by the same reason might be released in equity. Per Ld. Ch., choses en action and possibilities are assignable in equity, if made upon consideration; but here no consideration appears, and at law a possibility may be released, but this is a demand in equity under a trust, and therefore shall be supported by a consideration; and ordered the plea to stand for an answer. Robinson v. Baxawor, H. 1734. 3 Vin. Ab. 155, pl. 29. 2 Eq. Ab. 90, pl. 18. Vide Ld. Gray v. D. of Hamilton, 3 Vin. Ab. 155, pl. 28. 2 Eq. Ab. 88, pl. 11. Theobald v. Duffay, 1 P. W. 574, (n). Higden v. Williamson, 3 P. W. 182.

15. A, by his will gave, two legacies to his daughter B. of 500L. each, one of them for her sole and separate use, she being married without a settlement. A decree was obtained for placing out these legacies for B.'s benefit. B.'s husband, upon petition to Lord Macclesfield, obtained an order (his wife consenting) for both legacies, by consent, to be laid out for the separate use of the wife. The husband and wife (she being 19) join in an assignment of the last 500L. to secure a debt to D., and the husband becomes a bankrupt. D. brought a bill against the assignees under the commission, and also against the husband and wife; and Lord King decreed the assignment good, and the residue to be paid to the assignees. The wife re-hears, alleging that she was poor, and not able to produce the order of Lord Macclesfield. Objected that the order was voluntary, and did not bind creditors; objected also that the assignment was good, it being of her separate estate, though under 21, and that infants may execute a power by an attorney. Ld. Ch.—As to the objection that the order was voluntary, and did not bind creditors, he said, that is a hard censure on the proceedings of the court, and such settlements are the usual practice, and this present one is according to the will. Where the husband makes a voluntary provision for the wife to take place after his death, it has been adjudged fraudulent; but here it is set apart immediately. As to the assignment itself, he admitted, that if the feme had been solo it had not been
good: but the case is stronger, because she was a feme covert; and though in cases of mere powers or authorities, infants may execute, because nothing moves from them, yet this is an interest, and can no more be departed with in equity by an infant, than by an infant's assignment of a legal estate at law. Decree varied. Halsey v. Badham, T. 1734. 2 Eq. Ab. 151. pl. 19.

16. As at law an assignee of a term may assign, and thereby get rid of his subsequent rent, and the covenants which run with the land, & fortiior he may do in equity. Valiant v. Dodemede, T. 1742. 2 Atk. 546. Vide Lekeux v. Nash, 2 Stra. 1221. where Lee, C. J. grounded his opinion on this and a similar case.—In some sorts of assignments made by tenants, the court has intemperances. Vide Treacle v. Coke, 1 Vern. 165. Philpot v. Hoare, 2 Atk. 219.

17. A husband may dispose of a possibility in equity, if assigned for a valuable consideration; but it must be an assignment of that particular thing, and not rest only on intention and construction of words in a covenant. Hawkins v. Obysh, T. 1743. 2 Atk. 549.


19. Under the constitution of the Hand-in-Hand Fire Office, the heir, to whom, upon the death of the insured, the property being frehold descended, cannot have the benefit of the policy without assignment. Mildmay v. Folgham, T. 1797. 3 Ves. 471.

20. Assignments of choses en action for a valuable consideration are good against creditors under a commission of bankruptcy. Brown v. Heathcote, M. 1746. 1 Atk. 160.

21. The provisions in 21 Jac. 1. c. 19. s. 11. with respect to legal interests, must be followed as to equitable ones; and as to choses en action, equity ought to follow the law; if not, infinite mischief would ensue: it is easy to turn a legal into an equitable interest; and if parliamentary provisions as to a legal interest, were not to be followed as to the equitable interests, it would defeat the act.—Ryall v. Rolle, H. 1749. 1 Atk. 183.

22. A possibility is assignable in equity for a valuable consideration; and love and affection to a child is a secondary consideration, and operates by way of agreement, and will be made good.—Wright v. Wright, E. 1750. 1 Ves. 411.

23. Whether the shares of a ship not at sea are within 21 Jac. 1. c. 19. s. 10, 11, or whether the transfer of a bill of sale is sufficient delivery of possession, and also whether it is affected by the registry act, quere? Exp. Stedgroom, T. 1790. 1 Ves. jun. 163.

24. Whether the office of registrar of the court of Chancery is assignable, quere? Coleman v. D. of St. Albans, H. 1796. 2 Ves. 25. In Drummond v. D. of St. Albans, T. 1800. 5 Ves. 455, it was held to be assignable.

25. Bill by the assignee of a person who had made a general conveyance in trust for his creditors, and afterwards taken the benefit of an insolvent act, in respect of the surplus, against the assignee, trustee, and mortgagees, disannulled with costs. Spragg v. Binks, T. 1800. 5 Ves. 583.

26. The court, perhaps, has gone too far in permitting assignments of rights in accounts to be taken: such a right cannot be parcelled out so that every person may file a bill pro interesse suo. C. S.

27. An assignment of furniture, &c. by a debtor to his creditors, in satisfaction of their debts, retaining possession under a demise at a rent, and afterwards taking a re-assignment from some, on payment of their debts, with interest, though it would be void as against creditors, will be established between the parties, though the answer insists that the deed, though with a fraudulent purpose, made absolute upon the face of it, was intended only as a security; and the circumstances precluding any legal remedy. Baldwin v. Cavethorne, T. 1812. 19 Ves. 165.
ASSIGNMENT, &c.—AVERAGE AND CONTRIBUTION.

ASSIGNMENT AND ASSIGNEE II.

Where two Assignments are made of the same Thing, which of the Assignees shall hold.

28. Where the thing assigned is only a chose en action, though the assignment be without notice, yet, as no legal estate passes, qui prior est in tempore potior est in jure. Tourville v. Naish, T. 1734. 3 P. W. 308. Reg. Lib. B. 1733. fo. 461. nomine Tourville v. Spelman.

29. If there are two executors who are also legatees, and one of them for a valuable consideration assigns part of his residuum to A., and afterwards for a valuable consideration assigns his whole residuum to the other executor, if both are but choses en action, the first must take place. Brice v. D. of Marlborough, M. 1728. 2 P. W. 496.

See more under Landlord and Tenant, Mortgage.

AVERAGE AND CONTRIBUTION.

I. In what Cases there shall be an Average and Contribution.

II. In what Proportions an Average and Contribution shall be made.

AVERAGE AND CONTRIBUTION I.

In what Cases there shall be an Average and Contribution.

1. A man indebted by several mortgages, judgments, bonds, and simple contracts, settles his estates for payment of his debts. The real securities shall be first paid, and then the bonds and simple contract debts in average. Child v. Stevens, M. 1682. 1 Vern. 101.

2. Settlement to pay 100l. per annum to the heir, and afterwards to raise 100l. a piece for younger children, to be paid according to their seniority; in case of a deficiency they shall all be paid in average. Brathwaite v. Brathwaite, M. 1685. 1 Vern. 375.

3. Where the issue and jointress claim by the same settlement, if there be a prior incumbrance, the jointress shall contribute and bear her proportion, and not lay the whole burden on the heir. Carpenter v. Carpenter, II. 1886. 1 Vern. 440.

4. A lessee for years makes several under-leases; the estate is out of repair, and the original lease avoided for non-payment of rent; and some of the under-lessees bring a bill to be relieved against the forfeiture: equity will not apportion the rent, nor relieve plaintiffs, but on payment of the whole rent in arrear, and repairing the premises: but having so done, they may compel the rest of the under-tenants to contribute. Webber v. Smith, T. 1689. 2 Vern. 103.

5. One conveys to the use of himself for life, with power to mortgage; remainder to trustees to sell to pay all his debts, and dies indebted by judgments, bonds, and simple contract. This deed is fraudulent as to the judgment creditors, and they shall not be compelled to take a satisfaction in average with the other creditors, having no notice of the settlement. Tarback v. Marbury, T. 1705. 2 Vern. 510.

6. An estate being considerably mortgaged, was devised to A., and several specific legacies were left to others. The surplus is not sufficient to discharge the debt. All the specific legatees shall contribute towards the discharging the mortgage before the mortgage premises shall be affected; for the covenant to pay the money makes it a personal debt, and the real estate shall never be put in average with the personal. Warner v. Hayes, 1706. W. Kel. 3.

8. One seized in fee of the manors of A. and B. mortgages A., and by will charges all his real estates with the payment of his debts, and devises A. to C. and B. to D., and dies. The devisee of A. shall compel the devisee of B. to contribute to pay the mortgage on A.; but if the will proves void, then no contribution. *Carter v. Barnardiston*, M. 1718. 1 P. W. 505. *Vide* Babington v. Greenwood, 1 P. W. 591. Howell v. Price, 1 P. W. 295. and notes there, on the point of contribution.

9. One by will charges all his estate with his debts, and dies seized of freehold and copyhold estates, which he particularly disposes of by his will. The copyhold, though not surrendered to the use of his will, shall yet be applied to the payment of the debts, *pari passu* with the freehold. *Harris v. Ingledeu*, H. 1730. 3 P. W. 96. This is not now received as the law of the courts of equity, which supply the want of *a surrender* of a copyhold estate in favour of creditors, so far only as may appear necessary for the payment of the debts. *Vide* Drake v. Robinson, 1 P. W. 443. Hazlewood v. Pope, 3 P. W. 322. Malabar v. Malabar, Ca. temp. Talb. 78. Combs v. Gibson, 1 Bro. Cl. Rep. 273. Hillier v. Tarrant, Forr. 238, n. et *vide* 3 P. W. 98, notes.—But this is to be understood of the legal estate only, for an equitable estate of copyhold will pass by such devise without a surrender. *Vide* Car v. Ellison, 3 Atk. 73. Tufnel v. Page, Barnard. 9. Allen v. Poulton, 1 Ves. 121. Macnamara v. Jones, 1 Bro. C. C. 481.

10. If lands be charged with payment of debts, and part be devised to A. and other part to B. &c. the creditors cannot be paid out of lands till the Master has certified the proportion which each devisee is to contribute; but if the Master certifies that the debts will exhaust the whole real estate, then the creditors may proceed against any devisee for the whole. S. C. *Vide* Noye v. Mordaunt, 2 Vern. 581. Streatham v. Streatham, Ca. temp. Talb. 176. &c.

11. One dies indebted by bond and seised in fee of lands, part of which he devises to J. S., and the other part to his heir at law: though this latter devise is void, (as to the purpose of making the heir take otherwise than by descent,) yet it shows the testator's intent that the heir should have his land; and therefore (as it seems) the land devised to J. S. and the other lands devised to the heir, shall contribute in proportion to pay the bond debts. S. C. 3 P. W. 367. *Vide* Howell v. Price, 1 P. W. 294. n. Long v. Short, 1 P. W. 403. Clifton v. Birt, 1 P. W. 678. O'Neal v. Mead, 1 P. W. 673.

12. If one who confesses a judgment aliens part of his land, and the rest descends, the heir shall not have contribution against the purchaser. *Hervey v. Woodhouse*, 1731. Sel. Ch. Ca. 3. 4. W. Kel. 3.

13. A tenant in tail subject to an in-cumbrance, exchanges part of the estate, and suffers a recovery of other part which he sells. The land taken in exchange is subject to no part of the in-cumbrance, but the whole must be borne by the remainder. *Kirkham v. Smith*, T. 1750. 1 Ves. 258. Amb. 518. *Vide* Lloyd v. Johns, *post*, pl. 17.


15. A. created a trust for the payment of incumbrances, out of the rents and profits of his real estate, part of which being subject to the arrears of a rent charge to the crown, was discharged by a privy seal, provided £5000 be paid to B. and C., for securing which a term was created by act of parliament: Hold, that this was a debt affecting the estate, and not within the trusts of the deed, and therefore that the tenants for life must keep down the interest. *E. of Petterborough v. Mordaunt*, H. 1739. 1 Eden 474. *Vide* Tracy v. Hereford, 2 Bro. C. C. 128. Penrhyv v. Hughes, 5 Ves. 107.

16. A creditor having five bonds, one of which had been paid before bill filed; afterwards a decree that the specialty creditors should abate in proportion. He shall not be called upon to bring back what he had received, but only shall abate on the outstanding debt. *Lothian v. Hasel*, H. 1739. 4 Bro. C. C. 167.

18. No contribution will be decreed in favour of one surety against another, whose engagement, as appeared from his bond, as also from parol evidence, was only as collateral surety, not as co-surety and whose liability was limited to a default of payment by the other surety who was ignorant of such collateral security being given. *Craythorne v. Swinburne*, T. 1807. 14 Ves. 169.

**AVERAGE AND CONTRIBUTION II.**

19. Where one devised lands in mortgage to A. for life, remainder to B. in fee, A. shall contribute one-third of the mortgage money. *Cornish v. Maw*, H. 1676. 1 Ch. Ca. 271. Finch 220. A mortgage is devised to A. for life; remainder to B. in fee. If the mortgage is redeemed, the money shall be paid to them in proportion to the value of their estates, viz. one-third to the tenant for life, and two-thirds to the remainder-man. *Brent v. Best*, M. 1682. 1 Vern 70.

21. Lands subject to a mortgage are devised to A. for life, remainder to B. in fee. A. redeems and dies. *Per cur.* Had B. come in the life-time of A. he should have paid only two-thirds of the money, but now the executor of A. who enjoyed but for a year, must make an allowance only for the time that A. enjoyed the estate. *Clyat v. Batteston*, T. 1666. 1 Vern 464.

22. J. S. made a settlement on himself for life, then to trustees for 99 years, to raise £500 a-piece for his three nieces, payable at 21; remainder to plaintiff for life; remainder to his first son in tail; remainder over. Bill by plaintiff to be let into possession, paying his proportion of the £1500 charged, £500 of which was due presently, and the rest in *future*. Decreed plaintiff's estate for life to bear £700, and those in remainder £800; but if the other £800 should, under the limitations, become payable in plaintiff's life, he was to pay it, and the 99 years term should be his security for reimbursement. *Rice v. Rice*, H. 1690. Prec. Ch. 21. *Vide Nightingale v. Lawson*, I Bro. C. C. 442, as to the proportion tenant for life shall bear with the remainder-man, in fines and renewals where it is said that in a beneficial lease, tenant for life renewing, the fine shall be apportioned according to the number of years unexpired, and the respective interests of the parties; and in Stone v. Theob. 2 Bro. C. C. 243, the fines were decreed to be paid out of the accumulated fund, and not apportioned between the tenant for life and remainder-man.

23. An estate in mortgage settled on A. for life, remainder to B. in fee. Tenant for life shall bear two-fifths of the principal and interest, and the remainder-man three-fifths. *James v. Hailes*, E. 1692. Prec. Ch. 44. *Vide Ponynch v. Hughes*, 5 Ves. 107. post, tit. *Estate*, vii. 215. A. devised a rent-charge to B., and another rent-charge to C., both issuing out of the same land, and with the like clause of entry, but the land was inadequate to answer both; both were in arrear, and each brought his ejectment, and recovered. Defendant being in possession, the other grantee brought his bill to have an account of the profits, and that one moiety might be applied to satisfy his arrears, which was decreed accordingly. *Eure v. Eure*, H. 1697. 1 Eq. Ab. 115. pl. 15.

25. A freeman of London, having two daughters, devises 600l. a-piece to them, and makes his wife executrix. By an estimate it appeared that his personal estate at his death was 18,000l. to 600l. of which the widow being entitled, A. her second husband, in consideration thereof, settled a jointure of 600l. per *annum*. Afterwards a loss of 12,000l. befell the freeman's estate: and though the wife was dead, and it was urged that the second husband was a purchaser of
AVERAGE AND CONTRIBUTION II.

In what Proportions allowed.


29. A church lease for three lives was devised in trust for testator's widow for life, remainder to his son in tail, one life expiring during his widow's life. Quere, At whose expense should the renewal be made? Per Ld. Ch.—Where a legal estate of this kind is devised to one for life, remainder over, and the tenant for life is one of the persons upon whose life the lease is held, there is no reason he should be at any expense in adding another life, because the lease is as durable as his interest. So where it is given in trust in the same manner, and the custos que trust is one of the lives named in the lease, this court will not compel the trustees to surrender that lease, in order for the renewal at the expense of the custos que trust for life. In the present case the custos que trust for life has a chance of a benefit from the renewal, and the son, who has the remainder in tail, has no more than a chance of benefit; therefore it is but reasonable that the widow should contribute to the expense of the renewal: and as to the proportion, the rule is, that the tenant for life shall pay one third of the charge, or keep down the interest, and that seems reasonable in this case. The widow accordingly paid one third the expense. Verney v. Verney, E. 1750. Amb. 88. Vide 1 Ves. 428, S. C. where it is said, the computation of tenant for life bearing one third was a wrong rule, as being too low. Vide ante. Rives v. Rives, pl. 22, and Nightingale v. Lawson, and Stone v. Thed, there mentioned. S. C.

30. Tenant for life of an estate for lives, being himself one of them, it is not competent to the remainder-man to compel him to contribute to the expense of a renewal, if it is a legal estate. Sed quare, if a trust. White v. White, T. 1798. 4 Ves. 33, et vide Verney v. Verney, ante. Upon appeal, Ld. Eldon held, that though the old rule throwing one third of the fine for renewal upon the tenant for life, does not now prevail; the tenant for life in general cases must contribute beyond the interest, in proportion to the benefit be taken; but in this case the testator having provided a fund for renewal, the tenant for life might put in his own life, and was not under an obligation to renew farther than to permit a mortgage for raising the fund. The decree was therefore affirmed.
AWARD I.

Arbitrators, their Power and Duty (a).

inserting expressly that the tenant for life ought to have kept down the interest. 
White v. White, T. 1804. 9 Ves. 554.
81. The contribution of a tenant for life towards a renewal fine now is in proportion to his enjoyment, and not one-third, as formerly, nor confined to keeping down the interest of a mortgage. 

AWARD.

I. Of Arbitrators, their Power and Duty. (a) Punishment for Neglect or Abuse. (b)

II. Of the Submission. (c) Parties thereto. (d)

III. Where examinable. (e) Where confirmed. (f) Where set aside. (g) Exceptions. (h) Disobedience and Punishment. (i) and of the Award generally. (k)

AWARD I.

Of Arbitrators, their Power and Duty. (a) Punishment for Neglect or Abuse. (b)

(a) Of Arbitrators, their Power and Duty.

1. Arbitrators were to make their award on or before the 27th March. They have the whole day, and the umpire has no power on that day. Anon. E. 1689. 2 Vern. 160.


3. Arbitrators need not chalk out the method by which their award is to be carried into execution. S. C.

4. Arbitrators have no power to examine on oath, under the usual clause of reference in articles of co-partnership. Willington v. Mackintosh, E. 1743. 2 Atk. 569.

5. Arbitrators are not bound to give notice when or where they meet. Titcomb v. Peat, T. 1747. 3 Atk. 530.


7. The time of making an award was enlarged from the first day of Michaelmas Term till the first day of Hilary Term. An award made on that day is good. Knowles v. Simmonds, T. 1791. 3 Bro. C. C. 358. 1 Ves. jun. 369.

8. On a general reference of all matters, an arbitrator may go farther than the court; for he may relieve against a harsh right. S. C.

9. An award contrary to law is an excess of power, and may be impeached. Morgan v. Mather, M. 1792. 2 Ves. jun. 15.

10. Where the submission is merely by bond, the arbitrators may award costs, as between attorney and client. Hartnell v. Hill, H. 1801. Forrest Exchq. Rep. 74.

11. Under a reference to settle the matter in difference, and award such alterations in defendant's works, as to the arbitrator should seem necessary, regard being had to their state at a particular period. An award, directing no other alteration than that part of the machinery, which was made of wood, should be made of cast iron, was held a due execution of the authority. Walker v. Froishisher, T. 1801. 6 Ves. 70.

12. Arbitrators must understand that they act corruptly, if they act as agents; so, if they take instructions or talk with one party in the absence of the other. Fetherstone v. Cooper, T. 1803. 9 Ves. 69.

13. An admission of assets by mistake is a clear subject of the jurisdiction of an
AWARD I. & II.

Power and Duty (a) — Punishment for Neglect or Abuse (b) — Submission (c).

arbiter under a general reference,
Young v. Walter, E. 1804. 9 Ves. 367.
14. Every arbiter has a power, subject to his discretion, to proceed ex parte, if one of the parties, though duly summoned, will not attend. Wood v. Leake, E. 1806. 12 Ves. 412.
16. By an order by consent all matters in dispute were referred to three arbitrators; one of the parties contesting that the other had, at a meeting with the arbitrators, revoked the reference, claimed a right to revoke it also, and the arbitrators refused to proceed. Held, that the court cannot order arbitrators to proceed, if they do not choose. Crawford v. Collins, H. 1818. 1 Swanst. 40. 1 Wils. 31.

(b) Punishment for Neglect or Abuse.
17. If arbitrators plead their award to a bill charging partiality, they must support their plea, or pay costs. Lingood v. Croucher, T. 1748. 2 Atk. 395.
18. An arbiter making an improper declaration is liable to costs, but he must have an opportunity to answer. Chicot v. Lequesne, T. 1731. 2 Ves. 315.

AWARD II.

Of the Submission (c) — Parties thereto (d).

(c) Of the Submission.
20. If two submit all controversies to the award of I. S. ita quod, &c. de premisis, and I. S. makes an award in part only, it is void at law, and equity will not assist. Robinson v. Biss, 1609. 1 Roll. Ab. 377.
21. All the parties to a suit consented to a reference; but the arbiter did not make his award within the time. The court enlarged the time, and referred it back to the arbiter, with the consent of all parties, except I. S. whose solicitor consented for him. Held, this did not bind I. S. though admitted that he would have been bound at law by his attorney’s consent. Colwall v. Child, E. 1667. 1 Ch. Ca. 86.
22. If the parties, in court, sign an order, by consent, to refer to arbitrators, finally to determine, and the award is ratified by the decree, yet one party may revoke his submission; but the court will grant an attachment against him for so doing. Hide v. Petit, M. 1670. 1 Ch. Ca. 185.
23. So, if the award differs from the submission, it is void both at law and in equity. S. C.
24. Where two persons submit to an award with a third, the arbitrators may go into all matters, as well between the two, as between the two and the third, provided all parties are before them. Carter v. Corle, M. 1684. 1 Vern. 259.
25. Exceptions to an award were allowed, though, by the submission, there should be no appeal or exception. Hide v. Cooth, M. 1689. 2 Vern. 109.
26. Conditional submission to an award be made de premisis. An award for part is bad; but, where the submission is not conditional, the award is good pro tanto. S. C.
27. Submission by a bond, the court will allow the same objection, as in an action on a bond. Cozater v. Anderson, E. 1720. 3 Vin. 134. pl. 19.
28. Submission by rule of court; the court will not receive objections, for the whole is considered to be within the rule. S. C.
29. Award that a mother shall procure her daughters to convey. The daughters are not bound, though they are entitled in remainder to the premises in question. Evans v. Cogan, H. 1727. 2 P. W. 450.
30. Bill to be relieved against an action on the bond. Ples as to so much of the bill as sought to set the award aside, and setting forth the submission and award as fairly made. Ples over-ruled, as covering too much, for plaintiff is entitled to relief against the penalty in all events. Potter v. Davy, M. 1734. 2 Eq. Ab. 75. pl. 35.
31. Though the arbitrators award the costs of the reference, which are not within the terms of the submission, that will not vitiate the award; but it will be good as to the remainder. Hartnell v. Hill, H. 1801. For. Exch. Rep. 75.
32. The submission, in this case, was made a rule of court after the award
made. Pownal v. King, E. 1801. 6 Vес. 10.

35. The objections to the award in this case being such as might have been equally the subject of jurisdiction in the King's Bench, where the reference was made a rule of court; it was contended that the reference ought to have been made a rule of court before the award was made; but per Eldon, C. it is of no consequence, for it must be made a rule of court, in order to apply (a); but where a man could have relieved himself at law, this court will deal less actively for him than if his bill had brought forward grounds peculiar to the jurisdiction of equity. Fetherstone v. Cooper. T. 1803. 9 Vес. 67. (a)Vide Pownal v. King, sup.

34. When an award is to be made a rule of court, the submission that it shall be so must be in writing. If, therefore, there is a parol agreement to make a reference a rule of court, until it is actually made so, either party may recede from it; for the word “insere” in the stat. 9 & 10 W. & M. c. 15. must mean an act that infuses that submission into something written. — v. Mills, H. 1811. 17 Vес. 419.

35. A wife having filed a bill against her husband, and he has filed a cross bill, all matters in dispute were submitted to arbitrators by consent of both parties, and an award was made. It is not a good objection to this award, that no separation had taken place between the husband and wife, and that wife's next friend was not a party to the submission. The award, in this case, being made a rule of court, an application was made to Clare C. to set it aside; but the court, without setting aside the award, made an order which partly did away the effect of it; upon which a doubt arose, whether it would not have better preserved consistency in the court's proceedings to set the award aside. Here the award was made, pending a suit in the Ecclesiastical Court for a divorces, and the award having assumed that there must be a separation, it provided accordingly. This was objected to, as an assumption of the jurisdiction of the Ecclesiastical Court, and as going beyond the submission in awarding a separation; to which it was answered, that the award did not adjudge a separation, but only proceeded upon the assumption that there must be one. Bateman v. Lady Ross, H. 1813. 1 Dow P. C. 235.

(d) Parties thereto.

36. Those who are not parties to the submission are not bound by the award. Thompson v. Noel, E. 1738. 1 Atk. 60.

37. Parties to an award are bound by it. Price v. Williams, T. 1791. 1 Vес. jun. 365.

38. A reference to arbitration being proposed, it was objected that one of the parties was a married woman, in respect of her interest in a real estate. Ld. Ch. would not allow the reference, nor would he let it go to the Master to enquire if it be for her benefit, as in the case of an infant, distinguishing the case of election upon the condition imposed. Davis v. Page, E. 1804. 9 Vес. 350.

AWARD III.

Where examinable (c).—Where confirmed (f).—When set aside (g).—Exceptions (h).—Disobedience and Punishment (i).—And of the Award generally (k).

(e) Where examinable.

39. An award, pursuant to an order of court, must be confirmed, and the cause may be set down for hearing on the award. Cressey v. Carrington, T. 1687. 1 Vern. 469. 2 Vern. 79.

40. Bill for a decree upon a matter about which an award has been made; without noticing the award, defendant insists on the award; plaintiff, in a supplemental bill objects to it; defendant files a bill to carry the award into effect. The court decreed on the right originally insisted on, leaving the award open to each party's remedy at law. Decree reversed in Demo Proc. by whom the cause was sent back, that both might be heard together on the whole matter. Hamilton v. Stapleton, E. 1702. Colles' P. C. 209.

41. On a bill to set aside an award, plaintiff at law did not pursue the method prescribed in 9 W. 3. by attachment, but brought his action on the bond;
AWARD III.

Where examinable. (c) Where confirmed. (f)

neither did he plead to the jurisdiction in equity. Ordered, the Master to state a case for the resolution of the court, whether equity may not proceed to examine the award. Ward v. Periam, E. 1720. 2 Eq. Ab. 91. pl. 1.

42. Equity will not interfere with an award that has been examined by another court of competent jurisdiction, unless subsequent fraud be shown. Cockey v. Anderson, E. 1720, 2 Eq. 92. pl. 2 ante. pl. 27.

43. The barons of the Exchequer thought themselves not confined to allow of exceptions to awards within the time prescribed by the statute, as courts of law are. Allardes v. Campbell, T. 1729. Bunb. 265.

44. But Ld. Ch. thought the two terms given by 9 & 10 W. 3. c. 15, s. 2, for complaints against undue awards, concluded all courts and all manner of equity. Godfrey v. Beschler, 1731. 3 Vin. Ab. 139. pl. 38.

45. Where arbitrators are deceived, or make a clandestine award, the court will avoid it. Medcalf v. Medcalf, T. 1737. 1 Atk. 63.

46. Bill will not lie to enforce an award where the parties to the submission do not acquiesce; it must be enforced at law. Spettigue v. Carpenter, E. 1738. 1 Atk. 60. 62. 1 Dick. 66.

47. The court, of which the award is made a rule, is the proper court to examine into the conduct of arbitrators. Kampshire v. Young, E. 1740. 2 Atk. 135. Vide Nichols v. Charlies, 14 Ves. 263. — v. Mills, 17 Ves. 419.

48. Neither law or equity will make a presumption to overturn an award, and it is proper that both courts should adhere to one rule. Lingood v. Eade, H. 1742. 2 Atk. 505.

49. Equity will not regard an objection to an award merely in point of form, or any other trivial matter. S. C.

50. To a bill for relief against an award suggesting misbehaviour, &c. in the arbitrators, they pleaded the submission and award with an averment of impartiality, but it was overruled. Rybott v. Barrett E. 1762. 2 Eden 131.

51. There is no way to get rid of an award in equity but by bill. Somptor v. Life, H. 1773. 2 Dick. 474.

52. Though an arbitrator, on a reference to enquire into facts, is as a master, the court will draw the conclusion, and see that it is right. Knox v. Simmonds.

T. 1791. 3 Bro. C. C. 358. 1 Ves. jun. 369.

53. The judgment of arbitrators on an allowance of compound interest is final; for it is a conclusion of fact, and, on a reference to arbitration, the court divests itself of all judgment on the facts. Morgan v. Mather, M. 1792. 2 Ves. jun. 15. 22.

54. Award that all suits should be discontinued; on motion that a subsequent bill filed should be dismissed, the court refused to act upon the award. Hutchinson v. Hodgson, M. 1793. 2 Anstr. 361.


56. Bill lies to set aside an award for fraud, though made a rule of a court, under 9 & 10 W. 3. c. 15. S. C.

57. Upon a reference to arbitration, if the award is not made in the manner and time stipulated, there is no case, either at law or equity, where the court has substituted itself for the arbitrators, and made the award, even where the substantial thing to be done is agreed between the parties; still less where any thing substantial is to be settled by the arbitrators. Cooth v. Jackson, H. 1801. 6 Ves. 54.

(f) Where confirmed.

58. Award that tenant for life should pay the remainder-man 370l. for waste (which was near the value of his estate) held good, though the party had made good the repairs within 40l. before the award was made. Where manifest error does not appear, without unravelling the award, and examining matters of accounts, it is not relievable. Brown v. Brown, E. 1683. 1 Vern. 157.

59. After an acquiescence of nine years an award shall not be set aside or unravelled on a suggestion that the empire had only considered of particular matters. Jones v. Bennett, T. 1713. 1 Bro. P. C. 411.

60. An award made without hearing one party, not set aside, because he had notice. Waller v. King, M. 1724. 9 Mod. 63.

61. An award of releases to the day of the date is good. Keen v. Godwin, T. 1728. Bunb. 259.

62. Bill to set aside an award, and for a general account. Plea, as against a general account, allowed; but plainti
AWARD III.

Where confirmed. (f) — When set aside. (g)

not precluded from objecting against the award for fraud or partiality. Lingood v. Eade, H. 1742. 2 Atk. 501.

63. Courts of law formerly used too much nicety in determining awards. S. C.

64. Reference by arbitrators of costs to be taxed will not vitiate the award at law. S. C.

65. Arbitrators award releases, leaving it to the court to give directions to a Master: this does not vitiate their award. S. C. ib. 506.

66. If arbitrators are mistaken in a doubtful point of law, it is no ground to set aside the award. Ridout v. Pain, T. 1747. 3 Atk. 494.

67. Award made by judges of the party's own choosing, is final, unless corruption appears, Titterton v. Peat, T. 1747. 3 Atk. 529.

68. Award cannot be set aside on motion, without being made a rule of court. Chicot v. Lequesne, T. 1751. 2 Ves. 317. ante, pl. 18.

69. The court will not let a party object to an award on a bill to set it aside, except for partiality or corruption; but if the party, by his bill, prays an account, he may make legal objections. Champion v. Wenham, M. 1754. Amb. 245.

70. Award not to set aside in toto for a mistake which turned the balance of an account. S. C.

71. An award can only be set aside for partiality or misbehaviour in the arbitrators, or for an excess of their power. Bumpster v. Life, H. 1773. Dick. 474. ante, pl. 51.

72. Award on a general reference cannot be impeached for erroneous judgment; but may for corruption, misconduct, excess of power or mistake admitted, but the evidence must be satisfactory. Morgan v. Mather, M. 1792. 2 Ves. jun. 15.

73. Award not to be set aside because an arbitrator made use of another person's judgment. Emery v. Wase, E. 1801. 5 Ves. 849.


75. It is no ground to set aside an award that the solicitor says he cannot attend the arbitrator's appointment, for if they make a reasonable appointment he must attend. Neither is it a ground to set aside an award that it was prepared by the solicitor of one of the parties, though very indelicat. Fetherstone v. Cooper, T. 1803. 9 Ves. 69. ante, pl. 35.

76. If an arbitrator, under a general reference meaning to decide according to law, mistakes the law, the court will set that right; yet if the parties choose to refer matters of law, meaning to have the judgment of the arbitrator upon them instead of that of the court, the award, though not agreeable to law, cannot be therefore impeached. Young v. Walter, E. 1804. 9 Ves. 364. Vide Kent v. Elatob, 3 East, 18. Ching v. Ching, 6 Ves. 282.

77. A declaration by one arbitrator that he had seen a letter of which (being mislaid) the contents were proved, he would have acted otherwise, is not sufficient to set aside an award, on the ground of a mistake admitted by the arbitrators, for there ought to be clear distinct evidence, and an affidavit by the arbitrators, to induce a court of equity to set aside an award, or a court of law to refuse to make it a rule of court. Anderson v. Darcy, H. 1812. 18 Ves. 447.

(g) When set aside.

78. On a submission, by consent and order of court, an award was made that a guardian should give a bond, that the infant when of age, should convey his lands. This award is unreasonable, and must be set aside, as binding upon an infant who may refuse to convey when of age. Cavendish v. ——, T. 1676. 1 Ch. Ca. 279.

79. The arbitrators being interested in the cargo touching which the award was made, their award was set aside. Earle v. Stocker, H. 1691. 2 Vern. 251.

80. Arbitrators promise to hear witnesses, but do not. Their award set aside. S. C. Vide Champion v. Wenham, Amb. 245. S. P.


82. Arbitrators throw cross and pile to choose an umpire. His award set aside, because so chosen. Harris v. Mitchell, H. 1704. 2 Vern. 483.

83. A submission to three arbitrators, or any two of them. Two make a private award. Set aside. Burton v. Knight, M. 1705. 2 Vern. 514.

84. Two or three days before an award made, one party desired the arbitrator to wait till he could satisfy him as to some
AWARD III.

When set aside.—Exceptions.—Disobedience.—Generally.


86. Baron and femme, before marriage, covenant to release all right that might accrue to them under the custom of London, from the wife's father's personal estate. The husband is bound by his covenant, and his release will bind the wife. An award to the contrary set aside. Medcalf v. Medcalf, T. 1737. 1 Atk. 63. ante, pl. 45.

37. If arbitrators are mistaken in a plain point of law, it is a ground to set aside the award. Ridout v. Pain, T. 1747. 3 Atk. 494. ante, pl. 66.

38. Award set aside, the arbitrator having received evidence after notice to the parties, that he would receive no more, and in which they acquiesced. Walker v. Frohisher, T. 1801. 6 Ves. 70.

(b) Exceptions.

39. Where exceptions were taken to an award, on a reference by consent, the court considered they had power to examine the justice of the award, and acted accordingly. Squib v. Bolton, M. 1670. 1 Ch. Ca. 186.

40. Either party may except to an award made by an order of court. Crossley v. Carrington, T. 1687. 1 Vern. 469. 2 Vern. 79. ante, pl. 39.

91. Exceptions allowed, though by the submission, there should be no appeal or exception. Hide v. Cooth, M. 1689. 2 Vern. 109. ante, pl. 25.

92. In this case the award or report of an arbitrator, upon a reference, was brought by him into court, to be read, but objected to, as not being filed and confirmed, so as to give the party an opportunity to except. The court ordered the report to be filed, and the party did except accordingly, but his exceptions were over-ruled. Vernon v. Wells, T. 1771. Dick, 452.

93. Exceptions will lie to matters on the face of the award, but not to matters of fact. Dick v. Millegan, M. 1792. 4 Bro. C. C. 117.

96. Exceptions may be taken to an award upon reference to inquire into facts. If allowed, the court will refer to a Master, and not back to the arbitrators. S. C. cited in Knox v. Simmonds, E. 1792. 1 Ves. jun. 369. 4 Bro. C. C. 358.

97. Exceptions to an award over-ruled, the order being that the award should be final. Mitchell v. Harris, E. 1793. 2 Ves. jun. 136.

(i) Disobedience and Punishment.

98. Attachment issued for not obeying an award, and then the party attached died, the attachment is gone, and the remedy lost: for it is not in nature of a judgment, but of a contempt. Webster v. Bishop, M. 1793. 2 Vern. 444. Pre. Ch. 223.

99. Where a submission to an award is made a rule of court, it is a contempt to dispute the order, unless partiality or corruption be shown. Lingood v. Crowcher, T. 1742. 2 Atk. 395. ante, pl. 17.

100. On non-performance of an award the proper motion is, that the party stand committed; and the service must be personal. Knox v. Simmonds, T. 1791. 4 Bro. C. C. 358. 1 Ves. jun. 369.

(k) Of the Award generally.

101. An award that a mother shall procure her daughters to convey, not binding on the daughters who were entitled in remainder. Evans v. Cogan, H. 1727. 2 P. W. 450. ante, pl. 29.

102. Bill lies to enforce an award to convey an estate where the party submitting has received the consideration money. Hall v. Hardy, T. 1783. 3 P. W. 187. 190.

103. There is a difference between an award to pay money and to do a collateral thing. S. C.

104. Award that an application shall be made to parliament to complete it, not binding, unless the act names. Gibson v. Smith, 1741. 2 Eq. Ab. 99. pl. 7.

105. The court will allow an award to be pleaded to a bill for the same matter, where it does not appear there was any discovery of new evidence subsequent to the award, or any fraudulent concealment of evidence by the defendant, at the time.

106. Disputes between a widow and heir at law were left to arbitrators, who made an award, to which the parties agreed; but no particular uses were directed thereby, except that the lands should be settled according to testator's will; and conveyances were made to carry the award into effect. The conveyances limited some of the lands contrary to the will. Upon a bill, by the widow, it was held she was entitled to have the conveyance rectified. *Ridout v. Pain*, T. 1747. 1 Ves. 10. 3 Atk. 494.

107. Submission of all matters in difference. Award to deliver up certain securities; two bonds were not noticed, yet presumed to be included in the award. *Crofton v. Conner*, H. 1770. 6 Bro. P. C. (T.) 409.

108. An award to be made on the first day of Machaelmas Term, afterwards enlarged till the first day of Hilary Term. An award made on the first day of Hilary Term is good. *Kneel v. Simmonds*, T. 1791. 3 Bro. C. C. 358. 1 Ves. jun. 369. ante, pl. 97. 101.

109. An order of reference was made to arbitrators, to take an account as before a Master. The parties are bound by a general award, without stating particulars; and the decision is final, because upon matters of fact. *Dick v. Millegan*, M. 1792. 2 Ves. jun. 23. ante, pl. 96.

110. There cannot be a partial enquiry in matters of award. Matters of exception must be confined to what appears on the face of it, compared with the proceedings. Any thing dehors must come upon motion to set it aside. S. C. M. 1794. ibid. 24.

111. Bill to set aside an award that had not provided for a particular event. The award ought to be final, unless particulars were stated. Plea of the award allowed. *Routh v. Peach*, H. 1795. 2 Anstr. 519.

112. A party cannot go into equity for discovery, and then fly to arbitrators for relief, for the court will not be ancillary to a domestic forum. *Street v. Rigby*, E. 1802. 6 Ves. 821.

113. An award which settles the costs on both sides is final. *Hartnell v. Hill*, T. 1804. 7 Gr. & El. 75. ante, pl. 31.

114. The court will not act under an award in a charity cause without the consent of the Att. Gen., or enquiring whether it be for the benefit of the charity or not; but with the Att. Gen.'s consent the court will allow a reference to a particular person by name, not considering him as an arbitrator, but as a special referee. *Att. Gen. v. Hewitt*, H. 1804. 9 Ves. 252.

115. Bill for specific performance of a contract made for the sale of an estate at a price to be fixed by arbitrators within a certain time, or by an umpire within a further limited time. The construction of the contract required the award to be made in writing, and ready to be delivered to each party before a certain day; in which case it should be final and conclusive on both parties, their heirs, executors, &c. The vendor died before the day appointed for the award, but was alive at the time of the investigation, and until after the arbitrators had made up their minds. The award being made, the representatives of the vendor refused to perform it, complaining that the estate was undervalued, and also objected that the award being framed as a deed was not on a deed stamp; but this objection was over-ruled. *Eldon*, C. said, first, that the death of one party was an event against which the court could not relieve. 2d. If the terms of an agreement were to be ascertained by an award, being so ascertained, the agreement shall be specifically performed if any thing is to be done in specie, as estates to be conveyed, &c., but not if the acts done towards executing the agreement are not valid at law, as to the time, manner, and other circumstances, unless there has been an acquiescence, notwithstanding the variation of circumstances, or the agreement evidenced by such an award has been part performed. (a) His Lordship further said there was no case at law or in equity, that if an award is not made at the time, and in manner stipulated, the court have substituted themselves for the arbitrators, and made the award even where the substantial thing to be done was agreed upon between the parties; but the time and manner left for others to prescribe; (b) and, finally, that there was no instance where the medium of an arbitration for settling the terms of a contract having failed, the court has assumed jurisdiction to determine that there is a contract in equity, though not at law, which shall be specifically performed, though the parties never agreed to it. Bill dismissed. *Blundell v. Bortagh*, T. 1816. 17 Ves. 252. See post.
AWARD III.—BANISHMENT.

116. Where legal rights are referred to arbitration, the award to be binding must be made according to law. Blan


118. On a question on the construction of an award, the court will endeavour to discover such a meaning as will make it certain and final, rather than a contrary construction, which would have the effect of defeating it. The specific performance of an award will be decreed in equity, it being an agreement on terms pointed out by a third person, and though equity will not specifically perform an unreasonable or illegal agreement, yet the court, considering the award as the decision of judges chosen by the parties, will not examine whether it is unreasonable. Therefore, where A. and B. having jointly contracted for the purchase of an estate, submitted all matters in difference between them to arbitration, and the arbitrator awarded that they should join in authorizing a sale of their interest in the estate, although a suit was depending against them for the specific performance of the contract for purchase, and it was yet undetermined whether the vendors could make a good title, no report having been made under an order of reference as to the title in that suit. A specific performance of the award was decreed. An award directing the sale of such an interest is not objectionable under the doctrine of maintenance and champerty. The circumstance of the court of K. B. having after an examination of defendant on interrogatories, and on receiving the report of its officer that defendant was not in contempt, discharged a rule nisi for an attachment for non-performance of the award, in refusing to sign an authority to sell the interest of himself and plaintiff in the estate, is not a ground to prevent this court from decreeing a specific performance. Wood v. Griffth, H. 1818. 1 Swanst. 43. 1 Wils. 34.

BANISHMENT.

A wife, whose husband is by act of parliament banished for life, may make a will, (a) and in every thing act as a feme sole, and as if her husband was dead, the necessity of the case requiring she should have such power. Countess of Portland v. Progers, T. 1689. 2 Vern. 104. (a) By 34 & 35 H. 8. it is declared in express words, that a devise of any manor, lands, &c. by a feme covert, infant, idiot, or non compos, is not good, and that such only as have a sound and disposing memory can devise. Vide Marquis of Winches
ter's Ca., 6 Co. 23. Cranvel v. Sanders, Cro. Jac. 497.—Note. The legatees under Lady Sandy's will, whose husband was banished, were decreed their legacies. 1 Eq. Ab. 171. pl. 1. (n.) Banishment can only be by act of parliament. Dict. per Ld. King, in Newsome v. Bowyer, 3 P. W. 38. as laid down in the case of Thomas de Wayland, 1 Inst. 133. Vide also Lady Belknap's Ca., 1 Inst. 132. Durly v. Duchess of Mazarine, 1 Salk. 116. Sparrow v. Carruthers, 2 Bl. Rep. 1197.
BANK OF ENGLAND.

1. Plaintiff filed his bill, claiming an equitable lien on stock (purchased with A.'s remittances from Virginia) in respect of money paid by plaintiff for the education of A.'s sons, and charging that such remittances were to satisfy plaintiff's demand. On motion by defendant, that the Bank might be ordered to transfer, Ld. Ch. said, this was requiring a decree by an interlocutory order; for defendant undertook to prove plaintiff had no lien, as appears by his answer. It is impossible to order a stakeholder to quit the stakes. Birch v. Corby, T. 1784. 1 Bro. C. C. 571.

2. The Bank of England were made parties to a bill, and as against them a discovery was prayed what sum an executrix had bought B.'s remainder into her own name. The Bank were brought on to a hearing. His Honour thought this an unnecessary expense, and said, that although in practice the service of a subpoena on the Bank operated as an injunction, by preventing their transfer, yet it was not so in law, as the subpoena served could not be an answer to an action for not permitting a transfer, though an injunction would; and his Honour declared it improper to bring the Bank to a hearing.—Bill dismissed with costs as against the Bank. Williams v. Williams, T. 1786. 2 Bro. C. C. 87.

3. Stock in the Bank being given by will to A. for life, remainder to B.; and A. having bought B.'s remainder, they joined in an application to the Bank to permit a transfer; the Bank refusing, a bill was filed; whereupon the Bank was ordered to transfer, but to be paid their costs. Pearson v. B. of Engl. H. 1789. 2 Bro. C. C. 529. 2 Cox. 175.

4. Though a residue is specifically devised, the Bank has no right to restrain the executor from transferring the funds. Lienjunction dissolved. B. of Engl. v. Moffatt, T. 1791. 3 Bro. C. C. 260.

5. Bank stock was specifically bequested to A. in trust to pay a bond debt due to himself; and as to the rest, to B. for life, remainder over; A., the trustee, being also executor, transferred to persons not entitled under the will. The Bank is not chargeable. Bill dismissed as against them. Hartgo v. B. of Engl. H. 1796. 3 Ves. 55. Ld. Ch. said, if the Bank were to be responsible in this case, they would be chargeable with all the trusts in the kingdom. The Bank could not prevent a transfer into the name of the executor, and when once the stock stood in his name he might transfer to others. It is required, for the protection of the Bank against a specific legatee, that the clause in the will shall be fully set forth to the Bank; if that is omitted, it is at the peril of the party.

6. The court ordered the dividends of money in the Bank on the testator's account to be paid according to the trusts of his will, but could not order the Bank to transfer where the trustee refused to answer. Shaw v. Wright, T. 1796. 3 Ves. 22. Ld. Ch. observed in this case, that it would be a great accommodation, and well worth while to give the court jurisdiction, as well in cases of infant trustees as where executors or trustees are abroad or obstinate, that the Bank should transfer as the court should order them. And in consequence of what fell from the Ld. Ch. in this case, the statute of 36 Geo. 3. c. 90. was made, to remedy the inconveniences complained of, and give the court further jurisdiction.

7. Part of a bankrupt's estate was paid into the Bank, in the names of the five assignees. One of them died, and another went abroad. The remaining assignees applied to the Bank for the money, to make a dividend, but the Bank refused to pay it without proof of the two other assignees being dead. But the court ordered the Bank to pay the money to the three remaining assignees. Exp. Collins, E. 1797. 2 Cox. 427.

8. The Bank cannot look beyond the legal title to the trusts of a will, and therefore cannot prevent an executor from selling out or transferring stock in his own name. B. of Engl. v. Parsons, M. 1800. 3 Ves. 665.

9. An application under the act of 39 & 40 Geo. 3. c. 36. to restrain the Bank from transferring, without making one residuary legatee and the executor parties, must be on notice to the defendants, or on affidavit, as in cases of waste.

Bank, should pay into court the dividends received by them previous to the filing of the bill. No order had been made either as to the capital or the dividends, but the Bank and South Sea Company refused to pay the dividends since the bill was filed. Defendants admitted themselves to be trustees, but stated, that the government had ceased to exist in consequence of the revolution. Ld. Ch. denied the motion; but said it might be made again, making the Att. Gen. a party. The Maryland case* being cited at the bar, Ld. Ch. said, there was a great distinction between that case and the present; that was a case in which the old government existed under the king's charter, and a revolution took place, though the new government was acknowledged by this country. Yet it was held, that the property which belonged to a corporation existing under the king's charter, was not transferred to a body which did not exist under his authority, and therefore the funds in this country was considered to be bona vacantia, belonging to the crown. Doben v. B. of Eng., H. 1805. 10 Ves. 352. *Barclay v. Russell, 3 Ves. 424.

17. A distribution by the Bank of extraordinary profit, beyond the regular dividend, not given by way of increased dividend, but as a bonus, was considered as capital, and not to belong to the tenant for life. Witta v. Steere, H. 1807. 13 Ves. 363. But in Barclay v. Waitewright, T. 1807, the tenant for life was held entitled to a dividend of 5% per cent. interest and profits for the half year.

18. Demurrer to a bill filed by the Bank for an injunction against the action of an executor, claiming a transfer of stock, allowed on the ground, that if the executor cannot maintain his action at law, an injunction is unnecessary; and if he can, upon his title to the stock to be applied as the other property, there is no equity. Bank of Eng. v. Lunn, H. 1809. 15 Ves. 569.

19. Copies of the Bank books are evidence, but upon a question whether the signature to a transfer is genuine, the books themselves must be produced, and such is the established course in the House of Lords. Auriel v. Smith, T. 1811. 18 Ves. 198. And see tit. Evidence.

20. The Bank of England are not entitled to prove a debt under a commission by a clerk without a power of attorney, but Eldon, G. said he would remove the difficulty by a general order, enabling them.

Bank of England, M. 1801. 6 Ves. 773. (n.)

10. Notwithstanding the act of 39 & 40 Geo. 3. c. 36. the Bank may still be made parties to a bill filed since that act to restrain a transfer of stock, and a demurrer by the Bank was overruled. Temple v. B. of Engl., E. 1802. 6 Ves. 770.

11. The Bank having been made parties under the decision of the last case, and the object in the present, viz. a discovery, and a restraint of transfer having been obtained, it was moved to dismiss the Bank, on payment of their costs. Ld. Ch. said, doubts had been intimated to him as to his decision in Temple v. The Bank, sup. but he was satisfied of its propriety. Att. Gen. v. Gale, T. 1802. 6 Ves. 777. (n.)

12. The trustees under a foreign will were dead, and no personal representation was taken out in this country. Held per M. R., that this was not a case for relief, by directing a transfer of stock within the statute 36 Geo. 3. c. 90. Lee v. B. of Eng., M. 1802. 8 Ves. 44.

13. Specific bequest of stock to the executrix for life, and after her death to her daughter absolutely at 21. The Bank having resisted a transfer according to an agreement to relinquish the life interest without the direction of the court, were held entitled to costs. Austin v. B. of Eng. T. 1803. 8 Ves. 522. Vide Pearson v. B. of Eng., 2 Bro. C. C. 529.

14. It seems that though the Bank made a difficulty in transferring a wife's stock at the instance of her husband, yet they consider themselves bound to do it if the husband insists upon it. Dict. in Wildman v. Wildman, M. 1803. 9 Ves. 176.

15. Motion by plaintiff, on behalf of himself and other members of the council-chamber of Berne, that the Bank and the S. Sea Company should be restrained from permitting a transfer of funds standing in the names of trustees, under a purchase by the old government before the revolution. Ld. Ch. refused the order, saying, that a judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which the court sits; and the fact of acknowledgment is a matter of public notoriety. Berne City v. B. of Engl., H. 1804. 9 Ves. 347.

16. Motion by the government of Switzerland, that their trustees and agents, in whose names money was invested in the
so to do. **Exp. Bank of Engl., T.** 1811. 18 Ves. 228. And accordingly his Lordship made such an order on the occasion of a similar application to the court. In **Re Stephens, H.** 1818. 1 Swanst. 10. 1 Wils. 293.

21. The Bank are entitled to be paid their costs out of the capital of a legacy, for the security of which they were made parties. **Hammond v. Neame, H.** 1818. 1 Swanst. 38. 1 Wils. 9.

22. The court will not interfere to require the Bank to transfer money which they withhold on having been served with process which was still in force, on a bill by representatives of deceased partners against the survivor of the firm, even for the purpose of paying partnership debts. **Toulmin v. Bank of Engl., H.** 1819. 5 Price 405.

For cases concerning Bankers in England, see tit. **Trade**, viii.

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**BANKERS IN IRELAND.**

**Restrictions upon them by the Irish Statutes.**

1. The laws regulating the trade of bankers in Ireland, form a very different and distinct code from the bankrupt laws; these do not attach upon the person or estate of the trader until an act of bankruptcy is committed by him, whereas the former attach upon a banker the very moment he embarks in that business. In the Irish statutes there are a variety of restrictions imposed upon bankers, to which no other trader is subject, all tending to give every possible security to the creditors of the Bank, so far as may be consistent with the necessary private dealings of every individual in society.

2. The first statute on this subject was that of 8 Geo. 1. c. 74. entitled, "An act for better securing the payment of bankers’ notes;" but as it is repealed by the act of 33 Geo. 2. it is unnecessary to state the provisions of it.

3. The next statute, which is still in force, is the 29 Geo. 2. c. 16, entitled, "An act for promoting public credit." It provides against concealed partners in a bank; for which purpose it enacts, under a severe penalty, that the name of every partner shall be subscribed to the promissory notes and accountable receipts issued by the house. This act also, under the penalty of 1000L, prohibits any banker from trading as a merchant, exporter, or importer; and makes it a capital felony in any clerk or cashier of a banker to embezzle or carry away money, or securities for money, the property of his employer, with intent to defraud him; and all persons knowingly receiving any such property, are declared felons.

4. The last act upon this subject is that of 33 Geo. 2. c. 14. entitled, "An act for providing a more effectual remedy for the security and payment of debts due by bankers." It is evident from the title, that the provisions of this last act were not intended to be confined to the mere creditors of the bank, but were made to extend to all the creditors of a banker without exception.

5. This last statute repeals that of 8 Geo. 1.; and what seems a singular provision, it enacts, "that no clause of that act shall in any sort obstruct or impede the operation of any of the clauses in the act of 29 Geo. 2." It may, however, be proper to advert to the time and occasion upon which this act was passed; it was in the same session in which an act had passed for the relief of the creditors of the bank then lately held by Mr. Malone and others: it was in part intended to stop a practice of which that bank had set the example, and ultimately became the victim,—the issuing of promissory notes payable with interest; and to quiet the general alarm which the failure of that house had spread, by enacting very general and extensive regulations upon a subject so essential to the commercial and trading interests of the
BANKERS IN IRELAND.

Restrictions upon them by the Irish Statutes.

country; and however obscurely some of the clauses may be framed, the statute of 33 Geo. 2. connected as it is with the 29 Geo. 2., establishes the most solid and permanent security to every man who has dealings with a banker in Ireland; and Lord Clare has said it is a matter of astonishment that some similar regulations have not been made in a neighbouring kingdom.

6. When these laws were made, the Irish had not adopted the English code with respect to bankrupts, and many of the provisions of the statute of 33 Geo. 2. were framed upon the model of the bankrupt laws of Great Britain. The clause which subjects the property of a banker, on his stopping payment or absconding, to all his debts, was clearly framed on that model; and the other clauses, which go farther than any of the bankrupt laws in Great Britain or Ireland are so framed that it is impossible for an Irish banker to trade on a fictitious capital: he cannot borrow money and secure it to the lender without giving full and public notice to the creditors of his bank; so that they never can if they will use reasonable diligence, be taken in to give him a credit beyond his real capital.

7. The restrictions to which bankers in Ireland are subject by the existing laws, are these:—First, the name of every partner must be signed to all promissory notes and accountable receipts issued by the house. Next, a banker is not allowed, under a severe penalty, to follow the business of a merchant, exporter, or importer. The next and most material construction is, that all deeds and conveyances made by any banker, by which any part of his real estate, or leasehold, or by which any mortgages belonging to him shall be granted, sold, mortgaged, demised, or in any way incumbered or affected, except leases for three lives, or 21 years, made at improved rents without fine, are declared fraudulent and void against all and every of his creditors, though made for a valuable consideration, unless such deeds shall have been registered in the public office for registering deeds, within one month from the date, if executed in Ireland, and within three months if executed elsewhere. He is next disabled even by a deed registered within a month, so long as he continues a banker, to make any settlement or conveyance to a child or grandchild, which shall prevail against his creditors. Next he is disabled from giving any security or note payable with interest, and every such note is declared void; but although by this provision the contract for payment of interest is nullified, it does not follow, that the principal sum for which the note is made may not be recovered.—On this clause Lord Clare observed, that it could not be considered to extend to a settlement made upon his marriage, but that it clearly takes in a conveyance to a child or grandchild in existence, though made for valuable consideration of marriage. 5 Ridg. P. C. 596.

8. It is next enacted, that the promissory notes of a banker payable on demand, if not paid on demand, shall bear interest; and from the moment that he stops payment, absconds or conceals himself, he is disabled from receiving or giving a legal discharge for any sum of money due to him; and he is also disabled from disposing of any part of his real or personal estate, or to execute any deed in any manner affecting it, unless a deed conveying his whole estate, or a sufficient part of it, for the payment of his debts, to trustees for the benefit of his creditors, or a deed of trust, agreed to and accepted by all his creditors. So that from the moment he absconds, stops payment, or dies, all his real and personal estate, rights, credits and effects, whether legal or equitable, become liable to all his debts, of what nature or kind soever they be, without regard to preference or priority in point of payment, except debts or incumbrances secured by deeds duly registered, pursuant to the provisions of the act, which are declared not to be affected by it.

9. It was not till the 11th or 12th year of Geo. 3. that a general bankrupt law was enacted in Ireland, and in that act bankers by name are included. The disabilities created by the bankrupt laws do not attach upon any trader until an act of bankruptcy has been committed by him, and therefore, unless an act of bankruptcy has been committed by a banker, he stands unaffected by them.

10. Hence it seems clear, that the acts for regulating the trade of a banker in Ireland are not repealed by the bankrupt laws: they form distinct codes, and may stand together. But it may be material to consider, when these laws are to be
executed, how the two codes may affect each other, and how far the equitable rules and principles which have been long established for the distribution of the estates of bankrupts, may and ought to govern courts of equity in the execution of a trust created under the authority of the act of 33 Geo. 2.

11. No point is more clear, than that a subsequent affirmative statute may repeal a prior one, if the words are contrariant; but it is equally clear, that if there be two affirmative statutes made on the same subject, in all points in which they do not contradict each other, both shall stand: therefore, in every case where a banker commits an act of bankruptcy, and a commission of bankruptcy issues against him, it seems certain that the assignees under that commission will be bound by every clause in the acts of 29 & 33 Geo. 2. not altered or repealed by the bankrupt laws, as fully and effectually as trustees would be bound by the same clauses acting under a deed of trust executed under the authority of the latter act. So it is equally evident, that where the provisions of that act do so attach upon the property of the bankrupt as to prevent the operation of the bankrupt laws, that no commission of bankruptcy can issue against a banker; and that in such case, though bankers are expressly named in the bankrupt laws, they cease to be the objects of them. Per Ld. Ch. Clare, in Dom. Proc. Hibern. in Hayden v. Carroll, H. 1796. 3 Ridg. P. C. 592. 600. Vide etiam Hayden v. Rivers, T. 1794. 1 Ridg. P. C. 448, (n)


14. The mode in which bankers' accounts with their customers are taken, is by charges, interest on their advances in a separate column up to the day of a lodgment made, and then the lodgment is deducted from the principal, and so on to the end of the year, when a rest is made, and a balance of principal, together with the interest, constitutes the first item in the next year's account. Such accounts are directed by the court to carry interest on the whole of the annual balances, though interest be paid on interest at the end of every year where there is a long acquiescence, but acquiescence alone in an account furnished will not amount to a settlement. Rests made by bankers at the end of every three months, however, will not be permitted. Id. Clancarty v. La Touche, M. 1810. 1 Ball & Be. 420. But rests at the end of every six months have been allowed. Vide Exp. Bevan, 9 Ves. 223. Where bankers' accounts are furnished yearly, and are acquiesced in, the court will presume an agreement, that the balance of principal and interest shall carry interest, but an agreement a priori, that interest should bear interest will be void; but that it should at the end of every year, is a valid agreement. Vide Bosanquet v. Dashwood, Forr. 37.
I. Of the Commission and Commissioners.
   (a) Of the Effect of a Commission, and of the Force, Operation, and Priority of an Extent on the Bankruptcy of the King's Debtor. (b) Of the Power, Duty, and Liability of the Commissioners. (c) Of the Docket and Sealing, or Re-sealing of the Commission, and herein of the Advertisement of the Bankruptcy. (d) Of the Examination of Witnesses, and of their Protection. (e) Of the Solicitor and Messenger, and herein of the Provisional Assignment. (f) Of Second Renewed and Auxiliary Commissions. (g) Of the individual Rights, Duties, and Liabilities of the Bankrupt. (h) Of the Death of the Bankrupt.

II. Of the Act of Trading.
   (a) Who is a Trader within the Bankrupt Laws. (b) Who is not. (c) Of the act of Trading generally.

III. Of the Petitioning Creditor.
   (a) Who may be such, and who may not. (b) Of the Duties and Liabilities of a Petitioning Creditor.

IV. Of the Act of Bankruptcy.
   (a) What amounts to an Act of Bankruptcy and what does not. (b) Of the Effect of an Act by relation. (c) Of the Act of Bankruptcy generally.

V. Of the Proof of Debts.
   (a) What Debts are proveable of course, and what are not so, and herein of the general Rights of Creditors. (b) Of Proof of Debts on Bonds, Bills, Notes, Annuities, &c. of the Interest, Protest, Re-exchange, Costs, &c. (c) Of Debts payable at a future Day, or on the happening of a contingent Event. (d) Of Debts due in Ireland, Scotland, and in Foreign Countries. (e) Of Rent Arrear at the Time of the Bankruptcy. (f) Of Money due on Mortgage, or on an equitable Deposit of Deeds. (g) Of the Proof of Debts in Cases of Lien, Pledge, or Set-Off. (h) Of Debts due to Solvent Partners, or those claiming under them. (i) Of Debts due to Sureties. (k) Of Debts due to Executors, Trustees, Guardians, &c. (l) Of Debts due to Corporation, Parish Officers, &c. (m) Of Proofs in respect of Policies of Insurance. (n) Of the Portions, or Property of a Bankrupt's Wife or Children.

VI. Of the Assignees.
   (a) Of the Choice of Assignees. (b) Of the Power, Duty, and Liability of the Assignees. (c) Where the Assignees are bound by the Acts of the Bankrupt, or are subject to, or have the benefit of his Equities. (d) Of Suits by and against the Assignees, touching the Bankrupt's Estate. (e) Of Insolvent Assignees. (f) Of the Death or Removal of Assignees.

VII. Of the Commissioners' Assignment.
   (a) What shall pass to the Assignees under the Commissioners' Assignment, or Bargain and Sale in general Terms, and what shall not pass thereby. (b) In what Cases the Wife's Fortune shall pass to the Creditors, and where the same shall be protected.

VIII. Of the last Examination.
   (a) Of the Bankrupt's Final Surrender. (b) Of his Commitment for Contumacy. (c) Of his Protection from Arrests.
IX. Of the Certificate.
   (a) By whom to be granted or refused. (b) For what Causes it will be stayed, denied, or declared void. (c) Of Gratuities given to obtain a Bankrupt’s Certificate. (d) How far it will discharge the Person or future Estate of the Bankrupt, and herein of the general effect of his Certificate.

X. Of the Dividend.
   (a) When to be declared, amongst whom, and how to be recovered. (b) How to be made, where the Creditors are joint, and several.

XI. Of the Bankrupt’s Allowance, or per Centage.
   Where payable and where not.

XII. Of a Refund of Property.
   Where a Creditor being partially paid or secured, shall be bound to refund.

XIII. Of Mutual and Contingent Debts.
   And herein of Cases of Set-off and Counter Demands.

XIV. Of Election.
   Where a Creditor shall be bound to elect whether he will seek Relief under the Commission, or pursue such other Remedies as he may have.

XV. Of Joint and Separate Traders.
   (a) Of the Practice adopted in the Bankruptcy of Copartners, previous to Lord Thurlow’s Order of the 8th March, 1794. (b) Of the subsequent and present Mode of proceeding. (c) Of the Interests of the joint and several Creditors in the effects of Joint Traders, and also in their separate Estates. (d) Of the Situation of a Solvent Partner, as connected with one who becomes Bankrupt, and herein of dormant, retiring, and deceased Partners.

XVI. Of the Supersedeas.
   (a) In what Cases granted. (b) Where refused. (c) Of the Supersedeas generally.

XVII. Of Bankrupt’s Trustees, Executors, or Agents.

XVIII. Of Annuities under Commissions of Bankrupt.
   And herein of the Sureties of the Bankrupt.

XIX. Of the surplus.
   (a) Where allowed, whether the Estate be joint or separate. (b) Where Interest shall attach in respect of Debts proved. (c) Of the Surplus generally, and of the Bankrupt’s Interest therein.

XX. Of the Sale of Bankrupt’s Estate in Mortgage before the Commissioners, under the Chancellor’s Order.

XXI. Of the Jurisdiction of the Lord Chancellor and the Vice Chancellor, and herein of the Requisites to support Petitions, &c. in Matters of Bankruptcy, and of the Course of the Court on such Petitions.

BANKRUPT L

Of the Commission and Commissioners.

(a) Of the Effect of a Commission, and of the Force, Operation, and Priority of an Extent on the bankruptcy of the King’s Debtor.

1. The granting a commission is not discretionary, but de jure on the petition of persons interested. The word may in the statute signifies must. Alderman Blackwell’s Case, E. 1688. 1 Vern. 132. 2 Ch. Ca. 143. And in no instance the court supersedes it without directing an issue, unless fraud or vexation appears. Exp. Wilson, Exp. Bradshaw, H. 1732. 2 Aik. 218.

2. Every one is bound to take notice
of a commission of bankruptcy. *Hutcheson v. Sedgwick*, T. 1690. 2 Vern. 161.—The statutes bind the courts of equity as well as law. *Exp. Goodman*, T. 1715. 2 Vern. 697. But they do not bind the Crown. *Rex v. Pixley*, M. 1725. Bumb. 202. though that was admitted in *Att. Gen. v. Stanniforth*, H. 1721. ibid. 98. There can be no such thing as an equitable commission; it must be a legal one. *Small v. Oudley*, M. 1727. 2 P. W. 429. for a commission of bankruptcy was held an action and an execution in the first instance. *Twiss v. Massey*, E. 1737. 1 Atk. 67. *Exp. Wilson*, H. 1732. 1 Atk. 153. *Sed vide Exp. Brown*, 1 Ves. & B. 66. where Lord Eldon, C. said he always found a difficulty in considering a commission as an execution in a strict sense. *Vide etiam Exp. De Tassett*, 17 Ves. 251. where his Lordship said, a commission was in nature of an execution for the legal debt of the petitioning creditor, and in *Exp. Hamper*, ib. 408. he said, a commission was deemed, but not accurately, an action and an execution in the first instance. The statute 13 Eliz. gives commissioners an equitable as well as a legal jurisdiction; and on petitions, Ld. Ch. proceeds as by a bill, upon the rules of equity, but a commission is not now treated as an execution, for the distribution is equitable. *Exp. Elton*, T. 1796. 3 Ves. 239. *Exp. Storke*, T. 1814. 3 Ves. & B. 107. and a commission differs from an execution, in vesting all the rights and possibilities of the bankrupt; for the latter only passes what the sheriff seizes. *Exp. Brown*, H. 1793. 2 Ves. jun. 68. 3. An extent in aid was taken out by the king's receiver against his own debtor, who was a bankrupt, and his assignees brought their bill in Chancery to set it aside. After 15 years pendency of the suit, the bill was dismissed. The jurisdiction belonging to the Exchequer, as the king's court of revenue, from whence the extent issued, and if Chancery was to set it aside, the process might be carried on in the Exchequer until the debt was cleared, according to the course of that court. *Brown v. Bradshaw or Trant*, E. 1701. Fra. Ch. 158. 2 Vern. 426. 4. If an extent and a commission issue on the same day, the extent shall have the preference. *Rex v. Earl*, H. 1718. Bumb. 33. *Sed vide Capell v. Brewer*, T. 1687. 1 Vern. 469. where it was resolved, that if an accountant to the king had sufficient effects of his own to satisfy, he ought not to have an extent in aid to defeat other creditors under a bankruptcy. *Et vide Cholmley v. Sturt*, 2 Vern. 496. *Exp. Balsfeld*, T. 1719. 1 P. W. 568. 5. A commission issued by a bankrupt's father to obtain his discharge, is an argument of fraud. *Exp. Balsfeld*, T. 1719. 1 P. W. 568. 6. Under the old statutes, a man was considered as guilty of a crime, or tort, in becoming a bankrupt. *Exp. Bennet*, E. 1743. 2 Atk. 258. 7. Granting caveats against the sealing of commissions, to be heard by counsel upon petition, has been found inconvenient, and affording the bankrupt an opportunity to make away with his effects. *Exp. Parsons*, H. 1746. 1 Atk. 72. 8. A commission cannot supersede a decree for a receiver, which is discretionary in the court, and as useful a power as any that belongs to it, and it is provisional only, not affecting the rights of the parties. *Skip v. Harwood*, T. 1747. 3 Atk. 564. 9. An order for dissolving an injunction nisi, will be made absolute, notwithstanding plaintiff is a bankrupt, unless he shows cause, for bankruptcy is no abatement. *Anon. M. 1748. 1 Atk. 263.* Whether the bankrupt be plaintiff. *(Davison v. Butler*, T. 1794. 2 Anstr. 60. (n.) Or defendant. *Rutherford v. Miller*, T. 1794. Anstr. 458. 10. The bankrupt laws are not adopted in Ireland. *Exp. Williamson*, T. 1720. 1 Atk. 82. *Sed vide 11 & 12 Geo. S. c. 8. of the Irish statutes, by which they are now adopted. 11. Where a security for a bankrupt and his co-obligor in a bond to the crown is compelled by an extent to pay the money, he may prove his debt and all charges. *Exp. Marshall*, E. 1731. 1 Atk. 262. 12. A commission against A., describing him as a partner with B. is a separate commission, *Exp. Woodmason*, H. 1787. 1 Cox, 308. 13. A commission cannot be altered, though a clerical error made in the office be evident. *Exp. Lee*, T. 1787. 1 Cox, 393. 14. A debt due to the crown shall be preferred to creditors under a commission, the sheriff being in possession under several extents, one of which was tested the day the provisional assignment was executed, so that the crown got the first possession, but the others
Effect of a Commission.

15. The crown will seize before the assignment, if it can, for a debt due from the bankrupt. Exp. Smith, E. 1800. 5 Ves. 297.

16. Ld. Ch. Eldon took the first occasion to express his strong indignation at the frauds committed under cover of the bankrupt laws, and especially in the country, where the bankrupt’s estate has been considered little more than a stock in trade for the commissioners, the assignees, and the solicitor; and their calculations have been made, how many commissions can be brought into the partnership. His Lordship said, that the bankrupt laws, as now administered, are a disgrace to the country, and a public nuisance; and after enumerating various instances of fraud and misconduct, he declared his determination to repress such practices in future. Pref. to 6 Ves.

17. Whereas many country commissions are directed to two esquires, who are not barristers, whereby improper persons become nominated as quorum commissioners. Ordered, that in future, no commissions be directed to an esquire, as a quorum commissioner, who is not a barrister. Per Ld. Loughborough, Aug. 12, 1800. 5 Ves. Pref. And if this order be evaded, it is a good ground for superseding the commission; for the barrister who cannot attend for the 20s. allowed by 5 Geo. 2. c. 30. s. 42. is not within the order. Exp. Harbin, E. 1811. 1 Rose 58.

18. A bankrupt was described in the commission as a surviving partner, which was alleged to be injurious to the petitioner, and unnecessary, but Ld. Ch. would not allow such a description to be altered. Exp. Thomson, M. 1803. 9 Ves. 207.

19. Under an extent against a bankrupt, the crown seized acceptances not due at the time of the bankruptcy, on which credit had been given, so that the bankrupt was not indebted at the time of his bankruptcy. Held, that the assignment of the commissioners should prevail over this extent. Exp. Rawton, T. 1810. 17 Ves. 431. Et vide S. C. post, tit. Trade, viii.

20. A. and B., bankers in London, had, at the time of their bankruptcy, cash and short bills belonging to C. and D., bankers in the country. The cash consisted of the excise duties, remitted by the country to the London bankers, and against which they had given to the commissioners the latter’s acceptances. An extent issued upon them; held that the crown has a right to elect against what funds it will go; and on the consent of the Att. Gen., the short bills were ordered to be delivered up. Exp. Rawton, T. 1810. 1 Rose 15. Vide Giles v. Perkins, 9 East 12.

21. To render the proceedings under a commission of bankruptcy evidence, it is now enough, under 49 Geo. 3. to show, that they are produced from the custody of the solicitor to the commission, or to prove the handwriting of one of the commissioners before whom they were taken. Collinson v. Hullear, T. 1811. 1 Rose 221. 3 Campb. 30.

22. A commission of bankruptcy is not by an execution within the meaning of the statute of 8 Anne, c. 14. s. 1. which directs that no goods upon demised premises shall be taken under any execution, unless the execution creditor shall, before the removal of such goods, pay to the landlord all arrears, not exceeding a year’s rent. Lee v. Lopes, H. 1812. 1 Rose 342. 15 East 230.

23. To scire facias against bail they may plead in bar to the execution, that before the alias sci. fa., plaintiff became bankrupt, and was so declared before the return of the writ, and that his effects, debts, &c. were assigned to the provisional assignee, who, before plea pleaded, assigned to the assignee under the commission, and that he was entitled to sue defendants. Kinneir v. Tarrant, E. 1812. 1 Rose 350. 15 East 622.

24. The commission and proceedings are conclusive evidence of the bankruptcy, unless notice be given under Sir. Sam. Romilly’s act. Humphries v. Coggan, E. 1812. 1 Rose 226. Unless on an indictment of a bankrupt for perjury before the commissioners, in which case it seems necessary to give strict evidence of the trading, petitioning creditor’s debts, and act of bankruptcy. Rex v. Punshon, ibid. 1 Rose 223. 3 Campb. 96 et vide Rex v. Buller, 1 Taunt. 71.

25. Where four traders carried on business in co-partnership, having a house in London, and another in Edinburgh, and two of the partners, till the bankruptcy, resided in Edinburgh, and severally carried on trade there, distinct from the co-partnership, and the rest of the
PARTNERS resided in London; a commission of bankrupt against the partnership was held to be a complete bar to a sequestration, either against the property of the partnership in Edinburgh, or the personal or real property of the separate and resident traders. But the validity of the commission is a question for the English Chancellor's decision, the courts of Scotland not having jurisdiction; yet if they are satisfied that the party subjected to the commission was domiciled in Scotland, and had not been domiciled in England, it is a question whether they would be bound to give effect to it. In the present case, three of the Lords of Session doubted whether the sequestration ought not to be awarded, qua ex the separate estates of the two resident traders: Ld. Crager, however, thought, that the sequestration ought to have been awarded by the Ld. Ordinary in the first instance, reserving the effect of it for after consideration.Bank of Scotland v. Cuthbert, M. 1812. 1 Rose 462.

26. If a commission has passed the great seal, although it never be opened or acted upon, yet has issued within the meaning of 49 Geo 3. c. 121. s. 2. so as to be notice of a prior act of bankruptcy. Watkins v. Mounde, M. 1812. 1 Rose 361.

27. A creditor is entitled to a commission of bankrupt as a matter of right, yet it must be the commission of the creditor, and not of the bankrupt. Exp. Downes, T. 1813. 1 Rose 593. Vide Exp. Gardiner, ib. 378.

28. The court of K. B. will sustain a commission of bankrupt notwithstanding the following objections:—

1st. That the petitioning creditor had, upon striking the docket, made an affidavit of his debt as for goods sold, though he had at the time obtained judgment in an action brought to recover the amount of the goods.

2d. That prior to the act of bankruptcy upon which the commission issued, there was another act of bankruptcy, with a debt sufficient to sustain a commission, and of that the petitioning creditor had notice.

3d. That prior to presenting the petition for a commission, the petitioning creditor had not relinquished his judgment.

As to the first objection, it was resolved, that all which the stat. 5 Geo. 2. c. 30. s. 23. required, was a debt of sufficient amount; secondly, that it was not competent to the bankrupt to defeat a commission against him, by alleging the criminality of another act of bankruptcy; thirdly, the stat. 49 Geo. 3. c. 121. s. 14. only applied to creditors who came in to prove their debts. Bryant v. Withers, T. 1813. 2 Rose 8.

29. A commission of bankrupt vests in the assignees under it all the persons or moveable property of the bankrupt, precluding creditors in Scotland, where the bankrupt also resided and traded from attaching by legal process such property of the bankrupt in that country, or from administering it in a course of distribution under a sequestration. But the commission does not affect the heritable or real property out of England, nor is there any legal obligation on the bankrupt to convey it to his assignees, farther than what the creditors are indirectly enabled to enforce, by the power which they have of granting or withholding his certificate. Held also, that the title of the assignees by assignament under a commission of bankrupt, does not, like an assignment by an individual, or upon particular contract, require intimation, the former being recognised as a transfer of a public nature, taking effect by operation of law, as a transfer by marriage: and it seems, that to complete a title by assignation, it is not necessary that the intimation should be notarial or formal; ordinary notice, or circumstances of conduct from which a claim under the assignation is to be inferred, will be considered as equivalent to solemn intimation. Selkirk v. Davis, E. 1814. 2 Rose 291. On appeal, 2 Dow P. C. 231. S. C.

30. On motion for an amovens manus, where the sheriff had seized debts due to the bankrupt at the test of the writ, and paid them to his assignees under a commission issued after the extent, and before the taking of the inquiry, the court intimated that this was not regularly a subject for summary interference, but ought to be put on the record. Res v. Glenny, T. 1816. 2 Price 396.

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Power and Duty of Commissioners.

32. A creditor ought not to act as a commissioner. Exp. Prosser, T. 1816. 2 Rose 370.

33. On the application of claimants, the court will order a venditioni exponas to issue before the due time arrive for selling a bankrupt's goods, seized under an extent, on an affidavit that it would benefit the bankrupt's estate; but the court will direct the sheriff to pay the prosecutor's demand to the Deputy Remembrancer, to the credit of the cause, and the remainder to the assignees, on the claimants paying into court £100 beyond the amount of the debt claimed by the prosecutor. Rex v. Cripps, H. 1817. 3 Price 606.

34. A power of attorney to execute the indorsement of a sale upon the register of a ship when she comes home, is not revoked by the bankruptcy of the granter of the power. Dixon v. Evart, T. 1817. 1 Buck 94.

35. Where a bankrupt's effects have been sold under a venditioni exponas, on an extent in default of claim, his assignees are not concluded; but they will be allowed, on application, to enter their claim, and plead in a proper case where the proceedings have gone so far, on payment of the costs of the sale and of the application, and putting the prosecutors in the same situation as if they had claimed and pleaded in due time; for laches cannot be attributed to assignees for the short delay of a month only. Rex v. Adam, M. 1817. 5 Price 39.

36. Infant defendants will not be concluded as to the question of bankruptcy, by the production of the commission under the 49th Geo. 3. c. 121. s. 11. though no notice has been given on their part of an intention to dispute the commission. Bull v. Tinney, T. 1819. 4 Madd. 372.

(b) Of the Power and Duty of the Commissioners.

37. The goods of a bankrupt were seized by the commissioners in Topsham bay, which were consigned to persons in Holland; who had not paid the bankrupt for them. The master of the vessel was ordered to deliver the goods to the commissioners, on payment of his freight, and on being indemnified against the bill of lading. Anon. M. 1709. 2 Eq. Ab. 98. pl. 1.


39. Commissioners are punishable for misconduct, as where a commission was taken out, and not opened for three months, this shows it was done to protect the estate, and it shall be superseded for example sake. Comb's Ca., T. 1725. Sel. Ch. Ca. 46. So, where a man was both clerk and commissioner, and received double fees. He was removed. Wood's Ca., T. 1725. Sel. Ch. Ca. 46. So, if commissioners wrongfully find a man a bankrupt, they are liable to an action. Whelock's Ca., T. 1725. Sel. Ch. Ca. 46. So, where the commissioners took more than 20s. a-piece, and spent large sums in feasting, at the expense of the estate, they were removed, a new commission was awarded, and they paid all costs. Exp. Holiday, H. 1799. 7 Vin. Ab. 77. pl. 3. Commissioners in the country can take no more than 20s. a-piece for each sitting. Exp. Pugett, H. 1786. 2 Bro. C. C. 50. So, where the bankrupt was prevented from surrendering at his last examination, because the commissioners did not attend on the day, the court censured them upon their petition for another day, and said the petition ought to have been by the bankrupt. Exp. Grey, T. 1790. 1 Ves. jun. 195.

40. Advertisements of sales before commissioners, should not be general, but name the hour, as before a master: and if a better bidder comes before the commissioners are gone, he must be received. Exp. Green, E. 1747. 1 Atk. 292. But the mode of selling is left to the commissioners, and not directed by the court, as in a sale before the master. Exp. Comyns, E. 1690. 1 Ves. jun. 112. 2 Coz. 225. S. C. Yet the commissioners cannot decide, whether a bankrupt's estate shall be sold or not; there must be an order for the sale, and any creditor has a right to insist upon it. Exp. Goring, T. 1790. 1 Ves. jun. 169.

41. Proceedings under commissioners are formed in analogy to those in Chancery; and in accounts, the court is to be aided by a proper officer as a master, and commissioners, or a master may proceed ex parte, without an order. Exp. Bax, T. 1751. 2 Ves. 388.
42. The Ld. Ch. will not interfere with the discretion of commissioners of bankruptcy by making an order upon them to enforce answers from a person examined as to the bankrupt's property received by him. *Exp. Farr*, T. 1804. 9 Ves. 513.

43. There are many acts of the commissioners, that the great seal cannot control, their authority to do them being given by the legislature. If the commissioners commit the bankrupt for not answering to their satisfaction, the Ld. Ch. (sitting in bankruptcy) cannot discharge him, though he may review their opinion, whether the answers are satisfactory; the mode is by suing out an *auctoritates* and a return to that, and then the Chancellor, not under the bankrupt statute, but as a law officer, having a right to issue that writ by the general law, has the return brought before him, and determining as any other judge; therefore the review of the conduct of commissioners in such case is not shut out. *Exp. King*, T. 1803. 11 Ves. 425. *Vide* Taylor's Ca. 8 Ves. 328. *Exp. Nowlan*, 11 Ves. 511.

44. It is no objection to a commission of bankruptcy, taken out by a creditor *bona fide*, and not at the instance of the bankrupt, that the direct object is to prevent an execution. *Exp. Bowes*, M. 1806. 11 Ves. 541. *Exp. Arrowsmith*, M. 1807. 14 Ves. 207.

45. The commissioners of bankruptcy and the Ld. Ch. have authority in bankruptcy to compel a discovery even against a purchaser for valuable consideration without notice. *Exp. Herbert*, M. 1806. 13 Ves. 183.

46. Lunacy is no defence against a commission of bankruptcy, any more than an action. *Anon.*, E. 1807. 13 Ves. 590.

47. Commissioners of bankruptcy ought not to decline to act, nor have a petition presented merely to get the opinion of the Chancellor. S. C.

48. Commissioners of bankruptcy may be removed for misconduct, but must not pay costs. *Exp. Scarth*, T. 1807. 14 Ves. 204. except in respect of conduct out of their duty as commissioners. S. C. E. 1808. 15 Ves. 293.

49. It is discretionary in the commissioners to sign a bankrupt's certificate, and they are not subject to any controul whatever on the subject. *Exp. King*, T. 1808. 15 Ves. 126. T. 1805. 11 Ves. 417. M. 1806. 13 Ves. 181. In consequence of what fell from Ld. Ch. in 1805, (11 Ves. 425.) a *mandamus* was moved to the commissioners to sign the certificate, which was refused. S. C. 7 East 92.

50. Costs were allowed to commissioners who were made parties to a petition without sufficient grounds. *Exp. Steele*, T. 1809. 16 Ves. 161.

51. A petition was presented by assignees to restrain the commissioners from bringing an action against them for the costs of defending an action brought against the commissioners and messenger for false imprisonment, in which the plaintiff was nonsuited; and also for a contribution among the creditors who had proved their debts; but the court dismissed it as to both. *Exp. Lainheau*, T. 1809. 16 Ves. 234. In *Batty v. Grewley*, 8 East 319. (which was the action mentioned above,) it was decided that the commissioners' warrant for arresting a witness may issue at once upon disobedience to their summons, and does not require a second summons.

52. Where a commission has been delayed in the opening for four months, and the bankrupt was the cause of the delay, the commissioners will be ordered to proceed. *Harrison's Case*, M. 1814. 3 Ves. & B. 174.

53. *Eldon*, C. said, he had suspended the insertion of bankruptcy in the Gazette only where, on inspection of the proceedings, no bankruptcy was found; or, under a country commission, to give the opportunity of producing the evidence. *Exp. Tarleton*, T. 1815. 19 Ves. 464.


55. Commissioners have power to adjourn the choice of assignees from the day publicly appointed for that purpose, although all the creditors present had concurred in an election. *Exp. Garland*, E. 1816. 2 Rose 361.

56. A commissioner cannot purchase the bankrupt's estate without the consent of the creditors at a general meeting, though he never acted. *Exp. Harris*, H. 1817. 1 Buck 17.

57. A separate commission was directed to a joint creditor, as one of the commissioners, and he acted under it, and proved his debt without an order. Held,
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that the commission should be superseded at the cost of the petitioning creditor. *Exp. Story*, T. 1817. 1 Buck 70. *Vide* *Exp. Prossor*, 2 Rose 370.

50. A creditor being (without his pri-
vity) named a commissioner, declined acting, and was afterwards chosen as-
signee. On the petition of another cred-
itor, he was restrained from acting as a
2 Madd. 292.

59. Creditors who wish to have the ac-
counts of the assignees taken, must first
apply to the commissioners for that pur-
pose; and if the creditors are dissatisfied
with their judgment, the creditors may
then petition the court to have the ac-
1 Buck 304.

60. The commissioners have authority
under the stat. 1 Jac. 1. c. 15. s. 10. to
to examine persons supposed to have, or
dtain a part of the bankrupt's estate, al-
though such persons do not claim to be
1819. 1 Buck 397.

(c) Of the Docket, and sealing, or re-
sealing the Commission; and herein
of the Advertisement of Bankruptcy.

61. A commission of bankruptcy can-
not be re-sealed even to correct a mere
clerical error, after any dealing upon it,
and if it has been opened. *Fisher's Ca.*, M. 1804. 10 Ves. 190. *Vide* *Exp. Thom-
son*, 9 Ves. 207. *Burrowes' Ca.*, 10 Ves.
286.

62. An alteration in a commission of
bankruptcy upon mistake will be permit-
ted, before it has been opened and acted
upon, but not afterwards. *Burrowes' Ca.* M. 1804. 10 Ves. 286. *Vide* *Exp. Thom-
son*, *sup.* *Fisher's Ca. sup.*

63. Where a solicitor in London on
Sunday received from the country in-
structions to strike a docket, and on Mon-
day before the opening of the office, re-
ceived similar instructions from another
client, they must draw lots according to
the course upon two applications at the
same instant. *Hayes' Ca.*, M. 1806. 13
Ves. 197. and in conformity to this, a
general order was made on the 29th De-
cember, 1806, directing that if two or
more persons shall apply at the same time,
to strike a docket against the same per-
son, and both shall be prepared to issue a
commission forthwith, then that it shall
be determined by lot, which person shall
issue such commission; but in case only
one of such persons shall be prepared to
issue such commission, then that the com-
mission shall be issued to the person so
prepared. 13 Ves. 207.

64. A commission of bankruptcy that
has been acted upon cannot be altered,
but if any thing additional be required, it
must be superseded, and a new commis-
Ves. 325.

65. Where an act of bankruptcy
was not clearly proved before the commis-
sioners, Ld. Ch. suspended the advertise-
ment in the Gazette till it was made clear,
and a further affidavit put in. *Exp. Foster*, H. 1811. 17 Ves. 414. 1 Rose 49.; but
the affidavit not being satisfactory, the
commission was superseded. *S. C. H.*
1811. 1 Rose 49. *Vide* *Exp. Lanches-
250.

66. But the court will order the com-
misson in other respects to proceed.
*Exp. Fletcher*, E. 1816. 1 Rose 336.

67. Unless there be a competition for
a town or country commission, the court
will not interfere to direct either one or
the other, though where such a competi-
tion does take place, and application is
made to the court, notice should be given
to the opposite party. *Exp. Bowdler*, H.
1811. 1 Rose 48.

68. The evasion of Ld. Rosslyn's order,
requiring the names of two barristers to
be inserted in a country commission, is
a ground for superseding it, but a barrister
who cannot attend for the 20s. allowed by
the stat. is not so within the order. *Exp.
Harbin*, E. 1811. 1 Rose 58.

69. Ld. Ch. will not stay proceedings
under a commission not opened, upon an
allegation that there was no petitioning
creditor's debt: the commission and the
adjudication of bankruptcy being of right
under the act, where the trading, &c. are
1 Rose 220. 17 Ves. 512.

70. Ld. Ch. resealed a commission in
order to rectify a clerical error in the
bankrupt's christian name, but a new
docket and bond were ordered. *Exp.
Sutton*, E. 1811. 1 Rose 85.

71. A docket was struck and commis-
sion ordered to be sealed, but the fees
not being lost, the direction was not com-
plied with; a commission issued after-
wards shall not prevail, but the solicitor
issuing it shall have his expenses. *Exp.*
*Evans*, T. 1810, 1 Rose 162.
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The Docket.—Sealing or re-sealing the Commission.—Advertisement of Bankruptcy.

72. The Ch. will not re-seal a commission, because it was dated before an act of bankruptcy could be proved to have been committed; but a commission, if not opened, may be re-sealed to correct an error in the name. Exp. Westcreek, E. 1812. 18 Ves. 228.

73. The general order which directs commissions to be sealed at the next public seal, if there shall be one within seven days, means the next immediate seal, without any discretion in the bankrupt office to defer it till another seal within the seven days. In Re Lambert, E. 1812. 1 Rose 258.

74. The Ch. will not allow the taste of a commission to be altered, and the commission to be re-sealed, in order to let in a subsequent act of bankruptcy, though no proceeding had been had under it. Exp. Cheesewright, E. 1812. 1 Rose 228. Vide, pl. 72. Vide Exp. Thomson, 9 Ves. 207. Fisher's Ca. 10 Ves. 190. Burrowes' Ca. ib. 286.

75. The General Order in bankruptcy (29th Dec. 1804) that the commission must be sealed at the first public seal after application, within four days after the docket, though within less than seven days, means the next public seal, and if there are two within the period mentioned, it means the first day. Exp. Hyne, E. 1812. 19 Ves. 61.

76. The intent of the general order of 26th June, 1793, will not be satisfied by an advertisement of bankruptcy, though it be too late for publication in the Gazette. Exp. Freeman, M. 1812. 1 Rose 380. Vide Exp. Ellis, 7 Ves. 135. Exp. Leicester, 6 Ves. 429. Exp. Layton, ibid. 454.

77. In the hurry of business, the clerk at the Bankruptcy-office omitted to make the necessary entry of an application for a docket. Another solicitor attended immediately after, to strike a docket against the same person. The first solicitor, however, was held entitled to the commission. Anon. E. 1815. 2 Rose 325.

78. In an urgent case, an order for a commission of bankruptcy was granted against T. Stevenson, otherwise H. Stevenson. Stevenson's Ca. II. 1815. 19 Ves. 277.

79. A solicitor having struck a docket, ordered the commission to be sealed within the regular time, but by mistake his clerk left 2s. 6d. of the fees unpaid to the secretary. On this, another solicitor struck a docket, but Eldon, C. held, that the mistake was sufficient to induce the court to uphold the first commission, and that the order of 29th Dec. 1806, ought not to be construed too strictly. Exp. Stafford, M. 1816. 1 Buck 1. Vide Exp. Evans, 1 Rose 162. In Re Lambert, ibid. 258. Anon. 2 Rose 323; and see the General Order of 13th April, 1816.

80. The court will restate the solicitor to a commission from negotiating a promissory note he had received from the bankrupt, for his costs in procuring the bankrupt's certificate, the bankrupt having purchased the debts of many of the creditors, and the solicitor being indebted to the estate in such a sum, that the share of it belonging to the bankrupt, as standing in the place of the creditors whose debts he had purchased, would exceed the amount of the note. Exp. Harding, H. 1817. 1 Buck 24. 37.

81. Where there is a bona fide intention to prosecute a commission, an advertisement in the Gazette of the commissioners' adjudication may be dispensed with, as where notice of the adjudication in a country commission was given at the bankrupt's office on the 28th day, in order to obtain a certificate for the purpose of inserting it in the Gazette; that was held sufficient to support the commission. Exp. Seppit, E. 1817. 1 Buck 81. Vide Exp. Freeman, 1 Rose 380. 1 Ves. & B. 34, and see the General Order of 26th June, 1799.

82. Ordered, that after 1st September next, on every application for a commission to be directed to persons named as commissioners, the solicitor, in delivering the names of such persons to the solicitor for insertion in the commission, do certify that no such intended commissioner is a creditor of the bankrupt. General Order, per Eldon, C. 25th June, 1817.

83. A solicitor's bill of costs under a commission of bankruptcy, though approved by the commissioners, and stated and allowed in the accounts of the assignees, was held to be taxable under 5th Geo. 2. c. 30. s. 46. Exp. Gregory, H. 1818. 3 Madd. 49.

(d) Of the Examination of Witnesses, and of their Protection from Arrests.

84. A bankrupt's wife cannot be examined against her husband, to prove
his bankruptcy, but by 21 Jac. 1, she may, touching the discovery of his effects; and by 5 Geo. 1. c. 24, the bankrupt may be examined as to his own bankruptcy; and though the wife had been committed for refusing a discovery, as well as to his effects, as to the act of bankruptcy, yet she was discharged. Exp. James, H. 1719. 1 P. W. 611.

85. Ld. Ch. on a former application, limited the examination of bankrupt's mother to her son's trading, but on the present, he refused to restrain the commissioners from enquiring into any circumstance which might make him a trader, neither would be allow the mother to have counsel, because of the precedent, Exp. Parsons, M. 1747. 1 Atk. 204.

86. A prisoner committed by the commissioners, for not answering a question relative to the bankrupt's estate, under sec. 18 of 5 Geo. 2. was brought up by habeas corpus, but was remanded until he would answer, and a defect in the warrant for want of form, would not avail him. Exp. Cole, E. 1773. 2 Dik. 479.

87. Bankrupt did not attend the commissioners, but petitioned that he might be examined upon interrogatories, and have a copy thereof, and a month's time to answer, and that he might not be questioned in his business of a banker. Ld. Ch. refused to restrain the commissioners in their examination. Exp. Bland, M. 1747. 1 Atk. 205.

88. Witnesses may be compelled to attend before the commissioners to prove an act of bankruptcy, reserving just exceptions as to any questions the commissioners may put to them, as an exception by a solicitor that he was professionally employed. Exp. Higgins, E. 1805. 11 Vsa. 8.


90. A witness cannot be compelled to attend upon commissioners of bankrupts upon motion, but upon petition he may. Exp. Morgan, M. 1811. 1 Rose 192.

91. A witness who attends the commissioners to tender his testimony upon an enquiry before them, though not summoned, is privileged from arrest, during such attendance, and returning; but the court did not determine whether such witness would be protected eundo. Exp. Byne, H. 1813. 1 Rose 451. 1 Ves. & B. 316. Vide Exp. Ross, 1 Rose 264. and notes.

92. The examination of a bankrupt, taken not in his own bankruptcy, but under another commission, is not, upon the death of the bankrupt, evidence upon a petition in his bankruptcy to expunge the debt of a creditor; but it may be used by the commissioners to direct them in the investigation of the subject upon which it has proceeded. Exp. Campbell, E. 1814. 2 Rose 51.

93. A witness summoned by commissioners is bound to attend, although his expenses may not have been tendered to him, but if he in fact be prevented by want of means, it would be an answer to an application for an attachment. Exp. Benson, T. 1814. 2 Rose 75. Vide Exp. Roscoe, ibid. 345.

94. The commission and proceedings are inadmissible evidence of an act of bankruptcy, for the purpose of defeating a conveyance. Whitworth v. Graham, T. 1815. 2 Rose 364.

95. Persons having refused obedience to the warrant of the commissioners to attend to prove the act of bankruptcy, upon the ground that they were creditors, and therefore incompetent as witnesses, were ordered to attend, it being not a preliminary objection to a party's being examined, that he is a creditor, as the result of his examination may establish that he is not. In Re Goodie, M. 1815. 2 Rose 330.

96. A party attending commissioners, for the purpose of being examined at the property of the bankrupt, is not entitled to have his expenses paid or ascertained, till his examination is concluded. Exp. Roscoe, H. 1816. 2 Rose 345. 1 Meriv. 158.

97. Between a witness at law and a party attending on the examination of commissioners, under stat. Jac. 1. c. 15. s. 10. there is a material difference, the latter is bound to attend, though his expenses should not have been tendered to him. S. C.

98. A witness who had been summoned, was ordered to attend the commissioners, to be examined touching the act of bankruptcy, and leaving the order at the place where the witness resided when served with the summons, was
BANKRUPT I.

Of the Examination of Witnesses.—Of the Solicitor and Messenger.

held to be good service. *Exp. Bowler, E. 1818. 1 Buck 258.

99. It is in the discretion of the Ld. Ch. to permit or refuse a defendant at law to have copies of his examination before the commissioners. Upon this petition, the examinations having been laid before the Ld. Ch., he refused the application, but gave costs, because the point was new. *Exp. Chater, In Re Crosby, M. 1818. 1 Buck 290.

c) Of the Solicitor and Messenger, and herein of the Provisional Assignment.

100. Ld. Ch. ordered a solicitors' bill to be taxed, under 2 Geo. 2 c. 23 22. for striking a docket, and a journey to get affidavit of debt, as business done relating to the bankruptcy. *Exp. Smith, T. 1800. 5 Ves. 706.

101. The messenger, under a commission of bankruptcy, having been put out of possession of property on board a ship, by threatening to throw him overboard, and the parties also using contemptuous language, were ordered to give security for answering the bankrupt's interest in the cargo. *Exp. Dixon, H. 1803. 8 Ves. 104.

102. A purchase of a bankrupt's estate by the solicitor to the commission was set aside in this case, and even upon the re-sale, Ld. Ch. would not permit him to bid, though he should discharge himself from the character of solicitor, unless with the previous consent of the persons interested, freely given, and upon full information. *Exp. James, E. 1803. 8 Ves. 337.

103. The solicitor to a commission of bankruptcy cannot purchase under it, either for himself or another; neither can a commissioner therein named, purchase under the commission, either for himself or another. *Exp. Bennett, H. 1803. 10 Ves. 381. Vide post, tit. Trust and Trustee, sec. v.

104. Upon superseding a fraudulent commission of bankruptcy, the solicitor was charged with costs as well as the other parties; except as to a criminal prosecution, not under a direction in bankruptcy, and in which he was not a defendant. *Exp. Arrowsmith, M. 1807. 14 Ves. 209.

105. The court will receive complaint of a messenger's misdemeanor, but if in the discharge of his duty, he takes possession of goods as the property of the bankrupt; the Ld. Ch. has no jurisdiction to order the goods so seized to be delivered up to a person who claims them as his own. *Exp. Crages, T. 1810. 1 Rose 25. Vide Exp. Page, infra.

106. No affidavit sworn before a Master extraordinary, who was solicitor to the commission, can be read in support of a petition by the assignees. *Exp. Brockhurst, T. 1810. 1 Rose 145.

107. It was long doubted whether the obstruction of a messenger in bankruptcy, whilst acting under the authority of the commissioners given by statute, and not under the Ld. Ch.'s order, is a contempt of the great seal; but *Hardwicke, C., held it to be so. When the commissioners commit, the Ch. can do no more than grant a habeas corpus to bring the party before him, not by his authority in bankruptcy, but as holding the great seal. The messenger is to enter and seize the property of the bankrupt at his own hazard, but if he enters the house and seizes the property of another, he cannot be turned out, for he is acting under authority, and any contumacious language or force towards him, is a contempt of the great seal, and it was so held by Lord *Hardwicke. But whether after execution of the commissioners' warrant of seizure, and the messenger has given up the possession, he can again seize without another warrant, the court did not determine. *Exp. Page, T. 1810. 17 Ves. 59. 1 Rose 1.

108. A solicitor having struck a docket within the regular time, gave in commissioners' names, and ordered the commission to be sealed, but through some misunderstanding, the fees were not left, and the direction was not complied with; another solicitor then struck a docket against the same bankrupt. Ld. Ch. held, that it would be construing the General Order of 29th Dec. 1806, too strictly, not to let the first commission issue, but he directed that the other solicitor should be paid his expenses. *Exp. Evans, T. 1811. 1 Rose 162.

109. The attorney employed by the petitioning creditor, and continued by the assignees when chosen, having delivered his bill to them, including all charges incurred by the petitioning creditor, and having received a sum from the assignees on account of his bill generally, was held bound, (as they were) by the 25th section of 5 Geo. 2. c. 30. to appropriate the sum so received, in reduction of the
BANKRUPT I.

Of the Solicitor and Messenger.—Second Commissions.

charges incurred by order of the petitioning creditor, and for which he was originally responsible; and the amount of such charges covered by the sum so received cannot be set off by the attorney, against a debt due from him to the petitioning creditor on his own account. *Phillips v. Dicas*, H. 1812. 1 Rose 345.

110. A majority of the assignees may regulate the removal or the continuance of the solicitor. *Exp. Tomlinson*, E. 1813. 2 Rose 66.

111. A messenger may apply for a direction that the assignees shall pay him his fees, though he neglected to make a demand till after final dividend; for the assignees must be presumed to have known of his claim, and ought to have reserved sufficient to satisfy it. *Exp. Hartopp*, T. 1813. 1 Rose 449.

112. The solicitor is answerable to the commissioners for their fees. *Exp. Griffths*, T. 1815. 2 Rose 342.

113. The fees of commissioners of bankruptcy are payable by the attorney to the commissioners; who (if they be not paid,) will, on petition, be ordered by the commissioners to pay them. *S. C.* 1 Madd. 56.

114. The court will not allow the expense of a provisional assignment, except where an extent is apprehended, or in other cases of necessity. *Exp. McWilliams*, M. 1815. 1 Madd. 141.

115. *LD. Ch.* expressed his disapprobation of a custom which has prevailed in the north, to have a provisional assignment as a matter of course. *S. C.*

116. The solicitor may maintain an action against assignee for business done under commission, although the bill has not been taxed, under 5 Geo. 2. c. 30. s. 45. *Tarn v. Heys*, E. 1816. 1 Stark. 279. *Vide Finchett v. How*, 2 Campb. 279.

117. If a solicitor, not being the bankrupt's solicitor, has in his custody a deed of assignment executed by the bankrupt, and which amounts to an act of bankruptcy, he must produce it, if required by the commissioners. *Exp. Law*, T. 1817. 1 Buck 110. *Vide Exp. Treacher*, ib. 17.

118. The court will order a solicitor's bill to be taxed, where the charges were *prima facie* exorbitant though paid, and though the assignee who paid them was dead. *Exp. Neale*, T. 1817. 1 Buck 111. *Vide Cooke v. Settree*, 1 Ves. & B. 126.

119. Where one sixth of a solicitor's bill of costs in bankruptcy was taken off on taxation, he was ordered to pay the costs of the taxation. *Exp. Hatherway*, M. 1817. 2 Madd. 329.

120. Where a bankrupt presented an unnecessary petition, his solicitor was ordered to pay 40s. costs. *Exp. Parker*, H. 1819. 1 Buck 313.

121. The authority given to the great seal to vacate the assignment, includes the bargain and sale; and the great seal has also power to vacate the bargain and sale from the date of its order. So ordered, where an assignee had absconded. *Exp. Corry. In Re Mullens*, H. 1819. 1 Buck 314. *Exp. Cooke*, ib. 319.

(f) Of second, renewed, and auxiliary Commissions.

122. No second commission can be taken out till the bankrupt has had his certificate under the first, for as all future personal estate is affected by the assignment, nothing of personal estate can pass to the second, but as to future real estate, there must be a new bargain and sale. *Exp. Proundfoot*, E. 1743. 1 Atk. 252.

123. A second commission against an uncertificated bankrupt, cannot be maintained, whether separate or joint. *Exp. Martin*, E. 1803. 15 Ves. 114. *Exp. Crew*, T. 1809. 16 Ves. 237. nor can a joint commission of bankruptcy, void as to one partner, be maintained against the other. *S. C. ibid. 115.*

124. It is discretionary in the court, whether or not they will supersede a second commission against an uncertificated bankrupt, and even under circumstances on the petition of the bankrupt himself. In this case an application from the petitioning creditor, under the first commission for that purpose, was dismissed with costs, 15 years having elapsed since the first commission, during the last seven of which the bankrupt had been permitted to carry on trade in another place. *Exp. Less, Exp. Poulten*, E. 1810. 16 Ves. 472.

125. A commission of bankruptcy having issued in London against A. and B., bankers at Shrewsbury and Chester, auxiliary commissions were directed to issue to those places, to take proofs of creditors holding notes under 20l. only such
proceeds to be received as proofs under the
But in Exp. Scott, the Ld. Ch. would not allow the bankrupt to be examined under
such auxiliary commission.

126. Where a commission issued against
country bankers, and was worked in Lon-
don, an auxiliary commission was granted
to receive proof in the country of small
debts under 20l., which proofs were after-
wards transmitted to the commissioners
in London, and then the country commission was superseded. The country
commissioners however were not allowed
to examine bankrupt. Exp. Upham, T. 1810.
17 Vesc. 212. Vide Exp. Perry, sup.
where the same course was adopted.

127. Where two commissions have is-
sued, and one has been superseded, the
proofs taken under that commission,
though become a nullity, have been di-
rected to be received under the other.
Dict. per Eldon, C. in Exp. Upham, sup.

128. Though a second commission,
while a first is subsisting, is, strictly speak-
ing, void, yet for such a commission to be
set up against the second, it must be in
1 Rose 134.

129. Ld. Ch. will not now seal a second
commission till a note has been given him
of what was done under the first. Exp.
Freeman, M. 1812. 1 Vesc. & B. 44. (n)
And in Exp. Brown & Manton, ib. 60. it
was held that a second commission
against an uncertificated bankrupt is void.
Vide etiam Exp. Martin, 15 Vesc. 114.
Exp. Lees, 16 Vesc. 472.

130. Although a second commission,
where a former one is in operation against
any of the same parties, is void; yet,
where the convenience of administering a
partnership fund requires it, and it can be
done without prejudice to transactions
which have taken place under the first
commission, the court will so dispose of
the first commission, as to prevent its be-
ing an impediment to the prosecution or
validity of the second. In this case (of
four co-existent commissions against a
partnership, and the individuals of it) a
very special order was made, giving vali-
dity and effect to that under which the af-
fairs of the bankrupts could be most con-
veniently administered. Exp. Mason, T.
1813. 1 Rose 423. 1 Vesc. & B. 160.

131. A. compounded with his creditors,
and afterwards became bankrupt, and ob-
tained his certificate, but did not pay 15s.
in the pound; another commission then
issued against him. A petition to super-
sede the last commission was presented,
alleging that all his property belonged to
the assignees under the first commission,
but it was dismissed; for by statute 5
Geo. 2. c. 30. s. 9, the future property
could not be taken by the assignees on be-
half of the creditors, but by the creditors
either generally or individually, proceed-
ing against their debtor either at law or in
equity. Exp. Baker, T. 1813. 1 Rose
452. Vide Thornton & Dallas, Deced. 16.
Philpot v. Corden, 5 T. R. 289. Hav-
land v. Cook, ib. 654. Horil v. Br. w-
&P. 467.

132. Though a commission is a demand
of right, yet a second commission against
an uncertificated bankrupt is strictly a nil-
ulity. It is however supported in practice.
Exp. Credland, T. 1814. 3 Vesc. & B.
Exp. Bullen, 1 Rose 134.

133. No equitable relief can be granted
on petition under a second commission
against an uncertificated bankrupt, on a
suggestion of property acquired in a sub-
sequent trade, and went of notice by the
subsequent creditors, but the petitioner
may file a bill for relief. Exp. Sterks, T.
1814. 3 Vesc. & B. 105.

134. The court in this case refused to
determine whether, where an uncertifi-
cated bankrupt became the object of a
second commission, the subsequent cre-
ditors were preferably entitled to the pro-
perty, it being a question to be raised by
a bill in equity, as too important to be
determined on petition. S. C. 2 Rose
179.

135. A second commission was supe-
seded, and a procedendo issued on a for-
mer commission, which had expired,
where the petitioning creditor under the
first commission had been prevented from
prosecuting his commission by the arti-
fices of a person who was desirous of co-
verying certain transactions between him-
self and the bankrupt by a lapse of two
months. Exp. Knight, T. 1815. 2 Rose
319.

136. Ld. Ch. will grant a renewed
commission on the petition of a creditor,
where the bankrupt, the commissioners,
and the assignees are all dead. Exp.
5 Geo. 2. c. 30. s. 45.

(g) Of the individual Rights, Duties, and Liabilities of the Bankrupt.

138. A bankrupt cannot be compelled to execute to his assignees an assignment of debts due to him in America, even though the American government will not take notice of the rights of the assignees under the English bankrupt law. Exp. Blakes, M. 1787. 1 Cox 309.

139. A commission issued against A. and B., but was not proceeded on. A. and B. had a very large sum at their bankers. The court will not interfere in such case to prevent A. and B. from recovering the money at law from the bankers, although the commission may remain in force. Fuller v. Gibson, T. 1788. 2 Cox 24.

140. When it appeared on the bankrupt’s examination, that he had lost more than $5 at play at one time, this fact cannot be expunged from the proceedings, though consented to by the creditor at whose instance it was inserted. Exp. Bartoft, T. 1788. 2 Cox 49.

141. The Ch. has jurisdiction in bankruptcy, to enforce the commissioners’ order for the attendance of the bankrupt, who had passed his last examination, and obtained his certificate. Anon. H. 1818. 14 Ves. 449.

142. The petition of a bankrupt attainted under a conviction for felony was dismissed, on the ground that a person attainted cannot be heard in the prosecution of a civil right. Exp. Bullock, H. 1808. 14 Ves. 452.

143. But whether a commission of bankruptcy may issue against an attainted person, as he can be sued in a civil action. quære. S. C.

144. A bankrupt repeatedly and vexatiously disputing his commission, will be restrained by injunction. Thorpe v. Goodall, M. 1810. 17 Ves. 395.

145. The assignees of a bankrupt cannot detain from him any part of his wearing apparel, though it may appear unnecessary, for the risk is his own; nor can they refuse him the inspection of his books previous to his last examination, though they may suspect his object to be fraudulent. Exp. Ross, M. 1810. 1 Rose 33.

146. Where the assignees of a bankrupt sold the good-will and interest of his trade, the bankrupt is not precluded from setting it up again, provided he does not hold himself out as carrying on the same trade, which has been the subject of the purchase. Cruddell v. Lye, M. 1810. 17 Ves. 385. 1 Roe 123.

147. The court will not suffer a bankrupt, by means of a bill of interpleader, to try the validity of his commission. Lowndes v. Cornford, M. 1811. 1 Rose 180.

148. The court cannot compel a bankrupt to execute a power in favour of his creditors. Thorpe v. Goodall, T. 1812. 1 Rose 270. continued from 17 Ves. 388—460. (vide Townsend v. Windham, 2 Ves. 3.) but he may be compelled after his last examination, to deliver up papers in his possession belonging to the estate, and to attend the commissioners. Exp. Bradley, H. 1812. 1 Rose 202. Vide Exp. Stevens, 14 Ves. 450. reported as Anon.

149. A bankrupt is protected from arrest under an extent, while attending the commissioners on the day appointed for his examination, and remaining in another room in the same house, during an interval of adjournment on that day, on the general principle of the law, protecting a witness before commissioners, who are for that purpose considered a court of justice. The order to discharge must be made on the gaoler, and not, as in the case of a private creditor, on the party. Exp. Russell, T. 1812. 19 Ves. 163. 1 Rose 278.

150. Where a bankrupt, disputing the commission, has failed in one action, the court will neither prevent nor direct another action, nor hold a single action to be so vexatious as to preclude a second, or induce the court to grant an injunction, as in Chambers v. Thompson, 4 Bro. C. C. 464. ; neither will the court stay proceedings under the commission because a second action has been brought by the bankrupt. Exp. Bryant, H. 1813. 1 Ves. & B. 215. 220


152. The existence of a prior separate commission invalidates a subsequent joint one. Exp. Pachelor, E. 1814. 2 Rose 26.

153. The drawer of a bill of exchange, who has paid the amount to the holder,
after a commission of bankruptcy issued against the acceptor, may sue the acceptor before he has obtained his certificate, and arrest him upon the bill, notwithstanding the holder has proved the bill under the commission. 

McNutt v. Graham, T. 1814. 2 Rose 289. 3 M. & S. 91. S. C.

154. A granted a lease to B. which contained a covenant that B. his executors or administrators, without mentioning "assigns," should not under-let, without the consent of the lessor. B. became bankrupt, and his assignees assigned the premises to C. B. obtained his certificate, and C. reassigned the premises to him, after which he under-lets them to another person. Held, that B. having been discharged at the time of his bankruptcy from all covenants in the lease by statutes 2 Geo. 2 c. 30. the under-letting by him, which was in the character of assignee, was no forfeiture of the lease. 


156. The court will not direct enquiries as to the management of the estate, on the petition of a bankrupt who has no pecuniary interest therein. Exp. Harrison, T. 1818. 1 Buck 246.

157. A bankrupt cannot file a bill against a debtor to his own estate, where the commission is considered to be invalid, and there is collusion between his assignees and the debtor; for the proper course is to try the validity of the commission by an action at law, or to petition for a removal of the assignees. Hammond v. Attwood. H. 1818. 1 Madd. 158. Vide Spragg v. Binkes, 5 Ves. 587. Benfield v. Solomons, 9 Ves. 84.

158. When a bankrupt is in a situation to try the validity of his commission at law, the court will leave him to his action, and put him upon terms as to the time of the trial. Exp. Billiard. H. 1818. 1 Buck 220.

159. Where the commissioners adjourn the last examination of a bankrupt, he is privileged by statutes 2 Geo. 2 c. 30. from arrest during the whole of the day to which it is adjourned. Exp. Simpson, T. 1819. 2 Wils. 127.

160. A bankrupt obtaining leave to surrender, after the time for surrendering expired, pays the cost himself. Exp. Carter. T. 1819. 4 Madd. 394.

161. If the time for the bankrupt's last examination be enlarged, the statute 5 Geo. 2 c. 30. protects him from arrest during the whole of the last day of examination. Simpson's Ca. T. 1819. 1 Buck 424.

162. If fraud is established, the court will supersede the commission before the finding of the commissioners. Therefore, where a commission was sued out by the trustee of an equitable creditor, who had signed a composition deed with the bankrupt, the court superseded the commission. Exp. Battier, T. 1819. 1 Buck 426.

163. The Ld. Ch. s. jurisdiction as to acts done in the bankruptcy, is not determined by the superseding of the commission; therefore, after the commission is superseded, a petition will lie on behalf of a purchaser of the estates put up to sale by the assignees, for the repayment of the deposit. Exp. Fector. T. 1819. 1 Buck 426.

164. Where a bankrupt had been in possession of his certificate for six years, the court will not recall it. Exp. Reed, T. 1819. 1 Buck 430.

165. A creditor issued a writ against the bankrupt, and then proved his debt under the commission; the bankrupt was afterwards arrested, and several detainers were lodged against him. Held, that the bankrupt should be discharged from the arrest, and all the detainers, the arresting creditor to pay all the costs. Exp. Moore, T. 1819. 1 Buck 521. — Vide Exp. Wilson, 1 Atk. 152.

166. A bankrupt cannot refuse to discover particulars relating to his estate and effects, although such information may tend to show that he has committed a criminal act; but if the question put to him be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it; therefore, where a petition prayed, that the creditors might be at liberty to examine the bankrupt, whether he, or any persons in trust for him, or for his benefit, have received, or are to receive any sum of money, or other valuable consideration, for his having resigned, or as an inducement to resign the office of town clerk of the city of Bristol, it was dismissed. In Re Worrall, T. 1820. 1 Buck 531.

(b) Of the Death of the Bankrupt.

167. A commission issued against H. at eleven in the morning; at three he was
BANKRUPT II.

Who is a Trader.

(a) Who is a Trader.

172. Pawnbrokers may be bankrupts as brokers. Highmore v. Molley, M. 1737. 1 Atk. 206.

173. So may an exciseman. S. C. Or a clergyman. Exp. Meymot, M. 1747. 1 Atk. 196. Or a peer, or a member of parliament, if he will trade. S. C.

174. So may a free covert sole trader by the custom of London. Exp. Carrington, H. 1739. 1 Atk. 206 but the acts of trading and bankruptcy must be before marriage. Exp. Mear, 3 Bro. C. C. 266.

175. So may a scrivener. Exp. Burchall, E. 1742. 1 Atk. 141. Who, within the meaning of the bankrupt laws, is one having money put into his hands to lay out on security, and laying it out accordingly in the ordinary course of his dealing, and making profit by taking commission. In Re Warren, T. 1805. 2 Sch. & Lef. 415.

176. A smuggler may be a bankrupt. Exp. Meymot, ante.

177. So may a foreigner, or a subject trading abroad; if he contracts debts here. Exp. Williamson, E. 1700. 1 Atk. 82.


179. So may a man who trafficks in exchange, by drawing and re-drawing bills to a large amount, and continuing it.—Richardson v. Bradshawe, H. 1752. 1 Atk. 128.

180. So may a brickmaker, taking earth off the waste, and selling the bricks. Exp. Harrison, M. 1782. 1 Bro. C. C. 173.

181. So may a renter of brick ground, to make bricks for sale, for it is a purchase of the clay. Parker v. Wells, M. 1785. 1 Bro. C. C. 178. (a)

182. A fisherman buying fish of other boats at sea, and selling it ashore, is a trader; and if such be the usual practice of: class of fishermen, one of them who is proved to have done so once, will be presumed to have continued his business in the same manner. Heanny v. Birch, E. 1812. 1 Rose, 326. Vide Exp. Pater- son, ib. 402.

183. Whether or not a trader has ceased his trading does not depend upon
the mere discontinuance of it, or the absence of any specific acts of trading, but upon the intention to exercise or resume the same; and that is a question for a jury. So whether a scrivener is a trader or not depends wholly upon his intention to get his living as such. *Exp. Paterson, T. 1813. 1 Rose 402. Vide Exp. Malkin, ib (n) Willett v. Chambers, Comp. 814. Exp. Wilson, 1 Atk. 218. Exp. Burchall, ib. 14. Bird v. Mayor, 1 Ld. Raym. 851. Hamson v. Harrison, 2 Exp. 555. In Re Warren, 2 Sch. & Lefr. 414.

184. A scrivener is one, who with an intention thereby to get a living, receives into his custody other men's money, to be laid out on their account, according to the purpose for which it is deposited. The mode of his remuneration, whether by procuration fees, by a charge for commission, or otherwise, is a circumstance immaterial; the actual deposit of and complete control over the money of others till invested, and the intention thereby to get a living, being the essence of this species of trading. *Exp. Malkin, E. 1814. 2 Rose 27.

185. A farmer buying and selling horses, to an extent unauthorized by his character of farmer, may be a bankrupt as a horse dealer, although he may have bought and sold without a license to deal in horses. *Exp. Gibbs, E. 1814. 2 Rose 38. Vide Wright v. Bird, 1 Price 20.

186. Whether a person is to be considered a trader after he has quitied business, depends upon his intention as to resuming it. *Exp. Cundy, 1816. 2 Rose 357. Vide Cotton v. Daintr. 1 Vent. 29. Exp. Paterson, 2 Rose 405.

187. A man, whether tenant or freeholder, who sells bricks, made on the produce of his soil, is not a trader within the bankrupt laws; but otherwise, if he purchase the materials of his manufacture; but in this case, from the peculiarity of an agreement, an issue was directed upon this species of trading. *Exp. Galsmore, T. 1816. 2 Rose 424.

188. Whether the owner of a colliery, exchanging one species of coal for another, to render his own marketable, be a trader, is a question for a jury, upon the Intention; but the owner of a colliery buying articles, and selling them to his own pitmen, is not a trader; nor is a fisherman who buys occasionally fish to make up for market a cargo otherwise deficient. S. C. 189. In *Exp. Stevens, 1819. 4 Madd. 236. Vice Ch. would not decide whether an insurance broker can be made a bankrupt, but left petitioner to try the point at law.

(b) Who is not a Trader.


192. Nor an executor buying wines to mix with his testator’s stock. *Exp. Nutt, T. 1743. 1 Atk. 102.

193. Nor is the bare exchanging of notes with a banker. *Exp. Bland, M. 1747. 1 Atk. 205.


195. Nor is an underwriter, in that capacity. *Exp. Bell, M. 1808. 15 Ves. 355.

196. Nor is a stockholder in a public company. S. C.


201. Nor is a farmer who makes lime from a pit on his farm which was worked before his term commenced. Neither does selling the surplus beyond what he required for manure make him a trader. *Exp. Ridge, H. 1813. 1 Ves. & B. 360.


203. A cow-keeper whose transactions of buying and selling were incidental to his occupation as a farmer, grazer, or drover, is not a trader under the stat. 5 Geo. 2. c. 30. s. 40. (a) *Carter v. Dear, H. 1818. 1 Swanst. 64. 1 Wils. 85. Vide Mills v. Hughes, Willes 388. Bolton v.
BANKRUPT II. & III.

Of the Act of Trading.—Petitioning Creditor.

Sowerby, 11 East, 274.; (a) made perpetual by stat. 37 Geo. 3. c. 124.

(c) Of the Act of Trading generally.


205. A commission of bankruptcy cannot be supported on an act of trading committed during infancy, though after full age a very small degree of trading will sustain a commission of bankruptcy, provided it be sufficient for the inference of an intention to deal generally. Exp. Moule, E. 1808. 14 Ves. 605.; for it is not the quantity of trading, but the intention, that will support a commission; and it is a question for a jury, whether there is enough to evidence that intention? Exp. Magennis, E. 1811. 1 Rose 84.

206. It is enough if a man will sell to every one who comes to buy, but merely stopping at the door as a casual customer, is not sufficient. S. C.

207. An order in council licensing a man to export and import goods, to and from an enemy's country, does not authorize his residence and trading there, but if he be there for the fair purposes of his license, it is no ground for superseding a commission founded on his petition. Exp. Baglehole, T. 1812. 1 Rose 271. 18 Ves. 525.

208. On a commission against an attorney and solicitor, the trading was buying and selling books. Per Eldon, C. The question is, whether the dealing, however small, is such as to manifest an intention to deal generally. This a jury must decide. Exp. Bryant, H. 1813. 1 Ves. & B. 313.

209. "Dealer and Chapman," is a sufficient description of trading, and a proof of "buying and selling" will support a commission. Exp. Herbert, H. 1814. 2 Ves. & B. 400.

210. A bankrupt was described in the commission and affidavit only as a waterman, and they were supported by a statement that he got his living by buying and selling. Ld. Ch. said, the latter words would support the commission, though he disapproved the issuing of commissions on such loose affidavits. S. C.

211. Act of bankruptcy will not be permitted to be proved by affidavit without personal attendance, although the same person had regularly proved the same act of bankruptcy under a prior separate commission against the same bankrupt, who had subsequently been included in a joint commission against him and his partners. Exp. Rowe, T. 1815. 2 Rose 389.

212. Where a commission of bankrupt issued against a person describing himself as a cattle dealer, and on the trial of an action of trespass by the bankrupt, evidence was received of a dealing in hops, and a verdict found for defendant, which verdict was set aside, and a new trial granted, on the ground that the evidence ought to have been rejected, the Ld. Ch. refused to insert the words "dealer and chapman" in the commission, or to supersede it, and grant another of the same date, though he seemed however to doubt the soundness of the decision at law. Exp. Small, T. 1819. 2 Wils. 85.

N. B. The decisions on the existence and validity of the Act of Trading, in cases where it is disputed, will be found more numerous in the Common Law Reports.

BANKRUPT III.

Of the Petitioning Creditor.

(a) Who may be such, and who may not.—(b) Of the Duties and Liabilities of a Petitioning Creditor.

(a) Who may be such, and who may not.

213. The petition for a commission must be by persons interested. Alderman Blackwell's Ca. E. 1683. 1 Vern. 152.

And upon an affidavit of the debt. Exp. Williamson, E. 1750. 1 Atk. 82.

214. A creditor, upon a note or a bond payable at a future day, could not peti-
BANKRUPT III.

Who may be Petitioning Creditor.

A commission may be taken out upon a debt due upon an award. Exp. Langood, T. 1742. 1 Atk. 241.

A commission may issue against one partner for a joint debt. Exp. Crisp, T. 1744. 1 Atk. 133; and a joint creditor may petition for a separate commission, but the funds of each must be kept apart. Exp. Elton, T. 1736. 3 Ves. 239. Exp. Ackerman, E. 1808. 14 Ves. 604. Vide more on this subject, post, s. xiv.

A commission may issue on a debt on account, though not liquidated. Flower v. Herbert, T. 1751. 2 Ves. 327.

An infant cannot issue a commission, for he cannot execute the bond to the Chancellor. Exp. Barrow, T. 1797. 3 Ves. 504.

A commission cannot be taken out by a person who is appointed, and acts as a trustee, under a deed of assignment for the benefit of creditors, though he does not actually sign the deed, and though it was agreed by all the creditors that he should not sign the deed in order that he should take out a commission, if the insolvent act improperly; for per Ld. Ch. acting under such a deed, is tantamount to the signing of it. Exp. Whalley, M. 1803. 1 P. Smith, 118.

A joint creditor being the petitioning creditor under a separate commission, was held entitled to prove and vote in the choice of assignees, &c. with the separate creditors, not being within the rule excluding the other joint creditors. Exp. Hall, E. 1804. 9 Ves. 349. Vide Exp. Elton, 3 Ves. 238. Exp. Clay, 6 Ves. 818 and references. Exp. Chandler, 9 Ves. 39.

On a question, whether the petitioning creditor’s debt was sufficient to support the commission, another creditor of the bankrupt is a competent witness to prove a negative. In Re Codd, M. 1804. 2 Sch. & Lef. 116.

By stat. 46 Geo. 3. c. 135. s. 5 it is enacted, that no commission of bankruptcy shall be avoided or defeated by reason of any prior act of bankruptcy being committed before the contracting of any debt due to a petitioning creditor, if such petitioning creditor had no notice of such act of bankruptcy at the time: and as to what shall be deemed notice for the purposes of this act, vide next section.


A. for 50l. bought the bankrupt’s note for 100l.; he may sue out a commission. Secus, if the indorsement were after the bankruptcy, Et secus, of an assignee of a bond. Exp. Lee, H. 1721. 1 P. W. 782. for an assignee of a bond, being an equitable creditor only, cannot sue out a commission. Medicott’s Ca. E. 1731. Ca temp. King, 6.2 Stra. 899. Exp. Hillyard, T. 1751. 2 Ves. 407. 1 Atk. 147. Yet equitable creditors may prove debts. Exp. Williamson, 1 Atk. 82. corte, pl. 214. But an equitable creditor cannot take out a commission. Exp. Sutton, T. 1805. 11 Ves. 164. Exp. Young, M. 1814. 3 Ves. & B. 40.

An indorsee of a note, given before an act of bankruptcy, though indorsed after, may issue a commission against the drawer. Exp. Thomas, M. 1747. 1 Atk. 73. 126.

A creditor who has his debtor in execution, cannot take out a commission. Barnaby’s Ca. M. 1726. 1 Stra. 653.

Neither can a petitioning creditor arrest the bankrupt. Exp. Wilson, T. 1743. 1 Atk. 152.; not even for a distinct debt, for he has made his election. Exp. Ward, M. 1743. 1 Atk. 153.; and a common creditor has a greater election, for if the petitioning creditor elects to proceed at law, it supersedes the commission. Exp. Lewis, T. 1746. 1 Atk. 154.

A man cannot swear to a debt, as due to himself in right of his wife, as administrator, so as to support a commission. Exp. Scarples, M. 1784. 7 Vin. 67. pl. 10. Nor can the executor of a bankrupt issue a commission for a debt due to his testator, unless the testator’s commission was superseded. Exp. Goodwin, E. 1730. 1 Atk. 100.

Defendant became indebted to plaintiff in 1730, but defendant’s act of bankruptcy was proved as far back as 1726. Yet held by the Lords, that plaintiff, the petitioning creditor, was a creditor when the commission issued; contra the decree of Lord Talbot. De Gols v. Ward, M. 1734. Ca. temp. Talb. 243. 4 Bro. P. C. 917.
Who may be petitioning Creditor.

228. An attorney's bill of costs, though not signed and delivered under the stat. 2 Geo. 2. c. 23. s. 22. is a good legal debt, upon which a commission of bankruptcy may issue; but a commission of bankruptcy cannot be taken out upon an equitable debt. Exp. Sutton, T. 1805. 11 Ves. 163. Exp. Steele T. 1809. 16 Ves. 166.

229. It is no objection to a commission that it is taken out to prevent the execution of a creditor, provided it is the commission of a bona fide creditor, and not that of the bankrupt. Exp. Bowes, T. 1805. 11 Ves. 541.

230. Whether judgment for damages in an action for breach of promise of marriage, by relation to the time of the verdict, forms a debt that will support a commission of bankruptcy issuing, and the act of bankruptcy committed in the interval, the court would not determine. Exp. Charles, T. 1809. 16 Ves. 256. Vide Exp. Hill, 11 Ves. 646.

231. Bills drawn before an act of bankruptcy, but becoming due afterwards, are sufficient to establish a petitioning creditor's debt. Brett v. Levett, H. 1810. 1 Rose, 102. 13 East, 213.

232. The bankrupt however, was, at the time of the act of bankruptcy, indebted altogether to more than 100l. to several persons, even allowing the rebate of interest on the bills. S. C. Vide Clarke v. Shee, Cown. 200.

233. Plaintiff having recovered 100l. against a trader for a breach of promise of marriage, and between the verdict and judgment he committed an act of bankruptcy, the debt upon the judgment is not a good petitioning creditor's debt. On a case directed in Exp. Charles, H. 1811. 1 Rose 372.

234. The general order of Ld. Loughborough, requiring the petitioning creditor's attendance in person, on the opening of the commission, is grounded on the great use of recording evidence in the commencement, which will support the commission in all its stages. Exp. Foster, H. 1811. 17 Ves. 414. 1 Rose 49.

235. Ld. Ch. will not stay proceedings under a commission not opened, on the allegation that there was no petitioning creditor's debt, for the commission issues of right under the statute. Exp. Lancaster, E. 1811. 17 Ves. 512.

236. A petitioning creditor who had neglected to prosecute a commission which he had obtained, applied for another commission(a). Eldon, C. refused the order, and condemned the practice of striking a docket for the sole purpose of compelling the debtor to compound with his creditors. Exp. Masterman, M. 1811. 18 Ves. 298. (a)See Lord Thurlow's order to the contrary, in Elley's collection of Orders in Bankruptcy, it was obtained by Sir Richard Arkwright, on the bankruptcy of Gibson and Johnson, 6th Dec. 1788.

237. A solicitor may issue a commission upon his own debt for costs, without having previously delivered his bill one month, but it is quite of course, after the commission, to refer such bill to the Master to be taxed. Exp. Howell, T. 1812. 1 Rose 312.

238. A. the petitioning creditor made an affidavit of his debt as for goods sold, though at the time he had a judgment in an action for the goods; an objection taken to this affidavit, was over-ruled. In Re Bryant, T. 1812. 1 Rose 288. Vide Ambrose v. Clendon, 2 Stra. 1042. Dawe v. Holdsworth, Peake's Ca. 64.


240. If the petitioning creditor knew of, and acquiesced in a deed of trust which was alleged to be an act of bankruptcy, though he did not execute, it will not support the commission. Exp. Gaskwell, T. 1812. 19 Ves. 234.

241. A petitioning creditor in his affidavit, stated the debt to be due on simple contract; objected, that it was due by judgment; for the creditor obtained judgment whilst the bankrupt was in prison, and that imprisonment was the act of bankruptcy. Per Eldon, C. The omission to mention the judgment in the affidavit, is no objection to the commission. Exp. Bryant, H. 1813. 1 Ves. & B. 213. and a bond taken after an act of bankruptcy committed (being a nullity,) will not affect a pre-existing simple contract debt. S. C. See more of this case, post, tit. Bankrupt, xii.
Of the Duties and Liabilities of a Petitioning Creditor.


243. Where partners are the petitioning creditors, the signature of the bond by one is sufficient. A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt. *Exp. Hodgkinson*, H. 1815. Coop. 99.

244. Sugar sold, to be paid for (by the custom of the trade,) two months after the sale, does not create such a debt as will support a commission, until the time of credit has elapsed. *Exp. Roberts*, T. 1815. 1 Madd. 72. *Vide Hoskins v. Duperoy*, 9 East 498. *Dutton v. Solomonson*, 3 Bos. & Pal. 582.

245. An uncertificated bankrupt can petition for a commission, if his assignees make no claim to the debt. *Exp. Cartwright*, T. 1815. 2 Rose 230.

246. A creditor who assists to, and acts under an absolute bill of sale for the benefit of creditors, but does not sign the deed, cannot afterwards sue out a commission against the debtor, on the ground that the bill of sale was an act of bankruptcy. *Exp. Shaw*, T. 1816. 1 Madd. 598. *Vide Bamford v. Baron*, 2 T. R. 594.(n.) *Spottiswoode v. Stockdale*, Coop. 103.

247. A commission cannot be supported on the petition of several creditors, where one of them is an infant and a separate creditor of the trader. *Exp. Meriton*, E. 1817. 1 Buck 42.

248. A purchased coal of B. and agreed to give him a bill for part of the purchase-money at two months. Afterwards A. sent B. a paper, purporting to be a bill accepted by him, with a blank left for the name of B. as drawer. B. kept the paper, but did not fill up the blank till after he had issued a commission against A.—Held that the bill did not constitute a valid petitioning creditor's debt, and that B. having elected to keep the bill, he could not prove his debt as petitioning creditor for goods sold. *Exp. Fordenex*, E. 1817. 1 Buck 34. *Vide Hoskins v. Duperoy*, 9 East 498.

249. A petitioning creditor may prove his debt by affidavit. *In Re Graham*, T. 1817. 1 Buck 47. *Vide General Order of 26th November, 1798.*


251. Where it had been referred to the Master to see if there was a sufficient petitioning creditor's debt, and upon the reference, it appeared that the petitioning creditor had, after the act of bankruptcy,beer paid a sum that would reduce his debt below 100f. the commission was nevertheless held good, on the ground that the payment could not be retained against the assignees, and that the suing out of the commission was a disaffirmance of the payment. But the petitioning creditor not having, previously to the reference, avowed that he held the payment for the assignees, was ordered to pay the costs of the petition and enquiry. *Exp. Miller, in Re Garland*, M. 1818. 1 Buck 283.

(b) Of the Duties and Liabilities of a Petitioning Creditor.

252. The petitioning creditor and solicitor took away a scrutineo, containing the bankrupt's papers, and made a pretended sale of it. The solicitor was removed, and ordered to pay the value and costs. *Exp. Moxene, In Re Abrahams*, T. 1725. Sel. Ch. Ca. 45.

253. Petitioning creditor shall pay costs, only where a commission is superseded for defect of form, and no doubt of the act of bankruptcy; otherwise, if the act of bankruptcy has not been fully proved. *Exp. Goodwyn*, E. 1730. Atk. 100.

254. Where a bankrupt was arrested by the petitioning creditor, and kept in custody till the solicitor could detain him in another action; the court discharged the bankrupt, the same attorney being concerned in both. *Exp. Wilson*, T. 1743. 1 Atk. 152.

255. A creditor's striking a docket, and then compromising, forfeits his debt, and cannot prove it under any subsequent commission. *Exp. Gedge*, E. 1797. 3 Ves. 349.

256. Under the stat. 5 Geo. 2. c. 30. s. 24. which provides against petitioning creditors-compromising commissions; the creditor forfeits the whole of his debt, whether the composition made by him,
extend to the whole, or to a part only. And the forfeiture takes place as well under a commission founded on any other act of bankruptcy, as upon the act thereby created. Exp. Vernon, M. 1788. 2 Cox 61.

257. The jurisdiction in bankruptcy to assign the bond, being, with reference to the bankrupt, confined to the case of malice, and conclusive as to that fact, Ltd. Ch. in a case of strong suspicion only, would not assign the bond; but superseded the commission with costs, without prejudice to an action. Exp. Lane, T. 1805. 11 Ves. 415. And in Exp. King, E. 1808. 14 Ves. 500. Ltd. Ch. refused to assign the bond, the court of King's Bench having determined that the whole sum of 200l. must then be recovered, which, in this case, was too much: he therefore ordered the bond to stand as a security for a specific sum for the costs.

258. A commission of bankruptcy, which had been relinquished by the petitioning creditor upon obtaining security, was superseded: his proof under another commission was expunged; and he being an assignee, a new choice was directed. Exp. Paxton, H. 1809. 15 Ves. 461. Exp. Browne, H. 1809. 15 Ves. 472.

259. Striking a docket merely, is not such an issuing of the commission as will subject the party to the penalties of 5 Geo. 2. c. 30. s. 24. S. C.

260. Where a petitioning creditor has acted under a deed of assignment of all a trader's effects, although he may not have executed, yet he cannot avail himself of it as an act of bankruptcy, and will be liable for the costs of the commission. Exp. Cankwell, T. 1812. 1 Rose 313.

261. A petitioning creditor was directed to have the management of the defence to an action brought by the bankrupt to try the validity of his commission, but the assignee to be fully indemnified. Exp. Stewart, E. 1813. 2 Rose 6.

262. A petitioning creditor is responsible for the production of a bill of exchange, upon the direct proof of which the petitioning creditor's debt has been established, for he is bound to be assistant to the commission in all its stages; and in this case the petitioning creditor declaring the commission to be invalid, was held liable for the costs of enquiries occasioned by that declaration. Exp. Gosse, T. 1816. 2 Rose 386.

263. A petitioning creditor, who with the knowledge of two or three of the creditors received his debt from the bankrupt, was held to have forfeited it under the statute of 5 Geo. 2. c. 30. s. 24. Exp. Brine, T. 1817. 1 Buck 108. Vide S. C. post. sect. xvi. (a).

264. The court has no jurisdiction in bankruptcy to order the petitioning creditor to pay the solicitor's bill up to the choice of assignees. Anon. T. 1820. 1 Buck 423.

BANKRUPT IV.

Of the Act of Bankruptcy. 

(a) What Amounts to an Act, and what does not. (b) Of the Effects of an Act by relation. (c) Of the Act of Bankruptcy generally.

(a) What amounts to an Act, and what does not.


266. Neither is it to stop payment. Bland's Ca. M. 1726, cited Mos. 3.

267. Denial to a creditor upon a bill payable at a future day, is not an act of bankruptcy. Exp. Levy, M. 1735. 7 Vin. 61. pl. 14.

268. Nor is yielding to prison, unless the defendant lay there two months. Exp. Barton, T. 1734. 7 Vin. 61. pl. 15. post, pl. 277.

269. Neither is absconding, to avoid an attachment upon an award for nondelivery of goods. Secus, if for the payment of money. Exp. Gulston, Exp. Dale, T. 1743. 1 Atk. 193.

270. Neither is a denial to creditors, at eleven o'clock at night. Exp. Hall, M. 1753. 1 Atk. 201. Neither is a denial to a creditor who called merely to buy goods, meaning to take out his debt in
BANKRUPT IV.

What amounts to an Act, and what does not.

that way, unless the debtor conceived that his creditor came for his money; this depends on the intent, not of the creditor, but of the debtor. Exp. White. T. 1814. 3 Ves. & B. 128.


272. Neither is the fraudulent surrender of a copyhold; for no process can touch it. Exp. Cockshutt. H. 1792. 3 Bro. C. C. 502.

273. Whether lying two months in a gaol, under a criminal sentence, and being afterwards charged with debt, is an act of bankruptcy? Ld. Ch. thought not.—Exp. Bowes. 4 Ves. 168.

274. A departure from the realm, and residence abroad, for a proper purpose, and without an intent to defraud creditors, will not support a commission. Exp. Matris. T. 1808. 3 Ves. 576.

275. A denial to a creditor with subsequent approbation, but the time of the denial not ascertained nor connected with the direction, is not an act of bankruptcy, more especially where the debtor has conversed with his creditors in the interval between the direction and the denial. Exp. Foster, M. 1811. 17 Ves. 414. 1 Rose 49.

276. A denial to a tax-gatherer calling for taxes is an act of bankruptcy. Jeff v. Smith, 1810. 1 Rose 117. 2 Taunt. 401.

277. B. was arrested, and though he could pay the debt, he went to prison, as he declared, to force his creditors to a composition. This is an act; so if he had procured himself to be arrested on a sham debt. Exp. Barton. T. 1724. 7 Vin. 61. pl. 15. ante, pl. 268.

278. A conveyance to trustees to pay pretended creditors, is a fraud upon just creditors, and an act. Read v. Ward, 7 Vin. 119 pl. 2.


280. So is a payment of a bill after the holder had issued a commission. Exp. Thompson. T. 1790. 1 Ves. jun. 157.


282. Quitting the dwelling-house with the intention of delaying a creditor, though under a groundless apprehension, is an act of bankruptcy; so is a denial to a servant calling for a debt by the direction of the acknowledged agent of the creditor, and by the appointment of the debtor; and that too, though the debtor was seen by the person applying, through the window of a partition, and heard given directions for his own denial. S. C.

283. An assignment by co-partners of all their property, in trust for their creditors, with a proviso to be void if all the creditors (above 20l.) should not execute, or a commission should issue against them within a certain time, is an act of bankruptcy; Secus when the deed was joint and not several, one never executed. Dutton v. Morrison. H. 1809. 1 Rose 213. 17 Ves. 193. See the several authorities referred to.


285. An assignment by copartners of all their property (a) in trust for their creditors, with a proviso to be void if all above 20l. should not execute, or a commission should issue within a certain time, is an act of bankruptcy within 1 Jac. 1. c. 15. s. 2. Secus, when the deed was joint and not several, and one party never executes. Dutton v. Morrison. T. 1810. 17 Ves. 193. (a) Worsley v. De Mattos. 1 Burr. 467.

286. Although the act of bankruptcy must be committed in England, yet a letter from a trader, who went abroad in the course of his trade, connected with circumstances here, may be sufficient evidence of such an act. Exp. Hague. T. 1810. 1 Rose 130.

287. Unless a debtor orders himself to be denied to a creditor, his subsequent approbation of it will not make it an act of bankruptcy. Exp. Foster. H. 1811. 1 Rose 49.

288. An act of bankruptcy, by leaving the house, is complete at the instant of departure, if without collusion, and therefore it is not affected by a subsequent residence with the petitioning creditor. Exp. Gardner. M. 1812. 1 Ves. & B. 43.

289. Two partners, one residing in Manchester, the other in London; the latter went for a few days on a visit at Manchester, both of them left the house of business there to avoid an arrest, carrying their books of account with them;

290. A trader who was denied by his own orders to a creditor, in the habit of calling upon him for money at his dinner hour, does not commit an act of bankruptcy, if his intent be to avoid interruption at that hour, and not to delay his creditor, although the creditor be thereby delayed. *Smith v. Currie*, E. 1813. 1 Rose 364. 3 Campb. 349.

291. A departure from the realm, by which creditors were delayed, is not an act of bankruptcy unless there was an intention to delay at the time. The deposition of the witness proving such an act should therefore state such intention or circumstances, from which the court will necessarily infer it, for though the departure of a man in embarrassed circumstances is strong, it is not conclusive evidence of intention. *Exp. Osborne*, T. 1813. 1 Rose 387. See the reporter's notes.

292. It is not an act of bankruptcy for a debtor to cause himself to be denied to a creditor, calling by the debtor's appointment for payment on a Sunday.—*Exp. Preston*, M. 1813. 2 Rose 21. 2 Ves. & B. 311.

293. It is an act of bankruptcy, by beginning to keep house, for a trader to cause himself to be denied to a creditor calling not for payment of his debt, but in order to cover it by buying goods to that amount. *Exp. Harris*, T. 1814. 2 Rose 67. *Vide Bayley v. Schofield*, ibid. 100.

294. A trader conveys all his real and personal estate to trustees to sell for the benefit of his creditors, under which the trustees contract to sell certain lands to defendant. The contract not being completed, the trustees file a bill against defendant for specific performance; but before answer, the trader becomes bankrupt, and his assignees file a supplemental bill to enforce the contract. The assignees may compel the performance notwithstanding the conveyance was an act of bankruptcy. *Godwin v. Lightbody*, E. 1818. Dan. 153.

(b) Of the Effects of an Act by relation.


296. Where the act is lying in gaol two months, it has relation to the first day of the surrender. *Barwell v. Ward*, E. 1754. 1 Atk. 200.

297. The moment a trader commits an act of bankruptcy, he ceases to have any dominion over his property: and any act, importing to transfer or dispose of it is fraudulent and void against all mankind: but equity will not relieve the assignees of a bankrupt against the purchaser of the lands or goods of a bankrupt without notice of the act of bankruptcy. *Chadus v. Brownlow*, E. 1791. 2 Ridg. P. C. 424.

298. A. and B. were joint traders, A. becoming insolvent, and B. abroad; defendant, a joint creditor, attached the goods of the co-partnership in the hands of C. Defendant obtained a verdict in the mayor's court. A. became bankrupt, and his assignees claimed the goods attached, A. having committed an act of bankruptcy prior to the attachment. Held, that the separate commission over-reached the attachment by relation to the act of bankruptcy. So an attachment in the West Indies shall be over-reached by bankruptcy, So shall an execution; for the effect of the relation under a separate commission is to make the assignees and the solvent partner tenants in common from the date of the act of bankruptcy. In the case of a separate bankruptcy execution will not be permitted even by a joint creditor, but the joint effects must be distributed even in the absence of the solvent partner, and the surplus applied under all the equities subsisting between the partners themselves. *Barker v. Goodair*, T. 1805. 11 Ves. 78. *Vide Hankey v. Garrett*, 3 Bro. C. 457. 1 Ves. jun. 236.


300. A fraction of a day will be allowed in support of a commission of bankruptcy, by admitting evidence that the act of bankruptcy, though on the same day, was previous to the issuing, that is, the awarding and sealing the commission. *Wydow's Ca. T. 1807. 14 Ves. 80*, though a commission of bankruptcy will not be
superseded for want of an act of bankruptcy, previous to striking the docket: the affidavit of belief that the party is a bankrupt at that time, not being required by the statute, though according to the practice, S. C.

301. Whether an assignment by deed, of book debts, is an act of bankruptcy, must depend upon what other effects the trader had. Exp. Richardson, T. 1807. 14 Ves. 186.

302. A concerted act of bankruptcy will not be available, except for creditors not privy to it. Exp. Bourne, T. 1809. 16 Ves. 145.

303. The relation to the act of bankruptcy is confused to an act subsequent to the petitioning creditor’s debt. Exp. Birkett, T. 1841. 2 Rose 71.

(e) Of the Act of Bankruptcy generally.

304. A wife cannot be examined touching her husband’s bankruptcy. Exp. James, H. 1719. 1 P. W. 611.


306. Where the bankrupt is outside of the kingdom, and there is a doubt of the act, the court will send it to law; but if the bankrupt is at home, the court will refer the doubt back to the commissioners. Exp. Gulston, Exp. Dale, T. 1743. 1 Atk. 193.


308. Witnesses refusing to obey the commissioners’ summons to prove an act of bankruptcy, were ordered by the Ld. Ch. (upon petition) to attend them. Exp. Lund, E. 1802. 6 Ves. 781.

309. Though a commission cannot stand upon a concerted act of bankruptcy, it may be supported, if any other act of bankruptcy, not liable to that objection, has been committed; and the priority of the act is no objection; nor that the object of the commission is to defeat an execution. Exp. Edmonson, T. 1802. 7 Ves. 303. But on a concerted act of bankruptcy, the commission must be superseded with costs, though it was carried on bona fide, and without collusion. Exp. Gouthwaitie, E. 1811. 1 Rose 87. Exp. Dufrene, M. 1812. 1 Ves. & B. 51. S. P.

310. Property attached in Jersey, being by the law of that island vested in the creditor attaching, upon confirmation by the court of the island, in the case of a bankruptcy it was held, that the creditors attaching were entitled to hold the property attached, and to prove the residue, where the act of bankruptcy was subsequent to the completion of the judicial act, whether on the same or on any other day; but where the act of bankruptcy was previous, they could not hold against the assignees of the bankrupt. Exp. Dobres, Exp. Le Mesurier, H. 1803. 8 Ves. 82.

311. In all future commissions of bankruptcy, all conveyances by, payments to, and contracts with, any bankrupt, bona fide made two months before the date of the commission, shall be good, notwithstanding any prior act of bankruptcy, provided the person so dealing with such bankrupt has not at the time of such conveyance, &c. any notice of any prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment. Stat. 46 Geo. 3. c. 133. s. 1.

312. And the issuing of a commission against such bankrupt, although such commission be afterwards superseded, or the striking of a docket whether any commission shall issue thereon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of this act, if it shall appear that an act of bankruptcy had actually been committed at the time of the commission, or striking such docket. Ibid. s. S. repealed by stat. 49 Geo. 3. c. 121. by which it is enacted, that all executions and attachments against the lands and tenements or goods of the bankrupt, bona fide executed or levied more than two months before the date and issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy, in like manner as if no such act had been committed, provided that the plaintiff in the action had no notice of any prior act of bankruptcy, or that the bankrupt had become insolvent or had stopped payment; and it was declared, that the issuing of a commission, though superseded, shall be deemed notice of an act of bankruptcy.

313. And further, that no commission of bankruptcy shall be avoided or defeated by reason of any prior act of bankruptcy being committed before the contraction of any debt due to a petitioning creditor, if such petitioning creditor had no notice of such act of bankruptcy at the time. Stat. 46 Geo. 3. c. 185. s. 5.
BANKRUPT IV.

Of the Act of Bankruptcy generally.

314. Where a witness refused to attend the summons of the commissioners to prove an act of bankruptcy, Ld. Ch. issued an order to compel such attendance. Exp. Jones, M. 1810. 17 Ves. 379. 1 Rose 39.

315. The bankrupt's agreeing to an act of bankruptcy, unless heconcerts it, is no objection to the commission. Exp. Oliver, E. 1811. 1 Rose 67. (a)

316. The Chancellor can order the trustees in an assignment of all a trader's effects, to produce it before the commissioners, in order to prove an act of bankruptcy. S. C. 1 Rose 313.

317. Where the only witness who could prove an act of bankruptcy was detained in Cumberland on business, the commissioners were permitted to receive an affidavit of the act, sworn before a Master extraordinary. Exp. Wood, T. 1812. 1 Rose 298.

318. Where a witness who had proved an act of bankruptcy under a separate commission refused to do so under a joint commission against the same bankrupt, the court ordered him to attend and pay all costs. Exp. Gardner, M. 1812. 1 Ves. & B. 78. Vide Exp. Lund, 6 Ves. 781. Exp. Higgins, 11 Ves. 8.

319. Where an act of bankruptcy was committed after the striking the docket, but before the commission was sealed, and though it be on the same day, it will sustain the commission. Exp. Du Frene, M. 1812. 1 Rose 333. 1 Ves. & B. 51. Vide Gordon v. Wilkinson, 8 T. R. 507. Wydow's Ca. 14 Ves. 80.

320. Departure from the realm or dwelling house, without proof or necessary inference of an intention to delay a creditor, is not an act of bankruptcy, and a pressure of debts, though strong, is not conclusive evidence of such an intent. A creditor cannot be a witness to prove an act of bankruptcy. (a) Exp. Osborne, T. 1813. 2 Ves. & B. 177. 1 Rose 357. S. C referring to Wydown's Ca. 14 Ves. 80. Robertson v. Liddell, 9 East 487. Bayly v. Schofield, 1 Maule and Selw. 336. (a) This was so held, under an impression that the interest of the creditor formed one of the objections in Bullock's Ca. (1 Taunt. 71. 14 Ves. 452.) but now the Chancellor requires an undertaking from the creditors not to prove under the commission. Vide etiam Shuttleworth v. Bravo, cited in Norcott v. Orcott, 1 Stra. 650.—N. B. Servants sometimes are creditors for their wages when they prove acts of bankruptcy or trading, but they are generally paid in full by the assignees.

321. The act of bankruptcy created by 4 Geo. 3. c. 33. must, in some of its circumstances, be proved by a creditor, but his testimony cannot be received as to facts, of which evidence can be obtained from other sources. Exp. Harcourt, T. 1815. 2 Rose 203.

322. The commission and proceedings are inadmissible evidence of an act of bankruptcy, for the purpose of defeating a conveyance. Whitworth v. Graham, M. 1815. 2 Rose 364.

323. One who had a deed in his hands which quoad one of the parties amounted to an act of bankruptcy, was ordered to attend with it on the commissioners, but without prejudice to any objection he might take before them as to a disclosure of confidential communications. Exp. Treacher, H. 1817. 1 Buck 17.

324. A. assigned all his estate to trustees for the benefit of his creditors, and B. made a like assignment to trustees, two of whom were trustees under A.'s assignment. A. at the instance of his trustees issued a commission against B, and the act relied upon was B's assignment: Held, that the commission being that of A.'s trustees could not be supported. Exp. Kelner, T. 1817. 1 Buck 104.
BANKRUPT V.

Of the proof of Debts.

(a) What Debts are proveable of course, and what are not so, and herein of the general Rights of Creditors. (b) Of Proofs on Bonds, Bills, Notes, &c. Interest, Protest, Re-exchange, Costs, &c. (c) Of Debts payable at a future Day, or on the happening of a contingent Event. (d) Of Debts due in Ireland, Scotland, and in Foreign Countries. (e) Of Rent Arrear at the Time of the Bankruptcy. (f) Of Money due on Mortgage, (g) Of the Proof of Debts in Cases of Lien, Pledge, or Set-Off. (h) Of Debts due to Solvent Partners, or those claiming under them. (i) Of Debts due to Sureties. (k) Of Debts due to Executors, Trustees, Guardians, &c. (l) Of Debts due to Corporations, Parish Officers, &c. (m) Of Proofs in respect of Policies of Insurance. (n) Of the Portions of a Bankrupt's Wife or Children.

325. A man buys land and has a conveyance, but before payment, he is a bankrupt. The vendor shall not prove his debt, but the land shall be charged. Chapman v. Tanner, M. 1694. 1 Vern. 268.

326. A. lends money to B. without notice that a commission had issued, he cannotprove his debt. Hitchcox v. Sedgwick, T. 1690. 2 Vern. 157.

327. A creditor by statute not executed must come in pro rata, though the lands are bounded. Newland v.——, E. 1706. 1 P. W. 92. Orlebar v. Fletcher, M. 1721. 1 P. W. 737, S. P. as to a judgment creditor.

328. If a man trade with a bankrupt between the act of bankruptcy and the commission, whatever for goods or money, without notice of the act, but the bankrupt keeping open trade, he shall come in as a creditor. Crossley's Ca. T. 1716. 7 Vin. 69, pl. 6.

329. A mortgagee who has paid the arrears of a bankrupt's rent, cannot stand in the landlord's place without an order, but he must prove his debt. Awnon. E. 1740. 1 Atk. 102.

330. Where a meeting of creditors is properly advertised, the majority in value present shall bind the absentees. Cooper v. Pepys, E. 1741. 1 Atk. 106.

331. The commissioners cannot admit several creditors to prove under a joint commission. Exp. Sandon, E. 1743. 1 Atk. 68. The practice in this case is now regulated, by order of court, dated 8th of March, 1794.

332. An apprentice who paid a premium, shall be admitted to prove a proportion of it under his master's commission, deducting the time he served with the bankrupt. Exp. Sandby, H. 1745. 1 Atk. 149.

333. A sold goods to B. in the course of trade, and afterwards took a usurious bond. B. became bankrupt, whereupon A. petitioned to prove his debt under B.'s commission; but a question arising whether the bond extinguished the preceding book debt, Lord Hardwicke refused to determine it, and dismissed the petition without prejudice to any other remedy by bill or action. Exp. Davy, E. 1745. Ridgw. Ca. temp. Hardw. 289.

334. A a creditor of B. a bankrupt, was indebted to H. and he drew in favour of H. on the assignees of B. for £79, his dividend of B.'s estate. The assignee accepted it by parol, and became bankrupt. H. shall have his whole money, and not come in pro rata. Exp. Kirk, M. 1743. 1 Atk. 108.

335. Upon an affidavit by a creditor, that he has not read the Gazette, he shall prove his debt, so as not to disturb a dividend already made, but a future dividend shall not be made, till he is brought up equal with the other creditors. Exp. Stiles, E. 1743. 1 Atk. 209.

336. Where a man, 15 years after the commission issued, and the bankrupt and assignees are dead, applied to prove his debt, he shall be rejected. Exp. Peachy, M. 1734. 1 Atk. 111.

337. A man may prove a debt in right of his wife, and bring an action against the bank upt, for a debt due in his own
right. Exp. Matthews, M. 1754. 3 Atk. 186.

338. A. received his child's earnings on the theatre, while living with him. The child shall prove a particular sum to avoid an enquiry; but this would be a dangerous rule. Exp. Macklin, T. 1735. 2 Ves. 675.

339. Where a man has two clear distinct demands on a bankrupt, he may sue for one and prove the other, but not if the securities are all for the same debt. Exp. Crissom, E. 1789. 1 Bro. C. C. 270.

340. On petitions to be admitted to prove debts rejected by the commissioners, the petitioners ought first to state to the court the grounds of the commissioner's objection. Expt Wilson, H. 1787. 1 Cox 308.

341. A. drew bills for £3000 on B. which were indorsed by C. for the accommodation of A. All the parties became bankrupts, at which time C. was indebted to A. on a distinct account in £2000. The assignees of A. proved the £2000 under C.'s commission, and the holders of the bills also proved the amount under C.'s commission, and received 8a. in the pound. The court directed the assignees of C. to retain the dividend on the proof of 2000l. for the benefit of the general creditors, and expunged the proof of the said 2000l. Exp. Maskelyne, T. 1787. 1 Cox 394.

342. A joint note of A. and B. was given for goods sold to A. only; and a receipt given as for money paid. A joint commission issued against A. & B. The creditor may still prove his debt for goods sold against the separate estate of A. Exp. Seddon, T. 1788. 2 Cox 49.

343. A creditor of a bankrupt borrows money of him, after a secret act of bankruptcy, which he repays with interest. The loan repaid is considered as never borrowed, and the creditor shall prove his whole debt. Exp. Congalton, M. 1789. c. Bro. C. C. 47.

344. Bankers receive and pay on account of a bankrupt, after notice of an act; all sums received are to the use of the estate, and they cannot set off payments, or come in as creditors, for debts paid which were due before the bankruptcy. Hankey v. Vernon, T. 1791. 3 Bro. C. C. 819. 2 T. R. 113.

345. Where a man petitioned to prove a debt, without going before the commissioners, and stating what passed before them, it was held irregular. Exp. Wright, M. 1792. 2 Ves. jun. 41.

346. Though unliquidated damages cannot be proved under a commission, yet if the demand is partly liquidated, as a difference of price, upon a resale, the creditor, having security, may apply it first to the former, then to the latter, and may prove the residue. Exp. Hunter, T. 1801. 6 Ves. 94.

347. Separate creditors who had taken a joint security, were permitted to resort under the commissions to their original debts, on giving up their securities. Exp. Lobb, T. 1802. 7 Ves. 592.

348. A creditor who has not received any dividend under a deed of composition, if a bankruptcy takes place afterwards, and there is no fund set apart for his use, cannot have those dividends out of the bankrupt's estate, and prove the residue of his debt; but he must come in as the other creditors at the date of the bankruptcy. Exp. D'Oliviera, Exp. Von Halle, H. 1803. 8 Ves. 84.

349. An executrix married, and she and her husband admitted assets in answer to a bill filed against them. The assets become a debt of the husband in respect of this admission, and may be proved under a commission of bankruptcy against him. In Re Mac Williams, T. 1803. 1 Sch. & Lef. 173.

350. Where a man has advanced money to a bankrupt upon usurious terms, and has taken a security (as a mortgage), his security shall be set aside, but he shall not be permitted to come in as a creditor, even for what he has actually advanced. Benfeld v. Solomons, T. 1803. 9 Ves. 84.

351. A joint creditor being the petitioning creditor under a separate commission, was held entitled to prove and vote in the choice of assignees, &c. with the separate creditors, not being within the rule, excluding the other joint creditors. Exp. Hall, E. 1804. 9 Ves. 349. Exp. Chandler, E. 1803. 9 Ves. 35. Exp. Tait, T. 1809. 16 Ves. 193. Vide Exp. Elton, 3 Ves. 238. Exp. Clay, 6 Ves. 813. and references.

352. By the stat. 46 Geo. 3. c. 135, it is enacted, that all bona fide creditors whose debts might have been proved under a commission of bankruptcy, if no prior act of bankruptcy had been committed, shall, notwithstanding any such prior act of bankruptcy, be admitted to
prove such debts, provided such creditors had not, at the contrac
tion of such debts, any notice of such prior act of
bankruptcy. As to what shall be deemed
notice within this act, see sect. iv. (a.)

333. Petitioner prayed to prove a
debt under the bankrupt's estate, which
the commissioners had rejected, it ap
pearing by the examination of the bank
rupt, that he was charged with having
received money, the receipt and appli
cation of which he refused to disclose.


Petition dismissed. Exp. Symes, T. 1805.
11 Vesc. 521.

334. Under a separate commission of
bankruptcy, a set-off against a separate
creditor of the bankrupt indebted to the
partnership in a greater amount was re
fused, as disturbing all the habitual ar
rangements in bankruptcy. Exp. Two
good, T. 1805. 11 Vesc. 517. 521.

335. An assignment was made in trust
to pay creditors who should execute the
deed, with a covenant by the debtor,
that if the creditors should not, out of
that fund, be paid in full within two years,
to pay the deficiency within a month af
termas. Before the expiration of these
two years, the debtor became bankrupt;
his creditors not being fully paid by the
assignment, were allowed to prove the
deficiency, after the application of the
trust funds, subject to a rebate. Exp.
Richardson, T. 1807. 14 Vesc. 184.

336. Proof in bankruptcy was admit
ted under promissory notes given for li
quidated damages by compromise of an
action for seduction. Exp. Mumford,
T. 1808, 15 Vesc. 289. Contra, had the
notes been given as an inducement to a
future seduction. S. C.

337. Proof in bankruptcy under a se
curity for more than the debt, was ex
punged; but security or satisfaction tak
en after a docket struck and not follow
ed by a commission, though it may
amount to a contempt, and cannot be re
tained, yet it is not within the statute 5
Geor. 2. c. 30. s. 24. so as to forfeit
the original debt. Exp. Browne, H. 1809.
15 Vesc. 472.

338. A debt which could not be reco
vered in an action at law against the
status of limitations, nor in equity by
analogy to it, will not be admitted under
a commission of bankruptcy. Exp. Des
nay, H. 1809. 15 Vesc. 479. Petition for
rehearing this petition, dismissed, and
former decision confirmed. S. C. T.
1815. 2 Rose 245.

339. Where one partner carried on a
distinct trade and became a bankrupt,
the other partner may prove under his
commission a debt for goods sold to him
by the firm. Exp. Heathom, T. 1810. 1
Rose 146. Vide Exp. Adams, 1b. 305.
Exp. St. Barbe, 11 Vesc. 413.

340. Where the proof of a debt was re
fused, and thereupon the creditor en
ters up judgment in an action he had
brought against the bankrupt, and took
out a ca. sa. in order to fix the bail, but
the bankrupt surrendered himself in dis
charge of them. It was held that the
creditor, on establishing his debt, should
not be precluded from resorting to the
commission. Exp. Arundel, T. 1810. 1
Rose 148.

341. A commission issued in London,
against a bank at Exeter. Many holders
of small notes, and many small creditors
lived in the country, an auxiliary com
mission was therefore granted to receive
the proof of small debts, to the extent of
20l. which proofs were sent to the com
missioners in London, and then the coun
try commission was superseded. The
country commissioners however were not
allowed to examine the bankrupt. Exp.
Upkam, T. 1810. 17 Vesc. 212. The same
course was adopted in Exp. Perry and
Exp. Scott. 1 Rose 12.

342. The deduction of a security is
never to be made in bankruptcy, but
when it is the property of the bankrupt.
Exp. Parr, E. 1811. 1 Rose 76.

343. A creditor under an award made
after an act of bankruptcy, cannot prove
his debt. Exp. Kemshede, T. 1811. 1
Rose 149.

344. A creditor who had taken out
execution against the bankrupt's effects,
gave up the proceeds under an agreement
with the assignees, that he should come
in with the other creditors for the balance
due to him. Held, that such agreement
means a proveable balance, and not a
debt effected with usury. Exp. Bangley,
M. 1811. 1 Rose 168.

345. Petitioning creditor's debt con
sisted of 100l. due from one partner in
dividually, on an award made under a
deed of reference of accounts between
partners. Held, that proof of the execu
tion of the deed of reference by the pet
tioning creditor and the bankrupt was
insufficient, and that the execution by
the other partners, must also be proved.
Anstrum v. Chace, H. 1912. 1 Rose 344.
15 East 209.
366. Proviso in a deed of composition, that in case of default of payment, or if a commission of bankruptcy should issue, the covenants to accept the composition should be void, and the creditors be paid or prove their whole debts, deducting only what had been received. Upon bankruptcy after breach in the payment of the composition, and a subsequent part payment, the creditors were held entitled to prove the whole residue of their debts, according to the proviso, retaining what they had received. Exp. Vere, T. 1812. 19 Ves. 93. 1 Rose 281. Vide Exp. Bennett, 2 Atk. 527.

367. A petition to prove a debt should state the grounds of its rejection by the commissioners. Exp. Curtis, T. 1812. 1 Rose 274.

368. No fraud can be inferred from the bare proof of debts, by relations of the bankrupt. Exp. Gardner, M. 1812. 1 Ves. & B. 45.

369. Commissioners cannot expunge a proof, for as long as it remains upon the proceedings, it is as a debt. Exp. Graham, H. 1813. 1 Rose 456.

370. A compounded with his creditors, to pay them 9s. in the pound, by four instalments, with a proviso, that if the composition should not be duly paid, the release should be void. The debtor pays three instalments and then became bankrupt before the fourth was due. Held, that the creditors were not remitted to their original debt, but could only prove for the amount of the fourth instalment. Exp. Pechle, T. 1813. 1 Rose 433. Vide Exp. Vere, ib. 281 ante, pl. 366.

371. A creditor attending to prove his debt, is protected from arrest. Exp. List, in Re Cumming, E. 1814. 2 Rose 24.

372. A creditor who, knowing the partnership of the parties, takes a bill drawn by all and indorsed by one, is not entitled to double proof, upon the ground that, previously to taking the bill, he required, and had the indorsement of the one, and that he thereby raised a contract for double security. Exp. Bank of England, T. 1814. 2 Rose 82.

373. The stat. 46 Geo. 3. c. 133. s. 2. does not restrain a creditor from proving a debt contracted before the act of bankruptcy on which the commission issued, but after notice of a prior act of bankruptcy. Exp. Bowness, T. 1814. 2 Rose 266. 1 M. & S. 479. S. C.

374. An order of the court of Chancery, for payment of a sum of money, may be proved under the commission as a debt, and will be barred by the certificate. Wall v. Atkinson, E. 1815. 2 Rose 196. Vide Exp. M-Williams, 1 Sch. & Lef. 174.

375. The court will not grant an order for an enquiry before commissioners of bankrupts, on an issue, to try whether a debt proved, was usurious, morely on a deposition of the bankrupt (uncertificated) as to the usury. Exp. Burt, T. 1815. 1 Madd. 46.

376. A sworn broker of London may prove in respect of debts arising out of transactions in which he had been engaged as a principal, though notwithstanding such transactions were in contravention of his bond and oath to his employers, executed and taken according to the statutes. Sed secus, if the debt had arise out of any transactions in which he was both broker and principal, for that is a fraud, and it invalidates the debt at common law. Exp. Dyster, H. 1816. 1 Meriv. 155. 2 Rose 349.

377. A father who was a partner in a bank, transferred a sum of money to the credit of his son in the partnership books. For this credit the son was held entitled to prove under a commission against the firm. Exp. Skerratt, T. 1816. 2 Rose 384.

378. An executor and trustee having committed a devastavit, will not be permitted to prove under his bankruptcy, and liberty so to do was given (in the first instance, and without previous application to the commissioners) to a legatee, on behalf of himself and others, with a direction that the dividends be paid into the bank, in trust in the matter. Exp. Moody, Exp. Preston, 1816. 2 Rose 413.

379. Husband and wife assigned to two creditors of the husband, a contingent interest, to which the wife was entitled, if she should survive A. B. The creditors insured the wife's life, and on her death, before the contingency happened, the creditors received the insurance money. On the husband becoming a bankrupt, the creditors were only allowed to prove the amount of what was due to them, after deducting the money received from the insurance office, minus the sum paid for the premium and expenses. Exp. Andrews, T. 1816. 1 Madd. 573.
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380. A holder of the notes of the Pentonfract bank, payable in cash or bank paper, if he did not receive them immediately from the maker, cannot prove the amount as for money had and received against the estate of the maker. Exp. Davidson, T. 1817. 1 Buck 31. Vide Exp. Iremong, 2 Rose 225. As to the assent necessary to give a right of action against the bankers, vide Williams v. Evans, 14 East 382. Ward v. Evans, 2 Ld. Raym. 928. Fenner v. Mears, 2 Blis. 1269. Israel v. Douglas, 1 H. Blis. 239. De Bernales v. Fuller, 14 East 590.

381. A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission issued after peace has been established. Held also, that a petition to enforce a claim of such a proof, ought to state the grounds of rejection by the commissioners. Exp. Schmaling, T. 1817. 1 Buck 93.

382. A. and B. were partners, but the trade was carried on in the name of A. only. A. drew bills in his own name, payable to his own order, and indorsed them. Afterwards B. indorsed them:—Held, that there was no legal contract for a holder to maintain an action against A. & B. on these bills, unless it appear that A. drew and indorsed them, as representative of A. and B.—Held also, that a person discounting these bills, may sue A. and B. jointly, for money had and received, if he can show that they received the money for the partnership purposes. In this case A. and B. having become bankrupts, the holders proved the bills. On the petition of joint creditors to expunge their depositions, issues were directed, to try whether the bankrupts were jointly liable on any of them, as for monies lent and advanced. The articles of partnership were to be given in evidence, and both bankrupts to be examined, but the bankruptcy was not to be set up. Exp. Bolitko, T. 1817. 1 Buck 100.

383. A. being indebted to B. gave him an order on his bankers, to pay him by a bill at three months. The bankers drew a bill for the amount upon their correspondents in London, who accepted it. Afterwards both the drawers and acceptors became bankrupt, and B. proved and received a dividend under both commissions:—Held, that B. was entitled to prove his debt under A.'s commission also. Exp. Rathbone, H. 1818. 1 Buck 215.

384. Six persons were in partnership as bankers, two of them carried on a distinct trade together, and had bill transactions with G.; in the course of which, in exchange for a bill drawn by them, upon and accepted by G. they deliver to him a bill drawn and accepted by the six partners, but not indorsed by the two in their separate character; G. also procured a bill of exchange delivered to him by the two partners without their indorsement, to be discounted at the bank, and paid over the proceeds to them. G. paid his acceptance, but both the other bills were dishonoured:—Held, that G. having lent his credit to raise the money wanted by the two partners, was entitled to prove against their estate for the amount of both the bills, deducting the dividends received under the commission, against one of the acceptors. Exp. Hustler H. 1818. 1 Buck 171. 3 Madd. 117.

385. W. (a separate trader,) was also in partnership with G. under the firm of G. and Co. W. on his separate account, was indebted to G. and Co. and he gave that firm a bill of exchange, drawn by A. and Co. and accepted by him. G. and Co. being largely indebted on a drawing account to F. and Co. paid the bill to them, and they indorsed it to D. and Co. A. and Co. compounded with their creditors. W., G. and Co. became bankrupts. D. and Co. by the composition, and by proving under the commission of W. and F. and Co. received 20s. in the pound upon the bill: Held, that although G. and Co. were only indebted to F. and Co. in respect of their acceptances, and which F. and Co. had not taken up when they became bankrupts, yet that the assignees of F. and Co. were entitled to stand in the place of D. and Co. in respect of the proof made by them under W.'s commission, to the extent of the dividends paid to D. and Co. under F. and Co.'s commission. Exp. Greenwood, E. 1818. 1 Buck 237.

386. A. guaranteed B. and Co. against any loss they might suffer on account of the non-payment of an installment by certain joint debtors of B. and Co.; one of the joint debtors becoming bankrupt, B. and Co. under an order for the proof of joint debts under his separate commission, proved the amount of the installment, and received a dividend. Ordered, that the benefit of the future divi-
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...deeds on the proof be sold, and the produce paid to B. and Co. and that the monies so received by them, together with the amount of the former dividend, be deducted from the instalment, and that B. and Co. might prove for the difference under A.'s commission. Exp. Reid, E. 1818. 1 Buck 259.

387. Goods were sold, to be paid for at the end of the year, but if paid for before then, 20 per cent. discount to be allowed. They were not paid for within the year, yet the purchaser was not allowed to prove the whole debt without deducting the discount. Exp. Pignol, E. 1818. 3 Madd. 136. Vide Exp. Ainsworth, 4 Ves. 673. S. P.

388. An examination before the commissioners upon an enquiry, is not evidence to expunge a creditor's proof, who was not party to the enquiry; nor is it evidence to ground an order for an enquiry as to the validity of the proof. Exp. Coles, T. 1818. 1 Buck 242.

389. Where a bankrupt petitioned to expunge the various proofs, on the ground of usury, &c. his petition was dismissed, because the multifarious costs which must be given out of the estate, would be hard upon those creditors whose debts were indubitable. S. C. 1 Buck 256.

390. Where a solicitor, who has papers in his hands belonging to the bankrupt, upon which he claims a lien for costs, proves his debt, such proof is equivalent to payment, and is a relinquishment of the lien. Exp. Hornby, E. 1819. 1 Buck 351.

391. On petition to expunge a proof founded on an affidavit of a creditor, who died before the proof was made, the commissioners were directed to review the proof, although two dividends had been paid. Exp. Bridges, T. 1819. 4 Madd. 269.

392. Where the commissioners had improperly rejected the petitioner's proof to a very large amount, whereby two creditors for comparatively trifling sums were enabled to choose the assignees, a new choice was directed, the petitioner indemnifying the estate against all the costs. Exp. Edwards, T. 1819. 1 Buck 411.

393. If a creditor, as an additional security for his debt, take the bankrupt's acceptances, he ought, when he proves the debt, to state that fact to the commissioners. Where a creditor had not done so, the proof was ordered to be expunged, with liberty for him to go again before the commissioners and tender his proof. Exp. Hussack, T. 1819. 1 Buck 390.

394. A partner who, after getting his certificate, had paid the notes of the firm, was permitted to prove against the joint estate. Exp. Atkins, T. 1820. 1 Buck 479.

395. Where the petitioner swore positively to a debt, and was contradicted by the bankrupt, and there was no other evidence, an issue was directed, at the trial of which, the bankrupt and the petitioner were to be examined. Exp. Williamson, T. 1820. 1 Buck 346.

396. The amount of notes which had been bought up after the bankruptcy of the maker, cannot be proved, unless it be shown that the persons from whom they were purchased, were individually entitled to a proof, in respect of them. Exp. Rogers, T. 1820. 1 Buck 490.

(b) Of Proofs on Bonds, Bills, Notes, &c. Interest, Protest, Re-exchange, Costs, &c.

397. A. lent money to B. and C. on bond; A. issued a ca. sa. against C. who paid 24l. and was discharged; B. became bankrupt. It was contended that the debt being entire at law, the whole was discharged, as in Bower v. Swadlin, 1 Atk. 294. Sed per cur. A. shall prove against B. a moiety of the money remaining due, the execution against C. being subsequent to the assignment of B.'s estate; but, as B. and C. were each only liable to half the debt in equity, and C. was not the original debtor for the whole, A. shall only have relief against B.'s estate for a moiety. Secus, had B. been the original debtor and had borrowed all the money. Exp. Smith, T. 1713. 1 P. W. 237.

398. A. drew on C. for 100l. in favour of B. which C. accepted; A. and C. were bankrupts; B. received a dividend of 40l. from C. and then desired to prove the whole 100l. against A. B. was allowed to prove only 60l. and the master to enquire if the 40l. was paid out of A.'s effects in C.'s hands, or out of C.'s own effects. If the latter, C. is a creditor for the 40l.; but if out of A.'s effects, then 40l. out of the 100l. is paid off. Exp. Ryswicke, H. 1722. 2 P. W. 89.
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399. If a trader, indebted by simple contract, pledges goods for payment, and promises interest, the creditors shall have interest to the date of the commission; so shall the specialty creditor have interest. Croydon's Ca. T. 1726. 7 Vin. 110. pl. 1. Et vido Bromley v. Child, 1 Atk. 259.

400. A. gives a note for 200l. to B. or order; B. indorses it to C. and to D.; A. B. and C. are bankrupts; D. receives 5s. in the pound from A.'s estate. He shall prove 150l. only against B.; and if he has paid contribution for more, it shall be returned. Exp. Lafobre, E. 1727. 2 P. W. 407.

401. Where the drawer and indorser of notes are both bankrupts, and the creditors have received 5s. in the pound from the indorser's estate, they can only prove the remaining 14s. against the drawer. Cooper v. Page, E. 1741. 1 Atk. 106.

402. Commissioners compute interest no lower than the date of the commission, because it is a dead fund. Exp. Bennett, E. 1743. 2 Atk. 528.

403. In a mutual account, the commissioners should compute interest on both sides, or stop it to the date of the commission. Bromley v. Gooder, M. 1743. 1 Atk. 80.

404. A creditor by bond, and on an open account, shall prove his bond, for the commissioners may still take the account, but he shall only have a dividend on his balance. Exp. Simpson, T. 1744. 1 Atk. 68.

405. A. without consideration, gave a note to B. for 100l.; B. indorsed it to C. who took a discount of 9 per cent. so that B. received only 90l. 6s. 8d.; C. took a bond from A. and B. for 100l. which he proved under the commission against A. The commissioners, finding the fact, stopped his dividend; and, on C.'s petition, the court directed an issue at law to try the question of usury. Exp. Thompson, T. 1746. 1 Atk. 125. Vide etiam Exp. Davy, E. 1745. Rigw. Ca. temp. Hardw. 289. where A. had sold goods to B. in the way of trade, and took an usurious bond on B.'s becoming bankrupt, the Ld. Ch. would not determine the question, whether the bond extinguished the book-debt on petition, but put the parties to file their bill.

406. If a man takes no more than five per cent. for the discount of notes, he shall prove the whole amount of them. Exp. Marlar, T. 1746. 1 Atk. 150.

407. The rule that note creditors shall not prove interest, unless expressed in the body of the notes, is reasonable, and the court will not break through it. S. C.

408. Petitioner was admitted to prove his whole debt, and before a dividend, he received a composition of 2s. 6d. in the pound from another party. As that composition was not paid till after he had proved his debt, he shall have a dividend on the whole sum proved. Exp. Wild- man, M. 1750. 2 Atk. 110.

409. A creditor is entitled to prove against all obligors, drawers of notes, &c. till he is completely satisfied. S. C.

410. Upon the authority of the foregoing cases, it is now a rule, that a creditor shall receive a dividend on the whole debt proved under each commission, (but not more than 20s. in the pound altogether,) though he shall not be at liberty to prove under any one commission more than what remains due at the time of the proof made.

411. An extent issued against the surety of a bankrupt who disputed the claim, though just. He shall be allowed to prove his expenses. Exp. Marshall, E. 1751. 1 Atk. 262.

412. G. drew many bills upon H. in favour of O. and A., which H. accepted for his honour; G. and H. were bankrupts. The holders proved under both commissions, and received dividends, but not 20s. in the pound. The assignees of H. petitioned to stand in the place of the holders, as against the estate of G. for so much as had been paid out of the estate of H. Ordered accordingly, but not to receive any dividend from G.'s estate till the bill-holders were fully satisfied. Exp. Marshall, M. 1752. 1 Atk. 129.

413. W. had large dealings with G. whose correspondent in London was H. G., and H. agreed that H. should honour all W.'s drafts on him on account of G.; W. drew for 4000l. which H. accepted, without having any effects of G. The payee, on non-payment by H. applied to W. who paid the bills. W. shall prove against the estate of H. because of his agreement with G. which made his estate liable. S. C.

414. Costs of protest before commission may be proved, but no costs afterwards. Anon. T. 1754. 1 Atk. 140.
415. Bills drawn in Pennsylvania, on a merchant in London, were protested for non-payment. The holder may prove the amount of the bills, together with 20 per cent. damage, allowed by the law of the province. *Francis v. Rucker*, T. 1768. Arab. 672.

416. A creditor on a bill swore to a debt of 2500£. This was admitted, and the residue was claimed. The creditor was entitled to the whole debt; but having since received 500£ from some other party to the bill, the former affidavit cannot be received as a proof of the remainder of the debt; but he must again prove the residue, after deducting the 500£. *Exp. Worrall*, H. 1787. 1 Cox 309.


418. A mere discount of a bill, without the indorsement of the party who receives the money, does not give the holder any claim against such party. *Exp. Roberts*, T. 1789. 2 Cox 171.

419. A written engagement to warrant the payment of a bill of exchange, although good to other purposes, is not within the statute of 7 Geo. 1. which applies to what arises on the face of the instrument; for it is contingent. *Exp. Harrison*, T. 1789. 2 Cox 172. 2 Bro. C. C. 615.

420. An indorser of a bill became a bankrupt; the holder proves his bill, and then compounds with the acceptor, without notice to the assignees. The indorser’s estate is discharged, and the debt shall be expunged. *Exp. Smith*, M. 1789. 3 Bro. C. C. 1.

421. Costs taxed after commission, upon a verdict obtained before, may be proved, the costs having relation to the verdict. *Exp. Simpson*, M. 1789. 3 Bro. C. C. 46.

422. No interest on the balance of a stated account is proveable under a commission, unless by express contract. *Exp. Ferneaux*, H. 1790. 2 Cox 219.

423. A bill of exchange having been indorsed after the bankruptcy of the acceptor, the indorsee can only prove such debt as the indorser could have proved it at the time of the bankruptcy. *Exp. Deay*, L. 1790. 2 Cox 423.

424. Accommodation bills, on the bankruptcy of the drawer, were paid by the acceptor to the holder, who, having a further demand on the bankrupt, proved the whole, including the bills. He may take, out of the dividend, his proportion of the debt beyond the bills, as if the bills had been expunged, and the rest belongs to the acceptor. *Exp. Turner*, T. 1796. 1 Ves. jun. 243. Vide *Exp. Rushforth*, 10 Ves. 400. *Paley v. Field*, 12 Ves. 435.

425. Acceptee became bankrupt, and petitioner, as indorser, paid the bill. He may prove that bill, but he cannot set off against the estate his own acceptance in the bankrupt’s hands. *Exp. Hale*, T. 1797. 3 Ves. 504.


428. A. desiring to discount a bill which his bankers refused to take, he indorsed to them another bill, drawn by him upon, and accepted by B. upon the faith of which they discounted the first bill. Neither of the bills were paid, and both parties became bankrupts. The proof of the debt against the estate of B. and not the dividend only, was confined to the amount of the bill discounted by A. *Exp. Blocham*, T. 1800. 5 Ves. 448. But this point was afterwards overruled, in another petition, under a different bankruptcy. S. C. T. 1801. 6 Ves. 449; where it was held, that a creditor, having securities of third persons to a greater amount than the debt due from the bankrupt, may prove the full amount, and receive dividends on the whole, until he gets 20s. in the pound on his actual debt. S. C. H. 1802. 6 Ves. 600. S. P.

429. A. and B. accepted bills drawn on them from Hamburg; but, having stopped payment, C. and D. again accepted the same bills, for the honour of the drawer, and paid them. A. and B. became bankrupts. Held, that C. and D. ought first to resort to the drawer, if the bankrupts had no effects of the drawer’s in their hands; the proof of the debt, however, was permitted to stand, and the dividend was reserved until enquiry whether the bankrupts had effects of the
Proof of Bonds, Bills, Notes, &c.

drawer, and if not, whether C. and D. had effects of the drawer at that time or since. Exp. Wackerbath, T. 1800. 5 Ves. 574.

430. A. to discharge a debt due from him to B. procured his banker C. to direct his correspondent and partner, D. to accept a bill drawn by B.; before the bill became due, C. and D. became bankrupts; C. being indebted to A. more than the amount of the bill, B. proved against the estate of D. but afterwards received the whole from A.—A. not having proved against the estate of C. in respect of the bill, is entitled to stand in the place of B. against the estate of D. whose proof having been expunged, was re-instated for the benefit of A. Exp. Matthews, T. 1801. 6 Ves. 285.

431. Dividends declared upon a bill of exchange, though not received, must be deducted from the proof by the indorser, under another commission. Exp. Leers, H. 1802. 6 Ves. 644.—Note. Ld. Ch. doubted the principle of this decision, but determined according to the practice at Guildhall, as stated by Mr. Cooke.

432. The holder of a bill of exchange may be compelled to prove under the bankruptcy of the acceptor, for the benefit of the drawer. Wright v. Simpson, E. 1802. 6 Ves. 734.

433. A surety depositing the money with an indemnity, may compel the creditor to prove against the estate of the principal for his benefit. S. C. et vides Exp. Leers, sup. S. P.

434. Proof of a lost bill was allowed; but the most extensive indemnity to be given, and to be settled by the commissioners. Exp. Greenway, E. 1802. 6 Ves. 812.

435. Bond upon a loan of stock, to secure a re-transfer and the dividends in the mean time. The obligor becoming a bankrupt after the day mentioned in the condition, proof was admitted for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission, by analogy to the case of annuities. Exp. Day, T. 1802. 7 Ves. 301.

436. The obligee of a bond to replace stock and pay the dividends in the mean time, cannot prove his debts unless the bonds were forfeited, either as to the capital or dividend before the bankruptcy. Exp. King, E. 1803. 8 Ves. 334. Vide Exp. Day, 7 Ves. 301. Exp. Mare, 8 Ves. 335.

437. A. covenanted with the trustees of his marriage settlement within seven years, or when requested, to convey lands of a given value in particular counties to the uses of such settlement. A. became bankrupt after the expiration of seven years, and no request having been made, the trustee could not be admitted to prove upon the covenant, unless secured by the penalty. So upon an agreement to replace stock upon demand, if demand is made before the bankruptcy, the price may be proved. Exp. Mare, E. 1803. 8 Ves. 335. 337.

438. Certain merchants at Liverpool had a banking account in London, in the course of which they remitted several sums, and upon that credit they drew on their bankers in London, who accepted their drafts; the merchants became bankrupts before the acceptances of their bankers were due. Held, that these acceptances, when paid by the bankers, were a sufficient consideration for them to prove under the commission the bills deposited by them, though such bills might not be due at the time of the bankruptcy; but the proof must be upon the bills, and not as a cash balance. Exp. Bloxam, T. 1803. 8 Ves. 531. Vide Exp. Maydwell, 1 Co. Bank. Law. 159.

439. B. handed over to G. a negotiable note for a valuable consideration, but not indorsing it, he gave G. a separate written acknowledgment to be accountable to G. for the note. G. indorsed it over to M. for a valuable consideration, and gave him the written acknowledgment. B. and the several parties to the note became bankrupts. M. cannot prove the note against the estate of B. the written acknowledgment not being assignable; but he is entitled to have the amount made an item in the account between B. and G. and to stand in the place of the latter. In Re Barrington, T. 1804. 2 Scb. & Lef. 112.

440. Goods were sold to be paid for by a bill at three months. The drawers and acceptors became bankrupts before the bills were due. The vendors having received dividends under their commissions, were held entitled to prove the deficiency as a debt under a commission against the vendors who had not indorsed the bills, and until that should be ascertained a claim was entered, and dividends upon the whole were reserved. And per Ld. Ch. it is now clearly settled, that if there is an antecedent debt, and a bill is
taken without an indorsement, which bill turns out to be bad, the demand for the
antecedent debt may be resorted to. So
it has been held, that if there is no ante-
cedent debt, and A. carries a bill to B. to
be discounted, and B. does not take A.'s
name upon the bill, if it is dishonoured,
there is no demand, for there was no re-
lation between the parties except that
transaction, and the circumstances of not
taking the name upon the bill is evidence
of a purchase of the bill. Exp. Black-
burne, M. 1804. 10 Ves. 204. Vide 1 Co.

441. Previous to entering into a part-
nership trade, G. executed a bond for
500l. to a trustee upon trust, that upon
the death, failure in trade, or bankruptcy
of G. the interest should be paid to his
wife for life, and that she should have a
power of appointing the principal among
the issue of the marriage. G. and his
partner became bankrupts. The bond
being voluntary, was deemed not to be
set up against the creditors, but to be
paid in case of a surplus after payment of
joint and several creditors. Assignees of
Gardiner v. Shannon, M. 1804. 2 Sch.
& Lef. 228.

442. A surety by bond for advances
generally, but under a limited penalty, is
not liable beyond the penalty; by paying
the penalty he is entitled to a proportion
of the dividends from a proof by the cre-
ditors, to a greater amount under the
bankruptcy of the principal debtor; and
a surety may compel the creditor to prove
under the commission against the prin-
cipal, and to become a trustee of the divi-
dends for such surety having paid the
whole. (Exp. Wood, cor. Ed. Thurlow,
M. 1791.) But a person liable with
others on a bill of exchange cannot raise
that equity by payment subsequent to
the proof of the holder, until he has re-
ceived 20s. in the pound. (Exp. Marshall,
1 Atk. 129.) Where a person has a de-
mand upon a bill or bond against several
persons, and no part of that demand has
been paid before the bankruptcy by any
of them, he may prove against each,
whether principal or surety, until he has
received 20s. in the pound. (Exp. Wild-
man, 1 Atk. 109.) Where a debtor in-
dorses paper of a less value, meaning to
make it a security for a debt; it is doub-
ful whether the indorsement means more
than to enable the party to operate a fur-
ther benefit than if the debtor had not in-
dored it. (Exp. Wallace, 1 Co. Bank.
Laws. 155.) It has been said, there is
no difference, whether it was the bank-
rupt's paper or accommodation paper, but
that is to be doubted; for if it was ac-
commodation paper, the proof could not
be expunged, for the man who pays it,
pays it for the use of the bankrupt after
the bankruptcy, and is, in truth, a surety
for the bankrupt, and could have a right
to insist, that the proof should be held
for his benefit. The principal case is not
that of a deposit of the bankrupt's pro-
PERTY, nor a security upon the bankrupt's
property, nor a pure debt unconnected
with any thing else; but a third person
entered into a bond, under a penalty,
with a condition for payment to other
persons, of bills, notes, &c., without
limit as to the amount, but the extent of
the demand, as to that person, being
limited to the penalty; the question is,
whether he shall say, not that he will
have the benefit of his pledge, or do any
other acts, but that he has in equity a
right to make the obligees trustees for
him of certain securities, all of which
were as between them intended to be paid
by other persons; and he was, as between
them, not to pay more than the penalty.
The rule certainly has been, that where a
man engaging for the whole of a debt,
pays only a part, he has no equity to
stand in the place of the person paid.—
Exp. Rushforth, H. 1805. 10 Ves. 409.

443. The holder of a bill discharging
the acceptor, by receiving a composition,
cannot prove the bill against the drawer's
estate. Exp. Wilson, T. 1805. 11 Ves.
where the mischievous effects of the dis-
tinction, as to an acceptor with effects,
or not, with reference to accommodation
paper, is pointed out.

444. Creditors having proved under a
joint commission, upon a joint and sev-
eral promissory note, but not having re-
ceived a dividend, were permitted to
waive their proof, and to prove against
the separate estate, not disturbing any di-
vidend already made. Exp. Bialby, T.
1806. 13 Ves. 70.

445. Where a creditor brought an ac-
tion before the bankruptcy, and obtained
a verdict and judgment after, he cannot
prove his costs under the commission,
whether the action be for an antecedent debt by contract, or mere damages in tort, though costs incurred after the bankruptcy are discharged by the bankrupt's certificate, as having relation to the antecedent debt. So with respect to interest it is a rule, that in most cases it stops at the date of the commission, subject to an equity of giving it in cases of contract only, if finally the effects are sufficient. Exp. Hill, M. 1806. 11 Ves. 654. in which Ld. Ch. reviewed the most material cases on this subject.

446. Costs ordered to be paid before, but not taxed till after, the bankruptcy of the person to receive them, cannot be set off by the party from whom they were due, proving the debt under the commission. Exp. Thomas, H. 1809. 15 Ves. 539.

447. A. being indorsee of B. C, and Co.'s acceptances for 1364L sued out a separate commission against B., though at the time D. (the person for whom A. had discounted the bills) had by payments on account reduced the debt to 420L. A. was held entitled to prove for the whole amount, and for all he received above 420L to be a trustee for D. Exp. De Testet, T. 1810. 1 Rose 10. 1 Ves. & B. 280.

448. A., the payee of a bill of exchange, indorsed it in blank, and delivered it to B. B. wrote above the blank indorsement, "pay C. or order." B. took up the bill after a commission of bankruptcy had issued against the acceptor. Petition for liberty to prove it under the commission dismissed, but with the offer of a case. Exp. Isbeister, T. 1810. 1 Rose 20. Vide Vincent v. Horlock, 1 Campb. 442.

449. A., in 1808, accepted bills for B.'s accommodation. B. became bankrupt, having paid away the Bills, and A. paid them without having received value. The debt not being provable under the commission, A. brought an action against B., and recovered his principal, interest, and costs. He then sold his debt, and assigned the judgment: Held, that under 49 Geo. S. c. 121. s. 8. the assignee of the judgment was entitled to prove the original debt under B.'s commission, and to receive a proportionate dividend; Held also, that the judgment debt, though greater than the original, would be barred by the certificate. Exp. Lloyd, T. 1810. 1 Rose 4.

450. When bills were drawn in London without stamps, but on the face of them they purported to be drawn at Amsterdam, though the holders had received them for full value, and knew not but that they were not drawn at Amsterdam, yet they cannot prove them. Exp. Manners, E. 1811. 1 Rose 68.

451. A creditor, who holds as a collateral security, certain bills drawn and accepted by the same persons, constituting distinct firms, and carrying on trade in different places, has a right to prove his whole debt without deducting the value of the securities he holds. Exp. Parr, T. 1811. 18 Ves. 65. 69. 1 Rose 76. Vide Exp. BonONUS, 8 Ves. 546.

452. Notice of a dishonoured bill to a bankrupt, as drawer, before the choice of assignees, good, though dishonoured the morning of the meeting: the bankrupt, until assignees are chosen, representing his estate. Exp. Molinet, T. 1812. 19 Ves. 216. 1 Rose 303.

453. The rule that a joint and several creditor must elect does not apply to a contract for double security against distinct firms, viz. bills drawn by all the partners upon a distinct firm, but who were, in fact, members of the firm. The creditor may prove against both estates. Exp. Adams, E. 1813. 1 Ves. & B. 495.

454. A holder of a bill drawn in the name of a firm, by some of the members, constituting a distinct firm, has a right to prove it against all the parties, according to their liabilities upon the bill, provided he was ignorant of their partnership. S. C. 2 Rose 36. Secus, when the holder was aware of the identity of the parties. Exp. Bigg, H. 1814. ib. 37.

455. Where A. held the acceptance of B. which he had taken in ignorance that B. was a member of the firm of C. and Co. the drawers, and of which firm one of the members was an infant, and had proved his debt against the joint estates under the separate commissions against B. and C. (the infancy of the other partner precluding a joint commission,) making his proof not as against the liability of the parties, arising from the contract on the bill, but upon his right to include or exclude the resort to a dormant partner. It was held, that such mode of proof was a conclusive election to resort to the joint funds alone, and discharged the separate estate of the acceptor from the liability which
would otherwise have arisen out of the ignorance of the holder; that the acceptor was a member of the firm of the drawers. Exp. Liddel, H. 1814. 2 Rose 34. Vide Exp. Adam, ib. 36. Exp. Bigg, ib. 37.

456. A creditor holding bills, proves the amount of them as his debt, with a statement, that he holds the bills as security; if any of the bills are subsequently paid by the other parties to them, the amount so paid must be deducted from the proof and the dividends; or if the dividends have been paid upon the whole of the proof without such deduction, the assignees are not thereby concluded, for the Ld. Ch. may order them to be refunded. Exp. Burn, T. 1814. 2 Rose 55. Vide Exp. Dewdney, 15 Ves. 479. 2 Rose 243. where a similar order to refund was made. And it makes no difference whether the bills have been indorsed by the bankrupt to the creditor or not. Exp. Burn, supra.

457. A creditor by bill or note may prove against all the parties to his security; but if previously to his proof against A. dividends have been declared upon his proof against B. or C., &c. such dividend must be deducted from his proof against A. Nor does it vary this rule, that the creditor is not being then prepared to substantiate his proof against A. had been permitted to enter a claim against his estate, before the declaration of the dividend under the other commission: and had also, before such declaration, made an affidavit of his debt to be paid before A.'s commissioners at the next meeting. Exp. Bk. of Scotland, H. 1815. 2 Rose 197. Vide Exp. Tedd, ib. 202. (n) S. P. And see the several cases (ib. 201. n.) arising out of the bankruptcy of Livesey & Co. and Gibson & Co.

458. Promissory notes payable in cash, or bank notes, are not promissory notes within the stat. of Ann. The holder therefore who had received them from an intermediate person, was held not entitled to prove them as a debt against the maker. Exp. Inneson, T. 1815. 2 Rose 223.

459. Where proof for the value of an annuity is tendered, the commissioners must ascertain it by the price paid, and the time of enjoyment. Exp. Whitehead, H. 1816. 2 Rose 338.

460. If a bill of exchange do not carry interest upon the face of it, a debt made up of the principal sum secured by the bill, and the interest up to the act of bankruptcy, though the bill be noted and protested according to the 9th & 10th Will. S. c. 17. is not sufficient to support a petition. Exp. Greenway, E. 1817. 1 Buck 412.

461. Where a bond debt was assigned by the obligee, and the bond delivered to the assignee, but no notice of the assignment given to the obligor previously to the bankruptcy of the obligee: Held that the debt remained in the ordering and disposition of the bankrupt, within the stat. 21 Jac. 1. c. 19. Exp. Monro, H. 1819. 1 Buck 300. Vide Exp. Smith, In Re Bakewell, ib. 149.

(c) Of Debts payable at a future Day, or on the happening of a contingent Event.

462. Formerly debts payable at a future day could not be proved under a commission, because the bankrupt could not charge his estate at common law after his bankruptcy: Vide Burdock's Ca. T. 1720. 7 Vin. 69 pl. 7. Long vs Bland, M. 1722. Bunb. 120. Exp. East India Comp. M. 1726. 2 P. W. 396.

463. But after 7 Geo. 1. c. 31. (which, however, is confined to written securities, Parslow v. Dearlove, 4 East 438.) a creditor upon a note payable at a future day was admitted to prove, S. C.; though a bond or note upon a contingency, before the happening of which the obligor or drawer becomes bankrupt, was held not within the statute. S. C. So, where a bankrupt, on marriage, gave a bond to secure 1000l. to his wife, if she survived: this shall not be proved, or any reservation made for it, in regard it may never be a debt; neither shall the obligee of a bottomree bond prove his debt before the return of the ship. Exp. Caswell or Cazale, 2 P. W. 497. 499. Mos. 28. 79. But, if the contingency happens before a final dividend, such creditor shall come in. S. C. Sed vide Exp. Groome, 1 Atk. 118 contra.; et vide stat. 19 Geo. 2. c. 32. s. 2. which provides for bottomree and respondentia creditors.

464. Now, however, by 5 Geo. 2. c. 30. s. 22. persons having bonds, notes, &c. payable at a future day, may not only prove their debts, but may petition for a commission.
BANKRUPT V.

Of Contingent Debts.—Debts due abroad.

465. A father was tenant for life, with remainder to his son in tail; the father and son joined in mortgaging the estate, for the debt of the father, who, becoming bankrupt, the mortgaged estate was sold under the commission. The son cannot prove any debt in respect of his interest in the estate, not being damned until after the bankruptcy. Kittler v. Raynes, T. 1784. 1 Cox 105. 1 Bro. C. C. 384.

466. A debt payable at a future uncertain period, as within three months after the decease of two obligors in a bond, or of the survivor, cannot be proved under a commission of bankruptcy. Esp Barker, T. 1835. 9 Ves. 110.

467. By stat. 49 Geo. 3. c. 121. s. 9, debts not payable at the time of the bankruptcy may be proved, upon deducting a rebate of interest to the time such debts would have become payable, according to the terms upon which the same were contracted.

468. Under a written undertaking to pay, on one month’s notice, the debt of another, proof in bankruptcy was not admitted, notice not having been given before the bankruptcy, and the debt therefore contingent. Esp. Minet, T. 1807. 14 Ves. 189. So under a guarantee the debt is contingent only, therefore a debt accrued by default after the bankruptcy of the surety, cannot be proved under the commission. Esp. Gardem, T. 1808. 13 Ves. 286.

469. Money due upon a judgment for mesne profits, is not within the 9th sect. 49 Geo. 3. c. 121. which directs, that all persons who have given credit upon good and valuable considerations bona fide, for any money whatever, which is not due at the time of the bankruptcy, shall be admitted to prove such debts. &c. Moggridge v. Davis, E. 1810. Wightw. 16.

470. Contingent interest assigned to secure in part a debt exceeding the value of the interest, the assignee insures against the contingency, and upon its taking effect receives the sum insured: held, upon the bankruptcy of his debtor, that the sum so recovered must be deducted from his proof. Esp. Andrews, T. 1816. 2 Rose 410.

(d) Of Debts due in Ireland, Scotland, and in foreign Countries.

471. Equitable demands may be proved under a commission, and a trader in Ireland coming here may be a bankrupt, and the creditors in Ireland may prove. Esp. Williamson, E. 1750. 1 Atk. 82. 2 Ves. 249.

472. A creditor in Scotland is within the meaning of stat. 5 Geo. 2. as to the mode of proving debts under commissions by creditors in foreign parts. Esp. Macdougal, E. 1798. 2 Cox 9.

473. An insurance by a subject of this country upon foreign property does not cover a loss by capture in a war afterwards taking place between this country and that of the assured, and proof in bankruptcy under such a policy was therefore expunged. Esp. Lee, T. 1806. 15 Ves. 64. But the right of a foreigner by contract generally is only suspended by a subsequent war, and may be enforced on a restoration of peace, and therefore such a claim in bankruptcy was admitted, but reserving the dividend. Esp. Countsmaker, T. 1805. 13 Ves. 71.

474. By the statute 49 Geo. 3. c. 121. s. 16. persons effecting policies of insurance with underwriters who become bankrupts, may prove their loss, provided the persons really interested are not in that part of the kingdom in which the commission shall have issued, in the proceedings under which such loss is to be proved.

475. A debt due to a creditor in America may be proved by his agent on whom service of a petition to expunge the same will be allowed on motion. Esp. Dunlop, T. 1818. 3 Madd. 279. Vide(a) Esp. Paton, ibid. 116.

(e) Of Rent Arrear at the Time of the Bankruptcy.

476. If a landlord suffers the assignees to sell off the bankrupt’s goods, he is not entitled to his whole rent, but must come in as a creditor pro rata. Esp. Descharmes, E. 1742. 1 Atk. 103.

477. Bankrupt owed A. his landlord, 12 years rent; the assignees sold the house and goods to petitioner. A. proved his debt, and three years after distrained the goods. A. was confined to his remedy under the commission. Esp. Grove, E. 1747. 1 Atk. 104.

478. Though a messenger be in possession, and even after assignment, the landlord may distrain, if the goods are still on the premises. S. C. Esp. Jacques, M. 1730. S. P. cited ibid.

479. Where a bankrupt’s goods are sold by an assignee, a landlord can only

517. Whether bills in the possession of a bankrupt, not due at the time of the bankruptcy, pass to the assignees or remain the property of the remitter, always depends upon the fact of agency or of their being payments on a general account.—Therefore, where a foreign house remitted to a London house, bills, some of which were not due when the London house became bankrupt, it was held, under the circumstances, that the London house acted as agents to procure payments for the foreign house, and being fixed with the trust, that the bills did not pass to the assignees. *Exp.* Smith, E. 1819. 1 Buck 355.

(b) **Of Debts due to solvent Partners, or those claiming under them.**

518. A solo trader indebted by bond took in a nominal partner, but without fraud; two years after the partnership failed; that separate debt was not allowed to be proved under the joint commission, unless something appeared to make the partnership liable, as payment of interest by both; very little would do it. *Exp.* Jackson, E. 1790. 1 Ves. jun. 131.

519. Money paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter. *Wright v. Hunter,* H. 1801. 5 Ves. 792.

520. A. and B. were partners, and became bankrupts; separate commissions were issued against both. The assignees of B. were allowed to prove a cash balance (due to B.) upon the estate of A.; but the dividends were retained to reimburse the estate of A. what it should overpay upon an advance of bills from A. to B. some of which were dishonored. *Exp.* Metcalfe, T. 1805. 11 Ves. 404.

521. Where partners were engaged individually in other concerns before their bankruptcy; if such concerns are distinct, proof may be made of debts as between the different estates, but not if they are mere branches of the joint concern. *Exp.* St. Barbe, E. 1805. 11 Ves. 404.

522. A. from fraudulent representations became a partner in B.'s business, and paid him a premium. On discovering the fraud, A. filed a bill, praying the partnership might be declared void, and a receiver appointed. The receiver was appointed. Then B. became bankrupt, and A., petitioned for liberty to prove under the commission the premium he had paid, but the Ld. Ch. refused, giving him liberty to make a claim. *Exp.* Broome, E. 1811. 1 Rose 69.

523. Partners constituting distinct firms in distinct places, may prove against each other. But where there is a partnership of two, and one carrying on business separately, as they are both liable for the same joint debts, the solvent partner cannot prove under the bankruptcy of his copartner, a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied. *Exp.* Adams, T. 1812. 1 Rose 305. *Vide* Exp. Hesham, ib. 146.

524. A partnership firm cannot prove against the separate estate of an individual member of it, in respect of funds drawn by such individual out of the general stock, unless the same were drawn out fraudulently, contrary to the articles of partnership, and without the privity or subsequent approbation of his copartners, or to increase his private estate. *Exp.* Harris, T. 1813. 1 Rose 437. *Vide* Exp. Lodge's assignees, 1 Ves. jun. 166.

525. The proof of two solvent partners was admitted under the bankruptcy of the third for a debt, which, by an unauthorized use of the partnership name, he had created against the firm, and which, after the bankruptcy, they were compelled to discharge. *Note.* All the debts of the partnership had been discharged. *Exp.* Young, T. 1814. 2 Rose 40.

526. A partner who has retired under a covenant of indemnity against the partnership debts, in consideration of his having assigned his share of the property, may prove a joint debt paid by him on indemnifying the joint estate against the joint debts. *Exp.* Ogilvie, T. 1814. 3 Ves. & B. 133.

527. If a surety become bankrupt, the creditor cannot, under the 49 Geo. 3. c. 121. s. 8. prove a debt, which became due not until after the bankruptcy. *Exp.* M'Millan, M. 1818. 1 Buck 287.

528. A husband covenanted by his marriage-settlement, that if his wife should die in his life-time, without having issue to survive her 30 days, he
would, within three months after her decease, transfer 300l., bank annuities, for the sole use and property of the next of kin of his wife. On the husband's becoming bankrupt in his wife's life-time, it was held, first, that his moiety of the trust stock could not be retained or set-off in satisfaction of the covenants; secondly, that the debt under the covenant was not proveable against the bankrupt's estate, for it did not exist at his bankruptcy, and it was matter of contingency, whether it would ever arise, and for that reason it did not constitute a debt which could be set-off under 5 Geo. 2. c. 80. s. 28 Brandon v. Brando. T. 1819. 2 Wils. 14.

(i) Of Debts due to Sureties.

529. A. by articles, was to build houses; B. furnished him with materials, and took an assignment of the articles as his security; but, before the execution of the articles, A. became bankrupt. B. has a special equity, and shall have all he advanced after he had a specific interest in the articles, but before that he trusted as another creditor. Langton v. Hall, E. 1715. 7 Vin. 73. pl. 4.

530. S. a trader in Holland, failed there, and coming to England, he applied to B. to be his security, and to advance him money, which B. did, and took a bond including the old debt; S. became bankrupt. B. shall prove his bond, for a man may revive an old debt. Exp. Burton, M. 1744. 1 Atk. 255.

531. A surety paying a debt after the act of bankruptcy, but before the commission issued against the principal, cannot prove his debt, nor can he stand in the place of the creditor, if the debt be paid by the surety before the creditor has proved it. Exp. Badger, E. 1783. 1 Cox 28.

532. A. tenant for life, remainder to his son in tail, the son joined him in a recovery and mortgage. A. became bankrupt, and the premises were sold, the son applied to prove his proportion of the produce of the estate. Non allocatur, for this is the case of a surety, who cannot prove unless he has paid the money before the bankruptcy. Kittew v. Raynes, T. 1784, 1 Bro. C. C. 384. 1 Cox 105.

533. A. being indebted to B., lodged several securities for money with him. Vol. I.
Of Debts to Sureties, &c.—Trustees, &c.

The drawer of a bill, though not strictly a surety for the acceptor, who is primarily liable in general, may be in nature of a surety; but the drawer, if first liable by the real nature of the transaction, with reference to the distinction, whether the acceptor had effects or not, is to have relief as a "person liable," within the statute 49 Geo. 3. c. 121. s. 8. Exp. Young, T. 1814. 3 Ves. & B. 40.

The words "person liable," in the statute 49 Geo. 3. c. 121. s. 8. will comprehend all persons rendering themselves responsible for the debt of another: e.g. an acceptor of a bill for the accommodation of the drawer. S. C. 2 Rose 40.

A surety is entitled to dividends on the debt proved by his satisfied principal. Exp. Beroke, M. 1815. 2 Rose 384.

Where A., at the request of B., and upon the security of a bill of exchange from him for the amount, delivers goods to C., and such goods are afterwards partly paid for by C., and then B. becomes bankrupt, A. can only prove as against the estate of B., the sum remaining due for the goods, and not the full amount of the bill. Exp. Reader, T. 1819. 1 Buck 381.

A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorized the creditor to act according to the best of his discretion, in the settlement of the affairs. The creditor accordingly went to Paris, and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankrupt issued against the London house, of which fact, the parties to the composition were ignorant: Held, that the bankruptcy did not determine the authority. Exp. McDonnell, T. 1819. 1 Buck 399.

It was agreed between a mother and a son, that she should join in conveying her life interest in an estate to a purchaser, the son undertaking, in consideration thereof, to secure to her an annuity; after the execution of the conveyance, and before the annuity was secured, the son became bankrupt:—Held, that the mother was not entitled to prove for the value of her life estate, but only for the value of the annuity, and the arrears at the date of the bankruptcy. Exp. Brockliss, T. 1819. 1 Buck 406.

If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety. Not so, if it be expressly stipulated in the deed of composition, that the remedies against the sureties shall be reserved, but parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted. Exp. Glendenning, M. 1819. 1 Buck 517.

It is competent for creditors executing a deed of composition with the principal debtor and certain of his sureties, to reserve their remedies against the other sureties. Exp. Carstairs, T. 1820. 1 Buck 560.

(k) Of Debts due to Executors, Trustees, Guardians, &c.

A broker acting del credere, paid money to the principal, on a loss which happened before the bankruptcy of the underwriter, but the payment was not made until after the bankruptcy. Quere, whether this debt can be proved by the broker under the commission against the underwriter? for a trustee cannot prove a debt alone; the cestui que trust must join in the proof. Exp. Dubois, H. 1787. 1 Cox 310.

Testator, bankrupt's uncle, forgave him a debt of 1000l. on condition he should pay his sister 60l. per annum, and if he failed in payment, the executors to call in the money. This is a proveable debt. Exp. English, T. 1789. 2 Bro. C. C. 610.

The court will allow another to prove on behalf of a creditor who is non compos mentis, on a medical certificate, and affidavit of his incapacity. Exp. Mantby, T. 1813. 1 Rose 387. N. B. No commission of lunacy had issued.

A being a partner in trade, at his death, his widow and administratrix continued their own and her children's property in the concern after his decease. This was a breach of trust. The house afterwards became bankrupt: Held, that the administratrix, as trustee for her children, may prove the debt, either against the joint or her own separ-
BANKRUPT V.

Of Debts to Trustees.—Corporations, &c.

550. One trustee cannot sign the certificate for himself and his co-trustee. Exp. Rigby, T. 1815. 2 Rose 224.

551. If an executor who is directed to carry on his testator's partnership trade, exceed his authority by employing the assets in the trade to an extent not warranted by the will, and the surviving partner and the executor become bankrupts, the excess of the assets so employed, may be proved by the executor under their commission. Exp. Richardson, H. 1818. 1 Buck 202. 421.

Of Debts due to Corporations, Parish Officers, &c.

552. Bankrupt was for many years collector of the land-tax, and at the time of his bankruptcy he owed 928l. to the chamber of London; an inhabitant of the parish where he was collector, was allowed to prove for himself and the rest. Exp. Child, E. 1751. 1 Atk. 111.

553. Proof of a debt was allowed against the estate of an overseer of the poor, in respect of money in his hands, though the period of accounting had not arrived. Exp. Edleygh, E. 1802. 6 Ves. 811.

554. The Bank are not entitled to prove a debt by their clerk, without a power of attorney, but Ld. Ch. said, he would make an order enabling them so to do. Exp. Bank of Engl. T. 1811. 18 Ves. 228. 1 Rose 142. which has been since done. See 1 Swanst. 10.

555. A petition was presented by a benefit society, to prove a debt under commission against their clerk, who was a bankrupt:—Held, that the stat. 33 Geo. 3. c. 54. a. 10. only applies to cases where the officer of such a society has, by virtue of his office, been entrusted with the moneys and effects of the society, which the clerk, in this case, was not. Exp. Buckland, H. 1818. 1 Buck 214.

556. The general rule in bankruptcy is, that if the petitioner do not pray his costs, he cannot have them. Exp. Allison, H. 1818. 1 Buck 215.

557. Corporations may prove debts under commissions of bankruptcy, by the affidavit of a person authorized by a general power of attorney, and may vote in the choice of assignees by a person authorized by a special power under their common seal, on proving such com-


Of Proof in respect of Policies of Insurance.

558. Debts upon insurance of ships, are only proveable against the estate of him who signs the policy. Insurance by a partnership being against 6 Geo. 1. c. 18. Exp. Angerstein, Exp. Lee, T. 1784. 1 Bro. C. C. 399. By 19 Geb. 2. c. 32. if an underwriter become bankrupt before a loss happens, the assured may claim, and after a loss, prove his debt under the commission, and receive his dividend, as if the loss had happened before the bankruptcy, and the same statute extends to insurances on lives. Vide Cox v. Liotard, Doug. 166. (a) Pattison v. Banks, Cown. 540. and Macu v. Cadell, Cown. 232. Et vide 49 Geo. 3. c. 121. s. 16.

559. Bill indorsed to a broker, for effecting insurances, one of which was illegal. The illegal part cannot be proved, and an enquiry was directed, as to the rest, in regard it was a stale commission. Exp. Mathuer, T. 1797. 3 Ves. 373.

560. Promissory notes were given by a stock-broker for the balance of an account of money advanced to him to be employed in stock-jobbing transactions, contrary to the statute 7 Geo. 2. c. 8. Part of the consideration consisting of the profits upon those transactions, proof under his bankruptcy was restrained to the money he had received, and applied to his own use. Exp. Bulmer, Exp. El lis, H. 1807. 13 Ves. 313.

Of the Portions of the Bankrupt's Wife or Children.

561. The provision of a wife shall, in general, be secured to her in equity, notwithstanding the bankruptcy of her husband (for his assignees stand in his place, and are subject to the same equity) if the provision be secured by a bond or judgment forfeited at law, before the bankruptcy, as in Holland v. Calliford, T. 1710. 2 Vern. 662. where the husband gave a bond to leave his wife 500l. at his death, secured on the land. So where the trustees, under their power, lent 500l. of the wife's money to the husband. Middlecome v. Marlow, H. 1742. 2 Atk. 519. So where the wife's
father, by bond, secured the interest of
1000L. to be paid to the husband and
wife, and the survivor, for life, and the
principal to the children on their deaths,
there was an arrear of interest at the
time of the father's bankruptcy, and the
bond was held forfeited. Exp. Winchester,
M. 1744. 9 Mod. 471. So where the
bankrupt, before marriage, gave a
bond to the wife's trustees to pay 1000L.
three months after his death, if she sur-

vived, and if not, to her children, and
the bankrupt died before a dividend.
Exp. Mitchell, M. 1751. 1 Atk. 120.
Also, where a bankrupt covenanted to
pay his wife's trustees 6000L by instal-
ments, viz. 1000L. at the end of seven
years, and 1000L. per annum afterwards,
unless the bankrupt should die, and then
the whole to be paid in one year, if the
wife or any child should be living, if not,
only 8000L. to be paid. The husband
becoming bankrupt in the seventh year,
Ld. Ch. doubted as to the 6000L., but
not as to the 3000L. Exp. Mitford, T
1784. 1 Bro. C. C. 398.

562. In the above cases, proof of the
wife's claim was admitted; but where the
event upon which the wife's provision is
payable did not happen before the bank-
ruptcy, or is so dubious and uncertain,
that peradventure it may never happen,
the court will not allow it to be proved
under the husband's commission, as in
Exp. Caswell or Cazalet, M. 1728. 2 P.
W. 497. Mos. 28. 79. where a bankrupt,
on marriage, gave a bond to secure to
his wife 1000L. if she survived. So
where the husband, on marriage, gave a
bond to pay his wife 300L. if she sur-

vived; and the husband died ten days
after his bankruptcy, the court doubted,
but the wife proved by consent 150L.
only. Exp. Greenaway, M. 1740. 1 Atk.
115. So also where the bankrupt be-
fore marriage, covenanted to leave his
wife 600L. if she survived, and died be-
fore a dividend. Lord Hardwicke in-
mented he could not admit the proof of
the wife's provision. Exp. Groome, M.
1744. 1 Atk. 115. 119.

563. Covenant in marriage articles,
that in case the wife should survive the
husband, or he should have any issue by
her, his heirs, executors, and admin-
istrators should raise 500L., and held that
the debt was contingent and not prove-
able by the trustees, though a warrant of
attorney to confess judgment, had been
given previous to the bankruptcy and
judgment entered up. Exp. Jacob, H.
1759. 1 Eden 174. This is the case re-
ferred to as Anonymous, in 8 Wils. 271.
It does not appear to have been much
discussed, and is certainly contrary to
the authorities. For though contingent
demands cannot be proved under a com-
mision taken out before the contingen-
cies on which they are made payable,
have taken effect. (Vide Tully v. Sparks,
Ld. Raym. 1546. Str. 867. Exp. Cas-
well, supra. Exp. Bailey, there cited.
Exp. Jeffores, 7 Vin. Ab. 72. pl. 7. Exp.
King, Lev. 254. Exp. Greenaway, 1 Atk.
113. Exp. Groome, ib. 115. Exp. Mit-
chell, ib. 120. Exp. Hill, Co. B. L. 238.
Exp. Bennett, ib. 239. Exp. Murphy, 1
Sch. & Lef. 44. Exp. Alcock, 1 Ves. &
B. 176. 1 Rose 328.) Yet if there is a
remedy at law, before the bankruptcy,
as where by way of security, the party
coovenants to pay money immediately, or
gives a bond with a penalty, and there
is a breach of the covenant, or the penalty
is forfeited at law before the bankruptcy,
the courts will take hold of the legal
eight to enable the trustees to come
in under the commission. Exp. Win-
chester, 1 Atk. 116. 9 Mod. 471. Exp.
More, 8 Ves. 355. Or if the bankrupt
confesses a judgment for it, as in the
present case, which is an immediate
debt at law, notwithstanding a defen-
sance. Exp. Smith, 1 Atk. 117. 121.
Vide etiam Cull. B. L. 120, 121. 1 Eden
176.(n.)

564. A., on marriage, executed a bond
to trustees, to pay 1000L. within three
months after his death, in trust for his
wife and issue in certain events, with a
proviso, that if A. should become insol-
vent or bankrupt, and the wife, or any
of the issue be then living, the trustees
should immediately claim, and be credi-
tors for the 1000L. and receive dividends
with the other creditors of A., to be ap-
plied solely to the use of the wife and
children. A. became bankrupt. This
debt cannot be proved under the com-
mision. Exp. Hill, M. 1786. 1 Cox
300. 11 Ves. 646. 654.

565. A bond was given by a trader
previous to his marriage, to a trustee;
and by a settlement of the same date,
it was covenanted, that the sum men-
tioned in the bond was to be payable
only in the event of the wife surviving
the husband; and it was further cove-
566. Though a bond by a husband to pay a sum (in the event of his bankruptcy or insolvency) to trustees for the purpose of settlement, cannot stand against the creditors: the property of the wife may be limited to the husband until he become a bankrupt or insolvent, and upon that event for his wife and children; and where, in articles for such a settlement, the husband covenanted to give a bond for 500l. upon the same trusts, and had received all his wife's fortune without making any settlement, proof was admitted under his commission, not only for the amount of her property agreed to be settled, but the 500l. or so much as the value of the wife's property would extend to, beyond the sum agreed to be settled. Exp. Cooke, E. 1808. 8 Ves. 323. Vide Lockyer v. Savage, 2 Stra. 947.

567. A trader on his marriage, received 600l. his wife's portion, and gave a bond in the penalty of 2000l. conditioned to pay 1000l. to a trustee, the interest whereof to be payable to himself for life, if he should continue solvent; but in case of his death or insolvency, then to his wife for life, and the principal to be divided among the children of the marriage. On his bankruptcy, the claim of the trustee on behalf of his wife for interest, was allowed to the extent of the 600l. but not for the remaining 400l. In Re Meaghan, T. 1803. 1 Sch. & Lef. 179. Vide Lockyer v. Savage, supra.

568. By articles on marriage, the husband agreed as speedily as might be to settle 40l. per annum on his wife if she survived, to be paid from the time of his decease, but that the interest and dividends arising from the money be invested in the three per cents. for the purpose of raising the annual sum of 40l. should in the mean time be received by the husband, and in case of issue of the marriage, that he should have power to dispose of the capital for the use of such issue by deed or will as she should think fit, and in failure of issue, that the wife should have the sole disposal of so much as amounted to 500l. being the portion the husband received with her, and if he survived, the dividends of that sum should be received by him for his life.—The husband became bankrupt, and no money was invested; his wife and children therefore petitioned that they might be admitted to prove 800l. or such other sum as would produce 40l. per annum, or at least for 500l. Ld. Ch. said, if the real meaning of this agreement is a covenant to invest as much money as will produce 40l. per annum, it differs this case from Utterson v. Verdon, 3 T. R. 529. 4 T. R. 570. Inasmuch as this bankrupt was under an obligation without any step taken by the other party, in that case it was to be upon demand made, and no demand having been made at the time of the bankruptcy, his Lordship inclined to think the demand should be proved, and the order was made accordingly for proving 800l. Exp. Granger, H. 1805. 10 Ves. 349. Vide Exp. King, 8 Ves. 334. Exp. Coming, 9 Ves. 115.

569. W. G. by settlement before marriage reciting that he had 1000l. employed in trade, (which was false) settled 500l. on his wife, and then became bankrupt and died: His widow was allowed to prove this 500l. under the commission, for the husband was bound to make good the representation of his marriage settlement. Exp. Gardner, E. 1805. 11 Ves. 40. Vide Montefiori v. Montefiori, 1 Bla. 363.

570. A settlement made, previous to marriage, of money, the property of the wife, is valid, in the event of the husband's bankruptcy; and part being lent to the husband upon his bond, under a power for that purpose, was proved under the commission. Exp. Hinton, E. 1808. 14 Ves. 398. Decided on the authority of Lockyer v. Savage, 2 Stra. 947. Et vide Meaghan's Case, 1 Sch. & Lef. 179. ante, pl. 567.

571. Proof in bankruptcy was admitted under a covenant by the bankrupt in consideration of marriage, immediately after the marriage, or whenever afterwards requested by the trustees to transfer 2000l. stock, alleged to be standing in his name, though not the fact, but the specific time of the request must be as-
572. Where a trader by settlement, on his marriage, in consideration of 1000l. his wife’s fortune, conveyed his house to trustees, to his own use till his bankruptcy or death, and if his wife should survive either event, then to raise 1000l. for her separate use; it was held a fair settlement, and the court would not on the husband’s bankruptcy, restrain the trustees from recovering the house at law, for though a man cannot secure a provision for his wife out of his own estate, to the prejudice of his creditors, yet to the extent of his wife’s fortune he may. *Higginson v. Kelly*, H. 1810. 1 Ball & Be. 252. 255. *Vide* Exp. Oxley, ib. 257. and Exp. Verner, ib. 260. where the court allowed the husband’s bond to be proved under his commission, and the dividends to be invested upon the trusts of the settlement. See these cases more at large, post, tit. *Baron and Feme*, ix.

573. A marriage solemnized in Scotland without banns or license is good, (a) and a bond given by a father by way of settlement, previous to a re-solemnization of such marriage, in England, cannot be sustained against the creditors under his commission. *Exp. Hall*, M. 1810. 1 Rose 30. *Vide* (a) *Ilderton v. Ilderton*, 2 H. Bla. 145.

574. I. S. covenanted in his marriage settlement, that he would, on a month’s notice, or that in the event of his death during his life, his representatives should, within a month after his death, transfer stock in trust, &c. in bar of dower, &c. with a proviso, that notwithstanding the covenant to transfer upon their request in writing, it should be lawful for the trustees, if they thought fit, to forbear requiring the transfer from him during his life; no transfer was made, nor any notice given, and the husband having become bankrupt, the court held, 1st. that this being a contingent debt, it could not be proved under the commission; 2d. that the bankruptcy could not have the effect of a voluntary transfer under the covenant; and 3d. that the clause giving the trustee power to forbear enforcing payment, must be construed as intended for their indemnity, for if it be considered as with a view to insolvency, it might amount to a fraud. *Exp. Atcock*, H. 1818. 1 Ves. & B. 176.

575. A debt due to the wife dum sola, cannot be set off in bankruptcy against a debt due from the husband. *Exp. Hol-den*, T. 1815. 2 Rose. 249.

576. On the bankrupt’s marriage in 1802, his wife’s estate, consisting of freehold, copyhold, and leasehold lands, were conveyed to the use of the bankrupt and his heirs, and he covenanted with the trustees, that within six months after he would pay them 4000l. upon the trusts of the settlement. The trustees never demanded payment. In 1806, the bankrupt sold part of the freehold premises, and he and his wife levied a fine of the whole, declaring the uses (of the part sold,) to the purchaser, but no declaration was made as to the remainder. In 1812, the bankrupt conveyed all his estates for the benefit of his creditors; and in 1813, he covenanted that he and his wife would levy a fine to the uses declared in the deed of 1812, which fine was levied, but thewife never surrendered the copyholds settled in 1802. In 1814, the commission issued, the execution of the trust deed of 1812 being the act of bankruptcy found; on this the wife’s trustees proved the 4000l. under the commission, and signed the bankrupt’s certificate:— Held, that the trustees for the wife and children had a lien upon the estates remaining unsold by the bankrupt, to the amount of 4000l. *Exp. Dicken*, T. 1817. 1 Buck 115.

577. On the marriage of W. W. (then solvent) he gave a bond to trustees for 2000l. payable within one month after demand, and for interest in the mean time, half yearly, but upon the trusts contained in a settlement, by which it was provided, that the trustees should not call in the 2000l. or any part of it, during the life of W. W. The interest was several years in arrear, when W. W. afterwards became bankrupt, but he never consented to a demand upon him for the principal sum: Held, this 2000l. was proveable against the separate estate of W. W. *Exp. Elder*, T. 1817. 2 Madd. 882. *Vide* Exp. Winchester, 1 Atk. 117. Exp. Groome, 2 Atk. 114. Exp. Row-lat, 2 Rose 416.

578. In a settlement made previous to a marriage, the husband covenanted that his executors should pay 3000l. to trustees, six months after his death, and if he should become bankrupt, that sum should be proveable under his commis-
BANKRUPT V. & VI.

Of Debts to Wife and Children.—Choice of Assignees.

The wife made a settlement of her property before the marriage, by which contingent interests were given to the husband. The husband became bankrupt, and on a petition by the trustees to prove the £3000 under his commission, it was held that they could only prove to the amount of what the husband’s contingent interest in the wife’s property sold for under his bankruptcy. Exp. Young, E. 1818. 1 Buck. 179. 3 Madd. 134. Vide Exp. Meaghan, 1 Sch. & LeF. 179. Exp. Hinton, 14 Ves. 598. Lockyer v. Savage, 2 Stra. 947. A creditor tendered to the commissioners proof of a debt of £5000, which they refused. He then petitioned for leave to prove £10,000, but as he had tendered to prove the minor debt only, the court would not permit him to offer proof of the greater sum. Exp. Fry. E. 1818. 3 Madd. 132.

See more of the proof of mutual contingent debts under commissions, post, sec. xiii.

See more of securing a wife’s provision in equity, post, tit. Baron and Feme, ix.

BANKRUPT VI.

Of the Assignees.

(a) Of the Choice of Assignees. (b) Of the Power, Duty, and Liability of the Assignees. (c) Where the Assignees are bound by the Bankrupt’s Acts, or are subject to his Equity. (d) Of Suit by and against the Assignees, touching the Bankrupt’s Estate. (e) Of Insolvent Assignees. (f) Of the Death or Removal of Assignees.

579. On the choice of assignees, the commissions are not to examine critically into a commission debt, but admit the creditor on his oath, if no previous objection appears. Exp. Simpson, T. 1744. 1 Atk. 68.

580. A. B., and C. carried on trade together, and A. and B. being partners in a distinct trade, became bankrupts. Held, that D. (a creditor of the three) could not prove his debt against the joint estate of the two, but he was admitted to prove against the separate estate of each. Exp. Clegg, E. 1793. 2 Cox 372.


582. The choice of assignees cannot be disturbed, because creditors were prevented by accident or mistake from voting, if they were not kept back by fraud. Exp. Surtees, U. 1806, 12 Ves. 10.


584. Though there appeared to be no instance of permitting joint creditors to vote in the choice of assignees under a separate commission, yet with the consent of the petitioning creditor who was a joint one, the court permitted them to vote where there was only one separate creditor, and his debt under £10. Exp. Jones, T. 1811-18 Ves. 283. Vide Exp. Taitt, 16 Ves. 194. Exp. De Tasset, 17 Ves. 247. Exp. Mackell, 2 Ves. & B. 216.

585. So in this case where the joint debts greatly overbalanced the separate debts, the court made the like order with the consent of the petitioning creditor, whose claim was greater than all the separate debts, which circumstance Ld. Eldon directed to be recited in the order. Exp. Taylor, T. 1811. 18 Ves. 284.

586. Assignees must be ejected by those creditors who have the power to vote; though those who have not may desire to have another. Exp. Butterfield, M. 1811. 1 Rose 127.
BANKRUPT VI.

Choice of Assignees.—Power and Duty.

587. The choice of assignees under a separate commission not disturbed, because they had been elected by joint creditors, who had been admitted as separate creditors. Secus, if they had been admitted and voted as joint creditors. Exp. Jeffery, T. 1812. 1 Rose 315.

588. A creditor who holds a security, and desires to vote in the choice of assignees, may have his security valued, and prove for the difference. Exp. Nunn, M. 1812. 1 Rose 322.

589. The court has no jurisdiction in bankruptcy to reject a creditor’s debt, on the ground that it must command the choice of assignees, and that the creditor has an interest adverse to the general creditors, by having property, and obtaining securities from the bankrupt immediately before the bankruptcy. But if he make an unjust use of his legal right by choosing himself, the Ld. Ch. will control him either by removing him (if the election is recent and nothing done under it) or otherwise by some arrangement, (as here from the magnitude of the debt) appointing an assignee to act solely in the investigation and decision of the disputed claim.” And Eldon, C. said, that an application to him before the commissioners had decided whether they would receive or reject proof of a debt with a view to the choice of assignees, was very improper. Exp. De Tasstett, Carroll and another, H. 1813. 1 Ves. & B. 280. 1 Rose 324. Vide Exp. Mills, 3 Ves. & B. 139.

590. Joint creditors are not entitled to vote in the choice of assignees under a separate commission, but the court will appoint an agent to attend to their interest as assignee, with costs out of the estate, for the court has jurisdiction to control the choice of assignees in bankruptcy, having an interest adverse to the general creditors if the question can be fairly tried without removal, by appointing a person to act. Exp. Mills, T. 1814. 3 Ves. & B. 139. 1 Rose 324. 2 Rose 68.

591. A bankrupt, whether certificated or not, cannot be chosen assignee of his own estate. Exp. Jackson, T. 1815. Coop. 286. 2 Rose 221.

592. The rule, that joint creditors shall not vote in the choice of assignees under a separate commission, cannot be departed from, therefore application by joint creditors for an inspector, on the ground of a predominant interest, will be refused till after assignees are chosen. Exp. Simpson, M. 1815. 1 Meriv. 38.

593. Commissioners of bankrupt have power to adjourn their meeting for the choice of assignees. Exp. Garland, E. 1816. 1 Mad. 318.

594. Where, through the error of the commissioners, the great body of the creditors was prevented from proving their debts, and voting in the choice of assignees, a new choice was directed. Exp. Hawkins, M. 1819. 1 Buck 520.

(b) Of the Power, Duty, and Liability of Assignees.

595. Assignees may remove the clerk to the commission at pleasure. Anon. M. 1728. 7 Vin. 117. pl. 2.

596. Assignees cannot compound a debt without advertising in the Gazette, and convening a previous meeting of the creditors. Warner v. Watkins, 1737. 2 Atk. 7.

597. Where the assignees refuse to bring a bill, for the benefit of the bankrupt’s estate, any creditor has a right to bring it, under peril of costs. Franklyn v. Fern, E. 1740. Barn. 30. 35.

598. At a meeting of creditors properly advertised by the assignees, the majority in value present bind the absentees. Cooper v. Pepys, E. 1741. 1 Atk. 106.

599. Creditors cannot give assignees a general power to prosecute suits, &c. at discretion, but there must be a distinct meeting advertised in the Gazette, to consider of each particular suit or case for arbitration. Exp. Whitchurch, T. 1742. 1 Atk. 91.

600. So assignees may advertise a meeting, on any extraordinary occasion, as well as for the purposes directed by the statute, and it is praiseworthy to do so. Exp. Proudfoot, E. 1743. 1 Atk. 253.

601. An assignee cannot stop a creditor’s dividend for private debts due to himself. Exp. White, E. 1742. 1 Atk. 90.

602. The court will order a bankrupt to attend his assignees, and make out his accounts after the end of the forty-two days, limited by 5 Geo. 2. if the assignees will undertake that he shall not be arrested. Exp. Turner, T. 1742. 1 Atk. 148.

603. An assignee must surrender a copyhold to a purchaser, though the lord may exact two fines, but one fine may be saved if the commissioners will except
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copyholds out of their assignments, and then the assignees can convey to a purchaser at once by bargain and sale, and there can be no danger in this practice, for an extent cannot affect a copyhold.

_Drury v. Man_, T. 1746. 1 Atk. 95.

604. An assignee of a bankrupt is a vendee of a copyhold under 13 Eliz. c. 7. S. C.

605. The receipt of one assignee alone is not a discharge for a debt due to the estate; it must be signed by all. _Secus_, as to executors. _Cas v. Read_, T. 1749. 3 Atk. 675.

606. Money was decreed to be paid to a man who became bankrupt; ordered, to be paid to the assignees on the petition of himself and the bankrupt, it being too small to bear the expense of a supplemental bill. _Settle v. Healy_, H. 1788. 2 Bro. C. C. 322.

607. A purchase by an assignee under a commission of bankruptcy, cannot be for his own benefit; for the principle against purchases by trustees of the trust property is most strictly applicable to assignees of bankrupts and their agents. _Exp. James_, E. 1803. 8 Ves. 537. 350. _Vide post_, tit. _Trust and Trustees_, v., where this rule is fully laid down.

608. Assignees of a bankrupt contracting to sell, are bound as other persons to make a good title; but in special cases, as if they contracted supposing they had a good title, the parties would be left to law, as assignees contracting to sell an estate generally, are bound to make a title to the inheritance free from incumbrances; but if it appears before the contract is executed that they cannot make such a title, the parties will be left to law. _White v. Fatjambe_, T. 1805. 11 Ves. 545. _McDonald v. Hanson_, H. 1806. 12 Ves. 277.

609. The authority of assignees in bankruptcy is limited to the distribution of the bankrupt's estate under the bankrupt's laws, and does not therefore extend to an agreement disposing of the surplus after 40c. in the pound to the creditors; and the petition by a party claiming under such a transaction was dismissed, without prejudice to a bill. _Exp. Barfit_, H. 1806. 12 Ves. 15. _Vide Bromley v. Goodere_, 1 Atk. 75.

610. In bankruptcy the assignees, and not the commissioners, are entitled to the custody of the proceedings. _Exp. Scarth_, H. 1808. 14 Ves. 293. _Vide Exp. Watson_, 1796, cited 13 Ves. 296.

611. The assignees in bankruptcy, and not the commissioners, are entitled to the custody of the proceedings. _Exp. Scarth_, E. 1808. 15 Ves. 293.

612. The assignees are not, under 5 Geo. 2. c. 30. entitled to detain from the bankrupt any part of his wearing apparel, on the ground of its being unnecessary; he himself under that statute being the party to determine it, at the risk of an indictment. Nor are the assignees entitled to refuse him the inspection of his books, previous to his last examination, on the ground of such inspection being with a fraudulent object. _Exp. Rose_, M. 1810. 1 Rose 33.

613. An assignee is only answerable for his own receipts, but if one assignee pays money to another he is chargeable. _Anon_. M. 1728. Mos. 36.

614. The rule that assignees are not liable to involuntary losses, does not extend to their agents, for if an agent embezzles money, the assignees are liable, unless the creditors consented to his appointment. _Exp. Earl of Litchfield_, M. 1737. 1 Atk. 87. 88.

615. Under a covenant in a lease restraining alienation by the lessee who becomes bankrupt, the assignee is bound if he makes a fraudulent assignment. _Secus_, if a fair one. _Philpot v. Hoare_, M. 1741. Amb. 480.

616. Assignees employ a broker to sell the bankrupt's goods, who receives the money, and in ten days dies insolvent. The assignee is not liable. _Exp. Belcher_, _Exp. Parsons_, E. 1734. Amb. 218.

617. Where assignees make a private advantage of the bankrupt's estate, and neglect to make a dividend, they shall be chargeable with interest at four per cent. _Walker v. Burrows_, M. 1745. 1 Atk. 94. _Vide 2 Eq. Ab. 101. pl. 5_. So shall the assignee take subject to all equitable liens against the bankrupt. _Brown v. Heathcote_, M. 1746. 1 Atk. 162. _Taylor v. Wheeler_, 2 Vern. 564. S. F. _Hinton v. Hinton_, 2 Ves. 639. S. P.

618. And the assignees having, in like manner, all the equity of the creditors, may impeach transactions which the bankrupt could not. _Anderson v. Maltey_, T. 1793. 2 Ves. jun. 235.

619. Where the statute of limitations might be pleaded against the bankrupt, it
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is pleasurable against his assignees, though they claim under an act of parliament. South Sea Company v. Wymondsell, M. 1732. 3 P. W. 144.

620. Where a bankrupt, by his acts before marriage, has made himself quasi trustee for his wife, his assignees must be so of course. Tyrrel v. Hope, T. 1743. 2 Atk. 562. Vide ante, s. v. and post, tit. Baron and Feme, s. ix.

621. Assignees are not bound to pay what is due en usurious contracts. Exp. Skip, T. 1752. 2 Ves. 489.

622. The intent of the bankrupt law is to put all creditors on a footing, and assignees take subject to all the bankrupt's equity. Exp. Dumas, 1754. 2 Ves. 582. 1 Atk. 253. Therefore where a merchant abroad draws on his correspondent here, who becomes bankrupt, and remits bills for the particular purposes of his drafts, the bills remaining unnegotiated must be delivered up to the assignees, or the money received thereon paid to the original owners. S. C.

623. An assignee will be charged with interest at 5l. per cent. on money belonging to the estate, if employed by him in his own business. Treves v. Townsend, M. 1783. 1 Cox 50. 1 Bro. C. C. 384.

624. An assignee of a bankrupt is never to be charged with interest for money retained in his hands at a higher rate than 4l. per cent. unless a special case is made for it. Exp. Strutt, E. 1788. 1 Cox 439. Vide Treves v. Townsend, exp. where the assignee was charged at 5l. per cent.

625. Tenant in tail makes a mortgage, with covenant for further assurance, and becomes bankrupt, his assignees are bound by the covenant, though no recovery was suffered. Pye v. Daubuz, H. 1791. 3 Bro. C. C. 595.

626. A bankrupt cannot file a bill for redemption in respect of his right to the surplus, but where he has a clear interest, the court will, upon petition and an offer of indemnity, compel the assignees, if they refuse, to let him use their names. Spragg v. Binke, T. 1800. 5 Ves. 390.

627. Assignees of a bankrupt are entitled to the equitable interest for life of his wife, as well as a capital sum, subject to the equity requiring a provision for her out of it. Wright v. Morley, E. 1805. 11 Ves. 21.

628. Assignees in bankruptcy take subject to all equities attaching upon the bankrupt. Exp. Hansen, H. 1806. 12 Ves. 349. Exp. Herbert, M. 1806. 13 Ves. 188.

629. The statute which enacts, that an assignee shall be charged 20l. per cent. for money wisely retained in his hands, is imperative. Exp. Bray, T. 1810. 1 Rose 144.

630. None but the assignees, or their solicitor, have a right to the custody of the proceeds under a commission of bankrupt. Exp. Bullen, T. 1811. 1 Rose 134. Even the clerk of the inrolments cannot detain them for his fees. Exp. Sanderson, T. 1812. ib. 275.

631. A merchant who had been relieved by an issue of commercial credit bills, (under the stat. 51 Geo. 3. c. 15. s. 48.) to the amount of 25,000l. became bankrupt; whereupon the court, on the petition of the secretary, and in obedience to the act, ordered the assignees to pay to the cashier of the bank that sum, together with interest and costs, in preference to the claim of all the other creditors. Exp. Holden, M. 1811. 18 Ves. 436.

632. The assignees of a bankrupt are not entitled to the specific execution of a contract for a lease entered into for the bankrupt's personal accommodation.—Flood v. Finlay, M. 1811. 2 Ball & Be. 9.

633. Two of three assignees directed the solicitor to the commission to give up the proceedings to another; but the third refused to concur till he knew whether such change would be beneficial to the estate: Held, that he had a right to that satisfaction. Anon. H. 1812. 1 Rose 207. But it seems that, if such third assignee withholds his consent, without a satisfactory reason, he will be liable for the costs of an application to the great seal for the solicitor's removal. Exp. Scrubby, ib.(n)

634. An assignee sustaining a litigated commission, is entitled to his costs out of the estate, as between attorney and client. Exp. Bryant, E. 1813. 2 Rose 1.

635. An assignee must consider the commission under which he derives his authority to be valid, and act under it at his own risk and responsibility, the Ld. Ch. not having jurisdiction to indemnify him against the consequences of a supersedeas. S. C. 2 Rose 17.

636. Depositories upon which commissioeners have founded a report, upon a reference to them, are proceedings in the bankruptcy, and as such to be left in the custody of the assignees, Exp. Newton, M. 1813. 2 Rose 19.
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637. A reference to arbitration of all matters in dispute by assignees of a bankrupt, and a consequent award, to pay a sum of money, is conclusive upon them as to assets. *Robson v.*——, 1813. 2 Rose 50.


639. Where the interest of any particular class of creditors is not sufficiently represented and protected by the assignees under the commission, the court will appoint an agent or inspector on their behalf, giving him authority, and indemnity, in point of expense, as fully as if he were actually an assignee; but till a debt is actually set aside, the court will not remove a creditor from his office of assignee upon suspicion of its unfairness. *Exp. Miles*, T. 1814. 2 Rose 68.

640. Parol agreement, although with part performance, is not within 49 Geo. 3. c. 121. s. 13. *Exp. Sutton*, T. 1814. 2 Rose 86.

641. Under 49 Geo. 3. c. 121. s. 19. the court will order the assignees of a bankrupt to deliver up possession, and execute an assignment, or surrender, of the bankrupt’s benefit in a lease, where the lease itself had been deposited in the hands of a third person as a security. *Exp. Chinn*, T. 1815. 1 Madd. 76.

642. Attested copies of title deeds are to be given by assignees; but their covenant for the production of the title deeds is to be confined to the time of their continuance as assignees. *Exp. Stuart*, T. 1815. 2 Rose 215.

643. A landlord, being assignee, cannot resume possession and relet, unless for the benefit of the estate. *Exp. Wright*, T. 1815. 2 Rose 244.

644. One assignee of a bankrupt may sue in equity without the rest; therefore to a suit instituted on behalf of a bankrupt, in the object of which the creditors had no interest, the assent of the creditors is not necessary, under the statute 5 Geo. 2. c. 30. s. 38. *Wilkins v. Fry*, H. 1816. 1 Meriv. 244.

645. Assignees assigning the bankrupt’s lease, are not entitled to a covenant of indemnity, either for themselves or the bankrupt, against the covenants with the lessor. S. C. ibid. 2 Rose 571.


647. Money paid by mistake by an assignee under one commission to the assignees under another, and divided amongst the creditors, by the latter, shall be repaid out of the future effects. *Exp. Bignold*, M. 1817. 2 Madd. 470.

648. The assignees of a bankrupt gave checks upon the banker of the estate to their agent, to enable him to purchase exchequer bills for the benefit of the estate. The agent received the money, but converted it to his own use; the money, however, was subsequently replaced in the bank: Held, that the assignees were not, under the 49 Geo. 3. c. 121. s. 4. chargeable with 20X. per cent. upon the monies so misapplied by their agent. *Exp. Wilkinson*, H. 1818. 1 Buck 197.

649. Assignees shall pay the costs of a trial upon an issue directed to try the validity of the commission, where they are plaintiffs, and the bankrupt is defendant; secur, in case of a petition to supersede the commission. *Exp. Edwards*, T. 1818. 1 Buck 232.

650. Upon a petition by a creditor for his dividend, the assignees can only resist the payment upon such grounds as they could have defended an action previous to the 49 Geo. 3. c. 121. *Exp. Hodges*, M. 1819. 1 Buck 324.

651. An assignee, desirous of becoming a purchaser of the estate of the bankrupt, must first obtain the consent of the creditors, at a meeting called for the purpose, and then petition, and serve the other assignees, and also the bankrupt with the petition. *Exp. Bage*, M. 1819. 4 Madd. 459.

(c) Where Assignees are bound by the Acts of the Bankrupt, or are subject to his Equity.

652. An award was made in an adversary suit between A. and B. A. became bankrupt secretly; his assignees are bound by the award. *Whiteacre v. Paulin*, E. 1691. 2 Vern. 229.

653. Bankrupt fraudulently debited himself with less than he sold some diamonds for, which were consigned to him. He would have been liable to costs; ergo, his assignees shall pay them. *Child v. Pitt*, T. 1725. *Sel. Ch. Ca.* 16.
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654. Assignees are bound by all the bankrupt's acts before the bankruptcy, whether legal or equitable, if for good consideration, and no fraud, and they are concluded by his disposition of his estate before the bankruptcy. Anon. T. 1725. 2 Eq. Ab. 101. pl. 5. Walker v. Burrows, M. 1745. 1 Atk. 94. S. P. So shall the assignees take subject to all equitable liens against the bankruptcy. Brown v. Heathcote, M. 1746. 1 Atk. 162. Taylor v. Wheeler, 2 Vern. 564. S. P. Hinton v. Hinton, 2 Ves. 633. S. P.

655. Merchants abroad draw on a correspondent for a particular purpose, and remit bills to answer it; the correspondent becomes bankrupt. The bills unnegotiated must be delivered up by the assignees to the petitioners; and as to those which were discounted, the petitioners waived their claim. Exp. Dumas, T. 1734. 1 Atk. 232. 2 Ves. 582.

656. The rule of equality extends only to a bankrupt's own estate. S. C. Secus, where the matters in question are not relative to his estate in law or equity. S. C.

657. Where the master of a ship, on behalf of the owner, lets it on charter-party to A., and the owner becomes bankrupt, and his assignees give notice to A. not to pay any further sums to the master, this notice will affect A. as to all sums paid afterwards by him to the master, beyond what the master had actually paid, or stood engaged for, on account of the ship, at the time of the notice; but will not defeat payments made to that extent. Wilkins v. Mure, M. 1784. 1 Cox 150.

658. A. and B. being indebted to C. for goods sold, delivered to C. two bills of exchange in part payment, but they did not indorse them, nor did their names in any manner appear thereon. A. and B. were bankrupts before the bills became due, and all the parties on the bills became insolvent: Held, that the bills must be sold (as in the case of any other mortgage,) and C. must receive the produce, and prove the residue of his debt under the commission against A. and B. Exp. Smith, M. 1789. 2 Cox 209. 3 Bro. C. C. 146.

659. A., as a security for money, borrowed it of B., made a lease of certain lands to C., and assigned the rent reserved to B.; but did not convey to him any further interest in the land. Under the bankruptcy of A. the premises were sold, and the value of the lease was ordered to be paid to B., as in the case of a mortgage. Exp. Wills, T. 1790. 2 Cox 253.

660. So where the assignees kept the fund eight years in hand, one admitted he had lent the money received by him at five per cent. and the other that he had put his receipts into his partnership trade, along with his own money, without any charge of interest. Decreed, they shall pay such interest as has been made; and where none, then four per cent. Hankey v. Garret, M. 1790. 1 Ves. jun. 236.

661. But where an assignee made no dividend, and in thirteen years had accumulated enough to pay 12s. in the pound, a distribution was ordered, on the petition of one creditor. Exp. Goring, T. 1790. 1 Ves. jun. 89.

662. This practice, however, is now regulated by an order of Ld. Loughborough, dated 8th March, 1794; reciting that large sums had been found to remain in the hands of assignees, to the prejudice of creditors. And it was thereby ordered, that where the majority in value of the creditors, do not appoint a safe deposit for the bankrupt's monies, they shall be paid into the bank, so often as they amount to 100l. and there remain until a dividend, and that in the commissioner's assignment, the assignees shall covenant to pay the money according to the directions of the creditors, or to their order. And, it being found, that assignees neglect to make a first dividend, at the end of four months, and within twelve months, and a second dividend within eighteen months, from the date of the commission. Ordered, that where the act of 5 Geo. 2. has not been in such cases complied with, the commissioners do advertise a notice in the Gazette for the assignees to attend them, and show cause why such dividends have not been made; and if the assignees do not show satisfactory cause, ordered, that the commissioners do appoint a time and place to make such dividends, and give due notice thereof. 4 Bro. C. C. 546.

663. A sale by assignees of a bankruptcy, by auction, to one of the creditors, previously consulted as to the mode of sale, and contrary to an order, that a receiver should be appointed to sell, another was directed. The estate to be put up at the aggregate amount of the purchase money, and the sum laid out in substantial improvements and repairs,
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which were to be allowed, in case of a sale at an advance, but if no further bidding the purchaser be held to his purchase. *Exp. Hughes, Exp. Lyon*, T. 1801. 6 Ves. 617.

664. An assignee, instead of selling the estate, taking a lease himself, is answerable for profit or loss. S. C.

665. An assignee is not justified in deferring a sale, and in such a case, if called upon to sell, will incur the peril of answering any depreciation. S. C.

666. The rule with regard to trustees purchasing trust property, applies to all agents, but to a bankrupt's assignees most strictly from their great power. In the present case, another sale was directed, the premises to be put up at the price the assignee gave, and if no more was bid, his purchase to stand. But as the assignee had bought them in at a former sale, at a high price, when there was another bidder, to a greater amount than the final purchaser, *quae re*, how the assignee is to be charged as to that difference? Ld. Ch. hesitated, not knowing what might be the effect of the precedent, *et advisare vult*; but he wished assignees to understand, that they are not to buy in without the privity of the creditors at least. *Exp. Lacy*, H. 1802. 6 Ves. 625. 630. *Vide Exp. James*, 8 Ves. 837.

667. An assignee buying dividends, is a trustee for the creditors, or for the bankrupt, as the case may be. S. C.

668. A banker, receiving the money under a bankruptcy, ought not to be an assignee. S. C.

669. Upon the same principle, and agreeable to the same doctrine, Ld. Ch. determined other cases about the same time. *Vide Exp. Tanner, Exp. Atwood, Owen v. Foulkes, Lister v. Lister*, 6 Ves. 630, 631. (n.)

670. An assignee in bankruptcy having purchased an estate of the bankrupt's under the commission, was held a trustee of the profit upon a re-sale; in the first instance, for an equitable mortgagee by possession of the deeds, who, having delivered them up on receiving the produce of the first sale, was held, under the circumstances, not to have lost his lien for the deficiency. *Exp. Morgan*, H. 1806. 12 Ves. 6.

671. A commission of bankruptcy was superseded for fraud, where nothing had been done under it; and the petitioning creditor was not to be found. The assignees not having attended any of the summonses, though not privy to the fraud; and though not having received any effects, were ordered to reimburse the messenger the expense subsequent to the choice of assignees, but not that previously incurred. *Exp. Hartop*, T. 1803. 9 Ves. 109.

672. An assignee in bankruptcy was removed and charged with interest at five per cent. for money paid in to his bankers to his own use, and used as his own property. *Exp. Townskend*, H. 1802. 14 Ves. 470. But the following clauses in stat. 49 Geo. 3. have altered this point.

673. If upon the choice of assignees the creditors do not direct how the money arising from the bankrupt's estate shall be paid in, the commissioners may direct the investment of it (until dividend) so that it be not placed in the hands of any of the commissioners, or of the solicitor, or in any bank or house of trade in which a commissioner or the solicitor is concerned, and the money shall be invested so often as it amounts to 100l. Per staj. 49 Geo. 3. c. 121. s. 3.

The commissioners may also order the money to be laid out in exchequer bills. *Ibid. a 7."

674. And any assignee disobeying such directions, shall be charged 20 per cent. on the money retained, or employed contrary thereto. *Ibid. sec. 4."

675. An assignee was a partner in a bank, into which he placed the trust-money, by the direction of the creditors.—He shall be charged with interest, to be computed on the annual balances, not as being a partner in the bank, but for keeping it too long there, viz. three years.—*Exp. Baker*, T. 1811. 18 Ves. 246.

676. Whate two commissions issued against the same bankrupt; and distinct assignees were chosen under each, a petition was presented that they might elect either to take or reject a lease: whereupon the court made an order upon both, subject to the question as to which commission should be sustained. *Exp. Pomery*, E. 1811. 1 Rose 57.

677. The commissioners for issuing commercial exchequer bills, were admitted (by their secretary) to prove the full amount of their principal, with interest up to the complete payment of the principal, in preference to all other creditors of the bankrupt. *Exp. Holden*, M. 1811. 1 Rose 175.
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678. A legacy falling to a bankrupt, before allowance of his certificate, and pending an unfounded petition to stay it, goes to his assignees, unless the petition was presented with that object. *Exp. Ansell*, T. 1812. 19 Ves. 203.

679. The court will direct a contribution amongst assignees in bankruptcy, to reimburse a payment made by one under an order for a loss occasioned by their joint act, and the objection, that the defend- ants acted only for conformity upon the representation and advice of the plaintiff, will not prevail; but the court said, there can be no contribution between wrong-doers upon entire damages for a tort. *Lingard v. Bromley*, M. 1812. 1 Ves. & B. 116.

680. J. R., before his bankruptcy being pressed to discharge a debt, gave her creditor a draft on the executor of a debtor of her's, which draft the executor promised to discharge on receiving assets. This is a good assignment of the debt in equity, and available against the assignees of J. R. *Exp. Alderson*, T. 1815. 1 Madd. 53.


682. An agreement was entered into, to pay into a bank of four partners, bills of exchange, indorsed, and to take in return their promissory notes. Three of the partners became bankrupts, and afterwards their bills were paid in, and their notes taken; then the fourth became bankrupt: Held, that the assignees were not entitled to retain their bills. *Exp. Mc'Gat*, H. 1816. 2 Rose 376.

683. Where a bill was lodged in a banker's hands to be applied to a particular purpose, but he became bankrupt without having so applied it, it is claimable from the banker's assignees. *Exp. Aken*, T. 1817. 2 Madd. 192.

684. A. employed B. to get bills discounted, which he had not indorsed; B. indorsed them, in order to procure the money on them. A. became bankrupt: Held, that the assignees of A. must relieve B. from the liability incurred by these indorsements. *Exp. Robinson*, T. 1817. 1 Buck 113. *Vide Exp. Iswater*, 1 Rose 20. *Exp. Hustler*, 1 Buck 176, and the reporter's note, lb. 114.

685. If a petitionor for a superfcededas himself becomes bankrupt before the petition is heard, his assignees must present a supplemental petition to have the benefit of that already presented, or it will be dismissed. *Exp. Birdwood*, T. 1817. 1 Buck 99.

686. Covenant "that the lessee shall and may have, and take a going-off crop from two-third parts of the arable lands, &c. on the effluxion of the lease or sooner determination of the said term." The lessee became bankrupt, and his assignees refused to accept the lease: Held, they were entitled to the off-going crop, paying rent up to the time when possession of the premises should be delivered to the landlord. *Exp. Manndrell*, T. 1817. 2 Madd. 315. *Vide Exp. Nixon*, 1 Rose 446.

687. The assignees of a lessee, by accepting the lease, discharged the bankrupt from all claims for rent, yet they may accept the lease to an insolvent to exonerate themselves from all future rent. *Onslow v. Corrie*, M. 1817. 2 Madd. 330. See the several authorities cited by the Vice Chancellor in his decree.

688. Certain stock standing in the name of a bankrupt, the dividends of which had not been claimed, was (under the 56th Geo. 3. c. 60.) transferred to commissioners for the reduction of the national debt. The assignee, by petition, (under the act) claimed the stock as part of the bankrupt's effects. Another person by petition claimed the same stock, insisting that the bankrupt was but a trustee for him. The court referred it to the master to ascertain whose stock it was, and in the mean time directed the stock to be transferred to the accountant-general. *Exp. Gillet*, H. 1818. 3 Madd. 28.

689. The drawer of bills of exchange deposited short bills with the acceptor to cover his drawing account. Both the drawer and acceptor became bankrupts: Held, the holder of the acceptances may call upon the assignees of the acceptor to apply the short bills in discharge of the acceptances to the extent of the lien which the acceptor had upon them at the time of his bankruptcy, but to ascertain that lien by inquiry was directed. *Exp. Parr*, H. 1818. 191. *Vide Exp. Wa- ring*, 2 Russ 192.

690. As the court is not empowered by the 49 Geo. 3. c. 121. s. 19, to determine a question of election by the assignees to accept a lease of which the bankrupt was lessee, an issue of quantum
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 indemificatus was directed. Exp. Quantock, H. 1818. 1 Buck 190.

(d) Of Suits by and against the Assignees, touching the Bankrupt's Estate.

691. Upon the assignees of a bankrupt, against whom an extent had issued, paying the crown's debts, and performing the bankrupt's promise to pay his father's debt to the crown, the extent was discharged. *Rez v. Lacey*, E. 1734. Burn. 337.

692. Assignees cannot bring a bill of revivor, but must sue by original bill. *Anon*. 1738. Com. 590. So, where assignees die or are removed, the new ones cannot revive, but must bring a supplemental bill, for there is but an artificial privity between them and the bankrupt. *Anon*. M. 1739. 4 Atk. 88. But, where money was decreed to be paid to a man who became bankrupt, the court ordered it to be paid to the assignee, on the petition of him and the bankrupt, the sum being too small to bear the expense of a supplemental bill. *Stedala v. Healy*, H. 1788. 2 Bro. C. C. 322.

693. Where assignees, in compliance with the resolution of a majority of the creditors, refuse to bring a bill for the benefit of the bankrupt's estate, any creditor may bring such a bill at the hazard of the costs. *Franklyn v. Fern*, E. 1740. Barn. 30. 33.

694. Goods were assigned to plaintiff, to secure a debt due by A. who became bankrupt, and his assignees possessed themselves of the goods. Plaintiff brought his bill for an account; the assignees demurred, for that plaintiff's remedy was at law. *Non allocutur*, for though plaintiff might bring trover, the goods were assigned as a security, and there is matter of account; *ergo*, a remedy in equity. *Ryal v. Roberts*, E. 1740. Barn. 38.

695. Where bills are brought to settle the demands of creditors, the rule for determination is the same as if heard on petition. *Browley v. Goodere*, M. 1743. 1 Atk. 76.

696. Where a solicitor carries on suits for an assignee without the authority of the major part of the creditors, the assignee shall be his debtor, and not the bankrupt's estate. Exp. Whitchurch, T. 1749. 1 Atk. 210.

697. Bill against the executor and assignee of a certificated bankrupt deceased, for an account, the assignee demurred, the executors being answerable to the creditors alone, and the assignees to the executors only. Demurrer allowed. *Utterson v. Mair*, H. 1798. 4 Bro. C. C. 270.

698. Assignees under a second commission must be nonsuited in an action of trover against the assignees under the first, if the bankrupt did not gain his certificate under the first commission; for he can have no future effects, nor can he contract a new debt. Exp. *Brown*, H. 1793. 2 Ves. jun. 69.

699. In a suit against assignees, the bankrupt may be examined as a witness, and therefore ought not to be a party. *Griffen v. Archer*, T. 1794. 2 Annatr. 478.

700. After judgment by default in an action for a dividend, the assignees filed a bill for a discovery, and to have the proof of the debt expunged. Demurrer to the jurisdiction allowed, the course being by petition. *Clarks v. Capren*, T. 1795. 2 Ves. jun. 666.—N. B. Ld. Ch. thought this bill quite new, and as defeating the summary proceedings under commission. Upon search no precedents could be found of such a case.

701. Upon a bill by assignees for specific performance of an agreement (previous to the bankruptcy) to grant a lease; the case consisting of a combination of circumstances, the evidence may sustain the relief with some modification. Demurrer over-ruled. *Brook v. Hewit*, T. 1796. 3 Ves. 253.

702. Where a bankrupt shows that apparent incumbrances against him are no substantial charges, and the assignees either refuse or are not permitted by the creditors to interfere; the court will allow the bankrupt to use the names of the assignees to enable him to recover the property upon his indemnifying them. *Benfield v. Solomon*, T. 1803. 9 Ves. 84.

703. In all actions brought by assignees, the commission and proceedings under it shall be sufficient evidence of the petitioning creditor's debt, and of the trading and act of bankruptcy of the bankrupt, unless notice be given by plaintiff before issue joined, or by defendant before plea, or on pleading that those matters are to be disputed, and the judge may certify the proof or admission made on the trial, which shall entitle the assignee to the taxed costs occasioned by the notice, which costs shall be added to the assignee's costs if he obtain a verdict, and
Of Suits by and against the Assignees, touching the Bankrupt's Estate.

if not, they shall be set off against the costs of the opposite party. Stat. 49 Geo. 3. c. 121. s. 10. And so in equity suits by assignees, against all other parties to the suit. Ibid. s. 11.

704. No action at law shall be brought against an assignee for any dividend, the remedy being by petition to the Ld. Ch. Ibid. s. 12.

705. A bankrupt brought an action against a debtor to the estate, alleging that the commission was invalid, but the assignees insisting on payment the debtor filed a bill of interpleader, and prayed an injunction against both, which was granted, for the court would not allow the bankrupt thus indirectly to contest the validity of the commission. Loudes v. Cornford, M. 1811. 18 Ves. 299.

706. On motion to dismiss an injunction bill (for an account) for want of prosecution, by reason of the bankruptcy of the plaintiff, the court held, that though that event did not abate the suit as it would at law, yet the suit was thereby become defective for want of parties. The Court of Exchequer, by analogy to the practice at law, certainly held the bankruptcy of the plaintiff no abatement, and in such a case they dismiss the bill, but here (said Ld. Eldon) the motion is, that the assignees shall be made parties or the injunction be dissolved, which shows that the court notices the bankruptcy. The proper order, his Lordship said, was for the assignees to be brought before the court within a reasonable time, as they were to have the benefit of the suit, otherwise the bill to be dismissed, but not with costs, unless that can be justified upon an enquiry into those cases where an injunction has been dissolved if the assignees of the plaintiff would not come in. The court made the order accordingly, observing that the case of a bankrupt defendant had no analogy. Randall v. Mumford, M. 1811. 18 Ves. 424. 1 Rose 196.

707. Assignees are considered as persons struggling only for the benefit of all the creditors, and the constant course is to give them their costs out of the fund belonging to all. Exp. Bryant, H. 1818, 1 Ves. & B. 216.

708. J. D. contracted to purchase an estate and became bankrupt, a bill for a specific performance was filed against his assignees, in which he was joined, both in the charges and prayer for relief. The bankrupt demurred. Demurrer allowed, but the court did not determine whether he could be made a party to a bill for a discovery only. Eldon, C. thought not(a.) Secur. where there is fraud in the bankrupt. Whitworth v. Davis, E. 1813. 1 Ves. & B. 545. Vide(a) Griffin v. Archer, 2 Anstr. 473. cited in King v. Martin, 2 Ves. jun. 643.

709. To a suit by assignees, the consent of the creditors is unnecessary, where their interests are not affected. Nor need all the assignees be plaintiffs; such as refuse to join may be made defendants. Wilkins v. Fry, H. 1816. 2 Rose 371.

710. A petition presented by assignees must, under the general order of 12th Aug. 1809, be signed by all present, and not by one only, as in case of copartners. Exp. Morgan, T. 1817. 1 Buck 109.

711. It is no ground for the removal of assignees, that the commissioners have improperly rejected the proof of a debt that would have turned the choice unless the rejection was fraudulent. Exp. Du- rent, H. 1818. 1 Buck 201.

712. The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared. Two of these assignees sign drafts for the dividends, which they forward to the other assignee for his signature. He also signs them and receives the money, which he applies to his own purposes. Upon his death a creditor’s suit is instituted for the administration of his assets: Held 1st, That under the covenant which the assignees entered into with the commissioners, the misapplied dividends were a special contract debt due from the estate of the assignee, who had misapplied them, to the estate of the bankrupt. 2dly, That the estate of the assignee was liable under the 49 Geo. 3. c. 121. s. 4. to pay 20 per cent. upon the funds misapplied. 3dly, That the 20 per cent. was not a specialty, but a simple contract debt. 4thly, That the 20 per cent. was part of the general estate of the bankrupt, and did not belong to the creditors entitled to the misapplied dividends. Wackerbath v. Powell, T. 1820. 1 Buck. 495.

Of actions by assignees, to recover a partial payment of money, or a partial delivery of goods. Vide post. s. xii.
BANKRUPT VI.

Of Insolvent Assignees.—Removal or Death.

713. Where an assignee died much indebted, and the creditors petitioned that his administrator might account for the bankrupt's effects in his hands, which the administrator denied on oath, the court thought this proper for a bill, and not to be taken summarily before the commissioners. Exp. Maitland, M. 1729. 2 P. W. 546.

714. Where an assignee dies before he has accounted, and leaves no personal assets, his real estates are liable. Primrose v. Bromley, M. 1739. 1 Atk. 89.

715. A creditor neglects to receive his dividend, and the assignee runs away, he must pursue the assignee as well as he can, for the bankrupt's estate is not liable to him. Cited in Smith v. Duke of Chandos, H. 1740. Barn. 419.

716. If after 1st January, 1810, any assignee becomes bankrupt, having 100l. of the bankrupt's estate in his hands, his certificate shall not discharge his future effects. Per stat. 49 Geo. 3. c. 121. s. 6.

717. Where an assignee had purchased goods at a sale under the commission, and became bankrupt. It was ordered that such of the goods as remained should be re-delivered; and that the value of what he had re-sold should be proved as a debt. Exp. Spong, T. 1811. 1 Rose 133.

718. Where an assignee becomes bankrupt, with money in his hands, his estate shall not receive any dividend in respect of his proof under the estate of which he was assignee, until full reimbursement of what he had in his hands. Exp. Bignold, M. 1817. 2 Nadd. 470. Vide Exp. Graham, 3 Ves. & B. 130. 2 Rose 74.

719. Where part of a bankrupt's estate had been paid into the bank in the names of three assignees, one of whom had absconded, the court ordered the bank to pay the money to the remaining assignees. Exp. Hunter, T. 1816. 1 Meriv. 408. Vide Exp. Collins, 2 Cox 427.

720. If an assignee, who has received effects, become bankrupt, a creditor, under the commission in which he was assignee, but who proved his debt after the bankruptcy of the assignee, is not entitled to any proof under the assignee's commission. Exp. Stonehouse, E. 1820. 1 Buck 531.

(f) Removal or Death of Assignees.

721. Where assignees die or are removed, the new assignees cannot revive, but they must bring a supplemental bill. Anon. M. 1739. 1 Atk. 88.

722. The court will not proceed to a second choice of assignees, upon a suggestion that some of them, or some of the creditors live abroad. Nor shall an assignee be removed, unless proved that he has neither substance or integrity. Exp. Gregnier, T. 1744. 1 Atk. 91.

723. Where a bankrupt assignee is removed, both he and his assignees must join with the commissioners, in the new assignment to the second assignee. Exp. Newton, E. 1749. 2 Atk. 97.

724. Ordered, per Loughborough, C. 8th March, 1794, That if any assignee shall become bankrupt, he shall be removed, and that upon the death or bankruptcy of an assignee, the commissioners, upon the application of one or more creditors, entitled to vote in the choice of assignees, shall give notice in the Gazette of their meeting to choose a new assignee; at which meeting the creditors shall proceed to a new choice, and that all proper parties shall join in an appointment, to vest the bankrupt's estate in the new, solvent, or surviving assignee, and that where any assignee shall be bankrupt, the commissioners under his commission, shall take an account of all the property come to his hands, making just allowances; and that what shall remain in specie, together with all books, papers, and writings, shall be delivered over to the remaining or new assignee, who shall be admitted to prove what balance may appear to be due from the bankrupt assignee; and for the better taking the accounts, all parties shall attend the commissioners, to be examined on interrogatories, and shall produce all books, papers, &c. as they shall direct. 4 Bro. C. C. 548.

725. Where one assignee purchased the bankrupt's estate for himself, and the other permitted it, Ld. Ch. removed them both, and ordered a re-sale; the assignee to account for any profit upon the re-sale, but if it should not produce so much, then to be held to his purchase. Exp. Raymonds, M. 1800. 5 Ves. 707.

726. Where all the assignees of a bankrupt were dead, and the heir at law of the survivor was an infant, Ld. Ch. made an order, under 5 Geo. 2. c. 30. s. 31. that the commissioners should execute a new bargain and sale and assignment. Exp. Bainbridge, T. 1801. 6 Ves. 451. Exp. Leman, II. 1807. 13 Ves. 273.
BANKRUPT VI. & VII.

Removal or Death of Assignees.—Commissioners’ Assignment.

727. The principle upon which an assignee may be removed requires either some imputation of misconduct in him; or where an account is to be taken, that it cannot be taken so conveniently and justly while that person remains assignee. Exp. Surtess, H. 1806. 12 Ves. 13.

728. An assignee permanently in Scotland was removed, for there the process of the Chancellor cannot reach him. Exp. Grey, H. 1807. 13 Ves. 274.

729. Where an assignee had absconded, and could not be heard of, Manners, C. directed a meeting of the creditors to elect a new one, after some doubts on the occasion. Exp. Higgens, T. 1809. 1 Ball & Be. 218. Vide Exp. Bainbridge, 6 Ves. 450. Exp. Leman, 13 Ves. 271.

730. The court cannot order an infant heir of the deceased assignee of a bankrupt to convey, as the bankrupt's estates vested in him by the death of his ancestor, but the petition may be amended, and the order made under the stat. 7 Ann. c. 19. Exp. Beddam, T. 1812. 1 Rose 310. Vide Exp. Bainbridge, 6 Ves. 451. Exp. Leman, 13 Ves. 271.

731. Ld. Ch. will dismiss with costs a petition to remove a bankrupt assignee for the order of 26th March, 1794, has rendered it unnecessary. Exp. Watts, T. 1818. 1 Rose 436.

732. Where an assignee has proved his debt, and upon petition, an action was directed against him to try his right to property of the bankrupt, alleged to have been fraudulently delivered to him by the bankrupt on the eve of the bankruptcy, he cannot dispute the validity of the commission, but at the hazard of his proof. Exp. Jexes, T. 1813. 1 Rose 993.

733. Where one of two assignees went abroad the other petitioned for the choice of a new assignee, that the bargain and sale might be vacated, that a new bargain and sale might be extended to the petitioner and the new assignee, and that service of the petition at the last place of residence of the absent assignee might be good service. On an affidavit of service of the petition at the last place of abode, an order was made accordingly. Exp. Bonbonour, H. 1818. 3 Madd. 25.

734. Where an assignee retires, he must give security (to be approved of by the Master) to protect the estate against any costs that may be occasioned by his retiring. He must also permit the new assignee to use his name in all actions at law. Exp. Thortley, T. 1818. 1 Buck 231. 3 Madd. 273.

See more of bankrupt or insolvent assignees, post, s. xvii.

BANKRUPT VII.

Of the Commissioners’ Assignment.

(a) What shall pass to the Assignees by the Assignment, or Bargain and Sale, and what shall not pass thereby, and of the vacating thereof. (b) In what cases the Wife’s Fortune shall belong to the Assignees, and where the same shall be protected.

(a) What shall pass, &c. (ut supra.)

735. A legacy given to the bankrupt before the commission, will pass. Tumison v. Groun, H. 1701. 2 Vern. 432.

736. If A., a trader, gives a judgment to B., and agrees to sell to C. for a valuable consideration, and then becomes bankrupt, the judgment will bind the lands in the hands of C., but what C. was to pay the bankrupt, shall be liable to the bankruptcy. Oriber v. Fletcher, M. 1721. 1 F. W. 737.

737. Lessee for years, under a restriction of alienation, and power of re-entry in such case, died, his executors entered and enjoyed, and then became bankrupt. The assignees sold this lease to plaintiff for 50l. the lessor insisting upon the forfeiture, ejected him; per curiam, the commissioners’ assignment being by authority of a statute, will supersede the private agreement, and the assignment by the assignees to the plaintiff is no breach of the condition, but good. Goring v. Warner, M. 1725. 7 Vin. Ab. 83. pl. 9.

738. A., seized of a copyhold, with a
custom of free bench. A., on marriage, settled this estate, reserving a power to charge his land with 300£. portion for younger children, and further, with 300£. for payment of his debts. A. became bankrupt and died, without performing the articles or executing his powers. The assignees brought their bill to have 300£. raised for the creditors, and the children brought theirs to have their fortunes raised. Ld. Ch. compared the power of charging the land with debts to a power of revocation left unexecuted, for which creditors shall have a remedy against the heir, and decreed the settlement to be strictly executed by the assignees, as it must have been by the bankrupt, and the reversion in fee to go to the assignees.—Jordan v. Savage, M. 1735. 2 Eq. Ab. 102. pl. 8.

739. A partner in a mercantile house, embezzled the partnership property, and contracting separate debts, became bankrupt. The assignees seized the partnership effects, and received the debts; on a bill filed, they submitted to do as the court should direct. Decreed, an inquiry into the bankrupt's share and interest in the trade, which shall be subject, first to make good what he had embezzled, and the residue applied to pay his separate debts. Gross v. Dufresnay, 1734. 2 Eq. Ab. 111. pl. 5.


741. An owner of hoys mortgages them, and is suffered by the mortgagee to use them for three years, they may be sold under the mortgagor's commission. S. C.

742. On the construction of 21 Jac. 1. c. 19. s. 11. it was determined, that if a person advances money on a conditional sale of goods, and does not insist on the delivery, he confines in the credit of the vendor, and not on the particular security, and therefore he ought to come in as a creditor. Ryal v. Rolle, H. 1749. 1 Atk. 165 to 185. 1 Ves. 348 to 375.

743. The statute 21 Jac. 1. extends to conditional, as well as absolute sales, and the general view of it is to prevent traders from gaining a delusive credit. S. C. And see Exp. Smith, 1 Ves. & B. 518. where it was held, that property in the possession and disposal of a bankrupt, passes to the general creditors by this statute.

744. A share in a trade, mortgaged to a partner, must be delivered, or it is a delusive credit. S. C.

745. The provisions in the act with respect to legal interests must be followed as to equitable ones. Choses in action are therefore included in the words, "goods and chattels," and are within the meaning of the act. S. C.

746. Creditors are entitled to the bankrupt's life-interest in his wife's choses in action. Fitter v. Fitter, H. 1742. 2 Atk. 515.

747. All future personal estate until the bankrupt's certificate, passes by the assignment, and vests in the assignees, but as to new acquired real estate, there must be a new bargain and sale; therefore, no second commission can issue until the bankrupt has obtained his certificate under the first. Exp. Proudfoot, E. 1745. 2 Atk. 252.

748. The court will not carry a voluntary conveyance by a bankrupt, into execution against his assignees. Secus, of a conveyance for good consideration before the bankruptcy. Tyrrel v. Hope, E. 1743. 2 Atk. 562.

749. B., after marriage in 1718, conveyed his real estate to trustees, in consideration of 5£. and other good considerations; in trust for himself for life, then to his wife for life, remainder to his eldest son if he survived them, the remainder to the second son, &c. B. became bankrupt; this conveyance falls directly within 1 Jac. 1. c. 15. s. 5. and therefore the trustees were directed to convey to the assignees of B. It is necessary to prove on 13 Eliz. that the person was indebted when the settlement was executed. Walker v. Burrows, M. 1745. 1 Atk. 93.

750. Before the marriage of G. S., his wife's father covenanted to pay him 1000£. on the marriage, and that his heirs, executors, &c. should pay G. S. 500£. six months after his death, and G. S. by same deed, contracted to give security by specialty, to pay 1000£. six months after his death, to his wife if she survived. Accordingly, three days after marriage, he gave a bond, and then became bankrupt, but before bankruptcy,
What shall not pass by the Assignment, and Bargain and Sale.

and after the father's death, he assigned the 500l. to plaintiff as a security for a debt. Upon a bill by plaintiff against the father's executors, and the husband's assignee, Ld. Ch. directed the executors to account to plaintiff for the 500l. which was never the wife's money, but the husband's, and said, if he were to stand neutral, the husband's assignees, who had the legal estate, and less equity than the plaintiff, might receive the money. Brett v. Forcer, H. 1746. 3 Atk. 403.

751. Where a wife has a demand in her own right, and the husband applies in her right, if there be no agreement on her behalf before marriage, the court will take care of her. S. C.

752. If the husband had not been a bankrupt, and had brought a bill for performance of the father's covenant, he could only have been compelled to give a bond, and the wife must have taken her chance, and an assignee shall not be in a worse condition than an assignor, but it has often been held he should be in a better. S. C.

753. R. purchased the office of Under Marshal of London for 900l. with a salary annexed, and became bankrupt; his assignees applied to the corporation for liberty to sell the office, tendering the alienation fine, but they refused, without the consent of R., which he withheld. On petition, Ld. Ch. thought the assignees might sell the office by anticipation, as it did not concern the administration of justice, and consequently was not within 5 & 6 Edw. 6. c. 16. though it is closely within 34 & 35 H. 8. c. 4. and 33 Eliz. c. 7. Exp. Butler, T. 1749. 1 Atk. 210 to 215. Amb. 73.

754. Upon R.'s refusal to surrender, the assignees obtained an order to sell his office, when B. agreed with them for the purchase at 830l. and he was presented to the court of aldermen, who approved him, and were ready to admit him on the bankrupt's surrender. R. again refused, and Ld. Ch. ordered him to be committed, whereupon he absconded — S. C.

755. An application was then made to the court, to order the mayor and aldermen to admit B. Ld. Ch. said, he could not make such order, nor supply the want of a surrender, as in the case of a copyhold. But for the furtherance of justice, Ld. Ch. recommended it to the corporation upon R.'s non-attendance, which was a cause of forfeiture, to dismiss him, and admit B. upon payment of 350l. and the alienation fine. S. C.

756. All the real and personal estate of a bankrupt vests in the assignees from the time the act of bankruptcy is committed, and it controls all subsequent acts, so that a sale of goods by the bankrupt after the act, is a sale of the creditor's property, for which the assignees may maintain trover. So it is with the payment of money. Billon v. Hyde, M. 1749. 1 Ves. 328. 1 Atk. 126.

757. A trader advanced half the money for the renewal of a lease, the lessee giving a note to pay the money, unless he should by will give the estate to one of his children. He bequeathed the estate to his daughter, and the father becoming a bankrupt, a moiety of the estate vested in his assignees, under 1 Jac. 1. c. 15. Fryer v. Flood, T. 1782. 1 Bro. C. C. 160.

758. Money of the wife is by settlement to be lent to the husband, at four per cent., but without interest till he should decline trade, then the interest to be paid to him for life, remainder to his wife for life, remainder to his children.—The husband becomes bankrupt; the assignees are entitled to this interest for his life. Stratton v. Hale, II. 1780. 2 Bro. C. C. 490.

759. A real and personal fund was ordered to be converted into money; the interest to be paid to the bankrupt's wife for life, without further disposition. The third part of the personal estate, which belonged to the wife as one of the next of kin, on the death of the testator;—Held to be an interest so vested, as to go to the husband's assignees, and not a new interest arising to the husband on her death. Robinson v. Taylor, E. 1789. 2 Bro. C. C. 589.

760. The right to sue for money lost at play, by 9 Ann. c. 14. is a vested interest, and passes to the assignees of a bankrupt. Brandon v. Sands, M, 1794. 2 Ves. jun. 514.

761. Bond upon marriage, to pay a sum of money to the husband, which, upon certain contingencies to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife and children. The husband became bankrupt, and payment was decreed to his assignees. Studd v. Tingcombe, M. 1800. 5 Ves. 695.
BANKRUPT VII.

What shall not pass by the Assignment, and Bargain and Sale.

762. A purchase made by a man in the joint names of himself and his wife, if he was a trader at the time, and afterwards became a bankrupt, is void as against the creditors within the statute 1 Jac. 1. c. 15. s. 5. So, if the purchase was made with his wife's money previously received by him and disposed of as his own. *Glaister v. Hewer*, T. 1802. 3 Ves. 195. T. 1803. 9 Ves. 12. 11 Ves. 377. *Vide Walker v. Burrows*, 1 Atk. 93. *Crisp v. Pratt*, Cro. Car. 548. *Lilley v. Osborn*, 3 P. W. 298. *Tucker v. Cosh*, Style. 288.


764. Though debts in general are within the statute 21 Jac. 1. c. 19. s. 10, 11. mortgages of real estate, whether original or by assignment, though also secured by bond or covenant, are not. The consequence is, that if they remain in the possession, order, and disposition of the bankrupt, at the time of the bankruptcy, they will pass by the assignment to the assignees; in order therefore, completely to divest the bankrupt of such debts, he must have done every thing that is equivalent to a delivery of moveable personal chattels, viz. An assignment and delivery of the security, if any, and notice to the debtor of the assignment. *Jones v. Gibbons*, E. 1804. 9 Ves. 410. *Vide Ryal v. Rowles*, 1 Ves. 348. 375. *Vide etiam ante, s. v.*

765. An uncertificated bankrupt, in general, can acquire property only for his creditors; therefore, when he has entered into a copartnership trade, the creditors of that partnership have no equity against his assignees for an account of the property used or acquired by him in such partnership, so as to apply it to the discharge of their own debts. *Evans v. Backhouse*, T. 1804. 10 Ves. 594.

766. T. held shares in a trading company, in trust for W., who by his will appointed T.'s residuary legatee; T. continued in possession of the shares and became bankrupt. Held, that the shares were not within the meaning of the bankruptcy act, 11 & 12 Geo. 3. c. 8. & 9. inasmuch as T. was himself the "true owner and proprietor thereof," subject however to the debts and legacies of W.; for the object of that act is to prevent deceit by a trader, arising from the visible possession of property to which he is not entitled, that is, where the possession is not in the true owner, but in one whom the true owner unconsciously permits to have it. And the circumstance that credit has been given on the faith of the property, will not bring the case within the act, neither is a forfeiture of the property by the owner, the effect of the statute. *Joy v. Campbell*, T. 1804. 1 Sch. & Lef. 323. *Vide Edwards v. Harben*, 2 T. R. 387. *Collins v. Forbes*, 3 T. R. 316. *Jarman v. Woolston*, 3 T. R. 618. *Manton v. Moore*, 7 T. R. 67. *Gordon v. East India Company*, 7 T. R. 228. *Bryson v. Wylie*, 1 Bos. & Pul. 83. (n.)

766. Property may be limited to a man to go over in certain events, as bankruptcy, but while it remains his property, it must be subject to all the incidents of property in general, and consequently to the payment of his debts. Therefore, where there was a trust to pay the dividends of a fund from time to time, into the hands of a man, or on his proper order or receipt, subscribed with his own hand, and that the same should not be grantable, transferrable, or otherwise assignable, by way of anticipation of any unreceived payment, or any part thereof, and on his decease, that the principal should be paid to such persons, as in a course of administration would become entitled to his personal estate, and as it had been his personal estate, and he had died intestate. The court held this an interest for life in the dividends, and assignable under a commission of bankruptcy against the legatee, but with a limitation over, of the principal, to those entitled under the statute of distributions (a) observing, that this case differed from the right of a married woman to dispose of property settled to her separate use, to be paid into her own hands on her receipt, &c. (b) unless restrained to payment not by anticipation. *Brandon v. Robinson*, M. 1811. 18 Ves. 429. 1 Rose 197. *Vide (a) Foley v. Burnell*, 1 Bro. C. C. 274, (b) Pybus v. Smith*, 1 Ves. jun. 189. 3 Bro. C. C. 340.
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What shall not pass thereby.

768. Lessee for years becomes bankrupt, his assigns have no benefit of the covenant for renewal at the end of the term, the clause in the statute being, that the assigns may perform conditions performable, and not broken. 

Vanderbanker v. Deborough, E. 1689. 1 Vern. 95.

769. A. on his son’s marriage, covenants for his life to pay his son an annuity; the son becomes bankrupt, his assigns shall not have the benefit of this covenant. 

Moyces v. Little, M. 1690. 2 Vern. 194.

770. Bond from A. to B., for payment of money, B. assigns it to C. to secure a debt, B. becomes bankrupt, C. shall hold the bond in equity. 


771. A. was indebted to B. by bond, and B. to A. for rent, B. assigned A.’s bond to C. bona fide. Whether A. shall retain the rent due out of the bond? 

Dubitatur, sed per C. S. stoppage seems to be a good equity. S. C.

772. A bankrupt is in possession of goods to sell in trust, they shall not pass. 


A deed made by a trader, two months before his bankruptcy, for securing his children’s fortunes, out of interest monies in his hands, is good, for the assigns can take nothing by the assignment but what the bankrupt can honestly assign. 

Cock v. Goodfellow, E. 1722. 10 Mod. 495. So a bona fide assignment of choses in action, is good against creditors. S. C.

773. R. W. and his partner gave a bond to H. for 1200l. and by deed, assigned to his order, the goods in two ships at sea, as also thirteen bills of lading, and the policies of insurance; the latter indorsed to H. but the former not. R. W. becoming bankrupt, his assigns filed a bill for the goods, insisting that R. W. acted as visible owner, and that H. had no possession. 

Sed per cur. R. W. did all he could to show a right in H., who shall detain the ship and cargo till his 1200l. and interest be paid, for this case is not within 21 Jac. 1. c. 19. 

Brown v. Heathcote, M. 1746. 1 Atk. 160.

774. An assignment of an outward bound cargo, is a complete contract, without delivery to the assignee. S. C.

775. Indorsing a bill of sale is not an assignment, unless goods are directed to be delivered to the assignees. S. C.

776. The clause in 21 Jac. 1. that all goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors, relates only to goods which the bankrupt has in his own right. 

Exp. Marsh. T. 1744. 1 Atk. 159.

777. M. sold to F. and G., two-thirds of 500 barrels of tar, one-third to be consigned for sale, on his own account and risk, and he to sustain all charges of shipping, &c. M. caused the tar to be put into his own warehouse, for the purposes of the agreement. F. and G. paid M. the amount of two-thirds, and M. made out a bill of parcels; M. then became bankrupt, and his assigns took the tar in his warehouse. This held not to be within 21 Jac. 1. c. 19. by a mere temporary custody, until F. and G. could ship their two-thirds of the tar, which they were entitled to do. 

Exp. Flyn, M. 1748. 1 Atk. 155.

778. K. being indebted to petitioner, gave him a note on demand, with a deposit of two-sixteenths of a ship, and an undertaking to mortgage them. K. paid part, and then borrowed one bill of sale, pretending to show it to a purchaser, but never returned it. K. became bankrupt, and then petitioner applied to have the remaining bill of sale sold, and the produce applied towards his debt. Upon the questions, whether the shares of a ship not at sea are within 21 Jac. 1. c. 19. 

s. 10, 11. whether a transfer of a bill of sale is a sufficient delivery of possession, and whether it is affected by the registry? 

Ld. Ch. said, according to the general rule, possession must be given: but as to the shares of a ship, there can be no more than a deposit of the bill of sale, with an undertaking to mortgage it. Here it does not appear the bankrupt ever acted as owner after the deposit. 

Ld. Ch. did not recollect whether the registry act affected a share only. — Ordered, the remaining share to be sold before the commissioners, the produce applied towards the petitioner’s debt, and the deficiency, if any, to be proved under the commission. 

Exp. Stagdroom, T. 1790. 1 Ves. jun. 163. Et vide 26 Geo. 3. c. 69. s. 17. by which the bill of sale must recite the registry, though only intended as a security. Rolleston v. Hibbert, 3 T. R. 406.
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779. I. S. gave his daughter (bankrupt's wife) his watch, jewels, chins, and household goods, to be at her disposal, and to do therewith as she should think fit. This is a bequest to her separate use, and shall pass not to the assignees. *Kirk v. Paulin*, 1732. 7 Vin. Ab. 95. p. 43.


781. A. by will gave two legacies of 500l. each to his daughter, the wife of I. S. an infant, for her sole and separate use, she being married, without settlement. A decree was obtained for placing out these legacies, for the wife's separate benefit. I. S. obtained an order to have one 500l. I. S. (and his wife, though an infant,) assigned this 500l. to secure a debt to D., and then he became bankrupt. D. brought a bill against the assignees, to establish the assignment. Lord King decreed the assignment good, and the residue to be paid to the assignees. On a re-hearing, *Ver. Talbot*, C. adjudged, that where a husband makes a voluntary provision to take place after his death, it is fraudulent; but here it is set apart immediately. Ed. Ch. admitted, that if the *feme* had been sole, the assignment had not been good; but as a *feme covert,* it was stronger; and, though in cases of mere powers, infants may exercise where nothing moves from them, yet this is an interest which cannot be departed with in equity by an infant, more than by an infant's assignment of a legal estate at law. Decree varied. *Halsey v. Badham*, T. 1734. 2 Eq. Ab. 154. p. 19.

782. D. owed K. 71l., and gave him a note, viz. "I promise to pay the sum of 71l. E. D." K. owed B. 82l. 19s. 6d. and gave him D.'s note, that he might receive the money on account, and B. gave a receipt for it, viz. "Received a bill for 71l. which, when paid, will be on account of T. B." K. became bankrupt, but did not indorse or assign the note to B. K.'s assignees applied for and received the 71l. The assignees of K. were considered as trustees for B., and were ordered to pay him the money. *Exp. Byass*, M. 1748. 1 Atk. 124.

783. H., a silkman, and F., a dealer in coals, were partners in both trades. They dissolved and exchanged releases. F. took upon him the debts of the coal trade, and H. of the silk trade, and the credits were assigned accordingly. H. died, and F. became bankrupt. The messenger seized H.'s effects, and was turned out of possession. *Per cur.* the seizure ought not to have been made; for by the release, the property of the silk trade vested in H.; but his representative should have asserted his right at law, and not turned out the messenger. *Exp. Titter*, H. 1746. 1 Atk. 138.

784. The office of Serjeant at Mace, in London, is not saleable under a bankruptcy, neither is a sworn clerk in the six clerks' office, for they concern the administration of justice. *Exp. Butler*, T. 1749. 1 Atk. 210 to 215. Amb. 75. Neither is the place of a Jew broker in London. *Exp. Lyons*, E. 1750. Amb. 89.

785. Merchants abroad draw on a correspondent for a particular purpose, and remit bills to answer it. The correspondent becomes bankrupt: the bills unaccepted must be delivered up by the assignees, or the money received must be paid to the owners; for the intent of the bankrupt laws is to put all creditors on an equal footing; and the assignees take subject to all the bankrupt's equity. *Exp. Dunme*, T. 1754. 2 Ves. 582. 1 Atk. 283.

786. An estate descended to a bankrupt, after she had obtained her certificate:—Hold, it did not go to the assignees, for it was not that kind of possibility meant by 5 Geo. 2. c. 30. there is no *persona designata*, and it must be a possibility that can be assigned or re-assigned, and such as she could disclose on her last examination. *Moth v. Frome*, H. 1761. Amb. 594.

787. A. by deed, assigned the cargoes of two ships to B. and C., but had no charter-party or bill of lading to deliver to them. On the arrival of one of the ships, he assigned to another person, and afterwards committed an act of bankruptcy:—Hold, that B. and C. not having been ready to take possession of the ship on her arrival, had thereby permitted A. to continue reputed owner under the statute of 21 Jac. 1. c. 19.
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Philpot v. Williams, T. 1764. 2 Eden 231. A bill of lading is not necessary to the transfer, for the best delivery the case will admit of, will take it out of the statute; but the delivery of the grand bill of sale will not do if there has been an opportunity of taking possession; yet where a ship is known to be in a foreign port, the mortgagee need not take possession till her arrival in Great Britain. See the authorities referred to by Mr. Eden.

788. A bequeathed 200l. stock to B., in trust to pay the dividends to C. for life, and then on C.'s death to divide the principal among his children. E., a daughter of C., married F., who became bankrupt in C.'s life-time:—Held, F.'s assignees not entitled to E.'s proportion of this stock. Gayler v. Wilkinson, M. 1773, cited in 1 Bro. C. C. 44.

789. A bankrupt who had obtained his certificate, being possessed of household premises, as executor and residuary legatee, mortgaged them to secure a debt of his own, and afterwards assigned the equity of redemption for a valuable consideration; but the deed recited, that the assignment was to pay the debts of the testatrix. The assignee took an assignment of the mortgage, and the bankrupt's certificate having been adjudged fraudulent, his assignees under the bankruptcy claimed the lease; but held, they had no right against the lessee for a valuable consideration. Bedford v. Woodward, H. 1790. 4 Ves. 40. (n.)

790. A specialty creditor has a right, under the bankruptcy of his debtor's heir, to follow the real assets, or the produce of them, in the bands of the assignees. Exp. Morton, T. 1800. 5 Ves. 449.

791. Estates which have descended after the bargain and sale of the commissioners, and before the bankrupt's certificate, are the property of the bankrupt, and do not vest in the assignees, except by a subsequent assignment. Carleton v. Leighton, T. 1808. 3 Meriv. 607.

792. Certificates from the East India Company on payment into their treasury in India, and a navy bill remitted, endorsed by the testator, to his agent in England, being at that time a creditor, if they did not pass at law by the indorsement, wore held, after the death of both parties, the agent having become bankrupt, not to pass in equity. Wil-
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cord) comes in question incidentally, it must be proved in the same mode as before the stat. 49 Geo. 3. c. 121. although no notice of contesting the bankruptcy has been given by the opposite party. 

Doe v. Manson, v. Liston, H. 1813. 2 Rose 276. 4 Taunt. 741.

798. It appears to be now the settled opinion in Scotland (founded on the principles of international law) that the assignment under an English commission of bankruptcy vests in the assignees, ipso jure, and without the necessity of intimation, the whole of the bankrupt's personal or moveable property in Scotland; and that the effect of all subsequent diligence, by any Scotch or other creditor, is thereby precluded. Therefore where a commission issued in England against a person, part of whose property consisted of some shares of Carron stock, and a creditor in Scotland afterwards arrested these shares, it was held by the Court of Session, and by the Lords, on the above ground, that the title of the assignees was preferable. 

Selkirk v. Davies, E. 1814. 2 Dow P. C. 250. In this case it was observed, that as there is no authority given by the English bankruptcy law, which compels a bankrupt to convey his foreign real property to the assignees, one mode of getting at the Scotch real property in such a case is, for the creditors to assign their debts to some individual, who will proceed against the estate according to the Scotch forms, and another mode is to withhold the certificate till the bankrupt consents to convey. 

Vide Stein's Ca. 1 Rose 462.

799. The owners of a ship are not joint tenants, but tenants in common; therefore upon a bankruptcy, the share of the bankrupt passes to the creditors under the commission, without being liable specifically to the claims of the other party owners in respect of their disbursements and liabilities on account of the ship. 

Exp. Harrison, E. 1814. 2 Rose 76. See the Reporter's note.

800. A deed of bargain and sale was held to have been rightly enrolled as of the day when it was brought into the office, though it was delivered to a porter in attendance there after office hours, and not minuted by the clerk, or in fact received by him, till two days afterwards. Held also, that the indorsement of the day of the indorsement by the clerk, is a part of the record, and cannot be avouched against; nor is evidence admissible to show that it was in fact enrolled on some other day, and even though the date be written on an erasure. 


801. The bankrupt was lessee of a lease, which contained a covenant that at the expiration or other sooner determination of the term, the lessee should take the off-going crop: Held, that the lease was determined by the Ld. Ch.'s order in bankruptcy under 49 Geo. 3. c. 121. s. 19. and that the assignees were entitled to the crop. 


802. If a lease is determinable upon notice at the will of the lessor or lessee, and the lessee covenants to leave at quitting the hay, straw, &c. on the premises, the bankruptcy of the lessee, and the election of the assignees not to take the lease, have the same effect with reference to the covenant as though the lessee had quitted on notice. 

Exp. Whittington, T. 1817. 1 Buck 87.

803. Where a trader agreed in consideration of a sum payable by instalments, to take two persons into partnership for 18 years, and five months after the partnership commenced, when only one instalment was due, he became bankrupt: It was held, his assignees were entitled at the respective periods, to receive the remaining instalments. 

Akhurst v. Jackson, H. 1818. 1 Swanst. 85.

804. Utensils in the soap trade being the property of one partner and insured in his name, having been left in the disposition of all the partners, a fire happened, by which they were consumed. After the fire a joint commission issued against all the partners. The insurance money was paid to the joint assignees: Held, that this money did not pass by the assignment under the joint commission. 

Exp. Smith, H. 1818. 1 Buck 149. 3 Madd. 63. See a note by the Reporter as to the construction of the 10th and 11th sections of 21 Jac. 1. c. 19.

805. Stock was secured by bond (and collaterally by an agreement to charge a real estate) to be replaced at the end of three years, and in the mean time the dividends to be paid as they accrued due. The dividends were not paid, but before the expiration of the three years the
BANKRUPT VII.

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obligor became bankrupt: Held, that the obligees should have the proceeds of the sale of the real estate immediately laid out in the purchase of stock without waiting the expiration of the three years. Exp. Fisher, H. 1818. 1 Buck 188.

806. A bargain and sale of a bankrupt’s lands may be vacated prospectively if it does not affect antecedent conveyances. Exp. Harris, M. 1818. 3 Madd. 473. Vide Exp. Corry, ib. (n.) S. P.

807. The commissioners have the power to exempt the copyhold estates of the bankrupt out of the bargain and sale, and convey them directly to the purchasers. Exp. Harvey, M. 1819. 1 Buck 493. Vide Drury v. Man, 1 Atk. 95.

808. The Accountant-General transfers stock standing in his name to one to whom it was mortgaged, to secure a debt, but such transfer was without the privity of the mortgagees. The mortgagee then becomes bankrupt: Held, that the stock could not be claimed by the assignees, under the 21 Jac. 1. c. 19. s. 10 and 11. Exp. Richardson, T. 1820. 1 Buck 480.

809. The assignment and bargain and sale will be vacated under the circumstances of the case, without directing a new choice of assignees. Exp. Kersley, T. 1820. 1 Buck 477.

(b) In what Cases the Wife’s Fortune shall belong to the Creditors, and where the same shall be protected.


811. In Jacobson v. Williams, ante, Ld. Couper thought commissioners of bank-
rupt could not assign a possibility, but he was clearly wrong in point of law, for not only the latter statutes relating to bankrupts mention the word possibility, but 15 Eliz. c. 7. s. 2. empowers commissioners to assign all that the bankrupt might depart with; and besides 21 Jac. 1. c. 19. enacts, that the statutes relating to creditors shall be expounded in the most beneficial manner for them. Vide Higden v. Williamson, ante. Vide etiam Moth v. Frome, H. 1761. Amb. 394. Where his Honour has clearly laid it down, that the sort of possibility assignable by commissioners, and intended by 3 Geo. 2. to pass, is such a one as can be disclosed by the bankrupt, on his last examination, where persona designata est. The doctrine, however, on this subject, now seems clear, that equity will not interrupt the legal title of the husband to his wife’s property, unless called upon by the husband, or those claiming under him, for its aid in respect to such property, in which case equity will impose terms on him or them, by compelling him or them to provide for the wife. Vide Brown v. Elton, M. 1733. 3 P. W. 202. So, where the husband becomes bankrupt, all such property as he could assign or release, passes by the commissioners’ assignment. Miles v. Williams, T. 1714. 1 P. W. 251.; but the assignees take it subject to the same equity of providing for the wife. Vide Bosville v. Brander, ante. Exp. Ceyssegame, ante. Grey v. Kentish, T. 1749. Vide Bushnan v. Pell, 1 Cox 135. or Worrall v. Marlar, ibid. in which case Lord Thurlow reviewed all the cases on this subject. Vide etiam post, tit. Baron and Feme, ix.

812. For the cases in which a wife’s monies, or those which appear to be so, shall pass by the assignment, and be payable to her husband’s assignees, vide Fitzer v. Fitzer, 2 Atk. 511. Walker v. Barrows, 1 Atk. 93. Brett v. Forcier, 3 Atk. 403. Stratton v. Hales, 2 Bro. C. C. 490.

813. K. M. by will gave 3000l. to trustees, in trust to invest the same and to pay the dividends to C. M. for life, or until she should be married; and after her death or marriage, then testatrix gave the principal between her two brothers and her sister Sarah, the wife of R. M., in equal shares. In 1783, testatrix died. In 1784, R. M. became bankrupt; and died in 1790, leaving his wife Sarah and one child surviving; and in 1789, C. M.
Where Wife's Fortune protected, and where not.

The surviving trustee under a bankrupt's will filed his bill against the widow Sarah, and the assignees of her late husband R. M., suggesting their opposite claims, and praying that their rights might be ascertained. The assignees claimed the fund and dividends since the marriage of C. M., and insisted that a settlement having been made on Sarah and her issue at the time of her marriage, she was not entitled to any further provision out of the fund. Sarah, the widow, stated her settlement, and that she had been permitted to prove one moiety of her original fortune under her late husband's commission. (Vide Exp. Mitford, 1 Bro. C. C. 398.) And she then insisted, that as her husband did not live to reduce her legacy into possession, his assignees could have no interest. Per M. R.: The assignees state, that the bankrupt having made a settlement on his wife when married, became a purchaser of her fortune, or at all events that they are entitled to the legacy in question, making a proper settlement upon her; but the husband cannot be considered a purchaser of more than the fortune she then had: and as to the future portionment, as the husband did not live to reduce it into his possession, it will survive to the wife; besides, the husband did not on his part fulfill the terms of his marriage settlement: but the wife was obliged to prove under his commission a part of the settled monies; no claim, therefore, can be maintained by the husband, or in his right, till his conditions are performed. This question lies entirely between the assignees and the wife, and it depends upon the effect that the commissioner's assignment has upon the choses en action or equitable interests of the wife, as to which such a distinction has always been made, that the effect of a particular assignment for a valuable consideration, and an assignment by operation of law, is not necessary to be inferred from that produced by each other; and it is only where the husband is dead, that the question between the wife and survivorship, and that of the assignees under a commission, can arise. The assignee of a bankrupt is not placed in a better situation than the bankrupt himself. The commissioners' assignment, like any other, by operation of law, passes his rights precisely as he possessed them; even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable: this shows that they are not considered purchasers for a valuable consideration, in the proper sense of the words; indeed, a distinction has been constantly taken between them and a particular assignee; and the former are placed in the same class as voluntary assignees and personal representatives. Though it has been much agitated, it has not been exactly determined, whether a particular assignee, for a specific consideration, is bound to make a provision for the wife out of her fortune, as assignees in bankruptcy are. Contrary doctrines on the subject have been advanced which his Honour took occasion to review; and finally, his Honour declared, that both on principle and authority, the bankrupt's widow having survived her husband, was entitled to her share of the legacy mentioned in the pleadings; together with the dividends from the time of her husband's death, and that the same should be transferred to her by plaintiff as surviving trustee. Mitford v. Mitford, T. 1803, 9 Ves. 87. Vide Garforth v. Bradley, 2 Ves. 677. Bosville v. Brander, 1 P. W. 458. Pringle v. Hodgson, 3 Ves. 617. Grey v. Kentish, 1 Atk. 280. Gayer v. Wilkinson, 1 Bro. C. C. 50, (n.) 2 Dick. 492. Burnet v. Kinaston, 2 Vern. 401. Jewson v. Mouton, 2 Atk. 417. Worrall v. Marlar, 1 Cox 153.

814. Bill by M. C. claiming, as next of kin of W. T., a share of the residue of his personal estate. W. T. died in April, 1802. In December, 1802, G. C., the husband of M. C., became bankrupt. By a settlement in 1791, previous to the marriage of G. and M. C., in consideration of the fortune which G. would receive with his intended wife, he (G. C.) covenanted with the trustees to pay them 1500£ to be invested in government securities, and there to stand in trust to pay the dividends to G. C. for life, then to M. C. for life; and then the principal to the children of the marriage, subject to the appointment of G. C. by deed or will. The trustees never called upon G. C. to pay the 1500£, but proved it as a debt under his commission; for such they received 11£, 10s. as a dividend. The plaintiff prayed by her bill, that her share of the residue of W. T.'s personal estate might be secured to her for life, and then to her children. Per M. R.: The doubt
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Wife's Fortune.—Last Examination.

in this case was, whether the husband ought to be considered a purchaser of his wife's whole fortune, or only of that which he was actually to receive with her on marriage. If he was a purchaser of the whole, she is not entitled to any provision out of what has since accrued; if he was not a purchaser of the whole, she will by the rule of this court be entitled to an additional provision out of that additional fortune. The rule is established, that to make the husband a purchaser of the whole, the settlement must either expressly or clearly import that intention. The settlement in this case does not express that intention, or clearly import it; and the meaning seems to be, that the husband should take only what was to become his immediately upon the marriage. It is not alleged, that the provision he made for her was more than adequate to that fortune. An account to ascertain the plaintiff's share was decreed, and the assignees were directed to make a proposal for an adequate settlement out of that share having regard to the settlement already made upon her. Carr v. Taylor, E. 1805. 10 Ves. 574. Vide Mitford v. Mitford, 9 Ves. 87. In the principal case it appeared, that G. C. the bankrupt was indebted to the estate of the intestate W. T. on bond, which claim the administrator of W. T. attempted to set off against the claim of M. C., the wife of the bankrupt, as next of kin of the intestate. Sed non allocatur.

815. The wife of a bankrupt has an equity against the assignees of her husband or their vendees for a settlement of her choses en action. Basevi v. Serra, T. 1807. 1 Meriv. 674. 14 Ves. 313. S. C.

BANKRUPT VIII.

Of the last Examination.

(a) Of the Bankrupt's final Surrender. (b) Of his Commitment for Contumacy. (c) Of his Protection from Arrests.

(a) Of the Bankrupt's final Surrender.

816. Commissioners may examine a bankrupt's wife, touching the concealment of her husband's effects, by 21 Jac. 1.; and may commit her if she refuses to answer. Exp. James, H. 1719. 1 F. W. 611.

817. Bankrupt petitioned for a meeting to surrender his return from abroad, where he swore he was detained by illness, which was denied on affidavit. Ld. Ch. disbelieving his affidavit, dismissed the petition. Exp. White, H. 1786 2 Bro. C. C. 47.

818. But where a bankrupt is really prevented from surrendering by illness, such a petition will be granted. Exp. Boulde, H. 1786. ib. 49.

819. So where the commissioners were dissatisfied with the bankrupt's former answer, such a meeting was granted at the expense of the estate, for the bankrupt can have none. Exp. Graham, H. 1786. ib. 48.

820. The assignees desire the bankrupt to stay abroad to get in his effects. The court will not appoint a new time for his surrender, for that is only done in cases of surprise or accident. Exp. Dawson, T. 1788. 2 Cox 48.

821. So where the bankrupt was prevented from surrendering by the non-attendance of the commissioners, the court censured them, but granted another meeting on their petition, but said the petition ought to have been by the bankrupt. Exp. Grey, T. 1790. 1 Ves. jun. 195.

822. A bankrupt, like a pauper, loses his privilege by misconduct; therefore, where he presented a third petition, he shall pay costs, or be committed, but the court will not restrain him from petitioning again. Exp. Shaw, T. 1792. 2 Ves. jun. 40. Locke v. Bromley, H. 1796. 3 Ves. 40. S. P.

823. The court in this case enlarged the time of a bankrupt, who had omitted to finish his examination, by reason of severe illness; but said, that the order of enlargement would not discharge a prosecution for felony. Exp. Ricketts, T. 1801. 6 Ves. 445.

824. A bankrupt who has neglected to surrender, cannot supersede his commission though all his creditors should con-
BANKRUPT VIII.

Final Surrender.—Commitment for Continuacy.


825. An order to enlarge the time for a bankrupt's surrender cannot be obtained but on the application of the bankrupt himself, supported by affidavit, or by the assignees. Ld. Ch. mentioned one instance only to the contrary, where the bankrupt, in coming home, was taken prisoner by the French. Fuller's Ca. M. 1804. 10 Ves. 183. Exp. Higginson, T. 1806. 12 Ves. 496.

826. A bankrupt has a right without regard to his conduct to an inspection of all his books, &c. under the stat. 5 Geo. 3. c. 50. s. 5. for the purpose of his examination. Also to have a list of the debts proved, and to have his necessary wearing apparel, but is retaining the latter he must determine at his last examination at the peril of an indictment. Exp. Ross, M. 1810. 17 Ves. 374: 1 Rose 33.

827. An order for enlarging the time for a bankrupt’s final surrender must be made 6 days before the expiration of the 42d day. Exp. Du Freme, T. 1812. 1 Rose 311.

828. Books referred to by the bankrupt on his last examination form part of the proceedings under the commission. Exp. Hardy, T. 1813. 1 Rose 395.

829. Where a bankrupt was charged in execution, the court will enlarge the time for his surrender in discharge of his bail, though the statute of 49 Geo. 3. permits a bankrupt in execution to be brought before the commissioners. Crump v. Taylor, T. 1814. 1 Price 74.

830. Where the bankrupt's books and papers were placed in the Master's office in Ireland by his English assignees in a suit there, they are ordered to procure them or copies, at the discretion of the commissioners, and at the expense of the estate, and the bankrupt shall not be committed on account of a defective examination in the mean time, for a bankrupt cannot be required, at the expense of his friends, to procure means of completing his examination not within his own power, the Chancellor however will not order the commissioners how they shall conduct a bankrupt's examination. Exp. Cridland, T. 1814. 3 Ves. & B. 93.

831. The court in its discretion will order the commissioners to accept a bankrupt's surrender after the usual time has elapsed, although the assignees should object. Exp. Shiles, H. 1816. 1 Madd. 248. See the various causes on this point collected, ibid. 249.

832. Where a bankrupt committed by commissioners is again brought before them, and is remanded, there ought to be a warrant of recommittal or detainer, stating the cause of recommittal. Simonds's Ca. T. 1816. 2 Rose 396. Exp. Oliver, 1 Rose 307.

833. A bankrupt can never be heard upon petition until he has surrendered to the commissioners; and in this case the petition of the personal representative of a bankrupt who had died after the last meeting of the commissioners without having surrendered, was dismissed. Exp. Gardiner, M. 1819. 1 Buck 458.

(b) Of the Bankrupt's Commitment for Continuacy.

834. Lingood being a bankrupt, and the three meetings advertised, the commissioners found he was removing and concealing his effects, whereupon they summoned him to appear before them the next day, which he refusing, they certified the fact to a justice of the peace, who committed him to Newgate, pursuant to a clause in 5 Geo. 2. The commissioners then brought him up on their own warrant, and on his refusal to be examined, they re-committed him. Lingood applied for his discharge, as illegally committed. Per curiam: The certificate to the justice was conformable to the act; and where the commissioners have full evidence of an intention to secrete, they may examine between the declaration of bankruptcy, and their Sittings at Guildhall. Exp. Lingood, T. 1742. 1 Atk. 240.

835. In several instances Ld. Macclesfield superseded commissions, to avoid such prosecutions for not surrendering, where no intent to defraud appeared. S. C.

836. Where a man is aggrieved by the commitment of the commissioners, he should issue a lok. cor., that the legality of it may be determined by the judges at law. S. C.

837. The old statutes considered the bankrupt as a criminal, and he might be imprisoned at the discretion of the commissioners. (Vide 13 Eliz. c. 7.) But though the rigour of the law is taken away as to the person, the right of examination remains, with a greater punishment; for if
Of the Bankrupt's Commitment for Contumacy.

he does not surrender, it is felony without clergy. S. C. But the omission to surrender must be wilful. Exp. Rodgers, E. 1756. Amb. 307.

388. Upon the bare certificate of the commissioners, that the bankrupt refused to attend their summons, the judge is bound to commit him. S. C.

389. Ld. Ch. in this case dismissed the bankrupt's petition, quoad his prayer to be discharged, but granted him 49 days further time to surrender and make his discovery. S. C.

340. If a bankrupt objects to a question, he must demur, and the court will judge of it on petition; but if he refuses to answer, and is committed, he must bring a hab. cor., and the question must be set forth in the return, that the judges may determine on the legality of it. Exp. Meynott, M. 1747. 1 Atk. 200.

341. Wood petitioned to be admitted a creditor for 21l. upon bankrupt's note, and that the solicitor might attend with the proceedings, on a prosecution against him for felony in not surrendering. As petitioner had not proved his debt, it may be rejected, if not satisfactory. Per curiam: Though such a prosecution may be carried on by one who is not a creditor; yet the act seems to intend, that the creditors shall be concurrent, and the court will not aid a prosecution on a penal law. Petition dismissed. Exp. Wood, T. 1751. 1 Atk. 221.

342. A bankrupt may be committed by the commissioners, though swearing positively, if his answers are not reasonably satisfactory. In this case, the bankrupt being brought up by hab. cor. was remanded, his whole examination being unsatisfactory; though his particular answers, separately taken, might have been considered otherwise. Taylor's Ca. E. 1803. 8 Ves. 328. Vide Perrot's Ca. 2 Burr. 1122, 1215. Exp. Nowlan, G. T. R. 118. 11 Ves. 511. And it is no objection to a commitment, that the order for it was made in the absence of the bankrupt, and bore date the day the examination took place, though made some days afterwards. Salt's Ca. H. 1807. 13 Ves. 361.

343. Bankrupt petitioned, that he might be discharged from his commitment for not giving satisfactory answers. The assignees consented; but Ld. Ch. doubted whether this should be done by petition, or by writ of habeas corpus, and

observed, that the commissioners' warrant by 5 Geo. 2. c. 30. is for commitment to the county gaol, and if he was not committed, his Lordship had nothing to do with it. Some days after, Ld. Ch. refused to make any order on the petition. Exp. Tomkison, T. 1804. 10 Ves. 106.

344. The petitioner was committed by the commissioners for not giving satisfactory answers. He brought an hab. cor., but the court of K. B. refused to discharge him. (Vide Exp. Nowlan, G. T. R. 118.) After several years imprisonment, he petitioned for a discharge; but Ld. Ch. held, that if the commitment was legal, he had no discretion upon a hab. cor. to discharge him, on the ground that his further examination was of no use to the creditors. Exp. Nowlan, H. 1805. 11 Ves. 511. Vide Taylor's Ca. ante, pl. 842. But the issuing a hab. cor. is the proper mode of reviewing the commissioners' judgment, in committing the bankrupt in such a case. Exp. King, E. 1805. 11 Ves. 425.

345. Bankrupt in custody in execution shall, by stat. 49 Geo. 3. c. 121. s. 12. be brought before the commissioners to be examined.

346. In a case of commitment by the commissioners of bankrupt, by virtue of their authority under the statute, the Ld. Ch. can do no more than grant the writ of hab. cor. to bring the prisoner before him, not by his authority in bankruptcy, but as holding the great seal. Exp. Page, T. 1810. 17 Ves. 59.

347. A bankrupt under commitment for not answering satisfactorily, has a right to petition to supersede his commission, on an objection to the proof of trading. The court directed an issue in this case. Exp. McGenis, E. 1811. 18 Ves. 289. 1 Rose 60. 84.

348. Where a bankrupt was committed for an unsatisfactory answer, and the recital in the warrant did not correctly set forth the admissions on the previous examination, on which the question was founded, the court directed a re-examination. (a) In this case also, a question arose, whether a bankrupt, committed by the commissioners, could be discharged on petition, without a hab. cor.; but as the bankrupt was in custody, under a surrender by his bail, that question was not decided, but Ld. Ch. said, if the writ of hab. cor. should be necessary, he would issue it immediately. Exp. Hoams,
Of the Bankruptcy’s Commitment for Contumacy.—Protection from Arrests.

T. 1811. 18 Ves. 257. Vide (a) Oliver’s Ca. 2 Ves. & B. 244. 1 Rose 407. Taylor’s Ca. 8 Ves. 328.

849. A bankrupt committed for not fully answering; applied to be brought up again; but as there were no effects to pay the fees, the commissioners refused.—The court, however, ordered the commissioners to meet gratis, or to be paid out of future effects, but said, if the bankrupt was re-committed, he should not have another order. Exp. Cohen, T. 1811. 18 Ves. 394.

850. If commissioners think, that the bankrupt has not answered satisfactorily upon his examination, they are bound to commit him; but he may be discharged either upon his answering satisfactorily to them afterwards, or upon his answers already given being deemed satisfactory by such other jurisdiction as he shall be brought before by hab. cor. And in such a case, it is not sufficient that the bankrupt answers fully, roundly, and positively; but he must answer credibly and satisfactorily. It was also held, that upon a question of discharge from commitment by commissioners, the Ld. Ch. will not go into the conduct of the bankrupt under the commission, or into any other examination than that stated in the return of the habecas corpus. Held also, that though a bankrupt is not bound to criminate himself, yet he must answer every lawful question; and if he refuses to account for any part of his effects, his refusal will subject him to a commitment. Exp. Oliver, T. 1813. 1 Rose 407. 2 Ves. & B. 244. Vide Pedley’s Ca. Leach 365. Exp. Nowlan, 6 T. R. 118. 11 Ves. 511. Taylor’s Ca. 8 Ves. 328. Bracey’s Ca. 1 Salk. 348. Miller v. Scare, 2 Bla. 1141.; and for other authorities on the construction of the statute, see the reporter’s note, p. 415.

(e) Of the Bankrupt’s Protection from Arrests.

851. The messenger, in seizing the bankrupt’s effects, broke into a closet where the bankrupt was hid; two bailiffs came in and arrested him, and caused him to be detained in prison. The officers were ordered to procure his discharge at their own expense, or stand committed. Amon. M. 1726. Sel. Ch. Ca. 64.

852. Though the bankrupt’s attendance on his assignees is confined, by 5 Geo. 2. to the 42 days, or the enlarged time at most; yet, if the assignees will undertake that the creditors shall not arrest him, the court will order his further attendance. Exp. Turner, T. 1742. 1 Atk. 148.

853. Where the bankrupt was arrested by the petitioning creditor, and kept in custody till he could be detained in other actions, the court discharged him, the same solicitor being concerned in both.—Exp. Wilson, T. 1743. 1 Atk. 152.

854. A petitioning creditor cannot arrest a bankrupt. S. C.

855. Bail are the gaolers of their principal, who is at large only by their indulgence, and they may take him on a Sunday: therefore, where F., a bailiff, and bail for the bankrupt; took him while attending on his last examination, and surrendered him, the court would not consider F., as it had never been adjudged a contempt, if the bail brought up the bankrupt to be examined. The bankrupt’s petition was dismissed, and he was left to his remedy at law. Exp. Gibbons, M. 1747. 1 Atk. 258.

856. The taking a bankrupt by his bail, is not a contravention of the clause in 5 Geo. 2. the force of which is arrests by creditors, and bail are no creditors till dammified. S. C.

857. The privilege of a bankrupt from arrests, during examination, extends to an attachment for non-payment of money awarded due, in analogy to an execution or process for debt. Exp. Parker, T. 1797. 3 Ves. 354.

858. A detained before defendant could be discharged from an illegal arrest, as he was returning from his examination under a commission of bankruptcy against him, cannot be supported. Exp. Hawkins, T. 1799. 4 Ves. 691.


860. A bankrupt’s privilege from arrest, extends to the end of the forty-second day. Ordered, that the plaintiff in the action should discharge him from his arrest; and the officer having acted without instructions, was ordered to pay the costs. But the court would not determine, whether a deviation by a bankrupt returning from examination, for the purpose of leaving his books at the house.
of the assignee, will deprive him of his privilege. Yet Ld. Ch. inclined to think, that the privilege of a bankrupt extends to the whole of the forty-second day. — *Exp. Donlevy, T. 1802. 7 Ves. 317. Et vide Lightfoot v. Cameron, 2 Black, 1113. Hinckston's Ca. cor. Northington, C. in 1759."

861. A bankrupt, pending his examination, is protected from an arrest made by virtue of an attachment issued for a contempt in not lodging money in court pursuant to a decree, for though the form of the process be criminal, yet if it issues to compel payment of a debt, it is an arrest, under the stat. 11 & 12 Geo. S. c. 8, s. 28. *In Re M'Williams, T. 1803. 1 Sch. & Lef. 169. Vide Exp. Parker, 3 Ves. 554."

862. Every mode by which a creditor can arrest a bankrupt for a debt, whether in law or in equity, comes within the protection of the bankrupt act. S. C. 175."

863. A bankrupt was committed for a contempt, for not bringing his title deeds into court pursuant to an order, but the sale of his estate appearing to have been unduly made, and that being the foundation of his commitment, Ld. Ch. ordered him to be discharged; he was however detained by some actions at law, from which Ld. Ch. held he could not release him without putting in special bail. *Exp. Dumbell, M. 1804, 10 Ves. 328."

864. Bankrupt, in his way to his examination bona fide before the commissioners, made a declaration, and was arrested, but the court discharged him from the arrest and all detainers. *Ogle's Ca. M. 1805, 11 Ves. 556. *Exp. Jackson, E. 1808, 15 Ves. 116. In Ogle's Ca. it was suggested, as in *Exp. King, 7 Ves. 312, the application might be made via voce in court, but the Ld. Ch. thought it safer to make the order in bankruptcy, and the registrar entered it so accordingly. *Vide etiam Sidgier v. Burt, 9 Ves. 69. *Exp. Donlevy, 7 Ves. 317."

865. A bankrupt having escaped from prison, was re-taken by the gaoler upon his return from examination, surrendering to the commissioners under the Ld. Ch.'s order after the time prescribed by the statute, he was not discharged; nor is the act of taking him a contempt. *Exp. Johnson, T. 1807, 14 Ves. 36."

866. The Ld. Ch. doubted his jurisdiction to discharge a bankrupt, taken in execution, after the time of his surrender had expired, but having obtained an order for a meeting to take his surrender. *Anon. H. 1808, 15 Ves. 1."

867. Where a bankrupt's time was enlarged beyond the 42 days allowed for his final examination, and he was arrested before the expiration of the enlarged time, Manners, C. discharged him on motion. *In Re Dalton, H. 1819, 1 Ball & B. 130, Vide Davis v. Trotter, 8 T. R. 475."

868. Courts of law will, upon motion, discharge a bankrupt (under stat. 49 Geo. S. c. 121, s. 14.) from the arrest of a creditor who has proved his debt under the commission. *Atherstone v. Huddleston, M. 1800, 1 Rose 112. 2 Taunt. 181."

869. A bankrupt is free from arrests on a protection granted at a private meeting of the commissioners, which he attended after notice of the commission, though the first public meeting had not been held, and plaintiff being arrested, the court discharged him, and ordered the officer to pay costs. *Exp. Wood, H. 1811, 18 Ves. 1, 1 Rose 46."

870. But he must apply by petition for his discharge. *Anon. E. 1812, 1 Rose 230, and not on motion, unless under circumstances which amounts to a contempt of court. S. C. For the cases in which a bankrupt is protected, vide Exp. Ross, ibid. 264. and note."

871. A bankrupt, whose last examination had been adjourned, sine die, voluntarily attended a meeting for a distinct purpose, in order to be examined before the commissioners, and he was there arrested: Held, that he was entitled to his discharge, and that all detainers were in operation (a). Ordered also, that his reasonable necessary charges be paid by the solicitor and the officer. *Exp. Ross, T. 1812, 1 Rose 260. Vide (a) Exp. Hawkins, 4 Ves. 691."

872. But the commissioners can give no directions which will protect an officer from the legal consequences of discharging his prisoner. S. C. ibid. 264."

873. A bankrupt attending the commissioners under a summons from them, is protected from arrest, even upon an extent at the suit of the crown. *Exp. Ruskell, T. 1812, 1 Rose 278, Et vide Exp. Ross ibid. 264. with a note of all the cases where a bankrupt may be subjected to or protected from arrests."

874. A bankrupt is not, by the commissioner's protection, privileged from
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Of the Bankrupt's Protection from Arrests.—Of the Certificate.

875. A bankrupt is protected by the statute 5 Geo. 2. c. 30. s. 5. from arrest, through the whole period of his examination, enlarged by the commissioners, though they had omitted to indorse the adjournment of his summons. Price's Ca., T. 1814. 2 Rose 260. 3 Ves. & B. 23.

876. Where a person was arrested on his return from proving a debt under a commission of bankrupt, the court ordered him to be discharged, and that the plaintiff, the attorney, the sheriff and his officers, should pay all costs. Exp. Bryant, T. 1815. 1 Madd. 49. 2 Ves. & B. 372. 2 Rose 24. S. C. nom. List's Ca. Et vidi Exp. King, 7 Ves. 513.

877. A bankrupt who was imprisoned at the date of his protection, is not privileged against subsequent detainers. Exp. Goldie, H. 1816. 1 Meriv. 176. 2 Rose 543.

878. If a bankrupt passes his last examination on the 42d day, he is protected during the whole of the day; but Ld. Ch. would not say how the case might be if his time had been enlarged. Exp. Davies, T. 1817. 1 Beck. 60. Vide Exp. Donlevy, 7. Ves. 617.

Bankrupt IX.

Of the Certificate.

(a) By whom to be granted or refused. (b) For what causes it will be stayed, denied, or declared void by the Ld. Ch. (c) Of Gratui ties given to obtain a Bankrupt's Certificate. (d) How far it will discharge the Person or future Estate of the Bankrupt, and herein of the general effect of his Certificate.

(a) By whom to be granted or refused.

879. A doubt arose as to the form of the certificate, under the late act of 5 Geo. 2. Per Parker, C. The commissioners are to certify one day, that the bankrupt had confirmed, and next, the creditors are to certify their consent, at foot, and then the commissioners are to certify, that the creditors had consented. Burdock's Ca., T. 1720. 7 Vin. 192. pl. 9.—Note, the practice now is, for the creditors first to consent, and then for the commissioners to certify the bankrupt's conformity.

880. On a joint commission, the separate creditors may oppose the bankrupt's certificate, though they have taken out separate commissions; for where two partners are bankrupts, their certificate under the joint-commission will bar their separate debts, as well as the joint, and so co'髻 versa. Horey's Ca., T. 1739. 2 P. W. 23. 24. Fit. 283. Exp. Assayer, T. 1737. 1 Atk. 67. Exp. Turner, T. 1742. 1 Atk. 97. In Re Simpson, M. 1752. 1 Atk. 138.

831. If a man discharged by the insolvent act, afterwards becomes bankrupt, his certificate must be special, and it will not discharge his future effects, but his person only. Exp. Green, T. 1746. 1 Atk. 257.

882. Certificates are matters of judgment, and discretionary, first in the commissioners, and then in the great seal; and a mandamus will not lie to compel an allowance. Exp. Williamson, T. 1750. 1 Atk. 82. 84. Exp. King, M. 1806. 13 Ves. 181. 7 East 92.

883. Unless a man proves a debt, or shows a reasonable ground for a claim, he cannot assent to, or dissent from, the bankrupt's certificate. Exp. Williamson, sup. 2 Ves. 249. S. C.

884. The allowance of a bankrupt's certificate, will not discharge his sureties. S. C.

885. Ld. Ch. in this case allowed the bankrupt's certificate, notwithstanding his suspicion, of the view in taking out the commission. S. C. 2 Ves. 249.

886. The assignees signing the certificate of a bankrupt and getting his release in order to qualify him as a witness, to prove a debt due to his estate, is a fair transaction. In Re Selby, v. Crew, H. 1794. 2 Austr. 504.
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887. The proof of the petitioning creditor, upon opening the commission, does not of itself entitle him to sign the bankrupt's certificate. Exp. Davis, T. 1794. 2 Coox 398.

888. Joint traders became bankrupt's, and obtained their certificates, but one of them died before he had made the affidavit of conformity; this joint certificate was allowed as the separate certificate of the survivor, and ordered to be inserted in the Gazette accordingly. Exp. Currie, T. 1804. 10 Ves. 51.

889. A man who has a debt in his own right, and another as executor, cannot sign a bankrupt's certificate in both capacities Exp. Saumarez, 1 Atk. 85. 87. Exp. Stracey, E. 1811. 4 Rose 66 S. P. Et Vile Powell v. Evans, 5 Ves. 839. as to executors in trust.

890. By stat. 46 Geo. S. c. 135. s. 4. it is enacted, that all bankrupts having obtained their certificate, shall be discharged from all debts provable under their commissions, even though a secret act of bankruptcy may have been committed prior to the contraction of their debts.

891. In this case the bankrupt's certificate was signed by a sufficient number of creditors (as required by the statute); but the commissioners refused to certify, whereupon he petitioned the great seal, alleging his conformity, and praying that they might be directed to certify. This petition brought before the court two important questions, neither of which the Ld. Ch. would resolve: 1. Whether the signature of a bankrupt's certificate, by his creditors, previous to his last examination, was valid? and 2. Whether a mandamus will lie to compel the commissioners to sign the bankrupt's certificate? His Lordship said there were many acts of the commissioners that the great seal could not control, the authority of the commissioners to do the being given by the legislature. If the commissioners commit the bankrupt for not answering to their satisfaction, his Lordship said he could not discharge him, sitting in bankruptcy, though he might review their opinion whether the bankrupt's answers were satisfactory. The mode is by suing out an habeas corpus, and a return to that, and then the Ld. Ch., not under the bankrupt statutes, but as a law officer, having a right to issue that writ by the general law, has the return brought to him, and determines as any other judge, and the review of the conduct of the commissioners in that case is not shut out. Petition dismissed. Exp. King, T. 1805. 11 Ves. 417. 425. 13 Ves. 152. 15 Ves. 120.

892. By the stat. 49 Geo. S. c. 121. s. 18. the signature of three-fifths of a bankrupt's creditors shall entitle him to the allowance of his certificate.

893. By a General Order, made 9th of August, 1809, it is directed, that the commissioners in all commissions of bankrupts which shall be issued from and after the 1st of September, 1809, do require that in all affidavits exhibited to them, in order to prove the signature to the consent of the creditors to the commissioners signing and sealing the bankrupt's certificate, the day of the month and year in which the respective creditors signed such consent be distinctly stated; and that the creditors at the time they respectively sign such consent shall write opposite their names the day of the month and year on which they so sign: and that the execution of the certificate by the commissioners be attested by the solicitor to the commission, or his clerk, or by the messenger to the commission, or by some clerk of the commissioners; and that the commissioners shall make and keep a list of all creditors proving debts above 20l. and of the amount of their respective debts, which list shall from time to time be signed by three of the commissioners. 16 Ves. 318, 319.

894. It is no objection to the Ld. Ch.'s allowance of a bankrupt's certificate, that the assignees have permitted the bankrupt to carry on business on the same premises, and in the same firm, and to continue in their houses; nor that the bankrupts have retained in their hands money, as assignees under other commissions, for the stat. 49 Geo. S. c. 121. s. 4 & 6. provides remedies for that evil.—Exp. Anderson, E. 1811. 1 Rose 93.

895. A joint creditor may prove under a separate commission for the purpose of granting or refusing the certificate. Dutten v. Morrison, T. 1810. 17 Ves. 209.

896. A petition to sign a certificate is usually dismissed with costs, but the bankrupt may forfeit that privilege by his misconduct. Exp. Black, E. 1811. 1 Rose 67. (n.)

897. A creditor who is the executor of another creditor can only sign the certi-
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Certificate, by whom to be granted or refused.

(b) For what causes a certificate will be stayed, denied, or declared void by the Ld. Chancellor.

904. A bankrupt's certificate being stayed, on the petition of a creditor, who had proved his debt, and suggested collusion, between the bankrupt and his son. A meeting of the creditors was called, to enquire into the matter, at which several other creditors proved, but as they did not join in the petition to oppose the certificate, the court would not delay the allowance of it, but left the first petitioner to his remedy by bill. Exp. Fydel, H. 1741. 1 Atk. 73.

905. Bankrupt was a trader in Ireland. Signing his certificate in three months from the commission, is premature, and the Chancellor stayed it on that account. Exp. Williamson, B. 1750. 1 Atk. 82, 84.

906. A commission issued on the 10th of September, and the certificate was signed on November 30th. This was considered per Ld. Ch. as premature, and the certificate was stayed. Anon. M. 1753. 1 Atk. 84.

907. Petition by a creditor to stay a certificate, that he might prove a debt which he did not account for having omitted to prove, dismissed. Exp. Adams, H. 1736. 2 Bro. C. 45.

908. A bankrupt's certificate shall not be stayed, in order to give a person insisting on a right to stop goods in transitu, an opportunity of proving, in case he should fail in his action. Exp. Heath, H. 1802. 6 Ves. 613.

909. A general inspection of a bankrupt's books, in order to get rid of his certificate, by proving gambling transactions, was refused. Exp. Mawson, H. 1802. 6 Ves. 614.

910. Ordered, that the affidavits to be read on the hearing of any petition to stay a bankrupt's certificate, shall be brought into the office, together with the petition, except such as are necessary in replying to affidavits in answer to it. Ordo Generalis, 16th of Nov. 1805, made in consequence of the petition, in Exp. Bowes, 11 Ves. 540.

911. A petition by a creditor having the bankrupt in execution to prove his debt for the mere purpose of preventing the certificate, then before the Ld. Ch. for allowance was dismissed with costs as to staying the certificate, with liberty to prove. Exp. Warwick, T. 1807. 14 Ves. 138.

912. Where bankrupt had obtained his certificate by an imposition on the great seal, and three years had elapsed, Manners, C. declared he would revoke it, if on a reference (which he directed,)
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he should find that no injury would be done thereby to persons having subsequently dealt with the bankrupt on the faith of it. Exp. Tulis, T. 1810. 1 Ball. & Be. 521.

918. Ld. Ch. will not stay a bankrupt's certificate, because the party had been before a bankrupt, which fact the commissioners had omitted to certify, according to Lord Apeley's order. Exp. Black, E. 1811. 1 Rose 60.

919. A creditor who had not proved his debt, but held the bankrupt in execution, petitioned to stay his certificate, alleging wilful concealment to a large amount, but swearing only as to information and belief; all which the bankrupt explained or denied on oath. Lord Eldon dismissed the petition, observing, that by the effect of the stat. 49. Geo. 3. c. 121. s. 14, a creditor coming in under a commission for the purpose of relief, waives his personal remedy; and his Lordship further observed, that as the law had left the granting of a bankrupt's certificate, wholly to the caprice of his creditors, if they thought fit to sign it, the commissioners were bound to certify, and the Chancellor to grant it, without any regard to the bankrupt's conduct previous to the commission, if there was no wilful concealment, but any preference in contemplation of bankruptcy, is void, how moral soever the act may be. Exp. Joseph, M. 1811. 18 Ves. 340. 1 Rose 184.

920. When concealment of property by the bankrupt is established, the Ld. Ch. will refuse the certificate. Secus, when concealment is only alleged upon information and belief. S. C.

921. The court will not stay a certificate, till joint creditors in a foreign country have an opportunity of assenting or dissenting. Exp. Basarro, E. 1812. 1 Rose 266.

922. On a petition for staying a bankrupt's certificate, affidavits filed after the petition has been preferred, can only be admitted in reply; and where the petitioner fails in his object, he shall pay costs if there be no gross misconduct in the bankrupt. Exp. Bank of Scotland, M. 1812. 1 Ves. & B. 3. 1 Rose 375. See the General Orders of 12th September, 1796, and 16th November, 1805.

923. Where a petition is presented to stay a bankrupt's certificate, and no fraud is proved, it will be dismissed, but without costs, if the case be suspicious. — Exp. Gardiner, M. 1812. 1 Ves. & B. 49. Et vide Exp. Royal Bank of Scotland, ibid. 7.

924. A certificate will be stayed, where the bankrupt has suffered fictitious
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defts to be proved. Exp. Laffert, M. 1812. 1 Rose 330.

925. On a petition to disallow a bankrupt's certificate, on the ground that it was rendered void by gaming, the affidavit on both sides were in direct opposition. Per Eldon, C. This application differs from one to stay a certificate which, if granted, would be good, for it is not to grant one, which, if granted, would be void. If the bankrupt has violated the law, his certificate ought not to be granted at all, but that fact must be clearly proved, the bankrupt has a right to try it at law. The Chancellor therefore granted the certificate, leaving the petitioner to avoid it at law, or to indict the bankrupt for perjury. Exp. Kenneth, H. 1813. 1 Ves. & B. 193. 1 Rose 331.

926. Where a bankrupt’s certificate under a separate commission was lying before the Chancellor for allowance, his Lordship would not stay it, because a joint commission had since issued, but, in the mean time, the separate commission, and ordered all the proceedings to be handed over to the joint commission. Exp. To- bin, H. 1813. 1 Ves. & B. 310. Vide Exp. Rawson, ibid. 400, where the same course was adopted.

927. A petition was presented to stay a certificate, and the usual order for an attendance thereon was made, but the bankrupt was never served, yet he took copies of the affidavit:—Held, that he should not be bound by so doing, but his certificate should be allowed. Exp. Kendall, E. 1817. 1 Ves. B. 543.

928. A bankrupt knowingly permitting a fictitious debt to be proved, shall not have his certificate. Exp. Freydeburgh, T. 1814. 3 Ves. & B. 142. Vide Exp. Shirley, 2 Rose 71.

929. That there is a petition pending to supersede the commission, is no objection to the allowance of the certificate, which, while the commission stands, the bankrupt is entitled to, unless there be objection exclusively attaching upon it. Exp. Bonny, H. 1814. 2 Rose 56.

930. Where it appeared that a commission had been issued fraudulently by the bankrupt, and that his certificate was obtained by fraud, the certificate was recalled, although obtained two years before. Exp. Cawthorne, M. 1814. 2 Rose 186. Vide Exp. Tallis, 1 Ball & Be. 321.

931. The proofs in bankruptcy in this case were expunged, and certificate recalled, having been obtained by fraud. S. C. 19 Ves. 260.

932. Where a petition to stay a certificate was not served till the day of petition, though not answered till the day before, it shall not deprive the bankrupt of his certificate. Exp. Benchley, H. 1815. Coop. 97.

933. The court will allow a petition to prove a debt, and stay a bankrupt’s certificate, where the delay in proving is well accounted for. Exp. Birch, T. 1816. 1 Madd. 600.

934. Certificate stayed, that creditors abroad whose debts would turn it, might have an opportunity of asserting or dissenting; but where a creditor has the bankrupt in custody, and petitions for liberty to prove and stay the certificate, he must discharge the bankrupt. Exp. Lord, T. 1816. 2 Rose 421. Vide Exp. Hardenbergh, 1 Rose 204.


936. The court has discretion to supersede a commission, whether the bankrupt has his certificate or not; but the court will not do so on the petition of joint creditors, who allowed a long time to elapse without obtaining an order to prove in a case where the certificate was lying for confirmation, and no fraud was imputed to the bankrupt. Exp. Cullen, Exp. Appleton, T. 1817. 1 Buck 68.

937. A bankrupt applying to have a petition for staying his certificate advanced, does not thereby waive his right to be personally served before the petition day; and it seems, that no petition to stay a bankrupt’s certificate before he has passed his last examination, can be supported. Exp. Groome, T. 1817. 1 Buck 39. Vide Exp. Harford, ib. 36, and references.

938. An affidavit in support of a petition to stay a certificate which was filed after the petition was presented, cannot be read. Exp. Dodson, H. 1818. 1 Buck 178. Vide Ord. Gen. 12th April, 1796, 16th Nov. 1805. Vide etiam, Exp. Bk. of Scotland, 1 Ves. & B. 5. Exp. Over- ton, 2 Rose 257.

939. A bankrupt’s certificate will not
For what Causes a Certificate will be stayed, &c.—Gratuitous given to obtain it. be stayed upon the petition of a creditor who has not proved his debt, and who has the means of trying the validity of the certificate at law. *Exp. Dodson, E. 1818. 1 Buck 225.*

940. A creditor petitioned to stay a bankrupt's certificate, imputing to him conduct which, if proved, would amount to felony: the court will not direct an issue to try the effect of conformity in such a case. *Exp. Scott, T. 1818. 1 Buck 275.*

(c) Of Gratuitous given to obtain a Bankrupt's Certificate.


942. A bankrupt's certificate is void if obtained by money, though officiously paid by a third person to a creditor without his privity. But whether affidavit to stay a bankrupt's certificate, filed after the petition was presented, must be confined to new matter, introduced by the bankrupt in reply, Ld. Ch. did not determine. *Exp. Butl, H. 1805. 10 Ves. 359.*

943. Where the fourth of several signatures to a certificate was obtained by the promise of the bankrupt to pay that creditor his debt, such certificate is void by stat. 5 Geo. 2. c. 30. s. 7. 11. though the creditors who signed before and after were sufficient in number and value without him, for his example might have induced the others to sign. *Phillips v. Dicas H. 1812. 1 Rose 345. 15 East 258. Vide Holland v. Palmer, 1 Bos. & P. 93.*

(d) How far it will discharge the Person or future Estate of the Bankrupt, and herein of the general Effect of his Certificate.

944. If a bankrupt has slipped the time for pleading his certificate to an action at law, equity will not relieve him. *Exp. Gooden, T. 1715. 2 Vern. 696.*

945. If a bankrupt is taken in execution, pending a reference of his certificate to the judges, the court will not discharge him, but put him to his audita querela. *S. C.*

946. G. brought an action for rent against the bankrupt, and obtained judgment before the allowance of his certificate, which not being allowed till after the rule was out, he could not plead it, and take the benefit of 4 & 5 Anne, c. 17. But in the *act.* sa. against the bail, the certificate was pleaded, and the plea over-ruled; so that no remedy was left, but in equity, or by *audita querela,* which is an equitable remedy at law. *On motion for an injunction, Ld. Ch. refused to grant one, because this was a merciful law, made in favour of bankrupts, and in prejudice of creditors; ergo, not to be extended in equity. Bagshill v. Gore, M. 1717. 7 Vin. 131. pl. 5.*

947. Commissioners cannot make a second assignment, after giving the bankrupt his certificate. *Jacobsen v. Williams, M. 1717. 1 P. W. 382. 386.*

948. Where a bankrupt, after allowance of his certificate, is sued for a debt, prior to his bankruptcy, the court will relieve on circumstances, though not on a matter purely of misleading. *Blackhall v. Combs, T. 1722. 2 P. W. 70.*

949. A bankrupt cannot plead his certificate to a bond, dated before the bankruptcy, and payable on a contingency which happened after the certificate. *Exp. Cazalet, M. 1728. Mos. 28. 79. Et vide Exp. Caswell, 2 P. W. 497. which is *S. C.*

950. A surety having paid the money for which he was bound, after the commission against his principal, is not barred by the bankrupt's certificate, but may claim his debt against the bankrupt's executors, in regard he was not competent to prove his debt under the commission. *Rucker v. Hagen, T. 1733. Amb. 672. 1 Dick. 487.*

951. A certificate in the life-time of the bankrupt, though not confirmed by Ld. Ch. till after his death, is good, for its operation arises from the consent of the creditors. *Bromley v. Goodere, M. 1743. 1 Atk. 77. 79.*

952. A certificate discharges the bankrupt's person, and his estate, subsequently accrued, but not that in the hands of the assignees. *S. C.*

953. Where four-fifths, in number and value, of a bankrupt's creditors, have signed his certificate, the court will not
BANKRUPT IX.

Of Gratuities given to obtain the Certificate.

stay it, on the petition of a creditor, whose debt is a matter of account, and who does not swear to a balance due. Ex parte Johnson, H. 1745. 1 Atk. 81.

954. A bankrupt's certificate will not discharge him from a commitment under an extent of the crown. Anon. M. 1745. 1 Atk. 262.

955. The clause in 5 Geo. 2. by which a bankrupt shall be excepted from its benefits, if he has given in marriage to any of his children, more than 100l. unless he has sufficient to satisfy all his creditors, must, as a penal statute, be construed strictly, and shall not extend beyond the bankrupt's children. Exp. Sannarez, 1754. 1 Atk. 87.

956. Where a bankrupt's certificate was signed, on the day of his last examination, and two-thirds of his creditors lived in Guernsey, the allowance of it was stayed. S. C.

957. Formerly the judges had cognizance of a bankrupt's certificate, but it now rests wholly in the great seal. S. C.

958. Where A., a part owner of a ship, had paid the whole of his liquidated share of the debts, to another owner, as agent for settling them, and the agent became bankrupt, and obtained his certificate, without paying the debts of the ship, so that A. was obliged to pay the share of the certificate, the bankrupt's certificate will bar A.'s claim on him. But in respect of another payment also, after the bankruptcy, on which a right of contribution arose, the whole was recovered against the certificate, or as it was called bankrupted, it being not pleading in abatement. Wright v. Hunter, H. 1801. 5 Ves. 792.

959. An uncertificated bankrupt in general can acquire property only for his creditors; therefore, where he has entered into a co-partnership trade, the creditors of that partnership have no equity against his assignees for an account of the property used or acquired by him in such partnership, so as to apply it to the discharge of their own debts. Everett v. Backhouse, T. 1804. 10 Ves. 94.

960. Costs incurred after bankruptcy, are discharged by the bankrupt's certificate, as having relation to the original debt, even though such costs may not be provable under the commission. Exp. Hill, M. 1806. 11 Ves. 649.

961. The instrument which certifies the bankrupt's conformity is not strictly a certificate, till allowed by the Ld. Ch. Exp. Sawyer, T. 1810. 1 Rose 141.

962. An objection was taken to a bankrupt's certificate, because two alterations had been made after it was stamped, though before the allowance, overruled, on the ground that it was not necessary to stamp a certificate till it was complete by the allowance. S. C. T. 1810. 17 Ves. 244.

963. Bankrupts entitled to leases, or agreements for leases, on delivering up the same to their assignees, shall not afterwards be liable for the rent, or in respect of any of the covenants. Under the statute 49 Geo. 3. c. 121. s. 19. an order was made in Exp. Pomery, E. 1811. 1 Rose 57.

964. It is no objection to a bankrupt's certificate, that he has not obtained his certificate under a former commission. Exp. Thompson, T. 1812. 1 Rose 285. Vide Exp. Crew, Exp. Lees, and Exp. Poulten, 16 Ves. 236. 477.

965. A certificate obtained under an English commission, operates as a discharge of the debts of Scotch creditors, provable under that commission. Bk. of Scotland v. Cuthbert, M. 1812. 1 Rose 462.

966. The court will not restrain further proceedings at law, upon a verdict obtained through defendant's neglect to produce his certificate in evidence. Langard v. Hibbertson, E. 1813. 1 Rose 459.

967. The court will discharge a certificated bankrupt out of custody, upon an attachment for non-payment of money. Wall v. Atkinson, E. 1815. 2 Rose 196. Vide Re McWilliams, 1 Sch. & Lef. 174.

968. C. being indebted to G. in 100l. agreed to transfer, within a given time, 100l. per annum long annuities, at the then price, and in the mean time to pay G. the dividends, and that the debt of 100l. should constitute part of the purchase money. The stock was not purchased at the time, and there was a rise in the price of the stocks: Held, that this agreement was not within the stock-jobbing act. Clark v. Giraud, E. 1816. 1 Madd. 581.

969. A creditor who signs the certificate of a surviving partner, does not thereby release the estate of a deceased partner; for the intent of the statute was to release the bankrupt whose conformity had been certified. Slech's Ca. in
Of Gratitude to obtain the Certificate.—Of the Dividend.


971. To a suit in the Dutch court at Demerara, to recover the balance of an account of sugars, consigned to and received by defendant and his partner in London. Defendant pleaded his bankruptcy and certificate in England, (of which plaintiffs had notice, but did not prove their debt;) Held, that defendant's bankruptcy and certificate discharged the debt. *Owens v. Forbes*, T. 1817. 1 Buck 57. Affirmed by the King in Council, at the Cock-pit.


BANKRUPT X.

Of the Dividend.

(a) When to be declared, amongst whom, and how to be recovered. (b) How to be made, where the Creditors are joint, and how, where several.

(a) When to be declared, amongst whom, and how to be recovered.

973. The commissioners made an order of dividend, where the bankrupt's estate was not sold, and the assignees had no money in hand. *Set aside as fraudulent. Hitchcox v. Sedgwick*, T. 1690. 2 Vern. 162.

974. Where a creditor neglects to receive his dividend, after the order of distribution made, and the assignee runs away with the money, he cannot come again on the bankrupt's estate for his dividend. Cited in *Smith v. Duke of Chandos*, Barn. 419.

975. An assignee cannot stop a private debt, due to himself, out of a creditor's dividend. *Exp. White*, E. 1742. 1 Atk. 90.

976. Commissioners may order a dividend where they think it fit that the assignees should make one. *Exp. Whitechurch*, T. 1742. 1 Atk. 91.

977. A creditor under a commission, being indebted to H. in 79L drew on the assignee for that sum, payable to H. The assignee accepted it by parol, and before a dividend, became bankrupt himself. H. is entitled to the whole 79L., and not obligated to come in under the assignee's commission. *Exp. Kirk*, M. 1745. 1 Atk. 108.

978. A creditor, after he has received a dividend may refund it, and bring his action at law. *Exp. Groves*, E. 1747. 1 Atk. 104. *Vide post, sec. xiv. as to cases of election.

979. Upon a creditor's affidavit, that he has not read the Gazette, he may prove his debt, so as not to disturb any dividend already made, but he shall be made equal to the other creditors, before any future dividend is declared. *Exp. Styles*, H. 1748. 1 Atk. 209. *Exp. Lang.* H. 1786. 2 Bro. C. C. 50. S. P.

980. Two debtors—one became bankrupt. The creditor proved his whole debt, and before a dividend, received a composition from the other. He shall only have a proportionate dividend. *Secus*, had he received the composition before the bankruptcy. *Exp. Wildman*, M. 1750. 1 Atk. 109. 2 Ves. 113.

981. A being a creditor on a bill of exchange, and also on simple contract, proved both debts under the commission. He afterwards received the whole amount of the bill of exchange from the other parties. He cannot take a dividend on more than the remaining debt. *Exp. Woodman*, H. 1784. 1 Cox 201.
BANKRUPT X.

Of the Dividend, when to be declared, &c.

982. A creditor who had obtained goods of his debtor, on the eve of his bankruptcy, shall not prove for the residue of his debt, without accounting for the goods, and his share of the dividend shall be retained until he gives up the property. Exp. Smith, M. 1789. 3 Bro. C. C. 16.

983. Assignees made no dividend for 13 years, but accumulated enough to pay 15s. in the pound. A distribution was ordered, on the petition of one creditor. Exp. Goring, T. 1790. 1 Ves. jun. 168.

984. It having been found, that large sums of money remained in the hands of assignees, to the delay of dividends and the prejudice of creditors, Loughborough, C. made an order, dated March 8, 1794, to prevent the like abuses in future: which see abstracted, ante, sec. vi. pl. 662. and at large, in 4 Bro. C. C. 546.

985. After judgment by default in an action for a dividend, the assignees filed a bill for a discovery, and to have the debt expunged. Dismissed, the course being by petition. The summary proceedings under commissions must not be defeated. Clarke v. Capron, T. 1795. 2 Ves. jun. 666.

986. Accommodation bills, on the bankruptcy of the drawer, were paid by the acceptor to the holder, who, having a further demand on the bankrupt, proved the whole, including the bills. He may take out of the dividend his proportion of the debt, beyond the bills, as if the bills had been expunged, and the rest belongs to the acceptor. Exp. Turner, T. 1796-3 Ves. 243.

987. A creditor coming in to prove his debt after a dividend made (provided his delay was not fraudulent, but owing to accident, or unavoidable circumstances) shall be put on a footing with the other creditors before any further dividend is made. In Re Wheeler, M. 1803. 1 Sch. & Lef. 242. Vide Exp. Peachy, 1 Atk. 111. Exp. Styles, 1 Atk. 208. Exp. Long, 2 Bro. C. C. 50.

988. Equity will not permit an action to be brought for a dividend except under particular circumstances and subject to control. Assignees of Gardiner v. Shannon, M. 1804. 2 Sch. & Lef. 229.

989. Surety in a bond may compel the creditor to prove under the bankruptcy of the principal debtor, and such creditor will be a trustee of the dividends for the surety paying the whole. Exp. Rushforth, H. 1805. 10 Ves. 414.

990. The first dividend in bankruptcy should be after the expiration of four months. Exp. Grosvenor, H. 1808. 14 Ves. 590. For the stat. 5 Geo. 2. c. 30. s. 33. directs the dividend to be made after four, and within twelve months.

991. By the statute 49 Geo. 3. c. 121. s. 5. the commissioners shall not declare a dividend till the assignees have passed their accounts in writing, and produced their vouchers, &c. on oath.

992. By the same statute, s. 12. no action shall be brought against an assignee for dividends, the remedy being by petition to the great seal.

993. The estate of bankers, who, after being appointed under a commission of bankruptcy, became bankrupts, cannot have any dividend on a debt previously due to them, until the whole received by them as bankers to that estate has been accounted for. Exp. Bebb, T. 1812. 19 Ves. 222. Vide Exp. Graham, 3 Ves. & B. 130.

994. Assignees have no means of restricting the payment of dividends declared, but by petition to expunge the debt. Exp. Whiteside, H. 1813. 1 Rose 319.

995. An order for payment of dividends declared, upon a creditor's petition, raises a personal responsibility against the assignee; therefore, where an assignee unsuccessfully resisted the payment of dividends declared, upon the ground of usury, and retained the amount in the hands of the estate's banker, he failed. The assignee was ordered to make good this loss. Exp. Graham, H. 1813. 1 Rose 456. Vide stat. 49 Geo. 3. c. 121. s. 3. 4. c. 621. s. 12.

996. A petitioning creditor prayed, that the assignees may, out of their funds, pay the solicitor's bill up to the choice of assignees, and which had been taxed by the commissioners, it was held a sufficient objection, that the commissioners had allowed charges in it which ought to be expunged. Exp. Thelwall, T. 1813. 1 Rose 397. Vide Exp. Harbin, ibid. 58.

997. Where the assignees were not prepared to state their objections to pay a dividend declared, the court ordered payment, with interest and costs, under
Dividend, how to be made.—Bankrupt’s Allowance.

998. A banker became bankrupt, having in his hands money of a bankrupt’s estate, under which he was a creditor: Held, that he was not entitled to receive a dividend on his debt, till the bankrupt estate had been reimbursed the loss occasioned by his insolvency. Exp. Graham, T. 1814. 2 Rose 74. 3 Ves. & B. 130.

999. Assignees are not justified in delaying the payment of dividends, merely because a third person has given them notice of a claim upon the dividends. Exp. Alsop, E. 1816. 1 Madd. 603.

1000. Upon a petition to be paid a dividend, the debt cannot be disputed. Exp. Lozley, M. 1819. 1 Buck 456.

(b) How to be made, where the Creditors are joint and several.

1001. G. drew many bills on H., in favour of V. and A., which H. accepted for his honour. G. and H. were bankrupts. The holders proved under both commissions, and received dividends, but not 20s. in the pound. The assignees of H. petitioned to stand in the place of the holders, against the estate of G. for so much as had been paid out of the estate of H. Ordered accordingly, but not to receive any dividend from G.’s estate till the bill holders were fully satisfied. Exp. Marshall, M. 1752. 1 Atk. 129. 1 Rose 213.


1003. It is discretionary in the Ld. Ch. to postpone the dividend beyond the time limited by 5 Geo. 2. c. 30. s. 33.; but a petition by creditors of surviving partners that the dividend might be postponed until those who were also creditors of a deceased partner, and had filed a bill against his representatives for an account of his assets and payment of their debts, should have gone in under the decree, was dismissed for want of equity. Exp. Kendall, E. 1817. 1 Rose 71.

BANKRUPT XI.

Of the Bankrupt’s Allowance or per Centage.

Where payable, and where not.

1004. A bankrupt is not entitled to his allowance, until a final dividend is made, nor even then, if he has not had his certificate. Exp. Grier, M. 1744. 1 Atk. 207. Exp. Stiles, H. 1748. 1 Atk. 206. S. P.

1005. A bankrupt’s allowance under the act is a vested interest, and if he dies, will go to his representative. Exp. Trapp, M. 1747. 1 Atk. 208. Exp. Calcott, M. 1754. 3 Atk. 814. S. P.

1006. Bankrupt partners paying different proportions towards the debts, shall have but one allowance, which shall be divided between them, in the proportions their respective estates have paid. Exp. Bates, T. 1783. 1 Bro. C. C. 432.

1007. A bankrupt’s estate shall pay interest, when sufficient, without breaking in upon his allowance. Exp. Morris, 3 Bro. C. C. 79. 1 Ves. jun. 132.

1008. The allowance to which the bankrupt was entitled under his first commission, but which he had not received, was ordered to be paid to the assignees under a second commission against him. And this order was made as of course without any service on the bankrupt. Exp. Miller, M. 1789. 2 Cox 213.

1009. Where a bankrupt’s estate does not pay 15s. in the pound, he can have no allowance under a second bankruptcy. Exp. Gregg, T. 1801. 6 Ves. 238.

1010. Under a separate commission a bankrupt paid 2s. in the pound to his separate creditors, and 18s. to the joint creditors who proved under an order. He is not entitled to the allowance under 5 Geo. 2. c. 30. s. 7. Exp. Farlow, T. 1813. 2 Ves. & B. 209. 1 Rose 421. Et vide 1 Christ. B. L. 187. Exp. Holmes, T. 1814. 3 Ves. & B. 137. S. P.

1011. A bankrupt under a joint commission, not entitled to an allowance, though the joint estate pays 10s. in the pound, unless both joint and separate
BANKRUPT XI. & XII.

Bankrupt's Allowances.—Refund of Property.

creditors who have proved, are paid 10s. in the pound, and if only one partner has obtained his certificate, no allowance can be given to him who has obtained it, for the allowance is not claimable except jointly. Exp. Powell, T. 1815. 1 Madd. 69. Vide Farlow's Ca. 2 Ves. & B. 209. 1 Rose 421. Exp. Bate, 1 Bro. C. C. 452.

BANKRUPT XII.

Of a Refund of Property.

Where a Creditor being partially paid or secured, shall be bound to refund.

1012. Equity will not compel a man to discover what goods he bought of a bankrupt, after his bankruptcy, and before the issuing of the commission, if he had no notice of the act. Aber v. Williams, H. 1681. 1 Vern. 27.

1013. A voluntary payment to a bankrupt, is not good. Secus, if recovered by law. Dict. Noel v. Robinson, M. 1682. 1 Vern. 94.

1014. Bill for an account of money received for one who became bankrupt.—Plea, that defendant was his menial servant, and had accounted, overruled. Wagstaffe v. Bedford, M. 1682. 1 Vern. 95. 2 Vent. 358.

1015. If a man trade with a bankrupt between the act of bankruptcy, and the issuing of the commission, whether by delivery of goods, or payment of money, without notice of the act, and the bankrupt keeping open trade, such person shall come in as a creditor? Crosley's Ca. T. 1716. 7 Vin. 69. pl. 6.

1016. A goldsmith (greatly indebted) after shutting up his shop, assigned his share in a wine trade, to I. S., a creditor, but without the knowledge of I. S., and then became bankrupt. This is good: for there may be a reason for a bankrupt, to prefer one creditor, and the time of the assignment is not material, if before the bankruptcy, and the debt be just, nor is it an objection that I. S. knew not of the assignment, for that shows it was without his importunity. Small v. Dudley, M. 1727. 2 P. W. 427. 431.

1017. But if the assignment had been of the bankrupt's whole stock in trade, as a goldsmith, it would have been void. S. C.

1818. I. S. made a payment to a creditor, after he became bankrupt, but with notice of the act. The assignees shall recover this money in trover, but not in assumpsit; for as to them, it is a tort, and not a contract. Bourne v. Dodson, M. 1740. 1 Atk. 157. Billon v. Hyde, M. 1749. 1 Atk. 126. 1 Ves. 327. S. P.

1019. A. borrowed money of B. and gave him a draft upon a fund, due to A. out of the Exchequer, and became bankrupt. This is an assignment for a valuable consideration, and shall prevail against the assignees of A. Roe v. Dawson, M. 1749. 1 Ves. 331.

1020. Creditors receiving money or bills, after an act of bankruptcy, is a good payment, if no notice. Hawkins v. Penfold, T. 1754. 2 Ves. 550.

1021. A creditor who obtained goods from his debtor, just before his bankruptcy, shall not prove for the residue, without accounting for the goods so obtained. Exp. Smith, M. 1789. 3 Bro. C. C. 46.

1022. A security was made by a debtor or insolvent, to a creditor ignorant of his situation, though his effects were under execution, and not two months before his bankruptcy. Ld. Ch. thought this valid, but permitted the assignees to bring an action. Exp. Scudamore, E. 1796. 3 Ves. 85.

1023. Delivery of goods to a bona fide creditor, in contemplation of bankruptcy, is bad, if without pressure. S. C.

1024. A bond assigned as a security for money paid to the use of a man who had committed a secret act of bankruptcy, cannot be retained against the assignees. Hammerley v. Purling, T. 1798. 3 Ves. 757.

1025. A mere gift of money by the bankrupt to his son, is not within the statute 1 Jac. 1. c. 15. Exp. Shorland, 7 Ves. 88.

1026. A payment in the course of trade if without notice of the act of bank-
BANKRUPT XII. & XIII.

Refund of Property.—Mutual and Contingent Debts.

1027. The person to whom costs were awarded in the matter of a bankrupt, brought an action at law founded on a written undertaking to pay these costs, recovered judgment and levied the money. But the Chancellor ordered him to acknowledge satisfaction on the judgment, refund the money, and pay the costs of the application. In Re Dillon, T. 1804. 2 Sch. & Lef. 110.


1029. P. was a partner in two houses in the West Indies; he came to London, shipped cargoes to his partners, and received and sold their consignments. P. became bankrupt, and his assignees brought their suit against a creditor of the two firms, (who had attached in the West Indies property belonging to both) for an account of what he had received under his attachments: Held, that the creditor was entitled to retain what he had received to the extent of his joint debts, and to account only for the surplus. Secur, if the bankrupt had been the sole debtor. The trade had been carried on in England only, and the attachments had been laid in London. Brickwood v. Miller, T. 1817. 3 Meriv. 279. Vide Sill v. Worswick, 1 H. Bla. 665. Hunter v. Potts, 4 T. R. 182. Barker v. Goodair, 11 Ves. 78. Dutton v. Morrison, 17 Ves. 201. 1 Rose 213. Fox v. Hanbury, C. P. 448. Caldwell v. Gregory, 1 Price 119. 130. 2 Rose 149. Smith v. Goddard, 3 Bos. & P. 465. Bristow v. Potts, 11 Ves. 81. (n.)

BANKRUPT XIII.

Of mutual and contingent Debts; and herein of Cases of Sett-off and Counter Demands.


1031. There was a mutual credit between A., a goldsmith, and B.; A. became bankrupt. Only the balance shall be liable; and it is not material whether the mutual credit be by open account or mutual stated debts. Lord Lanesborough v. Jones, T. 1716. 1 P. W. 325.—Note. This subject has received further regulation by 5 Geo. 2. c. 30.; and as to the general construction of mutual credit, vide Exp. Dece, T. 1748: 1 Atk. 228. between a merchant and his packer.—Exp. Prescott, T. 1733. 1 Atk. 250. where Ld. Ch. made a precedent. Exp. Ockenden, T. 1754. 1 Atk. 235. between a corn-dealer and his miller. So Downman v. Matthews, H. 1721. Pre.

1032. Accounts current between A. and B., a goldsmith: B. gave his cash note for 500L. to C., and A. gave a mortgage as a security; B. gave C. 100L. for his favour, who kept the cash note by him; the mortgage was forfeited, and B. became bankrupt. A. prayed relief, because C. had not received the note. An enquiry was directed how matters stood between A. and B. Lake v. Mason, T. 1717. 1 Bro. F. C. 579.

1033. I. S. was cashier to the Hudson's Bay Company, and when he became bankrupt had 800L. in his hands; he was a holder of their stock for 5000L. and a question arose if this was a case of mutual credit under 5 Geo. 2. c. 20. s. 28.
BANKRUPT XIII.

Of mutual and contingent Debts.

Ld. Ch. thought it was, and decreed the company to retain their 800l. out of the bankrupt's dividends, subsequent to his bankruptcy. *Gibson v. Hudson's Bay Company*, M. 1726. 1 Stra. 645.

1034. Sir J. B. was a holder of many considerable shares in the Royal Exchange Assurance Company, and was a director; having so large a portion of stock, the company lent him 12,000l. but without security; Sir J. B. became bankrupt, and the company insisted on a right to stop his stock until payment. *Per curiam*, the company cannot retain under 5 Geo. 2.; for the loan was not made by the corporation, but by the company as private persons. *Meliorucchi v. Royal Exchange Assurance Company*, T. 1728. 1 Eq. Ab. 9. pl. 8.

1035. On a mutual credit between a bankrupt and his creditors the commissioners should compute or stop interest on both sides, till the account is settled. *Bromley v. Goodere*, M. 1749. 1 Atk. 75. 80.

1036. A creditor by bond and open account may prove his bond, for the account may be taken afterwards; but he shall only have a dividend on the balance. If a creditor on an open account were to be excluded till the account taken, the choice of assignees might rest with the minor part in value of the creditors; he shall, therefore, prove what he swears to be due. *Exp. Simpson*, T. 1744. 1 Atk. 68. 70.

1037. A debtor to a bankrupt, before the commission, and a creditor upon a contingency happening afterwards, cannot set off under the clause relating to mutual credits. *Exp. Groome*, M. 1744. 1 Atk. 119. *Sed vide Exp. Caswell*, 2 P. W. 497.

1038. *Dub.* Whether a creditor under a separate commission, and a debtor to the joint estate, can set his demand against the former against his debt to the latter? Ld. Ch., directed the commissioners to certify the amount of each debt. *Exp. Edwards*, T. 1745. 1 Atk. 100. *Et vide Exp. Riley*, 1732. W. Kel. 24; where two partners were creditors of a bankrupt, and one of them was separately his debtor: Held, the joint debt cannot be set off against the separate demand.

1039. The clause relating to mutual credit has been extended to many cases where an action of account would not lie, nor could the court decree one; and it is not confined to pecuniary demands only, but to the goods of a debtor in a man's hands. *Exp. Decze*, T. 1748. 1 Atk. 229.

1040. A man may set off a debt under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt. *Ryal v. Rolle*, H. 1749. 1 Atk. 185. 1 Ves. 348.

1041. B. and M. had various transactions in negotiating bills, and M. had paid for B. 3000l. during these transactions M. committed a private act of bankruptcy; the assignees recovered a verdict for 3000l. against B. who insisted on being allowed 712l. which he paid for the bankrupt. Ld. Ch. thought B. not concluded by the verdict, but entitled to the allowance, which was payable in equity, as a matter of contract and account. *Billon v. Hyde*, M. 1749. 1 Atk. 126.

1042. Where the demands between debtor and creditor are mutual, the balance only shall be deducted out of the bankrupt's estate, to which only the equality of the bankrupt laws extend. *Exp. Dumais*, T. 1754. 1 Atk. 232. 2 Ves. 587.

1043. Bankers receive and pay money on account of a bankrupt, after notice of an act. All the sums received are to the use of the estate, and they cannot set off payments made or come in as creditors for debts paid, which were owing before the act of bankruptcy. *Hankey v. Vernon*, T. 1791. 3 Bro. C. C. 318.

1044. Separate commission against one partner; the other paid the joint debts. A. debtor to the partnership was a separate creditor of the bankrupt. He was allowed to set off against the bankrupt's share of the joint debt, and to prove for the residue of his separate debts, the solvent partner consenting to receive his share. *Exp. Quainten*, T. 1796. 3 Ves. 248.

1045. At law there can be no set-off between joint and separate debts. S. U.

1046. *Acceptor* becoming bankrupt, the petitioner having indorsed before the bankruptcy, took up the bill. He was admitted to prove, but not to set-off a debt due to him from the estate, viz. his own acceptance for 90l. in the bankrupt's hands. *Exp. Hale*, H. 1797. 5 Ves. 394.

1047. Where there were cross bills between two mercantile houses, both of which became bankrupts, no proof can be made as between the two estates in respect of the bad bills, or the excess of
Of mutual and contingent Debts.

damage eventually sustained on that account. Exp. Walker, M. 1798. 4 Ves. 373.; but the cash balance only. Exp. Earle, H. 1801. 5 Ves. 583.

1048. Part owners of a ship cannot set off their proportions of a debt due to the bankrupt on that account, against the debts due by the bankrupt to them severally. Exp. Christie, T. 1804. 10 Ves. 105.

1049. By stat. 46 Geo. 3. c. 135. s. 3. it is enacted, that in all cases where under commissions of bankrupt it shall appear that there has been a mutual credit or mutual debts between the bankrupt and any other person, one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit was given to, or the debts contracted by, such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided such credit was given to the bankrupt two calendar months before the date and suing forth of such commission, and provided the person claiming the benefit of such set-off, had not at the time of giving such credit any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent or had stopped payment. Provided also that the issuing of a commission against such bankrupt, although such commission be afterwards superseded, or the striking of a docket, whether any commission shall issue thereon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of this act, if it shall appear that an act of bankruptcy had actually been committed at the time of the commission or striking such docket.

1050. Under circumstances, an equitable set-off will be allowed, where there could be none at law, as where bankers were directed to buy stock, and represented that they had done so, though they did not, and they made entries and accounted for the dividends accordingly to A. B. their customer. The brother of A. B. wanting money, the banker lent him a smaller sum than the amount of the stock, taking the joist note of himself and A. B. The bankers becoming bankrupts, their assignees sued the brother alone, who thereupon joined with A. B. in a petition, that this debt might be set-off against the amount of the stock, and that A. B. might prove the balance under the commission, which was ordered ac-

1051. The court will not grant relief in nature of set-off against a separate creditor of the bankrupt, indebted to the partnership in a greater amount. Exp. Twogood, 11 Ves. 517.

1052. Joint and separate debts cannot be set-off against each other at law. S. C.

1053. The Chancellor allowed a set-off of a separate debt from the estate against a joint debt to it, and liberty to prove the balance under the commission. Exp. Hanson, E. 1806. 12 Ves. 346. 18 Ves. 232. S. C. T. 1811. 1 Rose 156.

1054. An acceptance not due till after the bankruptcy of the assignor, is capable of set-off within the 28th section of 5 Geo. 2. s. 30. as to mutual credit. Exp. Wagstaff, T. 1806. 13 Ves. 65.

1055. A. and B., partners, gave a joint and several bond to C., who afterwards became indebted to A. B. became bankrupt; C. proved the bond under the commission, and then brought a joint action against A. and B., to which B. pleaded his certificate. A. being thus precluded from setting off his separate debt, an injunction was granted against C.'s proceedings in the joint action. Bradley v. Millar, T. 1812. 1 Rose 273. Vide Exp. Hanson, 12 Ves. 346.

1056. A purchased an annuity of 200l. for 2000l., to be paid after her death. The grantor became bankrupt, and was indebted to her in 2275l. 5s. 9d. Held, that the annuitant is not entitled to set off the 2000l. against her debt, for as she could not be compelled to pay in advance, the bankrupt was not bound to receive in advance. Exp. Whitaker, T. 1812. 1 Rose 301.

1057. A covenant in a marriage settlement to transfer stock to the trustees, on receiving one months' notice, with liberty to the trustees to forbear giving the notice during the life of the covenator, was held to be a contingent debt not provable under a bankruptcy; for the bankruptcy was not equivalent to, nor did it supersede the necessity of notice. Exp. Alcock, H. 1813. 1 Rose 323. 1 Ves. & B. 176. Vide Exp. King, 8 Ves. 394. Exp. Mare, lb. 335.

1058. Under circumstances, a set-off and joint proof will be allowed in bankruptcy. Exp. Hickey, T. 1816. 1 Madd. 577.
Of mutual and contingent Debts.—Of Election.

1039. A. had a joint demand against B. and C., who were also creditors of A. B. by letter, made himself separately liable to A. on account of the demand originally joint: Held, that he could not either at law or in equity, set off the joint debt due from A. to himself and C. Held also, that if a party neglect to plead a legal set-off to an action, he is not entitled to the assistance of equity, to give him the benefit of the set-off. Exp. Ross, M. 1817. 1 Buck 125. Vide Exp. Stephens, 11 Ves. 27. Bishop v. Church, 3 Atk. 691. Exp. Norgood, 11 Ves. 517. Exp. Hanson, 12 Ves. 346.

1060. A creditor of a partnership made farther advances, on the security of a bill of exchange, which was deposited with him for that purpose by the partners, and he undertook to receive the amount when due, and return the surplus; but the bill was dishonoured, and remained in his hands unpaid: Held, that he was not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill. Exp. Flint, H. 1818. 1 Swanst. 30.

BANKRUPT XIV.

Of Election.

Where a Creditor shall be bound to elect whether he will seek Relief under the Commission, or pursue such other Remedies as he may have.

1061. It was formerly held, that where a creditor came in and sought relief under a commission of bankruptcy, he should not afterwards imprison the bankrupt. Exp. James, H. 1719. 1 P. W. 612.

1062. But it has since been repeatedly determined, that a man may prove his debt, and even receive a dividend, and yet arrest the bankrupt; but he shall be compelled to elect whether he will abide by his dividend, or hold the person of his debtor; in the latter of which cases he shall refund the dividend, if received, and if not, he shall renounce it. Exp. Salkeld, T. 1719. 1 P. W. 560. Anon. T. 1726. 2 P. W. 394. Exp. Blewitt, M. 1733. 2 Eq. Ab. 127. pl. 14. Exp. Fenwick, 7 Vin. 154. pl. 20. Exp. Hoosey, M. 1734. 7 Vin. 134. pl. 19. Exp. Capot, E. 1738. 1 Atk. 219. Exp. Greene, E. 1747. 1 Atk. 104. Exp. Williamson, E. 1751. 2 Ves. 251. Exp. Hopkinson, T. 1790. 1 Ves. jun. 159. Exp. White, M. 1792. 4 Bro. C. C. 114.

1063. There are many questions as to what amounts to an election. The choice of a creditor as assignee does not. Exp. Salkeld, T. 1719. 1 P. W. 560. Exp. Ward, M. 1743. 1 Atk. 153. But Ld. Ch. doubted if it did not, when a man chooses himself assignee. Exp. Dovillet, T. 1751. 1 Atk. 221. So, where a bankrupt surrendered in discharge of his bail, and was not charged in execution, but was released by his creditor. This is no election, and the creditor may prove his debt. Exp. Cundall, T. 1801. 6 Ves. 446.

1064. But it has been clearly held, that a petitioning creditor has determined his election, by taking out the commission. Exp. Ward, ante: and he cannot afterwards sue the bankrupt at law, though for a distinct debt; S. C. for if he were to elect to proceed at law, it would supersede the commission. Exp. Lewis, T. 1746. 1 Atk. 154. So, where a bankrupt was arrested before the commission issued, and was charged in execution after he was declared a bankrupt, and he conformed and obtained his certificate; his creditor petitioned to prove under the commission, but was denied, for charging the bankrupt in execution was deemed a conclusive election, and satisfaction of the debt. Exp. Warder, M. 1790. 3 Bro. C. C. 191. Exp. Cator, H. 1791. 3 Bro. C. C. 216. S. P. And taking the bankrupt in execution after the commission has issued, is an election. Exp. Knowell, M. 1806. 13 Ves. 192. So, where a creditor has signed the bankrupt’s certificate, he has determined his election, and he cannot afterwards sue the bankrupt at law, even though he should refund his dividend. Exp. Freeman, T. 1799. 4 Ves. 836.

1065. Another question has arisen, within what time an election shall be made? In Exp. Hopkinson, ante, a cre-
ditor who had the bankrupt six months in execution after the bankruptcy, petitioned that an account might be taken, and that he might prove; the account was directed, and he was ordered to elect in a fortnight. But where a creditor, three years and a half after, having received a dividend, refunded it, in order that he might proceed at law, he was allowed so to do, and also against his bail, but not by surprise; for the bail seeing that the creditor had proved his debt, and received his dividend, might be lulled into a neglect to surrender their principal, and he might abscond; Exp. Wright, M. 1792. 2 Ves. jun. 9.

1066. And the point seems as yet undetermined, whether a creditor shall be bound to elect before, or after a dividend and it is not established, even by the case of Exp. Hopkinson, where Ld. Thurlow refused to lay down a rule for delaying the election till after the dividend. Since that case, however, it is settled as a general rule, that election cannot be compelled before a dividend. Exp. Hannam, E. 1795. 14 Ves. 587. (n.) Sed vide Exp. Grosvenor, post, pl. 1072. For in Exp. Robertson, H. 1779, Ld. Thurlow said, not it might be the bankrupt’s fault, that the dividend was not made, yet he should expect the bankrupt to show, that it was not.

1067. But in what manner sooner a creditor may elect to proceed, he shall be at liberty to prove his debt, that he may assent to, or dissent from, the bankrupt’s certificate; in order that the remedy against the bankrupt’s person may be effectual, for the mode of putting a creditor to his election, is but modern, and in favour of bankrupts; but if that election is to exclude a creditor from opposing the certificate, it may be in the power of a few small creditors to deprive him of his remedy, and the same equitable construction, which compels a creditor to abide by his election at law, if he renounces all benefits under the commission, requires that he should not be hurt thereby. Exp. Salkeld, T. 1719. 1 P. W. 560. Vide Exp. Fenwick, 7 Vin. 184. pl. 20. Exp. Hooey, 7 Vin. 134. pl. 19. Exp. Capot, 1 Atk. 219. Exp. Lindsey, 1 Atk. 220. 1068. There are some cases, however, in which no election shall be compelled, but the creditor may prove his debt in one right, and imprison the bankrupt in respect of another claim. As where a creditor had a bankrupt in execution on one debt, and has another debt against him of a distinct nature, he may prove the latter under the commission, though he refuses to waive his execution in the former. Exp. Botterell, T. 1746. 1 Atk. 109. Exp. Crinob, E. 1783. 1 Bro. C. C. 270. S. P. So, where a man having lain two months in prison was made a bankrupt, and was superseded for want of proceeding, his creditor proved his debt, and then took him in execution on a fresh action, his discharge on petition was refused. Exp. Callow, M. 1795. 3 Ves. 1. Vide Exp. Bryant, 1 Ves. & B. 215, which was since the stat. 49 Geo. N. c. 121.

1069. There is another point or question of election, which has come before the court in cases of bankruptcy, and that arose under the commission against Livesey and Co. in which the question was, whether as to the sum for which the creditor had the bond of two of the partners, he should, under an agreement by them all to consolidate the funds, be considered as a creditor of both partnerships? to which it was answered, that when the general partnership agreed to take upon them the demand of the individuals and the other partnership, one term implied was, that their creditors should consent to be creditors of the general partnership only. It was held, therefore, that they must elect. Exp. Clowes, E. 1789. 2 Bro. C. C. 395. Vide etiam Exp. Bonnous, 8 Ves. 640.

1070. So a joint and separate creditor must elect against which estate he will go in the first instance, and electing to go against the joint estate, he has no preference to the other joint creditors, upon the surplus of the estate, beyond the separate debts. Exp. Bevan, T. 1804. 10 Ves. 107. Exp. Hay, E. 1808. 15 Ves. 4.

1071. A creditor under a joint and several bond may prove against the estates of both; but he must make his election before a dividend. Exp. Bentley, H. 1790. 2 Cox. 218.

1070. A creditor is not bound to elect to proceed at law, or under a commission, before a dividend is declared; he may therefore vote in the choice of assigns, though he has the bankrupt in custody on mesne process. Exp. Sharpe, T. 1805. 11 Ves. 203. Exp. Warwick,
BANKRUPT XIV.

Where a Creditor is bound to elect.

T. 1807. 14 Ves. 138. But election shall be compelled before a dividend where the creditor had, for the purpose of taking both remedies, split an entire demand; and being assignee, delayed the dividend. Exp. Grosvenor, H. 1808. 14 Ves. 387.

1073. A creditor of the bankrupt, holding him in prison under an arrest for part of his debt, and when superseded his friends for another part of the same debt, being also assignee under the commission, and when ordered to make a dividend, not proving, but making a claim only to a less amount than he had sworn to at law, was compelled to elect. Exp. Parquet, H. 1808. 14 Ves. 493.

1074. By statute 49 Geo. 3. c. 121. s. 14, proof of a debt under a commission shall be deemed an election not to proceed at law against the bankrupt in respect of such debt. Vide ante, sect. v. of this title. Exp. Lloyd & Exp. Lobbon, 17 Ves. 121. 334.

1075. After proof of a bill under a commission against the acceptor, it was paid by A., the drawer, who received a dividend, and then arrested the bankrupt for the balance. A. was also a surety for the bankrupt upon another bill, yet he was ordered to discharge the bankrupt, and restrained from lodging any detainer. Exp. Lobbon, E. 1810. 1 Rose 219. 17 Ves. 334. Vide stat. 49 Geo. 3. c. 121. s. 8. 14.

1076. A creditor obtained a judgment against a bankrupt, and issued a ca. sa., but the bankrupt having surrendered to his bail, he was not charged in execution. This is not an election to proceed at law. Exp. Arundell, T. 1811. 18 Ves. 231. 1 Rose 143. Et vide Exp. Cundell, 6 Ves. 446.

1077. Where a mortgagee has once elected to give up his mortgage and prove under the commission, he cannot afterwards retract on the ground of mistake. Exp. Downes, T. 1811. 18 Ves. 290. 1 Rose 96.

1078. Where a creditor, having two bills of exchange upon which the bankrupt was liable, has proved one under his commission, it is an election to relinquish an action upon the other. Exp. Dickson, T. 1811. 1 Rose 98. Exp. Harderberg, H. 1812. ib. 204. Vide stat. 49 Geo. 3. c. 121. s. 14.

1079. The proof or claim of a debt operates as a discontinuance, under the stat. 49 Geo. 3. c. 121. s. 14, so as to preclude the necessity of producing the rule to discontinue prior to the proof being admitted. Exp. Woolley, T. 1813. 1 Rose 394.

1080. A commission issued by a petitioning creditor, who, with the privy of two or three other creditors, received his debt from the bankrupt, was superseded under the stat. 5 Geo. 2. c. 30. s. 24. on the petition of a creditor, who was privy to the transaction, but whether the same creditor will be permitted to sue out a new commission, the court did not determine. Exp. Brine, Exp. Parsons, H. 1817. 1 Buck 19. 108. Vide Exp. Paxton, 15 Ves. 461; vide etiam Exp. Brown, ib. 472. and the distinction there taken between Exp. Thompson, 1 Ves. jun. 147, and Exp. Gedge, 3 Ves. 349. The remedy given by the statute, however, is to the creditors, and not to the bankrupt. Exp. Kirk, 15 Ves. 464. Sed vide Thomas v. Rhodes, 3 Taunt. 478. 2 Rose 104.

1081. An attachment of the bankrupt after the commission for non-payment of money into court, under an order in a suit against him before the commission, is not such an election to proceed against the person of the bankrupt as will satisfy the debt. Exp. Benjamin, E. 1817. 1 Buck 41.
BANKRUPT XV.

Of Joint and Separate Traders.

(a) Of the Practice adopted on the Bankruptcy of Copartners, previous to Lord Thurlow's Order of the 8th March, 1794. (b) Of the subsequent and present mode of proceeding in such Cases. (c) Of the Interests of the joint and several Creditors in the effects of Joint Traders, and also in their separate Estates. (d) Of the situation of a Solvent Partner, as connected with one who becomes Bankrupt, and herein of retiring, dormant, and deceased Partners.

(a) Of the Practice adopted on the Bankruptcy of Copartners, previous to Lord Thurlow's Order of the 8th March, 1794.

1082. If there is a joint commission against two partners, each must be found a bankrupt, and though one die, the commission may go on; but if one be dead at the time of the issuing of the commission, it abates and is absolutely void. Beasley v. Beasley, H. 1736. 1 Atk. 97.

1083. Separate commissions were taken out against persons formerly partners; the joint creditors were allowed to bring a bill against the separate assignees, for an account of the partnership debts, and they were directed to sell the whole, and deposit the produce in the bank until the determination of the suit. Exp. Vogel, E. 1743. 1 Atk. 152.

1084. Bankrupt partners paying different proportions towards the debts, shall have but one allowance, which shall be divided in the proportions their respective estates have paid. Exp. Bate, T. 1785. 1 Bro. C. C. 452.

1085. A commission against A., describing him as a partner with B., is a separate commission. Exp. Woodmason, H. 1787. 1 Cox 308.

1086. Joint creditor is entitled to prove his debt under a separate commission taken out against one partner. Exp. Copland, M. 1787. 1 Cox 420.

1087. A., B. and C. were in partnership; and A. and B. were also partners in a distinct house. Commissions issued against both firms. The estate of the two cannot claim any thing against the estate of the three, until the joint creditors of the three are fully satisfied. Exp. Hargreaves, E. 1788. 1 Cox 440.

1088. It was always allowed upon petition, and considered as a resolution of convenience, that separate creditors should prove under a joint commission, and joint creditors under a separate commission; so that the joint effects be first applied to pay the partnership debts, and then the separate debts, and the separate effects first to the separate creditors, and then to the partnership creditors. Vide Exp. Crowder, M. 1715. 2 Vern. 706. Stephens v. Brown, H. 1728. Fitzg. 283. Exp. Cooke, M. 1728. 2 P. W. 500. Horsey's Ca. H. 1729. 3 P. W. 23. Twiss v. Massey, E. 1737. 1 Atk. 67. Exp. Turner, T. 1742. 1 Atk. 97. Exp. Baudier, M. 1742. 1 Atk. 98. Exp. Vogel, E. 1743. 1 Atk. 152. Exp. Fowell, M. 1742. 2 Eq. Ab. 111. pl. 7.

1089. But the commissioners had no power to admit such proofs without the sanction of the court. Vide Exp. Sandon, E. 1743. 1 Atk. 68.

1090. Even so late as 1784, Ld. Thurlow seemed to have a doubt, whether joint creditors could prove under separate commissions; for in a petition, Exp. Cobham, 1 Bro. C. C. 576. that joint creditors might be let in to prove against a separate estate, he made an order because the petition was consented to, but left the question to be discussed on future consideration. The question being thus left open, the petition. (Exp. Haydon, T. 1785. 1 Bro. C. C. 434. Exp. Hodgson, M. 1785. 2 Bro. C. C. 5. Exp. Page, T. 1786. 2 Bro. C. C. 119. and Exp. Flintum, T. 1786. 2 Bro. C. C. 120.) were speedily presented, in all which joint creditors were allowed to prove against separate estates, and on hearing the latter petition, his Lordship said, he thought that point had been settled, especially since the case of Exp. Crisp, where it was determined, that a commission may issue against one party for a joint debt, though an action cannot be
BANKRUPT XV.

Of the Practice adopted on the Bankruptcy of Copartners.

1794, by Ld. Ch. Thurlow, the case Exp. Elton, (T. 1796. 3. Ves. 238. 241.) came on upon the petition of joint creditors, to be admitted under a separate commission, it was determined that they should be admitted, but not receive a dividend until an account taken of what they might have received from the partnership effects; neither can separate creditors take a dividend upon the joint estate rateably with the joint creditors; for each estate is applicable to its own debts. In bankruptcy the usual directions are, to apply the funds respectively, the joint to the joint debts, and the separate to the separate debts, and the surplus of each, to the creditors remaining on the other; et vide Exp. Clay, E. 1802. 6 Ves. 813. S. P. determined by Ld. Eldon.

1094. A joint creditor being the petitioning creditor under a separate commission, was entitled to prove and vote in the choice of assignees, &c. with the separate creditors, not being within the rule, excluding the other joint creditors. Exp. Hall, E. 1804. 9 Ves. 349. Vide Exp. Elton, 3 Ves. 238. Exp. Clay, 6 Ves. 813. and references. Exp. Chandler, 9 Ves. 35.


1096. But a proof by joint creditors under a separate commission was admitted, there being no joint estate or solvent partner. Exp. Sadler and Jackson, E. 1808. 15 Ves. 32.

1097. Joint and separate creditors also have each been allowed to prove provisionally under the commission on foot, whether joint or separate, in order that they might have power to oppose, or to sign the bankrupt's certificate; for under what commissionsoever the certificate be obtained, it discharges the bankrupt from all his debts, as well joint as separate. Vide Horsey's Ca. 3 P. W. 24. Twiss v. Massey, 1 Atk. 67. Exp. Turner, 1 Atk 97. Re Simpsons, 1 Atk. 138.

1098. Where a creditor has lent money to a co-partnership, and has the joint and several security of the co-partners, he may prove his debt either against the joint or separate fund, but when a dividend is made, he must elect out of which fund he will take his dividend. As where A and B, joint traders, had become

(b) Of the subsequent and present Mode of practice in such Cases.

1099. Since the order of 8th March,
Of the Practice on the Bankruptcy of jointly and severally bound to I. S., and joint and separate commissions were taken out against them, I. S. may elect, and he shall have a month to elect under which commission he will come, but if two joint traders owe a partnership debt, and one gives a separate bond, as a collateral security, the joint debt may be sued by the creditor of the partnership, who may likewise avail himself of the separate bond. Exp. Rowlandson, H. 1735, 3 P. W. 405.

1099. So a bond creditor, to whom the partners were jointly and severally bound, may make his election, to come against the joint or separate estate, but not against both, except for the deficiency, and after the other creditors are paid. Exp. Banks, T. 1740. 1 Atk. 106. 2 Ves. 550.

1100. So where a joint commission was taken out against two persons, and a separate commission against one, a creditor upon their joint and several bond, must make his election, upon which estate he will claim, but he shall have time to look into the joint and separate accounts, that he may see under which he can claim to the best advantage. Exp. Bond, H. 1745. 1 Atk. 98.

1101. So a creditor of one partner on bond, for money which came to the use of the copartnership, may prove against the joint or separate fund, but he must elect upon which fund he will take his dividend. Exp. Clowes, E. 1789. 2 Bro. C. C. 595.

1102. A partnership cannot be established by the evidence of partners, in their private communications; that fact must be proved affinante, and for want of such proof, a commission against the ostensible partner was sustained in this case. Exp. Benfield, T. 1800. 5 Ves. 424.

1103. A release to one joint debtor is a release to both, therefore a creditor, receiving a composition from one, cannot prove under the bankruptcy of the other. Exp. Slater, T. 1801. 6 Ves. 146.

1104. A joint commission, where one partner was resident abroad, was superseded; and so it shall be where one partner is an infant or a lunatic, for a joint commission cannot be maintained, but separate commissions must issue. Exp. Layton, Exp. Hardwicke, T. 1601. 6 Ves. 440. Exp. Barnet, H. 1802. 6 Ves. 501. S. P. as to an infant trader.

Copartners since Lord Thurloe's Order.

1105. A separate commission of bankruptcy was issued on the petition of a joint creditor. A joint creditor petitioned, on behalf of himself and others, that they might prove, in order to vote in the choice of assignees and receive dividends. Ld. Eldon said, this was the consequence to be apprehended from the rule established in Exp. Elton, (3 Ves. 288.) repealing the objections to that rule in Exp. Clay, (6 Ves. 813.) particularly in the inconsistency of permitting a joint creditor to be the petitioning creditor in a separate commission, and yet not allowing any other joint creditor to prove, except for the purpose of ascertaining to or dissenting from the certificate, and giving the account in the absence of parties interested in taking it. His Lordship followed Ld. Rosslyn's rule, which differed from that of Ld. Hardwicke and Ld. Thurloe, not as approving it, but finding it established: by that rule, however, excepting the case where there are no separate debts, the petitioner might take the order, provided he would pay the separate creditors. Exp. Chandler, T. 1803. 9 Ves. 35. Vide Exp. Crisp, 1 Atk. 134. Crisp v. Perrit, Willes, 467.

1106. Joint traders became bankrupts, and obtained their certificate, but one of them died before he had made the affidavit of conformity: this joint certificate was allowed as the separate certificate of the survivor, and ordered to be inserted in the Gazette accordingly. Exp. Currie, T. 1804. 10 Ves. 51.

1107. A. and B. were partners, and became bankrupts. Separate commissions were issued against both. The assignees of B. were allowed to prove a cash balance (due to B.) upon the estate of A.; but the dividends were retained to reimburse the estate of A. what it should overpay upon an advance of bills from A. to B., some of which were dishonoured. Exp. Metcalfe, T. 1805. 11 Ves. 404.

1108. Under a joint commission, the separate estate of one partner has a lien on the other's share of a surplus of the joint estate, in respect of a debt proved on bills drawn in the name of the firm for a separate debt, and may come in with the other separate creditors for a deficiency. Exp. King, T. 1810. 17 Ves. 115.

1109. Joint creditors cannot prove under a separate commission for the
Of the Practice on the Bankruptcy of Copartners since Lord Thurlow's Order.

1110. A joint creditor may sue out a separate commission (a), and may prove and receive dividends with the separate creditors, though as to part he may be only a trustee for another joint creditor, who, upon the general rule, could have proved only to affect the certificate, and not to receive a dividend (b). Exp. De Tasset, T. 1810. 17 Ves. 247. 1 Rose 10. Vide (a) Exp. Ackerman, 14 Ves. 604. (b) Exp. Crisp. 1 Atk. 134. Crisp v. Peritt, Willes, 467.

1111. Though joint creditors cannot vote in the choice of assignees under a separate commission, even though there be but one separate creditor, yet the court will make an arrangement for the joint creditors at their own expense, by appointing persons to deal with the joint estate in the nature of trustees, adverse to the separate creditors, (et e converso under a joint commission,) but the court will not appoint such persons assignees, for the choice of assignees is with the persons entitled to prove under the act of parliament, excluding such as could not prove without an order as separate creditors under a joint commission, now admitted under the General Order of 8th March, 1794, (which see ante, pl. 1092.) Exp. Parr, T. 1811. 18 Ves. 70. 1 Rose 76.; and the same point was resolved in Exp. Longman, 18 Ves. 71. where it was held, that the General Order was not intended to alter the rights of joint and separate creditors with regard to each other.

1112. Separate commissions were taken out against copartners by a joint creditor on the same debt and on the same day, immediately on the dissolution of a copartnership, but no separate creditor appearing, a joint commission was issued. The petitioning creditor under the separate commissions refused to disclose the person who proved the act of bankruptcy. Ld. Ch., after inspecting the proceedings, ordered the witness to attend at the peril of costs. Exp. Gardner, M. 1812. 1 Ves. & B. 74. Vide Exp. Lund, 6 Ves. 781. Exp. Higgins, 11 Ves. 8.

1113. Out of four partners in one trade, two traded distinctly. First a joint commission issued against the latter two, then a joint commission against the four, and afterwards separate commissions against the two who were not objects of the first commission. The court supported the commission against the four, as being the most capable of ample justice, and superseded all the rest, agreeable to the modern practice, ordering distinct accounts to be kept of the whole, but all the purchases made under the first commission against the two were confirmed. - Exp. Rawson, Exp. Mason, M. 1812. H. 1813. 1 Ves. & B. 160.

1114. A second commission against a bankrupt uncerificated is void; therefore where a joint commission issued after a separate one taken out by joint and several creditors, the separate commission can only be superseded for the benefit of the creditors, but the petitioning creditor shall have his costs if he acted bona fide, and secured all his rights as a joint and separate creditor to prove and elect between the joint and separate estates. Exp. Brown & Munton, M. 1812. 1 Ves. & B. 60. in which case Ld. Eldon said he always felt great difficulty from the decision in Crisp v. Peritt, Willes, 467. where it was held, that a separate commission may issue on a joint debt, for if so, what is to become of the demand against the other persons. And be added, that under a joint and several bond, the obligee could not bring a joint and also several actions, though he might have several executions.

1115. Where there is no joint estate, a joint debt may be proved under a separate commission. Exp. Machell, T. 1813. 1 Ves. & B. 216. Vide Exp. Taitt, 16 Ves. 194. (n).

1116. A joint commission in England, will not be superseded while a separate one is proceeding in Ireland. Exp. Cridland, T. 1814. 3 Ves. & B. 94.

1117. Though the effect of a separate commission is to pass all the interest in the joint estate to the assignees, yet the distributive share shall be confined by order of the joint creditors. S. C. ib. 98.

1118. Joint creditors are not permitted to prove against the separate estate, where there is joint property, however trifling in amount. Exp. Peake, T. 1814. 2 Rose 54. Vide Exp. Taitt, 16 Ves. 198.
BANKRUPT XV.

Interests of joint and several Creditors in the joint and separate Estates.

(c) Of the Interests of the joint and
several Creditors in the Effects of
joint Traders, and also in their se-
parate Estates.

1119. A lends money to one partner,
who lends the same to his partnership
trade; a joint commission issues: A
shall not come in as a creditor immedi-
ately, but by way of circuity, as standing
in the place of the partner who lent the
money to the trade. Exp. Hunter, H.
1741, 1 Ath. 222.

1120. So, where one partner draws
from the joint stock more than his share,
the other shall come in upon his separate
estate pro tanto. Exp. Drake, M. 1785.
cited in S. C.

1121. So, where two parties borrow
money, and one only gives a bond, to
which the other is a witness, and the
money is put into the trade, the obligee
shall prove under the joint commission,
Exp. Brown, E. 1725, cited in S. C.

1122. Debts upon the insurance of
ships, are only proveable against the se-
parate estate of the partner who signs the
policy; the insurance by a partnership
being against 6 Geo. 1. c. 18. Exp. An-
gerstein, Exp. Lee, T. 1784. 1 Bro. C.
C. 399.

1123. A separate commission issued
against A., who was one of three part-
ners, under which he obtained his certi-
cicate. A joint commission afterwards
issued against the three. On an appli-
cation to supersede the separate commis-
sion, and an allegation that the certificate
was not fairly obtained, the court direct-
ed an enquiry how the certificate was ob-

1124. Separate creditors, having re-
ceived 20s. in the pound, are not entitled
to interest out of the surplus of the sepa-
rate estate till the joint creditors are paid
20s. in the pound. Exp. Clarke, T. 1799.
4 Ves. 677. So vice versa, with joint cre-
ditors. Exp. Abell, T. 1799. 4 Ves. 837.

1125. Where the bankrupts are jointly
and severally bound to the crown, and
the joint estate has paid more than its
proportion of the debt under an extent,
the separate estates must contribute. Ro-
gers v. Mackenzie, T. 1799. 4 Ves. 752.

1126. J. R. traded in his own name as
a merchant, and also under the firm of
J. R. and Co. He was likewise a part-
ner with B. and P., as insurance-brokers.
These trades were carried on in different
parts of Bristol, and distinct accounts
were kept. In March, 1793, a separate
commission issued against J. R., and on
the same day a joint commission issued
against R. B. & P. A proved 30,725l.
under the separate commission, and
27,011l. under the joint. The joint cre-
ditors by their petition stated the latter
sum to be part of the former debt, that
J. R. had made use of the partnership
firm on his separate account, and that he
was indebted to the partnership in 6000l.
J. R. died in 1801, never having pro-
duced an account of his dealings with A.
Petitioners suggested that J. R. had
drawn all the bills, except two, without
the privity of P., who acted as cashier to
the partnership; that all the bills had
been made payable by J. R., at the same
time that J. R. was much embarrassed
and frequently arrested; and that no part of
the consideration came to the hands of
P., or was applied to the use of the part-
nership, but exclusively to the use of
J. R. Petitioners prayed, that A.'s proof
under the joint commission might be ex-
punged, and that he might refund his
dividend, and give an account of his deal-
ings with J. R.—For petitioner it was
contended, that A. ought to have elected
under which estate he would prove,
though he had distinct securities; and
that one partner could not, without au-
thority, bind the firm to a demand, the
consideration for which was received by
him alone, and never reached the part-
nership funds.—Eldon, C. could not ac-
cede to the principle, that if one partner,
for his own accommodation, pledges the
firm, the partnership is not bound; but
he agreed, that if it was manifest to the
party advancing the money, that it was
on the separate account, and that the
partnership was pleded against good
faith, then his authority to pledge the
firm must be shown; but this does not
apply to the ordinary course of com-
mercial transactions, nor to the discounting
of bills with bankers. In Fordlyce's Ca.
La. Thurlow and the judges doubted
upon the danger of placing every man
with whom the paper of a partnership is
pledged at the mercy of one partner,
with reference to the account he may
afterwards give of the transaction, but
there is no doubt now; the law has taken
this course, that if, under the circum-
stances, the party taking the paper can be
considered as being advertised by the na-
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tare of the transaction that it was not in
tended to be a partnership proceeding, as if it came for an antecedent debt, prima
facie it will not bind them; but it will, if
previous authority or subsequent appro
bation can be shown. In many cases of
partnership, and different private con
cerns, it is frequently necessary for the
salvation of the partnership, that the pri
date demand of one partner should be sa
tisfied at the moment; for the ruin of one
partner would spread to the others, who
would rather let him liberate himself by
dealing with the firm. With respect to
the question, whether this proof ought to
stand against both estates, it has been al
ready determined, that under a joint
commission of bankrupt the affairs of the
separate creditors may be arranged, and
also of separate firms of two or more par
tners. As to this species of paper, con
siderable difficulty in supporting it has
arisen in point of law. In Mainwaring v.
Newman, 2 Bos. & Pul. 120. It was
held, that no action would lie upon such a
transfer of paper. Ld. Eldon, how
ever, finding it treated as a ground of di
vidend, would not disturb the question.
The case in Livesay's bankruptcy does
not decide that there should not be a sort
do double proof, but too creditor must
elect: the question in that case was, whe
ther as to the sum for which the creditor
had the bond of the two, he should, under
an agreement by all the partners to con
solidate the funds, be considered as a cre
ditor of both partnerships? To which it
was answered, that when the general
partnership agreed to take upon them the
demand of the individuals and the other
partnership, one term implied was, that
their creditors should consent to be cre
ditors of the general partnership only. It
was held, therefore, that they must elect.
There have been many other cases, par
cularly in the bankruptcy of Burton, For
bes, and Co., where three or more par
tners being also concerned in other
trades, the paper of one firm was given
to the creditors of another, and they were
permitted to take dividends from both
estates; that, therefore, takes it out of
the general doctrine; but, said Ld. Eldon,
it is not now necessary to decide that
point, especially if it is to affect the doc
trine that has obtained in other cases
upon a petition containing no allegation
on that point. Exp. Bommonus, T. 1803.
3 Ves. 540. Vide Sheriff v. Wilks, 1 East

1 Co. Bank. Laws, 255. Exp. Clowes,
2 Bro. C. C. 595.

1127. Bill for an account by the annui
tants under the will of Cook (to whom
defendant's father was executor,) against
defendant as executrix and heir at law;
the usual accounts were directed, and the
testator's estate was reported in arrear.
Testator was in partnership with one
Nantes, who became a bankrupt, and then
testator died. The joint creditors of
Chiswell and Nantes, who had proved
under the commission against N. as sur
viving partner, went in under an order,
and proved their debts before the master.
No appropriation had been made to an
swer plaintiff's annuities. Testator died
seized of freehold estates. The cause
coming on for further directions, the sim
ple contract creditors of testator claimed
to stand creditors upon his real estate,
to the extent of the bond debt proved by
plaintiffs and paid out of his personal es
tate, and to be paid by sale or mortgage
of the real estate devised. A question
then arose between the joint and sepa
rate creditors of the testator, the latter
claiming a preference to the former, and
that the balance only might be paid over
to them. The joint creditors insisted to
come in upon the separate estate, pari
passu with the separate creditors, the
joint estate being insolvent, and the sepa
rate estate being solvent. Per Eldon, C.
This question is new in specie. The
joint creditors ask more than they could
do in bankruptcy, for there they could
not touch the separate estate till the
separate creditors were satisfied; they
have had their demand effectuated against
the joint estate surviving, and now they
contend, that by the accident of the
death, they shall be not only upon an
equal, but upon a better footing, as
against the separate creditors, than if the
testator had lived and had become a
bankrupt. Descroed, that the separate
creditors of the testator Chiswell be first
paid out of the separate estate, and that
the joint creditors do take the residue.
Gray v. Chiswell, T. 1803. 9 Ves. 118.

1128. A., B. and C. were partners and
bankrupts. A dividend of 20s. in the
pound was declared on the joint and
separate estates. The separate estate of
A. amounted to 15,000l. and his sepa
rate debts to 6500l., exclusive of 15,000l.
de from his separate estate to the joint estate. The separate estate of C. amounted to 1500L. beyond his separate debts, and the separate estate of B. exceeded his separate debts by more than 20,000L. The joint creditors petitioned that interest, subsequent to the commission, might be paid them out of the surplus of B.'s estate, upon which a question arose, whether the creditor's claim of interest was to be preferred to the debt due to the joint estate from the separate estate of A. Ld. Eldon held, that under a joint commission the right of the creditors to interest subsequent to the date of the commission, in the case of a surplus, shall be preferred to a debt from the separate to the joint estate, upon the principle that neither the partnership nor individual debtor can claim in competition with the creditors. Exp. Reese, T. 1804. 9 Ves. 588.

1129. Where partners were engaged individually in other concerns before their bankruptcy, if such concerns are distinct, proof may be made in bankruptcy of debts as between the different estates, but not if they are mere branches of the joint concern. Exp. St. Barbe, T. 1803. 11 Ves. 413.

1130. Under a joint commission, the separate estate of one partner has a lien on the other's share of the surplus of the joint estate, in respect of a debt proved, under bills drawn in the name of the firm for a separate debt, and may come in with the other separate creditors for the deficiency. Exp. King, T. 1810. 1 Rose 212. 17 Ves. 115.

1131. All the joint creditors, except the petitioning creditor, may prove under a separate commission, for the purposes of the certificate, and to receive a dividend, out of the surplus, after the separate creditors are paid; but if there are no joint effects, and no solvent partner, or no separate debts, or the joint creditors will pay the separate creditors 20s. in the pound; then they may vote in the choice of assignees, and go at once against the separate estate. Exp. Incester, T. 1810. 1 Rose 21. and note.

1132. When a joint creditor takes out a separate commission, he is as a separate creditor, and is the only joint creditor who can come in with the separate creditors and receive dividends with them. Exp. De Tasset, T. 1810. 1 Rose 11. 17 Ves. 247. Vide Exp. Taitt, 16 Ves. 193. Exp. Docwray, 15 Ves. 499. Exp. Ackerman, 14 Ves. 604. Exp. Chander, 9 Ves. 32. Exp. Hall, ibid. 349.

1133. Separate commissions had issued against R. and T. T. obtained his certificate, which was lodged for allowance, then a joint commission issued, and the joint creditors, with a view to supersede the separate commission, petitioned to stay the certificate. T. denied the partnership, and opposed the petition. Eldon, C. The cases on the question of partnership have gone on too nice a distinction, viz. that if a trader agrees to pay another a sum for his labour, even in proportion to the profits, that will not make him a partner, but if he has a specific interest in the profits, he is a partner. Suppose two persons concerned in a cargo, the whole being the property of one, but a profit out of the proceeds to go to the other, the creditors of the latter could not take a moiety of the cargo in execution subject to an account. If two openly trade in partnership, and a third person who gives them credit, not knowing there is a dormant partner, may bring an action against either of the apparent partners, and may have execution against the interest of that one in the joint effects, but there is no instance of an execution against the visible effects of the visible partner in an action against the dormant partner.(a) Ordered, the petition to stand over for affidavits of the fact of joint property, and to examine Boylston's Ca. On a re-hearing, Ld. Ch. said, it was clear a man might not be a partner as between himself and another, and yet be so considered with reference to third persons, but it did not follow that he might have any property in the effects of the co-partnership. As to a dormant partner, his Lordship said, the law was clear, that not being an ostensible contracting partner, a creditor may, but is not bound, to go against him.(b) Further, his Lordship said, suppose a judgment obtained against both R. and T. in this case, if T. had no property in the cargo, the judgment creditor could not levy on it under an execution against T. only, for it was the property of R. alone, but if T. were a partner in the property, though the foundation of the action had no relation to the joint concern, the plaintiff might levy on the goods of T. His Lordship, in concluding, said, he should well consider the case before he superseded the separate
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Incurring in recovering property for the joint creditors. Exp. Rutherford, M. 1811. 1 Rose 201.

1137. Although joint creditors cannot vote in the choice of assignees under a separate commission, yet the court will, in some cases, appoint persons in nature of assignees, to protect the interest of the joint creditors, and to use the name of the assignees en indemnifying them. Exp. Basarre, E. 1812. 1 Rose 266.

1138. Separate creditors are not entitled to vote in the choice of assignees under a joint commission. Exp. Jepson, T. 1812. 19 Ves. 224.

1139. Joint creditors cannot, under a separate commission, be allowed the expenses of their own solicitor employed to conduct examinations, &c. before the commissioners, out of the joint fund. Exp. Longman, T. 1812. 1 Rose 395.

1140. When a commission is superseded, every thing done under it falls with it, therefore a joint and separate creditor, who sued out a separate commission and proved under it, is, upon the supersedeas, restored to his right of election, to prove against the joint estate, and such a creditor may also elect out of which estate he will be paid the costs of the supersedeas. Exp. Browne, M. 1812. 1 Rose 435. 1 Ves. & B. 60.

1141. Joint creditors having taken out a separate commission, proving and voting in the choice of assignees, may afterwards join the bankrupt in an action as a co-defendant, upon giving him a full indemnity, undertaking to take no advantage of the verdict or judgment against him, and to pay the costs of the petition. Exp. Reid, H. 1813. 1 Ves. & B. 346. Vide stat. 49 Geo. 3. c. 121.

1142. Where A., a sole trader, B. and C. partners, and D. also a sole trader, had engaged in a joint adventure for the purchase of goods, and the vendor, with a knowledge of their joint interest, received in payment a bill drawn by A. on and accepted by B. and C.: Held that, on the bankruptcy of A. and also of B. and C., the vendor might prove the bill against both their estates. Exp. Walker, T. 1813. 1 Rose 441.

1143. The court can order the trustees in a deed of assignment of a trader’s effects, to produce it before the commissioners as evidence of an act of bankruptcy, but if the petitioning creditor has
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acted under the deed, he cannot avail himself of it as an act of bankruptcy. Exp. Cawkwell, T. 1812. 1 Rose 313. The court can order an assignee to pay a messenger’s bill of fees, though he did not demand it till after a final dividend. Exp. Hartopp, T. 1813. 1 Rose 499.

1144. Where sales had taken place under a separate commission, the Ld. Ch. would not supersede it, but to give effect to a subsequent joint commission, he directed it to be impounded in the office of the secretary of bankrupts. Exp. Rowlandson, T. 1813. 1 Rose 416. Vide Exp. Tobin, 1 Ves. & B. 308.

1145. Joint creditors not allowed to vote in the choice of assignees under a separate commission, although the petitioning creditor, whose debt would have carried the choice, consented, there being separate creditors who had a right to vote. Exp. Simpson, M. 1815. 2 Rose 397.

1146. A joint creditor sued out two separate commissions, and under one he proved against the joint estate, and received a dividend: Held that he had not concluded himself by proving as a joint creditor, but that upon refunding the dividend with interest, he might prove as a separate creditor. Exp. Bolton, E. 1816. 2 Rose 389.

1147. Although the property in a partnership be in one or more members of it, with an interest in the profits merely in the others, yet, in bankruptcy, the property is administered as to the joint creditors, as belonging to them all. Exp. Hunter, T. 1816. 1 Rose 382.

1148. Where joint creditors, under an order to prove against separate estates, proved against one or more of them, exclusively of the rest, the estate so burdened was held entitled to reimbursement from the others. Exp. Wiltuck, T. 1816. 2 Rose 392.

1149. Where several firms were engaged in a joint adventure, and there was no joint property, the creditors of the adventure, in the event of bankruptcy, must prove against the separate estate of the individual, not of the firms. Exp. Wylie, T. 1816. 2 Rose 393. Vide Exp. Peake, ib. 54.

1150. A joint creditor sued out two separate commissions; under one he proved against the joint estate and received a dividend, being then ignorant of his right to prove against the separate estate of the other partner: Held, that he had not conclusively elected to prove as joint creditor, but that upon refunding the dividend with interest, he might prove as a separate creditor. Exp. Bolton, Exp. Swanzy, M. 1816. 1 Buck 7. Vide Heath v. Hall, 4 Taunt. 326. Young v. Hunter, 16 East 252, where it was held, that if a creditor of A. and B. takes out a commission against A., and receives a dividend under it out of the joint estate, he may still sue the other partner for the residue.

1151. A., a trader, being indebted to several persons, entered into partnership with B., and brought his stock into the concern. By the partnership articles it was agreed that the joint trade should pay A.’s creditors, as per schedule: Held, that a separate creditor of A., though named in the schedule, could not be deemed a joint creditor of A. and B. Exp. Williams, H. 1817. 1 Buck 13. Vide Gilby v. Copley; 3 Lev. 138. for the distinction between a deed inter partes, and one made in the first person. Also Scudamore’s Ca. 2 Inst. 673. Salter v. Kedgley, Carth. 76. Cooker v. Child, 2 Lev. 74. As to contracts not under seal, vide Marehington v. Vernon, 1 Bos. & P. 101. (n. a.) Et vide contra, Bourne v. Mason, 1 Vent. 6. Crow v. Rogers, 1 Stra. 592. Bull. N. P. 134.

1152. Under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, form part of the joint estate. Exp. Burn, E. 1817. 1 Jacob & Walk. 378.

1153. A retiring partner, by an agreement in writing, assigned and sold all his share of the stock, debts, &c. to the continuing partner, who agreed to pay a debt of the retiring partner, and also to pay him an annuity of 100l. for the due payment of which, the agreement recited that the father of the continuing partner (who was no party to it) should be security. This was held to be an executory agreement, and the father refusing to become security, the partnership stock, &c. was not thereby transferred to the continuing partner, so as to form part of his separate estate. Exp. Wheeler, E. 1817. 1 Buck 25.

1154. Where a separate commission issued against one partner, and the other was insolvent, but not made a bankrupt. It was held, that the joint creditors could
not come in competition with the separate creditors, and receive a dividend out of the separate estate of the bankrupt. Exp. Jansen, E. 1818. 1 Buck 227. 3 Madd. 229.

1155. Judgment of outlawry against two of three joint debtors, does not make the debt a separate one, as against the third debtor; it cannot therefore be proved under his separate commission. Exp. Dunlop, T. 1818. 1 Buck 253.

1156. A. was a partner in separate firms, each of which became bankrupt; the surplus of his separate estate shall be applied in discharging the joint debts of the firms, in proportion to the whole amount of the debts proved against each firm respectively. Exp. Franklin, E. 1819. 1 Buck 332.

1157. Where some partners in a firm, who are trustees of funds, misapply them by making use of them for partnership purposes; if such misapplication be with the knowledge of the other members of the firm, the cestui que trust may prove against the joint estate. Exp. Heaton, T. 1819. 1 Buck 386.

1158. T. was in partnership with M. and F. He also carried on a separate trade, and being indebted 100£. on his separate account to K., he sent him a bill of exchange that wanted two months of becoming due, for 300£., indorsed by T., M., and F.; but not by T. in his individual character, and requested K. to give him credit for 100£., and to send him a bill for the remainder of the 300£. K. gave him credit for 100£. and sent him a banker's check for 200£., which was duly paid. The bill for 300£. was dishonoured; T., M. and F. became bankrupts: Held, that K. was not entitled to prove for any part of the 300£. against the separate estate of T. Exp. Kirby, M. 1819. 1 Buck 511.

(d) Of the Situation of a solvent Partner, as connected with one who becomes Bankrupt, and herein of dormant and retiring Partners.

1159. It was for some time a matter of doubt, whether the share of one partner, who has embezzled the effects of the partnership (and who, contracting private debts, has become bankrupt in his separate capacity,) shall be applicable to make good his embezzlement to the co-partnership, before his private creditors can come in. In Richardson v. Goodwin, T., 1698. 2 Vern. 295. this question came before the court, and the master was directed to take an account, and state a case; but afterwards, in Gross v. Dykes, 1734, 2 Eq. Ab. 111. pl. 3. where a partner in a mercantile house embezzled the partnership property, and contracting separate debts, became bankrupt, and the assignees seized the partnership effects, and received the partnership debts. On a bill filed, they submitted to do as the court should direct; and it was decreed, that an enquiry be made into the bankrupt's share and interest in the copartnership concern, which shall be subject, first, to make good what he embezzled, and the residue shall be applied to pay his separate debts.

1160. The question, how far partnership stock is liable to the debts of copartners in the first place? was again agitated in Ryal v. Rolle, 1 Atk. 183. 1 Ves. 348. 375. when Lord Hardwicke said, it was never carried further than to debts contracted relative to the partnership, either after the bankruptcy or the death of one of the parties. But in Hanks v. Garret, M. 1790. 1 Ves. jun. 282. one partner absconded and died abroad, but never was a bankrupt; a separate commission issued against the other, under which the assignees seized the joint effects: Held, that the joint debts are to be first paid, and the residue divided between the bankrupt's estate and the representatives of the deceased partner, for whom the bankrupt, as surviving partner, was no more than a trustee. So in a case of the same name, H. 1792. 3 Bro. C. 437. it was held, that where there is a joint commission against partners, and a separate commission against one, and the assignees take possession of the whole fund, they must divide it among the joint creditors, and the separate bond creditors of the other partners cannot claim against them.—Note. An order for keeping distinct accounts under a separate commission against a co-partner cannot be made upon petition, without consent; for the solvent partner has an interest in the joint property, and in the debts on the joint estate; that relief, therefore, must be sought by bill. So, in another case, the creditors of a copartnership which failed, in two years where allowed to come upon the separate estate of one partner, in respect of offsets taken out of the partnership by him, without
the privity of the other; and assignees under a separate commission cannot come in upon a joint estate, for a sum brought into partnership beyond the bankrupt's share, for creditors rely on the ostensible state of the fund. *Lodges' assignees v. Dr. Fendall*, T. 1790. 1 Ves. jun. 105.

1161. H. a silkman, and F. a dealer in coals, were partners in both trades: they dissolved, and exchanged releases; F. took upon him the debts of the coal trade, and H. of the silk trade, and the credits were accordingly assigned. H. died, and F. became bankrupt; the messenger seized H.'s effects, and was turned out of possession. *Per curiam*: The seizure ought not to have been made, for by the release the property of the silk trade vested in H.; but his representative should have asserted his right at law, and not turned out the messenger. *Exp. Timner*, H. 1746. 1 Atk. 136.

1162. A share of a partnership trade, mortgaged to a partner, must be delivered, or it is a delusive credit within 21 Jac. 1 c. 19. *Ryal v. Rolle*, H. 1749. 1 Atk. 383. 1 Ves. 348. 375.

1163. Where one partner lends money to another generally, and it is not entered into the partnership books, he does not gain a specific lien on the share of the borrower. *S. C. Sed vide Crofts v. Pyke*, 3 P. W. 180: a strong negative case.

1164. Where one partner in a banking-house died before the assignment under a separate commission against the other partner, a second separate commission was established against him as surviving partner. *Exp. Smith*, E. 1800. 5 Ves. 295.

1165. Upon a separate commission the benefit of an insurance effected by the bankrupt, upon his own account, on a ship of which he was joint owner, is not liable to the joint creditors. *Exp. Parry*, T. 1800. 5 Ves. 573. *Exp. Browne*, T. 1801. 6 Ves. 136. S. P.

1166. A fair dissolution of partnership took place between two: one retired, and assigned the partnership property to the other, taking his bond for the value, and his indemnity against the debts; the other continued the trade separately, above a year, and then became bankrupt. *Per curiam*: The joint creditors had no equity attaching upon the partnership effects remaining in specie; but if they had, their remedy should be by bill, and not by petition. *Exp. Ruffin*, T. 1801. 6 Ves. 119.

1167. Petitioner, upon retiring from business, took a bond from his partners for the balance due to him, together with their covenant of indemnity, in which a surety joined them. Upon the bankruptcy of the remaining partners, petitioner was arrested by the joint creditors, whereupon he petitioned that the specific stock and debts of the old partnership might be applied to pay the debts of that partnership in preference; but his petition was dismissed with liberty to file a bill. And *Ld. Eldon* said, it would have been very easy to have avoided this, if, upon the retirement of one partner, all the effects had been assigned in trust to pay the debts. *Exp. Fell*, H. 1805. 10 Ves. 347.

1168. Under a separate commission against one partner, the joint property is administered as if both partners were bankrupts, viz. in satisfaction of the joint debts, either by bill or petition, in order to ascertain the surplus constituting the separate interests. *Everett v. Backhouse*, T. 1804. 10 Ves. 98.

1169. A joint and separate creditor must elect against which estate he will go in the first instance; and electing to go against the joint estate, he has no preference to the other joint creditors upon the surplus of the estate beyond the separate debt. *Exp. Bucan*, T. 1804. 10 Ves. 107.

1170. Upon a dissolution of partnership, by the retirement of one partner, followed by a bankruptcy, the right of the joint creditors against the joint property remaining in specie depends on the bona fides; and where the transaction has that character, the Chancellor will not grant the petition of joint creditors to prove under a commission against one of the partners. *Exp. Williams*, E. 1803. 11 Ves. 3. Vide S. C. at large; *post*, tit. *Partnership*, vi.

1171. A. and B. were joint traders. A. becoming insolvent, and B. abroad, defendant, a joint creditor, attached the goods of the co-partnership in the hands of C. Defendant obtained a verdict in the mayor's court. A. became bankrupt, and his assignees claimed the goods attached. A. having committed an act of bankruptcy prior to the attachment: Held, that the separate commissions
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over-reached the attachment, by relation to the act of bankruptcy. So an attachment in the West Indies shall be over-reached by bankruptcy. So shall an execution; for the effect of the relation under a separate commission is, to make the assignees and the solvent partner tenants in common, from the date of the act of bankruptcy. In the case of a separate bankruptcy, execution will not be permitted even by a joint creditor; but the joint effects must be distributed even in the absence of the solvent partner, and the surplus applied, under all the equities subsisting between the partners themselves. Barker v. Goodair, T. 1805. 11 Ves. 78. Vide Hankey v. Garrett, 3 Bro. C. C. 457. 1 Ves. jun. 236.

1172. After a dissolution of partnership a commission issued against the remaining partner, and then a joint commission against him, and the retiring partner. The assignees petitioned for a distribution of the joint effects, alleging that the parties were insolvent when they separated, and that the whole was a fraud, for the retiring partner had obtained an injunction and a receiver, on the other's failure. Per Eldon, C. The retiring partner has a lien on the joint effects under the agreement for dissolution, but not against the creditors of the other, claiming either under a title given to him, or as property left in his order and disposition within the statute 21 Jac. 1. c. 19. s. 11. But the joint creditors have no lien on the partnership effects until execution, which may be joint or several, for their equity depends on the rights of the partners themselves. Exp. Roselandon, T. 1813. 2 Ves. & B. 172. Vide Exp. Ruffin, 6 Ves. 119. Exp. Fell, 10 Ves. 347. Exp. Williams, 11 Ves. 3.

1173. Joint creditors under a bankruptcy, are bound by a bona fide dissolution of the partnership, and an assignment of the partnership effects to one partner. But where, after a dissolution and such an assignment, a bill was filed by the retiring partner against the other, alleging fraud in the non-performance of the articles of dissolution, and praying an injunction and a receiver, which was ordered: it was held, upon a subsequent bankruptcy, that such interference of the court restored the property to its original character, as being joint; unless the plaintiff in equity had, by his conduct, between the time of the injunction and the bankruptcy, ren-
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Of Transactions between solvent and Bankrupt Partners.


1177. In Deveyne v. Noble, T. 1816. 2 Meriv. 530. the following points were held by Eldon, C.—That on the death of D., a partner in a banking house, where the survivors carry on the business without changing the firm, and afterwards become bankrupts; the equities of the several classes of the partnership creditors against the estate of the deceased, with reference to the alleged solvency of the house at his death, and to the effect of subsequent dealings with the survivors, and of notice expressed or implied, and to the custom of bankers, were declared in manner following, on exceptions to the Master's report, distinguishing such classes of creditors according to the difference of circumstances. That the estate of the deceased partner D. was not discharged from creditors, who at his death continued to deal with the survivors, and were paid by them in part (including also creditors whose debts remained unaltered either by receipt or payment, and those whose debts had increased by subsequent payments to the surviving partners,) Sleech's Ca. in S. C. 165. 359.—That though the common law only partially adopts the lex mercatoria as to partnership trades, holding that there is no survivorship in respect of interest, but that in respect of partnership contracts, the obligation is joint, and attaches exclusively on the survivors, yet equity will relieve against joint bonds given on the ground of mistake. S. C. ib. 568. Vide Lane v. Williams, 2 Vern. 277. Bishop v. Church, 3 Atk. 961. 2 Ves. 871. Jacomb v. Harwood, 2 Ves. 265. Daniel v. Cross, 2 Ves. jun. 277. Gray v. Chiswell, 9 Ves. 118. Exp. Kendall, 17 Ves. 514.—That the equity of a creditor against the estate of a deceased partner is not barred by eight months' non-claim and payment in part by the surviving partners. S. C. ib. 566. See the above references. That there is no difference in principle between the case of a banking house and any other partnership, as to the equity of a creditor against a deceased partner's estate, for money paid into their hands constitutes a debt, and not a deposit. A creditor's leaving money therefore with the surviving partners of a banker does not constitute a new contract, nor operate as a relinquishment of the old security. S. C. ib. 568.—That there is no rule of convenience in fixing any period within which a creditor of a bank not making his demand on the surviving partners shall be held to have waived his equity against the estate of the deceased. S. C. ib. 569. That notice of the death of one partner, whether before or after the creditor has received part payment from the survivors is not material. S. C. ibid. 570. And that a creditor, by drawing on the surviving partners, acknowledges them as his debtors, but not exclusively. S. C. ibid. 570.—That where a deposit of Exchequer bills was made with the house, and they were sold in D.'s life-time, and the produce was applied to the use of the house, D.'s estate was responsible for the breach of trust, and not discharged by subsequent acts, from which it might be inferred that the creditor adopted the surviving partners as his debtors. Clayton's Ca., in S. C. ibid. 575.—That the money received by the sale of Exchequer Bills became a joint debt from the moment they were sold without the consent of the creditor, and equally so whether every individual partner was or was not privy to the sale, which amounts only to a breach of trust. S. C. ibid. 579.—That notice given to the surviving partners by a creditor of the firm as solicitor for the representatives of the deceased, intimating that the estate of the deceased would not be liable for their future dealings, shall not discharge the estate of the deceased from a debt previously incurred, to that creditor, of which he was at the time ignorant. And payments made in respect of cash balances, shall not be taken as operating in extinction of such a debt. S. C. ibid. 580.—That interest on the Exchequer Bills shall be allowed at 5 per cent. from the time of the sale, because the claimant had a right to consider it as a debt from that time, and had elected so to consider it. S. C. ibid. 580.—And that creditors who, after D.'s death, continued to deal with the surviving partners, by drawing out and paying in, but having drawn out before they paid in, the balance varied from time to time, though on the whole it increased by such subsequent dealings, the subsequent payments made by the survivors must be taken in reduction of the balance due at D.'s death, and his estate will be discharged pro tanto. S. C. ib. 585. Vide etiam ib. 605. 610. et post, tit. Trade, vi.
S. C. as to the application of indefinite payments, by the rules of the civil law, and their effect in cases of this nature.—That creditors, in respect of stock standing in the names of the partners, which was sold in breach of trust, and the proceeds applied to the partnership’s use, might, as against the estate of the deceased partner, either consider it as a debt, or a claim to have the stock specifically replaced at their option, and it makes no difference that the stock stood in the name of, and was sold by one partner only, if the proceeds were applied to the use of the house. Barings’ Ca. in S. C. ibid. 611. That where a deposit of bills was made with the house in D.’s life-time, which were sold by the house, part in his life-time, and part after his death; the estate of D. was not answerable in respect of the latter, though the creditor had no notice of the death of D. Houston’s Ca. in S. C. ibid. 616.—That creditors who dealt with the house after D.’s death, and by such dealing their debts were increased, but never reduced, shall be at liberty to claim against the estate of D. Palmer’s Ca. in S. C. ibid. 623.—And that where stock was transferred to the partners, as a security for advances under an agreement not to sell without notice, the estate of D. was held liable for all the stock sold, contrary to such agreement, and not merely to the extent of the stock sold beyond the amount of the debt due to the firm in respect of their advances. Ward’s Ca. in S. C. ibid. 624.

1178. On a dissolution of partnership, the retiring partner sold his share of the partnership concern and property to the other; but some of the property remained in the joint names, and subject to the order and disposition of both. They afterwards became bankrupts, and separate commissions issued against them: Held, that as there was property outstanding in the joint names, the joint creditors cannot prove under a separate commission against the retiring partner. Exp. Harris, T. 1816. 1 Madd. 583. Vide Exp. Ruffin, 6 Ves. 19. Exp. Fell, 10 Ves. 347. Exp. Williams, 11 Ves. 3.

1179. If a retiring partner assigns his share to his continuing partners, upon trust, to pay him an annuity for life, subject to abatement or enlargement, fluctuating with the profits of the trade, that will not determine the partnership, with reference to the creditors of the firm. Exp. Wilson, Exp. Todd, H. 1817. 1 Buck 48. Vide ante, sect. vii. (a) S. C.

1180. If a solvent partner pay all the joint debts, his proof against the separate estates of his partners will be limited to the amount of their respective shares of the joint debts so paid; and if their estates are insufficient to pay 20s. in the pound, the solvent partner will not be allowed to prove the deficiency of each estate against the estate of the other. Exp. Watson, M. 1819. 1 Buck 449. Exp. Smith, T. 1820. ibid. 492. S. P.

1181. Two of these assignees became bankrupt. The solvent assignee pays a debt due from the three to the estate: Held, that he is entitled to prove a third of the debt against each of the other assignees’ estates. Exp. Hunter, T. 1820. 1 Buck 552.

For cases of set-off, under the clause of 5 Geo. 2. c. 30. s. 28. relating to mutual credits, vide ante, sect. xiii.
Supersedeas—where granted.

1185. Denial to a creditor whose debt is upon a bill payable at a future day, is not an act of bankruptcy, and a commission grounded upon such an act, was superseded. Exp. Levi, M. 1733. 7 Vin. Gt. pl. 414.

1186. A commission issued upon a husband’s oath, of a debt as due to himself which was in fact due to his wife as administratrix. Supersedeas awarded. Exp. Scaples, M. 1734. 7 Vin. Gt. pl. 10.

1187. A. treated with petitioner to buy his equity of redemption of a mortgaged estate. Articles were signed, and A. paid 25l. to clear off the mortgage, and was to pay 150l. more on executing the conveyances. H. refused to complete the purchase, or pay off the mortgage, whereupon A. arrested him, and after two months imprisonment, made him a bankrupt. H. petitioned to supersede the commission, suggesting that it could not be founded on such a debt. Ld. Ch. doubted whether the remedy ought not to have been by bill, for performance of the contract, but said, if it had rested on that, he would not supersede the commission, but leave the bankrupt to try it at law. It appearing however that A., after the commission, took an assignment of the mortgage, he was restrained from proceeding in the commission, for he could hold till redemption, and compel a performance of the contract, and oblige H. to refund the 25l. for which he had only given an acknowledgment, as part of the purchase-money. As no action could be maintained, this commission was ill founded, and as it did not appear that A. ever offered to pay the rest of the purchase-money, the commission was superseded at his expense. Exp. Hylliard, T. 1751. 1 Atk. 147. 2 Ves. 407.

1188. In several instances, to prevent prosecutions for seignory, where the bankrupt did not surrender in due time, Ld. Macclesfield has superseded the commission, if no intent to defraud appeared.—Dict. in Exp. Wood, T. 1751. 1 Atk. 221.
shall elapse before the order for the supersedeas, and the application first made on that day by any other attorney, for a supersedeas and a new commission shall be preferred to that of the attorney who sued out the former.

1197. Three joint traders became insolvent, and one of them was an infant. A joint commission against the other two was superseded. *Exp. Henderson*, T. 1798. 4 Ves. 163.

1198. Where the act of bankruptcy was eleven years before the commission, and perfectly notorious, and the petitioning creditor, whose debt was a matter of account in dispute, would thereby get the whole direction. *Ld. Ch.* superseded the commission. *Exp. Bowes*, M. 1798. 4 Ves. 165.

1199. A joint commission against two partners in England, and another residing abroad, was superseded. *Exp. Layton*, T. 1801. 6 Ves. 434.

1200. Where two commissions are taken out against the same party, the court will exercise a discretion, controlling the strict right, and support that which is most convenient, if the objections to it can be removed by superseding the other. *S. C.*

1201. It is an abuse to delay the execution of a commission, with a view to another arrangement. *S. C.*

1202. As a joint commission is supersedeable, where one partner resides abroad, so it shall be, where one partner is a lunatic or an idiot. *Exp. Barwis*, H. 1802. 6 Ves. 601.


1204. And on account of gross negligence, the solicitor was ordered to pay costs. *Exp. Conway*, sup. *Exp. Arronsmith*, M. 1807. 14 Ves. 209.

1205. A commission of bankruptcy may be superseded after the certificate obtained, as where it is fraudulently taken out at the instance of the bankrupt: but where the application which might have been made earlier, was delayed five years, and was founded upon objections to the trading and petitioning creditor’s debt, which must have been tried at law: the petition was dismissed. *Exp. Moulle*, H. 1808. 14 Ves. 602.

1206. Though a second commission against a bankrupt uncertificated under a former commission is bad at law, yet it is doubtful whether the Ld. Ch. will, at the instance of the bankrupt, supersede the latter, if the assignees under the former will not interfere with the property. *Exp. Rhodes*, H. 1809. 15 Ves. 359. *Exp. Lees*, *Exp. Poulten*, H. 1810. 16 Ves. 472. *Exp. Martin*, E. 1808. 15 Ves. 114.

1207: A bankrupt praying to supersede his commission on the ground of infancy, was left to his action; having traded two years as an adult; and the creditors resisting. *Exp. Watson*, T. 1809. 16 Ves. 263.

1208. A commission of bankruptcy may be superseded at any time after the first meeting, upon consent of all the creditors who had proved. *Exp. Duckworth*, H. 1810. 16 Ves. 416.

1209. There not being a sufficient act of bankruptcy apparent on the proceedings, the Ld. Ch. ordered a further affidavit to be laid before him; and that not being satisfactory, he superseded the commission with costs against the petitioning creditor, having previously suspended the insertion of the advertisement in the Gazette. *Exp. Foster*, H. 1811. 1 Rose 49. 17 Ves. 414.

1210. Though there be a trading, a debt, and an act of bankruptcy; yet, if a commission be taken out for a purpose foreign from its object (as to work a dissolution of a partnership) it is supersedeable at the costs of those who take it out. *Exp. Brown*, T. 1810. 1 Rose 151.

1211. A. and B. were partners, and separate commissions issued against them; A. obtains his certificate, but before it was allowed a joint commission issued against him and B.; on petition to supersede A’s separate commission, Ld. Ch. directed the joint commission to be superseded, on the ground of length of time, viz. eight years. A’s having obtained his certificate, and of a doubt whether there were any joint effects. *Exp. Rowlandson*, H. 1811. 1 Rose 89.

1212. Where a bankrupt, through erroneous advice, was induced not to surrender, and was prosecuted criminally, the court superseded the commission, to stop the prosecution, as no fraud in the bankruptcy appeared. *Exp. Lavender*, E. 1811. 18 Ves. 18. 1 Rose 55. *Vid* *Exp. Wood*, 1 Atk. 222.

1213. The court will supersede a commission taken out on a concerted act of
bankruptcy, though it be carried on bona fide, and without collusion. Exp. Gouthwaite, E. 1811. 1 Rose 87.

1214. If a man, who is aware that a commission superseded under Lord Rosslyn's order will be proceeded in, and he takes out another, it will be superseded at his costs. Exp. Sanden, E. 1811. 1 Rose 85. Vide Exp. Ellis, 7 Ves. 155. Exp. Leicester, 6 Ves. 429.

1215. Ld. Ch. will supersede a separate commission, to give effect to a subsequent joint one, upon the principle of general advantage to the creditors. And the prior petitioning creditor, unless he has acted mala fide, shall receive all the costs of the superseded. Exp. Brown, M. 1812. 1 Rose 433. 1 Ves. & B. 66.


1217. If a commission is clearly proved to be the commission of the bankrupt, it must be superseded, but it is no objection that it has been taken out to defeat an execution. Exp. Gardner, M. 1812. 1 Rose 377. 1 Ves. & B. 45. Vide Exp. Downes, 1 Rose 398. Exp. Gouthwaite, ib. 87.

1218. The court will supersede separate commissions taken out by a joint creditor against persons who had just ceased to be partners, and who had very few separate debts. Exp. Gardner, M. 1812. 1 Ves. & B. 74.

1219. With the consent of the petitioning creditor the Ch. will supersede a commission before it is opened. Exp. Trigwell, H. 1813. 1 Ves. & B. 348. 2 Rose 108: but the ground of his consent should be stated. Vide Exp. Browne, 15 Ves. 472. And under circumstances the Ch. will restrain the insertion in the Gazette. Exp. Fletcher, 1 Ves. & B. 350. Vide Exp. Foster, 17 Ves. 414. 1 Rose 49. Exp. Lancaster, 17 Ves. 512.

1220. The court will supersede a commission on the ground of delay in opening it, but will not in general assign the bond, because that is conclusive at law against the defendant, and there may be a better remedy by action on the case. Exp. Fletcher, T. 1813. 1 Rose 454. 1 Ves. and B. 350.

1221. Although the act of bankruptcy may not have been concerted, yet if the commission is clearly the commission of the bankrupt, and he evidently has the management and direction of it, the court will instantly supersede the commission. Exp. Downes, T. 1813. 1 Rose 398. Vide Exp. Gardner, ib. 378.

1222. The existence of a prior separate commission will invalidate a subsequent joint one. But for the convenience of administering the joint property, the court will, upon superseding the separate commission, give effect to the joint one, unless there be a strong reason against the court so interfering; and it is not sufficient that, by such interference, a separate creditor, to a great amount, will be deposed of his right of voting in the choice of assignees. Exp. Pachelor, T. 1814. 2 Rose 26.

1223. A creditor who had proved his debt is not thereby precluded from applying to supersede the commission, but this is not a general rule. Exp. Bonsor, T. 1814. 2 Rose 61. Vide Rankin v. Horner, 16 East 191. 1 Rose 393. (n.)

1224. A second commission was superseded, and a procedendo issued on a former commission which had expired, where the petitioning creditor under the first commission had been prevented from prosecuting his commission by the artifices of a person who was desirous of covering certain transactions between himself and the bankrupt by a lapse of two months. Exp. Knight, T. 1814. 2 Rose 319.

1225. Under Ld. Rosslyn's order of the 26th June, 1793, it was held, that in proceeding on a country commission the party is not entitled to 28 days, and as much more time as may be necessary for the post. Exp. Henderson, E. 1815. Coop. 227.

1226. Though the commission be legally valid, yet if it has been taken out against good faith, or with a view to enforce a compliance with an arrangement then pending between the parties, this court will supersede it on the general principle which all courts adopt to control the abuse of their process. Exp. Harcourt, T. 1815. 2 Rose 203.

1227. Although the requisites to sustain the commission appear on the proceedings to be established, yet if the court be satisfied on affidavit of their insufficiency, the commission will be well superseded without an issue. Exp. Goldsmore, T. 1815. 1 Rose 234. 1 Madd. 67. Vide Exp. Magennis, 1 Rose 84.

1228. A commission under which the bankrupt has obtained his certificate will
not be superseded on an objection to the trading; or that debtors to the estate, upon that ground refuse to pay the assignees. But quere, if the application for that purpose were made by all the creditors under the commission. \textit{Exp. Crowder}, M. 1815. 2 Rose 324.

1229. Where a commission issues on a denial, concerted between bankrupt and his sister, who was the petitioning creditor, it will be superseded with costs. \textit{Exp. Binmer}, H. 1816. 1 Madd. 250. See the various cases referred to by the Vice Chancellor on this subject.

1230. Although all the requisites of a commission concur to its validity, yet if taken out for an indirect and improper object, (as by a landlord, to determine a lease contrary to good faith,) it will be superseded. \textit{Exp. Gallimore}, T. 1816. 2 Rose 424.

1231. The court will supersede a commission concerted between the solicitor and petitioning creditor, and they shall pay the costs. \textit{Exp. Prosser}, H. 1817. 1 Buc. 77.

1232. The court will supersede a commission on the petition of the bankrupt, where the act on which the adjudication was made was invalid, and there was no affidavit of any other act. \textit{Secus}, if there had been such an affidavit. \textit{Exp. Burgess}, T. 1818. 1 Buc. 233.

1233. The court will not support a concerted commission, even though it be for the benefit of the creditors, that it should proceed. \textit{Exp. Brooks}, T. 1818. 1 Buc. 257. \textit{Vide Exp. Prosser}, ib. 77.

1234. If a commission be sued out at the instance of the bankrupt, the court will, on that ground alone, supersede it, although it may have all the legal requisites for its validity. The Ld. Ch. was of opinion, that where the circumstances are such as to make the bankrupt the agent of the petitioning creditor, the commission would be bad at law, on the ground of an implied concert on the part of the petitioning creditor, and as there might be a difficulty in bringing the facts before a jury, the practice of the court, where the case requires it, is to direct the bankrupt to be examined upon an issue to try the validity of the commission. \textit{Exp. Staff}, T. 1819. 1 Buck 481.

(b) Where refused.

1235. The court will not supersede a commission, or direct an issue upon the bankrupt's general affidavit, that he is not one, but will leave him to his \textit{habeas corpus}, if committed for not answering particular facts, before the commissioners. \textit{Exp. Lingood}, 1 Atk. 241. \textit{Vide Crowley's Ca. 2 Swans.} 1. 31.

1236. Where there is a doubt of the bankruptcy, and the bankruptcy is abroad, the court will not supersede the commission, but send it to law, but if the bankruptcy be at home, the court will refer it back to the commissioners to re-consider the evidence. \textit{Exp. Gulston, Exp. Dale}, T. 1743. 1 Atk. 198.

1237. Where a bankrupt has surrendered and acquiesced a year and a half, the court will not direct an issue to try the bankruptcy, but leave him to his remedy in trover, against the assignees. \textit{Exp. Nutt}, T. 1743. 1 Atk. 102. Neither will the court supersede a commission, after all the proceedings are completely ended, though the act of bankruptcy was doubtful. \textit{Exp. Desanths}, T. 1753. 1 Atk. 146. So, after two dividends, and the creditors have released the bankrupt, the court permitted him to stand in the assignee's place, and collect the remainder of the debts, but would not supersede the commission, lest it should defeat his certificate. \textit{Exp. Leaverland}, E. 1751. 1 Atk. 145.

1238. A commission is \textit{ex debito justitia}, and there is no instance of a supersedeas, without directing an issue, unless fraud or malice appears. \textit{Exp. Wilson}, H. 1752. 2 Atk. 218.

1239. Adjudication of bankruptcy, on Saturday, too late for the Gazette. On Monday another solicitor, having notice, obtained a supersedeas, under the general order of 26th June, 1793: both the bankruptcy and the supersedeas appeared in the Gazette on Tuesday. The supersedeas was quashed; and a \textit{procedendo} issued. \textit{Exp. Ellis}, T. 1802. 7 Ves. 183. \textit{Vide Exp. Leicester, 6 Ves. 429. Exp. Layton, Exp. Hardwicke}, ibid. 494.

1240. Ld. Ch. refused to supersede a commission of bankrupt, before any meeting, upon petition and affidavits stating the insolvency of the bankrupt, that he never committed an act of bankruptcy, and did not owe the petitioning creditor 100l. nor would he direct an issue. \textit{Exp. Stokes}, T. 1802. 7 Ves. 505.

1241. A commission of bankrupt is an execution for all creditors. The petitioning creditor, therefore cannot receive his debt, nor the commission be
superseded, while the others are unsatis-

fied. S. C. 408.

1242. A bankrupt who has neglected to surrender, cannot supersede his commission, though all his creditors should consent, without first obtaining leave to surrender. Exp. Jones, E. 1803. 8 Ves., 328. T. 1805. 11 Ves. 409. S. P. and the bankrupt's name the same. In both cases the bankrupt was the petitioner, but in the latter case his petition was opposed by the assignees.

1243. Though 20s. in the pound have been paid under a commission of bankruptcy and the certificate obtained, the commission cannot be superseded without consent of the creditors, for some may be abroad and others not to be found; besides the assignees acting correctly would be left open, and the title of purchasers under the commission might be thereby defeated. Exp. Jackson, T. 1803. 8 Ves. 583.

1244. A bankrupt was described in the commission as a surviving partner, which petitioner alleged to be unnecessary and injurious to him, but Ld. Ch. would not supersede the commission on that account, or allow the description to be altered. Exp. Thomson, M. 1803. 9 Ves. 207.

1245. The court will not supersede a commission of bankruptcy even for fraud, where purchases have been made under it. Exp. Edwards, T. 1804. 10 Ves. 104.

1246. A bankrupt cannot supersede his commission by impeaching the petitioning creditor's debt, on the ground of a security, taken privately, the remedy under the statute 5 Geo. 2. c. 30. s. 24. being given to some other creditor. Exp. Kirk, H. 1809. 15 Ves. 464.

1247. A bankrupt cannot supersede his commission whilst under commitment by the commissioners, even with the consent of all his creditors. Exp. Bean, T. 1810. 17 Ves. 47. 1 Rose 211. Nor before he has surrendered. Exp. Jones, 11 Ves. 409. But this rule will be dispensed with under circumstances: as where the bankrupt had been abroad and had not heard of the commission, and all the creditors consented. Exp. Hopkins, E. 1812. 1 Rose 228. Vide etiam Exp. Lavender, ib. 55. where the bankrupt had been prevented from surrendering through ignorance or mistake. See also Exp. Wood, 1 Atk. 222.

1248. Where a bankrupt has by a ver- dict in an action of trover against his assignees established that there was no act of bankruptcy, the court will not, unless under very special circumstances, delay superseding the commission, till after another trial; nor is it sufficient ground either to support the commission, or get a new trial, that the assignees have evidence sufficient, which by surprise they were prevented from producing, for they shall be presumed to know, that by the action the bankruptcy is disputed, and therefore they ought to be prepared with evidence to support it. Exp. Dick, H. 1811. 1 Rose 51.

1249. A. and B. were partners; separate commissions issued against them; A. obtained his certificate, but before it was confirmed by the Ld. Ch. a joint commission issued against A. and B. Upon a petition that A.'s separate commission might be superseded, the Ld. Ch. refused it; but directed A.'s certificate to be allowed, and the joint commission to be superseded on the ground of length of time, A.'s having obtained his certificate, and a doubt whether there were any joint assets. Exp. Rowlandson, H. 1811. 1 Rose 89.

1250. A commission of bankruptcy will not be superseded without consent of all the creditors, who had proved, certified by the commissioners and affidavit of the bankrupt's confirmation of all purchases under the commission; and the consent even of those who had received 20s. in the pound, will not be dispensed with. Exp. Milner, T. 1812. 19 Ves. 204.

1251. A commission cannot be superseded before it is sealed, but the petitioning creditor delaying to seal it, and taking that objection, the time of sealing it was limited to three days. Exp. Williams, T. 1813. 2 Ves. & B. 255.

1252. The Chancellor will not supersede a joint commission, merely because a separate one is proceeding in Ireland, though a hard case against the bankrupt, for that is analogous to proceedings in prosecution in another country as a cessio bonorum in Holland or in Russia, and until lately to a sequestration in Scotland. Exp. Cridland, T. 1814. 5 Ves. & B. 94. 2 Rose 164.

1253. Ld. Ch. on petition sustained a commission against the following objections: first, that a joint bond to the great seal had been executed by only one part-
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Supersedeas—where refused.

mer; secondly, that one of the bankrupts had been the subject of two former commissions, and although he had obtained his certificate, yet he had not, under the second paid 15s. in the pound. Exp. Hodgkinson, H. 1815. 2 Rose 172. Roberts v. Hardie, M. 1814. ib. (n.)

1254. A bankrupt who has not surrendered, cannot petition to supersede his commission, neither can a separate commission be superseded at the instance of joint creditors, where a joint commission cannot be sustained. Exp. Roberts, T. 1815. 1 Madd. 172.

1255. Ld. Ch. superseded a commission which had issued against a man by the name of Laidlow, at the instance of a creditor who had taken out a commission against him, by his right name of Laidlaw, although the bankrupt had used as well one name as the other, and though they were idemsonans. But whether the commission would have been superseded at the instance of the bankrupt himself was not determined. Exp. Schofield, T. 1815. 2 Rose 246. Vide Stevens, v. Elizze, 1 Rose 360. 3 Campb. 256. Exp. Baldwin, 2 Rose 20. Et vide Exp. Smith, 2 Rose 25, where the court sustained a commission taken out against a man by the name he had adopted.

1256. It is no ground for a supersedeas that a particular trading is not specified in the commission, for the general description of “dealer and Chapman” is sufficient. Exp. Herbert, T. 1815. 2 Rose 248.

1257. A commission under which the bankrupt has obtained his certificate will not be superseded on an objection by one creditor to the trading, or that debtors to the estate upon that ground refuse to pay the assignees; quere if the application for that purpose were made by all the creditors under the commission. Exp. Crowder, M. 1815. 2 Rose 324.

1258. The court will not supersede a commission merely on account of a misdescription of the bankrupt, if he is well known as described. Exp. Horsey, T. 1816. 2 Madd. 11. Sed vide Re Gordon, and Exp. Marsden, ib. 13. Vide etiam Stevens v. Elizze, 3 Campb. 256. Exp. Smith, 1 Rose 26. Re Baldwin, ib. 20. Exp. Schofield, 2 Rose 246, where the bankrupt was described by a wrong name.

1259. A separate commission will not be superseded to give effect to a joint one, where the bankrupt has committed a felony in not surrendering to the separate commission. Exp. Roberts, Exp. Wells, H. 1816. 2 Rose 378.

1260. One who has not sworn to a debt in support of his petition, nor proved it under the commission, cannot petition for a supersedeas of the commission. Anon. T. 1817. 2 Madd. 281.

1261. Where a commission had issued to a place at which only two creditors resided, and 200 miles distant from the great body of them, the court refused to supersede it on that account, but ordered the time for the choice of assignees to be enlarged ten days. Exp. Fellows, T. 1817. 2 Madd. 141.

1262. Where a firm consisting of four persons became bankrupts, the creditors of a firm of three of them may (under Lord Rosslyn’s general order) prove their debts under the commission against the four without any further order. Exp. Worthington, H. 1818. 3 Madd. 26. Vide Exp. Mason, 1 Rose, 423.

1263. Though a commission be obtained by collusion with the bankrupt, yet if assignees are chosen, who are not under the control of the bankrupt, and the commission is fairly proceeding for the benefit of the creditors, it will not be superseded. Exp. Warwick, E. 1819. 4 Madd. 262.

1264. A commission cannot be superseded with the consent of the petitioning creditor, before the first meeting for the proof of debts, the application being within the words of the order of the 21st August, 1818. Exp: Law, T. 1819. 4 Madd. 273.

1265. If in issuing a commission the petitioning creditor be influenced by motives not fraudulent, although other than the mere distribution of the estate, as the effecting the dissolution of a partnership, the court will not on that account supersede the commission. Exp. Wilm. Bram, M. 1819. 1 Buck 459.

1266. If a bankrupt die without surrendering, a petition presented by his representative to supersede the commission, cannot be heard unless it make out a case that would induce the court to permit a surrender if the bankrupt were living. Exp. Crowther, T. 1820. 1 Buck. 480. Vide Exp. Gardiner, ibid. 452.

1267. A petition to the bankrupt to supersede the commission will be dis-
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missed even without a counter petition, where the commission had been established by an action at law, and the bankrupt did not appear. Exp. Caponhurst, T. 1820. 1 Buck 476.

(c) Of the Supersedeas generally.

1268. Where a commission was superseded by the consent of the petitioning creditor, the court would not revive it on the application of other creditors, who had not come in. Ald. Baekwell's Ca. M. 1683. 1 Vern. 208.

1269. Where a commission is superseded merely for a defect in form, and no doubt of the bankruptcy, petitioning creditor shall pay costs. Scus, if the act is not fully proved. Exp. Goodwin, E. 1740. 1 Atk. 101.

1270. Tho' a majority of the creditors certify, that a commission ought to be superseded, yet if one says, "I shall be able to prove in a few days, do not certify yet," the court will afford him an opportunity to prove his debt. Exp. Crisp, T. 1744. 1 Atk. 135.

1271. Upon superseding a commission, the court may either direct an inquiry into the bankrupt's damages, before a master, or direct an issue at law, and for better recovery, may assign the petitioning creditor's bond. Exp. Gayter, M. 1749. 1 Atk. 144.

1272. Petition to supersede a commission, obtained by fraud. The petition was founded on the affidavit of three persons, who swore they had perjured themselves in proving their debts, for that they were not creditors. The commissioners were directed to inquire into the reality of those debts, and such others as they should see cause. Exp. Lord, M 1750. 2 Ves. 26.

1273. An attorney undertook to put in bail for his client, but neglected it, on which an order was made upon him, and an attachment issued. The attorney became a bankrupt: Held, that plaintiff in the action had a sufficient interest to apply for a supersedeas. Exp. Bold, H. 1788. 1 Cox 429.

1274. A commission supersedable under Lord Loughborough's order of June 26, 1793, is not actually superseded, till the writ issues; and therefore having been opened, and the bankruptcy adjudged, after the order made for the supersedeas, but before the writ sealed, and notice of the application having been sent to the solicitor, according to the practice in the office, the commission was supported. Exp. Leicester, T. 1801. 6 Ves. 429.

1275. Whether the order of Ld. Apsley, of Feb. 12, 1774, that a docket struck, and no commission issued thereon, shall in no case prevent a commission by another creditor, upon an application not made in less than four days, can be strictly acted upon, quare; the practice in the office being at variance with it, and there being danger of fraud. Ld. Ch. declined to give a decided opinion. S. C.

1276. An order for a supersedeas has no effect till the writ issues. Exp. Layton, Exp. Hardwicke, T. 1801. 6 Ves. 434.

1277. Where a docket is struck for a commission of bankruptcy, although the commission is not issued within the time limited by the general order, yet a second commission cannot be sustained without an order of supersedeas for the first. Exp. Dods, M. 1803. 1 Smith Rep. 120.


1279. A bankrupt under commitment for not answering satisfactorily, has a right to petition to supersede his commission, on an objection to the proof of trading. In this case the court directed an issue. Exp. M'Gennis, E. 1811. 18 Ves. 289. 1 Rose 34.

1280. Commission of bankruptcy superseded, and an action brought, the Ld. Ch. ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial; with liberty to inspect and copy. A judge has no authority to make such an order. Exp. Warren, T. 1812. 19 Ves. 162. 1 Rose 276.

1281. The commissioners met within five days after the commission issued, to proceed under it, but they were compelled to adjourn, because the attendance of three witnesses who were to prove the act of bankruptcy could not be procured, on which a petition was presented to enforce their attendance, but it could not be heard before the end of the twenty-eight days mentioned in the general order of 26th June, 1793, when a second docket was struck. Affidavits were made of due diligence in prosecuting the first commission, and that one witness was examined,
BANKRUPT XVI.

Of the Supersedeas generally.

which would have been a sufficient proceeding under the general order to have prevented a supersedeas, if it has not been previously issued and a second commission sealed; as to which Ld. Eldon said, he considered that a supersedeas, and a second commission, were to be deemed as sealed, for the purpose of proceeding on them from the time they were delivered to the messenger; but, in the present case, it appearing that the act of bankruptcy to support the first commission, was proved within an hour or two after the second commission had issued; and that the solicitor, under the first commission, when he found a second docket struck, had served the solicitor who struck that docket with a copy of the petition (to procure the attendance of witnesses) presented and answered, and had also given him notice of the day for hearing such petition, and that the first commission would be proceeded on, the Ld. Ch., under these circumstances, quashed the supersedeas of the first, and superseded the second commission. Exp. Freeman, M. 1812. 1 Ves. & B. 34. 1 Rose 380. In which case Ld. Eldon observed, that none of the bankrupt statutes give any directions as to superseding commissions, except where the creditor has privately received a part of his debt, in which case it is expressly declared by stat. 5 Geo. 2. c. 30. s. 24. that the commission shall and may be superseded, giving the right to the party, and no discretion to the Chancellor. As to other cases the court has exercised a discretionary power, considering a commission as an action and execution in the first instance, and this jurisdiction has been properly exercised where fraud was inferred from a suspension of proceedings for six months, (as in Exp. Puleston, 2 P. W. 545.) So, where the attendance of witnesses to prove some specific fact is withheld, the court has ordered the attendance of such witnesses, (as in Exp. Higgins, 11 Ves. 8.) Up to the year 1793, a commission was deemed supersetable if eight Gazettes had been published after the commission issued, and no proceedings had been taken, but his Lordship said, there was a great distinction between a commission supersetable and one to be superseded. The general order of 1793 was a rule of practice to prevent, and not to protect a fraud, by staying the execution of a commission intended bona fide to be proceeded in. A commission which is supersetable under the general order, is not actually superseded without a petition, nor until the writ has issued, which is subject to the Chancellor's discretion; but an affidavit that it does not appear from the Gazettes, that the party has been declared a bankrupt within the time is prima facie sufficient to obtain a supersedeas, and to prevent it, the strongest proof will be required of a bona fide intention to proceed, but that the creditor is prevented by some inevitable cause, (as in Exp. Layton and Hardwicke, 6 Ves. 454. Exp. Leicester, ib. 429. and Exp. Ellis, 7 Ves. 135.) Ld. Eldon further said, he had given directions that no second commissions should be sent to him in future without a note, specifying what had been done under the first.

1282. A petition to supersede a commission will be dismissed if no collision be proved, but in a suspicious case it will be dismissed without costs. Exp. Gardener, M. 1812. 1 Ves. & B. 45. 1 Rose 377.

1283. The consequence of superseding a commission is, that all falls with it. Exp. Brown and Munton, M. 1812. 1 Ves. & B. 66.

1284. Though a bankrupt would be restrained from repeated attempts to supersede the commission against him, amounting to vexation, he should not be prevented from bringing a second action; but pending that action, and an inquiry directed relative to an estate, by the sale of which he proposed to pay his debts, the commission was ordered to proceed in the usual course. Exp. Bryant, F. 1813. 1 Ves. & B. 506.

1285. If a creditor, who, believing a commission to be invalid, refused to prove under it, and acted adversely, declaring to the bankrupt and others, that he meant to petition for a supersedeas and to stay the certificate, unless his debt was paid or satisfied. This is not such a tampering as will operate in bar to his petition. Exp. Paterson, T. 1813. 1 Rose 402.

1286. A petition to supersede a second commission, must be served on the assignees under the first. Exp. Irvine, T. 1815. 1 Madd. 74. Vide Exp. Rhodes, 15 Ves. 542.

1287. Where a bankrupt petitions to supersede his commission, on the ground
that there is no act of bankruptcy, the court, (though no affidavit is filed in support of the commission, or notice that the proceedings would be produced,) will look into the proceedings to see if there is an act of bankruptcy. Exp. Vypond, E., 1816. 1 Madd. 624.

1288. A case of fraud must be made out to obtain a supersedeas after the certificate is allowed, unless the invalidity appear on the face of the proceedings. Exp. Levi, T. 1817. 1 Buck 75. Vide Exp. Crowder, 2 Rose 324.

1289. On a petition to supersede a commission, the bankrupt's examination before the commissioners is sufficient to show that the bankrupt was not a creditor, though the petitioner was not present at such examination. Exp. Foules, T. 1817. 1 Buck 98.

1290. On an order to proceed to trial upon two issues, to try the validity of a commission sought to be superseded, plaintiff, in his notice to the bankrupt of the acts intended to be relied on at the trial, must specify the acts relied on, the times when they were committed, and the witnesses who will be called to prove them. Exp. Bogen, M. 1817. 1 Buck 187.

1291. A commission of bankruptcy had been maliciously obtained and afterwards superseded, and the Chancellor had assigned the petitioning creditor's bond, on which the bankrupt had brought an action on the case; afterwards by a rule of court (made on consent) all matters in dispute except the bond, were referred to an arbitrator, who made his award, with an exception of the bond: It was held, that no action can be subsequently maintained on the bond, for the first action was a waiver of a second on the bond, and to restore that right, the agreement of the parties must be unequivocal: Held also, that the assignment of the petitioning creditor’s bond by the Chancellor, is conclusive evidence of malice. Holmes v. Wainwright, H. 1818. 1 Swanst. 20. Vide Exp. Fletcher, 1 Rose 454. Exp. Laren, 11 Ves. 416. Exp. Rimene, 14 Ves. 600.

1292. If it appear by the petition of a creditor to supersede a commission, that an action is commenced to try its validity, the court will not supersede the commission till the event of the trial is known; though no person should appear to oppose the petition. Exp. Price, E. 1818. 1 Buck 230. 3 Madd. 228.

1293. A writ of supersedeas of a commission, devests the estates conveyed to the assignees by the bargain and sale of the commissioners. Exp. Smith, T. 1818. 1 Buck 262; (n) where, see the form of a writ of procedendo, and a note by the reporter, as to the general effect of a supersedeas.

1294. Where a bankrupt petitions to supersede his own commission, and an issue is directed, the court will order the petition to stand over, so as to allow time for the trial of the issue; and if the trial should not take place within the period allowed, the bankrupt must satisfactorily account for the delay by an affidavit, or his petition will be dismissed. Exp. Ranken, M. 1818. 3 Madd. 371.

1295. Ordered, that in future no commission shall be superseded on the consent of all the creditors who have proved their debts until after the second meeting; but, if the commissioners are satisfied at the second meeting, that a petition will be presented for superseding the commission with the consent of all the creditors who shall have proved debts, they may adjourn the choice of assignees to afford an opportunity of presenting such a petition. Ordo. Gen. per Elden, C. 21st August, 1818.

1296. A bankrupt may petition to supersede his commission, on the ground that he was no trader, though he has obtained his certificate under it, if upon an action by the assignees against a creditor their title is successfully resisted, and the commission become ineffectual. Exp. Bass, T. 1819. 4 Madd. 270. Vide Exp. Crowder, 2 Rose 324; ante, pl. 1257, where an application by one creditor to supersede the commission under similar circumstances was refused.
BANKRUPT XVII.

Of Bankrupt Trustees, Executors, or Agents.

1297. A. beyond sea consigned goods to B. in London, who became bankrupt before the goods arrived; if A. can stop the goods in transitus, it is allowable, and the assignees shall have no relief. Wise- 

man v. Vandeput, M. 1690. 2 Vern. 203. Vide Snee v. Prescott, post, S. P. 1298. Goods in trust are not liable to the bankruptcy, though in possession of the bankrupt. Copeman v. Gallant, T. 1716. 1 P. W. 314. 1299. If A. beyond sea, consigns goods to B. in London, on B.'s account, and draws on him for the amount, the property vests in B., though the money is not paid, and it is liable to his debts. — Secus, of a factor or agent consignee, for he can have no property in the goods. Godfrey v. Furzo, T. 1733. 3 P. W. 185. 1300. A. in London, bought stock for I. S. in Holland, out of the monies of I. S. in his hands, and took the stock in his own name, but entered it in his books as the stock of I. S. A. became bankrupt: Held, not liable to the bankruptcy. Exp. 

Chion, T. 1721. 3 P. W. 187. (n.) 1301. Where assignees have possessed themselves of the effects of a bankrupt executor, the court will appoint a receiver, to whom they shall account for what they have got in of the testator's estate. Exp. 

Ellis, E. 1742. 1 Atk. 101. 1302. Where agents abroad are in advance for their principal in London, and doubting his solvency, they make bills of lading to their own order, indorsed in blank; though these bills of lading come to the hands of the principal, yet if the agent's partner in London writes abroad for the bills of lading, and an order for the captain to deliver the goods to him, he may retain them against the assignees, till re-payment of the advance. Snee v. 

Prescott, H. 1743. 1 Atk. 245. 1303. Bills or notes indorsed specially, viz. "Pay the money to my use," will prevent their being filled up with such an indorsement as passes the interest. S. C. 1304. The reason the law goes upon, in compelling a proprietor of goods after delivery, to come in as a creditor, is on account of the credit a bankrupt gains by having the goods in his custody. S. C.

1305. The clause in 21 Jac. 1. c. 19. "That all the goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors," relates to goods which he has in his own right only. Exp. 

Marsh, T. 1744. 1 Atk. 159. 1306. One M. had 500 barrels of tar in his warehouse at the time of his bankruptcy; it was the joint property of himself, F., and G., and only waiting to be shipped; this is only a temporary custody, and not within 21 Jac. 1. c. 19. Exp. 

Flynn, M. 1748. 1 Atk. 185. 1307. Where an assignee becomes bankrupt, his assignees, as well as himself, must join the commissioners in the new assignment. Exp. 

Newton, E. 1749. 1 Atk. 97. 1308. Bankrupt executor, and residuary 

legatee, has paid the testator's debts, and particular legacies, but refuses to collect the rest; the court will assist the assignees to collect them in his name, though they have not the legal interest. Exp. 

Butler, T. 1749. 1 Atk. 210. 213. Amb. 78. 1309. Goods consigned to a factor, and remaining in specie at the time of his bankruptcy, belong to his principal; so, if sold, and notes taken by the factor in payment, the principal shall have the notes, and not the assignees of the factor. Exp. 

Dumas, T. 1754. 1 Atk. 254. 1310. Bills sent by A. abroad, to B. here, with directions to apply the money to a particular use; B. became bankrupt before receipt of the money; A. has a special lien on the money, and it shall not be liable to the bankruptcy. Secus, if the bills had been sent on a general account, Exp. 

Owsell, H. 1756. Amb. 297. 1311. Where bills drawn in America on a merchant in London, were protested for non-payment on his becoming bankrupt, the drawer who paid the bills shall prove them, together with 20 per cent, charges, by the provincial law. Francis 

shall be paid into the Bank, for the benefit of testator's creditors. Exp. Leek, E. 1789. 3 Bro. C. C. 596.

1813. K. and S. being trustees of money in the funds, sell it for the benefit of S., who dies insolvent, and K. becomes bankrupt; the person interested may prove against the estate of K., the value of the funds at the time of the bankruptcy, though S.'s estate is first liable; so, where the bankrupt and another are executors of a creditor of the bankrupt, the other executor may prove the debt under his commission. Exp. Shakshaft, H. 1791. 3 Bro. C. C. 197.

1814. Two assignees of a bankrupt, one solvent, and the other became bankrupt as a partner in an insolvent house, into which he had put the money he received as assignee; the solvent assignee cannot prove this debt under the joint commission, there being no contract between him and the copartnership. Exp. Apiey, T. 1791. 3 Bro. C. C. 265.

1815. On the 8th of March, 1794, Ld. Loughborough made an order to regulate the practice in case of the insolvency of an assignee, which see ante, sect. vi.

1816. Under the bankruptcy of an executor and trustee directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets of the testator beyond that fund are not liable. Exp. Garland, T. 1804. 10 Ves. 110. Contra Hankey v. Hammond, 1 Co. Bank. Laws, 67.

1817. Bills, remitted by a country bank to their banker in London, remaining, at his bankruptcy, in his hands undue, or not actually applied according to the authority given, or afterwards coming to the hands of the assignees, and the proceeds received by them, remain the property of the remitters, taking up the acceptances on their account, and subject to the banker's lien for any balance; for the bills remain by the contract the property of the remitters, in the hands of the banker, as agent, for a particular purpose, viz. to hold until due, and receive the proceeds, which did not till then form an item in the cash account. The circumstance of the bill being written short, is only evidence of a trust, or to show the terms upon which the remittance was received; and the statute 21 Jac. 1. c. 19. s. 11. is not applicable to bills, so written short, or sent for a particular purpose; for the trust accounts for the possession, being considered on the same footing as goods in the hands of a factor, save only that he cannot pledge; but if the bills are dealt with before bankruptcy, the money cannot be followed, as they may be dealt with afterwards. Indorsement, however, in the case of bankers, gives an authority to pledge as well as discount. Exp. Pease and others, In Re Bolden, E. 1812. 19 Ves. 25.

1818. On a commission against bankers the provisional assignee will be ordered to deliver up short bills in their hands at that time, the estate being indemnified against their outstanding acceptances on the account of the petitioner. Exp. Buchanan, T. 1812. 1 Rose 280. 19 Ves. 201. See the several cases on the bankruptcy of Bolden and others, ibid, 232. 245. and 254. ante, sec. v. (g)

1819. Where a trustee, under a settlement became an absconding bankrupt, and was not likely to return, the court, upon proof, made an order under the stat. 36 Geo. 3 c. 90. that the remaining trustee should transfer stock in the name of himself and a new appointed trustee. Williams v. Bird, M. 1812. 1 Ves. & B. 3. Vide Shaw v. Wright, 3 Ves. 22. et. ante, tit. Bank of England, pl. 6. which case gave rise to that act.

1820. If a manager, (or receiver) of a colliery pays a creditor on the colliery with a bill which was not honoured, the colliery remains liable to the original debt, and the manager, being about to pass his accounts, and taking credit for the creditor's receipt on the delivery of the bill, by which a balance appeared due to the manager, who had become a bankrupt, the creditor, (on giving up the bill) was directed to be paid out of the manager's balance. Tempest v. Ord, M. 1815. 1 Madd. 89.

1821. A specific legacy given to an executor, who afterwards became bankrupt, having committed a devastavit, and the subject of the specific bequest was sold by his assignees; Held, that the produce in their hands was not specifically liable to make good the devastavit in favour of the parties beneficially entitled under the will; but that such parties were only entitled to prove to the amount of the devastavit. Geary v. Beaumont, T. 1817. 3 Meriv. 431.
BANKRUPT XVIII.

Annuities under Commissions of Bankrupt. And herein of the Sureties of the Bankrupt.

1822. Where an annuity is secured by a deed of covenant and a bond, which is forfeited before the bankruptcy, the creditor need not prove his debt, but may resort to the bankrupt on his covenant, notwithstanding his certificate. Fletcher v. Bathurst, T. 1723. 7 Vin. 71. pl. 4.

1823. A creditor by annuity upon the bankruptcy of the grantor, cannot prove the whole consideration money paid, but on the arrears and the value of the life for the time to come. Exp. Le Compte, T. 1738. 1 Atl. 251. Exp. Artis, post, S. P.

1824. Where a bankrupt is under an agreement with a penalty to pay an annuity a value must be put upon it after the penalty is forfeited, and that value may be proved. Exp. Belton, T. 1744. 1 Atl. 151.

1825. Unless the penalty of a bond, conditioned to pay a general personal annuity is become forfeited, nothing but the arrears due at the time of the bankruptcy can be proved, for the accruing payments become a debt after the bankruptcy and not provable. Exp. Artis, T. 1752. 2 Ves. 490. Exp. Barrow, E. 1783. 1 Bro. C. C. 268. S. P.

1826. Where the annuitant is a creditor by decree also, the deficiency is to be made good out of the capital. S. C.

1827. A bankrupt on his last examination gave up an annuity-bond for securing 40l. per annum, during the joint lives of his wife and E. S.; which bond was payable to trustees; decreed, the arrears and future payments 'to be made to the wife, and the bond to be delivered up to her trustees. Exp. Coysegame, H. 1753. 1 Atl. 192.

1828. Where an annuity was bought at five years purchase, and the assignees had consented to the creditors proving, a special meeting of the creditors was directed, to consider whether the assignees should not object to the proof, on the ground of inadequacy of consideration. Exp. Cator, E. 1783. 1 Bro. C. C. 267.

1829. The proof of a debt under bonds to secure an annuity, was rejected under a commission, on the ground that a bill accepted by the bankrupt, not being dishonoured till after the bankruptcy, the bonds were not forfeited; the annuitant then petitioned to be admitted a creditor, in regard that his annuity was bad for a defect in the memorial, but dismissed, for having insisted on his securities at the date of the commission, it was not the same debt. Exp. James, M. 1800. 5 Ves. 708.

1830. Where an annuity bond was lost, the court permitted the arrears of the annuity to be proved under a commission against the obligor, that being the real debt in equity. Toulmin v. Price, E. 1800. 5 Ves. 255.

1831. Bond and covenant to secure an annuity, though the penalty of the bond is forfeited by a breach before the bankruptcy, and the bond is therefore barred by the bankrupt's certificate; yet the annuitant may proceed upon the covenant for subsequent breaches. Exp. Granger, H. 1805. 10 Ves. 351.

1832. It is usual in equity to make an arrangement by ascertaining the value of an annuity under a commission of bankruptcy, which value should be proved instead of the full penalty of the annuity bond. Butcher v. Churchill, H. 1808. 14 Ves. 374. But the following statute settles this point.

1833. Annuity creditors by bond or covenant shall be admitted to prove the value of their annuities, to be ascertained by the commissioners. Stat. 49 Geo. 3. c. 121. s. 17.

1834. Upon proof of an annuity, the value is to be ascertained not by the market-price but by the price paid, and the time of enjoyment, subject to the circumstances of the contract between the parties. Exp. Thistlewood, E. 1812. 1 Roso 290 19 Ves. 236. Vides Exp. Whitehead, 1 Meriv. 10.

1835. A purchased an annuity of B, which was secured upon freehold lands, falsely stated to be of equal annual value, whereas it was not enrolled. A. petitioned to prove for the value of the annuity, which was allowed, but without prejudice to a bill then pending, and the dividends were reserved, but the court did not determine how far the provisions
BANKRUPT XVIII & XIX.

Of Annuities under Commissions.—Surplus.

of the annuity act might be dispensed with in a case of fraud, as against the creditors of the grantor. Exp. Wright, T. 1812. 1 Rose 308.

1336. The stipulated price for the redemption of an annuity, is not the criterion of the value to be proved under a commission of bankruptcy; but in the absence of any peculiar circumstances, the original price, with the variation occasioned by the lapse of time since the grant, is to be proved as the value. Exp. Whitehead, M. 1815. 1 Meriv. 10—127.

1337. The grantor of an annuity, secured by real property, became bankrupt, and after the bankruptcy, arrears of the annuity became due; the court, on the petition of the grantee, will order the real security to be sold, and the proceeds applied in satisfaction of so much of the arrears and value of the annuity as it will extend to pay, and allow the grantee to prove the residue under the commission. Exp. Key, E. 1816. 1 Madd. 426.

1338. A bond was conditioned to be void upon payment of 3000l., with interest, from the death of the obligor, and if the obligor should perform his covenant (for the payment of an annuity of 200l.) contained in an indenture of settlement. The obligor became bankrupt, and at that time the annuity was in arrear, by which a breach of the condition was created, and to which the certificate would be a bar. The obligee was therefore held entitled to prove under the commission of the obligor. Exp. Roselatt, T. 1816. 2 Rose 416. Vide Exp. Groome, 1 Atk. 115. Exp. Winchester, ibid. 116.

1339. A granted an annuity to B., secured by bond and judgment, two years after which he deposited a lease with B. as a further security. B. became bankrupt: Held, that the subsequent security need not be enrolled, and the usual order was made for the sale of the lease, and the valuation of the annuity. Exp. Price, E. 1818. 3 Madd. 132.

BANKRUPT XIX.

Of the Surplus.

(a) Where allowed, whether the Estate be joint or separate.  
(b) Where interest shall attach on the Surplus in respect of Debts paid.  
(c) Of the Surplus generally, and of the Bankrupt’s Interest therein.

(a) Where allowed, whether the Estate be joint or separate.

1340. In 1790, A. and B. became partners as bankers. In 1797, C. joined them as a copartner. A. and B. also carried on separate trades. In 1799, a commission issued against all three. Dividends of 20s. in the pound were declared on the joint and separate estates. The separate estate of A. amounted to 15,000l. and his separate debts to 6500l. exclusive of 15,000l. due from his separate estate to the joint estate. The separate estate of C. amounted to 1500l. beyond his separate debts; and the separate estate of B. exceeded his separate debts by more than 20,000l. The joint creditors petitioned that interest subsequent to the commission might be paid them out of the surplus of B.’s estate, upon which a question arose whether the creditor’s claim of interest was to be preferred to the debt due to the joint estate, from the separate estate of A. Ld. Eldon said, that all these cases were fully discussed by Ld. Thurlow in Lodge v. Fendall, 1 Ves. jun. 160. The course in bankruptcy has been to stop the proof at the date of the commission; which is founded on this, that the debt to be proved is the debt due before the commission, taking the commission to follow rapidly on the act of bankruptcy, which is frequently not the case. It is true now a great deal of debt accrued after the bankruptcy is paid under it, for instance, all the interest accrued though after the date of the commission, if the state of the effects will allow it, upon a sort of equitable principle, the interest being considered as a kind of adjunct or shadow of the principal debt which was due before the bankruptcy. It is now therefore clearly settled, that where there is a partnership and separate debts also, the partnership shall not be admitted a creditor upon any individual, nor any individual upon the partnership, until the
BANKRUPT XIX.

Surplus, where allowed, whether the Estate be joint or separate.

Creditors of the individual and the creditors of the partnership are satisfied to the extent of 20s. in the pound out of the respective estate. Also, that where the separate creditors are paid 20s. in the pound, and there is a surplus, that surplus shall not go immediately to pay interest to the separate creditors, but shall go to make the joint creditors equal with them as to the principal. No decision, however, has gone this length, that if both the joint and separate creditors are paid 20s. in the pound, upon the payment to that amount to the creditors of each class, a partner shall not be admitted a creditor upon the partnership or upon the individual. But Ld. Eldon could not distinguish these cases, for if the principle is, that neither the partnership nor the individual debtor shall claim in competition with the creditors, and that the creditors are entitled to any interest, the interest is as much a debt as the capital, and that principle will prevent either the partnership or the individual debtor ranking with the other creditors, until their demand is satisfied, which includes both the principal and interest of their debts. Ld. Ch. thought the prayer of the petition was right. Exp. Reed, T. 1804. 9 Ves. 583. Vide Exp. Mills, 2 Ves. jun. 195. Exp. Clark, 4 Ves. 677. Exp. Boardman, Co. Bank. Laws. 184.

1341. A joint and separate creditor must elect against which estate he will go in the first instance, and electing to go against the joint estate, he has no preference to the other joint creditors upon the surplus of the estate, beyond the separate debts. Exp. Bevan, T. 1804. 10 Ves. 107.

1342. Under a separate commission against one of two partners, the bankrupt paid all his creditors in full, and obtained an order for the surplus of the joint and separate estate: Held, that the other partner might apply by petition for an account of such surplus, and for payment of his proportion of it. Exp. Lanfear, T. 1813. 1 Rose 442.

(b) Where Interest shall attach on the Surplus, in respect of Debts proved.


1345. In bankruptcy interest steps at the date of the commission, unless there be a surplus, in which case creditors having debts bearing interest receive subsequent interest. Butcher v. Churchill, H. 1808. 14 Ves. 573.

1346. Interest out of the surplus will be allowed to judgment creditors from the date of the commission to the time when the principal sums were paid, though the securities were delivered up to the assignees at the time, with receipts in full indorsed on them by the creditors, under a supposition that no surplus would remain. Exp. Deavy, H. 1812. 2 Ball & Be. 77.

BANKRUPT XIX. & XX.

Where Interest shall attach on the Surplus, in respect of Debts proved.


1348. Creditors are not entitled to interest upon their debts out of a surplus unless it has been provided for by contract, either express or implied, and upon bonds to the extent of the penalty. An implied contract to pay interest may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon similar securities. Interest may also be given upon bills of exchange in an action at law, in the nature of damages, not strictly as interest, but for a breach of contract.—Exp. Williams, T. 1813. 1 Rose 399. Vide Exp. Cocks, ib. 317. and the cases there referred to.

(c) Of the Surplus generally, and of the Bankrupt’s Interest therein.

1349. Where the surplus consists of real and personal estates, the personal is to be first applied in payment of interest, and next the real; and where there are more than sufficient to pay the debts with interest, and the bankrupt is dead, the surplus real must be conveyed to his heir at law, and the personal divided among his next of kin. Bromley v. Goodere, M. 1743. 1 Atk. 75. 80.

1350. The proof of a debt, unless objected to in a reasonable time, is conclusive against the bankrupt and his representatives. S. C.

1351. A bankrupt, pending a commission, has a right to an inspection in respect of the surplus, and Ld. Ch. will take care, that at the close he shall have justice, but in this case the bankrupt was not permitted to surcharge and falsify in the master’s office, the account settled by the commissioners long ago; the palpable errors specifically pointed out will be rectified upon a short petition. Twogood v. Swanton, M. 1801. 6 Ves. 485.

1352. Where joint traders become bankrupts, the interest of each is his share in the surplus, subject to all the joint accounts, and that interest only is liable to the execution of a creditor. By the bankruptcy of one, his interest is devested, and vests in his assignees by relation to the act of bankruptcy; therefore joint creditors under a foreign attachment of even date with the commission, but subsequent to the act of bankruptcy, cannot have execution against the joint property, which must be applied towards the joint debts. Dutton v. Morrison, T. 1810. 17 Ves. 193.


1354. Where a bankrupt’s estate had paid 20s. in the pound, and all the commissioners and assignees were dead, the representatives of the surviving assignee, on being indemnified, were ordered to execute a power of attorney to a receiver (appointed by the court, in a cause where such surviving assignee was a defendant) in order that the effects might be collected. Twogood v. Hankey, T. 1817. 1 Buck 65.

BANKRUPT XX.

Of the Sale of a Bankrupt’s Estate in Mortgage, before the Commissioners, under the Chancellor’s Order.

See Lord Loughborough’s Order of 8th March, 1794. Ante, Sec. v. (f.)

1355. Ld. Ch. has no authority to compel a second mortgagee, not claiming under the commission, but resting on his security, to join in a sale obtained by a prior mortgagee, under the order of 8th March, 1794, where the estate did not produce enough for both mortgagees. Exp. Jackson, E. 1800. 5 Ves. 357.

1356. Plaintiff, a mortgagee of timber trees, wood, and underwood, moved for an injunction to restrain the cutting underwood. Defendant, the mortgagee, became a bankrupt; and assignees were not yet chosen. The Court granted the injunction on the right the mortgagee had to have the estate sold in the plight in which it was at the time of the bank-
BANKRUPT XX.

Of the Sale of mortgaged Property before the Commissioners.

ruptency, and to prove the rest of his debt. Hampton v. Hodges, H. 1803. 8 Ves. 105.

1357. The court will not order a sale of the bankrupt's estate in mortgage for more than the mortgage debt, nor will it thereout aid the bankrupt's sureties for a minor. Exp. Usher, T. 1809. 1 Ball & Be. 197.

1358. The Ld. Ch. made a special order in bankruptcy in this case, for sale of premises, subject to an equitable mortgage; the general order of 8th March, 1794, applying only to legal mortgages. Exp. Payler, H. 1810. 16 Ves. 494.

1359. A transfer of deeds from a depositary, in whose possession they constituted an equitable mortgage, to the person who discharged his debt, cannot be considered as an assignment from him, so as to over-reach an act of bankruptcy, against the express words of a defassance, on a warrant of attorney, stating that the deeds had been deposited by the bankrupt himself. Exp. Coombes, M. 1810. 1 Rose 268.


1361. A lien may be created on a copyhold estate, by a deposit of copies of the court rolls. Exp. Warner, T. 1812. 1 Rose 286.

1362. There can be no lien upon an equitable deposit of title deeds, beyond the first depositary. Exp. Whitbread, T. 1812. 1 Rose 299. But an equitable mortgage may be created by delivery of deeds for the purpose of preparing a legal mortgage. Exp. Bruce, E. 1813. ib. 374.(a) and on a deposit of a lease, it is no objection that it contains a covenant against assigning without license. Exp. Bagelholt, T. 1813. ib. 432. Vide (a) Exp. Coombes, ib. 268. Exp. Warner, ib. 286.

1363. The court will continue a security to a firm continued after an alteration in its members, where a letter can be so construed as to raise an agreement to that effect. Exp. Marsh, T. 1815. 2 Rose 239.

1364. The court has no authority (in bankruptcy) on the petition of an equitable mortgagee by deposit of deeds, to order a sale of the estate, where there is a subsequent mortgagee of the equity of redemption, who objects, and has not proved under the commission; for the proper remedy is by bill. Exp. Topham, T. 1815. 1 Madd. 33. Vide Exp. Jackson, 5 Ves. 337.


1366. An equitable mortgagee praying a sale of a mortgaged estate, shall pay the costs of the petition, and of the appearance of the assignees of a bankrupt mortgagor, not out of the produce of the mortgaged estate, but personally; but if the assignees oppose the mortgagee's petition on frivolous or mistaken grounds, they shall pay the costs occasioned by their opposition. Exp. Horne, E. 1816. 1 Madd. 622. Vide Exp. Garbett, 2 Rose 97.

1367. A solicitor presenting a petition in bankruptcy on his behalf, could not attest his own signature to the petition, but the court, on application, dispensed with it. Exp. Kingdon, E. 1816. 1 Madd. 446. See the order requiring such attestation, ib. 75. (n.)

1368. The court will allow the title of a petition in bankruptcy to be altered, if the petitioner has no sinister view, but it must be on paying the costs of the day. Exp. Rwe, E. 1816. 1 Madd. 309.

1369. The Vice Chancellor can certify the propriety of awarding a procedendo, where a commission has been superseded on his certificate. Exp. Crump, M. 1816. 1 Buck 3.

1370. An equitable mortgagee is not entitled to costs on application for a sale of his pledge, &c. though it was the bankrupt who neglected to have a regular mortgage. Anon, T. 1817. 2 Madd. 281.

1371. The court will not dismiss a bill of foreclosure against the assignees of a bankrupt mortgagor before the execution of the bargain and sale by the commissioners, on the ground that the assignees have not any interest. Bainbridge v. Pinhorn, M. 1817. 1 Buck 135. Vide Perry v. Bowes, 1 Vent. 560. Elliot v. Danby, 12 Mod. 3. Doe, d. Esdaile, v. Mitchell, 2 M. & Selw. 446.

1372. A mortgagee by a deposit shall have the costs of his application by petition for the usual order, where there is a
BANKRUPT XX. & XXI.

Of the Sale of mortgaged Property.—Chancellor's Jurisdiction.

Written instrument specifying the agreement for the deposit. Exp. Brightwell, H. 1818. 1 Buck 148. 1 Swanst. 3.

1373. Where a mortgagee was the sole assignee and principal creditor of a bankrupt, and there was only one other small creditor; he shall be allowed to bid for the estate in mortgage with the approbation of the master, on undertaking to make good the deficiency between the sum bid and the price to be fixed by the master, in case he should not approve of the bidding. In Re Salisbury, T. 1818. 1 Buck 245.

1374. An equitable mortgagee by a deposit of deeds, with a writing, expressing the terms of a deposit, was held entitled, on the bankruptcy of his debtor, to have a sale, and his costs out of the produce of the property pledged. Exp. Trew, M. 1818. 3 Madd. 372.

BANKRUPT XXI.

Of the Jurisdiction of the Lord Chancellor and the Vice Chancellor, and herein of the Requisites to support Petitions, &c. in Matters of Bankruptcy, and of the Course of the Court on such Petitions.

1375. The jurisdiction of the Ld. Ch. in matters of bankruptcy is under a special authority, and distinct from that of the court of Chancery. Exp. Lund, H. 1802. 6 Ves. 782. Philips v. Shaw, E. 1803. 8 Ves. 250. And from it there is no appeal. Exp. Bryant, H. 1813. 1 Ves. & B. 211.

1376. In equity, the whole order, management and disposition of a bankrupt's affairs are placed under authority which the Ld. Ch. exercises in bankruptcy; and there is less difficulty in such a case, in not allowing a bill to be filed, except in particular cases, or by special permission, if the bankrupt is not without remedy, but has a better and more beneficial remedy. Suppose a mortgage of a bankrupt's estate for an usurious consideration, the creditors coming to prove in the ordinary proceeding, every other creditor, or even the bankrupt, might petition, which petition he has a mode of verifying not open to him upon a bill; for the court, on his affidavit, stating the usury, will put the creditor to answer; and upon a principle quite different from that which obtains in a suit, for plaintiff to a bill could not offer to redeem without paying what was due, but by the jurisdiction in bankruptcy upon petition supported by the oath of the party interested, unanswered, the security is cut down altogether, not leaving the party a creditor, even for what was actually advanced. Benfield v. Solomon, T. 1803. 9 Ves. 34.


1378. The Ld. Ch. can compel the proceedings under a commission which has been superseded, to be produced at the hearing of a cause in Chancery in Ireland, with a view to evidence arising out of the bankrupt's examination, but not of course. Exp. Bernall, M. 1805. 11 Ves. 556.

1379. The Ld. Ch.'s jurisdiction to tax the bills of solicitors as officers of the court, subsisted, and was adopted in matters of bankruptcy, long before the stat. 3 Geo. 2. c. 30. Exp. Arrowsmith, M. 1806. 13 Ves. 125.

1380. A bankrupt attainted of felony under the stat. 5 Geo. 2. cannot petition the Ld. Ch., for though a person attainted may be heard as a suitor in a court of justice for the direct purpose of reversing the attainer, he cannot prosecute a civil right. Exp. Bullock, H. 1806. 14 Ves. 453. Vide R. v. Bullock, 1 Taunt. 71.

1381. A. obtained money from B. on the security of goods consigned to B.'s house in America, and shortly after became bankrupt. B.'s agent in America, ignorant of the advances made, and of the bankruptcy, remitted bills for the proceeds of the goods to A. A. delivered them to a person to get them accepted, who handed them over to B. The Chancellor has no power to direct A. or his assignees, to indorse these bills. Exp. Hall, T. 1810. 1 Rose 13. Vide Exp. Rowton, ib. 15. where it was determined, that whatever is necessary for the Chancellor to decide,
collaterally to the question of proof, will
give him jurisdiction in bankruptcy. Vide
etiam, Exp. Pense, ib. 232.
1382. On a reference to the Master in
a matter in bankruptcy, such affidavit
as might have been read at the hearing
of the petition, may be received in evi-
1 Rose 45.
1383. The examinations of a bankrupt
before the commissioners, are not evi-
dence upon the hearing of a petition,
unless notice has been given of an inten-
tion to make use of them. Exp. Stra-
cy, E. 1811. 1 Rose 68.
1384. The court cannot appoint a re-
ceiver upon petition in bankruptcy. Exp.
Tapper, T. 1811. 1 Rose 179.
1385. The Ch.'s jurisdiction extends
over the messenger as well as the solic-
350, but not to compel the restoration of
goods seized by the messenger. Exp.
Cragge, 1810. 1 Rose 23.
1386. An affidavit, grossly reflecting
on the credit and testimony of a petition
in bankruptcy, was taken off the file for
scandal, and defendant ordered to pay
costs. Anon. T. 1814. 3 Ves. & B.
93.
1387. No equitable relief can be grant-
ed on petition, under a second commis-
sion against an uncertificated bankrupt;
but the petitioner may file a bill, suggest-
ing property acquired in a subsequent
trade, and want of notice by the subse-
quent creditors. Exp. Storke, T. 1814.
1388. The court has jurisdiction to
control the choice of assignees in bank-
ruptcy. Exp. Mills, T. 1814. 3 Ves. &
B. 139. Vide Exp. Tastet, 1 Ves. & B.
280. S. P. Exp. Smith, ib. 518. Et ante,
it. Bankrupt, sect vi.
1389. Where commissioners refused
to proceed in the bankrupt's examination
unless he produced his books, &c. (which
were in the office of a master of the court
of Chancery in Ireland,) or copies of
them; an order was made, declaring that
such books or copies must, if required,
be produced at the expense of the estate.
Exp. Crielland, T. 1814. 2 Rose 164.
3 Ves. & B. 94.
1390. The attestation of a bankrupt's
petition, by an agent of the attorney for
the petitioner, is not a sufficient compli-
ance with the general order of 12th Aug.
1809, requiring the attestation of the at-
torney who presents the petition. Exp.
Weston, T. 1815. 1 Madd. 75.
1391. Where an attorney presents an
improper petition in bankruptcy, he was
ordered to pay the costs, Exp. Cuthbert,
T. 1815. 1 Madd. 78.
1392. The Ld. Ch. can direct the
V. Ch. to hear a petition for a procedendo
to issue, where a commission has been
superseded on the V. Ch.'s order, con-
cluded by the Ld. Ch. Exp. Hard, E.
1817. 1 Buck 45. Vide Exp. Crump,
ibid. 3.
1393. Ordered, that after Monday the
16th June, no petition struck out of the
V. Ch.'s paper for non-attendance be re-
stored without an order from his Honour,
made on petition, or be placed in the Ld.
Ch.'s paper without an order from his
Lordship, made also on petition. Ord.
Gen. per Eldon, C. 11th June, 1817.
1394. Affidavits in support of petitions
in bankruptcy, may be filed after the peti-
tion day, but the petition in such case
must stand over to give time to answer
them. Exp. Sparrow, T. 1817. 2 Madd.
184.
1395. A petition, attested by the agent
of the petitioner's attorney, and authen-
ticated by the attorney himself, is a suf-
cient compliance with the general or-
Vide Exp. Tilley, 2 Rose 83.
1396. The court will not entertain one
petition to expunge a charge of collusion
made in another, which was set down to be
heard, on a suggestion and affidavit
that the charge contained in the first was
unfounded. Exp. Leigh, M. 1817. 1 Buck
132.
1397. Where one of two partners
proved a debt, and died whilst the other
partner was abroad, service of a petition
to expunge the debt upon the attorney
appointed to receive the dividends, was,
on motion, ordered to be good service.
Exp. Peyton, H. 1818. 1 Buck 200. Vide
Exp. Anderson, ibid. 38.
1398. The court will allow a petition
to stand over to amend the title. Exp.
Mills, E. 1818. 1 Buck 230.
1399. Service of a petition in bank-
ruptcy on the attorney of a person abroad,
whose debt was sought to be expunged,
shall be deemed good service. Exp.
Paton, E. 1818. 3 Madd. 116. Vide
Exp. Anderson, 1 Buck 38. S. P.
BANKRUPT XXI.

1400. Affidavits in reply are only to be permitted where new matter is introduced in the affidavits answering a petition. Exp. Shapley, T. 1818. 1 Buck 244.

1401. A petition will not be allowed to stand over for the purpose of replying to affidavits, unless the application be made at least two days before the petition appears in the paper. Exp. Wiltshire, T. 1818. 1 Buck 232.

1402. Affidavits that merely state hearsay and belief as to a commission being concerted, are not sufficient to induce the court to direct an issue, but if they are corroborated by circumstances of suspicion, an issue will be directed. The jurisdiction, in bankruptcy, extends to every person fraudulently engaged in issuing a commission. Exp. Boyle, T. 1818. 1 Buck 247.

1403. The court will permit a petition to be signed by the petitioner's agent in London, where it is presented near the end of the Sittings after Trinity Term. Exp. Stone, T. 1818. 1 Buck 255.

1404. The Ld. Ch. can issue a writ of hab. cur. in the vacation. Crowley's Ca. T. 1818. 1 Buck 364. 1 Swanst. 1.

1405. A bankrupt was committed by the commissioners for not answering, and it appeared that in the questions put to him, the commissioners had stated facts of which they were only informed by the messenger, whose deposition was not set forth in the warrant, nor did it thereby appear to have been read to the bankrupt at the time of his examination: Held, that the commitment was substantially insufficient, and that the court could not commit the bankrupt under 5 Geo. 2. c. 30. s. 17. And the court also doubted the validity of the commitment of a bankrupt for not answering satisfactorily, when the commissioners seem to have been influenced by extrinsic evidence. Crowley's Ca. sup.

1406. On a petition to expunge the debt of B. the examination of a witness on a former occasion, as to a debt sought to be proved by A. cannot be read. Exp. Coles, T. 1818. 3 Madd. 315.

1407. Where a creditor has proved a debt, and the assignees have a demand against him, which, if determined in their favour, would give them a lien upon the dividends, they may proceed by a petition in the bankruptcy to enforce that demand. Exp. Timbrel, In Re Brown, H. 1819. 1 Buck 305.

1408. An affidavit sworn before the petition is answered, cannot be read. Exp. Parks, H. 1819. 1 Buck 332.

1409. Petition by the lessor of a bankrupt lessee for payment of rent due after the bankruptcy, and for a compensation for hay and straw sold and carried off the premises by the assignees, dismissed, on the ground that the jurisdiction of the court extended only to cases under the statute 49 Geo. 3. c. 121. s. 19. or where the petitioner made a case for an injunction. Exp. Warwick, In Re Hough, E. 1819. 1 Buck 326.

1410. The court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers in order to institute criminal proceedings against the bankrupt, the court refused to make the order, and dismissed the petition with costs. Exp. Jones, In Re Scott, E. 1819. 1 Buck 337.

1411. Affidavits filed in support of a petition to supersede a commission and stay a certificate, need not be answered, if founded only on information and belief, unless it is stated in the affidavit from whom the information was received, and that such person refuses to make an affidavit. Exp. Stevens, E. 1819. 4 Madd. 256.

1412. It is the practice of the court to take the assistance of a jury, when there is so much of doubt, that such assistance is felt to be necessary to the right determination of the case; but it is not the practice for the court to put the parties to that expense, without first hearing all the evidence read, and the case fully argued, unless the counsel on both sides agree in stating that such must necessarily be the result, if the matter were gone into. Upon this principle, the Ld. Ch. heard a petition upon an appeal from the V. Ch.'s order directing an action to be brought. Exp. Heygate, T. 1819. 1 Buck 442.

1413. The Ld. Ch. has not authority to compel the commissioners to declare a party, against whom a commission has issued, a bankrupt; his authority is limited to ordering them to proceed in their judgment. Exp. Perrin, M. 1819. 1 Buck 510.
1414. A petition may be framed in the alternative, and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances. Exp. Scholey, T. 1820. 1 Buck 476.
1415. The court has not jurisdiction in bankruptcy to declare the infant heir of an assignee, a trustee of the bankrupt's estate; such a case is within the statute relating to infant trustees. Exp. Kirk, T. 1820. 1 Buck 478.
1416. Although the affidavits in support of a petition, and those in opposition to it, are conflicting, yet the court ought to hear them read, and the arguments of counsel, before it sends the parties to try the question at law. Where the trading upon these proceedings was only proved by a single witness, who, in an affidavit, filed upon a petition to supersede the commission, contradicted that which he had formerly deposed before the commissioners, the court superseded the commission. Exp. Trusstrom, T. 1820. 1 Buck 550.

BARON AND FEME.

I. Rights, Estates, and Interests of the Husband.
II. The Wife's personal Estate, where unchanged by Marriage.
III. Where the Estate of the Wife before Marriage is so far reduced into the Husband's Possession as to be within his Control and liable to his Debts; and herein of his Power over his Wife's Estate.
IV. Of the Acquirements of the Wife after Marriage (a). Where she shall be considered as a Feme Sole during Cohabitation (b).
V. Acts of the Wife dum sola, how far binding on the Husband.
VI. Acts of the Wife during Coverture. How far the Husband shall be bound, and herein of his own Covenants.
VII. Acts in which a Wife voluntarily joins her Husband. Of her Appointment in his Favour, private Examination, and Consent, in Analogy to a Fine at Law. Intervention of Trustees.
VIII. Contracts, Rights, or Claims, dissolved or not by Marriage.
IX. Wife's Provision secured in Equity.
X. Where the Wife shall elect.
XI. Paraphernalia and Pinn-money.

BARON AND FEME I.

Rights, Estates and Interests of the Husband.

1. A woman seised of land chargeable with debts, married, and her husband received the rents but did not pay the interest of the debts; the wife died without issue; on a bill by her heir, decreed, the husband to account out of his own estate. Quere tamen. Brompton v. Alkis, M. 1706. 2 Vern. 566.
2. Plaintiff, the widow of H., before marriage with him, had an estate in fee of 100l. per annum. Besides household goods; by articles H. covenanted that
his wife should have them to her separate use, and dispose of them by deed or will; he also covenanted to leave her 500L. and to settle some lands upon her in tail, remainder to her right heirs; afterwards he got up his own part of the articles and cancelled them; then he prevailed on his wife to levy a fine of some of her own lands, which he mortgaged and settled on his wife in tail, remainder to himself in fee; most of the mortgage money was repaid, when H. conveyed away all the lands he had settled by articles on his wife, made his will, and died. Bill by the widow against the executors of H. for an account of the profits during coverture, and satisfaction for the goods consumed. Decreed, that no such account be taken or satisfaction made, but if the master shall find any of the goods, they shall be restored to the wife, for the wife was maintained by her husband, and never complained to her trustees of his misconduct, besides, she consented to levy a fine of her lands, therefore no notice can be taken of the past. But the residue of the articles shall be performed to the widow, and because lands covenanted to be settled were conveyed away, lands of equal value shall be purchased out of the husband's assets. The executors of A. prayed that the widow should pay the remainder of the mortgage money, but as A. was the principal debtor, his executors were decreed to pay it. Harrison v. Constantine, E. 1709. 2 Eq. Ab. 147. pl. 1.

8. On marriage the wife's real and personal estate was conveyed to trustees for her separate use, but she permitted her husband to receive the rents, bonds, and other securities. Decreed, on his death, that all principal sums be made good out of the husband's assets, but not the rents and interest monies received by him during the coverture. Powell v. Hankey, M. 1722. 2 P. W. 82.

4. The estate of a deceased husband is subject to the funeral charges of his wife, though she had a separate maintenance which she disposed of by will. Bertie v. Lord Chesterfield, T. 1723. 9 Mod. 31.

5. A man cannot make a grant to his wife in his life-time, nor will equity suffer her to have the whole of her husband's estate whilst he is living; for it is not in nature of a provision, neither will such a grant revoke the husband's will giving every thing away from her. Beard v. Beard, E. 1744. 3 Bk. 72.

6. Where a feme covert was entitled to one-sixth of the residue of a testator's estate, and upon a bill filed by another residuary legatee, to which she and her husband were made defendants; a decree was made for a sale of the estate and payment: Hold, that her share vested absolutely in her husband by survivorship; and though the defendants were creditors of the wife, yet that the court would interpose to take the money out of their hands. Forbes v. Phipps, M. 1760. 1 Eden 502. Vide O'glander v. Baston, 1 Vern. 396. Squib v. Wyn, 1 P. W. 378. Milner v. Milner, 2 T. R. 627.

7. Husband tenant in tail and his wife joined in a mortgage and fine of the husband's estate; the proviso gives the equity of redemption to the husband and wife, and their heirs, but the fine was declared to the use of the husband and his heirs. The husband died. Decreed, the estate belonged to the husband, and the wife had the equity of redemption only to secure her dower. Jackson v. Packer, M. 1770. Amb. 697.

8. A treaty between husband and wife for the purchase by him of the wife's separate estate, shall not be carried into execution after the death of the parties; but the husband's personal estate shall be liable for the rents received, and the heirs of the mother shall elect between the estate and their provision under the husband's will. Pitt v. Jackson, E. 1780. 2 Bro. C. C. 51.

9. The interest of a fund in court belonging to the husband, who was in a state of imbecility, was ordered to be paid to the wife for the maintenance of the family. Bird v. Leeford, M. 1792. 4 Bro. C. C. 100.

10. In an account against the husband's estate of the dividends of the wife's separate property received by him, consideration was had of his extra charges occasioned by her lunacy. Att. Gen. v. Parry, T. 1793. 4 Bro. C. C. 409.

11. The dividends of a wife's separate property were applied by a husband in the maintenance of the family; his estate shall not be liable to the wife who survived. Squire v. Deane, T. 1793. 4 Bro. C. C. 326.

12. Neither is the husband to account for the wife's separate estate which she
BARON AND FEME I. & II.

Rights of the Husband.—Wife's personal Estate.


14. Injunction to restrain husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, refused, it not being proved that she had given instructions for such a deed. And it seemed doubtful whether under any circumstances, such an injunction would be granted, though there are many cases where a person being fraudulently prevented from doing any act, the court has considered it as if that act had been done. Middleton v. Middleton, M. 1819. 1 Jacob & Walk. 94.

How far the husband's estate shall be bound by his covenants for his wife, or by her engagements during coverture. vide post, sec. vi.

BARON AND FEME II.

The Wife's personal Estate, where unchanged by Marriage.


16. Where the husband makes no disposition of his wife's money standing in trustees' names, it shall go to the wife, if she survives. Twysden v. Wise, E. 1683. 1 Vern. 161.

17. A wife on marriage had freehold lands and 500l. secured on bond; her husband settled 45l. per ann. on her, and died insolvent. Decreed, that the lands belonged to the wife as her own inheritance, and that the bond, as her chose en action, survived to her. Lister v. Lister, T. 1688. 2 Vern. 68.

18. A. by will gave his daughter 400l. to be paid her by his son; the daughter married C. who settled 100l. per ann. on her, and the son covenanted to pay the 400l. to C. C. died. The 400l. survives to the wife as her chose en action. Howman v. Corie, M. 1690. 2 Vern. 190.

19. A. devised lands in mortgage to be sold, and the surplus paid to his daughter, who married B.; B. became a bankrupt and died. The court would not assist B.'s assignees against the widow unprovided for. Parker v. Dykes, M. 1698. 1 Eq. Ab. 54. pl. 6. See post, sec. ix.

20. A.'s wife, on marriage, was entitled to a mortgage in fees; after marriage, A. assigned his interest in it to trustees, to call in the money and lay it out in land, to be settled on the husband and wife, and their issue, remainder to the husband's heirs. The husband died without issue, and then the wife died. This mortgage, as the wife's chose en action, shall go to her executors. Burnet v. Kinaston, M. 1700. 2 Vern. 401. 2 Freem. 239. Pre. Ch. 118. S. C. where it is stated that the wife died without issue, and that the husband took out administration, and then devised the mortgage to his children by a former ventre; but the court would not relieve the devisees against the claim of the administrators de bonis non of the wife.

21. A. had 1200l. in money, and 1300l. in the city chamber; on her marriage with B. his father settled 240l. per ann. on her. B. died: The father claimed the latter 1200l. insisting that B. was a purchaser, but decreed that it survived to the wife, the husband having done nothing to alter the property. Ruddyard v. Neivin, M. 1702. Pre. Ch. 209. 2 Freem. 262.

22. Where a woman by a marriage agreement is to have the separate use of any estate during coverture, she shall have that and its produce after marriage; and if any of it is invested in a purchase, the court will follow it as the produce of what she ought to have. Eastly v. Eastly, M. 1709. 2 Eq. Ab. 148. pl. 2.

23. An infant having lands of inhe-
Wife's personal Estate, where unchanged by Marriage.

A. By the marriage articles she was to convey her lands during the coverture, and have a jointure of 450l. per annum settled on her; A. died before it was done, and then she married B. who brought a bill to have the 450l. per annum settled. 

Per cur. Here was a consideration precedent to the augmentation of the jointure, which should have been performed during the coverture, and equity will not relieve in a case of mere neglect; besides, if the court should relieve, the wife would have her lands, and the 450l. per annum also. Wood v. Ingram, M. 1710. 2 Eq. Ab. 211. pl. 3.

24. A. pays contribution money under a bankruptcy upon a bond due to his wife, and died before the dividend; than the wife died. This remains the wife's chose en action, and shall go to her executors, they repaying the contribution money. Anon. M. 1715. 2 Vern. 707.

25. A. had lands at the time of his marriage, as also a bond for 500l., in consideration of which her husband made a settlement; the husband never called in the bond, but died indebted. The court would not allow an account to be taken of this bond as part of the husband's assets. Heaton v. Hassel, M. 1720. 2 Eq. Ab. 467. pl. 13.


27. Where a power is given to a woman to dispose of her estate by will, and she marries, her power is suspended; but it revives if she survives her husband. So decreed in equity. Sed qu. in Dom. Proc. by whom this case was unusually referred to the judges in B. R. who were to return their opinion to the court of Chancery, but nothing more was heard of the cause. Rich v. Beaumont, H. 1727. 3 Bro. C. C. 508.

28. By articles made on marriage of an infant, in consideration of 3500l. then paid to the husband, a suitable jointure was to be made on her when of age in bar of dower, and she was to convey her lands to be limited to the husband in fee. The jointure was settled, and the wife, when of age, was a party to the deed, but she never conveyed her own estate, nor was she ever required so to do by her husband, though her dower exceeded her jointure. The husband died, and the wife entered upon the settled lands: Held, she was not bound by the articles, nor by her acceptance of the jointure. She therefore kept her own estate, and the jointure also. Lucy v. Moor, M. 1728. Mos. 59. 3 Bro. C. C. 514.

29. P. gave a part of his personal estate to his daughter S.; she married, and when abroad with her husband they assigned this legacy in trust for their daughter, provided they died before they came to England: S. afterwards married a second husband, who survived her, but the first husband never reduced the money into his possession. If S. had continued a widow, she would have been entitled to this legacy, and no notice would have been taken of the daughter's interest. Grose nor v. Lane, E. 1741. 2 Atk. 180.

30. If a feme sole, having 1400l. stock, conveys it to trustees, to the use of her intended husband and herself for life, with power to dispose of 200l. this power survives to the wife on the death of her husband. Horner v. Bendoes, E. 1742. 9 Mod. 355.

31. A husband by a deed to which the wife was a party, covenants to assign a contingent portion of the wife's to the uses of the marriage. The husband dies without calling in the portion. The wife is bound by the covenant. Bush v. Dalway, T. 1747. 1 Ves. 19. 3 Atk. 530.

32. A widow seised in fee of copyhold lands, surrendered them - to the use of her will; on her second marriage, her husband agreed she should devise her estate during coverture, and she made her will accordingly. Per cur. The surrender was either void or suspended by the marriage, and it is certain that a feme covert cannot make a will or declare the uses of a surrender. George, ex dem. Thornberry, v. ————, M. 1739. Amb. 627.

33. Bill by husband and wife for a demand in her right; the husband dies; it is in nature of a chose en action, and survives to the wife, and the cause does not abate. Anon. E. 1750. 3 Atk. 720.

34. A wife may dispose of her separate personal estate by act in her life-
time, or by will, but her real estate descends to her heir, unless properly conveyed, as by way of trust, or power over an use before marriage, or by fine after marriage, but not by mere agreement, which can only bar tenancy by the courtesy unless it would be such as would be decreed to be carried into execution.—*Peacock v. Monk*, H. 1751. 2 Ves. 191.; and in Hume. Tenant, 1 Bro. C. C. 16. Lord Thurlow said, the rule laid down in this case, that a *feme covert*, with respect to her separate property, is competent to act as a *feme sole*, is the proper rule.

35. Bond to a trustee for the benefit of a bankrupt's wife. The assignees cannot bring an action, for by 1 Jac. 1 c. 15. s. 13. they have not only the bankrupt's remedy. Exp. *Coyseyame*, H. 1752. 1 Atk. 192.

36. A gave a bond reciting an agreement before marriage to settle his wife's real estate; the wife was not an executing party, but having acquiesced under the agreement after her husband's death, she was held bound by it. *Archer v. Pope*, T. 1754. 2 Ves. 523.

37. A wife's *chose en action* survive to her if the husband does not reduce them into possession by suing for and recovering them in his own name, which is equal to a tangible reduction. *Garforth v. Bradley*, M. 1755. 2 Ves. 676.

38. A entitled to a rent-charge, married, and had a settlement; upon her husband's death, the rent-charge was in arrear. These arrears, though not strictly *chose en action*, yet, as chattels real, shall survive to the wife, there appearing no intention that the husband should be a purchaser of all his wife's fortune. *Salvev v. Salvev*, M. 1770. Amb. 692. 2 Dick. 434.

39. A widow seized of a reversion in fee subject to an estate tail, and a trust term, (executed) agreed with her husband, before marriage (without seal or stamp) that her property should go to the survivor of them for life, with power for her to dispose of it by will during coverture. She made her will before marriage, giving all to her intended husband, and died six months after marriage. The husband is entitled to an equitable estate for life under the agreement, but the will not being protected by the power, is revoked by the subsequent marriage. *Hodaden v. Lloyd*, H. 1789. 2 Bro. C. C. 534.

40. A on marriage, agreed to settle his wife's stock, &c. on her for her use, but he fraudulently prevailed on her afterwards to transfer the stock to him without a settlement. Decreed, he should transfer the stock to trustees for the use of his wife, and pay all costs.—*Lampert v. Lampert*, H. 1750. 1 Ves. jun. 21.


As to the disposal by a *feme covert* of her separate personal property, *vide post*, sec. vii.

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**BARON AND FEME III.**

*Where the Estate of the Wife before Marriage is so far reduced into the Husband's Possession as to be within his Control and liable to his Debts; and herein of his Power over his Wife's Estate.*

As to the Husband's Assignment of her Chattels real, *Choses en Action*, or Possibilities.

42. A *feme* possessed of a trust term, married:—Held, the husband might dispose of it, yet secus if the term had been assigned in trust for the wife with the privity of the husband. *Sir E. Turner's Case*, T. 1681. 1 Vern. 7. in Dom. Proc.
Assignment by Husband of Wife’s Chattels real

to the assignment. Yet Ld. N. made a similar resolution, for the case of Pitt v. Hunt, was that of a term assigned, in trust for the wife before marriage, without the husband’s knowledge, and his Lordship decreed it might be disposed of by him.

43. Though a feme sole, custei que trust of a term, shall have the term for her separate use, if she marries without any previous agreement with her husband; yet the husband may dispose of it for a valuable consideration after marriage; and it shall be good in equity, as well as if she had had the term in herself, and had married. Sanders v. Page, E. 1688. 3 Ch. Rep. 223.

44. As a husband may dispose of a term for years, where the legal estate was in his wife, so he may of the trust of a term without the wife or trustees joining; and where a first husband assigned a term for the separate use of his wife, and died, a second husband may dispose of it, though he has made no provision for her, and her trustees were, in this case, decreed to convey the legal estate to a purchaser. Tudor v. Samyne, T. 1692. 2 Vern. 270.

45. A term for 99 years, determinable on three lives, was assigned in trust for C., who married, and died. Decreed, this trust of a term, as well as the term itself, belonged to the husband, and he need not take out administration. Pale v. Mitchell, M. 1709. 2 Eq. Ab. 138. pl. 4.

46. A feme had a large fortune, which, upon her marriage, was placed under the control of the court as a security, in case the wife should survive or have issue. Int. al. she had two mortgages, one of which was paid off during coverture: Held, that the property vested in the husband, and shall go to his representatives, though under control, by way of caution: Held also, that a husband may assign a term or mortgage for years which he has jure uxoris, as he may the trusts of such term, and it shall prevail against the wife if she survives; but the husband cannot alone assign the wife’s mortgage in fee, or bond debt, which is her chose en action.—Packer v. Wyndham, M. 1715. Pro. Ch. 418. Giff. Eq. Rep. 98. The difference between a bond and a term for years is, that a bond is a chose en action not assignable at law; and a term for years is a chattel real; which a husband may assign without his wife, as also the trust of such term, and consequently the money secured by it. Vide Grey v. Kentish, 1 Atk. 250. Bates v. Dandy, 2 Atk. 208. Squib v. Wyn, 1 P. W. 378. Boswell v. Brander, 1 P. W. 453. Cleland v. Cleland, Pre. Ch. 63. Blois v. Herford, 2 Vern. 501. Meredith v. Wyn, Pre. Ch. 312.

47. A husband being possessed of a term in right of his wife was divorced à mensa et thoro, and she had alimony; but the court, on her application, restrained him from selling it. Anon. T. 1723. 9 Mod. 43.

48. A term for years being vested in A. in right of his wife, he made an underlease with a covenant for renewal, and died. Decreed, a good disposition of the term in equity, and that the covenant was binding in other hands. Steed v. Cragh, T. 1723. 9 Med. 42.

49. A husband may assign the trust of a wife’s term, unless it be a trust from himself, for her benefit. So, also, he may dispose of her mortgage in fee as well as for a term. So, also, he may assign a wife’s possibility for a valuable consideration, and he may release her bond without receiving any part of the money. Bates v. Dandy, T. 1741. 2 Atk. 208.

50. As at law a husband could assign his wife’s term, so he may assign the trust of a term, but the assignee need not provide for the wife, before he is entitled. Jevson v. Moulsen, M. 1742. 2 Atk. 417.

51. It became a question in this case, whether an agreement by a husband for a lease of part of his wife’s term will bind her after his death, as the actual lease does; and if so, whether the rent is his property, or survives to the wife with the reversion? Ld. Ch. would not decide, but thought the husband was to be considered as owner of the interests under the agreement. Drues v. Denison, T. 1801. 6 Ves, 894.

52. A wife possessed of choses en action, died, and her husband administered and made a voluntary assignment; this is an alteration, and binds the property, but had the husband died without administering, his wife’s choses en action would have gone to his executors. Squib v. Wyn, M. 1717. 1 P. W. 378. It now seems settled, that although a husband
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may assign his wife's choses in action, it must be for a valuable consideration, and that beyond the consideration, it will not bind the wife surviving. Vide Bates v. Dandy, 2 Atk. 207. Jewson v. Moulson, 2 Atk. 417. Saddlington v. Kinsman, 1 Bro. C. C. 44. But as to the equity to which such property is subject in the hands of the assignee, vide Jacobson v. Williams, 1 P. W. 398. At the hearing of Saddlington v. Kinsman, E. 1779. sup. Squib v. Wyn, and Sheppard v. Sheppard, 1 Bro. C. C. 51. (n.) were cited, as instances of voluntary assignments, and where, upon a bill to charge the estate, the court made a decree, to which Ld. Thurlow said, that a voluntary assignment of a real estate, undoubtedly binds. Vide Worrall v. Marlar, and Bushman v. Pell, in Mr. Cox's notes to Bosvill v. Brander, 1 P. W. 458. Et vide post, s. ix.

53. A choses in action, though not assignable at law, yet is so in equity, where the husband may assign it alone, as he may any part of his wife's personal estate; so may a contingent interest which the husband has in right of his wife, or a possibility of a term, which, though not good strictly by way of assignment, will yet operate as an agreement, where for a valuable consideration.

D. of Chandos v. Talbot, 1731. 2 P. W. 608.

54. A possessed of a choses in action in his own right, may assign it without consideration, but in right of his wife he cannot, and yet he may release or forfeit it. Lord Carteret v. Paschall, T. 1733. 3 P. W. 199. 4 Bro. C. C. 168.

55. If a wife have a judgment, and it is extended upon an elegy, the husband may assign it without consideration; so, if a judgment be given in trust for a feme sole who marries, and by consent of her trustees, is in possession of the land extended, the husband may assign the extended interest; and so, if the feme has a decree to hold lands until a debt due to her is paid, and she is in possession under the decree, and marries, the husband may assign it without consideration, for it is in nature of an extent. S. C.

56. It is now well known that a possibility may be both assigned and released. Jewson v. Moulson, M. 1742. 2 Atk. 417.

57. A wife's possibility must be assigned for a valuable consideration, and it must be an assignment of that particular thing, and not rest in the intention or construction of a covenant. Hawkins v. Obym, T. 1745. 2 Atk. 549.

58. It has frequently been determined that a husband may assign his wife's choses in action, and that turns upon his right to sell. Per Hardwicke, C. in Bush v. Dalway, T. 1747. 3 Atk. 583.

59. It seems, that though the Bank make a difficulty in transferring a wife's stock at the instance of her husband, yet they consider themselves bound to do it, if the husband insists upon it; the power of the husband, however large it may be, to dispose of this description of property, does not necessarily determine that it is to vest absolutely in him; for though he may dispose of his wife's term, or he may forfeit it, or it may be taken in execution for his debts, yet it is not so absolutely his, as to be transmissible to his representatives, against the claim of the wife surviving. Wildman v. Wildman, M. 1803. 9 Ves. 176, 177. Vide Mitford v. Mitford, 9 Ves. 87.

60. Where a husband shall be deemed a purchaser of his wife's fortune:—In all cases where the husband makes a settlement equivalent to his wife's portion, it shall be intended he shall have it. Blos v. Lady Hereford, T. 1706. 2 Vern. 502. But if the settlement be only in consideration of part of the wife's fortune, then the remaining part, if out on bond, shall survive to the wife, unless it was expressly agreed that the husband should have it. Cleland v. Cleland, M. 1686. Pre. Ch. 68. So, where a husband agreed to make a settlement on his wife, which he was by inevitable accident prevented from doing, he was held to be a purchaser of her fortune, and her portion, charged by will on certain lands, but not raised in the life-time of either, was decreed to go to the administrators of the husband. Meredith v. Wynm, E. 1711. Pre. Ch. 312. Gilb. Eq. Rep. 170. So, where a wife had a choses in action, which was considered as a part of her portion for which the jointure was made, and the jointure was adequate, it was decreed, upon the husband's death, it should go to his executor. Norborne's Ca. E. 1705. 2 Freem. 282. So, where a wife had a fortunue to be raised out of a term, to commence in future, and her husband died before the term commenced, he shall have her choses.
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en action, if he has made a settlement; but if not, they shall survive to the wife. Morgel's Ca. E. 1709. 2 Eq. Ab. 467. pl. 12. Most of the cases on this subject have gone upon the reason of equality, where a husband, by making an adequate settlement on his wife, becomes a purchaser of her fortune: but in this case the wife had only a provision if she should survive, with an agreement on the part of the husband, that he would leave her 200L; yet such was the express agreement between the parties, and it shall bind; otherwise the law, which gives the chance of survivorship, must prevail; but here the wife has waived it, and the husband never having reduced her choses en action into possession, it is a sufficient consideration to make him a purchaser. Decreed, the husband's executors shall have a bond debt due to the wife, and not received by the husband. Adams v. Cole, H. 1735. Ca. temp. Tab. 168.

61. The wife's chose en action before marriage was charged on the husband's estate; on the death of the husband it shall not survive, but be merged; yet if a husband, in consideration of the wife's chose en action received by him makes an adequate settlement, equity will not deprive her of that right which the law gives her. Seyes v. Price, T. 1740. 9 Mod. 217. Barn. 117.

62. The wife's portion has, in some cases, been decreed to the husband, where he has made an inadequate settlement, if made before marriage. Secus, on a voluntary settlement after marriage. Lanyv v. D. of Athol, M. 1742. 2 Atk. 448.

63. A husband who had made a settlement on his wife after marriage, was considered as a purchaser of a mortgage belonging to his wife, though he had not reduced it into his possession. Sykes v. Meynat, T. 1763. 1 Dick. 368.

64. Where, upon a marriage, the husband makes a settlement upon the wife, and her portion is vested in trustees to provide for the issue in certain proportions in specified events; if there be cases unprovided for, the portion belongs to the husband. Watkins v. Watkins, H. 1787. Vern. & Scriv. 61.

65. A provision by a marriage settlement is not considered as a purchase of all the property of the wife, unless particularly expressed or clearly imported to be so. Druce v. Denison, T. 1802. 6 Ves. 385.

66. A settlement was made by a husband in consideration of the fortune or portion which he would receive with his wife on marriage. This was held to be limited only to the portion actually paid on their intermarriage, and not to extend so far as to make him a purchaser of future accessions, unless such an intention be expressed, or clearly imported by the settlement. Carr v. Taylor, E. 1803. 10 Ves. 574. Vide Mitford v. Mitford, 9 Ves. 87.

67. The court will not allow the husband, or those claiming under him, to take the wife's portion in equity, without making a suitable provision for her. So, where the portion of a lunatic was, by order of court, paid to the master, to be given to her husband on his making a settlement, and the husband assigned the money over to his creditors, without making a settlement, the court declared he should not lay his hands on the money, without providing for his wife; but in regard the husband died, and then the wife died without issue, the money was decreed to the husband's creditors; for his right was then the same in equity as at law. Nightingale v. Lockman, M. 1729. Mos. 231. Fitzg. 148.

68. So also, where a wife's legacy was her only portion, the court allowed her husband the interest of it for her maintenance; but where the husband had received great part, and refused to make a settlement, the court stopped the residue and the interest also, that it might accumulate for the wife's benefit. Bond v. Simmonds, H. 1743. 3 Atk. 20.

69. But this relief is personal to the wife; for where a husband, upon his wife's death, becomes entitled to her choses en action, the court will not compel him to provide for children, lest it should prejudice creditors. Scriven v. Tapley, T. 1765. Amb. 509. 2 Eden 337. where, in a note, it is said, that notwithstanding the reversal of his Honour's decree in this case, Sewell, M. R. in Cockell v. Phipps, 1 Dick. 391. acted in direct opposition to Lord Northington's opinion; but by Lloyd v. Williams, 1 Madd. 450. it seems that the latter case has been erroneously reported. See also Murray v. Elibank, 10 Ves. 54. from all which it appears that children have no
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87. As to the cases where a husband becomes bankrupt before he has received his wife's portion, and the equity of providing for her, to which his assignees are subject, vide ante, tit. Bankruptcy, sec. vi. (c) et post, sec. ix.

71. And how for the choses en action or possibilities of their wife shall pass by the commissioners' assignment upon the bankruptcy of the husband, vide ante, tit.

Bankruptcy, sec. vii.

72. Feme mortgages, in fee of a copyhold estate married, and died; the court would not decide whether the husband, as the wife's administrator, or the heir, should have the benefit of the mortgage, there being no covenant to pay the money. Turner v. Crane, E. 1683. 1 Vern. 170. Et vide ——— v. Hicks, 1 Vern. 412. Baker v. Thornbury, 1 Ch. Rep. 283. Noyes v. Ellis, 2 Ch. Ca. 220.

73. A widow before her second marriage, without the privity of her intended husband, assigned a term in trust for herself and child: Held good, but a power reserved to dispose of the remainder of the term after the decease of herself and child, held void; for not being disposed of before marriage, it vested in the husband. Blithe's Ca. E. 1685. 2 Freem. 91, 92. As to cases of fraud on marriage contracts, vide post, tit. Marriage, iii.

74. Money awarded to the husband in right of his wife, will go to his executors if he dies before payment, for the award is such a judgment as changes the property. Oglander v. Baston, E. 1686. 1 Vern. 396.

75. A man may sue alone for a debt due to his wife on bond, and if he dies it will go to his executor; but if he sues jointly, and recovers judgment, and dies, it will survive to the wife. S. C. et vide Garforth v. Bradley, 2 Ves. 676.

76. A debt due to a man, jure uxoris, is considered as originally due to him within 7 Jac. 1 c. 15. and therefore seizible on an extent. Reg. v. Thornton, II. 1708. Parker 271.

77. Feme entitled to a portion after her mother's death, and no interest payable in the mean time; decreed (by her consent after marriage) that her husband may have a moiety. Butler v. Duncomb, T. 1718. 2 Vern. 762.

78. A note given to the wife, in the husband's life-time, for money, is part of the husband's assets. Hodges v. Beverley, H. 1724. Bubb. 188.

79. A survived her first husband, who left her a legacy, but she married, and died before it was paid to her second husband; then he died, the legacy being unpaid; the second husband had an absolute interest in the legacy, by surviving his wife, and her administrator de bonis non is only a trustee for the administrator of the husband; for husband and wife, during coverture, are but one person, and the husband surviving has an exclusive right to administer. Humphrey v. Bullem, E. 1737. 1 Atk. 458.

80. Baron and feme covenanted before marriage to release the right under the custom of London, to be derived from the wife's father; the husband's release shall bind the wife, and an award to the contrary shall be set aside. Medcalf v. Medcalf, T. 1737. 1 Atk. 63.

81. A gave a part of his personal estate to B. his daughter, who married, and joined her husband C. in an assignment of this legacy, in trust for their daughter. C. died before the money was reduced into possession. B. married D. who survived her; Per curiam, if B. had continued a widow, she would have been entitled, and no notice would have been taken of her daughter's interest. Grosvenor v. Lane, E. 1741. 2 Atk. 150.

82. If a bond be given to a feme sole, she and her husband after marriage must join in the action, otherwise, if given to the wife after marriage, for then the husband may maintain an action alone. Bates v. Dandy, T. 1741. 2 Atk. 208.

83. Where there is a bond debt to the wife dum sola, and the husband receives it at law, the court will not grant an injunction, for the action was proper. Jeason v. Monson, M. 1742. 2 Atk. 417.

84. Where the ecclesiastical court has consented that a husband shall receive his wife's portion, equity has granted an injunction to stay proceedings there. S. C.

85. A husband recovers judgment for the wife's debt, and dies before execution; she is entitled to the money, and not his executor. Bond v. Simmonds, H. 1743. 3 Atk. 20.

86. Where a wife has a demand in her own right, and the husband applies for it, the court will take care of her, if no
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settlement; but where the wife's father, on marriage, covenanted with the husband, it never was the wife's debt. Brett v. Forcer, H. 1746. 3 Atk. 403.

87. A trust created by the husband of the wife's estate, not being deemed fraudulent against creditors, or a subsequent purchaser, equity will not carry it further, though voluntary conveyances are generally held fraudulent against purchasers. White v. Sansum, H. 1746. 3 Atk. 410. 412.

88. Though a husband died before he took out administration to his wife's estate, it shall go to his representative, for it is vested in him at her death; but had the wife survived, her choses en action, not reduced into the husband's possession, would have survived to her. Elliot v. Collier, T. 1747. 3 Atk. 526. 527.

89. A husband assigned his wife's choses en action, for the benefit of an unprovided child by his former marriage; the consideration of natural love and affection held not good. Beckett v. Beckett, M. 1760. 1 Dick. 340.

90. By agreement before marriage the husband may renounce his right to the wife's property. Hoare v. Hoare, E. 1790. 2 Ridg. P. C. 278.

91. Where a husband died before receipt of money ordered to be paid to him in right of his wife, decreed to his executors as a vested interest in him. Heygate v. Annesley, T. 1791. 3 Bro. C. C. 362.

92. Where a husband has assigned his wife's property for a valuable consideration, Arden, M. R. considered, that the assignee takes it subject to the same equity to which it was subject at the time of the husband's assignment. Roberts v. Roberts, H. 1796. 2 Cox 422.

93. By marriage, a husband acquires an absolute property in all his wife's personal estate, capable of immediate and tangible possession; but if it can be reduced into possession by action only, either at law or in equity, he has only a qualified interest, such as will entitle him to make it absolute by reducing it into possession; but if he does not do so, it will survive to the wife as her chose en action. Langham v. Nenny, T. 1797. 3 Ves. 469.

94. A settlement of the property of a feme covert, ward of the court, and of all the dividends and interest accrued, was directed in this case, in opposition to the husband's assignment for a valuable consideration. Like v. Beresford, T. 1797. 3 Ves. 506. As to a particular assignment by the husband for a valuable consideration, ride Burdon v. Dean, 3 Ves. 607. Oswell v. Probert, 2 Ves. jun. 680. Brown v. Clarke, 3 Ves. 166. Freeman v. Parsley, 3 Ves. 421.

95. A husband is entitled to the income of his wife's equitable interest, unless he has received some fortune with her, or has misbehaved, as by running away with a ward of the court. Macawley v. Philips, T. 1798. 4 Ves. 15.

96. Bill by a husband to have his wife's portion, part of which was invested in stock, made up money, on the ground either of express contract or representation upon which the marriage took place, was dismissed: the description by the articles though generally "the sum of 4000l." referring to that sum as in settlement; and the representation under circumstances not amounting to a warranty, and proceeding upon a common mistake. Ainslie v. Medlycott, T. 1803. 9 Ves. 15.

97. F. A. being entitled for her life to dividends of stock invested in trust for her, married I. S., who assigned part of it, and A. B. became his surety. I. S. then went abroad, without making any provision for his wife, whereupon A. B. the surety, filed a bill to enforce the husband's assignment, as an indemnity to him against past and future payments, and the same was established, but upon a bill filed on behalf of the wife, the court directed the remainder not assigned to be paid to her. Wright v. Morley, and Morley v. St. Alban, H. 1805. 11 Ves. 12.

98. Trust by will as to a moiety of the share of testator's married daughter A. for her separate use, and not to be subject to the control, &c. of B., her prescut or any future husband, remainder to her husband B. for life, remainder for all the children of A., and in case there shall not be any, or all shall die before 21, for the survivors of B. and A. his wife, his or her executors, &c. and as to a moiety of each of the shares of each of his two unmarried daughters, "upon the like trusts under the like restrictions" as described concerning the shares of A. "so and in such manner as that the same may be secured for the benefit of his said daughters and their children, and not be subject or liable to the control of any husband they may happen to


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marr[y],” one of the unmarried daughters having married and died without issue, her husband surviving was held not entitled to any interest in the moiety, the subject of the trust created by the will. Judd v. Wyatt, T. 1805. 11 Ves. 483.

99. A legacy given to a married woman subject to a life interest, was with consent during the existence of such life interest, paid to the husband: this is such a reduction into possession as will bar the wife's right by survivorship. Deswell v. Earle, T. 1806. 12 Ves. 473.

100. But possession by the husband as executor and trustee is not such a reduction into possession of the wife's share in the residue, as will entitle him against her right by survivorship. Baker v. Hall, T. 1806. 12 Ves. 497. Wall v. Tomlinson, E. 1810. 16 Ves. 413.

101. On marriage a settlement was made, giving back to the wife her original fortune after her husband's death, and which, int. al. contained a covenant from the husband, that if his wife should receive a reversionary interest to which she was entitled under a will, it should go on the same trust as the rest of the settled property. The husband becoming bankrupt, the wife has no claim upon that reversionary fund against the purchaser under the commission, for her right did not commence till after her husband's death, and he was absolute. Bassey v. Serra, T. 1807. 14 Ves. 315.

102. A settlement on marriage of the wife's fortune, in case of bankruptcy of the husband, though in the form of a bond by him, is void as against creditors, because it must be considered as the husband's bond, and affecting his property. Exp. Hodgson, T. 1812. 19 Ves. 206.

103. Husband and wife, assigned her reversionary interest in stock as a security for an annuity granted by the husband, who afterwards took the benefit of an insolvent act, and a general assignment was made of his property: then the person on whose death the wife was to take, died, afterwards the husband died, without having done any other act to reduce the stock into possession: Held, that the wife was entitled by survivorship against both the particular and the general assignee. Hornsley v. Lee, T. 1816. 2 Madd. 16. Vide Mitford v. Mitford, 9 Ves. 87. Woodlands v. Crowcher, 12 Ves. 174.

104. E., the father of N., after her marriage drew a check in her favour upon his bankers for 10,000l., for which the bankers gave her a promissory note; 1000l., part of the principal money, on the note was paid to her husband, and he also received the interest due on the note to the time of his death: Held, that upon his decease, his wife was entitled to the note as a chose en action, which had survived to her., Nash v. Nash, T. 1817. 2 Madd. 133. Vide Phippiakirk v. Pluckwell, cited 2 M. & S. 396. Wildman v. Wildman, 9 Ves. 176.

BARON AND FEME IV.

Of the Acquirements of the Wife after Marriage.(a) Where she shall be considered as a Feme Sole during Coverture.(b)

(a) Of the Acquirements of the Wife after Marriage.

105. Where a legacy is given to a feme covert, payment to her alone, without her husband, is not good. Palmer v. Trevor, M. 1684. 1 Vern. 261.

106. A voluntary bond by a husband, not indebted, to make his wife a jointure; the jointure was made, and the wife evicted; her giving up bond during coverture shall not bind her, but she shall have her jointure made good out of her husband's personal estate. Beard v. Nutt hall, H. 1686. 1 Vern. 427.

107. A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life and his widow's; the widow is not bound. Musgrave v. Dashwood, E. 1698. 2 Vern. 45. 63.

108. A., purchased a walk in a chase, and took the patent to himself, his wife, and I. S., and to the survivor for life. A. died indebted; the wife shall have the benefit of the patent for her life, as she cannot be a trustee for her husband; but sevus, as to I. S. Kingdome v. Bridges, T. 1688. 2 Vern. 67.
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109. A. purchased a copyhold, and took the surrender to himself, his wife, and daughter, and their heirs; A. and his wife take one moiety by entailties as one person, and the daughter takes the other; A. mortgaged his estate, and died; the mortgage is void, and no relief in equity. *Buck v. Andrews*, H. 1600. 2 Vern. 144.


111. A wife having power to dispose of the personal estate which she had before marriage, afterwards got a large personal property privately on her father’s death, which she conveyed from her husband, and disposed of to charities; this shall not be made good to the husband, so as to disappoint the charities. *Pilkington v. Cuthbertson*, E. 1711. 1 Bro. F. C. 357.

112. A wife cruelly treated by her husband, became entitled to 3000l., as her share of her intestate mother’s estate; the interest of the money shall be paid to the wife for her separate use, then to the husband for his life, and the principal to the children, if any; and if not, to the survivor. *Nichols v. Dancers*, E. 1711. 2 Vern. 671.

113. A. by will gave 300l. to a *feme covert*, payable out of a reversion of land, but created no separate trust; the husband assigned this legacy to trustees for his children, and by will bequeathed it in like manner; decreed a good assignment, and that he had a power to extinguish or release the legacy, which he by will confirming, had bound his wife. *Atkins v. Dawber*, M. 1714. Gilb. Eq. Rep. 38.

114. Where the *residuum* of a testator’s estate, bequeathed to a *feme covert*, is not collected and reduced to a certainty in her life-time, it is not a vested interest, but remains a *chose en action*, and shall go to the administrator of the wife. *Amhurst v. Selby*, 11 Vin. 377. pl. 8.

115. A large legacy was left to defendant’s wife, for which he sued in the spiritual court; testator’s executors filed a bill for an injunction against the husband; *per curiam*, the money shall be secured to the wife, whenever may be plaintiff to ask it in equity. *Gardener v. Walker*, H. 1722. 1 Str. 503.

116. A *feme covert* having a separate estate borrowed money on bond, and died ten years after, the husband possessed himself of her effects, and insisted on the statute of limitations. Decreed, the bond shall be satisfied out of the wife’s assets left by will. *Norton v. Turoville*, T. 1723. 2 P. W. 144.


118. A *feme covert* after marriage had a large succession of fortune, and though her husband made a new settlement, and increased her jointure, yet equity would not take from her what the law gave her. *Lamboy v. Lamboy*, T. 1725. Sel. Ch. Ca. 48.

119. A. devised lands to his daughter a *feme covert*, in fee, for her separate use, but did not appoint any trustees; the husband became bankrupt; the lands shall not be subject to the bankruptcy, for equity will supply the want of trustees, and protect the wife. *Bennet v. Davis*, M. 1725. 2 P. W. 316.

120. A. after marriage, purchased a term to himself and wife, and the survivor. A. mortgaged the term with proviso, to be void on payment of the money by either of them, or the executors of either, and that the husband, his executors, &c. should quietly enjoy till default; the husband, seven years after, died indebted: Decreed, that this settlement, being after marriage, was voluntary, and the equity of redemption being reversed to both, was assets to pay the husband’s debts. *Watts v. Thomas*, T. 1726. 2 P. W. 364.

121. I. S. devised 100l. *per annum* to his son A. and B. his wife, for their lives, viz. 40l. to A., and 60l. to B.—A. died; B. shall take the whole. *Cooper v. Scott*, H. 1731. 3 P. W. 121.

122. I. S. by will gave his daughter A., the wife of B., all his jewels, household goods, &c. to be at her disposal, and do therewith as she should think fit. B. became bankrupt; this bequest shall not pass by the commissioners’ assignment, for it is to the separate use of the wife. *Kirk v. Paulin*, 1739. 7 Vin. 95. pl. 43.

123. L. S. gave 4000l. in trust for the separate use of a *feme covert*; the court
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Of the Requirements of the Wife after Marriage.

would not allow the money to be paid to her husband, though she attended in court and consented. Blackwood v. Norris, M. 1734, cited in Penn v. Peacock, Ca. Temp. Tabl. 45.

124. A. gave the residue of her personal estate to B., not knowing she was married; the husband of B. agreed to make a settlement, but died before it was done; B. administered. Ld. Thurlow decreed the whole to be the property of the wife as survivor. Fort v. Fort, H. 1735. Ca. temp. Tabl. 171.

125. Plaintiff gave a demesne covert a promissory note, and a bill was brought to discover the consideration; but the husband dying before answer, the suit was abated, for a demesne covert can have no separate property. Leightoun v. Holiday, E. 1740. 2 Eq. Ab. 1. pl. 5.

126. A legacy of 60l. was given to a demesne covert, but her husband died before it became payable: Held, this was in nature of a chose in action, and shall survive to the wife; for it can not be presumed that the husband had released it. Brothers v. Hood, E. 1740. 2 Com. Rep. 725.

127. A husband borrowed money on his note, and promised to assign his wife's mortgage as a security: Held a disposition of her chose in action, protestat, and that the surplus belonged to the wife. Bates v. Dandy, T. 1741. 2 Atk. 207.

128. A wife had a freehold rent charge devised to her for life; her husband may distrain for it during coverture, but cannot convey it away, for she may be entitled to it wholly, by surviving him. Fitter v. Fitter, H. 1742. 2 Atk. 511.

129. A wife cannot change the nature of her estate, after marriage, for being under coverture, she cannot contract. Oldham v. Hughes, M. 1742. 2 Atk. 452.

130. Where a wife has a power to dispose of her separate estate, her disposition of it must be by acts strictly pursuing the power. Ross v. Ester, T. 1754. 3 Atk. 601. Burnett v. Mann, M. 1748. 1 Ves. 157.

131. Diamonds given to the wife by the husband's father on marriage, are her separate property, and so is a present from a stranger during coverture, but not so clear a case. Trinkets given by a husband to his wife, are her separate property, and so determined. Graham v. Loudonbery, M. 1746. 3 Atk. 393.

132. If an estate is given to a husband for the livelihood of his wife, he will be a trustee for her separate use, and technical words are not necessary to create a separate trust; "livelihood" is enough here to show the testator's intention. Darley v. Darley, M. 1746. 3 Atk. 399.

133. Wife cannot, during coverture, acquire any property distinct from her husband. Coomes v. Elling, E. 1747. 3 Atk. 676.

134. If a gift by a husband to his wife be made to a trustee for her separate use, in possession, it will be good, ut semble. S. C.

135. A wife seized of a copyhold estate, without her husband joining, but in his presence, surrendered it to the use of her will, and devised it to A.; the fact of the surrender not being before the court, it was sent to be tried, but Ld. Ch. thought the surrender good, or the steward would not have taken it in the husband's presence. Taylor v. Phillips, E. 1749. 1 Ves. 229.

136. Though a husband cannot by law assign a wife's possibility, yet equity will support such an assignment, if for a valuable consideration; in this case the wife had a legacy of stock, payable on a contingency which did not happen before the husband became bankrupt, the husband had assigned it as a security for a debt, and the particular assignee had notice of the wife's equity, but he waived his security; consequently, when the stock came to the bankrupt's assignees, they took subject to the same equity, and the stock was decreed to be transferred to the wife. Gray v. Kentish, T. 1749. 1 Atk. 280.

137. Upon a bill by husband and wife for money in her right, the court will decree it to them jointly, that the wife may have a chance of survivorship. Pavet v. Delaval, T. 1755. 2 Ves. 609.

138. A. covenanted, on the marriage of her daughter, to whom she gave a portion, that she would give her equal to what she gave the rest: A. left her daughter a legacy, and she took a part of the residue; the wife survived. Decreed, that what the husband had not reduced into possession, should go to the representatives of the wife, there being no contract to give him a certain right. Garforth v. Bradley, M. 1755. 2 Ves. 676.

139. Covenant in an infant's settlement, that whatever should come
her mother, or otherwise, should be bound thereby; this is restrained to what may come from the mother only. Williams v. Williams, E. 1782. 1 Bro. C. C. 132.

140. A male infant married an adult, who covenanted that her estate should be settled to certain uses. If a woman agrees to settle her general expectations when they shall fall in, without fraud, on her intended husband, the agreement shall be executed, and the husband, when of age, shall answer the contract; and the court rested on the wife's covenant, for the husband's only operated to take away all imputation of fraud. Slocomb v. Glubb, H. 1789. 2 Bro. C. C. 545.

141. Where a woman who is, or has been, married, is entitled to a legacy, the court will expect an affidavit that it has not been in any manner settled, before it will direct payment. Hough v. Ryley, E. 1789. 2 Cox 157.

142. The interest of a real and personal fund, was ordered to be paid to bankrupt's wife for life; she afterwards became entitled to a distributive share of an intestate's estate; this is not a new interest arising to the bankrupt on her death, but vested at the death of the intestate, and shall go to his assignees. Robinson v. Taylor, T. 1789. 2 Bro. C. C. 389.

143. A wife became entitled to a distributive share of a personal estate; the husband and wife being inhabitants of Prussia, the court doubted whether to make a settlement on the wife, or order the whole to the husband; it was referred to the master, to inquire what was the law of Prussia in such cases; and the court, after enquiring into the custom of London, ordered the whole to be paid to the husband. Sawyer v. Shute, T. 1792. 1 Austr. 63. Campbell v. French, H. 1797. 3 Ves. 323.

144. Where money is declared due a wife, the court will not order it to be paid to her trustees on motion, till the master has made his report on the settlement. Nordwick v. Mynd, T. 1793. 1 Austr. 274.

145. Husband and wife by indenture assigned in trust for the husband, personal property bequeathed to the wife; the husband, by will, gave his real and personal estate in trust for his wife for life, remainder over, and died; on the death of the wife and her second husband, the assignment was delivered up to be cancelled, on their waiving all benefit under the first husband's will. Wright v. Rutter, T. 1795. 2 Ves. jun. 673.

146. An action will not lie by a husband against an executor, for personal property bequeathed to his wife.—S. C.

147. Testator having proved the value of several annuities secured to the separate use of his wife, under a commission against the grantors, his assets were charged with the dividends only; but the claim of his widow to these dividends, as a gift by him to her, failed, there being no trustees, and the evidence not even affording ground to direct an issue. McLean v. Longlands, M. 1799. 5 Ves. 71.

148. A legacy to a married woman is not sufficiently reduced into possession by an executor's appropriation of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. Blount v. Bestland, T. 1800. 5 Ves. 515.

149. A husband cannot now maintain an action for a legacy in right of his wife. S. C.

150. A married woman carrying on trade without the interference of her husband, who resided in a different part of the kingdom, advanced money to the plaintiff for the purchase of a share in the lottery, upon an agreement with him that half should be considered a loan to him, and that they should be jointly concerned in the adventure: Held, that the wife's money being that of the husband, the produce of the lottery prize belonged to him also, and plaintiff's bill for a moiety of the prize was dismissed. Lampier v. Creed, T. 1803. 8 Ves. 599.

151. Stock was transferred into the name of a married woman, as next of kin of an intestate; her husband died without having done any act referring to it, except signing partial transfers by her: Held, that this stock survives to the wife: Held also, that the power of the husband to dispose of this description of property does not necessarily determine that it is to vest absolutely in him; for though he may dispose of his wife's term, or may forfeit it, or it may be taken in execution for his debt; yet it is not so absolutely his as to be transmissible to his representative against the claim of the wife surviving. Wildman v. Wild-
Of the Wife's Acquirements after Marriage.—Where considered as a Feme Sole.

152. A settlement was made by a husband in consideration of the fortune he would receive with his wife in marriage; but no intention was expressed, or could be imported from the settlement, that he should be benefited by any future accession. The wife after marriage took a subsequent interest arising to her as next of kin: Held, that she was entitled to an additional provision, even as against the assignees under the bankruptcy of her husband, and a claim by the administrator of the interest of a debt due from her husband to the estate of the deceased, cannot be set off against her right.—Carr v. Taylor. E. 1805. 10 Ves. 574.

153. A legacy was given to a married woman, subject to a life interest, but with the consent of all parties it was paid to her husband during the life of the person entitled for life. This is such a reduction into the husband's possession as shall bar her right by survivorship. Dowell v. Earle. T. 1806. 12 Ves. 473.

154. J. S. had a wife (who was insane) and one son; he had no fortune with his wife on marriage; but afterwards her uncle left her the interest of 20,000l. for her sole use for her life, and at her decease to her children. No commission had issued. The wife was maintained by her brother at her husband's expense, and her son was at the University. The husband maintaining his wife and receiving her separate income, would not be liable (if she were sane) to account for more than one year: (a) on a presumed agreement, to subject that fund to the maintenance of the family. But in this case, on the husband's application for an allowance, the court directed an enquiry as to part maintenance, and the husband's ability with due regard to her comfort: (b) Brodie v. Barry. T. 1813. 2 Ves. & B. 36. Vide (a) Parker v. White. 11 Ves. 225. (b) Att. Gen. v. Paruther, 4 Bro. C. C. 409.

(b) Where a Wife shall be considered as a Feme Sole, during Coverture.

155. The husband settled lands on himself for life, remainder to his wife for life, agreeing that she should hold and enjoy, till his heir or executor should pay to her executor, administrator, or assign, 100l. She died, leaving her husband, and by will bequeathed this 100l.:—Held, a good appointment in equity. Bietson v. Sawyer. T. 1684. 1 Vern. 244. But by a subsequent determination in S. C. M. 1693. 2 Vern. 328. It seems that the wife was not to have a disposing power over this 100l. unless she survived her husband; and it was there held, that the will of the wife, as a feme covert, was void.

156. A feme covert saves money out of her separate estate; she may dispose of it as a feme sole. Gore v. Knight, H. 1705. 2 Vern. 533. Pre. Ch. 255.

157. It was agreed before marriage, that the husband should have a certain part of the wife's estate, and that she should dispose of all the rest. 5000l. fell to the wife after marriage: Held, that she should have the disposal of it; for the covenant of the husband shall extend to a right in futuro. Pitts or Pot v. Lee, H. 1715. 4 Vin. 131. pl. 8.

158. After the marriage of plaintiff and his wife, the wife took a real estate by descent, whereupon they jointly conveyed the estate to trustees, in trust, to permit the wife to dispose of it as she pleased. By frugality she saved 1400l., which she bequeathed to her nieces, having no children. Decreed, the 1400l. well disposed of; and said, that the power of disposition being given after marriage, was stronger than if given before. Gold v. Rutland, E. 1719. 1 Eq. Ab. 346. pl. 18.

159. Articles between husband and wife are good without the intervention of trustees; for femes covert having separate estates, are considered as feme sole as to such estate, and they have an absolute power of disposing of them, notwithstanding their coverture. Freeman v. More, E. 1728. 3 Bro. P. C. 378.

160. Where a husband was attainted of felony, and pardoned on condition of voluntary transportation, a personal estate, which came afterwards to the wife, was decreed to belong to her as a feme sole, and was ordered to be paid to her second husband. Newsome v. Bowyer, T. 1729. 3 P. W. 37, 38.

161. J. S. absconded for fourteen years, and on his return, seiz'd on all the property which his wife had got together as a milliner, to support herself and children: Held, that what the wife had acquired in his absence was her separate
property, and that he should deliver up the whole of what he had so forcibly taken. *Cecil v. Juzen*, H. 1797. 1 Atk. 278.

162. Where a personal estate is given to a wife for her separate use, she may dispose of it as a *feme sole*, and all that accrues, if above the age of seventeen. *Hearle v. Greenbank*, T. 1749. 3 Atk. 709. 1 Ves. 303.

163. A wife having a power to dispose of her estate, under her marriage articles, conveyed it by lease and release to trustees, to the use of her natural son; afterwards she and her husband levied a fine of the land to other uses. *Per curiam*: The wife not having the legal estate, the lease and release could not operate as a conveyance, or as an execution of the power; the estate, therefore, passed by the fine. *Bramhall v. Hall*, T. 1764. Amb. 467.

164. A wife having a disposing power under her settlement, by will devised the trust of an estate in reversion, to which she became entitled during coverture, to her husband: Held, a good appointment, though no conveyance of the reversion was ever made, or fine levied. *Wright v. Englefield*, M. 1764. Amb. 468. *Wright v. Ld. Cadogan*, M. 1766. 6 Bro. P. C. 156. which seems to be S. C. and is thus cited in 2 *Eden* 239. A woman being entitled to the trust of a reversion in fee simple, by articles previous to her marriage, reserved to herself a power of disposing of all her estate to such uses as she should think proper—Held, that an appointment afterwards made by her in favour of her husband and children was good, although no conveyance of the reversion was ever executed: *Held also*: that under an appointment to all and every the daughter and daughters of A. and the heirs of their body and bodies, and in default of such issue, over; there being only two daughters, and one of them dying under twenty-one without issue; the surviving daughter was entitled, though there was no cross-reminders. *Vide Wright v. Holford*, Cwp. St. Phippard v. Mansfield, ib. 797. *Watson v. Foxen*, 2 East 36. As to the presumption for and against cross-reminders, *vide etiam Perry v. White*, Cwp. 777. *Atherton v. Fye*, 4 T. R. 710.—*Koe v. Clayton*, 6 East 628. *Doe v. Webb*, 2 Taunt. 234. The decree in this case was afterwards affirmed in the Lords, 1 Bro. P. C. (T.) 486.; where the point, as observed by Ld. Kenyon, in *Doe v. Staple*, 2 T. R. 695. was ably discussed on the doubt thrown out by Ld. Hardwicke, in *Péacock v. Monk*, 1 Ves. 190. 192.

165. A wife may dispose of her personal property, given to her separate use, by her will, without the assent of her husband; for *jus disponendi* is one of the incidents of a separate enjoyment. *Fettipplace v. Gorges*, M. 1789. 3 Bro. C. C. 8.

166. A *feme covert* is a *feme sole*, as far as the instrument creating her separate estate makes her proprietor; and if she pledges it according to her power, the trustees must hold to the uses she appoints. *Pybus v. Smith*, T. 1790. 1 Ves. jun. 189. But this rule does not extend to transactions with the husband. *Milnes v. Busk*, M. 1794. 2 Ves. jun. 498.

167. A married woman agreed to pay her landlord an additional rent out of her separate estate, unknown to her husband, in consideration of greater repairs. On her death, the husband filed a bill for a return of the money, suggesting a fraud on him. Bill dismissed. *Masters v. Fuller*, T. 1792. 2 Bro. C. C. 19. 1 Ves. jun. 513.

168. Where a wife has assigned her separate property, the assignee may have the trust executed in equity, for her disposition is good to the extent of her power; but a general creditor cannot in equity be paid out of that property; neither will equity make good a contract against a married woman, on which she cannot be sued at law. *D. of Bolton v. Williams*, 2 Ves. jun. 150. 156. 4 Bro. C. C. 309. 311.

169. A wife entitled to the interest of money for life, with a power of appointment as to the principal, received part of the principal for her support, and appointed to her husband, and died. The husband cannot claim from the trustees what his wife so received; but if a stranger had supported her, the trustees would have been allowed this payment, as against the husband. *Randall v. Hearle*, M. 1794. 2 Anstr. 563.

170. A bequest of two bonds and a mortgage to a married woman, with a direction that they should be delivered up to her, whenever she should demand or require the same, is a bequest to her separate use. *Dixon v. Olmius*, T. 1795. 2 Cox 414.
Where considered as a Feme Sole during Coverture.

171. Testator gave a feme covert 1000l. stock to her separate use, for life, with power to dispose of it by will, and in default to go over. This is an absolute gift, qualified only to exclude the husband on the death of his wife. Hales v. Margerum, M. 1796. 3 Ves. 299.

172. A husband may forfeit or dispose of his wife's chattel real during her life; if he do not, it shall survive to her; but if he survive, it shall go absolutely to him. Yet there are many obligations, which do not survive against the husband after coverture. Moody v. Matthews, T. 1802. 7 Ves. 183.

173. A by will gave to trustees 500l. 3 per cent. consols, in trust to pay and transfer the same, with all interest and dividends, to her daughter B., the wife of W. C., for her sole and separate use, as she should direct or appoint, according to her free will and pleasure, notwithstanding her coverture, and testatrix appointed D. sole executor. D. renounced, and E. the son of testatrix, having administered, transferred the stock to W. C. the husband. J. F. the other trustee under the will of A. (who had refused to act,) by his will gave 500l. to B. C. who received the money and lent it to plaintiff, and on plaintiff's bankruptcy she and her husband proved the debt under his commission. B. C. then made her will (reciting her sole and separate disposing powers,) whereby she gave 400l. 3 per cent. consols to plaintiff; and after some legacies, made her husband residuary legatee, and appointed her husband and plaintiff executors. By a codicil, B. recited her will and declared her full approbation thereof, and then also reciting that she had received a legacy of 500l. under the will of J. F. she disposed of it thus:—To her brother E. 50l., to her husband 250l., and to plaintiff 200l. Plaintiff obtained his certificate in the life-time of B. and paid 20a. in the pound. Whereupon he filed his bill, praying a transfer of the 400l. 3 per cent. consols, and payment of the 200l. money legacy. Defendant C. not having proved his wife's will, plaintiff applied for administration cum test. annexo; but administration was granted to G. pro lite only. Defendant C. insisted that the 500l. stock, being transferred to him by E., with the consent of his wife, was a gift to him from her; but E. stated, that he transferred the stock only that C. might become the trustee, and that he never claimed it for his own use, but treated it as separate property. Ld. Eldon thought the limited administration granted to the defendant G. pro lite, a very extraordinary proceeding. The case being argued, Ld. Eldon proceeded, saying, that the will and codicil of B. (the latter of which, after reciting the will, having the expression "which I fully approve of," would have the effect of a re-publication)amount, if of a testamentary nature, to a disposition by will of 400l. stock, unquestionably given to her separate use, (leaving the remaining 100l. stock to fall to her husband, either by the will or jus matris,) and 500l. money asserted to be her separate property; but in the first creation of that legacy, by the will of J. F. certainly it was not given as such. The legacy of 500l. stock being given to the separate use of the wife, it continued so, and the transfer could not destroy the separate trust, unless the husband can produce clear evidence that the wife intended, by such transfer, to destroy it; if the evidence be short of that, the husband clearly remains a trustee in the room of D. The wife, then, had vested in her such powers as the nature of the property and the terms of the instrument would give her. In this case the instrument only expressed a trust for her separate use, without determining the powers of disposition,—whether it should be by deed, will, or other writing. But the nature of that interest is now well settled, that the trust being for her separate use, she would be enabled to dispose by will if she thought proper, as incident to such an interest, though a will was not alluded to. She might have a power to dispose by an instrument not amounting to a will, and which, in this court, might be supported as a direction or appointment. It is not necessary to determine whether, if she sets about a disposition by will, meaning to make a testamentary instrument, and it turns out not to be a testamentary instrument, that is a good disposition, but it is necessary to consider another question, merely for the forms of the court, viz.; where a feme covert has the power by will, according to the terms of the instrument, requiring witnesses, to dispose of personal estates, it is necessary to prove, first, that the instrument was in nature of a will; and secondly, if so, that it was attested so modo, in which
the power required it to be attested. For the former purpose, it has been hitherto deemed necessary that this court should be satisfied by the judgment of the ecclesiastical court, that the instrument is in nature of a will. But this court has never been contented with that judgment, as to the circumstances of attestation; for after that proof in the ecclesiastical court, this court always requires the witnesses to be examined, in order to prove that it is her act, and will not trust the ecclesiastical court with this conclusion, that because it is her act, and in nature testamentary, therefore this court is of necessity to hold it an appointment. Though in the terms of the power, as well as from its nature, the attestation of witnesses is not necessary, still here the question is, whether it is her direction or appointment? Ld. Eldon thought that the wife's signature in this case ought to be proved, and he did not see the distinction upon which, if in the case he put, the attestation must be proved, the court will not also require the fact of signature to be proved again, where the essence of the appointment consists in that fact: but it does not rest there; for if there are no witnesses the rule of evidence requires it, if the objection in this case is insisted on; and his Lordship mentioned this to intimate, that he did not acquiese in the reasoning upon which it was concluded to be unnecessary that it should be proved as an appointment here. As to the money legacy of 200l. claimed by plaintiff, that rests upon different circumstances: as the implication from the acts of the wife is not to be pressed against the wife, neither ought implication to be pressed against the husband to give property to the separate use of the wife. Evidence equally clear is necessary in both cases. The legacy of 500l. was given to the wife; without more there is nothing to constitute a right to retain it against the husband. The executors took upon themselves to place this money in the hands of the wife; she lent it to plaintiff and took a bond in her own name; but the loan does not appear to be with the husband's privy, neither does it appear how the money was dealt with between the time of the loan to plaintiff and his bankruptcy. The proof under the commission is in terms which might be material if the effect of all the other circumstances is added: in the proof the husband asserted on oath, that the bankrupt was indebted to him in money, not separate money which his wife had lent to the bankrupt as separate money. The husband at that time was a trustee of the stock property of his wife, and he might by that species of proof mean, that as he held in trust what he had reduced into his possession, so he would what he might receive under the commission; but he has sworn that he did not mean to be a trustee, and if he is so, it is in consequence of a rule of the court, and not of his intention. Afterwards the dividend came home to his hands; but it is not explained that he received it to form a permanent fund for his wife, and it cannot be inferred from the proof alone that he intended it to be so; on the contrary, his acts import that he did not: his Lordship, however, offered to make a reference to the master if desired. It was contended for plaintiff, that the husband must be put to his election. As to which Ld. Eldon said, all election goes upon compensation; if by a will which gives A.'s estate to B. an estate is given to A., he may say he will keep his own estate. The compensation upon which the court goes is the implied condition, of which the other is to have the benefit, that whoever takes that estate in consequence of the election, shall take it cum omere. An estate being given to a person who will not accept it upon the terms of giving up his own estate, the question is, whether he shall not take it as heir? because it is against conscience that he shall by his legal title disappoint that disposition; but upon that point Ld. Eldon reserved his opinion. Lord E. then, adverted to the legacies, said, that as to the stock the will of the testatrix would have effect; but as to the money legacy, unless better enquiry can produce other circumstances attaching upon it a trust to the wife's separate use, no trust has attached at all. His Lordship then declared plaintiff entitled to the 400l. stock, and nothing more. Rich v. Cockell, Rich v. Hall, E. 1804. 9 Ves. 369. Vide Fettiplace v. Gorges, 1 Ves. jun. 46. 3 Bro. C. C. 8.

174. On a trust to permit a married woman to receive the interest or dividends of stock to her own use during her life, independent of her husband, held, per M. R., that she is absolutely entitled for life to her separate use; and upon the rule, that a feme covert is to be
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Where considered as a Feme Sole during Coverture.

175. A married woman is considered as a feme sole, as to property settled to her separate use, whether in possession or reversion, and as such she may sell it, if not particularly restrained by the instrument. Nor is her consent, on examination, necessary to pass her separate property. Sturgis v. Corp, M. 1806. 13 Ves. 190.

176. A married woman was appointed guardian of an illegitimate child; and the court ordered payment to her upon her separate receipt. Wallis v. Campbell, E. 1807. 13 Ves. 517.

177. Under a bequest of stock is trust to permit a married woman to receive the dividends for life, for her sole and separate use, &c. and to pay the same into her own proper hands, and that her receipt should be a sufficient discharge. A sale by her of part of the dividends was established. Browne v. Like, E. 1807. 14 Ves. 302.

178. The bond of a feme covert, as a surety, was enforced against her separate estate under a settlement to her separate use. Healy v. Thomas, H. 1809. 15 Ves. 596.

179. Where a legacy is left to a feme covert, and the assignees of the husband agree with the executors on a claim made for a settlement, to take only a part of the legacy, and the feme covert dies, leaving a child, such child is entitled to the residue of the legacy under the contract; but the child of a feme covert, a legatee has no equity to insist on a settlement after the death of a mother, unless there is a contract or a decree for a settlement in her life-time. Lloyd v. Williams, E. 1816. 1 Madd. 450. Vida Murray v. Ld. Elibank, 13 Ves. 7. Grosvenor v. Lane, 2 Atk. 180. Milner v. Colmer, 2 P. W. 641. Hearle v. Greenbank, 3 Atk. 717. 2 Ves. 298, and the other cases reviewed by the Vice Chancellor.

180. Bequest to a feme covert of a sum for her sole and separate use and benefit; and afterwards a bequest of the residue for her own use and benefit; the residue was held not to be separate estate of the wife. Wills v. Sayers, M. 1819. 4 Madd. 409.

Of the acts of a wife, where she cannot be considered as a feme sole, vide, s. vi. Of a wife considered as a feme sole, living apart from her husband, and having separate property, vide s. xiii.

BARÓN AND FEME V.

Acts of the Wife dum sola, how far binding on the Husband.

181. A. settled his lands for payment of his debts; but the trustees never acting, his wife, after his death, entered and took the profits; she married a second, and then a third time, still continuing to take the profits. An unsatisfied creditor appearing, decreed that the third husband should account for what had been received by himself and the second husband, and the wife when sole. Gilpin v. Smith, H. 1667. 1 Ch. Ca. 80.

182. A widow, before her second marriage, made a settlement without the privity of her intended husband. Set aside as fraudulent, he having married her in confidence of having her estate. Howard v. Hooker. 1672. 2 Ch. Rep. 81.

183. So, where a wife, the day before her marriage, entered into a private recognizance to her brother, it was decreed to be delivered up. Lance v. Norman, 1672. 2 Ch. Rep. 79.

184. A feme sole bought goods, but did not pay for them; she married, and died. The creditor brought his bill for a discovery against the husband, who demurred. Demurrer overruled. Freeman v. Goodham or Goodland, M. 1676. 1 Ch. Ca. 295. It appears from Lib. Reg. that the husband afterwards offered to pay for the goods, and it was so decreed on his offer, 3 P. W. 409. (n.) S. C.

185. Agreement by a feme sole, that if she died without issue, she would leave her heir her land, or 500l. Decreed to be executed. Goulmere v. Battison, E. 1682. 1 Vern. 48.

186. Upon the question, how far a se-
Wife's Acts before Marriage, how far binding on Husband.

190. Where a man married an administratrix, who wasted her intestate's estate, and died; her husband was decreed to make satisfaction for the deficiency until the marriage, to the extent of the portion he received, and after marriage, absolutely. Marriage is not a gift of goods, which the wife has in autre droit. Pouel v. Bell, E. 1706, Pre. Ch. 255.


192. Where a man married a trader who died indebted for goods bought, and which remained in specie at her death in the hands of her husband, the husband may insist that the wife's goods are his in law, and that he is not liable to his wife's debts. Blackmore v. Levy, T. 1700. 1 Eq. Ab. 60, pl. 6. Sed quare, et vide Thomond v. Suffolk, 1 P. W. 469. where Ld. Ch. said, the husband ought to be liable in equity; but Lord Nottingham said, in Freeman v. Goodland, 1 Ch. Ca.

295. that he would change the law on this point.
BARON AND FEMEJ V. VI.

Wife's Acts before—and after Marriage, how far binding on Husband.


198. A woman indebted by bond, married, and had a large portion; the husband paid the interest during his wife's life, but after her death he need not, being only chargeable for what was sued for and recovered in her life-time. Jordan v. Foley, T. 1732. Sel. Ch. Ca. 19. 20.

199. A commission of bankruptcy cannot be supported against a feme covert, upon acts of trading and bankruptcy before marriage. Exp. Mear, T. 1787. 2 Bro. C. C. 266.

200. A widow, previous to her marriage with G., conveyed her estates to trustees, to pay the rents to such uses as she, whether covert or sole, should appoint: she soon afterwards married B. This deed is valid against B.; and a deed revoking it, obtained by duress, was set aside. Lady Strathmore v. Bowes, T. 1788. 2 Bro. C. C. 345. 3 Ves. 28.

201. A woman on her marriage, was indebted on two promissory notes. Afterwards the husband gave his bond for the amount, and the creditor delivered up the notes. The bond being put in suit, the husband pleaded his infancy when he gave it. The court ordered the notes to be returned to plaintiff, and directed defendant not to plead the statute of limitations to any action plaintiff should bring on the notes, nor any other plea which defendant could not have pleaded when the bond was given. But this court would not order the immediate payment of the money. Clarks v. Cobley, T. 1789. 2 Cox 173.

202. If a woman conveys her property before marriage without the privity of her intended husband, it is fraudulent, and will be set aside. Ball v. Montgomery, T. 1793. 2 Ves. jun. 194.

203. An executrix married, and she and her husband admitted assets in answer to a bill filed against them. The assets become a debt of the husband, in respect of this admission, and may be proved under a commission of bankruptcy against him. In Re M'. Williams, E. 1803. 1 Sch. & Lef. 172.

204. A lady, about to marry, vested her property in trustees, "for her own sole use, benefit, and disposition;" this gives her a separate estate. Exp. Ray, M. 1815. 1 Madd. 199. Vide Adamsen v. Armitage, Coop. 283. Lumb v. Milnes, 5 Ves. 520.

BARON AND FEME VI.

Acts of the Wife during Coverture. How far the Husband shall be bound, and herein of his own Covenants.

205. Feme covert trades with her husband's consent, and gives bills for money; he receives the profits. She dies, and leaves a stock in trade; he shall be answerable for the debts contracted in the trade. Bewley v. Peake, E. 1697. 2 Freem. 215.

206. Where a wife usually in receipt of her husband's money, received the amount of a bond from I. S. The husband afterwards obtained judgment, but was decreed to acknowledge satisfaction. Seabourne v. Blackstone, M. 1663. 1 Ch. Ca. 38. 2 Freem. 178.

207. A feme covert, heir at law, and her husband, not consanguine of their right, were drawn in to execute articles for supplying the defects of a surrender of lands, devised to plaintiff. Equity refused to execute these articles, on the ground of fraud, without regarding the wife's inheritance. Preston v. Wasey, T. 1697. Pre. Ch. 76.

208. An extravagant woman prevailed on her sempstress to conceal part of her demand from the husband, who paid what was avowed to be due, and took a receipt in full: this is a discharge of the whole. Fowler v. Ayliffe, H. 1707. 2 Eq. Ab. 185. pl. 4.

209. Defendant's wife lived apart from her husband and passed for a widow, which defendant occasionally countenanced. The wife lent 50l. of her own money, and 50l. of plaintiff's (her servant,) who knew nothing of the marriage. The wife took a mortgage in her maiden name, and received the interest. On
discovery of this transaction, defendant seized all the mortgaged deeds, and insisted on his title at law. Plaintiff could not substantiate her case without the wife’s evidence. *Per curiam*, though a wife’s evidence can never be admitted to charge her husband, yet as the wife transacted the whole business as a *feme sole*, and kept her servant and the mortgagee in ignorance, and as the husband had countenanced a concealment of the marriage, the wife’s evidence, as supported by the mortgagee, was admitted to establish plaintiff’s property in the 50l. Decreed to plaintiff her 50l. and costs. *Rutter v. Baldwin*, H. 1719. 1 Eq. Ab. 226 pl. 15.


211. A *feme covert* was permitted to change her prochein amy after a considerable progress in the cause; the new one entering into a recognisance to answer the cost, and abide the order. *Lawley or Halpen v. Halpen*, M. 1731. Bunb. 310.

212. A wife’s promise to release, is not binding; *secus*, if repeated after her husband’s death. *Smith v. French*, H. 1741. 2 Atk. 245.

213. Coverture is no excuse for not redeeming a mortgage, for if the *feme* becomes discover, the statute of limitations will run from that time, even though she should marry again. *Anon. T. 1742*. 2 Atk. 353.

214. A *feme covert* having a separate estate, employed workmen in her husband’s house, and promised to pay them. M. R. doubted whether a parol promise could subject lands; but the wife submitting to pay, decreed accordingly. *Clerk v. Miller*, T. 1742. 2 Atk. 379.

215. Money, under the particular circumstances of this case, was ordered to be paid, under a letter of the wife, from the East Indies, though, on search, not found to have been ever ordered before. *Palmer v. Palmer*, H. 1757. 1 Dick. 293.

216. Covenant by a husband, that his wife shall levy a fine, or do any other act. In *Barrington v. Horne*, M. 1715. 5 Vin. 547. pl. 35. the husband was decreed to procure his wife to levy a fine. But in *Orted or Outram v. Round*, M. 1718. 4 Vin. 203. Lord *Cowper* thought it a great breach on the wisdom of the law, to force a wife to part with her land, without her consent, and decreed the husband to restore the purchase money with costs. Yet in *Hall v. Hardy*, T. 1738. 3 P. W. 189. *Jekyll* M. R. enforced the husband’s covenant, on a presumption that he had previously obtained his wife’s consent. *Sed quare*, where it appears impossible for the husband to procure his wife’s concurrence, and he offers to restore all the money with interest and costs, whether he ought not to be excused? Winter v. Devereux, 3 P. W. 189. (n.) In *Emery v. Wase*, 5 Ves. 848. mention is made of a case, where the husband was imprisoned until his wife should do an act. See the arguments of Ld. Ch. *Eldon* on this subject in *Emory v. Wase*, 8 Ves. 515. on appeal.

217. The court will not make a personal decree on the wife, where husband and wife jointly agree to convey; but the husband was decreed to convey, and to procure his wife to join, or to refund the money received. *Sedgwick v. Hargrave*, M. 1750. 2 Ves. 57.

218. Where a *feme sole* makes a mortgage, or takes an estate subject to a mortgage, and afterwards upon a transfer, her husband covenants to pay the money, his personal estate shall not be liable. *Secus*, where the husband has received the money himself. *Bagot v. Oughton*, E. 1717. 1 P. W. 348. Fortesc. 382. *Christmas v. Christmas*, T. 1725. Sel. Ch. Ca. 20. S. P.

219. Though a wife cannot, at law, borrow money, even for necessaries, so as to bind the husband; yet, if money is applied to the wife’s use for necessaries, or medical assistance, the lender shall stand in the place of him who afforded the supply. *Harris v. Lee*, M. 1718. Pre. Ch. 502.

220. Under special circumstances a wife applied to be allowed maintenance for herself and child, out of a fund in the Accountant-General’s name, to which the husband became entitled in right of his wife. The husband opposed the application, but the court made the order. *Atherton v. Nowell*, E. 1786. 1 Cox 229.

BARON AND FEME VI. & VII.

Wife’s Acts during Coverture—how far binding.

222. On motion for an injunction to restrain the sale of goods taken in execution by a creditor of Lord A. until answer or further order, which motion under the circumstances was made on a certificate of the bills filed, and without notice. It was held that a purchase by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against creditors if bona fide, though the husband was indebted at the time, and even though the object was to preserve from his creditors ancient family pictures, furniture, and other articles of a peculiar nature and value. Lady Arundel v. Phipps. Same v. Tauntom, T. 1804. 10 Ves. 139.

223. A femi covert having a power to dispose of her separate estate, granted an annuity to A., a young lady, on her marriage, having promised to provide for her: Held a specific lien on the grantor’s estates; and marriage being the consideration, A. is not to be considered a volunteer, nor is this grant a fraud on the husband, for he had notice of the execution of the annuity deed. Power v. Bailey, E. 1808. 1 Ball & Be. 49. The modern decisions on this subject are Sturgess v. Corp, 13 Ves. 190. Essex v. Atkins, 14 Ves. 542. Heatley v. Thomas, 15 Ves. 396. Dalbiac v. Dalbiac, 16 Ves. 116. Bullpin v. Clarke, next pl.

224. A married woman having a separate estate, gave a promissory note for money borrowed. The trustees of her separate property were decreed to pay the amount out of the rents and profits. Bullpin v. Clarke, M. 1810. 17 Ves. 365.

225. Where advances have been made for the maintenance of a married woman, deserted by her husband, on the credit of a fund in court (her property) and such advances exceed the income of that fund, the lender shall be reimbursed out of the principal; for when a man deserts his wife, he leaves her a credit for necessaries, and is liable to an action; and though execution could not be levied against the stock, the effect might be obtained circuitously, as he could not relieve himself but by consenting to the application of the fund. Guy v. Parkes, T. 1811. 18 Ves. 196.

226. In the distribution of a wife’s separate property after her death, her bond given for a debt contracted during coverture shall have no priority, for as a bond is void. Anon. T. 1811. 18 Ves. 258.

227. A femi covert living apart from her husband is not liable to account for monies received under a will, alleged to have been fraudulently obtained by her, or to have the same repaid out of her separate estate, and placed out in the names of trustees. Greatley v. Noble, H. 1818. 3 Madd. 79.

BARON AND FEME VII.

Acts in which a Wife voluntarily joins her Husband. Of her Appointment in his Favour. Private Examination and Consent, in Analogy to a Fine at Law. Intervention of Trustees.

228. Baron and femi levy a fine of the wife’s land, and mortgage it; the mortgage being forfeited, the mortgagee shall hold against the heir of the wife. Reason v. Backewell, E. 1682. 1 Vern. 41. 2 Ch. Rep. 98.

229. A jointress of houses joins her husband in a fine sur cession for 99 years, for securing 1500l. to I. S., who re-demises to the husband, reserving the equity of redemption to the husband, and his heirs; the houses were burnt, and the husband rebuilt them, and died. Decreasing the wife should redeem, she having the reversion, and being no party to the re-demise. Brend v. Brend, H. 1683. 1 Vern. 214.


231. A wife agreed to sell her estate, so that 200l. should be secured to her; upon a sale, the 200l. was vested in trustees; this shall not be liable to her husband’s debts, though she afterwards
Of the Wife's voluntarily joining in her Husband's Acts.

232. A wife joined her husband in a mortgage of her estate, to buy him a place; he afterwards paid the money, and took up the mortgage term, which he devised to his younger children. Decreed, the heir of the wife should have the term discharged from the children's claims. *Huntingdon v. Huntingdon*, H. 1708. 1 Bro. P. C. 1.


234. An agreement by the husband to sell his wife's estate shall not bind her without her own consent. *Bryan v. Woolley*, H. 1721. 2 Bro. P. C. 381.

235. Baron and feme join in a mortgage by demise, of the wife's New River Shares, at a pepper corn rent, but do not levy a fine. As no rent was reserved, and the premises were incorporeal, the lease was held determinable by the death of the husband, and the mortgage was at an end. *Drybutter v. Bartholomew*, E. 1723. 2 P. W. 127.

236. A lease for years, before marriage, was assigned to trustees, to make leases for the benefit of A. and B. his wife: after marriage A. and B. assigned this lease to S. who assigned it for a valuable consideration; the wife was concluded, though no fine levied. *Roupe v. Atkinson*, E. 1724. Bunb. 162.

237. Purchase to the use of baron and feme and their heirs; they join in a mortgage to the vendor to secure part of the purchase money; upon a bill to foreclose, they answer jointly; the husband dies, and the wife insists on the want of a fine: Held, the joint answer is equal to a fine, and mortgage good. *Anon. M.* 1729. Mos. 248.

238. Baron and feme levy a fine of her trust estate, which they mortgage; the wife by a separate answer, swears she was compelled by duress to join, but that not being proved, she shall be bound by the fine. *Penne v. Peacock*, M. 1734. Ca. temp. Talb. 41.

239. P. and her husband, when abroad, assigned P.'s share of A.'s residuary estate, in trust for their daughter, provided they should die abroad. P.'s first husband died, and P. married again, and her husband survived her. *Per curiam*, if P. had remained a widow, she would have been entitled to this share, and no notice would have been taken of the daughter's interest. *Grosvenor v. Lane*, E. 1741. 2 Atk. 180.

240. A. mortgaged his own estate, and his wife joined him in charging her's; this is a pledge, and the wife shall stand in the mortgagee's place. *Parteriche v. Pawlet*, T. 1742. 2 Atk. 384. In *Clinan v. Cooke*, 1 Sch. & Lef. 33. Lord Redesdale said, this case was imperfectly reported by Atkyns.

241. A wife cannot change the nature of her estate by articles, because she is unable to contract. *Oldham v. Hughes*, M. 1742. 2 Atk. 452.

242. Where a wife joined her husband in a fine to a purchaser, but not in the declaration of uses, she shall be bound after 13 years' widowhood, and acquiescence. *Swanton v. Raven*, T. 1744. 3 Atk. 105.

243. Where a feme covert has an interest in real estates, no consent of a remainder-man can bar the intail, unless there had been a fine; nor can equity execute such agreements, as to a legal estate. *Trafford v. Booth*, E. 1746. 3 Atk. 448.

244. A wife having power to appoint the rents of her separate estate, joined her husband in a bill for an account of them, and submitted that they should be applied to pay his debts; this is an execution of her power, and so decreed. *Allen v. Papworth*, M. 1748. 1 Ves. 163. *Vide Sackett v. Wray*, 4 Bro. C. C. 483. *contra*.

245. A feme covert can neither make a will, nor declare the uses of a surrender. *George, ex dem. Thornbury*, M. 1749. Amb. 627. But by custom, the surrender of a feme covert with the assent of her husband is good. *Mos.* 123. cited in 2 Bro. C. C. 387.

246. Upon proposal for a settlement, the husband and wife petitioned that the
BARON AND FEME VII.

Of the Wife’s voluntarily joining in her Husband’s Acts.

wife’s fortune should be paid to him, but there being nobody to consent for children, it was dismissed. Anon. T. 1755. 2 Ves. 672.

247. A wife was barred from claiming her separate estate, which she with her husband and trustees had called in, for it was managed by her husband, and affirmed by her as part of his estate, by several acts of her after his death. Paulet v. Delaval, T. 755. 2 Ves. 663.

248. Where a wife consents to pledge her own estate for her husband’s debt, he is bound to exonerate it. S. C.

249. A husband and wife having a joint power over the wife’s estate, empower an agent to sell it, but the husband’s letter desiring his wife’s compliments, is no proof of her joining in the authority. Daniel v. Adams, 1765. Amb. 495.

250. On marriage the wife’s estate was settled on the husband for life, then on the wife for life; then to their issue in tail; remainder in fee to the survivor of husband and wife; they levied a fine, and mortgaged the estate, which the husband suffered to become absolute in the mortgagee, and then died; his widow was held entitled to redeem. Hill v. Bp. of Bristol, T. 1776. 2 Dick. 526.

251. The bond of a femae covert jointly with her husband, will bind her separate property, but her general personal engagements will not bind her, neither can the court order a wife to execute a power; but where the power has been executed, the court may stop the fund. Hulme v. Tresant, T. 1778. 1 Bro. C. C. 16.

252. A sum in the funds was given by will to trustees, for the separate use of a femae covert, and to be subject to her appointment after her death; the wife made an appointment of this money to her husband: who with his wife filed a bill against the trustees to transfer this fund, which, on examination of the wife, the court decreed. Frederick v. Harwell, M. 1783. 1 Cox 193.

253. On marriage 9000l. was vested in trust, to pay the interest to the husband for life, and after his death to the wife for life, and after the death of the survivor, to pay the principal to such persons as the survivor should direct. The husband wanting money, the wife joined him in a deed poll, whereby they appointed the money, immediately to the husband; but the trustees desiring the direction of the court, upon personal examination of the wife, the trustees were ordered to pay the money to the husband, and to deliver up the settlement to be cancelled. Macarmic v. Butler, E. 1787. 1 Cox 357.

254. A wife having a settlement of a real estate and stock, the rents and dividends to be paid as she should from time to time direct, with a contingent remainder to herself; in failure of issue, conveyed the whole jointly with her husband to pay his debts. Equity will execute this conveyance; for if a parent desires that his child should not alienate her provision, he must express it in clear terms. Pybus v. Smith, T. 1790. 1 Ves. jun. 189.

255. In all applications for the wife’s money to be paid by consent to the husband, an affidavit must be made that there was no settlement on the marriage. Binford v. Bowden, M. 1792. 1 Ves. jun. 512. Minit v. Hyde, 2 Bro. C. C. 668.

256. A femae covert directs the rents of her separate estate to be paid to her husband, for his own use, but with intent to give them only to him during coverture, without account. On his death, she is entitled to the future rents, as well as the arrears not received; if her interest has passed, the deed would have been set aside on the circumstances of the case. Milnes v. Busk, M. 1794. 2 Ves. jun. 488.

257. Where the trust under a settlement is to the next of kin to the wife’s own family, subject to the wife’s appointment, and she makes an undue appointment, the husband cannot take, for his right to administer is not under the statute, but de jure mariti. Watt v. Watt, T. 1796. 3 Ves. 244. Bailey v. Wright, 18 Ves. 49. S. P.

258. A husband under a decree to propose a settlement of his wife’s stock agreed with her out of court, and while they lived apart, but not legally separated, to take part and give up the rest; this agreement does not bind the wife, and the husband dying before any other steps were taken for executing it, the whole survived to the wife. Macauley v. Phillips, T. 1798. 4 Ves. 15.

259. The court will not allow a femae covert to part with her separate personal estate to her husband, without a previous examination and consent, in analogy to the caption of a fine at law. (a) Middleton v. Osslow, M. 1721. 1 P. W. 798,
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where the wife gave up a part of her fortune to pay her husband's debts. 
Willats v. Cay, M. 1740. 2 Atk. 67. 
where the wife gave up her whole fortune, though the husband appeared to be insolvent. 
where the husband made an inadequate settlement. 
Oldham v. Hughes, M. 1742. 2 Atk. 452. 
where the husband having an election, consented that her money should be laid out in land, and then she could levy a fine. 
Millner v. Colmer, M. 1731. 
where the wife consented, and the husband covenanted, to increase her jointure. 
Trafford v. Boehm, E. 1746. 3 Atk. 448. 
Binford v. Bowden, T. 1792. 1 Ves. jun. 512. 
where money was directed to be laid out in land, and a remainder in tail was limited to a 'feme covert.' 
she consented to have the money instead of land; but in the latter case, the court directed an inquiry, whether the wife had a settlement. 
where the wife, though she had six children, persisted in her consent, after a strenuous opposition. 
Guise v. Small, T. 1793. 1 Anstr. 277. 
where a wife had appointed to her husband in pursuance of her power, in default of issue; and upon her consent, her appointment was established, subject to the claims of the children; and such is the course of the court, where the trustees put the parties to file a bill. 
for the court will not establish a deed between husband and wife, touching the wife's separate estate, without her examination and consent. 
But in Pawlet v. Delaval, T. 1755. 2 Ves. 653 to 671. 
it was held, that though the acquiescence of a wife is material to determine property, the court had not determined, that a wife may not dispose of her separate property to her husband, unless by consent in court, or intervention of trustees; and yet, upon the hearing, a MS. case was there cited, (Cowey v. Richardson, T. 1725, Reg. Lib. A. 491.) to show that the court would not permit a wife to dispose of her separate trust property, unless by judicial consent, or the intervention of friends. 
(a) For the form of such an examination, see Tasburgh's Ca. 1 Ves. & B. 507.

260. In all the foregoing cases, the court ordered payment of the money upon the wife's consent, but sometimes the court will only order payment of part of the portion, as in Ery. Higham, T. 1754. where the husband applied for 1000l., his wife's fortune, alleging he could make more of it in his business of a trunk-maker; she consented, but the court would only order him 400l.

261. And in other cases the court will dismiss the application altogether, notwithstanding the wife's consent without coercion. 
where testatrix had bequeathed 4000l. in trust for the separate use of the wife. 
Fraser v. Baillie, T. 1780. 1 Bro. C. C. 518. 
where trustees were interposed. 
In Edmonds v. Townsend, M. 1792. 1 Anstr. 93. 
where the wife's portion was a residuum not collected, for she might change her mind in the interim. 
where the wife's power of appointment was by writing from time to time, or by will, and she consented that the whole principal should be paid to her husband in her life-time.

262. In all instances, however, where the wife's examination and consent are taken, it must be personally in court, as in the foregoing cases; or if she is abroad, by dedimus, as in case of a fine; 
Parsons v. Dunn, M. 1750. 2 Ves. 60. 
or by a magistrate of the place where the wife resides, attested by notaries and translated; 
or in America, by a commission issuing under that government. 
Campbell v. French, H. 1797. 3 Ves. 321.

263. The creation and intervention of trustees seems to have been considered as an essential ingredient to the protection of every married woman's separate property, for in 
Pawlet v. Delaval, T. 1725. 2 Ves. 663 to 671. 
it was held, that a wife shall not dispose of her separate estate without it. 
In Hulme v. Tenant, T. 1778. 1 Bro. C. C. 16. 2 Dick. 360. 
Thurlov, C., said, without trustees a wife can have no separate property, and 
in Fraser v. Baillie, T. 1780. 1 Bro. C. C. 518. 
the court would not allow the wife to part with her life interest in money, where the trustees had interposed.

264. And in most cases the court will direct the trustees to hold or to convey, and transfer, according to the wife's appointment. 
Bunb. 162. where the trustees
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would have been decreed to execute, had they been made parties, and the wife not been concluded. So in Stanford v. Marshall, M. 1740. 2 Atk. 68. where a wife joined her husband in a bond for money lent, and the trustees were directed to pay the rent of her separate estate to the obligee. And in Pybus v. Smith, T. 1790. 1 Ves. jun. 189. Ld. Thurlow admitted the same doctrine, but directed an enquiry, whether the wife’s deed was executed freely. In Ellis v. Atkinson, T. 1792. 3 Bro. C. C. 565. 2 Dick. 759. the wife appointed a sum of money to be paid to her husband, over which she had a power to appoint by deed or will, and the trustees were directed to transfer. So in Guise v. Small, T. 1798. 1 Anstr. 277. where a wife had an interest for life, with remainder to her children, and in default of issue, an absolute power of appointment; the trustees were ordered to pay the money into court, to answer the wife’s appointment, subject to the contingent trusts.

265. Yet it is not in all cases that the court will order the trustees to transfer; for in Socket v. Wray, H. 1793. 4 Bro. C. C. 483. where a wife had a power to dispose of the principal by will, and consented that it should be sold, for the use of her husband in her life-time, the court refused to permit the trustees to transfer. So also in Blackwood v. Norris, M. 1794. cited in Penn v. Peacock, Ca. temp. Talb. 43. where 4000£ was bequeathed in trust, for the separate use of a feme covert, the court would not decree it, though the wife consented in court.

266. Neither is it in all cases that the intervention of trustees is essential. For in Moore v. Freeman, H. 1723. Banb. 205. it was held that articles between husband and wife are binding without it. And in Essex v. Atkins, H. 1808. 14 Ves. 547. it was stated to be the established doctrine, that a married woman can bind her separate property without the trustees; unless their assent is rendered necessary by the instruments giving her that property. And this too, notwithstanding Lord Roslyn’s doubt in Mores v. Huish, 5 Ves. 692. and post. pl. 270.

266. But the acquiescence of the wife is material to determine property. Pawlet v. Delaval, 2 Ves. 663 to 671.

268. Lord Loughborough, however, in Whistler v. Newman, 4 Ves. 129. regretted those decisions which bound him to say that the trustees must follow a wife’s disposition over her separate estate, vested in them, sui juris. And he added, that if the rule laid down in such case was pushed to its full extent, a wife having trustees, and her property under the administration of the court, would be less protected than if left those legal rights, which the husband cannot proprio marte affect, and which rights cannot be taken from her by implication or inference. And in Pybus v. Smith, 1 Ves. jun. 189. while the master was preparing a settlement directed by the court, the wife was destroying the very benefit the court intended her.

269. The rule that a feme covert is competent as to her separate estate, to act as a feme sole, laid down in Peacock v. Monk, 2 Ves. 190. is the proper rule. Hulme v. Tenant, T. 1778. 1 Bro. C. C. 16. 2 Dick. 560. so far as the instrument creating her separate estate makes her proprietor; but she ought not to part with it without an examination in court. Pybus v. Smith, ante. Yet it is different where the consent of trustees is rendered essential to the conveyance, though the bare appointment of trustees does not deprive the wife of that authority.

270. Where a husband and wife had raised money by way of annuity, (upon very extravagant terms,) charged on the wife’s estate settled in trust, to pay her the rents and profits to her separate use, the court would not enforce the security, but dismissed the bill; the trustees, in this case, laudably resisted the annuity, and Ld. Ch. doubted if a trust to pay the rents from time to time was a trust to pay by anticipation. Mores v. Huish, M. 1800. 5 Ves. 694.

271. Bill by husband and wife, stating that the wife was willing at some future period, when the court, according to its rules, could ask her to give her consent, that the husband should retain a residue unascertained, and admitted by the bill to have been treated contrary to the trusts of the settlement. No appointment had been executed except one in nature of a security, and not an absolute appointment. The wife joined in the bill, and was admitted, (and Lord Eldon said it was impossible to deny) that the were bringing a bill in her name, where the fund constituting her life-interest was in no manner limited to her separate use, was not a sufficient denotation of her con-
sent to a disposition so as to operate of itself as such. His Lordship said, the present bill proceeds upon an admission that the wife must be examined. No interest for life was secured to her separate use, no absolute appoistment had been executed as to her interest, and no power was reserved to her to execute any deed to affect her life-estate, which, if it could be affected, must be by force of her consent upon examination. It was admitted in this case that the fund had not come to the trustees, and was neither under their control nor that of the court, and it may be stated that the trust property had been applied to purposes inconsistent with the trust declared. Those declarations are the only admissible evidence as to the intention. Ld. Ch. further said, that without prejudice to any authorities cited or not cited, he could determine the present case to his satisfaction upon these principles: - The husband came here (together with his wife, though her joining amounts to nothing) a plaintiff accountable to the trustees for all he possessed under some act done, or intended to be done, by her, giving him a title to the whole property. What he had possessed he does not disclose. The property of the wife is to be disposed of by her consent, if available, the parties do not know, neither does the wife or the court know; by the bill the husband does not account for it, or put it under the control of the court, and it is to be considered that when it may be competent to ask the wife’s consent she may refuse it. It is settled that while the property is unascertained, the consent in cases upon which it is competent to work all the effect that has been contended by the plaintiff, is not to be asked by the court, and while the court cannot state the amount of the property, it will not address any question to her, or speculate upon what may be her inclination. In Edmunds v. Townsend, 1 Anstr. 95. in answer to a proposal that the consent might be taken for the whole amount without deduction, which would cover any less sum to which by abatements it might be reduced; the court of Exchequer said (to which Lord Eldon agreed) “that would be in effect taking her consent now to a sum to be ascertained at a future time, and thereby depriving her of the power of changing her mind in the interim, which the court ought not to do.” The present bill (continued Lord Eldon) amounts only to asking the opinion of the court whether, if hereafter the wife will consent, it will take her consent, and desiring that declaration before the husband will decide whether he will have his bill dismissed or proceed. He must submit to account, and put the fund under the control of the court, if he expects the court to ascertain the fund, and he is not to be permitted previously to call upon the court to act for his benefit upon the supposition that the wife will consent, unless he agrees that the court shall act as may be fit, if she should refuse to consent to give him as much as she now says she will. The case of Guise v. Small, (1 Anstr. 277) was mentioned for plaintiff, in which Ellis v. Atkinson, (3 Bro. C. C. 565.) was relied upon; that case, however, went off by agreement; but the same principles were entertained by Ld. Thurlow, in Pybus v. Smith, (3 Bro. C.C. 340. 1 Ves. jun. 189.) The court of Exchequer proceeded in some degree upon the authority of Ellis v. Atkinson, which went entirely upon the power of a married woman over her separate property, and it will be difficult to maintain the analogy between a fine, and the jurisdiction upon money, in this court. Without saying more upon the power of a married woman over her separate property, or what the court would do if the fund was ascertained; Lord Eldon’s opinion was, that the husband here desiring to know what the court will do if three years hence his wife shall be in the same mind to give her property to him; the answer is, that when the funds are once under the control of the court he must place them in such a situation that justice may be done to his wife if she will not consent, and unless he will submit to that, the bill must be dismissed. Bill dismissed accordingly. The next day Ld. Ch. observed, that in Fraser v. Baillie, (1 Bro. C. C. 518.) upon a bill for the same purpose, the court refused to act. Sperring v. Rockfort, H. 1803. 8 Ves. 164. In Richards v. Chambers, 10 Ves. 384. Grant, M. R. said, that Ellis v. Atkinson did not end by compromise.

272. Settlement of stock to the separate use of a married woman for life, and after her death for her husband absolutely. Upon the bill of the husband and wife for a transfer to him upon his personal security, M. R. decreed ac-
 accordance, the trustees, by their answer, desiring to be discharged, and submitting to act as the court should direct. Cheslyn v. Smith, M. 1801. 8 Ves. 183. Vide ante, Sperling v. Rochfort.

273. Two cases were before the court. In the first, property was settled in trust for the sole and separate use of a wife for life, and if she survive her husband, to be absolutely her's. If she die in his life-time, to go to such persons as she by deed or will should appoint, and in default of her appointment, to her executors and administrators. Part of the trust property was in court, and the husband and wife petitioned to have it transferred to them. She had executed an appointment in his favour, and having been examined de bene esse, consented to the prayer of the petition. In the second case the property was settled on the husband for life, if he survived, to him absolutely; if the wife survived, to her absolutely; they filed their bill desiring that the whole should be paid to the husband. Grant, M. R. felt himself called upon by these cases to determine the important and much agitated question, whether it is competent to a married woman by examination in this court to relinquish the provision secured by her marriage settlement, and to transfer to her husband that property to which he cannot make any claim, and over which she has not reserved any power of disposition. In the first case the wife having a separate estate for life might part without that life interest. She might also execute an appointment in favour of her husband or of any person, which, in the event of her death in his life-time, would be a valid disposition of the property. But the question in both cases is, whether the contingent interest which the wife, while sui juris, has secured to herself in the event of her surviving her husband, can through the interposition of this court be given up to her while under coverture. His Honour then examined the authorities, saying, that if by the established doctrine of the court this may be done, he should not think it proper to examine the soundness of the principle upon which it was introduced, but if the authorities leave it in doubt, then the principle may be enquired into upon which the court can exercise such a jurisdiction as is supposed by those who support this claim. Yet in examining the authorities, his Honour purposely abstained from those cases (as inapplicable) that relate either to the separate property which in equity the wife may have, or property over which she has reserved, or had given to her by the settlement, a power of appointment, or which the husband had an absolute or qualified right to reduce into possession. Having reviewed the cases his Honour said, it did not appear improper to enquire whether upon principle, the jurisdiction that has been assumed in some of them can be supported. Here the wife while sui juris meant to make a provision for herself in the event of her surviving her husband. Such were the terms upon which alone she chose to contract while in a condition to exercise her unbiased judgment. She wished to put that out of her reach, and secure it from her effect of the influence and solicitations to which she may be afterwards exposed. She might be told that there is no way in which that can be better accomplished than that which has been adopted, that the absence of power, the legal incapacity to act, is the best security. If the court will not interfere, a woman about to marry has the power to secure to herself this kind of protection, but she is deprived of it if the court upon her consent while covert annuls the contract made for her benefit while sui juris. The husband can have no rightful claim to her interest created for her benefit with his concurrence. In the particular cases before that court the interests are of such a nature, that if created by a third person he would have no power over them, for he cannot affect her interest which cannot take effect in possession during his life. When the wife upon examination consents to relinquish her equity, it is by virtue of a deposing power in her, or by the intervention of the court that the property passes to the husband. His marital right is allowed to operate unobstructed, by the equity which the wife does not oppose to it; the equity being out of the way, the right stands unqualified, and upon that the court decrees; but here there is no pretense of right on the part of the husband. As to the contingent interest there is no power of disposition in the wife; on the contrary, the non-existence of such power is the ground of calling upon the court; then with ut a right in the husband to
call for a transfer, or a power in the wife to make it, what is the ground of the decree? Ordinarily a decree does not pass the property, but merely declares the right existing by antecedent title and disposition. The only ground upon which it has ever been attempted to justify this jurisdiction is analogy to a fine at law. But in what does that analogy consist?—A title is asserted paramount to that of the married woman. Upon a fine the existence of that title is recognised by an agreement after suit, and upon a recovery by judgment of the court upon default of the party. An agreement upon suit, had, like the Transactio of the civil law, peculiar efficacy ascribed to it, and was not open to objections that would have been fatal to other agreements. Fines were always binding upon married women, though it was thought proper to make them liable to examination by the statute 18 Edw. I. c. 4. de modo levandis fines, but it was not merely by the examination that the fine had its efficacy. The court of Common Pleas could not by consent of a married woman upon examination give effect to her conveyance by lease and release; it is upon certain technical principles, and under the cover of certain forms, that she is permitted to part with her estate, without a direct violation of the rule of law denying her any disposing power, but the proceeding of this court is not referable to any of those forms in annulling a settlement made before marriage. The court exercises an arbitrary authority giving to the acts of a married woman an effect that does not legally belong to them. His Honour's opinion therefore was, that there was no right in the husband to call for, or power in the wife to make a transfer, and he could not therefore comply with either of the present applications.—He therefore dismissed the petition in the first cause, and the bill in the second, Richards v. Chambers, Seamman v. Duel, E. 1805. 10 Ves. 580. Vide Cheslyn v. Smith, 8 Ves. 183. The earliest cases on this subject seem to be Brudnell v. Price, Finch, 365.; and Paget v. Paget, 2 Ch. Ca. 101. in which Ld. Nottingham directed part of the property settled on the wife and children, to be laid out in an office for the husband with the consent of the wife. In O'Keate v. Calthorp, in Ch. 1739, cited in Sperling v. Rochfort, 8 Ves. 177. the settlement was precisely the same as in the principal case, and there Ld. Ch. said there was no ground to break in upon the settlement, and take away the interest, for if the wife had any power over the principal she should make an appointment. In Duckett v. Neagle, cited 8 Ves. 177, and more fully in 10 Ves. 583, the husband agreed to give the wife's trusten a bond for 500l., in case she should survive; upon examination she consented to these terms, and the court directed the payment. In Fraser v. Baillie, 1 Bro. C. C. 518. Eyre, B., would not permit a married woman by the effect of examination to give up for the benefit of her child her life interest under her settlement, and the first case in which the jurisdiction of an examination in nature of a fine at law was unequivocally exercised, was that of McCor- mick v. Buller, fully stated by Ld. Eldon, in Sperling v. Rochfort, 8 Ves. 174. but the principle on which that case was decided does not appear. Some previous cases are mentioned as proceeding on the same ground, viz. Newman v. Cartony, 3 Bro. C. C. 346. (n.) 565. which Ld. Alvanley dissented from in Sockett v. Wray, 4 Bro. C. C. 483. and Kirkman v. Taylor, cor. Sewell, M. R. in which the ground of the decree was not a supposed jurisdiction of the court, to authorize a married woman to part with an interest to which her power of appointment did not extend.—McCor- mick v. Buller, therefore, is the first case; two subsequent cases only have been referred to as involving the principle, viz. Ellis v. Atkinson, 3 Bro. C. C. 346. (n.) 565. and Guise v. Small, 1 Amstr. 277. In Ellis v. Atkinson, the decree cannot be supported without recourse to the principle in McCor- mick v. Buller, and yet Ld. Thurlow seems not to have recognised and acted upon that principle; the limitations in that case are the same as in the principal case before the court, but Ld. Thurlow founded his decree solely on the wife's appointment, and took no notice of the consent. As to Guise v. Small, Ellis v. Atkinson is there recognised, but M. R. said he did not comprehend the ground of that case. In Nevison v. Longden, in Scacc. T. 1800. the case of McCor- mick v. Buller is questioned. So Sockett v. Wray, 4 Bro. C. C. 483, is in contradiction to that case, deciding that the wife cannot by examination in court, exercise any greater or
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other power over her property, than is reserved to her by her settlement, and that the court cannot enlarge or vary that power. Sperling v. Rochfort, 8 Ves. 164. was the last case; but it was under such circumstances, that it was not necessary to decide the point.

274. The consent of a married woman was taken in court, under a bill filed by her and her husband, for execution of a contract for the sale of her reversionary contingent interest in stock. Wollands v. Crowther, H. 1806. 12 Ves 174. But the consent will not be taken till the subject is ascertained. S. C. 178. Et vide Sperling v. Rochfort, 8 Ves. 164. ante, pl. 271.

275. As to a fema coevert's power of disposition over an estate settled to her separate use. In this case a sale by the husband and wife by fine, was, under all the circumstances, established as to the separate estate of the wife for life, and her reversion in fee, though conveyed to a trustee for her separate use, to support contingent remainderers; but the court, upon her bill, set it aside as to the remainderer, to such persons and uses, &c. as she should appoint by will, and in default of appointment, to her children, and decreed two wills which were obtained from her to be delivered up. Parkes v. White, T. 1805. 11 Ves. 209. Eldon, C. said, the question in this case, what the wife could lawfully do with respect to her own interest only, not dealing as to those who would be entitled after her decease? is so extremely important, that it ought to be, once for all, well decided. In Whistler v. Newman, T. 1798. 4 Ves. 129. His Lordship considered every point as settled, unless the case could have been decided upon the circumstances, that the trustee was improperly dealing for his own interest. If it is asserted that, though Ld. Thurlow, following his predecessors as far back as the doctrine can be traced, repeatedly decided upon this principle, this court has now a right to refuse to follow it, his Lordship said he was not bold enough to act upon that position. Previous to, Whistler v. Newman, sup. Ellis v. Atkinson, T. 1792. 3 Bro. C. C. 346. (n.) 565. Pybus v. Smith, T. 1790. 3 Bro. C. C. 346. 1 Ves. jun. 189. Hulme v. Tenant, T. 1778. 1 Bro. C. C. 16. Peacock v. Monk, H. 1751. 1 Ves. 193. and other cases, had been determined, no judge ever felt so strong an inclination to say the act should not avail as Ld. Thurlow in Ellis v. Atkinson, and more particularly in Pybus v. Smith, in which case his reasoning was unanswerable, if the point had been open. Upon principle, a woman contracting marriage loses all the powers she has as a fema sole, and yet this court allows her to place herself by contract in the situation of a fema sole; and so it was at law, though it is now got rid of there. (See the references in notes, 5 Ves. 17.) Ld. Thurlow said, upon true principle, that if the contract makes her a fema sole, her faculties as such, the nature and extent of them, are to be collected from the terms of the instrument making her such. In Pybus v. Smith, sup. this court exerted all its providence, the trustees were to receive the dividends, and from time to time to pay them into the proper hands of the wife, receipts were to be given from time to time, &c. "not by anticipation." Ld. Thurlow was a trustee in that settlement, and took great pains to defeat what he considered established by the authority of this court. Notwithstanding all that was expressed in Pybus v. Smith, Ld. Thurlow found himself bound by authority to say, these words would have no more effect than to create, in the view of the court, a separate interest of the wife in the property. In Gorges v. Pettipace, M. 1789. 3 Bro. C. C. 8. 1 Ves. jun. 46. Ld. Thurlow thought the expression used in that will equivalent to all these words, and gave the wife a right to receive the property with her own hands from time to time, and to dispose of it by deed and by will also. The principle therefore is, that all these words are only an unfolding of all that is implied in a gift "to the separate use." Ld. Thurlow made that decision in Pybus v. Smith with great reluctance, thinking the act proposed most unrighteous; but he looked back to authorities, and found that he had occasion to consider the subject very much in Hulme v. Tenant, sup.

About that time the court had no difficulty in supposing a woman, having such an interest might give it to her husband, as well as to any one else. The cases never intended to forbid that, if he behaves well, though certainly the act ought to be looked at with jealousy. In that case there was a very formal creation of a limitation to the separate use, which is not necessary, for if the inten-
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...tion can be collected, it is just the same. The wife executed no formal instrument, but she joined her husband in a bond, which was a nullity, except as with reference to her intention; Ld. Thurlow, however, thought himself bound by authority to say, that as she could have no other intention than to charge her separate estate, that informal instrument was such a charge, and he by decree executed that intention, recurring back to all the cases in which informal acts of different sorts had been held a sufficient denotation of the wife's intention. Then came the case of Whistler v. Newman, sup. upon which Ld. Eldon would only remark, that it remained to be considered how far it was consistent with the preceding authorities, and if it was not, then whether it was competent to the court in that year to refuse a decree, consistent with all the decisions of the court of Chancery for above a century. It is true, said his Lordship, that the trustee in that case was a creditor, but it is obvious the transaction had no direct reference to him as a creditor. A bond of indemnity was given in that case, but no idea was entertained that any bond of indemnity was wanted as against the wife, for the report expressed it to be on account of the interest of the future children. It is one thing to say, that the trustee is well warranted in not acceding to the act, and another that he has done wrong by acceding. It is said, a trustee ought never to join in aiding a married woman to give away separate property. If this court has established that she can give it, and the mode by which she can, it is extraordinary to say she has not given it, because the trustee joins her. Lord Eldon said, he never heard before that if she had executed an instrument, that would be a good disposition, especially if for a valuable consideration, this court would refuse to execute that disposition in favour of a person entitled for a valuable consideration, and to call upon the trustee to clothe him with the same right the wife had. It cannot be said that her act alone will give the person a right to come for a decree against the trustee, and that the court will make the decree; and yet the act, in other respects good, is not good, because the trustee joins in that act which the court would order him to do.

and if no other observation can be added, but that it is to satisfy the debt of the husband, unless the doctrine is that she may give it to every one, but the person in whose favour, upon the most proper and meritorious obligations she may be influenced to act, that is not an objection. Ld. Ch. said, he so much doubted the authority of Whistler v. Newman, that he desired it might be very fully considered.

278. Where a wife permits her husband to receive her separate income, the account shall go only one year back.—Parkes v. White, T. 1805. 11 Ves. 225.

277. Under a trust by marriage settlement to pay the rents and profits according to the wife's appointment, and in default to her sole and separate use, a sale by her and her husband was established, Wills v. Dawkins, T. 1806. 12 Ves. 501.

278. Grant of an annuity by a married woman out of her separate estate was established, notwithstanding notice by the trustees that they would pay to the wife herself only, the transaction though for her husband's benefit, being her deliberate act when aware of what she was doing. Essex v. Atkins, H. 1808. 14 Ves. 542.

279. Husband and wife were seized under the marriage settlement, for their lives successively, with remainders in strict settlement, and in default of issue to the heirs of the wife. There being no issue, they joined in a mortgage by fine, declaring the ultimate use to the heirs of their bodies, remainder to the right heirs of the survivor; but as declaration or clear intention equivalent to it, is necessary to change the use, and no purpose appeared beyond the mortgage, a resulting trust arose to the wife, and her title was accordingly established against a claim under the husband surviving. Innes v. Jackson, M. 1809. 16 Ves. 356. But this case coming on afterwards on appeal, it was held, that there was evidence of an intention to effect a change of the beneficial interest, and that this was certainly more than a mere mortgage transaction, and that upon the deed itself there was a clear manifestation of such an intention, equivalent to a declaration, and consequently that the husband and his heirs, and not the wife and her heirs, were entitled to re-
BARON AND FEME VII.

Of the Wife's voluntarily joining in her Husband's Acts.


280. A conveyance to a bona fide purchaser under a decree against a feme covert, for a sale of part of her separate estate, cannot be set aside after an acquiescence of 22 years, though the purchase money may have been misapplied; for a feme covert is as much bound by a decree as a feme sole; and moreover a feme covert is not (as an infant is) entitled to a day to show cause against a decratal order, but it is binding till reversed. 


281. So, where an order is made on the consent of a feme covert, to dispose of her real estate, and acquiesced in during her life, it will not be set aside on a doubtful case, made many years after by her representatives. Burke v. Crosbie, sup.

282. Under a marriage settlement, monies belonging to the wife were settled (in default of appointment by her) in trust for her "next of kin or personal representatives," subject, as to part, to a trust for the husband for life: Held, that on the wife's death, without exercising her power, the husband was not entitled under the ultimate trust, because the benefit which he claimed as personal representative was one to arise after he had reserved all that was given to him as husband. 


283. Under a marriage settlement, the trusts were to pay the rents and interest of the wife's estate and property to her separate use, during the joint lives of herself and her husband, free from his power and control, and after his decease, in case she should survive, then the whole estate was limited to the heirs &c. of the wife for ever; but if she should die in the life-time of her husband, then the same should go as the wife should appoint by will only, and in default thereof, the real estate was limited over to another, and the personal estate to be paid to her executors &c., absolutely. There was a power to sell and a direction that the produce of the estate, if sold, should be applied according to the intent of the settlement. During the coverture, the wife's son by her former husband, being embarrassed, applied to his mother, who, to induce plaintiff (his father-in-law) to relieve him, gave plaintiff a bond to secure him to the extent of 2000l. six months after her death, on which plaintiff advanced the sum required. On a bill filed against the executors of the obligor, who survived her husband, it was held, per M. R., that the wife, during her coverture, could not execute any deed which would bind the estate after her death. — It was proved, however, that when a widow, the mother said she could not pay the bond, but her executors would settle it.

As to her liability on this undertaking, the court left plaintiff to his remedy at law on the new contract, if any such could be established: for as the mother could not change her property by a direct deed of appointment during her coverture, a fortiori, she could not do so by her bond. And his Honour further observed, that where a married woman stipulates that, in the event of her surviving her husband, the property shall be her's, and she reserves no disposing power over it during her coverture, there are no means by which she can dispose of it whilst covert. 


284. I. S. on his marriage, settled the wife's money in trust to pay her the interest for life, with a proviso against anticipation. I. S. afterwards wanting money, joined with a surety to raise it by way of annuity, secured by the wife's assignment of the interest to become due, and by charging the principal sum in the event of there being no children of the marriage. The surety is without remedy in equity under the assignment, in respect of his payment of the arrears of the annuity, recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement, and a charge of fraudulent concealment was not sufficiently established; so, though fraud had been fully made out against the wife, it seems that it would not be sufficient to support the assignment, for that would be to give her a power of alienation against the intention of the settler. 

BARON AND FEME VII. & VIII.

Of the Wife's voluntarily joining in her Husband's Acts.

285. A power to trustees with consent of A. under her hand; attested by two witnesses, to advance 1500l. to her husband. They advanced the money without the consent of A. Afterwards A. (by an instrument under her hand attested by two witnesses) testified that the money was advanced with her consent. On a bill filed by A., it was held that the trustees must refund the money and pay the costs. Bateman v. Davis and others, H. 1818. 3 Madd. 98.


BARON AND FEME VIII.

Contracts, Rights, or Claims, dissolved or not by Marriage.

287. Husband and wife agreed before marriage, that the wife should have the disposal of her own estate; the agreement was put into the hands of I. S., the wife's agent, who received the rents, and paid them to the husband with the wife's consent; I. S. shall not be answerable for what he received and paid, during the coverture; for an agreement between husband and wife only is determined by the marriage. Dary v. Chute, E. 1663. 1 Ch. Ca. 21. Sed quære.

288. A. agreed with his intended wife to settle lands on her; the marriage was had, and the husband died before the settlement was made; his heir shall execute this agreement, though urged that the marriage was a waiver of it, and a release at law. Haymer v. Haymer, M. 1678. 2 Vern. 343.

289. Agreement between husband and wife and others before marriage, that the wife should dispose of her own goods; the husband died, and then a question arose, whether the goods belonged to the husband's executor or to the wife, the marriage being an extinguishment of the agreement? but the court made no resolution. Pridgeon v. Pridgeon, M. 1688. 1 Ch. Ca. 12. Furzer v. Penton, M. 1686. 1 Vern. 408. S. P. yet no resolution.

290. A. lent money to B. and C. and took a bond in the name of a trustee; she afterwards married C. the principal obligor; this does not discharge B. who was a surety only. Cotton v. Cotton, E. 1693. 2 Vern. 290. Pre. Ch. 41.

291. A. gave B. a bond to leave her 1000l. if she survived, and then married her and died intestate, leaving all his real and copyhold estates in mortgage; B. took out administration, and was let in to redeem and to hold against the heir till satisfied, though the bond was gone at law by the marriage, and the copyhold was not affected by it, for it was in nature of a marriage agreement. Acton v. Acton, or Pierce, Pre. Ch. 237. 2 Vern. 480.

292. Feme gave her intended husband a bond, that if she married, she would convey to him her lands in fee; they intermarried, and die without issue; the bond, though void at law, is good evidence of the marriage agreement in equity, and the husband's heir shall compel the wife's heir to execute it. Cannel v. Buckley, M. 1724. 2 P. W. 243.

293. The wife's chose en action before marriage charged on her husband's estate, is merged by his death. Seys v. Price, T. 1740. 9 Mad. 217. Barn. 117.

294. Marriage is in its nature a civil, and in its celebration a sacred contract, and the obligation is a consideration moving from each of the contracting parties to the other, from which arises an equity in supplying defects for the wife, which the court will not do in favour of the husband. Banks v. Sutton, H. 1732. 2 P. W. 705.; and marriage agreements differ from all others, for as soon as the marriage is had, the principal contract is executed, and the estate and capacities of the parties are altered; the children are purchasers under both parents, and may compel a performance of the agreement from the relations of either; therefore, if the marriage contract could be rescinded, it would affect their interest; Harvey v. Ashley, E. 1748. 3 Atk. 610.

So a settlement on the marriage of a female infant is binding on her, and neither she nor her husband can avoid it. Dur-
BARON AND FEME VIII. & IX.

Wife's Contracts, dissolved by Marriage.

Ford v. Lane, T. 1781. 1 Bro. C. C. 106.
But to bind her, the settlement must be fair and reasonable. Williams v. Williams, E. 1782. 1 Bro. C. C. 152.


BARON AND FEME IX.

Wife's Provision secured in Equity.

296. A man suing for his wife's jointure in the spiritual court, will be restrained by an injunction in equity, till he has made a competent provision for her. Tansfield v. Davenport, Tott. 114.

297. A having married the legatee and executrix of L S, demanded 200 d due from B on bond to I S; B confessed the debt, but insisted that A had made no settlement on his wife; the court ordered the security to remain until A had provided for his wife. Wentworth v. Young, Nels. Ch. Rep. 577. et vide same order, Skin. 288. et Oxenden v. Oxenden, 2 Ver. 294. S. P. admitted to be the constant practice.


300. But if the husband ask for equity, he must do equity by providing for his wife. Vide the cases referred to ante, pl. 298.

301. And where the property is a subject of equitable cognisance, it is clear that the general assignees of the husband (whether by the operation of the law, or otherwise,) are subject to the husband's equity, by whomsoever the application may be made; therefore, if the husband become bankrupt, all such property of the wife as the husband could assign or release passes by the commissioners' assignment. Miles v. Williams, T. 1714. 1 P. W. 251. et vide ante, tit. Bankrupt, sec. v. (n.) vii.


303. But where the husband has assigned some particular chose en action or trust term of the wife for a valuable consideration, there is more doubt whether the court will impose any terms in favour of the wife on the particular assignee. Vide Turner's Ca. 1 Vern. 7. Pitt v. Hunt, 1 Vern. 18. Tudor v. Samyone, 2 Vern. 270. Packer v. Wyndham, Pre. Ch. 412. Walter v. Saunders, 1 Eq. Ab. 58. pl. 5. Bates v. Dandy, 1 Atk. 207.

304. Sed quare, whether in these cases of particular assignment, any distinction has been made between a trust term and a chose en action of the wife? Vide Prior v. Hill, 4 Bro. C. C. 139. which was the case of a general assignment to creditors. As to a particular assignment by the husband for a valuable consideration, vide Like v. Beresford, 3 Ves. 506. Burdon v. Dean, 2 Ves. jun. 607. Oswell v. Prosper, 2 Ves. jun. 680. Brown v. Clark,
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3 Ves. 165. Freeman v. Parsley, 3 Ves. 421. Franco v. Franco, 4 Ves. 515. Yet in Packer v. Wyndham, M. 17. S. Pse. Ch. 419. Ld. Cowper seems to have taken a distinction, and says, the difference between a bond and a term for years, is, that a bond is a chose en action, not assignable at law, and a term is a chattel real, which the husband may assign without his wife, as also the trust of such term, and consequently the money secured by it. Vide etiam Grey v. Kentish, 1 Atk. 280. Bates v. Dandy, 2 Atk. 208.


306. There are cases, however, in which the court has refused to compel the husband, or those claiming under him, to provide for the wife, or to secure her fortune in equity; and those cases principally are, where the husband has exercised his right at law, by reducing his wife's property into his possession, either by assigning her choses en action for a valuable consideration, as in Squib v. Wyn, 1 P. W. 378. and the other cases collected ante, sect. iii., or by assigning her term for years, or trust of a term, as in Packer v. Wyndham, M. 1715 Fre. Ch. 412. Gilb. Eq. Rep. 98. and other cases collected ante, sect. iii., or by releasing her possession, so as in Jacobson v. Williams, 1 P. W. 383. Higdon v. Williamson, 3 P. W. 142. Meth v. Frome, Amb. 394. Jewson v. Moulson, 2 Atk. 417. and other cases collected ante, sect. iii., in none of which cases equity can interfere.

307. Neither can the court secure the wife's fortune, where payable on a contingency, which is dubious and uncertain; but when the event does happen, the court will take all possible care of her interest, as in Exp. Casswell, M. 1728. 2 P. W. 497. Exp. Greaway, M. 1740. 1 Atk. 113. Baci v. Serra, M. 1807. 14 Ves. 313. and so where the provision is secured by a judgment or bond, forfeited at law, before a bankruptcy. Exp. Winchester, M. 1744. 9 Mod. 471. 1 Atk. 116. Exp. Groome, M. 1744. 1 Atk. 115. Exp. Mitchell, M. 1751. 1 Atk. 120. et vide Tully v. Sparks, 2 Ld. Raym. 1546.

308. A wife was held entitled to a provision against the particular assignee of the husband for valuable consideration, of the whole of her equitable interest, E. of Salisbury v. Newton, T. 1750. 1 Eden 370. See the Editor's note, in which he supposes this to be the first case which distinctly established the wife's equity to a provision out of her own fortune against the particular assignee of her husband. See also his Honour's construction in Mitford v. Mitford, 9 Ves. 100. Wright v. Morley, 11 Ves. 20. but the point seems yet undecided.

309. A bond was given by a trader to a trustee previous to his marriage, and by a marriage settlement of the same date, it was covenanted that the sum mentioned in the bond was to be payable only in the event of the wife surviving the husband; and it was further covenanted, that in case of the husband failing in his circumstances, but not otherwise, the trustee should sue on the bond. The husband became bankrupt in the lifetime of his wife. The Ld. Ch. would not allow the trustee to be admitted a creditor, for he considered the whole transaction a device to defraud the bankrupt laws. Exp. Murphy, H. 1803. 1 Sch. & Lef. 44.

310. A trader on his marriage received 600L., his wife's portion, and gave a bond in the penalty of 2000L, conditioned to pay 1000L to a trustee, the interest whereof to be payable to himself for life, if he should continue solvent, but in case of his death, or insolveney, then to his wife for life, and the principal to be divided among the children of the marriage. On his bankruptcy the claim of the trustee on behalf of the wife for interest was allowed, to the extent of the 600L., but not for the remaining 400L. Exp. Meagham, T. 1803. 1 Sch. & Lef. 179. Vide Lockyer v. Savage, 2 Stra. 947.


312. Nor where a settlement was made on the wife before marriage, though inadequate; sed secus, of a voluntary settlement after marriage. Lany v. D. of Athol, M. 1742. 2 Atk. 448.

313. Et vide contra, March v. Head, T. 1749. 3 Atk. 720. where, upon an ac-
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Wife's Provisions secured in Equity.

cession of fortune, the court ordered a further provision, the settlement before marriage being inadequate. So, where a husband made a new settlement in consideration of an accession of fortune, it was held good against his creditors. 

Ward v. Shallet, T. 1750. 2 Ves. 16. And, in another case, where the settlement did not appear inadequate, the court would not suffer the husband to exhaust the greater part of the wife's acquisition of fortune. 

Tomkyns v. Ladbroke, T. 1755. 1 Ves. 595. Upon the bill of a married woman, (entitled to a share of the personal estate, as one of the next of kin of the intestate,) against her husband and the administrator, the latter claiming to retain towards satisfaction of a bond due to him from the husband. Decreed, that he was not entitled to retain, but that the wife's share was subject to a further provision in favour of her and her children, her settlement being inadequate to the fortune she then possessed; and referred to the master to consider of a proper settlement, regarding being had to the extent of the wife's fortune, and the settlement before made. 

Lady Eliibank v. Montolieu, H. 1801. 5 Ves. 737.

S14. Bill by the infant children of Ld. E., stating the proceedings in the cause, Eliibank v. Montolieu, ante, and the decree which directed the master to approve a proper settlement, to be made by defendant Ld. E., on plaintiff Lady E., his wife, and her children by him, regard being had to the extent of her fortune, and the settlement before made upon her. The bill further stated, that Lady E. died intestate, before any report was made, and prayed that it might be declared that plaintiffs and defendant A. M., another child of lord and Lady E. have, under the decree of 1801, a right to a provision out of one-fourth of the personal estate of the intestate, under whom Lady E. claimed, as next of kin, and that it may be referred to the master to approve of a proper settlement to be made by defendant Ld. E., upon plaintiffs and defendant A. M., being all the children; regard being also had to the extent of Lady E.'s fortune, and the settlement already made by Lord E. To this bill defendant Montolieu demurred.—Per Ld. Ch. Upon this demurrer there are two points, one of form, the other upon the merits. A feme covert may waive her equity for a settlement out of her own property, even after the order, or at any time before its completion. The question then is, what is the effect of such an order as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. The husband, where he can, may lay hold of the wife's property, and equity will not interfere.

Previously to a bill, a trustee for a feme covert may pay her personal property, or the rents and profits of her real estate to her husband, but Ld. Alveley has laid it down that he cannot after; (Vide Macaulay v. Philips, 4 Ves. 15.) for the bill makes the court the trustee, and takes away that right of dealing with the property which the trustee previously had. After a bill filed, it is clear that the wife may come into court and consent to her husband's having the fund entirely under his dominion, and if she does not, the court will order a proposal to be made for a settlement on the wife and issue; but, notwithstanding such an order for a settlement under the wife's equity, if either party dies while it rests merely in proposal, the right of survivorship as between husband and wife is not affected.

It is not unfrequent where the master makes his report after a decree, for him to state that the parties had declined to lay a proposal for a settlement before him, and frequently notwithstanding such order by the original decree, upon further directions the wife came, consenting that the fund should be taken out of court, and was permitted so to do. If, therefore, the issue have a right against the father, it is altogether dependant on the will of the mother. In Rowe v. Jackson, (2 Dick. 604.) it was necessary to consider whether the wife never having expressed any change of opinion between the order for a proposal and her death, that order gave the children any right, and it was stated as not according to the practice, to permit the husband after that order to avail himself of the death of the wife to take the fund, and leave the children unprovided. The principle must be, that the wife obtained a judgment for her children, liable to be waived if she thought proper, otherwise to be left standing for their benefit at her death. Next as to the form, if the children have acquired a right by the judgment in the former suit, it is subsequent to the insti-
tion of the proceeding in that suit, and unless they can apply by petition, under the liberty to apply, they cannot apply, except by supplemental bill. Demurrer over-ruled. Murray v. Lord Elibank, T. 1804. 10 Ves. 84. This cause came on to be heard, when the right of the child to a provision was established. S. C. T. 1806. 13 Ves. 1. which decree was varied by adding directions for the master to take necessary accounts, &c. to ascertain and secure the fund, as had been prayed by the original bill by the mother. S. C. 14 Ves. 489.

315. There are cases also, in which the court will protect the wife, where the husband himself does not approach it to ask for equity. As in Ozenden or Rockingham v. Ozenden, E. 1705. 2 Vern. 493. Pre Ch. 239. where the trusts of a settlement remained to be performed, and the wife was forced from her husband, by illness of the husband. Decreed upon the application of the wife, she should have the interest of her fortune for her maintenance, until cohabitation. So, where a wife is cestui que trust, she may require an execution of that trust. Lupton v. Tempest, M. 1708. 2 Vern. 62. So, where the wife had a legacy, which was not paid when her husband became bankrupt, the court ordered it to be invested for her separate use for life, and afterwards for her children, upon her bill alleging, that she was entrapped into the marriage. Jacobson v. Williams, M. 1717. 1 P. W. 382. Gilb. Eq. Rep. 140. So also, where a feme sole mortgages in fee, marries a trader, who becomes bankrupt and dies, the mortgage deeds being in the hands of the assignees, the court refused the wife the benefit of her mortgage, for the covenant being to pay the money to the wife, it was her chose en action, and passed by the assignment, and though she had the legal estate, she was held a trustee for the assignees; but it would have been otherwise if by articles before marriage, it was agreed that this mortgage should continue to the wife. Baswell v. Brander, T. 1718. 1 P. W. 458. So also, where executors file a bill in nature of interpleader, to restrain proceedings in the spiritual court for the wife's legacy; the court will order her to be provided for. Harrison v. Buckle, M. 1720. 1 Str. 238. Gardener v. Walker, H. 1722. 1 Str. 508. S. P. But where the wife gained a legal interest in a household estate after marriage, the court refused, upon the bill of the executor, to make the husband add to her settlement, or even to make one; though in a case of a money legacy it would have been done. Adams v. Pearce, T. 1727. 3 P. W. 12. So, where a man marries a ward of the court, he shall make a settlement. Fhipps v. Sheldon, M. 1739. MS. (n.) 1 Eq. Ab. 64. pl. 1. Stackpoole v. Beaumont, E. 1796. 3 Ves. 89. 98. S. P. So, where a husband deserts his wife and goes abroad, the court will take care of her fortune, but if he maintains her, he shall have the interest, otherwise it shall be paid to her. Watkins v. Watkins, M. 1740. 2 Atk. 95. Sleech v. Thorington, T. 1754. 2 Ves. 560. So, where the wife had eloped, and lived in adultery, the court would not leave her wholly without a provision. Ball v. Montgomery, T. 1793. 4 Bro. C. C. 339. 2 Ves. jun. 191.

316. Yet, notwithstanding the court will compel the husband and those claiming in his right, to provide for the wife; it will not oblige the husband's assignee of the wife's term, or trust of a term, to provide for her until he is entitled. Jesson v. Moulsan, 2 Atk. 417. Neither does this equity extend beyond the wife, for, should it be construed to extend to children, it may prejudice creditors. Scriven v. Tapley, T. 1765. Amb. 509. 2 Eden 337.

317. A wife had 3500l. South Sea Annuities, which, by articles prepared in Holland, before marriage, was agreed to be settled to her separate use; the wife filed her bill for a transfer, on the husband's refusal to assist her; but the husband, who was served with a subpoena, not having been in England within two years preceding the bill, and consequently not coming within the 5 Geo. 2. c. 25. s. 1. for taking bills pro confesso, the court, after sequestration against the husband, ordered the South Sea Company to transfer. Vanhessen v. Shippenbeck, H. 1750. 1 Dick. 140.

318. Where a husband covenanted in his marriage settlement to convey sufficient in value to answer an annuity which his wife had at the time of her marriage, and died without having so done, the court decreed the deficiency to be made good out of his estate. Matthews v. Matthews, T. 1772. 2 Dick. 470.

319. The husband was a bankrupt,
and his wife had vested a contingent legacy, which he had not reduced into his possession when he died: Held, not to vest in his assignees, for it was not such an interest as the bankrupt could assign. Gayner v. Wilkinson, M. 1773. 2 Dick. 491.

320. Upon a bill by a husband for stock held in trust for his wife, a claim was set up under a bond by the wife and her former husband, securing an annuity out of the dividends as an assignment for a valuable consideration; but as it came collaterally before the court, and several objections were taken upon the annuity act, and on the lunacy of the wife, and the nature of her interest at the time, the court, though inclining to favour the wife's equity upon the general question against an assignee for a valuable consideration, would not determine it, but referred it to the master to approve a settlement upon the wife and her issue, with liberty for the representatives of the obligee to apply. Franco v. Franco, E. 1799. 4 Ves. 515.

321. The trustees in a marriage settlement lent part of the trust monies to the husband upon bond, when in full credit; he purchased an estate to himself in fee, and became bankrupt, whereupon the estate was conveyed to his assignees. The estate so purchased was ordered to be conveyed to new trustees, upon the trusts of the settlement, and the residue of the bond debt to be proved under the commission against the husband. Wilson v. Foreman, E. 1782. 2 Dick. 593.

322. Where there is an order on the husband to lay proposals before a master for a settlement on his wife and children, and the wife dies leaving issue, the court will bind the husband to the order. Rowe v. Jackson, H. 1783. 2 Dick. 604.


324. A bequeathed the residue of his real and personal estate, to I., to be placed at interest until 21 or marriage, and then the whole, with the accumulation, to be paid to her, for her use during her life, and after her decease, to the heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and for default of such issue, or in case of the death of the said I. before 21 or marriage, such residue to C. and his heirs for ever; Held, that this passes an estate for life only to I. in the residue of the personal estate, but not to her separate use, and she being married, and her husband a bankrupt, proposals were directed for a settlement on her and her issue. Jacobs v. Amyatt, M. 1792. 1 Madd. 378. (n.) Vide Beresford v. Hobson, 1 Madd. 360. and the cases there referred to.

325. On a proposal for a settlement under a commitment for marrying a ward of the court, a power was directed to be inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life; and the husband, on undertaking by his counsel to execute the settlement, was discharged. Winch v. James, M. 1798. 4 Ves. 386.

326. A husband conceiving himself entitled, under a void deed, to a residue bequeathed to his wife, and dying without getting possession, having made a general disposition by his will, under which she took an interest, it is a case of election, and her election to take the provision under the will, though less in point of value, was to her separate use, and was established against the assignees under the bankruptcy of her second husband. Rutter v. Maclean, H. 1799. 4 Ves. 531.

327. To prevent the marital right in the property of a married woman, a clear intention must appear that it shall be to her separate use; a mere trust to pay the interest to her for life is not sufficient, and his Honour in this case said, that as a husband is bound to maintain his wife, she ought, out of her separate property, to contribute to the common fund; and her utmost equity is a provision out of her fortune. It was admitted, that the capital being bequeathed according to the wife's appointment, whether covert or sole, and in default of appointment to her representatives, including her husband, was a bequest to her separate use. Lumb v. Milnes, T. 1800. 5 Ves. 517.

328. So is a bequest in trust to pay the annual produce into the proper hands of a married woman, a bequest to her separate use. Hartley v. Hurle, T. 1800. 5 Ves. 545.

329. Upon a settlement of the fortune of a ward of the court, who had married
whole, the settlement must either express or clearly import that intention.
*The settlement in this case does not do so; and the meaning seems to be that
the husband should take only what was to become his immediately upon the mar-
rriage. It is not alleged that the provision he made for his wife was more than adequate to that fortune. An account to ascertain plaintiff's share was decreed, and the assignees were directed to make a proposal for an adequate settlement out of that share, having regard to the settle-
ment already made upon her. Carr v.
Taylor, E. 1805. 10 Ves. 574. Vide
*Mitford v. Mitford, 9 Ves. 87. In the
principal case it appeared that G., the
bankrupt, was indebted to the estate of
the intestate W., on bond, which claim
the administrator of W. attempted to set
off against the claim of M., the wife of the
bankrupt, as next of kin of the intestate:
Sed non allocatur.
335. By articles on marriage the hus-
band agreed, as speedily as might be,
to settle 40l. per annum on his wife if she survived, to be paid from the
time of his decease; but the interest and dividends arising from money to be in-
vested in the 9 per cents. for the purpose of raising the annual sum of 40l. should,
in the mean time, be received by the hus-
band, and in case of issue of the marri-
age, that he should have power to dispose of the capital for the use of such issue
by deed or will; and in failure of issue,
that the wife should have the sole dispo-
sal of 500l., being the portion the hus-
band received with her, and if he sur-
vived, the dividends of that sum should
be received by him for his life. The
husband became bankrupt, and no money
was invested, his wife and children there-
fore petitioned that they might be admit-
ted to prove 800l., or such other sum as
would produce 40l. per annum, or at least
for 500l. Ld. Ch. said, if the real mean-
ing of this agreement is a covenant to in-
vest as much money as will produce 40l.
per annum, it differs this case from Utter-
son v. Vernon, 3 T. R. 592, inasmuch as this
bankrupt was under an obligation without
any step taken by the other party, and in
that case it was to be upon demand made,
and no demand having been made at the
time of the bankruptcy, his Lordship in-
clined to think this demand should be
proved, and the order was made accord-
ingly for proving 800l. Exp. Granger,
H. 1805. 10 Ves. 349. 3 T. R. 529.
354. Exp. Coming, 9 Ves. 115.
336. On the marriage of L. and M.
money was settled to the separate use of
the wife, and in the event of no children,
to her absolutely, provided she should
survive her husband, with power to the
trustees, with her consent, to invest it in
land to be conveyed to the same uses.
The husband, before marriage, purchased
a freehold estate, and after marriage
he purchased two leasehold estates, with
money which he borrowed, and which he
afterwards repaid out of his wife’s trust
money. The husband died without issue,
and intestate, whereupon his widow took
out administration, and filed her bill
against her husband’s heir at law, charg-
ing that the estates had been bought out
of her money, and that the deeds had
been deposited for her security, and
praying an account of the debts, and
that she may be considered a specialty
creditor in respect of her demand, and
have satisfaction out of the real estate as
such, or by virtue of an equitable lien:
Held, that the widow had no lien upon
the estates purchased by her husband,
though he had obtained the money from
the trustee, the circumstances of the case
not raising that presumption which in
other cases had been raised, as if the hus-
band had been under an engagement to
purchase, and his purchases were in pur-
suance of that engagement, and also upon
evidence of the fact of the application of
the trust fund, or the inability of the hus-
band by other means not being made out;
Held also, that though the husband cove-
nanted not to obstruct the appointment of
his wife under her power over her separate
estate, yet no specialty debt arises from
the husband by the effect of such cove-
311. Vide Sowden v. Sowden, 1 Bro.
C. C. 382. Lane v. Dighton, Amb. 409.
Ryal v. Ryal, 1 Atk. 59. Wilson v. Fore-
man, 2 Dick. 593. imperfectly reported,
but correctly stated by his Honour in the
principal case.
337. An assignment by the husband
of part of his wife's equitable interest,
viz. dividends of stock in trust for her,
for a valuable consideration, was enforc-
ed, upon the bill of a surety for the hus-
bard to be indemnified against past and
future payments, the assignment extend-
ing only to 100l. per annum out of 250l.
BARON AND FEME IX.

Wife's Provision secured in Equity.

The remaining dividends, under a bill on the part of the wife, were paid to her, the husband having, after the assignment, gone abroad without making any provision for her. **Wright v. Morley, H. 1805. 11 Ves. 12.**

338. A trader on his marriage gave his bond for 1000l. to the trustees of his marriage settlement, payable in the event of his bankruptcy or death, and he also conveyed the rent of his house to the same trustees as a provision for his wife and children. The father of the trader's wife also gave the trustees a bond for 800l., as his daughter's portion, which was vested in the same trustees as a future provision. The husband became bankrupt, and thereupon the court ordered the proof which had been made of the husband's bond to stand, and the dividend payable thereon, to be invested on security, the interest whereof should be paid to the assignees during the life of the bankrupt, and then the whole to his wife and children. The court also declared the bond of the wife's father, which was settled to the separate use of the wife in case of her husband's bankruptcy, to be valid. **Exp. Orley, M. 1807. 1 Ball & Be. 257.**

339 Where a trader on his marriage gave to trustees a bond for his wife's fortune, and the settlement did not provide for its proof under the husband's commission, in case he should become bankrupt, and that afterwards happened, the court ordered the bond to be proved, such appearing to be the intent of the parties. **Exp. Verney, T. 1808. 1 Ball & Be. 260.**

340. Securities obtained from a married woman, having separate property, by a creditor of her husband, who, by suppressing that fact, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, were set aside. **Dalbiac v. Dalbiac, E. 1809. 16 Ves. 116.**

341. A trader on his marriage, in consideration of 1000l., his wife's fortune, conveyed his house to trustees to his own use till his death or bankruptcy, and in either event if his wife survived, to raise 1000l. for her separate use; Held a valid settlement, and in nature of a mortgage to secure the wife's fortune, and an application by the assignees to restrain the trustees from recovering the house at law, was refused by the court, for though a trader cannot on his marriage secure a provision out of his own property for his wife, to the prejudice of his creditors, yet to the extent of her own property he may make such a provision. **Higginson v. Kelly, M. 1810. 1 Ball & Be. 252. 256. Et vide Exp. Meaghan, 1 Sch. & Lef. 179. Exp. Hinton, 14 Ves. 519. and Lockyer v. Savage, 2 Stra. 947.**

342. A covenant by a husband in consideration of the purchase money of an estate of his wife, within two years to convey lands in N. of the value of such purchase money by way of settlement. The husband died without performing the covenant, but performance of it was decreed against his representatives, by directing them to lay out in land so to be settled, a sum equal to the value of estates in N., which (at the time the covenant ought to have been performed,) would have been worth the amount of the purchase money, with interest at 4 per cent. from the death of the covenantor. **Lady Suffield v. Lord Suffield, H. 1812. 3 Meriv. 699.**

343. J. S. covenanted in his marriage settlement that he would, on a month's notice, or in the event of his default during his life, his representatives should, within a month after his death, transfer stock, in trust, &c. in bar of dower, &c. with a proviso, that notwithstanding the covenant to transfer upon their request in writing, it should be lawful for the trustees, if they thought fit, to forbear requiring the transfer from him during his life. No transfer was made, nor any notice given, and the husband having become bankrupt, the court held, first, that this being a contingent debt, it could not be proved under the commission; secondly, that the bankruptcy could not have the effect of a voluntary transfer under the covenant; and thirdly, that the clause giving the trustees power to forbear enforcing payment, must be construed as intended for their indemnity, for it is to be considered as with a view to insolvency, it might amount to a fraud. **Exp. Alcock, H. 1813. 1 Ves. & B. 176.**

344. By a deed of separation, a husband (a trader) covenanted with a trustee for the wife, that in consideration of being indemnified against the wife's debts, he would release a remainder in fee limited to himself for life, then to his wife for life, then to himself in fee, and settle the same as his wife should appoint. The
346. Where a wife has two provisions in her view, in most cases she shall be put to her election; but the principle upon which such election is directed, is, where one provision is contrary to, or inconsistent with, the other. Vide Strahan v. Sutton, M. 1796. 3 Ves. 249. And such inconsistency or contrariety, must appear from express declaration or necessary inference. French v. Davies, T. 1795. 2 Ves. jun. 572. But in all cases of election, the wife shall be permitted to consider which provision is most to her advantage. As where,

347. A. covenanted on marriage, that if his wife survived, she should have half her fortune secured: A. died, and left her more than she could claim. Per cur.: The legacy shall be considered in satisfaction of the covenant; but the wife shall elect which portion she pleases. Corus v. Farmer, M. 1708. 2 Eq. Ab. 34. pl. 1.

348. So where 8000/. was secured to the daughter of A. by his settlement, and he afterwards gave her 8000/. and 2000/. per ann. by will; she can have but one 8000/. but she may elect which she pleases, Copley v. Copley, T. 1711. 1 P. W. 147.

349. So where A. by deed poll, assigns all his securities to his natural daughter, but never delivered the deed poll to her; he afterwards gave her a bond for 10,000/. payable in 3 months after his decease, and devised to her all his lands, provided she married B.; he also gave her his personal estate, and made her executrix: she refused to marry B. She shall not have both the deed and bond, but may elect between them.—Johnson v. Smith, M. 1749. 1 Ves. 314.


351. So where 1000/. per ann. was given to a wife in lieu of dower, but if she married again, then 1000/. per ann.; she married and elected her dower, which was dereed to her. Boyntun v. Boyntun, E. 1783. 1 Bro. C. C. 445.

352. So where the provision to which a wife is entitled under her settlement is uncertain, the wife shall elect between that and her dower, though the settlement be in bar of dower. Caruthers v. Caruthers, H. 1799. 4 Bro. C. C. 500.

353. So where a wife has an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate in tail, she must elect, though it is manifestly the better interest, and her husband's taking possession under that title does not preclude her election. Wilson v. Townsend, T. 1792. 2 Ves. jun. 693.

354. So where a devisee dies in the life-time of the deviser, and the estate descends, the devisor's widow being entitled by will to a provision in bar of dower, must elect. Pickering v. Lord Stamford, E. 1797. 3 Ves. 337.

355. So where A., tenant in tail, remainder to B. the wife of C. in tail, conceiving he had obtained a fee under a void execution of a power, granted leases, and then devised the estate to B. for life, remainder over, and gave B. and C. other benefits under his will, leaving D. residuary legatee; upon a bill by D. to establish the will, B. elected to take her estate tail in opposition to the will, which the master reported to be for her benefit,
Where the Wife shall elect.

and it was decreed to her accordingly. *Dartington or Cawen v. Pulteney, T. 1797. 2 Ves. jun. 544. 3 Ves. 384.

356. So where a wife has one claim under the will of her former husband, and another against it, she shall elect between them. *Blount v. Bestland, T. 1800. 5 Ves. 515.


358. And she shall not be precluded by having received one portion, if she should afterwards discover that the other is more beneficial. As where testator gave his wife an annuity, charged on an estate of which she would be dowerable; this was held a case of election, but that the widow had not made her election by accepting the annuity for three years. *Wake v. Wake, E. 1791. 3 Bro. C. C. 255. Vide ejusstratam v. Powell, 1 Ball & Be 23. post, pl. 373.

359. Yet she shall make her election within a proper time, and be bound by it. As where a *feme covert, heir at law (of a copyhold estate, to which testator was not admitted,) who took a legacy of 5000l. under testator’s will, and received the interest for five years, was held to have elected under the will. *Ardenvofe v. Bennett, T. 1772. 2 Dick. 463.

360. Though no line can be drawn, for it must depend upon the circumstances of the case. As where a wife entitled to an estate under her settlement, and her husband gave her by will his personal estate, and an interest in his real estates, in lieu of her claims, and his will was not duly executed to pass the latter, she must elect between the personal estate and her settlement, but she may delay it till an account of the personal estate is taken. *Newman v. Newman, H. 1783. 1 Bro. C. C. 186.

361. So where a widow having different interests under her settlement and her husband’s will, and having proved the will, acted under it, and received the rents for six years, she was held to have made her election. *Butrickes v. Brockhurst, T. 1790. 3 Bro. C. C. 88.

362. Note. It seems, that where the court have held a wife bound by her election, they have tenderly ascertained that it is the most beneficial alternative.

363. There are some cases also in which a wife shall have both provisions. As where A., covenanted to buy 20l. per annum for his wife for life, and if he died before it was done, to leave her 500l.; he died without making any settlement, and bequeathed her the interest of 500l. for life, with power to dispose of 30l. at her death. Decreed, she should have 500l. under the articles, and the legacy also, and that the executors could not settle the 20l. per annum. *Perry v. Perry, T. 1703. 2 Vern. 505.

364. So where by articles before marriage of a female infant, it was agreed, that when of age she should convey her lands to her husband, in fee, in consideration of a suitable jointure in bar of dower; the jointure was settled, and the wife was a party to the deed, but she never was required by her husband to convey her lands; the husband died: Held, the wife was not bound by the articles, though she accepted her jointure; she therefore kept her own estate and the jointure also. *Lucy v. Moore, M. 1730. 3 Bro. P. C. 514. 3 Mos. 59.

365. So where A., on marriage, covenanted to secure 1000l. per annum to his wife in bar of dower, and by his will devised to her considerable real and personal estates: Held, she was entitled both to her annuity and the devise. *Broughton v. Errington, E. 1773. 7 Bro. P. C. 12.

366. So where testator entered into a marriage bond to leave his wife and children 2000l. and if no children, then to his wife; he died without issue, and left his wife a life interest in all his property: she shall take both. *Forsyth v. Grant, E. 1791. 3 Bro. C. C. 241.

367. But there are cases in which the court will make a decree contrary to the wife’s election. As where A., on marriage, covenants to purchase and settle lands of 400l. per annum to the use of himself and wife for life, remainder to the children, and in default, to pay 3000l. in lieu of dower; he died without making the settlement; the widow elected the 3000l., but the children insisted on the settlement, which was decreed to be performed. *Hancock v. Hancock, H. 1707. 2 Vern. 605.

368. So in some cases a wife shall not...
Where the Wife shall elect.—Paraphernalia and Pin-Money.

be put to elect at all, or her election shall be suspended. As where an infant widow, having a jointure, marries again without determining her election, and her husband enters on the settled estate, his entry shall bind both during the coverture. Harvey v. Ashley, E. 1748. 3 Atk. 617.

369. So where testator devised estates, which he had surrendered to his wife for life, remainders over. In one parish he had joint estates with his wife, and in others, no estates but in her right. The wife's estate could not pass by his surrender; ergo, not by his will, and the words are too loose to raise a construction that the wife shall elect. Read v. Crop. T. 1785. 1 Bro. C. C. 492.

370. So where a testator gave all his estate to trustees, by which devise the widow could not claim her dower without disturbing their possession. The court held, that the widow's title to dower was absolute and paramount to the will; she shall therefore have her dower, and not be put to her election. Foster v. Cooke, T. 1791. 3 Bro. C. C. 347.

371. A reference to arbitration being proposed, it was objected that one of the parties was a married woman, in respect of her interest in a real estate. Lord Ch. would not permit the reference, nor would he allow it to go to a master to enquire whether it would be for her benefit, as in the case of an infant; for, said his Lordship, the case of election is quite different; there she is to comply with a condition imposed upon her by the testator's will, but there is no instance of a reference to the master to enquire, whether it would be for the benefit of a married woman that a cause respecting her interest in a real estate should go to arbitration merely for asking for it. Davis v. Page, E. 1804. 9 Ves. 330.


373. Where A. by deed conveyed property to his wife, and then by will devised the same with other property to her, it is a case of election, but the taking possession alone, in ignorance of the rights devised, is not sufficient evidence of an election. Secus, where a defence is taken to an ejectment for the devised estates by the devisee, and there is a continuance of possession for a year, with a declaration of an intent to abide by the will, for this is sufficient to prove an election made. Stratford v. Powell, M. 1807. 1 Ball & Be. 23. See Wake v. Wake, 1 Ves. jun. 335. 3 Bro. C. C. 255, and the cases there referred to by the reporters. See also, the principles laid down by Ld. Hardwicke, in Tomlins v. Ladbroke, 2 Ves. 591. Pawlet v. Delaval, 2 Ves. 668. and Harvey v. Ashley, 3 Atk. 615. which Ld. Mansfield said were very applicable to this case, and decisive to show that other circumstances, besides an inaccurate knowledge of the comparative value between the two subjects of election are sufficient to bind a person to an election, and to defeat any subsequent attempt to disturb it.

BARON AND FEME XI.

Paraphernalia and Pin-money.

What shall be so considered and may be enjoyed and disposed of by the Wife, and what Arrears of Pin-money shall be allowed.


375. Plaintiff obtained judgment at law, (against the administrator of A.) de bonis quando. A.'s widow had several jewels, which she pretended to have bought out of the savings of her pin-money, but failing in the proof, the jewels were sold to answer plaintiff's debt. Wilson v. Pack, T. 1710. Pre. Ch. 295.

376. L. S. had a crotchet of diamonds belonging to his first wife, which by will he gave to his eldest son, and to go to his heir in succession, as an heirloom. Af-
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Paraphernalia and Pin-Money.

Towards he married a second, and then turned the crotchet into a necklace, adding new diamonds of 200l. value, which was more than the value of the crotchet. Upon the death of J. S., his heir-general claimed the crotchet of the widow. Ordered that the master 20 separate the diamonds, and deliver the diamonds which were in the crotchet, to the heir at law, as an heir-loom. Calmady v. Calmady, M. 1719. 11 Vin. 181. pl. 21.

377. A dies indebted by covenant in more than his personal assets can pay, but there being real assets sufficient, the wife shall have her paraphernalia, which is always to be preferred to legacies. Tipping v. Tipping, M. 1729. 1 P. W. 729. Vide post, tit. Executor, iv.

378. A husband allowed his wife for her separate use, to sell butter, eggs, pigs, poultry, &c. calling it her pin-money, out of which she saved 100l. which her husband borrowed, and died; there being no deficiency of assets, she shall come in as a creditor for this 100l. Slanning v. Style, M. 1734. 3 P. W. 337.

379. So, where the husband allowed his wife to receive two guineas from each tenant, upon every renewed lease; this shall be considered as the wife's separate money. S. C.

380. A had 300l. per annum. pin-money; the husband for several years paid her but 200l. per annum, but promised her she should have the whole at last. If a wife accepts less, it implies a consent to submit to that method; but where the pin-money is paid to her eo nomine, her agreement with the husband, relating to her separate estate, amounts not to a new agreement; and his promise that she should have it at last, is an undertaking to pay the arrears. Decreed for the wife. Ridout v. Lewis, E. 1733. 1 Atk. 269.

381. The wife in her last illness requested that her husband would put into a friends hands, for her daughter's use, all her wearing apparel and jewels, which she used. The husband, accordingly, after his wife's death, put the things into a strong chest, and delivered the key and an inventory, to his wife's friend. Though the husband afterwards took some of the things into his possession again, it does not invalidate the gift; for though gifts between husband and wife do not pass at law, yet they are supported in equity. Lucas v. Lucas, T. 1733. 1 Atk. 270.

382. Where there are real estates descended, the wife may have her paraphernalia; Secus, where the real estate came by the husband. Probert v. Morgan, T. 1739. 1 Atk. 441.

383. Where a wife's paraphernalia had been exhausted in payment of her husband's debts, upon the deficiency of personal assets; though the court could not decree satisfaction out of the real estates devised, yet satisfaction was decreed out of the surplus of the real assets descended, if any such there be. Probert v. Clifford, T. 1739. Amb. 6. This seems to be S. C. as Probert v. Morgan, ante; but the present case is taken from Reg. Lib. B. 1738. fo. 310. Vide 2 P. W. 544. (n.)

384. A husband, by will, disposed of his wife's jewels, (part of which were given her by himself, and part by her own relations,) to his brother and executor. The wife shall have her jewels as her paraphernalia, for the husband had no right to dispose of them. Northey v. Northey, M. 1740. 2 Atk. 77. 9 Mod. 270.


386. Where the personal estate has been exhausted to pay specialty creditors, the widow shall stand in their place for her paraphernalia, upon the real assets of the heir; yet though paraphernalia shall be applied to satisfy simple contracts, it shall not go to satisfy legacies. Saelson v. Corbet, T. 1746. 3 Atk. 369. So, where there is a trust estate charged with the payment of debts. Inclendon v. Northcote, E. 1746. 3 Atk. 438.

387. Diamonds given by the husband's father to his son's wife on marriage, are a gift to her separate use, and she is entitled to them. So is a gift by a stranger to the wife. So are trinkets, given to her by her husband; but where given expressly to be worn as ornaments, they are to be deemed paraphernalia, and the husband may alien them; though if considered as a gift, the wife may dispose of them contrary to the husband's intention. Graham v. Londonderry, M. 1746. 3 Atk. 393.

388. If a husband pledges his wife's paraphernalia, and leaves a sufficient personal estate, it shall be liable to re-
deem the pledge. In the present case, Lady D.'s diamond necklace was sold, and an account of the value was decreed to her. *Graham v. Londonderry, supra.*

389. Jewels of the wife, given by the husband's will to her, for life, shall not be sold for payment of his debts, charged on his real estate, in aid of personality. Decreed, the jewels to the wife, in prejudice of the charged estate. *Boynton v. Parkhurst, T. 1784. 1 Bro. C. C. 376. 1 Cox 106. S. C.*

390. A claim of paraphernalia shall not be disappointed by the effect of the option of a creditor having a double fund to resort to in the administration of assets. *Aldrich v. Cooper, E. 1803. 8 Ves. 397.*

**Arrears of Pin-money.**

391. A wife who has pin-money or separate maintenance, may dispose of the savings by her will, and it shall bind the husband and his devisee. *Herbert v. Herbert, E. 1692. Pre. Ch. 44. Milles v. Wickes, M. 1694. 1 Eq. Ab. 66. pl. 3. S. P.*

392. A term was created for raising 200l. per annum, pin-money, with the husband's covenant to pay it. One year's arrears are chargeable on the husband's trust estate for payment of debts. *Secus, if many years arrears. Offley v. Offley, T. 1691. Pre. Ch. 26.*

393. Testator created a trust for payment of his debts, and all which he owed to any person in trust for his wife. *Per curiam, the arrears of the wife's pin-money, not within the trust, for a man cannot be indebted to his wife, and there was no person in trust for her. Sed quare, for testator looked upon it as a debt. Cornwall v. Earl of Montague, M. 1701. 1 Eq. Ab. 66. pl. 2.*

394. Arrears of pin-money, not demanded in the husband's life-time, cannot be claimed after his death, where the husband and wife cohabited together. *Thomas v. Bennet, H. 1723. 2 P. W. 341.*

395. Testator died, leaving no personal assets, but charged his real estate, which was only a reversion in fee, with his debts. As far as he was able. At his death, there was an arrear of one year and three quarters pin-money, which the court allowed to the widow, in regard she and her husband had lived well together.

**Lady Warwick v. Edwards, M. 1728. 1 Eq. Ab. 140. pl. 7.**

396. A wife can only be admitted a creditor, by simple contract, for one year's arrear of pin-money against her husband's separate estate. *Lord Townsend v. Windham, T. 1750. 2 Ves. 7.*

**Where liable to the Husband's Debts.**

397. The widow shall not be allowed her paraphernalia, where the husband left no assets at his death, nor even if contingent assets should afterwards fall in; but where her jewels were specifically bequeathed to her, she shall take them as a specific legacy; though as paraphernalia, they must aid the deficiency at the time of testator's death. *Burton v. Pierpont, T. 1722. 2 P. W. 79.*

398. Where a man's real and personal estates are charged with his debts, and prove insufficient, his wife's paraphernalia shall be sold. *Parker v. Harvey, T. 1726. 3 Bro. P. C. 187.*

399. A. entered into a recognisance, and B. and C. were his securities. A. died; his personal estate shall be first liable, then his lands devised, and next, his wife's paraphernalia, and she shall not be permitted to pay off the recognisance, and extend the lands of the sureties. *Tynt v. Tynt, T. 1729. 2 P. W. 544. Vide post, tit. Executor, iv.*

400. No paraphernalia is allowed where the husband dies indebted, though the court will let the wife in on other funds, if there are any. *Lord Townsend v. Windham, T. 1750. 2 Ves. 7.*

**How barred or satisfied.**

401. A wife on marriage agreed to have only such part of her husband's personal estate as he should give her by will. This bars her paraphernalia. *Cholmley v. Cholmley, M. 1688. 2 Vern. 82.*

402. A. gave his wife her jewels for life, and then to her son; as the wife did not claim her jewels as paraphernalia, her administrator shall not have them. *Cleris v. Duke of Albemarle, M. 1691. 2 Vern. 247.*

403. A. on marriage settled 100l. per annum pin-money on his wife for her separate use, which becomes in arrear, and then the husband gave her a legacy of 300l. after which there was a further arrear, and then the husband died. **The**
BARON AND FEME XI. & XII.

Separation, Alimony, Debts of the Wife.

legacy was greater than the arrears. Decreed, though in the case of a wife, to be a satisfaction of the arrears due at the making of the will. Fowler v. Fowler, E. 1725. 3 P. W. 359.

404. Where pin-money is secured to the wife, and the husband finds her necessaries, it is a bar to any arrear incurred during that time. S. C.

405. A husband cannot devise away his wife's paraphernalia; he can only bar her by acts in his life-time. Seymour v. Tresilian, T. 1737. 3 Atk. 358.

406. Where a husband's personal estate is not sufficient to pay his debts, his wife cannot claim any jewels, plate, trinkets, &c. given her before marriage; and where there is no trust to pay debts out of a real estate, the wife cannot at all events come upon it for her paraphernalia. Ridout v. Earl of Plymouth, M. 1740. 2 Atk. 104.

407. A wife, who by her marriage articles, is expressly barred of every thing she could claim out of her husband's personal estate by the common law, custom of London, or otherwise, has no right to her paraphernalia. Read v. Snell, T. 1743. 2 Atk. 642.

BARON AND FEME XII.

Separation, Alimony, Debts of the Wife.

408. If a husband's bad conduct compels his wife to leave him, equity will upon her own, or her prochein amay's application, decree her a suitable separate maintenance. Sankv. Golding, Carey, 124. Farmer v. Compton, 1623. 1 Ch. Rep. 1 S. P. Ashton v. Ashton, 1650. 1 Ch. Rep. 164. S. P.

409. Where there was a decree for a separate maintenance, and the husband offered to be reconciled, but the wife refused, the court ordered the arrears to be brought into court, and the allowance to be suspended, with liberty to vacate or resort to the decree as occasion might require. Whorwood v. Whorwood, 1660. 1 Ch. Rep. 223. H. 1675. 1 Ch. Ca. 230. S. C. In Head v. Head, 3 Atk. 296. Ld. Hardwicke is reported to say, that this case was determined during the usurpation, when the power of the spiritual court was suspended.

410. A feme covert legatee of the use of goods for life, remains to a stranger, having parted from her husband, wasted these goods. The husband shall be charged, the stranger's title being paramount, and not under the wife. Page v. Read, H. 1682. 1 Vern. 143.

411. A feme covert living apart from her husband, and having a separate maintenance, contracted debts with those who knew of the separation; upon the husband's death they brought actions, but an injunction was denied to the executor, he having admitted he had a good defence at law. Ferrars v. Ferrars, M. 1682. 1 Vern. 71.

412. Upon a bill by the wife to discover acts of hard usage, and for a separate maintenance, the husband demurred, for that the matter was not examinable in equity. Allowed. Hincks v. Nelthorpe, M. 1683. 1 Vern. 204.

413. A woman living apart from her husband, and having a separate maintenance, contracted debts; the creditors may follow the maintenance in equity while it continues, but after the husband's death they cannot follow the jointure, for the husband's executor may have paid the debt, and he was not a party in this case. Kenge v. Delavall, E. 1685. 1 Vern. 326.

414. Note. The important question, whether a feme covert living apart from her husband, and having a separate maintenance secured to her by deed, can contract debts, and be sued as feme sole, was twice argued in B. R. and it was solemnly determined that she could not. Vide Marshall v. Rutton, E. 1800. 8 T. R. 543.

415. Upon a treaty for separation, it was agreed, that the husband should return his wife's portion to her father, who should maintain the wife and child, and indemnify the husband. This agreement was established in equity, though the husband offered to take them both back. Seeling v. Crawley, M. 1700. 2 Vern. 386.

416. A wife, who was compelled by hard usage to leave her husband, was decreed the interest of her portion for
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her maintenance until cohabitation.—

417. A wife separated from her husband may make a gift of the savings of her separate allowance as a _feme sole._—
Gage v. Lister, M. 1705. 1 Bro. P. C. 112. or she may dispose of them by will.
S. P. Bletsos v. Sawyer, T. 1684. 1 Vern. 245. S. P.

418. A. and B. his wife, separated by consent; B. had 1000l. _per annum_ settled on her. I. S. the son, took upon him all his father's debts, and the estate was conveyed to him; I. S. covenanting to indemnify his father from the debts and maintenance of his mother. Upon the mother's bill against the father and son for an allowance, the son offered to take her home. _Per curiam_, the son does not so far stand in his father's place as to bind his mother by that offer. Decreed, the son shall allow his mother 200l. _per annum._ Dutton v. Dutton, T. 1715. 4 Vin. 178. pl. 18.

419. Bill for performance of articles of separation. Though the court cannot decree alimony or a separation, it can enforce such articles; (a) but if the parties choose to come together again, the articles are no longer binding. Angier v. Angier, T. 1718. Gilb. Eq. Rep. 142.
Pre. Ch. 496. (a) Vide Wilkes v. Wilkes, 1 Dick. 790. Post, pl. 453.

420. The estate of a deceased husband is liable to pay the funeral charges of a wife having a separate maintenance.—
Bertie v. Lord Chesterfield, T. 1725. 9 Mod. 51.

421. A., the wife of the plaintiff, had been forced by cruelty to leave her husband, and she lived thirty years as a servant in the defendant's family, where she maintained herself, and B. and C. her children; B. died, and left an East India bond, and another bond by will to the separate use of A. his mother. A. proved the will, and delivered over the latter bond to plaintiff, her husband, and the East India bond she gave to defendant as a consideration to provide for her for life; then A. died; plaintiff filed his bill for the East India bond, charging alimony in his wife, though he had often visited her in defendant's service. Decreed, that the agreement between A. and the defendant, who had so long maintained her, should be established in equity Reif v. Budden, H. 1725. Bubb. 187.

422. M. married E.'s daughter; after some years the daughter eloped, and then E. left by will 6000l. in trust, to dispose of the principal and interest, as his daughter should by deed or will appoint. M. afterwards met and took possession of his wife, when she agreed, that if M. would permit her to live separate, she would pay him 1000l. and settle 200l. _per annum_ on him for life, and articles were accordingly executed; on a bill to set aside the articles, and that M. should elect to take the 200l. _per annum_. Decreed, that the articles were a good execution of the power created by the will of E., and that M. was not bound to elect.—

423. A husband deserted his wife, and went to America, having first fraudulently assigned all his property. The court decreed her a maintenance out of the estate assigned, though she had the interest of 4000l. as pin-money. In a suit for alimony, separate maintenance or pin-money is not a good plea:—

424. I. S. left his wife and children, and went abroad for fourteen years.—
The wife on her mother's credit maintained herself and children as a milliner. I. S. on his return, seized the wife's goods and stock in trade: Held, that what the wife had acquired in her husband's absence was her separate property, and not liable to the disposition of her husband. Cecil v. Juxon, H. 1737. 1 Att. 278.

425. A., on marriage with B., in consideration of 6000l. portion, conveyed lands to trustees for ninety-nine years in trust, to pay 100l. _per annum_ to B. for her separate use for life. After twenty years cohabitation, B. withdrew herself and went to France, but there was no proof of her incontinence. The trustees brought an ejectment, when A. filed his bill for an injunction, and offered to take his wife home, though he never made that offer but by his bill; he also, eight years after, instituted a suit in the spiritual court, for restitution of conjugal rights, and obtained a sentence of excommunication. The husband had paid the annuity for six months after the wife's
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departure; but there were great arrears, against which, and the future payments, the husband sought relief, insisting that his wife was only entitled during cohabitation. Ld. Ch. thought the husband should be relieved against the ejectment, but that the wife was entitled to her annuity, and the arrears and costs. Decree, the injunction obtained to be continued, on payment thereof by the husband, and in default, to be dissolved. Moore v. Moore, H. 1737. 1 Atk. 272.

426. A. having possessed himself of the greatest part of the wife's fortune, and left the kingdom, the interest of her trust-money was directed to be paid to her till he returned and maintained her. Watkins v. Watkins, M. 1740. 2 Atk. 96.

427. Though a husband on marriage has imposed on his wife by giving her a bond void at law, yet equity will establish the agreement according to the intent of the parties. S. C.

428. A wife cannot have maintenance where there is proof of her elopement and adultery. S. C.

429. Depositions of criminal conversation cannot be read against the wife in excuse for ill usage of her, unless expressly charged by the answer, and made part of the husband's defence. S. C.

430. Bill against the husband and a creditor upon the wife's annuity, to have articles of separation performed; decreed fully as against the husband, and that he should exonerate the annuity from the charge upon it. Fitzer v. Fitzer, H. 1742. 2 Atk. 511.

431. Though a man is bound to maintain his wife and children, yet his funds are liable to creditors; and the decrees of the spiritual court for alimony cannot affect the husband's estate as against creditors, but the person of the husband only. S. C.

432. In cases of separate maintenance, the court must be guided by judicial determinations, and not by private judgment. Tyrell v. Hope, T. 1746. 2 Atk. 560.

433. A. in a letter to his wife's father, said, as he did not choose to be a witness to her inferences, he would allow her 400l. per annum, while she lived with her father. The wife, on a bill for separate maintenance, moved for the arrears (600l.) to be paid for her support till the hearing. The court granted 400l. in gross, but not as arrears, and said it would be refused in future. The husband, in his answer, swore he was desirous of cohabiting with his wife. Two years after the motion, the wife filed a bill for the arrears, and growing payments for the 400l. pursuant to agreement, and the husband contended, that the agreement was only intended to exist during his occasional absence. It appeared that the wife was disordered in her mind, and that upon the husband's attempt to confine her, she obtained a supplicavit. Ld. Ch. gave judgment, 1. That the 400l. was only intended to continue during the husband's occasional absence. 2. As to the liberty to live separate, prayed by the wife, the court could not decree a separation or separate maintenance, unless upon the parties' own agreement. And, 3. The obtaining a supplicavit does not justify the wife's elopement, for it is granted on a supposition that they are to live together. Decreed, that as the court saw grounds for granting a supplicavit, and the husband's offer to receive his wife was only judicially made by his answer, the arrears of the annuity should be paid, and that the husband should take his wife home, and maintain her. If she refused, the maintenance should cease; but if he refused, then the maintenance to continue. Head v. Head, H. 1747. 3 Atk. 295. 547. 1 Ves. 17.

434. In some instances where a husband has offered to cohabit with his wife, and use her kindly, equity has refused to continue her separate maintenance, though after a decree. S. C.


436. Where a husband by force compels his wife to execute a deed of separation, allowing maintenance inferior to her rank and fortune, equity will decree a proper maintenance. Lambert v. Lambert, T. 1767. 6 Bro. P. C. 272.

437. Bill by a wife for performance of an agreement, and for alimony, she being compelled by her husband's cruelty to leave him. The court decreed her 500l. to carry on her suit. Yao v. Yao, H. 1774. 2 Dick. 498.

438. The wife's trustees, under a deed of separation, covenanting to indemnify the husband against the wife's debts, is a valid consideration, and takes the con-
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439. Though the court has a general jurisdiction to decree a specific performance of articles between husband and wife for a separation, and separate maintenance, (a) yet it is exercised very cautiously, and not until the court has seen whether there is any probability of a reconciliation; and where there has been a sentence for the restitution of conjugal rights, the court will not assist; and where the agreement is such as is not fit to be enforced, the court will in general order it to be delivered up, though in some cases no relief will be given to either party. Fletcher v. Fletcher, M. 1788. 2 Cox 99. 3 Bro. C. C. 619. (a) Vide Whorwood v. Whorwood, 1 Ch. Ca. 250.

440. The court will not interfere in an agreement between baron and feme, whereby the feme is to give up part of her separate property to the husband, in consideration of their living separate, even though the feme makes the application. Durand v. Durand, M. 1789. 2 Cox 207.

441. By deed executed before marriage, it was agreed that if any separation should take place by the desire, or at the instance of the wife, then the husband should receive the moiety of an annuity, which the wife was possessed of, and she should receive the other moiety, without the control of her husband; but if such separation should take place at the instance or by the means of the husband, then the wife should receive the whole annuity. This is such an agreement as equity will support, and if the separation appears to be caused by the means of the husband, the wife shall have the whole annuity during such separation. Hoare v. Hoare, E. 1790. 2 Ridg. P. C. 268.

442. On a motion for a ne exeat regno by a wife against her husband, till a suit instituted by her against him for cruelty and adultery should be determined, unless he would give security to abide the event; Ld. Ch. said, he would grant it if a precedent could be found. Colgar v. Colgar, E. 1796. 1 Ves. jun. 94.

443. A creditor of a wife has a right in equity against her separate property, and against her husband in respect of it, but not beyond it, if notice. Plaintiff, with notice of a separate allowance of the wife (a weak woman) advanced to her wantonly beyond it; upon proof that plaintiff had received more than the demand she could make out, the bill was dismissed, but without account or costs, plaintiff being very poor. Lelie v. Airey, E. 1791. 1 Ves. jun. 277.

444. Articles of separation, by which the husband was to pay his wife 100l. per annum, decreed to be performed specifically at the suit of the wife, though the husband by his answer offered to receive her again. Guth v. Guth, E. 1792. 3 Bro. C. C. 614.

445. No court has an original jurisdiction to give a wife separate maintenance, but it may be given incidentally, as on a supplication in Chancery; or a divorce, a mensa et thoro properter salutium in the Ecclesiastical court. Ball v. Montgomery, T. 1793. 2 Ves. jun. 193.

446. The spiritual court has exclusive cognizance of the rights and duties of marriage; equity therefore has no jurisdiction on a contract for separation between husband and wife simply, much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases, as where a third person covenants to indemnify the husband against the wife's debts, or a fortune accrues to the wife after a separation, or the property is the subject of a trust. Legard v. Johnson, H. 1797. 3 Ves. 532.

447. Trust in a deed of separation, to permit A. to receive dividends for the support of the wife, with a covenant of indemnity to the husband. A grant by the wife of an annuity out of the dividends was held a defiance of the trusts, and void. Hyde v. Price, T. 1797. 3 Ves. 437. 445.

448. A married woman living apart from her husband, and having a separate maintenance, cannot bind him by her contract. S. C.

449. Where a wife refuses to live with her husband, (an officer abroad with his regiment) who is willing to receive her, the court will not order a provision to be made for her out of the dividends to which she is entitled for life. Sed secus, if her husband had deserted her. Bullock v. Menzies, T. 1799. 4 Ves. 798.

450. A. on a separation from his wife, covenanted to pay her an annuity for her life, and assigned a pension for his own life, and that of B. as an auxiliary fund, in case of failure of payment by him;
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Separation, Alimony, Debts of the Wife.—Elopement, Adultery, Divorce.

and he Covenant that if he and B. should die in his wife's life-time, all his real and personal estate should be charged with the annuity. A. died, leaving real and personal estate, and B. surviving: Held, the wife should not have an allocation of the real and personal estate to secure her annuity, the pension being liable in the first instance. Lymar v. Mills, H. 1805. 2 Sch. & Lef. 388.

451. A question arose in this case upon the validity of articles between husband and wife for future separation, creating trustees, and providing that the wife may at any time, with the assent of the existing trustees, take away the children of the marriage, but the cause having ended by compromise, the question was not determined. The court however denying the dicta in the cases of Rex v. Mead, 1 Burr. 452. Beard v. Webb, 1 Ross & Pull. 59. Marshall v. Rutton, 8 T. R. 345. held, that after a deed of separation executed, the wife is not to all intents and purposes a "feme sole," for she cannot be a witness against her husband, or be guilty of felony in his presence, nor can an action be maintained against her; neither can she execute any deed generally. The contract of marriage cannot be affected by any agreement for a separation between the parties, which (according to Fletcher v. Fletcher, 3 Bro. C. C. 619. n.) will be put an end to by reconciliation, and ended after a separation a mensa et thoro in the spiritual court, but that can only be obtained proper savitium aut adulteriam, and the same cause cannot be revived. St. John v. St. John, T. 1805. 11 Ves. 326.

452. A bill was filed by a married woman claiming under a bond by her husband to a trustee for a separate maintenance, which bond was admitted by the answer to have been destroyed by them, on the ground of subsequent incontinence. The court retained the bill, with liberty to bring an action on the bond. Seagrave v. Seagrave, H. 1807. 13 Ves. 439.

453. A feme covert living apart from her husband, and contracting debts as a feme sole, is not entitled to summary relief at law, but in case of an action against her, is left to her plea of coverture. Exp. Watson, T. 1809. 16 Ves. 265.

454. A proviso in a deed of separation, that the wife surviving, shall be entitled to her dower and thirds of all real and personal estates, whereof the husband shall die seized or possessed, will be construed, not as a covenant to leave her such a portion of the personal estate, as she would be entitled to under the statute, had he died intestate, but that she should be in the same situation, as if not separate, as to dower and thirds, i. e. the actual share by the law or custom; not interfering therefore with his testamentary disposition. Cochran v. Graham, M. 1811. 19 Ves. 63.

455. The court will not decree maintenance, where husband and wife lived separate by consent, and there was no evidence of any cruelty on the part of the husband, who had before marriage settled part of his property upon his wife. Duncan v. Duncan, T. 1815. Coop. 254. 19 Ves. 394.

456. Though the court will not carry into execution articles of separation between husband and wife, because it recognises in them no power to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolution of that contract, yet engagements between the husband and a third party (as a trustee for the wife) will be held valid. Worrall v. Jacob, T. 1817. 3 Meriv. 256. 268.

BARON AND FEME XIII.

Elopement, Adultery, Divorce.

457. A wife having obtained a divorce a mensa et thoro, and the spiritual court having allowed her an addition of 50l. per annum for alimony, she brought her bill, complaining, that the husband, to defraud her, had procured the tenants to surrender their estates. The husband, by his answer, suggesting elopement and living in sin in the wife, offering to take her again. Ld. Ch. would make no other
order, than that the husband should admit the rents to be still in being, and then the wife might proceed at law if she could. *Mildmay v. Mildmay*, E. 1682. 1 Vern. 53.

438. Where husband and wife were divorced *a mensa et thoro*, the wife cannot claim administration in the spiritual court, till the divorce is repealed. *Skute v. Skute*, E. 1700. Pre. Ch. 111. 9 Mod. 43.


460. A wife cannot bring *hom. regel* against her husband, for the writ cannot in its nature be maintained. The husband by law has the custody of his wife, and may confine her; but he cannot imprison her; if he does, it will be good cause for a divorce *propter savitiam*. *Atwood v. Atwood*, E. 1718. Pre. Ch. 492.

461. Where a husband divorced *a mensa et thoro*, was about to sell her wife's term, an injunction was granted to restrain him. *Anon. T. 1723*. 9 Mod. 43.


463. A jointure is not forfeited by elopement, but dower is, by statute of Westminster 2. c. 34. S. C. *Seagrave v. Seagrave*, H. 1807. 18 Ves. 443. S. P. After a divorce *a mensa et thoro*, baron and feme live separately, and the wife has a child; this is a bastard. But in case of a voluntary separation, such a child would be deemed legitimate. *Saucs*, where a jury find no access. *Sidney v. Sidney*. ante.

464. Bill by a wife against her husband for a separate maintenance, charging, that she had behaved with the utmost duty and respect. The husband, in bar of her equity, insisted that she did not behave with that duty and affection which became a virtuous woman, and then he entered into particular facts of adultery. 1d. Ch. said, that the virtue of a woman does not consist in her chastity only, for she may be guilty of cruelty, and in this case it appeared that the wife beat her husband; a woman too may be addicted to gaming and extravagance, which is not virtuous. *Lady Donnerrail v. Loi: Don-

nerail*, in *Dom. Proc. on appeal from Chancery in Ireland*; but the Lords would not admit the depositions cited in *Clerk v. Periam*, 2 Atk. 338.


467. If a wife elopes without cause, and refuses to return, equity will not assist her in recovering her separate property. *Lee v. Lee*, M. 1758. 2 Dick. 321. 806.

468. A wife's fortune was settled in trust, but no provision was made for payment of the interest during coverture: she quitted her husband and lived in adultery. On a bill for payment of the dividends, the court decreed the husband to provide for the wife, but ordered the future dividends to be paid into court, and the costs out of the accumulated dividends. *Ball v. Montgomery*, T. 1798. 4 Bro. C. C. 359. 2 Ves. jun. 191.

469. Where the wife lived in adultery with plaintiff, and under his influence, the husband was permitted to answer separate from her, to a bill for an account of her property received by him. *Chambers v. Ball*, T. 1793. 1 Anstr. 269.

470. Cross petitions by husband and wife, living apart under a divorce *a mensa et thoro*, obtained against the wife for adultery; she petitioned that her money might be settled to her separate use, and he petitioned that it might be paid to him, but Ld. Ch. would make no order. *Curt v. Eastbrooke*, T. 1798. 4 Ves. 146.

471. A separation *a mensa et thoro* in the spiritual court can only be obtained *propter savitiam aut adulterium*, and after a reconciliation the same suit cannot be revived. *St. John v. St. John*, T. 1805. 11 Ves. 552.


473. A wife having misconducted herself, the husband sued for and obtained a divorce, but pending the suit the wife
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was delivered of a child. The husband, being convinced that the child was not his, never acknowledged it as such. But no declaration of illegitimacy having been obtained, and the child having been born nona matrimonio, it must be considered as legitimate. Routledge v. Carruthers, T. 1810. 4 Dow P. C. 392.

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1. A. by will, taking notice that his natural son J. had disoblged him, declared thus: "I do hereby resolve not to give him more than 20l. per annum, for life." And he gave his estate to his legitimate son. Per curiam, the words do not amount to a devise, and the bastard shall take nothing. Holder v. Holder. H. 1717. Vis. tit. Devise. (D. B.) pl. 8.

2. A. covenanted to convey his copyhold to his natural daughter, and for further assurance; he made no surrender, but the daughter was admitted; on her bill to supply the defect of the surrender, the court would not decree it against the heir, for the conveyance was voluntary, and the daughter was nullius filia. Furzaker v. Robinson, M. 1717. Pre. Ch. 473. Gilb. Eq. Rep. 159.

3. Bastards cannot take till they gain a name by reputation; therefore a devise of 300l. to all the natural children of L. S. extends not to bastards born after the making of the will, nor to a child en ventre sa mere, for a bastard's reputation begins with its birth; and though the money was to be paid as testator should by deed appoint, yet his appointment referring to the will was held to be a codicil only. Meetham v. Duke of Devon, H. 1780. 1 P. W. 529, 530.

4. A woman was supposed to marry A. first, and, during his life to marry B.; in a cause of jactitation of marriage in Ireland, the first marriage was affirmed, but on appeal to the Irish delegates, the second was adjudged good, by which there was issue, but none by the first; on a commission to review, and reverse the sentence of the Irish delegates, Ld. Ch. said, the object of the review was to bastardize the issue of the second marriage, and he should advise the crown not to grant it, for it ought not to be favoured. Franklin's Ca. T. 1725. 2 P. W. 299. Sel. Ch. Ca. 47.

5. A bastard legatee of personal estate died intestate and unmarried; the testator's executor having the legal title, may sue for the estate, without making the att. Gen., or the bastard's administrator, a party. Jones v. Goodchild, H. 1729. 3 P. W. 33.

6. Where a bastard dies intestate and unmarried, the king is entitled, and the ordinary of course, grants administration to the patentee of the crown. S. C.

7. A child born after a divorce a mensa et thoro, is a bastard. Secus, of a voluntary separation, unless the jury find no access. Sidney v. Sidney, E. 1734. 3 P. W. 275.

8. Testator, by will, gave an equal share of his real estate to his two natural sons, I. and C., but mistook their names. Per curiam, though bastards are not sons, they may acquire that name by reputation; as to the mistake of names, any thing that amounts to a designatio persona is sufficient. Rivers's Ca. M. 1737. 1 Atk. 410.

9. Upon a question of legitimacy, A. produced witnesses, who swore to a marriage in fact between his parents, and he obtained a verdict. On a second trial he declined to produce those witnesses, and rested solely upon a reputation of the marriage. Although he again obtained a verdict, yet this is not sufficient to satisfy the conscience of a court of equity. Siborne v. Naper, E. 1790. 2 Ridg. P. C. 224.

10. On questions of legitimacy, declarations of parents after the birth of the child can have but little weight. B. C. ibid. 234.
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11. An illegitimate child cannot claim a share under a devise to children generally, though the will was strong in his favour by implication. *Cartwright v. Vaudry*, T. 1800. 5 Ves. 530.

12. So held where the testator knew the state of the family, and that there were no legitimate children. *Godfrey v. Davis*, T. 1801. 6 Ves. 43.

13. An issue was directed to try whether plaintiff was heir at law of T. P. — Plaintiff’s father and mother were married and lived separate, the wife in London, and the husband in Staffordshire; at the end of 3 years, plaintiff was born; there was strong evidence of no access, and upon the point of access, the jury found for defendant. *Pendrel v. Pendrel*, H. 1732. 2 Stra. 925. Now, however, the old rule to presume access, if the parties were within the narrow seas, is done away; and access or non-access must be proved like any other fact. *Shelley v.* —, T. 1806. 13 Ves. 33.

14. It is a rule that a bastard cannot take as the child of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth. *Earle v. Wilson*, T. 1811. 17 Ves. 591.


16. I. W. (a married man, without any legitimate children,) by will devised to “the children which he might have by A. and living at the time of his decease.” Those children were natural children, but had acquired the reputation of being his by A. before the date of his will: Held, that they were entitled, as being sufficiently described, and intended to take upon the face of the whole will; but the judges who assisted the Ch. said, that an illegitimate child cannot take by the description of child of his reputed father, till he has acquired the reputation of being such child. And *Eldon*, C. added, that a bastard may take by purchase if sufficiently described, and he has acquired the reputation of being the child of that person. *Wilkinson v. Adam*, E. 1813. 1 Ves. & B. 422. 452. 466. *Vide Meatham v. D. of Devon*, 1 P. W. 529. *Earle v. Wilson*, 15 Ves. 528.

17. Under the description of “children” in a will, illegitimate children existing at the date of the will cannot take, unless proved by the will itself to be so intended, and extrinsic evidence can only be received for the purpose of collecting who had acquired the reputation of children. An only illegitimate son of the testator therefore, was held entitled as devisee. *Swaine v. Kinnerley*, H. 1813. 1 Ves. & B. 469.
BOND.

I. Where set aside.

II. Cases of partial Relief against the Penalty.

III. Where no Relief allowed.

IV. Voluntary Bonds—and their Order and Priority in the marshalling of Assets.

V. Void or defective at Law, yet aided in Equity.

VI. Condition or Recital, where amounting to, or Evidence of an Agreement.

VII. Of contingent, ambiguous, or uncertain Conditions.

VIII. Given, or held in Trust.

IX. Joint and several, and of Surety and Indemnity.

X. Obtained by Duress, Fraud, or Misrepresentation.

XI. Concealed, suppressed, lost or cancelled.

XII. Assignment, and Condition of the Assignee.

XIII. Interest—Penalty—general Payments.

XIV. Satisfaction, when to be presumed.

BOND I.

Where set aside.

*Equity will at all times set aside a Bond, or order it to be delivered up, where the consideration is bad.*

1. As where A., entitled to an estate, gave a bond to his counsellor B. to give him half of it if he recovered; the bond is void, and B. shall only recover his reasonable charges. *Skapholme v. Hart, M. 1680.* Finch 477.

2. So where A. settled his mansion house on his brother, and took his bond that he should not permit his mother to enter it. *Traiton v. Traiton, M. 1686.* 1 Vern. 413.

3. So where a bond was given in the common form for payment of money, but the agreement was proved to be that the obligor should marry A. *Key v. Bradshaw, T. 1689.* 2 Vern. 102.

4. So where a widow gave a bond to A. to pay him £100l. if she should marry again, and A. gave her a bond to pay her the like sum if she remained a widow, and she afterwards married B. *Baker v. White, H. 1690.* 2 Vern. 215.

5. So where an executor brought a bill to set aside bonds given by his testator, defendant swore they were given for money lent, but it was proved she was a prostitute; testator himself could have had no relief against these bonds, but his executor shall. Decreed to be delivered up, on payment of what was actually due. *Matthew v. Hanbury, M. 1690.* 2 Vern. 187.


7. So where a bond was given for money lost at play. *Humphries v. Rigby, M. 1698.* 2 Freem. 225.

8. So where testator directed his nephews, who were legatees of his personal estate, to give bonds to each other, that if either died without issue, he would leave the whole to the survivor; for this was considered an attempt to entail a personality. *Williams v. Williams, T. 1703.* 1 Eq. Ab. 207. pl. 9.

9. So where a captain of a ship outward bound, took bonds from his seamen, that they should not demand any wages till the return of the ship to London; the ship was lost: Held, that these bonds were unjust and void. *Buck v. Rawton, H. 1704.* 1 Bro. P. C. 102.

10. So where A. gave a bond for the debt of an extravagant woman, who had concealed the debt from her husband, and the obligee had, without the know-
BOND I. & II.

Where set aside—where partially relieved against.

11. So where a father entrusted his infant heir with a servant, who took the son's bond when of age, unknown to his father, for that was a fraud and breach of trust. Secus, of a bond given by a weak man, if no fraud or breach of trust, provided he be compositus mensis. Gismond v. Fitzroy, M. 1731. 3 P. W. 129, 130.


13. So where A. gave a bond to B. for the residue of his debt, to induce him to enter into a composition with the rest of his creditors. This bond, though not void by 5 Geo. 2. seems to be within the design of the act. Spurrett v. Spiller, M. 1740. 1 Atk. 105. Sed vide Lewis v. Chace, 1 P. W. 620. contra.

14. So where a bond was given by defendant to plaintiff as premium prudicitiae, Ld. Ch. would have ordered the bond to be cancelled, but by consent a perpetual injunction was awarded. Clarke v. Perrin, T. 1741. 9 Mod. 340. 2 Atk. 333. 337.

15. So where testator gave a bond ex turpi causa, and made an equal provision for the oblige by his will; it was held void as against creditors, and the legacy was left for the oblige and executor to contest. Robinson v. Gee, T. 1749. 1 Ves. 254.

16. So where A. gave a bond to B.'s wife, as a reward for prevailing on an old man to make his will in favour of A. But no costs, for A. was particeps criminis. Dobson v. Oze, T. 1749. 1 Ves. 276.


BOND II.

Cases of partial Relief against the Penalty.

17. Bond conditioned to pay 40l per annum out of an office taken away by the usurper, but revived at the restoration. The oblige shall only be liable while he enjoyed the office. Lawrence v. Brasier, 1665. 1 Ch. Ca. 72.

18. So where A. possessed houses under a public title, which, after his death, reverted to the right owner on the restoration, and personal property which was diminished by the fire of London, and his executors had entered into a recognizance to pay 10,000l. which A. had bequeathed to his daughter; the executor's recognizance shall be in force only to make good the value of A.'s estate, over and above the losses occasioned by the fire and the king's restoration. Holt v. Holt, 1670. 1 Ch. Ca. 190.

19. A. agreed to surrender his commission in the army to B. for 100l., for which B. gave his bond; B. was refused the commission: no relief in equity, save against interest and costs. Berresford v. Done, M. 1682. 1 Vern. 98.

20. Bill for relief against four bonds for procuring plaintiff a pension on board a man-of-war; the court could not set aside the bonds, but relieved against interest and costs, on payment of the principal. Symonds v. Gibson, H. 1693. 2 Vern. 308.

21. Plaintiff was sued upon a bond at law, and pleaded solvit ad diem, and by his bill in equity, he charged fraud, and want of consideration; the court relieved against the penalty, but decreed the principal, interest, and costs, to be paid. Duval v. Terry, E. 1694. Show. P. C. 15.

22. A. joined his son in a bond for 100l. conditioned that the son should not trespass or sport on B.'s manor; the son caught two flounders, and the bond was put in suit, and recovered with 40l. costs. Decreed, defendant should refund the 100l. and costs, for there is no statute to direct the taking of such a bond. Roy v. Duke of Beaufort, T. 1741. 2 Atk. 190.

23. On a bond payable by instalments, and judgment for the penalty, the obligor shall be relieved on payment of the instalment and costs. Exp. Groom, M. 1744. 1 Atk. 118.

24. Bond by plaintiff to defendant to
BOND II. & III.

Where partially relieved against—where not.

26. If a man agree not to do an act, and enter into a bond with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such act; but the court will relieve by injunction, until the actual damage sustained shall be ascertained by an issue. Hardy v. Martin, E. 1783. 1 Cox 26. 1 Bro. C. C. 419.

27. Plaintiff contracted to build a bridge, and support same for 7 years, and gave a bond to perform the articles; the bridge was carried away by a flood within a year; the court granted an injunction against the penalty, and left plaintiffs to their quantum damniificatus at law. Errington v Aynsly, T. 1788. 2 Bro. C. C. 541. 2 Dick. 692.

BOND III.

Where no Relief allowed.

28. Plaintiff gave a bond for 400l. to defendant, his mistress; defendant by answer admitted that the bond was a gift; as turpis contractus was proved, equity would not relieve plaintiff. Whalley v. Norton, M. 1687. 1 Vern. 483.

29. Neither would the court relieve a son against a bond to his father, that he would not dock the entail of an estate which his father had settled on him in tail, for the father might have made him bare tenant for life. Freeman v. Freeman, T. 1691. 2 Vern. 233. Pre. Ch. 28.

30. Nor against a bond from a man to his housekeeper, for secret service.—Bainham v. Manning, T. 1691. 2 Vern. 242.

31. Nor against a bond for the purchase of a captainship of the marines, where the oblior might have been admitted, but he refused to take the oaths. Joye v. Askoe, T. 1702. Pre. Ch. 199. Colles' P. C. 267.

32. Nor where a man bought lands and gave a bond to pay a portion, which he considered to be a charge upon them, and which turned out not to be so. Smith v. Aoery, M. 1703. 1 Eq. Ab. 269. pl. 9.

33. Nor where a man, when at liberty, gave a bond ratifying an engagement which he had entered into through fear. Goodman v. Scuse, T. 1709. 2 Eq. Ab. 183. pl. 3.

34. Nor against a bond given to the cashier of excise, in the name of the crown, for a debt due to the crown and himself, although he was not a commissioned officer. Rex v. Gale, H. 1819. Bunb. 58.

35. Nor against a bond given to a creditor to induce him to sign the oblior's certificate. Lewis v. Chase, E. 1720. 1 P. W. 620.

36. Nor against a bond for revival of a debt from which oblior was discharged by the laws of Holland. Exp. Burton, M. 1744. 1 Atk. 255, 256.

37. Nor against a bond given not to defraud the revenue, for that is a crime at law. Benson v. Gibson, M. 1746. 3 Atk. 395.

38. Nor where a wife having a separate estate, borrows money on her bond; for her separate estate shall be liable, and her own declaration may be read in evidence. Peacock v. Monk, H. 1751. 2 Ves. 193.

39. H, gave B., as his bailiff, a general authority to accept bills for him. B. accepted several without the knowledge of H., and discounted them at H.'s bankers, and applied the money to his own use, and then died. The bankers afterwards obtained a bond from H. for the balance of his account with them, including the several bills so accepted by B. On a bill to set aside this bond, as improperly
Where not released against—Voluntary.

obtained from H. the court directed the bankers to sue plaintiffs at law on these bills. The bankers selected some of these bills on which they brought their actions, and which were just sufficient to cover their demand; but on the trial there appeared a receipt indorsed on one of them, and the jury for that reason gave a verdict against the bankers on that bill, and for them on all the rest. There was no application for a new trial; but when the cause was set down again, the bankers applied to prove their demand on some other of the bills: Held, that the remedy (if any,) must be by motion or petition for a new trial; but the court would not assist the bankers to rectify their own inadvertence. *Healthy v. Mortlock and Francis, M. 1784. 1 Cox 141. Vide Kemp v. Mackrell, 2 Ves. 379.

40. A bond was given by a father to secure an annuity to his son; until he should be in possession of a living of a certain value, and an agreement of equal date was executed reciting the bond, and declaration that the son should forthwith enter into holy orders and accept such living. Ld. Ch. expressed a strong opinion, that on the grounds of public policy the transaction was illegal; but this case was decided on the ground that the son had not complied with the condition, having received the annuity 9 years, and being only in deacon's orders, and that therefore the annuity was determinable by the father or his representatives.—*Kircudbright v. Kircudbright, M. 1803. 8 Ves. 53.

BOND IV.

Voluntary Bonds—and their Order and Priority in the marshalling of Assets.


42. But a voluntary bond, though given as a provision which a man may consider it his duty to make, shall, as against creditors, be deemed fraudulent and void. As where A., intending to marry B., gave her father a bond for 500L, payable on a day certain, with an agreement that it should not be sued, but remain as a security in case of misfortune, to be paid before other creditors. *Wise's Ca. T. 1725. Sel. Ch. Ca. 46.

43. So where A. having separated from his wife, married another woman who knew nothing of his former marriage; but it being discovered, A., to induce his second wife to stay with him, gave a bond in trust to leave her 1000L, and died indebted. This is worse than a voluntary bond, but it would have been good if the second wife had left him on the discovery of his former marriage. *Lady Coz's Ca. M. 1734. 3 P. W. 399.

44. So, where a woman of good character went to live with A. as companion to his sister, knowing him to be a married man. A. seduced her, and she caused a separation between A. and his wife; A. gave her his bond, but her bill for payment of it was dismissed. *Priest v. Perrot, H. 1751. 2 Ves. 160.

45. A. gave a voluntary bond to a woman with whom he cohabited, though formerly of a very loose life: this is good; but a second bond, expressly securing a continuance of cohabitation by an annuity, in case of separation, is turpis contractus, and void. Bill by the executor of A., to have these bonds delivered up, dismissed with costs, the first bond being considered as unimpeached *Grav v. Matthias, H. 1800. 5 Ves. 286.


47. Yet the consideration for some voluntary bonds is so substantial and meritorious, that equity will support them. As where A. gave a bond after marriage to jointure his wife, which he did, and the wife gave up the bond. The jointure
was evicted. Decreed to be made good out of the personal estate, there being no other debts. Beard v. Nuttall, H. 1666. 1 Vern. 427.

48. So where a son in plentiful circumstances gave his father a bond, to pay him 120l. per annum for life. This is good, if done without coercion. Blackburn v. Edgley, 1 P. W. 607.

49. So where testatrix gave a bond for payment of money at her death in nature of a legatory disposition. Defendant obtained judgment against her executor, de bonis testatoris. The executor set up want of assets, but as he had pleaded non est factum, and not plene administravit, equity would not relieve him, save only against the penalty. Ramden v. Jackson, H. 1737. 1 Atk. 292. This case was decided upon the principle of Rock v. Leighton, stated from Ld. Holt’s MSS. in 3 T. R. 690. which is a leading case on this subject, and in which it was held that a judgment by default against an executor is an admission of assets; and if upon a fi. fa. being issued the sheriff cannot find sufficient assets of the testator to satisfy, he may return a devastavit. Vide etiam Skelton v. Hawlins, 1 Wils. 258; but more fully in 2 Saund 219. by Mr. Serj. Williams in notis, and Erving v. Peters, 3 T. R. 685. which were determined on the same authorities.

50. So where A. gave a bond to a woman whom he kept, to pay her the interest of £2000 for her life, and after her death, to her children; at his death there was four years interest due; but Ld. Ch. would not decree it, in regard A. had maintained them during all that time, yet held the bond good. Lloyd v. Carter, M. 1740. 2 Atk. 84.

51. So where a father having provided amply for his son, requested him to give his sisters 1000l. each on marriage, and the son gave them his bonds accordingly. The son died indebted. Per curiam, it would be dangerous to determine such bonds voluntary, or that the consideration should be commensurate to the value of the estate; where there is no fraud, they should be held as made for a valuable consideration. Blount v. Doughty, T. 1747. 3 Atk. 484.

Cases where the Obligor of a voluntary Bond has kept it by him for some secret Purpose, and not delivered it over to the Obligeer, or his Trustee.

52. A. executed a bond to his daughter, payable immediately, but always kept it by him; it was proved he did it to screen himself from taxes. Set aside. Ward v. Lant, H. 1701. Pre. Ch. 182.

53. A. on the marriage of his daughter-in-law, sealed a bond to her husband for 1500l., as the part of the portion he had promised, but he kept it by him till his death, when it was found with his will; decreed, a voluntary bond, because not made in pursuance of any written marriage contract, and as such to be postponed. Leoffes v. Levin, T. 1713. Pre. Ch. 370. Gilb. Eq. Rep. 32.

54. A. having secured to his wife an ample jointure by settlement, gave her his bond, after marriage, to answer a particular purpose; but the court set it aside in favour of a legatee of the husband. Stratford v. Powell, M. 1807. 1 Ball & Be. 21. Vide Ward v. Lant, Pre. Ch. 182. Antrobus v. Smith, 12 Ves. 39. 45. And parol evidence may be given of the circumstances under which a bond or deed is executed. S. C. 1 Ball & Be. 14. 21. Vide etiam Johnson v. Smith, 1 Ves. 914.

—As to bonds given by men to their mistresses, pro turpi causa aut in premium pudicitiae, vide post, tit. Seduction.

BOND V.

Void or defective at Law, yet aided in Equity.

55. If a scrivener omits to insert in a bond the name of one obligor, and that obligor signs and seals the bond, that defect shall be made good in equity. Crosby v. Middleton, 9 Ch. Rep. 99. Pre. Ch. 237. S. C.

56. Bond in the penalty of 40l., the clerk writes quadranginta libris, instead of quadringinta libris. This is good. Sims v. Urry, H. 1676. 2 Ch. Ca. 225.

57. Bond by A., before marriage, to
VOID AT LAW, AIDED IN EQUITY—WHERE EVIDENCE OF AN AGREEMENT.

B., his intended wife, to leave her 1000l. if she survived. The marriage was had, and A. mortgaged his estate, and died. Decreed, the wife should redeem the whole, and hold over till paid, though the bond was extinguished at law by the marriage. Acton v. Pierce or Acton, H. 1704. 2 Vern. 480. Pre. Ch. 237.

58. A. agreed to be bound as surety for B., and signed and sealed the bond, but the clerk omitted A.'s name in the obligation. A. finding the mistake, would neither give a new security, or pay the money. But equity compelled him. Crosby v. Middleton, M. 1710. Pre. Ch. 309. 3 Ch. Rep. 99.

59. A. agreed with B. for the purchase of timber, and together with C. entered into a bond not to fell any under a particular size; C. felled the timber, and it appeared that A. entered into the agreement for C. As there could be no remedy against C. on the bond, it was held a fraud on B. and irrecoverable in equity. Butler v. Pendergast, T. 1720. 2 Bro. P. C. 170.

60. Where the condition of a bond is entire, and the whole unlawful, it is in most cases void; but where consisting of different parts, some lawful and others not, it is good for the lawful parts, and void for the rest. Yale v. Rez, M. 1721. Bunb. 58. 2 Bro. P. C. 381.

61. An executor pleaded plene admin. to a bond debt, and that he was a bond creditor, and had paid himself. On the trial, an interlineation appeared of 50l. in the executor's bond after it was executed, Ld. Ch. would only allow it as a simple contract debt so as not to defeat bonds. D. of Chandos v. Talbot, T. 1725. Sel. Ch. Ca. 24.

62. Though a husband has imposed on his wife, by giving her a bond void at law, equity will establish the agreement of the parties. Watkins v. Watkins, M. 1740. 2 Atk. 97.

63. Though the executors of the obligee are omitted, yet they shall sue upon the bond when due, if the obligee be dead. Emes v. Handcock, H. 1742. 2 Atk. 509.

64. A bond was given for a sum which was calculated to be the residue of a personal estate; it appeared, but was not proved to be, a mistake. Bill to have the bond considered as a security for the sum really due, was dismissed. Burt v. Barlow, H. 1792. 3 Bro. C. C. 451.

65. A bond executed for a sum of money lost at billiards is void; but where such bond was assigned with the privity of the obligor, and upon his assurance that it was valid, and where he paid part of the money, and prevailed on the assignee to enter satisfaction upon the judgment obtained on the bond, and accept a new security for the remainder of the debt, equity will not relieve him. Kenny v. Browne, H. 1796. 3 Ridg. P. C. 514.


CONDON VI.

CONDITION OR RECITAL, WHERE AMOUNTING TO, OR EVIDENCE OF, AN AGREEMENT.

67. Bond conditioned to settle lands in a certain manor, on a day certain. The obligor died before the day, and saved his bond at law. Decreed, the lands to be settled. Holkham v. Ryland, E. 1697. Nels. Ch. Ca. 205.

68. Bond to replace stock on a certain day. The stock shall be replaced, and the intermediate dividends accounted for. Gardener v. Pullen, M. 1700. 2 Vern. 394.

69. A. gave B. a bond to leave her 100l. if she survived, and then married her; though this bond was annulled by the marriage, yet held good as a marriage agreement. Acton v. Pierce or Acton, H. 1704. Pre. Ch. 237. 2 Vern. 480.

70. A woman gave a bond to her intended husband, to convey her lands to him in fee, if she married. They intermarried, and died without issue. The bond, though void at law, is evidence of a marriage agreement, and the heir of the wife shall perform it to the heir of the husband. Connel v. Buckle, M. 1724. 2 P. W. 243.

71. A mother gave her son a bond, conditioned to surrender to him a copy-
BOND VI. VII. & VIII.

Contingent or uncertain Conditions—Given, or held in Trust.

hold estate, to which he was heir. Decreed, she was a trustee for him, and that she should surrender to his use, and both of the will of the, to be admitted as co-partners. Alison's Ca. M. 1724. 9 Mod. 62.

72. A bond conditioned to convey land for money received, is an agreement in equity, and shall be performed. Anon. M. 1728. Mos. 37.

73. Though the obligation and penalty are gone, the condition is construed an agreement to pay. Bishop v. Church, T. 1731. 2 Ves. 371.

74. Bond by a husband, reciting an agreement to settle his wife’s estate; the wife did not execute, but having by her acts after his death, bound herself to a performance, the same was decreed. — Archer v. Pope, T. 1754. 2 Ves. 523.

75. I. S. on marriage gave a bond, enabling his wife to dispose of her freehold estate, by deed or will; there was no other transaction, yet decreed to be performed as an agreement. Rippon v. Dawding, M. 1769. Amb. 565.

BOND VII.

Of contingent, ambiguous, or uncertain Conditions.

76. Bonds conditioned for payment of money at a future day, in case of the bankruptcy of the obligor may be proved under his commission, by statute 3 Geo. 2. c. 30. s. 22. Vide Holland v. Callford. Exp. East India Company. Exp. Greenaway. Exp. Winchester. Exp. Mitchell, and other cases, ante, tit. Bankruptcy, sec. v. (b.) But where they are payable on a contingency, they cannot be proved till the event happens; yet if it does happen before the bankrupt’s estate be fully distributed, the creditor shall come in pro rata. Exp. Caswell, M. 1728. 2 P. W. 497.

77. A. gave a bond to pay 900l. to his daughter, in case he should have no son living at his death. A. died, leaving his wife ensient with a son. The daughter shall not have this 900l. Gibson v. Gibson, M. 1698. 2 Freem. 223.

78. A. gave a bond to pay 520l. in six months after his father’s death, if he should survive, otherwise to be void: the father was then 70, and lived 11 years. A. died three years after. Equity would not relieve the executrix of A. against the bond, no fraud being proved. Hill v. Caillowel, M. 1748. 1 Ves. 122.

79. A grandfather gave a bond to his son, conditioned for payment to the son’s son of an annuity “in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father.” The grandson obtained, through some other interest, a place in the Ordinance office, with a salary exceeding the amount of the annuity: Held, that this was not a sufficient provision within the meaning of the bond, and that the provision, in the contemplation of the parties, must have been one of a permanent nature. Paché v. Smith, T. 1817. 3 Meriv. 512.

BOND VIII.

Given, or held in Trust.

80. A scrivener placed his client’s money in the hands of A., and took his bond for it. A. constantly paid the interest to the scrivener, who afterwards called in the principal, gave A. his receipt, and signed an engagement to give up the bond. The scrivener got the bond from his client, and then failed. The client obtained the bond from the scrivener’s clerk, and put it in suit against A. who brought his bill for relief. Decreed the bond to be delivered up, for the scrivener was a trustee for his client. — Abbington v. Orme, E. 1691. 1 Eq. Ab. 145. pl. 3.

81. A bond was taken in the name of
BOND VIII.

Given, or held in Trust.

L. a scrivener, in trust for I. S. L. borrowed money of B. and assigned the bond as a security; but neither I. S. nor B. knew of the conduct of L. Per curiam, nothing passed by the assignment but an equitableness right, which was rebutted by the prior equity of I. S. Cur. adv. vulg. Penn v. Brown, E. 1697. 2 Freem. 214.

82. A. and B., trustees for the separate use of a feme covert, lent the trust money to C., who gave them a bond, and the trust was declared in the condition. The feme kept the bond; B., one of the trustees, in settling his own account with C., gave him a receipt for 100l. as on account of the feme. B. became insolvent. Per curiam, the trustees here had a power to receive the pay, to call in and put out money; and, as their trust was declared in the condition of the bond, C. ought to have been cautious how he paid the money without writing it off the bond; besides he did not claim the allowance for four years. Decreed, the payment to B. not good. Baldwin v. Billingsley, H. 1705. 2 Vern. 539.

83. I. S. having borrowed 100l. of A. on a bond; B., the scrivener, when the bond was sealed, delivered it to A. I. S. paid many year's interest, and 50l. of the principal to B., which he paid over to A.; but the remaining 50l. which I. S. paid to B. was not paid over to A. when B. failed. Per curiam, though B. received the interest so long, and 50l. of the principal, it did not imply he had any authority from A., and as I. S. could not prove he had any such authority, he shall pay the last 50l again. Wolstenholm v. Davies, M. 1705. 2 Freem. 289.

84. A bond was given to B. in trust for A., who died; the money shall be paid in due course of administration, for there can hardly be a dispute touching the quantum of the debt, where the principal, interest, and costs, must be paid to the obligee. Sir Charles Cox's Creditors, M. 1733. 3 P. W. 342.

85. A release to one obligor is a release to both; but if there be an assignment of the bond in trust for others, antecedent to the release, it will be a question whether the obligee could release, as he must be presumed to have notice of the assignment, being himself a trustee there-in. The court directed the cause to stand over, till it should appear whether the date of the release was before or after the assignment. Bower v. Swadlin, M. 1738. 1 Atk. 294.

86. Bond given to A. in trust, to secure an annuity during the joint lives of E. S. and a bankrupt's wife. The bankrupt delivered up the bond at his last examination. The wife applied for the bond, and for all arrears and future payments of the annuity. Decreed. Exp. Cuyjugame, H. 1733. 1 Atk. 193.

87. Where a bond is given to a trustee, for the use of a bankrupt's wife, his assignees cannot bring an action. S. C.

88. A devisee for life of a rent charge assigned it to his creditors. The tenant for life of the estate, with intent to redeem it for the annuitant, gave bonds to the creditor, on condition of giving up their securities to be cancelled. The obligor's executors paid all the bonds but one, which they disputed; because, though delivered by the obligor to a third person for a creditor, when he should agree, it was not accepted till after the death of the obligor. This bond was recovered upon at law. The annuitant is entitled, against the executors, to the annuity dismembered, but not to the arrears incurred in the life of the obligor; and as against the tenant of the estate, to the arrears since the death of obligor; but the future payment must be left to agreement. Graham v. Graham, H. 1791. 1 Ves. jun. 271.

89. A bond delivered to a third person, to be delivered to the obligee, on performance of a condition, takes effect from the sealing, and is good to charge assets, though the obligor and obligee be both dead. S. C.

90. Bond by a feme, delivered to a stranger before marriage as an escrow, to be delivered over on condition, is good, though the condition be performed after marriage S. C.

91. Payment made in the name of A. with his money, raises a trust, but it is an equity which may be rebutted by evidence. S. C.
BOND IX.

Joint and several—and of Surety and Indemnity.

92. If A. is bound as surety for B. and has B.'s counter-bond, and the money is become payable on the original bond, equity will compel B. to pay the debt, though A. is not sued. Lord Ranelagh v. Hayes, M. 1683. 1 Vern. 190.

93. A surety shall not be further chargeable in equity than at law. Ratcliffe v. Graves, M. 1683. 1 Vern. 196.

94. By the custom of London, where one obligee being a surety is sued, his co-obligee shall contribute, and so where a surety pays the money, he shall have an action against the principal, though he has no counter-bond. Layr v. Nelson, E. 1687. 1 Vern. 456.

95. If two are bound jointly, and one dies, the survivor only is liable in equity. Boscus, if the bond be joint and several. Towers v. Moor, E. 1689. 2 Vern. 99. See vide Primrose v. Bromley, post, pl. 111. where the estate of the deceased was charged pari passu, with the surviving obligor.

96. A bond creditor shall have the benefit of all counter-bonds or collateral securities, given by the principal to the surety. As if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt. Maure v. Harrison, M. 1692. 1 Eq. Ab. 93. pl. 5.

97. Plaintiff, as executrix of her husband, lent money to A. and B. on their bond, payable to a trustee. She afterwards married B. This bond is not extant. Cotton v. Cotton, E. 1693. 2 Vern. 290. Pre. Ch. 41.

98. If A. and B. are bound in a bond, and the bond is lost, equity will set it up as well against B. the surety, as against A. Sheffield v. Lord Castleton, 1700. 1 Eq. Ab. 93. pl. 6.

99. A. was bound to B. for 500l., A. and C. his surety, afterwards gave B. a bond for 100l. as a further security. Then A. assigned a judgment to B. for 500l., on which B. received several sums. A. received 80l. on the judgment by consent of B. This shall not be taken in part of C.'s bond, which it would have been, if B. had received the money and lent it to A. Halford v. Byron, M. 1701. Pre. Ch. 178.

100. A. gave a bond to secure part of a debt to B. which an extravagant woman had concealed from her husband, and B. was prevailed upon by the wife, on payment of remainder by the husband, to give him a receipt in full; this discharges A. from her bond, she not being privy to the transaction. Fowler v. Ayliffe, H. 1707. 2 Eq. Ab. 183. pl. 4.

101. If the principal in a bond being arrested, gives bail, and judgment is had against the bail, and the sureties in the original bond are sued, and obliged to pay the money, they shall have the judgment against the bail assigned to them; and they shall not be contributory, for the bail stands in the place of their principal. Parsons v. Bridgock, E. 1708. 2 Vern. 608. Vide Wright v. Morley, 11 Vcs. 22.

102. A., together with B. and C., his sureties, executed a bond to D. for 300l. C. paid the debt out of A.'s money, but did not give up the bond to A.; he afterwards assigned the bond to secure a debt of his own. This is a gross fraud, and a perpetual injunction was awarded. May v. Harman, H. 1709. 1 Bro. P. C. 271.

103. A bond given as a security for a collector of customs, does not extend to a subsequent duty on coals, where the collector had a new deputation, and gave security for the duty on coals. Bartlett v. Attorney Gen., M. 1709. Parker 277. So held, where no security was given on the second deputation. Bowdage v. Attorney-Gen., M. 1709. Parker 278.

104. A. lent money to B. and C. on bond; B. became bankrupt; A. sued C. and took him on a ca. sa. and then discharged him, on payment of part. A. was allowed to prove one moiety only of the remainder against the bankrupt's estate; but if B. had borrowed all the money, A. should have proved for the whole. Exp. Smith, T. 1713. 4 P. W. 237.

105. Two obligors were bound jointly and severally, and one died; his executors may be sued, without making the surviving obligor a party. Collins v.
BOND IX.

Joint and several—End of Surety and Indemnity.

Griffiths, M. 1725. 2 P. W. 313. Vide Towers v. Moor, ante, pl. 95.

106. A security bond for a deputy post-master, for three years, shall extend further; but semb. if the arrears had been paid up at the end of three years, the surety might have been relieved. Williams v. Jones, M. 1729. Bum. 275.

107. If obligors are jointly and severally bound, they may be severally sued in equity, as well as at law. Stanley v. Stock, T. 1730. Mos. 383.

108. Where there are joint and several obligors, the obligee may elect to sue them jointly or severally; but if he sues them jointly, he cannot sue them severally, for the suit depending may be pleaded. So if they become bankrupts, the obligee may elect under which commission he will prove. Exp. Rowlandson, H. 1755. 3 P. W. 405. Exp. Banks, T. 1740. 1 Atk. 106. 2 Ves. 550. Exp. Bond and Hill, H. 1745. 1 Atk. 98. S. P. But if two owe a partnership debt, and one gives a bond as a collateral security, he may be sued on that bond, and the joint debt may be also sued. S. C. 3 P. W. 408.

109. A release to one obligor is a release to both, as well in equity as at law. Bower v. Swadlin, M. 1738. 1 Atk. 294.

110. An ignorant man filled up a bond, and bound the parties jointly; upon proof of the manifest intention of the parties that the bond should have been joint and several, plaintiff was relieved. Simpson v. Vaughan, H. 1739. 2 Atk. 31. Vide Exp. Symonds, 1 Cox 200.

111. Ld. Hardwicke said he had determined a case in Chancery, where two of the obligors were jointly bound, and one died. At law, it certainly might have been sued against the survivor only, but as Ld. Hardwicke thought it very hard, he decreed the estate of the deceased obligor to be charged pari passu with the survivor. Primrose v. Bromley, M. 1739. 1 Atk. 90.


113. Three obligors in a bond: the obligee brought the principal and the representatives of one surety before the court, and stated that the other died insolvent; an objection for want of parties in this case was overruled. But where a debt is joint and several, each debtor must be before the court, for they are entitled to each other's assistance, as well as to a contribution from each other. So, where there are different funds, and plaintiff can sue either heir or executor, both must be made parties; but there are exceptions to this rule, as where some of the obligors are only sureties, for a surety need not be a party, unless he has paid the debt. So, where there are no personal assets, the representatives of an insolvent co-obligor need not be before the court. Madox v. Jackson, H. 1746. 3 Atk. 406.

114. Where G. joined his brother S. in a bond, and mortgaged his estate in remainder as a surety, there is no reason, that the personal estate of S. shall be exonerated, and the debt turned on the mortgaged estate; and it is not enough to say, that S. might, by a recovery, have barred his brother's remainder. S. was clearly the original debtor in this case, and his debt shall not be forced on the estate of the surety. Robinson v. Gee, T. 1749. 2 Ves. 251.


116. The allowance of a bankrupt's certificate does not discharge his sureties. Exp. Williamson, E. 1750. 1 Atk. 94. 2 Ves. 249.

117. An obligee may have several actions against each obligor, but he shall levy only one satisfaction. Exp. Wildman, M. 1750. 1 Atk. 110. 2 Ves. 115.

118. One obligor in a joint bond dies, and the other is a bankrupt; though the legal lien is gone, if there be no partiality or collusion in the obligee, equity will set up his demand against both heir and executor of the deceased, but the real estate is only liable in default of personal assets. Bishop v. Church, T. 1751. 2 Ves. 371. Vide Belt's Sup. to Ves. 363.

119. Obligee unless paid, is not obliged to lend his name to sue the surviving obligor. S. C.

120. Though the obligation and penalty be gone, the condition is construed an agreement to pay. S. C.
BOND IX.

Joint and several—and of Surety and Indemnity.

121. If one obligor pays and sues the other at law in the obligee’s name, payment may be pleaded, but not payment by a stranger, as representative of a deceased obligor in a joint bond. Bishop v. Church, T. 1751. 2 Ves. 371.

122. So an assignment to a co-obligor who pays the money is useless, for even the principal may plead payment to an action in the name of the obligee, but an action on the case lies. S. C. Vide Woffington v. Sparks, post, pl. 125. S. P.

123. A surety for a bankrupt and his co-obligor, in a bond to the crown, is compelled by an extent to pay the money; he may prove his debt and all charges. Exp. Marshall, E. 1751. 1 Atk. 262.

124. Where an action is brought on the principal and sureties in an administration bond, by a bond creditor of the intestate, as assignee of the ordinary, and judgment is suffered by default; the judgment shall stand as a security for so much as shall fall short to satisfy the bond creditors of the intestate. Greenside v. Benson, T. 1754. 3 Atk. 248.

125. A surety in a bond, finding that the principal was decaying in circumstances, filed her bill, that obligee might put the bond in suit against him, or assign the bond to her. Per curiam, an assignment of the bond can be of no use, and plaintiff, by paying the money, may have an action at law against the principal; the court would only relieve against the penalty. Woffington v. Sparks, T. 1754. 2 Ves. 560.

126. Where a bond was in form joint only, but was suggested to have been intended to be joint and several, the court will refer it to the Master to inquire into the intent, and decide according to such intention. Exp. Symonds, H. 1786. 1 Cox 200.

127. On a bill by a surety against his co-surety and the principal for a contribution from the co-surety, in respect of money actually paid by plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise, where the principal is not a party to the suit. Lawson v. Wright, M. 1796. 1 Cox 275.

128. The doctrine of contribution amongst sureties, is not founded in contract, but is the result of general equity on the ground of equality of burthen and benefit; therefore where three sureties were bound by different instruments, but for the same principal, and in the same engagement, they shall contribute. Dering v. Earl of Winchelsea, H. 1787. 1 Cox 318. Vide Herbert’s Ca. 3 Co. 11. (b.) Swain v. Wall, 1 Ch. Rep. 149.

129. A. and B. were bound to C. for A’s debt; B. urged C. to sue on the bond, which he did as against A. and then consented to take A’s warrant of attorney, and give him three years’ time; this being done without B’s knowledge, the court granted a perpetual injunction against C. in favour of B. Nichols v. Smith, E. 1789. 2 Bro. C. C. 579.

130. Bond by a trader to indemnify his surety; if the surety pays part of the money before the bankruptcy, and the rest afterwards, the whole is provable under the traders’ commission, if the bond was forfeited before. Exp. Cockshott, H. 1792. 3 Bro. C. C. 502.

131. Upon a bill filed by a surety in a bond on which judgment has been entered, the court will decree to him, (on payment of the debt,) an assignment of such judgment, but where it appeared that defendant’s resistance arose from an apprehension that her assigning the judgment might defeat securities which she had taken subsequently from the principal obligor, (the consideration for which securities were shown to be old debts with arrears of interest,) the court thought defendant not entitled to favour in a court of equity, under such circumstances. Hill v. Kelly, T. 1794. 4 T. Rep. 265.

132. Defendant sued at law on an indemnity bond; plaintiff filed his bill for an injunction, but tendered no remuneration for damages sustained; dismissed, the remedy being at common law on a quantum deminutus. Goldthorpe v. Watts, H. 1795. 2 Anstr. 548.

133. B. was a surety for A. in a joint bond to C. and D. for 180,000l., conditioned to pay 90,000l., with interest, at 5 per cent. By a reorder bond of equal date, A. was bound to B. in like penal, with condition to indemnify B., his heirs, executors, &c. from payment of the said 90,000l., and interest, and from all damages he might sustain on account of the non-payment of the said sum, and interest. After the deaths of A. and B. the executors of B. were called upon, and did pay to C. and D. 30,000l.
on account of the principal, and several large sums for interest on A.'s debt. In a suit for the administration of A.'s estate, the court allowed the executors of B. to come in as creditors for the several sums so paid by them, and for interest on the 22,000l., but not for interest on the several sums of money paid for interest on the original debt. Rigby v. Macnamara—Law v. Rigby, T. 1796. 2 Cox 415.

134. "I return A. his bond," in a will, is not a release, but a legacy, and having lapsed, the bond is in force against a co-obligor surviving. Mainland v. Adair, T. 1796. 3 Ves. 231.

135. A. and B., partners, became jointly bound to C. conditioned "that if A. and B., their heirs, executors, or administrators, or any of them, shall do well and truly pay, &c." This bond is joint and several. Thomas v. Frazer, T. 1797. 3 Ves. 299.

136. A joint bond was held several against creditors, in the administration of assets, where the intention of the parties was admitted, and an account was directed, and to be paid as a specialty debt. Burn v. Burn, H. 1798. 3 Ves. 573.

137. A. was appointed military paymaster in the East Indies, and gave a bond of indemnity, in which B. and C. were his sureties. Upon A.'s death, the company claimed of his administrator 689,729 rupees, which he resisted; no notice of this claim was given to the sureties. On investigation, it appeared that the company was indebted to A. 90,548 rupees, which their agent paid to A.'s administrator, but the surety-bond was not delivered up. C. died in Calcutta, and B. remained many years in India, but upon his departure for England, the company set up a claim of 100,000 rupees against the estate of A., and B., as his surety, was obliged to lodge the money before he could depart for England. The company having thus by their power over B. as their servant, obtained payment from him, without any account of the proceeding against the principal, (whose estate was solvent,) and the company having also discharged B. from their service, he was restored to his place by a decree for repayment at 5 per cent., upon giving security for payment, in case he should in a future suit be held liable, but the court would not allow Indian interest. Law v. E. India Co. T. 1799. 4 Ves. 824.


139. A bond of indemnity, given against the consequences of a contempt, involves the party giving it. Exp. Dixon, H. 1803. 8 Ves. 104. Vide Exp. King, 7 Ves. 312.

140. A surety by bond for advances generally, but under a limited penalty, is not liable beyond that amount, and paying that sum he is entitled to a proportion of the dividends from a proof by the creditor to a greater amount under the bankruptcy of the principal debtor; and a surety may compel the creditor to prove under the commission against the principal, and to become a trustee of the dividends for such surety having paid the whole. Exp. Rushworth, H. 1805. 10 Ves. 409. Vide Exp. Wood, cor. Thurloe, M. 1791. et vide ante, tit. Bankrupt, v. (i.)

141. As a creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has fall as good an equity to the benefit of all the securities the principal gives to the creditor. Wright v. Morley, Morley v. St. Alban, H. 1805. 11 Ves. 22. Vide Parsens v. Bridgcock, 2 Vern. 608.

142. A proceeding against bail on their bond, or against the sheriff, is a proceeding against the principal; therefore, where the principal had obtained an injunction to restrain proceedings at law, such a measure is a breach of the injunction, and a contempt. Leonard v. Attwell, M. 1810. 17 Ves. 383. Vide Stone v. Tuffin, Amb. 32. Bolt v. Stoneway, 2 Anstr. 356.. as to which vide Ireson v. Harris, 7 Ves. 256. Bullen v. Ovey, 16 Ves. 141. Hearn v. Tenant, 14 Ves. 136.

143. F. B. gave his bankers a mortgage for a debt, and afterwards it was agreed that the whole should be paid by instalments, and secured by a warrant of attorney, without prejudice to a surety bond, which the bankers held for part of the debt: but as it appeared that this composition would deprive the surety of his remedy against the principal,
Joint and several—and of Surety and Indemnity.


144. Judgment was confessed on a joint and several bond, and an injunction was obtained by one obligor, the other not being a party, execution issued on the said bond, and notice was given to the sheriff of the injunction, and he was directed not to take the plaintiff in execution, and he took the other obligor only—this is no breach of the injunction. *Chaplin v. Cooper*, M. 1812. 1 Ves. & B. 16.

145. The colonel of a regiment took a bond of indemnity from his agents and another, as a surety, in respect of all charges, &c. to which he might become liable by their default. The agents afterwards became bankrupts, and the colonel was dead when government gave notice to his representatives of a demand on his estate, in respect of an unliquidated account. The colonel’s representatives brought their bill against those of the surety, (who was also dead,) to recover the balance due to government; and also to set apart a sufficient sum out of their testator’s estate to answer further contingent demands. But the court dismissed the bill with costs, though attempted to be supported upon the principal of a bill *quod timet*; Grant, M. R. observing, that though government allows the colonel of a regiment to appoint his own agent, yet he is held liable for his acts, not by virtue of any security he may have given to government, but by operation of law, and, further, that in the case of an ordinary money bond, there was no distinction upon the face of it between the principal and his surety. *Sed secus*, in the case of an indemnity bond, where the surety expressly stipulates for the act of his principal. *Astrebus v. Davidson*, M. 1817. 3 Meriv. 569.


147. Commissioners under an act for lending money to merchants, made an advance to A. who, with B. his surety, became bound for repayment. The Commissioners granted A. several indulgencies without the privity of B.; A. became bankrupt, and B. filed his bill to restrain proceeding at law against him; and it was held, that the obligor was discharged by the indulgencies granted to A. without his knowledge. *Bank of Ireland v. Beresford*, T. 1818. 6 Dow P. C. 233. Vide *Boulbee v. Stubbs*, 18 Ves. 20.

Bond X.

Obtained by Duress, Fraud, or Misrepresentation.

148. A. lent B. and C. 200l. and took their bond for 800l. payable on the marriage of either, or on the death of either’s father. B.’s father died, and C. married, but his portion was vested in trustees; equity would not subject this portion to the payment of C.’s bond. *Rich v. Sydenham*, 3 Ch. Rep. 75.

149. A., for 90l. lent to B., got his bond for 800l. when he was drunk, on which he obtained judgment. A. sought by his bill to subject B.’s trust estate in his wife’s lands; equity would not relieve A. even to the extent of the money really lent. *Sed secus*, if B had gone into equity to be relieved from the judgment, for then he must have paid the money borrowed. *Rich v. Sydenham*, E. 1671. 1 Ch. Ca. 202.

150. A. made several wills, and thereby gave 500l. to a Dutch church, and the like to a French church; no will was to be found after his death, and his brother endeavoured to get administration, but was opposed. After the expiration had depended eighteen months, the brother was told he should have administration, but it was expected he should give a bond to pay each of the churches 800l. A bond was given, and read in court, and then sentence was pronounced, and confirmed. Upon an information by the Att. Gen. that the churches might have the benefit of the
Obtained by Duress, Fraud, or Misrepresentation.

bond, and a cross bill to set it aside, as
unduly obtained, the court declared if
the bond was not given freely, but by
compulsion, it ought to be set aside, or
at least not carried into execution.
However, both bills were dismissed.

151. Defendant found plaintiff naked,
and going to bed with his wife, drunk
(as was suggested by plaintiff;) defend-
ant took up an axe, and, under terror,
plaintiff gave him a note for 300l., this
was in June; in August plaintiff gave
him a bond and judgment; and in Oc-
tober he surrendered a copyhold as a
further security. Plaintiff had told se-
veral persons that his debt to defendant
was a bargain for grass. On a bill to
set aside these securities, the court re-
fused to relieve further, without regard

152. Defendant having caught plaintiff
in bed with his wife, took a sword, and
threatened to kill him, unless he gave a
note for 100l. When the note became
due, plaintiff, to obtain time, gave his
bond for the money, and then filed his
bill for relief. *Per cur.*, had the transac-
tion rested on the note, equity would
have relieved, but plaintiff, by cooly
giving his bond, had ascertained the da-
mages he was content to pay. Dismiss-
ed. Anon. T. 1709. 3 P. W. 294. (n.)

153. A. on marriage gave a bond to
B., that if he died without issue, he
would leave 3000l. to one or more of
the children of his brother, who had
married B.'s daughter. A. died without
issue, having given in his life-time and
by will more than 3000l. to one of those
children, but without any declaration
that such gifts were in satisfaction of the
bond, which he meant to deny, as being
exorted from him by the threats of B.
A. also recited the fraud in his will, but
there was no other evidence of it. Ld.
Ch. would not allow the recital in the
will to overthrow the bond, which was
of fifty years standing, but decreed that
the gift should be taken in satisfaction of
it. *Hancock v. Hancock*, T. 1719. 9
Mod. 438.

154. A servant entrusted with the care
of his master's son on his travels, pre-
vailed on him, being a weak young man,
to give him a bond for 1000l. when he
became of age, which was concealed
from the father, though the son was un-
able to pay it; upon a bill for payment
of the bond, Ld. Ch. said, that though a
weak man gives a bond, equity will not
set it aside where there is no fraud or
breach of trust, if *compos mentis*; for
there can be no equitable incapacity if
there be a legal capacity. But the breach
of trust in abusing the father's confidence,
and the concealment of the bond from
him, are evidences of fraud. Decreed,
the bond to be released, especially as
plaintiff swore it was mislaid. *Osmond
v. Fitzroy*, M. 1731. 3 P. W. 310.

155. Bill to impeach some bonds ob-
tained by fraud and imposition. *Per cur.*
the production of a bond is *prima facie*
evidence of a debt, but where fraud
appears, the obligee must prove the actual

156. Plaintiff, a poor, illiterate man,
suing for an estate, gave a bond for
1000l. to defendant, who assisted him
with small sums. The bond was obtained
by pressing plaintiff for the money
expended. Ld. Ch. decreed the bond
to stand as a security for the money ad-
vanced and interest, and left defendant
to bring his *quant. mer.* for his trouble.

Talb. 111.

157. A. sold goods to B. in the way
of trade, and afterwards took an usurious
bond. B. became bankrupt. On the
question, whether the bond extinguished
the book debt, Lord H. put the parties
to file their bill, refusing to determine that
Exp.* Thompson, T. 1746. 1 Atk.
125. where his Lordship directed an issue
at law to try the question of usury.

158. An agent employed to sell a re-
versionary legacy, buys in the name of
another, and afterwards sells it to the
legatee, for a bond payable after his fa-
ther's death, and then obtains from him a
money bond, which he gave under the
idea that he was bound so to do. The
whole transaction is fraudulent, and the
last bond is no confirmation of it, though
four years interest was paid. Decreed,
that all the deeds be set aside, and an
3 Bro. C. C. 117. 1 Ves. jun. 220.

159. Where a bond is given at full age,
and the obligor is not in distress, but ex-
ecutes it under a notion of honour, and
BOND X. & XI.

Obtained by Duces, Fraud, or Misrepresentation.

an actual advance of money has been made, it will maintain the former bargain, however disadvantageous. Secus, if executed under distress or terror, or apprehension, though unfounded, *Crowe v. Ballard*, supra.

160. A bond given by a daughter who had not received her fortune, to a stepfather, for the immediate payment of a sum alleged to be due to her mother for maintenance, ought to be set aside as improvidently executed; the utmost that the mother could claim, being a lien on the interest of her daughter's fortune when recovered; but an act of the daughter, binding the interest of her fortune to that extent, would have been valid: in this case also, the daughter, was in distressed circumstances, and actually applying to her stepfather for assistance, when he prevailed on her to execute the bond. *Eaceley v. Magrath*, T. 1804. 2 Sch. & Lef. 31.

See more of this class of cases, post tit. *Deeds, Fraud, Heir, iv. Post Obit.*

BOND XI.

Concealed, suppressed, lost or cancelled.

161. Though an obligee in a voluntary bond, lose the bond, yet he shall have remedy against the obligor in equity: *Sed quod:* for these matters are discretionary in the court. *Underwood v. Stanley*, M. 1666. 1 Ch. Ca. 77.

162. If a bond is taken away fraudulently and cancelled, the obligee shall have the same benefit as if it were existing. *Savage v. Brown*, M. 1674. Finch 184.

163. If a man brings a bill for discovery of a bond, he need not make oath he has lost it, which he must do if he seeks relief for the duty. *Anon.* T. 1683. 1 Vern. 180.

164. Where a bond is lost, equity will set it up as well against the surety as the principal, for it was once a legal charge against both. *Sheffield v. Lord Castleton*, 1700. 1 Eq. Ab. 93. pl. 6.

165. I. S. gave a bond to his housekeeper for payment of an annuity; the bond was lost, yet decreed she should have her annuity or the penalty, though no wages appeared to be due. *Lightburn v. Weedon*, H. 1700. 1 Eq. Ab. 92. pl. 5.

166. A. gave B. three bonds, two of which were paid, but the third was delivered up by mistake at a settlement of accounts. The court directed an issue to try if there were, there, and relieved against this mistake. *Vasheen v. Gius

167. A. gave his wife a bond, permitting her to dispose of her separate estate, which he afterwards cancelled, yet it subsists in law, and shall be established in equity in favour of her executor. *oved v. Richardson*, MS. ca. T. 1725. cited in *Pawlett v. Delaval*, 2 Ves 670.

168. Obligee, on payment of 20L, procured his bond and notes (by misrepresentation) from obligee, a weak man: Decreed, to account for the whole. *Lucas v. Adams*, M. 1725. 9 Mod. 118.

169. A cancelled bond for performance of articles, was made an exhibit to prove the execution of the articles, the limitation being recited in the condition of the bond, *Anon.* H. 1726. Gilb. Eq. Rep. 183.

170. A. gave B. a bond conditioned to pay her 500L. if he did not marry her within a year. Soon after, under pretence of reading the bond, he carried it away against her consent. She filed her bill for the bond, and then died intestate. Her administratrix revised, and defendant was decreed to pay the money with interest at 4 per cent. *Atkins v. Farr*, H. 1736. 5 Vin. 396. pl. 2.

171. Evidence may be given at law of a lost deed; *sed secus* of a bond lost, for a *prospect in curia* must be made. *Small

172. Where a bond is burnt or cancelled by accident or mistake, or where it is procured to be delivered up by fraud, equity will set it up against a surety, though extinguished at law. *Skip v. Huay*, or *Wilcox v. Edwards*, T. 1744. 3 Atk. 91.

173. Bill by a husband, after his wife's
BOND XI. & XII.

Concealed, lost, or cancelled. — Assignment and Assignee.

Death to be relieved against a bond, which the wife just before her marriage had given to her aunt, unknown to her husband; held, no fraud on the marriage, a valuable consideration being sworn to. Blanchet v. Foster, E. 1731. 2 Ves. 264.

174. A. purchased an estate of B. and paid part of the purchase money, and gave his bond for the residue, which he afterwards unfairly got into his own possession. Equity will compel him to pay the whole, principal and interest. Kenrick v. Hudson, H. 1775. 6 Bro. P. C. 614.

175. Though a court of law will not permit a man to declare upon a lost bond, and dispense with the proffert, that does not quash Chancery of its concurrent jurisdiction. Atkinson v. Leonard, H. 1791. 3 Bro. C. C. 218. Toulmin v. Price, E. 1800. 5 Ves. 298.

176. Where an annuity bond is lost, the annuitant shall be at liberty to claim the arrears of the annuity, which is the real debt in equity. Toulmin v. Price, supra.

177. The new doctrine, that proffert of a bond may be dispensed with at law, seems questionable with regard to its supposed analogy to proceedings in equity. Exp. Greenway, E. 1802. 6 Ves. 813.

178. Where a bond was lost, and the principal obligor was out of the jurisdiction, the court granted relief upon the lost bond as against the sureties, upon an indemnity being given against the demands of plaintiffs, or persons claiming under them by virtue of the bond, and such costs, damages, and expenses, as they might be put to by reason of the loss of the bond. E. India Co. v. Beddam, E. 1804. 9 Ves. 464.

179. The jurisdiction of equity upon lost bonds is very ancient, and founded upon the want of remedy at law without proffert, till that jurisdiction was lately assumed. There is another reason for the exclusive jurisdiction of equity upon lost bonds, namely, the difficulty of securing an indemnity at law. Even the statute law has gone a great way to recognise the exclusive jurisdiction; for the statute 9 & 10 W. 3. c. 17. s. 8. expressly permits a creditor to recover upon a lost bill of exchange, and the debtor to call for an indemnity. S. C. Vide Exp. Greenway, 6 Ves. 812. Bremly v. Holland, 7 Ves. 19.

BOND XII.

Assignment, and Condition of the Assignee.

180. I. S. being indebted, sold his lands, and took the purchaser’s bond, which he assigned to one of his creditors. This assignment is good in equity. Mans v. E. India Co., E. 1677. Finch 299.

181. A. was bound to B. for payment of money. B. assigned his bond to C, and became bankrupt. C. is entitled to the bond; for as B. was bound by his assignment, so are those claiming under him. Peters v. Soame, H. 1701. 2 Vern. 428.


183. Payment to an obligee after Notice of an assignment, is not good. Baldwin v. Billingstye, H. 1705. 2 Vern. 599.

184. Where a surety in a bond pays the debt out of the proper monies of the principal, and, neglecting to give him up the bond, assigns it afterwards to secure a debt of his own, it is a gross fraud, and a perpetual injunction was awarded in favour of the principal. May v. Harmon, H. 1709. 1 Bro. P. C. 271.


186. An assignee of a bond cannot petition for a commission; for he is not
Assignment, and Condition of the
a legal creditor. Exp. Lac, H. 1721.
1 P. W. 782. And a commission was
superseded because grounded on such a
debt. Medicott’s Ca. E. 1731. 2 Str.
899. W. Kel. 6.

187. Where there is an assignment of
a bond in trust for others precedent to a
release of it, it is a question if the obli-
gee could release; for he must have
notice of the assignment, being himself
a trustee. Ordered, the cause to stand
over till it should appear whether the re-
lease was before or after the assignment.
Bower v. Swadlin, M. 1738. 1 Atk. 294.

188. A creditor cannot take an assign-
ment of an administrator’s bond given
under the statute of distributions; nor
will an action lie upon it, though assign-
ment for a breach that the intestate was in-
debted to the assignee upon specialty.
Baker v. Dun Aerosque, M. 1740. 2 Atk.
66.

189. But where A., a bond creditor
of the intestate for 600l., brought an
action against the administratrix, who
pleaded no assets ultra 54l., and then A.
procured the commissary to assign him the
administration bond, upon which he brought
his action, and the administratrix suffered
judgment by default, is it true that the
judgment should stand as a security for so
much as should fall short to satisfy A.
Greenside v. Benson, T. 1734. 3 Atk.
248. Vide Archbp. of Cant. v. Wills,
Salk. 515, where this question was solemn-
dly determined.

190. Though it is not always neces-
sary, in case of an assignment of an
equitable interest, to make the person
having the legal interest a party, yet
where a bond was given in 1709, assign-
ed in 1717, and no demand made till
1739, so that a presumption of satisfac-
tion arises, the representative of the
obligee must be made a party; for the
obligee might have received the money.
Brace v. Harrington, M. 1741. 2 Atk.
233.

191. Plaintiff, in 1769, sealed three
bonds to M. for 5000l. each. M. as-
signed the bonds to P., and P. to de-
fendant. Defendant sued upon them in
M.’s name. Plaintiff filed an injunction
bill, stating that the bonds were without
consideration, and antedated for the pur-
pose of fraud, and that he had M.’s
counter-bond of indemnity. Defendant
by answer, stated his account with P.,
and admitted the counter-bond, but de-
nied collusion or want of consideration.
P.’s answer was to the same effect, and
stated a fair debt to be due to him from
M. Plaintiff’s injunction was dissolved
on the merits. ld. Shelburne v. Terney,
T. 1772. MS. ca. cited in 1 Bro. C. C.
435. n.

192. A bond given for a general pur-
pose of raising money, and deposited by
the obligee as a security, shall be liable
to the obligee’s debt. Secus, if given for
a special purpose; for then it is mas-
C. C. 484.

193. Where a bond is assigned by the
obligee, towards satisfaction of a debt
owing from him to another, the assignee
is chargeable for the amount of any loss
incurred by a forbearance shown to the
obligor. Exp. Murt, M. 1788. 2 Cox. 68.

194. A bond assigned as a security
for money paid to the use of one who
has committed a secret act of bank-
ruptcy, cannot be retained against the
assignees. Hamersley v. Furling, T.
1798. 3 Ves. 737.

BOND XIII.

Interest, Penalty, general Payments.

195. A., indebted to B. and C., exe-
cuted to them two several bonds, on
which they soon obtained judgment for
the penalties and costs; they then filed
a bill to be satisfied out of the real assets
of A., the amount of these penalties and
costs, with interest: Held, they are not
entitled to interest. Ellis v. Whinnery,
E. 1720. 2 Bro. P. C., 159.

196. Equity will in some cases carry
a debt beyond the penalty, as where a
man is kept out of his money by an in-
junction, or is prevented from going on
at law. Duval v. Terry, Shaw. P. C. 15;
Hale v. Thomas, M. 1685. 1 Vern. 350.
S. P. But a plaintiff in equity can no
more charge a defendant beyond the pe-
nalty than he can at law. Hale v.
Interest, Penalty, general Payments.


197. But in general the penalty shall not be exceeded; for a man can have no more than his debt; and the penalty is the utmost of his debt. As where an obligor had received the greatest part of the money due on bond, and refusing the residue, insisted on the forfeiture, the obligor was relieved in equity. *Carey*, 2. So where A. gave a bond to B. for 20l. not to disparage his trade, which bond was forfeited; equity would have relieved if the penalty had been larger, as 100l. or upwards. *Tate v. Ryland*, 1670. 1 Ch. Ca. 183. So where defendant had plaintiff in execution, and refused to discharge him without payment of the penalty, defendant was decreed to refund all he had received except principal, interest and cost. *Friend v. Burgh*, M. 1679. Finch 437. *Sed idem 4 and 5 Ann. c. 16. for relief of debts at law in such cases.—So where the vendor of lands enters into a recognizance for the quiet enjoyment of the vendee, the court will not go beyond the penalty, though the vendee's loss by eviction be greater. *Bidlake v. Arundel*, 1 Ch. Rep. 95. So where a master of a ship covenants to pay a penalty for all cloth carried in his ship; and in like manner binds his mate not to carry cloth under the penalty of 50l. though the mate carries cloth to the value of 70l. unknown to the captain, and the captain is obliged to pay the money, he shall not, on his own application: charge the mate beyond the penalty. *Davis v. Curtiss*, E. 1674. 1 Ch. Ca. 226. So in case of a devise for payment of debts, and there is a bond, the interest of which exceeds the penalty, the creditor shall have no more than the penalty. *Anon.* M. 1689 1 Salk. 154. For where an obligee is plaintiff, equity will not carry the debt beyond the penalty; he having made himself the judge of his own recompense. *Secundus*, if he he defendant; for then the maxim applies, that “he who will have equity must do equity.” 1 Eq. Ab. 92. pl. 7. *Vide Hale v. Thomas*, 1 Vern. 530. Duval v. Terry, Show. P. C. 15. So where A. had judgment for the penalty of a bond, he can recover no more, though the principal and interest exceed it. *Steward v. Ramboll*, T. 1705. 2 Vern. 509. But the reporter says *quae*. So, where a state demand has been neglected for many years. *Galway Corp. v. Russell*, T. 1721. 2 Bro. P. C. 275. So, where a bankrupt has a surplus, the interest on his bond debts shall be confined to the penalties. *Bromley v. Goodere*, M. 1745. 1 Atk. 75 to 80. So, upon an old bond in the master’s office, the interest must not exceed the penalty. *Taw v. E. of Winterton*, H. 1792. 3 Bro. C. C. 489. *Knight v. Maclean*, 3 Bro. C. C. 496. So, where a mortgagee had also a bond, and the mortgagor conveyed to him the equity of redemption, paying the bond first, he cannot take beyond the penalty. *Lloyd v. Hatchett*, H. 1795. 2 Anstr. 525. So, though a devise for payment of debts revives simple contracts with full interest, though for 70 years, bond creditors are confined to their penalties. S. C. So, where upon an assignment of a bond and judgment, interest is allowed to the date of the master's report, it must not exceed the penalty. *Sharps v. E. of Scarborough*, M. 1797. 9 Ves. 557. Neither can the arrests of an annuity exceed the penalty of the bond. *Mackworth v. Thomas*, E. 1800. 4 Ves. 329. So, in taking an account of a testator’s estate before the master, bond creditors shall not have interest beyond their penalties. *Grosvenor v. Cook*, M. 1757. 1 Dick 305. *Gibson v. Egerton*, or Bumpstead v. Stiles, E. 1769. 1 Dick. 408. *Kettleby v. Kettle- by*, or *Rundell v. Pettett*, 2 Dick. 514. In *Atkinson v. Atkinson*, H. 1809. 1 Ball & Be. 239. it was said *arguendo* (at the bar and not denied by the court) that the rule which restrained the allowance of interest from going beyond the penalty was first established in *Wilco v. Clarkson*, 6 T. R. 303. which overruled *Ld. Lonsdale v. Church*, 2 T. R. 388.; and that in *Mackworth v. Thomas*, 5 Ves. 329. *Ld. Russ- lyn* held, that in the administration of assets in equity, interest beyond the penalty of a bond could not be recovered.

198. The court refused to give interest upon judgment debts beyond the amount of the penalty in the bonds against a re-
BOND XIII & XIV.

Interest, Penalty, general Payments Satisfaction, &c.

remainder-man, where the interest had accrued during the time of the tenant for life. On appeal to the Lords, plaintiff's counsel contended that there was no instance in such a case where interest had been decreed against a remainderman who was himself in no default. Decree affirmed. Latouche v. Fitzgerald, E. 1791. 2 Ridg. P. C. 353.

199. A gave B. a bond for 300l. A. and C. as his surety, afterwards gave B. a bond for 100l. as a further security. A. afterwards assigned a judgment for 500l. to B., on which B. received several sums; but A., with B.'s consent, received one payment of 80l. this shall not be applied in exonerating C.'s bond. Sec. secus, if B. had received the money, and lent it to A. Hallford v. Byron, M. 1701. Pre. Ch. 178.

200. If A. be indebted to B. by bond and mortgage, and pays money generally, B. may apply it in discharge of either debt. Secus, if A. declares to which account the money shall be applied. Wilkinson v. Sterne, H. 1744. 9 Mod. 427.

201. Devise by A. in trust to sell and apply the money among such persons as the trustees should think had any just demand on A. at his death, to each in equal proportion, according to the principal sum, as far as the money would extend; the securities to be delivered up, but the money to be only paid and received as a voluntary bounty the fund being more than sufficient, is liable to interest on bonds to the extent of the penalties. Aston v. Gregory, T. 1801. 6 Ves. 151.

202. It is a rule in equity that interest beyond the penalty shall not be allowed against the assets of a deceased person; but there are exceptions to this rule, as where a man is prevented by an injunction from recovering his debt at law, or where an elegit creditor is brought into equity for an account, or where (as in this case) a judgment creditor was trustee under the will of his debtor, and did not apply any part of the rents received to pay the interest on his own debt, but applied them in discharge of other debts. Atkinson v. Atkinson, M. 1809. 1 Ball & Be. 238. Et side Clarke v. Ld. Abingdon, 17 Ves. 106. where the court allowed interest beyond the penalty of a bond secured by mortgage.


204. I. S. borrowed money on bond and mortgage, and in the bond B. joined him as surety. The arrer of interest exceeded the penalty; per Grant, M. R. If the creditor sue on the bond, he cannot have interest beyond the penalty, but the mortgage is to secure the sum for which the bond is given, together with all interest that may grow due. The same sum is differently secured by different instruments, by a penalty, and by a specific lien. The creditor may resort to either, and if he resort to the mortgage the penalty is out of the question. Decreed payment of the whole. Clarke v. Ld. Abingdon, E. 1810. 17 Ves. 106.

205. The presumption of payment of a bond after 20 years, may be repelled by evidence that the obligor had no opportunity or means of payment. Flandon v. Winter, T. 1812. 19 Ves. 196.

BOND XIV.

Satisfaction, when to be presumed.

206. Where several bonds were existing, and money had been paid, but a doubt remained which of them were satisfied, the court directed an issue to try whether the several bonds in question were satisfied, and the jury finding that they were, decreed that the only bond produced, be delivered up, which decreed


208. Where A. gave a bond to leave 3000l. to one or more of his brother's children, and in his life time, and by his will, gave one of them more than that sum, the gift shall be taken in satisfaction of the bond, which was of fifty years' standing. *Hancock v. Hancock*, T. 1719. 9 Mod. 488.

209. A. was indebted to B. on bond. B. in his last sickness desired his executors not to trouble A. for the money, but the executors sued him to judgment and execution. Equity decreed the bond to be cancelled, and satisfaction acknowledged, and that the executors should pay A. his costs; but the Lords reversed the decree as to the costs. *Wickett v. Baby*, H. 1724. 3 Bro. P. C. 16.


211. I. S. was indicted to F. on bond. P. by deed-poll, in consideration of love and affection for E., the wife of I. S., agreed that all benefit and advantage of the bond, after P.'s death, should entirely remain for the benefit of E. and her issue. P. put the bond in suit, and then died. Held, his executors were entitled to the whole debt; for his suing the bond in his life-time, was evidence of his intent that no part of the money should remain for E. *Richardson v. Bedgwick*, E. 1731. 3 Bro. P. C. 576.

212. The judges have laid it down as an invariable rule, that where no demand has been made on a bond for 20 years, they will direct a jury to find it satisfied, presuming on the length of time. *Bedgwick v. Simpson*, E. 1740. 2 Atk. 144. *Leman v. Newens*, 1 Ves. 51.

213. When a bond has been assigned, and no demand made for 22 years, the representative of the obligee must be made a party. *Bruce v. Harrington*, M. 1741. 2 Atk. 235.

214. Indorsements made by an obligee on a bond of the payment of interest, if made and dated within 20 years, are sufficient evidence to take off the presumption of payment; but after the end of 20 years, though they would be evidence of the payment of interest, after that time they would not take it out of the presumption. *Glynn v. Bank of England*, M. 1750. 2 Ves. 43.
CASUALTY.—CHARITABLE USES.

5. It is against natural justice to pay for a bargain which cannot be had, as where houses purchased are burnt down before the day of payment. *Stent v. Baylis*, E. 1734. 2 P. W. 220.

6. It is the constant rule of law, in the case of considerations subsequent, that if the performance becomes impossible by the act of God, it is absolutely void; for in *Co. Lit. 206*. it is laid down, that in case of a feu-fevon in fee with a condition subsequent that is impossible, the state of the feu-fevon is absolute. *Graydon v. Hicks*, H. 1739. 2 Atk. 18.


8. If by accident, after the execution of a power, there is an excess in the lands settled on the jointress, she shall have the benefit; by parity of reason, if there is a deficiency by inundation, or casualty, she must acquiesce under it. *M. of Blandford v. D. of Marlborough*, E. 1743. 2 Atk. 544.

9. Where a loss by fire happens to a house sold before the master, before the confirmation of his report, it shall fall on the vendor, for the sale is not complete before the report is confirmed; and even so, though the sale had been delayed by the purchaser’s having opened the biddings. *Exp. Minor*, M. 1805. 11 Ves. 559.

10. In all cases of accidental loss by fire, the true meaning of the maxim, *res perit domino*, is, that both landlord and tenant shall suffer in proportion to the interest of each. *Bayne v. Walker*, T. 1815. 2 Dow P. C. 233. See more of this case, tit. *Landlord and Tenant*, sec. viii.

CHARITABLE USES.


II. Good Devise or Appointment, what (a.) Defects where made good (b.) Where ineffectual and void in toto (c.)

III. Of the Operation of the Statute of Mortmain.

IV. Superstitious or impolitic Uses. Application to other Uses.

V. Uncertain Devises or Appointments. Want of Objects.

VI. Devise or Appointment controulé in Equity. Doctrine of Cypress.

VII. Misemployment. Remedies. Trustees.

VIII. Surplus Rents—how to be applied.


X. Priority in marshalling Assets.

CHARITABLE USES I.

Endowment, By-Laws, Visitatorial Power.

1. Where no express visitor is appointed by the patent of a royal endowment, the legal estate is vested in the perpetual governors; but the crown, as visitor by implication, may issue a commission to inspect the conduct of such governors. *Eden v. Foster, Case of Birminham School*, H. 1725. 2 P. W. 325.

2. Where the king is founder, the crown is always visitor; but where a private person is founder, his heirs are visitors; but the founder may vest a visitatorial power in any other person or
CHARITABLE USES I.

Endowment, By-Laws, Visitorial Power.

his heirs.—S. C. And in the latter case the visitor being local, the court cannot interpose by granting a commission.—

3. It would be mischievous that governors should be visitors by construction, and exempt from visitation, for those who are entrusted with the rents and profits must be accountable. Eden v. Foster, H. 1725. 2 P. W. 325.

4. A power may be given to commissioners to make by-laws; and where it is too extensive, it will be void, but only pro tanto. S. C.

5. Bequest to public charities. "Public" is only a word of distinction. Each particular object may be private, but it is the extensiveness of the will, that makes a charity public. Att. Gen. v. Pearce, M. 1740. 2 Atk. 87. Barn. 288.

6. Local visitors only visit every three years; but they may hear complaints in the mean time. And it was said, that if a visitor’s reward is too small, the court may augment it. Att. Gen. v. Price, s.u.

7. Where the founder makes a perfect composition of his charity by giving the trustees a general power to place and discharge the treasurer and other officers, and to make by-laws, &c. at pleasure, they have a full power of a motion without assigning any cause. And where the domestic statutes say that the trustees shall and may turn out, &c. the words shall be construed imperatively that they must. Att. Gen. v. Lock, Case of Morden Coll. T. 1744. 3 Atk. 161.

8. Where the lessee of charity lands increases the revenues of the charity by his own improvements, his lease shall not be taken away without a suitable satisfaction for his lasting improvements. Att. Gen. v. Ballot Coll. M. 1744. 9 Mod. 407.

9. The wardens of a charity school were, by the statutes, to nominate a master being in priest’s orders, in 60 days, on default the dean and chapter of York to appoint in 30 days, and then the bishop. Defendants nominated R., not in priest’s orders, and the bishop sent notice to the chapter, who not appointing within 30 days, the bishop appointed C., who resigned into the hands of the wardens, and they within five days again appointed R., then in priest’s orders. This case depends on the right of R. His not being in priest’s orders was an objection not to be dispensed with. But then, what are priest’s orders? The subsequent statutes show, such orders were meant as incapacitated the person for saying mass; which now signifies performing the service according to the liturgy. The second nomination of R. was valid upon the resignation of C., upon which resignation the wardens were as much patrons as at first. This is not within the reason of a lapse. And the bishop was wrong in his notice; for he should have sent a copy of the statutes to the chapter. Notice must be given of the fact, but not of the foundation of a right: as upon notice of an avoidance, the patron must look to all consequences. Ed. Ch. said, this was not like a presentation; because the bishop could not revoke it, which the king, before induction, or a subject before institution, might do. The defendant having a right, and the relator none, his bill was dismissed with costs. Att. Gen. v. Wycliffe, H. 1747. 1 Ves. 80.

10. A direction by the founder of a college (temp. Edw. 3.) to the Chancellor of the University to visit it yearly (in exclusion of the heir) "et si quid reperit corrigendum," to amend it, are sufficient words to create a general visitatorial power in the Chancellor, technical words not being necessary. (Vide Attorney-General v. Middleton, post, S. P.) In the original foundation, the number of fellows was not limited; and near 300 years after this, two other fellowships were founded in the same college. In 1748, a fellow was elected contrary to the will of the latter founder, and one, at the same time, conformable to it; but no appeal was made to the Chancellor as visitor. Per curiam; the Chancellor is clearly visitor of the college, especially as he has a power who to construe the statutes in case of doubt. His determination is forum domesticum, adjudged summarily secundum arbitrium boni viti. And as the number of fellows was indefinite by the original foundation, the new ingrafted fellows are to be governed by the statutes of the first founder. An information therefore lies not to call the college to account for the election of members, or the application of the profits. Att. Gen. v. Talbot. Case of Clare Hall, Camb. E. 1747. 3 Atk. 674. 1 Ves. 73.

11. It is a rule that an information for a charity cannot be dismissed; but there must be a decree. Att. Gen. v. Smart, E. 1748. 1 Ves. 72.
12. But that rule only extends to private charities, nor those founded by the crown, which is of higher authority than the court. *Att. Gen. v. Smart*, ante. Nor to cases where there is a charter. *Att. Gen. v. Middleton*, post.

13. Defendant was presented by St. John's Coll. to the rectory of B., and the present bill was to restrain his institution and induction, and to present plaintiff. The college was founded temp. Hen. 7. and Q. Eliz. gave them a new body of statutes, by which they were governed. By ancient usage, when a benefice became vacant, the senior fellow in the divinity line was presented, whether he had taken the degree or not. Dr. A., the donor of the rectory of B., directed that the senior fellow, "being a divine," should be presented; and on his refusal, then to the next in rotation, &c. toties quoties. On a vacancy, plaintiff being senior fellow, was presented, but defendant insisted, that being D. D., he was the person intended by the donor, and appealed to the bishop of Ely, as visitor. The bishop required the college to present defendant under their common seal, which they did specially; but contended, that as the advowson was not devised to them by the founder, but by a third person under particular trusts, the visitor had no jurisdiction. Defendant pleaded to the jurisdiction of the Chancellor, and insisted on the will and the statutes. *Per M.R.* The gift of this rectory being circumscribed by particular trusts, inconsistent with the regulations by which the other property is to be governed, equity has the proper jurisdiction over the construction of the donor's will; and the execution of the trusts therein; and corporations are as much bound to execute trusts as private persons. His Honour was of opinion, that this being given on special trust, the visitor has no jurisdiction to determine on the present question. The statutes were consistent with the will, but since, if the statutes were followed, the intention would be defeated, the will must prevail. Subsequent donations may be put under the same visitatorial power as the founder's; but then the subsequent donor is considered as a co-founder and appointer of the visitor. In this case, the testator is founder, and the rules in his will are his statutes. The right of the visitor was not submitted to by the appeal; for that could not give the visitor a right he had not; nor could he have any jurisdiction as to breaches of the will, which this court has. Plea over-ruled on the merits.

—Ld. Ch. entirely concurred with his Honour. By the statutes given by Q. Elizabeth, the visitor could neither give new statutes or put any others in execution. The Queen reserved the power of adding. And a case may happen that the master may be removed even for obeying the bishop's sentence. How, then, can the bishop be general visitor if such a case should happen? It has been held (in *B. R. Rex v. Bishop of Chester*, 2 Stra. 797.) that visitatorial powers may be suspended by circumstances, and may revive, and that during the cesser the jurisdiction devolves on the king's courts. So here, where the power of legislation is reserved to the crown. As to the plea in this case, the presentation is clearly not a subject of visitatorial power. His Lordship then examined the origin and nature of such a power, which is *forum domesticum fundatoris*; to which power a subsequent donor may subject his gift. Where a charity is vested in trustees, no visitor over them can arise by implication. Where a visitor's power is unlimited, his rule is his sound discretion; but if there are particular statutes, they are his rule; and if he acts contrary to them his acts are a nullity. If a subsequent donor has given the legal estate, or a trust, to the college, without declaring a special trust, or creating a distinct visitor, he has by plain implication intended it should be governed by the statutes of the founder; but in the present case, a special trust being declared, it puts an end to the visitor's power. Ld. Ch. put several other cases, all tending to show, that the bishop had no power over this rectory as visitor, and that the plea was properly over-ruled. — *Green v. Rutherforth*, E. 1750. 1 Ver. 462.

14. Equity will not extend visitatorial powers, which, as being sumnary and arbitrary, are liable to abuse; neither will the court establish a charity where there is a charter, for in that case it must be regulated according to the powers of that charter, or left to the original rules of law. *Att. Gen. v. Middleton*, T. 1751. 2 Ver. 328.

15. A visitatorial power may be divided, one set of visitors for one purpose, and another for another; and as no tech-
CHARITABLE USES I.

Endowment, By-Laws, Visitatorial Power.

mical words are necessary for creating it, the very appointment of governor of an hospital will give that power, and it is no objection to their being visitors, that the legal estate is vested in them; but if they are also invested with the receipt of the revenues, they cannot be visitors, for they cannot visit and account to themselves. S. C. et vide Case of Sutton Hospital, 10 Co. 31. S. P. Att. Gen. v. Foundling Hospital, post, pl. 18. S. P.

16. Where the statutes of a private foundation, under charter, have not been observed in any one instance, a repeal of them must be presumed. The rule of law is, that a corporation has a power to make by-laws. A court of law will direct a jury to find a by-law, and on account of non-observance, will presume a subsequent by-law to repeal and alter it. S. C.

17. Equity will not interfere with visitors where they have not the management of the revenues; but where they have the power to remove the masters of a grammar school for misbehaviour, &c. as in the present case, and a collusion appears between the master and usher, (the usher making a sinecure for the master, who received both the salaries) the court will decree the master to account to the charity for the usher's salary even for 15 years back. Att. Gen. v. Bedford Corporation, T. 1754. 2 Ves. 505.

18. The Foundling Hospital being regulated by governors, under a charter, and confirmed by parliament, had contracted to let the surrounding meadows on building leases; on motion for an injunction to restrain them, as deviating from the original plan and design of the charity, an injunction was refused, no injury appearing to be done to the hospital, nor even probable evidence of a breach of trust. Att. Gen. v. Foundling Hospital, H. 1793. 2 Ves. jun. 42.

19. The founder of the free-school at Woodbridge directed the heirs male of his foresses to appoint a master, and on their default that the right of election should be in the curate and churchwardens, and six chief inhabitants. The chief inhabitants at the time of the foundation, and the heir of the last surviving foesser could not be discovered, so that the Ld. Ch. became visitor in right of the crown. Two persons were elected at the last vacancy, and upon petition the Ch. declared both elections void. His Lordship doubted the visitor's power to elect a master, but directed a reference to the Att. Gen., to report what directions or Alterations would be proper as to the mode and right of election, and in the orders, constitutions, and directions of the school, and what to him should seem must conducive to the interests of the objects of the charity, and the furtherance of the donor's intention. Att. Gen. v. Black, T. 1805. 11 Ves. 191.

20. A general appointment of visitor not excluding a commission of charitable uses (under 43 Eliz. c. 4.) from special powers, which would fall within the general visitatorial power, is good; and where the commissioners made a decree in such a case, which was excepted to, on the ground that they had exceeded their authority, the court over-ruled the exceptions; first, directing a case to the judges in B. R., who certified that there was not any visitor, governor, or overseer of the hospital in this case so appointed within the meaning of the 43 Eliz. c. 4. as to exclude the application of the powers granted by that act. Exp. Kirby Ravensworth Hospital, M. 1808. 15 Ves. 305.

21. An information filed by the inhabitants of Harrow against the master and governors of that school, had three objects:—1. The removal of such of the governors as were not inhabitants, and unduly elected according to the founder's statutes.—2. The better administration of the revenues; and 3. An alteration in the present constitution of the school: Held, per Elden, C.—1st, That the court of Chanonry had no jurisdiction with regard to the election of corporators, (even though made by fraud) nor to their amotion; for eleemosynary corporations were the subject of visitatorial jurisdiction; therefore, when the crown became visitor for want of an heir of the founder, the removal of a corporator de facto, should be sought by petition to the great seal, and not by bill or information. (a) But when corporations are constituted trustees, the court have sometimes (by decree) devested them of their trust, for an abuse of it, the same as other trustees. (b) The information, as seeking a removal, was therefore dismissed. 2dly. As to the revenues including the manage-
CHARITABLE USES I. & II.

Endowment, By-Laws, Visitatorial Power.

...ment of the estates, and the application of the income, Ld. Ch. directed enquiries to be made to ascertain whether the estates were properly and advantageously managed, with a view to prospective regulation, and a lease granted to one of the governors, though without fraud, was set aside upon general principles, as inconsistent with his duty; he was therefore directed to deliver up the possession, and be charged with the full annual value. With regard to the application of the income to purposes partly specified by the founder's rules, and partly left to the discretion of the governors, as it was not altogether agreeable to the founder's direction, (though no improper motives were imputable to the governors,) the court directed a scheme to ascertain it, having regard on one hand to the rules of the founder, and on the other to the alteration of the times and circumstances, which might render a literal adherence to them adverse to their general object and spirit.

3dly. As to the constitution of the school, with a view to reduce it to a mere parochial school, by restraining the number of boys not on the foundation, the Ld. Ch. absolutely refused to interfere; for the admission of scholars without prejudice to the children of the poor inhabitants was expressly directed; and though the resort of the parish boys to that school was very small, it did not appear to be the result of abuse. His Lordship said, however, that there could be no objection to encourage attention to the parish scholars, by an allowance to the master for each. Ld. Ch. further said, that the expenditure was not to be measured by the number of parish boys who were to be immediately benefited by it, if fairly referrible to the purposes of the school. A considerable allowance therefore to the master, towards repairs, and enlarging and improving his house for the accommodation of boarders, his Lordship considered, upon the whole, not extravagant, as a benefit from the increased revenue in that shape, instead of an increased salary. Nor was it improper with reference to the general advantage of the school. Furthermore Ld. Ch. said, that the course of education, and internal discipline of the school, should be left to the governors and masters; for the governors were expressly authorized to alter the founder's rules, and alterations long known and acquiesced in, were presumed to have been made by their authority, though the precise order does not appear. But any substantial deviation from the principle and purpose of the institution, his Lordship said, was the subject of visitatorial jurisdiction. Att. Gen. v. Claren- den, E., T. 1810. 17 Ves. 491. Vide (a) Att. Gen. v. Dixie, 13 Ves. 519. (b) Att. Gen. v. Foundling Hospital, 2 Ves. jun. 42.

22. Under the late statute 52 Geo. 3. c. 101. this charity was regulated on petition instead of an information, and though the internal management of it was exclusively the subject of visitatorial jurisdiction, yet, under a trust as to the revenue, the court will control an abuse by misapplication. Exp. Berkhameat School, T. 1813. 2 Ves. & Be. 134. Vide Att. Gen. v. Foundling Hospital, 2 Ves. jun. 42. Same v. Dixie, 13 Ves. 519.

23. Equity has jurisdiction over all charities under 52 Geo. 3. c. 101. for the purpose of administering the funds, even though the charity be created by royal charter, provided the application does not extend to regulate or alter the charity, in which case the crown only can interfere by virtue of its visitatorial power. In Re Chertsey Market, H. 1819. Dan. 261. 6 Price 174.

CHARITABLE USES II.

Good Devise or Appointment. (a) Defects, where made good. (b) Where ineffectual and void in toto. (c)

(a) What is a good Appointment to a Charity to be protected by 43 Eliz. though in some Cases as a Devise it may be void.

24. Tenant in tail without levying a fine, or suffering a recovery, may appoint to a charity, and it shall bind him in remainder, though he does not come in under the tenant in tail. Tay v. Slaughter, H. 1690. Pre. Ch. 16. Att. Gen. v. Rye, M. 1703. 2 Vern. 433. where it is said the intent of the statute was to
CHARITABLE USES II.

What is a good Devise or Appointment.

make the disposition of the party as free as his mind, and not to bind him to legal forms. Vide also Att. Gen. v. Burdett, M. 1717. 2 Vern. 755.

25. A married woman got into possession of a large personal estate, which she concealed from her husband, and disposed of to charities: Held, that it should not be made good to the husband, so as to disappoint the charities. Pilkington v. Cuthbertson, E. 1711. 1 Bro. P. C. 357.

26. A settled lands, with power of revocation by writing in the presence of three witnesses, and in her last illness, by letter, desired a deed of revocation to be prepared, but died before it was done, having by will given the lands to charitable uses: Held, a good appointment, though no revocation. Figg v. Pearsie, E. 1717. Gilb. Eq. Rep. 137.


28. Devise of a residue in trust "for those persons that are commonly called dissenting ministers," naming some of them particularly: Held, a good devise to the ministers. Lloyd v. Spillat, M. 1734. 3 P. W. 346.

29. A devised lands to a charity by will, and lived till a month after the new statute of mortmain, when he died without revoking his will: Held, a good devise, and the trusts for the charity were established. Ashburnham v. Bradshaw, E. 1740. 2 Atk. 36. Barn. 6.

30. Testator by will desired his executors to settle and secure, by purchase of lands of inheritance, "or otherwise, as they shall be advised," out of his personal estate, a perpetual annuity to the poor and indigent people of L. and also "to settle and secure" one other perpetual annuity of 5l. to the vicar of L. for an annual sermon. Ld. Ch. thought, that though this would have been void in mortmain, if resting on the words "by purchase of lands of inheritance," yet, as testator went on in the disjunctive, "or otherwise, as his executors should be advised," thereby giving them another mode to secure the annuities, it was clear of the statute; and decreed that the money should be invested in South Sea stock, for the charitable purposes of the will.

Sorresby v. Hollins, T. 1740. 9 Med. 221.

31. Testator devised to a charity, his copyhold lands which he had previously surrendered to his will. His will consisted of eleven sheets, two of which he signed in extremis, and then died. There were no witnesses, yet held a good appointment under 43 Eliz. Att. Gen. v. Sawtell, H. 1742. 2 Atk. 497.

32. Bequest of money to a charity to be invested in the public funds, until the whole can be laid out in the purchase of lands to the satisfaction of the governors and trustees appointed by testator. This is not void in mortmain, which it would be if land was to be purchased in all events. The trustees here have a discretionary power, and they can never lay out the money in land to their satisfaction, for that would be, contrary to their trust, to defeat the charity legacy. Grimmet v. Grimmet, H. 1754. Amb. 210. Vide English v. Orde, Hig. Mort. 82. Kirkbank v. Hudson, 7 Price 212.

33. Where money is bequeathed to be laid out in land to the use of a charity, the court will place it in the funds till the purchase is made. S. C.

34. A. by deed in 1721, conveyed his estate to fourfifths, to the use of himself for life, remainder to his first and other sons in tail, remainder to certain officers of Christ's College, Cambridge, for charitable purposes. By his will in 1746, he confirmed the deed, but fearing that the statute of mortmain might defeat the uses, be ordered, if any of them should be contrary to law, the settled estates should go in augmentation of the stipends of the fellows and scholars of Christ's and Caius's Colleges. The conveyance in 1721 was admitted to be defective, the use being limited to certain officers of the college, and not to the corporation, so that there was a want of persons to take in succession. Upon a bill to establish this charity against the heir at law, two questions arose: 1st. Whether the defect in the conveyance should be made good in equity? and, 2dly. If it fell within the purview of 9 Geo. 2. c. 36. Ld. Keeper thought himself bound by the uniform course of precedents, to assist this conveyance in favour of the charity. As to the statute, it appeared clear that testator intended the whole society to be benefited in their
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corporate capacity in succession, and not the individual members personally; and therefore it was such a gift as the legislature meant to support by the exception in the statute. Decreed, that part of the gift to be established, but another part, for the maintenance of four law students in Lincoln's Inn, and also certain decayed merchants, soldiers, and clergymen, who should reside in the testator's house at Wicksley, his Lordship declared to be void by the statute. *Att. Gen. v. Tancred*, M. 1757. Amb. 351. In another report of this case, 1 Eden 10. It is stated thus: A conveyance to a charity, defective on account of the uses being limited to certain officers of the corporation, and not to the body corporate, will be aided by the statute 43 Eliz. c. 4; therefore, where the devise was “To 13 Fellows of Christ's and the Fellows of Goulville and Caius colleges living at testator's death,” it was held a devise for the benefit of the whole corporation, and not of the Fellows in their natural capacities, and valid under the exception of the statute of mortmain; for the legislature intended by that exception to save devises for the benefit of particular members as well as the whole body, and also to except such devises as were bona fide for the benefit of colleges, and not those where the legal interest only passes to the college in trust for other charities (a). But this exception does not extend to colleges established at the time of the statute of mortmain (b). *Vide* S. C. in 1 Bla. 90. (a) *Att. Gen. v. Munby*, 1 Meriv. 527. (b) *Ld. Rosslyn* doubted this in *Att. Gen. v. Bowyer*, 3 Ves. 728.

35. A. by will executed before the statute of mortmain, directed B. to settle a freehold estate to pay a sum “not exceeding 100l. per annum.” in such manner and upon such people, and on such a part of the poorer people of a parish, as he should think fit and find to be a most proper charity; B. by will executed after the statute, appointed a sum less than the 100l. per annum: held, 1st. That the appointment was not void by the statute; and, 2dly. That the amount to be appointed was discretionary in B., and not to be increased under the 43 Eliz. to the whole amount given by the will of A. *Att. Gen. v. Bradley*, T. 1760. 1 Eden 482. *Vide* *Att. Gen. v. Tancred*, 9b. 10. *Att. Gen. v. Heatwell*, 2 Eden 234.

36. Money bequeathed to repair a free chapel is not within the statute, for no money was to be laid out in land, but only expended to support that which was already in mortmain. *Harris v. Barnes*, T. 1767. Amb. 661. So of money to build a neat parsonage house, at the bottom of the parson's garden. *Brodie v. D. of Chandos*, M. 1773. 4 Bro. C. C. 444. (n) So of money to repair parsonage houses. *Att. Gen. v. Bp. of Chester*, H. 1785. 1 Bro. C. C. 444. So of the dividends of stock to be applied towards establishing a school in Cornwall, the court could not direct the purchase of land or the building of a school, but the master might teach in his own house or in the church. *Att. Gen. v. Williams*, H. 1794. 4 Bro. C. C. 526.


38. Testator directed the dividends of certain sums in the funds, to be applied "for or towards establishing a school;" and he afterwards declared his meaning to be, that the schoolmaster should not have a less salary than 30l. *per annum.* and that the overplus of the dividends should be applied in buying books, fire, clothes, and other necessaries for the children, and placing them out as apprentices; but no part to be applied for victuals, drink, or lodging. It did not appear that there was any school already in existence. The court not deeming this bequest void in mortmain, directed the master to approve of a scheme, &c. *Att. Gen. v. Williams*, E. 1794. 2 Cox 387. 4 Bro. C. C. 526.

39. A bequest to poor relations shall be sustained as a good charitable use. *White v. White*, T. 1802. 7 Ves. 423.

40. W. E. in 1581, devised all his lands to A. and his heirs, with a direction, that yearly he and his heirs shall for ever distribute, according to his and their discretion, amongst testator's poor kinsmen and kinswomen, and amongst their issue, dwelling within B., 20l. *per annum.* without fraud or collusion: Held in the nature of a charitable bequest, and proper enquiries directed. *Att. Gen. v. Price*, E. 1811. 17 Ves. 371. *Vide*
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41. Testator bequeathed 1000l. to public and private charities, to be paid annually under the direction of Dr. C. Also to the poor of Chester 1000l. for ever, and to be distributed annually under the direction of Dr. C. These legacies were charged by the testator on his real and personal estates, and such part of his personal estate as was out on mortgage: Held void under the statute of 9 Geo. 2. c. 36. Currie v. Pye, E. 1811. 17 Ves. 464.

42. A bequest of a residue "to the widows and children of seamen belonging to the town of L." Held, a valid charitable bequest, to be applied in aid of a subsisting charity, for such of those objects as should be deemed deserving by the persons appointed to administer the charity. Powell v. Att. Gen. T. 1817. 3 Meriv. 48.

43. A grant to trustees and their heirs, of lands in trust, out of the rents to raise and pay certain annual sums, for the benefit of the rector and scholars of Exeter Coll., Oxon; and as to the residue, after payment of all taxes, and charges of repairs, &c. the same was to be yearly paid to and among the vicars, for the time being of four several parishes, for the augmentation of their respective livings; they the said vicars, to collect the rents, and account with the trustees to view the estates, and take care that the same be kept in good repair by the tenants, with a declaration, that it should not be lawful for the trustees, during 40 years, to cut timber, except such as should be wanted for the necessary repairs of mills, &c. and other appurtenances belonging to the estates; and except such young slabs and tillers in the woods, as should be necessary for selling the underwood; and after the expiration of the 40 years, then, what the trustees should have power to cut as they should think fit, and pay the produce to the said rector and scholars of Exeter Coll., as a fund for the augmentation of their library: Held, that by the construction of the deed, the estates were given as one fund for the benefit of two distinct institutions, and the whole was to be managed for the benefit of both in a due course of provident ownership; that the trustees were not restrained after the expiration of the 40 years, from cutting timber for repairs, nor from cutting timber on one part of the estates for repairs on another part, nor from selling timber when cut, and applying the produce in necessary repairs, so as they cut no more timber in the whole property than the repairs on the whole required: Held also, that the power of cutting young slabs and tillers continued, with the qualification annexed to it. Att. Gen. v. Geary, Br. T. 1817. 3 Meriv. 513. Vide Weiber v. Winton. Dean & C. ib. 422.

44. Bequest of stock to be laid out in rebuilding almshouses, which were proved to be in mortgage before the 9th Geo. 2. c. 36. (by an old inscription, and an extract from a local history,) is good. Shaw v. Pickthall, H. 1818. Dan. 92.

45. By an act 13 Geo. 3. certain commissioners were authorized to levy a rate on the occupiers of all houses in B. for paving, watching, and lighting the town; and another rate on every child of a coal brought into the town, for repairing or building works to protect B. against the sea; and reciting, that the inhabitants were unable to raise money for the purchase without the aid of parliament, with power of distress, and liberty to apply the surplus of the coal rate in aid of the poor rate. Demurrer to an information, overruled, stating, that the commissioners had, during several years, levied the coal duty at its maximum, and applied a large proportion of the produce in aid of the rate for paving, &c. instead of constructing and repairing works for protecting the coast. The object of the act held to be a charitable use, and within the 43 Eliz. c. 4., and therefore that this court had jurisdiction to take an account of the duty, to ascertain how it had been applied, and to give directions for the future application of it, in the ordinary way in which it acts as to other charitable purposes. Att. Gen. v. Brown, E. 1818. 1 Swanst. 265. 1 Wils. 323.

46. A bequest of a sum of money to erect a blue coat school and establish a blind asylum, directing that lands should not be purchased, but expressing an expectation that lands would be given for the purpose of such charities. This bequest is not void under the mortmain act. Hesskine v. Atkinsen, T. 1818. 3 Madd. 305.

47. A bequest of money to be laid out in the funds, and the dividends to be applied in providing a proper school-house, was held to be a good charitable bequest,
CHARITABLE USES II.

Devises or Appointments.—Where void.—Where made good.

as a school-house might be hired. So a bequest of a personal residue, for the benefit of such public and private charities as the executors should think fit, and amongst others, to establish a life-boat at Brighton, was held good; but money on mortgage and a lease, will not pass, as being void in mortmain; yet fixtures in the house demised were held to pass as part of the personal residue. Johnson v. Swann, M. 1818. 9 Madd. 457.

(b) Defective Devises or Appointments made good in Equity.


49. Testator gave the residue of his estate to the poor of the parish of H. in L., but that parish was in N.—It was set up by the next of kin, that testator did not imagine his residuum would exceed 10l., and had so declared, whereas it amounted to near 1000l.—The court thought parol evidence should be admitted to help out the description of the parish, but not as to the quantity of the thing given. Brown v. Langley, H. 1732. 2 Barn. 1818.

50. L. S. by indenture, executed more than 12 months before his death and duly enrolled, granted a house and premises held under a church lease, to Trin. Col. Camb., in trust for the rector of G. This was held a valid grant, though I. S. himself was then the rector of G. and retained the deed in his own possession. But an assignment of a mortgage and of the money due thereon to the same college upon the like trust was held void, as being executed within one year before the death of the donor, and not capable to be set up, by reference to a will made afterwards, whereby I. S. gave the advowson of the living beneficially to the college: Held also, that a bequest of money to be laid out in building upon land already in mortmain was good. And it was further held, that a recital in a will of property given by deed to charitable uses, which falls not from any defect in the instrument, but because the grantor did not live to the period prescribed by the statute for rendering the deed effectual, shall not operate as a confirmation by relation, so as to pass the property thereby assigned: And, lastly, it was held, that a great of land to a college not beneficially, but in trust, falls not within the exceptions of the statute in favour of the Universities. Att. Gen. v. Munby, E. 1818. 1 Mariv. 327. Vida Att. Gen. v. Parsons, 3 Ves. 186.

(c) Devises or Appointment, where ineffectual or void in toto.

51. L. S. devised freehold, copyhold, and leasehold lands to trustees for maintaining poor scholars in Sidney Coll. Camb., and for other charities.—The will was written in testator’s own hand, but had no witnesses.—In a codicil executed in the presence of four witnesses, testator recited his will and deed, having previously surrendered his copyholds.—Ld. Ch. said, the judges had carried such cases on 45 Eliz. to great lengths in favour of charities which the makers never thought of; and after consideration, declared that the will, not being good as a will, could not operate as an appointment, for he was very unwilling to break in on the statute of frauds. Att.-Gen. v. Baines or Barnes, M. 1708. 2 Vern. 597. Pre. Ch. 270. 3 Ch.Rep. 81. Gilb. Eq.Rep. 5. nom. Case of Sidney Sussex Coll. Sed vice Att. Gen. v. Sawtelle, 2 Atk. 497. Wagstaff v. Wagstaff, 2 P. W. 258. Att. Gen. v. Andrews, 1 Ves. 225. Hussey v. Grills, Amb. 229. Vida etiam Jenner v. Harpur, Pre. Ch. 389. 1 P. W. 247, where a parcel devise out of lands was held not a good appointment under 47 Eliz. though before the statute of frauds.—et Adlington v. Cann, 3 Atk. 141.

52. A. seised in fee of lands, and being cestui que trust of other lands, devised them to B. his nephew, for life, remaining to his first and second son in tail male (going no farther,) and after the nephew’s death without issue male, then to the trustees for a charity. The nephew suffered a recovery, and died without issue.—The trustees filed a bill to establish the charity, and defendants pleaded B.’s recovery in bar of the charity’s claim, which plea being allowed by the Barons, the trustees appealed to the Lords, who reversed the order allowing the plea. But the rights of the parties not being thoroughly determined, the cause came on again in Stace, nom. Att. Gen. v. Young, H. 1732. 2 Com. Rep. 423, when the Barons decreed that the recovery
CHARITABLE USES II. & III.

Where Devises good.—Where void in Mortmain.

suffered by B. as to the trust estate, was void, being contrary to the trusts of testator's will, and ordered defendants to convey to the charity, but as to the estate in fee, it was determined upon an ejectment at law, that B. was tenant in tail until issue born, and his recovery was good to bar the charity. *Att. Gen. v. Sutton*, M. 1721. 1 P. W. 754. 2 Bro. P. C. 382. Fortesc. 66. Fitzg. 13. 8 Mod. 257.

33. A. by will, gave an annuity of 50l., and 100l. in money, to B. and his heirs, and if B. died without heirs, then to a charity. B. died without issue, and then testator died; on a bill to establish the charity, held, that the devise being to B. and his heirs, and if B. die without heirs, then to a charity, the devise over is void, and the word heirs shall not be construed to signify heirs of the body, where the devise over is not inheritable. And the death of the first devisee in the life-time of the testator can make no difference, if the will was void at the making. *Att. Gen. v. Gill*, T. 1726. 2 P. W. 569.

34. Testator made his will in 1725, and left his estate to build a charity-school and other such purposes. Hearing afterwards of the new statute of mortmain, and fearing that his charitable disposition of the estates would be thereby avoided, he made a new will in 1738, whereby he devised the premises to defendants and their heirs, without declaring any trust on the face of the will; but he subscribed a writing, wherein he recommended defendants to see his will performed according to the humble request and the warded and well-disposed charitable disposition of (defendant) C. towards all men, and to bring the whole affair to its desired issue. Testator soon died, and his heirs at law brought a bill to set aside this devise, as void by the act. These questions arose, whether there was a specific declaration of a trust for a charity, to bring it within 9 Geo. 2. c. 56. of mortmain? and whether to bring it within that statute the trust must be declared according to the statute of frauds? and next, whether the above paper writing was a sufficient declaration within the statute of frauds? Ld. Ch. said, the present case was within the statute of frauds, and observed, that devises to charities had been repeatedly held to be within that statute, though it had beenendeavoured to make wills not executed according to that statute, operate as appointments, but that could never prevail. In all cases of charity before the court, it has been held that the declaration of trust for a charity meant to express as the statute of frauds directs; and his Lordship added, that if a bare parol avowment of a trust for a charity upon a will was to be allowed, the statute of mortmain would do more harm than good.—As to the next consideration, whether the paper writing was a sufficient declaration of trust within the statute of frauds, Ld. Ch. held it was not, though in the case of a seisinment it might have been a good declaration of a use.—His Lordship offered to retain the bill that the heir, who was an infant, might bring an ejectment, but the parties chose to have the bill dismissed without costs. *Adlington v. Cann*, T. 1744. 3 Atk. 141.

CHARITABLE USES III.

Of the Operation of the Statute of Mortmain.

Of Devises void in Mortmain, and where an Endowment of Money is so attached to the Gift as to stand or fall with it.

35. Testator, by will, devised his freehold and copyhold lands to his executors in trust to sell, and out of the produce to apply 1000l. to be laid out as a fund for certain charitable uses, which he forbore to mention, because his executors knew his designs. Testator then bequeathed all the monies to arise by sale of his real estates, and all rents and profits until a sale, and all his personal estates subject to debts, to his executors in trust, for Bethlem and St. George's hospitals.—Bill to establish this will against the heir.—The heir pleaded the statute of mortmain, and set out his title as heir. Ld. Ch. said there were two considerations—1st. The construction of the statute—2d. The effect of testator's will.—His Lordship then took a view of
the act, which, he said, imports that it shall not be in the power of any person to convey the lands themselves, and next, that they shall not charge and incumber them; therefore no man can charge even 100l. on any land to a charitable use by the statute. Then as to the will, the donation was a devise, not only of the land itself, but of its produce, and of the rents and profits until a sale, which nobody but the charity could compel; besides, a devise of the rents and profits is a devise of the land, and the person entitled to the produce of the land, when sold, might elect to have the land itself. It is impossible such a devise can be maintained. Plea allowed. Att. Gen. v. Lord Weymouth, H. 1743. Amb. 20.

56. I. M. by will, in 1734, before the mortmain act, devised particular lands and his personal estates, to be laid out in land to charitable uses. By codicil, in 1736, after the act, I. M. declared, that if by the mortmain act his estates could not pass to those uses, he then devised them to B. By a second codicil, in 1737, testator reciting that he was advised his devise of the land to the charity was void, bequeathed his personal estate to the charity, and the real to B. Testator died in February, 1738. On a case stated to B. R. the Judges certified that the estates were well devised to B. by the second codicil, and Ld. Ch. decreed the same to him accordingly. Att. Gen. v. Lloyd, T. 1747. 3 Atk. 551. 1 Ves. 32. Vide Ashburnham v. Bradshaw, 2 Atk. 36.

57. T. E. devised a copyhold estate to C., being 1000l. to be paid to his executors, and after debts and legacies, testator bequeathed all the residue of his estates, freehold, copyhold, leasehold, &c, to a charity. The bequest to the charity as a charge on land, is void by the statute, and results to the heir. Arnold v. Chapman. Case of Foundling Hospital, T. 1748. 1 Ves. 108.

58. H. W. by will, in 1734, devised particular lands to charitable uses. In 1744 he added new trustees and confirmed his will. The republication of the will by the codicil after the statute, rendered the devise clearly within it, and void. Willet v. Sanford, M. 1748, 1 Ves. 178. In Att. Gen. v. Andrews, 1 Ves. 225. a devise of copyhold lands not surrendered to the use of a will made before the statute, was held good, on the


60. A mortgagee in fee and in possession (under a hab. fac. possess.) with foreclosure, by will, in 1744, devised all the money due to him on that mortgage to a charity, and died in possession. Upon a bill to establish the charity, M. R. said, that the testator having both the legal and equitable estate, his devise in the present case came within the words as well as the plain intent of the statute of mortmain, and therefore his Honour dismissed the information, but without costs, as it was a new case. Att. Gen. v. Meyricke, M. 1750. 2 Ves. 44. On the authority of this case, Att. Gen. v. Martin was decided by Ld. Bathurst in 1776. Vide etiam Att. Gen. v. Tompkins, Amb. 216.

61. H. directed her real estate to be sold, and her debts and legacies to be paid out of her personal estate, the residue to her trustees, to be distributed in charities as her executors should think fit, particularly recommending the hospital at Bath. The trustees were desirous to pay the debts and legacies out of the produce of the real estate, so that the personal should remain entire to the charity, sed non allocatur, for it would be contrary to the express direction of the will to marshal the assets in that manner; the trust must either take effect according to the intent, or not at all; and money arising from real estates, must be accounted us real. Megg v. Hodges, M. 1750. 2 Ves. 52.

62. H. devised the residue of his real and personal estate to defendant for life, with power of appointment at her death, in default of which, testator directed his trustees to erect in or near York, an hospital for the maintenance of as many poor men as the surplus of his estate and effects would admit of. Bill, by the heir at law, against the charity. Per Ld. Ch. As the heir has not tried the validity of the will, nothing is left to determine upon but the construction. The
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remainder over of the real estate is void by the statute, and the reversion in fee belongs to plaintiff; but as to the residue of the personal, it belongs to the charity. The word "erect" imports foundation as well as building; so does "originus" in charters. Vaughan v. Ferrer, H. 1751. 2 Ves. 182.

65. If a sum of money is left to trustees for a charity, they may privately lay it out in land, for there is nothing in the statute to prevent them; but if they go into equity, the court will neither direct nor encourage it. S. C.

64. There is nothing in the statute to prohibit money being left to build a church or an hospital, &c. or to add to buildings, so there be no direction in the will to purchase lands. S. C.


66. I. E. by will, in 1758, gave his debts, securities, and ready money to trustees, in trust, till they could purchase land to pay the interest of 120l. to the poor of H. and Willed, that as soon as the trustees could meet with a suitable purchase, they should lay out 120l. in lands of inheritance, to be vested in them for ever upon the same trust. M. R. thought the second clause directory and not discretionary in the trustees, and decreed the devise void, for he would not go no further than Grimmet v. Grimmet, (Amb. 210. et ante, sec. ii. pl. 32.) English v. Orde, T. 1754. Highm. Mortm. 32.

67. W. R. by will, in 1745, gave 500l. to trustees to lay out 200l. in erecting a small school-house, and a house for the master; the whole purchase and building not to exceed that sum, and the remaining 300l. to be laid out in the purchase of land, or on some real security for the maintenance of the master. Ld. Hardwicke held, that the word "real" must be taken in its known legal signification, and that the legacy, quoad the 300l. was void; but as to the 200l., if any person would give a piece of ground, the trustees might lay out the money in erecting a school and house upon it. Att. Gen. v. Bowles, T. 1754. 3 Atk. 806. 2 Ves. 547. In Att. Gen. v. Tyndall, 2 Eden 212. Ld. Northington stated, that this case had no influence on his judgment, and considered such construction as frettering away the statute; and subsequent cases, from Pelham v. Anderson, 9 Ves. 191. down to Att. Gen. v. Munby, 1 Meriv. 327. (see them collected by Mr. Eden, in a note to Att. Gen. v. Tyndall, supra,) have given a construction to the word "erect," different from that given by Ld. Hardwicke, supra, and it is now considered, prima facie, the testator must be taken to mean by that word, that land shall be bought.

68. Bequest of money to be laid out under the direction of the minister and churchwardens of R. to erect a free-school there, is void, though there was a piece of waste land in the parish, on which the old free-school stood; but the testatrix did not point out that by her will, nor was there any reason to presume she meant it. Att. Gen. v. Hutchinson or Hyde, or Case of Roseton Free School, T. 1755. Amb. 751. 1 Bro. C. C. 444. (n.) Vide Ld. Thurlow's comments on this case, in Att. Gen. v. Nash, 3 Bro. C. C. 588.

69. A legacy towards "the erecting and endowment of a hospital for the county of D." is void, if it is necessary to purchase land for the purpose; but it may go in aid of an endowment of an hospital already existing. Foy v. Foy, H. 1758. 1 Cox 163. 1 Bro. C. C. 392. (n.)

70. Where a devise was proved to be made on a secret trust for a charity, it was held void, though the devisees had conveyed the lands to the charity upon those trusts; and the conveyances were set aside. Edwards v. Pike, E. 1759. 1 Eden 267. Vide Boson v. Statham, 1 Cox 17.

71. The object of the statute is to prevent new acquisitions in mortmain, therefore money left to build a new parsonage-house is not within the statute. Clubb v. Att. Gen. T. 1759. Amb. 373.

72. A lease for years under the crown, of a right to lay mooring chains in the Thames, is a franchise like a market, and an interest in the inheritance, therefore a devise of such a lease is void. Negus v. Coulter, T. 1759. Amb. 567.

73. A devise to A., B. and C., and the heirs of the survivor, which, by a separate deed, of even date with the will, was declared to be in trust for a charity,
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74. Devise of freeholds and leaseholds to be sold, and thereout to buy ground, and erect an alm-house, and the residue, together with all the personal estate, to be laid out in land for its endowment. The devise of the lands being void under the statute of mortmain, the M. R. decreed, that if the trustees could obtain its gift, a piece of ground, they might erect thereon, (on the authority of Att. Gen. v. Bowles, ante, pl. 67.) On appeal, Northington, C. held the gift of the general residue of the personal estate as void, as being given to be laid out in lands, and distinguished this case from Att. Gen. v. Bowles, for in that case the trustees were only to erect alm-houses, whereas in the present, they were to buy the land; and therefore reversed that part of the decree. Att. Gen. v. Tyndall, E. 1764. 2 Eden 207. Amb. 614. It is now clearly established, that unless the testator distinctly points to some land already in mortmain, the court will understand him to mean, that an interest in land is to be purchased, and the gift is not good. See the cases collected, 2 Eden 214. (n.)

75. R. H. by will, before the statute, gave all his personal estate to be laid out in land, and settled to charitable uses. After the statute he made a codicil, (not stetted,) gave a few legacies, confirmed his will, and died. Per curiam, though the devise to the corporation is void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. Decreed, the beir is a trustee to the uses of the will. Sealey v. Clockmakers' Co. T. 1780. 1 Bro. C. C. 81.

76. Testator devised land charged with charitable and superstitious legacies; they are void in mortmain, and shall sink into the estate for the benefit of the devisee. Jackson v. Hurlock, M. 1764. 2 Eden 263. Amb. 487.


78. Bequest of the residue of testator’s effects, mortgages, bonds, &c. to a charity; the mortgages in this case were for years, but still they are an interest in land, and the gift as to them is void, but the court ordered the mortgage money to be applied in the first place to pay debts. Att. Gen. v. Caldwell, M. 1766. Amb. 638.

79. Bequest of money to the corporation of Queen Anne’s bounty, to augment poor vicarages, is void by the statute of mortmain, for the corporation are bound by their rules to lay out their donations in land. Widmore v. Woodruff, M. 1766. Amb. 636. 1 Bro. C. C. 13. (n.)

80. Legacy of 1000l. to arise by sale of testator’s real estate, to bring water up to a town, for the use of the inhabitants for ever. This is a charitable as well as a public use, and void by the statute. Jones v. Williams, T. 1767. Amb. 561.

81. Devise of land in remainder to a body corporate, in trust for testator’s nephews and nieces, and their children, &c. Per curiam, though the devise to the corporation is void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. Decreed, the heir is a trustee to the uses of the will. Sealey v. Clockmakers’ Co. T. 1780. 1 Bro. C. C. 81.

82. A bequest for preaching a sermon on Ascension-day, for keeping the chimes of the church in repair, and for a payment to be made to the singers in the gallery of the church, are all bequests to charitable uses within 45 Eliz. Turner v. Ogden, H. 1787. 1 Cox 316.

83. Devise of freehold houses to eight poor persons, in the parish of M.; the gift being void in mortmain, a personal fund attached to the freehold was held void also, and the court could not apply the gift to any other purpose. Att. Gen. v. Goulding, M. 1783. 2 Bro. C. C. 428. In Att. Gen. v. Boultbee, 2 Ves. jun. 380. Arden, M. R. doubted this case, but fully established it, upon a review of all the cases, in Att. Gen. v. Whitchurch, 3 Ves. 141.

84. Testator gave a legacy to a charity “to be raised out of his real estate;” this is void in mortmain. Afterwards, by codicil, he gave a less legacy “instead thereof” to a different charity. The codicil only alters the quantum of the legacy, and not the fund out of
which it is payable. The legacy by the
codicil is void also. *Lacroft v. Maynard*, 1791. 3 Bro. C. C. 233. 1 Ves. jun. 279.

83. Residue of a personal estate given
by testatrix to trustees "to cause to be
erected and built a dwelling house, to be
appropriated for the use of a school-
house;" and testatrix directed and em-
powered her trustees to buy land for
that purpose. The trustees purchased
land with their own money, which they
offered to give to the charity. On de-
murder held, that the legacy was void.

86. A conveyance of land to a chari-
table use, enrolled within the time lim-
ited by the statute of 9 Geo. 2. c. 36, is
not void by reason of any reservation to
the grantor of a power of regulating the
charity. It is sufficient that the deed is
executed by the grantor at the time of the
enrolment, and it need not be executed by
the grantee: Held also, that a be-
quest of money to be laid out in land,
and applied to a charitable use, but until an
eligible purchase can be made, to be laid
out at interest, and the interest applied
in the same manner, does not give any
alternative to the trustees, but is void by
the statute. And so is a bequest made in
favour of two persons by name, if given
to them for officiating in a charity void by
2 Cox 301. 4 Bro. C. C. 67. 1 Ves. jun.
548.

87. A freeman of London devised the
residue of his real and personal estates
to be laid out in land for a charity. The
device is void; for the privilege, by the
custom, extends only to lands within the
city. *Middleton v. Cater*, T. 1793. 4
Bro. C. C. 409.

88. Bequest of real and personal estate
to a trustee to take a house for a school
to educate children of particular persons,
and other children, is good as to the par-
ticular objects, but bad as a general per-
manent charity. *Blandford v. Thack-
rell*, or *Fackrell*, 2 Ves. jun. 238. 4 Bro.
C. C. 594.

89. A devised four freehold tenements
to the churchwardens of S., to be after
the manner of alms-houses, and he be-
queathed 2000l. stock as an endowment.
The devise is void, and the endowment is
so attached to the gift as to fall with it.

141. This case was decided on the au-
C. C. 428. ante, pl. 83.

90. Settlement of the wife's estate, as
the husband and wife or the survivor
should appoint; and in default, to the
heirs of the husband. The wife survived,
and appointed to a charity. Decreed, to
the heirs of the husband. *Att. Gen. v.
Ward*, E. 1797. 3 Ves. 327.

91. Bequest to the society for in-
creasing clergymen's livings in England
and Wales, for the perpetual purpose of
increasing their livings." *Per curiam*,
as Queen Anna's bounty alone answers
this description, the bequest must be
void by the rules of that corporation.
*Middletott v. Glitrow*, E. 1798. 3 Ves.
784.

92. A charity legacy secured by a
mortgage, is void by the statute. *Whits
v. Evans*, T. 1798. 4 Ves. 21.

93. Legacy to the trustees of a chapel
for protestant dissenters, to be applied
by them towards discharge of a mortgage
on the chapel, is void by the statute.
*Crobyns v. French*, H. 1799. 4 Ves. 418.
So is a bequest of money to enable the
trustees of a charity to complete a con-
tract for the purchase of land. S. C.

94. A sum of money, secured upon
mortgage of turnpike tolls, is an interest
in land, and within the statute; but there
is another sort of toll which gives no right
at all in the land, and that is a toll thro-
4 Ves. 430. (n.) *Vide citam Finch v.
Squire, post*, pl. 101.

95. Devises of freehold houses to be
sold, and after payment of debts and leg-
egacies, the residue of the money to be
appropriated to the improvement of the
city of Bath. This is void by the statute.
542. So are bonds of commissioners of a
turnpike. S. C.

96. Trust by will for building a chapel
where it may appear to the executors to
be most wanted; if any overplus, to go
to the support of a faithful gospel minis-
ter, not exceeding 20l. per ann.; and if
any further surplus, then to go to such
charitable uses as the executor shall
think proper. The whole trust is void,
both as to the real and personal estate,
for the testatrix contemplated no residu
but what should be constituted by actu-
ally building the chapel. *Chapman v.
Brown*, T. 1801. 6 Ves. 404.
Of the Operation of the Statute of Mortmain.

97. Trust of real and personal estate by will, for the purpose of establishing a perpetual botanical garden, declared void, upon the expression of the testator, that he trusted it would be a public benefit. Townley v. Bedwell, T. 1801. 6 Ves. 194. Vide Wheldale v. Partridge, 5 Ves. 388. and the cases there referred to.

98. A bequest for re-building, repairing, altering, or adding to, and improving almshouses, is valid to the extent of any application upon the land already in mortmain, but it is bad so far as any additions are to be made by acquiring any other land. Att. Gen. v. Parsons, H. 1803. 8 Ves. 186.

99. A bequest to "erect" a charitable foundation, imports that land is to be bought, unless the testator's will manifests a purpose that is to be otherwise procured. S. C. ibid. 191.

100. A legacy to build almshouses, and purchase the ground, with a residuary bequest to a charitable society, (not having any lands in mortmain, nor any endowment,) provided they will furnish a piece of ground whereon to build the houses, taking the management, and if not, substituting trustees, with a direction to procure a piece of freehold ground. The whole was held void as to the primary object, under the statute 9 Geo. 2. c. 36. being to purchase land whereon to build the almshouses, or at least land already in mortmain not being distinctly pointed out; and as to the secondary object, though alone it might have been good, yet the principal object with which it was connected failing, it must fall with it. Att. Gen. v. Davis, T. 1804. 9 Ves. 335. Vide Chapman v. Brown, 6 Ves. 404. Attorney General v. Whorewood, 6 Ves. 194.

101. Money secured by assignment of the poor rates and county rates, is within the statute 9 Geo. 2. c. 36. and therefore cannot pass under a bequest to a charity. Finch v. Squire, T. 1804. 10 Ves. 41. Vide etiam Knapp v. Williams, ante, pl. 94.

102. A devise of real estate to be sold, and the produce, with the personal estate, upon trust, to be laid out in lands, or the funds, for the maintenance of a charity in Scotland, is void as to the produce of the real estate, but good as to the personal property, by the effect of the option. Curtis v. Hutton, E. 1808. 14 Ves. 527.

103. A bequest of money to clothe poor children educated in the nunnery school of W. would be void in England, as contrary to public policy and the statute of Edw. 6.; and so would a bequest of money to purchase or build a house for twelve reduced gentlemen, as contrary to 9 Geo. 2.; but not so in Ireland, for these statutes do not extend to Ireland. Att. Gen. v. Power, E. 1809. 1 Ball & Be. 150. 154. Et vide S. C. more fully stated, post, sec. vi. of this title. Vide etiam Carey v. Abbot, 7 Ves. 490.

104. The statute of Mortmain does not extend to the colonies, for the object of that statute was wholly political, and was intended to have only a local operation. Neither are alienations in mortmain inter vivos prohibited, though they are regulated, by the statute, it requiring them to be enrolled in the court of Chancery in England. A real estate, therefore, or the money produced by the sale of a real estate, in Grenada, may be devised to a charitable use. Att. Gen. v. Stewart, E. 1817. 2 Meriv. 143. 168.

105. Testator, after giving the residue of his personal estate to trustees for the perpetual endowment of two schools, then proceeds to "recommend" his trustees at a convenient time to lay out the money, when collected, in the purchase of freehold lands, to effect the above purpose. Although the gift of the personality would be a valid bequest, yet the word "recommend" is imperative on the trustees, and leaves them no discretion; unless, there be in some other part of the will an express option given to lay out the money in the way recommended, or not. The bequest is therefore void. Kirkbank v. Hudson, E. 1819. 7 Price 212. Vide Malim v. Keighley, 2 Ves. 338. 529. As to the construction of "recommend," vide post, tit. Words.
CHARITABLE USES IV.

Superstitious or impolitic Uses. Application to other Uses.

Of Devises or Appointments good as to Gift, yet void as to the Use. And herein of altering or diverting the same to purposes ejusdem generis.

106. Bequest of 600l. to sixty ejected ministers. The use of this charity is void, but not the charity itself. The use being void, the king gave the money towards building Chelsea Hospital. But Lord Keeper thought it should go oedem generis, and appointed it to maintain a chaplain at Chelsea. *Att. Gen. v. Baxter* T. 1684. 1 Vern. 248. *Sed vide Att. Gen. v. Hughes*, 2 Vern. 105: which is a branch of S. C., by which it appears that Lord Keeper's decree was reversed, and the money distributed according to the donor's will. *Vide stiam Moggridge v. Thackwell*, 1 Ves. jun. 469, where Ld. Thurlow said, that this case perhaps would not be followed.

107. I. S. by will, gave an exhibition to maintain Scotchmen in Oxon, to propagate the doctrine of the English church there. It was insisted that this charity cannot take place expressis, presbytery being established in Scotland by act of parliament; yet the substance may be pursued, and ought to be performed *cy pres*.—This is only a note of a case, and the decree does not appear. *Att. Gen. v. Guise*, E. 1692. 2 Vern. 266.

108. Bill to establish a charity given by a codicil, by which testator devised his residue, "for encouraging such non-conforming ministers as preach God's word in places where the people are not able to allow them sufficient and suitable maintenance, and for encouraging such as are designed to labour in God's vineyard as dissenters." Testator appointed two persons to dispose of his charity; both of whom died in his life-time. *Per curiam*, though this is a lapsed legacy at law, yet in equity it subsists: and the substance of the charity remains: and there is sufficient evidence of the testator's intent to maintain it under 43 Eliz. c. 4. Upon the next point, Ld. Ch. thought this was not a superstitious use within 1 Edw. 6. c. 14. Non-conforming ministers and dissenters here mean such Protestant dissenters as act under the Toleration Act of 1 W. & M. c. 18. Decreed, the residuum to be disposed of in presenti, and not in a perpetual charity. *Att. Gen. v. Hickman*, 1732. 2 Kel. 34. pl. 24.

109. E. P. (a Jew,) gave 1200l. to establish a *seneb*, or assembly for reading the Jewish law. *Per curiam*, this is in itself a charity, though contrary to the policy of the law: and the bequest is in the disposal of the crown. *Note*, it appears the king gave this legacy to the Foundling Hospital. *Da Costa v. Depa*, T. 1734. Amb. 228.

110. The college of William and Mary in Virginia, who were appointed administrators of certain charities in America by the donor's will, and incorporated by charter, (regn. W. & M.) having become subject to a foreign power, and being no longer a corporation, a new scheme must be laid before the master for the regulation of the charity: for where a trust for the advancement of Christianity (from local incidents) is in want of objects, the whole must be appointed *de novo*. *Att. Gen. v. London City. Case of Hon. Robert Boyle's Charity*, M. 1790. 3 Bro. C. C. 171. 1 Ves. jun. 243.

111. A legacy was given to Protestant dissenters to pay off a mortgage on their chapel, which being void by the statute, they contrived other means to pay it off. The court would not say the money might not be employed in repairing the chapel, but it could not be applied to any other purpose. *Corbyn v. French*, H. 1799. 4 Ves. 418.

112. Legacy to such purposes as the superior of a convent or her successor may judge most expedient. Void as a superstitious use. *Smart v. Prujean*, M. 1801. 6 Ves. 567. *Vide De Garrein v. Lawson*, 4 Ves. 433.

113. Rosary bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith, is void: yet the fund does not go to the next of kin; but is in the disposition of the crown to some other charitable use by sign manual. *Cary v. Abbott*, T. 1802. 7 Nes. 490.

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relates only to superstitious uses of a particular description than existing. S. C. 405.

115. Testatrix bequeathed the residue of her personal estate for the use of the Welsh Circulating Charity Schools, as long as they should continue; and for the increase and improvement of Christian knowledge, and for promoting religion, and to purchase bibles, and such other religious books, pamphlets, and tracts, as her trustees should think fit, to go to the same uses with those already bought, and to be kept by her servants in a freehold house, devised by the testatrix to trustees for them during life, and for that purpose: upon a bill to establish this charity, the master reported several necessary regulations, when the cause coming on for further directions, Ld. Ch. said, that the testatrix clearly thought that the charity might be discontinued before the death of the servants she appointed to live in the house, but meant that the charity should be maintained as long as her property would support it. The establishment of a school of this sort is to be regarded with great jealousy, conducted under no authority, the master not licensed, the nature of the books, except bibles, not ascertained, and the residence of persons sent to different parts regulated upon a system contrary to the establishment of this country, which gives the schoolmaster a connection with the place for life. When we see the use that is made of itinerant preachers especially allotting to each of them a temporary residence which makes them more mischiefous than they would be without such a system; a great deal is to be guarded against before the court can countenance the plan, but if no other objection can be made, it is hard to say there is not enough in the will to show the general intention and charitable purpose of promoting Christian knowledge, and it would not be difficult to decide whether this system shall be permitted to go on under no other checks than it provides, or whether this court, looking at the object of the institution, would secure that object, by applying those guards and checks which the law applies to interests of a similar nature. In the way of that general question, his Lordship knew no case except Brown v. Yeall, (stated 7 Ves. 50. n.) in which Lord Thurlow's opinion was, that testator not having given this court more of specific direction as to the nature of the books to be purchased and circulated, than they were to be such as may have a tendency to promote the interests of virtue and religion and the happiness of mankind, had not given direction enough; and therefore Lord Thurlow held the next of kin entitled; but this is not exactly that case, for in that case bibles were not mentioned. Here Ld. Ch. felt himself bound to say, that whether there was more or less objection to the words "other religious books and tracts" there is a denotation of a religious purpose to which the fund may be applied, with an option how it should be applied, and he must execute one term of that option. Next, it was objected, that testatrix contemplated a charity to have continuance, and did not mean that otherwise it should be devoted to any charitable purpose. On the whole testatrix contemplated the two events, that it might or might not have continuance, for when it subsisted upon contribution, it could only last as long as the subscriptions, and she meant, looking to the continuation of the subscriptions, but knowing that they might fail, that it should last as long as her personal estate could support it—that is no objection, but she meant more; she has provided for charitable purposes unconnected with her own object, and the distribution of books for promoting Christian knowledge is so expressed, that she could not mean her purpose to fail, if the particular mode as to the Welsh schools could not take effect: if those charities therefore ceased the property must be applied to the charity to which testatrix adverted. Ld. Ch. next considered, whether the charity, whatever it be, is so engrafted into, connected with, and placed upon, an establishment in real property, that the charity cannot subsist. Testatrix meant that her freehold house should be subservient to the distribution of her books, but it is not necessarily connected with that purpose, for the will contemplates the time when the charity might continue, and the house be no longer applicable; and next, that as the charity might not continue, she meant to give her property generally to purposes connected with a scheme for promoting Christian knowledge. Upon the whole there is not enough to bring this case within the au-
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thority of those where the principal devise of the land having failed, the bequest of the personal property is so connected with it that it must fail also; there is enough in this will to give the personal property to charitable purposes connected with the plan of promoting Christian knowledge; Ld. Ch. directed a scheme to be proposed, proper regard being had to the sort of charity which testatrix had contemplated, viz. the Welsh Charity; his Lordship said, the Master will fail in executing the purpose of the court, if he does not attend to the circumstances how far it is necessary to place checks upon such an institution in order to make it conformable to the establishments of the country, as they provide for the propagation both of religion and learning. An unlicensed school would not be consistent with that view which this court ought to take of such an institution, carrying it into effect in the execution of such a plan. Att. Gen. v. Stepney, T. 1804. 10 Ves. 22. Vide Moggridge v. Thackwell, 7 Ves. 50. (n.) where the case of Brown v. Yeall, is mentioned, which, see post, pl. 164.

116. If land or money be properly given "for maintaining the worship of God," without more, the court will execute the trust in favour of the established religion. But if it be clearly expressed that the purpose is that of maintaining dissenting doctrines, so long as they are not contrary to the law, the court will execute the trust according to the express intention. And where, as in this case, the intention clearly appears aliunde, though not expressed in the trust deed, the court will also carry the manifest design of the founder into execution, so far as is consistent with law. Att. Gen. v. Pearson, T. 1817. 3 Meriv. 409.

117. The principle of public policy does not extend to the case of dissenters, so as to prevent the court from sanctioning the appointment of a minister to a congregation for a limited period (and not for life,) provided such be the usage of the members, or the provisions of the original trust. S. C. ibid. 402.

CHARITABLE USES V.

Uncertain Devices or Appointments. Want of Objects.

In whom the Nomination of Objects shall rest, in Cases of Ambiguity, Uncertainty, or Defect in the Description of the Devices or Appointees.

118. Testator charged a manor with £1000, to be raised out of the profits, and to be applied to such charitable uses as he had by writing under his hand formerly directed. No such writing could be found; and the heir was in possession. Bill by Christ’s Hospital, alleging expressions of testator’s partiality to them, and that his majesty had declared the legacy should be laid out for their benefit. Per curiam, as the writing cannot be found, the king may appoint. Deceased, the money to be applied according to his majesty’s appointment. Att. Gen. v. Siderfin, H. 1683. 1 Vern. 224. 1 Eq. Ab. 96. 2 Freem. 330.

119. If a man bequeaths a sum of money to such a charitable use as he shall by codicil direct, and be directs none, the court may appoint at pleasure; but if the testator mentions a particular object, as a school, and does not name it, the court can only appoint to a school. Anon. M. 1702. 2 Freem. 261.

120. I. S. by will gave his executors £2000 to be disposed of by them “to his poor relations, not provided for by his will, according to their discretion and conscience.” It was contended that the statute of distributions should be the rule in this case; but the court would not restrain it even to the second degree, nor take from the executors their discretionary power, but only take care that they do not abuse it. Anon. E. 1709. 2 Eq. Ab. 190. pl. 3.

121. A. gave a legacy to the poor of two hospitals in C., naming them, and by codicil gave 5l. per annum, “to all and every the hospitals.” Testator lived and died at C. Held to be intended for all the hospitals in C., and not to extend to
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one a mile out of the town, though of the same foundation, and governed by the same statutes. *Masters v. Masters,* E. 1718. 1 P. W. 425.

122. A grant of land to a charitable use, viz. "that as many of the inhabitants of A. as are able to buy three cows, may feed them on the land," extends to every inhabitant who has three cows. *Wright v. Hobert,* M. 1724. 4 Mod. 64.

123. Testator by will bequeathed "all the rest of his personal estate to his executors, in trust, to employ to such charitable uses as by codicil he should appoint." Afterwards, by codicil, noticing the will, he directed "the residue to be applied to such uses as he by codicil should appoint," and died without appointing. The king shall not have the disposal of this trust as of a general charity. *Wheeler v. Sheer,* H. 1730. Mos. 290. *Vide Mills v. Farmer,* 1 Meriv. 55.


125. I. S. by will, gave "all his real and personal estate" to trustees, on certain trusts; remainder "to such of his relations on his mother’s side who were most deserving, and in such manner as they should think fit, and for such charitable uses and purposes as they should also think most proper." The trustees refused to act; and the court decreed them to assign the trust under the direction of the master.—On a cross bill, for an application of the charity bequest, M. R. held that the limitation over of the personal estate was good, but that the trustees’ power to appoint could not be assigned, as it devolved on the court on their refusal to act; and his Honour (deciding by the known rule of equality) directed that one half of the said estates should go to testator’s relations on his mother’s side, and the other half to charitable uses. His Honour could not judge of the merits of testator’s relations, nor prefer the one to the other; but he should exclude those beyond the third degree: Held also, that the representatives of those relations who died in testator’s life-time could have no claim.—*Doyley v. Att. Gen.* M. 1735. 4 Vin. 485. pl. 16.

126. L. by will, gave 200l. to a charity, according to Mr. ——‘s will. The court will not allow of parol evidence to explain a blank only; but decreed the alderman of the ward, &c. to appoint.—Where a person is nick-named, or two of the same name, parol evidence will be admitted to explain. *Baylis v. Att. Gen.* H. 1741. 2 Atk. 240.

127. A doubt arising whether the donor to a charity meant to give the principal and interest, or the interest only, Ld. Ch. said, the court had not in any case arbitrarily confined a gift to the produce only; but where the gift is altogether obscure and uncertain as to both, it must go to the master to inquire who the testator meant to benefit. *Att. Gen. v. Bucknall,* T. 1741. 2 Atk. 328.

128. Testator by his will gave 500l. to be disposed of in charity according to the discretion of Dr. B. Dr. B. did not receive the money in his life-time, but by his will directed his brother to dispose of it according to his discretion. The court thought the crown had the disposal of this charity, and the parties applied for his majesty’s sign manual, which having obtained, the court directed the money to be applied accordingly. *Att. Gen. v. Berryman,* T. 1755. 1 Dick. 168.


130. Bequest of a residue in augmentation of the charitable collection for poor dissenting ministers living in any county in England. It was proved that there were three distinct societies of dissenters in England: Held, the bequest should go to the poor ministers of each. *Waller v. Childs,* M. 1765. Amb. 524.

131. Devise of the surplus value of lands in mortgage in trust for charitable and pious uses generally. Ld. Apsley was inclined to favour the heir; but the authorities were too strong against him. His Lordship applied to the king for his sign manual, as Ld. Nottingham did, (in *Att. Gen. v. Peacock,* 27 Car. 2.) *Att.
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Uncertain Devises or Appointments.—Want of Objects.


132. Bequest of 1000l. to trustees for establishing a bishop in America, and also of 1000l. "to repair parsonage-houses." Neither of these legacies are void. The first must remain in court till it be seen whether such a bishoprick can be established. And as to the second, it has been often held that money may be left to repair or build on land already in mortmain. Att. Gen. v. Bp. of Chester, H. 1787. 1 Bro. C. C. 444.

133. Where a charity is so given that there can be no objects, the court will order a different scheme, but not where objects may exist in future. Att. Gen. v. Oglander, M. 1790. 3 Bro. C. C. 166.


135. A. C. by will duly executed, directed her freehold estates to be sold, which, together with her personal estate, she gave to her executor in trust, after payment of debts and legacies, to dispose of the ultimate residue "to such objects of benevolence and liberality as her executor in his own discretion should most approve of." Upon a bill by the next of kin to have this residuary bequest declared void, the At. Gen. was made a defendant, and the executor disclaimed all personal benefit. Per M. R. That this is a trust, unless it be of a charitable nature, too indefinite to be executed by the court, cannot be denied. There can be no trust over which the court will not assume a control. If there be a clear trust, but for uncertain objects, the subject is undisposed of, and results to those to whom the law gives the property in default of disposition; but it is now settled, and it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object, for in some cases the particular application shall be directed by the king, and in others by this court. The word "charity" is derived chiefly from the statute 43 Eliz. c. 4. and those purposes are considered charitable which that statute enumerates, or which by analogy are deemed within the spirit and intendment of it; but it is clear that liberality and benevolence can find numberless objects not included in the largest construction of the statute. The mention of the word "charitable" seems to have been avoided purposely in the testator's will, in order to leave the defendant (the executor) the most unrestricted direction. His Honour said he was not aware of any case in which the bequest had been held charitable, where the testator had not either used that word to denote his general purpose, or specified some particular purpose which this court has determined to be charitable in its nature. His Honour added, that the trusts in the present case might be completely executed, without bestowing any part of the residue upon purposes strictly charitable. The residue therefore cannot be said to be given to charitable purposes, and as the trust is too indefinite to be disposed of to any other purpose, it follows that the residue remains undisposed of, and must be distributed amongst the next of kin of the testatrix. Morice v. Bp. of Durham, E. 1804. 9 Ves. 399. Vide Moggridge v. Thackwell, 3 Bro. C. C. 517. 1 Ves. jun. 464. 7 Ves. 36.

136. In E. 1805, the foregoing case came on before Ld. Ch. Eldon, upon appeal. His Lordship said, if a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin shall take, then if he proceeds to express the trust, but does not sufficiently express it, or if he expresses a trust that cannot be executed, it is exactly the same. Ld. Ch. said, that with the exception of Brown v. Yeall, 7 Ves. 59. (n.) this was a new case; that Pierson v. Garnett, (2 Bro. C. C. 38. 226.) and the other cases of that class, do not bear upon this in any degree, for no trust upon words of request or recommendation can be supported, unless the objects and the subject of it are certain. Ld. Ch. further said, it did not seem to him upon the authorities, particularly Att. Gen. v. Whorewood, (1 Ves. 589.) that an argument for a proportionate division, or a division of some sort would be displaced; there being a ground in the present case for an application, partially, if it cannot be wholly, to charity. His Lordship considered the result of Att. Gen. v. Whorewood to be, the substratum of that charity failed, and consequently all those partial dispositions that would
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have been good to a charity, if unconnected with it, failed also, as where money was bequeathed to an infirmary or a school, and was connected with the building of it, (which is the foundation,) the whole superstructure must fall together.

Att. Gen. v. Doyley, 2 Eq. Ab. 194. was almost the only case that had been cited for a proportional division, and there was no difficulty in saying that the words in that case must be construed according to the habit and allowed authorities of the court. The only case decided upon any principle that strongly applies to the present, is Brown v. Yeall, (7 Ves. 50 n.) but Ld. Ch. doubted whether it was well applied, stating his reasons for that doubt, and then said, that upon the same ground in a late case as to the Welsh charities, it appeared too much, considering the society established for the propagation of the gospel, &c. to say a trust for the circulation of bibles and other religious books was not good. His Lordship coincided with his Honour, that no case had been decided in which the court had executed a charitable purpose, unless the will contained a description of that which the law acknowledges to be such, or devotes the property to purposes of charity in general. With reference to those cases in which the court says it is a disposition to charity, where in some the mode is left to individuals, and in other, individuals cannot select the mode or the objects, but it falls on the king, as pares patriae, to apply the property, it is enough now to say that the court, by habitual construction of those words, has fixed the sense; and where there is a gift to a charity in general, whether to be executed by individuals selected by the testator, or by the king, as pares patriae, it is the duty of the trustees on the one hand, and of the crown on the other, to apply the money to charity in the sense which the determinations have affixed to that word in this court, viz. either such charitable purposes as are expressed in the statute of 43 Eliz. c. 4. or to purposes having analogy to them. The question then is entirely, whether according to the ordinary sense, and not the sense of authors treating upon the great and extensive word "charity" in the Christian religion, the testatrix meant by these words to confine defendant to such acts of charity as this court would have enforced by decree and reference to a master. His Lordship did not think that was her intention, and if not, the intention is too indefinite to create a trust, but it was the intention to create a trust, and the object being too indefinite, has failed. The consequence of the law is, that defendant takes the property upon trust, to dispose of it as the law will dispose of it, not for his own benefit or any purpose this court can effectuate. His Lordship therefore confirmed his Honour's decree. S. C. E. 1803. 10 Ves. 522. Vide Bp. of Cloyne v. Young, 2 Ves. 91. 4 Vin. 485. 2 Eq. Ab. 194. stated from Lig. Reg. 7 Ves. 58. Att. Gen. v. Stepney, 10 Ves. 22. Att. Gen. v. Matthews, 2 Lev. 167.

137. Testator devised all his estates upon trust to pay the income to his wife for her life, enjoining her to co-operate with his trustees in carrying his wishes into execution, and directing her, with the advice and assistance of his trustees, to lay out one moiety in promoting charitable purposes as well of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergy men, or otherwise, as his wife should judge most worthy and deserving objects, giving a preference always to poor relations. Per cur. The testator's object is charity in general, with a preference, but not confined to poor relations: Held, that the distribution shall be at the discretion of the wife, with the advice and assistance, but not subject to the control of the trustees. Waldo v. Caley, T. 1809. 16 Ves. 206.

138. Testator directed the residue of his personal estate to be divided for "certain charitable purposes mentioned by him," and such "other charitable purposes as I do intend to name hereafter," afterwards he made a codicil, but did not name any charitable purposes. This was held a disposition of the residue in favour of charity for the court to execute, having regard to the objects particularly pointed out by the testator. Mills v. farmer, H. 1811. 1 Meriv. 53. Vide Att. Gen. v. Siderfin, 1 Vern. 224. 1 Eq. Ab. 96. 2 Freem. 330. S. C. Mogbridge v. Thuckwell, 7 Ves. 67. where Ld. Ch. examined all the cases on this subject.

139. On a bequest in trust for such "benevolent purposes as the trustees in their integrity and discretion might unanimously agree on;" the court held, that it could not be supported as a cha-
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ritable legacy, nor could the word "be

no-restricted to the sense of

"charitable" as to authorize an applica-

tion of the property confined to such

objects as are, strictly speaking, objects

of charity. The legacy was therefore
decreed void for uncertainty, and distri-

butable among the next of kin. James

v. Allen, T. 1817. 3 Meriv. 17. Vide


7 Ves. 56. (n.)

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140. No argument between the donees of a charity can alter or divert it to other uses than those expressly limited by the donor. Man v. Ballett, E. 1682. 1 Vern. 42.

141. The court, in this case, refused to mitigate or alter the terms on which a lectureship in polemical or casuistical divinity was founded in Cambridge, though no opposition. The heir cannot consent to alter the disposition made by his an-
Professors in Camb. E. 1682. 1 Vern. 55.

142. Two schools in the same town, one a free school, and the other a charity school. A. devised 500l. to the charity school. Though both are charity schools, only the latter shall take. Note, it seems the testator was partial to the charity school in his life time. Att. Gen. v. Hudson, M. 1720. 1 P. W. 674.

143. I. W. founded a lectureship at C. with a salary of 50l. per annum, charged upon his lands, to the lecturer, "so long as he should attend the charge of diligent preaching there once every Sunday, un-
less hindered by necessity; and when the lectureship should be void by death, re-

moval, or other departure, then the trus-
tees were to appoint a new lecturer." In

1701, the trustees appointed plaintiff expressly for life, and he being in debt, went to Spain. In 1710, the trustees appointed I. G. to the lectureship, vacant by plaintiff's departure. Bill by plaintiff against the trustees for his salary as lec-

turer. Per curiam, defendants in em-

ploying any person to preach acted as plaintiff's agents, and not as trustees of the charity, and therefore they must ac-

count, but they may discharge them-

selves, by having paid the full salary to I. G. Ld. Ch., however, upon considera-
tion, declared the appointment of the new lecturer good, for the lectureship was void by plaintiff's absence, and the necessity of absence for debt, was not that sort of ne-

cessity intended by the founder as an excuse; and though plaintiff was ap-

pointed expressly for life, yet he was subject to the terms imposed by the founder, which the trustees could not alter. Philip v. Walter, 1720. 4 Vin. 494. pl. 14. 2 Bro. P. C. 198.

144. Dr. S. having been elected one of the travelling fellows in physic, under Dr. Radcliffe's foundation, received the salary for five years; and then, instead of travelling abroad for five years more, as the donor's will required, he resigned his fellowship, being ill health. The trustees accepted his resignation, and put another in his room, and then filed a bill against Dr. S. to refund the five years' salary received. Bill dismissed, though it would have been otherwise, if the trusts-
tees had refused the doctor's resignation, for then he must have gone abroad, or refunded. Case on Dr. Radcliffe's will, Att. Gen. v. Dr. Stephens and Dr. Kidd-
by, E. 1737. 1 Atk. 358. Vide Gandy v. Austins, 4 Bro. P. C. 186. In the same case, Dr. K. was made defendant, and an injunction prayed against him for having let his chambers, and suffered them to want repair; but the court would not interfere, as that matter was determinable by the visitor only.

145. Testator left money to be dis-

tributed in charity at the discretion of his three executors; one died, the nomi-
nation of objects survived to the other two, for this was not a bare authority, but coupled with an interest, and the executors could not divide the charity, and each nominate absolutely. Att. Gen. v. Glegg, T. 1738. 1 Atk. 356. Amb. 584.

146 The corporation of N. in 1684, leased to trustees for 1000 years to make improvements, in trust, to permit the corporation to dispose of the rents, in
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maintaining a minister, and relieving the poor. The corporation continued in possession, and made orders till 1735, when the executor of the surviving trustee assigned the lease. The court refused to establish the assignment, but supported the charity, for such long usage was evidence that there was the like claim before the lease was granted. *Att. Gen. v. Ed. Gower*, T. 1740. 9 Mod. 224.

147. I. E. conveyed his real estate for the benefit of a charity. Ten days after, he made his will, by which he gave 3000l., the exact value of the land, to the same charity, and 250l. to the same, and devised the estate to A. and B. as tenants in common; on a bill for a general account, and for the direction of the court in settling testators’ estates, the court directed the master to consider in what way the money should be laid out, and a perpetual fund created for the charity. The Master reported a scheme for laying out 3000l., in purchasing the devised lands, and the 250l. in other lands for building a charity school. The court made a declaratory order confirming the master’s report, which was acquiesced in by A. (B. being dead, having settled the estate on himself in tail.) Upon the question, whether this purchase could be carried into execution by the aid of equity? Ld. Ch. could not say this was strictly contrary to the provision of the statute of mortmain, the first clause of which was intended to relate to gifts, or conveyances to a charity by way of donation. The legislature did not intend absolutely to forbid all purchases of land, but only to put them under some restrictions. Ld. Ch. said there was something in this case which might make a great opening to evade the statute, for if a precedent were made, any person knowing that if he died within a year after the conveyance, the statute would make it void, might give the exact value of the estate in money, in the same way, and then the one to be laid out in the purchase of the other. His Lordship saw material objections to execute the order on the master’s report by purchasing the devised land. The share of one of the tenants in common, was gone over to his issue in tail, an infant; and the court cannot lay out the money in an undivided moiety, and oblige the charity to hold in common with an individual. The only mode to carry the purchase into effect, is by an act of parliament, enabling the infant to convey, which if the parties do not mean to apply for, the information must be dismissed. *Att. Gen. v. Day. Case of Mr. Elbridge’s will*, E. 1749. 1 Ves. 218.

148. T. W., by will, devised the remainder of his real and personal estate to University Coll. Oxon, and by cedil annexed particular regulations, viz. “That a senior fellow of the college, being a divine of the age of forty, and good morals, should possess his estate, and the furniture at D. to keep the house, &c., in repair, and not to fell timber without leave of the college; to live hospitably, entertain, and give drugs to the poor, &c., &c.” And if he proved dissolute, then the college to proceed to an election. Objected, this was not a charity, but a trust. Ld. Ch. would not determine this point, nor decide as to the power of the crown to direct the uses, if as a charity, it was improperly provided for in itself, until he knew whether the regulations of the testator were consistent with the college statutes, and whether the college were capable of taking generally in mortmain. Referred to the master to enquire into those facts, but as to the result the reporter is silent. *Att. Gen. v. Wherewood*, or *Wherewood v. University College*, T. 1750. 1 Ves. 554.

149. Where trustees have power to distribute generally, according to their discretion, the court interposes not, unless in case of a charity, of which the court have a general government: Gower v. Mainwaring, M. 1750. 2 Ves. 89. Secus, when a rule is laid down for the trust. S. C.


151. Testator devised the profits of his land to trustees, to repair two roads according to their discretion. The inhabitants of one road being dissatisfied, filed an information, but the court refused to interfere, unless corruption in the trustees could be shown, yet the information was retained. *Att. Gen. v. Governors of Harrow School*, T. 1754. 2 Ves. 531.

152. Where a special visitor is appointed, there shall be no commission
under 43 Eliz. sed secus, of a collateral charity. S. C.

153. Where an intention appears in a testator to give the whole of a fund to a charity, the objects whereof are not sufficient to exhaust the whole, the court will apply the residue as nearly to the testator's designation as it can. But such defects will not be supplied, without some such intention appearing to guide the court; which cannot go so far as to dispose of a fund merely on seeing a general intention in the testator to die intestate as to the whole. *Att. Gen. v. Painter Stainers* Co. M. 1788. 2 Cox 51.

154. Testator bequeathed the residue of his personal estate in trust, to pay 12l. *per ann.* to the schoolmaster of R., and to apply the surplus (if any) in the clothing and putting out apprentice two children of R., and one child of W., and he made no further disposition of it: Held, that as the residue was more than sufficient for the purposes of the will, the surplus should not be considered as undisposed of, but must be applied in increasing the number of the objects of the charity. *Held also,* that the court will not marshal assets in favour of a charity. *Attorn. Gen. v. Hurst,* T. 1790. 2 Cox 364.

155. Sir G. D., in 1716, devised to trustees certain lands upon certain trusts, with an ultimate remainder to the same trustees in trust, out of the rents, to purchase the fee of a piece of ground in Cambridge, to erect a College within that University, to be called Downing College, and that a charter should be applied for to incorporate the same; and that, when founded, the trustees should stand seised to the use of the said collegiate body for ever. The trustees nominated by testator, died in his life-time. Upon a bill by the university, to establish this charity, twelve questions arose; but the great question was, whether a devise to a corporation, not in *esse,* and the existence of which would depend on the will of the crown, (supposing it a charitable use,) could be established in equity? It was urged, that if the objection was founded, that there was no object in *esse,* it would hold in all cases of a general trust, and it was admitted, that this case was new in *specie,* but not in *genera,* and that the devise was not void for want of object, the object being pointed out; it is a present devise upon an executory trust, and being so, it is immaterial whether the license precedes or follows the trust. *Per Camden,* C. The trust of this charity ought to be carried into execution, in case the king should grant a charter and license to take in mortmain, the will being established by a decree, under which the heir might apply to the crown. Referred to the master to inquire into the value of the estates, to settle the form and endowments of the charity, and other requisites, with liberty to contract for a piece of ground whereon to found a college, conditionally, if the crown should grant a charter. *Att. Gen. v. Downing. Case of Downing College,* T. 1769. Amb. 550. In 1795, an order was made for a separate report upon the annual value of the premises devised, and the master reported, that by reason of the intermixture of the testator's estates with those of the now defendant Bowyer, (who was Lady D.'s second husband,) he could not certify the annual value of the estates devised. Five fruitless applications were made to the crown for a charter, and in 1797 the cause came on for further directions, when it was prayed, that the master might receive a proposal for founding a college. *Loughborough,* C. said, there could be no objection, as the court had declared the will well proved, and with regard to the claim of the heir to the rents and profits from the death of the testator, till the right to hold in mortmain, was de *facto,* granted by the crown. His Lordship said it was impossible they could go to the heir, for at law they were applicable to the use. The will is not void, though the particular trust fails, for the crown may appoint it to another purpose, and the testator's interest shall be executed on the doctrine of *cy pres.* Referred again to the master to receive proposals for the establishment. *S. C. nomine.* *Att. Gen. v. Bowyer,* E. 1798. 3 Ves. 714. In 1800 the cause came on again, the crown having granted a charter and license, and the university consenting to confine their account against the heir at law, to six years, and to waive all the rest. *Ld. Ch.,* though he doubted his authority to confine the accounts, made his decree upon the terms of the relators procuring an act of parliament to confirm it. His Lordship also granted a commission to distinguish the intermixed
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lands from those devised to the charity, and appointed a receiver. S. C. E. 1800. 5 Ves. 300.

156. R. H. bequeathed one moiety of the residue of his personal estate to the Foundling; and the other to the Lying-in-Hospital, and if there should be more than one of the latter, then to such of them as his executors should appoint. Testator struck out the name of his executor, and never appointed another. Administration cum testamento annexo was granted. Per curiam, this is no revocation of the legacy, which being given to a charity, the court will appoint. White v. White, T. 1778. 1 Bro. C. C. 12.

157. T. S. bequeathed the residue of his personal estate in trust, "to build a church at W. where the chapel now is, in the manner he should direct, and for want of his direction, then, as his executors should think best." Upon a bill to establish this charity, the bishop opposed the erection of a church, unless the surplus could be applied to augment the chapelry annexed. M. R. said, if the bishop objected, he should not interfere, he was bound implicitly to follow the testator's intent. Referred to the master to report upon a plan, and also to the bishop's assent. Att. Gen. v. Bishop of Oxon. Case of Wheatley Church, T. 1786. 1 Bro. C. C. 444. (n.)

158. Testator devised estates to University Coll. to buy advowsons, but when they had funds sufficient they could not purchase, having so many as were allowed by the act 9 Geo. 2. of mortmain. The devise may be performed by exchange of advowsons, or otherwise cy pres, for the surplus cannot go to the heir at law as a resulting trust, he being excluded by the donor's will. Att. Gen. v. Green. Case of Dr. Ratcliffe's will, H. 1789. 2 Bro. C. C. 492.

159. Where summary powers are given to Ld. Ch. by a private statute, to regulate a charity, he cannot vary the foundation and general constitution of the trust. Exp. Bolten School, T. 1789. 2 Bro. C. C. 662.

160. Stock being fluctuating, cannot be appropriated to support a permanent charity, but it must be sold, and the produce appropriated. Isaac v. Gomperitz, T. 1789. 1 Ves. jun. 44.

161. Gift of a residue to I. V. to such charitable uses as he should appoint; but recommending poor clergyman with large families and good characters. I. V. died in testator's lifetime. I. V. was clearly a trustee, and not a legatee, and the court will sustain and execute the charity. Mogridge v. Thackwell, T. 1792. 1 Ves. jun. 464.

162. Upon a re-hearing of that part of the decree, which relates to the charity, it was affirmed: Ld. Ch. collecting the result of the authorities, that, where there is a general, indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. The costs of all parties were given out of the fund as between attorney and client. Mogride v. Thackwell, T. 1802. 7 Ves. 36.

Formerly a portion of the residue of every man's estate was applied in charity by the ordinary. S. C. ibid. 69. If the general substantial intention of a will is charity, the failure of the particular mode shall not defeat it; but the law will substitute another mode. S. C. ibid. 69; affirmed in Dom. Proc. 13 Ves. 416.

163. A college devisee in remainder after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to themselves, were held not to have accepted the devise by acts done merely to preserve the fund. Upon their refusal to accept it after the death of the tenant for life, the court directed the master to receive a proposal, in order to have it directed whether it could be executed cy pres. Att. Gen. v. Andrews. Case of Trinity Hall in Cambridge, E. 1798. 3 Ves. 632. In this case Ld. Ch. took a view of the cases on the doctrine of cy pres, the ground of which he said was, that the court should be satisfied they executed the intention as near as possible. That doctrine, as applied to charities, was formerly carried to great length, as in Baxter's Ca. 1 Vern. 248, and Da Costa v. De Pas. Amb. 228. but these have been much shaken by latter cases. Vide Att. Gen. v. Bp. of Oxon. 1 Bro. C. C. 444. (n.) Att. Gen. v. Goulding, 2 Bro. C. C. 428. which case, though doubted per M. R. in Att. Gen. v. Boulbee, ante, was fully established by him upon a review of the cases in Att. Gen. v. Whitchurch, post. Vide etiam Att. Gen. v. Minskull, T. 1798. 4 Ves. 14.
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164. The case of Brown v. Yeall, cited in the above case, and mentioned in 7 Ves. 50. in note, was this: R. B. by will, gave all his stocks, annuities, and monies in the public funds, in trust, after payment of certain legacies, to raise and apply 500l. yearly for twenty years, and from that period for 20 years the yearly sum of 1000l. until 5th January, 1860, to the purposes after mentioned, and in trust to invest the residue from time to time of the said yearly funds in the purchase of other funds of the same nature to accumulate. Testator then directed all such accumulations to be from time to time for ever applied in the purchasing of such books as by a proper disposition of them under certain directions, may have a tendency to promote the interests of virtue and religion, and the happiness of mankind; the same to be disposed of in Great Britain, or in any part of the British dominions. This charitable design to be executed by and under the direction or superintendence of such persons and under such rules and regulations as the court of Chancery shall direct. A bill was filed for the establishment of this charity, praying directions for carrying on the same, but it does not appear what became of the case afterwards. Reg. Lib. A. 1790. fol. 579. July, 1791. Ld. Eldon, however, in Att. Gen. v. Stepney, 10 Ves. 27. said, Ld. Thurlow's opinion in Brown v. Yeall, was, that testator not having given this court more of specific direction as to the nature of the books to be purchased and circulated, than that they were to be such as may have a tendency to promote the interests of virtue and religion, and the happiness of mankind, had not given direction enough, and therefore his Lordship held the next of kin entitled.

165. A compromise having taken place, since the hearing of Att. Gen. v. Andrews, ante, pl. 168, to apply part of the fund to an establishment at St. John's College, Oxford, with which the Merchant Taylors' Company are connected, and to give the rest to the next of kin, it was, with the Att. Gen.'s consent, now established by decree. Andrew v. Master & Warden's of Merch. Taylor's Co. T. 1802. 7 Ves. 223.

166. Plaintiff by his bill stated the proceedings in the cause, Andrew v. Merchant Taylor's Com. and Att. Gen. v. Andrew, supra, and then prayed an accout of the sums received by the defendants in respect of the profits made by them from the arrears of interest of 1050l. due on the turnpike security to the estate of the testator, and that proper rests may be made in the account of the interest of that sum taken under the decree of 5th March, 1796; that they may pay plaintiff what shall be due on that account, and also repay to him a legacy of 100l., and deliver up a piece of plate left to them by the testator. The bill also stated the terms of the deed of compromise made under the decree with the consent of the Att. Gen., and further, that the several legacies were bequeathed to the defendants in confidence that they would perform the trusts of the testator's will, which they having refused to accept, they are incapable of taking any benefit under it. Defendants insisted that they had duly accounted, and that the legacy of 100l. and the plate were not dependant upon their acceptance of the trust. Ld. Ch. held, that the next of kin of the testator were bound by the compromise before decreed to be carried into execution, and therefore he dismissed the present bill, as setting up a further claim of interest upon the sums to be accounted for by the defendants, but without costs: Held also, that defendants were entitled to the legacies of 100l. and the plate, as being distinct from the other disposition which they refused to accept. Andrew v. Trinity Hall, Cambridge, T. 1804. 9 Ves. 525.

167. S. T. by will, before the statute of mortmain, gave real and personal estate to a use that would now have been within the statute, and also to other uses not within it. In 1763, S. H. his nephew, gave personal estate to the uses of his uncle's will; the estate of S. T. being sufficient for the first use, the whole of S. H.'s gift shall go to the valid use. Att. Gen. v. Hartley, T. 1793. 4 Bro. C. C. 412.

168. A devise of real and personal estate to a trustee, to take a house for a school, and to educate children and grandchildren of particular persons, and other children, is good as to the particular objects, but bad as a general charity; for Ld. Ch. said, the testator clearly aimed at a permanent establishment, but the court will not assist him in evading the law. The heir insisted that the charity should be confined by the rules of
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law to lives in being at the time of the will: but per Ld. Ch., the law has fixed the time, which is 21 years after lives in being; therefore all the children and grandchildren born in the lives of the different stocks mentioned in the will, may be within testator’s bonny. Blandford v. Thackerell or Fackerel, T. 1793. 2 Ves. jun. 238. 4 Bro. C. C. 394.

169. In administering a charity, though a particular intention fails, the general intent shall be executed cy pres; therefore upon a trust for the vicars of P. provided they should be presented at the recommendation of the trustees, and the trustees refused to recommend, the Ch. (in right of the crown) presented: Held, that the vicar was entitled to the benefit of this trust. As to the doctrine of cy pres, as applied to charities, this sensible distinction has prevailed, that the court will not decree execution of a trust of a charity in a manner different from that intended, except so far as they see that the intention cannot be executed literally, but another mode may be adopted, consistent with the donor’s general intention, so as to execute it, though not in mode, yet in substance. Thus, where the object was to build a church in the parish of A. and the parish would not permit it, it could not be executed any where else but where it was, to distribute bread to poor persons attending divine service, and chanting the donor’s version of the psalms; though the chanting could not take effect, the rest was executed. Att. Gen. v. Boullbee; Case of Poleworth Vicarage, T. 1794. 2 Ves. jun. 380.

170. Where a charity cannot be executed as directed, but the general purpose appears distinct, and may be in substance attained by another mode, it shall be executed cy pres, but a personal bequest attached to a void charity as an endowment, must fall with its principal. Att. Gen. v. Whitchurch, T. 1796. 3 Ves. 141.

171. Bequest in trust for the poor inhabitants of several parishes, to be applied at times, and in proportions, and either in money, provision, physic, or clothes, as the trustees think fit. The fund being very considerable in proportion to the objects, the application was upon the principle of cy pres, extended for the benefit of the same objects to purposes not expressly pointed out by the will, as instructing and apprenticing, but of children; against the claim of the next of kin. Bp. of Hereford v. Adams, T. 1802. 7 Ves. 334. Vide Da Costa v. De Pas, Amb. 228. Mogridge v. Thackwell, supra.

172. The foundation of the Free Grammar School at Leeds, being for teaching the learned languages grammatically, the court would not allow part of the funds to be applied in procuring masters for French and German, and to other establishments, with a view to commerce, for though the nature of a charity can be changed by an application to objects different from those intended by the founder, yet that is only where it is clear that by a strict adherence to the plan, his general object will be destroyed, and not upon the notion of advantage to the inhabitants of the place. Att. Gen. v. Whiteley, T. 1803. 11 Ves. 241.

173. A bequest was made before the statute 9 Geo. 2. c. 36. to the congregation of presbyterians, to which testator belonged, for placing out as apprentices two poor boys of such as were members of the said congregation, and living in a certain parish. The fund becoming considerably more than sufficient, the court applied the surplus, upon the principle of cy pres, 1st. to place out sons of members within that parish: 2d. such boys in other parishes: 3d. daughters of members of the congregation in like manner: and 4th. sons of presbyterians generally, previous to building a school and other purposes, and sons of persons of the established religion, within the parish, were upon a proposal rejected. Att. Gen. v. Wansley, T. 1808. 15 Ves. 251.

174. A bequest of money to Roman catholic bishops and their successors is void, no such characters being known to the laws of Ireland; but where they are particularly named, (though so described) the bequest is good for their joint heirs, subject to the control of the court of Chancery. Att. Gen. v. Power, E. 1809. 1 Ball & Be. 143.

175. A bequest of money to purchase or build a house for the reception of 12 poor gentlewomen, though void by the English statute of 9 Geo. 2. yet as there is no such mortmain, act in Ireland, and the bequest was not within the old mortmain acts of Ireland, the court held it valid. S. C. ib. 154. But whether a bequest of money to clothe such poor children as should be educated in the muntery school
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of W. be legal, the court would not determine, but directed an enquiry by the master, to enquire into the character and description of the school. Sed dictum per Manners, Ch., that such a bequest would be void in England, as contrary to the statute of Ed. 6. (which does not extend to Ireland,) and against the public policy. S. C. ib. 150. Vide Carey v. Abbot, 7 Ves. 490. S. P.

176. An information to set aside a lease of a charity estate, 1st. as being for a long term determinable on lives, at a small rent on payment of a fine; and 2dly. on the ground of undervalue. But the court would not disturb it, the corporation (who were the trustees) having always let their estates in the same manner, and it being according to the custom of the country; and Grant, M. R. denied that there was any such principle, as that a lease for a charity estate for lives, or for a long term determinable on lives in existence, is prima facie a breach of trust. A lease for three lives was considered by the legislature, in framing the enabling and disabling statutes, and by many founders, as on a footing with leases for 21 years. In order to set aside a lease of a charity estate already existing, it is not enough to say, that the mode of letting is not the best that might be described, but it must be shown to be so positively bad, that no person meaning to discharge his trust fairly, could have resorted to it, as a lease for a long term absolutely at a stationary rent. It is true, that leases of charity estates may be set aside for undervalue only, but it must be such an undervalue as can be satisfactorily proved, and considerable in amount; and as to the evidence, the opinions of witnesses formed upon a loose recollection of circumstances, are not to be put in competition with the evidence of surveyors actually employed at the time to ascertain the value, and to whom no bad motive can be imputed. Att. Gen. v. Exeter Corporation, M. 1817. 3 Meriv. 524. 543.

177. A petition under statute 52 Geo. 3. c. 101. must have the signature of Att. Gen. or of Sol. Gen. (if there be no Att. Gen.) but such signature must not be affixed without the same deliberation as in the case of an information regularly filed; for that statute was only meant to extend to cases of plain breach of trust by the trustees themselves, and not to benefits derived from such breaches of trusts by third persons; therefore where an information has been filed, the court will not, on petition having the same objects, separate such objects, and give relief on the petition as to those which are regularly within its limits, and leave the rest to be disposed of on the information: and it was also held, that where a tenant of a charity estate has acted fairly, he shall not be turned out of possession, or have his lease set aside, merely on the ground of the inadequacy of his rent to the value of the estate. Exp. Skinner; In Re Lawford Charity, E. 1817. 2 Meriv. 453. And the petition further prayed, that an account of the receipts and payments of the deceased trustee might be taken, and that his representative and the tenant might be charged with the full value of the estate from the date of the agreement therein mentioned; but held, not within the act; Ld. Ch. saying, that it might be doubtful whether a petition seeking a variation of a lease would be within the act, but that one which prays an account of the effects of a deceased trustee, could clearly never be within it. S. C. H. 1818. 1 Wils. 14.

178. A residuary estate was bequeathed to the minister and church officers of a parish in Scotland, for the benefit of a charity or school there; and on information and bill in this court, the money was ordered to be invested in the funds in the name of the Acc't Gen., and the dividends to be paid to the trustees appointed by testator. In H. 1815. (19 Ves. 309.) a scheme stated in the master's report, was ordered to be carried into execution: but on appeal from this order, Ld. Ch. said, that where a charity is to be administered in Scotland, this court does not take the administration into its own hands. The gift being for the founding a Scottish charity, is certainly good; but it is for the courts in Scotland to determine, what kind of school or charity should be established. Att. Gen. v. Lepine, T. 1818. 2 Swanst. 181.

179. The court will not interfere to regulate a voluntary charity supported by contributions under the direction of trustees, where some of the trustees complain of the acts of the majority of them as being adverse to their intention, and to that of others of the contributors, where the conduct of the acting trustees is free from positive imputation. Where
CHARITABLE USES VI. & VII.

Doctrine of Cy pres.—Misemployment.—Remedies.—Trustees.

there is a trust deed, in such cases the court will not vary its terms on the application of persons suggesting that they are not such as all the creditors intended they should have been; and a proviso in such a deed, that gratuitous teachers should attend, and that no doctrines should be taught contrary to those of the Church of England, is not contravened by the appointment of a dissenting minister, at a salary, to read lectures in the school room when not used as a school, the subscribers contributing the amount of his salary. In Re Macclesfield School, M. 1818. 6 Price 214.

180. A market house which had been erected on land, granted by royal charter, for the purpose of holding markets and fairs thereon, the tolls of which were to be applied to charitable purposes, was pulled down, and rebuilt on another piece of land; but it appearing that it was done with the consent of the lessee of the manor under the crown, and with the general, though not universal, approbation of the inhabitants, who had defrayed the expenses by voluntary subscription; a petition for its restoration, on the ground that the removal had been prejudicial to the tolls, dismissed with costs. In Re Chertsey Market, H. 1818. Dan. 261. 6 Price 174.

CHARITABLE USES VII.


181. The rules on the foundation of an hospital were, that no lease should be granted for more than 21 years, and that at the old rent, taking a fine of two years value. The hospital granted a lease for 21 years, at the old rent, with a covenant by repeated renewals to make it up 60 years, and the lessee entered into a deed of covenants to pay a surplus rent to the hospital. Upon a bill by the assignee of this lease to have his lease again renewed, it was held, that this covenant was not binding, it being equally prejudicial to the hospital as a lease for 60 years, but the assignee, on paying the additional rent, was decreed to have his lease confirmed for 21 years from the last renewal. Lydiatt v. Foach, H. 1700. 2 Vern. 410.

182. A corporation holding in trust for a charity are but trustees, and though they may improve, they can do nothing to prejudice the charity, or in breach of the founder's rules. S. C.


184. Lands of 8l. per annum, purchased by a parish, were improved to 450l. per annum value. The trustees, by order of the vestry, raised 1000l. for the use of the parish, by way of annuity, which the parishioners sought to set aside, as a breach of the charitable trust; but the court dismissed their bill, and would have made them pay costs if they had not submitted to pay the annuity. Att. Gen. v. Lady Hart, M. 1703. Prs. Ch. 275.

185. A corporation trustees for a charity, and in possession, suppress or conceal some evidence relating to the charity; they shall pay costs. Hartford Borough v. Hartford Poor, T. 1713. 1 Bro. P. C. 399.

186. The reversion in fee of divers lands, let on lease for 70l. per annum, was granted by Henry 8. to the corporation of Coventry, in consideration of 1400l.; 400l. of the purchase money was paid by the corporation, and 1000l., the residue, by Sir Thomas White, but in the grant the corporation were said to be purchasers. The corporation, by agreement with Sir T. W., were to pay and apply the 70l. per annum in certain charities; 40l. per annum, part thereof, to circulate between certain towns for ever. Upon the expiration of the leases, the value of the lands were greatly increased, but Coventry having all along received the surplus, a bill was filed against them on behalf of the other four towns; whereupon Wright, C. S. in 1700, decreed that Coventry should have the
surplus rents; but in 1702, the Lords reversed this decree, declaring that the increase should be applied towards augmenting the several charities and appointments. In 1703, the court of Chancery decreed the order of the Lords to be carried into execution, and restrained Coventry from receiving the future rents. Pending these proceedings, Coventry, by fraud, drew the four towns into a private agreement, whereby, under a false pretence, they agreed to pay the four towns and the Merchant Taylors' Company 823l., and instead of applying 2241l., the increased profits, in augmentation of the charities, they agreed to pay only 60l. per annum. To execute this agreement, Coventry demised the charity lands to the Merchant Taylors for 20,001 years, and accepted a re-demise for 20,000 years, under the particular rent of 60l. per annum to the said four towns, granting leases for long terms at small rents for large fines to their own members and friends. Upon a bill by the poor inhabitants of Coventry against the five corporations who had signed the agreement, Ld. Harcourt, in 1710, declared the agreement to be vile and corrupt, and intended to defeat the order of the Lords. His Lordship decreed, that the agreement and the deeds of demise and re-demise should be set aside, that the trust estate should be reassigned, so as to put all the claimants in status quo, and that the 2241l. should be brought into court; and finally, that the corporation of Coventry should be utterly removed from the trust for their gross misbehaviour. Coventry laid under a sequestration for seven years, for non-payment of the 2241l.; when, having raised the money, they appealed to the Lords against Ld. Harcourt's decree, but the House affirmed it. Coventry City v. Att. Gen.; Case of Sir T. White's Charity, E. 1720. 2 Vern. 397. Colles' P. C. 280. 2 Bro. P. C. 286.

187. A college restrained by its constitution from making leases other than for 21 years, at a rack-rent, made an entry in their audit-book, recommending it to their successors to renew at less than the rack-rent, the tenant having greatly improved the premises. Upon a bill to have the benefit of this renewal, Ld. Ch. refused to decree it, censuring the parties who had signed the order, for a breach of the college statutes; and said, if the lessee had relied on their promise of renewal, they should make good his loss: Held, also, that the master, &c. signing the contract, was not binding on the college, for as touching the revenue it should be under their common seal. Taylor v. Dulwich Hosp. M. 1720. 1 P. W. 655.

188. Though the governors of a charity may not be guilty of corruption, yet where they are extremely negligent, shall pay costs, and the person taking advantage of their neglect, to the prejudice of the charity, shall not be benefited by his bargain. East v. Ryal, T. 1725. 2 P. W. 84.


190. Trustees of a copyhold in trust for repairing the church of A. and the chapel of B. in that parish, by desire of the parishioners, bought new ground, and built a new chapel, the old one being in ruins. This is no deviation, and the trustees may apply the saving, which, if inadequate, the parish shall reimburse them; but they may not mortgage or charge the estate. Att. Gen. v. Foyster, H. 1793. 1 Anstr. 116.

191. Equity will not interfere with the governors of a charity established by charter, unless they have also the management of the revenues, and abuse their trust; and that abuse cannot be presumed, but must evidently appear. Att. Gen. v. Foundling Hosp. H. 1793. 2 Ves. jun. 42.

192. Where trustees refuse to recommend a vicar, pursuant to the directions of the donor, the presentation of the church shall not be suspended, neither shall the general intent of a donor fail by reason of the misconduct of his trustees; but where trustees have a discretionary power which they do not choose to exercise, they shall not be punished with costs. Att. Gen. v. Boulbee, T. 1794. 2 Ves. jun. 380.

193. In 1715, the trustees of a charity granted a lease of lands, thencefore let at 31l. per annum, for 999 years, in consideration of 500l. to be laid out, and 4l. per annum additional rent. Per curiam, this is a sort of perpetuity, and destructive to the charity estate. Decreed, the lease to be given up; but in regard the tenant had lately laid out 500l. in im-
CHRITABLE USES VII.

Misemployment.—Remedies.—Trustees.

194. In 1747 the trustees of a charity demised to defendant's ancestor, for 99 years, a certain farm, part of the charity estate, at a yearly rent of 32l. with an agreement, that within seven years he should lay out 40l. in repairs. The original lessee died in 1753, and in 1801 the existing trustees filed their bill against defendant, his representative, charging collusion and breach of trust in the former trustees, and praying that defendant might surrender his former lease and accept a new one, which they offered for a reasonable term, and at a proper rent. Defendant insisted that his lease was a mere husbandry lease, and that he had laid out 130l. in repairs and draining. The relators proved that the farm was worth, to be let, 150l. per annum. Lord Ch. held, that this was a breach of trust in the first trustees, and that the lease ought to be delivered up; but his Lordship would not charge defendant with more rent than 32l. per annum, previous to the filing of the bill, nor with costs, if he gave up the lease without trouble; but in future, he said, such leases of charity estates would not be tolerated. Defendant undertook to give up his lease, and it was agreed that he should continue in possession to the end of the year, paying a rent. Att. Gen. v. Owen, E. 1805, 10 Ves. 562.

195. The court of Chancery has jurisdiction in all cases of abuse in the receipt and management of the revenues of a charity by the governors; and where the heir of the founder was a lunatic, an irregular appointment of governors and a schoolmaster, by his committee, was vacated upon petition to Lord Ch., as visitor. Att. Gen. v. Dixie; Case of Bosworth School, E. 1807. 13 Ves. 519.

196. Where the trustees of a charity joined in granting a long lease of the charity lands, against the express direction of the founder, the court set it aside with costs, as an improper administration of a charity estate. The relators, not desiring to disturb under-lessees, the account was confined to the filing of the information or previous demand. Att. Gen. v. Griffith, T. 1807. 15 Ves. 565.

197. The trustees of a charity granted a lease for 80 years, in consideration of the surrender of a former lease (of which 21 years was unexpired) of the rent reserved, and of 700l. to be expended by the tenant in rebuilding the house, &c. On a bill to impeach this lease as improvident, an enquiry by the Master was directed, whether the lease was reasonable or unreasonable in such a degree as that fraud could be inferred. Lord Ch. at the same time, observing, that a lease for 99 years as a mere husbandry lease, and at a rent adapted to a lease for 21 years, could not be allowed; neither could a building lease for 99 years upon an expenditure commensurate to a term of 99 years. Att. Gen. v. Backhouse, T. 1810. 17 Ves. 261.

198. The court will set aside the lease of a charity estate, if the under-value be considerable; but an under-lease granted on a fine is not conclusive evidence of an under-value, as where part of the value is ascribed to the good will of an established trade, and part to repairs. In such a case, the court will direct the master to enquire whether the rent was fair and adequate, and to distinguish how much of the premium on the underlease was for good will and repairs, and how much for the value of the lease above the rent reserved to the charity, and to report accordingly. Att. Gen. v. Magwood, T. 1811. 13 Ves. 315.

199. The trustees of a charity cannot, without an adequate consideration, let for 99 years, or beyond the course of provident management, much less with a covenant for a perpetual renewal, without an equivalent for the inheritance (a) but where there was a decree on default for setting aside a lease of a charity estate (containing a covenant for perpetual renewal) and an account was directed as to the annual rent reserved, the court permitted a hearing on terms of paying costs, and not disturbing the proceedings before the Master in drawing his report of what was due; but the money was not allowed to be paid into court before the report was made; and Eldon, C. said, that a petition, and not motion, was the proper application in such a case, and that relief will be given on an information for a charity without a specific prayer. Att. Gen. v. Brooke, N. 1811. 18 Ves. 319. Vide (a) Att. Gen. v. Owen, 10 Ves. 553.

200. After an order, permitting de-
fendant to release the decree (obtained on his default,) setting aside a charity lease, and directing an account of the rents against the defendant, he was ordered to give security for the sum reported due. Att. Gen. v. Brooke, E. 1812. 18 Ves. 496. Vide Att. Gen. v. Magwood, ibid. 315. Same v. Backhouse, 17 Ves. 283. and references. Same v. Wilson, 18 Ves. 518.

201. Where the lessors of charity estates were not merely trustees, but had also beneficial interests, and they granted leases for 21 years, at an under-value; the court set them aside as breaches of their trust. Att. Gen. v. Wilson, E. 1812. 18 Ves. 518. Vide Att. Gen. v. Gower, 9 Mod. 224. Same v. Magwood, sup. Same v. Brooke, sup. Same v. Backhouse, 17 Ves. 283. and references.

202. A petition was presented under the act of 52 Geo. 3. c. 110. which gives the court jurisdiction to proceed in charity matters by petition, but the trustees did not appear. Ordered, that they should show cause why the prayer should not be granted. Exp. Sagoears; In Re Mania Charity, E. 1813. 1 Ves & B. 496.

203. Where trustees have a leasing power, the court will control it for the benefit of a charity. Exp. Berkhamstead School, T. 1813. 1 Ves & B. 198.

204. The statute of 32 Geo. 3. c. 101. which substitutes petition for information, is limited to questions of abuse of trust as between the trustees and the objects of the charity, and it is not applicable to an adverse claim to land, as having formerly belonged to the charity, and the stat. of 40 Geo. 3. c. 56. as to money intailed, is discretionary. Exp. Rees, T. 1814. 3 Ves & B. 10. Vide Exp. Stern, 6 Ves. 156.


206. A trust created for the benefit of a charity is broken by the pulling down a chapel, selling the materials, and converting the burial-ground to other uses; and the court directed a conveyance to new trustees, on petition under 52 Geo. 3. c. 101. s. 12. Exp. Greenhouse, M. 1815. 1 Madd. 92.

207. The founders of a charity having named as trustees the occupiers of certain annual offices, other trustees were appointed by the court to hold the funds; but the selection was still left to those trustees appointed by the founder. Exp. Blackburne, In Re Taylor's Charity, E. 1820. 1 Jac. & Walk. 297.

CHARITABLE USES VIII.

Surplus Rents, how to be applied.

208. When a testator has devised his estate to charitable uses, and has pointed out the particular objects of his bounty, the court construes his intent, imperatively to be, not only in exclusion of his next of kin, but to the disinheritance of his heir at law; and proceeding upon that principle, they uniformly decree the surplus rents and profits to the augmentation of the charities. It was so resolved in the early case of Thetford School, 1610. 8 Co. 150. and has been followed in Arnold v. Att. Gen. T. 1698. Show. P. C. 22. Att. Gen. v. Mayor of Coventry, M. 1700. Colles' P. C. 280. 2 Bro. P. C. 236. Att. Gen. v. Price, T. 1744. 3 Atk. 109. Att. Gen. v. Smart, E. 1746. 1 Ves. 72. Att. Gen. v. Johnson, M. 1733. Amb. 190. Att. Gen. v. Sparks, M. 1753. Amb. 201. Att. Gen. v. Hardasher's Co. or Tonner, M. 1792. 2 Ves. jun. 1. 4 Bro. C. C. 103. Att. Gen. v. Minshull, T. 1798. 4 Ves. 11. 209. So where the funds devised by the testator turn out to be more than adequate to the number of his own objects, the surplus shall be applied to purposes juxtam generis; for the court has liberty to enlarge the charity; by extending the number of the objects of the testator's bounty. Att. Gen. v. E. of Winchelsea, M. 1791. 3 Bro. C. C. 373.

210. So where the owner of land is charged with an annuity issuing thereout for the maintenance of a schoolmaster, he shall not be excused on account of six years vacancy in the school; and though there are not persons in the parish sufficient to answer the description of the charity, yet the land shall not be dis-
CHARITABLE USES VIII. & IX.

Application of Surplus Rents.—Commissions.

charged, but the annuity shall accumulate for the increase of the charity. Aylett v. Dod, H. 1741. 2 Atk. 238.


212. The court will apply the increased revenues of a charity in augmentation of the original objects, though considered a proper subject of review as to the future. Exp. Berkhamstead School, T. 1813. 2 Ves. & B. 134. Vide Att. Gen. v. Tonner, supra.


214. Where in respect of the increased rents of a charity estate, it is referred to a master to approve of a scheme for their future application, and he recommends an augmentation of a salary given by the will of the founder, he is not, with respect to the augmentation, strictly confined to the provisions of the will as to the original salary, but may engraft upon it a new condition in furtherance of the testator’s general intention. Exp. Lane; In Re Knightsbridge School, M. 1819. 4 Madd. 479.

CHARITABLE USES IX.


216. Tenant in tail settled lands to a charity. The estate tail being spent, the remainder-man excepted to the decree of the commissioners; both the remainder-man and the issue in tail are bound in the case of a charity. Tay v. Slaughter, H. 1690. Pre. Ch. 16. Att. Gen. v. Rye, M. 1703. 2 Vern. 452. S. P.

217. Where charity lands were let at a great under-value for 81 years, upon payment of a fine, the lessee was decreed to pay all arrears according to the full value ascertained by the commissioners, and to deliver up the possession; and the court granted a commission to ascertain the lands intermixed with those of the charity. Reresby v. Farrer; Ca. of Pockleyton School, H. 1700. 2 Vern. 414.

218. A doubt having arisen in this case, whether, under 43 Eliz. c. 4. exceptions to the commissioners’ decree may be heard at the Rolls, his Honour refused to interfere. Rockley v. Kelly, E. 1700. Pre. Ch. 111.

219. S. in extremis was minded to give 200l. towards building the church at C., and twice desired P., who came to pray with him, to note it down, which he did, but not till three weeks after; but S.’s wife and maid put it down within four days: P. died a month after S. The commissioners, on inspecting these memoranda, though they did not expressly agree as to date, decreed the 200l. to the parish; but, on exceptions, Ld. Ch. held the gift not good, because not proved by the oath of three witnesses according to the statute. Philips v. St. Clement, Dans’ Parish, T. 1704. 1 Eq. Ab. 404. pl. 2.

220. An issue was directed in this case, upon a re-hearing of exceptions to a decree of the commissioners which had been twice confirmed. Corp. Christ. Coll. Oxon. v. Naunton Parish, T. 1705. 2 Vern. 507.

221. A nuncupative devise of 20l. per annum out of lands to a charity, before the statute of frauds, was held good by the commissioners of charitable uses; but on appeal, Ld. Harcourt held it void as a will, and not good as an appointment. To this the reporter P. W. puts a quere, and refers to Stoddard’s Ca. Duke’s Char. Uses, 81, where a nuncupative will was held good; for though a will cannot be created without a deed, yet by 43 Eliz. it may be appointed without a deed, and 43 Eliz. is subsequent to, and repeals 32 Hen. 8.; though it is true, that the statute of frauds repeals 43 Eliz. pro tanto; therefore, since the statute of
CHARITABLE USES IX.

Commission.—Inquisition.—Decree.—Exceptions.


222. Testator devised 100l. and the rectority of B. to J. C. and A., and the heirs of J., on condition that they should erect seven houses, and lease them to seven poor men as they should think fit, giving them the profits after all expenses; and in case of default in performing the trust, the same to go to the minister and churchwardens of B. for ever. Upon a commission of charitable uses, they thought they might add to or prescribe the mode of executing the intention; and the commissioners decreed, that J. should erect the houses before Christmas, and place therein seven poor men or women of the parish of B., (which was not required by the original,) and so upon death or removal, to place seven others, and 3l. to be paid to each; afterwards, the heir insisted he had a right to nominate any poor persons, though not of the parish of B.; but the court confirmed the decree of the commissioners, and decreed, that the heir should, within two months after notice of a vacancy, nominate out of the parish, and that upon default, it should devolve to the parish. The heir had nominated two persons not of the parish, yet though irregularly nominated according to the decree, they were permitted to enjoy for life; for the court would not permit the general intention to fail for want of circumstances annexed, which by default of the parties could not take effect. Att. Gen. v. Leigh, T. 1721.


223. A person who was summoned to appear before the commissioners, and did not appear, may except to their decree, if concerned in interest. Rauzen v. Turner, T. 1725. Sul. Ch. Ca. 42.

224. A commission to inquire into the misemployment of charities, within the borough of L., was directed to inquire, by twelve lawful men of the said borough, in the county of S., or other lawful means, concerning abuses within the said borough. Objected, 1st, That the commission was to inquire for this borough only, and not for the whole county. 2dly, That if the commission was proper, the authority to summon a jury was not legal, especially since 4 and 5 Ann. c. 16. of the body of the county. Per Ld. Ch.: The first objection is grounded on the words of the act, viz. Enquiry shall be made by twelve lawful men of the county; and it supposes that it is absolutely necessary, that every such commission should be for the whole county; but his Lordship saw no foundation for it; the statute does not fix the extent, but only the objects of every such commission; if the words of the act had been stronger, it ought not now to be made a question after a series of eight precedents, for a series of precedents against the plain words of an act have made a law. As to the second objection, what is said as to 4 and 5 Ann. c. 16. can have no weight, that statute concerns issues only to be tried out of the courts of record at Westminster; this is only an inquest awarded by act of parliament; and what arises from 43 Eliz. that the inquest shall be by men of the county, is answered by the commission itself, viz. twelve men of the said borough, in the county of S. It is the daily practice for juries, in general commissions for counties, to inquire about lands lying in different counties that are annexed to charities founded within the limits of those counties through which their commissions extended; the jury, therefore, under this commission, might well enquire into the lands out of the town, in the county at large. His Lordship thought the commission good, and well executed, and overruled the exceptions. Case of the Borough of Rochester, M. 1732. 2 Eq. Ab. 200. pl. 7.

225. T. C. gave to the Latin school at Y., "if any man be possessed of it that teacheth boys, and is richly grounded in the Latin tongue," 5l. yearly for teaching and instructing three boys. Item. he gave 50l. per annum. to the poor, out of his estate at H., to be paid by his executors. Testator made his wife executrix, and devised to her the estate at H. in fee.

Defendant was schoolmaster at Y., but never received the 5l. annuity. The commissioners of charitable uses ordered the testator’s widow to pay the arrears, and decreed, that the estate called H. was charged with the 5l. per annum. forever. The widow excepted, for that the estate was not charged; and if charged, the charge was not made perpetual. Per Ld. Ch.: There is no question but the
CHARITABLE USES IX. & X.

Exceptions.—Marshalling Assets.

226. A., by will, charged certain lands with 10l. per annum for maintaining a schoolmaster, and repairing the school. The annuity was to be paid half yearly; and if in arrear 42 days, he allotted 5s. per week nominate pana. The school was vacant six years, and on a commission of charitable uses, the commissioners decreed the owner of the land to pay the six years arrear, and also 5s. per week nominate pana, together with costs. The owner excepted, for that the vacancy was not his fault, and that if he paid the arrears he ought not to pay the penalty. Ld. Ch. decreed payment of the arrears, but directed that the penalty should only stand as a security for legal interest, where the principal sum is not regularly paid; and as to the costs, his Lordship awarded them in this case against the exceptant, but said, the commissioners had no power under the statute to give them. Aylett v. Dod, H. 1741. 2 Atk. 238.

227. In charity cases the court often gives the relators costs beyond the taxed costs. Osborne v. Denne, T. 1802. 7 Ves. 423.

228. On information, deviations from the will of the founder of a charity school, by separating the school from the master’s house, taking foreign pupils, so as to deprive the poor children of the master’s attention, &c., and applying the surplus revenue beyond the maintenance of the existing objects, arisen since the founder’s death, cy pres, to the same uses, were corrected by a decree, comprehending every object, the poor children, the master’s salary, and the almshouses. Att. Gen. v. Cooper’s Co. T. 1812. 19 Ves. 187.

CHARITABLE USES X.

Priority in Marshalling Assets.

229. Although charities are highly favoured in equity, and legacies to charitable uses are preferred by the civil law, in imitation of the Roman code, yet the rule in marshalling assets must be taken now as it was before the statute of mortmain. Vide Arnold v. Chapman, T. 1748. 1 Ves. 108.

230. Upon the question of marshalling assets, in Att. Gen. v. Graves, M. 1752. Amb. 158. and Att. Gen. v. Tomkiss, E. 1754. Amb. 216. Ld. Hardwicke said he would not set up a new rule for the benefit of charities, but they might have the benefit of the old one. Therefore, where there are general legacies, and the testator has charged his real estate with payment of all his legacies, if the personal estate is not sufficient to pay the whole, the court has said, the charity legacy shall be paid out of the personal estate, and the rest out of the real estate, in order that the testator’s will may be performed in toto.


232. And it is now settled, that the court will not marshal assets in favour of a charity legacy, so as to give it effect out of the personal chattels, it being void, so far as it touches any interest in land. Vide Mogg v. Hodges, M. 1750. 2 Ves. 52. 1 Cox 9. Att. Gen. v. Tyndall, E. 1764. Amb. 614. 2 Eden 207. Foster v. Blagdon.
CHOSES EN ACTION AND POSSIBILITIES.

What, how assigned, charged, or released.


CHOSES EN ACTION AND POSSIBILITIES.

What, how assigned, charged, or released.

1. **Chooses en action** belonging to an alien enemy are forfeited to the crown; but there must be a commitment and inquisition to entitle the king, and a peace before inquisition discharges the cause of forfeiture. *Att. Gen. v. Weedon*, M. 1699. Parker 267.

2. A **chose en action** is assignable in equity upon a consideration paid; therefore, where a seaman assigns his wages as a security for money, and dies indebted, the wages are bound. *Crouch v. Martin*, M. 1707. 2 Vern. 595.

3. A possibility is assignable in equity for a valuable consideration. And love and affection to a child is a secondary consideration, operating by way of agreement, and good. *Wright v. Wright*, E. 1750. 1 Ves. 411.

4. Where the thing assigned is only a **chose en action**, though the assignment be without notice, yet, as no legal estate passes, *qui prior est in tempore potior est in jure*, so if there be two executors who are also residuary legatees, and one of them for a valuable consideration, assigns part of his residuum to A., and afterwards, for a valuable consideration, assigns his whole residuum to the executor, if both are but **chooses en action**, the first assignment must take place. *Tourville v. Naish*, T. 1734. 5 P. W. 307, 308. *Vide Brace v. Marlborough*, D. 2 P. W. 496.

5. A man possessed of a **chose en action** in his own right may assign it without consideration; *secus, as to that of his wife*. *Id. Carteret v. Paschal*, T. 1739. 3 P. W. 199. *Et vide tit. Baron and Feme, sec. iii.*

6. **Chooses en action** and possibilities are assignable in equity, if made upon consideration; but where there is a demand in equity under a trust, which, at the time of the release, is a possibility only, it must be supported by a consideration. *Robinson v. Baraso*, H. 1734. 3 Vin. 153. pl. 29.


8. Assignments of **chooses en action** for a valuable consideration are good against creditors under a bankruptcy. *Brown v. Heathcote*, M. 1746. 1 Atk. 160.

9. The provisions in 21 Jac. 1 c. 19, s. 11. with respect to legal interests, must be followed as to equitable ones. And as to **chooses en action**, equity ought to follow the law. *Ryal v. Rolle*, H. 1749. 1 Atk. 163.

10. Money in the funds being a **chose en action**, cannot be attached or sequestered, but a pension payable at the treasury when assigned, is not a **chose en action**, but a grant. *McCarthy v. Good*, T. 1812. 1 Ball & Be. 387.

11. The assignee of a **chose en action** must take it, subject to all the equities to which it was liable in the hands of the original grantee. *Friddy v. Rose*, T. 1817. 3 Meriv. 86.

How far the **chooses en action** or possibilities of the wife shall pass under the commissioners' assignment in case of the bankruptcy of the husband, *vide ante*, *tit. Bankrupt, vii.* (b.)

Of the assignment of the wife's **chooses en action** or possibilities by the husband, *vide ante*, *tit. Baron and Feme*, iii.

How far the personal estate of the wife shall remain unchanged by marriage, and her **chooses en action** survives to her, *vide ante*, *tit. Baron and Feme*, ii.
COLONIES.

Plantations and Places subject to the Laws of England.

1. The method of making a plantation in Barbadoe liable to a debt contracted in England, is to procure a procuration from hence, under the seal of the mayor of London, or an acknowledgment by the owner upon the spot. A plantation in Barbadoe is not a testamentary estate. Per Ed. Jeffreys, Noel v. Robinson, T. 1667. 1 Vern. 460. 469.

2. An uninhabited country, newly discovered by the English, and possessed by them, is to be governed by the English laws; but an act of parliament made in England, without naming the plantation, will not bind it; therefore, the requisites of the statute of frauds in executing wills, have no effect in Barbadoe; but where the king of England conquers a country, by a conqueror’s right he may impose what laws he pleases, though, until such new laws are imposed, the country is to be governed by its own laws, unless where such laws are silent or contrary to the laws of God. Anon. T. 1722. 2 P. W. 73. Vide Blankhard v. Gally, T. 411. Campbell v. Hall, Cwmp. 204. Spragg v. Stone, Doug. 38.

3. Bill for possession of lands in St. Christopher’s. Defendant demurred to the jurisdiction. Per cur. Lands in the plantations are no more under the jurisdiction of Chancery than lands in Scotland; for the court only agit in persona: defendant should have pleaded to the jurisdiction. Demurrer overruled as insufficient. Robergeau v. Rees, M. 1738. 1 Atk. 543.


5. The boundaries of provinces granted by the crown cannot be altered without the consent or privy of the crown. S. C.

6. An agreement executed in England touching the boundaries of two British provinces in America, was decreed in this case to be executed in persona, though it could not be enforced in rem; and the tenure of the planters being preserved by the agreement, they need not be made parties. Penn v. Ed. Baltimore, T. 1750. 1 Ves. 444.

7. Where a bill is to enforce a Jamaica judgment, it must show the legal effect of that judgment in Jamaica, otherwise it is demurrable to. Catheart v. Lewis, E. 1792. 3 Bro. C. C. 516.

8. The effect of the statute of limitations or possessory law of Jamaica, (passed 4 Geo. 2.) is to bar, not merely the legal remedy, but any suit, claim, or demand, and it converts seven years possession into a positive absolute title, without any exception in favour of absen-tees, who are not within the exception expressed. This provision was held binding upon a court of equity, as well as of law. Beckford v. Wade, cor. Privy Counc. May, 1805. 17 Ves. 87.


10. A security by way of mortgage having been before a court of competent jurisdiction in the colony of Demarara, and a foreclosure and judicial sale directed thereon, the Ld. Ch. refused an injunction to restrain such sale, the allegations of fraud in the bill being merely general, and denied by the answer. White v. Hall, E. 1806. 12 Ves. 321.

11. All questions of title to land in the colonies ought regularly to be first decided by the local courts, from which an appeal lies to the king in council. Att. Gen. v. Stewart, E. 1817. 2 Meriv. 143.
COMMISSION.

I. Of Commissions to ascertain the Boundaries or Value of Estates.
II. Of the Execution and Return.
III. Of Review, where granted.

COMMISSION I.

Of Commissions to ascertain the Boundaries or Value of Estates.


2. Where charity lands have been let at a great under-value, and are intermixed with other lands belonging to the tenant, the court will grant a commission to ascertain the boundaries of each. Kerraby v. Farrer, H. 1700. 2 Vern. 414.

3. Where a man purchased an estate under an old survey, which proved to be incorrect and deficient in the number of acres in many instances, Ld. Ch. upon a bill decreed, that a commission should issue to measure the lands out of lease and those in lease, and the master to adjust the number of acres. Sir Cloudsley Shovel v. Bogan, T. 1708. 2 Eq. Ab. 688. pl. 4.

4. Bill against land owners to establish a right of 40l. per annum, and in lieu of tithes, which by a decree temp. Car. 1. were to be paid out of particular lands to the vicar of C. Decreed, a commission to ascertain the value of the lands and the owners' names, and what proportion of the 40l. each tenant ought to pay. Cuthbert v. Westwood, E. 1726. Gilb. Eq. Rep. 250.

5. If a man claims lands in equity, but knows not the bounds, the court will grant a commission to ascertain them when the right is established; but if the right is not settled, the party will be left to his remedy at law. Chapman v. Spencer, M. 1732. 2 Eq. Ab. 163. pl. 1.

6. The court will not grant a commission if defendant denies he has any of plaintiff's lands in his possession, for that would be to admit plaintiff's title in general; but if defendant has admitted plaintiff's title, and the dispute is only about the particular lands, there a commission is proper. Bo. of Ely v. Kenrick, M. 1732. Barnb. 322.

7. Though the interest of one party is more inconsiderable than that of the other, yet they shall equally bear the expense of a commission for settling boundaries, and separating freehold from copyhold. Norris v. Le Neve, E. 1744. 3 Atk. 88.

8. A bill to ascertain the boundaries of two manors was dismissed, where there was no dispute as to the soil: for all the cases in which the court has entertained bills for establishing boundaries, have been where the soil itself was in question, or where there might have been a multiplicity of suits. (a) Held, also, that the appointment of commissions to fix boundaries of legal estates, is not of course; for there ought to be some equitable circumstance in the case. (b) Wake v. Conyers, T. 1759. 1 Eden 331. 2 Cox 360. Vide 
(a) Leeds D. v. Powell, 1 Ves. 171. Leeds v. New Radnor Corporation, 2 Bro. C. C. 518. and references. (b) Vide ante, pl. 1. 6. Also, Hungerford v. Goring,
Of Commissions to ascertain the Boundaries or Value of Estates.


9. If the tenants of a manor confirm the boundaries, the lord is entitled to a commission to ascertain them, in order to prevent a distress. Boursie v. Prentice, E. 1783. 1 Bro. C. C. 200.

10. Commissioners of perambulation must make a return, and if they cannot agree in making it, they may report specially. But before they make such return or report, the court will not grant a new commission, upon the allegation of their disagreement. Corbery v. Mansell, H. 1737. Vern. & Scriv. 112.

11. A commission to ascertain the boundaries of a manor or a parish, ought not to be granted, unless all the parties who have a probable interest are before the court. Atkins v. Hatton, H. 1794. 2 Anstr. 386. Vide St. Luke v. St. Leonard, 1 Bro. C. C. 41.

12. Bill to establish a modulus, and that a neighbouring rector may interplead as to the tithes to be covered by such modulus, and that a commission may issue to ascertain the boundaries of each rectory. The court refused the commission, for the rectors have different claims: one claims in kind, and the other a modulus. Woolaston v. Wright, M. 1797. 3 Aust. 801. Vide Johnson v. Atkinson, 3 Anstr. 798.

13. Where lands were devised to a charity, but in the course of time became intermixed with those of the second husband of the testator's widow, a commission was granted to ascertain them. Att. Gen. v. Bosier, E. 1798. 3 Ves. 714. 5 Ves. 300.

14. Upon a bill by the lord of a manor, a commission issued to distinguish copyhold lands within the manor (comprised in admittances produced, the last in 1693) from freehold, and compounded from uncompounded copyholds, and to ascertain the boundaries, and if they cannot be distinguished, to set out lands of the tenant, of equal value, with so much of the copyhold lands as cannot be distinguished. D. of Leeds v. E. of Strif- ford, M. 1798. 4 Ves. 180.

15. It is the duty of a tenant to keep the boundaries, and the court will aid the reversoner to distinguish them; and if they cannot be distinguished, will give him as much land. Aston v. Ld. Exeter, T. 1801. 6 Ves. 293. Vide last case.

16. Bill by the lord of the manor of W. against the lord of the adjoining manor of J. (who was also lessee of the manor of W.) and against the commissioners under an act for inclosing lands within the manor of J., alleging confusion of boundaries, arising out of the union of possession, and that defendants were combining to set out a boundary to the manor of J. which would include lands belonging to the manor of W.; and therefore praying a commission to set out the lands lying within and being parcel of the manor of W. The lord of J. by his answer set out boundaries, referring to perambulations made previous to the union of possession; and the lease having expired after the filing of the bill, and it not having been proved that any confusion of boundaries was occasioned by default or neglect of the owners of J., while lessees of W., the bill was dismissed with costs as against the commissioners, but without costs as against the other defendant; for the court will not interfere in compelling either propietor to have his right so determined. Speer v. Cawstr, E. 1817. 2 Meriv. 410. Vide Wake v. Conyers, 2 Cox 360.

17. The court will grant a commission to ascertain and distinguish, or to set out boundaries, on a bill by a prebendary against the lessees, of the prebendal lands, and also against the owners of other lands, the parish with which the prebendal lands had become intermixed and confounded by reason of the unity of possession. Willis v. Perkins, T. 1817. 2 Meriv. 507. Vide Speer v. Cawstr, lib. 410.
COMMISSION II.

Of the Execution and Return.


19. A plaintiff may serve any of defendant's commissioners with notice of the execution of a commission, and is not bound to those only whom defendant might choose; otherwise, if the two commissioners, chosen by defendant, should be absent or dead, the commission could not be executed, wherefore the court suffers four on each side. *Anon.* E. 1747. 3 Atk. 633.

20. A commission issued to four commissioners, two made one return, and the other two made a return quite opposite.

COMMISSION III.

Of Review, where granted.

23. On appeal, new matter must be brought, but in review, the parties must proceed ex eisdem acts unless there be a clause to receive new matter. *Popping's Case*, T. 1725. 2 Eq. Ab. 82. (n.) to pl. 4. Sel. Ch. Ca. 48.

24. A commission of review to reverse a sentence of the delegates, is a matter of discretion in the crown, and if it be a hard case, as to bastardize issue, the Ch. will advise the crown to deny it. *Franklin's Ca.* T. 1725. 2 P. W. 299.


26. If five judges are present, and two are against the sentence, it is no cause for a commission of review. S. C.

27. The prerogative court and court of delegates in England gave sentence in favor of a will, and likewise the prerogative court in Ireland; but the delegates in Ireland reversed that sentence two years after the English sentence; both sides petitioned for a commission of review. Ld. Ch. declared he would advise his majesty to grant a commission to review the sentence in Ireland, but to suspend the commission of the first petitioners, till those commissioners had given sentence. S. C.

28. A commission of review was granted after probate of the first will confirmed by the delegates, though a second will appeared in revocation of the former. *Amersley v. Palmer*, T. 1722. 9 Mod. 8.

29. In this case a commission was granted pending an indictment for forgery of a will. *Popping's Ca.* T. 1725. Sel. Ch. Ca. 48.


31. Also upon a sentence of the court of delegates in Ireland, affirming a sentence of the prerogative court there. *Goodwin v. Giesler*, 4 Ves. 211. (n.)

32. The prerogative of granting a commission of review is to be exercised upon peculiar circumstances, and the import-
COMMISSION III. & IV.

Commission of Review.—Commissioners.

ance of the case. In this instance, a sentence of the court of delegates setting aside a will, the report of Ld. Ch. was against the application; his Lordship concurring upon the evidence, that the will was obtained, or an alteration prevented by undue influence; and there being no question of law; upon this proceeding no costs are given. Exp. Pearce, M. 1800. 5 Ves. 693.

33. A memorial was presented to the king in council, praying a commission of review to rehear a sentence pronounced by the delegates in affirmation of one by the prerogative court establishing a will, and pronouncing against a testamentary paper. The memorial was referred to the Ld. Ch., who certified against granting the commission, on the ground that the case did not furnish any such doubt with reference to the facts, or to important points of law, as made it expedient to grant a commission; which was prayed of the grace and benignity of the crown, regulated by sound discretion, and usually withheld upon principles of public expediency, unless there are very cogent reasons for believing that the sentence is founded on error in fact or in law, or unless the doctrines of law upon which it is supposed to be founded are so questionable and important as to make it clearly fit, that they should be considered in the most solemn manner. Ld. Ch. said, if there is any in which great caution should be observed, it is where the application is for a commission, admitting the party to new pleas and new proof, and it is convenient to the exercise of this prerogative that if the purpose is to have such a commission, the memorial should expressly pray it, and should contain allegations and matters on which that special prayer ought to be addressed to his majesty and the grounds upon which such special prayer could be complied with. His Lordship added, that if he should incline to consider the request on that view, he should not permit himself to advise his majesty to grant the commission, with a clause admitting a new plea and new proofs, without much further discussion, and without hearing counsel in opposition. If in any case such a commission is to be granted, (and such there has been,) it is necessary to the administration of justice to decide in what manner it is to come by way of preliminary proof, before he could trust himself with so high a prerogative, and so inconvenient to general justice. Ld. Ch. further said, that where there is a miscarriage in point of clear law, if a rule of law admitted, or in point of fact a rule of law and of importance, and it has not received due attention in the courts below, that would form a case upon which such an application would not be improper. Looking, therefore, to this case in that point of view, his Lordship said, a different conclusion of fact upon the evidence is not a sufficient ground to grant the extraordinary relief of a commission of review. Upon the whole, Ld. Ch. concluded, that the general intents of justice did not call on him to advise his majesty to grant the commission, even if the particular decision was wrong, for the principles upon which it is granted do not deny that it may be refused, even in a case which he should think there might be a better decision. Eagleton v. Kingston, T. 1803. 8 Ves. 438.

There are several instances where commissions of review have been granted, between the years 1666 and 1741, for which see Thesaurus Juridicus, tit. Commission, sec. iv. But note, the registry of delegates goes no further back than 1666. For the practical mode of obtaining this very rare commission, see 4 Ves. 211. (n.)

COMMISSION IV.


34. A commissioner may be a witness, but he must be examined before any other in the commission. Bright v. Woodward, H. 1683. 1 Vern. 369.

35. Where a witness examined for defendant, had deposed many reflecting things, and was ordered to pay costs, Ld. Ch. discharged the order, it being the
COMMISSION IV.

Power, Duty, and Liability of Commissioners.

Note. It seems the interrogatory did not lead to such a disposition. Anon. H. 1720. 2 P. W. 126.

36. Commissioners are not to consider themselves as agents for the parties by whom they are nominated. Watson v. D. of Northumberland, T. 1805. 11 Ves. 160.

CONDITION.

I. Precedent.
II. Subsequent.
III. Strict. Who may take Advantage or be prejudiced. Conditional Limitations.
IV. Performance expressly, or by pres—where dispensed with.
VI. Void Conditions.

CONDITION I.

Precedent.

1. Conditions precedent must be literally performed, and the court will never vest an estate, where by reason of a condition precedent it will not vest in law; and this maxim is so strong as to hold even in cases where the condition is become impossible. Harvey v. Aston, E. 1787, 1 Atk. 376. Boundell v. Curver, 2 Bre. C. C. 67. Et vidi Berlie v. Falkland, 2 Vern. 533. Secus, of conditions subsequent, which are to devest an estate. Fopham v. Bamfield, M. 1682. 1 Vern. 83. Colles' P. C. 1.

2. A possessed of a term, devised it to an infant ex ventre sa mere, if it should be a son, and if he should die a minor, then to testator's grandson. A. died, leaving his wife executrix. The infant was born, and proved a daughter. The executrix shall have the term, and not the grandson, for there was a previous condition and contingency, viz. the birth of his son, and his death during minority. Grascott v. Warren, T. 1697. 12 Mod. 128.

3. I. S. gave his daughter 4000l. to be paid her at 21, or marriage with consent. The daughter died when six years old, and the mother took out administration and married A. and then died, leaving A. her executor and sole devisee. Bill by A. for this 4000l. Held, that the 4000l. never vested in the daughter, for she never married or attained 21, which was a contingency, and a condition precedent never performed. Yates v. Phetts place or Fettisplace, H. 1700. 2 Freem. 243. 2 Vern. 416. Pre. Ch. 140. As to conditions restraining marriage, unless with consent, where the breach of them shall cause a forfeiture, and where they shall be considered in terrorem only, vide post, tit. Marriage, vi.

4. A. gave his grand-daughter 200l. on condition she remained with his executors till 21, but if she was taken from them by her father, who was a papist, or married against their consent, then only 10l. The executors placed the young lady with a clergyman, and before 21, with the consent of one executor, she visited her father, who married her to a papist. Decreed, per Ld. Ch. (on appeal) that the grand-daughter should have but 10l., for the 200l. was given on a condition precedent, which described the quality of the person to take, and though one executor consented to the visit he did not consent to the marriage, against which the testator particularly wished to guard; this was a marriage against consent of the executors, who
CONDITION I.

Precedent.

upon notice declared their disapprobation of it. Cregagh v. Wilson, H. 1706. 2 Vern. 572.

5. An infant siste, having lands in fee. married A. By articles, it was agreed she should convey these lands to A. during coverture, and then her jointure should be increased from 250l. to 450l. per annum. A. died and she married B. Bill to have the 450l. per annum. Per cur., here was a condition precedent to the augmentation of the jointure, and the court will not relieve against the neglect of parties. Wood v. Ingram, M. 1710. 2 Eq. Ab. 211. pl. 3.

6. Power under a settlement for trustees to teases 300l. for a daughter, to be paid her at 21, or day of marriage, when J. S. and his wife should die without issue male, and in the mean time, 100l. per annum for maintenance. Per Ld. Ch. the words, “when J. S. and his wife should die without issue male,” amount to a condition precedent, and the portion cannot be raised when one of them is dead without issue male; resolved also, that “the mean time,” in which the 100l. per annum is payable for maintenance, relates to the intermediate time between raising the money, and the daughter attaining 21, or marriage. Champney v. Champney, E. 1715. 10 Mod. 314.

7. B. bequeathed to his wife H. all his debts, goods, &c. provided that if H. died without issue by him, he appointed that 80l. per annum should remain to his brother I. A. died, then I. died, and then H. died without issue. Per cur., this legacy was to arise upon a condition precedent, which makes it the worse. All the cases put, are cases of a devise over, and here the fund is bequeathed to the wife. If the bequest be good, it must go to the executor of the legatee. Cur. adv. vult. Anon. H. 1718. 8 Vin. 450. pl. 4. 24.

8. Equity will not relieve against the breach of a condition precedent, where the damages are contingent, and cannot be estimated. Sweet v. Anderson, E. 1723. 2 Bro. P. C. 450.

9. Defendant agreed by note of hand, to pay B. 200l. in two years, and gave him a right of wheat, on condition he married his daughter, and settled land of the value of 600l. on her for her jointure. The marriage took effect, and there was issued a daughter, but both mother and daughter died within the two years. Bill to execute this agreement dismissed, for it was in B.’s power to have entitled himself to the 200l. when he pleased, by laying out the 600l. Powell v. Pellett, H. 1726. 2 Eq. Ab. 209. pl. 3.

10. Lands were devised in trust, to maintain an infant till 23, and then to convey them to him, and if he die before to convey them to another. The infant is not entitled till 23, and as the estate is not devised over, if he dies under, the surplus profits will go to testator’s heir. Tilly v. Simpson, M. 1729. Mort. 244.

11. I. S. in consideration of 500l. to be paid on marriage, made a settlement, giving his wife a power to dispose of 200l. at her death, which she did by will 15 years after. I. S. insisted, as against his wife’s legatee, that his having 500l. with his wife was a condition precedent, and that he only received 300l. Non. alloc. and decreed, per M. R. that the 200l. be raised with interest, from a year after the wife’s death. North v. Ansell, T. 1731. 2 P. W. 618.

12. Testator devised 500l. out of land upon a condition precedent, which, if not performed, the legacy was to sink for the benefit of the devisee. Per cur., this differs from a personal legacy, for it is a devise out of land, and is forfeited by the non-performance of the condition. Sherif v. Morlock, M. 1731. W. Kel. 24.

13. No technical words are necessary to distinguish conditions precedent and subsequent, but the same words may make either, according to the intent of the party. Dict. per Talbot, C. in Robinson v. Comyns, H. 1735. Ca. temp. Tulib. 164.

14. Testator devised this:—“If either of my devisees should marry into the families of R. or G. and have a son, I give all my estate to him for life, with remainder over, if not, to R.” The devisees married, but not into the favoured families. Bill by R. for this estate, dismissed, per Ld. Ch., for the marriage is a condition precedent, which the devisees have their whole lives to perform. Randle v. Payne, E. 1779. 1 Bro. C. O. 55.

15. A. having a life estate under the will of B., with remainder to C. in tail, devised, together with his own estate, to uses, by which C. would take only a life estate, but provided that his own estate should not be conveyed till C. should suffer a recovery, and bar the remainder in
CONDITION I. & II.

Precedent.—Subsequent.

16. A legacy given to daughters equally to be divided between them, when they arrive at 24 years of age, is vested immediately, and the time of payment only is postponed; it is not a condition precedent upon which the legacy was to vest, as where the word “if” is used. *Moy v. Wood*, E. 1792. 3 Bro. C. C. 471.

17. A copyholder made a demise for one year, and at the end of that year, from year to year for 13 years or more, making in the whole 14 years, if the lord will grant a license, and so as that no forfeiture shall be incurred, with the usual covenants in a farm lease. This license is a condition precedent, and the lord having refused to grant it, the court held that the tenant has no lease at law further than from year to year, and there is no equity arising from the circumstance that the lord purchased his tenant’s interest with notice of the demise, and an express exception of all subsisting leases, or agreements for leases. *Luskin v. Nunns*, T. 1805. 11 Ves. 170.

18. A legacy was given to A. to be paid to her so soon as she should attain 21, if she should live to attain that age, but not otherwise, or upon her marriage with the consent of the executors, but not otherwise, and in case she should die before 21 or marry without consent, then over: Held a condition precedent, and by her marriage under age without consent (one executor being dead, and the other abroad) the vesting was reduced to the single contingency of her attaining 21. *Knight v. Cameron*, M. 1807. 14 Ves. 389.

19. Testator bequeathed his residue in trust that if A. should, within six months after his decease, give security not to marry B., then, and not otherwise, to pay it to the children of A., with a proviso to go over, if she should neglect or refuse to give such security. This was held a condition precedent, and the six months shall be reckoned exclusive of the day of testator’s death; therefore as he died on the 12th January, between eight and nine in the evening, a security given on the 12th of July, about nine in the evening, was held sufficient, for there is no general rule, that in computing time from an act or an event, that the day shall be inclusive or exclusive, for it depends on the circumstances and reason of the thing. *Lester v. Garland*, T. 1808. 15 Ves. 248.

20. A limitation over after a limitation which never took effect, was established, it not operating as a condition precedent. *Meadows v. Parry*, M. 1812. 1 Ves. 124.

CONDITION II.

Subsequent.

21. Though equity will never vest an estate, where by reason of a condition precedent it will not vest in law, yet as to conditions subsequent, which are to vest an estate, it is otherwise; for where the party can be compensated in damages for the non-precise performance of the condition, there it is just to relieve, but where the party cannot be compensated in damages, it would be against conscience to relieve. *Popham v. Bamfield*, M. 1682. 1 Vern. 63. *Ld. Falkland v. Bertie*, H. 1677. 2 Vern. 339. The rule of law is, that where there is a subsequent condition, which becomes impossible by the act of God, it is absolutely void, for *let non cogit ad impossibilitia*, and this construction ought the rather to prevail in conditions, so odious as those which restrain the freedom of marriage. (Vide post, tit. Marriage vi.) *Peyton v. Bury, or Painton v. Berry*, T. 1731. 2 P. W. 626. W. Kel 37. *Graydon v. Hicks*, or *Graydon*, H. 1739. 2 Atk. 218. et *vide Harvey v. Aston*, 1 Atk. 361. *Jones v. Suffolk*, 1 Bro. C. C. 529.

22. Though no technical words are necessary to distinguish conditions prece-
CONDITION II. & III.

Subsequent.

dent and subsequent, but the same words may be taken indifferently, according to the testator's intent. Vide Robinson v. Comyns, Ca. temp. Tulk. 164. Yet that intent should be clear and plain, by de

vice over, to devest the estate in the case of a condition subsequent, where the thing is vested, and may be in nature of a penalty, but in the case of a condition precedent, for which there can be no compensation to dispense with the condition, would be giving an estate against the intent of the donor. Harvey v. Ast

ton, E. 1737. 1 Atk. 378.

23. Provò in a settlement, that if the intended marriage did not take effect, and the intended wife should not, when of age, by fine or otherwise, join in charging her estate with 2000l., then the settlement to be void. The marriage took effect, but the wife finding that her estate was of greater value than the jointure, she, with her husband, refused to charge it with the 2000l. Id. Ch. de
decreed a re-conveyance, and an account of the profits from the refusal, but no costs, for it was a condition subsequent to the vesting the estates in defendant.


24. A gave 6000l. to B, the only child of C., his sister and heir at law, payable at 21 or marriage, to be in lieu of all B. could claim out of his real and personal estates, and upon condition that she should release her right thereto. It was insisted that B. could have no right during the life of C., her mother, who was testator's heir, and that she might marry while an infant, or might marry a minor, and so be incapable of releasing, and yet the legacy might be due; wherefore it could be no more than a condition subsequent, which was allowed. Acherley v. Wheeler, or Vernon, T. 1722. 1 P. W. 783. In Ellis v. Ellis, 1 Sch. & Lef. 5. Lord Redesdale said Lord Hardwicke was dissatisfied with this case.

25. A gave his niece the surplus of his personal estate, payable at 21, and if she die before 21 or marriage, to go over.

The bequest over is a condition subsequent, and the niece shall have the inter-


CONDITION III.

Strict. Who may take Advantage or be prejudiced. Conditional Limitations.

26. A: seised in fee, devised lands to his daughter and her heirs; and his mind was, that if his son paid to her 50l., then his son should have the land. The money was not paid at the day; and the daughter sold the land, but deeded against the vendee, on the son's paying the money: for the court took it to be, but in nature of a security. Bland v. Middle-

ton, H. 1678. 2 Ch. Ca. 1.

27. Lands were limited by settlement to the second son in fee, provided that if the eldest son die without issue, the second shall within six months after his death pay 15,000l. to a sister, or if in default, the land to go to her sister and her heirs. The eldest son died without issue, and the sister died within six months. Decreed, that upon the second son's refusal, the land should go to the heir, and not the executor of the sister; otherwise the known difference between a condition and a limitation would be destroyed. E. of Winchelsea v. Wentworth or Ncrcliffe, II. 1687. 1 Vern. 402.

28. Sir H. W. made a deed of settle-

ment, in which an intended marriage be-
tween the duke of S. and his daughter was recited; and then a clause that in case the daughter should live to attain 16, and should refuse to marry the duke, the duke should have 20,000l. out of his personal estate; but if the marriage should take effect after the daughter attained 16, and she should have issue male, then in trust for the duke and his wife during their joint lives, with benefit of survivorship; remainders over. Sir H. W. by will confirmed the settlement, and directed, that in case the marriage should not take effect according to the limitations of the settlement, or in default of issue of the marriage, (if had) then remainder to testator's daughter for life, if she should sur-

vive the duke; remainder to her eldest son; remainders over. Testator died,

and the marriage took effect with the duke before the daughter was 16; but she lived to attain 16, and died before 17, without issue. On the hearing, it was insisted,
that by the deed and will the personal estate was not so vested as to entitle the administrator of the wife, by reason of her marriage before 16, and that it was testator's intent to restrain his daughter from marrying before that age, but Ld. Ch. thought the thing aimed at by testator, was a marriage with the duke, and for that intent the penalty of 20,000l. was inserted upon refusal; the latter clause was only to bring the 20,000l. again into the personal estate, and to be settled to the same uses with the rest, in case of a marriage before 16, which did not imply that the marriage might not be before 16. Ld. Ch. therefore decreed an account, &c., but the Lords reversed the decree. *Sir Casar Wood alias Cranmer v. D. of Southampton*, M. 1692. Show. P. C. 83. 1 Vern. 338. 2 Treem. 186.

29. Another point arose on the foregoing case. T. W. one of the co-heirs of *Sir H. W. claimed a moiety of the profits of the premises for the duke's life, which was decreed to him in Chancery, and the decree was affirmed by the Lords. *Sir Casar Wood, or Cranmer v. Webb*, M. 1692. Show. P. C. 87.

30. R. T. being seized in fee of lands, died, leaving M. P. and S. his daughters and co-heirs. By settlement on the marriage of P. with R. C. in consideration of 4000l. paid to him by M. they M. and P. conveyed two parts of said land to trustees, in trust for R. C. for life; remainder to P. for life; remainder to the issue of the marriage; remainder to R. C. and his heirs; *proviso*, that if there be no issue of the marriage living at the decease of the survivor of husband and wife, t. c. husband and wife, and the heirs of the wife, should, within 12 months after the survivor's decease without issue, pay to the heirs or assigns of R. C., the husband, 4000l.; then the remainders and trusts for R. C. and his heirs should cease, and the estate be to the right heirs of P. for ever. R. C. and his lady levied a fine of these lands to the use of R. C. and his heirs, and then they both died without issue. Bill by the sisters and co-heirs of P. to have the estate conveyed to them by the trustee and devisee of R. C. on payment of 4000l. according to the proviso. Ld. Ch. dismissed the bill, saying, that the proviso tended to a perpetuity, but the Lords reversed the decree, and it was added to the decratal order, that upon payment of 4000l. to the devisee of R. C., the sisters of P., as her heirs, should be let into possession. *Lloyd, Bart. v. Carew, Bart. H.* 1697. Show. P. C. 137. 1 Com. Rep. 20. Pre. Ch. 72.

31. J. C. fearing his niece should marry a papist, contracted with Lord G. to marry her to his son; they were both infants. J. C., in order to oblige his niece to marry the young lord, by will devised his estate to trustees for his niece, (in case within three years after his death she married Lord G.) for her life, remainder to her sons by Lord G. in tail male; and in default of issue, or in case the said marriage should not take effect within the three years, remainder to Lord F. for life; remainder to his sons in tail male; remainders over. Testator appointed three executors, and ten days afterwards by codicil declared, that if the marriage took effect within the ages of consent it should be considered as none, unless afterwards ratified. Testator then committed the care of his niece to Lady W. and died, leaving his niece 12 years old, and Lord G. somewhat younger. The niece immediately went to live with Lady W., who was appointed her guardian by the court. In December, 1685, the niece, in answer to a proposition of marriage sent her by Lord G.'s trustees, declared under her hand thus: "I will marry Lord G. as soon as ever he comes to his age of consent, or at any time before, by the advice of my friends and relations; and I do declare that I will marry no other person whatsoever." In February, 1686, the niece filed a bill, stating her readiness to marry Lord G. and praying that the trusts of her uncle's will might be performed. In May, 1686, Lady W. gave up the guardianship, and the court placed the niece under the care of her grandmother, Mrs. F. In May, 1687, just before Lord G.'s age of consent, the niece's friends sent proposals to Lord G.'s guardians for some maintenance out of her own estate, as Lord G. was about to travel; but the proposals were rejected; whereupon Ld. Ch. in July, 1687, declared such proposals reasonable, and further declared, that no person should persuade the niece to marry unless they were compiled with, whereupon Lord G.'s guardians acquiesced in the Ch.'s order, but he never afterwards renewed any address to the niece. In August, 1687, Ld. Ch. sent the niece to live with Lady H., where she remained till the expiration of the three years, and
for three years and a half afterwards, wholly unnoticed by Lord G. or any of his relations, though during that time she had made every advance towards the marriage which honour and modesty would permit. Afterwards she married Mr. Bertie, a protestant, of as honourable a family as Lord G. Mr. and Mrs. Bertie remained unmolested in possession, till June, 1694, when Lord F. on his father's death, brought ejectments. Mr. and Mrs. Bertie filed their bill in equity; and Lord F. filed his cross bill. Upon hearing of these causes, Lord Somers, assisted by the two chief justices, Holt and Treby, decreed, that Mr. and Mrs. Bertie's bill should be dismissed, and that the trustees should convey to Lord F. &c. according to testator's will, as he had used no contrivance to prevent the marriage. On appeal, the Lords thought Mrs. B. entitled to relief, and ordered, that the trustees should convey to her for life; remainder to Lord F. and the heirs male of his body; remainder to the right heirs of testator, and that there should be no account of the past profits. Bertie v. Lord Falkland, E. 1697. Colles v. P. C. 10, truly stated from the journals, but S. C. is variously reported in 2 Vern. 333. Salk. 251. 3 Ch. Ca. 129. 136.

32. A had issue a son, and by his second wife two sons and six daughters. A. settled his estate on his eldest son by the second marriage in tail male, remainder to the second son of the same marriage, remainder to the heirs male of his body, and in default, to the son of the first marriage, provided that, if by the default of issue, the estate came to the son of the first marriage, he, or his heirs, should pay 1000l. to the daughters. 'The son, by the second marriage, entered, and suffered a recovery of a moiety of the lands, and died without issue, by which one moiety came to the son of the first marriage. Decreed, that the moiety thus descended was liable to pay the whole 1000l. Hooley v. Booth, M. 1698. 2 Vern. 359.

33. Legacies were given to A., B.; C., and D., on condition, that as they came of age, they should release all claim on testator's estate; only such as refuse shall forfeit their legacies, for this condition shall be taken distributively. Hawes v. Warner, H. 1704. 2 Vern. 478.

34. I. S. seised in fee of lands both in possession and in reversion, after the death of A., and having a son and daughter, devised the lands in possession to his wife for life, and then he devised the respective premises to his son and his heirs, on condition that the son should, within a year after the death of B. (when it appeared I. S. had another reversion) pay 1000l. to the daughter of I. S. who had a power of entry on default. B. died, and the daughter marrying, brought her bill at the end of the year to have this portion raised, which was decreed to be done by sale, unless the heir should pray to have it done by mortgage. Bacon v. Clerk, M. 1718. 1 P. W. 478. Pre. Ch. 350.

35. A reversion is an estate, and a beneficial one, and may as well as any other estate be devised on condition. S. C.

36. A had issue three sons, B. his eldest, (who died in his life-time, leaving a daughter,) and C. and D. A. devised lands to his wife for life, and after her death to D. and his heirs, provided that if C. should, within three months after the death of A.'s wife, pay to D. 500l. then the land to remain to C. and his heirs; C. died in the life-time of the wife. Decreed, that the heir of C. shall take advantage of this condition, and not the right heirs of the testator. At this day in devises and limitations of uses, an estate may be limited over to a third person, upon the defeasance of a former estate in fee, if the condition be not too remote in point of time; and though there have been words found out to save in appearance the maxims in the common law, yet in truth and effect the very benefit and advantage of the condition is passed over to a third person, notwithstanding the maxims of law that a stranger cannot take advantage of a condition. Dict. per Ld. Parker, Marks v. Marks, E. 1719. Pre. Ch. 486. 10 Mod. 419. 1 Stra. 129.

—Note, in Harvey v. Aston, 1 Atk. 377. Willes, C. J. was of opinion, that if a stranger had imposed a condition, it was as strong as if a father had imposed it, and that the rule was not founded on the consideration of the person giving, but on the thing given, for cajus est dare quis est dispomere. Though a condition was not in strictness of law devisable, yet since the statute of uses, by an equitable construction of it, the devisee may take
CONDITION III.

**Strict—where held binding.**

the benefit of it, and C. in the principal case might have released this condition.

37. Nécessaire but the heir at law can take advantage of a cohabitation. Whaley v. Cox, E. 1737. 3 Eq. Ab. 349. pl. 29. But a condition will bind the heir, if the devise so takes effect as that he must claim under the ancestor. Miles v. Leigh, M. 1738. 1 Atk. 373.

38. Testator gave 550l. to his daughter, and devised his lands for 99 years, in trust, that if his wife should pay off the 550l. in four years, then he gave the lands to his wife for life, remainder to his son H. and his heirs, and for want of such issue, to him and his heirs for ever, and the term to attend the inheritance. The wife did not pay the money, and the estate was sold under a decree. Afterwards a bill was filed against the devise of the purchaser, by the son of H. as heir in tail for the reversion of the 99 years term; there having been no fine levied to the purchaser by H. to bar the estate tail: Held, that this was a conditional limitation in the wife for life, taking place as an executory devise, for it wanted a freehold to support it as a contingent remainder: and though the estate for life in the wife was a preceding executory limitation, which never took effect, because she did not perform the condition by paying the money, yet the estate tail to H. was well limited, expectant on the term of 99 years, and this being an executory devise, the freehold descended to H. as heir at law of testator, till the four years had elapsed, or the wife had performed the condition. Decreed in favour of plaintiff's title to the inheritance. Hayward v. Stillingsfleet, M. 1737. 1 Atk. 422. Whether a remainder over shall take effect upon a conditional determination of the preceding estate, depends upon the question whether the condition be annexed to the preceding estate, or is a condition precedent. Vide Scatterswood v. Edge, 1 Salk. 229. Jones v. Westcomb, 1 Eq. Ab. 245. pl. 10. Hopkins v. Hopkins, Ca. temp. Talb. 44. Andrews v. Fulham, 2 Stn. 1092. Gulliver v. Wickett, 1 Wils. 105. Wig v. Wig, 1 Atk. 392. Fonnerneau v. Fonnerneau, 3 Atk. 314. Avelyn v. Ward, 1 Ves. 420. Bradford v. Foley, Doug. 63. Statham v. Belt, Cwmp. 40. Horton v. Whitaker, 1 T. R. 346. Doo v. Brabant, 3 Bro. C. 393. Meadows v. Parry, 1 Ves. & B. 125. Humberstone v. Stanton, ibid. 385. Et vide post, tit. Executory Devise.

39. A devised his real estate to his brother B. and his heirs, on condition that B. should give a release within three months after the testator's death; and upon neglect he devised it to R.---B. died in testator's life-time; decreed, that the devise over should take place; contra the opinion of the court of C. B. in Roe v. Wickett, cited in 1 Wils. 107. 3 Burr. 1624, and agreeing with Fonnerneau v. Fonnerneau, 1 Ves. 118. Avelyn v. Ward, E. 1749. 1 Ves. 420. Jones v. Westcombe, Pr. Ch. 316. Gilb. Eq. R. 74. Andrews v. Fulham, 2 Stn. 1092. Gulliver v. Wickett, 1 Wils. 106. S. P.

40. Testator devised to his son A. in tail; remainder to B. his daughter in tail; remainder to his daughter C. in tail; remainder to her son D. and his heirs, on condition that he pay to his elder sister, plaintiff's mother, 100l., soon after he should be possessed of the estates, and in default, the estates should be "to the plaintiff's mother, &c." This is a conditional limitation, and there is a legal remedy for raising the money; it is a condition subsequent, as all conditions turned into limitations are, it is to be raised after D. comes into possession; and the only doubt is, from the devisee over being limited to the mother, without saying her executors. It is agreeable to law that it should extend to executors, and testator was writing what would be law, but he left off with an et cetera. Embry v. Martin, T. 1754. Amb. 231.

41. It has been declared that conditional limitations shall never be extended beyond what is absolutely necessary from the context of a will, and shall not be supposed to govern any disposition, except that upon which they may naturally be supposed to attach; therefore, if a testator says in his will, that if his wife shall be insane at his death, and a son shall be born, he gives it to that son, and after his death over; the condition has been construed only introductory-to the gift to that son if born, and not to govern the limitation over. Holmes v. Craddock, H. 1797. 3 Ves. 320.
CONDITION IV.

Performance expressly, or by pres, where dispensed with.

42. A. devised to each of his daughters 20,000l., payable at 25; but if either of them should marry before 16, or without consent, then only 10,000l. One married before 15 with consent, yet she shall have the whole 20,000l. Bennet v. Salisbury, E. 1691. 2 Vern. 223. Skin. 285. In a report of S. C., nomine Lid. Salvitby’s Ca. 2 Vent. 365. 3 Ch. Ca. 433. it is said to have been held, that both conditions ought to have been complied with.

43. Devise in trust to A: for life, remainder to his first and other sons in tail male, on condition that if A. should die without issue male, or if F. his father, should not, in his life-time, convey and assure to A. two-thirds of the estate settled on F. at his marriage, then A. shall have no benefit of the devise. This is a subsequent, and not a precedent condition, and a devise by F to A. of an equivalent estate, is a sufficient performance of the condition to entitle a court of equity to relieve against the breach. Horner, or Bamfield v. Popham, 1697. Collis P. C. 1. 1 Vern. 79. 344. 2 Vern. 427. 449. 1 P. W. 54. and in 1 Salk. 236. imperfectly.

44. Devise to A. and the heirs male of her body, on condition that she intermarry with, and have issue by one surname Searle; and in default of both conditions, he devised over to B. in the same manner, and in default thereof he devised to C. for 60 years, if he so long live; remainder to the heirs of the body of C. and their issue male for ever. This is a good estate tail, the words of the condition amount to a limitation, and the estate of A. or B. does not cease, though she marries one of another name, for the remainder is in default of both conditions, and she may survive her husband and then marry a Searle. Page v. Hayward, T. 1704. 2 Salk. 570. 3 Salk. 96.

45. There is a distinction between a collateral condition and a condition that runs with the land: if the donor reserve a rent with a condition to re-enter, a recovery will not be, otherwise if it be to re-enter on payment of a sum in gross.

46. A warrant was granted for nominating two lives to an estate held under the crown, subject to certain conditions, which not being complied with according to the strict letter, it was declared void. Moore v. Crosse, M. 1704. 1 Bro. P. C. 84.

47. A. gave some lottery tickets among her servants, on condition that if any came up a prize, her daughter should have a moiety. The footboy’s ticket was a prize of 1000l. Decreed, one moiety to the daughter, for an infant may be bound by a condition. Scott v. Haughton, T. 1706. 2 Vern. 560.

48. A. devised his estate to his son in tail, remainder to B. for life, on condition that he took the name of A., if not, then over to D. The son died without issue. B. performed the condition, and died. B. having performed the condition, D. took no estate, but it reverted to the heir of A. Ashurst v. Lyttan, E. 1729. 3 Bro. P. C. 486.

49. Legacy to a fema, on condition she married a man named B. A. took that name, and she married him: Held, by the Lords, not such a performance of the condition as would entitle the fema to the legacy. Barlow v. Bateman, T. 1720. 4 Bro. P. C. 194. 3 P. W. 663.

50. In a settlement a term was raised for daughter’s portions, viz. 10,000l., with a proviso, that if the father should, by deed or will, give or leave the sum of 10,000l. it should be a satisfaction. The father devised lands to the daughter, of the value of 10,000l.; this is no satisfaction, for money and land go in different channels. Chaplin v. Chaplin, E. 1734. 3 P. W. 245. Vide Eastwood v. Viscke, 2 P. W. 616.

51. Where a condition has been performed, to a reasonable extent, the court has dispensed with the want of circumstances. Harvey v. Aston, E. 1737. 1 Atk. 375. Dailey v. Dentourv, 2 Atk. 261, and notes to 3d edit. vide etiam post, tit. Marriage, vi.

52. Where a condition is annexed by a will to a devise, either of real or personal estate, and no notice is required to be given, nor any person obliged to give
notice, there the legatees must perform the condition, or cannot be entitled; and where they do not, if there is a devise over a forfeiture inures. Suppose an estate limited to A. for life, and to B. on certain conditions, and to C. in forma pauci, it will take in every condition in the preceding limitations to B. —

Chamcey v. Graydon, T. 1743. 2 Atk. 620.

53. Notice is necessary to work a forfeiture in an heir, though not in a stranger; the latter can only take under the instrument that imposes the condition, but the former enters by descent, and is ignorant of the devise. Burleton v. Humphrey, H. 1755. Amb. 259.

54. A grandfather cannot appoint a guardian to his grandson, but he may give his estate to him on condition of a particular guardian being appointed; and if the father does not consent, the estate will be forfeited. Blake v. Leigh, E. 1756. Amb. 306.

55. A. seized in fee of some estates, and of others for life, with remainder to his son in tail, devised all to his son for life, remainder over in strict settlement, on condition that if he did not suffer a recovery of the entailed estate, and settle it to the devised uses, then the estate in fee to go over. The son entered, and did many acts to show an election to take under the will, but never settled the estate, as required: Held, by the Lords, that the son not having settled the estate pursuant to the condition, the devise was void, and then the entailed estate would take its own course, unaffected by the will. D. of Montague v. Ld. Bealieu, E. 1767. 6 Bro. P. C. 232. Amb. 533.


56. Legacy on condition to release all claims on testator’s estate. The legatee took the legacy, but did not actually release. He is bound by his election, and his executors shall release. E. of Northumberland v. Ld. Egremont, or Ld. Aylesford, E. 1768. Amb. 657. 540.

57. A. gave his wife the use of his furniture at B. on condition of her residing there. He afterwards suffered a recovery of the estate at B., and dying without making any subsequent disposal, it descended to his heir at law. The wife shall have the bequest discharged of the condition, which the recovery put it out of her power to perform. Darley v.

Langworthy, or Darley, T. 1774. 7 B. 10. P. C. 177. 3 Wils. 6.

58. A term for years conditioned to be void upon non-performance of certain acts, becomes void without entry, but if a landlord dispenses with the performance of a condition, he cannot insist upon a forfeiture for the non-performance. Freeman v. Boyle, E. 1788. 2 Ridg. P. C. 79.

59. Where an estate is devised on condition, taking possession binds the devisee to the performance of it, though there be a loss, for he should have considered of that before he took possession. Att. Gen. v. Christ’s Hosp., M. 790. 3 Bro. C. C. 165.

60. Bond delivered to a third person to be delivered to the obligee, on performance of a condition, takes effect on performance from the original sealing, though both obligor and obligee be dead. So a bond by a feme delivered to a stranger before marriage, as an escrow, to be delivered on condition, is good, though the condition be performed after marriage. Graham v. Graham, H. 1791. 1 Ves. jun. 275.

61. A. bequeathed an annuity to B. with a condition to fall into the residue upon his signing any instrument, agreeing to sell, assign, charge, or dispose of it, or empowering any person to receive it, &c. in the most comprehensive terms. B. took the benefit of an insolvent act. This was held a breach of the condition, for the act was voluntary in B. Skee v. Hall, E. 1807. 13 Ves. 404. Vide Wilkinson v. Wilkinson, post.

62. A testator devised estates in trust for his son A. for life, and made provisions for other members of his family, with a proviso, that if they should respectively “assign or dispose of, or otherwise charge or incumber the life estate, the annuities and provision so made to them during their respective lives as aforesaid, so as not to be entitled to the personal receipt, use, and enjoyment thereof; then, the annuity or life estate or interest of him, her, or them, respectively so doing or attempting so to do, should from thenceforth cease, and should immediately thereupon descend to the person next entitled thereto, by virtue of the limitations aforesaid, as if he, she, or they were respectively dead.” Held that the life estate of A. ceased under the proviso;
CONDITION IV. & V.

Performance, where compelled.—Non-performance.

1st, by his signing a memorandum, declaring that his life estate should be chargeable with a debt in case some other property should be insufficient, which proved to be the case: 2dly, by his executing a power of attorney; authorizing a person to receive the rents and apply them in payment of debts due by himself and others, under which A. was, out of the receipt of the rents, and had no control over them for 11 months: 3dly, by borrowing money on the credit of future rents, and delivering to the lender, anticipated receipts for the expected rents, and an authority to him to recover and receive such rents for his own use, in satisfaction of the money lent. Wilkinson v. Wilkinson, T. 1820. 2 Wils. 47. Vide Doe v. Carter, S. T. R. 60. Rex v. Robinson, Wightw. 386.

CONDITION V.

Non-performance.—Compensation.

63. In all cases where the matter lies in compensation, be the condition precedent or subsequent, there ought to be relief. Hayward v. Angel, H. 1683. 1 Vern. 222. And the court will relieve against the breach of a condition precedent, where it is in nature of a penalty. Wallis v. Crimes, 1 Ch. Ca. 90.

64. A. devised lands in S. to his younger son C. and declared, that if he should be hindered from enjoying them, he should have lands at B. in lieu. A moiety of the lands at S. were evicted, and C. claimed all the lands in B. Sed per curiam, he shall only have an equivalent out of B. for the evicted lands. Tyle v. Tyle, M. 1684. 1 Vern. 270.

65. A. made a voluntary settlement on his son in tail, remainder over, provided that if his son did not pay a certain sum on a certain day, his estate should cease. The son did not pay the money on the day. On his bill to be relieved against the forfeiture, the court refused relief, for the conveyance was voluntary, and the father might impose what condition he pleased on his son. Longdale v. Longdale, E. 1687. 1 Vern. 456.

66. A. devised lands to his eldest daughter, on condition she should pay certain sums in six months; and in default, then to his second daughter, on the same condition. The eldest daughter did not pay the money within the six months. The court may enlajre the time, and has usually done it in all cases that lie in compensation. Woodman v. Blake, E. 1691. 2 Vern. 222. Sed vide S. C. nomine Master or Martin v. Willeaughby, 1 Bro. P. C. 177. Colls' P. C. 74. where it is said, this decree was reversed by the Lords. Et vide Man's Ca. M. 1695. cited 2 Freem. 206. S. P. if not S. C. Vot. I. 50
CONDITION V. & VI.

Non-performance.—Compensation.

69. "I give and bequeath to E. 100l. to be paid him within six months after he shall have served his apprenticeship." E. ran away from his apprenticeship, and died. Decreed, that the serving the ap- prenticeship is not the condition annexed to the legacy, but the appointment when it shall be paid. Sidney v. Vaughan, T. 1712. 2 Eq. Ab. 211. pl. 4.

CONDITION VI.

Void Conditions.

70. It is the constant rule of law in conditions subsequent, that if performance becomes impossible by the act of God, it is absolutely void. Graydon v. Graydon, or Hicks, H. 1739. 2 Atk. 618. Peyton v. Bury, T. 1731. 2 P. W. 626. Jones v. Suffolk, 1 Bro. C. C. 529. Harvey v. Aston, E. 1737. 1 Atk. 361. and notes.

71. Bequest to a feme covert, on condition she lived apart from her husband; the condition was held to be contra bonos mores, and void. Brown v. Peck, T. 1738. 1 Eden 140.

72. And it is a rule long since established, that where there is a gift upon a condition, or with a qualification, inconsistent with and repugnant to such gift, the condition is wholly void, and the qualification must be rejected. Bradley v. Peizo, E. 1797. 3 Ves. 324. So a condition, that a tenant in tail shall not alien, is repugnant and void. Piers v. Winn, H. 1676. Pollexf. 435. King v. Burchell, M. 1759. Amb. 379. And there are several cases of the same sort collected in 2 Danv. Ab. 22.

CONSENT.

I. Expressed or implied, where binding.

II. Of Counsel, Solicitor, or Agent, where binding on the Principal.

CONSENT I.

Expressed or implied, where binding.

1. I. S. deposited 300l. in a scrivener's hands, who without his consent, laid it out on a defective mortgage. I. S. received the interest for many years, and noticed the mortgage in his receipts. Decreed, he shall bear the loss. Clark v. Perrier, H. 1679. 2 Freem. 48.

2. Where there was an erasure in a will, and the executrix consented that the will should be proved as if no erasure had been made, she shall be concluded by such consent. Parker v. Ashe, M. 1684. 1 Vern. 257.

3. Though suggestions of fraud be probable and apparent, yet if the plaintiff acquiesces by his own solemn act, the court will not relieve him. Lloyd v. Tym, E. 1698. Colles' P. C. 14.

4. Where a decree or order appealed from is made upon the appellant's own consent, the appeal will be dismissed.—Northcote v. Northcote, H. 1702. Colles' P. C. 287. and this is an established rule. Toder v. Sansam, H. 1773. 7 Bro. P. C. 244.


6. A. by diverting a water-course, brought a nuisance upon B., who con- vived at it; yet the court granted an injunction, for every continuance is a fresh nuisance. Anson. M. 1709. 2 Eq. Ab. 522. pl. 3.
CONSENT I. & II.

Where binding.

7. Where church-wardens by order of the parish comence a suit, the consent of the parish shall bind them, and the vestry book shall be allowed as evidence of the consent. Case of Radnor parish, T. 1718. 4 Vin. 529. pl. 10.

8. Though an agreement to submit to the decree, and neither party to appeal, was signed by the parties, and made an order of court by consent, yet the cause was allowed to be re-heard. Buck v. Fawcett, H. 1733. 3 P. W. 242.

9. Where a man against whom a commission has issued, has surrendered, and acquiesced under it for 18 months, the court will not direct an issue to try the bankruptcy, even though the act was doubtful. Exp. Nutt, T. 1743. 1 Atk. 102.

10. A fine was levied by husband and wife of lands to a purchaser, but the uses were declared by the husband only, not varying from what the wife intended, this shall bind the wife, particularly after an acquiescence of 15 years after the husband’s death. Swanton v. Raven, T. 1744. 3 Atk. 105.

11. A. immediately on his coming of age, released to his mother all claims on his father’s estate, and after an acquiescence of five years sought to set the release aside; though such a release must always create suspicion, yet the court would not set it aside till the master had taken the account, as no particular im-

position was charged. v. Steadman Pall- ing, H. 1746. 3 Atk. 423.

12. An agreement not signed by one party is binding on him where it became an act upon it is the agreement of all. Owen v. Davies, H. 1748. 1 Ves. 82.

13. If a man build upon another’s land having no title, and the other is passive, and stands by without giving notice of his title, the builder shall have the land in equity, and enjoy the building quietly, for there solus sedet adīscio. Att. Gen. v. Baliot Coll, M. 1744. 9 Mod. 411. E. I. Co. v. Vincent, M. 1740. 2 Atk. 33. But these cases have never been extended so far as where parties have treated on an agreement for building, and the owner has not come to an absolute agreement; there if persons will build, they must take the consequences, for it is not such an acquiescence, as will prevent the owner from insisting on his right. E. I. Co. v. Vincent, sup.

14. There can be no acquiescence in acts of which the party is ignorant, at the time he has any right to dispute them. Cholmondeley v. Clinton, T. 1817. 2 Meriv. 362. Sed vide S. C., T. 1820. 2 Jac. & Walk. 1.

Of the redemption of a mortgage, or opening the foreclosure after a long acquiescence, vide tit. Mortgage, sec. vi. xvi.

CONSENT II.

Of Counsel, Solicitor, or Agent, where binding on the Principal.


16. D. appealed to the Lords stating by affidavit, that though the register had drawn up the order in Chancery, as by consent, yet he never gave any authority to his own counsel for such consent. Appeal dismissed. Downing v. Cage, H. 1699. 1 Eq. Ab. 165, pl. 4.

17. A steward had a general authority to make contracts with the tenants, &c.; this will not bind the lord without his consent, or unless part of the bargain is actually executed. Anon. E. 1717. 5 Vin. 322. pl. 35. For the acts of stewards, and how far the lord shall be bound thereby, vide tit. Copyhold, x. Vides tit. Master and Servant, i. Principal and Agent, l.

18. Where the agent of a company, in treaty with the owner of the soil, makes no reply or objection to the owner’s terms, and the company proceed to build, the silence of the agent shall bind the company to the contract. E. India Com- pany v. Vincent, M. 1740. 2 Atk. 83.

19. A decree in equity, founded upon an order made by consent, will not be reversed on an appeal to the Lords. Blundell v. Macartney, T. 1793. 2 Ridg.
CONSIDERATION.

I. Lawful and valid.

II. Unlawful and invalid.

III. Where a Deed is good without Consideration.

CONSIDERATION I.

Lawful and valid.

1. Marriage is the highest consideration in law, and is sufficient to give the grantee a greater equity than the heir, even though no portion is paid. A bare promise before marriage to settle a jointure, shall be executed in equity against the heir. Benson v. Bellasis, M. 1681. 1 Vern. 17. Vide Cotton v. Campion, 17 Ves. 263. where marriage was held a good consideration for a settlement of monies, &c. obtained by a manifest fraud. Post, tit. Marriage, i.

2. Marriage agreements differ from all others, for they do not arise from the consideration of the portion, but of the marriage itself, and they cannot be set aside, though the portion falls short. Exp. Marsh, T. 1744. 1 Atk. 158.


4. "Blood" is a good consideration, but not to be regarded if a pecuniary consideration is expressed. So, if a grant be made to two, and one only is of kin, it is objectionable. Clarkson v. Hanway, M. 1723. 2 P. W. 204.

5. Love and affection only mentioned in a deed, no proof of other considerations can be entered into; but otherwise if no consideration at all is mentioned. Peacock v. Monk, M. 1748. 1 Ves. 128. A deed, in consideration of love and affection, is good without livery, by way of covenant to stand seized. Rigden v. Veiller, E. 1751. 2 Ves. 235.

6. Meritorious considerations, such as the payment of a debt, or providing for a wife or child, will induce the court to assist the defect of an intended legal conveyance. Wright v. Englesfield, M. 1764. Amb. 468. Colman v. Sarel, M. 1789. 3 Bro. C. C. 12. So, where it is to save the peace and honour of a family, equity will execute an agreement. Stapleton v. Stapleton, T. 1739. 1 Atk. 2.

7. Articles for a valuable consideration, and the money paid, being adequate to the thing purchased, will bind the estate in equity, and prevail against a judgment creditor, mesne between the articles and the conveyance. Finch v. Ld. Winchelsea, T. 1715. 1 P. W. 282.

8. A. on the marriage of B. promised, by letter, to join him in a bond of indemnity, against a rent-charge issuing out of B.'s estate. A. never signed the bond,
CONSIDERATION I. & II.

What lawful—unlawful.

but the marriage took effect in consideration of A.'s letter. B. died insolvent, and then A. died: Held, the marriage is a sufficient consideration to support the undertaking to indemnify, and it will support an assumpsit at law. Ramsden v. Oldfield, M. 1721. 4 Vin. Ab. 453. pl. 5.

9. Though no consideration is expressed in a deed, it has great weight if the court sees what the real consideration is. Langly v. Brown, T. 1741. 2 Atk. 202.

10. If an old creditor of a bankrupt, after his discharge, becomes his surety in an office, it is a good consideration for reviving the old debt. Ex parte Burton, M. 1744. 1 Atk. 256.

11. Five shillings, and other valuable considerations in a deed, can at most but let in the proof of other valuable considerations. Walker v. Burrows, M. 1745. 1 Atk. 94.

12. A son taking beneficially under his father's will, promises to pay his sisters' portions; this is a good consideration for a bond. Bland v. Doughty, T. 1747. 3 Atk. 484. So a promise under age may be a consideration for a promise, when of age. S. C. Et vide Brooke v. Galley, 2 Atk. 84. Smith v. French, 2 Atk. 245. S. P.

13. A borrowed money of B. and gave him a draft on the exchequer; A. became bankrupt. This is an assignment for a valuable consideration, and shall prevail against creditors. Raw v. Dawson, M. 1749. 1 Ves. 331.


15. There is a distinction between a mere voluntary promise, and a promise upon the faith of which another does some act, as entering into engagements, or paying money; the first is nostrum pactum, and will not support an assumpsit, but the second forms a consideration upon which an action will lie, and therefore establishes a debt against assets. Crosby v. M'Doual, M. 1806. 13 Ves. 148.

16. A voluntary bond, though void against creditors, being valid as between the parties, its surrender is a sufficient consideration to sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent to substitute a valid for an invalid security against creditors. Exp. Berry, T. 1812. 19 Ves. 218.


CONSIDERATION II.

Unlawful and invalid.

18. Friendship is no consideration, and where such was set up, and fraud also appeared, the court ordered the estate to be reconveyed. Wilkinson or Woodhouse v. Brayfield, M. 1693. 2 Vern. 207.

19. Procuring a marriage is a fraudulent consideration; and a lease made as a reward for such service was set aside. S. ribbleshill v. Brett, H. 1703. 1 Bro. P. C. 57. 2 Vern. 445. Pre. Ch. 163. Vide tit. Marriage, iv. for Brocage Bonds. So a bond given as a reward for procuring an old man of 82 not to alter his will, though new in specie, is fraudulent, and must be delivered up. Debenham v. Oz, T. 1749. 1 Ves. 276.

20. In all cases where fraud or imposition appears, no colourable or pretended consideration can support a deed,
Unlawful.—Where unnecessary.


21. The purchase of a share in mines which proved to be a bubble, or money paid for effecting illegal insurances, are not such considerations as will support a bill of exchange in equity. Brown v.

CONSIDERATION III.

Where a Deed is good without Consideration.

23. If a wife has a judgment, and it is extended on an elegit, the husband may assign it without consideration. So, if a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign the extended interest; and if a feme has a decree to hold lands till a debt due to her is paid, and she is in possession under the decree, and marries, her husband may assign it without consideration. Ed. Carteret v. Paschall, T. 1733. 3 P. W. 200. 4 Bro. P. C. 168.

24. In aiding defective deeds made to provide for a wife or children, it has never been required that those deeds should be founded on any valuable consideration, in the strict sense of the word, Harvey v. Harvey, E. 1740. Barn. 110. 25. The assistance of the court cannot be had to constitute a party cestui que trust, without consideration as upon a voluntary covenant to transfer stock, &c. But if the legal conveyance is actually made, constituting the relation of trustee and cestui que trust, as if the stock is actually transferred, &c. though without consideration, the equitable interest will be enforced. Ellison v. Ellison, H. 1802. 6 Ves. 656.

As to voluntary contracts where good in equity, and by what considerations supported, vide tit. Agreement, vi. Bond, iv. Deeds, ii.
COPYHOLD.

I. Power of the Court over Copyholds. (a) Cases of Waste or Forfeiture. (b)

II. Devise by a Will not duly executed after a previous Surrender.

III. Surrender, Want of, where supplied.

IV. By what Words desirable, and who shall take.

V. Where liable to Debts and Legacies. Assets by Descent.

VI. Lord's Estate. Protection to his Tenant.

VII. Lord's Court. (a) Fines and Recoveries. (b)

VIII. Lord's Fine. Quit Rents, &c.

IX. Manorial Customs. (a) Heriot Customs. (b)

X. Steward. His Acts, how far binding.

XI. Right of Common.

XII. Contested Rights between neighbouring Lords.

XIII. Estates pur autre vie, and where Cestui que vie shall be a Trustee for the first Taker.

XIV. Free Bench.


COPYHOLD I.

Power of the Court over Copyholds. (a) Cases of Waste or Forfeiture. (b)

(a) Power of the Court over Copyholds.

1. Surrenders, how construed by the court, vide post, tit. Copyhold, iii. Issue to try a special custom and verdict for defendant. Ld. Ch. granted a new trial, as the question was of value, and concerned all the copyholders. Edwin v. Thomas, T. 1688. 2 Vern. 75.

2. When the legal interest of a copyhold is in one person, and the equitable in another, the court can order the trustees of the legal estate to surrender, though the cestui que trust refuses. Exp. Butler, T. 1749. 1 Atk. 216. Amb. 73.

3. The court will grant an injunction for a copyholder to restrain the lord from opening a mine without a special custom, but not to stop the working of a mine already opened. Grey v. Northumberland, M. 1806. 13 Ves. 236. Vide Player v. Roberts, W. Jo. 248. S. P. but the court will not continue such an injunction without securing the means of a speedy trial. S. C. T. 1810. 17 Ves. 281. Vide Robinson v. Lord Byron, 1 Bro. C. 588.—N. B. On the motion to dissolve this injunction, Ld. Eldon said he was induced to grant it, because the court had frequently interfered in the case of trial by a local knowledge of the means of working coal mines, usually applied in that part of the country. (a) And his Lordship further said, that though the property in mines or trees might be in the lord of the manor, it does not follow that he can enter and take it without the consent of the tenant. Vide Bourne v. Taylor, 10 East, 189. (a) Vide Mitchell v. Dors, 6 Ves. 147. Courthope v. Mapplesden, 10 Ves. 290.

(b) Cases of Waste or Forfeiture.

4. A. having two new copyholds of the manor of E. cut down timber on one to repair on the other. The Lord recovered at law for the forfeiture, but equity relieved on payment of costs, for it seemed to be agreeable to the custom that the timber should be so applied, though there was a dispute who should set it out. Nash v. Ld. Derby, H. 1705. 2 Vern. 557.

5. Though relief may be given against a forfeiture for permissive waste, yet against a forfeiture for voluntary waste it cannot, as where a tenant obstinately refuses to repair for many years together, after repeated admonitions, as in Cox v. Higford, M. 1710. 1 Eq. Ab. 121. pl. 20. (and 2 Vern. 664, confusedly stated,) or where a tenant grants leases, works a
COPYHOLD I. & II.

Jurisdiction over.—Devises of.

quarry, cuts down timber, and encloses lands, without license, after several admonitions, as in Peachy v. D. of Somerset, T. 1721. Pr. Ch. 568. 1 Stra. 446. Smith v. Packhurst, M. 1741. 3 Atk. 141.

6. If copyholders do not come in to be admitted, after proclamations, on so many court days, the lord may seize their lands. Clayton v. Cooke, M. 1742. 2 Atk. 449. If the tenants be infants, the statute 9 Geo. 1. c. 29. s. 1. shows the method how to proceed.

7. It is waste in a customary tenant to cut down timber, or to dig for stone, coals, lead, copper, or other minerals, and not such a personal tort as dies with the person; the tenant is a sort of fiduciary to the lord, and it is a breach of trust to take away his property, for which trover lies against the tenant, and his assets shall answer the damages. Bp. of Winchester v. Knight, H. 1717. 1 P. W. 406.

8. Where a tenant had cut down timber, and a bill was brought against him for a discovery, he demurred, for that as being waste, his answer would subject him to a forfeiture. Demurrer allowed. Att. Gen. v. Vincent, H. 1725. Bumb. 192.

9. If a copyholder commits waste, the lord of the manor may have an injunction and account. Richards v. Noble, E. 1807. 3 Meriv. 673.

COPYHOLD II.

Devises by a Will not duly executed after a previous Surrender.

10. It seems to be settled, that where a copyhold is surrendered to the use of a will, there need not be three witnesses to the will; for the estate passes by the surrender, and the will is only a general declaration of the uses. Wagstaffe v. Wagstaffe, M. 1724. 2 P. W. 258. Carey v. Askew, E. 1786. 2 Bro. C. C. 58. 1 Coz 241.

11. And yet there are some cases in which a copyhold has been duly surrendered; but where the testator himself has pointed out the manner in which his will shall operate as a declaration of the uses, as where A. surrendered to the uses of his will to be attested by the three witnesses, and made an unattested will: held, his lands could not pass. Godwin v. Kilsha, T. 1769. Amb. 684.

12. So where A. by will duly executed, gave certain interests in his real estates to such uses as he should declare by deed, attested by two witnesses. By deed poll he declared the uses; which being attested by two witnesses, held, it should pass the ultimate use of the copyhold, as declaring the trusts of the surrender. Vincent v. Stanfield, T. 1793. 4 Bro. C. C. 339. 2 Ves. jun. 209. But freeholds could not pass thereby for want of a third witness. S. C.


14. And where there is no custom to surrender to the use of a will, a customary freehold can only pass by a will attested according to the statute of Frauds. Hussey v. Grills, E. 1756. Amb. 299.

15. The clause in the statute of Frauds requiring the attestation of three witnesses is confined only to such estates as pass by the statute of Wills, (34 and 35 H. 8. c. 5.) which does not extend to customary estates. Tuffnell v. Page, post, pl. 17. and it has been so settled since Att. Gen. v. Baines, M. 1707. 2 Vern. 598.

16. But a trust or equity of redemption of a copyhold cannot pass by a will unless attested by three witnesses; for there can be no surrender to pass such trust, and the trusts of all lands are within the statute of Frauds, and (as it seems) the devise of a trust should pursue the nature of the estate. Wagstaffe v. Wagstaffe, ante, pl. 10. Applebyard v. Wood, T. 1725. Sel. Ch. Ca. 42.

17. Yet where the legal estate is in trustees, so that the custodiam trust cannot surrender it, it will pass by his will, though unattested; for equites sequitur legem. Tuffnell v. Page, E. 1740. 1 Atk. 37. Carr v. Ellison, 3 Atk. 73.
COPYHOLD III.

Surrender, want of, where supplied.

19. It seems to be established, that a defect in the surrender of a copyhold, (or in the execution of a power which is governed by the same rules,) shall be supplied only in favour of three descriptions of persons, viz. creditors, wife, and children; contra the case of Watts v. Bullas, M. 1702. 1 P. W. 60. the authority of which Ld. Hardeikke controverted in Goring v. Nash, M. 1744. 3 Atk. 189. Et vide Goodwyn v. Goodwyn, 1 Ves. 225. Byas v. Byas, 2 Ves. 164. Tudor v. Anson, 2 Ves. 582. Anson, 2 Freem. 115. Itbell v. Beane, 1 Ves. 215. Pope v. Garland, 3 Salk. 84. Bizby v. Eley, 2 Bro. C. C. 325. Wardell v. Wardell, 3 Bro. C. C. 116. or a purchaser; Bradley v. Bradley, 2 Vern. 164. Jennings v. Moore, or Blenkarne v. Jeneuus, 2 Vern. 609. 1 Bro. P. C. 244. And so the heire at law be not a child of the testator, though wholly unprovided for, the defect shall be supplied in favour of the wife, as in Chapman v. Gibson, H. 1791, 3 Bro. C. C. 229. where a surrender was supplied in favour of a wife, against a distant heir not provided for by the testator, but provided for aliunde. The principle of which case may be collected from the following cases, save as to the exception of an eldest son unprovided for, Vide Hardham v. Roberts, 1 Vern. 132. Bradley v. Bradley, 2 Vern. 163. Bath v. Montague, 3 Ch. Ca. 106. In Kettle v. Townsend, 1 Salk. 187. it is said not to be material whether the son is before provided for: for the father is the best judge of the son's provision. Sic in Freeston v. Rant, mentioned in n. to Watts v. Bullas, 1 P. W. 61. Watts v. Bullas shows only that a brother of the half blood is not within the case. In Ross v. Ross, 1 Eq. Ab. 124. (cited in 6 Vin. Ab. 238, by the proper name of Ross v. Ross,) the surrender was not supplied, because the devise was satisfied by a freehold which passed by the will. Et vide Bullock v. Bullock, 5 Vin. Ab. 58. pl. 19. S. P. In Cook v. Arnham, Ca. temp. Talb. 35. it was only doubted whether the rule would extend to reversionary interests. In Andrews v. Waller, 6 Vin. Ab. 237, the surrender was supplied. In Hawkins v. Leigh, 1 Atk. 387. Lord Hardeikke thought the will did not pass copyholds, therefore the point was not determined. Taylor v. Taylor, 1 Atk.
Surrender, want of, where supplied.

21. Other cases in which the court has decreed a surrender or supplied a defect are as follow, viz. where on a marriage agreement the husband entered into a bond to surrender his copyhold to the use of himself for life, remainder to his wife for life, remainder to the heirs of their two bodies, remainder to the heirs of the husband. Decreed, a surrender to the use of the husband for life, remainder to the first and other sons of the marriage in tail general, remainder to the daughters in tail general, in order by making the issue purchaser, to secure them from being defeated. *Nandike v. Wilkes*, E. 1716. Gilb. Eq. Rep. 114.

22. *Et vide* the following subdivisions. besides the before-mentioned cases, in which the testator's own child and heir at law was left unprovided for, as in *Kettle v. Townsoud*, 1 Salk. 187. *Hicken v. Hicken*, 6 Vin. 59. pl. 20. *Hawkings v. Leigh*, 1 Atk. 387; and where the devise of the copyhold was satisfied by a freehold which passed by the will, as in *Bosse v. Boss*, 6 Vin. 238. and *Bullock v. Bullock*, 5 Vin. 58. pl. 19.; there are other cases in which the court has refused to aid a defective surrender, or to supply the want of a surrender, as where A. devised a copyhold estate in borough English to his eldest son, but made no surrender, and devised houses to his youngest son, which were burnt down, and the youngest son, being an infant, had never entered, the court would not supply the want of surrender. *Cooper v. Cooper*, E. 1692. 2 Vern. 269.

23. Nor where there is a voluntary conveyance against the heir, unless he does anything to prevent the surrender. *Vane v. Fletcher*, T. 1717. 1 P. W. 554.


25. Nor where a man dies seised of freehold and copyhold lands, and devises his lands generally for payment of his debts, unless the freeholds are inadequate. *Att. Gen. v. Mott*, 1735. 2 Eq. Ab. 234. pl. 29. *Wilson v. Mount*, T. 1796. 3 Ves. 194. *Note*, in this case there was a parenthesis.

26. Nor in favour of younger children claiming a provision out of the copyhold.
COPYHOLD III.

Surrender, Want of, where supplied.


30. And in some cases a surrender may be presumed from lapse of time; as where plaintiff had been 40 years in possession, and defendant was an infant 18 years of the time, the court directed defendant to admit a surrender, but testator's will being contested, an issue was directed, and plaintiff not to insist on his length of possession. Lyford v. Coward, M. 1683. 1 Vern. 195.

31. So against a writ of aid, after 40 years possession, a perpetual injunction was granted Knight v. Adamson, M. 1689. 2 Frem. 106.

32. So were a younger son brought a bill, surmounting that his father had devised to his a copyhold, which if not duly surrendered, ought to be made good as an advancement; he was otherwise well provided for, but there was no proof, and his elder brother having been for 20 years in possession by consent, his bill was dismissed with costs. James v. James, E. 1700. 1 Eq. Ab. 123. pl. 11.


34. Copyhold estates had been surrendered to the use of mortgagees, but they were never admitted. The court held that the mortgagor devising them must surrender to the use of his will. Renebel v. Scrarton, M. 1802. 3 Ves. 30.

35. A. made a surrender of his copyhold, and left it in the hands of the tenant to be presented, which he neglected to do. Decreed, the surrender to be made good, and the lands enjoyed according to the will of A. Lloyd v. Burton, H. 1714. 1 Bro. P. C. 544.

36. Where there has been no admittance, the tenant continues as he was before the surrender, for the lord is not bound to notice the surrender till admittance. Peachy v. D. of Somerset, T. 1721. Pre. Ch. 565. 1 Stra. 454.

37. An admittance is void, if the surrender be made on a forged letter of attorney. Hilliard v. South Sea Co. T. 1722. 2 P. W. 77.; but this does not seem now to be followed. Et vide contra, Ashby v. Blackwell, Amb. 503.

38. A devise of a copyhold (duly surrendered) to A. and his heirs, in trust for B. and his heirs. B. died without heirs; the heir of the trustee has no equity to compel the lord to admit him. Williams v. Ld. Lonsdale, T. 1789. 5 Ves. 572. It seems a man damus will not lie to compel the lord to admit to a copyhold, yet in Rex v. Lord of Hendon, 2 T. R. 484. and in Rex v. Rennet, 2 T. R. 197. a mandamus was granted, but the doctrine was not submitted to; and in Williams v. Ld. Lonsdale, Ld. Ch. doubted his jurisdiction upon the reasoning which supports Burgess v. Wheate, 1 Bl. 123. In Com. Dig. tit. Copyholder, there are cases establishing the jurisdiction of Chancery to compel the lord to admit. As to the claim of the trustee, where the objects of the trust fall, vide Barclays v. Russell, 3 Ves. 424. Walker v. Donne, 2 Ves. jun. 170.

39. Cases in which a surrender pre-
Surrender, Want of, where supplied. 

A covenant to surrender his copyhold estate was made. A intending to devise his copyhold estate to his sister's son, and finding a surrender not then practicable, he prevailed on his sister, who was his heir, to give a bond to surrender her son's request, on payment of 200l. A died, and his sister was admitted: Held, she was a trustee for her son, and a surrender was decreed, on payment of the 200l.

Parks v. Wilson, M. 1734. 10 Mod. 315.

40. A. covenanted to surrender his copyhold to certain uses, but died before it was done. His heir was decreed to surrender. Newe v. Keck, M. 1725. 9 Mod. 106.

41. Cases of surrender on condition. Surrender to the use of B. and his heirs, on condition that B. and his heirs should pay to C. and his heirs 5l. per annum for ever, and in default, the use to B. &c. to be void, and C. and his heirs to take. B. was admitted, and there were several alienations of his estate, as also of the 5l. rent, all of which were done by surrender and admittance on assigning the rent for a valuable consideration. On a bill by the last surrenderee of the rent against the tenant in possession; decreed, a good alienation in equity, and the arrears to be paid. Spindler v. Wilford, 11. 1686. 2 Vern 16.

42. A. surrendered lands to the use of himself and his wife for life, remainder to his right heirs, at a time when he was not expected to live many days; and it appeared, he declared he made the surrender upon condition that if he recovered the surrender should be returned to him, and his wife should have 100l. per annum. A. recovered, and demanded his surrender, which was refused; he then made a second surrender (which was conditional) of 100l. per annum only on his wife, and died. The court looked upon the second surrender as a security for the wife's 100l. per annum, as where a person comes to redeem, and ordered costs out of the estate. Mapleton v. Mapleton, M. 1709. Gilb. Eq. Rep. 8.

43. A. covenanted on marriage, that within a month he would surrender his copyhold to his wife for life, remainder over, and if he neglected, then that he would leave his wife 500l. at his death. The husband made no surrender, but died after the month without assets. Decreed, the heir to surrender, for it is no election, but the covenant is a charge in equity. Wood v. Pesey, M. 1719. 5 Vin. 547. pl. 36.

44. A. surrendered his copyhold to T. to C. on condition that he surrendered to D. and his heirs, subject however to A.'s will; C. accordingly surrendered to D., and A. by will reciting the surrenders, desired D. to contrive, if possible, that the copyhold might be continued to the owners of the estate at O. D. surrendered to the use of his will; by the custom of the manor a surrender after seven years is void, and the estate goes to the widow. D. outlived the seven years, and died after having made his will, and devised the copyhold to B. in tail, remainder over (to whom testator had devised his estate at O. in like manner.) Decreed, the defect in the surrender to be made good, in regard D. was only a trustee. Portman v. Seymour, E. 1742. 9 Mod. 280.

45. Surrenders are construed in equity, as agreements at law and other conveyances; (Sutton v. Stone, M. 1740. 2 Atk. 101. Lovell v. Lovell, M. 1743. 3 Atk. 11. Et vide Idle v. Cooke, 1 P. W. 70. Sed vide Fisher v. Wigg, 1 P. W. 14, (and note.) Et vide post tit. Derise, lb.) and not as a will, for copyholds are not within the statute (27 H. 8. c. 10.) of uses. Rowden v. Malster, Cro. Car. 44. Rigden v. Vallier, 2 Ves. 257. Therefore, if the limitations of a copyhold are so framed, as that by the rules they are void, they must take their fate, for no intention can make them good.

46. As to a surrender by a feme covert, the court doubted if she could make a surrender, or by an appointment declare the uses of it. Tylbey v. Philips, E. 1749. 1 Ves. 229. for a surrender differs from a fine, which is good against the wife's heir by estoppel; and in George, ex dem. Thornbury, v. ——, M. 1749. Amb. 627. it was held that a wife can neither make a will, nor decree the uses of a surrender; but in Combs v. Colman, T. 1782. 2 Bro. C. C. 37. it was determined, on the authority of Mo. 12, that a surrender by a feme covert with the consent of her husband, is good, but a case was there made for the opinion of C. B. as to what estate passed under the surrender, will, and codec of a woman who had separated from her husband.

47. A customary heir shall in some cases be bound to make his election; as
COPYHOLD II.

Surrender, Want of, where supplied.

where testator devised to his heir his real and personal estates after the death of his wife, testator had also some copyholds, which he had not surrendered. After testator's death, the heir claimed the copyholds not surrendered, as heir, and the real and personal estates, as devisee. Upon a bill by the widow, decreed; the heir should elect. Unett v. Wilkes, T. 1768. Amb. 430. 2 Eden 187. See also Judd v. Pratt, 13 Ves. 168.

48. A being seized of copyhold lands, surrendered them to the use of her will, and bequeathed 1000l. to her heir; afterwards, she exchanged those lands for other lands, which she did not surrender. The heir was put to elect, and having elected, the legatee was decreed to surrender the copyhold to the uses of the will. Franks v. Standish, M. 1722. 1 Bro. C. C. 588. (n.) Et vide Nuyes v. Mordaunt, 2 Vern. 581.

49. Testator devised his copyholds, "which he had surrendered upon several trusts in favour of his wife and children." The only trust for the heir was an annuity of 300l. for life, remainder to his wife and children. Testator never having surrendered his copyholds, it was held a mistaken description, and that the copyholds were clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect, and was held not bound by receiving one half year's annuity while abroad. Rumbold v. Rumbold, E. 1793. 9 Ves. 69.

50. Devises of all testator's copyhold estates in general terms (unrestrained) to a child, passes all his copyholds surrendered to the use of his will. The point that the doctrine of election reaches the customary heir claiming a copyhold estate for want of a surrender, was admitted at the bar in this case. Blunt v. Clitherow, E. 1805. 10 Ves. 589. Vide Cunliffe v. Barker, 3 Atk. 3. Banks v. Deneshire, 3 Atk. 585. 1 Ves. 63. Pettit v. Prescott, 7 Ves. 541. Rumbold v. Rumbold, 3 Ves. 65. Wilson v. Mount, 8 Ves. 191. But though the authorities upon the doctrine of election reach the customary heir claiming a copyhold estate not surrendered to the use of the will, yet that doctrine does not affect an heir at law, where the devisee fails under the statute of Frauds. Goodrich v. Kembank, 1 Ves. 898. 3 Atk. 460. Goodrich, 8 Ves. 48.

51. Miscellanea. A voluntary surrender made by a man in his sickness, was held good against his wife and children, who claimed under a subsequent surrender made upon his marriage after his recovery. Allen v. Arne, H. 1683. 1 Vern. 363.

52. In consideration of marriage between two copyholders, the man surrendered his copyhold to the use of them and the survivor, and the woman did the same with hers. The man died before marriage, and the woman entered and enjoyed for thirty years. Decreed, a trust and a surrender, and an account of profits from the death of the man. Hammond v. Hicks, H. 1686. 1 Vern. 433.

53. A purchased a copyhold to himself, his wife, and daughter, and their heirs, and afterwards surrendered it to B. and his heirs, to secure a debt. Bill by B. complaining of fraud as against him: Held, this purchase was an advancement for the wife and daughter, and they are not trustees. The husband and wife (as one person) take a moiety by intresties, and therefore the surrender of A. can pass no part of the lands, and plaintiff might have informed himself of the title from the court roll. The husband could not alien a part of the intirety so as to bind his wife, and the other moiety was well vested in the daughter. Bill dismissed. Buck v. Andrews, H. 1689. Pre. Ch. 1. 2 Vern. 120.

54. Tenant for life of a copyhold sold his estate and surrendered it, that the lord might admit A. the purchaser. The copyholder in reversion entered, and recovered at law. A was relieved in equity, for the surrender was only to admit him as a purchaser. Anon. M. 1691. 2 Freem. 116.

55. A surrendered the reversion in fee of his copyhold to his son, to lessen the fine payable on a descent to the son. On a treaty for the son's marriage, the father told the lady's relations, that he had so provided for his son, who in consequence received 2000l. as a marriage portion: Held, his surrender to the son was neither voluntary or fraudulent; and though the father, on his second mar-
Surrender, Want of, where supplied.

ringle, settled the same estate on his wife, the court will not disturb the son's reversion, for the father's second settlement was but actum agere, the estate having before passed by the surrenderer, and the title appearing by the court roll. Kirk v. Clark, H. 1708. Pre. Ch. 275.

56. A devised all his estate, subject to his debts; he had no freeholds, and had not surrendered his copyholds. The want of surrender was supplied in favour of creditors; but it would have been otherwise, if there had been freeholds. Ithel v. Beane, H. 1749. 1 Ves. 215.

57. Testator seized of freehold and copyhold estates in H. and C., devised all his lands, tenements, and messuages, and hereditaments in those countries, to his wife for life, remainder to his first and second sons in tail, remainder to his wife in fee, having in the beginning of the will, declared that as to all his worldly estate, he disposed thereof as therein followed, but not having surrendered the copyhold to the use of his will, the court would not supply the want of a surrender, there being freehold estates to answer the words of the devise. Milbourne v. Milbourne, E. 1786. 1 Cox 247. 2 Bro. C. C. 64. Vide Haslewood v. Pope, 3 P. W. 322. Harris v. Ingledew, ib. 96. Ross v. Ross, 1 Eq. Ab. 124.

58. A dormant surrender of a copyhold, (i.e. a surrender to A. on condition to perform the will of the surrenderer,) will vest an estate in the dormant surrenderer, sufficient to support the contingent remainders of the surrenderer's will, without the interposition of trustees for the purpose. Gale v. Gale, E. 1789. 2 Cox 186. Vide Hopkins v. Hopkins, 1 Atk. 581.

59. A devise by general words, as messuages, lands, tenements, and hereditaments, for payment of debts, will include copyholds, if required, and the want of a surrender will be supplied, more especially where the testator's intention to subject his copyhold estates appears in other parts of his will. Kidney v. Williams v. Cussmaker, H. 1806. 12 Ves. 136. Holmes v. Coghill, ib. 216.

60. An admittance of the particular tenant of a copyhold is an admittance of the remainder-man, and a devise of the remainder or reversion requires a surrender to the use of the will. Church v. Mansell, M. 1806. 13 Ves. 126.

61. An admittance to a copyhold ensures according to the title, though it be not correctly expressed, but copyholds are not intended to be so comprehended in a devise to the testator's wife, in the general terms of "real and personal estates," as to entitle her to have the surrender supplied. S. C. On appeal by plaintiff to the Ld. Ch., his Lordship's opinion was, that the reversion of the copyhold estate did pass in this case under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if the testator left no freehold estates. Enquiries were therefore directed to ascertain that fact, and also if there was any custom of surrendering a vested interest in reversion or remainder, expectant on an estate tail. S. C. M. 1808. 15 Ves. 396. Vide etiam Pike v. White, 3 Bro. C. C. 286. Where evidence was produced that there was no custom in the minor to surrender, and Ld. Thurlow's opinion was, that such a negative custom was good for nothing. The court would hold that there might be a surrender to the use of the will, though no instance could be found on the records of the major, or if there could be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which the court would supply.

62. The court will supply the want of a surrender for a widow (how ample or scanty soever her provision may be,) against a collateral heir, viz. a sister whether provided for or not. Fielding v. Winwood, T. 1809. 16 Ves. 90. Sed gu as to a son. Et vide Chapman v. Gibson, 3 Bro. C. C. 229. 232. Hills v. Downton, 5 Ves. 557. Biscoe v. Cartwright, Gilb. 121.

63. Where the heir at law is provided for by the will of his ancestor, the court will supply the want of a surrender in favour of younger children, without regard to the amount of the heir's provision.— Garn v. Garn, M. 1809. 16 Ves. 146. Vide Hills v. Downton. Intermed. 44. An. 1810.
COPYHOLD III. & IV.

Surrender, where supplied.—How devisable.

Surrender to other uses, under which there had never been any admittance. Vassar v. Jeffrey, H. 1810. 16 Ves. 357.

65. A conveyance of a copyhold estate was made by a father to his younger son in consideration of love and affection, but the estate was never surrendered. On a bill to supply this defect, Grant, M. R. held, that the want of a surrender has been supplied on a deed as well as a will for a younger child, but upon the same principle as in the case of a will, or the execution of a power, that is, for and against the same persons. An enquiry was directed whether the heir was provided for, and to what extent. If he was without provision, his Honour thought that against a grand-child the defect ought not to be supplied. This question, he said, had never been declared, though, as against a collateral heir, it has been held, that the deposit shall be supplied. (a) Rodgers v. Marshall, T. 1810. 17 Ves. 294. Vide (a) Fielding v. Winwood, ante, pl. 62.

66. The court in certain cases will supply the defect of a surrender, to support the devise of a copyhold estate, though the defective execution of a devise of freehold estate will not be aided in equity. Brodie v. Barry, T. 1813. 2 Ves. & B. 190.

67. The court will not supply the want of a surrender for a child under a devise in general terms, not mentioning copyholds, nor executed to pass freeholds. Sampson v. Sampson, M. 1818. 2 Ves. & B. 337. Vide Byas v. Byas, 2 Ves. 164.

By the stat. 55 Geo. 3. c. 192, it is enacted, that wills of copyholds which have not been surrendered to the use of such wills, shall in future be as valid and effectual as if surrenders had been duly made. This only applies, however, to wills made since the passing of the statute.

COPYHOLD IV.

By what Words devisable, and who shall take.

68. Testator devised "all his cottages, messuages, lands, tenements, and hereditaments, whatsoever, in A. J. and W. " not before disposed of, with their and " every of their appurtenances, unto his " daughter B. and to the heirs of her " body, to enter upon at the age of 21, " and not sooner." There was some copy- holds in A. not surrendered. B. married plaintiff, and upon a bill to have the defect of surrender supplied and transferred, it was decreed, and held, that the copyhold passed to B. by the general words. Andrews v. Waller, H. 1733. 6 Vin. 257. pl. 12.

69. If a man devises all his lands and hereditaments in Dale, and has a manor in Dale also, the manor will pass as an hereditament; but if one has a manor in Dale, and also land there, which is not part of the manor, it is doubtful whether the manor will pass by a devise of all his lands. Hatfield v. Pope, T. 1734. 3 P. W. 822.

70. A copyhold surrendered to the use of a will passes by a general devise of lands, notwithstanding there are freeholds. Tendril v. Smith, M. 1740. 2 Atk. 85.

71. C. gave all his messuages, lands, tenements, and hereditaments in A. and elsewhere, and all other his real estates to trustees for 500 years, and after the determination of the term he gave all the premises to his wife for life sans waste. All the estates having come originally from the wife, testator could not mean to sever the copyhold from the freehold; therefore, by the general words of the will, the copyhold passed. Carr v. Ellison, E. 1744. 3 Atk. 73. Vide Smith v. Baker, 1 Atk. 386.

72. If A. has the beneficial interest only in copyhold lands, he may devise them, and they will pass by his will as well as any other lands, for without the legal estate he could not surrender them. S. C. Et vide Tufnell v. Pege, 2 Atk. 37. King v. King, 3 P. W. 360. Macey v. Shurmer, 1 Atk. 390. Allen v. Poulton, 1 Ves. 121. M'Namara v. Jones, 1 Bro. C. C. 481.
COPYHOLD IV.

By what Words derivable, and who shall take.

78. A steward indorsing the uses upon a surrender, is sufficient without specifying them on the court rolls. S. C.

74. A nominal master will pass under the words, "messuages, lands, tenements, and hereditaments." Norris v. Le Neve, E. 1744. 3 Ark. 82.

73. By a devise of all lands and tenements, only freeholds will pass; yet, if he had nothing but copyholds, they shall pass. Exp. Connell, T. 1744. 1 Ark. 360.

76. A copyhold, not particularly specified in a surrender to the uses of a will, may pass by the general introductory words, by which a plain intent in the testator appeared to dispose of his whole estate, and to leave no part to descend. Goodwyn v. Goodwyn, E. 1749. 1 Ves. 227. Et vide last and next section.

77. A will is only directory of the uses of a surrender; therefore, where the devisee or appointee has died in testator's lifetime, it was never intended the estate should vest, because, when it might vest, there was no person to take, inasmuch as the act was incomplete till testator's death. Dict. in D. of Marlborough v. Ed. Godolphin, M. 1750. 2 Ves. 77.

78. A copyhold surrendered to the use of a will, passes by the general words "all my real estate;" but otherwise if not surrendered, unless the testator had no freehold. An heir general, or by custom, cannot be disinherited by implication or inference. Byas v. Byas, H. 1751. 2 Ves. 164. Vide Judd v. Pratt, 13 Ves. 178.

79. I. S. made his will, reciting that he was seized of a copyhold estate, (which he was not,) and devised all his real estate, &c. He afterwards purchased a copyhold, and surrendered it to such uses as by will he should appoint, and died: Held, the copyhold did not pass; 1st, because the surrender was to a future appointment; and 2dly, because the words do not extend to an after-purchased copyhold. Warde v. Warde, H. 1756. Amb. 299.

80. Testator devised all his freehold and copyhold estates, the latter of which he surrendered to the use of his will, but afterwards he exchanged part for other copyholds, which were not surrendered. Held, that the heir claiming beneficially under the will should be put to his election. Frank v. Standish, M. 1722. 15 Ves. 391. (n.)

81. Testator devised estates which he had surrendered in several parishes, (describing them,) to his wife for life, with remainders over. In one parish he had a joint estate with his wife, and in others he had no estate but in her right. The estates of the wife, not passing by the surrender, do not by the will: and the words of the will were too loose to raise a construction that the wife should elect. Read v. Crap, T. 1785. 1 Bro. C. C. 492.

82. An assignment of personal property for a consideration clearly inadequate, is fraudulent as against creditors, under the 13 Eliz. But copyholds not being subject to debts, a conveyance of them cannot be so deemed. Matthews v. Fenner, M. 1785. 1 Cox. 278.

83. Testator gave to his executors, "all his goods, estates, bonds, debts, to be sold," &c. The word estates will pass a copyhold which was surrendered to the use of the will. Jongema v. Jongema, E. 1787. 1 Cox 362.

84. A copyhold will not pass by general description, where there is freehold to satisfy the words of testator's will, even though it had been supposed to be freehold, and devised first for payment of debts, and then to a younger child unprovided for. Lindapp v. Eborall, M. 1790. 3 Bro. C. C. 188.

85. Copyhold estates purchased and surrendered to uses declared, or to be declared by will concerning the same, were held to pass according to a will (previous to the purchase,) devising all copyholds generally, and therefore containing a description applicable to them. Att. Gen. v. Vigor, E. 1803. 8 Ves. 236. Vide Heylin v. Heylin, Comp. 130.

86. By a devise in general terms of "all the rest, residue, and remainder of my real and personal estate of what nature, &c." to nephews and nieces, and not for creditors, wife, or children, is not sufficient to raise a case of election, or for supplying the want of a surrender of copyhold land contiguous to, and intermixed with the freehold, against the heir. Judd v. Pratt, M. 1806. 13 Ves. 168. Byas v. Byas, 2 Ves. 164. Church v. Mundy, 12 Ves. 426. On appeal, the case of Judd v. Pratt came on before Ld. Eldon, and was affirmed, his Lordship observing a distinction as to supplying a surrender by implication from general
COPY HOLD IV. & V.

How desirable.—Where liable to Debts and Legacies.

words between the cases of creditors and children. In the latter, the intention is satisfied by the freehold estate, the extent of the provision being indefinite, which in the former is measured by the extent of the debts. S. C. M. 1809. 15 Ves. 390. Vide etiam Lindopp v. Eborall, 3 Bro. C. C. 188. Kidney v. Conssmaker, 12 Ves. 136.

87. The reversion of a copyhold estate will pass under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if testator left no freehold estates. Church v. Mundy, T. 1806. 13 Ves. 396.


90. R. P. being entitled to two copyholds, surrendered one of them to the use of his will, and then bequeathed both to executors in trust for his grandson. The executors having renounced probate, were not admitted, but afterwards the son of R. P. was admitted to the estates, which he surrendered for a valuable consideration to H., who surrendered them to plaintiff's father, and he bequeathed them to plaintiff: Held, that plaintiff, the grandson, was entitled to the copyhold which R. P. had surrendered to the use of his will, though 13 years had elapsed since he became of age, and that defendant, as a trustee, must surrender to him, and account for the timber cut, and also for the rents for the last 6 years. Pearce v. Newlyn, E. 1818. 3 Madd. 186.

COPY HOLD V.

Where liable to Debts and Legacies.—Assets by Descent.

91. Copyholds cannot be affected by an execution on a judgment, nor can they be seized upon an outlawry or extent. Rex v. Bud, T. 1768. Parker, 190. For no process can issue to levy a debt upon a copyhold estate; therefore a fraudulent surrender of a copyhold is not an act of bankruptcy. Ex parte Cockshot, H. 1792. 3 Bro. C. C. 505. and therefore a mortgagee of a copyhold cannot tack a judgment of his mortgage. Heir of Cannon v. Pack, E. 1715. 6 & Vin. 232, pl. 6. Neither shall the heir of a copyhold be bound by a covenant for further assurance. Farnaker v. Robinson, M. 1717. Pre. Ch. 477. Gilb. Eq. Rep. 139. Neither shall the copyhold be liable to a covenant in marriage articles, to settle lands on the wife for life, where the lands are settled to be held, without impeachment of waste. Pinnel v. Hallet, T. 1751. Amb. 106. Sed vide Whitehead v. Harrison, post, as to a sequestration on a decree.

92. Yet copyholds are subdued by a bankruptcy, and will pass to the commissioners, and consequently to the assignees. Jordan v. Savage, M. 1733. 2 Eq. Ab. 102. pl. 8. Drury v. Man, T. 1746. 1 Atk. 96. But the commissioners should except copyholds out of their assignment to the assignees, and convey to the purchaser immediately, for there can be no danger of an extent, and it will save the expense of two fines to the lord. Drury v. Man, supra; where it is said that the assignee of a bankrupt is a vendee of a copyhold under 13 Eliz. c. 7 and not the purchaser from the assignee of such estate. A sequestration on a decree runs against copyhold lands, though it cannot be revived against the customary heir. Whitehead v. Harrison, H. 1730. 1 Barn. 451.

93. In other cases nothing but the act of the copyholder himself can subject his estate to debts and legacies, and the co-
COPYHOLD V.

Where liable to Debts and Legacies.

A copyhold must be expressly mentioned, and particularly charged. Therefore, where a man seized of freehold and copyhold estates, devised all his real and personal estates for the payment of his debts, and died without having surrendered his copyhold, the court would not supply the want of the surrender, though the freehold and personal estates were insufficient, in regard the testator's intent to charge his copyhold did not manifestly appear. Chalis v. Casburn, T. 1715. Pr. Ch. 407. Gilb. Eq. Rep. 96. Sed vide Drake v. Robinson, T. 1718. 1 P. W. 443. where A. devised all his real estate to pay debts, and died without having surrendered his copyhold; Lord Ch. thought the words large enough to charge the copyhold, which is a real estate, and decreed the copyhold liable, in case the freehold should prove insufficient to pay the debts. So, in Hastwood v. Pope, T. 1734. 3 P. W. 322. in which case testator devised all his lands and hereditaments for a copyhold an hereditament. So, Mallabar v. Mallabar, E. 1735. Forr. 78. See all the cases on this point, ante, tit. Copyhold, iii.

94. But where a man has duly surrendered his copyholds, his intention to charge his copyholds is considered as manifest; and therefore where there was a proviso in the will of A. B. that if his personal estate should not pay his debts, then his executors to raise the same out of his copyhold premises: Held, the trustees had a power to sell the copyhold, and satisfy the testator's intention. Bateman v. Bateman, M. 1739. 1 Atk. 421. E. of Godolphin v. Pannack, T. 1751. 2 Ves. 271. S. P. as to the trust of a copyhold.

95. And under a general charge "upon all testator's worldly estate" for payment of debts, copyhold lands, are held liable as well as freehold, for the law follows the intention of the testator, but the freehold shall be first applied, though both are unnatural funds for the payment of debts. — Combes v. Gibson, E. 1783. 1 Bro. C. C. 277. Vide Kentish v. Kentish, H. 1792. 3 Bro. C. C. 257. Growcock v. Smith, 2 Cox 397.

96. Though the court will supply the defect of a surrender in favour of creditors, where the testator's intention to charge his copyhold is manifest, (vide supra, et ante, tit. Copyhold, iii.) yet it is otherwise with respect to legateses, especially if they are strangers. Rafter v. Stock, H. 1699. 1 Eq. Ab. 128. pl. 12. Mallabar v. Mallabar, E. 1735. Forr. 78.

97. Copyholds cannot be assets by descent, unless the custom be broken: As if A. surrenders to B. and his heirs, in trust for C., this breaks the custom; and if a copyholder in Borough English surrender in trust for himself and his heirs, the trust goes to the heirs at law, and is assets in his hands. Helly v. Helly, T. 1709. 2 Eq. Ab. 509. pl. 4. or unless it be extinguished, as where a copyholder in tail accepts from the lord a grant of the freehold. Dunn v. Green, T. 1724. 3 P. W. 9.

98. Copyholds not being subject to debts, a conveyance of them for an inadequate consideration, is not fraudulent against creditors, under 13 Eliz. Mathews v. Fraser, M. 1786. 1 Cox 278.

99. Copyhold estates are not assets for specialty debts, nor even for debts due to the crown, neither are they liable to any debts further than they are made subject by the testator. Altrich v. Cooper, E. 1803. 8 Ves. 393, 394.

100. The lord of a manor has not by law, although he may have by custom, any such property or interest in the timber growing on the copyhold premises of a tenant, as entitles him to enter and cut. Whitechurch v. Holworthy, T. 1812. 19 Ves. 213.

101. After a general direction to pay debts, funeral and testamentary charges, and a bequest of personal estate subject to the payment thereof, testator, in case his personal estate should not be sufficient to pay the same, charged his freehold estates with payment thereof, and subject thereto he gave all his freehold and copyhold estates, which he had surrendered, or intended to surrender, to the uses of his will. The copyhold estates were held charged. Noel v. Watson, M. 1813. 2 Ves. & B. 209.
COPYHOLD VI.

Lord's Estate.—Protection to his Tenant.

102. The cases in the last section show how great a protection the major estate of the lord, has ever been to the minor estate of his tenant, and how careful the court is, lest the lord's estate should be prejudiced.

103. And so in like manner a contingent remainder of a copyhold estate shall be preserved by the freehold, which is in the lord; as where plaintiff, tenant for life, remainder to his first and other sons in tail, remainder to defendant in fee, took from defendant a surrender of the reversion in fee to his own use, though his wife was then princement ensuant of a son. This contingent remainder was not destroyed by the surrender, for the freehold was in the lord. Mildmay v. Hungerford, M. 1691. 2 Vern. 243. To support a contingent remainder in a freehold, there must be a tenant of the precedent, yet not so of a copyhold, for there no precedent can be brought, being parcel of the manor only, and the freehold in the lord. Lovell v. Lovell, M. 1743. 3 Atk. 12. But contingent remainders of a copyhold cannot be preserved against a forfeiture by the lord's estate, where the preceding estates are expired. Habergham v. Vincent, T. 1793. 2 Ves. jun. 209. 4 Bro. C. C. 533.

104. In copyhold estates the lord is a trustee for the heir, and is bound to admit him, though the lord be the original grantor, yet it is only in virtue of the trust reposed in him by the law. Mason v. Day, H. 1711. Gilb. Eq. Rep. 77.

105. In a bill for surrender of a copyhold estate for lives, the lord must be a party, because upon the surrender the estate is in him, sed secus of a copyhold of inheritance. Anon. M. 1720. 6 Vin. 239. pl. 5.

106. The lord of a manor is said to be never out of possession; and that whatever is built on the waste is his, even after 60 years possession by the tenant. Lloyd v. Bartlett, T. 1726. 6 Vin. 123. pl. 1. Sed quare, after 20 years possession, which is a bar to an ejectment.

107. A seisin covert without her husband surrendered her copyhold to the use of her will or appointment and then devised it to A. Ld. Ch. doubted the efficacy of this appointment, because the devisee must come in under the estate of the lord, and by that medium there must be a good surrender into the hands of the lord to make the appointment effectual. Taylor v. Phillips, E. 1749. 1 Ves. 229.


COPYHOLD VII.

Lord's Court. (a) Fines and Recoveries. (b)

(a) Lord's Court.

109. A bill will not lie to compel a lord of a manor to permit plaintiff to bring a plaint in the lord's court, in nature of a writ of error, to reverse an erroneous common recovery suffered there. Ashe v. Roke, H. 1685. 1 Vern. 367.

110. Bill to compel the lord of a manor to receive a petition in nature of a writ of false judgment, for reversing a common recovery suffered in the manor court whereby plaintiff's remainder in tail was barred, suggesting several errors. The lord by answer, insisted that it was the first attempt of the kind, and of dangerous consequence, and therefore would not proceed on the petition, unless compelled by law. Bill dismissed, and the dismissal confirmed by the lords. Smith v. Dean & Chap. of St. Paul's, H. 1695. Show. P. C. 67.

111. If a copyholder sues in the lord's court, and a wrong judgment is given, equity will correct the proceedings, though no appeal or error lies. Christian v. Corren, M. 1716. 1 P. W. 350.

(b) Fines and Recoveries.

112. Copyholds cannot be entailed within the statute de donis, but they may by common law, and then surrenders or plaints, in nature of fines and recoveries, may bar them as well in the court baron.
COPY HOLD VII. & VIII.

Fines and Recoveries.—Quit Rents, &c.

as at common law, if the custom has been such, which is the rule in those cases. *Anon.* H. 1602. Cary 30.


115. A common recovery suffered in C. B. will not pass copyhold lands, otherwise as to customary freeholds, which pass by surrender in a borough court. *Oliver v. Taylor*, T. 1738. 1 Atk. 474.

116. A widow seised in fee of copyhold lands, surrendered them to the use of her will; she then married, and with her husband mortgaged the estate for a term under the lord’s license, without fine or surrender. The mortgage is bad at all events, for there ought to have been either a fine or surrender, so that the feme might be privately examined. The former surrender was fluctuating and ambulatory, till some further legal act done to complete it, and the marriage either made it void, or suspended it; in either case its operation is prevented. *George, ex dem. Thornbury*, v. *—*, M. 1749. Amb. 627. *In Compton v. Collinson*, 2 Bro. C. C. 387. it is said, upon the authority of *Moor*, 123. that the surrender of a feme covert, with the consent of her husband, is good by custom.

117. Chancery will not entertain a bill to rectify a mistake of names in a recovery suffered at a court baron, especially after a length of time and against a purchaser. *Bell v. Cundall*, T. 1750. Amb. 101.

118. Where by the custom of a manor an estate cannot be entailed, it is capable of such limitations as may make it a fee-simple conditional, and the tenant after the condition is performed, has power to dispose of it by surrender. *Pullen v. Ld. Middleton*, E. 1754. 9 Mod. 483.

119. To show a customary estate tail, it is necessary to show remainders over, or a long enjoyment, so as to exclude a fee-simple conditional. *Moore v. Moore*, T. 1755. 2 Ves. 602. Amb. 279.

120. An enfranchisement of a copyhold by one having a partial interest, is for the benefit of all the remainder-men as well as himself; a recovery suffered by one not in possession has therefore no operation. *Wynne v. Cooke*, T. 1780. 1 Bro. C. C. 515.

COPY HOLD VIII.

Lord’s Fine.—Quit Rents, &c.

121. A copyholder in fee made a conditional surrender for securing a sum of money payable in six months. The mortgage being willing that the money should continue, desired the lord to renew the surrender, but the lord insisted on the mortgagee’s being admitted, and paying a fine of two years value. No relief against the lord. *Tredway v. Potherley*, M. 1699. 2 Vern. 367.

122. Bill by a few tenants of a manor against the lord, to settle the custom as to fines upon death and alienation. An issue was directed, and the fines determined. All the tenants shall be bound by this determination. *Brown v. Hopwood*, M. 1701. 1 Eq. Ab. 163. pl. 4.

123. A manor belonging to a bishop’s see was usually let for lives, at 49l. 13s. 4d. The then bishop, upon a renewal, excepted the demesnes of the value of 32l. 11s. 1d. but reserved the full ancient rent, though he only received 16d. 12s. 3d. the balance rent. This acceptance does not bind his successor. *Dyke v. Bp. of Bath & Wells*, T. 1715. 1 Bro. P. C. 502.

124. The heir of I. S. who was the last of three lives named in a copyhold grant, brought a bill against the lord, to be admitted for his own life and that of two nominees, on payment of a year and a half’s improved rent, and insisted that he was not bound to renew but at his own pleasure. The court directed an issue to
COPYHOLD VIII.

Lord’s Fine.—Quitt Rents, &c.

125. A custom, that the heir of a copyholder shall claim a new copy for three lives, and so on for ever, paying the lord a reasonable fine, is void; but there may be a custom for the heir to have a new copy, paying a fine certain. Where the custom has not settled any fine, the law has interposed, and prevented the lord from taking more than two years value; but this is only as to copyholds of inheritance, for copyholds for lives, where the fine is uncertain, are like leases of freeholds for lives, and renewable only upon the best terms the party can make. [*Ld. Abergavenny v. Thomas, T. 1739. 9 Anstr. 686, 689. (n.) Wharton v. King, H. 1796. 9 Anstr. 659. S. P. determined on the authority of the two last cases.*]

126. Bill by the lord to recover a fine for a copyhold, on suggestion that defendant was admitted by attorney, but sometimes pretends that the attorney had no authority to take such admissances. Defendant answered as to part, but demurred as to the relief. Demurrer allowed. [*North v. E. of Strafford, M. 1732. 3 P. W. 149.*]

127. Bill against the same tenant to recover a quit rent, alleging that the land out of which the quit rent issued, by reason of the unity of the possession of the lands, out of which the rent is supposed to issue with other lands, is not known. The defendant answered as to the discovery, but demurred as to the relief. Demurrer good. [*S. C. Note, plaintiff might bring his action at law for the fine, and need not (ut sembi.) in his declaration set forth the particulars of the land held of him by defendant by copy of court roll only, that defendants’s wife had certain lands within the manor, &c. But as to the quit rents, it seems plaintiff must either in his action or avowry show the particular lands; and in case defendants, in their answer, say they do not know where the lands lie, or where they are, plaintiff may have a commission to set them out, and then the plaintiff being entitled to this relief, quere, Whether defendant’s demurrer to all relief be good.*] Vide [*Cox v. Foley, 1 Vern. 369.*] D. of [*Bridgewater v. Edwards, 4 Bro. P. C. 139.*] Benson v. [*Baldwyn, 1 Atk. 508.*] D. of [*Leeds v. Powell, 1 Ves. 171.*] D. of [*Leeds v. New Radnor Corp. 2 Bro. C. C. 318.*]

128. A single copyholder is not relievable in equity against an excessive fine, but must go to law; yet to avoid suits, several copyholders may join to be relieved against a general excessive fine. [*Couper v. Clerk, M. 1732. 3 P. W. 157.*] Vide [*Middleton v. Jackson, 1 Ch. Rep. 33.*] Popham v. Lancaster, 1 Ch. Rep. 96. [*Disley v. Robertson, Banh. 41.*] Baker v. Rogers, Sel. Ch. Ca. 34. Mayor of York v. Pilkinson, 1 Atk. 282. [*Bouviro v. Prentice, 1 Bro. C. C. 200.*]

129. A bill for a quit rent may be brought in some cases, as where lands out of which the rent is claimed are wholly uncertain, and where the days of payment are also uncertain; but these things should be laid in the bill, and it should also appear, that there is no remedy at law. [*Holder v. Chambury, E. 1734. 3 P. W. 236.*]

130. A general fine payable on the death of the lord is a good custom, even where the lord has alienated the manor in his life-time. [*Lovett v. Raw, E. 1735. 4 Bro. P. C. 204.*] D. of [*Somerset v. France, 1 Str. 654.*] Fortesc. 41. S. P. and in that case liberty was reserved for the tenants to try the reasonableness of the fine at the peril of forfeiture.

131. An assignee of a bankrupt copyholder must surrender to a purchaser, though the lord may exact the two fines; but one fine may be saved, by the commissioners conveying to a purchaser in the first instance. [*Drury v. Mon, H. 1046. 1 Atk. 93.*]

132. The lord is entitled to his fine, when by the custom the tenant is obliged to be admitted. [*Fawcett v. Lovett, T. 1751. 2 Ves. 300.*]

133. The statute 9 Geo. 1, c. 29, providing for the admission of copyholders, infants, or *fames covertos*, is confined to the cases expressed, viz. title by descent or surrender to the use of a will, and does not apply to a title under a deed; therefore to a bill by the lord stating a title in remainder, by deed of appointment under a settlement, and an admission by the tenant for life without fine, having paid a fine on a former admission under his original title, and upon his death, praying a discovery and production of the deed in aid of an action under the statute, a demurrer was allowed. [*Kensington v. Malsell, M. 1806. 13 Ves. 240.*]
COPYHOLD VIII. & IX.

Lord's Customs.—Quit Rents, &c.—Manorial Customs.

134. The lord admitting a tenant for life, may apportion the fine, but cannot remit it to the tenant for life, and charge the whole on the remainder-man. His receiving a fine however upon the admission of a tenant for life does not discharge the remainder, but as the admission of the tenant for life is the admission of all in remainder, the lord may assess the whole fine on him. S. C. 253.

COPYHOLD IX.

(a) Manorial Customs.

135. Bill by the tenants of a manor to establish their right to the profits of a fair, is very proper as a bill of peace. New Elm Hospital v. Andover, II. 1684. 1 Vern. 266.

136. A surrender to one and his heirs, in trust for another and his heirs, breaks the custom of a copyhold, for the trust must follow the nature of the estate. Helly v. Helly, T. 1709. 2 Eq. Ab. 509. pl. 4.

137. Where there is no particular custom for suffering a recovery, a common surrender will bar an intail. White v. Thornborough, M. 1715. Pre. Ch. 425. Vide ante, sec. vii. all the cases collected.

138. A tenant cannot by custom dig copper in a new discovered mine without the lord's license, nor can the lord without his tenant's consent. Bp. of Winchester v. Knight, H. 1717. 1 P. W. 406.

139. Bill to establish a right to tolls for carts coming into a manor, dismissed, it not appearing that the toll bars stood within the manor. Att. Gen. v. Ayre, M. 1720. Bubn. 68.


141. Where no custom is alleged of a tenant's power to cut down timber, it must be taken according to the common law, by which he has no power over it. Edwards v. Heather, M. 1724. Sel. Ch. Ca. 3.

142. Bill for suit of court to a manor, and fee farm rent or law day silver at plaintiff's court lost dismissed, as proper at law. Thornhaugh v. Hartshorn, T. 1727 Bubn. 237.

143. A custom to pay a general fine on the death of the lord is good, though the manor has been alienated by the lord in his life-time. Lowther v. Raw, E. 1735. 4 Bro. P. C. 264.

144. A custom to pay a fine on the change of every lord is bad, unless the lord be tenant for life or by courtesy, then it is good. D. of Somerset v. France, M. 1733. Fortesc. 41.

145. Evidence of customs in a neighbouring manor shall not in general be admitted, for every manor is governed by its own customs; yet in mine counties evidence has been admitted from other manors, with regard to the profits, where they are similar. Dean & Chapter of Ely v. Warren, T. 1741. 2 Atk. 189.

146. Chancery does not require so much exactness in setting forth a custom as the Exchequer or courts of law. S. C.

147. The court is not bound to send a custom to be tried which is prima facie void at law. Fawcett v. Lowther, T. 1751. 2 Ves. 300.

148. By the general custom of copyholds, the surrenderer must come and have the surrender presented at the next court; but there are several copyholds where the tenant need not come presented under three courts. S. C. Et vide Moore v. Moore, T. 1755. 2 Ves. 602. S. P.

149. As to a mortgage, where the estate is only a pledge, the mortgagee is not bound to present till the third court, and until such conveyance is presented, and the mortgagee is admitted, the mortgagor remains tenant. S. C.

150. The custom cannot operate upon a mere equity of redemption, but an equity of redemption will follow the custom as to the legal estate, as in Borough English, and in Gavelkind; but it is not proper to be tried, whether the law which is followed be the law of the land or lex loci. S. C.
Manorial and Heriot Customs.—Steward, his Acts, how far binding.

151. A custom is not void because it diminishes the lord’s casualty or profit, as to an escheat. S. C.

152. Though a custom that a copyholder for life may commit waste would not be good, yet it is good that a copyholder in fee may do so. S. C.

152. Customs are supposed to take their rise by grant or agreement, and in this case Ld. Ch. said, he would not on a direction to try a general custom insert every circumstance attending each particular case, for that would entangle the general custom. S. C.

154. Bill by the lord claiming a prescriptive right to tolls for goods landed, and praying a discovery of goods landed. He is not entitled to a discovery till he has established his right at law. Aliter where the title is in equity. Northleigh v. Luscombe, T. 1765. Amb. 612.

155. A custom that copyholds shall not be surrendered to the use of a will is bad. Pyke v. White, T. 1791. 3 Bro. C. C. 288.

156. The custom of a manor was, that if a tenant for life should obtain a grant in reversion in the name of a third person, such third person should be entitled beneficially, unless a trust was mentioned in the rolls of the manor; this custom was held reasonable, and that the persons named in the reversionary grants were not trustees, but beneficially entitled. Edwards v. Fidell, E. 1818. 3 Madd. 237.

(b) Heriot Customs.

157. Heriot customs are unreasonable, and not favoured in equity; therefore, where the freehold tenants made long leases to deprive the lord of his heriots, the court would not assist the lord, no trust appearing. Wirt v. Pemberton, E. 1709. 2 Eq. Ab. 279. pl. 1. Upon the death of the custumque trust no heriot is due, but of him only that has the legal estate. Trin. Col. Camb. v. Browne, H. 1686. 1 Vern. 441.

158. Equity will not entertain a bill to discover which person has the best ability to answer a heriot. Lud Montague v. Dudman, T. 1751. 2 Ves. 399.

159. An heriot service before the 12 Car. 2. when the feudal system was abolished, was this: where the tenant held of the lord by service, the instant the tenant died the property of the beast vested in the lord, and he might seize for it, or distrain for it at his election. But there, though the tenant died, the tenure continued, and therefore it was not unreasonable to say, that the lord might distrain for his heriot, because the tenure was a continuing tenure in the heir; however, it was doubted in Osborne v. Steward, T. 1686. 3 Mod. 230. whether in the case of a reservation of an heriot it could be distrained for after the expiration of the term, and it does not appear how that case was eventually determined. Inchiquin v. Burnell, T. 1795. 3 Ridg. P. C. 426.

COPYHOLD X.

Steward—his Acts—how far binding.

160. A mistake by the steward in a surrender is only matter of fact, and the courts of law will admit an averment of it, either as to the lands or uses. Towers v. Moor, E. 1689. 2 Vern. 98.

161. An entry in the steward’s book, and a parol proof by the foreman of the jury, was admitted as evidence, that a feme covert surrendered her whole estate, though the surrender and admission upon the roll were but of a moiety. Hill v. Wiggis, E. 1706. 2 Vern. 547.

162. A steward has a general authority to make contracts with the tenants, but this will not bind the lord without his approbation, unless part of the bargain is actually executed. Anon. E. 1717. 5 Vi. 522. pl. 35.

163. A steward swearing that he never heard of an agreement to surrender at or before the surrender, is a negative pregnant that he heard of it after, and a manifest evasion. Walker v. Walker, M. 1740. 2 Atk. 98.

164. A steward indorsing on a surrender, the uses of it, is sufficient, without specifying them on the court rolls. Carr v. Ellison, E. 1744. 3 Atk. 78.

COPYHOLD XI.

Right of Common.

166. Fifteen out of eighteen tenants agree to an inclosure. The common shall be inclosed. _Anon._ 1663. 3 Ch. Rep. 13, 14.

167. After two issues directed, and tried, to find whether the lord had a grant of free warren, and if he had, whether sufficient common was left for the tenants; Ld. Ch. said, those matters were proper at law; but it being urged, that the bill was a bill of peace, he granted a new trial on payment of full costs, though he doubted the jurisdiction of the court in such cases. _How v. Bromsgrove Tenants_, M. 1681. 1 Vern. 22. Cary 3.

168. A common that has been inclosed for thirty years, shall not be thrown open. _Silway v. Compton_, H. 1681. 1 Vern. 32.

169. If a commoner brings an action against A. for oppressing the common, and recovers small damages, as 3s., A. may bring a bill that any other commoner, who shall sue, may accept the like damages. _Pawlet v. Ingres_, H. 1684. 1 Vern. 308.

170. A decree for confirming an agreement between the lord and his tenants, for stinting the common, was revived at the suit of a purchaser (who did not come in privity,) and the decree was confirmed, though the lord and his tenants were only tenants for life; and M. R. said, that the issue in tail ought to be bound, for the lord in possession could not be presumed to prejudice his tenant's right. _Dun v. Allen_, H. 1686. 1 Vern. 427. Quere tenem.

171. After twenty years inclosure, under a decree made by the consent of the husband of a _feme covert_, who had a right of common, it shall not be opened; for though the husband could not bind his wife's interest, yet it appeared to be for her advantage. _Rothwell v. Widdington_, E. 1687. 1 Vern. 456.

172. An agreement between a lord and his tenants, for stinting a common shall be performed, though opposed by one or two of the tenants; for it is more to be favoured than an agreement for inclosing a common. _Doxahere v. Bed-
NOT INTERPOSE TILL AFTER ONE OR MORE VERDICTS AT LAW. ANON. H. 1726. GILB. EQ. REP. 183.


182. A LORD OF A MANOR CANNOT BRING A BILL AGAINST A TENANT, "TO THE END THAT HE MAY HOLD A DOWN BELONGING TO THE MANOR, DISCHARGED OF THE TENANT'S RIGHT OF COMMON THEREIN." HOLDER V. CHAMBURY, E. 1734. 3 P. W. 257.

183. BILL OF PEACE, AND FOR AN INJUNCTION TO RESTRRAIN DEFENDANTS, WHO HAVE AN INTEREST IN THE MANOR OF T. FROM PROCEEDING AT LAW AGAINST PLAINTIFF FOR BUILDING HOUSES ON THE MANOR WITHOUT LEAVE, AND THAT THEY MAY ACCEPT OF A REASONABLE COMPENSATION. THE COURT DISOVED THE INJUNCTIONS OBTAINED, BUT AS IT ACTS ONLY IN A JUDICIAL CAPACITY, IT CANNOT BE APPLIED TO AS AN ARBITRATOR. A BILL OF PEACE MAY AS WELL BE BROUGHT BY TENANTS AGAINST A LORD, AS BY A LORD AGAINST HIS TENANTS.—CASYERS V. LD. ABERGAVENNY, M. 1738. 1 ATK. 285.

184. FONNY LANDS NOT PRODUCING ANY PROFIT TO THE COPYHOLDER FOR SEVEN OR EIGHT YEARS (BEING UNDER WATER) HE MAY, WHEN THE LAND IS DRAINED, BE ENTITLED TO COMMON OF TURBARY, AND DIG TURF AS A COMPENSATION; BUT A TENANT MAY HAVE SUCH RIGHT, THOUGH A TENANT MAY HAVE SUFFICIENT TURF FOR THE HOUSE TO WHICH THIS COMMON IS APPENDANT. DEAN AND CHAPTER OF ELY V. WARRON, T. 1741. 2 ATK. 189.

185. A DECREE AGAINST THE LORD OF A MANOR WILL NOT BIND COPYHOLDERS IN FEE OR FREEHOLDERS FOR LIFE, WHERE THEY ARE NOT PARTIES. PEERS V. CLARKE, H. 1742. 2 ATK. 516.


187. COMMISSIONERS UNDER AN INCLOSURE ACT ARE LIABLE TO SUITS AT LAW AND IN EQUITY, IF THEY DO NOT ACT ACCORDING TO THEIR AUTHORITY, OR MAKE AN UNJUST DIVISION. SPEER V. CRAWTER, T. 1810. 17 VES. 216.


189. A GRANT WILL NOT BE PRESUMED FROM THE EXERCISE OF A RIGHT OF COMMON FOR MORE THAN TWENTY YEARS, IF DIFFICULTIES IN PREVENTING TRESPASS APPEAR, FROM THE EXTENT OF THE COMMON, WANT OF FENCES, OR ANY OTHER CAUSE WHICH MAY RENDER IT ATTRIBUTABLE TO ENCROACHMENT, OR CAUSE DE VICINAGE. DAWSON V. NORFOLK, D. H. 1815. 1 PRICE 246.

190. TO MAKE A TITLE TO AN ALLETTMENT (UNDER AN INCLOSURE ACT) OF ONE-SIXTEENTH, TO BE SET OUT FOR THE LORD OF THE MANOR, IT IS SUFFICIENT, ON THE TRIAL OF AN ISSUE UNDER THE ACT, TO SHOW THAT HE IS OWNER OF THE SOIL; AND HE NEED NOT PROVE THAT SUCH A MANOR EXISTS IN LAW, OR THAT HE IS LORD. SMITH V. SMITH, H. 1816. 2 PRICE 104.

191. BY AN INCLOSURE ACT, THE COMMISSIONERS WERE EMPowered TO SOIL TO THE OWNERS, BY PRIVATE CONTRACT, ANY PART OF THE COMMONABLE LANDS FRONTING OR ADJOINING TO THEIR RESPECTIVE HOUSES OR GARDENS, AND ALSO SUCH PARTS AT THE GREATEST DISTANCE FROM THE HOUSES OF THE RESPECTIVE PROPRIETORS, AS THE COMMISSIONERS SHOULD THINK FIT, FOR DEFRAISING THE EX-
COPY HOLD XI. & XII.

Right of Common.—Contested Rights between neighbouring Lords.

192. The lord of the manor of A. brought his bill for the arrears and growing payments of eight shillings per annum, which had been paid him for twenty years out of the manor of B.; he could show no other title; yet so decreed, for it is agreeable to the rules of law, where in cases of encroachment of rent, if the tenant makes but one payment of more than is due, he shall never go back for it, and after twenty years payment, a grant of the freehold of the copyhold from the lord of B. shall be presumed. Stewart v. Bridger, M. 1705. 2 Vern. 516.

193. Where a dispute arises from a confusion in the boundaries of a manor, a commission is sometimes granted upon weighty grounds, to ascertain the boundaries, though the court considers a commission as a proceeding contrary to the spirit of the common law. Vide ante, tit. Commission, i. In the present case the court of Chancery refused a commission, but the Lords granted it (upon appeal) with a previous inspection of all deeds, &c. Roux v. Barker, E. 1725. 3 Bro. P. C. 180.

194. A bill in equity lies to have a trial at law for the bounds of a manor. Letheffer v. Castlemain, M. 1726. Sel. Ch. Ca. 60.; and on such bill each party must give a note of the bounds he intends to claim.

195. A note of the bounds in this case being exchanged, and an issue directed, a verdict was found for defendant on three trials: he shall have all his costs at law and in equity, but on a bill of partition no costs are allowed on either side.

COPY HOLD XII.

Contested Rights between neighbouring Lords.


198. A bill does not lie merely to settle the boundaries of a manor, where the soil is not in dispute, nor has the court jurisdiction to settle the boundaries even of land unless some equity is superinduced by act of the parties. Per Heyley, S. C. in Wake v. Cowley, 2 Cox 360.

199. Equity will grant a discovery on a dispute between the lord of one manor and the lord of another. Anon. T. 1755. 2 Ves. 621.

200. A commission to settle boundaries ought not to be granted, where the interests of all parties who may probably be concerned are not before the court. Atkins v. Hatton, H. 1794. 2 Amstr. 386.

201. A terrier cannot be received in evidence, unless from the registry of the diocese, or a copy from the parish registry, if the original cannot be found. S. G. Miller v. Foster, 2 Amstr. 387. (n.) S. P.
COPYHOLD XIII.

Estates pur autre vie, and where Cestui que vie shall be a Trustee for the first Taker.

202. The principle of this class of cases seems to be, that he who pays the fine shall have the estate to him and his representatives, the other cestuis que vie being only the living images to support the estate, in trust for him who advances the money.

203. As where a copyhold estate was granted to A. for the lives of A., B., and C.—A. died intestate; his administrator shall have the estate during the lives of B. and C., as having the title of the first taker who paid the fine, the other lives being only in nature of trustees. How v. How, M. 1686. 1 Vern. 415. Clark v. Durners, H. 1678. 1 Ch. Ca. 310. S. P.

204. So where a copyhold was granted to the husband and wife, and I. S. for their lives successive; but it appearing by the rolls that the fine was paid by the husband and wife, I. S. was declared a trustee for them. Benger v. Drew, H. 1721. 1 P. W. 781. Withers v. Withers, M. 1752. Amb. 151. S. P.

205. So, though there is no custom in the manor for the first taker to dispose, equity will decree a trust, unless the other two lives were put in pursuant to some agreement. Anon. E. 1692. 2 Freem. 123.

206. But where the copy is to three, for their lives successive, and there is no custom within the manor, that the first taker may surrender the copy, the court will not decree the remaining life to be a trust, but the estate shall go in succession. Rundle v. Rundle, E. 1692. 2 Vern. 252. 265. N. B. In this case the first taker died intestate.

207. And though the custom be that an estate purchased within the manor for three lives shall go in succession, yet where the purchaser by his will devises all his estates real and personal in possession or reversion to his wife, though the legal interest be according to the custom, yet, as sole purchaser, he has an equitable interest, and it shall be decreed a trust for him. Smith v. Baker, T. 1737. 1 Atk. 385.

208. So, where the custom was to grant for three lives successive, D. purchased in the manor, and took the grant to himself, his wife, and his eldest son successive. By will he devised this copyhold to his youngest son; and the question was, whether this was an advancement to the eldest son, or whether he was a trustee for his father? Per cur. It is an advancement, and Lord C. B. in delivering his opinion observed, that the circumstance of the nominee being a child of the purchaser, has been considered as a circumstance of evidence to rebut the resulting trust, (and not as raising a consideration in itself,) and it was insisted that the custom required two nominees besides the purchaser, as taking off the inference of an intended advancement; yet the court thought that circumstance not sufficient to turn the presumption against the child. Dyer v. Dyer, M. 1788. 2 Cox 92. 1 P. W. 112. (n.) Et vide Lamplugh v. Lamplugh, 1 P. W. 112.

COPYHOLD XIV.

Free Bench.

209. A copyholder for life, where by the custom there is a widow’s estate, agreed to sell for his own life and the life of his widow; the widow is not bound. Husgrave v. Dashwood, E. 1688. 2 Vern. 45. 63.

210. The widow of a cestui que trust of a copyhold shall have her free bench,
COPYHOLD XIV. & XV.

Free Bench.—Enfranchisement.—Merger.—Extinction:

as well as if her husband had the legal estate. Otway v. Hudson, H. 1706. 2 Vern. 585.

211. Though a jointure settled on the wife of a copyholder is not expressly made in lieu of her free bench, but is only mentioned in the proviso, she shall be excluded, and be obliged to abide by her jointure, though she was an infant at the time of making the articles, and not a party to them. Jordan v. Savage, M. 1738. 2 Eq. Ab. 102. pl. 8.

212. If a husband becomes entitled to a copyhold estate by copy of court roll, and grants it out again by copy of court roll, his wife is not entitled to dower; but if he becomes entitled otherwise than by copy of court roll, and does not grant it out again by copy of court roll, she is entitled to dower. Sneyd v. Sneyd, T. 1738. 1 Atk. 443.

213. A wife is not dowable out of the trust of a customary freehold. Goodwin v. Winmore, E. 1742. 2 Atk. 326.

Porder v. Wade, H. 1794. 4 Bro. C. C. 520. S. P.

214. It is a dying seised by the husband, and not a seisin during the coverture, that entitles the widow to her free bench. S. C.

215. A jointure was settled in full recompense of all dower, or thirds, out of any lands of which the husband was or should be seized of freehold or inheritance. Copyhold is an inheritance, and therefore the widow shall be barred of her free bench in her husband's copyhold. Walker v. Walker, M. 1747. 1 Vesc. 54.

216. A copyholder for lives, where there was a customary right for the widow to enjoy the whole estate of which her husband died seised, articulated to sell his estate, but died before the surrender. The widow's free bench shall be bound by the articles. Hinton v. Hinton, T. 1755. Amb. 277, 2 Vesc. 631.

COPYHOLD XV.

Enfranchisement.—Merger.—Extinction.

217. A lord, who by custom has the cut of the woods growing on the lands, grants all the woods and underwoods to a copyholder and his heirs. This shall not merge in the copyhold. Faweiner v. Faweiner, M. 1681. 1 Vern. 21.

218. A copyholder in fee, took an enfranchisement of it in the name of a trustee, and then devised the land to his youngest son, who sold to A. The heir of the copyholder recovered in ejectment, but A., upon a bill, was decreed to hold and enjoy against him. Dancer v. Evet, H. 1685. 1 Vern. 392.

219. The lord enfranchised a copyhold, with all common thereunto belonging; though the common is extinct in law, yet it subsists in equity, and decreed to plaintiff the same right of common as belonged to the copyhold. Stigant v. Staker, H. 1691. 2 Vern. 250.

220. An enfranchisement of a copyhold by one having a partial interest, is for the benefit of all the remainder-men, as well as himself. A recovery suffered by one not in possession has therefore no operation. Wynne v. Cooke, T. 1780. 1 Bro. C. C. 515.

221. A. B., tenant in tail of a copyhold, remainder to himself in fee, purchased the freehold of the land in his own name, and then sold to I. S. and died. After 30 years possession, the son of A. B. set up a title as issue in tail. Decreed, that I. S. shall hold against him. Parker v. Turner, H. 1685. 1 Vern. 393. 438. 2 Ch. Rep. 174.

222. A., a copyholder in tail, the lord granted him the freehold of the copyhold in fee; the copyhold, though entitled, is extinguished. Dunn v. Green, M. 1724. 3 P. W. 9. Sed quere autem. If A be a copyholder in tail, remainder to B. in fee, and A. takes a grant from the lord of the freehold to him and his heirs, and dies without issue; is not B., in whom there was once a remainder in fee of the premises, entitled to the same?

223. Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the
Corporations.

I. Aggregate—their Magistrates, Members, Servants.

II. Aggregate—their Power and By-Laws.

III. Sole.

IV. Their Power and Duty as Trustees, collectively and individually.

V. Suits by and against. Quo Warranto.

VI. Individual Members, where competent Witnesses.

Corporations I.

Aggregate—their Members, Servants.

1. The clerks and servants of a corporation shall be bound to answer to a bill against the corporation for a discovery as the company, under their common seal, will disclose nothing to their own prejudice, nor could they be prosecuted for perjury. Amon. H. 1682. 1 Vern. 117. Wych v. Maol, T. 1734. 3 P. W. 310. Meoley v. Morton, T. 1785. 1 Bro. C. C. 469.

2. Part of a corporation having surrendered their charter and taken a new one, the others, who insisted on their old charter, brought a sci. fa. to repeal the new charter, upon which the old sheriffs returned sci. faci, which return was filed. Per cur. the king has a quo warranto depending, if the parties who were against the new charter meant to outrun the king's action, it ought not to be allowed, and the court ought not to interpose in such a case. Ca. of Nottingham Corp. E. 1683. 1 Vern. 155.

3. A chartered company unlawfully seized the property of A. The company, by act of parliament, was put on a new footing, with additional stock, &c. The new company shall make satisfaction to A. and indemnify the servants of the old company. African Co. v. Dockwra,
 Aggregate—their Magistrates, Members, Servants.


4. Where a charter directs the mayor to remain till a new one is elected and sworn; the successor cannot act till sworn. Pender v. Rez, Ca. of Penryn Boro'. E. 1725. 3 Bro. P. C. 173.

5. The charter directs that the aldermen shall be chosen annually; this clause is only directory, and does not determine the office of alderman at the end of the year, but the person legally elected and sworn, shall continue until death or removal, like the mayor. Prowse v. Foot, Case of Truro Boro'. E. 1725. 3 Bro. P. C. 167.

6. The election of burgesses, though in a manner different from ancient usage, must be made as directed by the charter, which the corporation has accepted for their government. Powell v. Rez, Ca. of Brecknock Boro'. E. 1728. 3 Bro. P. C. 425.

7. If lands are given to a corporate body, and it is dissolved, they will revert to the donor, and not escheat. Att. Gen. v. Ed. Gower, T. 1740. 9 Mod. 226.

8. The court will not decree public companies to make calls in favour of a particular creditor, unless under very extraordinary circumstances. Case of the York Blds. Co. M. 1740. 2 Atk. 36.

9. Where a certain number are incorporated, a major part of them may do any corporate act though nothing mentioned in the charter, and it is not necessary that every corporate act should be under seal. Att. Gen. v. Davey, T. 1741. 2 Atk. 212. Et vide Att. Gen. v. Scott, 1 Ves. 413.

10. A bill will lie against directors, committee men, and other officers of a corporation, for relief against a breach of trust, fraud, and mismanagement, for they are agents to those who entrust them to superintend the affairs of the company, and a gross non-attendance makes them guilty of the breaches of trust in others. So, a supine negligence, by which a great loss arises, makes them all equally guilty in the second degree, and liable, for they must not neglect to exercise the powers vested in them, to prevent the ill consequences arising from a confederacy. Charitable Corp. v. Sutton, T. 1742. 2 Atk. 405. 9 Mod. 349.

11. Corporate bodies, especially ecclesiastical, differ from private persons, and the rule for executing agreements will not hold as to aggregate bodies, as among private men. Therefore, though some of the members of a body are wanting, equity will decree execution of an agreement to grant a lease, if the money is paid; and a dean and chapter should always have their succession in view when they contract for a renewal of leases on filling up vacant lives, and not their own immediate advantage. Dr. Winy v. Hampton, Case of Canons of Sarum, E. 1747. 3 Atk. 475. No interest can pass out of a body corporate, unless under their common seal. S. C.


13. A free school founded by charter with proper powers must be regulated by the charter, and not in equity, as where there is no charter. Where there is no charter, an information for a charity is not dismissed though the relief prayed fails; otherwise where there is. Att. Gen. v. Midleton, T. 1751. 2 Ves. 329.

14. Where particular powers are given by charter, equity will not interfere in the appointment of general visitors, but it will as to matters of the revenue of the charity. Att. Gen. v. Bedford Corp. T. 1754. 2 Ves. 505.

15. A corporation may join in a suit to establish a claim of exemption from tolls, in favour of its individual members. London Corp. v. Liverpool Corp. T. 1790. 3 Anstr. 738.

16. The mayor or other individual member of a corporation, who is trustee of a rent-charge issuing out of the estate of such member, for a charitable use, must answer, not only with the rest under the common seal, but also individually, to a charge of having cancelled or destroyed the deed. Dummer v. Chippenden Corp. M. 1807. 14 Ves. 254. Vide etiam Steward v. E. India Co. 2 Vern. 380. Wych v. Meal, 3 P. W. 310.
CORPORATIONS II.

Aggregate—their Power and By-laws.

17. A corporation by their by-laws, may make restrictions upon their stock, that it shall be liable to pay the debts due to themselves from their own members, or to answer the calls of the company upon their stock. Therefore, a by-law to seize a member’s stock for a debt due to the company is good, but the by-laws will not extend to a debt due to the company’s trustee. By-laws may be made without any express power in the charter, but if the company have a power to make by-laws for the management of their trade, they cannot make them to carry on projects foreign to the affairs of the corporation; for by stat. 6 Geo. 1. c. 18. all projects and insurances are illegal. Child v. Hudson’s Bay Com. H. 1723. 2 P. W. 207. Gibson v. Hudson’s Bay Com. M. 1736. 1 Stra. 643. Meitanozchi v. Royal Exchange Ass. Co. T. 1728. 1 Eq. Ab. 9. pl. 8.

18. A power may be given to commissioners to make by-laws, but where it is too extensive, it will be void pro tanto. Eden v. Foster, H. 1725. 2 P. W. 325.

19. The charter of a corporation directs the mayor to be chosen annually out of four of the burgesses or inhabitants, but by a by-law it was ordained that they should all be aldermen. This by-law is void, as repugnant to the charter. Tucker v. Rex, Co. of Weymouth Corp. M. 1742. 4 Bro. P. C. 455.

20. The rule is, that a corporation has power to make by-laws; it is strange, therefore, to go into equity, to execute the private statutes of a foundation under a charter. Where such statutes do not appear to have been observed in any one instance, a court of law will presume a subsequent by-law to repeal and alter them. Att. Gen. v. Middleton, T. 1751. 2 Ves. 380.

21. A corporation having accepted a charter, empowering the body thereafter to elect persons in the room of such members as should die or be disfranchised, cannot elect any persons except there be vacancies by such events. Page v. Rex, Case of the Borough of Dundalk, E. 1792. 2 Ridg. P. C. 445.

22. Full notice should be given of corporation elections, particularly when held upon by-days, and any thing like surprise vitiated the election. S. c.

23. If a corporation by prescription will accept a charter limiting the corporation to a less number than existed by custom, the corporation will be bound by that acceptance, and no subsequent vicious custom departing from the charter can avail. S. c. ib. 502.

24. Under a by-law of an incorporated company for water-works, it was provided, that the members, after notice of default in paying a call, should pay in 10 days from a service of such notice, or incur a forfeiture. Plaintiff made default, alleging his ignorance of the call, and absence from town when the notice was sent: Held, that they shall not be relieved against this forfeiture. Sparks v. Liverpool Water Works Co. E. 1807. 13 Ves. 428.

25. The corporation of Whitstable Fishermen made a by-law, that any free-man engaging in any other oyster fishery on the coast of Kent should forfeit 10l., and until payment, should be excluded from all share of the profits. Upon this a question arose upon the validity of such a by-law, and whether such a suspension was not open to a mandamus as a temporary disfranchisement? But Ld. Eldon would not give any opinion on the latter point. (a) He held, however, that equity had a jurisdiction against a corporation in favour of a member, considering him as a partner, as well as in favour of a stranger, by directing an account of the profits where there was no remedy at law, and the difficulty of executing a decree of this court, from the peculiar circumstances and nature of the property, would not prevent it, though that might be a ground for some modification, as not calling for profits already distributed, and otherwise doing as little injury as possible. (b) As to the validity of the by-law, Ld. Eldon said, that a by-law in restraint of trade to a certain extent, would not have been good, even under the authority of a charter, though it may be good by custom; for that
CORPORATIONS II. III. & IV.

Aggregate, their Power and By-laws.—Sole.—Their duty as Trustees.

which may be the subject of a contract between different interests in a co-partnership might not be good as a by-law; for instance, an agreement amongst the citizens of London; who have as extensive a power to make by-laws as any corporation, not to sell except in the London markets, would be good, though a by-law to that effect has been held bad by the legislature. Adley v. the Whitstable Fishermen, M. 1810. 17 Ves. 315. 19 Ves.

304. 1 Moriv. 107. Vide (a) Rex v. Same, 7 East 353. Where a mandamus was moved for but refused, because the suspension did not go to a removal, and because plaintiff had his remedy in equity for an account and share of the profits as a partner. Vide etiam (b) Waters v. Taylor, 15 Ves. 10.

For trading companies acting under charter, vide tit. Trade, x.

CORPORATIONS III.

Sole.

26. The person is a corporation for taking lands for the benefit of the church, as the church-wardens are for personal things, which are bona ecclesiae, and for which they may maintain trespass. Att. Gen. v. Ruper, H. 1722. 2 P. W. 126.

But it is improperly said, that the church-wardens are a corporation, for all the parishioners are the body, and the church-wardens are only a name to sue by in personal actions, for the property is in the parishioners; and in all actions brought by the church-wardens, it must be laid ad damnum parochianorum. Whitmore v. Bridges, T. 1723. 2 Eq. Ab. 204. pl. 5.

27. If the crown, after the foundation of a college, grants an advowson or land to the senior fellow, such grant will operate to make him a sole corporation; and the bishop cannot take away the legal estate vested in a sole corporation, though part of the aggregate body, and give it to the aggregate body. Green v. Rutherforth, T. 1750. 1 Ves. 462.

CORPORATIONS IV.

Their Power and Duty as Trustees, collectively and individually.

28. The corporation of a charity founded by charter are but trustees, Lydiat v. Poach, 2 Vern. 411; and as trustees they cannot infringe the rules of the foundation. Taylor v. Dulwich, Hosp. 1 P. W. 633; nor suppress any evidence relating to the charity. Hertford Corp. v. Hertford Poor, 1 Bro. P. C. 899. They must strictly adhere to the rules of their charter. Corp. of Salop v. Att. Gen. 3 Bro. P. C. 241; and not imagining that their trust is honorary, become supinely negligent. Charit. Corp. v. Sutton, 2 Atk. 403; for the court in such cases will make them pay costs, and if they grossly misbehave, will remove them from their trust. Coventry City v. Att. Gen. 2 Bro. P. C. 236. Et vide ante tit. Charita-

29. Plaintiff, a schoolmaster, having been deprived of his office, filed his bill against the corporation of C. as trustees of a charity, praying a discovery, and injunction against a resolution, which he charged to have been procured by five of the members, including the bailiff, from improper motives. Demurrer by those five, for that no title to the discovery against them was shown, and ore tenus, that the charge would be a subject of criminal prosecution, over-ruled; for the court has the same jurisdiction over a corporation as over an individual, to control the corrupt execution of a trust. Demurr. v. Chippingham Corp. M. 1807. 14 Ves. 245.

30. Corporations of every nature have a general right to alienate their lands
Suits by and against.—Individual Members, where competent Witnesses.

Corporations IV. V. & VI.

30. An abuse of trust by a select body of the corporation of C., and charging them with using the common seal to raise money for defraying expenses not corporate, but it was dismissed on various subsequent transactions, particularly an award, which bound the corporation at large through the select body acting with authority, and upon a fair question whether the purposes were corporate or not. Colchester Corp. v. Lowten, H. 1813. 1 Ves. & B. 226. (a) Vide Rex. v. Watson, 2 T. R. 204.

Corporations V.

Suits by and against.—Qua Warranto.

31. Where a distinguis is issued against a corporation for non-performance of a decree, and afterwards a sequestration nisi, for want of appearance, the court ordered the proceedings to go on, notwithstanding three objections taken, and would not allow the company to enter an appearance on the distinguish and discharge the sequestration. Harvey v. E. India Co. M. 1700. Pre-Ch. 129. 2 Vern. 395.

32. An information in nature of a quo warranto upon 9 Ann. c. 20. for usurping the office of free burgess, does not lie against the mere claim of one who, though elected, never was admitted, nor against a member, till removal by the corporation. Rex v. Ponsonby, 1 Ves. 1. 5 Bro. P. C. 287.

33. The king, at his discretion, may seize the franchise of a corporation guilty of an offence amounting to a forfeiture. S. C. Et vide Bagg's Ca. 11 Co. 93.

34. In Hil. 1686, an information in nature of a quo warranto, was brought in Secacc. Ireland, against the corporation of D., and in Easter following, judgment being given against them, the king seized their liberties, &c. Held, that the judgment was void, for that an information would not lie in that court. In consequence of that judgment, Jac. 2. created a new corporation by charter, who made a reversionary lease to I. S. of some lands belonging to the old corporation. This charter being declared void by 1 W. & M. s. 2. c. 9. the lease is void also. Pippard v. Drogheda Corp. T. 1759. 5 Bro. P. C. 369.

Corporations VI.

Individual Members, where competent Witnesses.

35. Upon a question whether a bond belonged to plaintiff or defendant, it was objected, that all plaintiff's witnesses were members of the corporation, and the objection was allowed. Ld. Keeper said, every corporation ought to have a town clerk, and other clerks, not freemen, that they may be competent witnesses, if necessary. But defendant hav-

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36. Bill for relief against an award
COVENANT I.

Real—Personal, &c. how created—Relief—how construed.

made by some members of the E. I. Co. The arbitrators and some of the members were made defendants; demurrer to the whole bill allowed, for plaintiff can have no decree against them; they ought to be examined as witnesses. Steward v. E. India Co. T. 1700. 2 Vern. 380.

37. If a corporation would examine one of their own members as a witness, they must disfranchise him, and the method to do so is by an information, in nature of a quo warranto against him, who, confessing the information, judgment passes to disfranchise him. Colchester Corp. v. ———, M. 1719. 1 P. W. 505. (n)

38. It is a general rule, that mere witnesses are not to be made parties to a suit, except (inter alia) officers and servants of corporations. Dummer v. Chippenham Corp. M. 1807. 14 Ves. 252.

COVENANT.

I. Covenants real. (a) Personal. (b) Inherent. (c) Executed. (d) Executory. (e) How created, where, or when binding, or to whose Advantage. (f) Relief on Non-performance. (g) How construed and to be performed. (h)

II. To stand seized, what.

III. For the Acts of an Ancestor, or other Person, where binding.

IV. General and uncertain. (i) Implied. (k) Defective. (l) Voluntary. (m) Unlawful. (n)

COVENANT I.

Covenant real. (a) Personal. (b) Inherent. (c) Executed. (d) Executory. (e) How created, where, or when binding, or to whose Advantage. (f) Relief on Non-performance. (g) How construed and to be performed. (h)

(a) Covenant real, as running with the Land.

1. Baron and femme grant a water course through the fema's land, and covenant to cleanse and repair it, and suffer a recovery; this runs with the land, and is strengthened by the recovery. Holmes v. Buckley, M. 1691. Pre. Ch. 39.

2. H. B. settled lands on himself and wife for life, remainder to his son in tail, with a covenant to raise 500l. a-piece to his younger children, to be raised and paid as he should appoint. He died without making any appointment, and left several younger children. This covenant is a charge on the land, and shall bind the remainder in tail, and is an execution of the power of appointment. Garth or Garth v. Blaefrey, M. 1695. Gills Eq. Rep. 166.

3. A. tenant for life, with power to make a jointure of 1000l. per annum, which on his marriage he covenanted to do, but the lands settled were only 600l. This covenant shall bind the issue in tail, who shall make up the deficiency, though not privy to the marriage treaty. Lady Clifford v. Ed. Burlington, T. 1703. 2 Vern. 379.

4. A. covenanted to settle lands on the marriage of B. his son, but died without doing so, and the lands of A. descended to B. as his heir. In the covenant the heirs were not named, but executors and administrators only. This covenant is a lien on the land of the covenantor. Roundell v. Breyer, H. 1704. 2 Veru. 482. Vide Chetwynd v. Fleetwood, post, pl. 5.

5. A. covenanted before marriage to
COVENANT I.

Real, as running with the Land.

settle certain lands on his wife for life, and then devised those lands for payment of debts. The covenant is a specific lien on the lands devised; but if A. had covenanted generally to settle lands of 60l. per annum value on his wife, she must have come in as a specialty creditor. Freemont v. Dedire, E. 1712. 1 P. W. 427.

6. Tenant for life, with power to make a jointure, with remainder over, covenanted to make one on certain lands, in consideration of a portion, but died before it was done. This covenant shall bind the remainder-man in tail, who has no equity to have it satisfied out of the personal estate. Coventry v. Coventry, E. 1724. 2 P. W. 222. Gilb. Eq. Rep. 160, 9 Mod. 12. 1 Stra. 596. Francis's Max. 15.

7. A. covenanted on his marriage to lay out 3000l. in land, and settle it on himself in tail, remainder to B. A purchased the manor of D. with the money, and never settled it, but suffered a recovery. As this covenant was a lien on the land, so the recovery discharged the lien, and barred B. of his remainder. Manwood v. Turner, H. 1732. 3 P. W. 171.

8. An heir is bound to perform his father's covenant where he is benefited by the contract, though he claims nothing but what was settled on him in strict settlement. Chetwynd v. Fleetwood, T. 1742. 4 Bro. P. C. 433.

9. I. S. covenanted to convey and settle houses, lands, &c. or a rent-charge thereout, to certain uses. I. S. purchased lands, and died without making any settlement: Decreed, the after-purchased lands shall be to those uses, for a covenant to convey and settle is stronger than to settle only. Deacon v. Smith, E. 1746. 3 Atk. 328.

10. Covenants which wait on an estate in land, are void in their creation, if no estate passes by the deed. Chandos v. Brownlow, E. 1791. 2 Ridg. P. C. 406. So if the estate be evicted or surrendered, they become void. See Capenhurst v. Capenhurst, 1 Lev. 45. Soprani v. Skurro, Yelv. 18. Northcote v. Underhill, Salk. 199. Of this description are all covenants in leases which in any way relate to the land demised. They are annexed to the estates of the lessor and lessee respectively, and wait upon them, but although they are thus atten-

dant upon an estate in land, they still remain mere personal contracts, binding the parties affected by them at law merely personally; at common law, these covenants only bind those who were parties and privies to them, that is, the covenantor and covenantee, and their representatives, in respect of assets transmitted. But the assignees of the respective estates upon which these covenants awaited, being strangers in contract, were not bound by them at common law, nor could take advantage of them, one against the other. Chandos v. Brownlow, sup. Vide S. C. post, tit. Landlord & Tenant, vii. where it is shown how far this inconvenience was remedied by the stat. 32 Hen. 8. c. 34.

11. A covenant to appropriate one third of the produce of a real estate to raise a sum of money, is not merely personal, but a lien on the land, and must be specifically performed. Legard v. Hodges, T. 1795. 3 Bro. C. C. 531. 4 Bro. C. C. 421.

12. A., tenant for life, remainder to B. his son, in tail, under a settlement on the marriage of A., whereon B. had a power when in possession to make a jointure. A. and B. entered into a general covenant (without referring to the power) that the son, within 12 months, should make a jointure. The father died within 12 months, and the son took possession, and died without making any settlement. The estate is bound by this covenant in the hands of the remainder-man. Jackson v. Jackson, M. 1798. 4 Bro. C. C. 462.

13. Where an estate was conveyed to such uses as A. should appoint, remainder to himself in fee, yielding a farm rent which he covenanted to pay, and afterwards A. by virtue of his power, conveyed the estate to a purchaser: Held, that such purchaser was not subject to the covenant for payment of the rent; for though the covenant ran with the land in the first instance, yet it ceased to do so in the hands of the purchaser, as he did not take the interest of the original grantee, but took it as if the original conveyance had been made to himself. Roach v. Wadham, E. 1805. 16 East 289.

14. Upon a conveyance in fee, the grantees covenanted with the grantors, (lessees of water-works,) not to sell or dispose of water from a well, to the injury of the proprietors of said water-
COVENANT I.

Personal.—Inherent.

works, their heirs, executors, &c. On a bill to enforce this covenant, a question arose, whether it run with the land so to bind assignees, and whether it was contrary to the policy of the law; but the court left the parties to their remedy at law, and allowed a demurrer, on account of the inconvenience of enforcing such a covenant by injunction. Collins v. Plumb, E. 1810. 16 Ves. 454.

See more of these covenants, tit. Agreement, 1.

(b) Personal, as annexed to the Covenanter’s Person.

15. If A. having lands subject to a rent-charge, grants part of them to B. with a covenant that such part shall be free, this is not a real covenant to run with the land, but personal only, and chargeable on the heir with respect to assets. Cook v. Arundel, M. 1655. Hard. 87.; but the contra was decreed in Cornbury v. Middleton, T. 1671. 1 Ch. Ca. 212.


17. If A. covenants to pay an annuity to I. S., he shall not deduct for taxes, for the charge is only on the person of the covenanter. Robinson v. Stephens, M. 1709. 2 Salk. 616.

18. A jointure was made of an estate, ‘let for five years, at 17l. per annum., but worth 108l. per annum. The husband covenanted by quarterly payments, to make up the jointure 108l. per annum, during the five years. This is a personal covenant for payment of a sum in gross, and interest shall be allowed on the quarterly payments, but no taxes. Lyons v. Vernon, T. 1725. Sel. Ch. Ca. 25.

19. A covenant for renewal is in itself a mere personal contract, and at law the only remedy which lies for the breach of it is a personal action; but a substantive independent covenant binds the covenanter and his representatives in respect of the assets transmitted. Chandos v. Brownlow, E. 1791. 2 Ridg. P. C. 405.

(c) Inherent, as collateral to, or supporting the Grant.

20. A. covenanted that lands settled were 400l. per annum; the jointure being deficient, decreed, the heir shall make it good in specie. Speake v. Speake, H. 1683. 1 Vern. 217.

21. A covenant for further assurance by an heir selling his reversion during his father’s life, at an undervalue, shall not be decreed to be specifically performed. Johnson v. Nott, H. 1684. 1 Vern. 271.

22. The estate of A. was decreed to be sold for payment of debts, and all parties concerned to join in the sale. I. S. purchased the whole, and a conveyance was made to him, with a covenant for further assurance. I. S. sold off part, and delivering over the whole of the title deeds, he was left without a title to the remainder, whereupon he applied for a duplicate deed, which the court ordered, considering it to be within the covenant for further assurance, and directed it to be endorsed as a duplicate; but the court being moved again, the order was discharged, in regard the decree had once been executed. Napper v. Lud. Allington, M. 1700. 1 Eq. Ab. 166. pl. 4.

23. A., on his son’s marriage, settled lands which he covenanted to be 800l. per annum., and secured a power to charge 1200l. for younger children; he charged the estate with 600l. only, and died. The son objected to pay the 600l., because the lands only produced 600l. per annum. Decreed, the money was well charged, the father having only exercised half his power, and that in case of a deficiency, the son should seek a satisfaction for breach of the father’s covenant out of his estate. Ormsby v. Dodwell, M. 1701. 16 Vin. 454. pl. 7. 1 Bro. P. C. 20.

20. Where a man, upon transferring his wife’s mortgage, covenants to pay the mortgage money to the assignee, it shall only be considered as an additional security, and not susbsle in equity. Bagot v. Oughton, E. 1717. 1 P. W. 347. Fortesc. 332. 8 and 9 Mod. 249. 381. Evelyn v. Evelyn, H. 1731. 2 P. W. 664. Et vide post, tit. Estate real and personal, i. vide aliam Wood v. Huntingford, T. 1796. 3 Ves. 131.

25. Bill for further assurance under a covenant contained in a deed, which was defective and void, dismissed, for the covenant goes along with the estate, and falls with the conveyance. Furseker v. Robinson, M. 1717. Pre. Ch. 475. Gilb. Eq. Rep. 139.
COVENANT I.

Inherent.—Executed, &c.

26. A. devised certain lands to his son B. for life, remainder to B.'s first and other sons in tails, remainder to testator's second and third sons, &c. with power for any of his sons to make a jointure, not exceeding 400l. per ann. B. on his marriage, covenanted to settle 400l. per ann., clear of all taxes. A settlement was made, with a covenant, that if the lands should fall short of 400l. per ann., B. would make up the deficiency: Held, that the settlement was intended as an execution of the power, and the covenant to make it a clear 400l. per ann. was a mistake. Lady Londonderry v. Wayne, H. 1763. Amb. 424. 2 Eden 170.

27. Tenant in tail made a mortgage with covenant for further assurance, and became bankrupt. His assignees were held bound by the covenant, though no recovery was suffered. Pye v. Davus, E. 1792. 3 Bro. C. C. 395.

(d) Executed, as being satisfactorily performed.

28. A. covenanted on his marriage to purchase and settle lands of 200l. per ann. as a jointure for his wife, and to the first, &c. sons of the marriage. He purchased the lands, but made no settlement; and on his death they descended to his eldest son. Decreed, that the lands descended were a satisfaction of the covenant of A. Wilcock's v. Wilcocks, T. 1706. 2 Vern. 558.

29. Where there is a covenant to convey land, and the money is paid, a judgment confessed to a creditor between the time of the covenant and the conveyance shall not affect the purchaser, because the land shall be considered as sold from the time of the covenant. Peach v. Wincelsea, 1715. 10 Mod. 468. But a mortgagee without notice of the covenant shall hold against the covenantee, for his money is lent upon the credit of the land, and attaches upon it. Fischer v. Ed. Wincelsea, T. 1715. 1 P. W. 279.

30. Covenant to leave a wife 620l., the husband died intestate. The wife's share exceeded 620l.: Held a satisfaction of the covenant. Blandy v. Widmore, T. 1716. 1 P. W. 324. 2 Vern. 709. Both the printed and MS. statements sanction this case as good law in this court, upon the construction of a covenant between husband and wife as to what one party is to have at the death of the other; that it is to be construed with reference to the circumstance, that there is a claim upon the property independent of the covenant, and does not go upon the accident whether the wife takes out administration nor not: and see Gartshore v. Chalie, post, in which case Ld. Eldon reviewed the cases on this point. Et vide ante, tit. Agreement, iv.

31. A. devised his lands to his son B. for life, remainder to his first and other sons in tail. B., on his marriage, covenanted to assure lands of equal value to himself for life, remainder to his first, &c. sons in tail. B. died, and the lands descended to his eldest son; they shall be taken in satisfaction of his covenant. E. of Tankerville v. Cooke, H. 1729. Mos. 167. Vide also Wilcocks v. Wilcocks, ante, pl. 28. Davys v. Howard, post.

32. A large sum was covenanted to be laid out in land; it need not be laid out all at once; and if the covenator dies, having purchased lands which are left to descend, it will be a satisfaction pro tanto. Leckmere v. Leckmere, or Ld. Carlyle, M. 1733. Ca. temp. Tabb. 92. 3 P. W. 228. Vide Deacon v. Smith, 3 Atk. 323, where Ld. Hardwicke commented on this case.

33. I. S. on marriage, covenanted to settle lands of 500l. per ann. value; he afterwards purchased lands of 180l. value, which fell to 150l. per ann. They shall be a satisfaction pro tanto, according to the value at testator's death; but if he had purchased them at the time of the marriage, they should be taken as of the value at the time of the purchase. Pinel v. Hollett, T. 1731. Amb. 106. Londonderry v. Wayne, H. 1763. 2 Eden 170. S. P.

34. Lands devised to a wife are not a satisfaction of a covenant that lands settled on her are of a certain value, especially if it appears that testator intended she should have both the settled and devised lands. Prime v. Stebbing, T. 1732. 2 Ves. 409.

35. A. covenanted to lay out money in land to the use of himself for life, remainder to his first, &c. sons in tail. He bought lands of the prescribed value, and permitted them to descend to his eldest son: Held, a satisfaction of the covenant. So, if A. covenanted to lease his wife a certain sum, and died intestate, and the widow's distributive share amounts to more than the sum covenanted, it shall be deemed a satisfaction. Davys v. Howard, E. 1762. 5 Bro. P. C. 552. 567.
58. To make a devise or bequest a satisfaction, it must be \textit{ejusdem generis}, and not land for money or money for land: it must be of known value, and indisputably equivalent or superior both in gross and annual value to the thing to be performed. \textit{Broughton v. Errington, E. 1773.} 7 Bro. P. C. 12.

37. R. S., on marriage, in consideration of 1050l. portion, covenanted to pay the trustees 1500l. to be laid out in land on certain trusts, and also to pay 500l. more for similar uses if the lands he should purchase would not produce 2000l., and to make up the deficiency of 2000l. if any, out of his personal estate. R. S., soon after the marriage, bought a freehold estate for 2150l. which was conveyed to him in fee, but he never paid any money to the trustees, nor did he make any settlement. R. S. died, and the lands descended on his son. Decreed, the heir should be bound by the covenant of R. S. to perform the trusts of the settlement. \textit{Sowden v. Sowden, H. 1785.} 1 Bro. C. C. 582. 1 Cox 166. \textit{Et cide} Lechmere v. Lechmere, C. temp. Talb. 80. on the authority of which this case was decided.

38. Proviso in a settlement that the wife shall not be thereby barred of any thing the husband shall give by deed or will. He died intestate, and was a freeman of London. Her share by the statute and custom are not a satisfaction of the covenant. \textit{Kirkman v. Kirkman, T. 1786.} 2 Bro. C. C. 95.

39. The members of a society covenanted mutually that their widows should receive annuities from the society: this shall not be taken in satisfaction of a covenant in a settlement by a husband to pay his widow an annuity, in lieu of all claims on his personal estate. \textit{Rhodes v. Rhodes, E. 1790.} 1 Ves. jun. 96.

40. A. covenanted by his marriage settlement, in the event of his death, (leaving his wife surviving and children) within six months after his decease to convey, pay, &c. one clear moiety of all such real and personal estate as he should be seized and possessed of, or entitled to at his decease. Upon his death, leaving a child and grandchild, his widow administered and claimed, as against the next of kin, in addition to the moiety under the covenant, one-third of the residue of her husband's personal estate, under the statute of distributions. \textit{Per} \textit{Ld. Ch.}

Though the professed object of A.'s covenant was to provide for his intended wife and children, there was no provision expressly for the issue, and it was competent to the father in his life-time, or at his death, to disappoint every expectation of what the issue were to derive immediately from him, and the hope that the wife taking an interest from her husband might be enabled to provide for them, cannot be called a provision, but it shows that the parties had contemplated that the issue, if any, would be the next of kin; the period of time also specified in the covenant, viz. six months, has, in cases of satisfaction, been considered material, but in cases of performance little regard has been paid to it by the court. In Blandy v. Widmore, (2 Vern. 709. 1 P. W. 324.) the next of kin were not children; but \textit{Ld. Kenyon}, in Devere v. Pontet, Pre. Ch. 240. (n.) said, that in Blandy v. Widmore, there was a legal performance of the covenant. In that case the court must have understood the intention to be, that if the wife took a share of the personality, such share would satisfy her in the construction of the covenant as between husband and wife, the rather as the analogy is to be collected from Wilcocks v. Wilcocks, (2 Vern. 558.) It is now settled, that if there is a covenant to buy and settle lands upon the first and other sons in tail male, a purchase of less, equal, or greater value, taking the conveyance in fee, shall be held in performance and satisfaction, and that is proved by Sowden v. Sowden, (1 Bro. C. C. 582. 1 Cox 165.) In Lechmere v. Ld. Carlisle, Forr. 80. it was truly said, that a moi cannot at once find all the land he has covenanted to buy. In this case the wife administered, and what came to her hands was liable to all debts remaining unsatisfied in the course of a year; if she could only take it as administratrix, she could not take it as wife. According to Ld. Thurlow, in Kirkman v. Kirkman, 2 Bro. C. C. 132.) if the wife and issue take by the law some interest in the personal estate of the covenator, if he died intestate, the construction of the covenant, upon the whole intention between such parties, should be, that the property the wife would thereby take, should be applied in performance of the covenant, and it seems to have been decided, that a man required to do something actively should be
considered as performing his covenant by a passive permission of the descent of an estate, which prima facie, and without the presumption of the court, cannot be considered an act according to his covenant. In Lee v. D'Aranda, (3 Atk. 419. 1 Ves. 1.) Ld. Hardwicke thought the wife's being administratrix was by no means the leading point on which the case was to be decided; he said it was like Blandy v. Widmore, there was no breach in the husband's life-time as there was in Gliver v. Brickland, (cited 3 Atk. 450. 422.) and that the distinction that the covenant in the case before him was to pay, and in Blandy v. Widmore, to leave, was too slight to differ the judgment of the court; and Ld. Ch. said, he should have regretted to find that in the one case, the wife not taking administration she is to have both, but if on behalf of her children she takes administration she is not to have both. Those cases are distinct authorities, that where a husband covenants to leave or to pay money to a person, who, independent of that engagement, is entitled to a provision by law, the construction is to be with reference to that, and the slight difference between leaving and paying, or whether within three or six months, is not attended to, for the year allowed to executors and administrators is only for convenience, and does not postpone the vesting of the fund. The cases of Blandy v. Widmore, and Lee v. D'Aranda, stood without imputation till Haynes v. Micoc, (1 Bro. C. C. 189.) where testator had bound himself to leave his wife 300£ to be paid in one month after his decease, and by his will he gave her 300£. to be paid within six months after his decease. Ld. Thurlow at first found difficulty in saying the legacy should not be a performance, or if not a satisfaction, to and distinguish it from the last mentioned cases, but after a strong inclination to hold it a satisfaction, he was obliged to consider whether it was a performance, being of opinion that if not a satisfaction it was not a performance, and that according to Clarke v. Sewel, (3 Atk. 96.) and other cases, if the party was a mere stranger, the difference of the time of payment was not enough to show the one was a debt and the other a bounty; the difference is very slight, but Ld. Thurlow thought it sufficient to determine that the latter provision was not a satisfaction. Thus the authority of Blandy v. Widmore, and Lee v. D'Aranda, remains as yet unshaken. In Couch v. Stratton, (4 Ves. 391.) the judgment was very short, but Ld. Ch. took it to mean that the covenant was entire. The judgment that resort to the entirety of the covenant against satisfaction, seems to admit that it is questionable, whether if that circumstance had not occurred, the judgment ought not to be otherwise. It does not contradict the former cases or mean to shake them. Ld. Ch. said, if this case at all differs from Blandy v. Widmore, and Lee v. D'Aranda, it goes further than they do, for considering them as cases of covenant for a stipulated sum, and an intestacy, and latter cases as cases for a stipulated sum, and a legacy, which prima facie imports a bounty and an intention of kindness absent in the case of intestacy, this is a case in which the covenantor, regarding his intended connection as productive of issue, and that the rights of both his wife and children upon an intestacy would be fixed by law, does not covenant to leave or order his executors to pay her a particular sum, but says he will alter the proportion in which his widow and his children, or if none, his next of kin, shall take his property. There certainly was no provision for the issue, but issue being in contemplation, means were to be used to provide for them, or to enable others so to do. Whatever is the doctrine upon a will, as stated in Pickering v. Ld. Stamford, (2 Ves. jun. 272. 581. 3 Ves. 332. 492.) which is an authority that the widow is not barred in such case, because the intention was to bar her from her thirds, for the sake of persons under that instrument to take the residue; his Lordship did not know that it would apply to a marriage settlement, for soon after Blandy v. Widmore, upon a marriage settlement, the direct contrary was held in Davila v. Davila, (2 Vern. 724.) that the true meaning of such an agreement between husband and wife was, that the wife receiving that sum of money, should consider herself as not having survived her husband. It is not natural upon a marriage agreement, contemplating the rights upon the marriage, and the dissolution, to suppose an intention that the widow should take both, neither is it natural that the husband should intend to give his widow one moiety as against his children, and that the statute should also
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Executed, &c.

by giving the absolute interest in the leasehold estates to the first tenant in possession, having attained the age of 21.


42. There is a distinction between a trust making a direct gift, and a covenant by articles to be executed, but not between a covenant upon consideration of marriage, and an executory trust by will.

S. C. ib. 250.

43. G. by marriage-articles, conveanted that if he died in his wife's life-time, his executors should, within three months after his decease, pay his wife 3000l. He died in his wife's life-time, and bequeathed his personal estate to 4 executors, (all of whom either died or renounced,) and directed them at a certain period after his death, to divide his property in such ways and proportions as they should think right: Held, that the property was divisible according to the statute, as in a case of absolute intestacy.

The M. R. recognised the cases of Blandy v. Widmore, 1 P. W. 324. Garthshore v. Chalfe, 10 Ves. 1. and distinguished the present from the cases of Haynes v. Micoe, 1 Bro. C. C. 129. and Deveso v. Pontet, Pre. Ch. 240. (n.) 1 Cox 188. because there the question was, what was to be the effect, not of intestacy, but of testacy. The enquiry in the present case, said his Honour, is not whether the payment of the distributive share is a satisfaction, but whether it is a performance; between these there is an important distinction; satisfaction refers to intention, and is something different from, and substituted for, the substance of the contract, and the question in cases of that kind is, whether the thing done was intended as a substitute for the thing covenanted for.

But with reference to performance, the questions are, has that which was contracted to be given, been given? what was contracted to be given? a certain sum; and in what event? the husband's death. The widow's distributive share is therefore a performance of the covenant. Goldsmid v. Goldsmid, E. 1818. 1 Wils. 140. 1 Swainst. 211.

44. Covenant by husband on marriage to pay to the wife 1000l. six months after his decease. By his will be given her 1000l. payable three months after his
COVENANT I.

Executive.—Exe·cutory.

deceased, and after certain specific legacies, directs the residue of his real and personal estate to be sold, and pay thereout all his debts and legacies, and pay the interest on the residue to his wife for life, or until her second marriage, with a limitation over on her death or marriage. The legacy held to be a satisfaction of the covenant. Watten v. Smith, T. 1819. 4 Madd. 325. Vide Haynes v. Mico, 1 Bro. C. C. 129. Garthshore v. Chulick, 10 Ves. 9. Goldsmid v. Goldsmid, 1 Swans. 211. 1 Wils. 140.

45. A bond for the performance of a covenant to pay an annuity, until a person shall be in the enjoyment of a benefit which he might hold during his life, of the yearly value of 600l. held to be satisfied by his induction to a living of that value, although accompanied by a bond to resign in favour of either of two sons of the patron, when qualified to take it; in consequence of which the resignation afterwards actually took place. Rawlatt v. Rawlatt, H. 1820. 1 Jac. & Walk. 280.

(e) Executory, as remaining to be done.

46. I. S. bought an estate of A. who gave him a bond to suffer a recovery within three years, or to return him his money upon a re-conveyance. A. tendered a recovery, but before it was suffered, a third person made a title to the land, whereupon I. S. brought his bill for the purchase-money, but the court could not relieve him, for having consented to take the bond, he must resort to A.'s covenant against incumbrances. Maynard's Ca. E. 1676. 2 Freem. 42.

47. Under a devise of land for payment of debts, a covenant entered into by the devisor, when just of age, and a student at Cambridge, to pay his sister's portion, though taken by surprise, shall be performed. Ed. Hollis v. Lady Carr, H. 1666. 1 Vern. 431.

48. Though a covenant to stand seized of lands to be afterwards purchased is void at law, unless there be some new act to be done; yet it seems that a covenant to settle lands of such a value will charge after-purchased lands, though the covenantor had none at the time of the covenant. Took v. Hastings, E. 1689. 2 Vern. 97. In Deacon v. Smith, 3 Atk. 529. this case is questioned by Lord Hurdwick. See S. C. ante, tit. Agreement, pl. 10.

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COVENANT I.

Executory—how created, on whom binding.


55. Covenant in consideration of marriage to settle lands on husband and wife, and the issue male of the marriage, remained to the brothers of the husband. Equity will enforce this covenant, and not put the party to an action of covenant in the trustees’ names. *Vernon v. Vernon* T. 1730. 2 P. W. 594. W. Kel. 9.

56. If a man covenants to lay out money in land generally, and devises his real estate before he has made such purchase, the money agreed to be laid out will pass to the devisee. *Green v. Smith*, M. 1738. 1 Atk. 572.

57. A. on marriage covenanted that he would, by will, or some good assurance, grant to B. his wife, or to her mother, 1000l., but he died intestate without so doing. B. under this covenant is entitled to the 1000l., but not to a distributive share of A.’s personal estate also, if more than the 1000l., for it is not a debt of the husband, but only intended to secure a provision for the wife. *Lee v. Cox or D’Aranda*, H. 1746. 3 Atk. 419. 1 Ves. 1.

58. Bill for a discovery in aid of an action of covenant. Plea, a clause in the articles to refer all disputes to arbitration; overruled. A mere covenant to refer is no bar to an action, as an express agreement would be that there should be no suit. Parties may so agree, and it is every day’s practice. *Mitchell v. Harris*, T. 1793. 2 Ves. Jun. 192.

59. A. covenanted to indemnify lands settled on B. from certain debts, the interest of which, after A.’s death, B. was obliged to pay: Held, that B. was entitled to come against A.’s estate for the sums so paid, together with interest thereon. *Fergus v. Gore*, H. 1803. 1 Sch. & Lef. 107.

(f) How created—where, on whom binding—and to whose Advantage.

60. The words, “I do oblige myself, my heirs, executors, and administrators, to warrant and for ever defend, &c.” amount to the same as “I covenant, &c.” Many other words in a deed will amount to a covenant, besides the word “covenant,” as “I oblige, agree.” *Williamson v. Codrington*, T. 1750. 1 Ves. 516.

61. The words “grant” and “demise” are implied covenants, with this distinction, that if there are covenants in the same deed from the same person, by which he covenants in a more restrained manner, that will restrain the general effects of those words. *Salter v. Melhuish*, M. 1754. Amb. 250.

62. A. borrowed money on mortgage of his wife’s lands, and they both joined in a fine. The mortgage shall be paid out of A.’s personal assets, because of his covenant in the mortgage; but it shall be postponed even to his simple contract debts. *Tate v. Austen*, M. 1714. 1 P. W. 264. 2 Vern. 689. Secus, where the money was borrowed to pay the wife’s debts *ad interim*. *Lewis v. Nangle*, M. 1772. Amb. 150. 2 P. W. 664. (a.)

63. A. son taking his father’s estate, covenanted to allow him 500l. *per annum* for his life, to pay all his father’s debts, and to maintain his mother, who lived separate from her husband by consent. The mother is not obliged to live with her son, but the son is bound by his covenant to make her an allowance, and the court decreed her 200l. *per annum*. *Dutton v. Dutton*, T. 1715. 4 Vin. 178. pl. 18.

64. A long term being vested in a husband in right of his wife, he granted a lease, and afterwards borrowing money of the lessee, he covenanted to grant him a further term: Held, a good disposition of the term in equity, and that the covenant was such a lien as bound the right in other hands. *Steed v. Cragh*, T. 1723. 9 Mod. 42.

65. A. the father, and B. the son, covenanted to settle land on B. and his wife, and their issue, remainder to a nephew in fee. B. and his wife died without issue. If the father and son had an interest in the land, the nephew may compel a performance; but if the father
COVENANT I.

How created, or whom binding.—Non-performance and Relief.

had the sole interest, the limitation to the
nephew being voluntary, is not support-
ed by the consideration of that marriage,
or of the marriage portion. Ogood v.
Strode, M. 1724. 2 P. W. 245. 10
Mod. 535.

66. Though it may be a question whe-
ther the child of a freeman, upon a suita-
ble portion, may release her orphanage
share to her father, yet when such child
or her husband covenants to release to the
executors, after the freeman's death, it
is good, and equity will execute the
co·nant. Coz v. Belitha, E. 1725. 2
P. W. 272.

67. Husband and wife covenanted by
mortgage in 1692, to levy a fine in Easter
Term following; the fine was not levied
till Trinity term, 1695; for 10l. more
they joined in a conveyance of the equity
of redemption, and covenanted that the
fine should be to the uses of the last
deed: Held, that the covenant in 1695
was good and binding on the husband
and wife, and that the former deed might
be laid out of the case, as the covenant
under it for levying the fine in Easter
Term was not strictly pursued. Fleet-
wood v. Templeman, M. 1740. 2 Atk.

68. A bishop, by covenants to pay all
charges, does not subject himself to pay
land-tax, because he cannot bind his suc-
cessors. Secus, in the case of an indi-
vidual who can bind his heirs. M. of
Blandford v. D. of Marlborough, or Bp.

69. Covenant in a settlement that what-
ever should come to the wife from the
mother, "or otherwise," should be bound
by the settlement. This covenant is con-
fined to what comes from the mother,
and extends not to what may unexpect-
etly come altunde. Williams v. Williams,
E. 1782. 1 Bro. C. C. 152.

70. A purchased an estate in mort-
gage, and covenanted to discharge the
mortgage. He is bound, and his per-
sonal estate shall not exonerate the real
estate charged. Tweddell v. Tweddell,
E. 1786. 2 Bro. C. C. 101. 152.

71. A male infant married an adult
female, who by settlement covenanted
that her estate should be to certain uses.
He is bound by her covenant. Slocomb

72. No action of covenant will lie by
a person for whose benefit a covenant is
entered into with a third person. Exp.
Richardson, T. 1807. 14 Ves. 187.

(g) Non-performance and Relief.

73. A. on the marriage of his son B.
covenanted to settle lands to the use of
B. for life, remainder to the heirs male
of his body. B. died, leaving a son, who
brought his bill against A.'s executor for
performance of this covenant. Dismissed:
for B. being executor of A., he might
have satisfied himself for the breach of
this covenant, or as tenant in tail; if the
estate had been settled, he might have
1 Vern. 480.

74. To a bill for performance of a co-
venant with A., for the benefit of B., A.
must be made a party. Cooke v. Cooke,
H. 1688. 2 Vern. 36.

75. Bill for performance of a co-
venant, whereby plaintiff was to have a pit
in defendant's ground for digging black
stones. Dismissed, upon proof that de-
defendant and his ancestors had had a pit
there more than 60 years. Scotsfield v.
Whitehead, M. 1688. 2 Vern. 36.

76. A tenant for life, remainder to
the heirs of his body, covenanted not to
suffer a recovery: he did suffer a reco-
very, and devised the lands. The lands
devised are not affected, though the co-
venant is good to bind the assets; and
such covenant being at first accepted,
equity ought not to alter it. Collins v.
Ch. 252. Boreil v. Brender, T. 1719.
1 P. W. 461.

77. Whether a party has broken any
of his covenants or not, is a matter pro-
terly triable at law; for the damages can-
not be ascertained without a trial. Sta-
ford v. London City, E. 1719. 2 Bro.
P. C. 184.

78. A bill will not lie to be relieved
against a wilful or voluntary breach of
9 Mod. 23.

79. N., the mother of A. S., was seised
in tail, ex provisione viri, of the estate in
question; reversion in fee to her hus-
band. A. S. and W. S., her husband,
created a mortgage-term on his estate,
and joined in levying a fine to the mort-
gagee; remainder to such uses as W. S.
should appoint. W. S. before the levy-
ing the fine, on sale of an estate, cove-
nanted with I. S., the purchaser, for quiet
COVENANT I.

Non-performance and Relief— how construed, and to be performed.

enjoyment, and afterwards made an appointment to trustees for particular purposes of the wife's estate. I. S. being evicted of the lands he purchased, brought his bill against A. S. and her children, to subject her estate to his demand, under the covenant of W. S. It being doubtful whether plaintiff's debt accrued by breach of covenant till after the appointment of W. S., the bill was dismissed. *White v. Sansum, H. 1746.* 3 Atk. 410.

80. R. H. on his marriage, covenanted to purchase and settle lands to certain uses. He purchased lands which he did not settle, but devised them away. After making his will, he purchased other lands, but made no settlement. Upon a bill by the heir to have the covenant performed, Ld. Ch. said, he would look into the cases, and go as far as the precedents, but no further. *Lewis v. Hill, T. 1749.* 2 Ves. 274.

81. Where legal and equitable estates meet in the same person, the equitable merge in the legal. A certain estate is covenanted to be conveyed, and is not so. The breach of the covenant is in damages; and such damages are money, not land, in the hands of the party injured. *Wade v. Pagot, E. 1784.* 1 Bro. C. C. 363.


83. Where in a lease there was a clause of re-entry for the breach of any of the covenants, and the landlord entered for a general breach, it was held, that if the forfeiture is incurred solely by non-payment of rent, the court, upon payment of the rent and costs, will relieve against such forfeiture, for then the end is obtained; sed secus, if the forfeiture be occasioned by the breach of other covenants against which equity cannot relieve. *Wadman v. Calcraff, T. 1804.* 10 Ves. 67. *Vide infra stat. 4 Geo. 1. c. 28.

84. The court will relieve against a forfeiture, where compensation can be made, against a clause of re-entry for breach of a covenant to lay out a specific sum in repairs, within a given time, and it is not limited to cases of accident, &c., but even against negligence and voluntary acts the court will relieve. *Sandres v. Pope, E. 1806.* 12 Ves. 282. *Et vide* Cage v. Russell, 2 Vent. 352. Northcote v. Duke, Amb. 511. *Hacket v. Leonard, 9 Mod. 90.* Vide citiam Eaton v. Lyon, 3 Ves. 690.

85. Equity will not extend its relief against the forfeiture of a lease beyond the case of payment of money, nor will the court restrain a landlord's remedy against his tenant for his breach of the covenant to repair. (a) And where a tenant breaks his covenants in an agreement for a lease by waste, or treating the land in an unhusbandlike manner, he is not entitled to a specific performance of that agreement; nor can a tenant be relieved against a breach of a covenant restraining alienation without license. *Hill v. Barclay, E. 1811.* 16 Ves. 402. and 18 Ves. 56. *Vide (a) Sanders v. Pope, 12 Ves. 282.* Wadman v. Calcraff, 10 Ves. 67. *See also* stat. 4 Geo. 2. c. 28. regulating the relief of a tenant against a forfeiture for non-payment of rent.


(b) How construed, and to be performed.

87. If a lessee comes into equity to compel a specific execution of a covenant in a lease, as running with the estate of the reviser, he must show that the defendant is personally liable at law in respect of the covenant and of his estate. *Chadno v. Browlowe, E. 1791.* 2 Ridg. P. C. 416.

88. The construction of covenants is the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no willful default. A legal instrument is not to be construed by the acts of the parties. *Eaton v. Lyon, E. 1798.* 3 Ves. 690. Bayley v. Lesminister Corp. 3 Bro. C. C. 621. 1 Ves. jun. 476. S. P.

89. A bond generally for performance of covenants, extends to implied as well as express covenants. *Iggulden v. May, II. 1804.* 9 Ves. 330.

90. A father under covenant for an
COVENANT I. & II.

How construed, and to be performed.—To stand seised.

equal division at his death of all the property he should die seised or possessed of, between his two daughters, or their families; though the effect of the covenant is, that he retains the power of free disposition by act in his life, he cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. Porteous v. Hennah, E. 1812. 19 Vra. 67. Vide Jones v. Martin, 5 Ves. 268. (n.)

91. A joint covenant of indemnity cannot be extended in equity beyond its legal operation, where there is no ground to infer mistake in the nature of the instrument, nor any previous equity which can entitle the covenantee to a several indemnity from each of the covenantors; for it has never been determined that every joint covenant shall be considered as joint and several. Therefore, where the obligation exists only by virtue of the covenant, its extent must be measured by the words of the covenant only. Secus, where the obligation is independent of the particular contract, as in the cases of partnership debts, bonds, &c. Sumner v. Powell, M. 1816. 3 Meriv. 30. Vide Devaynes v. Noble, 1 Meriv. 568, where his Honour, in Sleech's Ca. examined all the authorities on this subject.

Covenant for quiet enjoyment, vide tit. Agreement, i. pl. 7. tit. Covenant, i. (g) pl. 79.

Covenant to settle land or an annuity, vide tit. Agreement, i. pl. 9. Agreement, iii. pl. 211.

Covenant for further assurance, vide tit. Agreement, i. pl. 4. Agreement, iii. pl. 210. tit. Covenant, i. (e) pl. 22. ib. pl. 27.

Covenant that a vendor is lawfully seised, vide tit. Agreement, i. pl. 2.

Covenant against the acts of the vendor, and all claiming under him, and against all incumbrances, vide tit. Agreement, i. pl. 7. Covenant, i. (e) pl. 46. ib. pl. 50.

Covenant to lay out money in repairs and improvements, vide tit. Agreement, i. pl. 6. Landlord and Tenant, ii.

Covenant to save harmless and indemnified, vide tit. Agreement, iii. pl. 102.

Covenant not to suffer a recovery, vide tit. Agreement, iii. pl. 217, 218.

Covenant that a wife shall levy a fine, vide tit. Agreement, iii. pl. 219. Baron and Feme, vi. pl. 216. Fine, vi.

COVENANT II.

To stand seised, what.


93. A. by indenture, without livery, granted, enfeoffed, and confirmed his land to trustees, to stand seised to the use of his brothers, in consideration of blood. Decreed, this should work as a covenant to stand seised. Thorne v. Thorne, H. 1683. 1 Vraet. 141.

94. A femme seised of a copyhold on marriage of her daughter to I. S. surrendered it to the use of I. S. in fee. The husband, in writing, admitted that the surrender was to have been to the use of his wife in fee: and he becovenanted to stand seised in trust for her. This is not a voluntary covenant, but must be performed. Randall v. Randall, T. 1728. 2 P. W. 464.

95. A conveyance was made by lease and release, and the lease was lost. On proof of a consideration, the release will operate as a covenant to stand seised. Brown v. Jones, M. 1744. 1 Atk. 191. A consideration of marriage or blood will not raise a use by way of covenant to stand seised. Lloyd v. Spillett, 2 Atk. 149. If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. Pollerfen v. Moor, H. 1745. 3 Atk. 276.

96. A deed in consideration of love and affection is good without livery, by way of covenant to stand seised: because that does not pass by transmutation of possession, but the use remains to the grantor until taken out of him by force of the consideration. Rigden v. Vallier, E. 1751. 2 Ves. 255.
COVENANT III.

For the Acts of an Ancestor or other Person, where binding.

A covenant by a husband that his wife shall levy a fine, has in some cases been enforced; but Ed. Cowper, in 1781, said it was a great breach of the wisdom of the law to force a wife to part with her land without her consent. And it seems now to be the disposition of the court to excuse the husband if he restores the purchase money, with interest and costs. See the cases on this subject, post, tit. Fine, vi.

97. If A. borrows money for B. on a mortgage of his estate, the covenant in the mortgage deed must pay the money will bind him for whom it is borrowed; for it is his debt, and the mortgage is only the nominal person. The mortgagee may file a bill against his debtor, to have his estate disencumbered; and so may every surety against his principal; for he shall not be put to his indeb. assump. Lee v. Rook, E. 1730. Mos. 318.

98. It was said in this case to be a rule among conveyancers, that where an estate has been long in a family, the vendor's covenant must go so far back as the first purchaser of the estate; but where the vendor claims immediately under the person who first bought the estate, there he need not covenant any further back than from that person: because whoever buys the estate has the benefit of the covenants in the deed to the vendor's purchaser. Ed. Hardwicke said, he never heard of such a rule; yet where conveyances are to be made by a decree of the court, they should be settled by such rule as learned conveyancers would direct. There are many cases where a person covenants no further than his own acts, as where an estate is decreed to be sold for payment of debts, and no surplus remains, the court will not require the heir to covenant beyond his own acts: so as to a devisee. But where, after such sale, the surplus is considerable, the heir or devisee in many cases has been directed to covenant that neither he (the heir) nor his immediate ancestor, nor the devisee, nor his devisee, has done any act to incumber. Lloyd v. Griffith, H. 1745. 3 Atk. 267.

99. The appellant in this case having claimed the renewal of a lease from the heirs of the covenantor, pursuant to his covenant, they refused, alleging that the covenantor was a bare tenant for life. This refusal is a breach of covenant, for which an action at law will lie against the representatives of the covenantor. McCartney v. Blundell, T. 1789. 2 Ridg. P. C. 118.

100. The Irish Stat. 6 Ann. c. 2. does not enable a man to maintain an action of covenant at law, for breach of a covenant for renewal, contained in a lease which had been registered pursuant to the said statute, against one claiming the reversion and inheritance of the demise premises, as assignee of the covenantor, by deed executed prior to the lease and covenant, which was not so registered; but whether such an action might be maintained at common law, with the aid of the statute, quere. Chandos v. Brownlow, E. 1791. 2 Ridg. P. C. 345.

How far an heir is bound by the contracts or covenants of his ancestor, vide post, tit. Heir, ii.

COVENANT IV.

General and uncertain. (i) Implied. (k) Defective. (l) Voluntary. (m) Unlawful. (n)

(i) General and uncertain.

101. A covenant to make such a title as vendor's counsel shall approve, means no more than a good one. Lewis v. Lechmere, T. 1722. 10 Mod. 505.

102. A covenant to build a house on the glebe, but no time or value was mentioned. Decreed, a convenient house to be built. Each party to choose two commissioners; and if they could not
COVENANT IV.

Implied—defective—voluntary—unlawful.

Agree, then to resort to the diocesan. Allen v. Harding, T. 1709. 2 Eq. Ab. 17. pl. 6.

109. A general covenant to lay out a certain sum in a building of a certain value cannot be executed, as it does not expressly distinguish what the building is to be; so that the court can describe it as a subject for a master's report. Mosely v. Virgin, T. 1796. 3 Ves. 184.

(k) Implied.

104. Ld. Hardwicke said, there was no case where relief could be had in equity for satisfaction out of assets, merely on an implied covenant. Salter v. Melnus, M. 1754. Amb. 250.

105. By the words "granted, and demised," a covenant for quiet enjoyment is implied, and so is a covenant for payment of rent by the words "yielding and paying." Igulden v. May, H. 1804. 9 Ves. 330.

106. A bond generally for performance of covenants extends to implied as well as express covenants. S. C. Ibid.

107. Between express and implied covenants there is a distinction, the first may be enforced by injunction, but not the last. Kimpton v. Eee, M. 1813. 2 Ves. & B. 549.

(l) Defective.

108. A. covenanted by articles to convey lands, but did not covenant for his heirs: yet the heirs shall be bound. Gell v. Verden, T. 1694. 2 Freem. 199.

(m) Voluntary.

109. A voluntary covenant is not to be carried in equity beyond the letter. Base v. Grey, T. 1715. 2 Vern. 693.

110. Equity will decree performance of a voluntary covenant in favour of children, creditors, or on such other good considerations; but not in favour of a stranger both in blood and consideration. Parry v. Hughes, E. 1731. 2 Eq. Ab. 54. pl. 12.

111. A settlement after marriage by a man not indebted, is fraudulent against a purchaser. Evelyn v. Templar, H. 1787. 2 Bro. C. 150.

See further of voluntary covenants, ante, tit. Agreement vi.

(n) Unlawful.

112. A covenant before marriage to release the wife's guardian within two days after marriage of all accounts of mesne profits, was set aside in equity, as being extorted from the husband, and in nature of a marriage brocage contract. D. of Hamilton v. Ld. Mohun, T. 1710. 1 Salk. 158. 1 P. W. 121.

Of unreasonable or underhand agreements, vide tit. Agreement, ii. vii. Fraud.

CURTESY OF ENGLAND.


2. A husband may be tenant by the curtesy of money agreed or directed to be laid out in land, though not laid out. Vide Cunningham v. Moody, 1 Ves. 174. Sweetapple v. Biddon, 2 Vern. 536. Dodson v. Hay, 4 Bro. C. C. 404. So of an equity of redemption. So of the wife's equitable estate, but not of a mortgage in fee, unless there be a foreclosure, or the mortgage has subsisted so long as that the court will not be induced to grant a redemption; nor of a condition. Casborne v. English or Scarfe, 1 Atk. 608. 2 Eq. Ab. 728. pl. 6. In gavelkind lands a husband may be tenant by the curtesy without having issue; but it is only of a moiety of the wife's lands; and it ceases if the husband marries again. S. C.

3. A. by will, directed his trustees to
convey his freehold lands to his daughter P. and so as that she also should receive the rents, and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said P. for ever:

Held, that this was an executory trust, and that the wife took an estate for life only; therefore, the husband could not have curtesy; _sed secus_, if it had been an estate tail. _Lit. Hardwicke_ said in this case, that the devise being to the wife's separate use, would not bar the husband: for here is a sort of seisin in the wife. And though _Coke_ says, that to make a tenancy by the curtesy, there ought to be an inchoate right in the husband in the wife's life-time, he does not say he should be seised of the rents and profits. _Roberts v. Dixwell_, M. 1738. 1 Atk. 607.

4. A husband may be tenant by the curtesy of a trust for payment of debts, or of an equity of redemption devised to the wife for her separate use: for in a trust for payment of debts, it is only a chattel interest in the trustees: and the first taker has a freehold over. _S. C. Et vide Trodd v. Downes_, 2 Atk. 304.

5. Tenant by the curtesy shall have the aid of equity against a trust term assigned to attend the inheritance, and set up against him by the heir at law; though it was denied to a dowress. _Sned v. Clay_, M. 1695. 2 Vern. 324. But this doctrine was afterwards declared unreasonable. _Vide Brown v. Gibbs_, Pre. Ch. 97. The opinion of Lord Hale however, in _Att. Gen. v. Sands_, Hardr. 489, and all the resolutions in the case of a tenant by the curtesy, seem to have settled the point, both as to dowresses and tenants by the curtesy, that each shall have the benefit of the term against the heir. _Vide Dudley v. Dudley_, Pre. Ch. 241. _Higford v. Higford_, 1 _Eq. Ab._ 219. _pl. 5_. _Wray v. Williams_, 1 _P. W. 137_. _Brown v. Gibbs_, Pre. Ch. 65. _Bodmin v. Vendebundy_, ibid. 97.

6. A. devised lands to trustees in fee, to pay debts, and convey the surplus to his two daughters; one of them married and left an infant son. Her husband shall have curtesy. _Watts v. Ball_, II. 1708. 1 _P. W. 108_.

7. Wherever the estate is to be determined by express limitation or condition, on the death of the wife, there the husband shall not be tenant by the curtesy: as where an estate for life is limited to a woman; remainder to her first and every other son in tail male; remainder to the right heirs of her body; remainder to her right heirs; it is plain she is seised of the inheritance. Yet if she has a son, the husband shall not have curtesy, because the contingent estate which is to arise on her death, intervenes between her estate for life and the inheritance. _Boothby v. Vernon_, T. 1725. 9 _Mod. 147_.

8. A papist may be tenant by the curtesy, because that estate is cast upon him by the act of the law, and not by purchase. _Witheringston v. Banks_, T. 1725. Sel. Ch. Ca. 30. 3 _P. W. 49_. (n.) _Vide stat. 3 Jac. 1. c. 5._ which enacts that a popish recusant convict shall not be tenant by the curtesy.

9. Tenancy by the curtesy is not so much favoured in law as dower. A husband has no right to a tenancy by the curtesy, but from positive provision of the laws; but dower is a moral, a legal, and an equitable right. The husband's claim to curtesy does not arise from the relation of husband and wife, for then every husband would have it, which is not so; nor does he want it, for if it be not his own fault or his misfortune, he may acquire sufficient property during the coverture, to maintain himself after his wife's death, without any part of her estate, so that his tenancy has no moral foundation, and is properly styled by the curtesy or favour of the law of England. It is wonderful how a tenant by the curtesy was ever deemed entitled to relief in equity more than a dowress, and particularly, that a tenancy by the curtesy might be of a trust but not dower, that is a direct opposition to the rule of law, allowing dower of a seisin in law, but not tenancy by the curtesy, because the wife cannot gain an actual seisin, but the husband may, which reason holds in a trust estate, for the wife cannot gain or compel a trustee to convey the legal estate to the husband, but the husband himself may; therefore, if there be any distinction, dower ought to be preferred, to curtesy. _Banks v. Sutton_, H. 1732. 2 _P. W. 700_.

10. A husband does not forfeit his curtesy by adultery, as a wife does her dower, for there is no statute to inflict it. _Sidney v. Sidney_, E. 1734. 3 _P. W. 276_.

11. A custom for every copyholder to pay a fine upon the change of every lord
is good, if the lord be tenant by the curtesy. *D. of Somerset v. France*, M. 1735. *Fortesc. 41.

12. The seizin of a mother after her son's death, as tenant in common with her daughter, is a seizin of the daughter, sufficient to make her husband tenant by the curtesy of her part; for the entry and possession of one tenant in common, is that of the other. *Stirling v. Penlington*, H. 1739. 7 Vin. Ab. 149. pl. 7. 14 Vin. 512. pl. 5.

13. A tenancy by the curtesy and in dower are excrescences out of the inheritance, and not out of the freehold, and a continuation of the inheritance for a certain time in the husband, which would otherwise have ceased. A tenancy by the curtesy must arise out of the inheritance, which must vest in the wife, and there must be a possibility of its descending upon the children, for no estate in dower or by the curtesy can be, where the children cannot possibly take an inheritance; for the moment a husband takes as tenant by the curtesy, the inheritance must descend upon the children. *Sumner v. Partridge*, T. 1740. 2 Atk. 47.

14. Bill for redemption of a mortgage made nineteen years ago. A tenancy by the curtesy was set up as an excuse to save the right of redemption; non *allocatur*, for there would be no bounds to a redemption if this were allowed. It is of no consequence to the mortgagee who had the right of redemption, for if they do not use it they shall be barred. *Anon. T. 1742. 2 Atk. 383.

15. Where a husband is but tenant by the curtesy of his wife's estate, he cannot affect that estate without her joining. *Inceidon v. Northcote*, F. 1746. 8 Atk. 436.

16. Lands on which there were leases for years existing and a rent incurred, descended on a wife as tenant in tail general from her brother who was seized in tail, the wife survived three months after the rent day; though she made no entry, nor received any rent, yet this was such a possession in her, as made her husband tenant by the curtesy, for the possession of the lessee was the possession of the wife. But the husband is not entitled to his curtesy of any lands whereof no leases were existing and continued as aforesaid. *De Grey v. Richardson*, E. 1747. 3 Atk. 469.

17. A devised land in trust for the separate use of a *feme covert* for life, and to be at her own disposal. When only nineteen she disposed of it by will: Held, not a good execution of her power, so as to deprive her heir at law, though claiming a legacy also; neither shall her husband be tenant by the curtesy. *Hearts v. Greenbank*, T. 1749. 1 Ves. 299. 3 Atk. 716.

18. A tenant in tail with power to lease, remainder to B. the wife of C. made leases exceeding his power. By will, he devised some benefits to B., but B. elected to take her estate tail in opposition to the will. After her death, C. claimed as tenant by the curtesy, though he also derived and accepted benefits under testator's will. C. brought ejectments against the lessees: Held, that the lessees could not raise an equity against C. holding under B.'s election of her estate tail, but their bill was retained, that they might have satisfaction from testator's assets. *E. of Darlington, or Lady Cavan v. Pulteney*, T. 1797. 2 Ves. jun. 544. 3 Ves. 384.
CUSTODIAM.

The proceedings upon a custodia are those. An injunction goes to the sheriff to put the custode into possession, and immediately after an order is made upon the tenants of the lands to pay their rents to the custode; so that, in fact, all money received by these grants in custodia are received by authority, and pursuant to the order of the Court of Exchequer; and where the custodes are more than one, that court alone, as a court of revenue, determines in what order they shall be paid. The general rule is, that the first custode shall receive the rents of the estate forfeited to the crown in the first instance, and then the second custode is let into the receipt of the rents, and so on until all the creditors who have obtained grants of the estate are paid; but cases may arise in which this course is varied by orders of the court of Exchequer, particularly where the prior custodes do not use due diligence to call in the rents. Dillon v. Burton, H. 1794. 3 Ridg. F. C. 97.

DAMNUM.

Ad Quod Damnum.

Application to the court to set aside an ad quod damnum, on a suggestion of surprise upon the neighbouring inhabitants, when the inquisition was taken, and for want of a new road being set out (in lieu of the road taken away by the person who issued the writ) in his own ground. Lord Hardwicke held, there was no surprise, nor was it necessary the new road should be set out on the party’s own soil. So where a new road is made, and the parish can be at no further expense with regard to the old one, the inhabitants ought in future to repair the new; but where the new road lies in another parish, the person who sued out the writ, and his heirs ought not only to make it, but keep it in repair. In cases of ad quod damnum, equity must judge according to the rules of law, and the inconvenience to the public in such cases is not inquirable in equity, for the jurisdiction belongs to the quarter sessions, and it is sufficient if the inquisition is executed in a fair and open manner; and though the appeal is directed to be at the next quarter sessions, by 8 & 9 W. 3. c. 16. the justices may adjourn it to a subsequent sessions. Exp. Venn. H. 1734. 3 Atk. 766.
DEBTOR AND CREDITOR.

I. Creditors favoured in Equity, et e contra.(a) Frauds against them.(b)
II. Deed of Trust. Preference in Equity.
III. Composition, and Letters of License.(c) Partial Payments, and under-hand Agreements.(d)
IV. Set off in Equity.
V. General Payments, how to be applied.

DEBTOR AND CREDITOR I.

Creditors favoured in Equity, et e contra.(a) Frauds against them.(b)

(a) Creditors favoured in Equity, et e contra.

1. The court will never be instrumental in depriving a just creditor of any advantage he may gain over an heir. *Jones v. Puresoy*, E. 1682. 1 Vern. 47.

2. A woman living apart from her husband, and having a separate maintenance, contracts debts, the creditors may follow the maintenance in equity while it continues, but when it is determined by her husband's death, they cannot charge her jointure. *Kenge v. Delaval*, E. 1685. 1 Vern. 326.

3. A being decreed to pay a sum of money, or deliver possession of a house to B. on a certain day, conveys the house to a creditor in satisfaction of a real debt, this shall not defeat B. of the benefit of his decree. *Selfe v. Madoc*, T. 1687. 1 Vern. 459.

4. A husband who had made no provision for his wife, agreed that her fortune, which was in trustees' hands, should be laid out in land, and settled on them and their issue. This agreement, though accompanied by a judgment and after marriage, is not voluntary, so as to be set aside in favour of creditors. *Moor v. Rycault*, E. 1691. Pre. Ch. 22.

5. Bill by a creditor against B. for a discovery of the estate of H., supposed to be in his hands. Demurrer, for that no executor or administrator was a party, allowed, for if no person will administer, a creditor may. *Cowen v. Stroud*, M. 1692. 2 Freem. 188.

6. A bond creditor shall have the benefit of all counter bonds or collateral securities given by the principal to the surety. *Maure v. Harrison*, M. 1692. 1 Eq. Ab. 98. pl. 5.

7. A being unduly drawn in to convey his estates, made his will, and devised all his lands to pay his debts. His creditors may set aside this conveyance, having a right in nature of an equity of redemption, as testator himself had. *Blake v. Johnson*, H. 1700. Pre. Ch. 142.

8. A wife joined her husband in letting in an incumbrance on her jointure lands, and barring the estate tail, and then limited the uses to the husband for life, remainder to their daughters. Held, the daughters are not purchasers, so as to shut out a judgment creditor of the husband antecedent to the barring the estate tail, but the limitations to them must be considered as voluntary, unless the consent for the wife's parting with her jointure had extended to such limitations. *Ball v. Burnford*, T. 1700. Pre. Ch. 113.

9. A seised in fee in right of his wife, joined in a fine, and declared the uses to B. by way of mortgage, for securing 15,000L., and subject thereto to the use of A. for life, remainder to the wife in fee, then A. acknowledged a statute to C. for 500L., then the wife died, and A. sold his estate for his life, for 3000L., to D., the son and heir at law of the wife, who had no notice of the statute, and the mortgage was assigned to a third person, who paid off the 15,000L., and advanced the 3000L., then D. acknowledged a statute to E. (who had no notice of C.'s statute,) made his will, and devised his lands to A. and died. As to the 3000L., held clearly, that should be preferred to C.'s statute. Held also, that E.'s statute should be preferred to C.'s,
because the mortgagee was but in nature of trustee for the son. *Blake v. Hungerford*, E. 1701. Pre. Ch. 158.

10. A bound himself and his heirs in a bond, and died, leaving a real estate to descend; the heir sold the estate, but the court relieved the bond creditor, on a bill against the heir and purchaser. *Bateman v. Bateman*, E. 1702. Pre. Ch. 198.


12. The portion of a lunatic was ordered to be paid to the master, and the husband was to have it on making a settlement. He made no settlement, but assigned it to his creditors, and died without issue; then the wife died. Decreed, the creditors of the husband to have this portion. *Nightingale v. Lockman*, M. 1709. Mos. 231. *Fitzgib. 148*.

13. A gave to B. his niece, a legacy of 1000l. while she lived sole, afterwards on a treaty of marriage with defendant, it was agreed by articles, that 700l. of the legacy should be applied towards his debts. After marriage, defendant without his wife assigned the remaining 300l. to plaintiffs, his creditors, who brought their bill to be paid out of the remaining 300l. Decreed, an account to be taken, and upon proof that plaintiffs were real creditors, and that the assignment was bona fide, they were to have satisfaction accordingly; and the residues of the 300l. if any, to be put out for the benefit of the wife. *Pooey v. Brown*, H. 1711. Pre. Ch. 325. Gib. Eq. Rep. 80.

14. A mortgagee having notice of a judgment before his foreclosure and purchase of the equity of redemption, the judgment creditor may go before the master, and surcharge and falsify the mortgagee's account; but the mortgagee is not to account for the profits since the decree of foreclosure. *Bird v. Gandy*, M. 1716. 7 Vin. Ab. 45. pl. 20.

15. Though by the statute of fraudulent devises, a man is prevented from defeating his creditors by his will, yet any disposition he may make of his lands in his life-time, though voluntary, will be good against bond creditors. *Parsloe v. Weldon*, T. 1718. 1 Eq. Ab. 149. pl. 7. *Sed et quae*.

16. A judgment creditor may as well secure himself by taking up a prior mortgage, as a third mortgagee, for his judgment was a lien on the land, and when he gets in a prior mortgage, that ought not to be taken from him till payment of his whole debt. *Wright v. Filling*, T. 1718. Pre. Ch. 494.

17. A conveyed part of his lands in trust to pay his debts, and other part to maintain his children. This last conveyance is voluntary, and void as against creditors, though good against A. himself. So, where creditors having a lien on land, take satisfaction out of the personal estate which was liable to debts of an inferior nature, the inferior creditors shall stand in their place, and have satisfaction out of the land. *Sneed v. Culpepper*, M. 1718. 7 Vin. 52. pl. 7.

18. A husband being under age, the wife's father gave a bond to pay him 1500l. on his making a suitable joinder; he made a proper settlement on payment of the 1500l. This bond is not voluntary or fraudulent against creditors. *Brunaden v. Stratton*, bl. 1719. Pre. Ch. 529.

19. A judgment at law was obtained against one of the South Sea directors, whose estate was taken from him by the statute of 7 Geo. 1. c. 27. which made a provision for his creditors, but the court would not stay proceedings at law, for that act was not made to favour the late directors. *Houlditch v. Mist*, E. 1721. 1 P. W. 695. Et vide *Kempe v. Antill*, M. 1783. 1 Bro. C. C. 11. as to the forfeited estates of an American loyalist; vide etiam *Peters v. Erving*, H. 1790. 5 Bro. C. C. 54. where it was resolved, that a creditor having power to obtain warrants for payment of an American loyalist's debt out of his estate in America, is bound, upon being referred to that property, to make it available as far as he can. *Sic in Wright v. Nutt*, T. 1791. 8 Bro. C. C. 326.

20. Bill by the creditors of a mortgagor, to have the estate sold to pay their debts, pending the suit, the mortgagor foreclosed. Decreed, the creditors shall redeem, and the estate be sold to pay them. *Soley v. Salisbury*, T. 1725. 9 Mod. 153.

21. 'Equity will not allow unfair de-
DEBTOR AND CREDITOR I.

Creditors favoured in Equity, et c. contra.

mand to be set up against just and fair ones. Walker v. Gascoigne, E. 1726. 13 Vin. 543. pl. 12.

22. A. being much indebted, gave 600l. to his children, only six hours before his decease. This is good against creditors, but it would have been otherwise in the case of a real estate, or chattel real. Duffin v. Furness, T. 1729. Sel. Ch. Ca. 77.


25. A trust to pay the interest of a wife's settled monies to the husband, and if he fails, then to the wife's separate use, is good against creditors. Lockyer v. Savage, H. 1738, 2 Stra. 947.

26. Creditors cannot have a portion raised to satisfy their debts, if the contingency upon which it is payable never happens. Bradley v. Powell, T. 1736. Ca. temp. Taibl. 193.

27. Where a father, tenant for life, and his son, tenant in fee, join in a settlement, it is good against creditors, for the son might have disposed of the residuary interest without the father's joining. Russell v. Hammond, M. 1738. 1 Atk. 16.

28. But where the father takes back an annuity of the entire value of the estate settled, it is tantamount to a continuance in possession, and equity will relieve creditors against a settlement. S. C. Et vide Twyne's Case, 3 Co. 60. Taylor v. Jones, 2 Atk. 600. Vide etiam Bull. N. P. 257.


30. Where there is a covenant for trustees to convey the inheritance, equity will consider it as conveyed, and the trust term as attendant on it, and so connected in the cestui que trust, that it cannot be severed in favour of an heir or executor, though it may in favour of creditors. Cooke v. Cooke, M. 1740. 2 Atk. 67.

31. Equity only removes fraudulent conveyances out of the way, but will not disturb the remedy at law, nor decree profits back against the original debtor and owner of the estate received pendente lite, in favour of judgment creditors from the filing of the bill. Higgins v. York Buildings Co. M. 1740. 1 Atk. 107.

32. After a bond debt is turned into a judgment, the creditor cannot, in the life-time of the ancestor, bring any action on the bond, nor against the heir, for it is entirely extinct; but he still obtains a great advantage, as the judgments binds the land, and gives him the preference to all other creditors. Stileman v. Ashdown, M. 1742. 2 Atk. 609.

33. A judgment creditor is not bound to wait till he is paid out of the rents, for the court will accelerate the payment by directing a sale. S. P.

34. A. tenant (of a settled estate) for 99 years, if he should so long live, remain to trustees to preserve, &c. remainder to his first and other sons, remainder over to A. and B.; his son being indebted, assigned this settled estate in trust to their creditors, and agreed to suffer a recovery. The creditors filed a bill against A. and B. and against the trustee to preserve, &c. to compel him to join in the recovery. Per cur. the court will effectuate the intention.
DEBTOR AND CREDITOR I.

Creditors favoured in *Equity, et c. contra.*

of a testator as far as possible, to preserve the limitations he has made where the uses are executory; and as there is no similar case, in which the court has decreed the trustees to join, it ought not to be done here, for the father was made tenant for 99 years in order to preserve the estate, and prevent his having such an influence over the son, as to get him to destroy the settlement when of age.—Bill dismissed. *Woodhouse v. Hoskins,* H. 1743. 3 Atk. 22.

35. Stock was bequeathed to A. after his marriage, which he vested in trustees for the benefit of himself and his wife for life, and then to their children. This settlement is void, as against the husband’s creditors, both before and after the marriage. *Taylor v. Jones,* T. 1743. 2 Atk. 600.


37. It is not necessary to bring the representatives of a co-obligor before the court, where it plainly appears that there are no personal assets, and a principal has no right to say that his surety should be brought before the court, unless he has paid the money. *Madox v. Jackson,* H. 1746. 3 Atk. 416.

38. Debtors are entitled to a contribution where one pays more than his share. S. C.

39. A trust created by a husband of the wife’s estate, will not at law be deemed fraudulent against creditors. *White v. Sansum,* H. 1748. 3 Atk. 410.

40. D. was indebted to C. by bond. B., as administrator of C., brought an action against D., who pleaded his discharge under the insolvent act, but B. recovered. Then D., had a legacy under the will of M. B. sued out a fi. fa. and took a warrant to levy the debt out of the legacy, and also filed his bill against M.’s executor to admit assets to answer his demand. Decreed to B. satisfaction out of this legacy. *Edgell v. Haywood,* T. 1746. 3 Atk. 352. But if after the fi. fa. D. had assigned his legacy for a valuable consideration, and without notice, it would have been good against B. S. C. *Et vide Brown v. Heathcote,* 1 Atk. 162. *Choses in action* are not liable to an execution, but the creditor may either compel satisfaction by taking the person, or by outlawry, and taking the lands and goods under a *capias ultergatum.* S. C.

41. An insolvent act is for the benefit of creditors, and must be so construed as to give them all advantage over future effects. S. C.

42. In all cases of chattels in possession, the first action has the first satisfaction. S. C.

43. Where the court sees a consideration is made up with a view to defraud creditors, they will reduce it to what is equitable; but they will not determine bonds to be voluntary, if fairly entered into, merely because they do not exactly tally with the sum given for them.—*Blount v. Blount, or Doughty,* T. 1747. 3 Atk. 498.

44. In many instances a disposition by deed to take place after death, as by will, has been held good, but not as against creditors. *Drakeford v. Wilkes,* T. 1747. 3 Atk. 540. *Et vide Ramsden v. Jackson,* 1 Atk. 292.

45. During the existence of a *ca. sa.* on which the debtor is in custody, no other execution ought to issue, but if it does, and the sheriff takes a leasehold estate, under a *fi. fa.,* he is justified, though the court will set it aside on motion, and without an *audita querela;* but where defendant dies under execution, plaintiff (by stat. 21 Jac. 1.) may have a new execution. *Jeans v. Wilkins,* H. 1749. 1 Ves. 195.

46. There is a great difference between the statute 13 Eliz. c. 5. in favour of creditors, and 27 Eliz. c. 4. in favour of purchasers, which see explained in *Ld. Townsend v. Windham,* T. 1750. 1 Ves. 10. and *Walker v. Burrows,* M. 1745. 1 Atk. 93.

47. A voluntary agreement by a husband is not good against his creditors, though it is against his executors. *Att. Gen. v. Whorwood,* T. 1750. 1 Ves. 539.

48. A creditor by *elegit* may set aside a fraudulent conveyance in equity whether he could recover at law or not.
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Bennett v. Musgrave, M. 1750. 1 Ves. 559.

49. An obligee may have several actions against each obligor, though he can only levy one satisfaction. So he may prove under the bankruptcy of each obligor, till he is completely satisfied. Exp. Wyldman, M. 1750. 1 Atk. 109. 2 Ves. 113. Vide Exp. Lefebvre, 2 P. W. 407. Exp. Ryswicke, ibid. 89.

50. A. B. and C. creditors by judgment. A. sues out an ejectment, and the sheriff puts him into such possession as entitles him to a perception of the moiety of the rents and profits of his debtor's estate, till he is satisfied; he may afterwards take out another ejectment for a moiety of the remaining moiety, and so on; but B., in the mean time, sues out an ejectment on his judgment, and gets into possession of a moiety of the remaining moiety of the debtor's estate. And so according to the diligence used by either in case of a decree for a sale, the court directs payment of the creditor's whole demands, according to their priority, so that B. may be totally defeated, in case of a deficiency to satisfy both. A judgment until possession under an ejectment, is but an equitable judgment; but where a creditor has got such possession, and thereby obtained a specific lien, equity will not put him on a level with another judgment creditor who has no ejectment. If there are two judgment creditors, and neither has sued out an ejectment, the prior judgment shall be first satisfied in equity, for the court will suppose the first creditor had satisfied himself were it not to favour his debtor. Rowe v. Bant, T. 1751. 1 Dick. 150.


52. A judgment at law, though obtained upon a usurious debt, is good in equity for the money really advanced and interest. Scott v. Nesbitt, T. 1789. 1 Bro. C. C. 641.

53. A creditor of a wife has a right in equity against her separate property, of which he has notice, and against her husband in respect of it, but not beyond it. Lillia v. Airey, E. 1791. 1 Ves. jun. 277.

54. If a creditor has a suit at law upon the estate of his debtor, and a conscionable demand upon the same estate, and the debtor or his representative will come into a court of equity for its aid, to strip the creditor of his legal advantage, the court will not interfere, unless the party applying will discharge the whole of the creditor's demands, legal and equitable. Barnwell v. Barnwell, H. 1794. 3 Ridg. F. C. 75.

55. The general rule of equity is, that all fair creditors stand in a situation equally favoured, and therefore if a subsequent creditor, by the use of due diligence, has contrived to receive his debt, the court will not interfere to oblige him to account for what he has so received, and refund it to a prior creditor. Dillon v. Burton, H. 1794. 3 Ridg. F. C. 101.

56. The property of an American loyalist was confiscated during the American war, subject to the claims of such of his creditors as were friendly to American independence, to be made in a limited time; and, in fact, according to the evidence, further restrained to the inhabitants of a particular state. Bill by the debtor to have his bonds delivered up, or to compel the creditor to resort, in the first instance, to the fund arising from the confiscation, was dismissed, it not appearing that the creditor had the clear means of making his demand effectual against that fund. Ld. Ch. also expressed an opinion in favour of the right to sue personally, even in that case, against the authority of Wright v. Nutt, 3 Bro. C. C. 326. Wright v. Simpson, E. 1800. 6 Ves. 714. Et vide ante, tit. American Loyalist.

57. A creditor prevented by the act of the court from obtaining judgment, shall be put in the same situation as if he had it. Pulteney v. Warren, E. 1801. 6 Ves. 98.

58. The general principle on which a debtor to the estate cannot be made a defendant to a bill filed by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case, applies equally to the case of a creditor overpaid by the executor. In a case of that sort, upon the circumstances of suspicion particularly attending to the character of the creditor, as attorney and confidential agent to testatrix, an issue was directed. Alsager v. Rowley, E. 1802. 6 Ves. 748. Vide
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59. The discharge of a surety by the creditor is not a discharge of the principal without reserve, a co-surety therefore is not discharged; but when either of the co-sureties has paid beyond his proportion, the equity as between them is arranged on the principle of contribution for the excess. Exp. Giffard, E. 1802. 6 Ves. 805. 808. In Burke's Ca there cited, B. was co-surety for an annuity, and it was held that the grantee having given time to the principal, could make no demand against the surety.


61. It is a constant practice in Ireland for judgment creditors, after the death of the co-sureur to obtain a decree for a sale of his lands upon a failure of personal assets. O'Fallon v. Dillon, H. 1804. 2 Sch. & Leg. 19.

62. Soon after the marriage of A. with defendant, it was discovered that he had a former wife alive, and to make her some compensation, he gave her a bond to pay her 40l. per ann. for life, and 500l. in case she should survive him. The annuity being three years in arrears, he assigned to her some leasehold premises in consideration of 330l., of which the arrear of 120l. was part. A. became a bankrupt, having received 40l. of defendant's money, which he laid out in stock, and afterwards expended in building upon the premises. Per M. R. There is no participation of the crime here, as in the case of a single woman, but the bond must be considered voluntarily as against creditors, for though there was a moral obligation upon the man to compensate this injury, and though he acted upon it, does not follow that the bond was given from such motives, as the law can call a valuable consideration, for all settlements after marriage are voluntary against creditors. Here, however, is a transaction upon arrears. In Stiles v. Att. Gen. (2 Att. 132.) the D. of Wharton gave Dr. Young a bond for the arrears, and that was supported against creditors. By the subsequent arrangement in this case, the arrears were so satisfied, for which the defendant might otherwise have sued as a debt, and being a debt it may be dealt with as such. A bond given for the arrears, is a bond for a valuable consideration. So if the arrears are given up, and something is given in lieu of them, as in this case, where they were part of the consideration for the assignment of the lease which is so far valuable, and the rest is admitted. Bill dismissed. Gilham v. Locke, T. 1804. 9 Ves. 612.

63. On motion for an injunction to restrain the sale of goods taken in execution by a creditor of Lord A., until answer or further order, (which motion, under the circumstances, was made on a certificate of the bills filed, and without notice;) It was held, that a purchase made by a married woman from her husband, through the medium of trustees for her separate use and appointment, may be sustained against creditors, if bona fide, though the husband was indebted at the time, and even though the object was to preserve from his creditors, ancient family pictures, furniture, and other articles of a peculiar nature and value. Lady Arundel v. Whipps. Same v. Taunton, T. 1804. 19 Ves. 139.

64. Where a decree has been obtained by a creditor on behalf of himself and other creditors, a prior creditor who has obtained judgment at law in ejectment, grounded on an elegit, shall not be allowed to get into possession. Summer v. Kelly, T. 1805. 2 Sch. & Leg. 398.

65. The court will sustain a suit by a creditor, against persons accountable to the estate in a special case, as where the representatives cannot or will not act, but whether the plaintiff in this case,
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who was a creditor by judgment 17 years old, can have a decree without reviving by scire facias, the court would not determine; the bill, however, was retained, that the debt might be substantiated by an issue or other proceedings at law. Burroughs v. Elton, T. 1805. 11 Ves. 29. Vide Coyssame v. Fly, 2 Bl. 995. Roe v. Bant, 1 Dick. 150.

66. The doctrine of election is not applicable against creditors, taking the benefit of a devise for payment of debts, and also enforcing their legal right against other funds disposed of by the will. Kidney, or Williams v. Cousmaker, H. 1806. 12 Ves. 154.

67. There is this distinction between creditors and legatees, under a charge for payment of debts and legacies, that the former are to be paid in preference, and though the statute of fraudulent devises would prevent a devise for legacies to the prejudice of creditors by specialty, it would not prevent a devise for debts generally, though that might be the effect. S. C. Et vide Ridout v. Plymouth, 2 Atk. 104. Liuard v. Derby, 1 Bro. C. C. 311. Hughes v. Dalbiu, 2 Bro. C. C. 614.

68. Under a charge of debts, creditors by simple contract may, by marshalling, follow devised estates, if there be no estates descended, or if they have been applied. Kidney v. Cousmaker, sup.

69. Laches are not to be imputed to creditors under a devise for debts, as to an individual devisee, to prevent or limit the account of rents and profits, even against an infant heir S. C.

70. A merchant, who had been relieved by an issue of commercial credit Exchequer bills, (under stat. 51 Geo. 3. c. 15. s. 48.) to the amount of 25,000l. became bankrupt, whereupon the court (in obedience to that act, and on the petition of the secretary) ordered the assignees to pay the cahsier of the Bank that sum, with interest, together with costs, in preference to the claims of his other creditors. Erp. Holden, M. 1811. 18 Ves. 436.

71. Creditors shall be favoured in the construction of a will, if it can be done without violence to, or straining the words. Noel v. Watson, M. 1813. 2 Ves. & B. 269.

72. In a case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administratrix, the court will allow a creditor to prosecute the decree which has been so neglected. Simms v. Ridge, M. 1817. 3 Meriv. 458.

73. The act of 47 Geo. 3. s. 2. ch. 74. declaring the real estate of a trader subject to his debts, applies only to such as were traders at the time of their decease, and not to those who have bona fide left off trade before they died. Hitchon v. Benet, E. 1819. 4 Madd. 180.

(b) Frauds against them.

74. A wife joined her husband in a mortgage and levied a fine, and the husband agreed that his wife should have the redemption, after which he mortgaged the estate twice. The court set aside the agreement, but secured to the wife her dower. Dolin v. Collman, H. 1864. 1 Vern. 294. Et vide stat. 13 Eliz. c. 5.

75. Plaintiff having recovered a judgment for 14001. against I. S., brought a bill, charging that I. S. had conveyed his estate to trustees, and had lent 10001. to A. in B.'s name. I. S. is bound to discover the fact in this case. Smithie v. Lewis, E. 1686. 1 Vern. 399.

76. A obtained judgment against B. and then brought a bill against C. for an account and discovery of goods of B. which C. had got in his hands. C. is not bound to discover until execution has issued. Angell v. Draper, E. 1686. 1 Vern. 399. Taylor v. Hill, M. 1705. 1 Eq. Ab. 132. pl. 15. S. P.

77. A purchase of an estate of tenant for life, who was outlawed and had absconded, was set aside in favour of creditors, the purchase being made at an under-value, and pending the prosecution at law against him, and with notice thereof. Herne v. Meers, T. 1687. 1 Vern. 465.

78. It is not necessary to send it to be tried at law, whether a voluntary conveyance be fraudulent or not, for a court of equity can determine it. White v. Husey, T. 1690. Pre. Ch. 14.

79. A deed not fraudulent at first, may afterwards become so by being concealed and not pursued, as where a father makes a settlement on trustees in trust, to pay his debts therein mentioned, reserving 501. a year to himself for life, remainder to his son, and the father continues in possession, and 12 years after contracts debts by bond: the question of fraud in this case, however, was sent to
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be tried at law; and the result does not appear. *Hungerford v. Earle*, E. 1692. 2 Vern. 261.

80. A. made a bill of sale of his goods to a trustee for one who lived with him as his wife, and was so reputed. This is fraudulent against creditors. *Fletcher v. Sidney*, H. 1704. 2 Vern. 490.

81. But where A. purchased the lease of a house in the name of B., and took a declaration of trust to permit A. to enjoy for life, and then in trust for one who lived with him as his wife, and was so reputed. This lease is not assets of A., nor liable to his creditors after his death, for, when a man purchases, he may settle the estate as he pleases. S. C. *Vide Peacock v. Monk*, 1 Ves. 130. where Ld. *Hardwicke* disapproved this case.

82. A. conveyed lands to the use of himself for life, with power to mortgage such part as he should think fit, remainder to trustees to sell and pay all his debts, and afterwards became indebted by judgments, bonds, and simple contracts. This is fraudulent as against the judgment creditors, and they shall not be compelled to take a satisfaction in average with the other creditors, having no notice of the settlement. *Tarback v. Marbury*, T. 1705. 2 Vern. 510.

83. So, where A. made a voluntary settlement, reserving to himself a power to mortgage what part he pleased; this amounts in effect to a power of revo- cation, and therefore is fraudulent as against creditors by judgment. S. C.


85. A bond by a man to pay part of a portion to his wife's daughter, given long after her marriage, in pursuance of a verbal promise, is voluntary, and bad against creditors, though good against legatees. *Leofes v. Lewen*, T. 1718. Pre. Ch. 370.


87. A bond with a defeasance not to be put in suit unless misfortunes should happen to the obligor, is fraudulent as to creditors. *Wise's Ca.* T. 1725. Sel. Ch. Ca. 46.

88. A settlement after marriage, in consideration of a portion paid by the wife's father, is good against creditors, and not within 13 Eliz. c. 5. *Russell v. Hammond*, M. 1738. 1 Atk. 13.

89. A settlement being voluntary, is not for that reason fraudulent, but an evidence of fraud only. S. C. *Et vide Bovey's Ca.*, 1 Vent. 193. Ld. *Teynham v. Maitens*, 1 Mod. 119.


91. Every conveyance that is volun- tary, is fraudulent against creditors; and though a man is bound by law to maintain his wife and children, yet the funds out of which the maintenance is to arise are liable to creditors. *Fitz v. Fitz*, H. 1742. 2 Atk. 511.


93. But a creditor under circumstan- ces, may be let in upon estates jointly purchased by a father and his sons, and a moiety of each may be sold to satisfy judgment. S. C.

94. Where a father in a purchase takes a conveyance to himself for life, remain- der to his son in fee; as the father has the profits for his life, and is visibly in possession of the whole estate as owner, the estate shall be liable to his creditors. S. C. *Sed contra*, *Fletcher v. Sidney*, 2 Vern. 491. *Et vide Peacock v. Monk*, 1 Ves. 129.

95. Though a conveyance made by a man who afterwards became bankrupt, will be set aside in equity as an absolute
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96. Where a son takes beneficially under his father's will, and promises to perform it, it is a good consideration for a bond, and not fraudulent. *Blount* v. *Blount*, or *Doughty*, T. 1747, 3 Atk. 481. *Et vide* Thynn v. Thynn, 1 Vern. 296.

97. A made B executor and residuary legatee, and by deed of the same date vested 4000l. in him, to pay an annuity to A. for life, and afterwards 1000l. a-piece to C. and D., and an annuity to E. if they survived him. This is a testamentary act, and voluntary, and void under 13 Eliz. c. 5. *Peacock* v. *Monk*, M. 1748. 1 Ves. 127.

98. There is a difference between the statutes of fraud, of 13 Eliz. c. 5, in favour of creditors, and 27 Eliz. c. 4, which is in favour of purchasers. As to the latter, every voluntary conveyance is void against a subsequent one for a valuable consideration, though no fraud, and the party not indebted at the time; but with regard to 13 Eliz., if a voluntary conveyance of a real estate or chattel, be made by one not indebted at the time, though he afterwards becomes indebted, and such voluntary conveyance be for a child, and there is no badge of fraud to deceive subsequent creditors, that will be good; but if any intent to deceive subsequent creditors appear, it will be void. *Perd* Ld. Hardwicke, in *Ld. Townsend* v. *Wynham*, T. 1750. 2 Ves. 10.

99. A daughter entitled to 6000l., secured on land by her mother's settlement, subject to a contingency, married clandestinely in the lifetime of her father. The father then secured the 6000l. on his estate to the husband, who made a settlement on his wife. This is not a fraud upon his creditors. *Wheeler* v. *Cary*, M. 1751. Amb. 120.

100. An executor advanced money to two of his daughters on marriage, and to others as a voluntary gift; he afterwards died insolvent, having received assets. On a bill by the legatees, under his testator's will, it was held that the voluntary gifts were fraudulent. *Partridge* v. *Gopp*, E. 1758. Amb. 596. 1 Eden 168.

101. An assignment of personal property for a consideration clearly inadequate, is fraudulent as against creditors under 13 Eliz. But copyholds not being naturally subject to the debts, a conveyance of them cannot be fraudulent against creditors. *Mathews* v. *Peaver*, M. 1786. 1 Cox 278.

102. On the treaty of marriage between A. and B., the father and mother of B. in consideration of the settlement, joined in conveying a small estate (out of which the father was dowerable) to A. in fee, (but no fine was levied;) and they also joined in settling another estate, of which the father was seised in fee on the father for life; remainder to the mother for life; remainder to the uses of the marriage. At the time of the settlement, the father was indebted by speciality: Held, a fair family settlement, not made to defeat creditors, and the limitation to the mother for life is not fraudulent, within the statute 13 Eliz., more especially as she had joined in conveying the small estate in fee to the husband. *Jones* v. *Boulter*, M. 1786. 1 Cox 288. *Vide* Osgood v. Strode, 2 P. W. 245. Newstead v. Searle, 1 Atk. 265. Doe v. Rutledge, Cwpl. 705. Roe v. Mitton, 2 Wils. 356.

103. A husband having lived in adultery he and his wife separated, and thereupon the husband settled real estates worth 300l. per annum, on his wife for her separate maintenance, and on the children of the marriage. This settlement is not fraudulent as against creditors under the statute of 13 Eliz. *Hobbs* v. *Hull*, E. 1788. 1 Cox 445.

104. A creditor impeaching a settlement for fraud, must state that he is defrauded by it, and get judgment for his debt. *Colman* v. *Croker*, T. 1790. 1 Ves. jun. 161.

105. A settlement was made after marriage of stock, standing in the name of the wife, before and at the time of the marriage; but the husband being then insolvent, it was set aside after his death, for stock does not survive; yet the husband's assignees were bound to make a provision for the wife. *Pringle* v. *Hodgson*, H. 1798. 3 Ves. 617. where Ld. *Loughborough* has reviewed all the cases on this subject. *Note*. In *Dundas* v. *Dutens*, 1 Ves. jun. 196. Ld. *Thurlow* seemed to think the court could not touch stock to satisfy creditors. *Scd vide*
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106. Though generally a bill will not lie against a debtor to an estate, by those interested in the personal estate as creditors, yet it will, under circumstances of collusion with the representative, who is liable in the character of trustee and agent. Doran v. Simpson, T. 1799. 4 Ves. 651. Vide Newland v. Champion, 1 Ves. 105. To impeach a settlement after marriage, under 13 Eliz. the husband must be proved to have been indebted at the time, and to the extent of the insolveney. The creditors not producing any evidence, their bill was dismissed, with liberty to file another. Lush v. Wilkinson, T. 1830. 5 Ves. 385. Vide Stephens v. Olive, 2 Bro. C. C. 90. Battersbee v. Farrington, 1 Swanst. 106.

107. A son, tenant in tail in remainder, when just of age, in 1769 joined his father, tenant for life, in a recovery, for the purpose of raising 3000l. for the father, and re-settling the estate, the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement, was lost by his marriage and acquiescence, till after the death of his father, in 1793; though under the circumstances there was no probability of issue. Upon that ground, a bill by the trustees under a general trust for his creditors, claiming as purchasers under 27 Eliz. c. 4, was dismissed, without deciding whether they could sustain that character, or how far a settlement, merely as being voluntary, is affected by the statutes of Eliz. Brown v. Carter, H. 1801. 5 Ves. 862. Vide Kirk v. Clark, Pre. Ch. 275.

108. A settlement after marriage is fraudulent only as against creditors at the time. Kidney, or Williams v. Coussmaker, H. 1806. 12 Ves. 136.

109. A creditor who suppresses his debt in order to induce another person to enter into a contract, shall not be allowed to set up his debt, even against the person in whose favour, and at whose instance he made the suppression. Dalbiac v. Dalbiac, T. 1809. 16 Ves. 123. Vide Parkes v. White, 11 Ves. 209.

110. Assignment of property by a debtor, is a fraud against his creditors if he afterwards retains possession of the things assigned. Dutton v. Morrison, T. 1810. 17 Ves. 197. Vide Twyne's Ca. 3 Co. 80.

111. In a case of competition between creditors, an inquiry which had been directed as to the consideration of two annuities alleged to have been voluntary, or pro turpi causa, held proper; because when the objection was made, the assets would not, without such inquiry, be sufficient to satisfy all claims. Hunt v. Maunsell, T. 1813. 1 Dow P. C. 211. It was insisted at the bar, that the bill in this case might have been dismissed on the authority of Priest v. Perrott, 2 Ves. 160.

112. A replication to a plea (in bar to an extent in aid,) that defendant was trustee under a prior deed of assignment for the general benefit of all the insolvent's creditors; that the prosecutor of the extent was indebted to the crown before and at the time of executing the deed; that the insolvent then carried on trade, and was not then seized of lands, &c.; that the insolvent was then indebted to the prosecutor; and that the prosecutor had not executed the assignment, was held bad on general demurrer; Held also, that such an assignment is not fraudulent against such a creditor, unless a commission of bankruptcy has been sued out, and that no such deed can be avoided by an extent as a commission of bankrupt may. Rex v. Watson, T. 1816. 3 Price 6. Vide Pickstock v. Lyster, 3 Mau. & Selw. 371.

113. Where the validity of a deed depends upon the bona fides of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the court has adequate means of ascertaining those circumstances. The court would not decide, whether a deed of grant of personal assets in the nature of a mortgage, containing a stipulation for the grantor's continuing conditionally in possession, is for that reason fraudulent, and an act of bankruptcy. Hartley v. Smith, E. 1819. 1 Buck 368. Vide Ryal v. Rolle, 1 Atk. 163. Worsley v. De Mattos, 1 Burr. 467. Cadogan v. Kennett, Comp. 332.
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114. A. being indebted in 500l. by mortgage, leased all his lands to trustees to pay his debts, and died; his heir paid debts including the mortgage, to a greater amount than the value of the trust lands, and then refused to pay any more. Per curiam, the mortgagee should not have been paid out of the trust estate, to the prejudice of other creditors, for he was secured by his mortgage, and the trust lands ought to have been applied in the first place, to pay the other debts. Povey v. Ca. E. 1680. 2 Freem. 51.

115. Where a deed of trust is made for payment of debts, it shall extend only to debts contracted at the time of making the deed. Purefoy v. Purefoy, H. 1681. 1 Vern. 28.


117. Where land is devised to pay debts and legacies out of rents and profits, the land may be sold, otherwise, if out of annual rents and profits; but if such trust is by deed, the land cannot be sold in either case. Anon. M. 1682. 1 Vern. 104. 2 Vern. 557. Et vide Heycock v. Heycock, 1 Vern. 256.

118. A man indebted by several mortgages, judgments, bonds, and simple contracts, settled his estate for payment of his debts. The real securities shall be first paid, and then the bonds and simple contracts in average. Child v. Stephens, M. 1682. 1 Vern. 101.

119. Where lands are to be sold for payment of debts, as in the schedule, the purchaser must take care to see his purchase money rightly applied; but if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of a purchaser. Spalding v. Shalmer, H. 1684. 1 Vern. 301. Vide Culpepper v. Aston, 3 Ch. Rep. 115. cited in Whalley v. Whalley, 1 Vern. 487. where it was settled, that a sale by trustees of more lands than sufficient to pay the debts is not good.

120. Deed of trust for payment of such creditors as come in within a year. A creditor will not be excluded though he does not come in till after the year; but a bill may be brought after the year, to compel the creditors who stand out to come in, or renounce the benefit of the trust. Dunch v. Kent, M. 1684. 1 Vern. 260.

121. If there is a debt owing to the king, equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal assets. Sagitary v. Hyde, T. 1687. 1 Vern. 455.

122. A decree in equity for a sum certain, is equal to a judgment at law, and shall be paid pari passu therewith; but if the decree be for an account, it is only equal to a judgment quot computat, till the account be stated. Stearle v. Lane, M. 1688. 2 Freem. 104.

123. A voluntary judgment given by a freeman of London, payable three months after his death, is to be postponed to debts by simple contract, and to the widow’s customary part, but will bind the freeman’s legatory part. Fairband v. Bowers, H. 1690. 2 Vern. 202.

124. A recognizance being enrolled by the special order of the court, after the time for enrolling it was elapsed, the enorisor, betwixt the date of the recognizance, and the enrolling of it, borrowed money of I. S. upon a judgment, which was now over-reached by the recognizance, and the estate of the enorisor was in mortgage prior to the recognizance, so that neither the recognizance nor the judgment could reach the estate without the aid of equity. The court inclined to give preference to the judgment creditor. Fothergill v. Kendrick, T. 1691. 2 Vern. 234.

125. A trust term to raise any sum not exceeding 1500l. for payment of such debts as A. should owe at his death, and afterwards he borrowed 1000l., and appointed trustees to pay that 1000l., and died indebted to several others: Held, that the 1000l. should take place according to the appointment, and not be divided amongst all the creditors. Sey-
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Maur v. Fotherby, E. 1692. Pre. Ch. 44.

126. Debt on bond for sums certain, and debts ascertained, are to be preferred to demands which sound only in damages. Whitchurch v. Lady Baynton, T. 1692. 2 Vern. 272.

127. The court would not relieve an executor against an extent in aid taken out by a simple contract creditor against him, whereby he preferred himself to bond creditors, who had recovered judgments against the executors, though the defendant confessed he was able to pay the king. Dickenson v. Motteux, T. 1692. Pre. Ch. 47.

128. A. brought an action against B. for lying with his wife, after which B. assigned his estate to trustees in trust, to pay the several debts mentioned in a schedule, and such other debts as he should name within ten days. Then A. recovered 5000l. damages, and brought his bill to set aside this deed, as made to defeat him: Held not to be fraudulent, A. being no creditor at making the deed, and his debt recovered after being founded in maleficio; but for the surplus, (if any,) A. may come in. Lewknor v. Freeman, M. 1699. Pre. Ch. 105.

129. Equity will relieve against a fraudulent contrivance by an extent in aid, to gain a preference to a debt of an inferior nature. Brown v. Trant or Bradshaw, E. 1701. 2 Vern. 426.

130. A. assigned his wife's trust term for payment of debts, and died; his creditors shall have the benefit of the assignment, though his wife and child were unprovided for at his death. Walter v. Saunders, T. 1708. 1 Eq. Ab. 58. pr. 5. Ex vide Sir Ed. Turner's Ca. T. 1681. 1 Vern. 7.

131. If a man recovered a judgment or sentence in France for money due to him, the debt must be considered here only as a debt on simple contract, and the statute of limitations will run upon it. Duplin v. De Rosen, H. 1705. 2 Vern. 540.

132. A. in 1687, lent 1000l. to B. on a judgment, at which time there was a term of years attendant on the inheritance, which had been assigned to three trustees. In 1688, B. and one of the trustees assigned the term to C. for securing money then borrowed of him; A. having notice of this assignment, gets an assignment of the term from the two other trustees to D. in trust for the better securing his 1000l. A. shall have the benefit of this assignment, and be paid before C. E. of Bristol v. Hungerford, M. 1705. 2 Vern. 524.

133. Mortgages are not to be preferred to other real incumbrances; but mortgages, judgments, statutes, and recognizances shall take place according to their priority in order of time. S. C. in Doma. Proc.

134. A seaman assigned his wages as a security for money, and died indebted. This assignment specifically binds the wages, and the money secured thereby shall be paid in preference to all other debts. Crowe v. Martin, M. 1707. 2 Vern. 595.

135. An incumbrance by judgment being a lien on the land, if made prior to the grant of an annuity, shall be preferred before the grant of an annuity, because his charge on the land is posterior. Davidson v. Goddard, E. 1708. Gilb. Eq. Rep. 66.

136. A creditor who obtains judgment after the debtor has made a conveyance of his estate for payment of his debts, shall be paid only in average. Stephenson v. Hayward, H. 1710. Pre. Ch. 310.

137. Lord B. being indebted by bond and simple contract, raised a trust term to pay all his debts equally, and died. The bond creditors may be paid part of their debts out of the personal estate, and shall come in upon the trust term for the remainder, equally with the simple contract creditors. Corr v. Lady Burlington, T. 1713. 1 P. W. 228. The authority of this case has been much questioned on both points. Vide Lloyd v. Williams, 2 Atk. 110. Barwell v. Parker, 2 Ves. 363. E. of Bath v. E. of Bradford, ibid. 587. As to the first point it appears by Reg. lib. A. 1712. fo. 595. that Carr v. Burlington, sup. and Clifford v. Burlington, were held together on the master's special report, who stated that "Ld. Burlington, in August 1668, demised his several estates to trustees, in trust, to raise and pay all such sums as the Earl should owe at his death, for servants' wages, but not to postpone during his life the payment of the scheduled debts, with all interest due or to grow due, not preferring one creditor to another; and after payment thereof, in trust for the Earl and his assigns for the
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residue of the terms; and by deed poll, his Lordship charged the same premises with the payment of all such debts as he should owe at his death, in just and due proportions, not preferring one person to another." It also appeared that a great part of the personal estate had been applied in payment of the judgment creditors. "Decreed, that the personal estate of Ld. B. should be first applied to pay his judgment creditors, in a course of administration, and that what had been so applied was proper." And as to the second question, "What satisfaction the judgment creditors ought to have for what remained unsatisfied to them by the personal estate, Ld. Ch. declared, that the judgment creditors included in the schedule ought to receive satisfaction equally with the other creditors included; and that those not included ought to have satisfaction equally with those whose debts were provided for by the deed poll, and ordered a reference to the master to see what was due to the judgment creditors, and to carry interest on the Earl's death; and also to see what satisfaction the judgment creditors had received by the Earl's personal estate, and if any surplus of personal estate, after payment of principal and interest on the judgments, up to the Earl's death, then the judgment creditors to have interest out of the personal estate up to the time of payment; and if after paying the judgment creditors there should be a surplus of personal estate, then the bond creditors, in like manner, to have interest from the Earl's death to the day of payment: and if the trust estates should be more than sufficient to pay all the before-mentioned debts, then the consideration of interest to the other creditors from the Earl's death was reserved." 138.

One of several partners who was treasurer for the whole, entered into a contract with A. and afterwards failing, his estate was vested in trustees. Though the contract with A., concerned the partnership, yet A. is not entitled to any satisfaction out of the treasurer's share of the partnership effects; but must come in equally with the rest of his creditors, the money due to him upon the contract not being for wages. Ball v. Ed. Laneborough, T. 1713. 1 Bro. P. C. 384.

139.

A. borrowed money on mortgage of a ship, and covenanted to pay the insurance, but not the principal money. A. paid the insurance, and afterwards the ship was lost on a subsequent voyage. The mortgagee shall come in on the estate of A. for the principal money as a simple contract creditor. Thomas v. Terry, M. 1713. Gilb. E. Rep. 110.

140. A. being indebted to B. in 800L on a stated account, entered into articles for the payment of this debt by instalments of 80L per ann. A. afterwards by deed created a term of years for the payments of his debts out of the rents and profits of his estate, but not by sale or mortgage; only two of these instalments being paid, a bill was brought for recovering the rest; and on a question whether they carried interest, it was held they did, and they were accordingly decreed to be paid with interest at 4 per cent. Countess of Kildare v. Hobson, H. 1734. 4 Bro. P. C. 164.

141. A voluntary bond in equity shall be postponed to debts on simple contract, and if claimed for money lent, the person fails in proving his consideration, it cannot be set up afterwards as a voluntary bond. Ramsden v. Jackson, H. 1737. 1 Atk. 294.

142. Equity will not decree public companies to make calls in favour of a particular creditor. Ca. of York Buildings Co., M. 1740. 2 Atk. 56.

143. The D. of W. granted two annuities to Dr. Y. the first, in consideration of his great learning, and the second, in consideration of his having quitted the service of Ld. E. whereby he lost an annuity under a deed of trust for payment of the grantor's debts; the first annuity shall not prevail against bond or simple contract creditors, alter if the Dr. had been the D.'s tutor, but the second shall prevail against both, and the first shall be paid out of the surplus, if any. Bedford v. Gibson, M. 1744. 9 Mod. 412. Stiles v. Att. Gen. 2 Atk. 152. which is S. C.

144. It is in the power of the owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien upon the lands. Deacon v. Smith, E. 1746. 3 Atk. 322.

145. Bond creditors are considered in equity, as having a priority to simple contracts, because they have a priority at common law; and this court governs themselves by rules established in that forum, to which the jurisdiction properly
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Belongs. Regish v. Martin, T. 1746. 3 Atk. 333.

146. Where a creditor by judgment extends lands by ejectors, he holds quo warranto debuitum satisfactum fuerit, and at law the debtor cannot on a writ ad computandum insist on the creditors doing more than account for the extended value; but if the debtor comes into equity for relief, the court will give him, by obliging the creditor to account for the whole he has received; but as he who comes for equity must do equity, they will direct the debtor to pay interest to the creditor, though it should exceed the principal. Godfrey v. Watson, E. 1747. 3 Atk. 517. Et vide Bromley v. Goodere, 1 Atk. 80. (n. 2.)

147. A judgment creditor leaving the goods which he had taken in execution in the hands of his debtor, cannot take such goods from another judgment creditor, by insisting on his priority. West v. Skip, T. 1750. 1 Ves. 456.

148. One seized in fee of an estate subject to several equitable incumbrances, sold it to a purchaser, and conveyed the legal estate to him free from incumbrances, except some of the equitable incumbrances, which were later in date than the others; the purchaser having no notice of the other incumbrances, was held a trustee for the excepted creditors only, and they were preferred to the other creditors. Ingram v. Pelham, M. 1732. Amb. 153.

149. A rector being entitled to an annual stipend in lieu of tithes, assigned it by way of mortgage; afterwards a creditor of the rector obtained judgment, and in the regular course a sequestration of the stipend. Held, the mortgagee should be preferred. Errington v. Howard, T. 1757. Amb. 485.

150. Bill to establish a trust deed for payment of debts, to have the estates sold and the produce applied in discharge of the creditors coming in under the deed. Some of the creditors refused to sign the deed. Per curiam, the deed was meant for the benefit of all the creditors, and there is no case to the contrary. Bill dismissed. Atherton v. Worth, T. 1764. 1 Dick. 373.


152. A creditor by covenant is equal to a creditor by bond. Cheeley v. Stone, H. 1771. 2 Dick. 782. Where interest shall be allowed on simple contract debts under a deed of trust, vide post, tit. Interest, ii.

153. Voluntary bounty of 60l. by deed, charged on lands, of which the grantor covenanted to be seized in fee. By his will he confirmed the deed, and gave the grantee a legacy of 600l. The grantor not being seized in fee, the grantee was considered as a creditor by covenant, and satisfaction was deced to him out of the grantor's personal estate. Giles v. Roe, T. 1780. 2 Dick. 570.

154. Priority of satisfaction among equitable securities, must be according to the priority of their dates. Becket v. Cordley, II. 1784. 1 Bro. C. C. 353.

155. If a man covenants to settle his estate, and afterwards sells it, he is only to be considered as a trustee, and a debtor by simple contract; but if an action of covenant is brought, and judgment obtained, he is debtor by speciality. Bailey v. Ekins, E. 1784. 2 Dick. 632.

156. The creditor of a banker who has stopped payment is not entitled to any preference in equity. Whittingham v. Mitchell, E. 1757. 1 Ridg. P. C. 436.

157. A. having five bonds, one of which was paid before the bill filed. Afterwards it was decreed that the speciality creditors should abate in proportion: A. shall not be called upon to bring back what he has received, but shall only abate on the outstanding debt. Louthian v. Hassel, H. 1793. 4 Bro. C. C. 167.

158. A mortgagee had also a bond, on which the interest due exceeded the penalty: the mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond. Nothing beyond the penalty can be claimed. Lloyd v. Hatchett, H. 1795. 2 Anstr. 525. Et vide Godfrey v. Watton, 3 Atk. 517. Where it is said that a mortgagee, having tackled a judgment to his mortgage, is not confined to the extent of the penalty on the judgment, but may exceed it.

159. A gave his son B. a considerable legacy in trust, to be paid to him at 32; if he should not fail in business before that time; but if he should, then in trust to pay the interest only, for the support
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of himself, his wife, and family, and the principal not to be paid over to him till he was absolutely freed and discharged from the effects of his failure. At 28 B. failed, and was discharged under a deed of composition. Afterwards B. filed a bill for the legacy, which was decreed to him, neither the trustees or children opposing it; but Ed. Ch. recommended the trustees to look well to the discharge, for if the failure should end in a bankruptcy they would not be indemnified. De Mierres v. Turner, E. 1800. 5 Ves. 306. See this case more at large, p. post, tit Trust, iv.

160. L. and J. were merchants and co-partners. They became insolvent, and a docket was struck against them, whereupon the creditors met, and a deed of trust for the payment of the debts was agreed upon and executed, by which deed defendants were appointed trustees. In the deed there was a clause that the trustees "in the first place should pay the expenses of the commission, and all costs and charges of the deed, and otherwise incidental to the trust, and also reimburse themselves all other costs and charges attending the execution of the trust," which by the said deed they had power to deduct out of the produce of the insolvent's effects. Defendants employed plaintiff as their solicitor, to manage the concerns of the trust. After a lapse of some years, plaintiff delivered his bill to the trustees and claimed a balance of 80l. to be due to him, which refusing to pay, he brought this bill, praying that he might be decreed a special creditor on the trust fund: but Eldon, C. said this bill was perfectly novel; as to the commission of bankruptcy the petitioning creditor is always liable until the assignment, and as to the trust deed the plaintiff's remedy was against the trustees who employed him, but his Lordship held that charges could claim no right to be admitted as creditor on the trust fund. Wormal v. Harford, M. 1802. 8 Ves. 4.

161. The preference given to friendly societies by the stat. 33 Gen. 3. c. 54. s. 10. over other creditors, is confined to debts in respect of money in the hands of their officers, by virtue of their offices, and independent of contract, therefore it does not extend to money held by the treasurer upon the security of his promissory note, payable with interest, on demand. Eisp. Stamford Friendly Society, T. 1808. 15 Ves. 280. Vide eliam post, tit. Society or Club.

162. Orders sent by an insolvent merchant to his agents abroad, to hold balances in their hands, subject to the disposal of certain persons named by him, (who are, in fact, appointed trustees for his general creditors, by a deed termed a deed of inspection, in which he relinquished all claim to his business, but agreed to conduct it on their account and as their agent) were held not to protect bills of exchange transmitted by such foreign agents, and made payable to the insolvent, to satisfy balances due to him in their hands, from a creditor not a party to the deed, on whose behalf the sheriff has seiz'd the bills, under an extent, whilst in his possession and undorsed, against such a proceeding, resorted to after the arrangement, although the foreign agents had acceded to such arrangement; because, for want of a specific appropriation of the bills, and an express consideration quoad those particular bills, being shown to have been the foundation of their being assigned to the trustees, they were held to be the property of the insolvent merchant, notwithstanding the arrangement, and therefore lawfully seiz'd. Held also, that letters written by the foreign agent, assenting to the agreement, were good evidence to prove such assent. Rex v. Hunter, T. 1817. 4 Price 258.

Where interest shall be allowed on simple contract debts under a deed of trust, vide post, tit. Interest, ii.

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Composition and Letters of License.(c) Partial Payments and underhand Agreements.(d)

(c) Composition and Letters of License.

163. A creditor agreed to take less than his debt, provided the money was paid at a certain day. The money was not paid at the day, and he sued for the whole. The court would not relieve the

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164. Where a scrivener, on behalf of his client, but without his express authority, agrees to compound a debt, this shall bind the scrivener, but not the client. Parrot v. Wells, H. 1690. 2 Vern. 127. Secus, if the client had given an authority, for then he would have been bound.—Johnson v. Ogilby, E. 1734. 3 P. W. 277.

165. One by will devised the surplus, after debts and legacies paid, to his wife, and made A. and B. his executors. The creditors compensated for less than their full debts, from an apprehension that there were no assets; but assets afterwards coming in, the wife brought her bill for the account of the surplus, and the executors would then have let in the creditors for their full debts; but the court would not set aside this composition, the creditors not having a bill for that purpose. Ld. Castleton v. Fanshaw, M. 1699. Pre. Ch. 99.

166. Equity will assist a composition of debts, if obtained without fraud, and upon a fair representation. Pollen v. Husband, M. 1721. 1 P. W. 731. Et vide Cann v. Cann, ibid. 727.

167. A creditor agreed with his debtor to take 11s. in the pound, to be paid by instalments, and the debtor, after the first payment, became a bankrupt. Ld. Hardwicke held, the whole might be proved under the commission. Exp. Bennet. E. 1743. 2 Atk. 527.

168. If trustees will bind themselves to be liable for the acts of each other, the court will not relieve them, especially in the case of a composition of debts. Leigh v. Barry, M. 1747. 3 Atk. 583.

169. A creditor who has not received any dividend under a deed of composition, if a bankruptcy takes place afterwards, and there is no fund set apart for his use, cannot have those dividends out of the bankrupt's estates, and prove the residue of his debt, but he must come in as the other creditors at the date of the bankruptcy. Exp. D'Oliviera; Exp. Von Halle, H. 1803. 8 Ves. 84.

170. Creditors are as much bound by acting under a composition as if they had signed the deed; therefore, where upon a composition some creditors entered into a private agreement for additional security, though not for more than the amount of the composition, it was held void, for it is a fraud both on the debtor and the other creditors. Exp. Sadler and Jackson, E. 1808. 15 Ves. 52. Vide citam Leicester v. Rose, 4 East 372. contra Feise v. Randall, 6 T. R. 146.

171. Though an agreement for a composition generally is not binding on the creditor, unless strictly and absolutely fulfilled, yet a bond creditor having concurred in a general resolution for a composition to be secured by notes, shall be restrained (under circumstances referring to the interest of the other creditors,) from issuing an execution obtained on his bond, for more than the amount of the notes unpaid. Mackenzie v. Mackenzie, H. 1809. 16 Ves. 372.

172. Where indulgences are granted to a principal without the knowledge of the surety, the surety is thereby discharged. Boulbee v. Stubbs, E. 1811. 18 Ves. 20. Bk. of Ireland v. Beresford, T. 1818. 6 Dow P. C. 233.

173. The court condemns and will not aid the practice of striking docketes, in order to compel debtors to compound with their creditors. Exp. Masterman, M. 1811. 18 Ves. 208. See S. C. at large, ante, tit. Bankrupt, iii. pl. 256.

174. An irrevocable power of attorney to a creditor to receive a debt, not accompanied by an assurance of it, though with declarations that it was to be applied in payment to the creditor, is not an appropriation, and therefore it is not available against general creditors after the debtor's death. Lepard v. Vernon, E. 1813. 2 Ves. & B. 51. Vide Mitchell v. Eades. Pre. Ch. 125.

175. A deed of composition by creditors, not signed within the time stated in it, though void at law, yet if the creditors who have not signed act under it, it is good in equity. Spottiswoode v. Stockdale, H. 1815. Coop. 102.

176. A voluntary trust-deed for payment of debts was prepared, but no creditor was a party, nor was it made by agreement, but without consideration on the part of any creditor. The debtors afterwards executed other deeds, varying the trusts of the first: a creditor under the first deed, who had filed a bill, moved to restrain the trustees from executing the trust of the subsequent deeds till they had raised money to answer the first, but the court refused to interfere, saying that the trust being voluntary, the debtors might alter the first deed as they
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177. H. & Co. of Madras, consigned pears to B., with directions to sell and pay the proceeds to P. (to whom H. & Co. were then indebted,) on account. P. acknowledged the receipt of the consignment, and undertook to perform those directions, but no notice was given by either party to P. H. & Co. afterwards wrote to B. requesting he would send the pearls to America to be there disposed of. But H. & Co., becoming insolvent soon after, they assigned all their effects in trust for the benefit of their creditors. Held that the directions which accompanied the consignment did not constitute an appropriation, but was only a mere mandate, revocable at the pleasure of the consignor, and which was actually revoked by the subsequent disposition of the property, and that P. (who had no express notice of the consignment, but on hearing of it after he knew of the failure of H. & Co., had attached the pearls in the hands of B., and had actually sold the pearls, having also signed the trust-deed as a creditor,) was bound to account with the trustees for the proceeds. Scott v. Porcher, M. 1817. 3 Meriv. 652.

178. A tradesman failing, compounded, but made an underhand agreement with some of his creditors to pay them the whole. This is a fraud on the other creditors, and a bill for a performance of the agreement was dismissed. Child v. Dunbridge, T. 1838. 2 Vern. 72.

179. Where a man who is really solvent, assumes the appearance of insolvency, so as to frighten his creditors into an abetment and release of the debt, equity will relieve. Monger v. Kett, M. 1701. 12 Mod. 556.

180. A intrusted by B. to receive interest on tallies, received the principal, and failed, and afterwards compounded with his creditors; but B. would not come in without having a greater composition, which A. agreed to give, and then brought a bill to be relieved against his own agreement as underhand; but equity would not relieve a man guilty of fraud and breach of trust. Small v. Brackley, H. 1707. 2 Vern. 602.

181. Where a wife, with the consent of her trustees, has given up a part of her portion, in order to compound with her husband's creditors, the court ordered part of the trust money to be paid to the creditors thus consenting, in discharge of their demands; but every private note, &c. taken by any of the creditors for more than their share, was decreed to be set aside. Middleton v. Ed. Onslow, M. 1721. 1 P. W. 768.

182. A. agreeing with his creditors for a composition, gave one obstinate creditor a bond for the residue of his debt; such a contract seems to be within the reason and design of 3 Geo. 2. though not void by the express words of that act. Spurrett v. Spiller, M. 1740. 1 Atk. 105. So a person who has a composition on foot, may, by entering into a contract to pay the whole debt to an obstinate creditor, as an inducement for him not to appear and oppose the composition, deceive the bulk of his creditors, who imagine his debts to be less numerous than they really are. Vide Chesterfield v. Jansen, 1 Atk. 352. Smith v. Bromley, and Jones v. Barclay, 2 Doug. 696. Cockshott v. Bennet, 2 T. R. 763. Jackson v. Ducaire, 3 T. R. 551. Jackson v. Lomas, 4 T. R. 106. Et vide Sumner v. Brady, 1 H. Bla. 639. 647. which expressly contradicts the authority of Lewis v. Chase, 1 P. W. 620. as inconsistent with the spirit of the foregoing and other cases; the court having in that case refused to relieve a bankrupt from a bond given to a creditor who had petitioned against his certificate, in consideration of his withdrawing such petition.

183. An insolvent agreed with his creditors, that they should take 15s. in the pound in satisfaction of their debts. One of the creditors refused to come in, unless he gave his promissory note for the remainder, which was done. There was no stipulation in the composition deed that all the creditors should accede to it within a given time, nor did it appear that all the creditors had done so. The court will restrain the creditor from proceeding at law on the promissory note. Constan-tein v. Blache, M. 1786. 1 Cox 287. Vide Chesterfield v. Jansen, 2 Ves. 156. Spurrett v. Spiller, 1 Atk. 108. Lewis v. Chase, 1 P. W. 620.

184. The creditors of plaintiff, and amongst others the defendant, accepted-
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Partial Payments and Underhand Agreements.—Set-off.

A composition payable by instalments. Defendant took a new bond for half his demand, and received the composition for the other half only: Held, a fraud on plaintiff's other creditors, and on his wife, who joined in the security for the composition. Cecil v. Piaistow, T. 1793. 1 Anstr. 202.

185. Upon a deed of composition, one creditor was prevailed upon by the debtor to represent his debt as less than the real amount, receiving notes for the dividend upon the remainder, and bonds for the residue of his debt. Upon a bill by the debtor, and a creditor who was a party to the deed, the bonds were decreed to be delivered up, but the court was of opinion, defendant would be entitled to the benefit of the notes after all the trusts of the deed were satisfied, though not as against the creditors, and directed an enquiry as to that, reserving the question. Eastabrook v. Scott, T. 1797. 3 Ves. 456.

186. A separate agreement, securing to some creditors who had executed a deed of composition, a greater advantage, and without the knowledge of the rest, set aside. Mawson v. Stork, T. 1801. 6 Ves. 300.

187. A bond given to secure to one creditor the deficiency of a composition, if concealed from the other creditors, shall be delivered up with costs, though the obligee be particeps criminis, and it was so decreed on the ground of public policy, though formerly it was held contra; but such a bond, if made known to the other creditors, may be good. Jackson v. Mitchell, E. 1807. 13 Ves. 580.

188. A person dealing with another for a composition, shall not be bound by a concealment or representation of the amount of his debt, if the plan under which the concealment or representation takes place, is not carried into effect. Exp. Oakley, T. 1811. 1 Rose 138. Vide Montefori v. Montefori, 1 Bla. 363. Exp. Gardner, 11 Ves. 40. Exp. Campbell, 16 Ves. 244.

DEBTOR AND CREDITOR IV.

Set-off in Equity.

189. Where a clothier had sent goods to a factor to sell for him, and then died, and his administrator had brought an account against the factor for such goods, it was held that the factor could not, in equity, deduct out of the value of the goods the money owing to him from the clothier, for if there be debts of a higher nature, it would be a devastand in the administrator to pay or allow the factor's debt. Chapman v. Derby, M. 1689. 2 Vern. 117.

190. Yet in S. C. it was said that where two persons had mutual dealings and one became bankrupt, the balance only shall be paid to the bankrupt's estate. Vide stat. 5 Geo. 2. c. 30. s. 28.

191. So where A. a clothier, and B. a dyer, had mutual dealings in the way of their trade, which were carried on for several years, without payment of money on either side, and B. died intestate, and indebted by specialty: his specialty creditors took out administration and sued A. at law. Upon a bill for an account, and praying an injunction, the court decreed the account, it being the constant usage among merchants and traders to take goods of each other, and make a set-off so as to pay the balance only. Downam v. Matthews, H. 1721. Pre. Ch. 580. Hawkins v. Freeman M. 1724. 8 Vin. 500. 561. S. P.

192. A. was indebted to B. on bond; B. assigned the bond to C. his creditor, and became bankrupt; C., not being able to sue at law in B.'s name, brought a bill against A. to be paid the money due on the bond. The court doubted whether A. out of the money due on the bond should retain a debt due to himself from B., but seemed to think stoppage a good equity in this case. Peters v. Soame, H. 1701. 2 Vern. 428.

193. Stoppage is no payment at law nor in equity, unless under special circumstances, and in case of mutual demands, where the balance only is the debt: and slight evidence of an agreement to set-off will do. Jeffs v. Wood, E. 1723. 2 P. W. 128.

194. I. B. was a director of a public
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company, and held a large portion of their stock. The company lent him 12,000l., but not on the security of his stock. I. B. became bankrupt. The company cannot retain the stock against his assignees, for they did not lend him the money in their corporate capacity, but as private persons. Meliorucci v. Royal Exchange Assur., Co. T. 1728. 1 Eq. Ab. 9. pl. 8.

195. Where there are mutual demands, a defendant in an action at law may as well set-off upon the bankrupt act, 5 Geo. 2. c. 30. s. 29. as in common cases upon 2 Geo. 2. c. 22. s. 18. and 8 Geo. 2. c. 24. s. 6. Lock v. Benet, T. 1740. 2 Atk. 48.

196. Where there is a general trust of money for a society, a particular member cannot set-off a private debt against a share he may be entitled to on a contingency that may never happen. Lee v. Carter, M. 1740. 2 Atk. 84.

197. The costs of the dismissal of a bill were taxed to defendant at 88l. Plaintiff recovered judgment against defendant, and damages and costs to the amount of 440l., and then petitioned to set-off the costs at law against the costs in equity. Ld. Hardwicke thought it reasonable; and if the precedents (which he ordered to be searched) would justify him, he said, he would grant the petition. Gurish v. Donovan, É. 1741. 2 Atk. 165.

198. A packer may retain goods till he is paid the price of packing; and if he has another debt due to him from the same person, the goods shall not be taken from him till he has paid the whole, notwithstanding the debtor is become a bankrupt. Exp. Deese, M. 1744. 1 Atk. 228.

199. B. was residuary legatee, and surviving executrix of her husband, to whom C. and O. had given a joint bond. C. died, and plaintiff was indebted on her own private account to O. who became bankrupt. Upon a bill against his assignees for an injunction, and to set-off what was due to her as executrix against the debt due from herself to the bankrupt. The court denied an injunction, for such a set-off could not be made at law, and there is no instance of its being allowed in equity, the debt being due in different rights; and 2 Geo. 2. c. 22. s. 18. does not comprehend it. Bishop v. Church, M. 1748. 3 Atk. 691.


201. A man may set off a debt under the bankrupt act of 5 Geo. 2. as that act extends to all mutual debts, though not relative to the mutual credit between the bankrupt and other persons in the course of trade, and though the debts were of such a nature as could not be brought into a general account. Royal v. Rolle, H. 1749. 1 Atk. 185. 1 Ves. 375. Et vide Billon v. Hyde, 1 Atk. 126.

202. Petitioner, a creditor of the bankrupt for 100l., and 10l., and a debtor to him upon bond for 340l., payable at a future day, with interest, applied that he might set off his demand of 110l. against the principal and interest due on the bond, as far as it will go, and not be obliged to prove his debt under the commission, and take a dividend upon it only. Though this is not in strictness a mutual debt, yet it is a mutual credit; for the bankrupt gives a credit to the petitioner, in consideration of the bond, though payable at a future day. And he gives the credit for the debt the bankrupt owes him upon simple contract, and therefore within the equity of 5 Geo. 2. An account was directed to be taken between the petitioner and the bankrupt, and the balance only to be paid to the assignees. Exp. Prescot, T. 1733. 1 Atk. 229.

203. M. at the time he became bankrupt, was indebted to the petitioner for grinding corn, and plaintiff had in his custody wheat belonging to the bankrupt, part ground, and part grinding; 16l. 5s. was due to the petitioner for grinding the corn in his hands at the time of the bankruptcy. The wheat was sold by the assignees, by agreement between him and the petitioner, without prejudice to his claim; and he now applied to be paid his whole debt out of the money arising by the sale. Ld. Ch. was of opinion, the petitioner had no specific lien upon the corn, but only for what was due for grinding. Exp. Ozenden, T. 1754. 1 Atk. 285.

204. A person under a commission of bankruptcy may prove a debt in right of his wife, and yet bring an action in his own right for a debt due to himself from the bankrupt. Exp. Matthews, M. 1754. 3 Atk. 810.
DEBTOR AND CREDITOR IV. & V.

Set-off in Equity.—General Payments, how applied.

205. At law there can be no set-off between joint and separate debts. Exp. Quinten, T. 1796. 3 Ves. 248.
206. Though there be no mutual debts upon which a set-off could be sustained at law, yet equity will allow a set-off on mutual credit. James v. Kynns, M. 1799. 5 Ves. 108.

DEBTOR AND CREDITOR V.

General Payments, how to be applied.

207. Quicquid solvitur, solvitur secundum modum solvendi: therefore, where a man pays money generally, and is indebted for principal and interest, it shall be applied to reduce the interest in the first instance. So, if he be indebted in two sums, the one bearing interest, and the other not, the payment shall be applied to the credit of that debt which carries interest, or is the most penal upon the debtor, even though the creditor declares he received it on the other account. Chase v. Box, M. 1702. 2 Frem. 261. And an entry made by the debtor in his own books is sufficient to determine the application of the payment. But if the payment is general, and nothing is said at the time, the application shall be determined by the receiver.—Manning v. Western, H. 1707. 2 Vern. 606. Heyward v. Lomax, 1 Vern. 24. Ferris v. Roberts, 1 Vern. 34. Brett v. Marsh, ibid. 468. Anon. 12 Mod. 559.
208. A man that pays money may pay it upon what condition he pleases; and he who receives it receives the condition with it; but the condition must be expressed at the time of payment. Where a man is indebted on two contracts, it is natural that the debt first contracted should be first paid, and the surplus be applied in discharge of the second contract, and so in this case it was decreed. Wentworth v. Manning, E. 1708. 2 Eq. Ab. 261. pl. 1.
209. If a person indebted by bond and mortgage, pays money to his creditor generally, the creditor may apply it either in discharge of the mortgage or bond; aliter, if the debtor declared to which account the money shall be applied at the time of payment. Wilkinson v. Sterne, H. 1744. 9 Mod. 427.

DEEDS.

I. Construction and Operation.
II. Voluntary.
III. Obtained by Fraud, Duress, or Circumvention.
IV. Deeds lost, concealed, cancelled, suppressed, or destroyed.
V. Bill for Inspection of, setting aside, or Delivery up of, Deeds.

DEEDS I.

Construction and Operation.

1. A conveyance by way of feoffment, may operate as a covenant to stand seized. Thomson v. Atfield, E. 1682.
2. A. B. settled lands to raise 100l. a
year for his eldest son, and 100l. a-piece for his younger children; and afterwards he married again, and had children by his second wife. Decreed, the children by the second wife were equally entitled with the other younger children. Braithwaite v. Braithwaite, M. 1685. 1 Vern. 32.

3. There is great difference between a will and a conveyance at common law, for the law has appointed proper words to be made use of in limitations of estates in deeds, as the word "heir" to carry a fee-simple, and no other word tantamount or equivalent will be admitted: whereas, in a will it is otherwise, for that is a new conveyance by force of the statute 32 H. 8. which says, that it shall be lawful for a man to dispose of his lands by will at his pleasure; and this is the reason why a devise to a man in perpetuum passes a fee-simple, at the same time that these words in a deed give only an estate for life. Idle v. Cook, E. 1705. 1 P. W. 77.

4. Appointment by deed of certain annuities to be paid out of an office, is countermandable, and therefore where two such deeds are made, the latter shall prevail. Young v. Cottle, M. 1707. 1 P. W. 100.

5. A deed made by a child to a father, generally lies under the suspicion of a trust and a fraud, by reason the authority a father hath over his child, but is not void either at law or in equity, and equity will support it when done upon a good consideration. Manners v. Banning, E. 1709. 2 Eq. Ab. 282. pl. 1.

6. Articles are sometimes construed against the words, for the sake of the intent, as where the wife’s portion was agreed to be laid out in land, to be settled on husband and wife, and their issue, and if not laid out in land during their joint lives, and the wife should die first, then the money to go to the wife’s brother and sister. The wife died first, leaving issue and the money was not laid out in a purchase; yet decreed, that the issue, and not the wife’s brother and sister, should have it, equity supplying the words “if the wife die without issue.” Kentish v. Newman, T. 1713. 1 P. W. 234. Vide Targus v. Fuget, 2 Ves. 194.

7. A being possessed of a term by lease and release, granted, bargained, sold, and demised it to trustees, on certain trusts, remainder to the heirs of his wife, and covenanted that he was seised in fee. Per cur. though the settlement could not operate as a lease and release, yet A., being in possession, and the word “granted” being in the deed, it shall take effect as a grant or assignment of all his interest at law. And as A.’s intention to devest himself of the estate if it had been a fee was plain, it shall vest in the administrator of the wife, since it cannot go to her heir. Marshall v. Frank, H. 1717. Pre. Ch. 480. Vide Saunders v. Annesley, 2 Sch. & Lef. 99.

8. Where by the directions of a will, money is to be paid by the executors, as the testator by deed shall appoint, and the testator afterwards makes a deed of appointment, this deed referring to the will, shall be construed as part thereof. Metham v. D. of Devon, H. 1718. 1 P. W. 330. But where there are limitations of an estate by one deed, and further limitations by another, they cannot be coupled together. Vide Habergham v. Vincent, 4 Bro. C. C. 333.

9. In a case of articles, the court has a much greater latitude of construction, than in case of limitations of estates. Thus in articles to settle lands on the husband and wife for their lives, remainder to the heirs male of their bodies, shall be understood to have been intended the first and every other son; so in this case the words “heirs of the body of the neice by her husband,” shall be construed children, and the rather, because it is said just afterwards, “and to their heirs;” whereas, if there be a son of the marriage, it must be his heirs alone that must take, and though in case there had been only daughters, the words “their heirs” had been proper; yet, in this case, there are sons, and it cannot be intended that the provision was for daughters only, when not so expressed. Thomas v. Bennett, H. 1725. 2 P. W. 342. Et vide Bale v. Colman, 1 P. W. 145. Loveday v. Hopkins, Amb. 273.

10. A conveyance stating a valuable consideration, shall not afterwards be set up as a gift; and though it be found a gift by the jury, yet, if it prove to be fictitious and inserted by the grantor himself, it will be set aside in equity. Bridgman v. Green, T. 1755. 2 Ves. 627. Vide Whalley v. Whalley, 1 Meriv. 456.

11. A had a house in which he lived, and household goods, and had also a
DEEDS I.

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house for invalid seamen, with a vast number of beds, sheets, and household stuff, and by marriage articles it was agreed, that his wife should, on his death, have no claim upon his personal estate, except his household goods and household stuff. This exception was held to extend only to the goods which he had in his dwelling-house. Pratt v. Jackson, M. 1725. 2 P. W. 302. 3 Bro. P. C. 199.

12. A deed may be proved via voce, at the hearing, but not a will. Harris v. Inglethorpe, H. 1730. 3 P. W. 93.


14. A deed of lands in two different counties was made by way of sequestration, and livery and seisin of the lands in one county was indorsed. The deed was made in 1657. Decreed, that though no livery appeared of the other lands, yet, by reason of the possession and great length of time, equity will suppose and supply it; yet it had been much stronger, if livery had been indorsed of lands of one county, in the name of both; for then it would have been an implication that it was designed for both. Jackson v. Jackson, M. 1730. Sel. Ch. Ca. 81. Fitzg. 1.

15. The deed of an infant is not void, like that of a feme covert, but only voidable, for which reason, an infant cannot plead non est factum to his deed as a feme covert may. Nightingale v. E. of Ferrers, M. 1733. 3 P. W. 205.

16. In a settlement before marriage, was a proviso, that if the husband and wife should die leaving issue unprovided for, that then the trustees might enter upon the estate, and take the rents, till they had received 200l. for the benefit of such unprovided children, in such manner as the survivor of the husband and wife should appoint. The wife survived, and appointed the 200l. for a daughter, plaintiff’s wife, being an unprovided child. Upon a bill to have the 200l. raised, decreed, the 200l. and interest by way of maintenance, from the death of the mother. Green v. Belchier, H. 1734. 1 Atk. 505.

17. Where the words “to be raised by rent and profits” are used in a deed, the court will construe them liberally, and decree a sale, if there are no words to make it annual. S. C.

18. Where a court of law or equity finds that the general and substantial intent of the parties was, that the estate should pass, they will construe deeds in support of that intention, different from the formal nature of those deeds themselves. Stapleton v. Stapleton, T. 1739. 1 Atk. 8.

19. The heir at law does not want an express intention to take by a will, though it is otherwise with regard to a deed. Lloyd v. Spillet, E. 1740. 2 Atk. 151.

20. The general rules are, that the office of the habendum is to explain, limit, and declare the quantum of the estate which is to pass by the deed. It has never been disputed, but that it will carry the limitation of the estate further than the premises did. If a man give an estate to A. for life, habendum to him and his heirs, a fee-simple clearly passes. On the other hand, it is clear that the habendum never abridges the estate granted by the premises. It may vary, and alter it as if an estate be granted to A. and B. habendum to him and his heirs, a fee-simple clearly passes. On the other hand, it is clear that the habendum never abridges the estate granted by the premises. So, if an estate is granted to A. and to the heirs of his body, habendum to him and his heirs, this is a fee-simple. Some books say, that it is only an estate tail, and a remainder in fee; but M. R. said, it is difficult to maintain that opinion, and he thought it not law. It has been held, that if lands are granted to A. and his heirs for three lives, he may grant it to another and his executors for those lives. So, if granted to A. and his executors for three lives, he may grant to another and his heirs during those lives; from whence it follows, that if one of these limitations is in the premises, and the other in the habendum, the habendum shall take place, as if the premises in the grant of an estate pur auter vie, is to A. and his executors during the life of B. habendum, to A. and his heirs during that life, the heirs in that case shall have the benefit of that estate; so, if the grant of such estate is to A. and his heirs during the life in being, habendum to A. and his executors during that life, the executors shall have the benefit of it, because they
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Amenddum does not attempt to give a less or larger estate than contained in the premises, but is merely explanatory; and though before the statute of frauds no grant of a rent "per aeternam" could be good any longer than the party (viz. the grantee) himself lived, (because a rent lay not in occupancy, so that it was certain that there could not be a general occupancy of it, nor could the common law admit in that case of a special occupancy;) yet his Honour was of opinion, that such rent was within the statute of frauds, that statute intending to make a general alteration with regard to all sorts of estates that were granted "per aeternam," and a rent-charge is as much within the intention of the act as any other sort of inheritance. *Kendall v. Mickfield*, E. 1740. Barn. 46.

21. E. termor for 59 years by settlement, conveyed it to trustees, in trust to permit his wife G. to receive the rents during the term, if she so long live, and after her decease, to permit him to enjoy the rents during his life, and after his decease, in trust for the heirs of her body by him, and in default of such issue, remainder to H. for life, and after her decease, in trust for her two sons, W. and B.—E. died, never having had issue, and G. his wife, survived him: Held, that the whole term was not vested in G. and that the words "heirs of the body" were not words of limitation, but purchase, and the lease directed to be deposited in court for the benefit of all the parties. *Hodgeson v. Bussey*, M. 1740. 2 Atk. 89. Barn. 195. 9 Mod. 236. nomine Hodson v. Busell. Vide post, tit. Limitation over, for the general rules with respect to terms for years.

22. Deeds should be so construed, ut res magis valeat quam pereat, that the end and design of them should take effect agreeable to the intent of the grantor, for though the Judges have no power to alter the words of a deed, they may reject such as are insensible. *Dormer v. Packerhurst*, H. 1742. 3 Atk. 155. 1 Str. 1105. Baggshaw v. Spencer, 2 Atk. 570. Doran v. Ross, 3 Bro. C. C. 27.

23. The word "term," though more properly applied to a term for years, may mean an estate for life. S. C.

24. The presumption of satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended. *Wayland v. Wayland*, T. 1742. 2 Atk. 634.

25. Where the articles and the indenture of settlement bear date on the same day, as in this case, they must be considered as one and the same act, and a different construction ought not to be put upon them. *Hecogae v. Huntlake*, M. 1742. 2 Atk. 437.

26. A note under the hand of a husband ought to be looked upon as part of the marriage agreement, and consequently as part of the settlement; and where the wife would have been relieved if she had brought a bill against the husband, so would she equally against his assignees, who stand in his place. *Tyrrel v. Hope*, T. 1743. 2 Atk. 558.

27. The surrender of copyhold estates must have the same construction with seeffments at law, and other conveyances, and not as a will, and if the limitations of a copyhold are so framed as that by the rules of law they are void, they must take their fate, and no intention can make them good. *Lovell v. Lovell*, M. 1743. 3 Atk. 11.

28. A proviso was in a settlement, "shall and may" be laid out by the trustees in land. Per curiam, where there is a power to lay out money in land, but the original intention was, it should be considered as money, if not vested in land, it shall not be considered as such, or go to the heir. *Stamper v. Miller*, H. 1744. 3 Atk. 212.

29. In the case of voluntary settlements and wills, if there is no declaration of the trusts of a term, it results to the donor, otherwise, where it is a settlement for a valuable consideration, and in nature of a contract for the benefit of a wife and of the issue. *Brown v. Jones*, M. 1744. 1 Atk. 190.

30. With respect to ancient grants and deeds, there is no better way of construing them than by usage, and contemporanea exposito is the best rule to go by. *Att. Gen. v. Parker*, M. 1747. 4 Atk. 477.

31. In the case of trustees, though there are not negative words in a deed that they shall not be liable for the acts of one another, yet the court will not make them so for more than each have received. *Leigh v. Barry*, M. 1747. 3 Atk. 584.

32. When a consideration of love and
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affection only is mentioned in a deed, and it is not said for other considerations, no proof of other considerations can be entered into, for it would be contrary to the deed; otherwise where no consideration at all is mentioned. Peacock v. Monk, M. 1748. 1 Ves. 198.

33. "Heirs of the body," even in a deed, may be construed as words of purchase at law. "Issue" in a deed is always a word of purchase. Bagshaw v. Spencer, M. 1748, 1 Ves. 142. 2 Atk. 570.

34. On the intent of a declaration of trust to provide for the several stocks of a family at a distant time; the word "children" was held to extend to issue in general, great-grandchildren, and grandchildren as well as children, and they shall take per stirpes as to the stock, viz. that which would have belonged to each sister, if living, to go to their respective issues, but to be divided among themselves per capita, in lineal succession, as according to the statute of distributions. Wyke v. Blackman or Thurston, H. 1749. 1 Ves. 196. Amb. 555. more correctly stated in Davenport v. Hanbury, 3 Ves. 257.

35. A. by deed granted a personal estate to trustees for the benefit of her niece after her death: Held, that this estate goes to the representatives of the niece, and not to the representatives of the grantor. Peck v. Parrot, T. 1749. 2 Ves. 236.

36. Devise of land to two sisters and their heirs, if either married without consent, she should have only an estate for life; if either died unmarried, R. or his heirs should take it to him and his heirs, paying 500l. to the other. R. in the life of the two sisters conveyed all right, claim, and demand therein to his younger son, in consideration of love and affection, and for his advancement, and died. One sister died unmarried, the other married with consent: Held, that the heir at law of R. cannot claim on payment of 500l., in contradiction to the conveyance. Wright v. Wright, E. 1750. 1 Ves. 409.

37. The word "warrant," in a deed, is construed secundum subjectam materiam, and not barely as a warranty of the title to the reality. Williamson v. Codrington, T. 1750. 1 Ves. 516.

38. A deed in consideration of love and affection is good without livery, by way of covenant to stand seised, because that does not operate by transmutation of possession, but the use remains in the grantor, until taken out of him by force of the consideration. Rigden v. Vallier, E. 1751. 2 Ves. 255.

39. The doctrine of election has been in general confined to wills, but in this case it was determined that the party should, in like manner, be put to his election, where he claims under a deed. Bigland v. Huddleston, H. 1780. 3 Bro. C. 285. (n.)

40. Deed creating a trust term for payment of debts. Upon the question, whether the debts should be paid by the annual profits of the estate, or if money should be raised by mortgage for that purpose, decreed, that the money should be raised by mortgage. Bell v. Maidman, 1783. 2 Dick. 697.

41. Agreements are to be so construed as to give every word operation, yet the acts of the parties will be some evidence how they themselves understand their agreements. All instruments, however, shall be presumed complete before the date and execution, and any word written afterwards, whether on the face or on the back of the deed, shall be taken to be fabricated, unless noticed in the attestation. Davis v. Oliver, E. 1784. 1 Ridg. F. P. C. 9, 10. 15.

42. In Atkinson v. Pilsworth, T. 1787. 1 Ridg. F. P. 461. Vern. & Scriv. 160. Yelverton, C. B. laid down the following rules for the construction of deeds: 1. That no words in a deed, which may have an operative meaning without injuring the natural sense of any other part of the deed, shall be rejected as nugatory; and 2. Where two or more deeds act upon one and the same subject-matter, they ought to be considered and construed as one and the same instrument, and each is to be made auxiliary to the other in order to come at the true meaning of both.


44. Where the original delivery of a
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A deed was not void, but had an effect, the deed is not capable of a new delivery, yet circumstances may be equivalent to an actual delivery. Sexton v. Boyle, H. 1788. Vern. & Scriv. 416. 428. 457.

45. In construing an instrument, the whole context must be considered. Atta. Gen. v. Tenner, M. 1792. 2 Ves. 7. Et vide Butler v. Duncomb, 1 P. W. 457. S. P.

46. An absolute conveyance decreed, on parol evidence, to be only a security, it being clear on the written evidence, and the accounts of both parties, that the agreement was not what the deed purported to be. Cripps v. Joc. M. 1793. 4 Bro. C. C. 472. Et vide Irham v. Child, 1 Bro. C. C. 92. S. P.

47. A reservation is a clause in a deed, whereby the foessor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that he granted before. And in a reservation four things must concur: 1. It must be by apt words. 2. It must be of some other thing issuing or coming out of the thing granted, and not as part of the thing itself, nor of something issuing out of another thing. 3 It must be of a thing whereunto the grantor may have resort to distress, and 4. It must be made to one of the gran- tors, and not to a stranger to the deed. Inskiquin v. Burnell, T. 1795. 3 Ridg. P. C. 118. 422.

48. Where words are construed to amount to a reservation, which, according to their technical meaning, do not create a legal reservation, it is always done with a view to advance the interest of the parties, but not to defeat or destroy it. Per Yelverton, C. B. in S. C. 420. 422.

49. The construction of covenants is the same in equity as at law, but equity will relieve against a strict performance upon equitable circumstances, and no wifit default. Eaton v. Lyon, E. 1798. 3 Ves. 893. Et vide Bayley v. Leominster Corp. 3 Bro. C. C. 521. on the principles of which this case was decided.

50. A deed is not to be varied upon parol evidence of the actual agreement. Jackson v. Cator, M. 1800. 5 Ves. 688.

51. An instrument is to be construed without adverting to the nature of its provisions, if legal, or to what they would have been if a particular case had been contemplated. Mosely v. Mosely, H. 1800. 5 Ves. 248.

52. Settlement to such uses as the husband and wife should jointly appoint, and in default of such appointment, to them for life, and after the decease of the survivor, to the use of all or any of the child or children of them, in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times, and in such manner and form as the husband should by deed or will appoint, and in default thereof, to him or his heirs: Held, that the event upon which the last limitation depends, is default of appointment, not of children. Jenkins v. Quenchant, 5 Ves. 596, (n.) Vide D. of Marlborough v. Ld. Godolphin, 2 Ves. 61. Ld. Ch. in this case said, the rule that words must relate to the next antecedent, has many exceptions and limitations, for they can never be so applied if improper. Vide etiam Woodford v. Thellissoun, 4 Ves. 227.


54. A conveyance of a chattel interest by lease and release, cannot work a forfeiture or dissuasion, secus, if by sequestration: but in that case the person entitled to take advantage of the forfeiture is not bound to do so until the expiration of the lease. Saunders v. Annesley, T. 1804. 2 Sch. & Lef. 99.

55. A party relying on a subsequent instrument, as confirming a prior one, must take the prior as qualified by the subsequent instrument. Moore v. Butler, H. 1805. 2 Sch. & Lef. 271.

56. A conveyance by bargain and sale not enrolled, is evidence in equity of an agreement to convey. Mestaer v. Gillespie, H. 1806. 11 Ves. 625.

57. Charters and even acts of parliament may be presumed. Morse v. Royal, E. 1806. 12 Ves. 377. Vide Hillary v. Waller, ib. 239.

58. A deed must receive its construction as from the moment of its execution, and not from subsequent events. Balfour v. Welland, T. 1809. 16 Ves. 156.

59. Sealing and delivering are essential to a deed, which, if delivered, may
be a good deed, whether signed or not; but if it be to be executed under a power, with signature and sealing, both are necessary. *Wright v. Wakeford*, E. 1811. 17 Ves. 459.

60. It has been held by some Judges that a deed cannot be fraudulent, unless it is so both at law and in equity, and that the question of fraud is the same in all courts. *Ld. Eldon* said he did not agree to that doctrine, though in modern times a strong inclination has been evinced to say, that whatever is equity ought to be law. This opinion was acted upon by *Sir F. Buller*, who persuaded Lord Mansfield to act upon it, till it was reformed by *Ld. C. J. Kenyon*, with the assistance of the same able Judge; yet the clear doctrine of *Ld. Hardwicke* was, that there are many instances of fraud that would affect instruments in equity, of which the law could not take notice, as cases of appointments under powers where deemed illusory or not. *Butcher, or Gooday v. Butcher*, M. 1812. 1 Ves. & B. 98.

61. Upon the construction of deeds, the following points were resolved by *Grant, M. R.* First, that a provision for payment of "the first proportion or share," of all debts owing from one partner jointly, and as a partner, referred, not to the contribution as amongst the partners, but to what, with reference to the state of the partnership funds, and the ability of the other partners, he may eventually be called upon to contribute to the joint debts, so as they may be fully paid. Secondly, that under a provision for debts of various descriptions no preference was intended, which must be clearly shown, otherwise the court favours equal payments. And, thirdly, that a reference to a deed of a specified date, there being two of the same date; one executed at that time, and the other subsequently, should, in the absence of positive evidence, and aided by circumstances, be applied to the former. *Wadson v. Richardson*, M. 1812. 1 Ves. & B. 103.

62. A settlement of "all and singular the two-thirds parts of all and every the whole of my property, goods, &c. belonging to me in Great Britain, and the East Indies, lately willed and devised to me by J. M." was held to pass only two-thirds of such property as then remained, and did not extend to such parts of the property as had been spent previous to the settlement. *Cottam v. Missing*, M. 1815. 1 Madd. 176. Vide Tait v. Hibbert, 2 Ves. jun. 111. *Antrobus v. Smith*, 12 Ves. 46. *Taylor v. Leyden*, 9 East 49. Exp. Dubort, 18 Ves. 140.

63. The court will reform a deed, entered into under a previous agreement, by offering a fresh conveyance to be executed, and expunging therefrom a covenant which was complained of as not being the intention of the covenantor at the time of the agreement, although such covenant was introduced by the attorney of the covenantor, but without his express authority. But it was shown that the party had not considered himself liable to such a covenant when he entered into the agreement. *Rob v. Butterswick*, H. 1816. 2 Price 190. Vide Irwin v. Child, 1 Bro. C. C. 95.

64. The court is not bound to find an equitable effect for a clause in a deed, because the construction put upon it at law would leave it inoperative. *Gladstone v. Birley*, M. 1816. 2 Meriv. 404.

65. S. R. by his will, dated in 1717, devised his real estates to his daughter M. for life, remainder to trustees to preserve, &c.; remainder to the use of such of her children as she should appoint; and in default of her appointment to the use of her sons in tail male successively; and if she should die without issue, then over. On S. R.'s death in 1719, his daughter and heir at law M., entered into possession, and shortly afterwards assigned the remainder of a 200 years' term, (which had been created by the settlement on S. R.'s marriage, to raise 20,000l. for younger children,) to A. and S. upon the subsisting trusts of the settlement. In 1724 M. married Robert, afterwards Earl of O., and by settlement it was agreed that A. and S. should raise the 20,000l. and pay it to Earl Robert's father, which was accordingly done, and the remainder of the term assigned to D. the mortgagee. George, who was the only issue of the marriage, on his mother's death in 1781, entered into possession as tenant in tail male under S. R.'s will, suffered a recovery, and thereby acquired the fee. By indentures of lease and release dated in August, 1781, between Earl George (described as only son and heir of Earl Robert, by M. his wife, who was heir of S. R., who was only son of R. R. by A. his wife, who was daughter
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and co-heir of T. Earl of Lincoln and (Clinton,) of the one part, and J. S. of the other part; reciting the facts above stated, and that Earl George was desirous that the said premises should remain in the family and blood of S. R., it is witnessed, that in consideration of the natural love, &c. which said Earl George bore to his relations, the heirs of S. R., and to the intent that said premises should continue in the family of his late mother M. on her father's side, said Earl George conveyed, &c. said lands (being the estates devised by S. R.'s will) the said J. S. his heirs and assigns, to the use of said Earl George in tail, with a power of appointment, and in default of appointment, "to the use of the right heirs of S. R. for ever." And then the deed contained a power of revocation and appointment of new uses. In 1755, Earl George joined in a transfer of the mortgage term to E. H., converting it into a mortgage in fee, subject to reconveyance to Earl George, his heirs, &c. or to such person as he should appoint. In 1791 Earl George died, whereupon Earl Horace, his heir at law, entered, and under an idea that T., afterwards Earl Clinton, the heir ex parte materna of Earl George, was entitled to the equity of redemption of said premises, he, in 1792, joined him in a settlement of said estates. Doubts having been however suggested to Earl H., whether the deed of 1785 had not revoked the uses of the settlement of 1781, he executed a release and confirmation, dated in 1794, whereby after reciting such doubts, but that he was well satisfied that Earl George did not intend to alter the uses of the settlement of 1781, said Earl Horace granted and confirmed said premises to so much of the trusts of the deed of 1792 as were then subsisting, in the same manner as if the deed of 1785 had never been made. In 1798, T. died, leaving defendant his son and heir, who thereupon entered into possession as tenant in tail under the deed of 1792. In 1793 Earl Horace died, leaving plaintiff his heir at law, who shortly afterwards filed the present bill. On the hearing three points were raised; first, whether the effect of the settlement of 1781 was to limit the estates to the person who should be the heir at law of S. R. at the time of the death of Earl George without issue? Secondly, what was the operation of the deed of 1794, as a confirmation of the settlement of 1781, supposing that the claim of defendant's father at that time was doubtful? And, thirdly, whether the length of uninterrupted possession which defendant and his father had enjoyed, was not an answer to plaintiff's claim? Upon the first point Grant, M. R. was of opinion, that though Earl George clearly intended that such person should take as should be S. R.'s heir, upon a failure of issue in himself; yet that the strict technical sense of the words must prevail, and therefore that Ld. C. took no estate under the deed of 1781. Upon the second point, his Honour held that the deed of 1794 was executed by Earl Horace, with a view to remove the doubt, whether the deed of 1785 was not a revocation of the deed of 1781, but with this view only, and therefore that that deed cannot be construed to cure a defect in Ld. C.'s title under the deed of 1781, or to pass any substantial interest from Earl Horace. As to the third question—it appeared to his Honour that there was no room in the present case for the operation of the statute of limitations.—Length of possession, to operate as a bar, must be grounded on a disseisin; but there could be no disseisin in this case, because the subsistence of the mortgage made it a mere equitable estate, and of an equitable estate there can be no disseisin; first, because a disseisin must be of entire estate; and, secondly, because a tortious act cannot be the ground of an equitable title. Decreed for plaintiff. Ld. Cholmondeley v. Ld. Clinton, T. 1817. 2 Meriv. 173 to 362. Defendant having consented to take a case for the opinion of the court of K. B. on the first point, upon argument in that court, the above decision was confirmed, it being held, (Bayley, J. dissein.) that the words "the right heirs of S. R." must, according to their plain import, be held to denote Earl George, and therefore that defendant took no estate under the settlement of 1781. S. C. E. 1819. 2 Barn. & A. 625. 640. For the other points of this case vide tit. Disseisin, Length of Possession, Limitations, Statute of Mortgage. On this case coming on for further directions, Pomer, M. R. over-ruled the above decision as to the third question, he being of opinion that plaintiff's claim was barred by the length of possession in defendant and his father, by analogy to
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the statute of Limitations. B. C. 2 Jac. & Walk. 1. And this decree was afterwards affirmed on appeal to the Lords. Ibid. 190. It therefore became unnecessary to determine on the two first questions; but his Honour's opinion in opposition to that of Grant, M. R. seems decidedly to have been, that the intention of Earl George could be effectuated only by construing the limitation "to the right heirs of S. R." to mean such person as should be right heir at the time of Earl George's death without issue; and that the rule of construction, that the legal import of technical words would prevail, was not of so inflexible and universal a nature as to prevent the settlor's manifest intention from being carried into effect. See the very learned and able judgment of Sir T. Plomer, M. R. reported in 2 Jac. & Walk. ante.

66. As to the rule by which the construction of a limitation in words having a certain legal import, to a person or persons bearing a certain character, is to be governed; and whether intention, when sufficiently manifested, can in any case control the legal import, see the judgment of Grant, M. R. in the above case of Ld. Cholmendley v. Ld. Clinton, T. 1817. 2 Meriv. 340. the certificate of the judges of K. B. in S. C. E. 1819. 2 Barnew. & Ald. 625, and the judgment of Plomer, M. R. in S. C. T. 1820. 2 Jac. & Walk. 65. His Honour, the late M. R. and the Judges (excepting Bayley, J.) concurred in opinion that the rule of construction in the case of such limitations is universal and inflexible in favour of the words operating according to their strict legal import, without regard to the intention of the maker, whether it be sufficiently manifested or not by collateral circumstances, even on the face of the deed. Bayley, J., admitting the existence of such a general rule of construction, denied it to be of that universal and inflexible nature contended for, and considered that collateral circumstances existing and apparent on the face of the deed, ought to be resorted to to discover the intent of the settlor, and that the legal import of the words may be controlled and qualified, so far as it is affected by the clear manifestation of an intention inconsistent with their strict technical signification. In this opinion Plomer, M. R., felt himself strongly disposed to concur, considering that, if the instrument be one that is not matter of law, but depends wholly on the will of the party, and if the words be words not of limitation, but of purchase and description, the words of description are to be construed according to the intention of the settlor, if such be clearly manifested on the face of the deed, though such a construction be unconformable with, and contrary to, their direct technical sense.

67. Where a man was required to join in a conveyance, in order to obviate a specified objection to a title, he shall not be barred beyond that intent of which he was apprised. But if he consents to join in the conveyance upon a general information of objections to the title, the court will assume that he has enquired into the nature of such objections, and he cannot afterwards raise a question as to the extent of his information. Cholmendley v. Clinton, T. 1817. 2 Meriv. 356.

68. A recital in a deed is good evidence against the party making it, and those claiming under him; but the court inclined to think it is not so against third persons. Battersbee v. Farington, H. 1818. 1 Swanst. 106. 1 Wils. 88.

69. M. C. first tenant in tail under the will of his late father R. C. (by which will estates in tail male in remainder were given to the devisors other sons F. C. and T. C.) made a settlement on his marriage, by which he limited an estate for life to himself, with remainder to the first and other sons of his marriage in tail male, remainders to his brothers F. C. and T. C. for life, with remainders to their first and other sons in tail male; afterwards M. C. suffered a recovery, mortgaged the settled estate to one P., and died without issue male. C. the son of T. C. (F. C. having died without issue) entered upon the estate, suffered a recovery, and died, leaving M., the appellant, his eldest son. On a bill of foreclosure by P., which was resisted by M., the appellant, the question was, whether the appellant's father was entitled under the will of R. C. or only as a volunteer under the settlement by M. C. the first tenant in tail, and on a hearing, the foreclosure decreed below. But in Dom. Proc. it was argued, that as the settlor had not the fee, but was only tenant in tail at the time of the settlement, the provisions of the statutes of Elia (which were enacted for Ireland in 10 Car. 1.)
DEEDS I. & II.

Construction and Operation.—Voluntary.

70. A. by settlement, gave his moveable property (except the debts due to him) to B., and the residue, after payment of his debts, he gave to B. in life-rent; and to C. in fee; and then he gave a life-rent in his lands to B., and the fee to C., declaring that B. by acceptance of the deed, should be bound to pay the whole of his debts; manifestly conceiving that his moveable property would be much more than sufficient for that purpose, and intending that B. should have the life-rent in the lands free. The moveable property not proving sufficient to pay the debts, an action was brought by the life-renter against the surviving tenant for a valuable consideration; and the decree below was affirmed accordingly. Cormick v. Trapaud, T. 1818. 6 Dow. P. C. 60.

71. A voluntary conveyance made to the brother of the half blood, which was void and defective at law, was made good in equity against the heir, for said Ld. Keeper Wright, as the consideration of blood would raise an use at law, so should this imperfect conveyance raise a trust in equity, in respect of the consideration of blood. Watts v. Bullas, M. 1702. 1 P. W. 60. The authority of this case is controverted by Ld. Harwood, in Goring v. Nash, 3 Atk. 189. who said, the reasoning of Wright, C. S. was too large, and pursuing the maxim of law too far, as to the consideration of blood to raise a use, and it seems now to be established, that a defect in the surrender of a copyhold, or the execution of a power, which are governed by the same rules, Chapman v. Gibson, 3 Brev. C. C. 229., shall be supplied only in favour of three descriptions of persons, viz. creditors, a wife, and children. Goodwyn v. Goodwyn, 1 Ves. 228. Byas v. Byas, 2 Ves. 164. Tudor v. Anson, ibid. 582.

DEEDS II.

Voluntary.

72. Equity will not supply a defect in a voluntary conveyance. Lee v. Henley, H. 1681, 1 Vern. 37.; unless made to provide for children. Thomson v. Attfield, E. 1682. 1 Vern. 40. And it is discretionary in the court to grant aid where there is no remedy at law. Bold v. Corbett, M. 1689. Pre. Ch. 84.


74. The court will not relieve against the breach of a condition in a voluntary settlement. Longdale v. Longdale, E. 1687. 1 Vern. 456.

75. A purchaser, with notice of a voluntary lease made by the vendor to his own daughter, took security from the vendor, that his daughter, when of age, should surrender the lease to the purchaser. Decreed, the daughter shall enjoy the lease against the purchaser, he having notice of it, and taken a collateral security. Jennings v. Sellock, T. 1687. 1 Vern. 467.

76. A remainder-man in tail, in a vo-
luntary settlement, brought a bill for discovery of the deed; but it appearing that the entail was discontinued, the court would not relieve him. *Kelly v. Berry*, H. 1688. 2 Vern. 85. *Dance v. Phillips*, E. 1688. ibid. 50.

77. Equity can decree a conveyance to be fraudulent, merely for being voluntary, and that without any trial at law. *White v. Hussey*, T. 1690. Pre. Ch. 14.

78. A lessee at a rack-rent, and who paid no fine, is a purchaser, and shall avoid a voluntary conveyance. *Shaw v. Standish*, M. 1695. 2 Vern. 327.

79. A made a voluntary settlement on B, who afterwards agreed to deliver it up without consideration. This agreement shall bind in equity, for a voluntary settlement may be surrendered voluntarily. *Wentworth v. Deverginny*, H. 1696. Pre. Ch. 99.

80. Voluntary articles shall never be set aside against an absolute purchaser, although such purchaser had notice by being a party to the articles. *Sed quae*, for there was another point in the case which might be the foundation of the judgment. *Powell v. Pleydell*, H. 1702. 18 Vin. Ab. 118. pl. 5. 1 Bro. P. C. 5.

81. L S. made a voluntary settlement to trustees and their heirs, in trust to receive the profits, and to put them out for the increase of the fortunes of his daughters, A. and B.; and also executed a bond to the same trustees to pay them 1000l. on a certain day, but kept both deed and bond by him till his death, and received the profits, and then, by will, taking notice of the bond, he gave legacies to A. and B. in satisfaction thereof, and the surplus of his personal estate to his said two daughters and his four younger children. Yet A. and B. electing to have the benefit of the settlement, and the bond, and to set the profits from the date of the settlement against this maintenance, and to have the 1000l. with interest from the time it was made payable by the bond, it was so decreed. *Barlow v. Hancaige*, M. 1702. Pre. Ch. 211.

82. A made a voluntary settlement of an estate, subject to some annuities, in trust for his grandson and his heirs, and afterwards made another voluntary settlement of the same estate, to the use of his eldest son for life, remainder to his first, &c. sons in tail, remainder over, and by his will he gave a considerable estate to his grandson. Although it was proved that A. always kept the first settlement in his possession, and never published it, and that after his death it was found among waste papers, and the last deed was often mentioned by him, and he told the tenants that plaintiff was to be their landlord after his death, yet the court would not relieve the son against the first settlement. *Claverington v. Claverington*, H. 1704. 2 Vern. 473. In Pre. Ch. 235. and 1 Bro. P. C. 122.

83. C. is thus stated: A. made a voluntary settlement on his eldest son and his heirs, without power of revocation; afterwards he made a settlement on his second son for life, remainder to his first and other sons in tail, and died. The first deed came to the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first, but both sons having been otherwise provided for, held, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first. Vide Worrall v. Jacob, 3 Meriv. 256.

84. A. voluntary covenant is not to be carried in equity beyond the letter. *Basse v. Grey*, T. 1715. 2 Vern. 693.

85. A. purchaser for a valuable consideration, and with notice, shall not avoid a conveyance, barrable by a tenant in tail with consent of the tenant for life, it being at the time of the conveyance to him by the remainder-man in fee, a dry reversion expectant upon an estate tail, and of no value in the eye of the law. *Buckley v. Arnold*, T. 1716. 22 Vin. Ab. 20. pl. 10.

86. A made a voluntary settlement on her nephew, without power of revocation, keeping the deed in her possession; afterwards one by fraud got an attested copy of the settlement for the nephew, and then A. burnt the original deed, and settled the premises on another nephew. Bill by the first nephew to establish the copy of the first settlement was dismissed with costs, and the attested copy decreed to be delivered up to the second nephew, because it had been fraudulently obtained. *Nalred v. Gilham*, M. 1719. 1 P. W. 577.

87. Of two voluntary deeds, if the first be made absolute against the intent of the party, the second shall prevail. S. C.

88. Equity will not take away any defence the party may have at law to a voluntary deed; otherwise, if a deed for
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a good consideration were discharged by a voluntary release. 

88. A pretended sale of lands by W., shortly before his bankruptcy, to his brother, was set aside on the stat. 1 Jac. I. c. 15. whereby voluntary conveyances by persons who afterwards become bankrupts, are void. 

89. A. filed his bill to be relieved against a long lease fraudulently granted by his ancestor, but it was dismissed for want of sufficient proof. He afterwards filed a new bill, charging sufficient proof of the fraud, and upon the hearing, the lease was set aside. 

90. If a Freeman of London makes a voluntary deed in consideration of love and affection only, and reserves the power over the estate to himself, the property will continue his, and is subject to the custom. 

91. The rule that the assignees of a bankrupt stand in his place, does not hold in every case, for where a voluntary conveyance is made by a bankrupt, the court will carry it into execution against him, but not against his assignees. 

92. Though a conveyance made by a man who within a month after became bankrupt, will be set aside in equity as an absolute conveyance, yet the court will order it to stand as a security for so much as is really due. 

93. A. had a power to charge a sum of money on land by deed or will, and executed it by a voluntary deed. The court, in favour of the creditors of A. will consider it as personal assets, and lay hold of it for their benefit. 

94. If a voluntary conveyance is made by a man without consideration, and he is indebted at the time, or sells it afterwards, it is fraudulent by the statute of Eliz.; and therefore if a person entitled to an estate in fee takes a conveyance, so as to put a right in another from whom no part of the consideration for which the conveyance is made, moved, it is fraudulent. 

95. The determinations on the 27 Eliz. are, that every voluntary conveyance made, where afterwards there is a subsequent purchaser for a valuable consideration, though no fraud in the voluntary conveyance, nor the person making it at all indebted, yet such mere voluntary conveyance is void at law by the subsequent purchase. The difference between 27 and 15 Eliz. is this: where there is a voluntary conveyance of real estate, by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was made for a child, and no particular evidence or badge of fraud to deceive subsequent creditors, it will be good, but otherwise it will be void. 

96. Grant of an annuity fraudulently obtained by a dissenting minister having a spiritual ascendancy over a woman of fortune, who was under religious delusion, was set aside upon principles of public policy. 

97. To make void a voluntary conveyance, it must clearly appear to have been executed for the purpose of defrauding creditors. 

98. A. by a voluntary deed, assigned all the personal estate which he then was, or might at any time afterwards be possessed of, upon trust to pay the interest, &c. to himself for life, and after his decease, to such persons as he should appoint by will for their lives, and subject thereto to pay the principal to his next of kin who should be living at his decease, his, her, or their executors, &c. Soon afterwards the testator by his will gave some legacies, and gave the residue to the persons by name, who were his next of kin at the execution of that deed, and at his death; upon whose bill claiming under the deed, an account of the trust estate received by the trustees, and of the personal estate, &c. and to set aside the legacies, it was held that the power was not executed by the will; but one of the
plaintiffs being clearly affected with notice and acquiescence in the plan of giving the legacies instead of executing the power, the cause was ordered to stand over, with liberty to file a bill to establish the legacies; the court inclining, in case the other plaintiffs could be affected, at all events to apply the interest of the personal estate, during the lives of the legatees, in payment of the legacies. They were afterwards paid under a compromise. Griffin v. Nanson, M. 1799. 4 Ves. 34.

99. A voluntary settlement, though void against creditors, may be good to other purposes. Curtis v. Price, H. 1806. 12 Ves. 103.

100. A voluntary settlement made by a widow upon a clergyman and his family, but obtained by undue influence, and abused confidence in the defendant, who undertook to manage her affairs as her agent, was set aside in this case, upon principles of public policy, and as applicable to the relation between guardian and ward; for no interest obtained through the fraud of another person can be maintained. Huguenin v. Basley M. 1807. 14 Ves. 273. Vide Bridgman v. Green, 2 Ves. 627.

101. The court will not set aside voluntary leases obtained by an agent from his principal, where the gift appears pure and without fraud or misrepresentation, but will dismiss the complainant's bill with costs, as to such as were intended to be a provision upon, or an inducement to marriage; but where the relation of the parties, and other circumstances, justify an enquiry, upon principles of public policy or utility, the court will not decree costs. Harris v. Tremenheere, E. 1808. 15 Ves. 34.

102. Where the verdict in an issue has established that a full consideration for a lease has not been paid, the court will decree it to be delivered up. S. C.

103. It is a settled point that a settlement merely voluntary, and without actual fraud, is fraudulent in equity and void against a bona fide purchaser with notice, (or creditors) by the stat. 27 Eliz. c. 4. (a) though such a settlement is good between the parties themselves. (b) In fact, where a contract for a settlement is merely voluntary, the court will not interfere, but it will take jurisdiction upon a trust actually created, unless perhaps against a party having a right to put an end to it by his own act under a power of revocation, by analogy to the distinction between the cases where an intail can be barred by a fine, and where a recovery is necessary. Pulvertoft v. Pulvertoft, T. 1811. 18 Ves. 84. Vide (a) Evlyn v. Templar, 2 Bro. C. C. 148. Orley v. Manning, 9 East 59. where all the authorities on this point are collected. And see Hill v. Exeter Bp. 2 Taunt. 69. where the court regretted this doctrine should be extended to a purchaser with notice, it being a conclusion that seems equally inconsistent with the letter and spirit of the act, but perhaps as a general premise in favour of a purchaser without notice, the inference of a fraudulent purpose of subsequent sale may not be unreasonable, open however, to the effect of time and other circumstances. (b) Vide etiam Brookbank v. Brookbank, 1 Eq. Ab. 168. See the principal case more fully stated, post, tit. Marriage, v.

104. On a bill for a specific performance of articles previous to a marriage settlement, which were voluntary, and to be made in favour of relations, and as a provision for them, Grant M. R. said, the stat. of 27 Eliz. c. 4. had now received this construction,—that a voluntary settlement, however free from actual fraud, is by the operation of the act deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even when the purchase has been made with notice of a prior voluntary settlement: his Honor could hardly think that the words of the stat. warranted, or that the purpose of it required such a construction; for how could a purchaser be defrauded by a settlement of which he has notice before his purchase. But it is essential to the security of property, that the rule, when settled, should be adhered to. The stat. must receive the same construction, and produce the same effect in equity as at law. A bona fide purchaser of an equitable estate ought to be no more affected by a voluntary settlement, than the purchaser of a legal estate. A contract for a purchase is an equitable title, and the party having such a title is the complete owner of the estate in equity to most purposes, but the court does not in every case lend its aid to carry a contract for a purchase into execution, nor does it arbitrarily execute one contract and reject another.
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ground must be laid to prevent the party from obtaining in his case the assistance which the court usually gives in cases of the same general description. If a settlement were shown to be fraudulent in the ordinary acceptance of the word, it would not be contended that the court would, out of regard to such settlement, refuse to give a party purchasing with notice of it, the benefit of his contract; but it might be urged that settlements are often made on laudable and meritorious considerations, and that the court ought not to be instrumental in defeating such conveyances, but his honour said this was an assumption which the statute, according to the construction it has received, does not admit. Considering the party contracting for a purchase, as in equity a purchaser, the statute, as construed, says, that the settlement set up against him is merely a fraudulent device to cheat and impose upon subsequent purchasers: Again, said his honour, the statute, as construed, tells us, that the purchaser having notice of a voluntary settlement, has notice, not of a title, but of a nullity and fraud. How can the court say it is unconscientious in a person having such notice to treat for a purchase, when there is nothing against conscience to take a conveyance of the estate; and in Evelyn v. Templar, 2 Bro. C. C. 148. it was held, that notice of a covenant in a voluntary settlement, that the purchase money should be paid to trustees to be laid out in other lands, to be settled to the same uses, has no effect in equity. And in Pulvertaft v. Pulvertaft, ante pl. 103. Eldon, C. held, that even before any third person has acquired an interest in the property voluntarily settled, and when the matter rested entirely between the grantor and grantee, the latter had no equity to prevent the former from defeating the grant by a sale of the estate, it would be much then to say that he has an equity after the estate is contracted for, and a third person has acquired an interest in it, to prevent that third person from obtaining the benefit of the contract which the court would not restrain the settler himself from entering into. His Honour then observed, that as the legal estate in this case was in trustees, the purchaser had the best right to call for a conveyance, and a specific performance of the previous contract was decreed. Buckle v. Mitchell, H. 1812. 18 Ves. 100. 110. And see S. C. fully stated, post, tit. Marriage, v. w. additional references, but Leech v. Sean, 1 Ch. Rep. 78, and Parr v. Carwarden, 2 Dick. 544. are directly in point.


106. A voluntary deed once perfected cannot be revoked at pleasure, even although the maker has retained it in his own custody. And where the deed was made in execution of a power, the mere attempt to vary its disposition cannot of itself prove that the omission of a power of revocation in the deed creating the power of appointment, was occasioned by fraud or mistake. Worrall v. Jacob, T. 1817. 3 Meriv. 270. Vide Naldred v. Gilham, 1 P. W. 579. Boughton v. Boughton, 1 Atk. 625.

107. A voluntary settlement by one not indebted at the time, for the benefit of his wife and children, is good against future creditors. Batterbee v. Farrington, H. 1818. 1 Wils. 88. 1 Swanst. 106.

108. A father, at the request of his son, executed a mortgage to secure a debt due from the son to the mortgagee: Held, that the mortgage was not a voluntary conveyance without consideration, within 1 Jac. 1. c. 15. s. 5. Exp. Hearne, H. 1818. 1 Buck 165.

DEEDS III.

Obtained by Fraud, Duress, or Circumvention.

109. It is a constant rule in equity to avoid a release where there is supressio veri, or suggestio falsi, and therefore a release gained from one who was made to believe he should be compelled to pay costs, was set aside. Gee v. Spencer,
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110. But where a legacy was given to a fiance on condition not to marry B. without consent, which legacy not being devised over, was only in terrest, and she married the said B. before her father's death, and having been advised that the legacy was void, released the legacy to her brother on payment of 800L. Afterwards she brought her bill to set aside the release, suggesting that she was circumvented by the misrepresentation of her brother, who suppressed the will; but the release was confirmed. 


111. Where A. by false representation got an estate at an under-value, the court set aside the contract. 


112. One that could read made an agreement for 21 years. The lessor drew the lease for one year, and read it 21. Equity would not relieve the lessor. Sed secus, if he had not been able to read.

Anon. H. 1684. Skin. 159.

113. Equity relieved against the grant of a rent-charge in fee, to commence on failure of issue in the grantor, under circumstances of great necessity in the grantor, and gross fraud in the grantee. 

Ardglass v. Muchamp, E. 1784. 1 Vern. 237. For the cases of this class, ride post, tit. 

Fraud, Heir, iv.

114. A. drew in B. to sell his estate at a great under-value, with covenants from B. for A.'s quiet enjoyment. A. being excused, brought an action on the covenants. B. was relieved in equity, upon payment only of the purchase-money and interest, and not left liable at law to answer the value of the land upon the covenant. 

Zouch v. Swoose, E. 1685. 2 Vern. 320.

115. If a contingent remainder is destroyed by a legal conveyance, and that conveyance obtained by fraud, equity will relieve against it. 


116. Equity will relieve against a conveyance by deed and fine, without consideration, and obtained by fraud. 


117. A fiancee coeval, heir at law, and her husband, being drawn in to execute articles for supplying the defect of a surrender of copyhold lands to the use of a will, whereby they were devised to plaintiff, the court would not allow plaintiff to carry these articles into execution, by reason of the fraud which appeared. 

Preston v. Wasey, T. 1697. Pre. Ch. 76.

118. A. borrowed 200L of B. and gave him a mortgage of a term of 36 years, to commence in seven years, and defeasanced to be void on B.'s paying A. 40L. for eight years. Equity relieved against this mortgage, on payment of the 200L. and simple interest. 

Jas. v. Oades, M. 1700. 2 Vern. 402.

119. I. S. who was to have had considerable advantages under a will, was drawn in to make a composition for his right, and to give a release. Afterwards by will, he devised the residue to his wife on condition to pay his debts: Held, his right to set aside the release was devisable, and that the words were proper. 

Drew v. Merry, T. 1701. 1 Eq. Ab. 175. pl. 7.

120. One being poor, was drawn in to sell his estate greatly under value, yet if no fraud appears, equity will not relieve. 


121. A. lent money to B. on mortgage, and took a covenant from him, by another deed, that if A. should think fit, B. should convey to A. so much of the mortgaged estate as should be of the value of the money lent, at twenty years' purchase. The court set aside this covenant as unconscionable: for a man shall not have interest for his money and a collateral advantage also. 

Jennings v. Ward, M. 1705. 2 Vern. 520.

122. A man, deaf and dumb, suffered a common recovery of intailed lands, assisted by his uncle, and then settled the same to certain uses. Though no undue influence appeared, yet, as the uncle was interested, the court set aside the settlement. 

Ferres v. Ferres, T. 1709. 2 Eq. Ab. 695. pl. 1. (c).

123. Where a man, under fear, enters into an engagement, and afterwards, when at liberty, ratifies it by a bond and judg-
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ment, equity will not relieve him. Goodman v. Steuse, T. 1709. 2 Eq. Ab. 182.

124. A covenant by the husband before marriage to release the wife's guardian (within two days after marriage) of all accounts of mesne profits, was set aside in equity as being extorted from the husband, and in nature of a marriage brocage contract. D. of Hamilton v. Ld. Morus, T. 1710. 1 P. W. 121. 1 Salk. 158. 1 Bro. P. C. 54.

125. A devise under a will defectively executed, represents the will as duly executed, and for a small sum gains a release from the heir. Release set aside. Broderick v. Broderick, N. 1713. 1 P. W. 239.

126. When articles and a conveyance are not obtained with the strictest fairness, equity will set aside the conveyance, and order the purchase to stand as a security for the consideration money. White v. Lightburne, H. 1722. 2 Bro. P. C. 405.

127. If A. buy from B. a minor, under distress, the reversion of a house worth 40l. a year for 100l., and sell it again in a few days for 200l., equity will compel A. to account with B. for the difference. Spencer v. Chase, T. 1723. 9 Mod. 29.

128. A papist, 18 years old, is not disabled by 11 & 12 Will. 3. c. 4. to bring his bill in equity to set aside a conveyance fraudulently obtained from his ancestor. Carrick v. Errington, T. 1723. 9 Mod. 33. Mos. 8.

129. A conveyance in this case was set aside, because obtained from a weak man, 72 years old, and a pauper, for a small consideration. Clarkson v. Hanway, M. 1723. 2 P. W. 203.

130. Where a lease for years, worth 200l. per annum, belonged to two co-partners, and one of them, upon a false suggestion, that a fine of 250l. was to be paid for the renewal, obtained an assignment of the other's moiety for 20l. Equity set aside this conveyance as fraudulent, and ordered the assignee to account for moiety of the profits. Evans v. Hoskin, H. 1724. 9 Mod. 83.

131. Equity will set aside a deed obtained from a weak man, by misrepresentation, but not a will, for that is revocable. James v. Greaves, E. 1725. 2 P. W. 270.

132. Upon the death of a second brother, his eldest and youngest consulted a schoolmaster, as to which of them had a right to the lands, who gave his opinion in favour of the youngest, whereupon they agreed to divide the estate, but the court set aside the conveyance of the moiety, as being given under mistake. Lanecovn v. Lanecovn, T. 1730. Mos. 364.

133. Equity will not relieve a man against any agreement or deed gained from him when in liquor, merely for that reason, for that would be to encourage drunkenness. Secus, if through the management or contrivance of him who gained the deed, the man was drawn in to drink. Johnson v. Medlicott, T. 1734. 2 P. W. 130. (n.) Vide Cooke v. Clayworth, 18 Ves. 12. post.

134. A Freeman of London left his daughter 10,000l., and recommended her to release her orphans part, which she did. She is not bound by her ignorance of the law, but may make her election and avoid the release, if found to her advantage, after an account taken of her father's personal estate. Pusey v. Desbourrie, T. 1734. 3 P. W. 321.

135. A. on his marriage, article to settle his whole estate upon himself for life, remainder to his first and other sons in tail; no settlement was made pursuant to these articles, but B., when his eldest son attained 21, prevailed on him by threats and promises, and under a total ignorance of the articles, to join in a settlement, whereby the estate was limited to different uses, and a power given to the father to make a joinder. This settlement was set aside, as against the eldest son, for fraud, and the articles were established, and the father having, on his second marriage, given a bond, conditioned for making his wife a jointure; that bond was also set aside as against the heir, and the wife was put to seek satisfaction for the penalty of the bond out of A's personal assets. Jevers v. Jevers, E. 1735. 4 Bro. P. C. 199. Scrace v. Osley, E. 1736. ibid. 237. S. P.

136. Where a purchaser has given a full value for an estate, the mistake or ignorance of some of the parties conveying, of their claim under a marriage settlement, shall not turn to the prejudice of the purchaser. Malden v. Mewll, E. 1736. 2 Atk. 3. Neither shall an inadequate consideration avoid a release, if the party releasing be apprised of his
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137. Though a man is arrested by due process, yet if obliged to execute a conveyance while under arrest, equity will relieve as a case of duress. Nichols v. Nicholls, M. 1737. 1 Atk. 409.

138. J. B. remainder-man in tail, being distressed, conveyed two manors of the yearly value of 300L, expectant on an estate for life in his uncle S. R., for 300L to defendant, his heirs and assigns, after the decease of S. B. without issue male.

L. B. brought a bill to be relieved against this bargain as unconscionable. Lord Hardwicke held it a void conveyance, even in point of law, for as the plaintiff had only a remainder in tail, he could not dispose of the inheritance. Sir J. Barnadiston v. Lingleod, E. 1740. 2 Atk. 193. Barn. Ch. Rep. 357. Vide Lawley v. Hooper, 3 Atk. 278. Willis v. Jernegan, 2 Atk. 251.

139. Two persons, executors and trustees under a will, would not prove it nor suffer for usque de trust to take out administration custos vest. usque. till he had executed a deed, by which he was to pay 100L. to one executor, and 200L. to the other. Ld. Hardwicke declared he had unduly obtained, and decreed an allowance to be made to plaintiffs, of the sums of 100L. and 200L. Ayliffe v. Murray, M. 1740. 2 Atk. 58.


141. If a person enters into a hard bargain with his eyes open, equity will not relieve him unless fraud appears. Willis v. Jernegan, H. 1741. 2 Atk. 251.

142. It is no ground for a court of equity to set aside a deed, that a person put an unguarded confidence in another. Langley v. Brown, T. 1741. 2 Atk. 202.

143. A had an advowson which it appeared he intended for his son, but in his infirmity he was prevailed upon to sell it to B. Equity will not execute this contract, though no fraud was imputable to B. Bell v. Howard, E. 1742. 9 Mod. 302.

144. A solicitor made an absolute conveyance to himself of 1000L. from plaintiff's wife, while separated from her husband, in consideration of services done and favours shown. Ld. Hardwicke, on all circumstances, decreed the deed should only stand as a security for such sum as was justly due to the solicitor.

Sanderson v. Glass, T. 1742. 2 Atk. 296.

145. Plaintiff, heir at law to L. brought a bill to set aside a conveyance of an estate by L. to defendant, under circumstances of very glaring imposition and undue influence. Ld. Hardwicke directed the trustees of the conveyance to give plaintiff possession, and convey to him, with a saving clause for L.'s creditors, if any. Bennet v. Vade, T. 1742. 2 Atk. 324.

146. E. having obtained from T. the grant of a stewardship for himself and his heirs, under assurances that it was recoverable at pleasure, was ordered to pay costs for having abused his trust, and for his manifest intent to get the manor into his own hands, he was decreed to give up the grant of the stewardship.

Thornhill v. Evans, T. 1742. 2 Atk. 330. 9 Mod. 331.

147. Where in a treaty one party wilfully conceals a material fact to keep the other party in ignorance, and to profit by it, is a gross fraud, and equity will set aside the contract. Meade v. Webb, E. 1744. 4 Bro. P. C. 497.

148. If a conveyance good at law is set aside for fraud in equity, and the grantor is obliged to come into equity, he must do equity, or he shall not be relieved. Att. Gen. v. Baltol Coll. M. 1744. 9 Mod. 412.

149. A. obtained a conveyance from an insane person long before any commission of lunacy issued. This is a fraud, and the conveyance shall be set aside, though the consideration money was near the value of the estate. Evans v. Blood, H. 1746. 4 Bro. P. C. 557.

150. An agreement, if reasonable, and to settle family disputes, and no unfair advantage, shall not be set aside because the party was drunk, or paternal authority used. Cory v. Cory, T. 1747. 1 Ves. 19.

151. Where a deed, executed by one just after coming of age, to an agent,
without fraud, conveying a reversion for a nominal consideration of 180l. whereas a bounty or gift only was intended, the court would not absolutely rescind the deed, but decreed the agent to release the covenants, as being improper in a voluntary grant of a bounty. Cray v. Mansfield, H. 1750. 1 Ves. 379.

152. The court will set aside a fraudulent conveyance, in favour of a creditor by **elegant**, whether he could recover at law or not. Sed secus, if the deed had been merely voluntary, and no fraud. Bennet v. Musgrove, M. 1750. 2 Ves. 51.

153. A being poor and weak in his intellect, was prevailed upon by B. to sign a paper alleged to be an appointment of B. as receiver of a small estate then left for 20l. per annum on a lease almost expired; this paper afterwards turned out to be an agreement for a lease of the estate to B. at 14l. per annum. Soon after B. obtained an actual lease from A. of this estate for forty-one years at 14l. per annum, in consideration of 5l. a receipt for which was signed and witnessed, but no notice taken of the agreement: Held, the lease was void, as obtained by fraud and imposition. Webb v. St. Lawrence, T. 1751. 5 Bro. P. C. 30.

154. A father, by misrepresentation, imposed upon a trustee in a settlement to consent to his execution of a power. On a bill to set aside the appointment, the trustees were admitted to prove the imposition, but the father was not to clear himself. Scroggs v. Scroggs, E. 1755. Amb. 272.

155. No conveyance for a valuable consideration can afterwards be set up as a gift; many conveyances have been set aside on that ground; the present was a fictitious consideration, inserted by the desire of the grantor himself, yet it was set aside in equity, though found a gift by the jury, and an account was directed. Bridge- man v. Green, T. 1755. 2 Ves. 627.

156. A release *ex vi termini* imports a knowledge in the releaser of what he releases; and therefore where executors obtained a release of the orphanage share from the husband of a freeman's daughter, they were decreed to account, that the parties might elect the length of time, and alleged loss of vouchers being no bar to such account. Note, Henley, C. S. would give no opinion as to the right of a husband to release the orphanage share of his wife, but inclined to think he might.

Salkeld v. Vernon, E. 1758. 1 Edm. 64.

157. Where a husband by force compels his wife to execute a deed of separation, and thereby to accept a maintenance much inferior to his rank and fortune, equity will relieve the wife against this deed, and refer it to the master to settle a proper maintenance. Lambert v. Lam bert, E. 1767. 6 Bro. P. C. 272.

158. I. S. purchased an estate of his aunt for 100l., which was proved to be worth 200l. and upwards, but in the conveyance the consideration of natural love and affection was added: Held, a gross fraud on the aunt, and the conveyance was accordingly set aside. Fulmer v. Goff, H. 1774. 7 Bro. P. C. 70.

159. Purchase for a valuable consideration bona fide paid, held a good defence, though the consideration was much less than the real value. Bullock v. Sadlier, H. 1775. Amb. 764.

160. Equity will not set aside a deed entered into by parties apprised of their rights in order to put an end to a suit, although upon inadequate considerations. Stephens v. Id. Bateman, M. 1778. 1 Bro. C. C. 22.

161. Equity will not set aside leases for lives obtained by the agents of a deceased man of weak intellects, upon inadequate considerations, as fraudulent.—Gartside v. Isherwood, M. 1781. 1 Bro. C. C. 558.

162. A son, tenant in tail, subject to the life estate of his mother, settled his estate for the benefit of his family, in pursuance of an agreement in his mother's life-time; though the father had used his paternal authority in recommending his son to make this settlement, equity would not on that account set it aside upon the application of the other children, for the motive was to be applauded. Kinchant v. Kinchant, E. 1784. 1 Bro. C. C. 369.

163. R. W. seized in fee of lands, demised the same in 1696 to T. R. a papist, for lives; T. R. died in 1727, when W. R., his eldest son, also a papist, became seized as special occupant; in 1741 he conveyed all his interest to M. T. in consideration of 500l.; M. T. died in 1750, leaving C. respondent's wife, S. his heir at law, and M. who obtained administration; W. R. died in 1751, leaving an infant daughter A., and M. R. his widow, who entered and received the rents.
Appellants intermarried in 1770, during the minority of A., who became of age in 1772, and in 1778 appellants filed their bill, charging that W. R. was almost an idiot; and was imposed upon by J. K., for whom M. T. was only a trustee; that no consideration was paid; that the consideration pretended was made up of false accounts by J. K., who, being an attorney, had alarmed W. R. by telling him that his interest was discoverable under the property laws, and that therefore he must convey to some protestant to protect it, though J. K. knew that the original demise in 1696 was prior to the popery acts. That in 1741 J. K. filed a bill in the name of W. as a protestant discoveror, against W. R. praying to be decreed the benefits of the demise in 1696, and of the renewals on an allegation that T. R., the father of W. R., had, by his will in 1727, devised his interest to papists. J. K. proceeded in the cause, prepared the answers of all the defendants, and in 1742 the court decreed in favour of W., the protestant discoveror, which decree was drawn up by J. K. who caused it to be inserted; that depositions were read at the hearing, though by the registrar's minutes it appeared that none were taken in the cause. In 1742 W. assigned the decree to M. T. in trust for J. K. who purchased the inheritance of the lands. Appellants, after adducing many evidences of fraud and inadequacy of consideration, prayed that the decree in 1742 might be set aside for fraud, and a renewal of the original lease of 1696. Respondents, by their answer, insisted on the fairness of the transaction, which they explained, and insisted on the statute of limitations as to matters of account, and on length of time since the original purchase. Whereupon the court dismissed the bill, and their decree of dismissal was on appeal affirmed by the Lords. Mulehny v. Kennedy, E. 1786. 1 Ridg. P. C. 331.

164. A conveyance obtained from a person uninformed of his right will be set aside in equity, though no actual fraud or imposition appears. Evans v. Llewellyn, E. 1787. 2 Bro. C. C. 150. 1 Cox 338.

165. Equity will set aside a release of a legal demand improperly obtained, but will not decree payment of the legal demand. Pascoe v. Pascoe, M. 1788. 2 Cox 109.

166. A conveyance by a woman under any circumstances, and even the moment, before marriage, is good prima facie, and bad only if there be fraud, as where made depending the marriage treaty without notice. Lady Strathmore v. Boxes, E. 1789. 3 Ves. 28.

167. A deed obtained by fraud or duress is no revocation of a will made prior thereto. Hovey v. Wyatt, T. 1790. 3 Bro. C. C. 156.

168. Very clear and strong evidence is necessary to impeach a lease at a distance of time, on the ground of fraud originally practised in obtaining it. Chandos v. Brownlow, E. 1791. 2 Ridg. P. C. 397.

169. A having an estate in fee, and being tenant for life sans waste, of another estate, with the reversion in fee after an estate tail in B. his only son by a former marriage, became indebted by mortgage and otherwise, to a large amount. A. and B. joined in conveying both estates to trustees, upon trust, by sale or mortgage, sale of timber, or by rents and profits, to pay debts, and apply so much of the rents and profits of what should remain unsold, as should seem meet to them, as a sinking fund, and to pay the residue to A. and to settle the remaining trust estates (subject to an annuity to B. for the joint lives of him and A.) upon A. for life sans waste, with power to lease for twenty-one years only, remainder to trustees to preserve, &c. remainder subject to a jointure to A.'s wife, and portions for children by her, to the joint appointment of A. and B.; in default thereof to the appointment of B. surviving; in default thereof to B. in tail male, remainder to the other sons of A. in tail male; remainder to B. in tail; remainder to the daughters of A. in tail, with cross remainders; remainder to B. in fee, with powers of leasing, and full powers of management in the trustees, and a provision for the appointment of new trustees. The trustees raised a part by mortgage of the settled estate, which they applied to the debts. Upon the bill of A. to set aside the deed (except the trust for the debts) upon a general charge of fraud, misappropriation, and misrepresentation, or to control the management of the trust, and for an account against the trustees, the court held, first, that the deed could not be set aside partially for fraud, nor under this bill totally, for then the
prior estates in the settled estate must be re-vested clear of incumbrances, A. being under covenant to exonerate, and the mortgagees, who must either consent to change their securities or be paid, were not parties; 2dly, that general charges of fraud required no answer, and could not support a decree; that upon the evidence there was no fraud or mistake, and that B.'s joining to subject the settled estate was a sufficient consideration; 3dly, that the court would not interfere with the trustees, there being no misbehaviour, and that the payment of the annuity to B. was good. The bill therefore was dismissed with costs; and the trustees having been always ready to account, the court refused to retain it for that purpose, but without prejudice to a bill for that only. Myddleton v. ld. Knyon. T. 1794. 2 Ves. jun. 391. Vide Goring v. Nash, 3 Atk. 188. and notes.

170. Where the instruments are absolutely set aside for fraud, there ought not to be a reconveyance by the party who took under them. So, where there is a conveyance, and possession is retained, towards all third persons, the ownership is not de vested; but where deeds are set aside between the parties themselves and the heir of the party conveying, it must be upon actual fraud; and the retaining is only evidence, which, with reasonable proof of weak capacity, will be sufficient. So where deeds are set aside for fraud, but the estate has been conveyed to a third person, as an instrument not privy to the fraud, or where they are set aside on paying so much money, a re-conveyance ought to be decreed. Bates v. Graves, M. 1793, 2 Ves. jun. 287. Vide Kerrick v. Bransby, 3 Bro. P. C. 338. James v. Gravens, 2 P. W. 270. Bennett v. Vado, 2 Atk. 324.

171. If a deed is absolutely void at law for covin (said Ld. Eldon,) it may, perhaps, be treated as a nullity, but till the case of Hawes v. Wyatt, 7 Ves. 373. his lordship conceived there was a great difference between a deed void at law for covin, and a deed which in equity could be set aside for fraud, either by cancelling it, or by directing a reconveyance, on the ground that at law it was not a nullity, nor admitting the plea of non est factum, but that upon circumstances constituting a fraud in equity, the legal effect of it is reduced, and this court says it shall not prevail by directing an act to be done to reinstate the other party. If Hawes v. Wyatt is right, it contradicts Hicks v. Mors (Amb. 215) to a very considerable extent, and must be supported upon this principle, if any, that where a man is induced by fraud, this court considers him as having no will. Att. Gen. v. Vigors, E. 1803. 8 Ves. 283.

172. Defendant having lived for two years as housekeeper with plaintiff's father, who was very old and infirm, he first executed a will, giving all the residue to defendant, subject to the contingency of his daughter's death. A fortnight after, a deed was executed, and in six weeks after that, another deed. The father survived for some years. The only evidence of direct influence applied to a period four or five years subsequent to the execution of the deed. An account was also prayed of the receipts and expenditures of defendant during part of her service, under an agreement by which she was to have an allowance of 6d. in the pound. Defendant was a married woman, and had no property but stock; by her answer she denied fraud and undue influence, and insisted that she had duly accounted, and that the greater part of the money was laid out. Ld. Ch. knew no case in which upon facts so far posterior to the deeds, the proof had been put upon the party; he therefore refused to order the deeds to be delivered up without an issue, which plaintiff declined to take. As to the accounts, it was contended, on the authority of Hullme v. Tenant, (1 Bro. C. C. 16.) that defendant's separate property should be liable to answer any balance in her hands, but Ld. Ch. did not know how this court could give any execution against the property of a married woman. In Hullme v. Tenant, Ld. Thurlow went no further than the rents and profits of the wife's estate, not against the estate itself, and clearly not against her person." In this case the property is stock, and there is no instance of this court giving execution against stock pro nomine, upon which there is no lien. Nantes v. Corrock, M. 1803. 9 Ves. 182. Vide Dumas v. Dutens, 1 Ves. jun. 196.

173. The court in this case made a decree upon the evidence of a single witness against the positive contradiction of defendant's answer, containing circumstances giving greater credit to the deposition; the defendant having declined an
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issue. And the court also gave relief upon an instrument that had been delivered up under the ignorance of one party, and with the knowledge of the other as to a fact, upon which the right attached. East India Co. v. Donald, 2 Sch. & Lef. 280.

174. If A., having the fee-simple of an estate, be induced by fraud to accept a chattel interest, equity will control the setting up of the lease, but it is doubtful whether the court will interfere, if the party accepts the lesser estate through mere ignorance. Saunders v. Annesley, 2 Sch. & Lef. 101.

175. A. lease by a mortgagor to a mortgagee was set aside, the latter taking advantage of the distresses of the former, and using his mortgage as an instrument to obtain an undue advantage, and the lessor executing the lease on the faith of an agreement, that he was to be allowed a certain sum for maintenance of himself and family out of the property, which agreement the lessor did not perform, nor could he have secured on account of the rights of creditors: but it is doubtful whether the court would have set aside a fair lease on account of the mere relation between mortgagor and mortgagee. Gubbins v. Creed, 2 Sch. & Lef. 214.

176. A decree of foreclosure had on sequestration in 1777, in pursuance of the Irish statute of 7 Geo. 2. c. 14. against an absent mortgagor, known by plaintiff to be incompetent from mental imbecility to conduct his own affairs, and advantage having been taken in the account, of the state of defendant, of his absence, and of his having nobody to manage his defence, and a sale having been had in 1780 (in pursuance of such decree) to the person conducting the suit. The court set the whole aside as fraudulent, and directed an enquiry into the circumstances, upon the ground of which the decree and former proceedings were impeached in an original bill filed in 1785 by the heir of the mortgagor, and the court held that a charge in the bill, that A. "was of a weak and feeble understanding, approaching almost to idiocy," was an allegation sufficiently precise (no demurrer being taken) to put in issue that A. was "of insane memory; besides, it being proved that A. was incapable of managing himself or his affairs," he was held within the saving of sec. B. of the above statute, but this allegation would not have been sufficiently precise in a plea, nor in a bill, if demurred to. Coren v. Johnston, 2 Sch. & Lef. 280.

177. A., a trader, being indebted to B., and having agreed with the commissioners for wide streets, for the purchase of a lot of ground, proposed to B. that the conveyance should be made to him as a security for the debt, and by a note to his attorney directed the conveyance to be made to B. which was made accordingly, and at the same time a defeasance was prepared reciting the agreement, but it was never executed. A. then directed his attorney not to deliver up the absolute conveyance to B. till the defeasance should be executed, and afterwards A. became bankrupt: Held, that the conveyance to B. was an imperfect mortgage; giving him a specific lien in preference to the other creditors of A., yet decreed that B. should have the conveyance as a security for his debt; that the premises should be sold, and after payment of B.'s principal and interest, that the surplus should go to the assignees of A. Card v. Jaffrey, 2 Sch. & Lef. 347. Vide etiam Russell v. Russell, 1 Bro. C. C. 269. Et post, tit. Mortgage ii.

178. A. seised of the reversion in fee of premises, which were let to E. for a term at 15l. yearly rent, agreed bona fide to sell to B. the rent reserved by that lease for the residue of the term, for a sum, the principal and interest was to be reimbursed to B. in that time by the perception of the rent, supposing it punctually paid; and at the same time A. being induced by the accommodation offered him by B. in purchasing the rent, made a lease for lives renewable for ever to B. of the same premises, and at the same rent which E. paid, but not to commence or be payable till the expiration of E.'s lease, at which time the premises would be worth 20l. or 22l. per annum: Held, that this lease is not impeachable as a lease coupled with a loan, the first transaction being a fair purchase of the rent, and that the second, though induced by the first, was not distinguishable from a lease made upon payment of a fine. Lukey v. O'Donnell, 2 Sch. & Lef. 466.

179. A woman, ignorant of her rights, made a conveyance, upon a misrepresentation of the circumstances of the property,
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and though she was of full age, acquired in the sale, and received the interest of the purchase money for 12 years, the court set the conveyance aside, and the court said that no act will amount to a confirmation of an impeachable transaction unless the party has become aware of the fraud, and is also aware that his act will have the effect of confirming it. Murray v. Palmer, T. 1805. 2 Sch. & Lef. 474.

180. The words, "for divers good causes and considerations" thrown into a purchase deed, are symptoms of fraud. S. C. ibid. 488.

181. Where an agent has obtained valuable leases and agreements from his principal, who reposes confidence in him, and the agent availed himself of the inexperience and extravagance of the principal, the court will set them aside, or order them to stand as a security only for what has been advanced. Watt v. Groce, T. 1805. 2 Sch. & Lef. 492.

182. An impeached deed cannot be supported by evidence of considerations different from those alleged in it, and where the instrument is shown to be false, it lies on the party claiming benefit under it to support it. S. C. ibid. 501. Vide Vaughan v. Lloyd, cited 5 Ves. 48.

183. Where an instrument is incorrect in a matter that demonstrates fraud, the court in general will set it aside, but if the incorrectness arises from pure mistake, ignorance, or accident, the instrument may be reformed; yet where it is prepared by the party himself who seeks the benefit of it, this alone is sufficient to raise a strong suspicion of fraud. S. C. ibid. 509. Vide Piddock v. Browne, 3 P. W. 288.

184. Where the keeper of a house for lunatics obtained a deed by fraud and undue influence from a person under his care, the court set it aside, as within the general principle arising from the relation of guardian and ward, or attorney and client; for the court will set aside any transaction which appears to have grown out of the relation between guardian and ward, though the accounts had been settled, and the relation between them had ceased; so, independent of all fraud, an attorney shall not take a gift from his client while the relation subsists, even though the transaction be the most moral in its nature. Wright v. Proud, M. 1806. 13 Ves. 196, Vide Lady Sanderson's Ca., and Wells v. Middleton, cited in Morse v. Royal, 12 Ves. 372, and in Hatch v. Hatch, 9 Ws. 294.

185. Upon consideration of the nature of the deeds themselves, the circumstances under which, and the confidential relations of the persons by and from whom they were obtained, the court ordered them to be set aside as absolute conveyances, and directed them to stand as a security only for what should appear to be due on a general account, though 17 years had elapsed, for the parties throughout were ignorant of their rights, and were under the same influence and control, besides which there was no confirmation. Purcell v. McNama, T. 1806. 14 Ves. 91.

186. Where there was a great inadequacy of consideration combined with misrepresentation and surprise upon parties in extreme distress, ignorant of their interests, and not properly protected, the court set aside a conveyance by lease, release and fine, though the transaction took place 12 years before the bill, and a former bill had been dismissed, on account of plaintiff not appearing, which objection was not made either by plea or answer. Pickett v. Loggan, M. 1807. 14 Ves. 215.

187. Where parties enter into an agreement, the effect of which neither of them understand, the court will set it aside upon the ground of surprise, though no fraud appears. Willan v. Willan, E. 1809. 16 Ves. 72.

188. Where an uncle on his nephew's coming of age (to whom he had been guardian and agent,) obtained leases from him at an undervalue, and held out other considerations than the reserved rent, but for which he gave no security; the court set the claim aside as unduly obtained. Dawson v. Massey, M. 1809. 1 Ball & Br. 219.

189. Where a man ignorant of his rights and of the situation in which he stood as an expectant heir, made a grant of his reversionary property, and it appeared that such grant was procured by fraud and imposition, the court set it aside, notwithstanding it was afterwards confirmed by the grantor, and a space of 84 years had elapsed, and that time satisfactorily accounted for; for in such transactions the court will not look too minutely into the circumstances, but on grounds of public policy will set aside.
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Vide Cory v. Cory, 1 Ves. 19. Johnson
Vide Medlicott, 9 P. W. 130. (n.)

190. Where a deed is executed in order
to confirm a grant, (impeached by
suit) and to compromise the rights of
the grantor, the court will set it aside even
though the party be apprised of his
rights, (a) provided he be compelled to
accede to the deed of confirmation by po-
vertv and distress, occasioned by him by
whom the confirmation was required; but
where a man sui juris, and fully apprised
of all the circumstances under which a
deed of confirmation is required, voluntar-
ily executes it, the sufficiency of the con-
sideration cannot be questioned, nor will
the court relieve a man who deliberately
confirms his former acts; (b) but every
deed of confirmation must be free from
fraud, (c) and so must a deed of compro-
mise, (d) though mere inequality of con-
sideration is not sufficient to set it aside. (e)
S. C. ibid. 330. 359. (a) Vide Cann v.
Cann, 1 P. W. 723. Cole v. Gibbons, 1
Ves. 503. 3 P. W. 290. Crowe v. Bal-
fard, 3 Bro. C. C. 117. (b) Chesterfield v.
Janssen, 1 Atk. 344. (c) Morse v. Roy-
al, 12 Ves. 355. (d) Baugh v. Price, 1
Wils. C. B. 320. Stephens v. Ld. Bat-
eman, 1 Bro. C. C. 22. (e) Stapilton v. Sta-
pilton, 1 Atk. 2. Curwin v. Milner, 3 P.
W. 293. (n.) Vide etiam Gowland v. De
Faria, 17 Ves. 20.: where Sir W. Grant
held, that in dealing with an expectant
heir, acquiescence went for nothing dur-
ing the continuance of that situation.

191. A lease deliberately executed
cannot be set aside, on account of an un-
-founded though justifiable assertion of the
lessee pending the treaty, but no wilful
misrepresentation; nor can it be im-
pitched on the ground of a mistake, in
omitting a general warranty in the lease,
such not constituting a part of the agree-
ment. Legge v. Croker, H. 1811. 1
Ball & Be. 506.

192. It is a general rule, that a court
of equity will not assist a person who has
obtained, or wishes to get rid of an
agreement, or deed, on the ground of
more intoxication. Sed secus, where any
contrivance was used to draw him in to
drink, or any unfair advantage was taken
of his situation, or where there is that
extreme state of intoxication which de-
prives a man of his reason, for that
would invalidate a deed even at law.—
Cooke v. Clayworth, H. 1811. 18 Ves. 12.
DEEDS III.

Obtained by Fraud, Durex, or Circumvention.

fore a decree) without consent, though
an answer had been put in denying the
charge of undue influence. Ld. Eldon,
however, said, there would have been
no objection at that early stage of
the cause, to direct an issue to try a single
fact; such as legitimacy, competence, or
the like, (a) which differed much from
an enquiry by a jury, whether an instru-
ment had been obtained by fraud, for the
latter would bring into hazard part of
the very vital and essence of an equita-
ble jurisdiction. (b) Besides, there is this
distinction between the jurisdiction of
the courts of law and equity in questions
of fraud; that at law fraud must be
actually proved and not presumed, but
equity will entertain jurisdiction upon
instruments unduly obtained, where a
court of law could not enter into
the question. Formerly, the courts of law
never would interfere with objects of
improper conduct; such as marriage
brouage bonds, or the like, though they
now do, if the plaintiff will waive the
better relief which equity would give
him; but even then, the defendant may
object to an issue till it is shown on re-
cord that the court ought to grant it,
that if there is not ground enough to
have the instrument delivered up in
the first instance, though there be enough to
show that it ought to go to a trial. Ld.
Eldon said, it would endanger the juris-
diction to direct an issue in so early a
stage of the cause, and therefore he step-
ped the motion. Fullagar v. Clark,
E. 1812. 18 Ves. 481. Vide (a) Moss v.
Matthews, 3 Ves. 279. Eldridge v. Por-
ter, 14 Ves. 139. Blythe v. Elmhirst,
Vide etiam (b) Chesterfield v. Janssen,
2 Ves. 155. 1 Atk. 352.

197. But to set aside a lease at a very
inadequate rent which was obtained by
the contrived and habitual intoxication of
the lessor, immediately on his coming of
age, viz. at seven o’clock in the morning of
the very day after a night’s hard
drinking with the defendant; defendant
relied on a deliberate confirmation five
weeks afterwards; lease set aside with
costs. Say v. Barwick, M. 1812. 1 Ves.
& B. 195.

198 To a bill to set aside a convey-
ance for fraud, inadequacy, &c. a plea of
title paramount, under a former convey-
ance, of all the estate and interest under
which plaintiff claimed was allowed.
Hove v. Duppa, E. 1813. 1 Ves. & B.
511.

199. An agreement was entered into
between an uncle and his nephew, to
grant a sub-lease to the latter at a fixed
rent, with a covenant for perpetual renew-
al, of premises held by the uncle under
a church lease, renewable on fines at
the will of the lessors, only a few
days before the uncle’s death, and at the
time he was confined of the illness of
which he died, and was in such a state of
bodily and mental inability, as rendered
him incapable of transacting business
which required deliberation and reflec-
tion: Held, that this agreement, though
for valuable consideration, and in that
view of it, unreasonable, should be set
aside; but Ld. Redesdale doubting whe-
ther (even if there had been no evidence
of imbecility,) an agreement, made under
such circumstances, ought not to be set
aside on the ground of surprise and mis-
apprehension. And his Lordship added,
that since it was unfit that such an agree-
ment should be acted upon in equity, so
it was unfit that it should be acted upon
at law; it was therefore ordered to be
delivered up and cancelled. Further-
more his Lordship said, that, as the
agreement purport ed to be for valuable
consideration, the court could not, allege
it was partly for valuable consideration,
and partly for natural love and affection,
merely because it was made between re-
lations; for in such case no agreement
for valuable consideration between re-
lations could ever be questioned, how-
ever inadequate the consideration. Wil-
lan v. Willan, E. 1814. 2 Dow P. C.
274.

200. The court will not enforce a deed
executed by the members of a family to
determine their interests under the will
and partial intestacy of an ancestor,
where it appears on the face of the deed
that the parties did not understand their
rights, or the nature of the transaction,
and that the heir surrendered an un-
impeachable title without consideration,
and evidence was given of his gross ign-
orance, habitual intoxication, liability
to imposition, and want of professional
advice, although no direct fraud was
proved, and there was an acquiescence of
five years. Dummage v. White, H. 1818.
1 Swanst. 137. Vide Frank v. Frank,
1 Ch. Ca. 84. —— v. Cann, 1 P. W.
DEEDS III. & IV.

Deeds lost, concealed, cancelled, suppressed, or destroyed.


201. Where a deed of gift was obtained by undue influence over the donor, who was 84 years old and nearly blind, and placed a confidence in the donee, the court ordered it to be delivered up. Griffiths v. Robins, E. 1818. 3 Madd. 191.


Of leases renewed and connected with a loan, vide tit. Interest, sect. ix. and Mortgage, sect. v. For deeds obtained by attorneys from their clients, vide post, tit. Maintenance, Solicitor and Client, sect. i.

DEEDS IV.

Deeds lost, concealed, cancelled, suppressed, or destroyed.


204. After a decree of discharge affirmed on appeal to the Lords, a bill was brought for discovery of a deed (said to be burnt pending the appeal) which made out plaintiff's title, and the bill was brought, to the end, that after such discovery, plaintiff might apply to the Lords for relief. On demurrer, defendant was ordered to answer, but plaintiff to proceed no further without leave of the court. Barbon v. Searle, M. 1666. 1 Vern. 416.

205. A widow, before her second marriage, assigned over several goods to trustees, for the benefit of her children by her first husband; and the second husband having suppressed this deed, which was made out without his privy, and whereby the particulars of the goods would have appeared, he was decreed to pay 800l., which was proved to be the sum mentioned in the deed, and to be the value of the goods. Hunt v. Matthews, M. 1686. 1 Vern. 408.

206. If a lease of lands (by deed) is lost, the lessor may declare on a demise in general, without saying it was a lease in writing; otherwise of a thing which lies in grant. Tavers v. Moor, E. 1689. 2 Vern. 98.

207. A tenant in tail, remainder to B. in tail: A. not knowing of the intail, made a settlement on his wife for life, for her jointure, which B., who knew of the intail, engrossed, and after the death of A., recovered in ejectment against his widow; but the court relieved the widow, and granted perpetual injunction for this fraud in B. concealing the intail, which, if disclosed, the settlement might have been made good. Raw v. Potts, M. 1691. Pre. Ch. 35.

208. A. made a settlement on his marriage, whereby his son took a life estate in his lands, subject to his own life estate, and plaintiff remainder in fee, after divers intermediate remainders. On the son's death, A. got at the settlement and destroyed it, but the counterpart remained entire in his own hands, which,
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Deeds lost, concealed, cancelled, suppressed, or destroyed.

In his answer, he confessed, but insisted that plaintiff's remainder being voluntary he could have no aid in equity. Decreed, the counterpart to be brought into court, and there remain to prevent A. from selling the estate from plaintiff. Brookbank v. Brookbank, T. 1691. 1 Eq. Ab. 168. pl. 7.


210. A settlement under which plaintiffs claimed being lost, but having been proved in Chancery by plaintiffs themselves 30 years ago, when they were not concerned in interest, though they were since entitled by that deed. Ordered, that a copy of the deed should be admitted to be read at law, and also that plaintiff's depositions should be read to prove the deed, although they now claim under it. Lady Holcroft v. Smith, T. 1702. 2 Freem. 259.

211. Defendant by answer confessed he had in a passion burnt his marriage articles, but it being proved that he produced them after the time he said they were burnt, he was committed, and though he made oath he had them not, or could not produce them, yet the court would not discharge him till he consented to admit the articles to be as set forth in the bill. Sanson v. Ramsey, T. 1706. 2 Vern. 361. Et vide Gartside v. Ratcliffe, M. 1676. 1 Ch. Ca. 292. S. P.

212. In articles there was a covenant to covenant in the settlement that the lands were free. This is not a covenant that the lands are free; and in such a case if any incumbrance is discovered between the executing the articles and the settlement, whereof the party had no notice, that incumbrance shall be discharged before the settlement is sealed, for the concealment is not only a fraud, but it would be needless to enter into a covenant already broken; yet against all other incumbrances discovered afterwards, the party's own covenant only must remain. Vane v. Ed. Bernard, T. 1708. Gilb. Eq. Rep. 6.

213. A. signed a note, by which he acknowledged himself to be indebted to his brother and heir in 5000l., but his brother knew nothing of it. A. kept the note in his own custody, and it was found among his papers at his death. Adjudged a void note, and as a matter intended but not perfected. Disher v. Disher, T. 1712. 1 P. W. 204.


Where a deed is suppressed by the heir, the party claiming under such deed shall hold and enjoy, and the heir or suppressor of the deed shall convey to him. Dalston v. Coatsworth, M. 1721. 1 P. W. 731.

215. A parol agreement being confessed in the answer, shall be executed, especially where the agreement was originally in writing, but was lost. Honer v. Read, H. 1724. 9 Mod. 86.

216. A bond for performance of articles, though cancelled, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond. Anon. H. 1724. Gilb. Eq. Rep. 183.

217. A. contracted with B. to sell him a house in Middlesex, which was settled by his marriage articles, but not performing his contract, and availing himself of the want of registry of the articles, the court decreed him to pay all costs for the fraud in concealing the deed. Beattiff v. Smith, M. 1727. 1 Eq. Ab. 357. 11.

218. Where a defendant has concealed the deeds making out plaintiff's title, he shall account for the profits from the time plaintiff's title accrued. Bennet v. Whitehead, M. 1731. 3 P. W. 645.

219. It is but a slight equity for an heir, to say he wants the writings for his ancestor, unless he claims under some deed of entail concealed from him by his ancestor's devisee. Tanner v. Wise, T. 1734. 3 P. W. 296. Ca. temp. Talb. 284.

220. Testator's brother, J. C. and one of his executors, without the interference of his co-executor, possessed himself of testator's papers, and publicly destroyed such as he thought fit, declining the
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widow's request, that some person on her behalf might be present at the opening of the papers. Per curiam, although each executor has the whole office in him, and might do what J. C. did, yet he should have staid for his co-executor, who did not seem willing to act. J. C. does not seem to have been interested, and if he had wished to conceal any papers, he would not have burnt them publicly, but clandestinely. The court thought the title of J. C. subsisting, and as no fraud appeared in him, equity must follow the law. Cowper v. Cowper, M. 1734. 2 P. W. 746.

221. If a mortgage is found cancelled in the possession of the mortgagor, it is as much a release as cancelling a bond, but there must be some deed to vest the estate in the mortgagor. Harrison v. Owen, M. 1758. 1 Atk. 520.

222. A put mortgages into defendant B.'s hands, to receive the principal and interest, who pawned them to defendant S. for 100l. : Hold, that as B. must, upon the face of the deeds themselves, appear to have no property in them, S. shall deliver the deeds to the plaintiff, and leave the pawnee to his remedy at law against B. Jackson v. Butler, T. 1742. 2 Atk. 306.

223. A purchaser objected to a title for want of a deed, which had been enrolled, but could not be found. A copy of it taken in 1632, attested by five witnesses, was produced in court: Held, that this copy would have been sufficient even without an attestation. Sed secus, if the original deed has been in a private hand. Harvey v. Philips, E. 1743. 2 Atk. 541.

224. Settlement by lease and release, the lease was lost, and that was objected to as a defect. Per curiam, that does not at all affect the substance of the case, for a consideration being proved, the release will amount to a covenant to stand seized. Bloom v. Jones, M. 1744. 1 Atk. 190.

225. Court rolls were burnt. The presumption therefore that a surrender was lost is a matter of law, and neither law nor equity can go upon a presumption of evidence, which is the same in both courts in cases of casual loss; but where deeds are destroyed by a party interested, equity will go further than a court of law, in odium spoliatoris. Cooke v. Helier, T. 1749. 1 Ves. 235.

But courts of law seem to have amplified their jurisdiction on this point, so as now to take cognisance of cases of bonds lost, Sec Read v. Brookman, 3 T. R. 151.


227. A lost deed may be proved by circumstances, first showing that it once existed, or that it cannot be come at; and next, the uses must be proved, which may be done by reading the draft of the deed, supported by strong evidence. Whitfield v. Fawset, H. 1750. 1 Ves. 389. But if it be destroyed or in the hands of an adverse party, then parol evidence of the contents shall be allowed. Cole v. Gibson, T. 1750. 1 Ves. 505.

228. On a bill to supply the loss of a deed charged to be in defendant's hands, though a strong case for making an immediate decree, yet a trial at law must be directed if defendant insists on it; but courts of law will always admit the depositions of the witnesses in equity to be read. Clavering v. Clavering, E. 1751. 2 Ves. 233.

229. The trusts of a settlement made after marriage, were to raise portions for daughters in failure of issue male, to whom an estate was limited in tail; a daughter, not knowing of the settlement, gave a general release to an only son of the marriage, who died. Decreed, the portion to be raised notwithstanding the release. Ramadan v. Hylton, T. 1751. 2 Ves. 305. Vide Bingham v. Bingham, 1 Ves. 126.

230. The rules of evidence for supporting the contents of a lost deed are, first, to show that the deed is in the hands of the opposite party; and next, a reasonable account must be given of the destruction of it, as well as of its contents; in this case, it being proved that the deed was burnt, the court permitted a copy of it to be read. Salters v. Melhuish, M. 1754. Amb. 247.

231. W. F. made a secret conveyance of several estates to his daughter, to whom he had given a portion on her marriage, and she was also jointured, but he kept possession of the estates and the conveyances, and afterwards by will devised the estates: Held, the devise was good, testator having kept the conveyance a secret, and he continued in possession of the estate. There was evidence that he made the conveyance to avoid serving as
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Deeds lost, concealed, suppressed, or destroyed.—Bill for Inspection of.

237. It seems that a suppression of deeds is a strong ground for the interference of a court of equity to prevent the operation of a fine, even in the case of a legal estate, but in the case of a trust estate it is clear. Bowles v. Stewart, ibid. 225.

238. Concealment of a material fact is sufficient to avoid a release obtained by the person whose duty it was to make the disclosure. S. C. ibid. 209.

239. The court will presume the existence and execution of a settlement by indentures of lease and release, under such circumstances as the existence of the drafts, the statement in an abstract of the title, and the existence of the lease for a year, of other estates appearing to have been included in the same plan of settlement. And the court said, that the production of a paper, purporting to be an attested copy, may, with other evidence, have considerable weight. Ward v. Garmous, T. 1810. 17 Ves. 134.

240. A deed of gift, found cancelled among the papers of the grantor after his death, (in the absence of evidence of its having been satisfied,) will be enforced against the grantor’s representatives, on the presumption that it was cancelled improperly. Sluyckin v. Hunter, M. 1815. 1 Meriv. 40.

241. Where a lease and release were executed to create a tenant to the praeipe in a recovery, and the lease was lost; it was held to be a case to which the relief given by the 14 Geo. 2. c. 20. s. 5. applied. Howes v. Ailsbie, T. 1816. 1 Mudd. 551.

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Bill for Inspection of, setting aside, and Delivery up of, Deeds.

942. Equity will oblige a tenant for life to deliver deeds to the heir, confirming the life estate; but if there are any mesne remainderers in tail, as long as there is a possibility of issue, the court will not order them to be taken out of the hands of the tenant for life. Joy v. Joy, 2 Eq. Ab. 284. pl. 4.

243. If deeds are deposited with A. by mortgagor and mortgagee, before the condition broken; A. is trustee for the mortgagor, afterwards for mortgaggee; and if A. deliver them to the mortgaggee, equity will not decree them to be delivered to the mortgagor. Aeon. 2 Eq. Ab. 284. pl. 3.

244. If an heir at law brings a bill for deeds and writings against the widow of his ancestor, he must establish her jointure, though it was made after the marriage, and not pursuant to any marriage articles, but purely voluntary. Towers v. Dany, M. 1687. 1 Vern. 479.
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245. If two persons claim under the same settlement, the court will order it to be brought into court that both parties may use it and take copies. Banbury v. Briscoe, H. 1681. 2 Ch. Ca. 42. Vide Wright v. Plumtre, 3 Madd. 481.

246. Plaintiff was a remainder-man in tail, in a voluntary settlement, and the bill was for a discovery of the deed; but it appearing to the court, that the intail was discontinued, the court would not relieve. Kelly v. Berry, H. 1688. 2 Vern. 35.

247. Bill to discover whether in a mortgage made by A. to B. which had been assigned to defendant, there was not some trust for the benefit of plaintiff. Defendant, by answer, denied that there was any trust declared for him. Upon replication, the question was, whether defendant was obliged to produce the deed. The court would not compel him to produce it, saying, that by this method all purchasers might be blown up. Hall v. Atkinson, M. 1704. 2 Vern. 463. The reporter adds a quare to this.

248. If a conveyance is made with a power of revocation, and afterwards is revoked, to whom the inheritance belongs, may compel the deed to be delivered up to him to be cancelled, because the deed of revocation may be lost, and then it is unreasonable the other deed should be standing out. Anon. E. 1705. Gilb. Eq. Rep. 1.

249. I. S. lent money on a bad security, which his lawyer advised him was good; if it prove bad, and he has notice that another made title to it, he must deliver up all the writings, except the mortgage deed, for in that there may be a covenant for payment of the mortgage money. Opie v. Godolphin, M. 1720. Pre. Ch. 548.

250. A peer, disinherited by his ancestors is entitled to the favour of the court to have the family deeds brought before the master, to see whether any thing can be discovered for his advantage. Ld. Ch. said, it was ingratitude to the crown for a peer to devise the estate away from the honours. Earl of Suffolk v. Howard, T. 1723. 2 P. W. 177.

251. A bill to compel trustees to enter to preserve contingent remainders, is of the first impression, for their title is merely at law; but every remainder-man hath a right to the aid of equity, to compel persons to bring into court the deeds and evidences relating to the estate. Reeves v. Reeves, H. 1725. 9 Mod. 128.

252. On a bill for a commission to ascertain the boundaries of a manor, an issue was directed to try what lands were in defendant's possession. But on an appeal, this decree was reversed, and a commission of enquiry directed, with a previous inspection of all deeds. Rowe v. Barker, E. 1725. 3 Bro. P. C. 180.

253. Bill by one co-heir against another, who set up testator's will in his favour, but acknowledged the deeds to be in his hands. He shall produce the deeds to plaintiff, though the validity of the will has not yet been tried at law. Floyer v. Sydenham, M. 1725. 9 Mod. 99. 2 Ch. Ca. 4. Sel. Ch. Ca. 2.

254. An order made at the Rolls, that defendant might inspect a deed proved in the cause, and referred to by the deposit, as being part thereof, was discharged by Ld. Ch., for that defendant before hearing must not see the strength of the case, or any deed to pick holes in it. Davers v. Davers, E. 1727. 2 P. W. 410. Vide Hodson r. Ld. Warrington, 3 P. W. 35.

255. Defendant's witness proved a deed, and referred to it in his deposition. Plaintiff cannot compel defendant to produce the deed at the hearing, the reference not making it part of the deposition. Hodson v. E. of Warrington, 11. 1729. 3 P. W. 34. Quaere tamen? says the editor. Et vide Bettison v. Farrington. 3 P. W. 364.

256. It is but a slight equity for an heir at law to say he wants writings, when his title as heir stands in need of none, unless he claims under some deed of intail concealed by a widow or executor. Tanner v. Wise, or Morse, T. 1734. 3 P. W. 296. Ca. temp. Tabl. 284.

257. A died seised of lands, which descended upon B. and C. in co-parcenary. B. died before receipt of rent or partition, and his widow brought a bill, to have her dower assigned, suggesting that C. had all the title deeds; Held, that the widow shall be relieved. Moor v. Black, T. 1735. Ca. temp. Tabl. 126.

258. Plaintiff claimed by virtue of a remainder in tail, expectant on tenant in tail's dying without issue, and was the heir male of the family. Defendants were sisters and heirs general of the tenant in tail, and by their answer showed
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that their brother, the tenant in tail, suffered a recovery, declaring the use to himself in fee, and referred to the deeds in their custody. The court ordered that, before the hearing defendants should leave with their clerk in court the deeds making the tenant to the præcipue, and leading the uses of a recovery. Bettison v. Farringdon, T. 1735. 3 P. W. 363.

259. Though the court will order title deeds to be deposited in the case of a remainder-man, whose estate is expectant on a mere tenancy for life, yet it is never done, where plaintiff’s interest is more remote. In re Irv. E. 1738. 1 Atk. 491. Vide Ld. Lempster v. Pomfret, Amb. 154. Southby v. Stonehouse, 2 Ves. 612. Ford v. Peering, 1 Ves. jun. 72. 77. Smith v. Cooke. 3 Atk. 382.

270. A jointress had her own part of the marriage settlement in her custody, and became possessed of her husband’s, as his executrix; on motion, she was ordered to produce it to the clerk in court, but not to deliver it up, that being the very end of the bill. Aston v. Aston, H. 1745. 3 Atk. 302.

261. A jointress or a purchaser ought to produce their deeds, to see if the lands they claim are comprised therein. S.C.

262. A remainder-man in tail, or a revisioner in fee, may go into equity to have the title deeds secured for his benefit, though an estate for life is standing out. Smith v. Cooke, T. 1746. 3 Atk. 382.


264. But where a son remainder-man in tail, under a settlement made by his grandfather, in which the father was tenant for life without impeachment of waste, preferred a bill to have the title deeds brought into court, Ld. Hardwicke refused to direct it, observing, that some third person and a secure place, agreed upon by the parties, would be a much more proper repository than a master, and he added, that the relief prayed was the first application of the kind. Pyncent v. Pyncent, v. M. 1747. 3 Atk. 571.

265. Where an heir at law admits the will by his answer, and only says he is the heir of the testator, that is not sufficient to entitle him to the inspection of the title deeds and writings belonging to the estate, especially if he does not point out what deeds he wants. Potter v. Potter, T. 1749. 3 Atk. 719.

266. As an heir, before he has established his title at law, may go into equity to remove terms out of his way, so he may, for the production and inspection of deeds and writings. Harrison v. Southcote, T. 1751. 1 Atk. 546. 2 Ves. 389.

267. Where a defendant, by answer, sets up a title inconsistent with plaintiff’s claim, plaintiff cannot in equity oblige him to discover his title deeds; secus, if bill charges that deeds relating to plaintiff’s title. Baden v. Dore, T. 1752. 2 Ves. 445.

268. A disinherited heir may bring a bill for the inspection of deeds and writings, but there is no pretense that he shall pay costs, unless he appears to have no title, and continues to molest defendant. Leman v. Atie, H. 1753. Amb. 163. Vide Shales v. Barrington, 1 P. W. 481.

269. The court will allow a tenant for life to have possession of the title deeds except where they have been ‘brought into court (under an order) for safe custody. Webb v. Ld. Lymington, 1 1757. 1 Eden 8. Such applications by a tenant for life have been granted. Duncam v. Mayer, 8 Ves. 320. Churchill v. Small, and Knott v. Wise, cited ib. In Hicks v. Hicks, 2 Dick. 650. Ld. Kenyon is reported to have refused such an application, but no such order was found: and it is said in 1 Ves. jun. 77. that it stood over to look for cases. Ed. (n.)—One having a freehold interest has prima facias a right to hold the deeds. Ford v. Peering, 1 Ves. jun. 72. Strode v. Blackbourne, 3 Ves. 225. Bowles v. Stewart, 1 Sch. & Lef. 209. But the court has often deposited the deeds for the benefit of a remainder-man expectant after an estate for life. Vide Joy v. Joy, 2 Eq. Ab. 284. Ivie v. Ivie, 1 Atk. 431. Smith v. Cooke, 3 Atk. 382. Lempster v. Pomfret, Amb. 154. Southby v. Stonehouse, 2 Ves. 612. Ford v. Peering, supra. So, in the case of a jointress on confirmation of her jointure,
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270. Upon a bill by heir at law, for discovering and delivering up, or depositing title deeds, against persons in possession of them, as executors, and in possession of the premises by agreement with a tenant by the curtesy; plaintiff need not state every link of his pedigree. *Ford v. Peering*, M. 1789. 1 Ves. jun. 72.

277. Whenever a plaintiff has established an interest in any instrument in the hands of the defendant, he is in general entitled to a production of it. *Smith v. Northumberland D.*, E. 1797. 1 Cox 365. But in a subsequent case it was held, that he can only claim that right where his interest is in common with that of the defendant. *Burton v. Neville*, E. 1790. 2 Cox 242. And it was also held that a statement in a defendant's answer of the contents of an instrument, is not sufficient for the production without an express admission that the instrument was in his custody or power. *Erskine v. Bize*, E. 1790. 2 Cox 223.

272. A plaintiff claiming under a deed, not stated particularly by him, and not particularly and explicitly admitted by the defendant, cannot be entitled to a judgment or decree founded upon such deed against such defendant, without producing and proving such deed. *Bunney v. Moore*, E. 1791. 2 Ridg. P. C. 323.

273. The court will not order a plaintiff to produce a deed, though stated in his bill, at the instance of a defendant, before hearing; he must file a cross bill. *Anon*. E. 1792. 2 Dick. 778.

274. Bill by a tenant for life in possession, for a discovery and delivery of title-deeds, plea, a mortgage in fee by a former tenant for life, and defendant alleged himself to be seized in fee without notice. Ordered to stand for an answer, with liberty to except. *Strode v. Blackburn*, T. 1796. 3 Ves. 222.

275. A mortgagee of the unsettled part of an estate must discover the boundaries, and the title deeds are incident to the possession under the freehold title. *S. C.*

276. Motion that defendant should produce deeds, &c. at the trial of an ejectment refused, for the court will not aid plaintiff in proceeding at law without a decree. *Aston v. Ld. Exeter*, T. 1801. 6 Ves. 288. *Vide Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66.

277. Upon a disputed title to a lease granted by a corporation, a trust being set up against the lessee, a motion was made to compel the corporation to produce surrendered leases, counterparts of renewed leases, &c. after a *subpoena duces tecum* had been ineffectually served. Ld. Ch. expressed his surprise that the subpoena had not been obeyed, and said that in some way the production must be enforced. His lordship directed the motion to stand for judgment, but no order was made. *Cock v. St. Bartholomew's Hosp. Chatham*, H. 1803. 9 Ves. 138.

278. An answer, admitting the execution of a power of attorney to collect debts, and craving leave to refer to it when produced, is not a ground to move for the production of such power, the answer not having also admitted that it was in the possession or power of defendant. *Darwin v. Clarke*, H. 1805. 8 Ves. 158.

279. Trustees under a will, and the tenant for life of testator's estate, petitioned that the title deeds might be delivered out of court by the master to the trustees, to whom the estate had been conveyed to the uses of the will. In support of the petition, the orders in *Webb v. Webb*, T. 1757. (1 Dick. 298.) and *Churchhill v. Small*, T. 1769. (6 Ves. 222. n.) were produced, and *Knott v. Wise*, E. 1780. was mentioned, in which Ld. Thurlow said that a remainder-man had not any action at law, nor any equity to take the deeds out of the hands of the tenant for life. Upon these authorities Ld. Ch. made the order. *Duncombe v. Mayer*, E. 1803. 8 Ves. 320. *Vide Ford v. Peering*, 1 Ves. jun. 76, 77.

280. Tenant in tail in possession under a marriage settlement, filed his bill for a discovery and delivery of the title deeds. Defendant pleaded a mortgage by the tenant for life, alleging himself to be seized in fee, and in possession of the premises and deeds as apparent owner of the estate. Plea allowed, upon the rule that a court of equity will give no assistance against a purchaser for a valuable consideration, without notice. *Waltzey v. Lee*, M. 1803. 9 Ves. 24. See this case more at large, *post*, tit. *Vendor*, i.

281. Where lands have been taken for the service of government, under the
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statute 44 Geo. 3. c. 95. and an application is made to the court of Exchequer to lay out the purchase-money in government securities, to the uses of a certain will, that will must be produced in court, attested by one of the subscribing witnesses on affidavit, for the court will not make an order upon production of the probate only. *Exp. Templar, an Infant, M. 1804.*  2 P. Smith, 90.

282. Upon petition the court ordered the proceedings under a commission of bankrupt which had been superseded, to be produced at the hearing of a cause in Chancery in Ireland, not as a matter of course, but with a view to extract evidence from the bankrupt's examination; and Ld. Ch. said, where the papers are of record in another court of justice, this court says, if they would be evidence, they shall be used at the hearing, saving all just exceptions, but in that instance the determination is upon the production in this court of papers, for which the party can apply to the other court de jure. *Exp. Bernal, M. 1805.* 11 Ves. 557.


285. Plaintiff claimed to be tenant in common with defendant, under a settlement which he stated in his bill, but which he represented himself as incapable of setting forth with certainty, the same being in defendant's possession: general demurrer to a bill of discovery overruled, and the settlement ordered to be produced. *Wright v. Plumptre, M. 1816.* 3 Madd. 481.

286. On a bill to set aside a partition on the ground of inequality, and for a new partition, plaintiff stated a valuation and estimate, the gross result of which, without particulars, was contained in a schedule to the bill. Defendant by his answer denied the accuracy of the valuation, but alleged that he was unable to set forth in what particulars it was inaccurate, by reason of such omission, whereupon defendant moved for a production of the valuation and papers, &c. relating thereto; but the court dismissed the application with costs, observing, that where a defendant seeks the production of deeds, &c. stated to be in the plaintiff's possession, the usual course is to file a cross bill, but in such a case as the present no order could have been obtained. *Micklethwaite v. Moore, T. 1817.* 3 Meriv. 292.

287. Plaintiff moved for the production of a deed alleged to be in possession of defendant as tenant in common with him, but as it appeared that defendant had sold his share, and was in possession of the deed in question only as mortgagee from the purchaser, the court refused the motion, for a mortgagee has no right to show the title of his mortgagor. *Lambert v. Rogers, T. 1817.* 2 Meriv. 489.

288. Plaintiff shall have the production of documents referred to in the answer, and admitted to be in defendant's custody, though an injunction obtained by plaintiff had been dissolved, on the ground that the contract which he sought to enforce was illegal, for the court considers documents referred to as part of the answer. *Evans v. Richard, H. 1818.* 1 Swans. 7; for the practice in such cases, see the several authorities referred to in a note.

289. One executing a deed, the object of which is to defraud the law, cannot come into equity to have it set aside; therefore if A. convey an estate to B., in order to give him a qualification to kill game, and for a nominal consideration only, equity will not compel a re-conveyance, even though the deed has never been made use of. *Roberts v. Roberts, H. 1818.* Dan. 143. *Vide Curtis v. Perry, 6 Ves. 747.*

290. In a bill against executors, the plaintiff stated two promissory notes by testator, for securing the same sum on an affidavit of one of the executors, that he had seen one of the notes, and observed circumstances on the face of it tending to impeach its authenticity, and that the second note had been produced by plaintiff for payment in a foreign country, and also stating the defendant's belief, that before answer, he ought to have an inspection of the second note, that his answer might meet the case, a.
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motion that defendants should not be called on to answer till a fortnight after the second instrument should be produced, granted. Princess of Wales v. Earl of Liverpool and Count Munster, E. 1818. 1 Swanst. 114. 1 Wils. 113. Fifteen months having afterwards elapsed without any production, it was ordered (on defendant’s motion) that bill should be dismissed, unless the instrument should be produced by a given day, which order was afterwards made absolute. S. C. T. 1819. 2 Wils. 29.

291. Defendant admitted by her answer, that at a time past she had a deed in her possession. On motion for production, held, that this was not an admission that she had then the deed in her power. Heeeman v. Midland, T. 1819. 4 Madd. 391.

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Lands cannot ascend from the son to the father, but shall rather escheat; and though the law will not allow one of the half blood to be heir, yet there is no solid reason for it, for the uncle is not only more remote, but he has none of the mother’s blood. (a) And equitable estates shall be guided by the same rules of descent as legal estates, which rules are now so plain that there are very few disputes about them. Cowper v. Cowper, M. 1734. 2 P. W. 734. (a) Vide Collingwood v. Pace, 1 Vent. 424. Purchase, as contra-distinguished from Descent, vide tit. Purchase, ii.


DEVISE.

I. What shall be established in Equity as a good Will to dispose of a real Estate under the Requisites of 32 Hen. 8. c. 1. and 29 Car. 2. c. 3.; and herein of the Reproduction and Revocation of such a Will or Devise, and furthermore of Lands purchased after making a Will of real Estate.

II. Who are capable to devise, and of what Estate or Interest in the Devisor he may dispose by Will, and herein of the Devise of a Trust Estate.

III. Who are capable to take as Devisees under the Words of a Will. (a) Of the Construction of the Words of a Devise; (b) and herein of void Devises; whether as being a Disposition of what the Law already gives, (c) or the Policy of the Law will not admit; (d) or whether for uncertainty in the Description of the Person to take or the Estate devised; and who shall be the Taker in Cases of an imperfect Description. (e)

IV. Where a Devise is rendered void by the Death of the Devisee, in the Lifetime of the Devisor.

V. What Words in a Will will pass an Estate in Fee.

VI. What Words will pass an Estate Tail.
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VII. What Words will pass an Estate for Life.

VIII. What Words will create a Joint Tenancy, and what a Tenancy in Common.

IX. Of Devises by Implication.

X. Of Devises of Land on Condition or Contingency, with Remainders over, and herein of the Words by which an Estate in Reversion will pass, as also the Rest and Residue.

XI. Of executory Devises, their Nature and general Qualities, as distinguished from Contingent Remainders. Of executory Devises of Lands of Inheritance, where the Disposition of the Testator’s whole Fee-simple is qualified by some Contingency, upon which the Estate devised is limited. Where a future Estate is devised to arise at a Time or upon a Contingency certain, without limiting any immediate Freehold, and herein of executory Devises of Terms for Years to the Devisee for Life, with Remainders over.

XII. Of Devises of Land for Payment of Debts and Legacies. Of the Words by which a real Estate is charged therewith; and herein of Matters controverted and Questions arising between the Devisee and personal Representative, and of the Cases where the Devisee shall have the Aid of the personal Estate to exonerate him.

XIII. Of the Devise of an Estate in Mortgage, and where the Devisee shall or shall not take cum onere.

XIV. Where a Devise shall or shall not be construed as a Satisfaction of a Sum due.

XV. Of Fraudulent Devises.

XVI. Of the Jurisdiction of the Courts, touching the Validity of Wills of Land, and in Matters of Devise, and herein of the Admissibility of Parol Averment, and Parol Evidence.

DEVISE I.

What shall be established in Equity as a good Will to dispose of a real Estate under the requisites of 32 Hen. 8. c. 1. and 29 Car. 2. c. 3.; and herein of the Republication and Revocation of such a Will or Devise, and furthermore of Lands purchased after making a Will of real Estate.

1. If A. articles to purchase lands, but before the conveyance devises all his land to be sold to pay debts and legacies, the lands will pass, though he was not seized at the making of his will, neither did he re-publish it. So, if A. devises all his lands for payment of his debts, and then purchases land, equity will decree a sale of that land, though there were no precedent articles. Prideaux v. Gibbon, T. 1684. 2 Ch. Ca. 144. So, if A. buys copyhold lands, and dies before admittance, having first devised all his copyholds to T. S. the copyhold lands contrated for will pass by the will, or in any case if there are articles for a purchase, and the purchaser makes his will and dies before conveyance, the lands shall pass in equity. Danie v. Beadsham, T. 1640. 1 Ch. Ca. 39. Et vide post.

2. Where lands were devised to A. and afterwards to B. by the same will, it was held that the last clause shall not revoke the first, but they shall be joint devises. Dict. in Fane v. Fane, H. 1681. 1 Vern. 30.

3. A will in Dutch or in Latin, which concerns land in England, must be so framed as to pass an estate according to the rules of our law. Bovey v. Smith, M. 1682. 1 Vern. 83. N. B. The Dutch never use the word “heir.”

4. A mortgage was made after a voluntary settlement, with a power of revocation, and a will in confirmation of
such settlement; the mortgage is a revocation pro tanto only. *Perkins v. Walker*, M. 1682. 1 Vern. 97. *York v. Stone*, 1 Salk. 158.

5. A man devised lands in fee, and then leased the same lands for years to a third person; this is a revocation only pro tanto. *S. C. Vide Coke v. Bullock*, 2 Cro. 49.

6. J. S. seized in fee, by will in March, 1682, devised the lands in question to J. P. for life, remainder to defendant in fee. This will was proved by several witnesses, one of whom deposed that J. S. made two subsequent wills, and a minister proved that she burnt a will in Dec. 1683. Then plaintiffs produced another will, made by J. S. at Christmas 1685, attested by three witnesses, but not in the presence of J. S., so that though it might not be a good will to dispose of the estate, yet it was insisted to be a good revocation of the other, as a writing sufficient for that purpose within the 6th section of the 29th Car. 2. c. 3. of frauds. The case of Sir G. Sheers (a) was then mentioned, whose will was carried out of the chamber where he then was, into a lobby, and signed there by the witnesses, but one of them swore that there was a window out of that room to his chamber, through which the testator might see the witnesses as he lay in bed, and this was adjudged a good attestation within the statute. The jury found a special verdict, that J. S. being seized in fee, died, on 12th March, 1682, make her will, and devised the lands *supra*; that on 25th Dec. 1683, she caused another writing to be made, purporting to be her will, which was signed, sealed, and published by her in the presence of three witnesses, in the chamber where she then was, and where she continued while the witnesses subscribed their names in the hall, but that she could not see them so subscribing. Upon argument, the question was upon the construction of 29 Car. 2. c. 1. s. 6. whether this writing, purporting to be a will, was a revocation of the former! It was insisted that the want of witnesses did not make the last will void in itself, but only *quaed* the lands therein devised, and that it had its operation as to all other purposes, and that it must therefore be a revocation of the former. (b) Upon this argument the court gave judgment for the defendants, that the second will must be a good will in all circumstances to revoke a former will. *Egglestone and another v. Speke alias Petit*, M. 1689. 3 Mod. 238. 1 Shew. 89. Carth. 79. Comb. 156. Holt 222. (a) *Note, Sheers' Ca.* 2 Salk. 688. Carth. 81.; and 1 Eq. Ab. 403. pl. 8. and adjudged E. 1687, in C. B. on a seisin issue. The court there said that the statute required attestation in the testator's presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see; it is not necessary that he should actually see them signing, for at that rate if a man should but turn his back or look off, it would vitiate the will. Here the signing was in view of the testator, he might have seen it, and that is enough; so if testator being sick should be in bed and the curtain drawn. The same point was determined in *Davy v. Smith*, 3 Salk. 395. and in *Casson v. Dade*, 1 Bro. C. C. 99, where the testatrix could see her will attested through the windows of her carriage, and of an attorney's office, but if it appear that the testator could not see the witnesses attest, the will is void, though they retire for the purpose at his request. *Vide Broderick v. Broderick*, 1 P. W. 239. *Mackell v. Temple*, 2 Show. 288. *Longford v. Eyre*, 1 P. W. 740. *Carter v. Price*, Doulg. 241. *Hands v. James*, Com. Rep. 531. and *Onions v. Tyrer*, 1 P. W. 543. which see post, with notes, vide also *Ellis v. Smith, cor. Hardwicke*, C. (cum. assist.) in 1734. 1 Ves. 11. where a will subscribed by three witnesses, before whom testator declared it to be his will, but did not sign it; such declaration was held equivalent to a signing before them, and such will good within the 5th section of the statute of frauds, and held also a good will of revocation within the 6th section. (b) This was contended to be agreeable to the resolution of the Judges in former times, for there being nothing in the statute of wills (32 H. 8. c. 1.) which directs what shall be a revocation, the Judges, in *Trevilian's Ca. Dy.* 143. declared that it might be by word of mouth, or by the very intention of the testator to alter any thing in the will, for before the statute of frauds very few words did amount to a revocation. If lands are devised, and afterwards a seisin is made of the same, but for want of livery and seisin it is defective,
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yet this is a revocation of a will, though the feoffment is void Vide Mo. 429. 1 Roll. Ab. 614 to 616.

7. A. held a lease, of which nine months remained unexpired. He made his will in sickness, and devised all his interest in such lease to B. A. recovering, renewed his lease, and republished his will. Resolved, the renewed lease passed by the republication. Anon. H. 1690. 2 Freem. 116. Vide Brett v. Ridgen. Plowd. 341. Arthur v. Bockenham. Gilb. Dev. 165.

8. A. devised lands to trustees to pay debts, and then to pay his wife 200l. per annum for life. The debts being afterwards increased, (for great part of which his trustees were bound,) testator by deed and fine, in which his wife joined, conveyed his land to the said trustees to sell to pay his debts, and the surplus to be paid to him and his heirs: this is no revocation, but only pro tanto, and the wife shall be allowed to come in for her 200l. per annum. (a) and the other legacies and charges shall take place if sufficient, and if not, in proportion. Vernon v. Jones, M. 1691. 2 Vern. 241. Pre. Ch. 32. 2 Freem. 17. Vide Rider v. Wayger, 2 P. W. 334. Hartrup v. Whitmore, 1 P. W. 681. (a) Note. Vernon has added a quare to this decision, but the Hardwicke, in Sparrow v. Hardcastle, 2 Atk. 305. has settled it, by affixing the decision to be right.

9. A man made a will of lands several years before the statute of frauds, attested only by two witnesses. The testator lived some time after the statute, and then died, without altering his will. His Honour held the will good to pass the lands; but, being imported, he directed an issue at law. Sergeant v. Purdy, T. 1697. Pre. Ch. 77.

10. Testator’s will was written with his own hand, and published in the presence of three witnesses, at three several times, and they all attested it in his presence, but he did not sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest the will as was proved by that witness. Ld. Keeper held a publication of a will before three witnesses, though at three several times, good within the statute, and thought the writing the will with the testator’s own hand, a sufficient signing within the statute, though not subscribed or sealed by him, but doubted whether owning the subscription to be his was sufficient. The validity of the will, however, being a question at law, his Lordship ordered it to be tried. Cook v. Parsons, H. 1701. Pre. Ch. 184. 2 Vern. 459 Vide Lomayne v. Stanley, 3 Lev. 1. Holb v. Clark, 3 Mod. 218.—Longford v. Eyre, 1 P. W. 740. Dormer v. Thurland, 2 P. W. 509. Stonehouse v. Evelyn, 3 P. W. 254. Gryle v. Gryle, 2 Atk. 176. Grayson v. Atkinson, 2 Vern. 454. 2 Staun. 1109.

11. I. S. made his will, and gave 500l. to his brother, (with other legacies,) and devised his real estate to E. C. and her heirs; afterwards I. S. intermarried with E. C. and died leaving her privement ancient with a son, without making any alteration in his will. Quare, whether this alteration in the testator’s circumstances did of itself amount to a revocation of the will? Ld. Keeper was clearly of opinion, that an alteration of circumstances might be a revocation of a will of lands, as well as of personal estate, notwithstanding the statute of frauds, which extends not to an implied revocation: but no such alteration appears here, for no injury is done, and those are provided for whom the testator was most bound to provide for. Will established. Brown v. Thompson, T. 1702. 1 Eq. Ab. 413. pl. 15. Vide Cook v. Oakley, I P. W. 302. and the cases there referred to by Mr. Cox’s note; it appears that Wright C. S. decreed payment of the legacies.

12. A. by will in writing duly executed and attested by three witnesses, devised a copyhold to his wife, and on the day of his death directed his nephew to obliterate some devises, but said nothing as to the copyhold devised to his wife, and then he caused a memorandum to be written, that he had examined and approved of the will so obliterated and altered by his nephew, but he did not republish it in the presence of three witnesses, though he ordered his nephew to have it written out fair. However, before that was done he became delirious. This was held a good will, and the copyhold passed thereby. Burkett v. Burkett, E. 1703. 2 Vern. 498.

13. A. devised lands to his son B. for 99 years, determinable upon three lives, and charged the same with an annuity of 40l. to his daughter M. The testator afterwards, for a fine of 300l., demised these lands to S. for 99 years, determin-
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14. If a man devises lands, and afterwards mortgages the same for years, and then levies a fine sur consansse de droit come ceo, &c. this will be a revocation; but if there had been a fine sur concessit, it had revoked only pro tanto. Anon. E. 1707. 8 Vin. Ab. 136. pl. 10. 2 Eq. Ab. 770. pl. 5.

15. A devised lands by a will, to which there were no witnesses, and afterwards made a codicil, executed in the presence of three witnesses. The will is void as to the land, and the codicil will not support it. Att. Gen. v. Barnes, M. 1707. 2 Vern. 598. Pre. Ch. 270. Vide Jenner v. Harpur, Pre. Ch. 389. 1 Salk. 163. Adlington v. Cant, 3 Ark. 141. Vide 9 Geo. 2. c. 26. The editor of Pre. Ch. says, this decree was reversed in parliament, and he refers to one Bro. P. C. 254. but it is not to be found there.

16. A man cannot devise any lands to pass by his will, but what he had at the time of making or publishing it. Butler v. Cooks, M. 1707. 1 Bro. P. C. 199. therefore after-purchased lands cannot pass. Arthur v. Bekenham, H. 1708. 11 Mod. 148.

17. A will written on nine sheets was sealed by the testator, who signed the draft of a new will and then tore off sight of the seals from the first will; yet the first will was held a good will to pass the real estate, the statute not requiring all the sheets to be sealed; and the second good to pass the personal estate as casus omis- sus out of the statute. Hyde v. Hyde, H. 1708. 3 Ch. Rep. 153.

18. A codicil which concerns only personal legacies, will not amount to a re-publication of a will, so as to pass lands purchased after the making of the will.—Strode v. Russell, M. 1708. 2 Vern. 625.

19. A. by will gave lands to J. S., and having afterwards purchased other lands, he, on his deathbed desired B., his heir at law, not to hinder J. S. from enjoying the new purchased lands, though he had not by any writing declared the trust for.

J. S. B. suffered J. S. to enjoy the lands eleven years, and then pretended he thought the after-purchased lands had passed by the will: decreed, that this was out of the statute of frauds, and that B. letting J. S. enjoy it so long, was an execution of the trust, and though no express fraud was proved against B. (as in Lester v. Foxcroft, Colls' P. C. 108.) yet the possession for eleven years was a strong presumption that he suffered it in execution of the testator's declaration. Harris v. Harwell, M. 1708. Gilb. Eq. Rep. 11.

20. In December, A. made his will; and in January following, designing to make an alteration, he ordered a devise to be interlined. The will was read in this state to the testator's, who approved it, and put his seal on the wax in the presence of the same three witnesses who attested his will at first, but he did not subscribe his name de novo: Held a good signing, for the testator's subscribing is only with a view that the witnesses may know the will again. Townsend v. Pearce, E. 1711. Vin. Ab. tit. Devise, (R. 4.) 142. pl. 3.

21. Devise of lands to A. and afterwards the devisee devised the same lands to B. a papist, both devises are void; for though the last is void as a will, yet it is good as a revocation. Roper v. Constable, T. 1713. 8 Vin. Ab. 141. Note to pl. 2. 2 Eq. Ab. 771. pl. 8. For a subsequent devise to a person incapable of taking, is a revocation of a precedent devise to a person capable. Roper v. Radcliffe, E. 1714. 10 Mod. 239. 1 Bro. P. C. 450.

22. One by will, duly executed and attested, devised lands to trustees to several uses, under which the plaintiff claimed. He afterwards made another will of the same lands, devising them to other trustees, but to the same uses; (a) and in the last will there was a clause revoking all former wills, but in the last will, though subscribed by the testator, and attested by three witnesses, yet the witnesses did not subscribe their names in the presence of testator. Testator's heir at law claimed the lands, and then the question was, whether the last will, which was admitted to be void, quoad the lands in question, should be a good revocation of the former will. Eccleston or Eggleston v. Speake, ante, pl. 6. (3 Mod 258.) was cited, which case Ed. Ch. allowed,
in regard there the second will devised the lands to the same person as the first, and therefore the second will did not intend to revoke, but to confirm the former; but, suppose in the latter will in that case, there had been no devise of the same land to the same person, or if the latter will had only extended to the personal estate, and not to the lands in question, then the general clause of revoking all former wills might have been a good revocation. But a second will, devising lands to the same person as the former, and revoking all former wills, and this subscribed by three witnesses, but not in the testator’s presence, shall never revoke the former will, so as to let in the heir; nay, if, by the latter will, the premises in question had been given to a third person, it should never have let in the heir; in regard to the meaning of the second will, was to give to the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing, the first could have lost nothing, or if the first will had been cancelled by the testator’s direction, upon a presumption that the second devisee was to take the premises by the second will, such a cancelling should not have profted the heir, because it would have been a cancelling proceeding from a mistake; it is no more than if the testator, being sick, and having two wills under his pillow, should, by mistake, give his last will to be cancelled, or order one to cancel his first, who, by mistake, cancels his last will. So, in the principal case, though the first will was ordered by the testator to be cancelled, and the same was cancelled accordingly, yet this being upon a presumption that the latter will was good, and duly executed, it is properly relievable under the head of accident. In this case it was said by Sir T. Powis, and not denied, that if a man, having duplicates of his will, cancels one of those duplicates, with an intention to destroy his will, this is a good revocation of the whole will, and of both the duplicates, and that this was Sir E. Seymour’s Ca. Onians v. Tyrrer, H. 1716, 1 P. W. 343. 2 Vern. 741. Pro. Ch. 469. S. C. nomine Onions v. Tryers, Gilb. Eq. Rep. 130. S. C. nomine Anyons v. Fryer. (a) A mere change of trustees will not revoke a prior devise of the equitable estate. Wiltse v. Sandford, 1 Ves. 178. 180. Doe v. Fott, Doug. 684. Watts v. Fullarton, (cited) Doug. 691. It seems in the principal case, the witnesses subscribed their names in the presence of each other, and in the same house with the testator; see 2 Vern. 741. The law to be collected from the several cases upon which this subject seems to be this: the title of the heir at law is not to be defeated but by some other title, certain and unquestionable. Gilb. Devises, 115. And therefore where there is proof of the existence of a will, the contents of which do not appear, no conjecture shall be admitted as to the contents of such will in prejudice of the heir. Cowp. 92. So two inconsistent wills of the same date, neither of which can be proved to be last executed, (unless explained by some subsequent act of the testator,) are void for uncertainty, and will let in the heir. Phipps v. E. of Anglesea, 3 Bro. P. C. 45. On the other hand, wherever an effective devise appears to have been once made in disinheritance of the heir at law, it shall lie upon the heir to prove that such devise has been as effectively defeated. Harwood v. Goodright, Cowp. 87, and 7 Bro. P. C. 344. In the present case of Onions v. Tyrrer, the first will was impeached in both the ways pointed out by the statute of Frauds, namely, first, as being torn in the presence, and by the direction of the testator (to which point some evidence was adduced, as appears by the report of this case in 2 Vern. 741, and also by the decree from the Register’s book, as stated in 1 P. W. 743 n. and,) and, secondly, as being revoked by the second will. On the first head, the act of cancelling was not sufficiently proved, but yet it is determined by this case, as well as by Hyde v. Hyde, 3 Ch. Rep. 155. and Bartenshaw v. Gilbert, Cowp. 49. (which fully recognises the principles of Onions v. Tyrrer,) that the cancelling is in itself an equivocal act, and in order to operate as a revocation, must be done animo revocandi. On the second head, with respect to revocation by subsequent devise, it is necessary that the second will should expressly revoke, or be clearly incompatible with the first devise; guad the particular subject-matter of such devise, for no subsequent devise will revoke a prior one, unless it apply to the same subject-matter. Harwood v. Goodright, supra. It is also necessary that the second will
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should be subsisting and effective at the
time of the death of the testator. If,
therefore, it be not executed according
to the statute of Frauds, it is not effec-
tive, and it is as if no second will had
existed, as in Hyde v. Hyde, 3 Ch. Rep.
and in the present case of Onions v.
Tyzer; and yet a devise of lands, void in
respect of the incapacity of the devisee
to take, shall revoke a former devise.
Roper v. Ratcliffe, 1 Bro. P. C. 450. So
shall a subsequent grant to a person in-
72. So, if the second will be effectually
cancelled in the life-time of the testator,
the first will shall operate as if no other
had existed, for it is the only will sub-
existing at the testator’s death. Goodright
v. Glazier, 4 Burr. 2512. With respect
to the difference of the penning of the
two clauses of the statute as to wills and
revocations, (which is observed in Onions
v. Tyzer,) it does not appear that any
case has been determined expressly upon
the subject, either in affirmance of, or
contradiction to, what is said by Lord
Couper, in the decree, as taken from the
Register’s book, all the questions having
arisen upon instruments which have not
operated merely as revocations, but also
as substantive devises in themselves.
See however Ellis v. Smith, 1754. 1 Ves.
jun. 11. in which case two questions
arose upon the construction of the 5th
and 6th sections of the statute of
Frauds, first, whether the testator’s de-
claration before three witnesses, that it
was his will, was equivalent to signing it
before them, and constituted a good will
within the 5th section, and, secondly,
whether such will was a revocation ac-
cording to the 6th section. The court
there held, that such declaration was
equivalent to the testator’s signing his
will before the witnesses, and that such
will was good within the 5th section, and
was also a good will of revocation within
the 6th section of the statute.

23. A devised a term for ninety-nine
years, before the stat. of 3 & 4 W. & M.
c. 14. of fraudulent devises, in trust, to
pay 14l. per ann. to his grand-daughter for
life : after the making this will, A. mort-
gaged his land for five hundred years,
(which is a revocation in law during the
term, though the devisee has an equity
of redemption.) The mortgagee assign-
ed over the mortgage to plaintiffs, a bond
creditor of testator, and the reverson in
see descended to testator’s heir at law:
per Couper, C. the mortgage is a revoca-
tion pro tanto of the devise of the ac-
nuity, and the grand-daughter must keep
down the interest, or pay a third part
of the redemption; but being a devisee,
she may redeem the mortgage without
paying off the bond. Saunders v. Hum-
kins, E. 1716. 8 Vin. Ab. 156. pl. 2. 2
Eq. Ab. 771. pl. 10.

24. G. B. devised lands in trust to
permit his daughter S. to receive the
rents until her marriage or death, and in
case she married with the consent of the
trustees, then to convey to her and her
heirs; but if she died before marriage,
or married without such consent, then to
convey to other persons. S. afterwards
married with the consent of her father,
who settled part of the lands on her and
her husband, and died. Decreed, that
this settlement was no revocation of the
will as to the rest of the lands. Clarke v.
Berkley, M. 1716. 2 Vern. 720.

25. Making a codicil, and annexing it
to the will, does not amount to a repub-
lication of the will. Hutton v. Simpson,
S. C. nominate Symson v. Hornsby. Wide
Steed v. Berries, 1 Vent. 341. 2 Mod. 313.
and see the several cases pro and con re-
ferred to by the editor of Pre. Ch. 441.

26. A devised lands to his executor
for payment of debts, and recited that a
particular schedule of them was annex-
ed, remainder over. Afterwards he
mortgaged part of the same lands, and
paid most of the scheduled debts with
the money. Decreed, that this mortgage
was not a revocation either in all or in
part, and that the will ought to extend
to all the debts that should be owing at
the time of testator’s death, and not to
the scheduled debts only; and that the
mortgage was only a security, and not an
appointment how it should be made.
This decree, however, was reversed, but
without prejudice to the heir at law.
Barnardiston v. Carter, T. 1717. 8 Vin.
Ab. 147. pl. 25. 2 Eq. Ab. 771. pl. 11.
1 P. W. 505. S. C. but not S. P.

27. B. seised in fee, having had four
daughters, made her will, and thereby
devised lands to her only surviving
daughter and her heirs, and afterwards,
for securing 4000l. to the daughter (in
which she stood indebted to her for her
own and her three sisters’ legacies under
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their father's will, and wherewith and interest those lands were chargeable in the mother's hands) the mother mortgaged these lands to the daughter for five hundred years, with proviso to be void on payment of 100l. per ann. during the mother's life, and the 4000l. and interest within three months after her death. The question was, whether this mortgage for five hundred years to the daughter, was an absolute revocation of the devise thereof in fee to her by her mother's will, or only a revocation pro tanto. Decreed an absolute revocation of the devise in fee, it being made to the same person. (a) and therefore inconsistent with the devise. (b) Harkness v. Bailey. E. 1719. Pre. Ch. 514. Vide Vernon v. Jones, Pre. Ch. 33. Perkins v. Walker, 1 Vern. 97. Thorne v. Thorne, 1 Vern. 141. 182. Coke v. Bullock, Cro. Car. 49. York v. Stone, 1 Salk. 158. Hull v. Dunch, 1 Vern. 329. Parsons v. Freeman, 3 Atk. 743. Rider v. Wager, 2 P. W. 334. Et vide Roe, ex dem. Gibbons, v. Pott, where it was held, that if a mortgagor devises the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate in trust for the mortgagor, such a transfer of the legal estate shall not operate as a revocation of the will. (a) Note, a man could never be intended to be mortgagor and mortgagee at the same time. Pow. Dev. 618. (b) Yet it was agreed, that if the mortgage had been made to a stranger, it had only been a revocation quoad the mortgage.

28. I. S. made his will, and devised lands to A. and his heirs, in trust to pay the testator's heir at law 200l., and there were three witnesses to the will, one of which was A., the devisee. The heir brought his bill to impeach the will, for want of three credible witnesses, in regard A. the devisee of the land was a party interested. The question was, whether A. would not be a good witness if he should alien the land without covenant or warranty? The court said nothing as to this point, but that the heir ought to have contested the will at law; and if it had been adjudged against him there that the will was good, then he might go into equity for the 200l. Ld. Ch. retained the bill for a year, that the heir might have two assizes to try the will, but the heir to pay A. his costs. Baugh v. Holloway, T. 1719. 1 P. W. 557. Vide stat. 25 Geo. 2. c. 6. Et vide Wyndham v. Chetwynd, 1 Burr. 414. where the principal case is stated by Ld. Mansfield from the Register's book, and the credibility of witnesses attesting a will is considered at large, Ld. Mansfield having delivered a very elaborate judgment, in which he took occasion to enter very fully into a discussion of the meaning of the word "credible" in the statute of Frauds. Vide also Hindson v. Kersey, 4 Burr's Eccl. Law, 86.

29. A. devised a term for years to B. for life, remainder to C.—C. in the life of B. devised his remainder. This is good, for it amounts to a declaration by C. that his executor shall stand possessed of the term in trust for the devisee. A devise of a lease differs from a devise of a fee-simple, for a man cannot devise a fee which he has not at the making of his will; but leases or personal estates shall pass if they belong to testator at his death, for after-purchased lands will descend to the heir, but as to personal estate if the executor cannot take it, it is uncertain who may. Wind v. Jekyl, M. 1719. 1 P. W. 572. Vide Masters v. Masters, 1 P. W. 424. Et Bunter v. Cook, Salk. 237. where the court doubted whether a chattel real which testator had not at the making of his will should pass thereby. It has been determined however in Sterling v. Lydiard, 3 Atk. 199. Carter v. Carter, Amb. 28. that a lease for years or the trust thereof will pass under a will made prior to the demise; so in Marwood v. Turner, 3 P. W. 163. Abney v. Miller, 2 Atk. 609. and the point seems to be universally admitted; but in deciding upon the construction of such a will, a devise of a leasehold estate is held to be admitted by surrendering and renewing the lease, unless the contrary is expressed. Abney v. Miller, sup. Rudstone v. Anderson, 2 Ves. 418. Hone v. Medcraft, 1 Bro. C. 261. Copyhold lands purchased after making the will do not pass. Harris v. Cutler, 1 T. R. 438. (n) et vide post, pl. 33. By republication lands will pass, for that is making a new will, and the intent is manifest. Doe v. Keitt, 4 T. R. 604. Bunter v. Cook, 1 Bro. P. C. 129.

30. A. before her marriage with I. S. with his consent, conveyed her estate to trustees "to such uses and for such estates as she should by deed or will, or by any writing in the nature of a will,
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After her marriage she devised her lands. There were four witnesses to the will. One was beyond sea; two swore they saw the testatrix execute her will, and that they subscribed it in her presence; and the other swore that he subscribed the will as a witness in the same room, and at the request of the testatrix. Ld. Cowper doubted, at the first hearing, as to the proof of the execution of this will, but would not give any opinion until a future application, when the heir might have become of age. Now, per Ld. Macclesfield. The bare subscribing the will by the witnesses in the same room, did not necessarily imply it to be in the testator's presence, for it might be in a corner of the room, (a) in a clandestine, fraudulent way, and then it would not be a subscribing in the testator's presence, merely because in the same room; but it being sworn by the witness that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and therefore was well enough. (b) The proper way of examining a witness, to prove a will of lands, is, that the witness should not only prove the execution of the will by the testator, and his own subscribing it in the presence of the testator, but likewise the rest of the witnesses subscribing their names in the testator's presence; and then one witness proves the full execution of a will, since he proves that the testator executed it, and likewise that the three witnesses subscribed it in his presence, but this was not done in the principal case. Langford v. Eyre, M. 1721. 1 P. W. 740. Vide (a) Sir George Sheers' Ca. Salk. 688. where the witnesses subscribed the will in another room, where there was a window, through which the testator could see them, resolved to be sufficient. Vide (b) Dormer v. Thurland, 2 P. W. 509. Stonehouse v. Evelyn, 3 P. W. 254. Gryle v. Gryle, 9 Atk. 176. Grayson v. Atkinson, 2 Ves. 454. Carleton v. Griffin, 1 Burr. 549. Right v. Price, Doug. 229. Casson v. Dade, 1 Bro. C. C. 99. Westboech v. Keansdye, 1 Ves. & B. 364, and the cases there referred to, as to the several requisites of the statute of frauds, with respect to devises.

31. The statute of frauds and perjuries, which requires that a will of land should be subscribed by three witnesses in the testator's presence, is not binding in Barbadoes. Anon. T. 1722. 2 P. W. 75. 32. V., by will, dated 17th of January, 1711, after several devises, gave the residue of his real and personal estate to trustees, in trust to vest the residue of his personal estates in lands of inheritance, and that his trustees should stand seised, and possessed of his real and personal estate to the use therein mentioned. Afterwards V. purchased several fee-farm rents and lands and tenements, some of which rested on agreement only. Then V., by a codicil, made two days before his death, reciting that he had made a will, dated 17th of January, 1711, thereby ratified and confirmed the will, except in the alterations therein after mentioned. He then made several alterations in his legacies and devises, and gave all his lands by him purchased since his will, to his trustees and executors in his will named, to the same uses, and subject to the same trusts to which he had devised the bulk of his estate, and then he revoked his will as to three of the trustees therein, and nominated two new ones in their stead, and devised his estates to them accordingly. It was among other things objected, that the codicil being by a separate and distinct instrument, did not amount to a republication of the will, but it was decreed, per Macclesfield, C. that the testator's signing and publishing this codicil was a republication of his will, and both together made but one will. (Daniel v. Upley, Latch, 59;) and that whereby the lands contracted to be purchased, and all his real and personal estate will pass; and, on appeal to the Lords, this decree was affirmed. Acherley v. Vernon, M. 1723. 9 Mod. 68. 10 Mod. 518. Com. Rep. 381. 3 Bro. P. C. 107. Vide Potter v. Potter, 1 Ves. 437. Gibson v. Monfort, ibid. 489. 493. Pate v. Davy, Cawp. 138. Vide Chapman v. Tanner, 1 Vern. 267. Walker v. Pressew, 2 Ves. 622. Pollexfen v. Moore, 3 Atk. 273. Fawell v. Holmis, Amb. 724. Blackburn v. Gregson, 1 Bro. C. C. 420. Cator v. Earl Pembroke, 2 Bro. C. C. 284. If a person article to buy certain lands, he thereby becomes seised thereof in equity, and they will pass by a subsequent devise, of all his lands of inheritance. Vide Greenhill v. Greenhill, Pre. Ch. 320. 2 Vern. 679. 1 Eq. Ab. 174. Green v. Smith, 1 Atk. 372.; and where a man covenants to lay
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33. A trust of lands was limited to A. his heirs and assigns, or to such uses as he should appoint. A. devised these lands by will attested but by two witnesses. The will is void, and shall not operate as an appointment. (a) A copyhold surrendered to the use of a will shall pass by a will attested by two witnesses, or by one only; (b) because the copyhold passes by the surrenderer, and not by the will; but a trust or equity of reversion of a copyhold cannot pass by a will unless attested by three witnesses. (c) Wagstaaff v. Wagstaaff, M. 1724.

2 P. W. 258. Vide (a) Att. Gen. v. Barnes, 2 Vern. 598. D. of Marlborough v. Ld. Godolphin, 2 Ves. 76. Jones v. Clough, ibid. 386. Duff v. Dalzell, 1 Bro. C. C. 147; and an instrument in its nature testamentary, made in execution of such a power, has all the incidents to a will. Hatcher v. Curtis, 2 Eq. Ab. 671. Oke v. Heath, 1 Ves. 135. D. of Marlborough v. Ld. Godolphin, ante Lawrence v. Wallis, 2 Bro. C. C. 319. (b) Tuffnell v. Page, Barn. 9. 2 Atk. 57. Att. Gen. v. Andrews, 1 Ves. 225. Harg. Co. Lit. 111. 6. notes 1 and 3; and in Carey v. Askew, 2 Bro. C. C. 58. Kenyon, M. R. determined that a mere draft of a will, the signing and publication whereof were prevented by the sudden death of the testator, yet, being proved in the ecclesiastical court as a testamentary paper, was sufficient to pass copyholds which the testator had before surrendered to the use of his will. If a copyholder having an estate par autre vie, surrender all his estate in possession, remainder or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will; the fee will not pass, for he had not the fee at the time of the surrenderer. Ibbot v. Cowling, 6 T. R. 63. (c) But in Tuffnell v. Page, supra, Ld. Hardwicks was of opinion, that the trust of a copyhold would pass by a will not attested by the statute of frauds, as a copyhold surrendered to the use of a will would do, for that equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest; and decreed accordingly.

34. W. possessed of the remainder of a term for 500 years, for securing a sum lent on mortgage by W. to B., advanced a further sum upon B.'s granting a further term of 1000 years in the premises to J. in trust for W. Afterwards B., conveyed the inheritance of the same premises to S. for a valuable consideration, who conveyed the same to E. W. Then E. W. made his will in his own hand writing but the will had neither a date nor the name of the devisor subscribed to it, nor was it executed in the presence of witnesses. It being clear that the inheritance could not pass by such an instrument, the only question was whether it was good at law to pass this term of 500 years, which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term, which operated as a grant of the reversion of 1000 years, and not as a grant of a future interest. It was decreed per M. R. (which decree was afterwards affirmed by Gilbert and Raymond, Lords Comrs.), that the term would not pass, for that this was a term which would have attended the inheritance, and in equity have gone to the heir and not to the executor, and in that respect was to be considered as part of the inheritance; and a will, not made pursuant to the statute of frauds, would not pass any estate, of which the heir as such, would otherwise have had the benefit. Whitchurch v. Whitchurch, H. 1725. 2 P. W. 236. Gilb. Rep. 168. 1 Stra. 619. 9 Mod. 124. For the distinctions taken by Raymond, C. S. in delivering his opinion on this case, vide 9 Mod. 127. Vide etiam Villers v. Villers, 2 Atk. 72. Willoughby v. Willoughby, 1 T. R. 763. Amb. 282. Goodrich v. Sales, 2 Wils. 329. Scott v. Fenhoulet, 1 Bro. C. C. 69. Harg. Co. Lit. 293. a. part of note to 390. b.

35. A. devised to his wife six houses in London; in bar of dower, and subject
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to his legacies; to his eldest daughter one moiety of his real estate, and to his youngest daughter the other moiety. — Afterwards testator’s eldest daughter married, and previous thereto, by articles, he covenanted to settle one moiety of all his real estate to the use of himself for life, remainder to his eldest daughter and her husband for their lives, remainder to their younger children in tail general, remainder to himself in fee. The question was, whether these articles were a revocation of the will, as to a moiety? It was held that they were, for though this was but a covenant, and therefore at law no revocation of the will by which the testator had disposed of his real estate, yet the same being for a valuable consideration, was in equity tantamount to a conveyance, and consequently, in equity, (a) a revocation as to the moiety of the six houses devised by the testator. It appeared in this case, that testator made a codicil, whereby he confirmed his former will, subject to the marriage articles. A question then arose, whether the codicil amounted to a republication so as to entitle the married daughter to a moiety of the remaining moiety of the testator’s estate. Per curiam, the testator, by the codicil, confirmed his will, subject to the articles, which confirmation was a republication (b) of his will, and as if he had written it over again, or had afterwards, for a valuable consideration, assigned over a moiety of his real estate to his eldest daughter, by which the moiety so disposed of did no longer continue any part of the testator’s estate, so that the testator afterwards, by deviseing a moiety of his real estate, must be intended to have meant the remaining moiety only, and to have divided that moiety into moieties. But as a codicil does not, in republicating, give any quality to a will that did not belong to it previous to its revocation, its operation being merely to set it up again in the same state and condition in which it subsisted from its inception, (except only as to making it efficient as far as the expression used therein will reach, at the time of republication,) a devise not properly executed at its inception, will not be helped by a codicil, though that be executed pursuant to the statute of land. Pow. Dev. 681. In this case testator and his wife (after testator’s will was made) mortgaged the estate by lease and release, and fine, which was contended to be an absolute revocation of the will. But Ld. Ch. held it only to be a revocation pro tante. (c) Rider v. Wager, H. 1725. 2 P. W. 381. Vide (a) Cotter v. Layer, ibid. 624. Vide (b) Acherley v. Vernon; Com. Rep. 581. 3 Bro. P. C. 107. Potter v. Potter, 1 Ves. 457. Gibson v. Montfort, ibid. 485. (c) Sic York v. Stone, 1 Salk. 158. Perkins v. Walker, 1 Vern. 97. Hall v. Dunch, ibid. 329. 342. Parsons v. Freeman, 3 Atk. 748.

36. J. S. had a power during the joint lives of himself and wife, by any writing, purporting to be a will, under his hand and seal, attested by three or more credible witnesses (if he should die before his wife M. without issue between them, then living) to charge his lands with any sum not exceeding 2000£, to be paid as he should appoint, with the like remainder to M. if she should die without issue in the life of her husband. There was no issue of the marriage, and J. S. by will in writing, under his hand, attested by three witnesses, but not sealed, reciting his power, disposed of the 2000£ to plaintiffs (his relations.) Two of the witnesses to the will swore that the will was signed in the presence of all the three witnesses, but the third swore, that the testator having written and signed the will before, called for the witnesses, and declared that writing to be his last will, and that all three witnesses were then present, and subscribed their names in his presence. Ld. Ch. said that though he inclined to think the will of the land good, if the testator should acknowledge his name, and the witnesses should subscribe to his presence, yet that point should be reserved to the defendant; (a) but for the satisfaction of all parties, as it was a matter of law, he referred it to the Judges in B. R. by whom it was determined, that the will was void as a charge, for want of being sealed. (b) Dormer v. Thurland, H. 1729. 2 P. W. 306. Vide (a) Longford v. Eyre, 1 P. W. 740. Stonehouse v. Evelyn, 3 P. W. 254. Est ride ante, pl. 30. (b) In Darlington v. Pulteney, Cows. 268. Ld. Mansfield said, he was inclined to think with Ld. King on the present case, that the instrument being a good will, the power was thereby well executed; but on the other point agreed, that where there is
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no meritious consideration for the execution of such a power, the form must be strictly pursued. *Sic Ross v. Ewer, 3 Atk. 156.*

35. A. and B. tenants in common of lands in fee. A. devised his moiety in fee, after which A. and B. made partition by deed and fine, declaring the uses as to one moiety in severality to A. in fee, and as to the other moiety in severality to B. in fee. It was certified by the Judges in B. R. with whom King, C. concurred, that the will of A. was not revoked by the deed and fine, levied in pursuance thereof. *Luther v. Kidby or Kirby, E. 1730. 3 Vin. Ab. 148. pl. 30. 2 Eq. Ab. 774. pl. 19. 3 P. W. 169. (n.) Sic Swift v. Roberts, 3 Burr. 1490.* But if A. devises lands, and levies a fine, and the captious and deed of uses are before the will, but the writ of covenant is returnable afterwards, this seems a revocation, because a fine operates as such from the return of the writ of covenant, and not from the will. *Vide Lloyd v. Say & Sele, 9th, 491.* And yet this is a hard case, since by the act the commoner does all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

36. A. articled to buy lands and thereby became so seised of them in equity as to pass them by his will; but where one devise all his real estates, and then agreed to purchase lands, and died, his heir shall take them an after-purchase, not passing by the will. *Langford v. Pitt, T. 1731. 2 P. W. 629.* *Et vide Greenhill v. Greenhill, Pre. Ch. 320.*

37. If a testator, after devising all his lands, tenements, and hereditaments, forecloses an equity of redemption of a mortgagee in fee, such estate will not pass by these general words, because a foreclosure is considered as a new purchase of the land. *Casborne v. Scarfe, H. 1737. 1 Atk. 605.* This rule, as laid down by Ld. Hardwicke, and by the cases of Wynne v. Littleton, 1 Vern. 3, and Litten v. Russell, 2 Vern. 621, deserves some consideration. It is a point that frequently occurs in the practice of a conveyancer. The question is, whether Ld. H. meant that the above general words will not pass the legal nor beneficid. estate of mortgagees in fee after forfeiture, or whether those words are only incompetent to pass the beneficial interest? If the latter, the rule, generally speaking, is certainly right, because the beneficial interest being in fact nothing but the money due on the mortgage, and the lands mortgaged being considered in equity merely as a security for a personal debt, it is very evident that such personal or beneficial interest cannot pass by words peculiarly adapted to transfer real property, unless in some particular instances, as where the testator had no other lands than those mortgaged to him, in which case the manifest intention would be to hold against the general construction; *vide Clerk v. Abbot, Barn. 457. 461.* But there seems to be an obvious distinction between the legal estate of a mortgagee in fee after foreclosure, and his beneficial interest, as to the operation of a devise. The latter would certainly pass by a residuary bequest of "all his personal estate;" yet it is clear that the former would not, which, if not vested in some particular person by the will, would in such case descend to the heir at law of the testator, as a trustee for the devisee of the personal estate. *Vide Att. Gen. v. Meyrick, 2 Ves. 46. and the decree in Wynne v. Littleton, 1 Vern. 3,* but as the mortgagee is considered as to the legal estate merely as a trustee, *videlicet Amherst v. Dawlings, 2 Vern. 401,* if he should devise all and every his real estate to A. and his heirs, this would, according to Marlow v. Smith, 2 P. W. 198, pass the legal estate; and if he should likewise bequeath all his personal estate to B, this would pass the mortgage debt, and A. would thereby become a trustee for B. The reasoning in Marlow v. Smith was, that the legal estate being in the trustee, it was, in the eye of the law, his estate and his property, and therefore passed by a devise of his estate. If there then be a settled distinction between the legal and beneficial interest of a mortgagee, and if the words "real estate" will pass such legal estate, why will not the general devise of lands, tenements, and hereditaments have that effect, when unconnected with circumstances indicative of the testator's intention to exclude such a construction? The word "hereditament" must certainly be as operative as the words "real estate," for the former is expressive of the latter. In Littleton's Ca. 2 Vent. 354. it is said, that "If a man had lands in fee, and other lands mortgaged to him in fee, by a devise of all his
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lands, the mortgage would pass." Exp. Bovas, T. 1744. 1 Atk. 605. (n.) seems to confirm the above observations in their utmost extent. As to Wynne v. Littleton, upon comparing the case with the register-book, a doubt still remains whether the legal estate vested in W. as heir at law or as devisee. If as devisee (which appears to be the case) the above observations are established in their fullest extent. If as heir, it shows that the legal estate does not, even in equity, necessarily follow the beneficial interest, and pass as personal property to the executor or administrator, but requires certain technical words particularly adapted to the transfer of real property in order to pass it. It is observable, that in Wynne v. Littleton, the testator had made a charge upon the lands devised, which rather seemed to show, that those mortgaged were not intended to be the subject of the devise. As to Litton v. Russell, it can afford no argument on either side of the question.

40. Real estates in Bermuda will pass by a will, not duly executed to pass real estates according to the statute of frauds. Shadon v. Goodrich, E. 1905. 8 Ves. 451.

41. Testator, leasee of an estate, contracted for the purchase of the inheritance, and died before the conveyance was completed: Held, that by this contract he became complete owner of the whole estate in equity, and the vendor was a trustee for him. If he had by his will afterwards disposed of all his lands, this estate would have passed by that will: Ld. Ch. said, he thought it had been long established, that where the same person had the inheritance, and the term in himself, though he had in one the equitable interest, and the legal estate in the other, the inheritance draws to itself the term, and makes that attendant upon it. His Lordship said he did not apprehend that point was open to dispute, but Scott v. Fenhoulette, (1 Bro. C. C. 69.) was cited as against that proposition, at least to that extent, where they are considered separate estates going in different ways. Ld. Ch. thought that report in some respects incorrect, for the reasoning is by no means clear, and is in some parts at variance with the conclusion. Capel v. Girdler, E. 1804. 9 Ves. 510. Vide 1 Roll. Ab. 616. pl. 3. Watts v. Fularton, cited Doug. 691. Vide etiam Bridges v. Chandos, 2 Ves. jun. 429. Williams v. Owans, ibid. 602. Harmood v. Oglander, 6 Ves. 222. 8 Ves. 127. Vide etiam Whitburn v. Whitechurch, 2 P. W. 236. Goodnight v. Sales, 2 Wils. 329. Et etiam Butler's note to Co. Lit. 290. b. See also post, tit. Trust and Trustees, iv.

42. Bill by the nephew and devisee of testator, praying a specific performance of a contract entered into by the testator for the purchase of an estate, and that the executors may be decreed to pay the residue of the purchase-money beyond the deposit out of the personal assets, and if the vendors cannot make a good title, or for any other reason the contract cannot be executed, then that the amount of the purchase-money may be invested in the purchase of other lands, to be conveyed to the like uses as are expressed in testator's will concerning his real estate.—By the will, which was previous to testator's contract for the purchase, he gave all his freehold, copyhold, and leasehold estates to his nephew, for 99 years, if he should so long live, remainder to the heirs of his body, remainder to his right heirs in fee. Testator contracted for the purchase in June, and the remainder of the purchase-money beyond the deposit was to be paid on making a good title.—In July following testator made a codicil duly executed, reciting the contract, and directing that such contract should be carried into effect, that the purchase-money should be paid out of his personal estate, and that the estate so purchased should go to the uses expressed in his will as to his real estates. One of defendants, another nephew of testator, claimed under a bequest of the residue of the personal estate to be laid out in lands, and settled to the use of himself for life, with remainder to the heirs of his body, and for default of such issue to his right heirs. This defendant by his answer insisted, that if a title could not be made, no part of the personal estate ought to be applied in the purchase of any other estate for the benefit of the plaintiff. Upon the master's report the title proved defective, and the cause came on for further directions upon the claim of the plaintiff to the benefit of the contract. Per Ld. Ch. the case of Whitaker v. Whitaker, (4 Bro. C. C. 31.) cited in point, is a very clear case, though the dicta go a great way. Here the questions are, 1st, Whether the judgment of the master against the title is decisive as between the
DEVISE I.

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devises and legatees, there being good
title or not? 2dly, If the devisors of the
real estate can say they will have the real
estate, whatever may be the title, to be
paid for by the personal representative?
and 3dly, Whether they can repudiate
the contract entered into by the testator,
and can have a right to consider the tes-
tator as having contracted to buy some
other estate for them? His Lordship
stated another question, viz. What are
the equities of the parties, regard being
had to what the court must declare to be
the purpose of the testator upon the will
and codicil? The will devised freehold
estates to uses in which plaintiffs would
have partial benefits, viz. a term for 99
years, if he so long live, with remainders
over, and the testator afterwards disposed
of the residue of his personal estate, which
he directed to be laid out in land to be
settled to other uses; therefore, when he
had concluded the will, he declared that
such land as he actually had, should de-
volve in a certain course, and the land to
be purchased with the residue of his per-
sonal estate should go to other persons,
and he was content, that if he should die
the moment afterwards, the different
branches of his property should go in
those different modes. Afterwards he
entered into a contract for the purchase
of an estate, the particular containing one
condition, implied in almost every con-
tract, but expressed in this, that he was
to become the owner of the estate if a
good title could be made, he was placed
therefore in circumstances in which, from
that time until his death, or until the
agreement should break off, he was capa-
ble of devising the estate, as being the
equitable owner. The question was very
materially argued, as if immediately after
the contract testator had republished his
will, for an estate contracted for after a
general devise will pass by a republi-
cation of testator's will, and must be paid
for out of the personal estate. It was
also materially observed, that every de-
vice of land, whether particular or ge-
neral, is specific, as the devisee must have
the land at the date of the will, and con-
tinue to have it until his death. The first
question then is, whether the doctrine of
the court and the dicta in Whitaker v.
Whitaker, supra, will establish, that if a man
having lands, and having acquired an
equitable title in other lands by contract,
makes a general disposition of his estate,
an estate to which he has only an equit-
able title will pass. As between the heir
and personal representative. Lacon v.
Mertins, (3 Atk. 1.) Buckmaster v. Har-
rop, (7 Ves. 341.) and other cases, esta-
blish the general principle, that whatever
is the state of liability of the party him-
self to take at his death, must be the
state of the liability, to be considered upo-
on questions between these representing
him after his death, and if at his death,
he could not be compelled to take, clear-
ly the heir could not say to the executor,
"I will have the estate, and you shall
pay for it." There is no principle for the
devisors of the real estate to be more fa-
vored than an express legatee of personal
estate; there is as much intention that
the latter shall take the personal estate,
as that the real estate shall go to the de-
visors by the act of the deviser. Ld. Ch.
said the present case will turn upon this,
how far the dicta supposed to have fallen
from Lord Attenley in Whitaker v. Whit-
aker, can be supported by authority or
principle. It must go this length, that
where a man having legal estates and
equitable estates under a contract, de-
vises all his messuages, lands, &c. and
dies, standing quite neuter as to the equi-
table estates under the contract until his
death, the court must say those words
operate to the same effect as giving all his
lands, &c. legal and equitable, provided
the latter were conveyed, and if not, then
the interpretation is a wish to give all if
they can be had specifically, and if not,
then he devises the legal estates such as
he can pass, and such of his equitable es-
tates as he, or his representatives after
his death, shall be able to procure a title
to; and as to all the rest; it is a direction
to the executors, and against those to
whom the testator has given the personal
estate, to lay out so much as shall be ne-
necessary, not to procure a title to that es-
tate, but to procure a title to any other
estate they can find. If it did not amount
to that, Ld. Ch. said, he did not see how
the case was to be made out, for he
agreed if he had directed that out of his
personal estate, a sum of money should be
laid out in real estate, there was no doubt
it must be laid out, or if it was to be laid
out in a particular county, then the court
has gone upon this, that it is to be taken,
that there is some estate in that county,
and therefore that it may be procured.
But if it is to be in a particular parish, there
What is a good Will within the Statutes?

are the conflicting opinions of Ld. Thurs-
lew and Ld. Roslyn. Ld. T. thought
the money could not be laid out anywhere
else, and Ld. R. thought it might be laid
out elsewhere, if no land could be pro-
cured in that parish. Ld. Ch. said, his
difficulty in this case was, whether a
person devising his equitable estate, does
by that, not only give the equitable estate
he supposes his, but includes in that a
direction to purchase other estates; if
he was mistaken in supposing the estate
contracted for to be his, whether he did
not only mean, that his contract should
be executed, but also as he had said so
much, this court is further to infer, that
though the title to that estate cannot be
made, another estate shall be purchased;
a question which has never been so deter-
dined. In Coventry v. Coventry, (2 Atk.
336.) exchange being the subject, in which
case, in case of eviction, the party evicted
would take the estate given in exchange,
Ld. Hardwicke thought the intention upon
the whole was, that the estate should be
bought for those to whom he finally gave
it, if it could be, but if not bought they
should have the other estate to go in lieu
of it. Ld. Ch. thought this was carrying
the doctrine of the court further than had
been done before; he therefore took time
to consider. Ld. Ch. afterwards said,
that an equitable title, acquired after a
general devise, will pass by a republica-
tion of testator's will, if afterwards in his
life-time, or after his death, that equitable
title becomes clothed with the legal es-
state. If a good title could have been
made in this case, there would have been
no question, for then the common doc-
trine must have applied, that a person
acquiring the equitable title by the
contract, and dying before payment,
if a good title can be made, whether he
dies with or without a will, it must be
made, and the personal estate must pay
for the advantage of the devisee in one
case, or of the heir at law in the other.
Upon that principle, a reference was di-
rected to the master as to the title, and
the result was, that the title was bad.
Upon that, two further questions arose,
1st. Whether the devisees may take the
estate with a bad title if they think fit,
and the personal estate shall pay for it at
its value? and, 2dly, Whether the de-
vicees may say, they would have not only
the estate with its bad title at its worth,
but also the difference of the money,
which would have been paid had the title
been good, to be laid out in land? As
to the first, Ld. Ch. said, no case had in-
duced him to suppose, that if this were
between the heir and personal represent-
atives, it would be possible for the heir
to say, that though the title was doubt-
ful, yet, as real representative, he was
entitled to take it as it was, though his
ancestor never meant to take it so, or
intimated any purpose of retiring from
that situation, in which he might either
insist on a good title or reject the estate,
and though there is no proof that the
ancestor would have paid for the estate
with a bad title, yet the heir can insist,
that the personal representative shall pay
for it out of the assets. His Lordship
said, none of the cases cited gave any
colour for that. Green v. Smith, (1 Atk.
572.) states a doctrine inconsistent with
it, for that was a case where a man had
agreed to lay out money in land gener-
ally, and devised his real estate before
the purchase was completed; the money
agreed to be laid out was held to pass to
the devisee, for that was not the case of
a devise of real or personal estate, which
the testator had, but was a testamentary
declaration how a real estate was to be
acquired. A difference was also taken
between an heir and a devisee, and upon
that, Coventry v. Coventry, and Whitaker
v. Whitaker, were cited, from both which
cases, it is clear, that by a contract for a
purchase, if the vendor has a good title
in equity, it is the real estate of the pur-
chaser, and will pass by his will or de-
scend, and the devisee or heir may call
for application out of the personal estate
in payment. There are certainly many
passages in the report of Whitaker v.
Whitaker, going a considerable length to
establish that the case of a devisee is to
be distinguished from that of an heir, and
that in the case of a devisee, it is to be
understood that the vendee having the
estate at the time of the devise in the
sense in which he has it in equity, though
it fails, because ultimately he cannot
have it, yet such a devise is to be under-
stood as a direction, not only that the de-
vicee shall take, but that if he cannot, the
executors shall purchase an estate for
him. Ld. Ch. said this important doc-
trine was somewhat new, but when Ld.
Alvanley is represented to have stated it
to that length, it became his Lordship to
doubt, whether his opinion to the con-
trary was well founded. If the doctrine is as it appears stated, as follows, that if the testator, instead of a codicil, had re-published his will, then, in the construction of this court, the devise of all his freehold, copyhold, and leasehold estates, would go to this extent, that it would be a devise not only of all the legal estates he had at the date of the will, and of the equitable estate under the contract in these very lands, but that those words must have been construed exactly as if he had said he gave all his freehold, copyhold, and leasehold estates, meaning those of which he was then seised in law, and this estate of which he conceived himself seised in equity, and also if he should be mistaken in that, if that equitable estate cannot be conveyed, meaning, under those general words, that his executors should, out of his personal estate, buy some other estate for the benefit of those to whom he had given his freehold estate. As to Coventry v. Coventry, if that contained a case of election, the cited cases of Noys v. Mordaunt, (2 Vern. 581.) and Streetfield v. Streetfield, (C. temp. Talb. 176.) were correctly applied, but they prove nothing more than this familiar doctrine, that if A. gives an estate belonging to B., which A. had no power to give without his concurrence, and give any estate to B., it shall be understood to be given upon condition that he shall permit A.'s will to take effect as to the other; but whether the cited cases were correctly applied, depends altogether upon this, whether the testator had expressed his intention in such a manner as to raise a case of election, for if he had called upon the person who was his heir at his death, to convey any thing that belonged to that heir in that character, he could call on him to convey nothing but what was the testator's, and therefore, if there was any expression in that will affecting property in the hands of the heir, which was the testator's, it would pass by the intention declared, but not by election. So, if this codicil calls upon the residuary legatees of the personal estate, to give up something, that without their concurrence he could not give to the devisees of the freehold estate, their own property, and they withheld it, this court would compensate the devisees out of that personal estate as given. But what room was there for the application of that doctrine, either here or in Whitaker v. Whitaker? for the only question was, as to the intention by the codicil to say, he gave to the devisees of the freehold estate by the will the estate purchased under the contract, if it should become his, or to say, what he might, without raising a case of election, (being only the expression of his own intention, as to the manner of disposing of his own personal property, which he had full power to dispose of,) that he not only gave the estate, if it was his, but if it should turn out not to be his, desired the residuary legatees to lay out such a sum of money in the purchase of any other freehold estate the devisees should choose to take. Where there is a general direction to lay out money in land, the testator takes it for granted land can be procured. If a particular estate is pointed out, he conceives a title can be made, and it is now established, that where that fails, it may be laid out in other lands, the particular estate pointed out being only the mode directed for executing the primary intention for a purchase. The doctrine, therefore, is only this, that testator directed what he believed capable of being done in all events, though not in the precise mode, and the court follows that up, holding, that being directed to be done it shall be considered as done; but Ld. Ch. said, it is quite a different point, whether, if I have a contract for a particular estate, and direct, if it becomes mine, it shall go in a certain course, yet if it never becomes mine, money to be laid out in another estate is to go in that direction. The situation of the parties also is altered, for the vendor might be a debtor by specialty in respect of that contract. Instead of that the codicil only directing execution of the contract, the testator being under circumstances upon which he might withdraw from the contract as it could not be executed, yet after his death to make good the question between the heir or devisee, and the personal representative, a construction has been made, changing the vendor's situation as a debtor by specialty, and considering the testator as out of mere bounty acquiring another estate which he never thought of, and would not have so devised. His object might have been to buy that estate as contiguous, or for other
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reasons which might demonstrate his purpose to have that estate only. Ld. Ch. added, that as the present case was new, and did not fall in with the doctrine in Whitaker v. Whitaker, he should give his opinion with great deference, but he thought it carried the doctrine upon equities supposed to be founded upon the intent, further than the legitimate construction of this codicil authorizes to say, if this estate cannot be bought, it amounts to a direction to buy some other estate. Upon the second question, his Lordship repeated his opinion, that if he was right in placing the devisee in the situation of the heir, he (the devisee) could not say he would take an estate which the ancestor would not be obliged to take, and if the objection amounted to no more than that which would enable the vendor to say, the vendee shall take compensation; if it goes further, was to entitle the vendee to refuse, that must depend on the contest as to this point between his real and personal representatives immediately after his death; therefore, if no title can be made, the devises are not entitled to take this estate without it, or to have another estate bought for them. This cause was afterwards re-argued on the part of plaintiff; whereupon Ld. Ch. said, he could not get over his difficulty, that if a contract is entered into for the purchase of an estate, under hand and seal, that estate, by force of the contract, becomes the estate of the purchaser, and will go to his heir, who will take it free from all simple contract debts. The vendor is a creditor by specialty, and if the whole personal estate would be just sufficient to pay for the estate contracted for, the heir would take that estate as against the simple contract creditors, for there would be a contract by covenant under hand and seal, with which the executor would be charged at law; but if the vendor could not recover his money in an action, by reason that the title was defective, will this court hold, that as such contract was entered into, and the benefit of it devised, that shall be considered a devise not only of the land so contracted for, but a devise of any land that can be purchased with that money; and if so, will the court give such an effect to the contract and the will, as will prejudice simple contract creditors? If that is not the effect as to simple contract creditors, upon what principle can it be said, that this is the doctrine, if there are simple contract creditors, and not so if there be no such creditors? In the cases cited, there was no doubt if the title had been good, the estate would have descended upon the heir against the simple contract creditors, but it was held, if the title was not good, the heir could not insist upon any thing, and the consequence is, that the title being bad, the simple contract creditors might have been paid out of the purchase-money, that in the case of a good title would have been laid out in land. It is difficult to say there is a difference between the heir and devisee, where the title of simple contract creditors comes in question, and if not, the case must be pursued to the consequence, viz. that this is the doctrine of the court if there are simple contract creditors, and is not the doctrine if there are none. Brome v. Bonk, 10 Ves. 297. † Vide Blount v. Bestland, 5 Ves. 515. and 516. with references in nostis. Rumbold v. Rumbold, 3 Ves. 65. Wilson v. Mount, ibid. 191. Pottiward v. Prescott, 7 Ves. 541. Sheddon v. Goodrich, 8 Ves. 481. Rich v. Cokell, 9 Ves. 569. Andrew v. Trinity Hall, Camb. ibid. 533. Blunt v. Clitheroe, 10 Ves. 589. for other cases on the doctrine of election.

43. Defendant having by his answer admitted a contract, and letter, offering to sell at a valuation, the court decreed a conveyance on payment of the purchase money into the bank by plaintiff on a certain day, but directed, that on default of payment, the bill should be dismissed with costs. This contract not being binding till payment, the estate was held not to pass by a previous devise, but descendible to the heir. Gaskarth v. Lowerth, T. 1805. 12 Ves. 197.

44. A letter to solicitor, with directions to prepare the conveyance of a purchase, described generally as the land bought of A., but not specifying the terms, is not sufficient evidence of a contract within the statute of frauds: therefore the conveyance being subsequent to the will of the purchaser, and no previous contract having been made agreeable to the statute, to give the purchaser an equitable interest, the estate so purchased will not pass by his will; but where a written agreement for a purchase has been executed, the purchaser takes
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47. A declaration by testator, in the attestation of his will, that lands should go to a certain person, is not a sufficient devise of them under the Irish statute of frauds (a) for not being signed by the testator, or by any person by his direction. *Blennerhasset v. Day*, H. 1812. 1 Ball & Beo. 119. (a) *Vide 7 W. 3. c. 12.*

48. An unattested paper clearly referred to in a devise of real estate, is considered part of the will, if made previously, but not if subsequent; but legacies by an unattested paper are included under a charge of legacies on a real estate, but the produce of a sale of a real estate, cannot be directly disposed of by an unattested paper. *Wilkinson v. Adam*, E. 1818. 1 Ves. and B. 446.

49. A devise of the equitable fee under a contract to purchase, is revoked by a conveyance to a trustee and his heirs, to such uses as the devisee should appoint by deed with two witnesses, or by will with remainder to himself for life, then to the trustee for the life of the devisee to bar dower; remainder to the devisee in fee. *Plumer, V. C.* observed, that a devise is not revoked by merely taking the legal estate. (a)

(a) There is a distinction however between the intent and the bare alteration of the estate, as a ground to revoke a will. A feoffment by the devisee to such uses as he should appoint, with remainder to himself in fee, is clearly a revocation; *seecus*, where partition is the sole object. (b) As to the equitable interest, a purchaser is owner in equity for almost every purpose, such as profit and loss, &c. but before payment of the purchase money, he may be restrained from cutting timber. (c) As between the representatives of the purchaser, however, it is real estate, and a contract to sell a devised estate has the effect of revoking the devise. *Revell v. Burgess*, H. 1814. 2 Ves. and B. 382. *Vide (a) 1 Rol. Ab. 616. pl. 3. and Mr. Sugden's note on the passage in *Williams v. Owen*, 2 Ves. jun. 429. (Vend. & Putch. 148. 4th edit.)(b) *Maundrell v. Maundrell*, 10 Ves. 264. where the distinction between Luther v. Kidby, 8 Vin. tit. *Devis*, R. 6. pl. 90. and *Ticknor v. Ticknor*, (3 Atl. 741. 1 Wils. C. B. 308.) is clearly stated. (c) *Paine v. Meller*, 6 Ves. 349. *Vide etiam Brydges v. D. of Chandos*, 2 Ves. jun. 417. *Ward v. Eborall*, 4 Madd. 366.


51. A will, whereby freeholds were devised, was held to be well attested, though one of the subscribing witnesses was executor in trust under the will. *Phipps v. Pitcher*, M. 1815. 1 Madd. 144.

52. Testator devised all his freehold and copyhold manors and real estates whatever, upon certain trusts, and gave 35,000l. to the same trustees to lay out the same in lands to be settled upon the like trust, and testator afterwards contracted for the purchase of several estates, and by a codicil specifying some of the estates which he had so contracted for, he devised them to the same trustees upon the trusts of his will, and directed that the purchase monies should be taken as part of the 35,000l., and then he confirmed his will in all other respects: Held, that this codicil amounted to a re-publication, and passed not only the estates therein specified, but all the lands contracted for between the will and codicil. *Hulme v. Heygate*, E. 1816. 1 Meriv. 283. *Vide Piggot v. Walker*, 7 Ves. 98. *Lytton v. Falkland*, cited *ibid.* 117. *Strathmire v. Bowes*, 7 T. R. 482. *Goodtitle v. Meredith*, 2 M. & S. 5.

53. If A. devises an unqualified equitable fee, and afterwards the unqualified legal fee is conveyed to him, the will is not thereby revoked, because such convey.
DEVISE I. & II.

What is a good Will.—Who may devise.

Once was incident to the equitable fee devised. But if he afterwards take a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation of the will, being a change in the quality of the estate, and not incident to the equitable fee. Ward v. Moore, T. 1819. 4 Madd. 368.

Of the revocation of a will of lands, vide tit. Will, sec. v.

DEVISE II.

Who are capable to devise; and of what Estate or Interest in the Devisee, he may dispose by Will, and herein of the Devisee of a Trust Estate.

54. A man seised in fee, limited a term upon such trusts as he by deed or will should appoint, and for want of appointment to attend the inheritance. Afterwards by a nuncupative will, he gave "all, all to I.S." Testator was a bastard, and died without issue. This will not pass the trust of the term. Thrusston v. Att. Gen. M. 1685. 1 Vern. 340.

55. A father settled an estate upon his son for life, remainder to his first and other sons in tail-male, reversion to himself in fee; and devised, that if his son's wife should die in the life-time of her husband without issue male, he should have power to make a jointure to any other wife; and for want of issue male of his said son, then the estate should remain to his son by any other wife, and his grand-daughter should have 4000l.: and in case of failure of issue male by his son, then the estate should go to his grand-children and their heirs, share and share alike. This devise does not convey an estate tail to the son; for, per curiam, it is impossible to tack the estate by the will to the estate for life in the settlement, on purpose to support the contingent remainder, because the settlement and will are two distinct conveyances. Moor v. Parker, M. 1692. 4 Mod. 516. 1 Ld. Raym. 37. Skin. 558.

56. It was formerly held, that contingent interests in land, resting merely in possibility, were not devisable by a will, made previous to their vesting. Bishop v. Fountain, T. 1695. 2 Lev. 527. But it is now otherwise. Vide Selwyn v. Selwyn, 1 Bl. 222. Roe v. Griffiths, 1 H. Bl. 605 Moore v. Hawkins, 2 Eden 342. cited 1 H. Bl. 33. in Roe v. Jones. Vide etiam Pow. Dev. 34, 35. Fearne Cont. Rem. (4th ed.) 588, 539. 545.

57. A man contracted for the purchase of lands, but before the conveyance was made he died, having devised those lands. Per curiam, the devise is good, for the vendor, after the contract, became a trustee for the vendee. Darris's Ca. H. 1697. 3 Salk. 85. Vide Gilb. Ch. Rep. 243. Ld. Pembroke v. Boden, Ch. Rep. 113. 3 Pow. Contracts, 83.

58. By marriage settlement, on failure of issue male, a term was limited for raising 5000l. for daughter's portions, payable at eighteen, or marriage. There was one daughter only, upon whom the inheritance of the lands descended: she died, having attained eighteen, but under twenty-one, and unmarried; and, by a nuncupative will, gave all she could devise to her mother, who took administration with the will annexed. Per curiam, the trust of the term is not extinguished in equity, but is a subsisting charge on the estate, and ought to be raised and paid to the administratrix. Thomas v. Kemish, H. 1697. 2 Vern. 348. Vide Jackson v. Farrand, 2 Vern. 424. and Pre. Ch. 109. with notes. This case was affirmed in parliament. Colles' P. C. 112.

59. I. S., who was to have had a considerable advantage under a will, was drawn in by fraud, and false suggestions to make a composition for his interest, and to give a release: afterwards I. S., being sensible of the fraud, made his will and devised (int. al.) the residue to his wife, on condition to pay his debts, and made her executrix: Held, that his right to set aside the release was devisable, and the words proper for that purpose. Drew v. Merry, T. 1701. 1 Eq. Ab. 175. pl. 7. Vide Blake v. Johnson, Pre. Ch. 142.

60. One seised in fee of five messuages. by will devised two of them to
DEVISE II.

Who may devise, and what Estate or Interest.

his wife for life, remainder to his two daughters in fee, and the third and fourth to the wife and her heirs, she paying his legacies in case his personal estate fell short, and if she did not provide for the legacies in her life-time, then that the legatee, after her death, should sell the house and pay the legacies out of the produce; and then "all the overplus of my estate to be at my wife's disposal," and testator her executrix. The fifth messuage does not pass. Contra, Nevil, J. Shaw v. Bull, M. 1701. 12, Mod. 593. Vide Cole v. Rawlinson, 1 Salk. 254. Lady Bridgewater v. D. of Bolton, 6 Mod. 106. To make an inheritance pass under the words " residue" or " overplus" of my estate, the intent must be very plain; for if they stand indifferent to real and personal estate, or may be applied to personal alone, the heir shall not be dispossessed by the implication of such words, or by any but a necessary implication.


62. A devise of lands, out of settlement, will pass as well these lands, of which the testator was seized in fee, at the time of making his will, as those which were comprised in a settlement made on his marriage; the particular uses of which were determined by his having no male issue. But lands settled with a power of revocation, will not pass by a devise of lands out of settlement. Lady Falkland v. Lytton alias Strode, H. 1708. 1 Bro. P. C. 229. 3 Ch. Rep. 169. 2 Vern. 621. S. C. nom. Sir Litton Strode v. Lady Russell.

63. Upon a settlement, A. is made tenant for life, remainder to the heirs of his body by his wife, and in the same deed A. covenant not to suffer a recovery. A. does suffer a recovery, and deveys the lands, the covenant is good to bind the assigns, but A. being tenant in tail, and as having power to suffer a recovery, the lands devised shall not be affected. Collins v. Plummer, H. 1708. 1 P. W. 104. 2 Vern. 625. Gilb. Ch. Rep. 252.

64. A. employed B. to article for the purchase of lands, which B. did in April, but the possession was not to be delivered till Michaelmas. A. after payment of the purchase money, but before conveyance executed, devised to J. S., and afterwards A. took a conveyance of the lands so article for, to him and his heirs, and died: Held, that the land passed by the will, and that an equitable estate is as well devisable as a legal estate. Greenhill v. Greenhill, H. 1711. 2 Vern. 680. Pre. Ch. 520. Gilb. Eq. Rep. 77. Mr. Vernon says, quere if the conveyance to A. and his heirs, after making the will, does not amount to a revocation? In Langford v. Pitt, 2 P. W. 631. S. C. was cited per M. R. to have been so determined, but he took a difference where the purchase was made before the will, and where after, for, in the case before him, the testator had no equitable interest in the land; and so having no title, could devise nothing. Vide Pul teney v. I. D. Darlington, 1 Bro. P. C. 227. Acherley v. Vernon, 10 Mod. 528. Green v. Smith, 1 Atk. 572.

65. J. S. seized in fee, devised houses to his daughter, (and heir at law,) when she should attain 21, and in another clause he devised all the rest and residue of his lands to his wife for payment of his debts and legacies. The daughter died before 21. Held, that the rents and profits of the houses should go to the wife till the daughter should have attained 21. Crockford v. Wissell, T. 1711. 8 Vin. Ab. 200. pl. 7. 2 Eq. Ab. 322. pl. 15.

66. By articles before marriage, the husband agreed to add 1000l. to the wife's portion of 700l., and the securities were assigned to trustees, and agreed to be invested in land, to be settled on the husband for life, remainder to the wife for life, remainder to the first, &c. son in tail male, remainder to the daughters in tail, remainder to the right heirs of the husband. The marriage took effect, but there was no issue. The husband by will devised some lands to his wife, "and the rest of his real estate in York and elsewhere in Great Britain," to J. S. Also he gave all his personal estate, and all his securities for money to his wife, whom he made executrix, and died, leaving many of the securities remaining unaltered, but some of the money had been put out upon other securities, and was mentioned to be in trust for the husband, his executors, or administrators. The questions were, whether these securities, or any of them, passed as personal

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estate to the wife? And whether the husband intended to devise these monies, which were agreed to be laid out in land, as land purchased therewith. Per Ld. Harcourt. The articles have in equity changed the nature of this money, and turned it into land. As to so much of the 1400l. as is subsisting upon the securities on which it was originally placed, or any other securities when no new trusts have been declared, it ought to be considered as real estate, but as to the money which was called in by the testator, and placed out afterwards on securities on a different trust, that shall be taken as personal estate, forasmuch as there being no issue of the marriage, it was in the power of the husband to alter and dispose of it as against the heir at law, though not against the wife; and this placing it out upon different trusts Ld. H. took to be an alteration of the nature of it since the testator’s declaring the trust to his executors, seems tantamount to his having declared that it should not go to his heir. (a) Lingen v. Sorway. E. 1715. 1 P. W. 172. Pre. Ch. 400. Gilb. Eq. Rep. 91. 10 Mod. 39.——N. B., The statement in P. W. from which this case is taken, agrees with the register’s book. (a) It is observable that the husband might have devised this 1400l. (subject to his wife’s life estate,) either as real or personal estate, according as he should have signified his intention. Thus, if he had in his will described it as so much money agreed to be laid out in land, this would have been sufficient to have made it pass as personal estate, and by a will not attested by three witnesses, but without such a particular interposition of the testator manifesting his intentions, it remained as land, and consequently belonged to the devisee or representative of the real and not the personal estate. Determined in Cross v. Addenbroke, H. 1719. Fulham v. Jones, M. 1720. cor. Parker, C. but more particularly in Edwards v. Lady Warwick, 2 P. W. 171. Vide note (c) to Lechemere v. Ld. Carlisle, 3 P. W. 221, 222. Vide etiam Guidot v. Guidot, 3 Atk. 254. Pulleney v. Ld. Darlington, 1 Bro. C. C. 233. Rashleigh v. Master, 3 Bro. C. C. 99. Brown v. De Laet, 4 Bro. C. C. 527.

67. A. devised a term for years to B. for life, remainder to C.; C. in the life of B. devised his remainder. This is good, and amounts to C.’s declaring by his will that his executor shall stand possessed of the term in trust for the devisee. (a) A devise of a lease differs from a devise of a fee—simple, for a man cannot devise a fee which he has not at the making of his will, but leases or personal estate (b) shall pass by will if they be his at the time of his death. Therefore, if one devises all his real and personal estate, and afterwards acquires more of each kind, the real estate acquired afterwards shall not pass. Secus, as to the personal estate, and yet the intention of the party must have been the same as to both, but Ld. Ch. said, the reason of this difference seems to be, that with regard to the real estate bought after the making of the will, supposing that not to pass, there is still one in law capable of taking it, viz. the heir; but as to the personal estate, if the executor, though appointed before the acquisition of it, does not take it, it is uncertain who will. A devise of a chattel interest differs from a grant thereof, in regard that the grantee is immediately by the grant, but such devise (or rather legatee) is not in until the assent of the executor. Wind v. Jekyl, M. 1719. 1 P. W. 572. (a) Veazy v. Pinwell, 1639. Pollexf. 44. S. P. (b) Masters v. Masters, 1 P. W. 424. See ante, pl. 29. whether an after-purchased chattel or a copyhold shall pass by a subsequent will.

68. F. agreed to lay out 4000l. in lands to be settled in strict settlement, remainder to himself in fee. His wife died, leaving only one son by him. F. borrowed part of the money of the trustees, and by his will declared, that if his son should die before 21, the 4000l. and 500l. more should go equally among the children of his three sisters. The son died before 21, living his father; and F.’s brother and heir brought a bill to have the 4000l. laid out in land, insisting that the will, as made only of personal estate, did not bar him, because the money ought to be considered as land. But decreed, that as F. was become absolute owner of the money by the death of his son, he might either lay it out in land, or turn it into personal estate, as at first, and he showed an intention to have it as personal estate, Ld. Ch. decreed the money to the children. Fulham v. Jones, M. 1720, 2 Eq. Ab. 296. pl. 7.

69. J. S., who was a surviving trustee.
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to preserve contingent remainders, in his will, said, "as to such estate as God hath blessed me with, I devise in manner following." After which he gave part to A. and his heirs, and devised the rest of his estate to his wife in fee. This passes a trust estate, and testator's devisee shall be a trustee to preserve the contingent remainders. Marlow v. Smith, M. 1723.

2 P. W. 198.

70. One seised in fee, and possessed of a lease for 21 years, of land in D. devised all his lands, whereof he was seised, possessed, or otherwise interested in, to A. for life, remainder to B. in tail, remainder to C. for life, with power to make a jointure, remainders to trustees to preserve, &c. remainders over. The question was, whether the leasehold should pass with the freehold? Ld. Ch. owned the limitations were improper, but then the words of the will are very strong, "all the lands which the testator was seised or possessed of, or in any ways interested in," properly refer to a leasehold estate, and distinguish the present case from Rose v. Bartlett, Cro. Car. 292. where the words "possessed of or any way interested in," are not to be found. And as this lease for 21 years was always renewable, the testator, who was the lessee, might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance; and therefore his Lordship thought it ought to pass by the will. (a) Addis v. Clement, E. 1728. 2 P. W. 456. (a) Vide Turner v. Hurler, 1 Bro. C. C. 73. Lovelier v. Cavendish, Amb. 336. 1 Eden 99.; but the authority of Rose v. Bartlett has been submitted to in Day v. Trigg, 1 P. W. 286. Davis v. Gibbs, 3 P. W. 26. Knotsford v. Gardener, 2 Atk. 450. Pistol v. Richardson, 1 H. Bla. 26. (n.) in which the testator, being seised of freehold estates, and also possessed of two farms, holden by leases for 1000 years each, by will "gave, bequeathed, and devised, all his manors, advowson, donation, right of representation, and all and every his messuages, lands, tenements, and hereditaments whatsoever and wheresoever, which he was seised of, interested in, or entitled to, in the several counties of, &c. to his son for life, with imprisonment of waste, and after his decease to the heirs of his body," with a similar limitation to his daughter and the heirs of her body, remainder to the heirs of testator's family. He then gave his personal estate to his wife and daughter. This case was twice argued in B. R. and the court reluctantly determined that the two leasehold farms did not pass by this devise. Ld. Mansfield, in delivering the judgment of the court, stated the will at length, and said, he did so, in order to show that there were no words in the will, except the clause of devise itself, which indicated any intention in the testator to convey the leasehold premises, and that although the words of the devise were very comprehensive, yet a system of legal construction had been established by former cases (especially Rose v. Bartlett, and Davis v. Gibbs) which precluded them from considering the intention of the testator on the words of the devise, as they otherwise might have done, and bound them in their decision of the principal case. N. B. It seems that Addis v. Clement was not once adverted to in Pistol v. Richardson.—But this rule of construction does not extend to the case of a deed. Doe v. Williams, 1 H. Bla. 25.

71. One seised of lands in fee in A. and possessed of a term for years in B., devised all his lands, tenements, and real estate in A. and B. to J. S. and R. W. for their lives, and after their decease to the heirs, &c.; this will not pass the term, especially if there be another clause in the will which disposes of the personal estate. Davis v. Gibbs, II. 1729. 3 P. W. 26. Mon. 269. Vide Addis v. Clement, 2 P. W. 456.

72. One possessed of a term devised it to A. for life, remainder to the heirs of A.; it seems this shall, on A.'s death, go to his executor, and not to his heir. S. C.

73. A. having lands of inheritance in B. and C. and a mortgage in D. and lands extended in E. on a statute, devised all his credits and mortgages to his executors, and afterwards devised all his messuages, lands, &c. and all his real estate whatsoever in B. C. D. and E., to J. S. and R. W. for their lives, and after their decease to their heirs, as tenants in common. Decreed, per King, C. ; the mortgage and extended lands in D. and E. to the executors. S. C. as reported in Fitzg. 116.

74. Upon a bill filed to have an assignment of rents and profits of a leasehold
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81. Under a general residuary disposition by will to a natural son, his heirs, executors, administrators, and assigns, forever, to and for his and their own proper use and bequest, a trust estate does not pass. Exp. Brettell, M. 1801. 6 Ves. 577.

82. A devisee must have the estate devised both at the date of his will and at his death. Att. Gen. v. Vigors, E. 1803. 8 Ves. 283. Vide Howe v. Dartmouth, 7 Ves. 147. Broome v. Monk, 10 Ves. 605.

83. By a devisee in general terms a trust estate will pass, unless an intention to the contrary can be inferred from expressions in the will or the purposes or objects of the testator. Braybrooke v. Inskip, E. 1803. 8 Ves. 437. Exp. Morgan, T. 1804. 10 Ves. 101. Vide Roe, ex dem. Read, v. Read, 8 T. R. 118.

84. Though a will may be inaccurately penned, yet the court will construe it as to pass an estate originally in mortgage to the testator, but foreclosed by him, where it appears his intention to dispose of all his interest, for where a mortgagee by his will disposes of the money, it carries his interest in the land also. Sibberscheldt v. Schiott, T. 1814. 3 Ves. & B. 45.

85. A widow shall not be put to her election by a devisee to her for life of a mansion-house and fifty acres held with it, which was part of the same estate, out of which she claimed dower. Ed. Dorchester v. E. of Effingham, T. 1815. Coop. 319. Vide Birmingham v. Kirwan, 2 Sch. & Lef. 444.

DEVISE III.

Who are capable to take as Devises under the Words of a Will.

Who are capable to take as Devises under a Will.

86. Devise in trust for the children of A.—A. had only one child, and several grand children. The child only shall take, but if there had been no child of A. living, the grand children might have taken. Crooke v. Brooking, T. 1689. 2 Vern. 106.

87. A. devised a term for years to his daughter and her children (she having three children,) “and also to such other children as she should have, and the children of those children;” she had
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other children afterwards. Per cur. the woman and her three children took jointly each a fourth part, and that the after-born children took nothing; these words being words of limitation and not of purchase; and it is as much for the wife's part as though it had been given to her and the heirs of her body. Alcock v. Ellen, M. 1692. 2 Freem. 186. Vide Minshall v. Minshall, 1 Ask. 415.

88. A. devised an estate to T. and his heirs, upon trust, that he should convey it to such of the relations of the testator as he should think best, and most reputable for his family. A. died without issue, and the heir at law, testator's brother, preferred a bill against defendant, praying to have the estate conveyed to him. It was in proof on defendant's part, that testator, before the making of his will, several times declared that plaintiff was an ill husband, would spend his estate if he should leave it to him, and several other expressions showing the dislike of testator to plaintiff. But per cur., there being nothing in proof against plaintiff of any misbehaviour since testator's decease, the court will judge it most reputable for the family that the heir at law should have the estate, and as for discourses which were before the making of the will, those were all attained by the making of the will, and it cannot be denied, but if the trustee would give him the estate he was not disabled to take it. Clarke v. Turner, T. 1694. 2 Freem. 198.

89. A. devised by J. S. the wife of B. S. the "rents and profits" of certain lands during her life, to be paid by his executors into her own hands, &c.; held, that by the words "rents and profits," the land itself passed, contra Holt, C. J., who strongly inclined that the executors were trustees for the wife. Bush v. Allen, M. 1695. 5 Mod. 63. South v. Allen, ibid. 101, 102. 1 Salt. 228. Comb. 375. Vide Beale v. Dod, T. R. 193.

90. Devise thus: "All the rest of my estate I give to be equally divided between my three daughters, F., G. and A. and all my grandchildren and great grandchildren, or so many of them as shall be living within two years next after my decease." This was held to extend only to those then born, and not to any to be born within two years after testator's death. Trelawney v. Molesworth, E. 1701. Colles' P. C. 163.

91. A., had issue two daughters, one of whom was dead, and left issue B. her heir, and one of the co-heirs of A.—A. by will devised the estate to B. and his heirs; or, if he should take one moiety by descent and the other by purchase, or the whole by purchase. Adjudged he took the whole by purchase, for there can be no descent to one capitaee, as heir, but the descent is to all. Rawstorph v. Reading, T. 1703. Pre. Ch. 222. S. C. zosour Reading v. Reyston. 1 Sak. 242. Com. Rep. 128. S. C.

92. Lands were devised to three and their heirs, to the use of them and their heirs, upon trust, to convey part to A. for life, and other part to B. in tail, but no direction given as to the remainder in fee; though two of the trustees were related to the testator, yet the remainder in fee will not belong to them, but be a resulting trust for his heir. Hobart v. Lady Suffolk, H. 1709. 2 Vern. 644.

93. A. devised to trustees for his daughter for life, remainder to the second son of her body in tail male, and so to every younger son, remainder over. There were two sons B. and C. B. died, and after his death C. was born. C., though an only son, shall take, he being the second son in order of birth, and as the will is worded not to be excluded (a). Trasford v. Ashton, T. 1710. 2 Vern. 660. (a) Vide Chadwick v. Dolesman, 2 Vern. 529.

94. A. devised a term for years to his wife for life, and after her death to the child she was then ensuant with, but if such child died before 21, then he devised one third part of the said term to his wife, whom he made executrix; the wife not being ensuant at the time of the devise, held, first, that the devise to her was good, though the contingency never happened; secondly, that she should have the undisposed surplus of the personal estate, and not go in a course of administration. Jones v. Westcombe, M. 1711. Pre. Ch. 316. Gilb. Eq. Rep. 74.

95. The eldest daughter where there is a son, or where the estate by a settlement goes all to a remainder-man, is a younger child in equity. Beale v. Beale, H. 1718. 1 P. W. 244. So though an eldest daughter be the first born child of all. Butler v. Duncomb, T. 1718. 1 P. W. 451. Every one but the heir is a younger child, for the heir runs away with the land. And the court will indulge this latitude of construction in cases of por-

96. Devises of lands to the heirs male of E. L. lawfully begotten, and for default of such issue to his own right heirs. E. L. was living at testator's death: and upon a question between testator's heir, and the eldest son of E. L., it was adjudged, that the eldest son should take. Darvillon v. Beaumont, T. 1714. 1 Bro. P. C. 489. 1 P. W. 229. Vide Burchett v. Durdant, 2 Vent. 211. James v. Richardson, 1 Vent. 334. S. C. Vide citatam Goodright v. White, 2 Bla. 1010.

97. A. devised the surplus of his estate, one moiety to his son B. and the other moiety to his children and grand-children. B. shall not come in for a share of the surplus, he being by the words of the will separated from the other children. As to the other moiety the question was, whether a grand-child en vente sa mere should take. Per cur. It shall not, in regard a devise to children and grand-children should, prima facie, refer only to such children and grand-children as were living at the making of the will; (a) but if a devise were to children and grandchildren living at my death, a child en vente sa mere might in such case be regarded as living. (b) The court further resolved, that the children and grand-children must take per capita, and not per stirpes, they all taking in their own right, and not by way of representation. (c) Northey v. Strange, H. 1716. 1 P. W. 340. Gilb. Eq. Rep. 136. Pre. Ch. 473. S. C. nomine Northey v. Burbage. (a) Vide Heath v. Heath, 2 Atk. 121. Haughton v. Harrison, ibid. 329. Maddison v. Andrew, 1 Ves. 57. Ellison v. Airy, ibid. 111. Horseley v. Chaloner, 2 Ves. 85. Bartlett v. Hollister, Amb. 334. Isaac v. Isaac, Amb. 348. Baldwyn v. Kever,
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objected that express legacies were here given to the heirs, but none to the executors. If the devisees were intended to be owners, the testator need not have directed them to sell for the best price they could get; besides, if the personal estate had been sufficient to pay the debts, there would have been no need of a sale, and surely the devisees should not, in such case, take the estate from the heir. It is material also, that the trustees were to apply the produce of the sale in payment of debts, &c. which implies an application of the whole money, and shows that no beneficial trust was designed. (6) Again, the devise and power of sale being to the surviving, is an argument rather of a trust than an ownership, and that the trust was intended to follow the estate. Deceased, the devisees to account to the heir at law. Starkey v. Brooks, M. 1717. 1 P. W. 390. (a) Vide Hobart v. Lady Suffolk, 2 Vern. 644. Hill v. Bp. of London, 1 Atl. 618. Cook v. Duckenfield, 2 Atl. 562. (b) Vide Cruse v. Barley, 3 P. W. 20.

100. R. B. devised his estate, in case he should leave no son at the time of his death, to I. S.; the testator died, leaving his wife priorwent ensign with a son; this posthumous son is a son living at the testator’s death, and I. S. is not entitled. Sir R. Burdet v. Hoegood, M. 1718. 1 P. W. 486.


102. A. devises the residue of the real and personal estate to his four daughters, their heirs, executors, and administrators. One of the daughters dies in the lifetime of the testator, her share of the residuum shall go to the three surviving daughters, as undisposed of. Backwell v. Dry, T. 1721. 8 Vin. Ab. 416. pl. 10. 2 Eq. Ab. 564. pl. 1. 1 P. W. 700. S. C. nomine Bagwell v. Dry, states it thus: I. S. (inter alia) devises the surplus of his personal estate to four, equally to be divided, &c. share and share alike, and made B. his executor in trust. One of the four dies, living the testator; his share, as so much of the testator’s estate undisposed of by the will, shall go according to the statute of distributions, because each of the legatees had but a fourth devised to them in common. Pre. Ch. 587. 2 Eq. Ab. 556. pl. 20. S. C. stated thus: A. devises his real and personal estate to his four daughters, and their heirs, executors, and administrators. One died, living the testator. Her share shall go in the same manner as a real estate, to the surviving daughters.

103. A. seised in fee, devised his lands to his grand-daughter for life, remainder to his own right heirs male, and died, leaving his grand-daughter his heir at law, and also a deceased brother’s son, being the next in the male line, which nephew brought his bill to perpetuate the testimony of the will for the writings, and to stay waste. Demurrer for want of title on plaintiff’s own showing. Against the demurrer Brown v. Barkham (cor. Ld. Cooper, 2 Vern. 79. Pre. Ch. 442. 461.) was cited, where L.ord Coke’s notion (in Shelly’s Ca. 1 Co. 94. 1 Inst. 24. b.) “that he who takes as heir male by purchase, must bo completely heir, as well as heir male,” was denied; and Pybus v. Mitford, 1 Vent. 372. was cited, as also the case there quoted by Lord Hale. But Ld. Ch. interrupted plaintiff’s counsel, whom he would not allow to dispute a land-mark of the law; for, though what they contended for might be reasonable, if it had then been adjudged, yet, whatever the law was, provided it was certain, it would be well for the subject, though in particular
instances it might seem unreasonable; that in Ford v. Osultou, 3 Salk. 356.
11 Mod. 159. the remainder was limited to the heirs male of F. and that was determined to be void in all the courts. The words "heirs male," his lordship said, must be intended heirs male of the body, and would never extend to an heir male of the collateral line, and it not being said in the will "heir male of his body or of his name," the grand-daughter, who was his heir at law, might have an heir male, though not of his name. As to Brown v. Barkham, that was merely a trust; but the principal case is that of a legal estate, where the rule of law that has so long prevailed, and been taken for granted, must be observed, viz. that "he who claims as heir male by purchase, must be heir as well as heir male;" besides, this case differs from Brown v. Barkham, the remainder being there limited to the heirs male of the body of Barkham, the grandfather, whereas here the devise was to the heirs male, without saying of any body (a). Demurrer allowed. Daws v. Ferrers, T. 1722. 2 F. W. 1. Pre. Ch. 359. (a) This case was again brought before the court in Gwynn v. Hooke, 18th Nov. 1740. when Ld. Hardwicke directed a case for the opinion of the court of B. R. (Reg. Lib. A. 1740. fo. 310.) who certified in confirmation of Ld. Macclesfield's order, (8 Vin. Ab. 817. pl. 13. (n.) ) and that certificate was afterwards confirmed and the bill dismissed with costs. (Reg. Lib. A. 1741. fo. 646.) But in Willa v. Palmer, 5 Burr. 2615. on a case sent to B. R. by the court of Chancery, the question arose on both a will and a deed; whether A. took by purchase, under the description of heir male of the body of B., not being heir general. B. being in the first case the grantor, the court certified that A. took an estate tail by descent, but they added in the certificate, that if a third person had been the grantor, they would have thought that A. would have taken by purchase, as heir male of the body of B.; and they also certified that he did so take under the will.

124. Devises of land to trustees in trust, if the eldest son of A. turn Protestant, to such eldest son; this is a good devise, as not being to a papist but to a good Protestant. Carteret v. Carteret, E. 1723. 2 P. W. 135.

105. B. seised in fee of a real estate as heir ex parte materna, and being also seised in fee of a small estate as heir to his own father, devised all these lands to trustees and their heirs, in trust, to pay several annuities and charities; after payment of which he devised the residue of the rents and profits of the estates to his own right heirs of his mother's side for ever. The question was, who should be entitled to the residue of the rents and profits, whether the heir of the mother's father or the heir of the mother's mother? And it was insisted that parol evidence should be read, as explanatory of the testator's intention; it was objected, that in the case of land, where the statute required that the will should be in writing, there ought not to be any parol proof; (a) but per King, C. in this case parol evidence of what the testator said or directed when he ordered the will to be made, might be admitted (b) by analogy to the cases, where there were two persons of the same name or the like; for here there were two heirs of the mother's side, one who was the heir of the mother's father, and the other heir of the mother's mother, consequently the court might well admit parol evidence, (c) to show which heir of the mother's side was intended; and the depositions of two witnesses were accordingly read, proving that at the time of making the will, the testator declared the heir of his mother's mother should have his estate; because it came from thence. Per Ld. Ch. very little is to be said for the heir of the mother's father, who, in this case, was neither heir general, nor heir quoad these lands, for the heir, as to these lands, was the heir of the mother's mother, from whom they descended, so that the heir of the mother's father was neither the heir simpliciter, nor quoad hoc, to the party that last died seised; his lordship further said the case was clear without any great stress on parol proofs, and he had no doubt about it, though he would send it to the Judges as a matter of law, if insisted upon, which not being done, Ld. Ch. decreed in favour of the heir of the mother's mother's side, from whom the estate came. Harris v. Bp. of Lincoln, E. 1723. 2 P. W. 136. (a) Vide Strode v. Russell, 2 Vern. 621. where the House of Lords would not allow parol proof; for that the title of the devisee must depend on the words of the will. (b) Vide Cheney's Ca. 5 Co. 68. (c) For cases in
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which parol evidence has been admitted upon the construction of written instruments, vide Rachfield v. Careless, 2 P. W. 158.

106. A devise of lands to a Roman catholic, who is under eighteen years of age at the death of testator, and conforms within six months after attaining that age, pursuant to the 11 & 12 W. 3. 6. adjudged a good devise by Ld. King, contra the decision of Ld. Macclesfield in 3. C. E. 1722. Hill v. Filking or Filkin, T. 1725. 9 Mod. 154. 10 Mod. 481. 2 P. W. G. Sel. Ch. Ca. 22.

107. Devise of lands to the mother for life, remains to her children, &c. She had then one child; and about four years afterwards testator made a codicil, at which time she had two more children. —This is a future devise, and takes in the children after born, for the word "children" extends to more than the child born at the making of the will. Bateman v. Roach, M. 1725. 9 Mod. 104.

108. I. S. by will gave several exchequer annuities to trustees, for the residue of a term, in trust for E. D. for so many years of the term as she should live, and afterwards for the plaintiffs, for so many years, &c. as they or the survivor of them should live, and after the decease of the survivor, in trust for their issue, for all the residue of the said term, and for default of such issue, in trust for the defendants. The bill was to have the annuities sold, and the money arising therefrom to be paid to plaintiffs, (the devisees for life, with remainder to their issue, &c. King, C. said, where a devise is made to a man and his heirs, or the heirs of his body, the whole term vests in the devisee, and any remainder over is void; and so it was held in Dom. Proc. in Rushout’s Ca. The remainder in the present case is void, being after a limitation in tail. Died v. Dickenson, M. 1727. 8 Vin. Ab. 451. pl. 25. 2 Eq. Ab. 348. pl. 14. 325. pl. 51.

109. Testator by will gave an equal share of his real estate to his two natural sons, I. and C., but mistook their names. Per curiam, though bastards are not sons, they may acquire that name by reputation. As to the mistake of names, any thing that amounts to designatio personæ, is sufficient. Rivers’s Ca. M. 1737. 1 Atk. 410.


112. Devises of real and personal estate to trustees, to pay annuities and legacies, and residue of the estates to the child or children of G., with remainder over. The intermediate profits till a child born shall go to the residuary devisee. Gibson v. Rogers, T. 1750. Amb. 93.

113. A. devised to the younger children of his son B., to be paid at twenty one: Held a vested interest in those born at the death of testator. Horseley v. Chaloner, M. 1750. 2 Ves. 83.

114. Devises of land in trust for testator’s daughter for life, remainder to the heirs of her body, and if she die with issue, to sell, and divide the money amongst all and every the children of his sisters. The sisters had several shik

115. Devise to the descendants of F. I. now living in or about S., or hereafter living any where else: Held good, and that testator's grandchildren were entitled, but not a great grandchild, born after making the will, for he is excluded by the words "now living." Crossly v. Clare, E 1761. Amb. 397. Vide Edge v. Salisbury, Amb. 70.

116. A. devised certain estates to raise 10,000l. for all his younger children, naming them, and afterwards (having four more) by a codicil, taking notice of the devise and the increase of his family, he charged his estates with a further sum for such new born children, for their portions, to be paid at such time, and in such manner as the portions directed by his will. The estate was sold for only 8000l. Held, from the apparent intention of the testator, that all the younger children should share equally. Brackenbury v. Brackenbury, M. 1764. Amb. 474. 2 Eden 275. Vide etiam Milner v. Milner, cited 3 Ves. 613. Danvers v. Manning, 2 Bro. C. C. 18. Stebbing v. Walkby, ib. 85.

117. S. devised the residue of his real and personal estate to the children of A. equally, and if A. should die without leaving issue, then over: Held a vested defeasible interest, and the children as they are respectively born to take the accruing interest and profits equally. Shepherd v. Ingram, T. 1764. Amb. 448.


119. A. devised his estates to his son B. (then living,) and if he should die under twenty-one, and testator's wife should be absent at his death, then to his posthumous child or children, at twenty-one, but if not, then over. After the will, and in the life-time of the testator, two children were born, then B. died under twenty-one: Held, the two last children were entitled. White v. Barber, T. 1771. Amb. 704.

120. Devise in trust to the testator's son C. for life, remainder to the first, &c. son of his body lawfully begotten in tail. C. had no son at the time of making the will, but had one afterwards, who died in the testator's life-time. He had afterwards another son, who was held to take as first son. Lomax v. Holmden, T. 1749. 1 Ves. 290.

121. Devise of real estate in trust to sell and pay debts, then to A. for life, remainder to trustees to preserve, &c. A. paid off the debts, and the trustees conveyed the estate to other trustees for five hundred years, in trust, at the request of A. by mortgage and sale, to raise the money advanced by A. with remainder, as in the will. A. died without issue: Held, the term did not merge for the benefit of the heir to whom the estate descended, but the money should be raised for the next of kin. Wyndham v. E. of Egremont, T. 1773. Amb. 575.


123. E. S. devised all her real estate to trustees for 500 years, to raise 200l. for the purposes in the will mentioned, and after the determination of that time, and subject thereto, to other trustees for a term of 1000 years, in trust, to pay out of the rents certain annuities, and subject to the said two terms, she gave the premises to all and every the child and children of her brother T. G. and the heirs of their bodies, &c. T. G. had two children at testatrix's death, and one born afterwards, but before the death of the annuitants. This is an immediate devise, and the last mentioned child being born after testatrix's death, is not entitled to any share of the premises. Singleton v. Gilbert, H. 1784. 1 Cox 68. 1 Bro. C. C. 543.

124. An immediate devise to great-grandchildren, will not include a great-grandchild en ventre sa mere, at the testator's death. Freemantle v. Freemantle, E. 1756. 1 Cox 248.
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125. Devise to trustees and their heirs, in trust to receive and pay over the rents and profits to A., a feme covert, for life, for her separate use; and after her decease, to convey to her daughters, as tenants in common in tail, remainder over: Held, that A. took an equitable estate for life, and may by lease and release make a tenant to the præcipe for an equitable recovery; that each daughter took a vested estate when she came in esse, subject to be devested as the number increased. The conveyance in execution of the trust need not wait the death of A. Personal estate not exempted from debts, &c. by a charge upon the real; cross-remainder implied. _Burnaby v. Griffin_, M. 1796. 3 Ves. 266.

126. Devise to A. and her heirs, but if she dies under 21, and unmarried, then to B. and her heirs; A. died in the lifetime of the testator, under 21, and without issue, but having been married: Held, that testator’s heir at law was by the failure of this devise entitled. _Williams v. Chitty_, T. 1797. 3 Ves. 345.

127. Money bequeathed to be laid out in land, to be settled upon A. for life, remainder to the wife of A. for life, with remainder in tail to the sons and daughters of A. by such wife; A. was not married till after testator’s death: Held, to extend to a second wife. _Peppin v. Bickford_, M. 1797. 8 Ves. 570.

128. In wills, as well as in grants, there must be a person in esse, to take when the estate vests; therefore where a devise is immediate, and the description of the person to take is general, those answering it at the testator’s death alone can take. _Crome v. Odell_, H. 1811. 1 Ball & Be. 459. See _post_, tit. _Legacy_, ii. where this case is very fully stated.

129. It is competent to go out of the will to ascertain the state of the testator’s family, and his knowledge of it with respect to the disposition he has made. S. C. ib. 481. See also _post_, tit. _Will viii. (d)_ for the rules of construction.

130. J. W., a married man, without any legitimate offspring, devised “to the children which he might have by A., and living at his decease?” Held, that natural children who had acquired the reputation of being his children by A., before the date of his will, should take, as being sufficiently described and intended upon the face of the whole will, but the court rejected as a description of the devisees, passages in a written book unattested, of which probate was admitted under a reference to the will, to “the observations and directions which I shall leave in a written book;” but _Eldon, C._, said, that an unattested paper clearly referred to in a devise of real estate, had been considered part of the will, if previously and not subsequently made. _Wilkinson v. Adam_, E. 1813. 1 Ves. & B. 422. 445. See more of this case, _ante_, tit. _ Bastards_, pl. 16. _Devises_ i. pl. 48. _Words_, verb. _Implication._

131. Testator devised to A. for life, remainder to her first and other sons in tail male; remainder to F. for life, remainder to her first and other sons in tail male, remainder to the first and every daughter of A., remainder to the first and every daughter of F., with a proviso, as before, that if A. married a man of less fortune than the testator left her, the excess of his (testator’s) property, beyond that of the husband, should go over to F., and then, after stating his intention that the proviso should apply to F., in case by the death of A. she should before her marriage become possessed of his estates, he concluded thus: “And I will and devise that, in case my two daughters die without issue, my estate shall then go to my brother H.,” F. died in testator’s life-time. A. married a man of inferior fortune, whereupon testator’s heir and the heir of H. the ultimate devisee, brought ejectments against A. and her husband, to recover the excess beyond the husband’s fortune. For the heir of H. it was contended, that A.’s estate in the excess was forfeited, and that this was not a condition for the breach of which the heir might enter, but a conditional limitation, and that the extinguishment of the previous limitation by the death of F. only accelerated the limitation to H. For testator’s heir it was contended, that H. could only take on failure of issue of both A. and F., which had not happened, and that it was the manifest intent that the estate of A. in the excess should, on the breach, be forfeited as to herself and her issue; and that such excess must go to testator’s heir as undisposed of. For A. and her husband, it was contended that A. must of necessity take in the whole, a remainder in tail.
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general by implication, to effectuate the testator's intention, for otherwise all her issue could not take, there being no limitation to the children of sons, nor to the children of daughters, and yet the estate was not to go over until a failure of her issue. In the K. B. and the Exch. Chamber, it was decided against the heir of II. The court of K. B. decided in favour of testator's heir, but the Exch. Chamber reversed that judgment, and affirmed the other; that court being in favour of A. and her husband, in both cases. But by the Lords, the question was decided on a different ground, yet in favour of A., so far as her life estate in the whole was concerned.—Eldon, C. observing, that, even in the view taken of the case below, he was inclined to consider the judgment of the Exch. Chamb, as the better judgment; and that, though it had not been so on the principles there stated, it would be very difficult, under the words of the testator's will, to support either of the ejectments. Jones, d. Henry, v. Hancock, T. 1816, 4 Dow P. C. 203, 209. Vide S. C. post, tit. Marriage vi.

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132. A. made his will thus: “I devise to J. S. all those my lands in B. in the county of S. in the possession of D.” J. S. had no lands in the county of S. but he had lands at B. in the county of H. in the possession of D. In an ejectment by the heir of A., for these lands, it was ruled that the lands at B. in the county of H. passed well by this devise, and plaintiff was nonsuited. 


133. If a man have two estates, called Dale and Sale, and devise all his messuages, &c. viz. two parts of Dale to his grandson in tail, but makes no mention of Sale, yet it will pass by the particle “all,” and the videlicet shall be taken to be directive and not restrictive. 

Bagnell v. Abnett, T. 1692. 4 Mod. 141.

134. Devise to A. B.—Father and son are both named A. B., Per Holt, C. J. prima facie, A. B. the father shall be intended, but if the deviseor did not know the father, it will go to the son. 

Lepiot v. Brown, H. 1703. 1 Salk. 7. Holt, 41. 6 Mod. 199.

135. Devise to A. and his posterity, Ld. Keeper thought this would create an estate tail only, but the M. R. being of opinion that such a devise would amount to a fee, Ld. Keeper ordered precedents to be searched. 


136. The words “I desire,” or “I will,” amount to an express devise, and M. R. in this case said, that the words “Recommendation,” or “Desire,” in a will, are always expounded as a devise. 


137. A. disinherited his son, and by will gave the greatest part of his estate to B., and told B. if his son behaved well he might give him 20l. a quarter, and if he used that well, he might make it up 40l. a quarter. Decreed the 40l. a quarter to the son. 


138. A devise of “all such lands, tenements, and estate whatsoever, wherewith at the time of my decease I shall be possessed or invested, or which shall then or of right doth appertain to me,” will not pass an estate purchased subsequent to the making of the will. 


139. A. devised lands “to his own right heirs-male for ever.” This shall extend only to the heirs-male of the body of the testator, and not to a collateral heir, for the testator not having an heir-male of his body at the time of his death, the court held it a void limitation. (a) “Heirs-male, &c. in a will, are always intended of the body,” and imply an estate tail, (b) Ford v. Osulleton, M. 1709. 11 Mod. 189. 3 Salk. 336. (a) The proposition that a person to take as heir-male or female of the body by purchase, must be actual heir at law, was recognised, and this case was cited as an authority by Ld. Macclesfield, in Dawes v. Ferrers, 2 P. W. 1. Et vide ante, pl. 103. It is also mentioned by Mr. Hargrave, in a note to Co. Lid. 24. b.; but it was ruled in Willes v. Palmer, 5 Burr. 2615. 2 Black. 687, that a person might take as heir-male of the body by purchase, without being heir-general, whereupon Mr. H., in a subsequent note, guards the reader against incasiously adopting his private ideas, 164. (a) Vide Counen v. Clerk, Hob. 31. Southcot v. Stowell, 1 Mod. 226. 237. Freem. 216. 2 Mod. 207. 

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140. A. seised of lands in fee, by will gave several legacies, and then bequeathed thus, “I give the rest of my estate, chattels, real and personal, to J. S.” Resolved, that nothing but his chattels passed by the word “estate.” Anon. H. 1711. 8 Vin. Ab. 294. pl. 7. 2 Eq. Ab. 322. pl. 16. 328. pl. 2.

141. A. baron gives all his estates to his wife, and says, “I desire and request my said wife to give all her estate, which she shall have at the time of her death, to her and my nearest relations, equally amongst them.” Per cur. the words being so very general, both in respect of the money, and of the persons to take it, it does not amount to a devise, but it is only a recommendation to the wife to make such a disposition; but if he had desired she would give it to a particular person, it would have been a good devise and a trust. A devise to the nearest relation is good, (a) and such shall be so accounted as are next by the statute of distributions.—Anon. 1712, 8 Vin. Ab. 72. pl. 25. 2 Eq. Ab. 291. pl. 8. (a) Vide Pyot v. Pyot, 1 Ves. 335.

142. J. S. devised the residue of his estate to his wife, and desired her to give all her estate at her death, to his and her relations. Quare, if this amounts to a devise, or a trust in the wife for all the estates which the husband gave her by his will. Per Harcourt, C. These words are too general, to amount to a devise over of his estate, after the death of his wife, nor can it be taken as a trust, because the words extend to all the estate which she shall be possessed of at the time of her death, over which the husband has not any power; and, therefore, it must be taken as a recommendation, and not as a devise or trust; but if the testator had desired his wife by his will to give at her death, all the estate which he had devised to her, to his and her relations, there the estate devised to her, ought to go after her death to his and her relations, according to the statute of distributions. Palmer v. Schribb, E. 1718. 8 Vin. Ab. 289. pl. 25. 2 Eq. Ab. 291. pl. 9.

143. A. devised the surplus of his estate to his grandchildren living at the time of his decease, to be paid to them at 21, or marriage. There were two grandchildren born, one within four months and the other within six months after his decease. Per Ld. Chancellor. The words “living at the time of his decease,” must be restrictive words, and can be of no other use, else the devise had been “to his grandchildren.” A will must be expounded according to what is contained in it, and the court must not vary it to provide for those not provided for by it. Decreed, for the grandchildren living at the testator’s death, in exclusion of the two born after his decease. Musgrave v. Parry, H. 1715. 2 Vern. 711. Vide Palmer v. Cracroft, 2 Vern. 578.


145. A. devised lands to his younger sons at 24, and in the mean time the rents and profits to his eldest son, and died; the eldest son devised all the rents and profits of the premises to his younger brothers, but not to be paid to them until 24: Held, that only the rents and profits accruing from the death of the eldest brother, should pass. Tissen v. Tissen, M. 1718. 1 P. W. 500.

146. So, if one possessed of a term for years, devise all the profits thereof to J. S. The profits accruing from the death of the testator only shall pass. S. C.

147. By the devise of a house, with the appurtenances, only the garden and orchard will pass with it, but the devise of a house, with the lands appertaining, (a) the land usually occupied thereby with will pass. Blackburn v. Edgley, H. 1719. 1 P. W. 603. (a) Gulliver v. Points, 3 Wils. C. B. 141. Doe v. Martin, 2 Black. 1148.

148. J. S. devised that A. should continue to live at his house, and to be at the charge of keeping it, and the servants, and coach-horses, which the testator employed in ploughing the ground, and spend the corn arising thereon in the house. Here the land enjoyed with the house shall pass to A. S. C.

149. J. S. devises the interest and produce of the surplus of his real and personal estate to his grandchildren, until 21. This will pass the absolute right and property of the real and personal estate.
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to the grandchildren, after that age.


150. J. S. seised of a church lease for the life of A. devised an annuity out of it to B. for life, and directed that if B. survived A., then the testator's executor should purchase the leasehold premises for the life of C., testator's kinsman, and then devised that his executor, out of the surplus of the leasehold and personal estate, should keep the premises in repair, but if the premises could not be so purchased, then he devised the surplus of the estate to the plaintiff, and made D. his executor in trust, only giving him a small legacy. The executor purchased the leasehold for the life of C., and the question was, whether plaintiff or defendant C. was entitled to the surplus of the profits. Per King, C. Plaintiff cannot have this lease, the devise to him being on a contingency which never happened, viz. if the leasehold premises could not be purchased for the life of C., whereas such purchase has been made by the executor. Deemed that C. was entitled to the leasehold premises; and his Lordship said, this appears to have been a beneficial devise, because in the devising clause testator calls C. his kinsman, and here slighter words will serve to give the leasehold premises to C., for as much as no other person can take them, and it is a dark will. But, upon a re-hearing, his Lordship reversed this decree, and held, that by this will plaintiff was entitled to the lease. Stephens v. Stephens, H. 1725. 2 P. W. 323.

151. J. S. had two sons, A. and B. and three daughters, C., D. and E. and devised his lands to be sold to pay debts, and as to the produce after debts paid, he gave thereout 200£. to his eldest son A. at 21, the residue to B., C. and D. equally, at 21, or marriage. A. died under 21, and unmarried. The question was, what should become of the 200£. given to A. at 21? It was admitted that the 200£. never vested in A., it being given to him at his age of 21, and not payable at that age, so that the age was annexed to the gift, and not (a) to the time of payment, consequently it was not an interest transmissible to the executor or administrator of A. His Honour first inclined to think that this 200£. would not go to the younger children, because only the residue of the money arising by sale is given to them, which seemed to have excluded the 200£. legacy, so that he thought the 200£. belonged to the heir at law; and, on searching precedents, his Honour afterwards decreed, that the 200£. should be considered as land, and descend to the heir, for it was the same (b) as if so much land as was of the value of 200£. was directed not to be sold, but suffered to descend. Cruise v. Barley, M. 1727. 3 P. W. 20. (a) Vide Duke of Chandos v. Talbot, 2 P. W. 612. (b) The several cases on this subject seem to depend on the question, whether the testator meant to give to the produce of the real estate the quality of personality, to all intents, or only so far as respected the particular purposes of the will, for unless the testator has sufficiently declared his intention not only that the reality shall be converted into personality, for the purposes of the will, but further, that the produce of the real estate shall be taken as personality, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death, (whether, from the silence or the inefficacy of the will itself, or from subsequent lapse) will resit to the heir.


The only case which appears inconsistent with these decisions, is that of Ogil v. Cook, cited 1 Bro. C. C. 501. In the cases of Mallabar v. Mallabar, Ca. temp. Talb. 79. and Dourou v. Motteux, 1 Ves. 320. the question was between the heir at law and the residuary legatee of the personal estate, (and not the next of kin), and in those cases the court was of opinion, that upon the construction of the will, the real estate was converted into personality for all the purposes of the will, including the residuary bequests. These cases consequently do not decide the question, which would
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have arisen if there had been no residuary disposition, or if such residuary disposition had been confined to what was personality at the testator's death. But, notwithstanding that such interest results to the heir, as being part of the real estate undisposed of, it may yet be personal estate of the heir, and pass as such by a residuary bequest. Hewitt v. Wright, 1 Bro. C. C. 90. Another branch of cases are those in which the question has arisen between the real and personal representatives of deviseses under wills of the nature above mentioned. Vide Scudamore v. Scudamore, Pr. Ch. 543. Flanagan v. Flanagan, cited 2 Bro. C. C. 513. Fletcher v. Ashburner, ibid. 497.

152. If I devise all my lands and tenements in Dale, and have a manor in Dale, the manor, as it is a hereditament in Dale, will pass, but if I have the manor in Dale, and also land there, not parcel of the manor, it is a question whether the manor will pass by devise of all my lands. Haslewood v. Pope, T. 1734. 3 P. W. 322. If I have freehold and copyhold lands in Dale, and devise all my lands and hereditaments in Dale, to pay debts, only my freehold shall pass, if that be sufficient. Secus, if I have surrendered the copyhold to the use of my will. S. C. Et vide Goodwyn v. Goodwyn, 1 Ves. 226. Harris v. Ingledew, 3 P. W. 96.


154. Though real and personal estates are joined in the same devise, yet the same words may be taken in a different sense with regard to the different estates, to support the intention of the party, ut res magis valeat quam perceat. Sheffield v. Ed. Orrery, M. 1745. 3 Atk. 288. Vide Forth v. Chapman, 2 P. W. 693.

155. B. devised thus, 'All my freehold estate of any nature or kind whatsoever, which at present is in my power to dispose of, I give to my wife.' The question, whether the wife took an estate for life or in fee, was sent to B. R. Saleton v. Corbett, T. 1746. 5 Atk. 569.

156. Devise of real and personal estate in trust for a daughter, in fee; but if she die before 21 or marriage, then to his nearest relation of the name of 'Pyot.' The daughter died before 21 or marriage. The devise over is not void for uncertainty, nor shall the estate go to the heir, nor be confined to a single person, but it shall go to such of the stock of the Pyots who were nearest; and such of the Pyots as may have changed their names by marriage, even at the time the contingency happened, take with the rest. Pyot v. Pyot, M. 1749. 1 Ves. 335. In Leigh v. Leigh, 15 Ves. 99. Lawrence, J. said, that according to a N. S. note of this case, which he had, the devise over was 'to my nearest relation of the 'Pious,' not of the name of Pyot,' and that circumstance appeared to weigh much with Ld. Hardwicke; and Thompson, B. in S. C. said, that such appears to be the case by the register's book. Vide Doe, ex. d. Wright v. Plumptre, 3 Barn. & Ald. 482.


159. Devise of 'all my real estates, wheresoever situate, lying, and being,'
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161. Devise of a freehold and copyhold estate, part of the copyhold consisted of a malthouse and brewhouse, which were let with the plant and utensils; Held, that the plant and utensils passed. *Wood v. Gaydon*, E. 1761. Amb. 395.

162. Testator having by his will made his daughter tenant for life of his general real estates, and of lands to be purchased, both with his personal estate and with the profits arising from a sale of timber, he devised his collieries, &c. upon trust, to dispose and convey the same in such manner as she, whether sole or covert, should direct or appoint; and in default of appointment, to apply the money produced by the collieries, after paying the expenses, to the same uses as the residue of his personal estate: the testator then, after declaring that though his meaning was to give his daughter the absolute disposal of the said collieries, &c. to prevent the expenses and trouble that must attend the management of affairs of such a nature under the direction of the court, he requested her to direct the money arising therefrom to be applied in such manner as he had directed the same in default of appointment: Held, that from the general frame and intent of the will, the daughter had not the absolute disposal of this property, but that her interest was confined to a disposition by sale. *Bute v. Stuart*, T. 1761. 2 Edn 87. Affirmed in *Domo. Proc. 1 Bro. P. C. (T.)* 476.

163. A. devised to his eldest son, and if he die without a son or sons, born in his life-time, or in due time after his death, A. recommended him to devise, &c. to his brother: Held, a recommendation and not a trust. *Culliffe v. Culliffe*, T. 1770. Amb. 686.


165. Bequest of leasehold ground rents does not pass the reserved rent only, but the revisionary leasehold interest. *Kay v. Laxton*, 1780. 1 Bro. C. C. 76.

166. Testator devised his estates to trustees "upon trust, as counsel should advise, to convey, settle, and assure the said premises to or for the use of, or in trust for his daughter J. for her life, and after her death then on the heirs of her body, &c." The court directed the estates to be settled upon J. for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, &c. And *Kenyon, M. R.*, said, that the limitation being to both sons and daughters in tail general, there was no necessity for a subsequent limitation to J. and the heirs of her body. *Bastard v. Proby*, E. 1788. 2 Cox 6. 1 P. W. 478. (n) S. C.

167. "All my estates in law and equity," in a will, will pass personality to be laid out in land. *Rashley v. Masters*, T. 1790. 1 Ves. jun. 204.

168. A copyhold will not pass by general description, where there is a freehold to satisfy the words of the devise, even though testator had supposed it to be a freehold, and the first devise was for the payment of debts, and then given to a younger child otherwise provided for. *Lindopp v. Eborall*, M. 1790. 3 Bro. C. C. 188.

169. Testator gave his estate to trustees to apply the profits to the use of the child with which his wife was then pregnant, during infancy, and at 25, to the child in fee; but in case the child should die before 25, without issue, remainder over: the child was still-born. Afterwards testator made a codicil, affirming his will, and died without issue. Forty-three weeks after his death, his widow was brought to bed of a son; this son cannot take the estate, though found to be legitimate, but it shall go to the devisees over. *Foster v. Cook*, T. 1791. 3 Bro. C. C. 347.

170. Testator devised his estate upon trust, that his mansion-house, &c. should go as heir-looms, and be kept by the trustees in hand, and in good order and repair, till all incumbrances paid; upon further trust, to permit testator's daughter to have, hold, occupy, &c. his said
mansion-house, &c. for life; upon further trust to lay out from rents and profits what he should think necessary to keep the mansion-house in repair; then to pay the daughter an annuity for life, for whom he also charged the estate, and to apply the surplus in discharging the incumbrances from which he excepted the mansion-house, &c. He gave the trustee 200l. per annum above all charges, and limited the estate over. The daughter occupied the house till her death, and afterwards the trustee lived in it. The daughter was held to have had an equitable life-estate in the house, &c. as excepted from the general devise to the trustee, who, therefore, upon account, was not allowed for taxes and expenses defrayed by him during her life, but he was allowed for them afterwards, because it was necessary for him to occupy, either by himself or by a servant. The Court also allowed the trustee for necessary expense of procuring a thing to be done, which turned out to be reasonable, though he might not apply to the court to know whether it was proper, but he was not allowed for costs of a suit against the daughter, voluntarily paid by him, even though she was entitled to them from the estate.—Fountain v. Pellett, T. 1791. 1 Ves. Jur. 337.

171. La devised his estate in A. in strict settlement, and divers other estates to be sold and converted into personality, and the produce, with the residue of his personal, to be laid out in lands in A. contiguous and convenient to his estate in A., and by strong expressions, though without direct words, showed he intended it to be for the same uses: it was therefore so decreed. Brown v. De Laet, E. 1794. 4 Bro. C. C. 527.

172. Devise, subject to a term, to A. in strict settlement, remainder to B. in strict settlement, and after other limitations in tail, remainder upon trust, to be sold. — The trust of the term was to raise 4000l. to be applied first to debts, legacies, &c. the rents, profits, and emoluments arising, growing, or received from the real and personal estates, to be applied to debts and legacies, and afterwards to be an aggregate fund, and attend the inheritance. The interest of 4000l. to be paid out of the rents and profits of the estates in the term; the rents and profits to accumulate till one of the devisors should attain 21, then to be paid to him; by codicil, testa-
real estate, passed to the trustees. The Ld. Ch. sent it to law to be tried, and the court of C. B. certified in the negative, but his Lordship being dissatisfied with their certificate, directed a case for the court of K. B., there having been only one instance of sending a case back to the same court to be reviewed. * Trent v. Hammond, E. 1805. 10 Ves. 495. * which was Utterson v. Vernon, 3 T. R. 529. 4 T. R. 570.

179. Every devise of land, whether particular or general, is specific, for the devisor must have the land at the date of the will, and continue to have it until his death. Broome v. Monck, E. 1805. 10 Ves. 605. Vide etiam How v. Dartmouth, 7 Ves. 147. Att. Gen. v. Vigor, 8 Ves. 283.

180. Where a man had agreed to lay out money in land generally, and devised his real estate before the purchase was completed, the money agreed to be laid out was held to pass to the devisee, for that was a testamentary direction how a real estate was to be acquired. S. C. 613. Et vide Green v. Smith, 1 Atk. 572. So an equitable estate only in land acquired after a general devise, will pass by a republication of testator’s will, if afterwards in his life-time, or after his death, that equitable title shall become clothed with the legal estate. S. C. 611. See S. C. stated at large, ante, tit. Devises.

181. I. S. devised, in default of issue male of A., to the first daughter living at the death of testator, who should attain 25, for life; remainder to her first and other sons in tail male; remainder over, subject to a trust for debts and accumulation of the surplus rents and profits until a son or daughter should first come to the actual possession of the estates or receipt of the rents. After that period, such person to take the surplus rents, and the surplus of the accumulation, after payment of debts, to be paid to such person or persons, who by the limitation should first come to the actual possession of the estates, or receipt of the rents and profits: Held, that a daughter, living at testator’s death, and having attained 25, shall have possession of the estate, and the accumulated fund. Barker v. Barker, T. 1806. 12 Ves. 409.

182. I. S. devised to his sister A. (then unmarried,) for life, remainder to her first and other sons in tail male, remainder to her daughters as tenants in com-

mon in tail, remainder to his sister B., (then married) for life; remainder to her first and other sons in tail; remainder “to the first and nearest of his kindred, being male, and of his name, and blood, who should be living at the determination of the estates before devised, and to the heirs of his body:” Held, that a person claiming under the last limitation, must be of the testator’s name, as well as his blood; and the qualification as to the name, is not satisfied though the nearest of kin takes the testator’s name under the king’s license, previous to the determination of the preceding estates; for the effect of the king’s license is only a permission to use a name, and does not impose it. So, a person taking a name by act of parliament, does not lose his original name, for he might take a legacy under it. Leigh v. Leigh, E. 1808. 15 Ves. 92. Vide etiam Barlow v. Bateman, 3 P. W. 65. 4 Bro. P. C. 194. Pyot v. Pyot, 1 Ves. 335.

183. Devise to A. and her heirs for ever, “in the fullest confidence that after her decease she will devise the property to my family.” Held, that A. takes a life estate only, with remainder in trust for the heirs of the devisee, as persona designata. Wright v. Atkyns, T. 1810. 17 Ves. 253. 1 Ves. & B. 313. S. C. affirmed by Eldon, C., with a qualification as to the declaration of the party’s right. H. 1815. Coop. 11. 19 Ves. 299.

184. Under a devise of “all my real property,” a copyhold estate will pass to the devisee and his heirs. In many cases the Judges have explained the word “estate” to import the absolute property.—Nicholls v. Butcher, M. 1810. 19 Ves. 193.

185. T. B. devised in remainder “to the said T. B. for life,” and after his decease “to the said T. B., son of my nephew S.,” and his heirs. A nephew of the same name, “T. B.,” not being before mentioned, and in every other instance the devisee being pointed out by reference, and particular description of the degree of relationship, the great nephew was held to be intended in both limitations. Chambers v. Brailsford, H. 1811. 18 Ves. 368. On appeal from this decision, Eldon, C. held, that to authorize the rejection of words in a will, it must be absolutely impossible to construe the will whilst those words are retained, for the mere improbability that a testator could
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Have meant what he expressed, will neither amount to a cause for rejection, nor render the devise void for uncertainty, and his Honour's decree was affirmed. S. C. M. 1816. 2 Meriv. 25.


187. Where the testator devised his lands in fee, and charged the same with certain annuities, the court, collecting his intention from the whole will, held the devise to be beneficial, and not a trust resulting to the heir as to the surplus beyond the annuities. King v. Denison, H. 1813. 1 Ves. & B. 250. Et vide S. C. at large, post, sect. xii. and also tit. Heir, vi.


189. Devises of "my estates at S. which were devised to me by or purchased from A.," when the fact was otherwise, is not an intended restriction, but an erroneous description, and the qualification shall be restrained to the last antecedent. A devise shall be construed as applying to the body of the estate, or merely a reversion, from the combination of it with other estates, the general inaptitude of the limitations and other circumstances. Welby v. Welby, T. 1813. 2 Ves. & B. 191. Vide Strong v. Teatt, 2 Burr. 921. Daniel v. Miles, 6 East 494. Glover v. Spendlove, 4 Bro. C. C. 397. Church v. Mundy, 12 Ves. 426.

190. A devise and settlement in favour of children and grandchildren shall not be so construed as to comprehend great grandchildren. Per Grant, M. R. where there is a total want of persons properly answering the description, others who do not so completely answer it, may be let in; grandchildren, for instance, under a liberal construction of the word "children," if there are no children, but in no instance where there are. "Issue, also is an ambiguous term: sometimes confined to children, and sometimes comprehending all descendants. Clear words in the operative part of a clause are not to be construed by ambiguous terms in the introduction. E. of Oxford v. Churchill, H. 1814. 3 Ves. & B. 59. 69.

191. I. S. devised all his said mansors, and, tenements, and effects, real and personal, to one for life, and after his decease to his issue male, and the heirs male of such sons successively, one after another, with remainder to A., and in default of his issue male "as before," then over to B., and in default of his issue male "as before," then to the plaintiff: Held, that A. was entitled for life, with remainder to his first and other sons in tail male; B. to take in remainder in the same manner, and that plaintiff was entitled to the ultimate remainder in fee. Macnamara v. Ld. Whitworth, E. 1815, Coop. 241.

192. J. W. being seised and possessed of considerable freehold, leasehold, and copyhold estates in the county of H., and being in possession, as mortgagee, of certain leasehold houses at K. in the county of M., but having no other property in the county of M. and having other estates vested in him as mortgagee, besides those at K., made his will, devising all his freehold, copyhold, and leasehold mortgages, &c. in the county of H. and in the town of K. to A. for life, and after her death, "all and singular other his freehold, copyhold and leasehold messuages," &c. in the counties of H. and M., or elsewhere, to E. and T. for their joint lives, and after the several deceases, "all the said freehold, leasehold, and copyhold messuages," &c. unto and equally among their children: and he gave to A. "all the residue of his real estate not before disposed of, and all other his estates and interests whatsoever vested in him as mortgagee or trustee," &c. "and all the residue of his personal estate, ready-money and securities for money," &c. subject to the payment of debts and legacies: Held, that the mortgagee premises at K. passed under the devise of all his freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K. Woodhouse v. Meredith, E. 1816. 1 Meriv. 450.

193. Testator being seised of divers freehold, leasehold, and copyhold estates, devised the same, first, as to his freehold and fee-simple estates in possession, all and every the child and children of S. M. for life, and after the decease of such child, &c. to the lawful issue of such child, &c. to hold to such issue, his, her, and their heirs, as tenants in common, and in default of such issue, over. S. M. had nine children, four born
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in testator’s life-time, and five after his decease: Held, that all the children took estates tail as tenants in common, with cross remainders. Secondly, testator devised other freehold and fee-simple estates to trustees during the life of his son J. H., upon certain trusts, remainder to the children of J. H. and their issue, (in the same words as above to the children of S. M. and their issue) and in default of such issue, to all and every the child and children of S. M. (as before.) J. H. died without issue: Held, that only six of the nine children of S. M. took under this devise, viz. five who were born in the life-time of J. H. and one en ventre sa mere at his death.—Thirdly, Testator devised other freehold and fee-simple estates to his widow for life, and after her decease to the same uses as in the last devise: Held, that all the nine children of S. M. were entitled, as all of them were born in the widow’s life-time.—Fourthly, Testator devised other freehold and fee-simple estates to trustees during the life and lives of the child and children of S. M., in trust to apply the rents to their maintenance, and after the decease of such child, &c. to the lawful issue of such child, &c. (as before:) Held, that all the nine took equitable interests for their lives and the life of the survivor; and that on the decease of the survivor, the estate should go over to the issue of the four who were born in the testator’s life-time by purchase, as tenants in common in fee.—Fifthly, Testator gave his leasehold estates for lives and years in the same manner as he had devised his last mentioned freeholds, vesting the legal estate in the trustees: Held, that all the nine took, in equal shares, absolute interests in the leaseholds for years, and estates in the nature of estates tail in the leaseholds for lives, and that the limitations in the latter property were barred by deeds which were executed by some of the children. Mogg v. Mogg, E. 1816. 1 Meriv. 654. 711. See the several cases cited in delivering the judgment in B. R. and in argument at the bar.

194. Testator contracted for the purchase of a house, and afterwards by a codicil to his will gave to A. his executor the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down:” Held, that this amounted to a direction, that the money for the purchase of the house shall be so provided, and evidence was admitted to show what was the order given by the testator with respect to the cutting of timber. Stanford v. Raikes, T. 1816. 1 Meriv. 646.

195. Bequest of “the whole of my property of whatever description, freehold, leasehold, &c. of which I may be in possession at the time of my decease,” passes real estate agreed to be purchased by the testator at the making of the will. Holmes v. Barker, T. 1816. 2 Mad. 462. Vide Cave v. Cave. 2 Eden 180.

196. Devise of an estate to A., subject to the payment of 500l. with interest, to M. at 21, or marriage; but if she died before 21, and there should be no child of R. (the testator’s brother,) then the 500l. to revert to A. J. M. died before 21, unmarried: Held, that the children of R., born after the death of M. H., were entitled. Hutcheson v. Jones, E. 1817. 2 Madd. 124. Vide Barrington v. Tristram, 6 Ves. 348. Whitbread v. St. John, 10 Ves. 154. Godfrey v. Davis, 6 Ves. 43. Shepherd v. Ingram, Ambl. 448.

197. Testator made his will thus: “I leave and bequeath to all my grandchildren, share and share alike:” and by a codicil on the same day he thus expressed himself: “Further I appoint H. and E. my trustees for my grandchildren and nieces.” Held, that these instruments were void for uncertainty, and passed no interest in the real estate, though both were attested by three witnesses. Held also, that the trustees were not entitled to costs as between solicitor and client. Mohan v. Mohan, E. 1818. 1 Swans. 201. 1 Wils. 157. Vide Bowman v. Milbanks, 1 Lev. 150. 1 Sid. 191. 1 Keb. 719.

198. Held, upon the construction of the whole will, that an estate-tail passed; where the literal force of expressions differs in a will, it is a true rule to seek the intention of the devisor, rather in a consistent and rational purpose, than in a purpose inconsistent and irrational. Jenkins v. Herries, H. 1819. 4 Madd. 67.

199. Devise to M. J. and to all and every the child or children, whether male or female, of her body lawfully issuing, and unto his, her, and their heirs, as tenants in common. Held, that M. J. took an estate for life, with remainder to her children as tenants in common in fee. Jeffery v. Hokeywood, M. 1819. 4 Madd. 398.
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Void, as a Disposition of what the Law already gives—or as against Policy.

(c) Devise void, as a Disposition of what the Law already gives.

200. A. seised of lands ex parte mater-\-na, devised them to his executors for years, to pay his debts, and then to his heir at law, ex parte mater-\-na. This devise to the heir is void, for the tenure or quality of the estate is in no wise altered, and the devisee takes a fee, whether by the will or by descent. Hedger v. Rowe, H. 1682. 3 Lev. 127. But where another estate is created by the will, than would descend to the heir, or the quality of the estate is altered by the devisee, there the will shall prevail, though the devisee be heir at law. Moor, 680. Godolph, 461. 1 Rol. Ab. 610. Hob. 30. As where A. had a son and daughter, and devised his land to his son, and if he died without issue of his body, remainder over, here the son took an estate tail by the will, under which the heir must claim, or the remainder will be void. 1 Rol. Ab. 610. Hob. 30. So, where A. had issue, daughters, and devised his land to them and their heirs; this is good, though to testator's heirs, for by the devise they take as joint tenants, though by descent they would take as co-parceners. 3 Lev. 128. sup.

201. The testator being married and in ill health, devised lands "after failure of issue male of his own body," (which issue would have taken under his marriage settlement) to defendant (his heir at law) for life, with remainder over. Ld. Northington in T. 1764, decreed, that the devise being after a general failure of issue male, was too remote and void, and that the defendant took as heir at law; but that decree was reversed by Ld. Lough-\-borough as a bill of review. Lyttton v. Lyttton, M. 2795. 4 Bro. C. C. 441.

(d) Devises void, as a Disposition of What the Policy of the Law will not admit.

202. A. devised his lands to one and the heirs of his body, and if he should go about to alienate them, that his estate should cease, and the lands go to a charity. The devise over is void, as tending to create a perpetuity. Powter-\-er's Co. v. Christ's Hosp., E. 1683. 1 Vern. 161.

203. A. devised all the rest of his personal estate by leases in trust or otherwise to his nephews, and made them executors, willing that they should give mutual bonds, that in case either die without issue of his body, to leave all the said chattels and personal estate to the survivors. Bill to obtain such bonds dismissed, as an attempt to entail a person-\-alty. Williams v. Williams, T. 1703. 1 Eq. Ab. 207. pl. 9. Vide Seale v. Seale. 2 Eq. Ab. 346. pl. 7. 716. pl. 1. Et vide tute Limitations over, sect. i.

204. A. made his will, and devised "all the lands he shall have at the time of his death." After that he purchased lands, and died without repudiation: Held, a void devise, for a man cannot devise any lands but what he has at the time of making his will (a.) Assumed in Dom. Proc. The court seemed exceedingly desirous to establish the devise in this case, in regard the testator was captain of a ship; and Powell, J. said, that a man beyond sea, or in prison may have made his will in this manner, and may have many thousands a year descend to him, which he may know nothing of at the time of making his will. It is admitted in the principal case that by a republication the after-purchased lands would pass, for that the intent was manifest. Bunten v. Cook, Bunker v. Coke, Brunker v. Cook, Brunker v. Coke, M. 1707. 11 Mod. 106. 121. Fitzg. 225. Salk 287. Holt 236. 243. 246. 248. 745. 1 Bro. P. C. 199. Vide Doe v. Kett, 4 T. R. 604, (a) Lands purchased subsequent to the making of a will, do not pass, by the statute of wills. Vide Butler v. Baker, 3 Co. 30. Lovie's Ca. 10 Co. 78. Law-\-rence v. Dodwell, 1. Ld. Raym. 458. Holt 243. Strode v. Falkland, 3 Ch. Rep. 99. Brydges v. D. of Chandos, 2 Ves. jun. 427. unless the will is republi-\-cated; Brett v. Rigden, Plowd. 344; or the land has been articulated and contract-\-ed for previous to the making of the will. Prideaux v. Gibbon, 2 Ch. Ca. 144. Davie v. Beardshaw, 1 Ch. Ca. 39. Acherley v. Vernon, 9 Mod. 78. Lingen v. Sowray, 1 P. W. 172. Bean-\-clerk v. Mead, 2 P. W. 169. Pullen v. Ready, ibid. 590. Whitaker v. Whitak-\-er, 4 Bro. C. C. 31.; though by express stipulation the agreement is not to be carried into execution until a future day, which is after the making of the will. Greenhill v. Greenhill, Pre. Ch. 320. 2 Vern. 79. Potter v. Potter, 1 Ves. 437. And see further as to after-pur-\-chased lands, ante, pl. 33.

205. Where lands are devised in trust.
to be sold, for the payment of debts and legacies; and then to pay the surplus to J. S., a papist; J. S. is rendered incapable of taking the surplus, because it is not a personal interest, but a profit arising out of the land, and not only within the express words of the statute 11 & 12 W. 3. c. 4. but within the mischief which that statute was intended to prevent. Roper v. Redcliffe, T. 1714. 1 Bro. P. C. 450. 9 Mod. 230. 10 Mod. 237. 2 P. W. 3.

206. Tenant in tail made a nuncpative will, which was afterwards reduced into writing, but not attested by three witnesses, whereby he devised rent payable out of land to a charity. This devise was held void, though the will was made before the statute of frauds. Jenner v. Harper, T. 1714. 1 P. W. 247. Salk. 163. Gilb. Eq. Rep. 44. Pre. Ch. 389.

207. A devised all his money in the government funds, to be laid out in the purchase of lands, to be settled on his eldest son B. the plaintiff, and the heirs male of his body, remainder to his second son C. and the heirs male of his body, &c.; and he bequeath the rest of his personal estate to B. and the heirs male of his body, remainder over, in the same manner. Per cur. the personal estate cannot be estailed, but the whole vests in B. the eldest son. Scale v. Scale, M. 1715. 1 P. W. 290. Pre. Ch. 421. Gilb. Eq. Rep. 405. Note, P. W. takes no notice of testator's real estate, which he devised to plaintiff in tail, with like remainders over, but the other reporters state this part of the will. Vide Butterfield v. Butterfield, 1 Ves. 135. 154. Stratton v. Payne, 3 Bro. P. C. 257. E. of Chatham v. Tottell, 6 Bro. P. C. 450. Pelham v. Gregory, 5 Bro. P. C. 455. D. of Montague v. 4d Beaufort, 6 Bro. P. C. 255.

208. A devised lands to a corporation, in trust to convey the same to his godson B. for life, and then to his first son for life, and afterwards to the first son of that son for life, and in default or failure of such issue of B., to convey them to C. for life, &c. with remainders over to about 50 others, for their lives successively, and their respective sons, when born, for life, without giving an estate-tail to any of them, or disposing of the fees. Per cur. this is a vain attempt to make a perpetuity, yet the conveyance shall be made as near the intent of the testator as the rules of law will admit, by making all the persons in being tenants for life only; but the limitation to the sons unborn, must be in tail; and decreed accordingly. Humberston v. Humberston, H. 1716. 1 P. W. 332. 2 Vern. 737. Gib. Eq. Rep. 128. Pre. Ch. 455. S. C. nomine Humberston v. Humberston, and in Reg. Lib. A. 1716. fo 529. it is called Humberston v. Collett. Vide Godolphin v. Godolphin, 1 Ves. 21. Hucks v. Hucks, 2 Ves. 608. Spencer v. D. of Marlborough, 5 Bro. P. C. 392. Chapam v. Brown 3 Burr. 1638. Pitt v. Jackson, 2 Bro. C. 51.

209. Devise of lands to A. for life, remainder to B., a papist, for life, remainder to C., a protestant. A. dies. B. as a papist is disabled to take, and C. shall take presently, in the same manner as if the remainder had been to a monk. (a) Devise of lands to A. for life, remainder to B. a papist, for life, remainder to trustees for the life of B., in trust to let B. take the profits, and to preserve the contingent remainders,—the trust to let B. the papist, take the profits, is void, but the trust to preserve the contingent remainders is good, and in this case, the grantor and his heirs being protestants, shall have the profits during the life of the papist, after whose death they shall go to his son, being a protestant. (b) The statute of 11 & 12 W. 3. c. 4., which disables a papist from purchasing lands, disables him from taking by purchase, and consequently from taking by devise. (a) If a papist was above the age of 18 and six months, when the statute of 11 & 12 W. 3., against papists was made, he is est of the former clause of that statute. (d) Carrick v. Errington, T. 1726. 2 P. W. 362. 9 Mod. 33. Mos. 3. 3 Bro. P. C. 412. (a) Vide Thorby v. Fleetwood, 15 Sta. 518. (d) Hopkins v. Hopkins, Ca. temp. Tabl. 44. and another branch of S. C. 1 Atk. 597. (c) Vide Roper v. Ratcliffe, 9 Mod. 167. 181. 10 Mod. 230. 1 Bro. P. C. 450. (d) Vide Hill v. Fitchen, 2 P. W. 6.

210. T. devised all his real and personal estate to his wife for life; remainder to his son A. and his heirs for ever; and if he should die without any heir, then to plaintiff. A. by will devised the whole to plaintiff, but he neither levied a fine nor suffered a recovery. This is a fee mounted upon a fee, and a void devise both at law and equity, Tilbury v. Barbout, E. 1747. 3 Atk. 517. Sis
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211. Where testator devised his lands charged with superstitious legacies, which were void by the act of mortmain, they shall sink into the land for the benefit of the devisee. Jackson v. Hurlock, M. 1764. Amb. 487. 2 Eden 263.

Of devises void in mortmain, see ante, tit. Charitable Uses, sec. i. iii. vi.

(c) Of Devises void for Uncertainty in the Description of the Person to take, or the Estate devised; and who shall be the Taker in case of an imperfect Description.

212. If a man seised of lands (within a borough, where by the custom they are devisable by parol) devises in these words, "I give all to my mother," the lands pass not, for the words are too uncertain to disinherit an heir. Bowman v. Milbank, E. 1664. 1 Lev. 130.

213. A termor of 1000 years sans waste, devised the same to defendant, and if he died without issue, then to plaintiff. Plaintiff had obtained an injunction to stay waste nisi causa. Per cur. a devise after dying without issue generally is void; plaintiff therefore by his own showing would have no title. Cause allowed. Burford v. Lee, H. 1696. 2 Freem. 210.

214. A hath issue B. and C.—C. devised to B. 1000$, and after to the posterity of A. for their education, at which time B. was sixty years of age, and A. dead; the question was, who should have the 1000$ after B.'s death? And by Ld. Keeper, the lineal heir, if there be any, shall take it under the word "posterity." But B. dying without issue, and there being no lineal heir of A. the collateral heir shall take it, but those of the half blood shall not, as in the case of distribution. Anon. H. 1707. 2 Eq. Ab. 291. pl. 7.

215. If a devise is to one of the sons of I. S. who hath several sons, the devise is void, and shall not be supplied by any parol proof. Strode v. Lady Russell, M. 1708. 2 Vern. 624. Vide Cheney's Ca. 5 Rep. 68.

216. A. having settled all his real estate on his wife for life for her joisture, made his will, and gave several pecunary legacies, and then said, "all the rest and residue of my estate, chattels real and personal, I give and devise to my wife, who I make sole executrix." Per cur. the reversion of the joisture will not pass to the wife by this devise, because the precedent and subsequent words explain testator's intent to carry only the personal estate; for testator not having devised any real estate in the first part of his will, there could be no residue to dispose of except the personality. Markant v. Twisden, H. 1712. 1 Eq. Ab. 211. pl. 22.

217. A. devised lands to B. and his brothers successively, but not to be entered upon by any of them, until after marriage. The jury found B. to be the eldest brother; and then a question arose whether this will was void for the uncertainty who should take. Per cur. the will is good, for it being the case of brothers, the common law guided the exposition of the word successive, viz. that the eldest son should, after his marriage, enjoy it for life, then the second, and then the third. Had the devise been to C. D. and E. to take successively, it would have been void for the uncertainty. Ongly v. Peol, Ungly v. Peale, M. 1712. 10 Mod. 108, pl. 8. 2 Ld. Raym. 1312. Com. Rep. 197.

218. It has been said, that if an estate be given to a man and his issue, it is void for the uncertainty, because it does not appear whether male or female; but that has been determined since not to be law, and that it is well enough in a devise. Shaw v. Weigh, E. 1715. Gilb. Eq. Rep. 28. Vide Taylor v. Sayer, Cro. Eliz. 742. where a man having issue two sons, and two daughters, devised his land to his wife for life, remainder to his issue; Held, a void devise as to the remainder, for the uncertainty what issue was intended: but this case was cited and denied in Bate v. Ameherst, Raym. 8th. Contra, Loddington v. Kime, 3 Lev. 333.

219. Testator bequeathed his personal estate to his wife, and added, "I do not
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Void for Uncertainty, &c.—Where rendered void by Death of Devisee.

doubt, but my wife will be kind to my children.” The court thought that these words gave a right to no child in particular, or a right to any particular part of the estate, but that this clause was void for uncertainty. 


Malin v. Keightley, 2 Ves. jun. 333.

220. L. devised to R. M. eldest son of his nephew R. M. and the first heirs male of his body; in default of such issue, to the second son of the said R. M. and heirs male of his body and their issue, remainder over, &c. These words “the second son of the said R. M.” do not mean the second son of the devisee, but “the second son of the testator’s nephew, R. M.” The court never construes a devise void, unless it is absolutely so dark that they cannot find out testator’s meaning. The word “first,” in this case, means only that the sons should take in succession, according to priority of birth, and therefore no stress ought to be laid upon it. 

Minshall v. Minshall, H. 1737, 1 Atk. 410.

DEVISE IV.

Where a Devise is rendered void by the Death of the Devisee, in the Lifetime of the Devisor.

221. A. having two daughters, B. and C. devised some tithes and money to B., and gave legacies to her children, but declared, that as she married against his will, she should have no part of his real estate, and devised his real estate to C. in tail, remainder to B. for life, and to her first, &c. sons in tail, remainder to her daughters in tail. C. married in the lifetime of the testator, and died, leaving issue a son; though A. afterwards made a codicil of his will, and gave some particular legacies out of his personal estate; yet, per Ld. Ch., that does not amount to a republication of his will, and B. must have the lands immediately after the death of the testator, though contrary to his intention. In this case Ld. Ch. made the following resolutions: 1st. That C. dying in testator’s lifetime, the devise became void, and her son could not take as heir of his body, but the estate was to have vested in the mother, and the words “heirs of her body,” were words of limitation, denoting the nature and duration of the estate the mother was to take. 2d. Although the lands were devised to B. after the death of her sister, without issue, who had issue living, yet the devise to C. and the heirs of her body, becoming void by the death of C. in the life-time of the testator, B. shall take immediately, by virtue of the devise, though against the testator’s intent, against the express words of his will, and against the maxim that an heir is not to be disinherited without express words, for the authorities are so. (a) 3d. The testator, in this case, having given the residue of his estate to his wife, with power to dispose thereof, with the approbation of his trustees, she made a will, and devised to plaintiff, the husband of C. Ld. Ch. declared that devise void also, the concurrence of the trustees not having been obtained, and therefore testator died intestate as to the residue. 


Pre. Ch. 439. 452. nominis Symson v. Hornsby. (a) This point was settled in Hartop’s Ca. and since in Lansdown’s Ca. 10 Mod. 97. 2 Eq. Ab. 768. pl. 1. (n.) Com. 384. cited. Vide also Popham v. Bamfield, 1 P. W. 54. 2 Eq. Ab. 308. pl. 11. 12.

222. Special verdict in ejectment on this case; M. seized in fee, devised lands to A. and his issue, remainder to B. and his issue, remainder to the heirs of A.—A. died without issue in testator’s lifetime. B. died in testator’s lifetime, leaving issue; the defendant, who was also heir of A., and plaintiff in ejectment, was heir of the testator. The question was, whether in regard the devisees A. and B. died in testator’s lifetime, the issue of B. (who was born after
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the making of the will, and so could not take jointly with the devisees) could take as heir of the body of B., or as right heir of A. 7 Parker, C. J.; this case is exactly within the reason of Brett v. Rigden, Plowd. 340. 1st. Because as well in this case the word "issue," as in that word "heirs," is clearly used as a word of limitation, to measure out the quantity of estate the devisees is to take, and not as a word of purchase, the devisees only being in the consideration of the testator, and there is no diversity between a devisee in fee, and a devisee in tail; the statute of Westminster 2, makes none, for that only provides for the issue, where an estate tail is actually vested; the rules of law concerning the creation of estates tail are exactly the same, as to the intent of the deviser, or as to the vesting the estate, as those relating to estates in fee-simple; the statute de domis was made for the benefit of the issue in tail, which supposes an estate tail in the ancestor, as in this case. 2dly. Because the heir in tail is absolutely in the power of the ancestor, to be baried by him, as much as the heir in fee-simple is in his ancestor's power, and therefore in either case the deviser cannot be intended to have had any regard to the heir, since, in both cases, the deviser gives the devisee such an estate as enables him to bar his heir. 3dly. The heir cannot take, when the devisee dies in the life-time of the deviser, because he cannot take by descent, for nothing was ever in the ancestor, and if he should take as a purchaser, then the estate would be descendible, contrary to the testator's intent, for if the ancestor had taken the estate, and it had descended to the heir, the rules of descent had been quite different from what they would have been, if the heir had taken as a purchaser. Then, as to the remainder in fee, limited to the heirs of A., the heir general cannot take it, for the interposition of the estate tail to B. betwixt the estate tail limited to A.; and the remainder in fee to his right heirs makes no difference; because, notwithstanding the mean remainder, the word "heirs" is a word of limitation of estate, and the fee-simple vests in the ancestor; and if A. had survived the testator, the remainder in fee would have vested in him, therefore it is within the reason of Brett v. Rigden, and the rule laid down in Shelfeby's Ca.
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223. A. devised "all his messuage or tenement in E., to F. and his heirs, and all the rest of his messuages, lands, &c. in E. and elsewhere, to L., in fee." F. died in the life-time of the testator, so that this became a lapsed devise. The question was, whether this latter clause of the will would carry over the lapsed devise to L., the residuary devisee, or whether it should descend to testator's heir at law. Per curiam, the devise of all the rest and residue of my messuages, lands, &c. did not convey what was expressly devised before, for the testator's intent appears to be, to give his whole estate to F. in that messuage, and that at the time of the will made, he had no rest and residue in that house, and the devise to F. being void, the house will go to the heir. 


224. Lands devised to A. and the heirs of his body, A. died in the life-time of the testator: Held, that the devise thereby became void, in nature of a lapsed legacy, and that the only son and heir of A. could derive no title under it. Wynn v. Wynn, E. 1725. 3 Bro. P. C. 161.

225. A. devised lands to B. and his heirs for ever, upon condition to pay all his debts, legacies, and funeral expenses, and if he did not pay them, then he devised the premises to defendant C. and her heirs for ever; and as to all the rest and residue of his real and personal estate, not before bequeathed, to the said C. and her heirs. B. died before the devisor, so it was a lapsed legacy. The court held, that C. could not take the lands devised to B. by the words, "All the rest and residue of my real and personal estate, not devised or bequeathed," for it must be expounded, the rest and residue of the lands undevised at the time of making the will, and not at his death. Roe v. Fludd, E. 1729. Fortesc. 184.

226. If a man devises his real estate to I. S. and his heirs, signifying his intention, that if I. S. die before him, it should not lapse, the heir is not excluded unless the testator nominates another devisee. Sibley v. Cook, M. 1747. 3 Atk. 573.

227. Testatrix ordered lands to be sold, and the money to be laid out in the funds to certain uses, among which 1000l. was to be paid to A., her executors, administrators, and assigns. A. died before testatrix: Held, that the gift lapsed, and should go as land to the heir of the testatrix exp. maternae, being the side from whence the land came. Hutchinson v. Hammond, T. 1790. 3 Bro. C. C. 128. Vide Maybank v. Brooks, 1 Bro. C. C. 54.

228. Testator ordered a real estate to be sold, and the residue to be laid out in the funds, there to remain for 10 years, and at the end thereof he gave the same to his next of kin. The next of kin at the time of the death would be entitled to take, and the testator having but one brother who was such next of kin, and who died within the 10 years, it was held lapsed, but the personality shall go to the representatives of the brothers. Sprink v. Lewis, T. 1791. 3 Bro. C. C. 555.

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229. A. being seised of lands of 10l. per ann. in possession, and 34l. per ann. in reversion, gave certain legacies to be paid at certain different times, and then devised all his lands to his youngest son R., who did not pay the legacies within the time: Held, that a fee passed to R. because it appeared that the sums to be paid were more than the profit of the lands in possession would amount to in that time. Reakes v. Ley, T. 1679. 1 Frem. 479.

230. A devise of land to A. paying a sum out of the rents, or out of the land in general, is not a devise in fee, but a devise, paying a certain sum at the end of two years, or any other certain time, where the profits are not sufficient, will pass a fee-simple; and so a devise of lands, paying a certain sum, without more, is a fee-simple. Hawker v. Buckland, T. 1689. 2 Vern. 106. Vide Collier's Ca. 6 Co. 16. et post, pl. 248.

231. If a testator, seised of freehold
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232. De devised to A. for life, and after, to his heir. This is an estate in fee; but if it be, "and to the heirs of such heir," for such there is a contingent remainder. Dict. in Moor v. Parker, M. 1604. Skinn. 559. The word "heir" is nomen collectivum, and in a will comprises heirs, and heirs of the heir, and gives a fee.

233. A. seised of lands in fee, had issue two sons, B. and C. By will he devised several lands to B., and that B. should renounce all his right in Blackacre, (of which A. was then seised) to C. Objected, that this was no devise of the land to C. and that if B. should release his right, this was intended to be only an estate for life; but because the words were "all his right," it was apparent that A. intended that C. should have a fee; and Holt, C. J. and Treby, C. J. certified their opinions to Ld. Ch. accordingly. Hodgkinson v. Star, E. 1697. 2 Eq. Ab. 299. pl. 6.

234. I devise to B. all my right, title, and interest in those terms of years, which I have in such a place, and also my house, called "T." in which house the testator had a remainder in fee: Held, that a fee passed in "T." Holt, C. J. contra. Moor v. Rawlestone, T. 1699. 8 Vin. Ab. 303. pl. 4. 2 Eq. Ab. 299. pl. 8. Cole v. Rawlinson, 1705. 8 Vin. Ab. 209. pl. 20. 2 Eq. Ab. 300. pl. 13.

235. A. having a son and two daughters, devised the estate in question to his son and his heirs; provided that if the son should die before 21, or without issue of his body, then it should go to testator's two daughters. A. died, and the son lived to 21, and made his will, and devised the estate to plaintiff. The court inclined, that the son had but an estate tail; and so the devise to the daughters took effect, the son having died without issue; for, though it was devised to him and his heirs, yet the latter words, "if he die without issue, made it an estate tail, for A.'s meaning seems to be plain, that if the son had issue, that issue should have it: if not, it should go to the daughters. Helier, v. Jennings, M. 1699. 1 Freem. 509. 1 Ld. Raym. 305. S.C. nomine Helliard v. Jenning. Com. 91. 1 Freem. 510. 12 Mod. 275. Carth. 314. 236. Testator being seised of fee farm rents of lands and mines, devised his lands to A. for life, with remainder in tail, and all his mines to B. "All which I give and devise to B., his executors and assigns, together with all my plate and jewels, and all other my estate real and personal, not otherwise disposed of, to be given by him to his children, as he shall think convenient; I, solely trusting to his honour and discretion, that he will give them such provision as will be necessary for them." The question was, whether B. was entitled to the fee-farm rents in fee? Held, that the rents passed by the words "all my real and personal estate," for the word "estate" is genus generalissimus, and includes all things real and personal. E. of Bridgewater v. D. of Bolton, H. 1703. 6 Mod. 106. Holt 281. 1 Salk. 286. The word "estate," in its natural import, will carry a fee-simple, unless there be other words to restrain or control it. Vide Holdfast v. Martin, 1 T. R. 411. Doe v. Woodhouse, 4 T. R. 89. Ridout v. Pain, 1 Ves. 10. 3 Atk. 486. Bailis v. Gale, 2 Ves. 48. Tanner v. Wise, 3 P. W. 294. Ca. temp. Talb. 284. Barry v. Edgeworth, 1 P. W. 524. Ibbeton v. Beckwith, Ca. temp. Talb. 157. Macree v. Tall, Amb. 181. Stiles v. Walford, 2 Bla. R. 938. Doe v. Chapman, 1 H. Bla. 223. In several of the above cases the word "estate" was coupled with circumstances of local distinction, which it is clearly settled does not make any difference. The word "estate" has the same operation. Fletcher v. Smiton, 2 T. R. 656. In Goodwin v. Goodwyn, 1 Ves. 226, the court was doubtful with respect to a devise of estates in the occupation of particular tenants. In Frognorton v. Wright, 3 Wils. C. B. 414. 2 Bl. 889. Right v. Sidebotham, Doug. 759. Denn v. Gaskin, Cowp. 657. Introductory words of an intention to devise all a person's estate, &c. followed by a devise merely descriptive of particular property, were held only to carry an estate for life, but such
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Introductory expressions were allowed to be of considerable weight, in favour of the clear intention of the testator. In Chester v. Painter, 2 P. W. 335, a person devised one-third part of all his estate whatever to his wife, and to his son and his heirs two-thirds, and it was held, that the wife took only an estate for life, the testator having used the words of inheritance in the devise to the son. In Ibbetson v. Beckwith, Ca. temp. Talb. 157. Ld. Talbot held, that where the devise was of "all the testator's estate to A. for life, and to T. after her death, he taking, the testator's name, and if he refused, to M. and her heirs for ever," T. had a fee, but the testator's intention to pass a fee appeared manifest from other clauses in the will. As to the operation of the word "estate," vide etiam Hogan v. Jackson, Cwp. 399. Palmer v. Richards, 3 T. R. 356. Andrew v. Southouse, 3 T. R. 292. Doe v. Ront, 7 Taunt. 51.

237. A devise to a bastard and his heirs will pass a fee-simple, though he can have no heir at law but his issue. Ild v. Cook, E. 1705. 1 P. W. 78.

238. A. having a mortgage in fee of lands in D. on which he had entered, devised those lands to his two daughters, and their heirs, and other mortgages to them, their executors, &c. One of the daughters died. Decreed that her share of the lands in D. shall go to her heir, and not to her administrator, it being the intent of the testators, that those lands should pass as real estate, though as between him and the mortgagor they were but a mortgage. Neys v. Mordaunt, H. 1706. 2 Vern. 582. Pre. Ch. 265. Gilb. Eq. Rep. 2.

239. A devise of two farms to testa-
tor's father and mother for their lives, remainder to trustees and their heirs, till A. and B. should respectively come of age, and then to convey one farm to A. and the other to B. A. died under 21, he being to have an estate in fee conveyed to him. Decreed that the conveyance be made to his heir. Hoak v. Taylor, T. 1706. 2 Vern. 561. Vide Bos-
ra'son's Ca. 3 Co. 19.

240. A. devised 50l. to his heir, and all the rest and residue of his real and personal estate whatsoever to his wife, whom he made sole executrix: Held, these words pass a fee to the wife. Murray v. Wiss, M. 1706. 2 Vern. 564. Pre. Ch. 264. For instances in which a few will pass by deed or grant without the word "heirs." vide 10 Vin. Ab. tit. Es-
tate, (K. 2. L. L.) As to the passing an estate of inheritance in wills without the word "heirs," vide 8 Vin. Ab. tit. De-
vise, (2 a.) 242. and Gilb. Devises, 19.

241. A devise of "all my lands, tenen-
ments, and hereditaments, to my wife
and her assigns," reserving so much a year to be distributed among the poor of the parish for ever, passes an estate in fee by reason (a) of the perpetual charge, (b) and not by operation of the word "hereditaments." Smith v. Tis-
dall, T. 1707. 11 Mod. 90. 102. 2 Salk. 685. Holt, 293. (a) Only Powys and
Gould, J. went upon this reason. Holt,
C. J. and Powell, J. thought that the charge might be applied out of the per-
sonal estate. (b) Vide 1 Inst. 5. 8 Vin.
Thomas, ibid. 1343. Andrew v. South-
house, 3 T. R. 272. Note. A distinction was here taken between the words "inher-
tance" and "hereditament." Powys, J. said, the first denotes an interest, the latter describes somewhat that is not a tenement. Powell, J. said, that heredi-
tament describes the thing of which an inheritance may be, and carries that which lands or tenements do not, as common, &c. but he said he did not go upon the word "hereditament," but upon the word "interest." Holt, C. J. said, the word "hereditament" signifies the land in which I have an estate of inheri-
tance, and that he went upon the word "hereditament" to make a fee. These
words, his Lordship said, cannot be satis-
fied, unless this word carry the inheri-
tance; but Powell, J. denied that a de-
vice of "all my lands, tenements, and hereditaments," would carry a fee, for the
word "hereditament" does not signi-
fy the estate, as "inheritance" doth. It is now settled, that the word "hered-
itament" will not pass a fee. Hopewell

242. A. seised in fee, devised thus:
"I give to B. for life, remainder to C.
and his heirs, and for default of such
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heirs, remainder over.” Adjudged an estate in fee. Grumble v. Jones, H. 1709. 11 Mod. 207. 1 Salk. 238. S. C. nomine Aumile v. Jones. Note. This controversy was between the heir and the deviser, and the heir of the devisee, no way related to the devisee.

243 Devise to A. paying a sum of money to B. within two years. Per cur. A. has a fee in this case, for it is not like the cases where the sum devised is to arise out of the profits, &c. Rees v. Gower, H. 1709. 11 Mod. 208. Vide Collier’s Ca. 8 Co. 18. Green’s Ca. Hob. 65. Reed v. Hutton, 2 Mod. 25. Lee v. Stephens, 2 Show. 49. Beddely v. Leppington, 3 Burr. 1533. Doe v. Woodhouse, 4 T. R. 92.

244. A. devised to B. all his lands and hereditaments, and his personal estate, desiring him to pay his debts and legacies. A fee passes by this devise. Ackland v. Ackland, H. 1713. 2 Vern. 587.

245. A. by will gave the residue of his estate, after debts and legacies paid, to his wife, whom he made sole executrix. Cowper, C. was clear of opinion, that a fee passed by the devise of all the rest of his estate to his wife; subject to payment of his debts, &c. But held, that where a man devises all his estate, goods, and chattels, and no mention is made before in the will of lands, of which the testator was seized in fee, a fee-simple will not pass; but where a real estate is mentioned before in the will, and then such words follow, a fee passes. Cliffe v. Gibbon, M. 1715. 2 Raym. 1324.

246. A. devised thus, “I make my niece executrix of all my goods, lands, and chattels.” Testator had a real and personal estate, but no leases or interest for years, and the question was, what estate passed in the lands by this devise. Id. Ch. was clearly of opinion, that the real estate did not pass by these words, and that the word “lands” was not (as objected) useless and to be rejected; for, in all probability, there might be a rent in arrear of those lands, which would pass to the niece by her being made executrix. Pigott v. Penrice, E. 1717. Pre. Ch. 471. Gilb. Eq. Rep. 137. Com. Rep. 250. Vide Ridout v. Pain, 3 Ark. 486. 1 Ves. 10. where testator, at the end of his will, devised all the rest of his goods, chattels, and personal estate, together with his real estate not before devised to his wife, whom he ap-pointed sole executrix: Held, that the words “together with my real estate” passed a fee, notwithstanding they were accompanied with the words “goods, chattels and personal estate.” Et vide Murray v. Wise, Pre. Ch. 264. where testator devised all the rest and residue of his real and personal estate to his wife, and made her executrix: Held, that a fee passed by these words. Vide etiam Jackson v. Hogan, 7 Bro. P. C. 467, where A. gave and bequeathed to his mother all the remainder and residue of all the effects both real and personal, which he should die possessed of: Held, that the word “effects” as used in this will, was sufficient to carry the inheritance of testator’s real estate.

247. A. by will ordered all his personal estate to be sold to pay his debts and legacies, and, in case it should prove insufficient, he devised his real estate to his executors, for the purpose of making good the deficiency: he then devised his real estate, after such a time as his debts and legacies should be paid by the rents and profits thereof, to E. for life, and in case E. should have any issue male, then to such issue male, and his heirs, for ever; and, after the decease of E., in case he left no issue male, then, after such time as the testator’s debts and legacies were fully paid, part of his said real estate to J. S. in fee, and the residue to J. N. in fee. E. entered into possession, and kept down the interest of the debts; but afterwards suffered a recovery of the whole estate, and declared the uses thereof to himself in fee: Held, that an estate was vested in E. at the time of the recovery, notwithstanding the debts were not paid, and that he could make a good tenant to the precipe: Held also, that the remainders limited to J. S. and J. N. were contingent remainders, and well barred by this recovery. Barnardiston v. Carter, T. 1717, 2 Bro. P. C. 1. 1 P. W. 505.

248. I. S. devised his freehold estate to trustees and their heirs, in trust, to convey them to his son for life; remainder to his first, &c. son, in tail male successively; remainder to his four daughters, to each one-fourth in fee: and, in case any of his four daughters should die without issue, then the trustees to convey such forth part in fee to the respective heirs of the daughter so dying. One of the daughters died with-
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out issue, her fourth belongs to her brother as her heir, for she having a devise of the fourth part to her in fee, the words directing a conveyance to her heir in case of her death are no more than what would have been otherwise implied. Blackborn v. Edgley, H. 1719. 1 P. W. 696. Gilb. Ch. Rep. 29.

249. J. S. seised in fee of copyhold lands, which he had surrendered to the use of his will, devised thus: "As touching my worldly estate, I give to T. S. all that my parcel of land lying in W. (the lands in question.) Item, I give to T. S. all other my estate whatsoever and wheresoever, not hereinbefore given and bequeathed, and him the said T. S. I make the sole executor of this my will." T. S. was admitted, and afterwards devised to plaintiff and his heirs, and the question was, if T. S., by this devise, had and estate for life or in fee. The court held, that when J. S. gave all his estate whatsoever, that comprehended all that he had, real or personal; and when he had surrendered to the uses declared by his will, the will shall have the same construction as if it had passed the land itself. Judgment for plaintiff. Scott v. Alberry, T. 1717. Com. Rep. 357. 340. Vide Vin. Ab. tit. Devise, (T. a) pl. 14. Ridout v. Pain, 3 Atk. 494. Beachcroft v. Beachcroft, 2 Vern. 691. Bowdler v. Smith, Pre. Ch. 264. Tanner v. Morse, or Wise, Ca. temp. Talb. 284. 3 P. W. 295.


251. A devise to B. and her heirs, and if she and D. die without issue, testator gives several annuities charged upon the premises, to charitable uses; resolved that B. had an estate in fee. Scrape v. Rhodes, T. 1723. Com. Rep. 342.

252. A. gave specific legacies to his daughters, and other legacies to others; then he gave all the residue of his estate to W., &c. in trust, to increase his daughters' portions. Ld. Ch. Ch. decreed that this gave the daughters a fee, for no other estate could be esteemed in augmentation of their portions. Carpen-

253. L. S. by will devised all her lands and estate in C. to B. The question was, whether B. took an estate for life only, or in fee. Adjudged that by these words a fee passed to B., carrying not only the land, but also the testator's interest therein, and that this point had been so settled ever since the case of Bridgewater v. D. of Bolton, (ante, pl. 256.) Barry v. Edgeworth, E. 1729. 2 P. W. 523.


256. Land given to such uses as A. shall appoint, passes a fee. Langham v. Nanny, T. 1797. 3 Ves. 470.

257. Testator devised his real estate to A. in tail male, remainder over, and gave a sum of money in trust to be laid out in land, and settled to the same uses; then by codicil, he devised the same real estate to B. and his heirs, and gave every thing he had given in his will to A. in as ample a manner to B. B. is tenant in fee of the real estate, and he is entitled to have the money paid to him. Young v. Cumber, T. 1798. 4 Ves. 101.

258. Testator, by his will duly executed to pass real estates, disposed as follows: "unto his illegitimate children, T. and A., the whole residue of his estate, to share and share alike, he to be settled with by the executors on 12th September, 1800, and she on 13th September, 1808," on which days they would reciprocally be 21. They were declared heirs of each in case of death before that time, and should both die under age, then B. N. to have 5000L., and the remainder of his estate to be equally divided "between brother L.'s and sister E.'s fami-
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lies, increasing brother R.'s annuity to 30l. Testator died leaving his brother L. his heir. E. died in his life-time, and the two natural children died under age, and unmarried. The children of E. filed this bill to establish testator's will. Defendant L. insisted the testator's real estate did not pass by his will, but descended to him as heir, and that the residue of the personal estate was divisible per stirpes. Per M. R. The real estate passes by this will. By the first clause in which the testator seems to have the natural children in contemplation, the intention appears to dispose of the whole of his property, and the words were sufficient to carry that intention into execution. The words "what I may die possessed of," were sufficient to describe all property of whatever description. In Huxtep v. Brooman, (1 Bro. C. C. 437,) the words, "all I am worth," were held sufficient to pass real estate. And Ld. Holt, in Bridgewater v. Bolton, (1 Salk. 236.) said, the word "estate" was genus generalissimum, and includes all things real and personal. His Honour admitted that word had been so qualified by the context as to bear a narrower signification, as in Doe v. Buckner, 6 T. R. 610. where the words were held insufficient to carry real, not as being of themselves insufficient to pass lands, but upon the context of the will, personal estate only being in contemplation of the testator. In Shaw v. Bull. (12 Mod. 592.) Trevor, C. J. said, generally the word "my estate, the residue of my estate," or "the overplus of my estate," may pass an inheritance where the intent is apparent, but then it must be very apparent both from the will and the circumstances, for the heir at law cannot be disinherited but by a necessary implication. The doctrine of modern cases is, that where there is nothing to qualify the word "estate," it will carry the real as well as personal estate, and the contrary intention ought to appear, to induce the court to put upon that word a less extensive signification than it naturally bears. In Tilley v. Simpson, (1 T. R. 659. n.) Ld. Hardwicke said, where the court has restrained the word "estate," to carry personal estate only, it has been where it appeared to be the intention of the testator that it should be so understood. In Hogan v. Jackson, (Cwp. 399.) Ld. Mansfield said, it was clearly settled that the words "all my estate," would pass every thing a man had; but if the word "all" was coupled with the word "personal," or a local description, there the gift would pass personally only, or the specific estate particularly described. In the present will, his Honour said there was nothing to qualify the word "estate" taken in its largest sense, it means all the property. Testator disposed of part, and then gave the whole residue not disposed of to his illegitimate children. Some stress was laid on his declaring them heirs of each other. It is possible that word was not used in a determinate sense, but there was no expression in the whole will to show he used the word "estate" in a less extensive signification than that it naturally bears. The children, therefore, were held entitled to the whole real estate. Barnes v. Patch, T. 1803. 8 Ves. 604. Wooliam v. Kenworthy, M. 1803. 9 Ves. 137. See another branch of Barnes v. Patch, post, ut. Legacy, i. 239. So in the case of Cheriton v. Taylor, T. 1814. 3 Ves. & E. 160. it was held, that the word "estate," is sufficient to pass a fee; but the question there arose, whether the meaning of that word was restrained by the words which followed, viz.:—"now in the tenure, holding, or possession of W. S., his assigns, or under-tenants," which question was not determined. Sed vide Frogmorton v. Halliday 3 Burr, 1618.

260. A direction that all testator's children shall share equally in all his property, gives them a fee in his real estate. Patton v. Randall, H. 1820. 1 Jac. & Walk. 189.
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219. Vide Wild's Ca. G. Co. 17. Shelby's Ca. I. Co. 99. In Mandeville v. Carrick, T. 1705. 3 Ridg. P. C. 365. Yelverton, Ch. B. said, that King v. Melling was the first case in which "issue" was taken and considered as a word of limitation.

268. If a man seised in fee of lands covenants upon the marriage of his son to levy a fine to the use of his son in tail, and three years afterwards makes a will, by which he ratifies and makes good "all those my estates granted in marriage to my son, according to the writing made by me in trust." The son shall take an estate tail in the lands by the will, although no fine was levied pursuant to the intended deed of settlement. Smith v. Milford, T. 1692. 4 Mod. 131. 1 Salk. 225. 1 Show. 350. Comb. 195. A devise of several rents expressed in several writings is a good devise of the rents. Vide Molineux v. Molineux, Cro. Jac. 145.

269. An estate, together with the furniture of the house, was devised to a woman, and such heir of her body as should be living at her death, and on default of such, remainder over. Per curiam, the woman has an estate tail in the land, and an absolute property in the furniture, for no remainder of goods after an estate tail is good. The words "heir of the body" cannot in the same clause be construed words of limitation as to the land, and as to the goods, words of designation of the person. Devises of land to a man for life, remainder to the heir of his body (in the singular number) or to the issue of his body, is an estate tail. Richard v. Berghavenny, M. 1693. 2 Vern. 325.

270. Devises in trust for E. for life, in case she should, within three years, marry G., remainder to her sons by G. in tail male, and for want of such issue, or in case the marriage should not take effect within the said three years, then in trust for F. for life, and for his sons successively in tail male. This will give but an estate for life to E. and an inheritance in tail male to F. and no estate whatever to G. Bertie v. Ld. Faulkland, E. 1697. Colles' P. C. 10. 2 Vern. 333. 1 Salk. 231. 3 Ch. Ca. 129. 136.

271. I. S. having two sons, A. and B., by his will devised thus: "I devise to A. my eldest son, all that my farm called D. to him and his heirs male for ever, but if a female, my next heir shall allow and pay to her 200l. in money, or 12l. a year, out of the rents and profits of D., and..."
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shall have all the rest to himself, I mean my next heir, to him and his heirs male for ever.” The devisor died, and A. the son, entered and died, leaving issue but one daughter; and then B. the younger son, entered. Per cur. the younger son is entitled to the land in question, first, because it was manifest that the devise to A. was an estate tail. 2dly. That it was apparent the devisor had a design, that if A. had a daughter, she should not have the lands, and this intent is the more manifest as testator gave a rent to the female heir, and she could not have the rent and the land out of which it issued, and the apparent intent of the testator ought to be pursued, if it did not contradict the rules of law. Then the devisor said, “I mean my next heir, to him;” him is of the masculine gender, and is tantamount to the word “male.” Adjudged, that the devise to A. and his heirs male for ever, was an estate tail, and judgment for B., defendant, was given accordingly. Baker v. Wall, E. 1697. 1 Ld. Raym. 185.

272. A. having a son and two daughters, devised his estate “to his son and his heirs, provided, if his son should die before 21, or without issue of his body. Then it should go to his two daughters.” A. died, and the son being of age, devised the estate to plaintiff, and died without issue. Per cur. the latter words show the testator’s intention plainly to be, that the son should only have an estate tail, and that the daughters should take the land if he had no issue, and decreed accordingly. Helier, or Helliard v. Jennings, M. 1699. 1 Freem. 509. 1 Ld. Raym. 505.

273. A. devised lands to trustees, in trust to divide the profits equally between his wife and daughter, during the wife’s life, and after her death he devised the same to the use of his daughter in tail, with remainder over. The daughter died during her mother’s life, without issue, and intestate. Per cur. the daughter had no estate tail, but the mother and daughter were tenants in common. The daughter had an estate pur autre vie, which, upon the statute of frauds, ought to go to her administratrix, viz. her mother. Philips v. Philips, E. 1701. 1 P. Wm. 34. Pro. Ch. 107. 2 Vern. 430. 2 Freem. 11, 12. 247.


275. Where a trust is limited to a man and the heirs of his body, with remainder over, the court will not decree the trustees to convey to him an estate in fee, but an estate tail only. Saunders v. Neville, H. 1701. 2 Vern. 428.

276. A. by deed, on his marriage, settled his estate upon the issue of the marriage, remainder to his own right heirs, and if he should die without issue male, and leave one daughter, then the lands to be charged with 3000l. for her at 21, and 150l. yearly maintenance in the mean time. A. having then no issue, by his will devised thus: “and whereas, by the settlement made on my wife, I have reserved the inheritance of my lands in myself, after the estate tail therein is spent; now, in case I die without issue, or that such issue shall die without issue of his, her, or their body, or that the estate tail limited by that settlement shall determine, I give all my said manors to my kinsman B. and to his first and other sons in tail male; remainder to C. in fee.” A. had afterwards a daughter: Held, that this daughter was entitled under the will to the whole estate, as tenant in tail, and that B. took nothing. Cornwall v. Williams, E. 1701. Colles. P. C. 117.

277. Devise to A. and the heirs male of her body, on condition that she intermarry with and have issue by one surname S., and in default of both conditions, he devised over to B. in the same manner, and in default thereof he devised to C. for 60 years, if he should so long live, remainder to the heirs of the body of C. and their issue male for ever. This is a good estate tail. The words of the condition amount to a limitation, and the estate of A. or B. does not cease, though she marries one of another name; for the
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remainder is in default of both conditions, and she may survive her husband, and then marry. S. Page v. Hayward, T. 1704. 2 Salk. 570. 3 Salk. 96.

278. Devise to testator’s daughter and her children, and if she dies without issue, to go over. This creates an estate tail in testator’s daughter. Sweetapple v. Bindon, H. 1705. 2 Vern. 356.

279. Surrender of a copyhold to the use of baron and dame, for their lives, and the heirs and assigns of the baron and dame, and for default of such issue, to the right heirs of the surrenderor. This is an estate in fee, and not an intail in the baron and dame; but otherwise it had been the case of a will. Idle v. Cook, E. 1705. 1 P. W. 70. Vide Morgan v. Griffith, Cwmp. 234. Doun v. Shenton, ibid. 410.

280. A devise to I. S. and his children; if he has children at the time, they take with their father, but if he has none, it is an estate tail in him. Cook v. Cook, E. 1706. 2 Vern. 545.


282. A devised lands to his wife during her widowhood, and after her decease or marriage, to A. and B. during their natural lives, equally to be divided between them; and after their decease to the next heirs male of their bodies, lawfully, &c. equally to be divided between them; but in case either died without such issue, then to the other of them for life, and after his decease to the heirs male of his body, lawfully, &c. with divers remainders over. Proviso, that if any of his devisees should cut down or sell any timber, unless for necessary botes, then they should forfeit their respective estates. A. and B. made partition of the lands. B. levied a fine, and suffered a recovery of the lands allotted to him, and died without issue. Defendants entered as his heirs: Resolved, that A. and B. had by the will estates tail in common, executed in them, because the words “equally to be divided between them,” are sufficient in a will to make a tenancy in common, though they are not so in a deed; and that those words being applied as well to the estates given to their heirs male, as the estates given to them, made the estates tail, estates in common, and that the tails were executed in them, because estates for life being limited to them. “Heirs” in this case, is a word of limitation, and the words “after their deceases” were to be taken respectively, viz. that after the death of A., his moiety should go to the heirs male of his body, and after the decease of B. his moiety should go to the heirs male of his body; and that the proviso was no proof that the testator intended A. and B. estates for their lives only, because the testator intended that proviso to be extended to all his devisees, and if A. and B. took only estates for life, yet their heirs male would be devisees in tail, and his own right heirs, to whom he gave the fee, were devisees. Thurston v. Peak, 1717. 8 Vin. Ab. tit. Devise, pl. 11. 2 Eq. Ab. 318. pl. 18. Seagrave v. Miller, post, pl. 262, seems to be S. C.

283. The word “children,” when unborn, has, in the case of a will, been construed to be synonymous with “issue,” and therefore in a will would create an estate tail. (a) Per M. R. in Hughes v. Sayer, H. 1718. 1 P. W. 534. (a) Vide Wild’s Ca. 6 Co. 17.

284. There is a great diversity betwixt a devise of a freehold estate “to A. for life, and if A. dies without issue then to B.,” and a devise of a term of years, in the same words, for, in the former case, this might give A. an estate tail, because the words, “if A. die without issue,” in case of an inheritance, are inserted in favour of the issue (a) and to let in the issue after the death of the father; but in case of a term, they cannot have such effect, for the father takes the whole, which on his death will not go to his issue, but to his executors. Per Parker, C. in Targett v. Gaunt or Grant, E. 1718. 1 P. W. 452. Gibb. Eq. Rep. 149. 10 Mod. 402. (a) Vide Forth v. Chapman, 1 P. W. 607.

285. In a devise “to A. for life, and if A. die without issue, then to B.,” there is an express estate for life to A., yet the subsequent words will turn it into an estate tail; but where lands are devised “to A. for life, remainder to trustees, &c. remainder to his first, &c. son in tail male, &c. and if A. die without issue, then, &c.” this will not give an estate tail
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287. "It is my will, that if W. my son shall happen to die, and leave no issue of his body lawfully begotten, then, and not otherwise, after the death of the said W. my son, I give and bequeath all my lands of inheritance in L. unto R. my son, to hold after the death of the said W. to him and his heirs." Price, B. gave his opinion, that W. took an estate tail by this will; for the words shall not be construed to give an estate by way of executory devise, but where the devisee cannot take any other way; but here W. took by the will, for it is a necessary implication, that he shall have it to him and the heirs of his body, for the heir shall take by the will, though he is not expressly named, or there be no devise to him by express words. It was adjudged W. took an estate tail. Walter v. Drew, T. 1723 Com. Rep. 372. 375.

288. Testator devised to his two daughters and their heirs, and if they should die without heirs, then to his brother T. The question was, whether this was an estate in fee or in tail to the daughters? For, if it was in fee, it was a joint estate, but if in tail, the issue must take by moiety. (Co. Litt. 182.) Per curiam: Adjudged an estate tail in the two daughters, and this difference was taken, that where, in such a devise, the remainder over is limited to a relation of the devisee, it shall be construed an estate tail in the first devisee; but if the remainder over be limited to a stranger, it shall be construed an estate in fee, and the remainder over void. Anon. M. 1725. 2 Eq. Ab. 815. pl. 27.

289. I. S. devised lands to B. for life, and after his decease, to the heirs male of the body of said B. lawfully to be begotten, and his heirs for ever; but if B. should die without such heir male, then over. Defendant claimed as heir to I. S.; and the question was, whether B. took an estate tail, or for life only. Raymond, C. J. It will be a difficult thing, to make this an estate for life. The Ca. of King v. Melling, (2 Lev. 59. ante, pl. 267.) answers all objections. The word "issue" is a proper word of purchase, but "heirs" is always a word of limitation (a) and the word "heirs" being used here, the words "after his decease" are of no force. The words "heir" and "heir male" are nomina collective, and include all the heirs of the devisee. In Archer's Ca. it was the word "next," which confined it to one particular person, for without that word, it would have been a limitation, and not a purchase. "His," is the word which makes the difficulty in this case, but it may be referred to B. himself. Suppose B. had had several sons, if the eldest had been made a purchaser by this will, the others could not have taken: there must be stronger words to control the words "heirs male," and make them words of purchase. Id. Raymond thought B. took an estate tail. Fortescue, J. concurred, and said, "heirs" was a word of limitation, unless other words confined it to a particular person, as "next," "eldest," &c. (b) without which it can never be a word of purchase; but it has been held, that "issue" may be construed either way. The word "heir" refers to B., and "such" means "such heir male" in succession (c.) Judgment for defendant. Goodrich or Goodtitle v. Pully, M. 1726. 2 Str. 729. 2 Ld. Raym. 1457. 1 Barn. B. R. 6. (a) Vide Goodrich v. Wright, 1 Str. 31. But the words "heirs of the body," have been considered as words of purchase, where the intent required it in a covenant to stand seised to uses. Lisle v. Gray, 2 Lev. 223. T. Raym. 278.; as also in a deed of trust. Allgood v. Withers, cited 2 Burr. 1107. Et vide the opinion of Hardwick, C. in Bagshaw v. Spencer, 2 Atk. 580. 1 Ves. 147. (b) in Archer's Ca. 1 Co. 66, the particular person was pointed out by the word "next," and in Wild's Ca. 6 Co. 17. there is the word "children," which could not be a word of limitation. (c) Besides, in the present case, superadded words of limitation have
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290. A. devised to B. and C. during their lives, equally to be divided between them, and after their decease, to the next heirs male of their bodies, but in case either of them die without issue, then he devised the same to the other of them, and after his decease, to the heirs male of his body, and for want of such issue of both of them, then to others, with a proviso, that if any of the devisees cut down timber, unless for necessary botes, they shall forfeit their estates. This was held to be an estate tail in B. and C., notwithstanding the estate was limited to the next heirs male. Seagrave v. Miller, 1728. Fortesc. 84. Thrustout v. Peak, ante, pl. 282. is S. P. and seems to be S. C.

291. T. R. seised in fee of lands in F., devised the same to D., his wife, for life, and farther gave her 500L. "to be raised by her, or by her executors, &c. by sale of timber trees, or by sale of any part of the lands, or by digging, &c. and sale of coals on the premises, &c. at her choice, or at the election of her executors, and that if his wife should die before the 500L. were raised, then he gave her power by deed or will, in her life-time, to appoint any person to raise the same after her death, in manner aforesaid; but if either of his sisters L. or E. or the trustees named in his will, shall pay to his wife, or to her executors, &c. the 500L. then the power of selling timber, &c. shall cease." And after the decease of his wife, he devised the said lands to A., B. and C., and "the survivor and survivors of them (a) (subject to the raising the 500L.) upon trust for his said sisters, equally between them during their lives, without committing waste; and if they die leaving issue of their bodies, then in trust that the mother’s share shall be for such issue, or else in trust for the survivor or survivors, and (b) their respective issue, and if both his said sisters should die without issue, or having issue, such issue should die without issue, then in trust for I. S. and the heirs male of his body, and for want of such issue, then for R. G. and the heirs male of his body," with several remainders over. The chief question in this case was, whether testator’s sisters, who survived his wife, took an estate tail, or an estate for life only. In the great sessions for Flint (in 1725,) it was adjudged an estate tail, but that judgment was reversed upon a writ of error in B. R., (in M. 1728.) the Judges there holding that the sisters took only an estate for life, with remainders in tail to their issue. However, the Lords gave judgment, on a writ of error, that the sisters took an estate tail, agreeably to the opinion of Egere, C. J., Pemelly, C. B. and Fortescue, J. Contra, the other nine Judges, who held it an estate for life only. Shaw v. Way, or Weigh, E. 1729. 3 Med. 253. 382. Fitzg. 7. 2 Stra. 798. 1 Barn. B. R. 54. (a) Without saying “to their heirs.” (b) Before the Lords gave judgment, Dr. Hare, Bp. of Chichester, said, that the question seemed to depend upon the grammatical construction of the words of the will, and he perceived that the three Judges, who differed from the rest, argued upon the grammar of it. His Lordship said, that according to the grammatical construction, he should think “survivor, or survivors,” most properly referred to the sisters, rather than to the issue.

292. A devise to one, with a limitation over to another, if the first devise dies without issue, creates, in construction of law, an estate tail in the first devisee, as well as if the devisee had been to him and the heirs of his body. Sparrow v. Shaw, E. 1729. 3 Bro. P. C. 476.

293. “I devise my lands to A. for life, and after his decease,remainder to the heirs male of the body of A., and to the heirs male of such issue male.” Raymond, C. J. was of opinion, that these words conveyed an estate tail to A. and said, that the settled distinction was, where the word “heir” is in the singular number, and a limitation made to the issue of such heir, the word “heir,” is considered as a word of purchase and a descriptive per-
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sons; but wherever the word "heirs" is in the plural number, and a limitation made to the issue of such heirs, the word "heirs" is considered as a word of descent, and not of purchase. Burnet v. Coby, T. 1730, 1 Barn. 367.

294. A. devised lands to B. for life, sans waste, remainder to trustees, during the life of B. to support, &c. remainder to the heirs of the body of B., remainder over: Held, that the remainder to the heirs of the body of B. was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B. Papillon v. Voice, T. 1731, 2 P. W. 471. 2 Keb. 27. 34. Vide Smith v. Clay, Amb. 645. 6 Bro. P. C. 395. In Bagshaw v. Spencer, 2 Atk. 581. 1 Ves. 132. Ld. Hardwicke said, that the opinion given by Ld. King, in the above case, was a sort of extrajudicial opinion.

295. A. devised lands to his wife for life, then to his son H. for life, and then to his son G. and his heirs for ever, and if he die without issue, then to his two daughters. This is an estate tail in G. Tyte v. Willis, M. 1733. Ca. temp. Tabb. 1.

296. A. by will devised to his eldest son B. a real estate for life, remainder to his sons in tail male, remainder to his second son G. for life, remainder to his sons in tail male, remainder to plaintiff's brother G. for life, remainder to his sons in tail male, remainder over. And also gave to three trustees two long annuities in trust, as to one, for plaintiff's father for life, and then to plaintiff for life, remainder to the issue male of his body, remainder over; and as to the other, in trust for testator's son R. for life, and in default of issue male, remainder to C. for life, remainder to his issue male, remainder to G. for life, remainder to plaintiffs for life, with divers remainders over, and appointed C. his executor, who possessed himself of the title-deeds of the real estates, and the talties belonging to the annuities. B. died without issue; R. died without issue male; and the son of C. born after testator's death, is since dead, and his father administered to him. C. joined G. in the sale of the annuity devised to G. and the purchase-money was paid to C.—Plaintiff, the son of G., brought his bill to have the title-deeds belonging to the real estate deposited in court, and as to the annuity devised to C. and to plaintiff is remainder, to have security for payment of it, when his interest therein should take effect in possession; and as to the other annuity, to have satisfaction against C. for the breach of trust, in concurring in the sale to plaintiff's prejudice, and for an equivalent upon the death of his father G. Per curiam, as to the annuity devised to R. and afterwards to C. for life, &c. there being words of limitation annexed, such as would create an estate tail, in the case of a real estate, upon the birth of a son of C., the whole interest in remainder vested in such son, and C., as administrator to his son, is absolutely entitled to it. As to that, therefore, the court dismissed the bill, but as to the annuity sold by C., as it was at the instance of C., and G. received the money, the court would not charge C. with the price the annuity sold for, but decreed that G. and C., or one of them, should, at their own charge, purchase an exchequer annuity, and assign same to trustees upon the trusts limited by the will. Icet v. Icet, E. 1738, 3 Atk. 450. Vide Seale v. Seale, 1 P. W. 290. Dod v. Dickinson, 6 Vin. 451. pl. 25. Butterfield v. Butterfield, 1 Ves. 133. 154. Daw v. Fit, Fearne, 347. Salter v. Salter, 2 Atk. 367. Stratton v. Payne, 3 Bro. P. C. 257. Earl of Chatham v. Tothill, 6 Bro. P. C. 450. Hodgson v. Bussey, 2 Atk. 59.

297. R. W. by his will devised to his wife E. all his lands, not settled in jointure, and then says, "if she shall have no son or daughter by me, for want of such issue, the said promises to return my brother (the plaintiff,) if he shall then be living, and his heirs for ever." Decreed an estate tail in E., because, where the preceding words are proper to create an estate tail, the legal operation of them cannot be controlled by subsequent provisions; and the words, "if E. has no son or daughter," must be understood having no issue, and the words, "for want of such issue," amount to the same as if the testator had said for want of issue generally. Wyld v. Lewis, E. 1738, 1 Atk. 432. Vide Sunday's Ca. 9 Co. 127. Bamfield v. Popham, 1 P. W. 56. Blackborn v. Edgley, ibid. 605. Evans v. Astley, 3 Burr. 1570. Vide also Robinson v. Robinson, 3 Atk. 736.

298. A devise to A. for life, and to the heirs of his body, so unites the two estates as to make the first taker tenant
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299. A devised to B. and his heirs, and said afterwards, "if he shall die without heirs of his body:" this centrudes the devise to an estate tail. Lampley v. Blow- ner, M. 1746. 3 Atk. 398. Vide Lee v. Frieaux, 3 Bro. C. C. 381. where this case is stated from the register book.

300. Devise of the profits of lands to A. for life, and afterwards of the land itself, to the heirs of his body. This is an estate tail in possession. Butterfield v. Butterfield, M. 1748. 1 Ves. 154.

301. Devise to trustees in fee, but if B. attained twenty-one, or had issue, then to B. and the heirs of his body, and if B. died before twenty-one, and without issue, then over. B. attained twenty-one, and died without issue. An estate tail vested in B. at twenty-one, or on having issue, and the limitation over was a remainder, to take place on the failure of issue of B. Brownsworth v. Edwards, E. 1751. 2 Ves. 245.

302. G. R. devised to A. for life, and no longer, and after his decease to such son as he shall have, lawfully to be forgotten, taking the name of R., and for default of such issue, then to B. and his heirs for ever: Held, that A. must, by necessary implication, to effectuate the manifest intention of the testator, be construed to take an estate in tail male, notwithstanding the express devise to A. for his life, and no longer. Robinson v. Robinson, T. 1751. 3 Atk. 785. 1 Burr. 38. 2 Ves. 225. Vide Bamfield v. Pop- ham, 1 P. W. 54. Allenson v. Clitherow, 1 Ves. 24. Wyld v. Lewis, 1 Atk. 432. Lethieullier v. Tracy, 3 Atk. 784.—Vaughan v. Farrer, 2 Ves. 182. Evans v. Ashley, 3 Burr. 1570. Hay v. Ld. Coventry, 3 T. R. 83. Doe v. Applin, 4 T. R. 82. Se, in a cause between the widow of same testator and his heir at law, Jekyl, M. R. declared that A. the devisee (above-mentioned) was entitled only to an estate for life, with remainder to his eldest son, and if but one son, for his life, and that the remainder would go over to W. R. testator's heir at law. Robinson v. Robinson, 3 Atk. 738.

303. Where the intent of a testator in creating an estate tail is very doubtful, the court will lay hold of any circumstance rather than put it in the power of a person on a remote contingency, to bar all subsequent remainders. Lathicullier v. Tracey, E. 1754. 3 Atk. 797.

304. Fish covert, by will, pursuant to a power, devised to her husband "all the profits and revenue of my estates for life, and after his death, to my children, if I should leave any to survive me;" but if I should leave no such child or children, nor the issue of such, the said estates to I. H. making him sole heir, in default of issue, and after the death of my husband:" Held, that the children took an estate tail, and that the remainder to I. H. was good, and not a contingent executory limitation, on her dying without issue living at her death, but dying without issue generally. Southby v. Stonehouse, T. 1755. 2 Ves. 610. Vide Puresey v. Rogers, 2 Saund. 388.


306. Devise in trust for "T. R. for life, remainder to trustees to preserve, &c., remainder to the heirs male of T. R. and their heirs, provided, that if T. R. should die without issue living at his death, then in trust to raise 200L. for each of his nieces, and in default of such issue, to his grand-children: Held, that T. R. took an estate tail. Wright v. Pearson, T. 1758. Amb. 358. 1 Eden 119. S. C. where it is said, per Henley, C. S. that the same construction ought to be put upon words of limitation in cases of trusts, and of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees, and therefore this devise was held to be an estate tail from the apparent intent of the testator, and the general words of the will, though there was a limitation to trustees to preserve, &c., a reference to issue male living at the decease of the devisee, a restriction of failure of issue male to the life-time of persons in esse, and a limitation in feo annexed to the words "heirs of the body." See Mr. Fearn's discussion on this case (Cont. Rem. 126, 133.) and his remark, that a stronger case could not have been imagined in favour of the rule in Shelley's Ca. See also Eystell v. Wallace, 2 Ves. 225. Brydges v. Brydges, 3 Ves. 120. Green v. Stephens, 17 Ves. 64. Also Stan-
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308. Devise to C. and the issue of his body living at his death, and for want of such issue, then over: Held, C. took an estate tail. Oxford University v. Clifton, M. 1759. Amb. 383. 1 Eden 472.

309. J. S. devised an estate at A. to H. for life, remainder to the issue male of H., and to his and their heirs, share and share alike; and for want of such issue, to the issue female of H. and to her and their heirs, share and share alike; and for want of such issue, over: J. S. also devised an estate at B. to H. for life; remainder to the issue male of his body, and to their heirs; and for want of such issue, over; with a proviso to charge the premises for such person as would take next in remainder, in case H. or his issue should alienate, &c. H. had two daughters, and suffered a recovery of the estate at B.; Held, that he took an estate tail, and that the proviso was repugnant to the estate. King v. Burchell, M. 1759. 1 Eden 424. Amb. 379. This case was erroneously cited arguendo in Doe v. Laming, Burr. 1103.; but rectified in the report in Ambler, in Fearne Coat. Rem. 181 and in a note to Porter v. Bradley, 3 T. R. 145; but no report of the judgment has been printed. See the Editor's references and notes on the case. See also Wright v. Pearson, 1 Eden 119.

310. Devise to C. H. for a term, if he so live long, and after the determination of that term, to the heirs of the body of C. H., with remainders over: Held, the heir of the body of C. H. took an estate tail, as an executory devise. Harris v. Barnes, E. 1768. Amb. 666.

311. Wherever the issue cannot take but through the father, there, though the father has only an estate for life, given him by express words, yet he must, by necessary implication, to effectuate the intention of the deviser, take an estate tail, to convey that estate to his issue.

Mandevilll, Carrick, T. 1795 3 Ridgwy. P. C. 365.

312. Where an estate is given by deed or will to a man for life, with remainder to the heirs of his body, or to his issue, without saying more; an estate tail vests in the ancestor and the heirs of his body, or his issue will take it by limitation; and this rule (said Fitzgibbon, C.) was originally founded in principles of the feudal law, to prevent conveyance in fraud of the turens. S. C. 369.

313. A limitation that will create an intail in law, will have the same effect upon an equitable estate; therefore a devise in fee to pay debts, and then to the use of A. in trust for B. for life, remainder to the heirs male of his body, is an estate tail in B. Brydges v. Brydges, E. 1796. 3 Ves. 120.

314. Devise and bequest to A. and the heirs of his body, with limitations over if he has no such heirs; held an estate tail in the real, and an absolute interest in the personal estate, the limitation over being void; but thus expressed "if he leaves no such heirs," it would be good as confined to the time of the death, and not after an indefinite failure of issue, according to the distinction in Forth v. Chapman. (P. W. 663.) Crookes v. De Vande, M. 1803. 9 Ves. 202. Vide Rawlin v. Goldfrap, 3 Ves. 440. and references in 444, note (a).

315. A devise over to A., B., and C., and their heirs, such in due succession, as named, with usual limitations in failure of issue in D.: Held, that these limitations over are good by way of executory devise, and that A., B., and C. take successive estates tail. Stratford v. Powell, M. 1807. 1 Ball & Be. 1.

316. I. S. devised an estate per anter vie to A. for life, with power to will it to "B. and his lawful issue, in such manner as A. shall think proper, and in case A. shall die intestate, then to B. and his lawful issue," with remainder over to plaintiffs: Held an estate tail in B., subject to be devested by the execution of the power in A.: Held also, that A. and B. could, by deed conveying their estates, bar the remainders over. Osbrey v. Bury, T. 1808. 1 Ball & Be. 53. Vide Cunningham v. Moody, 1 Ves. 174. and Doe v. Martin, 4 T. R. 39.

317. Devise to the use of the deviser's
DEVISE VI. & VII.

What Words in a Will will pass an Estate Tail; and what an Estate for Life.

second son, A. for life, without impeachment of waste, and after his decease, to the heirs of his body, as tenants in common, and not as joint tenants; and in case of his decease without issue, then to the deviser's eldest son B., his heirs, &c. and in case both sons should die before twenty-one, over: Held, an estate tail in the land, and absolute interest in personally bequeathed with it. Bennett v. Tankerville, H. 1811. 19 Ves. 170.

318. A residuary trust by will to apply the rents and profits for A. during his life, and afterwards for the heirs of his body, if any, and in default of such issue, over, gives an estate tail in the real estate, and the absolute interest in the personal. Elton v. Eason, E. 1812. 19 Ves. 73.

319. A. devised to his wife for life, and after her decease, the estate to be settled by counsel, to go amongst his grandchildren of the male kind, and their issue in tail male, with remainder over. Only one grandchild was born in testator's life, but two were born afterwards during the life of the testator's wife: Held, that a grandchild born after the death of the testator, and before that of his wife, took an estate in tail male. Marshall v. Bousfield, T. 1817. 2 Madd. 166. Vide Blackburn v. Stables, 2 Ves. & B. 307.

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What Words in a Will will pass an Estate for Life.

320. One devised lands to his wife for life, and gave the reversion to A. and B., to be equally divided between them.—Decreed they were tenants in common for life only. Peaton v. Banks, M. 1682. 1 Vern. 65.

321. Devise of a term to A. for life, remainder to B. and the heirs male of his body: Held, that the remainder in B. is only contingent (if there can be a remainder of a term,) for the law supposes an estate for life to be of greater continuance than any estate for years, and therefore the whole term is in A. for life, and the remainder to the son is but a possibility. Dease v. Earle, T. 1689. 3 Lev. 264. 2 Vent. 126.

322. Devise to A. for life without impeachment of waste, and in case he have any issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to B. and his heirs for ever. A. entered, suffered a common recovery, and died without issue: Held, that A. took only an estate for life, and the subsequent limitation to the issue male of B. was held not to make him tenant in tail, but to be a contingent in fee to issue male, (a) who took by way of purchase as a devisee specifically described. Loddington v. Kine, M. 1693. 1 Squ. 224. 1 Ld. Raym. 203. 206. 3 Lev. 431. Vide Fearne's Cont. Rem. 4th ed. 347 to 355. where this case is examined and compared with those decided on the same principle. (a) The decision in the principal case was confirmed by the court, on an appeal concerning the same devise, in Carter v. Barnardiston, 2 Bro. P. C. 1. In Target v. Gaunt, 1 P. W. 433. post, 10 Mod. 403. Ld. Parker said this case was mistakenly reported by Levins, though he was of counsel in it himself.

323. Devise to A. for life, remainder to the heir of his body (in the singular number) and to the heirs of the body of such heir, is but an estate for life to A. Dist. in Richards v. Lady Bergamenny, M. 1695. 2 Vern. 325. Vide Archer's Ca. 1 Ca. 66.

324. If lands are devised to one, generally, without limiting for what estate he takes but an estate for life, unless it plainly appears that the testator intended him a greater estate, or that he is likely to be a loser, or his person chargeable. Fairfax v. Heron, H. 1696. Pre. Ch. 68. 2 Eq. Ab. 306. pl. 7.

325. Devise that trustees shall stand seized to the use of A. for life, remainder to A.'s first and other sons in tail male, is but a tenancy for life in A. Horner v. Popham, H. 1697. Colles P. C. 1. This is the case of Barmfield v. Popham, reported by Vernon and P. W.

326. Devise in trust for E. for life, in case she within three years should marry...
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G., remainder to her sons by G. in tail male; and for want of such issue, or in case the marriage should not take effect within said three years, then over. This will give but an estate for life to E., and no estate whatever to G. 


327. A. devised lands to trustees to pay debts and legacies, and then to settle remainder on his son B. and the heirs of his body, with remainders over, and directed that special care be taken, that it should never be in the power of his son to dock the intail. Decreed the son should be only tenant for life, without impeachment of waste; and that he should not have an estate tail conveyed to him. 


328. A devise “to the issue of I. S.” who had a daughter living, and afterwards had a son born: Held, that all the children shall take, and even grandchildren, if there were any; but they shall only take an estate for their lives. Ld. Keeper said, the devise is to the issue begotten, that makes no difference. The words, “begotten, and to be begotten,” are the same, as well in the construction of wills as settlements, and take in all the issue after begotten; and although, upon the death of a testator, there was only a daughter born, yet upon the birth of another child, the estate shall open, and take in the after-born son. A devise to the issue of A., and for want of such issue to B.—A. had a son and a daughter; they shall take only as persons described, and have only an estate for life, although the subsequent words, “for want of such issue,” seem to imply an estate tail; but then there must be a double use made of the word “issue;” 1st, it is a word of implication, who were the persons to take; 2dly, as words of limitation, to make an intail, which is not to be admitted. A devise to two, and the heirs of their bodies. It is a joint-estate for life, and several inheritances, and so is it if there is a devise over; but if there is a devise over, and one of them dies without issue, a moiety shall go over to the remainder-man. Cook v. Cook, E. 1706. 2 Vern. 545, 546.

329. A. devise to A. for life, he pay-
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So, different constructions may be put upon the same words in a devise, where they are applicable to different subjects. Forth v. Chapman, 1 P. W. 607. Harris v. Bp. of London, 2 P. W. 663. Sheffield v. Ld. Orrery, 3 Atk. 381. See Stafford v. Buckley, 2 Ves. 180. See also Shaw v. Weigh, 2 Stra. 798. with the several cases there cited and referred to.

333. B. having several freehold and copyhold lands, devised all his lands, goods, and chattels, to his three sons, equally to be divided between them, and devised over and above 100l. to his eldest, provided he gave a lawful and general release to his two younger brothers, and by his codicil he appointed, that if one of his younger sons should die, or marry in his minority without consent of his executors, then his portion should go to the other younger son. Per Harcourt, C. There being no words of limitation of estate in the devise to the two younger sons, they can take only an estate for life in the lands: and as to the general release directed by the will to be given to the younger son, that is satisfied by releasing his right to the personal estate, without affecting the real estate: so the devise over to the younger son, in case of the death of one under age, &c. may be satisfied by the personal, and the word "portion" properly signifies nothing. Bullock v. Bullock, M. 1713. 8 Vin. Ab. 238. pl. 10. 2 Eq. Ab. 311. pl. 16.

334. A. devised a third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son I. S. and his heirs: Held, the wife had but an estate for life in the third part of the real estate, (a) the word "estate" being intended to describe the thing only; and not the interest in the thing, and when the testator intends to pass a fee, he adds the word "heirs" to the word "estate." (b) Chester v. Painter, H. 1724. 2 P. W. 335. (a) Vide Barry v. Edgeworth, 2 P. W. 523. (b) Sed vide Ibbeton v. Beckwith, Ca. temp. Talb. 157. where the devise was of "all my estate to A. for life, and to D. after her death, he taking the testator's name, and if he refused, to M. B. and her heirs for ever." M. R. held D. took only an estate for life, but Ld. Talbot thought that D. had a fee, and varied his Honour's decree.

335. Lands were devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus of the rents and profits to A. during her life, for her separate use, or as she should direct, and after her death, the trustees were to stand seised to the use of the heirs of her body, with remainders over: Held, that this was a use executed in the trustees and their heirs during the life of A., and that she had only a trust in the surplus rents and profits during her life: and that the subsequent limitation to the trustees, to the use of the heirs of his body, was a use executed in the persons entitled to take by virtue thereof; and, therefore, there being only a trust estate in the ancestor, and a use executed in the heirs of her body, these different interests could not unite, so as to create an estate tail by operation of law in the ancestor. Ld. Say & Sele v. Lady Jones, E. 1729. 3 Bro. P. C. 458.

336. J. S. devised part of his lands in A. to his wife for life, and after her decease, to his son B. and his heirs lawfully begotten, viz. the first, &c. son and sons successively, lawfully to be begotten of the body of my said son B., and the heirs of the body of such first, &c. son and sons successively, by seniority of age, and in default of such issue, to testator's right heirs for ever. The question was, whether B. by this will was tenant in tail, or only tenant for life? Per curiam,
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though the first words, if you stop at the

videlicet, would carry an estate tail to B.,
yet according to Hob. 171. what comes
after the videlicet must be taken in to ex-
plain the former words, and by the last
it appears he intended his son should not
have it in his power to prevent the estates
being enjoyed by his children, or if he
had none, from reverting to the right heirs
of the deviser, (a) and it is no new thing
in the construction of wills, to let subse-
quent words entirely destroy the force of
preceding ones; as in the common case
of a devise to A. and his heirs, and if he
dies without issue, remainder over; the
first, if alone, would certainly carry a fee,
but the latter qualifies the former, and
makes it an estate tail. (b) So, if a de-
vice be to A. and his heirs, and for want
of heirs, then to B. the brother of A.;
these last words restrain the word “heirs,”
to mean only “heirs of the body,” be-
cause it is impossible that A. can want an
heir general, whilst he has a brother. (c)
Adjudged that B. took only an estate for
life. Judgment for the plaintiff. Lowe
v. Davies, M. 1729. 2 Ld. Raym. 1561.
1 Barn. B. R. 238. 2 Stra. 849. Fitzg.
112. (a) The word “heirs,” accompa-
nied with other words of limitation, has
been held to operate as a word of pur-
chase, in Archer’s Ca. 1 Co. 66. Clark
v. Davy, Moo. 303. 2 Roll. Ab. 417. (G.)
pl. 7. So, the words “issue,” or “issue
male,” Vide Luddington v. Kime, T.
Raym. 203. 1 Salk. 224. Backhouse v.
Wells, 1 Eq. Ab. 184. pl. 27. Doe, ex
Doe v. Collins, 4 T. R. 294. So likewise,
as in the present case, the word “heirs,”
or “heirs of the body, &c.” have been
restrained by subsequent words, to sig-
ify a particular heir, in Doe v. Laming,
3 Burr. 1100. 1 Bl. R. 145. Lisle v.
Grey, 2 Lev. 223. 1 Ld. Raym. 278.
Allgood v. Withers, in Ch. cited 2 Burr.
1107. 1 Ves. 150. Fearn Cont. Rem.
177. Et vide the opinion of Kenyon, C. J.
in Denn v. Puckey, 5 T. R. 306. Vide
etiam Goodright v. Pullyn, Stra. 729, and
Cooke, 1 P. W. 71. Porter v. Bradley,
1 T. R. 145. (c) Vide Webb v. Herring,
70. Tye v. Willis, Ca. temp. Tabl. 1.
Alien v. Sponloove, 1 Freem. 74. Picken-
ing v. Towers, Amb. 363. Ves v. Legge,
So also where the remainder is limited to
the heirs of the testator himself, if they
must also be heirs to the first devisee.
Nottingham v. Jennings, 1 P. W. 23.
Com. Rep. 81. Vide also Com. Dig. tit.

Devise, (n. 5.) 478.

337. A devised his real estate to his
son F. during his life, remainder, after
his decease, to his eldest son that should
be then living, remainder over. F. suf-
fered a recovery, and declared the use to
himself in fee; Held, that F. took only
an estate for life, and that the recovery
was bad. For, where a particular estate is
expressly given, it shall not be altered by
any implication from subsequent words,
especially where such implication, if ad-
mitted, defeats the general intention of the
will. Foord v. Foord, H. 1730. 3 Bro.
60.

338. Devise of money to be laid out in
land, in trust for plaintiff, and the heirs
male of his body, to take in succession
and priority of birth, with remainders
over: Held, that a should not take an
estate tail, but for life only. White v.

339. A. devised his real and personal
estate to his wife for life, remainder to
his son B. and his issue, lawfully begot-
ten, to be divided as he shall think fit,
and if he should die without issue, re-
mainder over: Held, an estate for life
only in B. with a power of division, and
remainder over, good. Hockley v. Max-
brey, E. 1790. 3 Bro. C. C. 82. 1 Ves.
jun. 143.

340. Devise of all the residue of testa-
tor’s estate, both real and personal, to A.,
to be placed out at interest, until 21, or
marriage, and then the whole with accu-
mulated interest, to be paid to her, and
for her own use for life, and after her
decesse to the heirs of her body lawfully
begotten, equally to be divided between
them, share and share alike; and in de-
default of such issue, or in case of the
death of A. before 21, or marriage, then
over: Held, an estate for life in A. Jacobs v.
Amyat, E. 1794. 4 Bro. C. C. 542.

Vide Long v. Laming 2 Burr. 1100.
Applyn, 4 T. R. 82.

341. A. gave B. all his lands, tena-
ments, and messuages whatsoever, after
depts, legacies and funerals paid. The
depts being charged only contingently on
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the real, if the personal estate should be deficient: Held, that plaintiff took only a life estate. Merson v. Blackmore, T. 1742. 2 A. & S. 341. Vide Ridout v. Payne, 3 A. & S. 486. and notes; but where a gross sum is to be paid out of the lands, it gives a fee simple to the devisee of those lands. Vide Doe v. Richards, 3 T. R. 356. Goodright v. Stocker, 5 T. R. 13. 342. Devise to E. M. during his life only, and after the determination of that estate to the said E. M.'s lawful issue male, and the lawful issue male of such heirs, the eldest always of such sons of the said E. M. to be preferred before the youngest according to seniority in age and for want of such issue in E. M., remainder over. This gives E. M. an estate for life only. Mandeville v. Carrick, T. 1795. 3 Ridg. P. C. 352.

343. By a devise of "my copyhold estate at P. now under lease," &c. but not specifying for what interest, an estate for life only passes. Petticord v. Prescott; T. 1802. 7 Ves. 580.

344. A. devised "to B. my farm and lands at R. to him and his heirs and assigns, for ever; and I also give to B. my farm, and manor of E." B. only takes an estate for life in the latter, under this devise. Paice v. Canterbury Archbishop, T. 1807. 14 Ves. 364.

345. A devise introduced by the words "I do give and dispose of all my worldly goods," and proceeded by a devise immediately following those words, of a manor and lands, and of "the perpetual advowson of H. in Leicestershire, and my manor of S., and all my lands in M." Held not sufficient to carry a fee in the lands of N. to a devisee, who was one of three residuary legatees, for want of words of inheritance or perpetuity; and that he only took an estate for life in the lands so devised; but the court gave no opinion as to what estate he took in the advowson, holding, that even if he had taken a fee therein, it would not have altered or extended the effect of the subsequent devise of the lands; but that the rule of law must prevail against the apparent hypothetical intention of the testator. Doe, d. Crutchfield v. Pearce, E. 1815. 1 Price 583. Vide Roe, d. Helling, v. Yeud, 2 N. R. 291. Moores, d. Tegg, v. Heaseman, and Gardner v. Sheldon, Vaugh. 262. as to the rule that express words are required to disinherit an heir. See also Right v. Sidebotham, Doug: (730) 759. Paice v. Canterbury Archbishop, 14 Ves. 369. Fitman v. Stevens, 15 Ves. 505. Roe, d. Bates, v. Clayton, 8 East 147.

346. Testator devised to his wife, and after her decease, to the heirs of her body, share and share alike, and in default of issue to be lawfully begotten by him, to be at her own disposal. A. died, and left six children by his said wife: Held, that the wife took an estate for life only, and that each of the six children took an estate in fee in remainder; as tenants in common, expectant on the determination of the mother's life-estate. Gretton v. Haward, T. 1816. 1 Meriv. 448. Vide & Taunt. 94. 2 March 9. S. C.

347. Estates were devised in trust to sell, and divide the produce, together with the personality, between testator's son J. and his daughter A., wife of S., in equal moieties, share and share alike; the share of the daughter to be for her sole use, and in case of the death of either leaving any child or children, in trust to stand possessed of the moiety so given to J. and A. to the use of such child and children, when they should attain 21, equally to be divided between them, if more than one, and if only one, &c. and until they should attain 21, the money to be invested in the funds, and the interest applied for maintenance; and if either J. or A. should die without issue, then that the survivor should take. J. and A. were only tenants for life of the property, with such limitations over as in the will mentioned. Farthing v. Allen, M. 1816. 2 Madd. 310.
What Words will create a Joint Tenancy; and what Tenancy in Common.


363. Devise to trustees and their heirs, in trust for A. for life; remainder to her children by her then husband, in trust, that they shall receive the profits thereof when they come of age. A. had then one child; and four years afterwards the testator made a codicil, by which he changed one of the trustees in the will, and confirmed all the devises therein; and then A. had two children more, who died: Held, the children had an estate in fee, as tenants in common. Bateman v. Roach, 1725. 9 Mod. 104.


So in deeds which receive their operation from the statute of uses. Vide Rigden v. Vallier, E. 1751. 2 Ves. 252. 3 Atk. 371. Goodtitle v. Stokes, i Wils. C. B. 331. Secus, in common law conveyances. Stones v. Heurtley, Rigden v. Vallier,—where Ld. Hardwicke says, that though deeds to uses must be construed like common law conveyances, as to words of limitation, yet he saw no harm in construing them otherwise, as to words of regulation or modification of the estate, as the words “equally to be divided,” are. Vide Stratton v. Best, T. 1787. 2 Bro. C. C. 233. Fisher v. Wigg, H. 1700. 1 P. W. 14. was the case of a surrender of a copyhold to the use of A. B. and C. and their heirs, equally to be divided between them and their heirs respectively, and held, a tenancy in common, by reason of the apparent intent of a surrender (by two Judges, contra Holt, C. J. who thought it a joint tenancy.) That case was determined in B. R. on the principle, that a surrender of a copyhold is not to be construed with the same strictness as a common law conveyance, (as said by Ld. Hardwicke in Rigden v. Vallier,) which contradicts the ground of decision in Fish v. Cook, 1 P. W. 70. unless the two cases can be reconciled upon Ld. Hardwicke’s distinction between words of limitation and words of regulation. However, in cases of surrenders of copyholds, Fisher v. Wigg seems an acknowledged authority. Vide Rigden v. Vallier, Goodtitle v. Stokes, supra. Denn v. Gaskin, Cowp. 660. Ld. Hardwicke held, that the construction of the words in I. B.’s will “as his sisters severally die,” is, that the sisters should take as tenants in common, and not as joint tenants. Sheppard v. Gibbons, M. 1742. 2 Atk. 441. Vide Heath v. Heath, ibid. 123.

366. A. devises his estate at B. to the husbands of his two daughters, and to their heirs, and in default of such, to be equally divided among his other chil-
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What Words create a Joint Tenancy.—Of Devises by Implication.

...The two husbands take a joint estate in fee. Pickering v. Towers, T. 1758. 1 Eden 142.


368. Testator devised, that in case of failure of issue descending from himself and his wife, a trustee and his heirs should stand seised of freehold lands, for the use and benefit of B. W. and his children, share and share alike, at his disposal. B. W. died in testator's lifetime: Held, that the children of B. W. took the entire interest in those lands as tenants in common. Hayes v. Ward, E. 1788. 2 Ridg. P. C. 85.

369. M. W. by will, devised certain estates, in trust to pay 5000l. between his two daughters, or to the survivor of them, and to be secured to them for life, then to their first and other sons in tail, then to their respective daughters in tail; with cross remainders if there should be no issue, then to his two sisters, or to the survivor for life, and their sons and daughters in tail, with remainder over; and he gave all the rest of his fortune, real and personal, to his daughters, share and share alike, subject to debts, &c. The testator died, leaving his wife surviving; Held, a joint-tenancy for life, with several remainders, the words of severance being confined to the subsequent limitations. Folkes v. Western, E. 1804. 9 Ves. 456.

370. A residue was bequeathed to two; they take a joint interest, but an agreement for a severance may be inferred from their dividing the property as received. Crook v. De Vandes, T. 1805. 11 Ves. 330. Vide Jackson v. Jackson, 7 Ves. 535. 9 Ves. 591.

371. Devises to the devisor's wife for life, and after her decease, unto and among all and every their children, in such manner and proportions as she should in her life or by her will appoint, empowering her to sell and receive the interest for life, and appointing after her decease both principal and interest, to and among their children, in such proportions as aforesaid. All the children died in the life-time of their mother, who never made an appointment: Held, that they were entitled as tenants in common to several estates of inheritance. Casterton v. Sutherland, E. 1804. 9 Ves. 446. Vide Reade v. Reade, 5 Ves. 744. Smith v. Camelford, 2 Ves. jun. 698. Cox v. Chamberlain, 4 Ves. 631.

372. Devises to A. and B. "between them." These words constitute a tenancy in common. Lashbrook v. Cock, M. 1816. 2 Meriv. 70.

DEVISE IX.

Of Devises by Implication.

373. A., a copyholder, devised his lands to I. S. (a stranger) for twenty years after the death of his wife, to raise portions for his younger children. Per Lord Chancellor, where such a devise is made to the heir, there an estate shall arise to the wife by implication, but where it is devised to a stranger (a) as in this case, there in the mean time it shall descend to the heir. Faulkener v. Faulkener, M. 1831. 1 Vern. 22. (a) A stranger is but fidei commissarius, quoad the profits of that part of the real estate which are devised from him. Gilb. Ch. Rep. 270.


375. "I devise to my wife 600l., to be paid to W. in full for the purchase of lands already settled on my wife, for life, for her jointure." The lands were not settled, and a question arose, whether a life estate should pass to the wife: Held, that this is no devise of the lands, for the testator has declared, that he has already settled the lands on his wife (which is a mistake,) and this cannot be expounded a devise to the wife by implication. Wright v. Wivel, T. 1689. 3 Lev. 259. 2 Vern. 56.
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376. No estate raised by implication in a will, can destroy an express estate, as where a devise was to A. for life, remainder to his first son, and so to every other son in tail male, and for want of issue male of A., remainder over; this gave no estate tail in A. by implication. (a) Bamfield v. Popham, H. 1702. 1 P. W. 54. Salk. 256. 2 Vern. 427. 449. In Allanson v. Clitheroe, 1 Ves. 26. it is said this case is wrong reported by Saltkeld. (a) The cases on this subject are collected in Robinson v. Robinson, 1 Burr. 44. Vide Allanson v. Clitheroe, 1 Ves. 24. Lethicullier v. Tracey, 8 Atk. 784. Evans v. Asley, 3 Burr. 1570. Doe v. Aplyn, 4 T. R. 82. Hay v. Ld. Coventry, 3 T. R. 83.; from all which cases it seems no general rule is laid down in the construction of words of this kind, but that courts both of law and equity consider the raising estates by implication, as depending upon such implication being necessary to effectuate the general manifest intention of the testator. Vide Att. Gen. v. Sutton, 1 P. W. 754.

377. Where an estate is created by implication, it must be a necessary implication, (a) as in case of a devise to the heir after the death of the wife, the wife shall take an estate for life by implication, because it is plain the testator's intent was, that the heir should not have it till after her death. Anon. T. 1703. 2 Freem. 270. (a) It has been settled by many authorities in the books, viz. 13 Hen. 7. 7. T. J. 98. 2 Lov. 207. 1 Vent. 203. Vaughan. 259. (Gardner v. Sheldon) that nothing less than a necessary implication could entitle the wife to an estate for life; and the known diversity is, where "I devise lands to my heir after the death of my wife," this is a devise by implication to her for life; but if "I devise lands to my second or third son after the death of my wife," this is no devise by implication to her, but the lands during her life shall descend to the eldest son as heir. Dict. arguendo in Willis v. Lucas, T. 1718. 1 P. W. 473.

378. A devise of lands to the heir after the death of the wife, by a necessary implication, gives an estate for life to the wife; otherwise where the devise is to a stranger. City of London v. Garway, H. 1706. 2 Vern. 572.

379. A. devised a college lease to his wife for life, remainder to his son, she paying 10l. per annum. to the son during her life. The son died in her life-time. This devise is an implication that the widow shall keep the term on foot, and the rent shall continue to the son's executor during her life. Lock v. Lock, M. 1710. 2 Vern. 666.

380. Where an entail is created by implication, it is ever in favour of the heir at law, to whom no estate being given by the will, so as to enable him to take by purchase, and there being a necessity, if he takes at all, of his taking by descent, in order to support the intention of the testator that the heir should take, the law creates by implication an estate tail in the ancestor to vest it in the issue by descent. Per Parker, C. Target v. Gasunt, or Grant, E. 1718. 1 P. W. 432. Gill. Eq. Rep. 149. 10 Mod. 402.

381. I. S. had three sons and a daughter, A., B. C. and D., and being seized in fee of land, devised it by will to C., his youngest son, for life, he or his heirs paying 10l. per annum each, to A., B. and D., and after the death of C. and his wife, then it was to go to the sons and daughters of C., equally to be divided between them. C. died, living his wife, who entered, conceiving it a devise by implication to her for her life; the heir, supposing the land not disposed of by the will, during the intervening time between the death of C. and the death of his wife, brought his ejectment at law.—Ld. Ch. was of opinion, that the wife ought to have an estate for life by implication, the heir at law being excluded by the annuities, but he directed an issue at law, as the will was ill-penned. Willis v. Lucas, T. 1718. 1 P. W. 472. 10 Mod. 416.

382. A. devised, that if W., the eldest son of the testator, should happen to die without issue, that then, and not otherwise, after W.'s death, he devised it over to his son R. and his heirs: Held, that W. took an estate tail by implication.—Walter v. Drew, T. 1723. Com. Rep. 372. Et vide Doe, ex dem. Ellis, v. Ellis, 9 East 382. S. P.

383. A. by will devised thus, "If my daughter depart this life without issue of her body living at her decease." These words do not give the daughter an estate tail by implication, but to the issue living at her decease an estate tail by purchase. Lethicullier v. Tracey, E. 1754. 3 Atk.
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Of Devises by Implication;—and on Contingencies, with Remainders over.

784. Amb. 294. 220. Vide Robinson v. Robinson, 3 Atk. 736. 739. and note. Vide etiam Bigge v. Beasley, 1 Bro. C. C. 130. where Ed. Tharlow said, that to call "dying without leaving issue," the natural sense of "dying without issue" is against all the cases, and there were fifty-seven on that point.


385. A. devised to B. for life an estate, which he supposed he had a power to dispose of, but in fact had not; he likewise gave a life interest in other estates to B.; B. claimed the first estate under an old entail: Held, not an implied condition. Cull v. Hay, T. 1773. Amb. 727.

386. Where the issue cannot take but through the father, there, though the father has only an estate for life, given to him by express words, yet he must, by necessary implication, to effectuate the intention of the devisor, take an estate tail to convey that estate to his issue. Mandeville v. Carriek, T. 1795. 3 Ridg. P: C. 365.


388. No devise by implication can arise from the mere recital of an erroneous conception of a right; but where there is a devise to B. after the death of A., and B. is the heir at law, it creates an estate for life in A. by necessary implication, though not disposed of, as the heir cannot take during A.'s life. So as to precatory words, which in equity have been held imperative, where the object and subject are certain, those are cases of trust raised either out of the disposition of an interest, or out of what amounts to a direction to elect; where, for instance, personal property is given to A. man for ever, with words of request to that person, to give upon his death definite ascertained parts, to definite ascertained objects, a trust arises, as it is declared what is to be given, and to whom, which however may by considered rather a strong decision. So if personal or real estate is given to A., with an expression of hope and trust, that he will give at his death property of his own to B., that is an imperative trust upon express condition. So where there is a devise to the heir, after the death of the devisors wife, the wife shall take an estate for life by necessary implication; but no implication arises for her upon such a devise of another man's estate, through the medium of election. Dashwood v. Peyton, E. 1811. 18 Ves. 27. 40. 48.

389. Testator gave A. for his life an annuity of 20l. to be paid out of his frehold estate at W. He then gave the rents of certain houses to B. for her life, and to C. for her life he gave another house, with 10l. a year. All the residue of his estate and effects, after the death of A., B. and C., he gave to D. Held, that no estate for life in the residue passed by implication to A., B. and C. Dyer v. Dyer T. 1816. 1 Moriv. 414.

DEVISE X.

Of Devises of Land on Condition or Contingency, with Remainders over, and herein of the Words by which an Estate in Reversion will pass, as also the Rest and Residue.

390. Lands were limited to the second son in fee, provided that if the eldest son should die without issue, the second son should, within six months after the death of his elder brother, pay 1500l. to his sister, or in default thereof, that the lands should go to the sister and her heirs. The eldest son died without issue; the sister died before the day of payment, and the second son refused to pay the 1500l. Decreed that the heir, and not the executor of the sister, should have the benefit of the devise over. Winchelsea v. Wentworth, T. 1666. 1 Vern. 402. Note, Ed. Ch. said, that to relieve in such cases, would be to destroy the known and common difference between a limitation and condition.

391. Testator devised lands to trustees and their heirs, in trust to receive
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Devise on Contingencies; with Remainders over.

the rents till the testator's son attained 21, and to pay one third to his wife, and out of the other two thirds to raise portions for his daughters, and he then devised the lands to his son when 21, in tail, with remainder over. The son died before 21 without issue, and the mother, who survived him, died before such time as the son would have attained 21. The remainder over is good, though the son died before 21. *Levet v. Needham*, E. 1690. 2 Vern. 138.

392. Land was devised to A. for life, remainder to B. in fee, paying several legacies within a limited time, and if he failed, with like remainder over to C., he paying the legacies. Upon a bill by B., the court gave leave to cut down timber to pay the legacies, though opposed by the tenant for life, and C. the last devisee in remainder, B. making satisfaction to A. for breaking the ground, carriages, &c. *Claxton v. Claxton*, T. 1690. 2 Vern. 152. Pro. Ch. 15.

393. On a devise of lands made "to my daughter A. and her heirs, upon condition that she at, or before 21, do consent to marry B. Provided that in case she shall refuse to marry B. at or before 21, or in the mean time shall marry any other person, the said bequest shall be void."

Held, that if B. die without requiring A. in marriage, she shall have the estate, although she afterwards marry before 21, notwithstanding the testator, by a subsequent clause in his will, had declared, "that A. shall not have the estate if she do not marry B."

for the latter clause referring to the same matter, and being in a will, shall not be taken in a larger sense than the proviso itself. *Thomas v. Howell*, T. 1691. 4 Mod. 67. Holt 225. 1 Salk. 170. Skiu. 301. 519. 2 Eq. Ab. 361.

394. If a devise be made of land to A. the eldest son of the testator, for 50 years, if he should so long live, to commence after the death of the testator, remainder to the heirs male of the body of the said A., and for want of such issue remainder over; the remainder to A. is void, for it is contingent, and has only an estate for years to support it. *Goodright v. Cornish*, H. 1693. 4 Mod. 256. 1 Salk. 220. 1 Ld. Raym. 3. Holt 227. Comb. 254. Skiu. 408. 12 Mod. 52.

395. A devise of lands was made to the eldest daughter, paying 100l. to the second daughter, and 100l. to the third daughter, &c. and if the eldest daughter did not pay the 100l. to the second daughter by such a day, then he devised the lands to the second daughter, she paying her sisters' portions by such a day; and if she did not pay, then he devised the lands to the third daughter, &c. Resolved that this was not in the nature of a mortgage, to be redeemable after the time of payment was over, but that the eldest daughter, not paying at the time appointed, the second daughter should have the land; and the eldest had no relief.—*Man's Ca. M. 1695. cited 2 Freem. 206. 2 Eq. Ab. 361. pl. 4.

396. A man possessed of a term, devised it to an infant en ventre sa mere, if it should be a son; but if, being a son, he should die during his minority, then testator devised it to his grandson; testator then died, leaving his wife executrix, and afterwards the child was born, and proved a daughter. Adjudged, upon a special verdict, without argument, that the executrix, and not the grandson, should have the term, because the grandson was not to have it but upon a precedent contingency, viz. the birth of a son, and his dying in his infancy, which condition must be first performed, and it appears plainly that the intent of the testator was, that he should not have it otherwise. *Grascoat v. Warren*, T. 1697. 12 Mod. 128.

397. One devised land to his son by his second wife, in tail male, remainder to his eldest son by his first wife, provided that if the land should come to his eldest son, then be or his heirs should pay 1000l. to the testator's daughter within four months after the estate should come to him or them, and in default of payment, the trustees to enter and raise the money. The son by the first wife died, leaving a son. The son by the second wife died without issue. Though the estate never came to the eldest son by the first wife, he dying in the life of his half brother, yet by the proviso that the eldest son, or his heirs, should, within four months after the estate came to him or them, pay, &c. the land was held liable to pay the 1000l. *Hooley v. Book*, M. 1698. 2 Vern. 339.

398. M. devised his land to I. S. paying 1000l. to his heir. I. S. made default, and the heir entered and recovered, yet the court relieved the devisee on payment of principal, interest, and costs.
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Devises on Contingencies, with Remainders over.

Barnardiston v. Fane, M. 1699. 2 Vern. 366. Et Grimston v. Ld. Bruce, M. 1707. 1 Salk. 156. 2 Vern. 593. S. P. where the court relieved the devisee against the entry of the heir, saying they will always relieve where compensation can be given for the breach of a condition.


400. A. made a lease to B. for 21 years, for payment of his debts and legacies, and at the same time, by will, taking notice of the lease, devised his lands, after the expiration of the lease, to C., and made B. his executor. A. lived 12 years after, and paid all his debts himself, and the personal estate being sufficient to pay the legacies, C. brought his bill to have the lease delivered up, the trusts being performed; but it was dismissed, the reversion of the term only being devised to him. Bushnell v. Parsons, M. 1703. Pre. Ch. 218. Vide Crompton v. North, 1 Ch. Ca. 196. and 1 Bro. C. C. 89. cited.


402. Land was devised to the heir at law, paying a sum of money to B. Held, that paying in this case did not make a condition, because no one could enter for the condition broken, except the devisee himself; but it would be a trust upon the land for raising the money, and if a purchaser had notice of the will, he would be affected by it. A devise to a stranger, paying 100l. to A. makes a condition, and the heir may enter for the breach of it, but when he has entered, he shall be a trustee, so far as to secure the 100l. Anon. H. 1704. 2 Freem. 278.

403. A. devised lands to trustees to convey to his eldest daughter, in case she should pay 6000l. among her sisters within six months; and if not, he gave the like pre-emption to each of his other daughters. The money not being paid within the time, equity will not enlarge it. Master v. Willoughby, H. 1705. 1 Bro. P. C. 125. Vide Woodman v. Blake, 2 Vern. 222. S. C.

404. If a devise be made to the heir at law, paying certain legacies, and for default thereof, remainder over; the heir, until default, is in by descent, and the father's interest is by way of executive devise. Anon. M. 1705. 6 Mod. 241. Vide Pelli v. Brown, Cro. Jac. 590. Saul v. Gerard, 3 Cro. Eliz. 525. Noy, 64. Mo. 422. Sed vide Gilpin's Ca. Cro. Car. 161. Britain v. Charnock, 2 Mod. 286. Emerson v. Inchbain, 2 Ld. Raym. 728. Allen v. Heber, 2 Bl. Rep. 22. Str. 1720. Newton v. Bennet, 1 Bro. C. C. 155. Pow. on Dev. 443. 3 Com. Dig. "Devise." (K) In the principal case Ld. Holt said, it is hard to maintain, either by use or devise, a remainder to a stranger, after a present fee to one who is not heir at law. If the intention of a testator be ever so apparent, the heir at law will inherit, unless the estate is completely disposed of to another person. Deo v. Gaskin, Cowp. 651.

405. A. having two daughters, B. and C., devised fee-simple lands to B., and other lands of which he was tenant in tail, to C. If B. will claim a share of the intailed lands under the settlement, she must quit the fee-simple lands; for the testator disposed of his whole estate amongst his children, when he had the power to cut off the intail, and therefore what he gave them was upon an implied condition, that they should release to each other. Noyes v. Mordaunt, H. 1706. 2 Vern. 581. Pre. Ch. 265. Gilb. Eq. Rep. 2. S. C. The rule, that he who takes under a will cannot dispute any
part of it, is said to hold only where an estate is specifically given away from him, and that it should be confined to simple devises of inheritance, and not to take place where there are limitations. Vide Forrester v. Cotton, Amb. 388. 1 Eden 532. Jenkins v. Jenkins, Belt Supp. to Ves. 250.

406. A. devised a farm to B. for life, and after some legacies, devised all other his personal estate, lands, tenements, and hereditaments, not before devised, to C. Decreed, that the reversion of the farm should pass by the general devise to C. Kingsman v. Kingsman, T. 1706. 2 Vern. 560.


408. So it is of lands in reversion expectant on an estate, and before the testator’s death, the tenant in tail dies without issue; these lands will pass, though a reversion only at the time of making the will, because the testator is seised at the time as much as he can, and it is a certain present interest, though to commence in futuro, and all the estate he could give he intended the devisee should have. Per Holt, C. J. in S. C.

409. J. S. was seised of Blackacre in fee, and Whiteacre in tail, and having two sons, devised the tail acre to his youngest son, and the fee acre to his eldest son: the eldest son entered upon the tail acre; the youngest son brought his bill, either to enjoy the tail acre, or to have an equivalent out of the fee acre, because the father plainly designed him something: Per curiam, this devise being designed as a provision for the youngest son, the devise of Blackacre to the eldest son must be understood to be with a tacit condition, to suffer the youngest son to enjoy quietly, or else that the youngest son should have an equivalent out of the fee acre. Decreed accordingly. Anon. H. 1708. Gilb. Eq. Rep. 15.

410. A. devised lands to his son and his heirs, and declared, that out of the lands he should pay 200l. to his sister, at the age of 21. She married and died under age. Per curiam, this legacy is


411. J. S. devised to A., and if he die without issue then living, to B. Decreed a good remainder, for the words “then living” relate to the time of testator’s death. Weake’s Ca. T. 1709. 2 Eq. Ab. 846. pl. 6.

412. A. devised 50l. per annum to the wife of B. during the life of C for her separate use. B’s wife died; the 50l. per annum shall be paid to her executors during the life of C. Rawlinson v. Montague, M. 1710. 2 Vern. 667.

413. A. devised a college lease to his wife for life, remainder to his son, she paying 10l. per annum to the son during her life. The son died in the life of his mother. Per curiam, the rent continues during the life of the mother, and shall be paid to the executor of the son, for the devise is an implication that she should keep the term on foot. Lock v. Lock, M. 1710. 2 Vern. 666. Vide Rawlinson v. Montague, supra.

414. A. having settled all his estates of inheritance upon his wife for life as a jointure, by will says, “all the rest and residue of my estate, chattels, real and personal, I give to my wife, who I make sole executrix.” Held, that the reversion of the jointure lands did not pass by this devise, but the personal estate only, (a) for the precedent and subsequent words explain the testator’s intent to carry only his personal estate; the first part of his will gave only legacies, and no land, therefore “the rest and residue of his estate” must be intended “estate of the same nature,” for not having devised any real estate, there could be no residue of such estate. Markant v. Twisden, H. 1712. Gilb. Eq. Rep. 30. (a) Lord Keeper said, that this case differed from Murray v. Wise, 2 Vern. 564.; and that no resolution was ever carried so far as to construe these words to pass a foe.

415. A man devised to his wife until his son should attain 21, and then to his son and his heirs; the son died at 13. The question was, if the estate devised to his wife determined by the son’s death, or should continue till the son might have attained his age of 21 years. Per curiam, the wife’s estate determined by the death of the son. This differs from Boraston’s Ca. 3 Co. 19. for there the devise was to executors for payment of
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418. A devised personal estate for the payment of debts and legacies, and the overplus to be disposed of as he should by codicil direct; part of his real estate also was devised for the payment of particular debts, and the residue to go as he should by codicil direct. A. by codicil directed that the overplus of such real estate should go to his executor for performance of his will, and then added, “I hope I have made a sufficient provision for performance of my will, and if there be any overplus of my personal estate, after a full performance, I give it to J. S.” Held, that J. S. was entitled to the surplus of the real estate, and that there was no resulting trust for the benefit of the heir. Tyrwhitt v. Trottman, T. 1714. 1 Bro. P. C. 478.

417. J. S. had three sons and a daughter, A., B., C., and D., and being seized in fee of land, devised it by will to C., his youngest son for life, he or his heirs paying 10l. per annum, each to A., B., and D.; and after the death of C. and his wife, then it was to go to the sons and daughters of C., equally to be divided between them; C. died, leaving his wife, who entered, conceiving she had an estate for life by implication, and the heir brought his ejectment, supposing the land not disposed of by the will during the intervening space between the death of C. and the death of his wife. Ld. Parker held, that these rents were not to sink upon the death of C., and during the life of his widow, (who had an estate for life, by implication,) they being expressly given to the several annuitants for their lives, and plainly intended as a provision for them during their lives; so that it was as if the annuities were given by the will in the first place, and then the land devised subject to the payment of them, from whence it seems the testator intended that whatever had the land should pay the annuities, and that C.’s wife should be liable to the annuities which she regularly paid after her husband’s death. Wildis v. Lucas, T. 1718, 1 P. W. 472. 10 Mod. 416.

418. J. S. Seised in fee of some lands in possession, and of others in reversion, after the death of A., and having a son and daughter, devised the lands in possession to his wife for life, and after her death and the death of the lessee for life of the other lands, he devised these respective premises to his son and his heirs, upon condition, that the son should, within a year after the death of B., (after whose life it was said, but not proved, that the testator had other lands in reversion,) pay 1000l. to the daughter of J. S., with a proviso, that upon non-payment the daughter might enter. B. died, and a year after her death, the daughter marrying, brought a bill for sale of this reversion, in order to raise the 1000l. portion, and the interest from the end of the year of B.’s death. M. R. decreed the portion to be raised by sale, unless the son should pray it might be done by mortgage, which decree was confirmed by Ld. Parker. Bacon v. Clerk, M. 1718. 1 P. W. 478. Pre. Ch. 500. Vide Stainforth v. Stainforth, 2 Vern. 460. Corbett v. Maldwell, ibid. 640. 657. Butler v. Duncombe, ibid. 760. 1 P. W. 448. 10 Mod. 433. Reresby v. Newland, 2 P. W. 93. 2 Bro. P. C. 487. Broome v. Berkeley, 2 P. W. 484. Evelyn v. Evelyn, ibid. 559. Hebblethwaite v. Cartwright, Ca. temp. Tabl. 31. Okeden v. Okeden, 1 Atk. 549. Hall v. Carter, 2 Atk. 354. Lyon v. Chandos, 3 Atk. 416.

419. Where the remainder is devised on contingency, the reversion in fee is not in abeyance, but descends to the heir. Carter v. Barnardiston, M. 1718. 1 P. W. 516.

420. A. possessed of a term, devised it to B. and C., and if either of them died, leaving no issue of their respective bodies, then to D. This was held a good limitation to D., if B. or C. left no issue at their death. Forth v. Chapman, M. 1720. 1 P. W. 663. Note, the effect of the word “issue,” is particularly considered in Ld. Glenorchy v. Bosville, Ca. temp. Tabl. 3. Meure v. Meure, 2 Atk. 265. Goodtitle v. Otway, 2 Wils. C. B. 6. Roe v. Collis, 4 T. R. 204.; and there is likewise a diversity between things merely personal and chattels real. Vide Atkinson v. Hutchison, 3 P. W. 258. Goodtitle v. Pegden, 2 T. R. 720. Ld. Ch. also, upon the appeal in the principal case, Forth v. Chapman, said,
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It might be reasonable enough to take the same words as to the different estates, in different senses, as if repeated by several clauses, viz. "I devise to A. my freehold land, and if A. die without leaving issue, then to B.; and I devise my leasehold to A., and if A. die without leaving issue, then to B." in which case the different clauses would have the different constructions, to make both devises good, and it would be reasonable & should be so, ut res magis valeat quam percata. The case of Forth v. Chapman, has been considered as an authority for a different construction of the same words as applied to different subjects. Vide Sheffield v. Ld. Orrery, 3 Atk. 288. E. of Stafford v. Buckley, 2 Ves. 180. Vide tames Porter v. Bradley, 3 T. R. 143.

421. R. B. devised his freehold estate, in case he should leave no son at the time of his death, to J. S. and his heirs. The testator died, leaving his wife proventum asint with a son. Ld. Ch. referred this case to the judges in B. R., who were unanimous, that the devise to J. S. was not an absolute devise, but subject to the contingency of the testator’s leaving no son at his death, which contingency not happening, the devise cannot take place; besides the testator expressed no intention of disinheriting his son. Ld. Ch. decreed for the posthumous child, and ordered an account of the rents and profits to be taken, and possession delivered up: (a) Burdet v. Hopgood, M. 1718. 1 P. W. 486. (a) Vide Beale v. Beale, 1 P. W. 246. Northev v. Strange, ibid. 342. Millar v. Turner, 1 Ves. 85. Bennet v. Honeywood, Amb. 1708. Cooper v. Forbes, 2 Bro. C. C. 63. Clarke v. Blake, ibid. 320.

422. J. S. devised a house, and directed by will, that an annuity of £1200 per annum. be paid to his cousin, and that she should maintain her son there; the son chose to go from her; still the cousin shall have the £1200 per annum in the same manner as if the son had died. Blackburn v. Edgley, H. 1719. 1 P. W. 604.

423. Testator devised lands to his wife for life, remainder to his second son, D., in fee; provided, that if his third son, N., should, within three months after the death of the wife, pay £500 to D., his executors or administrators, then he devised it to N. and his heirs. N. died in the life-time of the wife; afterwards the wife died, and D. entered. It is agreed that the heir of N. might still pay the money, and should take the land as an executory devise, and by way of descent. The law is now settled (a) that in case of a contingency, which cannot, in the nature of it, precede the death of a person, a reasonable term may be allowed, subsequent to the decease of that person for the performance of the condition, and a fee limited thereupon is good. In such case a year has been held no unreasonable time. Marks v. Marks, M. 1719. 10 Mod. 419. 422. Pre. Ch. 486. 1 Stra. 129. (a) In Lloyd v. Carew, Pre. Ch. 106. Show. F. C. 137. though it seems to have obtained for law before that case. Vide Gore v. Gore, 2 P. W. 28. Vide also Gulliver v. Wickett, 1 Wils. C. B. 105. Fearne on Exec. Dev. 7th ed. by Buller, 396.

424. A testator devised "all that my messuage in E. to F. C. and his heirs," and "all the rest and residue of my messuages, lands, tenements, and hereditaments in E. and elsewhere, to J. L. his heirs and assigns forever." F. C. died in the life-time of the testator, so that this devise became lapsed. The sole question was, whether the latter clause in the will would carry over the lapsed devise to J. L., the residuary devisee, or whether it should descend to the heir? It was admitted that such a clause would carry over a lapsed legacy from an executor. The court differed on this point, the only case near it being 1 Leon. 251. Ld. Chief Justice was of opinion for the heir, because the words "all the rest and residue to J. L." were exclusive of the lands devised to F. C. Another judge thought the testator meant to disinherit the heir. Ld. Chief Justice agreed as to the lands devised to F. C.; but non sequitur, that he meant it as to the lands devised to J. L.—adjudicatur. In Fortescue’s report of this case, it is said, the court held that the devise of "all the rest and residue of my messuages, lands, &c." did not convey what was expressly devised before, for that wills must be construed according to the testator’s intent, which, in this case, was to give his whole estate in that messuage to F. C. in fee; and therefore when he made his will he had no residue in that messuage, and the devise to F. C. being void, the house passed to the heir at law, not to
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J. L. Wright v. Horne, H. 1724. 8 Mod. 222. Fortesc. 182. In Roe v. Field, E. 1729. Fortesc. 184. testator devised land to R. B. in fee, and all the rest and residue of his estate, real and personal, to E. F. in fee. R. B. died in testator's life-time, and on the authority of the above case it was held, that E. F. could not take the land devised to R. B., because that was not any part of the rest and residue of the testator at the time the will was made. Vide also Goodright v. Opie, 8 Mod. 124. but no judgment was given in that case.

425. J. S. seised of a church lease for the life of A., devised an annuity out of it to B. for life, and directed that if B. survived A., then testator's executor should purchase the leasehold premises for the life of C., and then devised that his executor, out of the surplus of the leasehold and personal estate, should keep the premises in repair, but if the premises could not be so purchased, then he devised the surplus to the plaintiff, and made D. his executor in trust only, giving him a small legacy. The executor purchased the leasehold for the life of C., and the question was, whether the plaintiff or defendant C. was entitled to the surplus of the profits. Per King, C., plaintiff cannot have this lease, the devise to him being on a contingency, which never happened, viz. if the leasehold premises could not be purchased for the life of C.; whereas such purchase has been made by the executor. Decreed, that C. was entitled to the leasehold premises; and his Lordship said, this appears to have been a beneficial devise, because in the devising clause, testator calls C. his kinsman, and here slighter words will serve to give the leasehold premises to C., forasmuch as no other person can take them, and it is a dark will; but upon a re-hearing, his Lordship reversed this decree, and held, that by this will plaintiff was entitled to the lease. Stephens v. Stephens, H. 1725. 2 P. W. 323.

426. "I give to my wife all my lease at S., and all my household goods, she maintaining my children; but if she should marry, then only a moiety of it, and the remainder among my children." The wife did maintain the children, and did not marry: Held, the wife was entitled to the whole estate so devised, and that the children were entitled to no more than maintenance, unless she married. Scroggs v. Eustace, H. 1725. 1 Bro. P. C. 129.


428. J. S. by will gave several exchequer annuities to trustees, for the residue of a term, in trust for A. for so many years of the term as she should live, and afterwards for plaintiffs, for so many years of said term as they or the survivors of them should live; and after the decease of the survivor, in trust for the heirs of their bodies, lawfully to be begotten, for all the residue of the said term, and for default of such issue, in trust for the defendants. The bill waste the annuities sold, and the money arising therefrom to be paid to plaintiffs, who were the devisees for life, with remainder to the heirs of their bodies. Ld. Ch. said, where a term is devised to a man and his heirs, or the heirs of his body, the whole term vests in the devisee, and the remainder over is void; and so it was held in Dom. Proc. in Rushout's Ca. The remainder in the present case is void, being after a limitation in tail. Ded v. Dickenson, M. 1727. 8 Vin. Ab. 451. pl. 25. 2 Eq. Ab. 325. pl. 31. 348. pl. 14.

429. A. devised his estate to his son in tail, remainder to B. for life, on condition that he should change his name, and if he did not, then over to D. The son died without issue, B. performed the condition and died; and upon a question, whether D. should have the estate after
the death of B., it was held, that D. took no estate on the death of B., but it went to the heir at law of A. *Amherst v. Lytton*, E. 1729. 3 Bro. P. C. 486.

430. A. devised to his daughter "until his son shall attain forty years, hoping by that time he will have seen his folly." The son died under forty years of age: Held, that the devise to the daughter ceased. *Sed secus*, if the devise to A. had been made a fund to pay debts or portions, which could not be raised until B. shall attain the age of forty; in which case the word "shall" must be taken for "should." *Lomas v. Hoilenden*, H. 1732. 3 F. W. 176.

431. A testator says, "as to the rest and residue of all my lands, tenements, and hereditaments, my will is, that the annual profits shall be equally divided between R. and S.," but he said nothing about the personal estate. By all the rules of grammar, as well as law, the words "rest and residue" must relate to something that went before, and where the testator calls it by the name of real estate, it can never be said to affect his personal. *Beauchérie v. Mead*, E. 1741. 2 Atk. 168.

432. B. being possessed of a personal, and seised of a real estate, consisting of several parcels, on part of which his wife had a jointure, and reciting the same not to be sufficient provision for her, devised other lands to her for life, remainder to his brother and heir, remainder to his right heirs; and then to his wife, whom he made executrix, all the rest and remainder of his goods, chattels, and personal estate, together with his real estate not before devised: Held, that the reversion of two parcels of land not taken notice of in the will, passed by the residuary clause, the words "real estate" carrying land, and also the inheritance of that land, though accompanied with other words, as "goods and chattels:"(a) held also, that the reversion of two other parcels devised to the wife for life, were included in the residuary clause; for the reversion of particular estates will pass by the words "lands, messuages, tenements, and hereditaments."(b) *Ridout v. Payne*, E. 1747. 1 Ves. 10. (a) *Markant v. Twisdin*, 1 Eq. Ab. 211. (b) *Wheeler v. Walsond*, Allevyn, 28. *Chester v. Chester*, 3 P. W. 56.

433. An executory trust by will to three persons for their respective lives as tenants in common, and not as joint-tenants; but if any die without issue living at their death, that part to go to the survivors, with contingent remainders to the first, &c. son of their respective bodies; and in default of such issue, then over. Two of them died in the life-time of the testator, and the third left a son: Held, that the son should have only his father's share, and that the other two should go over. *Spurley v. Toll*, M. 1747. 1 Ves. 70.

434. A. devised his estate to trustees, to be conveyed by them to his three daughters, and the heirs of their bodies as joint-tenants, so soon as they should attain their respective ages of twenty-one: Held, not a joint estate to be construed like a joint-tenancy, for the conveyance should be at twenty-one, respectively, with cross remainders. *Marryat v. Townley*, T. 1748. 1 Ves. 102. "Cross" remainders have been admitted between three. *Copp. 797.

435. B. devised lands to his two daughters and their heirs; but if either married without consent, she should have only an estate for life; and if either died unmarried, then R. his son, or his heirs, should take it to them and his heirs, paying 500l. to the other daughter. R. in the life time of his two sisters, conveyed all right and claim in the lands to his younger son, in consideration of love and affection, and for his advancement, and died; one sister died unmarried, and the other married with consent: Held, that the heir at law of R. could not claim the land on payment of 500l. in contradiction to the conveyance. *Wright v. Wright*, E. 1749. 1 Ves. 409.

436. Where "estate" is mentioned generally in a residuary clause, accompanied with personal things, it shall be restrained to personal; but never where real estate is mentioned. *Bailis v. Gale*, M. 1750. 2 Ves. 51.

437. A. devised his house, with the appurtenances, to his wife, during her widowhood, but so that his eldest son, when twenty-one, or married, on notice, might have it. The widow married while the son was under age: Held, that the son would be entitled on attaining twenty-one, but that the intervening interest was undisposed of, and should fall into the residuum. *D. of Bridgewater v. Egerton*, H. 1751. 2 Ves. 121.
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438. A. devised his land to his wife, during her widowhood, with remainder over. The remainder over shall take effect by way of limitation over on her death, or second marriage. *Jordan v. Holkham*. M. 1758. Amb. 209.

439. Devise to testator's eldest son, his heirs and assigns; but in case he die under twenty-one, without issue, then over: the son attained twenty-one, and died: Held, he took by devise, and not by descent. *Scott v. Scott*. M. 1759. Amb. 383. 1 Eden 458. S. C. more fully stated, with reference to the rule of law in Harg. n. to Co. Litt. 12. b. and the several observations upon it in various cases, p. 462. (a.)

440. A proviso in a will, that in case the devisee shall come into possession of the family estate, the trustees shall stand possessed of such estate to the use of the next person in remainder, is valid, and the eldest son of the tenant in possession was held to be the next person in remainder. *Nichols v. Sheffield*, T. 1787. 2 Bro. C. C. 215.

441. Testator having a debt secured upon land, gave the mortgage money to the mortgagee, and desired that he would give a reversionary interest in the premises to A. The mortgagee, selling the estate, was decreed to bring the mortgage money into court, for the use of the devisee of the reversion, subject to an intermediate life estate. *Lewis v. King*, E. 1789. 2 Bro. C. C. 600.

442. Devise of lands to be sold in aid of personal estate; "and after the death of my wife, the estates not sold, and the personal not applied, to be subject as after-mentioned; the rents and produce to be carried on in accumulation as aforesaid, during her life, and also for five years after her death, and to be laid out in land; then if my son M. shall be living, and any lawful issue of his body, and if my son G. shall be living, and any lawful issue of his body, to them for life, as tenants in common; then to their issue, in moieties; if only issue of one, to that issue, if but one, to that one." With a power of settlement: "my wife to receive such provision as aforesaid, neat and clear, and the residue only to be subject to the devise over, to take place after her death; and if both my said sons shall be dead without issue," then to testator's daughter for life; after her death, to her son, his heirs, &c. and if she should have any other issue, to them, their heirs, &c. on failure of issue of testator's sons and grand-sons: Held, that the devise over was attached to the single event of both sons being dead without issue, at the death of testator's wife, or five years after, at most; and one son being alive at that time, though without issue, it never took effect; but held, that the son could not be entitled to the estate absolutely, on account of the contingent interest in his issue. *Graves v. Bainbridge*, T. 1792. 1 Ves. jun. 562.

443. A devise of lands not in settlement, upon testator's wife, will pass the reversion of the settled lands to his daughters as devisees. *Glover v. Spendlove*, T. 1793. 4 Bro. C. C. 337.

444. A. devised his estate to B. in fee, and bequeathed his personal estate to him; and in case of his death under twenty-one, without issue, then to C. Testator, by codicil, affirmed his will in all respects, except by directing that B. should not be entitled till twenty-five. B. dying between the age of twenty-one and twenty-five, without issue, held, that he had no title. *Scott v. Chamberlaine*, T. 1797. 3 Ves. 302.

445. Ld. Ch. and M. R. thought that the legal estate of mortgaged premises passed by a general residuary devise by the mortgagee to A. *Ex parte Sergison*, T. 1798. 4 Ves. 147; but the contrary has since been held in *Att. Gen. v. Butler*, E. 1800. 5 Ves. 330.

446. Devise of real estates, of the annual value of near 5000l. and other estates, directed to be purchased with the residue of the personality, amounting to above 600,000l. to trustees and their heirs, upon trust, during the lives of testator's sons, A., B. and C., and of his grand-son D., and of such other sons as A. now has, or may have, and of such issue as D. may have, and of such issue as any other sons of A. may have, and of such sons as B. and C. may have, and of such issue as such sons may have, as shall be living at his decease, or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the
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eldest male lineal descendant then living of A. in tail male, remainder to the second, &c. and all and every other male lineal descendant or descendants then living, (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited,) of A. successively in tail male, remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B. and C. as tenants in common in tail male, in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail, remainder to the trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively, in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee, and it was directed that the trustees should stand seised upon the failure of male lineal descendants of A., B., and C. as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund. The accumulation, till the purchase or sales can take place, to go to the same purposes, with a direction that all the persons becoming entitled shall use the surname of the testator only. The trusts of this will, upon a solemn debate, were established. Theobaldson v. Woodford, E. 1799. 4 Ves. 227.

447. A. tenant for life, if she should for so long continue unmarried, and in case of her marriage, to her in fee: but if she should die unmarried, then to her sister B. in fee; A. and B. and the husband of B. joined in a sale. The purchase-money was paid out in the funds in the names of trustees, without any declaration of trust or agreement as to the application, nor was any notice taken of this fund, in the wills of B. and her husband, and B. being the survivor, made a general disposition of all her personal estate in favour of A.—A. though still unmarried, was held absolutely entitled to the stock. Scawen v. Blunt, T. 1802. 7 Ves. 294.

448. A remote reversion in real estates and lands to be purchased and settled, will pass by general words in a will, as, "all and every other my lands, tenements, and hereditaments," though the uses are immediate; but the purchase being postponed to the death of the devise, the reversion in the estates to be purchased and settled to the same uses, subsequent to his death, not being an interest vested in him, did not pass; and though, upon the settlement, a power of appointment was implied, the will particularly executing express powers, did not amount to an execution of that implied power. At. Gen. v. Vigor, E. 1805. 8 Ves. 256. Vide Chester v. Chester, 3 P. W. 55.

449. Devise to A., an infant, for life, and his first and other sons, in strict settlement, with remainders for similar estates. The will further directed, "during the minority of the A. family," an accumulation of the rents to be laid out in a purchase, "until the minor should arrive at the full age of 25 years," and then "the heir to take full possession of this estate." A. being residuary legatee, was held absolutely entitled to the accumulation. Bingley v. Broadhead, T. 1803. 8 Ves. 415.

450. Where a power of disposal has been executed contrary to the intent of its creation, the estate shall pass under a general residuary devise, against a purchaser. Reed v. Sergold, H. 1805. 10 Ves. 370.

451. Testator devised to his nephew in fee, "not doubting in case he should have no child, but that he will dispose and give my real estate to the female descendants of my sister, in such part or parts as he shall think fit, in preference to any descendant in his own female line: Held, a trust for the sisters' children in the event described. Parsons v. Baker, E. 1812. 18. Ves. 476.

452. Testator having a copyhold estate (not surrendered) but no freehold, devised his residue by the general words, "estate and effects," in favour of a younger son, subject to debts, and in his will he recited that his eldest son was provided for: Held, that the younger son should take the whole residue under this clause, both real and personal. Maugham v. Mason, H. 1813. 1 Ves. & B. 410.

453. Testatrix, after a bequest to her younger children, thus devised her residue, "but in case I shall have but one child living at the time of my decease," or all but one die under age, and unmarried, then to another family: Held, not a condition; (a) the residuary clause was therefore established in the event of testatrix's death, without ever having had
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454. I. S. devised his estate, upon trust by mortgage, or out of the rents, to pay debts, and afterwards to raise portions for his daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts should be then paid." This was held a condition precedent to the portions becoming vested, and one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled in the event of the portion not having become vested in her life time, an enquiry was directed as to the time when the debts were or might have been paid. Bernard v. Montague, E. 1816. 1 Meriv. 422. Vido Smal v. Wing, 3 Bro. P. C. 503. Gaskell v. Harman, 6 Ves. 159. 11 Ves. 489. Elwin v. Elwin, 8 Ves. 547.

DEVISE XI.

Of executory Devises, their Nature and general Qualities, as distinguished from Contingent Remainders. Of executory Devises of lands of Inheritance, where the Disposition of the Testator's whole Fee-simple is qualified by some Contingency, upon which the Estate devised is limited. Where a future Estate is devised to arise at a Time or upon a Contingency certain, without limiting any immediate Freehold, and herein of executory Devises of Terms for Years to a Devisee for Life, with Remainders over.

455. "An executory devise is defined to be a devise of a future interest in lands, not to take effect at testator's death, but limited to arise and vest in some future contingency: this comprehends every species of executory devise, but at the same time is not confined to executory devises only: it includes every kind of contingent interest in lands given by devise, (for every contingent interest must necessarily be future;) but, says Mr. Fearne, every contingent interest in lands limited by devise, is not an executory devise, for some contingent interests by devise are contingent remainders, therefore such a definition must be considered defective in point of precision." 1 Eq. Ab. 186. Fearne Exec. Dev. 7th ed. by Buller, 381.

456. "An executory devise or bequest is strictly such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law: it is only an indulgence allowed to a man's last will, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder." Ibid. 386.

457. "An executory devise, admitted only in wills, respects personal estates as well as real,—it requires no preceding estate to support it, and if there be any preceding estate, it is not necessary that the executory devise should vest when such preceding estate determines; but these are distinctions in the subjects or modes of such interests, rather than in the consequential nature or qualities of the estates when created. The great and essential difference between a contingent remainder and an executory devise, is, that the first may be barred and destroyed, or prevented taking effect, by several means; whereas it is a rule that the latter cannot be prevented or destroyed by any alteration in the estate out of which, or after which, it is limited." Ibid. 418.

458. Where a man devised lands to his son T. and his heirs for ever, paying to R. 20l. at 21; and if T. should die without issue, living W. his brother, then W. should have the lands to him and his heirs: T. entered and suffered a recovery; and it was adjudged that T. took a fee, it being devised to him and his
heirs for ever, and also paying 20l. to R., both which clauses showed the intention of a fee to him; and the clause, "if he died without issue," was not absolute or indefinite, "whenever" he died without issue, but with a contingency,—his dying without issue, living W.—and that the limitation to W. was a good executory devise to take effect on the contingency of T.'s dying without issue in the life-time of W.; for it was agreed that it could not be a remainder, because one fee cannot be in remainder after another; and they adjudged that the recovery of T. did not bar this executory interest to W., because he who suffered the recovery had a fee, and W. had no estate depending on the estate of T. but a collateral and mere possibility, which could not be touched by a recovery; but it is said in that case, if the person to whom the executory devise is limited, come in as a vouchease in a common recovery, that this possibility is thereby given up. *Pells v. Brown,* M. 1620. Cro. Jac. 590. Palm. 151. Gib. 308.

459. A. possessed of a term, devised it to his wife for life, remainder to his first son for life, and if he die without issue, to his second son, &c. The remainder to the second son was held void, for the remainder of a term cannot depend on a possibility so remote as dying without issue; though objected in this case, that the devise was not "to the first son and his issue," but given to him for life only, with an executory devise to the second son, upon the contingency of the first not having issue at the time of his death. *Leo v. Windham,* 1663. 1 Lev. 290. 2 Ch. Rep. 14.

460. An executory devise to arise within the compass of a reasonable time, is good; 20, say 30 years have been thought a reasonable time, so as to be within the compass of a life or lives: for, let the lives be never so many, there must be a survivor, and it is but the length of that surviving life; the court declined to go one step farther, for such limitations make an estate unalienable, every executory devise being a perpetuity as far as it goes, viz. an estate unalienable, though all mankind join in the conveyance. *Scattergood v. Edge,* T. 1697. Salk. 229. *Note,* Twissden, J. used to say, "all the candles were lighted at once;" at this day it is clearly agreed, though formerly in many cases held otherwise, that a devise to an infant *en ventre sa mère,* is good, though he be born after testator's death, and he shall take by way of executory devise. *Taylor v. Bydall,* H. 1677. Freem. 244. 298.

461. A. having issue several sons, the eldest non compos, created a term for years, and by another deed declared the trust thereof to his second son, and the heirs male of his body, remainder to his other sons, provided that if his eldest son die without issue, or not leaving his wife ensuant with child, living the second son, so that the earldom descended on the second son, then the said term to remain to the third son, and the heirs male of his body; with like limitations to the other sons: the eldest son died without issue, living the second; this limitation to the third son was held good by *Ld. Nottingham,* contra the opinion of the three Chief Justices who assisted him. "*D. of Norfolk's Ca.* E. 1683. 3 Ch. Ca. 1. This decree was reversed by *North,* C. S. Vide 1 Vern. 163; but upon appeal to the Lords, *Ld. North's* decree was reversed, and *Ld. Nottingham's* established. *Note,* executory devises and limitations of the trust of a term are governed alike. *Vide* Massenburgh v. *Ash,* 1 Vern. 235.

462. A will shall never operate by way of executory devise, if it may take effect by way of remainder, i. e. if there is a particular estate to support it. *Reece v. Long,* T. 1689. Carth. 310. *Vide* Goodright v. *Cornish,* 4 Mod. 258.

463. A man devised a term to I. S. his heirs, executors, and assigns for ever, but if he died before 21, leaving no issue, then to I. D. The devisee died before 21, without issue, and the remainder was held to be good. *Martin v. Long,* T. 1690. 2 Vern. 151. Pre. Ch. 15. *Vide* Stephens v. *Stephens,* Ca. temp. Talb. 228.

464. In case of executory devises, there can be no limitation over. *Goodright v. Cornish,* H. 1693. 4 Mod. 259.

465. If a term is devised to A. and the heirs of his body, and if A. die without issue living B. then to B. *Per curiam,* this is a good limitation to B.; the contingency being to arise within the compass of a life in being. *Lamb v. Archer,* M. 1694. 1 Salk. 225. Com. 208. *Sakin.* 340. In this case, Child v. Bayley, *Cro. Jac.* 459. 1 Rol. Ab. 613., is said to be shaken by the D. of Norfolk's *Ca.* 3 Ch. Ca. 1, and denied to be law.

366. A. seised in fee, devised to B.
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for life, remainder to B.'s first son in tail male, and so to the second and third sons; and, for default of such issue, to C. for life, and to his first, second son, &c. in like manner. The devisor died; then B. married, and died without issue born, but the wife was privum ensent with a son, who was born after. The judgment in C. B. that the posthumous son had no title, was affirmed in B. R. on a writ of error; and it was there held that the remainder to the first son of B. was a contingent remainder, and so must take effect, according to the rule in Archer's Ca.; but at the time of the death of B. there was a default of issue male, on which the estate vested in the possession of C., and ought not to be removed again by the birth of a son after: Held, also, that this is no executory devise; upon the rule laid down in Purefoy v. Rogers, 2 Saund. 380.; that where a contingent estate is limited to depend on a freehold capable to support the remainder, it shall never be construed an executory devise. But this judgment was reversed in Dom. Proc. in Mich. Term following. Reeve v. Long, E. 1694. 12 Mod. 53. 4 Mod. 282. 3 Lev. 408. 1 Salk. 227. Skin. 430. Comb. 452. Carth. 339. Holt 228. Note, 3 Lev. 408. 4 Mod. 282. 1 Salk. 227. S. C. all accord. Carth. 308. says, it was held in B. R. that the contingency not happening till after the particular estate was determined, the remainder was destroyed, as in Archer's Ca. Skin. 430. says, that the judgment in C. B. was affirmed per totam curiam in B. R. upon the first argument, without any difficulty; and afterwards it was reversed in the House of Peers. And in 3 Lev. 408. and 1 Salk. 227. it appears that all the Judges were very much dissatisfied with the opinion of the Lords, and did not change their own opinions, but blamed Baron Tuxton very much for permitting a special verdict to be found, where the law was so clear and certain. Comb. 252. says, the judgment was reversed in Dom. Proc. the Lords having more regard to the equity of the case than to the settled rules of law and the opinion of the Judges. No absolute decision is to be found whether the stat. 10 & 11 W. 3. c. 16. is applicable to wills, but in Roe v. Quartley, 1 T. R. 634. the court seems to take it for granted that it is. 1 Salk. 227. n. by Mr. Evans. Mr. Butler (n. to Co. Lit. 298.) says, "there is a tradition, that, as the case of Reeve v. Long arose upon a will, the Lords considered the law to be settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination; besides, the words of the act may be construed, without much violence, to comprise settlements of estates made by will, as well as settlements by deed." In Bull. N. P. 105. it is also said there is no ground for the distinction.

467. One devised all his lands, after the death of his executor, to A., his executor's son, and his heirs for ever; but if A. died leaving no son, then to that son of his executor that he should think fit to give them to by his will, and for want of a son of his executor, then to B. This was held a good executory devise to B. as confined to the period of a life in being, and therefore no danger of a perpetuity. Fairfax v. Heron, H. 1696. Pre. Ch. 67. Vide Hopkins v. Hopkins, Ca. temp. Talt. 44. Chapman v. Blissett, ib. 145. Peelo v. Brown, 1 Eq. Ab. 157. pl. 4. Brett v. Rigden, Plowd. Com. 345. 1 Eq. Ab. 215. pl. 1.

468. F. being possessed of a term for years, devised it to his wife for life, and after her death to R. for life, and after her death to T. and his children; "and if it should happen the said T. do die before the expiration of the said term, not having issue of his body then living, then to go over to plaintiffs for the residue of the term. Defendants claimed by assignment from R. and T.—R. was dead, and T. died without issue, and plaintiff brought his bill to have an assignment of the term pursuant to the will. Decreed, that the remainders to plaintiffs were good by way of executory devise, and that the words "then living" must relate to the time of his death, for otherwise there would be no difference between this and the common limitations of a term "to one, and the heirs or issue of his body, and if he die without issue, remainder to another," which is void, for there it must be likewise intended, "if he die without issue before the expiration of the term," or "during the term," since after the expiration of the term he can limit no remainders over, because nothing remains then to be limited; but here it being limited over upon this contingency, "if he die without issue then living, viz. at the time of
his death," it is good; because the contingency must happen within one life, or not at all; for upon his death it will certainly be known whether he leaves issue or not: if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compass of a life, is good as an executory devise, and differs in nothing from the D. of Norfolk's Ca. ante, pl. 461. Fletcher's Ca. T. 1709, 1 Eq. Ab. 193, pl. 10.

469. One devised the surplus of his personal estate to the children of A. and B., neither of whom had any children, either at the making of the will or the death of the testator. Per curiam, the devise is executory, and shall extend to such children as A. and B. should have at the time of making the will, and to the children to take per capita, and not per stirpes, they claiming in their own right, and not as representing their parents. Weld v. Bradbury, M. 1715, 2 Vern. 703. Vide Ellison v. Airey, 1 Ves. 111. Coleman v. Seymour, ib. 211. Isaac v. Isaac, 9th Dec. 1768. Bartlet v. Hollister, Amb. 334. Hodges v. Isaac, ibid. 348.

470. A. possessed of a term for years, devised it by will to his son H. "for life, and no longer, and after his decease to such of the issue of the said H. as H. by his will shall appoint," (a) and in case H. should die without issue, then testator devised the same to B. for the remainder of the term, and died. H. died without issue living at his death, whereupon a question arose, whether this was an estate tail in H. or not? For if it was, or in the nature of an estate tail, the remainder to B. would be void; or (as P. W. puts the question) whether the term should go to the executor of the first testator, or to the executors of H. or to B.? Ld. Ch.—H. by this will 'takes only a life estate, with a power to dispose of it to which of his issue he thinks fit; the words "no longer" plainly show this to have been the intention of the testator. Where an entail is created by implication, it is ever in favour of the heir at law, to whom no estate being given by the will, so as to enable him to take by purchase, and as he must, if he takes at all, take by descent, in order to support the intention of the testator, that he should take, the law creates by implication an estate tail in the ancestor, to vest it in the issue by descent; but here this reason entirely ceases, for here is a provision how it shall go to the issue, viz. by the device of the party, until when, nothing vests in the issue. Ld. Ch. further said, the words "dying without issue," have two senses; (b) 1st, a vulgar sense, i.e. dying without leaving issue at the time of his death; 2dly, a legal sense, i.e. whenever there is a failure of issue. If this will be taken in the vulgar sense, then the devise over to B. is good, and this seems to be the meaning of the testator, for it must be intended such issue as he should or might appoint the term to, which must mean issue then living, and this construction shall be the more favoured, in regard it supports the will, whereas the other destroys it: (c) Hold, therefore, that the devise over of the term to B. was good; and Ld. Ch. observed, that there was a great diversity between a devise of a freehold estate to A. for life, and if A. dies without issue, then to B., and a devise of a term in the same words, for in the former case this might give A. an estate tail, because the words "if A. die without issue," in case of an inheritance, are inserted in favour of the issue, (d) and to let in the issue after the death of the father; but in case of a term, these words cannot have such effect, for the father takes the whole, which on his death will not go to his issue, but to his executors. Lord Ch. cited the case of Loddington v. Kime, 3 Lev. 451. (c) which his Lordship said was in points mistakingly reported by Levins, though he was of counsel in it, but as to this point it was right, and was stronger than the principal one. Torget v. Grant, or Grant, E. 1718, 1 P. W. 432. Gilb. Eq. Rep. 149. 10 Mod. 402. (a) These words in inverted commas are omitted in the register book, but are inserted in all the contemporary reports of this case. (b) Vide Nichols v. Hooper, 1 P. W. 199. Pinbury v. Elkin, ibid. 564. Forth v. Chapman, ibid. 666. (c) This subject, as applied to terms for years, is more particularly considered in Atkinson v. Hutchinson, 3 P. W. 258, which see post, with Mr. Cox's references to the synonymous cases. (d) Vide Forth v. Chapman, 1 P. W. 667. (c) Loddington v. Kime or Chime, is also reported in 1 Salk. 224. and 1 Ld. Raym. 203. 206. Vide ante, tit. Devise, vii.

471. A. devised to C. for life, and in case C. should have issue male, then to such issue male and his heirs for ever,
and after the death of C., in case he should have no issue male, then to D. in fee. After the testator’s decease, C. before he had any issue suffered a recovery; it was held clearly, that these remainder after the death of C. were contingent, and consequently barred by the recovery of C. before they vested, and then the question arose whether the remainder in fee was in abeyance, or descended to testator’s heir at law. The M. R. considered the fee as in abeyance, but Ld. Ch. on appeal, reprobated that notion, and held, that nothing but necessity could support the admission of it; that there could be no reasonable pretence for it but to preserve the remainder, which construing the fee to be in abeyance, would tend to destroy, and his Lordship said it was held, that where the remainder was devised in contingency, the reversion in fee descended to the heir in the mean time, and that whatsoever estate was not disposed of by the testator descended to the heir, and he said he should abide by that opinion, in which he was very clear. His Lordship added, it was a strange construction, to take pains, by a strain in law, to place a remainder in nobis, on purpose that the testator’s intention should be frustrated, and that the tenant for life might be under the temptation to disappoint the will, by destroying the contingent remainder by recovery or feoffment, which in such cases must be admitted to be tortuous conveyances; may, what is more extraordinary, that the tenant for life must be rewarded for this wrong, and that he, who before had an estate for life only, should gain an absolute and indefeasible fee-simple by doing a wrongful act, which would be taking advantage of his own wrong against both law and reason; and held further, that upon the recovery suffered by C., he being but tenant for life, the co-heirs of the testator having the reversion in fee descended to them, they had a right of entry commencing upon such forfeiture of C. So the court of C. B., upon the same case referred to them out of Chancery, (a) were clear as to the destruction of the contingent remainders by the recovery suffered by C. and that he thereby gained a tortious fee, good against all persons but the right heirs of the testator. Carter v. Barnardiston, M. 1718. 1 P. W. 503. 2 Bro. P. C. 1. (a) Vide Ludding

472. Testator devised lands to his wife for life; remainder to C. his second son in fee, provided if D. his third son, should, within three months after his wife’s death, pay 500l. to his executors, &c. then he devised to D. and his heirs: it was adjudged a good executory devise to D. Marks v. Marks, M. 1719. 10 Mod. 419. Pre. Ch. 486. 1 Stra. 129.

473. A. tenant for life, remainder to his wife for life, remainder to his (a) own right heirs, devised thus: “My lands in W. my wife is to have for her life; after her decease, of right it goeth to my daughter E. for ever, if she have heirs; if my daughter die without heirs in the life of my wife, and my wife does not marry again, and have children, I give, &c.” The question was, if defendant, the devisees under the will, could take, and how or when? Per curiam, the first clause is no devise; the words, “the wife is to have, &c.” is only a declaration of the testator, how his estate was to descend; and this being so, E. takes these lands as heir at law (b) and then it must be an executory devise, on the contingencies mentioned in the will. The words are “if the daughter die in the life of the mother, or without heirs.” This being a remote contingency, which may never happen, (c) it can never take place as an executory devise, and as a contingent remainder it cannot; there being no particular estate; therefore the heirs of the devisor have a good title. Wright v. Hammond, E. 1721. 11 Mod. 345. Stra. 427. In Webb v. Herring, 2 Cro. 415. 1 Saund. 144. 152. it is settled, that a devise over to a stranger shall be no alteration of a prior devise to the heirs of the devisor. Floyd or Lloyd v. Carey, Com. Rep. 20. Pre. Ch. 72. Show. P. C. 137. was a devise over, if a man had no heirs male of his body, and adjudged an executory devise. (a) In 11 Med. it is “remainder to her right heirs,” which must be an error.

474. In this case, Ld. Ch. took a difference between a limitation of a trust of a term of years, in such manner as that all power of alienation might be re-
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strained, and consequently a perpetuity introduced, and a limitation of a trust of a sum of money which may be subject to more remote contingencies. In the latter case, his lordship thought that a bond to pay money on the death of A. without issue of his body, would be good (a) and so for the same reason would be the trust of money so limited. *Pleydel v. Pleydel, M. 1721. 1 P. W. 748.* (a) Vide Pinbury v. Elkin, 1 P. W. 566.

475. Where a term for years was settled in trust for the husband for life, then to the wife for life, then to the first son of the marriage, and the heirs male of his body; and in the same manner to all the other sons successively; and for want of sons then to daughters. The husband and wife died without having had any son, but leaving a daughter; and the question was, whether she could take under this limitation, it being after a limitation in tail to the sons? *Ld. Coper* held, that if the limitation to the sons had taken effect, that to the daughters must have been void; but as there was no son, the latter limitation was good; for the construction must be, if a son, then to him; and if no son, then to a daughter. *Gore v. Gore, T. 1722. 2 F. W. 28. 2 Kel. 254. 9 Mod. 4. 10 Mod. 501. 2 Stra. 958.* *Higgins v. Dowler, M. 1707. 1 P. W. 98. 2 Vern. 600.* Salk. 158. S. P. Vide post, tit. Estate, viii. But in Salk. 156. it is said, that upon reading the settlement, it appears to be, "and in default of issue male of the body of the husband, then to the daughters," and so the husband took an estate tail, and therefore the subsequent limitation to the daughter was void. However, *Jekyll, M. R. afterwards, in Stanly v. Leigh, 2 P. W. 618.* said this was a mistake; and indeed it is observable, that although an indefinite failure of issue male of the body of the husband would have been too remote, yet as he took an express estate for life before, and this was not the case of an inheritance, it by no means follows that he took any estate by words of implication; and the words, "in default of issue male," might well refer to such default of such issue male as was before expressed. See *Mr. Cox's* note in P. W. 98. where the several cases and distinctions on this subject are collected, and where it is said that notwithstanding the authority of *Higgins v. Dowler* has been sometimes questioned (as in *Clare v. Clare, Ca. temp. Talb. 26.* Wyth v. Blackman, 1 Ves. 202.) yet it now seems fully established by *Stanley v. Leigh, 2 P. W. 636.* *Brooks v. Taylor, Mo. 188.* *Stephens v. Stephens, Ca. temp. Talb. 228.* *Gower v. Grosvenor, Barn. 54.* *Sheffield v. Ld. Orrery, 3 Atl. 287.* *Pelham v. Gregory, 5 Bro. P. C. 455.* *Doo v. Fonneran, Doug. 470.* *Marsh v. Marsh, 1 Bro. C. C. 293.* *Knight v. El- lis, 2 Bro. C. C. 570.* *Hockey v. Maw- bey, 3 Bro. C. C. 82.* The result of which cases (according to Mr. Fearns) is, "that whatever number of limitations there may be, after the first executory devise of the whole interest, any one of them which is so limited that it must take effect if at all) within 21 years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested."

476. A. seised in fee, and having three sons, G., E. & R., devised Blackacre to G., his eldest son, and his heirs, and Whiteacre to E., his second son, and his heirs, and a rent charge of 50l. *per annum,* issuing out of Whiteacre to R. and his heirs; proviso, that if either of his sons should die without issue, the other two living, so as his estate in land should come to the other two sons, then the rent should cease. G. died, leaving issue the defendant, and R. died *sans issue*; so that this contingency could never happen, because G. had issue, and he being dead, and R. also without issue, their estate in lands could never come to two where E. alone was surviving; *ergo* the rent charge must descend to defendant as heir at law, being the son of G., the eldest son of the testator; for this is an executory devise to two, or the contingency of one dying in the life-time of the other two, which contingency must arise within the compass of one life, otherwise it is void; for it is plain that the testator intended this benefit of survivorship during his sons' lives only. Judgment for defendant. *Parsons v. Peacock, H. 1725. 3 Mod. 547.* *Vide Snowe v. Cutler, 1 Lev. 136.* *Badger v. Lloyd, 1 Salk. 233.*

477. M. B., testator's widow, upon her marriage with Y. reserved a power to dispense of her estate as she should think
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6t, notwithstanding her coverture, and after her marriage she devised it to her husband Y. for life, remainder in parcels to her three sons and their heirs, "provided that if any or either of her sons died under 21 years without issue, the share of him or them so dying should go to the survivor or survivors." J. B., one of her sons, died under 21 years, and without issue, so that the lands which were devised to him must descend to plaintiff and defendant equally; for this being a common contingency, and having happened, whether it is by limitation of a use, or by executory devise, the remainder over is always good. The court was of opinion, that this could not be an executory devise, because testatrix was a fema covert. Buggins v. Yates, H. 1725. 9 Mod. 123.

478. Testator devised his term to his wife for life, remainder to his son and daughter, and died; the daughter and her husband, in the life-time of the wife, assigned their moiety, and after the death of the brother, living the mother, they assigned the other moiety. This assignment was held good, both in equity, and also by the Lords. Theobalds v. Duffay, M. 1725. 2 P. W. 608. 9 Mod. 101.

479. Where testator bequeathed the residue of his personal estate to A. for life, and after her death the interest to be applied for the maintenance of such children as she should have until the sons attained 21 and the daughter 18, and at such ages to be paid their portions and "for want of such issue," then to the children of S.—A. died without issue; and it was contended that the bequest over to the children of S. was too remote, for if the words "for want of such issue," should signify for want of such children of A. as should attain the said ages, yet it would exceed the rule which had confined these sorts of bequests (especially of mere personal estates) to lives in being. But Ld. King held it to be a good executory devise. Madax v. Staines, T. 1727. 2 P. W. 421.; and the decree was affirmed by the Lords, 3 Bro. P. C. 383. Vide Massenburg v. Aash, 1 Vern. 234. 257. 304. 3 P. 480. L. S. possessed of a term, devised it to A. for life, remainder to the heirs of A. This, it seems, shall on A.'s death, go to his executor, and not to his heir. Davis v. Gibbs, H. 1729. 3 P. W. 29.

481. A. devised lands to B. and his heirs for ever, upon condition to pay all the testator's debts, legacies, and funerals, and if he did not pay them, then he devised the premises to defendant and her heirs for ever, and gave the residue of his estate real and personal to defendant and her heirs. B. died before the devisee, so as it was a lapsed legacy as to him. One question was, whether this was an executory devise over of these lands to defendant? Per tot. cur., this cannot be an executory devise to defendant, unless it were an original devise. Here is no first devisee, for he is dead, and that devisee is void. Roe v. Fludd, E. 1729. Fortesc. 184.

482. A. having the reversion in fee of lands (which on the marriage of his son B. he had settled on himself for life; remainder to B. for 99 years, if he should so long live; remainder to trustees and their heirs during the life of B.; remainder to the first and other sons of B. successively in tail male; remainder to the heirs male of the body of B., reversion to A. in fee,) devised all the lands mentioned or contained in that settlement, "on failure of issue of the body of B., and for want of heirs male of his own body," to his daughter F. and the heirs of her body; adjudged in Dom. Proc, that this will did not give an estate by implication to B., and therefore the devise to F. was executory and void, as being on too remote a contingency. Lady Lanesborough v. Fox, E. 1733. Ca. temp. Tabl. 262. Vide Lytton v. Lytton, 4 Bro. C. C. 452, where this case is much commented upon.

483. A. devised all his real and personal estate, in trust to pay his son B. an annuity; and if B. should have any children, the residue of the rents to be applied towards their maintenance during B.'s life; and after his decease, a moiety of such trust estate to such child or children as B. should leave, their heirs, &c., and the other moiety to the children of testator's grandson C., and every other child or children of his daughter D., their heirs, &c. and if B. die without issue, the first moiety to C., and other child or children of D., and their heirs, &c. B. married and had issue a son and a daughter, and died; afterwards C. married and had issue a son and a daughter, and died; Held, that the limitation to the daughter of C. was well sup-
ported by the estate in the trustees, or if not, is good as an executor devise, and the profits shall go to the children of B. Chapman v. Blissett, M. 1785. Ca. temp. Talb. 145.

484. An executor devise of a freehold to a grandson unborn, when he shall attain the age of 21, is good. Stephens v. Stephens, M. 1736. Ca. temp. Talb. 228.

485. A gave 500l. to his daughters, and devised his land for 90 years, in trust, that if his wife should within four years pay off the 500l., then he gave the lands to his wife for life, and after her death to her son H. and his issue, and for want of such issue to him and his heirs for ever, and the same term to wait on the inheritance. The wife did not pay the money, and the estate was sold under a decree, upon a bill filed against H.; afterwards a bill was filed against the devisee of the purchaser by the son of H. as heir in tail for the reversion expectant on the term of 99 years; there having been no fine levied to the purchaser by the son to bar the estate tail, and the purchaser having notice of the title, Ld. Hardwicke held, that this was a conditional limitation in the wife for life, taking place as an executor devise (for that it could not be a contingent remainder, for want of a freehold to support it,) and that H. took an estate tail, with remainder to him in fee; and though in this case the estate for life in the wife was a preceding executory limitation, which never took effect, because she did not pay the money, and perform the condition on which it was to arise; yet the estate tail to H. was well limited, and took effect expectant on the term; (a) and that being an executor devise, the freehold descended to H. as heir at law to the testator, till the wife had performed the condition. (b) And his Lordship accordingly decreed in favour of plaintiff’s title. Hayward v. Stillingfleet, M. 1787. 1 Atk. 422. (a) The principle that a remainder over shall take effect, notwithstanding the condition annexed to the preceding estate, and on which the remainder is limited, should never arise or be performed, is recognised by many cases. Vide Scattergood v. Edge, 1 Saik. 229. Jones v. Westcombe, 1 Eq. Ab. 245. Hopkins v. Hopkins, Ca. temp. Talb. 24. Andrews v. Fulham, 2 Stra. 1092. 1 Ves. 421. 1 Wils. C.B. 107. 3 Burr. 1624. Gulliver v. Wickett, 1 Wils. C. B. 105. 2 Swan. 1093. 1 Ves. 421. Wig v. Wig, 1 Atk. 382. Fonnerau v. Fonneau, 3 Atk. 315. Aveluy v. Ward, 1 Ves. 420. Bradford v. Foley, Doug. 68. Stamford v. Bell, Comp. 40. Horton v. Whittaker, 1 T. R. 346. Doo v. Brabant, 3 Bro. C. C. 393. (b) Vide etiam Pay’s Ca. Cro. Eliz. 878. Gore v. Gore, 2 P. W. 28. Hopkins v. Hopkins, Ca. temp. Talb. 44. Wig v. Wig, sup. Tревисан v. Vivian, 2 Ves. 430. Bullock v. Stones, ibid. 521. Smith v. Newport, 2 Atk. 344. 476.

486. A devised lands in trust for B. for life, remainder in trust for his sons successively, remainder in trust for the future sons of C. remainder over, and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future. B. died in testator’s life-time, and it was decreed, the contingent limitations should enure as executor devises, and that the profits from the death of the testator till the birth of a son of B. should go to the heir; and afterwards, a son being born to B., upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some person should become entitled under the limitations in the will. Hopkins v. Hopkins, 1738. 1 Atk. 581. 1 Ves. 265. Ca. temp. Talb. 44. A correct copy of this case was stated by Ld. Longbrough in Haregham v. Vincent, 4 Bro. C. C. 390. Vide Reeve v. Long, Carth. 310. 4 Mod. 482. Neahty v. Bosville, Rep. temp. Hardw. 258. Walter v. Drow, Com. Rep. 372. 2 Ves. 616. Doe v. Morgan, 3 T. R. 763. 765.

487. Testator devised to A. and his heirs, if he should die before twenty-one, then to B. This is a good executor devise to B., being limited to take effect on an event which must happen within the compass of a life in being. Gurnel v. Wood, T. 1741. 8 Vin. 112. pl. 38.

488. Testator devised his estate to A. in case his daughter should die leaving no heirs of her body: Hold a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. Head v. Snell, T. 1743. 2 Atk. 646.

489. A. limited 10,000l. in failure of issue of the body of husband and wife, to B. in tail; the remainder is void as an executor devise being too remote; otherwise, where the limitations are for
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life, that confining it to a failure of issue, during the lives in being; and in the case of executory devises, it has been held to be a reasonable construction, if it falls within the compass of ever so many lives in being at the same time. \textit{Trafford v. Booth}, E. 1746. 3 Alk. 449. \textit{Vide} Hodgson v. Bussey, 2 Atk. 89. Beaucler v. Dormer, ibid. 309.

490. Testator devised his real and personal estate to trustees, and willed that the first son of A., when he should attain 21, should have it, and his heirs male, and that he should be well educated. A. had no son at testator's death: Held, a good executory devise of the real estate, and that the intermediate rents should belong to the heir of testator, but that his interest should cease upon the birth of a son of A. the rents being applicable to the education of that son. \textit{Bullock v. Stotes}, T. 1734. 2 Ves. 521. \textit{Vide} Pepham v. Lady Aylesbury, Amb. 68.—Hopkins v. Hopkins, 1 Atk. 581.


492. Devise to E. for ever, if he have a son who shall attain 21, but if he die without a son to inherit, then the son of W. shall inherit. This is an estate in fee to E. at 22 years of age, subject to be defeated by an executory devise over to the son of W. \textit{Heath v. Heath}, E. 1782. 1 Bro. C. C. 147.

493. Gift to testator's brother, without any restriction as to his children, to whom he shall leave, before or after his death, such part of his inheritance as their conduct may deserve; but if at the death of his brother there should be no children, then to A. This is an executory devise, which, if it took place, would defeat the interest of the brother's children. \textit{Lieutand v. Agassiz}, T. 1789. 2 Bro. C. C. 615.

494. Devise of personal estate, and of the rents and profits of real; the interest to accumulate and be laid out in land, to be conveyed with the real to the youngest or only son of the trustee at 21: Held, a vested interest by executory devise in an only surviving son, and to wait till the death of the father, but liable to be defeated by the birth of another son. The trustee survived his son, and received the rents and profits till his death, but never laid them out in land; those accrued after the son made his will, were held to be an equitable interest in land, and therefore to pass under it. \textit{Perry v. Philips}, M. 1790. 1 Ves. jun. 251. 495. In cases of contracts for land made before, but executed after making a will, the subsequent execution is not a revocation: the legal interest coming in case afterwards, would not pass by the will at law, but in equity is bound by the prior devise of the equitable interest. An executory devise is in its nature equitable, and becomes legal estate only by application of the statute of uses, which executes every species of interest that a court of equity would before, and that had been extended to cases not in the contemplation of the statute. An equitable lien is an equitable obligation to do according to conscience, and a devise of it is good in equity, as well as of every other equitable interest. S. C. Note. Mr. Fearne took it to be the clearest of all cases, that a springing use could not be devised; but it is now decided that it may, and Mr. F. (in his 4th ed. 545.) seemed to have changed his opinion, and acquiesced under the modern decisions in Selwyn v. Selwyn, 2 Burr. 1131. 2 Bl. Rep. 251. and Roe v. Jones, H. Bla. Rep. 30.; and Moer v. Hawkins, cor. Northington, C. there cited, since reported in 2 Eden 542.

496. Executory devises are not to be governed by the rules of law, as to common law conveynances; but the question is, whether they are to happen within a reasonable time or not. The rule as to executory devises allowing any number of lives in being, affording a reasonable time for gestation and 21 years, is now the clear law. Estates may be unalienable for lives in being, and 21 years, merely because a life may be an infant, or en ceuvre sa mere; therefore, the words "born in due time afterwards" cannot be held to mean more than children in the womb at testator's death. Most executory devises are without any freehold to support them, and the number of contingencies are not material if they are to happen within the limits allowed by law.

In a limitation "to the heir male of A., if he shall have one who shall attain the age of 21," there are three contingencies. It is good, though the heir should not be.
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born under 10 months after the death of A. If the law allows that, upon what ground shall not a day before the birth be allowed? And if that is allowed, ten months must be allowed, for it is too short a time to create inconvenience. Powell, J. gives the same reason for allowing it before the estate vested. Twenty-one years are allowed, because the law considers that time reasonable. If a limitation after a life of 10 months and 21 years is good, it is incomprehensible to say, that a devise to an infant en ventre sa mere the day before he is born can be bad. Every executory devise is good, that does not tend to a perpetuity by making an estate undivisible beyond the period allowed by law as to legal estates. Though the Judges, since the revolution, have disapproved of extending executory devises, there is no instance of a limitation of the number of lives, neither is the purpose of accumulation any objection to an executory devise. Thelusson v. Woodford, E. 1799. 4 Ves. 317. 331. 337. Affirmed in Dom. Proc. T. 1805. 11 Ves. 112. Vide D. of Norfolk's Ca. 3 Ch. Ca. 29. Love v. Windham, 1 Mod. 50. Scattergood v. Edge, 1 Salk. 229. Robinson v. Hardcastle, 2 Bro. C. C. 30.; as to the limitation of the number of lives. Et vide Hopkins v. Hopkins, 1 Ves. 268. 1 Atk. 561. Stephens v. Stephens, Ca. temp. Tatl. 228. Rogers v. Gibson, 1 Ves. 455. D. of Bridgewater v. Egerton, 2 Ves. 122. Chapman v. Blisset, Ca. temp. Tatl. 166.; as to the accumulation of real estate. Et vide Atkinson v. Turner, Barn. 74. Studholme v. Hodgson, 3 F. W. 300. Bollock v. Stones, 2 Ves. 521.; as to the accumulation of personal estate. Vide etiam Laddington v. Kime, 1 Raym. 203. Goodtitle v. Wood. Norfolk's Ca. 3 Ch. Ca. 29. Lincoln v. Newcastle, 12 Ves. 250.; as to the allowing 10 months and 21 years after lives in being.

497. C. M. devised all her real estates in trust to sell, and after payment of legacies, she gave the residue of her personal estate to the same trustees, to collect her debts and convert the whole into specie, and further, after debts and legacies paid, to invest the produce of her real estates, and the residue of her personal estate at interest in the public funds, or on real securities, upon trust to pay thereout 10l. per annum to A. T. for life, and the residue of the interest monies to her sisters E. G. and M. V. for their lives, with benefit of survivorship, provided that so much as should accrue to E. G. during the life of J. G. her husband, should not be paid to her or to any person for her use, but should, during his life, be invested by the trustees in real or government securities, and that the interest which should accrue thereon, should be added to and accumulated with the capital: and upon the decease of J. G., the capital, with the accumulations, should be forthwith paid to E. G., but if she should be dead, then testatrix bequeathed the same to M. V. if living, and if not, then it was to sink into the residue of her personal estate; and upon further trust, from and after the decease of the survivor of E. G. and M. V. to transfer the first and last mentioned trust funds, with the accumulations thereof, in case the same should have sunk into the residue of her personal estate, to other persons: under a bill by E. G. and her husband, the accounts having been directed against the trustees, who were also executors, a petition was presented to the M. R. by plaintiffs, praying a declaration that the proviso directing the accumulation was contrary to the statute of 39 & 40 Geo. 3. c. 98. and therefore null and void, and that the petitioners were entitled to the full benefit of the will, as fully as if such clause had not been inserted, and also praying a transfer to the Accountant-General, &c. which petition his Honour dismissed, and petitioners now applied to the great seal. Per Ld. Ch., the question is, whether the intention appears to attempt an accumulation for more than the life by deed or 21 years by will, the whole shall be void, or whether it shall take effect for the period during which the legislature meant it to be strictly lawful to direct accumulation? His Lordship then proceeded very much at length to state the existing law, previously to the act of 39 and 40 Geo. 3. c. 98. and to comment on the language and operation of that statute, the passing of which, his Lordship said, was well known to be owing to the case of Thelusson v. Woodford, 4 Ves. 317. (ante, pl. 496.) Ld. Ch. said, the construction which had been put upon the act was the right one. The difficulty was strongly put, that supposing the life of the husband should happen to endure for more than 21 years, what is to become of the
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Profits accumulated at the end of 21 years, and it is well put in those terms upon this will. It is now clear, that accumulation may be directed for 21 years, where an executory devise is created as large as heretofore, and when therefore there may be a very long interval. The same difficulty might occur upon a will, precisely in the terms of the act, as upon this will. Ld. Ch. said, he could put many cases in which the same difficulty would occur, if the direction for accumulation was in the very terms of the will. His Lordship concurring in opinion with the M. R., dismissed the petition. Griffiths v. Vere, M. 1803. 9 Ves. 127.

498. Where there is an executory devise over, even of a legal estate, this court will not permit timber to be cut, more especially in the case of a trust estate. Stanfield v. Habergham, M. 1804. 10 Ves. 276.

499. P. T. devised real estates of the annual value of near 5000l., and other estates directed to be purchased, with the residue of the personal estate, amounting to above 600,000l. to trustees, &c. upon trust, during the lives of testator's sons A., B., and C., and of his grandson D., and of such other sons as A. now has or may have, and of such issue as D. may have, and of such issue as any other sons of A. may have, and of such sons as B. and C. may have, and of such issue as such sons may have, as should be living at his decease, or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and, from time to time, to invest the same, and the produce of timber, &c. in other purchases of real estates, and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male, remainder to the second &c. and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited of A. successively in tail male, remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B. and C. as tenants in common in tail male, in the same manner, with cross remainders, or if but one such male lineal descendant, to him in tail male, remainder to trustees, their heirs &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee: and it was directed, that the trustees should stand seised upon the failure of the male lineal descendants of A., B. and C. as aforesaid, upon trust to sell, and pay the produce to his Majesty, his heirs and successors, to the use of the sinking fund, the accumulation till the purchases or sales can take place, to go to the same purpose, with a direction that all the persons becoming entitled, shall use the surname of the testator only. The decree, establishing the trusts of the will, was affirmed by Dom. Proc. upon appeal. Thelusson v. Woodford, T. 1806. 11 Ves. 118. For the Ld. Ch.'s decree in this case, see 4 Ves. 227.


501. So may property be limited in such a manner as to make it unalienable during any number of lives not exceeding that to which testimony can be applied, to determine when the survivor of them drops. S. C.

502. In executory devises, the time of gestation may be taken both at the beginning and the end. S. C. ib. 149. Et vide Gulliver v. Wickett, 1 Wils. C. B. 103. Long v. Blackall, 3 Ves. 486. 7 T. R. 100.

503. There is no difference in the execution of an executory trust, created by will, and a covenant in marriage articles, yet there is a distinction between a will making a direct gift, and articles containing a covenant to be executed, but none between a covenant upon consideration of marriage articles, and an executory trust by will. Lincoln v. Newcastle, E. 1806. 12 Ves. 227, 230, and see the cases there cited.

504. A directory clause in a will, raising an executory trust, the court will always mould to the purposes of the testator. S. C. ibid. 234.

505. A devise over to A., B. and C., and their heirs, each in due succession as named, with usual limitations, in failure of issue of D., does not import an indefinite failure of issue in D.; held, that the limitations over to A., B. and C., are good by way of executory devise, for the
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Words mean "issue living at the decease of D. the first taker;" Held, also, that A., B., and C., under these words, take successive estates tail. *Stratford v. Powell*, M. 1807. 1 Ball & Be. 1.

506. Devise to A. for life of an estate *per autre vie*, with a power to will it "to B. and his lawful issue, in such manner as A. shall think proper, and in case A. shall die intestate, then to B. and his lawful issue, as B. shall think proper;" with remainder over to plaintiff. This is a vested estate tail in B. liable to be defeated by the execution of the power in A. *Osbsrey v. Bury*, T. 1808. 1 Ball & Be. 53. *Vide Cunningham v. Moody*, 1 Ves. 174. *Doe v. Martin*, 4 T. R. 39: Held also, in S. C., that A. and B. can, by deed conveying their estates, bar the remainder over, and it is no breach of trust in A. as a trustee of the will, to join with B. in destroying the remainder over. *Vide Mansell v. Mansell*, 2 P. W. 678; and *Moody v. Walters*, 16 Ves. 283, where *Ld. Eldon* has observed on all the cases on this subject.

507. A trust of a term (during the respective minorities of several tenants for life, or in tail in possession, &c.) to receive and lay out the rents, &c. in stock, to accumulate for such persons as should, at the expiration of such minorities or death of minors, be in possession, or entitled to the rents, and of the age of 21, if too remote, and being void in its creation, it is incapable of modification, so as to establish it to the extent to which it might have been originally carried. *Grant*, M. R. observing, that before the stat. 39 & 40 Geo. S. c. 28. accumulations might have been co-extensive with, but could not exceed the limits of, an executory devise, viz. until an unborn child of a person in being attained 21, but a limitation to vest only in the first descendant of a person in being who might attain 21, was too remote, and an accumulation exceeding the limits of the above stat. is void only for the excess. His Honour further said, the general rule was, that a leasehold estate limited with freehold, vests absolutely on the birth of the first tenant in tail, subject to the intention declared or implied, that they shall go together as long as the rules of law and equity will permit; and under such a limitation the vesting of the leasehold in the first tenant in tail is not prevented by a power to sell and vest the money in real estate to the same uses. *Ed. Southampton v. Marg. of Hertford*, T. 1813. 2 Ves. & B. 54. *Vide Phipps v. Kelynge*, 2 Ves. & B. 57. *Griffiths v. Vere*, 9 Ves. 127. *Ware v. Polhill*, 11 Ves. 237. 283.

508. Testator devised in trust for a son of his nephew A. at the age of 24, and if no son, to a son of his great nephew B., but if neither have a son, then to a son of testator's great nieces' daughter taking his name; yet whoever should take, not to be put into possession till 24. Nor the executors to give up their trust "till a proper intail be made to the male heir by him;" Held, an executory trust for an only son of A. *en vente* at the testator's death(a.) and not void for uncertainty; or too remote; and *per Grant*, M. R., there is no distinction between executory trusts by marriage articles and will (b.), except the inference from the object of the former to provide for the issue, that the father should not have the power to defeat it; therefore an estate for life, with remainder to the heirs of the body, is a strict settlement in one case, and an estate tail in the other. *Blackburn v. Staples*, T. 1814. 2 Ves. & B. 367. *Vide (a) Thel- linsnon's Ca.*, 4 Ves. 227. (b) *Lady Lincoln v. D. of Newcastle*, 12 Ves. 227.

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OF DEVISES OF LAND FOR PAYMENT OF DEBTS AND LEGACIES. OF THE WORDS BY WHICH A REAL ESTATE IS CHARGED THERewith; AND HEREIN OF MATTERS CONTOURED AND QUESTIONS ARISING BETWEEN THE DEVISEE AND PERSONAL REPRESENTATIVE, AND OF THE CASES WHERE THE DEVISEES SHALL HAVE THE AID OF THE PERSONAL ESTATE TO EXEMORATE HIM.

509. Bill by the executors of A. against all his creditors; some were by simplo contract. A. had devised lands to his executors for the payment of his judgment; some by bond, and some by debts; and in the first part of his will,
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had devised an annuity of 50l. to his wife. Ld. Ch. directed, first, that the lands being devised to the executors, it should be construed that A., the testator, intended that they should be paid in the same order as the law directs, i.e. that the debts should be first paid before this annuity, which was but a legacy; let the wording of the will be how it might, although it devised the lands charged with this annuity for the payment of debts, yet the debts should have the preference; but his Lordship held, that all the debts, whether by judgment, bond, or simple contract, should be satisfied pari passu, and if the value of the land fell short, then that they should be satisfied in proportion, and only the judgments affecting the land, without any such devise, were to have the preference; but a debt, by a decree in Chancery, should be in equal degree with debts by bond or contract, because that doth not bind the land until sequestration; but so far as the personal estate did extend, his Lordship ordered, that the debts should be paid in the order that the law directs, and there a debt, by a decree in Chancery, should have the preference of a bond. Foley's Ca. H. 1679. 2 Eq. Ab. 459. pl. 4.

510. J. S. lent R. 1600l. with an intent to lend him 1400l. more, and took a mortgage for the money in P.'s name. J. S. died, and his executors refused to lend the other 1400l., whereupon P. advanced 1500l., and purchased an annuity in fee out of the lands contained in the mortgage, and took an assignment of the mortgage to protect his purchase, declaring the uses to be for the benefit of him and his heirs, and then made his will, and appointed all his debts to be paid, and particularly mentioned the debt of 1600l. to the estate of J. S. and devised his real estate to his nephew. The widow, by the custom of York, being entitled to a moiety of the personal estate, a question arose between the widow and the nephew, whether this 1600l. should be paid out of the personal estate? Per Ld. Ch. The devisee shall have the aid of the personal estate to discharge the real as well as an hæres factus, and decreed accordingly. Pockley v. Pockley, H. 1681. 1 Vern. 36. 2 Ch. Ca. 84. nomine Popley v. Popley. In Galton v. Hancock, 2 Atk. 436. Ld. Hardwicke said, this was the first case where the question was determined in Vot. I.


512. A. obtained a decree for 2700l. against B. who appealed to the House of Lords, where the decree was affirmed. B. on petition obtained an order for a rehearing, and immediately falling ill, made his will, and thereby devised his land for payment of his debts: Decreed, that after all the simple contract debts were satisfied, A. should be paid this debt. Nor- don v. Norden, H. 1682. 1 Vern. 142.

513. "My debts and legacies being first deducted, I devise all my real and personal estate to J. S." This amounts to a devise to sell for payment of debts. Newman v. Johnson, E. 1682. 1 Vern. 45.

514. If an equity of redemption or trust estate is devised to a stranger for payment of debts, all debts shall be paid equally. But if the devisee is an executor, the land becomes legal assets, and then the debts must be paid according to their precedence at law. Girling v. Lee, M. 1682. 1 Vern. 68.

515. One seised in tail, and of a term in trust to attend the inheritance, levied a fine, and by deed subjected the land to a debt of 1000l. but declared, that after that debt was paid, the land should be to the old uses, and he then devised the land for payment of all his debts: Decreed, that the land should be liable to the payment of all his debts in general. Turner v. Gwyn, M. 1682. 1 Vern. 99, 100. To this decree the reporter puts a query, for it seems he was but tenant in tail of the inheritance, and so could not charge it by his will, unless it be intended he had still a power of doing it, lodged in him by reason of the fine, notwithstanding he had declared that after payment of the 1000l. it should go to the former uses.

516. Where land is devised to pay debts and legacies out of the rents and profits, it may be sold: otherwise if out of annual rents. But if such trust be by deed, the land cannot be sold in either
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317. If A. articles to buy lands, and before conveyance devises all his lands to be sold to pay his debts and legacies, the lands will pass, though he was not seized at the making of the will, nor did he republish it. So, if a man devises all his lands for payment of his debts, and afterwards purchases land, equity will decree a sale of the purchased lands though there were no precedent articles. Prideaux v. Gibbons, M. 1684. 2 Ch. Ca. 144. Vide Davie v. Beadsham, 1 Ch. Ca. 39. Bun- ter v. Cock, 1 Salk. 237.

318. Under a devise of land for payment of debts, a covenant entered into by the devisor when just of age, and a student at Cambridge, to pay his sister's portion, though taken by surprise, shall be performed. Ld. Holits v. Lady Carr, H. 1686. 1 Vern. 451.

319. A. devised all his lands to B. and the heirs of his body, remain over, and in another part of his will, (reciting that he owed B. money,) he gave him all his personal estate, and made him his executor, willing him to pay his debts. It was objected, that a tenant in tail could not be a trustee, yet decreed that both the real and personal estates should be sold for payment of the testator's debts. Cloudley v. Pelham, M. 1686. 1 Vern. 411. Note, in Aleck v. Sparhawk, 2 Vern. 228. it is said that this decree was affirmed by the Lords.

320. "I will all my debts shall be paid before any of my legacies or gifts herein after mentioned." Then the testator gave several pecuniary legacies, and after devised lands to A. on condition to pay 5l. per annum to D. Per cur. testator's lands are not subjected to the payment of his debts. The general clause at the beginning of the will shall be intended only of the personal estate, and the pecuniary legacies thereof devised. Eytes v. Carey, E. 1687. 1 Vern. 457.

321. Where debts are directed by will to be paid out of the rents and profits, the court, if it is necessary, will decree a sale. Berry v. Askham, T. 1687. 2 Vern. 26. Vide Heycock v. Heycock, 1 Vern. 256. Anon. 1 Vern. 104.

322. Lands were devised for payment of debts and legacies. It was decreed by Ld. Nottingham, in the case of Sir John Bowles, that debts and legacies should be paid pari passu, but that decree was reversed by Ld. North, who gave preference to the debts. Ld. Jeffries, however, said, he was dissatisfied with that opinion, and would consider of it. In the present case he thought the debts and legacies should be paid in equal proportions. Gos- ling v. Dorne, M. 1687. 1 Vern. 482. Vide Hixon v. Witham, 1 Ch. R. 248. where Ld. North decreed the debts to be first paid.

323. A. made his will, and I. S. his executor, to whom he gave a legacy. All his lands he devised to J. N. on condition that he paid his debts and legacies, with power for the creditors to enter, if the debts were not paid within two months, and the legatese, if not paid, within three months. Upon this case, a question arose, whether the personal estate should be first applied in case of the real estate devised to J. N. Per Ld. Comr. Maynard. if a man devises his real estate to another, on condition to pay his debts, and does not dispose of his personal estate, that shall be first applied in ease of the real estate, and here the condition annexed to the devise is not to avoid the whole estate, but only to give an entry to the creditors and legatese. Per Ld. Comr. Keck. The creditors have a primary demand against the personal estate, and may take their remedy against it if they please. If there had been no executor, the administrator must have applied the personal estate in aid of the real, and the executor takes no more to his own use than an administrator; the personal estate must therefore be applied. Per Ld. Comr. Rawlinson.

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field v. Windham, Pra. Ch. 101. 
Wainwright v. Bendlowes, ibid. 451. where the personal estate has not been applied to exonerate the real. —Note, There are numerous cases in assurance, as well as in denial of the doctrine on this subject, the most material of which are recognised in Mayer v. D. of Ancaster, 1 Bro. C. C. 454.—(a) In Galton v. Hancock, 2 Atk. 456. Ld. Hardwicke observed, that the first case where the question was determined in favour of the devisee of part of a real estate only, was that of Pockley v. Pockley, 1 Vern. 36. ante, pl. 510. and that Ld. Nottingham's opinion had been followed ever since. Lord N. had before determined in favour of a harum factus of the whole real estate, that personal assets should be applied in exoneration. Vide Hayes v. Hayes, 1 Ch. Ca. 223. which Ld. Hardwicke said was the first case so determined in favour of a harum factus.

524. If A. covenants to settle land, or an annuity out of land, and has none, lands after purchased shall be bound even against a voluntary devisee. Took v. Hastings, E. 1689. 2 Vern. 97.

525. Where land is devised to executors for payment of debts, the produce of the land, when sold, will be legal assets. Hawker v. Buckland, T. 1689. 2 Vern. 106.

526. A. having mortgaged his lands, by will appointed them to be sold for payment of the mortgage-money, and in another part of his will, he devised a moiety of the mortgaged premises to B. and bequeathed his personal estate to his executor for payment of his debts. The personal estate shall be applied to pay off the mortgage in favour of the devisee. Johnson v. Milksopp, M. 1689. 2 Vern. 112.

527. One made his nephew executor, and devisee to him and his heirs, all his lands, in trust to sell and pay his debts and children's portions: Decreed, that the money arising by the sale was not legal assets, and that the debts and children's portions should be paid in equal proportion. Anon. H. 1690. 2 Vern. 133.

528. A. purchased an estate, which he avowed to belong to his son, but there was no express declaration of trust, and the receipt for the consideration money was given in the name of A.—A. afterwards made his will, and devised this estate for payment of his debts. The court thought the trust sufficiently declared by the special circumstances of the case, and upon the face of the deeds, and decreed accordingly. E. of Plymouth v. Hickman, T. 1690. 2 Vern. 107. Vide Burko v. Jones, 2 Vce. & B. 281.

529. A devise of lands for payment of debts, shall include debts upon which the statute of limitations has run, equally with other debts; the duty remaining though the remedy be gone. Gofton v. Mill, T. 1690. 2 Vern. 141. Proc. Ch. 9. Gilb. Ch. Rep. 323.

530. Testator devised 5l. per annum to his eldest son for forty years, if he should so long live, and to his second son, whom he made executor and residuary legatee, he devised his real estate in tail, with several remainders over. The executor paid the annuity for twenty years, and then died. Decreed the land should be liable (a) to the annuity, though there were no express words to charge it, the devisee being executor, and the heir, who was disinherited, having no other provision. Elliot v. Hancock, 2 Vern. 148. (a) Vide Clowdale v. Pelham, 1 Vern. 411.

531. A. devised lands to B. in tail; remainder over, and gave his executor power to raise 500l. out of his estate for his next heir, desiring him to see his debts paid. Per curiam, the lands are charged with the debts, and the executor has a power to sell for payment thereof. Wareham v. Brown, T. 1690. 2 Vern. 153.

532. One devised lands to A. for payment of debts, and devised other land, which he had mortgaged to B. and also gave B. his personal estate. Per curiam, B. must take the mortgaged lands cum onere, and though the personal estate was bequeathed to B. and land was devised for payment of debts, yet the personal estate shall be subject to debts. Lovell v. Lancaster, M. 1690. 2 Vern. 183.

533. J. S. by his will devised his lands, to his brother, (who was his heir) in fee, and giving sundry legacies, made his brother executor, desiring him to see his will performed. Per curiam, the lands are liable on the face of the will. The testator need not have devised the lands to his brother, for he was his heir, unless he intended he should take them subject to the legacies, but he is devisee and executor, and is desired to see the will performed, and therefore this is a
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534. Devises of lands to A. for life; remainder to such child or children as should be living at testator's death, and their heirs, A. paying 40l. to B. *Per curiam*, this is a charge not only on A.'s estate for life, but also on the remainder. *Sadd v. Carter*, T. 1691. Pre. Ch. 27.

535. One devised all his goods, chattels, and estate whatsoever, on condition to pay his debts and legacies. These words pass his real estate, he having by will devised a considerable legacy to his eldest son, and other legacies and the surplus of his estate, after his wife's death, to be equally divided between the first four children. *Lunlay v. May*, M. 1691. Pre. Ch. 37. *Vide Trott v. Vernon*, Pre. Ch. 430.

536. Devise to trustees for payment of debts and legacies. The trustees were made executors, and the estate fell short. *Per curiam*, the debts must be first paid, because the trustees being made executors, the produce of the estate, when sold, becomes legal assets. *Greates v. Powell*, M. 1691. 2 Vern. 248. *Vide Anon. 2 Vern. 405.*

537. A. devised the rents and profits of his lands to his wife (whom he made executrix) until his son should attain twenty-one, towards payment of his debts, and if my son die before twenty-one, my debts being paid, then to A. in tail.” The son died before twenty-one, and the profits to the time the son would have attained twenty-one, were not sufficient to pay all the debts. *Per curiam*, it was plainly the testator's intention, that all his debts should be paid out of his lands, therefore decreed that the profits, beyond that time, should be applied to the payments of the debts. *Martins v. Woodgate*, M. 1691. Pre. Ch. 34.

538. A purchased lands of B., and mortgaged back those lands for part of the purchase money, giving a note to B. for the remainder. A. then devised the land to be sold for payment of his debts. *Per curiam*, this note can have no preference, but must be paid in proportion with other debts. *Bond v. Kent*, M. 1692. 2 Vern. 281.

539. Lord G. devised several legacies, and charged them upon his lands, which he also charged with the payment of his debts, and made his lady executrix, but did not give her his personal estate in express words, though it was in proof he declared she should have it. *Per curiam*, as the lands were expressly charged with the payment of the debts and legacies, Lady G. shall have the personal estate exempt, and if she should be sued for any debts, she may be reimbursed out of the lands. *Lady Gainsborough's Ca.* M. 1692. 2 Freem. 188.

540. If a man devises his lands to J. S. and desires that the said J. S. should pay his debts; or if it be, the said J. S. paying his debts; or if immediately after the devise of his lands, he appoints or desires that his debts should be paid; or if he use any expression in his will, whereby it appears that he had any intent to charge his lands with his debts; in such case his land will stand charged.

But in the case at bar, where the testator had, in the beginning of his will said, that he desired that all his just debts should be paid, and afterwards, in the said will, he gave several legacies, and devised lands, it was held that his devise was not charged with the payment of the debts: for if that should be so, the debts of every testator would be charged upon his lands, for there are few wills but have some such expression, whereby testator desires his debts to be paid. *Anon. M. 1693. 2 Freem. 192.*

541. A. devised his lands after debts paid (and then says, my debts are only those contained in the schedule.) A. afterwards contracted new debts. The payment of the first debts is all that is required by the will. *Loddington v. Kime*, M. 1695. 3 Lev. 433.

542. Held *per curiam*, that if a term for years of land be devised to executors, in trust for payment of debts, and all the executors renounce, and will not convey over to others, to the end that they may execute the trust, the trust and the term are both lost. *Anon. M. 1696. A Raym. 740.*

543. Testator being seized of lands, and possessed of goods, devised A. to be sold, and B. to be mortgaged for payments of his debts, but he died so much in debt, that if the whole were sold the produce would only pay the debts with a small overplus, after accounting for the money arising from the sale of the personal estate. Decreed, that all should be sold, that the mortgages and judgments should be first sa-
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tasked, and then the bonds paid, if the the sale, among other sums, to pay 100£,
personal estate should prove sufficient, to the testator's heir at law; but no dis-
otherwise pro tanto, and that so much of position was made by the testator of the
the bonds as should remain unpaid should surplus of his estate. Per curiam, the
come in equally with the simple contract land shall not be turned into personal
debts, and be a charge on the lands, for estate, nor more sold than what is neces-
so to them, bonds have no preference in sary to pay the legacies, and the heir
equity. Bonds certainly have a preference shall have the surplus. Randall v. Bookey,
to goods and chattels, because the E., 1701. 2 Vern. 425. Pre. Ch. 162.
executor is bound by law to prefer to 2 Ch. Ca. 115. 121. Vide Cordell v. Nor-
1 P. W. 679. It was ruled, that an estate, 171. City of London v. Garway, 2 Vern.
devised in fee, should not be charged 571. Hobart v. Lady Suffolk, ibid. 644.
with a legacy, where the personal estate Starkey v. Brooks, 1 P. W. 390. Farring-
was exhausted by a specialty debt. And ton v. Kelghley, ibid. 550. Cruse v. Bailey, 3 P. W. 22. Stonehouse v. Evelyn,
see Mr. Cox's note to that case. ibid. 252. Hill v. Bp. of London, 1 Atk.

544. One devised his real estate for 620. And cont. Coningham v. Mellish, payment of his debts, and the overplus Pre. Ch. 31. and references.
he gave to his sisters, and bequeathed the personal estate to his wife, whom he
made his executrix. Per curiam, the A. devised all his real and personal
wife shall have the personal estate exempt estate for payment of his debts and
from debts, for the debts amounted legacies, and died. A creditor obtained
to more than the personal estate, therefore, judgment against the executor, and then he
if the testator did not mean his wife joined other creditors who had not obtained
should have it exempt, he could mean judgment, in obtaining a decree for
nothing. There is no room in this case a sale, and to be paid in proportion. The
to make a different construction. Bam- judgment creditor had received several
field v. Wyndham, M. 1699. Pre. Ch. 101. dividends, after having proved his debts
Vide Gower v. Mead, Pre. Ch. 2, and before the Master, and then he petitioned
references. Wainwright v. Bendlowes, ibid. for a re-hearing, pretending, that as a
451. Dollam v. Smith, ibid. 456. The judgment creditor had received several
Samwells v. Wake, 1 Bro. C. C. 145. dividends, after having proved his debts

543. Lands were devised to A. to be before the Master, and then he petitioned
sold to pay debts and legacies, and A. for a re-hearing, pretending, that as a
was made executor. Per curiam, the judgment creditor, he ought to have a
money raised by the sale is legal assets, preference, at least out of the personal
and the debts must be first paid, and estates; but the other creditors having
otherwise if the devisee had not been joined in the bill, and contributed to the
made executor. Anon. M. 1700. 2 Vern. charges of the suit, and the dividends
405. Vide Graves v. Powell, ibid. 248. having been made pursuant to the decree,
Hixon v. Witham, 1 Ch. Ca. 248. The court would not alter it: and held
Edwards v. Graves, Hob. 265. 1 Rol. Ab. that if any preference were to be, plain-
tit. Executor, 920. tiff ought to bring what he had received

456. Lands were devised to be sold into hutch-pot, and to take either all law
for payment of debts. They may be or all equity. Shepherd v. Kent, E. 1702.
decreed to be sold for that purpose, with Pre. Ch. 190. 2 Vern. 435.
out giving an infant heir a day to show Decreed, that the heir should
cause when he comes of age, for by the pay his debts by a certain time, or in
device of the land there is nothing to de- default thereof the real estate should be
scend to the heir, therefore an immediate sold, and liberty given to the heir to am
sale may be decreed; but if the heir be for the personal estate. Stydolph v. Lang- decreed to join in the sale, then he must
ham, H. 1705. 14 Vin. Ab. 285. pl. 16. have a day after he comes of age to show

547. Lands were devised to trustees to sell, and out of the money arising by

540. A. by will subjected both his real
and personal estates to the payment of his debts. Decreed, that the heir should
pay his debts by a certain time, or in
default thereof the real estate should be
sold, and liberty given to the heir to am
for the personal estate. Stydolph v. Lang-
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college. It appeared by parol evidence, that the brother promised the testator he would pay the annuity, and that the testator would otherwise have charged his real estate therewith. Decreed, that the real estate should be charged with the annuity. Oldham v. Litchfield, T. 1705. 2 Vern. 506. Vide 2 Freem. 234. 2 Eq. Ab. 44. pl. 8. S. C. nomine Oldham v. Litchford, thus stated:—It is there said, that testator was making his will, and was directing an annuity of 40l. to be paid to plaintiff by defendant; that defendant requested him to omit the legacy, under a solemn promise he would see it paid, and that thereupon it was omitted. It is stated that Mr. R. decreed the annuity should be a charge on the real estate; (a) Ld. Keeper, however, on appeal, though he decreed payment of the annuity, would not charge it on the land; but M. R. being in court, said, the maintenance of a poor scholar was a charity within 43 Eliz. and he thought it might amount to an appointment within that statute, upon which reasoning his Honour said he made his decree. (a) Vide Lord Thurlow's judgment in Pember v. Mother's, 1 Bro. P. C. 54. In Whithorne v. Rossell, 12 Goo. 2. Ld. Hardwicke said, Vernon did not give the reasons upon which the court went, but perhaps they looked upon the promise of the executor as a confession of assets.

551. A., by will, charged his real estate with the payment of his debts, legacies, and funeral expenses, and devised to his wife, (whom he made executrix,) all his personal estate not otherwise disposed of. Decreed, the personal estate to be applied in ease of the real, there being no words in the will to exempt the personal estate from the debts, and the wife taking the personal estate as executrix. French v. Chichester, H. 1706. 1 Vern. 568.

552. A. devised the residue of his real and personal estate to his executor in trust to sell, or so much thereof as should be needful, for the payment of his debts and legacies: Held, that this was intended as a beneficial devise to the executor, and parol evidence was admitted to prove such intention. Docksey v. Docksey, H. 1710. 1 Bro. P. C. 324.

553. It was agreed by the court and bar, that the cases wherein the personal estate has been applied to exonerate the real, are only where there is no express exemption of the personal estate by a charge on the real estate, or a devise of freehold lands for payment of debts; in the latter cases the real estate so subject shall not be exonerated by the personal. Hall v. Broker, M. 1710. Gib. Eq. Rep. 72.

554. So if any particular part of the personal estate be bequeathed to an executor, such particular legacy not being cast upon him by the law, shall not come in aid for payment of debts, but he shall be chargeable only in respect of the surplus. S. C.

555. A. devised to his wife a rent-charge of 200l. for thirteen years, in trust, nevertheless, for the payment of his debts and legacies: he also devised to her certain lands, in augmentation of her jointure. The surplus of this rent-charge, and after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. Wych v. Packington, T. 1712. 1 Bro. P. C. 372.

556. H. being seised in fee, and indebted by bonds, gave legacies to children, (for whom he had otherwise provided,) and devised his lands to his eldest son in tail. The eldest one (who was also executor) paid the bond debts out of the personal estate, and there not being assets to pay the legacies, the legatees brought their bill to recover out of the real estate. Ld. Keeper admitted, that if the lands had descended, the legatees might have been relieved, (a) but as the testator had devised the lands they ought to be exempted. His Lordship, however, ordered precedents to be searched, whether a legatee ever had relief against an heir in such a case. (b) Herne v. Meyrick, T. 1712. 1 P. W. 201. Salk. 416. (a) Vide Anon. 2 Ch. Ca. 4. Culpepper v. Aston, ibid. 117. Clifton v. Burt, 1 P. W. 678. Tipping v. Tipping, ibid. 730. Lucy v. Gardner, Bumb. 137. Haslewood v. Pope, 3 P. W. 324. Latkins v. Leigh, Ca. temp. Talb. 53. Note. In Clifton v. Burt, 1 P. W. 678 the decretal order in this case was produced, by which it appeared that Ld. Harcourt did not determine this case, but adjourned it for further consideration.—(b) In Scott v. Scott, Amb. 383. It seems admitted that a legatee cannot have relief against an heir in such case. Vide Clifton v. Burt, for a note of the cases on this subject by the learned Editor, Mr. Cox.
557. Bill for specific performance of an agreement for the purchase of lands, against the heir and executors of A., to whom lands were devised for payment of debts. Cross-bill by the heir against the executors for an account of the personal estate of testator, to be applied in aid of the real estate devised to be sold for payment of debts. Testator devised particular lands to his executors, to be sold for payment of all his proper debts, and made A. and B. executors. Decreed, that the executors account for the personal estate of testator; for that is liable to debts in aid of the real estate, and since the personal estate is not sufficient to pay off the debts, the lands must be sold to pay the residue of the debts, and the surplus of the money raised by the sale, after debts paid, to go to the heir.

Gale v. Crefts, M. 1713. 4 Vin. Ab. 468. pl. 11. 2 Eq. Ab. 494. pl. 9. See Lady Gainsborough’s Ca., Hungerford’s Ca., Cook v. Moor, all in Dom. Proc. Chwist’s Hosp. v. Garraway, Hule v. Hale, both in Chan. temp. Cowper, C. cited for the basis at law, to prove, that where there are no negative words in the will, an express devise of all the personal estate to the executors does not exempt the personal estate from payment of the testator’s debts; though there be a devise of lands for payment of debts.

558. A. raised in fee, and possessed of personal estate, made his will as follows: “I will and devise, that all my debts, legacies, and funeral charges, shall be paid and satisfied in the first place.” Item, “I give and devise,” (a) and he then proceeds to dispose of his real and personal estate. The personal being insufficient, quere, whether the clause in the will should amount to a charge on the real estate? Ld. Ch. was of opinion it should, for the personal estate was in all events liable; and when testator wills and devises, that his debts, &c. shall be paid in the first place, these words must be intended to give a preference to every other purpose, since he does not devise his real or personal estate to any person in particular; for these purposes the persons who come within that description must be supposed to be within his view, and it must be taken as a devise for their benefit, preferable to any other disposition, either of his real or personal estate, and consequently both of them are liable.


559. A. devised 500l. a-piece to his three daughters at 21, or marriage, to be paid out of his stock, and devised the rents of his real estate to his wife for life, in lieu of dower, and for the maintenance of his children, and towards making up their portions, and after his debts and legacies paid, he devised the lands to his son, who, together with his wife, he made executors; the stock was but of 100l. value, the wife being dead, and the two eldest daughters having had their portions paid them: Held, that the lands were liable in the hands of the son to the youngest daughter’s portion.


560. N. B. by his will devised thus: “I do, by this my will, dispose of my worldly estate; first, I will that all my debts be paid and discharged, and out of the remainder of my estate I give my wife 500l.; my mind and will is, that my wife have one moiety of what is left after my debts paid.” Testator then gave a close in D. to B. B. his brother, and for the remaining part of his estate, as well real as personal, he gave the same to his brother, J. B., whom he made executor.

Per cur., “worldly estate” comprises all that a man had in the world, as well real as personal; those words subject the real estate to debts, and a moiety of what is left after debts paid must comprise all that was liable to debts: Decreed, a moiety of the surplus of the real and personal estate to the wife.


561. A. directed his debts and legacies to be paid out of the rents of his real estate, and that his executors should receive the rents, till his nephew came to 25, and then that they should pay the surplus of such rents to him, to whom also he gave the surplus of his personal estate. The nephew died a minor, and his mother administered to his effects:
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the question then was, whether the residue of the personal estate belonged to the administratrix, exempt from debts and legacies, or if the personal estate should be first applied; notwithstanding the express charge on the real estate. Ld. Ch. thought the personal estate was to be first applied, in ease of the real. 1st. Because there was no express clause to exempt the personal estate, (a) and that had been. the distinction always taken in equity. 2dly. The testator throughout had carried a very frugal intention, for the heir of the family was not to have so much as the rents and profits of the real estate, until the age of 25. It cannot be considered that the testator intended indefinitely to trust his nephew with the personal estate, without limitation to any age, or that he could have had such a frugal intent, with regard to the real estate, and such a loose one, with regard to the personal, when both of them were intended to go to the same person. If the personal estate had been bequeathed to a stranger, it might have had another consideration, but here it cannot: Decreed, the personal estate to be subject in the first place to the debts and legacies. Dolman v. Smith, 11716. 2 Vern. 740. Pre. Ch. 456. Gilb. Eq. Rep. 123. Vide Gower v. Mead, Pre. Ch. 2. Bamfield v. Wyndham, ibid 101. Howell v. Price, ibid. 423. Webb v. Jones, 2 Bro. C. C. 60. Vide Feltham's Ca. 1 Lev. 205. For the authorities pro and con on the doctrine of this subject, vide Mayer v. D. of Ancaster, 1 Bro. C. C. 454.

563. A man made his will thus, "as to the disposal of my worldly estate, I give and devise, &c."

and devised
his lands to B, his eldest son in tail, remainder to his three other sons in tail male successively, with remainder to his own right heirs; and he devised copper mines, and other estates to B, his eldest son, to be sold for payment of his debts; and he gave his daughter 1500l. to be paid by B., within three months after her marriage, and made B. his executor, and died. The personal estate falling short, a question arose, whether the testator's lands should be charged with this legacy. Ld. Ch. thought the lands were not charged, but ordered precedents to be searched, and in the mean time directed an account of the personal estate to be taken before the master. Ld. Pursell v. Parry, M. 1716. Pre. Ch. 450. Vide Clowdale v. Pelham, 1 Vern 411. Alcock v. Sparkw. 2 Vern. 228. Halsewood v. Pope, 3 P. W. 323. Lypot v. Carpenter, 1 Vern. 500, in which cases the lands were charged. Et vide cases Davis v. Gardiner, 2 P. W. 187, where the court decreed the lands not charged.

564. T. B. by will, devised lands to A. for life, remainder to B. for life, remainder to the heirs male of the body of C. testator's father. A. directed that his household goods at L. should go along with his house there, for the benefit of his heirs. The residue of his lands, testator devised to D. and E., to be sold for payment of his debts, and the surplus to be divided between D., E. and B., and the residue of the personalty, testator gave to his sister, whom he made exe-
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But for a sale of testator's trust estate for payment of his debts. *Per* *Ld. Ch.*, it appears the testator intended a beneficial legacy to his executrix; and as money devised to be laid out in land, is considered in equity as land, so land devised to be turned into money, must be considered as money. In this case, testator seems to have rejected his land, by directing it to be sold, it must therefore be looked upon as if sold by him in his lifetime. The same law which gives land to the heir, gives personal estate to the executor, or next of kin, and they are equally entitled to the favour of the law. *Decreed*, the executrix to take the personal estate, discharged from the testator's debts. *Hayford v. Benlows*, M. 1716. *Amb. 581*.

565. A. conveyed all his lands to trustees, in trust, to pay his debts and legacies, and by his will gave all his personal estate to his wife, whom he made executrix: Held, that the security upon the lands did not discharge the personal estate, but that the same still continued liable, and ought to be taken in aid of the real estate. *French v. Chichester*, II. 1717. 1 *Bro. P. C. 192*.

566. "As to all my worldly estate, I give and dispose thereof in manner following:" and then the testator gave several pecuniary legacies, and several annuities for lives, to be paid by his executor, and next he devised all the rest and residue of his goods and chattels and estate, to his nephew, M., (defendant, and heir at law to testator,) and made him sole executor. *Note*, there was an express devise in the will, to a relation of the testator. The question was, if the real estate be chargeable with the legacies and annuities, in default of the personal estate? and *Cowper*, C. was of opinion, that by the devise of all the rest and residue of his goods, chattels, and estate, all his lands did pass to his executor; and that he took by the will, and not by descent, as heir at law; and that the lands so devised to him, were chargeable with the pecuniary legacies and annuities, when the personal estate fell short to satisfy the same, and decreed accordingly. *Aubrey v. Middleton*, M. 1717. 4 *Vin. Ab. 460.* pl. 15. 2 *Eq. Ab. 497.* pl. 15. *Ld. Ch. observed*, that it was clearly the testator's intent, that these annuities and legacies should be paid, and said he would endeavour to support the plain and express intention; that it was also certain, from the whole frame of the will, that testator meant to dispose of all his real and personal estate, for he begins, "as to all my worldly estate, &c." and then comes lastly a clause as to all the rest and residue. The words "rest and residue" may here have some stress laid upon them, and seem to refer to the introductory clause in the will, which certainly extends to lands, and will bear a larger construction by reference to the first clause. *Vide* *Bench v. Biles*, 4 *Madd. 187*.

567. J. S. seised of lands in fee, in consideration of 300l. by lease and release, conveyed the same to R. in fee, with a covenant for quiet possession, and that they were free from incumbrances. In the release there was a proviso for re-entry on re-payment; but there was no covenant for payment of the 300l. J. S. continued in possession, and paid the interest to R. as it became due. J. S., upon his marriage, settled these lands on his wife, and the issue of that marriage, and covenanted that it was free from all incumbrances, except R.'s mortgage. Afterwards J. S. made his will, and thereby gave several legacies; and all the rest of his goods and chattels he gave to his wife and daughter, whom he made his executrices, and appointed them to pay his debts. J. S. died, leaving the said daughter, who was his only child, who, dying within age, plaintiff became heir at law to J. S., and brought his bill against J. S.'s widow, to have the personal estate applied in exonerarion of the said land. *Cowper*, C. was clearly of opinion, that the land was conveyed by J. S. to R. as a mortgage, because J. S. had, by the proviso, reserved to himself, his heirs or assigns, a power of redeeming, and laid upon his marriage settled the lands as his own, and in the marriage deed called the land conveyed to R. a mortgage; and he was of opinion, that the rents and arrears expressed in the proviso, signified the interest of the 300l. and said, that the word "rent," taken in its largest sense, was not improperly used to denote interest. *Decreed*, that the personal estate should be applied to the exonerarion of the real. *Mr. Viner says*, several precedents were cited, where only real estates were charged, and yet the personal estates given to others had been applied to the discharge of the real.
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Powel v. Price, M. 1718. 4 Vin. Ab. 468, pl. 12. 2 Eq. Ab. 498. pl. 17. Ld. Ch. said, that J. S. appointing his executrix to pay his debts, was a proof that he designed her to pay his debts in exoneration of the inheritance, for the redemption whereof he had so large a power by the proviso, and the personal estate is not discharged by its being given to the heir, because it was given to her jointly with the wife. Upon which reason he seems to have founded this decree.

568. J. S. by will devised his lands for the payment of his debts: Held, that bonds and simple contract debts, shall be paid equally; but if by will he only charges his lands with the payment of his debts, so that the lands descend charged with the debts, and consequently are legal assets by descent as to the bond-creditors, and charged only in equity by the will as to simple contract debts, the bonds shall be preferred before the simple contract creditors. But if the heir sells the lands before action brought, then both are to be paid equally. By the statute of fraudulent devises, a will for payment of debts or younger children's portions, according to an agreement before marriage, shall be good. Freemout v. Dedire, E. 1718. 1 P. W. 430. See the distinctions taken between legal and equitable assets, in Deg. v. Deg. 2 P. W. 415. post. pl. 570.

569. J. S. by will devised her lands to her heir at law, but charged the same with the payment of her legacies above mentioned. Afterwards, by a codicil, she gave other legacies to some of the same persons as were legatees under her will, but that codicil was not attested, and her land could not be charged thereby. Both the real and personal estates were insufficient to pay the legacies. Upon a bill by the legatees for their claims, his Honour decreed, that the personal estate being inadequate, and the real estate being liable to the legacies by the will, though not to those by the codicil, the estate should be so marshalled, that the whole will might take effect, and the legacies be paid. (a) And, therefore, that the legatees in the will should be paid out of the real estate, and if that be inadequate, they must go in average with the legacies in the codicil, and be paid out of the personal estate. A deficiency being admitted, his Honour directed the estate to be sold to prevent a greater deficiency, but the specific legatees not to abate in proportion. His Honour further decreed, that the real estate being charged by the will with the legacies above mentioned, that charge could not extend to the legacies in the codicil, (b) but if the real estate had been charged with the payment of the legacies in general, it would have taken in those in the codicil, which were as much as those mentioned in the will. (c) Masters v. Masters, E. 1718. 1 P. W. 421, 422. (a) Vide Hyde v. Hyde, 3 Ch. Rep. 85. Bligh v. E. of Darney, 2 P. W. 820. (b) Vide Hone v. Medcraft, 1 Bro. C. C. 261. (c) Vide Hyde v. Hyde, rep. Brandenell v. Boughton, 2 Atk. 266. Hannis v. Packer, Amb. 556. Windham v. Chetwynd, 1 Burr. 423. and Jackson v. Jackson, T. 1788. 2 Cox. 35. 4 Bro. C. C. 466. where G. J., by will, gave a number of legacies, and at the end of his will made a general devise of all his real estates, "subject to, and charged with his debts and funerals, and also the said therein before-mentioned legacies," to trustees in trust, to receive the rents and profits, and to apply the same, or a competent part thereof, "subject, nevertheless, to his debts, funerals, and legacies," in manner therein mentioned. The will was duly executed. Afterwards the testator wrote another instrument in his own hand, without date or signature, which began, "This is the last will and testament of me, &c." and he thereby charged his real estates with the payment of the legacies therein after given, and then gave several legacies, many of which were given to persons who were legatees in the first will. The spiritual court granted probates of both these instruments. Mr. Justices Buller determined, that the legacies in the second instrument only, were to take effect, notwithstanding both had been proved, but that upon a true construction of the first instrument, it amounted to a general charge of legacies on the real estate, which would include the legacies given by the second.

570. One borrowed money during his infancy, and applied it to the buying of necessaries. (a) After he came of age, he devised his lands for payment of his debts; this debt, contracted during infancy is within the trust, for the lender of the money stands in the place of the person paid. (b) Marlow v. Pitfield, T. 1719. 1 P. W. 558. (a) An infant
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573. I. S. possessed of a term for years, devised it to A. and made B. his executor, and died, leaving some debts. B. sold this term to C. Decreed, that C., the purchaser, shall hold it against the devisee. Secess, if it had been sold at an under value, or if the purchaser had known that there were no debts, or that the debts were or could be paid without breaking in upon this specific legacy.—Esther v. Corbet, T. 1723. 2 P. W. 148. Vide Burling v. Stonard, 2 P. W. 150. Nugent v. Giffard, 1 Atk. 463. Elliot v. Merriman, Barn. 78. 2 Atk. 41. So, although the term be sold in satisfaction of the private debt of the executor; vide Nugent v. Giffard, supra. Mead v. Ld. Orrery, 3 Atk. 235. Ithell v. Beane, 1 Ves. 215. Unless the purchaser appeared to collude with the executor, as in Crane v. Drake, 2 Vern. 616. This point also came in question in Scot v. Tyler, 2 Bro. C. C. 431. Farr v. Newman, 4 T. R. 621. Andrew v. Wrigley, 4 Bro. C. C. 125.

574. "As touching all my worldly estate, I dispose of the same as follows: Imprimis, I will that all my Just debts be paid and satisfied." It was argued, that it is a general preface for a testator to make a general disposition of his real and personal estate, as is mentioned after in the will; that it is an independent clause, and means only an intention of a general disposition. Testator afterwards devised, his freehold and copyhold estate to his son and his heirs, when he should come to 21, paying his wife 100l. a year for her dower in the mean time. After 100l. per annum to his wife for dower, the rest of the profits to be put out for the
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benefit of all his children, but no provision for debts. It was insisted, that if a man devises lands after debts paid, that is a charge; but decreed, that this was not a charge of debts upon the real estate. *Borton v. Wilcock*, T. 1723. 4 Vin. Ab. 463. pl. 19. 2 Eq. Ab. 499. pl. 23.

575. "As for (and) concerning my estate with which God hath blessed me, I give as followeth: *Imprimis*, I will, that all my debts and funeral charges be paid and satisfied;" and then test: or makes a particular disposition of the estate. Decreed this to be no charge, as it would have been, where testator says, "I will my debts be paid in the first place," or where he gives away the estate, after payment of debts and legacies; for here was a clause in the will, that after payment of legacies and funeral charges, the surplus was to go to such and such uses, which declare the intention to be, that the same was to answer only legacies and funeral charges, and not debts. *Parker v. Wilcox*, T. 1723. 8 Vin. Ab. 439. pl. 25. 2 Eq. Ab. 371. pl. 16.

576. One seized in fee, and indebted by bond, in which his heirs were bound, devised his lands to A. for life, remainder to his first, &c. son in tail, remainder over. On a bill brought by the bond creditors, the court would not decree the devisee for life to account for the profits, but only to keep down the interest; but the court will decree a sale to satisfy the bonds, though the lands be not devised for payment of debts. *Manaton v. Manaton*, T. 1724. 2 P. W. 234.

577. I. S. seized in fee of lands, devised the same to his wife, and to her heirs and assigns for ever, to be sold to pay his debts and legacies, in aid of his personal estate. But the personal estate being sufficient to discharge all his debts and legacies, and the real estate not being sold, the court was of opinion, that, where lands devised *at supra*, and the lands are not sold, for that the personal estate is sufficient to discharge the whole debts and legacies, it is plainly an implied trust in the devisee for the heir, and he is entitled to come into this court to have a reconveyance, and an account of the profits. (a) *Buggins v. Yates*, H. 1725. 9 Mod. 122. Where a devise of lands is to trustees and their heirs, for payment of debts and legacies, there is a resulting trust for the heir, and he may properly come into court, and offer to pay the debts and legacies, and pray a conveyance of the whole estate to him, for the devisees are only trustees for testator, to pay his debts and legacies. *Vide Roger v. Radcliffe*, 9 Mod. 171. This is a privilege which has always been allowed in equity to a residuary legatee; for if he comes into court, and tenders what will be sufficient to discharge all debts and legacies, or prays that so much of the lands, and no more, may be sold, than what will raise money to discharge them, this is always decreed in his favour. (a) *Vide Massey v. Sherman*, Amb. 320. *Wynne v. Hawkins*, 1 Bro. C. C. 179. *Nowlan v. Nolan*, ibid. 491. *Rogers v. Rogers*, 3 P. W. 193. *Pre. Ch. 81*. 1 Bro. C. C. 66. *Bicknell v. Page*, 2 Atk. 79. *Galton v. Hancock*, ibid. 438. *Walker v. Jackson*, ibid. 675. *Haslwood v. Pope*, 3 P. W. 325. *Bridgman v. Dove*, 3 Atk. 202. *Samwell v. Wake*, 1 Bro. C. C. 144. *Chitty v. Parker*, 2 Ves. jun. 271.

578. One seized in fee of lands, and possessed of a personal estate, by will directed that his legacies be paid out of his real estate; and gave his personal estate to his children. *Per M. R.* If the legacies had been only charged upon the real estate, yet the personal estate should be first applied to pay them, and so should it have been against a residuary legatee; but in this case the real estate being the fund appointed, and the whole personal estate (a) given away by the will, the legacies must be paid out of the real estate only, but the debts shall still be paid out of the personal estate, the will not ordering the debts to be paid out of the real. (b) *Heath v. Heath*, T. 1726. 2 P. W. 366. (a) *Haslwood v. Pope*, 3 P. W. 324. (b) *Thomas v. Britnell*, 2 Ves. 313.

579. If a devise be to executors of an equity of redemption only, this is but equitable assets, and to be applied to pay all sorts of creditors equally. (a) A devised all his real and personal estate to his executors and their heirs, in trust to sell and pay all his debts; his real estate being only equitable assets, and the testator leaving debts by bond and simple contract, if the bond creditors are paid part out of the personal estate, they shall bring it back again into hotch-pot; (b) if they would be paid any thing out of the real estate. The testator’s heir at law (in this case) was a creditor, (c) and opposed the will as to part of the lands de-
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vised for payment of debts, and which
testator had no power to devise, yet he
was not by this excluded from being let
into the residue of the fund given by tes-
tator for payment of debts. **Deg v. Deg,**
T. 1727. 2 P. W. 416. One branch of
this case seems to be reported in Sel. Ch.
Ca. 44. and 2 Eq. Ab. 673. pl. 10. nom.
Degg v. E. of Macclesfield. (a) Vide the
case of Sir Charles Cox's creditors, 3 P.
W. 341. But from the manner in which
the case of Deg v. Deg is mentioned by
M. R. in Chambers v. Harvest, Mos. 132.
and Hall v. Kendall, ibid. 328. it
seems not to have been decided on the
ground of the premises devised being an
equity of redemption, but upon the prin-
ciple mentioned in the following note.
Upon the principle of law, that whatever
comes to the hands of a person in the
character of executor, or by reason of his
executorship, should be assets in his
hands (according to Alexander v. Lady
Gresham, 1 Lay. 224. and Detbick v.
Carraun, Hurd. 405.) the generality of
the old cases determined, that money
arising by sale of lands devised to, or
subjected to the power of executors to
sell for payment of debts and legacies,
should be legal assets in their hands, (al-
though they could not be charged with
the value of the lands before sale.) Gir-
ling v. Lee, 1 Vern. 63. Hawker v. Buck-
land, 2 Vern. 106. Geaves v. Powell,
Ch. 127. Anon. 2 Vern. 405. Bickman
v. Freeman, Pre. Ch. 136. Walker v.
Moager, 2 P. W. 552. Ld. Masham v.
Hurdiang, Bubn. 359. Blatch v. Wilder,
1 Atk. 420. Yet some of the old cases,
considering the devisee, &c. in the
double character of trustee and executor,
preferred the former, and consequently
made the assets equitable. Hickson v.
Witham, Finch 196. Anon. 2 Vern.
133.; and the latter cases incline strongly
to this construction. Chambers v. Har-
328. Prowse v. Ahingdon, 1 Atk. 484.
Lawin v. Oakley, 2 Atk. 50. Silk v.
Prime, 1 Bro. C. C. 138. (n.) Barker v.
Boucher, ibid. 140. (p) Newton v. Ben-
nett, ibid. 135. Batson v. Lindegreen,
2 Bro. C. C. 94. Still, however, it
seems that where an estate descends to
the heir, charged with the payment of
debts, it will be legal assets. Fre-
moult v. Dediere, 1 P. W. 430. Plunk-
ett v. Fenson, 2 Atk. 290. (b) Vide
Bailey v. Ploughman, Mos. 95. decided
on the authority of Deg v. Deg. So
Haslwood v. Pope, 3 P. W. 328. Mor-
220. (c) If the son had been a volun-
teer only (and not a creditor) he should
have been put to his election. Noys v.
Mordaunt, 2 Vern. 581. Stratefield v.
Streatfield, Ca. temp. Talb. 176.

580. If an estate is devised in trust to
pay debts, the heir must account from
the filing of the bill. Chambers v. Har-

581. Equity will supply the want of a
surrender of a copyhold, in case it be
designed for payment of debts, or to a
wife, or for younger children unprovided
for. Tollef v. Tollef, M. 1728. 2 P.
W. 490. Vide Watts v. Bullas, 1 P. W.
60. Chapman v. Gibson, 3 Bro. C.
iii.

582. I. S. by will settled his land for
payment of debts, and made M. his wife
executrix, and devised all his personal
estate to her, and, by subsequent clauses,
gave several specific and pecuniary le-
gacies to her and died. Adjudged, that
M. took the personal estate, not as a leg-
gatee, but as an executrix, and so the
same, after legacies paid, shall be applied
to discharge the real estate in favour of
the heir. Lucy v. Bromley, H. 1729.
Fitzg. 41. Bubn. 260. by whom the case
is thus stated: A by will charged his
real estate with payment of his debts,
funerals, and legacies, and gave to M. his
wife, 1000l., and his house in R., with the
use of the goods therein for life, &c. and
after other legacies, testator concluded
his will, and made his wife sole execut-
rix of his will, and of all his goods,
chattels, and arrears of rent not before
given or limited in his will. Per cur.
the personal estate in the hands of M.
ought to be applied to pay debts in case
of the real estate. *Note.* It was insisted
that making M. executrix of particulars,
amounted to no more than making her
executrix in general. But per Pengelly,
C. B. if the words "to her own use," had
been added, or such like words, it might
have given some cause of doubt.

583. A. B. began his will thus: "As
to such effects wheresof God has ap-
pointed me steward, I charge the same
with the payment of all such debts as I
shall owe at my death, and also with the
several legacies hereinafter bequeathed;"
and after giving some legacies, he devised some copyhold lands (duly surrendered) "to his eldest son and his heirs, subject to and charged with all his just debts, and the several legacies thereinbefore bequeathed," and made his said son executor, who proved the will, and died: On a bill by the creditors against the son's representatives, an account of assets was decreed, and all further directions reserved. It appeared on the master's report, that great part of the personal estate had been wasted by the executor, and the rest applied in payment of some debts, and that the copyhold had been sold to pay off a mortgage thereon, and the remainder of the money arising by the sale was not sufficient to pay the debts and legacies. The question was, whether the creditors should have a preference, or whether the creditors and legatees should be paid pari passu? Per Ld. Ch. the words "and also" are not material, but it is most so that the devise is to the executor, which must be taken to be a devise to him to enable him to pay testator's debts and legacies, and this is assets, and whether legal or equitable assets it is the same thing, for equitable assets in the hands of the executor (a) must be applied as legal assets are, first, to pay debts, and then legacies; indeed, if this were a bare trust (b) to pay debts and legacies, it must be otherwise, and the legatees might then have a right to be paid equally. Decreed, the unsatisfied creditors to be paid out of the remainder of the money arising by sale of the copyhold estate in the first place. Walker v. Meager, T. 1729. 2 P. W. 550. Mos. 204. (a) Vide Deg v. Deg, 2 P. W. 416. (b) Quaere autem, whether it is not the practice, in case of a trust for payment of debts and legacies, to prefer the former? Et vide Greaves v. Powell, 2 Vern. 248. Sic Bradgate v. Ridlington, Mos. 56.

584. A. was principal in a recognisance for 5000L, and B. and C. were sureties. A., before marriage, jointured his wife in some lands, without notice either to the wife or her friends of this recognition, and devised his real and personal estate to B. one of his sureties, and died; first, the personal estate of A. the principal, shall be applied towards satisfying this recognition, then his lands devised, the devisee being a volunteer; next, the paraphernalia of the wife of A., and lastly, the two sureties shall contribute to make up the deficiency. Tynt v. Tyat, T. 1729. 2 P. W. 542. As against real assets descended, it seems, upon the authority of Tipping v. Tipping, 1. P. W. 730. the wife shall stand in the place of creditors for the amount of her paraphernalia. So Nelsen v. Corbet, 3 Atk. 369. Graham v. Londonderry, ibid. 393. Sed quaeris as against real assets devised; et vide Probert v. Clifford, Amb. 6. Vide etiam Inelsey v. Northcote, 3 Atk. 348. contra.

585. Where there are several devises of land charged with debts, the creditors cannot be paid until the master has certified what each devisee shall contribute; but a creditor may proceed against any one devisee for the whole. Harris v. Inlets, H. 1730. 3 P. W. 93. 98.

586. One devise all his real estate in trust to pay all his debts; the bond creditors recover part of their debts out of the personal estate; the simple contract debts shall be equally paid out of the real estate with the bond debts, and the bond creditors shall have nothing thereout until the simple contract creditors shall have received as much from the same as shall make them equal in payment with the bond creditors. Haslewood v. Pope, T. 1734. 3 P. W. 323. Vide Deg v. Deg, T. 1727. 2 P. W. 416. Car v. Lady Burlington, T. 1713. 1 P. W. 228.

587. On a devise of lands to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors exhaust the personal estate. Haslewood v. Pope, sup. 588. If one owes debts by bond, and devises his lands to I. S. in fee, and leaves a specific legacy, and dies, and the bond creditor comes upon the specific legacy for payment of his debt, the specific legatee shall not stand in the place of the bond creditor to charge the land, because the devisee of the land is as much a specific devisee, as the legatee is of a specific legacy. S. C. Et vide Clifton v. Burt, 1 P. W. 673.

589. One devise all his personal estate to his daughter, and all his real estate to trustees, in trust to pay debts, &c. remainder to his daughter in tail, remainder over; the personal estate shall, in the first place, be applied to pay his debts, for the personal estate is the natural fund. (Vide Knight v. Knight,
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590. A. by will gave his wife B. an estate for life, and in the latter part created a trust term for payment of debts, to take place from the day of his death. This term shall take place of the wife’s life estate, especially as it is a trust term for raising money, and it is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent. Ridout v. Dowding, T. 1737. 1 Atk. 419. Vide Uvedale v. Halfpenny, 2 P. W. 151. Worsley v. Granville, 2 Ves. 383. Brown v. Jones, 1 Atk. 188.

591. A. devised his real and personal estate to be sold for payment of his debts, and appointed B. executor. The personal estate not being sufficient, the creditors brought their bill to be paid out of the real estate. Decreed, a sale of the freehold and copyhold estates, and that the heir and executors, and all proper parties should join in the sale. Blatch v. Wilder, T. 1738. 1 Atk. 420. As to the question, whether money in the hands of an executor, arising from the sale of estates, be legal or equitable assets, vide S. C. ante, itit. Devise, sec. ii.

592. It is a certain rule in equity, that where an estate is charged with an incumbrance, or payment of debts, and after such payment the surplus is given over, the whole property vests in the residuary legatee. Hawkins v. Chapple M. 1739. 1 Atk. 622.

593. Testator devised all his real estate to trustees, upon trust to sell a competent part, and, in the first place, pay and discharge all his debts and legacies; and next to reimburse themselves the cost of the trust, and after such payments to settle such parts as should remain unsold, as therein mentioned; and he declared, that the whole money to be raised by such sale, should be deemed and taken to be part of his personal estate; and then he gave all the residue of his personal estate, of what nature and kindsoever, after payments of his debts, &c. to A. — The personal estate, under these directions, must be applied, in the first place, in or towards payment of the debts and legacies. E. of Ingham v. French, H. 1745. 1 Cox 1. Amb. 35. Vide Halewood v. Child, Forr. 234.

594. Devise to trustees, from and immediately after the determination of precedent estates, to the use of A. in fee, charged and chargeable with legacies, to be paid within twelve months: Held, that the legacies run over all the precedent estates, as well as the fee. Carter v. Carter, M. 1748. 1 Ves. 168.

595. Devise of real and personal estate to trustees, in trust to pay certain annuities and legacies out of the rents and profits of testator’s personal estate, and if not sufficient, then out of the rents and profits of his real estate: Held, the trustees took the inheritance, and not a chattel interest in the estate. Gibson v. Rogers, T. 1750. Amb. 93.

596. The court will go so far as it can to attain the payment of debts; and real estate where charged, is affected by equitable, as well as by other debts. Astley v. Powis, T. 1750. 1 Ves. 483, 495.

597. Devise of land charged with payment of debts; if the devisee has sold, pending a suit for sale and payment of debts, such an alienation is void. Walker v. Smallwood, M. 1768. Amb. 673.

598. Testator devised the residue of his real estate to D. and E. for payment of his debts, and gave the residue of his personal to his sister, who made sole executor. The real estate shall exonerate the personal from payment of debts. Hayford v. Benlowes, M. 1769. Amb. 581.
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699. Bill by a tutor for an annuity of 200l. for his own life, against the executors of the pupil, who by his will charged his estate with all his debts by bond, mortgage, or simple contract. The claim was supported by letters referring to an annuity, but no specific length of time was named. Bill dismissed without costs. Jameson v. Skipwith, H. 1779. 1 Bro. C. C. 34. Affirmed 14th March, 1780, in Dom. Proc.

600. Testator having by his will charged all his worldly estate with his debts, his copyhold lands are liable as well as his freeholds. Coombes v. Gibson, E. 1783. 1 Bro. C. C. 273.

601. A debt due by decree in equity, though but a personal demand, will bind the heir or devisee having assets, and such heir or devisee refusing to perform a decree against him will be subject to an attachment. Conner v. Browne, T. 1785. 1 Ridgwy. P. C. 139.

602. A seised of a remainder in fee, expectant on an estate tail in N., limited the same to himself for life, remainder to trustees for 99 years, in trust (amongst other things) to raise and pay such sums of money, and to such persons as A. should by deed or will appoint; and he reserved to himself a general power of revocation of all the uses thereby limited. A. afterwards by deed appointed, that, when the said estate tail should be spent, and the term came into possession, the trustees should raise 2000l. for W.; and covenanted, that if the estate tail should be spent in his own life time, then he would pay the 2000l. unto W.; but if not till after his death, and he should revoke the said term of 99 years, then that his heirs, executors, &c. should, within a year after the estate tail should be spent, pay the 2000l. to W., with a proviso, that if N. should suffer a recovery of the premises, and bar the remainder in fee, the 2000l. should not be payable. A. afterwards by will revoked all the uses of the first settlement, "to all intents and purposes whatsoever, as if the same had never been limited;" and thereby devised all the said premises, subject nevertheless to payment of the said sum of 2000l. to W.," in manner therein mentioned. A. died, and afterwards N. died. The 2000l. remained a charge on the devised premises after the death of N. notwithstanding the revocation of the term, and the personal estate of A. was not applicable to it. Wilson v. E. of Darlington, H. 1785. 1 Cox. 172. 2 P. W. 664. (n.) S. C.

603. Testator devised a part of his real estate to trustees, in trust to sell and pay scheduled debts, and then devised all his personal estate to his wife, "fully and clearly exonerated from all the debts in the schedule specified." And he settled the residue of his real estate on his wife and child, as therein mentioned. The trust estate not being sufficient to pay the scheduled debts, the settled estates must be applied in exoneration of the personal estate. Morrow v. Bush, T. 1785. 1 Cox. 185.

604. W. by his will devised his real estate to trustees, in trust to sell and to apply the produce, first, in payment of all the charges, and all other his debts and legacies, and as to the residue, to pay one moiety to his daughter M. and to lay out the other moiety in government securities, and to pay the dividends for the maintenance of the three sons of his daughter A. until they should attain the age of 24 years, and he gave them that moiety equally; but if they all should die under 24, then he directed, that such moiety should sink into and be deemed part of the residue of his personal estate, and be applied as that was therein disposed of. He then gave several specific legacies; and all the residue of his personal estate he gave to his daughter A. and to H. equally between them. The debts and legacies were held payable in the first instance out of the purchase money of the real estate. Webb v. Jones, E. 1786. 1 Cox 245. 2 Bro. C. C. 60.

605. Testator by will limited his estate in E. to several persons in succession: he then devised his estate in S. to trustees, in trust to sell, and out of the purchase money to pay all his debts, legacies, and funeral expenses; but in case the S. estate should be deficient for those purposes, then the deficiency should be made good out of the E. estate. He then gave several specific and pecuniary legacies, and all his personal estate, not before disposed of, to his wife A. After making this will, the testator sold the estate, and received the purchase-money: Held, that the debts, legacies, and funeral expenses should be raised
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606. D. devised estates to trustees for a term, in trust to raise money for payment of all his debts and legacies; and subject thereto, he limited the estate in strict settlement, with the ultimate remainder to his own right heirs. By the falling in of the intermediate limitations, A. and B. became entitled to the estates as right heirs of the testator. The testator's debts and legacies remaining unsatisfied, A. and B. executed joint bonds for the amount of them, and then A. died. These bonds are not debts of A., to which his personal estate is primarily liable, but they must be borne in the first instance by the devised estate. Basset v. Percival, T. 1796. 1 Cox 268. 2 P. W. 664. (n.) S. C.

607. Where testator by his will and codicils has clearly shown his intent to exempt his personal estate from his judgments and specialty debts, they shall be a charge on the lands descended, in exoneration of those devised; but parol evidence to show that testator intended to exempt his personal estate, is not admissible. Reeves v. Neuenham, E. 1788. 2 Ridg. P. C. 11. Vern & Scriv. 482.

608. Testator by his will made several devises and bequests to his wife, whom he appointed executrix and residuary legatee, and directed a certain part of his real estate to be sold to pay his debts and legacies, in case his personal estate should be insufficient; afterwards, his property being considerably increased, he by a codicil devised lands to his wife during widowhood, "which lands," said he, "are to be free from all incumbrances, and I charge and incumber all my real and freehold estates, except the lands before named in this codicil, with all the debts I owe by bond, judgment, or other specialty, and direct that my executrix shall pay my simple contract debts, and arrears of rent, out of my personal estate." Held, by the Lords, that the personal estate is exempted from the payment of all debts except simple contract debts. Reeves or Devonshire v. Neuenham, E. 1788. Vern. & Scriv. 482. 2 Ridg. P. C. 11. Contra, the decree in the Exchequer, reported by Vern. & Serib. 319.

609. Where estates are charged by will with the payment of debts, the court will order them to be sold, if necessary, though the heir at law be in the East Indies, and the devisee insane. Williams v. Whinyates, M. 1788. 2 Bro. C. C. 399.

610. Where a sum of money was in court, to be laid out in lands, which, when purchased, would be subject to testator's bond debts, the debts were decreed to be paid out of the sum in court. Cottell v. Money, E. 1791. 3 Bro. C. C. 256.

611. Under a general charge for payment of debts, where testator had freehold and copyhold estates, and had sold all his freeholds in his life-time, the copyholds were held liable. Kentish v. Kentish, E. 1791. 3 Bro. C. C. 257. Coombes v. Gibson, 1 Bro. C. C. 273.

612. Testator by his will ordered the trustees to possess themselves of his estates and substance, and to pay debts. This is a charge on the debts on the real estate. Foster v. Cook, T. 1791. 3 Bro. C. C. 347.

613. Where land is devised in trust to pay debts and legacies, it is charged with all such as the ecclesiastical court will establish. Habergam v. Vincent, T. 1792. 1 Ves. jun. 411.

614. Where land was devised to be sold, the money produced by the sale was held chargeable with simple contract debts, on the implied intention of the testator. Kidney v. Coussmaker, T. 1793. 2 Ves. jun. 267. Affirmed (in 1797) in Dom. Proc.

615. "After paying debts," amounts to a charge of debts upon a real estate, for which very little is sufficient. S. C.

616. Where land was devised in trust to sell for payment of debts and funeral expenses, with a particular disposition of the surplus money, and the personal estate was not otherwise disposed of than by the appointment of an executor, who was not one of the trustees, it was held to be liable to the debts, &c. in the first place, and especially as the produce of the sale was insufficient. Gray v. Minnithorpe, E. 1796. 3 Ves. 103.

617. Under a devise to sell and pay debts and funeral expenses, the personal estate was held exempt, upon the evident intention of the testator; but where the direction in the will is express that the debts, &c. shall be paid out of the real estate, the person to whom the personal estate was bequeathed shall take it ex-
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618. To exempt the personal estate under a devise for payment of debts, the intention must plainly appear on the will; and the court cannot look to extrinsic circumstances. Brummel v. Prothero, T. 1796. 3 Ves. 111.

619. Though a general charge of debts upon a devise estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended; but this arrangement does not bind the creditor. Manning v. Spooner, T. 1796. 3 Ves. 114.


621. Real estates devised were held liable to simple contract debts, under a direction in the beginning of a will, that debts and funeral expenses shall be first paid, and that which descended to the heir by the failure of the devisee to be paid. Williams v. Chitty, T. 1797. 3 Ves. 545. Vide Manning v. Spooner, sup.

622. Trust term in a will to raise out of real estate several sums, of which some were secured by testator's bond and covenant, the intention being to give them as portions out of the land, and not as debts or legacies; the personal estate was held not applicable. Read v. Lichfield, T. 1797. 3 Ves. 475.

623. A devise of land after payment of debts, is a charge on the land, for until debts paid, testator gives nothing; and in this case M. R. took the same distinction as in Kightley v. Kightley, 2 Ves. jun. 328. between debts and legacies in an implied charge upon an estate specifically devised, though Ed. Ch. doubted the distinction in Williams v. Chitty, 3 Ves. 551. His Honour could not agree, that where there is a specific devise, there is no difference between debts and legacies. Tesistor must mean his debts to be paid, and then his legacies, and a specific devise is as much a legacy as a pecuniary one, and it is equally within the intent of the testator that the legatee should have it. Shallcross v. Finden, T. 1798. 3 Ves. 739.

624. By the common law, a man could not by testamentary disposition affect his lands, or the guardianship of his children. His lands could not be affected till 32 Hen. 8., and the guardianship not until 12 Car. 2. Dict. in Exp. E. of Ixeaster, E. 1803. 7 Ves. 370.

625. Where testator by his will, going beyond a mere charge, has created a particular fund for payment of debts, that shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not, and of the personal estate, even in favour of the next of kin taking it for want of disposition; for the rule as to the exoneration of estates descended, by a devise for the payment of debts, will hold, even though the estates devised may be equitable assets, and the descended estates legal assets, (a) but a mere charge upon a devised estate will not protect a descended estate from being first applied, for words having an obvious meaning are not to be rejected upon a suspicion that the testator did not know what he meant. (b) Milnes v. Slater, E. 1803. 8 Ves. 303. Vide (a) Manning v. Spooner, 3 Ves. 114. Davis v. Topp, 2 Bro. C. C. 259. (n.) Donne v. Lewis, 2 Bro. C. C. 257. Powis v. Corbett, 3 Atk. 556. Harmood v. Oglander, 6 Ves. 199. 8 Ves. 106. (b) Serle v. St. Eloy, 2 P. W. 386.

626. Testator devised his lands upon several limitations for life, and in strict settlement, with a direction that the incumbrances shall remain charged upon the estates respectively, until discharged by the several tenants for life, to whom they were respectively limited: Held, that all the rents and profits during the estates for life, should be applied to the incumbrances, principal as well as interest. Milnes v. Slater, sup.

617. Where lands are specifically devised, legatees shall not stand in the place of creditors against the devisee, unless the lands are made subject to debts, or are in mortgage, as in Luikias v. Leigh, (Ca. temp. Talb. 54.) Aldrich v. Cooper, E. 1808. 8 Ves. 397.

628. B. devised her freehold estate to trustees, whom she also appointed executors, in trust immediately after her death to sell and dispose of the same to the best advantage, and to apply the
Of Devises of Land, for Payment of Debts and Legacies.

money arising from such sale, in the first place in discharge of her funeral expenses and debts; secondly, she ordered and directed several sums to be paid to different persons named, "who were all creditors of her late husband;" then she gave pecuniary legacies to several relations, and 20l. each to her executors, "in compensation of trouble," the said several sums to be paid by her executors and trustees, out of the money arising from the sale of her said lands, which she ordered "to be sold with all convenient speed after her decease;" and such of the said purchase-money as should remain after the paying the said legacies, she disposed of by her will, "the said several legacies, to be paid by her executors as soon as they should sell and dispose of the said lands." B. died possessed of some personal property: Held, that there is not enough on this will to found a presumption that the testatrix intended to exonerate her personal estate. The distinction between a direction to sell real estate out and out, for payment of debts, and a charge for payment of debts, is exploded, as to any effect in exempting the personality. In either case, the residue, if undisposed of, goes to the heir, unless there be a disposition made, demonstrative of an intent that it shall change its nature, and become personality. 


630. Where an estate is charged with debts, and the first taker of it is an infant, the infant's estate shall be reimbursed by another charge, though the creditors had cancelled all their securities, and no assignment of them had been taken. Ware v. Polhill, M. 1805. 11 Ves. 285.

631. Testator devised and bequeathed all his real and personal estate in Grenada, to pay all such annuities, legacies, or bequests, as he should give or bequeath, to be paid out of or charged upon his real or personal estate in Grenada, by his will, or any codicil, whether witnessed or not: Held, that a charge by an unattested codicil is void, it being not a charge by the will of legacies, but a reservation (by a will executed according to the statute) of a power to charge by an unattested paper; and as to an objection which was made in this case, that the real estate was not charged as a subsidiary fund to the general personal estate, his Honour did not determine. His Honour observed, however, that the reason why a charge of debts and legacies upon real estate, by a will duly executed, covers future debts and legacies, though by an unattested instrument, is their fluctuating nature. Rose v. Cunynghame, T. 1806. 12 Ves. 29. Vide citat. Habergham v. Vincent, 2 Ves. jun. 204.

631. A paper was proved as a will, reciting the marriage articles of the testator's daughter with A., confirming those articles, and directing that all testator's property and effects shall be vested in A., preferably to any executor or administrator, upon and after the testator's decease, for all and every the purposes of his said agreement, expressed or intended: Held, that the probate of this paper, obtained by A. as executor, was conclusive, and A. was held not a trustee for the next of kin, upon parol evidence of declarations subsequent to the will. Walton v. Walton, T. 1807. 14 Ves. 318.

632. It is not universally true, that the expression of a purpose for which even a devise of land is made, limits the devise to the purposes expressed; where, for instance there is a devise of land for payment of debts, it does not necessarily follow that there is a trust for the heir after the debts are paid. Indeed, there is no general rule, but each case depends on its own circumstances. Where the purpose expressed is in favour of the party to whom the bequest is made, the presumption for limiting the bequest is rather stronger. S. C. ibid. 322. Et vide Hill v. London Bp., 1 Atk. 618. Rogers v. Rogers, 3 P. W. 193. Forr. 266.

633. Testator devised his real estates, subject to and chargeable with certain annuities: Held a beneficial devise, and not a trust resulting to the heir, as to the surplus beyond the annuities. King v. Denison, H. 1813. 1 Ves. & B. 260. Ld. Eldon determined this case on the testator's intent, and the context in the will adopting the principle laid down in Hill v. Bp. of London, 1 Atk. 618. and the cases there referred to, and also in Wright v. Wright, 16 Ves. 190. and the references in the note there, (which sec. post; tit. Heir, vi. and post; tit. Trust, ii.)
DEVISE XII. & XIII.

Of Devise for Payment of Debts and Legacies; and of an Estate in Mortgage.

His Lordship next pointed out the nice distinction upon which the court went in Hill v. Eip. of London, between a devise charged with debts, and a trust to pay debts. The former, he said, was a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter, a devise for a particular purpose, with no intention to give him the beneficial interest; where, therefore, the whole legal interest is given for the purpose of satisfying the trusts expressed, and the execution of those trusts does not exhaust the whole, so much of the beneficial interest as is not exhausted, belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intent to give the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee; for then it is intended to be given him.

This, Ld. Eldon said, was the meaning of the several passages in the cases before Ld. Hardwicke, who observed, that a trust may be raised by implication, without the word “trust.”—Ld. Eldon then observed, that a devise, after a direction that all the testator’s debts should be paid, amounted to a charge on his estate.

634. Devise in trust to sell, in such manner, and at such time as the trustees shall think proper. The period of conversion, as between those entitled for life, and in remainder, depends not upon an arbitrary discretion, nor even a sound discretion in each case, but upon some fixed rule, ascertaining a given period, as upon a trust to sell with all convenient speed; controlled in this instance by consent of the tenant for life, who was in possession. Walker v. Shore, H. 1816. 19 Ves. 387.

635. Testator by will charged all his estates, with the payment of debts, and made his son residuary legatee; he afterwards purchased copyhold estates, which were duly surrendered to the use of his will, and by codicil devised those copyholds to his son in fee: Held, that this codicil was a republication of the will, so as to subject those copyholds to the payment of debts. Rouley v. Eyton, H. 1817. 2 Meriv. 128.

636. Testator bequeathed to his wife all his real and personal estate for life, and after her decease, he gives certain legacies, and then the rest, residue, and remainder of his real and personal estate, to his nephews: Held, that testator plainly considered it as one fund, and that the legacies were a charge on the real estate. Bench v. Biles, E. 1819. 4 Madd. 187.

See more of the construction and operation of devises for the payment of debts, post, tit. Estate Real and Personal.

DEVISE XIII.

Of the Devise of an Estate in Mortgage, and where the Devisee shall or shall not take cum onere.

637. One devised lands to A. for payment of debts, and devised other land which he had mortgaged to B., and also gave B. his personal estate. Per cur. B. must take the mortgaged lands cum onere, and though the personal estate was devised to B., and land was devised for payment of debts, yet the personal estate shall be subject to debts. Love v. Lancaster, M. 1890. 2 Vern. 183.

638. Devise for life of mortgaged land must pay one third of what was due at the death of the devisor, with interest for the same, and the heir must pay the rest; and so it is where the mortgagor has received the profits during the life of a tenant for life. Ballet v. Spranger, M. 1696. Pre. Ch. 62. Wide Rives v. Rives, Pre. Ch. 21. James v. Hailee, ibid. 44. Clyvett v. Batteson, 1 Vern. 404. But a tenant for life (according to the rule now established) contributes in proportion to his interest and enjoyment. White v. White, 9 Ves. 554. Allen v. Backhouse, 2 Ves. & B. 65.

639. An estate in jointure was subject to a mortgage. The jointress and reversioner must redeem in proportion, the
DEVISE XIII.

Of the Devise of an Estate in Mortgage, and where the Devisee takes cun onere.


640. One having mortgaged his fee-simple estate, devised his leasehold to A. his wife, and his fee-simple to B. his eldest son, and died, leaving no other personal estate. *Per cur.* the devisee of the fee-simple estate must take it cun onere, and shall not charge the leasehold specifically devised, with the mortgage. (a) By which construction, his Honour said, each devisee would take effect. (b) *O'Neal v. Mead*, H. 1700. 1 P. W. 693. (a) Vide *Tipping v. Tipping*, 1 P. W. 780. *Davis v. Gardner*, 2 P. W. 199. *Rider v. Wagé*, ibid. 335. *Chaplin v. Chaplin*, 3 P. W. 367. (a) *Long v. Short*, 1 P. W. 403. His Honour also observed that the resolution in this case would not in the least interfere with that in *Clifton v. Birt*, 1 P. W. 673. for there was no mortgage.

641. An estate in mortgage was devised to A., and several legacies given to others. The mortgagee shall be first satisfied out of the personal estate, and if that falls short, the legateses must take in proportion. *Warner v. Hayes* or *Hayes*, F. 1707. 1 Bro. P. C. 210.

642. Mortgages in fee, though forfeited, will not pass by a general devise of all the testator's lands, tenements, and hereditaments; nor will they pass by such general words, though the equity of redemption was foreclosed or released, after the making of the will, but they will go to the heir at law. *Strode v. Lady Russell*, M. 1708. 2 Vern. 623. 3 Ch. Rep. 169. S. C.

643. J. S. devised a lease for lives, after payment of his debts, to his two grandchildren, H. and W., but if either of them died without heirs of their bodies, then the share of him so dying, should go to the testator's other grandchild C. W. died without issue; and on a bill filed by a mortgagee to sequestrate, it was held, that H. and C. were entitled to redeem in equal moieties. *Wastney v. Chappell*, T. 1714. 1 Bro. P. C. 457.

544. Since the statute against fraudulent devises, the devisees of the equity of redemption is in the same case with the heir, and cannot redeem without payment, as well as what the testator had borrowed on mortgage, as of what he had subsequently borrowed of the mortgagee on bond, because the statute makes such a devise void as against creditors, and then the devisee stands in the same place as the heir must have done if no devise had been made; but before that statute, such devisee would not have been liable to the bond debt. *Challis v. Cashmore*, T. 1715. Pre. Ch. 407. Gilb. Eq. Rep. 96. That the vendee or devisee of the equity of redemption was not obliged to pay both before the statute against fraudulent devises, was resolved in *Bailey v. Robinson*, Pre. Ch. 39.

645. Testator began his will by "directing that his executor should raise sufficient to pay all his just debts. He then devised his manor, &c. at G. to plaintiff J. S. and her heirs, at 21 or marriage, subject to the incumbrances which were or should be upon it at his decease; in the mean time the rents and profits to be paid to her father or mother, for plaintiff's sole benefit. He then devised to his brother L. C. and his heirs, the reversion of the manor of W., after the death of M. F., subject to the payment of such of his debts as should remain unpaid, and all the rest of his real and personal estate not specifically disposed of, he devised to defendant J. E., his heirs and assigns, in trust to sell, and thereon pay his debts and legacies; and in case there should be any deficiency, or any debt or legacy should remain unpaid, then he charged the same on the reversion of the manor of W." At the time of testator's death, the manor of G. was in mortgage to H. for 500l. Upon the hearing cor. M. R. his Honour declared that all the testator's debts and general legacies were by his will to be paid out of his personal estate, and out of the real estates devised to defendants J. E. and L. C., and that the mortgage of H. on the manor of G. devised to plaintiff J. S. was to be taken as one of those debts; and this devise was afterwards affirmed by *King C. on appeal. (a) *Serté v. St. Elsy*, M. 1726. 2 P. W. 386. (a). This case, though not always approved of, has been considered as a leading authority in *Galton v. Hancock*, 2 Atk. 437. M. of *Tweedale v. E. of Coventry*, 1 Bro. C. C. 240. D. of *Ayns- ter, v. Mayer*, ibid. 434.

646. Land mortgaged: for two, several terms of 1000 years was afterwards set-
DEVISE XIII.

Of the Devise of an Estate in Mortgage, and where the Devisee takes cum onerat- 
tied to A. in tail, remainder to B. in tail, remainder to A. in fee, whereby A. and 
B. had successively an equity of redemption, incident to their estates. A. by his 
will, appointed the mortgage to be paid off, and the terms to be assigned to M., 
and by the same will devised all his lands (being seised of all other lands in fee) to 
C. and his heirs. A. and B. both died without issue, whereby the estate tail was 
spent; and upon a question whether the equity of redemption passed to M. by the 
will of A. and was thereby severed from the mortgagee, and was liable to be redeemed 
by C. Amhurst v. Latton, E. 1729. 3 

647. A. seised of an estate in fee, subject to a mortgage, and also of an estate 
par autre vie, devised all to his wife, and made her residuary legatee and execut- 
trix; afterwards he purchased the revest 
ion of the estate par autre vie, and died, 
without altering or republishing his will: 
 Held, that the purchase of this revest 
ion was a revocation of his will pro tanto, 
which descends to the heir at law; but 
equity, in marshalling the assets, will ap 
ply that part so descending, to discharge 
the mortgage, in exonerating the devisee, 
who at common law, and before the 
statute of fraudulent devises, was not li 
able to debts, the descent being broken. 
temp. Hardw. 301. 312. 2 Atk. 424. 450. 

648. A devise "subject to a mortgage," 
is not sufficient to exonerate personal es 
1 Cox 82. 3 Bro. C. C. 545. Vide Weak 

649. G. C. by articles settling in strict 
settlement, real estate, then subject to 
a mortgage of 1500L., and subject also to 
other incumbrances, covenanted to exo 
nerate the real estates from the 1500L., 
and to charge it on the leasehold. Af 
terwards G. C. by will, reciting the ar 
ticles, devised the leasehold to his eldest 
son, "in order to exonerate his said real 
estates, from the said sum of 1500L., and 
to enable his said son to pay the same, 
and other debts and incumbrances affect 
ing the same;" and the will proceeded, 
"And I do hereby charge and incumber 
the said leasehold interest, so bequeathed, 
with the payment of the said 1500L." 
The testator also by his will confirmed 
the articles with the exception of certain 
directions therein made, as to the rents 
and profits of the settled lands, which he 
thereby limited in a manner different from 
the articles: Held, first, that the words 
"in order to exonerate, &c. and to en 
able, &c." amounted to a direction, and 
that the devisee was a trustee to pay out of 
the leaseholds not only the 1500L. but 
all other debts and incumbrances affect 
ing the real. 2dly. That G. C., by charg 
ing such debts and incumbrances on the 
leasehold, meant to purchase the power of 
disposing of the rents and profits of the 
settled estate, as he did by his will, dif 
f erent from the provisions in the articles. 
3dly. That the testator's eldest son, who 
was tenant in tail of the settled estates, 
not having applied the leasehold proper 
ity in exonation thereof, in pursuance of 
the will, and having died without suffer 
ing a recovery, that the remainder-man in 
tail had a right to compel the exona 
ration of the settled estate out of the lease 
hold. Under a decree for a sale of a 
competent part of certain leasehold in 
terests, the property of a minor, (partly 
held for lives, and partly chattels,) the per 
son who acted as receiver of the estate, 
and appeared in the cause as guardian to 
the minors purchased a lease for lives: 
Held, that the sale, (though for full value) 
was fraudulent, and void under the cir 
2 Sch. & Lef. 173. 

670. After a devise of freehold and 
leasehold interests, charged with incum 
brances that affect the testator's real es 
tate, he bequeathed to the same devisee 
all the rest of his real and personal es 
states, adding, "And I do hereby order 
and direct my said son to pay off my just 
debts." This is an obligation on the son 
to pay all the debts of testator, in respect 
of the property given him, and discharges 
a chattel interest bequeathed to another 
S. C. ibid. 188. 

651. When a testator expresses a de 
sire as to the distribution of property, 
and the objects to which he refers are 
certain, the desire so expressed, amounts 
to a command. S. C. ibid. 189. 

652. A. devised his estates, in trust, 
to sell and pay off a mortgage, and to 
raise another sum for daughters: the 
personal estate, though bequeathed after 
payment of debts and legacies, is exempt 
ed from the payment of these two sums, 
upon the plain intention and without ex-
DEVISE XIII. & XIV.

Of an Estate in Mortgage, &c.—Where construed a Satisfaction.

press words, for either express words or plain intention must be found to exonerate the personal estate from the testator’s debt by mortgage, and a devise to sell for payment of all debts will not exonerate the personal estate. Hancox v. Abbey, T. 1804. 11 Ves. 179. Vide Watson v. Brickwood, 9 Ves. 447. Hall v. Cox, 3 Bro. C. C. 322. Ancaster v. Mayer, 1 Bro. C. C. 454.

653. An estate which a testator holds as mortgagee, will not pass under a general devise of all lands to use in strict settlement, although testator, at the making of his will, had obtained a decree for an account in a bill of foreclosure; for the estate does not lose the quality of a mortgage until the final order of foreclosure. Thompson v. Grant, M. 1819. 4 Madd. 438.

654. A devise of all lands which testator may hold in mortgage at his death, will not pass an estate which was held in mortgage by testator at the making of the will, but as to which he had obtained a final order of foreclosure before his death. S. C.

DEVISE XIV.

Where a Devise shall or shall not be construed as a Satisfaction of a Sum due.

655. A. had a son and four daughters; he settled lands on himself for life, remainder for 21 years, to raise 5000£ for daughters’ portion, 2000£ whereof to be paid to the eldest, remainder to the son in tail, remainder to himself in fee; the son died without issue, and afterwards the father devised the land to his four daughters equally; yet held, that the eldest daughter should have 1000£ more than any of the rest. Ld. Teviot v. Lady Spencer, H. 1689. Pr. Ch. 6.


657. A daughter’s portion secured by a trust term, was held not to be extinguished by a devise of the lands to the daughter in tail in remainder, after a term of 60 years, devised for payment of debts and legacies. Lawrence v. Blatchford, II. 1703. 2 Vern. 457. Vide Kemish v. Thomas, 2 Vern. 348, where the fee-simple descended on the daughter, yet held no extinguishment of her portion.

658. A. agreed with B. to give him 2000£ portion, to be laid out by A.—A. purchased lands with 1000£, and mortgaged them, and then settled pursuant to the articles, excepting only in one limitation. A. devised these lands to his wife for life, and gave legacies to B. and his children, and died without issue, leaving B.’s children his heirs at law, who, together with B., brought their bill against the widow and executor of A., to have an account of the profits, and for performance of the articles. Per cur., the land settled according to the articles is a good performance, so far as the value is over and above the mortgage. It was urged that the legacy to the children was a bounty, and not a satisfaction of the demand of the heir, because, at the time of the legacy, it was not known, whether he would be heir, or take any thing by the settlement; also, it was a legacy given to him in company with others, and the dispute is not between the executor and a creditor, but between the executor and B. and his son and daughter; and there are assets enough to answer any thing.—Yet his Lordship directed that the master should enquire what assets by descent in fee, and other personal estate, came into his hands, and that to be as part of the satisfaction of his demand. Leachmere v. Blagrace, E. 1707. Gilb. Eq. Rep. 64.

659. I. S. devised 10l. per annum to A. for life, chargeable on a leasehold estate,
Where a Devise shall or shall not be construed a Satisfaction of a Sum due.

and made his wife sole executrix, and died. Afterwards she made her will, and B. executor, and thereby also devised 10l. a year to A. for life. B. being afterwards seised in fee of other lands, settled his estate on himself for life, remainder to his first, &c. son in tail, remainder to trustees* for 99 years, to pay his debts and legacies, and afterwards that A. should have and receive 20l. a year for life, and then died without issue, whereby the term vested in the trustees to execute the trust. Ld. Ch. decreed the gifts by the wills good; and said, that where a man is debtor in 10l., and gives 20l., it shall be a satisfaction, not a legagy; and that he believed in his own private opinion, that the 20l. annuity was intended for a satisfaction, and that there was no case like this in point; yet it was agreed, the costs should be decreed against A., the plaintiff, because he knew in his conscience that B. intended satisfaction. Davison v. Goddard, E. 1708, Gilb. Eq. Rep. 65.

660. A. devised his copyhold lands to B., his daughter, the wife of C., on condition she did not disturb his executors, for 800l., which A. had covenanted to pay as a marriage portion. C. entered, and enjoyed the estate, and B. died. Decreed, the devise to B. was no bar to C.'s claim for the portion, yet it should be taken in satisfaction pro tanto. Bridges v. Beebe, E. 1709, 2 Eq. Ab. 34. pl. 2.

661. Ld. Burlington took Lady Barrymore when an infant, and maintained her; and living seised of lands, settled them upon her, but kept the writings himself; and still continued to take the profits of the lands. Afterwards, he made his will, and thereby devised to her a portion in lieu of all other provisions made by the settlement. She married: Ld. Burlington died; and Ld. Barrymore accepted the portion devised to her. The question was, whether the accepting of the legacy was a devesting of the inheritance vesting in her? Ld. Ch. asked, if she was of full age at the time she accepted the legacy; for, he said, the question would turn upon that, it being much more advantage to her to have the inheritance, than to elect money in lieu thereof, for money may be disposed of by her husband. Ld. Burlington cannot devest the inheritance given to Lady Barrymore, by devising to her a greater value in full satisfaction of all provisions, yet her accepting of this devise is a tacit contract, and so a waiver of her inheritance, ex contractu. Franklin v. Barrymore, T. 1709, 2 Eq. Ab. 515, pl. 2.

682. By articles the husband was to purchase and settle lands of 800l. value on himself and wife for life, remainder to the heirs male of the marriage, remainders over. The eldest son sought the benefit of this agreement against his father's executors, who insisted that the father had purchased a copyhold estate, which descended to plaintiff, and had also left him 800l. legacy, and that they ought to be taken in satisfaction, especially as his parents were tenants in tail, and might have barred him: Decreed to plaintiff the 800l. with interest at 4 per cent. from his father's death. The copyhold descended to be taken pro tanto, but not the 800l. legacy. Wilkes v. Wilkes, T. 1714, 5 Vin. 293, pl. 39.

663. M. L. by will, devised some legacies out of his personal estate to his wife, and part of his real estate, during her widowhood: the residue he devised to trustees for 21 years, for payment of debts and legacies. The remainder of the whole estate he devised to plaintiff (a remote relation) for life, and to his first and other sons in tail, &c. Resolved, first by, Wright, C. S. in 1702, afterwards by Couper, C. in 1717, and finally by the Lords, that nothing appeared in testator's will, intending to bar the widow of her dower; and if it did, it would only be a bar at law; and that where no such intention appears, the widow shall not be put to her election, but shall have her dower, as well as the provisions made for her by her husband's will. Lawrence v. Lawrence, T. 1717, 1 Bro. P. C. 591. In Galton v. Hancock, 2 Atl. 427, Ld. Hardwicke said, there was formerly a doubt with regard to dower, but it has been settled ever since the case of Lawrence v. Lawrence, sup. And Mr. Sanders, the editor of Atkyns, 5th edit. refers to the following cases since decided, viz. Hitchon v. Hitchon, Pro. Ch. 133. Lemon v. Lemon, 8 Vin. 366. Tinney v. Tinney, 3 Atl. 8. Incledon v. Northcote, ibid. 436. Harg. Co. Lit. 36. (n. 6.) Ayres v. Willis, 1 Ves. 230. Arnold v. Kempstead, Amb. 467. 2 Eden 236. Villarea v. Ld. Galway, Amb. 682. 1 Bro. C. C. 292. (n.) Pearson v. Pearson, ibid. 292. Boynton v. Boynton, ibid. 445. Jones v. Collier, Amb.
Where a Devise shall or shall not be construed a Satisfaction of a Sum due.

730. Wake v. Wake, 3 Bro. C. C. 255. Notwithstanding the doctrine on which the principal case was finally decided, and the frequent recognition of it, devises have been since frequently deemed a satisfaction of dower on account of very strong and special circumstances, as where allowing the wife to take a double provision, would have been quite inconsistent with the dispositions of the will; on this latter principle, Ld. Northington has decided for the satisfaction of dower in Arnold v. Kempstead, 2 Eden 236. and Ld. Camden, in Villareal v. Galway, Amb. 682.

664. J. S. devised lands to his wife for life, and devised other lands to plaintiff his brother, and his heirs. Defendant, testator's wife, entered into the lands devised to her, which were of more value than her dower, but not devised to her expressly in lieu and satisfaction of dower; and afterwards brought her bill for dower against the devisee of the other lands, and recovered against him with costs, who thereupon brings his bill to be relieved by the judgment, the lands devised to her by her husband being of greater value, and she in possession of them. Ld. Parker said, this point is determined already by the House of Lords, in Lawrance v. Lawrence, sup. and there is no relief in this case in equity, therefore the bill must be dismissed. Lemen v. Lemon, T. 1719. 8 Vin. Ab. 366. pl. 45. 2 Eq. Ab. 353. pl. 13.

665. In a settlement made on the second marriage of J. S. was a proviso, that “if any estate of inheritance shall descend from the father to the daughters of the marriage of as great value (to be sold) as their portions, then the trust term (created to raise such portions) shall cease for the benefit of the person who shall be entitled to the settled lands as next in remainder.” J. S. the father, being seized of other lands in fee, devised them to his daughters in tail: Held, this not such an estate of inheritance, as will be a satisfaction of the portions for the daughters of J. S. by his second wife, because the daughters claim those lands by purchase, and the proviso in the marriage settlement restrains the satisfaction to lands coming to the daughters by descent from their father. Savile v. Saville, T. 1720. 2 Atk. 409. Sel. Ch. Ca. 32.

666. Part of lands charged with 400l. portion were devised to the party to whom the portion was payable, although the lands devised were more than the portion, yet held to be no extinguishment of the charge. Rushout v. Rushout, H. 1725. 16 Vin. Ab. 449. pl. 11. 2 Eq. Ab. 665. pl. 8.

667. J. S. by will, left 8784l. to A., in trust, to be invested in lands, and settled on herself for life; remainder to the heirs of B.—A decree was had against A. to lay out the money in lands, and to settle the same according to J. S.'s will. A. purchased land to the value of 3200l. and devised those lands to C. (who was heir at law to B.) and her heirs, and gave several legacies, which could not be paid if the devise were not to be taken as part satisfaction, and for that reason it was so decreed. Gibson v. Scudamore, M. 1726. Sel. Ch. Ca. 63.

668. A. gave a bond on his marriage, either within four months to settle lands of 100l. per annum on his wife, or that his heirs, executors, &c. should pay her 2000l. within four months after his death. A. devised to his wife 88l. per annum by his will, and died. This shall not be taken in part of the 100l. per annum, but only as a benevolence. Eastwood v. Vincke or Styles, 1731. 2 P. W. 614.

DEVISE XV.

Of Fraudulent Devises.

670. A bound himself and his heirs in a bond, and died, leaving a real estate to descend to his heir, subject to a mortgage for years, and the heir having alienated the estate, the obligee brought a bill against the heir and purchaser to be relieved on the statute against fraudulent devises. *Per* Ld. Keeper. The statute being introductory of a new law, the relief on it ought to be at law, and a bond creditor cannot redeem a mortgage for years, without first having a judgment against the heir. *Sed secus*, of a mortgage in fee. *Bateman v. Bateman*, E. 1702. Pre. Ch. 198. *Vide Galton v. Hancock*, 2 Atk. 430.

671. If a creditor brings a bill under the statute of fraudulent devises against the assignee of the devisee only, the heir is a necessary party, and for want of him the cause must stand over, for equity follows the law in this respect, and at law the action must be against both the heir and devisee. *Warren v. Stawell*, H. 1740. 2 Atk. 125. *Vide Gawler v. Wade*, 1 P. W. 99.

672. The defect in *13th Eliz. c. 5.* of fraudulent conveyances, is remedied by *3 W. & M. c. 14.* which extends it to fraudulent devises. *Kynaston v. Clark*, T. 1741. 2 Atk. 204.

673. At common law the devisee was not liable to debts, the descent being broken; and the rule of equity before the statute, did not differ from the rule of law, unless there were some particular circumstances in the case. The court of Chancery often attempted, before the statute, to make a devised estate liable to specialty debts, but were not able to come at it, which was the occasion of the statute. *Gorton v. Hancock*, E. 1745. Ridg. Ca. temp. Hardw. 312.

674. Where there is a devise to trustees, and the first trust is for payment of debts, it takes out of the statute of fraudulent devises. *E. of Bath v. E. of Bradford*, T. 1754. 2 Ves. 586.

675. A devise to trustees to pay yearly rents and profits, in discharge of a wife's jointure, and in payment of debts, and the interest thereof; the court cannot decree a sale of the devised estate: for where there is a devise for payment of debts, it takes the case out of the statute of fraudulent devises, and the creditor can only come as the will directs. *Lingard v. Derby*, M. 1783. 1 Bro. C. C. 311. But in *Hughes v. Doulben*, *post*, *Thurlow*, C. dissented from this opinion, observing, that if it only meant to decide that the inconvenience of the mode prescribed by testator for the payment of his debts, would not bring it within the statute, provided the fund was ultimately sufficient, he agreed with it; but, that if that was meant to be laid down, even though by the mode prescribed, the fund would turn out ultimately insufficient for that purpose, he could not accede to it; and in *Bailey v. Ekins*, T. 1802. 7 Ves. 323. Ld. Ch. said, that the uniform rule is, that a provision by will *effectual in law or equity* for payment of creditors, is not fraudulent within the statute.

676. If a devise for payment, of debts does not provide for it in a practicable manner, it does not take the case out of the statute; therefore, where testator made a general charge of his debts upon his real estates, exempting his personalty therefrom, and then devised a particular estate to trustees for that purpose, excepting his mansion house; on reference to the Master, he sold the whole estate, including the mansion house, but reported, that a good title could not be made to the latter. On exceptions to the report, Ld. Ch. ordered the devised estate to be sold, and if that should prove inadequate, then the mansion house should be sold also. *Hughes v. Doulben*, T. 1789. 2 Bro. C. C. 614. 2 Cox 170. *Vide also Ld. Bath v. Ld. Bradford*, 2 Ves. 590.

677. There is a strict analogy between a devise of land, creating a fund for the debts, and a residue of personal estate: first, the land is not subject to simple contract debts;—secondly, it is a devise in favour of simple contract creditors. The specialty creditors, upon a devise for payment of debts, must come in under the will. *Dict. per* Ld. Ch. in *House v. Chapman*, E. 1799. 4 Ves. 544.

678. Though the statute of fraudulent devises would prevent a devise for legacies to the prejudice of creditors by spe-
DEVISE XV. & XVI.

Of Fraudulent Devises.—Of the Jurisdiction in Matters of Devise.

679. A direction in a will to pay simple contract, before specialty creditors, is not void; being within the exception in the statute of fraudulent devises. Miliar v. Horton, E. 1812. Coop. 45.

DEVISE XVI.

Of the Jurisdiction of the Courts, touching the validity of Wills of Land, and in matters of Devise, and herein of the admissibility of Parol Averment, and Parol Evidence.

680. J. S. by will gave to his son certain lands, he paying 100l. to the testator's widow; and all the rest and residue of his real estate, to his wife and her heirs, to the intent to pay his debts and legacies. On a bill by the heir to have the surplus, evidence was produced, (which Ld. Ch. allowed to be read) to show that the testator's intent was, that his son should have no more than what was expressly given him; and that the reason of testator's giving his wife so much, was because that the testator, talking with the witness about the settlement of his affairs, and telling him he designed his heir, (the plaintiff,) the same lands which were given him by the will; and that he did design other lands for his younger son; whereupon the witness said, that that would be a means to set the two sons at difference, and therefore he had better give them to the wife, and depend upon her generosity to the younger son, which advice he approved of and followed. And his Lordship said, that such evidence may be read to explain any implication, notwithstanding that matter dehors ought not to be averred; and decreed accordingly. Docksey v. Docksey, H. 1708. 1 Bro. P. C. 324.

681. A. by will had devised his land to his mother in fee; afterwards the mother was told by J. S. that the will would not be good, but ought to be guarded, and J. S. said he would make another will for the testator, which should be sufficiently guarded. Accordingly J. S. drew another will, whereby A. gave his land to his mother for life only, remainder to J. S. in fee. On the death of A. the mother brought her bill to establish the first will, and examined plaintiff to prove the ill practices of J. S. in obtaining the second will; before the hearing, the mother died, and by will devised a rent charge, (with a clause of distress) out of the estate to plaintiff, and devised the land so charged to others; divers witnesses were called to prove testator non compos, when he made his second will. Per Ld. Ch. A will though good at law, may yet be set aside in equity for fraud; (a) as if A. should agree to give B. bank bills for 100l., in consideration that B. would, by his will, devise his lands to A., and B. makes such will accordingly, and the bank bills prove to be forged, this will, though good at law, shall be avoided in equity by testator's heir, for the fraud. So, in the principal case, though the will would be good at law, yet it would be set aside in equity for the fraud; (b) but as to the testator's being non compos, that is entirely at law, and must be tried there. Ld. Ch. directed an issue in Middlesex, where the will was made, (though the lands lay in Salop) to try whether the will, by which the lands in fee were devised to the wife, was the last will of the testator A. Goss v. Tracey, M. 1715. 1 P. W. 288. 2 Vern. 690. (a) Vide 1 Ch. Rep. 12. 66. (last edit.) for instances of a will of land being set aside in equity for a fraud. (b) Sed vide contra. James v. Greaves, 2 P. W. 270. Bennet v. Vade, 2 Atk. 324. Webb v. Claverden, ibid. 494. Anen. 3 Atk. 17. And so with respect to wills of personal estate, it belongs exclusively to the Spiritual court to determine questions of fraud in obtaining them, as well as the sanity of the testator. Archer v. Moss, 2 Vern. 8. Nelson v. Oldfield, ibid. 76. Karrick v. Bransby, 3 Bro. F. C. 358. Marriot v. Marriot, 1 Stra. 666. Barnsley v. Powell,
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1 Ves. 287. Bennet v. Vade, 2 Atk. 324. Meadow v. Duchess of Kingston, Amb. 756. But it seems in cases of fraud, affecting a part only of the will, a court of equity will decree the legatee to be a trustee for another. Marriot v. Marriot, 1 Stra. 666. In Barnsley v. Powell, 1 Ves. 119. 284. Ld. Hardwicke sat aside for fraud, a deed of proxy, under which probate had been obtained from the Spiritual court, and decreed the guilty party to consent to a repeal of the probate.

682. The testator’s intention ought to be collected from the words used in his will, (which are not required to be technical nor artificial,) and words which he has not used cannot be added. Dem., ex dem. Bridget, v. Page, M. 1788. 3 T. R. 87. cited in Hay v. Coventry. And this intention must be collected from the will itself, and not from any parol evidence concerning it, for courts of law and equity are very cautious in admitting parol evidence upon the construction of a will. It has been admitted, to ascertain the person, where two are of the same name, or where there has been a mistake in the christian or surname. Ulrich v. Litchfield, T. 1742. 2 Atk. 372.; and oftentimes to ascertain a person or thing; vide Harris v. Bp. of Lincoln, 2 P. W. 136. Dowsett v. Sweet, Amb. 165. Bradwin v. Harpur, ibid. 374. Parsons v. Parsons, 1 Ves. 166. Delaware v. Rebello, 3 Bro. C. C. 446. Likewise in favour of executors, where the next of kin claimed the undevised surplus; and the ground of its admissibility as to executors, is, that it is ad ducted to rebut a presumption raised against the legal title of the executor. Vide May v. Lewis, 2 P. W. 159. (n.) Petit v. Smith, 1 P. W. 7. Granville v. Duchess of Beaufort, ibid. 114. Littlebury v. Buckley, cited 2 Vern. 677. Bachelor v. Searie, ibid. 736. Docksey v. Docksey, 1 Bro. P. C. 324. Hatton v. Hatton, 2 Eq. Ab. 433. pl. 56. Rutland v. Rutland, 2 P. W. 210. Lake v. Lake, Amb. 126. 1 Wils. C. B. 313. And this seems to have been adopted as a rule of evidence in courts of equity, though occasionally with some hesitation. Gainsborough v. Gainsborough, 2 Vern. 252. and Crompton v. North, and Kingsmill v. Cook, there cited, Lamplugh v. Lamplugh, 1 P. W. 111. Mallabar v. Mallabar, Ca. temp. Talb. 78. Brown v. Selwyn, ibid. 240. 4 Bro. P. C. 179. Ulrich v. Litchfield, 2 Atk. 373. Walker v. Walker, ibid. 99. Blinkhorne v. Feasey, 2 Ves. 28. Brady v. Cubitt, Doug. 32. Coote v. Boyd, 2 Bro. C. C. 525. Clinton v. Hooper, 3 Bro. C. C. 301. But in favour of the next of kin there appears to be only one case in which parol evidence has been admitted, and that is Rachfeld v. Careless, 2 P. W. 157. 9 Mod. 9. or Rushdell v. Carness, 1 Stra. 568. In Fonnerau v. Pointiz, 1 Bro. C. C. 472. the admission of parol evidence being contended for, it was observed that the court would not admit it to raise a title or gift; but where the title or gift is raised, and there is a doubt as to the person or other circumstances, then it shall be admitted, and (said Ld. Thurlow) every evidence as to the description of the subject the testatrix described, must be admitted. His Lordship thought he could let in evidence of the value of the estate, not to controul the bequests which testatrix had made in words themselves distinct, not to controul a bequest which she had made of a subject she had accurately described, but because the words which she had used in the description were, upon the whole of the context, uncertain. There seems no case however, where parol evidence has been admitted to contradict a will. Vide Brown v. Selwyn, Ca. temp. Talb. 240. Chamberlain v. Chamberlain, 2 Freem. 52. Lowfield v. Stoneham, 2 Stra. 1261. Hampshire v. Peirce, 2 Ves. 217. Maybank v. Brook, 1 Bro. C. C. 84. See more, post, tit. Evidence, iii. Exec. viii.

683. A devisee cannot dispute the validity of a decree obtained against him upon a bill of revivor, for then he would be in a better case than the heir. Minshall v. Ld. Moham, E. 1711. 2 Vern. 672. 2 Bro. P. C. 523. Vide Clare v. Wardell, 2 Vern. 548.

684. C. by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters, that he might thereafter have, as tenants in common in fee. He had afterwards another daughter, L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and 15,000l. to his daughter L. The attorney took the minutes of this second will in writing; but before it was prepared, the testator died. These minutes were proved in the Spi-
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685. Where lands at or of any particular place are devised, parol or extrinsic evidence is not admissible to show that the devisee included or intended to pass under the description, other lands not at that particular place; therefore, where J. S. having lands in the manor of Ashton, in Ashton parish, and also other lands in several neighbouring parishes, made his will, and devised lands under the description of "my estate of Ashton," and parol or extrinsic evidence was offered to show that the testator in his life-time, was accustomed to designate the whole of the lands derived from his mother, including not only the estate at Ashton, but also the neighbouring lands, by the general name of his "Ashton estate," the Lords, (concurring in the unanimous opinion of the Judges,) resolved, that the evidence had been properly rejected, for extrinsic evidence is only admissible to explain the intention of a devisee in his will, where an ambiguity is raised by extrinsic circumstances; and there it is admitted from the necessity of the case, because the will cannot have effect without it, as where one devised his estate of B., and has two estates called B.; extrinsic evidence must be admitted to show which of them he meant. So where one devised to his son J., and had two sons of that name, extrinsic evidence must be admitted to show which of them was meant; and so where one devised to his nephew W. and had no nephew answering the description, evidence must be admitted to show which nephew he intended by a description not strictly applying to any of them. Doe, d. Oxenden, v. Chichester, T. 1816. 4 Dow P. C. 65. Vide Dormer v. Dormer, Finch 422. Pulteney v. Darlington, 2 Ves. jun. 544.

686. A. (by will dated in 1735,) devised "all his real estates" (in these general words,) to his daughter J., for life, remainder to her first and other sons in fee. J. married E., who had no notice of the will, and in 1746, they petitioned parliament for an act to enable them to make a settlement, they being minors; in the petition J. was represented as being entitled in fee, to certain estates which had belonged to her father A., and on that ground the act passed, and a settlement was made; B. by settlement made in 1776, gave considerable interests to C., his eldest son by his wife J., which C. could not otherwise have in his father's life-time: the will of A. was not discovered till 1799, and in 1800, C. filed a bill claiming the estates under that will as eldest son of J., but it was dismissed in Chancery; and that decree was affirmed by the Lords, on account of the uncertainty, whether the estates passed under the general words in the will of A., and whether the representation to parliament might not have been correct, B. honestly believing for so long a time, that he was actually a purchaser for a valuable consideration. Rushiffe (Ed.) v. Parkyns, E. 1818. 6 Dow P. C. 149. Vide Blake v. Bunbury, 1 Ves. jun. 514. Welby v. Welby, 2 Ves. & B. 191.

687. A. devised his real estate, in trust to pay the clear rents and profits, in certain proportions, to certain persons in the will mentioned, for life; and then testator proceeded as follows: "And from and after the death of the survivor of them," (the said several persons) "I give and devise all and singular the said manor, messuages, lands, &c, unto all and every the children of my late sister E. C., by her three several husbands," (naming them) "that shall be then living, and their heirs and assigns for ever, equally to be divided between them as tenants in common, and not as joint tenants; and if there should be but one such child, and no issue of any of the other children then living, then, and in that case, I give and devise all my said real estates, in Ireland, unto such surviving child, his or her heirs or assigns for ever." The event was, that at the death of the surviving annuitant, there was only one child of the testator's sister, E. C., living, but there was issue of several of the other children then living: Held, by the Lords, (concurring with the Judges attending) that there was an intestacy, from the death of the surviving annuitant; the event which happened not having been provided for. Shullock v. Smith, T. 1818. 6 Dow F. C. 22.
DISSEISIN.

1. A wrong-doer, to gain a possession by disseisin, must not step on the land, and then leave the right owner in possession, which, though sufficient to give a disseisin on a sequestration, is not to levy a fine. Townsend v. Asch, T. 1745. 3 Atk. 339.

2. Disseisin and remitter by entry is no revocation of a will. Att. Gen. v. Vigor, E. 1803. 8 Ves. 282. Vide Goodtitle v. Otway, 3 Ves. 669. 1 Bos. & Pull. 602. Vide post, tit. Will & Testament, v. where it is said by Ld. Eldon, disseisin is not the act of the party, for it is against his will. If testator was disseised before the execution of his will, the land devised will not pass thereby, for he was not seized at the date of the will, having only a right of entry, but if he has the land at the date of the will, and was disseised afterwards, the act not being an act of violation, and afterwards he enters, he is remitted to his old title, and if he then dies, it may be predicated of him, that he had the estate at the date of his will and at his death. Suppose there was a republication of the will after the disseisin and before entry, that republication would not pass the estate, for the same reason, that if at the date of the will he had nothing else but a right of entry, the will will not pass it. The opinion of Ld. Holt was, that if he had not entered, the will would continue revked, because at his death he had only the right of entry. Att. Gen. v. Vigor, et supra.

3. A conveyance of a chattel interest by lease and release, cannot work a forfeiture or disseisin. Secus, if it were by sequestration; but in that case the party entitled to take advantage of the forfeiture is not bound to do so till the expiration of the lease. Saunders v. Aynsley, T. 1705. 2 Sch. & Leif. 99.

4. A enters under the lease of B., who acknowledges the entry as by his command. A. is a disseisor, and B. also is chargeable as such. Howden v. Aynsley, M. 1805. 2 Sch. & Leif. 621. Vide Taylor v. Horde, 1 Burr. 60.

5. Possession gained under a title consistent with that of the person having right, and who was in possession, as where a lessee at will makes a lease for years, and the lessee for years enters, this, though the estate at will did not warrant the lease for years, is only a disseisin at election. S. C. Et vide Blunden v. Baugh, Cro. Car. 502.

6. Mere possession for 20 years is not sufficient at law to bar the claim of a true owner, unless there has been something tantamount to a disseisin; and of an equitable title there can be no disseisin, because that must be of the entire estate, and because a tortious act cannot be the foundation of an equitable title. (a) So upon a bare trust, no estate can be gained by disseisin, abatement, or intrusion, while the trust estate continues. Per Grant, M. R. in Cholmondeley v. Clinton, H. 1817. 2 Meriv. 358. Vide (a) Hopkins v. Hopkins, 1 Atk. 581. But on the hearing of this cause for further directions, T. 1820. 2 Jac. & Walk. 1. this doctrine was controverted by Plomer, M. R. and the cases cited by Grant, M. R. in his judgment, distinguished from the present, and commented on as not bearing out his Honour, the late M. R., in the positions laid down by him.
Dissenters.

1. A presbyterian having three infant daughters bred up in that persuasion, and three brothers who were presbyterians, made his will, appointing his brothers and also a clergyman of the church of England, guardians to his three daughters, and died, having sent his eldest daughter to his next brother. The clergyman got the other two daughters into his custody, and placed them at a boarding school, where they were bred according to the church of England; and then brought his bill to have the eldest daughter placed out with the other daughters; the three presbyterian brothers brought their bill to have the two daughters delivered to them, offering a parol evidence that the testator directed and declared that he would have his children bred up presbyterians. The court declared no proof out of the will ought to be admitted, in the case of a devise of a guardianship, any more than in the case of a devise of land. Storke v. Storke, T. 1730. 3 P. W. 51. Vide Anon. 2 Ves. 86. D. of Beaufort v. Berrie, 1 P. W. 703. and Darcy v. Ld. Holdemriss, there cited.

2. At an assembly of Ld. Ch. Ellesmere, the Lords of the council, and all Judges of England, in the Star Chamber, it was held, that privations of puritan ministers by the high commission court were lawful. Middleton v. Crofts, M. 1736. 2 Atk. 655.

3. A dissenter is not incapacitated as such from acting as guardian to an infant. Corbett v. Tottenham, M. 1808. 1 Ball & Be. 61.

4. Several protestant dissenters bought a piece of ground to erect a chapel. The purchase was joint “to hold to them, their heirs, successors, and assigns, for ever, in trust to erect a chapel.” The regulation of such an establishment, with no revenue, but supported by voluntary contribution, is the proper subject of a bill, and not an information. The appointment of the minister being in the congregation generally, and not in the heir of the surviving trustee, and the number of trustees to be kept up; but the mode of appointing them, as well as the visitor, whether by the majority only, or in a more limited way, being uncertain, an enquiry was directed who, according to the nature of the establishment, are entitled to propose trustees, and elect and approve a minister, for there may be a ground for the jurisdiction of the court, as to the right of electing a minister of a congregation, where no mandamus will lie; for the court will support dissenting establishments, if they preach a doctrine tolerated by law. Davis v. Jenkins, M. 1814. 3 Ves. & B. 131. Vide Fearon v. Webb. 14 Ves. 15.


6. On an information to quiet the possession of the relatives, (one of whom was a surviving trustee, and the other a minister of a protestant dissenting meeting-house) and for an appointment of new trustees, and an injunction to stay proceedings in ejectment by the defendants, claiming also to be trustees of the meeting-house. Upon motion for the injunction, it appeared that the meeting-house was erected in 1701, under a trust-deed, whereby the purpose was declared to be “for the worship and service of God.” The relatives contended, that from the purpose so expressed, the intention was for promoting the doctrine of the Holy Trinity, and that the trust could not be diverted from that purpose; but defendants insisted that the intention was as general as the purpose expressed, and had no regard to any particular tenets. A question was also made, whether a trust for supporting Unitarian worship was legal and could be supported? and it was further disputed, who, according to the true construction of the deed, were entitled (as trustees) to the possession, and whether a minister of a dissenting congregation, elected for a limited period, was afterwards removable at pleasure, and also as to the construction of the deed, and as to an alleged agreement between the parties as to such removal? The court, however, granted the injunction, upon the parties undertaking to abide by such order as the court should thereafter make, and at the same time it was referred to the Master to enquire, in whom
the legal estate was vested? the particular object (with respect to worship and doctrine) for which the trust was created? the usage of protestant dissenters as to the election of ministers, and the duration of their office, and whether any agreement, or understanding relative thereto, subsisted between the parties? Eldon, C. at length gave his judgment, observing, that in cases of charity, the court is not bound by the strict rules of practice, but will act as the justice of the case requires, neither is it bound to administer trusts for the benefit of protestant dissenters, nor will the court execute a trust which is illegal in its nature. The legislature, he said, never intended that the statute of 53 Geo. 3. c. 160. (against blasphemy) should alter the common law as to the objects of that statute; but where a trust is created for religious worship, and it cannot be discovered from the trust deed what was the nature of the religious worship intended, it must be implied from the usage of the congregation. But if it appeared to have been the founder's intention (although not expressed) that a particular doctrine should be preached, it is not in the power of the trustees or of the congregation to alter the design of the institution. In the trust-deed in question, which was for establishing a place of religious worship, there was a clause which related to the possible future prohibition of that which was thereby intended to be established. From this clause an inference might be drawn, that this sort of worship was such as at the time of the deed was not excepted out of the benefits of the Toleration act. There was also a clause which enabled the trustees to make orders upon matters relating to the meeting-house; but that clause cannot be so construed as to authorize them to convert the objects of the charity, by introducing a new form of worship, and new doctrines. Another clause was inserted, that in case of the desertion and removal of any of the trustees, the remaining trustees might, within a limited time, elect new trustees in the room of the trustees so deserting; but this does not extend to disable a trustee, having so deserted, from acting again, where no successor had in the mean time been appointed, nor to the case of a trustee who had left the object of his trust (a congregation of protestant dissenters) on account of its having been converted against his approbation to purposes distinct from the intent of the founder. A clause was likewise inserted for the appointment of new trustees, in case of any of the old ones should become of a different persuasion; but his Lordship said, that if any question should arise, whether a trustee has been properly removed, it then became necessary for the court to enquire, what was the religion of the party—not to animadvert upon it, but to ascertain whether the charge was substantiated. Therefore, where two parties, seeking the benefit of a trust for charitable purposes, differ as to the mode of carrying it into effect, one party trying to support the original system, and the other for some proposed alteration, the leas of the court must be to the former, however useful it may judge the proposed alteration to be. Alit. Gen. v. Pearson, T. 1817. 3 Meriv. 353. 419.
DOVER.

I. Who dowerable. Incidents and Remedies.

II. Bar. (a) Forfeiture. (b) Release. (c) Satisfaction. (d) Election. (e)

III. Assignment and Admeasurement.

IV. Liability to Taxes. Interest on Arrears.

DOVER I.

Who dowerable. Incidents and Remedies.

A. cestui que trust in fee, conveyed to B. his eldest son and his heirs. B. died, leaving a widow, and the interest at law was in C. the younger son, as trustee. The widow of B. shall have her dower in equity, and the conveyance to C. shall be set aside as an impediment to her recovery of it. Fletcher v. Robinson, T. 1853. 2 P. W. 710. (m) Et vide Otway v. Hudson, 2 Vern. 585. where it was held, that the widow of a cestui que trust of a copyhold shall have her widow's estate.

2. A husband gave a voluntary bond, after marriage, to settle a joiture on his wife, he made the joiture, and his wife gave up the bond, the husband died, and there were no other debts. The joiture was evicted. Per cur. the widow is entitled to dower, and what the dower shall fall short in value of the joiture, she may retain out of the estate, though the bond was delivered up; for such an agreement, though voluntary, ought to be decreed in equity. Beard v. Nuthall, 11. 1686. 1 Vern. 427.

3. Plaintiff's husband was seised in tail of lands, but there was a term of 99 years prior to his estate (the trusts of which being performed) to attend the inheritance. The husband levied a fine and suffered a recovery, and then sold the estate to I. S. who had notice of the marriage, but his wife not joining, she after his death recovered dower, with a cessat executio during the term, and brought her bill to have this term removed, and to have the benefit of her judgment and recovery at law; but the court held, that this being against a purchaser, equity ought not to give her any relief, and therefore dismissed the bill, which decree was affirmed by the Lords. Lady Radnor v. Vandebendy, E. 1597. Vol. I.


5. Bill by the widow of an intestate for her dower out of his real estate. The husband and wife had been divorced a mensa et thoro.—Equity will not assist the widow in such case, for there is no impediment to her remedy at law. Shute v. Shute, E. 1700. Pre. Ch. 111.

6. A. purchased lands in his eldest son's name, and put him in possession. The son falling sick, the father took a declaration of trust from the son, and after the son's recovery he was permitted to continue in possession. The son married and died; the father then got a conveyance from the younger son as heir of the eldest, Per curiam, the elder son's wife shall be endowered. Bateman v. Bateman, E. 1702. 2 Vern. 436.

7. Plaintiff, as administratrix to her husband, brought her bill against his heir for her dower. Dismissed, the remedy being at law. Wallis v. Everard, E. 1708. 3 Ch. Rep. 161.


9. A man, before marriage, vested his legal estate in trustees, in trust for himself and his heirs. Equity will not assist the wife in recovering her dower. Bent.
Who dowerable.—Incidents and Remedies.

neither a woman shall be endowed of a use not executed. Chudleigh's Ca. 1 Co. 23. Vernon's Ca. 4 Co. 1.

10. Bill for mesne profits by a woman who recovered in dower, dismissed; for, where the husband dies seised, there shall be no mesne profits until demand per statute of Merton. Delver v. Hunter, H. 1719. Bumb. 57.

11. Where a bankrupt himself by taking an assignment of a mortgage term, prior to his wife's title of dower, could not have protected his estate against it, there his assignee shall not, for they stand in his place. Squires v. Compton, E. 1724. 9 Vin. Ab. 327. pl. 60.

12. A widow shall be endowed of an equity of redemption, though the mortgage was made in fee before the marriage, upon her paying a third of the mortgage money, or keeping down a third of the interest. Banks v. Sutton, H. 1732. 2 P. W. 700. Sed vide Chaplin v. Chaplin, post, pl. 17.

13. A doweress shall not have the benefit of a trust term against a purchaser. S. C. ibid. 707. Et vide Bodmin v. Vandelandyne, ante. pl. 3.


15. So shall the widow of a cestui que trust be endowed. S. C. Et vide Fletcher v. Robinson, and Otway v. Hudson, ante. pl. 1.

16. So shall the widow of a tenant in tail of a trust, to whom the legal estate is by his donee's will directed to be conveyed at his age of twenty-one, he having lived to attain that age. S. C.


18. An estate pur anter vie. may be limited to A. in tail, remainder to B., but it makes no estate tail in A. to which dower can be incident, for it is a descivable freehold only, and is not within the statute de donis. Low v. Burton, E. 1734. 3 P. W. 262.

19. A doweress shall have emblements, because dower is considered as an ex crescense or continuance of the estate of the husband, but a jointure is not. Fisher v. Forbes, T. 1734. 9 Vin. Ab. 373. pl. 82.

20. If A. be seised of a trust estate of inheritance, it is generally true that the wife shall not be dowerable of it, for dower is a legal demand, and as a woman was not dowerable of an use before the statute 27 Hen. 8. so neither of a trust after Att. Gen. v. Lockley, M. 1735. 2 Eq. Ab. 383. pl. 8.

21. Plaintiff's father being seised in tail of several lands, and in possession of a great part, and having purchased several others, intermarried with defendant, plaintiff's mother, and died intestate. Plaintiff, as heir in tail, brought a bill to set aside the assignment of dower for partiality, upon a suggestion that part of the estate was copyhold, and not liable thereto. If the husband became entitled to the copyhold estates by copy of court roll, and granted them out again by copy of court roll, his wife is not entitled to dower; but if he became entitled otherwise than by copy of court roll, and did not grant them out again by copy of court roll, she is entitled to dower out of those estates. Sneyd v. Sneyd, T. 1738. 1 Atk. 442.

22. A wife is not entitled to dower out of an instantaneous seisin. The comusee of a fine is not so seised as to give his wife a title to dower, nor in the case of a use has the widow of a trustee any claim of dower from such a momentary seisin in her husband. S. C.

23. Devise to A. and her heirs, and if she die before her husband, he to have 20l. a year during life, remainder to her children. A. died before her husband. It is a rule in the case of a tenancy by the curtesy, as well as in dower, that the estate shall come out of the inheritance, and not of the freehold. Summer v. Partridge, T. 1740. 2 Atk. 47.

24. Defendant purchased a real estate of plaintiff's husband, (which was mortgaged for a term,) who agreed to pay it off out of the purchase money, and to assign the term to a trustee for the pur-
chaser, to attend the inheritance, which was accordingly done. The husband died in 1719, and in 1737, plaintiff brought her bill against defendant for an account of profits, and to be paid her dower. Bill dismissed, on appeal, without costs. Hill v. Adams, T. 1741. 2 Atk. 208.

25. Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, equity will assist her to find them out; and if her title to it is established, will give her the profits from the time her title accrued. If a dowress comes into equity to have a term removed, which is satisfied, equity will decree her an account of the rents and profits from the time her title accrued; secus, if the term had been out of the way, and she had had no need to come into equity. Dormer v. Fortescue, E. 1744. 3 Atk. 140.


27. A. by will gave his wife a specific personal legacy, and devised her a remainder for life in his real estate, in default of issue. This devise is not consistent with the widow's claim of dower, so as to overturn the will (as in Noys v. Mordaunt, 2 Vern. 581.) for the widow takes but a temporary exercccant interest, and shall not be excluded. So decreed, on the authority of Lawrence v. Lawrence, 1 Bro. P. C. 591. Incledon v. Northcote, E. 1746. 2 Atk. 436.

28. Tenant in tail and his wife join in a mortgage of the husband's estate, by lease and release and fine; the proviso reserved the redemption to the husband and wife and their heirs, but the latter part of the deed declared the uses of the fine, after payment of the mortgage-money, to the husband and his heirs. The husband died; Held, the husband was solely entitled to the estate, and that the wife had a power of redemption only to secure her dower. Jackson v. Parker, M. 1770. Amb. 688.

29. Bill by a widow against her husband's heir, for dower. Ordered to be retained for a year, to try her right at law. The heir died, then the widow established her right at law against her husband's devisee, and died: whereupon her representatives filed a bill of revival and supplement against the executor and devisee of the heir, for a third part of the mesne profits to the time of her death, which was ultimately decreed. Curtis v. Curtis, or Day v. Leman, T. 1789. 2 Bro. C. C. 620.

30. Plea of a purchase for a valuable consideration without notice of marriage, is not good to a bill for dower, it being a legal title. A plea of purchase without notice, is only a bar to an equitable claim. Williams v. Lanne, T. 1791. 3 Bro. C. C. 264.

31. A purchaser cannot protect himself against a claim of dower, by a term attendant on the inheritance, unless he has procured an assignment. So where a husband had a power of appointment paramount the right to dower, and in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance adapted to pass the interest in the estate, as a limitation of the fee, was held to take in that way, and not by way of appointment, and that therefore he was subject to dower. Maundrel v. Maundrel, T. 1802. 7 Ves. 567. Vide Cox v. Chamberlain, 4 Ves. 651. Et pot. tit. Trust, v.

32. At law all terms are considered as terms in gross, and therefore without regard to the purpose, they prevent a dowress from any legal benefit from recovery in dower, for she recovers in stay of execution during the term; but equity regards the purpose for which the term is created and subsists, and if only for the benefit of the owner of the inheritance, it is considered part of the inheritance, not absolutely merged, but so attendant as to accompany it, and every right and interest growing out of it, by operation of law or agreement. It is not therefore to be used against the owner of the whole or any part of the inheritance; every description of ownership having a use in the term commensurate with the interest in the inheritance. When dower arises therefore, the term is in a proportion as much attendant upon that interest as during the husband's life upon the inheritance, and protects it against either heir or purchaser. S. C. ibid. 577. Et vide Willoughby v. Willoughby, 1 T. R. 771.

33. Upon appeal before the Ld. Ch., his Lordship affirmed the order, upon the point that a purchaser, to avail himself of an outstanding term against dower, must have procured an assignment, or at least
Dower I. & II.

Who Dowerable.—Bar of.

a declaration of trust, or have got possession of the dower creating the term. Maundrel v. Maundrel, M. 1804. 10 Ves. 246. See more of this case, post, tit Power, v. Trust, iv.

34. There is an important difference between the cases of dower and a mesne incumbrance. Ed. Hardwicke has laid it down generally (a) as a principle he should wish to see established, that legal titles should take their chance, and the court would not interfere even to put dower out of the way. He also lays it down, that if there is notice in the case of the incumbrancer, the legal title cannot be dealt for, and his Lordship goes further, that a trustee having notice cannot deal with a purchaser. Then the general doctrine, that he who takes from a trustee with notice, is himself a trustee, introduces a difficulty, to say if the trustee having an estate expressly declared to attend the inheritance, is a trustee for all who have interests in the inheritance, in this sense, that he is a trustee for the dowress, and also for him who has the inheritance subject to his wife's dower, having distinct notice of her right, and the purchaser also having notice of it, he may, by a simple assignment, create an estate not subject to the same equities, though only a transfer to another trustee to attend the inheritance. S. C. 10 Ves. 261. Vide (a) Swannock v. Lifford, Amb. 6. Mr. Butler's note (105.) to Cu. Lit. 208. a. 2 Att. 208. nominet Hill v. Adams.

53. A conveyance to such uses as A. shall appoint, and for default of appointment to him in fee, is a mode used to prevent dower. S. C. ibid. 263. Vide Cave v. Holford, 2 Ves. jun. 694. (n.) 3 Ves. 657. 4 Ves. 850.

36. A. was seised in fee of estates let at the time of the marriage, upon leases for lives, which do not expire during the coverture: Held, that his wife is not entitled to dower. D'Arey v. Blake, E. 1805. 2 Sch. & Lef. 387. Vide Forder v. Dade, 4 Bro. P. C. 326.

37. Though by analogy to proceedings at law, costs do not follow a decree merely for dower, yet on a vexatious resistance the widow shall have her costs. Worgan v. Ryder, M. 1812. 1 Ves. & B. 20. Vide Lucas v. Calcraft, 1 Bro. C. C. 134. and stated in notes.

Dower II.

Bar. (a) Forfeiture, (b) Release. (c) Satisfaction. (d) Election. (e)

(a) Bar.

38. The law pays implicit regard to the intent of the party, and therefore there is a fine by way of render, there shall be no dower. Baden v. E. of Pembroke, E. 1688. 2 Vern. 58.

39. So, where the husband was only a trustee, it was held, that the wife was barred of her dower, though contrary to Nash v. Preston, (1 Cro. 191.) And such was said to be the constant practice of the court. Noel v. Jenon, M. 1678. 2 Freem. 43.

40. So, where A. on marriage, settled a portion on his wife, charged on his own estate, in consideration of a legacy of 900l., to which she was entitled, chargeable on the same estate, and in bar of dower. A. died, and his wife claimed her dower: Held, a good settlement to bar her dower, according to 27 Hen. 8. c. 10. But where, in consideration of the wife's fortune, which consisted of choses en action, the husband settled an estate inadequate to such fortune, and the degree of the wife, equity will not take away that right which the law gives the wife to her choses en action. Says v. Price, T. 1740. 9 Mod. 217. Barn. 117.

41. Though, at law, a jointure upon a woman of full age would not bar her of her dower, yet the statute of 27 Hen. 8. c. 10. makes it a bar, and a jointure will bind an infant, and preclude her from dower, even though the jointure be very inadequate to the dower. Harvey v. Ashley, E. 1748. 3 Att. 612. E. of Bucks v. Drury, E. 1762. 5 Bro. P. C. 570. (T. iii. 492.) 4 Bro. C. C. 505. (a.) 2 Eden 39. 60. et post, tit. Jointure, very fully.

42. But the court requires that the intention of a man shall be plain, clear, and unequivocal, to bar his wife of her
Dower II.

Bar of.—Forfeiture.


43. Therefore, where A. settled a jointure on his wife by articles before marriage, to which she was no party, it shall not bar her of her dower; neither will a devise of a moiety of a man's estate to his wife for life, after payment of his debts, &c., but she ought to elect whether she would insist on her dower, or to take under the will. Daly v. Lynch, T. 1715. 1 Bro. P. C. 538. Neither will a bequest of a residue of a personal estate. Aryes v. Willis, 1 Ves. 250. Nor is a settlement of a leasehold estate before marriage, in lieu of dower, a bar of thirds, where the husband had no real estate. Creswell v. Byron, T. 1791. 3 Bro. C. C. 363.

44. A widow will not be barred of her dower by a testamentary provision, if there be not a clear indication of the testator's intention, or unless some other disposition of his property would be defeated by the widow's taking both. The testator's giving all his real and personal estate, on trust, in the first place, to pay such provision to the wife, is not of itself a sufficient indication of such intention. Thompson v. Nelson, E. 1788. 1 Cox 447.

45. Neither shall a wife be barred of her dower, where she joined her husband in a mortgage, and levied a fine, in confidence of an agreement that she should have the redemption of the mortgage, and the husband afterwards mortgaged the estate again. Dolin v. Colman, H. 1684. 1 Vern. 294.

46. Nor is the settlement of an estate made on the marriage of a female infant, first to the use of the husband's mother for life, remainder to the husband for life, with remainders over, in bar of dower; for the mother might survive the husband (as in this case she did.) The wife may therefore, elect to take either the provision under the settlement, or her dower. Caruthers v. Caruthers, H. 1794. 4 Bro. P. C. 500.

47. Neither shall the debts or engagements of the husband, in their consequences, deprive the wife of her dower. Therefore, where a man's lands were sequestrated before marriage, and he died afterwards, the dower of his wife shall attach upon his lands. Anon. H. 1682. 1 Vern. 118. University Coll. v. Fawcroft, E. 1688. ibid. 166.

48. So where A. devised lands to his executors for payment of debts, remainder to his son in tail, and the son married, and died before the debts were paid, the estate in the executors is only a chattel interest, and shall not hinder the son's wife of dower. But her dower cannot commence in possession, nor can damages be recovered for detaining it, but from the time of the debts being paid. Hitchins v. Hitchins, M. 1700. 2 Vern. 404.

49. A provision previous to the marriage of a female infant, in bar of dower and thirds, if precarious and uncertain, as that the personal estate shall go according to the custom of London, does not bar her. Smith v. Smith, H. 1800. 5 Ves. 189.

50. Estates were purchased out of a partnership fund, but conveyed to one partner under a specific agreement that the estate should be his, and he be a debtor for the money. The widow of that partner had her dower established against the assignees under a joint commission of bankruptcy against both. S. C.

(b) Forfeiture.

51. If a wife elopes, and lives in adultery, she forfeits her dower, by the statute of Westminster, c. 24.; but there is no statute inflicting the like forfeiture of the husband's tenancy by the curtesy. Sydney v. Sydney, E. 1754. 3 P. W. 276.

52. By an Irish statute, 6th Ann. a woman by subtle means or secret insinuations or delusions, threats and menaces, prevailing on the son and heir apparent of any person having lands of the yearly value of 50L., or personal estate of the value of 500L., to marry her, is rendered incapable of demanding any dower or thirds, or other interest out of the real or personal estate of her husband. This being in nature of a penal statute, must be construed strictly, and therefore when it is pleaded to a writ of dower, the jury must expressly find that subtle means, &c., were used, for they are not to be presumed from the circumstances of the marriage being private, without the father's consent. Kent v. Whitby, E. 1738. 4 Bro. P. C. 362.
DOWER II.

Release.—Satisfaction.—Election.

(€) Release.

53. A mother having a right to dower, released it to encourage her son's marriage, and showed the release to his intended wife and her relations. This release shall bind the mother, though obtained by fraudulent suggestion. Beverley v. Beverley, H. 1690. 2 Vern. 183.

54. A legacy given to a wife in consideration that she release her dower, shall be preferred and be paid in average, for by releasing her dower, she becomes a purchaser. Burridge v. Bradly, T. 1710. 1 P. W. 127. Blower v. Morret, 2 Ves. 240. And so, though the legacy exceeds the value of the dower. Davenhill v. Fletcher, Amb. 244.

55. A mortgageor in fee died, and the mortgagee bought in his widow's right of dower. The heir of the mortgageor shall have the benefit of it on redemption, for a mortgagee is only a trustee for the mortgagor after the money is paid. Baldwin v. Banister, E. 1718. 3 P. W. 237.

(d) Satisfaction.

56. A devised lands in trust to pay one-third of the rents to his wife, in satisfaction of dower, till his son attained 21. The wife died and then the son died under 21. Decreed, the administrator of the wife shall have her third of the rents till such time as the son would have attained 21. Coates v. Needam, T. 1688. 2 Vern. 65.

57. Devise of lands to a wife who was entitled to dower is no bar of dower, but a voluntary gift, unless expressly said to be in satisfaction of dower. Hitchen v. Hitchen, M. 1700. Pre. Ch. 133.

58. A husband in his life-time, gave a bond in trust to secure to his wife 400l., in case she survived: parol evidence, to show it was intended in lieu of dower, and that the wife acknowledged it to be so, cannot be allowed. Tinney v. Tinney, M. 1743. 3 Atk. 8.

59. Settlement before marriage of the wife's fortune on herself, with a covenant by the husband to pay 6000l. to trustees three months after his death, in trust, if the wife should survive and have no issue (which was the event) to pay 1000l. to her for life. She is entitled to dower, and her share under the statute of distribution is no satisfaction of the covenant. Couch v. Stratton, H. 1799. 4 Ves. 291.

(€) Election.

60. Where a wife has two provissons in her view, as a legacy under her husband's will, and her dower, she shall in most cases be put to her election. Therefore where A. devised a rent-charge out of his real estate to his wife during her widowhood, the wife shall elect to take under the will, or her dower, but her election shall not be determined till she knows which is most to her advantage. Arnold v. Kempstead, T. 1764. Amb. 466. 2 Eden 236. and the editor's notes. Vide etiam Villareis v. Lord Galway, T. 1769. Amb. 682. S. P. and Jones v. Collier, ibid. 730. which is a stronger case to S. P., for the testator there expressed himself so as to exclude all idea of dower. In Boynto v. Boynton, E. 1785. 1 Bro. C. C. 443. S. P. was determined, and it was there said, that in these cases of election, the court does not go upon any calculation of the comparative value between the legacy and the dower.

61. But a widow cannot be put to her election unless by express declaration or necessary inference, arising from the inconsistency of her claim with the disposition of her husband's will. French v. Davies, T. 1793. 2 Ves. jun. 572. Strahan v. Sutton, M. 1796. 3 Ves. 249. Greatorox v. Carey, 6 Ves. 615.

62. I. S. made a settlement on his wife for life, in bar of dower, and died, having devised lands to trustees for payment of his debts, but the trustees refused to act, and a creditor took out administration. Upon his bill for an account, the widow insisted on waiving the settlement, and claiming her dower. Sed non allocatur, for that would be to let in the heir, to the prejudice of the creditors. Decreed, that the wife should take a life estate under the settlement, but should assign it over in trust for the creditors, who should convey to her a third unincumbered, for her dower. Mills v. Eden, E. 1722. 10 Mod. 487.

63. A fema infant having a jointure made on her before marriage, may, when of age, elect to abide by it or not, unless after her coming of age she enters. An account in this case, was first directed of the real estate, and then that she should elect jointure or dower. Cray v. Willis, T. 1734. 2 Eq. Ab. 399. pl. 17.
DOWER II.

Election.

64. Where testator has given his widow an annuity (charged on an estate of which she would be dowerable) she must elect; but the acceptance of the annuity for three years does not determine her election. Wake v. Wake, E. 1791. 3 Bro. C. C. 255. 1 Ves. jun. 335. Et vide Jones v. Collier, Amb. 780. Arnold v. Kempstead, 2 Eden 236. et ante, pl. 60. Sed vide Pearson v. Pearson, 1 Bro. C. C. 291. Foster v. Cook, 3 Bro. C. C. 347.

65. Where a devisee dies in the lifetime of the devisee, and the estate descends, the devisee’s widow being entitled by the will to a provision in bar of dower, must elect. Pickering v. Ed. Stamford, E. 1797. 3 Ves. 337.

66. But in some cases the wife shall have the benefits intended for her by her husband, and her dower also. As where A., previous to his marriage, covenanted to secure to his wife an annuity of 1000l. issuing out of lands, for her jointure, and in bar of dower, and the marriage was had, and A. by will devised to his wife certain parts of his real and personal estate, of considerable value: Held, that she was entitled both to the estates devised and to her annuity, for that she was not intended as a satisfaction for the other. Broughton v. Errington, E. 1773. 7 Bro. P. C. 12.

67. And so, though the estate devised be larger than the dower, yet she shall have both. Galton v. Hancock, M. 1742. 2 Atk. 427.

68. So where A. by will, taking no notice of his wife’s right of dower, made a provision for her out of his personal estate, by way of residue. This is no bar by implication, nor does the claim of dower break in upon the will, and as a residue it is stronger, for it is an accidental benefit the testator might intend, in addition to the dower. Ayres v. Willis, E. 1749. 1 Ves. 230.

69. So where a man gives his wife an annuity, and then bequeaths all his substance to his trustees for payment of his debts, it is not such a direction as shall deprive his wife of her dower, or force her to elect, for her title is paramount to the will. Foster v. Cook, T. 1791. 3 Bro. C. C. 347.

70. A. seised in fee, devised his house to his wife for life, at a rent below the real value, she keeping the same in re-pair, and not alienating it, except to the persons in remainder. A. then devised the residue of his estate, together with the remainder after the death of his wife to B. in fee: Held, that the wife electing to take the house under the will cannot have dower thereout, but she is entitled to dower out of the residue of the estate. Birmingham v. Kirwan, T. 1803. 2 Sch. & Lef. 444.

71. The foundation of the rule of election is, that a person cannot accept and reject the same instrument, and this rule, which is applicable to dower, and is a rule both of law and equity, equally applies to every species of instrument, whether deed or will. S. C. ibid. 449. 450.


73. As the right of dower is in itself a clear legal right, an intent to exclude that right must be demonstrated by express words, or by clear and manifest implication, and in order to exclude that right, the instrument must contain some provision inconsistent with the assertion of the right to demand dower. S. C. ibid. 452. 453. Vide etiam Hitchin v. Hitchin, Pre. Ch. 132. Villareal v. Galway, Amb. 682. Lawrence v. Lawrence, 2 Vern. 365. Arnold v. Kempstead, 2 Eden 236. Strahan v. Sutton, 3 Ves. 249. Ld. Dorchester v. E. of Eltham. Coop. 319.


75. A widow shall not be put to her election between her dower and her jointure under her husband’s will, till she has ascertained the extent of each, and as to the testator’s general expression
DOWER II. & III.

Election.—Assignment and Admeasurement.

of "my estate" in his will, that does not necessarily extend to dower. Chalmers v. Stirling, E. 1813. 2 Ves. & B. 222.

76. Testator devised all his real and personal estate to trustees, in trust as to a freehold house, for his wife for life, and he also directed an annuity to be paid to her, and another to his daughter;—his daughter to have also the occupation of freehold house for her life. The wife claiming dower, must be put to her election; for by the devise of the house to his daughter, testator showed a clear intent that the trustees should take an interest in the house, which would exclude the widow’s dower, and the same intention must necessarily be applied to the whole estate, which passed by the same devise. Miall v. Brain, H. 1819. 4 Madd. 119.


DOWER III.

Assignment and Admeasurement.

77. Equity will relieve against a fraudulent assignment of dower by the sheriff. Hob v. Hob, H. 1683. 1 Vern. 218.

78. The want of a formal assignment in dower is nothing in equity, for the right in conscience is the same, and where an heir brings a bill against his mother for an account of profits, it is most just that equity should, in the account, allow a third for the right of dower. D. of Hamilton v. Ld. Mohun, E. 1710. 1 P. W. 122.

79. A. died seised of lands, which descended upon B. and C. in coparcency. B. died before recovery of rent or partition made, and his widow brought a bill to have her dower assigned, and to have all the title deeds from C., which the court thought reasonable, for A. having died before recovery or partition, she could not prove seisin in him without the deeds. Moore v. Black, T. 1735. Ca. temp. Talb. 126.

80. The court decreed dower to be assigned in Megott v. Megott, 1742. 2 Dick. 794.; and in Goodenough v. Goodenough, H. 1772. dower was decreed to be allotted, to be set out by the master, and the dowress to be let into possession.

81. In cases where there is an apportionment of dower by consent, not by writ, costs are not to be given unless previous questions are raised, and the party is litigious. But in a writ of dower on an assignment of dower, no costs are given, unless there be a deorcement, when the statute of Gloucester gives damages; or where there are collateral circumstances, as where dower is demanded upon a feoffment or other title. Lucas v. Calcraft, E. 1782. 1 Bro. C. C. 134. Vide Worgan v. Ryder, 1 Ves. & B. 90.

82. Bill to have dower assigned, but no impediment shown to a recovery at law. Demurrer, for want of equity, over-ruled, for plaintiff’s title being admitted, there is nothing to try at law.—Mundy v. Mundy, E. 1793. 4 Bro. C. C. 294.

83. Upon a bill for an assignment of dower, and an account of the arrears, the question was, from what time the account should be given, 12 years having elapsed before the bill filed? Per M. R. The widow is prima facie entitled from the time her title accrued, and it is upon defendant to show why he should not have it. Sometimes a question arises, whether the account shall be carried back to the time the title accrued, though barred at law, as in Dormer v. Fortescue, (2 Atk. 282. 3 Atk. 124.) His Honour decreed the account from the death of the husband. Oliver v. Richardson, M. 1803. 9 Ves. 222.
DOWER IV.

Liability to Taxes. Interest on Arrears.

84. Where land was mortgaged for securing an annual payment of 20l. to a widow, in satisfaction of dower, this annual payment being secured out of land, ought to answer taxes as the land does; but if the tenant, in his payment of the annuity to the widow, omits to deduct for taxes, he shall not make her refund in equity. Atwood v. Lamprey, M. 1719. 3 P. W. 198. n.

85. A devise to trustees to pay out of the rents 30l. per annum to his wife for life, without deduction, in satisfaction of her dower. There shall be an allowance for land-tax, for this devise must be considered as a rent charge. Green v. Marygold, M. 1727. 8 Vin. Ab. 411. pl. 3.

86. Equity will not give interest on the arrears of an annuity secured by bond, and accepted by the widow in bar of dower, nor in any case on arrears of dower. Tew v. Winterton. E. 1792. 3 Bro. C. C. 439. 1 Ves. jun. 451.

ECCLESIASTICAL PERSONS AND THINGS.

I. Of the Parson or Rector. Government of his Church, and herein of the Canons of the Church made by the Convocation.

II. Of the Parson, as an individual Member of the Community.


ECCLESIASTICAL PERSONS AND THINGS I.

Of the Parson or Rector. Government of his Church, and herein of the Canons of the Church made by the Convocation.

1. A parson inappropriate shall not have the nomination of a vicar. Mallit v. Trigg. E. 1682. 1 Vern. 42.

2. No writ de cautione admittanda ought to issue till affidavit filed, that the Bishop has refused to admit of caution. Archbp. of York v. ----, H. 1682. 1 Vern. 119.

3. An improper of small tithes is bound to maintain a priest, where there is no vicarage endowed, and in such a case the king may assign to the curate such a proportion of the small tithes as he thinks fit; but otherwise, where there is an endowment, though never so small. Bennet v. Lee, E. 1684. 1 Vern. 247.

4. A bill will not lie to be quieted in possession of a pew, though plaintiff had a decree before the ordinary for it, for the court cannot examine whether the bishop has done right, nor will his decree bind his successors. Baker v. Child, E. 1691. 2 Vern. 226.

5. A. seised of the manor and patronage of W. by will, gave a rent-charge and the right of nomination to the church, which was a donation; to six trustees, who, when reduced to three, were to choose others. B. the only surviving trustee, assigned his trust to others, who nominated to the church: Held, that the assigns of the surviving trustee, and not
ECCLESIASTICAL PERSONS AND THINGS I.

Of the Parson or Rector.—Government of his Church, &c.

the owner of the manor, had a right to nominate. *Att. Gen. v. Fleyer*, H. 1716. 2 Vern. 748.

6. Building and endowing a church originally entitled the patron to the patronage, but an improvisor of a parish has no right to nominate a preacher to every chapel within the parish; it would be a hardship should he be bound so to do, neither ought it to be at his election. A man may build a private chapel for himself and family, or for himself and his neighbours, but that will not give the parson a right to nominate his preacher. *Herbert v. Dean & Chap. of Westminster*, H. 1721. 1 F. W. 774.

7. The parson is a corporation for taking land for the benefit of the church, as the churchwardens are for personal things. *Att. Gen. v. Roper*, H. 1722. 2 P. W. 125.

8. The canons of 1603 not being confirmed by parliament, do not *proprio vigore* bind the layty, and there is no canon since 1603, which can bind a layman, though made in full convocation. The clergy, however, are bound by canons confirmed by the king only, though the confirmation of parliament is necessary to bind a layman. Yet canons that have been allowed by general consent, within the realm, and are not repugnant to the laws, shall still be in force as the king's ecclesiastical laws. The necessity of parliamentary confirmation to bind the layly, has existed ever since the reformation. *Middleton v. Crofts*, M. 1736. 2 Atk. 630. (Append.) Ca. temp. Hardw. 57. 2 Stra. 1056. 2 Barn. B. R. 331. 2 Kel. 148. *Vide post*, tit. *Infant*, vii. *Marriage*, vii.

9. Though the canons, which have not the authority of parliament, are not binding on laymen, yet they are prescriptions to ecclesiastical courts, and to clergymen; therefore a clergymen who marries a couple out of the parishes in which the man and woman reside, is liable to penalties, for the canons must be pursued with the utmost exactness, by ecclesiastical persons. *More v. More*, E. 1741. 2 Atk. 158.

10. A rector may cut down timber for the repairs of the parsonage-house or chancel, but not for any common purpose, and he is entitled to botes for repairing barns and out-houses belonging to the parsonage. If it is the custom of the country, he may cut down underwood for any purpose, but if he grube it up, it is waste. *Strachy v. Francis*, M. 1741. 2 Atk. 217.

11. Reading prayers or a sermon in a private family, is not performing divine service. Divine service is an expression often used in acts of parliament, which direct the readings of proclamations after divine service. *Trebus v. Keith*, H. 1742. 2 Atk. 499.

12. A parson can neither preach, administer the sacrament, or celebrate marriage, without the bishop's license, though such a license is not necessary for every particular case, but a bishop may suspend a minister wholly, if he is irregular, till he submits to perform his duty properly. *S. C.*

13. If an incumbent in possession of above 8l. per annum, in the king's books, accepts a second livings under that value, it is an absolute avoidance of the first, and if he possesses one under that value, and takes a second without a dispensation, the first is void at the election of the patron. *Boteler v. Allington*, E. 1746. 3 Atk. 455.

14. That a quare impedit cannot issue after six months, where a parson has been presented to a living, by one who has not a right, is a rule very proper to be adopted in equity, because it is the general one that equity follows the law, whether originally a resolution of the common law, or introduced by statute. The statute of Westminster (13 Edw. 1. c. 5.) was intended to secure the peace of the church, and being considered as a statute of limitation, it is a bar of an equitable as well as legal right, and therefore a plea of plenary of six months and upwards will be allowed. *S. C.*, *Et vide* Gardner v. Griffith, 2 P. W. 404.

15. A bill lies in the name of a chancellor or curate, to establish his right, but not an information in the name of the Att. Gen. unless for charities, as augmentations of vicarages are. *Brezet v. Tamberlane*, T. 1752. 2 Ves. 426.

16. A perpetual curacy or chapel has all sorts of parochial rights, as a clerk, wardens, &c. the right of performing divine service, baptism, sepulture, &c. and the curate has small tithes and surplus fees; but chapels of ease are merely *ad libitum*, and have no parochial rights; therefore, on the union of the two parishes, one is frequently deemed the parish church, and the other as a parochial
ECCLESIASTICAL PERSONS AND THINGS I. II. & III. 595

Of the Parson or Rector, as an Individual.—Advowson, &c.

17. The right to nominate to a chapel of ease is in the vicar of the mother church, though the chapel was erected and endowed with lands by the lord and freeholders of a manor, and though the right of nomination was given by the archbishop in his deed of consecration to the inhabitants, declaring that the vicar had no right to nominate. The inhabitants had repaired the chapel and nominated for 90 years; yet held, that the rector or vicar cannot lose his right but by agreement between the patron, parson, and ordinary, and then only on a compensation made to him; for prescription presupposes an agreement by deed, and not by parol. Dizon v. Kerrison, E. 1766. Amb. 528.

18. The Dean of St. Paul's is not one of the magnates (a great man) mentioned in the stat. 37 Hen. 8. c. 12. s. 16. where residence (viz. the Deanery House) shall be exempted from tithes. Warden and Canons v. Dean of St. Paul's, T. 1817. 4 Price 77.

ECCLESIASTICAL PERSONS AND THINGS II.

Of the Parson, as an individual Member of the Community.

19. It seems that a clergyman, if he will trade, may be a bankrupt, and the statute of 21 Hen. 8. will not exempt him, for he cannot take advantage of the breach of one law to excuse himself from the breach of another. Esp. Meynot, M. 1747. 1 Atk. 196.

20. An agreement in 1800, for a lease of a farm to a clergyman for the purpose of occupation, is void under the statute of 21 Hen. 8. c. 13. But whether a clergyman buying a lease, as property, or taking it by devolution of law, as next of kin, &c. is within that statute, the court will not determine. Morris v. Preston, T. 1802. 7 Ves. 556.

ECCLESIASTICAL PERSONS AND THINGS III.

Advowson. Right of Presentation.

21. A grant of the next avoidance to one without his privity, held a resulting trust for the grantor, no other trust being declared. D. of Norfolk v. Browne, H. 1697. Pre. Ch. 80.

22. A manor with an advowson appendant was in mortgage when the church became vacant. The mortgagor shall be present unless he be foreclosed, and if the church became vacant pending a suit to foreclose, though defendant has no bill, the court will restrain plaintiff from proceeding by quare impedit. Amburst v. Dowling, M. 1700. 2 Vern. 401. Vide Jory v. Cox, Pre. Ch. 71. accurately stated from the register book in a note to 2d ed.

23. The mortgagee of a manor and advowson was in possession when the mortgagor made a simoniасal presentation of A. who was rejected by the bishop. The mortgagor and mortgagee then joined in presenting B.—C. got the title of the crown, and brought an information to remove the mortgagee's title, that it might not be set up at law, which the court decreed. Att. Gen. v. Hesketh, or Sudell, E. 1708. 2 Vern. 549. Pre. Ch. 214.

24. If an advowson only be mortgaged, and the living becomes void, it seems the mortgagee shall present, especially if it be so expressed in the deed as part of the agreement. But where one mortgaged a manor with an advowson appendant, and the church became void, the mortgagee, though in possession, shall not present till the mortgage is foreclosed, and the mortgagor must bring his bill within six months, as in quare impedit. Gardener v. Griffith, H. 1726. 2 P. W. 403. Affirmed in Parliament, vide
ECCLERICAL PERSONS AND THINGS III.

Adyson—Right of Presentation.


25. A seized in fee, devised his lands and tenements in B. to trustees, to apply part of the rents in augmentation of eight several vicarages. The church of B. became vacant; decreed that the heir of A. shall present. Kentz v. Langham, M. 1783. Ca. temp. Talb. 143.

26. R. S. rector of B. devised his perpetual advowson of B. to G. S. willing and desiring her to sell it to Eton Col., and on their refusal to Trinity Col., and on the refusal of both, to any other college in Oxford or Cambridge, being the best purchaser. This is not a resulting trust of the advowson to the heirs of the testator, but a devise of the beneficial interest therein to G. S. with an injunction, only to sell to particular societies, and on an avoidance by the death of the testator, the devisee and the heir shall present. Hill v. Bp. of London, H. 1738. 1 Atk. 618.

27. W. H., by will, devised the perpetual advowson of S. to W. C., upon trust to present his son to the living, and that if the church shall next after his death be full of an incumbent, then to sell the perpetuality, and to apply the profit arising from the sale first to the payment of debts, and then to distribute the surplus in thirds to his daughters. The trustees presented the son, who died before the advowson was sold, leaving an infant daughter, who brought her bill, insisting upon a resulting trust in the advowson to her, as heir at law after debts and legacies paid: Held, that the whole legal estate being devised away, there could be no resulting trust for the heir. So if A. seized of an advowson be also incumbent and devises it, the devisee, after his death, shall nominate, for where the ownership and property of an advowson be in the devisees, they and not the heir, shall nominate in consequence of such ownership, nor will it make any difference, whether the devisee has the advowson in him as a personality or as a reality. Hawkins v. Chappel, M. 1739. 1 Atk. 622.

28. Where there are several cestui que trusts of a presentation, they must all agree, or there can be no nomination; so in case of joint-tenants before severance, but where parties in an advowson cannot, they must cast lots who shall present first. Seymour v. Bennett, M. 1742. 2 Atk. 482.


31. Where there was only a general allegation as to the right of election to a curacy, which was not examined into, or proved, the court would not make any decree, but dismissed the information with costs. Att. Gen. v. Parker, or Price v. Doughty, M. 1747. 3 Atk. 576. 1 Ves. 43.

32. In the case of a presentation, the king before induction, or a subject before institution, may revoke it. Att. Gen. v. Wycliffe, H. 1747. 1 Ves. 80.

33. The privilege of an elder sister to present first in turn, not only descends to her heir, but goes to her assignee. Buller v. Bp. of Exeter, M. 1749. 1 Ves. 340. vide Harris's Ca. Cro. Elia, 19. 2 Inst. 365.

34. Trustees had an advowson, with directions to present in a certain time. This is directory only, and they may do it afterwards, but they must join in the presentation. General disuse is evidence of a consent to lay aside that part of their constitution which arose by consent. Att. Gen. v. Scott, H. 1750. 1 Ves. 415.

35. Where trustees have a power to elect a vicar, they must all join, or the bishop may refuse their nominee, and he shall not by quare impedit be compelled to institute him. So election as well as presentation being requisite on the part of the trustees, they shall give notice of their meeting, and if the election be not fair, the court will not compel all the trustees to join in the presentation. The election in such case is a personal trust, and cannot be executed by proxy, and where by a decree the trustees are or-
ECCELESTICAL PERSONS AND THINGS III.

Adowson.—Right of Presentation.

Adowson: an adowson is gross passes; and a sale of the next presentation within the term by direction, and for the benefit of the coetusque trust, was established. E. of Albermarle v. Rogers, M. 1794. 2 Ves. jun. 477.

43. Bill to have a presentation to a living upon the next avoidance delivered up, charging defendant with gross misconduct in obtaining it, and otherwise while a private tutor in the family. General demurrer to the bill allowed, for the court said no bishop will ever institute such a clergyman. McNamara v. ———. E. 1801. 5 Ves. 824.

44. The stat. of 7th Ann. c. 18. enacting, that the interest of the patron of an adowson shall not be displaced by usurpation, is not retrospective. Att. Gen. v. Bp. of Litchfield. E. 1801. 5 Ves. 828.

45. Where by neglect, the number of trustees to present to a living was not filled up at the time of an avoidance, the court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee without special ground, but the court will take care that the trust shall be properly filled up in future. S. C.

46. This information was filed at the relation of several of the inhabitants of Clerkenwell, praying that the election of a defendant as curate might be declared void, and that another election might take place, according to a deed in 1656, and a decree in the exchequer, by which it appeared that the improper rectory was purchased for the use of the parishioners and inhabitants, and that the nomination of the curate had been declared to be in the parishioners and inhabitants, paying to church and poor. Ld. Ch. expressed an opinion, that assessment gave the right, though actual payment had not been made: but the election on that principle was not disturbed on the ground of common consent, no objection having been made to it at a general meeting; and the parish having no representative meeting in vestry for such purpose. Att. Gen. v. Foster, H. 1804. 10 Ves. 335. Vide Att. Gen. v. Parker, 3 Atk. 576. 1 Ves. 49. ante, pl. 31. which was a case respecting the same curacy. See more of this case, post, pl. 48.

47. The qualification in the grant of a living, that the person to be presented should not, at such time as the church should be void, “be presented, instituted,
or induced into any other living,” is sufficiently complied with, by the previous resignation of another living, which resignation, if sent by the post to the bishop, is enough, if he signs a memorandum of his acceptance of it, for that acceptance is not a judicial but a domestic act, requiring no registration. Hayes v. Esxeter Coll. Ozm. E. 1806. 12 Ves. 336.

48. Upon a former hearing of this cause, (nominis Att. Gen. v. Foster, ante, pl. 46,) the court decreed the nomination of the curate to be in the parishioners and inhabitants, paying to the church and poor; and now a question arose, whether that qualification was assessed by assessment only, not followed by actual payment. Upon common consent, however, to that among other regulations, an election on that principle was established, a case of very strong and high probability being required for an issue or enquiry, and in this case, the court declining prospective directions as to the future, the bill was dismissed with costs, except as to keeping up the number of trustees, with reference to the stipend of the curate, as only a proper subject of the information. All the rest, viz. the nomination, &c. the court considered as the subject of a private suit, and said, that an informality in the bill, such as plaintiffs not stating that they sued on behalf of all the parishioners, might have been cured by amendment. Att. Gen. v. Nearcombe, T. 1807. 14 Ves. 1.

49. Where the trust of an advowson is to present some fit person, such as the inhabitants and parishioners, or the major part of the chiefest and discreetest of them should nominate, the right of election is in the inhabitants, above the age of 21, paying the church and poor rates, and popular election by a majority of such voters, and others not so qualified, was in this case established. Fearns v. Webb, H. 1808. 14 Ves 13.

50. A. contracted with B. (since deceased,) for the purchase of an advowson, but took no steps to enforce the contract till long after the death of the vendor, when the title was objected to on the ground of outstanding judgments, and a creditor’s bill pending: Held, that A. is not entitled as against a devisee of B. to present, on a vacancy occurring in the mean time, though A. had not renounced his contract, but insisted on having it completed: Held, also, that if in consequence of A. insisting on such right, a bill becomes necessary to ascertain the true claim to the next presentation, which is thereby put in danger of lapse, a decree in favour of the plaintiff will carry costs as far as his claim came in question, though it be part of the decree that, subject to the next presentation, A. be permitted to complete his contract. Wynif. v. Bp. of Esxeter, H. 1815. 1 Price 292.

51. Where the title of a family to an advowson was evidenced by conveyances and deeds for a period of nearly 140 years, and there had been three presentations by them, and none by the crown, a grant will be presumed. Gibbons v. Clark, H. 1819. 1 Jac. & Walk. 159.

ECCLESIASTICAL PERSONS AND THINGS IV.

Simony. Resignation Bonds.

52. Upon an action on a resignation bond, plaintiff at law moved to dissolve an injunction obtained by defendant. North, C. S. was not satisfied that such a bond was good in law, he therefore directed plaintiff to declare on it, and defendant to plead simony, and after judgment to return into equity. Grahe v. Grahe, H. 1692. 1 Vern. 181.

53. Defendant, on presenting plaintiff, took a bond of him to resign, and defendant having a large estate in the parish, on plaintiff’s demanding title of him, he gave him notice to resign, but on the bishop’s learning the cause of the resignation, he refused to receive it; defendant then putting the bond in suit, a perpetual injunction was awarded. Darwell v. Sanders, M. 1686. 1 Vern. 411.

54. The guardian of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs: the patron died an infant, leaving two sisters his heirs, and upon the incumbent’s refusal to resign, they put the bond in suit and
recovered judgment. Upon a bill to be
relieved against the judgment, it was
proved that the sisters had said, that if
he would not give 700l. for the perpetual
advowson, they would make him resign:
Held, that the proof in this case lying on
defendants, unless they show some good
reason for removing the incumbent, the
court will decree against the bond. Bonds
for resignation have been held good in
law. The stat. 31 Elia, against simony,
made the penalty upon the lay patron,
and no case of a resignation-bond appears
before that statute, since which they have
been allowed only to preserve the living
for the patron himself, or for a child, or
to restrain the incumbent from non-resi-
dence, or a vicious course of life, but if
any other advantage be made, it will avoid
the bond; and though it be general for
resignation, yet some special reason must
be shown to require a resignation, or the
court will not suffer it to be put in suit,
for if it should not be so, simony may be
committed without proof or punishment.
A particular agreement to resign for the
benefit of the friend that would be pre-
pared, must be proved, and without such
agreement the bond ought not to be sued
but for misbehaviour of the parson. In
this case, there being proof of endeavours
to get money out of plaintiff, the court
decreed a perpetual injunction against the
bond, and satisfaction to be acknowledged
on the judgment, and plaintiff to give a
new bond to resign, but that not to be
sued without leave of the court. Hilliard
v. Stapleton, M. 1701. 1 Eq. Ab. 87. pl. 5.
Vide Grey v. Hesketh, Amb. 268. where
Sir. Hardwicke said, "that Ld. Keeper
Wright went too far in this case."
55. A presented B. to a vicarage, and
took a bond conditioned to resign after
ten years, upon request. The ten years
expired, and the request was made. B.
prepared a resignation, and tendered it to
the bishop, who refused to accept it, saying
these bonds were against conscience
and void; and because this in an action
brought upon the bond would be no plea.
(a) B. (who held the benefit for a third
person of good conversation, but did not
reside in the vicarage) brought his bill to
be relieved, and to have an injunction
against the bond at law. But the court
would not relieve unless the patron had
made some ill use of the bond, for the
law allows resignation bonds to be good.
Price, B. in this case was not clear as to
any judicial act to be done by a third per-
son, but the party having done his ende-
vour, the parson had three months given
him to resign, which, if he did, the court
would grant a special injunction. Steeper
(a) Grey v. Hesketh, post, pl. 58. Such
bonds, though to resign generally, are
good, and have been constantly so allow-
ed, because they may be on good and
valuable considerations, and not simoniac-
al; as where the party took a second be-
nefice, or for non-residence, and equity
will insist on such bonds where the consi-
deration is good. Vide Turner v. Hawk-
kins, Fortesc. 351. So in Peole v. E. of
Carlisle, 1 Stra. 227. a general resigna-
tion bond was held good.
56. Though resignation bonds are not
prohibited by law, yet if they are made
use of to extort money from the incum-
ent, or to turn him out for any thing
but ill behaviour or immorality, the court
will grant an injunction against them.—
131. ante, pl. 52. Bp. of London v.
Fytche, 1 Bro. C. C. 96.
57. A. on presenting B. to a living,
took a bond from him to resign when C.
came of age; instead of requiring a resign-
ation, it was agreed that B. should hold
the living, paying 30l. per ann. to C.,
which B. paid for seven years, but re-
fusing to pay it any longer, A. put the
bond in suit. B. applied for an injunc-
tion and to have back his 30l. per ann.
Ld. Ch. granted the injunction, not (as
he said) upon account of any defect in
the bond itself, which he held good,
but on account of the ill use that had
been made of it; and as to the money,
as it was paid upon a simoniacal contract,
his Lordship left B. to his remedy at
law. Peel v. Capell, M. 1723. 1 Stra.
554.
58. It is no excuse for not resigning,
agreeable to the conditions of a resigna-
tion bond, that the bishop refused to ac-
cept the resignation. Grey v. Hesketh,
5 Co. 23. Hilliard v. Stapleton, 1 Eq.
Ab. 86.; in which case Ld. Hardwicke
said, Ld. Keeper had gone too far. Est
Vide Durston v. Sandys, 1 Vern. 411. ante,
pl. 53.
59. Where a clerk, previous to his
being presented to a living, gave his pa-
tron a general bond to resign upon re-
ECCLESIASTICAL PERSONS AND THINGS IV. & V.

Simony.—Spiritual Court.—Prohibition.

quest, such bond is simoniacal and illegal, which was pleaded by the bishop to a square impedit in this case; and though the courts of C. B. and B. R. determined in favour of the bond, yet this judgment was reversed by the Lords. B. of London v. Fytche, T. 1783. 2 Bro. P. C. 211. 1 Bro. C. C. 96.

60. A bond was given by a father to secure an annuity to his son, until he should be in possession of a living of a certain value, and an agreement of even date was executed, reciting the bond, and declaring that the son would forthwith enter into orders, and accept such living. Ld. Ch. expressed great doubts as to the validity of this bond, connected as it was with a corrupt agreement for taking orders. The policy of the ecclesiastical constitution of this country requires that a man should take orders without any reference to considerations of a pecuniary nature. This case, however, was decided upon the ground that the son had not complied with the condition, having received the annuity nine years, and being still only in deacon's orders, and that therefore the annuity was determinable by the father or his representatives.—Kircudbright v. Kircudbright, M. 1803. 8 Ves. 55.

61. B. a purchaser (under a decree) of the first presentation to an advowson, of which A. was seised for life, afterwards took a conveyance from A. of the second presentation to the same benefice, and sold the first presentation to the existing incumbent. A. sought to set aside this transaction for fraud, and he prayed a discovery, which B. by his answer refused to make, as tending to subject him to a forfeiture for simony. On the death of B., the suit was revived against his executors: Held, that the executor was entitled to the same protection. Parkhurst v. Lowden, E. 1816. 1 Merv. 391.

ECCLESIASTICAL PERSONS AND THINGS V.

Spiritual Court. Jurisdiction. Prohibition.

62. As to the jurisdiction of the ecclesiastical court, and of injunctions and prohibitions granted against the proceedings therein, vide tit. Jurisdiction, sec. ii.

63. It is the practice of the ecclesiastical court that the party coming into court, and doing any act himself, shall vacate a power given to another to act for him. Hayes v. Ezra Coli., Ezra, E. 1806. 12 Ves. 346.

ELECTION.

1. Where a man is put to his election whether to proceed at law or in equity, if the bill be filed for the land, and an account of mesne profits, he may elect to proceed in ejectment for the possession, and in equity for the account. Anon. M. 1092. 1 Vern. 105. but in Dormer v. Fane, 3 Atk. 129. infra, pl. 3. Ld. would by no means admit of it.

2. An election is not peremptory, for plaintiff, after having elected to proceed at law and failed there, may bring a new bill in equity. Lady Plymouth v. Bladen, H. 1688. 2 Vern. 32.

3. Where a man brings a bill in equity for the possession of lands, and for an account of the profits, and an ejectment at law for the same estate, and there is nothing more in the case, the court will
put him to his election. Dormer v. For-

4. A father was tenant in tail under a
marriage settlement: contrary to the
articles, the settlement was rectified for
the son; but he having a benefit under
his father's will by payment of his debts,
was held bound to make his election.
Roberts v. Kingley, T. 1749. 1 Ves. 238.
Vide Honor v. Honor, 1 P. W. 123.
2 Vern. 658.

5. A contingent legacy was given to
the heir, on express condition not to dis-
pute testator's will, which was not execut-
ted according to the statute. The heir was
put to his election when of age, either to
claim the legacy or the lands devised
Ch. 265. Streetsfield v. Streetsfield, Ca.
temp. Talb. 176. Herle v. Greenbank,
3 Atk. 695. 1 Ves. 298. Jenkins v. Jen-
kins, Belt's Supp. to Ves. 250. As to
persons having legacies on condition not
to dispute testator's will, under which
they may have a right to claim, vide tit.
Legacy, sec. vi.

6. On marriage, the fathers on each
side agreed to settle lands. One did so,
but the other gave a bond in 1200£ pen-
alty to pay 600£; if he did not. He has
not an election afterwards to forfeit the
600£, or to make a settlement, the settle-
ment being the primary agreement, and
the 600£ amounting only to a penalty or
further security. Chililner v. Chililner,
T. 1754. 2 Ves. 528.

7. Part of testator's estate being in
settlement, he devised all his estates, &c.
in general words, and not specifying them:
Held, not such a sufficient indication of
his intention to dispose of that over which
he had no power, as to induce the court
to compel the devisee to elect. Forrester
388.

8. Where an heir at law had an estate
devised to him in remainder, and claimed
a copyhold estate in opposition to the
will, for want of a surrender, he was put
to his election. Unett v. Wilkes, E. 1768.
Amb. 430. 2 Eden 187. Et vide Green
v. Green, 2 Meriv. 80, and Judd v. Pratt,
13 Ves. 173.

9. Devise of an annuity (charged on
real estate, to testator's wife, during
widowhood. It appearing to be the mani-
first intention of testator to give this in

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lisa of dower, the widow may elect to
take either under the will, or her dower.
Arnold v. Kempstead, T. 1768. 2 Eden
236. Amb. 466. Vide Kidney v. Cousm-
aker, 12 Ves. 186. Dorchester v. Efl-
ingham, Earl, Coop. 319. et ante tit.
Dower, sec. ii.

10. A devised; all his freehold and
copyhold estates, having surrendered
the copyholds to the use of the will, but the
testator afterwards exchanged part for
other copyholds which were not surren-
dered. The heir claiming beneficially
under this will was put to his election.
Frank v. Standish, M. 1772. 15 Ves.
391. (n.)

11. A devised an estate to B. for life,
supposing she had a right. She also gave
him a life interest in other estates. B.
claimed the first estate under an old en-
tail: Held, he shall not be put to his
695. 1 Ves. 298. Greaves v. Boyle,
1 Atk. 509.

12. Where a sum was settled by mar-
riage articles upon the only child of the
marriage, and the father afterwards by
will, gave her all his real estates for life,
with remainder to her children, and
ordered personal property to be laid out
in lands to the same uses, she must elect
between the devises under the will, and
the sum which she claims under the set-
1 Bro. C. C. 481.

13. Testator, by settlement, reserved
an election to convey certain lands, or
pay a certain sum of money; not having
decided during his life, and his personal
estate being inadequate to the payment
of his debt, held, that the estate shall be
2 Bro. C. 5.

14. A treaty between husband and wife
for the purchase, by him, of the wife's
several estates, shall not be carried in
execution after the death of the parties,
but the husband's personal estate shall be
liable for the rents received, and the heirs
of the mother shall elect between the
estate, and their provision under the hus-
band's will. Pitt v. Jackson, E. 1786.
2 Bro. C. 57.

15. Where a devisee takes a gift under
a will, the law annexes a condition to the
gift, that he shall not dispute any other
part of the will, even though that other part gives away from him something to which he had an undoubted right; he must therefore make his election whether he will renounce the particular gift to him by the will, or abide by the will altogether; but this rule has many exceptions, viz. 1st, Where the testator himself annexes a condition to the gift. 2dly, Where the devisee does not disturb the devise in toto, but only claims an excescent interest out of the estate (as dower,) and then suffers it to go according to the disposition made thereof by the will. 3dly, Where it may be collected from the whole will that it was not the testator’s intention to exclude the devisees, claiming a contrary right to the letter of the will, from any other benefit under it; and, 4thly, when the testator bequeathes a present gift to a remainder-man after an estate tail, and by the same will either gives the lands to another, having no power to give them, or subjects the remainder to a charge, to which he had no power to subject it. In neither of these cases is the remainder-man subject to the equity of making his election, whether he will renounce all benefit under the will, or do all his power to make good the devise of the remainder on one hand, or confirm the charge on the other; and the court said, these tacit conditions are to be considered as they stood at the death of the testator, and the implication of them must be a necessary one; something as if written in the will. Stewart v. Henry, M. 1786. Vern. & Scrv. 53, 56.

16. By marriage settlement, 1000£ was to be laid out to the use of the wife for life, remainder to herself in case she should survive, but if the husband should survive, then to such uses as she should appoint; and in default, to such persons as would take under the statute of distributions. She died without appointment, leaving a daughter: the father gave the daughter an estate in fee, in performance of the covenant. This is a case of election; but the daughter electing to take under the will, takes the personality as next of kin. Hoare v. Barnes, T. 1791. 5 Bro. C. C. 316.

17. An election to take under or in opposition to a will, can only be compelled by an election of something, nor dehors the will. Stratton v. Best, E. 1791. 1 Ves. jun. 6. Vide Noys v. Mordaunt, Pre. 526 a.

18. There never can be a case of election but upon a presumed intention of the testator. Crosby v. Murray, T. 1792. 1 Ves. jun. 555. And an election can only exist where a person has a decided interest in something left him by testator’s will. S. C.

19. No one is bound to elect without a clear knowledge of the funds from which he is to make his election. Whistler v. Webster, T. 1794. 2 Ves. Jun. 371. Vide Wake v. Wake, 1 Ves. jun. 355. Stratford v. Powell, 1 Ball & B. 23. Chalmers v. Storrill, 2 Ves. & B. 222. But where lands are devised by will not duly executed, the heir having a legacy upon express condition not to dispute the will, must elect. So, where testator has disposed of the estate of another, who has some interest under the will, he shall not take that unless he gives up his estate to that amount. Whistler v. Webster, sup. Vide Blake v. Banbury, 1 Ves. jun. 514. Finch v. Finch, ibid. 524.

20. As to the equity of compelling an election in contradistinction from an express condition, see Ld. Cavan v. Puttney, T. 1793. 2 Ves. jun. 544.

21. A party bound to elect between two funds, having mortgaged one, elected the other: the former must be taken, subject to the mortgage, but shall be reimbursed by the latter. Rumbold v. Rumbold, E. 1796. 3 Ves. 65.

22. A person entitled under a will, and also paramount, and against it, must elect. Wilson v. Mount, T. 1796. 3 Ves. 191.

23. Where a testator, conceiving himself entitled to the property of another person, makes a general disposition of all his estate, and gives some benefit to that person, he must elect. Therefore a husband conceiving himself entitled under a void deed to a residue bequeathed to his wife, and dying without getting possession, having made such a general disposition by a will, under which she took an interest it is a case of election, and her election to take the provision under the will, which, though less in point of value, was to her separate use, was established against the assignee under the bankruptcy of her second husband. Rutler v. M‘Lean, E. 1799. 4 Ves. 531.

24. Parties having claims under another against a will, must elect. Welles v. Tanner, H. 1800. 5 Ves. 218.; and between such claims an election was decreed. Blount v. Bestland, T. 1800. 5 Ves.

25. In a case both of election and satisfaction by the will of a parent, as to two subjects of claim by his younger children under a settlement, a case of election was raised as to a third subject, viz. stock vested in trustees upon the construction of the will. Pole v. Ld. Somers, T. 1801. 6 Ves. 309. Vide Druce v. Dennison, 6 Ves. 383.

26. The heir, claiming under a will, and against it, a copyhold estate unsubmerged, must elect. Pettit v. Prescott, T. 1802. 7 Ves. 540.

27. Where a will proceeds upon a mistake, a devisee insisting on the benefit of such mistake, must relinquish what the will gives him. Vine v. Dungannon, M. 1804. 2 Sch. & Lef. 130.

28. All election goes on compensation. If by a will which gives A.’s estate to B., an estate is given to A., he may say, he will keep his own estate.—The compensation on which the court goes, is the implied condition, of which the other is to have the benefit, that whoever takes that estate in consequence of the election, takes it cum onere.—Per Eldon, C., in Rich v. Cockell, E. 1804. 9 Ves. 369.

29. The doctrine of election takes place, where one legatee insists on something, by which he would deprive another legatee under the same will, of the benefit to which he would be entitled, if the former permitted the whole will to operate. Andrew v. Trinity Hall, Camb., T. 1804. 9 Ves. 583. Vide Blount v. Bestland, 5 Ves. 515. and references.—Rumbold v. Rumbold, 9 Ves. 65. Wilson v. Mount, ibid. 191. Pettitard v. Prescott, 7 Ves. 541. Shedden v. Goodrich, 8 Ves. 481. Rich v. Cockell, 9 Ves. 369.

30. Election is where the testator gives what does not belong to him, but to some other person, and gives that person some estate of his own, by virtue of which gift, a condition is implied either that he shall part with his own estate, or not take the bounty, thereby permitting the testator’s will to take effect. Brooke v. Mencke, E. 1803. 10 Ves. 609. 616. Vide Coventry v. Coventry, 2 Atk. 366. Noys v. Mordaunt, 2 Vern. 581. Streetfield v. Streetfield, Ca. temp. Tabl. 176. Blunt v. Clitheroe, 10 Ves. 589. Andrew v. Trinity Hall, supra, and references.

31. The ground of the doctrine of election is, that no person puts himself in a capacity to take under an instrument, without performing the conditions of it, expressed or implied. Moore v. Butler, M. 1805. 2 Sch. & Lef. 267. See Mr. Raithby’s note (1) to Noys v. Mordaunt, 2 Vern. 382. Cull v. Showell, Amb. 727, and 3 Wooddey. Lect. App. 1.

32. The foundation of the rule of election is, that a person cannot accept and reject the same instrument; and this rule is equally applicable to every species of instrument, whether deed or will.—(Moore v. Butler, supra;) and it is a rule of law as well as of equity, and equally applicable to dower. Birmingham v. Kirwan, T. 1805. 2 Sch. & Lef. 449. Vide etiam Drury v. Drury, Dom. Proc. 1762. Harg. Co. Lit. 36. b. n. 7. Gosling v. Warburton, 5 Bro. P. C. 570. fo. ed. vol. ii. 492. 8vo. ed.

33. A widow is not bound by her election made under a mistaken impression of the extent of claims against her; nor is the doctrine of election applicable against creditors taking the benefit of a devise for debts, and also for enforcing their legal right against other funds disposed of by the will. Kidney or Williams v. Coussmaker, H. 1808. 12 Ves. 156. Vide Arnold v. Kempstead, 2 Eden 236. et al., pl. 9.

34. It is a general rule that, to put an heir to his election, the intention must distinctly appear, but whether it may be shown from circumstances dechor the will, the court doubted, though such circumstances may be evidence as to the property, but as to the intention of the testator, the court (in Stratton v. Best, 1 Ves. jun. 285.) reprobated the doctrine

35. An heir at law, having interests bequeathed to him, shall be put to his election; and this is the jurisdiction exercised by the court in compelling election, viz. that a person shall not claim an interest under an instrument, without giving full effect to it as far as he can, renouncing any right or property which would defeat the disposition. The ground of election is the implied condition upon intention, though from mistake, and the only instances of limiting the principles of election are, an attempt to devise by a will not duly executed, and an attempt to devise by an infant. Thelusson v. Woodford, M. 1806. 13 Ves. 200.; in which case the Ld. Ch. after examining the most material authorities upon this point, said, the principle of election is plain and intelligible, that if a person, being about to dispose of his property, includes in his disposition, either from mistake or not, the property of another, an implication arises that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition.

36. An effective gift may be made by raising a case of election, but for that purpose, a clear intention to give that which is not his property is required, and the principle of election is, that it does not give a right to retain the thing itself, though it may give a right to compensation out of something else. Dashwood v. Peyton, E. 1811. 18 Ves. 41. 49. Et vide S. C. fully stated, ante, tit. Devise; ix. Vide etiam Rich v. Cockell, 9 Ves. 369. Et ante, pl. 28.

37. A female infant is not bound by any agreement made on her marriage under age to settle her freehold estate; for she may, when of age, accede to it or not as she chooses; (a) but if she elects to defeat it, the court will not allow her husband to assist her, and if she should, her acts during coverture are ineffectual. If, however, she accedes but in part, when of age, that is an election to abide by the whole. Milner v. Ld. Harwood, T. 1811. 18 Ves. 275. Vide etiam (a) Dunford v. Lane, 2 Bro. C. C. 106.

38. The election of a Scotch heir claiming under an English will, is not controlled by the Scotch law of death bed. Heads v. Barry, T. 1813. 2 Ves. 271. in this case, Grant, M. R. said, he did not understand why a will not executed to pass real estates, should not be read, to discover in it an implied condition, as to real estate annexed to a gift of personality, (a) with reference to election by the heir, and as applied to freehold and copyhold estates; and as to the question, whether an instrument, of any given nature or form, is to be read against the heir for the purpose of election, as belonging to the law of real property, Ld. Hardwicks held that determinable by the statute regulating devises of land, and upon that principle, his Honour said, if the domicil were in Scotland, and the real estate in England, an English will imperfectly executed, ought not to be read in Scotland to put the heir to election. So, if by the law of Scotland no will could be read against the heir, a will of land in Scotland ought not to be read in England, to put the Scotch heir to an election. But his Honour doubted the soundness of that principle. See S. C. post, tit. Scotland, (a) Boughton v. Boughton, 2 Ves. 12. Stockton v. Goodrich, 8 Ves. 481.

39. The heir shall elect between lands devised to him and lands descended, where the deviser was tenant in tail of some of the lands, and tenant for life with the reversion in fee of others. The ground of election against the heir, is not only an implied condition that he shall confirm the whole will, but also the intention, in case the condition shall not be complied with, to give the disappointed devises, out of the estates over which the deviser had a power, a benefit correspondent with that of which they are deprived by such compliance; and accordingly the court decided in favour of the heir confirming that will; and if not, then in trust for the disappointed devises, as to so much of the estate given to him, as shall be equal in value to the estates intended for them. Welby v. Welby, T. 1813. 2 Ves. & B. 187.

40. Testator, by his will, gave various legacies to his heir at law. Afterwards he contracted for the purchase of several freehold estates, which he clearly intended to go to his executors for the purposes of the will, and not to go to the heir at law: Iffed, that the heir shall elect, and not be permitted to take the estates and the benefits under the will also. Rendlesham v. Woodford, T. 1813. 1 Dow P. C. 249. 18 Ves. 209. S. C.
and see the authorities there referred to.

41. The court on motion will compel a plaintiff to elect, whether he will proceed at law or in equity, as of course, but upon a false suggestion that the suits are for the same matter, it will be discharged; and the question, if difficult, will be referred to the Master, but all proceedings in the mean time will be stayed. Mills v. Fry, T. 1814. 3 Ves. B. 9. Vide Boyd v. Hunzelman, 1 Ves. B. 331.

42. A plaintiff suing in equity and in a foreign court of law, shall be put to his election. Pieters v. Thompson, H. 1815. Coop. 294.

43. Plaintiff, suing for equitable relief, part of which only could be had at law, is not entitled to elect; but can proceed at law only by leave of the court. A receiver, appointed at his instance, who, though his officer, ought, as indifferent, to restrain him, is not aided by an order for liberty to disturb, without his undertaking to proceed no farther at law. Mills v. Fry, H. 1815. 19 Ves. 277. Coop. 107.

44. By settlement on the marriage of G. with plaintiff, certain estates to which G. was entitled, as tenant in tail in remainder, were expressed to be settled, as to part, to the use of G. for life, remainder to plaintiff for life, remainder to the first and other sons of the marriage, and as to part, to the use of G. for life, remainder to the first and other sons, &c. immediately on the determination of his life estate. Other estates to which plaintiff was entitled in fee simple, were by the same settlement conveyed to similar uses. Upon the death of G., defendant (his only son and heir at law) entered on the estates to which he was entitled, as tenant in tail, under the settlement, and brought ejectments to recover possession of those, to which his father was entitled as tenant in tail at the time of the settlement, and into which plaintiff had entered on his death, as tenant for life under the settlement, as not having been duly conveyed to the use of the settlement; but the court restrained defendant from proceeding at law, on the ground of election. Yet the court doubted whether, where a party has elected (under a settlement) to take one of two beneficial interests, he is bound in equity to give up the other absolutely, or only to make compensation.

But it was held, that the principle upon which a person is put to his election under a contract is, that if he will not give the price intended, he shall not have the thing contracted for. Also, that the question as to election is very different where it arises under a will, and where under a settlement. (b) Green v. Green, T. 1816. 2 Meriv. 86. Vide (a) Thelwall v. Woodford, 13 Ves. 220. Affirmed 1 Dow 249. (b) As to this, see the several cases referred to in notes.

45. Bill by executors of a creditor against executors and devisees of a debtor, for specific performance of an agreement by defendant’s testator, for a mortgage of part of his real estate to secure the debt, and also for the usual accounts of his personal estate, and a sale of other parts of his real estate: Held, that the prayer was inconsistent, and that plaintiffs must confine themselves either to the mortgage or to the account. In a suit by creditors against devisees and the heir at law, if a sale may be necessary, the court never dismisses the bill against the heir, though he admit the will. Jackson v. Radford, T. 1817. Wills’ Exc. 129. 4 Price 274.

46. A father seised in fee of a manor and lands in R. by settlement on his second marriage, limited estates tail in those lands to the sons of the marriage, without noticing the manor, and the ultimate remainder he limited to himself and his heirs. The father, (still having the manor of R. and the reversion of the lands, and having two sons of the marriage) made his will, by which he devised all his manor and lands in B. and R. to his sons for life, with remainder to their sons in tail. There were expressions in the will, from which (if nothing had opposed that construction) it might be concluded that the testator intended to devise immediate estates for life to his sons, not only in the manor, but in the lands in A. in which they had estates tail under the settlement, and thereby to raise a case of election; but in the will he expressly ratified the settlement, and every thing therein contained: Held, both in Chancellor and by the Lords, that this was not a case of election. Eldon, Ch. observing that it was difficult to apply the doctrine of settlement where the testator has a present interest in the estate devised, though it may not be entirely his own. It cannot therefore be conjectured after
the express confirmation of the settlement by the testators will, that he did not mean to confirm it. Ranchor Ls. v. Lady Parkins, E. 1813. 6 Dow P. C. 149. Vide Blake v. Bonbury, 1 Ves. jun. 514. Welby v. Welby, 2 Ves. & B. 191.

47. A tenant for life, remainder to B. his only son in tail, remainder to A. in fee. B. died in A.'s life-time without issue, and without having barred the remainder, having by his will given all his estates, in very general terms to A. for life, and from and after his decease, the settled estates by name, and also estates of which he was himself seised in fee, "and all other estates which descended or came to him, or should descend or come to him, from his father," to C. and D. his sisters of the half blood, as tenants in common in fee; and his personal estate to A., whom he appointed executor; having by a codicil devised to A. in fee, a freehold estate he had purchased since the execution of his will. On B.'s death A. proved his will, possessed his personal estate, mortgaged for his own benefit the estate devised by this codicil, enjoyed during his life all the settled estates, and also the real estates whereof B. was seised in fee. A. died two years after B., having by his will, which was executed six weeks after B.'s death, devised the settled estates, and all other his estates, to trustees for a term, for payment of his debts, and for raising money for renewing the leases of part of the settled estates which were held by lease for lives, with remainder to C. and D. as tenants in common for life, with survivorship between them, and with remainders to their issue in strict settlement, with remainders over, including a limitation to F. for life. On A.'s death, C. and D. entered and enjoyed all the estates for 14 years, when C. died without issue, having devised all her estates to D. in fee. D. continued in possession of the whole till her death, about 29 years after the death of C. During the periods of C. and D.'s enjoyment, they on various occasions executed deeds containing recitals of the will of B., and describing themselves as devisees for life under it; and on renewals of the lease of part of the settled estates, D. paid the fines and expenses out of her own monies, but it appeared from several letters, written by her at those times, she considered herself as having a right, which she declined to exercise, of charging the estate with the amount. D. died without issue, leaving G. her heir at law, and having by her will devised to G. in fee, part of the settled estates by name, and the residue of the settled estates by name to E. in fee (who died in her life-time,) and bequeathed 500l. to F. and appointed him executor. Bill by G. against F., who had become entitled to an estate for life in possession under A.'s will, to put F. to his election either under or against D.'s will, and to have it declared that A. had elected to take under B.'s will; Held, upon a view of the circumstances, that A. had not elected; that in order to constitute election, the acts of a party must imply a knowledge of the inconsistent rights, and an intention to elect; and that the execution of deeds by C. and D., containing recitals of the character in which the party claimed, and by the exercise of a power to dispose of the estates in that character, was conclusive evidence of election by them, Dillon v. Parker, E. 1818. 1 Swanst. 359. 1 Wils. 253.

48. By the will of S., A. his widow took a life interest, and his six children the remainder in fee as tenants in common, in his real estates, of the annual value of 870l. A. under the erroneous expectation of acquiring an absolute power of disposition, having levied a fine of her husband's estates, devised a portion of them, worth about 135l. per ann. to G. her grandson in fee; another portion of like amount (together with an estate of her own at N. of the annual value of 115l.) for the benefit of the widow and children of W., her eldest son; and the residue, worth about 600l. per ann., to her daughter E. in fee. W., being entitled, under the will of S., as one of his children, to one-sixth, and as heir to three of his brothers who died without issue, to three-sixths of his father's estate, devised all his real estate for the benefit of his widow and children, and died shortly before his mother A.: the widow and children of W. selecting to take under the will of S. and in opposition to that of A., and by that election frustrating to the extent of 455l. per ann. the disposition of the latter in favour of E.: E. is entitled to the estate at N. in partial compensation. Grettum v. Hayward, E. 1819. 1 Swanst. 409.
EMBLEMENTS.

1. Husband and wife were joint-tenants for their lives, the husband sowed the land, and died before severance; upon this a question arose, who should have the corn? It was admitted that where strangers are joint tenants, emblements shall go to the survivor, but in this case, the court having recommended that the wife and executor of the husband should take it in moities, it was agreed to. Romney’s Ca. M. 1694. 2 Vern. 322.

2. As between tenant for life, and remainder-man, emblements shall go to the executor of the former, and not to the latter, for the public is interested in the produce of the grain, and great regard is to be paid to the benefit and convenience of the public. Lawton v. Lawton, M. 1743. 3 Atk. 13. See this subject more fully, post, tit. Executor and Administrator v.

ENTRY.

I. Of the Right of Entry generally.

II. In what Cases an actual Entry is necessary, in order to avoid a Fine, and maintain an Ejectment.

ENTRY I.

Of the Right of Entry generally.

1. A man is entitled to recover profits only from the time of his entry, and an injunction will not prevent an entry. Filley v. Bridger, M. 1705. 2 Vern. 519. Sed vide Curtis v. Curtis, 2 Bro. C. C. 620. where M. R. doubted the authority of this case, and particularly what is said as to the injunction not preventing the entry. Vide etiam Pre. Ch. 292. S. C. nomine Tilley v. Bridges, E. 1705, where Ld. Keeper was of opinion, that, where one has title to the possession of lands, and makes an entry, and thereby becomes entitled to recover damages at law for the detention of possession after his entry, he shall not turn his remedy at
ENTRY I. & II.

Right of Entry.—Where actual Entry necessary.

law into a suit in equity, and bring a bill for an account of profits, (except in the case of an infant, or some other particular circumstance.) Vide D. of Bolton v. Deane, Pre. Ch. 516. Vide etiam Bennett v. Whitehead, 2 P. W. 643.

2. A right of entry always supposes an estate; for it is nothing without a right to hold and receive the profits, and if an estate be granted to a man reserving rent, and in default of payment a right of entry is granted to a stranger, it is void. Smith v. Packhurst, H. 1742. 3 Atk. 159.

3. A right of entry differs from a power, for it will go to executors and administrators. Sherman v. Collins, H. 1745. 3 Atk. 322.

4. That which can be avoided by entry may be made good by confirmation. Boyle v. Lysaght, E. 1787. 1 Ridg. P. C. 392.

5. A term for years, conditioned to be void, upon non-performance of certain acts, becomes void without entry, and there can be no waiver. Freeman v. Boyle, E. 1788. 2 Ridg. P. C. 79.

But when the condition is annexed to a freehold, (in which case an entry is necessary in order to take advantage of the breach) there may be a waiver after the breach, and before entry, for until entry be made, the entry is not complete. S. C. as reported in Vern. & Scriv. 414. Et vide Walter v. Davids, Cowp. 305.

6. Where a man was disseised before the execution of his will, the land will not pass thereby, for he was not seized at the date of his will, having only a right of entry; but if he has the land at the date of his will, and was disseised afterwards, the act not being an act of volition, and afterwards he entered, he is remitted to his old title, and if he then dies it may be said, that he had the estate at the date of his will, and at his death. So, where there was a republication of that will after disseision, and before the re-entry, the land cannot pass by the will under the bare right of re-entry; for, by the opinion of Ld. Holt, if testator had not entered, the will would continue revoked, because at his death he had only the right of re-entry. Att. Gen. v. Vigor, E. 1803. 8 Ves. 282.

7. A cessuit que trust is always barred by length of time operating against his trustee; if therefore, the trustee does not enter, and the cessuit que trust does not compel him to enter as to the person claiming paramount, the cessuit que trust is barred. Hovenden v. Annesly, M. 1805. 2 Sch. & Lef. 629.

ENTRY II.

In what Cases an actual Entry is necessary, in order to avoid a Fine, and maintain an Ejection.

8. In Doe, ex. dem. Duckett, v. Watts, M. 1807. 9 East 17. it was held, that where an ejectment was brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 Hen. 7. c. 24. it is not necessary for the lessor to prove an actual entry to avoid such fine, considering it to operate only as a fine at common law, but by the defendant's confession of lease, entry, and ouster, the merits only of the plaintiff's title are put in issue. In this case Ld. Ellenborough said, that the stat. 4 Hen. 7. makes a fine with proclamations a bar, saving the rights of persons who pursue them by action or lawful entry within a certain time. In Oates v. Bridon, 3 Burr. Mansfield said, that to avoid a must be an actual entry, &c. and that in all other cases the confession of lease, entry, and ouster, is sufficient, without adverting to the distinction, as in the note to S. C. in Bull. N. P. 105. between a fine with proclamations, and a fine at common law. Vide etiam Goodright v. Cutter, Doug. 478. and Smith v. Clifford, 1 T. R. 741. The entry, therefore, previous to the bringing of an ejectment, is only necessary by the words of the statute, so far as relates to a fine with proclamations, an ejectment not being considered as an action within the meaning. So is the case of Jenkins v. Pitchard, 2 Wils. C. B. 45. and the practice ever since has been in conformity with that decision; and when it is said, that an entry is necessary before ejectment brought to avoid a fine, it must be understood of
ENTRY II.

Where actual Entry necessary.

A fine with proclamations, which seems to have been the case in Berrington v. Packhurst, Andr. 125. 2 Stra. 1086; and, Ld. Ellenborough added, that the point having been settled by antecedent cases, there was no ground for disturbing it, wherefore the rule to set aside the verdict in Doe v. Watts was refused. This resolution, however, was contrary to the decision of C. B. in Tapner, d. Packham, v. Merlot, T. 1740. Willes, 177, which is not noticed in this nor in Jenkins v. Fritchard, nor Oates v. Bridon, supra, though prior to both in point of time.

Ld. Ch. J. Willes there said, that the court would not determine, whether the fine was to be considered as a fine with proclamations or not, the action having been brought before the time, when all the proclamations were expired, and all the proclamations having been made that could be made before that time, because it was clear, that it was a fine of one sort or another, and there was no pretence to say that the fine was void, and if not void, all the court were of opinion, that when a person in possession levies a fine of any sort, the parties out of possession cannot maintain an ejectment without an actual entry. Ld. Kenyon also, in Compere v. Hicks, 7 T. R. 732. observed, that in Berrington v. Packhurst, as reported in Andr. 136. Ld. Hardwicke said, that in the case of a fine the party had no title before entry, not on account of the statute of Hen. 7. but on account of the puissance of the fine at common law. On the other hand, the necessity of an entry before ejectment brought to avoid a fine, seems, in other cases prior to those, to have been put upon the ground of the statute of Hen. 7. in relation to a fine with proclamations, as in Lutterell's Ca. Mo. 450, and in Awdley's Ca. ibid. 457. where it is said, that the statute is to be construed strictly, being made for the security of titles, also at common law it was necessary to enter for a condition broken; but in Little v. Heaton, 1 Salk. 259. (which was endeavoured to be distinguished from the case in Willes,) an entry was held not necessary before ejectment, and the opinion of Hale, C. J. was referred to, who had held, that the confession of lease, entry, and ouster, was sufficient in ejectment, in which opinion, all the judges concurred, and subsequent resolutions to the same effect were also referred to. The confession of lease, entry and ouster, is truly, as to the entry, a confession of the entry of the lessee, and not of the lessor in ejectment; but it must be recollected, that by the ancient practice (to supersede which the rule for confessing lease, entry, and ouster, was made, temp. Rolle, C. J. leaves to try title in ejectment were actually sealed and delivered on the land itself, and consequently the lessor must have entered upon it before, in assertion of his title, because (according to the books) it was maintenance in any one who was put out of possession to convey to another, and indeed, where the rightful owner was dispossessed, there might be some risk of his failing in his ejectment if he had merely entered, and afterwards executed a lease off the land, for the dispossessors continuing in, or immediately after regaining possession, would have operated as a new dispossess, and consequently as a re-dissession of the lessor at the time of executing the lease. Then there is nothing in the statute 13 Edw. 1. stat. 4. de modo levisandis fines, which requires that an entry shall be made on the land, in order to avoid the fine, though it concluded those who had right, if they made not their claim of their action within a year and a day, sur la pie, i. e. upon the foot, the fine, and not by the country, as it is translated in Runnington's Ed. of the Statutes, and other books, as if pays had been written instead of pie. Vide Naunton v. Leman, 2 Bla. 994. But Ld. Coke (2 Inst. 518.) seems to consider the statute of Edw. 1. as repealed by that of Hen. 7. so far as to render an entry of the party's claim at the foot of the fine, unavailing at this day. (Vide note (c) to Clarke v. Pywell, 1 Saund. 319.) Certainly it must be unavailable against a fine levied with proclamations, according to the latter statute; and since the statute 21 Jac. 1. c. 16. the party having a right of entry, has 20 years within which to make his entry, after his right accrues; but by stat. 4 Ann. c. 16. s. 16 no claim or entry on lands shall be of any force or effect to avoid any fine levied with proclamations, or shall be a sufficient entry within the stat. of Jac. 1. unless an action shall be thereupon commenced within one year after, &c. and prosecuted with effect; upon the whole, it seems now, that for every purpose except that of avoiding a fine with proclamations, in which case the statute of
ENTRY II.

Where actual Entry necessary.

Hen. 7. requires an entry, the bringing an ejectment will answer the same purpose; and, indeed, according to the good sense of the thing, it seems better adapted to answer any useful purpose, for which an actual entry on the land was originally required, or can at this day be made; but if the confusion of the lease made by the lessor in ejectment, be evidence of an admission on the part of the defendant, that the lessor had made an actual entry on the land before, or at the time of making the lease, in order to enable him lawfully to make it, it should seem, while the matter was re integra, that the same evidence might have been applied to a fine levied with proclamations, under the statute of Hen 7. without doing a violence to the words of the statute.

EQUITY AND ITS OFFICERS.

1. Accountant General.—The rule of evidence in the accountant general's office ought to be the same as in court; therefore, upon the marriage of a woman entitled to the interest of a fund for her separate use, an affidavit was required beyond the marriage, and identity that there was no settlement or agreement for a settlement, without prejudice to future cases. So to obtain payment to the representative, the mere production of the probate is not sufficient, but proof of the death is required, and that the testator was the party in the cause. Clayton v. Gresham, M. 1804. 10 Ves. 288.

2. Agent.—Vide tit. Solicitor, post, in this section.


4. Barrister or Counsel.—Counsel have a right to drafts as precedents, but not to detain them where either party may have a benefit from the inspection of them. Stanhope v. Roberts, M. 1741. 2 Atk. 214.

5. The court will not suffer a counsel to maintain an action for fees, nor if he be a mortgagee, to take more than legal interest, under pretence of a gratuity for business done. Thernhill v. Evans, T. 1742. 2 Atk. 332.

or agent to take a conveyance from the right heir, for his own benefit, which he discovered by being a trustee. Norris v. La Nove, H. 1743. 3 Atk. 38.

7. Where a decree has been made by consent of counsel, it cannot be impeached on a bill of review. Smith v. Turner, 1 Vern. 273.; but if the party feels himself aggrieved, he must seek his remedy against his counsel. Harrison v. Ramsey, 2 Ves. 488. Bradish v. Gee, Amb. 229.

8. D. appealed to the Lords, stating by affidavit, that though the Register had drawn up the order in Chancery as by consent, yet he never gave any authority to his counsel for such consent. Appeal dismissed. Dowig v. Cage, 1 Eq. Ab. 163, pl. 4.

9. The evidence of counsel or attorney submitting to be examined may be read. Bp. of Winchester v. Fournier, 2 Ves. 446.


11. If a party's clerk in court be dead, no proceedings can be had against him until he has appointed a new clerk in court, and a subpoena ad faciendum attorney, must be taken out for that purpose. Radcliffe v. Roper, E. 1718. 1 P. W. 420.
EQUITY AND ITS OFFICERS.

12. Clerk in Court.—Defendant having examined B. his clerk in court, plaintiff exhibited interrogatories to cross-examine him, to which he demurred, for that he knew nothing but as defendant’s clerk in court or agent. Demurrer overruled, as covering too much, for it ought to conclude, that he knew nothing but by the information of his client. **Valliant v. Dodomead, E. 1743. 2 Atk. 324. Vide post, tit. Solicitor.**

13. A six-clerk is not obliged to deliver papers to plaintiff till his fees are paid, though plaintiff has paid his solicitor, who satisfied his clerk in court (viz. the sixty clerk) the whole bill.—N. B. In this case, this sixty clerk had absconded. **Taylor v. Lewis, M. 1750. 3 Atk. 727. 2 Ves. 3. Vide Grey v. Cockrill, 2 Atk. 114. Turvin v. Gibson, 3 Atk. 730. Anon. 2 Ves. 25.**


15. The court will not consider the lien of the clerk in court for his costs, on any collateral application between the parties, but the clerk in court must make his claim. **Holworthy v. Mortlock, H. 1786. 1. Cox 202.**

16. One of the sixty clerks to this court having been arrested by process out of one of the common law courts, he insisted on his privilege to be sued in the petty bag only. But it appearing by affidavit, that he had long secreted himself to avoid his creditors, the court would not discharge him. **Exp. Shepperd, M. 1794. 2 Cox 398.**

17. After verdict in an action in the petty bag, against one of the sixty clerks, an application to discharge the defendant, for not having been charged in execution within two terms must be made to the King’s Bench; but the court, to remove any difficulty, made a collateral order. **Fraser v. Lloyd, H. 1815. Cowp. 187.**

18. Commissioners of Bankrupt.—Instances of misconduct in them punished or censured, vide ante, tit. Bankrupt, i.

19. Conveyancer, vide Barrister—Solicitor.—D. on going abroad as supercargo, by articles, covenanted with the South Sea Company, that he would not demur to any bill they might bring within two months after his return, which was afterwards altered to six. D. wanted to examine G., who drew the articles, touching the alteration of the time. G. demurred, for that he knew as conveyancer only. Demurrer overruled. **South Sea Co. v. Doliffe, cited in Valliant v. Dodomead, 2 Atk. 523. Vide Cutts v. Pickering, Vent. 197.**

20. Before 10 & 11 Will. 3. all skillful conveyancers inserted a limitation to preserve contingent remainder to posthumous children; but since the statute, they had left it out, which shows their uniform opinion, that this statute carries the intermediate profits, as well as the estate. The court has always paid great regard to the opinions of eminent conveyancers; and the point of Dower, in Radnor v. Vandecbury, Show. P. C. 69, was determined entirely from their opinion. **Basset v. Basset, H. 1744. 3 Atk. 508. Vide Robinson v. Robinson, 2 Ves. 231. Reeve v. Long, 3 Lev. 408.**

21. Conveyances made under a decree, are to be settled by the like rule as men of judgment among conveyancers would direct. **Lloyd v. Griffiths, H. 1745. 3 Atk. 267.**

22. Master in Chancery.—A master allowing a security which proves defective, is not liable unless bribery or corruption appears in his conduct. **Corner v. Hollingshead, M. 1688. 2 Vern. 90.**

23. When the parties who might resist a claim upon the master do not attend, he must take the account as carefully as if they did. **Carew v. Johnston, H. 1805. 2 Sch. & Lef. 300.**

24. Master Extraordinary in Chancery.—Where affadavits in support of a petition, were sworn before the solicitor in the cause, the court made him pay the costs, and dismissed the petition. **In re Logan, 3 Atk. 813. In this case the court, awarded costs, as between attorney and client, against the parties concerned in a fraudulent bankruptcy, (except those who discovered and gave evidence,) and did not deprive the solicitor of his office of master extraordinary, but committed him.** Exp. Thorpe, 1 Ves. jun. 194.

25. Register.—The office of registy
in Chancery is assignable. Drummond v. D. of St. Albans, T. 1800. 5 Ves. 435. 

26. Solicitor.—A solicitor made an absolute conveyance to himself of 1000L from plaintiff's wife, while apart from her husband, which was prepared six weeks before, but not executed till three weeks after she left him, and it was then signed at a lodging defendant got for her. The considerations expressed in the deed are, for service done and favours shown; the bill was brought to set aside the deed as obtained by fraud, and that it was intended as a conveyance in trust for plaintiff's daughter, though not so declared: Held, that the conveyance should stand as a security only for what was due to defendant, and that the surplus must be deemed a trust for the daughter, who being dead, it devolves on plaintiff, as her representative. Sanderson v. Glass, T. 1742. 2 Atk. 296.

27. Where a party calls his solicitor as a witness, the other side may cross-examine him as to that point in the cause, but not as to any other; for counsel and solicitors are privileged from being examined in such cases, which agents are not. Valkens v. Dodson, E. 1743. 2 Atk. 324. But if a counsel or attorney consents to be examined, the court will not refuse to read his deposition. Madock v. Madock, 1 Ves. 62.

28. Solicitors are modern officers of the court, compared with clerks of court. 6 Ves. 637. Vide Exp. The Six Clerks, 3 Ves. 589.

29. A gift to an attorney after the cause is over, without any duress, will not be set aside; but otherwise, if it be before or during the cause. Oldham v. Hand, 2 Ves. 259.

30. Where a solicitor is retained to appear, and does not, the court will not punish him; but a solicitor once retained, cannot be changed without leave of the court. Wadams v. Booth, 2 Atk. 27.

31. By the statute of Westminster 1. ch. 29. attorneys and serjeant counters, who have been guilty of mal-practices, shall not again be heard in the way of their profession; and where a solicitor is guilty of mal-practice, he may be struck off the roll. Mr. Justice Mitchell's Ca. 2 Atk. 173. Savage's Ca. Doug. 355. (ed. edit.)

32. On suspicion of collusion, an en-
EQUITY AND ITS OFFICERS.

upon all the plaintiffs to discharge him. Exp. Ledwith, T. 1803. 8 Ves. 598.
40. The solicitor to a commission of bankruptcy cannot purchase any part of the bankrupt's estate, either for himself or another. Exp. James, E. 1803. 8 Ves. 337. Exp. Bennet, H. 1805. 10 Ves. 381.
41. It is sufficient ground for the interference of equity, that a person entrusted to act as an attorney for all parties, abuses the confidence placed in him. Costigan v. Hastings, M. 1804. 2 Sch. & Leif. 165.
42. A solicitor falsely asserting that an injunction was granted, is liable to damages, to an indictment, and to be struck off the roll. Kimpton v. Eve, M. 1813. 2 Ves. & B. 352.

As to the jurisdiction of the courts of Chancery and Exchequer, vide post, tit. Jurisdiction, vi.
For cases of maintenance, barterry, champerty, or embracery, vide post, tit. Maintenance.

ESCAPE.

1. A. was committed to the Fleet by the court of Chancery, for a contempt in rescuing his father, who was taken on the Ld. Ch.'s warrant. A. then removed himself to the King's Bench. The marshal set him at liberty, on which Pratt, C. J. granted his escape warrant, and A. was taken to Newgate: Held, that such a warrant did not lie. Paine's Ca. T. 1718. 1 P. W. 439.
2. In debt against the sheriff for an escape of one in execution on an outlawry after judgment, may be brought either in the tam quam, or at the suit of the party only. Throgmorton v. Church, H. 1720. 1 P. W. 687. Vide Moore v. Reynolds, Cro. Jac. 619.

Cases of escape from the Fleet Prison, vide post, tit. Fleet Prison.

ESCHEAT.

1. Where lands escheat to the king, he shall have the benefit of a term to attend the inheritance. Bodmin v. Vandebendi, H. 1685. 1 Vern. 337.
2. Lands cannot ascend from the son to the father, but shall rather escheat. Couper v. Couper, H. 1732. 2 P. W. 734.
3. F. escheated an estate in fee, devised it to his wife, then to H. to sell, and after debts and legacies paid, the residue to plaintiffs. H., who had a bare power, died, and for want of heirs in F. the estate escheated to the crown. Chancery would not entertain a bill against the Attorney-General to have the will established and the estate sold, though the Exchequer, as a court of revenue, might do it. Reese v. Att. Gen. M. 1741. 2 Atk. 223.
4. A. seised in fee ex parte paternae, conveys to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, &c. and for no other use whatsoever. A. died without appointment, and without heirs ex parte paternae: Held, that the heir ex parte materna was not entitled, and that from
the analogy between trusts and legal estates, the crown was entitled by escheat; but that if the conveyance had barred the crown of its rights, as between the maternal heir and the trustee, the former was entitled. Burgess v. Wheate, H. 1759. 1 Eden. 177. Blac. 121. S. C.

5. Trustees not having the legal estate, cannot hold against the crown, claimed by escheat. Walker v. Deane, T. 1793. 2 Ves. jun. 176. A copyhold estate cannot escheat to the crown. S. C.

6. In this case the court, upon petition for leave to traverse an inquisition upon a commission of escheat, found in favour of the crown, thought the application proper, and made an order. Exp. Webster, E. 1802. 6 Ves. 809. Vide Exp. Wragg, 5 Ves. 540. Exp. Ferne, ibid. 832.

7. It is the ordinary rule for the crown to give a lease to the party discovering an escheat. Moggridge v. Thackwell, M. 1803. 7 Ves. 71.

8. The supposed heir of a bare trustee who was stated to have died without heirs, cannot traverse an inquisition of escheat, where there is no evidence except the oath of the applicant to invalidate the inquisition. Re Sadler, T. 1816. 1 Mad. 581. Vide Exp. Webster, 6 Ves. 809.

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**ESTATE.**

I. Fee Simple.

II. Fee qualified, or Base Fee.

III. Fee tail and in Remainder; (a) and heredit of a conditional Fee. (b)

IV. For Life and in Remainder.

V. Pur autre vie; and heredit of the Irish Tenure by Lease for Lives renewable for ever.

VI. Estate for Years.


VIII. Vested in Possession, or in Interest, with a fixed Right of Enjoyment.

IX. Legal and equitable.

X. Vested Interests in Chattel Property.

XI. Contingent and uncertain Interests in Chattel Property.

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**ESTATE I.**

**Fee Simple.**

1. A man seized in fee may create a term for years, to commence after his death, without issue. See sec. as to one possessed of a long term for years. Kirsley v. Buck, T. 1712. 2 Ves. 684. Vide post, sec. vi.

2. A freehold estate cannot be kept in abeyance. Studholm v. Hodgson, T. 1734. 3 P. W. 305. But where, from necessity, it happens to be so, the court will so mould it, as best to answer the purposes of the limitations. Cunningham v. Moody, M. 1748. 1 Ves. 174.

3. A limitation to a man for life, and then to his heirs at law, is a fee-simple, that word indicating only the order in which, and not the time at which the limitations are to take place. O'Keefe v. Jones, H. 1807. 13 Ves. 415.
ESTATE II.

Fee qualified, or base Fee:

4. A tenant in tail of a rent granted de novo, without any remainder ever, suffered a recovery. This will not pass an absolute, but only a determinable fee, viz., such as must end on the death of the tenant in tail without issue. Chaplin v. Chaplin, H. 1735. 8 P. W. 280. Vide 2 Lutw. 1225. Harg. Co. Lit. 241. a. n. 4. 298. a. n. 2.

ESTATE III.

Fee-tail and in Remainder; (a) and herein of a conditional Fee. (b)

(a) Fee-tail and in Remainder.

5. If a tenant in tail agrees to convey, he must execute the agreement; but if he dies, his issue is not bound unless by some act he confirms the agreement. Ross v. Ross, T. 1670. 1 Ch. Ca. 171. for the heir comes in by the statute de daniis singly, and not as deriving from the ancestor who contracted. Powel v. Powel, H. 1708. Pre. Ch. 278.

6. A. On the marriage of his son B. covenanted to settle lands on him for life, remainder to the heirs male of his body. B. died leaving his son, who brought a bill for performance of the covenant. Dismissed, in regard B. would have been tenant in tail, and might have barred the remainder. Cann v. Cann, M. 1687. 2 Vern. 480.

7. Issue in tail under a settlement, having encouraged a stranger to buy an annuity of the younger son, which he took under his father's will, the court decreed the annuity to be confirmed. Hobbs v. Norton, H. 1682. 1 Vern. 136.


9. A bond by a son, on whom his father had settled an estate tail, not to dock the intail, is good, for the father might have made him only tenant for life. Freeman v. Freeman, T. 1691. 2 Vern. 233. It would seem that the bond is good to charge the assets only, and would not follow the estate in the hands of a bona fide assignee. See Collins v. Plummer, 1 P. W. 107.


11. Tenant in tail sold for a full value, and received the money, covenanting to levy a fine, which he was afterwards decreed to do; and he actually died in prison for not performing the decree; yet held that his issue could not be bound. Fee v. Crane, M. 1693. 2 Vern. 306.

12. Where the trustees join with a cestui que trust in tail, in a feoffment, it will bar an estate tail in trust. Bowater v. Elly, H. 1697. 2 Vern. 344.

13. Tenant for life, and cestui que trust in remainder in tail, joined with the trustee in making a feoffment of the land. This is a good bar of the estate tail. Bowater v. Ellis, T. 1697. Pre. Ch. 81.


15. A tenant in tail covenanted to settle a jointure, and died. His issue in tail are not bound. Lady Clifford v. Ed. Burlington, T. 1700. 2 Vern. 379. Vide Coventry v. Coventry, 2 P. W. 222, which is the ruling case on this subject.

16. Bare articles, or a deed executed by a tenant in tail only, seem hardly sufficient to bar the intail. Legate v. Scnell, E. 1706. 1 P. W. 91. It has been now long settled, that the issue in tail is not barr'd, without a recovery actually

17. A. was tenant in tail, subject to a charge to B. for life; B. died, the rent-charge being in arrear. The issue in tail is not liable, by 32 Hen. 8. c. 27. to the arrears incurred in the life of the ancestors. Fairfax v. Derby, T. 1708. 2 Vern. 612. Vide Edriche's Ca. 5 Co. 118.

18. A tenant for life, remainder in tail, whose estate was charged with a sum of money, was decreed to join in levying a fine and suffering a recovery, and the tenant for life to pay one third part. Jones v. Selby, H. 1709. Pre. Ch. 238.

19. A power of making leases does not prevent a devisee's estate from being an estate tail, or restrain it to an estate for life; for by such a power the devisee, without fine or recovery, may make leases to bind the remainder or reversion: whereas by the statute of Hen. 8. a tenant in tail can only make leases to bar the issue, and not the remainder or reversion. Bale v. Coleman, E. 1711. 1 P. W. 144. Vide King v. Melling, 2 Lev. 58.

20. The statute of Hen. 8. c. 28. s. 2. gives a tenant in tail power to make leases for three lives absolute only, and not for 99 years determinable on three lives. Glasville v. Payne, T. 1730. 2 Atk. 40. Barn. Ch. Rep. 18. Vide Whitlock's Ca. 3 Co. 70.

21. Tenant in tail of a rent granted de novo, without any remainder over, suffered a recovery. This will not pass an absolute, but only a determinable fee, viz. such as must end on the death of the tenant in tail without issue. Chaplin v. Chaplin, H. 1733. 3 P. W. 230. Harg. Co. Lit. 241. a. n. 4. 298. a. n. 2.


23. A tenant in tail conveying totum statum suum, conveys but an estate for his life, therefore a deed to pass such an estate as a fee is a void contract. Bernardston v. Lingood, H. 1740. 2 Atk. 134. Barn. Ch. Rep. 337.

24. A copyhold surrendered to the husband for life, to the wife for life, remainder to the heirs of their bodies, remainder in fee to the survivor. This gives to the wife, who survived, an estate tail only after possibility of issue extinct, and the estate tail vests in the heirs of the husband and wife. Sutton v. Stone, M. 1740. 2 Atk. 101. Mr. Fearne says, that this is more a memorandum than a report of the case, and that the decree is not easily to be accounted for, no reason for the resolution appearing.

25. If a tenant in tail, remainder in fee, grants an estate to A. to commence after the death of tenant in tail, and then levies a fine to other uses, A.'s estate is merged in the fine. Langley v. Brown, T. 1741. 2 Atk. 199. Vide Symonds v. Cudmore, Salk. 338. But if tenant in tail conveys to one during his own life, or covenants to stand seised to the use of himself for life, with remainder over, this remainder, it seems, is void in its creation. Vide Machell v. Cleck, 2 Salk. 619. Vide post, tit. Fine and Recovery, ix.

26. A tenant in tail is not bound to keep down interest upon incumbrances. Sergison v. Sealy, M. 1742. 2 Atk. 416. And the reason is, because the remainder-man or reverserion is considered as wholly in his power. Chaplin v. Chaplin, 3 P. W. 233. Amesbury v. Brown, 1 Ves. 477. But the same reason does not hold in the case of an infant tenant in tail, because he cannot bar the remainders, unless under privy seal, therefore his guardian or trustees must keep down the interest, S. C. 1 Ves. 480. So a tenant for life is obliged to keep down the interest on incumbrances. Vide Hungerford v. Hungerford, Gilb. Eq. Rep. 69. Partridge v. Pawlet, 1 Atk. 467. Revel v. Watkinson, 1 Ves. 93. Tracy v. Hereford, 2 Bro. C. C. 128. Et vide post, next section. Where a tenant in tail pays off an incumbrance, without taking an assignment, it is an exoneration of the estate; but where a tenant for life pays it off, he is considered as a creditor for
Fee-tail and in Remainder.

the money so paid off; and in either case, evidence of the intention, or situation of the estate, may be admitted to prove the contrary. Kirkham v. Smith, 1 Ves. 238. Amesbury v. Brown, ibid. 477. Jones v. Morgan, 1 Bro. C. C. 218. Shrewsbury v. Shrewsbury, 3 Bro. C. C. 120.

27. A remainder-man in tail, or a reversioner in fee, may come into court to have his title deeds secured for his benefit, though an estate for life is outstanding. Smith v. Cooke, T. 1746. 3 Atk. 382.


29. Agreements are not executed in equity against issue in tail, or remainder, claiming per formam doni. Hinton v. Hinton, T. 1755. 2 Ves. 634.


31. A tenant in tail obtained an act of parliament enabling him to charge the estate; though the rights of the remainder-man were not accepted in the saving clause, yet held they were bound. Secus, had he been tenant for life only. Westby v. Kiernan, H. 1771. Amb. 697.

32. A son, tenant in tail in remainder, joins his father, tenant for life, in suffering a recovery, and then they mortgage the lands. The son shall not be compelled to pay interest on this mortgage during the life of his father. Guy v. Cox, T. 1784. 1 Ridgwor. P. C. 153.

33. The fine of a tenant in tail does not take away the right of the remainder-man, but the remainder-man is at liberty to prove the vouches in a recovery non compos. Hume v. Burton, T. 1785. 1 Ridgwor. P. C. 207, 208.

34. A fine, with proclamations by a tenant in tail, whether the proclamations are finished in his life-time or not, will bar the issue in tail, because the fine is quasi a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment. S. C. ibid. 270.


37. A tenant in tail restrained by act of parliament from suffering a recovery, paid off several portions charged on the estate, without taking an assignment of the securities: Held, he shall be a creditor for the sums paid, which shall be raised for his administratrix. Shrewsbury v. Shrewsbury, T. 1790. 3 Bro. C. C. 120. 1 Ves. jun. 247.

38. Upon a bill by a tenant in tail, in reversion, timber was ordered to be cut, and the produce of it to be laid out in the funds, leaving the discussion of the claims till the tenant in tail should come of age. Mildmay v. Mildmay, T. 1792. 4 Bro. C. C. 76.

39. Tenant in tail, with reversion in fee, levying a fine, lets in the reversion: but suffering a recovery bars it, and all incumbrances, and gains a new fee. Case v. Holford, E. 1798. 3 Ves. 675.

40. Upon an ejectment by an heir in tail; defendants cannot rest upon the judgment in the recovery, but all the proceedings must appear upon the record. Lady Shaftsbury v. Arrowsmith, T. 1798. 4 Ves. 71.

41. Trust by deed, creating estates tail after any contract for alienation, to raise money for the persons next in limitation, held void, as tending to a perpetuity, and inconsistent with the rights of the tenant in tail. Mainwaring v. Baxter, T. 1800. 5 Ves. 458.

42. Tenant for 99 years, if she shall so long live; remainder to trustees to preserve, &c.; remainder to the heirs of her body; remainder over to the same trustees, upon trust, for other persons. Upon the application of those persons, and the trustees under stat. 6 Anne, c. 18, the husband of the tenant for life was ordered to produce her; Ld. Ch. requiring evidence that she was not pregnant when she left her husband. Exp. Grant, M. 1801. 6 Ves. 512.
ESTATE III.

Fee-tail and in Remainder.

43. A petition was presented under 40 Geo. 3. c. 56. by a person entitled to an estate tail in lands to be purchased under a settlement, to have the money paid without a recovery. Ld. Ch. approved the course that had been taken (a) upon this act, according to which the court takes care that the fund is clear, and for that purpose he desired to see the settlement. His lordship further said, a petition of this sort should never be heard on the last day of term, but to obtain the order in term the application must be made at such time in the term as to give sufficient time for a recovery to be suffered. Exp. Frith, T. 1803. 8 Ves. 609. Vide (a) Exp. Bennett, 6 Ves. 116. Exp. Hodges, ibid. 576. Lowton v. Lowton, 5 Ves. 12. (n) Lloyd v. Johnes, 9 Ves. 37.

44. Tenant in tail claiming upon the death of a former tenant in tail without issue, not through or under him, but by a new limitation in remainder, is entitled to continue the suit of the former tenant in tail (though 52 years ago) and to have the benefit of the proceedings by a supplemental bill. Ld. Ch. said, that Osborne v. Usher, (2 Bro. P. C. 314.) raised this question, whether, if a tenant in tail was a party, and died leaving issue, the issue could appear in that proceeding? not whether he could bring a new suit? it was held by the lords that he might appeal; that, however, was the case of issue succeeding to the estate tail of his ancestor. In Shepherd v. Lucas, it was held, that a remainder-man in tail may bring a writ of error. In Wingfield v. Whalley, (2 Bro. P. C. 447.) the court went a great way in giving a remainder-man the benefit, together with the disadvantage of proceeding against the prior tenant in tail. The consequence of which is, that in some cases not proceeding to absolute decree, subsequent remainder-men in tail may be entitled to the benefit of proceedings of a prior remainder-man. His Lordship could not hold that a good judgment, which decided that one tenant in tail only need be a defendant, but that the proceedings had against him for all, should not be for the benefit of all. If it can be maintained, that if a decree has been made, it creates so much obligation for and against the subsequent remainder-man, and it can be made out to be the necessary result of principles of convenience that these whose interest the represents, ought to have the benefit, and bear the disadvantage of testimony given before the hearing, the degree of advantage cannot affect the principle. It follows, therefore, that if any advantage arises from the tenant in tail taking up the cause, he will have a right to say his interest was represented, and he will continue it. It saves expense, and may be of advantage to both, to the plaintiff as giving him the benefit of admission, and to the defendant as giving him the advantage of any statement in the bill. If the plaintiff sues, by a continuation of the suit, there is no injustice in pressing against him the advantage of the statement in a bill which he adopts, but neither plaintiff nor defendant is shut out from stating particular circumstances attaching upon his case. Wingfield v. Whalley, (supra) is an authority that those circumstances may be brought before the court by answer or fresh examination of witnesses: this bill, therefore, may be sustained. The next material question is that of contribution. Here Ld. Ch. examined the case of Kirkham v. Smith, (1 Ves. 258.) and then said, unless there was some distinction he was not aware of, between that case and the present, the concurrence of that tenant in tail would take away the equity, but his Lordship had some doubt about it, thinking that determination might break in upon the distinction between tenants in tail of inheritance, and persons having interests in the nature of estates tail not inheritance, as money to be laid out in an estate tail with remainders over. An act not equivalent to the judgment of the court, is not an act that would devest equities as among those subsequently becoming entitled to different parts of what was once the estate tail. As to Blake v. Blake, (3 P. W. 10. n.) that was an interest in nature of an estate tail, but it was not an estate tail, and the ground of that decision was, that the equity attaching upon the received lease, being one which could be discharged by a mere deed, the court would not call upon the lessee to make a settlement which he might undo at the same moment, but that is subject to the distinction between fine and recovery, and that was the ordinary doctrine of the court till the late act of parliament (40 Geo. 3. c. 56.) (a) as to money to be laid out in land to be settled. Another point on which Ld. Ch. laid great stress, was, that there was a tenant in tail a party.
though he did not distinctly appear as such on the record, and that leads to the right interpretation of the decree made by Ld. Hardwicke in this cause in 1751, who cannot be supposed to have made the decree without somebody before the court representing the inheritance, that decree therefore being made against the person representing the inheritance, was binding upon all the remaindermen behind, by analogy to the rule at law, that a recovery in which a subsequent remainderman is vouched, bars all remaindermen behind, without prejudice to those intermediate. It is further material, that if according to Kirkham v. Smith, (supra,) a part of the estate sold under the act of the party, discharges the rest from contribution, the selection by the court of that estate for sale, will raise a case at least as strong against contribution, as if it was the act of the party out of court. His Lordship's opinion therefore was, there should not be contribution. As to the sale itself under all the circumstances, Ld. Ch. said, there was a great difficulty in setting that aside. It is the daily practice of the court for convenience, to sell property which it may afterwards appear unnecessary to sell as real estate, before the situation of the personal property is ascertained, but the court afterwards sets right the interests. (b) A purchase therefore under a decree, though affected by irregularity and notice, shall not be set aside in favour of a subsequent remainderman, a prior tenant in tail having been a party to the sale. Bill dismissed without costs. Lloyd v. Johnes, T. 1803. 9 Ves. 57. (a) For the construction of the statute. 40 Geo. 3. c. 36. vide Lowton v. Lowton, 5 Vos. 12. (n.) Vide etiam Exp. Bennet, 6 Vos. 116. Exp. Hodges, ibid. 576. Exp. Frib. 8 Vos. 609. (b) Holme v. Stanley, ibid. 2.

45. Under a covenant in a marriage settlement, a sum was to be laid out in real estate to be settled on the father for life, with remainder to the children as tenants in common in tail. The children petitioned under the statute. 40 Geo. 3. c. 56. to prevent the necessity of suffering a recovery. Ld. Ch. granted the petition accordingly, saying, that the court has no jurisdiction in this case by motion, but by petition only. Baynes v. Baynes, E. 1804. 9 Vos. 462. Vide Exp. Frib. 8 Vos. 609. and references, ante, pl. 43.

46. A decree against a tenant in tail shall bind a remainder-man, (a) but the remainder-man may appeal or re-hear the cause. (b) And in the present case it was held, that an appeal lies at the suit of a tenant in tail in remainder against a decree affecting his rights obtained by a prior tenant in tail; and such remainder-man may file a supplemental bill to make himself a party to the former suit, for the purpose of appealing. Giffard v. Hort, T. 1804. 1 Sch. & Lef. 386. Vide (a) Lloyd v. Johnes, 9 Ves. 37. ante, pl. 44. (b) Osborne v. Usher, 2 Bro. P. C. 314.

47. Where a tenant in tail was prevented from suffering a recovery by the fraud of one whose wife was entitled in remainder, the court granted relief by treating the estate even in favour of a volunteer, as if the recovery had been suffered. Lutterell v. Olmius, cited in Mestair v. Gillespie, M. 1806. 11 Ves. 638.

48. A tenant in tail after possibility being dispensable of waste by law, has equally with the tenant for life without imprisonment of waste by settlement, an interest and property in the timber. Williams v. Williams, M. 1808. 15 Ves. 427. In which case Ld. Ch. stated instances of a tenancy in tail, after possibility of issue extinct, in possession, or of a remainder or reversion.

49. A tenant in tail, after possibility having been once tenant in tail in possession with the other donee, and therefore dispensable for waste, may not only commit waste, but also convert to her own use the property wasted. She shall not therefore be restrained in equity, except for malicious waste. Williams v. Williams, sup. et vide Garth v. Cotton, 1 Dick. 189. 3 Atk. 751. 1 Ves. 524. 546.

50. Devise to A. and after his death to his first and other sons, and in default of male issue, then to his eldest and other daughters, and to their heirs male for ever. This gives A. an estate in tail male, Wight v. Leigh, H. 1809. 15 Ves. 564.

51. A tenant in quasi tail cannot bar the remaindermen over by will. Dillon v. Dillen, H. 1809. 1 Ball & Be. 95. et vide Osbrey v. Bury, ib. 53. where the reporters have doubted whether a bill by a remote remainder-man to set aside a deed barring a quasi entail, can be maintained during the life of a tenant for life, with a power to devest the estate tail, but Ld.
Manners was of opinion that such a remainder in tail might be destroyed.

52. A tenant in tail is not obliged to keep down the interest on a charge affecting the estate, but if he do so his personal representatives will not be allowed it out of the estate charged. Redington v. Redington, H. 1809. 1 Ball & Be. 145. Vide Amesbury v. Brown, 1 Ves. 477.

53. If tenant in tail reserves an entire rent upon a farm in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner. Res. d. Perkins v. Phillips, E. 1810. Wightw. 69.


55. On a bill by an infant tenant in tail, a receiver was appointed, with an order to keep down the interest of incumbrances out of the rents. The receiver accordingly kept down the interest of all but one mortgage, but as the interest of that belonged to infants, and was never applied for, (except a small portion for maintenance,) the residue of the rents was paid into court to the credit of the cause. The tenant in tail having come of age he suffered a recovery, and resettled the estate, after which he died. The master having certified that the deceased was not bound, while tenant in tail, to keep down the interest of the incumbrances, the rents paid into court during that time consequently belonged to his personal representatives, but the party claiming the estate under the settlement, then petitioned for leave to except to the report, on the following grounds: 1st. That in the case of an infant tenant in tail, the interest of incumbrances ought to be kept down out of rents. 2dly. That the direction to the receiver to keep down the interest amounted to an appropriation of so much of the rents to that purpose: and 3dly, that the deceased, by not claiming the fund when of age, showed an intention that it should be so appropriated. But it was held, 1st, That the general question could only arise in favour of a remainderman, or reversioner, whose rights were in this case barred by the recovery. 2dly, That the order was not meant to vary the rights of the real and personal representatives, but to prevent the incumbrancers from being prejudiced by the court taking the estate into its custody, and also to protect the estate from hostile proceedings on the part of the creditors, and did not amount to an appropriation: and lastly, That there was nothing in the circumstances to alter the character of the property, which consisting of rents paid into court, and neither applied in payment of interest nor appropriated for such payment, it was personal estate, and ought to be dealt with as such. Bertie v. E. of Abingdon, M. 1817. 5 Meriv. 560.

(b) Of a conditional Fee.

56. An annuity in fee, granted by the crown out of the Barbadoes duty, is not a rent or reality, nor within the statute of frauds, nor de donis; but being settled on A. and the heirs of her body, is a fee-simple conditional at law. The remainder over would, in the case of a common person be void; but A. having issue, may bar the possibility of reverter. E. of Stafford v. Buckley, H. 1750. 2 Ves. 170. 178.

57. Where by the custom of a manor an estate cannot be entailed, it is capable of such limitations as may make it a fee-simple condition; and the tenant, after the condition is performed, has power to dispose of it by surrender. Pullen v. Middleton, E. 1744 9 Mod. 483.

58. Originally an estate tail was an estate upon condition to become a fee upon issue had, for the purpose of alienation, but not absolutely, as if not aliened it descended per formam doni, and it does not appear that any formdon was ever brought by the issue during the life of the tenant in tail. Allan v. Allan, H. 1808. 15 Ves. 157.

Where a remainder-man in tail shall be bound to execute the real covenant of the tenant for life, which is a lien on, and
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runs with the land, vide ante, tit. Covenant, i. (a.)

As to the force of a common recovery, in extinguishing all conditions, powers, and incidents annexed to an estate tail, vide post, tit. Fine and Recovery, vi.

For a base or qualified fee, vide ante, s. ii. of this title.

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60. Where a tenant for life makes a lease for years, rendering rent, and dies in the interim of any two quarter days, to whom shall the rent belong? Vide post, tit. Landlord and Tenant. So of money to be laid out in land, and, in the mean time, to be invested in stock, to whom shall a fractional dividend belong?

61. Award that a tenant for life should pay the remainder-man 370l. for waste, held good, though the party had made good the repairs within 40l. before the award made. Brown v. Brown, E. 1683. 1 Vern. 157.

62. A bought a reversion, expectant after a life estate in B. though B. had no title, he shall enjoy it in equity against the purchaser. Walton v. Stanford, M. 1692. 2 Vern. 279.

63. Devisee for life, remainder over, committed a forfeiture by levying a fine and making a mortgage, for which the remainder-man recovered in ejectment. Yet the mortgagee having no notice of the will, had a decree to hold during the mortgagor's life, and the rather as the mortgagor made an affidavit that there was no will, and that he was heir at law.


64. A tenant for life, remainder to his sons. A before a son was born, brought his bill for an account, which was decreed and taken: this shall bind the sons. Leonard v. Lady SUSSEX, M. 1705. 2 Vern. 527.


66. So, where A. seised in fee, conveyed the lands, and all trees and mines, to trustees in fee, to the use of A. for life, remainders over: A cannot open the mines, or cut down the trees. S. C. ibid. 242.

67. Tenant for life of coal mines may open new pits or shafts for working the old vein of coal. Clavering v. Clavering M. 1726. 2 P. W. 388.

68. A tenant for life, remainder to her daughters in fee. An award that A. shall procure her daughters to convey, is not binding on them. Evans v. Cogan, H. 1727. 2 P. W. 450.

69. Tenant for life, with power to make a jointure, covenanted on marriage to make a jointure according, and also to make an additional jointure on receiving or becoming entitled to any further money in right of his wife. After the death of the husband, the wife becomes entitled to an additional fortune. She shall not compel the remainder-man to make an additional jointure on her, on this ac-
count; but on the other hand, the husband's creditors shall not take from the wife this additional fortune. Holt v. Holt, Gibson v. Holt, M. 1731. 2 P. W. 648.

70. A tenant for life of goods is not obliged to give security for the goods, but only to sign an inventory to the person in remainder. Lecte v. Bennett, H. 1737. 1 Atk. 470. Vide Bill v. Kynaston, 2 Atk. 32. 21. Vide etiam post, tit. Legacy xvi, where the cases on this subject are more fully stated.

71. As a tenant for life, and the person in remainder in the nature of a tenant in tail of a freehold lease, may certainly join, and bar the next in limitation, so he who had both the interests in himself, may bar the intail of such lease. Foster v. Foster, E. 1741. 2 Atk. 239. Sic Norton v. Frecker, 1 Atk. 524. Saltern v. Saltern, 2 Atk. 376. Williams v. Jeckyl, 2 Ves. 681. Blake v. Blake, 3 P. W. 10. (n.)

72. The reason why the common law gave so large a power to a tenant for life without impeachment of waste, was for the interest of the public, as timber might thereby circulate, for shipping and other uses. Packington's Ca. E. 1744. 3 Atk. 216. Vide Pyne v. Dor, 1 T. R. 55.

73. In Partridge v. Pawlet, E. 1744. Ridg. Ca. temp. Hardw. 254. A tenant for life, sans waste, was restrained by injunction from felling timber. Afterwards his creditors obtained an order for a sale of timber, and a receiver was appointed for the money arising from the sale; but before the timber was felled, the tenant for life died; on this his representatives moved, that they might have the benefit of the timber, but Ld. Hardwicke thought the question of too much importance to be determined on motion, and ordered it to be put in the paper. Note. A case of the same name is reported in 1 Atk. 467, but no notice is taken of this point.


75. The court will restrain tenants for life, without impeachment of waste, to a reasonable exercise of that right; and therefore restrained defendant from cutting down timber not full grown, or not fit for repairs. Aston v. Aston, T. 1749. 1 Ves. 264. Vide Dowshire v. Sandy, 6 Ves. 107. Williams v. Machamara, 8 Ves. 70. 71.


77. A father, tenant for life, joined with his son in raising money, which the father received: he must exonerate the son's estates. Piers v. Piers, T. 1750. 1 Ves. 322. Vide Kittear v. Raynes, 1 Bro. C. C. 384.

78. An express estate for life is not enlarged by implication, unless necessary, as to preserve the intent for the line in succession. Vaughan v. Ferrer, H. 1751. 2 Ves. 182.


81. On a bill by reverson, against the tenant for life, to oblige him to repair or have a receiver appointed, the court refused relief. Wood v. Guynn, E. 1761. Amb. 395.

82. In case of lands exchanged under an act of inclosure, tenants for life impeachable for waste, cannot cut timber for inclosures, but they must raise the
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88. Where a tenant for life paid off an incumbrance upon the estate, he shall be considered as a creditor for the money so paid; but where paid by the tenant in tail, it was held in exoneration of the estate, of which he may make himself absolute owner. *Jones v. Morgan*, M. 1783. 1 Bro. C. C. 206.

84. An estate was settled on A. for life; then, as to part, on B. for life; remainder, as to the whole, to uses, under which defendant took, as tenant for life; with power to A. to charge, but not incumber B.'s estate for life. The estate given in remainder fell during B.'s life, and the interest of the charges exhausted the rents and profits. Upon B.'s life estate falling in, the rents and profits of that portion of the estate were decreed to discharge and pay the arrears, which shall not be a charge upon the inheritance. *Tracey v. Harford*, M. 1786. 2 Bro. C. C. 128.

85. The appellant in this case, having claimed the renewal of a lease from the heirs of the covenator pursuant to his covenant: they refused, alleging that the covenator was a bare tenant for life.—This refusal is a breach of covenant, on which an action at law will lie against the representatives of the covenator. *Maceartney v. Blundell*, T. 1789. 2 Ridg. P. C. 113.


87. A tenant for life subject to a trust term, shall not be let into possession before an account is taken, nor until the trust is executed, unless he pays into court a sum sufficient to answer it, or where the best way of performing the trust appears to be by letting him into possession. *Blake v. Bunbury*, T. 1790. 1 Ves. jun. 194.

88. But he may be let into possession by consent, on giving security to pay the charges payable out of the rents and profits, and to keep down the interest of the fund, to answer contingent charges. S. C. ibid. 514.

89. A tenant for life, with liberty to cut timber at seasonable times, shall not cut trees planted for ornament or shelter to the mansion-house, or saplings unfit to be sold as timber. *Chamberlayne v. Dummer*, T. 1792. 3 Bro. C. C. 549.

90. A tenant for life liable to waste, having sold timber, cannot prevent the vendee from cutting it. *Wentworth v. Turner*, M. 1793. 3 Ves. 3.

91. In this case the court held the rule unreasonable, that a tenant for life should pay one-third of the renewal fine of an estate for lives, and said it did not now prevail. *White v. White*, T. 1798. 4 Ves. 33. *et post*, on appeal. And in *Lord Penryhn v. Hughes*, M. 1799. 5 Ves. 107. it was said the old rule, so much exploded (in *White v. White*,) which imposed a gross sum on the tenant for life, as part of the capital of an incumbrance, is at an end; and held, that he shall now take, subject to all the interest which could have accrued prior to his estate. *Sic. Allen v. Backhouse*, T. 1813. 2 Ves. & B. 65.

92. A leasehold estate renewable, being bequeathed with limitations in the nature of a strict settlement, and the custom being to renew annually and to underlet, the court declared that the fines upon renewal ought to be paid out of the rents and profits, and that the person entitled for life, undertaking to pay those fines out of the rents and profits, was entitled to fines on renewal of the underleases; and a renewal of such of the under tenants as should be desirous of it was directed. *Miles v. Miles*, E. 1802. 6 Ves. 761.

93. Tenant for life with a leasing power entered into an agreement by article to make a lease pursuant to the power. This shall bind the remainder-man. — *Shannon v. Bradstreet*, H. 1803. 1 Sch. & Lef. 50.

94. If a remainder-man lies by, and suffers a lessee under the tenant for life, to lay out money without giving him notice of his intention to impeach his title, this is a good ground of relief against such remainder-man. S. C. ib. 73. And the remainder-man shall not turn round such lessee to seek compensation against the assets of such tenant for life. ib. S. C. 74.

95. Testator devised his lands upon
several limitations for life, and in strict settlement, with a direction, that the incumbrances should remain charged upon the estates respectively, until discharged by the several tenants for life, to whom they were respectively limited: Held, that all the rents and profits during the estates for life should be applied to the incumbrances principal as well as interest. *Milnes v. Slater*, E. 1803. 8 Ves. 295.

96. A purchase of the inheritance by tenant for life, is open to many objections, as tending to introduce vast fraud upon the persons entitled to such inheritance, particularly infants, the tenant for life having generally the conduct of the case, having all the information, acquiring that knowledge at the expense of the estate, making use of it, and frequently purchasing much under the value, yet it would be very strong after what has so long been permitted, to say, that upon general principles the tenant for life should not purchase. *Lloyd v. Johnson*, T. 1803. 9 Ves. 52.

97. A renewal taken by a tenant for life, of a lease for lives, is a trust for the benefit of those in remainder, and a fine levied by the heir of such tenant for life, keeping possession of the title deeds, will not bar those in remainder. *Bouctes v. Stewart*, T. 1803. 1 Sch. & Lef. 209.


99. Upon the accounts of the receiver in this cause, a point was made, whether tenant for life having died in the middle of the year, the land tax, quit rents, and other charges, should be borne entirely by the estate of his son the infant remainder-man in tail, having actually become due after the death of the tenant for life, or whether there should be an apportionment. *Per M. R. The statute of 11 Geo. 2. c. 19. s. 15. has no application to this case. It might be very reasonable to make such a statute as to the apportionment of taxes between the tenant for life and the remainder-man, giving the tenant for life the benefit only, as against the tenant, the unleges. *Sutton v. Chaplin*, T. 1804. 10 Ves. 66.

100. There are many cases in which the act of the tenant for life, binds the remainder-man with evidence. As in cases of boundaries, if upon a difference as to a boundary, the tenant for life acquiesces, and an adjustment takes place; though the remainder-man may say, that his right is trespassed upon; and though it may be so, yet the submission of the tenant for life, if without fraud, would be strong evidence against the remainder-man; so if a tenant for life suffers easements to be enjoyed out of his lands, it is just as good evidence against the remainder-man, as if he were seized in fee, for these are the rights of persons, who had nothing to do with the settlement. *Saunders v. Annesley*, T. 1804. 2 Sch. & Lef. 101.


102. By settlement previous to the marriage of defendant, certain estates were limited (subject to a term) to the use of defendant for life, sans waste, remainder to trustees to preserve, &c. remainder to same trustees for 2000 years, to raise younger children's portions, and subject thereto to the use of the first and other sons of the marriage in tail male. Remainder to defendant in fee. The settlement contained a power for the trustees with the consent of defendant and wife, or after their decease, in their own discretion to sell or exchange, and if sold to lay out the produce after payment of incumbrances, in the purchase of other lands to be settled to the same uses. *Ld. Ch. said, in a trust of this nature, the most improvident course that can be adopted, is to entrust the tenant for life with the execution of such a power as this; for it is generally his interest to convert the estate absolutely into money, either with a view to sell another estate to his family, or for the ordinary purpose of getting a better income during his life. The mode of settlement therefore in such a case is, that the trustees are to sell, but not without calling to their aid all fair attention to the nature of the subject and the convenience of the family. They are to sell, therefore, with the consent of the husband and wife; and as she is a purchaser..."
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for her future family, the providence of the settlement further requires, that the fact of her consent and approbation should be evidenced by deed with two witnesses; with that consent and approbation necessary to protect the interest of the tenant for life, the trustees, bound to a due attention to the interests of the children, have the power to sell for such price as shall appear to them to be reasonable. The object of the sale must be to invest the money in the purchase of another estate, to be settled to the same uses; and they are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or at least this court would expect some strong purpose of family prudence justifying the conversation, if it is likely to continue money.

Mortlock v. Buller, M. 1804. 10 Ves. 308. See O'Ronoke v. Perceval, 2 Bla. & Be. 60. where Ld. Manners said he was counsel in this case, and that it was a decision upon which he should always entertain a doubt.

103. An express estate for life, with a power to dispose by will, shall not give an absolute interest so as to preclude the necessity of executing the power. Reid v. Shergold, H. 1805. 10 Ves. 371.

104. An execution of a power by will shall be revoked by a subsequent conveyance upon a sale by the tenant for life having obtained the legal estate, and that not being an execution within the intent of the power, the estate shall pass under a general residuary devise against the purchaser. S. C. ibid.

105. I. S. being indebted to P. in 2300£. by sundry securities, affecting his real estate, joined P. in 1755, in assigning all said securities to L., as a security for 1800£., then lent by L. to P. The interest on said 1800£. was regularly paid by I. S. and his heirs to L., but no interest on the surplus of the 2300£. was paid either to P. or L. since 1755; Held, that the payment of interest on the 1800£. preserved the right to demand the interest in the surplus, notwithstanding the lapse of time; and that under the circumstances, no presumption could arise of the surplus having been paid: Held, also, that the mere laches of P. in not demanding the interest from the tenant for life from 1755 to 1802, was not sufficient to deprive him of it against the remainder-man. Sed secus (at emb.) if his small demands had arisen from any contrivance or collusion between him and the tenant for life. Leftus v. Swift, H. 1806. 2 Sch. & Lef. 632. Vide Aston v. Aston, 1 Ves. 264. Bonham v. Haincourt, Pre. Ch. 30.

106. I. S. being, in 1755, tenant for life of an estate which was subject to a charge, owed an arrear of interest, for which P. then took the bonds of I. S., and stipulated to give him time for the payment: Held, that P. could not retain his demand against the estate for that arrear, having notice that I. S. was tenant for life, and therefore bound to keep down the interest. S. C.

107. Testator appointed A., his daughter-in-law, his sole executrix, to have and enjoy all his real and personal goods, cattle, chattels, during her life, but not to diminish or commit waste on the lands, and his highest heir at law to enjoy the same after her death: Held, that A. takes an estate for life only on the whole, both real and personal estate, with remainder to testator's heir at law. Grogan v. Muddock, E. 1808. 14 Ves. 488.

108. A tenant for life without imprisonment of waste, being dispensable, has also the property in the trees severed. Williams v. Williams, M. 1803. 15 Ves. 425. Vide Bowles' Ca. 11 Co. 79. Heriaclendens' Ca. 4 Co. 62.

109. Where, by settlement, a term for years was vested in trustees to raise by sale or mortgage, a sum of money to pay the debts of a tenant for life, and he soon after pays the debts with his own money, without taking an assignment of the securities. It was held, that a mortgage by the trustees made several years after, by the direction of the tenant for life, is a clear execution of the trust, for the tenant has a right during his whole life, to stand in the place of his creditors; and it is not necessary for him to take an assignment of their securities, in order to keep the charge on the estate alive; nor can it ever be presumed (after his express declaration, that he meant to charge the estate,) that he meant to exonerate it, but such a presumption may be disproved and rebutted. Redington v. Redington, H. 1809. 1 Ball & Be. 131. 142. Vide Jones v. Morgan, 1 Bro. C. 206. Shrewsbury v. Shrewsbury, 3 Bro. C. 120. 1 Ves. jun. 227.

110. Tenant for life petitioned, that a
sum which the Deputy Remembrancer had received for lands taken for the public service, might be applied in part of a sum which he had previously paid to redeem the land tax, he not having availed himself of the clause in the redemption act, which enabled him to sell part of the lands: Ordered, though the next in remainder was a minor. *Thompson, B. dubitante. Re Shepherd,* H. 1811. Wightw. 131.

111. A bill will not lie at the suit of a remainder-man to set aside a lease by tenant for life, on the ground of its being accompanied with a loan of money, there being no privity between them, and the remedy being at law. *Corbet v. Segrave,* H. 1812. 2 Ball & Be. 98. For the cases of leases connected with loans, *see post,* tit. *Interest of Money,* ix.


As to the right of a tenant for life to cut timber, *vide post,* tit. *Waste.*

ESTATE V.

**Pur autre Vie:** (a) and of the Irish Tenure by Lease for Lives, renewable for ever. (b)

(a) *Pur autre Vie.*


115. A devised to B. a rent out of a lease for years, determinable on lives, to be paid half yearly, if the *cestui que vie* should live so long. B. died during their life-time: Held, that the rent was not determined, but shall be paid to the executors of B. during the term. *Gosley v. Gilford,* H. 1688. *2 Vern. 35.

116. An estate *pur autre vie* may be limited to a man and his heirs, may be entailed, and may descend; but a term for years cannot be so entailed. *Finch v. Tucker,* M. 1690. *2 Vern. 184.

117. A having an estate for three lives, settled it to the use of himself in tail, remainder to B. The remainder was held void, or, if good, it may be barred by deed, surrender, or other conveyance; for a lease *pur autre vie* is not within the statute *de denis.* *Baker v. Bayley,* E. 1691. *2 Vern. 225.

118. Dean and chapter made a lease to a man, his executors and administrators, for three lives: Held, a descpicable estate, and to belong to the heir, and not to the executor. *St. John's Coll. v. Fleming,* M. 1694. *2 Vern. 230. Vide D. of Devonshire v. Kinton, 2 Vern. 720. and *vide stat.* 14 Geo. 2. c. 20.

119. I. S. lessee of land to him and his heirs for three lives, assigned the whole estate, reserving a rent to him and his executors, and died: Held, that his executors, and not his heirs, were entitled to this rent. *Jenison v. Ed. Lexington,* T. 1719. *1 P. W. 355.


121. An estate *pur autre vie* may be limited to A. in tail, remainder to B., for this is only a description who shall take as special occupants during the life of
Estate V.

Pur autre Vie.

cestui que vie. Love v. Burron, E. 1754. 3 P. W. 262. It was doubted in this case by Ld. Ch., whether A. as tenant in tail, could by lease and release bar the remainder-man, since no recovery could be suffered of an estate for lives; and it has been determined by the Lords, that a remainder, in such case, could not be barred. Vide Wasteney v. Chappel, T. 1714. 1 Bro. P. Q. 457. But it seems now, that any alienation by the (quant) tenant in tail, will be sufficient to bar the remainder-man, although if no such act be done, the remainder-man will take as special occupant. Vide Baker v. Bayley, E. 1691. 2 Vern. 225. Norton v. Frecker, H. 1737. 1 Atk. 324. Foster v. Foster, E. 1741. 2 Atk. 459. Salters v. Salters, T. 1742. ibid. 376. Williams v. Jekyll, M. 1755. 2 Ves. 681. Blake v. Blake, 3 P. W. 10. (a. 1.) Vide post, tit. Occupancy.

122. I. S. had a rent-charge granted to him and his assigns for three lives. I. S. and his wife mortgaged it to A. his executors, administrators, and assigns. Habendum to him, his heirs and assigns, during the three lives, upon trust that A. his executors, administrators, and assigns, should enjoy 100l. per ann. out of it, till the mortgage was satisfied. A. made an unattested will, and appointed plaintiff his executor, who brought his bill against the heir of A. for this 100l. per ann. Per M. R. the particular nature of this case is such, that a grant of this kind to a man and his executors, is the same as a grant to a man and his heirs; and in both cases, the heirs and executors do not take as representatives, but as special occupants; and, therefore, it has been held, that if lands are granted to A. and his heirs for three lives, he may grant it to another and his executors for those lives. So if granted to A. and his executors for three lives, he may grant it to another and his heirs during those lives; from whence it follows, that if one limitation is in the premises of the deed, and the other in the habendum, the habendum shall take place, as if the premises in the grant of an estate pur autre vie are to A. and his executors during the life of B., habendum to A. and his heirs during that life, the heirs shall have the benefit of the estate. So if the grant be to A. and his executors during the life in being, habendum to A. and his executors during that life, the executors shall have it, because the habendum is merely explanatory, and does not attempt to give a less or larger estate, than contained in the premises; and though, before the statute of frauds, no grant of rent pur autre vie could be good any longer than the grantee lived, because a rent lay not in occupancy, so that it was certain that there could be no general occupancy of it, nor could the common law admit in such case of a special occupancy. His honour thought that this rent was within the statute of frauds, which intended to make a general alteration in all sorts of estates granted pur autre vie, and a rent-charge is as much within the intention of the act as any other inheritance. Decreed, that the heir of I. S. should take this rent-charge, but for the benefit of the executor, agreeable to the trust in the mortgage deed. Kendal v. Michfield, E. 1740. Barn. Ch. Rep. 48.

123. Where a purchaser has an advantage by the dropping in of lives, the court will direct an enquiry, what interest was proper to be paid by him on that account. Davy v. Barber, H. 1742. 2 Atk. 489. Vide Exp. Manning, 2 P. W. 410. Blount v. Blount, 3 Atk. 636. Though in the West of England, the dropping of lives is considered not as accidental, but as part of the annual profits of the estate. Davy v. Barber, supra.

124. Tenant for life, of an estate held for three lives, one life dropped. The tenant for life not being one of the cestui que vie, must contribute proportionally to the renewal Verney v. Verney, E. 1750. Amb. 88.

125. Where a leasehold estate for lives was settled upon the husband for life, remainder to the wife for life, with remainders to the children, the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal. Lawrence v. Maggs, T. 1759. 1 Edon 458. See the editor's note of cases where the tenant for life is one of the lives, and also as to the apportionment of the fine, where tenant for life is not a cestui que vie.

126. Devise of lands to trustees in trust to pay an annuity, and subject thereto, to A. for life, remainder to trustees to preserve, &c. remainder to the heirs of the body of A., remainder to testator's

127. *Quasi* tenant in tail of a freehold lease for lives, may, by surrendering the old lease, and taking a new one to himself, bar the remainders over. *Grey v. Mawlock*, T. 1765. 2 Eden 359. See the editor's note on Lord Kenyon's reference to this case in *Doe v. Luxton*, 6 T. R. 292.


129. So where he accepts a sum of money to give up his claim of renewal, the money shall be settled to the old uses. *Raw v. Chichester*, E. 1775. Amb. 715.

130. In a beneficial lease, the tenant for life renewing, the fine shall be apportioned between him and the remainder-man, according to their respective interests. *Nightingale v. Lawson*, E. 1785. 1 Bro. C. C. 440.

131. A. gave his freehold, leasehold, and personal estate to trustees as a general fund, (the leasehold consisted of bishop's leases renewable) which testator ordered to be renewed in trust to pay the rents and profits to B. for life, with remainder over. The fines for renewal shall be paid out of the accumulated fund, and not apportioned between the tenant for life and the remainder-man. *Stone v. Theed*, T. 1787. 2 Bro. C. C. 248.

132. Where one devised a rectory for lives, subject to a charge upon the lease, though varied by renewals, and a bond was given for the money by the owner of the lease, who did not make the charge, it shall remain as a charge on the lease, and not on the personal estate of the obligor of the bond. *Billinghurst v. Walker*, E. 1789. 2 Bro. C. C. 604. *Hamilton v. Worley*, 3 Bro. C. C. 99.

133. Money paid as a fine by the last life, in a lease for a renewal, was ordered to be a charge on the estate. *Adderley v. Clavering*, T. 1789. 2 Bro. C. C. 659.

134. A tenant of an estate *per acquiescit* vie may be compelled, under the statute of 6 Ann. c. 18. to produce the surviving cestui que vie. *Exp. Sir John St. Aubyn* T. 1799. 2 Cox 373.

135. Such an interest in an estate *per acquiescit vie* as would be an estate tail, if applied to freehold lands of inheritance, may be disposed of by deed, so as to bar the issue; for an estate *per acquiescit vie* may be limited in tail. *Exp. Sterne*, T. 1801. 6 Ves. 158. *Vide Foster v. Foster*, 2 Atk. 259. *Williams v. Jukel*, 2 Ves. 681.

136. The interest in an estate *per acquiescit vie* to a man, his executors, administrators, and assigns, beyond the debts, belongs to those who are entitled to the personal estate. The executor was, therefore, in such case, held a trustee for the residuary legatees. *Ripley v. Watersworth*, T. 1802. 7 Ves. 445. *Tenant per acquiescit vie* made lease for years, and died during that lease, living the cestui que vie. The lessee for years would take the estate itself. *S. C. 442.

137. This case coming on again on appeal, (vide ante, pl. 91) *Eldon*, C. held, that though the old rule, throwing one-third of the fine for renewal upon the tenant for life, does not now prevail, the tenant for life in general cases must contribute beyond the interest in proportion to the benefit he takes, but in this case, the testator having provided a fund for renewal, the tenant for life might put in his own life, and was not under an obligation to renew further than to permit a mortgage for raising that fund. The decree was therefore affirmed, inserting expressly that the tenant for life ought to have kept down the interest. *White v. White*, T. 1804. 9 Ves. 554. *Vide Nightingale v. Lawson*, 1 Bro. C. C. 440. *Vernon v. Verney*, 1 Ves. 428. Amb. 88. *Stone v. Theed*, 2 Bro. C. C. 243. *Vide etiam Allan v. Backhouse*, 2 Ves. & Be.
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65. where the rule now appears to be that tenant for life shall contribute according to his enjoyment.

138. A recital in a freehold lease, that the lands are "now in the occupation and tenure of the lessee, and his under tenants," stops the lessee from contending that the lessee was not in possession, so as to render livery of seisin unnecessary: Held also, that after 20 years possession, livery of seisin may be presumed. 


149. An infant was possessed of two estates pur autre vie. —The leases were granted to the guardian, to hold them as lessee, "his heirs and assigns," and the other to him "his executors and administrators." The declaration of trust was made for the infant only, without any ulterior words. On a renewal by the guardian, a question arose, how the renewed leases should be taken? Held, that they should follow the original intent of the infant. 

Milner v. Ld. Harewood, T. 1811. 18 Ves. 274.

140. In a lease for 99 years, determinable on three lives, there was a covenant, that upon the death of either of the lives, &c. on request and payment of 20l., &c. to grant a new lease for another term of 99 years, determinable with the life of a new person to be named, under the same yearly rents, covenants, &c. the court did not determine, but inclined to think, that the lessee was entitled to a covenant for renewal in such new lease. 


(b) Of the Irish Tenure by Lease for Lives, renewable for ever.

141. The precise time of the introduction of this tenure into Ireland seems not to be accurately ascertained; but it seems to be known there before the revolution. At whatever period however, or from whatever motive this tenure might have been first introduced, it appears that the people of Ireland were much alarmed at some judicial determinations in England, tending to shake a title under which it is said a seventh part of the landed property in Ireland is held.

142. N. H. filed a bill in the Exchequer of Ireland, stating, that by articles, 4th October, 1734, J. H. devised to G. H., father of plaintiff, certain lands for the lives of himself and of A. and B.; and it was agreed that leases should be perfected at the request of either party, containing, amongst others, a covenant of renewal for ever, paying a certain fine in six months after the fall of every life; that N. K., father of defendant, being mortgagee of the lands under J. H., applied to G. H. to attorn to him, which was done. It appeared that N. K. had notice of the articles, and ratified them. G. H. continued in possession till 1742, when one of the cestui que vies died, and application was made to N. K. for a renewal, which he declined, being only mortgagee, and the matter was therefore postponed. In 1755, G. H. died intestate, leaving plaintiff his son and heir: and in 1757, N. K., leaving defendant his son and heir, who purchased the equity of redemption and became absolute owner of the lands; plaintiff was ignorant of the articles till 1768, when he applied for a renewal of the two lives, and an account of the rents received by N. K. This was declined, whereupon plaintiff filed his bill, offering to pay the renewal fines for the two lives, with interest, and praying that defendant should account for the rents received by him since the death of N. K., his father; that plaintiff might be restored to his possession, and defendant compelled to execute leases at the old rent, according to the articles. Defendant in his answer, insisted upon the mortgage to his father, and the conveyance of the equity of redemption, alleging, that he was not bound by the articles, they being subsequent to the conveyance; and further that G. H. had been considered merely tenant at will; denied that any application had been made to N. K. for a renewal, and stated, that G. H. had actually surrendered the premises, and insisted, he was not bound to execute any renewal of the articles or lease, or to account for the profits, and the rather, as plaintiff had lain, by so long, and till the death of all the persons who could give an account of the proceedings. On the hearing, the court decreed that plaintiff was entitled to a lease according to the articles, and it was referred to the master to state an account. From this decree the defendant in equity appealed to the British House, by whom it was reversed; Ld. Mansfield observing that, supposing the point respecting the mortgage and possession out of the case,
another question would arise, viz. whether the respondent would be entitled to a new lease under the covenant in the articles for a perpetual renewal, the terms of which are as above stated: it appears that one life dropped in 1741, and another in 1755, and that no step was taken for a renewal till 1768: now it is said to be the practice, that though the lessee neglect, upon the death of a life, to renew and pay the fine within the limited time, yet be may, at any time after, during the continuance of any one of the lives, renew, upon payment of a new fine, at the end of every seven years during the vacancy. Ld. M. said, he always thought people were bound to perform their covenants, and if a man covenants to renew within six months after the fall of every life, surely the court cannot make a new agreement for him; but it is said to be the established law in Ireland, and confirmed in England. His Lordship then stated the case of Anderson v. Sweet, 2 Bro. P. C. 430. Ross v. Worropp, 4 Bro. P. C. 411. and Pendred v. Griffith, ibid. 512, to show to the House the difference between those cases and the present; upon this point, therefore, Ld. M. thought, that on the falling of a life, another should be inserted in due time, and before the day for renewing it elapses; the court cannot destroy the agreement of the parties, nor give a compensation for damages sustained, which are merely eventual and uncertain; besides, here the obligation to renew is not equal on both parties, in this respect, therefore, the articles are inequitable, and the lessor has no remedy if he is deprived of his legal advantage, arising by the lapse. Ld. M. concluded by saying, he thought this class of cases deserved not any support in equity, and that in the present court could not dispense with the lessee’s neglect in not renewing agreeable to the covenant. Kane v. Hamilton, E. 1774. 1 Ridg. P. C. 180.

143. E. E. being seized in fee of the manor of H., “and having power to make leases thereof in fee-farm, or for any number of years or lives, renewable,” granted unto T. M. the towns of C. and S. parcel of the said manor, for ever, to hold to said T. M., his heirs and assigns, for ever, viz. during his own life, and the lives of A. and B., his two sons, and the lesser liver of them, at the rent therein in a covenant, amongst others, that upon the decease of any of the said lives, then, upon payment of a certain fine to E. E., his heirs or assigns, within three months next after such death or decease, he or they should add another life, instead thereof, by new deed indentured unto T. M., his heirs and assigns, continuing the lives forever, upon payment of the said fine, at the fall of every life as aforesaid. In 1708, the original indenture, and the lands granted thereby, became vested in plaintiff’s grand-father; and it being doubtful whether two of the lives had not fallen, he applied for a renewal, which he obtained for the further lives of his grandfather and father. In 1737 H. E., to whom the reversion of the lands had descended, made his will, conveying to trustees for the use of the defendant O., his eldest daughter, for life, remainder in tail male, remainder over, and afterwards died, leaving O. a minor, who became seised under the will, and the trustees appointed A. M. receiver of the rents during the minority. In 1748 plaintiff’s mother married, whereupon her husband, in consideration of her marriage portion, covenanted to limit the lands to a strict settlement, subject to a jointure to her, which he afterwards did. Defendant O. attained her full age in 1751, and in 1754 married R., and in 1756 the lands were settled upon O. for her separate maintenance, under which title she enjoyed the rents till the death of R., when she became seised under her father’s will; A. M. employed G. M. as agent during the minority of defendant O., after whose marriage, accounts were settled, in which R. and defendant O. had credit for all the rent of the premises, after which G. M. was continued as receiver till 1736, and accounted for the rent till his death. T. M., one of the cessus que vies in the indenture of renewal of 1708, died in 1741; another died in 1746, and the third in 1763, leaving plaintiff’s mother his widow, and plaintiff his eldest son, who became seised under the marriage settlement, subject to the jointure. Defendant O. resided in England till the end of 1763, and soon after, on her return to Ireland, deeds of renewal were sent to her, with a sum sufficient for all fines and interest, and an account giving credit for all such fines and interest, but no notice was taken thereof, and in 1765 defendant O. brought an ejectment to recover
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the premises, whereupon this bill was filed, praying, that defendant O. might be compelled to execute a new lease of the premises, pursuant to the covenant for renewal, and be restrained from proceeding in ejectment. Defendant O., by answer, admitted the original deed, and the renewal in 1708; believed the articles made on the marriage of plaintiff's father were after marriage, and therefore without consideration, and that the plaintiff was not a purchaser; that, by articles of agreement in 1730, plaintiff's grandfather and father absolutely sold and conveyed, or agreed to sell and convey, the lands to H. E., and his heirs, in consideration of £200, but that some claim having been set up by one T. M.; plaintiff's grandfather, and family were permitted to continue in possession till the accounts were adjusted, and the rents were to go in discharge of part of the purchase-money; that in 1751 the possession was delivered up to H. E., who, out of regard, permitted plaintiff's grandfather to remain in part of the dwelling-house, and took plaintiff's father into the family as house-steward, who thereby gained access to the papers, and took away the accounts and vouchers of the purchase-money; that she was ignorant of this agreement for a sale until 1754, when the accounts were settled executed there was a proviso, that nothing therein contained should extend to prejudice her title to the lands. Issue being joined, the cause came on to be heard, and the Ld. Ch. Laford directed issues to be tried at law, "whether any and what agreement was entered into by plaintiff's grandfather or father with the said H. E. for a sale of their interest in the said lands and of the said lease, and if there was any such agreement, whether the same was carried into execution, or whether the same was varied or departed from by the parties thereto, or either of them." Upon these issues the jury found, "that there was no agreement entered into by the plaintiff's grandfather or father with the said H. E. for a sale of their interest in the lands in question, or the lease thereof." This verdict the defendant O. sought to set aside, but the Ch. refused, and the cause came on again on the Judge's certificate and merits, upon which hearing Ld. Ch. Laford observed that Gilbert, C. B. had invented the mode of making satisfaction for lapse of time by the rule he adopted respecting septennial fines. Here O. might have insisted upon a fine every year, but as she did not, it comes to the cases of renewal upon terms. His Lordship therefore decreed that plaintiff was entitled to a new grant of the lands in question, according to the true purport of the indentures of 1685 and 1708, upon payment of the several fines and interest, and of the rents and arrears and duties which had become due, and he referred it to the master to ascertain the times when the life in being at the time of the grant in 1708, and the two additional lives, then inserted, respectively determined, and to take an account of what was payable for the fines and interest; and in computing interest on the several fines, the Master was to reckon the same up to the 10th of June, 1764, only, when a tender was said to have been made to defendant O. in case it should appear to the master upon enquiry, that a sufficient tender was then made, and on payment of such fines, interest, rents, and duties, O. should execute proper conveyances, containing a new grant and confirmation of said lands, according to the purport of the indentures of 1685 and 1708, in which the lives of D., of the plaintiff, and his brother, were to be inserted, as the three lives to stand in the place of those that had fallen; such new grant to be subject to the jointure of plaintiff's mother; and it being admitted that O. had been for some time in possession, she was to account for the rents during that time, and plaintiff was to have his costs at law, but not in equity. From this decree defendant O. appealed to the British House of Lords, contending, that the evidence of the agreement in 1730, for the surrender of the lease by plaintiff's grandfather and father to defendant's father, being clear and uncontradicted, the Ld. Ch. ought to have dismissed the plaintiff's bill without directing an issue; but that if such issue was proper, his Lordship's final decree was improper. In the British House, Thurlow, C. said, that the respondents went into equity to try whether they were entitled to that perpetual renewal which they claimed; they insisted that if by error or accident they had incurred a
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Forfeiture of their right at law, they were entitled to relief in equity, upon making a full compensation to the lessor, by paying the fines, with interest, from the time they became due. The intention of the parties clearly was to grant a lease, which should, by perpetual renewals, continue for ever. The lessee contracted that he would do certain acts, and the lessor agreed, that, upon the performance thereof, he should have a right to perpetual renewal of the demised premises, and a perpetual renewal means an estate for ever; but that was under a covenant on the tenant's part, to do all those acts which he agreed to perform; but the contract on the part of the lessee was not complied with, no sum was tendered within the limited times after the dropping of the lives for the purchase of a new life, according to the terms of the covenant; the lessee has neglected then to do that which he ought to have done. How then can equity compel a man to do what he has not agreed to do? it is clear he had no remedy at law; it was agreed, the right of the lessees upon these covenants had never been ascertainment upon any settled rule: his Lordship said, he took the rule to be this, that equity will relieve the lessee if he has lost his right by fraud in the lessor, or by accident on his own part, but will never assist him where he has lost his right by his own gross laches or neglect. It was agreed, that if the lessee had not abandoned his right, he ought to have been let in to his renewal, and that the real value of his estate was great, and far beyond the value of the fines, and that therefore he could not be presumed to have intended a forfeiture of his right, and that he had not, by any act, given cause for a conjecture that he had, or ever intended to abandon that right which he had to a perpetual renewal: but, said Ld. Thurlow, the rule in such cases seems to be that when the lessee has lost his legal right, he must prove some fraud on the part of the lessor, by which he was debarred the exercise of his right; or some accident or misfortune on his own part, which he could not prevent, by means whereof he was disabled from applying at the stated times for renewal, according to the terms of his lease. The true reason, said his Lordship, why the respondent's father did not attempt to re

new, was, because he feared the contract for sale in 1730, between his father, himself, and H. E. had effectually barred him, not only of that right, but of any right to the estate. It was also argued, that covenants of this kind ought to receive the broadest extent; that much property would depend on this decision, and that if this decree should be reversed, it would cause a great confusion in Ireland; but Ld. Thurlow did not see that any inconvenience could arise from such decision; it would put them on making their leases with accuracy, and enforce a due compliance with the specific terms on which they were made; this doctrine, said his Lordship, reduces the law upon this head to the clearest and most simple light possible, but an unlimited right to renewal entangles this species of property in Ireland in a constant series of litigation. Ordered, that the decree complained of, be reversed, and the respondent's bill dismissed. Bettsam v. Murray, 1777. 1 Ridg. P. C. 187.

144. Thus stood the law, until the passing of the Tenantry Act of 19 & 20 Geo. 3. c. 30.; soon after which, the appellate jurisdiction being restored to the Irish House of Lords, the case of Boyle v. Lasagne, E. 1787. 1 Ridg. P. C. 384. came before that House upon appeal from a decree of the Irish court of Chancery, and upon that occasion Ld. Ch. Lafford fully expressed his sentiments to the House upon the subject of the foregoing decisions, prefacing his speech with a history of renewable leases in Ireland, which tenure, his Lordship said, obtained till it acquired the tenants great respect and very valuable properties, inasmuch as they were considered to have a perpetual interest; upon that principle they gained ground, and became a fund for settlements of every kind, for mortgages and other securities. Tenants, however, like other men, were apt to neglect their own affairs; hence they omitted to make renewal upon the fall of lives, and were guilty of great laches. The landlords thereupon brought ejectments, and the tenants resorted to equity for relief, and courts of equity, where the breach was made up by an adequate compensation, though they were entitled to relief, but still considerable difficulties arose in estimating what should be a compensation, until Ld. C. B. Gilbert,
Who presided in the Exchequer in Ireland, struck out the compensation of Septennial fines, considering a life as equal to seven years, upon the idea of which the Tenantry Act says, that if a man is not heard of for seven years, he is to be presumed dead; that compensation is a fine for every seven years, with interest accordingly. In the case of Anderson v. Sweet, the C.B. decreed a renewal to the tenant, upon payment of Septennial fines and interest, and his decree was affirmed by the Lords, (2 Bro. P.C. 430.) Courts of equity were then very glad to lay hold of that rule, and in every subsequent case they held the tenant entitled to a renewal upon those terms, except in cases of fraud or dereliction. A long string of cases came into public discussion in the courts, some with and some without negative clauses, for in some of these leases were inserted express provisions, that if the tenant neglected to renew within a certain time, he should not have a right to call upon the landlord for a renewal, but, notwithstanding that clause, courts of equity adopted the same rule in that very extraordinary case, as coming under the idea of compensation, viz. Murray v. Bate- man, which his Lordship said came before him in 1776, he had a great number of those cases laid before him, besides those cited at the bar; he also enquired of the Judges, of the ablest men, and the eldest practitioners in the hall, and they all agreed that the uniform practice was to decree renewals in all cases, except where there was fraud or dereliction on the part of the tenant; in consequence of this general remonstrance, his Lordship said, he formed his opinion; accordingly, said Ld. L., "I decreed a renewal," considering that there was a local equity, or, as it is often called, the old equity of the kingdom." The fate of that decree is well known; it was reversed by the Lords in England, and Ld. L. added, he was satisfied the principles of it were not there understood; their Lordships were unacquainted with that local equity, and that it was the original intent of the parties to convey a perpetuity. Ld. L. further observed, that some very eminent men, concerned in that reversal, had since told him they had changed their opinion; and said, that, according to English principles, the reversal was right, but that, considering the usage in Ire-land, and all the circumstances of the case, it was wrong. The voice of the people expressing a dissatisfaction with that determination of the Lords, and a general alarm in consequence, brought the point before the legislature, and the old equity was revived by the Tenantry Act, in 19 & 20 Geo. 3. c. 50. Lord L. further observed, that after that reversal, and before the act, one or two cases came before him, in which he refused relief; they were cases of strong neglect; all the lives were gone, and he considered the determination of the great court of dernier resort as declaratory of the law of the land, and that he was not at liberty to set up a decree against it, which was sure to be reversed; it would have been cruel to the party, but by the act the old equity was revived, and, indeed, if it had never been made, his Lordship said, after the supreme jurisdiction had been restored to the Irish House, he would have had no hesitation in determining as he had done, in Murray v. Bateman. By the Tenantry Act, it is now provided, that in all cases of mere neglect, where no fraud appears to have been intended, and no dereliction on the part of the tenant, by neglecting or refusing to renew after the landlord has demanded the fine, courts of equity shall relieve upon an adequate compensation being made. It professes to provide for leases for lives; but, said his Lordship, what are leases for lives, within the fair and equitable construction of the statute? It is said a lease for 99 years, determinable upon lives, is not a lease for lives. It is true, that at law it is not, for it is but a chattel; but in substance and equity it is as much a lease for lives, as a lease for lives at law, for it does not depend upon the number of years, but drops with the lives, and therefore it is a lease for lives within the statute.

145. K. being seized in fee of lands, demised part thereof for 99 years, if three lives therein named, or any of them, should so long live, at a certain rent, with a nomination and tenement for each day said rent should remain unpaid after demand, and in said lease was a covenant for renewal for ever, on the fall of every life, on the tenant's paying 20 l., within 12 months after every such fall. This lease was assigned to J. F. and the inheritance having vested in B., he, in 1717, upon the death of one of the lives, renewed for 99
years, inserting three new lives with the like covenants, &c. as in the original lease. In 1739, the inheritance vested in A. B., who in that year executed a renewal, which recited the original lease and the renewal in 1717, and that one of the lives had died, and that the lease, within the limited time, paid the renewal fine, and nominated G. F. in his stead. By this renewal A. B. demised the lands to H. F. provided J. C., G. F. and R. W., or any of them, should so long live, subject to the former rents, nomine panis, &c. And in this lease of 1739, the covenant of renewal upon which the question arose, was in these words: "Provided always, that if any of said (lives) shall die before said term hereby demised, and that such other person or persons who shall then have the estate and interest for the years hereby demised, and then to come of and in the premises by survivorship, or any other way, shall not, within the space of 12 months next after the decease of such of them, said (lives) which first happen to die, by his or their deed or deeds lawfully executed, surrender to said A. B., his heirs or assigns, or to such other person or persons to whom the next reversion of remainder of said premises, expectant upon said term and demise, shall then respectively appertain, all his and their estates, term, and interest, hereby granted, either absolutely or upon condition, in the said deed of surrender to be contained, to this effect, viz. that if any such person or persons to whom such surrender shall be made, shall not, within the space of three months after delivery of such deed of surrender, and payment to him or them made, of 20l., and tender made of a draft, purporting a new lease of said premises to be made to such person or persons so surrendering same, their executors, administrators, and assigns, for 99 years, to be on the death of such said (lives) as shall be then nominated by such party such engaged under the like reservations, as in these pretatis mutatis; and as for surrendering this present pretended deed of surrender, and the like of them, with all and the covenants are contained with the like conditions in mutatis mutandis as in this present proposal, seal and deliver such, or their act and deed, and these said surrender and these premises shall be void; and said A. B. doth hereby, for himself, &c., covenant with said H. F., his, &c. that said A. B. his heirs and assigns, shall and will, from time to time, on such surrender and payment, and reservations, seal and deliver such deed, in manner as herein provided; and that if he or they, or his or their heirs or assigns, or the heirs or assigns of the survivor of them, shall refuse so to do for the space of three months after such surrender, then said deed of surrender shall be void, and this present deed to remain good to said H. F., his executors and assigns, for their lives respectively, and after their deaths, to their executors, administrators, and assigns, for the remainder of said term of 99 years, under the same yearly payments and reservations therein likewise expressed; and then a covenant from A. B. for quiet enjoyment during the term." In 1740, one of the lives dropped, and in 1744, the interest in the lease was conveyed to H. W. In 1749, H. W. paid to A. B. a renewal fine of 20l., and then nominated a life in the place of the life dropped, for which fine A. B. gave a receipt. In 1760, another dropped, and in 1765, H. W. paid the renewal fine, with three years interest, to A. B.'s agent, and took his receipt nominating another life. A. B. continued to receive the rents till his death in 1771, when the inheritance vested in the appellant, and in the same year, the last cessai que vie in the renewal of 1739, died. In 1774, H. W. applied to the appellant's agent to receive the renewal fine and the nomination of a life. The agent wrote to appellant for permission, but not receiving any answer, concluded A. B. was satisfied to renew, accordingly he took the fine from H. W. and gave a receipt for it, but the agent being afterwards directed by letter from appellant's attorney to return the fine, he applied to H. W., who consented to take back the fine and give up the receipt. The appellant continued to receive the rent till 1776; but in 1780, (after the Tenantry Act,) he brought ejectments on the title, and in November following H. W. filed his bill in the Exchequer, stating the several matters before mentioned, and praying that the appellant might be obliged to execute a renewal of said lease pursuant to the original lease, for the lives of certain persons, (then named,) tendering the fine and interest for the same, according to the usual mode of
computation, and that the appellant might be restrained from proceeding in his ejectment. Appellant by his answer admitted the original lease and renewals, but insisted that the lease had become absolutely void, by non-performance of the terms of the proviso, and incapable of being set up by the acceptance of rent and fines, and though it were capable of being set up, yet that appellant's father had not power to do it, having been made tenant for life, with limited powers made by a settlement in 1736, and he insisted that fraud had been practised on his father by concealing the true time of the fall of the lives. Issue was joined. Witnesses were examined, and in 1782, the court decreed that H. W. was entitled to a new lease for 99 years, provided the lives last nominated by him, or any of them, should so long continue, at the rent, and under the covenants, &c., mentioned in the lease of 1739, upon the said H. W.'s paying to the appellant 20l. as a renewal fine on the death of the last life with interest, and also 20l. with interest from the time it ought to have been paid, together with all rent and arrears thereof, and that an account should be taken, and appellant have his costs. H. W. died in 1784, when the respondent took out administration and revived the cause. From this decree in Secce. A. B. appealed to the Irish House of Lords, when Lisford, C. said, the old lease and the renewals not being found, were probably given up at the times of renewal. That of 1739 is in being, and contains a singular and perplexed covenant, but the parties themselves seemed to have considered it as a covenant for a perpetual renewal. This is a lease for lives within the statute, fairly and equitably, and both parties considered the lease of 1739 as a perpetual interest; for in 1740 a life fell, and nothing was done till 1749, so that there was neglect on both sides. In 1749 a fine was paid, and a life named on a receipt given without any formal execution of a renewal. From 1749 to 1760 it went on the same way. In 1760 another life died, and four years after another fine was paid, and another life named as before, without any formal renewal. Thus it passed till B. died in 1771, when another life also fell, and in 1774 the tenant went to the agent, named a life, and paid the fine, taking a receipt as before. On this A. B. wrote to his agent to return the fine, which the tenant took back, and gave up the receipt honestly, consenting that his claim should undergo a fair discussion. The question then was, if this was a covenant for perpetual renewal? His Lordship said, the parties seem to have considered the lease as a perpetual interest. It is a case of mere neglect and supineness on both sides. It was said, that by the covenant, in particular words, the tenant was bound to surrender within 12 months after the fall of a life. His Lordship did not deny but that the term was gone at law; but he said the want of a surrender was relievable in equity. Next it was contended that there was fraud on the part of the tenant, that there was no interest paid in 1749, upon the payment of the fine, and that therefore the death of the cestui que vie might have been then concealed from the landlord. Now fraud is not to be presumed, and in this case none appears. On the part of the landlord the covenant was, that he would renew, and if he refused, there was a penalty. The party may then elect to have a specific performance of the covenant. A case was mentioned of Freeman v. Boyle (Vern. & Scriv. 402.) to have come before his Lordship on the same covenant, in which he refused relief. His Lordship recollected it; it was in June, 1780, and the reversal of his decree in Murray v. Bateman, (sup.) was in 1779. In June, 1780, no bill on this subject was brought into parliament or expected, though the Tenancy Act was passed in August following. The lease being forfeited, the case stood as if all the lives had dropped, and came within one of the cases put by the Lords in Murray v. Bateman, and as the equity then stood it was the equity of the land. His Lordship said, if a lease for years were made, and nothing said about lives, he did not think it would come within the act; but if a lease were made for any number of years though not depending upon lives, if it were renewable for ever, it would come within the old equity. Lord L. concluded that the decree should be affirmed. Id. Per cur. concurred with Id. Lisford in every point except that the equity of the tenant was a local equity. It is a general principle of equity to relieve against mere lapse of time; but as the landlord suffered an injury by the tenant's neglect to renew in time, he ought to have a compensation.
ESTATE V.

Of the Irish Tenure by Lease for Lives, remountable for ever.

The only difficulty was, what that compensation should be, for Septennial fines, were more than adequate; the price of an annuity for life, being 10 years purchase in Gilbert's time. Ld. Earlsfort also coincided with the Ld. Ch. From the determination in Sweet v. Anderson, down to the reversal of the decree in Murray v. Bateman, persons having such leases, were considered to have perpetual interests, and not depending on the strict terms of the renewal clauses. The lease in question had always been so considered by the parties, and the provis as a covenant for a perpetual renewal. Ld. Farkham declared his concurrence, and reprobated the reversal of the decree in Murray v. Bateman. He observed, that the Lords of England could not plead in excuse that they were ignorant of the established law of Ireland in such cases, for they had confirmed it in Sweet v. Anderson, and in many subsequent cases. Decree affirmed. Boyle v. Lysaght, E. 1787. 1 Ridgw. P. C. 384.

146. From the foregoing decisions, a general conclusion may be drawn, that where compensation can be made to the landlord, and the conduct of the tenant has been fair, he shall have relief. So equity will relieve against lapse of time if there be no fraud, and compensation can be made, and that though even all the lives are dropped, the court paying but little regard to negative clauses in renewable leases. The same principles were recognised by the Irish House of Lords in Magrath v. Musskerry, T. 1787. 1 Ridgw. P. C. 469., though in that case Ld. Leford dismissed the tenant's bill for a renewal, and his Lordship's decree was affirmed by the Lords, but that was a case of gross misconduct on the part of the tenant, falling completely within the proviso of the Tenancy Act, and much less entitled to the aid of the court than the tenant was in Murray v. Bateman, supra.

147. Bill praying execution of an agreement for a lease for lives, ought to name the lives to be inserted. O'Hertlihy v. Hedges, E. 1803. 1 Sch. & Lef. 128.

148. A renewal taken by a tenant for life, of a lease for lives, is a trust for the benefit of those in remainder, and a fine levied by the heir of such tenant for life, keeping possession of the title-deeds, will not bar those in remainder. Bowles v. Stewart, T. 1803. 1 Sch. & Lef. 209.

149. In Williams v. Jekyll, 2 Ves. 681, and Westfailing v. Westfailing, 3 Atk. 461. Ld. Hardwicke seems to have thought, that a lease for lives to one, his executors and administrators, would make the executor or administrator, a special occupant, but Ld. Redesdale differed from Ld. Hardwicke, saying, that the old authorities bear the other way. (a) And his Lordship observed, that the title of an executor depends on his taking on himself the administration of the will, and therefore does not commence instantaneus, but by his subsequent act, and as to an administration ex peremittente, his title cannot commence instanter, and therefore it should seem that the character of special occupant cannot properly belong to either. Campbell v. Sandys, M. 1803. 1 Sch. & Lef. 289. Vide (a) Anon. Dy. 328. b. (a) Rol. Ab. tit. Occupant, G. 2. 3. but stated contra by Comyns in his Digest, Estates, F. 1. tit. Occupant, Windsor's Case, 3 Leon. 35. Salter v. Butler, Mo. 664. Cr. Eliz. 901. Yelv. 9. Lowe v. Burros, 3 P. W. 364. note (d). Oldham v. Pickering, Carth. 376. 1 Salk. 464. Hargr. Co. Lit. 41. b. (u.) 4.

See more cases of renewal of leases, post, tit. Landlord and Tenant, vi.

And for cases on Irish Tenantry Act, vide post, tit. Landlord and Tenant, xii.

Of copyhold estates, par autre vie, and where estui que vie shall be deemed a trust for the first taker, vide autr, tit. Copyhold, xiii. et post, Landlord and Tenant, vi.
ESTATE VI.

Estate for Years.

150. A remainder of a term for 2000 years, is an assignable interest in the devise, of the term. Kingstader v. Courtney, T. 1700. 2 Freem. 238.

151. A devised a term to trustees to pay debts and legacies, and subject thereto to B. for life, remainder to his sisters. The debts and legacies were paid by a sale of timber, yet a lease was decreed to be made of the mansion, &c. for nine years, though opposed by several of the reversioners. Gibson v. Cromwell, H. 1709. 2 Vern. 647.

152. One possessed of a term for 2000 years cannot carve out a future term, to commence after the determination of an estate tail. So if a termor grants his land to another without mentioning any term, it is void for uncertainty. Kirby v. Duck, T. 1712. 2 Vern. 684.

153. A seized in fee, demised to B. his executors for 99 years, in trust for himself and his wife for their lives; and after the survivor's death, in trust for their issue; and in default, in trust for the issue of the husband; and in default, in trust for the heirs of the survivor of husband and wife. They had issue, a son; the husband died, and then the son died in his mother's life-time without issue. The mother administered to her husband and her son, and then assigned the term to defendant. Decreed, defendant well entitled, and that the term should not go to the husband's heir as attendant on the reversion. Hayter v. Rod, T. 1717. 1 P. W. 360.

154. A devisee in remainder of a term, articles for a valuable consideration, to sell it: this is a good assignment in equity, and the devisee afterwards becomes a trustee for the purchaser. Wind v. Jekyll, M. 1719. 1 P. W. 574.

155. A tenant for 99 years, if he so long live, with power of charging the premises with sums of money, joined in suffering a recovery, and declared the uses thereof. This extinguished the power of charging the estate. Savill v. Blackett, H. 1721. 1 P. W. 777.

156. A fine levied by a termor for years, is a forfeiture, but the reversioner has five years after the expiration of the term. Brandlyn v. Ord, M. 1738. 1 Atk. 371. Vide Smith v. Clifford, 1 T. R. 738.

157. Trustees to preserve contingent remainders, cannot permit a tenant for years, by the destruction of that estate, to bring forward a remainder to himself or another for the purpose of cutting timber. Stanfield v. Habershon, M. 1804. 10 Ves. 278. Vide Garth v. Cotten, 1 Dick. 183. 3 Atk. 751. 1 Ves. 524. 546.

Where a lessor dies in the interim of any two quarter days, who shall be competent to receive the rent? Vide post, tit. Landlord and Tenant, x.

Leases for years, vide post, tit. Landlord and Tenant, generally.

Term created in trust to raise portions or pay debts, vide ante, tit. Debtor and Creditor, ii. Devise, xv. et post, Portions, i. Trust, vii.

Terms created for the purpose of mortgaging, vide post, tit. Mortgage.

Term in trust to attend the inheritance, vide post, tit. Trust iv.

ESTATE VII.


158. Two persons lent money; and took a mortgage jointly, and one died: the survivor shall not have the whole, but the executors of the deceased shall have a moiety. Petty v. Styward, 1682, 1 Ch. Rep. 57.

159. But if two take a lease of a farm jointly, the lease shall survive, but the
stock shall not, though occupied jointly, neither shall any stock in trade survive. *Jeffreys v. Small*, H. 1683. 1 Vern. 217. So, where two pay share and share alike for a purchase, and one dies, it shall survive. *Hayes v. Kingdom*, H. 1681. 1 Vern. 33. *Usher v. Ayloper*, H. 1683. 1 Vern. 361. In *Jeffreys v. Small*, supra, Ld. K. said, where two became interested by way of gift or the like, survivalship shall take place, and accordingly it has been decreed, that if A. devises the residue of his estate to his two executors, or makes several men executors, the survivor shall take all; but in *Draper’s Ca. T.* 1681. 2 Ch. Ca. 64. Ld. Ch. said, the survivor shall carry all, because all the Judges will have it so.

160. A bond given by one parcener to pay the other, his executors or administrators, an annual sum during the life of I. S. for widow of partition shall go to the executor, and not to the heir. *Hubert v. Hart*, H. 1682. 1 Vern. 183.

161. If I. S. directs by will that 240l. shall be laid out in lands, and settled on M. and her issue, and if she die without, then on the children of E.—M. died without issue, and then the trustees made the purchase, and conveyed the land to the two children of E. and their heirs; one died. Decreed, the survivor shall not have the lands. *Sandles v. Brown or Bollard*, E. 1688. 2 Vern. 46. 3 Ch. Rep. 214. S. C. Reported contra, where it is said, that if the money had not been laid out it would not survive. *Vide Aston v. Smallman*, E. 1706. 2 Vern. 556. where it was held, that between joint-tenants of the trust of a term, survivorship shall take place as well in equity as at law.

162. If a man conveys his house and four farms to trustees, on trust, that his two sisters may coinhabit the house, and “equally divide” the rents and profits “between them,” this is a joint-tenancy; for though the words “equally to be divided between them,” do sometimes, in a will, make a tenancy in common, yet it is only by way of construction. *Clerk v. Clerk*, M. 1694. 2 Vern. 323. As where one devised lands to his two sons and their heirs for ever, and the longer liver of them, to be equally divided between them: Held, a tenancy in common, the latter words controlling the former. *Blisset v. Cranwell*, M. 1693. 3 Lev. 573.

163. A. and B. are joint-tenants. A makes a lease of his moiety to commence on his death, if B. should so long live. This is a severance, and the lease shall bind B. surviving. *Clerk v. Clerk*, M. 1694. 2 Vern. 323.

164. One joint-tenant made a deed of gift of his moiety to his wife, with intent to sever the joint-tenancy; the deed was made to the wife herself, and was without consideration, and voluntary, it was therefore held void at law, and equity would not relieve the wife. *Hayes v. Giles*, M. 1700. Pre. Ch. 124. 2 Vern. 385. S. C. Where it is said, that there was an express agreement between the two joint-tenants, against survivorship.

165. A. assigned a term in trust, to permit himself to receive the profits for life, then to his two daughters, B. and C., their executors and administrators, “equally to be divided between them,” during the residue of the term, they paying a certain sum within two years to his other two daughters. B. died, and C. mortgaged to D.: Held, that B. and C. were tenants in common by the intention of the father, which was to make distinct provisions for them. *Hamilton v. Hunt*, E 1701. Pre. Ch. 163. and the cases there referred to.

166. A. devised his lands to trustees in fee, to pay his debts, and convey the surplus to his two daughters; one of them married, and left a son: her husband shall be tenant by the curtesy. *Watts v. Bell*, H. 1706. 1 P. W. 106.

167. Three being jointly interested in the trust of a term, one of them mortgaged his part: Held, a severance, for joint-tenancies are odious in equity, and it would be to the disadvantage of the mortgagor to construe it otherwise. *York v. Stone*, M. 1710. 1 Salk. 158. But the law loves not to multiply tenures, and therefore a joint-tenancy of an inheritance is favoured at law. *Fisher v. Wiggs*, 1 Salk. 392.

168. On a partition in Chancery, every part of the estate need not be divided, but it is sufficient, if each tenant in common, &c. have an equal share of the whole. *Le. Clarendon v. Hornsby*, T. 1718. 1 P. W. 446.

169. Lands were conveyed to trustees, in trust, as to one moiety to A. (an infant) in tail, and as to the other moiety to B. in tail; A. brought a bill for a partition: Decreed, a partition but the trustees not to convey till the infant is of age, that
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he may join in confirming the partition.


170. The commissioners of sewers conveyed lands to five persons and their heirs, and then to improve the lands, agreed to advance them money, and be jointly concerned in profit or loss: Held, they were tenants in common, and not joint tenants; and held also, that where two or more purchase lands, and advance the money equally, and take a conveyance to them and their heirs, this is a joint-tenancy; but if they advance the money in unequal proportions, they are partners, and however the legal estate may survive, yet the survivor shall be deemed a trustee for the deceased. So if two or more jointly purchase, and one lays out large sums in repairs, and dies, this shall be a trust and a lien on the land, and that in all cases of partnership, the parties are to be considered as tenants in common, or the survivors as trustees for those who are dead. Lake v. Gibson, T. 1729. 1 Eq. Ab. 290. pl. 3.

171. Five persons purchased a level from the commissioners of sewers, and the purchase was taken to them as joint-tenants in fee; but they contributed ratably to the purchase; afterwards several of them died: Held, that they were tenants in common in equity, and though one of the five undertakers deserted the partnership for 30 years, yet he was let in afterwards upon terms. Lake v. Cradock, M. 1737. 3 P. W. 158. Payment of money creates a trust for the parties advancing it. Rigdon v. Vallier, 3 Atk. 731. 2 Ves. 296. Partridge v. Pawlett, 1 Atk. 467. 2 Atk. 55. Hall v. Digby, 4 Bro. P. C. 224.

172. Two tenants in common put out money as joint-executors: it shall not survive, but go to the respective representatives of each. Partridge v. Pawlett, H. 1736. 1 Atk. 467.

173. J. H. having a devise in common with J. P. whom he survived, took possession of two houses, and enjoyed them: he was decreed to account as far back as the death of J. P. Prince v. Heylin, H. 1737. 1 Atk. 498.


175. Though the words "equally to be divided" in a strict settlement at common law, have never been determined barely of themselves to make a tenancy in common, yet it has been settled that they do so in a will, both with regard to real and personal estate. Owen v. Owen, E. 1733. 1 Atk. 495. It seems if there be a joint-tenancy created by will, and it happens by whatever cause that one of the joint-tenants is prevented from taking, the whole will vest in the survivor after testator's death. Vide Pring v. Clay, 2 Ch. Rep. 187. Humphrey v. Taylor, Amb. 136. Dowse v. Sweet, ibid. 175. Frewing v. Rolfe, 2 Bro. C. C. 220. Baldwin v. Johnson, 3 Bro. C. C. 455. Buffar v. Bradford, 2 Atk. 220.

176. A. and B. co-heirs of L. S. being seized in fee of certain lands, A. married C., and B. married D. By an agreement, in which these husbands joined, a partition was made between them, by which each of them and her heirs was to take half. B. entered, and enjoyed her moiety till her death. Both husbands died, and a bill was brought against B. to confirm the division: Held, that the agreement of the husbands could not bind the inheritance of their wives, (a) see is a long enjoyment under it of any force, unless it had been originally the agreement of the wives: but B. consenting to the enjoyment of the several parts of the said premises, that had been held in severally, it was decreed that plaintiff and defendant should take in severally accordingly. So a parol agreement of long standing will be established in equity, for an equality of partition, if entered into by persons who had a right to contract, and if acknowledged by all parties to have been the actual agreement. So if a joint-tenant, upon equality of partition, accepts a contingent uncertain interest, where one moiety of the lands is of superior value to the other, it will not vacate the agreement. Ireland v. Riddle, M. 1739. 1 Atk. 541. (a) Sic Oldham, v. Hughes, 2 Atk. 452. But this doctrine, so far as it relates to partitions (where such partitions are equal) is directly contrary to the text of Littleton (§ 257) and the authority of Coke, Co. Lit. 171. Vide Oakley v. Smith, 1 Eden 261. Amb. 368. In May v. Hook, (Harg. Co. Lit. 246,
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178. The words "share and share alike," make a tenancy in common, and so has been held for 200 years. And so will the word "respectively" separate an estate, and make a tenancy in common. *Heath v. Heath*, 1740. 2 Atk. 122. *Vide Prince v. Heyjin*, 1 Atk. 493.


180. Devise of lands to younger children equally, as tenants in common, with benefit of survivorship: Held, to refer to a survivorship spoken of in the former part of the will, and therefore to be a tenancy in common, with a limitation to the survivors after the death of any before 21 without issue. *Hawes v. Hawes*, T. 1747. 3 Atk. 524. 1 Ves. 15. 1 Wils. C. B. 165. *Vide Mendez v. Mendez*, 1 Ves. 86. *Stones v. Heurity*, ib. 165.

181. The court inclines against joint-tenancy, as an inconvenient estate; and so do courts of law, now, though formerly they favoured it. *S. C.*

182. In deeds which receive their operation from the statute of uses, the words "equally to be divided," make a tenancy in common. *Sed secus in common law conveyances*. In *Rigden v. Valtier*, E. 1751. 3 Atk. 781. 2 Ves. 252. *Ld. Hardwicke* said that though deeds to uses must be construed like common law conveyances as to words of limitation, yet he saw no harm in construing them otherwise as to words of regulation and modification of an estate, as the words "vided" are. *Vide ante*.

Coparcenary—Partition, &c.

tit. *Device* viii. pl. 348. et seq. where the authorities are collected.

183. Two tenants in common in tail of a copyhold estate, (where, the intail was barred by surrender,) enter into an agreement for a partition, and make cross surrenders of the parts allotted to each other: Held, that they barred only a moiety of their respective estates, and that the agreement to divide cannot operate as a partition, particularly in the case of copyholds, as it was without the lord's privity; nor can a defendant claiming under the entail, be compelled to submit to the plaintiff. *Oakley v. Smith*, H. 1759. 1 Eden 261. Amb. 368. *Vide Ireland v. Rittle*, 1 Atk. 541.*ante*, pl. 176.

184. One tenant in common, having leased his share, the lessee is a necessary party to a bill for partition, and his costs must be borne by his lessor. *Cornish v. Gest*, T. 1788. 2 Cox 27.

185. A dormant surrender of a copyhold operates as a severance of a joint-tenancy, though it is revocable during the life-time of the surrenderor. *Gale v. Gale*, E. 1789. 2 Cox 196.

186. A tenant in common in possession was ordered to give security for payment of the proportion of rents to his cotenant, otherwise a receiver to be appointed. *Street v. Anderton*, T. 1793. 4 Bro. C. C. 414.

187. In cases of partition, where the parties are entitled unequally, if the plaintiff be entitled to the smaller share, the costs shall be borne equally; *sed quare*, if the plaintiff be entitled to the larger share. *Hyde v. Hindly*, M. 1794. 2 Cox 408.

188. Covenant by joint-tenant to sell, severs the joint tenancy in equity, though not at law. *Brown v. Raindile*, M. 1796. 3 Ves. 257.

189. Notwithstanding the inclination of the court of late to a tenancy in common, an interest given to two or more, either by way of legacy, or otherwise, is joint, unless there are words of severance, as "equally among," &c. or an inference of that sort arises in equity from the nature of the transaction, as in partnerships, a joint mortgage, &c. *Morley v. Bird*, E. 1798. 3 Ves. 628. *Vide ante*, tit. *Device*, viii. et post, tit. *Legacy*, x.

190. It is no objection to a partition between tenants in common, that other persons may come in *esse* and be enti-
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In Joint-tenancy. In Common—Coparcenary—Partition, &c.

ted. Wills v. Slade, M. 1801. 6 Ves. 498.

191. The court will grant an injunction, between tenants in common against de-
struction, but not against pure equitable waste. Hole v. Thomas, T. 1802. 7 Ves.
589.

192. Where a house was devised to three persons, as tenants in common, and they refused to join in an ejectment, the court decreed a commission for partition, the difficulty being no objection in this court. Turner v. Morgan, H. 1803. 8 Ves. 143. Vide Parker v. Gerard, Amb. 236. Warner v. Baynes, ibid. 589.

193. The case of partition, is distinct from that of exchange, and if not it is always considered as a special case. Each party can compel the other to make partition. The estate is the same, enjoyed afterwards in a different quality, and in another mode, and upon a principle compounded a little of these two reasons, that which can be done voluntarily, and provided nothing more is done than mere partition, shall not revoke a will. Ld. Eldon said, provided nothing more is done, for it has been long established, that if the object is to do any thing beyond the partition, it will be a revocation, and it is tried by the fact whether the acts demonstrate any intention to go beyond the mere partition, and notwithstanding the expressions of the Judges in some of the reports, that Luther v. Kidby, (3 F.W. 170. (n.) and Ticknor v. Titter v. Ticknor v. Titter, (cited 3 Atk. 714. Amb. 116. 1 Wils. C. B. 308.) cannot not stand together: Ld. Eldon thought they were perfectly reconcilable. Att. Gén. v. Vigor, E. 1803. 8 Ves. 282.

194. On articles previously to the marriage of A. with B.—A.'s father bound the whole of a farm, as a marriage portion to his son A. along with B., the one half of the said farm to be the right, title, and interest of the issue of B. by A.: Held, that the issue shall be tenants in common. Taggart v. Taggart, E. 1803. 1 Sch. & Lef. 84. Vide Hanbury v. Hanbury, cited 3 Atk. 372.

195. There is this difference between partition at law and in equity—the former operates by the judgment of a court of law, and is conclusive on the parties, and the latter proceeds on conveyances to be executed between the parties, and cannot be effectual if the parties be in

competent to execute. Whaley v. Dawson, H. 1805. 2 Sch. & Lef. 372.

196. Where under a commission of partition directed to four commissioners, two different returns were made, and each by two commissioners, the court would not act upon either, but directed a commission, appointing five commissioners. Watson v. Northumberland, T. 1805. 11 Ves. 153.

197. It is doubtful whether a power to exchange can be executed by a partition; for until there has been a partition, there cannot be an exchange. McQueen v. Farquhar, T. 1805. 11 Ves. 476.

198. I. S. devised estates to trustees, their heirs, &c. upon trust, to sell and pay debts, &c. and then to apply the rents, &c. to A. for life, and after his decease to the heir or heirs at law of B., and the heirs, executors, &c. of such heir or heirs, to whom the trustees were directed to convey and assign accordingly: Held, that the co-heiresses of B. being also the co-heiresses of the devisor, take not as co-parceners by descent, but as joint-tenants by purchase, and therefore subject to survivorship. Swaine v. Burton, M. 1808. 15 Ves. 365.

199. Where a joint-tenancy is created under a bequest of personal property, to more than one, without words of severance, the heir being also devisee, takes by purchase, and not by descent, if the devised estate is not of the same nature. S. C. ibid. 371.

200. A renewal fine paid by one of two tenants jointly holding under a bishop's lease, is a lien on the other moiety though under settlement. Hamilton v. Denny, T. 1809. 1 Ball & Be. 199.

201. On a bill for a partition between several owners of inclosed land, Grant, M. R. by his decree, directed a reference to the Master, to enquire whether plaintiff and defendants, or any and which of them, were entitled, and in what shares, according to the respective values of the other estates, and then a commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interest, but no previous or subsequent costs by analogy to the proceeding at law. And his Honour said, there could be no objection from a covenant not to inclose, without general consent from rights of common, or from the inequality and uncertainty of the shares, in
ESTATE VII. & VIII.

In Common.—Coparcenary.—Partition, &c.—In Possession, or in Interest.

proportion to other estates. Furthermore, his Honour said, that on a bill for partition, the interests and proportions were to be ascertained by the court and not by the commissioners; and that a partition can never affect the rights of third persons as rights of common, &c. but only the freehold and inheritance of the soil. On appeal, Eldon, C. said, the commission to make partition, issued not under the authority of any act of parliament, but from the difficulty attending partition at law, where plaintiff must from his title as he declares, and also the titles of defendants, by analogy to the equitable jurisdiction in dower: Ld. Ch. affirmed his Honour's decree, with a trifling alteration. Agar v. Fairfax, Same v. Holdsworth, M. 1811. 17 Ves. 583. Vide Calmady v. Calmady, 2 Ves. jun. 568. and see 1 Foulbl. Tr. of Eq. 18.

202. Bill for a partition by lessee for years, need not set forth that defendant is seised in fee or otherwise well entitled; nor need the reversioner be a party. Baring v. Nash, E. 1813. 1 Ves. & B. 551. Et per Plumer, V. C. No objection to a partition can arise from the smallness of interest, inconvenience, or the reluctance of the other tenants in common. S. C. Et vide Parker v. Gerard, Amb. 236. Warner v. Baynes, ib. 589.

203. Commissioners under a commission of partition, have no lien in the commission for their charges, but they must make their return, and then apply to the court for payment. Young v. Sutton, H. 1814. 2 Ves. & B. 365.

204. A joint purchase by two, to them and their heirs, with equal payments, is a joint-tenancy; and therefore survivorship takes place. Abeling v. Knipe, T. 1815. 19 Ves. 441.

205. On a bill for a partition, against infant cessant que trusts, the court will direct the conveyance to be resipted until they attain 21. Att. Gen. v. Hamilton, H. 1816. 1 Madd. 214.

VESTED IN POSSESSION, OR IN INTEREST, WITH A FIXED RIGHT OF ENJOYMENT.

206. Limitation of a trust of a term to one for life, remainder to his first, &c. son in tail, and for want of issue male, then to his daughters: Adjudged, the trust to his daughters good, for there never having been a son, the limitation in tail never vested; if it had, the remainder over would have been void. Higgins v. Dowler, M. 1707. 1 P. W. 98. 2 Ves. 600. Salk. 156. Vide ante, tit. Devise, xi. pl. 475.

207. P. gave part of his real estate to his son, his heirs and assigns for ever, but in case he die before 21, or without issue, then to testator's wife, her heirs and assigns. The son died after 21, without issue: Held, a vested interest in fee in the son, as he attained 21; and though he died without issue, that it did not go over to the mother, but descended to his heir at law. Walsh v. Peterson, M. 1744. 3 Atk. 198. In the above case, the word "or" was construed to be a copulative. There are several cases wherein this case has come in question, and which have received the same construction. Vide Sowell v. Garrett, Mo. 422. Cro. Eliz. 525. Price v. Hunt, Pollexf. 645. Barker v. Surtees, 2 Stra. 1175. Framingham v. Brand, 3 Atk. 390. 1 Wils. C. R. 140. 2 Ves. 249. Wright v. Kemp, 3 T. R. 470. Vide etiam Read v. Snell, 2 Atk. 646. Richardson v. Spraag, 1 P. W. 434. Dobbins v. Bowman, 3 Atk. 408. Jackson v. Jackson, 1 Ves. 217. Brownword v. Edwards, 2 Ves. 249. Eccard v. Brooke, 1 P. W. 434. (n. 2.) Furnival v. Crew, 3 Atk. 86.

208. I. S. brought an action in the Court of Session against his mother, for aliments, which he claimed. The mother had been a ward in Chancery, and having when 15 years of age, married the respondent's father, a settlement of her property, real and personal, was made, under the direction of the court, by which the interest of the personal estate was made payable to her for life, and to the principle to her children, in equal shares at her death; but their interests to become vested, as to sons, at 21, and, as to daughters, at 18, or on marriage. As to
the freehold, copyhold, and leasehold estates, they were to be sold, and the money to be invested in the purchase of freehold and copyhold estates, of which the mother was to become tenant for life, with remainder to her first and other sons in tail, &c. The pursuer was the first son. The father died. The mother advanced 100L as fee, to a clerk to the signet, into whose office the son entered, with a view to become an advocate, as his mother was then residing in Scotland. The mother married again, and refusing to allow her son an annual sum for his maintenance, he having attained 21, brought the present action for aliment, which was allowed to him super jure naturae. But the Lords reversed the judgment of the Court of Session. Eisdem, C. being of opinion that the interests of the respective parties were settled by the English settlement, which could not be undone; and considering, that as the son had a vested interest in the property, with which he might deal in the market, he had sufficient aliment without aid from his mother. Woolcy v. Maidment, E., 1818, 5 Dow P. C. 257.

Estate, the vesting of which shall be suspended till a condition performed. Vide ante, tit. Condition, i. pl. 15.

What is a vested interest in chattel property? Vide post, tit. Estate, x.

At what time a legacy shall be deemed vested in the legatee, vide post, tit. Legacy, ix.

When portions shall be deemed vested, and when and how the same shall be raised and paid, vide post, tit. Portions, i.

ESTATE IX.

Legal and Equitable.

209. Trust estates are to be governed by the same rules, and are within the same reason as legal estates. Philips v. Philips, E. 1701. 1 P. W. 55.; and this maxim has obtained universally, for if there was not the same rule of property in all courts, there would be the utmost uncertainty. It is so in the rules of descent, as in gavelkind and borough English lands. There is a possessio fratris of a trust as well as a legal estate. The like rule exists in limitations, and as well in barrings entails of trusts as of legal estates. There is no exception out of this general rule, nor any reason that there should be; it would be impossible to fix the boundaries, and show how far it ought to go; perhaps, in early times, the necessity of keeping to it was not seen or thoroughly considered. Banks v. Sutton, H. 1732. 2 P. W. 713.

210. A. devised money to trustees, to be laid out in lands, and to be settled on B. for life, without waste, remainder to trustees and their heirs for the life of B. to support, &c. with a power to B. to make a jointure, remainder to B.'s issue, remainders over, and by the same will devised lands to B. to the same uses, and died, leaving C. executor. B. sued C. the executor, for the deeds relating to the lands that were in his hands, and to have the money laid out in lands and settled. Decreed, per M. R. that B. had but an estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into court, and that the lands to be bought with the money were to be settled on B. for his life only, remainder to his first, &c. son; but, by the opinion of Ld. Ch. King, B. was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto, though as to the lands to be purchased, that being executory, and in the power of the court B. was to be tenant for life, with remainder to his first, &c. son. Papillen v. Voice, T. 1728. 2 P. W. 471. In many of the cases on this subject, the distinction has been taken and relied upon between legal and equitable estates; but from Austen v. Taylor, Amb. 376. Doe v. Laming, 2 Burr. 1108. The opinion of Buller, J. in Hodgson v. Ambrose, Doug. 327, and Jones v. Morgan, 1 Bro. C. C. 206, it seems that such distinction does not now prevail, in courts either of law or equity; that the rules of the two courts are perfectly concurrent on those points; that in both, the intention of the testator is equally attended to, and the same latitude admitted in the construction of words; that where the testator
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uses technical words only, their technical meaning must be adopted; but where it can be sufficiently collected from the context, that he means them in any other sense, his intention shall prevail against their technical import, and therefore a limitation to heirs, without further explanation, (the ancestor taking an estate of freehold by the same instrument) can never give an estate by purchase, as decided by Colson v. Colson, 2 Atk. 246.; the objections to which case do not tend to prove that the testator used the words "heirs of the body," in any other than their technical meaning, but merely that he intended an estate for life only to the ancestor, and an estate by purchase to the heirs of the body, which the law would not permit; whereas, had the former intention been demonstrable, it should have prevailed, the rule of law not being applicable to the construction of words, but to the nature and operation of the estate or interest devised. (Vide the other cases on this subject in Bate v. Colman, 1 P. W. 142. et alio, tit. Devises, viii.) But the distinction which has been made between trusts executed and executory, seems to have occasioned greater difference of opinion. Vide Ld. Glenorchy v. Bosville, Ca. temp. Talb. 3. Roberts v. Dixwell, 1 Atk. 637. Wright v. Pearson, Amb. 358. Austin v. Taylor, ibid. 376. White v. Carter, ibid. 670. Bagshaw v. Spencer, 1 Ves. 152. Bastard v. Froby, at the Rolls, E. 1788. in which the case was, "P. devised to A., B., and C., their heirs and assigns for ever, to the use of them, their heirs and assigns, for ever, all his manors, &c. in D. and elsewhere, upon trust, to set the same out in such manner as they should approve for the benefit of testator's daughter J., and the rents and profits thereof to lay out and apply for her advantage, until she should attain 21, or be married; and on her attaining that age, that the said trustees or the survivor of them, or the heirs, &c. should convey, settle, and assure the said manors, &c. unto or to the use of, or in trust for the said J., for her life, and after her death, then on the heirs of her body lawfully issuing; but in case his said daughter should die, without lawful issue, then he devised all his said real estates to his brother A., his heirs and assigns for ever." On a bill filed by the daughter and her husband, to have the trust of this will carried into execution, Kenyon, M. R. declared, that on the true construction of the will, in the events which have happened, the real estate ought to be settled on J. for life, with remainder to her first, and other sons in tail general, remainders to her daughters in tail general, as tenants in common, with cross remainders in tail general, with remainder in fee to A."

Reg. Lib. A. 1787. fol. 415. N. B. His Honour mentioned a case of Lloyd v. Jones, coram Ld. Northington, in which Ld. N. said, he conceived Ld. Hardwicke to have admitted at last, the difference between trusts executed and executory.


211. The legal interest in a lapsed legacy is in the executor, but the beneficial is in the next of kin of the testator. Owen v. Owen, E. 1738. 1 Atk. 496. Vide Foster v. Munt, 2 Vern. 473. Page v. Page, 2 P. W. 489.


213. The provisions in 21 Jac. 1. c. 19. s. 11. with respect to legal estates, must be followed as to equitable ones: it is easy to turn a legal into an equitable interest. If equity was not to follow the law, infinite mischief would ensue; and if parliamentary provisions as to legal interests were not to be pursued as to equitable interests, it would defeat the act. Ryall v. Roll, H. 1749. 1 Atk. 183.

214. It is now settled, that the same construction must be put upon words of limitation in cases of trusts, as of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees. Wright v. Pearson, T. 1758. Amb. 358. 1 Eden 119. Vide S. C. with reference, ante, tit. Devises, vi. pl. 306.

215. Devises to the wife for life, remainder to trustees, to preserve, &c. remainder to A. for life, remainder to trustees; remainder to the heirs of her body, remainder over, with a declaration that she should have only an estate for life.
These are legal estates. Theng v. Bedford, M. 1788. 1 Bro. C. C. 313.

216. Where legal and equitable estates meet in the same person, the equitable merge in the legal. Wade v. Paget, E. 1734. 1 Cox 74. 1 Bro. C. C. 364.

217. Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges, therefore, where the former descends, ex parte paterna, the latter, ex parte materna, upon their union, the paternal heir has no equity. Selby v. Alston, E. 1797. 3 Ves. 339.

218. It seems that a suppression of deeds, is a strong ground for the interference of a court of equity, to prevent the operation of a fine, even in the case of a legal estate, but in the case of a trust estate it is clear. Bowes v. Stewart, T. 1803. 1 Sch. & Lev. 225.

219. Where a man having legal and equitable estates, devises all his messuages, lands, &c. and dies, standing quite neuter as to the equitable estates till his death, those words operate to the same effect as giving all his lands, &c. legal and equitable, provided the latter were conveyed, and if not, then the interpretation is, a wish to give all, if they can be had, specifically, and if not, then he devises the legal estates, such as he can pass, and such of his equitable estates, as he, or his representatives after his death, shall be able to procure a title to. And as to all the rest it is a direction to the executors, and against those to whom the testator has given the personal estate, to lay out so much as shall be necessary, not to procure title to that estate, but to any other estate they can find. Broom v. Monck, E. 1805. 10 Ves. 609. more fully stated, ante tit. Devises, i. pl. 42. Et vide Whitaker v. Whitaker, 4 Bro. C. C. 31.

220. A remainder in fee by settlement to trustees, was limited to the life of tenant for life, though not so expressed, the object of the trust terminating with that life, and a remainder following to the same trustees, upon the death of the tenant for life, for a term of years. A subsequent remainder, therefore, to the heirs of the body of tenant for life was held a legal estate, uniting with the legal estate for life, and vesting an estate tail according to the rule in Shelly's Ca., not an equitable estate, capable of taking effect only as a contingent remainder. Curtis v. Price, H. 1806. 12 Ves. 89.

221. It is now clearly settled, that an equitable estate may be barred by an equitable recovery if there is an equitable tenant to the practise; and an equitable estate in remainder, though united with the legal fee, in trust to secure the limitations, may also be barred by an equitable recovery; for it is in the power of those who have the substantial equitable interest, where there is nothing but equitable interests interposed between the legal estate and the ulterior equitable interest, to suffer an equitable recovery. And such, said Ld. Eldon, was the true doctrine, with respect to equitable recoveries. Wykham v. Wykham, M. 1811. 18 Ves. 413. Vide S. C. fully stated, post, tit. Power, i.

222. Of a mere equitable estate there can be no disseisin, 1st, because a disseisin must be of the whole estate; and 2dly, because a tortious act cannot be the foundation of an equitable title. Per Grant, M. R. in Ld. Cholmondeley v. Ld. Clinton, T. 1817. 2 Meriv. 358. Vide the judgment of Plomer, M. R. in S. C. (on further directions) 2 Jac. & Walk. 1.

223. The equitable estate is the estate at law in a court of equity, and is governed by all the same rules in general as all real property is, by limitation. The equitable estate in this court is the same as the land, and the trustee is considered as a mere instrument of conveyance. Per Plomer, M. R. in S. C. ibid. 148. Et vide the language of Ld. Mansfield, in Burgess v. Wheate, 1 Edon 224. Casborne v. Scarfe, 1 Atk. 603. 2 Jac. & Walk. 194.

Of legal and equitable assets, vide post, tit. Executor and Administrator.
224. The right to sue for money lost at play, by 9 Anne, c. 14, is a vested interest, and passes to the assignees of a bankrupt. Brandon v. Sands, M. 1794. 2 Ves. jun. 514.

225. A clear vested interest is not to be devested, because the express contingency upon which it was to devest did not happen. Harrison v. Foreman, H. 1800. 5 Ves. 207. Vide Mackell v. Winter, 3 Ves. 236. 536. Perry v. Woods, ibid. 208.

226. Bequest to testator's wife for life; and after her death to be divided between his brothers and sisters equally, but in case of the death of any of them in the life-time of his wife, the shares of him or her so dying, to be divided between his or her children. His Honour held the share of a deceased brother, who died in the widow's life-time without having had a child, vested, subject to be devested only by his death, in the life-time of the widow leaving children, which event not having happened, his representative was held entitled. Smith v. Willock, H. 1804. 9 Ves. 233.

227. There is this distinction between land and a personal chattel; the former is held by title, and the latter by possession, but possession is not even prima facie evidence of a title. Hircn v. Mill, M. 1806. 12 Ves. 119.

At what time a legacy shall or shall not be said to vest in the legatee, vide post, tit. Legacy, ix.

Cases of portions, where vested, and when and how to be raised and paid, vide post, tit. Portions, i.

ESTATE XI.

Contingent and uncertain Interests in Chattel Property.

228. Portions by a settlement to be paid to the son at 21, and to the daughter at 21, or marriage, if after the death of their parents, with survivorship among them; if any should die before the share or shares should become payable, and a limitation over if there should be no child or children living at the death of the survivor of the parents, or being such, all should die before the fund should become payable. Ld. Ch. would not determine whether a child of their marriage attaining 21, takes a vested interest in the life of his parents, nor that the children should stand in the place of their parents, nor that a child dying without issue should have no share. Legh v. Haverfield, T. 1800. 5 Ves. 452.

229. By settlement in 1757, after the marriage of A. and B., the trusts of which are stated in the case of Legh v. Haverfield, supra, as to 3000l. it was recited, that by articles executed in 1740, previous to the marriage, C. the father of B. agreed to settle 3000l. to the separate use of B., and after her death for her children at 21, or marriage with consent. She married without consent, and A. after the marriage proposed to C. to make a settlement on his wife, upon consideration of C.'s giving up the forfeiture, and securing the like sum of 3000l. for the benefit of her and her issue, in pursuance of which proposal, the sum of 3000l. was settled to the separate use of B. for life, and after her decease upon the same trusts for the children, as were declared with respect to the other subjects of the settlement, after the successive life interests of A. and his wife, and the ultimate limitation to C., his executors, &c. By indentures in May, 1802, B. assigned to D. one-fourth of the interest, and dividends of the trust funds arising during her life, and also one-fourth of the capital. This bill was filed by E. D.'s husband claiming in her right as
personal representative of her former husband F., and under the assignment of 1802, praying, that they may be entitled to one-fourth of the property settled by the indenture of 1757. Per M. R. The question in this case arises from the settlement in 1757. The claim made by plaintiffs is, upon the proposition, that D.'s former husband took, at 21, a vested interest in one-fourth of the several funds comprised in the settlement, subject only to the life-interest of his father and mother, and as the mother who survived the father, had assigned to D. one-fourth of her whole interest, it is contended by plaintiff, that they are entitled to an immediate transfer. That is opposed by G., the only surviving child of the marriage; contending that F. did not take a vested interest; and, that supposing the proviso to operate, according to the literal import, it adds nothing to G.'s interest, but gives only a contingent interest to those to whom the property is given over; that in the event B., who assigned to D., centres in herself the whole of that; and, therefore, by the assignment, plaintiff is entitled to one-fourth. Each of these funds is by the deed of 1757, made the subject of distinct and separate settlements. But the material provisions are so alike, that they may all be comprehended under one general description. The trustees are to stand possessed of the first fund after the death of the wife, who alone had a life-interest in that, and of the other funds after the deaths of the husband and wife, entitled to the interest for life, for the benefit of the children, if more than one, equally to be divided among them; and to be paid to the sons at 21, to the daughters at that age or marriage; but if a son should attain 21, or a daughter attain that age, or be married in the lives of the father and mother, entitled for life, respectively, the shares of such sons or daughters were not to be paid till after their decease; and then a proviso for survivorship, if any of such children should die before his or her share should become payable. Had the deed stopped here, after the decisions that have been made, it is not possible to contend that the shares would not have been vested at the age of 21, or marriage. The words "payable, assignable, or transferrable," have different senses, according to the different clauses of the settlement to which they refer. With reference to the right or capacity of the children, the sense is at 21 or marriage. But then the enjoyment of the persons entitled for life is not to be broken in upon; it is therefore provided, that the right which exists for every other purpose, shall not be exercised to their detriment. With reference to that interest, the sense is not till the death of the tenant for life; but it is only with reference to that, that the preceding declaration is at all qualified; and as against every one but the tenant for life, the children have a right to say, it remains unqualified; when, therefore, it is so provided, the words must be taken in their first acceptance, and not in their restrictive sense, for particular purposes and persons.—Where the rights of the children were the subject of consideration, each child was declared to be entitled to have his or her share paid, assigned, or transferred at 21 or marriage; it is in another clause, with reference to the tenants for life, that the time is altered. As between themselves the time of payment must be taken to be unaltered. The construction upon these settlements is established by a variety of cases from Emperor v. Rolfe, (1 Ves. 208.) down to Hope v. Clifden, (6 Ves. 499.) particularly by Jeffries v. Reynous, (6 Bro. P. C. 398. 2d ed.) in which the decree made at the Rolls, and affirmed by Ld. Northampton, (2 Eden 365.) was also affirmed by the House of Lords. His Lordship then distinguished the present case from Jeffries v. Reynous, supr. Woodcock v. Dorset, 3 Bro. C. C. 569. Bennet v. Seymour, Amb. 621. and Hope v. Clifden, supra. And his Lordship then declared, it was unnecessary to decide, that a distinction is attempted here between the 3000L given by C. and the other funds in the settlement of 1757. The ground is, that he had in 1740 settled one sum upon C., which she had forfeited by marriage without consent; and notwithstanding that he settled another sum of 3000L, the intention to settle that, just in the same manner as the former sum, is assumed; and as by that the only event in which it was to return to C. was the event of no child attaining 21 or marriage, this proviso ought to be restrained. But his Honour doubted whether, in 1757, there
was a sufficient indication to adopt the provisions of 1740. The only reference to it is by stating the fact that such a provision was made and forfeited. C. agreed to settle another sum in lieu of that; and to settle it, not as was provided in the settlement of 1740, but as therein after mentioned. He was absolute master of that sum. Whatever therefore is the operation of the proviso, it must be the same with respect to each of the funds to which it professes to extend. But the assignment to plaintiff of the contingent interest of the fourth part renders it unnecessary to decide either of the questions, upon which these doubts have been expressed. The right to make the assignment is clear. One of two events must happen; either G. would die before her mother, or she would survive her mother. If she died before her mother, no valid objection could be raised upon her part to plaintiff's claim, whatever construction the proviso may receive, for if, by construing it against the latter, and according to the alleged spirit, it was to be considered as applying only to the event of no child attaining 21, then F., at 21, would have taken the absolute interest. Upon the literal construction in the event now supposed, the whole would go over from all the children, and it would be quite immaterial to G. what B. chose to do. Upon the other supposition the contingency would fail, upon which alone any thing would be taken from the children having attained 21; so, plaintiff representing her former husband would be in the same situation as Mrs. H. in the case of Hope v. Clifden, supra. His Honour did not see how the proviso, according to any construction, could possibly give any thing to G.—B. might raise the question, whether, as the shares of all the children were given over, if all should die before the fund was payable, the meaning might not be, that the share of each child should go over. But all the claim of G. must rest upon the clause of survivorship. In Randall v. Metcalfe, Ld. Bathurst's decree was reversed, (Vide 3 Bro. P. C. 319, 2d edit.) and that reversal is an authority for the decree in Hope v. Clifden, supra, and for the opinion his Honour had delivered. According to the letter of the clause the stock was to go over if the daughter died without issue; though she should have issue who should die in her life above 21. She had two children, a daughter and a son; the latter attained 21, and survived his mother. As the event of her death without issue did not happen, the claim in that event was out of the question. But the son, as against the representative of the deceased daughter, contended, that he was entitled to the whole; and that was Ld. Bathurst's decree. The House of Lords, however, reversed that decree, and declared the appellant, in right of his wife, entitled. The words there were, "if any die before 21 or marriage." Here it is "if any die before they become payable." But his Honour's opinion was, that the import of the cause was just the same upon Jeffries v. Reynous, supra. Thus, there being no possible event in which G. could become entitled to the share of F., and no objection but upon her part, it followed, that plaintiffs were entitled to the decree sought. Schenck v. Legh, H. 1804. 9 Ves. 300.

230. A trust was created by deed, of money, to accumulate until the grantor's grand-children then living or to be born, should respectively attain 21, and then to pay to each, as they should respectively attain such age, their respective shares to be ascertained by the number in being, as they respectively attain 21, without regard to such as might be born afterwards: Held, that no interest vested until payment; that the measure of distribution is the number existing at each period, and that those who had received have no further claims upon the fund's increase by shares falling in; therefore, where one died under 21, after all the others had received their shares, or died under 21, his share was undisposed of by the deed, and passed by a bequest of "all effects whatsoever," following specific descriptions of property. Campbell v. Prescott, T. 1809. 15 Ves. 500.

231. A settlement of personality "to next of kin in equal degree," passes the property to a surviving sister, in exclusion of children by a deceased brother. Anon. T. 1815. 1 Madd. 36.

232. On a settlement of personality "to the next of kin of the said A. P. of her own blood and family, as if she had died sole and unmarried," the next of kin take, as under the statute of
ESTATE REAL AND PERSONAL.

Where the personal Estate of a Testator shall be applied to exonerate the real, or 

1. Mortgage in fee is made redeemable, on payment of 300l. and interest, on six month's notice. The mortgagor dies, having devised his personal estate to his wife. The personal estate is liable to pay the mortgage. Howell v. Price, M. 1715. 1 P. W. 291.


Where the personal Estate of a Testator shall be applied to exonorate the real; but if a seised in fee, mortgages his land, leaving B. his son and heir, and B. dies, leaving C. his heir, B.'s personal estate shall not be applied to pay this mortgage, because it was not B.'s debt; so, though the mortgage being transferred in B.'s time, B. covenants to pay the money, yet the debt not being originally the debt of B., his covenant is only a surety, and the land the original debtor, which C. shall therefore take cum onere. *Evelyn v. Evelyn*, H. 1731. 2 P. W. 664. *Et vide Cope v. Cope*, Salk. 449.

5. The rules respecting the application of the personal estate in case of the real, as between volunteers, (for which *vide Howell v. Price*, 1 P. W. 291.) as they proceed on the principles, that the primary fund ought in conscience to exonorate the auxiliary, consequently, can hold only in those cases where the funds in question stand in those relative situations. The incumbrance may be in its nature real, or may become so by the act of the person who has power of charging both funds; or although the lands were auxiliary only to the personal estate of the original contractor, it yet may become the primary fund, as between it and the personal estate of any other person who may take the land, (either by descent or purchase) subject to the charge. In all those cases, the personal estate is charged, (if at all) only as a surety for the land, and shall have the same measure of equity as the land is entitled to, when it is pledged as a surety for a personal debt. In *Bagot v. Oughton*, 1 P. W. 347. “Land descended to the wife, subject to a mortgage made by her father; on an assignment of the mortgage, the husband covenanted for payment of the money to the assignees. Decreed, the husband's personal estate was not liable to exonerate the mortgaged premises, for the debt was originally the father's, and continuing to be so, the covenant was an additional security, for the satisfaction only of the lender, and not intended to alter the nature of the debt.” In *Coventry v. Coventry*, 9 Mod. 12. and 2 P. W. 222. “Although the covenantor was the original contractor, yet the charge being in its nature real, and the covenant only an additional security, the land was de-voiced to bear its burthen.” So, *Edwards v. Freeman*, 2 P. W. 435. *In-Lesman v. Newnham*, 1 Ver. 51. “The son, tenant
Where the personal Estate of a Testator shall be applied to exonerate the real.

in fee, on an assignment of the ancestor's mortgage, covenanted with the assignees for payment, yet determined that the personal security was only auxiliary, and both principle and interest were charged primarily on the land, for although the interest had accrued during the possession of the son, the interest must follow the principal, and be a charge on the same fund. So, Lacam v. Merins, 1 Ves. 312. In Robinson v. Goe, 1 Ves. 251, the same principles are laid down. In Parsons v. Freeman, coram Ld. Hardwicke, M. 1751. "A. purchased an estate for 90l., which was at that time mortgaged for 86l., and he covenanted to pay 86l. to the mortgagee, and 4l. to the vendor. The court admitted the rules of law above-mentioned; but in that particular case thought, that although the covenant was with the vendor only, and the vendor's personal estate therefore not liable in that respect to the mortgagee, yet the words were sufficiently strong to show an intention in the vendor to make it his personal debt. Reg. Lib. B. 1751, fol. 238. In Lewis v. Nangle, 7th November, 1752, coram Ld. Hardwicke, Mrs. N. was, before her marriage with defendant, indebted to several persons, and entitled to the inheritance of lands, charged with the payment of sundry sums; and before marriage entered into articles, whereby the premises were to be settled on the husband for life, sans waste, remainder in like manner to the wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband being pressed for payment of his wife's debts, and having also occasion for a further sum of money, they borrowed 1500l. of the wife's sister, (the original plaintiff in the cause) and secured it by a mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond, conditioned for the payment of the money, according to the proviso of the mortgage, subject to this mortgage; the lands were settled to the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. Mrs. N. died without issue, and the present plaintiff was the devisee of the sister, who brought his bill against N. for payment of mortgage-money; but Ld. Ch. held, that though part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his Lordship dismissed the bill, so far as it sought to compel defendant N. to exonerate the land; but directed him to keep down the interest during his life." Reg. Lib. B. 1752. fol. 574. In Forrester v. Leigh, T. 1753. "L. the testator, had purchased several estates subject to mortgages, with regard to one of which, he entered into a covenant for payment of the mortgage-money, for the purpose of indemnifying a trustee, and as to another, which was part only of an estate, subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and indemnify each other; Ld. Hardwicke thought these covenants would not have the effect of making the mortgages personal debts of the testator, they having been entered into for particular purposes, and declared his opinion accordingly in the decree." Reg. Lib. A. 1752, fol. 325. In Perkins v. Baunton, "W. O. by will devised certain real and personal estate to Jane B. her heirs, executors, &c. in trust, by sale, or selling-timber, to pay all his debts, and directed that Jane should receive the rents and produce of his real and personal estate without account, during his daughter's life-time, she main taining his daughter; and after the death of his daughter, he leave all his real and personal estate whatsoever, to Jane B. in fee, and appointed her sole executrix. W. O. died, and Jane B. proved the will. W. O. in his life-time mortgaged part of his estate, for securing 1500l. and interest, which remained a charge at his death. Jane B. paid off 500l., part of his 1500l. and afterwards borrowed a further sum of 2500l. on mortgage of the estates, which money was in the mortgage-deeds expressly recited to have been borrowed, to enable her to discharge W. O.'s debts. Jane B. afterwards died, and on the disposition made by her, and those claiming under her, of the property of W. O. this cause was instituted. On the first hearing, the court declared, that the sum of 1500l., part of the 3500l., was not to be considered as a debt of Jane B. but to remain a charge on the real estate, and directed an account of her personal estate. On the re-hearing, that part of
the decree was reversed, and instead thereof, it was declared that the 1500L. appearing to have been a charge made upon W. O.'s estate in his life-time, and remaining such at his death, was to be considered as a continued lien thereon, and that the subsequent charge made on the estate by Jane B. being expressed in the mortgage deed to have been made for that purpose, was, together with the 1500L., amounting in the whole to 3500L., to be considered as remaining a charge on the estate.” Reg. Lib. B. 1776. fol. 265. and 1780. fol. 365. In Wilson v. Darlington, at the Rolls, H. 1785. a real estate charged with the sum of 2000L. as a bounty, was held to be primarily liable, though the personal estate was also subjected by the covenant of the donor. Et vide D. of Ancaster v. Mayor, 1 Bro. C. C. 454. In Shafto v. Shafto, coram Ld. Thurlow, H. 1786. A. mortgaged lands to B. to secure payment of 5000L., with interest at 5 per cent. and by will devised the lands to C. in tail male, remainder to plaintiff in tail male, remainder over, and died. C. suffered a recovery to himself in fee. The mortgagee calling for his money, D. agreed to advance it at 4 per cent. on assignment of the mortgage, which was done with provision for redemption, on payment of the principal and interest, at 4 per cent. and for himself, his heirs, &c. covenanted with D. that he, his heirs, &c. some or one of them, would pay to D. the said principle and interest. C. afterwards agreed to raise the interest to 5 per cent. and by deed covenanted with the mortgagees, that the estate should remain a security for the 5000L., with interest at 5 per cent., and that he, his executors, &c. would pay such interest for the same. C. soon after died, the interest on the mortgage being then in arrear for about 10 months. The bill was brought (amongst other things) to have the 5000L. and interest, paid out of the personal estate of C. or at least the arrear of interest due at his death, and the additional 1 per cent. charged by the last deed, but Ld. Ch. was clearly of opinion, that the personal-estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought, that the interest must follow the nature of the principal, and that the contract for the additional interest turning upon the same subject, must be in the nature of a real charge. So Tankerville, E. v. Fawcett, 2 Bro. C. C. 57. In Basset v. Percival, at the Rolls, T. 1786. “A by will devised estates to trustees for a term, to raise money for payment of his debts and legacies, in aid of his personal estate, and subject to the term, he devised the estate in strict settlement, with the ultimate limitation to his own right heirs, and gave the residue of his personal estate to his executrix B. The executrix applied the personal estate in payment of some of the debts, and all the legacies, except a legacy to herself, and then died, whilst the limitations in strict settlement subsisted: and after the death of B. her representatives filed a bill, to have a debt due to her and her legacy raised, and the only person then entitled under the limitations in strict settlement dying, pending the suit, by which event, the ultimate limitation to the testator’s right heirs took place, a supplemental bill was filed against C. and D. the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of B. at a certain sum; this demand was afterwards assigned to E. who also bought in all the debts remaining due from the testator. So that he became the sole creditor on the estate. C. being dead, and a bill being filed by E. for payment of these sums of money, the question was, whether the moiety thereof should be raised in the first place, out of the personal estate of C. or out of the real; his Honour was of opinion, that the real estate was the original debtor, and ought to bear the burden.” And again in Tweddell v. Tweddell, 2 Bro. C. C. 101. the covenant of indemnity was not sufficient to charge the personal estate. In Mather son v. Hardwicke, at the Rolls, T. 1789, “The testator devised an estate to A. and B. as tenants in fee in common, charged with the payment of his debts and legacies. A. paid off all the debts, and all the legacies, except one, for which he gave the legatee his promissory note, and died before he paid it. As to the debts and legacies actually paid by him, it was admitted on the part of his personal representatives, that being tenant in fee of an estate subject to incumbrances, he must be presumed to have paid off those incumbrances, with a view of easing the estate from them altogether; but as to the legacy, the promissory note was said to be only a collateral security;
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and that the devised estate was the primary fund for the payment of it, and his honor was clearly of that opinion." Vide Billinghamurst v. Walker, 2 Bro. C. C. 604. Clinton v. Hooper, 3 Bro. C. C. 211. Et vide Astley v. Tankerville, ibid. 545. As to the case of Earl Belvidere v. Reesfort, 6 Bro. P. C. 520. Vide Tweddell v. Tweddell, supra. Vide etiam D. of Ancaster v. Mayer, 1 Bro. C. C. 454, where it was held, that notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator, subject to a mortgage, shall bear the burden of that mortgage, as not being properly the debt of the testator. See also, Ld. Thurlow's decision in this case, where he has examined all the principal cases to this point.

6. A. by will gave all his personal estate to his three sisters, equally between them, and (being indebted by simple contract, bond, and mortgages) gave his real estate to his four sons, chargeable with his just debts, and made his sisters his executors. The personal estate shall be applied to exonerate the real, especially as one of the funds must be exhausted. Bromhall v. Willbraham, M. 1734. Ca. temp. Tabl. 274.

7. Where land was originally charged with daughters' portions, it must bear the burthen, and they shall not be paid out of the personal estate. Burgoyne v. Fox, T. 1738, 1 Atk. 576.


9. Devise of real estate to testator's wife, her heirs and assigns, in trust, by sale of so much as should be necessary, to raise what would fully pay all his debts and funeral expenses, and all the residue to her for life, remainder to testator's heirs, on her body begotten. Testator gave his tobacco box to his uncle, and the residue of his personal estate to his wife for ever. Held, the personal estate should not be exonerated from the payment of his debts, nor should parol evidence be received of testator's intent to give his personal estate exempt from his debts, for that is only admissible to support legal rights against an equitable claim. (b) Henley, C. S. The court will not inquire into the amount of the personal estate, or whether its is or is not sufficient to pay testator's debts. (b) Stephenson v. Heathcote, H. 1758. 1 Eden 38. (c) (a) As to the admissibility of parol evidence, vide S. C. port. cit. Evidence, iv. (b) Judges have sometimes directed the amount of the testator's estate to be inquired into, as a ground for construction, as in Stapleton v. Colville, Fort. 202. Oates v. Bydron, 3 Burr. 1895, cited in Goodtitle v. Edmonds, 7 T. R. 740; but the court were dissatisfied. However, it is now fully settled, that the court cannot enter into that inquiry. Walker v. Collier, Cro. Eliz. 379. Inchiquin v. French, 1 Cox 8. Doe v. Fylde, Comp. 833. In Andrews v. Emmott, 2 Bro. C. C. 29, Lords Kenyon and Thurlow refused the inquiry, which was approved of in Stancon v. Standen, 2 Ves. jun. 593. Hales v. Margetson, 3 Ves. 599. Et vide in Stancon v. Mayer, 1 Bro. C. C. 466. Brummel v. Prothore, 3 Ves. 118. Aldridge v. Walscourt, 1 Ball. & Bl. 313. Boote v. Blundell, 1 Meriv. 222. Vide etiam Judd v. Pratt, 13 Ves. 168. Ed. (n) (c) This case, says the Editor was relied on in Ancaster v. Mayer, 1 Bro. C. C. 454, and Boole v. Blundell, 1 Meriv. 193. In the latter, Ld. Ch. entered fully into the doctrine of exoneration, and from that judgment, it appears, that by the old law express words were necessary to exempt, as to which see Ferrys v. Robertson, Bunn. 301. The rule, however, was (with regret) soon departed from, and then followed the principle, that the want of such words might be supplied by "plain implication," or "manifest intention," that was explained by Ld. Thurlow (in Ancaster v. Mayer, MS.) to be "irresistible conclusion," and by Ld. Alwensley reduced to "such a conclusion as will satisfy the Judge;" but all the cases agree that it is not sufficient to charge the real estate, for testator must show he intended to exonerate the personal, and (though the contrary has been allowed) circumstances dehors the will, must not assist in explaining. See the Chancellor's decision in Boole v. Blundell, and in the Editor's note. In the following cases the personal estate has been considered as not exempt. Cutler v. Coxeter, 2 Vern,
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13. Where the testator in his will has clearly shown his intent, to exempt his personal estate, from his judgments and specialty debts, the court will charge them on the lands descended, in exoneration of those devised, but parol evidence to show that the testator intended to exempt his personal estate is not sufficient. 

14. In Barnwell v. Barnwell, H. 1794. 3 Ridg. P. C. 61. It was asserted to be a general rule, that until a judgment has been revived against the heir and terre-tenants of the co-novator, and an ejectment has issued, a court of equity will not entertain a bill to levy the debt, but (said Ld. Clare) the equity upon which bills of this nature have been entertained, is founded upon the statute of Westminster, and has been adopted no less for the ease of the creditor in levy his debt with expedition, than in mercy to the representative of the debtor, by relieving his estate from the ruinous expense of an action at law, and of the suits which may arise in consequence of it. If the terre-tenants are charged unequally with payment of the debt, it lays a ground for fresh suits between them for contribution, and if the creditor levies the debt by extending the real estate of the debtor, where there is a personal fund applicable to the payment of it, this lays a ground for a suit also by the heir against the executor, to have the personal estate applied to reimburse him; and therefore it is, that courts of equity have, (in Ireland) for more than a century, uniformly entertained bills in the first instance, after the death of the co-novator, for an account of his real and personal estate, and of the sum due for principal, interest, and costs, on the foot of the judgment, plainly because this course tends to expedite the payment of the debt, and to preserve the estate from accumulated costs, and also to save the multiplicity of suits, by directing an account of the real and personal estate of the debtor, and by applying in the first instance the fund properly applicable to the payment of the debt.

15. To exempt the personal estate from the debts, the will must show that...
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16. To exempt the personal estate from the debts, there must be a declaration plain, or manifest intention. Have v. Dartmouth, T. 1802. 7 Ves. 149. Vide Gray v. Minnethorpe, 3 Ves. 103.

17. The heir of a purchaser was exonerated in this case by the personal assets from a mortgage, the result of the transaction being a personal contract, and the personal assets therefore the primary fund. Waring v. Ward, T. 1802. 7 Ves. 332.

18. There shall be no exonerations of the heir by the personal assets of a party, who never personally contracted; or not originally, but only as a further security in a subsequent transaction; not intended to disturb the order of charge, as the transfer of a mortgage; or the purchase of an equity of redemption; for even though the interest is raised, the excess follows the subject of the original contract. S. C. ibid. 338. Et vide Tweddell v. Tweddell, 2 Bro. C. C. 101. 152.

19. The heir shall be exonerated from a mortgage, where it was the personal debt of his ancestor. Kipley v. Waterworth, T. 1802. 7 Ves. 455.

20. The court will not direct legacies to be paid under a charge upon real estate, in aid of the personal, without producing the stamp required by the stat. 36 Geo. 3, c. 32. s. 7. until it is ascertained that there is no personal estate applicable. Vide Holmes v. Stanley, 8 Ves. 1. Et post, tit. Stamps.

21. Where it appears by the answer, that the real estate must be responsible, as that there is no personal estate to be first applied to debts, a receiver will be granted in the first instance. Jones v. Fughe, M. 1802. 8 Ves. 71.

22. Where testator has created a particular fund for payment of debts, that shall be first applied in exoneration of descended estates, (whether acquired after the date of the will or not,) and of the personal estate, even in favour of the next of kin taking it for want of disposition. For the rule as to the exoneration of estates descened by a devise for the payment of debts, will hold, even though the estate devised may be equitable assets, and the descended estates legal assets. Every devise of real estate, whether in general terms or not, is in nature of a specific devise, but it is otherwise as to personal estate, for the personal estate can only be exempt from debts by a plain declaration or necessary inference. A mere charge on a devised estate will not prevent a descended estate from being first applied, for words having an obvious meaning are not to be rejected upon a suspicion that the testator did not know what he meant. Milnes v. Slater, E. 1803. 8 Ves. 295. Vide ante, tit. Devise, xii. et post, tit. Executors and Administrators, sec. ii. iv. and references.

23. Legacies and annuities were charged upon a mixed fund of the personal estate, and the produce of real directed to be sold. A different disposition of the whole was made by a codicil, but that failing as to the real estate for want of a due execution, the charge was held to remain on the real estate. Sheddon v. Goodrich, E. 1803. 8 Ves. 481.

24. The personal estate is not exonerated from debts and legacies by a mere charge, for express words or plain intention upon the whole will, are absolutely necessary. Watson v. Brickwood, E. 1804. 9 Ves. 447. Vide D, of Ancaster v. Mayor, 1 Bro. C. C. 454. ante, pl. 5. Bootle v. Blundell, 1 Meriv. 193. Gittins v. Stoele, 1 Swanst. 28.

25. A devise of a particular estate upon trust to raise and pay 400L. to A., was held an exclusive charge, and not exonerated by a subsequent direction for the application of the personal estate to the debts and legacies, in exoneration of the real estates charged, which was referred to a prior charge upon the estates, expressly excepting the estate charged with the 400L. Spurway v. Glynn, T. 1804. 9 Ves. 483.

26. Testator contracted for the purchase of an estate, which he directed to go to the uses of his will, but he died before the contract was completed. The title proved defective, but the devisee, notwithstanding, claimed to have the benefit of this contract: Held, that he has no claim upon the personal estate, either to have the purchase-money or another
estate purchased for him, or the same purchase completed under the defect of title if he would so take it. *Broms v. Monck*, E. 1805. 10 Ves. 597. See this case stated at large, ante, tit. *Devise*, i. pl. 42.

27. B. devised her freehold estates to trustees in trust, immediately after her decease, to sell and dispose of the same, and to apply the money arising from such sale, first, in discharge of her funeral expenses and debts; and, secondly, she directed several sums to be paid to different persons named, "who were all creditors of her late husband." Then she gave pecuniary legacies to several relations, and 200l. each to her executors. The several sums to be paid by her trustees out of the money arising from the sale of her said lands, and such of the said purchase money as should remain after paying the said legacies, she disposed of by her will, "the said several legacies to be paid by her executors as soon as they should sell and dispose of the said lands." B. died possessed of some personal property: Held, that there is not enough in this will to found a presumption that the testatrix meant to exonerate the personal estate, for the distinction between a direction to sell real estate out and out for payment of debts, and a charge for payment of debts, is exploded as to any effect in exempting the personality. In either case the residue, if undisposed of goes to the heir, unless there be a disposition made, demonstrative of an intent, that it shall change its nature and become personal. *McClanlan v. Shaw*, M. 1805. 2 Sch. & Lef. 538. *Vide etiam* Stapleton v. Colville. Ca. temp. Talb. 208. Inchiquin v. French, Amb. 38. Powis v. Corbett, 3 Atk. 566. Douce v. Lewis, 2 Bro. C. C. 257. Manning v. Spooner, 3 Ves. 114. Tait v. Northwick, 4 Ves. 816. Hartley v. Hurle, 5 Ves. 340. Brydges v. Phillips, 6 Ves. 567. Watson v. Brickwood, 9 Ves. 447. Hancox v. Abbey, 11 Ves. 179.

28. Where a tenant has an option to purchase, the rent, until the option is made, belong to the heir, but from that time the conversion takes place, and the purchase-money shall go to the personal representatives. *Townley v. Bicknell*, E. 1808. 14 Ves. 591.

29. Where there are no express words in a will to exempt the personal estate, it must be considered as the primary fund to pay the testator’s debts charged on his real estate, though that personality be escheated, in trust for the testator’s daughter, for to discharge the personal estate as the primary fund, the intent must appear from the will and not from any extrinsic circumstances. An express declaration however is not necessary, nor is a charge on the real estate, or a mere gift of the personality sufficient. And the court further held, that the remainderman is not a competent witness to prove payment of a legacy charged on the estate. *Albridge v. Ld. Wallscourt*, E. 1810. 1 Ball. & Be. 312. *Vide Stapleton v. Colville*, Forr. 202. and Ancaster v. Mayer, 1 Bro. C. C. 454. and Brumwell v. Prothero, 3 Ves. 111. where Ld. Thurlow and Ld. Alvanley explained Stapleton v. Colville. And *see* Tait v. Northwick, 4 Ves. 816. where Ld. Rosslyn doubted the decision in *Burton v. Knowlton*, 3 Ves. 107.

30. The personal estate being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration or plain and unequivocal manifestation of intent, and neither a charge nor a direction to sell, nor the creation of a term for payment will exempt the personal estate, but the circumstances that the residuary legatee is the first taker of the real estate, is sometimes held, a ground for exempting the personal. *Tower v. Ld. Rous*, T. 1811. 18 Ves. 132. *Vide Watson v. Brickwood*, 9 Ves. 447. Hancox v. Abbey, 11 Ves. 179. and references. *Albridge v. Wallscourt*, *et al*.

31. Where a testator has by his will directed certain of his freehold estates to be converted into personal, not to all intents, but for the purpose of paying certain legacies and annuities only. A resulting interest for the heir arises as to the residue which cannot be affected by an unattested codicil bequeathing a lapsed share of the residue to another. (a) But where there is a conversion of a testator’s real estate for all the purposes of his will, those who could not claim under the will (as the next of kin) have no claim in case of a lapse. (b) And it was also held that in no case can real estate be converted into personality by will, so as to enable the testator to make a direct disposition.
Where the personal Estate of a Testator shall be applied to exonerate the real.

of it by an unattested codicil: Furthermore, the court made this distinction between legacies charged, on land as an auxiliary fund, and a portion of the land itself or its produce, when directed to be sold; for, on the former, an unattested codicil has effect, but not on the latter. Hooper v. Goodwin, T. 1811. 18 Ves. 156. 167. Vide (a) Sheddon v. Goodrich, 3 Ves. 481. (b) Ackroyd v. Smithson, 1 Bro. C. C. 503. Collins v. Wakeman, 2 Ves. jun. 683.

32. A copyhold estate was conveyed to trustees in trust to sell, and the produce was to be deemed part of the grantor's personal estate, and held in trust for such uses, as he should by deed or will appoint, and in default, then to his right heir. On the same day the grantor executed a will, (not referring to the deed,) and thereby directed a sale of particular property, and he disposed of his personal estate in general terms. This was held not applicable to the estate conveyed by the deed, which went to the heir, no use being by the subsequent instrument declared, if the estate was converted. Lowes v. Hackward, T. 1811. 18 Ves. 168.

33. It is a clear rule in equity that where real estate is directed to be converted into personality for a purpose which either wholly or partially fails, to the intent of such failure, it is to be considered as real estate, and if it happens that the purpose cannot be served, the court will not infer any other, but leave the whole to resum to the heir at law. Hill v. Cock, H. 1813. 1 Ves. & B. 174.

34. Real estate, except what was converted by the execution of a power, taken as personal, the will not operating a conversion out and out; the representatives therefore, the trust not being disappointed, take the respective estates as they find them, and have no equity against each other. Walter v. Maunde, T. 1815. 19 Ves. 419.

35. It has been long since decided, that in order to exonerate the personal estate from payment of debts, the will must contain express words for that purpose, or a clear manifested intention, or declaration plain, or necessary inference, tantamount to express words. But it is impossible to define what circumstances could be sufficient to show this intention, for that must in every case arise from the context of the will; for where testator's intention is so expressed or implied, it must be such as not only to charge the real estate, but to discharge the personal. Yet the intention is not required to be so manifested as that all persons must agree upon it, but so as to convince the mind of the Judge who has to decide upon each particular case. Circumstances, therefore, from which an inference has been ordinarily raised, are where the same person has been constituted a trustee of the real estate and also an executor, and where the personal estate has been given as a residue or as personal estate generally, or after an enumeration of particulars. So where the residuary legatee was also devisee of the real estate, or of part of it for life, or otherwise. But these, said Ld. Ch., are circumstances which are entitled to consideration only, in reference to the context of every particular will in which they occur. And, finally, his Lordship stated, that the amount of the personal estate was not a circumstance to be enquired into, so as to furnish a ground for construction. Per Ld. Eldon, C. in Bootle v. Blundell, M. 1816. 1 Meriv.'93. Note, Ld. Eldon in this case reviewed all the authorities with the peculiar circumstances of each, and at length declared, that in his judgment a difference of opinion would always be unavoidable on questions of this nature, unless they were brought back to the old rule, that nothing but express words could exempt the personal estate. Vide etiam Greene v. Greene, 4 Madd. 148.

36. By the old law the personal estate could not be exempted from debts and legacies without express words; (a) but now the rule is to collect the testator's intent by considering every part of his will. (b) Gittins v. Steele, H. 1818. 1 Swanst. 28. Vide (a) Watson v. Brickwood, 9 Ves. 452. (b) Bootle v. Blundell, 1 Meriv. 193.

37. Testator bequeathed his real estate to trustees, subject to the payment of debts, in trust for sale, and there out to pay his debts, and after payment thereof, to invest the surplus for his wife for life, remainder to his children, and gave all his personal estate to his wife absolutely: Held, to convey a clear intention that the real estate should directly, and in all events, be the primary fund.
ESTOPPEL.


Of devises in trust to pay debts, vide ante, tit. *Devise*, xii.

ESTOPPEL.

3. Estoppel is quaintly defined, the stopping of a man’s mouth from speaking the truth, but the legal definition of it contains much good sense. The law cannot be known until facts are ascertained, and facts can never be ascertained unless some evidence is allowed to be of such a nature as cannot be contradicted, and therefore it is that estoppels are allowed. Estoppels may be pleaded or given in evidence; a jury, however, is not bound by an estoppel, arising by act *in pais*, or by matter of writing, when given in evidence, but they may find such estoppels, and if they will find, the court is bound to give judgment accordingly. “Estoppels being specially found by the jury, the court must judge according to the special matter, for albeit estoppels ought to be regularly pleaded and relied upon by apt conclusion, and the jury is sworn to find *veritatem facti*; yet when they find the estoppel, the court must judge according to law.” 1 Inst. 227. But, if the estoppel arises by matter of record, and is given in evidence, the jury is bound to find accordingly, under peril of an attainder. (Needler v. Winton Bp., Hob. 227.) So if the estoppel appears upon the record, and issue is joined, if the jury find the fact against the estoppel, yet judgment shall be given according to the estoppel, and not according to the verdict, because, says the Year Book 11 Hen. 6. 42. the verdict is nothing to the purpose, being a mere juro’s fail to try a matter contrary to the record. *Hume v. Burton*, E. 1785. 1 Ridg. P. C. 247.

2. Lands are devised to A. and B. and the heirs of the survivor, in trust to sell; though the inheritance be in abeyance, the trustees by a fine may make a good title by estoppel. *Sec quare. Vick v. Edwards*, T. 1735. 3 P. W. 372.

3. If a person of age grants a lease, having nothing in the premises, and the lands afterwards descend to him, the lease shall ensue by way of estoppel. *Sec socius in the case of an infant. Smith v. Low*, T. 1739. 1 Atk. 489.

4. A fine levied by a *feme covert*, will be good against her heir by estoppel, though it passes no estate at all. *Taylor v. Phillips*, E. 1749. 1 Ves. 230.

5. Though a fine levied by a *feme covert* is good against her heir by estoppel, it is otherwise of a surrender of her copyhold. *George, ex dem. Thornbury*, v.

6. When a record is an estoppel to the party, it must be direct, and in point to the fact, which the party is estopped from proving contrary to the record concerning that fact. *Hume v. Burton*, E. 1784. Ridg. P. C. 25. 107. Co. Lit. 352.

7. There are only two ways of taking advantage of an estoppel. If the estoppel appear on the record, the party may demur, or if not on the record, he may plead. S. C. ib. 69.

EVIDENCE.

I. Sufficiency or Disability of a Witness.

II. What sufficient; positive; presumptive.

III. Parol or collateral, where admitted.

IV. Admission of a Fact, how far regarded in the Scale of Evidence.

V. How far and in what Cases Parliamentary Journals, and the Proceedings of the Court of Chancery, are received as Evidence in Courts of Law.

EVIDENCE I.

Sufficiency or Disability of a Witness.

1. An executor may be admitted to prove the revocation of a legacy, though he has proved the will. Jervoise v. Duke, M. 1681. 1 Vern. 20.

2. A co-plaintiff, though but a trustee, cannot be examined as a witness for the other plaintiffs. Phillips v. D. of Bucks, H. 1683. 1 Vern. 230. Colchester Corp. v. ——, 1 P. W. 595. But one defendant may be examined as a witness for another. Windham v. Richardson, 2 Ch. Ca. 214. In Armiter v. Swanton, Amb. 393. a trustee-plaintiff was permitted to be examined on the part of a defendant. And in Troughton v. Gitley, Ld. North-ington ordered, that defendant might examine one plaintiff, (who was co-assignee of a bankrupt) as a witness for defendant. 1 P. W. 506. (n.)

3. A wife cannot be examined as a witness against her husband. Cole v. Gray, T. 1688. 2 Vern. 79.

4. A bankrupt having assigned and released all his estate to his assignees, may be a competent witness for them. Philips v. Wilson, H. 1708. 2 Vern. 737.


6. Where a witness was disinterested at the time of his examination, but afterwards became interested in the cause as plaintiff, in a bill of revivor, the court thought him a good witness, and allowed his deposition to be read. Goas v. Tracey, M. 1715. 1 P. W. 288. Et vide Hawes v. Hand, 2 Atk. 615. Glynn v. B. of England, 2 Ves. 42. S. P. So a witness, releasing her interest in the ques-

7. A surviving witness to a bond is made executor of the obligee; in an action brought by him on the bond, evidence shall be admitted to prove his hand-writing, (though plaintiff,) in support of the bond. Goas v. Tracey, supra. So a grantee, when he appears to be a bare trustee, is good evidence for his castus que trust, to prove the execution of the deed to himself. S. C. Et vide Croft v. Pyke, E. 1733. 3 P. W. 181. S. P. but not an executor in trust, as he is liable to be sued by the creditors and to answer costs. Croft v. Pyke, sup.

8. A parishioner is not good evidence, to prove a charity given to the parish._ Sed secus, of a lodger who does not pay poor rate, yet he shall be intended a housekeeper, unless the contrary appear. Att. Gen. v. Wyburgh, H. 1719. 1 P. W. 599.

9. An interested witness must produce a release, or his evidence cannot be read. Anon. M. 1737. 2 Atk. 15.; and the release must not be a partial, but a general one. Sandford v. Paul, 3 Bro. C. C. 370. 1 Ves. jun. 298.

10. Where a witness, who attested a deed, is dead, his death must be proved; but if he lived in England, a certificate of his funeral need not be produced; otherwise, if he lived abroad. The rules of evidence are exactly the same both at
Sufficiency or Disability of a Witness.


11. Where a witness is under a necessity of exculpating her own behaviour first, no regard ought to be paid to her evidence against the conduct of others.—Watkins v. Watkins, M. 1740. 2 Atk. 97.

12. The deposition of a trustee was admitted to be read as to the quantum of trust-money in her hands, which was given to her daughter, under circumstances which were held to go to her credit, but not to her competency. Downing v. Townsend, T. 1753. Amb. 592.

13. The evidence of a co-defendant, particaps fraudis and interested, cannot be allowed, but an objection goes only to the credit of an attorney and trustee.—Bridgman v. Green, T. 1755. 2 Ves. 629. Particaps fraudis cannot be admitted to disprove the fraud. Downing v. Townsend, sup.

14. A father having imposed upon a trustee in a settlement, to give his consent to his execution of a power, on bill brought to set it aside, the trustees were admitted to prove the imposition, but the father was not to clear himself. Scroggs v. Scroggs, T. 1755. Amb. 272.

15. A man who can recover nothing by the suit in question, is a competent witness. Craven v. Tickel, M. 1789. 1 Ves. jun. 61.

16. A father coming to bastardize his own issue, is a legal, though a very suspicious witness. Stanhope v. Edwards, E. 1790. 1 Ves. jun. 134.

17. A son employed under, paid by, and accounting to his father, may be a witness, but he is not accountable to his father's principal. Carterwright v. Hately, T. 1791. 1 Ves. jun. 292.

18. A gave a legacy to his wife, by the description of his chaste wife: evidence of her incontinence is not admissible.—Kennel v. Abbot, T. 1789. 4 Ves. 809.

19. Bill for discovery in aid of an action; demurrer by a mere witness allowed, though the discovery would be more effectual than the examination at law, and notwithstanding a charge of interest in defendant, as to which he may be called by plaintiff, waiving the objection, and if called against him, may be examined upon the voir dire. Fenton v. Hughes, T. 1802. 7 Ves. 287. A party having called a witness cannot discredit him. S. C. ibid. 290.

20. On the question, whether a commission of bankrupt is or is not maintainable, (e. g. whether the petitioning creditors's debt was sufficient,) a creditor of the bankrupt is competent to prove the negative. Re Cody, M. 1804. 2 Sch. & Lef. 115.

21. Where the defendant's answer positively denies an agreement for a lease, and that denial is confirmed by circumstances, the court will not decree a lease upon expenditure and improvements under an alleged agreement, proved by one witness only. Filling v. Armitage, M. 1805. 12 Ves. 78.

22. The interest which an auctioneer derives from his commission, is not sufficient to defeat his evidence. Buckmaster v. Harrop, H. 1807. 18 Ves. 474.

23. There is a distinction between an executor in trust, and a bare trustee, for the former is not a competent witness, being liable to actions, and interested to increase the funds; but a trustee has no such interest, and therefore his evidence is admissible. Ed. Alcany, when M. R., took this distinction, and Ed. Hardwicke seems to have been of the same opinion from several cases; (a) but this distinction exists only in equity, and not at law. Bellin v. Russell, H. 1809. 1 Ball & Be. 99. (a) Vide Mann v. Ward, 2 Atk. 228. Mabank v. Metcalfe, 3 Atk. 95. Fotherby v. Bate, ibid. 603. Vide etiam Betison v. Bromley, 12 East 250. and the cases there referred to.

24. A remainder-man is not a competent witness to prove payment of a legacy charged on the estate. Aldridge v. Ld. Wallscourt, E. 1810. 1 Ball & Be. 312. But in Smith v. Blackburn, 1 Stack. 283. Treby, C. J., held, that an heir apparent might be a witness concerning the title of the land, but a remainder-man could not, and that a tenant in tail in remainder of an estate tail, had such an estate as to render him an incompetent witness as to the title.

25. An executor cannot be a witness in equity to increase the fund, but at law he may, (a) and an executor in trust is in the same situation. (b) Mulberry v. Dillon, M. 1810. 1 Ball & Be. 413. Vide (a) Floyd v. Powis, MS. Ca. cited by Manners, C. Et vide (b) Mabank v.
Sufficiency or Disability of a Witness.—What sufficient; positive; presumptive.


26. The evidence of a witness placing himself behind a wainscot or tapestry, and stating the effect of a conversation there overheard, must be received with great caution. Savage v. Brockepp, M. 1811. 18 Ves. 339.

How the members of a corporation may be rendered competent witnesses, vide ante, tit. Corporation, sec. vi.

EVIDENCE II.

What sufficient; positive; presumptive.

27. A copy of a deed to lead the uses of a fine enrolled for safe custody only, may be read as evidence upon a trial at law. Combs v. Spencer, M. 1704. 2 Vern. 471. Combs v. Dowel, M. 1717. ibid. 591.

28. A copy of a note was taken by one who was entrusted with it, and who afterwards died; under it was written an acknowledgment that nothing was due; this was allowed to be read in evidence, though not proved to be a true copy, and the defendant had sworn there was no such acknowledgment under the note, it appearing, when the note was produced, that the bottom was torn off. Winn v. Lloyd, H. 1707. 2 Vern. 603.

29. A steward swearing that he never heard of an agreement to surrender, at or before the surrender, is a negative pregnant that he heard of it after, and a manifest evasion. Walker v. Walker, M. 1740. 2 Atk. 98.

30. A merchant’s copy-book of letters has been allowed to be read where the person who has the original letters refuses to produce them. Sturt v. Mellish, T. 1743. 2 Atk. 611.

31. Payment of interest for a legacy by an executor from time to time shall be evidence of assets, but a single payment of interest shall not. Clergy, Sons of, v. Swainson, E. 1748. 1 Ves. 75.

32. In questions whether, the advancing or paying of money by a father, was intended as a bounty to his child, his papers, books, and memorandums shall be evidence. Hill v. Ballard, H. 1748. 1 Ves. 77.


34. But letters, books, or entries by servants or agents, after their death, shall be allowed as evidence. Leeburn v. Worden, M. 1760. 2 Ves. 54. Peacock v. Monk, ibid. 190.

35. A man’s own entry in a book of accounts, shall be allowed as evidence on enquiry before the master, where all papers, &c. were to be produced, not as evidence of the demand, but as a claim in his life-time. S. C.


38. A copy of a register or baptism in Guernsey, is not sufficient evidence here, of a party being of age, because that island is not under the same ecclesiastical jurisdiction. Huett v. Le Mesurier, M. 1786. 1 Cox. 275.

39. Very clear and strong evidence is necessary, to impeach a lease at a distance of time, on the ground of original fraud practised in obtaining it. Chandos v. Brownlow, E. 1791. 2 Ridg. P. C. 397.

40. Where a fact is put in issue by the original cause, and evidence examined to it, no evidence can be adduced upon that fact upon a supplemental bill; neither will equity assist a party to make out a different case, upon a second trial at law, upon that which he made upon the first. Cockburn v. Hussey, E. 1792. 2 Ridg. P. C. 504.

41. A terrier cannot be received in evidence, unless from the registry of the
EVIDENCE II.

What sufficient; positive; presumptive.

diocese, or a copy from the parish registry, if the original cannot be found. Atkins v. Hatton, H. 1794. 2 Aust. 386. Miller v. Foster, ibid. 387. (n.) 8 P.

42. Declarations of a party to a deed, previous to the execution, were admitted in support of the deed against imputations of fraud, but declarations subsequent, impeaching the deed, were rejected. Conolly v. Ld. Howe, M. 1800. 5 Ves. 700.

43. Where an appointment has been executed under a will regularly proved, evidence that the power has been improperly obtained, cannot be received. Kemp v. Kemp, E. 1801. 5 Ves. 849.

44. Upon a presumption of satisfaction by will, evidence is admissible; 1st, to constitute the fact that testator was debtor to his legatee; and 2dly, to meet or fortify the presumption; and so upon equities arising out of presumptions, evidence is admissible. Pole v. Ld. Somers, T. 1801. 6 Ves. 309. Wright v. Rutter, 2 Ves. 673. Rutter v. McLean, 4 Ves. 581.

45. A statement of property in testator’s hand-writing, together with his books of accounts, were admitted as evidence, that be considered as his property, and meant to dispose of, certain mortgages and leases belonging to his wife, and taken by her under a will of which he was joint executor with her before marriage. Drusc v. Denison, T. 1801, 6 Ves. 385.


47. The affirmative must be proved in every issue. A negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed, until it is proved, but when the affirmative is proved, the other party may contest it with opposite proofs of some matter or proposition, totally inconsistent with what is affirmed. There is an exception, however, of such cases, where the law presumes the affirmative contained in the issue, as where a man is charged with not doing an act which, by the law, he is liable to do, for the law presumes that every man does his duty to society, until the contrary is ascertained, and this exception was fully recognised in Williams v. East India Company, M. 1802. 3 East 192.

48. A notary public has credit everywhere by the law of nations, but the certificate of a magistrate of a colony abroad requires evidence as to his magisterial character. Hutchin v. Mannington, T. 1803. 6 Ves. 823.

49. Where an answer is required as evidence upon a trial at law, the court, except in a criminal case, will not permit the record itself to be sent, but an office copy, unless proof of the signature is necessary. But where the action is by a stranger, unconnected with the suit in equity, the court will not grant the application. So, under a commission of bankruptcy, the court will not allow the proceedings in the secretary’s office to be used as evidence in actions by strangers unconnected with the commission. Jarvis v. White, E. 1803. 8 Ves. 313.

50. An attested copy of the memorial of the assignment of a judgment, is evidence of the fact of the assignment. So the attested copy of the memorial of the registry of a deed, is evidence of the fact of the registry: but if the memorial be used as evidence of the contents of the deed, the original must be produced.—Hobhouse v. Hamilton, T. 1803. 1 Sch. & Lef. 207. Vide 1 Leon. 184. 1 Salk. 389.

51. As to evidence of hand-writing, the rule is, that the witness must have seen the party write, and swear to his belief, that the writing produced is his, but where a witness will not take upon himself to say he believes it to be the writing of the person, though he thinks it like, Ld. Ch. said, that was no evidence; in contradiction to the case of Garrells v. Alexander, 4 Esp. Rep. 37, where Ld. Kenyon is made to say that it is evidence. Ld. Ch. however, doubted that authority. So comparison of hands, by one who never saw the party write, is not evidence. (a) Eagleton v. Kingston, T. 1803. 8 Ves. 474. (a) Vide Rex v. Cator, 4 Esp. Rep. 117. Brookhard v. Woodley, Peake’s N. P. 20. Macpherson v. Thoytes, ibid. Cary v. Pitt, 1797. Neither is the comparison of hand-writing proved in the instance of a single letter for the purpose of commitment, though a comparison has been admitted as evidence where confirmed by the contents of a correspondence. Wade v. Broughton, M. 1814. 3 Ves. & B. 172. Vide Eagleton v. Coventry, 8 Ves. 475.
EVIDENCE II.

What sufficient; positive; presumptive.

52. The court in this case made a decree upon the evidence of a single witness, against the positive contradiction of the defendant's answer, containing circumstances giving greater credit to the deposition, and the defendant having declined an issue at law. E. India Co. v. Donald, H. 1804. 9 Ves. 273.

53. It is a rule of evidence in equity, that if there is nothing more than the positive unqualified assertion of one witness, and a positive denial by the defendant, the plaintiff shall not have a decree, but there is an exception to that rule upon circumstances giving greater credit to the witness. Ed. Ch. said, he did not know how to reconcile all the cases on this subject, except perhaps that the court being willing to give judgment upon the question, whether the circumstances outweigh the effect of the rule so as to authorize a decree against defendant, will allow defendant to ask, that he shall at his peril, withdraw it from this court, and run the risk of an enquiry less favourable in its principle, by praying an issue, and his Lordship inclined to think, that is the principle upon which the court ought to act. S. C.

54. Though an agent may, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts, yet evidence of his declarations must be confined to what is either by the statement itself, or as tending to determine the quality of contemorary acts, the foundation of, or inducement to the agreement. A letter, therefore, by an agent, is not evidence against the principal, of a pre-existing agreement, though it may be of an agreement contained in that letter, but whether a receipt given by an agent for goods directed to be delivered to him is evidence against the principal, the court did not determine. Fairlie v. Hastings, T. 1804. 10 Ves. 123. Vide Meesters v. Abram, 1 Esp. Rep. 373. Bauerman v. Radenius, 7 T. R. 663. Biggs v. Lawrence, 3 T. R. 454.

55. The rule of evidence in the Accountant-General's office, ought to be the same as in court, therefore, upon the marriage of a woman entitled to the interest of a fund for her separate use, an affidavit was required beyond the marriage and identity, that there was no settlement or agreement for a settlement, without prejudice in future cases. So to obtain payment to the representative, the mere production of the probate is not sufficient, but proof of the death is required, and that the testator was the party in the cause, Clayton v. Gresham, M. 1804. 10 Ves. 285.

56. Upon a bill to raise money under a deed of appointment, the only copy produced appeared not to have been executed; but it having been recited in two settlements, and the books of a deceased solicitor being produced, wherein he had charged for preparing and executing it, the court allowed that as evidence, and decreed the money should be raised, Skipwith v. Shirley, T. 1805. 11 Ves. 64.

57. A conveyance by bargain and sale, which cannot be complete as a legal conveyance without enrolment, is evidence in equity of an agreement to convey. Meester v. Gillespie, H. 1806. 11 Ves. 625.

58. Inscriptions on tomb-stones, and engravings on rings, are evidence of a pedigree. Vossels v. Young, M. 1806. 13 Ves. 140. So are declarations of heads of families upon inquisitions post mortem. So is hearsay evidence of declarations by the husband, as to his wife's legitimacy, as well as those of relations by blood, in cases of pedigree, and so is the hearsay of relations to prove consanguinity, and without the correctness required by other facts; the degree therefore is not requisite, but the principle being interest, the opinion of the neighbourhood will not do. S. C.

59. Upon pedigree slight evidence is sufficient; as reputation, and a forgery established is not decisive, but weighs considerably against the party producing it. S. C.

60. Evidence of tradition must be qualified even upon pedigree. It must be from persons having such a connection with the party, that it is natural, and likely, from their domestic habits, that they are speaking the truth, and could not be mistaken, and upon that principle, descriptions in wills, monuments, bibles, &c. are admitted. Whitelocks v. Baker, E. 1807. 13 Ves. 511.

51. Extrinsic evidence is admissible not to construe a will, but to show with reference to what it was made. Benough v. Walker, H. 1809. 15 Ves. 514.

52. The Fleet register is evidence, a declaration upon the fact, and not as a register; but a duplicate of the register formed and signed weekly by the clergymen.
man, and annually transmitted to the ordinary by the canon law, is evidence. Lloyd v. Passingham, E. 1808. 16 Ves. 59.
63. Forgery is not conclusive against a fact proved by other evidence. S. C.
65. Evidence of an interruption (of a right of way) acquiesced in, is infinitely of more weight than a right of usage, but a conviction for a nuisance in stopping up a way is not conclusive evidence of the right. Legge v. Croker, H. 1811. 1 Ball. & Be. 514.
67. Copies of the bank books are evidence, but upon a question whether the signature to a transfer is genuine, the book itself must be produced, and such is the rule established in parliament. Auriol v. Smith, T. 1811. 18 Ves. 198.
68. The identity of an individual, is to be established by proving his handwriting. It is not absolutely necessary for his defence, (said Ld. Eldon,) that it should be open to him, to desire to see what is said to be his handwriting, to prove, perhaps, by two witnesses, that it is not, and how can he do that without the original? Suppose the evidence offered in a criminal proceeding was a clerk of the bank, stating, that he had examined it with the original, and that it was the handwriting of defendant, the first objection would be, that it is not the best evidence. The book books are not like records which cannot be parted with, and there is a plain demand of justice for the production of these books, as defendant (admitting that the clerk believes the writing to be his,) may deny it positively; and may state that if the original transfer be produced, he would prove, by numerous witnesses, that it was not his. These objections would prevail in a criminal case, and why not in a civil suit; and unless the bank books were to be deemed records, they cannot be distinguished from the books of a tradesman. His Lordship, after many arguments, said, the proper point depending on particular circumstances, comes to this. Where a case occurs in which the handwriting being controverted, is to be proved or disproved by evidence before a jury, how can the party, who has the custody of the writing, be excused from producing it? Ld. Eldon further said, consider a clerk coming from the bank is a common case, stock transferred, and a declaration of trust. If, by statute, the books of the bank were directed to be kept there, they would stand on the same footing as parish registers by the canon, which are to be kept in the parish chest, and prima facie are not to be produced, and the evidence of the clerk who saw the party write it would be sufficient; but though evidence, combined with the direction of the statute is good prima facie, yet the party might prove the clerk was mistaken in two ways: first, upon the production of the writing sworn to be his, he may prove the negative, that it is not, which alone, perhaps, would not prevail against the positive evidence of the clerk who saw it written; but he might add proof, that he was not there, leading to a conclusion, that must reduce the contradiction to no evidence whatever. Ld. Eldon concluded by saying, there was no case in which the books of the bank may not be produced at every assize in the kingdom. S. C. ibid. 202. 206.
69. Upon a question of pedigree, an objection arose as to the admission of a parish registry in evidence, which was not kept according to the 70th canon, (which required weekly entries,) or a copy, or proof that the original was not to be found. Ld. Eldon said, this was a question of great public importance.—In attending to the sort of registries that are received, he said, it was difficult to say why the fleet registries were rejected, and equally so to say, on what principle a copy was received, except that the original could not be removed from the place where it was kept. Should this principle be applied to registers with the same strictness, as to other documents, few would be found kept according to the canon, yet such registers, and even copies of them, are now received in evidence. Extreme danger (said his Lordship,) attends the rule now acted upon, of receiving copies, without more proof than the bare examination of them. Estates have been recovered on the evidence of examined copies, where no credit was due to the original; and his
What sufficient; positive; presumptive.—Parol or Collateral, where admitted.

Lordship added, that the security of titles was more preserved by requiring the original to be produced, and not admitting a copy, than by any other rule guarding the inheritance. The book produced in this case was nothing but a copy down to the year 1662, which, his Lordship said, he would not have received at nisi prius, without showing that the original was lost; a leaf was also cut out that would be most material since 1654, but by taking away that leaf, the series about that time was not destroyed, nor did the loss of that leaf destroy the character of the book. Evidences of relationship are soon lost in the lower order of families, but the declarations of relations are some evidence of a pedigree, though very inconclusive, without showing on what occasion such declarations were made, or what led to them, &c. which would have been the effect of an ordinary conversation on that subject; as to the evidence of a physician, or of a servant of the family, it has never been decided that they should be considered as part of the family.

Ld. Eldon directed an issue in this case, observing, that the original register books must be produced. Walker v. Wingfield, H. 1812. 18 Ves. 443.

70. On a bill by the assignor and assignee of a debt, for the recovery of the same, and stating the assignment, it is not necessary to prove the assignment, though defendants say they are ignorant of it. Ryan v. Anderson, E. 1818. 3 Madd. 174.

71. An entry of the birth of a dissenters child, in a registry kept for the purpose at a public library, is not such evidence of the birth as the court can act on. Exp. Taylor, T. 1820. 1 Jac. & Walk. 483.

72. A probate in the Ecclesiastical court, is not evidence in this court, that copyhold estates would pass by the will. Jervoise v. D. of Northumberland, T. 1820. 1 Jac. & Walk. 570.

EVIDENCE III.

Parol or Collateral, where admitted.

73. One by will gave his executor 5l. for his care, in fulfilling the will, and made no disposition of the surplus. Parol proof was given of the intention and direction of the testator to the scrivener, that the executor should have the surplus, yet decreed to the next of kin. Rackfield v. Careless, T. 1723. 2 P. W. 158. 9 Mod. 9. 1 Str. 568. nomine Rushdell v. Carnesse. This appears to be the only case in which parol evidence has been admitted in favour of the next of kin, and the proof for them was but very slight; but there are many cases in which parol evidence has been admitted in favour of the executors, or (what is tantamount) in exclusion of the next of kin, and the ground of its admissibility is, that it is adduced to rebut a presumption raised against the legal title of the executor, which seems to have been adopted as a rule of evidence in courts of equity, though (occasionally) with some hesitation. See the cases on this point collected, post, tit. Executor, viii. et ante, tit. Devise, xvi. Parol evidence shall not be admitted to contradict a will. Vide Brown v. Selwyn, Forr. 240. Chamberlain v. Chamberlain, 2 Freem. 9. Lowfield v. Stoneham, 2 Str. 1561. Hampsire v. Pearce, 2 Vern. 217. Maybank v. Brooke, 1 Bro. C. C. 54.

74. The rule that parol evidence shall not contradict a written agreement is generally true; but a written agreement may be waived or varied by a subsequent parol agreement. Ed. Milton v. Edworth, H. 1733. 6 Bro. P. C. 587.

75. A written contract to be waived by parol, requires a very clear proof.—The statute requires all contracts concerning lands to be in writing, and an agreement to waive a purchase, concerns the land as much as the original contract. Buckhouse v. Crosby, E. 1737. 2 Eq. Ab. 32. pl. 44.

76. M. R. observed, that the court had gone too far in permitting part performance of an agreement, to take cases out of the statute of frauds, where it must be supported by parol evidence; and said the remedy ought to rest in compensation. Foster v. Hall, H. 1798. 3 Ves. 712.
EVIDENCE III.

Parol or Collateral.

77. Parol evidence is admissible against a written agreement under the head of mistake, surprise, or fraud. M. of Townshend v. Stangroom, H. 1801. 6 Ves. 328.


79. But parol evidence may be admitted, to ascertain a person or thing.—Vide Stephenson v. Heathcote, Eden 38. et post, pl. 92. and the cases there referred to.

80. So to explain a surrender of a copyhold, and to show a mistake either in the land or uses. Towers v. Moore, H. 1689. 2 Vern. 98. A devise of land is not to be explained by parol proof touching the declaration of the testator, or the instructions given by him for making his will. S. C.

81. Words can have no weight in evidence against a deed solemnly executed. Skates v. Barrington, M. 1718. 1 P. W. 482.

82. Testator gave the residue of his estate to the poor of the parish of K. comm. L. but that parish was in comm. N.; it was set up by the next of kin, that testator did not imagine his residuum would exceed 10l., and had, so declared; whereas, it amounted to near 1000l. The court thought that parol evidence should be admitted, to help out the description of the parish, but not as to the quantity of the thing given. Brown v. Langtry, H. 1732. 2 Barn. 118.

83. The court will not allow parol evidence to explain a blank in a will, but where a legatee is nicknamed, or two of the same name, parol evidence will be admitted to explain. Baylis v. Att. Gen. H. 1741. 2 Atk. 240.

84. Courts of law and equity admit parol evidence in two cases only, to ascertain the person, where there are two persons of the same name, or where there has been a mistake in the name, (a) and in resulting trusts relating to personal estate, (b) as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted, to ascertain who shall have it. Ulrick v. Litchfield, T. 1742. 2 Atk. 573.


85. Bequest to testator's nearest poor relations: parol evidence shall be admitted to show that testator knew he had such in Salop, but not to prove declarations or instructions whom he meant by the written words of his will. Goodinge v. Goodinge, E. 1749. 1 Ves. 231. Et vide Whithorne v. Harris, 2 Vern. 527. As to the cases where parol evidence shall be admitted in the case of a will, see Hodgson v. Hitch, Pre. Ch. 229. Ulrich v. Litchfield, sup. pl. 84. and the cases there collected. Hodgson v. Caldicott, 2 Vern. 393. Batchelor v. Searle, ibid. 736. Ruchfeld v. Careless, 2 P. W. 158. 150. Centra, Stode v. Russell, 2 Vern. 624. In Pett v. Smith, 1 P. W. 9. it was held to be dangerous to admit parol proof, where there was a written will, but as to personal estate, such proofs have been allowed. Fane v. Fane, 1 Vern. 31.; but they ought to be plain and indisputable. In Binkhorn v. Feast, 2 Ves. 28. Ed. Hardwicke said such evidence had been admitted, to rebut an equity, arising from a resulting trust, though since Brown v. Selwyn, Ca. temp. Talb. 240. he had been tender of admitting it in such cases. Vide post, tit. Trust, sect. ii.

86. Where A. tenant in tail, remainder to B. in tail, joined in a mortgage and bond to raise money, and A. died, it seems, parol evidence could not be admitted of an agreement, that his creditors
Parol or Collateral, where admitted.


88. Parol evidence was admitted to show, that though a bond given on marriage, was for 150l. per annum, yet the agreement was for 100l. only; but it being a private agreement to deceive a material party, the bill was dismissed; still, however, parol evidence to prevent fraud shall be admitted. Pitzaim v. Ogborne, T. 1751. 2 Ves. 573.

89. So on devise of guardianship, parol evidence of the father's intent, as to the education of his child, shall be admitted. Assuet. M. 1750. 2 Ves. 56.

90. Parol evidence being admitted on one side, may be called for on the other. So at law, though to prove a matter in writing; but in mercantile contracts, the evidence of merchants is allowed, Buxton v. Comyns, T. 1751. 2 Vern. 331.

91. Parol evidence to prove the destruction and contents of a deed will be admitted. Salkern v. Maleshich, M. 1754. Amb. 247.


93. The court will not permit parol evidence of an agreement, for the redemption of an annuity, which was left out of the deed, under an idea, that, if inserted, the transaction would be usurious, there being no charge of fraud in the omission. Ld. Irham v. Child, H. 1781. 1 Bro. C. C. 92. Vide Ld. Portmore v. Morris, 2 Bro. C. C. 219. Hare v. Shearwood, 3 Bro. C. C. 168.

94. Parol evidence of an attorney was admitted, to prove that a party to a set-
Evidence III.

Parol or Collateral, where admitted.


95. So, if a parent’s intention that a portion should not be taken in performance of a legacy. Dobrez v. Mann, E. 1787. 2 Bro. C. C. 165.

96. Parol evidence cannot be admitted to vary a written agreement, although it may, to raise an equity, founded on the agreement, by proof of collateral circumstances. Davis v. Symons, M. 1787. 1 Cox 402. But it is admissible to explain an ambiguous agreement in writing, though not to extend it. Stokes v. Moore, T. 1786. ibid. 219. Vide D. of Bucks v. Ward, 3 Bro. P. C. 39.

97. Parol evidence is not admissible to show, that the testator intended to exempt his personal estate from debts. Reeves v. Neweham, E. 1758. 2 Ridg. P. C. 21. 35. 44. Vide Stephenson v. Heathcote, 1 Eden 38. ante, pl. 92.

98. So, to show that legacies given by a second codicil were intended as cumulative. Coet v. Boyd, H. 1789. 2 Bro. C. C. 521. Vide Hooley v. Hatton, 1 Ves. jun. 390. (n.) and the cases there referred to.

99. Though when a wife’s estate is mortgaged for the benefit of the husband, she has a right to stand as creditor on the husband’s assets, yet this may be repelled by evidence to show her intention to the contrary. Clinton v. Hooper, H. 1791. 3 Bro. C. C. 201. 1 Ves. jun. 173.

100. A gift by will, to Lady——, is absolutely void, and it shall not be supplied by parol evidence. Hunt v. Hort, T. 1791. 3 Bro. C. C. 311.

101. Agreement for the lease of a farm, referring to a paper containing the terms, parol evidence to prove which of the clauses in that paper had been read at a meeting, was refused. Brodie v. St. Paul, E. 1791. 1 Ves. jun. 326.

102. Parol evidence shall not be admitted to raise an equity, that a pension granted by the crown to defendant, was in trust for plaintiff, against the oath of defendant in his answer. Fordyce v. Willis, E. 1792. 3 Bro. C. C. 577.

103. On parol evidence, an absolute conveyance was decreed to be only a security, it being clear on the written evidence, and the accounts of the parties, that the agreement was not what the deed purported to be; Cripps v. Gee, M. 1793. 4 Bro. C. C. 472. Vide Irnham v. Child, 1 Bro. C. C. 92.

104. Parol evidence cannot be admitted to prove from conversations before and at the same time of signing an agreement for a lease, that the intent of the party was different from the memorandum, though the same was written by the lessee, and the words “clear of all taxes,” (which were the subject of the conversation) were omitted in the memorandum. Rich v. Jackson, H. 1794. 4 Bro. C. C. 514.

105. Parol evidence is admissible on the part of an advanced son or his heir, to rebut a claim of trust, though improper against the legal operation of a deed. Reddington v. Reddington, E. 1794. 3 Ridg. P. C. 182. Taylor v. Taylor, 1 Atk. 387. Lamplugh v. Lamplugh, 1 P. W. 111. S. P.

106. The court will not admit evidence of conversations with the person who drew a will, to show that the testatrix had no other real estate. Standen v. Standen, T. 1795. 2 Ves. jun. 589.; nor parol evidence of an intention not to revoke a will. Cave v. Holford, E. 1798. 3 Ves. 650.

107. The court decreed, an increase of certain provisions in testator’s will, upon evidence of his request to his executor and residuary legatee, on whose promise testator refused to make a new will, saying, he would leave it to the executor’s generosity. Barrow v. Grenchou, T. 1796. 3 Ves. 152.


110. Parol evidence is admissible to rebut a presumption, without regard to
the nature of it; as whether a mere casual conversation with a stranger, or between the parties and upon the subject, or whether at the time of the transaction, previous or subsequent. But those circumstances are very material with reference to the weight and efficacy of it. *Trimmer* v. *Bayne*, T. 1802, 7 Ves. 508. Where an executor is trustee of the residue for the next of kin, parol declarations previous and subsequent to the will, as well as at the time, are admissible; but their weight and efficacy are very different. S. C. *Vide Ellison v. Cookson*, 2 Bro. C. C. 307; 3 Bro. C. C. 61. 1 Ves. jun. 100. Debeuze v. Mann, 2 Bro. C. C. 165.

111. A. by public advertisement offered lands to be let for three lives or 31 years, and proposals having been made by B. and accepted, an agreement was executed between B. and the agent of A. authorized to contract for him for a lease of the lands, in which agreement the term for which the lease was to be made was not mentioned. A. is not bound to perform this contract, there being no evidence in writing of the term to be demised, and there being no reference in the agreement to the advertisement, parol evidence cannot be received to connect the one with the other, so as to ascertain the term. *Clinan v. Cook*, M. 1592. 1 Sch. & Lef. 22. But if one written instrument refers to another written instrument, parol evidence may be admitted to show what was the thing so referred to. S. C. ibid. 53.


118. Parol evidence may be admitted, and will prevail against the presumption that a debt is satisfied by a legacy of greater amount, the will also affording an inference in favour of that presumption. *Wallace v. Pomfret*, M. 1805. 11 Ves. 542.


117. Parol evidence against conditions of sale by auction, is not admissible, and alterations in writing are permitted with great jealousy. *Buckmaster v. Harrop*, H. 1507. 13 Ves. 471.

118. Parol evidence is not admissible in aid of a specific performance upon the sale of an estate by auction, to explain by declarations of the auctioneer, an ambiguity on the face of the particular by a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement signed on the back of the particular, binding the purchaser "to a strict fulfilment of this article," and to abide by the conditions and declarations made at the sale. *Higginson v. Clouse*, T. 1808. 15 Ves. 516. *Vide Jenkins v. Peppy*, ex.ced. 6 Ves. 330.

119. Though a paper, as the particular upon a sale by auction, may by reference, be engrailed into a contract within the statute of frauds, that will not authorize the introduction of parol evidence to show what part was read. S. C. ib. 522. *Et vide Brodie v. St. Paul*, 1 Ves. jun. 326.

120. Parol evidence by one witness unsupported by any other testimony, is not sufficient to found a decree. *Down v. Massey*, M. 1809. Ball & Be. 234.


122. Legacy to A. if in the testator’s service at the time of his decease, parol evidence was admitted to show, that though she had quitted his house, she continued and was considered by him in his service, and upon that evidence her legacy was established. *Herbert v. Reid*, T. 1810. 16 Ves. 481.
123. The existence and execution of a settlement, by lease and release, may be presumed from the production of the drafts, the statement of them is an abstract of the title, and the existence of a lease for a year, or other estates appearing to have been included in the same plan of settlement. *Ward v. Garnett*, E. 1810. 17 Ves. 154.

124. In a case of double portions, one by settlement, and the other by will, both moving from the father, the question was, whether parol evidence was admissible to show an original intention to substitute one proviso for another, or only where it is first offered against the presumption of satisfaction: Held, that it was clearly admissible to show that the father was author of the portion, by giving up an interest and accepting a charge in lieu, on the marriage of his son; and it was said, per M.R., that whatever is wanting to show a consideration, and from whom it moves, may be supplied by evidence dehors the deed, so that it does not contradict it. *Hartopp v. Hartopp*, T. 1810. 17 Ves. 184. *Vide* S. C. more at large, *post*, tit. *Portions*, ii.

125. Parol evidence will be received to prove the terms of an agreement under which possession has been delivered, and where money has been expended in substantial improvements, for that implies the existence of an agreement. *Tools v. Medlicott*, M. 1810. 1 Ball & Be. 401. 404. *Vide Davis v. Hene*, 2 Sch. & Lef. 341.

126. Parol evidence is admissible on the part of a defendant resisting the specific performance of an agreement, to prove fraud, mistake, and omission in the articles, and also to show the situation of the parties as connected with it. *Flood v. Findlay*, M. 1811. 2 Ball & Be. 15. *Vide Stangroom v. Townsend*, Marq. 6 Ves. 328. Clark v. Grant, 14 Ves. 519. Ramsbottom v. Gosden, 1 Ves. & B. 165.

127. Parol evidence is not admissible to show that a deed was not intended as an execution of a power, for that would go to contradict it, nor can a deed in writing be altered by parol evidence; but the acts and declarations of a testator at the time of his will, to show what he meant by a particular expression, are admissible in evidence. (a) So fraud, in procuring a deed, and the circumstances attending it, may be proved by parol evidence, but evidence of facts not put in issue on the record, is inadmissible. (b) *Blake v. Marsell*, M. 1811. 2 Ball & Be. 25. *Vide* (a) *Hinchliffe v. Hinchliffe*, 3 Ves. 316. *Pole v. Ld. Somers*, 6 Ves. 309. *Drace v. Denison*, ibid. 385. (b) *Smith v. Clarke*, 12 Ves. 477.


129. There is a distinction between the admission of parol evidence to support, or to resist the specific performance of a contract for land. It is admissible for the latter purpose, on mistake or surprise as well as fraud, but not to vary, add to, or explain the written contract. Where the terms of a contract are ambiguous, as excluding or including timber, the purchaser's bill for a specific performance was dismissed, and he having throughout insisted on his construction, he was not permitted to compel the vendor to convey on the terms he originally offered. *Clowes v. Higgins*, T. 1815. 1 Ves. & Be. 524. *Vide Ramsbottom v. Gosden*, ibid. 165.

130. Where lands at or of any particular place are devised, parol or extrinsic evidence cannot be allowed to show that the testator included, or intended to include, other lands, not at that place, for such evidence is only admissible to explain a devisor's intent, where ambiguity is raised by extrinsic circumstances, and then it would not be allowed if the will could have effect without it. *Doo, d. Osmond*, v. *Chichester*, T. 1816. 4 Dow P. C. 65. *Vide S. C. ante*, tit. *Devise*, iii. and the cases there referred to.

131. Bill by a rector for an account of tithes. Defendant set up a simoniastic contract, supported by evidence of a letter alleged to have been written by one of the patrons to the plaintiff, previously to his admission to the living, expressing the terms of the contract which had been entered into, and afterwards the letter was returned to plaintiff, by whom it was destroyed. On an objection to such evidence for want of notice, to the plaintiff to produce the original letter:
EVIDENCE III & IV.

Patrol or Collateral, where admitted.—Admission of a Fact, how far regarded.

 Held, that the evidence was admissible, the depositions being sufficient notice. Such evidence would not have been admitted at law without notice, because till the trial, it could not be known what evidence would be offered. But even there, notice is not necessary, in a case where the party must know that the contents of a written instrument in his possession will come into question. Wood v. Strickland, E. 1817. 2 Meriv. 461.

132. On a bill for performance of an agreement by several persons to enter into several bonds for 1500l. parol evidence was admitted, to show that the agreement was to give a joint bond for 1500l., and not separate bonds to that amount. Lid. Wm. Gordon v. Herford, Marg., E. 1817. 2 Madd. 106. Vide Clinan v. Cooke, 1 Sch. & Lef. 39. Clarke v. Grant, 15 Ves. 519. Alluding to Pember v. Matthews, 1 Bro. C. C. 54. Ramsbottom v. Gosden, 1 Ves. & B. 165.

133. A bill of sale having been executed by a testator, and subsequently delivered to A., on a question whether it was intended as a gift, an entry in the testator’s book, made between the periods of the execution and the delivery, is admissible evidence. Ryle v. Haggis, H. 1830. 1 Jac. & Walk. 234.

For the authorities in which parol evidence has been admitted to rebut an equity set up by the plaintiff, in the case of resulting trust, vide post, tit. Trust, ii.

EVIDENCE IV.

Admission of a Fact, how far regarded in the Scale of Evidence.

134. An admission by a party concerned in matters of fact, is stronger than if they had been determined by a jury, and facts are as properly concluded by admission as by a trial; therefore, where parties come incidentally before the court, and that incident is admitted, the court may determine it, and hold the parties to their admission, though the court cannot determine upon the probate of a will adversely; and there is no difference between parties admitting things proper to be determined by the court in which the admission is made, and an admission of things cognisable in another court, for both are equally bound. Sheffield v. Duchess of Buckingham, M. 1799. 1 Atk. 690.

135. The admission of a debt obtained by fraud or force will not be set aside on motion, but it may be a ground for a new bill, though the former suit be depending. Townsend v. Lowfield, T. 1747. 1 Ves. 35.

EVIDENCE V.

How far and in what Cases Parliamentary Journals, or the Proceedings of the Court of Chancery, are received as Evidence in Courts of Law.

136. Coke considered Parliamentary Journals entitled to the authority of records, and he has referred us (in 4 Inst. 23.) to the stat. 6 Hen. 8. c. 16. which prohibits the absence of any of the members without license entered of record in the clerk’s book. The general opinion, however, now is, that the house itself not being a court of record, none of its proceedings are so, and though formerly copies of nothing short of records could be received as evidence of the originals, yet now, copies from the books of either house, examined with originals, are equally received as evidence of the proceedings of the house. Jones v. Randal, H. 1774. Comp. 17. Rex v. Ed. George Gordon, 1781. Doug. 589. (590.) though in cases where either house merely comes to resolutions as a foundation for other
EVIDENCE V.

Parliamentary Journals and Chancery Proceedings, where Evidence in Courts of Law.

proceedings, these resolutions are no evidence of the truth of the fact resolved. Peake's Evid. 53. Therefore, in the case of Titus Oates, 1685. 4 State Tr. 39. the resolution of the two houses as to the existence of the popish plot was held to be no evidence, in a court of justice, of the truth of that fact. And in Rex' v. Stockdale, M. 1790. Peake's Evid. 53. where the Commons had resolved that a publication was a libel on the house, and in Rex v. Reeves, T. 1796. ibid. that it was a libel on the constitution, and the Att. Gen. was ordered to prosecute; the jury were nevertheless directed to consider the intention of the defendants, and both parties were acquitted.

137. Proceedings in Chancery are not records or memorials of the laws of England, for the Chancellor proceeds secundum aguum et bonum, and is not bound to proceed secundum leges et consuetudines. Bull. N. P. 285.

138. The bill, when further proceedings were had upon it, was formerly considered as evidence against plaintiff of the facts stated in it. Snow v. Philips, 1664. 1 Sid. 220. But now the courts consider the allegations as mere suggestions to extort an answer from defendant, and hold it is only evidence to show that such a bill was filed, or to prove such facts as are the subject of reputation and hearsay evidence, such as plaintiff's pedigree, &c. Bowesman v. Sybourn, M. 1797. 7 T. R. 2.

139. The answer of the defendant upon oath, is undoubtedly evidence against him, for if the admission of a man be received in proof of a fact against him, much more ought that confession which he made on oath; but being considered as a confession only, it is not admitted in any case where a confession would not be evidence. Anon. Godb. 326. Wherefore the answer of an infant by his guardian, who is sworn to it, is not evidence against his rights. Eccleston v. Spoke, or Petty, 1689. Carth. 79.: and doubts were entertained in Wrottesley v. Bendish, 1733. 3 P. W. 235. how far a feme covert should be prejudiced by her answer, for in that case, upon the question whether the husband should answer jointly with his wife and not, Ld. Ch. Tulbot said he would not give any opinion, whether the answer might be read against the wife when discovere or not; but as in all times thencefore the wife, as well as the husband had been compelled to answer, he would not take upon himself to overthrow the constant practice, but he said he would not compel her to answer any thing which might subject her to a forfeiture, though the husband submitted to answer.

140. The consequence arising from the answer being considered as an admission only, is, that the objection of its being res inter alios acta does not apply as in case of other legal proceedings; therefore, in an action against B. the answer of A. his partner, to a bill filed against him by other creditors, was admitted as evidence of the facts stated in it. Grant v. Jackson, M. 1794. Peake's N. P. 203.

So was the voluntary affidavit of one man who was jointly interested with another in an action brought against them both. Viceroy's Ca. Gilb. Ev. 57.

141. The reason on which the rule was established, "that a copy of the whole judgment, and not a partial extract of it, must be produced to the jury," applies equally to proceedings in equity, and indeed every other written instrument. Brockman's Ca. 1701. Gilb. Ev. 51.

142. At law, a defendant is entitled to have his whole answer read; and so far was this rule carried in E. of Bath v. Battersea, 1694. 5 Mod. 10. that where defendant had answered, and on exceptions he put in a second answer, he was allowed to read that, in explanation of the general terms of the first answer on an information for perjury. Rex v. Carr, T. 1669. 1 Sid. 418. When, therefore, an answer is read, the party producing it makes the whole of it evidence for defendant, of the facts stated in it, yet not so conclusive but that plaintiff may contradict it by other evidence, or the jury may, from the result of the whole, draw their own conclusion, as to their belief or disbelief of the matters therein contained. Vide Bermon v. Woodbridge, T. 1781. Doyg. 758. (788.)

143. A different rule, however, prevails in courts of equity, for there the plaintiff may select a particular admission, and when that is read, defendant is obliged to prove the other facts stated in his answer by other evidence. Thus, where to a bill by creditors against an executor for an account, the executor answered that 1100l. was deposited in his hands by the testator, and that afterwards he
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gave a testator a bond for 1000l., by whom 100l. was presented to him for his trouble in making up the accounts, and in testator's general concerns, no other evidence appeared that testator had deposited 1100l. in his executor's hands, and it was held, that what was confessed by the answer, when it was put in issue, need not be proved by plaintiff, but that defendant should make out by proofs, what he insisted on by way of avoidance. This was held, however, under this distinction, that when defendant admitted a fact, and insisted on a distinct fact by way of avoidance, then he ought to prove the matter in his defence, because he may have admitted it from apprehension that it might have been proved, and therefore such admission ought not to profit him; but if it had been one fact, as if defendant had said the testator had given him 100l., it ought to be allowed unless disproved, for nothing of the fact, charged is admitted, and plaintiff may disprove the whole fact, as sworn, if he can, and upon its being urged that the probability was on defendant's side, Ld. Cooper said there was some presumption in that, but not enough to carry so large a sum, without better attestation. Anon. H. 1707. Gilb. Evid. 52. Vide autem Peake's Evid. 56. in notis.

144. An answer however may in one instance be read, without making the whole evidence, as where a person offered as a witness, has by his answer shown himself interested in the event of the cause, there that part of his answer which is read, in order to reject his testimony, does not entitle him to have any other part read, for that would be to defeat the purpose for which it was produced, and he would be giving his testimony, when by his own answer it appeared that he was an inadmissible witness. Sparrow v. Draz, M. 1676. Bull. N. P. 238.

145. The distinction at law and in equity, as to reading an answer, is this (said Ld. Eldon.) At law, if an answer is proposed to be read in evidence, the whole must be read, though there were declarations of Judges that there is no reason for reading the whole; and his Lordship said, it has often occurred to him, to consider, whether, in directing issues, the court should not attend more to its own rules of evidence, by which the effect of the depositions is contrasted with the answer read for the plaintiff, whether the practice of sending issues of fact to courts of law, proceeding by a rule perfectly different, without any direction on that head, is quite wholesome. His Lordship said, it had often been contended by him (amongst others) but never effectually, that, as on the trial of an issue or an action, the answer can be so treated at law; the court, if it had to determine on facts without sending the case to law, will depart from its own rules, as to what is, or is not to be attended to in contrasting the evidence with the answer read for the plaintiff, and a great delicacy has always prevailed in permitting an answer to be read for the purpose of showing by argument that it is not to be believed. The answer can be read only as evidence, for the purpose of being contrasted with the evidence of one or more witnesses; and his Lordship doubted whether it was possible to permit a party to read the answer, as that on which he relies, not because he believes, but because he discredits it; that, his Lordship said, was not the usual course of proceeding. Savage v. Brockopp, M. 1811. 18 Ves. 336.

146. An affidavit made by a man in the course of a cause is analogous to an answer. Brockman's Ca. 1701. Gilb. Evid. 52. But a voluntary affidavit not made in the course of a judicial proceeding, as one made by the vendor of an estate before a master, to show that the estate was free from incumbrances, must be proved to be sworn. Smith v. Goodier, M. 1683. 3 Mod. 36. Whereas, an answer on oath, is taken in all civil cases to have been sworn, without further proof than copies of the proceedings in the cause; (Gilb. Ev. 57.) and even on an indictment for perjury, proof of the handwriting of the master before whom it was sworn, and of the defendant himself, has been held sufficient evidence of the administration of the oath. Rex v. Morris, T. 1761. 2 Burr. 1189.

147. Depositions are not received as an admission of the party, like an answer, but as the next best evidence in the room, of what his adversary has been deprived of; therefore, though the deposition of a witness may be read, when he is dead, or cannot be found on the most diligent search, (Benson v. Oline, 1720. 2 Stra. 920,) yet not so while he is living, and to
be found for any other purpose than to confront and contradict him. *Tilly's Ca.* M. 1704. Salk. 286. Et vide *Baker v. Farfax*, T. 1717. 2 Stra. 101. However, where a witness who had been examined to an account in Chancery, and afterwards became blind, his deposition was allowed to be read at law, he being produced to support it by parol evidence. *Kingsman v. Crooke*, E. 1706. 2 Ld. Raym. 1166.

148. Though it be true that a private examination is not quite so satisfactory as a public one, yet still a deposition is the representation of the party on oath, and he may be cross-examined, for the commissioners are not confined to the strict words of the interrogatories, but they are bound to use all means to get at the truth. *Peacock's Ca.* 1611. 9 Co. 70.

149. The evidence of a witness on a former trial between the same parties, may, after his death, be read in a civil action upon producing the postea. *Coker v. Forewell*, H. 1729. 2 P. W. 563. *Secus* in a criminal prosecution. Sir John Fenwick's Ca. 4 State Tr. 265.

150. When witnesses reside abroad, or are about to quit the kingdom, or there is reason to apprehend their deaths, their depositions may be taken in a cause by consent of the parties, or under the direction of the court, on a bill to be filed for that purpose. And where the cause of action arises in India, the depositions of witnesses may be taken there and read in England, under the directions of statute. 3 Geo. 3. c. 63. s. 44, which has made such a provision in civil suits. Vide *Francisco v. Gilmore*, M. 1797 1 Bos. & Full. 177. But in these cases of secondary evidence, the party must be prepared to show that he is not capable of giving better; as where a witness was usually resident in England, or was examined there, proof must be given that he is out of the jurisdiction at the time his deposition is offered in evidence. *Anon.* E. 1701. Salk. 691.

151. The rule, that a verdict cannot be given in evidence, against a man who is not a party to the cause, applies equally to depositions, which are, as to strangers mere ex parte examinations, and therefore they cannot be admitted against him, unless in cases where the legislature has made them evidence against all persons; (Rutworth v. Lady Pembroke, H. 1608. Hard. 472.) as in case of bankruptcy, for instance, where by statute 5 Geo. 2. c. 50, it is enacted, that "all commissions and depositions, or any part of such depositions, may, on petition to the Ld. Ch. be entered on record, and in case of the death of the witnesses proving the bankruptcy, or in case the commission, or any of the proceedings under the same, shall be lost or mislaid, a true copy signed and attested, as therein is directed, shall and may on all occasions be given in evidence." If therefore a commission issue, and a witness prove an act of bankruptcy on a particular day, and die, his deposition, when enrolled, may be given in evidence to prove the act of bankruptcy, and the time it was committed, against any person whomsoever; and therefore if a creditor of the bankrupt levy execution against his goods after that day, the deposition so proved will overturn it. *Janson v. Wilson*, M. 1779. Doug. 244. (256.)

152. As to all equity proceedings, it is a general rule, that in order to give any interlocutory matter in evidence, a foundation must be laid by proving all its former stages. *Roch v. Rix*, Gilb. Ev. 56. As the bill to make way for the answer, the bill and answer, or the defendant's contempt for the depositions, &c. (Piercy v. ———, M. 1681. T. Jo. 164. Gilb. Ev. 65.) otherwise the whole bearing of the evidence would not appear; neither would the court see that the proceeding was regular; in which case the answer and depositions would have only the effect of a mere voluntary affidavit and which, if made by a stranger, could not be received in evidence, as the party would be deprived of his cross-examination, and if made by the party himself, then only as before-mentioned. *Anon.* E. 1655. Sty. 446. Further, if plaintiff's bill be dismissed for irregularity, as where a devisee revives the suit of his devisor, and several depositions are taken, and then the cause on hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot revive, then the depositions cannot be read in any other cause, for there was no cause regularly before the court. *Backhouse v. Middleton*, T. 1670. 1 Ch. Ca. 173. But if a cause was once regularly before the court, though the bill be dismissed by
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reason that the remedy was at law, than the depositions will be evidence. Smith v. Yeates, 1700. 1 Ld. Raym. 735.

153. The rule, that a judgment, when destroyed, may be proved by secondary evidence, applies equally to every sort of evidence. Roch v. Rix, supra. Et vide Barclay's Ca. H. 1698. 5 Mod. 211. Therefore, where it appeared from the evidence of the proper officer that the office had been searched, and that the bill could not be found, the answer alone was permitted to be read. Blow v. Ketchmore, E. 1666. 2 Keb. 31. So, ancient depositions have been received as evidence without bill or answer, but to entitle a party to deviate so much from the general rule, he ought to show great length of time, or some other reasonable evidence, to show that the bill had once been there, and to account for its loss. Peake's Ev. 67, 68.

154. A decree in equity being equal to a judgment at law, is governed by the same rules, and is only evidence against parties to the suit, or claimants under them, where it respects private questions; but in public cases it is evidence against all persons standing in the same situation as the parties to the suit. Case of Manchester Mills, E. 1761. Doug. 222. note 13. A decree, however, cannot be read in evidence of its own contents, while it remains on paper, without also proving copies of the bill and answer, unless they are stated in it at full length; but when the decree has been exemplified under the seal of the court and enrolled, it is evidence of itself. Lytt. Thane v. Paterson, E. 1739. Bull. N. P. 235. And in the latter case, the opposite party may show that the point in issue in that suit differed from that before the court; yet in Wheeler v. Louth, 1711. Com. Dig. tit. Evidence, c. 1. Trevor, C. J., held it sufficient, if the bill and answer were recited in the decretal order; but if only so much be recited as is necessary to introduce the decretal part, the bill and answer must be proved. Le Cauz v. Eden, E. 1781. Doug. 579. (601.)

Doubts, however, have existed, whether the decree under seal, which does not state the bill and answer, can be read without evidence of those proceedings. Vide Trowell v. Castle, E. 1661. 1 Keb. 21.

155. Upon petition in this case, the Ld. Ch. ordered the proceedings under a commission of bankrupt, which had been superseded, to be produced at the hearing of a cause in the court of Chancery in Ireland, not as a matter of course, but with a view to extract evidence from the bankrupt's examination; and Ld. Ch. said, where papers are of record in another court of justice, this court says, if they would be evidence, they must be used at the hearing, saving all just exceptions, but in that instance the determination is upon the production in this court of papers, for which the party can apply to the other court, de jure. Exp. Bernal, M. 1805. 11 Ves. 557.

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EXCHANGE

1. In exchange of estates, it is not clear if there is an alienation by one of the parties, and an eviction, that the heir at law or alience should enter. Coventry v. Coventry, T. 1742. 2 Atk. 366, 369.

2. Where, in the case of exchange, there was no title to the lands taken in exchange, and by arrangement, or by eviction, the lands conveyed in exchange were restored, those lands which were conveyed after testator's will, continuing under the effect of that conveyance, at the death of the deviser and long after, shall pass by his will, in consequence of the circumstances undoing the arrangement, but no case has been decided, that, on account of the nature of an exchange, if it is not undone till after the death of the deviser, it is not a revocation of the will. The difference between disseisin
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and exchange is, that the former is not the act of the party, for it is against his will, but exchange is an act of his own will, and the right of entry, matter of his own choice. There is another difference as to what may influence his choice, for, in disseisin, he loses, without getting any thing in lieu, as he does by an exchange upon an implied condition certainly for a right of entry, in case of eviction, if he thinks proper; but there may be many cases in which he may not think proper to exercise that right. Suppose, after the exchange, a rich mine were discovered on the estate, to which a good title could not be made, and by the profits of that mine, more might be made in one year than the value. Suppose an eviction by a third person, and the other party having a good title to the lands, he took in exchange, desires to exchange again, and to have an account of the profits of the mine, he may say he is satisfied, and refuse to exercise the right of entry. 


3. A power of exchange does not include a power of sale. McQueen v. Farquhar, T. 1805. 11 Ves. 473. Nor can a power to exchange be executed by a partition, (at semb.) for, until there has been a partition, there cannot be an exchange. S. C. ibid. 476.

4. Where plaintiff's bill alleged an agreement for an exchange, which was in part performed by his having purchased an estate for that purpose, the court will restrain defendant from selling until answer. Curtis v. Marq. of Buckingham. M. 1814. 3 Ves. & B. 163.

EXCOMMUNICATO CAPIENDO.

1. Motion to supersede the writ of excommunicato capiendia, 1st, for want of addition, and 2dly, because it was not said, that defendant was commorant in the diocese. Both exceptions were disallowed. But the court thought that after the writ had issued out of Chancery, and then been brought into B. R., and there delivered to the sheriff, but not actually returned into B. R.; the court, on plain error appearing, may supersede or quash it. Rex v. Burrow, E. 1718. 1 P. W. 455. Vide Trebec v. Keith, 2 Atk. 498. Exp. Little, 3 Atk. 479.

2. One that had been a prisoner in Newgate for debt, but since removed to the Fleet, was excommunicated. The court of Chancery will not direct the curator to make out a writ of excom. cap. to the warden of the Fleet, for it is a viscountiel writ, but the writ may be directed to the sheriff, who may return non post inventor, and on this return B. R. may grant an habees corpus, and thereupon charge him with an excom. cap.—Strudwick's Ca. T. 1730. 3 P. W. 53.

3. K. was cited to the Bp. of London's court, for officiating as a clergyman without license in a chapel of ease; and being for 40 days denounced excommunicate for contempt, upon the bishop's certificate, a significant issued in Chancery.—Upon a motion to quash the writ of signif., Ld. Hardwicke overruled all the exceptions, and held, that there was sufficient to warrant a writ of excom. cap. Dr. Thebec v. Keith, H. 1742. 2 Atk. 498. Vide Exp. Little, 3 Atk. 479.

4. A man may be resident in one diocese, and come into another to commit the offence charged upon him in the significant. This, for the purpose of being cited, is a sufficient residence, and he may be prosecuted in the diocese where the offence was committed. S. C.

5. The court cannot do any thing after an excom. cap. is returnable, for B. R. has the cognizance, and that court can compel the sheriff to return it, and the application to quash it must be there; but if the writ issued in vacation, and is not returnable, equity will relieve by discharging defendant out of custody. Exp. Little, E. 1747. 3 Atk. 479. Vide Barlow v. Collins, 1 P. W. 436. (in n.)

6. An executrix in custody, under a
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1. Of executions there are seven sorts only; 1st. Upon a Statute Merchant; 2d. On a Statute Staple, (in both these it is against the body, lands, and goods, and the creditor holds the lands till he is satisfied, but his interest in them is only a chattel;) 3d. Upon a Recognizance, against body, lands and goods; 4th. Upon an Easement, against lands and goods, here too the creditor holds the lands till he is satisfied, but in the third sort the sheriff must levy; 5th. Upon a Capias ad satisfaciendum against the body only; 6th. Upon a Fieri Facias against the goods only; and 7th. Upon a Levant against the profits of the land, and this is the old common law execution. *Dict. per Lifford*, C. in Aylmer v. Beliew, Vern. & Scriv. 26.

2. Where the bailiffs who levied an execution, for breach of an injunction, found money in the house, and carried it away, the party at whose suit the execution issued, was decreed to make satisfaction. *Childers v. Saxby*, M. 1683. 1 Vern. 207.

3. By marriage articles, the household goods, plate, &c. of the wife, were vested in trustees, to the use of the husband and wife for their lives, and vesting the absolute property in the survivor. A. got judgment against the husband, and levied execution on these goods, and the sheriff being indemnified, returned nulla bona, on which A. brought his action against the sheriff, and recovered. Then B. obtained a judgment, and the same proceedings were had. Upon this the wife’s trustees brought their bill for relief, but the court refused it, the property of the goods being in them at law only. In
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junction is dissolved. Morris v. Hankey, M. 1792. 3 P. W. 140.

8. *Choses in action* are not liable to an execution, but the creditor may compel satisfaction either by taking the person or proceeding to an outlawry, and taking the lands and effects by a capias utlegatum. Though in all cases of chattels in possession, the first satisfaction, if a debtor assigns a legacy after a *f. fa.* for a valuable consideration, and without notice, it will prevail against the execution. Edgill v. Haywood, T. 1746. 3 Atk. 356.

9. A leasehold estate is affected by an *elegit or fieri facias,* from the time it is lodged in the sheriff’s hands, and if the debtor afterwards makes an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be entitled to the possession. Burden v. Kennedy, T. 1757. 3 Atk. 739.

10. Where A. was in execution for costs, and a superior demand upon B. who took him, arose to A. as executor, he shall not be discharged on motion, for this can only be done on equitable grounds, as under the statute of set-off. Holworthy v. Allen, H. 1786. 2 Bro. C. C. 17.

11. *Choses en action,* such as stock debts, &c. not being liable to creditors cannot be taken on a *levati facias,* neither can they be touched in equity. Dunias v. Dutens, T. 1790. 1 Ves. jun. 196.

12. There is no instance of this court giving execution against stock *in nomine,* upon which there is no lien. Nantes v. Corrock, M. 1803. 9 Ves. 189.

13. Where the body is taken in execution, the debt is satisfied to all intents and purposes, and where a bankrupt is taken in execution after the commission has issued, the effect is an election, without regard to the motive. Exp. Knowell, M. 1806. 13 Ves. 192. Vide *etiam* Exp. Warder, 1 Co. Bank. L. 132. where an agent took a bankrupt in execution without authority, and it was held an election.

14. By stat. 56 Geo. 3. c. 50. no sheriff can sell any of the produce of a farm, nor any manor where the tenant has covenanted with his landlord to expend it on the land, and the sheriff must give the landlord notice of such execution. The sheriff, however, may sell, subject to an agreement to expend it on the land, or he may assign such covenant to the landlord.

15. A sheriff levying on goods alleged to be in settlement, cannot maintain a bill of interpleader, for he levies at his peril; and a plaintiff in such a bill admits a title against himself in all the defendants, and he cannot say that as to some, he is a wrong doer. Stringby v. Boulton, H. 1818. 1 Ves. & B. 334.

16. The landlord of premises, where goods have been seized under an extent in aid, cannot (under the 8th Anne, c. 14. s. 1.) call on the sheriff to pay 12 months’ rent, due before the terse of the writ. Rex v. De Curs, M. 1815. 2 Price 17.
EXECUTORS AND ADMINISTRATORS.

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EXECUTORS AND ADMINISTRATORS I.

Power and Duty; how favoured in Equity; where punished for Default, or personally liable for each other’s Acts.

1. If A. gives legacies and makes B. and C. executors, and D. makes C. and D. his executors, and dies, and they possess themselves of the estate of A., they may be both charged in equity, though at law the executorship survived to C.; and D. is not privy, yet A.’s estate shall be liable in whatsoever hands it may be:

Resolved, upon demurrer, in Nicholson v. Sherman, T. 1663. 1 Ch. Ca. 57. 2 Freem. 181. Vide Stiddolph v. Leigh, 2 Vern. 75. that a creditor may always follow his debtor’s estate, even though assigned by the executor.

2. It was suggested in this case, that the testator’s will was unduly obtained, and that the executor was insolvent. The will being litigated in the spiritual court, it was ordered, that the debtors to the testator should forbear to pay, until the matter was settled in the spiritual court, though it was urged, that insolvency might be imputed to every executor.—Smallpiece v. Anguish, E. 1666. 1 Ch. Ca. 75.

3. An heir being sued, paid a bond out of his ancestor, and then brought his bill against the executor to be paid of the personalty. The executor delivered up a bond of testator’s, and took another bond from the obligor, in which I. S. was bound as surety with him.
EXECUTORS AND ADMINISTRATORS I.

Their Power and Duty, &c.

Though this was a conversion of so much of testator's estate at law, yet decreed, that the executor should not be chargeable, as the security was intended to be bettered by it, but that he should assign a security to the heir. *Armitage v. Metcalfe*, E. 1686. 1 Ch. Ca. 74.

4. Equity will oblige an executor to pay arrears of rent, though the person of the testator was not liable. *Etton Coll. v. Beauchamp*, H. 1668. 1 Ch. Ca. 121.

5. If a widow possesses herself of the personal estate of her husband, under a revoked will, and pays debts and legacies without notice of the revocation, such payments shall be allowed to her. *Hole v. Stowell*, E. 1669. 1 Ch. Ca. 126.

6. A legacy was given to a child, 10 years old, and the executor paid it to his father for his benefit; the father became insolvent. The executor shall not be obliged to pay it over again. *Sed secus*, if the executor had taken security from the father, for then he paid it at his own peril. *Holloway v. Collins*, H. 1675. 1 Ch. Ca. 245; this point, however, seems now to be settled. *Et vide Dagley v. Telfory*, M. 1715. 1 P. W. 285, where the executor was held liable; and it seemed a hard case, for the testator on his death-bed desired the legacy might be paid to the father, in order that he might improve it for his son's benefit, which circumstance is not mentioned in Gilbert's Rep. of S. C. ib. 103. nomine Dawley v. Balfrey; but Ld. *Couper* thought it right so to determine, as a precedent, the father having bound his son down in a promise not to trouble the executor, for that he would make good the legacy, which he never had the power to do. *Vide 1 Eq. Ab. 300. pl. 2. Et vide his Honour's observations on this case, in Cooper v. Thornton, 3 Bro. C. C. 96. Vide etiam *Philips v. Paget*, 2 Atk. 81.

7. But where an administrator possessed of the intestate's goods, gave legacies, and died; and his executor, without compulsion, and pending a suit in right of the intestate to recover the goods, paid the legacies; the court would not relieve him, for his payment was voluntary, and with notice that the intestate's right to the goods was controverted. — *Hodges v. Waddington*, 1678. 2 Ch. Ca. 9.

8. An executrix having money in the hands of I. S., to a share of which she was entitled in her own right, entrusted him to put it out at interest for her, which he did, and the security proved defective. She shall not be responsible for the loss. *Gibbs v. Herring*, M. 1692. Pr. Ch. 49.

9. Chancery has power to compel executors to give security, where they are considered as trustees for legatees, and there is no agreement; but it will not alter the powers of an agreement. *Warrington v. Langham*, H. 1698. Pr. Ch. 89.

10. Testator gave several legacies, payable as soon as might be, and his estate consisted principally of stock. The executor gave bonds for the legacies, but he kept the stock till it fell so low that he had not assets. The court would not relieve him against his bonds, but ordered him to account for the stock at the value it was at the end of a year after testator's death. *Keyinge's Ca. H. 1702. 1 Eq. Ab. 239. pl. 29.

11. In general, an executor is a complete executor before probate, to all purposes but bringing actions, for he may relieve an action, assent to a legacy, may be sued, may alien or otherwise meddle with testator's goods; for by acts of administering, the executor has taken upon him the whole administration before probate, and is thereby entitled to receive testator's debts; and all payments made to him are good, though he should die and never prove the will. *Wankford v. Wankford*, H. 1702. 1 Salk. 301. 306, 307.

12. If an executor or administrator puts out money on a real security, which at that time there was no reason to object to, and afterwards such security proves bad, he shall not be accountable for the loss. *Brown v. Litton*, E. 1811. 1 P. W. 141.

13. If a man detains the goods of an intestate, the administrator must bring trover at law, for he cannot sue for them in the ecclesiastical court. *Sadler v. Daniel*, E. 1771. 10 Mod. 21. Where an administration is repealed, all acts which a rightful administrator might have done, shall be allowed. *Assn. M. 1706. Com. Rep. 150.

EXECUTORS AND ADMINISTRATORS I.

15. Two executors (one of them testator's banker) joined in a receipt, but only one of them actually received the money; they are both liable to creditors, but not to legateses; for creditors are entitled to the utmost indulgence of the law, but legateses have no remedy for their demand but in equity. *Churchill v. Hobson*, M. 1715, 1 P. W. 241. Salk. 318. This distinction between creditors and legateses, however, does not appear by the decree, nor has it been adopted in later cases. *Vide Sadler v. Hobbs*, 2 Bro. C. C. 117. But where two trustees join in a receipt, and one only receives the money, only the receiving trustee shall be charged. *Churchill v. Hobson, supra*. *Vide Fellows v. Mitchell*, 1 P. W. 81. *Aplin v. Brewer*, Pre. Ch. 173. Anon. Mos. 35. *Leigh v. Barry*, 3 Atk. 584. *Exp. Belchier*, Amb. 219. *Read v. Truelove*, ibid. 417. *Scurfeld v. Howes*, 3 Bro. C. C. 90. But in *Westley v. Clarke*, 1 Edin 359, *Northington*, C. said, that the distinction between trustees and executors, seems not to have been taken with precision sufficient, to establish a general rule; however, the rule now appears established, and in *Sadler v. Hobbs, supra*. It appears agreed, that a trustee shall not by the mere act of joining in a receipt become liable to answer the money in fact received by his co-trustee; but (notwithstanding the inclination of *Ld. Harcourt* and *Ld. Northington* to favour executors under similar circumstances) where by any act done by one executor, any part of the estate comes to the hands of another executor, the former will be answerable for his companions, in the same manner as if he has enabled a stranger to receive it.

16. A mortgage came to an executor, who received the mortgage-money, and paid it away to testator's creditors. Afterwards it appeared that the mortgage had been satisfied in testator's life-time. The executor must refund, though he had before paid the money away in debts which he had not otherwise assets to pay. *Pooley v. Ray*, T. 1717. 1 P. W. 325.

17. Where a legacy in a will is forged, the executor should prove the will in the spiritual court, with a special reservation as to that legacy, for he can have no remedy against it in equity. *Plume v. Beale*, M. 1797, 1 P. W. 338. *So Kerrick v. Bransby*, 3 Bro. P. C. 358. *Bennet v. Vol. I. 90


18. A was indebted to B. on bond; B. in his last sickness desired hisexecutor not to trouble A. for the money, but the executor sued him to judgment and execution. Equity decreed the bond to be cancelled, and satisfaction acknowledged; and that the executor should pay A. his costs; but the Lords reversed the decree as to the costs. *Vide Wekett v. Ruby*, H. 1724, 3 Bro. P. C. 16.

19. Where a term for years was devised to A. for life, remainder to B., and the executor assented to the devise to A.; this was held a good assent to the devise over. *Adams v. Piers*, T. 1724, 3 P. W. 12.

20. The interest of an executor, arises not from the probate, but from the testator, and therefore he may release a debt or assign a term before probate; but the right of an administrator arises from the ordinary; and an administration properly defined, is a private office of trust, being more than a bare authority, and yet less than the interest of an executor. *Hudson v. Hudson*, M. 1757, 1 Atk. 461. *Vide Wills v. Rich*, 2 Atk. 286. (n. 1.) *Mead v. Ld. Orrery*, 3 Atk. 239. An administrator may sue his bailiff or attorney in his own right, and need not name himself as administrator. So in an action of trover. Hudson v. Hudson, *sup.*; for administration is an office that survives, and administrators come in the place of executors. *Adams v. Buckland*, 2 Vern. 514.

21. An administration taken out in England, will not extend to the American colonies; but an agent there who gets in assets under an exemplification of a probate, is equally chargeable, as if the executor got them in himself. *Atkins v. Smith*, M. 1740, 2 Atk. 69.

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23. Bill by a creditor of an intestate for 100l. on note, charging that the administratrix promised to pay, as soon as she could get in effects. Plea, the stat. of limitations, and that she made no promise to pay: this is too general, for she should have pleaded she made no promise to pay out of assets. Anon. E. 1743. 3 Atk. 71.

24. If a man adds in his will, that if his executor should be attainted of felony or treason, another should stand in his room. If the person be attainted in the testator's life-time, the substitution is good. Carre v. Carre, E. 1744. Ridg. Ca. temp. Hardw. 210. 6 Atk. 174. Amb. 28.


26. The Ecclesiastical court can compel an administrator to exhibit an inventory, at the instance of a single creditor; S. C. but a creditor cannot compel an administrator to prove his inventory in that court. Bellamy v. Alden, Latch. 117. cited in S. C.

27. An executor or administrator in trust cannot be examined as a witness, for an executor is answerable for devastit, &c. which may give an improper bias to his mind, and the possibility of mal-administration has induced the court to reject him as a witness; but a trustee is considered as having no interest at all, and is examined by order every day. Foster v. Pate, H. 1747. 3 Atk. 604. Vide Goss v. Tracey, 1 P. W. 290. Croft v. Pyke, 3 P. W. 181. Man v. Ward, 2 Atk. 229. Maben v. Metcalf, 3 Atk. 96. Goodtitle v. Welford, Doug. 134. Luwe v. Jolliffe, 1 H. Bla. 365.

28. The power of an executor is not determined by the death of one, but the whole survives to the other, and he may assent to the legacy. Flanders v. Clark, T. 1747. 3 Atk. 509. 1 Ves. 9. Vide Hodgson v. Bussey, 2 Atk. 89. (n.)

29. Where an insolvent executor is getting the assets before probate, the court will restrain him, and direct the money to be paid into the bank. Smith v. Aykwood, M. 1747. 3 Atk. 566. Vide Phripp v. Steward, 1 Atk. 286. Powis v. Andrews, 2 Bro. P. C. 476.

30. An executor, as he is in autre droit, unless he has proved testator's will, is not entitled to bring a bill of interpleader, till as standing in his place he has made himself a debtor; neither can he declare before probate, though he may bring an action. Mitchell v. Smart, E. 1748. 3 Atk. 606. Vide Wills v. Rich, 2 Atk. 286. (n. 1.)

31. Where an executor admitted assets, the court made a personal decree against him, with interests and costs; but the court will not pin down an executor to an admission of assets under circumstances, as where the money is in a banker's hands; for the bank may fail, and that will not bind the executor. Horsley v. Challoner, M. 1750. 2 Ves. 83. 85. As to the liability of an executor, with regard to assets, vide Wall v. Bushby, 1 Bro. C. C. 484. Newton v. Bennett, ibid. 359. Perkins v. Baynton, ibid. 375. and the cases referred to in 1 Bro. C. C. 339. 362.

32. So where defendant, as administrator, was decreed to account for assets, and had delivered goods to her solicitor, who was robbed, defendant was held not chargeable. Jones v. Lewis, E. 1751. 2 Ves. 240.

33. An executor not exhibiting an inventory, and having without difficulty paid all legacies but one, was held to have afforded sufficient evidence of assets against himself, to answer that legacy as well as the rest, together with interest. Orr v. Kains, E. 1751. 2 Ves. 194. Vide Coppin v. Coppin, 2 P. W. 296.

34. One by will, after giving several legacies, appointed two persons to receive and pay the contents before mentioned: Held, by the Ecclesiastical court, to be a proper appointment of them as executors. Pickering v. Tuckers, T. 1758. Amb. 364.

35. Testator had directed that his executors should not be liable for each other's acts, one of them (in good credit) having called in a mortgage, and received the money, sent the assignment to his co-executors, who executed it, and signed a receipt: Held, that as no part of the money had come to the hands of the others, they should not be answerable. Westley v. Clarke, T. 1759. 1 Eden 357. 1 P. W.
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82. (n.) This case, though doubted by Ld. Thurlow in Sadler v. Hobbs, 2 Bro. C. C. 117. has, in consequence of the peculiarity of its circumstances, never been expressly denied. Et vide Churchill v. Hobson, 1 P. W. 241. Salk. 318. ante, pl. 15. and note there, to which may be added Mr. Eden's note in the present case, as being a decision approved of by Ld. Alvanley in Hovey v. Blakeman, 4 Ves. 596 and also Harden v. Parsons, 1 Eden 147. See also the several cases referred to in ib. 361. where the old rule was recognised and established.

36. If an executor lay out the assets on private securities, all the benefit made thereby shall accrue to the estate, yet the executor shall answer all the deficiency; and the good conduct of the executor cannot prevail against the general rule. Adye v. Feuilleteau, E. 1, 83. 1 Cox 24.

37. Executors drew a joint draft, signed by both, for property of their testator, and suffered it to remain in the hands of a tradesman, who became bankrupt: both are liable, though one of them had done no other act in the execution of the bill. Sadler v. Hobbs, T. 1786. 2 Bro. C. C. 114. Vide Churchill v. Hobson, 1 P. W. 241. Salk. 318. and Westley v. Clarke, 1 Eden 337. 1 P. W. 82, (n.) ante, pl. 35.

38. Where a legacy was left to A. on marriage, with consent, and till marriage, interest to be paid at 3 per cent. The executor laid out the money in the funds, in trust to pay the legacy, with interest at 3 per cent, and to pay the surplus to him. This is not a good appropriation, and the executor shall make it good if the stock sinks in value. Cooper v. Douglas, T. 1787. 2 Bro. C. C. 251.; for a trustee cannot bargain for himself, so as to gain an advantage. Forbes v. Ross, M. 1788. 2 Bro. C. C. 430.

39. Testatrix being possessed of a mortgage for 500l. directed her executors to permit S. and her assigns, to receive the interest for life, and if the mortgage should be paid off, then the principal money to be laid out in government securities, and the interest to be applied to the same use, and after the death of S. testatrix gave the principal to A. and B. and appointed C. and D. executors. The mortgage-money was paid to D. who became insolvent. C. joined in the conveyance to the mortgagee, and in the receipt, but neglected to see to the reinvestment of the money. Per M. R. The case of Sadler v. Hobbs, (2 Bro. C. C. 117.) must determine this. His Honour denied the rule that two executors joining in a receipt are both liable, or that an executor cannot in any case be discharged from a receipt given for conformity. In a court of law, his Honour said, the receipt might be conclusive evidence of receiving the money, but it was not so in equity: Held, the estate of D. only liable. Scurfield v. Hovse, E. 1790. 3 Bro. C. C. 91. Note, his Honour said, that till Westley v. Clarke, 1 P. W. 83. (n.) there was no case where an executor joining in a receipt had been held liable. In Murrell v. Pitt, 2 Vern. 570. the executors were mere Trustees, who had sold out the stock and divided the money, and upon the insolvency of one the other was held liable, for it was a voluntary act.

40. Where testator gave legacies to certain persons, by the description of his very good friends, and afterwards desired them to act as executors. One of them admitted he had not proved the will, or acted as executor; but he claiming the legacy, held, that he could not have it, without acting, or at least proving the will. Read v. Devaynes, T. 1790. 3 Bro. C. C. 95.

41. An executor who has not proved his testator's will, is not considered as acting merely by assisting a co-executor, who had proved, in collecting debts. Nor by writing directly to a debtor of the testator, and requiring payment. Orr v. Newton, T. 1791. 2 Cox 274. Vide Lawson v. Copeland, 2 Bro. C. C. 126.

42. A co-executor who proved, but never acted, cannot be charged by receiving a bill by the post, on account of the estate, and sending it immediately to the acting executor. Balchen v. Scott, T. 1795. 2 Ves. jun. 673. Vide Hovey v. Blakeman, 4 Ves. 596. Bacon v. Bacon, 3 Ves. 331.

43. Where executors were, by the will, with all convenient speed, to pay debts, and lay out the residue in mortgages, they were held not answerable for a loss occasioned by the insolvency of testator's banker, who had sold negotiable securities deposited with him by testator, Routh v. Howell, M. 1797. 3 Ves. 565. Vide Knight v. Ld. Plymouth, 3 Atk. 480. 1 Dick. 120.

44. An executor who died before probate, was held entitled to a legacy, given for his care and less of time in the exe-
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45. If an executor of his own accord, does what the court would have approved, it shall stand good. Lee v. Brown, M. 1798. 4 Ves. 369; and this principle has been established since. Andrews v. Partington, 3 Bro. C. C. 60. 401.

46. One executor in trust, is not answerable for the receipts of the other, merely by taking probate, permitting him to possess assets, and joining in acts necessary to enable him to administer, for joining in a receipt, perhaps not actually necessary, is not conclusive against an executor, any more than against a trustee, to charge him with the receipts of his co-executor. Sed secus, if the executor goes further, and concurs in the application of the money. Honey v. Blakeman, E. 1799. 4 Ves. 596. 608.

47. The executors of a receiver admitting assets, are bound to answer what upon a subsequent inquiry was found due for interest. S. C.

48. Where a bill of exchange was remitted to two agents, payable to them personally, and on the death of the person remitting, they were found to be his executors, the mere indorsement of one after they became executors, to enable the other to receive the money, is not sufficient to charge him who did not receive it. S. C.

49. An executor in trust for infants, in this case, though innocent, was charged with an incautious payment, having paid money under a written obligation, executed abroad under a counter-security, acknowledging the payment to be much more than the debt, and an undertaking to pay over the surplus; neither instrument was transferred, but the executor was allowed to try the question at law. Vez v. Emery, M. 1799. 5 Ves. 141.

50. Where executors neglect to call in money lent by their testator on bond, they shall be chargeable with loss, for they ought not, without great reason, to permit money to remain on personal security longer than is absolutely necessary, especially where infants are concerned. Powell v. Evans, E. 1801. 5 Ves. 839.

51. An executor cannot buy up debts for his own benefit. Exp. Lacey, H. 1802. 6 Ves. 628. For the cases of this class, vide post, sec. vii. et tit. Trust, iv.

52. The court will protect an executor in doing what it would order. But a transfer by an executor immediately after testator's death, to secure a debt of the executor and future advances, under circumstances of gross negligence, is a clear misapplication of assets, though not a direct fraud, and it shall be set aside by general legatees. Hill v. Simpson, T. 1802. 7 Ves. 152.

53. In many respects, and for many purposes, third persons may consider executors as absolute owners. S. C. ibid. 166. A power of disposition generally is incident to an executor. S. C. ib.

54. One executor and trustee was charged, under the circumstances of this case, with a loss occasioned by joining in the sale of stock, the other having received all the money and absconded. Chambers v. Mischin, T. 1802. 7 Ves. 186.

55. It is a general rule, that executors joining in a receipt are all chargeable: in the case of trustees, only the person receiving the money. But Ld. Ch. disapproved of the relaxation of that rule in favour of executors. S. C. ib. 198. Note. In this case, Ld. Ch. stated the reason of the distinction between executors and trustees in their liability. Vide etiam Westley v. Clarke, 1 P. W. 83. Pre. Ch. 178. Sadler v. Hobbs, 2 Bro. C. C. 114. Hovey v. Blakeman, 4 Ves. 596. Et vide Crosse v. Smith, 7 East 246. where it was held, that, when an executor once has the assets of his testator under his control, he is as responsible for the misapplication of his co-executor, as he would be for any other agent less accredited.

56. Leasehold estates specifically bequeathed to an executor, were by him assigned as a security for his own debt. No collusion appearing, that assignment was established against a creditor. Taylor v. Hawkins, E. 1803. 8 Ves. 209.

57. An executor having, under a misconception of a will at the trial of an issue upon a debt, entered into an improper compromise with the creditor, expressly subject to the approbation of the
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The money be actually received by one only; for it amounts to a direction by the other to pay his co-executor. Secus, if the signing be of necessity, and the money not under the control of both. S. C. ibid. 341.

65. A was named executor in a will, and acted on behalf of particular legatees, but disclaimed any intention of interfering generally. He afterwards renounced formally in favour of B., who was named a trustee in the same will, and who thereupon obtained administration cum test. annexo, and as such possessed himself of the assets, and afterwards died insolvent: Held, that A., notwithstanding his renunciation, was liable and answerable for the acts of B., it appearing that he had a control over the assets, and it being considered that B. obtained possession of them by his means; for, said Ld. Rededale, it is easy for a man who is named executor, to put himself out of all difficulty by declining to act; but where an executor does act, he cannot be discharged as against creditors, though as against legatees he may, for creditors are not bound by the terms of the will as legatees are. Doyle v. Blake, M. 1804. 2 Sch. & Lef. 231.

66. Where executors are jointly charged, and one only has received the money, though the other joined in the receipt, they are charged, on the ground that the property is under the control of both, and the question in such case then is, whether the executor joining in the receipt had a control, and of that his joining in the receipt is evidence. S. C. ibid. 242. Et. vide Westley v. Clarke, 1 Eden 360.

67. Executors, in order to be discharged, must either wholly renounce, or put the administration of the assets into the hands of a court of equity. S. C. ibid. 245.

68. An executor bound to accumulate, cannot account as if the money had been laid out in the funds, if it was not so laid out, or being so, he had sold out at an advance. Raphael v. Bohm, T. 1805. 11 Ves. 108.

69. Executors are chargeable for their negligence, if they join in a transfer to a co-executor, upon his representation that it was required for debts, but they are not liable, so far as they can prove the application to that purpose, though he possessed other funds, part of the assets,
not through them, and had wasted such funds; and the court held, that, to discharge a co-executor, the act must be necessary for the purposes of the will, and he must use reasonable diligence in inquiring into the truth of the representation. Shipbrook v. Hinchinbrook, T. 1805. 11 Ves. 252.

70. An executor doing any act by which the trust property gets into the property of another executor, though with an innocent motive, is equally answerable. Secus, if he is merely passive, and acquiescence on the part of the custos que trust will bind him. Langford v. Gascoyne, T. 1805. 11 Ves. 333.

71. At law, where trustees join in a receipt, prima facie they are all to be considered as having received the money; but it is competent for a trustee, and if he means to exonerate himself from that inference, it is necessary he should show that the money acknowledged to have been received by all, was in fact received by one, and the other joined for conformity. In the case of executors, it has been well said to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and therefore answerable for the application, so far as it is connected with the particular transaction in which he joins. It is much safer, therefore, for executors to abide by a general rule of that sort, than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds. Bricc v. Stokes, T. 1805. 11 Ves. 324.

72. The court will not appoint a receiver merely because an executor is in mean circumstances; secus, upon his misconduct. Anon. H. 1806. 12 Ves. 4.

73. A. by his will directed all his property and effects should be vested in B. preferable to any executor or administrator, upon and after his decease, for all and every the purposes in a certain agreement expressed or intended: Held, that the probate obtained by B. as executor, was conclusive, and that he was not a trustee for the next of kin, upon purloin evidence of declarations subsequent to the will. Walton v. Walton, M. 1807. 14 Ves. 318.

74. In equity there is a distinction between an executor in trust, and a bare trustee, the former being liable to actions is deemed interested in the increase of the funds, and therefore not a competent witness. Sed secus as to a bare trustee. This distinction however does not prevail at law. Belleso v. Russell, H. 1809. 1 Ball & Be. 99. Et vide S. C. ante, tit. Evidence, i. pl. 23. and the cases there referred to.

75. In equity an executor cannot be a witness to increase the testator's funds, but at law he may. (a) And an executor in trust is in the same situation. Malvany v. Dilton, M. 1810. 1 Ball & Be. 414. Vide (a) Floyd v. Powis, MS. Ca. cited by Manners, C. Et vide Ma-


76. The power given to an executor over his testator's property is very large, that he may better execute his trust, and prevent the inconvenience of implicating others, in inquiries into his application of the testator's assets. McLeod v. Drum-

mond, T. 1810. 17 Ves. 152. Et vide S. C. at large, post, sec. xi. of this title, with reference to the cases as to an executor's power over the assets of his testator. See also sec. vi as to a Devastavit.

77. Testamentary trustees are indemnified, though there is no direction in the will for that purpose, for the court infuses an indemnity clause in every will, Dawson v. Clark, T. 1811. 18 Ves. 254.

78. An executor claiming under the will, and also by a gift from the testatrix when living, was proceeding to sell the effects of the deceased. On a strong affidavit of undue influence in the executor, and that the produce of the effects would be irrecoverable if converted into money; the court (considering that an administration pendente lite, would not help plaintiff) granted an injunction against the sale. Edmunds v. Bird, E. 1813. 1 Ves. & B. 542. Vide King v. King, 6 Ves. 172. Richards v. Chavez, 12 Ves. 462.

79. An assignment of part of testator's assets, and a judgment confessed to a creditor by one executor, is not available against the dissent of the others, on behalf of the general creditors; though, perhaps, the court would not interpose against the particular creditor, or deprive him of any legal advantage if the property had actually passed. Lopard v.
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Vernon, E. 1813. 2 Ves. & B. 31. Vide
Elwell v. Quash, 1 Stra. 20.

80. Where one who is named executor under a will proves it, and deals with the estate, it is not competent for him to say, that he acts under a delegated power from the other executors, or in any other character than as executor. Graham v. Kebbe, T. 1813. 2 Dow P. C. 24.

81. Two executors and trustees were appointed, but one of them did not act otherwise than by joining in the sale of stock, under a representation that the sale was necessary for payment of debts, which it was not. The co-executor and trustee received the money, and applied great part of it to his own private use: Held, that the not-acting executor was chargeable for the amount, except such part as was applied to the purposes of the trust, and also to interest at 4 per cent., even though the parties beneficially interested, consented to the sale under a similar misrepresentation. Underwood v. Stevens, T. 1816. 1 Meriv. 712.

82. It is a general rule, that executors must deposit papers and writings in their hands, for the benefit of the parties interested, unless there are purposes which require, that they should retain them.—Freeman v. Fairlee, T. 1817, 3 Meriv. 30.

83. So where executors are unable to state whether houses, the rent of which they have received as executors, are leasehold or freehold, they shall not be allowed to set up the title of the heir as between themselves and the personal representatives. S. C. ibid. 35.

84. Where an executor admitted that his testator's property amounted to near 40,000l. and that the whole was invested in India on public securities, either in his name or in the name of the house in which he was partner, but subject to his disposal, unless some part was in the hands of the said house at interest, which he believed might be the case, was not a sufficient admission of money in his hands, to order the payment of any part of it into court, but where an executor deals with money in his hands, he is bound to ear-mark it; yet, if he cannot answer as to the state of it, the court cannot act as upon an admission. S. C. ibid. 39, 40.

85. The court will indulge executors and trustees who have a difficult duty to perform, if they keep their accounts regularly, and are always ready to give in-formation as to the state of the fund, and have provided for the security of the testator’s fund. But Ld. Ch. said, it was the bounden duty of an executor to keep clear and distinct accounts of the property which he was entrusted to administer. If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted. And if his partners have permitted him so to intermix the accounts, they cannot afterwards object to the production, more especially where the executor has clearly admitted having lent to the house part of the trust property, and that they have been dealing with it. S. C. ibid. 42, 44.

86. Testatrix directed her executor to sell two houses, and invest the produce (after payment of her debts,) in real or government securities, and to pay the interest to her three nephews until they attained 21; and as each attained that age to have one-third of the principal.—The executor sold the houses, and applied part towards funeral expenses, &c. the rest he paid into his banker’s hands, mixing it with his own money. On the failure of the bankers, the executor was held liable to pay the money to the legatees. Fletcher v. Walker, H. 1818, 3 Madd. 73.

87. Testator directed his executors to pay an annuity, unless circumstances should render it “unnecessary, inexpedient, and impracticable.” This means unless “in the opinion of his executors,” circumstances should so render it. The judgment of the executors in this respect, is not controllable by a court of equity, unless they act mala fide. French v. Davidson, M. 1818, 3 Madd. 396.

88. Executors have only power to sell real estate where expressly given, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. Bentham v. Wiltshire, H. 1819, 4 Madd. 44. Vide: Dalton v. Randall, 1 Jac. & Walk. 189.

89. A provision in a will for “testa-mentary expenses,” does not include the costs of a suit occasioned by the will.—Brown v. Groombridge, M. 1819, 4 Madd. 495.

90. A direction for a sale, in a given event, of an estate devised by the will, without expressing by whom it was to be...
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Power and Duty, &c.—Assets, legal and Equitable, how applied.


93. A., on his marriage, demised lands to B., who re-demised to A. for a lesser term, at a pepper-corn rent during A.'s life, and after his death at an annual rent for the life of his wife, for her jointure, and at a pepper-corn rent for the remainder of the term; A. died indebted. The re-demised term shall not be assets to pay any debts, but what affect the inheritance, it being raised for a particular purpose. *Baden v. Pembroke*, E. 1688. 2 Vern. 52.

94. A. made a mortgage for years, and died, after it was forfeited. The term, though not assets at law, was deemed to be sold for payment of debts. S. C.

95. A. made his nephew executor, and devised to him and his heirs all his lands in trust, to sell and pay all his debts and children's portions, and gave his children 100l. a piece. The money arising by this sale is not legal assets, and the debts and children's portions are to be paid equally. *Anon. H.* 1690. 2 Vern. 132.

96. By the statute of frauds, the trust of a fee is assets at law; but the trust of a term is not. *King v. Ballet*, M. 1691. 2 Vern. 248.

97. Tenant in tail suffered a recovery, let in a mortgage for years, and then limiting it to the old uses, he devised all his land for payment of his debts: Held, that the equity of redemption of this mortgage is assets. *Fossett v. Austen*, H. 1691. Pre. Ch. 39.

98. A husband assigned a personal estate, which belonged to his wife as executrix, in trust for such uses as he should by deed or will appoint; and in default, is trust for himself, his executors, &c. He afterwards gave this estate to his wife and children. This is assets, and the devise to the wife and children is only a legacy, and must be liable to the husband's debts in the first place. *Ashfield v. Ashfield*, E. 1693. 2 Vern. 287.

99. By marriage articles, money was agreed to be laid out in land, and settled to divers uses, remainder to the right heirs of the husband. The husband and wife died without issue. This money being in the disposal of the husband, is assets, and shall go to his executor, a fortiori to his residuary legatee. *Chichester v. Bickerstaff*, T. 1693. 2 Vern. 295.

100. A. indebted to B. in 300l., (in consideration of a settlement made on him by A. after his death) gave a bond to C. in trust for A. to pay 300l. as A. by will should direct. A. directed the 300l. to be paid to C., and made him executor. C. sued on this bond, and B. brought his bill for relief: Held, this 300l. was assets in the hands of B. to pay himself. *Thomson v. Towne*, E. 1695. Pre. Ch. 52. 2 Vern. 319. S. C. and resolution, though differently stated.

101. If the trustees for payment of debts, are not made executors, the devise does not become legal assets. *Anon. M.* 1700. 2 Vern. 406. *Et vide Hixon v. Witham*, 1 Ch. Ca. 248. But where land is devised to be sold by executors for payment of debts, the money raised by the sale is legal assets. S. C. *Et vide Edwards v. Graves*, Hob. 265.

102. A. devised his reversion expectant on an estate for life to A. and B. his executors, to be sold for payment of debts and legacies: as the devisees were made executors, the produce will be legal.
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Assets, legal and equitable, how applied.

103. A purchased a lease of a house in the name of B. and took a declaration of trust, to permit A. to enjoy for life, and then in trust for his reputed wife. This lease is not assets, nor liable to the creditors of A. after his death, for when a man purchases, he may settle his estate as he pleases. Fletcher v. Sidley, H. 1704. 2 Vern. 490. Sed wide Peacock v. Monk, 1 Ves. 130. where Lord Hardwicke said, this case was only an inclination of the court on the argument of counsel, and it would be dangerous to allow it as a precedent.

104. A. on marriage created a term in trust to raise 6000l., of which 3000l. was for his younger children, and the other 3000l. as he should appoint. Afterwards, he appointed the 3000l. as a collateral security to I. S., and by will he devised it, and the other 3000l. to his daughter. Yet held that it should be assets to satisfy a bond creditor. Lassels v. Ed. Cornwallis, M. 1704. Pre. Ch. 232. 2 Vern. 465.


106. A., after marriage, purchased a term to himself and his wife, and the survivor, and the executors, administrators, and assigns of such survivor, A. mortgaged the term, proviso to be void on payment of the money by A. or his wife, or the executors of one of them, and for quiet enjoyment till default. Seven years after, A. contracted debts, and died: Held, that this being the case of creditors, and the settlement being after marriage, in the power of the husband, and the equity of redemption being reserved to him, as well as to his wife, the term is assets to pay debts. Watts v. Thomas, T. 1726. 2 P. W. 364.

107. An estate for three lives granted to A., his executors and administrators, is a personal estate, and will, on A.'s death, be liable to all his debts by simple contract, as a lease for years would be. D. of Devonshire v. Atkins, M. 1726. 2 P. W. 381.

108. If a devise be to executors of an equity of redemption only, this is but equitable assets, and to be applied. Vide the case of Sir Charles Cox's creditors, Vol. I.

109. A. devises all his real and personal estates to his executors and their heirs, in trust to sell, and pay all his debts; his real estate being only equitable assets, and the testator leaving debts by bond and simple contract, if the bond creditors are paid part out of the personal estate, they shall bring it back again into hotch-pot, if they would be paid anything out of the real estate. Degg v. Degg, supra. And Bailey v. Ploughman, Mos. 95. was decided in the same man-

3 P. W. 341. But from the manner in which Degg v. Degg is mentioned by the M. R. in Chambers v. Harvest, Mos. 125. and Hall v. Kendall, ib. 328, it seems not to have been decided on the ground of the premises devised being an equity of redemption, but to pay all sorts of creditors equally. Degg v. Degg, T. 1727. 2 P. W. 416. Upon the principle of a law that whatever came to the hands of a person in the character of executor, or by reason of his executorship, should be assets in his hands, according to Detbick v. Caravan, 1 Lev. 224. The generality of the old cases determined, that money arising by sale of lands devised to, or subjected to the power of executors to sell for payment of debts and legacies, should be legal assets in their hands, (although they could not be charged with the value of the lands before sale.) Girling v. Lee, 1 Vern. 69. Hawker v. Buckland, 2 Vern. 106. Graves v. Powel, ibid. 248. Cutterback v. Smith, Pre. Ch. 127. Anon. 2 Vern. 405. Bickham v. Freeman, Pre. Ch. 136. Walker v. Maker, 2 P. W. 552. Masham v. Harding, Bunb. 399. Blatch v. Wilder, 1 Atk. 420. Yet some of the old cases, considering the devisee, &c. in the double character of trustee and executor, preferred the former, and consequently made the assets equitable. Hickson v. Witham, Finch 196. Anon. 2 Vern. 133.; and the latter cases incline strongly to this construction. Chambers v. Harvest, and Hall v. Kendall, supra. Prowse v. Abingdon, 1 Atk. 484. Lewin v. Oakley, 2 Atk. 50. Silk v. Prime, 1 Bro. C. C. 138. (n.) Barker v. Boucher, ibid. 140. (n.) Newton v. Bennett, ibid. 135. Batsch v. Lindegren, 2 Bro. C. C. 94. Still, however, it seems, that when an estate descends to the heir, charged with payment of debts, it will be legal assets. Freemoult v. Dredere, 1 P. W. 430. Plunkett v. Penson, 2 Atk. 290.
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 ner upon the authority of Degg v. Degg.
So Haslewood v. Pope, 3 P. W. 323.
Talb. 220.

110. The court doubted, in this case, whether a leasehold estate in Scotland, can be valued here as personal assets, as a leasehold in Ireland may, and therefore left it to the Master to report any thing specially. Bligh v. E. Darnley, T. 1731.
2 P. W. 622.


112. A lease for years, or a bond, or grant of an annuity being personal assets, shall be applied in a course of administration. Sir Charles Cox's Creditors, M. 1734. 3 P. W. 342. Wilson v. Fielding, M. 1718. 2 Vern. 764.

113. Testatrix gave a bond for payment of money at her death, in nature of a legatory disposition. To this bond her executor pleaded non est factum, upon which plaintiff at law got a verdict and judgment de bonis testatoris. The executor then set up in equity want of assets, but Ld. Hardwicke held, that the plea and judgment was an admission of assets, and he refused to relieve the executor, save only against the penalty. Ramsden v. Jackson, H. 1737. 1 Atk. 292. which case was decided upon the principle of a leading case, viz. Rock v. Leighton, stated from Ld. Holt's MSS. in 3 T. R. 690. where it was held that a judgment against an executor by default, was an admission of assets, and if upon a f. fa. being issued, the sheriff cannot find sufficient assets of the testator to satisfy, he may return a devastavit. Vide etiam Shelton v. Hawling, 1 Wils. C. B. 258. but more fully in 1 Saund. 219. by Mr. Sergt. Williams, in nisit, and Erving v. Peters, 3 T. R. 685. which were determined on the same authorities.

114 An executor, being indebted to A. assigned to him a mortgage term of his testator, as a satisfaction for the debt. This is a good alienation, and A. shall have the benefit of it against the daughters of testator, who claimed as creditors under a marriage settlement; for an assignment by an executor of a testator's asset to a person who has a sum of money bona fide due, is as valuable a consideration as for money paid down. Nugent v. Giford, M. 1737. 1 Atk. 463. The authority of this case seems confirmed by Ewer v. Corbett, 2 Pr. W. 148. Elliott v. Merryman, 2 Atk. 41. Mead v. Ld. Orrery, 3 Atk. 235. Ithell v. Beane, 1 Ves. 215. Jacomb v. Harwood, 2 Ves. 265. Bonny v. Ridgard, 2 Bro. C. C. 488. 4 Bro. C. C. 130. cued Whale v. Booth, 4 T. R. 625. (n.) Andrew v. Wrigley, 4 Bro. C. C. 125. where the R. M.'s observations on this case are stated by him from the Register's book. Vide etiam Langley v. Oxford, Amb. 17.

115. At law, an executor may alien the assets of a testator, and when aliened, no creditor can follow them; for if the consideration be good, equity will support it as well as a court of law, and there is no difference in equity between the power of an executor to dispose of legal and equitable assets. Nugent v. Giford, 24. But it seems that a testator's goods cannot be taken in execution for a debt of the executor. Farr v. Newman, 4 T. R. 621. Vide etiam Scott v. Tyler, 2 Bro. C. C. 481. where the question, whether an equitable assignment of a specific legacy by an executor, for his own private debt, was binding, was much agitated; that matter, however, ended in compromise.

116. A gave several legacies, and made B. his executor and residuary legatee. B. received all the assets, and bought lands with the money, and also the equity of redemption of another estate on which A. had a mortgage, and died. Upon a bill by the legatees, to be paid their legacies out of B.'s real and personal estate, the court directed that the assets laid out in the purchases should be restored to testator's personal estate, and the equity of redemption should be assets. Ryal v. Ryal. H. 1739. 1 Atk. 59. Amb. 414. Blatch v. Wilder. 1 Atk. 420. S. P. In Newton v. Bennett, 1 Bro. C. C. 135. Ld. Thurlow said, it has been always held, that an estate devised to an executor to sell, was equitable assets; though in Blatch v. Wilder, Ld. Hardwicke held them to be legal assets. Most of the old cases, however, agree with Ld. Hardwicke's decision. Vide Degg v. Degg, 2 P. W. 416. ante, pl. 108. (with special note.) Vide etiam Burwell v. Corrant, Hard. 405. But it seems now to be settled, that where a power is given to executors
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to sell lands (whether that power be naked or coupled with an interest, whether it be reserved to them and their heirs, or merely to them as executors,) the lands subject to such power will be considered as affected by a trust, and the executors as trustees, and the monies arising by the sale as equitable assets. Vide Hickson v. Witham, Finch 198. Anon. 2 Vern. 133. Challis v. Casborne, Pre. Ch. 408. Lewin v. Oakley, 2 Atk. 50. Newton v. Bennett, 1 Bro. C. C. 135. Silk v. Prime, and Barker v. Boucher, referred to in a note to S. C. Batson v. Lindegren, 2 Bro. C. C. 94. Notwithstanding it was held in Freemont v. De- dire, 1 P. W. 490.; Plunkett v. Penson, 2 Atk. 293.; and Allen v. Heber, 2 Stra. 1270.; that where lands charged with the payment of debts descend to the heir at law, they are legal assets, because the descent is not broken, as it would be in a devise to a stranger; yet that doctrine was expressly exploded in Hargrave v. Tindall, 1 Bro. C. C. 186. (n.) And in Batson v. Lindegren, supra, Ld. Tindal said that a devise to an heir, to sell, would make the produce of the assets, and a charge be a devise pro tanto. Vide Gilpin’s Ca. Cro. Car. 161. as to the question, whether an equity of redemption of a mortgage in fee of a trust estate, ought to be considered as legal or equitable assets? In Plunkett v. Penson, E. 1742. 2 Atk. 293. it was held, “that where a mere trust estate descends upon an heir at law, it will be considered as legal, and not as equitable assets, and this is founded on the 3d clause of the stat. of fraudulent devises, (3 & 4 W. & M. c. 14.) which gives a special creditor his remedy at law against the obligor’s heir; but it has not made a mortgage in fee of a trust estate subject to the same thing.” Vide Cole v. Ward- den, 1 Vern. 410. Plucknet v. Kirk, ibid 411. Sawley v. Gower, 2 Vern. 61. Trevor v. Perryor, 1 Ch. Ca. 148. Bar- throp v. West, 2 Ch. Rep. 62. So, “a reversion in fee being in the mortgagee on a mortgage for years, it is legal assets, because the bond creditor may have a judgment against the heir of the obligor, and a cesset executio, till the reversion comes into possession.” Secur, “where the mortgagee himself has but a term for years.” Vide Ca. of Sir Cha. Cox’s creditors, 3 P. W. 342. Hartwell v. Chitters, Amb. 308.

117. Before the marriage of E. with M., it was agreed that 300l., till it could be laid out in land, should be settled in trust to E. for life, to M. for life, and in default of issue, in such manner as M. should by deed appoint, and for want of appointment, to her right heirs for ever. M. by deed-poll appointed the 300l. to be paid to her husband, and employed by him to such charitable uses, or other purposes, as he should think fit. E. by will, gave 100l. a-piece to A., B. and C., being the money charged on the estate of M.’s father, and declared in his will, that such disposition was in pursuance of his wife’s directions. Upon a bill, by the creditors of E., to have this 300l. applied in payment of their debts, as a part of his assets, the court held, it was a part of the assets to be so applied, and not a naked power only to convey to charitable uses. And his Honor, in this case, observed, that there were but three ways of property; 1st, enjoying it in a man’s own right; 2d, transferring that right to another; and 3d, the right of representation. Hinton v. Toye, M. 1739. 1 Atk. 465. Vide Thompson v. Towne, Pre. Ch. 32. 2 Vern. 319. Lascelles v. Ld. Corn- wallis, ibid. 232. Ashfield v. Ashfield, 2 Vern. 287. Townsend v. Windham, 2 Vesc. 1. Bainton v. Ward, 2 Atk. 172.

118. I. S. on his marriage, settled his estate on himself for life, on his wife for life, remainder to trustees, to preserve, &c. remainder to his first and other son in tail, remainder to himself in fee. A son was born; the father died indebted by bond, and then the son died without issue, and by will devised the estate to defendant in fee. Ld. Hard- wieke held, that the reversion being come into possession, was assets to pay the father’s debts, notwithstanding the devise of the son; and it is inaccurate to say, that a reversion after an estate tail is not assets, for there is a liability which makes it assets in futuro. So a daughter entitled to an estate as a pos- sessio fratris, is liable to pay her father’s debts. Kinaston v. Clark, T. 1741. 2 Atk. 204. Vide Giffard v. Barber, 1 Ves. 175. Godolphin v. Abingdon, ibid. 57. Vide etiam Tweedale v. Coventry, 1 Bro. C. C. 240.

119. After assets are discovered by a bill in equity, plaintiff shall have satisfaction decreed him in equity, and not be
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120. An estate pur autre vie, though it is devised, will be liable to debts by specialty, to contribute in a course of administration, according to the gross value. Where a man takes an estate as executor, it is assets; for as an executor of a testator, he can take nothing without being so; as before the statute of frauds, &c. granting an estate pur autre vie, to A. his executors, he would have made it assets, devising it to them makes it equally so. Westfaling v. Westfaling, E. 1746. 3 Atk. 465. 467. Since the statute of 14 Geo. 2. c. 20. s. 9. it should seem that an estate pur autre vie, when limited to executors, must be considered not as a freehold, but as personal estate, to all intents. Vide Williams v. Jekyll, 2 Ves. 681. 684. 4 T. R. 230.

121. In Williams v. Jekyll, and Westfaling v. Westfaling, sup. Ld. Hardwicke seems to have thought that a lease for lives to one, his executors and administrators, would make the executor or administrator a special occupant, but Ld. Redesdale differed from Ld. Hardwicke, saying, that the old authorities bear the other way; (a) and his Lordship observed, that the title of an executor depends on his taking on himself the administration of the will, and therefore does not commence instanter, but by his subsequent act, and as to an administrator ex necessitate, his title cannot commence instanter, and therefore it should seem that the character of special occupant cannot possibly belong to either. Campbell v. Sandy, M. 1808. 1 Sch. & Lef. 289. Vide (a) Anon. Dy. 328. b. n. Rol. Abr. tit. Occupant, G. 2, 3. but stated contra by Comyns, in his Dig. Estates, F. 1. tit. Occupant. Windsor’s Ca. 3 Leon. 35. Salter v. Butler, Mo. 664. Cro. Eliz. 901. Yelv. 9. Lowe v. Burron, 3 P. W. 264. note. (d) Oldham v. Pickering, Carth. 376. 1 Salk. 464. Harg. Co. Lit. 41. b. (n. 4.)

122. The question, whether a reversion, after several estates tail falling in, subsequent to the death of the reversioner, be assets to pay his debts, was agitated in this case, but not determined. Tweedale v. E. of Coventry, E. 1783. 1 Bro. C. C. 240.

123. Under a decree for an account, and applying personal estate in payment of debts and funeral expenses, and directing the clear surplus to be paid over, making to the parties all just allowances, the Master ought to allow payments in discharge of legacies. Nightingale v. Lawson, E. 1784. 1 Cox 23. 1 Bro. C. C. 440.

124. An admission of assets by the executor’s answer, is waived by plaintiff’s going to an account of assets, and procuring a receiver to be appointed. Wall v. Bushby, T. 1785. 1 Bro. C. C. 484.

125. A bill was filed by testator’s creditors, stating a mortgage by testator, of part of his real estates, and that plaintiffs were entitled to the mortgage money: it then stated the will by which testator directed his real and personal estates should be liable to all his debts; he gave 50l. per ann. to his aunt, and other anuities and legacies: it further stated, that testator had other real estates, besides those in mortgage; the heir was an infant when the bill was filed, and at the decree: Thurlow, C. held all the real estates in and out of mortgage, and equitable assets. Pope v. Gwyn, H. 1787. 8 Ves. 28. (n.) Ld. Eldon, in stating the above case, in Shiphard v. Lutwidge, said there was another point in the above case, whether the parol would demur, which was material upon the point, whether a charge makes equitable assets. Sed vide Hargrave v. Tyn dall, 1781. 1 Bruc. C. C. 136. (n.) where it was determined that the parol would not demur.

126. Testator charged his real estate with 1000l. to be applied, as the residue of his personal estate was thereafter directed. He then gave the residue of his personal estate, after his debts, legacies, and funeral expenses were paid, to certain trustees, for the benefit of his relations, in manner therein mentioned. The personal estate was deficient for payment of his debts. The 1000l. is payable to the trustees for the relations, without being subject to the claims of the creditors. Killet v. Ford, E. 1788. 1 Cox 442.

127. Though testator declared to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets, which were insufficiant for the legacies; a charge on the real estate having failed for want of a proper attestation of the will. Byrnes v. Godfrey, T. 1798. 4 Ves. 6.

128. An equity of redemption is not
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Equitable assets, at least as against judgment creditors; for where there is a mortgage, then a judgment, and then a second mortgage, the judgment creditor may redeem the first mortgage. Sharpe v. Ed. Scarborough, E. 1799. 4 Ves. 538.


131. There is a distinction between a power and an absolute property; for a power, unless executed, is not assets for debts. Holmes v. Coghill, T. 1802. 7 Ves. 499.

132. H. L. by will duly executed, directed his debts, legacies, and annuities to be paid, for which he charged all his real estates, and, after giving some legacies and annuities, he devised to his son C., his heirs and assigns, all his lands, &c. and all other his real and personal property, subject to his said debts, legacies and annuities. Upon a bill by the creditors, against C. L., testator's heir at law and sole executor, the estates were sold under the decree, and the only remaining question was, whether the assets were legal or equitable? The simple contract creditors relying on Bailey v. Ekins, (7 Ves. 319.) insisted that these estates were equitable assets. Eldon, C. put a question, where the court does not look upon the heir at law as trustee for all debts by virtue of the charge. When Mr. Lloyd (as amic. cur.) mentioned the case of Pope v. Gwyn, cor. Thurlow, C. H. 1787. ante, pl 125. Upon the authority of which case, as also Bailey v. Ekins, supra, Ed. Eldon held, that, whatever difficulty there was in originally deciding, that a mere charge that does not break the descent, makes equitable assets, it is now settled that it does, and his Lordship accordingly declared the estates in this case equitable assets. Shiphard v. Latwidge, M. 1802. 8 Ves. 26.


134. A power of appointment over a sum of money, to be raised under a trust term, executed in favour of volunteers, is assets for creditors; but the equity of a purchaser, from a party taking under a voluntary deed of appointment, shall be preferred to that of general creditors having no specific charge. George v. Milbanke, M. 1803. 9 Ves. 190.

135. A remittance in bills and notes, for the purpose of answering acceptances, but received by the administrator in consequence of the death of the party to whom it was remitted, shall not be deemed general assets, for the specific purpose operates as a lien, which would also be the effect upon a bankruptcy.—Hassall v. Smithers, H. 1806. 12 Ves. 119.

136. The general rule for the conversion of personal property, bequeathed for life, with remainders over, into the 3 per cents. does not attach upon the property of a testator who died in India, under his will made there, and which was invested by his executor in the Company's securities there; but on the arrival of the parties in this country, a decree was made that it should be remitted, and invested accordingly. Holland v. Hughes; E. 1809. 16 Ves. 11.

137. Where an administrator had notice that a sale was required by the parties interested, a lease, granted by him of the premises afterwards, was set aside. Drohan v. Drohan, T. 1809. 1 Ball & Be. 185. Vide McLeod v. Drummond, 17 Ves. 152, where all the cases of executors, dealing with the assets of their testator, are fully considered by Ld. Eldon.
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138. If lands are devised to trustees for payment of debts, simple contracts and specialties shall be paid in proportion; and, though the trustees are creditors or sureties for the testator, they shall not prefer themselves. _Anon._ T. 1681. 2 Ch. Ca. 54. But if lands are devised to an executor, they become legal assets, and shall be paid in a due course, according to their superiority at law. _Hixton v. Witham_, H. 1675. 1 Ch. Ca. 248. _Girling v. Lee_, M. 1682. 1 Vern. 63.

139. Rent incurred in testator’s lifetime, though reserved on a parol lease, shall be before bond debts. _Willet v. Earle_, M. 1687. 1 Vern. 490.

140. Plaintiff sought by his bill to have satisfaction for a debt due from L. S. to whom defendant was executor. Defendant was surety for L. S., and to indemnify him, L. S. assigned to him a term for years, and died. Defendant paid the debt out of the personal assets of L. S., so that no assets were left to satisfy plaintiff’s demands as a simple contract creditor, whereof he prayed to be paid out of the term for years; but the court would not so decree it, for the defendant, as executor, might apply the assets either the one way or the other. _Sprywell v. Delawar_, H. 1688. 2 Vern. 56.

141. An administrator having paid away all the assets in satisfying specialty debts, was decreed to pay a debt due on decree, before he had paid those debts. _Searle v. Hall_, H. 1688. 2 Vern. 37. _Searle v. Lane_, M. 1688. 2 Vern. 88. S. P.

142. Where a testator is much indebted, and the executor is desirous to be rid of the assets, it is best for him to file a bill against the creditors, to the end that they may, if they think fit, contest each other’s debts, and dispute who ought to be preferred in payment. _Buckle v. Aitte_, H. 1688. 2 Vern. 37.

143. A gave his wife’s trustee a bond, to settle 40l. per annum on her for life, remainder to the heirs of his body by her. He died indebted by bonds, and his wife having administered, confessed a judgment to her trustee. This bond shall be preferred to others, quoad the wife, but the children shall have no preference.—_Cottle v. Fripp_, E. 1691. 2 Vern. 220.

144. A died indebted by mortgage, with a bond for performance of covenants; and owing other debts by bond, the personal estate shall be applied to pay off the bond debts in the first place. —_Fletcher v. Stone_, T. 1692. 2 Vern. 273.

145. A decree against an executor being prior in time, shall be preferred to a judgment at law. _Joseph v. Mott_, T. 1697. Pre. Ch. 79.

146. A decree is equal to a judgment at law, and therefore an executor shall not be allowed payment of bond debts before money due on a decree. _Bishop v. Godfrey_, M. 1701. Pre. Ch. 79.

147. A devised all his real and personal estate, for payment of his debts and legacies, and died. A creditor obtained judgment against the executor, and then he joined other creditors, who had not judgment, in obtaining a decree for a sale, and to be paid in proportion. The judgment creditor had received several dividends, after having paid his debt before the master; and then he petitioned for a re-hearing, pretending, that as a judgment creditor, he ought to have a preference, at least out of the personal estate; but the other creditors having joined in the bill, and contributed to the charges of the suit, and the dividends having been made pursuant to the decree, the court would not alter it; and held, that if any preference were to be, plaintiff ought to bring what he had received into hotch-pot, and to take either all law or all equity. _Shepherd v. Kent_, E. 1702. Pre. Ch. 190. 2 Vern. 435.


149. An executor or administrator paying away assets for simple contract debts, can have no relief in equity against
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150. One died indebted by bond, and by will gave a legacy of 500l. and devised his lands in fee to I. S., leaving a personal estate, sufficient only to pay the bond. The legatees shall not stand in the place of the bond creditor, to charge the land, in regard the land is specifically devised. Secus, if the land has descended to the heir. Clifton v. Burt, M. 1720. 1 P. W. 678. It being the object of a court of equity, that every claimant upon the assets of a deceased person shall be satisfied as far as such assets can, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof; it has long been settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. Lanoy v. Athol D., 2 Atk. 446. Lecam v. Mertens, 1 Ves. 312. Mogg v. Hodges, 2 Ves. 55. If, therefore, a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt.—Anon. 2 Ch. Ca. 4. Sagittary v. Hyde, 1 Vern. 455. Neave v. Alderton, 1 Eq. Ab. 144. Wilson v. Fielding, 2 Vern. 763. Galton v. Hancock, 2 Atk. 436. And legatees shall have the same equity as legateses descended. Culpepper v. Ashton, 2 Ch. Ca. 117. Bowman v. Reeve, Pre.Ch. 378. Tipping v. Tipping, 1 P. W. 730. Lucy v. Gardener, Bank. 137. Lutkins v. Leigh, Ca. temp. Tabl. 54. So, where lands are subjected to payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets: Haslewood v. Pope, 3 P. W. 328. So, where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets, upon a deficiency of the personal assets to pay the whole. Hyde v. Hyde, 3 Ch. Ca. 85. Masters v. Masters, 1 P. W. 422. Bligh v. Darnley, Earl, 2 P. W. 620. But from the principles of these rules, it is clear that they cannot be applied in aid of one claimant, so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, (though he shall as against lands descended.) Clifton v. Burt, supra. Haslewood v. Pope, 3 P. W. 324. Scott v. Scott, 1 Eden 458. Amb. 383. But such legatees shall stand in the place of a mortgagee, who has exhausted the personal assets, to be satisfied out of the mortgaged premises, though specifically devised. Lutkins v. Leigh, Ca. temp. Tabl. 53. Ferrester v. Leigh, Amb. 171. For the application of the personal assets in case of the real estates mortgaged, (vid. Howell v. Price, 1 P. W. 294.) does not take place to the defeating of any legacy. O’Neal v. Mead, 1 P. W. 693. Tipping v. Tipping, ibid. 780. Davis v. Gardiner, 2 P. W. 190. Rider v. Wager, ibid. 335. And it is to be observed, that none of the rules above mentioned subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of the others, 2 Atk. 488 1 Ves. 312. So in Robinson v. Tonge, M. 1720. 3 P. W. 398. "A. seised of freehold and copyhold lands, mortgaged the same in his life-time, and died indebted by mortgage and on several bonds. The specialty creditors insisted that the court, in marshalling the assets, could cast the whole mortgage on the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate. But the court said, that copyhold estates were not liable, either in law or equity, to the testator’s debts, further than he subjected them thereto, and ordered that the copyhold estate should bear its proportion with the freehold estate for payment of the mortgage, and should not be liable to make satisfaction for the specialty debts. Reg. Lib. B. 1738. fol. 488." This case, however, was over-ruled by Ld. Eldon in Aldrich v. Cooper, 8 Ves. 382. post, pl. 189. Where a mortgagee of freehold and copyhold estates being also a specialty creditor had exhausted the personal assets. It was held, that the simple contract creditor should stand in his place pro tanto, against both the freehold and copyhold estates. It is now settled, that the court will not marshall assets in fa-
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Your effect out of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. Mogg v. Hodges, 2 Ves. 52. Atk. Gen. v. Tyndall Amb. 614. 2 Eden 207. Foster v. Blagden, Amb. 704. Hilliard v. Taylor, ibid. 713. Where a legacy is given out of a mixt fund of real and personal estate, payable at a future day, and the legatee dies before the day of payment, quære, whether the court will not marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible; whereas, as against the real estate it would sink by the death of the legatee? Vide Prowse v. Abingdon, 1 Atk. 482. D. of Chandos v. Talbot, T. 1731. 2 P. W. 604. 616. Pearce v. Taylor, T. 1790. coram Thurlow, C. As to the right of a wife to have assets marshalled in respect of her paraperalia, vide Tipping v. Tipping, 1 P. W. 729. Tynte v. Tynte, 2 P. W. 542. Et vide ante, tit. Baron and Feme, xi.

151. B. agreed to buy part of A.'s estate, but died before conveyance, and his executor paid away his personal estate in special debts. The sale, in consideration of the purchase-money, is a specific lien on the lands; and for so much as the lands fall short to answer B. he shall come in as a specialty creditor. Charles v. Andrews, T. 1725. 9 Mod. 151.

152. An assignee under a commission of bankruptcy, died very much indebted by bond, &c. and the creditors of the bankrupt petitioned that the administrator of the assignee might account before the commissioners, he having some of the bankrupt's effects in specie in his hands, but the administrator denying this upon oath, and swearing that there were debts by specialty beyond the assets, the court thought this proper for a bill, and not for a summary way of accounting before commissioners. Exp. Markland, T. 1729. 2 P. W. 547. Vide Exp. Brooks, and Exp. Leake, 2 Bro. C. C. 596.


154. A. possessed of a term for 1000 articled to purchase the inherit-

ance, and by will gave 3000l. to his daughter, and made his son executor, and died; the son assigned the term in trust to attend the inheritance, of which he took a conveyance in his own name. Afterwards, the son acknowledged a judgment to B., and mortgaged the same lands to C., and died insolvent; B. shall first be paid his judgment, then C. shall be paid his mortgage, after which the daughter, (as administratrix to her brother,) shall be entitled to her legacy of 3000l. in preference to the simple contract creditors. Charlton v. Low, M. 1734. 3 P. W. 528.

155. A. owes money by several judgments and bonds, and dies intestate: his administrator pays the judgments and some of the bonds, and pays more than the personal estate amounts to: what the administrator paid on the judgments must be allowed him, but as to what he paid on the bonds, he must come in pro rata with the other bond creditors out of the real assets. Robinson v. Tonge, M. 1735. 3 P. W. 400. This case was overruled in Aldrich v. Cooper, 8 Ves. 382. post, pl. 189. It was insisted, in this case, that an administrator could not pay a bond creditor after a bill in equity filed by another bond creditor, it being in nature of an action at law, in which case, an administrator could not pay before judgment, which the court allowed without difficulty. This point, however, does not appear to have been fully settled till lately. In Darston v. Earl of Oxford, H. 1701. Colles' P. C. 229.; where A. and B. were both creditors of I. S. by specialty, who died, and left an executor, against whom A. brought a bill to be paid his debt, and pending the suit the executor voluntarily paid B. Upon a decree in A.'s suit, the executor claimed an allowance of his payment to B. which the court refused, A.'s bill in equity being a notice, and equal to an action at law; but the Lords, on appeal, reversed the Ld. Keeper's decree, on the ground that the debts were of equal nature, and that the executor might justify the preference he had shown. It is now, however, become the established doctrine, that a decree in Ch. is equal to a judgment at law; and where an executrix of A. (who was greatly indebted in debts of a different nature,) being sued in Ch. by some of them, appeared and answered immediately, admitting their demands, and other
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of the creditors sued the executrix at law, where the decree in equity not being pleadable, they obtained judgment; yet the decree in Ch. being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of term, was preferred to the judgments, and the executrix was protected in her obedience to the decree by an injunction against all proceedings at law. Morrice v. B. of England, E. 1737. Ca. temp. Talb. 217. 4 Bro. P. C. 287.

156. Where the representative of an intestate is seeking to give preference by confessing judgments, the court will give plaintiff leave to proceed at law to recover judgment with a cesset executio, and in equity for a discovery and account of assets. Baker v. Dumaresque, H. 1740. 2 Atk. 119. Bar. Ch. Rep. 277.


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Legacies to be discharged by his executors, adding, “I mean those only of my own contracting, not those heavier debts by my family,” and gave his personal estate to his mother, whom he made executrix, desiring her to pay all his just debts exactly: long after making the will, his mother bought in mortgages charged on his estate by his ancestors, and testator covenanted to pay the money: Held, that the personal estate was exempted from the principal and interest due on the mortgages, which were still a charge on the real. Leman v. Neunham, M. 1747. 1 Ves. 51. For this class of cases, vide ante, tit. Estate Real and Personal, and Mr. Coke’s valuable note to Evelyn v. Evelyn, 2 P. W. 659.

162. There being a provision in a settlement of 5000l. for a younger child at 21, the father, by will, added 5000l. more, and charged all on a residuary real fund, which he had also made liable to debts and legacies in aid of his personal estate; Held, that the real estate charged shall not be exonerated by the personal. Ward v. Ed. Dudley, E. 1748. 2 Bro. C. C. 316.


164. The court aims at equality of satisfaction, in the administration of assets. Martin v. Martin, E. 1749. 1 Ves. 212.

165. Where there is a demand out of assets, certainly due, but payable at a future time, the executor will be obliged to set apart the fund, in order to secure the person entitled. Johnson v. Mills, T. 1749. 1 Ves. 282.

166. Though in general a legal demand cannot be turned into an equitable one, yet if a demand is made out of assets, although there be a remedy at law, equity will decree an account and satisfaction. Bishop v. Church, M. 1750. 2 Ves. 106.


168. Testator charged his real estate, which was subject to a mortgage contracted by his ancestor, and also all his personal estate, with his debts and legacies. The mortgage debt shall be borne by the estate originally liable, and not paid out of his estates, and the executrix having paid it out of the personal estate, shall be repaid the money. So shall a legacy of 100l. charged on testator’s freehold and copyhold estate, be borne by the fund, and not by the personal estate. Lawson v. Hudson, T. 1779. 1 Bro. C. C. 38. Vide Billinghurst v. Walker, 2 Bro. C. C. 604. Hamilton v. Worley, 4 Bro. C. C. 199.

169. In order to exonerate the personal estate from the payment of debts and legacies, it is necessary not merely to charge the real estate, but the will must direct the application of the personal estate. Samwell v. Wake, E. 1782. 1 Bro. C. C. 144. Vide Webb v. Jones, 2 Bro. C. C. 60.

170. Notwithstanding the testator charged a term for years with payment of debts, a leasehold estate, purchased by him, subject to a mortgage, shall bear the burden of that mortgage, it not being properly the debt of the testator. D. of Ainsley v. Mayer, T. 1785. 1 Bro. C. C. 454.


172. Although generally a descended estate shall be applied in exoneration of a devised estate, yet under a charge for payment of debts, it shall not be so, if the devised estate be expressly pointed out in aid of another fund provided for that purpose. Donne v. Lewis, M. 1787. 2 Bro. C. C. 257. Vide Davies v. Tope, (cited.) Wride v. Clarke (also cited.) Powis v. Corbett, 3 Atk. 556. Galton v. Hancock, 2 Atk. 424.

173. Testator’s personal estate given to his next of kin, must be applied in discharge of testator’s mortgages not being expressly exempted, although it will be thereby exhausted. Philips v. Phillips, M. 1787. 2 Bro. C. C. 273.

174. Leasehold estates specifically devised, shall be applied in payment of debts, before copyhold estates not pur-

175. Where the testator by his will had ordered his trustees to possess themselves of his estates and substance, and to pay debts, it was held that this was a charge on the real estate, and that the assets should be marshalled for the legatees, to let them in so far as the personal estate had paid towards the debts. Foster v. Cook, T. 1791. 3 Bro. C. C. 347. Vide Bradford v. Foley, and Webster v. Alsop, ib. (in notis.)

176. Testator having two estates in mortgage, ordered the debt upon the one to be paid out of his personal estate, and charged the other upon the mortgaged premises, and gave the residue of his personal estate to persons by whose death, in his life-time, it lapsed: Held, that the mortgage debt charged upon the mortgaged premises, shall be paid out of the personalty, for though testator exonerated the personal estate in favour of the legatees, non constat, that he meant so to do in favour of the next of kin. Hale v. Coz, T. 1791. 3 Bro. C. C. 522.

177. Devise of a copyhold estate subject to a mortgage, held not sufficient to exonerate the personal estate from the payment of the mortgage-money. Ashley v. E. of Tankerville, E. 1792. 3 Bro. C. C. 545.

178. A. purchased an estate subject to a mortgage: the personal estate shall not exonerate the real from the mortgage debt, though the purchaser had given a fresh security. Tuckland v. Tuckland, T. 1786. 2 Bro. C. C. 101. Vide Barnes v. Crow, T. 1792. 4 Bro. C. C. 2, S. P. 179. A. being master of both funds, charged a debt which was personal on the real estate: his heir shall not have it exonerated by the personal estate. Hamilton v. Worley, H. 1793. 4 Bro. C. C. 199. 2 Ves. jun. 62.


181. Where a testator having both freehold and copyhold estates, charges all his real estate with his debts, if he has surrendered his copyhold to the use of his will, the freehold and copyhold

shall be applied rateably; but if he has not, the copyhold shall not be applied until the freehold is exhausted. Grocock v. Smith, T. 1794. 2 Cox 397. Vide Coombes v. Gibson, 1 Bro. C. C. 273. Kentish v. Kentish, 3 Bro. C. C. 257.

183. The assets of a testator shall be applied in favour of creditors, thus: 1st, the personal estate, unless exempted expressly or by plain implication, shall be liable; 2dly, estates devised for a particular purpose, as for payment of debts; 3dly, estates descended; 4thly, estates devised. Manning v. Spooner, T. 1796. 3 Ves. 117. Vide Gray v. Minnethorp, 3 Ves. 105. Burton v. Knowlton, ibid. 107. Brummel v. Prothero, ibid. 111.

183. Assets cannot be marshalled against judgment creditors, for they are to be paid in the first instance. Sharp v. Ed. Scarborough, E. 1799. 4 Ves. 538.

184. Specific disposition by will, in trust to sell and pay debts and legacies, and the charges of executing the trusts of the will, and then the residue to a charity. The general residue undisposed of shall be first applied to the debts and other charges, and the deficiency shall be borne by the trust property, and that of which the disposition failed, by the statute of mortmain, pro rata. House v. Chapman, E. 1799. 4 Ves. 542.

185. Upon a deficiency of assets administered in equity, a value must be set upon an annuity at the time of the death, and the annuitant can claim only in respect of that value. Franks v. Cooper, T. 1799. 4 Ves. 763.

186. Testatrix devised her real estate, subject to an annuity, some legacies, and her debts and funerals, and also subject to the debts of her late brother. The court ordered her assets to be marshalled in favour of a legatee by codicil. Norman v. Morrel, T. 1799. 4 Ves. 769.

187. Upon the administration of assets, no question ought to be decided in equity, till it has been determined whether the debt claimed is a good debt at law. Kennel v. Abbot, T. 1799. 4 Ves. 815.

188. Simple contract debts are not charged upon a real estate by a will, first devising, that all testator's debts and funeral expenses might be satisfied and paid by his executors, and then devising all the real estate specifically. Powell v. Robins, M. 1802. 7 Ves. 209. Vide
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189. Where a mortgagee of freehold and copyhold estates, who was also a specialty creditor, had exhausted the personal assets, the simple contract creditors were held entitled to stand in his place pro tanto, against both the freehold and copyhold estates. Aldrich v. Cooper, E. 1803, 8 Ves. 382. And note, that by this decision the case of Robinson v. Tonge, 3 P. W. 400, ante, pl. 155. was over-ruled.

190. It is an established principle, that where a creditor has two funds, he shall not by his option disappoint him who has but one fund, but he shall take to that which will leave another fund for another creditor. S. C. lb. 391. Trimmer v. Baynes, M. 1803, 9 Ves. 209. et vide Att. Gen. v. Tyndall, Amb. 614.

191. Legatees have not so strong a claim against assets descended, as simple contract creditors have, to stand in the place of specialty creditors, and to be paid out of the personal estate. So, where lands are specifically devised, legatees shall not stand in the place of creditors against the devisees, unless the lands are made subject to debts, or are in mortgage, as in Lutkins v. Leigh, (Ca. temp. Talb. 54.) So, where there is a claim of paraphernalia, that shall not be disapproved by the effect of the option of a creditor having a double fund. Aldrich v. Cooper, sup.

192. In the administration of assets, ordinarily, the first fund applicable, is the personal estate not specifically bequeathed, then land devised, or ordered to be sold, for payment of debts not merely charged, then descended estates, then lands charged with the debts, and the distinction is between a mere charge upon the real estate, and proposing the mode in which the debts are to be paid; Harmood v. Oglander, T. 1803, 8 Ves. 235. Vide Doune v. Lewis, 2 Bro. C. C. 257.

193. A final decree upon a sum ascertained, is equal to a judgment at law, (a) but a mere decree for an account of plaintiff's demand, and of the personal estate come to the hands of defendant, with a mere direction for payment out of the result of that account, does not prevent the executor paying a judgment debt. (b) Perry v. Phillips, T. 1804, 10 Ves 34. (a) There was long a struggle in this court before it was decided, that final decrees in equity were equal to judgments at law, but that was settled about the year 1737. Vide Morrice v. B. of England, Ca. temp. Talb. 217. 225. 3 P. W. 402. (n.) 4 Bro. P. C. 257. which case clearly determined, that the original decree was to be considered final. (b) In Ferrers v. Shirley (E. 1738, MS. Ca.) a judgment subsequent to a decree for an account was preferred, and the circumstance that there was a report prior to the judgment, was not sufficient to give a preference. According to Mr. Joddrell's MS. note in Smith v. Eyles, (reported in 2 Atk. 385.) the principle is, that if, under a bill against an executor, a reference is made to a master to compute what is due, until the report, and an order on that report to pay, non transit in rem judicatam, and so it was understood in Martin v. Martin, (1 Ves. 211.) In Brooks v. Reynolds (1 Bro. C. C. 182,) residuary legatees brought a bill to clear the fund for payment of the creditors, and after the decree an injunction was sought by executrix against suit at law; it was contended that the bill not being brought by any creditor whose demand was liquidated by the decree, the court could not authorize such injunction. But Ld. Thurlow, in that case, and in Kenyon v. Worthington (2 Dick. 668.) altered the principle upon which those injunctions originally went, seeing it necessary to protect an executor in obeying the exigency of an equitable judgment which could not be pleaded at law. The next class of cases is, where creditors are suing for themselves and others, they may prove their own demand, which may be considered a judgment for that, and in Douglas v. Cluy, (1 Dick. 393.) Ld. Camden said, that until decree, any creditor may proceed at law, but not after; the contrary, however, was insisted upon in Brookes v. Reynolds, (sup.) but Lord Thurlow said it was sufficient to maintain the jurisdiction, that this court had itself taken administration of the assets, and where once a decree is made, whether final or not, (from the inextricable difficulty of the executor, if this court calls on him to administer in it, and the creditors call on him to administer out of it,) in all cases where the court has itself taken administration of the assets, an in-
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The year allowed to executors and administrators for payment of legacies, is only for convenience, and does not prevent the vesting of the fund. — Garthshore v. Chalies, M. 1804. 10 Ves. 13.

There is this distinction between creditors and legatees under a charge for payment of debts and legacies, that the former are to be paid in preference; and though the statute of fraudulent devises would prevent a devise for legacies to disappont creditors by special, it would not prevent a devise for payment of debts generally, though the effect would be to let in creditors by simple contract to the prejudice of specialty creditors. Under a charge of debts, however, simple contract creditors may, by marshalling, follow the devised estates, if there be no estates descended, or such have been applied. Kidney v. Coursmaker, H. 1806. 12 Ves. 154.

A real estate devised to be converted into personality for special purposes, shall not be deemed personal to all intents so as to let in simple contract creditors: but the assets shall be marshalled if it appears at any period of the cause that specialty creditors have gone upon the personal estate, even though the bill be not framed with that view. Gibbs v. Ougier, T. 1806. 12 Ves. 413.

The executor of a deputy quartermaster-general is compellable to account before the commissioners for auditing public accounts, though no insuper was set, nor was the testator put in charge during his life; and though the account in which the insuper appeared, was not declared till seven years after his decease. Rxc v. Inclendon, E. 1811. Wightw. 369. Vide E. of Devon's Ca. 11 Co. 89.

The bond of a married woman, given for a debt contracted during her coverture, being a nullity, shall have no priority in the marshalling of her separate assets after her decease. Anon. T. 1811. 18 Ves. 258.

Suits have been allowed against executors at the suit of creditors, which suits have been often instituted at the instance of the executors themselves, to prevent preference, for when a decree was once made no creditor could go to law. This practice enabled executors to withhold payment to any body, and keep the assets in their hands; Ld. Eldon therefore introduced the rule that where the executors' answer did not set forth what the assets were, the executor should state them by affidavit, and then an injunction should be granted against any creditor suing, upon the executors bringing the assets into court, to be disposed of as the court should direct. Gilpin v. Lady Southampton, H. 1812. 18 Ves. 469.

A surety who pays off a specialty debt, it seems, to be considered as a specialty creditor of his principal. Robinson v. Wilson, M. 1814. 2 Madd. 454. N. B. This case stood over till the appeal to the Chancellor in Hotham v. Stone was determined.

An executor who has paid legacies is not competent to allege that debts are unpaid. Freeman v. Fairlee, T. 1817. 3 Meriv. 38.

Where there is a sufficiency of assets for payment of all the debts, executors may pay simple contract debts not bearing interest, before specialty debts bearing interest, unless the specialty creditors object, but the legatees are not at liberty to complain. Turner v. Turner, T. 1819. 1 Jac. & Walk. 39.

As to marshalling of assets and the preference shown to creditors in equity, under a deed of trust, for the payment of debts, vide ante, tit. Debtor and Creditor, ii. p. 421. and particularly Carr v. Burlington, pl. 137. p. 422. where the debtor had raised a trust term for payment of all his debts equally, but died before it was acted upon.

As to the marshalling of assets in favour of legatees only, vide post, tit. Legacy, iv.

It seems to be a rule that the court (where specialty creditors exhaust the personal fund) will marshal assets in favour of legatees, as against the heir in respect of assets descending, and as against a residuary legatee, but not as against a specific devisee. See many of the cases on this subject, post, tit. Legacy, iv.
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203. If A. has lands subject to a rent-charge, and grants part of the lands to B., with a covenant that such part shall be free, this is not a real covenant to run with the land, but personal only, and binding on the heir in respect of assets. *Cook v. Arundel*, M. 1636, Hard. 87; but the contra was decreed in *Cornbury v. Middleton*, T. 1671, 1 Ch. Ca. 212.

204. Ld. Ch. doubted in this case, whether the trust of an estate descended in fee to an heir, is liable in equity to satisfy a bond debt. *Creed v. Coville*, T. 1683, 1 Vern. 172.

205. But where the heir has assets, plaintiff must show by his bill that the heir was bound, or it will be good cause of demurrer. *Crossing v. Honor*, T. 1683, 1 Vern. 180.

206. A reversion in fee being only assets in the hands of the heir, *cum accidens*, the court will not decree a sale of it, but the creditors must wait till it falls.—*Fortrey v. Fortrey*, H. 1690, 2 Vern. 134.

207. One died indebted by covenant in more than all his personal assets could pay, but leaving sufficient real assets, his widow shall have her paraphernalia, in regard the creditor does not suffer, there being real assets for him. *Tipping v. Tipping*, M. 1721, 1 P. W. 729.

208. One bound himself and his heirs in a bond, and mortgaged some lands, of which he was seised in fee, for more than the value, and his heir had 200l. for joining in a sale of the premises: this 200l. was held not to be assets. *Dunn v. Green*, T. 1724, 3 P. W. 10.

209. A. was principal in a recognizance, and B. and C. were his sureties; A. afterwards jointured his wife before marriage, without notice either to the wife or her friends, of this recognizance, and devised his real and personal estate to B., one of his sureties, and died. First, the personal estate of A., the principal, shall be applied towards this recognizance; then his lands devised, the devisee being a volunteer; next, the paraphernalia of A.'s wife; and, lastly, the sureties shall make up the deficiency.—*Tynt v. Tynt*, T. 1729, 2 P. W. 542. As against real assets descended, it seems, that upon the authority of *Tipping v. Tipping*, supra, the wife shall stand in the place of creditors to the amount of her paraphernalia. So *Nelson v. Corbet*, T. 1746, 3 Atl. 369, *Graham v. Lawdorsey*, M. 1746, ib. 393. *Sed quae*, as against real assets devised. In *Pribert v. Clifford*, E. 1736, Amb. 6, the wife's paraphernalia, together with the whole personal estate, having been exhausted in payment of the husband's debts, the question was, whether the wife should be permitted to stand in the place of the special creditors, so as to receive a satisfaction for her paraphernalia out of the real estate, which the husband had devised, for it did not appear upon the pleadings, that any part of the real estate had been left to descend. Ld. Hardwicke said, that the court had decreed satisfaction for paraphernalia out of real assets descended, as in *Tipping v. Tipping*, sup. but that that case had gone a great way; for, by the old law, the wife's paraphernalia were absolutely in the power of the husband during his life, and that as the court had not in any former instance decreed the wife satisfaction for her paraphernalia out of real assets against a devisee, he would not establish the precedent; and by the decree his Lordship declared, that if the personal estate of the testator was not sufficient for payment of the debts, such deficiency was to be raised by sale of the real estate, liable to the speciality debts, and it was ordered, that the master should inquire whether any real assets of the testator descended on his heir, and if any such, then that a sufficient part thereof should be sold, in the first place, for payment of the debts, and if that should not be sufficient, then that a sufficient part of the devised estates should be sold for the same purpose, and the devices should contribute; and as to the claim of the wife, for the paraphernalia, his Lordship declared, that she was entitled to a satisfaction out of the real assets descending remaining after payment of debts. Sed vide *Incledon v. Northcot*, E. 1746, 3 Atl. 438, contra, where the personal estate
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having been exhausted by a husband's creditors, and there is a trust estate charged with the payment of debts, the wife is entitled to come in upon that estate to be reimbursed the value of her paraphernalia. Vide ante, sec. iii. of this title.


211. Where there was a decree for a debt, and defendant died, such decree does not bind the real assets descended to the heir, as a judgment does. The only way, upon a decree for a debt, to affect land, is to proceed for a contempt to a sequestration; but such sequestration abates by the death of the party, which an extent does not. Bligh v. E. Dareley, T. 1731. 2 P. W. 621. Vide Morrice v. B. of England, Ca. temp. Talb. 222. Astley v. Powis, 1 Ves. 496. Wharam v. Broughton, ibid. 182. But in Hawkins v. Crook, 2 Atk. 594 it is said, that although a sequestration on mesne process be determined by the death of a party, yet it is otherwise where it issues for non-performance of a decree.

212. If one who confesses a judgment, aliens part of his lands, and the rest descends, the heir shall not have contribution against the purchaser. Harvey v. Woodhouse, M. 1731. Sel. Ch. Ca. 3. 4.


214. A man cannot by any form of conveyance whatsoever, raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, so as to prevent the reversion from being assets to satisfy the son's debts. Gadsden v. Abingdon, M. 1740. 2 Atk. 57. Vide Kinaston v. Clark, 2 Atk. 204. 249. Counen v. Clerke, Hob. 29. Mo. 860.

215. Before the statute of 3 Wm. 3. c. 14 the heir was not bound by lands descending to him, where sold or aliened before action brought; and if an obligor devises his land, the devisee so selling was not liable to the obligee. This statute was made to remedy the defect in the 13 Eliz. c. 5. of fraudulent conveyances, and to extend it to fraudulent devises. If judgment be by default against an executor, it can only be de bonis propriis. Kinaston v. Clark, T. 1741. 2 Atk. 205. Vide Stileman v. Ashdown, 2 Atk. 434. 600.

216. V/ F. after marriage, in consideration of 2000l. portion, and in his father's life-time, settled certain lands on himself and his wife, and their issue, and after his father's death he suffered a recovery, revoked the former uses, and conveyed the estate to trustees for the use of himself for life; then he created a term for raising daughter's children's portions; remainder to his first, &c. son in tail male; remainder to himself in fee. On a bill by a bond creditor, for a sale of part of the real estate, if the personal should fall short, Ld. Ch. held, that the real estate never having been assets in the hands of W. F. the lands comprised in the settlement were not liable to his debts by specialty, for they are not specific lien's on his estate. Brown v. Durston, E. 1747. 3 Atk. 631. Vide: Russel v. Hammond, 1 Atk. 16.

217. Assets descended on the heir, must be applied to pay debts before the lands can be charged which are specifically devised. Powis v. Corbet, T. 1747. 3 Atk. 556.

218. Where the testator in his will and codicils has clearly shown his intent to exempt his personal estate from his judgments and specialty debts, the court will charge them on the lands descended in exoneration of those devised; but parol evidence to show that the testator intended to exempt his personal estate is not sufficient. Reeves v. Newenham, E. 1788. 2 Ridg. P. C. 11.

219. A specialty creditor has a right under the bankruptcy of his debtor's heir, to follow the real assets, or the produce of them, in the hands of the assignees. Exp. Morton, T. 1800. 5 Ves. 449.

220. Where the testator by his will going beyond a mere charge, has created a particular fund for payment of debts, that shall be first applied in exoneration of descended estates whether acquired after the date of the will or not, and of
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the personal estate, even in favour of the next of kin, taking it for want of disposition, for the rule as to the exonerations of estates descended, by a devise for the payment of debts, will hold, even though the estates devised may be equitable assets, and the estates descended legal assets, but a mere charge upon a devised estate will not protect a descended estate from being first applied, for words having an obvious meaning are not to be rejected upon a suspicion that the testator did not know what he meant. (b) Miles v. Slater, E. 1803. 8 Ves. 303. Vide(a) S. C. ante. sec. ii. pl. 133. and references. (b) Vide etiam Serle v. St. Eloy, 2 P. W. 386.

221. Freehold estates are not assets for payment of simple contract debts. Aldrick v. Cooper, M. 1803. 8 Ves. 384.

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Appendants to the Freehold.

222. Tenant for life set up a fire-engine for the benefit of a colliery; upon this a question arose, whether it should go to the remainder-man, as affixed to the freehold, or to the executor as personal estate. Per Ld. Ch., the old cases went a great way upon annexation to the freehold, but of late this strict construction has been relaxed for the encouragement of tenants for life. Coppers and brewing utensils are necessarily affixed to the freehold, but being placed there for the convenience of trade, landlords have no right to them. So, though cider is part of the profits of the real estate, yet cidermills shall be deemed personal property, and go to the executor. Emblements also shall go to the executor of the tenant for life, and not to the remainder-man, for the public is interested in the produce of the grain, and the benefit and convenience of the public must have great weight in such cases: Held, in this case, that the fire-engine erected in the colliery shall go to the executor of the tenant for life, and not to the remainder-man. Lawton v. Lawton, M. 1743. 3 Atk. 15. Dudley v. Warde, Amb. 113. The old rule seems to have been, that whatever was fixed to the freehold could never be taken from it. Vide Cooke's Ca. Mo. 177. Herlakenden's Ca. 4 Co. 64. Duy v. Bisbitch, Crw. Eliz. 374. Cave v. Cave, 2 Vern. 508. Culling v. Tufnell, Bull. N. P. 34. But lately there have been two exceptions to this rule: Ist, as between landlord and tenant; and, 2dly, as between tenant for life, or in tail, and remainder-man; but the rule still holds as between heir and executor. Vide Pool's Ca. 1 Salk. 868. Exp. Quinsey, 1 Atk. 477.

223. Plaintiffs, as administrators, brought trover for certain salt pans set up in the wyche-house in Cheshire; the pans were fixed with brick and mortar to the floor, with a furnace under them, and were worth, with the buildings and lodging rooms, 8l. per week. The ancestor who fixed the pans was seised in fee, and the inheritance was of little value without them, and a salt brine and salt pans form the most valuable inheritance in Cheshire.

To the executors, these works can be of no value beyond the bricks and mortar, and it is impossible to hold, that a freeholder could have affixed them to his inheritance with a view that they should be severed at his death, though with a tenant for years the consideration might be different, for he might say he would leave the estate as he found it: Held, that these salt works should go to the heir. Lawton v. Lawton, E. 1782. 3 Atk. 16. (a)

224. A mortgage of a brew-house with the appurtenances, will not carry the utensils, but the things only belonging to the out-houses; neither will the utensils pass by the sale of a brew-house, unless particularly valued. Exp. Quinsey, T. 1750. 1 Atk. 478.

225. As to fixtures, beds fastened to the ceiling with ropes, or even nailed, are not fixtures, but may be removed; but a tenant, during his term, may take away chimney-pieces, and even wainscots (if put up by himself) but after the term,
EXECUTORS AND ADMINISTRATORS V. & VI.

Appendants to the Freehold.—Suits by and between them, &c.

he will be a trespasser. So will an executor be a trespasser if he enters upon a freehold descended to take away fixtures. Exp. Quincy, supra.

226. Hangings, chimney glasses, or pier glasses, go not with the house as things fixed to the freehold, for they are matters of ornament, and furniture. Back v. Rebow, H. 1706. 1 P. W. 94.

EXECUTORS AND ADMINISTRATORS VI.

Suits by and between them. (a) Account and Allowances. (b) Devasavit. (c)

(a) Suits by and between them.

227. If A. makes B. executor, and after debts and legacies paid, gives the residue to C. If B. pays not all the goods into his inventory, or undervalues any of them, C. may sue B. in equity to compel him to show the real value of the goods, even before the debts are paid. Ward v. Kedgoin, E. 1616. Palm. 402.

228. A. gave B. a bond for 100L. B. made his will, and C. his executor; and after, declared his further will, that A. should have the bond, and died. C. proved the will, but omitted the codicil; and to compel him to prove it, A. sued C., pending which the bond was sued at law. A. brought his bill for relief. Per curiam, though there can be no relief for the legacy, till the codicil is proved, yet a man must be protected against the bond in the mean time. Injunction granted. Took v. St. John, E. 1657. Hard. 96.

229. Where a will was litigated in the spiritual court, on a suggestion that it was unduly obtained from a man sick of the plague, the court, on the motion, ordered, that the executor, (who was supposed insolvent) should forbear to receive the debts of the deceased, pendente lite. Smallpiece v. Anquish, E. 1666. 1 Ch. Ca. 76.

230. A bill may be exhibited in equity, against an executor, to discover assets, and he may thereon be decreed to pay debts and legacies, but plaintiff must charge that goods came to his hands.—Alexander v. Alexander, 1668. 2 Ch. Rep. 37. Parker v. Dee, 2 Ch. Ca. 200. Davis v. Curtis, 1 Ch. Ca. 226, but see if before suit at law against him. Et vide Hard. 115.

231. An executor pleaded to three several actions that he had no assets, sitra 100L. Judgment was held in each, but the court would not grant an injunction; for he should defend himself at law, and cover all his assets with a judgment in the first place. Anson. H. 1682. 1 Vern. 119.

232. A bill may be brought against an executor, for a discovery of personal assets, before probate, and pendente lite in the special court. Dulwich Coll. v. Johnson, M. 1683. 1 Vern. 49.

233. An executor pleaded plene admistravit, but his own letter being produced, confessing a mortgage made to his testator for 300L, a verdict was obtained against him; yet upon his proving in equity that the mortgage was worth nothing, and there were two prior mortgages on the same estate, the court relieved him. So upon a plea of ne unques executor, and a verdict obtained on proof that a chimney back came to his hands, the court relieved the executor. So upon the like plea and verdict, on proof that a defendant, after testator’s death, took money for a pot of ale, the court relieved, Robinson v. Bell, T. 1690. 2 Vern. 146.

234. Upon a bill against an executor for testator’s debt, the court sent plaintiff to law, though the debt was proved, but retained the bill till after the verdict, that plaintiff might have an account of the assets in equity. Gorray v. Ustwich, M. 1690. 2 Vern. 192.

235. An executor bringing a sci. fa. to revive a decree, must show he has proved the will; and where there are bona notabilia in divers dioceses, if he shows proof in the court of one ordinary only, it is not good; but the proof must be in the Archbishop’s court. Comber’s, Ca. M. 1721. 1 P. W. 766.

236. Where an executor, before probate, filed a bill, and afterwards proved the bill, such subsequent probate made the bill a good one. Humphreys v. Humphreys, H. 1734. 3 P. W. 351.

237. The rule at law, that an executor, defendant failing in his defence, shall pay
EXECUTORS AND ADMINISTRATORS VI.

Suites by and between them.—Account and Allowances.

costs, de bonis testatoris, et si non de bonis propriis, will not be varied in equity, especially where an executor, with notice, has paid simple contracts before bond creditors. Jefferies v. Harrison, H. 1796. 1 Atk. 468.

238. Plaintiff's father died intestate, and his mother administered. Forty years after the father's death, the son (who had accepted a legacy under the mother's will equal to two-thirds of what his father left) brought his bill against his mother's executor, for an account of his father's personal estate. Bill dismissed with costs, for example sake. Huet v. Fletcher, M. 1799. 1 Atk. 467.


240. An action at law will lie against an administrator upon his bond to the ordinary, and that he did not exhibit an inventory of intestate's effects, is a good assignment of a breach. Greenside v. Benson, E. 1745. Ridg. Ca. Hardw. 338. 2 Atk. 248.

241. To a bill against defendant, as executor, for an account, he pleaded a suit in the Chancery of Jamaica, for the same matter, to which he had put in an answer, with the account annexed, and soon after quitte Jamaica, for the sake of his health, but left his attorney there to manage his suit, which was still depending. Ld. Hardwicke said, that neither the term, nor even the year in which the suit was instituted, being set out for certain, there is not that averment which courts of law and equity both require in pleas; and as it was therefore defective in form, he overruled the plea. Foster v. Vassal, M. 1747. 3 Atk. 587.

242. After a general decree against an executor to account, &c. a creditor shall be restrained issuing, not only from staying execution, but from going to trial. Goats v. Fryer, M. 1789. 2 Cox 201. 3 Bro. C. C. 23.

243. An executor having a large balance of the personal estate in his hands, was ordered to pay the whole into court. Although he stated, that an action was pending against him for a large debt due from the testator; but with liberty, if plaintiff in the action should recover, to apply for a sufficient sum to be paid out again. Plaintiff did recover, and the court ordered the amount to be paid to him, and not to the executor. Yare v. Harrison, M. 1793. 2 Cox 377.

244. An administrator disputing by his answer, the foundation of the bill, viz. a balance of accounts against testator's estate, need not set forth an account of the personal estate, &c. by way of schedule. Phelps v. Case, T. 1798. 4 Ves. 107.

245. So where executors are uncertain whether part of testator's property is real or personal, and (if real) who are the persons entitled? They shall not, on that ground, decline to set forth in their answer to a bill by the personal representatives, what they had done with the property. Freeman v. Fairlie, T. 1817. 3 Meriv. 24.

(b) Account and Allowances.

246. A widow possessed herself of her husband's personal estate, and paid several of his debts, and afterwards his executor got the estate out of her hands. Decreed, by consent, that she should be allowed all that was incumbent on the executor to pay, but nothing to his prejudice. Ayre v. Ayre, M. 1663. 1 Ch. Ca. 33.

247. A gave legacies, and made B. and C. executors, and B. made C. and D. his executors, and died. C. and D. possessed themselves of the estate of A. They are both chargeable in equity, though at law the executorship survived to C., and D. is not privy. Nicholson v. Sherman, T. 1663. 1 Ch. Ca. 57. Et vide Stiddolph v Leigh, 2 Vern. 75. that a creditor may follow testator's estate, into any hand, though assigned by the executor.

248. If a widow possesses herself of personal estate, as executrix under a revoked will, and pays debts and legacies, without notice of the revocation, she shall be allowed those payments in equity. Hele v. Stowell, E. 1669. 1 Ch. Ca. 126.

249. If an executor renews a lease, he shall account for the new lease, as well as the old one, for the benefit of the creditors. Ann. M. 1675. 2 Ch. Ca. 208.

250. But where an administrator possessed himself of the intestate's goods, and gave legacies, and died, and his executor without compulsion, and pending a suit in right of intestate to recover the goods, paid the legacies; the court would not relieve him, because the payment was
EXECUTORS AND ADMINISTRATORS VI.

Accounts and Allowances.

254. Bill by the heirs and residuary legatese of A. against his widow and executrix; for an account of his estate. A. for seven years before his death, was so infirm, that though he signed receipts and executed leases; defendant received the money. Deceased, defendant to account for seven years’ receipts, but liberal allowance to be made, and no vouchers for house expenses. Buckle v. Milman, M. 1716. 4 Vin. 129. pl. 8.

255. An executrix, after a general admission of assets, was permitted to amend her answer by admitting assets, to pay plaintiff’s demand, where it did not exceed 400l. Daley v. Crump, T. 1719, 2 Bro. C. C. 619. (n.)

256. Bill for an account will not lie against one co-executor without the other, either as residuary legatee, or as a creditor. Scarry v. Morse, H. 1724. 9 Mod. 99.

257. An executor at first refused, and afterwards, in consideration of 100 guineas, consented to act; he died before the trust was completed; held, that his executors are not entitled to the money. Gould v. Fleetwood, M. 1732. 3 P. W. 251, 252. (n.)

258. The court never allows an executor or trustee for his time and trouble, especially where he has an express legacy for his pains; neither will it alter the case that the executor renounces, and yet is assisting in the executorship; nor even though it appears that the executor has deserved more, and has benefited the trust to the prejudice of his own affairs. Robinson v. Pett, E. 1734. 3 P. W. 249. Vide Gould v. Fleetwood, ibid. 250, 251. (n.) Cuthbert v. Peacock, 1 Salk. 155. Scantlebrough v. Harrison, Mos. 128.

259. Though, generally speaking, an executor or trustee compounding or re-leasing a debt, must answer for it; yet if it appears to have been for the benefit of the trust estate, it is an excuse. Bliss v. Marshall, M. 1735. 3 P. W. 381.

260. Though testator directed that his executors, should be allowed their costs out of his estate, for any expenses they might be put to, yet they shall not have that allowance in a case of plain fraud. Hide v. Haywood, H. 1740. 2 Atk. 126, Humphreys v. Moore, ibid. 108.


262. Though at law, where a man dies insolvent, his executor will be allowed no more for his funeral than is necessary, yet equity will not adhere to that rule, where the executor is let into a greater charge by large legacies and other appearances of solvency. Stagg v. Pastor, T. 1744. 3 Atk. 119. Vide Greenside v. Benson, 3 Atk. 249.

263. No funerals are allowed against creditors, except for the coffin, ringing the bell, parish, clerk, and bearers’ fees, and not for pail or ornaments. In ge-
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nornal it is said, that no more than 40s. shall be allowed for funerals as against creditors. Greenside v. Benson, T. 1745. 3 Atk. 249. *Et vide* Stagg v. Punter, 3 Atk. 119. *sed quara.*

264. In an action against an heir for the debt of his ancestor, he is charged as bound in the *debet* and *detinet,* as well as his ancestor; and the law gives him liberty to discharge himself by pleading nothing by descent, or but so much; but if his plea be found false, he is personally liable, though he had but one acre. Yet an executor is only chargeable from what comes to his hands, though his plea be found false. Martin v. Martin, H. 1749. 1 Ves. 212.


266. An administrator shall not be allowed any thing for his trouble which he does not demand. *Burrell v. Fisker,* T. 1751. 2 Ves. 365.


268. A trustee and executor not proving the will, but receiving interest money, may be called upon to account, but not an executor, and he may have proper allowances. The executor or administrator is the proper person to make him account. *Moore v. Moore,* T. 1755. 2 Ves. 599.

269. Under a decree for an account, and for applying testator's personal estate in payment of debts and funeral expenses, and directing the clear surplus to be paid over, making to the parties all just allowances: the *Master must allow payment in discharger of legacies. Nightingale v. Lawson,* T. 1784. 1 Cox 28. 1 Bro. C. C. 440.

270. An administratrix entered into the usual bond to exhibit an inventory. The limited time having elapsed without an inventory, a creditor put the bond in suit in the name of the Archbishops. The administratrix filed the bill for an injunction, which was granted on the terms of her giving judgment in the action, which was to stand as a security for the costs at law and in equity (but not for the debt,) and amending the bill by submittting to account. *Thomas v. Archbp. of Canterbury,* M. 1787. 1 Cox 399. *Vide* Greenside v. Benson, 3 Atk. 248. Archbp. of Canterbury v. Howse, Cmp. 1-1.

271. An executor who ought to have been a co-plaintiff, being made a defendant, held entitled to costs. *Bloom v. Burrow,* T. 1790. 3 Bro. C. C. 90.

272. An administratrix shall not be allowed, for debts paid after a decree to account, but she shall stand in the place of a creditor paid. *Jones v. Judges,* M. 1794. 2 Ves. jun. 518.

273. An executor in India passing his accounts in equity, is entitled to the commission upon receipts or payments, according to the practice in India. *Chatham v. Ld. Audley, Pool v. Larkman,* T. 1798. 4 Ves. 72.

274. But agents being appointed executors by their principal, are not entitled to commission upon remittances from India, made by testator, and not received by them till after his death. *Honey v. Blakesman,* E. 1799. 4 Ves. 598.


276. An executor making payment in the usual and regular course, without any circumstances of suspicion, shall be allowed them in account, and be discharged from any loss. *Bacon v. Bacon,* E. 1800. 5 Ves. 331.

277. An executor, charged by his answer, shall not be permitted to discharge himself, by his affidavit of payments to testator in his lifetime; but an admission of the receipt of sums which he had paid. &c. is a good discharge. * Ridgway v. Darwin,* T. 1802. 7 Ves. 404.

278. In an account against an executor, Ld. Ch. directed the Master to allow items, upon an affidavit that the vouchers were impounded in the ecclesiastical court. *Nielsen v. Corbet,* H. 1803. 8 Ves. 146.

279. It is a settled rule that the executor of an insolvent shall have no costs, for he need not have administered. *Adey v. Shaw,* T. 1804. 1 Sch. & Lef. 280.

280. An executor directed to accumulate, for the benefit of the *castus que trust,* cannot account as if the money had been laid out in the funds; if it was not so laid out, or being so, he had sold out at
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Account and Allocutus.


281. The examination of an executor, under the usual decree for an account, ought to contain an interrogatory, whether he is indebted to the testator, the debt from him being assets. Liberty was therefore given upon the suggestion of legatees, his co-defendants, without affidavit, to exhibit an interrogatory for that purpose, and not to go into an account which must be the subject of a distinct bill. Simmons v. Gutteridge, M. 1806. 13 Ves. 262.

282. Where every thing is left to the discretion of executors, they will be allowed a payment for mourning-rings, though not directed by the will. Paice v. Canterbury Archbp. T. 1807. 14 Ves. 364.

283. Executors are not allowed on motion, to account before the Master for the property their testator had bequeathed to minors, as an account so taken would not be binding on the minors; there being no suit to court to which they were parties. In re Burke, (a minor) H. 1809. 1 Ball & Be. 74.

284. There is no way of calling executors to account but by bill, but guardians and receivers may be obliged to account, on application by petition or motion, being bound by a recognizance to account when called upon; and they are considered as officers of the court, which is not the case with executors. S. C.

285. A testator (in India) bequeathed a sum in seca rupees to his wife for life, with remainder to his children, and appointed his wife executrix, who invested the money on Indian securities, producing a large rate of interest, and afterwards came to England with her only child, then an infant. On a bill on the infant's behalf, the court held, that the widow was not competent to refund the excess of interest received by her, beyond what the legacy would have produced, if invested in the English funds; but ordered that the money should be remitted to England and laid out in 3 per cent. annuities, in the name of the Aca. Gen. Holland v. Hughes, T. 1809. 3 Meriv. 685.

286. An executor is never called on to lodge money in court, except on an affidavit of his insolvency, or where he admits having in his hands a clear balance after payment of debts. Rutherford v. Dawson, M. 1811. 2 Ball & Be. 177. Vide Blake v. Blake, 2 Sch. & Lef. 26.

287. J. S. being appointed an executor under the will of his partner, claimed an allowance for carrying on the joint trade after his testator's death, but there being no express stipulation that he should have such, he was held not entitled there-to, nor in any case for his management, pains, and labour, but the court allowed him his late partner's share of his necessary expenses. Burden v. Burden, H. 1813. 1 Ves. & B. 170.

288. Testator by his will, bequeathed personal property to his executors, in trust, to lay out the same on good and sufficient security, for the benefit of an infant, and to be paid on his coming of age. After a decree to account and notice by the next friend of the infant; the executors left a part of such personal estate upon mortgage; whereupon they were ordered to pay the same into court; but this the executors applied for leave to replace the amount by so much stock of the money would have purchased at the time of the mortgage. Non allocutus to that extent. Widdowson v. Duck, T. 1817. 2 Meriv. 494.

289. Executor in India who has a legacy for his trouble, is not entitled to commission either on his receipts or payments, nor can he in passing his accounts after many years, renounce his legacy and charge commission on receipts and payments. Freeman v. Fairlie, T. 1817. 3 Meriv. 24.

290. Legacies to executors "for care and trouble in the execution of the will," are not to be paid to those who refuse to act, and where such legacies have been paid, they shall not be allowed to the acting executor, though charged in his accounts. S. C. ibid. 31.

291. Where an executor in India comes to England, and after 21 years he is called upon to account, he alleges that his books, &c. are in India: the court will order him to produce copies of all entries in such books, &c. within six months, for though it is impossible he should do so, yet the court will thereby have an opportunity from time to time, of seeing that he has used proper diligence. S. C. ibid. 45.

292. Where an executor by his answer acknowledged that he had received the testator's property, and lent it on a promissory note, he was ordered to pay
EXECUTORS AND ADMINISTRATORS VI.

Account and Allowances.—Deventavit.

293. Where an executrix, in respect of her receipts as such, was much indebted to the estate of her testator: it was held, that an annuity to which she was entitled under the will should be applied in payment of such debt, and that her solicitor had a lien for his taxed costs upon the annuity, after payment of what was due to the estate. Skinner v. Sweet, T. 1818. 3 Madd. 244.

(c) Deventavit.

294. The executor of an executor, shall be liable in equity, for any wrong or waste by his testator, though at law it is considered as a personal tort, which dies with the person. Price v. Morgan, E. 1676. 2 Ch. Ca. 271. Vide 2 Mod. 293. And in Vanacre's Ca. M. 1677. it was held, that the executor of an executor, who commits a deventavit, is liable in equity.

295. Where there is a bond, there is a lien by deed, which renders a second husband liable to a deventavit in his wife and her first husband; but where there is barely a breach of trust or debt by simple contract, there is equity the plaintiff should follow the wife's estate in the hands of the first husband's executor. Norton v. Sprigg, H. 1684. 1 Vern. 309.


297. A owed money to B., who died, and his administrator took A.'s covenant for the debt: A. became insolvent. This is a deventavit in the administrator. Norton v. Levet, M. 1678. T. Jo. 88. ; cited in 1 Vern. 474.

298. Two persons had mutual dealings, and one died before a settlement of accounts. Bill by the survivor against the executors for an account; and that plaintiff might discount what he was to pay out of what the executors had to pay; Decreed accordingly; though objected, it might be a deventavit in the executor. Beaumont v. Grover, M. 1701. 1 Eq. Ab. 8. pl. 7.

299. A term assigned by an executor, in trust, to attend the inheritance, shall in equity follow all the estates created out of it, and all incumbrances subsisting upon it. But the term being by this means become net assets at law, the executor who assigned it shall be liable to the creditors for a deventavit. Charlton v. Law, M. 1734. 3 P. W. 330. Vide Willoughby v. Willoughby, 1 T. R. 763.

300. If an executor, for the benefit of testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, for it may be followed as if it had remained in the same condition as it was at testator's death. Wolse v. Whearewood, E. 1741. 2 Atk. 159. Vide Ryal v. Ryal, 1 Atk. 69. Harrison v. Harris, 2 Atk. 121. Worsley v. Ld. Scarborough, 3 Atk. 399.

301. An executor shall be allowed to retain out of a legacy to his co-executors, in respect of a deventavit committed by him. Sims v. Doughty, H. 1800. 5 Ves. 243.

302. Where an executor deposited the assets of his testator, together with his own, as a security for his own debts, and to cover future advances to him, though under circumstances indicating an intention to apply the money borrowed to the purposes of the will, yet it cannot be held consistent with his duty as executor. MF Lead v. Drummond, T. 1810. 17 Ves. 168. Vide post, sec. xi. of this title, S. C. stated fully, with references.

How far a feme covert executrix or administratrix, or her husband, shall be liable for a deventavit, see the case of Adair v. Shaw, at large, post, tit. Executors and Administrators, xx.
EXECUTORS AND ADMINISTRATORS VII.

Where chargeable with Interest. (a) Where to find Security. (b)

(a) Where chargeable with Interest.


304. So if an executor makes use of his testator's money in trade. Ratcliffe v. Graves, M. 1683. 1 Vern. 196. or keeps it in his own hands for his own accommodation or advantage, or longer than the exigencies of testator's affairs required. Littlehales v. Gascony, E. 1790. 3 Bro. C. C. 73. Forbes v. Ross, M. 1788. 2 Bro. C. C. 430.

305. And so shall an administrator be chargeable with interest, where he keeps intestate's money an unreasonable time. Perkins v. Baynton, E. 1784. 1 Bro. C. C. 375.

306. And so if the attorney or receiver of an administrator, keeps the intestate's monies in his hands, the administrator shall pay interest. Brown v. Southhouse, T. 1790. 3 Bro. C. C. 107.

307. An administrator is not in every case chargeable with interest on personal estate, nor is it an inviolable rule that he shall be allowed costs at all events. Wilkins v. Hunt, E. 1740. 2 Atk. 151. Vide Hide v. Haywood, 2 Atk. 126.

308. The court had decreed an account against defendant as administratrix, of the assets of her husband. After his death she took all his goods and stock in trade, and carried on the same business. The master having reported 1400l. due to plaintiffs, they demanded interest upon it, but the debt being on simple contract, and the administratrix not having yet sold the goods, which was her only fund for raising the money, Ld. Ch. would not allow her to be charged with interest, for it is discretionary in the court to allow interest upon special circumstances, though there is no particular reservation of that in the decree. Ryves v. Colman, M. 1742. 2 Atk. 440. Vide Goodgivn v. Lake, Amb. 584.

309. The court will not charge interest, upon an executor, who makes use of assets come to his hands in the way of his trade. Child v. Gibson, T. 1743. 2 Atk. 603. Vide Adams v. Gale, 2 Atk. 106. (n. 2.) Hicks v. Hicks, 3 Atk. 274.

310. Where an executor has made 5 per cent. of the assets in his hands, or where he has by the non-application of assets damaged the estate to that amount, in either case he shall be charged with interest at that rate; so where he permits debts carrying interest at 5 per cent. to run on, when he had a fund to pay them, he shall as ratione pay interest at that rate. But where the executor retained the assets for his own purposes only, he should answer interest at 4 per cent. Hall v. Hallett, M. 1784. 1 Cox 134. An executor shall not, either immediately or through a trustee, be the purchaser from himself of any part of the assets; but shall be considered a trustee for the persons interested, and shall account to the utmost extent of advantage made by him of the subject so purchased. S. C.

311. The testator directed his executors to lay out the residue of his estate in the purchase of land, „or upon heritable or personal securities; at such rate of interest as they should think reasonable.” The executors lent the fund to one of themselves on bond, at 4 per cent., when 5 per cent. might have been made by heritable or government securities. The discretion given by the will to the executors, might have been soundly exercised, by their lending their money to any other person, upon such terms as they thought reasonable; but a trustee contracting with himself, cannot spare himself, he shall therefore pay interest at 5 per cent. for the money in his hands. Forbes v. Ross, M. 1788. 2 Cox 118. 2 Bro. C. C. 430.

312. Executors are not chargeable with interest for any sums, the produce of assets which do not yield interest, unless
they have been guilty of fraud or laches. Stewart v. Blaney, E. 1790. 2 Ridg. P.C. 204.

315. Executors divide a part of testator's property, but lodge a sum in the funds for securing the payment of an annuity; so to this they are joint-tenants, and it shall survive, upon the death of one, to the other. Baldwin v. Johnson, H. 1792. 3 Bro. C. C. 453.

314. An executor keeping his testator's money in his hands, was held liable to interests and costs; but if he had laid it out in the 3 per cent., the court would have affirmed his act. Franklin v. Frith, H. 1792. 3 Bro. C. C. 433.

315. If an executor keeps the funds of his testator, and uses them for his own benefit contrary to his trust, he shall account with interest at 5 per cent. and pay costs. (a) So an executor acting with his testator's property in any other manner than the trust requires, shall not only answer to the cestui que trust for any gain, but shall be liable for any loss. Piety v. Stace, T. 1799. 4 Ves. 620. (a) Vide Cracknell v. Bethune, 1 Jac. & Walk. 586.

316. Executors shall be charged with interest upon balances in their hands. Longmore v. Broom, E. 1802. 7 Ves. 124.


318. Where an executor withholds money, and does not put in his examination, he shall only be charged with interest at the general rate of the court, viz. 4 per cent. and costs; for 5 per cent. a special case beyond mere negligence is necessary, as that the executor employed the money in his trade; and the court will consider his keeping the money at his banker's as an employment of it in trade. S. C. ibid. 61. Et vide Exp. Hilliard, 1 Ves. jun. 89. Treves v. Townsend, 1 Bro. C. C. 384. Piety v. Stace, 4 Ves. 620. Fosco v. Redington, 5 Ves. 794. and references.

319. An executor in trust for infants, unnecessarily calling in the testator's property, which was out at interest upon good security, and at 5 per cent. (except a small part,) keeping large balances in his hands, and using it as his own, shall be charged with interest at 5 per cent. and costs. Mooley v. Ward, T. 1805. 11 Ves. 581. Vide Rocke v. Hart, sup. 320. Where an executor was directed, not to derive any advantage from keeping money in his hands, without accounting for legal interest, and to accumulate for the benefit of the cestui que trust The court decreed a computation of interest at 5 per cent. on all sums received by him while in his hands, and that the master do, in such computation, make half yearly rests. The object of the latter direction was to charge compound interest, and the decree, though going perhaps further than usual, was held, under the circumstances, properly executed, by a computation of interest upon each receipt from the day it was received, the balance of receipts, with the interest so calculated, and payments being struck at the end of the half year, and that balance so composed of principal and interest being carried forward as an item in the accounts producing interest. Raphael v. Boehm, M. 1805. 11 Ves. 92. This decree was affirmed on a re-hearing of S. C. E. 1807. 13 Ves. 407, and afterwards the cause came on for further directions: but the only question then was, as to the executor's subsequent costs, which the court allowed, so far as they were consequential to the proceedings on the original decree, but refused the costs of the inquiries, and accounts relating to the breach of trust. The executor, however, was not charged with these costs, arising principally from a necessary investigation into the rule by which they ought to be charged. S. C. T. 1807. 13 Ves. 390.

321. An executor, under a direction to accumulate, became bankrupt: on the authority of Raphael v. Boehm, sup. his estate was charged with interest at 5 per cent. and half yearly rest. Dornford v. Dornford, H. 1806. 12 Ves. 127.

322. An executor shall not be charged with interest, for a balance retained under a fair misapprehension of his right to it. Brune v. Pemberton, E. 1806. 12 Ves. 336.

323. Executors shall not be charged with interest on the balances in their hands, as merely of course, but only under circumstances. Ashburnham v.
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324. Causa negliget? cannot be imputed to an executor, as to a guardian or trustee. An executor therefore shall not pay interest on a balance in his hands, unless the purposes for which he retains it are fully answered. Dawson v. Massey, H. 1809. 1 Ball & Be. 231. See Newton v. Beaufort, 1 Bro. C. C. 359, where an executor was charged with interest after he could no longer show a good cause for retaining a balance. See also as to the payment of interest by executors. Littlehales v. Gascoigne, 3 Bro. C. C. 73. Piety v. Stace. 4 Ves. 101. 620. Longmore v. Broom, supra.—Raphael v. Boehm, supra. Bruere v. Pemberton, supra. Ashburnham v. Thompson, supra. Stewart v. Blaney, 2 Ridg. P. C. 204.

325. An executor (to whom negligence was imputable) will be charged with the arrears of rent unreceived, and balances in his hands, with interest at 4 per cent., and the costs of the suit, relating to such arrears and balances. Tebb v. Carpenter, H. 1816. 1 Madd. 290. Vide Lawson v. Copeland, 2 Bro. C. C. 157.—Powell v. Evans, 5 Ves. 839. Raphael v. Boehm, 11 Ves. 92. 13 Ves. 407. 390. Dornton v. Dornton, ibid. 402. Ashburnham v. Thompson, supra. See also other cases referred to, in which a representative was compelled to pay interest for money kept in hand, and Crackel v. Bethune, infra.

326. Where an administrator retained, in his own hands, a sum undistributed, he was charged with interest, though twenty years had elapsed before an effectual suit for account commenced. The account was also ordered to be taken with annual rents during the period of retention.—Stapoles v. Stapoles, T. 1816. 4 Dow P. C. 209.

327. An executor will be charged with interest on balances in his hands, though not prayed by the bill. Turner v. Turner, T. 1819. 1 Jac. & Walk. 39.

328. An executor directed by the will to lay out testator’s personalty in the funds, sells out stock unnecessarily, keeping large balances in his hands for several years, and resisting the payment of debts by a false presence of want of assets, and outstanding demands unascertained. He will be charged with 5 per cent. interest, and costs, but the court refused in this case to make rests in the account. Crackel v. Bethune, T. 1820. 1 Jac. & Walk. 586.

(b) Where to find Security.

329. If an executor wastes his testator’s estate he shall find security to pay legatees his legacy when due. Duncombe v. Stint, H. 1668. 1 Ch. Ca. 121.

330. As a testator, by appointing his executor, has thought him a proper person to be entrusted with his affairs, the ordinary cannot adjudge him incapable, nor can he insist upon security from him, and if the executor becomes a bankrupt, it is said the ordinary cannot grant administration to another. Yet the court of Chancery will compel an insolvent executor to give security. Rex v. Raine, 1698. 1 Salk. 299. 1 Vent. 335. See more, ante, tit. Bankrupt, xvii.

Where security shall be given for payment of a legacy, and where a legacy is divisible, vide post, tit. Legacy, xv.

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331. The result of the many cases on this subject appears to be this: by law, the appointment of an executor vests in him all the personal estate of the testator, and if any part (after payment of the funeral expenses and debts) remains undisposed of by the will, it vests with the executor beneficially; but wherever courts of equity have seen on the face of the will sufficient to convince them, that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus, in case of a complete intestacy, i. e. the next of kin, as where the executors are expressly
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332. So where there is a residuary clause, but the name of the residuary legatee is not inserted. Wheeler v. Sheers, Mos. 288. Cloyne Bp. v. Young, 2 Ves. 91. North Ld. v. Purdon, 2 Ves. 495.


334. So a pecuniary legacy to a sole executor, affords a sufficient argument to exclude him from the residue, as it is absurd to suppose a testator to give expressly a part of the fund to a person he intended to take the whole. Cook v. Walker, (cited) 2 Vern. 676. Joslin v. Brewett, Bubb. 112. Davers v. Dewes, 3 P. W. 40.

335. And it is settled (notwithstanding the case of Ball v. Smith, 2 Vern. 675.) that the wife being executrix shall make no difference, as appears as well by the cases mentioned in Farrington v. Knightly, 1 P. W. 544. as by Gossall v. Sounden, 2 Eq. Ab. 444. pl. 58. Martin v. Rebow, 1 Bro. C. C. 154.


337. The arguments that have been used in opposition to these decisions, and to show that the giving equal pecuniary legacies to two or more executors, is not absolutely inconsistent with an intention that they should take the surplus, are, 1st, that such gift would secure to them a proportion of their legacies, in the event of a deficiency of assets (which applies equally to the case of a sole executor;) and 2dly, then they would take the legacies separately, whereas the residue would belong to them jointly. However, the rule has long prevailed as above; neither will legacies to next of kin vary the rule. Wheeler v. Shur, Mos. 258. Andrew v. Clark, 2 Ves. 162.

338. But wherever the legacy is consistent with the intent that the executor should take the whole, a court of equity will not disturb his legal right; and therefore, where the gift to the executor is only an exception out of another legacy, it shall not exclude him from the residue, because it is necessary to make such exceptions expressly. Griffith v. Rogers, Pre. Ch. 231. Hoskins v. Hoskins, ibid. 263. Lady Granville v. Beaumont, 1 P. W. 114. Jones v. Westcomb, Pre. Ch. 316. Gossall v. Sounden, 2 Eq. Ab. 444. pl. 58. Newshead v. Johnstone, 2 Atk. 45.

339. So in Lawson v. Lawson, 7 Bro. P. C. 511. the same principle seems to have prevailed.


342. In Bowker v. Hunter, sup. Ld. Thurlow said, that when testator gives the executor part by express words, and in the same manner as he appoints him executor, it shows his intention to be different from that expressed by the fact of making him executor. In order to make a gift of part, a bar to the residue, the general gift must make the intent as clear as the other intention is from making him executor, while it bears another in-
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tent, it will not bar him from the residue. The fundamental distinction is established, by laying it down, that the rule, that the executor shall take the residue must prevail, unless there is an irresistible inference to the contrary. If the gift of the legacy is qualified, it is sufficient to prevent its barring the residue. The gift of unequal legacies may have a different ground from the gift of the whole, and the implication is, that the testator must have had a different intent, and that must rebut the equity. His Lordship held, that the executor should take the residue.

On a re-hearing, Ld. Loughborough, after reviewing all the pertinent cases, said, they were in favour of the executors, and affirmed Ld. Thurlow's decree, which he said would make this case conformable to the determinations proceeding on the distinction, without overthrowing those where a legacy is given simply to an executor.

343. Then as to specific legacies, it is determined, that a specific legacy will exclude a sole executor. Randall v. Booky, 2 Vern. 425. Southcot v. Watson, 3 Atk. 226. Martin v. Rebows, 1 Bro. C. C. 154.; and in Holford v. Wood, 4 Ves. 76. it was held, that a co-executor having specific bequests by will and codicil, shall be a trustee for the next of kin as to the residue. It has also been determined, that distinct specific legacies of unequal value to several executors, shall not exclude them. Blinkhorn v. Feast, M. 1751. 2 Ves. 27. 1 Wils. C. B. 283. S. C.; and the language of Ld. Hardwicke, in Southcot v. Watson, supra, treats specific and pecuniary legacies as standing precisely upon the same ground in questions of the nature.

344. However, no case occurs in the books, in which distinct specific legacies of equal value, to several executors have excluded them from the surplus. And the argument which supports this rule as to pecuniary, certainly does not apply with equal force to specific legates, since it is very probable, that a testator may wish to distribute specific quantities of stock or particular debts, &c. &c. amongst his executors, in some particular manner, although equally in point of value, and consistently with an intention that they should take the surplus; and Shrimpton v. Starhope, (cited 3 Atk. 230.) is not a case of distinct specific legacies, for it appears from Reg. Lib. B. 1736, fol. 104, that the testator there gave some specific legacies to a man and his wife jointly, whom he also made his executors. And so in Willis v. Brady, Barn. 64. and these cases, therefore, seem like legacies to a sole executor.


346. In Rachfield v. Careless, Powis, J. abs. C. said, this has been resata questio, upon which the courts had differed. Foster v. Munt, M. 1687. 1 Vern. 473. was the first case where Ld. Jeffries was of opinion, that any legacy to an executor occasioned a distribution of the surplus; but that decree was reversed by the Lords Commissioners, and their decree was reversed by the Lords. So were the decrees in Granville v. D. of Beaufort, in 1709, and Littlebury v. Buckley, in 1711, in favour of the next of kin on parol proof, reversed in the courts above.
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347. Notwithstanding the authority of the foregoing cases, *Ld. Hardwicke* in *Blashbrough v. East*, 2 Ves. 26, expressed himself to have been very tender in admitting parol evidence in cases of this kind; and that *Lake v. Lake*, Amb. 126. 1 Wils. C. B. 313, was the only case (in point) which had been decided since that time on parol evidence. *Vide White v. Evans*, post, pl. 365.

348. The same circumstances which entitled the next of kin to the surplus, in exclusion of the executors, will entitle the crown where there is no next of kin. *Middleton v. Spicer*, 1 Bro. C. C. 202.

349. A. gave the residue of her goods and chattels to her executors, and then gave them 100l. a-piece for their trouble, and after debts and legacies paid, she gave all the rest of her personal estate to the children of B. Decreed, the whole surplus to the children. *Fane v. Fane*, H. 1681. 1 Vern. 30.

350. Where there were two executors, and one died, his executor or administrator shall not have an account against the survivor. *Shore v. Billingsly*, M. 1687. 1 Vern. 482.

351. A. by will gave several legacies, and appointed executors, who were not related to him; testator afterwards had several children, and increased his estate, and died. Equity will not make the executors trustees for the children, as to the surplus of the estate. *Hills v. Brewer*, T. 1689. 2 Vern. 104.

352. An executor had a legacy, and there was no express disposition of the surplus. On a bill by the next of kin for distribution, the executor answered, and waived the benefit of the surplus by a mistake of the law. He shall not amend his answer, though he proved testator's intent that he should have the surplus. *Rawlinus v. Powell*, M. 1715. 1 P. W. 297.

353. Where an express legacy is given by will to the executors, and a legacy is given to the next of kin also, it is a bar as much to the next of kin as to the executors: therefore if the surplus is not disposed of by the will, the executors shall take it; and so it was decreed, though objected that it would shake many precedents. *Att. Gen. or Somner v. Hooker*, H. 1725. 2 P. W. 338.

354. A. made two executors, B. and C., appointing them residuary legatees; B. died. The whole shall survive to C. *Cray v. Willis*, T. 1729. 2 P. W. 529.

355. Where a husband is left sole executor, he is entitled to the surplus, and it shall not be construed as a resulting trust. *Partridge v. Pawlett*, H. 1736. 1 Atk. 467.

356. If two joint executors put out money as tenants in common, it shall not survive, but go to the representatives of each. *S. C.*


358. When executors are made trustees, they can take nothing for their own benefit, unless it be particularly given to them; nor, as they have no ownership, can they alter the interest of the custodia que trust. *Read v. Snell*, T. 1743. 2 Atk. 643.


360. A. gave his library of books to B. except such ten books as his wife should choose, and made her executrix. Held, she was not excluded from the surplus, and the strong reason with the court in this case was, that there was no bequest of the books to the wife, but the whole to another. *Southcott v. Watson*, T. 1745. 3 Atk. 229.


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364. Where a testator's widow and executrix took a life estate under her husband's will, she shall not be entitled to the residue. Zouch v. Lambert, T. 1793. 4 Bro. C. C. 326.

365. Where one executor has a legacy for his care and trouble, this not only makes him clearly a trustee for the next of kin, but it makes his co-executor a trustee also: and a legacy to an executor is only one mode of showing, that he shall not take a beneficial interest in the residue, though of this parol evidence cannot be admitted. The cases have run much against executors, and the court have laid hold of every circumstance of a legacy, which is not the true criterion of a testator to make his executor a trustee only White v. Evans, T. 1799. 4 Ves. 61. Et vide Nourse v. Finch, 1 Ves. jun. 344. 2 Ves. jun 78. 4 Bro. C. C. 289. Clennel v. Lewthwaite, 2 Ves. jun. 465. Thornton v. Tracey, ibid. 644. Holford v. Wood, 4 Ves. 76.

366. Testatrix by will appointed an executor, and gave him a legacy, and by a testamentary paper she directed the residue to be disposed of according to private instructions to him. By codicil she appointed an executor, and died, without giving any instructions. Held, that the executors are trustees for the next of kin. Mordaunt v. Hussey, T. 1798. 4 Ves. 117. Vide Bp. of Cloyne v. Young, 2 Ves. 91. Nourse v. Finch, sup. Starkey v. Brooks, 1 P. W. 390. White v. Evans, sup.

367. Partners in London were appointed executors and guardians, not individually, but as a firm; they claimed the residue undisposed of, in exclusion of persons appointed attorneys, executors, and guardians, in Denmark, and others appointed attorneys and executors in India. Decreed, a trust for the kin, with reference to the Master to appoint a guardian. De Mazar, or Kaudson v. Pybus, E. 1799. 4 Ves. 644.

368. An executor shall take the residue undisposed of, unless there be a strong and violent presumption against him, and a legacy does not afford the presumption, unless under special circumstances. Dicks v. Lambert, T. 1799. 4 Ves. 725. As to the grounds of admitting parol evidence between the executor and next of kin, in respect of the residues undisposed of, vide Clennel v. Lewthwaite, 2 Ves. jun. 469.


371. Stock bequeathed by a will without two witnesses, is subject in the hands of the executor, to the directions of the will, even for the purpose of a residuary bequest. Ripley v. Waterworth, T. 1802. 7 Ves. 440.

372. At law, the appointment of an executor is a gift of every thing not disposed of. Urquhart v. King, T. 1802. 7 Ves. 229.

373. Testator bequeathed his personal estate to trustees upon trust, the executors claimed the personal estate for their benefit, as not being comprised in the declaration of trust, but one of the executors was a trustee also: Held, that the executors were thereby excluded from taking the personal estate beneficially. Milnes v. Slater, E. 1803. 3 Ves. 295.

374. Testator made his will in India, by which he disposed of his property under the general introductory words "temporal estate;" held, that these words shall not extend to property partly in England, part remitted from India, between the will and testator's death, and other part on its passage to England at the time of his death. Two of the exe-
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Executors in India being clearly trustees by the effect of the directions annexed to their appointment, all the executors were held trustees for the next of kin of the residue undisposed of.—Legacies of a diamond ring to one, and of 200L. each to some of the others for mourning rings, as a token of affection and regard, were not held to make the executors trustees, 

Sadler v. Turner, T. 1803. 8 Ves. 617.

375. An executor refusing to execute the trust reposed in him, shall not have a legacy given to him in that character, Andrew v. Trin. Hall, Cambridge, T. 1804. 9 Ves. 534.

376. Where the expressions in testator's will import a trust, the court will hold that the executors are trustees of the residue undisposed of for the next of kin, who will not be excluded by being legatees under the will. But where testator had given two annuities for life, and then went on to say "when dead" "to return to the executors" the executors shall take these beneficially, and not as trustees, Sely v. Wood, T. 1804. 10 Ves. 71. Vide North v. Purdon, 2 Ves. 493. Bristol v. Hungerford, Pre. Ch. 81. Urquhart v. King, 7 Ves. 225. Sadler v. Turner, sup. and references. — Williams v. Jones, post.

377. Where one executor had a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin; and she was held entitled to the residue undisposed of, Williams v. Jones, T. 1804. 10 Ves. 77. Vide Sely v. Wood, sup. and references.

378. An executor to a tenant by sufferance or at will, obtaining a larger interest, is a trustee for the residuary legatees, like the case of general occupancy, James v. Dean, E. 1805. 11 Ves. 392.

379. Testator by his will appointed several executors, and to two of them he gave legacies as testimonies of his regard, and immediately following he imposed a trust upon them: Held, that the executors were not trustees for the next of kin, that their appointment as executors gave them a joint interest in the residue survived, and that the probate was conclusive as to their character of executors, Griffiths v. Hamilton, E. 1805. 12 Ves. 298. In which case Ld. Erskine said, that according to the rule laid down in Rachfeld v. Careless, 2 P. W. 158. and many other cases, an executor having a legacy expressly for his care and trouble, is a trustee for the next of kin of the residue undisposed of. And in White v. Evans, 4 Ves. 21. the principle was established, that one executor being a trustee of the residue, all are trustees, yet unequal legacies do not make executors trustees of the residue. (Urquhart v. King, 7 Ves. 225.) And lastly, his Lordship said, that a legacy to the next of kin does not rebut the trust of the residue undisposed of.

380. Executors are entitled to the residue undisposed of, and there is no inference against their legal right by any interest under the will. Where one only had a legacy, and are all called trustees as to the specific trusts imposed upon them, distinct from their appointment as executors, but there is no clear intention to make them trustees of the residue; it requires a strong and violent, though not an irresistible presumption, to consider them as trustees, where executors are appointed expressly in trust, they take the residue undisposed of as trustees for the next of kin, and not beneficially themselves. Pratt v. Sladden, T. 1807. 14 Ves. 193. Et vide Clenell v. Lewtheaithe, 2 Ves. jun. 471. Griffiths v. Hamilton, 12 Ves. 298. Sely v. Wood, 10 Ves. 71. Williams v. Jones, ibid. 77. and references.

381. Testator revoking all wills and codicils, declared that to be his codicil, by which he directed that the whole of his property "shall pass by this my codicil according to law," save and except some legacies mentioned, and appointed his brother sole executor, requesting him to make such arrangements as he had reason to think the testator should wish: Held, that the executor was a trustee for the widow and next of kin, according to the statute of distributions. Ed. Cranley v. Hale, T. 1807. 14 Ves. 307. Vide Jennings v. Gallimore, 3 Ves. 146.

382. An executor is always permitted to give parol evidence in favour of his legal title, except where he is plainly and unequivocally declared a trustee. Walton v. Walton, T. 1807. 14 Ves. 322.

383. A bequeathed to his executors, in trust: Held, that the trust not being declared, or failing, is a trust for the next of kin. Paige v. Canterbury Archby.
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384. Testator gave all his estate and effects to two persons, their heirs, executors, &c., upon trust, in the first place, to pay, and charged and chargeable with, all his debts and funeral expenses, and the legacies after given. These persons, whether they could claim in their individual characters or not, being afterwards appointed executors, were held entitled to the residue undisposed of (including a legacy void by the statute of mortmain) for their own benefit, against the claim of the next of kin, the whole property being personal. There are instances where the residue being intended to be given from the executors, they cannot take it, though the bequest does not take effect, as where the testator gives it in such manner as he shall appoint, and he makes no appointment. So, where a blank is left for the residuary legatees; there is this distinction, however, between a residuary devisee and legatee, as to a lapsed, for the latter takes every thing that lapsed, but the former does not. In Robinson v. Taylor, 2 Bro. C. C. 589, it was held, that where a general devise and bequest, upon trust, is not sufficient, there shall be a resulting trust for the heir and next of kin. A general residue of personal property comprehends every thing not effectually disposed of, and there is no difference whether a legacy falls into it by lapse, or is void at law, for the next of kin must be excluded by an express bequest of the residue, and executors take the residue precisely in the same plight as residuary legatees would take it. Dawson v. Clarke, M. 1808. 15 Ves. 416. Vide Pratt v. Sladden, 14 Ves. 193. 199. 200. 18 Ves. 247. S. C. Decree confirmed by Ld. Eldon, C. by whom it was held, that an executor takes not all that is undisposed of, as in the case of a lapsed, or where he is appointed in trust, and no object is expressed, but he takes only all that the testator did not mean to dispose of; therefore, where personal property is bequeathed upon a trust that does not exhaust the whole, the executor is not entitled to the surplus. Vide etiam, post, pl. 404. S. C. Et vide post, tit. Legacy xvii. So in the ordinary case of a lapsed Ld. Eldon held, in S. C., that the executor cannot take, even though the legacy be not given altum et.

385. An executor having general and specific legacies not given expressly for his care, &c. is not precluded from producing evidence of the testator's intention, that he should have the residue beneficially, by an exception of plate out of furniture bequeathed to him, and by a bequest to him of a contract for a leasehold house subsequent to the appointment of executor. The effect being only that he should not take the plate under the bequest of furniture, and that a future disposition of residue might have been contemplated. But where an executor has a legacy expressly for his pains and labour, he is not allowed to produce evidence of an intention that he should take the residue beneficially. And further, where, upon the evidence no direct intention is raised in favour of an executor, but a mere inference only from equivocal declarations with an intention to make an express disposition of the residue. The executor was declared a trustee of the residue for the next of kin. Langham v. Sanford, E. 1811. 17 Ves. 435. Vide Nourse v. Finch, 1 Ves. jun. 344. Hornsby v. Finch, 2 Ves. jun. 73. Cloyne Bp. v. Young, 2 Ves. 91.

386. Any intention to dispose is sufficient to exclude the executor, even though that intention was to give the residue to the executor himself; therefore, where a testator cancelled his residuary bequest by striking out with a pencil all the disposing part, leaving only the general description, with marginal notes, indicating alteration, and a different disposition of certain articles, it was held a resulting trust for the next of kin. Mounce v. Mounce, M. 1811. 18 Ves. 348. Vide Cloyne Bp. v. Young, 2 Ves. 91.

387. An executor and trustee dying 19 months after the testatrix, without having acted, is entitled to a legacy given him in token of regard, and as a recompense for his trouble, no neglect or refusal to act where necessary, having appeared on his part. Bridges v. Wotton, M. 1812. 1 Ves. & B. 135.

388. An executor taking a legacy, or executors having equal legacies, are held trustees (for the next of kin) of the residue undisposed of, for having part given they cannot be intended to have the whole; and this is the settled law. King v. Denison, H. 1813. 1 Ves. & B. 277. Vide Langham v. Sanford, E. Ves. 435. and the references.
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389. I.S. being appointed an executor, under the will of his partner, claimed an allowance for carrying on the joint trade after his testator's death, but there being no express stipulation that he should have such, he was held not entitled thereto, nor in any other case for his management, pains and labour, but the court allowed him his late partner's share of his necessary expenses. Burder v. Burder, M. 1813. 1 Ves. & B. 170.


391. Testator by his codicil, required and entreated his executor who was also his residuary legatee by his deed or will, to secure at his death a sum which he had omitted to express in his will, not doubting his compliance: Held, a trust by way of legacy out of testator's assets, and not a condition imposed independent of them. Taylor v. George, H. 1814. 2 Ves. & B. 378. Et post, tit. Will, lii.

392. A general devise and bequest to executors (having equal legacies of stock for mourning) their heirs, executors, &c. and on the especial trust, to devote all, both real and personal, to debts, legacies, and annuities, creates a resulting trust as to the residue. Southouse v. Bate, H. 1814. 2 Ves. & B. 396. Vide King v. Denison, 1 Ves. & B. 263. Dawson v. Clark, 15 Ves. 409.

393. A blank space between the last line of a will and the signature, raises no presumption of an intention to dispose of the residue against the legal right of the executor, nor can evidence from the next of kin be received in such case. White v. Williams, T. 1814. 3 P. W. 75. Coop. 58. Vide Knowell v. Gardiner, Gilb. Eq. Rep. 184.

394. Where a residuary fund remains unadministered by the executors, and one dies, it survives to the other. S. C. Et vide Baldwyn v. Johnson, 3 Bro. C. C. 455.

395. A being seized of real, and possessed of personal property, made his executors his residuary legatees: Held, that as to the residue of the real estate, they were trustees for the heir at law. Kellett v. Kellett, T. 1815. 3 Dow. P. C. 248.


397. Testator appointed A. and B. his executors (together with his wife,) "hoping they would be so good, out of respect to his wife, to accept the office;" and, "as to what worldly property he had, he thus disposed of the same, specifying the manner, by giving several specific and pecuniary legacies, but he did not dispose of the residue." Held, that the testator's intention was clearly expressed by the clause requesting the executors to accept the office, followed by the declaration as to his disposal of his whole property, that the executors should not take the residue beneficially. Girard v. Hanbury, T. 1817. 3 Meriv. 160. Vide North v. Pardon, 2 Ves. 498.

EXECUTORS AND ADMINISTRATORS IX.

Where an Executor takes as such, and where as Deviser or Legatee.

398. Testator gave the residue of his estate to his executrix, or to her heirs, executors, administrators, or assigns: Held, it was given to her as executrix; and she dying in testator's life-time, he died intestate as to the residue. Stone v. Evans, M. 1740. 2 Atk. 86.

399. A testator may give an executor the personal estate as a legacy, and exempt from debts; and a provision out of a real estate or one executrix will not bar her, neither with specific legacies given to one, bar either of the residue of the personal estate, but are put in only to give one a preference to the other. Walker v. Jackson, T. 1748. 2 Atk. 626. 1 Wils. C. B. 24. Bunb. 302. Vide Blinkhorn v. Feast, 2 Ves. 27. Wilson v. Ivat, ibid. 166.
EXECUTORS AND ADMINISTRATORS IX. & X.

Where an Executor takes as such.—Where he was Debtor to his Testator.


400. Where a legacy is given to an executor, he must prove the will in order to entitle himself to it, though not made a condition by the will: but he may prove at any time, even after the hearing, Reed v. Devaneys, M. 1791. 2 Cox 285. 3 Bro. C. C. 95.

401. Where a legacy is given to a man describing him as executor, if the office does not continue, he shall not have the legacy. Roach v. Haynes, T. 1803. 9 Ves. 593.

402. The court will presume prima facie that a legacy given to a person who is appointed executor, is given to him in that character though not apparently connected, unless there are circumstances to show, that the legacy was intended for him personally; therefore, where testator gave legacies by will to three persons, whom he thereby appointed his executors, and by codicil he gave them all additional legacies of equal amount, and all standing together: It was held, that one of the executors who had renounced, was not entitled to his legacies. Stackpoole v. Howell, E. 1807. 13 Ves. 417.

403. The court will give effect to a slight distinction upon a legacy given to a person by name, or by the description of executor. In the latter case he takes in that character with all the consequences. Currie v. Pye, E. 1811. 17 Ves. 467.

404. Where testator devises and bequeaths upon trust, the devisee cannot take beneficially the real estate not exhausted, but a trust results from the heir, nor can the executor (whether he or another be the trustee,) take beneficially, the surplus of the personal property. Dawson v. Clarke, T. 1811. 18 Ves. 255. Et vide Robinson v. Taylor, 2 Bro. C. C. 589. But in Southhouse v. Bute, 2 Ves. & B. 596. his Honor declares, he thinks the executors would take as such, even if it had been decided, that they did not take by the direct bequest.

405. Testator gave A. 10,000l. and the furniture in his house (plate only excepted,) and appointed him executor. Although the legacy constituted a violent presumption in law, that the testator meant to exclude him from the beneficial interest in the residue, the exception out of the bequest of furniture was not held such a circumstance as would confirm that presumption, so as to preclude the executor from giving parol evidence of an intention in his favour; for such evidence was liable to be repelled by evidence of a contrary intention; which, if supported, would induce the court to declare him a trustee for the next of kin. But if on the face of the will, there is not an apparent intention to exclude the executor, parol evidence of such an intention, is not admissible; so where a testator gave a legacy to A. by will, and afterwards by codicil, appointed him his executor, it was doubted, whether a violent presumption to exclude him from the surplus had arisen. But where the appointment followed the gift of the legacy, though at any interval in the same instrument the rule cannot apply, because the whole instrument must be construed to have effect from the very moment of signature. Langham v. Sandford, M. 1816. 2 Meriv. 6. 17 Ves. 435. S. C. Et vide Sandford v. Raikes, 1 Meriv. 646. Clessel v. Lewthwaite, 2 Ves. jun. 465. Nourse v. Finch, 1 Ves. jun. 344. Foster v. Munt, 1 Vern. 473. Vide etiam, post, tit. Will, viii. Note. In the principal case it was contended, that to rebut the presumption of law, it is enough to show evidence of an intention to exclude the next of kin, without any evidence of direct intention in favour of the executor; but the Ld. Ch.'s judgment seems to have left that point undecided.

EXECUTORS AND ADMINISTRATORS: X.

Where an Executor was Debtor to his Testator.

406. A. devised the residue of his real and personal estates to his two executors as tenants in common; one of them was indebted to testator by bond. This bond is not released, but shall be divided between them. Brown v. Selwyn, M. 1734. Ca. temp. Talb. 240. Vide etiam Cary v. Goodinge, 3 Bro. C. C. 110. where both executors were indebted to testator, in unequal sums, their appointment was 95.
EXECUTORS AND ADMINISTRATORS X.

Where an Executor was Debtor to his Testator.


47. If a debtor be made executor, the debt is totally extinguished; otherwise if he be appointed administrator, for then it is no extinguishment of the debt, but a suspension of the action, and his representative is chargeable to the administrator, de bonis non, of the first intestate. Hudson v. Hudson, M. 1737. 1 Atk. 461. Se Wankford v. Wankford, 1 Salk. 289. But it seems that the appointment of a debtor as executor, is only parting with the action, for the executor is considered as a trustee for the money owing to the testator; and such money, in equity, is considered as part of testator’s personal estate. Vide Holliday v. Boss, 1 Rol. Ab. 920. Askwith v. Chamberlain, 1 Ch. Rep. 138. Field v. Clark, ibid. 242. Fox v. Fox, 1 Atk. 460. Cary v. Goodinge, 3 Bro. C. C. 110.

408. Where one executor is indebted to the testator by mortgage, if co-executors are apprehensive he is insolvent, they should bring a bill against him for sale of the estate, for, to pray a foreclosure, would be improper. Lucas v. Scale, M. 1740. 2 Atk. 56.

409. An executor is bound to call in money, out upon personal security, and therefore he must pay in court money due from himself, Eagleson v. Kingston, E. 1803. 8 Ves. 468.

410. The examination of an executor under the usual decree for an account, ought to contain an interrogatory whether he is indebted to his testator. Liberty was therefore given in this case on the suggestion of co-defendants who were legatees, to exhibit an interrogatory for that purpose without affidavit, but not to go into an account which must be the subject of a distinct bill. Simmons v. Gutteridge, M. 1805. 3 Ves. 262.

411. A debt due from an executor to his testator, is assets, for the same reason that he may, if a creditor, retain, viz. that he cannot sue himself. S. C. ibid. 264. *Et vide Berry v. Usher, 11 Ves. 37. and note. (a)

412. Where two executors had pledged some bonds of their estator, (which were in their hands) to defendants their bankers, to cover advances of money from time to time, for several years, Grant, M. R. sustained the pledge, the bill having been filed by co-executors who had not previously acted, and not by specific legatees. McLeod v. Drummond, M. 1805. 14 Ves. 355. Vide Scott v. Tyler, 2 Bro. C. C. 431. 2 Dick. 712. Humble v. Bill, 2 Ves. 444. 1 Bro. P. C. 71. (T.)

413. There is a distinction between specific and residuary, or general legatees, claiming against the disposition of the assets by the testator. In the latter case, the court will relieve in circumstances implying fraud in the legal sense, as an assignment taken soon after testator’s death from the executor of an antecedent debt from him, on his representation that the whole was left to him. S. C. ibid. 361. *Et vide Mead v. Ld. Orrey, 3 Atk. 235. Hill v. Simpson, 7 Ves. 152. Nugent v. Gifford, 1 Atk. 468.

414. From the above decree at the Rolls, plaintiff appealed to Ld. Ch. Eldon, who carefully examined the authorities. The power given to an executor over his testator’s property, his Lordship said, was very large, that he might better execute his trust, and prevent the inconvenience of implicating and entangling third persons, in enquiries as to his application of the money produced by the conversion of the assets. Generally, a purchaser from an executor is not bound by his misapplication, nor in many cases even of pledge, if free from fraud or direct evidence, on the face of the transaction, of an intended misapplication. Here the deposits were made by acting executors, of their testator’s property, together with their own, and for their own debt, the latter therefore must be first applied. Ld. Ch. then adverted to the principal cases as to the power of executors over the assets in law and equity. (a) And after reviewing the several cases adverted to, he said there was a great difference between directing an instrument to be delivered up, where, upon the circumstances under which it was deposited, that would be too much, and calling on that person to make it effectual in equity. Further, his Lordship held, that where an executor has deposited the assets of his testator, as a security for his own debt, and to cover future advances to him, though under circumstances indicating an intention to apply the money to the purposes of the will, yet it cannot be held consistent with his duty as an executor. Ld. E. further said, that the case of Hill v. Simpson, sup. was very material, and on that his Honour observed; at the hearing, that for
Where an Executor was Debtor to his Trustee.—Where they may retain.

the first time he was of opinion, that a general pecuniary legatee had the same right in equity to follow the assets, in case of misapplication, as a specific legatee or a creditor had, in which opinion his Lordship concurred, saying, that the case of a residuary legatee was still stronger, and he may come in on the specific fund. Ld. E. then concurring with his Honour, in the distinction between an advance immediately on the deposit, and one to secure an antecedent debt: Decreed, that a pledge of the assets by an executor, could not be maintained against a pecuniary legatee, though for money advanced at the time, if under circumstances showing knowledge of an intended application, not conformable to, or consistent with, the character of executor. His Lordship refused to disturb the deposit in this case, and affirmed his Honour’s decree. S. C. T. 1810. 17 Ves. 152.

(a) Vide Farr v. Newman, 4 T. R. 651. where it was held by the whole court (against Baller, J.) and much to the satisfaction of Ld. Eldon, that a testator’s effects cannot be taken in execution for the executor’s debt, and his Lordship also said, he was not prepared to follow even Ld. Mansfield to the extent he went, in Whale v. Booth, ibid. 625. (n.) See also Humble v. Bill or Savage, sup., the reversal of which decree, by the Lords, was not considered satisfactory, either in Crane v. Drake, 2 Vern. 516. or by Jekyll, M. R. in Ever v. Corbett, 2 P. W. 148. or Arden, M. R. in Andrews v. Wrigley, 3 Bro. C. C. 137. See also Ld. Hardwicke’s observations on this reversal, in Mead v. Ld. Orrery, 3 Atk. 241. Burling v. Stenard, 2 P. W. 149. is similar to Ever v. Corbett, sup. Elliot v. Merriman, 2 Atk. 41. 3 Barn. 78., is very important in itself, and Ld. Knyvett took it as his text in Bonny v. Ridgard, cited in Scott v. Tyler, 2 Bro. C. C. 438. In Mead v. Ld. Orrery, 3 Atk. 255. is much general doctrine, but is evident from Taner v. Ivie, 2 Ves. 466. that Ld. Hardwicke did not depend on it. In Bonny v. Ridgard, sup. Ld. Knyvett shook the authority of Nugent v. Gifford, sup., and Mead v. Ld. Orrery, sup. on establishing the general doctrine attributed to them, and acceded to the propositions in Elliott v. Merriman, sup., and thought that length of time would be an answer to a demand, in respect of a misapplication of assets by an executor, and Ld. Eldon concluded by saying, that the judgment in Scott v. Tyler, as stated in 2 Dick. 712. at sup. was that which Ld. Thurlow would have given, if the case had not been compromised.

415. An executor admitting a balance due from him to the testator, upon an unsettled account, was ordered to pay the amount into court, though there were debts of the testator still outstanding; the testator had been dead three years. Mote v. Leatke, T. 1817. 2 Meriv. 491.

416. Bankers, the agents of executors, and authorised by them to receive certain assets, remitting the amount to the executors in the course of their duty as agents, and afterwards applying the assets, when received, in payment of the amount of such remittances, are not responsible in respect of a misapplication by the executors, where they are not privy to any intention of such misapplication. Keene v. Roberts, T. 1819. 4 Madd. 332. Vide Nugent v. Gifford, 1 Atk. 463. Mead v. Ld. Orrery, 2 Atk. 237. McLeod v. Drummond, 14 Ves. 358, 17 Ves. 172.

EXECUTORS AND ADMINISTRATORS XI.

Where an Executor or Administrator may retain.

417. The executor of an executor may retain towards satisfaction of the debt owing by the first testator, for he is executor of the first testator; but if one be indebted by bond to A. and makes A. and B. executors, and dies, and then A. makes C. executor and dies, in this case C. cannot retain, because he is not executor of the first testator, but B. is executor by survivorship; and the only reason of allowing a retainer is, because an executor cannot sue himself. Hepton v. Dryden, M. 1701. Pre. Ch. 179.

418. An executor pleaded plene administravit a bond debt, and that he was
EXECUTORS AND ADMINISTRATORS XI. & XII.

Where they may retain.—Who is entitled to Administration, &c.

a bond creditor, and had paid himself. On the trial, an interlineation appeared of 50l. in the executor’s bond, after it was executed. Ld. Ch. would only allow it as a simple contract debt, so as not to defeat bonds. D. of Chandos v. Talbot, T. 1725. Sel. Ch. Ca. 24.

419. A died indebted by one bond to B. and by another bond to C. and left B. and I. S. executors. B. intermeddled with the goods, and died before probate, and before any election made to retain. The point, whether B.’s executor might have retained the goods in his hands, as B. could have done, was not determined, the counsel for the executor having waived it. Craft v. Pyke, E. 1738. 3 P. W. 183. Vide Weeks v. Gore, 3 P. W. 184. (n.) Et vide Ryal v. Rowe, 1 Atk. 173. for the observations of Burnett, J. on this part of the case.

420. An executor, by an established rule of law, may retain to pay his own debt, and is not obliged to take in part where there are not assets enough to pay the whole. Robinson v. Cummings, M. 1742. 2 Atk. 411.

421. A right of retainer in an administrator is not prejudiced by the administration having been granted to one for the use of a lunatic creditor, any more than if granted dur. minor. nor because a debt is due to the obligee of a bond as trustee. Franks v. Cooper, T. 1799. 4 Vent. 763.

422. Where an executor claiming to retain out of his testator’s residue, certain parts of the property, to protect himself against a future contingent demand, in respect of covenants entered into by the testator for payment of rent, and repairs of an estate held by him on lease under a corporation, though there was no existing breach of covenant, nor arrears of rent in respect of which he was liable; the residuary legatee brought his bill for the property so retained, on which the court ordered that the funds in question should be made over to the residuary legatee, on his giving a sufficient indemnity to the executor, in such terms as should be settled by the master. Simmons v. Bolland, M. 1817. 3 Meriv. 547. Vide Eeles v. Lambert, Sty. 37. 54-73. Aleyon 38. Hector v. Gennet, Cro. Eliz. 466. Hawkins v. Day, Amb. 160. 3 Meriv. 555. (n.)

423. Executors advancing to creditors more than the value of testator’s personal assets, acquire an absolute right to them. Chalmer v. Bradley, T. 1819. 1 Jac. & Walk. 65.

EXECUTORS AND ADMINISTRATORS XII.

Who is entitled to Administration, and to whom granted. When taken out, and the Letters must be produced.

424. Where an intestate leaves a bond, the ordinary cannot grant administration to two in moiety, because it is an entire thing. Fawtry v. Fawtry, M. 1691. Salk. 36.

425. Where there is a brother and a sister of the half blood, and the sister is married, administration must be granted to the brother, and not to her and her husband, for that would be to make the husband administrator who is not next of kin to the intestate; and if she should die, her husband, by continuing administrator, might possess himself of the whole personal estate. Anon. 3 Salk. 21.

426. A feme covert died intestate, and her next of kin obtained administration. Upon the husband’s suit for a repeal, a prohibition was denied, for the ordinary had no power to grant administration to any but the husband. Sir George Sand’s Ca. 3 Salk. 22.

427. In a bill for an account of the personal estate of I. S. though the person entitled to administer to I. S. be a party, yet it is not sufficient, unless administration be actually taken out. Humphreys v. Humphreys, H. 1734. 3 P. W. 549.

428. A. sued as administrator of I. S. without showing that I. S. died intestate; yet an administration taken out of the archbishop’s court shall be intended a good administration. Tourton v. Flour, T. 1735. 3 P. W. 370.

429. Though an administration is not taken out till after the filing of the bill, yet if it is procured before the hearing,
WHO is entitled to Administration, &c.—Distribution, &c.

It is sufficient in equity. Sed secus, at law, because defendant may crave over of the letters of administration. Fell v. Lutridge, H. 1740. 2 Atk. 120. Burn Ch. Rep. 319.

430. A husband has exclusive right to administer to his wife, if he survives her; and if he dies before he has received a legacy left to her, the administrator de bonis non of the wife shall be a trustee only for the administrator of the husband. Humphreys v. Bullen, E. 1797. 1 Atk. 458. ante, tit. Baron and Pene, iii. pl. 79, and other cases in that section.

431. Though the ecclesiastical courts are bound by the statute, to grant administration to the next of kin of a wife, yet that does not bind the right in equity, for a surviving husband has her whole right vested in him, at the time of her death, and her whole property belongs to him. Elliot v. Collier, T. 1747. 3 Atk. 527.

432. A. promised that if the widow of the intestate would permit him to be joined with her in the administration, to make good the deficiency of assets to pay debts; held binding, and not within the statute of frauds. Tomlinson v. Gill, M. 1756. Amb. 330.

433. If a person comes from Jamaica, and resides and then dies in England, and administration be granted here, the judge of probate in Jamaica is bound thereby. So where one resided and died in England, administration was granted in England to his widow, and in Jamaica, to his sisters and their husbands. The widow applied for administration in Jamaica, which was refused, but that sentence was reversed on appeal to the king in council. Burn v. Cole, 1762. Amb. 415.


435. When one of the next of kin of an intestate, filed his bill for the delivery of a pretended will, &c. and for the appointment of a receiver of the intestate's property, until letters of administration were granted by the Ecclesiastical court, it was held unnecessary to have the will delivered up; and no ground being stated to show that such letters of administration could not be immediately obtained, the court refused relief. Jones v. Frost, H. 1818. 3 Madd. 1.

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Distribution, and who shall be preferred.

436. A. died intestate, leaving a brother of the whole blood, and a sister of the half blood: Held, that they should come in for equal shares. Smith v. Tracey, 1676. 1 Mod. 209. 1 Vent. 316. 2 Lev. 173. 1 Vern. 437. cited. Crook v. Wyatt, 2 Vern. 124. 2 Freem. 112. 2 Vent. 317. Show P. C. 108. S. P.


438. Money was bequeathed to A. for life, and if she died without issue, then to the children of her sister B. in such shares as A. should advise. Some of the children of B. died, leaving issue; and then A. died in the life-time of her husband, but made no appointment. Decreed, the money to be distributed among the children of B. and their representatives, per stirpes, and not per capita. Crook v. Brooking, E. 1689. 2 Vern. 50.

439. An Intestate left an uncle and a deceased uncle's son; the court inclined to think that the nephew was entitled equally with the surviving uncle, but took time to consider of it. Beetson v. Darkin, T. 1690. 2 Vern. 168. But the contrary is now determined in Maui v. Harding, T. 1691. 2 Vern. 238. Pre. Ch. 28. and in Pett's Ca. 1 P. W. 25. 1 Salk. 250.

440. A. died intestate, leaving one child; the whole personal estate shall go to him within the statute of distributions. Palmer v. Garwood, H. 1699. Pre. Ch. 21.

441. As to collaterals the statute says, "there is no representation admitted among collaterals after brother's and sister's children." Upon these words a question arose, whether the words were intended of brothers and sisters of the intestate's, or brothers and sisters being remote relations of the intestate; and it
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Distribution, and who shall be preferred.

was held, that representation should only be between the brothers and sisters of the intestate. *Mau v. Harding*, T. 1691. 2 Vern. 233.

445. And this representation amongst brothers and sisters, does not extend to their grand-children; for, where the persons claiming distribution were a deceased brother's daughter, and the grand-children of another deceased brother, it was held, that the deceased brother's daughter only was entitled, and that a deceased brother's or sister's grand-children should not come in with a deceased brother or sister's children. *Pett v. Pett*, T. 1700. 1 P. W. 25. Salk. 250. And as to the representation among other relations, where a man died without wife or child, brother or sister, and his next of kin were an uncle by his mother's side, and a deceased aunt's child; upon a demurrer, the court allowed the uncle to have the whole, and the deceased aunt's child nothing; and though the case seems hard, *F. Ch. said, the law was clearly so established. Bowen v. Littlewood*, M. 1719. 1 P. W. 594.

446. Where the intestate leaves a grand-mother and an aunt, the grand-mother will be entitled in exclusion of the aunt, for (said *Ld. Holt*) as by the common law, father and mother were nearer than brother and sister, so grand-father and grand-mother are nearer than uncle and aunt. The grand-mother is the root, but the aunt is only a branch of the kindred. *Blackborough v. Davis*, E. 1701. 1 P. W. 61. 1 Salk. 38. 351. 12 Mod. 623. *Woodroffe v. Woodroffe*, Prc. Ch. 527. S. P. determined on the authority of this case.

447. A man died intestate before the statue of distributions, and administration was granted after; his personal estate shall be distributed according to the statute. *Brow v. Whiting*, M. 1709. 2 Vern. 642.

448. Where a wife dies possessed of choses en action, and then her husband dies without taking out administration, and her next of kin administer to her, they shall be deemed as trustees for the executor of the husband, quoad such choses en action. *Curt v. Rees*, M. 1718. cited 1 P. W. 381. *Elliott v. Collier*, 3 Atk. 525. 1 Ves. 15. 1 Will. C. B. 168. S. P. *Et vide* Lady Asquith's case, 1 P. W. 392. Humphreys v. Bullen, 1 Atk. 458.


447. Where the next of kin to the intestate were a grand-father on the father's side, and a grand-mother on the mother's side, they shall take in equal moieties, being in equal degree, for though the grand-father may be more worthy of blood, yet in this case dignity of blood is immaterial. *Moore v. Barkham*, T. 1723. 1 P. W. 53.

448. As to a distribution between the mother, brothers, and sisters, of the intestate, each shall share alike; as where A. died intestate, and without issue, leaving a wife, a mother, and several brothers and sisters, the wife under the statute of 22 & 23 Car. 2. C. 10. s. 6. takes a moiety; and a question arising upon the statute of 1 Jac. 2. C. 17. how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters; upon a bill for the opinion of the court, it was held clearly, *per King*, Ch., that the mother should have no more than a share of the other moiety with the brothers and sisters of the intestate, for the intent of the statute was, to put the mother, (who before stood upon the same footing with the father,) in the same condition with those collaterals, so that whenever she is entitled they shall have an equal share with her. *Keily v. Keily*, T. 1726. 2 P. W. 344. 1 Str. 710. *Gilb. Eq. Rep. 189.

449. An estate *per autre vie* is distributable in equity, though not in the spiritual court. *Witter v. Witter*, H. 1730. 3 P. W. 102. *Vide* Oldham v. Pickering, Salk. 464. *Et vide* D. of Devonshire v. Atkins, 2 P. W. 382; but more particularly the statute 14 Geo. 2. whereby an estate *per autre vie* being un devised or in part applied to the payment of debts, according to the statute of frauds, shall be distributed in the same manner as personal estate.

450. Where the intestate left two aunts, and a nephew and niece, children of a deceased brother, *Ld. H.* ordered the surplus to be divided into four equal
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Distribution, and who shall be preferred.

Parts to each in equal degree, for the children do not take by representation, but each in their own right, and that per capita, and not per stirpes in this case; though if the father of the nieces had been living, he would have taken the whole. Durand v. Prestwood, T. 1738. 1 Atk. 454. Vide Lloyd v. Touch, 2 Ves. 213. Page v. Cook, ib. 214. cited. Walsh v. Walsh, Pre. Ch. 54. Davers v. Dewos, 3 P. W. 50. Stanley v. Stanley, 1 Atk. 456.

451. Where a man died intestate, leaving a wife, a mother, and children of a deceased brother, the children, as representatives of their father, bringing a bill to have one half of the moiety of the intestate's estate, the wife being entitled to the other moiety, and the mother, as they insisted, to have only an equal share with them, LD. Ch. Hardwicke ordered the residue of the intestate's estate to be divided into four equal parts, two parts for the widow, one fourth to the mother, and the other fourth to the brother's children. Stanley v. Stanley, T. 1739. 1 Atk. 458.

452. A died intestate at Jersey, and at his death 500L. was due to him on bond, in London: Held, to be distributable according to the laws of Jersey. Pipon v. Pipon, 1743. Amb. 28.

453. A man's personal estate is supposed to follow his person, and is therefore distributable according to the laws of the country where he is. S. C. Ridg. Ca. temp. Hardw. 172.

454. Before the stat. 22 & 23 Car. 2. the law of administrations depended upon the two statutes of Edw. 3 and Hen. 8. which directed the effects of the intestate to be distributed pro satiate animae, and in pious uses. Greenside v. Benson, E. 1745. Ridg. Ca. temp. Hardw. 340.

455. H. P. by a French will, as to the rest of his goods whether in France or in England, named for his only and universal heiresses, S. P. his sister, for one-third; and M. P. his sister, for another third; and as to the remaining third, he willed S. P. should enjoy the interest thereof for her life, and after death, the capital should be inherited by the children of I. P. his brother; and that his testament may be well executed, he appointed L. C. of London, merchant, his executor, giving him, in that quality, as full power as could be given to a testamentary executor. S. P. dying in the testator's lifetime, his surviving sisters and next of kin brought their bill to have what was devised to her, distributed. L. C. quasi executor insisted he was entitled to it, (S. P. being dead in the testator's lifetime) as a lapsed legacy: Held, that the executor being a trustee only, it must be divided according to the statute of distributions, viz. two-thirds to testator's two sisters, and the remaining third of this third to S. P. the only child of testator's brother. Androvin v. Poibane, E. 1745. 3 Atk. 299. Vide Graydon v. Hicks, 2 Atk. 18. Farrington v. Knightley, 1 P. W. 550. and notes. Bagwell v. Dry, ibid. 700. Chamberlain v. Knapp, 1 Atk. 52. and references.

456. L. previous to his marriage with A. covenanted that he would by will, or by some good assurance, grant to D. or her mother, or her executors, &c. in trust for D. 1000L. to be paid to her after his decease, for her separate use; and in case he should not by deed or will assure the same, then his executors, &c. should pay the 1000L. D. died without such deed or will: Held, that D. was not entitled to the 1000L., and her distributive share of L.'s personal estate also, it being meant by L. not as a debt, but as a security, only for his wife's provision. Lee v. Cox, H. 1746. 3 Atk. 419. Vide Blandy v. Widmore, 1 P. W. 324. and Mr. Cox's notes. Barrett v. Beckford, 1 Ves. 519. Weyland v. Weyland, 2 Atk. 632. Kirkman v. Kirkman, 2 Bro. C. C. 95.

457. A brother or sister of the half blood, shall have an equal share with those of the whole blood, and upon the construction of 22 & 23 Car. 2. c. 10. a. 6. it has been determined, that a posthumous brother or sister, or a brother or sister born after the father's death, shall share equally with the other brothers and sisters. Burnet v. Mann, M. 1748. 1 Ves. 156.

458. But upon the construction of the statute of 1 Jac. 2. it was a question whether a posthumous sister was entitled to a share of her brother's personal estate equally with her mother, yet after many arguments, LD. Hardwicke decreed for the posthumous sister. Wallis v. Hudson, H. & M. 1740. 4 Burn. Ecc. Law, 365.

459. A grand-daughter of the sister, and a daughter of the intestate's aunt, are in equal degree. Thomas v. Kettricke, M. 1749. 1 Ves. 533.
EXECUTORS AND ADMINISTRATORS XIII.

Distribution, and who shall be preferred.

460. If an English subject resides and dies in England, leaving debts or choses in action due in Scotland, and administration is granted here, they are distributable as the rest of his personal estate. Thorne v. Watkins, T. 1750. 2 Ves. 35.

461. T. S. seised in fee of lands, devised the same to his wife for life, and after her decease, to R. B. and the heirs of his body, and for want of such issue, to be sold and divided amongst his relations, according to the statute of distributions, where no will is made: Held, the wife is no relation to the husband, and that the next of kin take the whole exclusive of her, both by the words of the will, and the intention of the testator. A gave the residue of his personal estate to trustees, who were to permit his wife to receive the produce for her life, and says "after her decease, I give it to such of my relations as would have been entitled under the statute of distributions, in case I had died intestate." Held, the wife is not to be considered as a relation. Worseley v. Johnson, M. 1753. 3 Atk. 738. Vide Davis v. Baillie, 1 Ves. 94.

462. An agreement for the distribution of a personal estate was set aside, though ratified, the value being greater than was known at the time. Cocking v. Pratt, E. 1750. 1 Ves. 401.

463. Upon the question whether the personal estate of a brother, who died intestate, should go wholly to his brother, or be divided equally between him and the grand-father, Ld. Hardwicke held, that it belonged entirely to the brother, and that the grand-father had no right to share with him. Evelyn v. Evelyn, H. 1754. 3 Atk. 762. Amb. 191.

464. In cases where the next of kin to the intestate have been a grand-father and a brother, many suits have been commenced, to determine their rights, but the point has been fully determined in favour of the brother, in exclusion of the grand-father, in three distinct cases, viz. Evelyn v. Evelyn, H. 1754. 3 Atk. 762. Amb. 191. and Norbury v. Vicars, M. 1749. and Pool v. Wilshaw, T. 1708. there cited. In Evelyn v. Evelyn, Ld. Hardwicke said, that by the statute, "the ordinary (in case there shall be no wife, children, or children's children,) shall make a just and equal distribution, among the next of kin to the deceased in equal degree, or legally representing their stocks, pro se cuique jure according to the laws in such cases, and the rules and limitations hereafter set down;" which limitation is only a particular specification in what cases, representation shall be allowed, for there is nothing more expressed in the statute, than that the estate shall be distributed equally to every the next of kin, in equal degree. It has been said that the decrees in Pool v. Wilshaw, and Norbury v. Vicars, supra, were erroneous, but Ld. Hardwicke would not overthrow those decisions; his Lordship, after a full discussion, determined in favour of the brother, in exclusion of the grand-father.

465. The personal property of an intestate, wherever situated, must be distributed by the law of that country where his domicil was, which is prima facie the place of his residence, but that may be rebutted, and supported by circumstances. Bempe v. Johnstone, T. 1796. 3 Ves. 198.

466. Testator, by a will, unattested, after directing charitable and other legacies to be distributed by his executor, gave the residue of his estate, (if any) which he should be seised or possessed of, to his "next of kin, or heir at law," whom he appointed his executor "after his debts and funerals paid." Distribution decreed according to the statute. Lowndes v. Stone, T. 1799. 4 Ves. 649.
Distribution, and who shall be preferred.

A table to show at one view the general distribution of an intestate's personal estate, according to the statute of 22 & 23 Car. II. c. 10. explained by 29 Car. II. c. 30.

If an intestate dies, leaving

A wife and child, or children.

A wife only.

No wife or child.

A child, children, or representatives of them.

Children by two wives.

If no child, children, or representatives of them.

A child and grandchild.

An husband.

A father, and brother, or sister.

A mother, and brother, or sister.

A wife, mother, three brothers, a sister, and nieces.

A wife, mother, nephews and nieces.

A wife, brothers or sisters, and mother.

A mother only.

A wife and mother.

A brother or sister of the whole blood, and brother or sister of the half blood.

A posthumous brother or sister, and mother.

A posthumous brother or sister, and brother or sister born in the life-time of the father.

A father's father, and mother's mother.

Uncle or aunt's children, and brother or sister's grand-children.

A grandmother, uncle, or aunt.

Two aunts, a nephew, and a niece.

His personal representatives shall take in the proportions following:

One-third to the wife, the rest to the child or children; and if the children are dead, then to their representatives (that is, their lineal descendants,) except such child or children, not heirs at law, who had an estate by settlement of the intestate, in his life-time, equal to the other shares.

Half to the wife, rest to the next of kin in equal degree, to the intestate, or their legal representatives.

All to the next of kin and their legal representatives.

All to him, her, or them.

Equally to all.

All to the next of kin in equal degree to the intestate.

Half to the child, half to the grandchild, who takes by representation.

The whole to him.

The whole to the father.

The whole to them equally.

Half to the wife, residue to the mother, brothers, sisters, and nieces.

Two-fourths to the wife, one-fourth to the mother, and the other fourth to the nephews and nieces.

Half to the wife, (under the statute of Car. 2,) half to the brothers or sisters, and mother.

The whole, (it being then out of the statute of 2 Jac. 2. c. 17.)

Half to the wife, half to the mother.

Equally to both.

Equally to both.

Equally to the both.

Equally to both.

Equally to all.

All to the grandmother.

Equally to all.

* By statute Jac. 2. c. 17. a. 7. If after the death of the father, any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with the mother.
EXECUTORS AND ADMINISTRATORS XIII.

Distribution, and who shall be preferred.

An uncle, and deceased uncle’s child. All to the uncle.
An uncle by the mother’s side, and deceased uncle or aunt’s child. All to the uncle.
A nephew by a brother, and a nephew by a half sister. Equally per capita.*
A brother or sister’s nephews or nieces. The whole, the nephews and nieces taking per stirpes,† and not per capita.
A nephew by a deceased brother, and nephews and nieces by a deceased sister. Each in equal share, per capita, and not per stirpes.
A brother and grandfather. The whole to the brother.
A brother’s grandson, and brother or sister’s daughter. All to the daughter.‡
A brother and two aunts. All to the brother.
A father and wife. Half to the father, half to the wife.

If after the death of the intestate, his daughter marries, and dies before distribution made, her husband shall have the whole of the share to which he would have been entitled in right of his wife, had she been living. But he must first take out administration to his wife’s effects.

If A. was to die intestate, and the only issue he ever had were a son and a daughter, both of whom had married and died before him, leaving a wife and husband who had survived A., neither this wife or husband would have any part of A.’s personal estate, though the issue of his son and daughter, with the wife, (if such were living,) would have the whole, it therefore must go to the next of kin.

If A. dies intestate, without wife or child, having had only a brother and sister, both of whom had married and died before him, leaving a wife and husband who survived A., neither this wife or husband would be entitled to any part of A.’s estate, for in this case he would die without kindred, and his personal estate would vest in the crown; and thus it would be in respect to the husband of A.’s mother, and the husband and wife of any one that were his next of kin, and had married and died before him.

If a person be a subject of another country, and at his death had personal property in England, distribution is to be made according to the law of that country of which the owner was a subject.

* Per capita, is where all the claimants claim in their own right, as in equal degree of kindred, and notjure representatione, as if the next of kin be the intestate’s three brothers, A. B. and C.; here his effects are divided into three equal portions, and distributed per capita, one to each.

† When persons take by representation, it is called succession in stirpes; as if A. dies leaving three children, B. leaving two, and C., the brother of A. and B., surviving; then one-third to A.’s three children, one-third to B.’s two children, and the remaining third to C., the surviving brother.

‡ If the grandson’s father survived the intestate, but died before distribution made, then his son becomes entitled in distribution with the sister’s daughter to a moiety, but not otherwise, because the son becomes the representative of his father, it being a vested interest in him, but he must take out administration.
EXECUTORS AND ADMINISTRATORS XIV.

Advancement. Hotch-pot.

467. Plaintiff's father, on marriage, covenanted, in case of a second marriage, to pay the first son by the first wife, 500l.; there was a son, and several other children of the first marriage; the father died intestate. Per curiam, the heir must bring the 500l. into hotch-pot, though in nature of a purchaser under the marriage settlement. Phiney v. Phiney, H. 1708. 2 Vern. 638.


469. W. on his son's marriage, settled 5000l. annuities on himself for life, then on his wife for life, remainder to his son for life, remainder to his intended wife for life, with remainder to the issue of the marriage: Held, that not only so much as his life estate in the annuities should be valued at, but the whole 5000l. must be brought into hotch-pot, before the son can be admitted to a share of W.'s personal estate, who died intestate. Wayland v. Wayland, H. 1642. 2 Atk. 685. Vide Bland v. Widmore, 1 P. W. 324. Lee v. D'Aranda, 3 Atk. 419.


471. Testator authorized his executors, at any time, before L. should attain 26. to raise by sale of a sufficient part of certain bank annuities, any sum not exceeding 600l. and apply the same towards the preference or advancement in life, or other the occasion of L. as the executors should think proper; and at the age of 26 he gave said 600l. to L. absolutely. The executors declining to act, the court will not give this 600l. to L. before 26, without a reference to enquire whether his situation requires the 600l. or any part of it to be advanced. Lewis v. Lewis, H. 1785. 1 Cox 162.

472. Money laid out by intestate in repairing houses, which descended on his son and heir, is not an advancement to be brought into hotch-pot under the statute. Sed necus, if the houses had been given to the son in the father's lifetime. Smith v. Smith, H. 1800. 5 Ves. 721.

473. An advancement to the eldest son, if personal property must be brought into hotch-pot, under the stat. of distribution. The purchase of a commission in the army is an advancement, to be brought into hotch-pot. An annuity is an advancement, to be brought into hotch-pot, viz. the value at the date of the grant; or if it has ceased, the payments received, at the option of the child. A widow has no claim whatever upon what is brought into hotch-pot among the children. Kirkcudbright v. Kirkcudbright, M. 1802. 8 Ves. 51.

474. Land claimed by settlement, has been held a portion under the statute of distribution, but there does not appear any case where land taken by descent has been held a portion, neither that any provision by will, either of land or money has been within the statute considered a portion advanced in the life, it means, not a person making no will, but a person dying intestate as to the subject to be distributed by the statute; there is no instance of real estate given to a younger child or a particular part of the personal estate given to any child by testator, and where executors have been held trustees of the residue, which therefore, as undenominated, was to go under the statute, where in the division of that residue, this court ever brought into hotch-pot, what the particular child took under the will of that person dying partly testator, and partly intestate. All the cases put it upon this, admitting, that property, which cannot be taken till after the decease of the party, shall be an ad-
EXECUTORS AND ADMINISTRATORS XIV. XV. & XVI.

Satisfaction of distributive Share.—Administration durante Minoritate.

Advance,ment, yet it is an advancement made in the life of the intestate, which are the very words of the statute, "provided effectually secured and assured in his life-time." Twisden v. Twisden, E. 1804. 9 Ves. 425. Vide post, tit. Parent and Child. Portions, ii.

475. The provision in the statute of distributions, for bringing advances by way of settlement into hootch-pot, applies only to actual intestacy, not where there

is an executor, and consequently a complete will, though the executor may be declared a trustee. Walton v. Walton, M. 1807. 14 Ves. 324.

Advance under the customs of London and York, vide post, tit. Local Customs, iii. iv.


EXECUTORS AND ADMINISTRATORS XV.

Satisfaction of distributive Share.

476. Where a devise or legacy shall be taken in satisfaction of a distributive share, vide ante, tit. Devise, xv. Executor, xiii. et post, Legacy, xii. Local Customs, iii. iv. Portions, ii.

477. A trust term was created by the will of the grandfather, for raising portions, provided among other events, that the children should be by their father in his life-time advanced, and preferred with portions as good or greater, then that the same should cease: Held, that personal property derived by the children, under the intestacy of their father, is not a satisfaction. Twisden v. Twisden, E. 1804. 9 Ves. 413. ante, pl. 474. Vide post, tit. Parent and Child. Portions ii.

478. Covenant by a husband in his marriage settlement in the event of his death, (leaving his wife surviving, and children,) with six months after his decease, to convey, pay, assign, &c. one full and clear moiety of all such real and personal estate, as he should be seized and possessed of, or entitled to, at his decease; upon the death of the husband, leaving a child and grandchild, his widow administered: Held, upon the principle of part performance, that the widow was not entitled, (in addition to the moiety under a covenant,) to a third of the residue of the personal estate by the intestacy of her husband. Garthwaite v. Chalke, M. 1804. 10 Ves. 1. stated fully ante, tit. Covenant, i. pl. 40. Et vide Blandy v. Widmore, 2 Vern. 709. 1 P. W. 324. Lee v. D’Aranda 3 Atk. 419. 1 Ves. 1.

EXECUTORS AND ADMINISTRATORS XVI.

Administration durante Minoritate.

479. By the infant’s coming of age, administration dur. minor. is at an end, and a suit by such an administrator ceases, so that the infant must begin anew, unless a decree to account were had, in which case the infant may have the benefit of the proceedings. Jones v. Basset, M. 1701. Pre. Ch. 174.

480. Administration was granted, during the minority of four infants, one of whom married a husband of full age: this does not determine the administration, neither does the death of one of the infants determine it. Jones v. E. of Stradford, M. 1730. 3 P. W. 81. Vide Prince’s Ca. 5 Co. 29. contra.

481. Though a mother takes out administration during her daughter’s minority, yet as soon as the daughter attains 17, she is ipso facto administratrix, and so considered by relation from the beginning. Fosterby v. Pate, H. 1737. 3 Atk. 604.

482. An administrator dur. minor., is in general a competent witness after the administration is determined, and may be
EXECUTORS AND ADMINISTRATORS XVI. XVII. & XVIII. 733

Administration, durante Minoritate— with the Will annexed— de bonis non.

examined as such for the executor both at law and in equity; for he is very little more than a person appointed ad colligendum bona or an administrator pendente lite, who are always admitted as witnesses. S. C. ib. 638. 605. But where the bill charged that an administration dur. minor. had not accounted and delivered over the assets to the executor, and he by his answer, instead of insisting that he had accounted, and submits to pay, this rendered him an incompetent witness. S. C. ibid. 605.

488. An administrator, dur. minor., cannot sue or be called to an account, by any but the executor, for it is to him only that he is answerable for his administration; and where such an administrator, after he has possessed himself of effects, is brought before the court, without the executor, he may demur for that cause. S. C. ibid. 604. 606.

484. If an executor, appointed during the minority of testator’s daughter, has not collected all the testator’s property, by the time the daughter has become of age, he must be made a party, and be brought before the court. Glass v. Ozenham, H. 1740. 2 Atk. 121. Barn. Ch. Rep. 332.

483. A father, administrator dur. minor., of his daughter, who was executrix, and the residuary legatee of her grandmother’s estate, agreed, that when she married plaintiff she should have 300l. which, in the settlement, was called a portion. Lord Hardwicke refused to decree an account of the grandmother’s estate, as she had been dead 20 years, but directed that the father’s representative should account for his personal estate as to the 800l. only, and interest at 4 per cent. from the marriage. Wood v. Briant, E. 1742. 2 Atk. 321.

EXECUTORS AND ADMINISTRATORS XVII.

Administration with the Will annexed.

486. If an executor dies before probate, his executor cannot prove testator’s will, but administration cum test. annexa must be granted to the next of kin, or residuary legatee, (if any.) Day v. Chapfied, M. 1683. 1 Vern. 200. Vide Isadem’s Ca. Dy. 372.

487. Where a feme covert has a power to dispose of her estate by will, the writing she leaves ought first to be pronounced as a will in the spiritual court; and if no executor is appointed, they will grant administration to the husband, with the will annexed. Ross v. Ewer, T. 1744. 3 Atk. 160. Et vide S. C. with notes, post, tit. Will. 1.

EXECUTORS AND ADMINISTRATORS XVIII.

Administration de bonis non.

488. An administrator obtained a decree, and died; the administrator de bonis non may revive this decree within the equity of 30 Car. 2. c. 6. Owen v. Curzon, T. 1691. 2 Vern. 237.

489. An executor made a lease, rendering rent, his administrator shall have it, and not the administrator de bonis non of the testator. Davis v. Drewry, (cited) 1 Vern. 94.

490. The court makes an administrator de bonis non, a trustee for the next of kin, with respect only to such part of a testator’s personal estate as is undisposed of. Elliot v. Collier, T. 1747. 3 Atk. 527. 1 Wils. C. B. 168. 1 Ves. 15.

491. If an executor dies before he has administered, the effects unadministered will not go to his executor, but to the administrator de bonis non of the testator, in trust for the next of kin. Lloyd v. Stoddard, M. 1752. Amb. 152. Vide Att. Gen. v. Hooker, 2 P. W. 340.

492. B. a married woman, made a will, in execution of a power in her settlement; but she appointed C. executrix
EXECUTORS AND ADMINISTRATORS—XXII. & XXIII.

Feme Covert Executrix or Administratrix, Infant Executors.—Executor de son tort.

509. A widow entitled to a church lease (as administratrix of her deceased husband) for the benefit of her children, grants a sub-lease, at a fixed rent, with covenant for perpetual renewal under a penalty of 70s. The option to pay the penalty, is to be taken as of the essence of the contract; and Lord Redesdale's opinion was, that by a contract so grossly improvident, she could not bind her children even to the payment of the penalty. Macgrane v. Archbold, T. 1813. 1 Dow P. C. 107.

Cases of a feme covert executrix, and how far her husband shall be liable to her devastavit or deficiences, vide ante, tit. Baron and Feme, v.

508. Administration taken by a feme covert, is always presumed to be taken, with the privity and assent of her husband. S. C. ibid. 266. Et vide Seaborn v. Blackstone, 2 Freem. 178.

EXECUTORS AND ADMINISTRATORS—XXIII.

Executor de son tort.

510. A widow possessed herself of her husband's personal estate, and paid several of his debts, and afterwards his executor got the estate out of his hands. Decreed by consent, that she should be allowed all that the executor was bound to pay, but nothing beyond it. Ayre v. Ayre, M. 1663. 1 Ch. Ca. 33.

511. An executor de son tort, cannot discharge himself from an action by a creditor, by delivering over the effects to the rightful executor, after action brought, nor can he retain for his own debt of a higher, by consent of the rightful executor after action brought. Curtis v. Vernon, E. 1790. 3 T. R. 587.

512. Living in the house, and carrying on the trade of the deceased (a victualler) is sufficient intermeddling to make a man executor de son tort, and as liable de bonis propriis; though his wife proved the will after the action was commenced. Hooper v. Summersett, E. 1810. Wight. 16. See the several cases cited and referred to, all of which seem to be decisive on this point.

513. Until something is done upon a will, no one has an authority even to bury. Georges v. Georges, M. 1811. 18 Ves. 296. A stranger, however, does not make himself an executor de son tort by that necessary act. Stokes v. Porter, Dy. 166. b. But a case is referred to, of a widow adjudged so for milking the cows.

END OF VOLUME I: